



THE RIGHT TO ASYLUM
UNDER INTERNATIONAL LAW
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IN THE ASYLUM DETERMINATION PROCESS
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The Right to Asylum under International Law

Gender As a Protected Social Group In The Asylum Determination Process

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Now that you have been provided with the appropriate understanding of asylum seekers' rights and the hurdles they face, this article further narrows down to the aspect of gender and the right to asylum. In the context of this article series, "gender" refers to the social and cultural features that are usually attributed to a person.

Generally, Article 14 (1) of the Universal Declaration of Human Rights entitles everyone the right to seek and enjoy asylum from persecution in other countries.⁴ Furthermore, the 1951 United Nations Convention Relating to the Status of Refugees and its 1967 Protocol are the only global documents that deal with the rights and status of refugees. They aim to protect their rights, alongside regional and national enactments.

Article 1 (A)(2) of the 1951 Convention defines a "refugee" to include those who have a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion and cannot avail themselves to their country of former habitual residence for protection.⁵ People who fall within the scope of "particular social groups"

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⁴ Universal Declaration of Human Rights 1948, article 14 (1).

⁵ Convention and Protocol Relating to the Status of Refugees 1951/1967 Article 1(A)(2).

are protected under the 1951 International Convention and the Protocol. The 1951 Convention also underscores the *principle of non-refoulement*, which imposes on states to not turn refugees away or force them to return to a country where they were persecuted.

In light of this, many refugees agree that it is not an easy process to pass through the asylum-seeking stage because of the standard of proof in place under the 1951 Convention. The construction of Article 1 (A)(2) of the 1951 Convention allows one to seek asylum from torture including acts of violence that may be of a sexual nature.⁶ Furthermore, it is difficult for women to provide evidence on the same due to procedural barriers. However, gender or “gender-based persecution” is not recognized as a potential ground for seeking asylum, and neither is it explicitly provided for as a social group afforded protection under the 1951 Convention. Instead, under Article 1 (A)(2) of the 1951 Convention, women are considered as part of a “particular social group.”⁷ The aim of this article is to criticize the fact that such acts of violence against women are not expressly covered under the scope of the Convention.

In 2019, 9,088 asylum applications were made by women to the United Kingdom out of 35,566 total applications.⁸ By June 2020, there were 4.2 million asylum seekers globally from the reported 2 million asylum applications in 2019.⁹ Statistics from the World Bank show that gender-based violence is more prevalent against females, which affects 1 in 3 women in their lifetime.¹⁰ Some of these women flee sexual and gender-based violence, most of them end up encountering the same violence in refugee camps during the asylum application period and while in detention during delayed processing times.¹¹

⁶ Convention and Protocol Relating to the Status of Refugees 1951/1967 Article 1(A)(2).

⁷ Convention and Protocol Relating to the Status of Refugees 1951/1967 Article 1(A)(2).

⁸ Refugee Council UK, ‘Asylum Statistics Annual Trends’ (Refugee Council UK, February 2020) <<https://refugeecouncil.org.uk/wp-content/uploads/2020/03/Asylum-Statistics-Annual-Trends-Feb-2020.pdf>> accessed 18 January 2021.

⁹ UNHCR, ‘Figures at a Glance’ (UNHCR The UN Refugee Agency, June 2020) <<https://www.unhcr.org/figures-at-a-glance.html>> accessed 18 January 2021.

¹⁰ World Bank, ‘Gender-Based Violence (Violence Against Women and Girls)’ (World Bank, September 2019).

¹¹ G Robbers, G Lazdane, D Sethi, ‘Sexual Violence Against Refugee Women on the Move to and Within Europe’ (Euro WHO International 2016) <https://www.euro.who.int/_data/assets/pdf_file/0018/319311/9-Sexual-violence-refugee-women.pdf?ua=1> accessed 17 January 2021.

Additionally, there are women, granted with the refugee status in countries that do not support and provide adequate protection, who need to be relocated. In 2019, the United Nations High Commissioner for Refugees (UNHCR) reported that 76% of their cases for resettlement were of victims of torture and violence with legal and physical protection needs, particularly women and girls.¹² On top of this, women face further stressors while seeking asylum such as family separation, social stigmatization and housing and food insecurity.¹³

Within this article, there shall be an analysis of gender-based persecution against female asylum seekers and how the current 1951 Convention and its Protocol address them. Thereafter, there shall be an examination of the critiques against enhancing female asylum seekers' rights. To conclude there will be possible legal solutions to the problem to enhance equality and fairness while enforcing asylum rights.

Gender-Based Persecution for Female Asylum Seekers

There are 79.5 million forcibly displaced persons worldwide, at least half of those are women and girls. Although women and girls consist of half the population of refugees, they are considered a “minority” and a “vulnerable group.” This is not due to their number but, rather, it is due to the systemic discrimination and subordination of their status.¹⁴ Further, women continue to suffer from discrimination, whether implicitly or explicitly, and they are often denied the opportunity of being equal to men in all aspects of daily living.

Violence against women manifests in the following ways:

- a) Sexual and Gender-Based Violence (SGBV);
- b) Female Genital Mutilation (FGM);
- c) Domestic violence;

¹² UNHCR, ‘Global Trends: Forced Displacement in 2019’ (UNHCR The UN Refugee Agency, 2019) <<https://www.unhcr.org/be/wp-content/uploads/sites/46/2020/07/Global-Trends-Report-2019.pdf>> accessed 18 January 2021.

¹³ N Aguirre, A Milewski, J Shin, D Ottenheimer, “Gender-based violence experienced by women seeking asylum in the United States: A lifetime of multiple traumas inflicted by multiple perpetrators” (Science Direct August 2020) <<https://www.sciencedirect.com/science/article/pii/S1752928X20300664>> accessed 18 January 2021.

¹⁴ The World’s Biggest Minority? Refugee Women and Girls in the Global Compact on Refugees, UNHCR, UNSW, Available at www.unhcr.org/59e5bcb77.pdf.

- d) “Honour” crimes;
- e) Trafficking;
- f) Forced prostitution or forced labour; and
- g) Forced sterilisation and abortion.

All the above are heinous violations of basic human rights owed to women and they must be understood as constituting “persecution” within the 1951 Convention and its Protocol, whilst currently such acts are not covered by these instruments. Any other interpretation or ignorance of the problem is a fundamental challenge to the very core of our human rights system. Action must be taken to amend existing interpretative guidelines and grant higher protection to persecuted women.

The root of the problem begins with the wrongful belief that violence against women is a household/family/private matter, rather than a key element of the rampant existing sexism in society. Forced marriage, honour-related violence, domestic violence, rape and forced prostitution among the rest, are only some of the examples of gender-related persecution. Nevertheless, it is important to consider that gender-based violence and discrimination in these instances may vary depending on the gender roles and culture in societies.¹⁵

Hence, the particular difficulties facing many women as asylum seekers stem not from the absence of “gender” in the 1951 Convention’s grounds, but rather from the failure of decision makers to acknowledge and respond to the gendering of politics and of women’s relationship to the state when applying that definition to individual cases.¹⁶

In order to properly evaluate the claims of women and grant them the necessary protection under existing asylum laws, one must be receptive to the issue of gender discrimination and inequality.

¹⁵ G Robbers, G Lazdane, D Sethi, ‘Sexual Violence Against Refugee Women on the Move to and Within Europe’ (Euro WHO International 2016) <https://www.euro.who.int/_data/assets/pdf_file/0018/319311/9-Sexual-violence-refugee-women.pdf?ua=1> accessed 17 January 2021.

¹⁶ Heaven Crawley, “Gender, Persecution and the Concept of Politics in the Asylum Determination Process (2001) 9 Forced Migration Review 17.

Gap analysis of the Current International Instruments Affecting Female Asylum Seekers

Despite women not being a recognized protected social group in the 1951 Convention, the case of any woman, fleeing the persecution of violence due to her gender and seeking protection from such persecution, falls directly within the underlying purpose of human rights principles and, arguably, rights of asylum. As such, these women should be protected.

Practice often denotes that women seeking asylum on the basis of gender-based persecution apply for asylum through the protected group: “membership in a particular social group” as coined in Article 1 (A)(2) of the 1951 Convention. According to the UNHCR, in the Guidelines on International Protection, a social group is “a group of persons who share a common characteristic other than the risk of being persecuted, or who are perceived as a group by society.”¹⁷ Thus, the aforementioned ground on social groups within the 1951 Convention is often referred to as the ground with the least clarity. Gender-related claims have most often been analysed within the parameters of this ground. Women have recently been discussed as falling within the ambit of what constitutes a particular social group. However, an orderly and principled approach to the interpretation of a particular social group is needed.¹⁸

Case Study: The United States of America (US)

There seems to be a worrying trend across Western States with the treatment of domestic violence as a private matter. As a result, this places a significantly higher burden of proof on women victims of violence, who come from countries where their governments wilfully turn a blind eye on the matter. This not only deprives women of their human rights, but also promotes their deportation back to countries where their lives are in danger.

¹⁷ Guidelines on International Protection, UNHCR, available at <www.unhcr.org/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

¹⁸ See: www.unhcr.org/3b83b1c54.pdf, www.refworld.org/pdfid/4f7d94722.pdf, *Applicant A & Anor v MIEA & Anor* (1997) 190 CLR 225, 266

The matter of AB is viewed as a highly controversial case whereas the US Attorney General held that asylum will unlikely be granted to a woman fleeing domestic violence. The US Attorney General established that:

“Generally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”

“Gender” is arguably a large class of vulnerable people deserving protection that ought to fit within the definition of “refugees” under the existing treaties. Evolving such interpretative principles will undoubtedly involve a balancing act between affording protection to the deserving, while enforcing checks and balances to avoid abuse of the system, a primary political consideration in all recipient states.

Critiques of the Case for Enhancing Women’s Rights Under Asylum Law

According to the Office of the United Nations High Commissioner for Refugees (UNHCR), the drafters of the 1951 Convention and its Protocol “did not deliberately omit persecution based on gender, it was not even considered.”¹⁹ The drafters of the 1951 Convention created the definition of a “refugee” setting out five grounds under which a claimant could establish asylum, with gender being noticeably absent.²⁰

Early feminist critiques of Refugee Law included advocating for the addition of “gender” as a sixth ground to the refugee definition. These calls for a sixth ground have been resisted with the argument that amending the 1951 Refugee Convention may serve to undermine the protection of women asylum seekers. Notably, Binder states that:

¹⁹ Judith Kumin, Gender: Persecution in the Spotlight, in 2 Refugee 12 (2001), <<http://www.unhcr.ch/cgi-bin/texis/vtx/home>> accessed on 27 January 2021.

²⁰ Convention and Protocol Relating to the Status of Refugees 1951/1967 Article 1A (2).

“While a reformulation of the refugee definition would be desirable, political realities and trends in immigration policies inevitably lead to the conclusion that this approach is not very promising for the near future.”²¹

This article aims to construct gender as a protected social group in the asylum determination process. Unfortunately, the area is plagued with a lot of criticism.

Firstly, the 1951 Refugee Convention provides protection limited to groups facing persecution on five listed grounds. The first four grounds are relatively straightforward, while the fifth ground, “membership of a particular social group” has been described as the “ground with the least clarity.”²²

The biggest challenge for claimants making a gender-based claim is that decision-makers and advocates are reluctant to recognise women as a protected social group, preferring to narrow the category based on additional criteria.²³ Notably, in *Re Kasinga*, the Particular Social Group was described by the US Board of Immigration Appeals as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”²⁴

Moreover, in *Matter of AB*, the US Attorney General stated that Ms. AB’s claim did not meet the requisite particular social group definition requirements because her asserted protected group was created or defined by harm or threatened harm. The US Attorney General stated:

“‘Married women in Guatemala who are unable to leave their relationship’ was effectively defined to consist of women in Guatemala who are victims of domestic abuse because the inability ‘to leave’ was created by harm or threatened harm.”

The inconsistent and unpredictable use of the protected social group category by member countries is the result of the UNHCR’s failure to define a social group in precise terms. Judges who attempt

²¹ Binder, Andrea, 2001, “Gender and the ‘Membership in a Particular Social Group’ Category of the 1951 Refugee Convention” 10 Columbia Journal of Gender and Law.

²² UNHCR “Membership of a particular social group” within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.

²³ Foster, Michelle. 2012. The ‘Ground with the Least Clarity’: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’. In the United Nations High Commissioner for Refugees. Legal and Protection Policy Research Series 25.

²⁴ *Re Kasinga*, 21 I&N Dec 357 at 365 (BIA 1996).

to define it consider multiple factors such as education, family background, ethnic origin, economic activity and shared values. In addition, the adjudicating bodies consider the perception of the state towards the alleged social group and how they have been disadvantaged as a result of failing to receive state protection.²⁵

The Case for Enhancing Women’s Rights Under Asylum Law and Solutions to the Challenge

The United Nations (UN) initially recognized the plight of women refugees in 1979 when the General Assembly added an item on the situation of women refugees to the provisional agenda for the World Conference of the UN Decade of Women.²⁶

In its 2006 in-depth study on violence against women, the UN General Assembly recommended that states “adopt a gender-sensitive approach to the granting of asylum” and noted that “Treaty bodies have also highlighted the lack, in many countries, of comprehensive laws on trafficking and specific provisions for a gender-sensitive approach in their asylum laws.”²⁷

The United Nations High Commissioner for Refugees (UNHCR) through the Executive Office addressed the need for special training on gender-related issues²⁸ and called upon states to adopt a gender-sensitive interpretation of the 1951 Convention and its 1967 Protocol. In recognition of the particular vulnerability of women and children, international bodies and national governments have attempted to enhance their protection.

²⁵ Pittaway, E., & Bartolomei, L. (2001). Refugees, Race, and Gender: The Multiple Discrimination against Refugee Women. *Refuge: Canada’s Journal on Refugees*, 19(6), 21-32, <<https://doi.org/10.25071/1920-7336.21236>>, accessed on 3 February 2021.

²⁶ UN doc. A/RES/34/161, 17 December 1979 cited in the United Nations, *The United Nations and the advancement of women, 1945-96* (New York: United Nations, 1996), 243.

²⁷ UN General Assembly, ‘In-depth study on all forms of violence against women’: UN doc. A/61/122/Add.1, 6 July 2006, para. 382, p. 107.

²⁸ UNHCR Executive Committee Conclusion No. 98 (LIV)(2003).

The UN is the sponsor of a treaty protecting women's rights, i.e. the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW), yet this treaty is self-standing, lacking a bridge with other asylum provisions or treaties.

The issue is not that standards do not exist, but rather that they are watered down in interpretation or simply not enforced. Violence against women is often cornered as a matter of culture, some unimportant "behind the doors" matter not to be meddled with, and therefore certainly not meeting the standards of persecution. As an example, this used to be the approach with regard to female genital mutilation- a "cultural" matter not constituting persecution and, accordingly, not a basis for the granting of asylum.

The UN recognizes that gender is a reason for persecution; it, in fact, enacted the CEDAW convention. Yet, the five narrow categories established for asylum exclude "women"/"gender" as a protected ground.

Conclusion

Amending the 1951 Convention and/or the 1968 Protocol and their definition of "refugee" might not be easy to achieve, but the efforts of the UN – through its entity for Gender Equality and Empowerment of Women – should be aimed in that direction.

The foreseeable and often misused argument that this might open the floodgates to 50% of the population asking for asylum is unfounded and simply incorrect.

Notably, being a woman would grant no right to asylum in itself, given that the persecution requirement also needs to be satisfied and a nexus must be shown between her characteristic (gender) and said persecution. As explained, in fact, to qualify as a refugee one needs firstly to prove a well-founded fear of future persecution in both a subjectively genuine and objectively reasonable way. The fact that a refugee seeking asylum is a woman, in itself will in no case guarantee that said applicant will be granted asylum. On the other hand, should a meritorious asylum candidate meet all the requirements for a grant of asylum, said claim must not be denied for the sole fact that gender is not a recognized ground.

At [The Thinking Watermill Society](#), it is our sincere hope that our collection of articles on the Right to Asylum under International Law assist in keeping the conversation of gender as a protected social group alive. While these articles serve to educate the general public on the matter, it also serves as a call to policy-makers and advocates practicing within this sector to push for a change in the 1951 Convention and/or the 1967 Protocol to envision the protection of women from further harm and re-traumatisation.