



THE RIGHT TO ASYLUM FROM A GENDER PERSPECTIVE

by Cheptum Toroitich, Kimberley Mureithi and Maria Angela Maina



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The Thinking Watermill Society

by Cheptum Toroitich, Kimberley Mureithi and Maria Angela Maina

A close-up photograph of a person's hand holding a small, rectangular piece of aged, yellowish paper. The paper has a rough, torn edge and the word "REFUGEE" is written on it in bold, black, hand-drawn capital letters. The hand is positioned palm-up, and the background is a dark, textured wooden surface. The lighting is soft, highlighting the texture of the skin and the paper.

REFUGEE

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The right to asylum from a gender perspective

INTRODUCTION

Research studies by the United Nations High Commissioner for Refugees show that there are 79.5 million forcibly displaced persons worldwide. It has come to our attention at The Thinking Watermill Society, that although women and girls consist of half the population of refugees, they are still considered as a “minority” and a “vulnerable group.” This is not due to their number but, rather, to the systemic discrimination and subordination of their status. As a result, 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.

The above reflection shows the basis of this publication, the scope of which is to analyse the differences among the categories of migrants, refugees and asylum seekers. It is through this analysis that relevant Conventions have been applied in remarkable cases in respect of women, with results that sometimes contrast - at least from an intellectual point of view - with the common sense of justice. Hence, our publication focuses on illustrating to our readers the need for gender as a protected social group in the asylum determination process, delineated within the 1951 United Nations Convention relating to the Status of Refugees and its 1967 Protocol.

Thus, the conclusions of our studies suggest the adoption of a different approach that leads to considering asylum-seeking women as a special social category in certain circumstances in order to grant them effective protection.

The work is composed of the following chapters:

- **Chapter 1**
gives the readers a deeper understanding of the history behind the development of human rights in general and the important international codifications safeguarding the same.
- **Chapter 2**
examines the importance of recognition of women’s rights as human rights.
- **Chapter 3**
comprises two parts: one, which examines the history and principles of refugee laws to better portray the issue regarding women’s asylum rights, and the second part, which examines the history and principles of these refugee laws to better portray the issue regarding women’s asylum rights.
- **Chapter 4**
further narrows down to the aspect of gender and the right to asylum with our proposed conclusions and suggestions.

The authors Cheptum Toroitich, Kimberley Mureithi and Maria Angela Maina (all young Kenyan lawyers) had the opportunities to exchange their conclusions with Ms. Cathy Fall, the Head of the Field Legal Office of the United Nations Relief and Works Agency (UNRWA) in Jordan, who gave some personal opinions, and to benefit from a review by Mr. Fulvio Palombino, Professor of international law at the Federico II University of Naples. The whole work has been supervised by Ms. Caterina Luciani and by Mr. Mario Di Giulio, respectively

President and Vice-President of The Thinking Watermill Society.

The aim of the work was to divulge and share opinions on these issues with a scientific method, and was not meant to become an academic paper. In addition, the intention of its publication is to promote debates on the raised arguments and to push on an interpretation/critical analysis of the international conventions.

The Thinking Watermill Society is a non-profit organization that promotes the debate and exchange of ideas among its members regarding the changes underway in the economic, cultural and social landscape, together with the analysis of the consequences that said changes entail, to identify the possible opportunities of economic, cultural and social growth related to said changes. Our headquarters are in Rome, Italy.

At The Thinking Watermill Society, it is our sincere hope that our collection of articles on The right to asylum from a gender perspective-assists in keeping the conversation of gender as a protected social group. While these articles serve to educate the general public on the matter, we







CHAPTER 1

**HUMAN RIGHTS:
ITS HISTORY
AND DEVELOPMENT**

by Maria Angela Maina



INTRODUCTION

"I know my rights!"

This phrase is often uttered by individuals in liberty-threatening circumstances. Being human, we have a natural sense of what is right and wrong; not only because the law states so, but also by what is inculcated in us starting from a young age.

Then, what are these rights that we are keen on defending and why are they so important to us?

Echoing the words of Charles Dickens in a *Tale of Two Cities*,

”

“A wonderful fact to reflect upon is, that every human creature is constituted to be that profound secret and mystery to every other.”

Indeed, he makes an excellent observation. Each person is different from the other and so are their intentions. Without appropriate measures to direct our thoughts and actions, we would be living in a *man-eat-man society*, where Charles Darwin's theory of *Survival of the Fittest* would apply and thrive.

Thus, the legal recognition and protection of human rights in the world makes it possible for persons to live and coexist in peace. This is through the declaration that **we are all equal no matter what**. A deeper understanding of the history behind the development of human rights will make this more intelligible.

A BRIEF HISTORY OF HUMAN RIGHTS CODIFICATION

Before the 20th Century, most societies already had a simple understanding of human rights, even though they were not explicitly referred to using these words.

To begin with, our basic comprehension of human rights flows from natural law, which is what we are taught from a young age. That is, to do good and avoid evil. Mostly, this is done through religious teachings. For example, the Christian Bible illustrates, “*Do unto others as you would have them do unto you.*” This simple phrase is also embodied in the Hindu Vedas, the Babylonian Code of Hammurabi and the Muslim Quran.¹ Though these teachings are recognized as foundations of human rights, this was not the case at the beginning of time. These dictates were simply followed in order to propagate peaceful life in a community.

The first-ever documented evidence of simple human rights codification is noted in Babylon. King Cyrus the Great conquered the city, abolished slavery and made declarations stating that every person was racially equal and they had the freedom to choose their religion.² These declarations were embedded in the *Cyrus Cylinder* where it was later translated into the official United Nations (UN) languages. It forms the basis of the first four articles of the Universal Declaration of Human Rights.³

Nevertheless, the need for a written enactment in individual societies emerged, leading to the main precursors to the 20th Century human rights documents. This meant that human rights were first affirmed at the domestic level and, as a result, such national laws inspired international instruments.

With that, the Magna Carta is the earliest official and written document, which was signed by the King of England and came into force in 1215, after King John violated several ancient laws and customs by which England had been governed.⁴ Upon closer examinations, the *Great Charter* enumerates various fundamental rights and freedoms that later became known as “human rights”. One of these rights included the right of all free citizens to own and inherit property. Albeit the simplicity of this document, it is viewed as a crucial turning point of

1. Nancy Flowers, (University of Minnesota Human Rights Resource Center) <<http://hrlibrary.umn.edu/edumat/hreduseries/hereandnow/Part-1/short-history.htm>> accessed 21 September 2020.

2. Youth for Human Rights, ‘The Background of Human Rights’ (Youth for Human Rights) <<https://www.youthforhumanrights.org/course/lesson/background-of-human-rights/the-background-of-human-rights.html>> accessed 21 September 2020.

3. Youth for Human Rights, ‘The Background of Human Rights’ (Youth for Human Rights) <<https://www.youthforhumanrights.org/course/lesson/background-of-human-rights/the-background-of-human-rights.html>> accessed 21 September 2020.

4. Youth for Human Rights, ‘The Background of Human Rights’ (Youth for Human Rights) <<https://www.youthforhumanrights.org/course/lesson/background-of-human-rights/the-background-of-human-rights.html>> accessed 21 September 2020.

modern human rights.⁵ It paved the way for the enactment of other documents, which aim to ascertain individual rights in a community, such as:

- The Petition of Right (1628)
- The United States of America (US) Constitution (1787)
- The French Declaration of Rights of Man and of the Citizen (1789)
- The US Bill of Rights (1791)

The aforementioned enactments are also written precursors of many of the international human rights documents existing today.

However, because humans are dynamic in nature, these rights and freedoms appeared too vague to envision all the potential violations that may occur in any society. In addition, it became apparent that the relationships between states would be affected where one of them did not have written recognition of human rights. This was evident especially in times of war. Hence, there was a need for a comprehensive code that could be applied in every nation.

In 1863, what was going to become the *International Committee of the Red Cross* was born and soldiers could receive equal medical treatment in times of war. Subsequently, in 1864, the first Geneva Conference was held, upon the invitation of the Swiss Federal Council, to adopt a *Convention for the Amelioration of the Condition of the Wounded in Armies in the Field* (also known as the First Geneva Convention). This is seen as the first international effort to codify human rights for states.

The fully developed concept of human rights emerged after the Second World War (1939-1945). This catastrophic period consisted of war crimes and mass murders without any form of hope for future generations. For instance, only in one day, on September 23 1939, the assassination of two thousand Romanian Iron Guards took place.⁶

“**In times of war, the law falls silent**”
(Silent enim leges inter arma)
Marcus Tullius Cicero

As a result, in 1945, delegates from 50 countries met in San Francisco, US, and propagated the birth of the United Nations (UN). The UN Charter was subsequently drafted and came into effect in October 1945. The main goal of the UN is to save future generations from the scourge of war, “*which twice in our lifetime had brought untold sorrows*

5. Youth for Human Rights, ‘The Background of Human Rights’ (Youth for Human Rights) <<https://www.youthforhumanrights.org/course/lesson/background-of-human-rights/the-background-of-human-rights.html>> accessed 21 September 2020.

6. C Welch, *From the case files of The People and Daily Mirror, War Crimes*, Haynes Publishing, UK (2014) 31.

of mankind”.⁷ The UN Charter also played a crucial role in reaffirming faith in fundamental human rights, in the dignity and worth of human beings, in the equal rights of men and women, and of nations large and small.⁸ Thereafter, solid codification and international recognition of fundamental human rights and freedoms began its uphill journey⁹.

EXAMINATION OF EXISTING HUMAN RIGHTS DOCUMENTS

After World War II, the international community gathered legal experts and scholars to examine the earlier and simpler forms of human right codifications. Thereafter, the birth of several other human rights conventions occurred.

“Human Rights are rights inherent to all human beings, regardless of race, sex, nationality, ethnicity, language, religion or any other status. Human rights include the right to life and liberty, freedom from slavery and torture, freedom of opinion and expression, the right to work and education, and many more. Everyone is entitled to these rights without discrimination.”

United Nations

From the precursor documents, it is evident that **every human being is entitled to human rights from birth, and they should not be stripped off** because **we are all born with equal dignity**. As the UN began its operations, it built on these fundamental principles to advance the creation of the core international human right instrument, which led to the issuance of other international and regional legal instruments, including, but not limited to, the following:

7. Charter of the United Nations [1945], Preamble.

8. Charter of the United Nations [1945], Preamble.

9. Charter of the United Nations (1945), Preamble.

INSTRUMENT	ENTRY INTO FORCE	SCOPE AND PURPOSE
The International Covenant on Civil and Political Rights (and its two Optional Protocols)	1976	Full realization and enjoyment of civil and political rights.
The International Covenant on Economic, Social and Cultural Rights (and its Optional Protocol)	1976	Full realization and enjoyment of economic, social and cultural rights.
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (and its Optional Protocol)	1987	Prevention, fight and eradication of torture and other cruel, inhuman or degrading treatment or punishment throughout the world.
The International Convention on the Elimination of All Forms of Racial Discrimination	1969	Elimination of any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin.
The Convention on the Elimination of All Forms of Discrimination Against Women (and its Optional Protocol)	1981	Promotion of equality between men and women and protection against discrimination based on sex.
The Convention on the Rights of the Child (and its three Optional Protocols)	1990	Recognition of specific rights of children, who need special care due to their mental and physical immaturity.
The Convention on the Rights of Persons with Disabilities (and its Optional Protocol)	2008	Promotion and protection of the rights and dignity of persons with disabilities on an equal basis with others.
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families	2003	Recognition of the importance and extent of the migration phenomenon, the promotion and protection of the rights of migrant workers and members of their families.
International Convention for the Protection of All Persons from Enforced Disappearance	2010	Prevent enforced disappearances and combating impunity for the crime of enforced disappearance.

THERE IS NO LIFE WITHOUT HUMAN RIGHTS

Can you imagine your life without human rights?

It is impossible to think of such a scenario. Human rights are necessary for amicable life in society as individuals who are part of a larger community. It would be difficult for us to live in peace with one another and non-viable for us to achieve our goals. Thus, **observance of human rights is imperative** to prevent the re-occurrence of instances that threaten peaceful existence in society.

Without human rights, there is inequality, injustice, and discrimination, which lead to instability. For the realisation of international progress in all facets of humanity, our rights need legal protection and enforcement. At The Thinking Watermill Society, this is the core foundation of all our research and dealings. We, therefore, encourage the respect and observance of all fundamental human rights and freedoms for the full realisation of individual and institutional goals.

The subsequent chapter in this [Right to Asylum](#) book examines the importance of recognition of women's rights as human rights.







CHAPTER 2

**WOMEN'S RIGHTS
ARE HUMAN RIGHTS**

by Cheptum Toroitich and Maria Angela Maina



INTRODUCTION

The reality today in society is that women face discrimination based on their gender.¹ Even though gender inequality is experienced by and between individuals, it is also a result of how societies are organised, laws are set, economies function and ideologies shaped. This is evident through the different forms of gender discrimination, which include implicit bias, sexism and sexual harassment/assault.² It is for these reasons that women's rights are violated in a manner that lawmakers did not initially predict.

The saying "*Women's rights are human rights*" first arose in the early 1990s after Hilary Rodham Clinton coined it in her speech at the United Nations 4th World Conference on Women in Beijing.³ On the one hand, it makes perfect sense that human rights also apply to women inherently by virtue of their human nature. The universal recognition that all humans are born free and equal in dignity and rights⁴ is a profound declaration that rings true and ought to be respected. On the other hand, there are great possibilities to revolutionise the existing laws to include women's perspectives in the human rights discourse and to provide new insights into the gender-based inequalities they face today.

Nevertheless, there are already several human rights laws, regulations and policies that exist to safeguard women's rights and empower them with the tools to define, analyse and articulate their experiences. The major challenge with such instruments is the need for **effective interpretation and enforcement** to prevent further violation of women's rights and achieve gender equality.

The popular slogan "*The future is female*" is not meant to demean the existence of other rights. On the contrary, it is used to show that the development of women's rights provides a common foundation for developing an expansive array of visions and concrete strategies for change.⁵ Let us have a deeper look into the evolution of women's rights to bridge the gap between historical events and the present circumstances.

1. According to the World Health Organization, the word "sex" refers to "the different biological and physiological characteristics of females, males and intersex persons, such as chromosomes, hormones and reproductive organs", whilst "gender" refers "to the characteristics of women, men, girls and boys that are socially constructed. This includes norms, behaviours and roles associated with being a woman, man, girl or boy, as well as relationships with each other. As a social construct, gender varies from society to society and can change over time." See World Health Organization, 'Gender and health' <https://www.who.int/health-topics/gender#tab=tab_1>, accessed 6 July 2021.

2. UNODC, 'E4J University Module Series: Integrity and Ethics' (UNODC 2018) <<https://www.unodc.org/e4j/en/integrity-ethics/module-9/key-issues/forms-of-gender-discrimination.html>> accessed 24 September 2020.

3. Fester, Gertrude, "Women's Rights Are Human Rights," Agenda: Empowering Women for Gender Equity (1994), pp. 76–79.

4. Universal Declaration of Human Rights 1948, article 1.

5. Bunch C and Frost S 'Women's Rights an introduction' (2001), <<http://wwda.org.au/wp-content/uploads/2013/12/whrintro1.pdf>>, accessed on 4 May 2020.

GENDER EQUALITY: EVOLUTIONARY HISTORY AND WHY IT MATTERS

Women have suffered from the exclusion and denial of rights throughout history because of their gender. Historical antecedents show that specific rights have been systematically denied to women since time immemorial, such as:

- Access to education
- Right to vote and run for office
- Reproductive rights
- Property and land ownership rights
- Freedom from gender-based discrimination

In addition, aside from gender, other factors impede women's enjoyment of their rights, such as ethnicity, race and age.

The Committee on the Elimination of all Forms of Discrimination Against Women (CEDAW) recognizes and attributes the discriminatory treatment of women to stereotypes based on societal gender roles.⁶ In this regard, women and men appear to play different roles within a single-family unit. The men are viewed as breadwinners, the women are known as the caregivers. By extension, these stereotypes demonstrate to affect different aspects of daily life, such as education and career development activities. For instance, from a 2019 field experiment published in the *European Sociological Review*, it resulted that men are more preferred over women during job recruitment processes.⁷ The study attributes this to the deeply rooted gender stereotypes in employers rather than prejudices, which either reduce when women have higher qualifications or increase when women have children.⁸ These occurrences are no surprise, as they form the basis of thematic discussions today surrounding the need for women to break the glass ceiling in the professional arena.

“Why exclude them? Of the two sexes of which the species is composed, how comes all the natural right to political benefits to be confined to one?”

Jeremy Bentham (1789)

Men are also a part of the movement to enforce and protect women's rights. For one, in the late 18th Century, Jeremy Bentham questioned

6. CEDAW, General Recommendation No. 25, para. 7, n 1.

7. M J Gonzalez, C Cortina, J Rodriguez, 'The Role of Gender Stereotypes in Hiring: A Field Experiment' (2019) ESR 187, 187.

8. M J Gonzalez, C Cortina, J Rodriguez, 'The Role of Gender Stereotypes in Hiring: A Field Experiment' (2019) ESR 187, 187.

the restriction of suffrage to men only. He recognized that women should have the right to vote and participate equally in the legislative and executive branches of government. His call for gender equality did not only concern the field of politics, but also education and domestic duties.

Thereafter, in the 19th century, the fight for women's rights increased, beginning with the push for universal suffrage and the right to education. New Zealand then became the first country in the world to grant women the right to vote in the national elections.⁹ More than two centuries after, Bentham (Saudi Arabia) allowed its women to participate in municipal elections.¹⁰

In addition, Nobel Laureate Amartya Sen's work on gender inequality is of seminal importance. In his essay, "The Many Faces of Gender Inequality," he states that gender inequality is not one homogeneous phenomenon but a collection of disparate and interlinked problems.¹¹ Gender gaps today manifest themselves in job recruitment processes, career opportunities, sexual and reproductive health rights, access to healthcare, economic resources, time use, and decision-making power in the public and the private sphere.¹²

In essence, gender equality refers to the equal rights, responsibilities and opportunities of women and men as well as girls and boys. Achieving gender equality means to create a situation in which the social and cultural environment recognizes, implements and enforces both men and women as being of equal value.

Gender equality is not only a fundamental human right but also a necessary foundation of a peaceful, prosperous and sustainable world. This is why it is one of the 17 United Nations Sustainable Development Goals, as it is integral to all dimensions of inclusive and sustainable development.

9. P O Ray, 'Woman Suffrage in Foreign Countries' (1918) APSR 469, 471.

10. K Buchanan, 'FALQs: Saudi Arabia Municipal Elections – Women Participate for the First Time' (The Library of Congress 2015) <<https://blogs.loc.gov/law/2015/12/falqs-saudi-arabia-municipal-elections-women-participate-for-the-first-time/>> accessed 17 December 2020.

11. Amartya Sen, 'The Many Faces of Gender Inequality' (Harvard University 2001) <<https://scholar.harvard.edu/sen/publications/many-faces-gender-inequality>> accessed 17 December 2020.

12. Amartya Sen, 'The Many Faces of Gender Inequality' (Harvard University 2001) <<https://scholar.harvard.edu/sen/publications/many-faces-gender-inequality>> accessed 17 December 2020.

APPLICATION OF INTERNATIONAL HUMAN RIGHTS INSTRUMENTS

The United Nations (UN) plays a vital role in the recognition of gender equality. The preamble of the UN Charter, which came into force in 1945, expresses the determination to:



“...reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women...”¹³



Image source: United Nations

The emphasis on women's rights is strengthened by the International Bill of Human Rights, which comprises the international documents outlined below.

13. Charter of the United Nations and Statute of The International Court of Justice, (1945), Preamble.

1. The Universal Declaration of Human Rights

Adopted in 1948, it proclaims everyone's entitlement to equality before the law and the enjoyment of human rights and fundamental freedoms without distinction of any kind including, among others, race, colour, sex and language.

2. The International Covenant on Economic, Social and Cultural Rights and the International Covenant on Civil and Political Rights

The UN General Assembly adopted them both in 1966, translating the principles of the Declaration into a legally binding form. The two Covenants state that the rights set forth apply to all persons without distinction of any kind.

In addition, each Covenant specifically binds acceding or ratifying states to undertake to ensure that women and men have an equal right to the enjoyment of all the rights they outline.

Historically, these sets of rules have focused on actions directly attributable to state agents, based on their commission or acquiescence, such as killings, torture and arbitrary detention. The obligation of states to respect human rights referred to the obligation to refrain from "directly" doing anything that could violate them. Impliedly, any wrong committed within the private sphere, without any *direct* intervention by state agents, was not regarded as a human rights issue

Subsequent developments have contributed to the understanding that States also have the duty to prevent private individuals from interfering with the enjoyment of these rights by other private individuals – including women. This change was boosted, among other factors, by the women's rights movement that, since the 1980s and 1990s, has increasingly criticised this interpretation of human rights as perpetuating violations of women's human rights and stemming from male bias.¹⁴

During the United Nations Decade for Women (1976-1985), women from many geographical, racial, religious, cultural, and class backgrounds took up organizing to improve the status of women. The United Nations sponsored women's conferences, which took place in Mexico City in 1975, Copenhagen in 1980, and Nairobi in 1985. These meetings were held to evaluate the status of women and to formulate strategies for women's advancement.

The United Nations General Assembly adopted the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) in 1979. This is the main international convention on women's rights. It recognizes women's unique contributions to the international human rights framework.

The CEDAW preamble explains that, despite the existence of other instruments, women **do not** enjoy equal rights with men. Here below

14. United Nations, 'Women's Rights are Human Rights' (2014) <https://www.ohchr.org/Documents/Events/WHRD/WomenRightsAreHR.pdf>, accessed on 4 May 2020.

there is a listing of some clauses of this Convention that demonstrate the problem with pre-existing women's rights:

1. **Article 2(e)** addresses the obligation of states to turn their attention to discrimination against women perpetrated by any person, organisation or enterprise.
2. **Article 2(f)** concerns the modification and abolition of discriminatory laws and regulations as well as customs and practices.
3. **Article 5(a)** requires states to modify the social and cultural patterns of conduct of men and women to eliminate prejudices and all other practices, whether customary or not, based on the idea of the inferiority or the superiority of one of the sexes or on stereotyped roles for men and women.

Former Austrian politician and judge, Rudolf Kirschlager, sums up the main problem as he points out the problematic nature of the discrepancies between the normative systems of international and individual conduct. He demands that consistency be achieved between international, national and individual principles of conduct by subordinating them to a necessary unity of normative knowledge.¹⁵

WHY IS IT IMPORTANT TO RECOGNIZE AND PROTECT WOMEN'S RIGHTS?

By way of example, Female Genital Mutilation (FGM) is currently recognised as a form of violence against women. In some regions, this cultural practice acts as a cruel display of the attempt to control a woman's sexuality. The practice also violates a person's rights to health, security and physical integrity; the right to be free from torture and cruel, inhuman or degrading treatment; and the right to life when the procedure results in death.¹⁶ The practice of FGM is considered as a criminal act in all European Union (EU) Member States,¹⁷ showing their recognition of reproductive health rights. This explains the total number of female asylum applicants to the EU increasing from 65,125 in 2008 to 93,350 in 2011.¹⁸

15. Hans Köchler, 'The Principles of International Law and Human Rights' (1908) lecture delivered at a meeting of the International Progress Organization in Vienna, Austria, 3.

16. UNHCR, 'Female Genital Mutilation and Asylum in the European Union: A Statistical Overview' (2013), UNHCR 1, 3.

17. UNHCR, 'Female Genital Mutilation and Asylum in the European Union: A Statistical Overview' (2013), UNHCR 1, 3.

18. UNHCR, 'Female Genital Mutilation and Asylum in the European Union: A Statistical Overview' (2013), UNHCR 1, 5.

In the struggle to protect women's rights, FGM has been made illegal in 18 African countries, a region where the practice is prevalent. In Benin, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Djibouti, Egypt, Eritrea, Ethiopia, Ghana, Guinea, Kenya, Mauritania, Niger, Senegal, South Africa, Tanzania, and Togo, laws have been enacted to criminalize the practice regarding the implementation and enforcement of women's sexual and reproductive health rights.¹⁹ As of 2020, Sudan has also criminalized FGM with the Parliamentary recognition that it undermines the dignity of women.²⁰

It is noteworthy that around 20,000 women and girls seek asylum from FGM-practicing countries of origin in the European Union every year.²¹ The UNHCR notes that this has been constant between 2008 (18,110 women) and 2011 (19,565 women).²²

Therefore, as a result of the enforcement of women's sexual and reproductive health rights, alongside their workplace rights, there has been a domino effect on other women's rights.²³ In this respect, one may consider the right to seek asylum and the circumstance that there is a dire need to examine each woman's situation to prevent them from being sent back to their home country where their fundamental rights and freedoms are not respected.²⁴

A popular illustration is the *Matter of AB*²⁵ where the United States of America Attorney General decided that domestic violence perpetrated by non-state actors should not be a qualification for asylum. Without a doubt, this decision would drive the victim back to an unsafe environment. Nonetheless, in 2018, the decision was partially overruled with:

19. Center for Reproductive Rights, 'Female Genital Mutilation (FGM): Legal Worldwide prohibitions,' (Center for Reproductive Rights, 2009) <<https://reproductiverights.org/document/female-genital-mutilation-fgm-legal-prohibitions-worldwide#:~:text=African%20Nations,have%20enacted%20news%20criminalizing%20FGM.>> accessed on 17 December 2020.

20. AlJazeera, 'Sudan Ratifies Law Criminalising Female Genital Mutilation' (AlJazeera 2020) <<https://www.aljazeera.com/news/2020/7/10/sudan-ratifies-law-criminalising-female-genital-mutilation>> accessed 17 December 2020.

21. UNHCR, 'Female Genital Mutilation and Asylum in the European Union: A Statistical Overview' (2013), UNHCR 1, 5.

22. UNHCR, 'Female Genital Mutilation and Asylum in the European Union: A Statistical Overview' (2013), UNHCR 1, 5.

23. Refugee Council UK, 'Asylum Statistics Annual Trends' (Refugee Council UK 2020) <<https://refugeecouncil.org.uk/wp-content/uploads/2020/03/Asylum-Statistics-Annual-Trends-Feb-2020.pdf>> accessed 17 December 2020.

24. Refugee Council UK, 'Asylum Statistics Annual Trends' (Refugee Council UK 2020) <<https://refugeecouncil.org.uk/wp-content/uploads/2020/03/Asylum-Statistics-Annual-Trends-Feb-2020.pdf>> accessed 17 December 2020.

25. *Matter of AB*, US Department of Justice (2018), <<https://www.justice.gov/eoir/page/file/1070866/download>>, accessed on 4 May 2020.

“An applicant seeking to establish persecution based on violent conduct of a private actor must show more than the government’s difficulty controlling private behaviour. The applicant must show that the government condoned the private actions or demonstrated an inability to protect the victims.”

Later on, the Attorney General opened to the possibility of seeking asylum based on the violent conducts of private actors but affirmed a rather stringent burden of proof upon the applicant.



CONCLUSION: WOMEN'S RIGHTS ARE HUMAN RIGHTS

We, therefore, pose this question to you: *Women's rights exist on paper but do they apply in real life?*

"The objective now is not to renegotiate our dreams, but to emphasize the accountability of all actors. We are no longer seeking promises, but are demanding action."

**Ms. Farkhonda Hassan,
UN Economic Commission for Africa²⁶**

Even though the recognition for women's rights faces greater difficulties with the dynamic nature of humans, there remains a light at the end of the tunnel. Alongside the efforts of states to implement and enforce women's rights, various NGOs and UN organizations have been working tirelessly to give women the support they need today.

A recent ground-breaking achievement is the legal ban of FGM in Sudan. This should not be left unnoticed and is a great step in the right direction towards the protection of women in society.²⁷

That being said, ensuring effective protection, implementation and enforcement of women's human rights requires a comprehensive understanding of the underlying social structures and power relations that define and influence women's ability to enjoy their human rights along with states' governmental efforts to remodel their legislation to offer sufficient protection. These power structures have an impact on all aspects of life, from law and politics to economic and social policy, family and community life.

The subsequent chapter in this *Right to Asylum* book examines the history and principles of Refugee Law to better portray the issue regarding women's asylum rights.

26. Gumisai Mutume, 'African women battle for equality' (UN July 2005), <https://www.un.org/africarenewal/magazine/july-2005/african-women-battle-equality>, accessed 4 May 2020.

27. 'Sudan bans female genital mutilation, UNICEF vows to help support new law' (UN May 2020), <https://news.un.org/en/story/2020/05/1063122>, accessed on 4 May 2020.



The right to asylum from a gender perspective





CHAPTER 3

**THE RIGHT TO ASYLUM
UNDER INTERNATIONAL LAW**

**PART I: THE HISTORY
OF REFUGEE LAW**

by Kimberly Mureithi and Maria Angela Maina





Timothy P. Schmalz "Angels Unaware" (2019)
Image Source: [BBC News](#)¹

**"No one leaves home unless home is the mouth of a shark.
You only run for the border when you see the whole city running as well.
You have to understand, that no one puts their children in a boat,
unless the water is safer than the land.
Who would choose to spend days and nights in the stomach of a truck
unless the miles travelled meant something more than a journey.
No one chooses refugee camps or strip searches,
where your body is left aching.
I want to go home, but home is the mouth of a shark
Home is the barrel of the gun."²**
Warsan Shire

1. The sculpture *Angels Unaware* by Canadian sculptor Timothy P. Schmalz depicts migrants and refugees. Unveiled in the Vatican, St Peter's Square on the occasion of the Migrant and Refugee World. The sculptor depicts 140 migrants and refugees from different times in history: from indigenous people to Jews escaping Nazi Germany to Syrians and Africans fleeing war and famine today.

2. *Home*, Warsan Shire, 2015, *Conversations about home*. Warsan Shire is a Somali British poet who advocates for immigrant and refugee rights.

INTRODUCTION

In 2018, the United Nations Refugee Agency reported a record: **74.79 million persons of concern**.³ This figure comprises **20,360,562 refugees** and **3,503,284 asylum seekers**.⁴ International law protects their human rights from potential threats and violations through the tenets of Refugee Law – and International Human Rights Law more in general. It protects the special rights of refugees, including the right to seek and enjoy asylum in other countries as enshrined in Article 14 of the United Nations Declaration of Human Rights.⁵

To elaborate further on Refugee Law and its principles, this paper is divided into two parts. The first aims to address the historical background of Refugee Law to create a foundational basis for understanding the right to asylum in International Law. “The right to asylum from a gender perspective– Part I: The History of Refugee Law” shall dive deeper into the right to asylum, the application requirements and the various challenges asylum seekers face when exercising this right. More specifically, we shall look at the historical background of Refugee Law before looking at the distinction between refugees and migrants. Consequently, this will create a solid understanding of the main theme of this book on gender as a protected group in the Right of Asylum series.

“The right to asylum from a gender perspective– Part II: Asylum Law and Procedural Requirements” clarifies the meaning of the word asylum seeker and outlines the origin and evolution of the right to asylum, alongside the requirements to obtain refugee status.

HISTORICAL BACKGROUND OF REFUGEE LAW

In history, the first account of refugees can be traced back to the Biblical narrative of the Israelites fleeing from the Assyrian conquest in 740 BCE. Much later, in the 16th Century, migration was mostly due to political and religious upheavals as seen in Netherlands, France and England, which hosted the largest immigrant communities.⁶⁷ Afterwards, at the beginning of the 20th Century, the world witnessed the

3. UNHCR, ‘Population Statistics’ (The UN Refugee Agency) < <http://popstats.unhcr.org/en/overview> > accessed 16 May 2020.

4. UNHCR, ‘Population Statistics’ (The UN Refugee Agency) < <http://popstats.unhcr.org/en/overview> > accessed 16 May 2020.

5. Universal Declaration of Human Rights 1984, article 14 (1).

6. L B Luu, ‘Migration and change: Religious refugees and the London economy, 1550-1600’ (1996) DC 93, 93.

7. Umberto Cassuto, Elia Samuele Artom, ‘The Books of Kings and Chronicles Modern View’ (1981) 10.

Armenian genocide in Turkey,⁸ which involved the systematic murder and expulsion of 1.5 million ethnic Armenians as carried out by the Turks of the Ottoman government between 1914 and 1917.⁹ The displaced Armenians fled to various European countries and the United States of America (USA), which opened its borders to nearly 80,000 Armenians.¹⁰ This was a time when humanity rallied together, and USA citizens launched a fundraising campaign.¹¹ Individuals fleeing from persecution have characterized human history, which is exemplified by more recent events, such as the Islamic persecution that has led to the highest number of displaced persons from Syria, Afghanistan, South Sudan, Myanmar and Somalia in 2019.¹²

However, the numbers of displaced persons, refugees and asylum seekers began to increase. This can be seen in the aftermath of World War II where 7-11 million people were displaced, leading to numerous refugee camps being set up in the USA, Canada, Australia and Brazil.¹³ These countries opened their doors to millions of persons who were fleeing from the devastation of the war and the Nazi persecution.¹⁴ It is estimated that there were more than 11 million displaced persons of non-German origin.¹⁵ In addition, many Jews fleeing the Nazi regime were turned away only to be captured and sent to concentration camps.

Notably, although those were kinder times, countries such as the USA, Canada and Cuba turned down and sent back numerous refugees in boats to hostile territories. An instance of this is evident in the former USA Displaced Persons Act (1948), which contained details of heavy discrimination against Jewish displaced persons.¹⁶

8. Though Turkey denies the existence of a Genocide and prefers to use the term 'Genocide' claims the correct term is ethnic cleansing, over 32 countries formally recognize the event as a genocide. <https://www.armenian-genocide.org/recognition_countries.html> accessed 13 May 2020.

9. John Kifner, Armenian Genocide of 1915: An Overview (The New York Times)<https://archive.nytimes.com/www.nytimes.com/ref/timestopics/topics_armeniangenocide.html?mcubz=3> accessed 13 May 2020.

10. Dominik Jj. Schaller, Jurgen Zimmerer, 'Late Ottoman Genocides: The Dissolution of the Ottoman Empire and Young Turkish Population and Extermination Policies- Introduction', Journal of Genocide Research, Volume 10, 2008.

11. GlobeNewswire, 'Armenian-American Community's Feeding America Fundraiser Surmounts Goals'(GlobeNewswire) <<https://www.globenewswire.com/news-release/2020/05/01/2026278/0/en/Armenian-American-Community-s-Feeding-America-Fundraiser-Surmounts-Goals.html>> accessed 13 May 2020.

12. Islamic Relief Worldwide, 'Refugees and Displaced People' (Islamic Relief Worldwide), accessed 21 June 2021.

13. JSTOR Daily, 'Europe's Displaced Persons After World War II' (2006) <<https://daily.jstor.org/europes-displaced-persons-world-war-ii/>> accessed on 13 May 2020.

14. JSTOR Daily, 'Europe's Displaced Persons After World War II' (2006) <<https://daily.jstor.org/europes-displaced-persons-world-war-ii/>> accessed on 13 May 2020.

15. James Carlin, 'Significant Refugee Crises since World War II and the Response of the International Community' (1982) 1.

16. H S Truman, 'Statement by the President Upon Signing the Displaced Persons Act - June 25, 1948' (June 1948) 382-384.



Image source: [History](#)¹⁷

From 1933 to 1945, more than 300,000 Jews emigrated from Germany and Austria, and nearly 100,000 of those found refuge in other European countries, which were later conquered by Germany.¹⁸ After World War II, there was a significant increase in the labour force of migrant recipients, such as in the United States of America where the labour force grew from 60 million to 111 million from 1948 to 1982.¹⁹ The percentage of international migrants compared to the global population has changed only slightly in the 23-year period, from 2.9 per cent in 1990 to 3.2 per cent in 2013.²⁰ Between 1990 and 2013, the international migrant number has increased more than twice as fast in countries pertaining to more developed regions (by 53 million), compared to those countries located in less developed regions (by 24 million).²¹

The current status of refugees is unimaginable. Millions of displaced people cross the high sea and hostile borders to seek liberty and safety. In June 2020, the United Nations High Commission for Refugees (UNHCR) estimated a little under 1% of the earth's population is either an asylum-seeker, internally displaced or a refugee.²² One reason for this is long-term conflicts such as the ones in Afghanistan,

17. A ship the MS St Louis arrived on the coast of Miami, USA in June 1939. The ship was carrying 937 passengers, most comprised of Jews trying to escape Nazi Germany. The USA immigration stated that the ship did not have permission to disembark. Upon return of the ship to Europe nearly a third of the passengers were murdered.

18. United States Holocaust Memorial Museum, (Holocaust Encyclopaedia < <https://encyclopedia.ushmm.org/content/en/article/refugees>> accessed 14 May 2020.

19. CATO Institute, 'Post- World War II Migration and Lessons for Studying Liberalized Immigration' (A Nowrasteh 2014) <<https://www.cato.org/blog/post-world-war-ii-migration-lessons-studying-liberalized-immigration>> accessed 21 June 2021.

20. United Nations Department of Economic and Social Affairs, 'Trends in International Migration' (United Nations, 2013) <https://www.un.org/en/development/desa/population/publications/pdf/policy/InternationalMigrationPolicies2013/Report%20PDFs/g_Ch_1.pdf> accessed 21 June 2021.

21. United Nations Department of Economic and Social Affairs, 'Trends in International Migration' (United Nations, 2013) <https://www.un.org/en/development/desa/population/publications/pdf/policy/InternationalMigrationPolicies2013/Report%20PDFs/g_Ch_1.pdf> accessed 21 June 2021.

22. The UN Refugee Agency, '1 percent of humanity displaced: UNHCR Global Trends report' (The UN Refugee Agency 2020) <<https://www.unhcr.org/news/press/2020/6/5e-e9db2e4/1-cent-humanity-displaced-unhcr-global-trends-report.html>> accessed 21 December 2020.

Algeria and South Sudan, which have greatly contributed to the refugee crisis because of Holocaust-like persecution of ethnic minorities. For one, in 1994 the news of the Rwandan genocide was announced, in which nearly 1 million Tutsi were killed.²³ As history is known to repeat itself, the world's population stood by as injustice was committed, not forgetting the situation in Myanmar, where it is estimated that around 1.3 million Rohingya refugees have fled causing the Rohingya Refugee Crisis.²⁴

Today, the world faces the largest humanitarian crisis since World War II.²⁵ That is, nearly 70.8 million people were displaced at the end of 2018 with developing countries being the most affected.²⁶

Consider this: The largest humanitarian crisis is in Yemen with 24.1 million people in need and 1.2 million people internally displaced. In the bargain, Yemen still hosts the world's second-largest Somali Refugee population.²⁷

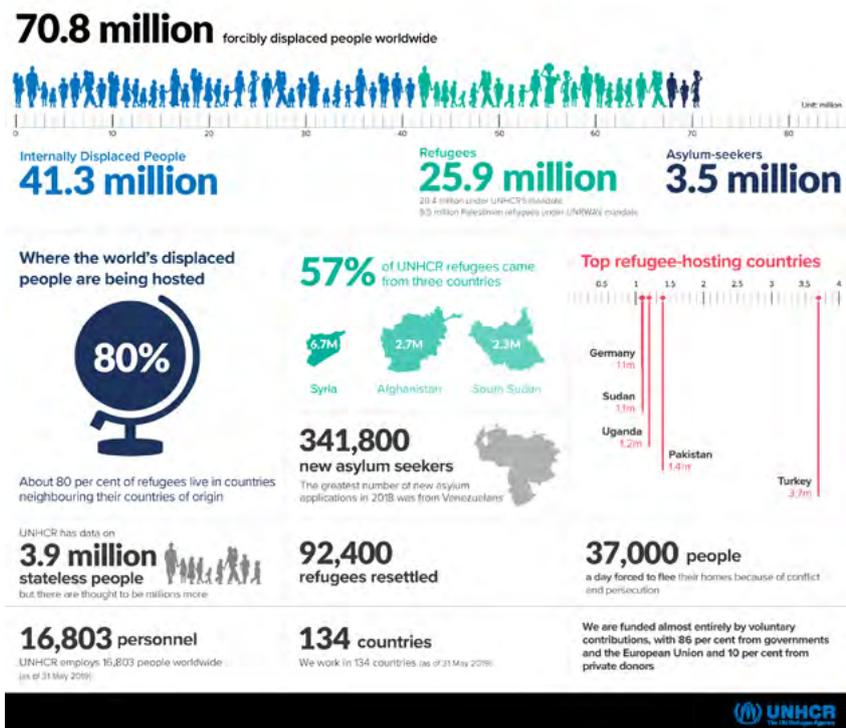


Image source: [UNHCR](#)

23. BBC, 'Rwandan genocide:100 days of slaughter'(BBC Africa, 4 April 2019) <<https://www.bbc.com/news/world-africa-26875506>> accessed 14 May 2020.

24. OCHA, Rohingya Refugee Crisis (OCHA 2019) <<https://www.unocha.org/rohingya-refugee-crisis>> accessed 4 May 2020.

25. BBC, 'UN: World facing greatest humanitarian crisis since 1945' (BBC News, 11 March 2017) <<https://www.bbc.com/news/world-africa-39238808>> accessed 14 May 2020.

26. UNHCR, 'Figures at a Glance' (2019) <<https://www.unhcr.org/figures-at-a-glance.html>>accessed 14 May 2020.

27. USA for UNHCR, 'Yemen Humanitarian Crisis' (UNHCR,2020) <[https:// www.unrefugees.org/emergencies/yemen/](https://www.unrefugees.org/emergencies/yemen/)>accessed 14 May 2020.

Since 1921, when the Norwegian Fridtjof Nansen was appointed as the High Commissioner for Refugees of the League of Nations,²⁸ states have been granting protection and special status to individuals fleeing from war, persecution and climate-related disasters. Many countries are refugee-hosting nations. As a result, state cooperation has led to the joint management of refugee camps with the help of **refugee assistance agencies**. Such camps were designed to be temporary facilities but have grown to fully-fledged cities.

Did you know: *The largest refugee camps in the world are Kakuma, Dadaab and Ifo in Kenya, Kutupalong in Bangladesh, Zaatari in Jordan, Panian in Pakistan, Yida in South Sudan, Mishamo and Katumba in Tanzania.*²⁹

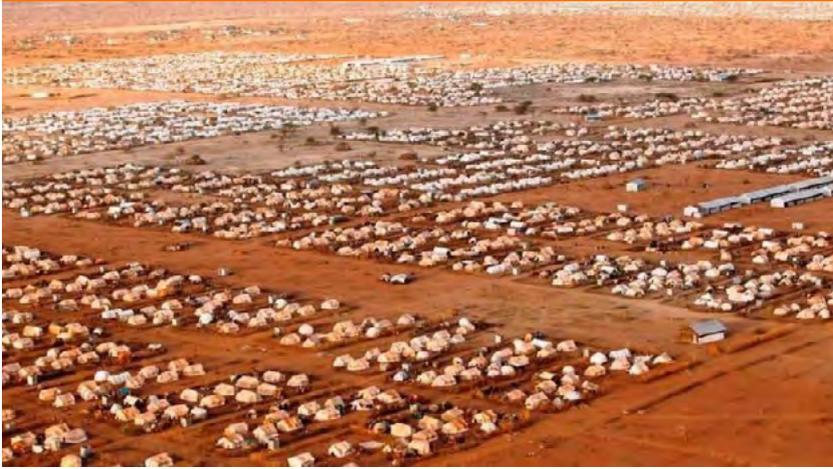


Image Source: [Standard News Kenya](#)

28. P Weis, 'The Development of Refugee Law' (1982) MJIL 27, 27.

29. Arcgis, 'Inside the World's 10 Largest Refugee Camps' (2020) <<https://www.arcgis.com/apps/MapJournal/index.html?appid=8ff1d1534e8c41adb5c04ab435b7974b>> accessed 15 May 2020.

THE DEFINITION OF THE TERM “REFUGEE”

The term *refugee* derives from the French term *refuge* meaning hiding place. In Latin, the word *fugere* means to flee and *refugium* means to take refuge. The word first appeared in 1540 following the persecution of the French Huguenots Protestants looking for refuge from the French Catholics.³⁰

In modern usage, the term refers to “a person who has been forced to flee his/her country because of persecution, war or violence.”³¹

In 1951, the **Convention Relating to the Status of Refugees** was adopted to set out **the rights of refugees and asylum seekers**. The definition of a refugee was highlighted to be:

“An individual who as a result of events occurring before 1 January 1951³² owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”³³

Acknowledging that, more had to be done regarding the legal status of refugees: the **Protocol Relating to the Status of Refugees** was prepared and came into force in 1967³⁴ broadening the temporal and geographical scope of application of the 1951 Geneva Convention.³⁵ With time, more laws were enacted to account geographical and social differences when relating to refugee and asylum issues.³⁶

30. Tom Holland, ‘In the Shadow of the Sword: The Battle for Global Empire and the End of the Ancient World’ (2012) 25.

31. UNHCR, ‘What is a Refugee?’ (UNHCR The UN Refugee Agency) < <https://www.unrefugees.org/refugee-facts/what-is-a-refugee/>> accessed 21 June 2021.

32. This only catered to those who were refugees because of events occurring before 1 January 1951. This did not take into consideration new refugees.

33. Convention and Protocol Relating to the Status of Refugees 1951, it also builds on Article 14 of the 1948 Universal Declaration of Rights that recognises the rights of persons to seek asylum.

34. Protocol Relating to the Status of Refugees (1967).

35. The words, “as a result of events occurring before 1 January 1951 and ...” were omitted.

36. Convention Governing the Specific Aspects of Refugee Problems in Africa (1969), Cartagena Declaration (1984).

REFUGEES VERSUS MIGRANTS

However, there remains one common misconception. That is, the difference between being a refugee and a migrant. Both terms are used interchangeably, and this may cause confusion because even though people of these two groups have certain similarities, the circumstances surrounding their search for host states set their differences.

To understand the elements of the definition of a refugee, one must look at it alongside the definition of a migrant. This is why the UNHCR often emphasizes the differences between the two categories.

For one, a migrant is someone who chooses to voluntarily move to improve his/her life. This is not to say that migrants are not forced to leave their host State. They are also affected by involuntary compelling circumstances, such as economic strain. However, those who move to further improve and enrich themselves, even though their living conditions are not as bad, are also characterized as migrants.³⁷ As a result, a migrant goes through the usual immigration procedures that involve an application through an embassy.

On the other hand, a refugee is a person who flees persecution. Thus, refugees **have no choice** and are often forced out of their homes by external forces that render their current living situation unbearable — that is, forced migration.

“The grounds for their fear or the violence they suffered can be of very different types. Yet, one common denominator is that they are forced to leave abruptly and have little opportunity to take their belongings with them. They are uprooted and dispossessed and must start completely from scratch.”

UNHCR³⁸

This is why refugees are protected by international laws such as the 1951 Convention Relating to the Status of Refugees and the Universal Declaration of Human Rights, which enforces the universal right to seek asylum in safer countries. A person is declared a refugee once

37. C Gasparis, ‘Chapter 7 Migration and Ethnicity in the Venetian Territories of the Eastern Mediterranean (13th to 15th Century)’ (2020), MHMATZ 193, 193.

38. UNHCR, ‘UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual’ (UNHCR) < <https://www.unhcr.org/4d944c319.pdf> > accessed 16 May 2020.

he/she satisfies the criteria set out in the definition provided for by the 1951 Convention, which are critically analysed here below.³⁹

a) The person has a well-founded fear of persecution.

The UNHCR states that this is often taken into the context of the person's family background and personal experiences.⁴⁰ This appears to be a flexible outlook to encompass the array of fear, violence or intimidation one may receive that causes him or her to fear for his or her well-being and survival.

The USA Supreme Court in *INS v Cardoza-Fonseca* held that "a well-founded fear of persecution" meant exactly what it said: a well-founded fear of persecution. In this case, Justice Steven goes ahead to give further elaboration as follows:

"That the fear must be "well-founded" does not alter the obvious focus on the individual's subjective beliefs, nor does it transform the standard into a "more likely than not" one. One can certainly have a well-founded fear of an event happening where there is less than a 50% chance of the occurrence taking place."⁴¹

This appears to indicate that the individual's beliefs and surroundings are indeed taken into consideration, rather than opting for a fixed definition of the phrase. Otherwise, a rigid interpretation would appear to lock out several individuals from asylum applications.

b) Persecution because of race, religion, nationality, membership of a particular social group, or political opinion.

From Article 33 of the 1951 Convention, it can be inferred that **a threat to life or physical freedom** constitutes persecution, as would other serious violations of human rights but - in this case - the following rights are often at risk: the right to freedom from torture, the right to freedom from slavery, the right to recognition as a person before the law and the right to freedom of thought, conscience and religion.⁴²

Usually, the applicant demonstrates the violation of, or threat to, the enjoyment of his/her fundamental human rights, thus the 1951 Convention is accompanied by nexus grounds for such persecution, which are race, religion and affiliation to a social/political group.

39. UNHCR, 'UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual' (UNHCR) < <https://www.unhcr.org/4d944c319.pdf> > accessed 16 May 2020.

40. UNHCR, 'UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual' (UNHCR) < <https://www.unhcr.org/4d944c319.pdf> > accessed 16 May 2020.

41. *INS v Cardoza-Fonseca*, 480 U.S. 421 (1987), < <https://supreme.justia.com/cases/federal/us/480/421/> > accessed on 18 May 2020.

42. UNHCR, 'UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual' (UNHCR) < <https://www.unhcr.org/4d944c319.pdf> > accessed 16 May 2020.

An applicant seeking asylum must demonstrate persecution either on one or more of these five grounds in order to receive the status of refugee.

- c) **The person is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.**

The applicants ought to have fled the country of their nationality to seek protection from the persecution they face. Failure to flee the country of nationality may lead them to be known as Internally Displaced Persons (IDPs).⁴³

Differences and Similarities between an IDP and a Refugee: *Both categories of individuals flee their home to survive. However, IDPs find safety within their own country, while refugees leave their home country and cross international borders to find safety.*

As a result of such persecution, the applicants must indicate how this hinders them from returning to their country of nationality in order to prevent recurrence of the violations.

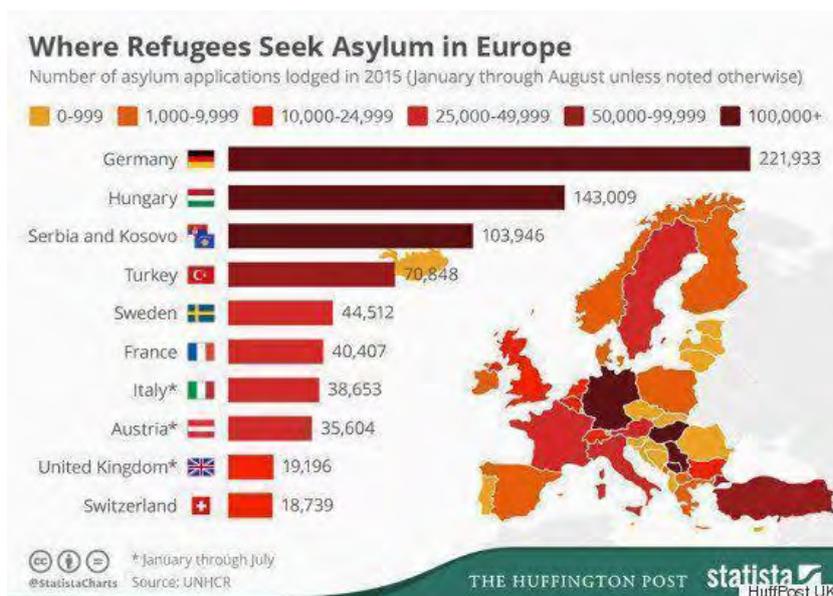


Image source: [Huffington Post UK](#)

43. Refugee Legal Aid Information for Lawyers Representing Refugees Globally, 'The 1951 Convention relating to the Status of Refugees and its 1967 Protocol - What they are' (Refugee Legal Aid Information) <<http://www.refugeelawaidinformation.org/1951-convention>> accessed 16 May 2020.

CONCLUSION

According to research studies, the major influx of people to Europe are those who are seeking safety, hence the imminent need to protect them from further human right violations. This culminated in what is now known as the **European immigrant/refugee crisis** due to an influx in the presence of refugees between 2014 and 2015.

Today, this is a vital part of European politics, where on the one hand, countries such as Hungary, Italy, Poland and Austria vote for the closing of borders to reduce the number of migrants; while on the other hand, many are dying at sea on the way to Europe, which has prompted a humanitarian outcry.⁴⁴

These individuals continue to seek international protection through claims for refugee status; however, these claims are often left undetermined, irrespective of when they were lodged. This causes the world to recognize them as “*asylum seekers*.” Consequently, their need for special protection appears to be imminent with the rising dangers that follow them as they seek refuge from the various threats they face in the countries of origin.

The subsequent chapter in this *Right to Asylum* book examines the history and principles of Refugee Law to better portray the issue regarding women’s asylum rights.



44. British Academy, ‘Refugees as new Europeans, and the fragile line between crisis and solidarity’ (Academia.Edu 24 February 2020) <https://www.academia.edu/42953048/Refugees_as_new_Europeans_and_the_fragile_line_between_crisis_and_solidarity> accessed 16 May 2020.







CHAPTER 3

**THE RIGHT TO ASYLUM
UNDER INTERNATIONAL LAW**

**PART II: ASYLUM LAW AND
PROCEDURAL REQUIREMENTS**

*by Cheptum Toroitich, Kimberly Mureithi
and Maria Angela Maina*





Image source: [The Guardian](#)¹

1. Hoping To Survive, by Razieh Gholami, from Afghanistan, painted in 2019.

INTRODUCTION

**“To be called a “refugee” is the opposite of an insult; it is a badge of strength, courage, and victory.”
Tennessee Office for Refugees²**

This powerful quote rings true, not only does it evoke thought, but it also stretches out its hand and grabs the depth of one’s heart. A lack of understanding of asylum seekers and refugees leads to an ill-starred society and legal system. Whereas, asylum seekers have a legitimate and well-founded international right to seek asylum, various policies, guidelines, and measures in place make this an often cumbersome process. To understand the hardship, joys and losses that asylum seekers face, one must get acquainted with the right to asylum as enshrined in international law and the technical process one must go through to achieve refugee status.

WHO IS AN ASYLUM SEEKER?

The word “*asylum*” is the Latin counterpart of the Greek word “*asy-lon*,” which means freedom from seizure.

Historically, asylum has been regarded as a place of refuge where one could be free from the reach of a pursuer. Before the establishment of nation-states and the national laws that recognize the right to asylum, the idea was found in the religious laws, traditions, and practices of many societies, making it a “remarkably constant feature of human history.”³

Individuals who seek refugee status or any other form of protection are called “asylum seekers.” When asylum seekers are granted refugee status, they are then referred to as refugees.

An internationally accepted definition of an “asylum seeker” may be found in various United Nations High Commissioner for Refugees (UNHCR) documents.

2. Global Giving Team, ‘A Quote To Share Every Waking Hour Of World Refugee Day’ (June 2020) <<https://www.globalgiving.org/learn/listicle/12-shareable-world-refugee-day-quotes/>> accessed 8 June 2020.

3. UNHCR, The State of the World’s Refugees 2006: Human Displacement in The New Millennium 31.

According to the UNHCR:

“asylum seekers are individuals who have sought international protection and whose claims for refugee status have not yet been determined.”⁴

Thus, a refugee is initially an asylum seeker, as he/she originally applies for asylum in the host country. An asylum seeker is not explicitly a refugee at the beginning but becomes one if he/she falls under the scope of the definition outlined in the 1951 Refugee Convention.

In the European Union (EU), an asylum seeker is a third-country national or stateless person who has made an application for protection under the 1951 Refugee Convention and Protocol in respect of which a final decision has not yet been taken.⁵

Recognizing the tumultuous circumstances that force millions of people to leave their home countries, various conventions, protocols and treaties have been ratified by states to grant special protected status to asylum seekers and refugees.

These instruments recognize the plight of asylum seekers, and due to the circumstances that push one to seek asylum, it would be unjust for them to suffer in inappropriate conditions as they are in detention or await processing by the host state.

Notably, the right of asylum stems from the recognition that the essential rights of human beings are not derived from the fact that he/she is a national of a certain state. Rather, it is founded on the attributes of human personality.⁶

Humans are dynamic in nature, and by virtue of this, it is close to impossible to formulate laws that will encompass every single aspect of human nature. This is why laws are enacted at different points in time to appreciate the dynamic nature of those it governs. One illustration worth examining is the evolution of the right of asylum. The aforementioned instruments have been enacted and further analysed in the following section.

4. UNHCR, 2009 Global Trends, 23.

5. Article 2(b) of Council Directive 2005/85/EC (Asylum Procedures Directive).

6. American Declaration on the Rights and Duties of Man. 1948, Preamble.

ORIGIN OF THE RIGHT OF ASYLUM

Why does this right deserve to be protected? Where did it originate from?

To answer these questions, there is a need to understand the history of the turmoil asylum seekers faced before this right was duly protected by international law.

“Refugees are not terrorists. They are often the first victims of terrorism.”

António Manuel de Oliveira Guterres⁷

History has often shown the negative perception surrounding asylum seekers and refugees by both politicians and citizens of host states. Some nations today have responded by building walls around their borders and passing regulations with strict guidelines lengthening the asylum process. The citizens view refugees as a threat to national security and a burden on the finances of the state without considering the difficult circumstances asylum seekers have faced.⁸ Many never think of the journey refugees go through to seek a better life. This is portrayed by the media and various testimonials by refugees themselves.



Image source: [DW](#)⁹

7. Global Giving Team, 'A Quote To Share Every Waking Hour Of World Refugee Day' (June 2020) <<https://www.globalgiving.org/learn/listicle/12-shareable-world-refugee-day-quotes/>> accessed 8 June 2020.

8. Irina Mosel and Christopher Smart with Marta Foresti, Gemma Hennessy and Amy Leach, 'Public narratives and attitudes towards refugees and other migrants' (odi.org November 2019) <<https://www.odi.org/sites/odi.org.uk/files/resource-documents/12970.pdf>> accessed 10 June 2020.

9. Deutsche Welle, 'Refugee numbers worldwide hit record high: UN' <<https://www.dw.com/en/refugee-numbers-worldwide-hit-record-high-un/a-49258216>> accessed on 11 June 2020.

Here is what [Little Hamze](#)¹⁰, a young asylum-seeking boy, had to say:

“We are here because we want a better life. In my country, ISIS was killing us. They killed many of our friends...When we came from Iraq, we walked very far. We came by bus, taxi, then a boat, then a train. We slept anywhere on the way. Now we have been here waiting for 3 months, waiting for the border to open so we can have a better life. Every night I pray that tomorrow we can go but nothing happens. I will keep praying every night.”

Little Hamze’s story is one that many asylum seekers relate to in every way. However, every refugee has a different story; each as terrifying as the next, illustrating the rigorous journeys they go through. This is why the law was developed: to provide humanity with protection from itself.

The table below illustrates the current international instruments that protect the right to seek and enjoy asylum:

INTERNATIONAL INSTRUMENTS RELATING TO THE RIGHT OF ASYLUM		
Name of legislation	Article	Objective
Universal Declaration of Human Rights (UDHR) (1948).	14	It provides the legal right to seek and enjoy asylum in other countries, which may not be invoked in the case of prosecutions genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations. ¹¹
Convention Relating to the Status of Refugees (1951).	–	Aims to facilitate international cooperation when dealing with refugees. ¹² It elaborates on the requirements needed to be granted asylum and details the rights that stream from being a refugee.
Protocol Relating to the Status of Refugees (1967).	–	This protocol arose to capture novel refugee matters, which were not covered under the 1951 Convention. ¹³

10. Youtube, ‘Refugee Life: Through a Child’s Eyes’ (July 2016) <<https://www.youtube.com/watch?v=tkkVnQEB1mE>> accessed 10 June 2020.

11. Universal Declaration of Human Rights (UDHR) 1948, s14 (1 and 2).

12. Convention Relating to the Status of Refugees 1951.

13. Protocol Relating to the Status of Refugees 1967.

To reinforce these international efforts, there have been regional enactments that further declare the right of asylum, such as:¹⁴

REGIONAL ENACTMENTS PROVIDING THE RIGHT TO SEEK AND ENJOY ASYLUM IN CERTAIN COUNTRIES	
Name of legislation	Article
American Declaration on the Rights and Duties of Man.	27
American Convention on Human Rights (Pact of San José, Costa Rica).	22
The Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico, and Panama (Cartagena Declaration).	–
African Charter on Human and Peoples’ Rights (Banjul Charter).	12
OAU Convention Governing the Specific Aspects of the Refugee Problem in Africa.	–
African Union Convention for the Protection and Assistance of Internally Displaced Persons in Africa.	-
Arab Charter on Human Rights (1994) and Arab Charter on Human Rights (2004).	28
Cairo Declaration on Human Rights in Islam.	12
Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast).	–

Once in a new country, these individuals apply for asylum, hence the term “asylum seeker.” After a successful application, they are granted the legal status of “refugee.”

14. International Justice Resource Center, ‘Asylum & The Rights of Refugees’ (International Justice Resource Center) < <https://ijrcenter.org/refugee-law/>> accessed 8 June 2020.

REQUIREMENTS TO OBTAIN THE REFUGEE STATUS

Under the 1951 Convention, individuals may obtain the refugee status if they meet the following criteria, as analysed here below.

a) A well-founded fear.¹⁵

There are various interpretations of this criterion, especially because of its subjective nature. However, various legal opinions rightly hold that a well-founded fear refers to a future threat of persecution, especially by individuals who have faced persecution in the past.¹⁶

Additionally, in the *Matter of Mogharrabi*,¹⁷ the Board of Immigration Appeals indicated that asylum seekers need to show that there is a reasonable possibility that they will suffer persecution if they return to their country of origin.

This begs the question of what constitutes persecution. Neither the 1951 Convention nor the 1967 Protocol expressly defines it. It appears that the definition is derived from the Council of the EU, which considers persecution to be acts of physical or mental violence, including:¹⁸

- acts of sexual violence;
- legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner;
- prosecution or punishment, which is disproportionate or discriminatory;
- denial of judicial redress resulting in disproportionate or discriminatory punishment;
- prosecution or punishment for refusal to perform military service in the conflict, where performing military service would include crimes or acts falling under the exclusion clauses set out in Article 12 (2);
- acts of a gender-specific or child-specific nature.

Consequently, in the demonstration of persecutory acts, there is the need to establish any such acts. The common notion is that these acts need to be perpetrated by a state agent, but this is not the case. Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards

15. UNHCR, 'UNHCR Protection Training Manual for European Border and Entry Officials, Session 3 Manual' (UNHCR) <<https://www.unhcr.org/4d944c319.pdf>> accessed 16 May 2020.

16 International Justice Resource Center, 'Asylum & The Rights of Refugees' (International Justice Resource Center) <<https://ijrcenter.org/refugee-law/>> accessed 10 June 2020.

17. *The Matter of Mogharrabi*, 1987 <<https://www.justice.gov/sites/default/files/eoir/legacy/2012/08/14/3028.pdf>> accessed on 10 June 2020.

18 International Justice Resource Center, 'Asylum & The Rights of Refugees' (International Justice Resource Center) <<https://ijrcenter.org/refugee-law/>> accessed 10 June 2020.

for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (the “Qualification Directive”)¹⁹ states so by including non-state actors as falling under the qualification, where the state is unwilling or unable to protect the individual.²⁰

Thereafter, there needs to be a nexus between the act of persecution and one of these grounds as elaborated in the next point.

b) Persecution on the grounds of race, religion, nationality, membership of a particular social group, or political opinion.

In order for an asylum seeker to rely on any of these grounds, he/she needs to possess any one (or more) of these factors.

Today, with half of 19.6 million of the refugee population being women,²¹ host states need to be mindful of the unique challenges that women particularly face within their countries of nationality.

There appears to be more awareness of this matter in the Qualification Directive that states:²²

“It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group’. For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs, resulting in, for example, genital mutilation, forced sterilisation or forced abortion, should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution.”

The reason why relying on one or more of these grounds is important, is because these qualities are immutable. Therefore, even though these grounds may appear rigid *prima facie*, they are flexible in practical application.

19. European Union, ‘Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted’ (EUR-Lex 2011) <<https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32011L0095>> accessed 31 January 2021

20. International Justice Resource Center, ‘Asylum & The Rights of Refugees’ (International Justice Resource Center) <<https://ijrcenter.org/refugee-law/>> accessed 10 June 2020.

21. UN General Assembly, 2016, ‘In Safety and Dignity: Addressing Large Movements of Refugees and Migrants, Report of the Secretary General.

22. Council Directive (EC) 2011/95/EU on Standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (2011).

For instance, the Council of the EU states that even women and homosexuals fall under the category of “a particular social group”. In each of these groups, there are individuals with similar characteristics that are so fundamental to their being and cannot be expected to change.²³ As a result, this distinct identity causes them to be perceived in a different light, making them vulnerable to persecution on this ground.

- c) The person is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.**

Based on the above two requirements, an asylum seeker would need to tie the various points raised to his/her country of nationality. That is to say, as a result of these grounds, the state has shown the inability or unwillingness to help them, causing them to have a well-founded fear of future persecution if they stay.



²³ International Justice Resource Center, ‘Asylum & The Rights of Refugees’ (International Justice Resource Center) < <https://ijrcenter.org/refugee-law/> > accessed 10 June 2020.

THE PROCEDURE OF ASYLUM APPLICATION

The 1951 Convention and the 1967 Protocol are the main international instruments governing the right to asylum. However, there are national procedures and guidelines that set forth the procedural requirements for an asylum application. Nonetheless, it appears that some asylum applications are done through UNHCR offices,²⁴ which conducts registration of persons as an essential tool for protection, for the management of operations, and the achievement of durable solutions. UNHCR's core methodology for refugee registration applies to asylum-seekers, refugees and other persons of concern to the Office and is used in situations such as:

- a) emergencies and mass movements;
- b) urban areas, where refugee status determination (RSD) may be the norm;
- c) camps for new populations and stable camp situations; and
- d) when implementing durable solutions, including voluntary repatriation, local integration and resettlement.²⁵

The process of asylum application with the UNHCR is elaborated in the steps below.

1. Reception of asylum seekers in the UNHCR office.

- Supervision and oversight in the reception.
- Reception procedures to assess the type of assistance the person is seeking and referral to the appropriate UNHCR procedures.
- Identification of any asylum seekers who may have special needs.
- Counselling on the UNHCR procedures.
- Maintenance of confidentiality.

2. Registration of Applicants.

- Filling of a registration information sheet by the principal applicant and every accompanying family member or dependent, including children.

3. Registration Interview.

- It takes place as soon as possible after asylum seekers approach the UNHCR office.

24 UNHCR, 'Procedural Standards for Refugee Status Determination under the UNHCR's mandate' (UNHCR) <<https://www.unhcr.org/4317223c9.pdf>> accessed 10 June 2020.

25. UNHCR, 'Handbook For Registration' (UNHCR) <<https://www.unhcr.org/en-ie/3f8e96a04.pdf>> accessed 3 February 2021.

- Interviews should be conducted in a non-intimidating, non-threatening, and impartial manner.
- For children, interviews are conducted in a friendly manner with the age of the child in mind.
- A photograph of the individual is taken along with copies of supporting documents.
- Assignment of a registration number to identify the asylum seeker throughout the process.

4. UNHCR Asylum Seeker Certificate is issued.

- Attests to the individual's status as "asylum seeker."
- Valid for not more than 1 year.

5. Interview.

- Presentation of claims to a qualified eligibility officer.
- Questioning and presentation of evidence.

6. Notification of RSD decision.

- Notice is given in writing.
- A positive decision grants the applicants refugee status and informs them of the implications of such recognition.
- Where there is a negative decision, one may appeal the decision.

CONCLUSION

Refugees are from all walks of life and finding asylum in a host state gives them hope for a better future. Through this analysis of asylum law, it is evident that there is another side of the coin. That is, not every asylum seeker's application is accepted, thus, leaving them vulnerable.

This is not to say that they are forced back into dangerous environments, but according to practice, these individuals may apply for more limited forms of protection. In this respect, individuals may seek protection under the 1987 Convention Against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment. This could apply in instances where the individual's fundamental rights might be threatened upon return to their country of origin – for example, because they are at risk of being subjected to torture even if they do not qualify as refugees.

Unfortunately, this is just the tip of the iceberg. Today, refugees face great obstacles that make it difficult for them to search for asylum. Do you want to know what these stumbling blocks are? The next chapter will expound more on the challenges that refugees face.



Image source: [The Guardian](#)²⁶

“The painting is about unity. People from different countries, different religions, and different tribes need to accept each other. We need to put our hands together to build a better world, one that does not see colour or differences, only what unites us. We should see others as we see ourselves in the mirror, as human beings. Humanity should take precedence over everything.”

26. Mirror of humanity, by Joseph Kangqi, South Sudan, 2019.





CHAPTER 4

**GENDER AS A PROTECTED
SOCIAL GROUP
IN THE ASYLUM
DETERMINATION PROCESS**

*by Cheptum Toroitich, Kimberly Mureithi
and Maria Angela Maina*



Now that you have been provided with the appropriate understanding of asylum seekers' rights and the hurdles they face, this chapter further narrows down to the aspect of gender and the right to asylum. In the context of this book, "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.¹ 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.² People who fall within the scope of "particular social groups" 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.³ 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."⁴ The aim of this chapter 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.⁵ By June 2020, there were 4.2 million asylum seekers globally from the reported 2 million asylum applications in 2019.⁶ Statistics from the World Bank show that gender-based violence is more prevalent against females, which

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

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

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

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

5. 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.

6. 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.

affects 1 in 3 women in their lifetime.⁷ 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.⁸

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.⁹ On top of this, women face further stressors while seeking asylum such as family separation, social stigmatization and housing and food insecurity.¹⁰

Within this chapter, 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.¹¹ Furtherly, 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.

7. World Bank, 'Gender-Based Violence (Violence Against Women and Girls)' (World Bank, September 2019).

8. 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.

9. 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.

10. N Aguirre, A Milewski, J Shin, D Ottenheimer, "Gender-based violence experienced by women seeking asylum in the United State: 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.

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

Violence against women manifests in the following ways:

- a) Sexual and Gender-Based Violence (SGBV);
- b) Female Genital Mutilation (FGM);
- c) Domestic violence;
- 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.¹²

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.¹³

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.

12. 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.

13. 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.”¹⁴ 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.¹⁵

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

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

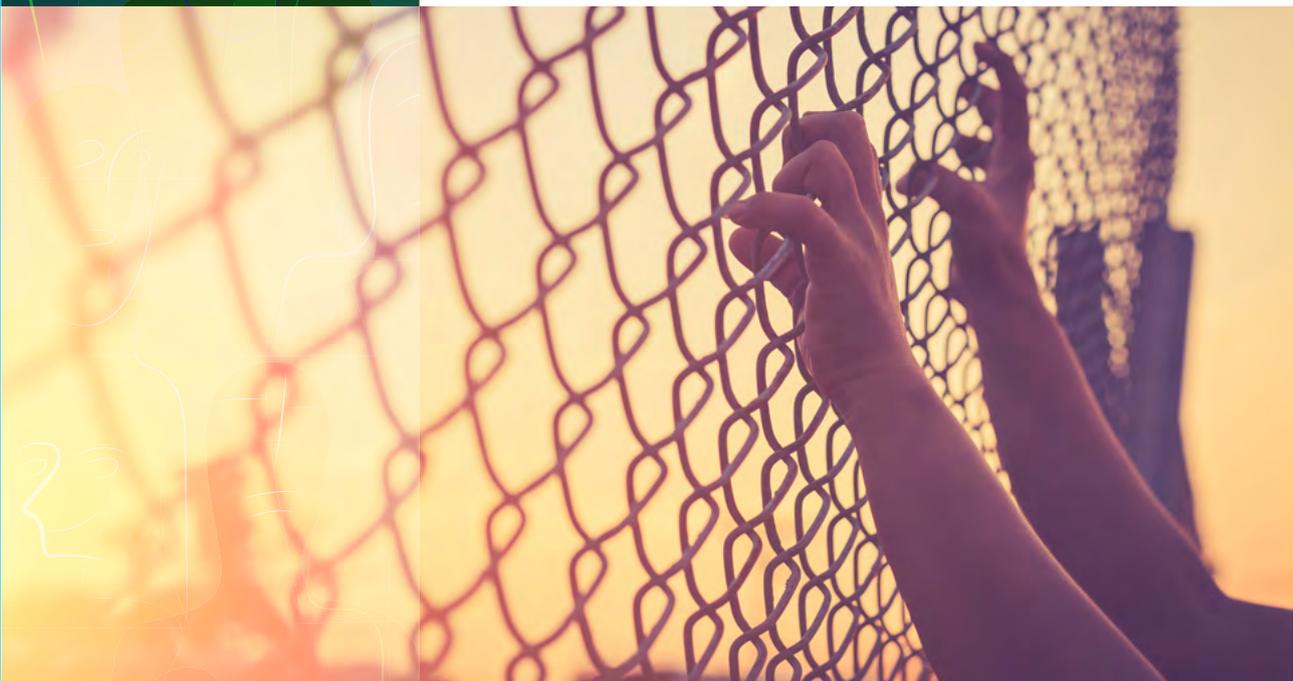
CASE STUDY: THE UNITED STATES OF AMERICA (US)

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.

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.”¹⁶ 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.¹⁷

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:



“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.”¹⁸

This chapter 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.”¹⁹

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.²⁰ Notably, in *Re Kasinga*, the

16. 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.

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

18. 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*.

19. 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.

20. 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.

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.”²¹

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 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.²²



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

22. 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.

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.²³

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.”²⁴

The United Nations High Commissioner for Refugees (UNHCR) through the Executive Office addressed the need for special training on gender-related issues²⁵ 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.

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.

23. 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.

24. 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.

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

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 book on *The right to asylum from a gender perspective* assists in keeping the conversation of gender as a protected social group alive. While this book serves 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-traumatization.



A close-up photograph of a person's hand holding a small, rectangular piece of aged, yellowish paper. The word "ASYLUM" is written on the paper in bold, black, hand-drawn capital letters. The hand is positioned palm-up, and the fingers are slightly curled around the edges of the paper. The background is dark and out of focus, showing a wooden surface with vertical grain lines. The lighting is soft, highlighting the texture of the skin and the paper.

ASYLUM



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info@thethinkingwatermill.com
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