

*UNDOING THE HISTORICAL MISOGYNY OF THE 1951  
REFUGEE CONVENTION: ADDING GENDER AS A SIXTH  
ENUMERATED CATEGORY*

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**ABSTRACT**

*The 1951 United Nations Refugee Convention, while pioneering in its protection of displaced individuals, notably omitted gender as a distinct category of persecution. This oversight has significant implications for refugee women, who represent half of the global refugee population. Despite their substantial presence, women are disproportionately underrepresented in asylum-seeking and granting processes, perpetuating cycles of vulnerability and exclusion. Patriarchal norms and expectations of women further compound these disparities, shaping migration patterns and influencing refugee admissions criteria. Existing refugee definitions inadequately capture the nuanced experiences of gender-based persecution, relegating women's experiences to generic categories such as “membership of a particular social group.” This paper contends that such classification fails to address the specific forms of violence and discrimination faced by refugee women and argues for the recognition of gender as a distinct category within refugee law, advocating for a more inclusive and gender-responsive approach to refugee protection. Through a critical examination of historical contexts and contemporary challenges, this paper underscores the urgent need for reform in refugee law to ensure the equitable treatment and recognition of displaced women worldwide.*

Key words: refugees, gender, Refugee Convention, asylum law, gender violence

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## I. INTRODUCTION

Over seventy years ago, the drafters of the 1951 Refugee Convention (“Convention”) made a decision that would go on to impact generations and generations of women: the decision to exclude gender<sup>1</sup> as an enumerated category of protection. While the term gender traditionally encompasses more than just women, in the context of the Convention, this paper is discussing a category built to protect women and girls. Today, women and girls represent half of the 19.6 million refugees worldwide, yet the most recent data published by UN Women found that only 4% of

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<sup>1</sup>One could argue that gender is not immutable, as gender expression and identity can be chosen. However, in order to be inclusive to all women, no matter their born sex, this paper uses the term gender. While there is a pressing need for protections for transgender, non-binary and queer people, this paper is limited to a discussion on gender. The term “woman” should be read as encompassing anyone who identifies as such.

projects in UN inter-agency appeals were targeted at women and just 0.4% of all funding to fragile states went to women's groups.<sup>2</sup> Furthermore, one in five refugees or displaced women were estimated to have experienced sexual violence,<sup>3</sup> an issue that disproportionately impacts women around the world.

Despite women making up over fifty percent of refugees and displaced people worldwide, global data shows gender disparities in not only those seeking asylum, but in who receive it. In most refugee-receiving countries, especially developed countries, the majority of asylum seekers are single men or men with families.<sup>4</sup> Recent studies have found that in Europe, male asylum seekers have been slightly increasing each year, reaching 73% of asylum seekers in Norway and Switzerland in 2015.<sup>5</sup> While data is limited, a report found that in the late 1990's, despite women and children representing 80% of refugees and displaced people, only 17.8% of United Nations High Commissioner for Refugees ("UNHCR")-assisted refugees in South Africa were female, with statements from the Department of Justice estimating that women constituted only 5% of those who were formally granted refugee status in South Africa.<sup>6</sup> In Europe, studies have found that due to patriarchal practices of household formations, only 31% of asylum seekers are women,<sup>7</sup> while women in the United States are admitted as refugees at lower rates than men.<sup>8</sup>

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<sup>2</sup> U.N. Secretary-General, *In Safety and Dignity: Addressing Large Movements of Refugees and Migrants*, at 5-6, U.N. Doc. A/70/59 (Apr. 21, 2016).

<sup>3</sup> U.N. Secretary-General, *Gender equality and the empowerment of women in natural disasters*, U.N. Doc. E/CN.6/2014/13 (Dec. 20, 2013).

<sup>4</sup> See Phillip Connor, *Number of Refugees to Europe Surges to Record 1.3 Million in 2015*, PEW RSCH CTR., (Aug. 2, 2016), <https://www.pewresearch.org/global/2016/08/02/4-asylum-seeker-demography-young-and-male/>.

<sup>5</sup> *Id.*

<sup>6</sup> Nahla Valji, et al., *Where are the women? Gender discrimination in refugee policies and practices*, 55 AGENDA: EMPOWERING WOMEN THROUGH GENDER EQUITY, 61, 61-72 (2003).

<sup>7</sup> Maximilian Schiele, *The Role of Gender in Asylum Migration to Europe: Analyzing Country-Level Factors of Gendered Selection of Asylum Seekers to Europe*, J. IMMIGR. & REFUGEE STUD. 1, 1 (2024).

<sup>8</sup> Compare Nicole Ward & Jeanne Batalova, *Refugees and Asylees in the United States*, J. MIGRATION POL'Y INST. (June 15, 2023), <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states> (women were admitted to the United States 3% less than men), with *Refugee Data Finder*, UNHCR, <https://www.unhcr.org/refugee-statistics/download/?url=7nTwUD> (last visited May 1, 2024) <PAREN>

Thus, despite the large segment of women refugees, women represent a disproportionately low percentage of asylum seekers, and an even lower percentage of those who gain relief through residency.<sup>9</sup> Additionally, women refugees face an added layer of oppression from gender discrimination<sup>10</sup> that is only exacerbated by a lack of a gender category. Displacement for women leads to exposure to exploitation, enslavement, rape and other forms of abuse and Sexual and Gender Based Violence.<sup>11</sup>

According to Article 1(A)(2) of the 1951 Refugee Convention, as amended by its 1967 Protocol, a refugee is someone who:

[O]wing to 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, is unable or, owing to such fear, is unwilling to return to it.<sup>12</sup>

Therefore, as the Convention currently sits, one must demonstrate, among other factors, persecution on account(s) of one of five enumerated grounds: (1) race; (2) religion; (3) nationality; (4) membership to a particular social group (“PSG”); or (5) political opinion. Claims based on gender are generally included in membership to a PSG.<sup>13</sup> However, this route is not easy, nor has it

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<sup>9</sup> See UNHCR, *Division Of Operational Services, Field Information And Coordination Support Section, 2006 Global Trends: Refugees, Asylum-Seekers, Returnees, Internally Displaced And Stateless Persons* 6 (July 16, 2007), <https://digitallibrary.un.org/naana/record/3966507/files/unhcr-refugees-jun2007.pdf?withWatermark=0&withMetadata=0&registerDownload=1&version=1>.

<sup>10</sup> WOMEN FOR WOMEN INTERNATIONAL, *5 Facts About What Refugee Women Face* (June 7, 2023), <https://womenforwomen.org.uk/blog/5-facts-about-what-refugee-women-face>,

<sup>11</sup> T.S. Twibell, *The Development of Gender as a Basis for Asylum in United States Immigration Law and Under the United Nations Refugee Convention: Case Studies of Female Asylum Seekers from Cameroon, Eritrea, Iraq and Somalia*, 24 GEO. IMMIGR. L.J. 189, 194 (2010).

<sup>12</sup> *What Is a Refugee?*, U.N. HIGH COMM’R FOR REFUGEES, <https://perma.cc/Z492-AGV7> (last visited May 1, 2024)

<sup>13</sup> Michelle Shapiro, *Revitalizing And Reforming International Asylum Law: A Proposal To Add Gender To The Refugee Definition*, 36 GEO. IMMIGR. L. J. 795, 801 (2022).

traditionally been accepted, leading many scholars to call for a sixth “gender” category to be added. Such calls have been made for a variety of reasons, namely because existing categories do not offer protections for gender-based persecution in an adequate way. These claims include conversations about the concept of the term “refugee,” the drafters’ “male-centric notion that persecution is something that only takes place in the public sphere,” and the belief that acts in the private sphere, which are traditionally women-dominated, are less of a concern.<sup>14</sup>

However, some scholars argue asylum systems are already overburdened and addition of a new category would open the floodgates to a large amount of claims that would be better addressed by domestic protections. Despite these concerns, as addressed below, this paper argues that the current refugee definition fails to address the patriarchal conditions of the current world. By requiring women to fit their claims into one of the existing categories, the Convention ignores the realities of misogyny and gender, and places additional burdens on an already oppressed group.

Section II of this paper briefly explores the historical background of the Travaux and Refugee Convention. Section III discusses gender claims under the current Convention, the most frequent types of gender persecution, and why such claims need to be treated differently than other forms of persecution. Section IV concludes by discussing the impact adding a sixth gender category would have on gender-based asylum claims.

## II. HISTORICAL BACKGROUND

Post-World War II, the newly formed United Nations formed both the International Refugee Organization (IRO) and an Ad Hoc Committee to prepare a refugee convention addressing the absence of a comprehensive system equipped to deal with the large number of growing European refugees.<sup>15</sup> In order to include non-members of the United Nations (“UN”), a conference was held in Geneva to

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<sup>14</sup> See Connie G. Oxford, *Protectors and Victims in the Gender Regime of Asylum*, 17(3) N.W.S.A.J. 18, 30 (2005) (citing Susan Moller Okin, *Feminism, Women's Human Rights and Cultural Difference*, in Uma Narayan et al., eds., in *Decentering The Center: Philosophy For A Multicultural, Postcolonial, & Feminist World* (2000)).

<sup>15</sup> NEHEMIAH ROBINSON, CONVENTION RELATING TO THE STATUS OF REFUGEES: ITS HISTORY, CONTENTS AND INTERPRETATION 3-4 (1953).

complete the drafting.<sup>16</sup> While the Ad Hoc Committee had consisted of representatives from only thirteen governments, conference delegates represented twenty-six states, most of whom were Western European,<sup>17</sup> and none of which were women.<sup>18</sup>

In order to create a definition for the term “refugee,” delegates looked to earlier texts, such as the 1946 constitution of the IRO, which defined a refugee as a person who had a “valid objection” to returning to their country of nationality or former habitual residence.<sup>19</sup> “Valid objections included “persecution or a reasonable fear of persecution because of race, religion, nationality, or political opinions.”<sup>20</sup> Representatives in Geneva decided to introduce membership in a particular social group as an “afterthought.”<sup>21</sup> Given lack of historical background, the PSG category lacks the same clarity as the categories originating in the IRO’s 1946 constitution. In the end, when ratifying the Convention, the drafting committee held that in order to establish a well-founded fear or being a victim of persecution, a person must either have been an actual victim of persecution, or able to show “good reason why *he* fears persecution.”<sup>22</sup>

While categories like race and religion are clear in their breadth, PSG is arguably broader and less defined. The UNHCR Handbook states, “[a] ‘particular social group’ normally comprises persons of similar backgrounds, habits or social status. A claim of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.”<sup>23</sup> Therefore, although the contemporary refugee definition is broader than the pre-World War II definition, it still

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<sup>16</sup> Mattie L. Stevens, *Reorganizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J. L. & PUB’ POL’Y 179, 184 (1993).

<sup>17</sup> ROBINSON, *supra* note 15, at 5.

<sup>18</sup> U.N. Secretary-General, Follow-up to the Fifth United Nations Conference on the Least Developed Countries, U.N. Doc. E/2022/53 (Apr. 19, 2022).

<sup>19</sup> GUY GOODWIN-GILL & JANE MCADAM, *THE REFUGEE IN INTERNATIONAL LAW* 19 (3d ed. 2007).

<sup>20</sup> Linda Dale Bevis, Comment, “Political Opinions” of Refugees: Interpreting *International Sources*, 63 Wash. L. Rev. 395, 398 (1988).

<sup>21</sup> ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966).

<sup>22</sup> ROBINSON, *supra* note 15, at 48.

<sup>23</sup> U.N. High Comm’r For Refugees, *Handbook On Procedures And Criteria For Determining Refugee Status Under The 1951 Convention And 1967 Protocol Relating To The Status Of Refugees*, U.N. Doc. HCR/PRO/4 (1979).

fails to encompass persecution based on gender. Furthermore, it relies on an antiquated framework tailored to tackle post-war "refugee flows from white, Western countries."<sup>24</sup>

As noted, the Convention arose directly in response to World-War II and the Holocaust. In fact, the Committee's initial draft of Article 1 specifically acknowledges victims of the Nazi regime.<sup>25</sup> However, despite the appalling gender-based violence committed during the Holocaust, gender was never genuinely taken into account in the Convention's legislative history or preparatory work (*travaux préparatoires*), underscoring a complete disregard for gender-related issues in a time when they were painfully present.<sup>26</sup>

Misogyny is, and was, a fundamental part of Nazi ideology. As feminist scholars have highlighted, some military factions utilized gang rapes as a means of fostering camaraderie and brotherhood.<sup>27</sup> Women endured forced abortions, sterilizations, and medical experiments on their reproductive organs, alongside harrowing sexual violence. It is estimated that over 34,000 female prisoners were forced into sexual slavery in 'rape sections' of concentration camps known as "Joy Divisions".<sup>28</sup> Others were compelled into prostitution or coerced into sexual acts as a means for survival, and subjected to sexual torture, mutilation, or humiliation. Many women suffered lasting physical harm, including uterine and vaginal bleeding, venereal and sexually transmitted diseases, while other women perished due to forced abortions and sterilizations.<sup>29</sup>

While men were also victimized, it is imperative to analyze how certain acts of brutalization, when done to women, take

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<sup>24</sup> ROBINSON, *supra* note 15, at 46-47.

<sup>25</sup> U.N. ESCOR, Report of the Ad Hoc Committee on Statelessness and Related Problems, Lake Success, New York, 16 January to 16 February 1950, U.N. Doc E/1618, E/AC.32/5 (Feb. 17, 1950).

<sup>26</sup> See 1951 Refugee Convention, *supra* note 12, art. 1; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) (amending the Immigration and Nationality Act of 1952) (sex is only mentioned briefly in regard to the Convention's anti-discrimination clause).

<sup>27</sup> Marta Havryshko, Sexual Violence in the Holocaust: Perspectives from Ghettos and Camps in Ukraine, Heinrich Böll Stiftung, (May 18, 2020), <https://www.boell.de/en/2020/05/18/sexual-violence-holocaust-perspectives-ghettos-and-camps-ukraine>.

<sup>28</sup> Nanda Herbermann, The Blessed Abyss: Inmate #6582 in Ravensbruck Concentration Camp for Women 30-31 (Hester Baer & Elizabeth R. Baer eds., Hester Bauer trans., 2000).

<sup>29</sup> *Id.*

different meaning. For example, as historian Regina Mühlhäuser has pointed out, “hair shaving, forced undressing and genital inspection during the Shoah produced feelings and meanings in women that differed from those of men due to socialized gendered roles and expectations. Those acts threatened men’s security rather than being associated with sexuality or sexual humiliation.”<sup>30</sup> While men who bore witness to sexual violence against family members experienced “sexual assault as emasculating acts related to their inability to protect ‘their women,’” women experienced “a loss of personal dignity, security, beliefs and a sense of identity. Some women committed suicide after being raped. Others developed mental illnesses.”<sup>31</sup> As one survivor remembers:

One of the Jewish survivors of the Bohdanivka camp remembers: “My acquaintance Rosenblatt and his family were with me. One night, Slyvenko (a policeman) took his wife Rosa. In the morning, she came back in pain, with torn clothes, and said that the policemen had raped her. Shortly, she lost her mind and died.”<sup>32</sup>

Despite the pervasiveness of gender violence in the Holocaust, the word gender did not appear once the initial sixty-six-page report/draft by the Ad Hoc Committee. In fact, the only instance when gender or sex was discussed during the Convention's drafting was when a representative from Yugoslavia proposed amending Article 3 (which stipulates that the Convention should be applied “without discrimination as to race, religion, or country of origin”) to include “sex.”<sup>33</sup> This suggestion was dismissed by representatives from Austria, Colombia, Italy, Switzerland, Turkey, the United Kingdom, and the United States,<sup>34</sup> who argued gender equality was a matter for national legislation.<sup>35</sup> Consequently, the proposal was rejected, and no further discussion on the topic ensued. Thus, Article 3 on Non-Discrimination instead read, “[t]he Contracting States shall not discriminate against a

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<sup>30</sup> Regina Mühlhäuser, “Sexual Violence and the Holocaust” in *gender: war* 102 (Andrea Peto ed., 2017).

<sup>31</sup> Havryshko, *supra* note 27 .

<sup>32</sup> *Id.*

<sup>33</sup> Thomas Spijkerboer, *Gender and Refugee Status* 1 (2000) (citing U.N. GAOR, 5th Sess., U.N. Doc. A/CONF.2/SR.5 at 9 (Nov. 19, 1951)).

<sup>34</sup> *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary* by Dr. Paul Weis, U.N. HIGH COMM’R FOR REFUGEES 4 (1990).

<sup>35</sup> Spijkerboer, *supra* note 33 .



refugee on account of race, religion, or country of origin because *he* is a refugee.”<sup>36</sup>

The use of the words “he,” “him,” and “himself” remains consistent throughout the entire Convention, including in Article 1’s definition of a refugee.<sup>37</sup> The sole reference to women is not within the draft itself, but in the Committee’s notes discussing statelessness and women’s relationship to men, in which they stated, “[t]he Committee did not include in the above draft resolution a specific reference to the statelessness of women resulting from marriage or dissolution of marriage since the question of the nationality of a married woman is at present being considered on a broader basis by the Commission on the Status of Women.”<sup>38</sup>

Even the UNHCR Guidelines on Gender Related Persecution acknowledges that “[h]istorically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognized.”<sup>39</sup> Feminist scholar Catharine MacKinnon astutely noted that the majority of gender-based violence was overlooked “when the laws of war, international humanitarian law, and international human rights guarantees were framed.”<sup>40</sup> This oversight persisted despite the evident and profound gender atrocities of the Holocaust, highlighting the entrenched misogyny that persists within the Convention to this day.

### III. CONCERNS AROUND THE CURRENT DEFINITION

Historically, women have been systematically excluded from seeking asylum due to the refugee framework’s failure to

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<sup>36</sup> Report of the Ad Hoc Committee on Statelessness and Related Problems, *supra* note 25 at 13.

<sup>37</sup> *Id.* at 12.

<sup>38</sup> *Id.* at 9.

<sup>39</sup> UNHCR, Guidelines On International Protection: Gender related Persecution Within The Context Of Article 1a(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees at 2, U.N. Doc. HCR/GIP/02/01 (May 7, 2002).

<sup>40</sup> Melania Randall, *Particularized Social Groups And Categorical Imperatives In Refugee Law: State Failures To Recognize Gender And The Legal Reception Of Gender Persecution Claims In Canada, The United Kingdom, And The United States*, 23 J. Gender, Social Pol’y & L. 529, 570 (2015) (citing Catharine MacKinnon, *Women’s September 11th: Rethinking the International Law of Conflict*, 47 HARV. INT’L L.J. 1, 1 (2006)).

acknowledge violence perpetrated by non-state actors, which disproportionately affects women.<sup>41</sup> As one scholar aptly stated, “women’s experiences of persecution, and forms of harm that only or mostly affect them, have tended to be excluded from the dominant interpretation of the Convention, and [women] have been unable to benefit consistently and equitably from its protection.”<sup>42</sup> Such persecution encompasses rape, domestic violence, female genital mutilation, honor killings, coercive family planning, forced marriage, and repressive social and cultural norms, many of which occur within the private sphere.<sup>43</sup> As discussed further below, gender understandings of the law and domestic violence are firmly rooted in the public versus private sphere dichotomy. Consequently, many view gender violence as a personal and private matter, thus placing it beyond the realm of public facts that constitute legal crimes.<sup>44</sup> This dichotomy of public versus private heavily influences both immigration law and its application.

Women face persecution in a multitude of ways, and while some experiences may overlap with those of men, many forms of persecution are specific to women. Typically, women’s refugee claims can be categorized into four groups:

- 1) women who fear persecution on the same grounds and in the same circumstances as men;
- 2) women who fear persecution because of kinship ties, such as persecution due to the status, views, or activities of their spouse, fathers, or family members;
- 3) women who fear persecution resulting from severe sexual discrimination, either by public authorities or at the hands of private citizens whose actions the state is unable or unwilling to control; and

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<sup>41</sup> See SUSANNE BUCKLEY-ZISTEL & ULRIKE KRAUSE, GENDER, VIOLENCE, REFUGEES 3–4 (Susanne Buckley-Zistel & Ulrike Krause eds., 2017).

<sup>42</sup> Rosamund Shreeves, European Parliamentary Research Service, Gender Aspects Of Migration And Asylum In The EU: An Overview at 7, P.E. 579.072 (Mar. 2016), [https://www.europarl.europa.eu/thinktank/en/document/EPRS\\_BRI\(2016\)579072](https://www.europarl.europa.eu/thinktank/en/document/EPRS_BRI(2016)579072).

<sup>43</sup> Connie Oxford, *The Gory Details: Asylum, Sexual Assault, & Traumatic Memory*, 4 SEXES 188, 190 (2023).

<sup>44</sup> See Catherine MacKinnon, *Rape Redefined*, 10 HARV. L. REV. 431, 431–34, 434 n.12 (2016).

- 4) women who fear persecution for transgressing or violating sexually discriminatory religious or customary norms/practices in their country of origin.<sup>45</sup>

While all four categories require attention, the existing system largely overlooks the latter two as valid grounds for granting refugee status.<sup>46</sup> Although treaties and initiatives like the Committee on the Elimination of Discrimination against Women (CEDAW) have aimed to challenge the ‘private sphere’ concept of gender violence, these efforts emerged decades *after* the Convention's ratification. The first international instrument explicitly addressing violence against women wasn't established until 1993, more than forty years after the Convention was ratified.<sup>47</sup> Despite advancements in other areas, the Convention remains unaltered and continues to hinder women seeking asylum today.

The UNHCR has acknowledged that whilst there is no universally accepted definition for persecution, it is generally defined as the threat to life or freedom or “other serious violations of human rights.”<sup>48</sup> However, in practice, there is a significant disparity among nations and immigration authorities when determining what qualifies as persecution. Furthermore, individuals must establish a *nexus* between the persecution they face and one of the five enumerated Convention grounds. This linkage prerequisite has disproportionately impacted asylum seekers escaping gender-based persecution, which overwhelmingly affects women's claims and, as elaborated on below, poses significant challenges for women seeking asylum.<sup>49</sup>

*A. Challenges claiming gender persecution under the “particular social group” category*

In recent decades, legal practitioners, scholars, and human rights advocates have raised concerns about the inadequacy of various

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<sup>45</sup> Stevens, *supra* note 16, at 191-92.

<sup>46</sup> *Id.* at 192.

<sup>47</sup> *Global norms and standards: Ending violence against women*, U.N. WOMEN, [www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards](http://www.unwomen.org/en/what-we-do/ending-violence-against-women/global-norms-and-standards) (last visited May 1, 2024).

<sup>48</sup> UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, HCR/1P/4/Eng/REV.2 (2019)

<sup>49</sup> Oxford, *supra* note 14, at 18.

legal systems in providing adequate protection to victims of gender-based persecution.<sup>50</sup> Despite efforts to expand access to asylum for these victims, only a handful of countries explicitly incorporate gender into their domestic refugee definitions. Consequently, most countries generally assess gender-related claims under the PSG framework.<sup>51</sup>

In 1985, “the Executive Committee of the High Commissioner’s Programme first referred to the fact that “women asylums seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1A(2).” However, the inclusion of women in the social group category was left to the discretion of individual states, emphasizing the inherent flaws in such efforts and underscoring the urgent need to explore alternative approaches to ensure consistent and unequivocal asylum protection for victims of gender-based persecution.<sup>52</sup>

When defining a particular social group, countries generally take one of two approaches: (1) the social perception approach or (2) the protected characteristic approach.<sup>53</sup> The former approach, which is utilized in France, Germany, and Australia, focuses on how the group is set apart from society, while the latter, which is used in the United States and Canada, offers narrow protection by focusing on the “innate or unchangeable characteristic of the particular social group.”<sup>54</sup> The social perception approach is particularly problematic when it comes to gender-based social groups, as it is subjective, often leading to inconsistent decisions on whether to recognize such a group.<sup>55</sup>

Regardless of the approach taken, the outcomes remain equally problematic. Under both approaches, women are compelled to frame their claims as persecution based on

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<sup>50</sup> Crystal Doyle, *Isn't "Persecution" Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE J. CIV. RTS & SOC. JUST. 519, 520 (2009).

<sup>51</sup> *Id.*; Shapiro, *supra* note 13, at 805.

<sup>52</sup> See Doyle, *supra* note 50, at 521; Alice Edwards, *Age and gender dimensions in international refugee law*, in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR’S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 51 (E. Feller, et al., eds., 2003).

<sup>53</sup> Shapiro, *supra* note 13, at 805-06.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.*

membership in a PSG, imposing an additional burden not faced by other asylum seekers.<sup>56</sup> Apart from demonstrating persecution due to a protected ground and their inability to access state protection, women must also establish the cognizability of the particular social group itself.<sup>57</sup>

For instance, in the United States, asylum seekers relying on membership in a particular group must satisfy three criteria to establish their claimed group as a social group, *in addition to* the standard requirements of an asylum case.<sup>58</sup> Due to this requirement, gender alone often fails to suffice as a basis for persecution. Instead, individuals must construct complex particular social groups that extend beyond mere gender, such as “women considered as property in a specific country, who are unable to leave their domestic relationships.”<sup>59</sup>

In the United States, cases like the *Matter of A-B*, which overturned the applicant’s granting of asylum for severe domestic violence and vacated an earlier precedent that confirmed domestic violence survivors could qualify for asylum,<sup>60</sup> exemplified how the three requirements have been utilized to impede gender-based claims; a group defined too broadly will fail the particularity requirements, while a group defined too narrowly will fail the social distinction requirements as it will not represent a group with social significance in the particular society at issue.<sup>61</sup>

On the other hand, cases like *Matter of S-A* present an alternative to the PSG approach. In this approach, individuals use one of the other protected grounds as a basis to present a gender-based claim. While this strategy can yield success, as seen in *Matter of S-A* where a typical gender-based violence claim succeeded not on gender grounds, but as a case of religious discrimination,<sup>62</sup> it still underscores the disadvantage faced by gender-based asylum seekers compared to those with claims based on a protected ground.

Early decisions often categorized women's gender claims within the PSG framework, primarily because decision-makers

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<sup>56</sup> *Id.* at 806.

<sup>57</sup> Randall, *supra* note 40, at 532-33.

<sup>58</sup> Shapiro, *supra* note 13, at 806.

<sup>59</sup> *Id.*

<sup>60</sup> A-B-, 27 I. & N. Dec. 316 (A.G. 2018).

<sup>61</sup> *Id.* at 336.

<sup>62</sup> See S-A-, 22 I. & N. Dec. 1328, 1336 (B.I.A. 2000).

failed to recognize women's actions as politically motivated.<sup>63</sup> However the fundamental issue with categorizing gender persecution under the PSG category lies in the lack of rationale for defining the subgroup within the broader gender category. In essence, while the current refugee definition acknowledges that "gender may serve as the basis for [particular] social group identification," it fails to address the critical question of how to delineate this group.<sup>64</sup>

This dilemma becomes particularly apparent in asylum claims based on sexual violence. Such claims are then subjected to testing within an ever-expanding yet paradoxically narrowing set of categories of claimants, such as "Kenyan women subjected to forced rape by cousins" or "Thai women facing physical violence from husbands." This unnecessary and useless particularization completely fails to acknowledge that sexual- and gender-based violence is *itself* a form of gender persecution, and that *gender* is both the common thread defining this social group, and the very factor that makes women the target of such persecution.

*B. Challenges claiming gender persecution under "political opinion"*

In addition to PSG, women may try to establish persecution under the political opinion category. However, portraying women's actions as inherently political presents significant challenges. The conventional perception of asylum seekers as male, coupled with narrow and gendered interpretations of what constitutes persecution, results in the consistent denial of international protection to women under this category. The definition of political opinion has been construed to encompass "opinions contrary to or critical of the policies of the government or ruling party."<sup>65</sup> Nevertheless, as detailed in the following section, under these definitions, "young girls who resist harmful traditional practices enforced by family, community, or village leaders would struggle to demonstrate that they are expressing a 'political opinion' of dissent or opposition to the governmental machinery, policies, or state."<sup>66</sup>

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<sup>63</sup> Edwards, *supra* note 52, at 68.

<sup>64</sup> Randall, *supra* note 40, at 570 (citing Audrey Macklin, Refugee Women and the Imperative of Categories, 17 Hum. Rts. Q. 213, 221 (1995)).

<sup>65</sup> Edwards, *supra* note 52, at 68.

<sup>66</sup> *Id.*

The influence of the Convention has fostered a mindset wherein women's political engagement is frequently misinterpreted as personal conduct. Acts such as challenging or violating discriminatory laws or participating in non-traditional political activities like caregiving or food provision, are often perceived as personal or 'domestic' actions rather than political protests.<sup>67</sup> This lack of recognition afforded to women's political involvement thus stands in the way of women seeking asylum for persecution on the basis of such actions.

In addition, the political motivation behind gender-based violence will often be ignored due sexual violence being viewed as private and apolitical. the "private nature" of gender violence. For example, in *Campos-Guardado*, a Salvadoran woman was gruesomely raped and "forced to watch her uncle, the chairman of the local agrarian cooperative, and others [be] hacked to death while the attackers shouted political slogans."<sup>68</sup> The court denied her asylum case as well as the political context and nature of the sexual assaults and killings.<sup>69</sup> This demonstrated the tendency to ascribe a purely sexual motivation to actions that may very well be rooted in political motivation. As described by one Human Rights Watch report:

Rape in conflict is used as a weapon to terrorize and degrade a particular community and to achieve a specific political end. In these situations, gender intersects with other aspects of a woman's identity such as ethnicity, religion, social class or political affiliation. The humiliation, pain and terror inflicted by the rapist is meant to degrade not just the individual woman but also to strip the humanity from the larger group of which she is a part."<sup>70</sup>

### C. Challenges establishing "persecution" & the impact of gender-based trauma

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<sup>67</sup> Valji, *supra* note 6, at 62.

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[https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/immigration/the-history-and-future-of-gender-asylum-law/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/the-history-and-future-of-gender-asylum-law/)

<sup>69</sup> *Id.*

<sup>70</sup> <https://www.hrw.org/reports/1996/Rwanda.htm>

Early feminist scholars were among the first to publicly discuss how gender violence and the absence of gender an enumerated ground adversely affect women asylum seekers. Erika Feller, the former director of the Department of International Protection, highlighted the failure to recognize gender as an independent basis for persecution, stating:

The drafters of the Convention failed singularly to reflect in words what has long been a reality – that crimes with a basis in gender are as persecutory in Convention terms as any other crimes when the harm inflicted is sufficiently serious and when they are part of a carefully calculated effort to achieve a political end.<sup>71</sup>

This historical and ongoing failure of the Convention has hindered women from establishing persecution. This is primarily because, for many women, abuse and violations occur not at the hands of the state or during times of war, but rather by private individuals within their communities.<sup>72</sup> Claims of persecution based on such experiences are frequently disregarded on the grounds that there is no state culpability—which is a requisite in appeals for international protection—in cases of private abuse. As one scholar put it:

Women face persecution which is unique to them as the persecution is related to their gender, for example rape and sexual violence, forced sterilisation, genital mutilation and domestic violence, from which women may be unable to get state protection. Women who do not conform to the moral or ethical standards imposed on them may suffer persecution from the state, members of their family and/or community. Women may be targeted because they are particularly vulnerable, for example, those who are young, elderly, disabled or those with caring responsibilities.<sup>73</sup>

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<sup>71</sup> Erika Feller, Dir., Dep't of International Protection, UNHCR, *Rape is a War Crime: How to Support the Survivors: Lessons from Bosnia – Strategies for Kosovo* (Jun. 18-20, 1999).

<sup>72</sup> Valji, *supra* note 6, at 65.

<sup>73</sup> Martina Pomeroy, Left Out in the Cold: Trafficking Victims, Gender, and Misinterpretation of the Refugee Convention's "Nexus" Requirement, 16 Mich. J. Gender & L. 454, 471 (2010).



The argument against including these claims fails to recognize “the dual nature of a state's responsibility to its citizens. States not only have a negative obligation not to violate a citizen's rights but also a positive obligation to respect and protect such rights.”<sup>74</sup>

Therefore, it's crucial to examine the types of persecution that specifically or disproportionately affect women and the challenges associated with claiming such persecution: (i) violence with impunity, including domestic violence, rape/sexual violence, and femicide; (2ii war-time violence; and (iii) cultural violence, including female genital mutilation and pervasive cultural oppression.<sup>75</sup> It is important to note that all three categories may lead to trauma and memory recall, further discouraging and preventing women from seeking asylum. Moreover, these areas underscore the historical public/private and political/non-political dichotomies that ultimately obstruct claims of gender violence.

*i. Sexual Violence*

Rape has long been considered a personal act and delegated to the private realm like other forms of gender violence. Catharine MacKinnon recently defined rape as a “crime of gender equality,”<sup>76</sup> arguing that “using consent as the benchmark for defining rape creates a gap between the legal reality and lived reality of sexual assault so wide that legal definitions are often unrecognizable to survivors.”<sup>77</sup>

To secure asylum, refugees must convince immigration officials that they have been persecuted or fear persecution if returned to their home country. This poses a significant challenge for asylum seekers who have endured sexual assault as a form of persecution for several reasons. Firstly, there exists a pervasive shame and stigma surrounding sexual assault that deters many from coming forward. Secondly, many asylum seekers, particularly those who have experienced sexual assault, exhibit symptoms consistent with trauma survivors.<sup>78</sup> As a result, victims' narratives of persecution are often fragmented or incomplete due to memory lapses. Consequently, “how asylum seekers who have been

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<sup>74</sup> *Id.*

<sup>75</sup> While this paper highlights these three types of persecution, this in no way indicates that the types of persecution facing women is limited to the ones discussed in this paper.

<sup>76</sup> MacKinnon, *supra* note 44, at 431 .

<sup>77</sup> Oxford, *supra* note 43, at 192.

<sup>78</sup> *Id.* at 189 .

sexually assaulted tell their stories of persecution is the antithesis of the expectations of credibility.”<sup>79</sup>

Additionally, individuals escaping persecution may have limited time to gather documents or evidence of their identity or the persecution they've faced. This challenge is particularly pronounced for women, as their persecutors often include spouses or family members, necessitating a more impromptu escape compared to male asylum seekers.<sup>80</sup> considering many gender-related claims arise from incidents within the private or familial realm, there exists a longstanding trend of dismissing gender violence claims for not aligning with the notion of public persecution, thereby denying them the basis for asylum protection.<sup>81</sup>

## ii. War-Time Violence

Forced migration has traditionally been associated with men, due to their exposure to persecution and political repression in the public sphere, which they remain the dominant force in.<sup>82</sup> However, studies consistently reveal that women not only endure increased sexual violence during periods of conflict, but that conflict increases the relative number of female asylum-seekers.<sup>83</sup> War-time violence poses particular dangers for women, which are exacerbated by the lack of recognition of sexual violence as a form of persecution.

During armed conflicts, whether international or internal and irrespective of the primary motives (religious, political, or ethnic), women are subjected to rape by combatants from all sides.<sup>84</sup> Similar to the Holocaust, emotions of hatred, superiority, vengeance, and national pride are deliberately manipulated in

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<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 195.

<sup>81</sup> See Doyle, *supra* note 50, at 530 .

<sup>82</sup> Silvia Sansonetti, *Female Refugees and Asylum Seekers: The Issue of Integration*, at 12 (Feb. 2016), [https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556929/IPOL\\_STU\(2016\)556929\\_EN](https://www.europarl.europa.eu/RegData/etudes/STUD/2016/556929/IPOL_STU(2016)556929_EN).

<sup>83</sup> See Schiele, *supra* note 8, at 15 (finding conflict increased the relative number of female asylum-seekers in Europe between 2008 and 2018; Cf. Hilary Charlesworth, et al., *Feminist Approaches to International Law*, 85 AMERICAN J. INT'L L. 613, 628 (1991) (“Recent evidence suggests that women and children, in particular, are victims of widespread and apparently random terror campaigns by both governmental and guerrilla groups in times of civil unrest or armed conflict.”).

<sup>84</sup> Christine Chinkin, *Rape and Sexual Abuse in International Law*, 5 EURO. J. INT'L L. 326, 326 (1994).

armed conflicts.<sup>85</sup> During the Rwandan genocide, for example, “rape and other forms of violence were directed primarily against Tutsi women...[t]he extremist propaganda which exhorted Hutu to commit the genocide specifically identified the sexuality of Tutsi women as a means through which the Tutsi community sought to infiltrate and control the Hutu community.”<sup>86</sup> The motives behind such sexual violence are thus directly linked to perceptions of gender, as, to many, “to rape a woman is to humiliate her community.”<sup>87</sup>

Furthermore, studies have indicated a correlation between the militarization of the nation-state and violence against women.<sup>88</sup> This often leads women with no domestic recourse. For examples, in the 1974 invasion and occupation of Cyprus, Turkish troops were notorious for the widespread rape of women and girls. In one instance, “twenty-five girls who reported their rapes by Turkish soldiers to Turkish officers were then raped again by those officers.”<sup>89</sup>

Given that the Convention requires fear of persecution, women who have been raped must show they have good reason to fear they have been raped again. Yet, even when raped by soldiers, it has been proven difficult for women to obtain refugee status, even when rape is pursuant to a deliberate policy, as in Bosnia and Kosovo.<sup>90</sup> As one scholar wrote, “[j]udges have a tendency to see rape in these circumstances as a matter of ‘dreadful lust’ - and so almost accidental, something random and therefore unlikely to happen again. On this basis, judges have rejected many refugee claims from women who have been raped in this situation.”<sup>91</sup>

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<sup>85</sup> *Id.*

<sup>86</sup> <https://www.hrw.org/reports/1996/Rwanda.htm>

<sup>87</sup> Chinkin, *supra* note 84, at 328.

<sup>88</sup> Chinkin, *supra* note 84, at 326.

<sup>89</sup> *Report of the Council of Europe on Human Rights in Cyprus*, 1974 (London: 1980), 121-22.

<sup>90</sup> Frances Webber, ‘As a Woman I have No Country’: *The Denial of Asylum To Women Fleeing Gender-Related Persecution*, <https://www.refugeewomen.co.uk/wp-content/uploads/2019/01/women-for-refugee-women-the-denial-of-asylum-to-women-fleeing-gender-related-persecution.pdf> (last visited Jan. 5, 2025).

<sup>91</sup> *Id.*; See also Women's Rights Project/Africa Watch, *Seeking Refuge, Finding Terror: The Widespread Rape of Somali Women Refugees in North Eastern Kenya* (New York: Human Rights Watch, 1993), 2 (where one Kenyan official stated rape accusations were made solely to attract sympathy and give the government negative publicity.”); Dorothy Thomas & Ralph Regan, *Rape in*

This violence extends beyond soldiers, with reports of rapes and sexual abuse by members of United Nations peacekeeping forces. Since the 1990s, there have been reports of rape by UN peacekeepers across the world.<sup>92</sup> As women right's advocate Sarah Taylor stated, "[t]he pattern of peacekeeper abuse has continued in large part because the UN peacekeeping system depends on the very troops committing the abuse."<sup>93</sup> Hence, "women are not free from interference even from those who are in the territory with an international mandate to restore international peace and security."<sup>94</sup>

Given the prevalence of gender-based violence and rape during war, persecution at the hands of non-state actors must still be categorized as persecution, as states have an obligation not only to refrain from violating international law themselves, but also to equally protect individuals from breaches by other individuals. Furthermore, decision-makers must adopt an understanding of rape that include its usage as a weapon of war, therefore placing women at risk, and thus in fear of persecution, during all periods of conflict.

### *iii. Cultural Violence*

Due to the premise that refugee status aims to safeguard individuals whose home countries have failed to protect them, there is a common misconception that the government itself must be the perpetrator of harm. Thus, many believe that cultural norms, which are "propagated directly by members of society, and not by the government, cannot form persecution."<sup>95</sup> Opponents of granting refugee status to victims of gender-specific persecution contend that certain forms of gender persecution, even egregious practices like genital mutilation, are entrenched cultural traditions

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*War: Challenging the Tradition of Impunity*, 16 SAIS REV. 81 ("When confronted with evidence of rape by government troops in Kashmir, Indian authorities try to impugn the integrity of witnesses, discredit the testimony of physicians, or just flatly deny the charges. A high-ranking army officer commented, "A soldier conducting an operation at the dead of night is unlikely to think of rape when he is not even certain if he will return alive," as if soldiers rape only when operating under safe conditions.").

<sup>92</sup> *UN: Stop Sexual Abuse by Peacekeepers*, Human Right's Watch (Mar. 4, 2016) <https://www.hrw.org/news/2016/03/04/un-stop-sexual-abuse-peacekeepers>.

<sup>93</sup> *Id.*

<sup>94</sup> Chinkin, *supra* note 84, at 326.

<sup>95</sup> Pomeroy *supra* note 73, at 474-75.

in other countries and should therefore remain free from outsider intervention or judgement.

Communities practicing genital mutilation, predominantly in regions spanning the Middle East, Africa, and Asia,<sup>96</sup> justify this practice on grounds of tradition and culture, citing reasons such as preserving female chastity and a misguided belief in its hygienic benefits.<sup>97</sup> These procedures encompass various forms, including clitoridectomy,<sup>98</sup> the excision of the clitoris or its prepuce, as well as more extreme practices like excision of the clitoris and surrounding tissues,<sup>99</sup> and infibulation,<sup>100</sup> which involves the removal of the clitoris, labia minora, most of the labia majora, and the subsequent stitching of the vulva to leave a narrow opening the size of a matchstick. These procedures are inflicted upon girls from infancy to puberty, often without anesthesia and in unhygienic conditions, leading to infections, psychological trauma, and infertility due to severe scarring and persistent inflammation of the vaginal area.<sup>101</sup> Moreover, genital mutilation poses significant risks during childbirth, potentially resulting in maternal and/or fetal mortality, yet such outcomes are frequently underreported due to the pervasive “traditional silence” surrounding this entrenched tradition.<sup>102</sup>

While there is strong opposition to non-intervention in oppressive traditions, it is crucial for those resistant to intervention to acknowledge that refugees fleeing such practices have actively rejected participation in these traditions. Therefore, when a woman opposes an established system or tradition or expresses her disagreement by fleeing, legal systems should prioritize respecting and safeguarding a woman’s beliefs and decisions rather than imposing traditions they reject.<sup>103</sup> However, the legal challenge under the Convention is not centered on whether the victim has the

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<sup>96</sup> Scilla McLean et al., *Female Circumcision, Excision and Infibulation: The Facts and Proposals for Change*, Minority Rts. Grp., Report No. 47, 1983, at 3, 7.

<sup>97</sup> *Id.* at 7.

<sup>98</sup> DORLAND’S ILLUSTRATED MEDICAL DICTIONARY 338 (27th ed. 1988); Elizabeth Williams Moen, *Genital Mutilation: Every Woman’s Problem 2* (Mich. St. Univ. Working Papers on Women in Intl. Dev. No. 22, 1983).

<sup>99</sup> FEMALE CIRCUMCISION, *supra* note 87.

<sup>100</sup> DORLAND’S ILLUSTRATED MEDICAL DICTIONARY, *supra* note 89; Moen, *supra* note 98.

<sup>101</sup> Moen, *supra* note 98.

<sup>102</sup> Moen, *supra* note 98.

<sup>103</sup> *See* Stevens, *supra* note 16, at 192.

right to dissent from tradition, but rather on whether they harbor a "well-founded fear of persecution" based on predefined categories. In addition, as described by Frances Webber:

Refugee claims based on the fear of genital cutting (FGM) are similar in this respect to those based on domestic or honour violence. Since it is not the State or its agents who are the persecutors, refugee protection is only given where it is needed, ie, where the authorities of the home country cannot or will not themselves provide potential victims with protection against the threatened violence. A refugee claim will be defeated by evidence that the authorities in the country of origin have taken 'effective and appropriate measures to eliminate FGM', including 'appropriate prevention activities as well as systematic and actual (not merely threatened) prosecutions and punishment for FGM-related crimes.'<sup>104</sup>

This dilemma underscores the obstacles faced by women fleeing from genital mutilation or other forms of gender-specific cultural oppression, often leading to their denial of refugee status.<sup>105</sup> A country that has certain laws may be very well deemed to have "eliminated" threats of persecution, even if those threats still existed at a local level with little intervention.

Given that women facing persecution based on their gender and refusal to adhere to gender-discriminatory religious or customary laws or practices may not receive adequate protection in their country of origin,<sup>106</sup> there have been calls to broaden the definition of "political" action, thereby expanding understandings of persecution. As one scholar questions:

Why is it so difficult to recognize the acts of a woman in transgressing social customs as political? Why are certain acts (for instance, acts contravening religious dress codes) considered to be non-religious in a society where there is no separation between the State and religious institutions? Why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the

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<sup>104</sup> Webber, *supra* note 90, at 12.

<sup>105</sup> See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

<sup>106</sup> Sansonetti, *supra* note 82.

fundamental customs of their society? Why has rape during ethnically motivated armed conflict been seen as only criminal and not also racial in character?<sup>107</sup>

In regards to cultural violence, the solution to these questions seems to lie within the legal framework of industrialized States, which often fails to recognize such activities as political due inherent bias towards Western political structures.<sup>108</sup> This results in the neglect of the political dynamics in non-Western countries. Therefore, not only does the Convention overlook acts of cultural violence as persecution, but it also regards *resistance against* such violence as non-political. The Convention's failure to contextualize the term "political" based on the location of human rights abuses or persecution results in an inadequate response to the harsh realities experienced by women, particularly those in non-Western countries. Just as the Convention must broaden to encompass gender to reflect women's lived experiences, the definition of political opinion must be tailored to consider the diverse circumstances in various countries of origin, especially in regions where authority derives from regional, tribal, or village levels.<sup>109</sup>

In conclusion, the Convention maintains a perspective on legal matters that is shaped by gendered dichotomies, such as the distinction between the public and private spheres, as well as dominant and submissive roles, rational and emotional responses, and political and non-political actions, with "male" corresponding to the first and highly valued component in each pair.<sup>110</sup> The history and evolution of the Refugee Convention suggest a male-centric conception of a "refugee," defining it as someone persecuted in the public sphere for acts occurring in that sphere.<sup>111</sup> Thus, expansion is not only viable, but urgently needed in order to grant women protection under the current refugee regime.

#### IV. THE POSSIBILITY OF EXPANSION

For many individuals, refugee status determination can be the difference between life and death. Hence, it's crucial to ensure that such determinations are not influenced by subjective interpretations, such as one person's understanding of a social

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<sup>107</sup> Edwards, *supra* note 52, at 68.

<sup>108</sup> *See id.* at 69.

<sup>109</sup> *See id.* at 68.

<sup>110</sup> Doyle, *supra* note 50, at 531.

<sup>111</sup> *Id.*

concept or situation. Historically, certain biases have led to the denial of protection under the Convention for claims that don't adhere to the 'adult male' standard.<sup>112</sup> To date, some efforts have been made to address this issue, including the UNHCR's guidelines on gender-based claims, the adoption of the Executive Committee's Conclusion No. 39,<sup>113</sup> and the 1987 issuance of instructions aimed at improving the protection of refugee women.<sup>114</sup>

However, while these guidelines offer some benefits, they also acknowledge the limitations of international refugee law in providing adequate protection for women asylum seekers, given the fact that gender is still not an enumerated ground for protection.<sup>115</sup> Given the non-binding nature of the UNHCR guidelines,<sup>116</sup> scholars have proposed amending the current definition of "refugee" to incorporate an additional gender category as a means of granting women adequate protection.<sup>117</sup>

#### *A. Arguments for expansion*

##### *i. The current refugee definition does not offer adequate protections for gender-based persecution*

Calls for an enumerated gender category challenge the male-centric notion embedded in the term "refugee" and the perception that persecution primarily occurs in the public sphere, while acts in the private sphere, traditionally associated with women, are given less significance.<sup>118</sup> To ensure non-discriminatory applications of refugee law, it is imperative to establish gender-sensitive and

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<sup>112</sup> Edwards, *supra* note 52, at 47.

<sup>113</sup> See generally Deborah Anker, The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States, Am. Bar Ass'n, [https://www.americanbar.org/groups/crsj/publications/human\\_rights\\_magazine\\_home/immigration/the-history-and-future-of-gender-asylum-law/](https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/immigration/the-history-and-future-of-gender-asylum-law/) (Apr. 27, 2020) (affirming women asylum seekers fearing "harsh or inhumane treatment for gender-based reasons may be considered a particular social group under the Convention.").

<sup>114</sup> U.N. High Comm'r For Refugees, Note On Refugee Women And International Protection, U.N. Doc. EC/SCP/59 (Aug. 28, 1990).

<sup>115</sup> *Id.*

<sup>116</sup> Shapiro, *supra* note 13, at 805 ("the U.N. Handbook may be a useful interpretive aid, but it is not binding on the Attorney General, the BIA, or the United States Courts.") (citing *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999)).

<sup>117</sup> Doyle, *supra* note 50, at 521.

<sup>118</sup> See Oxford, *supra* note 14, at 30.



inclusive asylum procedures,<sup>119</sup> alongside adopting a gender-sensitive interpretation of international refugee law.<sup>120</sup>

Understanding how the law affects women differently from men, and thus how gender influences refugee claims, is essential for an equitable legal system. As a preliminary matter, one must gain an understanding of what gender is: “Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles, and responsibilities that are assigned to one sex or another, while sex is a biological determination.”<sup>121</sup> As mentioned, the application of international and refugee law has been rooted in the public/private dichotomy, which has often been translated into male/female and political/apolitical divide.<sup>122</sup> Even when laws are written in gender-neutral terminology, the social perceptions of roles and responsibilities of the genders can create disparities in their applications.

For instance, women and other gender-based claimants often face additional persecution. Decision-makers more readily accept women’s claims of ‘derivative persecution,’ claims on the basis of their family membership, rather than claims of direct persecution, where the woman must prove she herself has suffered or fears persecution on a specific Convention ground.<sup>123</sup> Women’s asylum claims are thus influenced by gender stereotypes regarding accepted or believed roles, leaving those who do not conform to the adult male standard disproportionately affected by narrow interpretations of international law.<sup>124</sup>

*ii. Equality and progress can only be achieved  
through the recognition of gender as its own  
immutable characteristic*

In addressing the issue of social group classification, it is evident that gender shares similar characteristics to other immutable traits such as race and religion, leading to comparable vulnerabilities and harms. In other words, “[i]f it is their status as women in a gender equal society which renders them vulnerable to gendered

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<sup>119</sup> See Edwards, *supra* note 52, at 47.

<sup>120</sup> See *id.*

<sup>121</sup> UNHCR, *supra* note 39, para. 3.

<sup>122</sup> HEAVEN CRAWLEY, REFUGEE AND GENDER: LAW AND PROCESS 18-21 (2001).

<sup>123</sup> Spijkerboer, *supra* note 34, at 19.

<sup>124</sup> See Edwards, *supra* note 52, at 49

harms...then it is gender itself which is the basis for membership in a particular social group.”<sup>125</sup> When persecution is inflicted based on gender, it becomes the defining characteristic that delineates the social group, with gender serving as the foundation for the persecution.<sup>126</sup>

Policies aimed at safeguarding the rights and well-being of refugees cannot afford to be gender-neutral, as gender is not a passive element that can be overlooked. Rather, it represents one of the primary dimensions of discrimination and violence experienced by female refugees throughout their lives.<sup>127</sup> Scholars thus argue that “activities, measures, and policies that are developed within a gender-neutral framework are destined to fail in meeting the needs of female refugees and asylum-seeking women.”<sup>128</sup>

Without a distinct category recognizing gender as an independent ground of persecution, women will continually be subjected to inter-group comparisons and pressured to form sub-groups of particularly vulnerable women within the broader category of women. This process not only acts as a deterrent for women seeking asylum, but poses a significant barrier to accessing justice for the most marginalized women globally. Hence, it is imperative to enumerate gender as a distinct and acknowledged basis of persecution.<sup>129</sup>

*iii. A gender category will reduce re-traumatization and develop a better understanding of the multidimensional persecution women face*

Understanding gender persecution requires recognizing it as a complex and overlapping form of discrimination, both as its own distinct basis of persecution and as an additional layer of oppression. Without recognizing gender as an immutable characteristic, one cannot fully comprehend the multifaceted persecution experienced by women, as, in many instances, women face compounded persecution or heightened oppression solely *because* of their gender.<sup>130</sup> Adopting a more comprehensive framework not only creates equal access to protection, but reduces

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<sup>125</sup> Randall, *supra* note 40, at 571.

<sup>126</sup> *Id.*

<sup>127</sup> Sansonetti, *supra* note 82, at 49.

<sup>128</sup> *Id.* at 12.

<sup>129</sup> See Randall, *supra* note 40, at 571

<sup>130</sup> See Sansonetti, *supra* note 82, at 10.

re-traumatization by eliminating additional barriers and obstacles that disproportionately impact women.

Advocates calling for the inclusion of a sixth category argue that such a category “can ensure that the refugee definition will cover harms specific to women—like female genital mutilation, rape, and gender-based discrimination—and will recognize these harms as persecution.”<sup>131</sup> Traditional asylum claims by men typically involve a direct link between state actions and persecution on one or more Convention grounds. However, limiting recognition to only direct links between persecution and state actions discriminates against women, who are more likely to experience indirect links between persecution and state actions due to the state's inability or unwillingness to protect them.<sup>132</sup>

*B. Arguments against expansion*

*i. Floodgate argument*

The primary concern in expanding the Convention to include gender is the risk of a potential surge in asylum claims, particularly in cases related to gang-related gender-based violence.<sup>133</sup>

However, it's important to note that expanding the Convention's refugee definition to include gender does not remove existing restrictions and requirements that all asylum seekers must meet, nor does it expand domestic asylum procedures. Furthermore, even with an expanded definition, the Convention does not grant asylum seekers an automatic right to asylum. The refugee regime would remain restrictive and under the control of states.<sup>134</sup>

Additionally, the challenges faced by asylum seekers, such as ostracization, stigmatization, and discrimination, especially in cases of gender-based persecution, make it exceedingly difficult for refugees to flee and successfully obtain asylum. As history has shown, expanding eligibility criteria does not inevitably lead to a flood of asylum claims.<sup>135</sup> Instead, simplifying the analysis of gender-based asylum claims would streamline proceedings and reduce inefficiencies during initial screening processes and appeals. This would enable taxpayer resources to be allocated more

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<sup>131</sup> Stevens, *supra* note 16, at 179.

<sup>132</sup> Edwards, *supra* note 52, at 63.

<sup>133</sup> Shapiro, *supra* note 13, at 814.

<sup>134</sup> *Id.*

<sup>135</sup> Tahirih Just. Ctr., *Arguments for Adding Gender as a 6th Ground of Asylum*, <https://www.tahirih.org/wp-content/uploads/2021/09/Sixth-Ground-Summary-of-Arguments.pdf> (last visited May 1, 2024).

effectively elsewhere. Ultimately, these changes would enhance the fairness and efficiency of the asylum system without compromising its integrity.<sup>136</sup>

The concern about an influx in refugee claims should not overshadow dire need to prioritize the safety and well-being of women who are victims of gender-based violence and discrimination. Women deserve equal access to asylum and protections from persecution, regardless of the administrative challenges it may pose. Upholding principles of human rights and gender equality requires recognizing and addressing the specific vulnerabilities and injustices faced by women seeking refuge from violence and oppression. Therefore, any concerns about potential surges in asylum claims must be balanced with the fundamental duty to provide sanctuary and support for those in need, particularly women who are disproportionately affected by gender-based persecution.

*ii. Lack of Effectiveness*

Other scholars contend that simply adding gender as an explicit ground in the refugee definition falls short of addressing the myriad barriers confronting women seeking asylum due to gender persecution.<sup>137</sup> As one scholar expressed:

[T]he obstacles to women's eligibility for refugee status lie not in the legal categories per se, but in the incomplete and gendered interpretation of refugee law – the failure of decision-makers 'to acknowledge and respond to the gendering of politics and of women's relationship to the state.'<sup>138</sup>

The argument that recognizing gender as an additional ground for persecution is insufficient to eradicate prejudice within international legal frameworks does not diminish its necessity. On the contrary, enumerating gender as a sixth category represents a crucial interpretive and legislative stride toward a more comprehensive and gender-sensitive application of refugee law.<sup>139</sup> Numerous scholars and refugee experts have argued that such an

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<sup>136</sup> *Id.*

<sup>137</sup> Randall, *supra* note 40, at 569.

<sup>138</sup> *Id.* (quoting Deborah E. Anker, Gender in Refugee Law: From the Margins to the Centre 51 (Efrat Arbel et al. eds., 2014)).

<sup>139</sup> *Id.*

additional is a “moral and political imperative” and a “realistic goal, given the increased international recognition of the particular dangerous women refugees face.”<sup>140</sup> While acknowledging gender as a basis for persecution does not completely eradicate all the challenges and interpretive hurdles encountered by women fleeing persecution, it constitutes a vital step towards fostering a more fair and = gender-sensitive asylum process.<sup>141</sup> As Baroness Hall has observed:

The world has woken up to the fact that women as a sex may be persecuted in ways which are different from the ways in which men are persecuted and that they may be persecuted because of their inferior status accorded to their gender in their home country.<sup>142</sup>

Currently, at least twenty-five countries, including the European Union, have updated their laws to explicitly include gender as a basis for asylum, yet only four have formally added gender as a sixth ground.<sup>143</sup> By adding a sixth gender category, the UN would be pushing ratifying countries to question the inadequacy of their own procedures and place pressure on them to adopt similar efforts. Such an addition is needed in order to remedy the failures of the initial drafters in creating a “refugee” definition that protects *all* those experiencing persecution. As aptly concluded by Dr. Melanie Randall, “[f]airness, justice, and women’s equal access to the law require it.”

## V. CONCLUSION

The 1951 Refugee Convention currently fails to address gender-specific persecution, reflecting an outdated model that was initially crafted to address refugee flows primarily from white Western in the aftermath of World War II.<sup>144</sup> While adding an enumerated gender category does not solve the sexism plaguing global legal institutions, contemporary movements, largely originating in the less developed regions, “raise questions about the relevance of the

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<sup>140</sup> Stevens, *supra* note 16, at 218.

<sup>141</sup> Randall, *supra* note 40, at 571.

<sup>142</sup> *Id.* (citing Fornah v. Sec’y of State for the Home Dep’t [2006] UKHL 46, 86 (U.K.)).

<sup>143</sup> Tahiri Justice Center, *supra* note 135.

<sup>144</sup> See Stevens, *supra* note 16, at 203 (citing Astri Suhrke, Global Refugee Movements and Strategies of Response, in U.S. Immigration and Refugee Policy 157, 157 (Mary M. Kritz ed., 1983)).

conventional concepts to current realities.”<sup>145</sup> The complex nature of modern refugees and nation-states thus requires a modern definition.

Therefore, this paper advocates for the addition of a sixth gender category. However, even with the inclusion of a gender category, the most significant change must come from individual decision-makers. Present policies and arguments against expansion often prioritize preserving sovereignty and other domestic interests by managing or preventing refugee flows. This desire seems to have “surpassed both the goal of stopping the violence that forces people to flee and of assisting and protecting those who have managed to escape.”<sup>146</sup> Consequently, the current refugee definition proves ineffective in meeting the practical needs of the refugee population.<sup>147</sup>

The Refugee Convention requires a gender-inclusive and gender-sensitive interpretation, one that must be embraced by decision-makers handling individual cases. While the addition of a gender category will mark the beginning of undoing historical failure to protect refugee women, it does not signal the end of the changes and reforms necessary to provide women with adequate protection.

Gender-based violence is a global emergency.<sup>148</sup> Currently, one in three women worldwide experience physical or sexual abuse in their lifetimes.<sup>149</sup> On average, a girl or woman is killed by someone in her own family every eleven minutes.<sup>150</sup> Ninety million women live in countries that ban abortion, with 39,000 women dying each year from unsafe abortions.<sup>151</sup> Over 57.6 million women and girls are forcibly displaced or stateless, one in

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<sup>145</sup> Suhrke, *supra* note 144.

<sup>146</sup> Bill Frelick, *Refugees: Punishing the Victims*, Christian Sci. Monitor (Dec. 31, 1992), <https://www.csmonitor.com/1992/1231/31181.html>.

<sup>147</sup> See Stevens, *supra* note 16, at 203.

<sup>148</sup> See Gabriela Carbó Zack, *Stand With Her: Women-led Organizations Tackling Gender-based Violence*, UN Foundation (Nov. 21, 2022), [www.unfoundation.org/blog/post/stand-with-her-6-women-led-organizations-tackling-gender-based-violence](http://www.unfoundation.org/blog/post/stand-with-her-6-women-led-organizations-tackling-gender-based-violence).

<sup>149</sup> *Id.*

<sup>150</sup> *Killings of Women and Girls by Their Intimate Partner or Other Family Members*, U.N. Off. on Drugs and Crime (Nov. 2021), [https://www.unodc.org/documents/data-and-analysis/statistics/crime/UN\\_BriefFem\\_251121.pdf](https://www.unodc.org/documents/data-and-analysis/statistics/crime/UN_BriefFem_251121.pdf).

<sup>151</sup> *The World's Abortion Laws*, CTR. FOR REPRODUCTIVE RTS., <https://reproductiverights.org/maps/worlds-abortion-laws/> (last visited, May 2, 2024).

five of whom will be subjected to sexual violence as a result of their displacement.<sup>152</sup> Female refugees reported a 73% increase in domestic violence during the pandemic, a 51% rise in sexual violence, and a 32% growth in early and forced marriage.<sup>153</sup> Yet only 1% of gender-focused international aid is directed to women's rights organizations<sup>154</sup> and only 0.48% of the COVID-19 Global Humanitarian Response Plan went to funding for gender-based violence.<sup>155</sup>

Despite all the violence and oppression faced by women today, the Convention continues to ignore the common thread between the myriad of violence discussed in this article: the victim's gender. Gender violence is committed against women *because* of antiquated beliefs of what a woman is, what women owe men, and how women ought to behave. These beliefs plague legal systems, asylum decisions, and every facet of our patriarchal societies. Just as men's misogynistic beliefs about women underscore the violence they perpetrate, the cycle of denying women asylum continues to be perpetuated by a definition created by group of men over seventy years ago.

As stated by Jamie Gorelick and Layli Miller-Muro, "just as our collective understanding of violence against women has evolved, so must the laws that protect women."<sup>156</sup> By adding a gender category, the United Nations will be making a revolutionary and over-due statement to the world that women are deserving of the same rights men afforded themselves a long time ago. The time for change is now—we are tired of waiting.

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<sup>152</sup> *Gender equality and gender-based violence*, UNHCR, <https://reporting.unhcr.org/spotlight/gender-equality-and-gender-based-violence> (Last visited May 2, 2024).

<sup>153</sup> *New Report Finds 73% of Refugee and Displaced Women Reported an Increase in Domestic Violence Due to COVID-19*, Int'l Rescue Committee, <https://www.rescue.org/press-release/new-report-finds-73-refugee-and-displaced-women-reported-increase-domestic-violence> (last visited May 2, 2024).

<sup>154</sup> Zack, *supra* note 148.

<sup>155</sup> Int'l Rescue Committee, *supra* note 153.

<sup>156</sup> Shapiro, *supra* note 13, at 821; See Jamie Gorelick & Layli Miller-Muro, Opinion, *U.S. Asylum Law Must Protect Women*, WASH. POST (Apr. 7, 2021).