

GENDER AND THE “MEMBERSHIP IN A PARTICULAR SOCIAL GROUP” CATEGORY OF THE 1951 REFUGEE CONVENTION

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I. INTRODUCTION

The criteria of “membership in a particular social group,” as laid down in the U.N. Convention Relating to the Status of Refugees¹, and codified in the Refugee Act of 1980,² is an element of the universally recognized refugee definition which has become a critical point for many women seeking asylum in the United States and elsewhere. A person seeking refugee recognition not only has to demonstrate that she has been persecuted or has a “well-founded” fear of persecution; in addition, she must show that the persecution directed against her is caused by a discriminatory motive as stated in the refugee definition. Such grounds for persecution are limited to race, religion, nationality, political opinion, or membership in a particular social group.

Women are persecuted for the same reasons as men; for example, they are arrested and tortured due to their publicly demonstrated political opinions. However, women frequently face gender-based persecution, which may have two different meanings: “The concept of women being persecuted as women is not the same as women being persecuted *because* they are women.”³ The first concept, that of women persecuted as women, relates to the types and forms of persecution that are *gender-specific*, such as rape, female genital mutilation (FGM), or domestic abuse.⁴ The second

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¹ United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137; United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, T.I.A. No. 6577, 606 U.N.T.S. 267 [hereinafter Refugee Convention].

² 8 U.S.C. § 1101(a) (42) (A) (1994).

³ Refugee Women's Legal Group, Gender Guidelines for the Determination of Asylum Claims in the UK § 1.11 (1998).

⁴ See *infra* II.B.1.

concept, that of women persecuted because they are women, addresses the causal relationship between gender and persecution. The term gender-related persecution refers to the latter and focuses on the bases of persecution. Gender alone, or combined with other characteristics, can be the basis for the persecution. This two-pronged definition of gender-based persecution illustrates that gender-specific harm is not necessarily persecution perpetrated *because of* the victim's gender. As the case of female genital mutilation shows, a woman (or girl) may be persecuted both *as and because* she is a woman (or girl).⁵

Gender-related persecution, persecution *because of* gender, is often discussed in the context of the "membership in a particular group" category. The definition of refugee is deficient in addressing the concerns of persecuted women. I will begin with a brief overview of the Refugee Convention and the purpose of the social group category that will conclude with an examination of the international developments and the pertinent U.S. practice. This will facilitate a discussion of the differences in the application of the indefinite category of "particular social group" by a comparative case study in relation to one type of gender-based persecution. Courts should recognize gender-based definitions of "social group." I should emphasize that I can give only a short, rather incomplete examination of one aspect of the problems and obstacles that women fleeing gender-based persecution often confront due to the lack of a gender-sensitive refugee definition and the rather incoherent legal concept of "particular social group."⁶

⁵ Refugee Women's Legal Group, *supra* note 3, §§ 1.12-15. As to the meanings of the terms gender-based or gender-related persecution, see Nancy Kelly, Gender-Related Persecution: Assessing the Asylum Claims of Women, 26 Cornell Int'l L.J. 625, 642 (1993); Anjana Bahl, Home is Where the Brute Lives: Asylum Law and Gender-Based Claims of Persecution, 4 Cardozo Women's L.J. 33, 35-36 (1997).

⁶ Other critical aspects include, for example, the denial of asylum because the harm women fear is not viewed as "persecution" by asylum adjudicators. In addition, women are confronted with refugee determination procedures that fail to take account of women's particular experiences and cultural backgrounds. And, of course, due to economic, social and cultural circumstances, most women do not even have the possibility to seek refuge in a safe country where they would have a chance to be granted asylum.

II. GENDER-BASED PERSECUTION AND THE CONCEPT OF "MEMBERSHIP IN A PARTICULAR SOCIAL GROUP": CURRENT PRACTICE AND DEFICIENCIES

A. The Refugee Definition of the Refugee Convention and its "Gender-Deficiency"

Article 1(A)(2) of the Refugee Convention read together with the 1967 Protocol Relating to the Status of Refugees defines "refugee" as a person who

owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of [her] nationality and is unable, or owing to such fear, is unwilling to avail [herself] of the protection of that country; or who, not having a nationality and being outside the country of [her] former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.⁷

This refugee definition was drafted against the background of the atrocities committed by Nazi-Germany. The drafters' main concern was to address the mass persecutions suffered by the European Jews and other targeted persons based on racial, religious, and political grounds.⁸ The definition is also a product of the Cold War,⁹ which prompted ideologically-based concerns by the West about the international protection of political dissidents from Eastern European communist regimes.¹⁰ In its preamble, the Refugee Convention refers to the principle that "human beings shall

⁷ The refugee definition of the 1980 Refugee Act parallels that of the Refugee Convention. Congress' intent was to comply with the United Nations' definition. See Arthur C. Helton, *Persecution on Account of Membership in a Social Group as a Basis for Refugee Status*, 15 Colum. Hum. Rts. L. Rev. 39, 40 & nn.7-8 (1983).

⁸ See, e.g., Jack Garvey, *Toward a Reformulation of International Refugee Law*, 26 Harv. Int'l L.J. 483 (1985) (stressing that the Refugee Convention and its Protocol "center on a definition of 'refugee' that was designed to secure the humanitarian objective of relieving the victims of the Nazi persecutions"); Joan Fitzpatrick, *Revitalizing the 1951 Refugee Convention*, 9 Harv. Hum. Rts. J. 229, 239-40 (1996) (stating that "[t]he paradigm inspiring the Refugee Convention was the right-wing totalitarian regime of Nazi Germany.").

⁹ Jane Connors, *Legal Aspects of Women as a Particular Social Group*, Int'l J. Refugee L., Special Issue on Gender-Based Persecution, Autumn 1997, at 118.

¹⁰ See, e.g., James C. Hathaway, *A Reconsideration of the Underlying Premise of Refugee Law*, 31 Harv. Int'l L.J. 129, 148-49 (1990).

enjoy fundamental rights and freedoms without discrimination.”¹¹ This definition reflects the human rights philosophy of the time period with its “gender deficiency” in several aspects: the persecution grounds emphasize the protection of civil and political rights, while failing to directly address the violation of social and economic rights.¹² By focusing on direct rights violations by the state, traditional definitions fail to recognize the abuse of women as a human rights problem and reproduce the public/private sphere distinction of human rights law.¹³ This approach tends to characterize women’s experience of abuse as a private matter of the home and community, leaving the responsibility of addressing it to individual governments. In terms of refugee law, this means that “the key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men.”¹⁴ These activities can include belonging to political parties, making speeches, or attending demonstrations. Women’s experiences of harm, however, are often centered in the private realm¹⁵ and therefore do not easily fit within this framework of refugee protection. Thus, harmful acts against women are often viewed as private in nature and not politically motivated.¹⁶ The lack of gender-sensitivity with regard to women’s refugee claims is further evidenced by the fact that the persecution grounds of the Refugee Convention do not include sex or gender. In

¹¹ As to the significance of the preamble, see Regina v. Imm. App. Tribunal, Ex Parte Shah, 2 A.C. 629 (H.L. 1999), *infra* Part III.B.

¹² Kelly, *supra* note 5, at 627.

¹³ Hilary Charlesworth, What Are “Women’s International Human Rights?” in Human Rights of Women: National and International Perspectives 58, 71 (Rebecca J. Cook ed., 1994).

¹⁴ Doreen Indra, Gender: A Key Dimension of the Refugee Experience, 6 *Refugee* 3 (1987), *quoted in* Jacqueline Greatbatch, The Gender Difference: Feminist Critiques of Refugee Discourse, 1 *Int’l J. Refugee L.* 518, 519 (1989). *Cf.* Pamela Goldberg, Where in the World Is There Safety for Me?: Women Fleeing Gender-Based Persecution, in *Women’s Rights Human Rights* 345, 347 (J. Peters et al. eds., 1994). According to the author, the main difficulty for women “lies not in the legal definition but rather in how that definition is interpreted and applied. As with the common understanding of what constitutes human rights violations, the traditional view of what constitutes persecution reflects a male consideration of ‘normal’ or acceptable conduct.” *Id.*

¹⁵ However, as Greatbatch, *supra* note 14, at 520, stresses, the distinction between the private and public realm should not be overemphasized since it may disregard the oppression experienced by women in the public sphere and the interconnectedness of public and private spheres.

¹⁶ See Deborah E. Anker et. al., Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law, 11 *Geo. Immigr. L.J.* 709, 711 (1997).

contrast, the U.N. Charter and the Universal Declaration of Human Rights both prohibit discrimination based on sex.¹⁷

For these reasons, the facial gender-neutrality of the refugee definition is in fact a gender-deficiency that reflects the perspective of that time that women and men lead identical lives and that the human condition is unaffected by gender.¹⁸ The category of membership in a particular social group, however, which was introduced at the Conference of Plenipotentiaries as an amendment by the Swedish representative,¹⁹ has been widely recognized as an open-ended "catch-all" category²⁰ that allows the inclusion of persecution claims not covered by racial, religious, or ethnic groups.²¹

Therefore, one must not interpret the omission of a sex or gender category in the definition of the Refugee Convention as precluding women who fear gender-based persecution from receiving refugee protection.²² In fact, the contrary must be true, as the Refugee Convention is aimed at indiscriminately protecting those fearing persecution. As the Supreme Court of Canada emphasized in *Canada (Attorney General) v. Ward*: "[T]he meaning assigned to 'particular social group' . . . should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative."²³

¹⁷ U.N. Charter, art. 1, para. 3 & art. 55(c); Article 2, G.A. Res. 217A, U.N. GAOR, 3rd Sess., at 71, U.N. Doc. A/810 (1948).

¹⁸ Noreen Burrows, *International Law and Human Rights: The Case of Women's Rights*, in *Human Rights: From Rhetoric to Reality* 80, 82 (Tom Campbell et al. eds., 1986).

¹⁹ Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, U.N. GAOR, Summary Rec. of the 3rd mtg., at 14, U.N. Doc. A/CONF.2/SR.3 (1951). The Swedish representative explained only that "experience had shown that certain refugees had been persecuted because they belonged to particular social groups." *Id.* See also Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 Cornell Int'l L.J. 505, 509 (1993).

²⁰ Helton, *supra* note 7, at 41-42.

²¹ See, e.g., [1 Refugee Charter] Atle Grahl-Madsen, *The Status of Refugees in International Law* §89(iv) (1966); Guy S. Goodwin-Gill, *The Refugee in International Law* 46 (2d ed. 1996); David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as Grounds for Asylum*, 20 Colum. Hum. Rts. L. Rev. 203, 227-28 (1988).

²² See Bahl, *supra* note 5, at 37; Goldberg, *supra* note 14, at 347.

²³ *Canada (Attorney General) v. Ward*, [1993] 103 D.L.R. (4th) 1, 33. To the Court's inclusion of gender in the social group ground, see *infra* note 44.

B. Case Law and Practice with Regard to Gender-Based Persecution

1. Types of Gender-Specific Persecution

To illustrate what violations fall under the term "gender-specific persecution," I briefly want to refer to the most common types of gendered harms which can constitute persecution²⁴ (provided that the other conditions of the refugee definition are met). Perhaps the most pervasive forms of gender persecution are rape and other forms of sexual violence. Although men also are subjected to rape,²⁵ victims of rape are predominately women and girls. A pervasive pattern of sexual violence against women exists in all cultures and societies throughout the world. International communities should recognize cases of rape and other sexual violence as human rights violations and a basis for refugee status.²⁶ These cases should include those

²⁴ There exists no conventional or statutory definition of persecution. The U.S. judiciary has developed a number of descriptions of persecution. According to the Board of Immigration Appeals (BIA) persecution is the "infliction of harm or suffering by a government, or persons a government is unwilling or unable to control, to overcome a characteristic of the victim." See *In re Kasinga*, Interim Decision 3278 (BIA 1996). The Canadian Supreme Court in *Ward* approved a definition of persecution as "sustained or systemic violation of basic human rights demonstrative of a failure of state protection." *Canada (Attorney General) v. Ward*, [1993] 103 D.L.R. (4th) 1, 33 (citing James C. Hathaway, *The Law of Refugee Status* 103-05 (1991)). This approach has been integrated into the Canadian Gender Guidelines, Immigration and Refugee Board, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution* (Ottawa, Canada: Immigration and Refugee Board, March 9, 1993, reissued November 13, 1996) [hereinafter *Gender Guidelines*]. Today the definition of persecution as a serious human rights violation is widely recognized. See, e.g., *Handbook on Procedures and Criteria for Determining Refugee Status*, UNHCR, U.N. Sales No. HCR/IP/4/Eng/REV.1 § 51 (reedited 1992) (stating that besides threat of life or freedom, other serious violations of human rights would also constitute persecution) [hereinafter *UNHCR Handbook*]. See also, e.g., Anker et al., *supra* note 16, at 725. As gender-based violence has found increasing recognition as a serious violation of women's human rights, the description of persecution in terms of human rights opens the door (at least a bit) for women fearing gender violence to be granted refugee status.

²⁵ Reports about the Russian war in Chechnya have revealed that men are not spared from rape and other sexual violence. See Michael Wines, *Chechens Tell of Torture in Russian Camp*, N.Y. Times, Feb. 18, 2000. Rhonda Copelon points out that "[a]lthough women are overwhelmingly the victims . . . gender-based violence can be inflicted upon men as well as in the rape of male prisoners to humiliate them through 'feminization,' or violence against men because they are or appear to be gay or feminine." Rhonda Copelon, *Intimate Terror: Understanding Domestic Violence as Torture*, in *Human Rights of Women* 116, 145 n.1 (Rebecca Cook ed., 1994).

²⁶ The UNHCR Guidelines on the Protection of Refugee Women state in detail:

instances where the act occurs in the context of domestic violence,²⁷ where the consent of a public official is involved, or where systematic violations take place in times of armed conflict.²⁸

While rape and sexual violence are the most commonly recognized forms of gender-specific persecution, other kinds of persecution are gender-specific. These forms include cultural and religious traditions inhibiting women's right to life, liberty and security, such as female genital mutilation (FGM),²⁹ honor killings,³⁰ dowry deaths³¹ and other traditional practices

Persecution of women often takes the form of sexual assault. The methods of torture can consist of rape; the use of electric currents upon the sexual organs; mechanical stimulation of the erogenous zones; manual stimulation of the erogenous zones; the insertion of objects into the body-openings (with objects made of metal or other materials to which an electrical current is later connected); the forced witnessing of "unnatural" sexual relations; forced masturbation or to be masturbated by others; fellatio and oral coitus; and finally, a general atmosphere of sexual aggression and threats of the loss of the ability to reproduce and enjoyment of sexual relations in the future.

UNHCR Guidelines on the Protection of Refugee Women, UNHCR Subcomm. of the Whole on Int'l Protection, 42nd Sess., ¶ 59, U.N. Doc. EC/SCP/67 (1991) [hereinafter UNHCR Guidelines].

²⁷ See *infra* Part B; Anker et al., *supra* note 16, at 744 ("Domestic violence is not a random crime; it is a gender-specific violation of the rights of women. It often implicates the most fundamental of human rights: the right to life, and to freedom from torture and cruel, inhuman and degrading treatment.").

²⁸ See Krishna R. Patel, Recognizing the Rape of Bosnian Women as Gender-Based Persecution, 60 Brook. L. Rev. 929 (arguing that Bosnian women constitute a particular social group).

²⁹ See In re Kasinga, Interim Decision 3278 (BIA 1996). In this case which has drawn worldwide attention, the Board granted asylum because of FGM for the first time. After reviewing the extensive material that described the forms of FGM and the serious effects for a woman or a girl who has to undergo this practice, the Board found that FGM amounts to the level of persecution. It concluded that Kasinga, a young woman from Togo, was persecuted on account of her membership in the particular social group of "young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice." *Id.* at 3. See Amy Stern, Female Genital Mutilation: United States Asylum Laws are in Need of Reform, 6 Am. U. J. Gender & L. 89, 100 (1997) (pointing to Kasinga as a "groundbreaking" case); Linda A. Malone, Beyond Bosnia and In Re Kasinga: A Feminist Perspective on Recent Developments in Protecting Women from Sexual Violence, 14 B.U. Int'l L.J. 319, 331 (1996) (commenting that Kasinga can be viewed as "a perfunctory, narrowly confined majority decision . . . which seems deliberately minimalist to de-emphasize its significance"); see also Kris Ann Balser Moussette, Female Genital Mutilation and Refugee Status in the United States—A Step in the Right Direction, 19 B.C. Int'l & Comp. L. Rev. 353 (1996) (arguing that FGM is a form of gender-related persecution that gives a woman a valid claim for refugee status in the U.S. based on her membership in a particular social group).

harmful to women's and girls' health.³² In the same manner, human rights violators often subject women to inhumane and discriminatory treatment for transgressing customary and religious laws (such as dress codes, employment and education restrictions or restrictions on women's freedom of movement). The refugee definition should identify these women, too, as refugees.³³ Other forms of persecution specifically directed against women include forced abortion, compulsory sterilization,³⁴ and forced pregnancy.³⁵

³⁰ Perhaps as many as 5,000 women and girls a year are killed for violating their "family honor," many of them for the dishonor of having been raped. "Honor killings" take many forms. Women and girls are murdered mostly by male members of their own families. In other cases, young girls and women have been forced to commit suicide and others are disfigured by acid burns. Such killings have been reported, *inter alia*, in Bangladesh, Brazil, Egypt, India, Israel, Italy, Jordan, Pakistan, Turkey, Uganda, and the United Kingdom. Most of the perpetrators go unpunished or receive reduced sentences based on the justification of having murdered to defend their misconceived notions of "family honor." See Report of the Special Rapporteur, Civil and Political Rights, Including Questions of: Disappearances and Summary Executions, U.N. ESCOR, U.N. Doc. E/CN.4/2000/3, §§ 78-84 (2000); U.N. Population Fund, The State of World Population 2000, Lives Together, Worlds Apart – Men and Women in a Time of Change (Sept. 20, 2000), available at <http://www.unfpa.org/swp/swpmain.html>, ch. 3, at 6.

³¹ It is reported that between 1988 and 1993 more than 20,000 wives in India were murdered or committed suicide because they could not meet demands for increased dowries. The State of Women in the World Atlas 27 (Joni Seager, 2d ed. 1997).

³² See generally The Implementation of the Human Rights of Women, Traditional Practices Affecting the Health of Women and the Girl Child: Third Report of the Special Rapporteur on the Situation Regarding the Elimination of Traditional Practices Affecting the Health of Women and the Girl, U.N. ESCOR, Comm. on Hum. Rts., U.N. Doc. E/CN.4/Sub.2/1999/14 (1999).

³³ See UNHCR Refugee Women and International Protection Executive Comm., 36th Sess., Conclusion No. 39(k), U.N. Doc. A/40/12 (1985); *infra* B.2.

³⁴ See Cheung v. Canada (M.E.I.) [1993] 102 D.L.R. (4th) 214. The Federal Court of Canada held that

[t]he forced sterilization of women is a fundamental violation of basic human rights. It violates Articles 3 and 5 of the United Nations Declaration of Human Rights. . . . The forced sterilization of a woman is a serious and totally unacceptable violation of her security of the person. Forced sterilization subjects a woman to cruel, inhuman and degrading treatment.

Id. at 221. It concluded that Cheung belongs to a particular social group of Chinese women who had more than one child and faced forced sterilization. *Id.*

³⁵ Forced pregnancy was part of the pervasive pattern of gender crimes in the Bosnian war. A Commission of Experts reported:

All these forms of harm are not only primarily or exclusively directed at females, but may also be inflicted upon women and girls because of their gender.³⁶ In these cases, gender may act as either the persecutor's single motivation or it can be one factor among others, such as marital status, age, sexual orientation, ethnic or tribal affiliation, or economic class. In such a gender-related case, a woman's claim does not fit in the other four enumerated grounds. Because no separate ground for asylum based on gender exists, it is imperative that persecuted women gain protection under the social group category. Therefore, asylum adjudicators and judges should bear in mind the underlying purpose of the Refugee Convention in general and of the social group clause in particular when considering these kinds of claims.

2. *UNHCR and State Practice*

Currently, both international and national communities recognize the special problems of women fleeing gender-related persecution and seeking protection under the Refugee Convention.

a. *The International Level*

International organizations have been ambivalent in acknowledging the special problems of women. In 1985, in its Conclusion No. 39, the

Some captors also state that they are trying to impregnate the women. Pregnant women are detained until it is too late for them to obtain an abortion. One woman was detained by her neighbour (who was a soldier) near her village for six months. She was raped almost daily by three or four soldiers. She was told that she would give birth to a chetnik boy who would kill Muslims when he grew up.

Final Report of the Commission of Experts Pursuant to Security Council Resolution 780 (1992) of 6 October 1992, at § 248, U.N. Doc. S/1994/674 (1994).

³⁶ This paper is confined to gender-based persecution in the context of the "social group" category. Of course, women are also subjected to persecution on account of the other grounds encompassed in the refugee definition, even where serious harm takes a gender-specific form. As it has been commented, it is important that women's claims are not examined solely in terms of the "social group" ground if the aim is truly to give recognition to the nature of their experiences. Thus, it is asserted that most claims involving fear of persecution for transgressing religious or social norms can be determined on grounds of religion or political opinion and that the woman's resistance against gender oppression should be regarded as political activity. European Council on Refugees and Exiles, Position on Asylum Seeking and Refugee Women, §§ 14-25 (Dec. 1997), available at <http://www.ecre.org/archive/women.html>. See also Report of the Expert Group Meeting on Gender-Based Persecution, organized by the Division for the Advancement of Women and the Centre for Refugee Studies at York University, Canada, held in Toronto from Nov. 9-12, 1997, EGM/GBP/1997/Report.

UNHCR Executive Committee recognized that States “are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group.’”³⁷ Since that time, the UNHCR has periodically addressed the special protection needs of women refugees.³⁸ In 1991, the office of the UNHCR issued guidelines on the protection of refugee women in which it reiterated the principle that “women fearing persecution or severe discrimination on the basis of their gender should be considered members of a social group.”³⁹ In 1995, it encouraged States to develop and implement guidelines concerning persecution specifically aimed at women.⁴⁰ More recently, the U.N. Division for the Advancement of Women recommended that when a woman’s sex or gender constitutes a significant reason for persecution, the international community should recognize her fear as being on account of her membership in a particular social group, namely women.⁴¹ In contrast to these recommendations, the UNHCR Handbook, the main UNHCR document providing guidelines and criteria for the determination of refugee status,⁴² deals only generally with the social group category and does not mention gender as a social group.⁴³

³⁷ See *supra* note 33. A year earlier the European Parliament issued an identical resolution. See European Parliament, Resolution on the Application of the Geneva Convention Relating to the Status of Refugees, 1984 O.J. (C 127) 137.

³⁸ See, e.g., UNHCR Executive Comm. on Refugee Protection and Sexual Violence, 44th Sess., Conclusion No. 73, U.N. Doc. A/AC. 96/821 (1993) (supporting, among other things, the recognition as refugees of persons whose claim to refugee status is based upon a well-founded fear of persecution through sexual violence, for one of the reasons enumerated in the refugee definition including membership in a particular social group).

³⁹ UNHCR Guidelines, *supra* note 26, at ¶ 71.

⁴⁰ General Conclusion on International Protection, UNHCR Exec. Comm., 46th Sess., Conclusion No. 77 (XLVI) (1995) (emphasizing that in accordance with the principle that women’s rights are human rights these guidelines should recognize as refugees women who claim persecution through sexual violence and other gender-based persecution).

⁴¹ Report of the Expert Group Meeting on Gender-Based Persecution, *supra* note 36.

⁴² In Ramos-Vasquez v. INS, the Ninth Circuit stated:

While the United Nations Handbook is not binding on the INS [Immigration and Naturalization Service], the Supreme Court has observed that it “provides significant guidance” in construing the United Nations Protocol Relating to the Status of Refugees . . . to which the United States acceded in 1968, and which Congress sought to follow in enacting United States refugee law.

These conclusions and recommendations (in the same manner as the UNHCR Handbook) are not legally binding instruments, however, and States remain free to decide whether they want to employ them as interpretation guidelines. A number of States have chosen to do so and have developed refugee determination guidelines concerning women refugees fearing gender-based persecution.

b. The National Level

In 1993, Canada became the first State Party to the Refugee Convention to adopt comprehensive "Gender Guidelines" formally recognizing that the social group category could be applied to women fleeing persecution on gender grounds.⁴⁴ Following the UNHCR and the Canadian model, the Immigration and Naturalization Service (INS) issued Considerations For Asylum Officers Adjudicating Asylum Claims From Women in May 1995.⁴⁵ The INS Guidelines sought to enhance the gender-sensitivity of U.S. asylum officers dealing with substantive and procedural aspects of gender-related claims. Moreover, the guidelines represented an explicit recognition that gender-based persecution is a potential ground for asylum. Despite the lack of a uniform practice in the circuit courts,⁴⁶ the

57 F.3d 857, 863 (9th Cir. 1995).

⁴³ UNHCR Handbook, *supra* note 24. According to the UNHCR Handbook:

[A] "particular social group" normally comprises persons of similar backgrounds, habits or social status. . . . Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

Id. §§ 77-78.

⁴⁴ Gender Guidelines, *supra* note 24. In this respect, the Guidelines are mainly based upon the Canadian Supreme Court decision in Ward, in which the Court indicated three possible categories of "particular social groups." According to the Court the first one is defined "by an innate or unchangeable characteristic" that "would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation." Canada (Attorney General) v. Ward, [1993] 103 D.L.R. (4th) at 34.

⁴⁵ Immigration and Naturalization Service (INS), Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 16, 1995), *reprinted in* Deborah E. Anker, Women Refugees: Forgotten No Longer? 12 San Diego L. Rev. 771, 794 [hereinafter INS Guidelines].

⁴⁶ *See infra* II.B.3.

INS Guidelines reaffirm that gender, either alone or together with other characteristics, can define a particular social group.⁴⁷ In recent years, other countries have developed gender guidelines⁴⁸ and an increasing number of national courts have acknowledged that gender-based asylum claims can constitute persecution based on membership in a particular social group under the Refugee Convention.⁴⁹

In light of these national and international developments, one can conclude that persecution specifically directed at women, because of their gender, is covered by the (universal) Refugee Convention definition of refugee. However, due to the vagueness of the social group category, the asylum claims of women citing gender-based persecution depend largely on case-by-case adjudication conducted by individual decision-makers. An analysis of U.S. practice reveals that women risk presenting their case

⁴⁷ INS Guidelines, *supra* note 45, at 12-13. See also Deborah Anker, Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims to Protection in Canada and the United States (Part II), 2 Bender's Immigr. Bull. 608, 613 (1997). But see Caryn L. Weisblat, Comment, Gender-Based Persecution: Does United States Law Provide Women Refugees with a Fair Chance? Tul. J. Int'l & Comp. L. 407 (1999) (expressing the opinion that the INS Guidelines in recounting the divergent court holdings will offer little support to women confronted by the adjustable definition of the "particular social group" but rather "lead to further confusion for those who try to follow this stream of random cases").

⁴⁸ See Australia, Department of Immigration and Multicultural Affairs, Refugee and Humanitarian Visa Applicants, Guidelines on Gender Issues for Decision Makers (July 1996), reprinted in 9 I.J. Refugee L. 195 (Special Issue on Gender-Based Persecution, Autumn 1997). Some commentators see in the Australian Guidelines "the most thorough and far reaching of the existing guidelines." Bahl, *supra* note 5, at 41 n.48 (citing Heaven Crawley, Women as Asylum Seekers: A Legal Handbook 14-15 (1997)).

⁴⁹ See, e.g., Cheung v. Canada (M.E.I.), [1993] 102 D.L.R. (4th) 214 (the Federal Court of Canada concluding that Cheung belongs to a particular social group of Chinese women who had more than one child and faced forced sterilization); VG Frankfurt a.M. [German Administrative Court Frankfurt am Main], Oct. 23, 1996, 5 E 33532/94, excerpts reprinted in 3 Streit 130 (1997) (concluding that the claimant belonged to the social group of single women living in Afghanistan without male protection who have to appear in public in order to earn their living and are thus threatened with the accusation of violating the strict Islamic social mores); Refugee Status Appeals Authority, New Zealand, Refugee Appeal No. 203,9/93 Re MN, Apr. 5, 1995, cited in 9 I.J. Refugee L. 111, 156 (Special Issue on Gender-Based Persecution Autumn 1997) (accepting as social group "women who, as a result of their deeply held values, beliefs, and convictions, reject or oppose the way in which they are treated in Iran, and the attendant power structure which perpetuates and reinforces the so called 'Islamist' justification for this state of affairs"); see also the discussion of Kasinga, *supra* note 29. See generally Special Rapporteur on Violence Against Women, its Causes and Consequences, Report on Violence Against Women in Armed Conflict, Custodial Violence Against Women and Violence Against Refugee and Internally Displaced Women, ch. III.B.2, U.N. Doc. E/CN.4/1998/54 (1998) (referring to recent national developments with regard to gender-based persecution). See *infra* II.B.3. & III.

before a court that defines “social group” narrowly and rejects the validity of gender-based asylum claims made under the Refugee Convention and the 1980 Refugee Act.

3. *U.S. Administrative and Judicial Practice Concerning the “Particular Social Group” Category*

As mentioned above, courts at the U.S. appellate level have dealt with the meaning of the phrase “membership in a particular social group” inconsistently and have struggled to define the concept.⁵⁰ There are two divergent approaches in the circuits: 1) a restrictive tendency to refuse to allow gender to define social group; and 2) a more liberal inclination to allow for a broader definition of social group. The Board of Immigration Appeals (BIA or the “Board”) took the latter approach in its decision in *In re Acosta*.⁵¹ There, the BIA examined the protection afforded by the other four grounds enumerated in the refugee definition and articulated two alternative criteria for the social group category. It held that “the common characteristic that defines the group . . . must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”⁵² In addition, the BIA named sex as an “immutable characteristic,” which was a critical step for women fearing gender-based persecution.⁵³

Some courts followed the BIA’s reasoning⁵⁴ while others concluded either that gender alone cannot define a “particular social group”⁵⁵ and/or

⁵⁰ See *Fatin v. INS*, 12 F.3d 1233, 1238 & nn.4-5 (3d Cir. 1993) (citing courts and commentators).

⁵¹ *In Re Acosta*, 19 I & N Dec. 211 (BIA 1985).

⁵² See *id.*

⁵³ *Id.* at 233. Other examples mentioned by the Board are color or kinship ties. Following *Acosta* the Third Circuit in *Fatin* identified three elements that a claimant has to establish: “[She] must (1) identify a group that constitutes a ‘particular social group’ within the interpretation [of *Acosta*], (2) establish that . . . she is a member of that group, and (3) show that . . . she would be persecuted or has a well-founded fear based on that membership.” 12 F.3d at 1240.

⁵⁴ *Fatin*, 12 F.3d at 1240. In *Fatin*, the Third Circuit held that women in Iran could define a “particular social group” but found that the applicant did not face persecution simply because she was a woman. According to the court, only the subgroup of Iranian women whose opposition to Iran’s gender-specific laws is so profound that they would disobey were at risk of persecution because of the possibility of extreme consequences of disobedience. However, the court found that *Fatin* was not in this particular social group. *Id.* at 1241.

constructed the phrase in a restrictive way that makes it almost impossible to define a social group solely by gender. In *Sanchez-Trujillo v. INS*,⁵⁶ the Ninth Circuit reasoned that the phrase “particular social group” implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest.⁵⁷ Despite these contradictory court rulings, the INS Guidelines rely largely on *Acosta* and on the UNHCR Handbook,⁵⁸ which has been viewed as stating an even more liberal standard⁵⁹ than that articulated by the BIA in *Acosta*.

As demonstrated by these examples from the U.S. federal court system, there are disparities in the interpretation of the Refugee Convention and gender-based persecution even within one country. These differences are exacerbated at the interstate level. In an attempt to illustrate the inconsistency of state practice I wish to engage in a comparative case study. I have chosen Canadian, British, and American refugee cases concerning women who fled domestic violence and made persecution claims based on gender and other factors. Although the fact patterns are different, the

⁵⁵ See, e.g., *Gomez v. INS*, 947 F.2d 660, 663-64 (2d Cir. 1991). The court rejected a “social group” claim that was characterized as “women who have been previously battered and raped by Salvadoran guerrillas.” It further stated that “[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group.” *Id.* According to *Gomez*, a particular social group “is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor—or in the eyes of the outside world in general The attributes of a particular social group must be recognizable and discrete.” *Id.* This “distinguishing characteristic” test has been approved by commentators as broader than *Acosta* and more in line with decisions of foreign courts. See Fullerton, *supra* note 19, at 562. But see John Hans Thomas, *Seeing Through a Glass, Darkly: The Social Context of “Particular Social Groups”* in *Lwin v. INS*, 1999 BYU L. Rev. 799, 807-08 (criticizing the *Gomez* test as unworkable and contradictory because the court accepted the *Sanchez-Trujillo* voluntary relationship test, see *infra* note 57; “but not all characteristics perceived by an outsider are voluntarily chosen but instead may be arbitrarily imposed by the outsider”).

In *Fisher v. INS*, involving an Iranian woman who feared being subjected to “moral codes,” the Ninth Circuit found that persecution “does not include mere discrimination, as offensive as it may be” and moreover found that “[p]ersecution on account of sex is not included as a category allowing relief under section 101(a)(42)(A) of the Act.” 79 F.3d 955, 962-63 (9th Cir. 1996).

⁵⁶ 801 F.2d 1571 (9th Cir. 1986).

⁵⁷ *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986). According to the court, it is of “central concern” that a “voluntary associational relationship” exists among the purported members, “which imparts some common characteristic that is fundamental to their identity as a member of that discrete social group.” *Id.*

⁵⁸ See *supra* note 43.

⁵⁹ Kelly, *supra* note 5, at 648.

comparison of these cases nevertheless illustrates the deficiencies of the indefinite "social group" category. The lack of a uniform legal framework and the unpredictability in this realm leave many women and girls unprotected, despite having valid claims.

III. A COMPARATIVE CASE STUDY: DOMESTIC VIOLENCE AS PERSECUTION ON ACCOUNT OF MEMBERSHIP IN A PARTICULAR SOCIAL GROUP DEFINED BY GENDER?

A. U.S. Board of Immigration Appeals: In re R-A.⁶⁰

The applicant in this case was a Guatemalan woman who was forced to flee ten years of brutal domestic violence suffered at the hands of her husband. Since her marriage to a soldier in the Guatemalan army at the age of sixteen, the applicant was subjected to heinous psychological and physical abuse. Her husband raped and beat her repeatedly, forcing sex on her on a near daily basis, causing infection, severe abdominal injury and hemorrhaging. He used her body as a battering ram, breaking windows and mirrors with her head. As a result of the repeated traumas she endured, the applicant continued to suffer from abdominal pain and headaches. Her attempts to find protection from the state failed, as the police and judicial system refused to intervene or protect her. Every time she tried to escape and relocate in Guatemala she was tracked down by her husband.

The BIA acknowledged that if the claimant were returned to Guatemala, her husband would hunt her down and try to kill her. It expressly sympathized with her plight and found that she had been persecuted. Nonetheless, the BIA ruled that she did not qualify as a refugee. It reversed the finding of the Immigration Judge (IJ) that the claimant was persecuted because of her membership in the particular social group consisting of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."⁶¹ The BIA both refused the definition of social group provided by the IJ and found that the claimant failed to prove that her husband was motivated to harm her, even in part, because of her membership in a particular social group. As to the definition of "particular social group," the BIA referred to its own decision in Acosta,⁶² and

⁶⁰ In Re R-A, Int. Dec. 3403, 1999 BIA LEXIS 31 (BIA 1999).

⁶¹ The IJ also found that "through the respondent's resistance to his acts of violence, her husband imputed to the respondent the political opinion that women should not be dominated by men" and therefore granted asylum on political opinion grounds as well. However, the Board rejected this finding, too. See 1999 BIA LEXIS at *11-12, *19-27.

⁶² *Id.* at *14.

concluded that the proposed group may satisfy the basic requirement of containing an immutable or fundamental individual characteristic. However, the BIA went on to state that having an immutable characteristic does not foreclose the use of additional considerations that may properly bear on whether a social group should be recognized in an individual case.

Thus the BIA found that for the group to be viable for asylum purposes, there must also be some showing of how the characteristic is understood in the alien's society, such that the adjudicators in turn may understand that the alleged persecutors, in fact, saw persons sharing the characteristic as warranting suppression or the infliction of harm.⁶³ It held that the claimant failed to show that the group as defined by the IJ is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population within Guatemala.⁶⁴ The Board then concluded that an alleged persecutor cannot be motivated to harm the victim by her membership in a group whose existence itself has not been proven.⁶⁵ In addition, the Board pointed out the prominence or importance of a characteristic within a society. While not determinative, it found that the "mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a particular social group."⁶⁶ According to the Board, "the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown."⁶⁷ With regard to the nexus element (the requirement that the harm was *the result* of membership in a particular social group), the Board's reasoning seems to set an additional hurdle for the applicant: in order to establish that her husband had targeted and harmed her because of her membership in the social group, the court found that she should have shown that she was not the only victim of his abuse. The Board concluded that "[i]f group membership were the motivation behind his abuse, one would expect to see some evidence of it manifested in actions toward other members of the same group."⁶⁸

⁶³ *Id.* at *28.

⁶⁴ *Id.* at *29.

⁶⁵ *Id.* at *29.

⁶⁶ *Id.* at *30-31.

⁶⁷ *Id.* at *31. However, in the Board's opinion, the applicant did not show that spouse abuse is itself an important societal attribute, and failed to show that the characteristic of being abused is one that is important within Guatemalan society. *Id.* at *30.

⁶⁸ *Id.* at *34.

This ruling prompted a vigorous dissent by five Board members. The majority tried to distinguish the present case from *In re Kasinga*⁶⁹—a 1996 case in which the Board found that the claimant was persecuted on account of her membership in the particular social group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”⁷⁰ The minority, however, analogized the present case to this binding precedent. It demonstrated how the two cases are legally, factually and analytically similar. The dissent thus approved the IJ’s decision and concluded that the social group was based on gender, relationship to an abusive partner, and opposition to domestic violence.⁷¹ The dissenters further argued that it would have been legitimate to include all Guatemalan women or all married Guatemalan women in the particular social group.⁷² It is worth noting that the dissent stressed the importance of fundamental human rights in gender-related social group claims. In particular, it referred to important international women’s rights documents and the INS Guidelines which stated that “the evaluation of gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of those instruments by international organizations.”⁷³

Another important difference in the dissent was the assessment of the “on account of” or nexus element. The dissenters not only focused on the husband’s motivation but also took into account the State’s attitude toward wife abuse and domestic violence. In their assessment of the husband’s motivation, they found that “[t]he factual record reflects quite clearly that the severe beatings were directed at the respondent by her husband to dominate and subdue her, precisely because of her gender, as he inflicted his harm directly on her vagina, sought to abort her pregnancy, and raped her.”⁷⁴ They further noted that the government’s egregious failure to

⁶⁹ *In re Kasinga*, Interim Decision 3278 (BIA 1996).

⁷⁰ *Id.* at 13.

⁷¹ 1999 BIA LEXIS at *62.

⁷² *Id.* at *70 (referring to the House of Lords’ judgment in *Regina v. Imm. App. Tribunal, Ex Parte Shah*, 2 A.C. 629 (H.L. 1999). See *infra* Part III.2).

⁷³ *INS Guidelines*, *supra* note 45, at 16. The dissenters noted that the “international community has recognized that gender-based violence . . . is not merely . . . a private matter, [but] rather . . . a violation of fundamental human rights.” 1999 BIA LEXIS at *71. The majority, however, found that the INS Guidelines did not resolve the issue of whether or when past spouse abuse may qualify a female applicant as a refugee. *Id.* at *16.

⁷⁴ *Id.* at *76-77.

act gave her husband the certainty that he could commit his atrocities with impunity because of the applicant's gender and their relationship.⁷⁵

These arguments, however, were strongly rejected by a majority of ten Board members. As the majority made clear in its opinion, they felt that this case was not about persecution on account of gender, but rather about a person "facing genuine social ills" that her government did not remedy, for whom "social group" categorization was not applicable.⁷⁶

The Board's *en banc* opinion in In re R-A- constitutes a binding landmark decision on the question of whether violence against and persecution of women can serve as a basis for political asylum in the U.S. The decision has garnered national and international attention and has been widely criticized as being inconsistent with U.S. case law and policy, and as having a devastating impact on asylum law.⁷⁷ It seems clear that the Board interpreted the "particular social group" category more narrowly than the INS Guidelines recommended and also more narrowly than it had done in the past.⁷⁸ Although the Board did not require "voluntary associational relationship," as stated in Sanchez-Trujillo,⁷⁹ it did add more factors of "cognizableness" that define a "particular social group." The Board seemed concerned, at least in part, with some "floodgate" arguments when it stated that the social group concept "would virtually swallow" the refugee definition if "common characteristics" were all that were necessary to show membership in a particular social group.⁸⁰ With regard to the cognizableness of the social group one may also ask why the Board distinguished R-A- from Kasinga.⁸¹ It seems plausible that the Board was

⁷⁵ "Identifying why such horrific violence occurs at all," the minority opinion concluded that just as FGM is a means of controlling women's sexuality, "domestic violence exist[s] as a means by which men may systematically destroy the power of women, a form of violence rooted in the economic, social, and cultural subordination of women." *Id.* at *79.

⁷⁶ *Id.* at *52.

⁷⁷ See Amnesty International (AI), Urgent Action: Gender Asylum Claims; distributed by AI Columbia Law School on Sept. 23, 1999 (on file with author). According to AI, a number of major refugee, domestic violence, and human rights organizations, including the Women's Commission for Refugee Women and Children, AI, the Family Violence Prevention Fund, and Human Rights Watch have expressed concern about the Board's decision.

⁷⁸ See, e.g., In re Kasinga, Interim Decision 3278 (BIA 1996).

⁷⁹ 801 F.2d 1571 (9th Cir. 1986). For further discussion on this decision, see *supra* note 57.

⁸⁰ 1999 BIA LEXIS at *31. See *supra* note 67.

⁸¹ For history of Kasinga, see *supra* note 29.

in some way culturally biased, implicitly finding FGM outrageous and offensive to human dignity, while viewing domestic violence as so common and widespread that women subjected to it could not be regarded as belonging to a particular social group.

Considering the Ninth Circuit's own decision in *Sanchez-Trujillo*,⁸² it is improbable that the court will reverse the Board's decision. In any case, the Board's ruling remains an important, and certainly negative, precedent for its own practice and for women's gender-based refugee claims in general.

B. United Kingdom, House of Lords: *Regina v. Imm. App. Tribunal, Ex Parte Shah*⁸³

In the remarkable four to one judgment in this case, the Law Lords of the British House of Lords recognized two Pakistani women as refugees based on their membership in the particular social group of "women in Pakistan." The appeals before the Lords concerned two women who both became victims of domestic violence in Pakistan. The first, Shahanna Islam, was a graduate schoolteacher. In 1971, she married a man who was often violent towards her. In 1991, when a fight broke out in her school between two rival political factions, she intervened. As a result one of the gangs told her husband that she had been unfaithful to him. Her husband assaulted her so badly that she was admitted to the hospital twice. His brutality eventually drove her out of the house. According to the evidence, because the appellant was a woman, it was useless for her to complain to the police or the courts. The police were likely to accept her husband's allegations of infidelity and arrest her instead. The second woman, Syeda Shah, was frequently beaten by her husband and eventually, when pregnant, turned out of the house. She fled to England in 1992 and gave birth to a child soon thereafter. She feared that her violent husband would accuse her of adultery and assault her, or charge her with immorality before a religious tribunal.⁸⁴

The main issue for the Law Lords was to decide whether the appellants belonged to a "particular social group" and if so, whether their fear of persecution was "for reasons of" membership of a particular social group."⁸⁵ In their reasoning, the Lords relied mainly on the U.S. Board of

⁸² *Sanchez-Trujillo*, 801 F.2d at 1576.

⁸³ *Regina v. Imm. App. Tribunal, Ex Parte Shah*, 2 A.C. 629 (H.L. 1999).

⁸⁴ 2 A.C. at 636-37.

⁸⁵ *Id.* at 639.

Immigration Appeals' ruling in Acosta⁸⁶ and the Canadian Supreme Court decision in Ward.⁸⁷ They did not accept the practice of adding the elements of cohesiveness, co-operation, or interdependence to determine the existence of a "particular social group." Lord Steyn expressly rejected the Ninth Circuit's ruling on the criteria of social group in Sanchez-Trujillo.⁸⁸ As to the identification of a particular group, Lord Hoffmann reasoned that the group must first be identified by the larger society. He found that in the particular society at hand, Pakistan, "it seems . . . that women form a social group of the kind contemplated by the Convention. Discrimination against women in matters of fundamental human rights on the ground that they are women is plainly *in pari materiae* with discrimination on grounds of race."⁸⁹ Alternatively, Lord Steyn defined a narrower group based on the gender of the appellants, the suspicion of adultery, and their unprotected position in Pakistan. In particular, he found that this circumscription adhered to the principle that the group must exist independently of the persecution in that these three characteristics do not involve an assertion of persecution.⁹⁰ While two different social groups were defined by the Law Lords, they agreed that the gender-based persecution involved in the case was sufficient to support a claim of persecution on the basis of membership in a particular social group.

The Law Lords then turned to the question of causation, that is, whether the persecution was caused by the victim's membership in a particular social group. Lord Hoffmann rejected the argument that "because not all members of a class are being persecuted, it follows that

⁸⁶ In Re Acosta, 19 I & N Dec. 211 (BIA 1985).

⁸⁷ For more discussion of Ward, see *supra* notes 23 & 24.

⁸⁸ 2 A.C. at 640-43. Lord Steyn concluded "that there are divergent streams of authority in the United States. And it may be right to say that the preponderance of U.S. case law does not support Sanchez-Trujillo." *Id.* at 641. He further argued against the element of cohesiveness of the social group in that he accepted that homosexuals are capable of constituting a particular social group. "But homosexuals are, of course, not a cohesive group. This is a telling point against the restrictive view in Sanchez-Trujillo's case." *Id.* at 642.

⁸⁹ *Id.* at 643. In accordance with Lord Hoffmann, Lord Steyn found that Acosta's reasoning "covers Pakistani women because they are discriminated against and as a group they are unprotected by the state. Indeed the state tolerates and sanctions the discrimination." *Id.* at 644.

⁹⁰ *Id.* at 645. Regarding the question whether the feared persecution itself can be an element of the "particular social group" and the different state practice, see *infra* Part IV.

persecution of a few cannot be on grounds of membership of the class."⁹¹ It is important to note that, in contrast to the BIA in *In re R-A-*, Lord Hoffmann focused on the reasons the State did not offer protection to the appellants.⁹² Relying on the evidence in the case that showed an "institutionalized discrimination against women by the police, the courts and the legal system,"⁹³ he concluded "that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men."⁹⁴

⁹¹ *Id.* at 653. In the same way, Lord Steyn, in his reasoning about the characterization of the social group, rejected the argument that the state protection that some Pakistani women are able to receive would contradict the notion of the large persecuted social group consisting of "women in Pakistan." With the examples of Nazi Germany and Stalinist Russia in mind he pointed out that "under even the most brutal and repressive regimes some individuals in targeted groups have been able to avoid persecution." *Id.* at 644-45.

⁹² *Id.* at 654. Lord Hoffmann cited the example of a Jew whose business was destroyed by a competitor and his gang in Nazi Germany because of business rivalry. "They knew that the authorities would allow them to act with impunity . . . [because] the victim was a Jew." As to the question of why the victim was attacked, according to Lord Hoffmann, "the right answer in the context of the Convention would be 'he was attacked by a competitor who knew that he would receive no protection because he was a Jew.'" *Id.* at 654.

⁹³ *Id.* at 655.

⁹⁴ *Id.* at 653. Similarly, Lord Steyn found that "[g]iven the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic." *Id.* at 646.

The other two Lords of the majority, Lord Hope of Craighead and Lord Hutton mainly joined Lord Steyn and Lord Hoffmann in their reasoning and agreed in the outcome of the case. *Id.* at 655-59. It may be noted that Lord Hutton, without further explanation, preferred the narrower description of "particular social group" as delivered by Lord Steyn and expressed no view whether "women in Pakistan" constitute such a group. *Id.* at 658-69.

Lord Millett, in his dissenting opinion, acknowledged "that women in Pakistan are treated as inferior to men and subordinate to their husbands and that, by international standards, they are subject to serious and quite unacceptable discrimination on account of their sex." *Id.* at 663. However, he rejected the finding that the appellants in the present case were persecuted because they are women. He reasoned:

[P]ersecution is not merely an aggravated form of discrimination; and even if women (or married women) constitute a particular social group it is not accurate to say that those women in Pakistan who are persecuted are persecuted because they are members of it. They are persecuted because they are thought to have transgressed social norms, not because they are women. There is no evidence that men who transgress the different social norms which apply to them are treated more favourably.

Id.

The House of Lords' decision is noteworthy both in its general view of the Refugee Convention and in its reasoning in the particular cases. In this sense, the Law Lords, in defining the criteria for the "particular social group" category, expressly relied on the general purpose of the Refugee Convention. Referring to the Convention's preamble,⁹⁵ Lord Hoffmann concluded that "the Convention is concerned with discrimination on grounds inconsistent with principles of human rights."⁹⁶ He reasoned that "the framers of the Convention were . . . intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention," when using the general term "particular social group" in the definition of refugee.⁹⁷

In considering this particular case, it is important to note the Lords' discussion of the nexus requirement "*for reasons of* . . . membership in a

Nor did Lord Millett accept the general proposition that those who are persecuted because they refuse to conform to discriminatory laws to which they are subject, qualify for refugee status.

Such persons are discriminated against because they are members of the social group in question; but they are persecuted because they refuse to conform, not because they are members of the social group.

Id. at 664

In his concluding remarks he found:

The evidence in the present case is that the widespread discrimination against women in Pakistan is based on religious law, and the persecution of those who refuse to conform to social and religious norms, while in no sense required by religious law, is sanctioned or at least tolerated by the authorities. But these norms are not a pretext for persecution nor have they been recently imposed. They are deeply embedded in the society in which the appellants have been brought up and in which they live. Women who are perceived to have transgressed them are treated badly, particularly by their husbands, and the authorities do little to protect them. But this is not because they are women. They are persecuted as individuals for what each of them has done or is thought to have done. They are not jointly condemned as females or persecuted for what they are.

Id. at 664-65.

⁹⁵ The preamble states: "Considering that the Charter of the United Nations and the Universal Declaration of Human Rights . . . have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination." Refugee Convention, *supra* note 1, Preamble, 19 U.S.T. at 6260, 189 U.N.T.S. at 137.

⁹⁶ 2 A.C. at 651. *See also* Lord Steyn's reasoning, *id.* at 638-39.

⁹⁷ *Id.* at 651.

particular social group."⁹⁸ Instead of focusing solely on the husband's motivation, the Lords relied on the impunity with which he could act and on the State's reasons for tolerance and sanction of the persecution. This interpretation of the Refugee Convention's nexus element is perhaps one of the main differences between the Lords' decision and the BIA's decision in *In re R-A-*. Both the Board's majority and dissent referred to the House of Lords' decision; the dissenting opinion expressly emphasized the relevance of the level of impunity with which the husband could commit his atrocities against his wife, while the BIA's majority strongly rejected the Lords' reasoning.

Considering the differences in the Board's and the House of Lords' interpretation of the refugee definition, it may be assumed that the applicant in *In re R-A-* would have been recognized by the House of Lords as a member of the particular social group of "Guatemalan women"⁹⁹ who was persecuted, at least in part, on account of her gender.

C. Canadian Federal Court of Appeal: *Mayers v. Canada (M.E.I.)*¹⁰⁰

In *Mayers v. Canada (M.E.I.)*, the Canadian Court of Appeal unanimously recognized a social group defined as "Trinidadian women subject to wife abuse."¹⁰¹ As in the Board's and the House of Lords' cases, the claimant was a victim of spousal abuse. Mayers, a national of Trinidad and Tobago, fled her home and country in 1986 after she had suffered fifteen years of abuse and rape at the hands of her violent husband. Her husband also abused their children. Her attempts to obtain help from the Trinidadian authorities almost invariably failed and complaints made on her behalf by her mother and sister were dealt with similarly. The respondent

⁹⁸ *Id.* (emphasis added).

⁹⁹ Since the majority in *In re R-A-* found that the claim failed under the "on account of" requirement, it declined to address the issue of whether the claimant belongs to a "particular social group" consisting of "Guatemalan women" or of "battered spouses" as had been suggested in the appeal briefs and been approved by the dissenters. Even if the majority had accepted the "nexus" requirement, it remains unclear whether it would have agreed to the broader social group category in this particular case. 1999 BIA LEXIS at *32 n.2. In its reference to the House of Lords' judgments, the Board admitted that this decision would cause it to "part company with at least the rationale expressed in several of the opinions by the English House of Lords" in which broad notions of "particular social group" were accepted. It justified so doing, however, by noting that those appeals "arose in . . . different factual setting[s]." 1999 BIA LEXIS 31, *32 n.2.

¹⁰⁰ *Mayers v. Canada (M.E.I.)*, [1992] 97 D.L.R. (4th) 729.

¹⁰¹ *Id.* at 740.

"never complained specifically of rape as spousal rape was not then an offence in Trinidad."¹⁰²

In its analysis of the phrase "social group," the court examined administrative practice in Canada, scholarly writing, and the Ninth Circuit's decision in Sanchez-Trujillo, but did not mention Acosta. It remains unclear from the court's reasoning what the court inferred from Sanchez-Trujillo or other precedent.¹⁰³ The court interpreted the meaning of "particular social group" using the ordinary dictionary meaning of the words "women" or "Trinidadian women," and concluded that they did not constitute a "particular social group."¹⁰⁴ And while the court, without further reasoning, did accept "Trinidadian women subject to wife abuse" as a social group, it posed the question with regard to future decisions: "since . . . persecution must be feared by reason of membership in a particular social group, can fear of that persecution be the sole distinguishing factor that results in what is at most merely a social group becoming a particular social group?"¹⁰⁵ In other words, does fear of persecution change what is otherwise solely a "social group" to a "particular social group"? As Fullerton rightly commented: "The language is so opaque, and the procedural posture of the case so convoluted, that it is difficult to predict what effect this opinion will have on the development of the social group concept in Canadian jurisprudence."¹⁰⁶ Indeed, due to the justices' focus on procedural questions and their cursory consideration of refugee women and the social group concept, no conclusive prediction can be made from this case about the chances of women fearing gender-related persecution seeking recognition as refugees by Canadian courts. The Gender Guidelines issued soon afterwards and the Canadian Supreme Court's decision in Ward,¹⁰⁷ however, limited the impact of the "obscurity" of the Court of Appeal's ruling. Today, courts and applicants cite the Mayers decision as supportive precedent in gender-related refugee claims.¹⁰⁸

¹⁰² *Id.* at 732.

¹⁰³ However, the court emphasized the importance of international sources and commentaries. It cited scholarly opinion that criticized the Sanchez-Trujillo court's failure to take into account international and municipal law that would have revealed a different notion of the meaning of "social group." *Id.* at 736.

¹⁰⁴ *Id.* at 739.

¹⁰⁵ *Id.*

¹⁰⁶ See Fullerton, *supra* note 19, at 539.

¹⁰⁷ See Canada (Attorney General) v. Ward, [1993] 103 D.L.R. (4th) 1, 33.

¹⁰⁸ For example, the dissenting opinion in In re R-A- relied on Mayers. 1999 BIA LEXIS at *74.

These three decisions delivered by different judicial bodies in different national jurisdictions reflect the struggles of the judiciary with the interpretation and definition of a term that is "all-encompassing" and vague. They also reflect the difficulty decisionmakers and judges have in overcoming their own perceptions of who is a refugee and who fits into the definition of refugee. One might ask why the Board's majority in *In re R-A-* did not come to the conclusion that the claimant was persecuted "on account of her gender," instead finding that her plight, while compelling, was outside the scope of refugee protection. At the same time, one might marvel that the House of Lords integrated a human's (and a women's) rights perspective into its reasoning.

Generally, what can be positively noted is the fact that the Board, as well as the House of Lords, referred to foreign case law and considered account interpretations and definitions of the "social group" category developed by judiciaries of other countries. This is, at least, a promising starting point of a more coherent international practice with regard to refugee law in general and gender-based persecution in particular.

IV. CRITICAL APPRAISAL OF THE PRESENT PRACTICE AND CONCLUDING REMARKS

When the Refugee Convention framers drafted the definition of "refugee" fifty years ago, gender-related patterns of persecution were ignored. At that time, a choice of a gender-sensitive formula instead of gender-neutral terms may have prevented the unsettled and unpredictable case law that has followed. The language defining refugee has created substantial obstacles for women claiming gender-based persecution on account of "membership in a particular social group."

Despite the fact that the other four convention grounds are broadly defined, a social group based on "gender" is sometimes rejected because the group cannot be identified as a discrete entity or the definition of the group is considered over-broad.¹⁰⁹ The rejections are undeniably coupled with fears that if a gender-based persecution is accepted, a large influx of aliens seeking asylum based on gender will follow. This line of argument, however, misunderstands the function of the categories. Gender, like all other grounds for persecution, only serves to identify the reasons an individual is persecuted and does not imply anything larger.¹¹⁰ The

¹⁰⁹ See, e.g., *Sanchez-Trujillo v. I.N.S.*, 801 F.2d 1571, 1576-77 (9th Cir. 1986).

¹¹⁰ See Neal, *supra* note 21, at 243-44. See also *Gender Guidelines*, *supra* note 24, at 6, which state that "[t]he fact that the particular social group consists of large numbers of the female population in the country concerned is irrelevant—race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people."

recognition that a person is persecuted because she is a woman does not mean that all other women in a particular country or society are also subject to persecution. Refugee determination is a remedy based on case-by-case adjudications, concerned only with the particular circumstances of an individual case.¹¹¹ Clearly, concerns that the recognition of women from a particular society as a cognizable social group will open the “floodgates” is both unpersuasive and misplaced.¹¹²

Even when “gender” as a cognizable group is rejected as too broad, gender-based claims do not need to remain unsuccessful. Women’s identities are not confined to their being female. Women identify themselves with other innate or unchangeable characteristics, such as age, marital status, sexual orientation, ethnic or tribal affiliation, and economic status. Therefore, in many cases a particular social group will be comprised of sub-groups of women.¹¹³ In addition, women’s social grouping is often defined by the harm they have experienced, such as sexual violence.¹¹⁴

However, the creation of a particular social group comprised of women with shared experiences of gender-based harm runs counter to the

¹¹¹ Of course, the limited scope of an individual decision has two sides. On the one hand, this gives an adjudicative body the possibility of revising a “wrongly” decided case. On the other hand, the Board’s rejection in *Kasinga* to “endorse a significant new framework for assessing asylum claims in the context of a single novel case” limits the positive effects of this important precedent for future gender-based claims. *But see Kasinga*, Interim Decision 3278 (BIA 1996) (Rosenberg, concurring) (noting that the majority has set forth a road map for future gender-based claims).

Moreover, the proof of being a member in a particular social group is generally not sufficient for a grant of asylum. A refugee claimant has to show that all other elements of the refugee definition are fulfilled in her case, such as a harm that amounts to persecution and a fear that is well-founded.

¹¹² See Neal, *supra* note 21, at 241 n.192 (stating that “floodgate arguments appeal more to fear than analysis”), 243 (advancing additional reasons showing that such concerns are unfounded). See also Peter C. Godfrey, Note, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & Pol’y 257 (1994) (arguing with regard to gender and sexual orientation-based groups that the breadth of a social group is not a proper consideration for determining whether a particular social group is cognizable under asylum law).

¹¹³ See *Gender Guidelines*, *supra* note 24, at 6. See also *Kasinga*, Interim Decision 3278 (BIA 1996) (Rosenberg, concurring). She argues that it would have been sufficient to define the social group without reference to the applicant’s opposition to the practice of FGM. According to her, *Kasinga* is a member of a group: “girls and women of a given tribe, some perhaps of marriageable age, whose members are routinely subjected to the harm which the majority finds to constitute persecution.” *Id.*

¹¹⁴ Connors, *supra* note 9, at 127.

U.S. and the British¹¹⁵ court practice. Refugee groups (that is, refugees sharing a common experience) are not necessarily considered "particular social groups" by the courts.¹¹⁶ Courts have responded negatively to this approach and have even said, "that the actual persecution cannot be the defining characteristic of the group; those traits must be discrete."¹¹⁷ Therefore, the Mayers v. Canada (MEI) definition of a particular social group as one that consists of "women subject to wife abuse" would most likely be dismissed in U.S. courts.

In view of this inconsistent practice which lacks a comprehensive framework for women's gender-based asylum claims, many commentators and scholars have called for the inclusion of "gender" as a sixth ground of persecution in the Refugee Convention and to include gender persecution in U.S. law.¹¹⁸ Other experts are of the opinion that issues of gender can and should be dealt with within the existing structure.¹¹⁹ 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. Rather, efforts may be focused on improving the administrative and judicial practices with regard to the existing conventional and statutory framework. As the issuance of Gender Guidelines in Canada, Australia and the U.S., as well as undertakings by the UNHCR demonstrate, important steps toward a more gender-sensitive adjudication process have been made. However, as the non-uniform U.S. court practice and decisions like In re R-A- indicate, guidelines do not guarantee a more predictable practice, nor do they prevent setbacks in individual cases. Therefore, broad parameters for gendered claims in

¹¹⁵ See Regina v. Imm. App. Tribunal, Ex Parte Shah, 2 A.C. 629 (H.L. 1999). However, Lord Steyn states: "[W]hile persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of particular social group in society." *Id.* at 645 (citing Applicant A. v. Minister for Immigration and Ethnic Affairs, 71 A.L.J.R. 381, 402).

¹¹⁶ See, e.g., Kelly, *supra* note 5, at 656-58. See also Connors, *supra* note 9, at 127 (noting that "[w]omen's claims to be part of a particular social group are also hampered by the fact that the suffering of applicants is frequently indistinguishable from the suffering experienced by the general population of women in the country of origin").

¹¹⁷ Bahl, *supra* note 5, at 68.

¹¹⁸ See, e.g., Emily Love, Equality in Political Asylum Law: For a Legislative Recognition of Gender-Based Persecution, 17 Harv. Women's L.J. 133, 152 (1994); Mary M. Sheridan, Comment, In Re Fauziya Kasinga: The United States has Opened its Doors to Victims of Female Genital Mutilation, 71 St. John's L. Rev. 433, 463 (1997).

¹¹⁹ See Bahl, *supra* note 5, at 73; Greatbatch, *supra* note 14, at 526; Kelly, *supra* note 5, at 674.

general, and for the social group in the context of gender claims in particular, would be useful.¹²⁰ Because only a few States have issued gender guidelines, an international body (most likely the UNHCR) should expand the guidelines in the interest of developing a more uniform practice among countries. A further step would be the adoption of an Optional Protocol to the Refugee Convention which would establish a treaty-monitoring body vested with powers similar to those of human rights treaty bodies, like the Committee on the Elimination of Discrimination against Women (CEDAW). This body would have the authority to issue general recommendations, view state reports and receive individual complaints of refugee claimants.

To conclude, I want to emphasize the inter-relationship between refugee law and human rights law. Refugee law is undoubtedly concerned with violations of fundamental human rights. Yet the realms of refugee law and persecution are not only concerned with the level of harm, but also “connote(s) unacceptable, unjustified, abhorrent infliction of harm.”¹²¹ This “qualitative” or “normative”¹²² aspect of persecution is reflected in the five discrimination grounds. The international human rights agenda has prioritized gender discrimination and gender violence as especially grave and pervasive aspects of discrimination. The attitude that women and girls have a genuine human right to be free from discrimination and violence is endorsed by numerous international instruments and documents, the writings of human rights scholars, and the activities of human rights bodies, NGO’s and international organizations. States and the international community have recognized that gender-based discrimination and violence are unacceptable, unjustified and abhorrent inflictions of harm. With a view to the object and purpose of the Refugee Convention, States should integrate a human rights perspective into application and interpretation of the refugee definition. More concretely, courts and administrative bodies should define the “particular social group” category in a liberal and gender-sensitive way and thus recognize the non-private character of domestic violence and other types of gender-based persecution.

¹²⁰ See Connors, *supra* note 9, at 128.

¹²¹ Thomas A. Aleinikoff, The Meaning of “Persecution” in United States Asylum Law, 3 Int’l J. Refugee L. 5, 12-13 (1991).

¹²² *Id.*