



# UNHCR

## The UN Refugee Agency

### DISCUSSION PAPER

## Gender-related persecution and refugees

For this discussion paper, UNHCR invited experts from universities and refugee review authorities in the region to discuss the issue of gender-related persecution and refugee status

determination, as well as the specific risks facing refugee women. We also provide a summary of UNHCR's own guidelines on gender-related persecution.

## The importance of mainstreaming refugee claims by women

**By Rodger Haines, QC**

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IT IS a sad irony that the Refugee Convention, a human rights treaty based on the principle of non-discrimination, is so commonly applied to exclude the legitimate claims to refugee status by women. Why this should be so is difficult to fathom. The first recital of the Preamble to the Refugee Convention emphasises the

principle that human beings shall enjoy fundamental rights and freedoms without discrimination.<sup>1</sup> Those rights can be denied to men, women and children in different ways and the impact of that denial will be determined by such factors as the person's sex, gender, age and state of health.<sup>2</sup> It is inescapable that the inquiry into refugee status must take into account the claimant's sex and issues of gender. Economic, political and social structures in many societies discriminate against women and it is common in some countries to find that women are excluded from primary education, condemning women to a life of illiteracy and economic deprivation. The feminisation of poverty has been identified as a major contributor to trafficking.<sup>3</sup> Women's experiences of being persecuted are shaped by the power structures of the country of origin and by differences in such matters as race, class, sexuality, age, marital status, sexual history. Gender-

related persecution refers to the experiences of women who are persecuted **because** they are women, that is, because of their identity and status as women. Gender-specific persecution refers to the particular forms of persecution to which women are particularly vulnerable.

The refugee regime itself requires a highly specific examination of the particular characteristics and circumstances of the refugee claimant. In terms of Article 1A(2) it must be demonstrated that the individual has a well-founded fear of being persecuted and that that fear is for at least one of the five "reasons" enumerated in the definition. In more general terms, the inquiry is into who the individual is or what he or she believes and the reason why that person is unable or unwilling to avail him or herself of the protection of the country of origin. Both sex and gender are inherent aspects of all of these questions.

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In recent years seminal cases in common law jurisdictions have advanced a gender-sensitive approach to the Convention. They have recognised that the Convention affords protection from the risk of being persecuted at the hands of both state and non-state agents.<sup>4</sup> They have accepted that in certain circumstances women can comprise a particular social group, sex being an immutable characteristic.<sup>5</sup> They have established that the principle of non-discrimination must inform the interpretation of Article 1A(2) of the Convention.<sup>6</sup> The case law has also established that whether an individual faces a risk of being persecuted requires the application of international human rights standards to assess the serious harm faced in the country of origin and to determine the State's ability and willingness to respond effectively to that risk.<sup>7</sup> Persecution has been defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection.<sup>8</sup>

These developments are largely the product of a concerted campaign over the past twenty years to persuade refugee decision-makers that the refugee definition is not to be interpreted through the prism of male experiences.

Yet notwithstanding the enormous strides made (on paper at least) and the existence in several countries of gender guidelines, a recent comparative analysis of gender-related persecution in national asylum legislation and practice in Europe leaves no room for complacency.<sup>9</sup> This study, commissioned by the UNHCR, undertook a comparative analysis of approaches to gender-related persecution in national asylum legislation and practice across forty-two countries in Europe. In addition it undertook more in-depth research into policy and practice in four case-study countries (the UK, Sweden, Germany and Lithuania). The evidence collated during the course of this research indicates that there has been only limited progress in Europe towards ensuring gender-sensitive interpretation of the Convention and gender-sensitive asylum procedures. Where progress has been made, implementation of key recognitions is inconsistent. One telling example of this uneven progress is that authorities in less than half the countries surveyed have explicitly recognised that sexual violence can be a form of persecution. In the countries that do recognise this, individual decisions show that the application of this interpretation of persecution is inconsistent. Other key findings are:

- Less than half of the countries (41.5%) have recognised sexual violence as a

possible form of persecution, either in law, policy or case law;

- Just over half of the countries (56%) have recognised that in certain cases, discrimination can amount to persecution, either in law, policy or case law;
- Refugee status has been granted in only a limited number of cases involving forced prostitution or sexual exploitation;
- Over a third of countries do not recognise persecution by non-State agents as falling within the definition of a refugee under the Convention;
- Although a quarter of countries have recognised that women's political activities may take a different form to men's, three quarters do not;
- Just over a third of countries (39%) have recognised that persecution experienced or feared as a result of the failure to conform to religious mores may constitute a basis for a successful Convention refugee claim;
- Around a half (51%) of the countries surveyed recognise the possibility of imputed Convention ground;
- Only four countries out of the 41 countries surveyed have guidance on how to define a particular social group, either in law, policy, or case law. Just over a third of all countries have recognised women or particular groups of women as members of a Particular Social Group under the Convention;
- Around 40% of countries provide automatic and generally consistent access to procedures to all adults, including women who arrive with their husband or other male relative.

The authors of the study note that the treatment of gender-related persecution in national asylum legislation and practice in Europe cannot be seen

outside the context of broader shifts in the attitudes and policies in relation to asylum-seeking across Europe which has resulted in the tightening of access to procedures for refugee status determination. There is some evidence that because the experiences associated with gender-related persecution are already marginalised within the dominant interpretation of the Refugee Convention, these broader changes have a disproportionate impact on those seeking asylum on this basis. Although emerging case law on gender-related persecution is encouraging in some cases, first instance decision-making remains significantly less encouraging and is not necessarily consistent with this trend. There is evidence that some precedent setting decisions are still far from being systematically followed. It is clear that there is a long way to go in ensuring that procedures for refugee status determination are sensitive to the specific experiences and needs associated with gender-related persecution. This is particularly apparent in relation to the dominant and very masculine interpretation of the key elements of the Convention.

There are some very simple and first steps that all countries can embark upon. These include accepting basic procedural principles such as interviewing women separately from spouses and male relatives and encouraging them to make a claim in their own right where appropriate, and ensuring that all officials in the refugee determination system are properly trained to recognise the role of gender in shaping the refugee experience. These same points have recently been made in the Australian context as well.<sup>10</sup>

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Photo: UNHCR/H. Caux

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In both Australia and New Zealand the foundations have been laid for a dynamic gender-sensitive interpretation of the Convention. But Australian decision-makers and courts may no longer be free to interpret the Convention as a “living instrument.”<sup>11</sup> On one view ss 91R and 91S of the Migration Act 1958 (Cth) potentially constrain, to a substantial degree, the meaning to be given (in Australia) to “being persecuted” and “membership of a particular social group.” In addition an impermissibly high standard of causation is imposed by s 91R(1)(a). These impediments to a dynamic and purposive interpretation of the Convention do not apply in New Zealand where, free of statutory interference, the Refugee Status Appeals Authority has adopted a “contributing cause” standard of causation<sup>12</sup> and has also assessed the predicament of being persecuted against international human rights norms.<sup>13</sup> The difference the human rights approach makes to voluntary but protected activity was highlighted very recently when the Authority in *Refugee Appeal No. 74665/03* declined to follow the High Court of Australia in *Appellant S395/2002*.<sup>14</sup>

For too long women’s experiences have been seen as problematical, lying beyond the “true” scope of the Refugee Convention and requiring special interpretive “rules” or guidelines. This view is fundamentally misconceived. On accepted principles of treaty interpretation, sex and gender have always been at the heart of the refugee definition. Difficulties arise only because of misinformed decision-making. The refugee definition requires the adoption of an integrative perspective of human rights generally and this includes women’s rights. By interpreting forms of human rights violations against women within mainstream human rights norms it is possible to avoid marginalising women’s rights in refugee law.<sup>15</sup>

1 *The recital reads: Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination. On accepted principles of treaty interpretation this preambular statement is an integral part of the text of the Convention and must be taken into account if the Convention is to be interpreted in good faith in accordance with the ordinary meaning to be given to its terms in their context and in the light of the object and purpose of the Convention. These principles of treaty interpretation as mandated by customary international law are now codified in Article 31 of the Vienna Convention on the Law of Treaties, 1969.*

2 *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. Gender is not static or innate but acquires socially and culturally constructed meaning over time: 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, para 3.*

3 *Jenna Shearer Demir, “The Trafficking of Women for Sexual Exploitation: A Gender-Based and Well-Founded Fear of Persecution?” UNHCR New Issues in Refugee Research, Working Paper No. 80 (March 2003).*

4 *Canada (Attorney General) v Ward [1993] 2 SCR 689 (SC:Can); R v Immigration Appeal Tribunal; Ex parte*

*Shah [1999] 2 AC 629 (HL) and Horvath v Secretary of State for the Home Department [2001] 1 AC 489 (HL).*

5 *R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 (HL); Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 (HCA); Refugee Appeal No. 71427/99 [2000] NZAR 545; [2000] INLR 608 (NZRSAA).*

6 *Canada (Attorney General) v Ward [1993] 2 SCR 689 (SC:Can); R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 (HL) and Refugee Appeal No. 71427/99 [2000] NZAR 545; [2000] INLR 608 (NZRSAA).*

7 *Canada (Attorney General) v Ward [1993] 2 SCR 689 (SC:Can); R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 (HL); Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1 (HCA) and Refugee Appeal No. 71427/99 [2000] NZAR 545; [2000] INLR 608 (NZRSAA).*

8 *Canada (Attorney General) v Ward [1993] 2 SCR 689 (SC:Can); R v Immigration Appeal Tribunal; Ex parte Shah [1999] 2 AC 629 (HL); Minister for Immigration and Multicultural Affairs v Respondents S152/2003 (2004) 205 ALR 487 (HCA) and Refugee Appeal No. 71427/99 [2000] NZAR 545; [2000] INLR 608 (NZRSAA).*

9 *Heaven Crawley & Trine Lester, “Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe” (UNHCR, Evaluation and Policy Analysis Unit, EPAU/2004/05, May 2004) <www.unhcr.ch>.*

10 *Leanne McKay, “Women Asylum Seekers in Australia: Discrimination and the Migration Legislation Amendment Act [No. 6] 2001” (Cth) (2003) 4 Melbourne Journal of International Law 439.*

11 *Sepe v Secretary of State for the Home Department [2003] 1 WLR 856; [2003] 3 All ER 304 (HL).*

12 *Refugee Appeal No. 72635/01 [2003] INLR 629 at para [173] (NZRSAA) and the Michigan Guidelines on Nexus to a Convention Ground (2002) 23 Mich. J. Int’l L. 210.*

13 *Refugee Appeal No. 71427/99 [2000] NZAR 545; [2000] INLR 608; Refugee Appeal No. 74665/03 (7 July 2004) (NZRSAA).*

14 *Refugee Appeal No. 74665/03 (7 July 2004); Appellant S395/2002 v Minister for Immigration and Multicultural Affairs (2003) 203 ALR 112 (HCA).*

15 *See generally Deborah E Anker, “Refugee Law, Gender, and the Human Rights Paradigm” (2002) 15 Harvard Human Rights Journal 133.*



Photo: UNHCR/C. Schwetz

# Gender persecution – developments in the Australian jurisprudence

By Ms Sobet Haddad

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THIS paper provides a brief overview of the developments in Australian law on gender-related persecution. Despite there being a substantial body of domestic refugee jurisprudence, there has been comparatively limited judicial consideration of gender-related issues. Those areas that have received attention have been in connection with consideration of the concept of ‘particular social group’, principally as it relates to women or women with specific attributes, and the relevance of the state, or its agents in circumstances of what is sometimes categorised as ‘private’ harm.

Gender related persecution has been described as typically encompassing acts of sexual violence, domestic violence, coerced family planning, female circumcision, punishment for transgression of social mores, and discrimination against homosexuals.<sup>1</sup> Although it is acknowledged that gender based claims may be brought by women and men alike, they most typically relate to women.<sup>2</sup> With the exception of claims relating to homosexuality, which may be as categorised as sex-based rather than gender based (and as such will not be discussed in this paper), this is reflected in the Australian experience where gender based claims are more readily identified as relating to women claimants.

In the experience of the Australian Refugee Review Tribunal, gender based persecution issues primarily relate to claims of sexual assault or domestic violence, although these issues arise for consideration in less than 4 and 2% of cases respectively.<sup>3</sup> Claims of forced female circumcision, transgression of social mores, forced sterilisation or coerced family planning are even less common, each occurring in less than 1% of cases.

## Australian jurisprudence

IN AUSTRALIAN jurisprudence, there is little debate as to the seriousness of the acts typically associated with gender based claims. That rape, genital mutilation, or domestic violence meet the requisite level of harm, for the purpose of s.91R of the Migration Act

1958, or the Australian common law interpretation of Article 1A(2) of the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, is generally accepted without dispute, and as such has given little cause for consideration by Australian Courts. The debate has focussed instead on what, if any, nexus there is to the Convention. This in turn has concentrated attention on the question of whether women, or women with certain attributes in an individual society can be considered a particular social group for the purpose of the Article 1A(2) definition and the role of the state in defining the persecution and the nexus.

## Particular social group

GENDER based groups have been recognised by Australian courts as capable of constituting a particular social group for the purposes of the Convention.<sup>4</sup> Courts have however, been careful to qualify such recognition as being in the context of the available evidence in the individual case. Courts have cautioned that conclusions in other cases that might appear analogous or similar do not dictate the conclusion in another case, nor alter the position that it is for the decision maker determining whether a claimant is a person to whom Australia has protection obligations to decide whether a postulated group exists.<sup>5</sup>

Whilst it has been questioned as to whether all women in an individual society may form a particular social group, given the size and diversity of such a group in society,<sup>6</sup> it is now more readily accepted that such a group may fall within the definition of particular social group as understood in Australian law. A majority of the Australian High Court in *MIMA v Khawar & Ors* (2002) 210 CLR 1 considered variously that it was open on the evidence before the decision maker to conclude that groups such as “women in Pakistan”,<sup>7</sup> or “married women living in a household which did not include a male blood relation to whom the woman might look for protection against violence by the members of the household”<sup>8</sup> constituted a particular social group. Chief Justice Gleeson in that same case noted that size of the group alone did not stand in the way of concluding a particular social group existed and, whilst cohesiveness may assist in defining the group, it was not essential.<sup>9</sup> Taking a broad view of the issue, his Honour opined that women in any society were a distinct and recognisable group; and their distinctive attributes and

characteristics existed independently of the manner in which they were treated, either by males or by governments. It was neither the conduct of those who perpetrated violence against them, or of those who withheld the protection of the law from such victims of violence, which identified women as a group.<sup>10</sup> Although *McHugh and Gummow JJ* in *Khawar* made no express comment on the broad proposition of women in a defined society forming a particular social group, they nevertheless observed that gender based groups reflected the operation of cultural, social, religious and legal factors bearing upon the position of women in the particular society and upon their particular situation in family or other domestic relationships.<sup>11</sup>

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The acceptance of the possibility of women, or women in identifiable situations or with certain attributes as being capable of amounting to a particular social group has not resulted in sweeping findings that such groups exist in all cases where it is postulated, nor has it meant that consideration of gender related persecution by decision makers has been limited to consideration of the Convention ground of membership of a particular social group. Cases of sexual assault in particular are not uncommonly determined in the context of race, religion or political opinion.<sup>12</sup> However, given the emphasis on the need to consider the individual nature of case, and the variety of circumstances in which claims of gender-related persecution may occur, there is limited impetus for the development of gender specific law in Australian refugee jurisprudence.

## Causal link

LEAVING aside the issue of gender and particular social group, most analysis of gender-related claims in the Australian jurisprudential context have been within the parameter of causal nexus and the role of state in providing protection against harm arising from personal relationships.

It is now well established in Australia refugee law jurisprudence that a discriminatory response by the state, for a Convention reason, will provide the necessary basis for according refugee status where the harm suffered from non state actors is otherwise considered to be personally motivated. The leading Australian case of *Khawar* confirms that claims for protection made on the basis of domestic violence, where the harm suffered is not considered to be directly Convention related, may nevertheless satisfy the Article 1A(2) definition.

Ms *Khawar*, a Pakistani citizen claimed that she and her children were victims of serious and prolonged domestic violence from her husband and members of his family. She claimed that the police refused to enforce the law against such violence and that such refusal was part of systemic discrimination against women by the state. The Refugee Review Tribunal accepted the abuse had occurred but concluded that the harm from the claimant's husband and his family was not Convention related. It did not consider the allegations of police inaction, nor the position of women more generally in Pakistan.

Whilst a majority of the High Court took no issue with the decision maker's conclusion that the acts of violence perpetrated by the claimant's husband were personal in nature, it concluded that the authorities' toleration and

condonation of the violence, for a Convention reason, could establish a claim under Art 1A(2). In the view of McHugh and Gummow JJ, the persecution lay in the discriminatory activity of the state in not responding to the violence of non state actors, the harm being related to but constituted by the actual violence.<sup>13</sup> This differs somewhat from Gleeson CJ's view that the persecution is the combined effect of the conduct of the private individual and the state or its agents,<sup>14</sup> and Kirby J who preferred the formulation "persecution = serious harm + failure of state protection",<sup>15</sup> with both judges considering the necessary nexus between the Convention reason and the persecution could be provided by either the serious harm limb or the failure of state protection limb.

In *Khawar*'s case Gleeson CJ cautioned that an Australian court or tribunal would need to be well-informed about the relevant facts and circumstances, including cultural conditions, before reaching a conclusion that what occurs in another country amounts to persecution by reason of the attitude of the authorities to the behaviour of private individuals. Nevertheless, if, after due care, such a conclusion was reached, then there was no reason, in his Honour's view for hesitating to give effect to it.<sup>16</sup>

The emphasis in *Khawar* on the role of the state in establishing refugee status in situations that may otherwise be categorised as private or personal harm, has not meant that harm or violence within a personal relationship cannot be ascribed directly to a Convention reason.<sup>17</sup> *Khawar* has, however, resulted in a broader recognition of the circumstances in which gender based persecution, such as domestic violence may lead to recognition of refugee status in the Australian refugee determination process.

1 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*. 7 May 2002, paragraph 3. 2 *id.*

3 Based on review of RRT decisions database 1993 – 2004, including unpublished, as well as published decisions. Note these statistics cannot be taken as reflective of the Australian refugee determination experience as a whole as they do not include those cases involving gender based issues that may have been accepted at the primary determination stage by the Department of Immigration and Multicultural and Indigenous Affairs (DIMIA).

4 "Young Somali women", "single women in India", "married women in Tanzania", "women in Indonesia"

"Nepali women without protection", have been accepted by Australian Courts as being open on the particular evidence to formulation, or consideration as a particular social group: see *MIMA v Cali* [2000] FCA 1026, *Thalary v MIEA* (1997) 72 FCR 437; *MIMA v Ndege* (2000) 59 ALD 758; *SZAIX v MIMIA* [2004] FCA 104, *SZAQK v MIMIA* [2004 FMCA 407.

5 *MIMA v Ndege* (2000) 59 ALD 758, *Kaur v MIMA* [2000] FCA 1401.

6 *MIMA v Khawar & Ors* (2002) 210 CLR 1, per Callinan J at [153]-[154]. His Honour delivered the dissenting judgment in the case.

7 *MIMA v Khawar & Ors* (2002) 210 CLR 1, per Gleeson CJ at [32]

8 *ibid*, per McHugh and Gummow JJ, at [81]

9 *ibid*, at [32]

10 *ibid* at [35].

11 *ibid*, at [81].

12 See for example claims for protection from Indonesia nationals of Chinese ethnicity / Christian religion following the riots in Indonesia in 1998. eg RRT decision N99/30600, or those from Fijian nationals arising from the coup in 2000 – eg, RRT decision N01/37554

13 *MIMA v Khawar* (2002) 210 CLR 1 at [87].

14 *ibid* at [30].

15 *ibid* at [118], following Lord Hoffman in *Immigration Appeals Tribunal; Ex p Shah* [1999] 2 AC 629 at 653, and Lord Clyde in *Horvath v Secretary of State for the Home Department* [2001] 1 C 489 at 515-516.

16 *ibid* per Gleeson CJ at [26].

17 See for example, as applied in RRT decision V02/01452, where the Tribunal concluded that the domestic violence suffered by the applicant at the hands of her husband was for reason of her membership of a particular social group, 'women in PNG whom men regard as their wives'.



Photo: UNHCR/N. Behring

# Summary of UNHCR guidelines on gender related persecution

UNHCR published guidelines, in May 2002, on gender-related persecution within the context of Article 1A(2) of the Refugee Convention relating to the status of refugees. The full guidelines are available at [www.unhcr.ch](http://www.unhcr.ch) (search for 'gender persecution') and a summary is provided here.

## A: Background:

IT HAS been widely accepted that gender can have an impact on the type of persecution and the reasons behind the treatment, and properly interpreted, the refugee definition therefore covers gender-related claims. As such, there is no need to add an additional ground to the 1951 Convention Definition.

In refugee status determination procedures, all relevant circumstances of the case must be taken into consideration, including personality, background, personal experiences, and country of origin information. Generalisations as to gender are unhelpful and tend to lead to critical differences, which can often be relevant, being overlooked.

Discussed below are the elements of the refugee definition requiring a gender sensitive interpretation.

## B: Well founded fear:

WHAT amounts to well-founded fear will depend on the circumstances in the case. Males and females may suffer the same forms of harm, but may also be subjected to persecution specific to their sex. It has been widely accepted in international law that acts such as sexual violence will amount to persecution. In this respect, international law can assist decision-makers to determine the persecutory nature of a particular act.

Whether a law is persecutory in and of itself has proven to be material in determining some gender-related claims, particularly where the law has traditional or cultural origins that are not necessarily in line with traditional or cultural norms. However, the claimant must always prove that they have a well-founded fear of persecution as a result of that law.

Even though a State may have a prohibited persecutory practice, it may not be able to stop the practice effectively, or may continue to condone it. In this case, the practice would still amount to persecution. That a law has been enacted to prohibit the practice will not be enough to render a claim for refugee status invalid.

Where the penalty for breach of a policy or law is disproportionate and has

a gender component, it would amount to persecution. The circumstances of punishment cannot be disproportionate to the objective of the law, even if the law has general applicability.

Even where laws or policies have justifiable objectives, if they are implemented in a manner leading to substantial prejudice to persons concerned, they might be persecutory.

### **Discrimination amounting to persecution:**

It is generally agreed that 'mere' discrimination may not amount to persecution in and of itself, but a pattern of discrimination might on cumulative grounds amount to persecution (for example, if the consequences of the discrimination were substantially prejudicial in nature).

If the State concerned does not protect from serious abuse as a matter of policy or practice (i.e. discriminates in not extending protection against certain types of harm), this could amount to persecution. Domestic violence, for example, could be analysed in this context.

### **Persecution on account of one's sexual orientation:**

A claimant's sexual orientation may be relevant where the persecution claimed was on account of his or her sexuality. Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties could amount to persecution. Even if the practice is not illegal, a valid claim could still be established if the State is unable to effectively protect the claimant from persecution on the basis of his or her sexuality.

### **Trafficking for the purposes of forced prostitution or sexual exploitation as a form of persecution:**

The forcible or deceptive recruitment of women or minors for the purpose of forced prostitution is a form of gender-related violence, and women can continue to face serious repercussions after escape, such as reprisals from trafficking rings, and severe discrimination. In individual cases, being trafficked for the purposes of forced sexual exploitation could therefore be a basis for a refugee claim where the State has been unwilling or unable to provide protection against such harm.

### **Agents of persecution:**

The refugee definition allows recognition of both State and non-State actors as perpetrators of persecution. Acts committed by the local populace or individuals can amount to persecution if they are knowingly tolerated by the

authorities or the authorities refuse or unable to offer effective protection.

## C: The causal link ('for reasons of'):

THE well-founded fear of persecution must be related to one or more of the Convention grounds – in other words, must be for reasons of race, religion, nationality, membership of a particular social ground, or political opinion (though this reason does not have to be the dominant cause). It depends on jurisdiction as to whether the causal link must be explicitly established, or whether it is part of the refugee definition as a whole. In many gender-related claims, the difficulty in determination may not be the applicable ground as much as the causal link – that well founded fear of persecution was for reasons of that ground.

If there is a risk of persecution at the hands of a non-State actor for a Convention reason, the causal link is established, even if the absence of State protection is not Convention related. Alternatively, where there is a risk of persecution by a non-State actor that is not for a Convention reason, but the failure by the State to offer protection is for a Convention reason, the causal link is also established.

## D: Convention grounds:

A GENDER sensitive interpretation should be given to each Convention ground to determine whether a claimant has fulfilled the criteria of the refugee definition. In many cases a claimant may face persecution for a Convention ground which has been attributed to them.

Further, persecution in gender-related claims may be for one or more of the Convention grounds, and a claimant is not required to identify accurately the reason why he or she has a well-founded fear of persecution.

### **Race:**

Persecution for reasons of race may be expressed in different ways against men and women – for example, through the killing or incarceration of men, and through sexual violence towards women as a means of control of reproduction.

### **Religion:**

A woman may have a well-founded fear of persecution for reasons of religion where she does not fulfil the role assigned to her by religion, or refuses to practice a prescribed religion and is punished as a consequence.

There is some overlap between grounds of religion and political opinion in gender-related claims, particularly in

the realm of imputed political opinion. For example, in certain societies, a role may be ascribed to women by the official religion and the authorities may perceive failure to conform to this role as a failure to hold this belief. At the same time, the failure to conform could be seen as holding an unacceptable political opinion, particularly where there is little separation between religious and State institutions.

**Nationality:**

This term does not refer to ‘citizenship’. It may occasionally overlap with ‘race’. Although persecution on the grounds of nationality is not specific to men or women, it can take a gender-specific form.

**Membership of a particular social group:**

Gender-related claims are often based on this ground, and a proper understanding of it is therefore of paramount importance. However, it is important that at the same time, other grounds are not overlooked due to the emphasis placed on this ground. Other Convention grounds should not be rendered superfluous due to the interpretation given to this ground.

A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, and the characteristic will often be one that is innate. It follows that sex can be within the ambit of this category. The size of the group has often been used as a basis for refusing to recognise women as a particular social group. However, given that other grounds are not constrained by size, this argument has no basis in fact or reason. It is further well accepted that it should be possible to identify the group independently of the persecution.

**Political opinion:**

Political opinion broadly incorporated any opinion on which the State, government or society may engage, and may include an opinion on gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion on him or her.

In this sense, it is the context of the case that should determine its nature. A claim on this basis does, however, presuppose that the claimant hold a belief that it not tolerated by society and these opinions could come to the attention of the authorities, or be attributed to the claimant by the authorities. In these cases, the test of well-founded fear should be based on an assessment of the consequences that a claimant having certain dispositions would have to face if he or she returned.

Women are less likely to engage in high profile political activity than men, and are often involved in ‘low level’ political activities that reflect dominant gender roles. Women are also frequently attributed with the political opinions of their male relatives and persecuted on that account. This persecution may therefore be analysed in the context of imputed political opinion, as well as membership of a particular social group, the group being her family.

That a woman may not wish to engage in particular activities may also be taken by the persecutors as holding a contrary political opinion.

**Procedural Issues:**

Persons raising gender-related refugee claims require reassurance of the confidentiality of their claim and may be reluctant even then to identify the true extent of the persecution suffered.

**Against this background, the following measure should be kept in mind to ensure proper consideration of gender-related claims:**

- Women asylum seekers should be interviewed separately, and it should be explained to them that they may have a valid claim in their own right;
- Women should be given information on status determination in a language and manner they understand;
- Women should be interviewed and interpreted by women who are sensitive to cultural and religious matters;

- The interview room should encourage discussion and promote confidentiality;
- The interviewer should introduce herself and the interpreter and assure the claimant of confidentiality, but also explain that she is not a trauma counselor;
- The interviewer should remain neutral and objective during the interview but still be compassionate. The claimant should present their story with minimal interruption;
- The interviewer should ask both open-ended and specific questions which may help to reveal gender issues relevant to the claim;
- Second interviews should be arranged, particularly for claims relating to sexual violence, as this will help to establish trust and obtain all necessary information. Interviews should be stopped if the claimant becomes distressed.
- Where it is envisaged that the claimant has a gender-related claim, a relationship of trust and confidence needs to be developed;
- Relevant country of origin information should be collected;
- Emotion displayed during the recounting of experiences should not affect a woman’s credibility. In some cases, it might be appropriate to seek objective psychological or medical advice.
- Referral to counselling and other support services should be made available where necessary.

**Evidentiary matter:**

Documentary proof is not required in order for the authorities to recognise a refugee claim, but information on the practices in the country of origin may support a particular case. In relation to gender-related claims, however, this may not be readily available.

**Methods of Implementation:**

There have been two traditional approaches taken by States for a gender-sensitive application of refugee law. Some States have incorporated legal interpretive guidance within the legislation itself, which others have preferred to develop policy and guidelines for the decision-makers. UNHCR encourages States that have not already done so to ensure a gender sensitive application of refugee law and procedures.



Photo: UNHCR/H. Caux



# Ensuring the Effective Protection of Refugee Women at Risk

By **Dr Eileen Pittaway**

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MANY refugee women experience multiple incidences of traumatic experience including sexual and gender based violence as persecution, during flight and in countries of first asylum. The impact of each event is compounded by ensuing incidents and despite the best effort of UNHCR and the NGO community, is often further compounded by lack of adequate protection, caused mainly by lack of resources. This creates unacceptable levels of risk and vulnerability to further trauma, exploitation, sexual abuse and even death.

## Case Study – A Case of Extreme Risk

THIS report is based on research undertaken by researchers from the University of New South Wales, Sydney.

The case study below is drawn from the 100s of stories we have documented during the course of this project in Kenya and Thailand.

This is the case of a young orphaned woman (17) from the south of Sudan with a one year old baby, born of rape by perpetrators in Kakuma Refugee Camp. She is unable to support herself and the baby on the World Food Program food rations and has no income for other basic necessities such as soap and sanitary towels. She has been ostracized by the community because she is a single mother without family support. To obtain food her options are either: (a) selling sex in a dangerous and violent environment where often the men who use the desperate girls will beat them and not pay any money – “Sometimes the kinder men give us a few shillings” or (b) a so called “marriage” for “protection” to an older man who is likely to be violent and abandon her whenever she becomes pregnant again.

## Detailing the Compounding Risk Factors

### Incident 1

When she was 12, her village in the south of Sudan was bombed and her parents were killed. She saw them die. She then ran with her elder brother and neighbours over the mountains

into Kenya. On the way, the group was attacked by rebels. Her brother was shot and she thought he was dead .

She stayed with the body all night in fear, and in the morning she noticed signs of life. An unknown woman helped them and the brother recovered. They then resumed the journey and reached Kenya.

### Incident 2

In Kenya, a man who had known her family took her to live with him and his wife (also refugees). She was included on their UNHCR ration card. Her brother was sent elsewhere so she lost her only remaining relative. She was forced to work as a servant for the family who took her in and she did not attend school. When she was 13, the man who had custody of her arranged a marriage for her with a man of 45, who would pay a dowry. She ran away from the family rather than be married to an older man. The foster father beat her badly before she ran away

### Incident 3

She found her way to Nairobi and lived for a while with refugees in the slums. While she was there she was raped by a group of men and hospitalised. Her case again came to the attention of UNHCR who arranged for her to go to Kakuma and be fostered by a new family.

### Incident 4

After about a year, the teenage sons of the foster family started to rape her at night. She complained to the mother, who called her a prostitute and put her out of the house. By that time she was pregnant by one of the three sons.

### Incident 5

She was given shelter in the camp and her own ration card and lived with some other single women until the baby was born. Some of these women were forced to sell sex for food and basic necessities. They were constantly harassed by men and boys in the camp, and by the local Turkana men who knew where the single women were housed. Once the baby was born, an older man in the community offered to take her as his “wife” but she declined. He then started harassing her, and she was afraid that he would abduct and rape her.

### Incident 6

She was eventually put into protective custody but there was no resolution to her problem in the immediate future. The only solution offered was another relocation with other single women. She is very afraid to take this offer, as she knows that there is no guarantee of safety and that she has no means of generating any additional income to support herself and her child.

### End Result

She is now in a situation where resettlement is probably the only durable solution. Resettlement will be extremely difficult for this young woman. Amazingly she is still extremely resilient and determined to build a life for herself and her child. She has fought to maintain her independence and not to accept “marriage” as a way out of her situation.

In order to address problems such as these, with the endorsement of UNHCR, the researchers are now working on a pilot project will commence in 2005. It will develop a model of risk assessment, risk reduction, and a coordinated risk management response to ensure effective protection is provided to vulnerable refugee women.

This project acknowledges that in many sites, including Kakuma and on the Thai Burma border, excellent work is underway at a local level to provide a co-ordinated response to some of the problems identified in the research to date. By strengthening partnerships between UNHCR, NGOs and the refugee communities, it is anticipated that the project will produce some new and effective strategies for addressing the protection needs of refugee women.

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#### UNHCR DISCUSSION PAPER

No. 1/2005 (Published January 2005)

A publication of the Regional Office for Australia, New Zealand, Papua New Guinea and the South Pacific.

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