



LL.M International Law

Thesis

“An Analysis of Refugee Law Pertaining to the Validity of Women Constituting ‘a Particular Social Group’; With Specific Reference to Female Genital Mutilation as Grounds for Determining Refugee Status.”

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Abstract

This dissertation primarily examines a contentious issue of recent times, that of, women attaining refugee status on the basis of 'membership of a particular social group', as enumerated in article 1 of the 1951 Refugee Convention, and it attempts to reconcile disparate concerns held by the international community regarding such claims. Following a brief introduction to refugee issues, a general overview of refugee law will be given in chapters two and three. The fourth chapter sets in motion the main body of the dissertation which focuses on women who have suffered gender-based persecution and their claims for asylum. In the fifth chapter, the crux of the dissertation, specific reference is made to the widespread practice of female genital mutilation as grounds for refugee status. The sixth chapter embodies an analysis of the topic and considers human rights, interpretation and criticisms of the 1951 Convention and enforcement measures. Proposals for reform are dealt with in the seventh chapter: they include an interpretation revamp of the 1951 Convention, suggestions for enforcement mechanisms, the possibility of including a sixth ground, and the need for social change. Many sources were used in the course of this critique including: case law, international law documents, domestic legislation, texts, journals, electronic sources and other media. Fundamentally, this dissertation challenges the argument that women do not fall within the ambit of the 1951 Convention and that persecution may only be executed by a State. Thus, it is argued that persecution may be commissioned by non-State actors for the purposes of inflicting harm on women and that certain groups of women, who have a well-founded fear of gender-based persecution including female genital mutilation indeed, represent 'a particular social group' and may also have a claim under political opinion. It is acknowledged that

procedural, interpretation and application obstacles have often impeded women's access to the protection that the 1951 Convention affords to them. In order to facilitate women's access to refugee protection, interpretation of the 1951 Convention and social perceptions ought to adjust which, in turn, will provide women with absolute protection of the 1951 Convention: protection which, at present, seems to be lingering in the shadows behind many deep rooted stereotypes.

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Acronyms

BIA	Board of Immigration & Asylum (US)
CAT	Convention Against Torture
CEDAW	Convention on the Elimination of all Forms of Discrimination Against Women
CHAIR	Committee for Humanitarian Assistance to Iranian Refugees
CRC	Convention on the Rights of the Child
ECHR	European Court of Human Rights
EU	European Union
FBI	Federal Bureau of Investigation
FGM	Female Genital Mutilation
FORWARD	The Foundation for Women's Health, Research & Development
ICCPR	International Covenant on Civil and Political Rights
IDP	Internally Displaced Person
IFA	Internal Flight Alternative
IRB	Immigration & Refugee Board (Canada)
IRIN	Integrated Regional Information Networks
NGO	Non-Governmental Organisation
RAINBO	Research Action Information Network for the Bodily Integrity of Women
RVF	Rectovaginal Fistula
UN	United Nations
UNHCR	Office of the UN High Commissioner for Refugees
UDHR	Universal Declaration of Human Rights
VVF	VesicoVaginal Fistula

Introduction

The 21st Century has witnessed different forms of migration and new refugee situations all facilitated by globalisation.¹ The rights of refugees are of growing concern as the international community strives to maintain international peace and security which is the prime objective or *raison d'être* of the United Nations.² Mass exoduses of people can pose a threat to international peace³, therefore the organ charged with presiding over refugee matters is the Office of the United Nations High Commissioner for Refugees. Many complexities surround refugee law and the issues involving refugees continue to grow in magnitude and convolution.⁴ Essentially, refugee law is premised on the concept that refugees are entitled to claim the benefit of a premeditated and coherent system of rights.⁵ This body of law seeks to alleviate the suffering of victims of persecution and acts as a surrogate form of protection in the absence of national protection,⁶ thus conferring refugee status upon an individual on a temporary basis and has as its main goal voluntary repatriation.

Human rights have developed at a rapid pace over the past sixty years impacting profoundly on the renovation of International Law.⁷ Refugee Law may be regarded as

¹ Kneebone, S. (Ed.), *The Refugees Convention 50 Years On, Globalisation and International Law*, 2003, Ashgate Publishing, p. 5 (henceforth Kneebone, *The Refugees Convention 50 Years On*)

² Article 1, Charter of the United Nations, 892 UNTS 119, 26 June, 1945

³ Resolution 841 (1993) on Haiti

⁴ Gowlland-Debbas, Vera (Ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, 1996, Martinus Nijhoff Publishers, 3, (henceforth Gowlland-Debbas, *The Problem of Refugees*)

⁵ Hathaway, J.C., *The Rights of Refugees under International Law*, 2005, Cambridge University Press, p. 4, (henceforth Hathaway, *The Rights of Refugees*)

⁶ *Attorney General v Ward* [1990] 2 FC 667, 67 DLR (4th) 1.

⁷ Agius, E. *et al*, *Future Generations & International Law, Law and Sustainable Development Series*, 1998, Earthscan Publications Ltd, p. 40

a remedial or analgesic branch of Human Rights Law⁸ with its aim being to ensure that the rights of the individual, although not protected by their State of nationality, are protected elsewhere in the international community. In essence, it is a vehicle which provides surrogate protection for individuals and tries to guarantee their enjoyment of fundamental rights and freedoms. Female genital mutilation and domestic abuse, for example, are not considered punishable in many States therefore, International Law allows for the victims to seek refuge in other States.⁹ International Law is focused on intercourse between States, whereas Human Rights Law is concerned with the rights of individuals. Traditionally, Refugee Law existed independently of Human Rights Law and was primarily focused on State territorial jurisdiction and the crossing of borders. However, in recent years Humanitarian Law and human rights have penetrated the Refugee Law field and currently, Refugee Law exists between these two areas veering more towards the human rights sphere. It is important that such conditions are taken into account however, while Refugee Law is expanding this must not impinge on the existing established principles of Refugee Law as it stands.¹⁰

The fear always exists in the international realm that in broadening a definition one would place greater responsibilities upon States and further reduce their sovereignty and autonomy in international affairs. It seems that States are becoming more restrictive in their definitions of what criteria an individual must satisfy in order to be recognised as a Convention refugee.¹¹ Governments' concerns seem to be at odds

⁸ Hathaway, J.C., *The Rights of Refugees under International Law*, 2005, Cambridge University Press, p. 5

⁹ *Ibid.*, x

¹⁰ Gowlland-Debbas, *The Problem of Refugees*, x

¹¹ Goodwin-Gill, Guy, S., McAdam, J., *The Refugee in International Law*, Third Edition, 2007, Clarendon Press, p. 15 (henceforth Goodwin-Gill, *The Refugee in International Law*)

with one another, wishing to maintain a reputation of respect for human rights while trying to shed the 'burden' of the refugee 'problem'. A narrow definition does not adequately safeguard those who are in need of the protection of a host State. As modern International Law is premised on the maintenance of international peace and security and the protection of fundamental human rights, States should not continue to monopolise the international legal system. Therefore, a balance must be struck between the two interests in order to maximize protection for potential refugees whilst upholding fundamental principles of International Law such as State equality and sovereignty.

This paper will commence by giving a brief overview of Refugee Law and gender-based persecution as a backdrop for the main body of the thesis which will examine the validity of the claim that women, who have undergone or have a well-founded fear of being subjected to gender-based persecution namely female genital mutilation, constitute 'a particular social group' for the purposes of claiming asylum under the 1951 Refugee Convention. Furthermore, the critique will reflect on other forms of gender-related persecution such as domestic abuse and rape as well as examining human rights issues and political opinion relative to women, which all correlate to the analysis of female genital mutilation and shed necessary light on the subject in relation to asylum claims. The marginalisation of women in the context of Refugee Law and asylum systems will also be evaluated and I intend explore the current safeguards in place to protect those seeking asylum. Refugees travel by air, sea and foot to reach safety, often having lost everything they once possessed, to find that their greatest obstacle is convincing immigration authorities that they are in fact

entitled to claim asylum and assume refugee status.¹² For this reason I have also considered procedural reform and the need to foster a non-stereotypical interpretation of current legislation.

For some, classing women as a social group, effectively half the world's population, would open the flood gates for incessant, unquantifiable claims. However, by accepting that women may represent a social group, under certain circumstances, does not mean to say that every woman will automatically meet the criteria simply by being a woman *per se*.¹³ other criteria must still be fulfilled.

II

Who is a Refugee?

Despite the existence of legislation in respect of refugees and a myriad of NGO's dedicated to defending their rights, much confusion remains, with many not being able to distinguish between refugees, asylum seeker's and internally displaced persons.

A refugee is someone who is physically outside their country of origin and has a well-founded fear of persecution if he or she were to return to the country of origin. The individual must cross an international border and an indication that they are fleeing persecution should be evident, that is, the person must have a 'well-founded' fear of persecution based on any one of five grounds: race, nationality, religion, membership

¹² Hathaway, *The Rights of Refugees*, 1

¹³ Haines, R., 'Gender-related persecution', in, Feller, E. *et al* (Ed.), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, 2003, Cambridge University Press, p. 327, (henceforth Haines, 'Gender-related persecution')

of a particular social group, political opinion.¹⁴ Additionally, there should be an absence of protection on the part of their State of origin in the form of inability or unwillingness.

Asylum seekers are those who have not yet been granted refugee status but are in the process of applying. Internally displaced persons are those who have been forced to flee their homes in fear of persecution and to relocate within the same territory. In recent years it has become increasingly difficult to distinguish between refugees and IDP's as the number of IDP's has surpassed that of refugees.¹⁵

The word 'refugee' is one we hear more and more frequently. It is a word, which for many, has negative connotations or evokes feelings of pity. Throughout history the world has, on numerous occasions, witnessed mass migrations of people for various reasons. Many refugees have gone on to contribute greatly to their host countries, for instance, the UK boasts a number of success stories in the form of refugees making noteworthy contributions in cultural, social and economic aspects which have now become engrained in British culture.¹⁶ Well known refugees include Sigmund Freud (psychoanalyst), Sir Montague Burton (founder of Burtons), Michael Marks (founder of Marks & Spencer), Albert Einstein (Physicist), Karl Marx (Philosopher) and Mika

¹⁴ The UNHCR, Preamble, Convention Relating to the Status of Refugees, 189 UNTS 137, 28 July 1951 (henceforth 1951 Convention)

¹⁵ United Nations Publication, Department of Public Information, *Basic Facts about the United Nations*, 1998, United Nations Publication, p. 253, (henceforth UN Publication, *Basic Facts about the United Nations*)

¹⁶ For example, 18 Nobel Peace Prize winners, 16 Knights, 71 Fellows of the Royal Society, Scottish Refugee Council, Press Release, 'Refugee Week Scotland '08', Press Release, June 2008 www.scottishrefugeecouncil.org.uk/press/RedRoadReplicasPR (henceforth Refugee Week Scotland, Press Release)

(musician).¹⁷ In spite of this, for many, the word 'refugee' continues to generate unconstructive connotations, implying that 'refugees' are a burden and State liability.¹⁸

People leave their homeland for many reasons including: war, totalitarian governments, human rights abuses and other forms of persecution. At the end of 2006 it was estimated that there were 9.9 million refugees in the world with the UK providing refugee protection for a miniscule fraction of that number.¹⁹ The vast majority of refugees flee to developing countries or neighbouring countries. Pakistan receives most refugees in the international community.²⁰ Ergo, contrary to popular belief most of the receiving states are, in reality, developing countries and not, in fact, the United Kingdom. This places a greater burden on the already limited resources of developing countries.

The United Nations' body which governs matters relating to refugees is the Office of the UN High Commissioner for Refugees (UNHCR). It was established in 1951 by the UN General Assembly,²¹ carries out humanitarian work and has three main functions: to provide protection for refugees, seek out solutions to refugee dilemmas and to provide them with support.²²

¹⁷ The Scottish Refugee Council, Refugee Week Fact Pack 2008,

<http://www.scottishrefugeecouncil.co.uk>, (henceforth Scottish Refugee Council Fact Pack 2008)

¹⁸ Van Selm, Joanne *et al*, *The Refugee Convention at Fifty, A View from Forced Migration Studies*, 2003, Lexington Books, p. 66

¹⁹ The UK hosts roughly 3% of the world's refugees which is around 302,000 people, The Scottish Refugee Council Fact Pack 2008

²⁰ *Ibid.*

²¹ UN, *Basic Facts about the United Nations*, 44

²² 1951 Convention, UN, *Basic Facts about the United Nations*, 44

III

Refugee Law

International Legal Instruments

Refugee Law is a polemical field and a number of issues and philosophical debates are often raised. There is concern that an overly vague definition of the word 'refugee' would place excessive obligations and duties upon States while a very rigid and restrictive definition would limit the protection refugees may receive.²³

The Universal Declaration of Human Rights²⁴, under article 14 (1), imparts the right to asylum. The 1951 Convention Relating to the Status of Refugees²⁵ was the first International Law document which defined refugees and stipulated their rights and the duties of States. Originally, it was brought into force to deal with refugees that were created by the Second World War and had temporal and geographic qualifications.²⁶ This was later supplemented by the 1967 Protocol²⁷ which provides that the Refugee Convention will apply irrespective of the dateline, 1 January 1951, and it removes the geographic limitation.²⁸ Article 1 of the 1951 Convention defines a refugee as someone with a 'well-founded fear' of persecution due to race, religion, nationality or membership of a particular social group or persecution owing to political opinion. The person must be situated out-with the country of their nationality: Refugee status cannot be claimed while the individual is situated in his/her country of origin or place

²³ Goodwin-Gill, *The Refugee in International Law*, 35

²⁴ Universal Declaration of Human Rights, UNGA Res 217A (III), 10 December 1948 (henceforth UDHR 1948)

²⁵ 1951 Convention

²⁶ Article 1, *Ibid.*

²⁷ Protocol Relating to the Status of Refugees, 660 UNTS 267, 31 January 1967, (henceforth 1967 Protocol) UN, *Basic Facts about the United Nations*, 255

²⁸ 1967 Protocol

of habitual residence. The individual should be unable or unwilling (owing to such a fear) to avail oneself of the protection of their country of nationality.²⁹

The main aim of Refugee Law is voluntary repatriation, however, repatriation on a large scale can often have disastrous consequences for example, in 1997 four million refugees returned to Afghanistan. Such a huge influx of people can put immense pressure on an already vulnerable and volatile State infrastructure.³⁰

It must be borne in mind that the granting of asylum is at the discretion of individual States: 'the granting of asylum is not required by International Law and States are not obliged to grant asylum and the characterisation of who meets the definition of 'refugee' lies within the discretion of each State.'³¹ The only provision that States are bound by is that of *non-refoulement*.³²

Well Founded Fear of Persecution

The characterisation of persecution has been widely contested however, it may be inferred from article 33 of the Refugee Convention³³ that a threat to life or freedom would satisfy a claim.³⁴ Other exploits may be tantamount to persecution where a discriminatory element exists in prosecution, punishment or in a breach of criminal

²⁹ Article 1, 1951 Convention

³⁰ UN, *Basic Facts about the United Nations*, 253

³¹ Article 4, General Assembly Declaration on Territorial Asylum, Resolution 2312 (XXII) December 14, 1967

³² Expounded by article 33 1951 Convention and article 3 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984, Article 4, General Assembly Resolution 2312 (XXII) 1967

³³ 1951 Convention

³⁴ Wallace, R.M.M., *International Human Rights, Text and Materials*, Second Edition, 2001, Sweet & Maxwell, p. 259 (henceforth Wallace, *International Human Rights*)

law provision.³⁵ Convention refugee status requires that the fear of persecution must be a 'well-founded' fear, that is to say, there is a reasonable probability that if the person were to return to their country of origin they would be persecuted and this is assessed on a subjective and objective basis.³⁶ Accepted forms of persecution include, brutal beatings, incarceration, electric shocks and mock executions to name but a few.³⁷ The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status 1992, although non-binding is a good source of guidance for domestic authorities.³⁸ It holds that, '...the applicant's fear should be considered well-founded if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would be for the same reasons be intolerable if he returned there.'³⁹

Grounds

The individual must demonstrate that a nexus exists between the persecution and any one of the five grounds contained in article 1 of the 1951 Refugee Convention⁴⁰, specifically, race, nationality, religion, membership to a particular social group and political opinion. Race has not been defined, although it has been broadly interpreted to encompass ethnic, cultural and linguistic groups. Racial discrimination is regarded as persecution under the 1951 Convention.⁴¹ Persecution on the basis of religion

³⁵ *Ibid.*, 262

³⁶ *Ibid.*, 258

³⁷ Kelley, Ninette, Presentation, Canadian Council for Refugees, International Conference on Refugee Women Fleeing Gender-Based Persecution, 04/05/2001 (henceforth Kelley, Presentation, International Conference)

³⁸ *Ibid.*, 257

³⁹ UNHCR 'Handbook on Procedures and Criteria for Determining Refugee Status' 1992, para. 42

⁴⁰ "Race, religion, nationality, membership of a particular social group or political opinion." Article 1, 1951 Convention

⁴¹ Wallace, *International Human Rights*, 263

concerns prohibitions against worship in a private or a public sphere and severe discriminatory attitudes against individuals who practice a certain religion.⁴²

Nationality is not confined to citizenship: it extends to ethnic and linguistic groups. It is somewhat complex as it often overlaps with ethnicity and race.⁴³ Like religion, this area involves measures of discrimination against those belonging to a national minority. However, the UNHCR Handbook also highlights that it is possible for an individual belonging to a majority group to be in fear of persecution from a dominant minority.⁴⁴

With regards to the fourth criterion, membership of a particular social group, this was included latterly at the instigation of the Swedish delegate.⁴⁵ The concept has given rise to much debate as it often overlaps with the other criteria.⁴⁶ Although it was intended to encompass a myriad of groups, it is believed to induce uncertainty and lead to a dilution of the refugee definition, expanding the notion to include women and grounds which did not fit into the other criteria. Again, there must be a nexus between the membership and the persecution. It is imperative that the group is not created out of, or as a result of persecution.⁴⁷ Moreover, it is not necessary for the person to know the other members of the group. For example, left handed persons may constitute a group: this is something that cannot be changed and members do not necessarily know the other members. As highlighted by Professor Rebecca Wallace⁴⁸,

⁴² *Ibid.*, 264

⁴³ *Ibid.*, 265

⁴⁴ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status 1992, para. 76
Wallace, *International Human Rights*, 265

⁴⁵ Wallace, *International Human Rights*, 266

⁴⁶ *Ibid.*, 266

⁴⁷ *Ibid.*, 266

⁴⁸ Professor of International Human Rights Law

the imprecision of the definition of 'a particular social group' serves to avoid a narrow interpretation and application of the law.⁴⁹

Political opinion involves expressing a dissenting political opinion. What the person actually believes is entirely irrelevant- the crucial factor is the persecutor's perception of what the person believes.⁵⁰ The aforementioned alone does not satisfy all criteria required for refugee status. Additionally, a risk of persecution on return must exist and be demonstrated regardless of whether the person was persecuted before leaving the country. The risk may be a low risk. There is no requirement to prove the existence of the risk beyond reasonable doubt or on the balance of probabilities, a low risk will suffice.⁵¹ This is one of the factors that, differentiates Immigration Law and Refugee Law. The former uses the balance of probabilities standard of proof, while the latter employs a lower standard of proof. Furthermore, the individual is obliged to satisfy that they were at risk of persecution more-so than others thus, civil war, for example, would not necessarily give rise to refugee status.

State Protection

The inability or unwillingness on the part of a State to provide protection is an important factor in the determination of refugee status. However, the applicant must also demonstrate that a broader pattern exists with regards to the State's failure to provide protection.⁵² The above is generally not debated: it is the appropriate standard of protection that is most often the contested issue. Some assert that the protection

⁴⁹ Wallace, *International Human Rights*, 266

⁵⁰ Goodwin-Gill, *The Refugee in International Law*, 35

⁵¹ ⁵¹ Wallace, *International Human Rights*, 270

⁵² Kelley, Presentation, International Conference

should be 'adequate' while others deem that it must be rendered to be 'effective'.⁵³ According to article 8 of the UDHR⁵⁴, the protection should be effective and provide an effective remedy for the individual. There are four situations in which it is accepted that there is a failure of State protection: persecution committed by the State; persecution condoned by the State; persecution tolerated by the State; and persecution for which the State was unable or unwilling to offer adequate protection.⁵⁵

Refugee protection is intended merely to be a temporary status hence, at present the status is only granted for five years after which, the person's circumstances and situation will be reconsidered.⁵⁶ The Refugee Convention precludes those who have committed serious crimes from obtaining refugee status. The provisions of the Convention do not apply to individuals who have committed, or there are serious reasons to believe he or she has committed, war crimes, crimes against humanity or serious non-political crimes outside the country of refuge.⁵⁷

State protection should exist in practice, not solely in theory and should be available and accessible to all irrespective of race, sex, religion, class, ethnicity, age, disability and occupation.⁵⁸

⁵³ *Ibid.*

⁵⁴ Universal Declaration of Human Rights, UNGA Res 217A (III), 10 December 1948

⁵⁵ Haines, 'Gender-related persecution', 332

⁵⁶ Refugee Legal Centre, 'The Asylum Process', http://www.refugee-legal-centre.org.uk/C2B/document_tree/ViewACategory.asp?CategoryID=171

⁵⁷ Article 1 (F), 1951 Convention and article 14 (2) UDHR 1948

⁵⁸ Haines, 'Gender-related persecution', in, 333

Internal Flight Alternative

The individual must illustrate that there was no possibility of an internal flight alternative; basically that internal relocation was not an option because the civil strife or persecution was prevailing throughout the entire territory.

Some maintain that relocation within the State may allow State protection to function more effectively. States who are receivers of many refugees would like to think that domestic abuse or discrimination may be eradicated by the woman moving to another part of the territory in order to alleviate the burden on the receiving States and reduce their responsibilities and the potential number of individuals who may seek asylum in their State. Nevertheless, IFA poses a number of difficulties. For example, in a country where it is not appropriate for a woman to live alone without male members of her family, it would be no more appropriate in another region of the territory.⁵⁹ Additionally, should a woman be forced to relocate to somewhere that has inadequate health facilities or transport links as compared with her home? Other factors in the determination of the IFA are 'age, mental and physical health, religion, language, the ability of the person to raise a family and seek employment there.'⁶⁰ Therefore, responses in defence of the IFA argument include: the person could not practice their religion; the conflict could extend to the safe region in the future; language barriers would pose problems; no access to healthcare in the region; and a single woman would be harassed in that part of the territory.⁶¹

⁵⁹ Kelley, Presentation, International Conference

⁶⁰ *Ibid.*

⁶¹ Wallace, *International Human Rights*, 268

Cessation of Refugee Status

The provisions of the 1951 Convention cease to apply where an individual has a) voluntarily re-availed his or herself of the protection of the country of nationality b) voluntarily reacquired nationality c) acquired a new nationality d) voluntarily re-established his or herself in the country which he or she left e) there has been a change in circumstances, that is to say, the circumstances in connection with which he or she has been recognised as a refugee have ceased to exist.⁶²

It has been contested that when a change in circumstances occurs, such as the end of civil strife in the country of origin, returning someone to their country of origin after spending ten years in the host country would serve to violate their rights under article 8 of the UDHR. However, very seldom will article 8 rights trump immigration rules.

The Principle of *Non-Refoulement*

This principle prohibits the forcible expulsion of a person to a country where they would face persecution.⁶³ It is well documented under article 33 of the 1951 Convention and is reflective of Customary International Law. It provides that, 'No contracting State shall expel or return ("*refouler*") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.'⁶⁴ The two exceptions to this principle arise when the person is a danger to the national security of the host country or if the person

⁶² Article 1(C), 1951 Convention

⁶³ UN, *Basic Facts about the United Nations*, 255

⁶⁴ Article 33 (1), 1951 Convention

commits such a serious or heinous crime that he or she constitutes a danger to the community of the host country.⁶⁵ As noted above, *non-refoulement* is the only rule that States are bound by in relation to refugee law.

IV

Women

Membership of a Particular Social Group

The set phrase 'membership of a particular social group' is difficult to define and it appears to be the least well established of the five Convention grounds.⁶⁶ Some argue that a definition cannot possibly exist and instead each case must be considered on its individual merits.⁶⁷ To enable identification, the individuals in the group should be characterised by 'an immutable unchangeable characteristic or a changeable characteristic which one should not be required to change.'⁶⁸ Any persecution suffered must result from 'membership of a particular social group'. Further, the group should not have been created as a result of persecution.

The author Kristen Walker⁶⁹ states that under narrow interpretations, 'membership of a particular social group' should be on a voluntary basis only and should not merely be identifiable externally.⁷⁰ Conversely, in the *Chan v Canada*⁷¹ case it was averred

⁶⁵ Article 33 (2) 1951 Convention

⁶⁶ Edwards, A., 'Age and Gender Dimensions in International Refugee Law', in, Feller, E. *et al* (Ed.), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, 2003, Cambridge University Press, p. 70, (henceforth Edwards, 'Age and Gender Dimension')

⁶⁷ Walker, K., 'New Uses of the Refugees Convention: Sexuality and Refugee Status' in Kneebone, *The Refugees Convention 50 Years On*, 262 (henceforth Walker, 'Sexuality and Refugee Status')

⁶⁸ *Ibid.* 263

⁶⁹ Senior Lecturer in Law at the University of Melbourne, specialises in law and sexuality.

⁷⁰ Walker, 'Sexuality and Refugee Status', 263

⁷¹ *Chan v Canada* [1995] 3 SCR 593

that, 'a refugee alleging membership in a particular social group does not have to be in voluntary association with other persons similar to him – or herself. Such a claimant is in no manner required to associate, ally, or consort voluntarily with kindred persons.'⁷² At the other end of the spectrum, a broad interpretation would include all potential groups and forms of persecution.⁷³ Recognised social groups include, lesbians and gay men,⁷⁴ 'young boys who are victims of incest',⁷⁵ Chinese women who have more than one child and face forced sterilization,⁷⁶ women and girls who are in fear of undergoing female genital mutilation⁷⁷, to name but a few.

Gender-Based Persecution & Women as 'a Particular Social Group'

Gender-based violence is a widespread crisis which can occur against both sexes although women and girls are most often the victims. Without doubt it does exist in relation to men and boys⁷⁸, however, this analysis will focus on gender-based persecution in relation to females. One in three women in the world is a victim of gender-based violence and abuse.⁷⁹ In spite of the statistics, people often fail to grasp the severe social consequences sexual and gender-based violence can have and does have on women. This quote reflects the sentiment of such women: 'if they [raped women] come home, they would be better off shooting themselves. If anyone laid a hand on them they'd be written off for good here in Chechnya. It's kind of law. A

⁷² *Ibid.* at 646

⁷³ Walker, 'Sexuality and Refugee Status', 264

⁷⁴ *Ibid.*, 232

⁷⁵ *Canada (Minister of Citizenship and Immigration) v Smith*, Federal Court of Canada (Trial Division), 15 Jan. 1997

⁷⁶ *Cheung v Canada* [1993] 102 DLR (4th) 214, 216 (Fed. Ct. App.)

⁷⁷ *Fornah v Secretary of State for the Home Department* [2006] UKHL 46

⁷⁸ *Canada (Minister of Citizenship and Immigration) v Smith*, Federal Court of Canada (Trial Division), 15 Jan. 1997

⁷⁹ Tarih Justice Centre, Washington D.C., 'TCJ Information & Awareness Centre' June 2005, <http://tahirih.org/tahirih/resourcecenter/index.html>

sullied daughter is worse than a dead one to her father. It's a terrible disgrace. She'll never get married and no one will say a kind word to her, even though it's not her own fault she was dishonoured.'⁸⁰

The international refugee and human rights lawyer, Alice Edwards, explains that gender and sex are differing concepts in that, '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.'⁸¹ Similarly, the author Heaven Crawley observes that:

The term 'gender'...refers to the social construction of power relations between women and men, and the implications of these relations for women's (and men's) identity, status, roles and responsibilities (in other words, the social organization of sexual difference). Gender is not static or innate but acquires socially and culturally constructed meaning because it is a primary way of signifying relations of power. Gender relations and gender differences are therefore historically, geographically and culturally specific, so that what it is to be a 'woman' or 'man' varies through space and over time. Any analysis of the way in which gender (as opposed to biological sex) shapes the experiences of asylum-seeking women must therefore contextualize those experiences.⁸²

In order to clarify the terms: gender-related persecution concerns persecution experienced by women by virtue of them being women whereas, gender-specific persecution refers to acts which can only be carried out on women, that is, types of harm which are specific to women.⁸³ Such acts can result in an invasion of the physical and mental integrity of the woman causing great physical and psychological

⁸⁰ Woman displaced within the Russian Federation, Commission on Human Rights, 'Report of the Special Rapporteur on violence against women its causes and consequences, Yakin Erturk, Mission to the Russian Federation', E/CN. 4/2006/61/Add.2 26 January 2006, para. 58

⁸¹ Edwards, 'Age and Gender Dimension', 48

⁸² Crawley, 'Refugee and Gender: Law and Process', 2001, Jordans, Bristol, see in Feller, E. *et al* (Ed.), *Refugee Protection in International Law, UNHCR's Global Consultations on International Protection*, 2003, Cambridge University Press, p. 323

⁸³ Haines, 'Gender-related persecution', 327

harm over and above severe isolation of the woman by the community.⁸⁴ The UNHCR's 'Guidelines on Gender-Related Persecution' 2002 state that gender can 'influence, or dictate, the type of persecution of harm suffered and the reasons for this treatment.'⁸⁵ Gender-based persecution can take many forms namely, bride burning,⁸⁶ domestic abuse, female genital mutilation, forced sterilisation, morality codes, rape and sexual slavery to name but a few.⁸⁷ Women are often targeted in order to punish the dissident views of their fathers, brothers and spouses. This course of action was prevalent in Latin America in the 1970's and 1980's and is now considered to amount to persecution on the basis of political opinion.⁸⁸ Gender-based violence, honour killings and so forth are not confined to Islamic countries, as is often the misconception, but are also common practice in Colombia and Brazil⁸⁹ and other countries throughout the world.

Human Rights Watch states that domestic abuse is the principal cause of female injuries in practically every country in the world, yet most treat it with a degree of apathy.⁹⁰ In his article, "Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins", Gregory Kelson⁹¹ details some chilling facts: It has been estimated by the F.B.I. that a woman in the US is beaten every eighteen seconds. In Peru, women being beaten by their partners forms seventy percent of all incidents reported to police. In Japan, the second most common cause of divorce is wife beating. Until 1980, a husband was permitted to murder his wife for

⁸⁴ Edwards, 'Age and Gender Dimensions', 61

⁸⁵ para. 6

⁸⁶ Kelley, Presentation, International Conference

⁸⁷ Kelson, Gregory A., 'Gender-Based Persecution and Political Asylum: The International Debate for Equality Begins', <http://www.law-lib.utoronto.ca/Diana/fulltext/kels.htm> (henceforth Kelson, 'Gender-Based Persecution and Political Asylum')

⁸⁸ Kelley, Presentation, International Conference

⁸⁹ Kelson, 'Gender-Based Persecution and Political Asylum'

⁹⁰ Kelley, Presentation, International Conference

⁹¹ *Ibid.*

adultery in Colombia. In Brazil, until 1991, wife killings were considered to be non criminal 'honour killings'. Such facts dispel the fallacy that honour killings, domestic abuse and female subordination in general are more common or mainly aligned to the Muslim world.

Rape is one of the most conflict-ridden areas of law as it is often viewed as a personal act and detached from political persecution. However, it has been averred that, worldwide, rape is used to interrogate, torture and intimidate women on a large-scale as was the case with the mass rape that occurred in Bosnia.⁹² In the past, rape has been epitomized as an 'act of lust' and not a form of persecution within the meaning of the Convention. Similarly, female genital mutilation has been classified as a cultural practice and wife beating as a private act resigned to the domestic field, neither regarded as representing persecution in an international context.⁹³

These perceptions have changed in recent times and it has been identified that 'the potential individual rapist may also be driven by personal lust does not diminish the persecutory quality of the act ...any more than the traditional State-directed torture loses these qualities whenever the individual officer takes a sadistic personal pleasure in the process of inflicting pain.'⁹⁴ Therefore, in the absence of State protection, a woman may seek asylum on this basis if she satisfies the Convention grounds.

Weeding out actions such as domestic abuse and rape greatly depends on the authorities being able to provide an effective remedy however, it often rests on the

⁹² Kelson, 'Gender-Based Persecution and Political Asylum'

⁹³ Kelley, Presentation, International Conference

⁹⁴ Martin, D., 'Gender Cases: Doubts and Questions', Conference of the International Association of Refugee Law Judges, Bern, Switzerland, 26 Oct. 2000., Kelley, Presentation, International Conference

woman's ability to speak out and report the incidents. Women generally do not speak out about the persecution they have endured, regardless of location or culture, instead they suffer in silence to avoid social isolation and condemnation.⁹⁵

Morality codes are used to control the conduct of certain groups of women and encompass prohibitions against certain dress, right to divorce and such like. A good example would be that of Iran following the revolution of 1979 when Ayatollah Ruhollah Khomeini re-enacted obsolete laws and proceeded to strictly enforce them. The Iranian people, who had enjoyed equal rights, suddenly found that polygamy was again accepted, the marriage age was lowered to nine years old for girls, women no longer had the right to divorce their husbands and strict Islamic dress was to be observed at all times.⁹⁶ It has been recognised⁹⁷ that those who seek asylum on the basis of non adherence to the religious codes of their societies do not appear to be offered protection as promptly as those who have endured other forms of persecution: such codes are considered to be more discriminatory rather than persecutory thus, not falling within the grounds contained within the Convention.⁹⁸ However, more recently, such claims have been considered to fall under the category of social and political persecution as religious codes are seen to breach the right of freedom of religion as documented under article 18 of the Universal Declaration of Human Rights.⁹⁹

This area also deals with women who go against the grain of their societies and who transgress the social mores of society. Transgression of the social mores of society has

⁹⁵ Kelson, 'Gender-Based Persecution and Political Asylum'

⁹⁶ *Ibid.*

⁹⁷ Kelley, Presentation, International Conference

⁹⁸ *Ibid.*

⁹⁹ UDHR, 1948

been a common claim. For example, women in Islamic States who refuse to wear the veil and suffer disproportionate punishments could have a claim based on the grounds of religion and dissenting political opinion.

Gender-based persecution is a phrase which is increasingly cropping up in legal texts. Although not entirely accepted or universally accepted as a ground for refugee status, recognition is growing and there is a mounting need to consider the issues and determine its relevance in Refugee Law. 'Gender alone does not constitute a social group and is not sufficient to establish asylum status.'¹⁰⁰

There are two legal schools of thought on this area. The first school of thought, supports the notion that women constitute 'a particular social group'. The Summary Conclusions at San Remo reflect the same sentiment: 'sex can properly be within the ambit of social group category, with women being a clear subset defined by innate and immutable characteristics, and who are frequently treated differently from men.'¹⁰¹ The second school of thought pertains to the idea that some jurisdictions reject the idea that women represent 'a particular social group' at all, without taking the time to understand that women in isolation would not constitute 'a particular social group' unless they also satisfied the prerequisites of one of the five grounds. It has also been argued by those who do not support gender claims that the 'particular social group' ground cannot simply be used as a 'safety net' to catch all claims which do not fit adequately into the Convention's definition and grounds.¹⁰² Many have

¹⁰⁰ Yule, Kim, CRS Report for Congress, 'Asylum Law and Female Genital Mutilation: Recent Developments', Order Code RS22810, February 15, 2008 (henceforth Yule, CRS Report for Congress, 'Asylum Law')

¹⁰¹ Global Consultations, 'Summary Conclusions- Gender-Related Persecution', San Remo expert roundtable, 6-8 Sept. 2001, para. 5, see also Edwards, 'Age and Gender Dimensions', 70

¹⁰² Edwards, 'Age and Gender Dimensions', 70

argued that cataloguing women as a 'social group' is, in effect, indulging in an overly extensive interpretation of the Convention. Consequently, it broadens States' responsibilities¹⁰³ under the Convention and, predictably, many States are reluctant to support the claim. Many fear that the classification is too broad and will open the flood gates to receive an influx of women. Others, who live in societies where women are severely subordinate to men, argue that such a categorisation of women is the enforcement of Western ideals on sovereign States with differing cultural, social and religious practices to the West.¹⁰⁴

Moreover, the floodgates argument and the contention that women cannot form a social group on account of the size and potential unquantifiable claims was rebutted by the UNHCR which states in its Guidelines that the refusal to recognize women as forming a social group merely due to the size of the group has 'no basis in fact or reason, as the other grounds are not bound by this question of size'.¹⁰⁵

The 1951 Convention is silent on the subject of gender and it is not included in the stipulated grounds for attaining Convention refugee status. 'Many advocacy organisations are expressing concern that its [1951 Convention] scope is too narrow as its provisions do not sufficiently cover other categories of persons who need international protection.'¹⁰⁶ However, recently the legal realm is responding to the

¹⁰³ Kelley, Presentation, International Conference

¹⁰⁴ *Ibid.*

¹⁰⁵ UNHCR 'Guidelines on Membership of a Particular Social Group', 2002, paras. 18, 19, UNHCR, 'Guidelines on Gender-Related Persecution' 2002, para. 31, see also, Edwards, 'Age and Gender Dimensions', 70

¹⁰⁶ Gonzaga, J. A., 'The Role of the United Nations High Commissioner for Refugees and the Refugee Definition' in Kneebone, *The Refugees Convention 50 Years On*, 232 (henceforth Gonzaga, 'The Role of the UNHCR')

idea that women or, at least, a sub category of women may constitute a particular social group.¹⁰⁷

There is some debate surrounding the idea that gender is an adequate distinguishing aspect in relation to the 1951 Convention. The controversy lies with whether a woman who is the victim of gender-based abuse and violence can be considered to be a victim of persecution as a result of membership of that particular group.¹⁰⁸ This reinforces the need for a causal link; the persecution must be a direct result of membership to a particular social group.

The Executive Committee of the UNHCR released a statement affirming 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' within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.'¹⁰⁹

Women's rights have developed extensively under the auspices of the United Nations since the 1970's. Non-discrimination on the basis of sex is a well recognised principle under International Law.¹¹⁰ Increasingly, claims are being made by women fleeing female genital mutilation and domestic abuse;¹¹¹ the difficulty with such claims is that they are perceived as not being linked to a State.¹¹² Violence against women is considered by many to be an act carried out in a private capacity. Nevertheless, the

¹⁰⁷ Wallace, *International Human Rights*, 268

¹⁰⁸ Goodwin-Gill, *The Refugee in International Law*, 83

¹⁰⁹ UNHCR ExCOM Conclusion No. 39 (XXXVI) 1985

¹¹⁰ Goodwin-Gill, *The Refugee in International Law*, 81

¹¹¹ *Ibid.*, 81

¹¹² *Ibid.*, 81

Declaration on the Elimination of Violence against Women states that it is prohibited regardless of whether it takes place in public or private.¹¹³

Persecution by Non-State Agents

The 1951 Convention does not define persecution and does not stipulate the source from which it should emanate. As yet, there is no established definition or exclusive types of persecution however, it is accepted that it is not necessary that the State is the perpetrator of said persecution. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status 1992 asserts that although persecution is normally commissioned by authorities of a State, it may also be carried out by other sectors of the population providing that the authorities are; aware of the persecution; it is tolerated by the authorities; and the authorities refuse or are unable to provide an effective remedy.¹¹⁴ The UNHCR Guidelines call for a causal link between either the risk of persecution at the hands of a non-State actor relating to one of the Convention grounds or a risk of being persecuted by a non-State actor unrelated to one of the Convention grounds where the State is unable or unwilling to offer protection for reasons of a Convention ground.¹¹⁵ Examples of persecution by non-State actors can include acts of people trafficking, sexual slavery, enforced prostitution, domestic violence and female genital mutilation.¹¹⁶

¹¹³ UN Declaration on the Elimination of Violence against Women UNGA res. 48/104, 20 Dec 1993

¹¹⁴ UNHCR Handbook on Procedures and Criteria for Determining Refugee Status 1992, para. 65

¹¹⁵ UNHCR, 'Guidelines on Gender-Related Persecution 2002, para. 21 & para. 6

¹¹⁶ *Ibid.*

As pointed out by Alice Edwards in the article 'Age and gender dimensions in international refugee law',¹¹⁷ there is a discrepancy in the law of a number of jurisdictions: common law jurisdictions seem to accept that non-State agents can be perpetrators of persecution, while civil law jurisdictions still require a certain level of State input. Overall, there is a tendency to accept that non-State actors constitute perpetrators of persecution where the State is unable or unwilling to provide an effective remedy.

In the *Horvath*¹¹⁸ case, the House of Lords held that, the failure of the State to provide protection was 'the bridge between persecution by the State and persecution by non-State agents which is necessary in the interests of consistency of the whole scheme.' The *Shah and Islam* case¹¹⁹ also dealt with non-State actors as the perpetrators of persecution. The case involved two Pakistani women who were at risk of death by stoning as a consequence of false accusations of adultery. Lord Hoffman, having identified the threat and the fact that it was a personal affair, held that there was an unwillingness on the part of the State to protect them because of their gender and that they were denied the protection that would, ordinarily, have been afforded to men. Thus, it was held to constitute persecution for the purposes of the Convention. This slant was adopted in order to prevent discrimination against women who have been subjected to indirect forms of persecution by the State.¹²⁰

¹¹⁷ Edwards, 'Age and Gender Dimensions', 61

¹¹⁸ *Horvath* case n. 75 [2001] 1 AC 489 at pp. 497-8

¹¹⁹ *R v Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah, and Islam v. Secretary of State for the Home Department*, conjoined appeals, [1999] 2 WLR 1015; [1999] INLR 144; [1999] 2 AC 629

¹²⁰ Edwards, 'Age and Gender Dimensions', 63

International Legal Instruments & Human Rights

The 1993 Declaration on the Elimination of Violence against Women affirms that violence is 'any act of gender-based violence...whether occurring in public or private.' Sadly, this only forms soft law and is not legally binding however, it is a positive step forward.

The Universal Declaration of Human Rights encapsulates rights which may be invoked in support of women's asylum claims. Article 3 provides that everyone possesses the right to life, liberty and the security of person. Article 4 deals with the prohibition of slavery in all its forms while, article 5 prohibits the use of torture, cruel or inhuman treatment. Article 7 states that 'all are equal before the law and are entitled without any discrimination to equal protection of the law'. On a similar note, article 8 asserts that 'everyone has the right to an effective remedy by the competent national tribunals'. Lastly, article 18 imparts the right of freedom of thought, conscience and religion for all. This section has only scratched the surface of existing legislation that concerns women as the scope of this paper is not extensive enough to fully list and discuss every legal instrument relating to this issue in great detail.

According to some, the Convention's silence on the issue of sex and gender signifies that women must therefore subsist out-with the scope of the Convention. However, the Convention was intended to be non-discriminatory and provide surrogate protection for all who are not protected by their country of origin. Yet, it seems that the 1951 Convention and its subsequent Protocol only apply to a select few. It has been inferred that the existence of women on the periphery of the Refugee

Convention is reflective of society as a whole where women are often sidelined.¹²¹

Alice Edwards discusses that the success of asylum claims often depends on gender stereotypes and the accepted and understood roles of women. It has been recognised that, although the law is gender neutral it is, in reality, our perceptions of the roles of women in society opposed to men, which has caused these divisions in the interpretation and application of the law.¹²²

Claim For Asylum

Increasingly, States are recognising that gender is a significant factor in asylum claims. The UK and Canada have both published guidelines on refugee and gender matters. Canada was the first State to recognise claims for asylum on the basis of gender-based persecution following guidelines produced by the Chair of Canada's Immigration and Refugee Board in 1993.¹²³ Under its 1991 guidelines the Canadian law has essentially created a sixth category for claiming asylum.¹²⁴ The US published 'Considerations For Asylum Officers Adjudicating Asylum Claims From Women' two years later while, Germany, although, has not gone as far as the US or Canada does prohibit the *refoulement* of those who would face gender-related persecution on their return.¹²⁵ Ever since, Ireland, Panama, South Africa and Venezuela have all specifically included gender, sex and sexual orientation as grounds for claiming asylum in their respective jurisdictions.¹²⁶

¹²¹ *Ibid.*, 48

¹²² *Ibid.*, 48

¹²³ Kelson, 'Gender-Based Persecution and Political Asylum'

¹²⁴ *Ibid.*

¹²⁵ Section 60 Immigration Law, June 2002 see also, Edwards, 'Age and Gender Dimensions', 56

¹²⁶ Section 1, Irish Refugee Act 1996, Article 5 Panamanian Executive Decree No, 23, 10 Feb 1998, South African Refugee Act 1998, Article 5 the National Assembly of Venezuela Decree, 3 Oct 2001 see also Edwards, 'Age and Gender Dimensions', 56

In order for a claim to succeed in relation to gender-based violence, one must demonstrate that the claim is founded on a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion.¹²⁷ This claim may be successful where the government of the country of origin was unable or unwilling to provide a remedy for a breach, that is to say, to terminate the violence and punish the perpetrator. The State must be unable or unwilling to provide an effective remedy which may be tantamount to persecution.¹²⁸

The UNHCR Guidelines explicitly promote the acknowledgement of gender-based persecution. It declares that gender-based persecution may be a factor 'where the government cannot or will not protect women who are subject to abuse for disobeying social standards. The government need not itself have been the instigator of the abuse.'¹²⁹ Goodwin-Gill¹³⁰ and McAdam¹³¹ observe that:

The conditions and the occasion may as much be the responsibility of the State, as the failure to provide an effective remedy. For women suffer particular forms of persecution as *women*, and not just or specifically because of political opinion or ethnicity. Even though men too may be sexually abused, their gender is not a consideration. Women may be raped because of their politics, but they are also raped because they are women and because rape inflicts a particular indignity and promotes a particular structure of male power.¹³²

Should women as a social group be further categorised? Can all women reasonably belong to the group for the purposes of the 1951 Convention? Or should gender form

¹²⁷ UNHCR ExCOM Conclusion No, 73 (XLIV) 1993 (Refugee Protection and Sexual Violence)

¹²⁸ Goodwin-Gill, *The Refugee in International Law*, 83

¹²⁹ UNHCR Guidelines 1991, p. 41

¹³⁰ Previous Legal Advisor UNHCR, Professor of International Refugee Law, University of Oxford.

¹³¹ Director of International Law University of New South Wales.

¹³² Goodwin-Gill, *The Refugee in International Law*, 83

an official Convention ground for claiming asylum?¹³³ For example, what would be the status of women pertaining to a particular culture where violence against women is generally accepted as the norm and widely practiced? In the *Islam* case it was averred that the appellants could be distinguished from the rest of society by way of three characteristics: 'gender, suspicion of adultery, and unprotected status.'¹³⁴

In the case of *Parastoo Fatin*¹³⁵ of Iran, which concerned morality codes, it was held that all Iranian women are subject to the same laws and therefore if the applicant adheres to the laws she should not be a risk from persecution. However, as noted by Gregory Kelson¹³⁶ these laws are persecutory in their very essence and the U.S. Board of Immigration and Asylum should not have invoked such a flimsy argument as it demonstrated a disregard on the part of the US immigration authorities for international human rights treaties such as the Universal Declaration of Human Rights.

In the case of a regulation which is brought into force by a non-democracy and is persecutory towards women, the woman cannot reasonably be expected to adhere to codes which deprive her of her rights under the Universal Declaration of Human Rights. In the *Ting Ting Cheung* case, the Canadian court held that, 'there is a point at which cruel treatment becomes persecution regardless of whether it is sanctioned by law.'¹³⁷ Canada's Immigration and Refugee Board considered *Ms Cheung* to be a member of the group of Chinese women who have more than one child and face

¹³³ *Ibid.*, 83

¹³⁴ *Islam v Secretary of State for the Home Department* [1999] 2 AC 629, Goodwin-Gill, *The Refugee in International Law*, 83

¹³⁵ *Fatin v Immigration & Naturalization Serv.* 12 F. 3d 1233, 1235 (3rd Circ. 1993)

¹³⁶ Kelson, 'Gender-Based Persecution and Political Asylum'

¹³⁷ *Cheung v Canada* [1993] 102 DLR (4th) 214, 216 (Fed. Ct. App.), Kelson, 'Gender-Based Persecution and Political Asylum'

forced sterilisation and the IRB granted her refugee status as a result. The difficult issue is that women must prove that they are being persecuted and not merely prosecuted for a violation of their national law. It must be recognized that there are laws which are inherently persecutory.

Given that gender is not an expressed ground under the 1951 Convention it is very difficult for women to be successful in asylum claims. The Guidelines aim to deal with the problems that women claiming asylum may face and it prescribes improvements and acknowledges that women, faced with violence and no effective remedy or protection from their national state, should seek and receive asylum.¹³⁸ The UNHCR Handbook requires adjudicators to take into account the circumstances of each case and consider the subjective element of fear carefully; the Handbook implies that the five stipulated grounds as enumerated in the 1951 Convention should not be considered to be absolute.¹³⁹

Procedural Obstacles

The UNHCR Guidelines express that women have certain needs that stem directly from their gender and that certain procedural safeguards must be guaranteed.¹⁴⁰ A myriad of obstacles face women who make asylum claims on the basis on gender-based persecution. A common impediment in female asylum claims is a reluctance on the part of the persecuted woman to speak out as she is in fear of further beatings at the hands of her abuser or in fear of dishonouring her family by not standing by her

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ Guidelines on the Protection of Refugee Women (hereinafter UNHCR Guidelines), Geneva, 1991, Kelson, 'Gender-Based Persecution and Political Asylum'

husband and accepting the abuse. Women are often ashamed by their experiences and the acts they have been subjected to and are therefore unable to or too humiliated to discuss them in detail. Societal, cultural and religious pressures are such that women who have personally endured, or who have witnessed their children enduring, numerous beatings, rapes and near death experiences at the hands of their husbands and fathers often still refuse to leave their husbands when offered help, shelter and refuge. The few who somehow muster the strength to do so are often then subjected to interrogation, scrutiny, detention and further trauma by immigration authorities.

Great challenges lay ahead in this sphere. Primarily, there is a lack of cultural understanding, sensitivity and empathy amongst those dealing with asylum claims. The entire asylum system is not well-equipped to deal with such claims. As pointed out by the author Gregory Kelson, the asylum process is not a user friendly system, women are often interrogated by men about their experiences and often the men view gender-based persecution as a private act instead of acknowledging that it is a grave common occurrence of great social consequence and severity.¹⁴¹

Women who originate from societies where it is forbidden to show any emotion in public or to speak with males who do not form part of their immediate family will undoubtedly find it unbearable to talk of their degrading experiences with male adjudicators. Female asylum seekers have gender-specific needs and asylum systems should try, as far as possible, to show sensitivity towards those needs such as, providing female interviewers, employ fully trained and culturally aware staff.

¹⁴¹ *Ibid.*

In line with the aforementioned, gender-based persecution and violence is a social phenomenon which further precipitates subordinate roles for women and should not be ignored. Henceforth, my intention is to pursue the claim that women who are personally at risk of, or their children are at risk of, forcibly enduring the practice of female genital mutilation constitute 'a particular social group' for the purposes of the 1951 Convention and should be entitled to refugee protection.

V

Female Genital Mutilation

The Facts

Female genital mutilation (FGM) is an endemic custom which is practiced in many areas of the world. It involves the partial or complete removal of the female genitalia. Female genital mutilation is a life threatening practice causing excruciating pain and agonizing complications for women in childbirth and sexual intercourse and even in terms of everyday motions such as urination and menstruation. It is a traditional procedure, first recorded in the fifth century B.C.¹⁴², which is firmly anchored in the cultural heritage of many communities and serves to enhance the social status of a woman.¹⁴³ Common misconceptions are that the practice pertains mainly to African and Muslim cultures, insofar as those are the regions it is prevalent in nowadays. However, FGM was common practice in Western Europe and North American until the late 19th Century where it was used to 'cure' ailments such as hysteria, insanity,

¹⁴² Recorded by ancient Greek historian, Herodotus, IRIN, 'In Depth: Razor's Edge- The Controversy of Female Genital Mutilation', March 2005 (henceforth IRIN, March 2005)

¹⁴³ Powell, Richard A., et al, 'Female genital mutilation, asylum seekers and refugees: the need for an integrated UK policy agenda', www.fmreview.org/FMRpdfs/FMR14/fmr14.14.pdf, (henceforth Powell, 'Female Genital Mutilation')

epilepsy, lesbianism, and masturbation.¹⁴⁴ There have also been reports of occurrences amongst upper Amazonian tribes and the Arunta tribe in Australia.¹⁴⁵

In contemporary times, prevalence rates have been as high as 98% in some African countries. The custom is mainly practiced in Egypt and Sub-Saharan Africa however, it is also known to occur amongst various ethnic groups throughout the world including: Ethiopian Jews, Bedouin women in Israel and groups in Indonesia, India, Malaysia, the Philippines and Yemen.¹⁴⁶ FGM has now stretched beyond the 28 African countries in which it was originally practiced as a result of migration¹⁴⁷, and is now practiced amongst immigrant communities in Australia, Canada, USA, Europe and the UK. The charity FORWARD¹⁴⁸ has estimated that up to 6,500 girls are at risk every year in the UK.¹⁴⁹

Female genital mutilation is an umbrella term assigned to a number of procedures. Type I FGM involves the removal of the prepuce of the clitoris and the procedure is known as excision.¹⁵⁰ The second procedure, Type II, is essentially a clitoridectomy together with the removal of the *labia minora*.¹⁵¹ The third procedure is infibulation: the removal of the clitoris, the *labia minora* and the *labia majora*.¹⁵² Following this procedure, the woman is then stitched up leaving only a miniscule space the size of a

¹⁴⁴ National Board of Health & Welfare (Sweden), 'Female genital Mutilation', Socialstyrelsen, Article Number 2003-114-9, Australian Diversity Health Institute, 'Where is FGM Practiced?' <http://www.dhi.gov.au/fgm/faqs.htm>

¹⁴⁵ IRIN, March 2005

¹⁴⁶ FORWARD, 'Definitions and Terms for Female Genital Mutilation', 2006 <http://www.forwarduk.org.uk/key-issues/fgm/defintions> (henceforth 'Definitions', 2006)

¹⁴⁷ Powell, 'Female genital mutilation'

¹⁴⁸ The Foundation for Women's Health, Research & Development

¹⁴⁹ FORWARD, 'Definitions', 2006

¹⁵⁰ Kelson, 'Gender-Based Persecution and Political Asylum'

¹⁵¹ *Ibid.*

¹⁵² *Ibid.*

match stick head through which to pass urine and menstruate. Each time sexual intercourse or childbirth takes place the women must be slit open and then re-stitched afterwards. Type III FGM is most commonly practiced in Somalia, Djibouti and Sudan, although it also takes place in parts of Egypt, Ethiopia, Kenya, Mali, Mauritania, Niger, Nigeria and Senegal.¹⁵³ More recently a fourth type of FGM has surfaced but has yet to be classified although, it has been reported to involve burning of the clitoris, incisions in the wall of the vagina, the introduction of herbs and acids to the vagina to tighten the walls as well as infibulation.¹⁵⁴ It should be stressed that the practice has no medical purpose, significance or benefits in any of its forms.¹⁵⁵ It has been held that the male equivalent to genital mutilation would be a partial to significant amputation of the penis.¹⁵⁶

The age at which the practice is carried out varies greatly from newborn to before marriage, although occurrences have been reported during the first pregnancy and involving widows.¹⁵⁷ FGM has a profound and traumatic result on women causing irreparable damage. Many have expressed their condemnation of the cultural practice. It leaves the female with psychological and physical scars and trauma and triggers a number of immediate consequences namely: excruciating pain; shock; trauma; haemorrhage; urine retention, injury to adjacent tissue and death. Long-term consequences include cysts, dyspareunia (painful sexual intercourse); sexual dysfunction; childbirth difficulties, recurring urinary tract infections; urinary incontinence, fistulae; anxiety and depression.

¹⁵³ FORWARD 2005, "Female Genital Mutilation: Human Rights and Cultural Relativity", <http://www.forwarduk.org.uk> (henceforth FORWARD 'Human Rights' 2005)

¹⁵⁴ FORWARD, 'Definitions', 2006

¹⁵⁵ WHO, 'Female Genital Mutilation', May 2008
<http://www.who.int/mediacentre/factsheets/fs241/en/>

¹⁵⁶ FORWARD 'Human Rights' 2005

¹⁵⁷ *Ibid.*

Fistulae are a very common result of FGM. There are two types: vesicovaginal fistula (VVF) is the term given to describe the holes between the vaginal wall and the bladder and rectovaginal fistula (RVF) are holes between the vaginal wall and rectum.¹⁵⁸ The condition is normally a result of obstructed labour in consequence of type III or IV FGM as the vaginal wall is incised: this coupled with child marriage and early pregnancy makes for devastating consequences.¹⁵⁹ Fistulae are combated in the West by means of caesarian section.¹⁶⁰ In Nigeria, for example, where early marriage is common, a 'gishiri' cut is made by a traditional birth attendant with an unsterilised sharp object. The cut is made in the anterior vaginal wall however if cut too deep a hole is created between the vagina and bladder resulting in VVF.¹⁶¹ The immediate physical impact of fistulae is urinary and faecal incontinence and sometimes paralysis of the lower body.¹⁶² It often results in still birth, which is detrimental to the woman's future in cultures where childbirth is of great value.¹⁶³ The woman will often remain childless and incontinent and it is therefore likely that her husband will forsake her, which leaves the woman in a state of destitution as she would have been financially dependent on her husband.¹⁶⁴ However, many women maintain that the social repercussions of not undergoing FGM outweigh the physical torture.

Psychosexual, hygiene, aesthetic and social rationalisations are used to justify FGM.

The reasons and rationale for FGM are copious: it carries with it better marriage

¹⁵⁸ FORWARD 'Fistula', <http://www.forwarduk.org.uk/key-issues/fistula>

¹⁵⁹ *Ibid.*

¹⁶⁰ *Ibid.*

¹⁶¹ *Ibid.*

¹⁶² *Ibid.*

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*

prospects, it is more hygienic, it forms the rite of passage into womanhood, it is a religious requirement, it prevents promiscuity, it augments male sexual pleasure, and increases fertility. Depending on the region, particular reasons are given more emphasis than others for example, in some areas FGM exists merely as a rite of passage, whereas in other regions more significance is placed on the preservation of chastity and prevention of promiscuity.¹⁶⁵ Many regard FGM to be a traditional practice which safeguards a young girl's virtue. It generates respect for a female: one must be cut to be considered a respected member of the community. It is intended to curtail a female's sexual feelings so that she will not be overcome with lust: it refines and purifies a female's sexual appetite which, in turn, reduces sexual appetite and in doing so it reduces the possibility of adultery therefore, inhibiting female promiscuity. It is a means through which female sexuality is controlled, limited and diminished while simultaneously increasing male sexual desire. It also serves as a rite of passage into womanhood; initiates girls into womanhood and allows them to identify with their cultural heritage. Furthermore, the female orgasm is believed to kill sperm therefore, FGM is alleged to increase fertility by desexualizing the woman.¹⁶⁶ Additionally, the clitoris is considered to be a remnant of masculinity, dirty and unsightly; only when it has been removed will the girl become a woman.¹⁶⁷ This is a practice which predates Islam, Christianity and even Judaism and therefore cannot be attributed to religion. In societies where prevalence rates of FGM are high it is unlikely that a female will be considered for marriage without having undergone FGM. Post FGM women do not have an sexual desires or have sensitivity towards sexual relations although, in some cases a few of the clitoral nerves remain intact and

¹⁶⁵ FORWARD, 'Human Rights' 2005

¹⁶⁶ National Board of Health & Welfare (Sweden), 'Female genital Mutilation', Socialstyrelsen, Article Number 2003-114-9

¹⁶⁷ *Ibid.*

have some feeling left, although they are often buried under thick scar tissue. Alas, it frequently results in the permanent loss of *any* sensation in the genital area and the loss of all sexual feelings.¹⁶⁸

To ensure that the custom is adhered to and carried out there are measures in place that communities invoke to compel someone to undergo FGM. For instance, unexcised women may be rejected as unfit for marriage; a man may divorce an un-excised woman, curses are administered, derogatory songs are sung, with the most extreme being public forced excision. Conversely, those who undergo FGM are treated to gifts and a full day of celebrations followed by respect and empowerment within their communities.¹⁶⁹

The charity Foundation for Women's Health, Research and Development (FORWARD) affirmed that in 2001 alone between 100 and 140 million women and girls were subjected to FGM in one of its four forms:¹⁷⁰ three million of which are at risk of FGM on a daily basis. It is a practice which is deeply rooted in the heart of many communities spanning the entire globe and cannot be tackled simply by bringing legislation into force. The practice has existed for thousands of years and therefore, people's views and desire to continue the practice will not fade overnight. Some argue that the practice will happen regardless of it being outlawed and therefore it would be safer to allow trained professionals to carry out the procedure under sterile conditions using an anaesthetic. There is a concern that by allowing medical professionals to carry out the procedure this somehow legitimizes the practice of

¹⁶⁸ FORWARD "Can FGM be considered as grounds for asylum?" September 2006 <http://www.forwardsuk.org.uk/key-issues/fgm/fgm-asylum> (henceforth FORWARD, 'grounds for asylum')

¹⁶⁹ FORWARD 'Human Rights' 2005

¹⁷⁰ *Ibid.*

FGM, hence perpetuating the custom. Eradication of the practice will require education campaigns on a colossal scale as well as severe penalties for those perpetrating the practice. Anti-FGM activists are aware that traditions are not easily abandoned: widespread educational campaigns would have to be launched and financial support provided for the women fleeing the practice. It is a daunting and overwhelming task for any government especially in countries where FGM has a 95% or more prevalence rate. Many agree that education is the way forward and that a good education will protect a girl's virtue more than cutting off part of her body. FGM is an act of female subordination and men's colonization of women. Often, some have their entire genitalia removed.

The process causes permanent physical disfigurement as well as psychological damage which give weight to the argument that it does in fact constitute a form of torture and can no longer merely be accepted and condoned as a cultural practice. The counterargument is that FGM is also regarded as a rite of passage into adulthood and a means of social inclusion for women. It is a practice which is detrimental to a woman's life and her ability to reproduce. Such contretemps make it very challenging in trying to pigeonhole the practice for the purpose of asylum claims.

FGM, Human Rights & International Legal Instruments

Primarily, female genital mutilation may be regarded as an infringement of a woman's right to mental and physical integrity. The UNHCR has declared that 'FGM has been acknowledged as a form of human rights abuse, and a threat thereof or

forcible imposition can amount to persecution.'¹⁷¹ The UK Appellate Asylum Gender Guidelines (2000) stated that 'acts involving genital mutilation are infringements of the right to freedom from torture, inhumane and degrading treatment'.¹⁷² While the Home Office Asylum Directorate guidance to caseworkers affirmed in 1998 'Acts including genital mutilation when committed or sanctioned by officials would probably always constitute torture.'¹⁷³

Many believe that the procedure cannot continue to be tolerated by States and individuals alike even out of respect for plurality of cultures. It alters the individual's psycho-physical identity¹⁷⁴ and it impairs the individual in numerous respects. Such practices are 'premised on assumptions of inferiority or traditional stereotypes'.¹⁷⁵ It is largely accepted that the practice of FGM in any form constitutes a grave intrusion of the mental and physical integrity of the person.

Under article 5 of the Convention on the Elimination of All Forms of Discrimination Against Women¹⁷⁶ States are urged to take,

'all appropriate measures to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or superiority of either of the sexes or on stereotyped roles for men and women.'

¹⁷¹ UNHCR, 'Guidelines on Gender-Related Persecution' 2002

¹⁷² Save the Children UK, 'What is Female Genital Mutilation?', http://www.savethechildren.org.uk/caris/legal/srandi/sr_22.php

¹⁷³ Save the Children UK, 'What is Female Genital Mutilation?'

¹⁷⁴ Turillazzi, E & Fineschi, V., 'Female genital mutilation: the ethical impact of the new Italian law', 14/03/2006, <http://jme.bmj.com/cgi/content/full/33/2/98> (henceforth Turillazzi 'new Italian law')

¹⁷⁵ Haines, 'Gender-related persecution', 335

¹⁷⁶ Convention in the Elimination of All Forms of Discrimination Against Women, G.A. Resn. 34/180, 1979

This is quite clear in obligating States to implement measures to stamp out practices of the same calibre as FGM.

Another argument is that while, it is considered a horrific practice for anyone to undergo it is particularly horrendous for a child. The reasoning being that an adult, at least, may be in a position to freely consent to the practice or flee the country however, a young child who is forced to undergo FGM and have their sexuality stolen from them without their consent will also have to undergo the unnecessary suffering for the remainder of their lives. Thus, this is a serious breach of a number of provisions preserved in international documents that enumerate the rights of the child. Article 5 of the UDHR stipulates that no one will be subjected to torture, inhuman or degrading treatment.¹⁷⁷ The Convention on the Rights of the Child (CRC)¹⁷⁸ calls for gender equality under article 2 while article 19(1) of the said Convention prohibits all forms of mental and physical violence and maltreatment. Furthermore, article 24 (1) provides that children are entitled to the highest attainable standard of health. Finally, article 37(1) of the CRC requires States to take effective and appropriate measures to abolish traditional practices prejudicial to the health of children.¹⁷⁹

Current human rights legislation places an obligation upon States to outlaw such customs. However, in practice this would be very costly and time-consuming and would demand education campaigns on a regional, national and international scale and would also demand the implementation of enforcement policies which, all in all,

¹⁷⁷ UDHR 1948

¹⁷⁸ Convention on the Rights of the Child G.A. Res. 44/25, 20 November 1989 (henceforth CRC 1989)

¹⁷⁹ CRC 1989

would saddle developing countries with a further burden on their already scarce resources.

Cultural relativism is a term that describes the judging of cultures on their own terms: it enshrines the principle that we should not judge the cultural behaviour of others using the standards of our own culture. It may be submitted that the cultural relativist theory attempts to combat efforts to outlaw the practice of FGM however, FGM may be regarded as an act of violence against women and protection against such an act of violence under International Law would trump any cultural relativist argument. For how long can cultural arguments be used to mask human rights' violations especially in the case of a custom which causes grievous bodily harm and often death? Some view this contention as the West imposing its values on the rest of the world. The fact that some cultures and societies do not believe that FGM constitutes a breach of human rights is no longer accepted as a defence against the execution of such practices. Whether an act is considered to represent a breach of human rights must be gauged against the human rights accepted by the international community as a whole and not merely the perceptions of some select societies.¹⁸⁰ Quintessentially, human rights protecting people from violence and torture could be said to stem from the common heritage of mankind rather than exist in varying forms in different societies and cultures. Article 4 of the Declaration on the Elimination of Violence Against Women provides that States 'should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to [the] elimination of violence against women'.¹⁸¹ This clearly rebuts the cultural relativism argument.

¹⁸⁰ Haines, 'Gender-related persecution' 333

¹⁸¹ UN Declaration on the Elimination of Violence Against Women UNGA res. 48/104, 20 Dec 1993

Domestic Legislation Prohibiting FGM

African countries, amongst others, have passed laws prohibiting the practice of FGM yet, there is no clarity as to how they will implement and enforce such laws. The African Union recognises FGM as being illegal and constituting a form of human rights abuse.¹⁸² However, there are insufficient funds to educate hoards of people and to provide rehabilitation for countless victims. The momentum of the legal prohibitions is commendable but a great deal more must be done to put the prohibitions into practice. Having said that, the fact that legislation has been passed and the issue is becoming of greater international concern keeps the issue alive and signals the seriousness of the issue. Burkina Faso, has taken it a step further by introducing a hotline for people to call when they become aware of a circumcision taking place and this usually results in a police raid. Moreover, the policy has acted as a deterrent and it has been widely publicized in the media.¹⁸³

As highlighted by Dr Nahid Toubia of the charity RAINBO¹⁸⁴, bride price, which is, trading women in marriage is fundamental to the African economy. The African economy would collapse without bride price.¹⁸⁵ Therefore, as uncircumcised women are considered unfit for marriage, the banning of FGM has a knock on effect on the economy which must surely be an issue for African governments in contemplation of enforcement of laws prohibiting FGM.

¹⁸² 'Africa: End female genital mutilation- Africa Union'
16 June 2006

<http://www.irinnews.org/report.aspx?reportid=59355>

¹⁸³ IRIN, March 2005

¹⁸⁴ Research Action Information Network for the Bodily Integrity of Women

¹⁸⁵ Toubia, N., 'Female Circumcision as a Public Health Issue', 331 NEW ENG. J. OF MED. 712 (1994)

FGM was first outlawed in the UK by means of the Prohibition of Female Circumcision Act 1985 which was later superseded by the Female Genital Mutilation Act 2003 which now prohibits those resident in the UK from traveling abroad to carry out the practice. It is also illegal in Scotland under the Scottish Prohibition of Female Genital Mutilation Act 2005. The UK Act considers it an offence for an individual to carry out or aid and abet the practice either in the UK or abroad and imposes a maximum sentence of 14 years imprisonment.¹⁸⁶ Such legislation was desperately needed to combat, not only girls being sent abroad to be mutilated but situations where FGM experts are flown in from the countries of origin to execute the procedure.¹⁸⁷ In practice there are inadequate means for the elimination of FGM in the UK. Since the introduction of the legislation the practice has not subsided and it is estimated that up to 86,000 women in the UK have undergone FGM.¹⁸⁸ Although legislation has been in place for over 20 years and a large number of females undergo the procedure every year in the UK, there have yet to be any prosecutions brought in a UK court.¹⁸⁹

Italy brought legislation into force in 2006 in an attempt to stamp out FGM. As well as legislation prohibiting the practice, Italy has initiated informative campaigns, training of health workers, a helpline and international cooperation programmes.¹⁹⁰

FGM is rather widespread in Italy and a survey conducted in 1993 showed that 147 of 318 obstetricians and gynaecologists in the Padua region had treated women who had

¹⁸⁶ FORWARD 'grounds for asylum?'

¹⁸⁷ Turillazzi, 'new Italian law'

¹⁸⁸ Powell, 'Female genital mutilation'

¹⁸⁹ *Ibid.*

¹⁹⁰ Turillazzi, 'new Italian law'

been excised or infibulated.¹⁹¹ In Italy in 1999 a man was sentenced to two years imprisonment for subjecting his two children to FGM whilst on holiday and did so without their mother's consent.¹⁹² The European Parliament and Council have both condemned FGM¹⁹³ and 1984 saw the European Parliament recognise that women constituted a social group by adopting a resolution.¹⁹⁴ According to the author, Turillazzi, the main motivation for a law being promulgated by the European Parliament was due to financial reasons.¹⁹⁵

Much has been done with regards to eliminating FGM in theory nevertheless, a great deal remains to be done in practice. There is a need for increased education amongst medical and education professionals to detect FGM as well as a need for better enforcement measures to realise existing legislation.

Claim for Asylum

Increasingly, it is being recognised that FGM could give rise to women obtaining refugee status and may be regarded as persecution for the purposes of the 1951 Convention. Therefore, this section aims to deal with the practice and the legal reasoning that has been employed in the case law of a select few Western States which should facilitate the analysis of the claim that FGM, depending on the individual merits, may perpetuate refugee status. A claim may be successful where there is a) proof of persecution or a well-founded fear of persecution b) proof of one

¹⁹¹ Conducted by the Department of General Psychology, Univeristy of Padua, Padua, Italy, *Ibid.*

¹⁹² *Ibid.*

¹⁹³ *Ibid.*

¹⁹⁴ European Parliament Res 1247 (2001), Council Directive 2004/83/EC, Kelley, Presentation, International Conference

¹⁹⁵ Turillazzi, 'new Italian law'

of the Convention grounds namely, race, religion, nationality, membership of a particular social group or political opinion and c) proof that the well-founded fear of persecution is 'on account of' the applicant's membership in the protected class of individuals.¹⁹⁶ Further to this, it is submitted that an additional prerequisite should attach to the above criteria namely, d) the State must be unable or unwilling to provide an effective remedy.

Not surprisingly, there is a great deal of controversy surrounding the matter of whether FGM can and should constitute a ground for refugee status if the female has already undergone FGM, or whether an asylum application could be made if the person is fleeing from the threat of undergoing FGM? This skepticism is relevant mainly to type I and type II FGM, as type III and IV are ongoing, that is to say, the women has to be de-infibulated and re-infibulated each time sexual intercourse and childbirth occurs. Therefore, essentially, with type III and IV the persecution is relentless. Although, women can often suffer the consequences of type I and II on an unremitting basis. The UNHCR Guidelines declare that 'a woman may be considered a refugee if she or her daughters feel they are being compelled to undergo FGM against their will.'¹⁹⁷

Canada

Canada was the first member of the international community to recognise FGM as a form of persecution in the case of *Khadra Hassan Farah*.¹⁹⁸ In 1993 the IRB held that

¹⁹⁶Yule, CRS Report for Congress, 'Asylum Law'

¹⁹⁷ UNHCR, 'Guidelines on Gender-Related Persecution' 2002

¹⁹⁸*Khadra Hassan Farah, IRB Refugee Division (Toronto)* July 13, 1994 T93-12197 FORWARD 'Human Rights 2005'

if a child is forced to undergo FGM against her mother's will this indeed constitutes persecution of the mother herself.¹⁹⁹

France

Aminata Diop, a Malian woman applied for refugee status in France after fleeing Mali due to a threat of undergoing FGM. She was threatened by her fiancé and his family with undergoing the procedure with or without her consent. She pleaded that if she were to return to Mali she would be subjected to the procedure or, perhaps worse, the unyielding discrimination aimed at women who have not undergone the procedure. Ms Diop's application was rejected on three grounds: it was held that 'female circumcision is widely practiced, as a form of ritual, among certain ethnic groups making up the population of Mali'²⁰⁰. The court went on to say that the Malian government was in a position to offer her protection as the government's stance is that it does not support FGM when carried out against the woman's will. Lastly, the court held that Ms Diop's testimony was not credible as during the two months in which she prepared for her departure from Mali she did not attempt to seek the protection of the authorities.

United Kingdom

The UK charity FORWARD is the main anti-FGM group in the UK and campaigns for the rights of women to seek refugee status on this basis and raises awareness of the practice and the need for a more sensitive asylum system to be established in order to accommodate the needs of those who have been traumatized by their experiences.

¹⁹⁹ *Khandra Hassan Farah case*, Rice, Marcelle, "Protecting Parents: Why Mothers and Fathers who Oppose Female Genital Cutting Qualify for Asylum", Immigration Briefings, November 2004 (henceforth Rice, 'Protecting Parents')

²⁰⁰ *Aminata Diop Dossier 90-12-01134/AF1/SECAF3*. *Décision de Rejet*, Office Français de Protection des Réfugiés et Apatrides.

The 8th of December 2005 saw the issue of FGM, carried out under duress as grounds for asylum, discussed in the House of Lords.²⁰¹ In 2004, guidelines on gender were inserted into UK asylum policy. It encourages a sensitive approach towards female asylum seekers for example, by advocating that female applicants should be interviewed by women and not in front of their male relatives and children.

In the case of *M.H. & Others*²⁰² refugee status was granted on the basis of Article 3 ECHR, which, forbids torture, inhuman and degrading treatment. Although asylum was not granted on the basis of the 1951 Convention this ruling is highly significant as it demonstrates that harm will transpire to a parent who is unable to avert FGM being carried out on his or her daughter.²⁰³

The most significant UK case in this field to date is that of *Zainab Esther Fornah* who fled Sierra Leone in 2003 in fear of undergoing FGM. Ms *Fornah* fled her country of origin aged 15 following the killing of her family and her being repeatedly raped by soldiers. In the *Fornah* case the House of Lords considered what defines a social group and the applicant was deemed to belong to 'a particular social group'.²⁰⁴ In 2005 Ms *Fornah's* appeal was rejected on the basis that, although FGM is horrific to most, it *is* a traditional and cultural practice in Sierra Leone.²⁰⁵ In reference to the Immigration Appeal Tribunal's judgment, Lord Justice Auld was of the opinion that

²⁰¹ Baroness Rendell of Babergh, "FGM", 18 Oct 2005
http://www.publications.parliament.uk/pa/id200405/idsos/pdvn/idsos/text/s1208-28.htm#5128-28_unstar0, FORWARD 'Human Rights' 2005

²⁰² M.H. [2002] U.K. Immigration App. Trib. 02691, Rice, 'Protecting Parents'

²⁰³ Rice, 'Protecting Parents'

²⁰⁴ *Fornah v Secretary of State for the Home Department* [2006] UKHL 46

²⁰⁵ Lewis, Paul, 'Lords grant asylum to woman in fear of circumcision', The Guardian Thursday October 19, 2006, <http://www.guardian.co.uk/uk/2006/oct/19/lords.immigration.print> (henceforth Lewis, 'Lords grant asylum')

'the custom was so widespread in Sierra Leone and so bound up with its culture and traditions that it causes difficulties in claims for asylum by young girls who fear it.'²⁰⁶ Lady Justice Arden, however, allowed the appeal as she deemed girls who are in fear of FGM can be identified as one social group in Sierra Leone. She explained that, women who have undergone FGM and are accepted into society form one social group therefore, surely those who have not undergone the procedure and remain out-with the realms of societal acceptance must also constitute a social group.²⁰⁷ The 18th of October 2006 witnessed five law lords make a unanimous decision to grant asylum to 19 year old *Zainab Fornah*.²⁰⁸ Lady Hale of Richmond affirmed that women were 'just as worthy of the full protection of the refugee convention as are the men who flee persecution because of their dissident political views.'²⁰⁹ Lord Bingham declared that in Sierra Leone women are in 'a position of social inferiority as compared with men' and that female circumcision 'powerfully reinforces and expresses the inferior status of women as compared with men.'²¹⁰ This case was a landmark victory as it refutes, in their entirety, any defending arguments that female genital mutilation is merely a cultural and traditional practice and not worthy of international protection and sets a precedent for other UK cases.

U.S.

The reluctance to accept that women constitute a particular social group may be linked to the fear harboured by States that this would open the flood gates and in doing so would authorize and effectively approve the influx of a new group. This

²⁰⁶ 'Girl loses sexual mutilation case' BBC News, 09/06/2005

²⁰⁷ *Ibid.*

²⁰⁸ Lewis, 'Lords grant asylum'

²⁰⁹ *Ibid.*

²¹⁰ *Fornah* case, Lewis, 'Lords grant asylum'

argument was contested by the lawyer, Layli Miller Bashir in the case of the Togolese woman *Fauziya Kasinga*²¹¹ where she argued that in terms of people who are successful in the asylum claims, women are in the minority. She added that women who would potentially constitute a particular social group are women from developing countries who often do not have the financial means, resources and education to leave their own country and claim asylum abroad even if they so desired. She concluded that an influx would be highly unlikely even if women from a particular country or ethnic group *were* considered to embody 'a particular social group' and thus, she repudiated the 'floodgates' fear.²¹² The case of *Fauziya Kasinga* saw the US Board of Immigration Appeals overturning a previous decision and affirming that FGM could warrant refugee status under the US Immigration and Nationality Act. The only other case known to have succeeded on the basis of FGM in the US was that of *Abankwah v Immigration and Naturalization Service* in July 1999.²¹³ Despite these momentous rulings, US cases have since been inconsistent hence, the US cannot be deemed to be a State which accepts gender as grounds for asylum unequivocally or unconditionally.²¹⁴ Moreover, following the terrorist attacks of 11 September 2001 the US tightened its immigration controls therefore, the country's stance on gender related persecution remains uncertain.²¹⁵ Dan Stein, in his human rights brief²¹⁶, warned that including gender as a ground for asylum would serve to create the largest ever group of potential refugees.

²¹¹ *Fauziya Kasinga*, US Board of Immigration Appeals, File No. A73 476 695, 13 June 1996, member of the Tchamba-Kunsuntu tribe, fled Togo after being warned that she would be forced to undergo FGM.

²¹² FORWARD 'grounds for asylum'

²¹³ *Abankwah v Immigration and Naturalization Service* (US) 185 F. 3d. 18 1999

Parassram Concepcion, Natasha, 'Extending Asylum Eligibility to Include Gender-Related Persecution', Legislative Focus, <http://www.wcl.american.edu/hrbrief/v7i2/legislafocus.htm>

²¹⁴ *Ibid.*

²¹⁵ Interpreter Releases, May 13, 2002 http://www.cgrs.uchastings.edu/documents/media/ir_5_02.doc

²¹⁶ Executive Director, Federation for American Immigration Reform

As touched on previously, the scenario of a parent seeking asylum on account that he or she opposes FGM being carried out on his or her children must also be considered. The US case of *Abay v Ashcroft*²¹⁷ deals with this issue and acknowledges that FGM of a child can constitute persecution of the mother.²¹⁸ In such cases where, if the mother is deported the daughter will most definitely be subjected to FGM, courts have held that it forms either, 'derivative asylum' or actual persecution against the mother herself.²¹⁹ Although the mother would not personally be subjected to the practice on return to her home country, it is likely that she would be ostracized by her society and would be vulnerable to physical harm as a result of her resistance and defiance in the face of this ancient practice.²²⁰

Many claims in the US relating to FGM have been successful under the Convention Against Torture (CAT)²²¹ rather than in conjunction with the 1951 Convention. For example, a father applied for CAT protection on the grounds that his two daughters would be forced to undergo FGM and this, in turn, would constitute torture for the purposes of CAT.²²² CAT allows for protection to be sought on the basis of persecution and potential harm to a third person: article 1 states that 'the term torture means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession'.

²¹⁷ *Abay v Ashcroft* 368 F 3d. 634 (6th Cir. 2004)

²¹⁸ Rice, 'Protecting Parents'

²¹⁹ *Ibid.*

²²⁰ *Ibid.*

²²¹ Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1465 UNTS 85, 10 December 1984

²²² Matter of *Adeniji*, No. A 41 542 131 (oral decision) (US Dept. of Justice, Immigr. Ct., York, Penn., March, 10 1998) Rice, 'Protecting Parents'

In *Oforji v Ashcroft*²²³ the mother-daughter claim was rejected as the applicant's circumstances had changed and her evidence was held to be incredible and *Oforji* and her two daughters were forced to return to Nigeria despite the fact that her two daughters were US citizens.²²⁴

In *Abay*, FGM was held to represent severe physical harm constituting torture.²²⁵ For such cases the applicant must also demonstrate that such torture took place either under the auspices of a public official or was tolerated by the authorities.²²⁶ The CRS Report for Congress²²⁷ on FGM states that 'in order to successfully claim asylum based on FGM, the applicant must show, at a minimum, that she is 1) a female, 2) that belongs to a particular ethnic group, and 3) that ethnic group widely practices FGM.'²²⁸

The US BIA did condemn FGM as a form of 'sexual oppression...to ensure male dominance and exploitation' which is employed in order to 'overcome sexual characteristics of young women...who have not been, and do not wish to be subjected to FGM.'²²⁹ The CRS report for Congress affirms that 'if an asylum applicant successfully shows a well-founded fear of FGM if she returns to her home country that alone would satisfy the well-founded fear element of an asylum claim.'²³⁰ Nevertheless, the BIA does make it clear that a past subjection to FGM will not be

²²³ 354 F. 3d 609 (7th Cir. 2003)

²²⁴ Rice, 'Protecting Parents'

²²⁵ *Abay v Ashcroft* 368 F 3d. 634 (6th Cir. 2004), Rice, 'Protecting Parents'

²²⁶ Rice, 'Protecting Parents'

²²⁷ Yule, CRS Report for Congress, 'Asylum Law'

²²⁸ *Ibid.*

²²⁹ *Kasinga*, 21 I. & N. Dec at 366-367, Yule, CRS Report for Congress, 'Asylum Law'

²³⁰ *Ibid.*

regarded as sufficient to establish a well-founded fear of persecution.²³¹ The report concludes that where the applicant has already undergone FGM a claim for asylum is unlikely to be successful.²³²

In the *Mohammed v Gonzales*²³³ case it was held that FGM could be analogous to forced sterilization, in that, forced sterilization is considered to be a 'continuing harm' and form of persecution. Even so, it remains difficult to establish a claim for asylum based solely on FGM.²³⁴ In the above section FGM & human rights it is evident and accepted that FGM constitutes torture and a definite abuse and infringement of human rights yet, States are still reluctant to grant refugee status based on such claims.

VI

Analysis

1951 Refugee Convention

Can women effectively be categorised as a social group? And would the causal link be strong enough between the persecution and the social group to render refugee status appropriate? It has been acknowledged that 'the real issue is the gulf between the global purpose of international law to benefit all persons, and the marginalization of women from its ambit',²³⁵ which will be discussed in greater detail below.

²³¹ *Ibid.*

²³² *Ibid.*

²³³ 400 F 3d 785 (9th Cir. 2005), Yule, CRS Report for Congress, 'Asylum Law'

²³⁴ FORWARD 'grounds for asylum'

²³⁵ Edwards, 'Age and Gender Dimensions', 48

The Convention has been decried in some quarters as ineffective for the 21st century. In 2001, Jack Straw²³⁶ criticized the Refugee Convention as being 'too broad for conditions in the 21st Century and no longer an adequate guide to policy'.²³⁷ However, perhaps some are looking for deficiencies where they do not exist. Rather than attempting to stay the march of International Law to serve national interests, an increased commitment to the evolution of International Law would greatly improve the rights of individuals.

Ninette Kelley²³⁸ argues that the Refugee Convention does not in fact accord equal protection to both males and females. She reports that women who feared persecution for the same reasons as males but endured gender-specific persecution such as rape were not readily offered protection, as it was not a persecutory act for the purposes of the Convention. Additionally, women whose well-founded fear stemmed from persecution for not adhering to strict morality and discriminatory codes did not fall within the ambit of the Convention definition. Thirdly, women who had been subjected to sexual violence and abuse found it arduous to corroborate their claim with objective evidence and to talk about it with male adjudicators or in the presence of male relatives. Kelley also indicates that the 1951 Convention is not a safe haven device for all who have suffered grievous harm, only those who have a 'well-founded fear' of persecution.²³⁹

²³⁶ UK Home Secretary

²³⁷ Walker, 'Sexuality and Refugee Status', 326

²³⁸ Ninette Kelly is a legal practitioner and a former member of the Canadian Immigration and Refugee Board. Her views are based on a presentation given by the author to the Canadian Council for Refugees, International Conference on Refugee Women Fleeing Gender-Based Persecution, 4 May 2004

²³⁹ Kelley, Presentation, International Conference

Refugee protection would appear to restrict itself to those who can show they fit comfortably into the Convention definition.²⁴⁰

Interpretation of the 1951 Convention

Accurate interpretation of the refugee definition could legitimately encompass gender-related persecution.²⁴¹ Alice Edwards believes that it is not problems with the law that must be addressed, but, it is our stereotypes which must be addressed. The law and international norms are adequately equipped to deal with refugee issues however, it is the ingrained stereotypes and perceptions of women which are paralysing the system and preventing the 1951 Convention from being applied as intended to provide full protection to women as well as men.²⁴² Edwards maintains that the refugee definition need not be modified or manipulated to suit particular claims. Only recently, have new types of claims been able to succeed, as previously the correct interpretation of the definition had not been cultivated nor accepted.²⁴³

In some judgments gender-specific persecution has been classified as falling within the grounds of race, ethnicity, religion, political or an amalgamation of grounds.²⁴⁴ Nevertheless, women's claims had a propensity for being categorised within the boundaries of the fourth ground due to a universal inability to accept the situations of women as being political in nature. This is rather alarming and also stems from societal perceptions of the role of women.

²⁴⁰ *Ibid.*

²⁴¹ Haines, 'Gender-related persecution', 350

²⁴² Edwards, 'Age and Gender Dimensions', 49

²⁴³ *Ibid.*, 67

²⁴⁴ *Ibid.*, 68

Edwards strongly believes that many acts of women could and should be characterised as political, she wonders 'why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the fundamental customs of their society?'²⁴⁵ It is generally accepted that in order for the act to have a political element it must include opinions which are in conflict with the policies of the government.²⁴⁶ Edwards continues: 'based on these definitions, young girls who refuse to be subjected to harmful traditional practices, imposed on them by family, community or village leaders, would struggle to demonstrate that they were expressing a political opinion of dissent or opposition to the machinery of the State, government, and policy.'²⁴⁷

Politics exist in many spheres of society, not only in the realm of the official State authorities, especially in regions where tribal law is more prevalent than State sanctioned law. To suppose that dissenting political opinion can only exist in relation to the State, government and policy would be to take a very ignorant slant on the world and would signify a failure to recognise that other hierarchies and forms of politics and 'political apparatus' may exist out-with the traditional European framework, Western institutions and political make-up of the West.

Edwards also takes this line and believes that the definition of political opinion should not be constricted to 'state, government and policy' but should 'apply to any thought, opinion, action, or inaction that can be seen as questioning or opposing the views of authority or society at large, whatever the types of authority in place.'²⁴⁸ This should

²⁴⁵ *Ibid.*, 68

²⁴⁶ Goodwin-Gill, *The Refugee in International Law*, 49

²⁴⁷ Edwards, 'Age and Gender Dimensions', 69

²⁴⁸ *Ibid.*, 69

extend to any authorities which have the power to enforce laws or social rules and who have the power to punish those who do not conform to said rules such as, tribal leader, village chiefs and traditional healers.²⁴⁹

Rodger Haines QC brings to light the view that although some view private acts to be 'inherently non- political' there is, in fact, 'no such thing as an inherently political or inherently non-political activity'.²⁵⁰ He believes that whether something may be considered political or not all depends on its context.²⁵¹ He goes on to express that female genital mutilation can be viewed as a conflict of a political nature.²⁵² Casting off stereotypes assigned to women would serve to really open Refugee Law up and allow it to flourish. If International Law was static it would be a futile device and would become a dormant system. Domestic law adapts and evolves to match the needs of society and International Law must do the same: adapting to the new situations of ever changing societies should be seen as a strength and not a weakness.

Prohibition & Enforcement

The world has come a long way in unveiling and uplifting the silence over the issue of gender-related persecution. Even so, many consider domestic abuse and FGM to be acts of a private and individual nature which are not attributable to a State. Although the incidents of abuse may be taking place in a domestic setting, their occurrence is on such a vast scale that it has become a social phenomenon which States cannot continue to ignore. It cannot be disregarded and dismissed as a tribal practice

²⁴⁹ *Ibid.*, 69

²⁵⁰ Haines, 'Gender-related persecution', 347

²⁵¹ *Ibid.*, 347

²⁵² *Ibid.*, 348

happening only in developing countries. It must now be recognised that it is common practice amongst immigrant communities in the UK and other European countries and is happening on our doorstep. Having said that, social change is a very challenging and demanding goal to pursue. The international consensus is that laws must appeal to the common sentiment of the people in order for them to be successful in practice. The author Matthew Gibney believes that 'the restrictive attitudes and measures of governments in fact reflect the demos or popular view.'²⁵³ This would indicate that everyone should be educated on FGM and not the governments alone in order to meet individuals who have undergone FGM with a more understanding response.

The issue is not simply mere acceptance of the fact that FGM constitutes a form of persecution: there are also economic and administrative issues which creates an additional burden on the State. Further, States seem reluctant to accept it as a ground for granting refugee status for fear that such an admission will open the floodgates for countless claims on the grounds of FGM.

Criticisms of the 1951 Convention

In justifying the response of States Gonzaga argues that, 'the growing disillusionment among states about the relevance of the Convention is directly linked to the immigration challenges that they are facing, mainly brought about by or as an effect of globalisation.'²⁵⁴ As Nick Poynder²⁵⁵ highlights,

²⁵³ Gibney, M., 'The State of Asylum: Democratisation, Judicialisation and Evolution of Refugee Policy' in Gowlland-Debbas, Vera (Ed.), *The Problem of Refugees in the Light of Contemporary International Law Issues*, 1996, Martinus Nijhoff Publishers, 11 (henceforth Gibney, 'The State of Asylum')

²⁵⁴ Gonzaga, 'The Role of the UNHCR', 234

The restricted nature of the Refugee Convention is exacerbated by the current tendency of western governments to interpret the Convention in a strict and legalistic way, so as to limit the obligation to provide protection to asylum seekers who may, under a more generous approach, have satisfied the requirements for refugee status. At the same time, western governments have imposed penalties and other limitations on the processing of asylum applications which were not envisaged by the Refugee Convention.²⁵⁶

Also noted by Poynder is the number of 'needy applicants' which have slipped through the Refugee Convention's net of protection such as, women seeking protection from China's one child policy.²⁵⁷ The author proceeds to highlight the fact that under the Refugee Convention there is no effective complaints mechanism in place. When a State has misinterpreted the Convention or blatantly denied the applicant the protection he or she is entitled to under the Convention there is no means of redress for the applicant at an international level.²⁵⁸ There are clear flaws in some of the legal reasoning of the aforementioned cases and as some of the reasoning seems to have been manipulated in favour of national interest. Improper interpretation of the Convention prompts individuals to seek protection via other means. Such gaps in the system have, on occasion, been filled by other international legal instruments such as CAT, and the ICCPR. In resorting to these complementary methods, the Refugee Law is essentially being decentralized from the Refugee Convention and fragmented. This signifies that, the Refugee Convention is no longer the nucleus of refugee protection²⁵⁹ and instead individuals are forced to pursue other methods in order to secure protection and surmount the supposed cracks in the 1951 Convention.

²⁵⁵ Barrister, NSW Bar, Australia in the areas of immigration, anti-discrimination and human rights law.

²⁵⁶ Poynder, N., 'Mind the Gap': Seeking Alternative Protection Under the Convention Against Torture and the international Covenant on Civil and Political Rights.' in Kneebone, S. (Ed.), *The Refugees Convention 50 Years On*, Globalisation and International Law, 2003, Ashgate Publishing, 174 (henceforth Poynder, 'Mind the Gap')

²⁵⁷ *Ibid.*, 176

²⁵⁸ *Ibid.*, 178

²⁵⁹ Gonzaga, 'The Role of the UNHCR', 250

The author Satvinder Singh Juss²⁶⁰ argues that the 1951 Convention and 1967 Protocol are becoming obsolete, practically and conceptually.²⁶¹ He bases this argument on the fact that Northern countries are reluctant to take on more than their fair share of the 'refugee burden'. As noted by Singh Juss, if the remit of the Convention and refugee definition were expanded, upon whom would the burden fall?²⁶² He goes on to describe the failure of Western States to admit refugees and thereby fulfill their international obligations.²⁶³ The Convention merely confers on individuals the right not to be expelled or returned, it does not explicitly provide for the positive rights of being allowed entry, receiving asylum and not to having a claim terminated at sea.²⁶⁴ Also highlighted by Singh Juss is the concern that 'the current international regime does not address the changed political dynamics of the post-Cold War era.'²⁶⁵ This is supported by Michael Gibney who states 'It is, nevertheless, clear that the institutions of asylum and refugee protection are under tremendous strain, particularly given the political and ideological shifts in the perception of the 'refugee problem' that have followed the end of the Cold War.'²⁶⁶

It seems illogical that all individuals possess the right to claim asylum although States are under no obligation under International Law to grant asylum: States are entrusted to carry out the intentions of the Convention appropriately and in a *bona fide* manner. It is entirely at their discretion, in accordance with their own interpretation of the legal provisions and very much depends on who the individual State deems to fulfil the

²⁶⁰ Dr of Law, Kings College, London

²⁶¹ Singh Juss, S., *International Migration and Global Justice*, 2006, Ashgate Publishing, 219 (henceforth Singh Juss, *International Migration*)

²⁶² *Ibid.*, 220

²⁶³ *Ibid.*, 248

²⁶⁴ *Ibid.*, 219

²⁶⁵ *Ibid.*, 220

²⁶⁶ Gibney, 'The State of Asylum', 11

criteria. Increased obligations for States *a propos* refugees are necessary to avoid States being bound by merely one provision, that of *non-refoulement*.

Understandably, governments try to apply Refugee Law strictly in order to root out economic migrants and 'bogus' asylum claims. With so much debate and confusion perhaps it is time that the 1951 Convention and 1967 protocol were amended. An amendment may encompass recent developments and provide clarity for individuals and States, bringing Refugee Law up to date and into line with current refugee situations and social issues which were not acknowledged or did not exist in 1951. As observed in the Conclusions of the UNHCR Executive Committee, the notion of women forming 'a particular social group' was recognised as far back as twenty-three years ago yet the law surrounding this matter has been somewhat sluggish in developing.

The author Alice Edwards²⁶⁷, suggests that perhaps an understanding of the Convention must evolve alongside the fruition of refugee issues and new refugee situations such as, child and gender-specific forms of persecution and persecution by non-state agents.²⁶⁸ She believes that the only way to ensure a non discriminatory application of the 1951 Convention is to secure asylum procedures that are age and gender sensitive.²⁶⁹

²⁶⁷ International refugee and human rights lawyer

²⁶⁸ Edwards, 'Age and Gender Dimensions', 47

²⁶⁹ *Ibid.*, 47

International Community: Concerns & Criticisms

Ninette Kelley recognises that States try to stay poised 'between the desire to control immigration (and therefore restrict the ambit of the refugee definition), and the demand that the domestic application of Refugee Law conforms to their international obligations and meets the standards of fairness expected in other areas of domestic law.'²⁷⁰ States are faced with a balancing act between their international obligations and their ability to accommodate refugees under a broader definition and interpretation of the 1951 Convention which creates a conflict between law and policy. It has been averred that the 'rediscovery' that Refugee Law is a building block of Human Rights Law has intensified the domestic *versus* international and sovereignty *versus* human rights debates.²⁷¹

The author Marcelle Rice concludes that there are so many conditions that an applicant must satisfy that chances of obtaining protection from persecution are sadly slim. Therefore, 'the intersection of these inherent restrictions, thus ensure that the floodgates argument will remain a hypothetical contingency.'²⁷²

Certain legal fictions construed by some governments have led to the Convention being applied in a way other than intended.²⁷³ It would seem that several governments endorse preventative policies to preclude people from entering their countries for the purposes of seeking asylum. According to the Scottish Refugee Council, the UK government is increasingly initiating measures in order to prevent refugees from

²⁷⁰ Kelley, Presentation, International Conference

²⁷¹ Gowlland-Debbas, *The Problem of Refugees*, xiii

²⁷² Rice, 'Protecting Parents'

²⁷³ Goodwin-Gill, *The Refugee in International Law*, preface

entering the country for example, a visa does not exist to allow asylum seekers to enter the country legally for the purposes of applying for refugee status.²⁷⁴ Other methods employed include fining airlines for transporting people without permission to enter, stringent visa restrictions on countries which produce a lot of refugees and positioning immigration officers in refugee producing countries to prevent potential refugees from travelling to the UK.²⁷⁵ The Scottish Refugee Council also claims that European governments have commissioned armed warships and spy planes to patrol the Mediterranean and Canaries in order to impede 'irregular migration'.²⁷⁶ Corresponding to the aforesaid, in some cases governments are denying individuals the opportunity to even apply for refugee status by employing such firm measures which preclude individuals from safely entering a country. These individuals are entitled to protection under International Law, therefore, one must look at how to enforce States' obligations under the 1951 Convention.

Domestic Immigration Law in some Western States is ruthless, treating asylum seekers as criminals instead of affording them the protection they desperately need and are entitled too under International Law. Affording asylum is not purely an act of goodwill by States, they are in fact duty bound to comply with international human rights treaties. Those States who are fortunate enough not to have produced a constant flow of refugees view refugees as a 'burden' who are a drain on the State's resources instead of focusing on the potential benefits that asylum seekers could contribute to the host country's society. A huge number of asylum seekers that arrive in the UK are educated to university level and, given the chance, could contribute a number of skills to their new communities. Let it not be forgotten that establishments which are now

²⁷⁴The Scottish Refugee Council Fact Pack 2008,

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.*

regarded as British institutions such as Marks & Spencer, Burtons, fish and chips²⁷⁷ and the Mini were all founded and established by refugees.²⁷⁸

Much rests on statutory interpretation. The 1969 Vienna Convention on the Law of Treaties requires States to interpret treaties in 'good faith'²⁷⁹ which in reference to the 1951 Convention would oblige States to interpret it in such a way as to provide refugees with protection and ensure their fundamental rights and freedoms.²⁸⁰ Again, an equilibrium must be achieved between providing protection for those fleeing persecution and preventing the abuse of the asylum process and bogus claims.

A fear exists amongst States that their asylum system would be overwhelmed if women were deemed to constitute 'a particular social group'. Furthermore, an inconsistency in the interpretation of the Refugee Convention creates a precarious and volatile environment for applicants. Some interpret it stringently and conduct the process over many judicial stages. Restrictive interpretations may also be seen as the State 'cutting its cloth to suit its pocket'. With the volume of refugees arriving in the West, States are concerned that they cannot cope with the influx and pressure upon their institutions and resources.

It is apparent that many governments fall short of their duty to provide protection. Regrettably, it remains an issue that depends on political will, discretion and

²⁷⁷ Introduced to the UK by Jewish refugees in the 16th Century

²⁷⁸ Scottish Refugee Council, Press Release, 'Refugee Week Scotland '08', June 2008 www.scottishrefugeecouncil.org.uk/press/RedRoadReplicasPR, UK Refugee Council, 'Refugee Week', 2005, www.lmu.ac.uk/the_news/jun05/LeedsRefugeeWeekProgramme2005.pdf

²⁷⁹ article 31(1)

²⁸⁰ 1951 Convention, Preamble, Goodwin-Gill, *The Refugee in International Law*, 8

humanitarian goodwill.²⁸¹ Some view refugee protection as nothing more than an unregulated 'back door' immigration path.²⁸² Protection is on a temporary basis only, therefore it cannot be placed in the same category as immigration.²⁸³

Many governments clamour to be seen to be demonstrating a respect for human rights but when they are put in the position of juxtaposing human rights of foreigners with national interests, their supposed support and respect for human rights seems to dwindle significantly. It cannot be denied that economic considerations often surpass respect for human rights.²⁸⁴ In his review, Paris Aristotle²⁸⁵ notes that the West, although a great advocate for free movement of goods, does not so readily support the free movement of people and views refugees as an economic burden. It fails to recognize that the free movement of people is vital to the prolongation of capitalism.²⁸⁶

The author, Walker, held that, 'Refugee law is, after all, one mechanism for the protection of human rights- albeit not the only or the best mechanism.'²⁸⁷ Is the 1951 Convention, indeed, effective? Perhaps it is effective as an instrument of Refugee Law but what about its efficiency in terms of being a human rights instrument? It has been observed that,

Traditional human rights afford few immediate and self-actuating sources or relief, refugee law stands out as the single most effective, truly autonomous remedy for those who simply cannot safely remain in their own countries. The

²⁸¹ Hathaway, *The Rights of Refugees*, 998

²⁸² *Ibid.*, 999

²⁸³ *Ibid.*, 999

²⁸⁴ Kneebone, *The Refugees Convention 50 Years On*, 9

²⁸⁵ Member of Australia's Refugee Resettlement Advisory Council, delegate to the UNHCR Executive Committee.

²⁸⁶ Kneebone, *The Refugees Convention 50 Years On*, 9

²⁸⁷ Walker, 'Sexuality and Refugee Status', 266

surrogate protection of human rights required by refugee law is too valuable a tool not to be widely understood, and conscientiously implemented.²⁸⁸

Human Rights, Cultural Relativism & Social Factors

The preamble of the Declaration on Territorial Asylum states that:

The purposes proclaimed in the Charter of the United Nations are to maintain international peace and security...to achieve international cooperation in solving international problems of an economic, social, cultural or humanitarian character and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.²⁸⁹

The above statement would suggest that FGM should be accepted as grounds for obtaining refugee status as it may be regarded as an international problem of a social and cultural character. If the United Nations is absolutely committed to promoting and encouraging respect for human rights and for fundamental freedoms regardless of sex and cultural traditions surely certain groups of women must be said to fulfill the prerequisites of refugee status.

Some argue that International Law has not been created by consensus but instead imposed on the international community by powerful States. European jurisprudence seems to have dominated the evolution of International Law and some believe that sovereignty is not a universal cultural paradigm but produced by the one culture, namely the European culture and that International Law is merely a reflection of European values.²⁹⁰ One may contend that many human rights principles and individual freedoms are based on Western ideas and are not representative of the

²⁸⁸ Hathaway, *The Rights of Refugees*, 14

²⁸⁹ Preamble, General Assembly Declaration on Territorial Asylum, Resolution 2312 (XXII) December 14, 1967

²⁹⁰ Armstrong, D., et al, *International Law and International Relations*, 2007, Cambridge, p. 66 (henceforth Armstrong, *International Law*)

international community as a whole. 'As such they have been resisted by other countries on numerous grounds: that they constitute a disguised form of Western imperialism, or that they are incompatible with 'Asian values' or Islam.'²⁹¹ Nevertheless, in the present 'global human rights culture'²⁹² the cultural relativist stance has not received great backing, as Western tradition regards the rights of the individual as paramount and universally there is increased support for the protection of human rights.

The Committee for Humanitarian Assistance to Iranian Refugees (CHAIR) makes the point that women's claims are often dismissed on the basis of cultural relativism. Women refugees and their children account for 80% of the world's refugees and yet they find it nearing impossible to acquire refugee status.²⁹³ CHAIR supports the notion that women who have suffered sexual discrimination, imputed persecution and sexual violence represent 'a particular social group'. Sexual discrimination encompasses: a lack of equality with regards to divorce and child custody; the fact that women are prohibited from taking up certain professions or education; the sexes being segregated in every area of public life.²⁹⁴ Imputed persecution occurs when a woman is tortured, killed, detained, and threatened as a result of the political views of a male family member. Whilst sexual violence covers: female genital mutilation; sexual slavery; dowry debts; marital rape; forced sterilization; forced abortion; rape;

²⁹¹ *Ibid.*, 65, Many Islamic jurists take the view that declarations and regulations of the United Nations cannot be compared to rights that God himself has sanctioned, Bassiouni, M. Cherif (Editor), *The Islamic Criminal Justice System*, 1982, Oceana Publications, p. 11

²⁹² Armstrong, *International Law*, 154

²⁹³ The Committee for Humanitarian Assistance to Iranian Refugees (CHAIR) New York 1996, "Fact Sheet: Gender-Based Persecution", http://www.hambastegi.org/reports/fact_sheet.htm (henceforth CHAIR, 'Fact Sheet', 1996)

²⁹⁴ CHAIR 'Fact Sheet' 1996

and many more which are employed as 'tools of repression and torture'.²⁹⁵ In Iran, marital rape and domestic abuse are considered a husband's right and therefore tolerated by the government which, in turn, means that the government constitutes an agent of persecution.²⁹⁶

From an anthropological perspective, beauty and what African people consider to be attractive does not necessarily correspond with what European people deem to be attractive. As a result perceptions of sexuality and sexual pleasure are also very different. In certain societies FGM is common practice and not undergoing FGM would never be contemplated. For some undergoing FGM is as normal, accepted and unquestionable as losing infant teeth. It is very difficult to competently judge a practice of another culture on the standards of Western culture. It is understandable that some States may take offence to the fact that FGM is increasingly accepted as grounds for asylum. Sierra Leone, for example, condemned the UK for granting asylum on the grounds of FGM and held that *Fornah* had 'denigrated' Sierra Leone by seeking asylum on that basis.²⁹⁷ Septimus Kaikai, Sierra Leone's information Minister, stated that women should have the freedom to choose whether they undergo the procedure and that it is a very common procedure in Sierra Leone,²⁹⁸ with up to 90% Sierra Leonean women having undergone the traditional practice. Baroness Hale of Richmond made it clear that she believed that Sierra Leonean women in fear of undergoing FGM did constitute 'a particular social group' within the meaning of the 1951 Convention. Lord Bingham of Cornhill averred that 'Even the lower classes of Sierra Leonean society regard uninitiated indigenous women as an abomination fit

²⁹⁵ *Ibid.*

²⁹⁶ *Ibid.*

²⁹⁷ BBC, 'Sierra Leone anger at FGM asylum in UK', <http://www.bbc.co.uk/2/hi/africa/6065683.stm>

²⁹⁸ *Ibid.*

only for the worst sort of sexual exploitation.²⁹⁹ At present, not undergoing FGM leaves a woman exposed and very vulnerable. Essentially, she condemns herself to a lifetime of societal rejection and exclusion.³⁰⁰ This creates a conflict of rights between the female's right to personal, physical and mental integrity and her right to play a role in her society.³⁰¹

The right to cultural self-determination is equally pertinent and cannot simply be overlooked or dismissed. It is very difficult and somewhat naïve to assume that a custom which has been practiced for millennia³⁰² can be defeated and eradicated with 60 years worth of human rights legislation. If people firmly believe that FGM is required of them socially and religiously they will continue to engage themselves in FGM regardless of any legislation coming into force no matter how severe the penalties may be.

VII

Proposals for Reform

A Sixth Ground?

The current international mechanisms in place do not adequately reflect the current refugee situation.³⁰³ By contrasting recent social, political and economic developments with traditional standards of Refugee Law and Human Rights Law, one

²⁹⁹ *Fornah* case

³⁰⁰ Turillazzi, 'new Italian law'

³⁰¹ *Ibid.*

³⁰² IRIN, 'In Depth: Razor's Edge- The Controversy of Female Genital Mutilation' March 2005

<http://www.irinnews.org/InDepthMain.aspx?InDepthId=15&ReportId=62467&Country=Yes>

³⁰³ Gonzaga, 'The Role of the UNHCR', 236

may surmise that reform is needed in this area for the realisation of successful applications which do not so obviously spring from the five stipulated grounds. Therefore, this chapter will address proposals for reform in light of both rights-based and practice-based needs.

According to the author Vera Gowlland- Debas, the current refugee framework is far too narrow and should be broadened to include those who currently 'lie outside the net of protection of the 1951 Convention'. It should also seek to move out-with the current confines by involving the State of origin and the entire international community in the form of issues arising from before the flight of people and stretching to well after their return.³⁰⁴

The author Gregory Kelson advocates that there is a need for a sixth category of persecution, that is, gender.³⁰⁵ He goes on to set out his recommendations by proposing an amendment of article 1A (2) of the Refugee Convention, changing the language used therein to include the feminine pronoun and inserting a basic definition of gender. He goes on to stipulate that governments must begin to acknowledge gender-based persecution and that he is hopeful that although it will be a slow and agonizing process, women may receive the protection they so badly lack, but very much deserve, of in the years to come.³⁰⁶

Should the 1951 Convention be amended to include gender as the sixth ground for refugee status to adequately reflect the gravity of this social phenomenon? Countering Kelson's proposal, Rodger Haines QC makes the point that enumerating sex and

³⁰⁴ Gowlland-Debbas, *The Problem of Refugees*, xii

³⁰⁵ Kelson, 'Gender-Based Persecution and Political Asylum'

³⁰⁶ *Ibid.*

gender as a sixth ground would serve to marginalize women further from the refugee process as, essentially, it would be an admission that the protection that the 1951 Convention affords was not previously readily available to women and that 'sex and gender have no place in refugee law at present.'³⁰⁷

Women, Political Opinion & An Interpretation Revamp

Rodger Haines QC proposes that the refugee definition should be interpreted in a gender-sensitive manner.³⁰⁸ In support of this recommendation, I would contend that reform should be focused on a correct interpretation of the current provisions rather than bringing new legislation into force. There is a need to revise and consolidate current approaches to legislation pertaining to refugees rather than amending the legislation itself. The international community must embark upon the interpretation and application of Refugee Law from a different angle in lieu of merely interpreting it 'through a framework of male experiences'.³⁰⁹

In successful women's claims it has been accepted that such applications should fall within the scope of the fourth Convention ground of 'membership of a particular social group' however as mentioned previously, there is nothing to preclude women's claims from falling within the ambit of the fifth ground namely, political opinion. Therefore, an additional proposal for reform could include relinquishing preconceptions and moving to consider claims involving the practice of FGM to fall within the scope of political opinion rather than resigning women's claims to 'membership of a particular social group'. I would advocate a slightly broader

³⁰⁷ Haines, 'Gender-related persecution', 327

³⁰⁸ *Ibid.*, 323

³⁰⁹ *Ibid.*, 327

interpretation of the 1951 Convention in order to depose the present lack of insight with regards to authorities' inability to view private acts of severe harm commissioned against women as being political in nature.³¹⁰ Consequently, I would propose that women who are at risk of undergoing FGM may also have a valid claim under political opinion depending on the merits of the particular case. Doing so would provide women with greater scope for obtaining protection and further remove the copious obstacles they already face during the asylum process. There is a need for a proposal which encapsulates new refugee situations and vulnerable groups to ensure that the life of a refugee does not hinge on a State's individual interpretation of International Law and application of refugee provisions. A strengthened consensus and a more standardised approach would also help to disseminate the 'refugee burden' theory. Standardising the interpretations and the validity of claims across the international community may prevent certain groups from flocking to particular countries who are more likely to accept their claims thus, dispelling the 'floodgates' and 'burden' fear as refugees may disperse more evenly.

Enforcement Mechanism & Procedural Reform

Moreover, at present, there is no enforcement mechanism in place to ensure that governments are fulfilling their international obligations and that refugees are receiving the protection to which they are entitled and deserve. Instead, individual governments are accountable to no one and are expected to ensure that they comply with the Convention's provisions.³¹¹ Although the UNHCR plays a tremendous role in

³¹⁰ *Ibid.*, 327

³¹¹ Hathaway, *The Rights of Refugees*, 993

promoting respect for human rights and refugees, it is not an enforcement body.³¹² It is simply an organ that sets standards and makes private recommendations to States.³¹³ Should a new supervisory body be created under the auspices of the United Nations which would wield more authority and some form of enforcement mechanism on the international plane? The author Susan Kneebone³¹⁴ affirms that 'if the State is a hindrance to recognizing new categories of refugees as persons requiring protection against persecution, can we move beyond the State in seeking solutions?' She goes on to suggest that enlarging the mandate of the UNHCR and creating a international supervisory body³¹⁵ may serve as a type of ombudsman which would curb the *carte blanche* States seem to believe they possess presently *vis-à-vis* immigration.

Perhaps it is not the Convention itself which is in need of reform, or solely its interpretation, but the mechanisms through which it is implemented and the strategies that governments employ to deter refugees from entering the territory that must also be addressed.³¹⁶ Provisions are needed to combat governments' influx deterrence policies which clearly prohibit the individual's right to seek asylum in the first instance.

Even supposing gender-based persecution is universally accepted as a valid claim, much remains to be done to establish a more user friendly system. There is a need for procedural safeguards for women to ensure that they are able to recount their experiences with relative ease to a female interviewer and ensure that protection is not

³¹² *Ibid.*, 993

³¹³ *Ibid.*, 994

³¹⁴ Associate Professor in the Law Faculty, Monash University

³¹⁵ Kneebone, S., "Moving Beyond the State: Refugees, Accountability and Protection" in Kneebone, S. (Ed.), *The Refugees Convention 50 Years On*, Globalisation and International Law, 2003, Ashgate Publishing, p 263

³¹⁶ Hathaway, *The Rights of Refugees*, 998

withheld on the basis that the women does not feel comfortable disclosing the abuse she has suffered at the hands of a male with a male interrogator. The majority of the world's refugees are women yet the majority of adjudicators are male. This may not appear as an obstacle for Westerners however, women who have come from cultures where they are prohibited from talking with men out-with their immediate family or discussing certain topics may find this extremely intimidating and therefore will not recount the details of the horrors they have experienced hence, they may not be granted refugee status. There is a need for greater training and sensitivity towards new refugee situations and a need for an increased awareness of cultural differences amongst immigration authorities as at present the current system may be bordering being institutionally racist and sexist.

Moreover, asylum applications are a costly process for the applicant; the majority of refugees are women who have depended on their husbands for financial support. Consider the scenario of a woman fleeing Sudan because her husband's demands that their daughters must undergo FGM. The woman has depended on her husband for financial support so she arrives in the UK penniless and is forbidden to work until she has been granted refugee status. How can she possibly afford to fund her case? Must she solely rely on the kindness of strangers, campaigners and charities to raise the funds for her application? UK asylum conditions are severely inadequate. The asylum system impoverishes families further, forcing them to live on less than income support, or on vouchers if their claims have failed, in damp, unsafe housing where they are often subjected to racial abuse and attacks.³¹⁷

³¹⁷ The Scottish Refugee Council Fact Pack 2008

Social Change

Fundamentally, FGM is a social matter carried out for social ends and for that reason, the most pressing reform needed is that of adjusting social perceptions. Not only should females be educated on the dangers of FGM but men must also be educated. It is imperative that the social hierarchy of communities is not governed by this form of mutilation and that men begin to agree to marry un-excised women in order to facilitate change.³¹⁸ Essentially, the empowerment of women must be addressed. FGM is a practice that women do to themselves and their children as a means of gaining a little power in a patriarchal community. An alternative means through which to empower women, whether it is via economic or education channels³¹⁹, must be sought and implemented in order to assist them in becoming better equipped to negotiate an enhanced position for themselves in their society without having to endure FGM.

VIII

Concluding Remarks

This critique, although just skimming the surface of FGM and claims for asylum, has attempted to reconcile the disparate concerns relating to women as a social group and it may be hypothesized that although attitudes towards FGM as grounds for asylum are incoherent at present, one may speculate that increasingly asylum *will* be granted on the basis of Female Genital Mutilation.

³¹⁸ National Board of Health & Welfare (Sweden), 'Female genital Mutilation', Socialstyrelsen, Article Number 2003-114-9

³¹⁹ FORWARD 'Human Rights' 2005

Regrettably, there is no coherent mechanism in place to deal specifically with FGM asylum claims, and there is still considerable opposition to granting refugee status to victims of gender-based persecution. Many fail to recognise that violations of women's rights *do* warrant asylum.³²⁰ The aforementioned case law demonstrates that where States deem the 1951 Convention not to be applicable, victims of FGM or victims' parents may have a valid claim under CAT. Crucially, it must be borne in mind that the contention that women constitute 'a particular social group', by no means signifies that all female asylum seekers are entitled to refugee status. Female asylum seekers must nevertheless demonstrate that they satisfy one of the five grounds enumerated in the 1951 Convention before refugee status would be granted. Persecution commissioned by State officials or non-State actors are equally valid claims under Refugee Law.

Current immigration policies are riddled with flaws and shortcomings. It must be stressed that, it is policy and interpretation that are flawed not, indeed, the 1951 Convention and subsequent Protocol. In order to ensure the optimal exercise of refugee protection it is imperative that the norms be applied in a non-discriminatory manner to the individual circumstances. As noted by Edwards, drawing on the standard 'adult male' profile as a basis for application of the law, alters the nature of asylum claims of not only women but, children and men who do not correspond to their respective stereotypes.³²¹ She advances that, 'it is important to recognize that our different backgrounds colour our understandings and interpretations of law.'³²²

³²⁰“Interpreter Releases”, May 13, 2002,
http://www.cgrs.uchastings.edu/documents/media/ir_5_02.doc

³²¹ Edwards, 'Age and Gender Dimensions', 79

³²²*Ibid.*, 79

Certainly, one must appreciate that it is a difficult issue and that States do have to defend and protect national interests however, simultaneously it must be borne in mind that States are obliged under International Law to fulfil their obligations and abide by international human rights instruments. The unrelenting conflict between law and policy in States will continue to cause problems in years to come. The fact that States are only bound by the principle of *non-refoulement*, and all other Refugee Law provisions are at the individual State's discretion, does not in any way exonerate a State from its existing obligations under the international bill of rights. It must be conceded that absolute sovereignty is an obsolete concept: protecting the rights of individuals is vital and national sovereignty can no longer have supreme reign when it entails a sweeping infringement of the rights of refugees.

It cannot be denied that there has been a reorientation of Refugee Law in recent times which increasingly veers towards a human rights-based methodology. It seems that Refugee Law is developing alongside and in tandem with Human Rights Law therefore, different claims will become more successful as Human Rights Law further develops.³²³

Observing the current pattern emerging, one may predict with some confidence that in the near future FGM will be universally recognised as grounds for obtaining refugee status. Refugee Law and gender is a growing body of law, which must develop fully in order to provide women with the protection to which they are entitled.

³²³ Walker, 'Sexuality and Refugee Status', 277

In light of contemporary challenges in the international community and recent socio-political and economic shifts, new refugee situations have arisen and the United Nations must once again manifest its profound concern for refugees and endeavour to ensure the widest possible exercise of these fundamental rights and freedoms in order to 'extend the scope of protection'³²⁴ to women and other vulnerable groups who have slipped through the net of the current framework of protection.³²⁵ Naturally, international cooperation is paramount in order to facilitate burden sharing of the refugee 'problem'. New approaches to Refugee Law must be embraced, fomented and allowed to flourish to ensure that individuals receive the protection they so badly need and deserve. It should be acknowledged that significant progress has taken place in this field, nevertheless there is also scope for improvement and further protection of female refugees.

Female genital mutilation is a means through which to desexualise and colonise women and must be recognised as being a form of persecution. In consideration of the legal reasoning in existing case law, I would conclude that a woman who is in fear of herself or of her children undergoing FGM or has undergone type III or IV FGM would have a legitimate claim for asylum. Women who have undergone type I and type II would be in a less favourable position as their experience of FGM is not ongoing as in the cases of infibulation. Conceivably, as the jurisprudence surrounding this area develops we will witness in the future someone who claims that the trauma and depression suffered as a result of type I or type II FGM is ongoing and may constitute persecution and warrant protection. In line with the reckoning of Lady

³²⁴ Preamble, 1951 Convention

³²⁵ *Ibid.*

Justice Arden³²⁶, it may be deduced that the women who go against the social mores of their communities and are ostracized must also constitute 'a particular social group' as well as those who have conformed to the custom.

Purely owing to gender being omitted by the drafters of the 1951 Convention, whether it was owing to a lack of comprehension or predictability of potential future issues, does not mean that there is no scope for introducing gender as a ground in the future. Although, I do not believe that would be the most prolific course of action, I do recognize that law is not static and does not exist in a vacuum: it must be cultivated and allowed to evolve and adapt to new situations and social phenomena, to change with the times and cast off interpretations in light of the socially-defined roles allocated to women. Any refusal to deny refugee protection to women, who have suffered or risk persecution at the hands of non-State actors, is tantamount to a declaration that women do not deserve equal treatment before the law and a backing of the inequalities which existed in 1951 and a reluctance to accept current human rights provisions. Only when such patriarchal outlooks, social perceptions and stereotypes are dispersed will woman enjoy the full protection of Refugee Law which, in turn, will enliven the spirit of the Convention and breathe some life back into it allowing those who have undergone or risk undergoing female genital mutilation to find refuge.

³²⁶ *Fornah Appeal* June, 2005 "Girl loses sexual mutilation case", BBC News, 09/06/2005

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