

The Right to Asylum

Gender as a Protected Social Group

by Maria Angela Maina*

Abstract

This article examines the need to review and amend the Convention Relating to the Status of Refugees (1951) in order to expressly include gender as a ground of persecution within the requirements for obtaining refugee status under Article 1(A)(2), as opposed to the current practice of classifying asylum seeking women as “members of a Particular Social Group (PSG)”. This paper concludes that recognizing gender, as a nexus ground for protection, will give the victims appropriate protection from gender related persecution and will provide host States with a uniform legal standard for determining asylum applications with the discretion to conclude individual cases based on the evidence provided.

Keywords

refugee convention, asylum seekers, persecution, gender, gender related persecution, gender-based violence.

1. Introduction

The problem with the Convention Relating to the Status of Refugees (1951) is that it offers neither a comprehensive nor a flexible response to the diversity and complexity of forced population movements that are occurring today: It was designed for a different era¹. The contentious decade-long debate in this arena revolves

around the express inclusion of gender as a protected group within Article 1(A)(2) of the 1951 Convention Relating to the Status of Refugees (the Refugee Convention).

This article provides an overview of the stipulated requirements for obtaining the status of refugee and an analysis of how the Refugee Convention is interpreted and applied today, with the assistance of case law to point out the irregularities arising from

the *non liquet*. Its conclusion contains a summary of findings and recommendations on the possible best way forward.

2. Overview: International Requirements for Obtaining Refugee Status

Today, the 1951 Refugee Convention is legally binding to its signatories, with the requirement that no reservations may be made on Article 1 (definition of a “refugee”),

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among others. Consequently, Article 1 of the Convention plays an important role in determining refugee status internationally, since it stipulates who receives successful protection deriving from refugee rights. Article 1(A)(2) of the Convention which defines a refugee, *inter alia*, is itemized to provide the requirements an asylum seeker must satisfy to obtain the status of refugee, which is that the individual²:

1. Has a well-founded fear of persecution.
2. Fears persecution on the specific grounds of race, religion, nationality, membership of a particular social group or political opinion.
3. Is outside the country of his/her nationality or habitual residence and is unable or, owing to such fear, unwilling to avail him/herself of the protection of that country.

It is therefore imperative to understand the aspects that contribute to persecution.

*“Persecution” = Violation of Human Rights or Serious Harm + The Failure of State Protection*³

Prima facie, Article 1(A)(2) of the Convention displays a

difficulty in directly addressing the needs of asylum seeking women, especially amidst the global increase of gender-based violence cases, of which – globally – 736 million women are currently victims⁴. The present state of the Convention requires deeper interpretation by decision-makers and legal practitioners to effectively determine in which specific ground under Article 1(A)(2) they can place asylum seeking women to effectively grant them protection. Honestly speaking, it seems that nobody or nothing will effectively protect these victims if the Convention stands as is.

3. Gender as a Particular Social Group: Inconsistencies of Application and Interpretation

Women and children are deemed as vulnerable, especially in times of conflict, and form the bulk of those in refugee camps who suffer human rights abuses⁵. In this case, gender related persecution is primarily used to underscore the fact that structural and gender-based power differentials place women and girls at risk of multiple forms of

violence with little or no protection from their States of origin. In order to receive protection under international refugee law, these acts of violence need to have been perpetrated by either a State agent or a non-State actor. In the case of violence perpetrated by a non-State actor, international protection is received when the State is unwilling or unable to protect the individual accordingly.⁶ Female Genital Mutilation (FGM) is a common claim and one of the few reasons why women choose to flee their home countries in search of international protection.

3.1. Case Study: Female Genital Mutilation (FGM)

To begin with, acts of domestic violence and sexual violence, such as FGM, are often perpetrated by non-State actors. Thus, they are often viewed as private matters and, in most cases, the victims are not able to qualify for asylum⁷. Today, FGM is actively practiced and it is estimated that 68 million girls are at risk of being victims by 2030⁸. Incidentally, laws criminalizing FGM are present in various regions where this practice is prevalent but there is no con-

sistent enforcement of these laws. Many women and girls have sought asylum because of FGM practice within their community and this has led to challenges in assessing their claims since the Refugee Convention has a vague wording, which leaves room for creative interpretation and expansion⁹.

Nevertheless, there has been a more benevolent application of the Refugee Convention due to the UNHCR Guidelines on Gender-Related Persecution, where those fleeing FGM are classified as part of a PSG that appears to brand women either according to protected characteristics under persecution or socially, for simply being women within a discriminatory environment. For instance, the UK House of Lords considered women in Sierra Leone as part of a social group within Article 1(A)(2) of the Refugee Convention as they were all socially inferior to men and living with an imminent threat of FGM as an expression of discrimination against them¹⁰.

Moreover, the asylum seekers are required to establish the well-founded fear of the particular persecutory act by demonstrating the subjective

and objective fear of persecution on a balance of probabilities¹¹. In France, an Appeal was accepted on the basis that the National Court of Asylum understood the balance of probability and claimed that FGM objectively represented a social norm in Somalia and, thus, children not subjected to FGM constituted a PSG¹².

Contrary to the principles of the Refugee Convention, US case law requires a PSG to be a specified group with a constricted number, hence preventing women from seeking asylum because of gender related persecution.¹³ In further consideration, their case law presents the various applications and definitions granted to a PSG, as elaborated within the case of *In re CA Respondent*, which creates even more confusion as to the true qualifications that are required¹⁴.

Overall, the inconsistencies in the interpretation and application of the Convention in considering membership of a PSG, leads to insufficient protection; lack of clarity as to who exactly constitutes a PSG is left to an open interpretation and, as such, causing the rejection of some applications for not meeting the

required standards of proof. A present-day news report on an FGM victim's third application for asylum in the UK, proves the urgent necessity of this debate to be taken seriously. Asylum rights advocates affirm that the bar for granting asylum is too high and the grounds on which it is granted are extremely strict, tight and narrow¹⁵ which could potentially create a humanitarian crisis.

What's more, the PSG ground is criticized by scholars as being one with the least clarity in the Convention, calling for a need of a more orderly approach in order to prevent instances of refoulement and further violations of human rights. Evidently, the UNHCR reports that 76% of resettlement case¹⁶ were of victims of torture and violence with legal and physical protection needs, particularly women and girls.

4. Conclusion and Recommendations

There is more than a dire need to amend the Refugee Convention. The original Refugee Convention drafters did not consider gender at all¹⁷ as a PSG because of the social

and political context that triggered its creation¹⁸. Of course, time has passed, causing exigency for a review of its provisions to fit the context of today where there is the rise of gender equality, increase in cases of gender-based violence and amplifying concern over human rights violations within the 21st century.

Some domestic Courts have attempted to use the justification of the intention of the drafters to exclude gender while making their interpretation of the Convention. All the same, this approach is truly flawed and does not contribute to the cause of justice. It forces women to return to or resume living in hostile environments that lead to further violations of their human rights. It is imperative for laws to apply prospectively – looking into the future for possibilities to address gaps and possible situations that may arise. In addition, legislators, magistrates and – generally – men of law should not simply debate and make laws, but rather review them

in light of fundamental current affairs such as the global Sustainable Development Goal (SDG) no. 5 to eradicate gender inequality.

While critics believe that expressly recognizing gender in the Refugee Convention will open the floodgates for overwhelming asylum application from women, the Canadian Supreme Court differs whereas it holds the view that: “Gender’ can be the immutable characteristic that defines a PSG, and there has been no “explosion” of gender-related claims in Canada. On a more fundamental level, floodgate concerns ignore the essential nature of refugee status determination; that it is a highly individualized, case-by-case process. While recognizing ‘women’ as a PSG may make it easier for prospective claimants to meet the ‘membership of a PSG’ ground, they would still have to satisfy other elements under the refugee definition, none easier than the other”¹⁹.

Indeed, today the fight for gender equality is stronger

than ever. Yet, true justice can only be achieved from a collective change in social norms, cultural attitudes and policies. There is a symbiotic relationship between law, behavior and attitudes. FGM is an example of this symbiotic relationship. There is international human rights law against FGM and various national laws on the same, but the lack of enforcement and the still present attitude towards controlling women is the reason why it still predominantly happens in Africa, in the Middle East and in South Asia²⁰. We must strive to unify laws, social behavior and attitudes to achieve true gender equality. We can hold all the conventions and actively advocate against these acts, but if the laws and policies do not change to reflect this attitude, then nothing will truly change. The book, “The Right to Asylum from a Gender Perspective” by The Thinking Watermill Society, with the cooperation of Pavia e Ansaldo law firm, discusses this topic in totality.

Notes

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