

1.2 Age and gender dimensions in international refugee law

ALICE EDWARDS*

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I. Context

International refugee law has evolved in significant ways over the last fifty years, as it has been required to adapt to new and changing refugee situations and humanitarian challenges. The removal of dateline and geographical limitations by virtue of the 1967 Protocol, and developments in other bodies of international law, have ‘fundamentally transformed the 1951 Convention from a document fixed in a specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses’.¹ The Preamble to the 1951 Convention

* The views expressed are the personal views of the author, and are not necessarily shared by the UN or UNHCR.

1 See the paper by R. Haines on gender-related persecution in Part 5.1 of this book. For the 1951 Convention Relating to the Status of Refugees, see 189 UNTS 150 and for the 1967 Protocol thereto, see 606 UNTS 267.

calls on States ‘to assure refugees the widest possible exercise of [their] fundamental rights and freedoms’, necessitating an analysis of refugee law within the wider humanitarian and human rights context. International human rights law and international humanitarian law instruments complement the safeguards for refugees enumerated in the 1951 Convention. Importantly, these bodies of law reinforce the non-discriminatory basis of international law in general, which impacts on international refugee law in particular. The text, object and purpose of the 1951 Convention require that it be interpreted and applied in a non-discriminatory way. The codification of women’s and children’s rights has also substantially advanced understandings of equal treatment and equal rights within the international refugee protection framework. Age and gender perspectives have thus become important features of international refugee law over the last decade.

This paper will consider, in particular, Articles 1A(2), 1F and 1C, from these perspectives, thus complementing the other papers in this book. It presents a snapshot of some of the key aspects of refugee status determination which could benefit from age- and gender-sensitive approaches. In so doing, it sets out the evolution of the understanding of the refugee definition to include child-specific forms of persecution, persecution by non-State agents, and claims based on sexual orientation or as a result of being trafficked. It challenges certain preconceptions that have had the effect of denying protection under the 1951 Convention to claims not conforming to the ‘adult male’ standard. These legal issues, which nevertheless fall within the framework of the ‘second track’ of the Global Consultations with its focus on clearer interpretation of the 1951 Convention,² are not drawn together elsewhere in the book in this way. Their inclusion here gives them their proper prominence in international refugee law, while also recognizing that such approaches are still under development.

The logical first step to achieving a non-discriminatory application of refugee law is to ensure that age- and gender-sensitive and -inclusive asylum procedures are in place. The importance of equal access to asylum procedures cannot be overstated. This includes the implementation of a myriad of simple measures in order to foster an open and receptive environment. The second step is to adopt age and gender sensitive interpretations of international refugee law. This includes a full understanding of the differential impact of law and its interpretation on women *vis-à-vis* men, on children³ *vis-à-vis* adults, and on the elderly *vis-à-vis* able-bodied adults. It further requires an understanding of the double impact of age and gender dimensions on some claims, particularly those of young girls. This necessarily entails a clear understanding of the differences between sex and gender. Gender refers to the relationship between women and men based on socially or culturally constructed

2 For further information on UNHCR’s Global Consultations see the Preface and Part 1.1 of this book.

3 ‘Children’ for the purposes of this paper are persons under the age of eighteen years, unless otherwise specified.

and defined identities, status, roles, and responsibilities that are assigned to one sex or another, while sex is a biological determination.⁴

While there has been an overall trend towards recognition of gender-related claims (and less in relation to age-related claims), some States and judiciaries continue to fail to apply a full interpretation of the refugee definition. Not only are age and gender relevant to the identification of types of persecution feared, it is equally important that the entire refugee definition be age and gender inclusive. Notwithstanding the crucial importance of such a focus, the real challenge to refugee status determination is to give true effect to the individualized nature of the inquiry, characterized not only by age and sex, but also by cultural, religious, political, physical, mental, and other factors.

A. The human rights narrative

At the outset, it is important to reflect on how normative international law, while intending to protect all individuals, may exclude certain persons from the realization of its protective scope on account of its lack of differentiation between the impact of various provisions on different groups or individuals. Some commentators have argued that '[t]he normative structure of international law has allowed issues of particular concern to women to be either ignored or undermined'.⁵ The writer, however, finds that it is not the normative structure of international law that has marginalized the rights of women, nor the fact that laws tend to be written in gender-neutral language.⁶ 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. This is mirrored in society at large, with women often finding themselves on the sidelines of society. The application of international law in general and international refugee law in particular has been rooted in the public/private dichotomy, which has often been translated into a male/female and political/apolitical divide.⁷ This has not been caused by the law itself, but by social perceptions of the roles and responsibilities of women vis-à-vis men.

It was not until differences in the forms of persecution facing women were identified, and a holistic gender-sensitive and gender-inclusive approach to refugee law

4 See among others, UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol on the Status of Refugees', UN doc. HCR/GIP/02/01, Geneva, 7 May 2002 (hereinafter UNHCR, 'Guidelines on Gender-Related Persecution', 2002), para. 3.

5 H. Charlesworth, C. Chinkin, and S. Wright, 'Feminist Approaches to International Law', in *International Rules: Approaches from International Law and International Relations* (ed. R. J. Beck, A. C. Arend, and R. D. Vander Lugt, Oxford University Press, 1996), p. 265.

6 Except for specific international treaties directly related to women, such as the Convention on the Elimination of Discrimination Against Women 1979.

7 H. Crawley, *Refugees and Gender: Law and Process* (Jordans, Bristol, 2001), p. 18.

was promoted, that specific claims of women and other gender claims were recognized as falling within the purview of the 1951 Convention. As Spijkerboer has pointed out, 'derivative persecution' of female asylum seekers on the basis of their family membership is more readily accepted by decision makers than that of direct persecution where the claimant has to establish that she has suffered or fears persecution on a particular Convention ground.⁸ The assortment of asylum claims of women in particular rests in gender stereotypes of accepted and 'believed' roles. It is these stereotypes which need to be deconstructed, rather than there being a need to recreate international norms. Anyone who does not conform to the adult male standard is affected by narrow understandings of international law. These stereotypes also affect the claims of children or the elderly or other age groupings, which do not correspond to that standard. For example, children are not readily seen as full members of society, benefiting from rights equal to those of adults. It is an individual right to seek and to enjoy asylum from persecution, which is implicit in the 1951 Convention. Thus, in order to ensure that international refugee law is applied in a non-discriminatory way to all individuals, age and gender approaches are vital components of any analysis.

Developments in refugee protection (outlined below) must be seen within a broader framework of advancements in international human rights law, including, in particular, the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and its Optional Protocol,⁹ the Declaration on the Elimination of Violence Against Women 1993,¹⁰ the Convention on the Rights of the Child 1989¹¹ and its Optional Protocols on the Involvement of Children in Armed Conflict, and on the Sale of Children, Child Prostitution and Child Pornography,¹² the Beijing Platform for Action adopted at the Fourth World Conference on Women in 1995¹³ and the follow-up 'Beijing Plus 5' Special Session of the General Assembly,¹⁴ and jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda,¹⁵ as well as the Statute of the International Criminal Court.¹⁶

8 T. Spijkerboer, *Gender and Refugee Status* (Ashgate, Dartmouth, 2000), as restated in Crawley, above n. 7, p. 19.

9 1249 UNTS 13 and UNGA resolution A/RES/54/4, 6 Oct. 1999.

10 UNGA resolution 48/104, 20 Dec. 1993.

11 UNGA resolution 44/25, 20 Nov. 1989 (hereinafter 'CRC').

12 Both UNGA resolution 54/263, 25 May 2000; entered into force on 12 Feb. 2002 and 18 Jan. 2002 respectively.

13 'Report of the Fourth World Conference on Women, Platform for Action', UN doc. A/CONF.177/20, 17 Oct. 1995.

14 'Women 2000: Gender Equality, Development and Peace in the Twenty-First Century', 23rd Session of the General Assembly, UN doc. A/55/341, 5–9 June 2000.

15 International Criminal Tribunal for the former Yugoslavia (ICTY), judgment in the case of *Kunarac, Kovac and Vukovic*, Case No. IT-96-23 and IT-96-23/1, 22 Feb. 2001, found rape to be a crime against humanity as well as a violation of the laws or customs of war. This judgment was upheld by the ICTY Appeals Chamber on 12 June 2002. See also paper by R. Haines, Part 5.1 of this book.

16 Arts. 7(1)(g) and 8(2)(xxii) of the Statute of the International Criminal Court (ICC) specifically define a 'crime against humanity' and a 'war crime' as including 'rape, sexual slavery, enforced

These measures have advanced global trends towards gender inclusion and equal treatment between the sexes, and have given special attention to children.¹⁷ Human rights law has had the effect of moving predominantly private harm to an act that infringes international human rights law as a result of State tolerance or condonation. As UNHCR's 'Guidelines on Gender-Related Persecution' state:

International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution. In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act.¹⁸

This does not suggest, however, that it is necessary to identify a violation of human rights law in each and every case in order to establish persecution, although persecution will usually involve breaches of human rights law. Prior to the enumeration of women's human rights in international instruments, it cannot be said that rape did not amount to persecution for the purposes of the 1951 Convention. It still existed as a form of persecution. Rather, the international legal framework has helped to move away from male-dominated perspectives and to conceptualize the nature of such violence as a serious human rights violation. Many gender-related claims to refugee status draw on international law or pronouncements of the United Nations in order to support the persecutory nature of the violence in question.¹⁹ As there is no internationally accepted definition of what constitutes 'persecution', it would be unwise to limit its application to serious human rights abuses. It is possible that all forms of persecution have not yet been identified or codified in international human rights law. International human rights law does, however, have a role to play in clarifying some forms of persecution as serious human rights violations. As Jacqueline Bhabha and Wendy Young suggest in relation to children's rights, the 'best interests of the child' principle, as derived from Article 3 of the Convention on the Rights of the Child (CRC), 'operates as

prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity'. Art. 8(2)(b)(xxii), concerning international armed conflicts, differs slightly from Art. 7(1)(g) in defining other forms of sexual violence as being those 'also constituting a grave breach of the Geneva Conventions'. Art. 8(2)(e)(vi), concerning internal armed conflicts, gives the same list of war crimes except that 'any other form of sexual violence' is defined as one 'constituting a serious violation of article 3 common to the four Geneva Conventions'. Arts. 7(1)(c) and 7(2)(c) further include 'enslavement' as a crime against humanity, with specific reference to trafficking in women and children; Art. 6(d) identifies the imposition of measures intended to destroy, in whole or in part, a national, ethnic, racial, or religious group, by preventing births within the group, as 'genocide', as well as the forcible transfer of children of the group to another group, per Art. 6(e).

17 There is still a large void in relation to the rights of some other groups, such as the elderly and persons with disabilities.

18 UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 9.

19 See, also, P. Goldbert and B. Passade Cissé, 'Gender Issues in Asylum Law after Matter of R.A.', *Immigration Briefings*, Feb. 2000, p. 1.

an interpretative aid [to international refugee law], broadening and deepening the scope of protection, both in terms of substantive law and procedural mechanisms'.²⁰ Prior to the adoption and entry into force of the CRC, however, children were still entitled to the enjoyment of rights as individuals under other international instruments.

B. Recent developments

1. Gender

There has been significant progress in relation to the recognition of gender-related claims to refugee status over the last decade. In 1985, the Executive Committee of the High Commissioner's Programme first referred to the fact 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)', although it was left to States' discretion 'in the exercise of their sovereignty' whether or not to do so.²¹ In 1990, there was the first mention of providing skilled female interviewers in refugee status determination procedures as well as ensuring access by women asylum seekers to such procedures, 'even when accompanied by male family members'.²² UNHCR's 1991 'Guidelines on the Protection of Refugee Women' created the impetus for subsequent resolutions, advising that 'special efforts may be needed to resolve problems faced specifically by refugee women',²³ and urging that refugee status determination officials be given training regarding the claims of women asylum seekers.²⁴ Consequently, in 1993, there was encouragement to States to develop 'appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men'.²⁵ In October 1995, and again in 1996, 1997, and 1999,²⁶ the Executive Committee went further and

call[ed] upon the High Commissioner to support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women ... In

20 J. Bhabha and W. Young, 'Not Adults in Miniature: Child Asylum Seekers and the New US Guidelines', 11 *International Journal of Refugee Law*, 1999, p. 84, at p. 98.

21 Executive Committee, Conclusion No. 39 (XXXVI), 1985, on refugee women and international protection, para. k.

22 Executive Committee, Conclusion No. 64 (XLI), 1990, on refugee women and international protection, para. a(iii).

23 UNHCR, 'Guidelines on the Protection of Refugee Women', Geneva, 1991, para. 4.

24 *Ibid.*, para. 75.

25 Executive Committee, Conclusion No. 73 (XLIV), 1993.

26 See Executive Committee, Conclusions No. 79 (XLVII), 1996, para. o; No. 81 (XLVIII), 1997, para. t; and No. 87 (L), 1999, para. n, respectively.

accordance with the principle that women's rights are human rights, these guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or gender-related persecution.²⁷

Throughout this period, States began responding to the call for the introduction of safeguards, including the development of guidelines, in order to ensure equitable access to asylum procedures. The United States, Australia, Canada, and the Netherlands were the first States to accept the challenge.²⁸ UNHCR held a symposium on gender-based persecution in 1996 to examine comparative practices with a view to improving protection for women who fear persecution on gender-related grounds.²⁹ As a culmination of these developments, judicial reasoning took on new approaches, moving away from paradigms dominated by the experiences of male refugees, and towards a gender-sensitive and gender-inclusive interpretation and application of refugee law that gave equal significance to the sometimes different, although no less serious, forms of persecution feared by women. Case law has recognized a wide range of valid claims, including sexual violence, domestic violence, punishment and discrimination for transgression of social mores, sexual orientation, female genital mutilation, and trafficking, as outlined briefly in the paragraphs which follow.

Rape and sexual violence inflicted by members of the armed forces have been recognized as a ground for refugee status.³⁰ These decisions have paralleled developments in international human rights law confirming, for instance, that the rape of

27 Executive Committee, Conclusion No. 77 (XLVI), 1995, para. g.

28 US Immigration and Naturalization Service, 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women', 26 May 1995; Department of Immigration and Humanitarian Affairs, Australia, 'Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers', July 1996; Immigration and Refugee Board, Canada, 'Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution: Update', 13 Nov. 1996; and Netherlands Immigration and Naturalization Service, 'Working Instruction No. 148: Women in Asylum Procedures', subsequently superseded by guidelines in the Aliens Circular 2000.

29 'UNHCR Symposium on Gender-Based Persecution, Geneva, 22–23 Feb. 1996', 9 *International Journal of Refugee Law*, special issue, Autumn 1997.

30 See e.g., *Olympia Lazo-Majano v. Immigration and Naturalization Service*, US Court of Appeals (9th Circuit), 813 F.2d 1432, 9 June 1987 (El Salvadorean woman raped by sergeant of Salvadorean armed forces, political opinion); *Matter of D.V.*, US Board of Immigration Appeals, Interim Decision No. 3252, 25 May 1993 (Haitian woman gang-raped by soldiers after fall of Aristide government because of her active membership in a church group supporting that government); *Grajo v. Immigration and Naturalization Service*, 124 F.3d 203 (7th Circuit), 1997; *Fuentes v. Immigration and Naturalization Service*, 127 F.3d 1105 (9th Circuit), 1997; Decision of 7 Sept. 2001, Administrative Court Frankfurt am Main, Ref. No. 1 E 31666/97.A(1); *Raquel Martin de Mejía v. Peru*, Inter-American Commission on Human Rights, Case No. 10.970, Report No. 5/96, 1 March 1996 (Peruvian woman raped by armed forces for alleged membership of guerrilla group, later granted asylum in Sweden). The Center for Gender and Refugee Studies at Hastings College of the Law, University of California, USA, maintains a useful database of decisions on gender-related asylum claims and other relevant material at <http://www.uchastings.edu/cgrs/>.

a 17-year-old female detainee by an official of the State was an especially grave and abhorrent form of ill-treatment and that the accumulation of acts of violence, especially the act of rape, amounted to torture.³¹ Similarly, judgments of the international tribunals for the former Yugoslavia and Rwanda confirming enslavement, rape, and torture as crimes against humanity³² and genocide³³ have further clarified the international legal position regarding such acts. Victims of domestic violence where the State is unable or unwilling to intervene to provide protection have in recent years increasingly also been recognized as refugees, not least as a result of evolving jurisprudence on ‘membership of a particular social group’.³⁴

The position adopted by the Executive Committee 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”³⁵ has been accepted in numerous jurisdictions.³⁶ Again, human rights

31 *Aydin v. Turkey*, European Court of Human Rights, Case No. 57/1996/676/866, 25 Sept. 1997.

32 *Kunarac, Kovac and Vukovic*, above n. 15. See also, *Prosecutor v. Anto Furundzija*, ICTY, Case No. IT-95-17/1-T, 10 Dec. 1998, upheld on appeal 21 July 2000.

33 *Prosecutor v. Jean-Paul Akayesu*, International Criminal Tribunal for Rwanda (ICTR), Case No. ICTR-96-4-T, 2 Sept. 1998.

34 See e.g., *R. v. Immigration Appeal Tribunal and another, ex parte Shah; Islam and others v. Secretary of State for the Home Department*, UK House of Lords, [1999] 2 AC 629, [1999] 2 All ER 545 (hereinafter *Shah and Islam*) (two Pakistani women falsely charged with infidelity flee violence by their husbands and severe sanctions under Pakistani law, membership of a particular social group, social mores); *Minister of Immigration and Multicultural Affairs v. Khawar*, High Court of Australia, [2002] HCA 14, 11 April 2002 (Pakistani woman subject to severe domestic violence); *Matter of R.A.*, Interim Decision No. 3403, Board of Immigration Appeals, 11 June 1999 (Guatemalan citizen subject to brutal violence by her husband, membership of a particular social group, political opinion); *Aguirre-Cervantes v. Immigration and Naturalization Service*, US Court of Appeals (9th Circuit), 242 F.3d 1169, 21 March 2001 (19-year-old Mexican girl abused by her father granted status on the basis of ‘family membership’); Refugee Appeal No. 71427/99, New Zealand Refugee Status Appeals Authority (RSAA), 16 Aug. 2000 (Iranian woman and son subject to custody battle, cumulative discrimination).

35 Executive Committee, Conclusion No. 39, above n. 21.

36 See e.g., *Shah and Islam*, above n. 34; *Fatin v. Immigration and Naturalization Service*, Court of Appeals (3rd Circuit), 12 F.3d. 1233, 1993 (18-year-old Iranian woman, wearing the *chador* and freedom of expression and equality of the sexes); *Matter of S.A.*, Board of Immigration Appeals, Interim Decision No. 3433, 27 June 2000 (21-year-old Moroccan woman subject to severe physical abuse by her father on account of her differing religious beliefs about the role of women in Moroccan society), cf. *Fisher v. Immigration and Naturalization Service*, 79 F. 3d 955 (9th Circuit), 1996; *Matter of D.*, US Immigration Court, San Francisco, California, 3 July 1996, available at <http://www.uchastings.edu/cgrs/law/ij/9.pdf> (Afghan woman with well-founded fear of persecution on grounds of political opinion and religion); Refugee Appeal No. 71427/99, above n. 34; Refugee Appeal No. 2039/93 *Re M.N.*, New Zealand RSAA, 12 Feb. 1996 (Iranian woman subject to cumulative discrimination amounting to a real chance of persecution on grounds of race, religion, and political opinion at hands of State and male family members); Refugee Appeal No. 2223/94, New Zealand RSAA, 30 July 1996; Refugee Appeal No. 915/92 *Re S.Y.*, New Zealand RSAA, 29 Aug. 1994 (imputed political opinion); *Elkebir*, French *Commission des recours des réfugiés* (CRR, Refugee Appeal Commission), 22 July 1994 (Westernized Algerian woman threatened by Islamic militants, lack of State protection); *Sahraoui*, French CRR, 8 Feb. 1995 (being too Westernized); *Haj Ahmed*, French CRR, 30 Nov. 2000 (divorced woman, raising children on her own

developments have buttressed such interpretations. The European Court of Human Rights has found, for instance, that there was a real risk of the applicant, an Iranian refugee accused of adultery,³⁷ being subjected to treatment contrary to Article 3 of the European Convention on Human Rights,³⁸ including potentially death by stoning, if she were returned to Iran.

Other claims of gender-related persecution have included those concerning the practice of female genital mutilation, and refugee status has now been recognized in such cases in a number of jurisdictions.³⁹ For its part, the European Parliament has expressed the hope that member States of the European Union will recognize the right to asylum of women and girls at risk of being subjected to such treatment.⁴⁰ A further recent example of gender-related persecution concerns victims of trafficking, who have in some cases also been granted refugee status.⁴¹

Initiatives promoting the inclusion of women asylum seekers within refugee status determination processes and gender-sensitive interpretations of refugee law have also had the positive corollary effect of accepting the non-traditional claims of some men who breach social roles attributed to their sex.⁴² Just as women who

in Algeria). These issues are also addressed by the Australian High Court in *Khawar*, above n. 34, paras. 52, 123, 134, and 150.

37 *Jabari v. Turkey*, Application No. 40035/98, 11 July 2000.

38 European Convention on the Protection of Human Rights and Fundamental Freedoms, ETS No. 5.

39 See e.g. *In re Fauziya Kasinga*, US Board of Immigration Appeals, File No. A73 476 695, 13 June 1996 (19-year-old Togolese woman, FGM and forced marriage); *Annan v. Canada (Minister of Citizenship and Immigration)*, Canadian Federal Court (Trial Division), [1995] 3 FC 25, 6 July 1995; *Soumah*, French CRR, 7 Dec. 2001; A., French CRR, 18 Sept. 1991; *Soumahoro*, French CRR, 17 July 1995, cited in M. Laurain, 'Membership of a Particular Social Group in Recent French Case Law' (paper submitted to the Ad Hoc Committee of Experts on Legal Aspects of Territorial Asylum, Refugees and Stateless Persons (CAHAR), Council of Europe, Strasbourg, doc. CAHAR-PSG (2002) 4 fre, 14 March 2002); Decision No. IFAS 220.268/0-XI/33/00, Austrian Independent Federal Asylum Senate (IFAS/UBAS, second instance asylum authority), Vienna, 21 March 2002 (refugee status granted on basis of membership of the group of Cameroonian women who are to be circumcised).

40 E. V. Martinez-Orozco, 'Report on Female Genital Mutilation', A5-0285/2001, European Parliament, 17 July 2001, p. 13/32.

41 See e.g., Decision No. T98-06186, CRDD No. 298, 2 Nov. 1999 (Thai woman in sex trade debt bondage, refugee status as member of social group of women and/or former sex trade workers); *Dzhygun*, UK Immigration Appeal Tribunal, Appeal No. CC-50627-99 (00TH00728), 17 May 2000 (refugee status of trafficked Ukrainian woman upheld on appeal); Decision No. 99/20/0497-6, Austrian Administrative Court (*Verwaltungsgerichtshof*, 3rd instance), 31 Jan. 2002 (denial of asylum to Nigerian woman trafficked into prostitution overruled and returned for re-consideration).

42 See section II.A.3 below. Cases include *Ourbih*, French CRR (sections réunis (SR)), Decision No. 269875, 15 May 1998 (Algerian transsexuals a particular social group); *Djellal*, French CRR (SR), Decision No. 328310, 12 May 1999; *Aourai*, French CRR, Decision No. 343157, 22 Feb. 2000; *Meguenine*, French CRR, 12 July 2001 (all three cases involving Algerians openly proclaiming their homosexuality), cited in Laurain, 'Membership of a Particular Social Group in Recent French Case Law', above n. 39. See, also, *Re G.J.*, Refugee Appeal No. 1312/93, New Zealand RSAA, 1 NLR 387, 30 Aug. 1995 (Iranian homosexual recognized as member of particular social group,

refuse to wear the veil in some societies are seen as transgressing accepted social mores, male homosexuals, for example, in some societies also find themselves in breach of both gender roles and social rules and are persecuted as a result. The rapidity with which such cases have been seen as falling within the parameters of Article 1A(2) of the 1951 Convention demonstrates dynamic progression towards a correct understanding of the gendered nature of particular claims.

By 2000, there was widespread acceptance that gender can 'influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment',⁴³ although the Executive Committee continued to express its concern about the 'less than full application of international refugee instruments by some States Parties'.⁴⁴ In 1998, Norway introduced guidelines on determining refugee status⁴⁵ and, two years later, the United Kingdom introduced guidelines on gender-sensitive approaches to refugee law and procedures.⁴⁶ Sweden has introduced two sets of guidelines, one on women and the other on sexual orientation, with a focus on procedural aspects of asylum determination.⁴⁷ At the time of writing this paper, however, Sweden has yet to accept that the claims of women or those based on sexual orientation fit within the 'particular social group' ground of the refugee definition, although Sweden has said publicly that legislative changes are in train to correct this.⁴⁸ The current Swedish 'Guidelines on Women' do emphasize, however, that 'women's expressions of protest and their refusal to submit are often directed towards social, cultural and religious norms' that are supported by political and religious arms of society. The Swedish 'Guidelines on Sexual Orientation' also refer to contravention of strict religious practices. This hints that such activities can be appropriately classified as political or religious in character for the purposes of

analysis of other jurisprudence on sexual orientation); *Hernandez-Montiel v. Immigration and Naturalization Service*, US Court of Appeals (9th Circuit), No. A72-994-278, 225 F.3d 1084, 24 Aug. 2000 (Mexican 'gay men with female sexual identities' a particular social group); *Matter of Marcelo Tenorio*, US Board of Immigration Appeals (BIA), File No. A72-093-558, 1999; *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, Federal Court of Australia, [2000] FCA 211, 6 March 2000. For an overview of cases in Europe, North America, South Africa, Australia, and New Zealand, see European Legal Network on Asylum (ELENA), 'Research Paper on Sexual Orientation as a Ground for Recognition of Refugee Status' (European Council on Refugees and Exiles (ECRE), June 1997).

43 UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 6. See also, paper by R. Haines, Part 5.1 of this book.

44 Executive Committee, Conclusion No. 89 (LI), 2000.

45 Royal Ministry of Justice and the Police, 'Guidelines for Determining Refugee Status in Norway', 15 Jan. 1998.

46 UK Immigration Appellate Authority, 'Asylum Gender Guidelines', Nov. 2000.

47 Migration Board, Legal Practice Division, Sweden, 'Gender-Based Persecution: Guidelines for the Investigation and Evaluation of the Needs of Women for Protection', 28 March 2001, and Migration Board, Sweden, 'Guidelines for the Investigation and Evaluation of Asylum Cases in which Persecution Based on Given Sexual Orientation is Cited as a Ground', 28 Jan. 2002.

48 Statement by the Swedish delegate to the final 'third track' meeting of the Global Consultations on International Protection on refugee women, Geneva, 24 May 2002. Currently, such claimants are granted subsidiary or complementary forms of protection.

the 1951 Convention refugee definition. Several non-governmental organizations have also produced valuable guidance in the absence of State action.⁴⁹

In comparison, Ireland, Panama, South Africa, and Venezuela have opted specifically to identify ‘sex’, ‘gender’, and/or ‘sexual orientation’ as grounds for claiming refugee status.⁵⁰ Still other countries have included references to specific forms of gender-related persecution, rather than adding an additional ground. Switzerland, for instance, expressly provides in legislation that the ‘motives of flight specific to women shall be taken into account’.⁵¹ Guatemala refers to sexual violence and other gender-based persecution.⁵² Germany prohibits *refoulement* of aliens facing persecution because of their gender, in addition to *refoulement* of those facing persecution on one or more of the Convention grounds.⁵³ In 1995, the Austrian Ministry of the Interior issued an order specifying that ‘on the basis of the [1951] Geneva Convention and the 1991 Asylum Law, rape, just like any other violation of a person’s integrity, is a ground for asylum, provided that it was motivated by one of the reasons enumerated in the [1951] Geneva Convention’.⁵⁴ A correct interpretation of the refugee definition does not, however, require that another ground be added.⁵⁵ Nonetheless, it is clear that specific reference to ‘sex’ or ‘sexual orientation’ within the law has the effect of removing any remaining doubt that persons facing gender-related persecution are protected by the 1951 Convention.

UNHCR, throughout its Global Consultations on International Protection in the context of the fiftieth anniversary of the 1951 Convention, adopted a gender- and age-inclusive approach. In addition, States Parties urged that separate agenda items on refugee women and on refugee children be included in relation to the ‘third track’ of the Consultations.⁵⁶ Within the documentation on refugee women,

49 See, e.g., ECRE, ‘Position on Asylum Seeking and Refugee Women’, Dec. 1997; Refugee Women’s Legal Group, ‘Gender Guidelines for the Determination of Asylum Claims in the UK’, July 1998; National Consortium on Refugee Affairs, South Africa, ‘Gender Guidelines for Asylum Determination’, 1999; Irish Refugee Council, ‘Guiding Principles on Asylum-Seeking and Refugee Women’, June 2001.

50 The 1996 Irish Refugee Act, section 1, defines membership of a particular social group as including ‘persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation’; Panamanian Executive Decree No. 23, 10 Feb. 1998, Art. 5, includes ‘gender’; the 1998 South African Refugee Act specifies that members of a particular social group can include persons persecuted because of their ‘gender, sexual orientation, class or caste’; the National Assembly of Venezuela, Decree of 3 Oct. 2001, Art. 5, adds the ground of ‘sex’ to the refugee definition.

51 1998 Asylum Act, Art. 3(2).

52 Government Accord No. 383-2001, Guatemala, 14 Sept. 2001, Art. 11(d).

53 Immigration Law, section 60, signed into law by Federal President, June 2002.

54 Order of the Austrian Ministry of Interior, No. 97.101/10/SL III/95.

55 See UNHCR, ‘Guidelines on Gender-Related Persecution’, 2002, above n. 4, para. 6; and Global Consultations, ‘Summary Conclusions – Gender-Related Persecution’, San Remo expert roundtable, 6–8 Sept. 2001, para. 1.

56 UNHCR, ‘Refugee Women’, Global Consultations on International Protection, UN doc. EC/GC/02/8, 25 April 2002, Parts V and VI; and UNHCR, ‘Refugee Children’, UN doc. EC/GC/02/9, 25 April 2002.

a section was dedicated to the continuing need for gender-sensitive interpretation and -application of refugee law. A section on trafficking also highlighted the particular vulnerabilities of refugee women as targets of trafficking rings, in addition to finding that some trafficked persons may be able to mount valid claims to refugee status, where the State has been unable or unwilling to protect them against such forms or threats of harm.⁵⁷ As indicated in the Introduction in Part 1.1 of this book, the second track specifically included gender-related persecution as a separate discussion at the expert roundtable in San Remo, 6–8 September 2001.

2. Age

Less has been said in relation to the age dimension in the interpretation and application of international refugee law. Like sex and sexual orientation, age is not included in the refugee definition in Article 1A(2) of the 1951 Convention as a specific ground for seeking asylum. Nonetheless, the range of potential claims with an age dimension is broad, including forcible or under-age recruitment into military service,⁵⁸ family or domestic violence,⁵⁹ infanticide, forced or underage marriage,⁶⁰ female genital mutilation,⁶¹ forced labour, forced prostitution, child pornography, trafficking,⁶² and children born outside of strict family planning rules.⁶³ Although refugee children are entitled to access the same protection as refugee adults, their special vulnerabilities require that an age-sensitive approach be adopted in relation to substantive aspects of refugee law as well as procedures. If not, the risk of failing to recognize child-specific forms of persecution or underestimating the particular fears of children is high. Age-sensitive approaches are particularly relevant to children, although they are also important for the elderly, who may, for example, suffer severe discrimination (including exclusion) amounting to persecution.

The claims of many children often incorporate a gender element. For example, young girls, as opposed to adult women, are most likely to be threatened with female genital mutilation. Thus, such cases necessarily import both an age and a gender dimension which are often overlooked. Is the girl at risk of persecution based on

57 UNHCR, 'Refugee Women', above n. 56, Parts V and VI.

58 See, *Minister for Immigration and Multicultural Affairs v. Applicant Z.*, Federal Court of Australia, [2001] FCA 1823, 19 Dec. 2001, in which an appeal was dismissed, finding that 'able-bodied Afghan men' do not constitute a 'particular social group'.

59 Decisions Nos. U95-00646, U95-00647, U95-00648, CRDD, 15 Jan. 1997, 67 *Reflex*, 26 May 1997 (principal claimant a 12-year-old citizen of both USA and UK, persecution based on sexual abuse by British father), see below n. 93 for appeal to the Federal Court of Canada (Trial Division). Decision No. TA0-05472, CRDD, 30 May 2001 (teenage unaccompanied minor subject to physical abuse by his father and verbal abuse by both parents in Poland).

60 See *Re W. (Z.D.)*, CRDD No. 3, No. U92-06668, 19 Feb. 1993.

61 See, by way of comparison, the cases mentioned above n. 39.

62 See, by way of comparison, the cases mentioned above n. 41.

63 See *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs*, High Court of Australia, [2000] HCA 19, (2000) 170 ALR 553, 13 April 2000.

her sex, as a girl, or her age, as a young girl, or both? Are young boys who flee forcible recruitment being persecuted by reason of their sex, or because of their age, or both? In both these examples, their vulnerability to particular forms of persecution is compounded by these two factors: age and gender. Cases of young girls frequently see the convergence of age and gender dynamics. In other cases, the question of age is of overriding significance, such as in child prostitution and child pornography, which affect boys and girls, albeit to different degrees in different contexts. Their shared characteristic is their young age. Even in cases involving politically or religiously motivated persecution, age-sensitive approaches are needed in order to ensure an accurate refugee status determination.

While international human rights law, including especially Article 22 of the CRC and its Optional Protocols, has significantly advanced the rights of the child, refugee law has not progressed to the same degree. Although many States recognize the right of children to seek asylum, there is often a complete absence of analysis in judicial decisions as to how their age may affect their claim. Similarly, the Executive Committee Conclusions are all but devoid of references to child asylum seekers and their special needs in relation to access to asylum systems, although they are reasonably comprehensive in so far as they promote the 'best interests' of the child⁶⁴ and identify specific forms of protection issues facing children, including 'physical violence, sexual abuse, trade in children, acts of piracy, military or armed attacks, forced recruitment, political exploitation or arbitrary detention'.⁶⁵ The link between these forms of harm and claims to refugee status is, however, missing. In 1987, the Executive Committee underlined the special situation of unaccompanied and separated children, including 'their needs as regards determination of their status',⁶⁶ although no more was said.

Few countries have adopted guidelines to assist decision makers in handling the special circumstances of asylum-seeking children. Canada adopted guidelines on procedural and evidentiary aspects of children's claims in 1996, followed by the United States in 1998.⁶⁷ More recently, Finland has adopted guidelines for interviewing (separated) minors.⁶⁸ UNHCR has also developed guidelines on unaccompanied children.⁶⁹ At the time of writing, UNHCR, together with other

64 See CRC, Art. 3(1).

65 Executive Committee, Conclusion No. 47 (XXXVIII), 1987, on refugee children, para. e; as repeated in part in Executive Committee, Conclusion No. 59 (XL), 1989, on refugee children, paras. h and i; No. 72 (XLIV), 1993; No. 74 (XLV), 1994; No. 79 (XLVII), 1996; and Executive Committee, Conclusion No. 84 (XLVIII), 1997, on refugee children and adolescents (in its entirety); No. 85 (XLIX), 1998, paras. k and dd; No. 87 (L), 1999, para. o; and No. 89 (LI) of 2000.

66 Executive Committee, Conclusion No. 47 (XXXVIII), 1987, on refugee children, para. i.

67 Immigration and Refugee Board, Canada, 'Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues', 30 Sept. 1996; US Immigration and Naturalization Service, 'Guidelines for Children's Asylum Claims', 10 Dec. 1998.

68 Directorate of Immigration Finland, 'Guidelines for Interviewing (Separated) Minors', March 2002.

69 UNHCR, Community Service Guidelines, 'Working with Unaccompanied Children: A Community-based Approach,' revised May 1996, pp. 39–52; UNHCR, 'Guidelines on Policies

humanitarian agencies, was in the process of finalizing the ‘Inter-Agency Guiding Principles on Unaccompanied and Separated Children’, which include a short section on children in refugee status determination.⁷⁰

II. Age and gender in the refugee definition

A. Inclusion

1. *Non-State agents of persecution*

Whether persecution, within the context of the 1951 Convention definition, can be derived from non-State actors or agents, as opposed to State agents, has been at the forefront of debate on international refugee law. The UNHCR *Handbook on Procedures and Criteria for Determining Refugee Status*⁷¹ clarifies that, while persecution is normally related to action by the authorities of a country, it may also emanate from sections of the population, if the acts are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.⁷² This conforms with the 1951 Convention refugee definition itself which does not prescribe from whom the persecution must originate. Similarly, neither the 1969 Organization of African Unity (OAU) Refugee Convention,⁷³ nor the 1984 Cartagena Declaration on Refugees,⁷⁴ contains a requirement that the persecutor be the State.

In most common law countries, persecution at the hands of non-State actors has now been accepted, in situations where the State is unable or unwilling to offer effective protection against such harm (the so-called protection view).⁷⁵ The

and Procedures in Dealing with Unaccompanied Children Seeking Asylum’, Feb. 1997 (hereinafter UNHCR, ‘Guidelines on Unaccompanied Children Seeking Asylum’, 1997). See, also, ECRE, ‘Position Paper on Refugee Children’, Nov. 1996; UNHCR and International Save the Children Alliance in Europe, ‘Separated Children in Europe Programme: Statement of Good Practice’, Dec. 1999.

70 UNHCR, UN Children’s Fund (UNICEF), International Committee of the Red Cross, International Rescue Committee, Save the Children (UK), and World Vision International, ‘Inter-Agency Guiding Principles on Unaccompanied and Separated Minors’, forthcoming 2002.

71 UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status* (Geneva, 1979, re-edited 1992).

72 *Ibid.*, para. 65.

73 OAU Convention Governing the Specific Aspects of Refugee Problems in Africa, adopted 10 Sept. 1969, 1001 UNTS 45.

74 Adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico, and Panama, in Cartagena, 19–22 Nov. 1984.

75 See, for instance, *Minister for Immigration and Multicultural Affairs v. Ibrahim*, High Court of Australia, [2000] HCA 55, 26 Oct. 2000; *Zalzali v. Canada (Minister of Employment and Immigration)*, Canadian Federal Court of Appeal, [1991] 3 FC 605; *Canada (Attorney General) v. Ward*, Supreme Court of Canada, [1993] 2 SCR 689; *Adan v. Secretary of State for the Home Department*, UK House of Lords, [1999] 1 AC 293; *Horvath v. Secretary of State for the Home Department*, House of Lords, [2000] 3 All ER 577.

European Commission's Draft Directive on standards for qualification as a refugee, supports this view and has proposed that persecution may originate from non-State actors, thus advancing the cause of gender-related claims.⁷⁶ In contrast, civil law jurisdictions are more divided and tend to require some level of accountability of the State.⁷⁷ While some discrepancy remains between the case law in different jurisdictions, a trend is emerging towards a general acceptance that persecution can be at the hands of non-State actors, at least where the State refuses to offer protection, and, increasingly, where the State proves unable to do so.

For many gender-related claims, the view adopted can be a determining factor in the grant of refugee protection. It can also be a key factor in many non-gender-related cases today, given the specific nature of armed conflicts and civil wars, where the State is often unable to exercise effective control or offer satisfactory protection. In fact, acceptance of non-State agents of persecution was first advanced in cases with no gender component.⁷⁸

Claims to refugee status on the basis of domestic violence are the ultimate test of the durability of the so-called protection-based approach. Substantial positive case law now exists on this question.⁷⁹ Most recently, the High Court of Australia in *Khawar* reconfirmed the approach adopted by the House of Lords in *Horvath*, in which the failure of the State to provide protection was seen as 'the bridge between persecution by the state and persecution by non-state agents which is necessary in the interests of the consistency of the whole scheme'.⁸⁰ By so doing, the High Court reaffirmed the decision of the Federal Court of Australia to grant refugee status to Mrs Khawar, who claimed she was the victim of serious and prolonged domestic violence on the part of her husband and members of his family, and that the police in Pakistan refused to enforce the law against such violence or otherwise offer her protection. Such refusal was considered not only to be a mere inability to provide protection, but also 'alleged tolerance and condonation'.⁸¹

Although still largely untested, claims to refugee status on the basis of being trafficked for the purposes of sexual slavery or enforced prostitution are as plausible as other claims of gender-related persecution and invoke the non-State actor issue. As UNHCR states, '[t]he forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related

76 European Commission, 'Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection', COM(2001), 510 final, 12 Sept. 2001, Art. 9(1).

77 See, V. Türk, 'Non-State Agents of Persecution', in *Switzerland and the International Protection of Refugees* (ed. V. Chetail and V. Gowlland-Debbas, Kluwer Law International, The Hague, 2002), pp. 95–109, for State practice in Germany, Switzerland, France, and Italy. See also, W. Kälin, 'Non-State Agents of Persecution and the Inability of the State to Protect', 15(3) *Georgetown Immigration Law Journal*, Spring 2001, pp. 415–31.

78 See the *Adan*, *Horvath* and *Ward* cases, above n. 75. 79 See the cases listed above n. 34.

80 *Horvath* case, above n. 75, [2001] 1 AC 489 at pp. 497–8, restated by Gleeson CJ in *Khawar*, above n. 34, at para. 19.

81 *Khawar*, above n. 34, at para. 30.

violence or abuse that can even lead to death'.⁸² Although such practices are most often characterized as a form of persecution perpetrated by non-State actors, the direct complicity of the police or other State officials in such activities is not uncommon.

There is no reason why a victim of trafficking,⁸³ who fears returning home due to the real possibility of being re-trafficked, targeted for reprisals, or threatened with death, should not be granted refugee status where the State of origin is unable or unwilling to protect that person against such harm. Severe community ostracism or discrimination may also rise to the level of persecution in an individual case. Of course, many forms of persecution, such as rape, sexual violence, physical assault, and other forms of violence, amount to criminal acts. The trafficking experience can also render some victims stateless and eligible to apply for refugee status as stateless persons under Article 1A(2) of the 1951 Convention.⁸⁴

Two recent cases illustrate some of these issues. An Austrian High Administrative Court decision, involving a citizen of Nigeria who was sold by her adoptive parents into forced prostitution and trafficked to Italy, suffering severe ill-treatment, annulled a preceding negative decision on the grounds of illegality of substance. The earlier decision was found to have wrongly reasoned that 'the risk she claimed was clearly not attributable to the reasons set forth in the [1951] Geneva Convention'.⁸⁵

82 UNHCR, 'Guidelines on International Protection: Gender-Related Persecution', 2002, above n. 4, para. 18; UNHCR, 'Refugee Women', above n. 56, paras. 18–19. See also, A. Edwards, 'Resettlement: A Valuable Tool in Protecting Refugee, Internally Displaced and Trafficked Women and Girls', 11 *Forced Migration Review*, Oct. 2001, p. 31, at p. 34.

83 A distinction is drawn here between smuggling and trafficking. Art. 3 of the 2000 UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the 2000 UN Convention Against Transnational Organized Crime, UN doc. A/55/383, defines trafficking in persons as:

the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.

84 UNHCR, 'Activities in the Field of Statelessness: Progress Report', UN doc. EC/51/SC/CRP.13, 30 May 2001, para. 18:

Trafficked women may have their documents stolen or destroyed either on arrival in a third country or prior to transfer, often making it impossible to prove their status when they try to re-enter their country. They may be placed in detention in the country to which they have been transported illegally, and may linger there for years because of the refusal of the country of citizenship to readmit them in the absence of evidence of their nationality, and refusal of the country of detention to release them without proper documentation.

85 Decision No. 99/20/0497-6, above n. 41 (author's translation).

The United Kingdom Immigration Appeal Tribunal's decision in *Lyudmyla Dzhygun* accepted that trafficking could amount to persecution in the absence of State protection, but struggled with the issue of whether victims of crime could constitute a 'particular social group'. The Tribunal finally decided that it could not see how being a victim of a crime precluded an individual from being a member of a 'particular social group'.⁸⁶ The group was defined as 'women in the Ukraine who are forced into prostitution against their will', stating that this group exists independently of the persecution it fears.⁸⁷

Such cases raise not only the issue of the correct interpretation of 'persecution' for the purposes of the 1951 Convention definition and the identification of the appropriate ground, but also the causal link between the persecution and the ground – the question of whether the persecution was 'for reasons of' one of the Convention grounds. There have been mixed results in this regard. In the now famous case of *Shah and Islam*,⁸⁸ it was well accepted that the two Pakistani women satisfied the element of persecution, having been found to be at risk of false accusations of adultery, an act punishable in Pakistan by flogging or stoning to death. The decision rested on whether the claimants were at risk of being persecuted 'for reasons of' their membership in a particular social group, which in this case was considered to be 'Pakistani women'. Lord Hoffmann found that two elements were needed in cases involving non-State agents of persecution:

First, there is the threat of violence to the claimant by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. The combination of these two elements was held to constitute persecution within the meaning of the Convention.⁸⁹

This approach has been further clarified by subsequent decisions and has found voice in UNHCR's 'Guidelines on Gender-Related Persecution':

In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner, or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established,

⁸⁶ See, *Dzhygun*, above, n. 41, para. 34.

⁸⁷ *Ibid.*, para. 29. See also, Decision No. T98-06186, CRDD, above n. 41; Decision No. V95-02904, CRDD, 26 Nov. 1997; *An Li v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), IMM-1023-95, 30 March 2001; *Matter of J.M.*, US Immigration Court, San Pedro, California, 3 Dec. 1996, available on <http://www.uchastings.edu/cgrs/law/ij/364.pdf>.

⁸⁸ *Shah and Islam*, above n. 34.

⁸⁹ *Ibid.*, per Lord Hoffmann. For more on the causal link or nexus, see papers by T. A. Aleinikoff on membership of a particular social group, in Part 4.1, and by R. Haines on gender-related persecution, in Part 5.1, of this book. See, in contrast, *Matter of R.A.*, Interim Decision No. 3403, above n. 34.

whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is established.⁹⁰

This approach is adopted to ensure the equitable treatment of men and women before the law. Traditionally, claims to asylum by men involved a *direct* link between the action of the State to suppress, intimidate, or imprison the claimant and one or more of the Convention grounds. To accept only direct links between persecution and the State would be to discriminate against women who are more likely to be subjected to indirect links between the persecution and the actions of the State, through an inability or an unwillingness of the State to protect them. It may also exclude the non-traditional claims of some men. This is to apply a gender analysis to the application of the law. Similarly, an age-sensitive analysis needs to be promoted. Children are often subjected to persecution by non-State actors, including parents, other family members, guerrilla groups, or their community. In some cases of persecution at the hands of government officials, parents or guardians can be implicated in the persecution. As has been noted, '[t]hey may participate directly, as when a child is sold, married, forced into hazardous work or subjected to child abuse or female genital mutilation', or they may 'acquiesce in the abuse, whether through voluntary consent or fear'.⁹¹ The same standard applied to gender-related claims should equally apply to age-related claims. Thus, where a child has been subjected to abuse at the hands of a non-State actor, it will amount to persecution where the State has been unable or unwilling to provide protection to the child against such harm.

What amounts to 'protection' in this sense has not been fully tested. Absent a complete breakdown of State apparatus, it has been presumed that the State is capable of protecting its citizens. Clear and convincing confirmation of its inability to do so seems to be the standard in order to rebut this presumption.⁹² A Canadian case, with age and gender dimensions, demonstrates the difficulties in this regard.⁹³ The

90 UNHCR, 'Guidelines on Gender-Related Persecution', 2002, above n. 4, para. 21. See also, 'Summary Conclusions on Gender-Related Persecution', San Remo, above n. 55, para. 6.

91 Bhabha and Young, above n. 20, pp. 107–8.

92 See e.g., *Attorney General of Canada v. Ward*, above n. 75.

93 *Canada (Minister of Citizenship and Immigration) v. Smith*, Federal Court of Canada (Trial Division), [1999] 1 FC 310, [1998] FCJ No. 1613, 29 Oct. 1998 (see above n. 59 for earlier CRDD decision of 15 Jan. 1997 in this case). For a negative decision, see *R.O.I. (Re)*, CRDD No. 235, 1996 (UK and Iran), and for positive decisions, see *U.C.R. (Re)*, CRDD No. 94, 2001 (France); *D.I.P. (Re)*, CRDD No. 288, 1996 (USA); *G. (B.B.) (Re)*, CRDD No. 397, 1994 (Beirut). In several of these cases, the issue of child abduction was raised, including in relation to persecution and possible exclusion. In *U.C.R.*, the panel found that the threat of 'international kidnapping of children to a country that is not a signatory to the Hague Convention [on the Civil Aspects of International Abduction], by its very nature, [is] a serious and continuing breach of fundamental rights, both of the children and the mother, [and] thus amounts to persecution within the meaning of the definition'. In

principal applicant in this case was a 12-year-old boy who was a citizen of both the United States and the United Kingdom. The Convention Refugee Determination Division (CRDD) initially granted him asylum, finding that he belonged to a group of ‘young boys who are victims of incest’. The Division found that both the United States and the United Kingdom had deprived him of some of the basic rights enumerated in Articles 19–37 of the CRC and that such a violation amounted to persecution. On appeal, however, the Federal Court overturned the earlier decision, finding that a claimant:

must advance ‘clear and convincing’ evidence of a State’s inability to afford protection. Several visits to the police were not considered sufficient to rebut the presumption. When the State in question is a democratic State, the claimant must do more than simply show that he went to see some members of the police force and that his or her efforts were unsuccessful.

In contrast, in a similar case the CRDD held that the claimant was successful in rebutting the presumption. It was held that the claimant had no choice but to flee France from the threat of abduction by the children’s Syrian father, as all the witnesses and written testimony were consistent in saying that the claimant had no choice but to flee and, further, all available judicial remedies had been exhausted.⁹⁴ In a further case, the CRDD found that there was no State protection (by the United States) against the forcible abduction or recourse against the forcible separation from the mother. In stating this, the CRDD in the latter case specifically clarified that the reasoning did not reflect on the United States’ ability to provide protection to its citizens in general, but was rather a reflection of the ability of the United States to provide adequate protection to these particular children in their particular circumstances.

By analogy to the above cases asserting a higher burden on persons originating from democratic countries, cases involving ‘non-democratic societies’ therefore seem to require less action on the part of the claimant in order to prove a lack of State protection. There is no doubt that objective information about the country of origin must be produced to support the claim that there is an absence of State protection. This evidence should indeed be clear and convincing, although independent reports and data may be challenged where an individual is refused protection by the State of origin on several occasions. There should not, however, be a higher standard imposed upon claimants originating from democratic societies. States should be held to the same standards of accountability and protection.⁹⁵ A State may have

relation to the application of the exclusion clauses, it found that the mother had not committed an act contrary to the purposes and principles of the UN in bringing her children to Canada, as her intention was to protect them from a real and imminent danger.

⁹⁴ *U.C.R. (Re)*, CRDD No. 94, 2001.

⁹⁵ It is arguable that there should even be a higher standard on democratic States to ensure needed protection.

instituted a plethora of systems to protect individuals. Whether these systems work in reality is the ultimate issue; that is, are these protections accessible, effective, and durable? An individual should not be required to exhaust all available remedies in order to establish that protection is unavailable in cases where the fear of persecution is particularly serious or imminent. To put it differently, the responsiveness of the State in providing protection should increase in direct proportion to the vulnerability of the particular individual. If the State would take concrete action in the case of a child or a woman beaten in the street by a stranger, but does not do so in relation to a child or woman subjected to violence at home, it could be determined that the State has withheld protection from those citizens. The public/private dichotomy is never more pronounced than in these types of cases and is often reflected in the level of protection available to such individuals.

2. *Assessing the well-founded nature of the fear*

The understanding of the term 'persecution' is fundamental to an accurate determination of a particular case, especially in relation to age and gender-specific claims. One issue that can become an obstacle to a child's claim to refugee status is how to make an accurate assessment of the well-foundedness of the fear of persecution. Where certain forms of persecution are explicitly identified, such as sexual abuse, female genital mutilation, or forcible marriage, an assessment of the nature of the persecution will be less controversial. In these cases, it is possible to indicate particular human rights provisions in support of the claim. It becomes more difficult when an asserted form of persecution by a child would not amount to persecution in the eyes of an adult. As Bhabha and Young note: 'Actions which when directed at adults might be considered mere harassment or interference, could amount to persecution when applied to children.'⁹⁶ They illustrate this as follows:

Aggressive police questioning, handcuffing, slapping or rough handling that may not constitute 'serious harm' for an adult, for example, may produce lasting damage, physical or psychological trauma in a child that amounts to persecution, particularly if the child is young or physically frail.⁹⁷

For the elderly, their frailty or lack of mobility could also make threats rise to the level of persecution compared to more active persons, as they would be less able to avoid them or to escape. Certain legitimate forms of punishment for adults might amount to persecution for either children or elderly persons. Cumulative forms of discrimination against the elderly, including exclusion from social and economic life, could rise to the level of persecution in particular cases.⁹⁸

⁹⁶ Bhabha and Young, above n. 20, p. 104.

⁹⁷ Ibid.

⁹⁸ These considerations could also apply to the disabled.

3. *Avoiding persecution*

Some gender-related cases, particularly those based on sexual orientation, have raised the issue of the degree to which one could be required to suppress one's opinions or activities in order to avoid persecution. This has been directly related to establishing the well-founded nature of the persecution, and also has implications for possible internal relocation alternatives (see section II.A.5 below). In cases based on political opinion or religion, it has been consistently held that one cannot be expected to suppress one's political opinion or religious beliefs in order to avoid persecution.⁹⁹ To suggest otherwise would be contrary to the true essence of international refugee protection. Nonetheless, a few cases concerning 'sexual orientation' have given rise to lengthy discussions on the extent to which a homosexual can be expected to 'discreetly' or 'safely practice his homosexuality'.¹⁰⁰ Although the Refugee Review Tribunal in the Australian case of *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs* recognized that it might be an infringement of a fundamental human right to be forced to suppress or conceal one's sexuality,¹⁰¹ it found that it is not as freely accepted that it would be an infringement if one were required, for safety's sake, simply not to proclaim that sexuality openly.¹⁰² The appeal to the Federal Court did not fully decide this question, confining its decision to whether the applicant had a well-founded fear of persecution if he were to pursue a homosexual lifestyle in Sri Lanka, disclosing his sexual orientation to the extent reasonably necessary to identify and attract sexual partners and maintain any relationships established as a result.¹⁰³ Should a member of a social group be required to be discreet about that membership in order to avoid persecution, while another individual is not expected to repress their political or religious beliefs? Is this not applying a different standard to cases argued on the grounds of political opinion or religion to those argued under 'particular social group'? A German judgment, in

99 See, UNHCR, 'Guidelines on International Protection: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees', forthcoming, 2003 (hereinafter UNHCR, 'Guidelines on Internal Flight or Relocation Alternative', forthcoming, 2003).

100 See Decision No. V95/03188, Refugee Review Tribunal, 12 Oct. 1995, appealed to Federal Court of Australia as *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, above n. 42, and *R. v. Secretary of State for the Home Department, ex parte Binbasi*, [1989] Imm AR 595, High Court (Queen's Bench Division), 20 July 1989; cf. Decision No. IV/IE06244/81, Administrative Court (*Verwaltungsgericht*) Wiesbaden, 26 April 1983 (refugee status on the basis of membership of a particular social group of homosexuals in Iran).

101 *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, above n. 42. See also, *Toonen v. Australia*, Human Rights Committee, Communication No. 488/1992, UN doc. CCPR/C/50/D/488/1992, 4 April 1994, which held that laws prohibiting consensual homosexual acts in private violate the right to private life under Art. 17 of the International Covenant on Civil and Political Rights 1966, 999 UNTS 171.

102 *Applicant L.S.L.S. v. Minister for Immigration and Multicultural Affairs*, FCA, above n. 42, paras. 18–35.

103 *Ibid.*, para. 24.

contrast, ruled that the applicant should not have to refrain from homosexual activity and live inconspicuously.¹⁰⁴ It found it to be as unacceptable to expect someone to avoid persecution by living a hidden homosexual life, as to suggest someone deny and hide their religious beliefs or try to change their skin colour.

As stated earlier, human rights law can assist in the identification of forms of persecution, although it is not necessary in each and every case to identify a human rights violation in order to establish a well-founded fear of persecution. International refugee law operates to assist persons in need of protection because of a well-founded fear of being persecuted on one or more of the five grounds, and is thus not limited to fear of a breach of one's individual human rights. Whether or not it is a universal right publicly to display one's sexuality is not the critical issue, as suggested by the Australian case discussed above. Rather, international refugee law is premised on the protection of individuals in fear of being persecuted for reasons of their race, religion, nationality, membership of a particular social group, or political opinion. Human rights law in the sense of the Australian case discussed above has been used to narrow the protections available under the 1951 Convention and highlights the danger of having to link a fear of being persecuted with a human rights violation.

4. *'Particular social group' versus the other grounds*

A stumbling block to earlier decisions by domestic courts has, to some extent, been the failure of the refugee definition in Article 1A(2) of the 1951 Convention specifically to identify 'sex' or 'age' as individual grounds of persecution. As has been noted:

The drafters of the Convention failed singularly to reflect in words what has long been a reality – that crimes with a basis in gender are as persecutory in Convention terms as any other crimes when the harm inflicted is sufficiently serious and when they are part of a carefully calculated effort to achieve a political end.¹⁰⁵

In applying the refugee definition to claims of gender-related persecution, creative judicial reasoning has, therefore, necessarily been invoked. This is not to suggest that the refugee definition has been distorted to 'fit' particular claims based on gender within it. Rather, a proper interpretation of the definition was until recently neither advanced nor accepted. Cases raising an age component have yet to benefit fully from an age-sensitive analysis.

104 Case No. IV/IE06244/81, above n. 100.

105 E. Feller, Director, Department of International Protection, UNHCR, 'Rape is a War Crime: How to Support the Survivors: Lessons from Bosnia – Strategies for Kosovo', presentation, Vienna, 18–20 June 1999.

Early decisions tended to view the gender-specific claims of women within the ‘particular social group’ ground, due, in large part, to the failure of decision makers to recognize actions by women as political. Yet Heaven Crawley notes that ‘nowhere are the effects of the public/private dichotomy on the understanding of women’s experiences more evident... than with regard to the concept of “politics”’.¹⁰⁶ Subsequent judgments have found that gender-related persecution can be characterized as racial, ethnic, religious, or political in nature, or a combination of one or more of these grounds, although decision makers more consistently rely on the ‘social group’ ground. Claimants often raise ‘political opinion’ or ‘religion’ as a valid ground, yet decisions rarely analyze them in depth. As important as the ‘fifth’ ground is to age- and gender-related claims, a full application of the refugee definition requires a full and equal utilization of the other Convention grounds. Why is it so difficult to recognize the acts of a woman in transgressing social customs as political?¹⁰⁷ Why are certain acts (for instance, acts contravening religious dress codes) considered to be non-religious in a society where there is no separation between the State and religious institutions? Why are young girls who refuse to undergo female genital mutilation not political dissidents, breaking one of the fundamental customs of their society? Why has rape during ethnically motivated armed conflict been seen as only criminal and not also racial in character?¹⁰⁸

The meaning of ‘political opinion’ has largely been defined to include ‘opinions contrary to or critical of the policies of the government or ruling party’.¹⁰⁹ In comparison, Goodwin-Gill supports a broader definition of ‘any opinion on any matter in which the machinery of State, government, and policy may be engaged’.¹¹⁰ 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. Even Goodwin-Gill’s broader definition requires that the ‘State, government, or policy’ be ‘engaged’ in order to see a particular opinion as ‘political’. Surely, the failure of the State to engage to prevent harmful practices or to punish those engaging in it should also be considered ‘political’, especially in the face of harmful practices that violate fundamental human rights? Should not political opinion apply to any

106 Crawley, *Refugees and Gender*, above n. 7, p. 21.

107 See, e.g., statements made in *Re M.N.*, Refugee Appeal No. 2039/93, above n. 36, in relation to the first instance decision: ‘The Refugee Status Section did not even remotely come to grips with this aspect [the political opinion and religion aspect] of the appellant’s case.’

108 UNHCR Vienna Regional Office, ‘Asylum-Seekers in Austria: An Analysis and Case Study of the Legal Situation and Administrative Practice’, Feb. 1995, pp. 207–12. Reference is made to several cases in which rape of civilian women by soldiers in armed conflict were not considered as ‘persecution’ within the meaning of the refugee definition, but criminal behaviour.

109 A. Grahl Madsen, *The Status of Refugees in International Law* (A. W. Sijthoff, Leyden, 1972), p. 220.

110 G. S. Goodwin-Gill, *The Refugee in International Law* (2nd edn, Clarendon, Oxford, 1996), p. 49. See also *Ward*, above n. 75, which endorsed this definition.

thought, opinion, action, or inaction that can be seen as questioning or opposing the views of authority or society at large, whatever the type of authority in place? The latter would include any form of authority that has the power to impose laws or social rules, or to punish or to discriminate against those refusing to participate in accepted social or cultural practices or rites, including tribal leaders, traditional healers, and village chiefs. Jurisprudence in industrialized States often fails to see such activities as political in nature due to its inherent bias towards Western political structures, and has ignored the political apparatus in non-Western countries. Rather, it would seem more correct when interpreting the term 'political' to look to the context in which the human rights abuse or persecution took place. The definition given to 'political opinion', as with the refugee definition as a whole, needs to be individualized to take account of the situation in different countries of origin. This is especially important in countries where authority devolves to regional or village levels.

Interestingly, some applications for refugee status on the grounds of sexual orientation have been considered under 'political opinion', despite the fact that many homosexuals do not consider their sexual orientation to be a political matter.¹¹¹ Is it political to engage in homosexual acts or to adopt an overtly homosexual lifestyle? The answer to this question will depend on whether the decision maker considers sexual orientation to be, on the one hand, an innate or immutable characteristic or one so fundamental to a person's identity that a claimant ought not be compelled to change it,¹¹² or, on the other hand, a choice. Relying on the latter, it may well be 'political' to actively pursue a homosexual lifestyle. Conversely, relying on the former analysis, it would not be necessarily seen as a political gesture to engage in sexual activity, but rather a natural aspect of being a human being. Of course, a political opinion subversive to the laws and/or policies of the State may be attributed to a homosexual on the basis of that person's sexual orientation or lifestyle.

There has been some recognition that refusing to wear the veil in some Islamic societies where there is disproportionate punishment as a consequence amounts to persecution for reasons of 'religion'.¹¹³ Similarly, laws that impose serious penalties on homosexuality could be considered under the 'religion' ground, where these laws are rooted in religious doctrine. Even in cases involving strict religious codes to justify discriminatory and persecutory laws and action against certain groups, courts and tribunals have not always readily categorized such policies or action as religious in nature, but have preferred to rely on the 'particular social group' ground.

111 See *Dykon v. Canada (Minister for Employment and Immigration)*, Canadian Federal Court (Trial Division), (1994) 87 FTR 98, Sept. 1994, quoted in ELENA, 'Research Paper on Sexual Orientation', above n. 42, pp. 1–2.

112 See, Decision No. T-91-04459, *Jorge Alberto Inaudi*, CRDD, 4 April 1992.

113 See above n. 36.

The social group ground has been the least developed of the five grounds, with gender-related claims finally attempting to settle its true scope. There continue to be, however, two different schools of thought as to how specifically defined the particular social group must be. For example, several jurisdictions have rejected that women *per se* constitute a ‘particular social group’, largely out of fear of a flood of such claims, yet overlooking the requirement that simply being a woman would not suffice to meet each element of the definition. Other supporters of this view have argued that the ‘particular social group’ ground is not a ‘safety net’ for all forms of persecution that do not fall within the other four grounds.¹¹⁴ The expansion of the refugee definition from the one contained in UNHCR’s Statute,¹¹⁵ which omits the social group ground altogether, to its later inclusion in the 1951 Convention definition, could nevertheless be viewed as further evidence that at least part of the intention of adding an additional ground was to secure protection for persons outside the four other grounds.

UNHCR, in its recent ‘Guidelines on International Protection’ on membership of a particular social group, has stated that women can be a ‘particular social group’ for the purposes of the refugee definition. Using the large size of the group as a means for refusing to recognize ‘women’ as a social group is rejected by UNHCR as having ‘no basis in fact or reason, as the other grounds are not bound by this question of size’.¹¹⁶ The Summary Conclusions from the San Remo expert roundtable also reflect this analysis, stating: ‘It follows that sex can properly be within the ambit of the social group category, with women being a clear subset defined by innate and immutable characteristics, and who are frequently treated differently to men.’¹¹⁷

The same can be said in relation to age-related claims. It follows that ‘children’ or ‘the elderly’ as a whole could form a social group. Normally, given the factual circumstances of a given case, the group will be narrower than this, such as ‘young boys in Y society’. Unlike gender-related cases, theoretically, age-related cases could challenge the ‘protected characteristics’ test,¹¹⁸ in so far as one’s age is neither

114 For an overview, see the paper by Aleinikoff, Part 4.1 of this book.

115 Statute of the Office of the High Commissioner for Refugees 1950, A/RES/428 (V), 14 Dec. 1950, para. 6(ii).

116 See UNHCR’s ‘Guidelines on International Protection: “Membership of a Particular Social Group” within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees’, UN doc. HCR/GIP/02/02, 7 May 2002 (hereinafter UNHCR, ‘Guidelines on Membership of a Particular Social Group’, 2002), paras. 18 and 19; as well as UNHCR, ‘Guidelines on Gender-Related Persecution’, 2002, above n. 4, para. 31.

117 ‘Summary Conclusions on Gender-Related Persecution’, above n. 55, para. 5.

118 This is one legal interpretative approach used to define ‘particular social group’ by examining whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. Sex would be considered as an immutable characteristic. See, UNHCR, ‘Guidelines on Membership of a Particular Social Group’, 2002, above n. 116, para. 6. See also, *Ward*, above n. 75; and the paper by Aleinikoff, Part 4.1 of this book.

‘innate nor immutable’ due to continuous change over time. However, the fact that a particular individual is unable to change his or her own age, except with the passage of time, should surely identify ‘age’ as, at least, an immutable characteristic. The ‘social perception’ approach¹¹⁹ would seem to avoid such dilemmas, as in most situations children are seen as a particular social group by the society in which they live. In contrast, ‘sexual orientation’ cases relying on the ‘particular social group’ ground could face difficulty under the ‘social perception’ approach where the individual’s sexuality is hidden from public view or where he or she has not acted to alert the authorities or others to it, even where discriminatory laws carry harsh or excessive penalties. Many jurisdictions accept that an individual’s sexuality is immutable, or at least so fundamental to identity that he or she ought not to be compelled to forsake it, for the purposes of the ‘protected characteristics’ approach.¹²⁰

The paper in this book by T. Alexander Aleinikoff further concludes that ‘an applicant need not demonstrate that every member of a group is at risk of persecution in order to establish that a particular social group exists’.¹²¹ This is the only correct interpretation and has been accepted in many jurisdictions, including recent statements by Gleeson CJ of the Australian High Court in *Khawar*:¹²²

Women in any society are a distinct and recognisable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. Neither the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group. Women would still constitute a social group if such violence were to disappear entirely.¹²³

5. *Internal flight possibilities*

When a State is directly involved in acts of persecution, through its officials, the question of a possible internal flight or relocation alternative to the claimant is ‘presumed’ not to be relevant.¹²⁴ This is a correct presumption. It is not required that the asylum seeker prove that he or she will be persecuted throughout the

119 This is an approach which considers whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.

120 See ELENA, ‘Research Paper on Sexual Orientation’, above n. 42.

121 See the paper by Aleinikoff, Part 4.1 of this book.

122 *Khawar* case, above n. 34, para. 33. 123 *Ibid.*, para. 35.

124 Global Consultations, ‘Summary Conclusions on Internal Protection/Relocation/Flight Alternative’, San Remo expert roundtable, 6–8 Sept. 2001, para. 2. See also, the paper by J. C. Hathaway and M. Foster in Part 6.1 of this book; UNHCR, ‘Position Paper: Relocating Internally as a Reasonable Alternative to Seeking Asylum – The So-Called “Internal Flight Alternative” or “Relocation Principle”’, Geneva, Feb. 1999, see Annex, paras. 1–3; cf. UNHCR, ‘Guidelines on Internal Flight or Relocation Alternative’ (forthcoming, 2003), above n. 99.

country.¹²⁵ However, this standard has not yet been extended to non-State actor cases. The Summary Conclusions from the expert roundtable in San Remo state that '[w]here the risk of being persecuted emanates from a non-State actor, IPA/IRA/IFA [internal protection/relocation/flight alternative] may more often be a relevant consideration',¹²⁶ even though an individual may have suffered persecution and may already have proved as part of the claim that the State is unable or unwilling to provide effective protection against further harm. Thus, if we accept that, in cases where the State is the direct agent of persecution, it is in control of its agents, can we not also assume that, if the State is unable or unwilling to protect the claimant in the place of the original persecution, it would also be unable or unwilling to protect the claimant in another part of the territory? The fact that we judge non-State actor cases, which are most often raised in age- and gender-related claims, against a different standard from those cases of persecution by the State, is to discriminate indirectly against women and children. Thus, the presumption should work in favour of all types of case, rebuttable by evidence of the fact that the claimant could have relocated, and could in the future relocate, elsewhere.

Where an assessment of a possible internal alternative is considered relevant to a particular case, the next step is to consider whether it would be 'reasonable' to require the claimant to return there, according to UNHCR and a large number of jurisdictions.¹²⁷ J. C. Hathaway and M. Foster in their paper in this book analyze the availability of a place of internal relocation in the context of the extent to which an individual would be protected in that place. Protection in this sense is predicated on respect for human rights. The 'reasonableness' approach similarly analyzes respect for international human rights law, but in addition places specific emphasis on the particular situation of the individual. Both these approaches require an analysis of the potentially differential impact of return on different groups (women vis-à-vis men, as well as children vis-à-vis adults, and elderly vis-à-vis able-bodied adults), although the 'reasonableness' approach more readily points to age and gender inclusiveness. As has been stated elsewhere in the text, international human rights law is an important guiding tenet of international refugee law, although refugee law is not restricted to such an analysis.

Unaccompanied or single women may face particular hardships in areas of potential return, including perhaps community ostracism, isolation, or severe discrimination. It may not even be possible in some countries for unmarried women to live alone.¹²⁸ Hathaway and Foster note that 'cases involving child applicants have

125 UNHCR, *Handbook*, above n. 71, para. 91.

126 Summary Conclusions on IPA/IRA/IFA, above n. 124, para. 2.

127 E.g. Australia, Austria, Canada, Germany (in some cases), Sweden, the UK, and the USA.

128 See, *Haj Ahmed*, French CRR, above n. 36; *Gonzales-Cambana v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-933-96, 1997, also cited in the paper by Hathaway and Foster, Part 6.1 of this book.

stressed the importance of access to education and basic economic subsistence'.¹²⁹ The Canadian case of *Elmi* helpfully stated:

What is merely inconvenient for an adult might constitute 'undue hardship' for a child, particularly the absence of any friend or relation. Moreover, in the case of a child whose education has already been disrupted by war, and who would arrive in [the internal relocation area] without any money, there arises the question not simply of 'suitable employment' but of a livelihood at all.¹³⁰

The impact of internal relocation on unaccompanied or separated children should only ever be considered in exceptional circumstances. For accompanied children, it may be a legitimate issue depending on the full circumstances of the case, although a detailed analysis of the impact of return on persecuted children would need to be carefully weighed. A child may believe that he or she has reached safety in the country of asylum. To return a child to the country of origin may induce devastating psychological effects. Depending on the age of a child, he or she may not understand the concept of distance and may believe that 'anywhere' within the country is dangerous.

The particular vulnerabilities of older persons have also been considered in a number of cases, albeit with mixed results.¹³¹ The cases have taken into account level of education and literacy, family links, language abilities, and disability in assessing 'reasonableness' or 'undue hardship'. As with children, what might be difficult or cumbersome for an able-bodied adult might amount to undue hardship for an older person.

B. Exclusion

As stated above, there has been progress in relation to recognizing rape, sexual slavery, and other forms of sexual violence as war crimes or crimes against humanity under the International Criminal Tribunals of the former Yugoslavia and Rwanda and the Statute of the International Criminal Court. Such violations should, therefore, be considered similarly in terms of excludable crimes. In the context of armed conflict, they would fall under Article 1F(a), or in other situations as serious, non-political crimes under Article 1F(b).

The exclusion clauses raise, in particular, age-related questions. The case of child soldiers is a typical example where complex factual and legal issues come into play.

129 Hathaway and M. Foster, Part 6.1 of this book, referring to the German Federal Constitutional Court, Decision of 24 March 1997, 2 BvR 1024/95, NVwZ 97, 65.

130 *Elmi v. Canada (Minister of Citizenship and Immigration)*, Federal Court of Canada (Trial Division), Decision No. IMM-580-98, 12 March 1999, para. 13. See also Hathaway and Foster, Part 6.1 of this book.

131 See Hathaway and Foster, *ibid.*

The Graça Machel study on the *Impact of Armed Conflict on Children*¹³² brought to light the situation facing child soldiers in many armed conflict situations throughout the world. Its sequel, released in 2001, dedicates a chapter to child soldiers.¹³³ Moreover, international human rights safeguards have been put in place to protect children from being involved in hostilities or forcibly conscripted into armed forces. Articles 1 and 2 of the CRC Optional Protocol on the Involvement of Children in Armed Conflict 2000 provide that persons under eighteen years should not take part in direct hostilities and that States should take all feasible measures to ensure that children under eighteen are not compulsorily recruited. Article 8 of the Statute of the International Criminal Court lists ‘conscripting children under the age of fifteen years’ as a war crime. These are important defining parameters, which indicate that in most cases, children who have committed serious crimes during the course of armed conflict are not only perpetrators of those crimes, but are equally the victims of abuse. Geoff Gilbert warns in his paper in this book that ‘States should not contribute to the traumatization of the child by washing their hands of them through the process of exclusion from refugee status’.¹³⁴

Article 40 of the CRC provides that States shall establish a minimum age for criminal responsibility. This can vary from ten to fifteen years, and can result in unequal treatment of children seeking asylum in different jurisdictions. Where there are discrepancies in age limits, it is not clear whether the applicable age of criminal responsibility is that in the child’s home State, or that in the country of asylum. Caution would indicate that the higher age of the two should be applied, although this would also lead to inconsistent decision-making within and between jurisdictions. Where a child otherwise fulfilling the refugee definition is below the age of criminal responsibility, they cannot be excluded from refugee status. For those children who have reached that age, one must determine if they possessed the mental capacity at the time of the commission of the crime.

In determining *mens rea*, consideration ought to be given to a wide range of factors. These include the age of the claimant at the time of becoming involved with the armed group (the younger the age, the lesser the responsibility), his or her reasons for joining the armed group (was it voluntary or coerced or in defence of oneself or others?), the consequences of a refusal to join, the length of time as a member, the forced use of drugs, alcohol, or medication, promotion within the ranks due to actions undertaken, the level of education and understanding of the events in question, and the trauma, abuse, or ill-treatment suffered by the child as a result of his or her participation. Children become soldiers in a variety of ways, through

132 Report of G. Machel, Expert of the Secretary-General of the United Nations, *Impact of Armed Conflict on Children*, United Nations and UNICEF, 1996, available on <http://www.unicef.org/graca/>.

133 G. Machel, *The Impact of War on Children* (Hurst & Co., London, 2001).

134 See the paper by G. Gilbert, ‘Current issues in the application of the exclusion clauses’, in Part 7.1 of this book.

conscription, pressure, kidnapping, as a way to protect their families,¹³⁵ or as a way to support their families economically. Child soldiers are used for forced sexual services, as combatants, messengers, porters, or cooks.¹³⁶ The application of the exclusion clauses to children is a complex and sensitive process. Michael S. Gallagher argues that, as child soldiers can be seen as victims of war crimes, Article 39 of the CRC comes into play, requiring 'recovery and reintegration' to be the 'only permissible governmental goal for such children'.¹³⁷ UNHCR states that, where a child is below the minimum age, he or she cannot be considered by the State concerned as having committed an excludable offence.¹³⁸ Children should be given the benefit of the doubt in all cases, and clear and convincing evidence is needed to show why a particular child should be excluded. The principle of the 'best interests' of the child should be taken into account, in relation to both exclusion and post-exclusion action.

Increasingly, women are becoming publicly active in politics and may be directly involved in excludable acts. Depending on the position of women (including their rights and status) in the society concerned, however, it may be particularly necessary to take into account issues of duress and intimidation. As has been outlined above in relation to children, women may not only participate in a violent action for instance, they may also be the victim, being subjected to rape and other forms of sexual slavery and forced labour. Men may also be forced into participating in excludable acts, by threats to their family members or by threats of death to themselves. Most importantly, decision makers should not make assumptions about culpability on the basis of the individual's ethnic origin, race, religion, political opinion, social group, age, or sex. Clear and credible evidence must be forthcoming in all cases.

C. Cessation

While much has been written about the application and interpretation of Article 1A(2) of the 1951 Convention in a gender sensitive manner (and less about age), little has been written in relation to the cessation clauses, Article 1C. The 'compelling reasons' exception to Article 1C(5) and (6), in particular, needs to import age and gender sensitive analyses. As the UNHCR *Handbook* notes, the exception sub-clauses 'deal with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even

135 Machel, above n. 133, pp. 8–9. 136 *Ibid.*, p. 7.

137 M. S. Gallagher, 'Soldier Bad Boy: Child Soldiers, Culture and Bars to Asylum', 13 *International Journal of Refugee Law*, 2001, p. 310, at p. 333.

138 UNHCR's 'Guidelines on International Protection: Application of the Exclusion Clauses: Article 1F of the 1951 Convention Relating to the Status of Refugees', forthcoming, 2003.

if fundamental changes have occurred in the country of origin'.¹³⁹ Given the potentially serious consequences of return, the general cessation clauses are necessarily personalized. To import age and gender considerations into the cessation exception, it is important to understand the nature of the persecution suffered and the gravity of its effects on each individual. The psychological effects of rape and sexual violence on women assume, in many cases, that return may never be possible, particularly if the family or society of origin is likely to ostracize or otherwise victimize the refugee. In such cases, 'return involves much more than physical aspects of return'.¹⁴⁰

A UNHCR study in Bosnia and Herzegovina offers an analysis of return prospects of minority women, including victims of sexual violence and torture. While the study does not deal specifically with the cessation clauses, many of its ideas can be imported into such an analysis. The study concluded that:

ex-camp or prison detainees, survivors or witnesses of violence against family members, including sexual violence, as well as severely traumatised persons, should be offered protection and alternative durable solutions [to return home]. It is presumed that such persons have suffered grave persecution, including at the hands of elements of the local population, and cannot reasonably be expected to return.¹⁴¹

For victims of sexual violence, 'fundamental change' in the country of origin would necessarily include police and judicial measures to ensure the swift arrest and prosecution of alleged perpetrators of such violence. It should also necessarily require appropriate medical and psychosocial help. The effect on the principal victim is not the only consideration in relation to the 'compelling reasons' exception. The impact of return on other family members, including spouses and children, needs to be carefully weighed. A child or spouse may have been a witness to the violence, and return could invoke serious psychological damage. Fear of community ostracism or victimization, including physical abuse and attacks, can be very real, especially for victims of sexual violence returning to very traditional communities. This level of social ostracism also affects other members of the family.

For recognized child refugees who have suffered severe persecution, there would be very few situations where cessation would apply. It could be said that a traumatized child will always fall under the 'compelling reasons' exception. Sometimes children appear to survive trauma better than adults. This is not always true, and close medical and psychological advice should be sought. The ability of children to suppress violent memories is in many cases the direct result of the trauma they have suffered. The fact that a child has spent a long time in a host country must

139 UNHCR, *Handbook*, above n. 71, para. 136.

140 See, UNHCR and UNHCHR, 'Daunting Prospects – Minority Women: Obstacles to their Return and Integration', Sarajevo, Bosnia and Herzegovina, April 2000, p. 16.

141 *Ibid.*

work in the child's favour. Uprooting children can be very disruptive, even under the most peaceful and voluntary conditions. Returning children to the scenes of violent crimes can have untold psychological damage on them.

III. Age and gender in asylum procedures

The age and gender sensitive implementation of asylum procedures should not only address questions of access to the determination procedure. It ought to provide separate interviews for female asylum seekers, as well as an 'open and reassuring environment' so as to establish trust between the interviewer and the claimant and to 'help the full disclosure of sometimes sensitive and personal information'.¹⁴² The often male-oriented nature of questioning can mean that women who have been involved in indirect political activity or to whom political opinion has been attributed do not always disclose their full story. As UNHCR's 'Guidelines on Gender-Related Persecution' have noted, '[f]emale claimants may also fail to relate questions about "torture" to the types of harm which they fear (such as rape, sexual abuse, female genital mutilation, "honour killings", forced marriage, etc.)'.¹⁴³ These are among the range of procedural safeguards that need to be put in place to ensure that all claimants have equal access to a determination procedure. Failing to provide all adult members of a family with separate interviews can later place the refugee family in a precarious situation.

Provision of separate interviews can affect not only initial inclusion decisions but also subsequent decisions on cessation of refugee status due to fundamental change in the country of origin. For example, a husband establishes that he was actively involved in political activities and risked persecution in his country of origin. As a result, he is granted refugee status. After a declaration of general cessation has been made on the basis of ceased circumstances under Article 1C(5), he may have no right to remain in the country of asylum. His wife in contrast who was sexually assaulted and persecuted on the basis of her ethnicity never applied for asylum. Had she applied for asylum initially, she might have been able to establish 'compelling reasons' arising out of past persecution in order to be exempted from the application of general cessation.¹⁴⁴ The fact that her claim was not detected at the time and can now not be invoked successfully in its own right in relation to cessation shows a fundamental error in the asylum system. Where such errors occur, the appropriate solution would be to allow a full hearing of the asylum application of the individual who was initially not heard, although this is not ideal. The victim may no longer be able to establish that she is at risk of future persecution, even though she may have

142 UNHCR, 'Guidelines on Gender-Related Persecution', above n. 4, para. 36(iv).

143 *Ibid.*, para. 36(vii).

144 *Mehmet Brahim v. Immigration Appeal Tribunal and Secretary of State for the Home Department*, High Court of Justice (Queen's Bench Division), Case No. CO/2238/2001.

compelling reasons arising out of past persecution to avoid cessation of status had it been so granted in the first place. Therefore, any subsequent hearings ought to take into account her status at the time of flight in order to give effect to the intention of international refugee law and to compensate for the serious administrative error.

Similarly, the claims of children and the elderly necessitate special care and attention. There is an extra burden on States to take all appropriate measures to ensure that a child seeking asylum receives appropriate protection and humanitarian assistance.¹⁴⁵ This would include at a minimum:

- Unaccompanied and separated children seeking asylum should not be refused access to the territory.¹⁴⁶
- Due to their vulnerability, applications by children for refugee status should be given priority and every effort should be made to reach a decision promptly and fairly. Appeals should be processed fairly and expeditiously.
- Unaccompanied asylum-seeking children should be represented by an adult familiar with the child's background and have access to legal representation.¹⁴⁷
- Interviews should be conducted by specially qualified and trained personnel.

As UNHCR has noted:

Particular regard should be given to circumstances such as the child's stage of development, his/her possibly limited knowledge of conditions in the country of origin, and their significance to the legal concept of refugee status, as well as his/her special vulnerability. Children may manifest their fears in ways different from adults.¹⁴⁸

The manner in which a child's rights may be violated may be different from those of adults.¹⁴⁹ In particular, the claims of children have suffered from:

scepticism about the reliability of child testimony, deference to local traditions implemented by non-state actors and considered oppressive by the asylum seeker, [and] narrow construal of the 'membership of a particular social group' to exclude broad demographic characteristics such as age.¹⁵⁰

145 CRC, Art. 22.

146 UNHCR, 'Guidelines on Unaccompanied Children Seeking Asylum', 1997, above n. 69, Executive Summary.

147 *Ibid.*, Part 8: Procedures. See also, UNHCR, 'Reception of Asylum-Seekers, Including Standards of Treatment, in the Context of Individual Asylum Systems', UN doc. EC/GC/01/12, 4 Sept. 2001, Annex.

148 UNHCR, 'Guidelines on Unaccompanied Children Seeking Asylum', 1997, above n. 69, para. 8.6.

149 *Ibid.*, para. 8.7. 150 Bhabha and Young, above n. 20, p. 98.

Instead, an awareness of cultural differences in children's behaviour is sometimes critical to an accurate assessment of the case. Children from different backgrounds interact differently with persons in positions of authority. For instance, in some cultures it is normal for children not to look adults in the eye, but in other cultures this can be interpreted as lying.¹⁵¹

Older persons may be acutely traumatized by the refugee flight experience, especially where they are without family members, or where they have never been outside their country of origin. They may not be able to articulate their claims due to a lack of education, disorientation, or memory loss. As with other asylum seekers, they should be given advice in a manner and language they understand.

IV. Conclusion

The application of normative rules to individual circumstances in a non-discriminatory way is an essential ingredient of full and inclusive refugee status determination. This requires an assessment of the intentions of the law (in the case of Article 1A(2), to protect persons from persecution) and the differential impact a particular approach can have on different individuals. Taking the 'adult male' as the standard distorts the nature, not only of the claims of some women and children, but also of those of men who do not conform to male stereotypes. It is important to recognize that our different backgrounds colour our understandings and interpretations of law. Applying age- and gender-sensitive analyses to law means identifying the individual nature of the inquiry.

Focusing on the individuality of claims should lead to a non-discriminatory approach, and ensure that individuals are not discriminated against on the basis of race, colour, sex, language, religion, national or social origin, property or birth, or other status. Making generalizations about different groups is not always helpful and can overlook important differences. Although international law is intended to govern relations between States, human rights law (and refugee law) have at their centre the rights of individuals. Thus, the failure of a State to fulfil its obligations can result in a breach of an individual's rights, as well as a breach of human rights (and refugee) law. A State's failure in this regard includes unwillingness or inability to protect. Thus a State not only has an obligation under international human rights (and refugee) law to refrain from directly breaching its provisions, it must equally take measures to protect individuals from breaches by other individuals. Forms of persecution perpetrated by State and non-State actors are, therefore, valid.

On this basis, it is conceivable that the failure of a State to protect an individual from persecution by a non-State actor could amount to a human rights violation by

151 Directorate of Immigration, Finland, 'Guidelines for Interviewing (Separated) Minors', above n. 68.

that State. Human rights law in this respect contributes in some cases to a clearer identification of particular forms of persecution, although the 1951 Convention does not require that a human rights violation be acknowledged in order to establish ‘persecution’. Importantly, the protections available under international refugee law should not be narrowed by strict alignment with international human rights law, especially in light of existing preconceptions and interpretations of law that do not always recognize age and gender dimensions, as well as the fact that not all forms of persecution have yet been codified in international human rights law.

To adopt and implement age- and gender-sensitive interpretations of the 1951 Convention is also to recognize the inherent bias in legal formulation – the fact that ‘sex’, ‘sexual orientation’, or ‘age’ were omitted from the refugee definition resulted from the lack of understanding of the fact that individuals may suffer different forms of persecution, for different reasons, including age- and gender-related ones. It is also a reflection of inequalities in society at the time of drafting the 1951 Convention, which continue to influence its interpretation and application. Age- and gender-inclusive approaches are not only critical for an accurate interpretation and application of Article 1A(2). The exclusion and cessation clauses and all other aspects of the 1951 Convention should equally benefit from such analyses. As stated above, the underlying objective of applying age- and gender-sensitive approaches is to give true effect to the individualized nature of refugee status determination.