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Persecution On Account Of Gender: A Need For Refugee Law Reform

Bret Thiele*

I. INTRODUCTION

As humanity enters the twenty-first century, human rights advocates celebrate successes achieved since the United Nations' Universal Declaration of Human Rights. Although this celebration is much deserved, we advocates cannot become complacent. In addition to recognizing past successes, we must continue to find innovative means of promoting and protecting human rights for all people. One area in which substantial progress can be made is in the area of refugee and asylum law.

In this regard, both international and domestic U.S. law has failed to establish an adequate framework within which to address the unique problems of refugee women. The purpose of this article is to address this silence and to suggest one solution to the problems refugee women face. Specifically, I argue that it is urgently necessary to add a gender category to the international and U.S. definitions of refugee.

The principle that women's rights are human rights is now widely accepted, at least at the international level of discourse. Human rights

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violations disproportionately affecting women are increasingly being recognized. The problems caused by the disproportionate level of human rights violations of women are becoming apparent in the area of refugee/asylum law. While sharing the basic needs of all those who seek asylum, women asylum applicants have particular needs and suffer particular forms of persecution on account of gender. Furthermore, gender inequality is itself seen as a social system of subjugation and disadvantage, which is itself at odds with human rights norms and ideals.

Sexual assault, domestic abuse, sexual trafficking and institutionalized gender discrimination affect women to a far greater degree than they do men. In addition, women suffer from gender-specific persecution such as female genital mutilation and systematic rape as a weapon of war. Although persecution on account of gender is now being recognized by human rights advocates, the ability to seek refuge from persecution on account of gender has failed to develop accordingly. While part of this lack of development reflects a more general failure within the human rights discourse to adequately reflect the persecution of women, it also in part results from archaic ideas of who a refugee is.

II. CURRENT DEFINITIONS OF “REFUGEE”

United States law defines “refugee” as:

any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.³

By enacting the Refugee Act of 1980, which contains the above definition, Congress sought to rationalize the existing patchwork of U.S. laws then dealing with refugees. Congress’ goal was to articulate “a coherent and comprehensive U.S. refugee policy” that would comply fully with this Country’s obligations under the 1967 United Nations Protocol Relating to the Status of Refugees (Protocol).⁴ The Protocol defines refugee by referring to the definition found in the 1951 Convention Relating to the Status of Refugees,⁵ which defines refugee as any person who:

owing to well-founded fear of being persecuted for reasons of race,
religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.\(^6\)

This current international definition of refugee is essentially the same as the definition originally drafted in the 1951 Refugee Convention, except that the words "as a result of events occurring before 1 January 1951" and the words "as a result of such events" have been omitted. The current international definition was originally drafted to address the effects of World War II and focused specifically on the refugee crises then facing the continent of Europe at the time. This focus limited the definition of refugee to include only those causes most apparent in the aftermath of World War II, specifically, persecution on account of "race, religion, nationality, membership of a particular social group or political opinion."\(^7\) The facial gender-neutrality of the definition reflects the perspective of that time that women and men lead identical lives and that the human condition is unaffected by gender.\(^8\)

The gender-neutral definitions, focusing on violations committed directly by the State against individuals and on denial of civil and political rights, however, encompass more readily the situation of men, rather than women, who seek protection as refugees.\(^9\) Furthermore, the international definition was designed to address not only persecution by State actors, but also persecution that occurred in the public realm. In fact, "[t]he typical human rights victim is portrayed in both legal and human rights literature as a male dissident, tortured or imprisoned by the State."\(^10\) This definition leaves out persecution occurring in the private realm, however, which disproportionately affects women.

The U.S. Congress has the ability to expand the definition of refugee under U.S. law. The U.S. recognizes the Protocol, to which it acceded in 1967, as a non-self-executing treaty. As such, it is U.S. domestic law, in this case the Refugee Act of 1980, that is binding upon the U.S. rather than the Protocol itself. While the Protocol articulates the minimal obligations,

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6. Id. ch. I, art. 1(A)(2).
7. Id.
9. See generally Jane Connors, Legal Aspects of Women as a Particular Social Group, 1997 INT'L J. REFUGEE L. (Special Issue) [hereinafter Connors, Legal Aspects of Women as a Particular Social Group].
Congress can expand the scope of the Protocol’s protections by means of domestic legislation. Indeed, the definition of refugee found in the Refugee Act of 1980 already differs from the international definition in one important aspect. Under the Act, a person is deemed to be a refugee if s/he fears future persecution or because of persecution. Thus, in recognizing past persecution as a ground for asylum, Congress expanded the international definition of whom the U.S. considers to be a refugee. This important precedent demonstrates Congress’s ability to expand the protections offered by the more limited international definition of refugee.

III. RECENT TRENDS

A. THE EVOLUTION OF U.S. CASE LAW

Gómez v. INS offers an illustration of the inadequacy of the current refugee definition.11 Carmen Gómez was born and raised in El Salvador.12 Between the ages of twelve and fourteen, she was raped and beaten by guerilla forces on five separate occasions because her family did not support the rebel faction.13 On each of these occasions the guerrillas threatened her life and vandalized her home.14 Ms. Gómez finally fled El Salvador in 1979 and sought refuge in the United States.

Ms. Gómez was found deportable based on her illegal entry into the United States.15 She declined to designate a destination to which she could be deported.16 When the Immigration Judge designated El Salvador, Ms. Gómez applied for political asylum.17

The Immigration Judge concluded that Ms. Gómez was ineligible for political asylum because she did not meet the definition of refugee.18 She appealed to the Board of Immigration Appeals (BIA), which upheld the deportation order.19 She then appealed her case to the United States Court of Appeals, Second Circuit.20

The Second Circuit Court of Appeals dismissed Ms. Gómez’s appeal.21 In doing so, the Court noted that the Immigration Judge and the BIA were correct in finding that Ms. Gómez had not been previously abused on account of race, religion, nationality, political opinion or membership in a

12. See id. at 662.
13. See id.
14. See id.
15. See id.
16. See id.
17. See id.
18. See id. at 662-63.
19. See id. at 663.
20. See id.
21. See id. at 665.
particular social group.\textsuperscript{22} Rather, the Court agreed that she had been abused because she is a youthful woman and, because she was not more likely to be abused than other youthful women, did not qualify as a refugee.\textsuperscript{23} Such a shocking finding illustrates how U.S. immigration courts fail to recognize rape as a method of persecution, a method which in this case clearly was used to persecute Ms. Gómez on account of an imputed political opinion.

In Fatin \textit{vs. INS}, the United States Court of Appeals for the Third Circuit analyzed whether or not an Iranian woman with western and feminist views had a well-founded fear of persecution in Iran based on membership in a particular social group, namely women who possess such views and oppose Iran’s strict rules of dress and conduct.\textsuperscript{24} The court stated that Ms. Fatin did not present a well-founded fear of persecution based on membership in a particular social group because she did not demonstrate that she would suffer persecution different than that imposed upon the Iranian female population as a whole.\textsuperscript{25} This conclusion creates a troubling precedent. Because a woman seeking asylum must show that she will be persecuted to a greater degree than the general female population, an asylum claimant faces a much higher evidentiary burden if she comes from a country that persecutes or allows persecution of all or most women. Thus, the particular social group theory, when pertaining to women, is flawed in that it accepts the universal persecution of women as status quo, and requires the female claimant to distinguish her persecution as greater than that of the average woman.\textsuperscript{26}

Like Gómez, Fatin illustrates the inadequate protection offered by the current refugee regime. In Fatin, an oppressive government and society was ‘successful’ in either socializing a majority of women into accepting their persecution as normal or frightening a majority of women into silence, or both. Because of this degree of societal-wide persecution, the court in Fatin implied that women who refuse to quietly accept their persecution did not fall within the scope of the U.S. definition of refugee, and thus are not afforded protection. Fatin illustrates how the particular social group category inadequately protects women.

In 1993, the Ninth Circuit reviewed a denial of asylum in Fisher \textit{v. INS}.\textsuperscript{27} Like Ms. Fatin, Ms. Fisher sought refuge from persecution in Iran.\textsuperscript{28} The Ninth Circuit Court of Appeals used the persecution versus

\begin{itemize}
  \item \textsuperscript{22} See id. at 664.
  \item \textsuperscript{23} See id.
  \item \textsuperscript{24} Fatin \textit{vs. INS}, 12 F.3d 1233 (3d Cir. 1993).
  \item \textsuperscript{25} See id. at 1243 n.12.
  \item \textsuperscript{27} Fisher \textit{v. INS}, 79 F.3d 955 (9th Cir. 1993).
  \item \textsuperscript{28} See id.
\end{itemize}
prosecution distinction in affirming Ms. Fisher's asylum denial. The court stated that the BIA's conclusion that, although enforcement of Iran's dress and conduct rules "may seem harsh by Western standards, it does not rise to the level of persecution" and was "consistent with our cases that distinguish prosecution for general crimes from persecution." The court stated further that Ms. Fisher "merely has established that [she] faces a possibility of prosecution for an act deemed criminal in Iranian society, which is made applicable to all [women] in that country."

Again, a court has failed to consider gender-based persecution when all women in a country or society face that persecution. Furthermore, in using the prosecution-persecution distinction, the Ninth Circuit dismisses gender-based persecution when a government uses its legal system to mandate that persecution. Thus, women face yet another burden when making gender-based asylum claims under existing refugee law. In contrast, claimants making a case on account of political opinion or religion are not precluded from making an asylum claim merely because a government has criminalized their particular political party or religion.

The issue of persecution against women, analyzed in the framework of society-wide persecution in Iran, arose again in 1994. In Safaie v. INS, the claimant made a particular social group and political opinion claim. Ms. Safaie belonged to a group of women who, because of their political opinion, refused to conform to Iran's strict customs and laws relating to dress and behavior. Ms. Safaie was detained, interrogated for eight hours, expelled from her university and threatened with further punishment on account of her not accepting these strict customs and laws.

In her claim for asylum, Ms. Safaie asserted that, "Iranian women, by virtue of their innate characteristic [their sex] and the harsh restrictions placed upon them, are a particular social group." The Immigration Judge denied her claim and the BIA affirmed, noting that her detention was an attribute of a generally oppressive regime and not persecution within the Immigration and Nationality Act. The Eighth Circuit affirmed the BIA conclusions and stated further that it believed that a category based solely on gender "is over-broad, because no factfinder could reasonably conclude that all Iranian women had a well-founded fear of persecution." The court, using a classic 'blame the victim' response, also stated that Ms. Safaie did not fight her persecution with a "missionary fever" and therefore

29. See id. at 962.
30. Id. at 961.
31. Id.
32. Id. at 962.
33. Safaie v. INS, 25 F.3d 636 (8th Cir. 1994).
34. See id. at 638-39.
35. Id. at 640.
36. See id. at 639.
37. Id. at 640.
her opposition was not strong enough to “suffer the severe consequences of noncompliance.” This analysis places a greater burden on women than on claimants seeking asylum on account of the other categories. For example, exercising some degree of self-preservation by hiding one’s political opinion or religion have not been held to preclude a grant of asylum.

In *Sharif v. INS*, a case similar to *Fisher and Safaie*, the Seventh Circuit examined whether an Iranian woman should be granted asylum on account of gender-based persecution. The court found that neither persecution shared by the general population nor punishment resulting from violating Iran’s laws of general applicability amounted to persecution for purposes of asylum eligibility. In coming to this conclusion, the Seventh Circuit relied on *Fatini* and reiterated the analyses in *Fisher and Safaie*.

In *In re Fauziya Kasinga*, the claimant was successful in using the particular social group category. In *Kasinga*, however, the BIA did not conclude that Ms. Kasinga faced persecution on account of her gender, but rather gender-specific persecution on account of a narrowly defined particular social group. In this case, the particular social group was limited to persons who were: (1) young women; (2) members of the Tchamba-Kunsuntu Tribe of northern Togo; (3) not having undergone female genital mutilation (FGM); and (4) who opposed the practice of FGM. Though this case creates a positive precedent that will aid women in similar circumstances, it reinforces the idea that persecution against women on account of gender alone is insufficient to seek asylum.

**B. WOMEN AS A PARTICULAR SOCIAL GROUP**

As the preceding cases illustrate, human rights advocates have in recent years attempted to use the particular social group category to offer protection to persons persecuted on account of gender. The *travaux préparatoires* of the Refugee Convention offers little illumination of the intended scope of this category. During the Convention, Swedish delegate Sture Petren introduced this category as an amendment to the international definition. In introducing this amendment, Mr. Petren stated that “experience has shown that certain refugees have been persecuted because they belong to particular social groups” and, thus, a category designed to cover them should be included. The precise interpretation of this phrase,

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38. *Id.*
40. See *id.* at 935.
42. A term in international law literally meaning “preparatory work.” Similar to the term “legislative history” in domestic U.S. law.
43. See generally Connors, *Legal Aspects of Women as a Particular Social Group*, supra note 9.
however, has long been the subject of academic debate.\(^4\)

U.N. and U.S. jurisprudence arrive at differing interpretations regarding the scope of protection offered by the particular social group category. The United Nations High Commissioner for Refugees (UNHCR) Handbook requires only "similarity of background, habits or social status" to constitute a social group.\(^6\) U.S. case law, however, offers a more narrow definition. In In re Acosta the U.S. Board of Immigration Appeals concluded that:

persecution on account of membership in a particular social group encompasses persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.\(^7\)

As examined above, U.S. courts have consistently interpreted the Acosta definition as requiring another variable besides sex or gender to demarcate the social group from women generally.\(^8\)

At its thirty-sixth session, the Executive Committee of the High Commissioner's Programme issued a note on refugee women and international protection. Of particular interest was paragraph 10, which states that:

[for] women who face harsh and inhuman treatment because they are considered as having transgressed the social mores of their society, consideration should be given by States to interpreting the term "membership of a particular social group", as mentioned in article 1 (A) (2) of the 1951 United Nations Refugee Convention, to include women belonging to this category.\(^9\)

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45. See generally Connors, Legal Aspects of Women as a Particular Social Group, supra note 9; Maryellen Fullerton, A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group, 26 CORNELL INT'L L.J. 509 (1993).
48. See, e.g., Fatin v. I.N.S., 12 F.3d 1233 (3d Cir. 1993).
49. Note on Refugee Women and International Protection, Sub-Committee of the Whole on International Protection, U.N. Executive Committee of the High Commissioner's
The developing particular social group category, as the cases previously discussed illustrate, is mirrored in U.S. domestic refugee law where gender-related asylum claims have received increasing attention from advocates, the INS and the courts.

The use of the particular social group category, however, is not without problems. Although U.S. courts have stated that sex or gender can define a social group, decisions have required another variable to demarcate the social group from women generally.50 As in Gómez, discussed supra, persecution on account of gender was insufficient to qualify as a refugee. And as demonstrated by Fatin, discussed supra, persecution under the particular social group category needs to be to a greater degree than the persecution suffered by women in general. To date, there has been no case in which sex or gender on its own has been sufficient to establish membership in a particular social group.51

C. GUIDELINES FOR ADJUDICATING GENDER-BASED ASYLUM CLAIMS

In 1991, the UNHCR published a list of recommendations entitled Guidelines on the Protection of Refugee Women (UNHCR Guidelines).52 These guidelines address the particular concerns of women while in flight, in refugee camps, and during the asylum determination process. These guidelines presented a ground-breaking policy statement which signaled that refugee-receiving countries need to treat gender-based persecution as a valid basis for obtaining refugee status.53 Notably, however, the UNHCR Guidelines did not advocate altering the definition of refugee to include a gender category.54

The UNHCR Guidelines state that:

[e]nsuring the protection of refugee women requires adherence not only to the 1951 Convention [Relating to the Status of Refugees] and its 1967 Protocol but also to other relevant international instruments such as the Universal Declaration of Human Rights; the 1949 Geneva Conventions and the two Additional Protocols of 1977; the 1966 Human Rights covenants [the Covenant on Economic, Social and Cultural Rights and the Covenant on Civil...
and Political Rights]; the Convention on the Elimination of All Forms of Discrimination Against Women; the Declaration of the Protection of Women and Children in Emergency and Armed Conflict; the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages; the Convention on the Nationality of Married Women; and the Convention on the Rights of the Child.  

The UNHCR Guidelines state further that “[w]hile individual States may not be parties to all of these instruments, they do provide a framework of international human rights standards for carrying out protection and assistance activities related to refugee women.” It is notable that the UNHCR stated that these international instruments “provide a framework” of standards for carrying out “protection and assistance” to refugee women. From this statement, it can be surmised that States are expected to recognize the types of gender-specific persecution proscribed in these instruments as grounds for asylum.

The UNHCR Guidelines address certain gender-based persecution which is on account of women transgressing social mores. The UNHCR, however, recognizes the difficulty posed by the current definition of refugee, stating that:

[t]he claim to refugee status by women fearing harsh or inhumane treatment because of having transgressed their society’s laws or customs regarding the role of women presents difficulties under [the 1951 Convention definition of refugee]. As a UNHCR legal adviser has noted, transgressing social mores is not reflected in the universal refugee definition. Yet, examples can be found of violence against women who are accused of violating social mores in a number of countries. The offence can range from adultery to wearing of lipstick. The penalty can be death. The Executive Committee of UNHCR has encouraged States to consider women so persecuted as a social group to ensure their coverage.

The UNHCR Guidelines also address sexual discrimination, stating that:

[w]omen may also flee their country because of severe sexual discrimination either by official bodies or in local communities. Protection from sexual discrimination is a basic right of all women ... and discrimination can constitute persecution under

55. Guidelines on the Protection of Refugee Women, supra note 52, at 7-8, 36.
56. Id.
57. Id. (emphasis added).
certain circumstances.\textsuperscript{58}

The UNHCR Guidelines have advanced refugee law by enumerating the body of international instruments which create the framework of standards within which to carry out protection and assistance activities related to refugee women and by expressly stating that transgression of social mores and sexual discrimination can rise to the level of persecution. This advancement, however, only deals with broadening the definition of persecution. These guidelines still require women who have been persecuted or have a well-founded fear of persecution on account of gender to be able to fit their situation into one of the five existing categories (race, religion, nationality, membership in a particular social group and political opinion) before they are able to seek the protection otherwise offered by refugee law.

In 1993, Canada's Immigration and Refugee Board (IRB) issued Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (Canadian Guidelines).\textsuperscript{59} These guidelines were updated in 1996.\textsuperscript{60} The Canadian Guidelines are designed to incorporate the UNHCR Guidelines into Canadian asylum decision-making and have two stated goals: first, to heighten the sensitivity of IRB decision-makers to the unique problems women refugees face, and second, to provide a method of analysis within which to evaluate a woman's claim to refugee status.\textsuperscript{61}

The Canadian Guidelines have weaknesses similar to the UNHCR Guidelines. In addition, the Canadian Guidelines have been criticized because they are not binding upon Canadian asylum decision-makers and only apply to those women who apply for asylum inside Canada but not to women who apply for Canadian asylum from abroad, including from within refugee camps.\textsuperscript{62} The former criticism is not likely to change any time soon. The Canadian Immigration and Refugee Board has recognized this criticism, but in response has stated that it abides by a principle of independent decision-making, and that binding guidelines "could potentially offend this principle."\textsuperscript{63} The Canadian Parliamentary Standing Committee on Citizenship and Immigration, which oversees the IRB, concurred, "concluding that there are no compelling reasons to elevate the Guidelines to binding status."

\textsuperscript{58} Id.
\textsuperscript{59} IMMIGRATION AND REFUGEE BD. OF CANADA, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1993).
\textsuperscript{60} IMMIGRATION AND REFUGEE BD. OF CANADA, GUIDELINES ON WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION UPDATE (1996).
\textsuperscript{61} See Oosterveld supra note 53.
\textsuperscript{62} Id.
\textsuperscript{63} NURIEHAN MAWANI, CENTRE FOR REFUGEE STUDIES, YORK UNIVERSITY, PRESENTATION FOR THE CONFERENCE ON GENDER ISSUES AND REFUGEES: DEVELOPMENT IMPLICATIONS 7-8 (1993).
In 1995, following Canada’s lead, the United States Immigration and Naturalization Service (INS) issued a memorandum to all INS Asylum Officers setting forth guidelines for adjudicating women’s asylum claims (U.S. Guidelines). In drafting this memorandum, the INS relied in part on the UNHCR and Canadian Guidelines.

The U.S. Guidelines have two aims: first, to “set out procedural considerations for [U.S.] asylum officers that take into account the particular complexities often present in gender-based claims;” and second, to “set out what [the U.S.] believe[s] are the cardinal legal principles governing gender-based claims.”

The U.S. Guidelines, however, cite Gómez, Fatin and Safaie in determining that persecution solely on account of gender is insufficient for an asylum claim under U.S. law.

IV. CURRENT TRENDS

A. UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES: GENDER-RELATED PERSECUTION

1. UNHCR Executive Committee Conclusions

In 1985, the Executive Committee of the U.N. High Commissioner for Refugees (EXCOM) issued Conclusion No. 39 in which it “noted that refugee women and girls constitute the majority of the world refugee population and that many of them are exposed to special problems in the international protection field.” Conclusion No. 39 also:

stressed the need for such problems to receive the urgent attention of Governments and of UNHCR and for all appropriate measures to be taken to guarantee that refugee women and girls are protected from violence or threats to their physical safety or exposure to sexual abuse or harassment.

Most importantly, Conclusion No. 39:

66. Id.
69. Id. ¶ (c).
70. Id. ¶ (e).
Recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group” within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention. 71

In 1993, EXCOM issued Conclusion No. 73, which called upon State-parties to the Refugee Convention and the UNHCR to ensure the equal access of women and men to refugee status determination procedures. 72 In addition, EXCOM supported the recognition as refugees of persons with a well-founded fear of persecution through sexual violence. 73 In arriving at its conclusion, EXCOM:

[noted] with grave concern the widespread occurrence of sexual violence in violation of the fundamental right to personal security as recognized in international human rights and humanitarian law, which inflicts serious harm and injury to the victims, their families and communities, and which has been a cause of coerced displacement including refugee movements. . . . 74

EXCOM, however, has not addressed the topic of creating a gender category within the international refugee definition. It merely recognizes sexual violence and transgression of social mores as forms of persecution that, if used on account of one of the five existing categories (race, religion, nationality, membership in a particular social group, and political opinion), would qualify a person for refugee status.

In 1996, EXCOM issued Conclusion No. 79 which, inter alia, addressed the needs of refugee women. 75 Conclusion No. 79 stated that EXCOM:

Recalls its request that UNHCR support and promote efforts by States towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women, welcomes in this context the convening by UNHCR in February 1996 of the Symposium on Gender-Based Persecution, the purpose of which was to share information on States’ initiatives in this respect, and encourages UNHCR to continue and strengthen its efforts for the protection of women having a well-founded fear of persecution; and calls on States to adopt an approach that is

71. Id. ¶ (k).
73. Id. ¶ (d).
74. Id. ¶ 1.
sensitive to gender-related concerns and which ensures that women whose claims to refugee status are based upon a well-founded fear of persecution for reasons enumerated in the 1951 Convention and its 1967 Protocol, including persecution through sexual violence or other gender-related persecution, are recognized as refugees.\textsuperscript{76}

B. \textbf{UNITED NATIONS COMMISSION ON HUMAN RIGHTS}

At its fiftieth session on March 4, 1994, the Commission on Human Rights adopted resolution 1994/45, entitled "The Question of Integrating the Rights of Women into the Human Rights Mechanisms of the United Nations and the Elimination of Violence against Women,"\textsuperscript{77} in which it decided to appoint, for a three-year period, Ms. Radhika Coomaraswamy as Special Rapporteur to the U.N. Commission on Human Rights on Violence against Women—Its Causes and Consequences. This appointment started an evolutionary process within the Commission in regards to gender-based persecution.

In 1996, Ms. Coomaraswamy's report took a slightly stronger position than that taken by the UNHCR Executive Committee by recommending that "[r]efugee and asylum laws should be broadened to include gender-based claims of persecution, including domestic violence."\textsuperscript{78}

Ms. Coomaraswamy's report focuses particularly on domestic violence as a violation of human rights. The report lists a number of manifestations of domestic violence, including: (1) women-battering;\textsuperscript{79} (2) marital rape;\textsuperscript{80} (3) incest;\textsuperscript{81} (4) forced prostitution;\textsuperscript{82} (5) violence against domestic workers;\textsuperscript{83} (6) violence against the girl child;\textsuperscript{84} (7) sex-selective abortions and female infanticide;\textsuperscript{85} and (8) traditional practices affecting the health of women and children including female genital mutilation and religious extremism.\textsuperscript{86}

In its resolution 1996/49, the Commission on Human Rights welcomed Ms. Coomaraswamy's report. The Commission expressed its deep "concern that some groups of women, such as... refugee women... are especially vulnerable to violence."\textsuperscript{87} The Commission, however, did not

\begin{footnotes}
\item[76] Id. \textsuperscript{1} (o).
\item[79] Id. at 10-12.
\item[80] Id. at 13, 18-19.
\item[81] Id. at 14-15, 19-20.
\item[82] Id. at 14-15, 20-21.
\item[83] Id. at 15-16, 21, 22-23.
\item[84] Id. at 15, 24-25.
\item[85] Id. at 25-27.
\item[86] Id. at 28-30.
\end{footnotes}
address the causes of refugee flight nor expressly supported the report recommendation that refugee and asylum laws be broadened to include gender-based claims of persecution.

Ms. Coomaraswamy’s next report in 1997 did not focus much attention on gender-based persecution and refugee women, however, the Commission adopted resolution 1997/24 that, inter alia, encouraged Ms. Coomaraswamy to continue her study on violence against women and renewed her mandate for three additional years.\textsuperscript{88} In accordance with this resolution, Ms. Coomaraswamy produced a report in 1998 containing a section entitled “Violence against Refugee and Internally Displaced Women.”\textsuperscript{89} With this report, the Commission was able to delve substantially into the issue of gender-based persecution and refugees.

In her 1998 report, Ms. Coomaraswamy looked at both violence against women as a basis for and consequence of flight.\textsuperscript{90} Ms. Coomaraswamy noted that “women have fled when the authorities have failed to protect them from physical abuse, including domestic violence and rape, inflicted as punishment for failing to conform to the social or cultural norms advocated by their attackers.”\textsuperscript{91} She noted further that “these and other forms of gender-based violence may cause women to flee their homes to become internally displaced or to leave their country and seek refugee status under the [Refugee] Convention.”\textsuperscript{92}

Ms. Coomaraswamy noted that “if the [Refugee] Convention recognized persecution because of gender, individual women would then merely have to prove that they were persecuted because they were women rather than proving that they were members of a social group of persecuted women with common beliefs and practices.”\textsuperscript{93} In her final recommendations, however, she merely encouraged that governments “seek to remove legal and administrative barriers to women seeking asylum on the basis of gender-based persecution.”\textsuperscript{94}

In its resolution 1998/12, the Commission welcomed Ms. Coomaraswamy's report.\textsuperscript{95} And although the Commission only stressed that States must exercise due diligence to prevent violence against refugee and internally displaced women, without addressing the issue of refugee status on account of gender persecution,\textsuperscript{96} it called upon States to

\begin{thebibliography}{99}
\bibitem{90} Id. at 33.
\bibitem{91} Id. at 34.
\bibitem{92} Id. at 34.
\bibitem{93} Id. at 40.
\bibitem{94} Id. at 45.
\bibitem{96} Id.
\end{thebibliography}
"mainstream a gender perspective... into national immigration and asylum policies, regulations and practices, in order to extend protection to those women whose claim for protection is based on gender-related persecution."97

Although in 1999 the Commission did not specifically revisit the refugee issue as it relates to women, it did decide to continue consideration of the question of violence against women.98 The evolution of the Commission's normative framework regarding gender-based persecution is quite promising, and hopefully the Commission will further develop and clarify this norm.

C. AMNESTY INTERNATIONAL: CONCLUSIONS AND RECOMMENDATIONS ON REFUGEE LAW

In 1997, Amnesty International issued its report entitled Refugees: Human Rights Have No Borders99 in which it outlined why persons flee, why they need protection and the system that should provide that protection. In its report, Amnesty International made several recommendations regarding refugee women. In particular, Amnesty International stated that "States should, at a minimum, adopt and implement the recommendations of the UNHCR Guidelines on the Protection of Refugee Women and the numerous EXCOM Conclusions concerning refugee women."100 Furthermore, Amnesty International stated that:

Governments should recognize that women may be forced to flee as a result of persecution in the form of sexual violence or other gender-related abuses, as acknowledged by the world's governments in the Beijing Declaration and Platform for Action adopted in 1995. Governments should ensure that asylum decision-makers understand that sexual violence and other gender-related abuses can constitute persecution under the U.N. Refugee convention definition of a refugee.101

Regarding situations like Iran and Afghanistan, where broad-based gender persecution occurs, Amnesty International recommends that:

Governments should offer protection to women who fear persecution because they will not conform to, or have transgressed, gender-discriminating religious or customary laws or practices of their society. Governments should recognize that asylum claims on these grounds fall within the ambit of the U.N. Refugee

97. Id.
100. Id. at 114.
101. See id.
Convention and international human rights instruments.\textsuperscript{102}

Although not explicitly mentioned in this report, the addition of a gender category to refugee definition would provide a method by which Amnesty International's recommendations could be implemented.

D. THE BEIJING DECLARATION AND PLATFORM FOR ACTION

The \textit{Beijing Declaration and Platform for Action} (\textit{The Beijing Declaration})\textsuperscript{103} also encouraged the dissemination and implementation of the \textit{UNHCR Guidelines}.\textsuperscript{104} The \textit{Beijing Declaration} also noted that "[w]omen often experience difficulty in some countries of asylum in being recognized as refugees when the claim is based on [sexual violence or other gender-related persecution]."\textsuperscript{105}

Although the \textit{Beijing Declaration} called upon governments to:

Apply international norms to ensure equal access and equal treatment of women and men in refugee determination procedures and the granting of asylum, including full respect and strict observation of the principle of non-refoulement through, \textit{inter alia}, bringing national immigration regulations into conformity with relevant international instruments, and consider recognizing as refugees those women whose claim to refugee status is based upon the well-founded fear of persecution for reasons enumerated in the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, including persecution through sexual violence or other gender-related persecution. \ldots \textsuperscript{106}

However, it did not expressly address adding gender to the existing Refugee Convention definition of refugee.

V. CONCLUSION: THE OMISSION OF A "GENDER" CATEGORY IMPAIRS THE PROTECTION OF HUMAN RIGHTS

As the cases discussed above demonstrate, the omission of a gender category has resulted in a lack of protection for many women fleeing persecution. The use of the particular social group category has proved ineffective. This ineffectiveness is particularly apparent in situations where women come from countries and societies in which they are persecuted generally. As stated above, the particular social group theory is flawed because it requires the female claimant to distinguish her persecution as

\begin{enumerate}
  \item \textsuperscript{102} See \textit{id.}
  \item \textsuperscript{103} \textit{Beijing Declaration, supra} note 2.
  \item \textsuperscript{104} \textit{id.} \textsuperscript{129}.
  \item \textsuperscript{105} \textit{id.} \textsuperscript{137}.
  \item \textsuperscript{106} \textit{id.} \textsuperscript{149(h).}
\end{enumerate}
greater than that of the average woman. The various guidelines, though welcome, do not go far enough. The guidelines aid asylum decision-makers in dealing with the peculiarities of women in flight or seeking refuge, but do not offer protection to women who are persecuted solely on account of their gender.

The U.N. High Commissioner for Refugees has invited member States to make their own individual reforms to include gender. By expanding its definition of refugee to include gender as a sixth category, the United States can take a position of international leadership in the realm of refugee law as it applies to gender-based persecution. Such a change would be an example to other governments, which in turn could expand their respective definitions and advocate for the expansion of the international definition of refugee.

107. See generally Kandt, United States Asylum Law, supra note 26.
108. See Guidelines on the Protection of Refugee Women, supra note 52.