
Women and Girls Fleeing Conflict

Gender and the Interpretation and Application of the 1951 Refugee Convention

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Introduction

Women, girls, men and boys all suffer when exposed to the effects of conflict. Sometimes women and girls have similar experiences in these situations as men and boys. Many times, however, they have different experiences. They may be subjected to different violations because they are women and girls, or they may be subjected to the same types of violations as men and boys but experience or perceive these harms in a different manner. One obvious example is sexual violence committed during war; the United Nations reports that '[s]exual violence, and the long shadow of terror and trauma it casts, disproportionately affects women and girls.'¹ This different female experience stems from pervasive global gender inequality: around the world, women and girls tend to be poorer and receive less education and are often less mobile as a result of traditional family and care-giving responsibilities, all of which negatively compound their experiences during conflict.² While women and girls may have common experiences based on their gender, sometimes girls suffer additional targeted harm as a result of their young age. For

* I thank Alexandra MacKenzie for her valuable research assistance and UNHCR's Sanne Andersen, Alice Edwards and Gisela Thater, as well as Margaret Martin, for their helpful suggestions. Any errors are my own. A more detailed version of this chapter is available in UNHCR's RefWorld online database.

¹ UN Secretary-General, 'Conflict-Related Sexual Violence: Report of the Secretary-General', 13 January 2012, UN Doc. S/2012/33, para. 6.

² Committee on the Elimination of Discrimination against Women, 'Concept Note: General Discussion on the Protection of Women's Human Rights in Conflict and Post-Conflict Contexts', 18 July 2011, 6-7.

example, girls forcibly recruited to serve as fighters may serve in combat (like boys) but may also be subjected to conjugal slavery (unlike boys).

When women and girls fleeing conflict seek asylum, are their gender-differentiated experiences recognized by decision-makers? It is not immediately obvious that they would be, given that neither the terms 'sex' nor 'gender' appear in the definition of 'refugee' set out in the 1951 Convention Relating to the Status of Refugees (1951 Convention), as amended by the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).³ However, over the past twenty years, there has been a significant focus at the international level on ensuring a gender-sensitive interpretation of the refugee definition. These efforts include UNHCR's issuance of a number of groundbreaking guidance documents⁴ and state adoption of legislation including 'sex' or 'gender' in the list of 1951 Convention grounds⁵ or of guidelines on female asylum-seekers.⁶

Given this guidance, one would expect gender-sensitive determinations of asylum claims by women and girls fleeing conflict. However, numerous studies show that deep flaws still exist in the domestic consideration of refugee claims by women and girls and that both policy and practice need

³ Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954), 189 UNTS 137 (1951 Convention), Art. 1A(2); Protocol Relating to the Status of Refugees (entered into force 4 October 1967), 606 UNTS 267 (1967 Protocol), Art. 1(2). On the history of this, see A. Edwards, 'Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010', *RSQ* 29(2) (2010), 21, 22-3.

⁴ Recent examples include UNHCR, 'Handbook for the Protection of Women and Girls', January 2008; UNHCR, 'Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response', May 2003; and UNHCR, 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees', 7 May 2002, HCR/GIP/02/01, para. 6 (UNHCR, 'Guidelines on International Protection No. 1').

⁵ For example, Refugee Act of 1996 (Ireland), sec. 1 (in defining membership of a particular social group).

⁶ For example, 'Guidelines on Gender Issues for Decision Makers 1996' (Australia); and 'Gender Guidelines 2012' (Australia); 'Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution 2003' (Canada) ('Guidelines for Women Refugee Claimants'); 'Gender Guidelines for Asylum Determination 1999' (South Africa); 'Asylum Gender Guidelines 2000' (United Kingdom) ('Asylum Gender Guidelines') and 'Gender Issues in the Asylum Claim 2006' (United Kingdom); and 'Considerations for Asylum Officers Adjudicating Asylum Claims from Women 1995' (United States) and 'Gender Guidelines for Overseas Refugee Processing 2000' (United States) ('Considerations for Asylum Officers').

improvement.⁷ To date, this analysis has not concentrated specifically on women and girls who have fled conflict. This chapter therefore aims to bring some focus to this subset of female refugee claimants.⁸ It does so by analyzing a group of forty-six cases decided between 2004 and 2012 in Australia, Canada, New Zealand, the United Kingdom and the United States involving women and girls who seek asylum based on claims related to conflict. These cases come from various levels of the refugee determination process. In addition to this group of recent cases, this chapter also considers certain relevant earlier cases, as well as reports on and academic discussions of the female refugee experience that include contemplation of conflict-related claims.

The second section of this chapter begins by exploring when conflict-related ill-treatment has been recognized as persecution and when it has not. This section also examines whether ill-treatment in conflict can be considered to be targeted at individual women and girls. The third section examines the 1951 Convention grounds most often used in refugee claims made by women and girls fleeing conflict: membership of a particular social group, political opinion, race and religion. The fourth section discusses how lack of state protection has been considered in female conflict-related refugee claims. The fifth section discusses procedural and evidentiary problems that arise in such asylum claims, especially with respect to credibility gaps on sexual violence and lack of gender-specific country-of-origin information. The final section concludes with observations on the need for a deeper understanding of persecution, expanded conceptions of the 1951 Convention grounds as they relate to women and girls fleeing conflict and recognition that women and girls fleeing conflict face problems similar to those making peacetime-related claims *and* specific conflict-related evidentiary and procedural hurdles.

⁷ For example, C. Querton, "'I Feel Like as a Woman I'm Not Welcome': A Gender Analysis of UK Asylum Law, Policy and Practice", *Asylum Aid*, January 2012; H. Muggeridge and C. Maman, 'Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims', *Asylum Aid*, January 2011; H. Cheikh Ali, C. Querton and E. Soulard, 'Gender-Related Asylum Claims in Europe: Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU Member States', *GENSEN*, May 2012; and UNHCR, 'Improving Asylum Procedures – Comparative Analysis and Recommendations for Law and Practice: Key Gender-Related Findings and Recommendations', March 2010.

⁸ This chapter does not focus on some related areas that deserve greater scrutiny, such as gender-related refugee claims by men and boys fleeing conflict and the reliance on subsidiary or complementary protection as a 'safety valve' for gender and conflict cases (on this, see, Cheikh Ali et al., 'Gender-Related Asylum Claims in Europe', 57).

Persecution

The 1951 Convention requires that the refugee claimant possess a well-founded fear of a form of harm that qualifies as persecution.⁹ The term 'persecution' is not defined in the 1951 Convention, though there is agreement that 'a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group' and other serious violations of international human rights constitute persecution.¹⁰ There are a number of gender-related forms of harm that are currently considered to fit within these parameters – such as rape, dowry-related violence, female genital mutilation, domestic violence and trafficking – because they inflict severe pain and suffering (both mental and physical), whether perpetrated by state or non-state actors.¹¹ However, only some gender-related forms of ill-treatment common in the context of conflict have been recognized as rising to the level of persecution. The conflict-related harm that is most well established as a form of gendered persecution is rape.

Rape in Conflict

Rape is committed during conflict for many reasons.¹² These reasons may range from opportunistic 'sexual looting', to strategic design, to a combination of the two.¹³ These reasons may overlap and coexist in a given conflict and may also change over time. Rape can also be committed in many ways, such as brutal gang rapes, the insertion of various objects into victims' genitalia, the raping of pregnant women and forced sexual intercourse between male and female civilian abductees.¹⁴ Rape is an

⁹ 1951 Convention, Art. 1A(2).

¹⁰ UNHCR, 'Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees', January 1992, HCR/1P/4/Eng./Rev.1, para. 51. Such human rights would include those listed in the 1981 Convention on the Elimination of All Forms of Discrimination against Women (entered into force 3 September 1981), 1249 UNTS 13 (CEDAW).

¹¹ UNHCR, 'Guidelines on International Protection No. 1', para. 9.

¹² OCHA Policy Development and Studies Branch, 'Sexual Violence and Conflict: Understanding the Motivations', 20 June 2008.

¹³ X. Agirre Aranburu, 'Sexual Violence beyond Reasonable Doubt: Using Pattern Evidence and Analysis for International Cases', *Leiden Journal of International Law* (2010), 609, at 613–14, 622.

¹⁴ For example, as carried out by the Revolutionary United Front during the civil war in Sierra Leone: *Prosecutor v. Sesay et al.*, Case No. SCSL-04-15-T, Trial Judgement, 9 March 2009, paras. 1181, 1185, 1193–4, 1205–7, 1289 and 1347, n. 2509 (*Sesay* Trial Judgement).

expression by the perpetrator of control and power¹⁵ and therefore is effective in not only physically and psychologically harming the victims but also in tearing apart social units (such as families and communities).¹⁶ This is why rape has been acknowledged as a particularly effective tool of genocide,¹⁷ as a crime against humanity (including the crime against humanity of persecution)¹⁸ and as a war crime.¹⁹ Rape has also been recognized as a human rights violation.²⁰

Given the serious harm created by rape, it is therefore not surprising that rape has been identified within international and domestic refugee law as a form of persecution. UNHCR has stated that '[t]here is no doubt that rape is an act which inflicts severe pain and suffering (both mental and physical) and which has been used as a form of persecution by States and non-State actors.'²¹ Various country guidelines, directed at refugee claim adjudicators, also specify rape as a form of persecution.²² Domestic refugee case law has also recognized rape in conflict as a form of persecution.²³ In my examination of twenty recent cases involving claims of rape (of the claimant or a family member) or fear of rape as persecution,²⁴ eight claims or appeals were accepted on the evidence of

¹⁵ M. Eriksson, *Defining Rape: Emerging Obligations for States under International Law?* (Boston: Martinus Nijhoff, 2011), 171.

¹⁶ *Ibid.* 126; *Sesay* Trial Judgement, paras. 1349–50.

¹⁷ *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgement, 2 September 1998, at para. 731 (*Akayesu* Trial Judgement).

¹⁸ For example, *Prosecutor v. Krstić*, Case No. IT-98-33-T, Judgement, 2 August 2001, paras. 617–18.

¹⁹ Rape is explicitly listed as a crime against humanity and sometimes also as a war crime in international criminal statutes: e.g., Rome Statute of the International Criminal Court (entered into force 1 July 2002), 2187 UNTS 90 (Rome Statute), Arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e) (vi).

²⁰ UNGA Res. 48/104, 20 December 1993, Art. 2.

²¹ UNHCR, 'Guidelines on International Protection No. 1', para. 9.

²² For example, Canada, 'Guidelines for Women Refugee Claimants', Art. B 'Assessing the Feared Harm'; United Kingdom, 'Asylum Gender Guidelines', Art. 2A.16–8; and United States, 'Considerations for Asylum Officers', 9.

²³ *SS (Burundi) CG*, [2004] UKIAT 00290 (29 October 2004) (United Kingdom), para. 16 (*SS (United Kingdom)*).

²⁴ *1203764*, [2012] RRTA 312 (18 May 2012) (Australia) (*1203764 (Australia)*); *TA6-00022*, [2007] RPDD No. 233 (29 October 2007) (Canada) (*TA6-00022 (Canada)*); *JXV (Re)*, [2008] RPDD No. 3 (23 January 2008) (Canada) (*JXV (Canada)*); *VA8-01482*, [2010] RPDD No. 105 (8 March 2010) (Canada) (*VA8-01482 (Canada)*); *VA9-00148*, [2010] RPDD No. 512 (30 June 2010) (Canada) (*VA9-00148 (Canada)*); *MA8-07482*, [2010] RPDD No. 145 (17 September 2010) (Canada) (*MA8-07482 (Canada)*); *Kika v. Minister of Citizenship and Immigration*, [2011] FC 1039 (2 September 2011) (Canada) (*Kika (Canada)*); *Refugee Appeal Nos. 73894, 73895, 73896, 73897*, (24 January 2005) (New Zealand) (*73894 et al. (New Zealand)*); *Refugee Appeal Nos. 76464 and 76465*,

past rape and/or future feared rape.²⁵ For example, in a New Zealand case involving the Democratic Republic of the Congo (DRC), the female applicant's husband was sexually assaulted in detention, her mother and sister were raped during a visit to their house by soldiers and other women in her house were sexually assaulted. This, and other treatment during conflict, was considered to amount to a well-founded fear of persecution.²⁶

However, it must be noted that several of the eight positive decisions presented troubling histories in the lower courts, only remedied on appeal. For example, in the Canadian case of *Kika*, the claimant had been raped by soldiers in the DRC in 2006.²⁷ Her claim was initially denied on the basis of lack of evidence of persecution but was ordered to be reassessed, as 'the officer apparently did not consider the possibility that Ms. Kika had a gender-based claim for refugee protection as a result of her sexual assault in 2006.'²⁸ As in *Kika*, the claimant in the case of *NS* (United Kingdom) was originally denied asylum in part because the adjudicator had found that her rape occurred 'because the assailant found her attractive, and therefore that the attack was a purely personal one, and no more than a common crime'.²⁹ On appeal, the Immigration Appeal Tribunal stated that this 'finding was not based on the evidence before [the adjudicator]'.³⁰ The evidence was that the applicant's

(28 June 2010) (New Zealand) (76464 & 76465 (New Zealand)); *AB*, [2011] NZIPT 800019 (24 August 2011) (New Zealand) (*AB* (New Zealand)); *SS* (United Kingdom); *NS* Afghanistan CG, [2004] UKIAT 00328 (30 December 2004) (United Kingdom) (*NS* (United Kingdom)); *In re B (FC) (Appellant) (2002) Regina v. Special Adjudicator (Respondent) ex parte Hoxha (FC) (Appellant)*, [2005] UKHL 19 (10 March 2005) (United Kingdom) (*In re B (FC)* (United Kingdom)); *BK* DRC CG, [2007] UKAIT 00098 (September 2007) (United Kingdom) (*BK* (United Kingdom)); *LM* Republic of Congo (Congo-Brazzaville) CG, [2008] UKAIT 00064 (4 August 2008) (United Kingdom) (*LM* Congo (United Kingdom)); *PS (Sri Lanka) v. Secretary of State for the Home Department*, [2008] EWCA Civ. 1213 (23 October 2008) (United Kingdom) (*PS* (United Kingdom)); *AMM and others* Somalia CG, [2011] UKUT 00445 (IAC) (15 July 2011) (United Kingdom) (*AMM and Others* (United Kingdom)); *Mohammed v. Attorney General*, [2005] 400 F.3d 785 (10 March 2005) (United States) (*Mohammed* (United States)); *Mambwe v. Attorney General*, [2009] 572 F.3d 540 (16 July 2009) (United States) (*Mambwe* (United States)); and *Kante v. Attorney General*, [2011] Fed. App. 0014N (6th Cir.) (7 January 2011) (United States) (*Kante* (United States)).

²⁵ *Kika* (Canada); 73894 *et al.* (New Zealand); *AB* (New Zealand); *NS* (United Kingdom); *In re B (FC)* (United Kingdom); *LM* Congo (United Kingdom); *PS* (United Kingdom); and *AMM and Others* (United Kingdom).

²⁶ 73894 *et al.* (New Zealand), paras. 35, 43 and 97 (it was unclear whether the applicant herself had been raped).

²⁷ *Kika* (Canada), para. 5. ²⁸ *Ibid.*, para. 14. ²⁹ *NS* (United Kingdom), para. 16.

³⁰ *Ibid.*

husband had been detained by the militia of an Afghan warlord on suspicion of supporting the warlord's enemy.³¹ The warlord's nephew took advantage of her husband's detention and the applicant's vulnerability³² and demanded that the applicant become his fourth wife; when she refused, he raped, beat and threatened her with death.³³ The tribunal concluded that 'to take as a wife, by force, the wife of one's enemy, after first imprisoning him, is not an uncommon act in the course of war or other conflict, as an act of aggression against the enemy.'³⁴ The applicant was granted refugee status.³⁵

In another case, *PS* (United Kingdom), the applicant, a Tamil woman from Jaffna, had been raped on three occasions in her home by Sri Lankan soldiers.³⁶ The first time, she was raped by two soldiers.³⁷ Five days later, one of those soldiers returned, accompanied by a different soldier, and both of them raped her. A week or so after, these latter two soldiers returned, held her father at gunpoint so that he could witness the act and raped her again.³⁸ She subsequently tried to kill herself and failed and then discovered that she was pregnant.³⁹ The immigration judge classified these soldiers as 'rogue', comparing them to three civilian criminals, and concluded that these past rapes had no relevance to the potential for future persecution.⁴⁰ This decision was rejected on appeal: the soldiers were clearly able to act with impunity, given the repetition of the rapes, and therefore there was a real risk that she would again be targeted for rape by Sri Lankan soldiers in the vicinity.⁴¹ In a similar decision, in the case of *LM Congo* (United Kingdom), the court accepted, on appeal, that the applicant, who was from the Republic of Congo, had been raped in 1997 and that she had 'a real risk of something similar happening to her on return'.⁴² Finally, in *In re B (FC)*, the House of Lords considered an appeal by a female Kosovar Albanian applicant who had been raped in front of her husband, sons and twenty to thirty neighbours due to suspected involvement in the Kosovo Liberation Army. Baroness Hale of Richmond found that the Court of Appeal had failed to realize that 'the persecution of Mrs. B was expressed in a different way from the persecution of her husband and sons', through rape, and that rape may be a weapon or strategy of war.⁴³

³¹ *Ibid.* Paras. 26, 28.

³² *Ibid.* para. 29 (she was still being harassed by the militia, who killed her sister).

³³ *Ibid.* Paras. 31 and 68. ³⁴ *Ibid.* para. 69. ³⁵ *Ibid.* para. 101.

³⁶ *PS* (United Kingdom), para. 1. ³⁷ *Ibid.* ³⁸ *Ibid.* ³⁹ *Ibid.* ⁴⁰ *Ibid.*, para. 7.

⁴¹ *Ibid.*, paras 15 and 16. ⁴² *LM Congo* (United Kingdom), paras. 1, 2 and 114.

⁴³ *In re B (FC)* (United Kingdom), para. 30.

These examples demonstrate that rape claims stemming from conflict face some common obstacles. The first obstacle is in the characterization of the rape. Some adjudicators – such as the initial adjudicator in *NS* (United Kingdom) – view sexual violence in conflict as a matter of personal sexual gratification rather than as a method of terrorizing, controlling or punishing civilians.⁴⁴ In the UK case of *Najjemba*, the court held that a woman from Northern Uganda who had suffered rape at the hands of government soldiers was the victim of ‘simple and dreadful lust’ and not persecution.⁴⁵ This was despite her connection to her son, who was suspected of involvement with a rebel group opposed to the Ugandan government and had ‘disappeared’.⁴⁶

A related concern is that those who commit sexual violence in conflict are sometimes viewed by adjudicators as having committed the act in their private capacity and are therefore analogous to common criminals rather than persecutors, which was the original reasoning in *PS* (United Kingdom) and the reasoning in the Canadian case of *VA9-00148*.⁴⁷ Both the ‘conflict rape as lust’ and the ‘conflict rape as a common crime’ approaches demonstrate a profound misunderstanding of the context of rape in conflict. As Macklin puts it, ‘some decision-makers have proven unable to grasp the nature of rape by State actors [and non-state fighters, too] as an integral and tactical part of the arsenal of weapons deployed to brutalise, dehumanise, and humiliate women and demoralise their kin and community.’⁴⁸ The characterization of rape as lust incorrectly creates the impression that sexuality, rather than an exercise of power and gender-based discrimination, is at play. It also completely ignores the coercion, overarching violence and impunity created by the conflict. In other words, even if the perpetrator’s motive happens to be entirely sexual, it does not follow that the perpetrator did not target the victim for persecutory reasons or that his conduct does not cause severe pain and suffering to the point of persecution. Similarly, the characterization of rape as a ‘common’ criminal activity instead of

⁴⁴ *NS* (United Kingdom), para. 16.

⁴⁵ *Najjemba v. Secretary of State for the Home Department*, [2002] EWCA Civ. 1082 (15 July 2002) (United Kingdom), para. 9.

⁴⁶ *Ibid.*, para. 2.

⁴⁷ *PS* (United Kingdom), at para. 7; *VA9-00148* (Canada), para. 16. More generally, see H. Crawley and T. Lester, ‘Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe’, May 2004, EPAU/2004/05, para. 167.

⁴⁸ A. Macklin, ‘Refugee Women and the Imperative of Categories’, *Human Rights Quarterly* 17(2) (1995), 213, 226.

persecution assumes that the rape in conflict is somehow random or private – and therefore unconnected to the state and lacking the discriminatory or rights-violating character required by the refugee definition.⁴⁹ This is despite the fact that the rape occurs in the context of overarching violence and impunity granted by weak or misdirected state authority and enhanced by vulnerability and gender-based discrimination. Both types of (mis)characterizations of rape are not exclusive to refugee claims involving conflict,⁵⁰ but the fact that they occur means that decision-makers are failing to adequately consider the environment surrounding the rape. On a positive note, these characterizations were correctly dismissed in *In re B (FC)* and the UK case of *N*.⁵¹

The second common obstacle identified in the cases is that, sometimes, adjudicators (and the applicant's counsel) do not recognize the importance of considering the after-effects of past rape in order to consider the risk of future persecution.⁵² These after-effects commonly include societal stigma, which considers raped women and girls to be somehow 'tainted'.⁵³ This stigma is a form of discrimination, and it can create social, cultural and economic exclusion for the victim and her children and lead to increased vulnerability to sexual and other forms of violence, as well as death.⁵⁴ For example, the US case of *Mambwe* considered the claim of a young Angolan woman who had fled from National Union for the Total Independence of Angola (UNITA) forces as a child, was raped in a Zambian refugee camp (and gave birth as a result) and was kidnapped from Zambia by UNITA and repeatedly raped.⁵⁵ Her appeal was

⁴⁹ T. Spijkerboer, *Gender and Refugee Status* (Burlington, VT: Ashgate, 2000), 94–5, 97–9. The assumption that rape is 'private' can lead to three incorrect assumptions: a denial that the rape amounts to persecution, that it is not linked to the conflict and that it has no state connection. H. Crawley, *Refugees and Gender: Law and Process* (Bristol, UK: Jordan Publishing, 2001), 89.

⁵⁰ Crawley, *Refugees and Gender*, 44.

⁵¹ *In re B (FC)* (United Kingdom), para. 30; and *N (FC) v. Secretary of State for the Home Department*, [2005] UKHL 31 (5 May 2005) (United Kingdom), para. 58 (*N* (United Kingdom)).

⁵² For example, even though *NS* (United Kingdom) contains strong gender analysis, the Immigration Appeal Tribunal did not consider the specific future risk of further victimization (including stigmatization) raised by the applicant's previous rape. However, it did consider the risk to the applicant and her children of living in Kabul on her own without family or community support. See *NS* (United Kingdom), paras. 64–5, 93–4, 96.

⁵³ For example, in societies where virginity is highly valued, 'loss of virginity for women often means loss of marriage opportunities, which can have severe social-cultural repercussions for them and their families'. International Centre for Transitional Justice, 'Across the Lines: The Impact of Nepal's Conflict on Women', December 2010, 27.

⁵⁴ Crawley, *Refugees and Gender*, 43. ⁵⁵ *Mambwe* (United States), 2.

denied on the basis that the conflict in Angola had ended.⁵⁶ However, it appears that the court (and earlier decision-makers) did not consider the lasting stigma (and therefore discrimination) she would likely face in post-conflict Angola as a lone young woman with no relatives who had been a past victim of rape by rebels, raising a child conceived through rape.⁵⁷ However, in *In re B (FC)*, Baroness Hale of Richmond states, 'To suffer the insult and indignity of being regarded by one's own community (in Mrs. B's words) as "dirty like contaminated" because one has suffered the gross ill-treatment of a particularly brutal and dehumanizing rape directed against that very community is the sort of cumulative denial of human dignity which to my mind is quite capable of amounting to persecution' as 'the victim is punished again and again for something which was not only not her fault but was deliberately persecutory of her, her family and her community.'⁵⁸ She did note, however, that these issues should have been identified by earlier decision-makers but were overlooked.⁵⁹ An evaluation of the risk created by the after-effects of rape should be a standard consideration in conflict-related cases in order to better understand potential sources of future persecution.

Other common obstacles to conflict-related refugee claims based on rape – such as rape being considered to be part of indiscriminate conflict, rape being found not to relate to a 1951 Convention ground, rape evidence being considered as not credible and a lack of relevant country-of-origin information on rape in conflict – will be dealt with in the sections that follow.

Other Forms of Sexual Violence in Conflict

While case law and academic analysis to date have largely focused on rape as a form of persecution common in conflict, other forms of sexual violence may qualify as forms of persecution.⁶⁰ International criminal

⁵⁶ *Ibid.*, 7.

⁵⁷ Rape victims with children are often severely stigmatized and ostracized (as are their children). See M. Turshen, 'Women's War Stories', in M. Turshen and C. Twagiramariya (eds.), *What Women Do in Wartime: Gender and Conflict in Africa* (New York: Zed Books, 1998), 1, at 16.

⁵⁸ *In re B (FC)* (United Kingdom), para. 36. ⁵⁹ *Ibid.*, para. 39.

⁶⁰ For example, trafficking for sexual slavery or enforced prostitution: UNHCR, 'Guidelines on International Protection: The Application of Article 1(A)(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons at Risk of Being Trafficked', 7 April 2006, HCR/GIP/06/07, para. 15; United Kingdom, 'Asylum Gender Guidelines', para. 2A.18, which lists, apart from rape,

law provides some assistance in enumerating examples of such sexual violence. Sexual slavery, enforced prostitution, mutilation of sexual organs or breasts and forced nudity have all been recognized as forms of sexual violence amounting to crimes against humanity and/or war crimes.⁶¹ Given their comparability to rape, it can be expected that the same obstacles outlined earlier would apply to other forms of sexual violence.

Other Forms of Gender-Related Ill-Treatment in Conflict

There are a number of gender-related forms of ill-treatment that occur in conflict that may qualify as persecution. These include conjugal slavery (also referred to as 'forced marriage' in conflict),⁶² forced pregnancy,⁶³ forced sterilization⁶⁴ and forced abortion/miscarriage.⁶⁵ The latter three violations are likely the easiest to understand as gender-related crimes because they are targeted at reproductive organs. Conjugal slavery, which is comprised of sexual slavery plus domestic slavery, is also clearly a gender-related crime: the perpetrators enforce a norm of 'femaleness' on the victims, expecting them to submit to sex and cook and clean on demand.

Other forms of gender-related persecution in conflict may be more difficult to identify for two reasons. Firstly, applicants may describe seemingly gender-neutral forms of ill-treatment, such as torture, enslavement and imprisonment, but underneath those descriptions may lie a gendered form of the harm particularly targeted at or affecting women

'enforced nakedness, mechanical or manual stimulation of the erogenous zones; the insertion of objects into the body openings; the forced witnessing or commission of sexual acts; forced masturbation; fellatio and oral coitus; a general atmosphere of sexual aggression, the loss of the ability to reproduce plus threats of the above'.

⁶¹ For example, Rome Statute, Arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi); *Sesay* Trial Judgement, paras 143–72, 1205–8, 1291–7, 1465–75, 1579–83; *Prosecutor v. Tadić*, Case No. IT-94–1-T, Opinion and Judgement, 7 May 1997, paras. 45, 198, 206; *Akayesu* Trial Judgement, para. 697.

⁶² *Prosecutor v. Taylor*, Case No. SCSL-03–01-T, Trial Judgement, 18 May 2012, paras. 427–30 (*Taylor* Trial Judgement); *Sesay* Trial Judgement, paras 1154–5, 1178–9, 1291–7, 1406–13, 1459–75, 1579–83. See also *NS* (United Kingdom), paras. 31 and 69, on attempted forced marriage.

⁶³ Rome Statute, Arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi); *Mambwe* (United States), 2, containing facts related to pregnancy resulting from rape.

⁶⁴ Rome Statute, Arts. 7(1)(g), 8(2)(b)(xxii) and 8(2)(e)(vi).

⁶⁵ M. Deen, 'Pregnant Girls Forced to Abort', *The Lubanga Trial*, Open Society Justice Initiative, 18 March 2009.

and girls: torture through threatened or actual sexual touching or rape,⁶⁶ enslavement by forced domestic labour⁶⁷ and imprisonment by the opposing side in a conflict so as to create easily available female 'entertainment' for troops.⁶⁸ Another example is terrorizing civilians; this may be achieved through a variety of methods, including rape, sexual slavery and conjugal slavery.⁶⁹ In other words, while some ill-treatment will be gender related on its face (like rape), other ill-treatment may only be revealed as such after gathering further information from the applicant. In the cases studied for this chapter, there appeared to be missed chances to discover potential gendered ill-treatment when ill-treatment was simply described as 'torture' or 'beatings' without further explanation of how these acts were carried out.⁷⁰

Secondly, the way in which women view harm may be gender differentiated. For example, 'preliminary empirical research suggests that loss of a child, separation from children, and witnessing harm to children or family members are particularly viewed by women as primary harms to the self, often as or more egregious than a severe violation of their own bodies'.⁷¹ Since female applicants may experience various harms as intertwined, they may not be able to easily compartmentalize the harms they face into conflict- and non-conflict-related harms for the purposes of describing past and feared persecution.⁷² Similarly, given their experience of persecution as a physical-social-economic whole, they may not see sexual violence as the sole or central part of their claim.⁷³ Thus,

⁶⁶ *Prosecutor v. Furundžija*, Case No. IT-95-17/1-T, Trial Judgement, 10 December 1998, para. 163.

⁶⁷ *Taylor* Trial Judgement, paras. 1066, 1072-5, 1094, 1098, 1108, 1144-6, 1828, 1833.

⁶⁸ *Prosecutor v. Kunarac et al.*, Case No. IT-96-23-T and IT-96-23/1-T, Judgement, 22 February 2001, paras. 747-55, 760-6.

⁶⁹ *Sesay* Trial Judgement, paras 1347-52; and *Taylor* Trial Judgement, paras 2034-8, 2051-2, 2175-8.

⁷⁰ See 73894 *et al.* (New Zealand), para. 41; and *EB (Ethiopia) v. Secretary of State for the Home Department*, [2007] EWCA Civ. 809 (31 July 2007) (United Kingdom), para. 8 (*EB* (United Kingdom)).

⁷¹ F. Ní Aoláin, D. F. Haynes and N. Cahn, *On the Frontlines: Gender, War, and the Post-Conflict Process* (New York: Oxford University Press, 2011), 48, 154. This is illustrated in the observation that '[f]emale claimants may also fail to relate questions about "torture" to the types of harm which they fear': UNHCR, 'Guidelines on International Protection No. 1', para. 36(vii).

⁷² Ní Aoláin *et al.*, *On the Frontlines*, 46.

⁷³ H. Baillot, S. Cowan and V. Munro, "'Hearing the Right Gaps": Enabling and Responding to Disclosures of Sexual Violence within the UK Asylum Process', *Social and Legal Studies* 21(3) (2012), 269, 289.

applicants should be given the opportunity to identify the full range of conflict-related harms from their perspective in order for the harms to be evaluated cumulatively as persecution. Such an approach is more likely to uncover a wider range of gender-related persecutory acts.

Both reasons require those working with refugee claimants to listen closely to the stories told, to consider whether what is said reveals potential gendered ill-treatment and to ask appropriate questions to gain further insight.⁷⁴ In the cases studied, adjudicators tended to focus on the most obvious individual gender-related violation when considering whether persecution is gender related⁷⁵ rather than evaluating the harms as a whole, although there were exceptions.⁷⁶ However, sometimes gender aspects were simply never raised or examined by the applicant (or her representative) or the decision-makers, or the adjudicator decided to focus on the non-gender-related aspects of the claim.⁷⁷ This has been identified as a particular problem in cases involving sexual violence – ‘a tendency among some asylum professionals to marginalize, trivialize or ignore accounts of rape’.⁷⁸

Indiscriminate versus Targeted Gender-Related Ill-Treatment

This section concludes by discussing a major obstacle for female refugee claimants fleeing conflict: the categorization of gender-related violence as

⁷⁴ See *ibid.* Proper listening requires training: UNHCR, ‘Improving Asylum Procedures – Gender’, 10.

⁷⁵ For example, *SS* (United Kingdom); *HH & Others*, Somalia CG, [2008] UKAIT 00022 (November 2007) (United Kingdom) (*HH* (United Kingdom)); *LM Congo* (United Kingdom); *Mohammed* (United States); and *Mambwe* (United States).

⁷⁶ For example, *NS* (United Kingdom), paras. 60–4; and *NA Iraq* CG, [2008] UKAIT 00046 (2 January 2008) (United Kingdom), paras. 91–9 (*NA* (United Kingdom)).

⁷⁷ For example, *In re B (FC)* (United Kingdom), paras 30–9; *N* (United Kingdom), paras 56–8 (the only issue considered was whether the appellant would be able to access treatment for HIV but not the fact that she had been kidnapped by the Lord’s Resistance Army and then raped by government soldiers); *JXV* (Canada), para. 91; *0901064*, [2009] RRTA 373 (4 May 2009) (Australia), para. 54 (*0901064* (Australia)) (unclear whether her torture was gendered despite country of origin information on gendered abuse in detention, and whether she was chosen to deliver the parcels because of a gendered assumption that a woman would attract less attention or would be less at risk); *1010754*, [2011] RRTA 320 (4 May 2011) (Australia), para. 30 (the gendered aspects of the applicant’s status as a widow and of the harassment were not explored) (*1010754* (Australia)); and *EB* (United Kingdom), note 70 above, para. 8 (the potentially gendered aspects of torture were not explored); *AB* (New Zealand), note 24 above, paras. 6, 7, 14 62–4; and *73894 et al.*, (New Zealand), paras. 35, 43, 97–104.

⁷⁸ Baillot et al., ‘Gaps’, 270, 289–91.

part of the general indiscriminate consequences of conflict and not targeted at the claimant. This classification occurred in a significant number of the cases studied.⁷⁹ For example, in the Canadian case of *VA9-00148*, an applicant from the DRC described an attack in 2008 in which rebels came to her home demanding money because they knew that her family had a business.⁸⁰ Her family was beaten and tortured, and the applicant was raped.⁸¹ The rebels stole \$40,000 and abducted her husband and stepson – she has not seen them since.⁸² The rebel violence subsequently increased, and her neighbour and her children were beheaded, while others had body parts amputated or were killed.⁸³ While the adjudicator found that a nexus to a 1951 Convention ground does exist due to the sexual violence, he characterized the beatings, rape and torture of her and her family as ‘localized crime’, and even if the rebels had targeted them, it was for money and not for any other reason.⁸⁴ This led to a decision that ‘[a]lthough conditions in the DRC certainly involve a degree of risk and violence’, the applicant and her family would not face a personalized risk to their lives if returned.⁸⁵ This decision is particularly striking because it lacks any consideration of the significant political and ethnic dimensions of the conflict in the DRC, including the political and ethnic choices by the various rebel groups of where, how and who they attack.⁸⁶ As Goodwin-Gill and McAdam note, ‘A closer look at the background to the conflict . . . and the ways in which it was fought, will often establish a link to the [1951] Convention.’⁸⁷

The classification of gender-related ill-treatment in conflict as indiscriminate leads to the assumption that the applicant was not

⁷⁹ *1002652*, [2010] RRTA 557 (15 July 2010) (Australia), para. 68 (*1002652* (Australia)); *TA8-00963*, [2009] RPDD No. 395 (22 September 2009) (Canada), para. 7 (*TA8-00963* (Canada)); *TA8-18792*, [2010] RPDD No. 374 (17 June 2010) (Canada), para. 36 (*TA8-18792* (Canada)); *VA9-00148* (Canada), para. 20; *Kika* (Canada), para. 9; *PS* (United Kingdom), para. 7; *Camara v. Attorney General*, [2009] 580 F.3d 196 (4 September 2009) (United States), 8 (*Camara* (United States)); *SS* (United Kingdom), para. 22.3; and *Gomez v. Immigration and Naturalization Service*, 947 F.d 660; 1991 US App. LEXIS 25697 (28 October 1991) (United States), 6604 (*Gomez* (United States)).

⁸⁰ *VA9-00148* (Canada), para. 10. ⁸¹ *Ibid.* ⁸² *Ibid.* ⁸³ *Ibid.*, para. 11.

⁸⁴ *Ibid.*, paras. 15 and 16. ⁸⁵ *Ibid.*, para. 20.

⁸⁶ There are numerous reports by international organizations and NGOs detailing varying political and ethnic reasons for militia violence. For example, on motives for sexual violence by the Mai Mai, see J. Kelly, ‘Rape in War: Motives of Militia in DRC’, United States Institute of Peace, June 2010. The adjudicator did not appear to refer to any country-of-origin information in making this decision.

⁸⁷ G. S. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, 3rd edn. (New York: Oxford University Press, 2007), 126.

personally targeted for past persecution and/or that she can be returned to her country of origin because any future risk she would face is a risk faced by everyone in that country. While the facts of every case are individual, these underlying assumptions can be legitimately questioned. On the issue of personal targeting, it is crucial that decision-makers examine both the narrow and the wider context in which the violations occurred. In the case of *VA9-00148* outlined earlier, the narrow focus reveals a potential case of targeting: the applicant was raped during the rebel attack, while her husband and son were abducted.⁸⁸ Both forms of mistreatment are gendered: the applicant may have been targeted for rape because she is female,⁸⁹ while the men may have been targeted for abduction because they are men (perhaps to become forced fighters). Furthermore, if one examined the wider context of militia movements in the applicant's area at the time of the attack,⁹⁰ one might be able to discern other cross-cutting ways in which the applicant and her family were targeted – perhaps due to the (presumed) ethnicity or (presumed) political affiliation of the individuals in that area. These narrow and wider inquiries into the conflict would also inform analysis of the risk of future targeting for gender-related persecution (including persecution of a different type than originally suffered).⁹¹ These deeper inquiries – both gender sensitive and intersectional – are crucial to more accurately determining whether violence is indiscriminate or targeted.

⁸⁸ *VA9-00148* (Canada), para. 10.

⁸⁹ There are many layers to this: she may have been targeted for rape because she is of the female sex (and therefore has the genitalia to rape); because of her gender (e.g. due to patriarchal assumptions by the perpetrators that women are there to serve the needs of men); to punish her in a psychological and physical manner without the use of physical weapons; to humiliate her male family members (that they cannot protect her, that the enemy has power); and/or to humiliate her community.

⁹⁰ This requires detailed country-of-origin information. For more on this, see the part on country-of-origin information later.

⁹¹ For example, *AA (Uganda) v. Secretary of State for the Home Department*, [2008] EWCA Civ. 579 (22 May 2008) (United Kingdom), para. 17 (*AA* (United Kingdom)), in which humanitarian protection (but not refugee status) was granted to the applicant based on a future risk that the applicant (originally from northern Uganda and a victim of rape) would be forced into prostitution if returned to Kampala: 'Even if it is the fate of many of her countrywomen, I cannot think that either the AIT or the House of Lords that decided *AH (Sudan)* would have felt able to regard enforced prostitution as coming within the category of normal country conditions that the refugee must be expected to put up with.'

Lessons Learned

During war, gender norms often take on even greater socio-political significance than during peacetime. For example, 'the role of women in the biological and social reproduction of group identity places them in a position of particular vulnerability.'⁹² Thus, gender-related acts in conflict, such as the rape of women and girls, often take on deeper meanings or have broader repercussions (for families, for communities), thereby creating differentiated experiences. However, the significance of these meanings or repercussions is 'currently rarely recognized in the asylum determination process'.⁹³ This is evidenced by the common obstacles faced by women and girls in proving that they were persecuted in gender-related ways in the past and/or that they risk gender-related persecution in the future. Within rape claims, there are continuing difficulties with the incorrect characterization of rape in conflict as a 'private' act. Additionally, not enough attention is paid to the after-effects of past rape in creating future risks of persecution. While the cases studied did not shed much light on other types of ill-treatment in conflict that might be considered as gender-related persecution, there are clearly many more (less obvious) forms.

Another, rather significant obstacle is that a number of decision-makers classify gender-related violence as part of the general indiscriminate consequences of conflict. It appears that this is done without necessarily considering potential gender-related reasons for targeting (e.g. the various ways in which rape is used as a weapon of war) or the wider political and other dimensions of the conflict. If this contextual and gender-sensitive analysis is done, it is suggested that fewer cases of gender-related ill-treatment would be categorized as untargeted.⁹⁴

Refugee decision-makers must listen carefully for, and draw out, gender-related ill-treatment while at the same time respecting that women or girls may identify harm in gender-differentiated ways. Unfortunately, the analysis of persecution in the cases studied suggests that this careful listening is not always happening.

⁹² Crawley, *Refugees and Gender*, 88.

⁹³ *Ibid.* This comment is from 2001, but the analysis in this section demonstrates that it is still applicable.

⁹⁴ This does not directly answer the question of whether violence directed against women and girls during conflict can ever be described as indiscriminate. The discussion suggests that many more forms of ill-treatment in conflict may be considered gender based and that the fact that the ill-treatment is gendered may reflect at least a modicum of targeting of the victim on the basis of gender, sex or both.

1951 Convention Grounds

Under the 1951 Convention, only those who can demonstrate a ‘well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion’ can qualify as refugees.⁹⁵ As gender is not explicitly listed as a persecutory ground, women and girls fleeing conflict for gender-related reasons must fit their claims within one of the other grounds.⁹⁶ There are many different ways in which gender relates to the 1951 Convention grounds. If the persecutor would not have persecuted the victim had the victim not been female, ‘then an inference may be drawn that one of the motivations for persecution was the victim’s gender.’⁹⁷ For example, a party to a conflict may impose specific forms of conformity on women and girls based on a particular ideological view of how they should act.⁹⁸ When the reason underlying the persecution is the victim’s gender, then ‘membership of a particular social group’ may be the best category.⁹⁹ Where the gender of the victim dictates the manner of persecution (i.e. the persecution is carried out in a gender-specific manner, such as through rape and other forms of sexual violence, forced marriage, forced abortion, forced sterilization or forced pregnancy) but is not necessarily the reason for the persecution itself, then other 1951 Convention grounds might be more applicable.¹⁰⁰

Membership of a Particular Social Group

In practice, claims by women and girls tend to be considered under – and, indeed, funnelled into – the category of ‘membership of a particular

⁹⁵ 1951 Convention, Art. 1A(2).

⁹⁶ UNHCR, ‘Guidelines on International Protection No. 1’, paras. 22–34. Note that ‘sex’ may be relevant as a category: A. Edwards, ‘Distinction, Discretion, Discrimination: The New Frontiers of Gender-Related Claims to Asylum’, remarks presented at Gender, Migration and Human Rights Conference, Florence, Italy, 18–19 June 2012, 11–12. Where sex is a factor, gender may also simultaneously be a factor. There are often socially constructed assumptions accompanying the choice of biologically female individuals for persecution.

⁹⁷ A. Roberts, ‘Gender and Refugee Law’, *Australian Yearbook of International Law* 22 (2002), 159, 185.

⁹⁸ Goodwin-Gill and McAdam, *The Refugee in International Law*, 82.

⁹⁹ T. Inlender, ‘Status Quo or Sixth Ground? Adjudicating Gender Asylum Claims’, in S. Benhabib and J. Resnick (eds.), *Migrations and Mobilities: Citizenship, Borders, and Gender* (New York University Press, 2009), 359.

¹⁰⁰ *Ibid.*

social group' (MPSG).¹⁰¹ The cases studied confirmed this. MPSG was the most common 1951 Convention ground, with political opinion, race and religion the next most common grounds (in that order). Thus, conflict-related cases appear to reflect the more general trend in female cases, which suffer from the disproportionate use of MPSG.¹⁰²

UNHCR has defined 'particular social group' as 'a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.'¹⁰³ Within the cases studied, there were examples in which 'women' within a particular country were identified as such a group,¹⁰⁴ for example, Iraqi,¹⁰⁵ Afghani¹⁰⁶ and Somali women.¹⁰⁷ However, in other cases, this category was not considered to provide enough differentiation.¹⁰⁸ In these other cases, the group was defined both by gender and by other characteristics, for example, Tamil women whose husbands are missing or dead,¹⁰⁹ Afghan women and girls related to a particular male,¹¹⁰ lone Somali Ashraf woman with children,¹¹¹ widows of former members of the Iraqi Ba'ath Party and lone women with children,¹¹² single Somali women with

¹⁰¹ This is the tendency in all claims by women and girls and not only conflict-related claims: see Querton, 'I Feel Like', 32–3; Cheikh Ali et al., 'Gender-Related Asylum Claims in Europe', 58–60; C. Querton, "The Interpretation of the Convention Ground of "Membership in a Particular Social Group" in the Context of Gender-Related Claims for Asylum', Refugee Law Initiative, January 2012, 4; and Edwards, 'Transitioning Gender', 28.

¹⁰² Cheikh Ali et al., 'Gender-Related Asylum Claims in Europe', 55.

¹⁰³ UNHCR, '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', 7 May 2002, HCR/GIP/02/02, para. 11 (UNHCR, 'Guidelines on MPSG'). Note that some countries require both or add an additional requirement: Querton, 'I Feel Like', 35–6; Cheikh Ali et al., 'Gender-Related Asylum Claims in Europe', 62; and Crawley and Lester, 'Comparative Analysis of Gender-Related Persecution', para. 388.

¹⁰⁴ UNHCR has indicated that 'women' can be a valid group: UNHCR, 'Guidelines on MPSG', para. 12.

¹⁰⁵ *1002091*, [2010] RRTA 469 (7 June 2010) (Australia), para. 69 (*1002091* (Australia)).

¹⁰⁶ *NS* (United Kingdom), para. 79

¹⁰⁷ *HM Somalia*, [2005] UKIAT 00040 (26 January 2005) (United Kingdom) para. 35 (*HM* (United Kingdom)).

¹⁰⁸ *HH* (United Kingdom), para. 352: 'On the evidence, being a woman, without more, is not a sufficient differentiator to place her at such risk.'

¹⁰⁹ *1203764* (Australia), para. 85.

¹¹⁰ *JDG (Re)*, [2007] RPDD No. 33 (10 July 2007) (Canada), para. 133 (*JDG* (Canada)).

¹¹¹ *HH* (United Kingdom), para. 369. ¹¹² *NA* (United Kingdom), paras. 93 and 97.

children with no clan or family protection¹¹³ and family of senior Iraqi government employees with the additional factors of being in a mixed Sunni/Shia marriage and having liberal views.¹¹⁴

The cases studied demonstrate that there are differing approaches as to whether and when it is appropriate to adopt the broad category of 'women' as a particular social group in a given country in conflict. For example, the UK case of *HM* indicated that women in Somalia form a particular social group 'not just because they are women, but because they are extensively discriminated against'.¹¹⁵ However, in the UK case of *HH & Others*, a narrower approach was adopted, in order, it appears, to be able to accept one female claimant and exclude others. Thus, the analysis did not focus, as it had in *HM*, on the overarching situation of women in Somalia. Rather, the focus was on clans and sub-clans because '[o]n the evidence, being a woman, without more, is not a sufficient differentiator' to place her at individualized risk on return to a city 'which is in a situation of armed conflict'.¹¹⁶ Thus, the successful claimant was classified as part of the social group 'one Ashraf woman with children', while the analysis of the others focused on clan (and not gender).¹¹⁷ In this case, the narrowness of the social group seemed to be a decision-making device rather than an analysis of intersectionality. Intersectionality, in and of itself, can be positive and necessary because it recognizes the lived realities of female members of a society – who are not only female but also of a particular age, religion, race and so on.¹¹⁸ However, if one is able to establish that a woman is being persecuted because she is a woman, or for reasons of gender, then 'women' may be the more accurate particular social group.¹¹⁹

A default to the MPSG category sometimes also means that the nature of the conflict from which the applicant is fleeing is not analysed

¹¹³ *AMM and Others* (United Kingdom), para. 631.

¹¹⁴ *1110871*, [2012] RRTA 131 (6 March 2012) (Australia), paras. 90–1 (*1110871* (Australia)).

¹¹⁵ *HM* (United Kingdom), para. 35. ¹¹⁶ *HH* (United Kingdom), para. 352.

¹¹⁷ *Ibid.*, paras. 349, 355 and 369.

¹¹⁸ For example, the intersection of sex and age in the case of girls can compound the harm suffered: A. Edwards, 'Age and Gender Dimensions in International Refugee Law', in E. Feller, V. Turk and F. Nicholson (eds.), *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (Cambridge University Press, 2003), 46, at 47. For cases involving girls, see *Mohammed* (United States); and *AA* (United Kingdom).

¹¹⁹ Edwards, 'Distinction', 10–11.

at all or not in depth.¹²⁰ It is not clear from the cases why this is so, but it may be because many MPSG gender-related cases typically deal with 'private' harms in peacetime,¹²¹ such as domestic violence, forced marriage and female genital mutilation.¹²² As with these other sorts of harms, sometimes the MPSG analysis in conflict-related cases focused closely on the ill-treatment and less so on the wider (and more 'public') religious, national or political aspects of the conflict and their gendered components.¹²³ As a result, potential social groups or other applicable 1951 Convention grounds may be missed. There is also the concern that conflict-related cases raising non-typical gender issues (e.g. outside of the realm of sexual violence) may mistakenly be considered as not qualifying as MPSG. Within the cases studied, the decisions that did consider the nature of the conflict in some depth tended to be more thorough in their consideration of the various facets of MPSG *and* the other 1951 Convention grounds.¹²⁴

It is well accepted that the social group cannot be solely defined by the type of current persecution.¹²⁵ However, this does not mean that the form of persecution is irrelevant. Those who have suffered past gender-related persecution such as rape 'are linked by an immutable characteristic which is at once independent of and the cause of their current ill-treatment'.¹²⁶ A characteristic or an attribute expressed visibly may reinforce a finding that the individual belongs to a particular social group, but it is not a pre-condition for recognition of the group,

¹²⁰ For example, *MZXQS v. Minister for Immigration and Citizenship*, [2009] FCA 97 (17 February 2009) (Australia) (see original decision, para. 24) (*MZXQS* (Australia)); *1010754* (Australia); *AHU (Re)*, [2007] RPDD No. 189 (AHU (Canada)); *TA8-00963* (Canada); *VA9-00148* (Canada); *Kika* (Canada) (original decision, para. 9); *EB* (United Kingdom); *AA* (United Kingdom); *SH (Palestinian Territories) v. Secretary of State for the Home Department*, [2008] EWCA Civ. 1150 (22 October 2008) (United Kingdom); *Mohammed* (United States); *Lopez v. Attorney General*, [2007] 504 F.3d 1341 (25 October 2007) (United States) (*Lopez* (United States)); *Mambwe* (United States).

¹²¹ Baillot et al., 'Gaps', 274–5.

¹²² For example, see the topics covered in K. Musalo, J. Moore and R. Boswell, *Refugee Law and Policy: A Comparative and International Approach*, 4th edn. (Durham, NC: Carolina Academic Press, 2011), 689–820; and Crawley, *Refugees and Gender*, 79–198.

¹²³ In one case, the analysis changed from being about ill-treatment in conflict to female genital mutilation, perhaps because the decision-maker felt it was more well established as a gender-related form of harm falling within MPSG: *Mohammed* (United States).

¹²⁴ *1002091* (Australia); *1110871* (Australia); *1203764* (Australia); *JDG* (Canada); *Camara* (United States); and *Kante* (United States).

¹²⁵ For example, *In re B (FC)* (United Kingdom), para. 37; and UNHCR, 'Guidelines on MPSG', paras. 2 and 14.

¹²⁶ *In re B (FC)* (United Kingdom), para. 37.

especially given that those targeted for persecution may take pains to remain as invisible as possible.¹²⁷ Thus, 'persecutory action toward a group may be a relevant factor in determining the visibility of a group in a particular society.'¹²⁸ This may be of special assistance in cases dealing with gender-related harm in conflict because women and girls who suffered war-related sexual violence or were conjugal slaves ('bush wives') may be stigmatized within society and therefore become part of a visible group. That said, some adjudicators seem to struggle with drawing the line between when a proposed particular social group is defined improperly by reference to conflict-related persecution and when a past form of conflict-related persecution might be a relevant factor in creating visibility for the immutable characteristic.¹²⁹

Contrary to these concerns, MPSG may also be a good category in which to analyse the types of conflict-related social and cultural harms identified by many women as central to their persecution.¹³⁰ This is illustrated, for example, in cases identifying relational social groups, especially family.¹³¹ That said, women and girls should not be essentialized as solely social and cultural beings¹³² – obviously their lives are complex, and their suffering in conflict is also complex. It is for this reason that it is also important to consider the applicability of other 1951 Convention grounds in conflict-related refugee claims by women and girls.¹³³

Political Opinion and the Remaining Convention Grounds

The 1951 Convention ground of political opinion is particularly useful in conflict-related claims. Nine of the cases studied seriously considered

¹²⁷ UNHCR, 'Matter of Valdiviezo-Galdamez, Amicus Curiae Brief in Support of Respondent', 10 August 2012, 17–18.

¹²⁸ UNHCR, 'Guidelines on MPSG', paras 2 and 14. This approach was applied in *LM Congo (United Kingdom)*, para. 111 (applicant's current vulnerability increased by fact of past rape in Congo).

¹²⁹ *Kante (United States)*, 26–7; and *Gomez (United States)*, 663–4.

¹³⁰ Ní Aoláin et al., *On the Frontlines*, 48 and 154.

¹³¹ *MZXQS (Australia)*, paras. 23–4; *1010754 (Australia)*, para. 68; *1110871 (Australia)*, para. 90; *TA3-24983 and TA3-24984*, IRB Canada (2 February 2005) (Canada), 6–7 (*TA3-24983 and TA3-24984 (Canada)*).

¹³² Edwards, 'Transitioning Gender', 27–8.

¹³³ The importance of this was demonstrated in some cases in the case set: e.g. *NA (United Kingdom)*, paras. 91–7, which considered that being an ethnic Palestinian, former member of Ba'ath party and widow of former Ba'ath member, an academic and a lone woman with children in Iraq were risk factors (the first was enough, but the immigration judge looked at other risk factors for completeness). See also *1203764 (Australia)*, para. 85.

political opinion as an applicable 1951 Convention ground.¹³⁴ This ground captures different ways in which a woman or girl may have political opinion imputed to her by a party to the conflict. This may occur when the claimant worked with, or for, a political party or a politician in her country of origin. For example, in the case of *LM Congo* (United Kingdom), the applicant had served as secretary for youth and in other roles for an opposition group.¹³⁵ Persecutors may also impute political opinion based on familial relationships. In the Australian case of *MZXQS*, the applicants claimed a well-founded fear of persecution because of their link to their sister, a well-known Tamil opposition Member of Parliament in Sri Lanka representing an LTTE-controlled area.¹³⁶ The original tribunal considered this claim as falling under MPSG and dismissed the claim on this ground.¹³⁷ The court found that the tribunal had incorrectly characterized the claim, which was actually a claim of imputed political opinion on the basis of their relationship with their sister.¹³⁸ Another way in which political opinion may be imputed to a woman or a girl is for appearing to hold views different from those of the warring factions.¹³⁹ In the UK case of *LM Iraq*, the applicant was perceived by Iraqi militia as supporting or collaborating with the West in part because she was a high-profile working woman who did not wear the hijab at work.¹⁴⁰ In addition, political opinion has been deemed to be imputed based on racial or ethnic identity. In the Australian case of *1203764*, the tribunal found that there was a real risk that the applicant, a Tamil from the north, would be sexually assaulted or otherwise harmed if she returned to Sri Lanka for reasons of the political opinion imputed to her (membership of or sympathy for the LTTE).¹⁴¹

The applicant herself may not classify her actions as political. It is therefore important for refugee decision-makers to recognize when

¹³⁴ *MZXQS* (Australia); *0901064* (Australia); *1012015*, [2011] RRTA 245 (1 April 2011 (Australia) (*1012015* (Australia))); *1203764* (Australia); *TA3-24983 and TA3-24984* (Canada); *73894 et al.* (New Zealand); *LM Iraq* CG, [2006] UKAIT 00060 (26 July 2006) (United Kingdom) (*LM Iraq* (United Kingdom)); *LM Congo* (United Kingdom); but see *Lopez* (United States).

¹³⁵ *LM Congo* (United Kingdom), para. 107. In this case, the political opinion of the applicant's political superior was imputed to her: para. 114.

¹³⁶ *MZXQS* (Australia), para. 4. ¹³⁷ *Ibid.*, para. 11.

¹³⁸ *Ibid.*, para. 24. The tribunal was therefore asked to deal with the political opinion claim: para. 28.

¹³⁹ *LM Iraq* (United Kingdom), paras 73–5.

¹⁴⁰ *Ibid.*, paras 67, 71, 73 and 75. This was considered as perceived political opinion (rights of Iraqi women): para. 73.

¹⁴¹ *1203764* (Australia), para. 84. See also *1012015* (Australia).

a claim is, in fact, based on political opinion by examining the applicant's actions. For example, in the case of 73894 *et al.*, the female applicant, who was from the DRC, indicated that she 'has not been interested in politics'.¹⁴² However, she and her husband disagreed with the government's policy of persecuting Rwandan Tutsis, and the applicant therefore helped to shelter Rwandan Tutsis (while her husband helped them to flee).¹⁴³ The Refugee Status Appeals Authority characterized this as 'an overt political act opposing the policies of the Kabila regime'.¹⁴⁴ As a result of her actions and those of her husband, her home was searched several times, and the female members of her family were raped and sexually abused.¹⁴⁵ Despite the conclusion that sheltering Rwandan Tutsis was a political act, the authority felt that the applicant's case was derivative of her husband's and based its grant of refugee status on imputed political opinion (due to her husband's actions).¹⁴⁶

Women's political activity during conflict may take forms different from that associated with male political activity – and the political activity by women must be recognized as such. In the US case of *Lopez*, the applicant joined the Colombian Liberal Party, providing humanitarian assistance to residents of poor communities and conducting seminars on the principles of the Liberal Movement.¹⁴⁷ She was subsequently attacked by the FARC in retaliation for these activities.¹⁴⁸ The immigration judge found that these activities were 'community-based and not political in nature', and therefore the 1951 Convention ground of political opinion did not apply.¹⁴⁹ This categorization of women's political activities as something other than political, such as community work, is also recognized as a serious problem for non-conflict-related female refugee claims.¹⁵⁰

Finally, the cases demonstrated that in the context of racially or religiously motivated conflicts, the 1951 Convention grounds of race and religion are particularly helpful.¹⁵¹ While the 1951 Convention

¹⁴² 73894 *et al.* (New Zealand), para. 15. ¹⁴³ *Ibid.*, paras. 95 and 96.

¹⁴⁴ *Ibid.*, para. 96. ¹⁴⁵ *Ibid.*, paras. 41–5.

¹⁴⁶ *Ibid.*, paras. 100–4. The grant of status is found in para. 106. There appears to be a typographical error in the first sentence of para. 106, as the second sentence refers to a grant of refugee status.

¹⁴⁷ *Lopez* (United States), 1343. ¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*, 1344. Petition for review on this point not granted.

¹⁵⁰ Crawley, *Refugees and Gender*, 79–83.

¹⁵¹ On race, see 1203764 (Australia), para. 85; *NA* (United Kingdom), para. 91; on religion, see *JXV* (Canada), para. 89.

ground of nationality was not represented in the cases studied, it also would be a useful ground in the context of nationality-driven conflicts.

Lessons Learned

This section has explored the hazards associated with over-reliance on MPSG in cases dealing with both gender and conflict, such as a tendency towards creating artificial subgroups of women rather than relying on 'women' generally.¹⁵² Additionally, there appears to be a focus on the 'private' side of the gender-related harms to the detriment of an analysis of the nature of the conflict. It is important for adjudicators to avoid an automatic reliance on MPSG and instead consider the other 1951 Convention grounds, especially political opinion. Race, religion and nationality may also be useful grounds when considering cases stemming from racial, religious or nationality-driven conflicts. However, there are benefits to using MPSG, as it draws attention to social and cultural harms.

Lack of State Protection

When adjudicators evaluate the risk of future persecution in gender-related claims, one issue they assess is whether the applicant can benefit from state protection against the actions of non-state actors. The cases studied revealed some gender-sensitive analysis of whether or not state protection is available, especially consideration of the dangers faced by a lone woman (sometimes with children) returning to a conflict-ridden society rife with discrimination against women, in which women (and girls) may be common targets for gender-related violence (such as rape, forced prostitution and trafficking).¹⁵³ However, there were also disturbing examples of non-sensitivity. In the UK case of *PS*, the second immigration judge found that the Tamil applicant's rapists, despite being Sri Lankan soldiers, were comparable to 'three civilian criminals'.¹⁵⁴ The judge concluded that

¹⁵² Edwards, 'Distinction', 10.

¹⁵³ For example, *NA* (United Kingdom), paras. 97–8; *AA* (United Kingdom), paras. 9–10; and *AMM and Others* (United Kingdom), para. 631. See also, Judgement W2K11.30330, Administrative Court of Würzburg (Germany), 16 February 2012, available online (in German) at: www.asyl.net/fileadmin/user_upload/dokumente/19769.pdf, in which the fact that a woman was single and lacked protection of a male family member led to a serious and individual threat for the applicant in Afghanistan, and there was no meaningful internal protection alternative.

¹⁵⁴ *PS* (United Kingdom), para. 7.

there was no threat of future persecution and that, in the event the applicant had difficulties from them again, she could seek state protection from the Sri Lankan government.¹⁵⁵ This was overturned on appeal, with the judges finding that '[t]he whole point was that, unlike ordinary criminals, the soldiers were in a position to commit and repeat their crime with no apparent prospect of detection or punishment.'¹⁵⁶ The lesson from this case is that the analysis of future risk must be undertaken in a gender-sensitive manner with a full appreciation of the nature of the conflict, including whether the state permits impunity for gender-related violations.

One key issue arising in the cases studied related to the impact the end of a conflict had on consideration of the risk of future persecution and state protection. This is demonstrated in the US case of *Mambwe*, in which the end of the civil war in Angola was considered to eliminate any future risk of persecution.¹⁵⁷ This was despite the applicant's assertion that the civil war 'was not put to rest' by the peace accord and disarmament of UNITA.¹⁵⁸ Rather than consider persecutory risks in Angola facing young female rape victims of UNITA with a child by rape who have no relatives, the court instead only considered whether UNITA is still a military threat.¹⁵⁹ Thus, state protection from sources of persecution other than UNITA were not considered, even though the applicant is likely to face severe societal stigma from those on both sides of the conflict.¹⁶⁰ It is important to recognize that the timelines of persecution do not necessarily accord with the timelines of cease-fires or peace agreements. One court explained, 'Regime changes may be less effective in protecting women from such dangers [as rape] than they are for men.'¹⁶¹ The Canadian guidelines correctly state, 'A change in country circumstances, generally viewed as a positive change, may have no impact, or even a negative impact, on a woman's fear of gender-related persecution.'¹⁶² Peace processes may marginalize women's concerns and may not touch deep-seated discrimination directed against women and girls.¹⁶³ When considering risk of future persecution in cases where

¹⁵⁵ *Ibid.* ¹⁵⁶ *Ibid.*, para. 8. ¹⁵⁷ *Mambwe* (United States), 4. ¹⁵⁸ *Ibid.*

¹⁵⁹ *Ibid.*, 4–5.

¹⁶⁰ See also AA (United Kingdom), para. 17, noting that the future persecution feared (in this case, forced prostitution) can be of a different category from that on which the original claim was based.

¹⁶¹ N (United Kingdom), para. 58.

¹⁶² Canada, 'Guidelines for Women Refugee Claimants', Art. C(3), 'Evidentiary Matters'.

¹⁶³ Ní Aoláin et al., *On the Frontlines*, 46.

conflict has ceased, it is relevant for an adjudicator to consider whether conflict-related sexual violence has been addressed in any cease-fire or peace agreement in the country of origin.¹⁶⁴ If it has not, then this is a potential indicator of state unwillingness to counter sexual violence.

Procedural and Evidentiary Issues

Procedural and evidential barriers 'often inhibit women's access to the determination process and may serve to limit the quality of information gathered about the claim and, in turn, the quality of the decision-making process'.¹⁶⁵ This proved true in the cases reviewed. The most challenging issue arising in conflict- and gender-related claims appears to be lack of gender-sensitive country-of-origin information, followed closely by an inability to establish credibility.

Country-of-Origin Information

The lack of gender-sensitive country-of-origin information is an overarching problem affecting all gender-related claims,¹⁶⁶ but the problem seems to be compounded in conflict-related claims. Where there was adequate gender- and conflict-related country-of-origin information available to decision-makers, the analysis of the cases tended to be more thorough and sensitive.¹⁶⁷ Where such information seemed to be lacking, the analysis was less thorough and more speculative, and the female applicants had serious difficulties proving their cases.¹⁶⁸

Female claimants typically would benefit from pre-conflict information on the legal, political, social, cultural and economic position of

¹⁶⁴ For examples of how this might be done, see UN Department of Political Affairs, 'Guidance for Mediators: Addressing Conflict-Related Sexual Violence in Ceasefire and Peace Agreements', January 2012, 5.

¹⁶⁵ Crawley, *Refugees and Gender*, 199.

¹⁶⁶ Querton, 'I Feel Like', 32; Crawley and Lester, 'Comparative Analysis of Gender-Related Persecution', para. 653; H. Crawley, 'Thematic Review on the Coverage of Women in Country of Origin Information (COI) Reports', Centre for Migration Policy Research, 19 September 2011, 133–44.

¹⁶⁷ For example, *110871* (Australia), para. 86; *NS* (United Kingdom), 10–17; *LM Iraq* (United Kingdom), paras 38–9 and 63–4; *HH* (United Kingdom), paras. 187, 188 and 192; *NA* (United Kingdom), paras 31 and 40; *LM Congo* (United Kingdom), para. 77; and *SS* (United Kingdom), paras. 22.4–8.

¹⁶⁸ For example, *AHU* (Canada); *TA8-00963* (Canada); *VA9-00148* (Canada); *Kika* (Canada); *Lopez* (United States); *Camara* (United States); and *Kante* (United States).

women and girls and the consequences for non-adherence to socio-cultural gender norms; information on how these aspects have changed for women and girls during the conflict; the incidence and forms of reported violence (in both the private and public spheres) against women and girls pre-conflict and during the conflict; the protection available to them during the conflict or post-conflict; any penalties imposed on those who perpetrate the violence and detailed information about the nature of the conflict and the parties to the conflict.¹⁶⁹ It is not always possible to collect this information on countries at peace, but getting accurate, up-to-date information on the situation of women and girls during a conflict can be extremely difficult, and if it is collected, it likely reflects under-reporting and therefore underestimation.¹⁷⁰

The cases studied tended to rely on specific types of country-of-origin information, especially from UNHCR,¹⁷¹ so it is crucial that UNHCR continue to provide as much guidance in this respect as possible.¹⁷² Other sources included international NGOs¹⁷³ and certain UN reports.¹⁷⁴ There is certainly scope for improving country-of-origin information on both gender and conflict issues to include a wider range of UN documents, such as Security Council resolutions referring to gender-related ill-treatment,¹⁷⁵ reports of the UN Secretary General written pursuant to Security Council resolutions 1889 (and its indicators) and 1960¹⁷⁶ and other UN reports providing qualitative and quantitative

¹⁶⁹ Ní Aoláin et al., *On the Frontlines*, 45–6; Crawley, 'COI', 133–4.

¹⁷⁰ Chiekh Ali et al., 'Gender-Related Asylum Claims in Europe', 89; and UN Women, '2011–2012 Progress of the World's Women: In Pursuit of Justice', 83.

¹⁷¹ For example, NS (United Kingdom), 13–14.

¹⁷² For example, UNHCR, 'Interim Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Côte d'Ivoire', 15 June 2012, HCR/EG/CIV/12/01, 28–32.

¹⁷³ For example, NS (United Kingdom), 13–15; Amnesty International and International Commission of Jurists.

¹⁷⁴ For example, reports from the UN Commission on the Status of Women: *ibid.*, 13–14.

¹⁷⁵ Since the adoption of Resolution 1325, the Security Council has made reference in its country-specific resolutions to gender-based violence directed against women and girls (UNSC Res. 1325 (2000), 31 October 2000). For example, in 2012: UNSC Res. 2035 (2012), 17 February 2012, *op. para.* 8; UNSC Res. 2040 (2012), 12 March 2012, preamble *para.* 7.

¹⁷⁶ The indicators are set out in UN Secretary-General, 'Women and Peace and Security: Report of the Secretary-General', 28 September 2010, UN Doc. S/2010/498, Annex. Each year, the Secretary-General addresses one-third of these indicators in his reports: e.g. UN Secretary-General, 'Report of the Secretary-General on Women and Peace and Security', 29 September 2011, UN Doc. S/2011/598. The Secretary-General's reports pursuant to Resolution 1960 include a discussion of conflicts in which sexual violence

information on women and girls in conflict settings. Finally, reports from international and domestic nongovernmental women's organizations (including those located in the country of origin) should be considered.¹⁷⁷ All refugee-receiving countries should aim to systematically collect and make available to applicants and their representatives up-to-date and accurate information on the situation and experiences of women and girls, including in conflict.¹⁷⁸ Where there is a lack of information, decision-makers should be cautioned against drawing speculative conclusions or assuming lack of persecution.¹⁷⁹

Credibility

The second most challenging procedural barrier relates to credibility. Within the cases studied, a number of claims were not accepted due to rulings of lack of credibility, either at the initial stages or on appeal.¹⁸⁰ This was due to a number of factors, most often inconsistencies¹⁸¹ or perceived implausibilities in testimony, 'incorrect' demeanour (e.g. being matter-of-fact when the adjudicator expects an applicant to be distressed)¹⁸² or lack of corroborative country-of-origin information. When found credible, it was often due to a combination of 'correct' demeanour,¹⁸³ relative consistency in the applicant's story¹⁸⁴ and

has been documented: UN Secretary-General, 'Conflict-Related Sexual Violence: Report of the Secretary-General', 13 January 2012, S/2012/33, paras. 17–57 and Annex.

¹⁷⁷ Crawley, 'COI', 137, 142. ¹⁷⁸ *Ibid.*, 134.

¹⁷⁹ *Ibid.*, 139; Cheikh Ali et al., 'Gender-Related Asylum Claims in Europe', 91.

¹⁸⁰ For example, 0901064 (Australia) (found credible on appeal); 1002652 (Australia); 1203764 (Australia) (on rape); TA3-24983 and TA3-24984 (Canada); JDG (Canada); MA5-05605, [2007] RPDD No. 26 (26 October 2007) (Canada); TA6-00022 (Canada); MA8-00516, [2009] RPDD No. 148 (6 May 2009) (Canada); VA8-01482 (Canada); TA8-18792 (Canada); MA8-07482 (Canada); Kika (Canada), para. 14; EB (United Kingdom) (found credible on appeal); BK (United Kingdom); HH (United Kingdom); AMM and Others (United Kingdom); Mohammed (United States) (at initial stage); and Mambwe (United States).

¹⁸¹ In one case involving a claim of sexual violence, the decision-maker accepted that women can have valid reasons for giving unclear evidence about rape but felt that the applicant's inconsistencies were too large: BK (United Kingdom), paras. 524 and 527.

¹⁸² For example, *Refugee Appeal No. 75410*, (7 March 2005) (New Zealand), paras 54–7 (75410 (New Zealand)); the applicant presented evidence about her fiancé's disappearance in a matter-of-fact manner, but the adjudicator felt that she should have been distressed and so found her not credible.

¹⁸³ For example, 1110871 (Australia), para. 86; and TA3-24983 and TA3-24984 (Canada), 4 (gave evidence in a straightforward and consistent manner).

¹⁸⁴ Complete consistency is not expected: 0901064 (Australia), para. 63.

corroborative country-of-origin information.¹⁸⁵ The cases mirror concerns expressed about similar experiences with claims by women and girls more generally.¹⁸⁶ For example, previous studies have shown that most female claimants are simply not believed at first instance.¹⁸⁷ This is due to many factors: a hostile environment negatively affecting how detailed the applicant can be in explaining her case,¹⁸⁸ undue concentration on perceived inconsistencies without consideration for the impact of trauma and dislocation on memory or for culturally different ways of expression,¹⁸⁹ disincentives for women and girls to reveal sexual violence (due to being traumatized, feelings of shame or fear of stigma) with late disclosure of sexual violence sometimes being held against the applicant,¹⁹⁰ difficulty in evidencing gender-specific forms of harm and the absence of state protection¹⁹¹ and incorrect assumptions about the meaning of an applicant's demeanour.¹⁹² Credibility findings are clearly affected by gender-insensitive refugee claim processes and procedures.

Lessons Learned

The cases revealed two major procedural problems facing women and girls making refugee claims based on a combination of gender- and conflict-related harms. The first challenge for these applicants was in accessing and presenting accurate and up-to-date country-of-origin information containing relevant facts about the conflict and its gender dimensions. The second difficulty was in establishing credibility in the claim procedure. These problems are not exclusive to conflict-related

¹⁸⁵ For example, *1012015* (Australia); *1010754* (Australia); *1110871* (Australia); *JXV* (Canada); *73894 et al.* (New Zealand); *75410* (New Zealand); *76464 and 76465* (New Zealand); and *AB* (New Zealand).

¹⁸⁶ For example, Muggeridge and Maman, 'Unsustainable', 34–43; Querton, 'I Feel Like', 55–63; and Cheikh Ali et al., 'Gender-Related Asylum Claims in Europe', 77–88.

¹⁸⁷ Muggeridge and Maman, 'Unsustainable', 5.

¹⁸⁸ Human Rights Watch (HRW), 'Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK', 42.

¹⁸⁹ Querton, 'I Feel Like', 38–9. For example, HRW, 'Fast-Tracked', 41, recounts the case of Jane S., who was told that her accounts of being raped and the killing of her family in Sierra Leone were not believed because she could not remember the dates.

¹⁹⁰ Cheikh Ali et al., 'Gender-Related Asylum Claims in Europe', 81; Querton, 'I Feel Like', 41–4.

¹⁹¹ Cheikh Ali et al., 'Gender-Related Asylum Claims in Europe', 77, 172.

¹⁹² Querton, 'I Feel Like', 41; and HRW, 'Fast-Tracked', 40–1.

claims, but the fact that a claim involves conflict heightens these challenges.

Conclusions

Women and girls fleeing conflict clearly face a number of obstacles to presenting a successful claim for refugee status. In the second section, this chapter indicated that some forms of gender-related ill-treatment in conflict have been found to amount to persecution, especially rape. And yet many applicants have difficulty establishing conflict-related rape as persecution for two reasons. Firstly, some adjudicators incorrectly characterize rape in conflict as a 'private' act and therefore outside the realm of persecution, and secondly, not enough attention is paid by decision-makers to the after-effects of past rape in creating related yet different future risks of persecution. Another challenge relates to the current relatively narrow perception of what qualifies as a gender-related form of persecution in conflict. Rape and some other forms of sexual violence are recognized, but it is less common for decision-makers to recognize non-sexual but still gendered violations. A third obstacle is that some decision-makers classify gender-related violence as part of the general indiscriminate consequences of conflict and therefore not targeted enough to amount to past persecution or present a risk for future persecution. However, refugee decision-makers may be less likely to classify such violence as untargeted if they have an in-depth understanding of both the gendered nature of the conflict and the nature of gender-related discrimination before, during and after the conflict, provided through country-of-origin information. While it is not clear whether there are forms of gender-related ill-treatment in conflict that may properly be considered as indiscriminate, it is evident that more cases of such ill-treatment should be considered as targeted (rather than indiscriminate) than is currently the case.

The third section continued the discussion of obstacles, focusing on the 1951 Convention grounds. As with all gender-related claims, there is a tendency for adjudicators to rely on MPSG as the main ground for analysis. The use of MPSG can be acceptable, but it can also be problematic. For example, while some decision-makers have accepted that 'women' can be a valid particular social group, others create narrower, sometimes artificial, subgroups, which can distort the resulting analysis. As well, some adjudicators focus on the 'private' side of the gender-related harms to the detriment of an analysis of the nature of the conflict.

These obstacles may be overcome in conflict-related cases with a more fulsome focus on the other 1951 Convention grounds, such as political opinion.

The fourth section considered obstacles arising with the consideration of whether or not there is state protection in the country of origin. There is some positive case law considering the risks to lone females returning to conflict-affected countries of origin. However, there are also cases in which the judges failed to understand the actual vulnerabilities of women and girls in relation to their own conflict-affected or post-conflict state. Additionally, some positive case law recognizes that a cease fire or peace agreement does not necessarily mean the end of gender-related persecution in a country of origin, but other case law demonstrates that some decision-makers do not pay enough attention to the actual post-conflict circumstances of women and girls. Women and girls fleeing conflict therefore face more difficulties than they should in demonstrating lack of state protection and risk for future persecution.

Finally, the last section examined procedural and evidentiary difficulties arising in conflict- and gender-related claims. Women and girls face significant hurdles in accessing and presenting accurate and up-to-date country-of-origin information containing relevant facts on the conflict and its gender dimensions; this has a significant impact on their ability to demonstrate persecution, a 1951 Convention ground, and lack of state protection and therefore their credibility. On the latter, some decision-makers took into account the effects of conflict-related trauma on memory or demeanour, but others unfortunately did not.

In conclusion, while there are welcome developments in international and domestic refugee law under which claims by women and girls fleeing conflict have been accepted, there is also significant room for improvement. There is a need for a deeper understanding of gender-related persecution and its future risks, such that seemingly indiscriminate and/or seemingly gender-neutral ill-treatment of women and girls is more correctly recognized as persecution. There is also a need for expanded conceptions of the 1951 Convention grounds as they relate to women and girls fleeing conflict. Lastly, while women and girls fleeing conflict face problems similar to those making peacetime-related claims, they may also face specific conflict-related evidentiary and credibility hurdles. There have been many recent studies outlining proposed improvements to domestic refugee determination processes involving either women and girls or gender-based claims more

generally.¹⁹³ The hurdles identified in this chapter might be (partly) removed by implementing the recommendations in these studies, but it may be necessary for decision-makers to be provided with (more) conflict- and gender-specific guidance on persecution, applicable 1951 Convention grounds and state protection to assess country-of-origin information and credibility.

¹⁹³ For example, Cheikh Ali et al., 'Gender-Related Asylum Claims in Europe'; Querton, 'I Feel Like'; Muggeridge and Maman, 'Unsustainable'; HRW, 'Fast-Track'; UNHCR, 'Improving Asylum Procedures – Gender'.