Elevating a well-founded fear of sexual violence to a form of persecution in refugee status determination: Justifications for a more inclusive approach

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1 Introduction

The 14th Dalai Lama said, 'although you may not always be able to avoid difficult situations, you can modify the extent to which you can suffer by how you choose to respond to the situation'. On 30 March 1959, fearing for his life in his native Tibet, the Dalai Lama decided the best way to mitigate the extent of his suffering was to seek refuge in India – making him possibly the most famous refugee in the world. To date, and for the last 54 years, the Dalai Lama has not set foot in Tibet, the homeland of the people for whom he is the spiritual leader. For centuries the act of seeking refuge as a result of persecution has occurred across civilizations. The persecution, often on religious grounds, that occurred during the early and late modern historical periods, resulted in mass displacement. The best example is perhaps the French Huguenots, five hundred thousand of whom fled to different corners of the globe in the face of religious persecution. Moreover, many of the great intellectuals of the modern era, including Victor Hugo, Sigmund Freud, Joseph Conrad, Friedrich Nietzsche and indeed, Albert Einstein, were refugees. Similarly, today millions of people seek to escape the hardship they have endured in their home states by becoming refugees in foreign, sometimes hostile, environments. This process has come to be formally regulated through international law.

Women's rights, and specifically the proscription and criminalisation of sexual violence on the international plane, developed in parallel with the legal formalisation of refugee determination and regulation. International law norms directed at individuals are often assumed to be universally applicable, and thus gender-neutral. However, this tends to undermine issues of particular

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relevance to women.[1] It is true that the bars to women's eligibility for refugee status often do not lie in the legal categories *per se* (ie, the non-inclusion of gender or sex as one of the five listed grounds of persecution in the Convention Relating to the Status of Refugees ('Refugee Convention')),[2] but in the incomplete and gendered interpretation of refugee law and the failure of decision-makers to 'acknowledge and respond to the gendering of politics and of women's relationship to the state'.[3] Nevertheless and conversely, approaching the protection of female refugees from the requisite gendered perspective, will not achieve the desired outcome should the positive law not allow for protection on the basis of a legitimate and well-founded fear of sexual violence.

At one end of the spectrum, a commentator such as Henry, argues that law is an inherently flawed mechanism for delivering justice in the context of human rights violations because:

> law by its very nature is selective, narrow, distanced, adversarial, politicized, gendered, partial and unequal. Law often fails abysmally to offer vindication or comfort to victims, almost always is unable to capture or grasp the extent and gravity of crimes that have shocked humanity.[4]

The starting premise of this contribution is less pessimistic. While law and its application are indeed often 'selective, narrow, distanced, adversarial, politicised, gendered, partial and unequal', states, commentators, and practitioners must consistently strive to make it better. While in no way perfect, law has had some measure of success as a mechanism for delivering justice. This piece commences with a simultaneous investigation of the nature and development of refugee law, and the emerging jurisprudence on women's rights. This analysis leads to an investigation of the possible bases upon which sexual violence should be regarded as persecution for the purposes of refugee status determination, and thereby asserts that the law can be used effectively to protect women subjected to sexual violence, if it is correctly interpreted, and if its objectives are given credence. This proposition is also compatible with the UNHCR Executive Committee Conclusion no 50, which affirms that '[s]tates must continue to be guided, in their treatment of refugees, by existing international law and humanitarian principles and practice bearing in mind the moral dimension of providing refugee protection'.[5] There is no justifiable

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[1]Chinkin, Charlesworth and Wright 'Feminist approaches to international law' in Buss and Manji (eds) *International law: Modern feminist approaches* (2005) at 17.
[2]United Nations Convention Relating to the Status of Refugees 28 July 1951, 189 UNTS 137.
[3]Anker 'Refugee law, gender, and the human rights paradigm' (2002) 15/Spring *Harvard Human Rights Journal* at 133.
[4]Henry *War and rape: Law, memory and justice* (2011) at 118.
[5]UNHCR EXCOM 'General Conclusion on International Protection' (1988) par (c).

reason why this same moral dimension should not apply to persons applying for refugee status, even if their circumstances have not previously been legislated for purposes of refugee status being accorded, so long as this can be done within the confines of the rule of law.

The basis upon which this analysis will take place is that it is necessary for international human rights law, international criminal law, and humanitarian law to co-apply as it is these regimes which 'complement the safeguards for refugees enumerated in the 1951 Convention'.[6] This is an evolving process that has been underway since the early 2000s, and I aim to contribute to this development of the law by formulating concrete and specific alternatives so as unequivocally to protect women who are subject to persecution in the form of sexual violence in any precarious context in which they may find themselves.

2 The context of sexual violence during times of armed conflict and civil unrest

Many of the most basic and fundamental of human rights recognised today were paid mere lip-service in 1951 when the Refugee Convention was adopted. While 'race', for example, is a ground listed in the Refugee Convention, the international community found no fault with segregationist-South Africa's role as one of the fifty founding members of the United Nations a mere six years before the Refugee Convention was adopted. Similarly, Dr Martin Luther King's dream that 'my four little children will one day live in a nation where they will not be judged by the colour of their skin but by the content of their character',[7] was expressed more than twelve years after the adoption of the Refugee Convention, and remained but a dream for him and many others for years to come.

The women's rights movement exists alongside the civil rights movement. In many countries the freedom of women is still substituted by the will of men. At the time of accession to the Convention Against All Forms of Discrimination Against Women, Malaysia for example, among many other states with reservations, declared that it would not be bound by article 16(1)(a) of the Convention, which provides:

> States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women … The same right to enter into marriage.

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[6]Edwards 'Age and gender dimensions in international refugee law' in Feller, Türk and Nicholson (eds) *Refugee protection in international law: UNHCR's global consultations on international protection* (2003) at 47.

[7]'I have a dream' 28 August 1963.

It therefore comes as no surprise that the 1951 Refugee Convention made no provision for persecution, and thus for refugee determination, on the basis of sexual violence. This notwithstanding, 'rape is considered to be one of the worst ways of inflicting bodily and mental harm upon an individual'.[8] On a literal interpretation this would constitute a well-founded fear of persecution in the context of women living in a country afflicted by civil conflict or other events seriously disturbing the public order (as defined in the OAU Refugee Convention Governing the Specific Aspects of Refugee Problems in Africa)[9] and therefore such women should have an opportunity to (try) to escape this threat of rape through seeking refuge in a safe country.

In reflecting on the gender dimensions of refugee law, Edwards contends that, 'the real issue is the gulf between the global purpose of international law to benefit all persons, and the marginalisation of women from its ambit'.[10] Great strides have been made in international human rights law with respect to women's rights, including the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and its Optional Protocol,[11] the Declaration on the Elimination of Violence Against Women 1993,[12] the Beijing Platform for Action adopted at the Fourth World Conference on Women in 1995[13] and the follow-up Beijing Plus 5 Special Session of the General Assembly,[14] not to mention the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the potential of the International Criminal Court.[15] However, as Feller so eloquently puts it:

> the drafters of the [Refugee] Convention failed singularly to reflect in words what has long been a reality – that crimes with a basis in gender are as persecutory in Convention terms as any other crime when the harm inflicted is sufficiently serious.[16]

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[8] De Brouwer *Supranational criminal prosecution of sexual violence: The ICC and the practice of the ICTY and ICTR* at 45, as quoted in Henry n 4 above at 95.
[9] The OAU Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Doc CAB/LEG/24.3); 1001 UNTS 45. The OAU Convention on Refugees was adopted on 10 September 1969 and entered into force on 20 June 1974. 1001 UNTS 45.
[10] *Id* at 48.
[11] 1249 UNTS 13 and UN GA resolution A/RES/54/4 6 October 1999.
[12] UN GA resolution 48/104 20 December 1993.
[13] 'Report of the Fourth World Conference on Women, Platform for Action' UN doc A/CONF 177/20 17 October 1995.
[14] 'Women 2000: Gender equality, development and peace in the twenty-first century' 23rd Session of the General Assembly UN doc A/55/341 5-9 June 2000.
[15] Edwards n 6 above at 49.
[16] Feller Director, Department of International Protection 'Rape is a war crime: How to Support the survivors: Lessons from Bosnia – strategies for Kosovo' (18-20 June 1999) *UNHCR presentation* Vienna.

That women and girls are often subjected to severe sexual violence during armed conflict and times of civil strife is beyond contestation. Indeed, this reality has been well documented for millennia. In line with the maxim, *inter arma enim silent leges* ('in times of war, the laws are silent'), Homer, Herodotus, and Livy (among others) documented 'war rape'[17] during the eight hundred year period across which their lives spanned: approximately 800 BC to 17 AD. The Bible makes frequent reference to war rape, for example, 'Their little children will be dashed to death before their eyes. Their homes will be sacked, and their wives will be raped'.[18] Moreover, war rape has occurred in every major military era since. Rape and pillage are particularly associated with the Vikings, later with Genghis Khan's Mongol Empire, and even more recently, early twentieth century Japanese military engagement in China.

Within international humanitarian law (IHL) rape has consistently been deemed a violation in all relevant IHL treaties ever since it was first proscribed in the Lieber Code of 1863. In fact, the potential punishment for rape makes it clear that the Lieber Code recognised the severity of this crime:

> All wanton violence committed against persons in the invaded country, all destruction of property not commanded by the authorized officer, all robbery, all pillage or sacking, even after taking place by main force, all rape, wounding, maiming, or killing of such inhabitants, are prohibited under the penalty of death, or such other severe punishment as may seem adequate for the gravity of the offense.
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> A soldier, officer or private, in the act of committing such violence, and disobeying a superior ordering him to abstain from it, may be lawfully killed on the spot by such superior.[19]

While not proscribing rape by name, common article 3 of the Geneva Conventions prohibits 'outrages upon personal dignity', which would certainly include rape. Greater content is given to this prohibition in the Additional Protocols. 'Outrages upon personal dignity' is regarded as a fundamental guarantee for both civilians and persons *hors de combat*.[20] Moreover, in Protocol I it is specified that this includes 'humiliating and degrading treatment, enforced prostitution and any form of indecent assault';[21] whereas, in Protocol II, rape is explicitly mentioned.[22]

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[17]The concept 'war rape' is a relatively imprecise concept referring to the occurrence of rape during armed conflict, perpetrated by either participants in armed conflict, or civilians.
[18]Isaiah 13:16.
[19]Article 44 of the Lieber Code.
[20]Article 75(2) Protocol I; art 4(2) Protocol II.
[21]Article 75(2) Protocol I.
[22]Article 4(2) Protocol II.

In human rights law it misses the point to reference only specific and explicit formal prohibitions of rape and sexual violence extracted from treaty norms, when the physical integrity, safety and dignity of women lies at the very heart of human rights as a concept. As the Universal Declaration of Human Rights provides, 'All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood'.[23] While rape and sexual violence are extensively prohibited by human rights instruments, such conduct also violates a host of fundamental human rights norms, including the right to physical integrity, the right to liberty, the right not to be subjected to cruel, inhumane or degrading treatment, and perhaps most importantly, the right to dignity.

Rape and other forms of sexual violence are prohibited by a host of IHL, international human rights law (IHRL), and international criminal law (ICL) instruments, as well as by customary international law. ICL has spearheaded the jurisprudential developments on rape during armed conflict. The first legal instrument that expressly included the prohibition of the crime of rape on an international level, was Control Council Law (CCL) no 10, which regarded rape, amongst other serious crimes such as torture, murder and enslavement, as a crime against humanity.[24] This notwithstanding, such violations received virtually no attention before the 1990s. The Yugoslav Wars of the early to mid-1990s, together with the conflict in Rwanda of the same period, and the genocides that were associated with both, shocked the international community. *Ad hoc* international criminal tribunals were established to prosecute offenders in both instances – being the International Criminal Tribunal for the Former Yugoslavia (ICTY), and the International Criminal Tribunal for Rwanda (ICTR).

The Statute of the ICTR criminalised rape as a crime against humanity, and as a violation of article 3 common to the Geneva Conventions and Additional Protocol II.[25] Jurisprudence emanating from the ICTR has made a significant contribution to international law. The *Akayesu*[26] decision (which was reinforced in the *Musema* decision[27]) adopted a broad 'conceptual' definition of rape. *Akayesu* recognised that rape is an extremely grave crime as it can constitute genocide and a crime against humanity, on condition that all the other elements for each of these crimes are met. In this case, rape was defined as 'a physical invasion of a sexual nature, committed on a person under

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[23] Article 1.
[24] Article 6.
[25] Articles 3 and 4.
[26] *Prosecutor v Jean-Paul Akayesu* case no ICTR-96-4.
[27] *Prosecutor v Alfred Musema* case ICTR-96-13-A par 965.

circumstances which are coercive'.[28] The decision went further to elaborate on sexual violence as constituting 'any act of a sexual nature which is committed on a person under circumstances which are coercive. Sexual violence is not limited to a physical invasion of the human body and may include acts which do not involve penetration or even physical contact'.[29]

Primarily due to the different context within which the Yugoslav wars were fought, the Statute of the ICTY criminalised rape as a war crime and a crime against humanity.[30] However, the decisions of the ICTY have largely confirmed the ICTR's approach. This is illustrated with reference to the *Delaliae* (also referred to as *Eelebiaei)*,[31] *Furundžija*,[32] *Kunarac*[33] and *Kvočka* cases.

In the *Furundžija* case, the tribunal qualified rape as an outrage upon personal dignity and torture in terms of article 3 of the ICTY Statute, and arrived at a more technical and specific definition of rape, being:

> (i) The sexual penetration, however slight
> (a) of the vagina or anus of the victim by the penis or any other object used by the perpetrator; or
> (b) of the mouth of the victim by the penis of the perpetrator;
> (ii) By coercion or force or threat of force against the victim or a third person.[34]

Kunarac et al[35] is a landmark case for the fact that it enhanced the coercive element of rape defined in *Furundžija*. The judgment reads: 'Sexual acts are forbidden when perpetrated against the free will of a person, and the "use of force-threat" element is reduced from the status of an element of the crime to being evidence of the lack of consent of the victim to the sexual intercourse'.

In *Kvočka et al*[36] the ICTY reintroduced the requirement of the use of force as an element of the crime, together with the lack of consent.[37] On appeal, however,

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[28] *Akayesu* par 16.
[29] *Id* par 688.
[30] Article 5.
[31] *Delaliae et al* case IT-96-21-T 1998.
[32] *Prosecutor v Anto Furundžija* Trial Chamber II ICTY-IT-95-17/1-T10 (10 December 1998).
[33] *Prosecutor v Kunarac* Judgment IT-96-23-T and IT-96-23/1-T 22 February 2001 available at http://www.un.org/icty/ind-e.htm. The three accused (Bosnian Serb soldiers, Dragoljub Kunarac, Radomir Kovač and Zoran Vuković) were found guilty of crimes against humanity including torture and rape. The case was appealed, and on 12 June 2002 the Appeals Chamber upheld the convictions and sentences of all three accused.
[34] Paragraph 185.
[35] Case IT-96-23 and IT-96-23/1 22 February 2001.
[36] Case IT-98-30/1 2 November 2001.
[37] Paragraphs 177-178.

the appeal judges confirmed that the lack of consent is a *conditio sine qua non* of the definition of rape, and that the requirement of the use of force is not an essential element but rather a symptom of the lack of genuine consent.[38]

Reverting to the ICTR position, the Rome Statute of the International Criminal Court[39] criminalises rape both as a crime against humanity, and as a war crime in international and non-international armed conflict.[40] The provision criminalising rape as a war crime in the Rome Statute is a rather holistic provision that includes, 'rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilisation, or any other form of sexual violence of comparable gravity'.[41]

It is worth mentioning that the Statute of the Special Court for Sierra Leone[42] also includes provisions regarding the crime of rape as a crime against humanity. In particular, article 2(g) interdicts rape, sexual slavery, enforced prostitution, forced pregnancy, and any other form of sexual violence. Article 3, which prohibits violations of article 3 common to the 1949 Geneva Conventions and of Additional Protocol II, includes a specific reference to 'outrages upon personal dignity, in particular humiliating and degrading treatment, rape, enforced prostitution and any form of indecent assault'.[43]

There is therefore considerable scope for integrating gender into international humanitarian law and policy, particularly into the Refugee Convention, which is silent on gender.

It appears that sexual violence in the context of armed conflict, for the most part, occurs within the parameters of one of four narratives, being: opportunistic predators who commit sexual violence for personal gratification; sexual violence as a strategy of an attack against a civilian population; and sexual violence as a strategy imposed in the context of ethnic conflict. The fourth narrative is that of so-called 'military sexual trauma'.[44] Military sexual

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[38]Paragraph 129.
[39]UN Doc A/CONF 183/9*.
[40]Article 7(1)(g), 7(h) (which confirms persecution as a crime against humanity and includes gender as a new discriminatory ground) 8(2)(b)(xxii) and 8(2)(e)(vi).
[41]Article 7(1)(g).
[42]2178 UNTS 138 145; 97 *AJIL* 295; UN Doc S/2002/246 appendix II.
[43]Paragraph 3(e) of the Statute of the Special Court for Sierra Leone.
[44]The US Department of Veteran Affairs has documented the occurrence and incidence of military sexual trauma amongst members of the US military in a report concerning forms of post-traumatic stress disorder, available at http://www.ptsd.va.gov/public/pages/military-sexual-trauma-general.asp. Military sexual trauma is invariably prevalent in all military settings, irrespective of whether the composition of the military is entirely male or a combination of male and female members.

trauma occurs where service-members subject fellow members of an armed force to sexual violence or rape during a term of service. Such instances are dealt with within the context of the relevant armed forces military justice system, and are unlikely to result in the seeking of asylum. As such, this category will not be discussed further.

2.1 Sexual violence by opportunistic predators

It does not take much imagination to know what the implications are when a person who has a criminal propensity towards the commission of sexual violence is placed in a situation where such violence has largely become normalised. Often during armed conflicts, specifically in the context of civil war in developing states, there is a general collapse of legal systems. Everything from the criminal justice system to divorce courts, experience a breakdown in operation. This criminal justice void, coupled with the experience of the environment within which a potential perpetrator finds himself – that is an environment where armed forces and groups use sexual violence on a massive scale as a weapon of war (as described below) – contribute greatly to the well documented spike in opportunistic sexual violence during armed conflict, and to a lesser extent, during civil strife that falls short of armed conflict.

A particularly disconcerting aspect of such opportunistic incidence of rape during armed conflict is rape perpetrated by international peacekeeping forces. Peacekeeping contingents forming part of both United Nations peacekeeping forces, as well as regional peacekeeping forces, such as the Economic Community of West African States Monitoring Group ('ECOMOG'), have convincingly been implicated in rape and sexual violence.[45]

The developing jurisprudence on sexual violence in international law has paid scant attention to such opportunistic incidents of sexual violence – for good reason. International law exists with a great margin of deference to states and their function to administer law and order domestically. Indeed, as Lowe has pointed out, domestic law is one method through which states create a unique identity in line with the traditional culture of their people, geo-political factors, and so forth. International law, on the other hand, exists to create a measure

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[45]Human Rights Watch reported in 2003 that ECOMOG were implicated in perpetrating acts of sexual violence while undertaking a peacekeeping mission in Sierra Leone in the report titled '"We'll kill you if you cry": Sexual violence in the Sierra Leone conflict' http://www.hrw.org /reports/2003/sierraleone/sierleon0103-06.htm. More recently, South African peacekeepers in the Democratic Republic of the Congo have been charged with 93 cases of misconduct, 23 of which involve rape, sexual exploitation, sexual abuse and the assault of women. The report is available at http://www.dailymaverick.co.za/article/2013-06-14-peacekeepers-behaving-badly-why-south-african-ill-discipline-in-drc-is-a-un-problem/.

of homogeneity by utilising a core set of minimum norms with which all states must comply.[46] When opportunistic perpetrators commit crimes, whether they are of a sexual nature, or murder, or any other crime, without a direct nexus to the armed conflict, save for the conducive environment created by the armed conflict, such violations are left to the municipal criminal justice system to remedy. In the context of peacekeeping forces, it is common practice that the relevant status of forces agreements reserve criminal jurisdiction over the relevant service members to the military justice system of the contributing nation. It is, of course, vastly problematic where such offences go unpunished, but this does not change the fact that such violations are generally not subject to international law or its mechanisms.

Nevertheless, refugee status determination does not require that the persecution (or the fear thereof) taking place occurs through violence that is dealt with on the international plane. As such, opportunistic sexual violence as a basis for refugee status determination will form a core component of the analysis below.[47]

2.2 Sexual violence as part of an attack against a civilian population

The Rwandan genocide is probably the best-known modern example of rampant sexual violence during armed conflict. Thousands of Tutsi women, as well as female Hutu sympathisers, were raped on the streets, at checkpoints, in cultivated plots, in or near government buildings, hospitals, churches, and other places where they sought sanctuary.[48] It is estimated that between 250 000 and 500 000 women were raped during the 1994 genocide.[49] While the number of women raped during the Yugoslav wars is estimated to be far lower,[50] the scale was still massive, and the rapes as horrific as the Rwandan experience. Notoriously vicious rape camps were set up in the vicinity of the Serb controlled town of Foča, where women and girls were kept for prolonged periods solely to be sexually exploited. Similarly disturbing camps existed elsewhere in the former Yugoslavia.

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[46]Lowe *International law* (2007) at 148. Henkin *How nations behave* (1979); Kingsbury 'The concept of compliance as a function of competing conceptions of international law' (1998) 19 *Mich JIL* at 345; Koh 'Why do nations obey international law?' (1997) 106 *Yale LJ* at 2599.

[47]See n 4 above. A well-founded fear or actual occurrence of sexual violence as a basis for 'persecution' below.

[48]Nowrojee 'Your justice is too slow: Will the ICTR fail Rwanda's rape victims?' United Nations Research Institute for Social Development (UNRISD) Occasional Paper 10 (November 2005) at 4.

[49]Henry n 4 above at 91.

[50]It is estimated that up to 60 000 Bosnian Muslim women were raped during the Yugoslav wars. See Littlewood 'Military rape' (1997) 13/2/April *Anthropology Today* at 8.

The subsequent category, sexual violence in the context of ethnic conflict, is a sub-category of the present one. It is, however, dealt with separately because much of the international law jurisprudence has developed within the confines of this narrower category. Moreover, 'race' is a listed basis for persecution in the Refugee Convention. As such, as discussed below, such incidence may well be anticipated by the Refugee Convention, as opposed to sexual violence in the context of an armed conflict strategy outside of ethnic conflict. Additionally, where rape is strategically used during armed conflict along ethnic lines, this underlying intention adds further to the inherent heinous nature of rape. Indeed, where this intention meets the threshold of genocidal intent, rape can be a means through which genocide can be perpetrated. The jurisprudence of the ICTY and ICTR as regards sexual violence, developed mostly in the context of ethnic conflict, and will thus be discussed in the next section.

Nevertheless, rape is often used as a conflict strategy outside of an ethnic conflict. The Secretary General of the United Nations is mandated to present annual reports to the Security Council on 'sexual violence in armed conflict'.[51] Included in each of these reports is an annexure which contains 'a list of parties credibly suspected of committing or being responsible for patterns of rape and other forms of sexual violence in situations of armed conflict on the Security Council agenda'. In his most recent report, the Secretary General included the Central African Republic, Côte d'Ivoire, the Democratic Republic of the Congo, Mali, and the Syrian Arab Republic.[52] The conflicts in the Central African Republic, Côte d'Ivoire, and the Syrian Arab Republic are not fought primarily along ethnic lines.

2.3 Sexual violence as strategy imposed in the context of ethnic conflict

Criticism, for the lack of a gender perspective, of the recent *Lubanga* judgment of the International Criminal Court, the first judgement of this court, is sadly reminiscent of the ICTR prosecutorial staff's reluctance to charge rape as either a crime against humanity or a war crime in the initial series of indictments issued by that court.[53] Indeed, from a prosecutorial perspective, the *Lubanga* case is characterised by a one-dimensional perspective whereby the prohibition of the use and recruitment of child soldiers was isolated as the sole charge in a conflict characterised by the most heinous atrocities, including widespread cannibalism. Lubanga was not charged with any form of sexual

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[51] Paragraph 18 of SC resolution 1960 (2010).
[52] Secretary-General's Report at the 67th Session of the United Nations General Assembly 14 March 2013, Agenda item 33, Prevention of Armed Conflict (A/67/792–S/2013/149).
[53] *Prosecutor v Thomas Lubanga Dyilo* Warrant of Arrest ICC-01/04-01/06 (2006); *Prosecutor v Lubanga Confirmation of Charges* ICC-01/04-01/06 (2007).

violence. During 2009, the legal representatives of the victims in the *Lubanga* case unsuccessfully filed an application to have the charges against Lubanga amended to include the crime against humanity of sexual slavery, and the war crimes of sexual slavery and cruel and/or inhuman treatment.[54] Judge Benito has highlighted this fact in her dissenting opinion; in particular, she focused on the inclusion of sexual violence within the legal concept of 'use to participate actively in the hostilities'.[55] Moreover, when Trial Chamber I of the ICC issued principles on reparations, in the context of the *Lubanga* case, it provided:

> The Court should formulate and implement reparations awards that are appropriate for the victims of sexual and gender-based violence. The Court must reflect the fact that the consequences of these crimes are complicated and they operate on a number of levels; their impact can extend over a long period of time; they affect women and girls, men and boys, together with their families and communities; and they require a specialist, integrated and multidisciplinary approach.
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> The Court shall implement gender-sensitive measures to meet the obstacles faced by women and girls when seeking to access justice in this context, and accordingly it is necessary that the Court takes steps to ensure they are able to participate, in a full sense, in the reparations programmes.

Fourteen years before the *Lubanga* judgment, Trial Chamber I of the ICTR convicted Jean-Paul Akayesu of a range of crimes, including rape as a crime against humanity. Nevertheless, in this case, too, the prosecutor was reluctant to charge the defendant with gender crimes. The first deputy prosecutor of the ICTR has been quoted as saying, 'it is a waste of time to investigate rape charges in Rwanda, because African women don't like to talk about rape. We haven't received any real complaints.'[56] This narrow-minded approach and insensitivity to and ignorance of culture, has contributed to the obstruction of the protection of women's rights. Indeed, there is conceivably no genus of

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[54]See, *inter alia*, letter from Brigid Inder, Executive Director, Women's Initiative for Gender Justice to Louis Moreno Ocampo, Prosecutor, International Criminal Court (August 2006), available at http://www.iccwomen.org/news/docs/Prosecutor_Letter_August_2006_ Redacted .pdf; 'Congolese Women's Campaign Against Sexual Violence in the Democratic Republic of the Congo' International Justice (ICC) available at http://www.rdcviolencesexuelle.org/site/en/node/55 ('[D]espite voluminous evidence of sexual violence brought to the attention of the Prosecutor and the International Court in the *Lubanga* case, the warrant made no mention of any accusation of violence committed against Congolese women and girls'); 'Beni Declaration by Women's Rights and Human Rights NGOs from the Democratic Republic of the Congo on the Prosecutions by the ICC' Beni, North Kivu, DRC (16 September 2007) (cited in Flint and De Waal 'Case closed: A prosecutor without borders' (2009) Spring *World Affairs*.

[55]ICC-01/04-01/06-2842 Separate and Dissenting Opinion of Judge Odio Benito par 16.

[56]Henry n 4 above at 92.

women that do like talking about rape, not to mention instances in which they are the victims of rape. Attention was only paid to rape as a substantive crime following a line of inquiry by Judge Navanethem Pillay in respect of two witnesses who testified about crimes other than sexual crimes, and the submission of an *amicus curiae* brief by the International Women's Human Rights Law Clinic, the Working Group on Engendering the Rwanda Tribunal, and the Center for Constitutional Rights in New York City.[57]

These challenges notwithstanding, Akayesu was ultimately not only convicted of rape as a crime against humanity, but the Trial Chamber took a very progressive stance as to the requisite elements of rape – 'The Tribunal considers that rape is a form of aggression and that the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts'.[58] Additionally, it was held that rape and sexual violence 'constitute genocide in the same way as any other act as long as they were committed with the specific intent to destroy, in whole or in part, a particular group, targeted as such'.[59] Significantly, the *Akayesu* decision held that sexual violence may constitute genocide on both a physical and mental level[60] as 'sexual violence was an integral part of the process of destruction, specifically targeting Tutsi women and specifically contributing to their destruction and to the destruction of the Tutsi group as a whole'.[61] The tribunal held 'sexual violence [in Rwanda] was a step in the process of destruction of the Tutsi group – destruction of the spirit, of the will to live, and of life itself'.[62] The case of *Prosecutor v Nyiramasuhuko* also deserves mention here. *Nyiramasuhuko* is not only the first woman to have been convicted of genocide and incitement to rape by an international tribunal, but in a sad twist of irony, she was the former Rwandan Minister for Family Welfare and the Advancement of Women.[63]

The *Akayesu* case is also remarkable for the fact that it recognised that gender-related crimes are systematically used as instruments of war and terror, and the impact of the crime is extensive and devastating, resulting in harm inflicted far beyond the immediate victim, extending to families, whole communities, associated groups and the public at large. Today the *Akayesu* judgment is regarded as *the* breakthrough for rape and sexual violence in international criminal law.

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[57] For more information see, Rhonda Copelon 'Gender crimes as war crimes: Integrating crimes against women into international criminal law' (2000-2001) 46 *McGill LJ* at 217.
[58] *Akayesu* par 687.
[59] *Id* par 731.
[60] *Id* pars 731-734.
[61] *Id* par 731.
[62] *Id* par 732.
[63] *The Prosecutor Against Pauline Nyiramasuhuko and Shalom Ntahobali* case ICTR-97-21-I.

Having said that, the ICTY has also made significant contributions to the emerging international criminal law jurisprudence on rape and sexual violence. In particular, the *Furundžija* judgement confirmed the *jus cogens* character of the prohibition of torture, and found that rape can be an instrument through which to commit torture. The *Kunarac* case confirmed that rape perpetrated during civil conflict constitutes a crime against humanity. By implication, therefore, it was held that the prohibition on rape has a *jus cogens* character.[64]

Henry comments that the significance of the law developed in the *Akayesu* case is unparalleled'[65] for the fact that the ICTR created ground-breaking precedent prosecuting rape as a crime against humanity and as a crime of genocide[66] for the first time in history. The decision that rape constitutes a form of genocide presents an opportunity to reconceptualise wartime sexual violence as falling under the most egregious categories of international crime.[67] This begs the question: why did the reconceptualisation take place with respect to the development of international criminal law, but not simultaneously with respect to refugee law?

Henry comments that the problems related to the court's treatment of rape crimes and victims of these crimes, form part of a dubious legacy that is arguably indicative of a persistent and broader indifference to crimes against women during warfare.[68] Moreover, its legacy remains uncertain due to 'missed opportunities and debacles'.[69] Thus, my argument is that an important opportunity was lost. There is thus an incompatibility/ irreconcilability between the different 'branches' of law – IHRL, ICL and IHL. As such, I am advocating for the co-application of these and therefore, the concomitant development of refugee law to bring it in line with the other 'branches' so as to mitigate the impact of the threat or occurrence of sexual violence. In order to do so, it is imperative to investigate the nature of 'refugee law'.

3 The nature of refugee law

If international criminal law is an infant within the international legal order,

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[64]McHenry makes the argument that both *Akayesu* and *Kunarac* reach the implicit conclusion that the prohibition of rape has a *jus cogens* character (McHenry 'The Prosecution of rape under international law: Justice that is long overdue' (2002) 35 *Vanderbilt Journal of Transnational Law* at 1309).

[65]Askin 'Gender jurisprudence in the ICTR: Positive developments' (2005) 3/4 *Journal of International Criminal Justice* at 1012.

[66]Foundation Hirondelle ICTR, 'Appeals Court confirms judgment on former mayor' 1 June 2001 available at http://www.hirondelle.org.

[67]Henry n 4 above at 95.

[68]MacKinnon 'The ICTR's legacy on sexual violence' (2008) 14/2 *New England Journal of International and Comparative Law*.

[69]Askin n 65 above at 1008; MacKinnon n 68 above; Nowrojee n 48 above.

international human rights law is its slightly older sister. The internationalisation of human rights law emerged after the first of the World Wars ,and was mainstreamed through the adoption of treaty norms, in the form of the Charter of the United Nations of 1945 (UN Charter) and the Universal Declaration of Human Rights of 1948.[70] Hereafter, state practice followed suit resulting in a large body of customary international law. This coming of age is different to the manner in which older regimes of international law manifested. In regimes such as IHL, the formulation of treaty norms generally followed significant customary practice.[71]

Given that commentators, and the international community more broadly, have become keenly aware of the so-called 'fragmentation' (when negatively construed),[72] or 'expansion and diversification' (if more positively construed) of international law,[73] it is important to consider the position of refugee law, *vis-à-vis* other relevant branches of international law.

Goodwin-Gill and McAdam, in their seminal study, *The Refugee in International Law*, contend that 'the most important [consequence of international law for refugees] ... is the obligation of states to respect the principle of *non-refoulement* through time'.[74] Indeed, the corpus of refugee law exists around the notion of *non-refoulement*.

In 1982, the Executive Committee of the programme of the United Nations High Commissioner for Refugees (UNHCR), for the first time concluded that the principle of *non-refoulement* 'was progressively acquiring the character of a peremptory rule of international law'.[75] During 1996 the Executive Committee bolstered its earlier contention by concluding that, the 'principle of *non-refoulement* is not subject to derogation'.[76] Allain correctly identifies the significance of these Executive Committee reports in that:

> Perhaps the most important forum for identifying the value attributed to the norm of *non-refoulement* is in the Conclusions adopted by the Executive

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[70]Universal Declaration of Human Rights GA res 217A (III), UN Doc A/810 (1948) at 71.
[71]See Waschefort *Child soldiers and international law: Progressing Towards 'an era of application'?* (forthcoming) (on file with author).
[72]See Koskenniemi 'Fragmentation of international law: Difficulties arising from the diversification and expansion of international law' Report of the Study Group of the International Law Commission UN Doc A/CN.4/L.682 (13 April 2006); Report of the International Law Commission 56th session UN Doc A/59/10.
[73]For a more positive conception, see Simma 'Fragmentation in a positive light' (2003-2004) 25 *Mich JIL* at 845.
[74]Goodwin-Gill and McAdam *The refugee in international law* (2007) at 1.
[75]Executive Committee Conclusion 25 'General Conclusion on International Protection' 1982.
[76]Executive Committee Conclusion 79 'General Conclusion on International Protection' 1996.

> Committee of the programme of the United Nations High Commissioner for Refugees (UNHCR). Such Conclusions reflect the consensus of States, acting in an advisory capacity where issues of protection and *non-refoulement* are addressed internationally. Their pronouncements carry a disproportionate weight in the formation of custom, as they are the States most specifically affected by issues related to *non-refoulement*.[77]

Finally, during 1994, Koh acknowledged that 'numerous international publicists now conclude that the principle of *non-refoulement* has achieved the status of *jus cogens*'.[78] While there is centuries of state practice entrenching the principle of *non-refoulement*, this principle can trace its modern lineage to the Universal Declaration of Human Rights: 'everyone has the right to seek and to enjoy in other countries asylum from persecution'.[79]

Refugee law is often characterised as a regime of law in and of itself, that is to say a so-called 'self-contained regime' of international law. This conclusion is problematic for a number of reasons. First, it appears that the most fundamental norm of refugee law, the principle of *non-refoulement*, has a strong inherent human rights character. Secondly, refugee law is a very narrow area of law, that overlaps completely with human rights law and general international law, meaning that there is no utility in recognising it as being independent from these branches of law. However, the downside thereto is the further fragmentation/ diversification of international law. The UNHCR has characterised the Refugee Convention as being 'both a status and rights-based instrument',[80] giving further credence to the view that refugee law lies at the cusp of human rights law and general international law. Finally, the preamble to the Refugee Convention commences with the words: 'considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that human beings shall enjoy fundamental rights and freedoms without discrimination'.

Hathaway maintains the separate existence of refugee law. He concedes that there has only been modest evolution of the refugee rights regime since 1951, while there has been an exponential change in international human rights law.[81] In addition, the definition of the term 'refugee' is arguably obsolete, as

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[77] Allain 'The *jus cogens* nature of *non-refoulement*' (2001) 13 *Int'l J Refugee L* at 526, 539.
[78] Koh 'The Haitian Centers Council case: Reflections on *refoulement* and Haitian Centers Council' (1994) 35 *Harv ILJ* at 30.
[79] Article 14(1).
[80] Introductory note by the Office of the United Nations High Commissioner for Refugees to the text of the 1951 Convention Relating to the Status of Refugees (2010) at 3.
[81] Hathaway *The rights of refugees under international law* (2005) at 119.

it does not give meaningful content to the quality of a refugee.[82] Accordingly, Hathaway has argued that:

> Current refugee law can be thought of as a compromise between the sovereign prerogative of states to control immigration and the reality of coerced movements of persons at risk. Its purpose is not specifically to meet the needs of the refugees themselves (as both the humanitarian and human rights paradigms would suggest), but rather to govern disruptions of regulated international migration in accordance with the interests of states.[83]

This realist perspective is unconvincing. Hathaway conflates the motivating factors for states to afford refugee protection, with the nature of the relevant norms. The governments of many developing states are very eager to ratify international human rights instruments, such as the Convention on the Rights of the Child, but often pay scant regard to their implementation. It seems likely that the motivating factor for such ratification is primarily political. However, this does not all of a sudden render the relevant convention something other than a human rights convention.

Refugee law, to the extent that refugee determination could be deemed a human right, as I argue it is,[84] was one of the first subject-specific aspects of human rights law that was elaborated, specifically through the 1951 Refugee Convention.[85] While such an early recognition of the plight of the refugee is indicative of the importance of refugee protection, it brings with it the disadvantage that refugee law's founding instrument was conceived at a time when international human rights law was under-developed and little understood. Indeed, this might well have led to the temptation to characterise refugee law as semi-independent. Moreover, the landscapes upon which refugees are currently persecuted, are often different to those contemplated in 1951. This notwithstanding, 'the rights set by the Refugee Convention include several critical protections which speak to the most basic aspects of the refugee experience, including the need to escape, to be accepted, and to be sheltered'.[86] Since the right to *non-refoulement* is a non-derogable/peremptory

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[82]Sztucki 'Who is a refugee? The Convention definition: Universal or obsolete?' in *Refugee rights and realities: Evolving international concepts and regimes* (1999) at 55.
[83]Hathaway 'Reconsideration of the underlying premise of refugee law' (1990) 31 Harv *ILJ* at 129, 131.
[84]The UNHCR training manual declares: 'The international refugee law, like humanitarian law, is in fact a branch of human rights law' UNHCR 'Introduction à la protection internationale des refugies' (Module de formation, Geneva, June 1992) at 19 as quoted in Sztucki n 82 above at 63.
[85]This is simply a matter of chronology: the UN Charter was adopted in 1945; the UDHR in 1948, and the Refugee Convention three years later, in 1951, before any of the major human rights treaties had been adopted. Accordingly, refugee law remains under-developed due to the fact that it hasn't benefited from the inspiration and evolution of international human rights law.
[86]Hathaway n 81 above at 94.

right, a woman who has a well-founded fear of persecution due to the threat of sexual violence, should have the protection of the knowledge that she cannot be sent back to the place where that threat may be realised.

The analysis to this point clearly establishes that refugee law (as a narrower subject-specific component of human rights law) has developed separately from the emerging jurisprudence on rape during armed conflict found within ICL, and developments regarding women's rights in human rights law more broadly. Waschefort advocates for an 'issues-based approach to human rights':[87]

> Many of the perceived disadvantages of a system that increasingly develops around somewhat isolated semi-autonomous sub-regimes, falls away, if one engages with each of these sub-regimes that are relevant to the issue at hand, in such a way so as to create synergy between the norms and regimes in question. To … [enhance the work of those who seek to mobilize the law as a vehicle to achieve social change], I believe, an issues-based approach can be greatly beneficial. Ultimately this approach is nothing more than a conceptualization of the way in which existing norms and knowledge can be used more effectively to achieve the goals of the broader human rights movement …

The analysis that follows is undertaken in the spirit of such an issues-based perspective in that the developments in international law more broadly, are interpreted to understand the nature of refugee status determination in particular. There are three contexts within which it is possible to include sexual violence within the ambit of persecution for refugee status determination. First, rape as a weapon of ethnic conflict with 'race' constituting the ground for persecution. Secondly, rape being encapsulated in the concept of 'membership of a particular social group'. Finally, sexual violence as a new form of persecution in terms of customary international law.

4 Refugee status determination and a well-founded fear of sexual violence as a basis for 'persecution'

All governments consider control of entry by non-nationals to be amongst the most fundamental elements of their sovereignty. The relevant authorities of the receiving countries decide whether and how they permit asylum, mostly on the basis of international and national standards, legal obligations, and economic limitations. Notwithstanding this, the Universal Declaration of Human Rights provides unequivocally that individuals have the right to seek and enjoy asylum once it is granted.[88]

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[87]Waschefort 'Beyond Fragmentation: An Issues-Based Approach to 'Human Rights'' (2012) 37 *SAYIL* at 62-82.
[88]Article 14.

Gibney places a realistic slant on the definition of refugees. For him they are 'people who require a new state of residence, either temporarily or permanently, because if forced to return or to stay at home they would, as a result of either the inadequacy or brutality of their state, be persecuted or seriously jeopardise their physical security or vital subsistence needs'.[89] The Refugee Convention's core mandate was to alleviate the consequences of the problems described by Gibney, by offering victims a degree of international legal protection among other assistance, and eventually helping them to begin a new life.[90] However, its major weakness is that it was not designed to tackle the root causes of people's flight; specifically human rights violations, political and armed conflict in the country of origin, etc.[91] For this reason, the Convention should be exploited to maximum effect, by ensuring that anyone who is subject to persecution – of any kind – should resort under its protection.

In its preamble, the Refugee Convention granted UNHCR the statutory authority to declare refugee status and facilitate asylum by way of the UNHCR Statute.[92] Once refugee status is granted, the UNHCR has certain responsibilities towards the refugee: first, to allocate resources to alleviate the immediate crisis, and secondly, to seek a permanent solution for refugees.[93] Article 35 provides that the UNHCR is tasked with the role of supervising the process with cooperation from all ratifying states. Furthermore, it oversees the application of international treaties, and coordinates the admission of refugees to host countries.

According to the UNHCR Refugee Handbook (which is used when state parties are implementing the relevant refugee treaties in their domestic jurisdictions), a person is a refugee as soon as he/she fulfils the criteria set out in the definition. That takes place before he/she even applies for refugee status. Recognition of refugee status does not make the person a refugee, but merely declares that he/she is one. The Refugee Convention, read with its Protocol, defines a refugee as someone 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

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[89]Gibney 'Liberal democratic states and responsibilities to refugees' (1999) 93/1/March *American Political Science Review* at 170.
[90]*Ibid*.
[91]UNHCR 'The Refugee Convention, the landmark document that underpins our work' available at www.unhcr-centraleurope.org/en/resources/conventions/refugee-convention.html.
[92]UN Refugee Convention preamble pars 5-6.
[93]UN General Assembly. Statute of the Office of the United Nations High Commissioner for Refugees 14 December 1950 A/RES/428(V) available at http://www.unhcr.org/refworld/docid/3ae6b3628.html.

> 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.[94]

This Refugee Convention definition embodies three essential elements, that is, due to 'a well-founded fear of persecution based on listed grounds' a person finds herself 'outside the country of origin, nationality, or habitual residence', and owing to the aforementioned persecution, is 'unable or unwilling to avail herself of the protection of the country of origin, nationality, or habitual residence'. The persecution requirement stands apart from the other two requirements in that the question of 'a well-founded fear of persecution' speaks to a legal standard, whereas the person in question being outside her home state and being unwilling to return to it, are questions of fact. This notwithstanding, the latter two factors have evidentiary value in establishing 'a well-founded fear of persecution'.

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However, before doing so, it is important not to substitute the UNHCR's approach to their own working methods, with the obligations of states incurred

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[94] Article 1A(2) 1951 United Nations Convention Relating to the Status of Refugees 28 July 1951, 189 UNTS 137; art 1(2) of the Protocol.

[95] The UNHCR has determined that such details as the meaning of phrases such as 'well-founded fear', 'persecution' and 'membership of a particular social group' are not a direct concern of where the refugee concept is used to denote people who are displaced to states other than their state of nationality because of serious threats to their life and liberty. UNHCR, *The State of the world's refugees* (1997) at 51-52.

[96] Sztucki n 82 at 58.

by instruments such as the Refugee Convention. As mentioned above, the principle of *pacta sunt servanda* requires states to comply with their obligations in terms of the Convention strictly and in good faith. The only framework within which a lack of direct concern with details contained in the legal requirements of the Convention can be seen to alter state obligations, is through the application of customary international law.

3.1 'A well-founded fear of persecution'

As the recognition of persecution based on fear of sexual violence stands or falls on the question of 'a well-founded fear of persecution', it is imperative that this concept be canvassed.

There is no internationally accepted definition of what constitutes 'persecution'. The ordinary dictionary definition of persecution is: 'to pursue with malignancy or injurious action, especially to oppress for holding a heretical opinion or belief'.[97] The EU has attempted to formulate persecution in Draft Guidelines for the Application of the Criteria for Determining Refugee Status (November 1994), in the following terms:

> In order to constitute 'persecution' … acts must constitute by their nature and/or repetition an attack of some seriousness which would render normal life in the country of origin impossible ('normality' of life must be assessed having regard to the prevailing conditions in the country).

The 1994 'Note on International Protection' by the UN High Commissioner for Refugees,[98] made the switch from the 'well-founded fear of persecution' on certain grounds, as the basis for refugee status, to the 'need for international protection as a defining concept', as it is this which distinguishes refugees from other aliens.[99] This raises the question whether, even if gender was a listed ground, sexual violence would meet the threshold of harm required for refugee status. There is considerable agreement that jeopardy to physical integrity is included in this concept.[100] Harm inflicted through torture would similarly meet the threshold of harm required.[101]

The Refugee Convention is, for the most part, silent on the standard of harm that is feared in order to meet the threshold of persecution. In addressing the unlawful entry or presence of refugees in receiving states, the Refugee

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[97] As utilised by Nolan J in the case of *R v IAT Ex p Jonah* 1985 Imm AR 7.
[98] UN Doc A/AC 96/830 par 20.
[99] *Id* pars 6 and 8.
[100] Plender *International migration* (1988) (2 ed) at 417-418.
[101] The general rule is that the perpetrator of such persecution must be the state or the state must be knowingly complicit in the persecution.

Convention speaks of, 'coming directly from a territory where their life or freedom was threatened in the sense of article 1'.[102] Similar language is used in relation to *non-refoulement*.[103]

The notion of well-founded fear has both an objective and a subjective element. Leading judicial authority has borne out well, the objective criterion inherent in this concept. The House of Lords has held that in determining whether a well-founded fear of persecution exists in a given case, 'the Secretary of State could take into account facts and circumstances known to him or established to his satisfaction but possibly unknown to the applicant in order to determine whether the applicant's fear was objectively justified'.[104]

The US Supreme Court and the Canadian Federal Court of Appeal, have endorsed similar objective tests for the establishment of a well-founded fear of persecution.[105] In particular, in reference to these cases, Beyani has concluded that:

> … the consistency of the tests used is significant in providing evidence that the standard of well-founded fear of persecution is one of general application in international law. There is a similarity of content in the tests … which are variously used to determine objectively a well-founded fear of persecution. On good authority, there is no practical difference in the legal application of these tests.[106]

Nevertheless, there is a factual subjective element as well, in that the individual involved is invariably motivated to flee her country due to her subjective fear of persecution (which may of course be objectively justified). However, according to De Than and Shorts, 'it is not sufficient to be persecuted when that appears to be the norm in the home country as would occur in a civil war or a state of political unrest'.[107] While there is case law to support this view,[108] it is an argument with which I cannot agree, particularly given the (expanded) definition of a refugee in the 1969 OAU Refugee

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[102]Article 31.
[103]Article 33.
[104]*R v Secretary of State for the Home Department, ex parte Sivakuniaran* 1988 1 All ER 193.
[105]*INS v Cardoza-Fonseca* (1987) 467 US 40. *Adjei v Minister of Employment and Immigration* Federal Court of Appeal Decision A-676-88, 25 January 1989 172, 173.
[106]Beyani 'Introduction' in Weis *The Refugee Convention, 1951: The Travaux Préparatoires analysed with a commentary* (1995) at 8.
[107]De Than and Shorts *International criminal law and human rights* (2003) at 30.
[108]See *Ward v Secretary of State for the Home Department* [1997] Imm AR 236, where Ward claimed asylum on the basis of her being tortured by the Peruvian police on suspicion of being a member of the Shining Path terrorist group. Her claim was rejected in the following statement: 'The Secretary of State considered that the problems you have faced, even if true, amounted to nothing more than the sort of random difficulties faced by many thousands of people in Peru'.

Convention. Moreover, this argument undermines the essence of international human rights law, which protects, *inter alia*, the right to the highest attainable standard of health[109] (which includes both physical and mental health),[110] not to mention the essence of refugee protection more narrowly. Moreover, the analysis also attributes an inclusive meaning to the phrase 'sexual violence' to enable refugee status to be accorded for reason of the perpetration of sexual violence against a woman.

3.2 Sexual violence in ethnic conflict: 'Race' as a ground for persecution

The Refugee Convention definition requires the well-founded fear of persecution to exist for reasons of one or more listed grounds for such persecution. These are 'race, religion, nationality, membership of a particular social group or political opinion'. Rape as a strategy of ethnic conflict, was discussed earlier. MacKinnon persuasively argues that with respect to rape as genocide:

> It is rape as an instrument of forced exile, rape to make you leave your home and never want to go back. It is rape not to be seen and heard and be watched and told to others: rape as spectacle. It is rape to drive a wedge through a community, to shatter a society, to destroy a people.[111]

In line with MacKinnon's argument, the African Women's Protocol criminalises sexual violence as genocide.[112] Accordingly, in the narrow circumstances of sexual violence as a strategy of armed conflict, where victimisation can be linked to race or ethnicity, as was the case in Rwanda, and still is in the DRC, persecution on the basis of race with sexual violence as the standard of harm, should meet the Refugee Convention requirements for refugee determination.

3.3 Widespread and systematic sexual violence: 'Membership of a particular social group as a ground for persecution

Victims fleeing gender-related persecution is a new frontier. In conformity with the preceding discussion, during 1985 the Executive Committee of the United Nations High Commissioner for Refugees recognised that:

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[109]Article 14 of the International Covenant on Economic, Social and Cultural Rights 1966.
[110]General Comment 14 of the UN Committee on Economic, Social and Cultural Rights (2000) UN Doc HRI/GEN/1/Rev 7 12 May 2004.
[111]MacKinnon 'Rape, genocide and women's human rights' in Stiglmayer (ed) *Mass rape: The war against women in Bosnia-Herzegovina* (1994) at 190.
[112]Article 11 Women's Protocol.

> States … are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of article 1A(2) of the 1951 United Nations Refugee Convention.[113]

In 1993, the same Committee cast the net somewhat wider when it concluded that 'persons whose claim to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion' should be recognised as refugees.[114] Here, that link with a listed ground is still mandatory/prescriptive, but it is contemplated that sexual violence can occur in the context of any one of the listed grounds.

A 'particular social group' is the least developed of the grounds qualifying as persecution. The UNHCR has previously concluded that women can constitute 'a particular social group' for the purposes of the refugee definition.[115] Furthermore, the 'Summary Conclusion' from the San Remo expert roundtable stated: 'it follows that sex can properly be within the ambit of the social group category, with women being a clear subset defined by innate and immutable characteristics, and who are frequently treated differently to men'.[116]

Aleinikoff's conclusion that 'an applicant need not demonstrate that every member of a group is at risk of persecution in order to establish that a particular social group exists'[117] is widely held to be the only correct interpretation, and has been accepted in many jurisdictions, such as in the *Khawar* decision by Gleeson CJ of the Australian High Court:

> Women in any society are a distinct and recognizable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments. Neither the conduct of those who perpetrate domestic violence, or of those who withhold the protection of the law from victims of domestic violence, identifies women as a group. Women would still constitute a social group if such violence were to disappear entirely.[118]

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[113]UNHCR 'Guidelines on the Protection of Refugee Women' Geneva (July 1991) at 36 par 54.
[114]Sztucki n 82 above at 65-66; par (d) of Conclusion 73 (XLIV).
[115]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' UN doc HCR/GIP/02/02, 7 May 2002 par 31.
[116]'Summary conclusions on gender-related persecution' San Remo expert roundtable 6-8 September 2001 par 5.
[117]Aleinikoff 'Protected characteristics and social perceptions: An analysis of the meaning of 'membership of particular social group'' in Feller *et al* n 6 above at 263.
[118]*Minister of Immigration and Multicultural Affairs v Khawar* High Court of Australia 2002 HCA 14, 11 April 2002 par 35.

The Refugee Convention provides that '[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin'. During the negotiation of the Convention, the Yugoslav delegation proposed the inclusion of the words 'or sex' after the words 'country of origin', but this proposal was opposed and subsequently withdrawn. Interestingly, the Migration for Employment Convention, which predates the Refugee Convention by two years, provides that each Contracting Party 'undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to migrants lawfully within its territory treatment no less favourable than that which it applies to its own nationals in respect of ... accommodation ...'.[119] The UNHCR has rallied around the protection of female displaced persons, and has identified sexual violence as a key threat to the well-being of displaced women and girls. It seems that the basis upon which women are particularly identified as vulnerable and thus deserving of special protection, is that they belong to 'a particular social group'. This approach is to be favoured over race as the sole ground for persecution in the case of sexual violence during ethnic conflict, as 'a particular social group' is more inclusive.

3.4 Sexual violence as a basis for 'persecution': Customary international law

It is unacceptable that women should suffer purely on the basis of the dogma of positivism. Yet, the sacrosanct principle of the law of treaties, *pacta sunt servanda*, implies that states cannot be held to standards to which they did not consent at the time of ratification of the Refugee Convention. Treaty norms are largely frozen in time at adoption (although interpretation can change over time, the text can only be changed through formal amendment). As such, the parameters for judicial manoeuvring are restricted in so far as interpreting 'persecution' to include the basis of sexual violence is concerned.[120] Fortunately, customary international law is fluid, and not confined to the parameters of a sixty-year-old text (as in relation to the Refugee Convention). There is a strong argument that customary international law has developed independently from the treaty definition, and that 'gender' has become an additional ground to those listed in the Refugee Convention.

That there have been significant developments as regards refugee status determination post-1951, is well documented by developments within the regional human rights systems. In the context of Africa, the OAU Refugee Convention adopts the definition as stipulated in the 1951 UN Refugee

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[119] Article 6 of the Migration for Employment Convention 1949.

[120] As opposed to reading sexual violence into existing grounds such as race and 'social group', as argued above.

Convention but extends it quite considerably. Accordingly, a refugee is (also) a person 'who owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or his nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of nationality'. This Convention sets out the principles, which are specific to Africa, including additional exclusion and inclusion clauses, and the prohibition of so-called 'subversive activities'[121] within the refugee and asylum context.

The equivalent instrument in the Americas is the 1984 Cartagena Declaration on Refugees.[122] This Declaration is not binding, but has been recommended to states in the Americas by the General Assembly of the Organisation of American States,[123] and provides a clear statement of the region's desire to protect refugees. This Declaration includes a duty of *non-refoulement* and the region's undertaking to ensure the physical protection of refugees.

The will to ratify international human rights law treaties is politically motivated; but such enthusiasm for scoring political points is often not accompanied by the political will to follow through with many of the associated obligations. In the *Petane* case, Conradie J eloquently expressed the different nature of customary international law in this regard:

> One must … look for state practice at what states have done on the ground in the harsh climate of a tempestuous world, and not at what their representatives profess in the ideologically overheated environment of the United Nations where indignation appears frequently to be a surrogate for action.[124]

It is clear that some specific aspects of refugee law are widely deemed customary international law, such as the principle of *non-refoulement*, for example.[125] To this end, by 1982 Weis had already contemplated the *jus cogens* nature of the principle of *non-refoulement*. However, it is not only the degree to which different isolated aspects of refugee law have crystalised into customary international law that is relevant to interpreting the legal scope of 'persecution', but also the customary nature of concomitant rights, such as the rights to equality and physical integrity.

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[121]UNHCR Q&A, 'OAU Convention remains a key plank of refugee protection in Africa after 40 Years' available at www.unhcr.org/4aa7b80c6.html.
[122]OAS Doc OEA/Ser L/II 66 Doc10 Rev1. Adopted by the Colloquium of the International Protection of Refugees in Central America, Mexico, and Panama, in Catagena 19-22 Nov 1984.
[123]UNHCR 'OAS General Assembly: An Inter-American Initiative on Refugees' (1986) 27 *Refugees* at 5.
[124]*S v Petane* 1988 3 SA 51 (C) 61D-E.
[125]Weis (1982) 3 *Michigan Yearbook of International Legal Studies* at 27-42 31.

Feminist scholarship tends to look for silences and blind-spots in dominant discourses, and seeks to interject alternative voices.[126] One such dominant discourse which must be challenged is that 'the law sees and treats women the way men see and treat women'.[127] Accordingly, the argument advanced in this paper is that while the 1951 UN Refugee Convention, its 1967 Protocol, the 1969 OAU Refugee Convention, and the 1984 Cartagena Declaration do not explicitly include sexual violence as a specific ground upon which persecution takes place and for which refugee status should be accorded, it is nonetheless *lex ferenda*[128] and hence is gaining acceptance and legal impetus.

5 Conclusion

Recognised refugees and registered asylum-seekers enjoy a specific legal status that sets them apart from other migrants. Refugees are 'forced' to migrate through persecution, war, or violence. They are regarded to be in an exceptionally vulnerable situation, as they do not receive any protection from their own state and therefore deserve particular humanitarian concern. It is my primary contention that women who are at risk of (or who have already become victims of) sexual violence, should be eligible for refugee status. For such women, the real challenge to refugee status determination is to give true effect to the individualised nature of the inquiry, characterised not only by sex, but also by cultural, religious, political, physical, mental, and other factors.[129]

The ICTR in the *Akayesu* decision (as endorsed by the ICTY in the *Kunarac* and *Furundžija* judgments) elucidated the elements defining rape in international law. This approach has advanced international jurisprudence and enriched the understanding of the crime of rape in international law, thereby complementing the global pursuit of the eradication of rape and sexual violence. For this reason, it has been argued that such pursuit may only effectively be realised by way of affording women a mechanism (refugee status) by which to prevent such invasion of their sexual integrity. It is legally absurd to conclude that while rape, in specific contexts, has reached the status of a *jus cogens* violation; rape or the fear thereof does not satisfy the requirements for refugee status determination.

For refugee law to serve the purpose for which it was intended, a creative rethink of international law is required. Such a rethink should embrace the co-

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[126]Godec 'Between rhetoric and reality: Exploring the impact of military humanitarian intervention upon sexual violence – post-conflict sex trafficking in Kosovo' (2010) 92/877/March *International Review of the Red Cross* at 236.
[127]MacKinnon 'Feminism, Marxism, method and the state: Towards feminist jurisprudence' (1983) 8/4 *Signs: Journal of women in culture and society* at 644.
[128]Not written, but an emerging legal norm.
[129]Edwards n 6 above at 48.

application of international human rights law, international criminal law, and humanitarian law, so as to develop refugee law to the point where freedom from sexual violence can be achieved for many through the elevation of a well-founded fear of sexual violence to a form of persecution in refugee status determination.