



# The 'refugee' and the 'nexus' requirement The relation between subject and persecution in the United Nations Refugee Convention



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## SYNOPSIS

The challenge that my paper deals with is the complexities of gender and violence within international refugee law, taking women exposed to male partner violence as a starting point. The focus is the definition of 'refugee' in the United Nations Refugee Convention and the requirement that the persecution must be based on specific grounds, the 'nexus' requirement. My analysis shows that the Convention is grounded in an essentialist understanding of the subject and that the preservation of its structure and integrity also means preserving the power structures in society. The argumentation suggests that it is time to abolish the 'nexus' requirement and the limitation of the grounds, but my conclusion is rather that we must continue to work with our frame of thought focusing on the 'refugee situation' and the discursive constitution of the subject in time and space.

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## Introduction

My paper deals with the challenges posed by the complexities of gender and violence within international refugee law, taking women exposed to male partner violence as a starting point. The focus of my challenge is the definition of 'refugee' in the [Convention relating to the Status of Refugees \(1951\)](#) and the requirement that the persecution must be based on specific grounds, the 'nexus' requirement. The definition covers only persecution *for reasons of* race, religion, nationality, membership of a particular social group or political opinion. In many states, such as Sweden, women are recognized as constituting a 'particular social group', making this a ground of particular interest in my analysis. In the case of male partner violence it is also this ground that is often invoked. In this instance it must be shown that the violence stems from her membership of a 'particular social group'. In this way, the persecution (violence) and the ground for persecution (being a woman and thus part of a 'particular social group') are separated as being non-constitutive of each other. My paper challenges this separation between the subject and the persecution. It is challenged in the light of studies revealing that women – and

these women in particular – have difficulties showing that the persecution that they fear is grounded in their 'membership of a particular social group'. It is also challenged in the light of theories that the subject is constituted in discourses through processes involving actions such as persecution.

This means that the analysis has both an empirical and theoretical starting point. The theoretical starting point will be described more thoroughly, since it is primarily that which will contribute to new knowledge in this area of law, while the empirical starting point – that the definition of refugee has been interpreted historically within a framework of male experiences – will only be used as a 'backdrop' in the analysis, since it is well-established internationally (see [UNHCR, 2002a](#)). Hence, this is an argument that has been made, well and extensively, for the past twenty years (see e.g. [Bailliet, 2012](#); [Bhabha, 2004](#); [Crawley, 2001](#); [Edwards, 2003](#); [Freedman, 2010](#); [Heyman, 2005](#); [Kneebone, 2005](#); [Macklin, 1995](#); [Mascini & van Bochove, 2009](#); [Randall, 2002](#); [Spijkerboer, 1994](#); [Tuit, 1996](#)). In Sweden too, studies suggest that female asylum seekers are discriminated against in the asylum determination process ([Cheikh Ali, Querton & Soulard, 2012, p. 30](#). See e.g. [Bexelius, 2008](#); [Feijen & Frenmark, 2011](#); [Segenstedt & Stern, 2011](#);

Zamacona Aguirre, 2008). I myself have made a contribution to this argument in a recently published article (Nilsson, 2012). The point of departure for that article was the changes that were made in the new Swedish Aliens Act (SFS 2005:716) of 2006 concerning the definition of 'refugee', implying inter alia that persecution on account of gender should be covered by the definition, and empirical studies showing that these changes have had little impact in practical applications. The conclusion in my study is, however, that there is a gap not only between the law and practical applications, but also between the international legal framework and the changes made in national law. Instead, it seems that gender equality is not favored in the policy area of asylum, while it is a commonly observed feature in other policy areas. Accordingly, under the threat of masses of asylum-seekers crossing our borders, there are very limited possibilities for taking gender into account, as globalization and the feminization of asylum-seekers increases this threat. It is particularly the case if 'we' revise our self-image as a good and equality producing state ('non-refugee producing state') and acknowledge that it is not only 'the other' women (and children) that are being oppressed. Holding on to international refugee law may from this perspective seem impossible, applying it in a 'generous spirit' even less possible.

The study, however, also raised questions about the basic premises in the international legal framework upon which the changes were based. As already mentioned, this is the focus of the current article. In other words: this article takes the theories and studies referred to as *starting points* for an analysis of problems concerning the international legal regime, but it is *the international legal regime that is the focus of my analysis* and that is the subject of my challenge.

I will start with a description of my theoretical starting points. I will then turn to the international legal framework. In this part of the paper I will provide a background to and description of the 1951 Convention and its definition of a refugee as amended by the [Protocol relating to the Status of Refugees \(1967\)](#), giving a more detailed description of the 'membership of a particular social group' ground. I will then pay particular attention to statements made by the United Nations High Commissioner for Refugees, UNHCR, concerning the interpretation of the concept. The Commissioner's statements are not legally binding, but they provide legal interpretative guidance for interpretation of the Convention and Protocol.<sup>1</sup> In many states, including Sweden, they also form the basis for recognizing women as constituting a 'particular social group' which makes them important in the analysis. Thereafter follows the analysis and discussion, where I will problematize the Convention's basic design, the 'nexus' requirement and the separation that it implies, in the light of the theories and studies referred to. Finally, I will present my conclusion.

### Theoretical starting point

The analysis starts from a critical perspective based on a feminist legal theory. A feminist perspective on law represents an expansion of the field of women's legal research, from research into legal issues with direct relevance to women to research from a more complex, systems-critical perspective into the premises and assumptions upon which law is based (Gunnarsson & Svensson, 2009). It involves both a distrust of law and a desire to change the power system, which is linked to

sex/gender and signifies and shapes the law (Nilsson, 2007a). However, an intersectional perspective is also used. This is a critical perspective that expresses an understanding that gender does not include one social position but many and focuses on the interaction between various power structures (Crenshaw, 1989, 1991).<sup>2</sup> In contrast to power analysis based on the asymmetric position of different groups in a hierarchical order, however, an intersectional perspective seeks to examine the context in which the definition of groups and the separation into different (and unequal) categories becomes meaningful and a basis for the exercise of power. It is, therefore, essential to examine the temporal and spatial design of the exercise of power but, as well as challenging the boundaries of time and space, an intersectional perspective also offers an opportunity to transcend the analytical divisions created by the categories of class, sexuality, gender and race/ethnicity. To examine how e.g. class is intersected by both gender and race stereotypologies, or how the constitutive role of sexuality functions in the creation of a gender order, means questioning the 'logic of distinguishing'<sup>3</sup> which sustains the notion of homogeneous and hierarchically divided power relations. This is a form of analysis which requires that attention be paid to the discursive structures and material conditions that make these categories meaningful and indispensable conditions for the exercise of power. From this perspective, it is not only the relationship between different categories which is of interest; the question is rather how these categories are created and given meaning in specific contexts (de Los Reyes, 2007; de Los Reyes & Gröndahl, 2007).

This is a contextualized approach to law and legal knowledge which builds on social constructionist thinking. A social constructionist theory of law focuses on how law relates to the social, in that it not only regulates something that exists prior to law, but is also in itself part of the social construction of that same reality (Burman, 2007). A common approach among social constructionist researchers is discourse analysis where theory and method are intertwined, in a theoretical and methodological totality, focusing on language. However, within discourse theory there is not one single approach but a series of interdisciplinary and multidisciplinary approaches (Winther Jørgensen & Phillips, 2000). Some of these include detailed linguistic analysis; some do not (Fairclough, 2003). A number of key premises, however, constitute the basis for most discourse analysts, however, building on social constructionist theory: First, discourse analysis assumes a critical approach to taken-for-granted knowledge. It means that our knowledge and our worldviews are not seen as mirror images of the reality "out there", but as a product of our way of categorizing the world. Secondly, it is assumed that the way we understand the world and the categories and concepts that we use are historically and culturally specific. Discursive action is a form of social action as it helps to construct the social world (including knowledge, identities and social relationships) and thereby preserves certain social patterns. Thirdly, it assumes a relationship between knowledge and social processes. Knowledge is thus seen as something which is produced in social interaction, where one builds common truths and fights for what is true against what is false. This means that all forms of social interaction, but especially linguistic ones, are of great interest. Fourth, it assumes a relationship between knowledge and social action. In a particular worldview, some forms of actions are 'natural' and others unthinkable. Different social worldviews

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