

# Should she be granted asylum? Examining the justifiability of the persecution criterion and nexus clause in asylum law

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*The current international asylum regime recognizes only persecuted persons as rightful asylum applicants. The Geneva Convention and Protocol enumerate specific grounds upon which persecution is recognized. Claimants who cannot demonstrate a real risk of persecution based on one of the recognized grounds are unlikely to be granted asylum. This paper aims to relate real-world practices to normative theories, asking whether the Convention's restricted preference towards persecuted persons is normatively justified. I intend to show that the justifications of the persecution criterion also apply to grounds currently lacking recognition. My main concern will be persecution on the grounds of gender.*

*The first section introduces the dominant standpoints in theories of asylum, which give different answers to the question of who should be granted asylum, based on different normative considerations. Humanitarian theories base their claims on the factual neediness of asylum-seekers, holding that whoever is in grave danger of harm or deprivation should be granted asylum. Political theories base their justifications on conceptions of legitimacy and membership, holding that whoever has been denied membership in their original state should be granted asylum. Under political theories, Matthew Price's theory will be discussed, which provides a normative justification of the currently recognized persecution criterion. The second section provides a descriptive definition of persecution based on Kuosmanen (2014), and evaluates the normative relevance of the different elements of this definition based on the theories presented previously. The third section is devoted to the examination of the normative justifiability of the nexus clause's exclusive list of the bases (grounds) upon which persons might be persecuted. The section argues that while the clause does not recognize that persecution might be based on gender, in fact many women experience harms based on gender that fulfil all the normatively relevant definitive conditions constituting persecution. The conclusion shows that although the current law's preferences towards the persecuted are justifiable, the nexus clause's limiting enumeration of grounds is not. This applies especially to the exclusion of gender as grounds for granting asylum.*

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## Introduction

The current international asylum regime, outlined in the Geneva Convention and Protocol established by the UNHCR in 1951 and 1967, reads:

The term ‘refugee’ shall apply to any person who: [...] owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country (Article 1/A/2);

No Contracting State shall expel or return (‘refouler’) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion (Article 33/1).<sup>2</sup>

Granting asylum is understood as granting entry to a seeker in, or at the borders of a state other than her original state, and granting indefinite permission of residence there. According to the Convention, receiving states have a duty of admission only towards persecuted persons. In the so-called “nexus clause”, the Convention enumerates specific grounds—ethnicity, nationality, religion, political opinion, or social group membership—upon which persecution is recognized. If harm is inflicted on persons for other causes, or on the basis of other characteristics—such as gender—there is no binding text that commands states to recognize the asylum applicant. It is not impossible for states to grant asylum to seekers based on other grounds not listed in the nexus clause: depending on the receiving state’s individual assessment, gender may be interpreted under the social group or on the political opinion ground. And even though the UNHCR encourages such interpretations (UNHCR 2002), in the saturated situation of massive migration flows, states are looking to limit eligibility as much as possible, sticking with the strictly binding, ratified text, rather than expanding their understandings of eligibility.

This paper investigates the normative justifiability of the Convention’s persecution criterion and nexus clause,<sup>3</sup> and argues that while the persecution criterion is justifiable, the nexus clause’s exclusion of gender as a ground is not. I intend to show that the available justification of the persecution criterion also justifies the recognition of other grounds, currently not listed in the nexus clause. In particular, I argue that the normative relevance of persecution, which makes it the proper condition to be remedied by asylum, is demonstrated in the case of women victims of gender-based violence and discrimination.<sup>4</sup> So far, the theoretical debate has paid little attention to the issue of gender in terms of asylum.<sup>5</sup> This paper shows that gender cannot be ignored even in a restrictive theoretical approach, which instead of deducing entitlement to asylum from the existence of unmet needs, justifies the persecution criterion. It shows that the same circumstances that make persecution normatively relevant also make gender-based harm and discrimination normatively relevant: in other words, that gender-based harm and discrimination could constitute persecution, and that consequently, gender should be explicitly recognized as a ground in the nexus clause.

In the first section, I introduce the dominant standpoints in theories of asylum, which give different answers to the question of who should be granted asylum,

based on different normative considerations. Theories are divided into humanitarian and political approaches, based on their central concerns.<sup>6</sup> Humanitarian theories base their claims on the factual neediness of asylum-seekers, holding that whoever is in grave danger of harm or deprivation should be granted asylum. What I will refer to as “political” (in contrast with humanitarian) theories base their justifications on conceptions of legitimacy and membership, holding that whoever suffers harm as result of her state’s legitimacy failure, or has been denied membership in their original state, should be granted asylum. Under political theories, Andrew Shacknove’s theory will be discussed, which tries to interpret humanitarian concerns through a political conception. Matthew Price’s theory will be discussed as a political approach that provides a normative justification of the currently recognized persecution criterion. Consequently, the first section will show that the persecution criterion *is* justifiable, i.e. that there is a justification for the claim that asylum should be granted to persecuted people, and therefore the criterion for the current law is acceptable.

The second section explains Kuosmanen’s (2014) descriptive definition of the term “persecution” and evaluates the normative relevance of the different elements of this definition based on the theories presented previously. Kuosmanen analyses the term’s meaning, drawing on common assumptions and historical cases. He identifies a set of conditions, which, when all are fulfilled—when harm occurs in a context in which all these circumstances are present—qualifies the situation as persecution. The section goes on to explore the normative relevance of these conditions, constitutive of persecution’s definition, according to humanitarian and political approaches, and Shacknove’s and Price’s claims in particular.

The third section is devoted to the examination of the normative justifiability of the nexus clause’s exclusive list of the bases (grounds) upon which persons might be persecuted, and the complexities of the corresponding element (“unjust, discriminatory targeting”) of persecution’s descriptive definition. In this section, elements of the definition of persecution that one may find hard to establish in the case of gender-based harms are discussed. The section argues that while the nexus clause does not recognize that persecution might be based on gender, in fact many women experience harms based on gender that demonstrate all the normatively relevant definitive conditions constituting persecution.

The conclusion shows that although the current law’s preferences towards the persecuted are justifiable, the nexus clause’s limiting enumeration of grounds is not. This applies especially to the exclusion of gender as a ground for granting asylum.

## I. Who should be granted asylum?

Is it justifiable that victims or prospective victims of harm, in order to be admitted, have to suffer harm as a result of “persecution”, and have to demonstrate that this persecution is based on certain attributes specified in the nexus clause? This section will give an overview of dominant normative positions, and will show that the persecution criterion is justifiable, if one does not subscribe to a humanitarian theory of asylum.

In the discourse of asylum theory, two approaches can be distinguished: *humanitarian* and *political* conceptions of asylum. Humanitarian theories claim that the duty to grant asylum is invoked by the factual neediness of claimants, while

political theories point to political concepts, such as membership and legitimacy, to ground the duty of granting asylum. While humanitarian approaches are not promising in terms of justifying the persecution criterion, a brief introduction to humanitarian reasoning is useful to position this inquiry in the disciplinary context, and to see the contrast between the dominant normative approaches. Understanding the humanitarian approach is essential in order to grasp the significance of arguments in political conceptions, which object to deriving the duty to grant asylum from humanitarian reasons.

Humanitarian approaches in asylum theory identify certain “basic goods” to be provided to all human beings *qua* human beings as a primary matter of moral duty. Philosophers representing this approach usually formulate the requirement of this provision as “all individuals have a *right* to X”. Under humanitarian conceptions, the core of the claim to gain entry is neediness, and the probable consequences of not having needs met, such as starvation and death, for instance.<sup>7</sup> The argument justifying entrants’ claims, invoking the duty to grant asylum, proceeds as follows:

- (P1) All human beings have a basic right to X.
- (P2) Some human beings have no access to X in the state where they reside.
- (P3) There are other states where X is available.
- (C) Human beings with no access to X in the state where they reside shall be admitted to states where X is available.

Theories vary with respect to identifying X, from including basic goods of subsistence such as food and water to including means to provide for oneself and develop capabilities, such as education and work. Meeting the specified “basic needs” or “rights” for deprived persons takes priority over less fundamental claims of citizens—the duty stands as long as no similarly strong claim can be made by citizens of the receiving state.

Approaches emphasizing basic goods of subsistence seem intuitively strong, focusing on immediate situations where access to goods is a matter of life and death. Humanitarian theories hold that the processes leading to deprivation or harm are irrelevant to justifying the duty of admission. As Carens puts it: “From a moral perspective, what should matter the most is the seriousness of the danger and the extent of the risk, not the source of the threat or the motivation behind it” (Carens 2003: 103). Consequently, (P3) states should prioritize granting entry to prospective victims of famine or drought over claims of persons persecuted based on systemic discriminatory targeting but with provisional harms less grave than starvation, for instance. The moral duty to prioritize assistance to those in grave and urgent need might seem intuitively compelling but however noble, it does not account for two important considerations.

First, and most importantly, there is no reasonable link between the imperative of assisting those in need and the proposed tool for that assistance (i.e. inclusive asylum policies). “Basic right” goods of subsistence are generally mobile goods: we need not abandon the duty of securing access to X, even if we do not agree that the most urgent need is the weightiest claim *to asylum*. We should simply look for other ways to realize this humanitarian duty.<sup>8</sup> Deriving the reason to grant asylum from the existence of needs misses justifying the pairing of the need to the proposed tool of remedy (Gibney 2004: 84).

Second, there is no consideration of efficiency. In this approach, the duty of admission is based on the claim that “(P1) All human beings have a basic right to X”. We can thus assume that the aim is to provide for the basic needs of all those entitled (all humans), or for as many as possible. Therefore, efficiency should arguably be a priority. Humanitarian help and protection could be provided in other, more efficient and cost-effective ways than asylum, which means more persons could be saved (Barry 1992).

Political theories of asylum find the lack of “legitimate political membership” to be decisive in determining to whom asylum should be granted. They derive claims not from the mere existence of certain needs, or the gravity of threats, but from the *reasons* why the seeker is in need of help or protection, and the implications of these needs with regard to their and their states’ political status. Clearly, this approach is more promising in terms of justifying the persecution criterion.

According to political theories, the claim for entry is strongest if the causes of suffering, or the risk of harm, indicate a “legitimacy failure” (i.e. involved official actors’ failure to attend to certain duties). This failure is what invokes the obligation of other states to take over the duty to protect, and to take as recognized members (citizens) those whom their origin state failed. Asylum, on this approach, is the granting of a “non-exportable” (Walzer 1983: 48), “special, political good” (Price 2006: 431): membership in a legitimate state.

In what follows, I will introduce two definitions of state failure, designed to justify the shift of duties from the origin state to (potential) receiving state(s) or the international community. According to Andrew Shacknove, it is the failure of providing for the minimal needs of citizens, thereby “severing the bond” between state and citizen (Shacknove 1985), while in Matthew Price’s account, it is the failure to recognize citizens as right-bearing members of the political community (Price 2006: 2009).

Invoking the Hobbesian conception of social contract, Shacknove derives his theory from what he considers to be states’ minimal requirements, duties that, if fulfilled, provide legitimacy: to protect citizens from harm. The state, to stay legitimate (to actually remain a state), has to guard the “bond” consisting of mutual duties and responsibilities with its citizens, by preventing harm stemming from human activity. Otherwise, Shacknove argues, the social contract, the establishment of state authority, makes no sense—we are back in the State of Nature, the “negation of society” (Shacknove 1985: 277). Harm can be inflicted by human agents or by non-human (natural) events. Shacknove asserts, however, that most harm (including deprivation) is in fact the result of human malice or incapability. For him, natural disasters can serve as grounds for asylum, if the state fails to adequately handle the situation.<sup>9</sup>

Harm can be inflicted by state or non-state actors. In the first case, the state obviously negates its duties and turns against its own citizens, resulting in a loss of “bond” and therefore, legitimacy. In the second, the state (willingly or unwillingly) fails to attend to the duties it was by definition created for, the guardianship of social order and the protection of citizens. States unable to accomplish their duties can acknowledge their failure and ask for help from the international community. In this case, the international community shall assist, but shall equally accept refugees from the state, as even the state itself acknowledged that it has failed.

But why does it follow that other states have a duty to assist in the form of asylum? In Shacknove's argumentation, when "society ceases to exist", individuals are in dire need of *membership* in another society. This means, (as the international legal framework also recognizes),<sup>10</sup> that every human individual is entitled to citizenship, understood as politically recognized membership in an "existing" (legitimate) state.

Shacknove's argumentative framework presents a dilemma. Does the duty actually follow from individuals' entitlement to "basic goods", as in humanitarian theories? Or is the entitlement to membership in a legitimate society the basic requirement of a just and sustainable moral order? If it is the first, belonging to a legitimate society is a mere tool: "all individuals are entitled to citizenship" is synonymous with the above-mentioned "all individuals have a right to X", where X is understood as a set of goods to fulfil human needs. In this case, Shacknove's theory is not really political, but humanitarian, claiming that everyone is entitled to provision of basic needs and protection, and therefore those who do not have this, should be granted asylum in a state where they can have this. The only "political" insight Shacknove's approach adds is that *if* we subscribe to his reading of the Hobbesian social contract, states are established precisely for the reason of securing these goods and provision of security. Thus, in this reading, those whose basic needs are unmet shall be granted membership (by Shacknove, equivalent to citizenship) in other, legitimate societies (states) as a tool of protection and provision of basic needs. This addition might address the objection concerning the justified pairing of needs to remedies raised by humanitarian theories, if one interprets the requirements of legitimacy in such a generous way.

On the other horn of the dilemma, if the entitlement to citizenship in a legitimate state is a basic requirement of a just and sustainable moral order, not as a tool for satisfying needs but *in itself*, we have yet to see what justifies this entitlement, and why permitting some to lack citizenship would be wrong. Price offers a justification for this second approach.

Price's account is rather strict, aiming specifically to address the persecution criterion. His justification is based on a combination of Rawls's Law of Peoples, Arendt's (and Benhabib's) conception of "rightless persons", and a number of empirical and efficiency-orientated arguments, some of which were already raised as objections to humanitarian theories. For Price, the emphasis is not on protection of basic rights (understood with or without also covering satisfied basic needs), but on *membership*. The essential question is whether the state is culpable for the harm suffered by the citizen. If it is, harm's occurrence is demonstrative of the victim's loss of membership in her society.

Based on Rawls, Price distinguishes outlaw states, inflicting illegitimate harm on citizens (as opposed to legitimate harm, such as deprivation of freedom as punishment for a criminal act), and burdened, but "good-faith" states, lacking resources to prevent harm being inflicted on their citizens. Persons suffering because of their state's incapability, and burdened societies in general, can and should be helped in ways other than asylum (such as *in situ* aid, temporary protection, resettlement programmes, or military intervention). The duty to grant asylum is upheld for those who have lost membership in their society. This is understood in Arendtian terms: not a temporary or arbitrary loss of certain rights, and certainly not the existence of unmet needs, but a status of "rightlessness". For

Price, asylum is the “granting of a special political good”—membership. Moreover, membership is of critical importance because it is a precondition for having rights *at all*. This can only be secured—the right to have rights can only be guaranteed—by membership in a political community. Underlying Price’s theory is the principle that no individual shall become “rightless”, that persons are entitled to the *right to have rights*. Asylum is the remedy to these persons because they, per definition, *cannot* be assisted in the state that denied their membership, unlike other deprived or harmed persons.

However, there is a problematic point (acknowledged by Price): the possibility of losing membership by the state’s failure to protect citizens from non-state persecution. The loss of membership, and of the “right to have rights”, can also occur when those harmed by non-state actors receive no protection from the state. It fails by not providing protection and prosecution by official agents, not by inflicting harm directly by official agents. For instance, when the police repeatedly refuse to assist a battered woman, considering domestic violence a private matter, whereas they intervene in and prosecute violent assaults carried out in non-private spaces, the state fails to recognize the domestic violence victim as a rights-bearer in failing to protect her from a fellow citizen. Thus, a state’s failure to recognize a citizen (or certain types of citizens) as rights-bearers and full members of that state can be demonstrated by ways other than “outright” state persecution.<sup>11</sup>

## II. What does the term “persecution” mean?

We have seen that the persecution criterion is normatively justifiable through a political conception of asylum, which derives the duty to grant asylum from persons’ entitlement to membership, understood as “the right to have rights”, and holds that persecuted persons are the appropriate recipients of asylum because they were denied membership in these terms. Before examining whether the nexus clause’s enumeration of grounds, and the exclusion of gender as a recognized ground for persecution is justifiable, it is useful to identify the core *descriptive* features of what we understand to be persecution: what makes some harms demonstrative of persecution, what differentiates this term from “any” harm?

Surprisingly, defining persecution and its moral implications (i.e. “what makes it wrong”) has not received much attention from political philosophers, but was mostly assumed to be common knowledge (Kuosmanen 2014: 131). Jaakko Kuosmanen (2014) has established a definition of persecution by unpacking common assumptions based on historical cases. According to him, in order for harm to be considered persecution, there are three necessary, but alone insufficient, conditions to be established: (1) asymmetrical and systemic threat; (2) severe and sustained harm; and (3) unjust discriminatory targeting.

(1/a) “Asymmetrical threat” refers to uneven power relations and capacities between the persecutor (the perpetrator of harm) and the persecuted (the harmed). According to Kuosmanen, this is what distinguishes persecution from inter-state wars—traditionally understood—where the sides are relatively even, each posing a threat to one another, and each in recognized positions of power. This first criterion is rather self-explanatory: if it were not this way, the perpetrators simply could not realize all the other constituting elements of persecution.

(2) “Severe and sustained harm” is also a fairly clear condition. Severity distinguishes persecution from discrimination, and the sustained condition is necessary to establish that we are not talking about an isolated incident, but one similar to discrimination in that abuses are likely to re-occur, foreclosing the long-term possibility of living a decent life free from abuses. We have seen that in the humanitarian approach, the only truly important nature of harm is that it is severe and sustained. The normative relevance of these conditions is in fact so high, according to a humanitarian conception, that they cancel the importance of any other circumstance.

Kuosmanen’s description of (1/b) “systemic threat” can be divided into two main sub-conditions. One sub-condition concerns the *widespread* occurrence of harms of a similar nature, distinguishing “personal vendettas or small family feuds” from persecution (Kuosmanen 2014: 132). The other sub-condition concerns what could be called the origin *state’s agency* in inflicting harm, including indirect infliction of harm, demonstrated by the state’s failure to protect from and/or prosecute intentionally caused harm against some citizens. The conception of “systemic” harm as involving state agency, i.e. finding the state “culpable”, denotes a political dimension of condemnation towards the origin state.

The criterion of (1/b) “systemic threat” is closely related to the third criterion of Kuosmanen’s descriptive definition of persecution, (3) “unjust discriminatory targeting”: one does not exist without the other. This criterion establishes that we do not call it persecution when there are random harms against persons without a discriminatory basis to them, even if harms are severe, re-occurring (“sustained”) and widespread. The typical case for this would be an unstable state’s inability to enforce its monopoly on violence, resulting in high crime rates. Unjust discriminatory targeting of persons cannot exist without state agency being implied, i.e. without the state perpetrating or condoning harm against certain citizens. Conversely, the state is unlikely to exercise agency in persecution by posing threats or not eliminating threats (establishing the “systemic” criterion), without having some discriminatory basis to this. We will return to a more complex examination of the “systemic” and “unjust discriminatory targeting” conditions, evaluating their normative importance and implications to gender, in the next section.

As we have seen in the previous section, standpoints regarding state culpability set apart humanitarian and political conceptions of asylum: according to humanitarian conceptions, this condition does not carry normative implications, while under political conceptions, it is precisely this culpability that invokes the duty to grant asylum. Political theories draw largely on the normative relevance of “systemic” threat, understood as threat involving state agency.

Shacknove’s argument emphasizes the element of “severity and sustained-ness” as carrying normative importance, as well as the harm’s “systemic” nature, in that he claims that state agency can be established in virtually any circumstance. Within his framework, a state failed by its weakness in ability to protect and provide might not be condemned *per se*, but it is declared “inexistent”. In this perspective, “asymmetric” power relations do not necessarily have to be demonstrated, since the absence of power on part of the state, and the absence of a clearly identifiable persecutor, can also result in rightful asylum applicants. In Shacknove’s approach, the importance of harm’s “systemic” nature understood as the harm being widespread is not justified (“bonds” severed with one or a few citizens are bonds



severed nonetheless), and neither is the importance of unjust discriminatory targeting.

In contrast, Price's justification addresses all the elements constituting the definition of persecution, putting the emphasis on the "systemic" as involving state agency and condemnation. Unlike humanitarian theories and Shacknove's quasi-humanitarian political conception, Price focuses less on severity, as illegitimate harm by the state could be demonstrated even in the case of less "severe" harms. Meanwhile, we must not forget the distinction between losing *a* right and losing *the* right to have rights, i.e. losing membership, which is arguably a rather severe "harm" (or at least, might give rise to extremely severe harms), and which also justifies the normative relevance of the "sustained" element. Price contends that the nexus clause, captured in the element of "unjust discriminatory targeting", is only a factual statement. He contends that those who are victims of harms in his conception, i.e. those who suffer harms demonstrative of all the other conditions establishing persecution, always get into this position because they are targeted on some identifiable basis. Otherwise, we are talking about a burdened state, to be assisted in other ways.

Kuosmanen's definition is a descriptive, not normative, analysis of the issue at hand. He defines persecution by unpacking common assumptions in what we refer to when we say "persecution" into these elements: (1/a) asymmetrical and (1/b) systemic threat, i.e. threat that is widespread and involves state agency; (2) severe and sustained harm; and (3) unjust discriminatory targeting. If all these conditions are present in a case, then the case is considered to constitute persecution. This definition in itself would not mean that persecution is a normatively justified criterion for granting asylum, and those who can establish they are persecuted, and only those, should have a right to asylum. However, based on this definition, paired with Price's normative justification of persecution as the appropriate ground for asylum, which addresses each constitutive element of the term, we can proceed to a more complex examination. The next section will consider whether the normative concerns that make persecution a justified ground for asylum also apply to gender, a case not listed in the nexus clause; and whether the descriptive-definitive elements that, according to Kuosmanen, qualify some harms as persecution, could apply to gender-based harms.

### **III. Should she be granted asylum? State agency, unjust targeting, and gender as a nexus**

Women are usually thought of as *discriminated* against based on gender, or as *becoming victims* of violence based on gender, but are rarely thought of as "persecuted" based on gender, which is mirrored by the omission of gender from the nexus clause's list of grounds. This is so, despite the fact that gender-based violence and discrimination against women happens in circumstances of asymmetrical power relations, is widespread, severe and sustained, and targets women unjustly and in a discriminatory manner. However, the agents directly responsible for perpetrating the most severe harms are usually not official entities but fellow citizens, which might explain why it is not traditionally thought of as persecution.

Nevertheless, even in such cases, state agency can be established in at least two ways. One is the lack of protection from harm, and involves prior preventive measures. This occurs by failing to provide legal provisions of security for the given type of harm and victim (e.g. not establishing laws against domestic violence) or lack of intervention (e.g. restraining orders or police intervention). Another way, even if such laws are introduced, and perhaps if even intervention is provided, is the lack of perpetrators' prosecution posterior to the harm.

Additionally, depending on how we interpret the "severity" element of persecution, it can be argued that the kind of sustained, unjust, discriminatory and targeted "harm" against women amounting to denial of membership and the right to have rights is also inflicted directly by some states. Interpreting severity based on the concept of "rightlessness", this occurs when women (or any kind of people) are systematically and perpetually denied socio-economic goods and rights that are generally granted to fully recognized citizens, such as rights to ownership, entering contracts, education, work, suffrage, movement in public spaces or driving, to name a few.

On the basis of the persecution criterion's justification by Price, accompanied by Kuosmanen's recognition of *indirect* state agency as state agency, non-state harm can be recognized as persecution if the state systematically fails to protect (prospective) victims and prosecute perpetrators, thereby demonstrating its denial of, and deprivation from the victims' *right to bear rights*. This is not to claim that the state should be omniscient: it cannot foresee and prevent all occurrences of harm. But, given its authority and monopoly on violence, and—even in the most minimal, libertarian "night watchman" state conception—its duties to protect citizens from one another, the state is to establish laws that prohibit citizens from harming one another, and is to prosecute persons who commit harms, thus guarding its legitimacy. When the state does not use its authority and power to protect (certain) citizens from (certain) inflictions of harm via laws and intervention, and/or not to prosecute the perpetrators of these harms, it fails to recognize citizens equal as rights-bearing members. The state's passivity, allowing harm to occur and re-occur without consequences for the perpetrator becomes the denial of membership of those on whom it allows harm to be inflicted, similar to when the state directly inflicts (illegitimate) harm. The illegitimate nature of such harm stems not only from it being inflicted by "non-authorized" users of violence, but from illegitimate, discriminatory reasons based on which the state refuses to fulfil its role.

Obviously, not all harm perpetrated by non-official actors constitutes persecution. There are crimes that are arbitrary as to whom they affect, or crimes that are personal, directed at an individual *qua* that specific individual, no attributes attached. Harm becomes a matter of political concern when the social status or group membership of the victim(s) contributes to, or is the sole reason for inflicting harm upon them, and/or for the perpetrators being allowed to do so by the state (or not being prosecuted for doing so).<sup>12</sup> When the state establishes a *pattern* of differentiation between victims or perpetrators, i.e. it fails to protect and prosecute in case of certain victims but not in case of others, we are dealing with persecution. Macklin refers to the importance of systemic perpetration and systemic lack of law enforcement to identify what is persecution: "It is a truism that refugee law does not protect individuals from 'common crimes'; it only protects them from 'persecution'. The transition from 'common crime' to 'persecution' turns, in part, on the role of

the state in *systematically* failing to protect the claimant (*and the type of claimant*) from the feared harm” (Macklin 1995: 233: emphasis added).

Persecution involving harm *by* private (non-official) actors does not necessarily mean that the act is committed “*in*” what is traditionally perceived as the private sphere. However, harm in the private sphere and by private agents is worth discussing for its key relevance in gender-based persecution. The “Women’s Rights are Human Rights” movement pointed out shortcomings in the establishment and conceptualization of human rights, failing to recognize the kinds of human rights violations women face. This is because women predominantly face them in the so-called private, not in the public, realm (Bunch 1995). This discourse is easily translated to the asylum context, and not only because the right to asylum is traditionally rooted in the “human rights regime” (Anker E. 2002), but because presupposing that illegitimate harm is by definition one committed in the public and in a non-gendered way, demonstrates a similar deficiency in acknowledging the realities of women’s situation. Zeigler and Stewart point to the lack of women’s perspective: “Men [...] are seldom victimized because of their very maleness, but because of a political, racial, or religious conflict [...] not [as] part of an accepted, institutionalized system of subordinating them because of sex. [...] A policy developed with transgressions against men in mind cannot readily shift to accommodate the violence produced by patriarchy” (Zeigler and Stewart 2009: 124). Inlender emphasizes that one should acknowledge a difference between gender-specific forms of harm, and gender-based harm, i.e. harm in which the victim’s gender contributes to being picked as a target (Inlender 2009). However, from a feminist perspective it can be argued that in no gender-specific instances of harm can the gender of the victim be fully dissociated from her victimization.

Macklin, based on MacKinnon, argues that the asylum framework replicates the same public/private dichotomy that states refer to when they disregard harm inflicted on women in the private sphere. It does so by not recognizing persecution involving non-state actors in the private sphere, but assuming it to be the “private matter of the state” how it deals with such instances of harm. In her words: “...just as local police are reluctant to intrude into the ‘private’ sphere of the home, the international human rights regime is reluctant to intrude into the ‘private’ sphere of domestic law and law enforcement” (Macklin 1995: 235). At the same time, it is hypocritical to assume that “private matters” are untouchable by public legislation: in every state, laws of marriage, divorce, and other laws involving private matters are enforced publicly. Furthermore, if these laws systematically disadvantage women, or explicitly serve as points of reference to harming women, they can constitute part of the public atmosphere which in and of itself can amount to persecution, and contribute to the infliction of “private” harm. Consider as examples the acceptance of dowry violence or family tribunals.

Based on Price, if all the other elements of the definition of persecution are realized (harm is asymmetrical, severe, sustained and systemic), the victims are by definition ones targeted in a discriminatory manner, based on some “nexus” (are targeted unjustly and in a discriminatory way). This means that in fact, only on an unjust discriminatory basis can someone be persecuted, as a matter of definition. But this still does not *justify* this element. The idea of illegitimate, as opposed to legitimate harm offered by Price in the persecution criterion’s justification is akin in meaning to the idea of “unjust” discriminatory targeting within this element of

persecution's definition as a term. But in both forms, this requirement calls for further examination.

The element of *unjust* discriminatory targeting, as well as of *illegitimate* harm, is to exclude the possibility of mistakenly terming "just" targeting or legitimate harm as persecution. The typical example of legitimate or just harm, used by both Price and by Kuosmanen, is the limitation of freedom (incarceration) as punishment for a criminal act. But who determines what harm is legitimate or just, and what harm is not; what acts merit legitimate or just harm as punishment, and what is the legitimate or just punishment for what act? When duties to grant asylum are discussed, theorists seem to be unsure whether the subject is the correct course of action on the part of liberal democratic "western states", or whether the subject is "universal duties". Up until the point of defining what is legitimate and illegitimate, just and unjust on the part of states, the quest to find a universally acceptable normative justification to the persecution criterion and persecution's definitive elements seems manageable. However, the discrepancy between the diverse value-sets existing on a global level poses serious challenges to specifying the meaning, and determining the justifiability of this element.

In identifying legitimate state-inflicted harm, or identifying cases when victims are illegitimately unprotected, the subjective value sets of different cultures and states give room for a variety of interpretations of the "legitimacy" or "justice" criterion. Harms and deprivations from freedom, viewed as legitimately imposed in one state, may be considered illegitimate by another. For instance, some states regard the death penalty as an illegitimate infliction of harm *tout court*. So it may be justifiable to grant asylum to a criminal who is sentenced to capital punishment in his state of origin, even though in his state, this is viewed as legitimate harm.

Certainly, some states would not consider disproportionate punishments for women appearing in public unveiled or for survivors of rape as illegitimate, unjust or discriminatory harm, nor would agree to calling the lack of protection from and prosecution of domestic violence an illegitimate absence of state protection. But some states would also not regard disproportionate punishments to political dissidents or religious outcasts unjust or discriminatory, or agree to calling the lack of their protection illegitimate. Still, political and religious dissidents are to be protected according to the nexus clause, while victims of gender-based persecution remain excluded and thus unprotected not only by their own state, but also by the international community of states.

A possible reason why gender still has not made it to a ground could be what Okin drew attention to with her question "Is multiculturalism bad for women?" (Okin 1999). According to Okin, the *modus vivendi* of multicultural tolerance grants an automatic "pass" to violations when they occur based on gender, considering the different ways in which women are oppressed as constitutive elements of cultures too important to be condemned. And asylum's expressive dimension, as we saw, involves condemnation.<sup>13</sup>

Establishing principles for determining legitimate and illegitimate harm and identifying the "just" bases for inflicting harm are important rights of states. It is essential to exercising their authority, autonomy and sovereignty. This prevents other states from (or trumps other states' duties to) "rescue" those who they would consider rightful asylum seekers while the victims are still in their country of origin. The duty to grant membership applies only to those outsiders who left their state

and are viewed by the respective receiving state as victims of illegitimate harm (or unjust discriminatory targeting).

Not listing gender as a recognized and binding ground is an implicit acceptance of, or at least tolerance towards, not considering systemic, severe and sustained harm against women unjust or illegitimate. Worse still, it is barely short of foreclosing the possibility of asylum to victims of gender-based persecution. Since many states constantly struggle to limit immigration, they are unlikely to look for ways to grant asylum to applicants who cannot present a ground binding by international law.

Price understands the nexus clause as providing *examples* of illegitimate inflictions of harm. He assumes that whenever people are systemically persecuted by their state, or when the state systematically allows some people to be harmed by fellow citizens in a way that amounts to persecution, the reason for this, the basis of this is always traceable to a social status or characteristic such as those listed. The problem is that in practice, when determining whether or not one is granted asylum, enumerated grounds are not examples, but are treated as the only binding grounds. Even though the UNHCR introduced several guidelines and handbooks on how to interpret claims based on gender, kinship ties, gang crime, etc., these are not binding.

Moreover, three of the listed grounds are specific: ethnicity, religion and nationality. Interpretation of “social group belonging” and “political opinion” is subject to the receiving state’s judgement.<sup>14</sup> All three specific enumerated grounds are in fact social/political grounds. They are recognized because of their socially/politically significant nature. And yet, the social-group ground is itself now the weakest basis for asylum claims because it leaves so much room for free interpretation.

Macklin suggests that this inconsistency should be addressed by recognizing “systemic harm (persecution) inflicted on a social or political basis” as a general ground for asylum, to replace the “hierarchy of grounds” (Macklin 1995: 161). In addition, all kinds of such bases could be enumerated, so that “social/political membership” would be better understood, and the danger of arbitrary non-recognition of some grounds upon which persecution is committed in a way that fulfils every element of the term’s definition, and in a way that invokes the normative duties towards the persecuted, would be eliminated.

## Conclusion

The persecution criterion in the Geneva Convention is normatively justifiable through Price’s political approach, which resonates with Kuosmanen’s descriptive definition of the term “persecution”. However, the nexus clause attached to the persecution criterion is not justifiable in its current form.

Humanitarian approaches, deriving the right to asylum from the duty to assist, emphasize the normative and moral relevance of the severe and sustained conditions of harm, dismissing the importance of other conditions that would constitute persecution. These theories fall short of justifying pairing the proposed remedy with the problem, as severe and sustained harm without the conditions that transform mere harm into persecution can be terminated in other, more efficient ways.

Andrew Shacknove aims to justify asylum as the correct remedy for victims of severe and sustained harm through arguing that state agency can be established in any case when severe and sustained harm is present. In his interpretation, the severe and sustained conditions always imply systemic threat (understood as threat involving state agency, but not necessarily understood as being widespread); i.e. whenever severe and sustained harm occurs, the state plays a role in this harm's existence. Shacknove, like the humanitarian theorists, grounds his claims in persons' entitlement to security and basic goods, and invokes the Hobbesian social contract to show that when this entitlement is not realized, the harmed are entitled to membership elsewhere. This justification dismisses the importance of widespread systemic harm, asymmetrical power relations and unjust discriminatory targeting, and thus in this view, the persecution criterion and nexus clause are not justified.

Matthew Price's theory, based on a conception of membership as rights-bearer status, justifies all the elements of the definition of persecution as normatively relevant conditions, invoking the duty towards, and only towards, persecuted asylum-seekers. This duty entails that those who were denied membership in their origin state should be granted entry to, and membership in, another state. However, endorsing Price's justification still does not justify the contents of the nexus clause as the legal materialization of persecution's definitive element "unjust discriminatory targeting". It might be true that, as a rule, only on an "unjust, discriminatory" basis are persons harmed severely and in a sustained, systemic, widespread manner involving asymmetrical power relations and direct or indirect state agency. Nevertheless, it is not established that this "unjust, discriminatory" basis cannot be anything else than the bases listed in the nexus clause.

Harm against women on the basis of gender most times involves asymmetrical power relations, is severe, sustained, systemic, widespread, involves direct or indirect state agency and is perpetrated on an unjust, discriminatory basis. This means that all the conditions describing gender-based harm qualify it as persecution. The justification that applies to all these conditions, establishing them as normatively relevant to identifying rightful asylum applicants, also applies to women harmed on the basis of gender. State agency can be established by indirect action: the absence of state protection and prosecution. This means that the typical forms of harm perpetrated against women by non-official actors can fit the definition of persecution, when these harms are ignored or condoned by the state. This is indicative of the denial of victims' membership as rights-bearers. Direct, state-imposed gender-based discrimination against women can also amount to persecution, if it is demonstrative not only of a temporary or arbitrary loss of rights, but of a permanent status of rightlessness and lack of recognition as a member of the political community, which is a severe and sustained "harm" according to Price's justification of persecution as a criterion.

Unjust discriminatory targeting is an important element of the persecution criterion, and is legally embodied in the nexus clause. However, it can apply to grounds currently not recognized by the nexus clause. Different states' positions on whether the harm—directly inflicted by the state or permitted by the state—is considered unjust or illegitimate makes no difference to whether the grounds based on which persecution can be committed or is committed, are to be recognized. This means that even if some states found that denying membership or the right to have rights is acceptable in case of women, this possibility not only justifies, but requires,

granting asylum to women of this status in other states, and requires the establishment of a firm legal basis to do so.

## Notes

<sup>1</sup> Noa Wirth Nogradi is a PhD Candidate and tutor at the School of Politics and International Studies, University of Leeds, UK. Her PhD research is focused on feminist concerns in global justice. She is most grateful to Rachelle Bascara and two anonymous reviewers, who provided valuable feedback on previous versions of this paper, and to Andrew Williams and Paula Casal for comments on the first version of this paper. She is grateful to Judit Wirth for bringing this topic to her attention, inspiring this research.

<sup>2</sup> Note: the exclusive use of masculine pronouns.

<sup>3</sup> Examining whether other elements of the Convention are normatively justifiable or legally coherent—such as the requirement that the claimant has to be in or at the border of the state—is also an important task, but unfortunately, it exceeds the scope and limits of this paper.

<sup>4</sup> Recognizing sexual orientation as a ground is also an important matter. Arguably, some men are also persecuted based on gender, most importantly when not conforming to gender-roles in terms of sexual orientation. This paper focuses on gender-based persecution against women, but the conclusions regarding the nexus clause can be interpreted to apply to other grounds, including LGBTIQ.

<sup>5</sup> This limited attention to gender is not an unfamiliar phenomenon in discourses centred on universal rights and global ethics concerning states' and the international community's duties. For critical analysis in this realm, see Catharine MacKinnon's "Are Women Human? And Other International Dialogues" (2006), and the influential Women's Rights are Human Rights movement and scholarship, especially Charlotte Bunch's works.

<sup>6</sup> To see the wider context of this discourse, refer to the partiality-impartiality debate discussed in-depth by Rachelle Bascara (2016).

<sup>7</sup> Miller provides a possible explanation of why humanitarians articulate "basics" as rights (as "basic human rights") rather than as needs (Miller 2007: 164).

<sup>8</sup> Van Parijs uses this idea to justify global distributive justice: if we have these borders that determine the likelihood of grave deprivation, in turn (P3) states are obliged to assist distant (P2) others. (Van Parijs 2007: 16)

<sup>9</sup> For instance, drought in itself does not inevitably cause famine: should the state attend to its duties, it would establish efficient ways of prevention, and distribution of food in the country (Shacknove 1985, 279).

<sup>10</sup> The UN Convention Relating to the Status of Stateless Persons (1954) binds states not to expel stateless persons, but urges favouring their naturalization (unless they find the stateless person a serious threat to national security and even in this case, they should allow him/her a reasonable time to gain admission in another state). (Chapter V/31-32.)

<sup>11</sup> Price speaks primarily of physical harm; however, deprivation from rights and freedoms, or economic harm, may well be interpreted within his theory. For example, he would not hold that not providing access to education, or not presenting citizens with property, is illegitimate harm calling for a duty to grant membership elsewhere. *But* cases of "Numerus Clausus"-like situations, or the

systematic denial of some's rights normally exercisable by citizens (such as denying "certain kinds of people's" right to education, or to hold property), could be demonstrative of denying their membership.

<sup>12</sup> Systemic infliction of harm upon certain "types of persons", and systemic failure to protect certain "types of persons", are interrelated: the two practices strengthen one another. That is, if the state does not protect some, they became easy targets for harm; and if some are so regularly and systemically harmed, it might not "occur" to the state that such harm is "not normal" and should be prosecuted.

<sup>13</sup> For a further discussion of this tension, see Nath (2013).

<sup>14</sup> Courts that find an asylum claim based on none of the explicitly enumerated grounds justified tend to formulate their decisions in subtle ways. This is done in order to provide the narrowest possible precedent. Here is an example: "Claimant, opposing Y practice, but forced to undergo/do Y, or is punished by Y, as it is demanded/accepted in Z tribe, is persecuted for belonging to the social group of Y-opponents in Z" (GAO v. GONZALES 2006; Matter of A-T 2008).

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