

# How to Address the Inadequacies in the Protection of Transgender Female Refugees in Countries of Refuge?

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SIGNATURE...K G LOUW.....

DATE: 11 FEBRUARY 2018.....

## **DEDICATION**

This thesis is dedicated to every transgender refugee who has suffered and continues to suffer in silence around the globe. I hope that this thesis does your struggle justice.

## **ACKNOWLEDGMENT**

My biggest thank you must go to my parents Brennan and Denise for their unwavering support and encouragement in my years of study. I am truly grateful for all they have done for me.

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## **ABSTRACT**

Despite their prevalence in the global refugee system, the unique struggles faced by transgender female refugees in countries of refuge has remained silent. Although existing as places of refuge, host states have remained particularly hostile to these refugees. The term ‘transgender’ is still relatively new and this thesis aims to outline the plight of transgender female refugees through the various forms of violence directed against them. Thus, an extended definition of violence must be taken to be able to contemplate the ways in which the transgender woman is assaulted, whether that takes the form of physical, sexual, economic, or medical violence. Moreover, despite an international and regional legal system existing, which delineates the human rights of refugees across the globe, there still appears to be a disconnect between the law and the lived realities of the transgender female refugee. The law itself is no ally to the transgender women due to its inherent patriarchal nature; the transgender woman is perceived as a threat to the existing patriarchal and heteronormative structures in place in society. Moreover, the 1951 Convention Relating to the Status of Refugees was drafted at a time when the needs of transgender female refugees were not known and thus most of the existing international human rights instruments all pre-date the emergence of transgender rights. This disconnect is further fuelled by the lack of hate crime law in the international arena as a tool to enforce and protect transgender female refugees. Lastly, it was further seen that South Africa, as a country of refuge for African transgender refugees, provides a good example of ways in which the transgender woman can be assisted, such as through the development of Ubuntu and hate crime legislation.

REFUGEE, TRANSGENDER RIGHTS, PATRIARCHAL OPPRESSION, 1951 UN  
REFUGEE CONVENTION

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# CHAPTER ONE

## INTRODUCTION

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### 1. INTRODUCTION

Since the end of World War II, human rights have taken a global stage in the international community. Scholars, such as James Griffin, have stated that:

‘A human right is one that a person has, not in virtue of any special status or relation to others, but simply by virtue of being a human. That much is agreed.’<sup>1</sup>

As World War II saw one of the largest refugee crises in history, it is not surprising that in 1951 the United Nations passed its Convention Relating to the Status of Refugees.<sup>2</sup> The Convention was the first international legal instrument to introduce specific protection for refugees and further, it is important from the outset to recognise that refugee rights are human rights as ‘safeguarding human rights is of critical importance not only to the prevention of refugee problems but also for their solutions’.<sup>3</sup> Vincent Chetail has demonstrated in his work that ‘as a result of a gradual normative process, they have become so intimately interdependent and imbricated that it is now virtually impossible to separate one from the other’.<sup>4</sup> With this borne in mind, it can be seen that refugees are entitled to the protection afforded by the numerous international legal instruments that focus on human rights issues that face the transgender female refugee.

A refugee has been defined conceptually as ‘a person fleeing life-threatening conditions’,<sup>5</sup> and more specifically by the UN Refugee Convention as people who are fleeing from an objectively based fear of persecution, which has been limited to a number of grounds, namely race, religion, nationality, membership of a social group or due to political opinion.<sup>6</sup> As a class of people, refugees face numerous challenges on the journey seeking asylum and even

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<sup>1</sup> J Griffin ‘Discrepancies between the Best Philosophical Account of Human Rights and the International Law of Human Rights’ (2001) 1 *Proceedings of the Aristotelian Society* at 2.

<sup>2</sup> 189 UNTS 150, adopted 25 July 1951, entered into force 22 April 1954 (hereafter referred to as the UN Refugee Convention).

<sup>3</sup> B C Nirmal ‘Refugees and Human Rights’ (2001) 1 *ISIL Yearbook of International Humanitarian and Refugee Law* at 94-96.

<sup>4</sup> V Chetail ‘Are Refugee Rights Human Rights? An Unorthodox Questioning of the Relations between Refugee Law and Human Rights Law’ in R Rubio-Martin *Human Rights and Immigration* (2014) Oxford University Press: Oxford at 68.

<sup>5</sup> A E Shacknove ‘Who is a Refugee?’ (1985) 95 *Ethics* at 277.

<sup>6</sup> UN Refugee Convention at Article A (2).

in the countries of refuge. When one looks at South Africa as an example, refugees are faced with intense xenophobia and a corrupt home affairs system.<sup>7</sup> On a more global level, refugees are stigmatised, with societies viewing them as a burden. In Europe, for example, refugees have been blocked off from entering Europe through the bordering States. Hungary and Serbia have even put up large fences to prevent asylum seekers from gaining access to Europe.<sup>8</sup> In the United States, asylum seekers are kept in detention centres for prolonged periods of time and denied basic rights.<sup>9</sup> It is clear then that refugees face serious issues and have their human rights violated on a daily basis.

However, within refugees there are a diversity of experiences. Certain classes of refugees face additional barriers and threats. Transgender female refugees are such a class. The United Nations High Commissioner for Refugees (UNHCR) released a report, which detailed the experiences of female refugees in Latin America travelling to the United States. After interviewing a number of transgender women, the UNHCR noted these additional problems:

‘They reported routine discrimination, harassment, beatings, and attacks on them or their friends, as well as forced sex work. Transgender women repeatedly emphasised that the police provided no protection and in some instances perpetrated further harm. Many...talked of being confronted by constant discrimination...simply leaving the house was often a cause for discrimination.’<sup>10</sup>

Despite the fact that international human rights instruments exist, which serves to protect humans from violence and harm, transgender female refugees are not benefitting from this scope. One transgender woman, whose name was hidden for protection, testified how her whole life she has faced discrimination and violence. At seven years old she was raped and at 15 the police attempted to burn her alive. Yet, despite arriving in a city of refuge for refugees, she faced continued violence at the hands of the police and other refugees.<sup>11</sup> Moreover, on a

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<sup>7</sup> See L B Landau ‘Protection and Dignity in Johannesburg: Shortcomings of South Africa’s Urban Refugee Policy’ (2006) 19 (3) *Journal of Refugee Studies*; See also Staff Reporter ‘Government in Denial about Xenophobic Violence’ SA Breaking News 2014, available at <http://www.sabreakingnews.co.za/2014/06/19/xenophobic-violence-dismissed-by-government-to-keep-its-image/>, accessed on 29 March 2017.

<sup>8</sup> See <https://www.theguardian.com/world/2016/oct/04/serbia-refugees-hungarian-border-macedonia-bulgaria>, accessed on 29 March 2017.

<sup>9</sup> G Hallett ‘Asylum Seekers Already Face Prolonged Detention’, available at <https://www.humanrightsfirst.org/blog/asylum-seekers-already-face-prolonged-detention>, accessed on 1 January 2018.

<sup>10</sup> UNHCR ‘Women on the Run: First-Hand Accounts of Refugees Fleeing El Salvador, Guatemala, Honduras and Mexico’, 26 October 2015 at 27-8.

<sup>11</sup> *Ibid* at 29.

more international level, another study highlighted that there is widespread intolerance of transgender people and due to this, there is much transphobic persecution in the lives of transgender female refugees and asylum seekers.

This then raises the question why are transgender female refugees facing additional problems than other refugees; why are their human rights violated in such violent ways; why is their plight invisible and silent; and what can be done to remedy and help protect this class of refugees.

## 2. RESEARCH CONTEXT

According to the UNHCR, there are approximately 21.3 million refugees in the world,<sup>12</sup> with the vast amount coming from Africa, Latin America, the Middle East and Asia.<sup>13</sup> The number of transgender female refugees has never been officially recorded as, due to their stigmatisation, it is almost impossible to try to gather such information. What is known is that on a global stage, this class of refugees are facing struggles in each corner of the globe, whether it is forced sex work in Iran,<sup>14</sup> the denial of hormone therapy in the United States of America,<sup>15</sup> physical assaults in South Africa,<sup>16</sup> or sexual violence in Latin America.<sup>17</sup> As of yet, not much has been done to protect transgender female refugees. They are still facing these struggles on the global stage, despite the fact that they are entitled to human rights protection and that they have rights as humans and rights as refugees. This thesis will unpack what human rights are implicated in the life of a transgender female refugee in refuge. It will outline the types of violence they face and investigate whether there is a protection-gap and if there is, if a solution can be found. If there is indeed a protection gap for transgender female refugees, a way must be found to end their persecution and address these unique struggles as refugees flee persecution and should not face further persecution in refuge.

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<sup>12</sup> UNHCR 'Figures at a Glance', available at <http://www.unhcr.org/figures-at-a-glance.html>, accessed on 3 April 2017.

<sup>13</sup> See <http://popstats.unhcr.org/en/overview>, accessed on 3 April 2017.

<sup>14</sup> S Kalantari 'Transgender Iranian Refugees are Struggling to Outrun Prostitution and Violence', available at <https://news.vice.com/article/transgender-iranian-refugees-are-struggling-to-outrun-prostitution-and-violence>, accessed on 3 April 2017.

<sup>15</sup> D O'Day-Senior 'The Forgotten Frontier – Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention' (2008) 60 (2) *Hastings Law Journal*.

<sup>16</sup> B Ao 'An Awkward Reason for Seeking Refugee Status', available at <http://www.iol.co.za/news/south-africa/western-cape/an-awkward-reason-for-seeking-refugee-status-2024643>, accessed on 3 April 2017.

<sup>17</sup> UNHCR op cit note 10.

### 3. OVERVIEW OF THE APPLICABLE LAW

In addressing the question at hand, this thesis will draw heavily on the rights of refugees as outlined in the 1951 UN Refugee Convention and the 1967 Protocol,<sup>18</sup> which are the main international sources delineating the rights of asylum seekers and refugees. Moreover, the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)<sup>19</sup> will be considered in much detail when considering the African regional system, as this is the main refugee Convention that assists refugees in Africa.

In order to discuss the variety of rights that are available to refugees, some of the major scholars in refugee law will be consulted, such as Jeff Crisp, Paul Weis, and James Hathaway, to name but a few.<sup>20</sup> Regional and domestic scholars will also be consulted in order to better understand their systems respectively.

Moreover, as discussed previously, refugee rights are human rights and this means that the international human rights instruments are of importance. With regard to the specific ‘silent’ plight of transgender female refugees, the International Covenant on Civil and Political Rights<sup>21</sup> (hereafter referred to as the ICCPR) will be considered in detail. The ICCPR outlines a number of rights that are of relevance to the violence suffered by this class of refugees. This Covenant, alongside the 1951 UN Refugee Convention, will importantly demonstrate how a legal route exists to provide protection to transgender female refugees and yet the reality on the ground is somewhat different. Attention will also be drawn to a variety of treaties, such as the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment,<sup>22</sup> the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW),<sup>23</sup> and the Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>24</sup>

When looking regionally and domestically it will be important to consider the human rights that have been committed to in the regions. If it is accepted that human rights apply to

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<sup>18</sup> Protocol Relating to the Status of Refugees, 31 January 1967, UNTS 606.

<sup>19</sup> OAU Convention, 10 September 1969, 1001 UNTS 45.

<sup>20</sup> See B Gorlick ‘Human Rights and Refugees: Enhancing Protection through International Human Rights Law’ (2000) 69 (2) *Nordic Journal of International Law*; See also A Edwards ‘Human Security and the Rights of Refugees: Transcending Territorial and Disciplinary Borders’ (2009) *Michigan Journal of International Law*; P Weis ‘Human Rights and Refugees’ (1972) 1 *Israel Yearbook on Human Rights*; J Hathaway *The Rights of Refugees under International Law* (2005) Cambridge University Press: Cambridge; A de Zayas ‘Human Rights and Refugees’ (1992) *Nordic Journal of International Law*; A Edwards ‘Human Rights, Refugees, and the Right to Enjoy Asylum’ (2005) 17 (2) *International Journal of Refugee Law*.

<sup>21</sup> 16 December 1966, UNTS 999.

<sup>22</sup> 10 December 1984, UNTS 1465.

<sup>23</sup> 18 December 1979, UNTS 1249.

<sup>24</sup> International Covenant on Economic, Social, and Cultural Rights, 16 December 1966, UNTS vol 993.

everyone by virtue of their humanity, these human rights will have direct applicability to transgender female refugees. Specifically, reference will be made to the African Charter on Human and Peoples' Rights,<sup>25</sup> the American Convention on Human Rights,<sup>26</sup> and the European Convention on Human Rights.<sup>27</sup>

What will be gathered from all of these legal instruments is whether transgender female refugees, as humans, are entitled to the human rights guaranteed to in international human rights law and whether or not they are suffering on the ground; if their rights are not being guaranteed. At this point, a more in depth look will be needed in looking at the success and failure of regional and domestic systems in protecting transgender female refugees to see what can be learnt.

#### **4. THE IMPORTANCE OF INVESTIGATING DIFFERENT LEGAL ORDERS**

Legal research into foreign legal orders is an invaluable tool in any thesis. As Edward Eberle so eloquently put:

Comparative law is a quest for the exotic, the different, the other. It examines the dimensions and forms of law and culture outside the normal ken of one's visage in the hope that one can gain new and different perspectives on law, culture, and patterns of order. Equally important, comparative law ultimately focuses back on local culture.<sup>28</sup>

It is an emerging fact that in today's world we are beginning to see a global culture forming. The creation of the United Nations is testament to this fact; the creation of Brazil Russia India China South Africa (BRICS) and North Atlantic Treaty Organisation (NATO) are further examples. It has become impossible to look at a term, such as human rights, that has a global impact and try and view it in isolation. It is only through worldwide investigation that we can seek to learn from other legal systems, to help one understand their legal culture. Eberle emphasises this point when he states that 'the insights gathered can usefully illuminate the inner workings of a foreign legal system. And these insights can be applied to our own legal culture'.<sup>29</sup> Another useful part of investigating a foreign domestic legal order is that it can help to dispel biases about other legal cultures; it promotes diversity and inclusivity.

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<sup>25</sup> 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58.

<sup>26</sup> Pact of San Jose, 22 November 1969, entered into force 18 July 1978.

<sup>27</sup> November 1950, ETS 5.

<sup>28</sup> E J Eberle 'The Method and Role of Comparative Law' (2009) 8 (3) *Washington University Global Studies Law Review* at 471.

<sup>29</sup> *Ibid* at 452.

James Gordley held the view that ‘the law of a single country cannot be an independent object of study. To understand law...one must look beyond its boundaries’.<sup>30</sup> Much criticism has been made that human rights legal work has been Eurocentric focused and western; it is only through looking to other States that this notion can be extinguished. With regard to the study of addressing the inadequacies in the protection of transgender female refugees, it is useful to study successful legal systems in how they have protected this class of refugees.

## 5. A CONCEPTUAL APPROACH: THE FEMINIST PERSPECTIVE

As this thesis critiques the law, it shall do so through the discourse of feminism, which has a ‘rich discourse in questioning the legitimacy of laws as they impact on women’.<sup>31</sup> The nature of this thesis will be feminist at its core as it is delving into the issues of transgender females, who by classification are women; the issue is therefore a feminist one. Feminism, at its core, tries to provide gender equality and confronts patriarchy. Indeed ‘it thereby offers a frontal challenge to patriarchal thought, social organisation, and control mechanisms’.<sup>32</sup> Feminist scholarship will, therefore, be used ‘as a theoretical framework to analyse these laws, processes and administrative decisions’<sup>33</sup> that affect transgender female refugees. Feminism is not just linked to solely biological females, but covers any identity that threatens patriarchy, which would necessarily involve transgender females. Thus, feminism can be considered the appropriate approach to critique and analyse the implementation of these laws dealing with transgender female refugees as it attempts to provide gender equality: a system where they are dealt with equally and fairly and protected by the law. The scholarship surrounding feminism can be used to reconsider what the law should look like and provide solutions to providing equality.

## 6. RESEARCH AIMS AND OBJECTIVES

The aim of this study is to canvass the human rights violations faced by transgender female refugees on a daily basis so as to lift the ‘silence’ of their plight. The thesis will illustrate how

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<sup>30</sup> J Gordley ‘Comparative Legal Research: Its Function in the Development of Harmonised Law’ (1995) 43 (4) *The American Journal of Comparative Law* at 555.

<sup>31</sup> K A Chinnian ‘Gender Persecution as a Ground for Asylum in South Africa and Canada: Reconceptualising a Theoretical Framework for Assessing Refugee Claims by Women’ (2014) PHD Thesis, University of the Western Cape at 26.

<sup>32</sup> K Offen ‘Defining Feminism: A Comparative Historical Approach’ (1998) 14 (1) *Signs* at 151.

<sup>33</sup> Chinnian op cit note 31 at 30.

the variety of international human rights instruments have failed practically to provide protection and how transgender refugees are stigmatised to the point that they are not considered worthy of having human rights, as compared to other refugees. Moreover, the success and failure of regional and domestic systems will be conveyed in order to provide a global overview of the current crisis facing this class of refugees and what can be learnt from the variety of systems. A comparative approach is therefore necessary so as to provide a more complete solution for their protection.

Specifically, the objective of canvassing and critiquing is to make recommendations on how to best protect transgender female refugees practically; what will work for them on the ground.

## 7. LITERATURE REVIEW

Scholarly work on transgender female refugees is slowly coming to the forefront of academic research as people begin to notice their plight. However, the vast majority of the research is not focused on the violence they face and the protection they need, such as the effective use of the right to physical security, but rather on the issues of gender identification and transgender being a ground of asylum. Therefore, not much research has been done on the daily persecutions they face on their journey to refuge and their time in refuge, whether it be the denial of access to healthcare, discrimination in employment, rape, and or physical assault. Moreover, the only work that has been done are reports by the UNHCR or independent research units who layout some of the problems faced by this class of refugees.<sup>34</sup>

What can be concluded from looking at the literature on transgender female refugees is that no one as of yet has compiled research that looks generally at the violence they suffer and the protection, or lack thereof, that they need to live and thrive as humans. The literature does not provide an overview of the issues faced by transgender female refugees and it does not propose any solutions. One article dealt with the issue of gender identification in the asylum system<sup>35</sup> and another dealt specifically with access to hormone therapy in the United States detention centres.<sup>36</sup>

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<sup>34</sup> See UNHCR op cit note 10; Y Millo 'Invisible in the City: Protection Gaps Facing Sexual Minority Refugees and Asylum Seekers in Urban Ecuador, Ghana, Israel, and Kenya' (2013) Hebrew Immigrant Aid Society Report.

<sup>35</sup> See L Anderson 'Punishing the Innocent: How the Classification of Male-to-Female Transgender Individuals in Immigration Detention Constitutes Illegal Punishment under the Fifth Amendment' (2010) 25 (1) *Berkeley Journal of Gender Law and Justice*.

<sup>36</sup> See D O'day-Senior op cit note 14.

Another problem with the existing literature is that it mainly focuses on the United States and other Western countries. Much has been done with regard to specific issues in detention centres in the United States, Australia and Europe, but no literature has dealt with non-Western States and the issues faced by transgender female refugees in these regions and what solutions may be proposed to assist them. This thesis would then aim to focus on the violence faced by these refugees on a global level, without focusing excessively on the global North, which has silenced the rest of the world. The thesis will highlight the plight of these refugees in all aspects of the globe and unveil their ‘invisibility’.

This study will draw upon the existing legal research with regard to the specific issues faced by transgender female refugees. Moreover, much of the thesis will draw upon the experiences of this class of refugees and the reports instituted by various research units and the UNHCR. These will provide an invaluable tool in seeing how the law is working on the ground and what practical solutions could be offered.

## **8. METHODOLOGY**

This thesis will be a scholarly piece of work, which will necessarily entail academic journals, reports, and articles, which were outlined in the literature review. It will use the academic literature to help unveil the plight of transgender female refugees and to give them a voice in the legal community. Moreover, the international human rights instruments will be discussed and critiqued to determine how this class of refugees can be protected; it will be kept in mind the power relations in the international sphere when the scope of international human rights law is delineated.

The study will furthermore legally critique the existing protection mechanisms and analyse and propose solutions as to why there is a protection gap and how to fill that gap in the law. This will necessarily involve recommendations on how to best protect and give effect to the human rights of transgender female refugees and grant them the dignity that has long been denied to them by virtue of the system.

## **9. CONCLUSION AND CHAPTER SYNOPSIS**

This chapter served to introduce the inadequacies in the protection of transgender female refugees. It outlined a number of questions that need to be answered: why are transgender female refugees facing additional burdens than other refugees; why are they not being protected from violence; what can be done to provide light on their plight; what are the most

practical solutions to providing protection for them? This thesis will address each of these questions and provide answers to each.

Chapter two will define what is meant by transgender and by violence, thereby highlighting the plight of transgender female refugees. It will go identify and introduce the various types of violence faced by this class of refugees as a way to unveil their struggle and draw attention to the additional burdens that they face as compared to other refugees.

Chapter three looks at the normative framework in question, thus outlining the applicable law. It will look to what international human rights instruments are available that can provide protection to transgender female refugees, whilst also considering the various regional systems.

Chapter four will then seek to analyse the law that was canvassed in chapter three by testing if the protection of transgender female refugees is inadequate. This chapter will critique the shortcomings of the applicable law through a feminist lens.

Chapter five shall focus on canvassing a domestic legal systems' approach to protecting or not protecting transgender female refugees. This chapter will seek to provide a more diverse answer to their protection by learning from the successes and failures of the South African legal order due to South Africa's status as one of the beacons of hope for transgender refugees in the world.

Lastly chapter six will draw conclusions from the rest of the thesis and will make recommendations to the legal community as to how best to address the inadequacies in the protection of transgender female refugees.

## CHAPTER TWO

# THE PLIGHT OF TRANSGENDER FEMALE REFUGEES

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### 1. INTRODUCTION

This chapter's purpose is to outline the plight of transgender female refugees regarding human rights violations in order to be able to understand how there is a protection-gap with regard to this class of refugees. It will aim to analyse what it means to be transgender and why there is a stigma attached to being a transgender woman, with specific mention on how it is a threat to the patriarchal heterosexual society in which most transgenders live.

Furthermore, this chapter will introduce and justify a new expanded definition of violence so as to account for the diversity of rights transgressions the transgender female refugee faces.

After this, it will be necessary to outline the different types of violence that have been identified in the journeys of transgender female refugees and in the countries of refuge across the globe. The chapter will focus specifically on the main types of identified violence that face transgender female refugees, namely physical, sexual, economic, and medical violence. By highlighting the predominant types of violence that these refugees face, it will be seen that there is an inadequacy in their protection in the global refugee and asylum system that was not envisaged by the 1951 UN Refugee Convention that needs to be addressed if they are to have meaningful and safe lives in refuge.

### 2. WHY IS THERE A STIGMA ATTACHED TO BEING TRANSGENDER?

#### 2.1. Defining Transgender and Stigma

In order to be able to understand the struggles facing transgender female refugees, it is necessary to define what is meant by the term transgender so that we may identify the transgender refugee. The Yogyakarta Principles, although not binding law, made a broad attempt to define gender identity: 'Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond

with the sex assigned at birth'.<sup>37</sup> Yet despite this, the term 'transgender' is yet to be defined in any international legal instrument.

Essentially, 'transgender is an umbrella term used to define individuals whose gender identity or expression differs from the culturally-bound gender associated with one's assigned birth sex'.<sup>38</sup> It has become dominant in society that there are two biological sexes and therefore two gender identities respectively: male and female. However, across history there have always been those who have challenged this dominant view. For example, the Hijra in India,<sup>39</sup> the Travesti in Brazil<sup>40</sup> and the Kathoey in Thailand.<sup>41</sup> Thus, it can be seen that the notion of being transgender is by no means new to the 20<sup>th</sup> and 21<sup>st</sup> Century. Transgender women have gone by many names over history, but for the sake of this thesis, these class of refugees shall be referred to as transgender as an inclusive term. The transgender refugee may then be identified as those class of persons who identify with a gender that is different to their assigned biological sex.

Stigma, on the other hand, has been defined as 'the social process of labeling, stereotyping, and rejecting human difference as a form of social control'.<sup>42</sup> It is important to define stigma, as this thesis shall demonstrate that it is the stigma of being transgender that has inhibited the progress of their protection. Stigma can take on three levels, namely structural, interpersonal and individual. Structural stigma 'refers to the societal norms and institutional policies that constrain access to resources, while interpersonal stigma refers to direct or enacted forms of stigma such as verbal harassment, physical violence, and sexual assault'.<sup>43</sup> This thesis will focus on these two types of stigma in order to demonstrate the inadequacy in the protection of transgender female refugees from a more focused outlook, by looking at the discriminatory policies in place, barriers to healthcare, extortion and violence in the workplace and various hate crimes, which can range from verbal harassment to physical and sexual assaults.

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<sup>37</sup> International Commission of Jurists 'Yogyakarta Principles – Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity, March 2007.

<sup>38</sup> J W Hugto 'Transgender Stigma and Health: A Critical Review of Stigma Determinants, Mechanisms, and Interventions' (2015) 147 *Social Science & Medicine*.

<sup>39</sup> S Nanda *Neither Man nor Woman: The Hijras of India* (1990) Wadsworth Publishing Company: Belmont.

<sup>40</sup> D Kulick *Travesti: Sex, Gender, and Culture Among Brazilian Transgendered Prostitutes* (1998) The University of Chicago Press: Chicago.

<sup>41</sup> H Brummelhuis 'Transformations of Transgender: The Case of the Thai Kathoey' (1999) 9 (2) *Journal of Gay & Lesbian Social Services*.

<sup>42</sup> Hugto op cit note 38 at 222.

<sup>43</sup> Ibid at 223.

## 2.2. Why is there Widespread Prejudice against Transgender Women?

Whilst literature is available in defining what is meant by transgender, it is invaluable to understand why there is prejudice attached to the transgender woman; why do these refugees face more struggles than the ordinary refugee, which shall be seen through this chapter. Transgender women are a threat to the patriarchal system and it is for this reason that there is widespread prejudice against them.<sup>44</sup>

Patriarchy ‘is a socially constructed phenomenon, enforcing notions of sex and gender that equate to male supremacy and female inferiority’.<sup>45</sup> In its most basic and crude form, ‘men displaying feminine characteristics are often seen as weak, so that men in leadership positions...have had to hide their femininity’.<sup>46</sup> However, the truth is much deeper and complex than just this. Trans people step over the gender binary, which has been in dominance for centuries, reinforcing gender roles for men and women and enforcing heterosexuality as the ideal for society.<sup>47</sup> Trans women, however, challenge this notion and create their own gender narrative. Soumadri Banerjee writes that:

When trans people reject their gender identity society imposes upon them without consent at birth and reclaim their own gender narratives, they bring into question all our preconceived notions of gender...The struggle of trans women to assert their true selves is one of self-determination in active defiance of a misogynist culture in which any association with femininity is mocked and demonised.<sup>48</sup>

It is obvious then that transgender women are demonised by the patriarchal and misogynistic culture that dominates. It is further evident why transgender female refugees face additional burdens over other refugees in the system; any challenge to the dominant power in society is always met with violence. When the transgender female refugee is open about her gender identity, she is met with resistance.

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<sup>44</sup> AORTA ‘Challenging Patriarchy and Sexism’ (2017) Resource Packet, available at <http://aorta.coop/wp-content/uploads/2017/06/Patriarchy-and-Sexism-Handout.pdf>, accessed 30 July 2017 at 3.

<sup>45</sup> D J Kruger & M L Fisher ‘Patriarchal, Male Competition, and Excess Male Mortality’ (2014) 8 (1) *Evolutionary Behavioural Sciences* at 4.

<sup>46</sup> ‘Trans History’, available at [http://www.gendernetwork.com/TransHistory.html#.WO3d\\_FOGP-Y](http://www.gendernetwork.com/TransHistory.html#.WO3d_FOGP-Y), accessed on 12 April 2017.

<sup>47</sup> N L Fisher ‘Seeing Straight: Contemporary Critical Heterosexuality Studies and Sociology: An Introduction’ (2014) 54 (4) *The Sociological Quarterly* at 501-505.

<sup>48</sup> S Banerjee ‘Can Trans-Inclusive Feminism Shake up the Patriarchal Status Quo?’ (2017) *Youth Ki Awaaz* at 1.

### 3. DEFINING VIOLENCE

After having discussed the reason why transgender female refugees face additional burdens in countries of refuge, the ways in which they are met with resistance must be investigated. This is because it is only through understanding the violence they face, that we can see the extent of the protection gap. This thesis will argue for a broader definition of violence when looking at how transgender female refugees are dominated and violated because older definitions of violence, such as the Oxford Dictionary definition, were not cognisant of the struggles faced by transgender women. The plight of the trans woman has only come to the public sphere in the 21<sup>st</sup> Century and a 21<sup>st</sup> Century definition of violence is therefore needed. If one looks to the Oxford Dictionary, it defines violence as ‘behaviour involving physical force intended to hurt, damage, or kill someone or something’.<sup>49</sup> However, this is too restrictive and ignores the complexity of power structures involved in the term ‘violence’. Leticia Casique and Antonia Furegato approach violence through a preferred lens. For them, ‘violence is an extremely diffuse and complex phenomenon...it is influenced by culture and submitted to continuous review’.<sup>50</sup>

Feminism has indeed approached gender-based violence through this broad lens; violence in feminism is any way that men assert their superiority against women: ‘it is violence perpetrated by men to maintain control and dominion over women’.<sup>51</sup> Similarly, when we look to transgender female refugees, these people are attacking the dominant masculine culture and are, what some would coin, ‘the other’. As they are doing this, society’s natural reaction has been to try and assert their dominance over them and maintain superiority. Moreover, by taking this definition of violence, it fits in with international law. If one looks to the Convention on the Elimination of All Forms of Discrimination Against Women, violence is defined ‘as any act...that produces physical, sexual, mental harm or suffering in women, including threats, coercion or arbitrary privation of freedom in public or private life’.<sup>52</sup> Thus, what we are seeing is that violence manifests itself in various forms of aggressions. It is not enough to take a restrictive view of violence as just being physical harm

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<sup>49</sup> Oxford Dictionary, available at <https://en.oxforddictionaries.com/> accessed 01 September 2017.

<sup>50</sup> L C Casique & A R F Furegato ‘Violence Against Women: Theoretical Reflections’ (2006) 14 (6) *Revista Latino-Americana de Enfermagem* at 951.

<sup>51</sup> *Ibid* at 952.

<sup>52</sup> *Ibid*; See also the Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979, UNTS vol 1249 (hereafter referred to as CEDAW).

as this would do injustice to the plight of transgender female refugees who face a diverse amount of aggressions, all in order to maintain their inferiority in society. The rest of this chapter will be dedicated to unpacking these forms of violence that make up its definition: namely, physical, sexual, economic, and medical.

#### 4. TYPES OF VIOLENCE

##### 4.1. Physical Violence

Physical violence is the most easily recognisable form as it clearly violates a number of human rights, such as dignity and the right to bodily integrity and transgender female refugees face continual acts of physical violence on a global level. It has become common for transgender female refugees to face physical and degrading treatment in countries of refuge due to their trans status. It seems that in every corner of the globe transgender female refugees are assaulted physically. Within the African continent, the situation for this class of refugees is particularly precarious. If one looks at Uganda, it is common for physical violence to be levelled against them from the host country's communities; many 'moved frequently due to harassment and violence experienced at the hands of neighbouring host community members'.<sup>53</sup>

In the Euro-Asian continent, Turkey has become a haven for many refugees fleeing from the Middle-East. However, the lived experiences of transgender female refugees have been far from safe. In fact, it has become so dangerous for them, that 'in Turkey, as a result of harassment and violence, many...[transgender female] refugees feared leaving their homes and minimised the time they spent outside'.<sup>54</sup> Furthermore, other scholars have documented a variety of hostile attitudes towards transgender refugees, such as rocks being thrown at them as they walked the street, 'being beaten on the street for no other reason'<sup>55</sup> than transphobia, and that the transgender female refugees attempt to hide their identities from the Turkish community and other refugees. Another reputable news source reported that 'the main

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<sup>53</sup> D Buscher 'Unequal in Exile: Gender Equality, Sexual Identity and Refugee Status' (2011) 1 *Amsterdam Law Forum* at 97; See also T Onyulo 'Uganda's Other Refugee Crisis' (2017), available at <https://www.pri.org/stories/2017-07-12/ugandas-other-refugee-crisis>, accessed on 30 July 2017.

<sup>54</sup> Buscher op cit note 53; See also Helsinki Citizens' Assembly and the Organisation for Refuge, Asylum and Migration 'Unsafe Haven: The Security Challenges Facing Lesbian, Gay, Bisexual and Transgendered Asylum Seekers and Refugees in Turkey' (2009) at 1.

<sup>55</sup> T Spijkerboer *Fleeing Homophobia: Sexual Orientation, Gender Identity and Asylum* (2013) Routledge: New York at chapter 5.

complaint raised by the transgender female refugees is harassment – physical and verbal violence’.<sup>56</sup>

Not only do transgender female refugees face physical violence in traditionally conservative countries, but refugees in North America face widespread abuses in the asylum system. One NGO, Heartland Alliance’s National Immigrant Justice Centre, reported that it ‘has filed four more complaints with the Department of Homeland Security’s Office of Civil Rights and Civil Liberties, taking it to 17 filed since April’.<sup>57</sup> Transgender female refugees routinely face physical harassment inside of the United States of America’s detention centres, where they are kept for prolonged periods of time. One example of abuse was recorded when a transgender female refugee ‘asked for toilet paper [and] was abused’ and another ‘was abused and singled out for public searches where guards forced her to remove her outer clothing and mocked her exposed breasts’.<sup>58</sup> South America, on the other hand, is no better. The UNHCR in its report titled ‘Women on the Run’ reported numerous case studies of transgender female refugees facing physical violence at the hands of the police, other refugees, and local communities. One woman reported how ‘in Mexico, if anyone sees you wearing women’s clothing, they make fun of you or throw things at you, or people might hit you’ and another transgender woman notes how she left school ‘because classmates hit her with rocks’.<sup>59</sup>

Europe is no better than any of the other regions. ‘Across Europe...transgender migrants say they suffer from verbal, physical and sexual abuse in refugee shelters, and some have been forced to move out’.<sup>60</sup> Some of the most notorious countries with documented records include the Netherlands, Germany, Spain, Denmark, Sweden and Finland. Finland, in particular, has come into the spotlight for its inhumane treatment of transgender female refugees. Amnesty International, in its 2016 Report on Finland, found that their domestic

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<sup>56</sup> S Kalantari ‘Transgender Iranian Refugees are Struggling to Outrun Prostitution and Violence’, available at <https://news.vice.com/article/transgender-iranian-refugees-are-struggling-to-outrun-prostitution-and-violence>, accessed on 18 April 2017.

<sup>57</sup> C Paul ‘More Complaints on Treatment of LGBT Refugee and Immigrant Detainees’, available at <http://www.care2.com/causes/more-complaints-on-treatment-of-lgbt-refugee-and-immigrant-detainees.html>, accessed on 18 April 2017.

<sup>58</sup> Ibid.

<sup>59</sup> UNHCR op cit note 10 at 28.

<sup>60</sup> Chicago Tribune ‘Across Europe, Gay Migrants Face Abuse in Asylum Shelters’, available at <http://www.chicagotribune.com/news/nationworld/ct-gay-migrants-20160222-story.html>, accessed on 18 April 2017.

legislation only allowed transgenders to be recognised as such if they were sterilized, diagnosed with a mental disorder and were over 18.<sup>61</sup>

## 4.2. Sexual Violence

Sexual violence is another form of aggression that transgender female refugees face around the world in refuge and similarly infringes on human rights, such as bodily integrity and dignity. Sexual assault and rape are used as a form of humiliating trans women and to “teach them a lesson”. In this we see the patriarchal society in its clearest form; this thesis asserts that rape is used as a weapon, as it has been used in war times as one, to dominate trans women. These refugees are then forced to the bottom of the power structure as rape in this sense is not about attraction but about power and reinforcing misogyny and patriarchy. North America has some of the most vivid accounts of how transgender female refugees are sexually abused in the asylum system. Human Rights Watch, an internationally renowned human rights NGO, discovered in a report that multiple transgender women were subject to rape inside of the USA’s detention centres for immigrants. One transgender woman named Sara V from Honduras, ‘reported that she was raped by three men at a detention centre in Arizona’.<sup>62</sup> Despite the fact that trans women are vulnerable to sexual abuse from men, transgender female refugees are placed in male detention centres, where Isa Noyala correctly states that they are being set up for sexual violence.<sup>63</sup> If they are not held in male detention facilities, then they are put in solitary confinement for their own protection. However, solitary confinement is a form of violence in itself, as Human Rights Watch stated: ‘many who had spent time there experienced trauma and psychological distress’.<sup>64</sup>

In other parts of the world the stories that have arisen are of the same nature as North America. In South America, for example, ‘one transgender woman said: I was constantly beaten and raped when doing sex work’<sup>65</sup> and another stated that she ‘made a criminal complaint against the police officials who raped and beat’<sup>66</sup> her and is now living in fear of

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<sup>61</sup> Amnesty International 2016/2017 Annual Report, available at <https://www.amnesty.org/en/countries/europe-and-central-asia/finland/report-finland/>, accessed on 18 April 2017.

<sup>62</sup> E Y H Lee ‘Transgender Women Face Sexual Abuse and Humiliation Once they Arrive in the U.S.’, available at <https://thinkprogress.org/transgender-women-face-sexual-abuse-and-humiliation-once-they-arrive-in-the-u-s-report-finds-62b36e6932ef>, accessed on 20 April 2017.

<sup>63</sup> Ibid.

<sup>64</sup> Human Rights Watch, available at <https://www.hrw.org/news/2016/03/23/us-transgender-women-abused-immigration-detention>, accessed on 20 April 2017.

<sup>65</sup> UNHCR op cit note 10.

<sup>66</sup> Ibid.

being murdered by the same police officials. Another transgender women reported: 'I lived on the street and didn't have anyone. When I was seven years old, a cousin raped me for five years'.<sup>67</sup> After this, the transgender female refugee fled after witnessing police officials burn transgender refugees alive. In Uganda, the leader of a transgender female refugee association was abducted and raped and has never been seen again since the incident.<sup>68</sup>

Thus, one can see that on every stage of the journey transgender female refugees face sexual violence. Many of them flee their home countries due to it and yet when arriving in a country of refuge they find that the situation is no different. Whether they are in an immigration detention centre in the USA, in a satellite city in Turkey, in Mexico fleeing from South America, or in Europe, this class of refugees suffer from sexual violence.

### **4.3. Economic Violence**

#### **4.3.1. Forced Sex Work**

Another major issue that is plaguing the world of transgender female refugees is that of forced sex work and extortion in employment. In many countries of refuge, trans women that are refugees are unable to find work due to the stigmatisation of trans people in those countries. Many are fired during their time at work if it is discovered that they are transgender. There appears to be widespread discrimination and inequality when it comes to finding suitable work. As a result of this discrimination, many are forced to go into sex work in order to survive: to eat and get accommodation. One can then see the link between denial of employment and forced sex work or just plain extortion in places of employment.

If one looks for examples around the world, various news reports and NGO reports have highlighted this issue. In Turkey, which as stated previously is the country of refuge for many transgender female refugees fleeing from the Middle East, has seen many of these refugees being forced into sex work. One Iranian transgender refugee named Sepi outlined her story:

'Tomorrow I may be forced to have sex with someone else just so I have a place to sleep and he could have 1000 different kinds of diseases. Or he might try to kill me... She also says most of her homeless transgender girlfriends ended up becoming prostitutes because they had no other means of financial support'.<sup>69</sup>

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<sup>67</sup> UNHCR op cit note 10.

<sup>68</sup> Buscher op cit note 54.

<sup>69</sup> Kalantari op cit note 57.

The other issue regarding living in Turkey is that the UNHCR claims that they are not able to provide a monthly income to refugees to help them to survive. Transgender female refugees are not singled out for their precarious situation and also receive no income from the UNHCR. Furthermore, most cannot find work in Turkey. Helsinki Citizens' Assembly Refugee Advocacy Support Program states that 'only two refugees have managed to obtain a work permit'<sup>70</sup> and that furthermore 'transgender refugees often can't even find off the book jobs – and if they do, they usually get fired once they're exposed as transgender'.<sup>71</sup>

The situation in other parts of the world is not better. Kenya is one country that takes in many refugees from Africa, such as Somalia and Congo and Burundi. However, transgender female refugees face forced sex work in order to survive.<sup>72</sup> Many do not come out as transgender for fear of violent repercussions. Katy Migiro reports how 'most of them end up in sex work and get infected'<sup>73</sup> and many are held as sex slaves in Kenya and are told 'you will have sex with strangers and your host will make money out of it'.<sup>74</sup> In Ecuador the Women's Refugee Commission noted how transgender female refugees isolate themselves out of fear for violence and discrimination and face employment troubles: 'trans refugees broadly understand that the only employment options available to them are working in hair salons or sex work'.<sup>75</sup>

Thus, one can see how due to the physical and sexual violence faced by transgender female refugees in the countries of refuge, many see isolation as the only way to survive in such a hostile environment. Furthermore, as employment is difficult for refugees in general, it is even more difficult for transgender female refugees who face further stigmatisation. Even if they are able to find work, their status as transgender means they are at risk of being fired at any time. With this in mind, many turn to sex work in order to survive, but even in sex work there is a risk of being held in sexual slavery, as in Kenya, and they are also prone to extortion in employment, whether that be sexual or general work, as pointed out by the UNHCR that transgender female refugees in Mexico and El Salvador have no other choice but to work in prostitution.<sup>76</sup>

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<sup>70</sup> Kalantari op cit note 57.

<sup>71</sup> Ibid.

<sup>72</sup> K Migiro 'LGBTI Refugees Risk Death, Rape and Sexual Slavery in Kenya', available at <http://news.trust.org//item/20130517100240-7de0m/?source=spotlight>, accessed on 24 April 2017.

<sup>73</sup> Ibid.

<sup>74</sup> Ibid.

<sup>75</sup> Women's Refugee Commission 'Gender-Based Violence Prevention and Response: Opportunities and Challenges for Serving Urban Refugees in Ecuador' Field Visit Summary: February 2015 at 3.

<sup>76</sup> UNHCR op cit note 10 at 28.

#### 4.4. Medical Violence

Medical violence is a term coined in this thesis to describe a unique aggression faced by transgender female refugees and it essentially entails the denial of the right to have access to healthcare. Trans women require access to hormone therapy in order to assist them with their gender transformation. However, in countries of refuge many are denied access to this. Furthermore, in more extreme cases, trans female refugees are denied access to healthcare in general solely for the express reason that they are transgender. The most widely documented cases involving transgender female refugees and healthcare is with regard to detention centres in the USA. The USA is one of the few countries in the world to actually keep refugees and asylum seekers in detention for prolonged periods of time and during the course of the detention healthcare issues arise. Human Rights Watch discovered that ‘transgender women are also denied adequate access to medical care, like hormone replacement therapy and HIV-related care’.<sup>77</sup> In another case ‘ICE (Immigration and Customs Enforcement) detention officials had confiscated the individual’s prescription hormones’ and ‘repeated requests to ICE’s medical staff for more hormones had been refused’.<sup>78</sup>

In other parts of the world, there seems to be a disconnect between what the UNHCR and host countries state and what is actually happening. In Turkey, for example, the UNHCR has claimed that they have helped transgender female refugees have access to hormone therapy and yet one researcher reported: ‘even though the UNHCR claim that they help transgender refugees with hormone therapy, none of the trans refugees to whom I spoke were able to receive hormone therapy’.<sup>79</sup> One transgender woman in Turkey reported that she could not even afford to buy HIV medication, let alone hormone therapy.<sup>80</sup> In Australia, the situation is similar to that of the USA, with transgender female refugees being denied access to adequate healthcare, resulting in the deaths of some.<sup>81</sup>

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<sup>77</sup> See <https://thinkprogress.org/transgender-women-face-sexual-abuse-and-humiliation-once-they-arrive-in-the-u-s-report-finds-62b36e6932ef>, accessed on 20 April 2017.

<sup>78</sup> D O-Day Senior ‘The Forgotten Frontier? Healthcare for Transgender Detainees in Immigration and Customs Enforcement Detention’ (2009) 60 (2) *Hastings Law Journal* at 453.

<sup>79</sup> S Shakhari ‘The Irony of Rights: Healthcare for Queer and Transgender Refugee Applicants in Turkey’ (2013), available at [http://www.jadaliyya.com/pages/index/13940/the-irony-of-rights\\_healthcare-for-queer-and-trans](http://www.jadaliyya.com/pages/index/13940/the-irony-of-rights_healthcare-for-queer-and-trans), accessed on 20 April 2017.

<sup>80</sup> *Ibid.*

<sup>81</sup> See <https://www.greenleft.org.au/content/no-pride-australias-homophobic-anti-refugee-policies>, accessed on 20 April 2017.

Thus, one can see that due to their stigmatisation, transgender female refugees face struggles with accessing medical care. Many of those in authority hold discriminatory views of trans women, as reported by the stories of trans women in the detention centres; many have stated that the detention officers consider them to be ‘dirty’ and regularly call them degrading terms, such as ‘faggots’.<sup>82</sup> With this in mind, one can see why trans female refugees are struggling to access hormone therapy, which is vital to their transition to the gender of their choosing. Denial of hormone therapy is a clear violation of their dignity; to deny them the medication that allows them to be the gender of their choosing is a cruel and inhumane practice and forces them to be a gender that they do not subscribe to.

## 5. CONCLUSION

It is clear then that transgender female refugees are in a precarious situation and are in need of protection. Refugees globally face a stigma and violence and trans refugees face additional challenges: they face physical, sexual, economic and medical violence in countries of refuge at the hands of public authorities and private individuals, whether they be citizens or fellow refugees. It is clear then that their plight is invisible as most suffer in silence, with most news stories focusing on the plight of refugees and not on the unique struggles of transgender female refugees. In countries of refuge, they are vulnerable to physical harassment and assault, which can also take the form of rape and sexual assaults, which in turn lead them to struggle to find economic stability as they fear coming out into the public sphere and face discrimination in the workplace. Furthermore, their dignity is routinely denied by denying them hormone therapy and, in some cases, medical care in general. The plight of these refugees must be addressed and unveiled so that they do not suffer in silence and in invisibility.

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<sup>82</sup> See Senior op cit note 78.

## CHAPTER THREE

### THE NORMATIVE FRAMEWORK

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#### 1. INTRODUCTION

This chapter aims to outline in detail the normative legal framework that governs refugees and human rights in general in so far that they are applicable to transgender female refugees. Specifically, focus will be on the rights that have accrued to refugees through international law treaties and conventions, conclusions and recommendations, and case law that has emanated on an international level. Additionally, as refugee rights have been recognised as human rights, it is necessary to outline the human rights instruments that are applicable to the protection of transgender female refugees; what are they entitled to as humans, as refugees, and as trans women. After this, the chapter will lay out the regional legal framework and what has been done to protect refugees and transgender women. Attention will be paid to the three main regional systems: the European system, the Inter-American system, and the African system.

#### 2. INTERNATIONAL LAW

This thesis will analyse the accepted sources of international law, both soft and hard. James Hathaway eloquently put: ‘refugee rights are matters of international law to the extent they derive from one of the accepted trio of international law sources: treaties, custom, or general principles of law’.<sup>83</sup> It is important then to know that whilst engaging with what is international law, we must distinguish between what is hard law, otherwise known as binding, and what is soft law, that is non-binding on member states. When speaking of soft law in international terms, the term ‘suggests that law-making should be viewed as a process, not as a single, decisive act of legislation’<sup>84</sup> and that it contains ‘hortatory, rather than legally binding, obligations’.<sup>85</sup> Hard law, on the other hand, is that law that is binding on states, either in treaty form or by way of a Security Council Resolution, or in terms of a Convention.

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<sup>83</sup> J Hathaway *Rights of Refugees under International Law* (2005) Cambridge University Press: Cambridge at 15; See also Statute of the International Court of Justice 59 Statute 1055 (1945), adopted June 26, entered into force October 24 1945 (hereafter referred to as the ICJ Statute) at Article 38 (1).

<sup>84</sup> T W Bennett & J Strug *Introduction to International Law* (2013) Juta & Co Ltd: Cape Town at 29.

<sup>85</sup> A T Guzman & T L Meyer ‘International Soft Law’ (2010) 171 (2) *Berkeley Law Scholarship Repository* at 172.

In terms of international law several rights have been identified specifically, such as the right to dignity, the right to bodily integrity, the right to work and the right to access healthcare. These rights were chosen as they are direct promulgations of rights that alleviate the four main types of violence perpetrated against transgender female refugees. In chapter two of this thesis it was seen that trans women are affected by four main types of violence, namely physical, sexual, economic and medical; these four rights counter these types of violence.

## 2.1. TREATIES AND CONVENTIONS

### 2.1.1. Right to Dignity

Dignity is an ambiguous term, but has come to be possibly the most important right in international human rights law. At the core, ‘dignity matters because it forms the foundation of civilised society, without it, serious abuse of people is more likely to occur’.<sup>86</sup> Immanuel Kant, being the father of dignity, defined it as entailing the principle that humans should not be used as a means to an end;<sup>87</sup> all humans are of equal worth and, therefore, have an inherent dignity that ought to be protected. The founding document of the international system, as recognised by most in the international legal community, is the Charter of the United Nations.<sup>88</sup> The Charter is soft law and is, therefore, not binding, but is considered to be the first to lay out the foundation of human rights for all. The purpose of the Charter was noted in paragraph 3 of the preamble as the following: ‘to reaffirm faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women and of nations large and small’.<sup>89</sup> From the outset then, the founding purposes of human rights were to give affect to dignity and equality. Dignity is an ambiguous term, but a rather important right that appears in so many documents around the world, whether they be international, regional or domestic.<sup>90</sup> At Article 1.3. the Charter highlights that there should not be discrimination based on race, sex, language, or religion.<sup>91</sup> Thus, the founding document adheres that all individuals, by virtue of being human, are entitled to equality and dignity. Furthermore, the founding document of human rights, the United Declaration of Human

<sup>86</sup> L Michael ‘Defining Dignity and Its Place in Human Rights’ (2014) 20 (1) *New Bioethics* at 1.

<sup>87</sup> A C Steinmann ‘The Core Meaning of Human Dignity’ (2016) 19 *Potchefstroom Electronic Journal* at 4.

<sup>88</sup> Charter of the United Nations, 24 October 1945, 1 UNTS XVI.

<sup>89</sup> *Ibid* at Preamble para 3.

<sup>90</sup> Examples can be found in Universal Declaration on Human Rights and the Constitution of the Republic of South Africa, 1996.

<sup>91</sup> Charter op cit note 88 at Article 1.3; See also K Drzewicki ‘Human Rights in the United Nations Charter and the Universal Declaration of Human Rights’ (1998) 7 (9) *Polish Quarterly of International Affairs* at 10.

Rights states in the preamble that the ‘recognition of the inherent dignity...of all members of the human family is the foundation of freedom, justice, and peace in the world’.<sup>92</sup> Whilst these two documents are not the only human rights instruments that cite dignity as a founding right, it is important to note that it does appear in them. This is because they are the founding documents of both the international legal system and of international human rights law. All other human rights instruments that follow on from these two documents are at the essence attempting to give effect to the purposes and values highlighted in these two documents.

### 2.1.2. Right to Bodily Integrity

The right to bodily integrity is an important right as it protects the security of a person, whether it be from physical or sexual violence. Whilst it has been framed in other terms, such as the right to physical security, the ‘doctrine safeguards the physical parameters of a person’.<sup>93</sup> The UDHR states in Article 3 that everyone has the right ‘to life, liberty, and security of the person’<sup>94</sup> and the International Covenant on Civil and Political Rights similarly states at Article 9 (1) that everyone has ‘the right to liberty and security of the person’.<sup>95</sup> Although the 1951 UN Refugee Convention does not have a specific provision relating to bodily integrity or physical security, James Hathaway has reasoned that ‘this could be that the drafters took it for granted that the physical security of refugees would be protected since the essential purpose of granting refugee status is to provide surrogate protection’.<sup>96</sup> Furthermore, the Convention Against the Elimination of All Forms of Racism states that everyone has the right to be protected from violence or bodily harm.<sup>97</sup> Moreover, the Convention on the Elimination of all Forms of Discrimination Against Women<sup>98</sup> does not explicitly state that women’s bodily integrity must not be infringed, however, it has been implied through the various Articles prohibiting discrimination against women. Furthermore, the CEDAW committee explained to Thailand ‘that sexual harassment, rape, domestic violence and marital rape, whether in the family, the community or the workplace, constitute violations of women’s right to personal security and bodily integrity’.<sup>99</sup> Finally, the

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<sup>92</sup> Universal Declaration of Human Rights, 10 December 1948, 217 A (III) at the preamble (hereafter referred to as UDHR).

<sup>93</sup> C L Neff ‘Woman, Womb, and Bodily Integrity’ (1990) 3 (2) *Yale Journal of Law & Feminism* at 328.

<sup>94</sup> UDHR op cit note 88.

<sup>95</sup> International Covenant on Civil and Political Rights, 16 December 1966, UNTS 999.

<sup>96</sup> F Khan & T Schreier *Refugee Law in South Africa* (2015) Juta & Co Ltd: Cape Town at 206.

<sup>97</sup> Convention Against the Elimination of All Forms of Racism, 21 December 1965, UNTS 660 at Article 6.

<sup>98</sup> Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS 1249 (hereafter referred to as CEDAW).

<sup>99</sup> CEDAW/C/1999/I/L1/Add 6 (1999).

Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment applies a duty on state parties to the Convention to prevent torture from taking place within its jurisdiction,<sup>100</sup> and that each state party will hold any offenders accountable for cruel and inhuman treatment. Torture was defined as any act which is used for coercing a confession, punishing him, intimidating him or a third person, when such an act is consented to or acquiesced by a public official.<sup>101</sup> The Convention further sets up a Committee in terms of Article 17, which shall investigate how state parties are keeping to the principles and values in the Convention and issue reports on countries and their compliance.

It is thus safe to presume that the right to bodily integrity is guaranteed under international human rights law and furthermore, it is implied in international refugee law that refugees are also protected from violence in its physical form. It would also be further safe to presume that in theory transgender female refugees should be protected from physical and sexual violence as the various legal instruments guarantee.

### 2.1.3. Right to Work

The right to work is an important right as it guarantees the ability to make a living; without a job there cannot be any money and without money one cannot create a life in any country. This right has therefore become an important one for refugees because ‘refugees by their very nature are denied the support of their governments and cannot rely on intercession by their state of formal nationality’.<sup>102</sup> This has been recognised in many international human rights instruments. At Article 23.1 the UDHR states that ‘everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment’.<sup>103</sup> Similarly, the International Covenant on Economic, Social and Cultural Rights proclaims that ‘The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts’.<sup>104</sup> The right to work and the right to choose your work is related significantly to dignity; it is only by allowing people to freely choose their employment that they can feel fulfilled. Furthermore, this economic right, as well as other economic rights, are

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<sup>100</sup> Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, UNTS 1465 at Article 2 (1).

<sup>101</sup> Ibid at Article 1.

<sup>102</sup> BS Chimni *International Refugee Law: A Reader* (2000) Sage Publications: London at 181.

<sup>103</sup> UDHR op cit note 92.

<sup>104</sup> International Covenant on Economic, Social and Cultural Rights, 16 December 1966, UNTS 993 at Part III Article 6 (hereafter referred to as ICESCR).

important ‘for achieving a more equitable, just society and the fulfilment of the promise of the modern human rights revolution’.<sup>105</sup>

With regard to refugees, the right to work is of vital importance. The 1951 UN Refugee Convention holds in Article 17 that refugees have the right to wage-earning employment and that in Article 18 they have the right to engage in self-employment. As noted earlier, this right is important for refugees’ dignity. A domestic case in South Africa powerfully put that ‘the freedom to engage in productive work is an important component of human dignity, for mankind is pre-eminently a social species with an instinct for meaningful association’.<sup>106</sup>

#### 2.1.4. Right to Access Medical Care

The importance of the right to have access to health care was described by James Hathaway:

‘Filling the refugees’ bowls may not keep them alive, typically, it not simply hunger that kills refugees, but a complicated interaction between hunger and disease. Disease prevention and treatment has a critical role to play. This need not cost the earth. In fact, simple health initiatives can save more lives than high-tech medical treatments’.<sup>107</sup>

The ICESCR proclaims at Article 12 that State parties must recognize ‘the right of everyone to the enjoyment of the highest attainable standard of physical and mental health’.<sup>108</sup> The significance of this Article is its inclusion of mental health and of using the phrase “highest attainable”. The wording of this Article is strong and applies pressure on the state parties to give affect to the highest possible standard of health. On top of this, the 1951 UN Refugee Convention at Article 23 states that refugees shall enjoy the same access to public relief as those of citizens. Public relief has generally been defined to include the right of access to medical care. This would mean that refugees should have the same level of access to healthcare as the citizens of the country of refuge. Hathaway notes in his book that the right to have access to healthcare is one of the four most important that all refugees need, regardless of the situation in the country of refuge. In support of this belief, he cites the Committee on Economic, Social and Cultural Rights, who declared that ‘a State party cannot,

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<sup>105</sup> G Mundlak ‘The Right to Work: Linking Human Rights and Employment Policy’ (2007) *International Labour Review* at 215.

<sup>106</sup> *Minister of Home Affairs v Watchenuka* 2004 (4) SA 326 (SCA) at para 25-7.

<sup>107</sup> J C Hathaway *Rights of Refugees under International Law* (2005) Cambridge University Press: Cambridge at 508.

<sup>108</sup> ICESCR op cit note 104.

under any circumstances whatsoever, justify its non-compliance with the core obligations to provide healthcare, which are non-derogable'.<sup>109</sup> Lastly, this Committee established a 'policy of strict scrutiny',<sup>110</sup> which in essence means that non-implementation is only justifiable in the event that there is legitimate resource insufficiency.

### 2.3. CONCLUSIONS AND RECOMMENDATIONS

This part of the chapter will aim to introduce some of the non-binding measures that have been taken on the international stage to protect transgender people in general and how this can be linked to transgender female refugees. In 2015, the United Nations, along with 12 other UN entities released a joint statement calling on the end of discrimination against transgender people. It was noted by many that 'the statement is a powerful class to action to government to do more to tackle homophobic and transphobic violence and discrimination'.<sup>111</sup> Then in 2016, the Human Rights Council made history when they passed a resolution that built upon two previous resolutions on ending violence against transgender people in 2011 and 2014 respectively. Yahia Zaidi stated that 'it is important to note that around 70 percent of the organisations are from the global south'<sup>112</sup> and this is, therefore, 'a powerful cross-regional message of strength to the UN to protect the rights of LGBTI people'.<sup>113</sup> One the most significant advancements with the new resolution from the UN is that an independent expert has been appointed, who will identify the gaps and consult with states and stakeholders.<sup>114</sup> With an independent expert, the plight of transgender people has a face and the inadequacy in the protection of transgender female refugees may well be addressed.

With regard to the physical security of refugees, the Executive Committee of the UNHCR has passed two resolutions, namely Conclusion No. 45 and No. 48. These Conclusions 'condemn all violations of the rights and safety of refugees and asylum-seekers and in

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<sup>109</sup> Hathway op cit note 107 at 513; See also UN Committee on Economic, Social and Cultural Rights, General Comment No 14 (2000) UN Doc HRI/GEN/1/Rev 7, May 12 2004 at para 47.

<sup>110</sup> Ibid.

<sup>111</sup> <http://www.ohchr.org/EN/Issues/Discrimination/Pages/JointLGBTIstatement.aspx>, accessed on 3 May 2017.

<sup>112</sup> See <https://www.hrw.org/news/2016/06/30/un-makes-history-sexual-orientation-gender-identity>, accessed on 3 May 2017.

<sup>113</sup> Ibid.

<sup>114</sup> Ibid; See also General Assembly Resolution 32/2 'Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity', 15 July 2016 A/HRC/RES/32/2 at 3.

particular military or armed attacks on refugee camps and establishments'.<sup>115</sup> Thus, although there has been a lack of recognition of the physical safety of refugees in the 1951 UN Refugee Convention, it has not gone unnoticed by the UNHCR, who has made efforts to promote the physical safety of refugees, particularly those in refugee camps.

### 3. REGIONAL LAW

#### 3.1 European Regional System

The Council of Europe was founded in 1949 and is the oldest of the three main regional systems and has, therefore, the most jurisprudence on the topic at hand. The most important document regarding human rights in Europe is the European Convention on Human Rights, which delineates the human rights system for the regional system. At Article 5 the Convention guarantees the right to liberty and security and at Articles 3 and 4 the Convention prohibits forced labour and torture. Interestingly, the Convention is very focused on civil and political rights and not on socio-economic rights, with very little regarding employment standards and access to healthcare. Whilst there has been no promulgation of any law to do with transgender female refugees, in 2010 the European Parliament released a Directive for internal policies regarding transgender persons' rights in European Union member states. In this Directive the European Parliament notes that a Recast Directive was passed in 2006, which pronounced 'that equal treatment for transgender people has to be applied on the basis of the acquired gender after a gender reassignment'.<sup>116</sup> However, other than this Recast Directive's reference to transgender persons, little to none has been formally passed in the European system with regard to transgender rights, and in particular there is no legislation or policies regarding transgender female refugees.

With regard to refugees, the European Convention is silent on the right to asylum. However, the European Court has been very active in protecting the rights of refugees who are in host states and who bring human rights violations complaints before it. In the case of *Hirsi Jamaa v Italy*, the Court held that by sending refugees back to countries where they risk persecution, the domestic authorities could be guilty of human rights abuses.<sup>117</sup> Furthermore, the Court in *MSS v Belgium and Greece* found Greece guilty of breaching Article 3, which prohibits cruel and inhumane treatment, by keeping a refugee in a detention centre with 20

<sup>115</sup> BS Chimni *International Refugee Law: A Reader* (2000) Sage Publications: London at 164.

<sup>116</sup> See <http://www.lgbt-ep.eu/wp-content/uploads/2010/07/NOTE-20100601-PE425.621-Transgender-Persons-Rights-in-the-EU-Member-States.pdf>, accessed on 4 May 2017.

<sup>117</sup> *Hirsi Jamaa & Others v Italy*, Application No 27765/09 (ECHR February 23 2012).

others.<sup>118</sup> To date, however, there have been no international court judgments on transgender female refugees. Yet, there have been cases that talk of the rights of refugees and the need to protect them from physical violence. What can be gathered from these cases is the principles that underlie the judgments, principally that there is a need to protect refugees by virtue of their humanity. One such example is the principle of non-refoulement, which essentially means that refugees must not be returned to countries in which there is a fear of persecution. In the case of *T.I. v United Kingdom*, the European Court on Human Rights emphasised the importance of not subjecting refugees to cruel, inhumane and degrading treatment.<sup>119</sup> Similarly, the Court again in *Chahal v United Kingdom* stated that ‘the Convention prohibits in absolute terms torture or inhuman or degrading treatment or punishment, irrespective of the victim’s conduct’.<sup>120</sup> What can be seen from these two cases is that the courts value the refugees’ dignity; their right not to be subjected to treatment that is degrading in the country of refuge.

### 3.2. Inter-American System

Many transgender female refugees make their way from South America to North America in hope of finding a haven. However, as the UNHCR noted in its report titled “Women on the Run” these transgender refugees often face widespread violation of human rights in their country of origin, on the journey to refuge and also in the countries of refuge. The Inter-American regional system was established in 1948 in Bogotá, naming itself the Organisation of American States. This Bogotá Conference in 1948 adopted the American Declaration on the Rights and Duties of Man.<sup>121</sup> Interestingly, ‘the Inter-American system thus had a human rights declaration seven months before the United Nations had adopted the Universal Declaration and two and half years before the European Convention was adopted’.<sup>122</sup> Then in 1959 the Inter-American Commission on Human Rights was established and in 1969 the American Convention on Human Rights<sup>123</sup> came into creation. Some of the rights that have

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<sup>118</sup> *Grand Chamber Decision, Case of M.S.S. v Belgium*, Application No 30696/09 (ECHR January 21 2011).

<sup>119</sup> *T.I. v United Kingdom*, Application No 43844/98, 7 March 2000 (European Court of Human Rights).

<sup>120</sup> *Chahal v United Kingdom*, Application No 70/1995/576/672, 11 November 1996 (European Court of Human Rights).

<sup>121</sup> Inter-American Commission on Human Rights (IACHR), American Declaration on the Rights and Duties of Man, 2 May 1948.

<sup>122</sup> H J Steiner P Alston & R Goodman *International Human Rights in Context: Law, Politics, Morals* (2008) 3 Ed Oxford University Press: Oxford at 1021.

<sup>123</sup> Organisation of American States (OAS), American Convention on Human Rights, Pact of San Jose, Costa Rica, 22 November 1969.

been created with the adoption of the American Convention were the right to humane treatment,<sup>124</sup> the right to be free from slavery,<sup>125</sup> the right to personal liberty,<sup>126</sup> right to equal protection.<sup>127</sup> These rights would mean that transgender female refugees in theory are entitled to them and thus the violence they face while in the Americas is a direct violation of the American Convention on Human Rights. What is missing from the Convention is socio-economic rights, such as the right to work and the right to have access to medical care and thus the transgender female refugee who may need access to hormone therapy cannot claim for this under any right in the Convention and furthermore they cannot enforce their right to work under this regional system.

The American Declaration, however, is an important document as it informs the foundation of the human rights system. David Harris pointed out that the system ‘is based upon two overlapping instruments, namely the American Declaration on the Rights and Duties of Man and the American Convention’.<sup>128</sup> The Declaration in its preamble notes that signing states recognise the inherent dignity of every individual and that all men are born equally, in dignity and in rights. With the regard to the specific Articles recognizing rights within the Declaration, the right to life, liberty and security<sup>129</sup> is recognised, as well as the right to equality before the law,<sup>130</sup> the right to protection of honour,<sup>131</sup> the right to preservation of health and to well-being,<sup>132</sup> the right to work,<sup>133</sup> the right to asylum and the right to be free from arbitrary arrest.<sup>134</sup> Thus, one can see that the American Declaration encompasses a much wider variety of rights. However, it has been seen merely as soft law and not binding. Yet, in an Advisory Opinion by the Inter-American Court of Human Rights in 1989,<sup>135</sup> in which Colombia sought an advisory opinion on the status of the American Declaration, the court held it to have a significant status. The Court held that the American Convention and other human rights instruments could not be interpreted without reference to the American Declaration as the member states of the organisation have ‘signalled their

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<sup>124</sup> OAS op cit note 123 at Article 5.

<sup>125</sup> Ibid at Article 6.

<sup>126</sup> Ibid at Article 7.

<sup>127</sup> Ibid at Article 24.

<sup>128</sup> D Harris & S Livingstone *The Inter-American System of Human Rights* (1998) Clarendon Press: Wotton-on-Edge at 1.

<sup>129</sup> American Declaration op cit note 121 at Article I.

<sup>130</sup> Ibid at Article II.

<sup>131</sup> Ibid at Article V.

<sup>132</sup> Ibid at Article XI.

<sup>133</sup> Ibid at Article XIV.

<sup>134</sup> Ibid at Article XXV.

<sup>135</sup> Inter-American Court of Human Rights, Advisory Opinion OC – 10/89, July 14 1989.

agreement that the Declaration contains and defines the fundamental human rights referred to in the Charter... Thus the Charter of the Organisation cannot be interpreted and applied... without relating... to the corresponding provisions of the Declaration'.<sup>136</sup> This Advisory Opinion, therefore, highlights the significance of the American Declaration in the human rights legal sphere in the Americas. By highlighting the significance of the Declaration it can be seen that the transgender female refugee who is in a host country in the Americas can, in theory, claim these rights and their entitlement to them. Thus, the Inter-American system has in place a legal framework that could apply to individuals within member states. However, it must also be noted that there is no direct reference to refugees and asylum-seekers within the American Convention and Declaration, which is a significant drawback as states may argue that their duties only apply to their citizens.

### 3.3. African Union

The final main regional legal system existent in the global stage today is the African system. The African Union, as it is known today, used to be known as the Organisation of African Unity, and has as its main human rights document the African Charter on Human and Peoples' Rights of 1981.<sup>137</sup> Significantly, 'one of the peculiarities of the Charter is the inclusion of peoples' rights, not only in the list of rights protected, but in the name of the Charter. The African system recognises not only individual rights, but also attaches importance to the rights of the group as such'.<sup>138</sup> The African Charter at Article 4 emphasises that member States must respect human rights<sup>139</sup> and promote gender equality<sup>140</sup> within their respective countries. Additionally, and possibly quite importantly for transgender female refugees, is the adoption of a Protocol in 2003<sup>141</sup> that promoted the rights of women in Africa. The Protocol 'defines discrimination against women to include any distinction, exclusion or restriction or any differential treatment based on sex'.<sup>142</sup> However, there are no provisions dealing specifically with gender identity within the African regional framework,

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<sup>136</sup> Advisory opinion supra note 135 at paras 42-4.

<sup>137</sup> African Charter on Human and Peoples' Rights (Banjul Charter), 27 June 1981, CAB/LEG/67/3 rev 5, 21 ILM 58 (1982).

<sup>138</sup> U O Umozurike 'The African Charter on Human and Peoples' Rights: Suggestions for More Effectiveness' (2007) 13 *Annual Survey of International and Comparative Law* at 180.

<sup>139</sup> African Charter op cit note 137 at Article 2.

<sup>140</sup> Ibid.

<sup>141</sup> African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 11 July 2003.

<sup>142</sup> Steiner op cit note 122 at 1065.

meaning that the transgender woman would be excluded from its ambit. The African Commission on Human and Peoples' Rights was established by the African Charter and has been called upon by resolutions of the NGO Forum to protect transgender rights. Annually, the African Commission holds sessions to discuss human rights violations on the African continent and review country reports. Specifically, at the 46<sup>th</sup> Session, the NGO forum called on the Commission to expand the rights of transgender persons, passing a resolution to 'condemn the situation of hatred and systematic attacks by state and non-state actors against lesbian, gay, bisexual, transgender and intersex individuals'.<sup>143</sup> However, nothing yet has been formally passed or declared on the rights of transgender individuals in Africa. Some of the fundamental rights recognised within the African Charter include the right to be free from discrimination,<sup>144</sup> right to work,<sup>145</sup> right to health<sup>146</sup> and in the preamble the Charter specifically notes the importance of freedom, equality, justice and dignity as being the essence of the aspirations of the African continent.<sup>147</sup> However, it is very unlikely that the transgender female refugee will find protection from violence within this regional system seeing that numerous countries in Africa criminalise homosexuality. As homosexuality is regarded as a crime in most African countries, it is improbable that transgender persons would find protection.<sup>148</sup>

Refugee rights on the African continent are by and far covered by the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa.<sup>149</sup>

Although not many rights are recognised under the OAU Convention, Bonaventure Rutinwa writes:

'the rights to be recognised as a refugee and not to be subjected to refoulement, refugees are also entitled under international law to certain standards of treatment, which include security rights,

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<sup>143</sup> S Ndashe 'Seeking Protection of LGBTI Rights at the African Commission on Human and Peoples' Rights' (2011) *Feminist Africa Issue* at 22

<sup>144</sup> African Charter op cit note 137 at Article 2.

<sup>145</sup> Ibid at Article 15.

<sup>146</sup> Ibid at Article 16.

<sup>147</sup> Ibid at the Preamble.

<sup>148</sup> See Law Library of Congress 'Laws on Homosexuality in African Nations' (2014), available at <https://www.loc.gov/law/help/criminal-laws-on-homosexuality/homosexuality-laws-in-african-nations.pdf>, accessed on 9 August 2017.

<sup>149</sup> Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 UNTS 45 (hereafter referred to as the OAU Convention).

including protection from physical attack, and assistance to meet basic needs; basic dignity rights, including protection against discrimination...self-sufficiency rights, including rights to work<sup>150</sup>

Regarding the OAU Convention itself, the Charter asserts itself to the principle of non-discrimination,<sup>151</sup> co-operation with the UNHCR and the 1951 UN Refugee Convention.<sup>152</sup> Therefore, one can see clearly that the OAU Convention explicitly recognises the rights that refugees are guaranteed to in the 1951 UN Refugee Convention and, furthermore, academic scholars, such as Rutinwa and Hathaway, argue that the international standards of protection of human rights and dignity apply to refugees in Africa. This would mean that the transgender female refugee living in refuge who is in fear of physical or sexual violence could claim protection under the OAU Convention. Yet, similarly to the other regional systems, there is a lack of reference to transgender rights, let alone reference to transgender female refugees. Thus, on a continent where homosexuality is criminalised by the majority of states, it is not likely that the transgender female refugee will find protection.

#### 4. CONCLUSION

This chapter has outlined the normative framework that governs refugee rights and international human rights law more generally. What was gathered from the international legal framework is that the rights to bodily integrity, work, and healthcare are all guaranteed and are premised on the right to dignity. Dignity is a concept that has appeared in the preambles of nearly all the international human rights instruments and even within the regional human rights instruments. However, what was also noticed was the lack of reference to gender and gender identity and sexual orientation. Yet, the references to the dignity and equality of all persons and groups of peoples in the human rights instruments give hope that a normative framework exists that is founded on such foundational principles.

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<sup>150</sup> B Rutinwa 'The End of Asylum? The Changing Nature of Refugee Policies in Africa' (1999) *New Issues in Refugee Research*, Working Paper No 5 at 7; See also J Hathaway & R A Neve 'Making International Refugee Law Relevant Again: A Proposal for Collectivized and Solution-Oriented Protection (1997) *Michigan Law Journal* at 158-166.

<sup>151</sup> OAU Convention op cit note 149 at Article 4.

<sup>152</sup> Ibid at Article 8.

## CHAPTER FOUR

### ANALYSIS OF THE NORMATIVE FRAMEWORK

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#### 1. INTRODUCTION

The law as discussed in the previous chapter is there for the protection of all human beings, and in particular the law was laid out in a way that gathered momentum for the protection from human rights violations for transgender female refugees. Within this chapter a feminist critique will be used in order to not only analyse, but contextualise the normative framework on an international and on a regional level. Feminism, as noted in chapter one, 'is aimed at overcoming gender oppression by using feminist methodologies to analyse and reform the law in order to achieve gender equality'.<sup>153</sup> Thus, the underlying themes that will be seen throughout this analysis will be that of testing whether patriarchy and misogyny are still heavily present within the law, thus leading to gender inequality and the oppression of minority groups. This chapter will start with engaging with specific examples in which there is a perceived gap between the law and practice. The lack of reference to bodily integrity, Alice Edwards critique on the right to physical security, and the lack of reference to state responsibility are but a few of the examples of where there are perceived problems in the law surrounding this area. Moreover, this leads on to a general theme of ineffectiveness in the international sphere and why the law is perceived as being ineffective. Regionally this is also a problem and will need to be analysed in order to see whether it has been fulfilling its regional role in promoting and protecting human rights in the respective regions. Thus critiquing the law is a fundamental exercise; it allows the exploration of where the law reaches in reality, where it stops and fails on the ground and in the end leads effectively into what recommendations can be made to protect transgender female refugees if they are indeed found to be needed. The chapter will then end with an exploration of the larger issue at hand; that the reason why transgender female refugees face such severe hardships is due to the fact that they challenge the patriarchal system.

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<sup>153</sup> Chinnian op cit note 31 at 26; See also C Smart *Feminism and the Power of Law* (1989) Routledge: London at 69.

## 2. UNHCR STATEMENT OF THE PROBLEM

The UNHCR are the leading international organisation for the protection of refugees and it follows that it is appropriate, when analysing the law, that their statement and opinion on the status of transgender female refugees must be considered first before delving into a deeper theoretical analysis. The largest report gathered by the UNHCR was titled “Women on the Run” and has been cited many times over the previous chapters. Although this report was regionally located in the Americas, the UNHCR chose to make general comments on what was lacking in the protection of transgender female refugees and why there is a perception that the law is failing this minority group of refugees. The number one factor that the UNHCR identified as leading to the plight of transgender female refugees was that there is a lack of domestic state protection. In the report, the UNHCR claimed that of all the trans women interviewed, all described the impossibility of finding any form of safety, whether it be in the home country or in the countries of refuge. One transgender female refugee named Alma stated that when she moved Honduras to San Pedro Sula to Tegucigalpa, she made 30 reports to the state authorities, of which none were investigated or followed up on. In fact, Alma was considered lucky as she had a life partner in the United States of America who managed to afford a private bodyguard for her. In the report, ‘transgender women told UNHCR they had no way of reporting abuse or finding protection. Sara said, “I saw many times that the police would beat my trans friends... There are murders of transgenders and we cannot complain”’.<sup>154</sup>

Thus, the UNHCR found that there was a definite lack of state protection; the mechanisms that were in force in the countries of refuge did not offer them a pathway to complain about the abuses and rights violations that they were suffering. In fact, the police, who are supposed to be guardians of law and protecting human beings from crime, were more often than not the perpetrators. It was then the ineffectiveness of the domestic countries of refugees’ state protection that the UNHCR titled as the main contributing cause to the plight of transgender female refugees. However, it is not just the domestic state implementations that are failing these refugees. The international and regional legal frameworks are proving to be ineffective and furthermore, the question must also be answered as to why it is that this particular class of refugees are facing such severe shortcomings. Is it because they present a direct challenge to the global patriarchal system? Or perhaps their problems were not envisaged at the time of

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<sup>154</sup> UNHCR op cit note 10.

the drafting of the 1951 UN Refugee Convention? The further significance of the UNHCR's statement of the problem is that although they do not provide any direct solutions, they are in fact conscientising the issue. They are highlighting the plight of the transgender refugee to the international community and are thereby conscientising people. By conscientising the plight of the transgender refugee, they bring light to it, which is the first step in addressing the issue at hand.

### **3. ANALYSING THE EFFECTIVENESS OF THE LEGAL FRAMEWORK**

#### **3.1. The International Framework**

##### **3.1.1. A Focused Look on the Right to Human Security**

The international legal framework has been the main focus of the normative framework and it is only logical that it is first analysed in order to see how effective it has been and where there are possible gaps in the protection of transgender female refugees. Furthermore, human security was the main issue that was highlighted in chapter two with regard to the plight of this class of refugees; it was seen how they were subjected to a diverse form of physical and sexual assaults, all assaults on physical security and bodily integrity. The rape and physical assaults of transgender female refugees violates this right, which is guaranteed to all humans through the UDHR, ICCPR and various other international human rights instruments. Interestingly, there is no direct reference to the right to physical security in the 1951 UN Refugee Convention. Alice Edwards, a respected legal scholar on refugee law, takes a broader view on human security and refugees more generally and notes three main criticisms in the law on human security.

Edwards' first critique of human security is that there is a lack of a precise definition, which can be seen through the various countries' approaches to protecting it. For Edwards, 'at minimum, human security means security of persons from threats to life, freedom, and dignity'.<sup>155</sup> However, when one looks to Japan and Canada, as Edwards does in her scholarly work, we can see that the definition and breadth of the law on human security is contested internationally. For Canada, human security has no place in national security interests and, therefore, limits the definition and scope of human security when national security is at risk. Japan, on the other hand, has incorporated a much broader approach to human security and 'has stated that the concept of human security comprehensively covers all the menaces that

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<sup>155</sup> A Edwards 'Human Security and the Rights of Refugees' (2009) *Michigan Law Journal* at 778.

threaten human survival, daily life, and dignity'.<sup>156</sup> Thus, although human security or bodily integrity has been recognised at some form at international law, critiques have been levelled at the term for not being concise enough and, therefore, useless. It thus gives a pathway to states to argue against providing the maximum amount of protection to transgender female refugees as the direct scope of the right has never truly been defined.

Secondly, Edwards highlights that there is a lack of a legal framework in refugee law regarding human security. This second criticism links to the first in that as the term is ambiguous in its scope and obligations on states, the legal framework for protecting the physical security of refugees is lacking. Importantly, international law is consent-based in that states who sign specific conventions and treaties have to consent to the international law in question. The UNHCR itself has noted this criticism and has even stated that the focusing on a lack of protection is drawing attention away from protecting the needs of refugees.<sup>157</sup>

The third criticism, and possibly the most hazardous to transgender female refugees, is what Edwards labelled as the “Securitisation” problem. Highlighting all these issues faced by refugees under the term of human security has had the effect of grouping them ‘under a security canopy’.<sup>158</sup> Thus, what has happened is that refugees are being seen as security threats instead of oppressed groups of people needing protection. Chimni states the problem in the following way:

‘The language of burden sharing has today been transformed into a language of threats to the security of states. Refugees are now seen as threatening a host country’s security by increasing demands on its scarce resources or threatening the security of regions by their mere presence’.<sup>159</sup>

Lastly, Edwards has conveyed that the ‘human security framework is weakly institutionalized and has poor enforcement power’.<sup>160</sup> In essence, these four criticisms of the human security framework point to the fact that there is no clear definition, legal framework, and

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<sup>156</sup> Edwards op cit note 155 at 779; See also MOFA, Diplomatic Bluebook 1999, Ch II section 3, available at <http://www.mofa.go.jp/policy/other/bluebook/1999/II-3-a-.html>, accessed on 19 May 2017; See also Y Takasu, Director-General, MOFA of Japan, Statement at the International Conference on Human Security in a Globalised World (May 8 2000), available at [http://www.mofa.go.jp/policy/human\\_secu/speech0005.html](http://www.mofa.go.jp/policy/human_secu/speech0005.html), accessed on 19 May 2017.

<sup>157</sup> UNHCR Policy Committee Meeting on August 3, 1998, Draft Paper by Centre for Documentation and Research, The Concept of Human Security and its Relevance to UNHCR, UN Doc AHC/98/219.

<sup>158</sup> Edwards op cit note 155 at 784.

<sup>159</sup> B S Chimni ‘Globalisation, Humanitarianism and the Erosion of Refugee Protection (2000) 13 *Journal of Refugee Studies* at 252

<sup>160</sup> Edwards op cit note 155 at 788.

enforcement mechanism to ensure that states not only protect refugees, but also how far this protection should extend. If this protection is lacking for refugees, then as a by-product there is a lacking of protection of transgender female refugees.

### 3.1.2. A Lack of Reference to State Responsibility

The lack of a formal system of allocation of responsibilities for the protection of refugees has also left the refugee system as ineffective in many parts. This is the second way in which the international legal system has failed transgender female refugees. At first, it may not seem as obvious as to why there is a need to have a clear system of allocating responsibilities regarding refugees in order to protect transgender female refugees, however, it is essential. The problems raised by not having such a system of burden-sharing ‘is that it does not ensure that protection will be provided to a refugee, when no state assumes responsibility for providing such protection to him’.<sup>161</sup> Furthermore, having a system allocating responsibilities ‘would ensure that the international response to the protection needs of refugees is predictable and comprehensive’.<sup>162</sup> Yet, despite the above the UNHCR has been making some grounds with authors such as Hathaway and Neve pushing for models of allocation. The primary point that has received consensus is that ‘access to physical safety should be granted as close as possible to the country of origin and neighbouring countries should thus bear the primary responsibility to provide such access’.<sup>163</sup> However, as pointed out in chapter two and in the renowned UNHCR Women on the Run report, transgender female refugees face physical, sexual, economic and medical violence on the stage of the journey and in the countries of refuge, whether they be the first country of asylum or not. The question is then becoming why transgender female refugees struggle to access safety from violence and discrimination on a more extreme level than refugees in general.

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<sup>161</sup> C Phuong ‘Identifying States’ Responsibilities Towards Refugees and Asylum Seekers’ Paper Presented at the ESIL Research Forum on International Law, May 2005 at 8.

<sup>162</sup> Ibid.

<sup>163</sup> Ibid at 10.

### 3.1.3. A Lack of Hate Crime Development

One last aspect that is necessary to engage with is the lack of any development regarding hate crime. Whilst there have been some references to the principle of non-discrimination, there is only one reference in an International Convention to hate crime. In the Convention on the Elimination of Racial Discrimination, it states:

‘Hate crimes are hard to define and are considered by some to be controversial, however, it is generally accepted that hate crimes can be understood in terms of motive or intention or discrimination.<sup>164</sup> Thus, we can say that ‘hate crimes are criminal acts committed with a bias motive’.<sup>165</sup>

The lack of reference to hate crimes on the international area is unfortunate as it potentially serves as an effective way of protecting transgender female refugees from violence. Despite the fact that hate crime has been successfully domesticated in domestic jurisdictions, there is no international legal document on it. Rape has never been defined as a hate crime, when in the case of transgender women, rape has been used specifically as a way to humiliate them and their identity, as identified in chapter two of this thesis. The importance of hate crime being recognised is for a number of reasons. The most important of these reasons is that ‘where a prosecution and sentence takes account of the bias motive, such public acknowledgement reassures the victim that his or her experience has been fully recognised’.<sup>166</sup> The immediate importance of this can be seen in relation to the purpose of this entire thesis, which is to shed light on the silent struggle of transgender female refugees. By focusing on the motives of hate crimes it enables data to be effectively gathered on the state of affairs regarding transgender women in a particular area. Moreover, if it were to bring to light to atrocities committed against transgender female refugees, it would then also serve as a call to demand protection to counter these unique threats.

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<sup>164</sup> J Schweppe & M A Walters *The Globalisation of Hate: Internationalising Hate Crime?* (2016) Oxford University Press: Oxford at 54-56.

<sup>165</sup> Office for Democratic Institutions and Human Rights ‘Hate Crime Laws: A Practical Guide’ (2009), available at <https://www.osce.org/odihr/36426?download=true>, accessed 9 August 2017 at 16.

<sup>166</sup> *Ibid* at 22.

### 3.2. The Regional Systems

Following on from critiquing the international human rights system, it is necessary to engage with the regional human rights system. To engage in this task, the three systems will be looked at generally before similarities can be drawn between issues facing each of the three main regional systems. Regarding the European system Lucius Caflisch has noted that there is a yearly backlog of around 17,000 cases in the European Court of Human Rights, which amounts to about a three-year waiting list before the Court will even hear the complaint at hand. Caflisch further notes the problem in the following way: ‘all this goes to show that the Strasbourg Court is in a serious predicament. First, it is true that the Court has been able to increase its output by about one quarter; but did it do so at the expense of quality? It is also true that over 90% of the applications are inadmissible, but in order to reach that conclusion, applications must be summarily examined’.<sup>167</sup> This long waiting line to be heard by the Court provides a significant barrier to justice for oppressed groups as they have to await years in order to even be heard. Within three years many events can occur and circumstances can change and this leads to an ineffective protection of human rights. Waiting three years for access to the European Court does not help transgender female refugees who are facing rights violations daily every year. Another issue that is facing the European system is that relies too heavily on individual complaints. Indeed, the problem with relying on individual complaints is ‘that they fail to expose the overall picture of human rights prevailing in countries. They only allow the court to see individual complaints one at a time and thus deny it a macro-level view of the human rights situation in member states’.<sup>168</sup> Moreover, as one can see from the critique, the European system is reliant predominantly on its Court and not other mechanisms in which human rights can be promoted and enforced.

Accessibility is also an issue that is facing the Inter-American regional human rights system. The system itself is based in Washington DC and Costa Rica, which means that applicants have to travel to one of those two locations in order to bring light to their human rights violations. Furthermore, there is a lack of trust in this regional system as the Inter-American Commission does not have a transparent system and there is a dire lack of material and political resources accorded to it and the Inter-American Court. Another reason for the

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<sup>167</sup> L Caflisch ‘The Reform of the European Court of Human Rights: Protocol No 14 and Beyond’ (2006) 6 *Human Rights Law Review* at 403-404.

<sup>168</sup> F Kidanemariam ‘Enforcement of Human Rights under Regional Human Rights Mechanisms: A Comparative Analysis’ (2005) LLM Thesis Submitted at University of Georgia at 74.

lack of trust in the system is the situation regarding the United States of America and Cuba. Cuba has been the subject of the multiple reports spanning 50 years and yet nothing has effectively happened in Cuba to change the human rights situation. On top of this, there is potential bias with regard to its focus on Cuba; some argue that Cuba has in fact done more for its people than any other American country. If this is true, why has been there such a focus on Cuba; is it because they are communist? Lastly, the USA has refused to actively participate in the Inter-American system and has not signed the American Convention on Human Rights. The USA's refusal has provided a resource barrier to the system and is a block in its effectiveness.

The last regional system is the African system and accessibility has also been signalled as an issue, as has trust and effectiveness of the system. 'Individuals and NGO's can only have standing before the African Court if their countries have signed a declaration accepting the African Court's competence and jurisdiction... This restricted accessibility to the African Court impedes the effectiveness of the Court in fully protecting rights'.<sup>169</sup> Thus, accessibility has become a major issue in the African regional system and there appears to be a theme that African leaders do not want to give too much authority to a regional power. Evidence for this can be seen through the comment made by Ambassador Badawi who worked for the African Commission and stated that 'the question of allowing NGOs and individuals to submit cases to the Court was one of the most complicated issues during the consideration of the draft Protocol'.<sup>170</sup> Thus, how can a regional system be effective if individuals and NGOs are not able to bring complaints before it. It seems then that in drafting the Protocol, the wishes of national leaders were considered more important than their human rights violations. If transgender female refugees are facing human rights violations in Africa, there is a very little that the African regional system can offer them as they most likely will not have access to the African Court.

In conclusion, the regional systems are suffering from issues of accessibility and inefficiency. Transgender female refugees who are facing struggles in the Americas, Africa and Europe cannot access justice in each of the respective regional systems as each system has restricted access to appear before the court. Furthermore, there is a heavy reliance on

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<sup>169</sup> L W Kembabazi 'A Critique of Accessibility to the African Court for Human and Peoples' Rights by Individuals and NGO's: Drawing Experiences From the Inter-American and European Systems' (2009) LLM Thesis Submitted at Central European University at 2; See also Article 34 (6) of the Protocol to the African Charter on Human and Peoples' Rights establishing the African Court on Human and Peoples' Rights.

<sup>170</sup> I A B El Sheikh 'Draft Protocol to the African Charter on Human and Peoples' Rights on the Establishment of the African Court on Human and Peoples' Rights: Introductory Note' (1999) 9 *African Journal on International and Comparative Law* at 943-44.

using the court in each system, which as pointed out is not investigating the problem and denies a macro-view of the human rights situations in member countries.

#### **4. WHY IS THERE A GAP BETWEEN HUMAN RIGHTS LAW APPLICATION AND THE PROTECTION OF TRANSGENDER FEMALE REFUGEES?**

The next question to consider after considering the lack of international and regional protection for transgender female refugees is to consider why there is a gap in the law. This thesis has pointed to the fact that it is taking a conceptual approach from a feminist perspective due to the long and rich discourse that feminism has had in analysing and critiquing legal frameworks. The thesis has also alluded to the concept that there is a lack of protection for transgender female refugees due to the evidence of patriarchy in society and oppression of women. At the outset it is important to note that a feminist conceptual approach is needed in order to discuss the plight of transgender female refugees in the refugee system as the thesis is engaging with societal ideas of what gender is and is deconstructing patriarchy and the ways in which transgender women present a challenge to this dominant system. When discussing gender identity no other discourse has such a diverse amount of scholarship on the issue.

##### **4.1. Asking the Woman Question**

Professor Katharine Bartlett, a leading scholar on using feminism as a critiquing tool, has identified a number of methods, such as asking the woman question and consciousness-raising, to be used to critique and analyse the law from a feminist perspective. Asking the woman question has been argued by Bartlett to be the primary method of feminist critique and its method is simple. ‘The woman question asks about the gender implications of a social practice or rule; have women been left out of consideration...In law, asking the woman question means examining how the law fails to take into account the experiences and values that seem more typical of women than of men’.<sup>171</sup> On top of this, as transgender women identify as female and not as male, for all accounts and purposes they are women, although society may refuse to acknowledge this, as seen by the amount of violence directed against

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<sup>171</sup> K Bartlett ‘Feminist Legal Methods’ (1990) *Harvard Law Review* at 837.

them in chapter two of this thesis. The importance of this method has been noted by Chinnian as ‘the questions and answers in this method reveal the truth of societal hierarchies and enable reform directly linked to the data acquired’ and ‘this method investigates the bias in the law, establishing whose dominant view the law reflects and protects’.<sup>172</sup> Heather Wishik identified several questions as examples of how asking the woman question can be used in any given situation in approaching the analysis of the law. Firstly, ‘what have been and what are now all women’s experiences of the life situation addressed by the doctrine, process, or area of law under examination’.<sup>173</sup> Secondly, ‘what assumptions, descriptions, assertions and/or definitions of experience does the law make in this area’.<sup>174</sup> Third, ‘what is the area of mismatch, distortion or denial created by the differences between women’s life experiences and the laws assumptions or imposed structures’.<sup>175</sup> Lastly, ‘what patriarchal interests are served by the mismatch’.<sup>176</sup>

With regard to transgender female refugees, it is clear that trans women have been left out of the conversations and discussions that formed the law. The specific issues that are faced by these refugees have not been considered, demonstrated by the invisibility of trans women in the 1951 UN Refugee Convention and every other major international and regional human rights instrument. Transgender female refugees experience violations of their rights to employment, physical security, and right to have access to healthcare. The law appears to make the assumption that transgender women and transgender refugees do not need specific human rights instruments that protect them specifically as they will be covered in the human rights instruments. However, this is a fatal mistake as there is a large disconnect between this assumption and the lived realities of transgender female refugees; they are clearly not protected by the international human rights instrument and the regional ones. Their human rights are violated despite the existence of various Conventions delineating the rights to bodily integrity and employment and healthcare.

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<sup>172</sup> Chinnian op cit note 31.

<sup>173</sup> H R Wishik ‘To Question Everything: The Inquiries of Feminist Jurisprudence’ (2013) 1 (1) *Berkeley Journal of Gender, Law & Justice* at 72.

<sup>174</sup> Ibid at 73.

<sup>175</sup> Ibid at 74.

<sup>176</sup> Ibid.

## 4.2. Consciousness-Raising

The second main feminist method of critique is what has been coined as consciousness raising. This method ‘is an interactive and collaborative process of articulating one’s experiences and making meaning of them with others who also articulate their experiences’.<sup>177</sup> Bartlett writes:

‘Consciousness-raising operates as a feminist method not only in small personal growth groups, but also on a more public, institutional level, through bearing witness to evidences of patriarchy as they occur, through unremitting dialogues with and challenges to the patriarchs and through the popular media, the arts, politics, lobbying, and even litigation’.<sup>178</sup>

The importance of this method is that it further highlights the specific plights and battles that the oppressed group are facing. By collecting together the evidence of the plight of transgender female refugees one can begin to see the power balance in society and the ways in which transgender female refugees appear as a threat and why they lack adequate protection. Chapter two of this thesis was, in essence, a form of consciousness-raising as it brought to light the plight of trans refugees in countries of refuge. The experiences of trans female refugees in the Americas, Asia, Africa and Europe was brought together to show how these refugees are facing physical and sexual violence, economic violence and medical violence, despite being in countries of refuge and despite international human rights instruments promoting rights that go against these forms of violence. Chapter two of this thesis, therefore, demonstrates how patriarchy is still at play on a global level and how the plight of transgender female refugees has not been addressed specifically in any human rights instrument internationally and regionally.

## 5. INTERNATIONAL HUMAN RIGHTS LAW & REFUGEE LAW AS A SITE OF PATRIARCHAL OPPRESSION

International human rights law, and in particular international refugee law, is a site of patriarchal oppression and without this being addressed transgender female refugees will always struggle to access protection from human rights violations. The wording of human

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<sup>177</sup> Bartlett op cit note 171 at 863.

<sup>178</sup> Ibid at 864-5; See also A Bender ‘Lawyer’s Primer on Feminist Theory and Tort’ (1988) 38 (3) *Journal of Legal Education* at 9-10.

rights instruments and the lack of any clear reference to transgender rights convey the law as being essentially male-oriented and this was further backed up through the feminist methods of consciousness-raising and asking the woman question. On top of this, the current limited understanding of sex and gender have led to these being grounds of oppression; that being that there are only two recognised sexes and genders. Chinnian states that this narrow formulation has led to the oppression of women. ‘In patriarchal communities, privileges are afforded to men, and women are regarded as subservient to men, hence society is the very site of oppression for women’.<sup>179</sup>

Building upon this, Karen Chinnian has noted that:

‘The narrow assumptions of sex ignores the range of sexes between the sexed male and the sexed female. Then the socially constructed concept of gender is superimposed on sex and creates identities to give meaning to sex’.<sup>180</sup>

What Chinnian means by this is that society is built upon assumptions to do with the roles attached to sex and gender. For most, sex and gender go in hand in hand and this has been instilled in society from birth. Children are born and assigned a gender from birth according to their sex category; ‘as soon as they talk, they start to refer to themselves as members of their gender...adolescent boys and girls approach and avoid each other in an elaborately scripted and gendered mating dance’.<sup>181</sup> Thus, due to society’s understanding of sex and gender, the law that has followed has adhered to such assumptions. These assumptions have isolated the transgender woman, meaning that international human rights law has not fully considered the unique struggles and oppression faced by trans women. This can also be seen in the 1951 UN Refugee Convention. The Convention itself has no reference to sex and gender in it, hinting that the transgender refugee was not considered at the time of drafting. However, some progress has been made with the UNHCR’s interpretative guidelines on gender-related persecution. Whilst the guidelines distinguish between sex and gender, acknowledging that they are two distinct things, it still entrenches the notion that sex is fixed and determined by nature; this again isolated the transgender female refugee. The other issue with the guidelines is that by assuming sex is fixed and determined, ‘gender is interpreted to be based on sex, and this enables a hierarchy of...gender roles and the power afforded to

<sup>179</sup> Chinnian op cit note 31; See also G Rubin ‘The Traffic in Women: Notes on the Political Economy of Sex’ in R Reiter (ed) *Towards an Anthropology of Women* (1975) at 179.

<sup>180</sup> Chinnian op cit note 31 at 47.

<sup>181</sup> L Jorber ‘Night to his Day: The Social Construction of Gender’ in P S Rothenberg *Race, Class and Gender in the United States: An Integrated Study* (2004) at 55.

each'.<sup>182</sup> It is clear that that much needs to change in how the law conceives of gender and sex in order for the transgender female refugee to come out of isolation. International human rights and refugee law cannot begin to conceive of the oppression of the transgender if it still holds conservative views on how gender and sex are conceived in society and how power imbalance can ensue following the notion that sex and gender are fixed and determined.

## 6. CONCLUSION

In summary then, this chapter investigated the numerous shortcomings in the law regarding the protection of transgender female refugees. It was seen that international law has done very little in developing a precise definition of human security and how to best give effect to this right. The danger of having an imprecise definition is that it gives abusive states the pathway to deny a certain level of protection that would be needed for the transgender female refugee to be safe. Secondly, this chapter looked at how there is a definite lack of reference to state responsibility in regard to burden-sharing the responsibilities of protection refugees and how there has been little to no development in creating international hate crime legislation. Both these lack of developments on the internal arena have left lacunas in the law that leave the transgender female refugee vulnerable and lacking protection. Lastly, and most importantly, it was seen that the major gaps in the protection of the trans female refugee in international and regional law is due to the fact that international human rights law and international refugee law are sites of patriarchal oppression and thus the trans refugee, being a threat to the patriarchal structures in the law, lack legal protection as their specific needs have not been considered or catered for.

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<sup>182</sup> Chinnian op cit note 31 at 54.

## CHAPTER FIVE

### **Favourable Developments in the Republic of South Africa**

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#### 1. INTRODUCTION

The focus of this chapter is on the positive developments in the protection of transgender female refugees in South Africa. Through the introspection of South Africa's domestic legal order it is possible to discover new perspectives on its law and more specifically, the legal culture that has developed in a way that has begun to lift the plight of transgender individuals. Following on from the previous chapter's feminist critique of the patriarchal nature of refugee law, South Africa can be seen as having begun to create a legal order that respects diversities in gender and sex. Having already investigated the international and regional frameworks in place, it becomes necessary to complete the picture and analysis of the transgender female refugee situation with a discussion on domestic legal orders. Through this, one can discover the negatives and positives in the procedures and legislation in place for the protection of trans female refugees. In this chapter, South Africa has been identified as the domestic legal order of focus. South Africa is considered a haven for transgender female refugees on the African continent with many fleeing to the state in order to escape persecution. Furthermore, in order to break away from the focus on Western and Eurocentric oriented human rights, South Africa is a prime example of a country that falls outside of the Global North and is also sensitive to the issues of transgender female refugees. Over the course of the chapter, the state of affairs for transgender women shall be investigated and a thematic analysis of the legislation that is in place shall be detailed. Moreover, South Africa's unique development of the constitutional value of Ubuntu and its creation of specific hate crime legislation will be explored as possible lessons for the international community and other host countries in how to approach the protection of transgender female refugees. Lastly, the concept of state responsibility will be explored as an avenue for transgender women in South Africa to seek protection. From this above analysis it will be possible to learn from the developments in the South African legal order.

## 2. USING SOUTH AFRICA AS A CASE STUDY FOR THE PROTECTION OF TRANSGENDER FEMALE REFUGEES

### 2.1. Transgenderism and Transgender Refugees in South Africa

It is difficult to provide an accurate number of how many transgender women currently live in South Africa as being transgender is still considered to be a cultural taboo, despite the country's liberal legislation.<sup>183</sup> However, it is known that they form a sizeable population enough to have legislation put in place to protect them. South Africa is the only country on the African continent where a person may legally change their sex that was given to them at birth. In terms of the Alteration of Sex Description and Sex Status Act<sup>184</sup> any person may undergo transitional surgery and change their assigned birth sex. It is for this reason that transgender female refugees see South Africa as an accepting and liberal nation. Furthermore, in terms of transgender female refugees, many flee to South Africa as it is one of the few countries where homosexuality is not illegal. 'From a constitutional perspective, South Africa appears to be a progressive beacon for Lesbians, Gays, Bisexuals, Transgender and Intersex people living on a continent where homosexuality is illegal in 38 out of 54 countries'<sup>185</sup> and furthermore the South African Constitution explicitly prohibits discrimination on the grounds of gender and sexual orientation.<sup>186</sup> It is also one of the few countries in which refugees can claim asylum based on persecution due to sexual orientation<sup>187</sup> and gender.<sup>188</sup> This liberal framework that is in place is due to the country's Constitution, which will be explored in more detail in terms of its protection for vulnerable groups and how this applies to transgender female refugees.

### 2.2. Constitution of the Republic of South Africa

The first aspect of the South African legal order that shall be discussed is its Constitution as it is the supreme law of the land. The Constitution<sup>189</sup> was founded officially in 1996 and was

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<sup>183</sup> V O Netshandama, A H Mavhandu-Mudzusi & P Matshidze 'Deconstruction Matula (Taboo): A Multi-Stakeholder Narrative About LGBTI' (2017) 31 (4) *South African Journal of Higher Education* 307-324; See also G Nicolaides 'South Africa and the Transgender Issue' (2015), available at <http://ewn.co.za/2015/09/16/EWN-SPECIAL-REPORT-Gender-Issues>, accessed on 19 August 2017.

<sup>184</sup> Alteration of Sex Description and Sex Status Act 49 of 2003.

<sup>185</sup> M de Waal 'LGBTI Rights in South Africa' (2012), available at [https://www.dailymaverick.co.za/article/2012-06-29-lgbti-rights-in-sa-the-constitutional-dream-and-the-not-so-dreamy-reality#.WZhQ2ZOg\\_q0](https://www.dailymaverick.co.za/article/2012-06-29-lgbti-rights-in-sa-the-constitutional-dream-and-the-not-so-dreamy-reality#.WZhQ2ZOg_q0), accessed on 19 August 2017.

<sup>186</sup> Constitution of the Republic of South Africa, 1996 at section 9 (3).

<sup>187</sup> Refugees Act 130 of 1998 at section 1 (xxi) defines social group for persecution purposes as including gender and sexual orientation

<sup>188</sup> Ibid.

<sup>189</sup> Constitution of the Republic of South Africa, 1996.

born out of the Apartheid struggle against white supremacy. For centuries, South Africa was governed under strict racial segregation laws based on formal Christian doctrine. However, under the guidance of the African National Congress a nationwide struggle took place against the regime, resulting in the handing over of power to the country's majority. From this context, the Constitution of South Africa was drafted so that no one would ever face the discrimination and violence that people of colour and minority groups had faced during Apartheid. The Constitution itself turned out to be a progressive and liberal document, being the first in the world to have express protection of sexual orientation in section 9 (3).<sup>190</sup>

Aside from this, the document is founded on the principles of dignity and equality, as stated in section 1.<sup>191</sup> Dignity has been considered by legal scholars to be the supreme constitutional value in South Africa, with Justice Arthur Chaskalson stating that:

‘the affirmation of human dignity as one of the founding values of the Constitution is significant...the 1996 Constitution now refers to the inherent dignity of all people, thus asserting that respect for human dignity, and all that flows from it, as an attribute of life itself, and not a privilege granted by the state’.<sup>192</sup>

Furthermore, in section 9 of the Constitution,<sup>193</sup> there is an express recognition that discrimination on any of the listed or analogous grounds are strictly prohibited, and in section 10<sup>194</sup> the right to dignity is formally codified. Apart from these significant rights, some of the other major rights that could apply to transgender female refugees include the right to fair labour practices,<sup>195</sup> the right to healthcare,<sup>196</sup> and the right to bodily integrity.<sup>197</sup> The most significant part of these rights is that they begin with the word ‘everyone’. The use of this word in particular means that there is no distinction between citizens and aliens in accessing the rights in the Bill of Rights. The significance of this phrase has a direct impact on transgender female refugees. It means that even though transgender refugees are not citizens of South Africa, they are nonetheless entitled to the broad range of rights contained in the Constitution. South Africa does not, therefore, discriminate on who these rights apply to.

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<sup>190</sup> Constitution op cit note 189.

<sup>191</sup> Ibid at section 1: The Republic of South Africa is one, sovereign, democratic state founded on the following values:

(a) Human dignity, the achievement of equality and the advancement of human rights and freedoms.

<sup>192</sup> Arthur Chaskalson ‘The Third Bram Fischer Lecture: Human Dignity as a Foundational Value of our Constitutional Order’ (2000) 16 (2) *South African Journal on Human Rights* at 193.

<sup>193</sup> Constitution op cit note 5.

<sup>194</sup> Ibid.

<sup>195</sup> Ibid at section 23.

<sup>196</sup> Ibid at section 27.

<sup>197</sup> Ibid at section 12.

Furthermore, South Africa's commitment to the inherent human dignity of all people is significant to transgender female refugees as it means that the way they are treated and handled must be done in accordance with their dignity. Dignity must frame the treatment of transgender female refugees in South Africa.

One of the leading judgments in the Constitutional Court of South Africa regarding sexual minorities and the prohibition against discrimination is the *National Coalition*<sup>198</sup> case. Within this judgment the constitutional values of dignity and equality were used to repeal the criminalization of sodomy. The significance of this case lies in its remarks on treating every human being with worth:

‘It is easy to say that everyone who is just like ‘us’ is entitled to equality. Everyone finds it more difficult to say that those who are ‘different’ from us in some way should have the same equality rights that we enjoy. Yet so soon as we say any group is less deserving and unworthy of equal protection and benefit of the law, all minorities and all of society are demeaned. It is so deceptively simple and so devastatingly injurious to say that those who are handicapped or of a different race, or religion, or colour or sexual orientation are less worthy’<sup>199</sup>

This powerful statement summarises the South African jurisprudential approach to minorities and those that are vulnerable. Through this judgment it can be seen that the Constitutional Court would view the discrimination and targeting of transgender female refugees is demeaning to all minorities and undermines society. Thus, the Constitution of South Africa is a strong shield for trans women to defend themselves against prejudice and discrimination.

### **2.3. What can be learnt from South Africa's use of Ubuntu?**

Aside from the Constitution itself, South Africa is unique in that the judiciary has begun formulating a constitutional legal principle named Ubuntu. South Africa is pioneering in that it celebrates its pluralistic legal system and places customary law on the same level as the common law and through this celebration of diversity, the recognition of Ubuntu as a key principle of transforming the law occurred. In the Constitutional Court case of

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<sup>198</sup> *National Coalition for Gay and Lesbian Equality and Another v Minister of Justice and Others* 1999 (1) SA 6 (CC).

<sup>199</sup> *Ibid* at para 22.

*Makwanyane*,<sup>200</sup> Justice Madala stated that Ubuntu is an ideal that ‘runs like a golden thread across cultural lines’.<sup>201</sup> Madala J went on to further state that ‘while Ubuntu envelops the key values of group solidarity, respect, human dignity...in its fundamental sense it denotes humanity and morality. Its spirit emphasizes respect for human dignity’.<sup>202</sup> Mohamed J defined Ubuntu as ‘the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women’.<sup>203</sup> Langa J added to this definition and gave his content to it by stating that Ubuntu is ‘the entitlement of all people to unconditional respect, dignity, value and acceptance’.<sup>204</sup> Through this value, the South African courts have been inspired to give full effect to the human rights of vulnerable groups. In applying this to transgender female refugees, it can clearly be seen that any form of violence directed at them would be contrary to Ubuntu as it does not respect the trans female refugees’ dignity and does not show respect and compassion towards the transgender refugee, but rather hate. Interestingly, the dominant feminist critique of refugee law with regard to transgender female refugees is that it has not considered the unique struggles they face as opposed to the general refugee population. Feminism outlines that this is due to patriarchy dominating the discussion and looking at the law through a “male-dominated” lens. Ubuntu, however, is a principle that can be used to begin to challenge this framework as its root lies in dignity and equality. Giving recognition to the transgender woman’s unique struggle and addressing it would be part of Ubuntu as it recognises her inherent dignity.

Thus, what can be learnt from South Africa is that it has found a value that runs throughout cultures and is not significant to just one single culture. Furthermore, although dignity can also be argued to be a golden thread running through cultures, Ubuntu is much more than just dignity and is an all-encompassing, almost undefinable value, that places supreme compassion and respect at its core. With Ubuntu influencing any legal culture, transgender female refugees would have legal protection in all forms and would begin to lift the silence of their struggle that has been overlooked by the patriarchal order within international refugee law.

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<sup>200</sup> *S v Makwanyane* 1995 (6) BCLR 665.

<sup>201</sup> *Makwanyane* supra note 200 at para 306.

<sup>202</sup> Ibid at para 307.

<sup>203</sup> Ibid at para 262.

<sup>204</sup> Ibid at para 224.

#### 2.4. Legislation and Policies of the Republic of South Africa

After having discussed the supreme law of the South Africa, its Constitution, it becomes necessary to engage with the legislation that is in place and the ways in which the government has attempted to provide protection for transgender female refugees. This discussion will further take a two-fold thematic enquiry; it shall follow the two themes of inclusivity on one hand, and non-discrimination, on the other hand. The primary legal instrument that deals with refugees is the Refugees Act.<sup>205</sup> However, this piece of legislation is in fact quite limited in terms of the amount of protection it offers to refugees. Between sections 28 and 34, the Act lists a number of rights and obligations of refugees, none being particularly relevant for the topic of this thesis; namely transgender female refugees. Section 29 states that no person may be detained for longer than 30 days, after which a judge of the High Court must hear the case. Despite this apparent lack of rights in the Refugees Act, there are other pieces of legislation that apply to refugees and not just to citizens.

The first set of legislation centres around the concept of inclusivity; including transgender female refugees within the ambit of protection and this is primarily found within the labour legislation of South Africa. The Labour Relations Act,<sup>206</sup> the Employment Equity Act<sup>207</sup> and the Basic Conditions of Employment Act<sup>208</sup> all provide protection to all persons working in South Africa and not just to citizens. Formal refugees, therefore, do have rights under this legislation. In the case of *Ndikumdavyi v Valkenburg Hospitals*<sup>209</sup> held that the definition of a dismissal is wider than a contract of employment and should just apply to an employment relationship. The effect of this case essentially meant that refugees and other vulnerable groups of employees are protected from unfair dismissal, which can be found in Chapter VIII of the Act. Under this Chapter, employees are entitled to not being unfairly dismissed and also have the right not to be subjected to unfair labour practices. In essence, this could assist transgender female refugees if they face discrimination and harassment in the workplace due to their transgender status, which was already highlighted in chapter 2 through the discussion on economic violence against trans refugees. The Labour Relations Act would give them the right to take their matter to the Commission for Conciliation, Mediation and Arbitration for resolution.

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<sup>205</sup> Refugees Act 130 of 1998.

<sup>206</sup> Labour Relations Act 66 of 1995.

<sup>207</sup> Employment Equity Act 55 of 1998.

<sup>208</sup> Basic Conditions of Employment Act 75 of 1997.

<sup>209</sup> *Ndikumdavyi v Valkenburg Hospitals* (2010) Case No C970/2010 Labour Court.

The second set of legislation focuses on the right not to be unfairly discriminated against, as provided for in the Constitution under section 9. An important piece of legislation in this regard is the Promotion of Equality and Prevention of Unfair Discrimination Act,<sup>210</sup> otherwise known as PEPUDA. At section 2 PEPUDA highlights that its object is to promote equality and protect the human dignity of all persons so as to eradicate discrimination in all aspects of life; both private and public. The main focus of this Act for this thesis is found in section 8, which is the prohibition of unfair discrimination on the ground of gender. Within this section, discrimination in policies, conduct, access to healthcare, and the denial of access to opportunities is expressly forbidden. This is highly significant for the transgender female refugee living in a country of refuge. As was canvassed in chapter 2 of this thesis, transgender female refugees face harassment and discrimination in the workplace, in the way they are treated in detention and in the way they are denied access to healthcare. PEPUDA seeks to address these issues and expressly prohibits these forms of discrimination. This is definitely a welcome stride for the protection of transgender individuals in South Africa and those trans refugees who live in fear. Moreover, PEPUDA makes hate speech an offence in the Republic of South Africa. Not only does the Constitution recognise in section 16<sup>211</sup> that speech must be prevented that causes psychological harm and also that speech that excludes minority groups must be prevented, but PEPUDA is the current legislation in place that deals with this. Section 10 of PEPUDA in essence describes hate speech as any speech that is intended to be hurtful, harmful or to incite harm, or to promote or propagate hatred.<sup>212</sup> For transgender female refugees, who are a vulnerable minority group, the legislation states that any harmful or hateful speech against them is an offence. Thus, in a country where being transgender is still a taboo and in refugee communities where attitudes are still conservative, transgender women have the law in order to enforce their rights

#### **2.4.1. The Importance of Hate Crime Legislation**

Although not yet able to be classified as legislation, the Hate Bill<sup>213</sup> is likely to come into force in the near future. The South African government has been in the process of creating and developing a new Act of Parliament in order to deal with hate crimes and hate speech.

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<sup>210</sup> Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000.

<sup>211</sup> Constitution op cit note 5 at section 16 (2) and (3).

<sup>212</sup> PEPUDA op cit note 210.

<sup>213</sup> Prevention and Combating of Hate Crimes and Hate Speech Bill, General Notice 698 of 2016, Government Gazette, 24 October 2016.

The new Draft Bill recognises that a hate crime can be targeted on the grounds of gender, sex, sexual orientation and gender identity and that the hate crime will be prosecuted as a criminal offence under the Criminal Procedure Act.<sup>214</sup> What is further significant about the introduction of this Bill is that it actively puts a duty on the state to promote the Hate Bill and train public officials, such as the South African Police Service and the National Prosecuting Authority. In a country where sexual minorities are targeted for murder and abuse,<sup>215</sup> this Hate Bill is a beacon of protection to deal with such crimes in a serious manner and to educate the public that such actions are not acceptable. In terms of transgender female refugees who face physical violence and emotional violence, this Bill would allow them to bring such complaints to the Police and have the violators prosecuted.

Moreover, the Bill has received support from South African legal academia. One academic Gideon Muchiri notes the importance of targeting hate crimes specifically. He writes that hate crimes ‘are message crimes intended to speak to the entire hated group’<sup>216</sup> and it is for this reason that hate crimes should be quarantined from other criminal offences. Furthermore, he describes how the police in South Africa do not investigate into the hateful motives of hate crimes and with the new Bill it ‘will give law enforcement officials impetus to seek relevant evidence to improve the chances of conviction for hate crime offenders’.<sup>217</sup> Thus the new hate crime Bill will create yet another avenue for the transgender female refugee to seek protection. Further, it will bring light to any hateful motive and rhetoric directed at trans persons in South Africa if they occur and are brought before the courts. By focusing on motives it further allows for civil society groups to educate and target the motives so as to attempt to prevent such crimes from happening in the future. Once again, one can see that the South African legal culture that is currently in the process of being formed is providing avenues to lift the silence of the struggle of the transgender female refugee. In chapter two it was seen that transgender female refugees face very specific violence due to their transgender status. By allowing this to be punishable under a hate crime gives express recognition to that

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<sup>214</sup> Criminal Procedure Act 57 of 1977.

<sup>215</sup> See The New Age, available at <http://www.thenewage.co.za/trans-woman-murdered/>, accessed on 12 July 2017; See also Mamba Online, available at <http://www.mambaonline.com/2016/01/12/western-cape-trans-woman-knifed-death-15-year-old-homophobe/>, accessed on 12 July 2017; See also Guardian, available at <https://www.theguardian.com/world/2011/may/03/south-africa-homophobic-attacks>, accessed on 12 July 2017.

<sup>216</sup> G Michuri ‘The Upcoming Hate Crimes Bill: A Welcome Development in the Fight against Xenophobia and Hate Crimes in South Africa’ (2016), available at <https://africlaw.com/2016/08/05/the-upcoming-hate-crimes-bill-a-welcome-development-in-the-fight-against-xenophobia-and-hate-crimes-in-south-africa/>, accessed 19 August 2017.

<sup>217</sup> Ibid.

patriarchal violence and begins to lift the veil and introduce a much needed feminist approach to transgender issues.

### 2.5. State Responsibility

Lastly, while this chapter has predominantly focused on domestic law, international law regarding South Africa cannot be ignored. Under international law the principle of state responsibility cannot be ignored as it is essential to the smooth functioning of the international legal system. In short, state responsibility ensures that states adhere to their international obligations to which they have signed. The 2001 Draft Articles on State Responsibility<sup>218</sup> are considered to be a restatement of customary international law and are therefore considered binding on all member states.<sup>219</sup> In terms of the requisite elements, a state must have breached an international obligation, the conduct in question cannot be justified and the act must be attributed to a subject of international law. South Africa has signed and ratified many international human rights instruments that are of direct relevance to transgender female refugees. Some of these include, the Covenant on Civil and Political Rights, the Covenant on Economic, Social and Cultural Rights, the Convention on the Elimination of All Forms of Discrimination Against Women, and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment. Thus, South Africa is internationally responsible for ensuring that its obligations under these instruments are met. This would mean that any violence discussed in chapter 2 being directed at transgender female refugees would require South Africa to remedy and a failure to do so would result in South Africa being in breach of its international obligations.

### 3. CONCLUSION

Much can be learnt from the legal order of South Africa as an example of a legal culture adhering to the tenets of feminism. South Africa is unique among many countries in that its legal framework is liberal and pioneering and that furthermore has specific principles and legislation that can protect transgender female refugees and lift the silence of their struggle.

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<sup>218</sup> Draft Articles on Responsibility of States for Internationally Wrongful Acts, November 2001, Supplement No 10 (A/56/10, Ch IVE1).

<sup>219</sup> TW Bennett & J Strug *Introduction to International Law* (2013) Juta & Co Ltd: Cape Town at 265.

Firstly, the South African courts have used the principle of Ubuntu to ground human rights cases and to promote a new legal culture in which all are treated equally and with dignity. On top of this, South Africa is committed to dealing with hate crime and hate speech, which is a significant step in the protection of transgender human rights as it expressly recognises that certain hate crimes are directed at persons due to their gender identity. Lastly, South Africa is also special in that it has signed up to many international human rights instruments, which in turn mean that the principle of state responsibility obligates South Africa to keep its international obligations, which are a form of protection for the transgender women. Thus, Ubuntu, hate crime legislation and state responsibility are the three unique factors that make South Africa a beacon of hope for transgender female refugees in Africa and this is where the hope lies. Human rights must be grounded in a principle like Ubuntu that runs throughout cultures and societies in order to shape legal orders in a way that adequately protects transgender female refugees from the various forms of violence canvassed in chapter 2 of this thesis and treats them and their unique issues with dignity and sensitivity.

## CHAPTER SIX

# CONCLUSIONS AND RECOMMENDATIONS

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### 1. INTRODUCTION

The aim of this thesis was to break the silence of the international struggle of transgender female refugees and to raise consciousness of their need for justice and protection. It established this through the investigation of the unique struggle of the transgender female refugee and how the legal framework does not cater for this unique struggle. The importance of this thesis lies in that it attempts to break the silence regarding the status of these vulnerable refugees in host countries and to address the patriarchal nature of international refugee law. Moreover, this thesis' importance is evident with the increasing amount of violence being directed at transgender female refugees. It was established in chapter two that the transgender refugee is facing a global crisis through multiple variants of violence. This chapter shall make final conclusions and will introduce an international protocol to the 1951 UN Refugee Convention to address the violence faced by transgender female refugees. Multiple international human rights instruments have been created to address specific struggles, such as the Convention on the Rights of the Child and the Convention on the Elimination of All Forms of Discrimination Against Women, and this thesis shall present international instruments that deal specifically with the transgender refugees and transgender persons in general.

### 2. THE SILENT STRUGGLE OF TRANSGENDER FEMALE REFUGEES

This thesis had brought light unto the struggle of transgender female refugees and is the first step in conscientising the academia and international community to their plight. It was seen that refugees as a class of persons face global stigma and violence, especially through xenophobia. However, it was also noted and seen that transgender female refugees face additional struggles to those that other refugees would suffer and that these additional struggles are for the most part silent. Some of these unique challenges that the trans refugees must overcome include an expanded definition of violence, which includes physical, sexual,

economic, and medical violence. It was seen throughout the thesis that the trans woman's body is subject to a variety of attacks from public authorities and private individuals. In countries of refuge, where transgender female refugees would flee for safety, they instead face physical harassment and rape and economic instability and denial of access to adequate healthcare. Thus, despite all of these forms of violence that the transgender female refugee is subjected to, their struggle has not yet been made the subject of international journals, the United Nations recommendations, and neither has it even made its way into international law through treaties and conventions. Their plight truly is a silent one.

### **3. AN INEFFECTIVE LEGAL FRAMEWORK FOR PROTECTION**

An analysis of the law provided that international human rights law and international refugee law are sites of patriarchal oppression. Through using feminist methods of analysis, it was concluded that there is a lack of reference to transgender rights and that furthermore, the law is still conservative in its understanding of sex and gender. Society's assumptions and stereotypes attached to being male and female have isolated the transgender woman in the legal framework. Thus, for any positive change to occur, the power imbalance and structural inequalities in the law must be addressed.

The framework was found to be insufficient in providing protection for transgender female refugees against the various forms of violence that were discussed in chapter two. What was discovered is that despite international human rights law providing a number of human rights that were applicable and despite international refugee law promoting beneficial rights, there is a complete disparity between what the law says and how the law works on the ground. It was seen that despite the existence of a right to physical security in international and regional law, there has been no accepted definition and it is due to this lack of precision that transgender female refugees are often left vulnerable. Moreover, this disparity was found to be directly linked to the patriarchal nature of international human rights law in that at the time of drafting of the 1951 UN Refugee Convention the struggles of transgender female refugees were not considered. It was not considered as the struggle for transgender rights had not yet become public.

Moreover, the law was seen to be lacking in reference to state responsibility, allocating the roles to states for protecting refugees, and also a lack of any hate crime in international

law. This lack of hate crime and reference to state responsibility has left the trans female refugee vulnerable and open to abuse. As stated in chapter four, ‘when no state assumes responsibility for providing protection’<sup>220</sup> there is a lacuna in the legal framework. On top of this, the lack of specific hate crime for transgender related persecution was also regarded as unfortunate. Hate crime legislation provides an avenue of protection and further allows the arbitrator of the matter to publically acknowledge the bias motive of the attack, which in turn would assist in lifting the silence of the transgender female refugee.

#### **4. SOUTH AFRICA AS AN EXAMPLE OF POSITIVE CHANGE**

This thesis’s final goal was to investigate a specific domestic legal order in order to learn from its developments in the protection of transgender female refugees. South Africa was chosen for several reasons. Firstly, it is a nation that came out of an authoritarian regime in 1994 and passed a comprehensively liberal Constitution. Secondly, it is the one country of refuge on the African continent that provides protection to sexual minorities, like transgender women and lastly, it is a country not associated with the Global North and the West, which has dominated much of the academic discourse on transgenderism. What was learnt from South Africa was its ability to find common ground across cultures in order to produce a principle to advance human rights; this principle is Ubuntu. Moreover, South Africa is a strong adherent to state responsibility due to its ratification of numerous international human rights instruments and lastly, it has also been in the process of developing a comprehensive Hate Crime Bill, which as discussed previously will assist in shedding light on transgender attacks. South Africa was thus a good example of how countries of refuge could seek ways to balance legal plurality with transgender rights.

#### **5. RECOMMENDATIONS**

##### **5.1. Protocol on Transgender Refugee Rights to the UN Refugee Convention**

Throughout the course of this thesis it has become apparent that there is a dire need to protect transgender female refugees due to a complete lack of protection and recognition on the

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<sup>220</sup> Phuong op cit note 160.

international arena. This was tied down to the fact that international refugee law is still inherently patriarchal and has therefore remained blind to the unique struggles that transgender female refugees face. The patriarchal setting of international refugee law has only served to exacerbate their silence. It is for this reason that express recognition must be given to the rights of transgender refugees to recognise their unique struggle and lift the silence and the one way in which this can be effectively accomplished is through the introduction of a Protocol to the UN Refugee Convention on the Rights of Transgender Refugees. This Protocol would need to address several things, which shall be canvassed below.

### **5.1.1. The Law Must be Sensitive to Transgender Needs**

The first important thing is that the Protocol has to be designed in a way that is sensitive to the needs of transgender refugees. As was outlined in chapter 2 of this thesis transgender female refugees suffer from four main types of violence, namely physical, sexual, economic and medical. Thus, any international protocol would have to specifically outline these human rights for the transgender refugee. It would have to ensure that signatories agree to ensuring effective protection of the physical security of transgender refugees; effective enforcement and prosecution of sexual crimes; adhering to the principle of non-discrimination in employment and enforcement of non-harassment in the workplace; lastly, to ensure signatories agree to allow transgender refugees access to healthcare, including hormone treatment. In this way, the Transgender Refugee Protocol would be addressing the specific needs of transgender female refugees by address the predominant forms of violence they face daily.

### **5.1.2. Hate Crime Legislation**

Another important aspect to the Transgender Refugee Protocol would be to ensure that state signatories promulgate domestic hate crime legislation within a reasonable time period. It has to be noted that international law must be sensitive to the capacities of the respective governments and thus a reasonable time period would have to be interpreted in light of each

country's respective capacity. However, it remains essential for hate crime legislation to be implemented as it directly lifts the silence of transgender female refugees. As has been previously discussed hate crime specifically looks at the motives behind crimes. Transgender female refugees face physical and sexual assaults on a daily basis around the globe and when it is taken to court, if it is, it is classified as a listed crime, such as assault, which is not cognisant of the motive behind the crime. If we are to truly address the patriarchy within societies in general and to also address the patriarchy within international refugee law, hate crime is one way of doing so. It ensures that the state recognises the hate towards to transgender women in the crime committed.

## **5.2. International Transgender Convention**

Although this thesis' main objective was to address the plight of the transgender female refugee, a more generalized international convention would be necessary in order to achieve that goal. A transgender convention that outlines the specific rights that transgender persons are entitled to and to encourage state signatories to dismantle oppressive structures in the same way that CEDAW has encouraged states to promote gender equality. The transgender convention would address the patriarchy that is inherent within international law at the moment and it would become the first step in formal recognition of transgender rights. Once it is on the "table", there can be progression.

## **6. CONCLUSION**

In conclusion, this thesis has outlined the silent struggle that transgender female refugees face in countries of refuge globally. It was seen that they are unique in their struggles against physical, sexual, economic and medical violence and that the law is inadequate in its protection of transgender women against these forms of violence mainly due to its patriarchal nature and lack of knowledge of transgender sensitive issues. It was then seen through South Africa that there are possible ways that countries may engage in developing a legal order that is welcoming of transgender refugee rights. Lastly, this chapter outlined a way in which their

struggle can be alleviated through the creation of a transgender convention and through a protocol to the UN Refugee Convention on transgender refugee rights.

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