

**To what extent does the European recast Qualification
Directive protect refugee women seeking asylum on the basis
of gender-related claims?**

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1. Introduction

In the course of its attempt to create a Common European Asylum System, the European Commission adopted five legal instruments¹, which are binding upon the member states and introduce measures of cooperation in burden sharing², access to and improvement of decision-making processes. This development shall harmonize the different European asylum policies, implementing a common approach to deal with asylum seekers and refugees throughout the whole European Union.

One of the five instruments was the adoption of the Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted³ (hereinafter Qualification Directive) in 2004. It goes to the heart of the traditional refugee definition because it sets out the regional framework of who is entitled to refugee status. Thus, it has considerable impact on refugee women's claims seeking asylum on the basis of gender-related claims.

The Qualification Directive intended to achieve the harmonization of the asylum determination procedures among European states. The Qualification Directive introduced minimum standards for the determination of asylum claims, aiming at equal outcomes in decision-making processes, especially on first instance levels. While all member states had to change their national legislation to comply with the provisions of this Directive, they were allowed to adopt more favorable legislation. However, after a period of four years and an assessment of the situation, it became clear that the Qualification Directive failed its goal at least partly, since imbalances in asylum determination processes still existed. These resulted in immense differences in recognition rates of

¹ Comprising the recast Qualification Directive 2011/95/EU, the Dublin III Regulation 604/2013, the Eurodac Regulation 603/2013, the Reception Conditions Directive 2013/33/EU and the recast Asylum Procedures Directive 2013/32/EU

² NGOs rather use the term 'responsibility-sharing', which means a fair distribution of the persons seeking asylum among the European member states

³ *Council Directive on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted* 2004/83/EC (2004)

same country nationals in European states⁴, despite the goal of the concept to reach uniform standards. The cause was said to be insufficient guidance coming from the Qualification Directive for the decision-making authorities. Consequently, the European Commission adopted a recast Qualification Directive⁵ in 2011. It demanded national legislation to be adapted accordingly by the 21st of December 2013.

The international refugee regime is governed by the 1951 Convention Relating to the Status of Refugees⁶ (hereinafter 1951 Convention). Being a party to that Convention is a prerequisite for joining the EU. Thus all European states are bound by the obligations arising from the 1951 Convention. Consequently, the recast Qualification Directive is “based on the full and inclusive application”⁷ of the 1951 Convention.

Nonetheless, due to the development of international human rights law, in terms of the protection of women’s rights, it is evident that the 1951 Convention lacks sufficient clarification and guidance for asylum claims arising from women’s experiences of traditional harmful practices. Those harmful and discriminatory practices comprise for example forced marriage, female genital mutilation, domestic violence including rape, China’s one child policy and the risk of forced sterilization emerging in this context as well as in others, traditional dress codes, dowry burning or honor killings. This list is not meant to be exhaustive, since women might be subjected to several other norms, customs, rules or policies, which they try to escape from and base their asylum claims on. Asylum claims that deal with these forms of harm are often referred to as gender-related asylum claims.

However, under the refugee definition of the 1951 Convention a specific ground of ‘gender’ or ‘sex’ is missing. An asylum claim is only valid and state responsibility can only be invoked, if it can be established that one has a “well-founded fear of being

⁴ in 2012 for example, on first instance level in Belgium and Greece, asylum claims of Afghans were recognized in 59,1% and 6,8% respectively, available at <http://www.ecre.org/topics/areas-of-work/protection-in-europe/92-qualification-directive.html> [accessed 18.03.2014]

⁵ *Recast Directive on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted* 2011/95/EU (2011)

⁶ *Convention Relating to the Status of Refugees* (1951) General Assembly Resolution 429 (V) 1950

⁷ Recast Qualification Directive, *supra* note 5, Recital 3

persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”⁸

This is the issue women are confronted with: Do their experiences of suppression and inferiority, the harmful practices they are subjected to, amount to persecution under the definition of the 1951 Convention? And is it possible to establish that their fear of persecution is for reasons of one of the grounds enumerated under the Convention?

Women have been long invisible within the traditional framework of the 1951 Convention, reflecting the general gender-blindness in international human rights law.⁹ Some have criticized the 1951 Convention for excluding women from its ambit. They argue that one more ground, namely gender, should be added to the definition.¹⁰ Others have countered that the Convention is absolutely meant to provide protection to women as it is based on non-discrimination and equality principles.¹¹ They point out that the problem is that decision-makers have too long applied a male lens of interpretation in determination processes and all five grounds of the Convention can and must be interpreted in a gender-sensitive manner.¹²

Those discussions only started with the development of the general women’s human rights discourse three decades after the adoption of the core instrument of refugee protection, i.e. the 1951 Convention. While asylum was long thought to offer international protection to male, political dissidents, persecuted by the state,¹³ women’s rights violations were in the meantime not recognized due to the public-private dichotomy. This phenomenon, which is built on societal attitudes describing gender-roles, resulting in the public sphere being occupied by men, and the private sphere by

⁸ 1951 Convention, *supra note 6*, Art.1A(2)

⁹ MacKinnon as stated in NahlaValji ‘Women and the 1951 Convention: Fifty Years of Seeking Visibility’ *Refugee Vol.19 No.5* (2001) at 27

¹⁰ Todd Stewart Schenk ‘A Proposal to Improve the Treatment of Women in Asylum Law: Adding a “Gender” Category to the International Definition of “Refugee”’ *Indiana Journal of Global Legal Studies Vol.2 Iss.1* (1994)

¹¹ As can be derived from the Preamble of the 1951 Convention, considering the principles of fundamental rights and freedoms of all persons without discrimination

¹² Roger Haines ‘Gender-related persecution’ in Erika Feller, Volker Türk and Frances Nicholson (eds.) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) at 327

¹³ NahlaValji, Lee Anne de la Hunt and Helen Moffett ‘Where are the women? Gender discrimination in refugee policies and practices’ *Agenda 55*(2003) at 62

women, is reflected in international law.¹⁴ Thus, law was long not applicable in the private realm due to a “[l]ack of direct state intervention in the name of protection of privacy”.¹⁵ But since the private sphere is the place where most women are subjected to discriminatory and harmful practices or attitudes, evolving international legislation regarding women’s human rights clearly incorporated state’s responsibilities to prevent human rights abuses in that sphere as in the public realm.¹⁶ Thus, acts of gender-based violence, committed by non-state actors against women in the private sphere, have been internationally condemned and challenged. States now have the obligation to effectively protect women from the abuse of their rights by private individuals like the husband or community members. These developments had shaping effect on refugee law insofar that acts of gender-based violence can amount to persecution and can be linked to one of the enumerated grounds of the Convention, if state protection is not provided. This is to assess on an individual basis. Hence, gender-related claims must be considered in asylum determination processes. Due to the difficulties arising for women under the 1951 Convention, the United Nations High Commissioner for Refugees (UNHCR) adopted guidelines to help states interpret the existing Convention to include women’s experiences. Furthermore, some states introduced gender-guidelines, which detail the specific circumstances arising from a claim based on the applicant’s gender, in order to assist decision-making officials on national level. However, while some states challenge the traditional definition of a refugee through a male-centered framework, others seem to apply a narrow definition.

The recast Qualification Directive intends to overcome the above stated obstacles to gain equal outcomes, no matter in which member state the application was made. It provides clarity and guidance beyond the provisions of the 1951 Convention and also addresses difficulties arising from gender-related claims in more detail than the traditional definition. The recast Qualification Directive is currently the crucial instrument for the

¹⁴Alice Edwards ‘Age and gender dimensions in international refugee law’ in Erika Feller, Volker Türk and Frances Nicholson (eds.) *Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection* (2003) at 48

¹⁵Hilary Charlesworth ‘The public/private Distinction and the Right to Development in International Law’ *12 Australian Year Book of International Law* 190 (1988) at 194

¹⁶*Convention on the Elimination of All Forms of Discrimination Against Women*, General Assembly Resolution 34/180 (1979) Art.2(e)

determination of refugee statuses on a regional level. Therefore, this paper will analyze the recast Qualification Directive in terms of its protection standards, theoretical and factual, for women seeking asylum due to the risk of gender-based persecution.

This paper will analyze the recast Qualification Directive in terms of its protection standards for women seeking asylum on the basis of gender-related claims.

The first chapter undertakes a review of the international legal framework, pertaining to refugee claims. It will outline the traditional protection standards of refugee definition of the 1951 Convention and the challenges arising for females' claims within that regime. Then, some major international human rights instruments will be examined regarding women's right to equality, non-discrimination and to live free from violence. Hereunder, the development of states' obligation to protect women from all forms of violence will find particular consideration. Especially in asylum claims where the fear of persecution arises from non-state agents, the states' willingness and ability to protect the applicant is crucial for the assessment of the asylum claim, since persons are only eligible to international protection if the state is unwilling or unable to offer effective protection. The first chapter will further describe the current soft law regime regarding refugee women fleeing harmful practices under both, the 1951 Convention and the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).

The second chapter provides an overview of the regional framework regarding human rights standards, before then turning to the establishment of the Common European Asylum System. The lengthy introduction and historical background information are important to understand the European concept of refugee protection. In addition, the measures taken under this approach have an impact on the application of the recast Qualification Directive and consequently also on the outcome of women's asylum claims.

In the third part of this paper the recast Qualification Directive is discussed in detail. Several articles of importance for women refugees and gender-related claims will be consecutively examined. Amendments compared to the former Qualification Directive are highlighted as well as the (non-)consideration of suggestions to the recast proposal from refugee rights organizations. Most importantly, case-law is considered insofar as it

either helped to interpret international or regional legislation through a gender-sensitive lens or refused to apply such an approach which often results in the denial of refugee status.

Lastly, the conclusion of this paper provides a summary of the improvements under the recast Qualification Directive but also the obstacles which still do exist under the current instrument, especially if the bigger picture is kept in mind of the interacting measures under the Common European Asylum System.

2. International Framework

In this part, the international framework dealing with the right to asylum or international protection and the protection of women's human rights will be outlined in four subsections. The international framework is the primary basis for refugee women's claims, as it sets out core obligations for states. Thus, the rights laid down hereunder are either directly binding for states or incorporated in national legislation.

The Universal Declaration of Human Rights¹⁷ (hereinafter Universal Declaration) marks the starting point for the development of a legal human rights framework. Secondly, the paper will turn to the 1951 Convention. The world-acclaimed refugee definition will be discussed, stressing the difficulties for women to fit their experiences of gender-based violence and harmful traditional practices within the scope of the internationally adopted system. Then, the framework of international human rights instruments regarding women's rights will be considered. Under traditional human rights instruments, women have the same rights as men, particular in terms of equality rights, constituting a principle of non-discrimination. Major treaties protecting the rights of women and men alike are the International Covenant on Civil and Political Rights¹⁸ (ICCPR), the International Covenant on Economic, Social and Cultural Rights¹⁹ (ICESCR) as well as the Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment²⁰ (UNCAT). Nonetheless, the maintenance and exercise of harmful practices upon women deprives many females of the rights written down in these treaties. The recognition of violence against women as human rights abuse was long not addressed on the international agenda because of the public-private dichotomy. The discriminatory and harmful experiences of women are mostly committed by individuals within the private home or community, instead of, as often incumbent in asylum

¹⁷*Universal Declaration of Human Rights*, General Assembly Resolution 217 A (III) (1948)

¹⁸*International Covenant on Civil and Political Rights*, General Assembly Resolution 2200A (XXI) (1966)

¹⁹*International Covenant on Economic, Social and Cultural Rights*, General Assembly Resolution 2200A (XXI) (1966)

²⁰*Convention against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment*, General Assembly Resolution 39/46 (1984)

determination processes, by state actors in the public realm. Only with the adoption of CEDAW, the supervising Committee (hereinafter CEDAW Committee) then declared, that violence against women is a form of sex-discrimination and impedes with women's right to equality.²¹ Thus, the right to live free from violence is clearly a prerequisite to fulfill women's human rights. CEDAW therefore imposes strict obligations on states to protect women from violence. Since then, the interpretation of the right to international protection was reshaped, because states can be held responsible if they are not able or willing to protect women effectively from any forms of gender-based violence, irrespective of in which sphere or by whom the violence occurs. According to the developments made in the recognition of women's human rights, guidelines have been released by institutions on international and regional level, calling for a gender-sensitive interpretation of the refugee definition. Thus, the forth part under this chapter addresses soft-law. States are not necessarily obliged to follow these guidelines, but they can assist them if issues in the interpretation arise. Due to the voluntary adherence of these recommendations, practices in their application vary immensely between states, depending on their willingness to include women's experiences into the definition of the definition of a refugee.

2.1 The Universal Declaration of Human Rights

The Universal Declaration marks the beginning of the development of an international legal framework. Although it is not binding, it was adopted as a commitment of shared values and cooperation among states to prevent further human rights abuses, as a result of the shocking consequences of the Second World War.²² Several rights regarding all humans' dignity and liberty, without distinctions of any kind, are listed therein. People's sex is explicitly mentioned as one of the grounds on which discrimination cannot be made.²³ Pertinently, Article 14(1) of the Universal Declaration states that everyone has the right "to seek and to enjoy asylum from persecution."²⁴ However, Article 14(2) restricts the right to only political asylum. Thus, persons who are persecuted for non-

²¹ General Recommendation No. 19, CEDAW Committee, 11th Session (1992) Para. 1

²² History of the Universal Declaration of Human Rights, available at <http://www.un.org/en/documents/udhr/history.shtml> [accessed on 21.11.2013]

²³ Universal Declaration, *supra note 17*, Art. 2

²⁴ Id. Art. 14(1)

political reasons would not qualify for the right to international protection.²⁵ In essence, asylum is often referred to as ‘political asylum’. Although the Universal Declaration is not a binding instrument, it still has inviolable character, comprising all rights which have then been enshrined in further international and regional treaties with mandatory obligations for the fulfillment of those rights upon member states.²⁶

2.2 The Convention Relating to the Status of Refugees (1951 Convention)

The reason asylum is generally considered to be political, is attributable to the origination process of the 1951 Convention. The Convention was limited in its scope of application. Its aim was to address the refugee problem that arose from persons who were fleeing Europe as a result of the Second World War.²⁷ It was therefore limited in time and geography to refugee problems in Europe. In 1967 however, the Protocol Relating to the Status of Refugees²⁸ was adopted, removing those limitations.²⁹ With the removal of the limitations, the Convention became the universal instrument that regulates and secures the rights of refugees.³⁰ Hence, it is the leading instrument or ‘cornerstone’ with regards to international standards to protect asylum seekers and refugees.³¹

With regard to the internationally accepted and applied definition of persons eligible for international protection or refugee status, under Article 1 A (2) of the 1951 Convention a refugee is someone who,

‘owing to [a] well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is

²⁵ Id. Art.14(2)

²⁶ The Foundation of International Human Rights Law, available at http://www.un.org/en/documents/udhr/hr_law.shtml [accessed 28.11.2013]

²⁷ Guy S. Goodwin-Gill ‘Convention relating to the Status of Refugees. Protocol relating to the Status of Refugees’ in *United Nations Audiovisual Library of International Law* (2008) at 1, available at http://legal.un.org/avl/pdf/ha/prsr/prsr_e.pdf [accessed 28.11.2013]

²⁸ UN General Assembly, *Protocol Relating to the Status of Refugees*, UN Treaty Series Vol.606 (1967) at 267

²⁹ Id. Art.1

³⁰ R. Haines, *supra note 12*, at 326

³¹ Joan Fitzpatrick ‘Revitalizing the 1951 Convention’ 9 *Harvard Human Rights Journal* 229 (1996) at 229

outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country.’³²

Article 1 A (2) also extends the meaning to stateless persons who are seeking refuge from persecution, but the country of nationality is understood to be the “country of former habitual residence” of the asylum seeker.³³

According to that, the Convention omits any reference to ‘gender’ in its definition of a refugee on which one would be able to base her claim of asylum. Article 3 of the Convention defines the principles on which state parties must not distinguish between persons during the qualification process to the entitlement of refugee status. These non-discrimination grounds comprise “race, religion or country of origin.”³⁴ Again, this provision fails to protect from sex-discrimination in the asylum determination process. Thus, the Convention does not guarantee equal access for women to asylum.³⁵ Its binding standards, enforced on a daily basis within international practices by the signatory states, have “long excluded women, procedurally and substantively, from the international right to protection from persecution.”³⁶

Within the drafting process of the 1951 Convention, the issue of gender-inequality was mentioned, but dismissed due to concerns that its inclusion in the treaty might interfere with domestic legislation in some states.³⁷ While the 1951 Convention must be interpreted in light of its non-discriminatory purpose³⁸, women are rendered invisible within the Convention’s protection framework as a result of the emphasis given to political activities.³⁹ By the time of drafting, the 1951 Convention was clearly meant to protect first generations rights. Political and civil rights were considered to outweigh social, cultural or economic rights.⁴⁰ Following the first decades of the application of the

³² 1951 Convention, *supra note 6*, Art.1A(2)

³³ Id. Art.1A(2)

³⁴ Id. Art.3

³⁵ Alice Edwards ‘Transitioning Gender: Feminist Engagement with International Refugee Law and Policy. 1950-201.’ *Refugee Survey Quarterly Vol.29 No.2* (2010) at 22

³⁶ N. Valji, *supra note 9*, at 26

³⁷ UNHCR, *Commentary on the Refugee Convention 1951(Articles 2-11, 13-37)* (1997) Art.3(4)

³⁸ According to the preamble of the 1951 Convention, “human beings shall enjoy fundamental rights and freedoms without discrimination”

³⁹ A. Edwards, *supra note 35*, at 26

⁴⁰ Heaven Crawley ‘Gender, persecution and the concept of politics within the asylum determination process’ *Forced Migration Review 9* (2000) at 17

Convention, the lens of interpretation by decision-makers was clearly male-centered. It assumed that the typical asylum seeker is “a male dissident, tortured or imprisoned by the state for traditional political activities.”⁴¹ Women were long not seen as political activists, and the roles they fulfilled in political resistance movements, when compared with their male counterparts, did not fall into male-defined classifications of political activism.⁴² As a result of prescribed roles to ones gender, like they exist in all societies around the globe, women often exercise acts like passing secret messages, administering first aid, providing active members with food or helping to hide comrades.⁴³ Nonetheless, women are active in politics and therefore, disregarding the level of involvement, can be at risk of being persecuted. In addition, they might also fear persecution simply because of familial relations with political activists, whose philosophy is then attributed to them.⁴⁴

Above all, the most common forms of violence and harmful practices women are exposed to are perpetrated by family- or community members within the private sphere as a result of traditional and religious customs and norms or political discriminatory measures and policies. These types of harm are only directed at women because of their gender/sex, but at the same time often take on gendered forms.⁴⁵ Such claims give rise to gender-related asylum claims. The difficulty of fitting these patterns of persecution into the traditional definition of the 1951 Convention arises from the traditional dichotomy between the private and public sphere, which unfortunately, has been read into the negotiation and interpretation of the 1951 Convention. As outlined above, the public-private divide hampers states’ willingness and ability to intervene in human rights abuses occurring in private realm. The 1951 Convention reinforces the public-private dichotomy through its failure to provide equal protection opportunities for women arising from gender-related asylum claims. Even though its language may be said to be gender-neutral, it has been pointed out that the omission to include specific gender

⁴¹ N. Valji et al, *supra* note 13, at 62

⁴² European Council for Refugees and Exiles (ECRE), *Position on Asylum Seeking and Refugee Women* (1997) Para.20

⁴³ Jane Freedman ‘Women’s Right to Asylum: Protecting the Rights of female Asylum Seekers in Europe’ *Human Rights Review* (2008) at 418

⁴⁴ ECRE, *supra* note 42, Para.20

⁴⁵ R. Haines, *supra* note 12, at 326

sensitive provisions weakens protection standards for female asylum seekers.⁴⁶ For example, some feminists have criticized the utility of the framework of equal treatment for men and women that is implicit in its gender-neutral language. Their point is that it does not help women to counterbalance existing patterns of subordination due to the power imbalances they face in relation to men.⁴⁷ Consequently, they have argued that “equality is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex.”⁴⁸ Thus, women’s groups and scholars have expressed their regrets that the traditional interpretation of the 1951 Convention neglects women’s experiences, and have called for gender-sensitive manner application of the Convention and asylum procedures.⁴⁹ To understand the difficulties women experience to fit their gender-related asylum claims under the traditional scope of the refugee protection regime, some key elements in the refugee definition of the 1951 Convention need to be further explained.

2.2.1 Persecution

Under the 1951 Convention’s refugee definition, the applicant must establish, among other things, that the harm she fears amounts to persecution. This provides an obstacle for women who are claiming international protection on the basis of being at risk of gender-related persecution. The element of “a well-founded fear of being persecuted”⁵⁰ is closely linked to states’ positive obligations to protect their citizens from human rights abuses. However, despite the existence of national legislation for the protection of women’s rights, some states apparently do not bother to strictly enforce these laws. Since gender-related asylum claims are normally based on the fear of persecution due to non-state actors, the ability and willingness of the claimant’s government to protect her are of vital significance of the outcome of the refugee status determination. This section will address what constitutes persecution under the 1951 Convention definition and

⁴⁶ H. Crawley, *supra* note 40, at 17

⁴⁷ Hilary Charlesworth, Christine Chinkin and Shelley Wright ‘Feminist approaches to International Law’ 85 *Am. J. Int’l L.* 613 (1991) at 632

⁴⁸ *Id.* at 632

⁴⁹ A. Edwards, *supra* note 35, at 23

⁵⁰ 1951 Convention, *supra* note 6, Art.1A(2)

whether women's experiences of harmful practices fall within the scope of that definition.

Persecution is not defined in the 1951 Convention. The UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol⁵¹ (hereinafter the Handbook) serves as a guide for decision-making or judicial personnel of the signatory states, on how to interpret the 1951 Convention and how to assess asylum applications.⁵² In terms of the clarification of the term persecution, it only refers to Article 33 of the Convention, which prohibits state parties to return an asylum seeker back to her home country, if her "life or freedom would be threatened on account of [her] race, religion, nationality, membership of a particular social group or political opinion"⁵³ in that country. If other actions can amount to persecution must be established within the individual assessment of an asylum claim.⁵⁴ Furthermore, the Handbook also addresses persecution on cumulative grounds. This paragraph might be of considerable interest for refugee women, as it clarifies that some measures one might be exposed to, including discriminatory practices, which themselves do not amount to persecution, can in their entirety do so.⁵⁵ It can be said that the term was deliberately not defined under the original instrument, as the drafters knew they could never comprise all possible forms of mistreatment, which would lead to an individual's entitlement to international protection.⁵⁶ However, the concept of persecution is not meant to protect persons from random incidents though, but rather from continuing and systematic violations of their human rights.⁵⁷ To determine the persecutory content of an act on which the asylum claim is based, decision-makers are required to integrate general human rights standards, as they impact on and complement the refugee qualification process.⁵⁸ Thus, as a result of the linkage between international refugee law and human rights law, the concept of refugee protection was further developed to include women's

⁵¹ UNHCR, *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol* (1992) HCR/IP/4/Eng/REV.1

⁵² Id. Foreword IV

⁵³ 1951 Convention, *supra note 6*, Art.33(1)

⁵⁴ Handbook, *supra note 51*, Para.52

⁵⁵ Id. Para.53

⁵⁶ James Hathaway, *The Law of Refugee Status* (1991) at 72

⁵⁷ Id. at 72

⁵⁸ A. Edwards, *supra note 14*, at 47

experiences according to the recognition of women's human rights on the international arena.⁵⁹ As consequence, forms of gender-specific harm, disproportionately or even exclusively affecting women, have been recognized to amount to persecution by some decision-makers or courts.⁶⁰ Several activists, academics, practitioners and refugee rights organizations, including UNHCR, are supporting this gender-sensitive interpretation of persecution and argued "that, in order to respond to women's experiences, refugee law needs to evolve through a process of interpretation, rather than be amended to incorporate new gender-specific provisions."⁶¹

The 1951 Convention protects individuals fleeing violations or the threat of universal values, depriving them of their dignity, as recognized under the core human rights instruments by the world community.⁶² But, to have one's claim recognized, an asylum seeker must also establish evidence of the state's failure to protect her from violations of her human rights.⁶³ Because where the claimant's state of origin can provide meaningful protection, she can be reasonably expected to seek protection within that state, instead of claiming international protection.⁶⁴ And before all others, it is the duty and responsibility of the all nation states' governments to observe and protect their citizens' rights.⁶⁵ While the civil and political rights of individuals require a state to abstain from interfering with them, and are consequently referred to as negative rights, the so-called second generation rights, namely social, economic and cultural rights, automatically invoke positive obligations insofar as the state must actively intervene to protect them.⁶⁶ Because civil and political rights were considered more important, the Handbook links persecution to the action of state authorities in the first instance, before then stating that

⁵⁹ Id. at 47

⁶⁰ Deborah E. Anker and Paul T. Lufkin, *Gender and the Symbiosis Between Refugee Law and Human Rights* (2003) available at <http://www.migrationpolicy.org/article/gender-and-symbiosis-between-refugee-law-and-human-rights-law> [accessed on 24.03.2014]

⁶¹ Id.

⁶² R. Haines, *supra note 12*, at 327

⁶³ Nahla Valji, Lee Anne de la Hunt and Helen Moffett 'Protecting the Invisible: The Status of Women Refugees in Southern Africa' in Jeff Handmaker, Lee Anne de la Hunt and Jonathan Klaaren (eds.) *Advancing Refugee Protection in South Africa* (2008), at 221

⁶⁴ J. Hathaway, *supra note 56*, at 88

⁶⁵ Id. at 75

⁶⁶ Philipp Alston and Gerard Quinn 'The Nature and Scope of States Parties' Obligations under the International Covenant on Economic, Social and Cultural Rights' *Human Rights Quarterly*, Vol.9 No.2 (1987) at 159

persecution might also emanate from discriminatory or harmful actions perpetrated by non-state agents, if the government of that state tolerates the committed acts or, despite the best of its intentions, fails to provide protection for the victim effectively.⁶⁷ Accordingly, women fleeing gender-related forms of harm committed by private persons must show that their state is unable or unwilling to provide effective protection to be able to meet the first crucial element of the refugee definition.⁶⁸

Nowadays, states' interpretations vary immensely when assessing the claimant's fear of persecution regarding the agents of persecution. While some jurisdictions still demand a partial accountability of the state to determine the applicant's fear of persecution, others recognize the right to international protection if the state is incapable to do so.⁶⁹ In *Horvath vs. Secretary of State for the Home Department*⁷⁰, the Lords of Appeal found that "the word 'persecution' implies a failure by the state to make protection available against the ill-treatment or violence which the person suffers at the hands of [her] persecutors."⁷¹ The court went on to argue that the inability of the state to provide protective measures for its citizens is "the bridge between persecution by the state and persecution by non-state agents which is necessary in the interest of the consistency of the whole scheme."⁷² Conclusive thereto, the British NGO called Refugee Women's Legal Group, which is actively involved in policy making structures and works towards the guarantee of gender perspectives in national refugee legislation, refers to a simple definition: at risk of persecution is where a serious harm and a failure of state protection exist.⁷³

Only if it can be established that the acts of gender-based harm inflicted upon a female refugee constitute a serious threat to the claimant's life or freedom and no state protection is available to her, the first element of the determination process, namely that

⁶⁷ Handbook, *supra note 51*, Para.65

⁶⁸ States' obligations to protect women from gender-based violence are further discussed in chapter 1.3.2 of this paper

⁶⁹ A. Edwards, *supra note 14*, at 60

⁷⁰ *Horvath vs. Secretary of State for the Home Department* (2000)

⁷¹ Lord Hope of Craighead, Opinions of the Lords of Appeal for Judgment in the Case of *Horvath vs. Secretary of State for the Home Department* (2000) available at

<http://www.publications.parliament.uk/pa/ld199900/ldjudgmt/jd000706/horv-1.htm> [accessed 24.03.2014]

⁷² Id.

⁷³ Refugee Women's Legal Group, *Gender Guidelines for the Determination of Asylum Claims in the UK* (1998) Para.1.17

she is at risk of persecution upon return to her country of origin, is successfully met. Nonetheless, this does not suffice for the entitlement to refugee status. Therefore, the risk of persecution must be for one of the grounds enumerated in the 1951 Convention.

2.2.2 The nexus requirement

The definition of a refugee under the 1951 Convention comprises five reasons for which an individual can be persecuted to qualify as a refugee. These grounds are religion, race, nationality, political opinion and membership of a particular social group.⁷⁴ It is a requirement to provide that one is at risk of being persecuted for reasons of at least one of those grounds. In this respect, it is the duty of the decision-making authorities to examine if the applicant's fear of persecution can be causally linked to one or more enumerated grounds of the Convention.⁷⁵ A female asylum seeker, whose claim is based on gender-related forms of harm, is facing the difficulty that she must fit her claim under one of these five grounds. This is why some say the refugee definition under the traditional instrument shall be transformed to incorporate 'gender' as an explicit sixth ground of persecution to ensure easier access to the refugee protection regime for female claimants.⁷⁶ Others counter that the merely annexation of an additional ground to the definition does not achieve the desired outcome of gendering the present policies. Rather, the current system of refugee protection is in need to undergo a thoroughly "re-evaluation of all aspects of existing policy and practice to measure their gendered impact."⁷⁷ Thus, all five grounds can be interpreted gender-sensitively to include women's experiences. It is about time for decision-makers on all levels, as well as for judicial staff, to include women's experiences and to acknowledge the political extent of women's refusal to adhere to harmful customs and practices.⁷⁸ The addition of a sixth ground to the 1951 Convention could even lead to further exclude women from the ambit

⁷⁴ 1951 Convention, *supra note 6*, Art.1A(2)

⁷⁵ Handbook, *supra note 51*, Para.66

⁷⁶ T. Schenk, *supra note 10*

⁷⁷ Nahla Valji et al, *supra note 63*, at 216

⁷⁸ R. Haines, *supra note 12*, at 327, see also A. Edwards, *supra note 14*, at 68

of refugee protection by denying them their individual experiences and simply imposing the gender-category on them.⁷⁹

Due to the developments in international human rights law to recognize and include women's rights under its scope, refugee law was transformed to take gender-based asylum claims into account. To assist decision-making officials and governments, new guidelines were adopted by UNHCR on how to interpret the 1951 Convention to include women's experiences. These recommendations are not binding upon state but have persuasive character. The next part of this paper addresses the progresses made on international level to protect women's human rights, resulting in the adoption of CEDAW, before then turning to present soft law standards regarding the female asylum applicant's claims based on gendered forms of harm.

2.3 International developments of women's human rights regarding gender-based violence

Although women have been entitled to the same rights as men under traditional human rights instruments, they have long not benefited from the 'equal treatment' standard due to their subordination in the so-called private sphere, outside the operation range of states. The abuse of their rights committed by private family- or community members has long not been seen as human rights violation. Due to developments in international human rights law, legislation was adopted to actively protect women's rights and abolish patterns and attitudes responsible for the subordination of and harmful practices upon women. CEDAW provides the international standards for women's protection needs and outlines states' obligations to protect them. These developments had shaping impact on refugee law, because the recognition of gender-based violence as a human rights violation enabled women to claim international protection needs if state protection was denied. The following part briefly addresses the marginalization of women from international human rights law, before then discussing how CEDAW challenges the suppression of women through the introduction of extended state obligations.

⁷⁹Ankerbrand as cited in Linda Kirk, *Gender related persecution and the Refugee Convention Art 1(A)2. Research Paper #23030569* (2010) at 10, available at http://www.iarjl.org/general/images/stories/papers_to_be_published/101025_linda_kirk_-_research_paper-final.pdf [accessed 25.03.2014]

International human rights law seeks to give rights to individual persons and groups, allowing them to make claims against their home countries on a global level, and thereby shifts the focus from the sovereign state towards the protection of all peoples' freedom and autonomy.⁸⁰ But even international human rights law, although meant to benefit all human beings irrespective of their sex, historically ignored and undermined women's experiences.⁸¹ Some even say their needs and interests "have been deliberately ignored over the centuries as means of keeping [them] subordinate."⁸² Theoretically, women's rights are enshrined into international instruments as far back as the birth of the first human rights treaties, since equality and non-discrimination clauses constitute two main pillars of the fundamentals of human rights.⁸³ The entitlements of the Universal Declaration have been further manifested in the ICCPR and the International ICESCR. These treaties impose binding obligations upon their signatory countries to ensure that all persons, women and men alike, can enjoy the respective rights listed thereunder.⁸⁴ Albeit the theoretical protection mechanism of international human rights law for women, reality proved to be more difficult by interacting with social structures, which often shape domestic legislation.⁸⁵ Accordingly, some feminists criticize the framework of equal treatment of men and women, underlying the gender-neutral language within the traditional human rights treaties. The 1951 Convention also reflects this approach and, as discussed above, as a result women struggle to fit into its ambit. Consequently, feminist academics proclaim that this approach does not help women to counterbalance the existing subordination, due to the power imbalances they face regarding to men.⁸⁶ It is argued that "equality is not freedom to be treated without regard to sex but freedom from systematic subordination because of sex."⁸⁷ In line with that, specific guidelines have been published to help women accessing the regime of

⁸⁰ Hilary Charlesworth 'What are "Women's Human International Human Rights"?' in Rebecca J. Cook (ed.) *Human Rights of Women – National and International Perspectives* (1994) at 58

⁸¹ H. Charlesworth et al, *supra note 47*, at 625

⁸² Arvonne S. Fraser 'Becoming Human: The Origins and Development of Women's Human Rights' *Human Rights Quarterly Vol.21 No.4* (1999) at 854

⁸³ UN, *The Foundation of Human Rights* available at http://www.un.org/en/documents/udhr/hr_law.shtml [accessed 20.12.2013]

⁸⁴ ICCPR, *supra note 18*, Art.3, see also ICESCR, *supra note 19*, Art.3

⁸⁵ Dorothy Q. Thomas and Michele E. Beasley 'Domestic Violence as a Human Rights Issue' *Human Rights Quarterly Vol.15 No.1* (1993) at 39

⁸⁶ H. Charlesworth et al, *supra note 47*, at 632

⁸⁷ Id. at 632

international protection. But those progresses only happened after the phenomenon of gender-based violence was tackled on the international agenda. The outcome was the adoption of CEDAW.

2.3.1 Convention on the Elimination of All Forms of Discrimination against Women

Despite the implementation of the first international treaty on women's human rights in 1979, a clear provision on state's duties to protect women from violence is missing therefrom.⁸⁸ Only ten years after the adoption of the so-called 'Bill of Rights' for women, the Committee on the Elimination of Discrimination against Women (CEDAW Committee), supervising the implementation on domestic level of the respective instrument, clarified that women must be protected from violence under CEDAW and that signatory states are obliged to collect and release data of gender-based violence.⁸⁹ In its General Recommendations No. 19, the CEDAW Committee then linked violence against women with the denial of their human rights and equates gender-based violence with discrimination because of women's sex.⁹⁰ In addition thereto, it was recognized that not only violence committed by state actors, but also violent acts by private persons or companies are prohibited and must be eliminated.⁹¹ Only in the outcome-document of the 1993 World Conference of Human Rights in Vienna, the Vienna Declaration and Program of Action, women's rights were finally considered human rights and their rights as inherent to the universality of all human rights.⁹² In the same year, the Declaration on the Elimination of Violence against Women⁹³ (DEVAW) was adopted, finally providing a definition for the suffering of women. Hereunder, violence against women is defined as

‘any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats

⁸⁸ Alice Edwards, *Violence against Women under International Human Rights Law* (2011) at 8

⁸⁹ General Recommendation No. 12, CEDAW Committee, 8th Session 1989

⁹⁰ General Recommendation No. 19, CEDAW Committee, 11th Session 1992 Para. 1

⁹¹ Id. Para. 8-9

⁹² Vienna Declaration and Programme of Action, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, UN Doc. A/CONF.157/23, Para. 18

⁹³ *Declaration on the Elimination of All Forms of Violence against Women*, General Assembly Resolution 48/104 (1993)

of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.’⁹⁴

DEVAW further enumerates specific forms of violence women are exposed to. These include:

- (a) ‘Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- (b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.’⁹⁵

But it is clearly stated that violence can go beyond these forms and is not limited hereto.⁹⁶ The recognition and naming of these types of harm is important for gender-related asylum claims as the list allows for the different practices to amount to persecution. Furthermore, since the CEDAW Committee declared gender-based violence to fall within its mandate, CEDAW provides the best means in terms of state obligations. Thus, the treaty is of actual relevance for female refugees seeking asylum on gender-related claims since it outlines a new era regarding the positive rights of states to protect women from violence. The next part will illustrate the responsibilities of states in depth.

2.3.2 State obligation to protect women from violence under CEDAW

As outlined above, within asylum determination processes it is crucial, to provide a nexus between the act of persecution suffered by the individual and one of the enumerated grounds of the 1951 Convention. In addition, and most often relevant for female asylum applicants due to the fear of persecution stemming from the threat of non-state actors, the refugee determination demands that state protection is not available

⁹⁴ Id. Art.1

⁹⁵ Id. Art.2

⁹⁶ Id. Art.2

for the claimant. Under CEDAW, state responsibilities have been extended compared to other human rights instruments and tailored on women's actual needs.

Core article under CEDAW is Article 2 as it expresses states' obligation. It regulates member states to combat all forms of discrimination within its domestic legislation and to provide substantive equality for women.⁹⁷ Furthermore states are obliged to combat discriminative customs and practices "by any person, organization or enterprise,"⁹⁸ which lead to unequal treatment of women.⁹⁹ This provision is of importance for female refugees, as it explicitly prohibits discriminative acts perpetrated by non-state actors in both, the public and private sphere.¹⁰⁰ In General Recommendation No 19, gender-based violence is named as a form of discrimination which deprives women of their human rights and fundamental freedoms.¹⁰¹ Even if gender-based violence is not namely mentioned in the Convention's articles, a link can be always drawn between single articles of CEDAW and violence against women by construing that the term 'discrimination' includes gender-related forms of violence.¹⁰² The Women's Convention imposes, for the first time in the history of international human rights law, obligations on states to abolish all forms of 'social and cultural patterns', existent policies, regulations and laws and 'customs and practices'¹⁰³, which maintain the idea of women's subordination and inferiority. The CEDAW Committee further clarifies that traditional attitudes and stereotyped role ascriptions to one's sex and gender often "perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision."¹⁰⁴ While these acts are forms of direct violence, the Committee urges state parties to overcome the underlying factors of gender-based violence, which are often cause and consequence all in one, like women's lower levels of education and in political

⁹⁷ CEDAW, *supra note 16*, Art.2a)

⁹⁸ Id. Art.2e)

⁹⁹ Id. Art.2f)

¹⁰⁰ General Recommendation No.28, CEDAW Committee, 47th Session (2010) Para.17

¹⁰¹ General Recommendation No.19, *supra note 90*, Para.7, including the right to equal protection before the law, and equality in the family

¹⁰² Center for Reproductive Rights, *Freedom from Violence is a Human Right. Government Duties to Protect Individuals from Violence, Ill Treatment, and Torture*(2008) at 3

¹⁰³ CEDAW, *supra note 16*, Art.2(f) and 5(a)

¹⁰⁴ General Recommendation No.19, *supra note 90*, Para.11

participation.¹⁰⁵ Consequently, since the establishment of a positive protection framework which emanates from CEDAW, states can be held accountable for acts of gender-based violence, also if committed by non-state actors in the private domain, if they fail to comply with international obligations and as a result cannot protect women from violence.¹⁰⁶ The CEDAW Committee states in this regard that state parties to the Convention must “act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensations.”¹⁰⁷ The obligation to apply the due diligence standard, can be put in relation to the examination of a state’s unwillingness or inability to offer protection from persecution under the 1951 Convention. But especially in terms of gender-based violence, the concept of state protection as emerging from CEDAW contributed to the development of the interpretation of the 1951 Convention’s definition. CEDAW’s protection standards provide a clearer and better standard for the examination of the ability and willingness of the respective country, than originating from the Convention itself. Due to the precise description of states’ responsibilities geared to women’s needs under CEDAW, the concept of international protection was able to deduce guidance from it for the determination if state protection is available in the asylum seeker’s country of origin. Accordingly, refugee women can benefit from CEDAW, since they can draw on the legal obligations arising therefrom in the determination of the fear of persecution in gender-related claims.

The development of the international framework for the protection of women’s human rights, no matter if violated in the private or public sphere or based on the justification of cultural, religious or traditional practices, impacted on enhancement and extension of the traditional definition of the 1951 Convention. Due to “the fact that there is no realistic prospect of the Convention being expanded”¹⁰⁸, UNHCR and other organizations have issued guidelines, which cover the recent developments and address women’s

¹⁰⁵ Id. Para.11

¹⁰⁶ Rebecca Cook ‘State Responsibility for Violations of Women’s Human Rights’ 7 *Harv. Hum. Rts. J.* 125 (1994) at 150-151

¹⁰⁷ General Recommendation No. 19, *supra note 90*, Para.4 and 9

¹⁰⁸ R. Haines, *supra note 12*, at 326

experiences, to assist governments to interpret the 1951 Convention definition in a gender-sensitive manner.

2.4 Soft-law that includes gender-related claims under the traditional refugee definition

Although soft law does not impose strictly enforceable rules on states, as do the treaties discussed above, it is legally significant by assisting with the interpretation of binding instruments. UNHCR issues documents which comprise guiding and recommending help for persons involved in asylum determination procedures “with the aim of contributing to the improvement of the relevant legal protection framework and implementation practices.”¹⁰⁹

The first document mentioning the vulnerability of displaced and refugee women to different forms of harm, which lead to physical and mental problems, and calling for taking account of their special needs is the Nairobi Forward-looking Strategies.¹¹⁰ This paper marks the outcome document at the end of the women’s decade between 1975 and 1985 and places refugee within the area of special concerns.¹¹¹ Thus, women themselves brought the topic on the international agenda, although the Nairobi Forward-looking Strategies lack sufficient guidance on how to deal with this problematic.

Addressing the 1951 Convention and thus, the internationally applied system of refugee determination, it was the European Parliament in 1984 to call for a gender-sensitive interpretation of the traditional definition. Herein, they recommended considering female asylum seekers who have been persecuted on the basis of gender-related claims as being eligible for international protection within the ground of a particular social group under

¹⁰⁹ UNHCR, Guidance for authorities for durable solution for refugees. Available at <http://www.unhcr-centraleurope.org/en/resources/legal-documents/unhcr-handbooks-recommendations-and-guidelines.html> [accessed 27.03.2014]

¹¹⁰ Nairobi Forward-looking Strategies, UN A/CONF.116/28/Rev. (1985) Para.298

¹¹¹ Id. IV (L)

the Convention.¹¹² Only a year later, the UNHCR's Executive Committee (EXCOM) held a session particular on women refugees, concluding that

‘women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.’¹¹³

Nonetheless, EXCOM respects the sovereignty of states and allows them in the same paragraph to adopt this measure voluntarily.¹¹⁴ It then took the UNHCR some more years to issue the first guidelines to protect refugee women in 1991. Herein UNHCR mandates that states should collect data to identify specific issues of refugee women¹¹⁵ and train adjudicating personnel in gender-sensitive techniques for interviewing procedures¹¹⁶ as well as of the conditions in their respective countries of origin.¹¹⁷ The subsequent guidelines on sexual violence from 1995 recite different conclusions of EXCOM, stating that the perpetrators of sexual violence might be private persons,¹¹⁸ recommending that states should adopt gender guidelines which recognize gender-specific forms of persecution and thus to entitle refugee women who suffered from sexual violence within the meaning of the 1951 Convention's definition of a refugee, if committed for one of the enumerated grounds of the Convention and either perpetrated by the state or, in the case of non-state actors as persecutors, if the state is unwilling or unable to protect the victim.¹¹⁹ Due to their informing rather than obligatory character, these two guidelines were not groundbreaking; as they have not been clear on whether, when or how gender-related claims entitle female asylum seekers to refugee status.

Of bigger impact are the following two guidelines of UNHCR, published as a result of the Global Consultations on international protection in 2002. The first guidelines aimed to guide governments, decision-making and adjudicative authorities on gender-related

¹¹² Jane Freedman ‘Protecting Women Asylum Seekers and Refugees: From International Norms to National Protection?’ *International Migration Vol. 48 No.1* (2010) at 178, see also Heaven Crawley as cited in A. Edwards, *supra note 35*, Footnote 14

¹¹³ Conclusion No.39 (XXXVI) Refugee Women and international Protection, Executive Committee, 36th Session (1985) at (k)

¹¹⁴ *Id.* at (k)

¹¹⁵ UNHCR, *Guidelines on the Protection of Refugee Women* (1991) Para.16

¹¹⁶ *Id.* Para.72

¹¹⁷ *Id.* Para.73

¹¹⁸ UNHCR, *Sexual Violence against Refugees. Guidelines on Prevention and Response* (1995) at 1.1

¹¹⁹ *Id.* at 4(a)

persecution¹²⁰, while the second addressed the meaning of ‘Membership of a Particular Social Group’¹²¹. The former guidelines ensure that gender dimensions must be considered in asylum determination procedures. It recognizes that although

‘gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims.’¹²²

It then further describes that the persecutory element must be established in each individual case,¹²³ even though a causal link for the reasons of race, religion, nationality, political opinion, or membership of a particular social group must be given.¹²⁴ The guidelines also outline what acts or circumstances can amount to a well-founded fear of being persecuted, including specific references on discrimination and one’s sexual orientation.¹²⁵ In addition, when describing the five enumerated grounds of the Convention in the context of gender-related persecution, UNHCR acknowledges the emphasis given to decide gender-based asylum claims on the ground of ‘membership of a particular social group’,¹²⁶ reflected in the prevalence of jurisprudences.¹²⁷ Consequently, other grounds are often overlooked, although claims of female asylum seekers may fit under any of the Conventional grounds or might overlap with one another, because they are not ‘mutually exclusive’.¹²⁸ Unfortunately, under the ground of political opinion, UNHCR reinforces the general assumption that women’s claims are generally not as political as those of men, since they “are less likely than their male counterparts to engage in high profile political activity and are more often involved in

¹²⁰UNHCR, *Guidelines on International Protection: Gender-related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/02/01 (2002)

¹²¹UNHCR, *Guidelines on International Protection: “Membership of a Particular Social Group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc HCR/GIP/02/02 (2002)

¹²² Guidelines on Gender-related Persecution, *supra* note 120, Para.6

¹²³ Id. Para.9

¹²⁴ Id. Para.20

¹²⁵ Id. Para.10-17

¹²⁶ Id. Para.28

¹²⁷ A. Edwards, *supra* note 35, at 30

¹²⁸ Guidelines on Gender-related Persecution, *supra* note 120, Para.23, see also Guidelines on PSG, *supra* note 121, Para.4

‘low level’ political activities”¹²⁹. Accordingly, UNHCR underline and support the emphasis on interpreting gender-based asylum claims of women to fit them under the particular social group determinant as can be seen from the guidelines. On the one hand, this can prove advantageous for women seeking asylum on the basis of gender-related claims because, since it means that their claims can be linked to one of the five grounds of the 1951 Convention. On the other hand does this interpretation not support the engendering of the other Convention grounds and downplays women’s experiences of discriminative or harmful treatment as stemming from religion or politics.¹³⁰

However, the guidelines on ‘membership of a particular social group’ serve as complement to the Handbook as do the guidelines on gender-related persecution and therefore “provide legal interpretive guidance”.¹³¹ Herein, the term of a particular social group is defined as

‘a group of persons, who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.’¹³²

In line with UNHCR remarks that one’s sex might be a clear characteristic to fit within the scope of a particular social group, the case of *Khawar* before the Australian High Court highlighted that women in all societies constitute a “distinct and recognizable group; and their distinctive attributes and characteristics exist independently of the manner in which they are treated, either by males or by governments.”¹³³ Despite that, the guidelines also stress that the particular social group is not a catch-all element for any persecuted persons and a member of a particular social group must still establish a well-founded fear of being persecuted as well as the linkage to one of the five enumerated grounds.¹³⁴ Regarding non-state actors of persecution, the guidelines extend the nexus requirement as required under the traditional definition. Where originally a link had to be established between the act or threat of harm and one of the five grounds,

¹²⁹ Id. Para.33

¹³⁰ Gender-related claims for reasons of religion and political opinion will be further discussed in chapter 4.2

¹³¹ Guidelines on PSG, *supra note 121*, preface

¹³² Id. Para.11

¹³³ *Minister for Immigration and Multicultural Affairs v. Khawar* (2002) Chief Justice Gleeson Para.35

¹³⁴ Guidelines on PSG, *supra note 121*, Para.2

the concept was broadened to include the possibility of a causal linkage if not the persecutory act itself, but the state's failure to provide protection must stem from one of these grounds.¹³⁵

Hence, the traditional interpretation of a direct link between the act of persecution 'for reasons of' at least one of the Conventional grounds is overcome. This is an important for refugee women, because in most gender-related asylum claims the threat of persecution is stemming from private persons. This means women must rely on the ability and willingness of their home countries to offer protective measures. From now on, women have the possibility to establish a valid refugee claim by connecting the state's denial of protection to one of the grounds. This acknowledgement of an indirect link takes into account their experiences of being persecuted in the private sphere at the hand of family- or community members and state's failure to provide effective protection from those forms of gendered harm.¹³⁶

¹³⁵ Id. Para.23

¹³⁶ A. Edwards, *supra note 14*, at 63

3. European Framework

All European member states¹³⁷ are bound to comply with several international treaties like the ICCPR, ICESCR, CEDAW, the 1951 Convention, UNCAT and the Convention on the Elimination of All Forms of Racial Discrimination¹³⁸. The ratification of the 1951 Convention is a prerequisite for states, if they wish to become a member state of the EU.¹³⁹ Furthermore, Europe has its own EU law and is in terms of human right standards led by the European Convention on Human Rights and its Protocols¹⁴⁰ (ECHR), which roughly echoes the protection framework of the Universal Declaration and the Charter of Fundamental Rights¹⁴¹ (EU Charter) of the EU.

While the ECHR does not include a right to asylum, the Charter of Fundamental Rights, which was only adopted in 2000, incorporates the right to asylum now in its Article 18¹⁴². The Charter also comprises that “[e]veryone is equal before the law”¹⁴³, discrimination on the grounds of one’s sex or sexual orientation is forbidden¹⁴⁴, gender-equality must be ensured and that this allows for the adoption of advantageous measures for women.¹⁴⁵ Under EU law, particularly the Treaty on European Union¹⁴⁶, equality between men and women must always prevail¹⁴⁷ and gender-equality is further to be promoted in all activities and policies undertaken by EU member states or institutions.¹⁴⁸ To further reach the goal of gender-equality, a Convention on Preventing and Combating

¹³⁷ There are 27 at present. Member states transfer power to different EU institutions, like the Council of Europe and the European Commission, which can adopt legislation, either directly binding for the member states or to be adopted within national laws

¹³⁸ *International Convention on the Elimination of All Forms of Racial Discrimination*, General Assembly resolution 2106 (XX) (1965)

¹³⁹ Elspeth Guild ‘The Europeanization of Europe’s Asylum Policy’ *Int J Refugee Law Vol.18 No.13-14* (2006) at 630

¹⁴⁰ *Convention on Human Rights* as amended by Protocols Nos.11 and 14, supplemented by Protocols Nos. 1, 4, 6, 7, 12, 13

¹⁴¹ *Charter of Fundamental Rights of the European Union*, 2000/C 364/01

¹⁴² Id. Art.18 states that ‘[t]he right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty establishing the European Community.’

¹⁴³ Id. Art.20

¹⁴⁴ Id. Art.21

¹⁴⁵ Id. Art.23

¹⁴⁶ *Consolidated Version of the Treaty on European Union*, C 83/13 (2010)

¹⁴⁷ Id. Art.2

¹⁴⁸ *Consolidated Version of the Treaty on the Functioning of the European Union (TFEU)*, C 115/47 (2008) Art.8

Violence against Women and Domestic Violence¹⁴⁹ (hereinafter Istanbul Convention) was opened for signature in 2011,

‘recognizing that violence against women is a manifestation of historically unequal power relations between women and men, which have led to the domination over, and discrimination against, women by men and to the prevention of the full advancement of women.’¹⁵⁰

Article 60 of the Istanbul Convention imposes the duty on signatory countries to introduce legal measures to ensure gender-based violence against women can amount to persecution and that each Convention ground is interpreted in a gender-sensitive manner. If a causal link between the act of persecution and one (or more) of the enumerated grounds can be established, international protection must be granted.¹⁵¹ However, due to the lack of ratifications, the Istanbul Convention did not enter into force yet.¹⁵²

This chapter will provide a thorough review of the European political developments. Thereby the paper focuses on the establishment of a Common European Asylum System which sets out the standards for refugee protection and determination in the member states. This context is helpful to understand the legal framework of the former Qualification Directive from 2004 and particular the recast Qualification Directive of 2011, which will be then analyzed in detail regarding its protection standards for women seeking asylum on the basis of gender-related claims in the next chapter.

3.1 The establishment of a Common European Asylum System

Based on the clearly economic aim of the EU to create a free market among the EU member states and to “offer its citizens an area of freedom, security and justice”¹⁵³, in the course of the Schengen Agreement the internal borders between the states

¹⁴⁹ Council of Europe, *Convention on Preventing and Combating Violence against Women and Domestic Violence* (2011)

¹⁵⁰ Id. Preamble

¹⁵¹ Id. Art.60

¹⁵² Council of Europe, Treaty Office, available at:

<http://www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=&DF=&CL=ENG>
[accessed 27.01.2014]

¹⁵³ Treaty on European Union, *supra note 146*, Art.3

were abolished from 1985 on.¹⁵⁴ This in turn led to extensive security controls at the external borders to keep tabs on the immigration of third-country nationals.¹⁵⁵ At that time, asylum and immigration policies have been dealt with on intergovernmental level within the so-called ‘third pillar’ of the EU, under which no participation of European institutions was ensured.¹⁵⁶ As a result, countries have created their own asylum policies on a national level. Some practices have been imitated by neighboring countries with spreading effect and therefore had a bottom-up impact on the creation of common policies throughout the EU.¹⁵⁷

However, due to the abolishment of the internal borders, asylum seekers were able to travel freely among the member states once they crossed the external borders of the EU. Thus, they were also able to lodge asylum applications in multiple jurisdictions, a phenomenon often referred to as ‘asylum shopping’¹⁵⁸. As a result, the current attitude towards asylum seekers is one of disbelief because they are often expected to abuse the system.¹⁵⁹ Due to that, asylum seekers are seen to constitute a national threat and politics were adopted to “prevent asylum seekers from entering the internal market.”¹⁶⁰ Consequently, it has been stated that the European policies are rather governed by politics, than the principle of international law.¹⁶¹

¹⁵⁴ Starting with a group of five countries in 1985, over time more member states opted in. Further information on the Schengen area available at http://europa.eu/legislation_summaries/justice_freedom_security/free_movement_of_persons_asylum_migration/133020_en.htm [accessed 28.03.2014]

¹⁵⁵ Nathalie Shimmel ‘Welcome to Europe, but Please Stay Out: Freedom of Movement and the May 2004 Expansion of the European Union’ *Vol.24 Iss.3 Berkeley J. Int’l L* (2006) at 771

¹⁵⁶ The Maastricht Treaty from 1992 established three pillars. Policies addressed under the first pillar were mainly dealt with on supranational level. That means, member states transferred decision-making power to the Community. However, asylum was placed under the third pillar. Thus, asylum policies were nationally dealt with in the field of home affairs. The Amsterdam Treaty, superseding Maastricht, then lifted ‘asylum’ to the first pillar, making it a Community matter with legal power for EU institutions.

¹⁵⁷ Rosemary Byrne, Gregor Noll and Jens Vedsted-Hansen ‘Understanding Refugee Law in an Enlarged European Union’ *EJIL*(2004) at 15, see also Timothy Hatton ‘*European Asylum Policy*’ *IZADP No.1721* (2005) at 7

¹⁵⁸ Harold Shepherd ‘Towards a Common European Asylum System: Asylum, Human Rights and European Values’ *Refugee Vol.22 No.1* (2004) at 98

¹⁵⁹ ECRE, *The Way forward. Towards Fair and Efficient Asylum Systems in Europe* (2005) at 5

¹⁶⁰ E. Guild, *supra note 139*, at 637

¹⁶¹ Alice Edwards and Carla Festman (eds) *Human Security and and Non-Citizens: Law, Policy and International Affairs* (2010) at 14

The Schengen Convention¹⁶² was superseded by the Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Community¹⁶³ (hereinafter Dublin Convention), which was further amended into the Dublin Regulation III¹⁶⁴. All of those instruments were intended to respond, at the respective time of their implementation, to the internal market situation of free movement, which was seen problematically only for third-country nationals. They thus determine that the first country of arrival within the European member states is responsible for the examination of the asylum claim.¹⁶⁵ Furthermore they state that only one asylum application can be made within the European countries.¹⁶⁶ An applicant can be rejected by the state where the claim was lodged, if the asylum seeker entered the EU via another member state. The asylum seeker is then transferred the first state of entry of the EU, to have her application examined there.¹⁶⁷ Although meant to be one of the first measures to harmonize the different asylum policies among the European nations into an efficient, fair and rapid system,¹⁶⁸ it was criticized to be a system of burden-allocation rather than burden-sharing.¹⁶⁹ For instance, UNHCR and ECRE expressed their concern for shifting a disproportionate burden to the countries at the external edge of Europe, particularly to southern and eastern countries, resulting in a negative impact on the assessment of asylum seekers' claims in terms of having their case promptly and meaningfully examined.¹⁷⁰ This resulted in the recognition of the need of legal instruments, which harmonize the different national refugee status determination processes and procedures, as well as reception standards to reach a uniform standard of refugee protection.

¹⁶² *Convention Implementing the Schengen Agreement* of 14 June 1985 between the Governments of the States of the Benelux Economic Union, the Federal Republic of Germany and the French Republic, on the Gradual Abolition of Checks at their Common (1990)

¹⁶³ *Convention determining the State responsible for examining applications for asylum lodged in one of the Member States of the European Community*, 97/C254/01 (1997)

¹⁶⁴ Council Regulation (EU) No 604/2013 of 26 June 2013

¹⁶⁵ *Id.* Art.13

¹⁶⁶ *Id.* Art.3

¹⁶⁷ *Id.* Art.13

¹⁶⁸ ECRE, *Sharing Responsibility for Refugee Protection in Europe: Dublin Reconsidered* (2008) at 9

¹⁶⁹ Geoff Gilbert 'Is Europe living Up to Its Obligations to Refugees?' *European Journal of International Law Vol.15 No.5* (2004) at 970

¹⁷⁰ ECRE, *supra note 168*, at 5 and 12-13

3.2 Aims of the Common European Asylum System

In 1999, European Heads of States met in Finland to discuss the framework of the legal and political developments of a Common European Asylum System (CEAS), which resulted in the Tampere Presidency Conclusions¹⁷¹. It was confirmed that all member states maintain “absolute respect of the right to seek asylum”¹⁷² in terms of the 1951 Convention. Furthermore, a specific remark was made to pay particular respect to women’s human rights in Europe’s internal and external migration policies.¹⁷³ During this meeting, the foundation for the CEAS was negotiated. However, to address asylum policies on the European level, another development was necessary. Thus, with the entry into force of the Amsterdam Treaty¹⁷⁴ in the same year, asylum and immigration matters were moved from the third pillar, where the member states had decision-making power over their own national asylum policies, to the first pillar of the EU. Since the policies under the first pillar are governed by the European Community, state’s sovereignty regarding asylum was removed. Instead, responsibility was transferred to the supranational level, shifting power to EU institutions to adopt binding legislation with a top-down impact on the member states.¹⁷⁵ With the aim of making progress to harmonize the different national asylum systems into a common approach, Article 63 of the Amsterdam Treaty states that the European Council must take measures within a five year period regarding binding minimum standards for the member states in the area of asylum. These measures must be in compliance with the 1951 Convention.¹⁷⁶ The four fields in which measures must be adopted are

- (a) ‘criteria and mechanisms for determining which Member State is responsible for considering an application for asylum submitted by a national of a third country in one of the Member States,
- (b) minimum standards on the reception of asylum seekers in Member States,

¹⁷¹ European Council, *Tampere Presidency Conclusions* (1999)

¹⁷² Id. Para.13

¹⁷³ Id. Para.11

¹⁷⁴ *Consolidated Version of the Treaty Establishing the European Community*, C 325/33 (2002)

¹⁷⁵ Anne von Oswald, *Europeanization in the field of Immigration and Asylum* (2011), available at <http://migrationeducation.org/17.1.html?&rid=18&cHash=49dd26642e390846adc14034c69001ab> [accessed on 28.03.2014]

¹⁷⁶ Amsterdam Treaty, *supra note 174*, Art.63

- (c) minimum standards with respect to the qualification of nationals of third countries as refugees,
- (d) minimum standards on procedures in Member States for granting or withdrawing refugee status.¹⁷⁷

At the end of that five year period a framework for the establishment of the CEAS was set out and a common ground in terms of cooperation among the member states was reached. Nonetheless, the European Commission conceded that „the objectives set at Tampere have not yet all been achieved.“¹⁷⁸ Hence it was time to further build on the results of the Tampere era. Therefore, another five-year program was adopted. The Hague Program was running from 2004-2009 and often referred to as the first phase of the CEAS. Hereunder, legally binding instruments were established on a supranational level, requiring the member states' compliance.¹⁷⁹

In compliance with the statutory provisions of the Amsterdam Treaty and the objectives determined at Tampere, in 2004 the first Qualification Directive was implemented. At its core, the Qualification Directive intended to achieve common protection standards among the member countries¹⁸⁰ and to reduce secondary movement of asylum seekers “purely caused by the differences in legal frameworks.”¹⁸¹ On a long term basis, the Directive seeks to implement a uniform status of international protection valid among all EU member states,¹⁸² since considerable differences in the recognition and rejection rates of asylum seekers from the same countries of origin in different European jurisdictions were found.¹⁸³ As Dr. Lambert notes, the Qualification Directive is, “from the perspective of international law, (...) the most important instrument in the new legal order in European asylum because it goes to the heart of the 1951 Convention”.¹⁸⁴

¹⁷⁷ Id. Art.63(1)

¹⁷⁸ Commission of the European Communities, COM (2004) 401 final at 7

¹⁷⁹ Council of the European Union, The Hague Programme: strengthening freedom, security and justice in the European Union 16054/04 (2004) at 2

¹⁸⁰ Qualification Directive, *supra note 3*, Recital 6

¹⁸¹ Id. Preamble para.7

¹⁸² Tampere Presidency Conclusions, *supra note 171*, Para.15

¹⁸³ E. Guild, *supra note 139*, at 639

¹⁸⁴ Dr. Hélène Lambert ‘The EU Qualification Directive, its impact on the Jurisprudence of the United Kingdom and International Law’ *International and Comparative Law Quarterly Vol. 55 Issue 01* (2006) at 161, an example of the different treatment and recognition rates of females, who are at risk of female

Again, after the five year period, the European Commission recognized that the intended harmonization of asylum policies and legal practices among the member states was not yet achieved. Indeed, although providing the basis for future developments, “shortcomings have been identified and it is clear that the agreed common minimum standards have not created the desired level playing field.”¹⁸⁵ Thus, the time schedule for the establishment of a CEAS was once again postponed to be completed by 2012. Remarks were made by the Commission of the European Communities, to include ‘gender considerations’ into a coherent and comprehensive common standard in the new phase of the CEAS,¹⁸⁶ to ensure gender equality.¹⁸⁷

The second phase of the CEAS was implemented by the Stockholm Program 2010-2014 and replaced its predecessors, the Tampere Conclusions and Hague Program.¹⁸⁸ Hereunder, the recast Qualification Directive was adopted in December 2011, requiring national legislation to be accordingly transposed by December 2013.¹⁸⁹ It aims to overcome the remaining differences between the member states and intends to provide a clearer and better standard of protection.¹⁹⁰ The next part of this paper will analyze the recast Qualification Directive in terms of its provisions of particular relevance for female asylum seekers and claims based on gender-related persecution.

genital mutilation see UNHCR, Too much Pain. Female Genital Mutilation & Asylum in the European Union. A statistical overview (2013)

¹⁸⁵ Commission of the European Communities, Communications from the Commission to the European Parliament, the Council and the Committee of Regions. Policy Plan on Asylum. An integrated Approach to Protection across the EU. COM 360 final (2008) at 4

¹⁸⁶ *Id.* at 3

¹⁸⁷ *Id.* at 5

¹⁸⁸ Hellenic Republic - Ministry of Foreign Affairs, The Stockholm Programme (2011) available at <http://www.mfa.gr/en/foreign-policy/greece-in-the-eu/area-of-justice-freedom-and-security.html?page=2> [accessed 30.01.2014]

¹⁸⁹ Recast Qualification Directive, *supra note 5*, Art.40, valid for all member states except Denmark, UK and Ireland. While UK and Ireland are further bound by the former Qualification Directive, Denmark is not subject to neither, Recitals 50-51 and also Qualification Directive, *supra note 3*, Recitals 38-40

¹⁹⁰ Recast Qualification Directive, *supra note 5*, Recital 8

4. The recast Qualification Directive

The recast Qualification Directive is another move forward in the course of the harmonization of the different European asylum policies, the introduction of minimum standards among the member states and the aim of reaching common eligibility criteria for the determination of refugee status. It serves as a tool for governments, decision-making authorities and courts to the extent that it provides regional obligation provisions, the member states' national legislature must comply with.¹⁹¹

However, if member states wish to offer higher protection standards than those laid down in the recast Qualification Directive, they can do so.¹⁹² Nonetheless, a common asylum policy must be in compliance with the “full and inclusive application”¹⁹³ of the 1951 Convention and with other international treaties according to Article 78 of the TFEU.¹⁹⁴ Furthermore, European member states are bound to comply with obligatory provisions under other treaties they are a party to.¹⁹⁵ Thus, it can be said that the recast Qualification Directive should be interpreted in light of other international and regional instruments like the ICCPR, ICESCR, CEDAW, the ECHR and the EU Charter. But also the emerging jurisprudence of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (CJEU) has guiding character for the member states.¹⁹⁶

The contributions of several NGOs in the process of proposing amendments for the recast Qualification Directive to offer better protection standards for female refugees seeking asylum on the basis of gender-based claims resulted in some changes in the new Directive which will be discussed in detail in the next part. Therefore, single provisions of the recast Qualification Directive which are of importance for those women will be consecutively analyzed.

¹⁹¹ Id. Art.40

¹⁹² Id. Recital 14

¹⁹³ Id. Recital 3

¹⁹⁴ Id. Recital 9, see also TFEU, *supra note 148*, Art.78

¹⁹⁵ Id. Recital 17

¹⁹⁶ ECRE, *Not There Yet: An NGO Perspective on Challenges to a Fair and Effective Common European Asylum System* (2013) at 27

4.1 Acts of Persecution under the recast Qualification Directive

A significant difficulty women face in order to fit their gender-related claim within the refugee definition of the 1951 Convention is, whether or not the harm they experience amounts to persecution. This is even more an obstacle, as persecution is not defined under the core instrument on refugee protection.

The recast Qualification Directive addresses acts of persecution under its Article 9 and provides a definition of the term. Accordingly, an act clearly amounts to a human rights violation and can therefore lead to persecution within the meaning of the 1951 Convention's definition, if it endangers one's fundamental rights.¹⁹⁷ These are one's right to life, the prohibition of torture, forced labor or slavery and the unlawful punishment. Those rights are of paramount importance under the ECHR, from which no derogation can be made, even in times of war or public emergency.¹⁹⁸ The recast Directive also recognizes that persecutory acts may take different forms comprising both, bodily or mental harm, involving sexual violence¹⁹⁹ and that acts can further be of gender-specific nature.²⁰⁰ These provisions already existed in the former Directive, but have only been adopted by some member states of the EU into national legislation.²⁰¹ Since acts of gender-specific nature are not defined, Article 9(2)f can be criticized for not providing sufficient guidance for member states to consider gender-based asylum claims adequately.²⁰² Again, the issue of the public-private divide arises as some states keep classifying forms of gender-based violence as private. By doing so, those gendered forms of violence are downplayed and women are often expected to seek protection from authorities in their home countries. Furthermore, the fact-finding assessment might be more difficult if the persecutor is an individual.²⁰³ Despite this, the former

¹⁹⁷ Recast Qualification Directive, *supra* note 5, Art.9(1)

¹⁹⁸ ECHR, *supra* note 140, Art. 15(2)

¹⁹⁹ Id. Art.9(2)a

²⁰⁰ Id. Art.9(2)f

²⁰¹ ECRE, *The Impact of the EU Qualification Directive on International Protection* (2008) at 20

²⁰² Hana Cheik Ali, Christel Querton and Elodie Soulard, *Gender-related Claims in Europe: Comparative Analysis of Law, Policies and Practice Focusing on Women in Nine EU member states* (2012) at 41

²⁰³ Id. at 41

Qualification Directive already incorporated non-state actors as possible actors of persecution.²⁰⁴

Consistent with that provision, the German Federal Administrative Court found that a non-state agent must not have any special characteristics and that a single person can be entirely sufficient to qualify as persecutor. Despite this judgment however, lower courts interpreted in gender-related claims that an individual cannot be the sole persecutor, “but insisted that a certain degree of group organization was required to qualify as an actor of persecution.”²⁰⁵ This example clearly shows the lack of willingness of authorities to apply a gender-sensitive refugee definition interpretation and the obstacle refugee women are confronted with if establishing a well-founded fear of persecution due to gender-related forms of harm perpetrated by non-state agents.

Nonetheless, UNHCR commented on the former Qualification Directive as setting the stage for a more coherent framework of asylum policies among the member states. This commentary states that achievements have been made in harmonizing the legal interpretation of serious harm and the non-state agent question in the EU member states.²⁰⁶ These developments might be further supported by the new amendment in the recast Qualification Directive as outlined below, if governments and authorities move beyond the male-centered lens of interpretation and start applying a gender-sensitive refugee definition, which includes women’s experiences. Therefore, the acts of harm suffered by women just for the reason that they are women cannot be longer interpreted as personal or domestic conflicts, but should be able to amount to persecution if state protection is absent. In order to provide more guidance to the member states and offer higher protection standards, especially to victims of persecution perpetrated at the hands of non-state actors, the recast Qualification Directive extended the concept of the causal link, which requires that the act of persecution is ‘for reasons of’ one of the grounds enumerated in the 1951 Convention.

²⁰⁴ Qualification Directive, *supra* note 3, Art.6(c)

²⁰⁵ UNHCR, *Asylum in the EU. A Study on the Implementation of the Qualification Directive* (2007) at 45

²⁰⁶ *Id.* at 43

Since refugee law is not meant to protect all persons from any kind of persecution, a crucial limitation was adopted to identify the persons in real need of international protection. Therefore, an asylum seeker must be able to connect the feared persecution to one of the five grounds of the refugee Convention. The risk of “a well-founded fear for being persecuted [must be]for reasons of race, religion, nationality, political opinion or membership of a particular social group”²⁰⁷ to establish a valid claim to international protection.²⁰⁸ The Michigan Guidelines specify that it is not the applicant herself who must establish the nexus requirement, but it is rather the responsibility of the examining authorities to decide whether or not the fear of persecution is for one of the five grounds.²⁰⁹

Traditionally, mostly male asylum applicants were able to establish a direct linkage between the persecutory act committed by agents or entities of the state to at least one ground found in the 1951 Convention. This direct nexus represented an obstacle for women claimants, as they are more likely to be persecuted at the hands of private persons and thus there exists a more indirect link between the persecution and the inability or unwillingness of a state to provide effective protection.²¹⁰ Hathaway provides four ‘Rajudeen’ principles, which describe different situations where the state should be seen as failing to provide protection to the individual. A state’s failure to provide protection is established, if either the act was committed by the state in question, or if the concerned state condones the persecutory act or tolerates it. Further, even if the state neither condones nor tolerates the persecution, but if the persecution still exists because the state refuses to provide protection or is for other reasons unable to provide protection then a lack of state protection is also established.²¹¹

This so-called protection view was then eventually applied in cases. In New Zealand, dealing with a case of domestic violence of an Iranian woman, the judges found

²⁰⁷ 1951 Convention, *supra* note 6, Art.1(A)2 (my emphasis added)

²⁰⁸ James Hathaway ‘The Causal Nexus in International Refugee Law’ 23 *Mich. J. Int’l L.* 207 (2002) at 207

²⁰⁹ *The Michigan Guidelines on Nexus to a Convention Ground* (2002) Para.3, available at <http://www.refworld.org/docid/3dca7b439.html> [accessed 23.03.2014]

²¹⁰ A. Edwards, *supra* note 14, at 63

²¹¹ J. Hathaway, *supra* note 56, at 129

‘That if a refugee claimant is at real risk of serious harm at the hands of a non-state actor (e.g. husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied.’²¹²

Similarly, in *Islam and Shah*²¹³, a conjoined appeal decision in the UK, the judges also addressed two claims of Pakistani women regarding gender-based persecution. The two claimants feared domestic violence without state protection and criminal proceedings for being wrongfully accused of adultery, which might result in penalties as severe as flogging or even stoning to death if returned. The House of Lords dealt with the analysis of the term persecution, the nexus requirement and the particular social group definition. Regarding the definition of persecution, Lord Hoffman pointed to the definition dating as far back as 1988, established by the UK NGO Refugee Women’s Legal Group, who concisely stated that persecution amounts to serious harm and the failure of state protection.²¹⁴ When Lord Hoffman considered the reasons for the women’s fear, he finds that two elements are present.

‘First, there is the threat of violence to Mrs Islam by her husband and his political friends and to Mrs Shah by her husband. This is a personal affair, directed against them as individuals. Secondly, there is the inability or unwillingness of the State to do anything to protect them. There is nothing personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements have to be combined to constitute persecution within the meaning of the Convention.’²¹⁵

Thus, the judges established the nexus due to the state tolerating the physical harm against the women and stressed that the state’s inaction is as important for the harm feared as the threats of violence by their husbands.

Following this practice of law, the recast Qualification Directive now recognizes that the nexus requirement is also established if not the act of persecution, but the failure of the state to provide protection, is for reasons of race, nationality, religion, political opinion

²¹²*Refugee Appeal No.71427/99* (2000) Para.112

²¹³*Islam v Secretary for the Home Department; R v Immigration Appeal Tribunal and Another; Ex parte Shah* (1999)

²¹⁴ Id. Lord Hoffman at 17

²¹⁵ Id. Lord Hoffman at 17

or membership of a particular social group.²¹⁶ In its Annex to the recast Qualification Directive proposal, the European Commission explains that this step was necessary to recognize the criminal extent of acts committed by non-state agents, which are not always for reasons of the Convention grounds. But the fact that those acts are treated with impunity by the state and authorities for grounds mentioned in the 1951 Convention definition equally entitles to international protection.²¹⁷

Thus, although the recast Qualification Directive attempts to provide a gender-inclusive definition of persecution, it is still weak in its guidance since acts of gender-specific nature are not further described. Leeway is given to authorities on how to interpret that term. And while some countries might adopt clearer national gender-guidelines, others might apply a restrict interpretation. However, it is a major progress that the nexus requirement can be now also linked to the absence of efficient state protection. This can considerably impact women's claims to asylum due to the likelihood of being at risk of persecution by individuals and not state officials. Nonetheless, since either the persecutory act or the inaction of the state must be connected to one of the grounds of the 1951 Convention, those reasons for persecution will be dealt with in the next subsection in more detail, as women must fit their claims to one of those enumerated grounds.

4.2 Reasons for persecution under the recast Directive

Under the recast Qualification Directive the five grounds are dealt with in Article 10. States are obliged to take those reasons for persecution into account when determining the asylum claim. Unfortunately the ground of particular social group is the only one under the recast Directive, where amendments to incorporate gender-aspects were made.

From the beginning of the debate around gender-related asylum claims, they were suggested to be considered under the category of particular social group.²¹⁸ Some say,

²¹⁶ Recast Qualification Directive, *supra* note 5, Art.9(3)

²¹⁷ Commission of the European Communities, *Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted*, Annex (2009) COM 551 final (2009) at 5

²¹⁸ J. Freedman, *supra* note 112, at 178

that this ground was adopted to stay flexible and open for future groups at risk of persecution.²¹⁹ The interpretation of women's experiences under the ground of particular social group is also favored by the European Parliament and the UNHCR as they advocate the interpretation of gender-related claims under the particular social group calculus to ensure those claims are covered under the 1951 Convention, since a specific ground of gender is missing in the 1951 Convention definition.²²⁰ Also Hathaway states that “[g]ender-based groups are clear examples of social subsets defined by an innate and immutable characteristic.”²²¹ However, some feminists have questioned and criticized the concept of trying to fit the claims of refugee women exclusively within the framework of a particular social group. They say women cannot be made to be a cohesive group as their experiences vary immensely even within the same state or origin due to several differences regarding their status, culture and age. Thus, “the very assumption that women have common experiences which can be explained by reference to their gender alone can itself undermine the argument”.²²²

Haines suggests interpreting all five grounds of the 1951 Convention in a gender-sensitive manner.²²³ Especially the reasons of ‘religion’ and ‘political opinion’ should be considered if assessing gender-related claims to overcome the public-private dichotomy. Women can be persecuted because they transgress religious dress codes or social mores. Hence, they are suspected to hold certain beliefs and are persecuted therefore. Similarly, women might be at risk of persecution due to an imputed political opinion. This means, they are assumed to hold such an opinion, no matter if they actually do.²²⁴ Consequently, by solely labeling them as a member of a particular social group and considering their claims exclusively under that ground, the real source of threat is overlooked. Therefore, if women do not conform to discriminating customs, laws or practices, those claims should at least find consideration under the grounds of religion or political opinion.²²⁵

²¹⁹ N. Valji, *supra note 9*, at 26

²²⁰ Guidelines on the Protection of Refugee Women, *supra note 115*, Para.54

²²¹ Hathaway, *supra note 56*, at 161, see also *FB v The Secretary of State for the Home Department* Heaven Crawley. *Refugees and Gender: Law and Process* (2001) at 73

²²³ R. Haines, *supra note 12*, at 342

²²⁴ Further discussed in Section 4.2.2 and 4.2.3 respectively

²²⁵ A. Edwards, *supra note 14*, at 68

The following section considers the three grounds of particular social group, political opinion and religion, as they are most suitable for women to base their claim on. The reason of particular social group will be dealt with first and discussed at large, because it is the most common one.

4.2.1 Membership of a particular social group

Under the recast Qualification Directive important amendments were made under the particular social group calculus, which aim to improve the assessment of gender-related claims to include women's experiences. UNHCR and ECRE comment on the new provision that gender-related aspects of the applicant, comprising his or her gender identity, must find due consideration in the assessment of an asylum application.²²⁶ This is crucial for the advancement of the recognition of female applicants subjected to gender-based violence. The more so, because the previous Directive declared that gender-related aspects alone could not create applicability of constituting a particular social group. But that wording was deleted.²²⁷ Under the recast Directive decision-making authorities or judges in all the EU member states are obliged to consider the applicant's gender if examining the reasons for persecution in an asylum claim.

Despite these improvements, the recast Directive's definition of who falls under the particular social group calculus requires additional consideration.

In Article 10 it says

- (d) 'a group shall be considered to form a particular social group where in particular:
- members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, *and*
 - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.'²²⁸

²²⁶ Recast Qualification Directive, *supra note 5*, Art.10(d)

²²⁷ Qualification Directive, *supra note 3*, Art.10(d)

²²⁸ Recast Qualification Directive, *supra note 5*, Art.10(d) (emphasis added)

Although this definition is partly in line with international guidelines, a subtle difference to international interpretations is crucial for the protection of asylum seekers.

Firstly, there are various legal approaches to interpret the term of a ‘particular social group’ because the ground lacks clarity.²²⁹ Although a complete list of people falling under this Convention ground cannot be established, the ground also cannot be understood to encompass all those people, who do not fit under any other ground of the 1951 Convention.²³⁰ In addition, it is not applicable if the persecution is the only characteristic its members share.²³¹ Secondly, over the years international jurisprudence developed two different approaches in determining what a particular social group is.

One approach is commonly referred to as ‘protected characteristic’ or ‘immutability’ approach. This approach is also part of the particular social group definition in the recast Qualification Directive. It highlights that members of the group must share a characteristic element, which is immutable in nature. That means, either out of control for the individual to change²³² or so vital to one’s identity, core beliefs or values that the renunciation therefrom cannot be required due to its human rights substance.²³³ This interpretation emerged in accordance to the interpretation of the grounds of religion, nationality, race and political opinion. Those four grounds also hold an either innate element, which simply cannot be changed, or such a fundamental element, which cannot be demanded to renounce.²³⁴ Consequently, in *Acosta* the Court found that one’s sex can fall under the ambit of immutable characteristic, as well as kinship relations or past experiences.²³⁵ Due to the seminal nature of the judgment, it influenced many other courts in their decisions and was emphasized by scholars. In the US for example, gender

²²⁹Christel Querton, *The Interpretation of the Convention Ground of ‘Membership of a Particular Social Group’ in the Context of Gender-related Claims for Asylum. A critical analysis of the Tribunal’s approach in the UK* (2012) at 5

²³⁰R. Haines, *supra note 12*, at 345

²³¹Guidelines on PSG, *supra note 121*, Para.2

²³²*Matter of Acosta Interim Decision #2986 A-24159781* (1985) Para.10

²³³UNHCR’s Intervention, *Islam v Secretary for the Home Department; R v Immigration Appeal Tribunal and Another; Ex parte Shah* (1999) at 4

²³⁴C. Querton, *supra note 229*, at 7

²³⁵*Matter of Acosta, supra note 232*, at 233

was found to constitute a particular social group.²³⁶ In the guidelines commenting on this ground, UNHCR also clarifies that women can constitute a particular social group, despite the size of the group. This is in accordance with the interpretation of the four other enumerated grounds, as they are also not defined in terms of their size. Furthermore, it is not necessary for the claimant to prove that all members of the social group are subjected to persecution.²³⁷

In the past some European states refused to recognize women per se as a particular social group due “to the risk of receiving asylum claims from ‘half of humanity.’”²³⁸ Therefore some states introduced working instructions for immigration officers, explicitly excluding sex or gender to be a sufficient reason for the determination of a particular social group.²³⁹ Currently, through emerging jurisprudence and the amendments in the recast Qualification Directive, a new standard is set out in this respect.

Compared to the ‘protected characteristic’ approach, the ‘social perception’ approach instead requires decision-makers to recognize the group through shared or common features, which set the group apart from society at large.²⁴⁰ Those characteristics must not necessarily be immutable or crucial to one’s identity, but are rather just perceived to exist by society. Hence, the characteristics are imposed on the individual, no matter if she actually possesses the assumed characteristic or not.²⁴¹

UNHCR suggests reconciling the two established approaches into one definition. Thus, for the determination of a particular social group, “a group of persons must share a

²³⁶ T. Alexander Aleinikoff ‘Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’ in in E. Feller, V. Türk and F. Nicholson (eds.) *Refugee Protection in International Law*, UNHCR’s Global Consultations on International Protection(2003) at 276

²³⁷ Guidelines on PSG, *supra note 121*, Para.17-19

²³⁸ J. Freedman, *supra note 43*, at 420

²³⁹ E.g. Netherlands and Sweden as in T, Aleinikoff, *supra note 236*, at 285, see also Heaven Crawley and Trine Lester. *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe* (2004) at 89

²⁴⁰ Guidelines on PSG, *supra note 121*, Para.7

²⁴¹ C. Querton, *supra note 229*, at 8

common characteristic other than their risk of being persecuted, *or* who are perceived as a group by society.”²⁴²

The substantial difference between UNHCR’s definition and the one of the recast Qualification Directive arises from the applicability of those two standards. While the UNHCR guidelines state that the fulfillment of either the ‘protected characteristic’ or the ‘social perception’ approach is sufficient to determine a particular social group, the recast Directive requires both to be applicable. Thus, the EU’s protection standard is criticized as too restrictive.²⁴³ Aleinikoff remarks that most people falling under the first approach are also perceived by society as a distinct group. And while the ‘protected characteristic’ standard allows a decision-maker to reasonably examine whether or not an asylum applicant carries an immutable or innate characteristic, the ‘social perception’ approach goes beyond the assessment of internal factors, but demands the applicability of external factors.²⁴⁴ Consequently, not all groups who are perceived as such by the society they live in, do so because of a fundamental or immutable feature. For example, women who refuse to obey traditional or religious dress codes are likely perceived as a distinct group since they are clearly cognizable from those women who adhere to those customs. Nonetheless it might be difficult to determine if those women would fall under the scope of the ‘protected characteristic’ approach.²⁴⁵

To summarize, the recast Directive strengthens women’s claims based on gender-related persecution under the social group calculus, as it provides member states with an extended definition, which obliges them to consider questions of gender-aspects. It remains to be seen how decision-makers and courts will interpret Article 10(d) of the recast Qualification Directive and if they adopt more favorable standards, following a positive example of jurisprudence comes from the UK. In *Fornah v Secretary of State*

²⁴² Guidelines on PSG, *supra* note 121, Para.11 (emphasis added)

²⁴³ UNHCR, *comments on the European Commission’s proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted* (2009) at 8

²⁴⁴ A. Aleinikoff, *supra* note 236, at 297

²⁴⁵ *Id.* at 297-298

for the Home Department²⁴⁶, the House of Lords endorsed the reconciliation of both approaches in accordance with international guidelines. Lord Bingham criticized the cumulative definition of the Qualification Directive. He stated that the requirement to fulfill both elements, the innate characteristic and the distinct identity, in order to be recognized as a social group, is more limited than requested by international authority.²⁴⁷ Lord Brown, in the same case, drew on the UNHCR definition and emphasized that the Qualification Directive has “to be interpreted consistently with this definition”.²⁴⁸ A third judge, Lord Hope, referred to an Australian case where the requirement of a social group to be perceived by society as such is “[t]o require evidence of a recognition or perception by the society that the collection of individuals in that society comprises “a particular social group” is to impose a condition that the Convention does not require.”²⁴⁹ Thus, Lord Hope provided that “it is a mistake to insist that such recognition is always necessary.”²⁵⁰ As result of the consensus of the majority of the judges, this decision has binding character for other courts in the UK and provides a more favorable standard than the Qualification Directive due to the acceptance to apply the two approaches alternatively.

In both decisions, *Fornah* and *Islam and Shah*, the judges found one’s gender or sex sufficient to determine a social group. In the former case the group of ‘women in Sierra Leone’²⁵¹ was recognized and in the latter case it was found that ‘Pakistani women’²⁵² constitute a social group. Thereby the law was interpreted in conformance with UNHCR standards that women share innate characteristics and are often treated in a different manner than men.²⁵³

²⁴⁶ *Secretary of State for the Home Department v. K.; Fornah v. Secretary of State for the Home Department* UKHL 46 (2006)

²⁴⁷ Id. Lord Bingham Para.16

²⁴⁸ Id. Lord Brown Para.118

²⁴⁹ *Applicant S v. Minister for Immigration and Multicultural Affairs*, HCA 25 (2004) McHugh Para.68

²⁵⁰ *Fornah v Secretary of State for the Home Department*, supra 266, Lord Hope Para.46

²⁵¹ Id. Lord Bingham Para.31

²⁵² *Islam and Shah*, supra note 213, Lord Steyn at 9-10

²⁵³ Guidelines on PSG, supra note 121, Para.12

4.2.2 Political opinion

The recast Qualification Directive does not provide any provisions in terms of a gender-sensitive interpretation of the political opinion calculus, although women's rights groups urged the European Commission to amend the recast Directive to include a stipulation that all five grounds are to be read in a gender-specific manner.²⁵⁴ However, international guidelines, academics and jurisprudence have proved more flexible and engendered the other Conventional grounds. As mentioned above, women might face acts of gender-based violence on account of an imputed political opinion.

It is important to note that the 1951 Convention incorporated the term of 'political opinion' and not 'political activity'. This means an asylum seeker must not show that she has acted upon her political beliefs before she left her country of origin.²⁵⁵ Neither is it necessary that the applicant actually holds the political opinion, if that opinion is attributed to her by her persecutor.²⁵⁶

A common standard of interpreting asylum claims on the basis of the individual's political opinion is that the claimant is known or alleged to hold "opinions contrary to or critical of the policies of the government or ruling part."²⁵⁷ Although a broader definition was suggested by Goodwin-Gill to include "any opinion on any matter in which the machinery of State, government, and policy may be engaged"²⁵⁸, the explicit recognition of non-state actors as persecutors is still missing. Thus, many refugee women with gender-related claims struggle to establish a causal link of their fear of persecution for reasons of their political opinion.

The UNHCR gender-guidelines extend the protection standard for women under the ground of political opinion. In Paragraph 32 they state that the rejection of gender roles can be interpreted to constitute a political opinion, as well that causation can be

²⁵⁴European Women's Lobby, Asylum Aid and ILGA Europe. *Proposal for amendments on the Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of the international protection and the content of the protection* (2010) Art.10 granted (recast).

²⁵⁵J. Hathaway, *supra note 56*, at 149

²⁵⁶Handbook, *supra note 51*, Para.80

²⁵⁷Grahl Madsen as cited in Edwards, *supra note 14*, at 68

²⁵⁸Guy S. Goodwin-Gill, *The Refugee in International Law* (1996) at 49

established if the actual or attributed opinions contradict those of authorities or society, thereby including private persons as possible persecutors. Furthermore is it not a prerequisite for the asylum claimant to have suffered persecution or openly expressed her opinion in her country of origin in order to establish a valid claim. A forward-looking assessment will determine, whether her factual or attributed opinion could lead to severe consequences and thus, if she has a well-founded fear of being persecuted if she was returned.²⁵⁹ While the gender-guidelines also reflect the general depiction of gendered roles, placing women in the engagement of ‘low level’ political activities, they acknowledge the imputation of political opinions through activities of kinships. However, instead of explicitly stating to consider these claims of imputed political opinion under the appertaining ground, the guidelines mention the possibility of considering those cases under the particular social group calculus, namely of ‘family’.²⁶⁰

A study among nine European member states in 2012 found that most countries fail to provide a gendered understanding of the political opinion ground. In Sweden national gender guidelines exist to help decision-makers determining gender-based claims, but these guidelines do not provide a gender-sensitive definition of political opinion. Consequently, first instance decisions often fail to apply a gender-sensitive interpretation under the other four Conventional grounds besides the PSG.²⁶¹ An application of a woman from Ethiopia, claiming to fear persecution due to her support of the opposition party and her father’s activities in the previous governmental system was denied, although she was raped by military men during a raid in her family’s home. The judges rejected her claim as they did not find her ‘low level activities’ to put her in danger if returned and the incident of sexual violence was not established to be connected with her actual or imputed political opinion. Since their assessment was that the incident of rape was committed by state actors for individual satisfaction, she could be assumed to find protection of state authorities and was not subjected to a future risk of being persecuted.²⁶²

²⁵⁹Guidelines on Gender-related Persecution, *supra* note 120, Para.32

²⁶⁰Id. Para.33

²⁶¹H. Cheik Ali et al, *supra* note 202, at 72

²⁶²Id. Footnote 269

Similarly, the national gender-guidelines of the UK obliges personnel of the Border Agency

‘not to underestimate or overlook the political dimensions of women's experiences of persecution even though a woman may not regard herself as making a political statement. Non-conformist opinions or behaviour may in certain circumstances be the expression of a political opinion or may result in a woman having a political opinion attributed to her whether she holds one or not. For instance opposition to institutionalised discrimination against women in society or expressing views in opposition to the predominant social or cultural norms may be seen to constitute a political opinion. Non-conformist behaviour in certain cultures such as refusing to wear a veil, pursuing an education or choosing a partner could also lead to a woman having a political opinion attributed to her.’²⁶³

Despite those instructions providing guidance, it seems that decision-makers and judicial officers still tend to apply the particular social group ground. In the UK case of *FB v The Secretary of State for the Home Department*²⁶⁴, the claim was decided under the particular social group calculus, even though the court gave rise to the question of imputed political opinion. The case dealt with a 16 year old citizen from Sierra Leone, who fled her home country after she was forced to marry the village chief after her mother's death. She should have become his fourth wife, despite the considerable age gap between them. Furthermore, because her mother was a Soweï, that is a woman performing female genital mutilations on girls, the applicant, who herself had been subjected to this harmful tradition, was expected to undertake her mother's functions in accordance with traditions of her tribe.²⁶⁵ Her first claim was refused as the court found that there was no future risk of persecution since she had already undergone the practice of female circumcision. It was also found that her fear of being forced to enter into marriage with the chief of the village could be avoided through relocation in her country of origin.²⁶⁶ Only in the appeal, the political extent of her refusal to comply with tradition came up. And although it was found that the applicant herself does not see her activities as politically motivated, others might attribute a political statement to her denial to abide

²⁶³ UK Border Agency. *Asylum Instruction on Gender Issues in the Asylum Claim* (2010) Para.4.6

²⁶⁴ *FB v The Secretary of State for the Home Department* (Lone women - PSG – internal relocation – AA (Uganda) considered) Sierra Leone (2008) UKAIT 00090

²⁶⁵ *Id.* Para.1-4

²⁶⁶ *Id.* Para.5

by social mores and to oppose herself to the rules of the community.²⁶⁷ However, in its conclusion the Tribunal then granted asylum on the basis of the applicant's risk of being persecuted for reasons of belonging to a particular social group, which was defined as "a woman who has shown herself opposed to traditional values in her rural environment."²⁶⁸

Edwards wonders why it is so difficult for decision-making authorities to recognize the political extent of women's refusal to comply with traditional practices and customs, which are often harmful if not life threatening and perpetrated as means to keep them subordinate.²⁶⁹ Edwards speaks for a contextual, culture-sensitive interpretation of the ground of political opinion when dealing with gender-related asylum claims. Thus, as soon as a woman claimant holds beliefs or even acts upon them, resulting in the opposition of common views or customs in her society and preserved by any form of authority, it should be considered under the political opinion ground. This approach would focus on the respective environment of the women's home country, respecting their individual experiences, as even subgroups from society at large, like tribes or clans, might have enough power to enforce the maintenance of discriminative or harmful practices.²⁷⁰

In accordance with that, Crawley also challenges the view of cultural relativism, which she says is prevalent among decision-making authorities if determining gender-related asylum claims. Through upholding the importance of cultural differences, an asylum claim of a Sierra Leonean woman, fleeing her fear of forced female genital mutilation, was rejected in the first instance in the UK. In the judge's opinion, FGM was not discriminative in her circumstances since the custom is accepted by most of society.²⁷¹ Even though this decision was overturned by the House of Lords in an appeal, it shows the lack of recognition of women's experiences, perhaps connected with the fear of

²⁶⁷ Id. Para.72

²⁶⁸ Id. Para.91

²⁶⁹ A. Edwards, *supra note 14*, at 68

²⁷⁰ Id. at 69

²⁷¹ J. Freedman, *supra note 43*, at 419

European states of being flooded with female refugees, once those harmful customs are recognized to amount to persecution.²⁷²

A good example of gendering the political opinion ground among the European member states comes from Belgium. There, the Immigration authorities published guidelines on women in the asylum procedure which stipulate to consider gender-related claims within the assessment of the reasons for persecution primarily under the political opinion calculus.²⁷³ In line with those instructions, several asylum claims of parents from Guinea, fleeing their country due to the risk of their daughters being exposed to female genital mutilation, were recognized by courts of second instance for reasons of their political opinion. The appeal courts ruled that it is legitimate to fear persecution under the ground of political opinion of the 1951 Convention due to the refusal to expose one's daughter to the practice of female circumcision, since the custom was found to be compulsory for girls in Guinean society and impossible to avoid and non-compliance with the ancient tradition would result in ostracism for the whole family.²⁷⁴ Despite the Belgian jurisprudence confirming the UNHCR guidelines on gender-related persecution under the ground of political opinion and thus being a standard of good practice for European member states in this regard, the working instruction for decision-making authorities unfortunately fails to adopt the UNHCR standard on particular social group by describing women in general as too diverse to constitute a social group and that the applicant's sex alone is not sufficient to determine her claim under the social group calculus.²⁷⁵

As can be seen from the above disparate decisions, the recast Qualification Directive failed to amend its provisions to provide a gendered definition of political opinion and thus misses the opportunity to harmonize protection standards among the member states. Due to the vague definition found under Article 10 (1) e) countries still apply different interpretations to the concept fear for persecution 'for reasons of political opinion', although some countries adopted more favorable standards in accordance with Recital

²⁷² Id. at 20

²⁷³ A. Aleinikoff, *supra* note 236, at 285

²⁷⁴ H. Cheik Ali et al, *supra* note 202, at 74

²⁷⁵ A. Aleinikoff, *supra* note 236, at 285

14 of the recast Directive. It is desirable that European jurisprudence will set clear precedent to include women's experiences under all of the Conventional grounds and that some member states follow international or regional practices and adopt compulsory guidelines on a national level.

4.2.3 Religion

Women might be at risk of persecution for reasons of their religion, as a result of transgressing social mores, resisting certain traditional customs like dress codes, the refusal to observe gender-discriminative practices or laws for married or unmarried women alike and holding emancipatory or feminist views. According to the UK gender-guidelines, "[w]here the religion assigns particular roles or behavioural codes to women, a woman who refuses or fails to fulfill her assigned role or abide by the codes may have a well-founded fear of persecution on the ground of religion."²⁷⁶ In compliance with the recast Qualification Directive and applicable for all five grounds of persecution, it is meaningless for the determination process whether the claimant actually possesses the religious characteristic causing the fear of persecution or if it is imputed to her by the actors of persecution.²⁷⁷ This ground is often closely linked or overlaps with the political opinion calculus. The severe punishments by state or non-state agents of religious actions or inactions which are in violation of the religious law or customs are often prevalent in theocracies where specific behavioral roles are imposed on the female population²⁷⁸ and thus a refusal to conform with those roles can be viewed as a threat for the political system.²⁷⁹ Claims should be also considered under this ground if the state is unable to provide effective protection against the rule of political groups in some parts of the applicant's country of origin, or if the state favors a specific religious persuasion.²⁸⁰

There are two crucial elements when defining religion. The UNHCR Handbook combines them and refers to one's right to freely choose her religion or conscience,

²⁷⁶ UK gender guidelines, *supra* note 263, Para.3.13

²⁷⁷ Recast Qualification Directive, *supra* note 5, Art.10(2)

²⁷⁸ UK Gender-guidelines, *supra* note 263, Para.3.15

²⁷⁹ Guidelines on Gender-related Persecution, *supra* note 120, Para.26

²⁸⁰ *Id.* Para.3.15

which is understood to include any “theistic, non-theistic and atheistic beliefs”²⁸¹ and to change and practice it accordingly.²⁸² Hathaway clarifies that an asylum claim based on religion can also be put down to comprise these two dimensions. Firstly, someone might be at risk of persecution simply for the reason for her religion, no matter if she is a self-defined adherent of that particular religion or only assumed to belong thereto by her persecutors. Secondly, one might fear persecution due to her manifestation of her beliefs.²⁸³

Two cases will be considered under this Convention ground. The first is an example from New Zealand, dating as far back as 1994. Although not European, this case is reviewed as the Appeal Court applies a positive gender-sensitive interpretation of the religion and political opinion ground, which are overlapping. The second example is a current decision from the UK House of Lords, which granted the right to stay on humanitarian grounds to the appellant after her claim was rejected in lower instance decisions.

In *Refugee Appeal No. 2039/93*²⁸⁴ the judges considered a claim of an Iranian woman, who left her country of origin due to her fear of being persecuted by her own family and the Iranian government. She based her claim on four different grounds, comprising her own race and religion, the political views and activities of her relatives, the oppressive attitude and discrimination of the male family member in her own family as well as the systematic oppression in society at large.²⁸⁵ She provided evidence of the arrest and imprisonment of some of her close relatives for their political views by the governmental regime and furthermore testified credibly of her own family’s mistreatment of female members, which was reflected in the domination of Iranian men over women in society at large, strongly upholding the traditional concept of honor. The subordination of women became clear through her testimony of cases of forced marriage, honor killings,

²⁸¹ As cited in Goodwin-Gil, *supra note 258*, at 45 footnote 56

²⁸² Handbook, *supra note 51*, Para.71

²⁸³ J. Hathaway, *supra note 56*, at 102-103

²⁸⁴ *Refugee Appeal No. 2039/93 Re MN*, New Zealand: Refugee Status Appeals Authority (1996) available at <http://www.refworld.org/docid/3ae6b741c.html> [accessed 28.02.2014]

²⁸⁵ *Id.*

refusal of gaining education and strict dress-codes which were common in her family.²⁸⁶ The Immigration Service denied her claim as they did not find the discrimination women are subjected to and the inferior attitudes and codes they must conform to in Iran to cumulatively amounting to persecution. Although they agreed that Arabic women as a minority face a suppressive environment, those actions were not considered severe enough to amount to a well-founded fear of persecution.²⁸⁷

However, the Appeal Court found the lower court's decision to neglect the crucial elements of her claim and considered her opposition to the patriarchal system in both, the Iranian society and within her family under two grounds of the 1951 Convention, namely political opinion and religion. They found her fear of being persecuted by members of her extended family and also state-agents was well-founded for reasons of her political opinion and religion and refugee status was granted.²⁸⁸

Contrary to this holistic understanding of that woman's experiences in Iran, in the case of *EM (Lebanon) (FC) (Appellant) (FC) v Secretary of State for the Home Department*²⁸⁹ the appellant was a Lebanese woman, whose claim was rejected on the first instance by the immigration authorities in the UK and again in the following appeal before the Immigration and Asylum Tribunal.²⁹⁰ Then, the Court of Appeal further refused her claim to stay on humanitarian grounds²⁹¹, before this right was eventually granted by the House of Lords.²⁹²

The claimant applied for asylum together with her son, since her husband was violent towards her and did not want to have children. Due to his violent attacks, she lost her first child during pregnancy.²⁹³ After their first child, the said son, was born, his father tried to kidnap the newborn baby. After this attempt failed, he got extremely violent

²⁸⁶ *Id.*

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *EM (Lebanon) (FC) (Appellant) (FC) v. Secretary of State for the Home Department (Respondent)* [2008] UKHL 64 (2008)

²⁹⁰ Asylum and Immigration Tribunal, *Appeal No. AS/04832/2005* as cited in E. Krivenko 'Muslim Women's Claims to Refugee Status Within the Context of Child Custody Upon Divorce Under Islamic Law' *Int. Journal of Refugee Law* Vol. 22 No.1 (2010) see footnote 21

²⁹¹ *EM (Lebanon) and Secretary of State for the Home Department* [2006] EWCA Civ 1531 (2006)

²⁹² *EM (Lebanon) (FC) (Appellant) (FC) v. Secretary of State for the Home Department, supra note 289*

²⁹³ E. Krivenko, *supra note 290*, at 54

towards the claimants. Eventually, the applicant was able to get divorced with help of a national court in Lebanon, awarding her with custody over her son until his seventh birthday. Then, under Islamic law, the father automatically gets the right of custody over the child. Out of her fear to lose her son, she arranged false documents and left the country. Because of that she feared persecution from her husband and national authorities upon return.²⁹⁴ The appellant based her claim on the ground of belonging to a particular social group, namely ‘women in Lebanon’, who, as she states, are deprived of their rights.²⁹⁵ The Panel used the claimant’s own history, and the fact that she was able to gain help from the national courts regarding her divorce, to deny this assertion. The following explanation was given by the court.

‘Muslims in Lebanon are governed, in family matters, by Muslim law. The fact that the rules of Muslim law operate in a way which some Western societies might regard as discriminatory does not show that all women are deprived of standing before the law.’²⁹⁶

While they further confirmed that she might be able to obtain visitation rights upon return with her son to Lebanon by national courts,²⁹⁷ they also recognized her likelihood to be imprisoned.²⁹⁸ It might be questionable what the Immigration Tribunal would have found if considering the claim under the ground of religion, since it can be said that she did not accept the religious interpretation of the law. This outcome is consistent with the finding of the study, assessing gender-related asylum claims in Europe, which found that most states fail to apply a gendered interpretation of this Convention ground.²⁹⁹ In the latter case, the permission to stay on humanitarian grounds was only granted by the House of Lords, after the appellant’s son was heard. Lord Hope of Craighead concluded that in his opinion the case has compelling reasons to grant them permission to stay on humanitarian grounds, especially under consideration of her son’s needs.³⁰⁰ Thus, the decision-makers in this case provided a very restrictive interpretation of the particular social group calculus, accompanied by a lack of consideration of the political opinion

²⁹⁴ *EM (Lebanon) and Secretary of State for the Home Department*, *supra* note 291, Para.2

²⁹⁵ *Id.* Para.7

²⁹⁶ *Id.* Para.7

²⁹⁷ *Id.* Para.35

²⁹⁸ E. Krivenko, *supra* note 290, footnote 39

²⁹⁹ Hana Cheik Ali et al, *supra* note 202, at 74-75

³⁰⁰ *EM (Lebanon) (FC) (Appellant) (FC) v. Secretary of State for the Home Department*, *supra* note 289, Para.18

and religion ground. Furthermore, they also fail to properly examine the risk of persecution and do not consider the impact on the claimant caused by the agents of persecution.

The recast Qualification Directive does not provide any guidance regarding a gender-sensitive interpretation of a gender-related asylum claim for reasons of religion. Consequently, it is up to decision-makers and judges how to interpret this ground in such claims. While some might have national guidelines which go beyond the recast Directive, the current protection framework does not appropriately respond to the difficulties women face in gender-related asylum claims regarding the ground of religion.

4.3 Actors of persecution and actors of protection

For most asylum claims lodged by women, if subjected to gendered forms of harmful customs and discriminative practices, the risk of persecution does not emanate from state-agents, but rather from private actors like family- or community members. The public-private dichotomy arises, creating a barrier for the applicability of state obligations for women's human rights violations, since those forms of harm were long considered private or cultural issues.³⁰¹ The question of the non-state actor accountability is closely connected with the question of the availability of a state which is willing and able to provide protection to the victim. These two elements are crucial for the outcome of asylum claims based on gender-related persecution.

Article 6 of the recast Qualification Directive, dealing with actors of persecution, was not amended. Consistent to the provisions of the former Qualification Directive, actors of persecution may be state actors, "parties or organizations controlling the State or a substantial part of the territory", or private persons.³⁰² If one is persecuted or fears persecution by a non-state actor, it must be demonstrated that there is no protection available in the country of origin; neither provided by the state or the controlling groups,

³⁰¹ C. Purvis, *Gender: Addressing the Public/Private Divide. What types of efforts have acknowledged and remedied the public/private divide?*, available at <http://thinkafricapress.com/international-law-africa/public-private-divide> [accessed 04.03.2014]

³⁰² Recast Qualification Directive, *supra note 5*, Art.6

nor by international organizations.³⁰³ Thus, Article 6 must be read along with Article 7, providing a closer description of who is able to offer protection from persecution and what kind of protection must be offered.

With the assistance of international, regional and national refugee rights organizations, commenting on the recast Qualification proposal, Article 7 on actors of protection was amended to provide better guidance for the EU member states. Herein it is set out that the state, controlling parties or international organizations are able to provide protection to individuals.³⁰⁴ There is controversy regarding whether non-state agents should be entitled to be able to provide protection. Both, the UNHCR and ECRE suggest that “non-state actors in principle should not be considered actors of protection”³⁰⁵, since they do not have the same attributes as states are thus lack enforcement mechanism.³⁰⁶

However, since the former Qualification Directive lacked clear obligations as to what extent protection must be provided to individuals, some member states tended to interpret Article 7 of the former Directive insofar as several organizations of the UN, and further that even tribes or communities, can offer protection from severe human rights violations.³⁰⁷ To clarify this and offer some better protection standards, amendments were made to the recast Directive to include that those actors must be willing and able to provide appropriate protection. The recommended addition to this provision to include that those actors of protection should be “willing and able to enforce the rule of law” was not adopted.³⁰⁸ Subparagraph 2 of Article 7 of the recast Directive further prescribes that the protection “must be effective and of a non-temporary nature.”³⁰⁹ While this provision sounds promising at first, the recast Qualification Directive goes on to say that “protection is generally provided when the

³⁰³ Id. Art.6

³⁰⁴ Id. Art.7(1) sets out that ‘Protection against persecution or serious harm can only be provided by: (a) the State; or (b) parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State; provided they are willing and able to offer protection in accordance with paragraph 2.’

³⁰⁵ Proposal for a recast Council Directive, *supra note 243*, at 4

³⁰⁶ European Parliament. *Setting up a Common European Asylum System: Report on the application of existing instruments and proposals for the new system. Study* (2010) at 175

³⁰⁷ ECRE. *Comments on the European Commission Proposal to recast the Qualification Directive* (2010) at 7

³⁰⁸ Proposal for a recast Council Directive, *supra note 243*, at 6

³⁰⁹ Recast Qualification Directive, *supra note 5*, Art.7(2)

actors mentioned (...) take reasonable steps to prevent the persecution or suffering of serious harm”³¹⁰. This weak guidance of ‘reasonable steps’ is arguably insufficient to ensure that the individual is – de facto – effectively protected against persecution or serious harm for a durable time.³¹¹

In *Salahadin Abdulla & Others v Bundesrepublik Deutschland*³¹², the CJEU found

‘that Article 7(1) of the Directive does not preclude the protection from being guaranteed by international organizations, including protection ensured through the presence of a multinational force in the territory of the third country.’³¹³

It went on to consider if protection can be said to be available if only through the help of multinational troops.³¹⁴ Hereby emphasis was given to the accessibility of that protection for the individual. The court states that to verify if the individual will have access to effective protection,

‘the competent authorities must assess, in particular, the conditions of operation of, on the one hand, the institutions, authorities and security forces and, on the other, all groups or bodies of the third country which may, by their action or inaction, be responsible for acts of persecution.’³¹⁵

According to this, the simple presence of an agent of protection is never sufficient. But,

‘[t]he existence of an actor of protection and the availability, effectiveness and enduring nature of the protection provided by that actor in the refugee’s country of nationality are questions of fact which must be assessed by the national court in the light of the above considerations.’³¹⁶

Thus, while the CJEU defines ‘reasonable steps’ to a better extent than the recast Directive which might be used by member states as guidance, it also confirms the applicability of non-state agents to be actors of protection. Unfortunately, this approach contradicts international standards of refugee protection and even the very definition of a refugee in the 1951 Convention, in which the availability of protection is linked to one’s

³¹⁰ Id. Art.7(2)

³¹¹ ECRE, *supra note 307*, at 8

³¹² *Salahadin Abdulla & Others v Bundesrepublik Deutschland*, Judgment of the CJEU (2010)

³¹³ Id. Para.75

³¹⁴ Id. Para.76

³¹⁵ Id. Para.71

³¹⁶ Opinion of Mr Mazak in Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08 (2009) Para.59

country of nationality.³¹⁷ National law diverges in this regard, whether non-state actors are considered as protectors.³¹⁸ And although there is no legal requirement for asylum applicants to exhaust all sources of state protection, nor to seek protection in one's home country before escape, many member states demand a reasonable explanation from the claimant why protection was not sought. This often ignores the bias of local authorities against women if they seek help from harmful practices.³¹⁹ It is to help that member states exercise their right to implement better standards. But since then, a restrictive approach might be applied, which especially impacts on asylum claims of women, since NGOs have been considered as possible protectors from persecution by non-state actors, without bearing in mind their lack of temporary and effective activities.

If actors of protection are found to be available for an asylum applicant in her country of origin, or if she can be considered to live free from persecution in another part of her country than her habitual residence, Article 8 of internal protection might be applicable.

4.4 Internal Protection or Relocation Alternative

The concept of internal protection alternative is not considered under the 1951 Convention³²⁰, but rather is a 'state-created doctrine', used to reject refugee statuses³²¹. This practice has also been adopted by European member states and is addressed in Article 8 of the recast Qualification Directive. Hereunder states are obliged for consider that an asylum seeker might not be eligible to international protection, if she "has no well-founded fear of being persecuted or is not at real risk of suffering or serious harm: or (...) has access to protection against persecution or serious harm as defined in Article 7" in one part of her country of nationality.³²² If it is established in the assessment of an asylum claim that one of these two situations is found asylum might be denied on that basis.

³¹⁷ 1951 Convention, *supra note 6*, Art.1(A)2

³¹⁸ European Parliament, *supra note 306*, at 176

³¹⁹ Hana Cheik Ali et al, *supra note 202*, at 53

³²⁰ Handbook, *supra note 51*, Para.91

³²¹ Jonah Eaton 'The Internal Protection Alternative Under European Union Law: Examining the Recast Qualification Directive' *Int. Journal of Refugee Law* 24/4 (2012) at 766

³²² Recast Qualification Directive, *supra note 5*, Art.8(1)

This provision is of importance for claimants being at risk of persecution by non-state actors and thus it has specific relevance for refugee women since perpetrators in gender-based persecution claims are in most cases relatives or community members and not state officials. For asylum seekers who are at real risk of persecution by state-actors in their home country, the alternative to relocate within that country does not exist. This is a result of the presumption that state officials have national reach.³²³

While the predecessor of the recast Directive required that “the applicant can reasonably be expected to stay in that part of the country”³²⁴, the new Article was amended to demand the safe and legal journey of the claimant to that area of the country, as well as the expectation to reasonably settle there.³²⁵ This partly reflects the jurisprudence of the ECtHR. In *Salah Sheekh v Netherlands* the court found the appropriate standard for internal protection is the requirement for the applicant to “be able to settle there”.³²⁶ In order to establish whether the applicant has the possibility to settle in another area of her country, “the general circumstances prevailing in that part of the country and (...) the personal circumstances of the applicant” must be taken into account.³²⁷ The UNHCR guidelines offer better guidance, stating that several factors, ranging from one’s “age, sex, health, disability, family situation and relationships, [to] social or other vulnerabilities, ethnic, cultural or religious considerations, political and social links and compatibility, language abilities, educational, professional and work background and opportunities, and any past persecution and its psychological effects”³²⁸ as well as socio-economic circumstances must be considered in the assessment of an internal relocation alternative.³²⁹ Women are often particularly affected by relocation, even more so if they are unaccompanied by male relatives, single or divorced. Those personal circumstances can place them in situations of undue hardship.³³⁰ Thus, it is highly recommended for

³²³UNHCR. *Guidelines on International Protection: “Internal Flight or Relocation Alternative” within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees*. HCR/GIP/03/04 (2003) Para.13-14, see also recast Qualification Directive, *supra* note 5, Recital 27

³²⁴ Qualification Directive, *supra* note 3, Art.8(1)

³²⁵ Recast Qualification Directive, *supra* note 5, Art.8(1)

³²⁶ *Salah Sheekh v the Netherlands*. Application No. 1948/04 (2007) Para.144

³²⁷ Recast Qualification Directive, *supra* note 5, Art.8(2)

³²⁸ Guidelines on Internal Flight Alternative, *supra* note 323, Para.25

³²⁹ *Id.* Para.29

³³⁰ A. Edwards, *supra* note 14, at 72

member states to observe the UNHCR guidelines to avoid putting women under future risk of persecution.

Regarding women's claim in the EU, the ECtHR found that the custom of female genital mutilation is against one's right not to be subjected to torture and degrading or inhuman treatment as laid down in Article 3 of the ECHR.³³¹ Nonetheless, in several European countries women were denied refugee status due to the fact that the courts established the possibility of an internal relocation alternative.³³² These approaches are not in line with UNHCR guidance on the treatment of women at risk of female genital mutilation, where it is explicitly stated that the fact of the state's unwillingness or inability to protect its female citizens from persecution in one area of its territory, should automatically lead to the assumption that it will then also fail to provide effective protection in another part of the country.³³³

Although the recast Qualification Directive further states to ensure the use of "precise and up-to-date information from relevant sources"³³⁴, a study of the UK-based refugee organization Asylum Aid found decision-making authorities at the first instance level to use country of origin information selectively.³³⁵

Bailliet urges states to implement the due diligence standard regarding the assessment of internal flight alternatives in women's asylum claims on an individual basis.³³⁶ The due diligence concept is pretty well established within international women's legislation.³³⁷ In accordance with this precise assessment standard, after several other appeals have been refused or denied, the ECtHR decided that an Afghan woman could not be deported to her country of origin, since this would violate Article 3 of the ECHR, as a

³³¹ *Collins and Akaziebie v Sweden*, Application No. 23944/05 (2007)

³³² *Izevbekhai and Others v Ireland*, Application No. 43408/08 (2011) and *Omeredov Austria*, Application No. 8969/10 (2011)

³³³ UNHCR. Guidance Note on Refugee Claims Relating To Female Genital Mutilation (2009) Para.28

³³⁴ Recast Qualification Directive, *supra* note 5, Art.8(2)

³³⁵ Asylum Aid. *Unsustainable: the quality of initial decision-making in women's asylum claims* (2011) at 65

³³⁶ Cecilia Bailliet 'Persecution in the Home – Applying the Due Diligence Standard to Harmful Traditional Practices within Human Rights and Refugee Law' *Nordic Journal of Human Rights* 30:1 (2012) at 53

³³⁷ General Recommendation No. 19, *supra* note 90, Para.9, see also Report of the Special Rapporteur on violence against women, its causes and consequences Yakin Ertürk. *The Due Diligence Standard as a Tool for the Elimination of Violence against Women*. E/CN.4/2006/61 (2006)

result of her cumulative risks she might be subjected to upon return.³³⁸ This judgment approves UNHCR's explanation of the cumulative effect. It prescribes a concept where different factors, separately not leading to the preclusion of an internal relocation alternative, together amount to such unduly harsh circumstances for the claimant that she cannot be reasonably expected to settle there.³³⁹

Despite existent guidelines and some holistic judgments, the member states' future application of Article 8 under the recast Qualification Directive might fall short for women's claims of asylum, since the consideration of gender-related aspects is not required under the assessment of the internal flight alternative.

4.5 Subsidiary protection standards

In a case where international protection cannot be granted, but threats for the applicant's life or freedom are given due to certain circumstances in her country of nationality, she cannot be deported. Thus, subsidiary protection might be granted, which is a temporary protection status. Thus, if the situation in the home country of the person changes and the risk of serious harm ceased to exist, subsidiary protection can be withdrawn and the person is sent back.

Under Chapter five of the recast Qualification Directive rules are laid down for the qualification of persons for subsidiary protection.³⁴⁰ In accordance with the definition of a 'person eligible for subsidiary protection', temporary protection shall be provided to individuals, who do not qualify for refugee status, but where it is established that their life is in serious risk of severe harm if they are returned to their country of nationality or former habitual residence.³⁴¹ Following this obligatory provision for the member states, to adjudicate temporary protection to those who are entitled to it under the terms of the recast Qualification Directive, the standard of international protection was extended at least theoretically.³⁴² The recast Directive implements criteria for the eligibility of persons to subsidiary protection, which are drawn from both, the responsibilities arising

³³⁸ *N. v. Sweden*. Application No. 23505/09 (2010) Para.62

³³⁹ Guidelines on Internal Flight Alternative, *supra note 323*, Para.25

³⁴⁰ Recast Qualification Directive, *supra note 5*, Art.15-19

³⁴¹ *Id.* Art.2(f)

³⁴² UNHCR, *Implementation of the Qualification Directive* (2008) at 11

from international human rights legislation and the common practices of EU member states.³⁴³ In practice however, asylum seekers face two obstacles: either being granted the inferior status of subsidiary protection than refugee status, or not being able to meet the requirements for subsidiary status and as a consequence, not being eligible for temporary protection either.³⁴⁴ This obstacle for claimants to gain subsidiary protection on the one hand, together with wide divergences in the interpretation of states on the other hand emerges mainly from the third subparagraph of Article 15 of the recast Qualification Directive. This Article defines what constitutes ‘serious harm’ for the qualification of subsidiary protection under the recast Directive, which consists of:

- (a) ‘the death penalty or execution; or
- (b) torture or inhuman or degrading treatment or punishment of an applicant in the country of origin; or
- (c) serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal conflict.’³⁴⁵

The latter subparagraph allows decision-makers to apply a narrow interpretation due to the required element for a claimant to show an ‘individual threat’. This restrictive requirement can be derived from Recital 35 of the recast Directive which clarifies that risks, which are present for the whole or parts of the population, do usually not create the assumption to constitute a serious harm for an individual.³⁴⁶ To meet the requirements of this element might be particularly difficult for women claimants who fear severe harm perpetrated by non-state agents.

Upon request of Belgium, in a judgment by the CJEU a definition was provided for the member states to interpret that the entitlement to subsidiary protection “is not subject to the condition that that applicant adduce evidence that [she] is specifically targeted”³⁴⁷ and the link between the extent of indiscriminate violence and the individual threat of the person. Thus, the need of an applicant to prove her individual threat shrinks with the

³⁴³ Recast Qualification Directive, *supra* note 5, Recital 34

³⁴⁴ European Parliament, *supra* note 306, at 191

³⁴⁵ Recast Qualification Directive, *supra* note 5, Art.15

³⁴⁶ *Id.* Recital 35

³⁴⁷ *M. Elgafaji, N. Elgafaji v Staatssecretaris van Justitie*, Case C465/07 (2009) Para.43 available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:62007CJ0465:EN:HTML> [accessed 10.03.2014]

increase of the severity of the violence in her country.³⁴⁸ Nonetheless, the application of that Article varies among the member states and impacts on the outcomes of women's asylum claims. Generally, it is the creation of a subordinate protection regime, since protection obligations arising under Article 15 of the recast Directive are only of temporary nature.³⁴⁹

Two cases in which the denial of refugee status but the grant of subsidiary protection might be debatable will be summarized as they show the difficulty to establish that the harm feared amounts to persecution and to link it to one of the five Convention grounds.

The first example is a German case, addressing the risk of female genital mutilation and forced marriage of a Nigerian woman. Both harmful customs have not been recognized to amount to persecution under the grounds of political opinion and/or particular social group. However, the court found that she in all probability would be exposed to serious harm in form of inhuman or degrading treatment upon her return, considering her individual situation as a single woman with broken family ties in a traditional society. This was likely to lead to the socio-economic marginalization of her and thus the court found she qualified for subsidiary protection.³⁵⁰ In a French case, a Nigerian woman who got victimized as a prostitute by human traffickers was found not to be at risk of persecution due to her membership of a particular social group, but that she will probably be exposed to serious harm by her traffickers if returned to her country of origin.³⁵¹ The latter judgment was contrary to a previous decision of the same court, where in a very similar case, refugee status was granted on the basis of her well-founded fear as a member of a particular social group.³⁵² These cases demonstrate the attempt of

³⁴⁸ Id. Para.43, see also ECRE, *supra note 201*, at 26

³⁴⁹ Recast Qualification Directive, *supra note 5*, Art.16 "A (...) person shall cease to be eligible for subsidiary protection when the circumstances which led to the granting of subsidiary protection status have ceased to exist or have changed to such a degree that protection is no longer required."

³⁵⁰ *German Administrative Court Münster 11 K 413/09.A* (2010) available at <http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-m%C3%BCnster-11-k-41309a-15-march-2010#content> [accessed 11.04.2014]

³⁵¹ *Cour Nationale Du Droit A'Asile N°10020534* (2011) available at <http://www.asylumlawdatabase.eu/en/case-law/france-cnda-29-july-2011-miss-on%C2%B010020534#content> [accessed 11.03.2014]

³⁵² *Cour Nationale Du Droit A'Asile N°10012810* (2011) available at <http://www.asylumlawdatabase.eu/en/case-law/france-cnda-29-april-2011-miss-e-n%C2%B010012810> [accessed 11.03.2014]

decision-makers to deny asylum while implementing “a remedy of for the plight of a persecuted woman” in terms of providing subsidiary protection, which comes along with less rights in the host state, although the status might be extended several times, due to the non-cessation of the circumstances in the country of origin of the individual.³⁵³ Unlike times of conflict, which are likely to cease within some months or years, a shift of social and cultural attitudes, underlying gender-related asylum claims, takes longer and puts women in a dilemma between the impossibility to return home on the one hand and the impossibility to fully settle in the host country through the temporary nature of the permit and the limits of rights.³⁵⁴

In an Irish case, the High Court challenged a previous outcome, which denied subsidiary protection to a Nigerian woman³⁵⁵, because they found that her fear of serious harm did not emerge from ‘actors of serious harm’ but instead from non-state agents³⁵⁶, namely her husband. The judges referred to national regulations where “compelling reasons arising out of previous persecution or serious harm alone may nevertheless warrant a determination that the applicant is eligible for protection.”³⁵⁷ Thus, the previous decision was quashed and judicial review granted.³⁵⁸

As can be seen from the cases outlined, the concept for subsidiary protection might be misinterpreted due to vague formulations of the law itself and it might be flawed through the application of a framework reflecting men’s experiences of political persecution. But if the state is not able or willing to offer protection against forms of gender-based violence and individuals can act with impunity, then the threat emanating from non-state actors must be recognized in the asylum determination procedure to be sufficient for international protection.

³⁵³ Crystal Doyle ‘Isn’t “Persecution” Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution’ *15 Wash. & Lee J. Civil Rts. & Soc. Just.* 519 (2009) at 552

³⁵⁴ *Id.* at 552

³⁵⁵ *JTM v Minister for Justice and Equality, IEHC 99 (2012) Para.5*

³⁵⁶ *Id.* Para.15

³⁵⁷ *Id.* Para.23

³⁵⁸ *Id.* Para.49

5. Conclusion

This paper provided an overview of the difficulties women fleeing harmful traditional practices face during the asylum determination process. The recast Qualification Directive, the regional instrument providing the legal framework for refugee protection, was analyzed to what extent it provides protection to women seeking asylum on the basis of gender-related claims. Due to the lack of protection provisions regarding one's gender under the 1951 Convention, and the slow progress made on international level to include gender-related asylum claims under the refugee definition, regional legislation was adopted to address this problem in more detail. The 2004 Qualification Directive ought to harmonize the different standards in the member states, since they resulted in immensely varying outcomes of asylum claims of same third country nationals. As a result of the interpretive guidance of courts and the gender-guidelines provided by UNHCR, the recast Directive offers clearer provisions compared to the former Qualification Directive and goes beyond the refugee definition of the 1951 Convention. But despite the fact that it obliges member states to consider gender-specific forms of harm and gender aspects in the asylum determination process, it still provides gaps and shortcomings as this paper has shown. They will be summarized again below.

As discussed in this paper, several Articles of the recast Qualification Directive were amended to make the interpretation of the refugee status determination more gender-sensitive and to address those obstacles that women face in their asylum determination processes. Due to the obligation on the member states to amend their national legislation accordingly by the 21 December of last year, one must wait and see if decision-makers, particularly at the first instance level, are able to apply the recast Directive in light of the purpose of the 1951 Convention, in a more gender-sensitive manner.

The examination of those articles of the recast Directive, which are of importance for female claimants who seek asylum from gender-based forms of harm, revealed that a lack of appropriate guidance regarding protection standards for women still exists.

Despite that, two main amendments have been made. Addressing the core of the legal definition of a refugee, an important expansion was made to the former Directive, which

is of particular relevance for female asylum seekers. Firstly, the recast Directive clearly states in Article 9 that either the act of persecution or the withholding of state protection can be linked to one of the grounds of the 1951 Convention. This addition has the potential to positively impact on asylum claims of women, who are at risk of persecution originating from non-state agents. Secondly, the obligation for member states to take 'gender-related aspects' into account when examining asylum claims under the enumerated ground of particular social group is laudable. In future questions of one's gender identity and sexual orientation must find consideration under this ground.

However, although it is positive to explicitly include non-state agents as possible actors of persecution, a claim arising thereunder is only applicable if there's no state protection available, which in turn can be provided by non-governmental international organizations. It is questionable whether international organizations are able to effectively protect a claimant perpetually. Furthermore is the concept of actors of protection, which is directly related to the non-state agent question, too vague in its guidance. It fails to provide an appropriate interpretation for the term of 'reasonable steps' which actors of protection are supposed to take for the prevention of the risk of persecution in the claimant's country of nationality. Consequently, it can be assumed that member states will interpret the term differently and as a result reach different outcomes of who can effectively offer protection. Thus, protection standards will further vary depending on where the asylum application is lodged.

In addition, the concept of internal flight alternative might create a future system to avoid responsibility of refugee protection. It is most relevant for women because Article 8 is only applicable if the fear of persecution emanates from private persons. While Article 8 was subject to improvements compared to its predecessor, no attention is paid to the vulnerable situation some women might face upon relocation. This is also contrary to UNHCR practice where women who are victims of gender-based violence, are considered as vulnerable group and have special needs. But under the recast Directive women do not constitute a vulnerable group and consequently no specific measures are taken into account regarding the internal flight alternative for women. Furthermore, Article 8 does not explain sufficient detail what is meant with the expectation of the

claimant to reasonably settle there. No reference whatsoever is made to consider women's situation, for example with regard to socio, economic or cultural difficulties they might face if expected to settle in another part of their country. Again, since there is too much room for interpretation, member states will struggle to apply this provision uniformly and consistently. While some authorities or courts might follow UNHCR guidelines or even apply national gender-guidelines, others might interpret it narrowly, therewith possibly weakening the harmonization process and gender-sensitive interpretation of asylum claims.

Contrary to the UNHCR guidelines on gender-based persecution, the recast Qualification Directive fails to provide a gendered interpretation of all Convention grounds. Despite the improvement to include 'gender-related aspects' under the particular social group calculus in asylum determination processes, states may struggle to apply a uniform interpretation of this term. It might even be necessary to ask European courts for interpretive guidance. Furthermore, the definition of a particular social group as set out in the recast Directive falls short due to the cumulative requirement of both approaches, the one of immutability and the one of social perception. Thus, it is more restrictive than the requirements in international guidelines. This can create a hurdle for women if they are for example not perceived as a particular social group by society.

It remains to be seen whether decision-makers will be able to apply the provisions of the recast Qualification Directive from a gender-sensitive perspective and if they will refer to and follow the more holistic guidelines of UNHCR in this regard. If they will fail to recognize women's experiences of traditional harmful customs and practices as amounting to persecution on account of the Convention grounds, it is likely that a subsidiary protection system may result. This in turn could impose another obstacle on female claimants due to its temporary protection nature. However, it is worth mentioning here that the content of subsidiary protection was crucially enhanced since persons with that status now enjoy the same rights as recognized refugees under the recast Qualification Directive, limited in time though.

The Common European Asylum System shall be finally and fully implemented by the middle of 2015. As a result of the remaining challenges for the member states, it is unlikely that the recast Qualification Directive will be implemented in the light of the 1951 Convention and offers sufficient protection standards for refugee women fleeing gender-based violence. Decision-makers at the first instance level may still apply a stringent interpretation of a refugee through a male-focused lens. The cases of women's claims as discussed above were mostly decided in appeal decisions. However, this is time- and cost-consuming and contrary to the goal of the Common European Asylum System to make the determination processes and outcomes fairer and faster. It also proves difficult for some women who do not have the financial means or appropriate knowledge of their rights to appeal against a first instance refusal.

Lastly, the recast Qualification Directive must be seen in connection with the other instruments adopted under the Common European Asylum System. For example: the fact that the recast Asylum Procedures Directive allows member states to define independently, which countries they consider as so-called 'safe third countries' and 'safe countries of origin' undermines the application of equal protection standards under the recast Qualification Directive. And as long as the Dublin regulation exists, member states are able to hand over examination responsibilities to the countries at the edge of Europe. This scenario results in huge differences in asylum numbers and, without help or changes, it is not expected that these countries will be able to cope with situations of overstrained national asylum systems. Consequently, it is unlikely that the 'better standards' as set out in the recast Qualification Directive will be met accordingly.