



# REPORT ON THE LEGAL RIGHTS OF WOMEN AND GIRL ASYLUM SEEKERS IN THE EUROPEAN UNION

ISTANBUL, MARCH 2017



# TECHNICAL REPORT

# WOMEN AND GIRLS' ACCESS TO ASYLUM IN THE EUROPEAN UNION



EUROPE AND CENTRAL ASIA REGIONAL OFFICE  
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# FOREWORD

**In 2016, the number of asylum seekers reaching the European Union (EU) dropped dramatically. However, this has been mainly due to increased restrictions and does not accurately reflect the number of women and men, boys and girls around the world who continue to suffer violence and persecution. Unfortunately, many of the women who are subjected to sexual and gender-based violence still have limited or no access to protection and justice in their home countries, whether it is due to ongoing conflict, weak institutions, or entrenched social and cultural norms. Furthermore, as UN Women offices in the Western Balkans and Turkey report, women are also facing severe violence while en route to, or waiting to gain entry to, the EU.**

In January 2016, UN Women published a Gender Assessment of the Refugee and Migration Crisis in Serbia and the former Yugoslav Republic of Macedonia. The assessment found that even though there were many positive examples of targeted efforts to respond to the specific needs, priorities and protection risks of refugee women and girls, there were many gaps in response planning and implementation that left women vulnerable and at risk.

On the 8th of March 2016, the European Parliament convened a meeting on the situation of women refugees and asylum seekers in the EU and concluded that “there is a great degree of gender inequality for asylum seekers across the European Union” and gender-based persecution is too often not recognised in asylum procedures. When UN Women’s Regional Office for Europe and Central Asia was approached with the offer from the international law firm Skadden, Arps, Slate, Meagher & Flom to assist us on a pro bono basis, we therefore asked them to write a report that would look specifically at how women and girls access asylum in the EU.

As the cases in this report demonstrate, judges in EU member states are applying restrictive interpretations of existing national and international legislation and deciding that even though women have faced torture, threats of assassination, forced marriage, sexual abuse and been the victims of trafficking, these forms of gender-based persecution do not qualify them for asylum. As there is no agreed definition of gender-based persecution in the EU, the courts can rule that applicants are not eligible for asylum because the persecution that they face is not based on race, religion, nationality, social grouping or political beliefs – the five grounds for asylum included in the 1951 Refugee Convention.

Since the Refugee Convention was drafted over half a century ago, there have been significant advances in gender equality, women’s rights and awareness about sexual and gender-based violence. Thanks to this progress, various international documents started to fill the lacuna in the Convention, which does not explicitly consider persecution on the basis of gender as grounds for asylum. UNHCR, the CEDAW Committee, and the Council of Europe, have all called on EU Member States to be gender sensitive in their application of the Refugee Convention. The Istanbul Convention, as a binding document for its signatories, is especially important in this regard as it establishes several obligations in relation to asylum claims of women who have survived violence.

UN Women was established to assist countries to progress more effectively and efficiently towards achieving gender equality, women’s empowerment and upholding women’s rights, and to hold the UN system accountable for its own commitment towards gender equality. Through the research presented in this report, the UN Women Regional Office for Europe and Central Asia hopes to demonstrate existing gaps in women’s and girl’s access to asylum. We believe that this report is particularly timely because EU Member States are currently reviewing a vast load of asylum cases, and revision of EU guidelines and regulations on asylum issues are being discussed.

As we discovered when preparing this report, women represent less than a third of all asylum applicants in the EU. This is a startling discovery when we consider that violence does not discriminate, and women are just as likely as men to have suffered persecution. In 2016 women and children were also the majority of those who attempted to reach EU shores. This unequal recourse to asylum suggests that women are less confident in their applications, face more challenges in presenting a full case, have less access to gender-appropriate information and services, and are being restricted by cultural norms.

Although this report does not directly address family re-unification, we would like to flag it as a major issue of concern, especially as new restrictions on asylum are enforced. These restrictions are disproportionately affecting many women and children who are separated from family members, mostly husbands/fathers and unaccompanied children, who travelled to the EU ahead of them in 2014-2015. Today, women and children are the clear majority of those who are stranded in Greece and the Western Balkans, facing harsh winter conditions and at risk of abuse by criminal gangs. Access to asylum is essential for persecuted women and girls who reach the EU, but EU Member States

should also ensure that those who remained behind are allowed to join family members who have received refugee protection.

A radical imbalance in the numbers of men and women gaining asylum in EU states is potentially destabilizing to host countries and to refugees’ countries of origin. A firmer legal and political commitment to protecting women who have survived gender-based persecution needs to be made to reverse this trend.

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# EXECUTIVE SUMMARY AND RECOMMENDATIONS

In 2015 over 1 million women and men travelled to the European Union (“EU”) in search of protection. The asylum system that they entered, which is based on the 1951 Convention Relating to the Status of Refugees (the “1951 Convention”) and its subsequent 1967 Protocol Relating to the Status of Refugees (the “Protocol”, and together with the 1951 Convention, the “Refugee Convention”), is not unified across the EU, and the rights of women and girls<sup>1</sup> are protected differently from one member state to another. EU member states and institutions, and UN agencies, have recognised how the lack of unity and fragmented responses are resulting in sub-optimal solutions for states and exacerbating the difficulties that refugees and asylum seekers face. In 2016, even though the number of asylum seekers trying to reach the EU via the Mediterranean reduced to 361,712, many tens of thousands remained stuck in transit, and the backlog of asylum cases in the EU continued to cause uncertainty and lack of international protection for those who need it.

The following report looks specifically at how women and girls access asylum in the EU. As this report shows, however, there is no common definition of gender-based persecution throughout the EU with the result that those who have survived gender-based violence must painstakingly prove that this amounts to persecution, based on one of the criteria for refugee status set out in the Refugee Convention (i.e. race, religion, nationality, membership of a particular social group and political opinion) and that they cannot be protected by their country of origin. In March 2016, the European Parliament concluded that “there is a great degree of gender inequality for asylum seekers across the European Union” and that “women and LGBTI people are subject to specific forms of gender-based persecution, which is still too often not recognised in asylum procedures”<sup>2</sup>

The EU has committed to focus on actions to eliminate violence against women in 2017. This is therefore an opportunity to ensure that the right to protection and asylum for survivors of gender-based persecution are better recognised. On 19 September 2016, the UN Summit for Refugees and Migrants culminated with Heads of State and Government and High Representatives adopting the New York Declaration for Refugees and Migrants (the “New York Declaration”). Critically, the New York Declaration includes commitments to “ensure that our responses to large movements of refugees and migrants mainstream a gender perspective, promote gender equality and the empowerment of all women and girls, and fully respect and protect the human rights of women and girls.”<sup>3</sup> For the EU and its member states, a more unified asylum system, that fully guarantees

protection from sexual and gender-based violence, would help meet this commitment, while being more effective and fair in the determination of women and girls’ applications for asylum.

In March 2016, Turkey and the EU signed an agreement and set up a system that was intended to stem the flow of irregular migration from Turkey and set up legal channels of resettlement of refugees to the EU. This together with the closure of borders in the Western Balkans reduced significantly the number of asylum seekers trying to enter the EU via the western Mediterranean, while leaving some 60,000 women and men in Greece and several thousand in the former Yugoslav Republic of Macedonia and Serbia. The new restrictions were not complemented with the promised increase in legal pathways to the EU, with the result that many women and girls are stranded in Greece and the Balkans.<sup>4</sup>

Even when they make it to the EU and apply for asylum, women face protection gaps and some wait for years in unsafe accommodation centres while their asylum applications are reviewed. In practice, there are no EU-wide binding gender guidelines on refugee status, asylum and reception, with the result that the gender-sensitivity of the EU member states’ asylum systems varies as shown by the cases and statistics set out in this report, depending on local legislation, associated guidelines, experience and practice.

This occurs even though the UNHCR, the Committee for the UN Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”), and the 2011 Council of Europe Convention on Preventing and

1 We refer to women and girls in this report in order to be consistent with international conventions. Any reference to women only in this report should also include girls.

2 European Parliament, ‘The situation of women refugees and asylum seekers in the EU’, 8 March 2016.

3 United Nations General Assembly, New York Declaration for Refugees and Migrants, 13 September 2016.

4 Out of the 173,450 who reportedly reached Greece in 2016, 42% were men and 21% were women (and 37% children). If you assume that half the children were girls, close to 40% of all arrivals in Greece last year were women and girls..

Combatting Violence Against Women and Domestic Violence (the “Istanbul Convention”) all call on EU member states to be gender sensitive in assessing claims for refugee status. EU member states are also bound by the applicable *acquis communautaire* (body of law) in the field, including the Qualification Directive<sup>5</sup>, which imports the substantive grounds for refugee status under the Refugee Convention. Terrible and multiple forms of gender-based violence have occurred during the wars in Syria, Iraq and Afghanistan, that have caused significant numbers of women to flee. Sexual abuse and exploitation, early and forced marriage, honour crimes, female genital mutilation (“FGM”) and trafficking, are not only occurring in conflict zones, but are also ruining the lives of women and girls in other countries where the state provides no protection.

Yet as experience described in this report shows, women who seek asylum based on these forms of persecution face numerous legal challenges to prove their suitability for refugee status. The Refugee Convention requires that successful asylum applicants, not only demonstrate that they have a well-founded fear of persecution, but also that this is on account of their belonging to a protected group. Women and girls are not always recognized as such a group. Judges have too often claimed, when reviewing gender-based asylum applications, that women who survived sexual violence had problems in “the personal sphere” and therefore do not require international protection. Women may also face inherent biases of decision makers who make subjective credibility assessments.

Due to the large number of asylum seekers in Europe in 2015, asylum rules and policies have come under scrutiny both at the national and European level. It is important that any change to the existing framework incorporates a gender sensitive approach that includes recognition of gender-based persecution as recommended by CEDAW, the Istanbul Convention and the European Parliament in its March 2016 resolution on the situation of women refugees and asylum seekers in the EU.

In 2016, the Commission presented proposals to reform and/or replace the existing regulations and directives that make up the *acquis communautaire* related to asylum issues, including the Qualification Directive. Although the Commission’s latest proposals

confirm that a “gender-sensitive approach” should be applied by EU member states, other changes, such as those to streamline the ‘Dublin’ system of allocating asylum seekers among the member states, including an enhanced focus on the rapid identification of ‘inadmissible’ applications from so-called ‘safe’ countries of origin, may put women and girls at further risk.

In the coming years, EU member states will likely continue to make changes to national policies and laws regulating access to asylum, and the Common European Asylum System (“CEAS”) is likely to continue to see modifications. Together with other international agencies and the UN system, UN Women expects to cooperate with the EU to implement the New York Declaration, which included a Comprehensive Refugee Response Framework and a commitment to develop a Global Compact for Refugees in 2018, in order to ensure that asylum legislation, policy, practice and common frameworks are more gender sensitive.

The purpose of this report is to consider the position of women’s and girls’ right to asylum under international and EU law, and how it is applied in practice. It sets out the general legal framework, highlights some recent developments and deficiencies, and provides suggestions on how the deficiencies could be remedied. This report is not intended to provide a comprehensive analysis of the law and practice of each individual EU state, but rather to highlight some of the key issues that affect women’s and girls’ claims to asylum in Europe.

## Recommendations

**EU law and policy makers, including member states and the European Commission, should:**

- Ratify the Istanbul Convention and integrate it into national legislation, policies and practice.
- Ensure that reform of the CEAS takes into account member states’ obligations under the Istanbul Convention.
- Follow the recommendations made by the European Parliament in its March 2016 ‘Resolution on the situation of women

<sup>5</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast)

refugees and asylum seekers in the EU' containing proposals for a comprehensive set of EU-wide gender guidelines in their review of asylum related legislation and procedures, including of EU directives.

- Agree to a common definition of sexual and gender-based violence and of gender-based persecution, which includes honour crimes and trafficking.
- Introduce and/or recognise gender as a self-standing basis of persecution in national legislation, and in EU directives and policies related to asylum.
- Ensure that, in the amended directives and regulations that will make up the *acquis communautaire* related to asylum issues, female asylum applicants can qualify for protection under the Convention ground of "membership of a particular social group" without having to demonstrate cumulatively that they are both members of a "particular social group" and that they are perceived as such by society at large.

**Individual EU member states should also take the following steps in order to improve the functioning of their asylum systems:**

- Improve their capacities to identify survivors of gender-based persecution upon their entry into the country; provide adequate gender-sensitive services, accommodation, information and legal aid; and ensure that female adjudicators and translators are consistently available.

- Implement more gender sensitive approaches to credibility assessments of persons claiming to have survived gender-based violence.
- Ensure that women victims of violence will not be returned to any country where their life would be at risk or where they might be subject to torture or inhuman or degrading treatment (i.e., non-refoulement).
- Give reasons for asylum decisions in order to make available useful data on the consideration given to gender-based violence, and to ensure transparency as to the grounds on which asylum claims have been accepted.
- End temporary limitations on family reunification and provide legal pathways to allow women and children to reunite with their family members who have gained protection in EU states.

Finally, national and international expert bodies should include evidence on women's rights and gender relations in guidance notes that they prepare for judges and other legal experts reviewing asylum cases in order to ensure that decision makers are properly aware of all relevant circumstances when determining women and girls' application for asylum.

# I.

## THE LEGAL FRAMEWORK APPLICABLE TO WOMEN AND GIRL REFUGEES AND ASYLUM SEEKERS

Most EU states have signed and ratified key international documents guaranteeing refugee rights, including the 1951 Refugee Convention and its 1967 Protocol, the UN Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”), and at the time of writing, 14 EU member states have ratified the 2011 Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence (also known as the Istanbul Convention).<sup>6</sup> Member states are obligated to ensure that their asylum process is in line with EU-wide directives and UN guidance on the treatment and processing of asylum-seekers and the determination of their claims. Yet, it is only the Istanbul Convention that includes binding provisions on gender sensitive asylum determination and reception.

### (i) The Refugee Convention and the UNHCR

Whilst numerous international law instruments are of potential relevance to the rights of female refugees,<sup>7</sup> the key international instrument is the Refugee Convention.<sup>8</sup> The Refugee Convention has been widely ratified and applies in 142 States including all EU member states.<sup>9</sup> The Refugee Convention defines a “refugee” as an individual who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country”.

Notably absent from the Refugee Convention definition is any reference to gender, aside from

the gendered use of “his” and “himself”, which reflects that the refugee definition has historically “been interpreted through a framework of male experience”.<sup>10</sup> Indeed, it has been remarked that the Refugee Convention was drafted during an era of “complete blindness to women, gender, and issues of sexual inequality”.<sup>11</sup>

The UNHCR exercises a supervisory role in relation to the Refugee Convention, and issues non-binding but nonetheless important interpretative guidelines.<sup>12</sup> In response to the omission of gender and gender-specific protection needs from international refugee law under the verbatim wording of the Refugee Convention (see further below), the UNHCR has provided the following non-binding guidance and recommendations to State signatories<sup>13</sup>:

- (a) Handbook on Procedures and Criteria for Determining Refugee Status 1979

6 The Istanbul Convention.

7 The Geneva Convention Relative to the Protection of Civilian Persons in Time of War (Fourth Geneva Convention) (1949); the Additional Protocol I relating to the Protection of Victims of International Armed Conflicts (1977); Additional Protocol II relating to the Protection of Victims of Non-International Armed Conflicts (1977); The Universal Declaration of Human Rights (1948); Declaration on the Elimination of Violence against Women (1993); Declaration on the Protection of Women and Children in Emergency and Armed Conflict (1974).

8 UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137; UN General Assembly, Protocol Relating to the Status of Refugees, 31 January 1967, United Nations, Treaty Series, vol. 606, p. 267. The Protocol binds parties to comply with the substantive provisions of Articles 2 to 34 of the 1951 Convention with respect to “refugees” as defined in Article 1A(2) of the Convention.

9 The official list of States parties to the 1951 Convention and Protocol. Some further States are signatories to one of either the 1951 Convention or the Protocol, but are not signatories to both.

10 UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 1: Gender-Related Persecution, supra para. 5.

11 Alice Edwards, “Transitioning Gender: Feminist engagement with international refugee law and policy 1950-2010” Refugee Survey Quarterly, 2010, vol. 29(2), page 22.

12 In the aftermath of WWII, the United Nations High Commissioner for Refugees (the “UNHCR”) was established as a global institution mandated to lead and co-ordinate international action to protect refugees, and to safeguard the rights and well-being of refugees. See: UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V).

13 Although we note that in its December 2016 proposals for ‘Better Protecting Refugees in the EU and Globally’, the UNHCR has not made any distinction regarding the specific needs of women asylum seekers in its suggestions on establishing a well-managed common asylum system. UNHCR, Better Protecting Refugees in the EU and Globally, December 2016.

(the “1979 Handbook”), which has subsequently been updated (see below);<sup>14</sup>

- (b) Other periodic conclusions and recommendations made by the UNHCR executive committee (“ExCom”) addressed to States signatories, relating specifically to the protection of refugee women;<sup>15</sup>
- (c) Guidelines on International Protection concerning Gender-related Persecution (2002);<sup>16</sup>
- (d) Guidance on “Membership of a Particular Social Group” (2002);<sup>17</sup>
- (e) Guidelines relating to Victims of Trafficking and Persons at Risk of Being Trafficked (2006);<sup>18</sup>
- (f) Handbook for the Protection of Women and Girls (2008);<sup>19</sup> and
- (g) Guidance on Refugee Claims relating to Female Genital Mutilation (2009).<sup>20</sup>

The UNHCR also issues reports on specific country or regional situations, for example, the UNHCR has recently issued guidelines for assessing the international protection needs of women and girl asylum-seekers from Afghanistan, Greece and Macedonia, Syria, and Libya.<sup>21</sup>

In addition, the effective exercise of UNHCR’s mandate both presupposes, and is underpinned

by, the commitment from States to cooperate with it. However, strictly speaking UNHCR guidelines are non-binding, giving rise to criticism that there are “critical gaps in the ‘effective scope’ of the international refugee protection regime...”, and that “...significant discrepancies remain in the ways in which states interpret and implement their obligations under the 1951 Convention and 1967 Protocol, both in terms of determining who comes within their scope and the rights and entitlements of recognized refugees”. In addition to the obstacles posed by non-binding guidelines and differences of interpretation of key legal instruments, EU member states have “[d]iscordant views on different elements of the refugee definition [that] give rise to varying rates of refugee recognition among states, with asylum seekers subjecting their futures to what has been described as an ‘asylum lottery’”.<sup>22</sup>

## (ii) CEDAW

The UN Convention for the Elimination of All Forms of Discrimination Against Women (“CEDAW”) is another central international law instrument protecting the rights of women refugees.<sup>23</sup> There are 189 States parties to CEDAW, but only 107 are parties to its Optional Protocol, which authorises the CEDAW Committee to initiate and conduct inquiries in respect of compliance by States parties with respect to their obligations under CEDAW, as well as facilitating a complaints procedure.<sup>24</sup>

14 UNHCR, Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, December 2011, HCR/1P/4/ENG/REV.

15 Throughout the 1980s, as a result of “serious concern” that “the basic rights of refugee women continue to be violated in a number of situations, including through threats to their physical safety and sexual exploitation”, ExCom issued several conclusions and recommendations. See: UNHCR, Refugee Women and International Protection, ExCom Conclusion No. 39 (XXXVI), 18 October 1985; UNHCR, Refugee Women, ExCom Conclusion No. 54 (XXXIX), 10 October 1988; UNHCR, Refugee Women and International Protection, ExCom Conclusion No. 64 (XLI), 5 October 1990; UNHCR, Refugee Protection and Sexual Violence, ExCom Conclusion No. 73 (XLIV), 8 October 1993; UNHCR, Conclusion on Protection from Sexual Abuse and Exploitation, No. 98 (LV), 10 October 2003; UNHCR, Conclusion on Women and Girls at Risk, No. 105 (LVII), 6 October 2006.

16 UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 1: Gender-Related Persecution, *supra*. See also: UNHCR, Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response, May 2003; UNHCR, Action against Sexual and Gender-Based Violence: An Updated Strategy, June 2011.

17 UNHCR, Guidelines on International Protection No. 2: «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, 7 May 2002, HCR/GIP/02/02.

18 UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, 7 April 2006, HCR/GIP/06/07. See also: UNHCR,

Human Trafficking and Refugee Protection: UNHCR’s Perspective, September 2009; UNHCR, A Thematic Compilation of Executive Committee Conclusions, Smuggling and Trafficking, June 2011; UNHCR, Prevent. Combat. Protect: Human Trafficking, November 2011.

19 UN High Commissioner for Refugees (UNHCR), UNHCR Handbook for the Protection of Women and Girls, January 2008.

20 UNHCR, Guidance Note on Refugee Claims relating to Female Genital Mutilation, May 2009. See also UN High Commissioner for Refugees (UNHCR), Action against Sexual and Gender-Based Violence: An Updated Strategy, June 2011; UNHCR, Too Much Pain: Female Genital Mutilation & Asylum in the European Union - A Statistical Overview, February 2013; UN High Commissioner for Refugees (UNHCR), UNHCR’s Contribution to the European Commission’s Consultation on Female Genital Mutilation in the EU, May 2013.

21 UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 19 April 2016, HCR/EG/AFG/16/02; Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis - Greece and the former Yugoslav Republic of Macedonia, 20 January 2016; International Protection Considerations with regard to people fleeing the Syrian Arab Republic, Update IV, November 2015; UNHCR Position on Returns to Libya - Update I, October 2015..

22 Volker Türk and Rebecca Dowd, «Protection Gaps» The Oxford Handbook of Refugee and Forced Migration Studies June 2014 at paras. 279 - 281.

23 UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13.

24 UN General Assembly, Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, *supra* p. 83.

Article 5(a) of CEDAW, requires States parties to take all appropriate measures:

*“to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women”.*

Non-binding guidance was issued by CEDAW's executive committee on 5 November 2014 in General Recommendation No.32, which clarifies the gender-related dimensions of refugee status, asylum, nationality and statelessness of women.<sup>25</sup> It supplements the 1951 Refugee Convention by recommending that:

*“States parties apply a gender perspective when interpreting all five grounds [determining the reasons for persecution according to the Refugee Convention], use gender as a factor in recognizing membership of a particular social group for purposes of granting refugee status under the 1951 Convention and further introduce other grounds of persecution, namely sex and/or gender, into national legislation and policies relating to refugees and asylum seekers”.*

### (iii) The EU acquis

In addition to the Refugee Convention and CEDAW, EU member states are also bound by the EU law *acquis communautaire*, which includes EU regulations, decisions, directives and judgments of the EU courts. Pursuant to the CEAS, the EU has adopted various regulations, decisions and directives, for example:

- (a) Council Decision (EU) 2015/1523 of 14 September 2015 establishing provisional measures in the area of international protection for the benefit of Italy and of Greece;<sup>26</sup>

- (b) Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the member state responsible for examining an application for international protection lodged in one of the member states by a third-country national or a stateless person (recast) (the “Dublin III Regulation”);<sup>27</sup>

- (c) Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast) (the “Asylum Procedures Directive”);<sup>28</sup>

- (d) Directive 2013/33/EU of the European Parliament and Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (the “Reception Conditions Directive”);<sup>29</sup> and

- (e) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 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 (recast) (the “Qualification Directive”).<sup>30</sup>

For present purposes, the Qualification Directive is the most important EU instrument as it imports the grounds for refugee status under the Refugee Convention, and sets up minimum standards for granting subsidiary protection to those who are in need of international protection, but who have not satisfied the elements of the refugee definition.<sup>31</sup>

The obligation of Member States not to discriminate against women in respect of asylum law is bolstered by

25 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32, para. 38.

26 Council Decision (EU) 2015/1523 of 14 September 2015.

27 Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013.

28 Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013.

29 Directive 2013/33/EU of the European Parliament and Council of 26 June 2013.

30 Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011.

31 Subsidiary protection complements the international refugee protection regime, but should not be treated by Member States as an alternative or replacement for it. Article 2(f) of the Qualification Directive sets out the grounds for claiming ‘subsidiary status’ protection as follows: ‘person eligible for subsidiary protection’ means a third-country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) does not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”.

the human rights framework of EU law. For example the Court of Justice of the EU (“CJEU”) has stated that the Qualification Directive must be interpreted in a manner consistent with the Charter of Fundamental Rights of the European Union (the “Charter”).<sup>32</sup> Enshrined in the Charter is the principle that everyone is equal before the law (Article 20), and an obligation to ensure the principle of equality between women and men (Article 23). Article 21(1) contains a broad anti-discrimination clause. Accordingly, the obligation of Member States not to discriminate against women in respect of asylum law is bolstered by the human rights framework of EU law.

Since the late 1980s the European Court of Human Rights (“ECtHR”) has developed a vast body of jurisprudence highlighting areas in which the European Convention on Human Rights (the “ECHR”) can support the particular protection needs of persons of concern to UNHCR.<sup>33</sup> When the Charter contains rights that stem from this ECHR, their meaning and scope are the same, and, pursuant to Article 6(3) of the Treaty on the European Union, fundamental rights that are guaranteed by the ECHR are considered to constitute general principles of EU law.

Neither the CJEU nor the ECtHR exercise jurisdiction over the Refugee Convention, and the supervisory responsibility of UNHCR is specifically articulated in Article 21 of Council Directive 2005/85/EC on minimum standards on procedures in Member States for granting and withdrawing refugee status. The explicit recognition of the UNHCR’s supervisory role in the sphere of EU law further underscores the application and relevance of the UNHCR’s gender specific guidelines within the EU law acquis.

The UNHCR’s research has in the past shown that there are protection gaps in respect of some refugees, including women refugees, in the EU asylum system. This has been caused by what the UNHCR

views as an incorrect interpretation of the Refugee Convention, which has led to wide variations in the interpretation and application of the international protection provisions in the Qualification Directive amongst Member States.<sup>34</sup>

Indeed, in 2014, the UNHCR stressed that consistent and harmonised application of the CEAS instruments in the EU is needed:

*“The central principles of fundamental rights and solidarity should underpin further development and implementation of the CEAS. ... Procedural and substantive safeguards are crucial to the efficient operation of asylum systems in the Union, and can help Member States swiftly and accurately identify refugees and people at risk of serious harm, as well as those who do not qualify for protection.*

*A uniform asylum status, and a uniform subsidiary protection status throughout Member States of the Union, through consistent and harmonised application of the CEAS instruments, would entail greater consistency in the status and levels of rights accorded to people in need of international protection throughout the EU.”<sup>35</sup>*

To remedy some of these gaps insofar as they relate to gender, the European Parliament issued a resolution on 8 March 2016, which contains proposals for a comprehensive set of EU-wide gender guidelines (the “Proposed Guidelines”), to be adopted as part of wider reforms to EU migration and asylum policy.<sup>36</sup> Furthermore, during 2016, the Commission presented proposals to reform and/or replace the existing regulations and directives which make up the acquis (see below) in order to “ensure full convergence between the [Member States] national asylum systems”.

32 Article 2(f) of the Qualification Directive, “Directive 2004/83 must for that reason be interpreted in the light of its general scheme and purpose, and in a manner consistent with the 1951 Geneva Convention ... Directive 2004/83 must also be interpreted in a manner consistent with the fundamental rights and the principles recognised, in particular, by the Charter of Fundamental Rights of the European Union ...”

33 See for example: ECtHR, *Soering v. the United Kingdom*, No. 14038/88, Judgment of 7 July 1989; ECtHR, *Vilvarajah and Others v. the United Kingdom*, Nos. 13163/87, 13164/87, 13165/87, 13447/87 and 13448/87, Judgment of 30 October 1991; ECtHR, *Cruz Varas and*

*Others v. Sweden*, No. 15576/89, Judgment of 20 March 1991.

34 UNHCR, *Safe at Last? Law and Practice in Selected EU Member States with Respect to Asylum-Seekers Fleeing Indiscriminate Violence*, 27 July 2011.

35 UNHCR, *Asylum and international protection in the EU: strengthening cooperation and solidarity*, January 2014.

36 European Parliament resolution of 8 March 2016 on the situation of women refugees and asylum seekers in the EU (2015/2325(INI)).

## (iv) The Istanbul Convention

Opened for signature in Istanbul in May 2011, the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence of 2011 (also known as the “Istanbul Convention”) is the first legally-binding human rights instrument in Europe to recognise violence against women as a violation of human rights and a form of discrimination.

As is further explored below, the Istanbul Convention in its Articles 60 and 61 bears a special significance for refugee women, and, by way of complement to the Refugee Convention and CEDAW, specifically confers protection on refugee women against violence, and establishes several obligations on States parties in relation to asylum claims. Indeed, the UNHCR has issued a publication concerning the relevance of the Istanbul Convention to the Refugee Convention.<sup>37</sup>

The Istanbul Convention has not been ratified by a number of Member States. At the time of writing, it has received a total of 22 ratifications, of which 14 are Member States (although it has been signed but not ratified by several more).<sup>38</sup>

However, in March 2016, the European Commission made proposals for the EU to ratify the Istanbul Convention<sup>39</sup> which was followed up by a similar call by the European Parliament in November.<sup>40</sup> The Commission and Parliament have also recognised the significance of the Istanbul Convention in its recent proposals to reform/replace the key instruments underlying the *acquis*. For example, in its proposal to replace the Qualification Directive with a new Regulation (the “Proposed Qualification Regulation”), the Commission explains that the proposal takes into account Member States’ obligations under the Istanbul Convention and that:

*“In the light of the Commission’s proposal for Council decisions for the signing and conclusion of the Istanbul Convention, and in view of guaranteeing women in need of international protection who have been subject to gender-based violence with a suitable level of protection, a gender-sensitive approach should be adopted when interpreting and applying this Regulation and will in any event be required after the conclusion of the Istanbul Convention by the EU.”<sup>41</sup>*

In the circumstances, it can be expected that the EU ratification of the Istanbul Convention will occur and that the future reviews of the CEAS will be in line with it.

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37 UNHCR, *Refugee Women and the Istanbul Convention* (2013).

38 The full list is available at the Council of Europe, Treaty Office.

39 European Commission, press release, *Commission proposes EU accession to international Convention to fight violence against women*, 4 March 2016.

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40 European Parliament, press release, 24 November 2016.

41 European Commission, *Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents*, 13 July 2016, COM(2016) 466.4

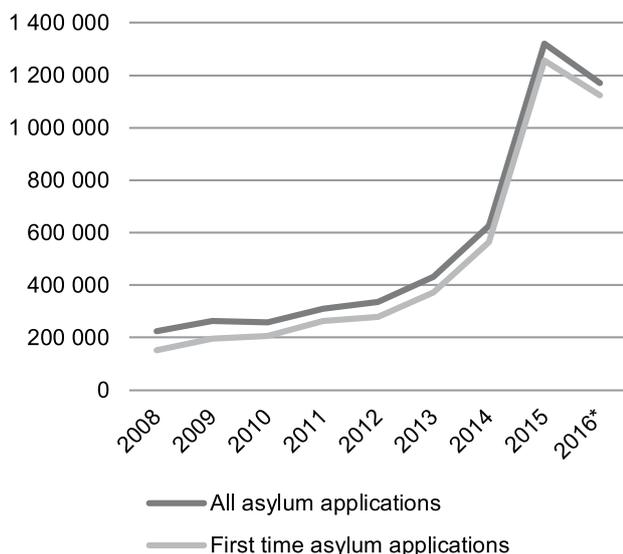
## II.

# GENDER DISAGGREGATED STATISTICS – FIRST INSTANCE AND FINAL DECISIONS CONCERNING FEMALE REFUGEES IN 2016

The existing international and EU level legal framework on refugees and recommendations concerning non-discrimination against women, would suggest that women seeking asylum in the EU would encounter similar systems, laws and practices. Yet data made available by Eurostat<sup>42</sup> demonstrate that while the numbers of asylum seekers rapidly increased over the past five years, women represent just over 30% of all asylum applicants and even though they tend to be almost as successful as men in receiving refugee status, their cases are reviewed with dramatically different outcomes across the EU.<sup>43</sup>

The following table shows the total number of asylum applications and first time asylum applications made in the EU-28, per year, from 2008 to 2016 (the data made available by Eurostat for 2016 are for applications made during the first eleven months of the year only).

### ASYLUM APPLICATIONS MADE IN EU-28



Of the approximately 1.1 million first time applicants during 2016, more than half originated from just three countries: Afghanistan, Iraq and Syria.

The United Nations High Commissioner for Refugees (“UNHCR”) has reported that sexual and gender-based violence is a “growing concern for thousands of women, girls, men and boys affected by the Syria and Iraq crises. Women and girls as well as men and boys face increased risks and multiple forms of violence as a result of the conflict and displacement, including forced and early marriage, sexual violence, including sexual abuse and exploitation and domestic violence”.<sup>44</sup>

Where claims are made by asylum-seekers who have fled Syria and Iraq, the UNHCR considers that persons with, inter alia, the following profiles (depending on the particular circumstances of each individual case) are likely to be in need of international protection as a refugee:

*“Women, in particular women without male protection, women who are victims of or at risk of sexual violence, early and forced marriage, domestic violence, “honour crimes” or trafficking”.*

42 Eurostat produces statistics on a range of issues relating to international migration. Between 1986 and 2007, data on asylum were collected on the basis of an informal understanding. Since 2008 data have been provided to Eurostat under the provisions of Article 4 of Regulation (EC) 862/2007. The statistics are supplied to Eurostat by statistical authorities, home office ministries/ministries of the interior or related immigration agencies in the Member States. Eurostat, Asylum Statistics, 2016.

43 At the time of publication of this report, the most recent Eurostat data is available at, Eurostat Asylum and Managed Migration.

44 UNHCR, Sexual and Gender-based Violence Prevention and Response In Refugee Situations in the Middle East and North Africa - Executive Summary, Nov. 25, 2015.

The UNHCR has reported that people fleeing Afghanistan may be at risk of persecution for reasons connected with the ongoing armed conflict in Afghanistan, or on the basis of serious human rights violations unrelated to the conflict, or both. In particular:

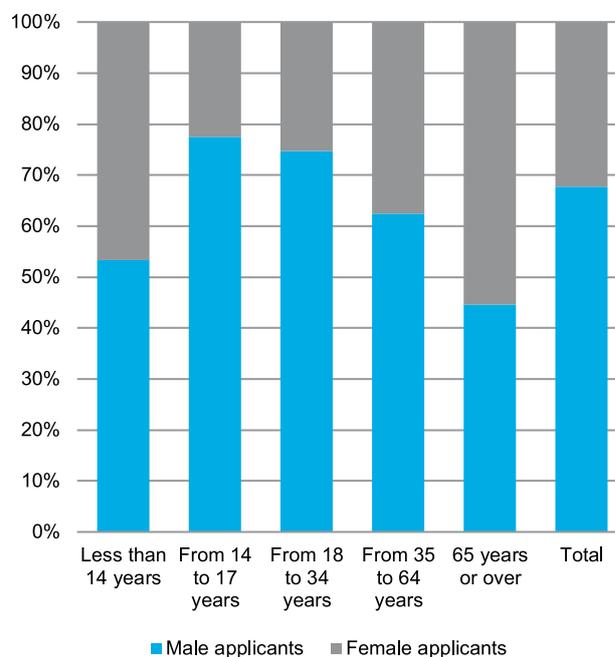
*“Afghanistan continues to be considered a ‘very dangerous’ country for women and girls. The deterioration of the security situation in some parts of the country has undone some of the earlier progress in relation to women’s human rights. Deep-rooted discrimination against women remains endemic. Violence against women and girls remains widespread and is reported to be on the rise; impunity in relation to such violence is reportedly common”.*

With regard to Afghanistan, the UNHCR has stated that, inter alia, the following risk categories of women are likely (depending on the circumstances of the case) to be in need of international protection as refugees:

- (a) Survivors, and those at risk, of sexual and gender-based violence;
- (b) Survivors, and those at risk, of certain harmful traditional practices (including forced marriage); and
- (c) Women perceived as contravening “social mores”.<sup>45</sup>

Despite the potentially large numbers of women and girl refugees originating from Syria and Iraq (where women per se are considered likely in need of protection as refugees), and Afghanistan (where potentially large numbers of women fall within identified risk categories), the data collated by Eurostat demonstrate that more men than women sought asylum during 2016 (see chart below – again, the data reflects the first eleven months of 2016 only). Overall, the gender ratio in the number of male to female asylum applicants was roughly 68% to 32%.<sup>46</sup>

## ASYLUM APPLICANTS IN EU-28 DURING 2016\* BY AGE AND SEX EXPRESSED AS A PERCENTAGE



With particular reference to applicants originating from Afghanistan, Iraq and Syria:

- (d) Out of a total of 175,770 applicants from Afghanistan, 125,450 applicants were males (71.5%) and 49,790 applicants were females (28.5%);
- (e) Out of a total of 121,240 applicants from Iraq, 74,340 applicants were males (61%) and 46,705 applicants were females (39%); and
- (f) Out of a total of 320,225 applicants from Syria, 198,050 applicants were males (62%) and 121,610 applicants were females (38%).

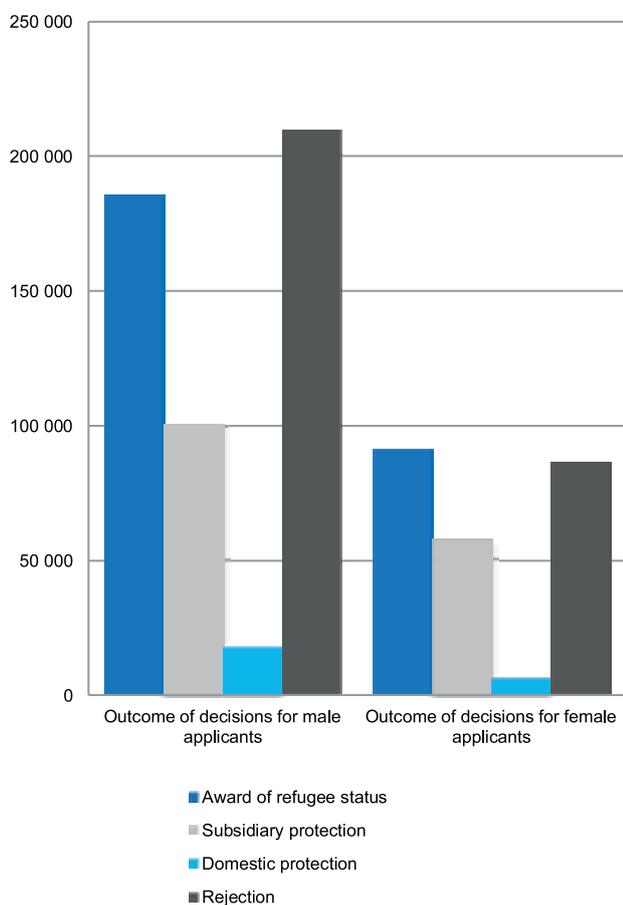
Data on asylum application decisions have been made available by Eurostat for two instance levels, namely the first instance decisions and the final decisions taken in appeal or review. Individual cases may result in grants of (i) refugee status, (ii) subsidiary protection status under the Qualification Regulation, (iii) an authorisation to stay for humanitarian reasons (predicated on the relevant State’s national legislation, which varies among States), or (iv) rejection.

<sup>45</sup> UNHCR, UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, supra, page 4, 56, 62.

<sup>46</sup> The figures for 2016 are largely unchanged from those in 2015, in which the gender ratio of male to female asylum applicants was approximately 72% to 28%.

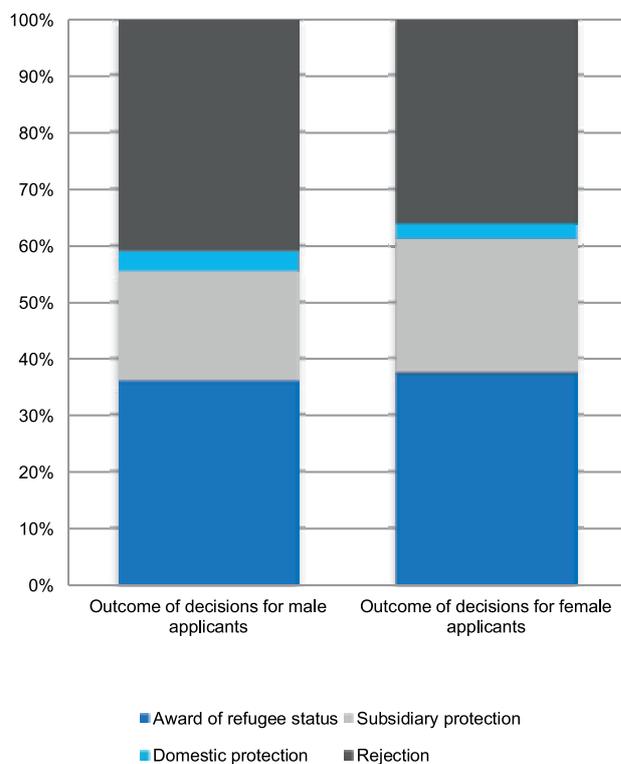
In respect of the number and type of first instance decisions during the first three quarters of 2016 emanating from the EU-28 Member States (as a whole) by applicants emanating from outside the EU-28 States (as a whole) by sex, Eurostat statistics demonstrate that there have been substantially more awards of refugee status at first instance in favour of men than women (see chart below):

### 2016\* FIRST INSTANCE DECISIONS BY EU-28 IN RESPECT OF EXTRA EU-28 ASYLUM APPLICATIONS BY OUTCOME BY NUMBER



However, the same statistics viewed in terms of prospects of success (i.e. ignoring the fact that significantly more applications are made by males than females) demonstrate that the odds in favour of an award of refugee status, subsidiary protection, domestic protection or rejection respectively, are nearly the same for men and women, with women having a slightly better chance of being awarded refugee status or receiving another successful outcome on average across the EU-28 (see chart below):

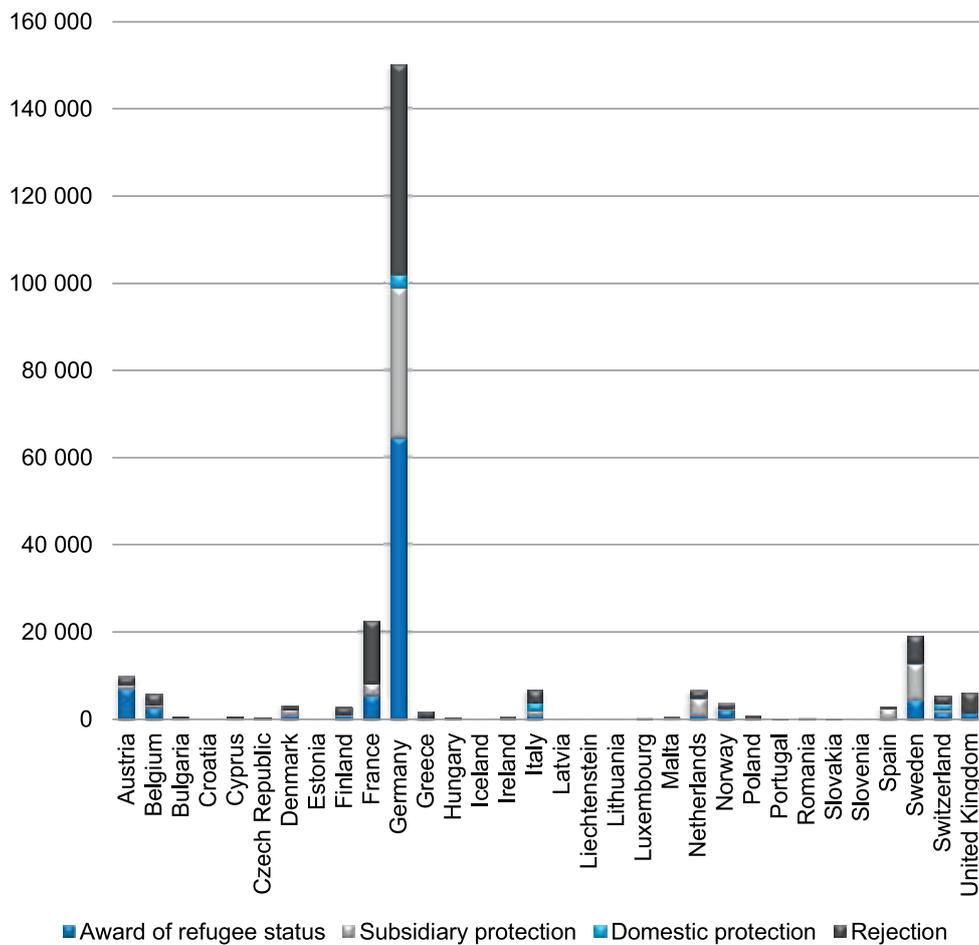
### 2016\* FIRST INSTANCE DECISIONS BY EU-28 IN RESPECT OF EXTRA EU-28 ASYLUM APPLICATIONS BY OUTCOME EXPRESSED AS A PERCENTAGE



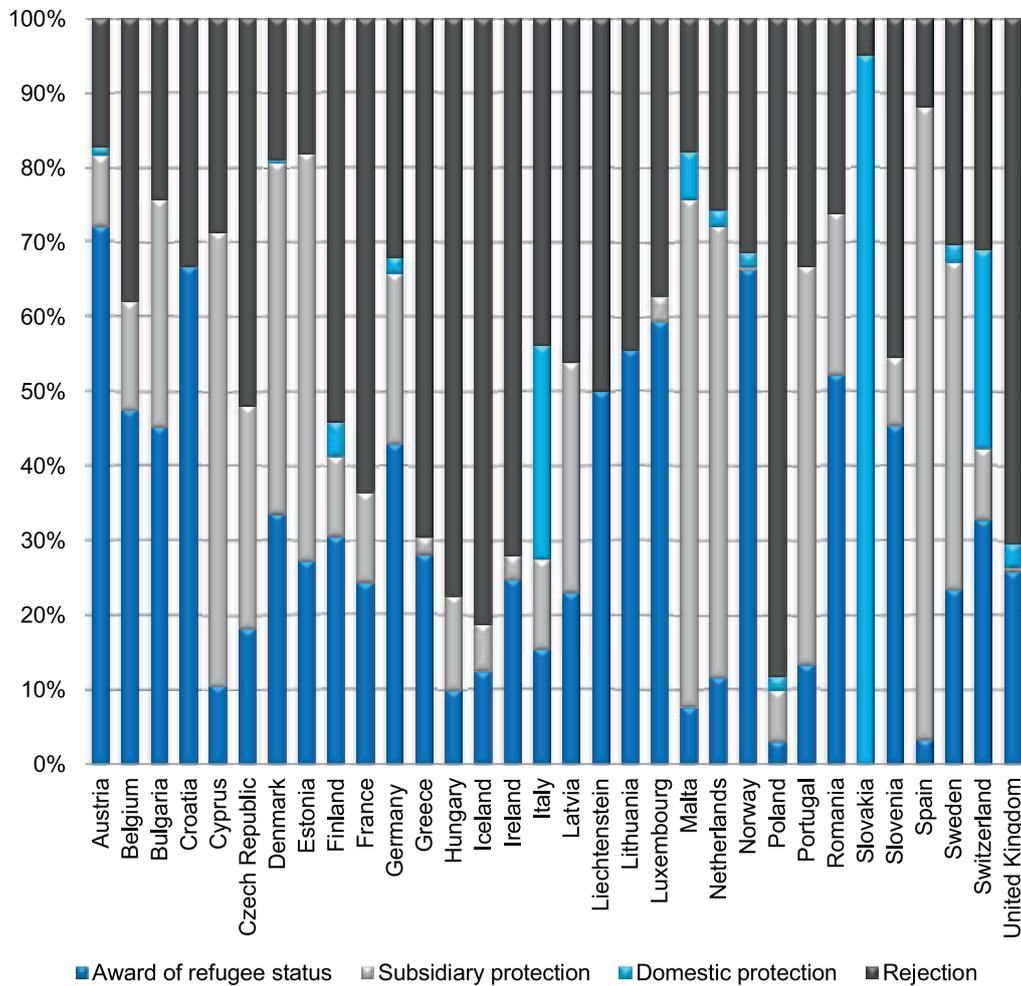
However, once the same Eurostat statistics are viewed in terms of the practice of individual Member States, a picture of inconsistency in approach to asylum cases starts to emerge. To illustrate this point, we have

taken the statistics for female applicants only looked at in terms of the outcome of decisions at first instance during the first three quarters of 2016 (see charts below):

## 2016\* FIRST INSTANCE DECISIONS BY INDIVIDUAL MEMBER STATE IN RESPECT OF FEMALE ASYLUM APPLICATIONS BY OUTCOME BY NUMBER



## 2016\* FIRST INSTANCE DECISIONS BY INDIVIDUAL MEMBER STATE IN RESPECT OF FEMALE ASYLUM APPLICATIONS BY OUTCOME EXPRESSED AS A PERCENTAGE



As the above charts demonstrate, there is significant variation among Member States in relation to the proportion of applicants who are granted protection, and the types of protection which are provided. The European Union acquis and UNHCR guidelines are therefore being applied with significant variances from state to state.

### III.

## “REFUGEES” AND THE RIGHT TO ASYLUM

This section briefly outlines the relevance of gender and gender-based persecution in determining refugee status. As demonstrated below, Member States have taken disparate views as to when women can successfully claim refugee status on the grounds of gender-based persecution.

Art. 1 A, para. 2 of the Refugee Convention defines a “refugee” as a person who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country.” There are therefore two important elements to meeting the threshold of refugee under international law. First, an applicant must demonstrate that they have a well-founded fear of harm (for example, gender-based violence) that meets the threshold of “persecution”. Second, the applicant must demonstrate that such persecution is on account of one of the protected grounds (i.e. race, religion, nationality, membership of a particular social group, or political opinion).

The lack of reference to gender or sex in the refugee definition can pose obstacles for applicants, even though the UNHCR has recommended that the refugee definition be interpreted as a whole with an awareness of possible gender dimensions.<sup>47</sup> It has specifically called upon all signatory States to “recognize that gender-related forms of persecution in the context of Article 1A (2) of the 1951 Convention relating to the Status of Refugees may constitute grounds for refugee status”.<sup>48</sup>

The CEDAW committee has similarly recommended that: “States parties should interpret the definition of a refugee in the 1951 Convention relating to the Status of Refugees in line with obligations of non-discrimination and equality: fully integrate a gender-sensitive approach while interpreting all legally recognized grounds; classify gender-related claims under the ground of membership of a particular social group, where necessary”.<sup>49</sup>

Furthermore, mindful of the fact that “[a] robustly gender-sensitive interpretation of the existing asylum grounds is required to address the widespread gender blindness in granting refugee status. Indeed gender can impact on the reasons behind the type of persecution or harm suffered”,<sup>50</sup> Article 60 of the Istanbul Convention requires States parties to recognise gender-based violence as a form of persecution under the Refugee Convention, and also to ensure a gender-sensitive interpretation to the grounds of persecution (as well as developing gender-sensitive reception procedures).

Therefore, properly interpreted, the definition of “refugee” under international law encompasses gender-related persecution claims.<sup>51</sup> In 2015, the UNHCR articulated this point before the Danish Refugee Appeal board as follows: “even though gender is not specifically mentioned 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”.<sup>52</sup> Parties to the Convention shall ensure that women victims of violence shall not be returned to any country where their life would be at risk or where they might be subject to torture, inhuman or degrading treatment (i.e. non-refoulement).

However, as explored in the following section, because the Refugee Convention is silent on gender, its application to the claims of female asylum seekers depends on it being interpreted in a gender-sensitive manner by States parties. This has led to a piecemeal approach with protection being afforded to women in varying degrees. Despite clear guidance from the UNHCR, the fact that gender is not explicitly listed as a ground under the Refugee Convention increases the scope for a broad range of interpretations on the

47 UNHCR, Submission from the United Nations High Commissioner for Refugees (UNHCR) to the legal representative in case numbers XXX, XXX and XXX before the Danish Refugee Appeal Board, 2015.

48 UNHCR, Conclusion on Women and Girls at Risk, No. 105 (LVII), 6 October 2006.

49 UN Committee on the Elimination of Discrimination Against Women (CEDAW), General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women, 5 November 2014, CEDAW/C/GC/32, para. 38.

50 Council of Europe “Hearing on Refugee Women and the Istanbul Convention”, Parliamentary Network “Women free from violence” and UNHCR, Strasbourg, 23 January 2013.

51 See also the 1979 Handbook, para 67, and UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution, supra, para 6.

52 UNHCR Submission to the legal representative in case numbers XXX, XXX and XXX before the Danish Refugee Appeal Board, 2015, supra.

level and circumstances of protection to be afforded to women and girls in respect of gender-related asylum claims.

## A. GENDER-SPECIFIC HARM CAN AMOUNT TO “PERSECUTION”

As stated by the UNHCR in its guidelines: “‘Gender-related persecution’ is a term that has no legal meaning per se. Rather, it is used to encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status”.<sup>53</sup>

Moreover, classifying persecution as “gender-related” does not discharge an applicant from the necessity to prove in every single case that all elements of Art. 1 A, para. 2 of the Refugee Convention are fulfilled.<sup>54</sup> Notwithstanding this, UNHCR has recognised that the following acts may, depending on the circumstances, amount to persecution within the meaning of Art. 1 A, para. 2 of the Refugee Convention (this list is not exhaustive):<sup>55</sup>

- (a) Sexual violence;
- (b) Rape;
- (c) Physical violence;
- (d) Emotional and psychological violence;
- (e) ‘Dowry-related’ violence;
- (f) FGM;
- (g) Domestic violence;
- (h) Trafficking, including trafficking for the purposes of sexual exploitation or forced prostitution;
- (i) Persecutory (including discriminatory) action on account of sexual orientation;
- (j) Forced or ‘sex-selective’ abortion;

- (k) Early marriage;
- (l) Forced marriage;
- (m) ‘Honour’ killing and maiming;
- (n) Other harmful traditional practices, such as the denial of education for girls and women;
- (o) Certain local laws stemming from cultural norms and practices that fall below international human rights standards and that constitute prohibited persecutory practices;
- (p) Other prohibited persecutory practices condoned by the relevant State;
- (q) Penalties or punishments that are disproportionately severe on women and have a gender dimension; and
- (r) Patterns of gender discrimination and less favourable treatment, including failure to extend protection to individuals subject to gender related abuse, or treatment amounting to socio-economic violence.

In this section, the following gender specific fact-patterns shall be explored in further detail in light of the recent refugee situation in Europe: (i) sexual violence; (ii) ‘honour’ crimes; (iii) forced marriage; and (iv) trafficking. This section of the report will focus on case law arising out of certain jurisdictions by way of example.

Before engaging in analysis of specific forms of persecution, it is noted that “[o]ften, applicants, victims of gender-related violence (including female genital mutilation), fail to substantiate their allegation that they would face a “real and concrete risk” of being subjected to violence if expelled indicating that the threshold in finding a violation if deported is very high”.<sup>56</sup> This pertinent issue concerning the threshold which applicants must surpass in order to establish a real risk of persecution has also been compounded by issues concerning the credibility assessment of applicants, i.e. whether or not an applicant’s case is believed to be true.<sup>57</sup>

53 UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution, *supra*.

54 Andreas Zimmermann, Claudia Mahler, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary, Oxford Commentaries on International Law (27 January 2011).

55 UNHCR Guidelines on International Protection No. 1: Gender-Related Persecution, *supra*, para 9-18 and UNHCR, Sexual and Gender-

Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response, May 2003, p. 15-19.

56 UNHCR, Refugee Women and the Istanbul Convention (2013), *op cit*

57 See for example: Refused - The experiences of women denied asylum in the UK (May 2012), Kamena Dorling, Marchu Girma and Natasha Walter, page 12 – 14. See also: Unsustainable: the quality of initial decision-making in women’s asylum claims (January 2011), Asylum Aid.

## (i) Sexual violence

### Context for the development of international principles

In 1993, ExCom issued a conclusion in which it strongly condemned “persecution through sexual violence, which not only constitutes a gross violation of human rights, as well as, when committed in the context of armed conflict, a grave breach of humanitarian law, but is also a particularly serious offense to human dignity”. ExCom additionally expressed support for the recognition as refugees of persons whose claim to refugee status is based upon a well-founded fear of persecution, through sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion. Finally, ExCom recommended States adopt appropriate guidelines on women asylum-seekers, “in recognition of the fact that women refugees often experience persecution differently from refugee men”.<sup>58</sup>

As of 2003, ExCom continued to issue conclusions involving “distressing reports” that “refugees and asylum-seekers, in particular women and children, have been victims of sexual abuse and exploitation during flight or upon arrival in their country of asylum, and deeply concerned that this has negatively impacted ... [the] granting of refugee status”.<sup>59</sup>

Based on Articles 1 (definition of discrimination against women) and 2 (measures to be taken by States to pursue a policy of eliminating discrimination against women) of the CEDAW and Recommendation 19, paragraph 6 of the 11th Session of the CEDAW Committee, in 2003 the UNHCR adopted an expanded definition of sexual and gender-based violence as follows:<sup>60</sup>

*“... gender-based violence is violence that is directed against a person on the basis of gender or sex. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.... While women, men, boys and girls can be victims of gender-based violence, women and girls are the main victims.*

*...shall be understood to encompass, but not be limited to the following:*

- a) Physical, sexual and psychological violence occurring in the family, including battering, sexual exploitation, sexual abuse of 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 and institutions, wherever it occurs” (emphasis in original).

In 2008 the Security Council of the United Nations further acknowledged that “women and girls are particularly targeted by the use of sexual violence, including as a tactic of war to humiliate, dominate, instil fear in, disperse and/or forcibly relocate civilian members of a community or ethnic group”.<sup>61</sup>

In 2011, the UNHCR reported in further guidelines that: “In recent years, mass rape in war has been documented in Bosnia, Cambodia, Liberia, Peru, Somalia and Uganda. A European Community fact-finding team estimates that more than 20,000 Muslim women were raped during the war in Bosnia. Ninety-four percent of displaced households surveyed in Sierra Leone have reported incidents of sexual assault, including rape, torture and sexual slavery. At least 250,000, perhaps as many as 500,000, women were raped during the 1994 genocide in Rwanda”.<sup>62</sup>

Since 2013 the UN Secretary General has reported annually on conflict related sexual violence and, in 2016, related “harrowing accounts of rape, sexual slavery and forced marriage being used by extremist

58 UNHCR, Refugee Protection and Sexual Violence, ExCom Conclusion No. 73 (XLIV), 8 October 1993.

59 UNHCR, Conclusion on Protection from Sexual Abuse and Exploitation, No. 98 (LIV), 10 October 2003.

60 UNHCR, Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response, May 2003, page 11.

61 UN Security Council, Security Council resolution 1820 (2008), 19 June 2008, S/RES/1820 (2008).

62 UNHCR, Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons. Guidelines for Prevention and Response, May 2003, page 7.

groups, including as a tactic of terror.” He noted that conflict-related sexual violence occurs in many settings, and his 2015 report focused on 19 country situations for which credible information is available (13 conflict settings, 5 post-conflict countries and 1 additional situation of concern).<sup>63</sup>

### Difficulties encountered in practice by applicants

Several Member States have recognised that rape and sexual violence may amount to persecution.<sup>64</sup> However, despite the clear guidance from the UNHCR, in the past it has sometimes proven difficult in practice for women to obtain refugee status on the basis that they have suffered sexual violence.

Whether a victim of rape qualifies as a refugee depends on a multiplicity of factors. One issue stems from the reluctance of courts to tie the reason for the rape to a Convention ground.<sup>65</sup> By way of example, in respect of an application made in the UK by a victim of rape from Afghanistan in the early 2000s, the initial adjudicator had refused to recognise the rape as amounting to persecution because “the only reason for the rape of the Appellant in Takhar was because her assailant found her attractive, and therefore that the attack was a purely personal one, and no more than a common crime”.<sup>66</sup>

Another issue relates to the fact that the Refugee Convention is forward looking and requires that there be a well-founded fear of persecution in the future, which raises complications for past victims of rape. As reported by an asylum law practitioner:

*“It has proved very difficult for women to obtain refugee status on the basis that they have been raped by soldiers during war or civil conflict - even when it is pursuant to a deliberate policy, as in Bosnia and Kosovo. Judges have a tendency to see rape in these circumstances as a matter of ‘dreadful lust’ - and so almost accidental, something random and therefore unlikely to happen again. On this basis, judges have rejected many refugee claims from women who have been raped in this situation. But some more progressive judges have recognised*

*that rape is frequently systematically used as a weapon of war, and therefore that there is a real risk of its recurrence. In cases where it is accepted that rape is used as a weapon of war, it is generally perceived as being for reasons of race or ethnicity or imputed political opinion”.*<sup>67</sup>

### Spotlight – United Kingdom

Baroness Hale of Richmond sitting in the House of Lords in the 2005 case of Hoxha and B recognised that rape in the context of armed conflict may be persecution: “Women are particularly vulnerable to persecution by sexual violence as a weapon of war”.<sup>68</sup>

Further, it was accepted by the House of Lords that the persecution stemming from rape may endure beyond the initial crime, in the sense that the way a victim is subsequently treated within their community may qualify them for refugee status:

*“To suffer the insult and indignity of being regarded by one’s own community (in Mrs B’s words) as ‘dirty like contaminated’ because one has suffered the gross ill-treatment of a particularly brutal and dehumanising rape directed against that very community is the sort of cumulative denial of human dignity which to my mind is quite capable of amounting to persecution. Of course the treatment feared has to be sufficiently severe, but the severity of its impact upon the individual is increased by the effects of the past persecution. The victim is punished again and again for something which was not only not her fault but was deliberately persecutory of her, her family and her community”.*<sup>69</sup>

### Future decision making

It is appropriate at this juncture to re-articulate the plea of the UNHCR made in 2003 for States to develop a common understanding of sexual and gender-based violence:

*“...it is important for all actors to reach a common understanding of sexual and gender-based violence concepts and terminology and to agree*

63 Report of the UN Secretary General, Conflict Related Sexual Violence, 23 March 2015. The UN Secretary general repeated this theme in his 20 April 2016 report: “The shocking trend of sexual violence employed as a tactic of terrorism by violent extremist groups was documented in my previous report, in which I built a case for making women’s protection and empowerment central to counter-terrorism strategies, which have traditionally been gender-blind.”

64 See: “Gender related asylum claims in Europe Study” (2012) European Parliament Directorate General for Internal Policies, page 39.

65 “As a woman I have no country”: the denial of asylum to women fleeing gender-related persecution” Frances Webber, page 9-10; see also Prosecutor v. Anto Furundzija (Trial Judgment), IT 95 17/1 T, International Criminal Tribunal for the former Yugoslavia (ICTY), 10 December 1998.

66 The decision was overturned upon appeal. NS (Social Group - Women - Forced Marriage) Afghanistan v. Secretary of State for the Home Department, CG [2004] UKIAT 00328, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 30 December 2004.

67 United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority.

68 In re B (FC) (Appellant) (2002). Regina v. Special Adjudicator, Ex parte Hoxha (FC), [2005] UKHL 19, United Kingdom: House of Lords (Judicial Committee), 10 March 2005, citing Rodger Haines QC at para 30.

69 Regina v. Special Adjudicator, Ex parte Hoxha, para 36.

*on standard reporting mechanisms. This will help in the development of a coherent approach, in information sharing and in joint monitoring and evaluation among actors. Clear and consistent terminology will help you to collect data properly, analyse the situation, monitor trends, compare data over time and ensure effective follow-up. The use of consistent terminology around the world can allow for comparisons to be made among different refugee settings and can provide valuable data for programme planning and development that have previously been unavailable”.*<sup>70</sup>

The European Parliament has called on Member States to give reasons for positive asylum decisions in order to make available useful data on the consideration given to gender-based violence, and to ensure transparency as to the grounds on which asylum claims have been evaluated. From the point of view of policy, law making and practice, more comprehensive data collection could enable a better understanding of the grounds of persecution on which asylum claims are based, and the relevant Refugee Convention ground(s).<sup>71</sup>

## (ii) ‘Honour’ crimes

In its guidelines for assessing the international protection needs of asylum-seekers from Afghanistan, the UNHCR has highlighted that accusations of adultery and other “moral crimes” may elicit “honour” killings or crimes:

*“Sexual and gender-based violence against women in Afghanistan reportedly remains widespread. Such violence includes “honour killings”, abduction, rape, forced abortion and domestic violence. As sexual acts committed outside marriage are widely seen in Afghan society to dishonour families, victims of rape outside marriage are at risk of ostracism, forced abortions, imprisonment, or even death. Societal taboos and fear of stigmatization and reprisals, including at the hands of their own community*

*and family members, often deter survivors from reporting sexual and gender-based violence”.*<sup>72</sup>

Honour crimes have been recognised by some States to constitute persecution, albeit to varying degrees and in varying circumstances.<sup>73</sup> For example, the government of the UK has issued country guidance on women fearing gender-based harm in Afghanistan,<sup>74</sup> Pakistan, Turkey, and Iran,<sup>75</sup> in which it has recognised that gender-based persecution includes honour crimes.

Whilst honour violence may be accepted as gender-related persecution, whether for reasons of religion, political opinion or membership of a particular social group, complexities may arise in each particular case because: (i) as in the case of domestic violence, the perpetrator may be a private individual (as opposed to the State); and (ii) such cases will often raise questions as to whether the authorities of the country of origin are able and willing to provide sufficient protection.<sup>76</sup>

In the EU, Article 7 of Council Directive 2004/83/EC states that protection is generally provided by the State when it takes reasonable steps to prevent the persecution or suffering of serious harm, “inter alia, by operating an effective legal system for the detection”.<sup>77</sup>

In the UK country guidance for Iran, the issue of State protection in connection with honour crimes is commented upon as follows:

*“Honour killings occur in many of Iran’s outermost provinces and among Iran’s ethnic minorities living near the border areas. Punishment for those who commit an honour crime has been reportedly circumvented in some cases and, even though the authorities attempted to cease the tradition by imposing long prison sentences, families found different ways to murder women accused of damaging a family’s honour. Reports also suggest that women can be pressured into committing suicide so no one will be punished for their death. In honour killing and domestic violence cases, it*

70 UNHCR, Conclusion on Protection from Sexual Abuse and Exploitation, No. 98 (LIV), 10 October 2003, page 89.

71 European Parliament, The situation of women refugees and asylum seekers in the EU, 8 March 2016.

72 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, 19 April 2016, HCR/EG/AFG/16/02.

73 See: “Gender related asylum claims in Europe Study” (2012) European Parliament Directorate General for Internal Policies, page 40.

74 United Kingdom: Home Office, Country Information and Guidance - Afghanistan: Women fearing gender-based harm / violence, February 2016, Version 1.0. Note that on 6 October 2016 the parliament of Pakistan unanimously passed two anti-honour killing and anti-rape bills moved by PPP Senator Farhatullah Babar.

75 United Kingdom: Home Office, Country Information and Guidance - Pakistan: Women fearing gender-based harm / violence, February 2016, Version 3.0; Country Information and Guidance - Turkey: Women fearing gender-based violence, February 2016, Version 1.0; Country Information and Guidance - Iran: Women, February 2016, Version 1.0

76 “As a woman I have no country: the denial of asylum to women fleeing gender-related persecution” Frances Webber, page 9.

77 European Union: Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 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, 30 September 2004, OJ L 304/12-304/23; 30.9.2004, 2004/83/EC.

*is extremely unlikely for the head of the family to demand punishment. Perpetrators therefore frequently get away with a short prison sentence or may avoid punishment altogether.*<sup>78</sup>

Unfortunately, as further discussed below, in practice there has been reluctance to afford protection to, or to recognise the positive rights of, those at risk of being subjected to honour crime by some States.

### Spotlight – Sweden and the ECtHR

In *A.A. and others v. Sweden*, the ECtHR ordered the deportation of six applicants and their children from Sweden to Yemen.<sup>79</sup> The applicants had claimed that, if deported, they faced a real risk of being the victims of honour-related crimes in violation of Articles 2 (right to life) and 3 (prohibition of torture) of the ECHR. The majority of the ECtHR, however, concluded that substantial grounds for believing that the applicants would be exposed to a real risk of being killed or subjected to treatment contrary to Article 3 of the Convention if deported to Yemen, had not been shown.

In a poignant dissent, Judge Power-Forde disagreed with the outcome of the majority. Judge Power-Forde stated in relevant part:

*“...the risk of ill-treatment which the applicants would face, if deported, relates, primarily, to the first, second and fifth—all of whom are women—and to the sixth applicant who is a 13 year old girl ... These women fall within a group of “vulnerable individuals” entitled to State protection. Such protection is not only unavailable in their home country; it is not even considered necessary. The beating of women, their forced isolation or imprisonment and forced early marriage are not addressed in Yemeni law. Marital rape is not a criminal offence. Violence against women and children is considered ‘a family affair’ and there is no minimum age for marriage. ...The Migration Board [in Sweden] has rejected the women’s application for protection against honour related crimes, forced marriage and/or domestic violence on the basis that the family’s problems were related to ‘financial matters’...The Migration Court [in Sweden], which refused to conduct a hearing, also considered that the applicants’ reasons for protection mainly concerned problems within ‘the personal sphere caused, inter alia, by the country’s*

*traditions’... It affirmed that before international protection could be considered for problems of violence and reprisals within the family, all avenues of mediation and protection by the national authorities should be tried ... The rationale offered by the domestic authorities in refusing the applicants’ claims for protection is not at all convincing. With respect, it displays a remarkable lack of insight into the reality of life for many women in Yemen—and for these applicants, in particular. To demand that vulnerable women exhaust meagre, discriminatory and ineffective ‘remedies’ before courts that can sanction the marriage of a 12 year old child (as did the Yemeni court in this case)—before a grant of international protection may be considered—is to demand too much.”*

Although much progress has been achieved by the UNHCR and individual States, the case highlights the fragility of international protection, and the need to establish legal principles concerning the circumstances under which honour crimes (and also child marriage and forced marriage) can constitute “persecution” on the basis of gender.

### (iii) Forced marriage

In the UNHCR’s recent country report on Afghanistan, it is stated that, “[h]armful traditional practices continue to be pervasive in Afghanistan ... Rooted in discriminatory views about the role and position of women in Afghan society, harmful traditional practices disproportionately affect women and girls. Such practices include various forms of forced marriages, including child marriages; forced isolation in the home”.<sup>80</sup>

Several Member States have accepted that forced marriage may amount to persecution,<sup>81</sup> however, illustrated below, in practice past victims of forced marriage have faced difficulties demonstrating a well-founded fear of persecution.

### Spotlight – Sweden and ECtHR

In late 2015, the ECtHR was asked to hear a case concerning the deportation of a Somali asylum applicant whom had applied for asylum, and been rejected, in Sweden.<sup>82</sup>

78 United Kingdom: Home Office, Country Information and Guidance - Iran: Women, February 2016, Version 1.0, para 2.4.8.

79 *A.A. and others v. Sweden*, Council of Europe: European Court of Human Rights, 28 June 2012.

80 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, *supra*, pages 60 – 61.

81 See: “Gender related asylum claims in Europe Study” (2012) European Parliament Directorate General for Internal Policies, page 38.

82 *R.H. v. Sweden*, Application no. 4601/14, Council of Europe: European Court of Human Rights, 10 September 2015.

The applicant had been forced to marry an older man against her will, and at the time she had had a secret relationship with a boy from school. This relationship was revealed a few days after the forced marriage when the applicant and her boyfriend had tried to escape from Mogadishu together, and were detected by her uncles. The applicant was beaten and hospitalised for a few months. The applicant and her boyfriend subsequently fled Somalia and embarked on a long journey through Ethiopia, Sudan and Libya before taking a boat to Italy. However, the boat sunk and her boyfriend did not survive. Later, while in Sweden, she had learned that her father had also passed away in 2010 and her mother in 2011.

The applicant claimed inter alia that, if returned to Somalia, she would at best be returned to the man whom she had been forced to marry, and at worst sentenced to death at the hand of her uncles for fleeing the marriage and the country. The applicant also asserted that she lacked a male support network in Somalia and therefore risked being sexually assaulted.

In spite of her case, the Swedish Migration Board rejected the applicant's application for asylum and ordered her deportation to Somalia, considering that the application was marred with credibility issues. The ECHR also held by five votes to two, that the deportation of the applicant to Mogadishu in Somalia would not give rise to a violation of Article 3 of the ECHR. In particular, the applicant's "claims concerning her personal experiences and the dangers facing her upon return have not been made plausible ...she has family living in the city, including a brother and uncles. She must therefore be considered to have access to both family support and a male protection network".

In another powerful dissent, the Joint Dissenting Opinion of Judges Zupančič and De Gaetano stated that:

*"we believe that on the basis of all the evidence she will, upon her forced return there, face a real risk of being subjected to inhuman or degrading treatment or punishment, if not worse. ...Once again, unfortunately, both the Swedish courts and this Court have reached the same conclusion by examining under the microscope minor discrepancies or inconsistencies in the applicant's statements – most of which have a reasonable explanation – while at the same time downplaying the general situation in the country of return that*

*emerges from various international reports. We find this method unacceptable, as previously indicated in the separate opinions in K.A.B. v. Sweden (no. 886/11, 5 September 2013) and in J.K. and Others v. Sweden (no. 59166/12, 4 June 2015). In the instant case the applicant, a single woman who has been living in Sweden for almost eight years and who has been absent from her country for longer, will not only be returned to an essentially dysfunctional society, but also to one that is positively hostile to her status and to what she has done these last ten years plus. Whatever family the applicant may still have in Mogadishu, especially male members, they will be equally, if not more, hostile."*

It is noted that, whilst the attempt to resist deportation was decided under the ECHR, the case as presented appears to be one which fell short at the national level as regards protection under the Refugee Convention, and highlights the impact that credibility assessment can have on the outcome of claims. Irrespective of issues of credibility, it is difficult to see how the maintenance of the applicant's forced marriage could not fall to be construed as a violation of her human rights, including, inter alia, Article 12 ECHR which enshrines two constituent rights, the right to marry and the right to found a family (see further below).

### Spotlight – Germany

In 2013, in respect of an applicant originating from Afghanistan, the German Administrative Court found that both the applicant and her daughter were to be recognised as refugees on the grounds of their threatened persecution based on gender.<sup>83</sup> In particular, the court found that the applicant had fled her home due to a justified fear of an arranged marriage, and would continue to be threatened by the latter if she were to return or would be otherwise exposed to repression from her father. Among the court's reasoning was a finding that the risk of arranged marriage is widespread in Afghanistan, particularly for underage girls, which means that it may constitute grounds for refugee status for women. Further, the main actor of persecution was viewed to be the father, who was classified as a 'significant non-state actor' within the meaning of Article 6 (c) of Directive 83/2004/EC (on minimum standards for the qualification and status of third country nationals or stateless persons as refugees).

The court also stated that the act of an arranged

83 Germany - Administrative Court Gelsenkirchen, 18 July 2013, 5a K 4418/11.A.

marriage (with which the applicant was threatened), and the maintenance of such a marriage constituted a violation of Article 12 of the ECHR, according to which men and women have the right to enter into marriage and to found a family. The court clarified that Article 12 also includes the negative freedom not to be obliged to marry if this does not correspond to a person's will. The court further considered that arranged marriages and the obligation to remain in an arranged marriage also violate the right to private life set forth in Article 8 of the ECHR. Furthermore, arranged marriages violate Article 16 (2) of the Universal Declaration of Human Rights, according to which "Marriage shall be entered into only with the free and full consent of the intending spouses".

## (iv) Trafficking in persons

Well before the present situation of refugees arriving in European cities and refugee camps, in 2006 ExCom recognised that "women and girls may be exposed to certain risks, such as trafficking, in any location, the different nature of camp and urban environments can expose women and girls to different protection risks".<sup>84</sup>

In 2014, the UNHCR highlighted in a report specifically addressing asylum and international protection in the EU, that victims of trafficking in human beings may have international protection needs as refugees. The international protection needs of victims of trafficking "demands that asylum authorities are aware of the specific risks which may face victims of trafficking, and analyse them in light of protection criteria in the asylum acquis." In particular, "[a] fundamental rights-based approach to victims of trafficking could help address the fragmentation of their entitlements across different policy areas".<sup>85</sup>

In the present refugee context, the UNHCR has stated that: "Throughout the journey from their country of origin to Greece, refugees and migrants face high risks of violence, extortion and exploitation, including rape, transactional sex, human and organ trafficking.

Women and girls, especially those travelling alone, face particularly high risks of certain forms of violence, including sexual violence by smugglers, criminal groups and individuals in countries along the route".<sup>86</sup>

With specific regard to Afghanistan, where there are reported to be high risks for women of being trafficked internally for sexual exploitation, the UNHCR considers that "people, especially women and children, in particular social-economic circumstances that create vulnerabilities to trafficking or bonded labour, may be in need of international refugee protection on the grounds of their membership of a particular social group or other relevant grounds, depending on the individual circumstances of the case. This includes survivors of trafficking or bonded labour who may be in a position of heightened vulnerability to being re-trafficked or being re-subjected to bonded labour".<sup>87</sup>

Today, with respect to trafficking, States are subject to a dedicated international law regime, for example, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (the "Palermo Protocol").<sup>88</sup> Member States are additionally regulated by the Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"),<sup>89</sup> and also Directive 2011/36/EU of the European Parliament on preventing and combatting human trafficking.<sup>90</sup>

### Spotlight – United Kingdom

On 23 February 2016, the UK Upper Tribunal considered the asylum claims of victims of trafficking from Albania.<sup>91</sup> In this case, X was an Albanian national, who before leaving Albania lived with her 'strict Muslim' family, in a poor economic situation. X met a man (the trafficker) and they began a secret relationship. Upon the relationship being discovered, X was beaten severely by her father and brother. X managed to run away.

The trafficker collected X and took her to a flat in Tirana. He told her that her family were looking for her and wanted to kill her. She was confined to the flat for a month, after which she was forced to work

84 UNHCR, Conclusion on Women and Girls at Risk, No. 105 (LVIII), 6 October 2006.

85 UNHCR, Asylum and international protection in the EU: strengthening cooperation and solidarity, January 2014, para 8.

86 UNHCR, Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis - Greece and the former Yugoslav Republic of Macedonia, 20 January 2016.

87 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, *supra*, page 71.

88 UN General Assembly, Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 15 November 2000.

89 Council of Europe, Council of Europe Convention on Action Against Trafficking in Human Beings, 16 May 2005, CETS 197.

90 Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA.

91 TD and AD (Trafficked women) (CG) v. Secretary of State for the Home Department, [2016] UKUT 00092 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 23 February 2016.

as a prostitute in the flat under the immediate and real threat of physical violence. X wanted to kill herself twice by jumping off the balcony, but was prevented by the trafficker. She was permitted to speak to her sister once by phone, who informed her that her family knew she was working as a prostitute and that her brother would kill her if she returned home.

The trafficker arranged to obtain an official passport for X but held on to it himself. The trafficker, and another man, then drove X in a car for a week before putting her in the back of a lorry with several other girls. The trafficker told X that he expected her to have sex with 'clients' in the UK.

Upon hearing the case, it was accepted by the tribunal that the UK has an international obligation to provide victims of trafficking with assistance for their physical, psychological and social recovery under the Palermo Protocol.

The tribunal recognised the status of the victim as a refugee and set out specific country guidance in respect of victims of trafficking from Albania:

"In the past few years the Albanian government has made significant efforts to improve its response to trafficking. This includes widening the scope of legislation, publishing the Standard Operating Procedures, implementing an effective National Referral Mechanism, appointing a new Anti-trafficking Co-ordinator, and providing training to law enforcement officials. There is in general a Horvath-standard sufficiency of protection, but it will not be effective in every case. When considering whether or not there is a sufficiency of protection for a victim of trafficking her particular circumstances must be considered.

[...]

*Trafficked women from Albania may well be members of a particular social group on that account alone. Whether they are at risk of persecution on account of such membership and whether they will be able to access sufficiency of protection from the authorities will depend upon their individual circumstances including but not limited to the following:*

*1) The social status and economic standing of her family; 2) The level of education of the victim of trafficking or her family; 3) The victim of trafficking's*

*state of health, particularly her mental health; 4) The presence of an illegitimate child; 5) The area of origin; 6) Age; 7) What support network will be available".*

### Spotlight – France

In March 2015, the National Court of Asylum Law in France ("CNDA") ruled that trafficking was to be regarded as a form of persecution under the Refugee Convention and under the Qualification Directive.<sup>92</sup> Whilst the outcome is to be applauded, the history of the case demonstrates the difficulties victims of trafficking for sexual exploitation may face in respect of the implementation of their right to asylum.

The case concerned a woman, AB, who, after the death of several family members, was offered a job in Europe. She departed from Edo State, Nigeria after being subjected to a ritual ceremony known as "juju" used to mark her allegiance to the trafficking network. Once in Paris, AB was forced into prostitution to pay off the exorbitant debt she accrued to her trafficker. However, AB subsequently escaped her pimps, and applied for asylum.

The French body responsible for initial asylum decisions, OFRPA, rejected AB's application for asylum. Upon appeal in 2011, the CNDA subsequently recognised AB as a refugee on the basis of a social group defined by reference to victims of trafficking. OFRPA formed an appeal against the CNDA's decision.

Upon hearing the appeal, the CNDA recognised that trafficking is a form persecution, and that Nigerian trafficking victims are at risk of persecution in their country of origin.

Applying the 'social perception' test (see Section B(iv) below), the CNDA considered that the Refugee Convention ground of "membership of a particular social group" is recognised for Nigerian women from Edo State that are victims of trafficking. Having been subjected to "juju rituals", and having escaped the operating system of the traffickers, such women were thereby exposed to threats and shared "a common history".

### Spotlight – France and ECtHR

Despite the positive decision of the CNDA above, in June 2015 the ECtHR issued a finding in L.O. v. France that somewhat goes against the finding of the French court as regards the protection risks of Nigerian prostitutes from Edo State.<sup>93</sup>

92 Décision No. 10012810, 24 mars 2015, France: Cour Nationale du Droit d'Asile, 24 March 2015.

93 L.O. v. France (Application No. 4455/14, Judgment, 18 June 2015).

The case related to a Nigerian national who moved to France in 2010 after being told by her trafficker that she could earn money working in France as a babysitter for his children, but was instead forced into prostitution.

In 2011, she claimed asylum on the basis of a risk of FGM and arranged marriage. Her claim was refused by the French Authorities in 2013. She filed a request for review of her asylum application on the basis that she was victim of a network of human trafficking. Her application was rejected once more. In a complaint to the ECtHR, the applicant made the case that her return to Nigeria would expose her to a real risk of inhuman and degrading treatment contrary to Article 3 ECHR (prohibition of torture), as her trafficker had threatened to harm her and her family if she did not pay her so called 'debt' to him.

The ECtHR concluded that the Nigerian Authorities were able to offer her sufficient protection against any risks of harm and to provide her with assistance upon return. Her application was accordingly rejected on the basis that there were no serious and current grounds to believe that the applicant would be at real risk of treatment contrary to Article 3 upon return to Nigeria.

## B. THE REFUGEE CONVENTION GROUNDS

As explained above (see para 44), an applicant must not only have a well-founded fear of persecution, but that well-founded fear of persecution must be on account of one or more of the grounds specified in Art. 1 A, para. 2 of the Refugee Convention. In other words, persecution must be for reasons of (i) race, (ii) religion, (iii) nationality, (iv) membership of a particular social group or (v) political opinion. Linking persecution to one of the Convention grounds is seen as critical as demarcating the boundaries of States' obligations for international protection.

There are several preliminary points to note in this regard. First, as recently articulated by the UNHCR: "Ensuring that a gender-sensitive interpretation is given to each of the Convention grounds is important in determining whether a particular claimant has

fulfilled the criteria of the refugee definition".<sup>94</sup> Second, in many gender-related claims, the persecution feared could be for one, or more, of the Refugee Convention grounds; they are not mutually exclusive and may overlap.<sup>95</sup> Finally, the UNHCR has adopted the stance that a Refugee Convention ground "needs only to be a contributing factor to the well-founded fear of persecution; it need not be shown to be the dominant or even the sole cause".<sup>96</sup>

### (i) Race

The UNHCR Guidelines on Gender-Related Persecution explicitly recognise that: "Persecution for reasons of race may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and persecuted in a different way, such as through sexual violence or control of reproduction".<sup>97</sup>

Indigenous women may also suffer persecution on grounds of race, which has been defined as "race, colour, descent, or national or ethnic origin",<sup>98</sup> in circumstances of severe discrimination or violence directed at such innate or physical characteristics.

There has been a tendency in the past in cases of gender-related persecution to focus on how victims can be brought under the Refugee Convention ground of "membership of a particular social group" (discussed in detail below). However, as noted above the Refugee Convention grounds can in some cases be closely interrelated and overlap, and it is important in such cases to give due consideration to the special features of the case. For example, in *AT and Others*, the UK Upper Tribunal, considering the risk of persecution on grounds of alleged sexual misdemeanour in Libya, observed that "a woman of black African ethnicity may more easily be able to demonstrate risk on account of an accusation of a sexual misdemeanour because in her case there is the added issue of discrimination and racism against those of African ethnicity which is likely to affect her circumstances on return".<sup>99</sup>

94 UNHCR Submission to the legal representative in case numbers XXX, XXX and XXX before the Danish Refugee Appeal Board, 2015, *supra*.

95 UNHCR Guidelines on International Protection No. 1: Gender-Related Persecution, *supra* para. 6.

96 UNHCR Submission to the legal representative in case numbers XXX, XXX and XXX before the Danish Refugee Appeal Board, 2015, *supra*.

97 *Ibid*.

98 *Ibid*.

99 *AT and Others (Article 15c; risk categories) Libya CG v. Secretary of State for the Home Department*, [2014] UKUT 00318 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 14 July 2014.

This point is further illustrated by a case from 2014 before the Supreme Administrative Court of Switzerland.<sup>100</sup> In that case the applicant, a Somali national from a minority clan, had suffered the death of her father (killed by persons unknown), husband (killed in a car accident) and mother (shot by militia) in Somalia. The applicant was found to be at a real risk of gender persecution, including trafficking. As a displaced, single woman without a male guardian who belonged to a minority clan, the applicant's case was tied to the convention ground of "membership of a particular social group", as the risk of an impending prosecution for members of this group was said to be disproportionately higher and more concrete, than it was for the rest of the population. The court's reasoning reveals that the fact the applicant was from a minority clan in Somalia was a salient factor in determining her heightened risk of persecution—which as a single, displaced and unprotected female, would likely take the form of gender persecution. The case therefore might also have been tied to Refugee Convention grounds of "ethnicity, race or nationality".

## (ii) Religion

The Guidelines on Gender-Related Persecution state that: "In certain States, the religion assigns particular roles or behavioural codes to women and men respectively. Where a woman does not fulfil her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion".<sup>101</sup>

In its 2006 conclusions, ExCom recognized that "each community is different and that an in-depth understanding of religious and cultural beliefs and practices is required to address the protection risks women and girls face in a sensitive manner while bearing in mind obligations under international refugee, human rights and humanitarian law".<sup>102</sup>

## (iii) Nationality

The Guidelines on Gender-Related Persecution emphasize that: "Nationality is not to be understood only as "citizenship". It also refers to membership of an ethnic or linguistic group and may occasionally overlap with the term "race". Although persecution on the grounds of nationality (as with race) is not specific to women or men, in many instances the nature of the persecution takes a gender-specific form, most commonly that of sexual violence directed against women and girls".<sup>103</sup>

This Refugee Convention ground of "nationality" is therefore closely related to the ground of "race".

## (iv) Membership of a particular social group

*"Membership of a particular social group" was a late inclusion in the text of the Refugee Convention,<sup>104</sup> and it was left undefined by its drafters, without any significant debate or discussion. As observed by a leading commentator, "the challenge is in identifying 'the true autonomous and international meaning' of 'particular social group' that conforms with the object and purpose of the Convention and is able to be applied in a consistent and clear manner by decision-makers across common law and civil law jurisdictions."<sup>105</sup>*

As far back as 1985, ExCom recognised that: "States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a «particular social group» within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention".<sup>106</sup> In practice, membership in a particular social group has become one of the most important grounds under the Convention, as decision-makers have had greater ability to apply it more flexibly to accommodate applicants whose persecution meets the normative threshold envisioned by the Convention but does not fit under the other grounds.

100 A (Somalia) and their children B (state unknown) and C (state unknown) v Federal Office for Migration (FOM), Switzerland: Tribunal administratif fédéral, August 6 2014.

101 UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution, supra para 25.

102 UNHCR, Conclusion on Women and Girls at Risk, No. 105 (LVII), 6 October 2006.

103 UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution, supra para 25.

104 United Nations General Assembly Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, Summary Record of the Third Meeting held at Geneva, 3 July 1951, A/Conf 2/SR 3 at 14, cited in Applicant A v. Minister for Immigration and Ethnic Affairs (1997) 190 CLR 225, 234 n 36 (Brennan J).

105 Michelle Foster, The 'Ground with Least Clarity': A Comparative Study of Jurisprudential Developments relating to 'Membership of a Particular Social Group', UNHCR Division of International Protection: Legal and Protection Policy Research Series (August 2012), at p. 3.

106 UNHCR, Refugee Women and International Protection, ExCom Conclusion No. 39 (XXXVI), 18 October 1985.

Yet, even today some States still impose restrictive interpretations on the meaning of a “particular social group”, contrary to the spirit of the Refugee Convention, CEDAW, and the Istanbul Convention.

A ubiquitous problem in the past has been the reluctance of decision-makers to frame the relevant particular social group as simply (and broadly) ‘women’; yet, other jurisdictions have adopted precisely this approach. For example, in one of the leading Australian cases, *Minister For Immigration & Multicultural Affairs v Khawar*, Gleeson CJ concluded that women in Pakistan may form a particular social group, and stated, “I see nothing inherently implausible in the suggestion that women in a particular country may constitute a persecuted group”,<sup>107</sup> especially in the context of particular information regarding that country.

### The UNHCR's Interpretation

Seeking to adopt a single standard incorporating and reconciling the two dominant approaches to “particular social group” reflected in the Refugee Convention State practice up until 2002 – namely the “protected characteristic” approach and the “social perception” approach – the UNHCR in its 2002 guidelines on Membership of a Particular Social Group defined “a particular social group” 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 (emphasis added).”

The UNHCR therefore sees the dominant approaches as alternative, rather than cumulative, tests.

On the basis of this definition, the UNHCR reasoned that “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men (emphasis added).”<sup>108</sup> It added: “their [women’s] characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries”.<sup>109</sup>

The UNHCR further noted, in its 2002 Guidelines on Gender-Related Persecution:

“The size of the group has sometimes been used as a basis for refusing to recognise ‘women’ generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate, or that every member of the group is at risk of persecution. It is well-accepted that it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context” (emphasis added).<sup>110</sup>

### The EU Qualification Directive

Regrettably, in a clear departure from the UNHCR’s Guidelines, a number of national and regional legislators and courts have conflated the “protected characteristics” and “social protection” approaches to create a cumulative test for ascertaining the existence of a “particular social group” in refugee status claims.

The Qualification Directive, in both its 2004<sup>111</sup> and 2011 versions, reflects such an approach. Article 10(1)(d) of the Qualification Directive (as recast in 2011), like its predecessor, provides that:

*“...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” (emphasis added).*<sup>112</sup>

The Qualification Directive falls short of the UNHCR’s guidelines because the text of the Directive suggests that the “protected characteristics” and “social perceptions” approaches are two prongs of a

107 *Minister for Immigration and Multicultural Affairs v. Khawar*, (2002) 210 CLR 1 at [35].

108 UNHCR, Guidelines on International Protection No. 2: «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., at para 12-13. See also UNHCR Guidelines on International Protection No. 1: Gender-Related Persecution, supra para. 30.

109 UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution, supra para. 30.

110 UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution, supra para. 31 (emphases added, internal citations omitted).

111 Council Directive 2004/83/EC of 29 April 2004.

112 An almost identical formulation also appears in Article 10 of the Proposed Qualification Regulation.

cumulative test. Disappointingly, despite affirming earlier that the interpretation of the Qualification Directive must reflect its drafters' intention to correctly implement, and not detract from, the Refugee Convention,<sup>113</sup> the CJEU has adopted a literal interpretation of the Qualification Directive's language, requiring the fulfilment of both prongs of the test cumulatively in its judgment in X, Y and Z.<sup>114</sup> Although the Qualification Directive departs slightly from its predecessor in removing controversial language to the effect that "[g]ender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article", for all practical purposes the Qualification Directive adopts the same approach to gender-related aspects. Indeed, although an amendment had been proposed by the European Parliament to make the two limbs of a particular social group clear alternatives, the final version of Article 10(1)(d) merely states that "[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group..." (emphasis added).<sup>115</sup>

### The Practice of Member States

Not all Member States recognise women as members of a "particular social group" under the 1951 Convention.<sup>116</sup> Yet, it is important to emphasise that the Qualification Directive explicitly provides only "minimum standards". "Member States may introduce or retain more favourable standards for determining who qualifies as a refugee...in so far as those standards are compatible with this Directive".<sup>117</sup>

### Spotlight – United Kingdom

Whilst in the past the approach of the UK has been criticised as overly restrictive in its interpretation of "member of a particular social group",<sup>118</sup> in its most recent country guidelines, the UK appears to have adopted an interpretation in respect of certain

countries that is in line with the spirit of the Refugee Convention, CEDAW and the Istanbul Convention.

For example, in respect of Pakistan, the UK guidelines state that:

*"Women in Pakistan form a particular social group (PSG) within the meaning of the Refugee Convention."*

The decision of the House of Lords in *Shah and Islam* is also set out within the guidelines. In that case it was held that women in Pakistan constituted a particular social group because they share the common immutable characteristic of gender, they were discriminated against as a group in matters of fundamental human rights, and the State gave them no adequate protection because they were perceived as not being entitled to the same human rights as men.<sup>119</sup>

In respect of Afghanistan, the decision of an English tribunal that women in Afghanistan form a particular social group within the meaning of the Refugee Convention, has likewise become entrenched in the Afghanistan guidelines.<sup>120</sup>

In respect of Turkey the UK guidelines simply state: "Women in Turkey form a particular social group (PSG) within the meaning of the 1951 UN Refugee Convention because they share a common characteristic that cannot be changed and have a distinct identity which is perceived as being different by the surrounding society".<sup>121</sup>

However, with respect to Albania, where it has been recognised by the UK that "domestic violence in Albania is a serious and widespread problem, with a recent survey showing that some 53 percent of women had experienced domestic violence within the last 12 months". The UK guidelines explicitly outline that:

113 Aydin Salahadin Abdulla (C-175/08), Judgment, 2 March 2010, at para. 52.

114 *Minister voor Immigratie en Asiel v. X* (C-199/12), *Y* (C-200/12), and *Z* (C-201/12) v. *Minister voor Immigratie en Asiel*, Judgment, 2013, at paras. 44-49.

115 Qualification Directive, at Article 10(1)(d), last sentence (emphases added).

116 European Parliament, Briefing on Gender Aspects of Migration and Asylum in the EU: An Overview (March 2016), at page 9.

117 Qualification Directive, at Article 3. See also Qualification Directive, at preamble para 14.

118 Christel 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).

119 United Kingdom: Home Office, Country Information and Guidance - Pakistan: Women fearing gender-based harm / violence, February 2016, Version 3.0.

120 NS (Social Group - Women - Forced marriage) Afghanistan CG [2004] UKIAT 00328; United Kingdom: Home Office, Country Information and Guidance - Afghanistan: Women fearing gender-based harm / violence, February 2016, Version 1.0.

121 United Kingdom: Home Office, Country Information and Guidance - Turkey: Women fearing gender-based violence, February 2016, Version 1.0.

*“Women at risk of domestic violence in Albania are not considered to form a particular social group within the meaning of the 1951 UN Refugee Convention. This is because although they share an immutable (or innate) characteristic – their gender – which cannot be changed, and although traditional views of their subordinate position in society are still prevalent in parts of the country, in general, in view of their equality under the law and the general availability of state protection against domestic violence, they are not now perceived as different and do not have a distinct identity in Albanian society”.*<sup>122</sup>

The result of this position is that the onus is on the applicant to demonstrate that she would be personally at risk of gender-based violence which reached a sufficiently high threshold to amount to a real risk of serious harm, and that she would be unable to access effective state protection or take the option of internal relocation. Evidentially speaking these may be difficult criteria for an applicant to meet in practice. The different treatment in respect of Albania by the UK demonstrates how the availability of the Convention ground of “membership of a particular social group” is contingent on the social situation of women in the country of origin.

### Spotlight – France

The ‘social perception’ approach is firmly entrenched within French asylum jurisprudence.<sup>123</sup> In its application of the social perception approach, the French courts have been criticised in the past for adding additional criteria not required under international law.<sup>124</sup> By way of example, in the case of Mme G,<sup>125</sup> it was decided that because the applicant lacked an external manifestation of her sexual orientation common to the “particular social group” she claimed to be a part of, her claim must fail for not meeting the requirement of ‘social visibility’. The French courts have in the past added other requirements, for example, that the definition of the group must be restrictively defined and sufficiently identifiable, based on concern for unlimited expansion of the social group ground.<sup>126</sup>

However, as stated by the UNHCR:

*“...the fact that large numbers of persons risk persecution cannot be a ground for refusing to extend international protection where it is otherwise appropriate. It is also important to bear in mind that none of the other Convention grounds are limited by the question of size. Moreover, a broad definition of the group does not mean that all members of the group will qualify as refugees – each applicant must still meet the other criteria of the refugee definition; having a well-founded fear of persecution”.*<sup>127</sup>

Even in the most recent positive decision in respect of women trafficked from Nigeria, the particular social group was defined restrictively as: Nigerian women from Edo State, that are victims of trafficking, that have been exposed to “juju” rituals, and that subsequently escaped the operating system of the traffickers. It is also possible to trace the French court’s approach regarding the necessity for outward visibility of the social group in its reasoning that the victims receive “a disapproving look from not only the main criminal actors but also from the surrounding society”.<sup>128</sup> This reproving look can “characterize a unique identity assigned to them regardless of their will; it follows from these young women belong to a particular social group because of their shared history and their own identity perceived as being different by the surrounding society”.<sup>129</sup>

The UNHCR’s has expressed in the past that approaches which conflate the two elements of the definition, or add additional elements, go beyond what is required under the “social perception” approach, and accordingly could result in the deprivation of refugee status to persons who are entitled to claim it.<sup>130</sup>

### Spotlight – Greece

Some Greek courts have accepted women or a particular category of women as forming a particular social group.

In 2011,<sup>131</sup> the Second Special Refugee Committee granted refugee status to an Iranian citizen who had

122 United Kingdom: Home Office, Country Information and Guidance - Albania: Women fearing domestic violence.

123 See Colloque à l’Occasion des 60 ans de la CNDA (Paris, France, 29 Octobre 2012) “Protection Conventionnelle et protection subsidiaire, complémentarité ou concurrence? L’exemple de la notion d’apparence à un certain groupe social” Keynote Address by Volker Türk, Director of International Protection, UNHCR Geneva, page 6.

124 Colloque à l’Occasion des 60 ans de la CNDA, supra.

125 Mme. G Commission des Recours des Réfugiés (CRR), 04039953/513547 C+, 25 March 2005.

126 Colloque à l’Occasion des 60 ans de la CNDA, supra page 7.

127 Colloque à l’Occasion des 60 ans de la CNDA, supra.

128 Décision No. 10012810, 24 mars 2015, France: Cour nationale du droit d’asile.

129 Décision No. 10012810, 24 mars 2015, France: Cour nationale du droit d’asile.

130 Décision No. 10012810, 24 mars 2015, France: Cour nationale du droit d’asile.

131 Case 95/126761, Second Special Refugee Committee, 2011.

fled Iran due to fear for her life following systematic domestic violence (psychological and physical) by her husband. Amongst other things, the latter forced the applicant into marriage when she tried to escape, planned her stoning and filed criminal charges against her for being a “moharebeh” (enemy of god) due to her atheism, her political beliefs as well as for adultery and abduction of their child.

The Committee recognised that the applicant had a well-founded fear of persecution. It found that her status as a victim of domestic violence and the lack of protection by the Iranian state constituted a “form of gender persecution, because these acts were an affront to human dignity and bodily integrity”. It found that the Iranian law’s provision which allowed flogging or stoning as acceptable forms of punishment meant the applicant faced a severe form of persecution which was unacceptable in light of the prohibition against torture or inhuman or degrading treatment.

The Committee held that the applicant was being persecuted for:

*“being a member of a social group with inherent characteristics (i.e. woman), since due to her “improper” conduct she violated the law, which is based on the traditional or cultural norms and practices of Islam and is part of a situation that cannot be changed because of its historical duration. Her anti-conforming behaviour is subject to the persecutory laws and practices of the state, which impose a disproportionately severe punishment on women that are accused of sexual relations outside their marriage” (emphasis added).*

This result is to be contrasted with the applicant’s initial application, which was rejected on the grounds that she did not meet “the necessary subjective and objective elements of a well-founded fear of persecution” for lack of evidence of personal persecution by Iran based on her race, religion, nationality, social class or political beliefs.

In a separate case,<sup>132</sup> the applicant, from Ethiopia, who had been expelled from the country due to her mother’s Eritrean nationality, was forced to work for a family as a maid for free, without medical care or education. She was forbidden from leaving the house and was sexually abused and attacked by male members of that family.

On appeal, the Refugee Committee considered the applicant to be part of the distinct social group of

single Ethiopian women and recognised her status as a refugee.

It compared the applicant’s claims to reports by international organisations on the situation in Eritrea and Ethiopia: these confirmed the strained relations between Eritrea and Ethiopia, the persecution of citizens with national origin from the other country as well as the high percentages of sexual manipulation of underage girls in these countries and their victimisation by human traffickers. It further recognised the Ethiopian state’s inability to address these issues.

The Committee found both a subjective element of fear (taking into account the length of the applicant’s absence from her country of origin; her lack of family; her removal from the country through trafficking) and an objective element of fear (given the social stigmatisation of single women in Ethiopia, the danger of human trafficking and the difficulty in recognising the applicant’s national origin).

However, proving that one is a member of a particular social group is not straightforward. For example, the Greek Council of State held that:<sup>133</sup>

*“female victims of human trafficking that are in danger of facing violence by non-governmental entities...are protected as refugees if, among other things, it is determined that they are deemed members of a particular social group, they fear persecution due to their participation in this group and the authorities of their country of origin are not in a position or are unwilling to provide protection” (emphasis added).*

The applicant in that case, also from Ethiopia, had argued that she was a victim of human trafficking; that she had been “sold” by her father to an unknown person; and that she had been sexually abused and forced into working as a maid for twelve years. She pleaded that, upon return to Ethiopia, she would be in danger of psychological and sexual violence by the unknown person to whom she had been sold and that the Ethiopian authorities were unable and unwilling to provide protection to victims of human trafficking.

The court found that the applicant’s claims were neither substantiated nor credible, and also that they were not substantiated by UN reports concerning human trafficking and the situation in Ethiopia.

132 Case 4/7788365, Refugee Committee of Byronas, 2013.

133 Case: 119/2010, Greek Council of State, 2010.

134 UNHCR, UNHCR letter to Attorney General relating to the Matter of Rodi Alvarado Peña, A73 753 922 (4 Jan. 2004), p. 11. See also the Guidelines on Gender-Related Persecution, para 32.

## (v) Political opinion

The UNHCR has adopted the stance that the Refugee Convention ground of “political opinion” encompasses opinions on gender roles.<sup>134</sup> An example is non-conformist behaviour of women that leads a persecutor to impute a political opinion to women (irrespective of whether the individual concerned held such political opinion).<sup>135</sup> Indeed, sexual violence by way of retaliation for actual or imputed political opinion has been recognised as constituting “persecution”.<sup>136</sup>

The Guidelines on Gender-Related Persecution note that: “Women are less likely than their male counterparts to engage in high profile political activity and are more often involved in ‘low level’ political activities that reflect dominant gender roles. For example, a woman may work in nursing sick rebel soldiers, in the recruitment of sympathisers, or in the preparation and dissemination of leaflets. Women are also frequently attributed with political opinions of their family or male relatives, and subjected to persecution because of the activities of their male relatives”.<sup>137</sup>

As discussed in the context of the Refugee Convention ground of “race” (above), resorting by default to an analysis under the Refugee Convention ground of “membership of a particular social group” in respect of female applications, can cause the importance of gender in a given case to be confused, or other more appropriate grounds to be overlooked. Once again, in the case of AT and Others, whilst the court of first instance had considered that, “[g]iven the circumstances and cultural factors set out above, female applicants who have been raped by soldiers loyal to Gaddafi or other combatants are also likely to be able to show that they are at real risk as members of a PSG”, the Upper Tribunal in fact found such individuals risked persecution, “not because the person is female, but because she comes within

the risk category that we have identified of former/suspected [Gaddafi] loyalists or supporters.”<sup>138</sup> In other words, women in such circumstances fell to be treated as political refugees in their own right, not as victims of a more passive social group.<sup>139</sup>

## C. CREDIBILITY ASSESSMENT

Many asylum applications are rejected on the basis that the decision-maker, be it a judge, asylum officer or other intermediary, does not find the applicant’s testimony credible.<sup>140</sup> Because there are no specific official directions on how to conduct a credibility assessment,<sup>141</sup> the credibility assessment is not only one of the most challenging aspects of the asylum process but also perhaps the most subjective. While countries and international organisations alike have published guidance on how to assess an applicant’s credibility, the method of conducting the assessment remains largely in the hands of the decision-maker. UNHCR has stated that credibility assessments “cannot be reliant on an individual decision-maker’s subjective approach, assumptions, impressions and intuition”.<sup>142</sup>

In addition to the inherent subjectivity of such a determination, female asylum applicants face higher barriers to achieving credibility for several reasons. First, it is often difficult for women who have experienced sexual assault, abuse, trafficking, or other gender-based violence to divulge the details of these experiences in a male dominated environment.<sup>143</sup> The nerve-wracking environment of a court or interview room, male audience, and post-traumatic stress that afflicts many female asylum-seekers,<sup>144</sup> compounded by usually little knowledge of the asylum process or the language in which the process is being conducted, may induce nervous behaviours that the judge or decision maker will incorrectly interpret against a female applicant’s credibility.<sup>145</sup>

135 Guidelines on Gender-Related Persecution; UNHCR, Guidelines on International Protection No. 7: The Application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to Victims of Trafficking and Persons At Risk of Being Trafficked, 7 April 2006, HCR/GIP/06/07, ¶ 40.

136 See for example: In-Re- D-V-, 21 I.&N. 77 (B.I.A. 1993); and AT and Others (Article 15c; risk categories) Libya CG v. Secretary of State for the Home Department, [2014] UKUT 00318 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 14 July 2014, paras 193 – 194.

137 UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution, supra para 33.

138 AT and Others (Article 15c; risk categories) Libya CG v. Secretary of State for the Home Department, [2014] UKUT 00318 (IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 14 July 2014.

139 For further criticism, see Alice Edwards, ‘Transitioning Gender: Feminist engagement with international refugee law and policy 1950-2010’, in *Refugee Survey Quarterly*, 2010, vol. 29(2), page 27.

140 “The assessment of credibility is often at the core of asylum refusals in Belgium, France, Hungary, Malta, Romania, Spain, Sweden, the UK and Italy.” Hana Cheikh Ali et al., ‘Gender Related Asylum Claims in Europe: A comparative analysis of law policies and practice focusing on women in nine EU Member States’, May 2012, at 77.

141 UNHCR, ‘Beyond Proof: Credibility Assessment in EU Asylum Systems’, May 2013, at 221.

142 ‘Beyond Proof,’ supra at 251.

143 UK Home Office, ‘Uncharted Territory: Violence against migrant, refugee, and asylum-seeking women in Wales’, at 35.

144 ‘Gender Related Asylum Claims in Europe,’ supra n. 222, at 77.

145 ‘Beyond Proof,’ supra n. at 33.

A survey of nine EU Member States reflected the particular difficulties of victims of sexual and gender-based violence in the credibility assessment and the effect, usually negative, that trauma has on credibility findings in gender-related claims. Italy, Malta, and Sweden have been lauded for lowering the standard of proof in cases of sexual and gender-based violence in order to account for the distortions or inconsistencies that can result from trauma.<sup>146</sup> While the UK has put in place provisions to give asylum seekers the benefit of the doubt, often decision-makers still overlook pertinent facts and circumstances, and fail to apply a lower standard of proof in women's asylum claims.<sup>147</sup> Belgium and French asylum authorities are known to deny claims on the basis of a negative credibility finding because the applicant was unable to provide documentation or evidence of their abuse,<sup>148</sup> despite UNHCR guidance that emphasises that documentation is not required to prove sexual and gender-based violence because the documentation often does not exist, and widely-available medical reports that state that the physical signs of sexual and gender-based violence are very often not observable or cease to be observable after a short period of time following the assault, and therefore medical evaluation will not be able to document its occurrence.<sup>149</sup>

Second, it is suggested that judges and decision-makers may lack sufficient training, education, and sensitisation to the particular vulnerabilities of female asylum-seekers,<sup>150</sup> many of whom are often also victims of, or at high risk of experiencing, sexual and gender-based violence.<sup>151</sup> A few European states, notably Bulgaria, Slovenia, Sweden, and Germany, have recognized the need for greater gender-based sensitisation and training of the authorities who are often the first point of contact with female migrants and asylum seekers.<sup>152</sup>

These states have either put in place or are developing guidelines or procedures to more effectively and sensitively identify, handle, and support victims of sexual and gender-based violence, especially through the asylum or other immigration processes. A few Member States still do not have such procedures either in place or in development, including Croatia, Italy, and Hungary<sup>153</sup> - a shortfall which is all the more

acute given that many refugees and asylum seekers' first point of entry into Europe, and therefore first encounter with European authorities, is Italy or Hungary.<sup>154</sup>

### The CREDO Project: Europe's attempt to harmonise credibility assessment procedures

Cognisant of the pitfalls and uncertainty of the credibility assessment in the asylum process and the need for sensitive treatment of female migrants and refugees, the UNHCR, the International Association of Refugee Law Judges (IARLJ) and other organizations partnered to form the CREDO Project, which is partly funded by the European Refugee Fund. The CREDO Project aims to identify the shortcomings in state practice regarding credibility assessments across the EU, what standards of proof are being applied, and to provide guidance in an attempt to harmonise credibility assessment guidelines and improve asylum decision-making in the European Union.<sup>155</sup>

One of the keystone reports produced in 2013 as part of the CREDO Project by UNHCR, 'Beyond Proof: Credibility Assessment in EU Asylum Systems', extensively documents the various approaches to credibility assessment in the EU, and clarifies and outlines key concepts, standards, and factors that should be incorporated into state practice of credibility assessment. The report indicates that approaches to credibility assessment vary significantly across the European Union, and advocates a more structured approach to credibility assessment in accordance with the guidance, standards, and insights elaborated upon in the report. UNHCR's call extends beyond state practice to the need for national legislation and asylum procedural guidance to explicitly incorporate this structured approach, one that supports giving the benefit of the doubt to asylum seekers, producing written decisions that explicitly state the reasons for particular credibility findings, and taking into account each applicant's individual and contextual circumstances.<sup>156</sup> The authors of the report surveyed cases across Europe in order to identify any differences in what constitutes the threshold for establishing credibility in the courts, and once again found profound variation.

146 'Gender Related Asylum Claims in Europe,' supra n. 222, at 88, 79.

147 Helen Muggerridge and Chen Maman, 'Unsustainable: the quality of initial decision-making in women's asylum claims,' *Asylum Aid*, 2011, at 51-59.

148 'Gender Related Asylum Claims in Europe,' supra n. 222, at 88.

149 'Gender Related Asylum Claims in Europe,' supra n. 222, at 77.

150 European Union Agency for Fundamental Human Rights, 'Thematic focus: Gender-based violence,' June 2016.

151 European Union Agency for Fundamental Human Rights, 'Women refugees at high risk of being victims of gender-based violence,' June 17, 2016.

152 'Thematic focus: Gender-based violence,' supra n. 233.

153 'Thematic focus: Gender-based violence,' supra n. 233.

154 Lizzie Dearden, 'Six charts and a map that show where Europe's refugees are coming from - and the perilous journeys they are taking: Record numbers of people fleeing war, persecution and poverty are entering the EU,' *The Independent*, September 2, 2015.

155 European Country of Origin Information Network, 'UNHCR study on credibility assessment in asylum procedures in the EU,' June 6, 2013.

156 'Beyond Proof,' supra n., at 250.

## Spotlight – Belgium

Belgium has not explicitly articulated a level of conviction or persuasiveness for decision-makers, but its case law reflects that the benefit of the doubt should be given to applicants when one is convinced of the credibility of the statements.<sup>157</sup> Furthermore, a 2008 decision by the Belgian appeal authority established that consideration of the substance of a claim should never be excluded even if there are doubts regarding some events about which the applicant testifies, or if the credibility of the applicant has been challenged.<sup>158</sup>

## Spotlight – The Netherlands

Legislation and jurisprudence in the Netherlands seemingly put forward two different standards for establishing credibility. The Aliens Act policy guidance states that, in the ordinary course, the applicant's statements must merely be "plausible". However, in certain circumstances, for instance if the applicant is unable to produce identification documents, the act calls for increased scrutiny of the applicant's case. In that situation, the threshold for credibility is heightened such that statements must be "positively persuasive".<sup>159</sup> The majority of cases that UNHCR sampled from the Netherlands required applicants to meet the higher threshold of "positively persuasive" rather than merely plausible, because in nearly all cases the decision-maker considered the applicant liable for an inability to produce a travel document, identification documents, or other papers said to be necessary for proper assessment of the application.<sup>160</sup>

## Spotlight – The United Kingdom

UK policy guidance and jurisprudence states that decision-makers should adopt one approach to all asylum applications. However, the Supreme Court has held that two different standards of proof for facts asserted by the applicant, the lower threshold of "reasonable likelihood" that the facts are true,<sup>161</sup> and

the more stringent "balance of possibilities" test,<sup>162</sup> may both be consistent with the ECtHR's approach, despite the fact that the latter approach has been criticised for its potential to allow authorities to exclude uncertain facts from their assessment.<sup>163</sup> The most recent guidance from the UK advises that facts which are "beyond a reasonable doubt" true and "probably" true should be accepted, while those that are "beyond a reasonable doubt" false should be rejected,<sup>164</sup> but more importantly every fact, regardless of plausibility (unless definitively disproven), should be accorded some weight, however little.<sup>165</sup> With the UK's exit from the EU, which was driven in part by immigration concerns, it will be crucial for those involved in the asylum process to monitor any change in asylum decision-making based on this historic political shift.

The goal of standardisation and harmonisation across Europe is to ensure that receiving asylum should not be a "lottery" between EU Member States, or within their individual national judicial systems (i.e. significant variation among judges in credibility assessment findings). Increased transparency, consistency, and principled approaches to credibility will advantage all parties involved in the asylum systems in the EU. It will also facilitate the work of UNHCR and similar organisations as they develop revised guidance on conducting credibility assessments in asylum procedures.<sup>166</sup>

The states and other concerned bodies struggling to establish and reinforce quality and consistency in asylum decision-making in the EU will also benefit in terms of practice but additionally, the more standardised asylum decision-making is across Europe, the less that states in which it is perceived that gaining asylum is "easier" will be overwhelmed with asylum applicants, leading to a more manageable spread of applicants across Europe. Lastly, asylum seekers will benefit from a more transparent, predictable, and objective system, which will inevitably produce more just and accurate results in asylum cases.

157 'Beyond Proof,' supra n. at 238, citing Belgian Council of State 186.868, 7.10.2008, para. 1.2.

158 CCE 31st January 2008, in 'Gender Related Asylum Claims in Europe,' at 81.

159 'Beyond Proof,' supra n. 139, at 238, citing Article 31 section 1 Aliens Act 2000; IND Aliens Act Implementation Guidelines (2010) Vc 2000, C14/2.4 (in the version of WBV 2010/10); IND Working Instruction 2010/14, 4 c: "It should be assessed whether the statements of the alien on the alleged factual circumstances, events and assumptions are credible"; and 4.2: "Finally, at the end of the assessment of the statements of the alien a clear conclusion regarding the plausibility of these statements has to be drawn and stated"; IND Working Instruction 2010/14, para. 4.1 (b). See also IND Aliens Act Implementation Guidelines (2010) Vc 2000, C14/2.4 (in the version of WBV 2010/10).

160 'Beyond Proof,' supra n., at 239.

161 *Koyazia Kaja v Secretary of State for the Home Department* [1994] UKIAT 11038, 10 June 1994. LJ Brook at p. 10 in *Karanakaran v*

Secretary of State for the Home Department [2000] EWCA Civ. 11, 25 January 2000, 3 All E.R. 449; see also *Horvath v Secretary of State for the Home Department* [1999] EWCA Civ 3026. However, it should be noted that the Court of Appeal, in its opinion suggested that there was no reason why facts should not be established on the basis of the balance of probabilities approach, and then the prospective risk evaluated according to the 'reasonable degree of likelihood' test.

162 *MA (Somalia) v Secretary of State for the Home Department*, [2010] UKSC 49, 24 November 2010, at para. 20.

163 'Beyond Proof,' supra n., at 239.

164 UK Border Agency (UKBA), 'Considering Asylum Claims and Assessing Credibility,' Asylum Instructions, February 2012, at 13.

165 *Karanakaran v Secretary of State for the Home Department* [2000] EWCA Civ. 11, 25 January 2000; see also UKBA, *Considering Asylum Claims and Assessing Credibility*, February 2012, p. 13, para 4.2.

166 'Beyond Proof,' supra n., 251.

## IV.

# GENDER SENSITIVE PROCEDURES FOR PROCESSING ASYLUM CLAIMS

## A. INTRODUCTION

It has long been recognised that women and girls, and particularly victims of gender-based violence, may face particular difficulties in applying for and obtaining asylum. So, for example, in its Conclusion on Women and Girls at Risk,<sup>167</sup> ExCom acknowledged that “women and girls can be exposed to particular protection problems relating to their gender, their cultural and socio-economic position, and their legal status, which mean they may be less likely than men and boys to be able to exercise their rights and therefore that specific action in favour of women and girls may be necessary...”.

The particular problems faced by women and girls in the process of applying for and obtaining asylum have been the subject of much academic consideration. These problems include:

- (a) Lack of gender-sensitive conditions in reception centres (such as failing to provide strictly separated sanitary facilities and sleeping quarters and overcrowding) which risk exposing women to further sexual and gender-based violence. This is particularly problematic for unaccompanied girls and single women who do not benefit from the protection of family members or fellow travellers;
- (b) Insufficient healthcare (including psychological, reproductive and sexual healthcare and trauma counselling) including, in particular, for the needs of pregnant women, nursing mothers, and victims of sexual and other gender-based violence;
- (c) Lack of awareness that women and children can file individual applications for asylum. This may be particularly significant in situations where a woman is a victim of domestic violence since a woman who

is able to obtain asylum in her own right will be less dependent on her family or husband;

- (d) Difficulty in obtaining and presenting evidence of, for example, gender-based violence, with the result that female asylum seekers are often considered to be less credible than men;
- (e) Cultural and other reasons which may mean that women (particularly those who have suffered domestic or sexual abuse) may find it difficult to talk about their experiences, particularly if the interviewer is a man; and
- (f) Responsibility for the care of children and the elderly in the family, leaving little time to concentrate on application procedures.

In this section of the report, we identify the key international and EU law instruments which govern the process by which women and girls may apply for asylum in Europe (and particularly within the EU) and the conditions in which they should be permitted to do so. We then go on to consider recent analysis of the extent to which the rights of women and girls have been observed in the course of the current crisis.

## B. THE LEGAL FRAMEWORK

### International law and guidance

The Refugee Convention is silent as to the manner in which an application for asylum (or other international protection) is dealt with, and as to the conditions in which applicants are to be treated prior to the determination of their application. However, at a general level, both CEDAW and the Convention on the Rights of the Child (“CRC”)<sup>168</sup> impose obligations on States parties to ensure that the rights of women and girls are protected in the asylum process.

<sup>167</sup> UNHCR, Conclusion on Women and Girls at Risk, 6 October 2006.

<sup>168</sup> UN General Assembly, Convention on the Rights of the Child (CRC), 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3.

Article 1 of CEDAW, for example, obliges States parties to “take all appropriate measures to eliminate discrimination against women” (including gender-based violence).<sup>169</sup> Similarly, Article 2 of the CRC obliges States parties to “take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child’s parents, legal guardians, or family members” and sets out specific obligations in relation to, for example, family reunification (Article 10), protection from violence and exploitation (Articles 19 and 34) and protection and humanitarian assistance (Article 22).

Of more direct significance, Article 60 of the Istanbul Convention requires states to develop gender-sensitive reception procedures, support services and asylum procedures (including refugee status determination and applications for international protection).

The Council of Europe has also adopted Resolution 1765 (2010) ‘Gender-related claims for asylum’ which sets out various recommendations in order to ensure that asylum procedures within States parties are sufficiently sensitive to gender-related claims and to the particular needs of victims of gender-based violence.

Finally, non-binding but important international guidelines concerning the standards for the reception of applicants for international protections (“reception conditions”) have also been published by various international bodies, including the UNHCR and the IASC. These include:

- (a) UNHCR’s 2008 Handbook for the Protection of Women and Girls;<sup>170</sup>
- (b) UNHCR’s Recommendations as Regards Harmonisation of Reception Standards for Asylum Seekers in the European Union;<sup>171</sup>

- (c) UNHCR’s Guidelines on the Applicable Criteria and Standards relating to the Detention of Asylum-Seekers and Alternatives to Detention;<sup>172</sup>
- (d) IASC’s Gender Handbook in Humanitarian Action;<sup>173</sup>
- (e) IASC’s Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action;<sup>174</sup> and
- (f) The SPHERE Standards.<sup>175</sup>

### The Dublin III Regulation

The Dublin III Regulation establishes criteria and mechanisms for determining which Member State is responsible for examining an application for international protection, and makes provision for applicants to be transferred among Member States for this purpose.

Chapter III of the Dublin III Regulation sets out a hierarchy of criteria for determining the Member State responsible for examining any application. Although these criteria give priority to Member States with which an applicant already has family connections (Articles 8 to 11), in practice the criteria relied on most commonly are (i) that the relevant Member State has issued a valid residence document or visa to the applicant (Article 12); or (ii) that the relevant Member State is the one which the applicant first entered “irregularly” (Article 13). This has the effect of placing a substantial share of the responsibility for examining asylum applications on Member States at the external border of the EU.<sup>176</sup>

The implementation of the Dublin III Regulation largely broke down in the face of the recent migrant crisis.

169 The significance of CEDAW in this regard is acknowledged in, for example, the UK Border Agency’s Instruction on ‘Gender Issues in the Asylum Claim’ which states that “in addition to the UK’s obligations under the 1951 Refugee Convention and the European Convention on Human Rights (ECHR), and the minimum standards for protection set by the EU Qualification Directive, there are international and national legal instruments which impose positive duties on the UK to eliminate discrimination and gender-based violence; these include for example the UN Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) ratified by the UK in 1986, the ECHR as implemented by the Human Rights Act 1998 and the Gender Equality Duty introduced into the Sex Discrimination Act 1975 by the Equality Act 2006.”

170 UNHCR, Handbook for the Protection of Women and Girls, January 2008.

171 UNHCR, Reception Standards for Asylum Seekers in the European Union, July 2000.

172 UNHCR, Detention Guidelines, 2012.

173 Inter-Agency Standing Committee (IASC), Women, Girls, Boys, and Men: Different Needs—Equal Opportunities, December 2006.

174 IASC, Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action, 2015.

175 The Sphere Project, Humanitarian Charter and Minimum Standards in Humanitarian Response, 2011.

176 Article 3(2) provides that where it is not possible to designate a responsible Member State on the basis of the above criteria, the first Member State in which the application for international protection was lodged shall be responsible, unless it is impossible to transfer an applicant to that Member State “because there are substantial grounds for believing that there are systemic flaws in the asylum procedure and in the reception conditions for applicants in that Member State, resulting in a risk of inhuman or degrading treatment”. We note that a number of states have suspended the return of applicants to, for example, Hungary in light of concerns about its asylum system. See European Council on Refugees and Exiles, Case Law Fact Sheet: Prevention of Dublin Transfers to Hungary, January 2016.

## The Reception Conditions Directive

Although not directed specifically to the needs of women and girls, the Reception Conditions Directive lays down certain minimum standards which should protect women and girls in reception centres (and in detention).

- (a) Article 5 provides that Member States shall inform applicants for asylum “within a reasonable time” after they have lodged their application of at least any established benefits relating to reception conditions. Member States must also provide information to applicants (in a language that they understand or are reasonably supposed to understand) on organisations that provide specific legal assistance or concerning the available reception conditions, including health care;
- (b) Articles 8 to 11 are concerned with detention of asylum seekers. These Articles make clear that, where applicants for asylum are detained, they should be detained only where it proves necessary, for as short a period as possible and in specialised detention facilities. Article 11 requires Member States to ensure that female applicants are detained separately from men (unless they are family members) and that the health, including the mental health, of vulnerable persons shall be of primary concern. (For the purposes of the Directive, vulnerable detainees are defined in Article 21 and include pregnant women, single parents with minor children, victims of human trafficking and persons who have been subject to torture, rape or serious sexual violence, including FGM);
- (c) Article 17 obliges Member States to make “material reception conditions” (i.e. housing, food and clothing) available to applicants for international protection. Article 18, in turn, requires Member States to take into consideration any gender and age-specific concerns, and to take appropriate measures to prevent assault and gender-based violence, within reception and accommodation centres. In addition, Member States must take into account the specific situation of vulnerable persons;

- (d) Article 19 requires Member States to provide necessary medical or other assistance to vulnerable persons;
- (e) Articles 21 to 25 are concerned with vulnerable persons (including minors) and require Member States to assess whether an applicant is a vulnerable person and to take into account any associated “special reception needs” throughout the duration of the asylum procedure. Article 25 makes specific provision for victims of torture, rape and other serious acts of violence and obliges Member States to provide necessary medical and psychological care and to ensure that those working with victims of torture, rape or serious acts of violence are properly trained and subject to obligations of confidentiality;
- (f) Article 28 requires Member States to put in place relevant mechanisms in order to ensure that appropriate guidance, monitoring and control of the level of reception conditions are established, and to submit relevant information to the Commission concerning, inter alia, the steps taken to identify persons with special reception needs; and
- (g) Article 29, finally, requires that authorities implementing the Directive should have received the necessary training to deal with the needs of both male and female applicants.

## The Asylum Procedures Directive

Like the Reception Conditions Directive, the Asylum Procedures Directive is of general application and is not directly concerned with the protection of women and girls. That said, the Asylum Procedures Directive contains a number of provisions relating to the process of applying for asylum which should benefit women and girls and, particularly, victims of sexual and/or gender-based violence.

- (a) The Recitals to the Asylum Procedures Directive make clear that certain applicants may require special procedural guarantees due, inter alia, to their gender or as a consequence of rape or other serious psychological, physical or sexual violence. Member States should endeavour to identify applicants in need of such guarantees and such applicants should, where necessary, be exempted

from accelerated or border procedures which cannot meet their needs. In any event, examination procedures should be gender-neutral and should take into account the complexity of gender-related claims (Recitals 29 to 32);

- (b) Article 4 of the Asylum Procedures Directive obliges Member States to ensure that personnel dealing with asylum applications are properly trained. Such training shall include issues related to the handling of asylum applications from minors and vulnerable persons with specific needs and shall take into account training established and developed by the European Asylum Support Office (which includes dedicated training modules on gender, gender identity and sexual orientation, and on interviewing vulnerable persons);
- (c) Articles 7 and 8 require Member States to ensure that each adult with legal capacity has the right to make their own, individual, application for international protection and require Member States to inform potential applicants of the possibility of making such an application. In particular, Article 7(2), while permitting an applicant to make an application on behalf of his or her dependants, requires Member States to inform each dependent adult of the procedural consequences of the lodging of an application on his or her behalf “and of his or her right to make a separate application”. In the case of applications made on behalf of an applicant’s dependents, Article 11(3) permits Member States to take a single decision in relation to all dependants, unless doing so could jeopardise an applicant’s interests, particularly in cases involving, inter alia, gender-based persecution;
- (d) Articles 14 and 15 provide that applicants (and, where an application is made on behalf of the applicant’s dependants, each dependant adult) shall be given the opportunity of a personal interview in relation to their application. Such interviews shall normally take place without the presence of family members, under conditions which ensure appropriate confidentiality and which allow the applicant to present their case in a comprehensive manner, including by

ensuring that:

- (i) The person conducting the interview is competent to take account of the applicant’s particular circumstances, including the applicant’s cultural origin, gender and vulnerability; and
- (ii) The interviewer and any interpreter are the same gender as the applicant;
- (e) Article 24 requires Member States to assess “within a reasonable period of time” after an application is made whether the applicant is in need of special procedural guarantees and to provide any such applicant with adequate support in order to allow them to benefit from the rights under the Directive;
- (f) Article 33 provides that Member States are not required to examine whether an applicant qualifies for international protection if their application is considered inadmissible. For these purposes, Article 33 provides that Member States may only consider an application to be inadmissible if (i) another Member State has already granted protection; (ii) a country which is not a Member State is a first country of asylum (i.e. another state which will protect the applicant) or a safe third country (i.e. a state in which an applicant can seek refugee status and in which their rights to life, liberty, non-refoulement and non-removal are respected); or (iii) where an application has previously been made. Relatedly, Article 39 provides that Member States may choose not to examine an application made by an applicant who has entered its territory “illegally” from a European safe third country (i.e. a country which has signed and observes the Geneva Convention, has an asylum procedure prescribed by law and has ratified ECHR); and
- (g) Article 49 requires Member States to take all appropriate measures to establish direct cooperation and an exchange of information between their respective authorities responsible for examining applications for international protection.

In addition to the various Directives outlined above, Directive 2012/92/EU of 25 October 2012 establishing minimum standards on the rights,

support and protection of victims of crime (recast) obliges Member States to inform and support victims of crimes committed in EU Member States. Such protection includes, for example, trauma support and counselling. This Directive also potentially applies to asylum seekers because it applies to victims in a non-discriminatory manner, including with respect to their residence status.

### Local asylum guidelines

As well as the various legal instruments identified above, the border agencies of a number of EU Member States have issued formal guidance to their agents regarding gender-sensitivity in relation to asylum system and/or incorporating aspects of gender sensitivity in immigration officers' training.

The UK Border Agency, for example, has issued an instruction on 'Gender Issues in the Asylum Claim' which makes clear that "the UK Border Agency accepts that acts of a gender-specific nature, other than sexual violence, may...constitute persecution" and offers guidance on, among other things, requests for female interviewers, the provision of childcare facilities, late disclosure of information concerning gender-based violence and the potential significance of gender and cultural norms in assessing an applicant's credibility.

## C. CHANGES TO THE EU ACQUIS

In its 6 April 2016 Communication<sup>177</sup> the Commission recognised that the CEAS is characterised by differing treatment of asylum seekers, including in terms of asylum procedures and reception conditions, and that there is divergence between Member States in relation to decisions to grant refugee status or subsidiary protection to applicants from a given country of origin.

Accordingly, in May and July 2016, the Commission published proposals for various directives and

regulations to replace the key instruments that make up the acquis. These instruments include:

- (a) The Proposed Qualification Regulation;
- (b) A recasting of the Dublin III Regulation<sup>178</sup> (the "Proposed Dublin III Regulation");
- (c) A recasting of the Reception Conditions Directive<sup>179</sup> (the "Proposed Reception Conditions Directive");
- (d) A proposed regulation to replace the Asylum Procedures Directive<sup>180</sup> (the "Proposed Asylum Procedures Regulation"); and
- (e) A proposed regulation establishing a Union Resettlement Framework<sup>181</sup> (the "Proposed Resettlement Regulation").

Like the Communication, these instruments recognise that there are "notable differences between the Member States in the types of procedures used, the reception conditions provided to applicants, the recognition rates and the type of protection granted to beneficiaries of international protection". The Commission says that these differences "contribute to secondary movements and asylum shopping, create pull factors, and ultimately lead to an uneven distribution among the Member States of the responsibility to offer protection to those in need".

As explained below, a number of these instruments contain provisions which should, if implemented properly, serve to increase the protections afforded to female refugees and asylum seekers.

### The Proposed Dublin III Regulation

The Proposed Dublin III Regulation introduces a number of measures designed to streamline the processes for determining the Member State responsible for examining any application for international protection, and to identify "inadmissible" applications at the earliest opportunity. In particular,

177 Communication from the Commission to The European Parliament and The Council Towards A Reform of The Common European Asylum System and Enhancing Legal Avenues To Europe COM(2016) 197.

178 European Commission, Regulation of the European Parliament and of the Council establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person, May 4, 2016, COM(2016) 270.

179 European Commission, Proposal for a Directive of the European Parliament of the Council laying down standards for the reception of applicants for international protection, 13 July 2016, COM(2016) 465.

180 European Commission, Proposal for a Directive of the European Parliament of the Council establishing a common procedure for international protection in the Union and repealing Directive 2013/32/EU, 13 July 2016, COM(2016) 467.

181 European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing a Union Resettlement Framework and amending Regulation (EU) No 516/2014 of the European Parliament and the Council, 13 July 2016, COM(2016) 468.

the Proposed Dublin III Regulation introduces amendments to Article 3 of the Dublin III Regulation which would oblige the first Member State in which an application for international protection is lodged to:

- (a) examine whether that application is inadmissible because a non-Member State should be considered a first country of asylum or safe third country (as defined in Articles 35 and 38 of the Asylum Procedures Directive). In short, these provisions would potentially apply where the applicant has entered the EU from a third country which, in the view of the authority examining the application, will protect the applicant and/or in which the applicant can seek refugee status and in which their rights to life, liberty, non-refoulement and non-removal are respected; or
- (b) adopt an accelerated procedure for examining the application if the applicant is a national of, or formerly resided in, a safe country of origin (i.e. a country as to which it can be shown that there is generally and consistently no persecution, torture or inhuman or degrading treatment or punishment and no threat of indiscriminate violence in a situation of armed conflict).

The Proposed Dublin III Regulation would also impose obligations on applicants who enter EU territory irregularly to make an application for international protection in the first Member State so entered. If the applicant fails to do so, the Member State ultimately responsible for examining the applicant's application must do so in an accelerated procedure. Furthermore, an applicant shall not be entitled to the reception conditions in Articles 14 to 19 of the Reception Conditions Directive<sup>182</sup> (with the exception of emergency healthcare) in any Member State other than the one in which he or she is required to be present.

### The Proposed Reception Conditions Directive

The changes in the Proposed Reception Conditions Directive are "limited and targeted" and are said by the Commission to take into account Member States obligations under the Istanbul Convention and to underline the need for Member States "to take into

account the individual behaviour and the particular circumstances of the applicant and to need to respect his or her dignity or personal integrity, including the applicant's special reception needs". Among other things the Proposed Reception Conditions Directive:

- (a) Requires Member States to inform applicants for international protection of any established benefits relating to reception conditions sooner (Article 5), and to make material reception conditions available to applicants "from the moment" they apply for international protection (Recital 7, Article 16);
- (b) Requires Member States to identify vulnerable applicants (i.e. applicants with "special reception needs") more quickly by ensuring that applicants' needs are assessed "systematically", "as early as possible after an application for international protection is made" and by properly trained staff. Staff must also record an applicants' special reception needs in the applicant's file and must refer applicants to a doctor or psychologist for further assessment where there are indications that the applicant may have been a victim of torture, rape or other form of serious psychological, physical or sexual violence and that this could affect their reception needs (Article 21); and
- (c) Extends the obligation in Article 25 of the Reception Conditions Directive to require Member States also to provide necessary medical and psychological care to victims of "gender-based harm" (Article 24).

### The Proposed Asylum Procedures Regulation

The objective of the Proposed Asylum Procedures Regulation is said to be to establish a fair and efficient ("streamlined") procedure throughout the Union, involving (i) "simpler, clearer and shorter procedures"; (ii) adequate procedural guarantees; (iii) stricter rules to prevent abuse of the system; and (iv) harmonised rules on safe countries. To that end, the Proposed Asylum Procedures Regulation:

- (a) Requires the determining authority to provide applicants with information about their rights and obligations (Article 8) and

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<sup>182</sup> i.e. schooling and education, employment, vocational training material reception conditions and non-emergency healthcare.

provides for applicants to have separate interviews in relation to the admissibility (Article 10) and the merits (Article 11) of their application. The person conducting such interview must be competent to take account of the personal and general circumstances surrounding the application (Article 12). Applicants shall be provided with an interpreter and, when requested, the interviewer and any interpreter shall be the same gender as the applicant (Article 12). Such interviews shall be recorded (Article 13);

- (b) Like the Proposed Reception Conditions Directive, requires Member States to “systematically assess” whether applicants require special procedural guarantees (Article 19) and to initiate the process of identifying applicants with special procedural needs “as soon as an application is made”. Personnel responsible for receiving and registering applicants shall, when registering applications, indicate whether or not the applicant presents “first indications of vulnerability”. Such needs must be recorded and the applicant must be referred to a doctor or psychologist for further assessment where there are indications that the applicant may have been a victim of torture, rape or other form of serious psychological, physical or sexual violence “and that this could adversely affect their ability to participate effectively in the procedure” (Article 21);
- (c) Provides that where applicants have been identified as in need of special procedural guarantees, such applicants “shall be provided with adequate support”. Furthermore, the determining authority shall cease to apply accelerated examination procedures (see below) if such support cannot be provided within those procedures (Article 19);
- (d) Sets out specific deadlines by when various steps in the application process should be completed. For example, applications for asylum must be registered promptly and, in any event, within three days (Article 27); the applicant must then lodge the application, together with “all the elements needed for substantiating their application” within ten working days of registration (Article

28); the examination to determine the admissibility of the application shall then be completed within one month (or just 10 days where the Member State applies the safe third country/first country of asylum concept) (Article 34(1)); the examination on the merits should then be completed no later than six months from the lodging of the application (Article 34(2)). The Proposed Asylum Procedures Regulation also requires the determining authority to accelerate the examination on the merits in certain circumstances, including where the applicant has made “clearly inconsistent and contradictory, clearly false or obviously improbable representations which contradict sufficiently verified country of origin information” (Article 40) and provides that certain decisions (including where the examination of the application has been accelerated) may be taken at the border or in transit zones (Article 41); and

- (e) Provides that decisions on applications shall be taken after an appropriate examination as to the admissibility or merits of the application. Such applications must be examined “objectively, impartially and on an individual basis”, taking into account the statements and documentation presented by the applicant and, among other things, all relevant, accurate and up-to-date information relating to the situation prevailing in the applicant’s country of origin (Article 33).

### The Proposed Resettlement Regulation

The Proposed Resettlement Regulation provides for the establishment of a Union Resettlement Framework to provide for the legal and safe arrival of third country nationals and stateless persons (Article 3) and sets out certain eligibility criteria for nationals to qualify for such resettlement schemes (Article 5) and certain grounds for exclusion (Article 6). Those eligible for the schemes include women and girls at risk and survivors of violence and/or torture, including on the basis of gender. The Proposed Resettlement Regulation makes clear that, in determining the regions or third countries from which resettlement shall occur, the Commission shall consider: (i) the number of persons in need; (ii) complementarity with financial and technical assistance; (iii) the Unions relations with that country; and (iv) that country’s cooperation with the Union in the area of migration and asylum (Article 4).

Articles 10 and 11 set out the 'ordinary' and 'expedited' procedures, respectively, for assessing whether third-country nationals or stateless persons fall within the scope of a scheme and permit Member States to give preference to persons with, inter alia, particular protection needs or vulnerabilities.

### Safe Countries

One issue that warrants further consideration in the context of the process of applying for asylum is the use in EU law of the concepts of (i) safe country of origin; and (ii) safe third country/first country of asylum. Although related, the concepts have different consequences: the safe country of origin concept goes to the heart of the application by creating a presumption that a national of a 'safe' state will not be subject to persecution; the safe third country/first country of asylum concept relates to the procedural question of where the applicant should apply for asylum.

Articles 36 and 37 of the Asylum Procedures Directive make provision for Member States to designate safe countries of origin and although a number of individual Member States have promulgated their own lists of safe countries of origin, in September 2015 the Commission published a proposed regulation to establish a common EU-wide list of safe countries of origin<sup>183</sup> comprising of: Albania; Bosnia and Herzegovina; the former Yugoslav Republic of Macedonia; Kosovo; Montenegro; Serbia; and Turkey. That list has been incorporated into the Proposed Asylum Procedures Regulation.

However, the explanatory memorandum to the list of safe countries of origin raises a number of serious questions as to whether the countries listed are, in fact, sufficiently safe (from a gender-based perspective, or otherwise) and whether it is appropriate to erode the procedural safeguards offered to applicants from those countries. For example, according to the data cited by the Commission in the explanatory memorandum:

- (a) LGBTI people have been the subject of persecution in all of the States concerned;

- (b) There has been persecution in some states against, for example: Roma (Albania, Macedonia, Montenegro, Serbia), religious and ethnic minorities (Kosovo, Serbia, Turkey) women (Kosovo) and children (Bosnia and Herzegovina, Macedonia); and

- (c) A relatively high proportion of asylum claims made to EU Member States by Turkish citizens in 2014 (23%) were in fact successful<sup>184</sup> (indeed, Turkey had not previously been included on any of the safe country of origin lists promulgated by the Member States).<sup>185</sup>

In the circumstances, it is questionable whether the list proposed by the Commission is reasonable.

The safe third country/first country of asylum concept is, in any event, potentially problematic. In particular, there would appear to be a risk that the emphasis on safe third country/country of origin criteria, and on expedited procedures for determining the admissibility of applications, could have a detrimental impact on women and girls seeking asylum.

This is because, among other matters, "accelerated procedures have a negative impact on gender-related asylum claims because shorter timeframes make it difficult for women to disclose sexual violence or rape and to gather expert country or medical evidence".<sup>186</sup> Such difficulties may even be compounded if, as is the case in certain Member States, accelerated procedures are adopted which also involve other restrictions on the applicant's ability to present her case, such as restrictions on legal aid, a lack of any suspensive appeal etc.

Furthermore, while the Asylum Procedures Directive does impose certain minimum standards before a Member State can apply the safe third country standard, it does not require the relevant third country to have a fair, efficient or gender-sensitive asylum procedure.

183 European Commission, Proposal for a Regulation of The European Parliament and of The Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing international protection, and amending Directive 2013/32/EU.

184 310 claims were successful: Recital 62 of the Proposed Asylum Procedures Regulation.

185 Steve Peers, 'Safe countries of origin: Assessing the new proposal', EU Law Analysis, September 14, 2015. See also Amnesty International,

"Turkey 'safe country' sham revealed as dozens of Afghans forcibly returned hours after European Union refugee deal", 23 March 2016; "Europe's gatekeeper: unlawful detention and deportation of refugees from Turkey", 16 December 2015; and "European Union-Turkey deal: Greek decision highlights fundamental flaws", 20 May 2016. On the appeal won by a Syrian national who arrived in Greece against a decision that would have led to his forcible return to Turkey, see Human Rights Watch, "Turkey: border guards kill and injure asylum seekers — border lock-down puts Syrian lives at risk", 10 May 2016.

186 Directorate-General for Internal Policies, Gender Related Asylum Claims in Europe, 2012.

The explanatory memorandum to the Proposed Asylum Procedures Regulation makes clear that, during the process of consultation in relation to that proposal, “[m]ost representatives of civil society cautioned against the mandatory use of concepts [sic] first country of asylum and safe third country, and of special procedures in general...several stakeholders argued that vulnerable stakeholders, and in particular unaccompanied minors, should be exempted from the application of special procedures”. Accordingly, although the Proposed Asylum Procedures Regulation places considerable emphasis on the safe third country/first country of asylum concept (Section V), it also contains a number of provisions which should serve to protect vulnerable applicants from the application of these principles. For example, the Proposed Asylum Procedures Regulation requires the determining authority to conduct an individual assessment in order to determine if the relevant country is safe for the “particular applicant” (Article 45(3), Recital 46) and provides that certain expedited procedures and border procedures which would otherwise apply shall be disapplied in the case of applicants in need of special procedural guarantees (Article 19).

This issue has recently come into sharp focus in light of efforts by Italy to designate Libya as a safe third country<sup>187</sup> and, in particular, with the March 2016 EU-Turkey Joint Action and subsequent Statement. Under that deal, from 20 March 2016 all new irregular migrants and asylum seekers arriving from Turkey to the Greek islands and whose application for asylum have been declared inadmissible should be returned to Turkey.<sup>188</sup> However, for every Syrian returned, the EU will resettle a Syrian from Turkey to the EU. Priority will be given to migrants who have not previously entered or tried to enter the EU irregularly, within the framework of the existing commitments. In April 2016, the European Commission wrote in relation to the agreement that: “The measures required careful consideration to ensure full compliance with EU and international law, and it has been made clear that refugee protection safeguards will continue to be fully respected, with any application for asylum being processed individually by the Greek authorities with a right of appeal”.<sup>189</sup>

In order to fast-track the implementation of the resettlement leg of the 1:1 scheme, standard

operating procedures have been developed in close cooperation between the Commission, Member States, UNHCR and Turkey.<sup>190</sup> The system envisages the initial referral by Turkey to UNHCR of a list of candidates to be resettled and the involvement of UNHCR in identifying the Syrians willing to be resettled, assessing their vulnerability and referring them to the specific Member States. Member States will then make the final decision regarding the selection of people to be resettled and will carry out their own security checks.

The Note of the Council of Ministers which sets out the relevant procedure describes the UN vulnerability criteria as including: women and girls at risk; survivors of violence and/or torture; refugees with legal and/or physical protection needs; refugees with medical needs or disabilities; children and adolescents at risk.

However, the Note also specifies that a number of other categories of individuals are not eligible for settlement within the EU. This includes families with complex or unclear profiles. Complex profiles for these purposes include: (i) under-aged spouses; and (ii) further spouse(s), where the family member already has a spouse living with him or her. This restriction is therefore likely to affect disproportionately women and girls who are presumably already in a vulnerable position. It would be good to gather from the relevant sources in Member States in particular how this restriction has been interpreted and implemented since the EU-Turkey deal was struck, and more widely how the category of “women and girls at risk” has been interpreted in practice by the Member States.

Putting aside the restriction above which appears rather problematic, the fact that women and girls at risk have been singled out under the vulnerability criteria is positive, subject to the interpretation of that category by Member States.

The procedure for resettlement under the deal is, however, also prone to failings with respect to women. In practice, the Directorate General of Migration Management (“DGMM”) shares with UNHCR a list of persons falling within the target group (described above), ensuring in particular that family unity can be maintained. The number of persons on the list should be commensurate with the number of Syrians

187 See UNHCR, Position on Returns to Libya, November 2014.

188 For UNHCR's view on the legal considerations that are relevant to the return and readmission of persons in need of international protection from Greece to Turkey under the EU-Turkey Joint Action Plan, see UNHCR, ‘Legal considerations on the return of asylum-seekers and refugees from Greece to Turkey as part of the EU-Turkey Cooperation in Tackling the Migration Crisis under the safe third country and first country of asylum concept’, March 23, 2016.

189 European Commission, ‘First report on the progress made in the implementation of the EU-Turkey Statement’, April 20, 2016.

190 Council of the European Union, Note from the Presidency to the Representatives of the Governments of the Member States on Standard Operating Procedures implementing the mechanism for resettlement from Turkey to the EU as set out in the EU-Turkey Statement of 18 March 2016, April 27 2016.

returned from Greece to Turkey. The list should contain information concerning: (i) identity data (name, date of birth, nationality, spouse, children/dependants identity documents, and registration number); (ii) date of registration with Turkish authorities; and (iii) UNHCR resettlement submission category.

With respect to each category of information listed above, it is highly plausible and in fact likely that women and girls have poorer records than men (or none at all). For that reason, it seems to us essential that women are assisted when they are contacted by the DGMM (whether alone or as part of families) in order to establish and communicate their identity data, provide identity documents, and establish that they have indeed been registered with the Turkish authorities. It is important that, where possible, this information is properly organized before the UNHCR contacts the person on the list received from DGMM.

As part of their enquiry DGMM will ask the persons on the list their whereabouts, family composition and willingness to participate in the scheme. With respect to complex profiles, one can imagine situations where families who may be in a complex situation with an under-aged spouse or a “further” spouse, misrepresent their true family situation in order to be eligible for resettlement either by misrepresenting the nature of relationships within a family or omitting to mention certain members (like other spouses). This will be difficult to establish and should be factually investigated on the ground in camps and by UNHCR when interviews are conducted. These face-to-face interviews where personal information is collected and documents (where available) are examined, are an opportunity to establish whether the persons fall evidently within one of the UNHCR resettlement submission categories and, if not, why not. From a gender equality perspective, it would be very useful if UNHCR kept records and data from these interviews, in particular relating to family composition, status of women and identification or other practical difficulties rendering a resettlement more challenging, perhaps impossible.

As of 15 June 2016, approximately 500 Syrians had been resettled in Europe under the EU-Turkey deal,<sup>191</sup> despite the sharp fall of illegal immigration

into Greece. It appears at this stage that the deal is at a risk of unravelling due to: (i) Turkey's refusal to change its anti-terror laws (to meet a key EU demand on visa-free travel); and (ii) the mismatch in expectations between Turkey and the EU over how many Syrians will be resettled in Europe.<sup>192</sup>

## D. GAPS IN PROTECTION

Although the various instruments which currently make up the CEAS include a number of provisions which potentially assist asylum-seeking women and girls to overcome the difficulties they face, the absence of specific and generally applicable EU-wide rules, means that the treatment of asylum seekers is largely subject to local-law implementation of CEAS and, crucially, to the (often informal) practices adopted by the relevant local authorities. Indeed, despite the various legal and non-legal instruments identified above, in its resolution of 8 March 2016,<sup>193</sup> the European Parliament confirmed that “there is a great degree of gender inequality for asylum seekers across the European Union” and that “women and LGBTI people are subject to specific forms of gender-based persecution, which is still too often not recognised in asylum procedures”.

These difficulties have been echoed in a number of recent studies into the fate of (particularly) women and girls along the common ‘migrant routes’ into Europe, particularly within Greece<sup>194</sup> and the FYR Macedonia,<sup>195</sup> Serbia<sup>196</sup> and Slovenia (FYR Macedonia and Serbia are not, of course, EU Member States, although both are signatories to the Istanbul Convention, which Serbia also ratified in November 2013).

Among other problems, these studies identified:

- (a) Many European countries have proved unwilling, or unable, to host large numbers of asylum seekers. Those that see themselves primarily as ‘transit countries’ have failed to put in place appropriate structures to process large numbers of individuals seeking long term protection and to support asylum seekers, leaving women and girls vulnerable to violence and exploitation;

191 European Commission, Press Release “Relocation and Resettlement: Increased efforts on resettlement and relocation must be sustained” (15 June 2016).

192 EU countries have said they expect to see 12,000 refugees relocated from Turkey, well below the 72,000 places that are available under EU law, and far below the expectations of Turkey, which is sheltering over 3 million refugees.

193 European Parliament, The situation of women refugees and asylum seekers in the EU, 8 March 2016.

194 UNHCR, A Summary of Assessment Findings and Recommendations; The Situation of Refugee and Migrant Women; Greece 2016, 23 January 2017.

195 UNHCR, ‘Initial Assessment Report: Protection Risks for Women and Girls in the European Refugee and Migrant Crisis; Greece and the former Yugoslav Republic of Macedonia’, 20 January 2016.

196 UN Women, ‘Gender Assessment of the Refugee and Migration Crisis in Serbia and FYR Macedonia’, January 2016.

- (b) A perception among government agencies and humanitarian actors that sexual and gender-based violence (“SGBV”) is not a major feature of the current “refugee and migration crisis” due, in part, to a lack of data on SGBV incidents. This, in turn, has resulted in a lack of government-supported systems to identify and respond to SGBV concerns and limited SGBV capacity and expertise with limited number of personnel who are familiar with these issues available to provide needed support;
- (c) Limited sharing of information among government agencies. Such failure makes it more difficult for survivors of gender-based persecution, including various forms of SGBV, to be identified quickly; to obtain prompt access relevant services; and to avoid having to share the details of their experience multiple times;
- (d) A lack of gender segregated facilities and safe spaces for women and girls in reception centres (which limitations are exacerbated by over-crowding in such centres); facilities which the European Parliament has identified as “the most basic needs to prevent gender based violence”. The demand for services that do respond to the needs of women and girls far outstrips supply;
- (e) Inadequate provision of language appropriate information to asylum seekers concerning their journey, their rights (including their rights to apply for asylum in the so-called transit countries) and the services available to them, together with a lack of (particularly female) translators; and
- (f) A lack of referral pathways, which, in turn, compounds a reluctance on the part of migrants to access health and other services in order not to delay their journey and that of their family.

Similar problems have also been identified within ‘destination’ countries within the EU such as Germany and Sweden:<sup>197</sup>

- (a) A lack of standardised procedures to identify and support victims of gender-based violence and other vulnerable women and girls;
- (b) A lack of suitably trained personnel to identify victims of gender-based violence and other traumatised people;
- (c) Overcrowded reception and accommodation centres, often without private spaces for individuals or families and sometimes without gender-segregated toilet, shower and other facilities. Such overcrowding has led to delays in the processing of asylum applications which delays, in turn, mean that applicants have to endure lengthy stays in unsuitable reception centres;
- (d) Insufficient healthcare (including psychological care). Indeed, in Germany such care is, in any event, limited to emergency care for acute diseases or pain and the availability of some emergency care (including emergency post-rape care) is uncertain and depends on the discretion of individual hospitals; and
- (e) Lack of information about applicants’ rights.

Although beyond the scope of this Report, we note that family reunification within the EU (which the UNHCR has observed is “in most cases...the first priority for refugees upon receiving status”) is similarly affected by inconsistency of application and “practical obstacles...leading to prolonged separation, significant procedural costs and no realistic possibility of success”.<sup>198</sup> Indeed, in a 2014 Communication in relation to the EU Family Reunification Directive<sup>199</sup> the Commission noted that a 2008 report on the implementation of the Directive “concluded that there were a number of cross-cutting issues of incorrect transposition or misapplication of the Directive and that its impact on harmonisation in the field of family reunification remained limited” and made

197 Women’s Refugee Commission (WRC), ‘Falling Through the Cracks: Refugee Women and Girls in Germany and Sweden’, March 9, 2016; and European Parliament Directorate General for Internal Policy, ‘Reception of female refugees and asylum seekers in the EU Case Study Germany’, February 2016.

198 UNHCR, Family Reunification in Europe, October 2015.

199 Communication from the Commission to the European Parliament and the Council on guidance for application of Directive 2003/86/EC on the right to family reunification

clear that “the Directive must be interpreted and applied in accordance with fundamental rights and, in particular, the right to respect of private and family life, the principle of non-discrimination, the rights of the child and the right to an effective remedy...”

The situation has only become more complicated since then. The current demographic imbalance between the numbers of women and men who apply for and receive asylum has the potential to negatively affect refugees’ opportunities for integration in the EU and, in the absence of effective provision for family reunification, their families’ livelihood in their countries of origin.

Despite this, a number of EU member states have put limitations on family reunification for persons that have recently been granted subsidiary protection. Germany, for example, imposes a “transitional period of two years...to persons entitled to subsidiary protection whose residence permit was issued after 17 March 2016. Family reunification is not possible during this period. Family reunification is permitted once again after 16 March 2018.”<sup>200</sup> The situation is similar in Sweden, where “If you have been granted

protection status as a person in need of subsidiary protection, and have applied for asylum after 24 November 2015, you have the right to family reunion only in exceptional cases”.<sup>201</sup> These limitations are plainly inconsistent with the Commission’s clear advice in its Communication that “the Directive should not be interpreted as obliging MSs to deny beneficiaries of temporary or subsidiary protection the right to family reunification...the humanitarian needs of persons benefitting from subsidiary protection do not differ from those of refugees...”.

Further valuable evidence on the reception and integration of women refugees and migrants can also be found in a number of UN documents such as the UN Secretary General’s report ‘In Safety and Dignity: Addressing large movements of refugees and migrants’<sup>202</sup> and in the OECD study “Making Integration Work”<sup>203</sup>. In his report, the Secretary General expresses concern that “xenophobic and racist responses to refugees and migrants seem to be reaching new levels of stridency, frequency and public acceptance” and calls for “a dignified approach to human mobility, rather than one built on closed borders and criminalization”.

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200 Germany: Federal Office for Migration and Refugees, “Family Asylum and Family Reunification” (9 December 2016).

201 Migrationsverket – Swedish Migration Agency, “Family Reunification” (23 February 2017)

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202 Report of the UN Secretary General, In Safety and Dignity: Addressing Large Movements of Refugees and Migrants, 09 May 2016.

203 OECD series Making Integration Work, 28 January 2016.

## V.

# CONCLUSION

As examples in this report have highlighted, there are several protection gaps for women when applying for refugee status and asylum in the Europe Union. Indeed, the Refugee Convention itself was never drafted with gender in mind, and it has taken subsequent decades of non-binding guidelines, lobbying and case law to develop a gender-sensitive approach. While much progress has been made since the Refugee Convention first came into being in 1951, there is still some way to go to ensure that women's specific experiences are accounted for, that gender-based violence is uniformly accepted as a form of persecution that justifies the right to asylum, and to ultimately ensure that women are not discriminated against in the refugee and asylum process.

This report has demonstrated that there is no consistent interpretation among EU Member States on some of the key requirements of the Refugee Convention. For example: (i) whether certain forms of harm suffered by women may constitute "persecution" for the purpose of the Refugee Convention; and (ii) how to interpret "membership of a particular social group". In some states applicants must demonstrate that the persecution that they faced was on account of race, religion, nationality and membership of a particular social group or political opinion, while their gender is rarely considered to be a sufficient ground for persecution.

Regulations and directives of the Common European Asylum System which have been adopted over the past five years have begun to take into consideration the specific needs and vulnerabilities of women and girls. In its recent Communication "Towards a reform of the Common European Asylum System and Enhancing Legal Avenues to Europe", adopted on 6 April 2016, the Commission proposed more harmonisation of the asylum processes across member states and better taking into account the specific needs of women applicants who have experienced gender-based harm. However, more should be done to ensure that EU law and national implementing legislation is fully in line with the guidance issued by the UNHCR on the protection of women and girls, and the Council of Europe's Istanbul Convention, which requires that parties ensure that gender-based violence may be recognised as a form of persecution within the meaning of the 1951 Refugee Convention.

This report's findings are consistent with those of the European Parliament agreed upon in March 2016 which identified an implementation failure in practice by some states: "there are vast and worrying disparities in the way different EU States handle gender-related asylum claims. As a result, women are not guaranteed anything close to consistent, gender sensitive treatment when they seek protection in Europe. Women seeking asylum are too often confronted with legislation and policy that fail to meet acceptable standards, while even gender-sensitive policies are not implemented in practice"<sup>204</sup>. To remedy this, common standard should be propagated at EU level.

The European Parliament's 8 March 2016 Guidelines represent a positive development to remedying some of these protection gaps.<sup>205</sup> In particular, in relation to the gender dimension of refugee status determination, the European Parliament has proposed that:

*"...gendered forms of violence and discrimination, including but not limited to rape and sexual violence, FGM, forced marriage, domestic violence, so-called honour crimes and state-sanctioned gender discrimination, constitute persecution and should be valid reasons for seeking asylum in the EU and that this should be reflected in new gender guidelines" (emphasis added).<sup>206</sup>*

Under the heading of 'Gender dimension of refugee status determination', the European Parliament has also called for:

*"...more objective and gender-sensitive approaches to credibility assessment in all Member States, and enhanced training on credibility assessment for decision-makers which incorporates a gender dimension; highlights that credibility assessments can never be completely accurate and should not be used as the only basis for a negative asylum decision; recommends that when assessing asylum claims from women, cultural, social and psychological profiles including cultural background, education, trauma, fear, shame and/or cultural inequalities between men and women should be taking into account" (emphasis added).<sup>207</sup>*

Women and girls are facing ever more vicious and systematised forms of sexual and gender-based violence in countries in conflict, such as Iraq and Syria, but also in states that are not currently overcome by warfare, but where extremists, predatory traffickers, and violent family members act with impunity and justice systems fail women. When they reach the safety of the EU, the survivors of these terrible crimes are entitled to protection under international law, according to UNHCR guidelines and the EU's own acquis. In 2017, when women will continue to flee gender-based persecution and seek refuge in EU member states, it is imperative that remaining gaps be filled to ensure that women and girls are granted equal rights and opportunities to gain asylum.

204 European Parliament resolution of 8 March 2016 on the situation of women refugees and asylum seekers in the EU (2015/2325(INI)).

205 Ibid.

206 Ibid.

207 Ibid.

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