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# Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe

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# 1. Introduction and background

## Background

1. In 2002, UNHCR issued Guidelines on International Protection No.1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (henceforth the UNHCR Gender Guidelines) (Annex 1).<sup>1</sup> UNHCR's Gender Guidelines resulted from the Second Track of the Global Consultations on International Protection process, which examined this subject at its expert meeting in San Remo in September 2001. They build on and/or complement other UNHCR guidance on aspects of gender-related persecution including:

- A number of recommendations made by the Executive Committee dating back to 1985;
- Guidelines on the Protection of Refugee Women produced in 1991;<sup>2</sup>
- 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 (henceforth the UNHCR PSG Guidelines).<sup>3</sup>
- UNHCR's Gender Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination (RSD) in the field. Their focus is therefore on ensuring a gender-sensitive interpretation of the 1951 Convention and that RSD procedures do not marginalise or exclude the gender-related experiences of persecution.
- The Gender Guidelines recognise that depending on the respective legal traditions, there have been two general approaches taken by States to ensure a gender-sensitive application of refugee law and in particular of the refugee definition: some States have incorporated legal interpretative guidance and/or procedural safeguards within legislation itself, while others have preferred to develop policy and legal guidelines on the same for decision-

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<sup>1</sup> UNHCR's Gender Guidelines can be downloaded at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+TwwBmeU+Di8wwwwwwwwwwhFqhT0yfEtFqnp1xcAFqhT0yfEcFqitnDm nGat1omncoDn5a+XX+Dzmxwwwwww1FqmRbZ/.opendoc.pdf>

<sup>2</sup> UNHCR's *Guidelines on the Protection of Refugee Women* (1991) can be downloaded at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+OwwBme0h6B8wwwwwwwwwwhFqhT0yfEtFqnp1xcAFqhT0yfEcFqitnDm nGat1omncoDn5aWKKWDzmxwwwwww1FqmRbZ/.opendoc.pdf>

<sup>3</sup> UNHCR's PSG Guidelines can be downloaded at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+CwwBmRe04VpwwwwwwwwwwhFqhT0yfEtFqnp1xcAFqhT0yfEcFqd7IHat1omncoDn5MzmAwwwwwwDzmxwwwwww/openssl.pdf>

makers. Regardless of which approach is taken, UNHCR encourages States who have not already done so to ensure a gender-sensitive application of refugee law and procedures, and stands ready to assist States in this regard.

### **Aims of the research**

2. At the end of 2003, the UNHCR's Regional Bureau for Europe commissioned a time-limited research project to undertake a comparative analysis of approaches to gender-related persecution in national asylum legislation and practice across Europe. The Department of International Protection provided additional financial support. The motivation for this work was the emergence of anecdotal evidence about inconsistencies in the development of policy approaches to gender-related issues in procedures for refugee status determination (RSD), and a concern to understand more concretely the extent to which the detailed recommendations for best practice in this area provided in the Gender Guidelines have been taken forward at an individual country level.

3. In this context, the aims of this research were to:

- Review whether, and if so how, UNHCR's Gender Guidelines have been incorporated into national legislation and practice;
- Review any guidelines (procedural or substantive) produced by governments on assessing gender-related persecution;
- Undertake a 'mapping exercise' which provides policy makers and practitioners with up-to-date information on current practice in assessing gender-related and gender-specific persecution; and
- Provide an assessment of how the UNHCR and other guidelines work in practice, for example, in relation to initial decision-making and case law or procedures for ensuring that information about women's experiences is collected at an early stage.

4. Our research, and this report, covers the Europe Bureau region of 42 countries. It had been our intention that the majority of the research and analysis would be limited to those countries which have incorporated legal interpretative guidance and/or procedural safeguards within the legislation itself, or have developed policy and legal guidelines on the same for decision-makers. It quickly became apparent however that a very limited number of countries fulfill these criteria and so our research and analysis has been wide-ranging across all the countries covered by the Regional Bureau for Europe.<sup>4</sup>

5. In addition we undertook more in-depth research into policy and practice in four case study countries. These countries provide examples of different approaches to gender issues in RSD procedures which appear to result in different – and somewhat surprising – outcomes:

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<sup>4</sup> The exception to this is Luxembourg which is not included in this study

6. The United Kingdom was chosen because - on paper at least - it has one of the most explicitly gender-sensitive approaches to refugee status determination in Europe, with publicly available gender-differentiated statistics on applications and (first-instance) decisions, recently published guidance on gender issues in the asylum claim for interviewing officers and first-instance decision-makers, and published gender guidelines that are aimed at second-instance decision-makers. In addition there is recognition of non-State agents and sexual violence in case law and clear case law on the definition of Particular Social Group (PSG) (including cases where women/particular groups thereof have been found to be members of a PSG). Yet there is evidence that the situation 'on the ground' appears inconsistent and that the overall context of tightened asylum policies and procedures means that protection for those claiming gender-related persecution may not be as forthcoming as this evidence suggests.

7. Sweden was selected as the second case study country because there is evidence of contradictory approaches to gender-related persecution. Sweden is one of the only countries in Europe to have produced its own Gender Guidelines aimed at all decision-makers, yet these Guidelines explicitly state that gender cannot define a PSG. Asylum-seekers with gender-related claims can thus only be provided with subsidiary status. The overall rate of refugee status granted by the Swedish authorities is one of the lowest in Europe (less than 2% at first instance).

8. The third case study country, Germany, produces gender-differentiated statistics on applications but not decisions and has a special procedural framework, including nominating and training special adjudicators for victims of gender-related persecution. However, the fact that German case law only accepts persecution by non-State agents if the measures are attributable to a State or state-like entity (i.e. if the State is not generally willing and able to offer protection) reduces the scope for gender-related persecution to be recognised. Although there are no guidelines for defining Particular Social Groups, it has been recognised by the highest German courts that gender constitutes a protected trait falling within the terms of the 1951 Convention.

9. Finally, Lithuania was selected as the fourth case study country because it is one of the incoming members of the European Union in which UNHCR and several Nordic authorities have invested heavily to establish new legislation, guidelines and systems. Although the overall number of asylum applications is low, Lithuania provides an example of a country at a much earlier stage in developing policy and practice and where there is therefore the potential to ensure that trends in recognising gender-related issues are reflected in new procedures for refugee status determination.

10. Information about policy and practice in these case study countries - and about the gaps between the two where these have been identified - are included throughout this report in the relevant sections to which they relate.

11. We recognise that the countries covered by the Regional Bureau for Europe are very diverse in both their experiences of the asylum issues and in their procedures for refugee status determination. We also recognise that a number of these countries are at a very early stage in developing their own RSD and have, for many years, relied upon UNHCR to undertake status determination on their behalf. These countries include Lithuania, Croatia, Bosnia and Herzegovina, FYROM, Serbia and

Montenegro and Albania. All those countries have adopted a national law on asylum, which is more or less in accordance with international standards.<sup>5</sup> Special mention should be also made of Turkey, in view of its size, strategic location and importance. Despite the fact that Turkey restrictively interprets the 1951 Convention and its 1967 Protocol, which it has acceded to include only European asylum-seekers, it has established a temporary asylum procedure for non-Europeans. While a draft law is being discussed, UNHCR processes the asylum applications from all non-Europeans. The Turkish Government has a rudimentary, under-resourced parallel procedure but relies on UNHCR's decisions, routinely adopting them as its own. Furthermore, the RSD authorities usually agree with UNHCR's recommendations on recognizing sexual and gender-based violence and PSG as asylum grounds. We have reflected the diversity of experience and of procedures in refugee status determination in the European countries in our analysis and interpretation of the evidence.

12. It is clearly difficult to capture the full extent of these variations in a study of this kind, and even more difficult to capture and understand any differences which may exist between policy (either in legislation or guidance) and practice 'on the ground'.

### **Context, scope and limitations**

13. Over recent years there has been a growing literature that provides theoretical and empirical evidence regarding the influence of gender on both the experience of persecution, and the way in which individual countries interpret these experiences. This literature has addressed gender-related issues in the context of the US, Canada and Australia, as well as countries within Europe. The US, Canada and Australia have their own national Gender Guidelines. By contrast very few countries in Europe have such guidelines and EU-wide policy making has not systematically addressed this issue in any detailed or meaningful way.

14. Despite increasing evidence from a number of European countries about the effects for individual women and men of the failure to take gender-issues into account in RSD, there has never been a systematic review of policy and practice in this area across the countries covered by the Regional Bureau for Europe. This report aims to provide such a review and to provide UNHCR, country level decision-makers, practitioners and other stakeholders with a snapshot which can be used as a benchmark against which to measure future progress. We accept that there are limitations with our methodological approach (see below). These limitations arise in significant part from the fact that this has been a short, time-limited study.<sup>6</sup> These time constraints combined with the limitations of the available evidence available mean that we have not been able to examine these issues in as much depth as we would have liked. It should be noted for example that some of the guidance that is used in individual countries is not publicly available and therefore could not be assessed for content and impact.

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<sup>5</sup> The exception to this is Serbia and Montenegro where the draft asylum law has not been yet submitted to parliament

<sup>6</sup> This work was commissioned in mid-December 2003 and a period of eight weeks was available to collect information from UNHCR Branch Offices and other sources with a further four weeks for analysis and write-up

15. Nonetheless, we hope that this research provides a useful synthesis of the current state of play across Europe and can be taken forward by others, within and outside UNHCR, either on a country-by-country basis, across regions, or in relation to specific themes and issues identified in the report.

16. We are also aware that the treatment of gender-related persecution in national asylum legislation and practice in Europe cannot be seen outside the context of broader shifts in the attitudes and policies in relation to asylum-seeking across Europe. Over recent years there has been growing political concern within many countries about the scale of asylum flows and their composition. This has resulted in a series of legislative and policy changes to tighten access to procedures for refugee status determination at both the national and EU level. There is some evidence that because the experiences associated with gender-related persecution are already marginalised within the dominant interpretation of the 1951 Convention, these broader changes have a disproportionate impact on those seeking asylum on this basis. Reflecting this, it is also important to note that although emerging case law on gender-related persecution is encouraging in many cases, first instance decision-making remains significantly less encouraging and is not necessarily consistent with this trend. There is evidence from this research that some precedent setting decisions are still far from being systematically followed.

17. The 1951 Convention relating to the Status of Refugees and its 1967 Protocol (1951 Convention) is only one of many international instruments which set minimum human rights standards and therefore have the potential to protect individuals against human rights violations. These other instruments may be useful tools in providing a broader context and aiding a correct interpretation of the 1951 Convention and providing adequate protection. These include but are not limited to:

- The Universal Declaration of Human Rights (UDHR) (1948);
- The Slavery Convention (1926) and Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery (1956);
- The Geneva Conventions on the Laws of War (1949) and two Additional Protocols (1977);
- The Convention for the Suppression of the Traffic in Persons and the Exploitation of Prostitution of Others (1949);<sup>7</sup>
- The European Convention on Human Rights (ECHR) (1950);
- The Convention on the Consent to Marriage, Minimum Age for Marriage and Registration of Marriages (1962);
- The Convention on the Elimination of All Forms of Racial Discrimination (CERD) (1965);
- The International Covenant on Civil and Political Rights (ICCPR) (1966);
- The International Covenant on Economic, Social and Cultural Rights (ICESCR) (1966);
- The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979) and Optional Protocol (2000);
- The UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) (1984);
- The Convention on the Rights of the Child (CRC) (1989);
- The UN Declaration on the Elimination of Violence Against Women (1993);
- The UN Platform for Action (1995); and
- The UN Convention against Transnational Organised Crime (the Palermo Convention) (2003) and specifically the Protocol to Prevent, Suppress and Punish Trafficking in Persons especially Women and Children and the Protocol against the Smuggling of Migrants by Land, Air and Sea.

18. The limited focus of this study on the extent to which the UNHCR Gender Guidelines have been incorporated means that this broader legislative framework is not explicitly examined. Nonetheless it provides an important backdrop for understanding the development of case law and practice in some countries. The provisions of a number of EU Council Directives that have either been proposed, are awaiting agreement, or have been agreed at the time of writing are referred to where these are directly relevant. However we have not been able to assess the extent to

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<sup>7</sup> This Convention currently only relates to trafficking for sexual purposes but there are currently moves at the European level to broaden and update this Convention and its focus

which the provisions of the European Convention on Human Rights (ECHR) (and in particular Article 3) have been utilised to prevent the return of individuals fearing gender-related persecution who have not been recognised as refugees within the meaning of the 1951 Convention but have been given complementary or alternative forms of protection.

## **Methodology**

19. The principal method used to gather information to benchmark the situation in the countries covered by the Regional Bureau for Europe was a questionnaire survey that was sent out to the 41 Branch Offices covered by this study.<sup>8</sup> A copy of the questionnaire can be found at Annex 2. The purpose of the questionnaire was to gather information about the extent to which UNHCR Gender Guidelines have been incorporated into national policies and procedures for Refugee Status Determination in the countries comprising the Regional Bureau for Europe. We were also interested in identifying whether governments have produced their own gender guidelines or policies for the determination of asylum claims where the gender of the applicant is a significant aspect of the applicant's experiences.

20. Respondents were given a limited period in which to return the questionnaire and all had done so by the time the follow-up work and analysis commenced. The information provided in the questionnaires was collated centrally. Further clarification and information was sought directly from the Branch Offices where necessary.

21. In addition to the questionnaire survey, extensive desk-based research was undertaken to identify existing information and analysis on gender issues in procedures for refugee status determination (produced by academics, practitioners and advocacy groups). This was supplemented by telephone interviews and on-line correspondence with key stakeholders working on these issues, particularly in the case study countries, in order to identify gaps between policy and practice where these exist.

22. An important aspect of the methodological approach has been to circulate draft sections of this report as it has been produced to representatives in the Branch Offices for further clarification as appropriate. In addition, a final draft version of the report was circulated to all Branch Offices and relevant staff at UNHCR Headquarters for additional information and clarification to be incorporated.

23. Despite our best efforts to ensure that the information presented in this report is accurate and comprehensive, we recognise the limitations of the methodology adopted, particularly in relation to the level of expertise held on these issues by the UNHCR staff that were available to complete the questionnaire. As indicated above, this project has been time-limited and these constraints have necessarily imposed limitations on the amount of information that could be collected as well as its depth. We hope that the issues identified through this work can be explored in more detail, for example, through visits to case study countries.

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<sup>8</sup> Luxembourg was the only country covered by the Europe Bureau not to participate in the survey. The Danish and Portuguese Refugee Councils completed the questionnaires for Denmark and Portugal and the Finnish Refugee Advice Centre completed the questionnaire for Finland

## Analytical approach and structure of the report

24. As is noted in the UNHCR Gender Guidelines, it is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by the General Assembly, as well as the Executive Committee of UNHCR's Programme.

25. The UNHCR Gender Guidelines are also very clear about the importance of defining and distinguishing between the terms 'gender' and 'sex' when analysing the concept of gender-related persecution:

26. Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time (UNHCR 2002a, paragraph 3).

27. As a result, claims involving gender-related persecution may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women. In some cases, the claimant's sex may bear on the claim in significant ways to which the decision-maker will need to be attentive. In other cases, however, the asylum claim of a female asylum-seeker will have nothing to do with her sex. This definition of gender means that gender-related persecution can involve a whole range of experiences which reflect the nature of gender roles in particular social, political and historical contexts, and a range of penalties (both physical and social) which can be imposed by the State or by the family and community for failing to conform to gender-defined roles and identities including, for example, as a result of sexual orientation.

28. Reflecting this understanding of gender as a characteristic shared by all asylum applicants but not automatically or necessarily constituting an important explanatory factor underlying their experiences or fear of persecution, our analytical approach does not look specifically at different types of gender-related cases, but rather examines general policy and practice to ascertain the sensitivity, or lack thereof, to gender-related issues which may arise in the context of asylum claims made by both women and men. In many cases the complexity of case law means that there is overlap between the issues addressed in different sections of the report.

29. This report systematically examines policy and practice regarding gender-related persecution across European countries in relation to the essential elements of the refugee definition in Article 1(A) of the 1951 Convention.<sup>9</sup> The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees ('the UNHCR Handbook') (1992) expresses that persecution comprises human rights abuses or other serious

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<sup>9</sup> According to Article 1(A) of the 1951 UN Convention relating to the Status of Refugees, the term 'refugee' shall apply to any person who 'owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside [her] country of origin and is unable, or, owing to such fear is unwilling to avail [herself] of the protection of that country; or who, not having a nationality and being outside the country of [her] former habitual residence as a result of such events is unable or, owing to such fear, is unwilling to return to it'

harm, often but not always with a systematic or repetitive element.<sup>10</sup> The concept of persecution within the Refugee Convention therefore raises two questions:

- Is there a violation of human rights or other serious harm that amounts to persecution; and
- Is the State unable or unwilling to offer effective protection?

'Persecution' = Violation of Human Rights or Serious Harm + The Failure of State Protection
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30. Having established whether persecution or a fear of persecution exists, the next step is to establish whether the persecution or fear of persecution is 'for reasons of' one of the grounds enumerated in the 1951 Convention. The structure of the report reflects this analytical approach with the material organised thematically around the elements of the 1951 Convention.<sup>11</sup> Reflecting the UNHCR Gender Guidelines, we also examine the extent to which procedural aspects are sensitive to gender issues.

31. **Section 2** provides an overview of our findings in relation to the availability of gender-differentiated statistics on asylum applications and outcomes provided by individual countries and collated by UNHCR's Statistics Office.

32. **Section 3** examines the extent to which the countries covered in this report have explicitly or implicitly incorporated UNHCR's Gender Guidelines into procedures for refugee status determination. It also outlines national guidance that has been introduced with a view to ensuring gender-sensitive procedures and interpretation of the 1951 Convention.

33. **Section 4** presents evidence in relation to the interpretation of persecution by the countries covered by the Regional Bureau for Europe, and the extent to which gendered forms of 'serious harm' – specifically sexual violence (including FGM), discrimination (including gender-specific forms of discrimination), and sexual exploitation associated with trafficking – are recognised as constituting persecution within the meaning of the 1951 Convention.

34. **Section 5** examines the requirement in international refugee law for there to be a failure of State protection before international protection can be provided, and specifically, the extent to which current approaches allow for the fact that women's experiences of persecution are often at the hands of non-State agents.

35. **Section 6** provides information on the interpretation of the Convention grounds (with the exception of PSGs) and outlines the extent to which gender-related claims have been 'mainstreamed' into the concepts of 'politics' and religion, including where opinions on these have been imputed or attributed as a result of behaviours and actions or family associations.

36. **Section 7** specifically examines current policy and practice in relation to the definition of PSGs in the context of UNHCR's specific guidance in relation to this

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<sup>10</sup> UNHCR 1992 (originally published in 1972), paragraphs 51-53

<sup>11</sup> We do not systematically examine all the Convention grounds but identify the interpretation of some of the grounds in cases where there is specific policy and practice on gender-related persecution

issue. It also examines the existence or otherwise of guidance on how to define a PSG on the basis of gender or sex in the countries covered in this study.

37. In **Section 8** the analysis turns to procedures for refugee status determination including access to the determination process, privacy and confidentiality, the provision of same-sex interviewers and interpreters and training for RSD interviewers and decision-makers. This section also examines how trauma and cultural differences associated with gender-defined roles are dealt with during interviews and in assessing credibility, and looks at the availability of information on gender issues in county reports and assessments.

38. The conclusions and recommendations of the research are presented in **Section 9** of this report.

## 2. Gendered statistics on asylum applications and decisions

39. The need for detailed statistics on asylum applications and decisions has been consistently recognised and set out in a range of statements from different organisations. Since 1985, it has further been clarified that this must include gender-specific information:

40. All States who are signatories to the 1951 Convention have undertaken to provide UNHCR with information and statistical data requested concerning the implementation of the Convention, in order to allow UNHCR to monitor the application of its provisions;<sup>12</sup>

41. In 1985, the UNHCR Executive Committee (EXCOM) called on all States to work towards fair and appropriate treatment of refugee women and “stressed the importance of a more detailed knowledge and understanding of the special needs and problems of refugee women in the international protection field, and of gathering statistical, sociological and other data concerning refugee women and girls in order to identify and implement appropriate mechanisms to ensure their effective protection”.<sup>13</sup>

42. The UNHCR Guidelines on the Protection of Refugee Women (1991) made a key issue of the need for a demographic profile of the refugee population by gender and age.

43. In 1998 the United Nations Recommendations on Statistics of International Migration specified the need for all States to record statistics showing numbers of applicants by age, sex and country of origin, as well as the number of applicants granted refugee status, complementary status, or refused, again with age, sex and country of origin specified (UN 1998);

44. Most recently, the Agenda for Protection emphasises the need for better data collection to be undertaken by States and for this information to be made available (UNHCR 2003a, Goal 2, Objective 3). The Agenda for Protection urges States to generate and share more detailed, comparable, sex- and age-disaggregated statistics on the size, type and composition of migratory flows, to enable a quantitative analysis of the problem and shed light on the causes and ramifications of such international movements. In particular, States are to consider tabulating data according to the revised United Nations Recommendations on Statistics of International Migration.

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<sup>12</sup> See Article 35 1 and 2 (b)

<sup>13</sup> EXCOM Conclusion No.39 Refugee Women and International Protection (1985), paragraph (i). In 1987 the Executive Committee further recognised ‘the need to collect reliable information and statistics about refugee women, to increase awareness about their situation’ (EXCOM Conclusion No.46 General Conclusion on International Protection, paragraph (h)), and in 1990 re-iterated ‘the importance of collecting data which allows for the monitoring of progress achieved in meeting the needs of refugee women’ (EXCOM Conclusion No.64 Refugee Women and International Protection, paragraph (a))

45. Gender-differentiated statistics on asylum applications and decisions provide an important source of information that can assist in monitoring progress towards meeting the needs of women asylum-seekers. Whether or not the governments of receiving countries produce gender-differentiated statistics provides one indication of their interest in addressing the needs of women asylum-seekers. At the very minimum it reflects a recognition that the gender of the applicant is of some relevance during the application process. Gender-disaggregated data also help show how decision making related to gender issues is developing, including whether States are, in fact, granting higher 1951 Convention recognition for women and girls, as can be seen, for example, in the UK case study presented below. Furthermore, since asylum applications by their nature require registering basic demographic details such as age and gender, this information is readily available to receiving States. The production of gender-differentiated statistics should therefore be a relatively straightforward process. Despite this the Parliamentary Assembly of the Council of Europe has expressed regret that no reliable information or statistics were systematically collected by Council of Europe Member States.<sup>14</sup>

46. This section summarises the information collected during the course of this research on the existence or otherwise of gender-differentiated statistics in the countries covered by the Regional Bureau for Europe. One of the key findings of the research is that there is currently a lack of transparency and consistency in this area. This can be said of both information on asylum applications and that on decisions.

47. It should also be noted that some of the information that was provided by Branch Office questionnaires on the availability of gender-disaggregated data differed from the information held by the UNHCR's Statistics Office (see Annex 3). Some statistical information was provided by UNHCR Branch Offices of which the UNHCR Statistics Office was not aware. For example, it has been confirmed that France, Hungary, FYROM, Switzerland and Spain produce gender-differentiated statistics on asylum applications, but this information is not available according to the Statistics Office.<sup>15</sup> In the case of Switzerland, the yearly statistics produced by the Swiss Federal Office for Refugees (FOR) are public (posted on the FOR website) and contain gender-differentiated information on asylum applications and decision (including refugee status, temporary admission, refusal, non-admissibility and withdrawal of claims) and returns. It is not clear why the UNHCR Statistics Office does not have this information. A possible explanation - although not in the case of those countries which make their information publicly available through other sources - could be that some countries state they produce such statistics but do not make them available directly to the UNHCR Statistics Office. It is conceivable that this data is not made available because it is not considered sufficiently robust and/or has not been 'cleansed', but we are not able to deny or verify this.<sup>16</sup> Although both sources of information have been considered for the purposes of this analysis more

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<sup>14</sup> Parliamentary Assembly of the Council of Europe (1998) Situation of refugee women in Europe, paragraph 2, Recommendation 1374, adopted 26th May 1998

<sup>15</sup> Swiss statistics are available on the German and French versions of Federal Office for Refugees' website at <http://www.bff.admin.ch/franz/mainf.htm> Statistics for other countries have been obtained from UNHCR Branch Offices

<sup>16</sup> 'Data cleansing' is the process by which raw data is verified and checked for inconsistencies and/or inaccuracies in recording. In order to ensure that statistics are robust, some countries do not release information publicly (including to UNHCR and other international organisations) until they are confident that the data is accurate

weight has been given to the information collated centrally by the Statistics Office, partly because this is by definition a source of expertise, and partly also because it has demonstrated the availability of figures rather than merely reported their availability. In addition it should be noted that some of the countries surveyed – particularly those in Eastern Europe – are still in the process of institutionalizing RSD procedures. In these cases UNHCR is able to provide gender-differentiated statistics for 2002, based on procedures managed by UNHCR at that time.

### **Gender-differentiated statistics on applications and decisions**

48. According to the information provided by UNHCR Branch Offices through the questionnaire survey, just under half of the countries (44%) produce gender-differentiated statistics on asylum applications (Figure 1).<sup>17</sup> The information provided by the UNHCR Statistics Office indicates that a similar proportion of countries produced gender-disaggregated data on applications although the composition of these countries is slightly different.<sup>18</sup>

49. According to the questionnaire survey, less than a fifth of countries (19%) covered by the UNHCR Regional Bureau for Europe produce gender-differentiated statistics of initial decisions on asylum claims.<sup>19</sup> Again, the information provided by the Statistics Office differs slightly in the composition of countries for which this information is recorded.<sup>20</sup> The UK case study presented below is indicative of this discrepancy. Whilst the UK produces gender-differentiated statistics on initial decisions (although not on the outcome of any subsequent appeal), this information is not recorded by the UNHCR Statistical Office and is recorded as not available.

50. The objective of our analysis has been to assess the availability of gender-disaggregated data rather than its content. However in order to ‘set the scene’ for the information presented in the rest of the report, a brief overview of what is known about applications and outcomes for men and women is provided below.

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<sup>17</sup> According to questionnaire responses these countries are: Austria, Belarus, Croatia, Czech Republic, France, Germany, Greece, Hungary, Lithuania, FYROM, Poland, Russian Federation, Slovenia, Spain, Switzerland, Turkey and United Kingdom

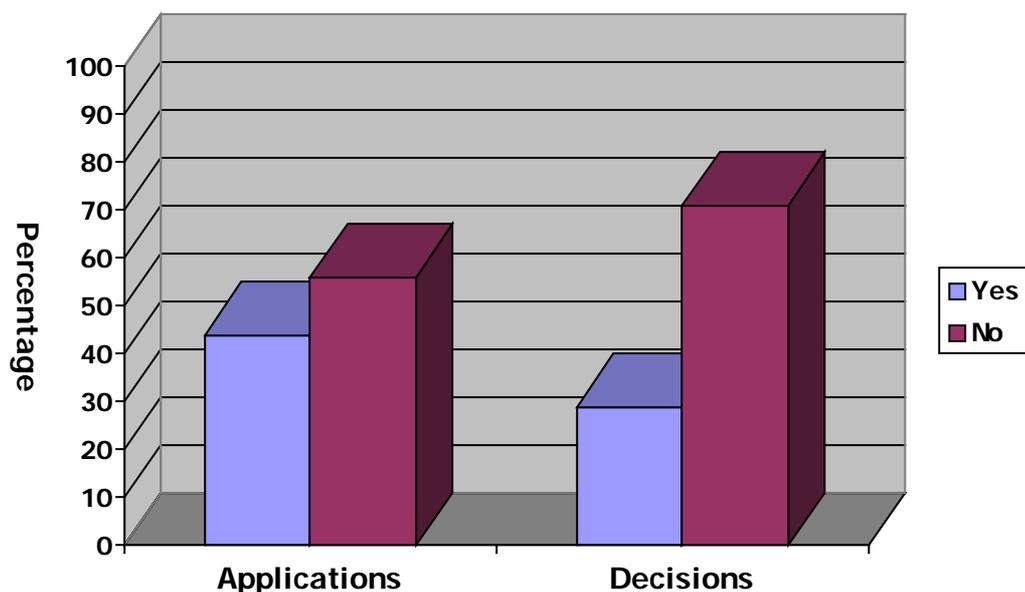
<sup>18</sup> According to the UNHCR Statistics Office these countries are: Albania, Azerbaijan, Bulgaria, Croatia, Czech Republic, Denmark, Estonia, Germany, Latvia, Lithuania, Malta, Poland, Moldova, Slovenia, Sweden, Turkey and the United Kingdom

<sup>19</sup> These are Belarus, Croatia, Hungary, Lithuania, Poland, Russian Federation, Slovenia, Switzerland and the United Kingdom

<sup>20</sup> According to the information provided by the UNHCR Statistics Office, a similar number of countries produce gender-disaggregated information on decisions but these are: Albania, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Cyprus, Czech Republic, Malta, Poland, Moldova, Slovenia, Sweden and Turkey. We have received confirmation from UNHCR’s Branch Office in the Czech Republic that gender-differentiated data are not available for decisions on asylum applications

**Figure 1: Gender-differentiated statistics**

(Source: Information from UNHCR Branch Offices)



51. According to the figures provided by the UNHCR Statistics Office, the proportion of female applications in 2002 ranged from approximately 16% to 46% (the higher rate being in Bosnia and Herzegovina). Countries with approximately 16% of female applications in 2002 were Croatia, Slovenia and Bulgaria. Countries with between 22% and 31% of female applicants were (in ascending order) Estonia, Albania, Malta, the UK, Latvia, Czech Republic, Germany, Moldova and Lithuania. Countries receiving between 37 and 42.5% of asylum applications from women were Sweden, Denmark, Azerbaijan and Turkey.<sup>21</sup> From this information we can conclude that around a third (29%) of applications for asylum in Europe are made by women.

52. Notwithstanding the practical difficulties in ascertaining which governments produce gender-disaggregated data on asylum applications and decision, it is worth noting that among those which have been confirmed as doing so are several countries with only recent experience of RSD procedures and small caseloads, as well as countries with more experience and significantly greater numbers of applications.

### Case study countries

53. All of the countries selected as case studies for this study - Lithuania, Sweden, Germany and the United Kingdom - produce gender-differentiated statistics on asylum applications. The UK, Lithuania and Sweden also produce gender-differentiated statistics on asylum decisions.

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<sup>21</sup> The questionnaire responses indicated that the proportion of female applicants in Germany was 31%, in Spain, 39%, and in FYROM 51%. The graphs available for Switzerland and Hungary clearly contained gender-differentiated statistics but were not clear (in the Swiss case) or in English (in the Hungarian case)

54. In Germany, statistics show that in 2001 and 2002, women's applications made up 30% and 31% of total asylum applications respectively.<sup>22</sup> Germany does not produce gender-differentiated statistics on asylum decisions.

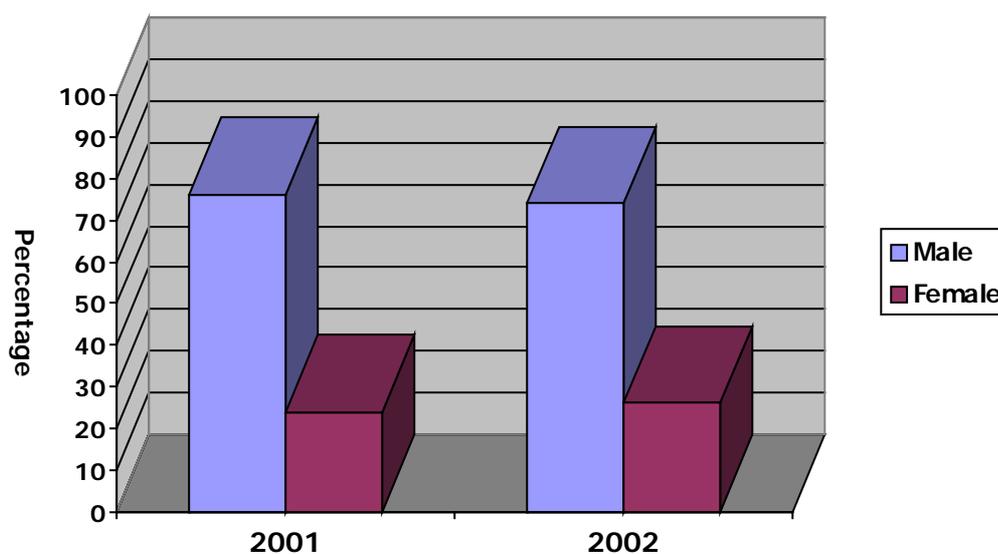
55. Regarding Lithuania, information from the UNHCR Statistics Office state that in 2002, female applicants made up 31% of asylum applications.

56. Sweden produces gender-differentiated statistics of asylum applications, and has such statistics from 1995 onwards. Figures for 2002 indicate that that 37% of asylum applications filed in that year were made by women. Sweden also produces gender-differentiated statistics on decisions that result in refugee or complementary status.

57. The United Kingdom Home Office produces gender-differentiated statistics on asylum applications and initial decisions, and has done so since 2001. The Home Office also produces gender-differentiated statistics on applications by unaccompanied minors (but not decisions), dependents, and people detained under immigration provisions (see Home Office 2002, 2003 for further information).

**Figure 2: UK applications by gender (2001-2002)**

(Source: Home Office 2003)



58. In 2001, 71,030 asylum applications were made, of which 17,090 were made by female applicants. Female applications made up 24% of the total 71,030 asylum applications made in this year.<sup>23</sup> In 2002, the proportion of female applications rose slightly to 26% (Figure 2).

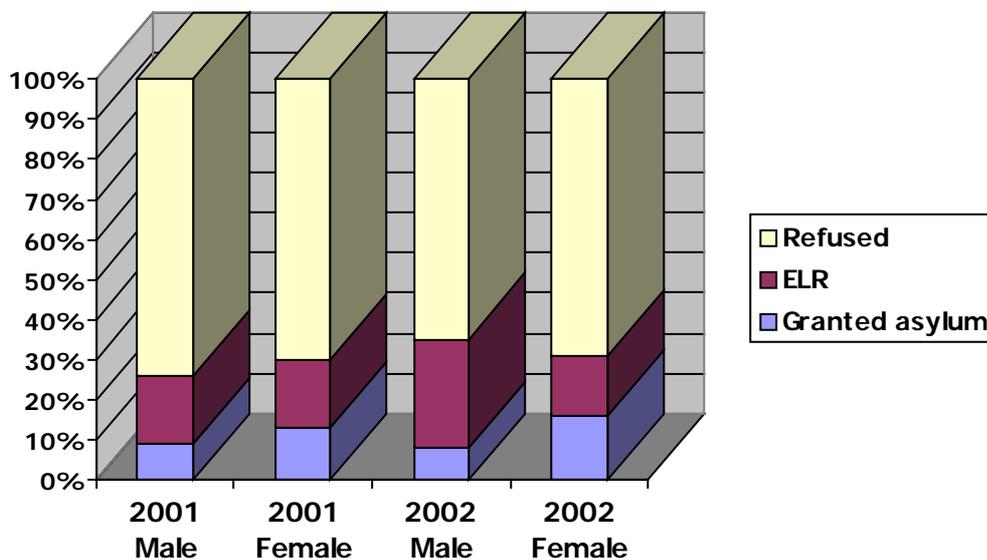
<sup>22</sup> Informed obtained from the UNHCR Statistics Office and Nuremberg Branch Office

<sup>23</sup> It should be noted that these figures include decisions on Unaccompanied Asylum Seeking Children (UASC). A total of 12,430 UASCs applied for asylum in 2002 (nearly 15% of total applications), of whom 2,950 were girls, and 9,480 were boys. The proportion of girl UASCs was nearly 24% of UASCs applications overall, slightly lower than the proportion of female applications overall for 2002. In 2002, 8.7% of decisions made on UASCs resulted in refugee status, and 74.5% resulted in ELR. Refused cases made up 16.7% of UASC applications. This information is derived from Table 4.4 of Home Office 2002

59. The figures for decisions – which have only been available since 2001 – make interesting reading. In 2001, women were proportionately granted refugee status more often than men, and were granted Exceptional Leave to Remain (ELR) in the same proportion as men.<sup>24</sup> Thirteen per cent of female applications resulted in refugee status, while 9% of male applications resulted in refugee status. Seventeen per cent of both women’s and men’s applications were refused but granted ELR, the form of complementary status granted at that time. 71% per cent of female applications were refused, compared to 75% of male applications. Overall, 30% of women’s applications and 26% of men’s applications were granted either refugee status or ELR (Figure 3).

**Figure 3: UK decisions by gender (2001-2002)**

(Source: Home Office 2003)



60. The figures for 2002 show that 70% of female applications were refused compared to 65% of male applications. Unlike in 2001, therefore, female applications were refused more often than male applications. However, 16% of female applications were granted refugee status, compared to 8% of male applications. Fifteen per cent of female applications were granted ELR, compared to 27% of male applicants.<sup>25</sup>

61. It is important to bear in mind that statistics provide quantitative as opposed to qualitative information about asylum outcomes and do not provide evidence about the process by which these outcomes are reached. The fact that in some countries

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statistics. Information about decisions on UASC applications have not to date been gender-differentiated

<sup>24</sup> ELR has now been replaced by humanitarian protection or discretionary leave, which may be granted for a limited period because there are humanitarian or other reasons for allowing the applicant to stay in the UK

<sup>25</sup> Where the Home Office does not dispute an unaccompanied minor’s age, then the minor will either be granted refugee status ‘on the merits’ of his or her claim, or failing that will be granted ELR until their 18th birthday. More detailed study of decisions would have to take into account the inclusion of applications from unaccompanied asylum-seeking children in the gender-differentiated statistics, since the grant of ELR, if not refugee status, is likely to be higher among children whose age is not disputed by the Home Office, than among adults

women's asylum claims result in an outcome of Convention refugee status does not necessarily mean that there is no discrimination in RSD procedures. For example, because women asylum-seekers often come from societies with strong gender-defined roles, they may be more reluctant to leave their home and families and do so only when circumstances become so hostile that remaining is no longer an option (Spijkerboer 1994). It may therefore be the case that they should receive a disproportionately higher rate of success in the asylum process and that even an equal or slightly higher success rate reflects discrimination in outcomes. This hypothesis is not explored in the study, but illustrates the complexities involved in interpreting outcome statistics by gender.

62. In 2001, Crawley reported that women asylum-seekers in the UK were not able to benefit equitably from international protection available under the 1951 Convention, primarily because women's experiences were marginalised when decision-makers interpreted the Convention, and because procedural and evidential barriers inhibited women's access to the determination process and appropriate consideration within it (Crawley 2001).

63. Neither the Home Office nor the Immigration Appellate Authority (IAA) which hears applicants' appeals against refusal, produce gender-differentiated statistics on appeal decisions. This has created an important gap in information to monitor how men and women's applications are assessed, both at the initial stage (from which approximately one quarter of decisions are later overturned at appeal), and at appeal.

64. In addition, some further caution is required when referring to statistics on decisions because of the way in which these statistics are interpreted. Statistics on the outcomes of the asylum process are routinely used in the UK to support the arguments both of those who call for further restrictions on the asylum process (including access to it), and by those who consider that existing policies are already too restrictive. For example, the fact that only a small proportion of applicants succeeds at the initial stage has been used to argue that the majority of asylum claims are unfounded, while the fact that approximately one in five appeals succeeds has been used to demonstrate that initial decisions are defective and that those who need access to protection are not receiving it.<sup>26</sup>

65. Raw statistical data on either initial decisions or appeals cannot be used in isolation as indicative of the fairness or otherwise of decisions. Rather it is important to look at this data in the context of broader evidence about the quality procedures for RSD. The quality of initial decision-making has been the subject of ongoing criticism from several quarters in recent years. For example, a recent Select Committee on Home Affairs (2004) concluded that:

There are certainly grounds for concern about the poor quality of much initial decision-making on asylum claims. The pressure to speed up the process may have led to an erosion in the quality of some initial decision-making. We recommend greater 'front loading'

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<sup>26</sup> See for example Myths and Facts by Migration Watch available at <http://www.migrationwatchuk.org/> which cites information which is comparable with Amnesty International (2004)

of the applications system, that is, putting greater resources into achieving fair and sustainable decisions at an earlier stage.

66. Whilst appeals decisions cannot be said to be wholly consistent either, it is noted that “there has been a steep rise in initial-level appeals in recent years, accompanied by a rise in the proportion of appeals which are successful, from one in 25 in 1994 to one in five in 2002” (Select Committee on Home Affairs 2004, paragraph 50).

67. In the absence of statistics from the IAA, it is useful to refer to the research carried out by the London-based Refugee Women’s Resource Project (RWRP), which monitored the asylum claims of 102 women represented by Asylum Aid, and whose claims were either ongoing or decided between 1st January 2000 and 31st December 2001 (RWRP 2003).

68. The RWRP research shows that the proportion of women claiming asylum varies significantly depending on the country of origin. For example, women made approximately 14% of all claims from Iran and Sudan, while the proportion of claims made by women originating from Eritrea was over 56%. The report notes that “with the exception of the Sudan, the proportion of women asylum-seekers is higher for countries where civil unrest and/or war are widespread. It is lower in countries where the primary focus of human rights violations is political and civil rights abuses and where women’s rights are repressed” (RWRP 2003, 35). The RWRP research found that “over half of cases in our sample which were determined resulted in grants of status. Yet, three quarters of all cases had been refused asylum at initial stage” (RWRP 2003, 165).

69. The proportion of claims rejected at initial decision in the RWRP study is only slightly higher than the overall refusal rates for female applicants (75% in the study, 70% nationally in 2001.) If representative, this rate would indicate that at least one third of women’s claims resulted in some status after appeal. A success rate of 30% on appeal compares with a national average of 19% in 2001 (Home Office 2003).

70. Further research would require the existence of gender-differentiated statistics on appeal decisions, but in the interim there exists some indication that women’s claims may be more successful at appeal than men’s claims. If this were confirmed, it could in turn indicate that the IAA’s approach to gender-related cases is more sensitive to gender issues than Home Office initial decision-making, perhaps reflecting the fact that it published its own Asylum Gender Guidelines in 2000 whereas the Home Office has only very recently published similar (but less detailed) guidance on gender issues in the asylum claim (Home Office 2004). This study does not aim to investigate this possibility.

## **Recommendations**

71. Governments should publish asylum statistics according to the international standard set out in the official UN guidelines contained in Recommendations on Statistics of International Migration (1998). Published statistics on applications, initial decisions and appeals should be gender-differentiated.

72. All governments that collate gender-disaggregated data should systematically and routinely communicate this information to UHCR according to their obligations under Article 35 of the 1951 Convention. UNHCR should address the problem of discrepancies and inconsistencies between the information held by the Statistics Office in Geneva and Branch Offices in the countries of the UNHCR Regional Bureau for Europe.

73. UNHCR should publish a list of those countries that meet the required standards for producing gender-differentiated statistics and encourage those who do not yet do so to adopt this practice



### 3. Adoption of UNHCR's Gender Guidelines

#### The need for guidelines

74. It has been increasingly recognised that although international refugee instruments are 'gender neutral', "their interpretation by the State, at both national and international level, reflects and reinforces gender biases" (Crawley 2001). According to Crawley (2001), women are unable to benefit equitably from international protection as a result of gendered experiences being marginalised in the interpretation of the 1951 Convention, and the fact that procedural and evidential barriers often inhibit women's access to the determination process and may serve to limit the quality of information gathered about the claim and, in turn, the quality of the decision-making process.

75. UNHCR has produced a range of guidelines over the years that promote a gender-sensitive interpretation of the 1951 Convention:

- In 1991 UNHCR produced Guidelines on the Protection of Refugee Women, in order to ensure that UNHCR staff and its implementing partners identified and addressed the specific protection issues of refugee women;
- In 1993 the EXCOM recommended "the development by States of appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from men";<sup>27</sup> and
- In 1995 UNHCR published its Sexual Violence Guidelines addressing legal views of sexual violence, and providing guidance on procedural issues when dealing with victims of sexual violence. The Sexual Violence Guidelines were updated in 2003.

76. As part of the Global Consultations on International Protection convened by UNHCR on the occasion of the 1951 Convention 50th anniversary, the San Remo Expert Roundtable on gender-related persecution discussed key developments and needs regarding the assessment of gender-related persecution. These discussions contributed to UNHCR's Gender Guidelines, which were the first set of Guidelines aimed specifically at the procedures for refugee status determination in the countries in which asylum is sought.

77. The need for such Guidelines has been recognised by a range of international organisations and advocacy groups, by regional bodies, and by some States:

78. In 1996 a European Parliament Resolution urged Member States to adopt guidelines on women asylum-seekers as agreed by the UNHCR Executive Committee (European Parliament Resolution, November 1996);

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<sup>27</sup> EXCOM Conclusion No. 77 Refugee Protection and Sexual Violence (1993)

79. In its 1998 recommendation, the Council of Europe's Parliamentary Assembly urged member States "to adopt criteria and guidelines dealing with women seeking asylum, in order to enhance a gender-sensitive approach and ensure women's specific needs are met, particularly at ports of entry" (Parliamentary Assembly of the Council of Europe, 1998, recommendation 1374, paragraph 6 (j));

80. Outside of Europe, the Canadian Immigration and Refugee Board have developed Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (March 1993); the United States Immigration and Nationality Service have produced Considerations for Asylum Officers Adjudicating Asylum Claims From Women (June 1995), and the Australian Department for Immigration and Multi-Cultural Affairs produced Guidelines on Gender Issues for Decision-makers (July 1996). In 1999, South Africa's National Consortium on Refugee Affairs published Gender Guidelines for Asylum Determination.

81. Guidelines provide an essential reference point for decision-makers, as well as legal representatives, and as such their contents have an intrinsic value. They are an important policy mechanism for ensuring a gender-sensitive perspective on the 1951 Convention and for ensuring that the gender-related and gender-specific aspects of asylum claims are properly assessed and taken into account in procedures for refugee status determination. However mechanisms for ensuring that such Guidelines are implemented are equally critical to their success. The Agenda for Protection stipulates the need for the UNHCR Gender Guidelines to be disseminated and implemented (UNHCR 2003 at Goal 1, Objective 6), but there is acceptance that States may take one of two approaches to implementation; they may incorporate interpretative guidance and/or procedural safeguards into legislation or issue separate guidelines for decision-makers. In either case it is preferable that decision-makers are required to use any guidelines that exist. In Canada this is reflected in case law, where failure to consider the national Gender Guidelines in making a decision may result in the decision being considered unsafe.<sup>28</sup> The evidence collected during the course of this research suggests that neither the UNHCR Gender Guidelines nor national guidance has been made binding in this way in European countries.

### **Incorporation of UNHCR Gender Guidelines**

82. None of the countries surveyed as part of this research have officially adopted the UNHCR Gender Guidelines into their legislation or policy.

83. Finland has implicitly adopted the recommendations of the earlier 1991 guidelines, following a Supreme Administrative Court pronouncement in 1996: "The Parliament states in its letter on the Cabinet's Bill for Aliens Act that the assessment of an asylum claim must be based on the principles accepted by the United Nation's High Commissioner for Refugees."<sup>29</sup> However it should be noted that Finland has an overall refugee status recognition rate of 1% or less, so this implicit incorporation may not be sufficient to ensure that women who need protection are able to assess it.

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<sup>28</sup> Federal Court of Canada, *Elezi v Canada (Minister for Citizenship and Immigration)* 2003 FCT 210 (20 February 2003)

<sup>29</sup> Supreme Administrative Court 29 November 1996, No. 3784

84. In Austria, the Higher Administrative Court recently referred to the UNHCR Gender Guidelines when allowing an asylum appeal on the basis that the female applicant, who had suffered sexual violence, was not allocated a female adjudicator in an earlier hearing.<sup>30</sup>

### **Regional Guidance**

85. The European Parliament has called upon the Member States, “when considering applications for, and possible recognition of, refugee status, to take into account persecution and/or the fear of persecution which may be suffered by women on account of their sex.”<sup>31</sup>

86. In addition, the European Parliament has recently adopted a resolution on immigration, integration and employment, which contains some references relevant to this study. They mainly regard trafficking, and will be referred to under the appropriate headings.<sup>32</sup>

87. Noting the lack of a number of gender-related considerations in the (then proposed) Qualification Directive, the European Women’s Lobby (2002) has suggested that EU Gender Guidelines be drafted, and that these could be inspired by existing reference documents, namely the UNHCR Guidelines on the Protection of Refugee Women (1991), the Refugee Women’s Legal Group’s Gender Guidelines for the Determination of Asylum Claims in the UK (1998) and the considerations detailed in *Women as Asylum Seekers: a Legal Handbook* (Crawley 1997).<sup>33</sup>

### **European Union Directives**

88. In May 2004, ten countries will join the European Union. These countries are Poland, Latvia, Lithuania, Estonia, Slovenia, Cyprus, Slovakia, Hungary, Czech Republic and Malta. This enlargement of the European Union emphasises the importance of EU-level policy and legislation regarding asylum. After May 2004, two-thirds (27 out of 42) of the countries surveyed will be required to implement EU-level policy and legislation.<sup>34</sup>

89. There are no EU-level guidelines on gender-related and gender-specific persecution. However, two proposals for Council Directives contain some provisions that are relevant to this study and which will be addressed in the relevant sections of this report. The proposals are:

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<sup>30</sup> Austrian Higher Administrative Court, No. 2001/01/0402-10 of 3 December 2003

<sup>31</sup> European Parliament Resolution on the violation of women’s rights and EU international relations (2002/2286 (INI)), adopted 19/11/2003, Article 13

<sup>32</sup> European Parliament Resolution on the Communication from the Commission on immigration, integration and employment (COM(2003) 336 – 2003/2147 (INI)), adopted 15/01/2004)

<sup>33</sup> The EWL did not refer to UNHCR’s 2002 Gender Guidelines. Their statement was made in the same month as the launch of UNHCR’s 2002 Gender Guidelines, and it is likely the EWL were not able to refer to them at the time of writing.

<sup>34</sup> Of the countries surveyed for this study, the countries which will not be members of the European Union after May 2004 are: Albania, Armenia, Azerbaijan, Belarus, Bosnia and Herzegovina, Bulgaria, Croatia, FYROM, Georgia, Moldova, Norway, Romania, Serbia and Montenegro, Switzerland, Russian Federation and Ukraine

- Amended Proposal for a Council Directive on the minimum standards on procedures in Member States for granting and withdrawing refugee status (henceforth the Procedures Directive); which is agreed by the States, pending formal adoption, and
- The Council Directive on minimum standards for the qualification and status of third country nationals and stateless person as refugees or as persons who otherwise need international protection (henceforth the Qualification Directive) which was adopted in April 2004.

90. It was originally intended that both of these proposed directives be finalised in June 2003, but this deadline was missed, and a new deadline was set for May 2004. On the 30th April 2004, as this report was being finalised, the Council formally adopted the Qualification Directive. The Council also reached political agreement on the Procedures Directive, in which Member States take a common approach to processing asylum applications in the EU. Throughout this report we base our discussion and analysis of the versions of the Directives that were publicly available.<sup>35</sup>

91. Although Member States will be given approximately two years to implement the directives once they are agreed, it is worth noting that authorities in several countries have already referred to the directives. For example, the recent proposal for changes to Swedish asylum legislation refers to both the UNHCR Gender Guidelines and to the Qualification Directive when positing that gender should be accepted as a ground of persecution. Belgian case law has referred to the Qualification Directive's definition of a particular social group.<sup>36</sup>

92. The Qualification and Procedures Directives have been strongly criticised by UNHCR as falling short of accepted international legal standards, and of their potential to lead to an erosion of the global asylum system. The main points of criticism are outside of the scope of this report, and focus on the restrictive measures such as 'safe third country' policies and non-suspensive appeals against decisions.<sup>37</sup> European Union Directives are not relied on as benchmarks for this study. Rather, they are referred to as an indication of proposed EU minimum standards.

### **European Convention on Human Rights**

93. The Council of Europe's 1950 European Convention on Human Rights (ECHR) has been applied to protect individuals from being returned to countries where they face potential abuses of their human rights. Case law arising from the ECHR contains a number of important principles that are of relevance to those not provided with adequate protection at the national level. In addition Article 3 of the ECHR states

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<sup>35</sup> Further information about the status of these directives and their content can be found at [http://europa.eu.int/comm/justice\\_home](http://europa.eu.int/comm/justice_home) and at <http://www.statewatch.org>

<sup>36</sup> Commission Permanente de Recours des Réfugiés, Decision 01-0668/F1356/cd, 2 March 2002, and Decision 01-0089/F1374/jfn, 22 March 2002

<sup>37</sup> UNHCR Press Release 29 March 2004 available at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+CwwBmeLUhSewxwwwrwwwwwwmFqnN0bIhFqnN0bItFqnDni5AFqnN0bIcFq5pGn55aGncnw5na+XX6MzmwwwwwwDzmxwwwwwwdFqidGmnGaxOa-uPPyER0ay0IgGFqvueIyqFaGnh1tnnaqronha1Gtn5a0uaBdaGnqdD5omnGaw5Oc1MapcwD5eD7nw/pendoc.htm?tbl=NEWS&id=3fc1e5a94&page=news>

that “no one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

94. Case law has developed both at the European Court of Human Rights and in Council of Europe countries regarding the protection offered by the ECHR, including protection from treatments resulting from deportation. The case of *Soering v. UK*<sup>38</sup> established that this right can be invoked as protection from refoulement, in cases where States propose to return someone to a country where they would face torture, inhuman or degrading treatment. The case of *Soering* determined that the UK could not extradite a German national accused of murder to the United States, where he would face the death penalty. It was ruled that extradition would lead to a long period of awaiting the death penalty, which would constitute inhuman and degrading treatment, in breach of Article 3. The case of *Cruz Varas v. Sweden*<sup>39</sup> established that States’ vicarious responsibility exists not only in extradition cases, but also in deportation cases. In the case of *Jabari v. Turkey*,<sup>40</sup> the European Court of Human Rights found that deporting the appellant to Iran, where she had been arrested for suspected adultery, would result in a real risk of her being subjected to treatment contrary to Article 3.

95. States may invoke their need for ‘proportionality’ when considering individuals’ rights against the interests of the country, and application of the ECHR has established a ‘margin of appreciation,’ according to which States are granted some discretion regarding their views on proportionality, due to the State being best placed to know what is in its best interests (Harris, O’Boyle and Warbrick 1995). Despite this it is clear that the ECHR can constitute a safeguard for individuals in need of protection from persecution and who have exhausted national remedies without satisfaction.

96. This study’s primary focus is on the application of the principles of the UNHCR Gender Guidelines in refugee status determination. Since protection provided by the ECHR cannot result in refugee status but rather complementary protection, the provisions and application of the ECHR are not investigated in detail here. Furthermore, ECHR case law has only rarely specifically considered gender issues. Nonetheless RSD authorities and legal representatives are aware of Council of Europe States’ requirement to consider breaches of the ECHR that would result from deportation and the ECHR is therefore an important backdrop for our analysis.

### **Existence of national guidance**

97. The determining authorities in Sweden and the United Kingdom have produced guidance on the assessment of gender-related asylum claims. As both of these are case study countries, they are considered in detail below.

98. In addition, some countries include gender-related points within their general RSD policy or guidelines.

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<sup>38</sup> *Soering v UK*, A161, 1989

<sup>39</sup> *Cruz Varas v. Sweden* A 210 (1989)

<sup>40</sup> *Jabari v. Turkey*, Application No. 40035/98 July 11, 2000

99. In Norway, the 1998 Ministry of Justice guidelines introduced recognition of non-State agents, and the possibility of gender constituting a Convention ground for the granting of refugee status. They also introduced the principle of giving asylum applicants the benefit of the doubt.

100. Lithuania has developed an electronic manual for its RSD staff (Lithuanian Migration Department, undated) which incorporates a number of gender-related persecution points, including: a definition of a Particular Social Group, including reference to gender as one possible PSG; reference to women who fail to conform to religious or social mores in some societies; and specific reference on how to assess the asylum claims of especially vulnerable applicants, including women.

101. Switzerland has included gender-related guidelines within its RSD handbook. This handbook has been compiled by the Swiss Federal Office for Refugees (FOR) and contains various directives and guidelines for RSD purposes, many of which are publicly available and posted on the FOR website. The current directive on the hearing of asylum claims dates back to 1999 and contains a paragraph on the hearing of gender-related claims. This paragraph states that same-sex interviewers should be provided wherever possible and that interviewers should automatically be of the same-sex where the situation there points to gender-related persecution. An annex to the directive (which is not publicly available) deals with gender issues in relation to interviewing and credibility. The German RSD authorities have a handbook on how to interview asylum-seekers which addresses cases presented by female asylum-seekers. Furthermore, all adjudicators are equipped with a handbook on the definition of gender-related persecution, in which gender-specific forms of human rights violations including female genital mutilation, honour crimes, forced marriage, forced abortion and punishment for violation of gender-specific norms are discussed. The handbook includes information on the legal framework for assessing these claims as well as precedent and other interesting decisions. However these guidelines are for internal use only and no further details are available.

102. In 1995, following research by Thomas Spijkerboer, the Immigration and Naturalization Service (IND) in the Netherlands sought the advice of the Emancipation Council on the assessment of gender-related asylum claims. In accordance with the Emancipation Council's recommendations, the IND implemented operational instruction 148 in 1997 that incorporated guidelines relating to the questioning of women and the assessment of asylum applications submitted by women. In the same year, the State Secretary gave an undertaking to the Dutch Lower Chamber to incorporate the gender-inclusive approach in the training of IND officers and also to evaluate the operational instruction no. 148. The Dutch Immigration Department (2002) examined the impacts resulting from these changes (INDIAC 2002).

103. In Belgium, the working group 'Female Refugees' of the Dutch-speaking Women's Council (Nederlandstalige Vrouwenraad) and the Belgian government drafted gender-sensitive asylum directives in 1997 and 2001 respectively, but we were unable to find evidence that these directives have been implemented.

104. In Finland, the Finnish Advisory Board on Refugee and Migration Issues has stated that a gender-perspective should be included in all decisions that are made, in order to ensure that specific attention be paid to women's circumstances and the possible consequences of any decision would have on them (Luopajarvi 2003).

Furthermore, the Government Bill for a new Aliens Act mentions female asylum-seekers and briefly elaborates on the interpretation of the refugee definition in cases of gender-related persecution.

105. Some countries, including the Czech Republic and Switzerland, specifically include gender in policies on non-refoulement, or temporary/complementary protection.<sup>41</sup> However, since this study is primarily focussed on the assessment of gender-related persecution under the 1951 Convention, information of this kind has not been specifically sought.

### **Other gender guidelines or guidance**

106. There are four countries where it is known that gender guidelines or guidance has been produced by the voluntary sector, or by legal or women's organisations. These are: the United Kingdom, Ireland, the Netherlands and Belgium.

107. In the United Kingdom, Gender Guidelines for the Determination of Asylum Claims in the UK were produced by the Refugee Women's Legal Group in 1998. These were partly based on the US, Canadian and Australian Gender Guidelines, and in turn formed the basis of the Immigration Appellate Authority Asylum Gender Guidelines which were published in 2000. The role of the Refugee Women's Legal Group in generating the momentum for RSD decision-makers to produce their own guidelines and guidance is discussed below.

108. In Ireland, the Women's Committee of the Irish Council for Civil Liberties produced guidelines entitled *Women and the Refugee Experience: Towards a Statement of Best Practice*, in 2000. The Irish Refugee Council also published *Guiding Principles on Asylum-seeking and Refugee Women* in 2001.

109. In the Netherlands, the Aliens Affairs Advisory Committee (ACVZ) made recommendations on the treatment of women's and gender-related asylum claims in their evaluation report on *The UN Convention on the Elimination of All Forms of Discrimination Against Women in relation to the position of alien women in Dutch aliens legislation and aliens policy* in November 2002. The recommendations include gender-differentiated statistics and the need for 'systematic and exhaustive' representation of gender aspects in Dutch immigration law and policy.

110. In Belgium, general recommendations on how to assess gender-related asylum claims were included in *YWCA - Antwerp's research on Living Conditions and Social Status of Refugee Women in Belgium* (YWCA-Antwerp 2001).

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<sup>41</sup> For example, in the Czech Republic special protection and assistance is provided to women asylum-seekers in the accommodation facilities run by the Czech authorities through the so-called 'protected zone system' which consist in accommodating women applicants (women alone or with their families) in separated buildings. This permits the provision of adequate assistance by specialist as well as the identification of specific needs upon arrival thus, the subsequent provision of tailored assistance. The protected zone system ensures 24 hours monitoring of the zone with security guards and specialised personnel available but also establishes different regime/spaces for different groups that may eat or organised specific activities at different times. Women applicants are issued special ID cards with a special sign to distinguish the applicants that are accommodated in the protected zones. Elderly persons, separated children or persons suffering handicap are also accommodated in the protected zones together with women

## Case study country: Swedish Gender Guidelines

111. In March 2001, the Swedish Migration Board produced Guidelines for the Investigation and Evaluation of the Needs of Women for Protection (henceforth Swedish Gender Guidelines). The Swedish Gender Guidelines act as a procedural and interpretational guide to the assessment of women's claims under the 1951 Convention, and also to cases which are viewed as directly or exclusively gender-related, which are considered under a separate clause of asylum legislation. The Guidelines focus on increasing interviewing and decision-making caseworkers' awareness of the particular problems women can encounter in the asylum process, as well as the particular forms and sources of persecution of which they may be at risk. Notably however the Guidelines specify that women cannot constitute a PSG under the 1951 Convention, as this would be inconsistent with the 1997 Aliens Act.<sup>42</sup>

112. In order to address the provisions of the Swedish Gender Guidelines, it is necessary to refer briefly to their legal background and context.<sup>43</sup> In 1997, the Swedish Aliens Act was amended, and while the definition of a refugee remained that given by the 1951 Convention, a new category was introduced of 'aliens in need of protection'.<sup>44</sup> The Aliens Act defines an 'alien in need of protection' as an individual who has left the country of their nationality because he or she:

- Has a well-founded fear of being sentenced to death or corporal punishment or of being subjected to torture or other inhuman or degrading treatment or punishment (the 'torture clause');
- Due to an external or internal armed conflict needs protection, or, on account of an environmental disaster, cannot return to his/her country of origin, or
- Because of his/her gender or homosexuality, has a well-founded fear of persecution (the 'gender clause').

113. At the time of the introduction of the new Aliens Act, the Swedish parliament rejected the possibility of considering gender as a defining characteristic of a Particular Social Group under the 1951 Convention, arguing that this would be excessive, and that the inclusion of gender in the category of aliens in need of protection would result in better recognition of gender-related cases than before (Lyth 2002, Luopajarvi 2003).

114. The Swedish Gender Guidelines include the statement that "according to a clearly enunciated Swedish position, identity as a woman is not within the purview of the Convention's ground 'membership of a particular social group'" (Swedish Migration Board 2001, 13). The impression that this implies a lower status accorded to gender-related persecution is reinforced by several statements within the guidelines, namely the emphasis that persecution based on gender (which cannot be considered under the Convention) must nonetheless reach the same standard of severity as persecution under the Convention (Swedish Migration Board 2001, 13). In sum, the requirements are identical for gender-based persecution and other forms

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<sup>42</sup> For further details on Swedish immigration legislation and recent proposals for change, see sections 3 and 7.

<sup>43</sup> This is addressed more fully in section 7 on Particular Social Groups (PSG)

<sup>44</sup> Swedish Aliens Act 3, Section 2 cited in Swedish Migration Board, April 2002

and causes of persecution, but the status recognition that can be granted under the gender clause of the Aliens Act is limited to complementary protection.

115. A parallel point can also be made when considering whether discrimination is considered as a form of persecution when its cumulative effects are sufficiently severe to rise to the level of persecution. According to the Swedish Gender Guidelines, such cases will only be considered where they are based on a Convention ground, which would tend to confirm that discrimination based on gender cannot qualify as persecution in Swedish decision-making..

116. However, a number of points made within the Swedish Gender Guidelines should, in theory, also allow for women's circumstances and activities to be considered under 1951 Convention. For example, the Gender Guidelines state that certain forms of gender-related persecution can be based on political or religious views, and that in the experience of the Swedish Migration Board, the proportion of women's applications that are purely based on gender is roughly 5%.<sup>45</sup>

117. In January 2002, the Swedish authorities also issued Guidelines for Investigation and Evaluation of Asylum Cases in which Persecution Based on Given Sexual Orientation is cited as a Ground. These Guidelines note that although "homosexuality is not within the purview of the Convention ground of 'membership of a particular social group' within Swedish decision making, there is a clear international trend towards including gender-related persecution and sexuality as a 'social group' (Swedish Migration Board 2002, 13)." The Swedish Migration Board accepts that it is possible that its own policy may change in the future.

118. It should be noted that at the time writing, a government-appointed expert committee had recently presented a proposal to amend the Swedish Aliens Act (Committee Report to the Ministry of Foreign Affairs 2004). The proposal addresses all of the main criticisms of the 1997 Aliens Act's provisions, as well as some of the problematic aspects of Swedish application of the Convention grounds. It recognises that the status provided under the Aliens Act's gender clause does not provide the same level of protection against deportation in the event of being convicted of a criminal offence, and that the provision of travel documents and the right to family reunification are only granted to those with refugee status. The proposal refers to the UNHCR Gender Guidelines, as well as to practice in the UK, New Zealand, Canada, the United States and Australia, to acknowledge that women and homosexuals may constitute particular social groups under the 1951 Convention. The content of the proposal and its implications are discussed in more detail in section 7 of this report.

### **Case study country: UK guidance**

119. In 1998, the Refugee Women's Legal Group (RWLG)<sup>46</sup> produced Gender Guidelines for the Determination of Asylum Claims in the UK. These guidelines

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<sup>45</sup> The statement is actually that this is the figure for 'gender-related persecution.' However, the intention of this statement seems to be to refer to persecution based exclusively on gender, rather than cases which involve consideration of gender as a factor

<sup>46</sup> The Refugee Women's Legal Group (RWLG) was established at the beginning of 1996 by individuals and organisations concerned about the impact of changes in immigration law on refugee women in the UK. Central among its aims is the development of a gendered perspective on refugee law and policy. The RWLG is an informal group of lawyers, practitioners, academics and others working with refugee

draw on the Australian, Canadian and US Gender Guidelines, as well as the UNHCR 1991 Guidelines on the Protection of Refugee Women. The RWLG guidelines in turn formed the basis of the Immigration Appellate Authority's (IAA) Asylum Gender Guidelines (henceforth IAA Gender Guidelines) produced in November 2000. This is a strong illustration of the potential for the voluntary sector to catalyse positive change at official level.

120. The IAA is the institution in the UK that is responsible for hearing appeals. The IAA Gender Guidelines are the most comprehensive official Gender Guidelines in Europe. They refer to legislation, case law and academic sources to address gender-sensitive interpretations of persecution (including by non-State agents), Convention grounds and procedural issues, including equal access to procedures, sensitive interviewing techniques and assessment of credibility. However, it should be noted that first-instance decision-makers are not bound by the IAA Gender Guidelines. In addition there has been some debate about whether appeals decision-makers have to refer to them.

121. The Immigration Appeals Tribunal (IAT), which hears appeals against decisions made by the IAA, determined in August 2002 that the IAA Gender Guidelines were in the public domain and that adjudicators could make reference to them without prior warning to the parties involved in an appeal.<sup>47</sup> This view placed the IAA Gender Guidelines alongside Home Office country information reports and the UNHCR Handbook as a document that all parties can be considered to be aware of, and could be interpreted as implying that failure to consider the guidelines could make a decision unsafe. However, in October 2003 the IAT took a different view, and determined that there was no requirement to refer to the Guidelines when considering how to adjudicate an appeal.<sup>48</sup> This decision stands in stark contrast to the requirement for Canadian decision-makers to refer to their national Gender Guidelines (Symes and Jorro 2002).

122. In addition to the guidance produced by the IAA, the Home Office produces Asylum Policy Instructions (APIs) for its interviewers and caseworkers making initial decisions. The only publicly accessible APIs are those regarding 'Assessing Claims', and these include both general and specific considerations to gender-sensitive assessment of claims. They will be referred to in the appropriate chapters, as will available information about how they are applied in practice.

123. At the time of writing, the UK Home Office had very recently published guidance on Gender Issues in the Asylum Claim as part of its APIs to first-instance decision-makers (Home Office Asylum 2004). This instruction – issued on 3rd March 2004 – gives guidance on:

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and asylum-seeking women which discusses common concerns, formulates responses and shares information. For further information and to download a copy of the RWLG's gender guidelines see <http://www.rwlg.org>

<sup>47</sup> Terbas [2002] UKIAT 03713, 13 August 2002

<sup>48</sup> [2002] UKIAT 00121 M (Sierra Leone)

- The additional considerations caseworkers should have in mind when assessing claims for asylum that could include gender related issues; and
- How to take gender issues into account when looking at the persecution experienced and whether there has been a failure of State protection.

124. The instruction takes caseworkers through:

- Definition of gender;
- Gender and persecution;
- Discrimination;
- The Failure of state protection;
- Internal flight / relocation;
- Gender-related persecution on Convention grounds;
- Interviewing;
- Credibility;
- Objectivity; and
- Granting or refusing the claim.

125. It also points caseworkers to the fact that further information can also be obtained from the IAA Gender Guidelines.

126. It is worth noting that large sections of the guidance are directly replicated from the guidelines that were produced by the Refugee Women's Legal Group in 1998. This reflects the fact that since that time the RWLG has been in regular and on-going discussion with the Home Office about the incorporation of their own guidelines in the APIs – the Home Office's preferred approach which it chose to follow rather than adopt separate Gender Guidelines. However there are some important aspects of the RWLG guidelines and the UNHCR Gender Guidelines that have not been included, particularly with relation to procedural issues. These similarities and differences between UK policy and practice and the UNHCR Gender Guidelines are discussed in more detail in the relevant procedural and substantive sections of this report.

## **Recommendations**

127. States should produce clear guidance on procedural and substantive issues relevant to gender-related persecution. This guidance should draw upon and reflect the principles and standards in the UNHCR Gender Guidelines. Such guidance should be applicable to decision-makers at all stages of the RSD process (i.e. both first instance decisions and appeals) and should be non-discretionary.

128. Implementation of the guidance should be evaluated and monitored by States on a regular basis (every 2 years). This information should be made available to UNHCR.

## 4. Interpretation of persecution

129. As was noted in section 1, the analytical framework adopted in this report reflects the recognition in the UNHCR Gender Guidelines that the key to responding appropriately to gender-related persecution is to ensure that all aspects of the 1951 Convention are interpreted with a gendered perspective. Reflecting this, the report systematically examines policy and practice across European countries, regarding gender-related persecution in relation to the essential elements of the refugee definition in Article 1(A) of the 1951 Convention.

130. In examining whether the countries surveyed as part of this research have interpreted the concept of persecution in a way that reflects gendered experiences, this section examines whether gender-specific persecution has been recognised in legislation, case law or practice as constituting a violation of human rights or serious harm that amounts to persecution (for consistency with earlier suggestions). Section 5 will then examine whether these countries have considered that the State in the countries from which asylum applicants originate are unable or unwilling to offer effective protection in these cases.

131. The UNHCR Gender Guidelines make clear that gender-related persecution encompasses a wide range of treatments, and highlight the need for clear understanding of what defines gender, and recognise that gender-specific forms of harm may constitute persecution within the meaning of the 1951 Convention:

What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case. While female and male applicants may be subjected to the same forms of harm, they may also face forms of persecution specific to their sex. International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution. In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act. There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors (UNHCR 2002a, paragraph 9).

132. In November 2003, The European Parliament adopted a resolution on the violations of women’s rights which called upon Member States, “when considering applications for, and possible recognition of, refugee status, to take into account persecution and/or the fear of persecution which may be suffered by women on account of their sex” (European Parliament 2003, Article 13). The Qualification Directive also states that persecution includes acts of physical or mental violence, including acts of sexual violence (paragraph 11.2 (a)).

133. The UNHCR Gender Guidelines state that where women fear forced prostitution, their feared treatment may be the basis for an asylum claim:

Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of minors for the purposes of forced prostitution or sexual exploitation is a form of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on woman's freedom of movement, caused by incarceration, and/or confiscation of passports or other identity documents. In addition, trafficked women and minors face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm (UNHCR 2002a, paragraph 18)

134. The Gender Guidelines further note that in particular cases, trafficking for other purposes could also amount to persecution.

135. The phenomenon of forced prostitution, particularly in the context of trafficking, has only recently started to be addressed. Although many countries may recognise that the treatment, involving slavery and rape (either by captors and/or through forced prostitution) is unacceptable treatment constituting a breach of human rights, few countries have developed a positive position in terms of refugee status determination.

136. Forced prostitution raises many of the same issues as other gender-related forms of persecution: recognition of the severity of the harm inflicted, recognition of non-State agents and failure of State protection, and the establishment of a Convention ground.

137. To ensure that trafficking in persons, especially women and girls, is recognised as a potential issue in the refugee context, the Global Consultations on International Protection recommended that trafficked women and girls seeking asylum should have access to asylum procedures, and that an examination should take place regarding circumstances under which the refugee definition applies to trafficked persons (UNHCR 2002b, paragraph 20).

### **Recognition of sexual violence as a form of persecution**

138. There are clear benchmarks to show that sexual violence should be considered as a form of persecution. The UNHCR Guidelines on the Protection of Refugee Women (1991) encouraged the "acceptance of the notion that sexual violence against women is a form of persecution when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or to punish"(UNHCR 1991, paragraph 71). It was emphasised that such persecution is

not limited to rape but can consist of sexual assault which takes a variety of forms (paragraph 59). UNHCR's updated guidelines on sexual and gender-based violence issued in 2003 include detailed references to a number of national, regional and international agreements that make clear that sexual violence is serious and unacceptable (UNHCR 2003).<sup>49</sup>

139. However despite the strong recommendations made in these statements in a period spanning more than a decade, the San Remo expert roundtable concluded in 2001 that "the main problem facing women asylum-seekers is the failure of decision-makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated grounds and their failure to recognise the political nature of seemingly private acts of harm to women" (UNHCR 2001, paragraph 4). The survey of European countries policy and practice undertaken as part of this research indicates that sexual violence is still considered by many decision-makers to be a private act rather than an act of persecution.<sup>50</sup>

140. Seventeen out of 41 countries surveyed (41.5%) have recognised sexual violence as a possible form of persecution, either in law, policy or case law. These countries are: Austria, Belarus, Belgium, Denmark, France, Germany, Greece, Hungary, Ireland, the Netherlands Norway, Romania, Slovenia, Spain, Sweden, Switzerland and the United Kingdom. This could imply that more than half of the countries surveyed have not recognised sexual violence as a form of serious harm that constitutes persecution within the meaning of the 1951 Convention.<sup>51</sup>

141. In Austria the authorities have recognised that rape and other sexual violence can constitute persecution, as long as the abuse can be attributed to the State (regardless of whether the persecution emanates directly from the State or that the State is unable and/or unwilling to provide effective protection).<sup>52</sup> Consequently, the Independent Federal Asylum Senate (IFAS, appeals body) granted refugee status to a young woman from Cameroon, despite her fear of FGM not emanating from the State, as it was considered that she could not rely on effective State protection.<sup>53</sup> The appeal body also granted refugee status to a baby girl from Ethiopia based on a fear of FGM, after the first-instance decision granted only a complementary form of

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<sup>49</sup> In 1993 the EXCOM also strongly condemned persecution through sexual violence, which it accepted 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 offence to human dignity'. EXCOM supported the recognition as refugees of persons whose claim to refugee status is based upon a well-founded fear of persecution, though sexual violence, for reasons of race, religion, nationality, membership of a particular social group or political opinion (EXCOM Conclusion No.77 *Refugee Protection and Sexual Violence*, paragraphs (a) and (d))

<sup>50</sup> In the questionnaire responses that were collected as part of this research, interpretations of 'sexual violence' were appropriately broad, and included rape and female genital mutilation. Where questionnaire responses made clear that only complementary protection could be granted for such cases, this was considered not to constitute recognition under the 1951 Convention

<sup>51</sup> The countries that have not or cannot be shown to have recognised sexual violence as a form of persecution are: Albania, Armenia, Azerbaijan, Bulgaria, Croatia, Czech Republic, Estonia, Finland, Italy, Latvia, Lithuania, FYROM, Malta, Moldova, Poland, Portugal, Russian Federation, Slovenia, Turkey and Ukraine. Although sexual violence is not explicitly mentioned in the law, the fact that the UNHCR Handbook is incorporated in the national legislation of Cyprus leads UNHCR to conclude that sexual violence will be recognised as a form of persecution when it arises but we were unable to identify any evidence in the form of specific decisions or case law to confirm that this is the case

<sup>52</sup> This is in accordance with Austria's policy on non-State agents and State protection. For further discussion see section 5 of this report

<sup>53</sup> IFAS/UBAS no. 220.268/0XI/33/00, 21 March 2002

protection. In at least one case determined by the IFAS, specific reference has been made to the UNHCR Gender Guidelines.<sup>54</sup> In cases involving sexual violence, the difficulty for applicants in Austria lies less in recognition of sexual violence as a form of serious harm, and more in determining authorities' reluctance to recognise a Convention ground as the cause for the abuse. For example, the case of a Somali woman raped by several members of another clan was refused for this reason, although the Higher Administrative Court (HAC) found that the treatment was for a Convention reason and the case was remitted, and ultimately succeeded.<sup>55</sup>

142. In Switzerland, asylum law states that "the motives of flight specific to women are be taken into consideration."<sup>56</sup> The Swiss Appeals Board has determined that rape and enforced marriage constitute forms of persecution, so long as (in line with Swiss policy on non-State agents) the State can be held either directly or indirectly accountable.<sup>57</sup>

143. In Belarus and Hungary, asylum legislation includes reference to sexual violence, with an implicit recognition that it can amount to persecution. Applicants whose fear of persecution is based on sexual violence are to be provided with particular care, including provision of same-sex interviewers.<sup>58</sup> In Hungary, there have been several successful cases where the persecution feared was sexual violence.

144. In Denmark, sexual violence is recognised as a possible form of persecution, but only within strict criteria which require the treatment to be severe or life-threatening, and that the victim must be unable to rely on social networks or public bodies for support in the country of origin.

145. Similarly, in the Netherlands, sexual violence is recognised but only in specific types of cases. Dutch policy states that sexual violence inflicted by State agents during the exercise of their duties, will not be considered a private act. However no reference is made to how to assess cases of sexual violence that do not fit these criteria, i.e. sexual violence at the hands of non-State agents.<sup>59</sup>

146. In Belgium, sexual violence has been recognised as amounting to persecution in a number of cases, both in initial decisions and on appeal. In Greece, appeal cases have also recognised sexual violence as a form of persecution, but there have been few applications on this basis. In France, the appeals body has also recognised sexual violence, specifically FGM, as a form of persecution.<sup>60</sup> In Slovenia, the authorities have recognised rape in the context of ethnic violence as a form of persecution.

147. In Romania, cases involving sexual violence have tended to result in a grant of humanitarian status (as in the cases of Somali women at risk of rape on return, and other Somali cases based on a fear of FGM.) However in 2003, refugee status was

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<sup>54</sup> No. 216.194/10-II/39/01 of 25 October 2002

<sup>55</sup> HAC, case no. 2000/01/0305 of 11 June 2002

<sup>56</sup> Swiss Asylum Law, Article 3, paragraph 2

<sup>57</sup> EMARK 93/9, EMARK 96/16

<sup>58</sup> Instruction on Procedure of Recognition as Refugee in the Republic of Belarus, Cessation and Loss of Refugee Status, approved by Ministry of Labour and Social Protection of the Republic of Belarus on 30/06/2003 Nos.77, 37, and Hungarian Government Decree 172/2001 (IX.26), Section 6 (3)

<sup>59</sup> Aliens Circular 2000, Section C1/3.3.2

<sup>60</sup> Further details on the two significant appeals allowed on this basis are provided in Section 7 on Particular Social Groups

granted to a woman whose case was partly based on a fear of FGM, and in another case refugee status was granted to an Iraqi woman raped for reasons linked to her ethnicity.

148. In Ireland, information from UNHCR indicates that initial decisions and appeals have recognised sexual violence as a form of persecution, but decisions in such cases are not made public.

149. In Norway, 50 individuals were granted refugee status on the basis of gender-related persecution in 2003, most of whom were women from Iran, Ethiopia and Afghanistan, who feared rape, forced marriage and honour-related violence.<sup>61</sup>

### **Case study countries: sexual violence as a form of persecution**

150. Recognition of sexual violence as a form of persecution varies significantly across the case study countries.

151. In Lithuania<sup>62</sup>, there are no known cases of sexual violence being recognised as persecution by decision-makers. The Order on Processing Asylum Applications defines persecution as serious acts of violence, while the electronic RSD manual defines it as discrimination on Convention grounds which “endangers human life, freedom or other vital human rights and freedoms” (Lithuanian Migration Department undated).<sup>63</sup>

152. In Sweden, the Migration Board’s Gender Guidelines quote Articles 1 and 2 of the 1993 UN Declaration on the Elimination of Violence against Women, noting that the definitions of violence against women therein are of “acts of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life” and shall be understood to include but not be limited to “physical, sexual and psychological violence occurring in the family, including battering, dowry, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation,” as well as “physical, sexual or 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; and physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs”.

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<sup>61</sup> Norwegian Directorate of Immigration, Press Release February 2004

<sup>62</sup> It should be noted that there have been a number of recent changes to procedures for refugee status determination in Lithuania in recent years. Between 1997 and 2000, asylum appeals were heard by the Refugee Affairs Council, which consisted of two members of Parliament, seven Ministry representatives, one representative of the President’s Office and two NGO representatives. The Vilnius District Court could hear a further appeal. On 1 September 2000 a new version of the Law on Refugee Status came into force and established new appeal bodies. Vilnius District Administrative Court now hears asylum appeals, and the Lithuanian Supreme Administrative Court hears further appeals.

<sup>63</sup> The information on the definition in the Order of the Minister of Interior on Processing Asylum Applications of 5<sup>th</sup> January 2001 was received thanks to Ms Violetta Targonskiene, Deputy Head of Asylum Affairs Division of the Migration Department under Minister of Interior, Lithuania

153. However, there is evidence that this guidance is not always reflected in practice. For example, although there is some evidence that rape has been recognised as amounting to persecution, this recognition is not consistent. A study carried out in 2001 followed 80 asylum claims made by women and showed that of these, three women were granted refugee status, all of whom had suffered rape (Bexelius 2003). Other women who had suffered rape were refused, sometimes on the basis that the abuse suffered did not amount to persecution. The report refers to the case of a Bangladeshi woman whose account of gang rape by political opponents was considered credible but not to be for a Convention reason or sufficiently serious to warrant the granting of refugee status. The report also notes that no woman who had suffered rape at the hands of non-State agents was granted refugee status. Research following the introduction of the Swedish Gender Guidelines indicates that the consideration of rape in Swedish asylum practice has not improved.

154. Cases involving FGM have been the only cases that have succeeded under the gender clause of the Swedish Aliens Act. This means that women whose asylum claim was based on fear of, or escape from, FGM were granted complementary status. Bexelius (2001) found that between 1997 and 2000 inclusive, 29 such cases were granted complementary protection under the gender clause.

155. It is noted that the Swedish Gender Guidelines define FGM and forced abortion as the only two forms of abuses that are exclusively gender-specific, on the basis that they affect only women (Swedish Migration Board 2001). When combined with the application of the gender clause only to FGM cases, this indicates that application of the gender clause has been limited to cases of abuse that are viewed as exclusively gender-based, while other gender-related cases are considered within the mainstream of asylum considerations. The Swedish Gender Guidelines state that where an asylum case could come under several provisions of the Aliens Act, the applicant should be allowed to stay in Sweden based on the provision that provides the best protection (Swedish Migration Board 2001). As a result of the current Swedish position on gender, cases based on a fear of FGM cannot result in refugee status. Furthermore, considering FGM under the gender clause rather than the torture clause means that the status granted does not provide the same absolute protection from removal (Lyth 2002).

156. Lyth (2002) notes that the two forms of gender-related persecution referred to in the Swedish Gender Guidelines as exclusively gender-specific. They are based on physically gender-specific acts, and suggests that this implies a narrow view of gender which actually refers to sex rather than socially-constructed gender roles and circumstances (Lyth 2002, 22). If this is correct, it could also explain the narrow application of the gender clause.

157. In the United Kingdom, the Home Office Asylum Policy Instructions (APIs) on assessing claims state that “unjustifiable attack on life and limb and slavery, torture, cruel inhuman or degrading punishment or treatment” must be considered as human rights violations which amount to persecution if allied with a Convention ground and the authorities are unwilling or unable to provide effective protection.

158. The APIs further state that acts in these categories include “unjustifiable killing, or maiming,” and “physical or psychological torture, rape and other serious sexual violence” (Home Office undated, paragraph 8.2). The recently introduced guidance on Gender Issues in the Asylum Claim states that possible forms of

persecution include, but are not limited to: marriage-related harm; violence within the family or community; domestic slavery; forced abortion; forced sterilisation; trafficking; female genital mutilation, sexual violence and abuse, and rape (Home Office 2004, paragraph 9).

159. Despite this, the evidence collected during the course of this research suggests that whilst the seriousness of rape is not generally questioned in the courts, recognition of its violent motive and therefore whether it constitutes persecution for a Convention reason has been inconsistent. Although sexual violence is recognised as a form of persecution by the UK authorities, there remains a strong tendency not to accept that this treatment is connected with a Convention reason. In 1999, there were two judicial reviews of decisions made by the IAA and IAT, which considered whether rape during detention occurred for a Convention reason (in both cases, political opinion). In the case of Muiriu,<sup>64</sup> it was conceded that the female detainee was particularly vulnerable due to her ethnicity and political opposition to the authorities, and that although “there is unlikely to be rape occurring without some degree of sexual interest”, she would not have suffered such treatment were it not for Convention-related factors.

160. In the same year, the Court of Appeal found in the case of Roomy<sup>65</sup> that when soldiers raped a man in their custody, their conduct was deplorable but “they were assaulting him in this way to gratify their own licentiousness, and [it] was not the product of whatever reason had led the applicant to be within their otherwise lawful custody.”

161. In July 2002, the Court of Appeal dismissed Rose Njemba’s appeal on the basis that the attack against her was not considered to be for a Convention reason. Ms Njemba had been raped by four soldiers who were questioning her about her son, whom they suspected of rebel activity. Her son was severely beaten and arrested on the same occasion. The appellant was eventually granted Indefinite Leave to Remain in the UK in a discretionary decision by the Minister Beverley Hughes, following an extensive public campaign.<sup>66</sup>

162. Regarding FGM, the IAA Gender Guidelines (IAA 2000, paragraph 2A.17) include a statement made by the then-Minister of State Ann Widdecombe in 1996:

We would regard enforced abortion as torture, as we would enforced mutilation or sterilisation. [...] I stress that both personally and as a Minister I utterly accept that forcible abortion, sterilisation, genital mutilation and allied practices would almost always constitute torture. In fact, they would probably always constitute torture. There is no doubt in my mind that anyone making a case to us on those grounds would have an extremely good case for asylum.

163. As noted above, the Home Office guidance on Gender Issues in the Asylum Claim released in March 2004 includes FGM as a possible form of persecution, as long as it is linked to a Convention reason. Case law has recognised asylum

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<sup>64</sup> High Court, *R v Secretary of State ex parte Muiriu* (CO/1533/99, 21 May 1999)

<sup>65</sup> *R v Secretary of State for Home Department, ex parte Roomy* CO/4454/98 10 May 1999

<sup>66</sup> For further information see RWRP *Women's Asylum News*, May 2003, Issue 32 available online at <http://www.asylumaid.org>

applicants fearing FGM. The case of *Yake*<sup>67</sup> brought by a young woman from Cote d'Ivoire, applied the US interpretation made in *Kasinga*<sup>68</sup> in finding that certain groups of women at risk of FGM constituted a particular social group and that what they feared would amount to persecution:

In the context of this case, we find the particular social group to be the following: Young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice ... In accordance with *Acosta*, the particular social group is defined by common characteristics that members of the group either cannot change, or should not be required to change because such characteristics are fundamental to their individual identities. The characteristics of being a 'young woman' and a 'member of the Tchamba-Kunsuntu Tribe' cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.

164. However, a number of cases at the IAT have been refused refugee status on the grounds that women at risk of FGM were not found to be members of a PSG, or to come under any other Convention ground (Luopajarvi 2003, 61). Although complementary status can still be granted in such cases, this is an example of inconsistent application, and the risk that interpretations in the same courts can be as likely to develop along increasingly restrictive lines as to gradually become more gender-sensitive.

165. In Germany, it is generally recognised that rape and other sexual violence amount to serious harm and constitute persecution whenever the State or a state-like entity is not willing or able to grant protection. The Federal Administrative Court (FAC) has upheld this position (Luopajarvi 2003).

166. In a case in 1991, the Hessen Administrative Court found that the rape of a Kurdish woman by Turkish soldiers was representative of how Kurdish people were mistreated by Turkish authorities, and found to be persecution. The rape of ethnic Albanian women by Serbian police was found in 1997 to be part of a persecutory campaign (Ankenbrand 2002). In 2002 several cases of Kurdish women from Turkey who had been subjected to rape were granted refugee status, and it is reported that a number of women with comparable cases from Angola, DR Congo, Azerbaijan and Chechnya were also granted refugee status in 2002.<sup>69</sup>

167. Despite this, the failure to recognise sexual violence as a form of persecution is common even where sexual violence has been carried out by State agents. This is the result of the position in Germany that the State itself needs to be responsible for abuse, and the view that sexual attack is inherently a private act.<sup>70</sup> Ankenbrand (2002) notes that, as recently as 1998, the Stuttgart Administrative Court followed the

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<sup>67</sup> *Yake* (IAT) 00493, 19<sup>th</sup> January 2000

<sup>68</sup> *Matter of Kasinga* (BIA) in re Kasinga, Interim Decision 3278 BIA 1996

<sup>69</sup> Information provided by UNHCR

<sup>70</sup> It is noted that with a small number of exceptions – in cases with very particular circumstances – no cases of domestic violence have been allowed by the German decision-makers, because it has been considered that this private act is not attributable to any State

interpretation made by the FAC in 1987, which considered widespread rape by hostile militia as the common fate of women caught in a war zone and therefore not recognised as persecution. Ankenbrand (2002) also refers to the 1996 case of a Sri Lankan woman raped by Indian soldiers whose abuse was found by the FAC to be committed by private actors and therefore not the responsibility of the State. However in an important recent precedent dates 12th June 3003, the highest German Court, the Federal Constitutional Court, quashed the negative decision in the case of a Kurdish rape victim from Turkey, stating that the criteria for State responsibility for the actions of individual civil servants were to be applied much more generously.<sup>71</sup>

168. German decision-makers have in principle recognised that FGM is not merely a private act, but “an objectification of women caused by dominant societal perceptions” which results in serious damage, both physically and psychologically. A recent court determination considered that it was not even necessary to question whether FGM was serious enough to constitute persecution (Luopajarvi 2003, 61-62). As such, the issue when considering the determination of cases involving FGM is not the severity of the treatment but rather the consideration of State responsibility. Ankenbrand (2002) notes that where FGM is illegal, or adult women could seek protection from non-governmental organisations or relocate within the country, cases involving FGM have been dismissed. In contrast, case law on the forced circumcision of Christian men in the Turkish army has found this was bodily harm amounting to persecution illustrating the impact of a strict view on State responsibility. However, Ankenbrand notes that in some cases where the State has shown no indication of prosecuting perpetrators of FGM, refugee status has been granted.

169. A UNHCR monitoring project found that of 173 claims based on fear of FGM which were followed over several years up until the end of 2002, 21 cases resulted in refugee status. Half of these were granted at initial decision, and half at appeal. Decisions referred to membership of a PSG, the right to religious self-determination, political opinion (to live a non-circumcised life), ethnic origin and age and gender of the applicants, and held that State protection against traditional practices was not available. In 40 of the 173 cases, complementary protection on humanitarian grounds based on an imminent threat to life and limb due to impending FGM was granted to the girls and women. In another 15 cases, a temporary injunction against deportation was issued.<sup>72</sup> In over half the 173 cases, no status was granted on the basis that the State in the country of origin was committed to protection (such as by legislating against the practice), or because it was considered that applicants could rely on an internal flight alternative. Other cases were rejected on credibility grounds.

### **Recognition of discrimination as amounting to persecution**

170. The UNHCR Handbook and the UNHCR Gender Guidelines are clear that discrimination can amount to persecution. The UNHCR Handbook states that separate measures of discrimination that do not in themselves amount to persecution may be considered together to be persecution on cumulative grounds. In addition,

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<sup>71</sup> BverfG 2BvR 134/01

<sup>72</sup> Information provided by UNHCR

“separate measures of discrimination may give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence” (UNHCR 1992, paragraphs 55 and 55).

171. The UNHCR Guidelines on the Protection of Refugee Women (1991, paragraph 55) state that:

Women may also flee their country because of severe sexual discrimination either by official bodies or in local communities. Protection from sexual discrimination is a basic right of all women and is enshrined in a number of international declarations and conventions. While the universal right to freedom from discrimination on grounds of sex is recognised, and discrimination can constitute persecution in some cases, the dividing line between discrimination and persecution is not a clear one.

172. Taking this one step further, the UNHCR Gender Guidelines state that discrimination may amount to persecution if the provision of State protection is discriminatory:

Significant to gender-related claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harm. If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one’s differing sexual orientation, could, for example, be analysed in this context (UNHCR 2002a, paragraph 15).

173. According to the UNHCR Gender Guidelines, discriminatory legislation can also constitute persecution:

Assessing a law to be persecutory in and of itself has proven to be material to determining some gender-related claims. This is especially so given the fact that relevant laws may emanate from traditional or cultural norms and practices not necessarily in conformity with international human rights standards. However, as in all cases, a claimant must still establish that he or she has a well-founded fear of being persecuted as a result of that law. This would not be the case, for instance, where a persecutory law continues to exist but is no longer enforced (UNHCR 2002a, paragraph 10, emphasis in original).

174. In addition, the Qualification Directive states that acts of persecution can take the form of “legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner; prosecution or punishment, which is disproportionate or discriminatory; or denial of judicial redress resulting in a disproportionate or discriminatory punishment, so

long as the acts are sufficiently serious in nature, in themselves or cumulatively.”<sup>73</sup> This makes clear that EU Member States will be required to consider that discrimination can amount to persecution in certain cases.

175. Our survey of European countries’ policies and practices sought to assess whether receiving States recognise that discrimination can amount to persecution. The questionnaire did not limit this information to gender-related discrimination on the basis that if a State does not recognise that discrimination can amount to persecution, this position will include gender-related discrimination but where such recognition exists it should theoretically extend to persecution on this basis. This study does not assume that recognition of gender-related discrimination would be automatic in such cases, but rather would be dependent on other elements of gender-sensitivity addressed within the report.

176. Over half (56%) of the countries that were surveyed have recognised that in certain cases, discrimination can amount to persecution, either in law, policy or case law.<sup>74</sup>

177. In Albania, decisions have acknowledged that discrimination can amount to persecution, in accordance with the UNHCR Handbook. Similar decisions have been made in Armenia, although such recognition has not to date been applied in a gender-related case. In Belgium and Cyprus, there is also recognition of discrimination as a possible form of persecution as specified in the UNHCR Handbook. This is also at least implicitly the case in the Ukraine, where discrimination on cumulative grounds has been recognised as a form of persecution. In Hungary, Spain and the Russian Federation, there is no specific policy on discrimination, but some cases have recognised that it can amount to persecution.

178. In Austria, several cases have recognised that some forms of discrimination can amount to persecution. In 2002, the Higher Administrative Court found that the systematic obstruction of access to medical care experienced by an Afghan woman amounted to persecution.<sup>75</sup> This decision was followed by the second instance decision body in June 2003, when it was determined that women’s circumstances in Afghanistan had not significantly improved and that the discrimination they continued to suffer constituted persecution.

179. In a few exceptional decisions, the threat of a complete loss of a minimum subsistence level upon return has been regarded as persecution on account of the applicant’s gender. The applicants in three such cases were respectively a single mother from Eritrea, a divorced woman from Kosovo, and a single Roma woman from Serbia and Montenegro.<sup>76</sup> These cases are considered exceptional due to their detailed attention to the circumstances of women in the country of origin.

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<sup>73</sup> Qualification Directive, Articles 11.2 and 11.1, respectively

<sup>74</sup> These countries are: Albania, Armenia, Austria, Belarus, Belgium, Bulgaria, Cyprus, Denmark, France, Germany, Greece, Hungary, Ireland, Lithuania, Netherlands, Norway, Romania, Russian Federation, Spain, Sweden, Switzerland, Ukraine and the United Kingdom

<sup>75</sup> HAC No. 99/20/0483, 16 April 2002

<sup>76</sup> IFAS/UBAS No. 216.886/0-V/14/00, 3 September 2002; IFAS/UBAS No. 208.291/13-I/01/02, 3 September 2002; IFAS No. 229.797/0-VII/2/02, 4 June 2003

180. In Belarus, asylum law states that persecution includes discrimination, if it makes living in the country of origin difficult or impossible.<sup>77</sup>

181. In Denmark, Convention refugee status has been granted to some women from countries where discriminatory legislation places them at risk of severe punishment. For example, Iranian women who had been unfaithful, and had left the country without their husbands' permission, have been granted refugee status, due to the risk of disproportionate punishment on their return.

182. In France, discrimination has been considered to amount to persecution in some cases, particularly in relation to transgression of social or religious mores.<sup>78</sup>

183. In the Netherlands, the Aliens Circular states that where discrimination creates serious limitations to the applicant's ability to function in society, it may amount to persecution.<sup>79</sup> If a particular punishment only exists for women, it is considered to constitute persecution if the punishment is disproportionate and is related to one of the grounds for persecution or, in addition to a normal punishment there is question of discriminatory persecution on one of the grounds for persecution. Discrimination specifically aimed at women can only be considered if there is a Convention ground other than gender.<sup>80</sup>

184. In Norway, the proposed amendments to the Aliens Decree make explicit that violations which might not in themselves amount to persecution, may cumulatively amount to persecution.<sup>81</sup>

185. In Romania, instructions on the interpretation of refugee law state that serious acts of discrimination may amount to persecution.<sup>82</sup> This has been applied in the cases of some Afghan women living under the Taliban, and some Iranian women considered to be at risk for having married non-Muslims.

186. In Switzerland, the asylum law states that refugees are persons who fear 'serious disadvantages' due to one of the five Convention grounds, resulting in danger to life or limb or freedom, or in an 'unbearable psychological pressure.'<sup>83</sup> Applicants whose cases rely on this provision must demonstrate that it would not be possible to lead 'a life in dignity' in the country of origin. The Swiss Appeals Board has determined that continuous harassment by the Muslim population suffered by two Syrian-Orthodox women from Turkey, justified their fear of future rape and abduction by Muslim civilians. The State was found to be unwilling to afford protection to the claimants, itself discriminating against the Syrian-Orthodox population.<sup>84</sup> However, in another case, the Appeals Board found that the harassment suffered by an Azerbaijani homosexual at the hands of both authorities

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<sup>77</sup> Instruction on Procedure of Recognition as Refugee in the Republic of Belarus, Cessation and Loss of Refugee Status, approved by Ministry of Labour and Social Protection of the Republic of Belarus on 30/06/2003 Nos. 77, 58

<sup>78</sup> More details of these cases are provided in section 6 on transgression of mores and section 7 on the definition of Particular Social Groups

<sup>79</sup> Aliens Circular 2000, C1/4.1.2.5

<sup>80</sup> Aliens Circular 2000, section C1/4.2.11

<sup>81</sup> Proposal for amendments to the Aliens Decree, Section 58 (b)

<sup>82</sup> Methodology for the implementation of the Refugee Law, Article 2, paragraph 2

<sup>83</sup> Asylum Law, Article 3, paragraphs 1 and 2

<sup>84</sup> EMARK 93/9

and the local population lacked the intensity necessary to constitute 'serious disadvantages' or an 'unbearable psychological pressure.' This was in part because non-State agents committed the more recent events.<sup>85</sup>

187. In Finland, some decisions by the Directorate of Immigration have implied that a law prescribing the death penalty for adultery or homosexuality is disproportionately severe, and constitutes discriminatorily enforced punishment, but Convention refugee status has not been granted on this basis. The Directorate of Immigration has taken the view that lashing as a punishment for breaking the law is not a basis for granting asylum or international protection, and that problems resulting from breaking Islamic dress codes are not severe enough to warrant international protection (Luopajarvi 2003).

188. Latvia, Estonia and Slovenia questionnaire responses all noted it was difficult to respond to this question given the small caseload in these countries to date.

### **Case study countries: discrimination as persecution**

189. Discrimination is explicitly recognised as potentially constituting persecution in the United Kingdom and in Sweden, while German authorities have tended to take a more restrictive position. In Lithuania, there are no known cases of Convention refugee status being granted exclusively on the basis of discrimination, although it is likely to have been a factor in the small number of gender-related asylum claims which have succeeded.

190. In Lithuania, there have been six cases of gender-related persecution that have resulted in Convention refugee status. All of these succeeded at appeal, between 1998 and 2000, and five of them were claims by Afghan women who feared persecution by the Taliban. Given the Taliban's treatment of women, it seems likely that discrimination would have been part of the claim, but all the women had significant other factors to their claims, including political affiliation. Details about the exact nature of the persecution experienced or feared are however not known.<sup>86</sup>

191. As noted above, the Lithuanian electronic RSD manual defines persecution as "discrimination on account of race, religion, nationality, membership of a particular social group or political opinion which endangers human life, freedom or other vital human rights and freedoms" (Lithuanian Migration Department undated).<sup>87</sup>

192. In Germany, only under certain circumstances does German jurisprudence recognise persecution on account of prosecution for violation of domestic law, and this has particularly affected women fearing persecution for disobeying discriminatory laws. Ankenbrand (2002) that this has had a particular impact on women from Afghanistan because of the relationship between the persecution feared and the German approach to non-state agents. She notes that in 1998 and 1999,

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<sup>85</sup> EMARK 96/30

<sup>86</sup> Information from communication with Laurynas Biekša, Lithuanian Red Cross, which provides legal representation to asylum-seekers in Lithuania. Further details about these cases are provided in sections 6 and 7 of this report

<sup>87</sup> The information on the definition in the Order of the Minister of Interior on Processing Asylum Applications of 5 January 2001 was received thanks to Ms Violetta Targonskiene, Deputy Head of Asylum Affairs Division of the Migration Department under Minister of Interior, Lithuania

Afghan women's cases were refused refugee status on the basis that the Taliban had not established a State-like control of the country and could not qualify as agents of persecution. A decision in 1999 did not dispute that the Taliban's regime made unmarried women without any male relatives more vulnerable to famine, but found that their lives were not threatened and refugee status was not granted due to the lack of a State power, although at least some were granted complementary status. However as of 2001, when the FAC determined that the Taliban exerted State-like power and that gender could be considered a ground of persecution, there have been many cases where Afghan women who have lived under the Taliban regime were found to have a well-founded fear of persecution owing to their gender, education, western orientation and other gender-specific discriminatory measures.<sup>88</sup>

193. The United Kingdom's Home Office APIs recognise that in certain cases, some forms of discrimination might amount to persecution, including discrimination affecting the right to: freedom of thought, conscience and religion; freedom from arbitrary arrest and detention; freedom of expression, assembly and association; privacy; access to public employment without discrimination; access to normally available services such as: food; clothing; housing; medical care; social security; education; right to work; or a combination of such measures assessed cumulatively (Home Office undated, paragraph 8.5). The same paragraph of the APIs emphasises that discrimination in the provision of protection by the law must particularly be considered, and a further statement emphasises that:

The caseworker should also consider whether protection afforded by the authorities is available to an individual regardless of their race, ethnicity, sexual orientation, disability, religion, class, age, occupation or any other aspect of their identity. The official authorities of a country may need to take measures that restrict the exercise of certain freedoms. Such restrictions may not in themselves constitute persecution. However, if the restrictions are being applied in a discriminatory manner and have sufficiently serious consequences [...] they may amount to persecution (Home Office undated, paragraph 8.5).

194. The recent Home Office guidance on Gender Issues in the Asylum Claim closely reflects the UNHCR Gender Guidelines when it is noted that:

A discriminatory measure, in itself or cumulatively with others, may amount to persecution [if] the discrimination has consequences of a substantially prejudicial nature for the person concerned such as serious restrictions on rights to earn a livelihood, restrictions on political enfranchisement, to practice or not practice a religion, to have access to public places or normally available educational, legal, welfare and health provision (Home Office 2004, paragraph 11).

195. In addition, the guidance states that women may be subjected to discriminatory treatment that is enforced through law or imposition of social and religious norms, which may include family and personal laws; dress codes;

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<sup>88</sup> FAC 9 C 21.00, 20 February 2001. For more details on this case see Section 5 of this report

employment or education restrictions; restrictions on freedom of movement and political disenfranchisement (Home Office 2004, paragraph 12).

196. The IAA Gender Guidelines detail the consideration of discrimination and the forms that may apply to women in particular. They also emphasise the consideration of discrimination made in the High Court case of *Shah and Islam*, which set a precedent for recognising particular groups of women as members of a Particular Social Group (IAA 2000, paragraphs 2A.5 – 2A.13).<sup>89</sup>

197. The Swedish Gender Guidelines reflect the UNHCR Handbook's statement on cumulative discrimination in noting that "a combination of different instances of harassment and restrictive measure may, in some cases, serve as the basis of refugee status, even if each measure on its own does not." However the point is concluded with an emphasis that "one condition in such a case is that these relate to grounds for refugee status" (Swedish Migration Board 2001, 13 – 14). The implication of this statement is that discrimination on the basis of gender alone would not be considered as qualifying for refugee status, and this is consistent with the position in Swedish policy that a Particular Social Group cannot be defined by gender.

198. The Swedish Gender Guidelines imply that access to State protection may be affected by discriminatory factors, and that it may be more difficult for some women than men because of traditions or laws in the country. However, where severe discrimination is based on gender, the Swedish prohibition of considering gender as a characteristic defining a Particular Social Group would restrict the potential for refugee status to be granted.

199. Research indicates that refugee status has rarely been granted to women coming from countries where they are subject to inherently discriminatory laws or policies or where disproportionate punishments are inflicted. Rather, evidence on cases between 1997 and 2000 shows that some women with such cases have been granted complementary status on humanitarian grounds or risk of inhuman or degrading treatment. Furthermore, "the decisions tend not to include any discussion on whether and in what circumstances discriminating laws or policies can be considered persecution" (Luopajarvi 2003, 46).

200. The Swedish Aliens Appeals Board has held that serious restrictions on the right to earn a livelihood can constitute persecution. However, an analysis of 52 gender-related asylum cases since the introduction of the Swedish Gender Guidelines showed that there were no instances of refugee status being granted on the basis of discrimination, irrespective of whether the discrimination emanated from discriminatory legislation, application of legislation or from non-State agents (Bexelius 2003).

### **Recognition of sexual exploitation as a form of persecution**

201. It is not possible to state categorically which countries recognise forced prostitution/sexual exploitation as a form of persecution under the 1951 Convention, which grant complementary status in some cases, and which do not recognise such abuse at all. Based on the information available, at least 10 countries out of 41 have

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<sup>89</sup> For further details about the *Shah and Islam* case, see Section 7 on Particular Social Group (PSG)

granted some form of status for cases based on this treatment or fear of such treatment. These countries are: Albania, Austria, Belarus, Denmark, France, Germany, Ireland, the Netherlands, Poland and the United Kingdom. This means that three quarters of the countries surveyed have not recognised sexual exploitation or forced prostitution to date in their asylum procedures. For a majority of countries, it was noted that few or no such asylum claims had been made. Among the countries that do grant complementary status, the number of successful cases appears to be very small.

202. Based on questionnaire responses, there are three countries which have granted refugee status in at least one case of forced prostitution or sexual exploitation. The appeal body in France granted refugee status to a young woman from the Dominican Republic who had suffered both enslavement in her own country, and trafficking to Haiti where she was forced into prostitution.<sup>90</sup> A number of factors were considered, including the lack of State protection on account of her ethnicity, and the stance she was seen to have taken in seeking to refuse forced prostitution amounted to a (political) battle for human rights and dignity. Her fear of being forced back into prostitution and reprisals for having fled were considered as a well-founded fear of persecution.

203. In Denmark, the Danish Refugee Board granted asylum to four women whose cases were based on forced prostitution between May 1995 and August 2003.

204. The authorities in Austria granted refugee status at first instance to a Chinese child who was at risk of being sold into prostitution by her father. Austrian authorities have also granted complementary status in some cases involving sexual exploitation: the appeal authorities have found that a single woman from Kosovo risked forced prostitution on return and that this would have been a breach of their rights under Article 3 of the European Convention on Human Rights, protecting all individuals from torture and inhuman or degrading treatment.<sup>91</sup>

205. One asylum application made in Austria by a woman who feared ill-treatment or death at the hands of her traffickers on return was initially rejected as manifestly unfounded on the basis of there being no Convention ground. The Higher Administrative Court ruled that the case had to be decided in the regular procedure since it was not evident whether the persecution was based on criminal reasons or on membership of a particular social group.<sup>92</sup> However by the time of this appeal decision, the applicant had disappeared. This case may serve to highlight one of the specific problems of addressing the protection needs of individuals at risk of sexual exploitation: if they have been trafficked into the country where they claim asylum, they may remain vulnerable even in the country of asylum, and require additional physical protection.

206. Another six countries have in certain cases granted (at least) complementary protection in cases based on forced prostitution or sexual exploitation. These countries are: Belarus, Germany, Ireland, the Netherlands, Poland, and the United Kingdom.

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<sup>90</sup> MEIJA, Commission des Recours des Réfugiés (SR), Decision nr. 423904 of 17 October 2003

<sup>91</sup> No. 201.989/5-III/09/99 of 27 June 2001

<sup>92</sup> HAC No. 99/20/0497 of 31 January 2003

207. In Albania, one case has resulted in temporary protection on humanitarian grounds, concerning a Moldovan trafficked woman who had been sexually exploited.

208. In Belarus, RSD authorities have referred to the need for protection from forced prostitution in individual decisions.

209. In Ireland, some cases have resulted in some form of protection, but decisions have not been made public.

210. In the Netherlands, it is not possible to claim asylum on the basis of forced prostitution, but a temporary residence permit may be issued if victims file a complaint.<sup>93</sup> A permit for continued residence on humanitarian grounds may be granted in cases where there is a risk of reprisals from family members for which there is no State protection; a risk or persecution due to prostitution, or if there is no prospect of reintegration in the country of origin, based on factors such as social networks and public opinion.<sup>94</sup> It is noted that some of these requirements run in parallel to the other requirements for refugee status (for example, risk of persecution and failure of State protection). When combined with the Netherlands' position on not considering gender as a defining characteristic of a PSG, this implies that the disenfranchisement of gender-related cases in Sweden under current legislation may also apply in the Netherlands.

211. For Poland, the questionnaire response noted that protection has been offered where the sexual exploitation has been linked to a Convention ground.

212. In Belgium, there are no known cases that have resulted in protection being granted, although like in the Netherlands, there is a policy of granting temporary residency to those who cooperate with the authorities in investigating the crimes of their traffickers. Evidence to date shows that the length of the residence permit (six months) suggest a greater emphasis on time to investigate rather than victims' needs, and that victims may be reluctant to agree to cooperate as this temporary residency is outweighed by fear of retribution from traffickers.

### **Case-study countries: sexual exploitation**

213. None of the countries selected as case studies for this research have established a position in asylum case law regarding sexual exploitation. There is nothing in Lithuanian or German law or policy that refers to sexual exploitation in relation to refugee status determination. However in Germany, guidelines on the implementation of the aliens law state that victims of sexual exploitation or forced prostitution may be eligible for humanitarian protection.

214. In the United Kingdom, the Home office APIs recognise that slavery, physical and psychological torture, rape and other serious sexual violence constitute forms of persecution. As such, forced prostitution and sexual violence could be considered as forms of persecution, but there is no explicit reference to this phenomenon. The Home Office guidance on gender issues in the asylum claim refers to domestic slavery and trafficking as possible forms of persecution (Home Office undated,

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<sup>93</sup> Aliens Circular 2000, Section B9

<sup>94</sup> Aliens Circular 2000, Section B9/4.6

Home Office 2004). In addition, the IAA Gender Guidelines state that “where a victim of sexual violence has no alternative but to marry her attacker or become a prostitute, these are also human rights violations” (IAA 2000, paragraph 2A.21). However, the UK has yet to make a favourable determination based upon sex trafficking status alone (Auton et. al. undated).

215. In Sweden, the Migration Board’s Gender Guidelines refer to the definition of violence against women in the 1993 UN Declaration on the Elimination of Violence against Women, which includes violence related to exploitation and physical, sexual and psychological violence linked to trafficking in women and forced prostitution. However the guidelines do not state whether these phenomena can constitute persecution.

### **Sexual exploitation and trafficking: emerging trends**

216. Given the emergence of trafficking and sexual exploitation as an issue in refugee status determination, it is worthwhile noting some of the policies and approaches currently being developed in this area (by countries within and outside Europe). Whilst some of these are not explicitly related to procedures for RSD, others are directly relevant. It should be noted that not all trafficking of women and girls to Europe is for the purpose of sexual exploitation. Labour migration – including domestic slavery – remains an important aspect of the past and current trends.

217. Canada has found that trafficking victims fall within its understanding of the definition of a Convention refugee, having granted asylum to a number of victims. The Canadian Council for Refugees has also produced the most comprehensive compilation of concerns and recommendations for future approaches (CCR 2003).

218. In Europe, the emphasis to date has been on combating trafficking rather than protecting its victims. A number of countries, including France, have introduced legislation, which grants some form of residence status to trafficking victims who cooperate with the authorities in reporting the activities of traffickers. In France, the reporting victims may be granted a residence and work permit as well as rehabilitation assistance, under certain circumstances (Auton et. al. undated).

219. These national developments run parallel to the EU Council Directive on granting short-term residence permits to those who cooperate with the authorities.<sup>95</sup>

220. The Directive has been strongly criticised by Human Rights Watch, which has noted its emphasis on combating trafficking rather than seeking to provide protection to victims of trafficking (Human Rights Watch 2002). Among other points, Human Rights Watch has expressed dismay that the directive states that only those considered appropriate need be informed of the possibility of a short-term residence permit in return for cooperation, and the organisation points out that “no other victims of human rights violations are required to cooperate with authorities in criminal investigations or proceedings in order to enjoy the protection of the State” (Human Rights Watch 2002, 5). Critical comments on the directive were also

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<sup>95</sup> The Council Directive on the short-term residence permit issued to third-country national victims of trafficking in human beings or to third-country nationals who have been subjects of an action to facilitate illegal migration who cooperate with the competent authorities, , 14432/2003-C5-0557/2003 – 2002/0043 (CNS), 9 March 2004.

provided by UNHCR and the UN High Commissioner for Human Rights (UNHCHR) to put more emphasis on the human rights of the victims and on safety and security of those participating as witnesses in criminal procedures, and that in the case of asylum-seekers and refugees found amongst those affected by trafficking and smuggling, full consideration must be given to their claims for international protection (UNHCR, UNHCHR, October 2003).

221. The European Parliament stipulated a number of amendments to the directive. These amendments make some recognition of the need to consider the needs of trafficking victims, including their potential need for more long-term protection. However the emphasis of the proposal remains combating trafficking rather than protecting its victims.<sup>96</sup>

222. In this regard, the European trend appears to go against international recommendations.<sup>97</sup> The United Nations Palermo Protocol to prevent, suppress and punish trafficking in persons states that its purpose is:

- To prevent and combat trafficking in persons, paying particular attention to women and children;
- To protect and assist the victims of such trafficking, with full respect for their human rights; and
- To promote cooperation among States Parties in order to meet those objectives.<sup>98</sup>

223. The UN Special Rapporteur on Violence against Women expressed concern in 2000 about “the apparent link between protectionist, anti-immigration policies and the phenomenon of trafficking” and the fact that:

[I]n the overwhelming majority of countries of destination, deportation remains the primary mechanism for dealing with undocumented immigrants, including trafficked persons. [...] Some trafficked women want to return to their countries of origin to escape abuse and violence. Others, however, fear stigmatization, rejection by their families, prosecution by the Government or reprisals by their traffickers if they return. [...] Deportation implies not only returning to the conditions which the women attempted to leave in the first place, but often also intimidation and threats by the smuggling operation either because the women owe the traffickers money for their failed trip or because they testified or are perceived to have provided information against the procurers (UN Commission on Human Rights 2000).

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<sup>96</sup> European legislative resolution on the proposal for a Council Directive on the residence permit issued to third-country nationals victims of trafficking. Provisional Edition 09/03/2004)

<sup>97</sup> For further information on European approaches, see <http://www.belgium.iom.int/STOPConference/Confdocs/Confpapers/index.htm>

<sup>98</sup> United Nations (2000) Protocol to prevent, suppress and punish trafficking in persons, especially women and children, supplementing the United Nations Convention against transnational organized crime, Article 2

224. The United Nations Recommended Principles and Guidelines on Human Rights and Human Trafficking recommend that:

States shall ensure that trafficked persons are protected from further exploitation and harm and have access to adequate physical and psychological care. Such protection and care shall not be made conditional upon the capacity or willingness of the trafficked person to cooperate in legal proceedings;

Safe (and, to the extent possible, voluntary) return shall be guaranteed to trafficked persons by both the receiving State and the State of origin. Trafficked persons shall be offered legal alternatives to repatriation in cases where it is reasonable to conclude that such repatriation would pose a serious risk to their safety and/or to the safety of their families;

225. In addition the Principles and Guidelines also highlight the importance of:

Ensuring that procedures and processes are in place for receipt and consideration of asylum claims from both trafficked persons and smuggled asylum-seekers and that the principle of non-refoulement is respected and upheld at all times;

Ensuring that anti-trafficking laws, policies, programmes and interventions do not affect the right of all persons, including trafficked persons, to seek and enjoy asylum from persecution in accordance with international refugee law, in particular through the effective application of the principle of non-refoulement.

226. Nonetheless, a significant recognition of victims' protection needs has been made in the European Parliament's recent resolution on immigration, integration and employment, which includes several statements regarding trafficking and sexual exploitation (European Parliament 2004). The resolution:

Emphasises the extraordinarily vulnerable situation of illegal immigrant women working illegally, secretly and in intolerable conditions which prevent them from reporting incidents of violence or discrimination, sexual or otherwise, of which they are victims, since they totally depend on their employer, the people who smuggle them in, or other;

Stresses that women and minors are the main victims of human trafficking and/or sexual exploitation and that they therefore need appropriate protection and assistance; stresses the need to address the issue, to promote measures to prevent trafficking, to eliminate sexual exploitation and to ensure the integration of victims; insists that Member States should take measures and adopt appropriate legislation so as not to penalise these victims;

Considers that action against illegal immigration and trafficking in human beings must not result in a repressive policy directed against

illegal immigrants but rather against traffickers and those who benefit from the situation;

Stresses the need to look into the causes and consequences of illegal as well as legal immigration and refuge, especially for women immigrants and asylum-seekers, who might be emigrating because of gender discrimination or persecution.

### **Recommendations**

227. Sexual violence – including FGM – should be recognised as a form of serious harm that can constitute persecution within the meaning of the 1951 Convention. The fact that such violence is of a sexual nature should not undermine a proper and substantive assessment of whether such harm is experienced or feared for a Convention reason. Sexual violence is not a private act.

228. States should recognise that discrimination – including gender-specific forms of discrimination – can rise to the level of persecution within the meaning of the 1951 Convention.

229. States should consider whether, and if so how, victims of sexual exploitation and trafficking can be protected under the 1951 Convention. States must recognise that the consequences of being trafficked can go beyond the effects of sexual exploitation and that social ostracism, stigma and reprisals may constitute persecution. Measures to combat sexual exploitation and trafficking must include protection for the victims. This protection should be long-term and should not be dependent upon the victim's willingness or ability to provide information to the authorities.



## 5. Persecution by non-state agents

230. The previous section examined the definition of persecution, including the interpretation of ‘serious harm’. In addition to establishing a well-founded fear of persecution, a woman must also show that the State has failed to protect her. A failure of State protection exists in the following situations:

- If ‘serious harm’ has been inflicted by the authorities or by associated organisations or groups; or
- If ‘serious harm’ has been committed by others and the authorities are unwilling to give effective protection; or
- If ‘serious harm’ has been committed by others, and the authorities are unable to give effective protection.

231. International legal obligations of the State are found in international treaty and customary law and include specific obligations to protect women’s human rights.

232. This section examines the extent to which European countries surveyed for this report recognise that persecution by non-State agents can form the basis for 1951 Convention refugee status where the State is unwilling or able to provide protection. Recognition of non-State agents of persecution where there is inadequate State protection is important for many asylum-seekers, but it can have particular importance for gender-related claims, because women often have a less direct relationship with the State or because access to protection is gendered. There is evidence that women are more likely than their male counterparts to experience or fear persecution by individuals who are not directly connected to the State, and furthermore that they may be less able to obtain the protection of the State against such harm.

233. Reflecting this, the UNHCR Gender Guidelines state that “there is scope within the refugee definition to recognise both State and non-State actors of persecution” (UNHCR 2002a, paragraph 19) and emphasise the principle established by the UNHCR Handbook that “where serious discriminatory or other offensive acts are committed by the local populace, they can be considered persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to provide effective protection” (UNHCR 1992, paragraph 65).<sup>99</sup>

234. The Gender Guidelines reflect and build upon the general principle that there needs to be a ‘causal link’ between the persecution feared and a Convention ground and provide guidance on instances where that link would clearly be established:

235. In cases where there is a real risk of being persecuted at the hands of a non-State actor (e.g. husband, partner, or other non-State actor) for reasons which are

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<sup>99</sup> See in this context also paragraph 19 of Interpreting Article 1 of the 1951 Convention Relating to the Status of Refugees, UNHCR, April 2001

related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established (UNHCR 2002a, paragraph 21)

236. Gender-specific harm - whether at the hands of non-State agents or State agents - is addressed in the UNHCR Gender Guidelines:

237. 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” (UNHCR 2002a, paragraph 24)

238. The Gender Guidelines emphasise that State protection cannot be assumed on the basis that a certain act is illegal:

239. Even though a particular State may have prohibited a persecutory practice (e.g. female genital mutilation), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. In such cases, the practice would still amount to persecution. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual’s claim to refugee status is not valid (UNHCR 2002a, paragraph 11)

240. Although the interpretation of persecution by State agents can also be problematic in some cases involving gender-related issues – especially where these involve sexual violence – the focus of this section is on whether or not European countries recognise that persecution by non-State agents can constitute a failure of State protection leading to a need for international protection under the 1951 Convention.

### **Recognition of non-State agents**

241. The international protection regime set out by the 1951 Convention is intended as a surrogate for those unable to gain adequate protection in their countries of origin. The fact that this protection need arises from persecutory actions by the State or from an unwillingness or inability of the State to protect an individual or community from others is irrelevant for the purposes of refugee status determination and this is reflected in the UNHCR Handbook (UNHCR 1992). State practice in much of the world, though sometimes based on very different analyses, is overwhelmingly supportive of the position adopted by UNHCR, that persecution by non-State agents falls within the scope of the 1951 Convention refugee definition. However a few asylum States restrict the meaning of ‘persecution’ in the sense of the 1951 Convention to harm emanating from the State itself, or its agents. These States follow an analysis that makes determinative the perpetrator or source of the feared or experienced harm.

242. Some of European countries follow this analysis and do not recognise persecution by non-State agents as falling within the remit of the 1951 Convention. There are concerns that because of the gendered nature of women's relationship with the State – which is likely in many contexts to be less direct than that of men – this trend has a disproportionate impact on gender-related asylum claims. Crawley (2001) observes that “[w]hilst there is no shortage of episodes where women are directly victimised by the State or by agents of the State, much of the violence committed against women is committed by non-State agents. It is perpetrated by husbands, fathers, boyfriends, in-laws, and, in the case of female genital mutilation, women in the local community” (Crawley 2001, 52).

243. In addition, a large proportion of the world's conflicts involve private actors totally unaffiliated to the State or de facto State structures in an environment where the State or de facto State is either not able to provide effective protection or has in effect ceased to function. The recent and ongoing situations in Afghanistan, Colombia, Liberia, Northern Iraq, Sierra Leone, Somalia and Sri Lanka are examples of such scenarios. As Türk (2002) points out, over recent history there has been an increase in intra-State conflicts that are less likely than conflicts between States to result in successful external intervention. This brings to the fore the necessity of international refugee protection for those fleeing such circumstances.

244. In cases of warfare, many people may suffer serious harm, but women may be particularly targeted, as reported by Martin (2004, 31-32): “In many conflicts, attacks on women are a planned part of a terror campaign. [...] Familiar stories have been told of the civil conflict in Mozambique, Guatemala and Eritrea. The use of rape as a mechanism for ethnic cleansing came to international attention in Bosnia and Rwanda”.

245. Türk (2002) notes that the vast majority of countries agree, to a greater or lesser extent, that persecution within the meaning of the 1951 Convention may emanate not only from the State but also from private groups or individuals in situations where the national authorities are either unwilling or unable in practice to provide the persons concerned with effective protection. The logic behind such a broad approach is the recognition of the international protection as compensation for the lack of effective national protection, including in situations where the State is willing but unable to provide such protection.

246. Türk (2002) also notes that there is, however, also a minority view, subscribed to by some countries, according to which persecution emanating from non-State agents may, under certain circumstances, not be considered sufficient to meet the refugee definition criteria of the 1951 Convention. This divergence in the interpretation of the refugee definition is related in essence to situations where the State is unable to provide effective protection. The theoretical underpinning of this position is the ‘accountability/complicity view’ according to which persecution only exists when the State can be held accountable for human rights violations. The two main approaches to non-State agents of persecution have been characterised by an emphasis on protection and accountability, respectively.

## Recognition of non-State agents within European countries

247. Twenty-seven countries of 41 surveyed (66%) recognise that fearing non-State agents of persecution can be a valid basis for an asylum claim. This recognition has been made either through legislation, policy, or because cases involving non-State agents have been allowed. In 14 countries out of 41 countries (34%), there has been no such recognition.

248. Among the countries that recognise persecution by non-State agents, some have only very recently begun to do so. Although France had already been recognising non-State agents in some cases (especially cases deriving from civil war situations) (Türk 2002), its revised asylum law, which came into force on 1st January 2004, makes this recognition explicit.<sup>100</sup>

249. In Norway, there has been a gradual increase in the recognition of non-State agents of persecution in individual decisions, and it is expected that the new Immigration Act, to be finalised in May 2004, will include an explicit recognition that persecution by non-State agents is within the purview of the 1951 Convention.

250. The authorities in Italy have until recently refused to consider non-State agents of persecution. In 1995 the State Council determined that the Central Commission (first-instance decision body) was right to consider that persecution by non-State agents was outside the scope of the 1951 Convention. However, more recently, some decisions by the Regional Administrative Courts have granted refugee status in cases based on persecution by non-State agents.

251. In Albania, Belarus, Czech Republic, Hungary and FYROM legislation does not address this issue, but decision-makers have granted Convention refugee status in cases involving persecution by non-State agents.

252. In Cyprus, consideration of non-State agents of persecution follows the guidance provided by the UNHCR Handbook. In Finland, reference is made to the UNHCR Handbook in asylum legislation, which confirms recognition of non-State agents of persecution.<sup>101</sup>

253. Romania and Slovakia both recognise non-State agents of persecution through asylum legislation. In the Romanian Methodology for the Implementation of Refugee Law, there is explicit recognition of non-State agents (Article 2, paragraph 2), and case law has confirmed this through the grant of refugee status to an Iranian woman fearing persecution from her husband and 'society,' on the basis that the State did not provide protection against domestic violence, and that divorced women were not accepted by society. In another case, the Romanian appeals body granted refugee status to an Iraqi woman raped for reasons linked to her ethnicity.

254. Slovakian Asylum Law defines persecution as "serious or repeated acts causing a threat to life or freedom or other acts causing mental pressure on a person, when performed, supported or tolerated by country authorities in the country of alien's nationality or in the country where the alien had his/her residence, when the

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<sup>100</sup> Loi du 10 décembre 2003 modifiant la loi n° 52-893 du 25 juillet 1952 relative au droit d'asile

<sup>101</sup> Asylum Regulation of 17 January 2003, paragraph 13.4

person concerned is a stateless person, or when this country is not capable of ensuring appropriate ensure protection from such acts” (Article 2).

255. In Bulgaria, recognition of non-State agents of persecution has been made through a decision by the Sofia City Court on 3rd December 2003, wherein it was found that the Government of Afghanistan failed to protect its citizens against non-State agents of persecution. In Latvia, at least one decision in an Afghan case has indicated some recognition that persecution need not emanate from State agents.

256. In Poland, this recognition has been made through the grant of refugee status to individuals fearing persecution in Somalia and Afghanistan, where it was considered that there were effectively no State authorities. In Slovenia, individual cases have recognised non-State agents, although not yet in a case involving gender-related persecution. In Moldova, there were only two grants of refugee status in 2003, and one of them explicitly recognised non-State agents of persecution. The low caseload in Estonia renders it difficult to establish the authorities’ position on this issue, and in the Ukraine no position has been developed.

257. In Portugal, there is no recognition of non-State agents of persecution. Cases based on fear of persecution from mafia groups in Romania and the Russian Federation have been rejected on this basis, as well as cases involving fear of the GIA group in Algeria.

258. According to the evidence regarding Switzerland, persecution must be the responsibility of the State or at the very least a de facto State authority. For the determination of de facto authority, Swiss jurisprudence uses the criteria of a certain duration, stability and effectiveness of control over territory. This State-centred view thus excludes persecution by non-State agents, who have no links with the State and whose activities the State is unable to control, as valid grounds for granting refugee status (Türk 2002). The Swiss position is similar to the German position, detailed in the case study below.

259. The Qualification Directive has, in the main, taken a ‘protection’ position on non-State agents, although this is carefully qualified. It states that persecution or serious harm may be at the hands of the State, of “parties or organisations controlling the State or a substantial part of the territory or State”, or of non-State agents if it can be demonstrated that neither State nor de facto authorities can provide protection. It is significant that the proposal considers international organisations be included amongst those actors which would be expected to provide protection and which applicants would have to demonstrate had failed to do so (Article 9). This position has been criticised by UNHCR:

It would, in UNHCR's view, be inappropriate to equate national protection provided by States, with the exercise of a certain administrative authority and control over territory by international organisations on a transitional or temporary basis. Under international law, international organisations do not have the

attributes of a State. In practice, this has also meant that their ability to enforce the rule of law is often very problematic.<sup>102</sup>

260. The Directive emphasises that protection from persecution can be provided by the State, or parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State. This has been strongly opposed by Amnesty International (2002, 4-5) which maintains that protection should only be expected:

...by a de jure recognised authority that can be held accountable for its actions both internationally and nationally, and not a quasi-State. [...] State-like authorities are not or cannot be parties to international human rights instruments and therefore cannot be held accountable for non-compliance with international refugee and human rights obligations.

261. Amnesty International notes that areas under the authority of State-like bodies are rarely secure, and points out that recent history shows that these organisations often do not have the necessary means to prevent human rights violations and to ensure a reasonable degree of security.

262. The Qualification Directive outlines that protection is 'generally provided' when these bodies take reasonable steps to prevent the persecution or suffering of serious harm by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and the applicant has access to such protection. The need for an effective protection system, and for applicants to have 'real access' to protection is an important point of interpretation which will strongly affect the extent of the protection offered by the Directive.

### **Case study countries: non-State agents**

263. Lithuania, Sweden and the UK recognise persecution by non-State agents, whilst Germany does so only if the persecution can be attributed to the State or a state-like entity. Since the UK and Germany have well established and opposing positions on this issue, policy and practice in these countries will be especially highlighted to illustrate the different positions which exist among States, despite UNHCR's guidance on this issue.

264. In Lithuania, recognition of non-State agents of persecution is established by law. The Order on the Assessment of Applications to Grant Refugee Status, approved by the Minister of Interior on 5 October 2001, states that refugee status shall be granted if a person has been persecuted or has a well-founded fear of persecution at the hands of the authorities in their country of origin, or at the hands of third parties, where the authorities do not ensure protection from that persecution. During the drafting process of the Order, discussions were held as to whether the reasons for failure of protection should be considered relevant. It was concluded

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102 See UNHCR Note on key issues of concern to UNHCR on the draft Qualification Directive available at <http://www.unhcr.ch/news/290304Qua.pdf>

however that there is not need to focus on the reasons, thus emphasising the protection principle.<sup>103</sup>

265. In Sweden, the 1997 Aliens Act makes clear that asylum claims based on a fear of persecution from non-State agents will be considered. The Act adopts the 1951 Convention definition of a refugee, and adds: "This applies irrespective of whether persecution is at the hands of the authorities of the country or these cannot be expected to offer protection against persecution by private individuals."<sup>104</sup>

266. The Swedish Migration Board's Gender Guidelines also accept that gender-related persecution can relate to both the public and private spheres. Non-State agents are recognised as agents of persecution, although under Swedish law where such persecution is gender related, the resulting protection is generally not that of the 1951 Convention.

267. The Swedish Gender Guidelines also recognise that the opportunity of individuals to obtain protection from abuse from the authorities in their countries of origin varies greatly, and that women are often in a worse position than men in this respect, due to traditions and/or laws of the country in question.

268. Studies carried out before and after the introduction of the Swedish Gender Guidelines, analysing 80 and 52 women's asylum claims respectively, note that no woman claiming a fear of gender-based violence at the hands of non-State agents succeeded in being granted refugee status as a result of the application of the gender clause (Bexelius 2001).

269. To date, the German authorities have interpreted the 1951 Convention as referring to persecution committed by State agents or where state-like agents are accountable for the persecutory measures. This position has been described by the European Court of Human Rights as an 'apparent gap in protection'.<sup>105</sup>

270. Türk (2002) explains that the theoretical underpinning of this position is the 'accountability/complicity view' according to which persecution only exists when the State can be held accountable for human rights violations' and that this 'accountability approach' is particularly developed in German case law. One reason is related to the fact that the granting of asylum has in recent years not been based on the 1951 Convention refugee definition but on the German Constitution (the Basic Law), which uses the term 'political persecution', as well as Section 51 (I) of the German Aliens Act, which grants refugee status under reference to Article 33 of the 1951 Convention.<sup>106</sup> Solely focusing on the interpretation of this provision of the Basic Law, the German Constitutional Court, in 1989, elaborated on the nexus between political persecution and 'State accountability.' Following this logic, harm originating from private actors was considered 'attributable' if the State failed to offer protection despite its ability to do so. However, in cases where the State was unable to provide

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<sup>103</sup> Communication with Violeta Targonskiene, Deputy Head of the Asylum Affairs Division of the Migration Department under the Ministry of the Interior, Republic of Lithuania, February 2004.

<sup>104</sup> Swedish Aliens Act 3, Section 2

<sup>105</sup> *T.I. v. UK*, 7 Mar. 2000, Application No. 43844/98, Cited Page 70, Luopajarvi (2003) Luopajarvi also refers to A. Pretzell & Dr. C. Hruschka, 'Non-state agents of persecution: A protection gap in German Asylum Law?' 15 *Tolley's Immigration, Asylum and Nationality Law* No. 4 (2001), 221

<sup>106</sup> There were times in history when the 1951 Convention definition was the only basis used in practice when defining the then Art. 16 II 2 of the German Constitution

protection, harm inflicted by private groups was not deemed attributable to the State.<sup>107</sup>

271. This 1989 decision by the Constitutional Court confirmed earlier deliberations, including the Constitutional Court's ruling in 1980 that where non-State agents carried out human rights abuses, the acts had to be instigated, endorsed or knowingly tolerated by the State in order for the State to be held accountable.<sup>108</sup> In a 1983 decision, the Federal Administrative Court, added that discriminatory or other offensive acts committed by third parties can be regarded as 'indirect persecution', where the State authorities prove unable or unwilling to provide protection. However, the FAC defined the ability of a State to provide protection as a theoretical one, and did not consider it necessary to consider whether a State is able to provide effective protection from non-State agents in practice.<sup>109</sup>

272. The German courts have determined furthermore that if there is no State, there can be no persecution. Thus individuals persecuted during a civil war, or where the State cannot be said to be functioning, cannot qualify for asylum (Türk 2002). The emphasis is on providing protection only where persecution derives from the State rather than where it is needed because of the absence of an effective State which is willing and able to protect.

273. Although there has been no fundamental position change regarding persecution by non-State agents, some small but significant developments should be noted. The Federal Constitutional Court has held that an ongoing civil war does not per se preclude State persecution in cases where the State is one party to such civil war and fights against certain opposing groups which have an asylum-related characteristic in common.<sup>110</sup> In 2001, the FAC concluded that the Taliban exerted State-like power in Afghanistan,<sup>111</sup> while also confirming a decision issued in the previous year that gender was an innate characteristic.<sup>112</sup> This case implied recognition of a de facto authority. However, as Türk notes, "the criteria applied in Germany to define groups as exercising de facto authority are, particularly stringent and do not apply in a number of situations where persecution is prevalent" (Türk 2002, 100).

274. Following the 2001 decision on de facto authorities, when the Federal Office resumed decision-making on Afghan cases in May 2001, a large proportion of women from Afghanistan were granted refugee status, for reasons based on gender and/or education, profession, western orientation due to a long stay abroad, political and sometimes the ethnic background of the applicants.<sup>113</sup>

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<sup>107</sup> 80BverfGE (10 July 1989)

<sup>108</sup> BVerfG, dec. of July 2, 1980, 1 BvR 147.80

<sup>109</sup> BVerwG, dec. of August 2, 1983, 9 C 818.81

<sup>110</sup> FAC, 3Dec 1985, 9 C 33.85. See also Federal Constitutional Court, 10 Aug. 2000, Collection of decisions, 2 BvR 260/98. Cited page 70, Luopajarvi, December 2003. Luopajarvi also refers to subsequent decisions by the Federal Administrative Court, BVerfG, 20 Feb. 2001, 9C20.00; 9C21.00; 1C30.00, 31.00, 32.00, available at <http://www.bundesverwaltungsgericht.de>

<sup>111</sup> Case: 20.02.2001 (9 C 21.00)

<sup>112</sup> For further information see Section 7 of this report which examines the definition of Particular Social Groups (PSG)

<sup>113</sup> Communication with UNHCR Nuremburg Sub Office

275. Between mid-November 2001 and September 2003, decisions on Afghan cases were halted because of the changing situation in the country at that time resulting from deployment of international forces. When they resumed, it became clear that the 2001 FAC decision had not had an overall catalytic effect in changing the view that where there is no authority (de facto or otherwise), there can be no persecution. After the fall of the Taliban, various lower courts in 2002 and 2003 based their negative decisions on the legal conception that persecution in Afghanistan was not possible due to the absence of de facto State structures.<sup>114</sup>

276. In theory, complementary status under non-refoulement provisions can be granted in cases of persecution by non-State agents, but research has shown that even non-refoulement protection is withheld in certain cases, and there remains a serious protection gap (ELENA 2000).<sup>115</sup>

277. Ankenbrand (2002) refers to a series of FAC judgements on Turkish cases in 1992 and 1993, concerning forced marriage and forced conversion to Islam of single Christian women, wherein the FAC found that since the Turkish government disapproved of such acts, it could not be held responsible, and therefore refugee status was denied.<sup>116</sup>

278. As noted earlier in section 3 of this report, a law was passed in 2002 which included recognition of non-State agents, as well as explicit recognition of gender-related persecution. Although the law was invalidated due to defective Parliamentary procedures, a new proposal containing similar provisions was put forward by the government in early 2003 (Luopajarvi 2003). In addition, if the proposal for a European Union Directive on minimum standards is adopted with its current protection focus intact, this would require Germany to change its position on non-State agents.

279. The failure to recognise persecution by non-State agents in Germany combined with the historical tendency of authorities in many countries to consider gender-related abuse to be a 'private' affair, undermines the protection potentially available to those claiming asylum on the basis of gender-related persecution. Reflecting this, it is worth noting that there are a number of cases in which even rape by State agents has been dismissed as unrelated to the State in Germany and therefore as not constituting persecution within the meaning of the 1951 Convention.

280. In the United Kingdom, the Home Office's RSD guidelines, as well as case law on this issue, make it clear that the UK authorities recognise that non-State agents can be perpetrators of persecution warranting international protection. Whether or not fear of persecution by non-State agents is accepted in any given case depends on consideration of the availability of State protection.

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<sup>114</sup> UNHCR German Branch Office Press Release, *Decision Practice shows a Legal Reform is of Utmost Importance*, 30 September 2003. See, for example, HAC Munster, dec. of 30 March 2003, 20 A 4270.97 A

<sup>115</sup> This paper cites the research conducted by the lawyer Kerstin Mueller for the Informationsverbund Asyl (Germany). The paper "*Nicht-staatliche Verfolgung – Schutzlücke im Deutschen Asylrecht?*" (2000) examines the jurisprudence of the Federal Constitutional Court, Federal Administrative Court and lower courts as to whether a protection gap exists with respect to refugees fearing non-State persecution

<sup>116</sup> Turkish cases: Federal Administrative Court 31 March 1992 – 9C 135/90; 16 August 1993 – 9C 7/93; 17 August 1993 – 9C 8/93 and 3 December 1993 – 9C 450/93. All are referred to at page 51, *Refugee Women under German Asylum Law*, Birthe Ankenbrand, International Journal of Refugee Law Vol. 14 No.1, 2002

281. The Home Office Asylum Policy Instructions (APIs) state that “where seriously discriminatory or other offensive acts are committed by the local populace they may constitute persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection” (Home Office undated, paragraph 8.5).<sup>117</sup> The APIs also refer to persecution as involving “the continuous or systematic failure of the State to offer protection to someone suffering a threat to life or freedom on account of [a Convention ground]” (Home Office undated, paragraph 8.1).

282. The House of Lords determination of the Horvarth<sup>118</sup> case in 2000, addressed the issue of State protection that had been debated in the courts throughout the late 1990s (for further information see Symes 2000). The meaning of the protection test was found to be “a practical standard, which takes proper account of the duty which the State owes to all its nationals,” and that “the sufficiency of State protection is not measured by the existence of a real risk of abuse of rights but by the availability of a system for the protection of the citizen and a reasonable willingness by the State to operate it.”

283. The Court of Appeal, the following year, found, that when assessing sufficiency of State protection, it is necessary to place the appellant’s evidence “in its proper historical context,” including the experiences of people sharing the appellant relevant characteristic (Roma ethnicity in this case) and the appellant’s own experience of police failures and abuses.<sup>119</sup>

284. This point has been recognised in the Home Office APIs, which state that:

The caseworker should also consider whether protection afforded by the authorities is available to an individual regardless of their race, ethnicity, sexual orientation, disability, religion, class, age, occupation or any other aspect of their identity. They should also take into account whether or not the applicant has sought the protection of the authorities, any outcome of doing so or the reason for not doing so.

285. Despite this, asylum decisions do not consistently follow the guidance set out in the Asylum Policy Instructions. Research on asylum applications made by women, carried out by the Refugee Women’s Resource Project (RWRP), found that “the most common reasons to refuse an application in the persecution analysis is that the abuser was not an agent of persecution, or is not a State agent or is a State agent acting outside his authority” (RWRP 2003, 107).

286. Examples of such refusals included statements to the effect that non-State agents could not be considered agents of persecution within the terms of the 1951 Convention, an assertion that clearly contradicts the APIs. These statements were made in the refusal of cases involving domestic violence, as well as forced marriage and trafficking for the purposes of forced prostitution.

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<sup>117</sup> This paragraph includes a reference to paragraph 65 of the UNHCR Handbook (1992)

<sup>118</sup> *Horvarth v Secretary of SSHD* [2000] INLR 15

<sup>119</sup> *Harakel v SSHD* [2001] EWCA civ 884.

287. Furthermore, in just under half of the cases refused on grounds of non-State agents being responsible for the feared persecution, applicants had in fact stated that “police, intelligence, army or State security members” were the agents of persecution, acting either with or without the assistance of non-State actors (RWRP 2003, 109).

288. In one quarter of RWRP’s sample, refusal letters also referred to the applicant’s failure to seek protection from the authorities in the country they fled. Given that in 11 of these 18 cases the persecution already suffered had been at the hands of State agents, it appears that these decisions did not take into account the Home Office APIs on whether it is reasonable for applicants to have sought protection from the authorities (RWRP 2003, 113).

289. This evidence leads us to conclude that while the UK authorities explicitly recognise non-State agents of persecution where there is insufficient or ineffective State protection, there is a lack of consistency regarding the extent to which this is reflected in initial decisions involving gender-related persecution.

### **Recommendations**

290. A failure of State protection exists where the State is responsible for persecution or where it fails to protect an individual from persecutory action by non-State agents. The absence of effective State structures should not preclude recognition of a need for protection. Receiving States should recognise that both the availability and efficacy of State protection may be affected by gender. International protection should be provided in these cases either through amendment of the existing legislation or changes in practice resulting in the issuance of appropriate guidance on gender issues or explicit recognition of UNHCR’s Gender Guidelines.



## 6. Interpretation of the Convention grounds

291. In 2001, the San Remo Expert Roundtable concluded that, along with the failure to recognise gender-related forms of persecution, “the main problem facing women asylum-seekers is the failure of decision-makers to incorporate the gender-related claims of women in their interpretation of the existing enumerated grounds” (UNHCR 2001).

292. The 1991 UNHCR Guidelines on the Protection of Refugee Women noted that an improved understanding of the various bases upon which women can and should be granted refugee status will increase the likelihood of a fair hearing of their claims. These guidelines sought to promote acceptance in the asylum adjudication process of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status.

293. The UNHCR Gender Guidelines similarly recognise that establishing a Convention ground has remained a difficulty for many decision-makers:

The well-founded fear of being persecuted must be related to one or more of the Convention grounds. That is, it must be ‘for reasons of’ race, religion, nationality, membership of a particular social group, or political opinion. The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause. In many jurisdictions the causal link (‘for reasons of’) must be explicitly established (e.g. some Common Law States) while in other States causation is not treated as a separate question for analysis, but is subsumed within the holistic analysis of the refugee definition. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground (UNHCR 2002a, paragraph 21)

294. The UNHCR Gender Guidelines emphasise that “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” (UNHCR 2002a, paragraph 22). The Gender Guidelines also note that in many gender-related claims, the persecution feared could be for one, or more, of the Convention grounds. As was noted in the previous section of this report, the Gender Guidelines make clear that where either the feared persecution or the lack of State protection is based on a Convention ground, the necessary causal link is established.

295. As with the analysis of the interpretation of persecution, the analysis of Convention grounds presented below is not exclusive to the experiences of women. Different forms of political activity and participation, transgression of religious and/or social mores and imputed political and religious beliefs are equally relevant to male asylum-seekers. However they may be seen less frequently in cases involving

men because of strongly gender-defined roles in many countries from which refugees and asylum-seekers originate.

296. This section therefore examines the current interpretation of the Convention grounds of 'political opinion' and 'religion' in European countries in order to ascertain the extent to which gendered experiences of persecution are taken into account in procedures for RSD. It also examines the extent to which political or religious opinions that are imputed to women (and some men) as a result of their failure to conform to expectations regarding their activities and behaviour are recognised and reflected in decision-making.<sup>120</sup> Given the historical importance of the PSG ground in claims involving gender-related persecution, the analysis of the information gathered during the course of this research in relation to this ground is provided separately in section 7.

### **Recognition of gendered political activities**

297. The UNHCR Gender Guidelines make clear that women's political activities can be different to men's. The Guidelines note that:

The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies. 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. While this may be analysed in the context of an imputed political opinion, it may also be analysed as being persecution for reasons of her membership of a particular social group, being her "family". These factors need to be taken into account in gender-related claims (UNHCR 2002a, paragraph 33).

298. The Guidelines also note that the fact that a woman may not wish to engage in certain activities, such as providing meals to government soldiers, may be equally important for gender-related claims and may be interpreted by the persecutor(s) as holding a contrary political opinion (UNHCR 2002a, paragraph 34).

299. On this basis the UNHCR Gender Guidelines urge that political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles. It would also include non-conformist behavior that leads the persecutor to impute a political opinion to their victim. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature.

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<sup>120</sup> Although this study does specifically not investigate the Convention grounds of race and nationality, the issue of imputed Convention ground includes the attribution of racial or national characteristics

### *Recognition of gendered political activities*

300. Just over a quarter (27%) of the countries surveyed for this report have recognised that women's political activities may take a different form to men's, either through law, policy, or case law.<sup>121</sup> Nearly three quarters of European countries have therefore not recognised the gendered nature of political activities in countries of origin.<sup>122</sup>

301. In Austria, a Turkish Kurdish woman who had provided clothes and food to PKK fighters was found to fear persecution on account of imputed religious opinion.<sup>123</sup>

302. In the Netherlands, the Aliens Circular states that activities such as cooking, which are usually regarded as activities in the private area, could be considered as public activities by the Government in the specific country of origin.<sup>124</sup>

303. In Finland, one example of the lack of recognition of gender-defined political activities concerns the case of a young woman who had refused to participate in collecting money for the war between Eritrea and Ethiopia, and had suffered threats and sexual violence on account of her stance. Her fear of persecution was considered not to be linked to a Convention ground, although she was granted complementary status (Luopajarvi 2003).

### *Case study countries: gendered political activities*

304. In Lithuania, neither law, policy, nor any individual decisions have recognised that women's political activities may take a different form to those of men. In Germany, this has been recognised but not consistently applied, and in Sweden, there is no evidence of the explicit recognition of gender-defined political activities in the national Gender Guidelines. In the UK, decision-makers have not consistently applied explicit recognition in policy and case law of gender-defined political activities.

305. In Germany, although women's political activities are generally recognised if they are similar to men's, this is reportedly not always the case when women's political activities take a different form to men's. As a result, women's political activities may not be regarded as significant enough to qualify their persecution as being based on political opinion.<sup>125</sup>

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<sup>121</sup> These countries are: Austria, Belarus, Czech Republic, Denmark, France, Germany, Greece, Ireland, the Netherlands, Sweden and the United Kingdom

<sup>122</sup> These countries are: Albania, Armenia, Azerbaijan, Bulgaria, Croatia, Cyprus, Estonia, Finland, Georgia, Hungary, Italy, Lithuania, FYROM, Malta, Moldova, Norway, Poland, Portugal, Romania, Switzerland, Turkey and Ukraine. The fact that the UNHCR Handbook is incorporated in the national legislation of Cyprus leads UNHCR to conclude that the gendered nature of political activities will be recognised when it arises but we were unable to identify any evidence in the form of specific decisions or case law to confirm that this is the case

<sup>123</sup> IFAS/UBAS No. 214.667/10, 23 May 2002

<sup>124</sup> Aliens Circular 2000, Section C1/3.3.2

<sup>125</sup> Information provided by UNHCR

306. The UK's Home Office APIs include a general statement which recognise that women's political activities may take a different form to men's, and a specific reference to activities which can be considered political:

The caseworker should be aware that the experiences of women in their countries of origin may sometimes differ from those of men, and that ways of protest, activism and resistance may manifest themselves in different ways. Certain types of persecution and ill-treatment will be specific to and more commonly affect women (Home Office undated, section 3)

...It should be remembered that political acts can also include less direct actions such as hiding people, passing messages or providing community services, food, clothing and medical care (Home Office undated, paragraph 9.5)

307. The IAA's Gender Guidelines emphasise that women can be involved in conventional political activities such as making speeches, attending demonstrations and writing publications, but that women's roles in society may determine what form their political activity takes (IAA 2000, paragraphs 3.21 and 3.22). In addition, the guidelines state that,

Political activities often undertaken by women (as well as by men) may include (but are not limited to): providing community services, food, clothing, medical care, hiding people and passing messages from one person to another. The context in which these activities are performed makes them political, regardless of whether they are inherently political. For example posting posters is not inherently political, but will be if, for example, they support a particular party or cause; cooking food is not inherently political, but will be if for example, it is part of or supportive of Trade Union activities. Such political activities may put women at risk of persecution on the basis of an actual or imputed political opinion (IAA 2002, paragraph 3.23)

308. Crawley (2001) reported on a number of cases between 1995 and 1997 that exhibited a poor understanding of some activities' political significance, including adjudicators' refusals for the following reasons:

...By your own admission, you only attended four rallies and your political activity was limited to making T-shirts for Safina (Case of a Kenyan woman detained twice and raped in detention because of her political allegiance.)

Even if... a low level of activity is relevant, any interest the authorities might have had ... was in the appellant's father and not her. (Case of a Ghanaian woman whose father was elected local chairman of PNP party, and who had sewn flags and clothes for party supporters) (Crawley 2001, 98 - 99).

309. More recently, the Refugee Women's Resource Project (2003) similarly reports that women's activities are often interpreted as too 'low-level' to be considered political, or linked to their fear of persecution. The cases reported by RWRP reflect

restrictive views put forward in Home Office refusal letters. Fourteen cases are reported in which refusals referred to the 'low-level' of activities reported, which included attending demonstrations, public meetings and lectures for the Communist party whilst refusing to join the ruling party of a repressive Islamic regime; political campaigning prior to an election; and giving money, clothes and food to members of a political organisation. The report concludes that Home Office decisions often fail to recognise both women's conventional political activities, as well as forms of political activities more common to women than to men (RWRP 2003).

310. The Swedish Gender Guidelines make three references to the fact that women's political activities can take a different form to men's:

Women act less frequently in the public arena [...] For example, women can act as a link for political information, or may have hidden wanted persons or actively violated social rules or norms.

The political activity of women can be expressed in a different way to men, but still give rise to a much larger risk and vulnerability...

The political activity of a woman can often be more difficult to substantiate than that of a man. Proof of membership in political parties, statements by party representatives and similar evidence may be difficult for a woman to produce, since her activities may have been of a different nature (Swedish Migration Board 2002 12, 14 - 15).

311. However, research suggests that the Swedish authorities have a very traditional way of looking at the concept of political activity, thus in case law only highlighting organised political activity (Bexelius 2003).

### **Transgression of religious or social mores**

312. The transgression of social or religious mores is a frequent aspect of cases involving gender-related persecution. The UNHCR's Gender Guidelines have made clear that where such transgression has taken place, or is considered to have taken place by the persecuting agents, there is a basis for granting refugee status, all other elements of the definition considered.<sup>126</sup> The Guidelines note that in some States a woman who does not fulfil a particular role or comply with behavioural codes may be persecuted for reasons of religion regardless of what she actually believes. It is also noted that there is some overlap between religious and political opinion in gender-related claims, especially in the realm of imputed political opinion, because the authorities or other actors of persecution may perceive women to hold particular religious or political views because of the failure to behave in a particular way or hold particular views. In addition it is proposed that where the penalty or punishment for non-compliance with, or breach of, a policy or law is disproportionately severe and has a gender dimension, it would amount to persecution.

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<sup>126</sup> This position builds on UNHCR's (1991) Guidelines on the Protection of Refugee Women

313. In addition to the position taken in the UNHCR Gender Guidelines, the Qualification Directive states that when assessing refugee claims, “the concept of religion shall in particular include the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in a community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.”<sup>127</sup>

*Recognition of transgression of religious or social mores*

314. Over a third (39%) of European countries surveyed for this research have recognised that a failure to conform to religious mores can form the basis for a successful refugee claim.<sup>128</sup>

315. In Slovenia, there has been only one case involving transgression of religious mores, that of a young man who refused to comply with his tribe’s wishes. The case was not considered to be gender-related.

316. In Spain, decisions on some cases launched by Afghan, Algerian and North Caucasian women have recognised that transgression of religious mores can constitute the basis of an asylum claim.

317. In Latvia, several Pakistani applicants have been recognised as refugees by the Appeals Board, on religious grounds.

318. In the Netherlands, the Aliens Circular states that where a woman transgresses social practices, religious precepts or cultural norms that are discriminatory against women, this can be interpreted as an act of political conviction, if she comes from a society where women have a narrowly defined (subservient) role, and the Government in that country endorses this order in gender relations, for example by failing to protect women from human rights violations.<sup>129</sup>

319. In Austria, it is noted that recognition of transgression of religious or social mores is rare, and that many cases have been rejected due to the view that there is no Convention ground. However, the appeals authority has found that a Kurdish woman from Northern Iraq fearing honour killing was a member of a particular social group characterised by being “Kurdish women, who in the eyes of their male family members have brought dishonour on their family through disgraceful behaviour and thus must be killed.”<sup>130</sup> In addition, positive first instance decisions have been made regarding the claims of a Chechen woman who had been raped by Russian soldiers and feared being killed by her brothers for having brought

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<sup>127</sup> Qualification Directive, Article 12 .1 (b)

<sup>128</sup> These countries are: Austria (with one successful case explicitly based on that reason), Belarus, Czech Republic, Denmark, France, Germany, Greece, Hungary, Ireland, Latvia, Lithuania, the Netherlands, Norway, Poland, Slovenia, Spain, Sweden and the United Kingdom. Among the 59% of countries which cannot be said to have recognised failure to conform to religious mores as a basis for Convention refugee status are Belgium, Malta and Portugal, for which questionnaire responses indicated that no clear statement could be made on how the authorities assess cases involving transgression of social or religious mores

<sup>129</sup> Section C1/4.2.8, Aliens Circular 2000

<sup>130</sup> IFAS/UBAS No. 221.110/0-IX/27/02, 8 July 2002

dishonour on the family, as well as a Palestinian woman from Lebanon who feared honour killing for having refused an arranged marriage.<sup>131</sup>

320. In France, the appeals body has granted refugee status to an Afghan woman on the basis that her lifestyle, including her desire to pursue an education, work and abstain from practising a religion, placed her at risk of persecution by the Taliban.<sup>132</sup> In another decision, the appeals body granted refugee status to another Afghan woman, on the basis that “her circumstances as a woman with a progressive family background, and her professional training in the fashion industry” exposed her to a risk of persecution.<sup>133</sup> The positive appeals decision on a case regarding a woman from Djibouti who feared forced marriage, the French appeals body stated that “her refusal to submit to the traditions of her [Afare] community, which would have obliged her to give up her employment and Western lifestyle, expose her to serious discrimination amounting to persecution, at the hands of members of her community.”<sup>134</sup>

*Case study countries: transgression of social or religious mores*

321. All of the case-study countries have to some extent recognised that transgression of religious or social mores can be the basis of a successful asylum claim, but practice is inconsistent in all countries. Lithuanian authorities are not known to have allowed a claim on this basis in the last three years, and while the Swedish Gender Guidelines refer to such cases, there are no known cases of refugee status being granted.

322. Lithuania’s RSD guidelines make several references to cases involving failure to conform to religious or social mores. The guidelines state that “it is universally accepted that women who have received a western education may constitute a particular social group in Islamic countries” (Lithuanian Migration Department undated).

323. The guidelines also note that EXCOM Conclusion No. 39 “may be partly followed.”<sup>135</sup> It is notable that the RSD guidelines’ paraphrasing of the EXCOM conclusion refers to ‘capital punishment or serious bodily injury’ rather than ‘harsh or inhuman treatment’, and it is not clear in what way decision-makers should interpret the advice that they ‘partly’ follow EXCOM Conclusion No.39.

324. There have been six successful claims regarding gender-related persecution in Lithuania, and none have taken place since 2000. None of these decisions appear to be exclusively based on transgression of social or religious mores, although five of the women whose cases succeeded were from Afghanistan, and the sixth was from Iran, both countries where transgression of religious mores could result in persecution. Some of the Afghan cases were based partly on having an education or

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<sup>131</sup> Federal Asylum Office (FAO) No. 02 05.038-BAT, 23 September 2002, and FAO No. 01 18.789-BAI, 19 February 2002

<sup>132</sup> Commission de Recours des Réfugiés, (CRR) 6 May 1999, Mlle Berang

<sup>133</sup> CRR, 15 December 2000, *Mme Azir*

<sup>134</sup> CRR, 20 July 2001 Issa Faradj

<sup>135</sup> The reference to EXCOM Conclusion No.39 states that it is ‘regarding women originating from certain traditional communities where they may face capital punishment or serious bodily injury due to their having transgressed social or religious law

earlier career linked to the Soviet Union, and the Iranian woman's case was partly based on running a beauty salon, which was perceived as 'indecent.'

325. The UK authorities have recognised that failure to conform to religious or societal mores can constitute the basis for a successful asylum claim under the 1951 Convention. The Home Office APIs state that:

A woman who opposes institutionalised discrimination against women or expresses views of independence from the social or cultural norms of society may sustain or fear harm because of her actual political opinion or a political opinion that has been imputed to her. She is perceived within the established political/social structure as expressing politically antagonistic views through her actions or failure to act. If a woman resists gender oppression, her resistance is political. (Home Office undated, paragraph 9.5)

326. The recently issued Home Office guidance on 'Gender Issues in the Asylum Claim' further notes that:

Non-conformist behaviour may in certain circumstances be the expression of a political opinion or may result in a woman having a political opinion attributed to her whether she holds it or not. For instance opposition to institutionalised discrimination against women in society can be seen to constitute a political opinion and non-conformist behaviour in certain cultures such as refusing to wear a veil, pursuing an education or choosing a partner could lead to a woman having a political opinion attributed to her (Home Office 2004, paragraph 43).

327. The IAA Gender Guidelines make clear that a woman's refusal to conform to religious or social norms may be a basis for an asylum claim (IAA 2000, paragraphs 3.25 - 3.30). The guidelines indicate that such a stance may result in persecution for religious reason, or political reasons, whether these are real or imputed.

328. There is some evidence that the recognition that persecution for transgressing social or religious mores can form the basis of a successful refugee claim pre-dates this official guidance on the issue. For example in the 1996 Tribunal case of *Fathy and Ahmadi*,<sup>136</sup> it was found that:

A woman who is westernised must, we think, have considerable difficulty in concealing it. If she reveals it, in our view, it is perceived in Iran to be the expression of a political opinion contrary to the State. It is not merely a transgression of Islamic mores: it is a transgression of an Islamic mora as interpreted by this particular regime and the two are indistinguishable. We are not going so far as to say that every woman can say she will not abide by the dress laws and by doing so bring herself within the Convention, it depends on the circumstances, but in this case we do not think it matters very much whether she says she will or not, the perception will be that

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<sup>136</sup> *Fathy and Ahmadi* (IAT) 14264) 1<sup>st</sup> December 1996

she is making a political statement and therefore the persecution will be for a Convention reason on that basis.

329. However, the Refugee Women's Resource Project (2003) has recently concluded that Home Office decision-makers display "an inability or unwillingness [...] to accept a broader definition of political opinion or imputed political opinion to include opposition to social mores and other forms of institutionalised discrimination against women [or to] interpret such opposition as a political act" (RWRP 2003, 111).

330. The RWRP (2003) study provides examples of cases where this has happened, including comments made in Home Office decisions in the cases of two women who had been respectively detained, threatened and beaten for failing to comply with Islamic dress in their countries of origin. Both decisions considered that despite the treatment already suffered on account of failure to conform to dress codes prescribed by Islamic law, the consequences of failing to do so did not constitute persecution (RWRP 2003, 112)

331. The groundbreaking High Court case of Shah and Islam considered the consequences of being viewed as not conforming to legally-sanctioned religious mores in Pakistan, and found that the women concerned faced persecution for being members of a particular social group. This case is examined in more detail in Section 7 of this report.

332. Decision-makers in Germany have recognised that failure to conform to religious or social mores can form the basis of an asylum claim, but this interpretation has not been consistently applied.

333. In 2002, several women from Iran whose claim was based on the failure to conform to the religious mores were granted refugee status, including a Sunni woman whose in-laws were Shi'a, and a woman who had entered into an extra-marital relationship in Germany while her husband was still in Iran. Both cases involved the treatment meted out for adultery in Iran.<sup>137</sup>

334. An Afghan woman whose claim was based on refusing to abide by Afghan dress requirements was refused Convention refugee status. The Higher Administrative Court found that the discrimination suffered by the claimant did not amount to persecution. Although being forced to wear a veil was not in line with basic rights when German standards were applied, it could be expected of a Muslim woman to follow the norms based on Islamic tradition.<sup>138</sup>

335. The Swedish Gender Guidelines acknowledge that the activities and involvement of women may be difficult to identify based on the common view that political conviction or oppositional opinions, for example, are expressed in the public sphere. They also note that women's expressions of protest and their refusal to submit are often directed toward social, cultural and religious norms that are not only supported by the political and religious establishments, but also by the public, in general, including women (Swedish Migration Board 2002). This general comment

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<sup>137</sup> Administrative Court Würzburg. W 7 K 01.30984, 19 August 2002, and Administrative Court Augsburg Au 5 K 99.30766, 25 February 2002

<sup>138</sup> HAC Rhineland-Palatinate in Koblenz 6 A 10217, 28 May 2002

is the only reference to failure to conform to religious or social mores in the Swedish Gender Guidelines, and there is no indication as to how such cases should be considered.

336. The questionnaire response from Sweden indicates that successful cases involving the transgression of social or religious mores would normally be granted complementary status.<sup>139</sup> Reflecting this, the emphasis on 'refusal to submit' in the Swedish Gender Guidelines reference to transgression of mores has been criticised as being too narrow and not taking into account circumstances where women may be powerless to refuse but nonetheless have to flee persecutory treatment (Lyth 2002, 19).

337. Bexelius (2001) has reported that none of the cases in her study that were based on transgression of social or religious mores resulted in the grant of Convention refugee status. The refusal letters do not go into great detail, but rather make general references such as "the circumstances are not of the character qualifying for asylum..."<sup>140</sup>

### **Imputed Convention ground**

338. The 1991 UNHCR Guidelines on the Protection of Refugee Women address the possibility that a women may be targeted for political reasons unconnected to her own activities or stance and call on those responsible for refugee status determination to:

339. Understand that women in many societies do not have specific information about the activities of men in their families. Gaps in their knowledge should not be construed as a lack of credibility unless there is other evidence of such lack of credibility (UNHCR 1991, paragraph 72).

340. This position is reflected in the UNHCR Gender Guidelines which state that "in many cases, claimants may face persecution because of a Convention ground which is attributed or imputed to them. In many societies a women's political views, race, nationality, religion or social affiliations, for example, are often aligned with relatives or associates or with those of her community." (UNHCR 2002a, paragraph 22) The Guidelines emphasise that an imputed Convention ground is no less valid than a Convention ground based on a real stance or characteristic: "attribution of the Convention ground to the claimant by the State or non-State actor of persecution is sufficient to establish the required causal connection" (UNHCR 2002a, paragraph 20).

341. Although it is possible to be persecuted on account of an imputed race, religion or particular social group, the most commonly addressed form of imputed Convention ground is that of political opinion. A succinct explanation of imputed political opinion comes from a US Court of Appeals case:

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<sup>139</sup> Although the possibility of granting Convention refugee status is not explicitly excluded, Sweden's grant of complementary status for gender-based persecution, and its current prohibition from finding gender to be a basis for membership of a PSG, makes this unlikely in practice. This issue is discussed further in section 7 of this report

<sup>140</sup> Bexelius' unpublished research (2003) indicates that this did not change after the introduction of the Swedish Gender Guidelines

342. In establishing an imputed political opinion, the focus of inquiry turns away from the views of the victim to the views of the persecutor. We consider, however, not the persecutor's own political opinions, but rather the political views the persecutor rightly or in error attributes to his victims. If the persecutor attributed a political opinion to the victim, and acted upon the attribution, this imputed view becomes the applicant's political opinion as required under the Act.<sup>141</sup>

343. It should be noted that the Qualification Directive states that "when assessing if an applicant has a well-founded fear of being persecuted it is immaterial whether the applicant actually possesses the racial, national, social or political characteristic, which attracts the persecutory action, provided that such a characteristic is attributed to him or her by the actor of persecution."<sup>142</sup>

#### *Recognition of imputed Convention ground*

344. Around half (51%) of the European countries surveyed as part of this research recognise the possibility of imputed Convention ground.<sup>143</sup>

345. It is noted that in Italy there have been very few such cases and there is no consolidated practice. However, it is believed that the question would be the well-foundedness of the fear of persecution, rather than whether the Convention reason was real or imputed. In Hungary, a small number of decisions have recognised imputed Convention grounds.

346. In the Netherlands, policy states that persecution may be on the grounds of imputed political opinion or religion.<sup>144</sup> This policy refers to Convention grounds being attributed by governments, and do not indicate that these may also be attributed by non-State agents of persecution.

347. Examples of recognition of imputed Convention grounds in Austria include a case regarding draft evasion wherein there was considered to be a risk of disproportionate punishment based on imputed political opinion,<sup>145</sup> as well as the case of a 54-year old Turkish Kurdish woman who had provided PKK-fighters with clothes and food out of the local host tradition, and was granted asylum based on her fear of persecution due to imputed religious opinion.<sup>146</sup>

348. In Finland, the Asylum Appeals Board has granted refugee status to an Iranian family whose fear of persecution was based on having a close relative who had been a member of the Iranian Communist Party.<sup>147</sup>

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<sup>141</sup> *Sangha* (CA) 103 F.3d 1482 (9<sup>th</sup> Cir.1997)

<sup>142</sup> Qualification Directive, Article 12.2

<sup>143</sup> These countries are: Austria, Belgium, Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, the Netherlands, Norway, Portugal, Russian Federation, Sweden, Switzerland and the United Kingdom

<sup>144</sup> Aliens Circular 2000 C1/4.2.7 and C1/4.2.8

<sup>145</sup> HAC No. 99/20/0401, 21 March 2002

<sup>146</sup> IFAS/UBAS No. 214.667/10) 23 May 2002

<sup>147</sup> Finnish Asylum Appeals Board, No. 81/94, 20 April 1994

349. In Portugal, the son of a prominent African leader deposed by a rebellion was granted refugee status on account of his father's political activities placing him at risk of persecution.

350. In Switzerland, it is recognised that persecution can be directed at family members of individuals suspected of political activities prohibited by the State. Several decisions have referred to this possibility, including one decision that stated that serious discrimination could be reasonably expected to escalate if suffered by an individual who had a politically active family member. The same decision found that where applicants came from countries where persecution of family members was common, the standard of proof should be lowered.<sup>148</sup>

351. In Norway, decisions have recognized imputed Convention grounds. A draft Immigration Act, due to be finalized in May 2004, contains provision to explicitly recognize imputed grounds of persecution.<sup>149</sup>

352. The questionnaire response from Romania did not report explicit recognition of imputed convention grounds, but it is noted that three Kurdish Iraqi women have been found to belong to a PSG by virtue of being women whose male family members are suspected of being member of a rival political party. This decision implies a tacit recognition that persecution can be feared for reasons of imputed political opinion.

*Case study countries: imputed Convention ground*

353. All of the case-study countries have recognised imputed Convention grounds to some degree, although only Sweden and the UK has done so explicitly in official guidance.

354. Neither the Lithuanian asylum law nor the RSD guidelines provided to decision-makers in the form of the electronic manual refer to imputed Convention grounds. There is, however, an implicit recognition that characteristics can be attributed to individuals due to family ties: the RSD electronic manual lists family and blood relationships as being examples of characteristics defining a particular social group.

355. In practice, it is reported that there has been a reluctance to recognise imputed Convention grounds, particularly in recent years, since a change in the structure of the appeals system. However among the six gender-related claims granted status between cases in 1998 and 2000, several include elements of imputed Convention ground. Thus, although Lithuanian authorities do not appear to have referred explicitly to imputed political opinion, they have granted refugee status in cases where agents of persecution have attributed a Convention ground to the applicant.

356. In three of these cases, part of the claim was based on the fact that the applicants' husbands were being searched for political reasons. This element of their claims was considered under the Particular Social Group ground. One of these three cases was also based on the applicant running a beauty salon, which was considered

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<sup>148</sup> EMARK 93/6; ARK II Kammer, decision of 13.10.1994, and ARK II. Kammer, decision of 19.12.1994

<sup>149</sup> Draft proposal for Amendments to the Norwegian Aliens Decree, Section 58c

an indecent activity by the Iranian authorities, but this element was not reflected in the Convention ground on which she was granted refugee status.<sup>150</sup>

357. A fourth successful case, in 2000, could potentially have involved an imputed Convention ground, since the fear of persecution was based on having received a higher education under the previous regime in Afghanistan, working in a hospital and running a pharmacy.<sup>151</sup>

358. As was noted earlier in this report (at fn.61), RSD procedures in Lithuania have undergone a number of changes in recent years. No cases of gender-related persecution have resulted in refugee status since the change in the appeal bodies in September 2000, and there is no evidence that cases involving imputed Convention grounds have succeeded since this time either. It appears on the evidence available that the Refugee Affairs Council was more progressive in its application of the 1951 Convention than the Vilnius District Administrative Court has been to date.

359. In Germany, imputed political opinion has been recognised in recent years especially with respect to certain countries of origin, most notably Iraq<sup>152</sup> and Kurdish applicants from Turkey (Ankenbrand 2002). In addition some recent asylum claims made by women from other countries of origin, especially Chechnya, have resulted in refugee status based on ethnicity and imputed political opinion.<sup>153</sup>

360. The Swedish Gender Guidelines recognise imputed political opinion in certain circumstances:

Even if a woman cannot directly be deemed to be politically active, in the broad definition of the term, she may well have been deemed to be active by government authorities, due to factors such as political activity of her husband or other relatives or friends (Swedish Migration Board 2001, 14).

361. This reference to imputed political opinion does not refer to political opinion being attributed to applicants by non-State agents, but there is the potential for such cases to be recognised given the Swedish authorities' general recognition of non-State agents.

362. In the UK, authorities recognise the possibility of a Convention ground being attributed to an individual, at least in the case of political opinion.

363. The Home Office APIs state that: "An individual may suffer harm on the basis of an imputed (attributed) political opinion as a result of the perception that their political views are aligned with those of the dominant family or community members" (Home Office undated, paragraph 9.5).<sup>154</sup> In addition, the recently published Home Office guidance on 'Gender Issues in the Asylum Claim' notes that "women may have political opinions attributed to them on the basis of family or

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<sup>150</sup> See cases 1998 11 23 N.18; 1999 04 29 N.24; and 2000 05 01 N.40, determined by the Lithuanian Refugee Affairs Council, asylum appeal body between 1997 and 2000

<sup>151</sup> Lithuanian Refugee Affairs Council, 2000 01 24 N.34

<sup>152</sup> Information provided by UNHCR Germany

<sup>153</sup> For example, Decision 5038841-160 of 10.10.2003, Federal Office for the Recognition of Foreign Refugees

<sup>154</sup> The APIs refer to the UNHCR Handbook (1992, paragraphs 80-86)

community affiliations, and that nonconformist opinions of behaviour may also result in a woman having a political opinion attributed to her" (Home Office 2004, paragraphs 42 and 43). The Home Office guidance makes similar provisions with regard to the attribution of religious stances being attributed to women on the basis of their family or community, or on the basis of their own actions (paragraphs 23 and 24).

364. The IAA Gender Guidelines also make reference to imputed Convention grounds:

Women may face persecution because of a Refugee Convention ground which is attributed or imputed to them. In many societies a woman's political views, race, nationality, religion and social affiliations are often seen as aligned with relatives or associates or with those of her community. It is therefore important to consider whether a woman is persecuted because of a Convention ground which has been attributed or imputed to her (IAA 2000, paragraph 3.3).

365. Case law in the UK has confirmed recognition of imputed political opinion. This has not been limited to opinion being attributed as a result of family members' stances. In the case of *Nsalam*,<sup>155</sup> it was noted that:

As in most one-party states and states with over-riding power concentrated in a single man... or group... the ruling power are likely to perceive all opposition and all offences against public order as being opposition to their rule and therefore falling within the category of Article 1(A)(2) of the Refugee Convention designated 'political'.

366. The IAA Gender Guidelines also cite the Tribunal determination of *Findik*:<sup>156</sup>

[The Home Office representative] in his submissions before us submitted that if we were to find that the second appellant had been raped and tortured then we should conclude that this had nothing to do with the husband's political activities and views. We have to say that this suggestion is not an attractive argument, and that the whole story is really linked to the husband's activities. In her evidence before us, the second appellant specifically said that she was questioned about her husband and that the authorities were concerned to find out about him. We reject [the Home Office representative's] submission and find as a fact that the detentions, tortures and rape arose as a result of her husband's political activities (IAT 2000, paragraph 3.32).

367. It should be noted that imputed political opinion has been recognised in cases involving both State agents and non-State agents of persecution. The case of *Nsalam*, above, refers to State agents, and the cases of *Gomez*<sup>157</sup> and *Allie*<sup>158</sup> recognise

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<sup>155</sup> *Nsalam* (IAT) (13130, 25th March 1996)

<sup>156</sup> *Findik* (IAT) (17029)

<sup>157</sup> *Guteirrez Gomez* (00/TH/02257, 20th November 2000)

persecution by non-State agents for reasons of imputed political opinion. However, as was seen in section 4 of this report which analysed the assessment of cases involving sexual violence, there are also cases where imputed Convention grounds are not considered relevant by UK decision-makers, including the judiciary.

## **Recommendations**

368. Gender-defined roles can clearly have an impact on the persecution feared or harmed. States should ensure that a gender-sensitive interpretation is given to each of the Convention grounds when determining whether a particular claimant has fulfilled the criteria of the refugee definition. This should be done by incorporating the UNHCR's Gender Guidelines into guidance to decision makers on the interpretation of the Convention grounds, and by providing appropriate training and Country of Origin Information (COI).

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<sup>158</sup> *Allie* (IAT) (14814, 27<sup>th</sup> March 1997)



## 7. Gender-related persecution and particular social groups

369. In 2002, following the San Remo Expert Roundtable on Particular Social Groups (PSG), part of the Second Track of the Global Consultations on Protection, UNHCR developed 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 (henceforth the PSG Guidelines).<sup>159</sup>

370. The PSG Guidelines provide a summary of national jurisdictions' development of a PSG definition, as well as putting forward legal interpretative guidance on assessing claims that assert a claimant has a well-founded fear of persecution for reasons of his or her membership of a PSG.

371. The PSG Guidelines reflect a recognition that the PSG Convention ground does need delimiting, without which the other four Convention grounds would become superfluous. Thus, "to preserve the structure and integrity of the Convention's definition of a refugee, a social group cannot be defined exclusively by the fact that it is targeted for persecution, [although] persecution may be a relevant element in determining the visibility of a particular social group" (UNHCR 2002b, paragraph 2).

372. The PSG Guidelines emphasise that there is no 'closed list' of social groups, and that the term "should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms" (UNHCR 2002b, paragraph 3).

373. The PSG Guidelines summarise the two approaches that have dominated decision-making in common-law jurisdictions:

A 'protected characteristics' approach (sometimes referred to as an 'immutability approach') which examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it;

A 'social perception' approach, which examines whether or not a group shares a common characteristic that makes them a cognizable group or sets them apart from society at large.

374. The approaches outlined above have been referred to in some decisions and under both approaches: women, families and homosexuals have been recognized as particular social groups, although the PSG Guidelines note that in civil law

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<sup>159</sup> UNHCR's PSG Guidelines can be downloaded at <http://www.unhcr.ch/cgi-bin/texis/vtx/home/+CwwBmRe04VpwwwwAwwwwwwwhFqhT0yfEtFqnp1xcAFqhT0yfEcFqd7IHat1omncoDn5MzmAwwwwwwwwDzmxwwwwwwww/.opendoc.pdf>

jurisdictions, decision-makers tend to place more emphasis on whether a risk of persecution exists, and that the PSG ground is generally less well developed.

375. Given the varying approaches of States to the PSG definition, and the protection gaps which can result, UNHCR believes that the two approaches ought to be reconciled and the PSG Guidelines accordingly adopt a single standard that incorporates both dominant approaches:

A particular social group is 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 (UNHCR 2002b, paragraph 11).

376. This definition includes characteristics which are historical and therefore cannot be changed, and those which, though it is possible to change them, ought not to be required to be changed because they are so closely linked to the identity of the person or are an expression of fundamental human rights. Most importantly for the purpose of this report, "it follows 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" (UNHCR 2002b, paragraph 12).

377. The PSG Guidelines also emphasise that the Convention grounds are not mutually exclusive; that although the PSG cannot be defined exclusively on the basis of fearing persecution, any persecutory action would be relevant to their position in society; that social groups do not have to be cohesive, and that not all members of the social group need be at risk of persecution for the group to exist (paragraphs 4,14,15 and 17). It is noted that the size of the purported social group is not a relevant criterion in determining whether or not it exists.

378. The UNHCR Gender Guidelines follow the position put forward in the PSG Guidelines, and provide clear guidance on how to define a PSG in the context of gender-related claims. It is noted that in some cases the emphasis given to the social group ground has meant that other applicable grounds, such as religion or political opinion, have been over-looked (UNHCR 2002a, paragraph 28).

[A] particular social group is 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 (UNHCR 2002a, paragraph 29)

It follows 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 than men. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries. Equally, this definition

would encompass homosexuals, transsexuals, or transvestites (UNHCR 2002a, paragraph 30)

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 (UNHCR 2002a, paragraph 31)

### **Existence of guidance to define a PSG**

379. Only four of the countries surveyed as part of this research have guidance on how to define a particular social group, either in law, policy or case law. These countries are France, Lithuania, the Netherlands and the United Kingdom.<sup>160</sup> In addition, Austria and Ireland have stated that gender may be a defining characteristic of a PSG (but are not known to provide guidelines on the definition), and Finland is developing guidance on PSG definition. The PSG guidance in Lithuania and the UK will be detailed in the case study section below.

380. In France, a 1997 ruling by the Conseil d'Etat has provided guidance on defining a particular social group. The case of *Ourbih* was based on the appellant's fear of persecution in Algeria for reasons based on his transexuality. The Council d'Etat ruled that a social group was "a group of individuals, defined by common innate characteristics, which a particular society marks out for discriminatory treatment." The defining characteristics may be based on "the past, lifestyle, or social status."<sup>161</sup>

381. In the Netherlands, the Aliens Circular 2000 defines a 'social group' as a group with a common background, status or norms and values or common interests.<sup>162</sup> The same policy states that women in general cannot be considered to form a particular social group because they are too diverse.

382. In Austria, a Higher Administrative Court Decision has implied that gender ought to be considered under the category of PSG, in stating that:

The fact that gender was not included in the refugee definition laid down in the 1991 Asylum Law, based amongst others on the argument that such persons would already be protected as members

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<sup>160</sup> Moldova also reported the existence of guidelines to define a PSG, but we were not able to verify this information

<sup>161</sup> Conseil d'Etat CE 23/6/97, *Ourbih*

<sup>162</sup> Aliens Circular 2000, Section C1/4.2.10.1

of a 'particular social group' (270 FLG 18. GP 11), need (...) also not be overlooked in interpreting the currently applicable law.<sup>163</sup>

383. In Ireland, the 1996 Refugee Act states that "[membership of a particular social group includes membership of a trade union and also includes membership of a group of persons whose defining characteristic is their belonging to the female or the male sex or having a particular sexual orientation."<sup>164</sup>

384. In Finland the Aliens Act is currently undergoing reform. The Cabinet introduced the Bill for the New Act to the Parliament in June 2003.<sup>165</sup> The Bill's travaux préparatoires of Section 87 Subsection 1 include a chapter on women as a particular social group, which states that:

Persecution subjected to women on grounds of their gender can also be interpreted in context of a particular social group [...] Women can in some cases be persecuted also for reasons which cannot be considered to be based on race, religion, nationality or political opinion. In these cases the ground for persecution can be considered membership of a particular social group. Sexual orientation can also be mentioned as an example of membership of a particular social group as a ground of persecution.<sup>166</sup>

385. In Norway, proposed amendments to the Aliens Decree clarify that both approaches to defining a PSG recommended by the UNHCR PSG guidelines are included as possible definitions. The proposed amendment emphasises that age, sex and sexual orientation are relevant factors when considering all Convention grounds.<sup>167</sup>

386. In 1984, the European Parliament adopted a resolution calling on all States to consider women who have been victims of persecution as belonging to a particular social group under the 1951 Convention. However it would appear that this has not been explicitly implemented by a majority of Member States.

387. The Qualification Directive defines a particular social group as one "where 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 the group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society."<sup>168</sup>

388. Thus, the EU Directive requires both the immutable characteristic approach and the social perception approach be fulfilled simultaneously. This is a higher requirement than that outlined by the UNHCR Gender and PSG Guidelines, as well as higher than the current policy and practice of some Member States.

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<sup>163</sup> HAC No. 99/20/0497, 31 January 2002

<sup>164</sup> Irish Refugee Act 1996 paragraph 2

<sup>165</sup> The reform is currently pending in the Parliament as has been planned to enter into force 1 May 2004

<sup>166</sup> Document He 28:2003, 175 section 87, subsection 1

<sup>167</sup> Proposal for Amendments to the Aliens Decree, Section 58(c)

<sup>168</sup> Qualification Directive. Article 12.1 (d), emphasis added

389. The Directive notes that gender-related aspects might be considered, without by themselves creating a presumption for the applicability of this Article.

### **Case study countries: guidance on defining a PSG**

390. Among the case study countries, the UK has the most developed guidance on defining a Particular Social Group. Lithuania has also included guidance on defining a PSG in its electronic RSD manual. In Germany, there has been little emphasis on developing a definition of a PSG. In Sweden, the most significant feature of PSG policy is that to date it has been explicitly prohibited to consider gender as a defining characteristic of a PSG. This is linked to the specific legislative provisions for gender in Sweden. However, a proposal for significant change was made on 8th March 2004 and is included in the analysis below.

#### *Germany*

391. From the late 1960s to the mid-1980s, the social group ground was frequently referred to in German case law in cases involving, among others, homosexuals, women, proletarians, the nobility, academics, students and certain professions. In 1998 the FAC decided in the case of a homosexual man from Iran that it did not matter whether homosexuals from Iran belonged to a PSG (as was argued in the lower court decision in this case), because homosexuals in Iran were persecuted owing to the fact that the State regarded them as undesirable elements and political opponents. As a result it was ruled that the political opinion ground applied. With this decision, the way was paved to a predominance of the other Convention grounds. Currently the PSG ground is not frequently used, and as a result has not been particularly well developed. Case law is scarce and there is no established guidance on the defining a PSG (Luopajarvi 2003).<sup>169</sup>

392. As with the background to Germany's position on non-State agents, it is likely that this is also due, in part at least, to the legal definition of a refugee being based on Article 16a of the German Constitution, which uses the term 'political persecution'. There has been a tendency by decision-makers to consider potential social group claims under other Convention grounds, and FGM cases as well as cases involving failure to comply with religious dress codes have been considered as involving political persecution.

393. This is not per se a negative tendency, unless the reluctance to rely on the PSG category results in individuals not being granted refugee status because their claims cannot be 'fit' into the other Convention grounds. It is clear even within this study that gender-related cases are particularly vulnerable to such difficulties. When claims have succeeded under the PSG heading in Germany, most determinations simply state that this is the Convention ground without stipulating or specifying how this has been defined.

394. Nonetheless, there is some case law providing guidance on potential defining characteristics of a PSG. In 1987, the German Constitutional Court ruled that no State has the right to endanger or violate life, limb or the personal freedom of any individual on account of his/her political opinion, religious belief or any other

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<sup>169</sup> Additional background information provided by UNHCR

innate, inalienable trait.<sup>170</sup> In the same vein, the Federal Administrative Court has ruled that the 1951 Convention grounds are not exclusive, and that there might be other innate irrevocable characteristics, such as skin colour, on the basis of which individuals might be discriminated against and persecuted.

395. Gender has been referred to twice as an innate characteristic relevant to the granting of asylum, by the highest German Court, the FAC, in a 2000 case of a young male Tamil from Sri Lanka,<sup>171</sup> and in a 2001 case concerning a family from Afghanistan.<sup>172</sup> As a result of the above decision, various lower instances have also focused on unalterable, individual characteristics (such as gender or homosexuality) that have resulted in a fear of persecution (Luopajarvi 2003).

### *Lithuania*

396. Although the Lithuanian asylum legislation does not provide guidance on the definition of a PSG, the electronic manual on RSD does address this issue.

397. The electronic manual refers to the definition of a PSG provided by the US case of *Acosta*,<sup>173</sup> quoting directly:

Persecution on account of membership in a particular social group means persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, colour, or kinship ties. In some circumstances it might be a shared past experience such as former military leadership or land ownership, etc. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences (Lithuanian Migration Department, undated).<sup>174</sup>

398. The electronic manual provides specific examples of possible characteristics which could define a social group, including gender, sexual orientation, family or kinship ties, class and voluntary associations. In addition, the manual states that the definition of a PSG is not static and that it has become “universally accepted that women who have received a Western education may constitute a particular social group in Islamic countries” (Lithuanian Migration Department undated, Social Group Section).

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<sup>170</sup> BVerfG, decision 2 BvR 478/962/86 of 01.07.1987

<sup>171</sup> FAC 25.07.2000 (9 C 28.99)

<sup>172</sup> FAC 20.02.2001 (9 C 21.00). This is the same case referred to in Section 5, which found the Taliban at the time exerted a state-like control over the country.

<sup>173</sup> *Matter of Acosta, In re Acosta* 19.I & N211 (Board of Immigration Appeals 1985)

<sup>174</sup> Quote as in English translation of Social Group section of the Electronic Manual for Lithuanian Asylum Practitioners, provided by UNDP Branch Office in Vilnius, 2<sup>nd</sup> March 2004. The significance of the *Acosta* definition of PSG is highlighted by the fact that it has also been referred to in later ground-breaking case law, most notably the UK High Court case of *Shah and Islam*, as well as the UK Immigration Tribunal case of *Yake*, which found particular groups of women to be members of a PSG, in cases based on domestic violence and FGM respectively

399. The same section in the manual emphasises that UNHCR pays close attention to gender-related persecution, and refers to EXCOM Conclusion No. 39, in reference to its view that women who fear persecution on account of transgression of religious mores should be considered as a PSG.<sup>175</sup> The manual highlights the importance of gender having become a recognised basis for persecution.

400. The electronic RSD manual notes that Convention grounds may overlap, and refers to the Council of the European Union's Joint Position of 4 March 1996 on the definition of the term 'refugee', which states that fear of persecution for reasons of membership of a PSG may overlap with other Convention grounds.

### *Sweden*

401. Interestingly, the inclusion of the PSG category in the 1951 Convention is due to an undebated suggestion by Mr Petran, the Swedish delegate to the 1951 Conference of Plenipotentiaries. Mr Petran stated that "experience had shown that certain refugees had been persecuted because they belonged to particular social groups. The draft [of the 1951 Convention] made no provision for such cases, and one designed to cover them should accordingly be included" (Goodwin-Gill 1996, 46).

402. For the purposes of this study, the most significant aspects of Sweden's use of the PSG category are: a generally undeveloped definition in policy or case law; the impact of the provisions of the 1997 Aliens Act, in conjunction with a prohibition on considering gender as a defining characteristics of a PSG; and a recent legislative proposal which, if adopted, will dramatically change the Swedish position. An outline of all of these aspects is necessary to understand the current Swedish position on the PSG category.

### Exclusion of gender as a defining characteristic of PSG

403. Bexelius (2001) has noted that Swedish decisions on asylum claims tend not to go into great detail about interpretation and application of the law, making it more difficult to monitor developments. As a result it is difficult to trace the evolution of PSG definitions in Swedish asylum decisions. However, a decision by the Swedish Aliens Appeals Board in 1996 marked the beginning of a trend which resulted in gender being specifically excluded from consideration under the PSG Convention ground: the decision referred to the UNHCR Handbook's reference to a PSG as normally comprising "persons of a similar background, habits or social status" and formed the view that this could not be applied either to women in general, nor to women with a specific background (Folkelius and Noll 1998).

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<sup>175</sup> As noted in this report's section on transgression of social or religious mores, the Lithuanian RSD manual appears to paraphrase the EXCOM Conclusion to the effect that this applies where women fear 'capital punishment or serious bodily harm', unlike the original Conclusion's reference to 'harsh or inhuman treatment.' However it has not been possible to confirm whether this is due to translation issues, either in the translation of EXCOM Conclusion No. 39 into Lithuanian, or in the translation of the Lithuanian RSD manual into English. The same uncertainty applies to the manual's assertion that the EXCOM recommendation may be 'partly followed.'

### Current position

404. As was noted in section 3 of this report, the Swedish Gender Guidelines state that “according to a clearly enunciated Swedish position, identity as a woman is not within the purview of the Convention’s ground ‘membership in a particular social group’” (Swedish Migration Board 2001, 13). This clearly enunciated position was developed during the preparatory work to the amendments to the Aliens Act in 1997, when the Swedish government stated that it would be excessive to consider women and homosexuals in general terms as members of a particular social group, and that cases based on these characteristics must be considered outside of the 1951 Convention (Luopajarvi 2003). This restrictive approach was partially justified by the view that EU harmonization of the refugee definition would not require member States to consider gender as a characteristics of a social group (Folkelius and Noll 1998).

405. The Swedish Aliens Appeals Board has complied with this position, and furthermore has made clear that to consider more specific groups of women in particular countries or particular cultural groups would be an unreasonable demarcation between these women and others in that group (Luopajarvi 2003)

### Provisions of the 1997 Aliens Act

406. The Swedish Aliens Act was amended in 1997 to create a new category of ‘aliens in need of protection’, who would receive a residence permit through complementary status.

407. One such category is individuals who have a well-founded fear of persecution based on their gender or sexual orientation (Aliens Act 1997, Article 3.3, otherwise known as ‘the gender clause’) The word ‘gender’ is used in the English translation provided by the Swedish Migration Board, but there has been some discussion about whether the original Swedish word used refers to ‘sex’ or to ‘gender,’ and strong criticism levelled at the restrictive implications of a reference to ‘sex’ (Folkelius and Noll 1998).

408. The view that ‘sex’ was the intended word is born out by evidence regarding the application of the gender clause of the Aliens Act: at least in the first three years after the introduction of the gender clause, it was applied only to cases involving female genital mutilation, implying a narrowly sex-based interpretation of gender (Lyth 2002). The provisions and application of the gender clause has also been criticised fur further fuelling a restrictive stance by failing to distinguish between gender-specific forms of persecution, and gender-related causes of persecution (Folkelius and Noll 1998).

409. Consideration of cases under the gender clause, which can result only in complementary status, does not imply any lower standard of harm feared. The Swedish Gender Guidelines make clear that persecution based on gender must nonetheless reach the same standard of severity as persecution under the 1951 Convention. This further reinforces the impression that the gender clause is not an additional safeguard for gender-related cases, but rather an active limit on their prospects of recognition.

410. Another explicit restriction on considering gender-related cases is made when the Swedish Gender Guidelines note that considering discrimination as a form of persecution when its cumulative effects are severe enough: such cases will only be considered where they are based on a Convention ground (Swedish Migration Board 2001, 13). This makes clear that in theory even serious and cumulative discrimination based on gender cannot be considered under the 1951 Convention (as would be consistent with the previously-stated position), but that furthermore there is a real possibility that it would also not be considered under the gender clause, since this treatment can only qualify as persecution where it is allied with a recognised Convention ground. The implications of excluding gender from consideration under the PSG Convention reasons therefore not only withholds the prospect of refugee status for relevant cases, but, in conjunction with other positions, may even disenfranchise gender-related cases completely, or force them to rely only on discretionary granting of humanitarian status. This risk was identified by Folkelius and Noll in 1998: “complex and opaque cases may be labelled with ‘humanitarian grounds’ instead of being properly scrutinised and accorded a residence permit under one of the rights-based categories” (Folkelius and Noll 1998, 619).

411. A complaint was submitted to the Committee on the Elimination of Discrimination Against Women in 2001 by a Swedish Member of Parliament and a lawyer, stating that the gender clause had the effect of impairing women’s access to asylum, and that the Aliens Act was thus discriminatory legislation (Hoffman and De Geer 2001).

412. Through their recommendations for gender-sensitive interpretations of persecution and Conventions grounds (other than the PSG ground), the Swedish Gender Guidelines introduced in 2001 could have resulted in a greater understanding of gender-related persecution. Although there is no evidence that gender-related persecution became better recognised under the 1951 Convention after the introduction the Swedish Gender Guidelines, women whose cases were based on FGM were granted status under the torture clause (Aliens Act 1997, Article 3.1), rather than the gender clause. Cases based on a fear of domestic violence and forced marriages have also been granted complementary status under the torture clause since the introduction of the Swedish Gender Guidelines.<sup>176</sup> Although status granted under this clause is still only complementary status, it offers an absolute protection from removal, while residence permits granted under the gender clause can be denied on the basis of the applicant’s previous activities or in the interests of national security (Folkelius and Noll 1998). Nonetheless, Bexelius (2003) reports that even after the introduction of the Swedish Gender Guidelines, gender-related asylum claims are still not recognised under the 1951 Convention.

413. Although gender-differentiated statistics on asylum decisions are not available, the overall recognition rates indicate that a restrictive practice is in place for all asylum claims. In 2002, the Swedish Migration Board recognised 1.6% of applicants as refugees, and in 2003 only 1% of applicants were recognised as refugees within the meaning of 1951 Convention. Residence permits on protection grounds were granted in 8% of cases in 2002, and in 3.6% in 2003. Thirty-one per cent and 21% of cases were granted residence on humanitarian grounds in 2002 and 2003 respectively,

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<sup>176</sup> Information from the Swedish Migration Board

meaning that in these years, in 63% and 78% of cases, the Swedish Migration Board refused any status (US Committee for Refugees 2002, 2003).

#### New legislative proposal

414. On 8th March 2004, a government-appointed expert committee presented a proposal to amend the Swedish Aliens Act (Committee Report to the Ministry of Foreign Affairs 2004). The proposal addresses all of the main criticisms of the 1997 Aliens Act's provisions, as well as some of the problematic aspects of Swedish application of the Convention grounds. The proposal:

- Recognizes that the status provided under the Aliens Act's gender clause does not provide the same level of protection against deportation in the event of being convicted of a criminal offence, and that the provision of travel documents and the right to family reunification are only granted to those with refugee status;
- Refers to the UNHCR Gender Guidelines, as well as practice in the UK, New Zealand, Canada, the United States and Australia, to acknowledge that women and homosexuals may constitute particular social groups under the 1951 Convention and recognise that the Qualification Directive refers to this possibility;
- Puts forward the view that there are no obstacles in international law to Sweden allowing women and homosexuals to be considered under the particular social group ground of the 1951 Convention;
- Suggests that when applying the Swedish refugee definition, the authorities should be guided in their interpretation of a 'particular social group' by the guidelines issued by UNHCR and by the proposal for an EC Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection;
- Seeks to clarify the use of the word 'kön' in Swedish legislation, and puts forward the view that it can and should encompass 'gender', rather than only 'sex.' The proposal simultaneously clarifies the difference between gender-specific forms of persecution (which may be motivated by reasons unrelated to gender) and gender-based persecution (which occurs for reasons inseparable from the individual's gender);
- Emphasises that persecution which takes place on account of gender may be considered under the 1951 Convention grounds of religion, political opinion or membership of a particular social group;
- States that the basic approach to examining possible Convention grounds of an asylum claim should be first to determine whether persecution is attributable to the applicants' race, nationality, religion or political opinion, and only subsequently to determine whether the ground of membership of a particular social group is applicable in order to catalyse greater recognition of the full range of Convention grounds which gender-related asylum claims

may come under and counteract the 'ghettoisation' of gender-related claims under the 1997 Aliens Act;

- Concludes that 'persecution on account of a person's sexual orientation or gender should be included within the refugee definition, and that the gender clause of the Aliens Act should be deleted.

415. This proposal was presented to the Minister of Migration and Asylum Police on 8th March 2004. After a consultation process involving relevant stakeholders, the proposal will be considered by the Council on Legislation, after which it can be presented by the Government as a Bill to Parliament. Although it will thus be some months before the contents of the proposed legislative changes are debated and finalised by Parliament, the current proposal has the potential to close the legal protection gap in Sweden's assessment of gender-related asylum claims, and further, to catalyse greater gender-sensitivity in the definition of persecution and application of Convention grounds, including that of Particular Social Group.

#### *United Kingdom*

416. In 1999 the House of Lords defined a particular social group when determining the cases of *Shah* and *Islam*. This definition remains the most authoritative guidance on how to define a PSG, and it is noteworthy in the context of this study that these cases granted refugee status to two women from Pakistan whose cases involved a range of gender-related elements, including domestic violence, imputed transgression of religious and social mores (through false allegations of adultery), and legally-enshrined discriminatory failure of protection and punishment.<sup>177</sup>

417. Apart from the decision being a milestone in the recognition of women's circumstances, the most significant elements of the decision are the criteria laid out to define a particular social group:

- Members of a particular social group are defined by an immutable characteristic [...] that is either beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed;
- The definition of a PSG does not require its members to be cohesive;
- The PSG cannot be defined by the persecution it faces but discrimination faced by the group can be considered as part of what defines it;
- Other Convention reasons are equal grounds on which a person may be discriminated against by society;
- There is no requirement that all members of the group are persecuted.

418. The High Court determined that on the facts before them, 'women in Pakistan' constituted a particular social group, because they shared an immutable

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<sup>177</sup> *ex parte Shah* [1999] Imm AR 283 [1999] 2 AC 629) and *Islam v Secretary of State for the Home Department* and *R v Immigration Appeal Tribunal*. For full details of the case, see <http://www.parliament.thestationeryoffice.co.uk/pa/ld199899/ldjudgmt/jd990325/islam01.htm>

characteristic, and because they were discriminated against and as a group unprotected by the State.<sup>178</sup>

419. The Home Office Asylum Policy Instructions (APIs) refer generally to the case of Shah and Islam, highlighting the need for an immutable characteristic and for the group to exist independently of persecution, although not necessarily independently of discrimination (Home Office undated, paragraph 9.4)

420. The new Home Office guidance on Gender Issues in the Asylum Claim refers specifically to the Shah and Islam finding 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” (Home Office 2004, paragraph 30).

421. The guidance refers to possible characteristics of a PSG as including sex, age, marital status, religion, family and kinship, past economic status/class, occupational history, disability, sexual history and ethnic, tribal or clan affiliation, and refers to the fact that women who may be subject to FGM have been found to constitute a particular social group (Home Office 2004, paragraphs 31 and 35). The guidance also states that external perception may be a factor in defining a PSG.

422. The guidance notes that although “most women who are persecuted will be covered by other Convention grounds [...] in some cases gender may be a factor in recognizing membership of a particular social group or an identifying characteristics of such a group” (Home Office 2004, 28)

423. Lastly, the Home Office guidance acknowledges that the fact that the particular social group consists of large numbers of the female population of the country concerned is irrelevant – race, religion, nationality and political opinion are also characteristics that are shared by large numbers of people.

424. Thus, High Court case law as well as Home Office policy now provides clear guidance on how to define a particular social group.

### **Recognition on the basis of membership of a gender-based PSG**

425. Over a third (36.5%) of countries surveyed as part of this research have recognised women or particular groups of women as members of a Particular Social Group under the 1951 Convention.<sup>179</sup>

426. In addition, the authorities in Denmark have recognised that women or particular groups of women and homosexuals may face persecution in connection to their gender or sexual orientation, but ‘Particular Social Group’ does not feature in Danish asylum legislation or case law.

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<sup>178</sup> For an analysis of the elements of the *Shah and Islam* case, see Symes (2000, 162 – 175)

<sup>179</sup> These countries are: Austria, Belarus, Belgium, Bulgaria, Finland (where there has been only such successful case, and it was allied with another Convention ground), France, Germany, Greece (where there has been only one such successful case), Hungary, Ireland, Lithuania, Norway, Portugal, Romania and the United Kingdom

427. Official guidance in Sweden and the Netherlands specifically prohibits considering women as members of particular social groups under the 1951 Convention. In the Netherlands, it is openly stated this is because such a category would be too broad.

428. In Belarus, no details are available but at least some groups of women are reported to have been found to constitute a PSG, and in Romania, three Iraqi women of Kurdish descent have been found to belong to a PSG by virtue of being women whose male family members are suspected of being member of a rival political party. In Greece, an Iranian woman was found to be a member of a PSG, although the decision did not provide a definition of the group.

429. In Austria, several decisions have recognised particular groups of women as members of a PSG. Cameroonian women who are to undergo FGM have been found to constitute a PSG by the Independent Federal Asylum Senate,<sup>180</sup> as have “Kurdish women, who in the eyes of their male family members have brought dishonour on their family through disgraceful behaviour and thus must be killed.”<sup>181</sup> Other cases have recognised women from Afghanistan, and specific groups of women from Ethiopia, Kosovo and Somalia as constituting particular social groups.

430. In Bulgaria, a decision by the Sofia City Court on 3rd December 2003 found that single women in Afghanistan should be considered as a social group in the meaning of the 1951 Convention definition.

431. In Finland, there is only one known case in this category. An Iranian woman with a long history of her family and husband being politically active, as well as being personally active in the promotion of women’s rights was found to have a well-founded fear of persecution on grounds of membership of a particular social group and political opinion.<sup>182</sup> It is not known if gender was referred to as the defining characteristic of the PSG.

432. In France, two decisions by the appeal body in December 2001 found that parents who oppose the practice of FGM on their daughters could be considered members of a particular social group. The two asylum cases were respectively made by a mother from Somalia and a husband and wife from Mali. Although the decisions did not deliberate on the definition of a particular social group, the Malian case did refer to the applicant’s minority Midgan ethnicity as relevant to her fear of FGM being inflicted on her daughter, and her associated fear of persecution for refusing it.<sup>183</sup>

433. In Belgium the appeal body has recognized certain groups of women as members of a particular social group on two occasions. In an asylum claim made by a young girl from Cameroon who feared forced marriage to an older polygamous man, consideration was made of the applicant’s age (she was 15 or 16 years old at the time of the appeal), as well as of the marriage traditions in Cameroon and associated lack of State protection. The decision referred to the Canadian decision of Ward, as

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<sup>180</sup> IFAS/UBAS No. 220.268/0-XI/33/00 Decision 21 March 2002

<sup>181</sup> IFAS/UBAS No. 221.110/0-IX/27/02 Decision 8 July 2002

<sup>182</sup> Helsinki Administrative Court 20 December 2002 N.o 02/1741/7

<sup>183</sup> Commission des Recours des Réfugiés (CRR) Sissoko case [CRR (SR), Decision No. 361050, of 7 December 2001] and Awo case [CRR (SR), Decision No. 369776 of 7 December 2001]

well as the UK decision of Shah and Islam and the Qualification Directive. The decision noted that a particular social group could be defined by “common characteristics which differentiate members from the rest of society, not least in the view of that society, and concluded that the appellant was a member of a social group, namely ‘young Cameroonian women.’”<sup>184</sup>

434. In a second case, ‘women from Djibouti’ were found to constitute a particular social group. The applicant was a woman who feared domestic violence after requesting a divorce and failing to prevent her husband from inflicting FGM on their daughter. The appellant’s Afare ethnicity was considered relevant since her husband, of Issa ethnicity, had started to beat her at the same time as ethnic problems emerged between groups in the country. The appellant’s husband’s ethnicity was also the predominant ethnicity of the police in Djibouti. In this case reference was also made to the Canadian case of Ward, the UK case of Shah and Islam, and the Qualification Directive.<sup>185</sup>

### **Case study countries: recognition of gender-based PSGs**

435. All of the case-study countries except for Sweden have recognised some groups of women as members of particular social groups. As detailed above, considering gender as the defining characteristic of a particular social group has until now been explicitly ruled out by the Swedish government. However this position is now being reconsidered.

436. German courts have recognised women as members of a PSG. Examples include women from Iran unwilling to comply with the Islamic dress code, and single women in Afghanistan (Luopajärvi 2003). In a recent FGM case, it was held that the applicant feared persecution – in the form of FGM - because she belonged to the group of women. As women in Guinea have strongly gender-defined roles and social status, an appeals court held that they could be defined as particular social group. No higher court decisions have succeeded solely on the basis of a PSG. However the highest asylum court, the FAC, has stated in 2000 and 2001 that gender alone has to be regarded as an asylum-related trait.<sup>186</sup>

437. As noted above, the Lithuanian authorities have recognised six cases of gender-related persecution. All of these were decisions by the Refugee Affairs Council, the appeals body between 1997 and 2000. No such decisions have been made since the change in appeals system in September 2000. Decisions made by the Refugee Affairs Council are not binding on initial decisions, nor on the new appeals body, the Vilnius District Administrative Court.

438. All six positive decisions on gender-related persecution were based at least partly on membership of a particular social group, including ‘educated women having had a high position job’ (in Afghanistan) and ‘women having no man support or escort’ and ‘women whose husband is being searched.’

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<sup>184</sup> Commission Permanente de Recours des Réfugiés. Decision 01-0668/F1356/cd, 8 March 2002

<sup>185</sup> Commission Permanente de Recours des Réfugiés. Decision 01-0089/F1374/jfn

<sup>186</sup> Information provided by UNHCR

439. In the UK, as indicated above, 'women from Pakistan' were found to constitute a particular social group in a precedent-setting High Court decision.

440. However, although women or particular groups of women have been found to be members of a PSG in asylum decisions, an assessment of how cases involving FGM and failure to conform to religious mores indicate that there can be a tendency by decision-makers to take a restrictive view of the PSG category.

### **Recommendations**

441. States should produce clear guidance on how to define a particular social group (PSG). Such guidance should be based on the UNHCR's Guidelines on International protection: 'Membership of a Particular Social Group' (PSG Guidelines).

442. Guidance should recognise that sex, gender and sexual orientation can properly be within the ambit of the social group category. The size of the social group is irrelevant to determining whether or not it exists.

443. States should refrain from assuming that it is appropriate to categorise all gender-related persecution claims under the PSG ground. To do so may limit the development of a gender-sensitive interpretation of all Convention grounds, and effectively marginalise gender-related claim by ignoring the social and political context in which women's experiences take place.



## 8. Procedural and evidential issues

444. The San Remo Expert Roundtable in 2001 emphasised that “protection of refugee women not only requires a gender-sensitive interpretation of the refugee definition, but also a gender-sensitive refugee status determination procedure” (UNHCR 2001, paragraph 8).

445. Crawley (2001) has noted that procedural and evidential barriers “often inhibit women’s access to the determination process and may serve to limit the quality of information gathered about the claim and, in turn, the quality of the decision-making process.”

446. Procedural and evidential matters do not apply exclusively to women applicants, nor exclusively to applicants with gender-related asylum claims. Nonetheless there is evidence that many women pursue their claims in ways that differ significantly from those of their male counterparts. Hinchelwood (1997) notes that:

The first and foremost preoccupation [of victims of torture] is with their asylum claim. There is a noticeable difference between men and women in this anxiety, with exceptions, of course. Men are often much more vocal and active in their anxiety, they change solicitors, seek letters, reports, ask to be brought forward in the queue. They cannot settle. Most women I have seen [over 9 years of therapeutic work with survivors of torture] have just melted into the background after their arrival, especially if they have no children, or have left their children behind. They are frequently ‘befriended’ by a lawyer who does nothing and they stay in the room allocated to them for weeks, months on end, just putting time and distance between themselves and their shame.

447. There are a number of reasons why procedures for refugee status determination may not respond appropriately to the needs and experiences of women:

- The gender-defined roles assigned to women in many refugee-producing countries can result in an assumption (on behalf of both spouses, families and determining authorities) that a woman will not have her own asylum claim;
- Use of sexual violence against women is common, and the trauma and shame often resulting from such treatment can be inhibiting and require particular sensitivity;
- Gender-defined roles (such as the requirement that women be sexually ‘pure’) may make it even more difficult for women applicants to reveal details of past harm;

- Gender-defined political activities may be more difficult to substantiate with evidence (e.g. proof of sheltering political activists is harder or impossible to obtain, compared with proof of party membership or activities).

448. This report has so far addressed the need for a gendered interpretation and application of the 1951 Convention's protection provisions. The assessment by RSD authorities will be based on the information provided by asylum-seekers about their experiences. This part of the report therefore focuses on:

- How this information is obtained, focusing in particular on access to procedures, and respect for privacy considerations and sensitivity to difficult issues.
- How information is assessed, with regard to credibility issues and in relation to available Country of Origin Information (COI).

### **Access to procedures**

449. Crawley (2001) has argued that while technical and psychological difficulties can affect all asylum-seekers' access to procedures for refugee status determination, these can be exacerbated for women. The same assumption underpinning the dominant interpretation of the 1951 Convention - namely that asylum-seekers are politically active men who have been persecuted by the State - detrimentally affects women's access to procedures with the result that that "if asylum procedures allow for the experiences of women at all, they tend to regard them as dependent wives, daughters and mothers" (Crawley 2001, 199).

450. This assumption by refugee status determination interviewing officers and decision-makers can be exacerbated by women's own assumptions about what is expected of them. The UK's IAA Gender Guidelines refer to a number of factors which may result in a women not making her own claim even though that claim may be a strong one, including a tendency to leave 'official' matters to the spouse, fear of the authorities, and concerns about confidentiality and the exposure of events thought shameful, as well as a culture of subordination to men (IAA 2000, paragraphs 5.11-5.14).

451. There can be serious consequences to a woman arising from this lack of - or failure to take advantage of - independent access to RSD procedures. The most important of these - both on principle and in practice - is that her experiences and her potential protection need will not be considered. This can result in no protection being offered. Failure to promptly ensure that women are informed of their right to submit a claim independently and facilitate her to do so, may result in an application for asylum being made some time after arrival, which can undermine the applicant's credibility in the eyes of the determining authorities, again jeopardising the provision of protection from potential harm. Lastly, where protection is offered to a woman as a dependent on her husband's claim, this derivative status can make the woman's protection from harm dependent on her marital status (Crawley 2001).

452. In addition, access to services and basic rights including freedom of movement often depend on proof of identity. Refugee and asylum-seeking women who lack adequate registration documentation may be denied access to services, or may be

detained by police. Some refugee registration processes offer registration documentation only to husbands and male relatives. Whilst this research has not specifically examined the provision of registration documents, existing evidence clearly reinforces that need for women to have equal access to procedures and the documentation that flows from this.<sup>187</sup>

453. Given the serious protection issues involved, it is not sufficient for European countries to passively grant women independent access to RSD procedures and assume that this will automatically guarantee gender-sensitive processes. Rather it is necessary for States to address the factors – technical and psychological – that can make such access problematic for women asylum- seekers.

454. UNHCR has repeatedly encouraged States to provide equal access to women asylum-seekers:

- In 1990, the EXCOM recommended that those concerned “ensure appropriate access by women asylum-seekers to such procedures, even when accompanied by male family members”;<sup>188</sup>
- The UNHCR (1991) Guidelines on the Protection of Refugee Women encourage RSD workers to “afford opportunities for the women as well as the men in a family to provide information relevant to the determination of refugee status,” (paragraph 71) and “institute procedures to ensure that women have equal access to registration procedures and are provided appropriate documentation” (paragraph 76);
- The 1991 guidance notes that “sometimes, women who arrive as part of a family unit are not interviewed or are cursorily interviewed about their experiences, even if it is possible that they, rather than their husband, have been the targets of persecution. Their males relatives may not raise relevant issues because they are unaware of the details or ashamed to report them (UNHCR 1991, paragraph 57);
- In 1993, the EXCOM called upon States and UNHCR to ensure the equal access of men and women to refugee status determination procedures and to all forms of personal documentation relevant to refugees” freedom of movement, welfare and civil status;<sup>189</sup>
- Most recently, the UNHCR Gender Guidelines state that “it is essential that women are given information about the status determination process, access to it, as well as legal advice, in a manner and language that they understand.” The guidelines explicitly state the importance of explaining to women the fact that they might have a valid claim in their own right (UNHCR 2002a, paragraphs 36 (i) and 36 (ii)).

455. It should also be noted that the Qualification Directive states that: “Member States shall ensure that each adult having legal capacity has the right to make an application for asylum on his/her own behalf”, and that where an application is

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<sup>187</sup> See EXCOM Conclusion No. 91(LII) Conclusion on Registration of Refugees and Asylum-seekers

<sup>188</sup> EXCOM Conclusion No.64 *Refugee Women and International Protection* (1990), paragraph (a) (iii)

<sup>189</sup> EXCOM Conclusion No. 77 *Refugee Protection and Sexual Violence* (1993), paragraph (c)

made on behalf of dependents, “Member States shall ensure that the dependent adults consent to the lodging of the application on their behalf, failing which they shall have an opportunity to make an application on their own behalf” (Article 5). The Directive further states that Member States should ensure that “authorities likely to be addressed by someone who wishes to make an asylum claim are able to advise that person how and where he/she may make such an application and/or may require these authorities to forward the application to the competent authority.” The requirements of this Directive could ensure that female asylum-seekers arriving with other family members are properly informed of their right to independently file an asylum claim.

*Access to procedures in European countries<sup>190</sup>*

456. Seventeen countries out of 41 (41%) provide automatic and generally consistent access to procedures to all adults, including women who arrive with their husband or other male relative. These countries are: Albania, Armenia, Bulgaria, Croatia, Czech Republic, Finland, France, Germany, Ireland, Latvia, Lithuania, fYROM, Romania, Russian Federation, Slovakia, Spain and Ukraine.<sup>191</sup> Among the remaining countries, there was no evidence that a separate application could not be made, and indeed several, including Greece, Turkey, the Netherlands, Portugal, Poland, Belarus and the UK noted that this could be done on request. However, simply allowing separate access to procedures does not equate to specific measures to overcome decision-makers’ and applicants’ assumptions that women should not need to make their own claims.

457. In Finland and France, each adult family member is required to lodge their own asylum claim, and in fYROM, Romania and Ukraine, it was noted that separate access to procedures was explicitly referred to in national asylum law.<sup>192</sup> In the Czech Republic, it was noted that separate access to procedures was ‘systematic.’ All adult women have to lodge their own applications for asylum even where they have arrived with a spouse or other male family member. In Ireland, all adult individuals are given access to RSD procedures, and in Armenia it is reported that female asylum-seeker who arrive with a spouse or other male relatives are normally requested to submit separate asylum applications.

458. It was reported that in Albania, the asylum law’s reference to individual asylum applications implied, in practice, a requirement for all adults to make their own claims. In Latvia, reference was also made to internal regulations ensuring separate access to procedures.

459. In Poland, those applicants viewed as ‘dependents’ of the main applicants are required to give their written consent to be included as in the main application. It is understood that most women who arrive with their husband choose this option rather than making their own application for asylum.

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<sup>190</sup> Serbia and Montenegro and Bosnia and Herzegovina are not included in this section of the survey, as they have not yet begun RSD procedures.

<sup>191</sup> Not all questionnaires or subsequent correspondence with UNHCR Branch Offices provided absolute confirmation of how separate access is provided for. It is possible that for some countries listed as providing separate access this may not systematically take place. This could be the case, for example, in Ireland, Albania and Latvia, although current information indicates separate access is provided

<sup>192</sup> For Ukraine, this reference is in the Refugee Law, Article 11, paragraph 2

460. In Switzerland, both spouses are interviewed and records kept, but a separate file is rarely opened for women. In Austria, women are normally asked if they have their own reasons for coming to the country, but in practice this has not proven sufficient to systematically encourage women to make their own claims where this would be considered to be in their best interest.

461. In Bulgaria, it is standard practice to interview spouses separately at the initial stage to identify whether they have separate grounds for asylum, but it is not known how a decision is made regarding whether or not accompanying women make their own claim.

462. In the Netherlands, there is no particular provision for separate access to procedures, but in practice where a husband and wife apply for asylum, each will be interviewed separately. Doornbos (2003) has reported that as a rule in such cases, husbands are interviewed first, on the basis that they are the head of the family, and subsequent interviews with wives are swifter and appear to be restricted to confirming the husband's account. Policy advises that where a woman fears persecution based on the activities of her spouse or relatives, interviewers should pay attention to the applicant's own experiences.<sup>193</sup>

463. In Denmark, the practice is for women who arrive with their partner to have their asylum claims processed jointly.

464. In Norway it is understood that accompanied women may currently make their own claim, but that separate access to procedures will be made explicit by incoming legislation.<sup>194</sup>

465. The Council of Europe's 1998 recommendation on the situation of women recommended that the Committee of Ministers re-examine refugee status determination procedure and policies with a view to ensuring that women who have an independent claim for refugee status have access to individual consideration of such claim, even if they are accompanied by a male partner.<sup>195</sup>

*Case study countries: access to procedures*

466. Among the case-study countries, Lithuania and Germany automatically provide separate access to procedures for women who arrive as part of a couple or family. In the UK and Sweden, women who arrive with a male partner or family member are entitled to make their own asylum claim, but there are no known measures to inform or reassure women about this.

467. In Lithuania, for the purpose of refugee status determination, all adults are interviewed individually, even if they have arrived as part of a family. A personal file is created for each adult family member, and decisions are issued separately.

468. With regard to the UK, as noted above, the IAA Gender Guidelines (2000, paragraphs 5.11 - 5.14) recognise that a number of factors may inhibit women's

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<sup>193</sup> Aliens Circular 2000, C1/4.2.11)

<sup>194</sup> Proposal for Amendments to the Norwegian Aliens Decree, Section 54, paragraph 4

<sup>195</sup> Recommendation 1374 (1998): Situation of refugee women in Europe, Parliamentary Assembly of the Council of Europe, adopted 26<sup>th</sup> May 1998, paragraph 6 vi (e)

access to procedures. These factors have been further examined by the Refugee Women's Resource Project (2003), which refers to a variety of factors which are believed to impede women making their own claims when they arrive with their husband or a male relative. One factor was poor information, leading women to believe either that they could not apply in their own right, or that making their own claim would prevent them also being dependent on their husband's claim. This lack of information was compounded by some men's insistence that they apply for asylum, since they were the heads of the family. One case reported by RWRP involved Home Office officials advising a woman to remain dependent on her husband's claim, although she potentially had a strong independent claim of her own.<sup>196</sup> One legal representative summarised the overall situation as that of an assumption on the part of the Home Office that women will always be dependent on their husbands. A further factor which impeded women making their own claims was linked to lack of information regarding their right to privacy and confidentiality in all stages of making their own claim, difficulties in accessing good quality legal representation, and the need for child care.

469. The recently issued Home Office guidance on 'Gender Issues in the Asylum Claim' (March 2004) makes no reference to the need for women to have separate access to procedures.

470. In Sweden, there is no known policy on ensuring that women who arrive with male relatives have separate access to procedures. However the Swedish Gender Guidelines recognise that it is important for women to be given the time to develop the grounds of their application and guard against a short interview after that with the husband (Swedish Migration Board 2001). However it is not clear whether this constitutes a commitment to separate claims being encouraged from women asylum-seekers.

471. The recent proposal to amend Swedish asylum policy on gender-related persecution focuses exclusively on the interpretation of the Convention grounds, and makes no reference to procedures.

472. Women who arrive in Germany with their spouses and male relatives have access to separate procedures and are not treated as dependents. They are generally interviewed separately and informed that they have to make their own claim for asylum. Nonetheless, the Federal Office has recognised that many women may need encouragement to consider that their own circumstances can be a valid basis for an asylum claim:

It is the experience of the deciding officers of the Federal Office that female asylum-seekers who have entered the Federal Republic of Germany in the company of their husbands usually give only the husband's reasons for seeking asylum, even if they themselves have suffered individual persecution. This applies particularly to women with certain cultural backgrounds (for example, women from Islamic countries). Even intensive efforts by deciding officers with training

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<sup>196</sup> This fact may not necessarily have been known to the official at the time the advice was offered but illustrative nonetheless of the damage that can result from advice premised on certain gender assumptions.

and psychology do not always succeed in persuading a woman to describe her own history of persecution.<sup>197</sup>

473. In 2001, the Federal Office implemented measures to anticipate such access difficulties. At the time of filing an application, before the procedure begins, women asylum-seekers are routinely given a leaflet in their mother-tongue. The leaflet states that female applicants may be interviewed by a female decision-maker, and that the Federal Office provides specially trained female adjudicators in the field of gender-specific human rights violations, including rape, sexual abuse and impending female genital mutilation. If the applicant is illiterate, there is provision for an interpreter to read the leaflet to her. UNHCR has noted that as well as informing women of their right to make their own claims and reassuring them of the possibility of female officers, the information in the leaflet may also help them understand that gendered forms of persecution are relevant to their claims.<sup>198</sup> This approach by the German authorities is a positive measure towards improving access to procedures for women.

### **Privacy and confidentiality**

474. While the testimonial process is highly stressful for any asylum-seeker, women applicants may find relating details of their experiences particularly difficult, especially if they have suffered harm which they find shameful. Women may only feel able to relate this information if they are not in the presence of family members. In addition, there may be conflicts of interest within a family (Crawley 2001).

475. The UNHCR Gender Guidelines state that women asylum-seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case (paragraphs 36 and 36). The UNHCR guidance published in 1991 also emphasises the need to provide women with the opportunity to be questioned out of the hearing of other members of their family. Victims of sexual abuse may not feel comfortable recounting their experiences in front of their fathers, husbands, brothers or children (UNHCR 1991, paragraph 72).

476. The Procedures Directive requires that “a personal interview should normally take place without the presence of family members unless the determining authority considers it necessary for an appropriate examination to have other family members present,” and that “a personal interview should take place under conditions which ensure appropriate confidentiality.”<sup>199</sup>

477. However the Procedures Directive makes no reference to the circumstances in which determining authorities could reasonably consider it necessary to have other family members present, nor of whether applicants’ preferences should be considered.

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<sup>197</sup> Comments made by Ms Marion de Wyl, Second Secretary, German Federal Ministry of the Interior at UNHCR Gender Symposium cited in Symes and Jorro (2003, paragraph 7.13)

<sup>198</sup> Information provided by UNHCR

<sup>199</sup> Amended proposal for a Council Directive on the minimum standard on procedures in Member States for granting and withdrawing refugee status. ASILE 66, 4<sup>th</sup> December 2003, Articles 11.1 and 11.2

478. As was noted above, 39% of countries surveyed provide automatic and generally consistent access to procedures to all adults, including women who arrive with their husband or other male relative. The vast majority of these countries (90%) also provide the opportunity to be interviewed away from relatives without a request having to be made. The revised asylum law in Austria provides for a separate examination of asylum applications in respect of family members. It is not yet known how this will be implemented in practice. One country - Georgia - does not provide the opportunity to be interviewed in private, and a further three countries - Turkey, Bulgaria, Belgium - noted that a specific request must be made to ensure privacy when being interviewed.

*Case study countries: privacy and confidentiality*

479. The authorities in Germany, Lithuania, Sweden and the UK all generally provide privacy to all asylum-seekers when they are interviewed, including women applicants. In Germany the Federal Office for the Recognition of Foreign Refugees has issued a 'Handbook for Adjudicators', which includes a volume on quality standards for the interview. We did not identify any specific guidelines on this issue in Lithuania.

480. The Swedish Gender Guidelines emphasise the importance of interviewing women separately from her husband or any other family members, in order to ensure that these relatives' presence not impede on her ability to divulge her grounds for asylum. In addition, the Guidelines emphasise the need for interviewers to fully address issues of confidentiality, making clear that neither the interviewer, interpreter nor legal representative if applicable will reveal what the applicant tells them, particularly not to her family (Swedish Migration Board 2001).

481. In the UK, research has shown that although there is recognition of applicants' need for privacy, this has at times not extended to a recognition of women's childcare needs, and as a result practical considerations may overrule recognition of the need for privacy.

482. RWRP (2003) states that some legal representatives have reported that Home Office employees have considered it appropriate to interview women in front of their children. In one case a heavily pregnant mother of two was threatened with a refusal of her claim based on non-compliance with the procedures because she asked for her interview to be delayed for half an hour to allow her husband to finish with his own interview and take care of the children. The woman's past experience included repeated sexual assault in the presence of her children. While Home Office caseworkers may not have been aware of this, this is exactly the type of possibility that should automatically be taken into consideration with respect to interviewing applicants in private.

483. The recently issued Home Office guidance on 'Gender Issues in the Asylum Claim' acknowledges that "victims of sexual abuse may not feel comfortable recounting their experiences in front of relatives. Wherever possible applicants should be interviewed by themselves, and certainly in cases where a claim of sexual abuse has been made or it is considered to be a possibility" (Home Office March 2004, paragraph 47). This guidance implies that where caseworkers do not anticipate the applicant to have suffered sexual violence, and where it may be impractical or

require changes to ensure a private interview, an applicant may be interviewed in front of relatives.

### **Interviewers and interpreters**

484. The UNHCR Gender Guidelines state that “claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves, and they should be provided automatically for women claimants” (paragraph 36 (iii) and see also paragraphs iv-ix). This reflects the statement in the 1991 UNHCR Guidelines on the Protection of Refugee Women that “the female victim of sexual torture obviously may be reluctant or find it very difficult to speak about it, particularly to a male interviewer” (UNHCR 1991, paragraph 60). The 1991 guidance also emphasises the need to “employ women as interviewers and interpreters for purposes of determining status. The very delicate and personal issues arising from sexual abuse requires the physical presence of officials who are sensitive to the needs of refugee women. In many instances it requires female staff members...” (paragraph 75). In 1990, the UNHCR Executive Committee recommended the provisions “wherever necessary, skilled female interviewers in procedures for the determination of refugee status” (UNHCR 1990, paragraph (a)(iii)).

485. If interviewers sometimes represent potentially intimidating figures of authority for applicants, then interpreters may be seen to represent the applicants’ ethnic community. As noted above, the UNHCR Gender Guidelines state that all applicants should have access to interpreters of their own sex. The UNHCR (1991) Guidelines on the Protection of Refugee Women state that “the recruitment and training of female interpreters is a precondition for the most successful interviewing” (paragraph 72).

486. It is worth noting here that the Council of Europe’s 1998 recommendation on the situation of women proposed that the Committee of Ministers “review the staffing and recruitment policies of [determining authorities] to ensure that there is sufficient number of female staff, and that in cases of claims to refugee status based on gender-related persecution, a member of female staff is available.”<sup>200</sup>

487. The Procedures Directive makes no reference to the provision of interviewers of the same sex as the applicant. However the Directive does state that the authorities in Member States should “select an interpreter who is able to ensure appropriate communication between the applicant and the person who conducts the interview. The communication need not necessarily take place in the language preferred by the applicant for asylum if there is another language which he/she may reasonably be supposed to understand and in which he/she is able to communicate in.”<sup>201</sup>

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<sup>200</sup> Recommendation 1374 (1998): Situation of refugee women in Europe, Parliamentary Assembly of the Council of Europe, adopted 26<sup>th</sup> May 1998, paragraph 6 vi. (d)

<sup>201</sup> Amended proposal for a Council Directive on the minimum standard on procedures in Member States for granting and withdrawing refugee status. ASILE 66, 4<sup>th</sup> December 2003, Article 3(b)

*Provision for same-sex interviewer and interpreters in law or policy*<sup>202</sup>

488. At least one third of the 39 countries surveyed make reference within their law or policy of the need to take into account the sex of the interviewer.

489. Austria provides for interviewers of the same sex in cases that involve sexual violence, although it is noted that in practice this is normally equated with cases involving rape. Belarus also provides for same-sex interviewers in cases based on sexual violence, as do Hungary and Switzerland. In Switzerland, the Federal Office maintains a list of countries where persecution of a sexual nature is common, so that a same-sex interviewer can be automatically allocated to applicants from these countries.<sup>203</sup> Same-sex interviewers can also be requested in other instances.

490. According to questionnaire responses, Croatia, Lithuania and Moldova have laws or policies that specify the right to exercise a choice between a female or male interviewer. Poland allows traumatised applicants to choose the gender of their interviewer. In Bulgaria, France and Slovenia, there is a provision that women should be allowed to request interviewers of the same sex.

491. In the Netherlands, Operational Instruction no 148 advises that women should be informed of their right to be interviewed by a female interviewer. In addition, if a male interviewer receives any indication that a female applicant has experienced gender-related persecution, he is required to stop the interview and inform her that a female interviewer can hear her. This practice is based on a policy letter from the Secretary of State for Justice dated 17 September 1997, which has now been incorporated in the Aliens Circular.<sup>204</sup>

492. At least a quarter of the 39 European countries surveyed also have provisions in law or policy allowing the possibility of interpreters of the same sex. These are the same countries that have provisions for same-sex interviewers, with the exception of Austria and Moldova, which do have explicit provisions for interviewers of the same sex but not for interpreters.

*Provision of same-sex interviewers and interpreters in practice*<sup>205</sup>

493. In a significant majority of countries surveyed (86.5%), some effort is made in practice to allow applicants in general to be interviewed by an interviewer of the same sex, or for particularly vulnerable applicants to have a choice about the sex of the person that they are interviewed by. However there was considerable variation in the extent to which such efforts are made. In less than half of these countries

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<sup>202</sup> Serbia and Montenegro and Bosnia and Herzegovina are not included here because policy and practice cannot be assessed, and no distinction has been made here regarding whether provisions are in law or policy. However it is noted that Bosnian LMSAA does not include any provision for the opportunity to be interviewed by a same-sex official

<sup>203</sup> Directive relative à la loi sur l'asile, 20 September 1999, paragraph 3.2.1

<sup>204</sup> Information provided by UNHCR

<sup>205</sup> Moldova (which does have provision for this in legislation) has not encountered a relevant application, and so, along with Serbia and Montenegro and Bosnia and Herzegovina, these countries are excluded from the survey of practice

(43.5%), we found evidence that requests to be interviewed by someone of the same sex are usually granted, in line with provisions where these exist.<sup>206</sup>

494. In Albania, Georgia, Malta, the Russian Federation and the United Kingdom, no particular effort is noted to allow requests for same-sex interviewers. Spain will do so 'in exceptional cases,' and this discretion may well apply to the other countries mentioned above. In Turkey, the relevant parallel RSD authorities have made efforts and started to employ more female interpreters. In Ireland, requests are usually granted, and in practice allocation of a female interviewer is automatic if the female asylum-seeker has stated in her application that she has suffered sexual violence. In the Czech republic female interviewers and interpreters are available for interviews and women applicants have access to female legal and social counsellors provided by NGOs who provide assistance to asylum-seekers with the support of funds from UNHCR

495. In 15 of the 37 countries surveyed (40.5%) attempts are made to accede to requests but there are practical difficulties. For example in Ukraine, not all regional departments are able to provide female interviewers. In Turkey, several female RSD interviewing officers have been appointed to asylum-related duties and requests by female asylum-seekers for female RSD interviewers are received positively and complied with whenever possible. Belarus and Hungary also note a lack of female RSD employees, and in Slovakia such requests depend on availability of staff at the time of the interview. Other countries where there are difficulties acceding to requests are Bulgaria, Estonia, Greece, Italy, Latvia and Austria. However in Austria, a recent case in the High Court allowed an appeal based on the fact that the female applicant was dealt with by male offices at both first and second instances, despite having stated that she had suffered sexual violence.<sup>207</sup>

496. A similar pattern can be seen in relation to the provision of interpreters of the same sex. Just over a quarter of the countries surveyed (28.5%) generally provide interpreters of the same sex, either automatically or on request.<sup>208</sup> In nearly half of the countries surveyed efforts are made to grant such requests, but practical difficulties associated with a shortage of interpreters in general, and of female interpreters in particular, make this variable at best. In 4 out of 35 countries (11.5%), efforts to provide interpreters of the same sex are made in very sensitive or exceptional cases. These countries are Austria, Italy, Poland and Spain. In 4 out of 35 countries (11.5%), there is no detectable effort to provide same-sex interpreters for interviews. In Georgia, Malta, Russian Federation, and the United Kingdom requests for same-sex interpreters are not provided for and no particular effort is noted to respond to requests made.

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<sup>206</sup> These countries are Azerbaijan, Belgium, Croatia, Cyprus, Czech Republic, Denmark, Finland, France, Germany, Ireland, Lithuania, FYROM, the Netherlands, Portugal, Romania, Slovenia, Sweden and Switzerland

<sup>207</sup> Higher Administrative Court, decision No. 2001/01/0402-10, 3 December 2003

<sup>208</sup> These countries are Armenia, Azerbaijan, Czech Republic, Denmark, Finland, France, Ireland, Norway, Sweden and Switzerland

*Case study countries: Same-sex interviewers and interpreters*

497. Lithuanian asylum law strongly recommends that female asylum-seekers should be interviewed by female staff. In Germany, Sweden and the UK, requests for same-sex interviewers and interpreters are possible.

498. It is established by law in Lithuania that all interviews and 'other actions' carried out in connection to female asylum-seekers should be undertaken by female staff, so long as female applicants do not object to dealing with female staff.<sup>209</sup> The composition of Asylum Affairs' Division includes two male and eight female officials.<sup>210</sup>

499. There is no conclusive information available regarding the extent to which this is carried out in practice in relation to interviewers, although it is reported that there are often difficulties in being able to provide female interpreters.

500. In Germany, in line with the information provided to female asylum-seekers at the time of submitting their application, it is possible to request a female interviewer and such requests are generally respected in practice. Although a female interpreter may also be requested, such requests may be more difficult to respond to for practical reasons associated with the availability of interpreters.

501. The Gender Guidelines produced by the Swedish Migration Board (2001) state that a woman's preference regarding the sex of her interviewer should be given weight. There is no requirement in the guidelines for RSD staff to specifically ask the applicant about her wishes. Where it appears that there may be particular sensitive issues, it is noted that it may be appropriate to appoint a female interviewer, either at the outset or in some cases, when investigation has already begun.

502. The Swedish Gender Guidelines state that a female applicant should be asked if she would like an interpreter of the same sex, and that her request should be responded to if possible (Swedish Migration Board 2001). Available information female interviewers and interpreters are usually provided on request.

503. In the UK, it is theoretically possible to request a same-sex interviewer at the initial application, but there is some evidence that applicants are not routinely informed about this possibility, and there is nothing that requires the Home Office to comply with requests.

504. Research undertaken by the Refugee Women's Resource Project (2003, 147) notes that requests for a female interpreter were on 'several' occasions refused or only granted after persistent objections from the legal representative.

505. Research carried out by the Immigration Law Practitioners' Association (ILPA) in 1999 showed that legal representatives were 'less than satisfied' with the Home Office's ability and willingness to provide same-sex interviewers when requested (Crawley 1999). RWRP's (2003) research showed that this continues to be a problem, with nearly half of the legal representatives they surveyed stating that requests for a female interpreter were occasionally (41%) or often (7%) not respected.

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<sup>209</sup> Order on Examination of Applications for Refugee Status, Minister of Interior, 2001, paragraph 57

<sup>210</sup> Information provided by UNHCR

506. As with interviewers, it is understood that a request can be made for a female interpreter to be employed for an interview, but that there is no policy which requires the Home Office to comply.

507. RWRP's (2003) findings on the provision of interpreters of the same sex were that over half of the legal representatives surveyed said that requests for a female interpreter was occasionally (37%) or often (15%) not respected.

508. However, not until the introduction of the Home Office guidance on 'Gender Issues in the Asylum Claim' has there been any explicit policy on the provision of same-sex interviewers and interpreters. It is now stated that:

Every effort should be made to comply with any reasonable request for an interviewer or interpreter of the same sex as the applicant. While it will usually be possible to arrange for an interviewer of the same sex to conduct the interview, it may not always be possible to arrange for an interpreter of the same sex. Requests made in advance should be complied with whenever possible (Home Office 2004, paragraph 45).

509. The new guidance does not mention any requirement to inform applicants of their right to request same-sex interviewers and interpreters, and the repeated emphasis on 'reasonable' requests being complied with where 'possible', even with advance requests, indicates that the inconsistent practice reported by RWRP and ILPA may not be remedied by the provisions of this guidance.

510. At the appeals stage, it is possible to request an all-female hearing, including a female adjudicator, interpreter and Home Office representative. Consideration of such requests is recommended by the IAA guidance (IAA 2000, paragraph 5.6). Although the administration of the IAA tends to be cooperative when such a request is made, practicalities can result in such requests being overruled by adjudicators – for example if no female staff are available at the time of the hearing.

511. A recent Tribunal case found that there was nothing in the Procedure Rules nor elsewhere (including the IAA guidance) which requires a request for an all-female hearing to be complied with. The determination pointed out the organisational and administrative difficulties involved and implied these could reasonably be given more weight than a request. The Tribunal conceded that in some cases there is a real risk of a lack of a fair hearing if the request is not granted, but emphasised these cases would be very rare, and did not specify at to what would qualify such a case.<sup>211</sup> This Tribunal case stands in stark contrast to the Austrian High Court's December 2003 ruling that the provision that asylum-seekers who base their fear of persecution on interference with their right to sexual self-determination should be interviewed by officials of the same sex also applies to the second instance decision, and that the envisaged reduction of inhibition thresholds could only be met by using a same-sex interpreter at the same time.

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<sup>211</sup> [2002] UKIAT 00121 M (Sierra Leone). This case was also referred to above in relation to the implication that the IAA (2000) *Asylum Gender Guidelines* need not be considered.

## **Gender training for RSD interviewers and decision-makers**

512. The evidence collected for this research, particularly the more detailed information on the case study countries, highlight the fact that key recognitions made in case law and policy are not always applied consistently. Appropriate training for those involved in RSD is a critical factor in ensuring that existing policies and guidelines are known, understood and implemented on the ground. RSD caseworkers often work in a pressured environment that places an emphasis on swift decisions. This makes it all the more important that they are provided with adequate training.

513. Reflecting this, the UNHCR Gender Guidelines state that States should ensure that all those involved in refugee status determination are familiarised with the Gender Guidelines. This reflects a recommendation made by the UNHCR Executive Committee in 1993 that States establish “training programmes designed to ensure that those involved in the refugee status determination process are adequately sensitised to issues of gender and culture” (UNHCR 1993, paragraph j). In addition the guidance published by UNHCR in 1991 also referred to the need for training in gender issues regarding interviewing and the assessment of asylum claims, for all interviewers and decision-makers, including immigration officers (UNHCR 1991, paragraph 75).

514. The Procedures Directive notes the need for personnel examining applications to have appropriate knowledge of the relevant standards applicable in the field of asylum and refugee law.<sup>212</sup> A possible interpretation of this requirement would potentially oblige EU Member States to ensure adequate training for all interviewers and decision-makers in gender issues, but the Directive does not specify that training of this type is necessarily required.

515. There is no systematic assessment in this survey of the quality or quantity of training on gender issues for RSD caseworkers. Furthermore, it has not been possible to ascertain the exact prevalence of training – UNHCR country offices are naturally fully aware of the training they have provided, but cannot always be certain of what proportion of RSD workers they have trained, nor of what additional training is offered internally.

516. For the purposes of this survey, there are three categories of assessment, none of which reflect quality or quantity of training. These are:

- Gender training systematically provided;
- Gender training periodically provided;
- No gender training provided.

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<sup>212</sup> Amended proposal for a Council Directive on the minimum standard on procedures in Member States for granting and withdrawing refugee status. ASILE 66, 4<sup>th</sup> December 2003, Article 7 (c.)

517. Rather than focusing on the number of staff trained, this categorisation focuses on the regularity of training and the degree to which it is institutionalised by the relevant authorities.<sup>213</sup>

518. Fifteen countries out of 38 (39.5%) provide or have provided training on gender issues to all RSD caseworkers.<sup>214</sup> Eighteen countries out of 38 (47.5%) provide or have provided training on gender issues to at least some of their RSD caseworkers. In five countries out of 38 (13%), RSD interviewers and decision-makers have received no training in gender issues. These countries are: Belarus, Georgia, Malta, Poland, and the Russian Federation.

519. In the Netherlands, an assessment of training in gender issues for RSD caseworkers found that although all received such training, they remained unsure about how to apply policy provisions on gender-related asylum claims. Although gender-sensitivity was supposedly included in their standard training, the subject of a gender-inclusive approach to RSD had barely been raised (INDIAC 2002). This assessment highlights the fact that even where gender-sensitivity training is nominally provided to all RSD caseworkers, in practice it may be lacking in detail or be ineffective.

520. In Finland, all interviewers and decision-makers at least at first-instance have received training. However, police officers also carry out interviews and have not been trained in gender issues.<sup>215</sup>

*Case study countries: training in gender issues*

521. Evidence from the case study countries indicates that the provision of training in gender issues is varied.

522. In Germany, there is no systematic system of regular training on gender issues for all decision-making staff. However, the Federal Office has, with the participation of UNHCR, trained specialist decision-makers and this has been done in such a way as to ensure that there is at least one such gender-specialist decision-maker in each of the 25 branches of the Federal Office. Furthermore, UNHCR has conducted training sessions for judges, especially from the Higher Administrative Courts, which include gender issues.<sup>216</sup>

523. In Sweden, all new RSD caseworkers receive training, believed to include some reference to gender issues, particularly given the existence of the Swedish Gender Guidelines produced by the Migration Board in 2001. In addition, UNHCR and

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<sup>213</sup> Serbia and Montenegro and Bosnia and Herzegovina are not included in this survey because they have not yet started RSD procedures and it may be that further training will be provided prior to commencement. However it is noted that in Bosnia and Herzegovina, some training has already taken place, including on gender issues and more is planned for 2004. Portugal has also been excluded from this part of the survey as it was not known whether RSD caseworkers receive training in gender issues.

<sup>214</sup> These countries are Armenia (currently 3 RSD caseworkers), Azerbaijan, Croatia, Cyprus (currently 14 initial decision-makers and 3 appeals decision-makers), Denmark, France, Ireland, FYROM, Moldova, the Netherlands, Norway, Slovenia, Sweden, Switzerland and the United Kingdom

<sup>215</sup> Other countries which have provided gender training to at least some of their RSD caseworkers are Albania, Austria, Belgium, Bulgaria, Czech Republic, Estonia, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Romania, Slovakia, Turkey and Ukraine

<sup>216</sup> Information provided by UNHCR

NGOs have provided training on gender issues to some RSD caseworkers. However, there is no information to confirm that all RSD caseworkers receive sufficiently detailed training on gender issues.

524. In Lithuania, the electronic RSD manual refers to Executive Committee Conclusion No. 39, including the specific recommendation that interviewing and decision-making staff receive appropriate training on gender issues. Information from UNHCR and the Lithuanian Asylum Affairs Division of the Migration Department indicates that at least some of the RSD staff have received training in gender issues, provided by UNHCR and cooperating countries, notably Sweden. However it has not been possible to establish the coverage of this training, in terms of whether all RSD workers have received such training, nor in terms of the breadth and depth of the training received.<sup>217</sup>

525. Information available regarding the UK indicates that standard training for Home Office interviewers and decision-makers includes gender issues. At this stage no further details are available on the depth or range of training on gender issues.

### **Consideration of trauma in RSD procedure**

526. Consideration of the possible effects of trauma is an important factor in assessing all asylum claims. While some asylum applicants may be traumatised due to having suffered torture or other abuse, many more will be psychologically affected by the experience of exile, including social isolation, inadequate income, the loss of a valued role in society, and separation from family (Goldman et al 2000). All asylum applicants will be in a foreign country, going through often unclear bureaucratic procedures on which their future depends. Thus, consideration of possible trauma should be an integral part of the RSD process.

527. In addition those who have experienced gender-related persecution are among those particularly vulnerable to trauma. The UNHCR Executive Committee recommended in 1993 that “in procedures for the determination of refugee status, asylum-seekers who may have suffered sexual violence be treated with particular sensitivity” (UNHCR 1993, paragraph g). The UNHCR Gender Guidelines refer to the need to consider the possible effects of trauma when interviewing:

- Persons raising gender-related refugee claims, and survivors of torture or trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community (paragraph 35);
- An open and reassuring environment is often crucial to establishing trust between the interviewer and the claimant, and should help the full disclosure of sometimes sensitive and personal information. The interview room should

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<sup>217</sup> It is estimated by UNHCR that around 40% of RSD caseworkers had been trained in gender issues, although it was estimated that there is no systematic training programme and that the training is ‘not comprehensive’. Information from the Migration Department suggests that 2 out of 15 staff in the Migration Department have been trained in gender issues

be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances (paragraph 36 iv));

- The interviewer should take the time to introduce him/herself and the interpreter to the claimant, explain clearly the roles of each person, and the exact purpose of the interview. The claimant should be assured that his/her claim will be treated in the strictest confidence, and information provided by the claimant will not be provided to members of his/her family. Importantly, the interviewer should explain that he/she is not a trauma counselor (paragraph 36 (v));
- The interviewer should remain neutral, compassionate and objective during the interview, and should avoid body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate. The interviewer should allow the claimant to present his/her claim with minimal interruption (paragraph 36 (vi));
- Both 'open-ended' and specific questions which may help to reveal gender issues relevant to a refugee claim should be incorporated into all asylum interviews. Women who have been involved in indirect political activity or to whom political opinion has been attributed, for example, often do not provide relevant information in interviews due to the male-oriented nature of the questioning. Female claimants may also fail to relate questions that are about 'torture' to the types of harm which they fear (such as rape, sexual abuse, female genital mutilation, 'honour killings', forced marriage, etc) (paragraph 36 (vii));
- Particularly for victims of sexual violence or other forms of trauma, second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information. In this regard, interviewers should be responsive to the trauma and emotion of claimants and should stop an interview where the claimant is becoming emotionally distressed (paragraph 36 (viii));
- Where it is envisaged that a particular case may give rise to a gender-related claim, adequate preparation is needed, which will also allow a relationship of confidence and trust with the claimant to be developed, as well as allowing the interviewer to ask the right questions and deal with any problems that may arise during an interview (paragraph 36 (ix));
- For some cases, it may be appropriate to seek objective psychological or medical evidence. It is unnecessary to establish the precise details of the act of rape or sexual assault itself, but events leading up to, and after, the act, the surrounding circumstances and details (such as, use of guns, any words or phrases spoken by the perpetrators, type of assault, where it occurred and how, details of the perpetrators (e.g. soldiers, civilians etc.) as well as the motivation of the perpetrator may be required. In some circumstances it should be noted that a woman may not be aware of the reasons for her abuse (paragraph 36 (xi));

- Mechanisms for referral to psycho-social counseling and other support services should be made available where necessary. Best practice recommends that trained psycho-social counselors be available to assist the claimant before and after the interview (paragraph 36 (xii)).

*Consideration of trauma*<sup>218</sup>

528. Information gathered under this heading has been put into two categories: those countries that appear to take the effects of trauma into consideration, and of these, those countries which make a specific connection between trauma and assessing credibility.<sup>219</sup>

529. In just over a third of countries (37%), the responses to the questionnaire survey indicate that RSD procedures include some consideration of the possible consequences of trauma. The countries where it is reported that trauma is taken into account are: Belarus, Czech Republic, Finland, France, Germany, Greece, Ireland, Latvia, Lithuania, the Netherlands, Poland, Slovenia, Sweden, Switzerland and the United Kingdom.

530. For Belarus, reference was made to the legal provision for same-sex interviewers and interpreters and a trustful environment for traumatised applicants. In Slovenia, an apparently traumatised applicant is referred to an expert who can make an assessment prior to interview, and/or the traumatised applicant can request that his or her counsellor attend the interview with them.

531. In Poland, the 2003 Protection Law gives guidance on how to undertake interviews with traumatised applicants, including the need for tact, the possibility of carrying out the interview at the applicant's home, and the possibility of taking into account the timing of medical treatments when setting the date of the interview. The law also includes the possibility of a psychologist attending the interview, and the interviewing officer and interpreter being of the gender requested by the applicant.

532. For Ireland, reference was made to all RSD caseworkers having training on being sensitive to trauma in interviews, as well as the automatic allocation of a female interviewer where a female applicant has stated in her application form that her case includes sexual violence.

533. In Latvia, traumatised applicants are referred to a 'Crisis Centre.' In the Czech Republic women applicants are accommodated in Special Protected Zones during the asylum process where specialised workers (workers of the facility and NGO counselors supported by UNHCR) provide them with required assistance and services. The system in place in the Czech facilities for asylum-seekers permits that cases of victims of trauma are identified at early stage and receive necessary and adequate attention. Furthermore, this special accommodation and protection

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<sup>218</sup> Denmark could not comment on this question, and as in the rest of this section, Serbia and Montenegro and Bosnia and Herzegovina are not included. Therefore 38 countries are included in this part of the survey

<sup>219</sup> Given the subjectivity involved in considering whether or not consideration is given to the issue of trauma, there may be some inconsistency in the following data. It is acknowledged that more detailed information would be desirable, but the information provided does give some general indications of practice

arrangements permit to include the consideration of trauma in the asylum claim (through the assistance of the NGO legal counselor).

534. In France, reference was made to the possibility of appeal hearings being carried out in *camara*. There is reference to trauma in Article 23 of the Decree of 2 May 1953 relating to first and second-instance, but it is not clear at this stage whether this is merely an example of the *in camara* provision or a further specific provision applicable in cases of trauma.

535. In Greece, interviews must by law be interrupted if it becomes apparent that the applicant has suffered torture or is traumatised. The applicant must then be referred to a specialised medical facility for counselling or other relevant needs before the asylum procedure is resumed.

536. In the Netherlands, the IND makes efforts to ensure that female asylum-seekers suffering trauma due to gender specific ill-treatment have access to appropriate counselling services. The Netherlands has a 'trauma policy', but this refers to the provision of complementary forms of protection, and is not directly related to the RSD process.<sup>220</sup> It should be noted that in the Netherlands, it is not permitted to introduce new facts at appeal stage, even if the applicant suffers from trauma. Similar restrictions may apply in other countries as well, and is a negative example of failure to give due consideration to the effects of trauma.

537. In Albania, asylum law provides for a legal guardian to be appointed to vulnerable asylum-seekers, but this category refers to unaccompanied minors and the 'mentally disabled', which does not presuppose inclusion of applicants suffering from all but the most extreme and overt trauma.

538. Despite some examples of good practice derived from the questionnaire responses, it is of concern that in nearly two thirds (63%) of countries surveyed there is no particular consideration of the possible consequences of trauma.

#### *Consideration of trauma in credibility assessments*

539. The link between consideration of trauma and credibility has two aspects. Firstly, sensitivity to an individual's state of mind can increase that individual's ability to reveal the details of their case. Secondly, even where such practical considerations are made, and especially where they are not, the effects of trauma can result in gaps or discrepancies in the applicant's account. Such discrepancies may result in damaging conclusions about the applicant's credibility in the absence of recognition that they can be caused by trauma. Trauma may be a contributing factor in otherwise unexplained delays in claiming asylum, or may contribute to delays in revealing details of abuse even after a claim has been submitted and the RSD process commenced.

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<sup>220</sup> An asylum-seeker having experienced trauma is eligible for a (temporary) residence permit for asylum on the grounds of pressing humanitarian reasons (Article 29, 1, c of the Aliens Act 2000). The so-called trauma policy is formulated in Section C1/4.4 of the Aliens Circular 2000 and is applicable in cases in which the personal experience of certain events has been so traumatising for the asylum-seeker that it cannot be expected of him/her to return to his/her country of origin. The traumatic events must emanate from State agents, or be the result of lack of State protection

540. There has been considerable research establishing the effects of trauma on an individual's ability to recall events and related details such as dates. Additional research specific to the implications of these factors in assessing the testimonies of asylum-seekers is also available.

541. Herlihy et al (2002) conclude that discrepancies can arise between two accounts of the same event by the same person even where there is no reason for fabrication, and that refugees with high levels of post-traumatic stress are more likely to give inconsistent accounts if a long time elapses between interviews (as is often the case between initial interviews and appeal hearings). The authors also conclude that interviewees are more likely to be inconsistent in details they consider to be peripheral to their experiences than in details they consider to be most important.<sup>221</sup>

542. Cohen (2001) refers to general research concerning memory which shows that people recall information better than the source of that information (so they cannot state how they know certain facts, although they know them to be true), and that memory for dates and times is notoriously unreliable. Research on children has shown that closed questions are more likely to result in discrepancies between accounts, while allowing interviewees recall events freely is less likely to result in inaccuracies, while other evidence shows that torture victims are more distressed and unable to respond clearly when asked to recall distressing events with open-ended rather than specific questions. Cohen also refers to research showing how other factors can affect the ability to relate details of past events, including emotional arousal caused by the requirement to recall traumatic events, severe stress, malnutrition, minor brain injury, depression, sleep loss and chronic pain. Sufferers of Post-traumatic Stress Disorder (PTSD) show considerable impairment of their ability to recall events in a clear and consistent manner. Symptoms of PTSD include, but are not limited to, distressing recall, nightmares, flashbacks, avoidance behaviour and social withdrawal.

543. Cohen concludes that credibility assessment of asylum-seekers by the determination of accuracy and reproducibility of their recall is "not a valid component of asylum decision-making" (Cohen 2001, 17).

544. Cohen (2002) has further stated that "asylum-seekers do suffer from denial of credibility and claims are dismissed on grounds of minor discrepancies. The difficulty is not to convince the medical profession of the variable nature of memories but to change the fundamental process of witness testimony in law. Why is consistency valued so highly when common sense as well as research tells us it is difficult to tell a story exactly the same way twice?"

545. Crawley (2001) notes that while credibility issues affect both men and women, women's difficulties in accessing procedure, and in having gender-related claims assessed appropriately can compound credibility problems.

546. The UNHCR guidance published in 1991 encouraged recognition of the fact that women who have been sexually assaulted may exhibit a pattern of symptoms described as Rape Trauma Syndrome: "These symptoms include a persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-

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<sup>221</sup> It is worth noting that these findings may also be applicable in cases where an individual has not been traumatised by his or her experiences

blame, a pervasive feeling of loss of control, and memory loss or distortion. These symptoms will influence how a women applicant responds during the interview. If misunderstood, these symptoms may be seen wrongly as discrediting her testimony” (UNHCR 1991, paragraph 71).

547. UNHCR’s (1995) *Sexual Violence Against Refugees: Guidelines on Prevention and Response* note that:

Victims of sexual violence may not be forthcoming with this information at the outset and this reluctance to report sexual violence may have significant effects on refugee status determination. Experience has clearly shown that incidents may not come to light until refugees have been resettled and seek therapy, which may be months or even years later. Individuals may have contact with many refugee workers without sometimes ever disclosing their experience (UNHCR 1995, paragraph 4.3 a)

548. UNHCR’s *Sexual Violence Guidelines* published in 2003 state that individuals who have suffered sexual or gender-based violence may experience guilt, fear, shame, depression or anger, and may try to forget, deny or repress the traumatic event.

#### *Trauma and credibility assessments*

549. Of the 13 countries where UNHCR country offices reported consideration was given to the possible consequences of trauma, six countries have some form of policy, guidelines or practice which recognises that trauma should be taken into account when assessing an applicant’s credibility. These countries are: Finland, Germany, Ireland, Sweden, Switzerland and the United Kingdom.

550. In Finland, the interviewing protocol includes a specific question on trauma, and case law has recognised that trauma needs to be considered as part of the assessment of credibility.

551. In Switzerland, case law recognises there can be plausible reasons for delay in revealing all aspects of the claim, particularly where they relate to traumatic experiences.

552. In Ireland, training material for RSD caseworkers cites Hathaway (1991), noting that a claimant’s credibility should not be impugned simply because of vagueness or inconsistencies, since memory failure is experienced by many persons who have suffered persecution. The training material further notes that an applicant’s level of education, intelligence, psychological state and gender may all affect their ability to provide a detailed testimony.

553. The revised asylum law coming into force in Austria in May 2004 will make an exception for traumatised asylum-seekers from the prohibition of introducing new facts at appeal, thus making a concession that credibility assessments must take trauma into account. In addition, although Austria does not currently give any particular consideration to the possible consequences of trauma, its revised asylum law will ensure that those applicants who are traumatised due to experiences linked

to their reasons for fleeing must be considered through the normal procedure and not the accelerated procedure. However concerns have been expressed by UNHCR and others that this is likely to have dramatic negative effects, particularly for those who cannot or feel unable to voice their fear of persecution for other comprehensible reasons, for example cultural norms or shame. This means that women in particular may be prevented from introducing new facts at appeal because they have not been identified as being traumatised at an early stage.

554. It should also be noted that in the Czech Republic, asylum applicants (both male and female) who suffer from trauma, applicants with mental health disorder and serious health disorders are often accorded humanitarian status. The rights associated with humanitarian status in the Czech Republic do not differ from those associated with Convention refugee status.

555. The Procedures Directive allows Member States to utilise accelerated procedures in certain cases. Although accelerated procedures are not specifically addressed in this report, there is evidence that where these limit rights of appeal (including where they do not allow for appellants to remain in the country for their appeal) they may prejudice the fair assessment of their claims.<sup>222</sup> Although the Directive refers to the possibility of a 'good reason' for some of these actions, there is no specific reference to the need to consider the possible effects of trauma when determining why applicants may have behaved in this way, or whether this could or should be the basis to avoid recourse to accelerated procedures. The Procedures Directive does not include any reference to considering trauma in the RSD process generally, or specifically in relation to credibility assessments.

#### *Case study countries: consideration of trauma*

556. All of the case-study countries have some provisions for trauma in the RSD process.

557. In Lithuania, the Order on Examination of Applications contains specific provisions for vulnerable applicants. Vulnerable applicants are defined as including unaccompanied minors, applicants who have suffered torture or other trauma, applicants with a mental disorder or serious health disorder, and elderly applicants.<sup>223</sup>

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<sup>222</sup> The Procedures Directive notes that accelerated procedures may be applied in cases where the applicant, *inter alia*, 'has made inconsistent, contradictory, unlikely, or insufficient representations which make his/her claim clearly unconvincing'; 'has failed without reasonable cause to make his/her application earlier, having had the opportunity to do so'; 'is making an application merely in order to delay or frustrate the enforcement of an earlier or imminent decision which would result in his/her removal'; or 'entered the territory of the Member State unlawfully or prolonged his/her stay unlawfully and, without good reason, has either not presented himself/herself to the authorities and/or filed an application for asylum as soon as possible given the circumstances of his/her entry. See Article 23. 3, Amended proposal for a Council Directive on the minimum standard on procedures in Member States for granting and withdrawing refugee status. ASILE 66, 4<sup>th</sup> December 2003

<sup>223</sup> Order of the Minister of Interior on Processing Asylum Applications of 5th January 2001, paragraph 2.4

558. The Order states that those applicants defined as vulnerable must be dealt with by border guards or migration officials who have been trained to properly address the needs of vulnerable applicants.<sup>224</sup>

559. According to the Order, where there are indications that an applicant falling within the 'vulnerable' category has suffered torture or inhuman or degrading treatment, or if there are indications that the applicant suffers from a mental illness, then the migration official must request a doctor's advice on considerations to be made during an interview, including questions which should be avoided. If necessary, a doctor may attend the interview. Lastly, if there are indications of torture, then the migration official will not wear a uniform when interviewing.<sup>225</sup>

560. There appear to be no specific provisions for taking trauma into account when assessing an applicant's credibility. However, it is possible that the advice of an appropriate professional could be taken into account, in line with the provisions for interviewing vulnerable applicants.

561. The German Federal Office has special adjudicators who have received training in handling asylum claims made by victims of trauma. However it is not always possible to ensure that these special decision-makers deal with traumatised applicants.

562. The Federal Office has recently commissioned a university with devising a pre-screening tool for the decision-makers to better and promptly recognize when applicants are traumatised.

563. In Germany, a rejected asylum claim may be re-opened if there is evidence that the claimant is traumatised.

564. The Swedish Gender Guidelines state that their objective is to increase staff awareness of women's experience of the asylum process, and thereby to "give women applicants as good opportunities as possible to describe their own experiences, to the extent that there are willing to do so, including extremely sensitive and private aspects of these" (Swedish Migration Board 2001, 1).

565. This objective is reflected through numerous references to the need to be sensitive when interviewing women about their claims:

Women who have been subjected to injustice, especially of a sexual nature, will not normally be willing to spontaneously speak of this, either directly or indirectly.... The investigator must therefore be able to inspire and create confidence, have a good amount of knowledge regarding the situation in the women's country of origin, exhibit empathy, know how to use the conversational techniques, possess patience and the ability to adapt the investigation in question (Swedish Migration Board 2001, 6).

The investigative room and its surroundings should provide a sense of security, a relaxed feeling and facilitate open discussions. The

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<sup>224</sup> *ibid*, paragraph 55

<sup>225</sup> *ibid*, paragraph 56

room should be furnished in a neutral manner. The emotional environment prevailing at the interview is also of great importance in encouraging a woman to talk about difficult experiences. The dialogue should be conducted with understanding and empathy and inspire trust. The interviewer should be very receptive to a woman's signals. Therefore, it may sometimes be best that the investigator refrain from using a word processor (Swedish Migration Board 2001, 10).

566. In addition there is recognition that investigations of a sensitive nature can take time, and must be allowed this necessary time, and that women be provided the opportunity to describe the relevant chain of events and her personal reactions to it in her own words (Swedish Migration Board 2001, 11).

567. Lastly there is a general recognition that "gender-related violence and insults can be associated with powerful trauma and feelings of guilt and shame," (Swedish Migration Board 2001, 14) which can appear at any stage of the investigation, and that "particular problems may arise when dealing with women who are suffering severe trauma, such as Post-Traumatic Stress Disorder" (Swedish Migration Board 2001, 13).

568. Sweden's guidance makes clear that reluctance to speak or other forms of behaviour which could be interpreted as indicating poor credibility can be due to trauma: "a woman may have entirely justifiable reason for not wanting to speak about various types of violence and abuse, or not to go into detail about this" (Swedish Migration Board 2001, 12). The guidance also notes that:

"One special problem relating to the investigation is that certain women may find themselves in an acute traumatic state so that it is difficult for them to understand, answer or even perceive the issues under investigation. Not until after medical treatment can they perhaps reach a sufficient understanding of their situation. Here too, the Board may need to consult an expert or perhaps even commission a supplemental investigation" (Swedish Migration Board 2001, 10).

"There is often no reason to investigate painful abuse, such as sexual abuse in detail. The lack of detail in a woman's story should therefore not be viewed as an indication that her information is not credible" (Swedish Migration Board 2001, 15)

569. In addition the guidance suggests that decision-makers attend interviews where the applicant says she has been subject to abuse because "the presence of a decision-maker at the interview may be especially worthwhile" (Swedish Migration Board 2001, 8). Because women may be reluctant to speak if there are more people than necessary present, whether or not this happens should be decided on a case-by-case basis. While the decision-makers presence might assist in the determination process, any implication that credibility could be assessed wholly on the basis of the applicant's demeanour, could be interpreted as contradictory when read against other considerations about trauma and behaviour contained in the Gender Guidelines.

570. In the UK, the evidence collected during the course of this research suggests that there are no particular provisions in the UK for anticipating trauma in applicants or taking trauma into consideration during the interviewing process.

571. Research by RWRP undertaken in 2003 found that legal representatives considered the quality of interviewing by Home Office caseworkers was inconsistent. A large number said the interview was often (44%) or occasionally (37%) cursory. A similar proportion said interviews were often (33%) or occasionally hostile or aggressive (48%).

572. Crawley (1999) has reported that legal representatives are dissatisfied overall with the attitude of interviewing officers towards applicants, both in terms of tone and body language, and with regard to willingness to halt an interview if the applicant feels unable to proceed.

573. In the United Kingdom, case law has recognised that trauma can affect an applicant's ability to claim asylum without delay, or to be coherent or consistent in their evidence.<sup>226</sup>

574. The Home Office APIs state that assessment of claims must be objective, and that where there is no reason to doubt an applicant's credibility, he or she should be given the benefit of the doubt, even if there is no supporting evidence. However "the benefit of the doubt should not [...] be given where the account lacks coherence, runs counter to generally known facts, or the applicant's general credibility is doubtful" (Home Office undated, section 10). The same section of the APIs state that "particular care must be taken in assessing the application if the applicant *claims* to have been tortured" (emphasis in original), but does not specify what considerations should be made.

575. However, lack of consideration of trauma in procedural policy is also reflected in the way that trauma is often not sufficiently considered during the assessment of applicant's credibility.

576. The Immigration Rules (which provides the legislative framework for all asylum decisions) refer to a number of factors that would undermine an applicant's credibility. These allow the Home Office to 'certify' the claim, thereby preventing the applicant from appealing to the Tribunal if their appeal is refused.

577. Instances which would allow certification and which the APIs say would indicate a lack of credibility include: failing to claim asylum 'at the first opportunity'; making an application after a refusal to allow entry has already taken place on other grounds; failing to provide a valid passport, producing a false document or destroying identity documents. The Home Office APIs state that certification should not take place where an applicant has claimed to have been tortured (Home Office undated, section 15). However, many of the circumstances listed could be due in some degree to trauma, not necessarily incurred as a result of torture.

578. The APIs on assessing claims state that a reasonable explanation may be provided by the applicant, in which case credibility need not be affected. However, research shows that such explanations are often not taken into account.

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<sup>226</sup> *Adimi* [1999] Imm AR 560 and *Jakitay* (IAT, 12658, 1995)

579. RWRP (2003) indicates that consideration of the effects of trauma is inconsistent, both at the initial decision and the appeal stage. The report refers to a number of cases in their sample which were rejected because women did not state they had been raped when they first claimed asylum (for instance in the statement of Evidence Form that must be completed to make a claim), even if they did so when they were interviewed.

580. One such example in the report relates to a woman who was gang-raped by military officers in the presence of her children, on account of her political activities. Although she did not state this in her initial application, she did do so when interviewed by the Home Office three months later. Her claim was refused and certified as 'manifestly unfounded', despite the API guidance stating that no certification should take place where the applicant claims to have been tortured. The Home Office disbelieved her claim to have been raped because she had not disclosed this earlier. Furthermore, the adjudicator who determined her appeal considered that the applicant had not failed to "refer to the incident of rape earlier because of embarrassment. In my view she added these dramatic claims only to give substance to her appeal" (RWRP 2003, 78).

581. The RWRP report notes further that:

The arbitrary nature of decision making in this case is highlighted when it is revealed that a female relative of this applicant who fled to the UK at the same time as this woman and who had a very similar claim, was granted refugee status at appeal. That woman had experienced a similar assault which she did not disclose to the Home Office until her appeal hearing, but which was fully accepted by the adjudicator (RWRP 2003, 79).

582. The IAA Gender Guidelines make clear that delays in revealing humiliating or traumatising treatment need not imply any lack of credibility:

Delay in claiming asylum or revealing full details of an asylum claim will not necessarily be due to the lack of credibility of a particular asylum claim or claimant. Torture, sexual violence and other abusive treatment produce feelings of profound shame. This 'shame response' is a major obstacle to disclosure. Many victims will never speak out about sexual violence or will remain silent about it for years (IAA 2000, paragraph 5.43).

583. The RWRP report lists instances of asylum refusals (both at initial stage and at appeal) which refer to a failure to produce evidence, documentary or otherwise, to corroborate claims of rape,<sup>227</sup> and others which have failed to consider medical evidence provided by experts, including assessments concluding applicants were suffering from Post-Traumatic Stress Disorder.

584. Alleged discrepancies are also often a basis for refusing asylum claims. Research conducted recently by Amnesty International concludes that: "Refusal letters may also cast doubt on the credibility of an applicant when there are any

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<sup>227</sup> Both the IAA *Asylum Gender Guidelines* and medical expertise have emphasised that rape and other sexual torture often leaves no physical scars. See, for example, Burnett 2002

minor discrepancies in his or her account. In doing so, they ignore the wealth of objective information which shows that minor discrepancies in the accounts given by asylum-seekers are to be expected, and in some cases actually support the view that an applicant is telling the truth about his or her experiences" (Amnesty International 2004, 32).

585. Over one fifth of the claims refused in the RWRP research were refused at least partly on the basis of alleged discrepancies, in addition to other cases refused due to gaps in the applicant's knowledge, such as an inability to provide dates or names.

586. Both the RWRP and the Amnesty International reports provide numerous case-studies illustrating refusals on the basis of credibility points which take no account of human fallibility, let alone trauma. Some of these cases involved applicants who had been diagnosed with PTSD. The full details of the case-studies in both reports indicate that both men and women's cases are frequently refused on questionable credibility grounds. Amnesty International states that it believes that a 'checklist' approach to issues of credibility informs a negative culture of decision making, which is often based on 'catching applicants out' rather than investigating the substance of their claims.

### **Cultural differences**

587. The need to consider cultural differences in demeanour and basic assumptions runs in parallel to the need to consider the possible effects of trauma. Interviewers and decision-makers need to consider their impact on applicants, and also need to be wary of drawing conclusions about applicants' credibility based on culturally defined demeanour. The need for cultural sensitivity affects all asylum-seekers, but it can be particularly important for women, especially if they come from a culture where women's demeanour is expected to be different to that expected in Western culture. Thus, for women asylum-seekers, general cultural factors may be compounded by gender-specific cultural factors.

588. Hinshelwood (1997, cited in Crawley 2001, 212) notes that while in Western culture it is considered suspicious if a person will not make eye contact, "in many authoritarian regimes and cultures, it is wrong, impolite, especially for a woman, to look superiors in the eye. The eyes must be cast down. This fact has been beaten into many a torture survivor."

589. The unreliability of drawing conclusions from demeanour was succinctly summarised by Lord Bingham in the UK: "To rely on demeanour is in most cases to attach importance to deviations from a norm when in truth there is no norm."<sup>228</sup>

590. Cultural differences extend beyond demeanour. Cultural background, including gender-defined roles, can strongly affect how an individual reacts in a given situation. Interviewers and decision-makers need to be aware that what might seem an illogical reaction to them may be entirely appropriate for the applicant. Case law in the UK has addressed the limits of considering what a 'reasonable man' would do in a particular situation: "If it strains credulity to imagine what the 'ordinary man' would do in the position of a battered spouse, it is probably because

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<sup>228</sup> *R v Secretary of State ex parte Dhirubhai* [1986] Imm AR, cited Crawley (2001, 214)

men do not typically find themselves in that situation. Some women do, however. The definition of what is reasonable must be adapted to circumstances which are, by and large, foreign to the world inhabited by the hypothetical 'reasonable man'.<sup>229</sup>

591. The UNHCR Gender Guidelines state that "interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education" (paragraph 36 (iii)). In addition they note that:

The type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility. Interviewers and decision-makers should understand that cultural differences and trauma play an important and complex role in determining behaviour (UNHCR 2002a, paragraph 36 (xi)):

592. The UNHCR guidance published in 1991 encourages interviewers to "be aware of gender differences in communication, particularly regarding non-verbal communications. As an interviewer, avoid intimidating gestures that inhibit responses. In assessing the credibility of the female applicant, for example, do not judge it on the basis of such Western cultural values as the ability to maintain eye contact" (UNHCR 1991, paragraph 72).

593. The UNHCR Guidelines on Prevention and Response to Sexual Violence (1995, paragraph 4.3 a) note that "it is essential that status determination officers be conscious of possible reactions to trauma and are familiar with culturally different patterns of behaviour and language. The statement by the asylum applicant to have been 'badly treated' may be a euphemism for rape. Training for relevant officers is therefore highly recommended."

#### *Consideration of cultural differences*

594. There is very little evidence that there is consideration of cultural difference in European RSD procedures. Denmark, Finland, France, Ireland, Sweden and Switzerland are said to take cultural differences into account in RSD procedures, but in most of these cases there is only a general reference to cultural sensitivity when interviewing, and this may apply to other countries as well.

595. Sweden, Ireland and Finland are the only countries which appear to explicitly consider cultural differences in demeanour as relevant to credibility assessments. Sweden does so specifically in relation to its Gender Guidelines, and Finland is said to have case law that makes clear cultural differences should be taken into account when assessing credibility. In Ireland, training material provided to RSD caseworkers refers to the Canadian Gender Guidelines, which state that the demeanour of a witness is not an infallible guide to their credibility.

596. Failure to consider cultural differences can have serious impact on asylum determination, as highlighted by one questionnaire respondent who noted that although in theory training covered cultural sensitivity, many first and second instance decisions reasoned their dismissals of cases on credibility grounds by

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<sup>229</sup> Wilson J in *R v Lavallée* [1990] 1 SCR 852 at 874 cited in, Symes and Jorro (2003, paragraph 7.12)

referring to the fact that African asylum-seekers did not seem to be interested in the procedure, smiled when telling sad stories, or gave reasons for flight which were not plausible according to the decision-makers, who appeared to use their own social and cultural reference points to judge plausibility.

597. Another response noted that “although caseworkers receive some training on assessing credibility and how these differences in demeanour may affect their assessment, the general culture among decision-makers is one of disbelief.”

598. The Procedures Directive makes a broad reference to this issue, requiring Member States to “ensure that the person who conducts the interview is sufficiently competent to take account of the personal or general circumstances surrounding the application, including the applicant’s cultural origin or vulnerability, insofar as it is possible to do so.”<sup>230</sup> The framing of this reference in a very general manner, arguably weakens its impact as a serious systematic requirement to consider trauma or cultural factors when interviewing.

#### *Case study countries: cultural differences*

599. In Lithuania, there are no specific provisions for considering cultural differences. In Germany, a number of RSD caseworkers have received training in cross-cultural communication, and all have handbooks that include guidance on interview techniques.

600. The Swedish Gender Guidelines make reference to the need to consider cultural issues:

The investigator should possess broad cultural skills and knowledge in order to correctly understand and perceive a woman’s situation and the true basis for seeking asylum.... A high quality investigation requires language comprehension across cultural boundaries Words that are basically similar can be given different meanings in different countries and cultures. The same applies to body language and emotional expression (Swedish Migration Board 2001, 12).

Body language and emotional expression vary among various cultures, and sometimes between the sexes. A woman’s lack of emotional involvement when recounting a chain of events does not necessarily indicate that was not, or is not, strongly affected by what has happened (Swedish Migration Board 2001, 14).

601. In the UK, decision-makers’ consideration of cultural factors follows the same pattern as their consideration of trauma and credibility: there is some guidance that warns decision-makers to be sensitive to such issues, but this is followed inconsistently.

602. The Home Office’s APIs (undated, paragraph 11.4) on assessing claims note that:

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<sup>230</sup> Amended proposal for a Council Directive on the minimum standard on procedures in Member States for granting and withdrawing refugee status. ASILE 66, 4<sup>th</sup> December 2003, Article 3(a)

An inability to provide information relevant to an asylum claim may not of itself undermine credibility. In certain cultures men do not share information about their political, military or even social activities with their female relatives and caseworkers should consider whether this might account for gaps in a woman's knowledge.

603. This is reinforced in the recently issued guidance on gender issues in the asylum claim (March 2004, paragraph 48).

604. The Home Office APIs do not provide much detail about cultural sensitivity, although they do state that "social and cultural norms may affect the ability of an applicant to obtain effective protection and could also result in a reluctance to disclose relevant information. This may be particularly relevant when considering applications from women" (Home Office undated, section 3).

605. The IAA Gender Guidelines (2000, paragraph 5.24) state that "[c]ultural and other differences and trauma play an important role in determining demeanor i.e. how a woman presents herself physically, for example, whether she maintains eye contact, shifts her posture or hesitates when speaking."

606. Crawley (2001) provides academic and legal sources that demonstrate the dangers of making credibility assessments on the basis of demeanour, which is inherently cultural. This research also provides several examples of UK appeals and tribunal cases where credibility assessments were made on the basis of appellant's demeanor, including instances where demeanor was found to be supportive of the appellant's credibility.

607. Initial decisions by the Home Office often fail to consider cultural factors when determining credibility. Amnesty International (2004, 32) concludes that:

Home Office refusal letters often make assumptions about how people would behave in a certain situation, for example how a regime official would react to the offer of a bribe or how a political individual would respond to a warning from the authorities in their country. This appears to be based on nothing more than the sensibilities of the individual caseworker themselves, in accordance with their own view of what would constitute 'rational' behaviour in a given situation.

### **Country of Origin Information (COI)**

608. Forbes-Martin (2004, 31) quotes a Somali woman who describes the war in her country as 'a war on the women':

Any woman between the ages of eighteen and forty is not safe from being forcibly removed to the army camps to be raped and violated. And that's only the beginning. If her husband finds out, he kills her for the shame of it all; if they know he has found out, they kill him too; if he goes into hiding instead, and she won't tell where he is, they kill her.

609. This first-hand insight highlights the importance of gender-specific information about the situation in any given country.

610. Crawley (2002) suggests that both the quantity and quality of evidence about the experiences and situation of refugee women remains limited. She argues that without this information it is difficult for receiving States to make objective decisions based on clear evidence about whether an individual is in need of protection. She also suggests that as recognition of gender-specific and gender-related persecution increases, it will be increasingly important that States, UNHCR and other actors include information on gender relations and the implications of these for the position and experiences of women in country of origin reports.

611. Reflecting this, the UNHCR Gender Guidelines state that “country of origin information should be collected that has relevance in women’s claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status” (UNHCR 2002a, paragraph 36 (x)).

612. The UNHCR Gender Guidelines emphasise that appropriate information can be particularly important where substantiation of gender-related claims is more difficult to obtain than in other claims:

No documentary proof as such is required in order for the authorities to recognise a refugee claim, however, information on practices in the country of origin may support a particular case. It is important to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research (UNHCR 2002a, paragraph 37).

613. The UNHCR 1991 guidance highlighted the importance of gender-specific COI (paragraph 73). The guidance suggests that among the issues of which interviewers should be aware are:

- The position of women before the law, including their standing in the court, the right to lay a complaint and give evidence, divorce and custody law, the right to own property, the right to have or refuse an abortion;
- The political rights of women, including the right to vote, to hold office and to belong to a political party;
- The social and economic rights of women, including the right to marry the person of her choice, the right to an education, a career, and a job or

remunerated activities, the status of a widow or divorcee, and freedom of dress;

- The incidence of reported violence against women, the form it takes (such as sexual assaults, 'honour' killings, bride burnings), protection available to women and the sanctions or penalties on those who perpetrate the violence itself;
- The consequences that may befall a women on her return in the light of the circumstances described in her claim.

#### *COI in European countries*

614. In 17 countries out of 41 (41.5%) the authorities produce COI on which to base their decisions in asylum cases. These countries are: Belgium, Bulgaria, Czech Republic, Denmark, Finland, France, Germany, the Netherlands, Norway, Romania, Russian Federation, Slovakia, Slovenia, Sweden, Switzerland and the United Kingdom. This information is not always publicly available. With the exception of Slovakia, specific reference was made in all of these countries to the existence of a government department responsible for collecting and collating COI information. Information used by these departments included information from Foreign Affairs ministries, as well as information from international organisations.

615. In Belgium, Romania, the Russian Federation, Sweden and Switzerland this information is not made public. Although questionnaire responses did not specify, this may be the case in other countries as well.

616. In Denmark, collecting existing information is sometimes supplemented with 'fact-finding missions,' where regional experts travel to countries of origin and consult national authorities, NGOs and international organisations. These missions are usually undertaken in cooperation with organisations such as the Danish Refugee Council, or immigration authorities from other Nordic countries. Some missions are occasionally arranged to address questions in specific cases. Swiss authorities have also carried out such fact-finding missions.

617. More than half (55%) of the countries examined in this research do not collate their own country of origin information. However, most did refer to other sources, including UNHCR information, other countries' COI information, information from human rights organisations such as Amnesty International and Human Rights Watch, OSCE information, US State Department sources, as well as information from their own embassies and Foreign Affairs departments.

618. In the case of Croatia it was not clear if any country information was used at all: Croatian authorities do not yet collate their own information and it was not known if they used other information, because they do not refer to COI in their decisions. However a COI resource centre is currently being developed (UNHCR 2004). In Albania and Armenia, the authorities produce no COI but reference is 'sometimes' made to UNHCR information.

619. UNHCR has recently recommended increased cooperation between European countries in the researching, assessment and collation of COI. The high importance of

good quality COI for all decision-makers, seen in the context of limited resources for all, supports the consideration of regional cooperation (UNHCR 2004).

*Inclusion of gender-relevant information in COI<sup>231</sup>*

620. The questionnaire sent to UNHCR Branch Offices asked respondents to state whether COI used by determining authorities addressed the position of women before the law; women's political rights; women's social and economic rights of women; the consequences for women who transgress social, religious or cultural norms; the incidence and form of violence against women; the efficacy of protection available to women and the sanctions or penalties on those who perpetrate the violence, and the consequences that may befall a woman on her return.

621. The questionnaire responses regarding gender-relevant COI indicated that this area is still undeveloped in most countries. Many responses noted that the information available on each topic depended according to the case or country concerned. This indicates that the authorities in the surveyed countries do not systematically include gender-specific information in the COI used for decision-making. In addition, a number of countries were unable to pronounce on the contents of the COI used by authorities, as it is not made public.

622. In six countries out of 36 (16.5%), it was not known whether the COI used by authorities to make decisions included gender-relevant information, sometimes because the information is not made public.

623. In Belgium, it was noted that questionnaires used by the authorities to determine the applicant's nationality do not necessarily take into consideration the possibility that men and women may have different types of information about their own country.

624. In two countries, it was reported that there was little or no gender-specific COI. These countries are Albania - where it was noted that the authorities sometimes accept UNHCR information - and Georgia, for which reference was made to the small number of applications and early stages of RSD infrastructure.

625. In 28 out of 36 countries (78%), country of origin information generally included gender-relevant information, but in most cases it was noted that the information available varied according to the type of case and country of origin concerned, and the overall impression was that detailed information about women's circumstances is rare.

626. For example, the Netherlands questionnaire response noted that there is one paragraph in each country summary regarding various aspects of the situation for women. This paragraph came to be included following the recommendations made by the Emancipation Council in 1995, as referred to in the section on national

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<sup>231</sup> Moldova and Poland questionnaires responses both stated there had not yet been any cases which would have required such gender relevant information. Bosnia and Herzegovina and Serbia and Montenegro have not started RSD processes yet and could not respond to this question. The questionnaire from Bulgaria did not provide an answer. These countries were therefore not included in this part of the survey

guidelines above. The Netherlands was one of the very few countries which was able to provide any reference to gender-specific COI.

627. In Switzerland, internal COI reports used by the RSD authorities contain a chapter on the position of women. In addition, the Federal Office has produced reports which address specific topics, including gender-specific issues, including The role of the woman in Angola; The role of the woman in the DRC; Woman and the family in Sri Lanka; The Kosovo-Albanian woman in family and society; and Forced marriage and honour crimes in Yemen. Some of these reports are made public.

628. Some of the Swiss authorities' fact-finding missions focus on particular topics. In December 2003, a fact-finding mission took place to Cameroon with the objective of gathering information on the situation of women in Cameroon, in order to assess the effectiveness of national protection afforded to them.

629. While the questionnaire responses were understandably general on this broad topic, it is noted that the issues that were most often mentioned as only 'sometimes' or 'rarely' addressed in COI were the consequences for women who transgressed social or religious mores, and efficacy of protection available to women.

630. One questionnaire response noted that gender-related persecution claims such as fear of FGM, forced marriage or honour killings, involving non-State agents, are often refused on the basis that State protection exists, because no account is taken of the real situation on the ground in the country of origin.

631. The Council of Europe's 1998 recommendation on the situation of women recommended that the Committee of Ministers "ensure that the authorities responsible for refugee status determination procedure are well informed about the overall situation in the countries of origin of applicants, in particular concerning the situation of women, possible gender-related persecution and its consequences."<sup>232</sup>

632. The Procedures Directive refers to the need for "precise and up-to-date information from various sources, such as information from UNHCR, as to the general situation prevailing in the countries of origin of applicants and, where necessary, in countries through which they have transited, and that such information is made available to the personnel responsible for examining applications and taking decisions."<sup>233</sup> It is noted that information on the 'general situation' in countries of origin may not be adequate to assess the circumstances of individual claimants, including those making gender-related asylum claims.

#### *Case study countries: COI*

633. All of the case study countries have systems for collecting and collating COI information. Government departments in the UK, Lithuania and Sweden are responsible for producing this information, and in Lithuania and Sweden this information is not made public. In the UK, collated COI is publicly available, and the Home Office has recently evaluated the system. In Germany, COI information is

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<sup>232</sup> Recommendation 1374 (1998): Situation of refugee women in Europe, Parliamentary Assembly of the Council of Europe, adopted 26<sup>th</sup> May 1998, paragraph 6 vi (c)

<sup>233</sup> Amended proposal for a Council Directive on the minimum standard on procedures in Member States for granting and withdrawing refugee status. ASILE 66, 4<sup>th</sup> December 2003, Article 7 (b)

collated by a government department and assessed by a panel of experts with representatives from a range of organisations.

634. According to the Swedish Gender Guidelines, “[T]he Migration Board’s country documentation system (LIFOS) is an extensive, intensive and up-to-date knowledge bank with links to other information channels”, and further information can be sought where necessary from Swedish foreign offices or NGOs to gain additional insight into the particular circumstances of women in the relevant country (Swedish Migration Board 2002, 10 – 11).

635. The Swedish authorities are not required to make public the information used when determining asylum cases, and details are not known regarding the degree to which COI addresses gender-specific issues.<sup>234</sup>

636. The German Federal Office has an information department that collects and collates country of origin information, which can be accessed by initial decision-makers as well as by the courts. The range and objectivity of the information collated is monitored by a Panel of Experts, which includes representatives from UNHCR and Amnesty International, as well as lawyers and academics.

637. In recent years, the Panel of Experts has contributed to increased inclusion of information specific to women, such as the role of women in public life and under the law, and the prevalence of practices such as FGM or honour killings.<sup>235</sup>

638. In 1998, an Information Subdivision was created in the Lithuanian Asylum Affairs Division of the Migration Department under the Ministry of Internal Affairs, and made responsible for gathering and providing Country of Origin information, as well as national and international law and case law developments.

639. The electronic manual provides guidelines on seeking and using country of origin information, and also has links to a variety of resources, including electronic databases, reports from international and regional organisations such as the UN and Council of Europe, and reports from human right-focused NGOs such as Amnesty International, Human Rights Watch and International Helsinki Federation.

640. The electronic manual also includes links to some sources that provide specific gender-related persecution information, such as the Center for Gender and Refugee Status.

641. In addition to the electronic manual, a list of the documents held in the Migration Department’s library is available on its website, and some of the documents are available online.<sup>236</sup>

642. The UK’s Country Information Policy Unit (CIPU) produces reports every six months with information about the 35 countries generating the most asylum-seekers in the United Kingdom. This information is based on a variety of sources, including US State Department reports, NGO and media reports. The CIPU reports are relied on by initial decision-makers as well as by Home Office representatives at appeals.

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<sup>234</sup> Information provided by UNHCR

<sup>235</sup> Information provided by UNHCR

<sup>236</sup> Information from Ms Violetta Targonskiene, Deputy Head of Asylum Affairs Division of the Migration Department under Minister of Interior, Lithuania

643. In 2003 the Immigration Advisory Service<sup>237</sup> undertook research to assess the accuracy and objectivity of the CIPU reports, and concluded that “a significant amount of material in a number of the CIPU Assessments was inaccurate, wrongly sourced and/or did not give information of key relevance to assessing asylum claims” (IAS 2003, 7). Although the report acknowledged that some individual assessments were found to be of a high standard and good quality, the overall impression led IAS to conclude that the material in the CIPU Assessments “has been very poorly edited and as a result is of poor quality” (IAS 2003, 7). The IAS report also notes that apparently selective omissions lead to incorrect impressions being given about the circumstances asylum-seekers can be returned to.

644. Amnesty International’s (2004, 32) assessment of initial decisions points out that:

It is also possible that insufficiently trained Home Office caseworkers, without adequate time to prepare for asylum interviews, are not in control of their material during the interview and spot apparent discrepancies later on, which are then inserted into the Refusal letter. In many cases, Refusal letters appear to lack what is referred to in the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status as: An understanding of the particular situation of the applicant and of the human factors involved.

645. In September 2003, the Home Office itself published a report assessing how country information is used and produced (Morgan et al, 2003). This very thorough report includes the following recommendations:

- A formal process for consultation with external stakeholders be established;
- The development of a user panel for those who use COI produced by CIPU and/or come into contact with such information on a regular basis, and an expert panel of topic and country specialists;
- Full consideration of whether or not to establish an independent documentation centre;
- Increased clarity about the different roles of country information reports and Operational Guidance Notes – the latter put forward Home Office policy, rather than country information;
- A more proactive stance where the situation in a country of origin is becoming increasingly insecure;
- Consideration to the role and importance of COI in the interviewing, decision-making and appeals process;
- Appropriate training and advice on the use of COI for its users, especially caseworkers and Home Office representatives at appeals;

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<sup>237</sup> The Immigration Advisory Service’s main activity is providing legal representation in immigration and asylum cases

- Increased priority on the access to COI information for interviewers

646. The report's recommendations also note that Home Office caseworkers have expressed a need for more detailed information on specific country conditions, including gender issues.

## **Recommendations**

647. States should recognise that gender-sensitive procedures for gathering information about the basis of the asylum claim are necessary to ensure decisions are timely and sustainable. Whilst such procedures may initially incur extra resources, the benefits in terms of the overall quality of RSD are clear.

648. States should take proactive measures to inform women of their right to claim asylum and their right to confidentiality. Where it is clear that a woman may have an asylum claim in her own right she should be encouraged to do so. Receiving States should recognise concerns which women may have about making a separate application, and respond appropriately. Information should not be sought from women solely to verify the accounts of male family members.

649. Privacy and confidentiality is often vital for ensuring high quality procedures for refugee status determination. Practical considerations must never override the basic requirements of privacy and confidentiality. Women should be reassured that information about their experiences will not be shared with family members. Flexibility in scheduling interviews should be shown where women have childcare responsibilities for which alternative provision must be made.

650. Applicants should be informed of the right to request a male or female interviewer and/or interpreter and such requests should be responded to.

651. All those involved in procedures for refugee status determination should receive in-depth and on-going training in gender issues. Knowledge about gender should not be considered a 'speciality', but a basic requirement for interviewing and decision-making.

652. Procedures for refugee status determination should start from the assumption that an applicant may be traumatised as a result of his or her experiences. As a result it may be difficult for an applicant to communicate information about their experiences. In addition both interviewing procedures and decision-making should recognise cultural and gender differences in communication.

653. The quality and outcomes of procedures for refugee status determination across the countries of Europe would benefit from better quality information on countries of origin. Country of origin information used in refugee status determination should routinely and systematically include gender-specific information on all the areas outlined in the UNHCR's Gender Guidelines.



## 9. Conclusions and recommendations

654. The evidence collated during the course of this research indicates that there has been limited progress in Europe towards ensuring gender-sensitive interpretation of the 1951 Convention and gender-sensitive asylum procedures. Where progress has been made, implementation of key recognitions is inconsistent. One key example of this uneven progress is that authorities in less than half the countries surveyed have explicitly recognised that sexual violence can be a form of persecution. In the countries that do recognise this, individual decisions show that the application of this interpretation of persecution under the 1951 Convention is inconsistent.

655. A summary of our key findings, based on questionnaire responses, is provided below:

- Less than half of all countries produce gender-differentiated statistics on asylum applications and less than a fifth produce gender-differentiated statistics on decisions;
- None of the 41 countries surveyed have officially adopted the UNHCR Gender Guidelines into their legislation or policy. Two countries have produced their own guidance on the assessment of gender-related asylum claims, and a further eight have included some gender-related points within their general RSD policy or guidelines;
- Less than half of the countries (41.5%) have recognised sexual violence as a possible form of persecution, either in law, policy or case law;
- Just over half of the countries (56%) have recognised that in certain cases, discrimination can amount to persecution, either in law, policy or case law;
- Refugee status has been granted in only a limited number of cases involving forced prostitution or sexual exploitation;
- Over a third of countries do not recognise persecution by non-State agents as falling within the definition of a refugee under the 1951 Convention;
- Although a quarter of countries have recognised that women's political activities may take a different form to men's, three quarters do not;
- Just over a third of countries (39%) have recognised that persecution experienced or feared as a result of the failure to conform to religious mores as a basis may constitute a successful 1951 Convention refugee claim;
- Around a half (51%) of the countries surveyed recognise the possibility of imputed Convention ground;
- Only four countries out of the 41 countries surveyed have guidance on how to define a particular social group, either in law, policy, or case law. Just over a

third of all countries have recognised women or particular groups of women as members of a Particular Social Group under the 1951 Convention;

- Around 40% of countries provide automatic and generally consistent access to procedures to all adults, including women who arrive with their husband or other male relative;
- In just over a third of countries the possible effects of trauma are taken into account during the interviewing process but only six countries have specific policy guidelines which recognises that trauma should be taken into account when assessing an applicant's credibility. Despite some examples of good practice it is of concern that in nearly two thirds (63%) of countries surveyed there is no particular consideration of the possible consequences of trauma;
- There is very little evidence that an understanding of cultural differences in demeanour is reflected in RSD procedures. Only three countries explicitly consider cultural differences in demeanour in assessing credibility;
- At least one third of countries make reference to consideration of the interviewer's gender in their law or policy. In a significant majority of countries surveyed (86.5%), some effort is made in practice to allow women to be interviewed by women, applicants in general to be interviewed by same-sex interviewer, or particularly vulnerable applicants to have a choice but the extent of this effort varies considerably;
- Fifteen countries out of 38 (39.5%) provide or have provided training on gender issues to all RSD caseworkers; and
- In just over three quarters of countries country of origin information generally includes gender-relevant information, but in most cases the quality and quantity of this information varies considerably.

656. As was noted in section 1 of this report, there are considerable differences between the countries covered by the UNHCR Regional Bureau for Europe, which were surveyed as part of this research. Some of the countries with emerging asylum legislation and policy have taken the opportunity to make key provisions for procedures from the outset, such as including provisions for interviewers and interpreters of the same sex in asylum legislation or policy. However this example of a gender-sensitive approach to RSD needs to be extended to other procedures and 1951 Convention interpretations. The need for a holistic focus on gender-sensitive asylum policy and procedures applies not only to countries new to RSD processes, but also to countries with more established asylum systems.

657. Despite the methodological limitations of the short time-limited snapshot provided in this report, it is clear from the evidence collected that there is a long way to go in ensuring that procedures for refugee status determination are sensitive to the specific experiences and needs associated with gender-related persecution. This is particularly apparent in relation to the dominant and very masculine interpretation of the key elements of the 1951 Convention. But there are also some very simple and basic first steps that all countries can embark upon which require less effort. These include the production and publication of gender-differentiated statistics on

applications and decisions so that the extent to which women and men are protected can at least be monitored; accepting basic procedural principals such as interviewing women separately from spouses and male relatives and encouraging them to make a claim in their own right where appropriate; and ensuring that all RSD officials are properly trained to recognise the role of gender in shaping the refugee experience.

658. We hope that the results of this study will provide information which can be used by UNHCR to further assess gaps in national laws and practices, identify capacity-building needs, advocacy topics and overall future programming goals through a systematic, region-wide analysis. A summary of our specific recommendations is provided at Annex 4. In addition, however, we recommend that UNHCR regularly and routinely request information on the issues covered in this analysis. We recommend that our report be used as a benchmark against which to assess future progress against the specific themes identified including:

- The provision of gender-differentiated statistics;
- The development of gender guidelines and guidance;
- Interpretation of persecution;
- Assessment of whether there has been a failure of State protection;
- Interpretation of the Convention grounds;
- Guidance of the definition of Particular Social Groups (PSG); and
- The development of gender-sensitive procedures for refugee status determination.



## Annex 1 UNHCR Gender Guidelines (2002)

### **GUIDELINES ON INTERNATIONAL PROTECTION: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees**

UNHCR issues these Guidelines pursuant to its mandate, as contained in the Statute of the Office of the United Nations High Commissioner for Refugees, in conjunction with Article 35 of the 1951 Convention relating to the Status of Refugees and Article II of its 1967 Protocol. These Guidelines complement the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (Reedited, Geneva, January 1992). They further replace UNHCR's Position Paper on Gender-Related Persecution (Geneva, January 2000) and result from the Second Track of the Global Consultations on International Protection process, which examined this subject at its expert meeting in San Remo in September 2001.

These Guidelines are intended to provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field.

#### **I. INTRODUCTION**

1. "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. These Guidelines specifically focus on the interpretation of the refugee definition contained in Article 1A(2) of the 1951 Convention relating to the Status of Refugees (hereinafter "1951 Convention") from a gender perspective, as well as propose some procedural practices in order to ensure that proper consideration is given to women claimants in refugee status determination procedures and that the range of gender-related claims are recognised as such.
2. It is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status. This approach has been endorsed by the General Assembly, as well as the Executive Committee of UNHCR's Programme.
3. In order to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms "gender" and "sex". Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, while sex is a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender-related claims may be brought by either women or men,

although due to particular types of persecution, they are more commonly brought by women. In some cases, the claimant's sex may bear on the claim in significant ways to which the decision-maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex. Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.

4. Adopting a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The refugee claimant must establish that he or she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

## II. SUBSTANTIVE ANALYSIS

### A. BACKGROUND

5. Historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that many claims of women and of homosexuals, have gone unrecognised. In the past decade, however, the analysis and understanding of sex and gender in the refugee context have advanced substantially in case law, in State practice generally and in academic writing. These developments have run parallel to, and have been assisted by, developments in international human rights law and standards, as well as in related areas of international law, including through jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda, and the Rome Statute of the International Criminal Court. In this regard, for instance, it should be noted that harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds.
6. Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims. As such, there is no need to add an additional ground to the 1951 Convention definition.
7. In attempting to apply the criteria of the refugee definition in the course of refugee status determination procedures, it is important to approach the assessment holistically, and have regard to all the relevant circumstances of the case. It is essential to have both a full picture of the asylum-seeker's personality, background and personal experiences, as well as an analysis and up-to-date knowledge of historically, geographically and culturally specific circumstances in the country of origin. Making generalisations about women or men is not helpful and in doing so, critical differences, which may be relevant to a particular case, can be overlooked.

8. The elements of the definition discussed below are those that require a gender-sensitive interpretation. Other criteria (e.g. being outside the country of origin) remain, of course, also directly relevant to the holistic assessment of any claim. Throughout this document, the use of the term “women” includes the girl-child.

#### *B. WELL-FOUNDED FEAR OF PERSECUTION*

9. What amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case. While female and male applicants may be subjected to the same forms of harm, they may also face forms of persecution specific to their sex. International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution. In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act. There is no doubt that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking,<sup>5</sup> are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.
10. Assessing a law to be persecutory in and of itself has proven to be material to determining some gender-related claims. This is especially so given the fact that relevant laws may emanate from traditional or cultural norms and practices not necessarily in conformity with international human rights standards. However, as in all cases, a claimant must still establish that he or she has a well-founded fear of being persecuted as a result of that law. This would not be the case, for instance, where a persecutory law continues to exist but is no longer enforced.
11. Even though a particular State may have prohibited a persecutory practice (e.g. female genital mutilation), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. In such cases, the practice would still amount to persecution. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual’s claim to refugee status is not valid.
12. Where the penalty or punishment for non-compliance with, or breach of, a policy or law is disproportionately severe and has a gender dimension, it would amount to persecution. Even if the law is one of general applicability, circumstances of punishment or treatment cannot be so severe as to be disproportionate to the objective of the law. Severe punishment for women who, by breaching a law, transgress social mores in a society could, therefore, amount to persecution.
13. Even where laws or policies have justifiable objectives, methods of implementation that lead to consequences of a substantially prejudicial nature for the persons concerned, would amount to persecution. For example, it is widely accepted that family planning constitutes an appropriate response to

population pressures. However, implementation of such policies, through the use of forced abortions and sterilisations, would breach fundamental human rights law. Such practices, despite the fact that they may be implemented in the context of a legitimate law, are recognised as serious abuses and considered persecution.

#### Discrimination amounting to persecution

14. While it is generally agreed that 'mere' discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would, for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on the right to earn one's livelihood, the right to practice one's religion, or access to available educational facilities.
15. Significant to gender-related claims is also an analysis of forms of discrimination by the State in failing to extend protection to individuals against certain types of harm. If the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one's differing sexual orientation, could, for example, be analysed in this context.

#### Persecution on account of one's sexual orientation

16. Refugee claims based on differing sexual orientation contain a gender element. A claimant's sexuality or sexual practices may be relevant to a refugee claim where he or she has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices. In many such cases, the claimant has refused to adhere to socially or culturally defined roles or expectations of behaviour attributed to his or her sex. The most common claims involve homosexuals, transsexuals or transvestites, who have faced extreme public hostility, violence, abuse, or severe or cumulative discrimination.
17. Where homosexuality is illegal in a particular society, the imposition of severe criminal penalties for homosexual conduct could amount to persecution, just as it would for refusing to wear the veil by women in some societies. Even where homosexual practices are not criminalised, a claimant could still establish a valid claim where the State condones or tolerates discriminatory practices or harm perpetrated against him or her, or where the State is unable to protect effectively the claimant against such harm.

#### Trafficking for the purposes of forced prostitution or sexual exploitation as a form of persecution

18. Some trafficked women or minors may have valid claims to refugee status under the 1951 Convention. The forcible or deceptive recruitment of women or minors for the purposes of forced prostitution or sexual exploitation is a form

of gender-related violence or abuse that can even lead to death. It can be considered a form of torture and cruel, inhuman or degrading treatment. It can also impose serious restrictions on a woman's freedom of movement, caused by abduction, incarceration, and/or confiscation of passports or other identify documents. In addition, trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-trafficked, severe community or family ostracism, or severe discrimination. In individual cases, being trafficked for the purposes of forced prostitution or sexual exploitation could therefore be the basis for a refugee claim where the State has been unable or unwilling to provide protection against such harm or threats of harm.

#### Agents of persecution

19. There is scope within the refugee definition to recognise both State and non-State actors of persecution. While persecution is most often perpetrated by the authorities of a country, serious discriminatory or other offensive acts committed by the local populace, or by individuals, can also be considered persecution if such acts are knowingly tolerated by the authorities, or if the authorities refuse, or are unable, to offer effective protection.

#### C. THE CAUSAL LINK ("*for reasons of*")

20. The well-founded fear of being persecuted must be related to one or more of the Convention grounds. That is, it must be "*for reasons of*" race, religion, nationality, membership of a particular social group, or political opinion. The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause. In many jurisdictions the causal link ("*for reasons of*") must be explicitly established (e.g. some Common Law States) while in other States causation is not treated as a separate question for analysis, but is subsumed within the holistic analysis of the refugee definition. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground.  
Attribution of

21. In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.

#### D. CONVENTION GROUNDS

22. 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. In many cases, claimants may face persecution because of a Convention ground which is attributed or imputed to them. In many societies a woman's political views, race, nationality, religion or social affiliations, for example, are often seen as aligned with relatives or associates or with those of her community.

23. It is also important to be aware that in many gender-related claims, the persecution feared could be for one, or more, of the Convention grounds. For example, a claim for refugee status based on transgression of social or religious norms may be analysed in terms of religion, political opinion or membership of a particular social group. The claimant is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted.

#### Race

24. Race for the purposes of the refugee definition has been defined to include all kinds of ethnic groups that are referred to as "races" in common usage. 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.

#### Religion

25. 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. Failure to abide by such codes may be perceived as evidence that a woman holds unacceptable religious opinions regardless of what she actually believes. A woman may face harm for her particular religious beliefs or practices, or those attributed to her, including her refusal to hold particular beliefs, to practise a prescribed religion or to conform her behaviour in accordance with the teachings of a prescribed religion.
26. There is some overlap between the grounds of religion and political opinion in gender-related claims, especially in the realm of imputed political opinion. While religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion. For example, in certain societies, the role ascribed to women may be attributable to the requirements of the State or official religion. The authorities or other actors of persecution may perceive the failure of a woman to conform to this role as the failure to practice or to hold certain religious beliefs. At the same time, the failure to conform could be interpreted as holding an unacceptable political opinion that threatens the basic structure from which certain political power flows. This is particularly true in societies where there is little separation between religious and State institutions, laws and doctrines.

## Nationality

27. 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.

## Membership of a particular social group

28. Gender-related claims have often been analysed within the parameters of this ground, making a proper understanding of this term of paramount importance. However, in some cases, the emphasis given to the social group ground has meant that other applicable grounds, such as religion or political opinion, have been over-looked. Therefore, the interpretation given to this ground cannot render the other four Convention grounds superfluous.
29. Thus, a particular social group is 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.
30. It follows 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 than men. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries. Equally, this definition would encompass homosexuals, transsexuals, or transvestites.
31. 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.

## Political opinion

32. Under this ground, a claimant must show that he or she has a well-founded fear of being persecuted for holding certain political opinions (usually different from those of the Government or parts of the society), or because the holding of such opinions has been attributed to him or her. Political opinion should be understood in the broad sense, to incorporate any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles. It would also include non-conformist behaviour which leads the persecutor to impute a political opinion

to him or her. In this sense, there is not as such an inherently political or an inherently non-political activity, but the context of the case should determine its nature. A claim on the basis of political opinion does, however, presuppose that the claimant holds or is assumed to hold opinions not tolerated by the authorities or society, which are critical of their policies, traditions or methods. It also presupposes that such opinions have come or could come to the notice of the authorities or relevant parts of the society, or are attributed by them to the claimant. It is not always necessary to have expressed such an opinion, or to have already suffered any form of discrimination or persecution. In such cases the test of well-founded fear would be based on an assessment of the consequences that a claimant having certain dispositions would have to face if he or she returned.

33. The image of a political refugee as someone who is fleeing persecution for his or her direct involvement in political activity does not always correspond to the reality of the experiences of women in some societies. 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. While this may be analysed in the context of an imputed political opinion, it may also be analysed as being persecution for reasons of her membership of a particular social group, being her "family". These factors need to be taken into account in gender-related claims.
34. Equally important for gender-related claims is to recognise that a woman may not wish to engage in certain activities, such as providing meals to government soldiers, which may be interpreted by the persecutor(s) as holding a contrary political opinion.

### III. PROCEDURAL ISSUES

35. Persons raising gender-related refugee claims, and survivors of torture or trauma in particular, require a supportive environment where they can be reassured of the confidentiality of their claim. Some claimants, because of the shame they feel over what has happened to them, or due to trauma, may be reluctant to identify the true extent of the persecution suffered or feared. They may continue to fear persons in authority, or they may fear rejection and/or reprisals from their family and/or community.
36. Against this background, in order to ensure that gender-related claims, of women in particular, are properly considered in the refugee status determination process, the following measures should be borne in mind:
  - i. Women asylum-seekers should be interviewed separately, without the presence of male family members, in order to ensure that they have an opportunity to present their case. It should be explained to them that they may have a valid claim in their own right.

ii. It is essential that women are given information about the status determination process, access to it, as well as legal advice, in a manner and language that she understands.

iii. Claimants should be informed of the choice to have interviewers and interpreters of the same sex as themselves,<sup>22</sup> and they should be provided automatically for women claimants. Interviewers and interpreters should also be aware of and responsive to any cultural or religious sensitivities or personal factors such as age and level of education.

iv. An open and reassuring environment is often crucial to establishing trust between the interviewer and the claimant, and should help the full disclosure of sometimes sensitive and personal information. The interview room should be arranged in such a way as to encourage discussion, promote confidentiality and to lessen any possibility of perceived power imbalances.

v. The interviewer should take the time to introduce him/herself and the interpreter to the claimant, explain clearly the roles of each person, and the exact purpose of the interview. The claimant should be assured that his/her claim will be treated in the strictest confidence, and information provided by the claimant will not be provided to members of his/her family. Importantly, the interviewer should explain that he/she is not a trauma counsellor.

vi. The interviewer should remain neutral, compassionate and objective during the interview, and should avoid body language or gestures that may be perceived as intimidating or culturally insensitive or inappropriate. The interviewer should allow the claimant to present his/her claim with minimal interruption.

vii. Both 'open-ended' and specific questions which may help to reveal gender issues relevant to a refugee claim should be incorporated into all asylum interviews. Women who have been involved in indirect political activity or to whom political opinion has been attributed, for example, often do not provide relevant information in interviews due to the male-oriented nature of the questioning. Female claimants may also fail to relate questions that are about 'torture' to the types of harm which they fear (such as rape, sexual abuse, female genital mutilation, 'honour killings', forced marriage, etc.).

viii. Particularly for victims of sexual violence or other forms of trauma, second and subsequent interviews may be needed in order to establish trust and to obtain all necessary information. In this regard, interviewers should be responsive to the trauma and emotion of claimants and should stop an interview where the claimant is becoming emotionally distressed.

ix. Where it is envisaged that a particular case may give rise to a gender-related claim, adequate preparation is needed, which will also allow a relationship of confidence and trust with the claimant to be developed, as well as allowing the interviewer to ask the right questions and deal with any problems that may arise during an interview.

x. Country of origin information should be collected that has relevance in women's claims, such as the position of women before the law, the political rights of women, the social and economic rights of women, the cultural and social mores of the country and consequences for non-adherence, the prevalence of such harmful traditional practices, the incidence and forms of reported violence against women, the protection available to them, any penalties imposed on those who perpetrate the violence, and the risks that a woman might face on her return to her country of origin after making a claim for refugee status.

xi. The type and level of emotion displayed during the recounting of her experiences should not affect a woman's credibility. Interviewers and decision-makers should understand that cultural differences and trauma play an important and complex role in determining behaviour. For some cases, it may be appropriate to seek objective psychological or medical evidence. It is unnecessary to establish the precise details of the act of rape or sexual assault itself, but events leading up to, and after, the act, the surrounding circumstances and details (such as, use of guns, any words or phrases spoken by the perpetrators, type of assault, where it occurred and how, details of the perpetrators (e.g. soldiers, civilians) etc.) as well as the motivation of the perpetrator may be required. In some circumstances it should be noted that a woman may not be aware of the reasons for her abuse.

xii. Mechanisms for referral to psycho-social counselling and other support services should be made available where necessary. Best practice recommends that trained psycho-social counsellors be available to assist the claimant before and after the interview.

#### Evidentiary matters

37. No documentary proof as such is required in order for the authorities to recognise a refugee claim, however, information on practices in the country of origin may support a particular case. It is important to recognise that in relation to gender-related claims, the usual types of evidence used in other refugee claims may not be as readily available. Statistical data or reports on the incidence of sexual violence may not be available, due to under-reporting of cases, or lack of prosecution. Alternative forms of information might assist, such as the testimonies of other women similarly situated in written reports or oral testimony, of non-governmental or international organisations or other independent research.

#### **IV. METHODS OF IMPLEMENTATION**

38. Depending on the respective legal traditions, there have been two general approaches taken by States to ensure a gender-sensitive application of refugee law and in particular of the refugee definition. Some States have incorporated legal interpretative guidance and/or procedural safeguards within legislation itself, while others have preferred to develop policy and legal guidelines on the same for decision-makers. UNHCR encourages States who have not already done so to ensure a gender-sensitive application of refugee law and procedures, and stands ready to assist States in this regard.



## Annex 2 Questionnaire survey

### Section 1: Contact information

UNHCR Country Office:

Contact name:

Contact telephone number and email address:

### Section 2: Refugee Status Determination (RSD) - general

Are asylum applicants interviewed before a decision is made on their claim (yes/no)?

If yes, who is this interview carried out by (e.g. UNHCR, government office, separate agency)?

Do asylum applicants generally have access to legal advice before a decision is made (yes/no)?

Who provides this advice (e.g. independent solicitor, government-sponsored agency, combination of the two)?

Is there a right of appeal for those who receive a negative decision (yes/no)?

If yes, do all failed applicants have a right of appeal (yes/no)?

If no, what determines access to the appeals process (e.g. time or place where the application is lodged, country of origin)?

Is your office able to provide more detailed general information about the process of Refugee Status Determination in the country in which you are based (yes/no)?

### Section 3: Data and statistics

Does the government in the country in which your office is based produce gender-differentiated statistics on applications for asylum (yes/no/don't know)?

If yes, are these statistics publicly available? Please provide details of how they can be obtained e.g. through UNHCR country office, from website, direct from government

Does the government in the country in which your office is based produce gender-differentiated statistics on decisions made on asylum claims (yes/no/don't know)?

If yes, are these statistics publicly available? Please provide details of how they can be obtained e.g. through UNHCR country office, from website, direct from government

Does the government in the country in which your office is based produce any other gender-differentiated statistics, for example, on the number of women and men in detention, on the sex of those who are removed (yes/no/don't know)?

If yes, please provide details of what this data relates to and whether it is publicly available.

#### **Section 4: Gender guidelines**

Have the UNHCR Gender Guidelines (1991 / 2002) been incorporated into national legislation (yes/no)?

If yes, please provide the name of the legislation that adopts the Gender Guidelines

Have the UNHCR Gender Guidelines (1991 / 2002) been included in policies for Refugee Status Determination (yes/no)?

If yes, please provide details of which policies include UNHCR's Gender Guidelines

Have the UNHCR Gender Guidelines (1991 / 2002) been adopted in any other way e.g. through specific guidance on particular issues or case law (yes / no)? If yes, please specify how

Has the country in which your office is based produced its own national gender guidelines that are included in legislation, policy or practice (yes / no)? If yes, please provide details of these guidelines below and information about how copies can be obtained

Have any other gender guidelines for Refugee Status Determination been produced in the country in which your office is based, for example, by a voluntary sector, legal or women's organisation or body (yes/no)? If yes, please give details and information about how these guidelines can be obtained

#### **Section 5: Definition of persecution**

Is there recognition in national legislation, policy or case law of non-State agents as agents of persecution (yes / no)? If yes, please provide details below

Is there recognition in national legislation, policy or case law of sexual violence as a form of persecution? If yes, please provide details below

Is there recognition in national legislation, policy or case law that discrimination can amount to persecution? If yes, please provide details below

Has forced prostitution or sexual exploitation been recognised as a form of persecution in national legislation, policy or case law (yes/no)? If yes, please provide details below

## **Section 6: Convention grounds**

Is there recognition in national legislation, policy or case law that a Convention ground can be attributed because of association or family membership (yes/no)? If yes, please provide details below

Is there a recognition in national legislation, policy or case law that the failure to conform with religious norms can be the basis of a successful asylum application (yes/no)? If yes, please provide details below

Is there a recognition in national legislation, policy or case law that political opinion and political activity may take different forms for women and men, for example, through women's participation in support roles (yes /no)? If yes, please give details

Is there national legislation, policy or case law to assist in the definition of a particular social group (yes/no)? If yes, please provide details below

Are women or particular groups of women recognised as a particular social group (yes/no)?

## **Section 7: Procedural issues**

Do women have separate access to procedures for Refugee Status Determination if they arrive with a spouse or other male relative (yes/no)? If yes, please provide details of whether this is effective in practice

Are women provided with an opportunity to be interviewed separately from their spouse or other male relatives, including children (yes/no)?

Do interviewers and decision-makers in the country in which your office is based receive training on gender issues (yes/no)? If yes, please provide details of the type and extent of any training available

Are claimants able to request a male or female interviewer (yes/no)? if yes, is there any evidence about whether such a request is responded to?

Are claimants able to request a male or female interpreter (yes/no)? if yes, is there any evidence about whether such a request is responded to?

Do procedures for Refugee Status Determination allow for the consequences of trauma and sexual violence (yes/no)? If yes, how?

Do procedures for Refugee Status Determination allow for cultural differences in demeanour, for example, avoiding eye contact or not elaborating on answers (yes/no)? If yes, how?

Is country information produced by the government in which your office is based to assist in decision making (yes / no)? If yes, please provide details below

If no, is any other country information used in decision making, for example, that produced by UNHCR, other governments?

Does the country-of-origin information used for the purposes of Refugee Status Determination include (yes / no):

Position of women before the law

Political rights of women

Social and economic rights of women

Consequences for women who refuse to abide by or who challenge social, religious or cultural norms regarding their behaviour

Incidence and form of violence against women

Efficacy of protection available to women and the sanctions or penalties on those who perpetrate the violence

Consequences that may befall a woman on her return.

### **Section 8: Additional information**

Please use this section to provide any additional information about the approach to addressing gender-related persecution in procedures for Refugee Status Determination in the country in which your office is based. We would be particularly grateful for information about other organisations (voluntary sector organisations or women's groups) or networks which are actively concerned about or working on this issue and with whom we can make contact.

Annex 3 Percentage of female asylum applications and refugee status determination in 2002  
for countries covered by UNHCR's Regional Bureau for Europe

Country of asylum	Applied during year	Decisions during year Recognised refugee status.	Other	Rejected	Other closed	Total	Pending cases end of year
		N/av = not available					
Albania	22.9	33.3	66.6	12.5	44.0	53.5	26.9
Armenia	N/av.	N/av.		N/av.	N/av.	N/av.	N/av.
Austria	N/av.	N/av.		N/av.	N/av.	N/av.	N/av.
Azerbaijan	39.0	30.0		15.0	15.0	15.0	38.0
Belarus	N/av.	N/av.		N/av.	N/av.	N/av.	N/av.
Belgium	N/av.	N/av.		N/av.	N/av.	N/av.	N/av.
Bosnia and Herzegovina	46.0	45.0		47.0	47.0	47.0	47.0
Bulgaria	16.0	26.0	14.0	37.0	N/av.	24.0	18.0
Croatia	15.9	-		25.0	4.5	6.7	9.6
Cyprus	N/av.	39.1		N/av.	N/av.	N/av.	30.8
Czech Rep. (FI) <sup>238</sup>	28.0	28.5		N/av.	N/av.	N/av.	N/av.
Denmark	38.0	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Estonia	22.0	-		20.0	-	18.0	77.0
Finland	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
France	N/av.	N/av.		N/av.	N/av.	N/av.	N/av.
FYR Macedonia	N/av.	N/av.		N/av.	N/av.	N/av.	N/av.
Germany	30.9	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Greece	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Hungary	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Iceland	N/av.		N/av.	N/av.	N/av.	N/av.	N/av.
Ireland	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Italy	N/av.	N/av.	N/av.	N/av.		N/av.	N/av.
Latvia	26.5		33.3	26.5	100.0	27.7	18.2
Liechtenstein	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Lithuania	31.0	N/av.	27.5	N/av.	16.4	19.4	33.5
Luxembourg	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Malta	23.0	25.0	25.0	15.0	N/av.	N/av.	15.0
Netherlands	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Norway	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Poland (FI)	37.4	45.0		N/av.	N/av.	N/av.	N/av.
Portugal	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Rep. of Moldova	29.0	51.0		22.0	20.0	31.0	26.0
Romania	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Russian Federation	N/av.	50.0		N/av.	N/av.	N/av.	27.5
Serbia & Montenegro	N/av.	N/av.		N/av.	N/av.	N/av.	40.0
Slovakia	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Slovenia	16.0	100.0	50.0	32.0	11.0	20.0	27.0
Spain	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Sweden	37.0	40.0	40.0	N/av.	N/av.	N/av.	N/av.
Switzerland	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
Turkey	42.5	46.6		38.1	35.5	42.4	39.9
Ukraine	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.
United Kingdom	25.9	N/av.	N/av.	N/av.	N/av.	N/av.	N/av.

Source: UNHCR's Annual Statistical Report, 2002 (Table V); competent national authorities

<sup>238</sup> According to UNHCR's Branch Office in the Czech Republic this information is not correct as gender-disaggregated data on decisions are not available



## Annex 4 Summary of recommendations

### **Statistics**

Governments should publish asylum statistics according to the international standard set out in the official UN guidelines contained in Recommendations on Statistics of International Migration (1998). Published statistics on applications, initial decisions and appeals should be gender-differentiated.

All governments that collate gender-disaggregated data should systematically and routinely communicate this information to UNHCR according to their obligations under Article 35 of the 1951 Convention. UNHCR should address the problem of discrepancies and inconsistencies between the information held by the Statistics Office in Geneva and Branch Offices in the countries of the UNHCR Regional Bureau for Europe.

UNHCR should publish a list of those countries that meet the required standards for producing gender-differentiated statistics and encourage those who do not yet do so to adopt this practice

### **Guidelines**

States should produce clear guidance on procedural and substantive issues relevant to gender-related persecution. This guidance should draw upon and reflect the principles and standards in the UNHCR Gender Guidelines. Such guidance should be applicable to decision-makers at all stages of the RSD process (i.e. both initial decisions and appeals) and should be non-discretionary.

Implementation of the guidance should be evaluated and monitored by States on a regular basis (every 2 years). This information should be made available to UNHCR.

### **Definition of persecution**

Sexual violence - including FGM - should be recognised as a form of serious harm that can constitute persecution within the meaning of the 1951 Convention. The fact that such violence is of a sexual nature should not undermine a proper and substantive assessment of whether such harm is experienced or feared for a Convention reason. Sexual violence is not a private act.

States should recognise that discrimination - including gender-specific forms of discrimination - can rise to the level of persecution within the meaning of the 1951 Convention.

States should consider whether, and if so how, victims of sexual exploitation and trafficking can be protected under the 1951 Convention. States must recognise that the consequences of being trafficked can go beyond the effects of sexual exploitation

and that social ostracism, stigma and reprisals may constitute persecution. Measures to combat sexual exploitation and trafficking must include protection for the victims. This protection should be long-term and should not be dependent upon the victim's willingness or ability to provide information to the authorities.

### **Failure of State protection**

A failure of State protection exists where the State is responsible for persecution and where it fails to protect an individual from persecutory action by others. The absence of an effective State should not preclude recognition of a need for protection. Receiving States should recognise that both the availability and efficacy of State protection may be affected by gender. Surrogate protection should be provided in these cases.

### **Convention grounds**

Gender-defined roles can clearly have an impact on the persecution feared or harmed.. States should ensure that a gender-sensitive interpretation is given to each of the Convention grounds when determining whether a particular claimant has fulfilled the criteria of the refugee definition. This should be done by incorporating the UNHCR's Gender Guidelines into guidance to decision makers on the interpretation of the Convention grounds, and by providing appropriate training and Country of Origin Information (COI).

### **Definition of Particular Social Groups**

States should produce clear guidance on how to define a particular social group (PSG). Such guidance should be based on the UNHCR's Guidelines on International protection: 'Membership of a Particular Social Group' (PSG Guidelines)

Guidance should recognise that sex, gender and sexual orientation can properly be within the ambit of the social group category. The size of the social group is irrelevant to determining whether or not it exists.

States should refrain from assuming that it is appropriate to categorise all gender-related persecution claims under the PSG ground. To do so may limit the development of a gender-sensitive interpretation of all Convention grounds, and effectively marginalise gender-related claim by ignoring the social and political context in which women's experiences take place.

### **Procedural issues**

States should recognise that gender-sensitive procedures for gathering information about the basis of the asylum claim are necessary to ensure decisions are timely and sustainable. Whilst such procedures may initially incur extra resources, the benefits in terms of the overall quality of RSD are clear.

States should take proactive measures to inform women of their right to claim asylum and their right to confidentiality. Where it is clear that a woman may have an

asylum claim in her own right she should be encouraged to do so. Receiving States should recognise concerns which women may have about making a separate application, and respond appropriately. Information should not be sought from women solely to verify the accounts of male family members.

Privacy and confidentiality is often vital for ensuring high quality procedures for refugee status determination. Practical considerations must never override the basic requirements of privacy and confidentiality. Women should be reassured that information about their experiences will not be shared with family members. Flexibility in scheduling interviews should be shown where women have childcare responsibilities for whom alternative provision must be made.

Applicants should be informed of the right to request a male or female interviewer and/or interpreter and such requests should be responded to.

All those involved in procedures for refugee status determination should receive in-depth and on-going training in gender issues. Knowledge about gender should not be considered a 'speciality', but a basic requirement for interviewing and decision-making.

Procedures for refugee status determination should start from the assumption that an applicant may be traumatised as a result of his or her experiences. As a result it may be difficult for an applicant to communicate information about their experiences. In addition both interviewing procedures and decision-making should recognise cultural and gender differences in communication.

The quality and outcomes of procedures for refugee status determination across the countries of Europe would benefit from better quality information on countries of origin. Country of origin information used in refugee status determination should routinely and systematically include gender-specific information, on all the areas outlined in the UNHCR's Gender Guidelines.



## Annex 5. Acronyms

API	UK Asylum Policy Instructions
CCR	Canadian Council for Refugees
CIPU	UK Country of Origin Information Unit
COI	Country of Origin Information
ELR	Exceptional Leave to Remain
EWL	European Women's Lobby
EXCOM	UNHCR Executive Committee
FGM	Female Genital Mutilation
FOR	Swiss Federal Office for Refugees
FyROM	Former Yugoslav Republic of Macedonia
HAC	Austrian Higher Administrative Court
IAA	UK Immigration Appellate Authorities
IAT	UK Immigration Appeals Tribunal
IFAS	Austrian Independent Federal Asylum Senate
PSG	Particular Social Group
RSD	Refugee Status Determination
RWLG	Refugee Women's Legal Group
RWRP	Refugee Women's Resource Project
UASC	Unaccompanied Asylum Seeking Children

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