

**Flygtningenævnets baggrundsmateriale**

|                                 |                                                                                               |
|---------------------------------|-----------------------------------------------------------------------------------------------|
| <b>Bilagsnr.:</b>               | <b>232</b>                                                                                    |
| Land:                           | Diverse emner                                                                                 |
| Kilde:                          | Europarådet                                                                                   |
| Titel:                          | GENDER-BASED ASYLUM CLAIMS AND NON-REFOULEMENT: ARTICLES 60 AND 61 OF THE ISTANBUL CONVENTION |
| Udgivet:                        | December 2019                                                                                 |
| Optaget på baggrundsmaterialet: | 30. april 2020                                                                                |

# GENDER-BASED ASYLUM CLAIMS AND *NON-REFOULEMENT*: ARTICLES 60 AND 61 OF THE ISTANBUL CONVENTION



A collection of papers  
on the Council of Europe Convention  
on preventing and combating violence  
against women and domestic violence

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AND *NON-REFOULEMENT*:  
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OF THE ISTANBUL CONVENTION**

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against women and domestic violence**

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Council of Europe

French edition:  
*Demandes d'asile fondées  
sur le genre et non-refoulement :*  
*Articles 60 et 61  
de la Convention d'Istanbul*

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Cover and layout: KIS, Kyiv, Ukraine

Photos: Shutterstock

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# Acronyms

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|        |                                                                                    |
|--------|------------------------------------------------------------------------------------|
| CEDAW  | Convention on Elimination of all Forms of Discrimination<br>Against Women          |
| ECHR   | European Convention on Human Rights                                                |
| EU     | European Union                                                                     |
| FGM    | Female Genital Mutilation                                                          |
| GREVIO | Group of Experts on Action against Violence Against Women<br>and Domestic Violence |
| ICCPR  | International Covenant on Economic, Social and Cultural Rights                     |
| ICESCR | International Covenant on Economic, Social and Cultural Rights                     |
| NGO    | Non-Governmental Organisation                                                      |
| PACE   | Parliamentary Assembly of the Council of Europe                                    |
| UNHCR  | The United Nations High Commissioner for Refugees                                  |

# I. Introduction

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*No one leaves home unless home is the mouth of a shark*  
*Warsan Shire, from her poem 'Home'*

In their countries of origin, during their journey, in transit and destination countries, many refugee and asylum-seeking women and girls have been exposed to gender-based violence in the form of rape and other forms of sexual abuse and exploitation, harassment or domestic violence. Their protection from violence is not always considered a priority by receiving states. The gender dimension and protection needs of high numbers of refugees and asylum seekers have been largely overlooked and have left gaps in protection, thereby increasing risks for many women.<sup>1</sup>

As a tool to prevent and combat all forms of violence against women, including domestic violence, the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (hereinafter the Istanbul Convention) contains provisions specific to asylum-seeking and refugee women. The purpose of this publication is to support the implementation of Articles 60 (Gender-based asylum claims) and 61 (*Non-refoulement*) of the Istanbul Convention. The aim is to assist policy makers, border and immigration officials and practitioners by providing them with practical advice. This includes definitions, information and examples of: gender-based violence that may be recognised as forms of persecution or other serious harm; how to ensure that a gender-sensitive interpretation is given to each of the convention grounds; what the requirements of gender-sensitive reception procedures are; gender-sensitive practice and procedures in respect of refugee status

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1. 'Human Rights of refugee and migrant women and girls need to be better protected', Commissioner for Human Rights, Strasbourg 7 March 2016, available at: [www.coe.int/en/web/commissioner/-/human-rights-of-refugee-and-migrant-women-and-girls-need-to-be-better-protected?desktop=false](http://www.coe.int/en/web/commissioner/-/human-rights-of-refugee-and-migrant-women-and-girls-need-to-be-better-protected?desktop=false).

determination; and applications for other forms of international protection. It discusses the additional protection of the *non-refoulement* principle and concludes with a checklist which summarises the requirements of the provisions affecting asylum-seeking and refugee women in Articles 60 and 61 of the Istanbul Convention.

As of 1 December 2019, a total of 34 Council of Europe member states have ratified the Istanbul Convention and 11 member states have signed but not ratified. The European Union (EU) has also signed. The Group of Experts on Action against Violence Against Women and Domestic Violence (GREVIO) have completed and published the baseline evaluation assessments in relation to Albania, Austria, Denmark, Finland, France, Monaco, Montenegro, Portugal, Sweden and Turkey. These examine the extent to which states parties comply with their convention obligations. Some of GREVIO's findings are presented in the subsequent sections of this paper.

## II. What protection does the Istanbul Convention provide for migrant, refugee and asylum-seeking women?

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**T**he purpose of the Istanbul Convention is the **protection of women against all forms of violence, as well as the prevention, prosecution and elimination of violence against women and domestic violence** (Article 1 of the Istanbul Convention).

The Istanbul Convention provides a legally binding definition of gender-based violence, clearly establishing legal principles and standards in the area of preventing and combating gender-based violence and domestic violence. States that fail to diligently prevent and combat all forms of violence against women, including domestic violence will be in breach of the Istanbul Convention's provisions. The convention offers states, policy-makers and professionals the legal tools to answer questions on what the minimum standards are, and measures state authorities' needs to implement it in order to effectively respond to violence against women and domestic violence. Moreover, the convention establishes the linchpin between achieving gender equality and the eradication of violence against women: it recognises violence against women as a form of discrimination of women and starts from the premise that violence against women cannot be eradicated without investing in greater equality between women and men.

## Article 4: non-discrimination principle and relevance to migrant and refugee women

Article 4, paragraph 3 of the Istanbul Convention makes clear that:

The implementation of the provisions of this Convention by the Parties, in particular measures to protect the rights of victims, **shall be secured without discrimination** on any ground such as sex, gender, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth, sexual orientation, gender identity, age, state of health, disability, marital status, **migrant or refugee status**, or other status.

Article 4, paragraph 3 applies the fundamental legal human rights principle that a state is required to **recognise, secure and protect** the human rights of all people present within their jurisdiction.<sup>2</sup> Consequently, the provisions of the Istanbul Convention apply *in their entirety* to all women within a state's jurisdiction irrespective of their migrant or refugee status. Therefore, in respect of violence against women or domestic violence committed within the host state, no distinction can be made in respect of the obligations to prevent, protect, prosecute and integrate policies as between nationals, migrants with legal status, migrants without legal status, refugees or asylum seekers.

There have been many serious examples of gender-based violence and domestic violence experienced by women and girl asylum seekers in Europe including during their asylum-seeking journey, during the decision-making process and after obtaining refugee or humanitarian status in Europe. These include rape and sexual violence in refugee camps, reception centres and whilst in transit, so-called "honour" crimes, exploitation in prostitution by smugglers and harassment by immigration officials and society at large.<sup>3</sup>

Migrants are often particularly vulnerable to multiple forms of discrimination and may fall within multiple vulnerable groups. Many are not entitled to basic

2. European Convention on Human Rights (ECHR), Article 1: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention, available at: [www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf).
3. From Conflict to Peace? #Womensvoices: Recommendations on preventing and combating violence against refugee women and girls on the move 2016, European Women's Lobby, available at: [www.womenlobby.org/IMG/pdf/\\_womensvoicesfinalforweb.pdf](http://www.womenlobby.org/IMG/pdf/_womensvoicesfinalforweb.pdf).

rights under national laws such as health care or welfare assistance, which can significantly impact both their vulnerability to, and ability to escape from violence. Those with an ethnic minority or migrant background appear to be more vulnerable to discrimination on both single and multiple grounds than the majority population.<sup>4</sup> For example, a black asylum-seeking woman may experience discrimination on grounds of her race, her status as an asylum seeker and/or as a woman. She may be discriminated against on one or more of these grounds at any given time.

In recognition of the negative impact of multiple forms of discrimination on women's experiences of the asylum and protection systems, and in line with the requirements of the Istanbul Convention, the Parliamentary Assembly of the Council of Europe (PACE) resolved that states should take measures to combat discrimination against refugees and asylum seekers including women. In particular, they should launch awareness-raising campaigns on the positive contribution of refugees and asylum seekers to our societies and strongly condemn and punish any form of discrimination and violence against refugees and asylum seekers, including women.<sup>5</sup>

When decision makers are trained to recognise their own prejudices and unconscious bias and to apply a gender-sensitive approach to women's claims for protection, some of the barriers faced by those women should be overcome. Similarly, changing societal attitudes and tackling discrimination should ensure that incidents of violence against refugee women decrease.

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4. E-U MIDIS, European Union Minorities and Discrimination Survey. Data in Focus Report 5, Multiple Discrimination p17 accessed 23 September 2019.
  5. Resolution 2159 (2017) Protecting refugee women and girls from gender-based violence, available at: <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23700&lang=en>.

# III. Article 60: Gender-based asylum claims

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## **Historical failure of refugee and rights systems to address the specific situation of women**

Asylum law has long failed to address the difference between women and men in terms of why and how they experience persecution. This gender blindness in the establishment of refugee status and of international protection has resulted in situations where claims of women fleeing from gender-based violence have gone unrecognised. In the past decades, however, developments in international human rights law and standards as well as in case law, have led an increasing number of Council of Europe member states to recognise some forms of violence against women as a form of gender-related persecution within the meaning of Article 1 A(2) of the 1951 Convention relating to the Status of Refugees and its 1967 Protocol (the 'Geneva Refugee Convention').

The EU's Qualification Directive<sup>6</sup> requires EU member states to take into account gender when assessing a claim for protection, when considering whether the act concerned constitutes an act of persecution and in assessing whether the person falls within a particular social group (Articles 4, 9 and 10).

In conducting the baseline evaluations on compliance with the Istanbul Convention, GREVIO has noted that in some countries gender-based violence, both as a form of persecution and a ground for seeking asylum, is codified in law (Finland, France, Montenegro, Portugal, Sweden). This was not found to be the case throughout the Council of Europe member states (Albania – save

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6. Council Directive 2004/83/EC of 29 April 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted.

for *refoulement*, Turkey).<sup>7</sup> And in practice, even where it is codified in law, implementation very often remains insufficient.

#### ARTICLE 60

1. Parties shall take the necessary legislative or other measures to ensure that **gender-based violence against women** may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.

2. Parties shall ensure that a **gender-sensitive interpretation is given to each of the Convention grounds** and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.

3. Parties shall take the necessary legislative or other measures to develop **gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.**

The obligations set out in Article 60 are designed to ensure that gender-based violence against women may be recognised as a form of persecution and that states recognise that a woman may be persecuted because of her identity and status as a woman. Where such a woman is at risk of serious harm, protection should be provided.<sup>8</sup> This includes the requirement to adopt a gender-sensitive approach to the Istanbul Convention grounds of political opinion, race or nationality, religion and membership of a particular social group. This should help ensure women fleeing types of persecution from state or non-state actors such as female genital mutilation, forced marriage and serious domestic violence can be recognised as refugees. Finally, the drafters of the Istanbul Convention recognised that a gender-sensitive approach in law was only the first step. Without practical implementation those legal protections

7. The baseline evaluation reports of GREVIO can be found at: [www.coe.int/en/web/istanbul-convention/country-monitoring-work](http://www.coe.int/en/web/istanbul-convention/country-monitoring-work).

8. Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence paragraph 311, available at: [www.coe.int/en/web/istanbul-convention/basic-texts](http://www.coe.int/en/web/istanbul-convention/basic-texts).

will be ineffective. Women and girls require gender-sensitive asylum reception and determination procedures. These are aimed at ensuring both that women are safe during the asylum process and that they are able to tell their story. Immigration officials including border guards and other decision-makers must be equipped with the tools to provide protection and to make a protection decision based on a full and proper understanding of women's claims.

## **Article 60, paragraph 1: Recognising 'gender-based' violence against women as persecution**

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Applying the principles and definitions of the Istanbul Convention should assist states to identify and recognise the serious nature of the harm caused by gender-based violence against women and how this meets the definition of 'persecution' for the purposes of the Geneva Refugee Convention.

### **What is violence against women?**

**Violence against women** is "a **violation of human rights** and a form of **discrimination against women** and shall mean all acts of **gender-based violence** that result in, or are likely to result in, physical, sexual, psychological, or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life" (**Article 3 a of the Istanbul Convention**).

As a violation of human dignity and, in its worst forms, a violation of the right to life, it represents an **extreme expression of inequality** on the ground of sex, leading to discrimination on the ground of gender. Furthermore, the Istanbul Convention recognises in its Preamble that violence against women is the result of **historically imbalanced power relations between women and men**.

### **What does 'gender' mean?**

In the context of the Istanbul Convention, the term '**gender**' means "the socially constructed roles, behaviours, activities and attributes that a given society considers appropriate for women and men" (Article 3 c of the Istanbul Convention). The purpose of the term is not to replace the biological definition

of 'sex' nor the terms 'women' and 'men' but to emphasise how inequalities, stereotypes and – consequently – violence do not originate from biological differences, but rather from the attitudes and perceptions within society of how men and women should 'be'.<sup>9</sup>

### What is gender-based violence against women?

Article 3 d of the Istanbul Convention provides the following definition:

“violence that is directed against a woman because she is a woman or that affects women disproportionately”

- ▶ In respect of violence directed at a woman *because* she is a woman, the victim's gender is the primary motive for the acts of violence against her.
- ▶ Violence that affects women disproportionately, for example domestic violence or rape, would also be considered 'gender-based'.

In other words, 'gender-based violence' refers to any harm that is perpetrated against a woman and is both the cause and the result of unequal power relations based on perceived differences between women and men that lead to women's subordinate status in both the private and public spheres.<sup>10</sup> Underlying most aspects of gender-based violence are inequality and discrimination. Other identified factors include male-dominated power and control structures and social and cultural attitudes about women.<sup>11</sup>

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9. The Istanbul Convention is in no way the first Convention to use the term 'gender' however, difficulties in translation and in particular the difficulty distinguishing between sex and gender in some languages that do not have exact equivalents have been used to fuel controversies about the Convention. For further information see 'The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) Questions and Answers', available at: <https://rm.coe.int/prems-122418-gbr-2574-brochure-questions-istanbul-convention-web-16x16/16808f0b80>.
  10. 'Gender-based violence against women' in the Istanbul Convention is understood as equivalent to the expression 'gender-based violence' used in the Committee on the Elimination of Discrimination against Women (CEDAW) General Recommendation No. 35 on gender-based violence against women, updating General Recommendation No. 19 (2017), the United Nations General Assembly Declaration on the Elimination of Violence against Women (1993) and Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe to member states on the protection of women against violence.
  11. Defining sexual and gender-based violence in the Refugee Context, Simon Butler and McSherry, IRIS Working Paper Series No. 28/2019, available at: [www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/iris/2019/iris-working-papers-28-2019.pdf](http://www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/iris/2019/iris-working-papers-28-2019.pdf).

## Gender-based violence as discrimination

Gender-based violence constitutes a form of discrimination where either it mainly affects women and/or women are not protected by the law on an equal footing with men (see e.g. *Opuz v. Turkey* (2009)<sup>12</sup> in which the European Court of Human Rights (hereinafter the Court) found that gender-based violence was a form of discrimination against women, and that the state failed adequately to protect women owing to a failure to respond to such violence or to create an appropriate deterrent through an effective legal and protection system).

## Forms of Violence Against Women and Domestic Violence that should be considered as gender-based violence capable of amounting to persecution

Articles 33 to 40 of the Istanbul Convention provide a guide to the types of harm that should be considered 'gender-based violence', capable of amounting to persecution providing that harm meets the minimum level of severity to qualify as 'serious harm'.

- ▶ Psychological violence (Article 33)
- ▶ Stalking (Article 34)
- ▶ Physical violence (Article 35)
- ▶ Sexual violence, including rape (Article 36)
- ▶ Forced marriage (Article 37)
- ▶ Female genital mutilation (Article 38)
- ▶ Forced abortion and forced sterilisation (Article 39)
- ▶ Sexual harassment (Article 40)

All these offences apply irrespective of the relationship between the victim and the perpetrator (Article 43) and no culture, tradition or so-called "honour" can be regarded as a justification for any of the forms of violence covered by the convention (Article 42).

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12. *Opuz v. Turkey*, Application No. 33401/02, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-92945%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-92945%22]}).

**Psychological violence** is the intentional conduct of seriously impairing a person's psychological integrity through coercion or threats (**Article 33**).

Consideration should be given to a course of conduct and the nature of an abusive pattern of behaviour occurring over time, within or outside the family. Psychological violence often precedes or accompanies physical and sexual violence in intimate relationships (domestic violence). However, it may also occur in any other type of setting, for example in the workplace or school environment.

Psychological violence can be used against women as a means of torture by state authorities to obtain information or by family members and/or society to obtain compliance. It may include threats of rape or sexual assault and threats to harm other family members including children.

**Stalking** is the intentional conduct of repeatedly engaging in threatening conduct directed at another person, causing her or him to fear for her or his safety (**Article 34**).

Stalking can occur with or without physical contact, it can include threats and harassment, it can be online or offline, and it can include acts of spying or following the victim.

**Physical violence** is the intentional conduct of committing acts of physical violence against another person (**Article 35**).

**Sexual violence, including rape** covers all non-consensual vaginal, anal or oral penetration of a sexual nature of the body of another person with any bodily part or object. Engaging in other non-consensual acts of a sexual nature with a person or causing another person to engage in non-consensual acts of a sexual nature with a third person also falls within the scope of the Istanbul Convention (**Article 36**).

The focus of the Istanbul Convention definition is on the person's consent. Consent must be given voluntarily and the ability and capacity to consent must always be assessed in the context of the surrounding circumstances. 'Force' is not required, nor is a woman required to physically resist. The Court has also made clear that the essential element in determining rape and sexual

abuse was lack of consent rather than 'resistance' (see *M.C. v. Bulgaria* (2003)).<sup>13</sup> Age and mental capacity may be relevant to the issue of consent however the nature of the relationship (e.g. former or current spouse or partner) is irrelevant.

Sexual violence can include rape, mechanical or manual stimulation of genitals and erogenous zones, forced insertion of objects into body openings, sexual assault, sexual abuse, enforced nakedness, sexually abusive taunts and threats, forced witnessing of sexual acts, forced masturbation, oral sex, and threats of any of these actions.

Women face real risks of rape and sexual violence throughout their journeys at the hands of smugglers, traffickers and others and within temporary camps, accommodation and reception centres. Rape by the authorities is now also recognised as a violation of Article 3 of the ECHR (prohibition of torture).<sup>14</sup> Rape is used as a tactic of war<sup>15</sup> and rape in conflict should be recognised as a form of persecution. For lesbian, bisexual and transgender women 'corrective' or 'coercive' rape may be a particular fear. Sexual violence and rape are a common form of exerting power and control in abusive relationships and are likely to occur during and after break-up. The relationship between the perpetrator and victim is irrelevant. It is as unacceptable for a husband to rape his wife as is any other rape.

Sexual violence can result in significant physical, psychological and social consequences. Some women experience secondary forms of harm, which can include rejection by the spouse, family and wider community, and punishment (e.g. being accused of adultery, prosecuted and sometimes sentenced to punishments such as stoning as a result of being a victim). Discrimination, stigma and ostracism from their communities can prevent women obtaining education, employment and other types of assistance including protection and recovery assistance. Women ostracised from their families and communities can be soft targets for exploitation and often have little choice but to

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13. *MC v. Bulgaria*, Application No. 39272/98 (2003), available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-61521%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-61521%22]}).

14. *Aydin v. Turkey*, Application. No 23178/94, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22002-6215%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22002-6215%22]}).

15. Resolution 1820 (2008) S/RES/1820 (2008), available at: [https://undocs.org/en/S/RES/1820\(2008\)](https://undocs.org/en/S/RES/1820(2008)).

resort to ‘survival sex’ or other forms of transactional sex work to meet their basic needs.<sup>16</sup>

### **Spotlight: United Kingdom**

The House of Lords accepted that persecution stemming from rape may continue after the initial crime based on the way an individual was treated within their community.

“To suffer the insult and indignity of being regarded by one’s own community (in Mrs B’s words) as ‘dirty like contaminated’ because one has suffered the gross ill-treatment of a particularly brutal and dehumanising rape directed against that very community is the sort of cumulative denial of human dignity which to my mind is quite capable of amounting to persecution. Of course, the treatment feared has to be sufficiently severe, but the severity of its impact upon the individual is increased by the effects of the past persecution. The victim is punished again and again for something which was not only not her fault but was deliberately persecutory of her, her family and her community”.<sup>17</sup>

**Forced marriage** refers to the intentional conduct of forcing an adult or a child to enter into a marriage. The act of luring an adult or a child to the territory of a party or state other than the one she or he resides in with the purpose of forcing this adult or child into marriage is also covered by the Istanbul Convention (**Article 37**).

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16. Simon-Butler A. and McSherry B. (2019), Defining sexual and gender-based violence in the Refugee Context, IRiS Working Paper Series No. 28/2019, p29 available at: <https://www.birmingham.ac.uk/Documents/college-social-sciences/social-policy/iris/2019/iris-working-papers-28-2019.pdf>

17. *Regina v. Special Adjudicator, ex parte Hoxha* [2005] UKHL 19, available at: [www.refworld.org/cases,GBR\\_HL,423ec7784.html](http://www.refworld.org/cases,GBR_HL,423ec7784.html).

### Spotlight: Denmark

In the Danish Refugee Appeals Board's decision of 16 January 2017, an Afghan woman applicant was granted refugee status under the Danish Aliens Act Article 7(1) because of the threat of forced marriage in Afghanistan. She was found to belong to the particular social group of 'widows at risk of forced marriage'. The Afghan state was found to be neither willing nor able to protect women against persecution in cases of forced marriage and internal relocation was not available to the applicant.<sup>18</sup>

Other serious harms related to marriage can include for example: dowry deaths, bride burning, the practice of forcing widows to marry their husband's kin, so-called "honour" killing or other "honour"-related crimes, 'temporary marriages' designed to enable men to have sex outside of marriage, and domestic abuse including forced domestic labour within marriage either at the hands of the husband or other relatives.

**Female Genital Mutilation** covers the acts of excising, infibulating or performing any other mutilation to the whole or any part of a woman's labia majora, labia minora or clitoris, of coercing or procuring a woman to undergo any such acts, or of inciting, coercing or procuring a girl to undergo any of them (**Article 38**).<sup>19</sup>

It is now well established that subjecting any person, adult or child to female genital mutilation would amount to ill-treatment contrary to Article 3 of the ECHR.

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18. European Database of Asylum Law cases summary, available at: [www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-16-january-2017#content](http://www.asylumlawdatabase.eu/en/case-law/denmark-refugee-appeals-board%E2%80%99s-decision-16-january-2017#content).

19. For further information about FGM see 'A tool to end FGM', (2014) Council of Europe, available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680464e9f>.

### Spotlight: France

The French National Court of Asylum (CNDA) held that in countries where there is a high prevalence of female genital mutilation such as Nigeria, non-excised persons can be considered as having a well-founded fear of persecution for reasons of membership of a particular social group.<sup>20</sup>

Difficulties for asylum-seeking women arise in respect of proving that there is a risk of such treatment occurring, a lack of protection and that they cannot flee internally to avoid the risk.<sup>21</sup>

**Forced Abortion and Forced Sterilisation** refer to performing an abortion on a woman without her prior and informed consent or performing surgery which has the purpose or effect of terminating a woman's capacity to naturally reproduce without her prior and informed consent or understanding of the procedure (**Article 39**).

Sterilisation without fully informed consent is a breach of Article 3 of the ECHR.<sup>22</sup> As a form of harm, sterilisation is considered a major interference with a person's reproductive health status, involving manifold aspects of personal integrity (physical and mental well-being as well as emotional, spiritual and family life). Women with disabilities and women from marginalised ethnic groups have traditionally been at greater risk of forced sterilisation.

In circumstances where family planning is imposed by the state it is generally considered an appropriate response to population pressures. However, where family planning is enforced through the use of forced abortions and

20. CNDA, 21 October 2017, Mme E., No. 16029780, available at: [www.asylumlawdatabase.eu/en/case-law/france-%E2%80%93-cnda-21-october-2017-mme-e-n%C2%BA-16029780#content](http://www.asylumlawdatabase.eu/en/case-law/france-%E2%80%93-cnda-21-october-2017-mme-e-n%C2%BA-16029780#content).

21. See for examples *Omeredo v. Austria*, Application No. 8969/10, decision on admissibility, available at: <http://hudoc.echr.coe.int/fre?i=001-106527>; *Bangura v. Belgium*, Application No. 52872/10, available (in French) at: <http://hudoc.echr.coe.int/eng?i=001-164997>.

22. *V.C. v. Slovakia*, Application No. 18968/07, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22003-3736079-4262767%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-3736079-4262767%22]}); *N.N. v. Slovakia*, Application No. 29518/10, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22003-3980673-4625401%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-3980673-4625401%22]}); *I.G., M.K. and R.H. v. Slovakia*, Application No. 15966/04, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22003-4153303-4903272%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22003-4153303-4903272%22]}).

sterilisations, this would breach fundamental human rights law and therefore be recognised as serious abuse and considered persecution.<sup>23</sup>

**Spotlight: Germany**

Administrative Court of Trier, 23 March 2011, 5 K 1181/10.TR

A Chinese mother of two children was recognised as a refugee as there was sufficient probability of her being forced to undergo sterilisation in China due to violation of the one child policy.<sup>24</sup>

**Sexual harassment** is any form of unwanted verbal, non-verbal or physical conduct of a sexual nature with the purpose or effect of violating the dignity of a person, in particular when creating an intimidating, hostile, degrading, humiliating or offensive environment (**Article 40**).

States parties have the option to apply either criminal law or other sanctions when it comes to sexual harassment. For sexual harassment to constitute serious harm it would need to reach the ‘serious harm’ threshold. Evaluation will be case-specific, but the question should be considered against the background of sexual harassment as a form of violence used to control women. Sexual harassment is often the initial form of abuse experienced by women which can often escalate resulting in serious consequences including death if adequate protection is not provided.

**Crimes committed in the name of so-called “honour” (Article 42):** Although not specifically recognised as a criminal offence in the Istanbul Convention, the existence of such crimes is acknowledged as part of a wider ban on any attempt to justify criminal behaviour on the basis of culture, custom, religion, tradition or so-called “honour”. This formulation is based on the understanding that these are not new crimes but rather established ones, such as murder, manslaughter, bodily injury, etc., and what makes them different is the intent behind them. Article 42 ensures that crimes committed in the name of so-called “honour” would encompass acts of violence justified by claims that

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23. UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1952 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/02/01 (hereafter, UNHCR Gender Guidelines No 1) at paragraph 13.

24. European Database of Asylum Law available here: [www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-trier-23-march-2011-5-k-118110tr#content](http://www.asylumlawdatabase.eu/en/case-law/germany-administrative-court-trier-23-march-2011-5-k-118110tr#content).

the victim has transgressed cultural, religious, social or traditional norms or customs of appropriate behaviour.

**Trafficking in human beings** is not specifically covered in the Istanbul Convention as it is the subject of a separate treaty, the 2005 Council of Europe Convention on Action Against Trafficking in Human Beings.<sup>25</sup> However, identification of victims of trafficking is an important part of the asylum process and many women have experienced exploitation and abuse on their journeys or after arrival in the destination country and may well have a relevant fear of persecution on this ground and/or removal would breach Article 4 of the ECHR contrary to the *non-refoulement* provisions. Breach of Article 4 (prohibition of slavery and forced labour) and Article 2 (right to life) of the ECHR have been recognised in *Rantsev v. Cyprus and Russia*.<sup>26</sup>

**Domestic violence** refers to all acts of physical, sexual, psychological or economic violence, which affect women disproportionately and is therefore distinctly gendered. The term covers intimate-partner violence between current or former spouses or partners, as well as inter-generational violence, for example between parents and their children. Domestic violence is one of the most serious and pervasive forms of violence against women. Although the term ‘domestic’ may appear to limit its application to acts that occur in a household, it is recognised that violence often occurs between intimate partners, couples who are dating, and who do not necessarily live together. Therefore, a joint residence of the victim and perpetrator is not required, even when talking about inter-generational violence. **Article 3 b** of the Istanbul Convention defines this form of violence.

Domestic violence can be the reason for a woman leaving her country of origin, or it can be experienced during her journey or after arrival in the host country, during or after the asylum process. Seeking asylum is a stressful process that can increase the risk of domestic violence.

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25. Europe Convention on Action Against Trafficking in Human Beings, 2005, available at: [www.coe.int/en/web/anti-human-trafficking/about-the-convention](http://www.coe.int/en/web/anti-human-trafficking/about-the-convention).

26. *Rantsev v. Cyprus and Russia*, Application No. 25965/04 (2010), available at <http://hudoc.echr.coe.int/eng?i=001-96549>

In the landmark judgment *Opuz v. Turkey* (2009),<sup>27</sup> the Court recognised domestic violence as gender-based violence and discrimination against women (Articles 3, 8 (right to privacy) and 14 of the ECHR). This judgment has since been followed in more than 25 other cases in which the Court has found that the authorities' discriminatory failure to act amounted to condoning domestic violence. In *M.G. v. Turkey* (2016),<sup>28</sup> the fact that the Turkish law relating to protective measures was not extended to unmarried couples led to Turkey being found in breach of its positive obligations to protect victims of domestic violence.

The consequences of failing to properly identify the risk of domestic violence and continue an investigation were starkly identified by the Court in *Kontrova v. Slovakia*. The applicant's husband had a history of physical and psychological abuse of the applicant. When the couple went together to withdraw her complaint for battery the authorities encouraged and assisted in reformulating the complaint to a minor offence such that the investigation could be discontinued. The husband shot dead their two children.

## Discrimination as persecution

A pattern of discrimination, if the consequences are sufficiently severe, could amount to persecution on 'cumulative grounds'. For example, discrimination resulting in an inability to earn a living, the right to practice or not to practice a religion, access to education and other basic human rights could amount to persecution.<sup>29</sup>

Discrimination enforced through social, political or religious norms may affect:

- ▶ family and personal laws and status;
- ▶ dress codes including hair and makeup;

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27. *Opuz v. Turkey*, Application No. 33401/02, (2009), available at: <http://hudoc.echr.coe.int/eng?i=001-92945>.

28. *M.G. v. Turkey*, Application No. 646/10, (2016), available in French at: <http://hudoc.echr.coe.int/eng?i=001-161521>.

29. See also UNHCR Gender Guidelines No. 1 and UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (2019) (hereafter UNHCR Handbook (2019)), available at: [www.refworld.org/docid/4f33c8d92.html](http://www.refworld.org/docid/4f33c8d92.html) at paragraphs 54-55.

- ▶ employment and education;
- ▶ restrictions on freedom of movement both within and outside the country;
- ▶ restrictions on women's activities for example sports;
- ▶ restrictions on women accessing public spaces.

Where a woman resists or seeks to end discrimination either politically or through her actions a risk of serious physical or other persecutory harm may arise as a result.

If a woman is at risk of serious harm from non-state actors and the state, as a matter of policy or practice, does not accord certain rights or provide protection from serious abuse she should qualify for international protection. Cases of domestic violence or of abuse for reasons of one's sexual orientation, could, for example, be analysed in this context.<sup>30</sup> For examples of how this has been applied by the Court, see *Talpis v. Italy* (2017)<sup>31</sup> and *Bălşan v. Romania* (2017),<sup>32</sup> where the Court considered that the extent of the failure of state officials to be familiar with the existing legal frameworks and implement them, and women's lack of knowledge about their rights led to an 'insufficient commitment to take appropriate action to address domestic violence' and thus found a breach of Article 3 of the ECHR combined with Article 14.

## Women fleeing prosecution or punishment

A law can be persecutory in and of itself particularly if it emanates from traditional or cultural norms and practices not necessarily in conformity with human rights standards. This is unlikely to be the case if the law is not enforced and/or does not permit serious harm.<sup>33</sup> Whether a law is in conformity with accepted human rights standards should be assessed with reference to the various international instruments relating to human rights, in particular the Universal Declaration on Human Rights, International Covenant on Civil and Political Rights (ICCPR), International Covenant on Economic, Social and Cultural Rights (ICESCR), Convention on Elimination of all Forms of

30. UNHCR Gender Guidelines No. 1, paragraph 15.

31. *Talpis v. Italy*, Application No. 41237/14, available at: <http://hudoc.echr.coe.int/eng?i=001-171994>.

32. *Bălşan v. Romania*, Application No. 49645/09, available at <http://hudoc.echr.coe.int/eng?i=001-173619>.

33. UNHCR Gender Guidelines No 1. paragraph 10.

Discrimination Against Women (CEDAW) and the ECHR. More often, however, it may not be the law but its application that is discriminatory.

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.<sup>34</sup>

Examples of this may include a woman fleeing prosecution for adultery where she would not receive a fair trial<sup>35</sup> or a lesbian woman likely to be subject to the death penalty.<sup>36</sup>

## **Standard of protection required by the Istanbul Convention**

### **Protection and refugee claims**

Often women's asylum claims are refused on the grounds that they will be able to obtain 'sufficient' or 'effective' protection from the authorities in their home country. The standards of protection required by the Istanbul Convention can be a useful guide to assessing whether protection in the country of origin is 'effective'.

### **Investigation and prosecution of offences:**

If the forms of gender-based violence identified in the Istanbul Convention are not criminalised in the country of origin, it is usually very difficult for women to obtain 'effective' protection. This is because there will neither be a deterrent to prevent individuals committing those crimes nor protection from them after the event. Where the state has a law prohibiting a persecutory practice it will not constitute 'effective protection' in international law – unless it is enforced effectively.

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34. UNHCR Gender Guidelines No 1, paragraph 12.

35. See *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, available at: [https://www.refworld.org/cases,GBR\\_HL,3dec8abe4.html](https://www.refworld.org/cases,GBR_HL,3dec8abe4.html).

36. See the Court of Justice of the European Union case of *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* C-199/12 to C-201/12 available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0199>.

Applying the standards set by the Istanbul Convention, investigative and judicial proceedings related to all forms of violence should:

- ▶ be carried out **without undue delay** and in an **effective manner**, in order to secure vital evidence, enhance conviction rates and put an end to impunity for perpetrators (Article 49);
- ▶ oblige law enforcement agencies to react promptly and appropriately to an act of violence, including through preventive operational measures and the collection of evidence (Article 50);
- ▶ ensure risk assessment and risk management to keep the victim safe (Article 51);
- ▶ introduce emergency barring orders, protection orders and restriction orders (Articles 52 and 53);
- ▶ enable **ex officio and ex parte** proceedings and require state parties to ensure that investigations into and prosecution of the different forms of violence covered by the convention are not wholly dependent upon the victim's report and that proceedings may continue even if the victim withdraws their complaint (Article 55);
- ▶ ensure adequate additional **measures of protection**, such as protecting the privacy and the image of the victim, providing separate waiting rooms and allowing victims to testify without the presence of the alleged perpetrator (Article 56);
- ▶ provide for the right to legal assistance and **free legal aid** for victims under the conditions prescribed by their internal law (Article 57).

Where evidence related to the victim's past sexual history and behaviour is accepted as an excuse for acts of violence against women and domestic violence, it can lead to partial or even full exoneration of the perpetrator, which can result in a lack of protection. The Istanbul Convention only permits such evidence to be admitted if it is relevant and necessary (Article 54). Depending on social attitudes in the country of origin this may be particularly relevant for asylum claims.

**Examples of cases in the European Court of Human Rights where the lack of protection in cases of violence against women and domestic violence resulted in serious harm or death:**

*M.C. v. Bulgaria* (2003) failure to investigate and prosecute non-consensual sexual acts in the absence of physical resistance;

*Opuz v. Turkey* (2009) the court held for the first time that the failure to protect women from domestic violence as a consequence of general and judicial passivity created a climate conducive to domestic violence and was discriminatory. The Court further determined that there was a requirement to investigate and protect against domestic violence in circumstances where a victim withdrew a complaint;

*Eremia and others v. Moldova* (2013) failure to protect from the violent and abusive behaviour of husband and father, a police officer;

*B.V. v. Belgium* (2017) failure to carry out effective investigation in respect of rape and indecent assault;

*Talpis v. Italy* (2017) inaction by the authorities amounted to discrimination against women and led to underestimating the violence and thus essentially endorsing it;

*Bălşan v. Romania* (2017) despite repeated complaints, the authorities failed to protect a woman from domestic violence. The failure of the authorities to take the action required deprived the relevant national framework of its purpose and effect and was inconsistent with international standards on violence against women and discriminatory;

*Volodina v. Russia* (2019) domestic violence was not recognised in Russian law and there was no such thing as restraining or protection orders. This clearly demonstrated a reluctance to acknowledge the gravity of the problem of domestic violence and its discriminatory effect on women;

*E.B. v. Romania* (2019) failure to carry out an effective investigation into rape, failure to adopt a context-sensitive approach to take into account the victim's slight intellectual incapacity, and over-emphasis on failure to resist her attacker.

## Protection and support

If women cannot obtain social and/or legal support and assistance in their country of origin they may be unable to leave their abuser, report risks or offences against them or pursue prosecutions. If victim-shaming or gender inequality result in women being disbelieved, any laws or protective measures are unlikely to be implemented effectively.

Recognising these barriers to access to justice for women, the Istanbul Convention requires states to take measures to improve women's access to justice. These include access to information, provision of general and specialist support services, sufficient women's shelters, a telephone help-line and rape crisis or sexual assault referral centres (Articles 19 to 25 of the Istanbul Convention).

It does not necessarily follow that where these measures are not implemented in a country of origin either a 'real risk of serious harm' or a 'lack of protection' will exist as a matter of refugee law. However, they are good indicators of circumstances in which women may not **in practice** be able to obtain proper or effective protection against a risk of violence.

## Women and internal relocation

Because women's fear of persecution is often from 'non-state agents' or individual agents of the state, their claims are often dismissed on the grounds that they could return to their home country and live away from the place where they fear serious harm. For such an option to be viable there must be no risk of persecution or serious harm in that area either from the original persecutor or others, relocation must be safely and legally accessible and the applicant should be able to lead a relatively normal life without facing undue hardship.<sup>37</sup>

Women may face significant barriers affecting their ability to travel to and settle in other areas of the country of origin without facing hardship, insecurity or the inability to be with their families. These can include financial, logistical, social, cultural and other barriers. Discrimination and patriarchal attitudes

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37. UNHCR Guidelines on International Protection No. 4: "Internal Flight or Relocation Alternative" within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees.

could also lead to a risk of women being found by their persecutors or of forcible family reunification.

Women may also have very real difficulties establishing themselves in the site of relocation. For example, in some countries single women find it difficult to rent property because they are seen as prostitutes or because of financial barriers such as requiring a year's rent in advance. Women may have particular difficulty accessing employment. Women without access to housing and subsistence become particularly vulnerable to exploitation and 'survival sex'. They may be subjected to low level discrimination and harassment in the site of relocation. All these factors must be considered cumulatively before a decision can be reached that internal relocation is a viable option.

## **Article 60, paragraph 2: Gender-sensitive interpretation of the Geneva Refugee Convention Grounds**

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Article 60, paragraph 2 of the Istanbul Convention requires states to ensure that a gender-sensitive interpretation is given to each of the Geneva Refugee Convention grounds. Ensuring a gender-sensitive interpretation implies recognising and understanding how gender can have an impact on the reasons behind the type of persecution or harm suffered.

A woman may be persecuted:

- ▶ **as** a woman (e.g. raped) but for reasons unrelated to her gender (e.g. her membership of a political party);
- ▶ not persecuted in a manner specific to her female identity (e.g. beaten) but **because** of her gender (e.g. for wearing a veil);
- ▶ **as and because** she is a woman (e.g. female genital mutilation).<sup>38</sup>

Grounds for persecution can be **actual** or **imputed**. This means that the woman does not have to hold the particular characteristic or belief. It is sufficient if it is perceived or attributed to her by others or is a characteristic or belief of the persecutor.

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38. Examples taken from Gender Guidelines for the Determination of Asylum Claims in the UK, Refugee Women's Legal Group, July 1998, available at: [www.ilpa.org.uk/resources.php/4112/gender-guidelines-for-the-determination-of-asylum-claims-in-the-uk](http://www.ilpa.org.uk/resources.php/4112/gender-guidelines-for-the-determination-of-asylum-claims-in-the-uk).

Experience of persecution is often also shaped by race, marital status, age, sexuality, sexual history and other cultural and social factors. These will all influence the way in which women present their claims and the way in which they will be viewed in their home country.

### **Spotlight: the Netherlands**

On 21 November 2018, the Dutch Council of State<sup>39</sup> found that if an Afghan woman with a Western lifestyle was asked to adapt to the norms and values that apply in the country of origin to avoid persecution or such a woman was unable to adapt by permanently changing or hiding those characteristics they could be at risk of persecution in Afghanistan. Although a 'Western lifestyle' is not a religious or political conviction Western 'behaviour' could be a manifestation of a religious or political conviction (or lack of conviction).

### **Political opinion**

Persecution on the grounds of political opinion can include persecution on the grounds of opinions regarding gender roles. Some women may be persecuted, for example, for not conforming to society's roles and norms of acceptable behaviour and for speaking out against traditional gender roles. Women's participation in political activity and resistance may manifest itself in many different ways including ways different to those of men. For example:

- ▶ women may be politicians, members of political parties, activists, mayors, local councillors or members of other local or national political or politicised groups, associations or movements;
- ▶ they may attend conferences, meetings, rallies, demonstrations, protests;
- ▶ they may write articles, books, appear on radio, television, YouTube, Twitter, Instagram or other internet or social media channels;
- ▶ women may hide people, pass messages or provide community services, food, clothing and medical care;
- ▶ family relationships might be exploited to bring pressure to bear on male political activists;

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39. See <https://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:RVS:2018:3735>.

- ▶ failure to conform to moral, ethical and social ‘standards’ or behaviour could result in women experiencing cruel or inhuman treatment. For example, their attitudes toward the wearing of or refusal to wear certain clothing, make-up or hairstyles, or toward divorce, relationships, sexual activity or behaviour, or expressions of gender identity;
- ▶ refusal to abide by discriminatory laws or to follow prescribed rules of conduct should properly be viewed as political conduct but are often seen as ‘personal’ issues of choice.

### **Race or nationality**

Regarding persecution on the grounds of race or on the grounds of nationality, women may face certain types of persecution that specifically affect them. In some circumstances discriminatory denial of citizenship may be persecutory. Examples include:

- ▶ sexual violence and control of reproduction in cases of racial and ethnic ‘cleansing’;
- ▶ deprivation of a woman’s nationality upon marriage to a foreign citizen;
- ▶ a woman’s inability to pass on her citizenship to her child;<sup>40</sup>
- ▶ women in mixed race or ethnicity marriages may experience harm as a consequence of racism from their own family, their in-laws or society more generally.

### **Religion**

Concerning persecution on the grounds of religion, women may be persecuted for not conforming to religious norms and customs of acceptable behaviour. This is particularly true in cases of crimes committed in the name of so-called “honour” which affect women disproportionately. It is important to have regard to the overlap between religious and political persecution as a non-conforming woman may be seen as manifesting ‘political’ behaviour.

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40. Further information on arbitrary deprivation of nationality can be found in the Court factsheet at: [www.echr.coe.int/Documents/FS\\_Citizenship\\_Deprivation\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Citizenship_Deprivation_ENG.pdf) and in a paper produced by the UN High Commissioner for Refugees (UNHCR), ‘Refugee Status, Arbitrary Deprivation of Nationality, and Statelessness within the Context of Article 1A(2) of the 1951 Convention and its 1967 Protocol relating to the Status of Refugees’, October 2014, PPLA/2014/01, available at: [www.refworld.org/docid/543525834.html](http://www.refworld.org/docid/543525834.html).

A woman may also be wrongly assumed to subscribe to the same religious beliefs or opinions of her family members. Examples include:

- ▶ committing or being perceived to commit adultery;
- ▶ being the mother, aunt, sister, wife, partner or child of a religious preacher, an activist, an extremist or a terrorist;
- ▶ marrying outside a religion or refusing to marry within a religion;
- ▶ being lesbian, transgender or bisexual where this is deemed contrary to a religion;
- ▶ not being 'modest';
- ▶ wearing a veil or not wearing a veil.

### **Particular social group**

Persecution on the grounds of membership of a particular social group has increasingly been put forward in gender-related claims and has gradually acquired international support. Some women can be identified as a particular social group in their country of origin on the grounds that they share a common innate, unchangeable or otherwise fundamental characteristic other than the common experience of fleeing persecution. At a minimum, there will need to be a level of discrimination against the women *either* in respect of the relevant characteristic which may include gender *or* in respect of the provision of protection as a consequence. Examples may include:

- ▶ women fleeing female genital mutilation, forced marriage, serious domestic violence;
- ▶ women who refuse to conform to their expected social role;
- ▶ women who remain single are sometimes perceived as lesbian and can experience harm as a result;
- ▶ women who have no children, too many children, children with disabilities or children of a particular sex;
- ▶ women seeking to access children following the breakdown of marriage or a relationship;
- ▶ women who are lesbian, bisexual or transgender may also face particular forms of gender-related persecution and violence and will normally be

considered a particular social group although they may well also be at risk for other convention ground reasons.<sup>41</sup>

### **Spotlight: United Kingdom**

House of Lords, *Shah and Islam v. Secretary of State for the Home Department*

This decision was the first to accept that women could constitute a particular social group in some countries solely on the grounds of their gender. Where a government pursues discriminatory policies or is unwilling to curb societal discrimination against women, women may form a particular social group in that country.<sup>42</sup>

## **Article 60, paragraph 3: Gender-sensitive reception and support services, asylum procedures and gender guidelines**

The journey to and through Europe can create particular vulnerabilities to violence. The provisions of Article 60, paragraph 3 are designed to reduce the risk to women and girls of further violence occurring, to support them throughout the asylum process and to ensure that they achieve a fair and just outcome. To implement this, border guards, immigration officials, police, social workers and others responsible for women and girls in the asylum system must be properly trained to recognise the gender dimensions of women's protection needs and their asylum claims and to implement relevant policy. Developing standardised operating procedures and gender guidelines is a good way of achieving this. Article 60, paragraph 3 should therefore enhance the ability of women and girls to access the asylum and protection system, seek and obtain adequate support and protection in respect of gender-based violence and ultimately improve their access to justice.<sup>43</sup>

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41. See *Minister voor Immigratie en Asiel v X and Y and Z v Minister voor Immigratie en Asiel* C-199/12 to C-201/12, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A62012CJ0199>

42. A73 476 695, available at: [www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3278.pdf](http://www.justice.gov/sites/default/files/eoir/legacy/2014/07/25/3278.pdf)

43. Within EU member states regard should also be had to the Reception Directive: Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32013L0033>

## Reception centres and screening

Article 60, paragraph 3 requires states to develop gender-sensitive reception procedures that take into account women's and men's differences in terms of experiences and specific protection needs to ensure their right to safety when considering standards of treatment for the reception of asylum seekers.

Reception procedures include not just the initial screening of applicants but also provide a good opportunity to identify particularly vulnerable individuals, including women and girls who have experienced gender-based violence and related trauma in their countries of origin or on their journeys, and are thus in need of greater levels of support and protection. One way of achieving this could be routine health checks, carried out in a gender-sensitive manner, that allow women to disclose traumatic experiences.<sup>44</sup>

Many women and girls have been and are subjected to severe forms of violence against women in accommodation, reception and detention facilities throughout Europe and gender-sensitive measures to address this are often absent.<sup>45</sup> As evidenced during onsite visits by the Council of Europe's Special Representative of the Secretary General on migration and refugees<sup>46</sup> and GREVIO country evaluations,<sup>47</sup> the risk of abuse in some facilities is so high that refugee women take precautionary measures, for example by not leaving their tents during the night.<sup>48</sup> During the baseline evaluation of Sweden, GREVIO found shared reception or accommodation had led to (sexual) harassment of women and girls as well as indications of serious gender-based violence, with three women having been killed since 2015.<sup>49</sup> Cases of sexual violence committed by guards in refugee reception or transit centres have also been

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44. GREVIO Baseline Evaluation Report Finland, p58, available at: <https://rm.coe.int/grevio-report-on-finland/168097129d>

45. Council of Europe factsheet on *Protecting the rights of migrant, refugee and asylum-seeking women and girls* (2019), available at: <https://rm.coe.int/prems-089319-gbr-2573-protecting-the-rights-of-migrant-refugee-and-asy/168096608a>.

46. Country reports available at: [www.coe.int/en/web/special-representative-secretary-general-migration-refugees/country-reports](http://www.coe.int/en/web/special-representative-secretary-general-migration-refugees/country-reports).

47. Available at: [www.coe.int/en/web/istanbul-convention/country-monitoring-work](http://www.coe.int/en/web/istanbul-convention/country-monitoring-work).

48. See for example Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Bosnia and Herzegovina and to Croatia, 24-27 July and 26-30 November 2018 p12.

49. GREVIO's baseline evaluation report Sweden at p59 available at: <https://www.coe.int/en/web/istanbul-convention/sweden>.

reported both beyond and within European territory.<sup>50</sup> Further, where there is an absence of rules on access to the facilities, free access combined with high numbers of occupants and harsh conditions can combine to expose women and girls to a risk of abuse and violence.<sup>51</sup>

The provision of appropriate reception and support services should therefore help to prevent violence against women, facilitate the ability of women to present their claims for protection and guard against the risk of *refoulement* (see section on Article 61: *Non refoulement*). In conformity with the Istanbul Convention, PACE Resolution 2159 (2017) ‘Protecting refugee women and girls from gender-based violence’ requires measures in reception centres and other facilities, such as the presence of trained female social workers, interpreters, police officers and guards, separate accommodation with locks for single men and women, separate, well-lit toilet facilities, adequate lighting and the creation of safe spaces in every transit and reception facility.

### Information and counselling

It is essential to ensure women and girls are aware of their rights, understand the process and know how to seek and obtain support information and advice in a language that they understand (Article 19). Information should also be provided on the availability of reporting and complaint mechanisms. In some cultures, it is particularly difficult for women and girls to talk about gender-based violence and they may not have or know the words for the abuse they have experienced. Information provided in respect of sex and gender-based violence must therefore be communicated in a culturally- and gender-sensitive language. Some women and girls may be illiterate and will require information to be communicated verbally.

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50. See ‘Female refugees face physical assault, exploitation and sexual harassment on their journey through Europe’ (2016), Amnesty International at: <https://www.amnesty.org/en/latest/news/2016/01/female-refugees-face-physical-assault-exploitation-and-sexual-harassment-on-their-journey-through-europe/>.

51. See for example, GREVIO Baseline Evaluation Report Sweden, and Report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Bosnia and Herzegovina and to Croatia, 24-27 July and 26-30 November 2018.

Good quality legal counselling, funded by legal aid where necessary and appropriate, can significantly facilitate the ability of women to properly present their asylum claims.

### **Access to justice for women and girls in reception facilities**

Where gender-based violence or other abuse takes place within reception or accommodation facilities, including those run by private providers, women and girls must be able to seek redress. One example of how this might be achieved was noted in Islahiye 2 camp in Turkey, where women's committees had been established.<sup>52</sup> These were instrumental in ensuring that women's needs and concerns were brought to the authorities' attention.

To ensure women and girls are sufficiently protected against gender-based violence, mechanisms should be available to enable security issues and concerns of the occupants of the accommodation to be reported and taken into account. Formal arrangements for intervention and protection should be drawn up. Numbers for emergency services should be clearly visible in a place where a phone is available. When needed, arrangements should be made to ensure access for refugee and asylum-seeking women to shelters for women victims of gender-based violence.

If reception or accommodation centres for asylum-seeking women and girls are located in rural or remote areas provision should also be made for regular visits by mobile courts or court officers and lawyers, in order to ensure that sexual assaults are investigated and prosecuted.<sup>53</sup> There is evidence that the availability of such courts has led to increased reporting of sexual and gender-based violence, more convictions and greater community awareness about

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52. Report of the fact-finding mission to Turkey by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, 30 May-4 June 2016, available at: [https://search.coe.int/cm/Pages/result\\_details.aspx?ObjectId=0900001680699e93](https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=0900001680699e93).

53. Guidance note: Framework for measuring access to justice including specific challenges facing women, Council of Europe and UN Women available at: [https://rm.coe.int/168069cf4e, Resolution and 2159 \(2017\)](https://rm.coe.int/168069cf4e, Resolution and 2159 (2017)).

the legal system.<sup>54</sup> This is particularly important owing to the vulnerability of women and girls in transit and reception facilities and camps and the lack of access to ordinary state protection provision.

## **Gender-sensitive reception and support services**

Article 60, paragraph 3 requires support services for asylum-seekers that provide assistance in a gender-sensitive manner and that cater to the particular needs of women. This could include taking measures such as providing additional psycho-social and crisis counselling, as well as medical care for survivors of trauma, since many female asylum-seekers have been exposed to sexual or other forms of abuse. Support services should also aim at empowering women and should enable them to actively rebuild their lives through services such as education and training.

Women (or possibly their husbands) may refuse medical consultations by male doctors, especially gynaecologists, or find it difficult to express themselves with a male interpreter. In the absence of female specialists, access to healthcare for refugee and migrant women can be difficult.<sup>55</sup>

In addition to ensuring conditions are detected so they can be treated, the existence of trauma has an important impact on how women should be dealt with during the asylum process, including their interview and how their testimony is examined.<sup>56</sup> Women refugees who experience post-traumatic stress disorder and dissociative symptoms, including flashbacks, may require

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54. United Nations High Commissioner for Refugees' Comprehensive Protection Framework on Access to Justice for Sexual and Gender-Based Violence Victims and Survivors, available at: <https://cms.emergency.unhcr.org/documents/11982/51689/UNHCR%2C+Sexual+and+Gender-Based+Violence+against+Refugees%2C+Returnees+and+Internally+Displaced+Persons.+Guidelines+for+Prevention+and+Response%2C+2003/9591f62d-4f6a-4faf-8c03-df0d6bacf871>.

55. See report of the fact-finding mission by Ambassador Tomáš Boček, Special Representative of the Secretary General on migration and refugees, to Bosnia and Herzegovina and to Croatia, 24-27 July and 26-30 November 2018.

56. A good set of resources on best practice for dealing with victims of torture and trauma can be found here: <http://www.helenbamber.org/publications/>

particular care and attention. Clinical protocols should be drawn up to enable those working with refugee women to support them.<sup>57</sup>

To enable women to obtain proper and adequate access to medical care and counselling so that they recover from gender-based violence and are able to present their claims for protection properly:

- ▶ counselling, psychological support and health care, including sexual and reproductive healthcare and specific post-rape care should be provided in these facilities, for all victims of gender-based violence;
- ▶ the same access to affordable and adequate health services for all refugee and asylum-seeking women and girls as for the general population should be available;
- ▶ ensure girls are free to decide for themselves, that their voluntary and informed consent is always obtained, and that they do not require authorisation from a spouse, parent or guardian or hospital authority to access sexual and reproductive health services.

## Gender-sensitive asylum procedures

Gender-based violence is often deeply rooted in the social and cultural structures, norms and values that govern society and is often perpetuated by a culture of denial and silence. This can cause particular difficulties for asylum-seeking women in raising and explaining their claims in the asylum system. Procedures to assist women to disclose and explain their fears of gender-based violence whilst minimising the impact of secondary victimisation are considered below. The aim should be to ensure that women are able to access in full their own right to protection rather than be dependent on a husband, partner or male relative for safety, security and status.

In many communities, rape and sexual assault or abuse carry stigma and shame. This can be a major barrier to disclosing the basis of a fear of persecution.

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57. See 'A Protocol for Managing dissociative symptoms in refugee populations', Chessell et al (2019) *The Cognitive Behaviour Therapist* (2019) vol. 12 e27 available at: [www.cambridge.org/core/journals/the-cognitive-behaviour-therapist/article/protocol-for-managing-dissociative-symptoms-in-refugee-populations/1B09AB58101DF7AD547C6B72AFD5D16F/share/9c4f244dae3d8980094ec3d03fb961d2422cf5ae](http://www.cambridge.org/core/journals/the-cognitive-behaviour-therapist/article/protocol-for-managing-dissociative-symptoms-in-refugee-populations/1B09AB58101DF7AD547C6B72AFD5D16F/share/9c4f244dae3d8980094ec3d03fb961d2422cf5ae).

Where women are treated simply as part of the 'family group' or dependant on their male family member's (e.g. husband's, brother's) application, the opportunity to explore their fear is lost and the individual basis for seeking protection can be missed.

## **Interviews**

Ensuring women have the possibility of being interviewed separately from their family (both at screening and during any substantive claim) should be prioritised. Some women who have experienced and/or fear gender-based violence may not disclose in front of family members, including small children.

In the context of gender-sensitive procedures it is also important to ensure:

- ▶ the possibility for the applicant to express a preference for the sex of their interviewer and interpreter, and that this preference will be accommodated;
- ▶ respect for confidentiality of the information gathered through interviews;
- ▶ that breaks are given, if needed;
- ▶ that care is taken to avoid secondary victimisation or re-traumatisation of the woman;
- ▶ sufficient time is provided to enable the applicant to build a relationship of trust, allowing her to disclose the full circumstances of her claim. Very often, accelerated procedures are a barrier to disclosure;
- ▶ interviews are gender and culturally-sensitive, led by an interviewer, and assisted by a trained and qualified interpreter, when necessary.

## **Late disclosure of information relevant to the case**

It is common practice for asylum decision-makers and courts to treat facts disclosed at a later stage in the asylum process as less credible. This negatively impacts women who are often initially unable to disclose the nature and/or extent of gender-based harm they have experienced. This could be due to:

- ▶ the intimate nature of many types of gender-based violence against women (rape and sexual assault in particular);
- ▶ fear of the consequences of such a disclosure (e.g. their husband may disown them, it might affect a sister's marriage chances);

- ▶ internalised feelings of shame and stigma;
- ▶ fear of, or treatment by, the interviewing officer particularly where the officer is a member of the security force or police;
- ▶ the effect of post-traumatic stress disorder or other mental health difficulty (see above);
- ▶ being tired or traumatised as a result of the journey, process or difficult and unsafe accommodation and reception conditions.

Once a woman feels safe and/or has built up a relationship of trust with a lawyer, social worker, counsellor, an NGO or other adviser she may feel enabled to disclose. Late disclosure should not automatically be taken as an indicator that the account lacks credibility.

### **Non-suspensive or accelerated procedures**

Because of the complex nature of gender-based claims and difficulties women face in disclosing and properly presenting their claims they are often inherently unsuitable for non-suspensive and accelerated procedures. There is a real danger that women subjected to such procedures will be denied protection. Where indicators of trauma or sexual or gender-based violence are apparent, even if not disclosed directly, women should be removed from non-suspensive and/or accelerated procedures and directed to support services or counselling to ensure that time pressures do not prevent disclosure (for further information see below under *non-refoulement*).

### **Additional gender-sensitive procedures recommended by PACE**

With regard to the overall management of cases of gender-based violence and refugee policies, PACE in its Resolution 2159 (2017) on Protecting refugee women and girls from gender-based violence has recommended that states participate in relocation programmes and fund specific assistance and humanitarian resettlement programmes for women victims of gender-based violence or to support family reunification.

### **Spotlight: *Land* of Baden-Württemberg, Germany**

The Special Quota Project in the *Land* of Baden-Württemberg provides support and assistance to 1,100 refugee women survivors of violence. It was aimed at evacuating women and children who had been in the hands of Daesh, suffered traumatising violence and lost their male relatives to genocide. Many of the women are Yazidi. However, the programme also benefits Christian and Muslim women.

There are 21 cities in the *Land* involved in housing the beneficiaries and providing social work and psychological treatment.<sup>58</sup>

## **Gender guidelines**

Guidelines provide an essential reference point for relevant actors to understand how to adopt a gender-sensitive approach to the protection needs of women and girl asylum seekers who have been or are at risk of gender-based violence either in the host state or if removed.

It is important that the entire asylum process from arrival at a border through to a grant of protection or removal is gender-sensitive. Gender guidelines should cover:

- ▶ gender-sensitive reception procedures;
- ▶ identification of particular vulnerabilities, including victims and those at risk of gender-based violence, for example through health- or other forms of screening;
- ▶ enabling immigration and border officials including reception staff and decision-makers, to recognise trauma and the impact of trauma;
- ▶ safeguarding provisions and signposting for additional support where required;
- ▶ relevant national and international standards for protection of women and girls and determining their claims;

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58. Speech by Dr Michael Blume (Head, Special Quota Project, State Ministry of Baden-Württemberg) at the Citizenship and Immigration Committee, available at <https://open-parliament.ca/committees/immigration/42-1/39/dr-michael-blume-1/only/>.

- ▶ a gender-sensitive analysis of the Geneva Refugee Convention including gender-based forms of persecution, a gender-sensitive interpretation of the grounds of persecution and gender-specific requirements of protection;
- ▶ the interview process and requests for gender-specific interviewers and interpreters and the need for quality interpretation;
- ▶ the impact of gender on the ability to disclose and present a claim;
- ▶ assessing credibility in the claim through a gender lens;
- ▶ enhancing awareness and responsiveness to cultural and religious sensitivities or personal factors;
- ▶ preventing gender-based violence during the asylum process and what to do if such violence occurs.

Guidelines should be accessible to all relevant officials and those officials and interpreters should receive training in gender-sensitive procedures.

#### **Spotlight: United Kingdom**

United Kingdom Visas and Immigration produces guidance for frontline officers and decision-makers covering all aspects of the procedures. This includes a specific set of gender guidelines: 'Gender issues in the asylum claim'<sup>59</sup> – which provides guidance on safeguarding and support, relevant domestic and international legislation and a gendered approach to the Geneva Refugee Convention – and 'Domestic abuse: Responding to reports of domestic abuse from asylum seekers'.<sup>60</sup> Other relevant gender-related issues are incorporated into general policies, e.g. 'Asylum screening and routing'.<sup>61</sup>

59. Available at: <https://www.gov.uk/government/publications/gender-issue-in-the-asylum-claim-process>

60. Available at: <https://www.gov.uk/government/publications/domestic-abuse-responding-to-reports-of-domestic-abuse-from-asylum-seekers>

61. Available at: <https://www.gov.uk/government/publications/asylum-screening-and-routing>

International guidelines produced by the United Nations High Commissioner for Refugees:

- ▶ Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1952 Convention and/or its 1967 Protocol relating to the Status of Refugees HCR/GIP/02/01 UNHCR;
- ▶ Guidelines on International Protection No. 7: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the status of refugees to victims of trafficking and persons at risk of being trafficked. UNHCR HCR/GIP/06/07;
- ▶ Guidelines on International Protection No. 9: Claims to refugee status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1952 Convention and/or its 1967 Protocol relating to the Status of Refugees, UNHCR HCR/GIP/12/09.

## IV. Article 61: *Non-refoulement*

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*'...the idea of listening to and understanding personal stories, then deciding on them – that's non refoulement in a nutshell!'*  
Ledi Bianku, Judge of the European Court of Human Rights<sup>62</sup>

### ARTICLE 61

1. Parties shall take the necessary legislative or other measures to respect the principle of non-refoulement in accordance with existing obligations under international law.

2. Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

### What is the principle of *non-refoulement*?

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It is a fundamental principle of human rights law that a state is required to recognise, **secure and protect** the human rights of everyone present within their jurisdiction.<sup>63</sup> The principle of *non-refoulement* prohibits states from transferring anyone to a country or territory where she or he faces a real

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62. 'Non-refoulement as a principle of international law and the role of the judiciary in its implementation', Dialogue between judges 2017, p. 21, available at: [https://www.echr.coe.int/Documents/Dialogue\\_2017\\_ENG.pdf](https://www.echr.coe.int/Documents/Dialogue_2017_ENG.pdf).

63. ECHR article 1: The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention, available at: [https://www.echr.coe.int/Documents/Convention\\_ENG.pdf](https://www.echr.coe.int/Documents/Convention_ENG.pdf).

risk of persecution or a serious violation of human rights. It has its origins in international refugee law<sup>64</sup> and international regulations on extradition.<sup>65</sup>

Where the human rights violation which may follow removal or expulsion from a territory is in breach of an absolute right, for example the right to life, the right to freedom from torture, inhuman and/or degrading treatment or punishment or freedom from slavery, the principle of *non-refoulement* is absolute and not subject to any exceptions whether in law or practice.<sup>66</sup>

Under international law **flagrant breaches** of other non-absolute rights such as freedom from arbitrary detention (Article 5 of the ECHR) and the right to a fair trial (Article 6 of the ECHR) may engage the principle of *non-refoulement* depending on the level of seriousness.

### Direct or Indirect

*Refoulement* can be direct to the country of origin or indirect if a woman is removed to a third country which then removes her to the place of harm.<sup>67</sup> For women this may well arise in respect of safe third country procedures if the woman risks being removed to a place where she will be unable to access safe accommodation, will experience homelessness or lack protection from sexual assaults in asylum accommodation or reception centres or camps.<sup>68</sup> There is a heightened risk of *refoulement* arising in accelerated and non-suspensive procedures. Where a state proposed to return an applicant to a 'safe' country, the Court has affirmed that the responsibility lies with the sending state to assess the risks the applicant faces in the receiving state of onward *refoulement*,

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64. Article 33 Geneva Refugee Convention.

65. Article 3, UN Model Treaty on Extradition 14 December 1990 adopted by General Assembly Resolution 45/116, amended by General Assembly Resolution 52/88, available at [https://www.unodc.org/pdf/model\\_treaty\\_extradition.pdf](https://www.unodc.org/pdf/model_treaty_extradition.pdf), European Convention on the Suppression of Terrorism (adopted 27 January 1977).

66. *Saadi v Italy*, Application No. 37201/06, see paras 125- 127, available at: [https://hudoc.echr.coe.int/eng#{%22itemid%22:\[%22001-85276%22\]}](https://hudoc.echr.coe.int/eng#{%22itemid%22:[%22001-85276%22]}).

67. See *TI v United Kingdom*, Application No. 43844/98, 7 March 2000.

68. See e.g. *MSS v Belgium and Greece* (2011), available at: <http://hudoc.echr.coe.int/eng?i=001-103050>, *Tarakhel v Switzerland* (2014) available at: <http://hudoc.echr.coe.int/eng?i=001-148070>.

deficiencies in the asylum process and denial of access to an effective asylum procedure (see *Ilias v. Hungary* (2019)).<sup>69</sup>

## **When might *non-refoulement* obligations be engaged for women?**

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Unlike the Geneva Refugee Convention,<sup>70</sup> *non-refoulement* under the ECHR and the Istanbul Convention applies to all expulsions regardless of considerations of national security (e.g. *Chahal v. UK* (1996))<sup>71</sup> or other strong public interests. The risk of *refoulement* may arise for women in the following types of cases:

- ▶ where they cannot show a refugee 'convention ground' for the harm feared;
- ▶ where they are a refugee but are excluded from protection of the Geneva Refugee Convention pursuant to Article 1F (war criminals, persons having committed a serious non-political crime outside the country of origin prior to admission as a refugee, or persons guilty of acts contrary to the nature and purpose of the United Nations);
- ▶ Where they are a refugee lawfully on the territory but threatened with expulsion on grounds of national security or public order (Article 32 of the Geneva Refugee Convention);
- ▶ where they are a refugee lawfully or unlawfully on the territory but not protected from *refoulement* owing to Article 33 of the Geneva Refugee Convention (if they are a danger to the security of the country in which they are, or have been convicted of a particularly serious crime and constitute a danger to the community of that country);
- ▶ where they are denied fair access to refugee determination procedures and, in particular, if there are significant procedural deficiencies in the process;

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69. See *Ilias and Ahmed v Hungary*, Application no. 47287/15, available at: <http://hudoc.echr.coe.int/eng?i=001-198760>

70. See e.g. *Sidikovy v Russia*, Application No. 73455/11, Judgment of 20 June 2013 paragraph 149 'the protection afforded by Article 3 of the convention is in any event broader than that provided for in articles 32 and 33 of the 1951 United Nations Convention relating to the status of Refugees.'

71. *Chahal v United Kingdom*, Application No. 22414/93, available at: <https://hudoc.echr.coe.int/eng#%7B%22itemid%22:%5B%22001-58004%22%5D%7D>

- (occasionally) in situations of mass influx.

EU Council Directive 2001/55/EC of 20 July 2001 *on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof* sets out what EU member states are required to do in cases of mass influx.

In *N v. Sweden*,<sup>72</sup> the Court held that expulsion of an Afghan woman to that country would violate the principles of *non-refoulement* and Article 3 of the ECHR on grounds that:

“Women are at particular risk of ill-treatment in Afghanistan if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system. The UNHCR thus observed that Afghan women who have adopted a less culturally conservative lifestyle, such as those returning from exile in Iran or Europe, continue to be perceived as transgressing entrenched social and religious norms and may, as a result, be subjected to domestic violence and other forms of punishment ranging from isolation and stigmatisation to honour crimes for those accused of bringing shame to their families, communities or tribes. Actual or perceived transgressions of the social behavioural code include not only social behaviour in the context of a family or a community, but also sexual orientation, the pursuit of a professional career, and mere disagreements as to the way family life is conducted.”

The Court considered that the fact of having lived for almost six years in Sweden, added to the fact that she had tried to divorce her husband, would expose her to “various cumulative risks of reprisal, which fall under Article 3 of the Convention, from her husband, his family, her own family and from Afghan society”.

## Removals to ‘safe’ third countries

A state may be able to remove an asylum seeker to a third country without determining her asylum claim if there is a safe third country responsible for

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72. *N v. Sweden*, Application No. 23505/09, judgment of 20 July 2010, available at: [https://hudoc.echr.coe.int/eng#{“itemid”: \[“001-99992”\]}](https://hudoc.echr.coe.int/eng#{“itemid”: [“001-99992”]})

that claim. Where the states are both EU states, 'transfer' is arranged under the Dublin Regulation<sup>73</sup> where the receiving state is either already responsible for the claim or it should accept responsibility under the 'hierarchy criteria'. These criteria include broad humanitarian aims and also try to ensure the right to family life is protected and to reunite children with family where appropriate. Where one or both states are not part of the EU, arrangements may be made where the third country is considered 'safe'.

In all cases, a state is required to consider whether this creates a risk of direct or indirect *refoulement* in breach of Article 61 of the Istanbul Convention. This may be particularly important in the following types of cases presented by women:

- ▶ where they have fled a violent husband, partner, or other family member present and/or seeking asylum in the state to which they are to be returned;
- ▶ where they are part of a family unit and currently experiencing domestic violence and it is proposed to transfer the whole family unit;
- ▶ where they have victims of violence in the sending state;
- ▶ where deficiencies in the asylum process and denial of access to an effective asylum procedure generally or on a gender-specific basis create a risk of harm in the receiving state or indirect *refoulement*.

States within the EU should also be aware of and apply the Protection Directive,<sup>74</sup> which sets out rules enabling protection measures already taken (such as a barring order or emergency protection order) to continue across states and the Victims' rights directive.<sup>75</sup>

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73. Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast).

74. Directive 2011/99/EU of the European Parliament and of the Council of 13 December 2011 on the European Protection Order.

75. Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime and replacing the Council Framework Decision 2001/20/JHA.

## V. Conclusion

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Implementing Articles 60 and 61 of the Istanbul Convention against the framework of the provisions of the convention as a whole should strengthen existing international protection frameworks available to asylum-seeking and migrant women. The details provided in it and in its Explanatory Report are fundamental to understanding the nature and effect of gender-based violence against women and domestic violence wherever it occurs. The Istanbul Convention also defines what is required to prevent and protect against gender-based violence against women and the additional support needs that should be in place to enable women to have access to available protection.

By requiring states parties to ensure gender-based violence may be recognised as a form of persecution and ensure that the grounds for asylum listed in the Geneva Refugee Convention are interpreted in a gender-sensitive manner, the forms of harm experienced by women and the reasons for the feared harm are more likely to be both identified and recognised as grounds for protection.

Ensuring gender-sensitive reception procedures, guidelines and support services should reduce the risk of women experiencing further gender-based harm whilst in the asylum and immigration systems and enable them to disclose relevant information during the process, so as to guarantee that their claims are heard and properly determined. Taken as a whole, these provisions of the Istanbul Convention can significantly enhance women's ability to have their claims for protection recognised in a process that does as little secondary harm as possible.

## VI. Checklist

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The following checklist can be of help in designing and implementing measures in law, policy and practice to implement Articles 60 and 61 of the Istanbul Convention:

- ☐ ensure gender-based violence is recognised as a form of persecution within the meaning of Article 1A(2) of the 1951 Convention relating to the Status of Refugees;
- ☐ ensure the forms of violence against women identified at Articles 33-40 of the Istanbul Convention are recognised as gender-based harm capable of amounting to persecution;
- ☐ ensure discrimination on the grounds of sex and/or gender including stigma, shame and ostracism as a result of gender-based violence is recognised as a form of harm capable of amounting to persecution;
- ☐ ensure the law allows decision-makers to recognise that where the penalty or punishment for non-compliance with or breach of a policy or law in the country of origin is disproportionately severe and has a gender dimension it would amount to persecution;
- ☐ ensure the consideration of available protection in the country of origin takes into account the gender dimensions of access to justice, including both the legal framework and the practical ability of women to access any protection available;
- ☐ provide access to relevant country-of-origin information to enable decision-makers to determine the likelihood of harm occurring and whether effective protection is available or, if it is not, whether there is an internal relocation alternative in the country of origin;
- ☐ ensure that consideration is given to the applicant's own personal circumstances, the support services available in the country of origin and her ability to access them in practice;

- ❑ ensure that any consideration of the legal issues in the asylum claim properly takes into account any discrimination and patriarchal attitudes women are likely to encounter.

*Gender-sensitive interpretation given to Geneva Refugee Convention grounds:*

- ❑ ensure a gendered understanding is given to each of the Geneva Refugee Convention 'grounds' for asylum and is explained in guidance;
- ❑ in particular, ensure gender is recognised as a basis for the existence of a particular social group.

*With regard to women's safety in transit and reception facilities:*

- ❑ ensure there are sufficient and adequate reception and screening arrangements designed to take into account the gender aspects of women's claims and needs throughout the process;
- ❑ ensure reception and accommodation centres are located in areas where women are safe and can access relevant services including health, social and legal assistance, schools and shopping facilities;
- ❑ take into account any relevant special needs when determining the placement of an applicant and any of her relevant family members. For example, consider any relevant mobility or access needs and mental and physical health provision;
- ❑ ensure the possibility of alternative housing, if necessary, owing to safety considerations for victims of sexual and gender-based violence, domestic violence, human trafficking, torture or other forms of physical and psychological violence;
- ❑ ensure the presence of female social workers, interpreters, police officers and guards in these facilities;
- ❑ provide separate sleeping areas for single women with or without children (up to age 18), and separate, well-lit bathrooms for women;
- ❑ create safe spaces in every transit and reception facility;
- ❑ when needed, ensure access for refugee and asylum-seeking women to shelters for women victims of gender-based violence;
- ❑ organise training programmes on identifying and assisting victims of gender-based violence for social workers, police officers and guards working in the facilities;

- ❑ provide information material in languages of the countries of origin on assistance services for victims of gender-based violence, including on reporting and complaint mechanisms;
- ❑ in accordance with the United Nations High Commissioner for Refugees' Comprehensive Protection Framework on Access to Justice for Sexual and Gender-Based Violence Victims and Survivors, provide for regular visits by mobile courts or court officers and lawyers to these facilities and document such visits, in order to ensure that sexual assaults are investigated and prosecuted;
- ❑ provide counselling, psychological support and health care, including sexual and reproductive health care and specific post-rape care in these facilities, for those who have experienced gender-based violence in their countries of origin, in transit or in destination countries;
- ❑ ensure the same access to affordable and adequate health services for all women and girls as for the general population, regardless of whether they are defined as migrants, immigrants, refugees or asylum seekers;
- ❑ ensure that girls are free to decide for themselves, that their voluntary and informed consent is always obtained, and that they do not require authorisation from a spouse, parent or guardian or hospital authority to access sexual and reproductive health services.

*With regard to asylum procedures:*

- ❑ ensure women can access asylum procedures at the borders and elsewhere;
- ❑ ensure asylum laws, practices and procedures are sufficiently gender-sensitive to enable women to present their claims for asylum and to have them properly determined to avoid the risk of *refoulement*;
- ❑ implement gender-sensitive asylum procedures by ensuring the presence of female asylum officers and trained, competent interpreters, is offered to the applicant and provided at her request; provide the opportunity to have separate interviews for women and men from the same family and guarantee the confidentiality of these interviews;
- ❑ ensure that asylum officers and interpreters receive training on how to detect cases of gender-based violence and use gender-specific

information about countries of origin, including the prevalence rate of female genital mutilation and forced marriage;

- ❑ ensure decision-makers are given proper and adequate guidance and training on how to recognise and understand gender-based violence against women within the framework of the Geneva Refugee Convention.

*With regard to the overall management of cases of gender-based violence and refugee policies:*

- ❑ participate in resettlement and relocation programmes, which represent the safest way for asylum seekers and refugees to come to Europe, and implement new, safe legal pathways to ensure safer transit for women and girls;
- ❑ fund specific assistance and humanitarian resettlement programmes for women victims of gender-based violence, on the model of the Special Quota Project of the *Land* of Baden-Württemberg in Germany;
- ❑ set up cross-border protection mechanisms for victims of gender-based violence;
- ❑ ensure the respect for standards of protection for victims of violence by private service-providers contracted to deliver services and accommodation to asylum seekers, by putting in place a monitoring mechanism which includes regular visits by migration officials;
- ❑ invest in social and economic integration programmes specifically targeting women refugees, in particular by providing language courses, facilitating the recognition of diplomas and access to employment, and providing education in respect of gender equality.

*With regard to combating discrimination against refugees and asylum seekers, including women:*

- ❑ launch awareness-raising campaigns on the positive contribution of refugees and asylum seekers to society;
- ❑ strongly condemn and punish any form of discrimination and violence against refugees and asylum seekers, including women.

*Non refoulement:*

- ❑ ensure women are adequately protected against *refoulement*;
- ❑ recognising the particular difficulties victims of gender-based violence face in fully disclosing their claim, ensure a gender-sensitive process that enables women to access procedures and properly present their claims;
- ❑ ensure accelerated and non-suspensive procedures do not result in women being unable to put forward their claims for protection resulting in *refoulement*;
- ❑ ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

## VII. Key Resources

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Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe to member states on the protection of women against violence (2002), available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016805e2612>

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Council of Europe publications addressing the Istanbul Convention and the topic of preventing violence against women can be found at: [www.coe.int/en/web/istanbul-convention/publications](http://www.coe.int/en/web/istanbul-convention/publications)

Council of Europe publications addressing migrant and refugee women and girls can be found at: [www.coe.int/en/web/genderequality/migrant-and-refugee-women-and-girls](http://www.coe.int/en/web/genderequality/migrant-and-refugee-women-and-girls)

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## ARTICLE 60 – Gender-based asylum claims

1. Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection.

2. Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.

3. Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.

## ARTICLE 61 – *Non-refoulement*

1. Parties shall take the necessary legislative or other measures to respect the principle of non-refoulement in accordance with existing obligations under international law.

2. Parties shall take the necessary legislative or other measures to ensure that victims of violence against women who are in need of protection, regardless of their status or residence, shall not be returned under any circumstances to any country where their life would be at risk or where they might be subjected to torture or inhuman or degrading treatment or punishment.

ENG

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The Council of Europe is the continent's leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

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