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**CONFLICT OF DISCRIMINATION LAW AND INTERNATIONAL  
REFUGEE LAW FROM THE PERSPECTIVE OF REFUGEE  
WOMEN**

Bachelor's Thesis

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## **Abstract**

Today's world is still associated to be masculine and ruled by the insight of men. Women all over the world are somewhat subordinated, so how things are when refugee status steps in? This research aims at revealing, whether the direct or indirect, discrimination towards refugee women. The forms of discrimination are most likely gender-related or hidden in structures of the masculine society.

By using qualitative research method based on primary and secondary sources, and strictly following the requirements for Bachelor Thesis at Tallinn University of Technology School of Business and Governance I have examined more precisely the forms of discrimination encountered by refugee women and provided legal solutions for preventing and decreasing it.

The problem derives from the Convention Relating to the Status of Refugees (1951) which did not include gender or sex in its non-discrimination article. Instead, women have been classified under a certain social group, which do not provide a sufficient protection. To fix the situation, states should emphasize several legal tools, i.e. Convention on the Elimination of All Forms of Discrimination Against Women and give them more appreciated position as a human right tool in their legislation.

Keywords: refugee women, gender-related violence, gender-related discrimination

## **Table of Abbreviations**

CEDAW	the Convention on the Elimination of All Forms of Discrimination Against Women
FGM	Female genital mutilation
ICCPR	International Covenant on Civil and Political Rights
NGO	Non-Governmental Organization
TFEU	Treaty on the Functioning of European Union
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

# Introduction

Non-discrimination and equal treatment are the main factors which different national and international bodies would like to follow, but somehow it has shrink to be just “a source of extant legal obligation.”<sup>1</sup> However, I believe that the situation differs when it relates to women and can change even radically. How can a refugee woman be positioned in the field of discrimination and equal treatment when the factor “gender” is not even mentioned in the Refugee Convention, then? This is the issue I would like to examine more carefully.

Even the previous history has shown that the status of women has always been lower than men’s. Women must have been fought for their rights and benefits to attain some respect and the status women hold today. Refugee women have faced many problems and perhaps the biggest of them is gender-based violence, for instance sexual violence, more specifically, rape and coerced sex.<sup>2</sup>

The Refugee Convention lays down the general requirements for judicial protection and treatment of refugees. The convention prohibits the discrimination based on race, religion, nationality, political opinion or membership in a particular social group.<sup>3</sup> Where is gender or sex? However, some provisions are promoting the status of women refugees, i.e. women must achieve the same treatment as the nationals in the field of work. Refugee woman must also have the same possibilities to take care of her children, thus maternity is well protected under the social security area.<sup>4</sup> Finally, there must be some safeguards for the future to provide continuing improvements and guarantee the physical and mental welfare of refugee woman and their families.<sup>5</sup>

The position of women is always a universal and timeless issue, especially within the refugee women and this is where the justification and the relevance of this topic arises. The feminism point of view offers tools for different consideration and helps to understand migration crisis even more deeply. Focusing on discrimination and the treatment of refugee women gives us a new insight of reality,

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<sup>1</sup> Pobjoy, J. M. (2010). *Treating Like Alike: The Principle of Non-Discrimination as a Tool to Mandate the Equal Treatment of Refugees and Beneficiaries of Complementary Protection*. p. 184

<sup>2</sup> Hynes, M., & Cardozo, B. L. (2000). Observations from the CDC: Sexual violence against refugee women. *Journal of women's health & gender-based medicine*, 9(8), p. 819

<sup>3</sup> United Nations High Commission for Refugees (UNHCR), Convention and Protocol Relating to the Status of Refugees

<sup>4</sup> Ibid. art. 24

<sup>5</sup> United Nations High Commissioner for Refugees (UNHCR), UNHCR Handbook for the Protection of Women and Girls, January 2008.

which is the reason why these two areas, discrimination and the position of refugee women, have been combined.

This research mainly focuses on discrimination women refugees encounter. The Refugee Convention does not treat refugees based on the gender, so it is interesting, for instance, why differences between the treatment of men and women refugees still exist. Research aims to reveal the hidden or unequal ways to discriminate, whether direct or undirect, and what might be the underlying reasons for this. It is also important to find relevant methods to prevent the discrimination.

The research problem arises from the current situation of the world and from the continuously increasing immigration rates. As a result, different cultures are crashing which might lead to different forms of discrimination. Discrimination might differ based on the subject and one of the core areas on this matter focuses on discrimination problems which are encountered by refugee women. Unfortunately, the legislation today prohibits all kind of discrimination but is powerless to totally discontinue it.<sup>6</sup>

The research question is positioned as: “are the minimum requirements of treating a refugee woman laid down in Refugee Law fulfilled? If not, what kind of legal methods there are to prevent discrimination towards refugee women?” I have used qualitative research to explain how the discrimination towards refugee women occurs and why has it happened. Primary sources include mostly legislations and other official documents. Secondary sources include several books, articles, legal journals from several authors. All the material has processed through a legal analysis which has a big role to analyzing all the material to form a coherent and sensible entity. The outcome should be executed according to the Academic Requirements and Guidelines provided by Tallinn University of Technology. Hypothesis of this research is that refugee women encounter discrimination. Also, there are many hidden structures in the legislation, and thus in general attitudes too, which have caused the unequal positions, and which makes refugee women encounter sexual and gender-related violence.

Thesis is consisted of three parts, which all are focused on their own areas of matter. First part focuses on legal aspect of a refugee woman by analyzing all the relevant judicial collections made for this purpose. The second part points out the discriminative aspects of legislation relating to the refugees through a GENSEN report and other discriminative acts. The third, and the last part, introduces the possible improvements and solutions which may be useful when turning down the discrimination, especially focusing on the areas important to women refugees.

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<sup>6</sup> Fitzpatrick, J. (1996). Revitalizing the 1951 Refugee Convention. *Harv. Hum. Rts. J.*, 9, p. 230

# **1. A refugee woman in the context of legislation**

The main problem where the legislatively underestimated position of all women derives is that states do not fully recognize women's equal rights as human rights. Even if human rights are said to be a basis for all actions, the truth is that no state is actually considering the treatment of women in its interaction with other countries.<sup>7</sup> However, sometimes it would be a better option for refugee women to rely on international human rights, instead of specific The Refugee Convention.<sup>8</sup> Under international human rights protection is given to those who have suffered from human rights breaches.<sup>9</sup> Percentage of refugees is the highest among women and children,<sup>10</sup> therefore conventions and declarations have laid down the general conditions that have effects on the position of a refugee woman in the context of legislation, such as The UN Declaration and Protocol relating to the Status of Refugees (1951), The Universal Declaration of Human rights (1948) and The Declaration on the Elimination of Discrimination Against Women (1967).

## **1.1. The UN Convention relating to the Status of Refugees 1951**

Article 1 (a) (2) of Convention relating to the status of Refugees has defined the term “refugee”, in a following way:

“As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual

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<sup>7</sup> Peters, J., & Wolper, A. (Eds.). (1995). *Women's rights, human rights: International feminist perspectives*. Psychology Press. p. 12

<sup>8</sup> Hathaway, J. C. (2005). *The rights of refugees under international law*. Cambridge University Press.

<sup>9</sup> Anker, D. E. (2002). Refugee Law, Gender, and the Human Rights Paradigm. *Harvard Human Rights Journal* 15, 133-154

<sup>10</sup> Haddad, E. (2008). *The refugee in international society: between sovereigns* (Vol. 106). Cambridge University Press. p. 43

residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.”<sup>11</sup>

The Refugee Convention is focused on the status of refugees but does not mention gender nor sex. When lacking the terms “gender” and “sex” in the original Refugee Convention women have usually been classified under the term “social group”.<sup>12</sup> Paragraph 78 of the UNHCR Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status puts some emphasis on characteristics of the group and its individuals by stating:

“Membership of a particular social group may be at the root of persecution because there is no confidence in the group’s loyalty to the government or because the political outlook, antecedents or some economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government’s policies.”<sup>13</sup>

This is what I find very problematic. Being part of a social group can be a sufficient claim for a refugee status only in special circumstances, therefore, how it ever can provide a sufficient protection in this matter? How can women ever achieve a sufficient legal protection under a term “social group” if, for instance, “there is no confidence in the group’s loyalty to the government” or “the existence of the social group is an obstacle to the Government’s policies” are definitions or reasons for persecution? When combining “the social group” and women’s legal rights in the light of UNHCR Handbook, there is nothing which flows with the legal status or human rights of women. Secondly, when speaking of persecution in cases of woman refugees, it is more often gender-related and different from persecution encountered by men refugees. The persecution in this context does not fully recognize the certain type of persecution which forms the biggest problems for women refugees and thus women fall out of this definition. Therefore, gender is strongly needed to take in the account in refugee law and “social group” gives a total wrong perspective for this and women are not provided enough protection under “a social group”.

However, after the publication of the Refugee Convention, during the 1980s, the lack of words “gender” and “sex” in the Refugee Convention were acknowledged and it was demanded to be one of the protective grounds. This lead to three different publications which were made in the purpose of improve the legal status of refugee women: UNHCR’s Guidelines on the Protection of Refugee

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<sup>11</sup> United Nations High Commissioner for Refugees (UNHCR), Convention Relating to the Status of Refugees, 28.07.1951, art. 1(2)

<sup>12</sup> Goodwin-Gill, G. S., & McAdam, J. (2007). *The refugee in international law*. Oxford University Press.

<sup>13</sup> United Nation High Commissioner for Refugees (UNHCR), Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status, 22.9.2009, art. 78

Women (1991) and the Gender Guidelines (2002).<sup>14</sup> Nevertheless, there has been several publications and recommendations from the UN, UNHCR, the Council of Europe, stating the fact that gender may be a crucial factor when assessing asylum claims. However, gender is still not recognized in some EU member states as a sufficient claim for asylum.<sup>15</sup>

Today, the Refugee Convention is considered to be outdated and there has been discussion of its relevancy. Women are first ones to suffer from the old-fashioned way of thinking in this Convention and it should be amended radically to make it fit for today's needs. Researches have criticized the Refugee Convention stating that, for instance<sup>16</sup> (Millbank, 2000):

- it confers no right of assistance on refugees unless they reach a signatory country,
- the asylum channel is providing an avenue for irregular migration and is linked with people smuggling and criminality,
- priority is given to those present, on the basis of their mobility, rather than to those with the greatest need in the refugee camps
- there is a disparity between what Western countries spend on processing and supporting asylum seekers and what they contribute to the UNHCR for the world refugee effort
- and, finally, it was not designed for today's amount of refugee outflows.

The criticism stated above is affecting to women specifically. However, usually women have no equal possibilities compared to men to start their journey. Instead, they stay on refugee camps taking care of the children while men are reaching the new country. Therefore, the Refugee Convention does not take care of women in the camps, even tough, they form the biggest part together with the children, of the population in those camps. The incapability of the Refugee Convention due to the mass amounts of refugees today is tackling refugee women first. These defects are enlarging the gap between the treatment of men and women refugees. The discrimination against women is thus indirect and it is hidden in the structure of the legislation. Indirect discrimination is more difficult to prevent and therefore the minimum requirements of treating a refugee are not fulfilled when speaking of women.

However, nearly 70 years later the Refugee Convention is the only instrument giving frames for the protection of refugees and still, it is not adequate for the situation today. The difficulties refugee

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<sup>14</sup> Arbel, E., Dauvergne, C., & Millbank, J. (Eds.). (2014). *Gender in Refugee Law: From the Margins to the Centre*. Routledge, p. 2-4

<sup>15</sup> European Commission, The GENSEN report – *Gender related asylum claims in Europe; Comparative analysis of law, policies and practice focusing on women in nine EU Member States*, 2012 p. 20

<sup>16</sup> Millbank, A. (2000). *The problem with the 1951 Refugee Convention*. Information and Research Services, Department of the Parliamentary Library.

women encounter are usually gender-related, therefore The Refugee Convention is not providing the correct legal protection to fight against these problems. Basically, this means the discrimination and persecution women have encountered are not criminalized under this instrument. Legally this is problematic. The backwardness is also one of the factors which is complicating women to achieve the discriminate-free position in the context of a legislation.<sup>17</sup>

## 1.2. UNHCR Policy on Refugee Women and Guidelines on Their Protection

A debate raised whether it is relevant to distinguish male and female refugees from each other in the international treaties and conventions, which will give the frames for the governments to regulate the upcoming gender-acknowledged refugee laws.<sup>18</sup>

UNHCR's Guidelines on The Protection of Refugee Women are focusing on refugee women's legal and physical needs of protection. This has been a relevant document for providing tools for the most important issues, for instance, gender-based violence, which is certain form of a discrimination. United Nation's Universal Declaration of Human Rights (UDHR) is a strong supportive tool by stating that: "Everyone has the right to seek and enjoy in other countries asylum for persecution."<sup>19</sup> Together with the Guidelines, UDHR condemns persecution and lifts persecution to be one of the relevant issues which should be sufficient reason for a state to provide protection.<sup>20</sup>

Human rights must be fulfilled in every situation, as discriminative treatment too. This might be forgotten in extremely utmost situations, i.e. in an armed conflict with another state. During a war women and children are in danger as civilians and therefore they need special protection. UNHCR has created the Declaration on the Protection of Women and Children in Emergency and Armed Conflict to increase the inhuman treatment and help them to fight for their self-determination and independence.<sup>21</sup> This declaration is supported by the Geneva Convention IV, which protects the civilians of war and gives special protection for, i.e. expectant mothers.<sup>22</sup> These documents are vital

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<sup>17</sup> United Nations High Commissioner for Refugees Executive Committee (UNHCR), Refugee Women and International Protection No. 64 (XLI), 5.10.1990

<sup>18</sup> Islam, M. R., & Bhuiyan, M. J. H. (Eds.). (2013). *An Introduction to International Refugee Law*. Martinus Nijhoff Publishers., p. 379-386

<sup>19</sup> United Nation (UN), The Universal Declaration of Human Rights (UDHR), 10.12.1948, art. 14 (1)

<sup>20</sup> European Commission – The GENSEN Report; *Gender-related asylum claims in Europe; Comparative analysis of law, policies and practices focusing on women in nine EU Member States*, 2012

<sup>21</sup> United Nations High Commission for Refugees UNHCR), *Declaration on the Protection of Women and Children in Emergency and Armed Conflict*, 14.12.1974

<sup>22</sup> United Nation, *Geneva Convention IV Relative to the protection of civilian persons in time of war*, 12.8.1949

for bringing the equality of women and men refugees closer to each other and treatment against women could and should be improved.

Despite the positive outcome the Guidelines managed to achieve, the implementation has been somewhat defective. Also, staff have not been trained from the gender perspective even if it is mandatory and agencies have decided not to follow this, which impedes the implementation. Naturally, lack of resources weakens the achievement of any goal. However, this is a serious barrier to implementation of the Guidelines.<sup>23</sup>

The discrimination towards women has been the triggering factor for new legislation, which main point is to bring equality. Drastically saying, the Refugee Convention has provided one sort of a basis for discriminative and unequal treatment, which was not intervened until the maltreatment had already happened. Despite of the protective legal tools made in purpose of improve women's status whether in armed conflicts or not, the poor implementation of the Policy on Refugee Women and Guidelines on Their Protection increases the Protocol's credibility as seriously bounding legislation, and therefore, any efforts to decrease the indirect discrimination towards women are powerless.<sup>24</sup>

### **1.3. The Convention on the Elimination of All Forms of Discrimination Against Women**

The Convention on The Elimination of All Forms of Discrimination Against Women (CEDAW) aims to the equality and equal rights between men and women and to promote these rights. Discrimination sets barriers against women in political, economic and cultural areas of life and thus women are being hindered to use their full potential in life. CEDAW puts governments under an obligation to establish adequate legal protection for equal rights of men and women. CEDAW has included provisions concerning on women's political and public life, nationality, right to equal education and right to equal work remunerations just to mention few.<sup>25</sup>

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<sup>23</sup> United Nations High Commissioner for Refugees(UNHCR), *Policy on Refugee Women and Guidelines on their protection: An assessment of ten years of implementation*, 2002

<sup>24</sup> United Nations High Commissioner for Refugees (UNHCR), Information Note on UNHCR's Guidelines on the Protection of Refugee Women, EC/SCP/67, 22.7.1991

<sup>25</sup> United Nations General Assembly, *Declaration on the Elimination of Discrimination against Women*, Resolution 2263 (XXII), 1967

However, there has been some criticism concerning on the implementation of the CEDAW as well. For some reason, the planning of the implementation of the CEDAW has been somewhat insufficient. There are no examples of countries which have created a comprehensive plan to implement the CEDAW into municipal level, which causes the CEDAW is not directly applicable. In some countries CEDAW has been cited in the courts but it has nevertheless been enough to transform the obligations under CEDAW into a legal norm. Therefore, a law reform has not happened. Convention has not reached a normative form that could improve the status of women. It is uncertain whether CEDAW is used as a specific framework or a basis for plans or acts on a national level to execute the improvements planned. Technical issues have also weakened the proper implementation of CEDAW. Enough data has not been collected to monitor the implementation and sufficient indicators have not been born. Another problem derives from the underestimated position CEDAW holds as a human rights instrument. Due to the programmatic nature it has, some states have reported of difficulties in implementing the Convention. However, CEDAW have provided common strategy to help states to implement convention properly and thus fulfil *de jure* and *de facto* rights required.<sup>26</sup>

All in all, CEDAW should be used and implemented at domestic level and this process needs improvement. CEDAW provisions must become directly applicable and thus achieving a normative position is a key factor for this purpose. Law reforming is required to achieve equality and non-discrimination inside the society's structure.<sup>27</sup>

It is vital for refugee women to get rid of the structural, whether direct or indirect, discrimination. Their adjustment in the new society greatly depends on their possibilities to participate in everyday life. It was recognized in the CEDAW that discrimination between genders still exists which proves the fact that despite the goals CEDAW has set, they have not been reached yet. CEDAW should be more emphasized and national courts should rely on CEDAW much more and give it its normative power. CEDAW cannot work properly without the support of courts and therefore women's rights are not fulfilled in practice. By giving CEDAW the normative status it already should hold, more verdicts could be made to improve the rights of refugee women. Also, lack of proper implementation weakens the function of CEDAW and creates a circle which is difficult to break. Courts cannot rely on the provisions of CEDAW due to this un-sufficient implementation and therefore no directly binding provisions could be regulated by governments if the courts are incapable of using them.

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<sup>26</sup> Dairiam, S. (2004). *CEDAW: Achievements and Challenges*, New Gender Mainstreaming Series on Development Issues

<sup>27</sup> Ibid.

## **2. Discrimination in the Context of International Refugee Law**

Equality and non-discrimination together are forming the core of the human rights. However, their realization in practice are somewhat unclear and endeavor to classify people sometimes leads to inequality.<sup>28</sup> It is problematic that member states do not fully recognize the gender-based harms. There are tens of thousands of women who seek asylum based on these non-recognized gender-based harms, such as female genital mutilation (FGM). Despite of all the convention that has been made to improve women's equal rights on a general level, and thus specifically refugee women's rights as well, some states do not find FGM, among other similar factors, to be a sufficient condition to grant an asylum. However, regulating the immigration based on persecution and immigration together is not easy.<sup>29</sup> On the top of this, the gender perspective is rather falling under the membership of certain social group, as mentioned in the Refugee Convention, than being processed under the Convention in its entity. This reflects a certain attitude, and according to this, the gender-based human rights violations cannot be regarded as a persecution. It also diminishes to the interpretation of the Refugee Convention on the grounds of the gender-based perspective.<sup>30</sup>

### **2.1. The GENSEN report**

The gender-related asylum claims, so-called the GENSEN Report is the broadest report published by European Parliament in 2012. It has focused on nine countries in Europe and the information has been collected based on 60 interviews with women asylum seekers from 27 different countries.

The GENSEN report has been the crucial report which has officially proved that there is a gap of consistency between theory and legal practice on gender-related claims concerning women in Europe. One of the findings were related to the ways of examining the gender-related asylum claims and the result was those ways are differing remarkably between different member states in Europe. There is a clear lack of proper implementation of gender-sensitive policies and women are often

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<sup>28</sup> Moeckli, D. (2008). *Human Rights and Non-discrimination in the 'War on Terror'*. Oxford University Press on Demand. p. 58

<sup>29</sup> Hurwitz A., The Collective Responsibility of States to Protect Refugees. Oxford: Oxford Monographs in International Law, 2009. p. 211

<sup>30</sup> Arbel, E., Dauvergne, C., & Millbank, J. (Eds.). (2014). *Gender in Refugee Law: From the Margins to the Centre*. Routledge p. 180

victims of a standards of legislation which they are incompetent to fulfill for one reason or another. It is sometimes difficult for officials or decision-makers to add the gender-related perspective in their everyday work of interpretation of the UNHCR's Refugee Convention. The other distressing notion which has been made is that those decision-makers are incapable of combining the gender perspective with other usual legislation, such as protection or defining the frames of persecution.<sup>31</sup>

The Qualification Directive (2011/95/EU) has laid down grounds which defines the requirements for refugee status together with the Geneva Convention and the Protocol. The directive aims in common criteria for the recognition of person who can be granted an asylum or the refugee status. The criteria should be in line with international human rights treaties and should be applicable at any time.<sup>32</sup> Also, this directive has been significant to increase the communication between EU judges and thus made the refugee's asylum process more effortless.<sup>33</sup> The GENSEN Report proved that no common criteria exist and the practices among EU member states have strongly varied. This makes the neutral and equal assessment of the asylum claim of refugee women more complicated and puts them into an unequal position. Some women might be granted asylum while others not. Discrimination towards these women is thus unnoticed and they do not achieve the protection they are seeking.

Convention on Preventing and Combating Violence against Women and Domestic Violence is deriving its purpose from the Refugee Convention but takes it one step further. When the Refugee Convention did not recognize the gender as a reason for discrimination or persecution, this convention does. It requires all the members of this convention should recognize the gender-related violence against women as a form of serious harm. Serious harm is always a sufficient condition for subsidiary protection. Also, this convention recognizes the gap between *de jure* and *de facto* situations concerning refugee women. The aims set in legislation are not fulfilled in practice. Other important factor are the structural problems which offers a governmental way to discriminate woman. Through certain society's structural mechanisms women are positioned to be subordinated. The convention has also listed the most common ways of violence or persecution refugee women have encountered; I will consider them more precisely below. Also, human rights violations are a serious problem towards women during armed conflicts. The convention in its entity emphasizes that women are

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<sup>31</sup> European Commission, *The GENSEN report – Gender related asylum claims in Europe; Comparative analysis of law, policies and practice focusing on women in nine EU Member States*, 2012

<sup>32</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted

<sup>33</sup> Elberling, B., 'Article 16', in Zimmermann, A. (ed.), *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*. Oxford: Oxford University Press, 2011 p. 79

generally exposed to a gender-related violence and persecution more often than men, which is an important factor to notify.<sup>34</sup> This convention processes many important problems which are relevant, especially in refugee women's treatment, and have been analyzed in this paper as well. These are crucial factors which effect on the disparities between women and men refugees.

## 2.2. Gender-based persecution

Before, the pure fact was that the persecution of women was barely talked. Instead of this, refugee law was only focusing on persecution of men and more specifically only on the public persecution. As a result, the refugee law was recognized as centered on men, i.e. asylum law does not recognize the certain type of persecution that women refugees encounter, such as rape, forced marriage, domestic violence or female circumcision. The problem is that if these gender-based acts of persecution are not recognized and prohibited, there are no grounds for a refugee woman to seek protection.<sup>35</sup>

The second problem arises when persecution is acknowledged only in public matters. The domestic violence, which is one form of gender-based violence, can be defined only as "a private dispute" and therefore it is not covered by the refugee law. It does not fulfill the requirements for international protection. This leads into the situation where persecution encountered by woman only occurs in "private" situations, whereas persecution encountered by men is regarded to be public. This gives a direct privilege to men refugees when processing the applications of asylum.<sup>36</sup>

Persecution towards woman takes a different form from the "general" idea of existing persecution. They are usually gender-related and thus encountered only by women. Also, different EU member states have a different approaching and different insight what could be regarded as persecution.<sup>37</sup>

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<sup>34</sup> Council of Europe, *the Convention on Preventing and Combating Violence Against Women and Domestic Violence*, 11.5.2011

<sup>35</sup> Arbel, E., Dauvergne, C., & Millbank, J. (Eds.). (2014). *Gender in Refugee Law: From the Margins to the Centre*. Routledge p. 110

<sup>36</sup> Ibid. p. 160-161

<sup>37</sup> United Nations High Commissioner for Refugees (UNHCR), *Note on Certain Aspects of Sexual Violence against Refugee Women*, EC/1993/SCP/CRP.2, 1993

### **2.2.1. Lack of credibility**

One example of discrimination of women refugees is the credibility of their testimony in asylum matters. Somehow, the credibility of women refugees has experienced to be lower than men. The credibility has become a key factor which has been strongly emphasized in the process of determining who is entitled for protection. The broadest survey made by the European Parliament, The GENSEN report, proved that the credibility was often the reason of refusal in women refugee's cases.<sup>38</sup>

One of the arising problems relating to the lack of credibility of refugee woman is the high standard of proof.<sup>39</sup> The second problem relates to the affirmative evidence. Sometimes there might be difficulties to identify gender-based violence in the form of affirmative evidence. The GENSEN report has acknowledged this factor and has factually shown the way of acting in every nine countries, when they encountered traumatized women in their asylum process. As a result, women are in an unfavorable position and prevents women fully disclosing their story.<sup>40</sup> All these factors together form great obstacles for women seeking asylum in Europe and they are all related to credibility and women fail to provide positive credibility assessment.

The case *UK – AS (Iran) v The Secretary of State for the Home Department* describes the very usual situation where the credibility of women is regarded as questionable. This case was an appeal from earlier decisions. Iranian woman applied for an asylum and protection in UK based on domestic violence and, because she converted to Christianity, was now scared of persecution in Iran. The court denied the application stating that claimant could not argue a well-founded fear of persecution and failed to give adequate reasons for well-founded fear of persecution based on religion.<sup>41</sup> Basically, her application was denied due to the lack of credibility on her testimony.

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<sup>38</sup> Arbel, E., Dauvergne, C., & Millbank, J. (Eds.). (2014). *Gender in Refugee Law: From the Margins to the Centre*. Routledge., p. 98-109

<sup>39</sup> European Commission, The GENSEN report – *Gender related asylum claims in Europe; Comparative analysis of law, policies and practice focusing on women in nine EU Member States*, 2012

<sup>40</sup> Arbel, E., Dauvergne, C., & Millbank, J. (Eds.). (2014). *Gender in Refugee Law: From the Margins to the Centre*. Routledge. p. 104-109

<sup>41</sup> Royal Courts of Justice, The Court of Appeal from Upper Tribunal (Immigration and Asylum Chamber), Case No: C5/2014/2742

## **2.2.2. Female Genital Mutilation (FGM)**

“FMG comprises all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, carried out for traditional, cultural or religious reasons. In other words, the procedure is for non-medical reasons.”<sup>42</sup>

It has been estimated that over 120 million women have suffered from FGM even though there are no medical reasons for it. This is broadly prohibited among European countries, but sometimes women may be subjected to it when arriving to Europe as a refugee or migrant, especially from African or Middle Eastern countries where FGM is still a normal procedure. However, this is a procedure which effects last the woman’s whole lifetime and it is irreversible. Usually it is made in unhygienic environment, with unhygienic tools and made by untrained individuals. There is a great risk of bleeding and health complications after the procedure. The problem with refugee women is that they barely have any information relating to gynecological services available to them. Therefore, female asylum seekers usually have difficulties, which are not acknowledged. Sometimes, their lack of the relevant language of their reception country or even English makes it more difficult to them to access to the information. In Europe the nurses, social workers and other individuals who are working with refugee women in the health care section may have never encountered FGM before and they have no preparedness, right attitude or enough information to handle the situation.<sup>43</sup>

The attitudes towards FGM are still quite tolerate according to the GENSEN Report. In some situations, Hungary has argued that because of the traditional nature of FGM has, it cannot be subjected as a severe harm caused to a woman. In Spain, the possibility of risk of FGM has been defined based on woman’s age. Spain stated that woman over 30 years or woman who has given birth to her first child, is no longer at risk. Belgium, France and UK have criminalized the practice and FGM may amount to persecution in their opinion, but the law has not been implemented properly. In Malta and Romania FGM is not considered to be a serious harm when certain requirements meet. Generally, in France, Hungary, Italy, Malta, Romania, Spain and Sweden past FGM is not considered as serious harm leading to persecution.<sup>44</sup>

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<sup>42</sup> United Nations High Commissioner for Refugees (UNHCR), *Guidance Note on Refugee Claims relating to Female Genital Mutilation*, May 2009, art 2

<sup>43</sup> Momoh, C. (Ed.). (2005). *Female genital mutilation*. Radcliffe publishing. p. 21-22

<sup>44</sup> European Commission, The GENSEN report – *Gender related asylum claims in Europe; Comparative analysis of law, policies and practice focusing on women in nine EU Member States*, 2012, p. 43-44

In case *ECtHR – Sow v Belgium* the Guinean national woman arrived in Belgium and claimed asylum on basis of female genital mutilation. She was already partially undergone the procedure and claimed to be at risk of re-excision is sent back. Belgium rejected the application due to the lack of credibility and the failure to argue a risk of being re-exercised. ECtHR upheld the verdict.<sup>45</sup> This shows how the lack of credibility affects on so many levels and women truly need to provide extremely strong arguments to support their claims. Also, this woman already was subjected to the FGM, but Belgium nevertheless decided to send her back. FGM is not taken as seriously as it should in Europe, therefore women seeking asylum based on FGM does not have high chances to protection.

### **2.2.3. Forced marriage**

When talking about the choice of whom to marry in the context of human rights it can be strongly connected with the self-determination and thus it is a hardcore human right acknowledged by several relevant international instruments. This has even been declared in the Universal Declaration of Human Rights (UDHR) and in International Covenant on Civil and Political Rights (ICCPR). Both declarations require the “free and full consent”.<sup>46</sup> Several international refugee law documents have acknowledged forced marriage as a gender-related persecution, i.e. in United Kingdom refugee tribunal gender guidelines.<sup>47</sup>

Forced marriage may amount to persecution in Spain, Malta, Romania, Italy, Sweden, UK, Belgium and France. In France, being married without own consent to a man as a mere fact does not amount to persecution. However, the refugee status has been granted for a similar type of claim. In Spain, the attitude towards forced marriage is stricter. Only twenty percent of the judges granted refugee status based on claims of forced marriage. Protection in Spain is only granted to women under 25 years. However, it is positive that older unmarried women have been considered to be at risk, too.<sup>48</sup>

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<sup>45</sup> Grand Chamber of ECtHR, 19.1.2016, 27081/13, *Sow v Belgium*

<sup>46</sup> United Nations General Assembly, Universal Declaration of Human Rights, Resolution 217A (III), A/RES/217 (III), 1948 & International Covenant on Civil and Political Rights (ICCPR), General Assembly Resolution 2200A (XXI), 1976.

<sup>47</sup> Dauvergne, C., & Millbank, J. (2010). Forced marriage as a harm in domestic and international law. *The Modern Law Review*, 73(1), 57-88.

<sup>48</sup> European Commission, The GENSEN report – *Gender related asylum claims in Europe; Comparative analysis of law, policies and practice focusing on women in nine EU Member States*, 2012

In ECtHR's *R.H. v Sweden* judgement Somalian woman was applying for asylum based on forced marriage among other factors. Her family wanted to force her to marry an older man and she tried to unsuccessfully escape but was beaten by her uncles. However, Sweden rejected the application because it was not plausible applicant has been subjected to violence by her relatives. ECtHR decided this is not a violation of human rights.<sup>49</sup>

#### 2.2.4. Domestic violence

Domestic violence is a worldwide problem and it does not occur only towards refugee women. However, because of the social situation they encounter in a new country, the occurrence of the domestic violence might be different too. The domestic violence rates are not higher among refugee women, but usually the domestic violence has something to do with their position as a refugee; limiting their language abilities, preventing women to access to jobs, uncertain legal statuses and as a result, it becomes more difficult to adjust in the new society and complicates of starting a new life in a receiving country. This kind of violence it is not typical mental or physical violence usually related with domestic violence, but it isolates refugee women and decreases their level of wellbeing.<sup>50</sup>

Belgium, Hungary, Italy, Romania, Spain, Sweden and UK have taken the perspective to consider domestic violence as a form of persecution. However, domestic violence is often difficult to proof and only a "word against a word" – situation. Some countries have taken as a practice to offer a subsidiary protection for refugee women presenting claims of domestic violence. Therefore, domestic violence is interpreted only as a serious harm. According to research, France has classified domestic violence to be just a private type of violence and does not regard it to amount to persecution.<sup>51</sup>

Czech Republic Supreme Administrative Court in case *D.B. v The Ministry of the Interior* held that application cannot be rejected based on "a safe" country of origin where applicant is from, if she plausibly proves she is subjected to domestic violence and it is a relevant factor which should grant protection thereto.<sup>52</sup>

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<sup>49</sup> Grand Chamber of ECtHR, 10.9.2015, 4601/14, *R.H. v Sweden*

<sup>50</sup> Menjívar, C., & Salcido, O. (2002). Immigrant women and domestic violence: Common experiences in different countries. *Gender & society*, 16(6), 898-920.

<sup>51</sup> European Commission, The GENSEN report – *Gender related asylum claims in Europe; Comparative analysis of law, policies and practice focusing on women in nine EU Member States*, 2012 p. 46

<sup>52</sup> Czech Republic - Supreme Administrative Court, 24.7.2013, 4 Azs 13/2013-34, *D.B. v Ministry of the Interior*

## **2.2.5. Rape and sexual violence**

Rape is a very gendered act: most of the victims are women. This states the very unequal balance of power between women and men. Usually this is problematic in countries where women are regarded as the property of men. The religious and cultural aspects support this presumption and gives no power to the women. These countries often value women based on “purity” which is a straight connection with virginity. Raped women are “dirty” or “ruined” and thus lose all their value in their family and in community. For refugee women, it is usually difficult to disclose these traumatic events to refugee workers, which is very problematic.<sup>53</sup>

Rape and sexual violence may amount to persecution in Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and UK. In Sweden the sexual violence is not considered as a State persecution when violence is perpetrated by State agent and the perpetrator is considered to act as an individual. However, it is common that sexual violence is not recognized as a persecution in practice. France has taken the narrow approach on this matter as well and classifies sexual violence and rape only as serious harm. It has been shown that women are not believed by French legal officers and judges, which has been regarded as bad practice.<sup>54</sup>

Appeal Committee of Vyronas in Greece granted a refugee status to an applicant who suffered of sexual violence during her teenage years by her father. The oldest son in the family attempted to rape her. She was given no education or health care and she had no identity documents. Court held that due to the absence of proper family network and the stigma which Ethiopian single girls have as a social group, she is being granted a refugee status.<sup>55</sup>

## **2.2.6. “Honor” crimes**

There are cultural and religious differences in every country which are regarded as acceptable and proper behavior for women. In some countries these “improper” acts can be extremely suspicious, i.e. going to the movies alone, holding hands or dating a man who is not sharing the same religion or

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<sup>53</sup> European Commission, The GENSEN report – *Gender related asylum claims in Europe; Comparative analysis of law, policies and practice focusing on women in nine EU Member States*, 2012 p. 47

<sup>54</sup> Ibid.

<sup>55</sup> Greece – Appeal Committee of Vyronas, 23.4.2013, Application No. 4/1188365

cultural background. In these situations, “the family council”, which usually consist of only men, has the right to decide for the right punishment. In the most extremely situations, a woman has been sentenced to death. The justification for this is the family’s honor which has been offended by this woman.<sup>56</sup>

Belgium, Hungary, Italy, Romania, Sweden and UK recognize the “honor” crimes as a form of persecution. It might be difficult to proof that these “honor” crimes will amount to persecution and mostly the facts around the case define need of protection. However, in UK if the offending the honor of a family has a possibility to amount to death, the definition of persecution is automatically fulfilled. In Sweden, there are no certain consistency relating to honor crime cases and it should be created when it currently is classified as only “a serious harm”.

In case *R v Faqir Mohammed* Shahida Mohammed was killed by her father after her father found Shahida’s boyfriend in her room, whom she had kept in secret. Father stabbed her daughter to death and stated that killing his daughter was reasonable and is in accordance with his religion. He argued that Quran prohibit the relationship between man and woman. According to father, his actions were in accordance with custom and tradition.<sup>57</sup>

## **2.2.7. Trafficking and forced labor or forced prostitution**

Especially refugee women are a target for traffickers because of their stateless conditions.<sup>58</sup> Trafficking is a serious violation of human rights and UNHCR requires states itself to fight against this phenomenon. States must provide all tools necessary for their authorities and for those responsible for anti-trafficking and thus grant the international protection.<sup>59</sup>

Different EU member states have a different approaching to this. Belgium defines slavery to be “officially forbidden trough all international human rights standards”. Also, “a sufficiently serious act” is being considered as a persecution. Prostitution itself can be considered as a persecution due to the fact it has been defined as physical and mental violence against women. Italy has based their opinion relying on the Refugee Convention. UK always defines trafficking as a gender-related

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<sup>56</sup> Sev'er, A., & Yurdakul, G. (2001). Culture of honor, culture of change: A feminist analysis of honor killings in rural Turkey. *Violence against women*, 7(9), 964-998.

<sup>57</sup> Manchester Crown Court, 18.2. 2002, R v Faqir Mohammed

<sup>58</sup> Ibid.

<sup>59</sup> UN High Commissioner for Refugees (UNHCR), *Human Trafficking and Refugee Protection: UNHCR's Perspective*, September 2009.

violence which may amount to persecution and women being held in a servitude for the purpose of forced labor amounts to persecution. However, Spain has a negative position and does not recognize trafficking as a factor amounting to persecution. Spain is justifying this by stating that it is only an insufficient form of harm. Asylum claims based on trafficking are not handled under the Refugee Convention. Even if Sweden has recognized a gender-based violence as a serious harm which usually amounts to persecution, it still has not recognized the forced prostitution as a factor subject to amount to persecution. As a result, several of relatable factors are left unnoticed, for instance, the violations of the right not to be subjected to the gender-based discrimination.

In *decision no. 10012810* by French National Asylum Court Nigerian national was trafficked to France and forced into prostitution. Nigerian woman was applying for a refugee status claiming that she would be ostracized by her social and family network in Nigeria. The victims of trafficking would be despised by Nigerian society. She was given a refugee status stating finding that Nigerian women who were victims of trafficking constituted a social group described as in the Refugee Convention.<sup>60</sup>

## **2.2.8. Forced sterilization or abortion**

The right to decide on matters relating to sexual and reproductive healthcare, including sterilization and abortion, are protected by international human right treaty law. Right to health, right to bodily integrity, the right to be free from the violence, torture, degrading or inhuman treatment and right to be free from the discrimination are all strongly linked to this.<sup>61</sup> However, there have been situations where women have encountered difficulties in claiming asylum or refugee status based on violations of reproductive rights. It has been problematic to classify this situation under any statutory claim of asylum.<sup>62</sup>

This is an important subject especially for women in China. China holds the one-child policy and mothers have been forced into abortions and sterilization based on this policy. However, French court has ruled this is not a discriminatory policy at all and therefore a Chinese mother is not granted a refugee status based on China's policy. It might be possible only in cases where this situation

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<sup>60</sup> France – National Asylum Court, 24.3.2015, Decision no 10012810

<sup>61</sup> Zampas, C., & Lamačková, A. (2011). Forced and coerced sterilization of women in Europe. *International Journal of Gynecology & Obstetrics*, 114(2), 163-166.

<sup>62</sup> Bresnick, R. O. (1995). Reproductive Ability as a Sixth Ground Persecution under the Domestic and International Definitions of Refugee. *Syracuse J. Int'l L. & Com.*, 21, 121.

amounts to persecution or serious harm and it can be proved. Sweden and UK have taken the opinion forced sterilization and abortion constitute persecution.<sup>63</sup>

*The decision UM 22097-10* by Swedish Migration Court was concerning the applicant who lived with her uncle's family and was constantly beaten in that family. When she got pregnant, the family tried to force her to get an abortion. Her life was threatened, and she escaped to Sweden. The applicant was granted a refugee status due to "particularly distressing circumstances" and risked being forced into prostitution.<sup>64</sup>

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<sup>63</sup> European Commission, The GENSEN report – *Gender related asylum claims in Europe; Comparative analysis of law, policies and practice focusing on women in nine EU Member States*, 2012 p. 50

<sup>64</sup> Sweden – Migration Court, 22.2.2011, UM 22097-10

### **3. Methods for Preventing Discrimination in Europe**

European Union has been working to achieve common and uniform policies for asylum system in Europe, specifically according to the Geneva Convention and the Treaty on the Functioning of the European Union (TFEU). To fulfil this goal, European Asylum Legislation needs some tools around it and it must be interpreted through several important international laws. The GENSEN report has also acknowledged that modernizing the law is not a sufficient action itself. The correct implementation and practical cooperation are equally important together with the modernization of law.<sup>65</sup> Perhaps, the most important factor is to acknowledge that refugee protection is not an internal issue anymore, but international.<sup>66</sup> However, the situation in Europe is better than elsewhere. Europe has created a legislation which cover more than just refugees falling under the definition of the Refugee Convention.<sup>67</sup>

#### **3.1. CJEU in asylum matters**

European Union has a broad range of ways to prevent the discrimination. After the Lisbon Treaty was established, it made the institutional changes in CJEU possible. CJEU is having now all the possibilities in migration and asylum cases. Therefore, CJEU became the first supranational judicial body with granted authority in order to provide guidance in the matters related to interpretation of European Union asylum legislation. But is this institutional change a sufficient procedure to reduce discrimination? How does it help refugee women? These institutional changes have no role if CJEU does not explicitly pay attention to the position of refugee women and acknowledge the problematic points. To ensure the equal treatment of all refugees, CJEU must notice that refugee women do not have the same requisites that men refugees have and should take this aspect in account in all its decisions. CJEU should change the focus of their verdicts more favorable towards refugee women and take other than only legal aspects into account, i.e. mental health of refugee women, which is

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<sup>65</sup> Arbel, E., Dauvergne, C., & Millbank, J. (Eds.). (2014). *Gender in Refugee Law: From the Margins to the Centre*. Routledge p. 4, 179-180

<sup>66</sup> Feller, E., Türk, V., & Nicholson, F. (Eds.). (2003). *Refugee protection in international law: UNHCR's global consultations on international protection*. Cambridge University Press

<sup>67</sup> Lambert, H., McAdam, J., & Fullerton, M. (Eds.). (2013). *The global reach of European refugee law*. Cambridge University Press. p. 247

usually more relevant factor in assessing asylum claims among women than men. This is also a message for national level judges to scrutinize their point of view and thus improve the position of women refugees on all levels.

The Qualification Directive (Council Directive 2004/83/EC) is the most common directive CJEU is working with due to the general characteristics and the minimum standards it has submitted and due to the high number of preliminary references by the national courts in the asylum matters. Despite of the general characteristics and minimum requirements, they should me applied to refugee women more precisely. It is important to deliver a strong message to treat refugee women even more equally especially when there is a such high number of preliminary references. It shows the right path to all national courts and their judges. Usually the recast Qualification Directive (2011/95/EU), the recast Asylum Procedures Directive (2013/32/EU) and the recast Reception Conditions Directive (2013/33/EU) are the significant tools CJEU can assess the right condition in each asylum case, preliminary question or asylum claim. These directives are vital when assessing the asylum claims for international protection and therefore Member States have an obligation to implement these directives on a national level.<sup>68</sup> These directives should be applied more from the feminist point of view and despite the general and neutral wording, it should be remembered to keep the refugee women aspect clearly in mind. By emphasizing the importance of women equal treatment when applying these directives in practice, slow progress can be made and thus discrimination should be decreased.

Also, the recast of Qualification Directive now includes the gender and it is officially a justification for a state recognition in order to get protection and refugee status acknowledged. It states that “*gender related aspects, including gender identity, shall be given due consideration for the purposes for determining membership of a particular group*”.<sup>69</sup> And article 4 of the same directive states: “*the individual position and personal circumstances of the applicant, including factors such as background, gender and age*” must be taken into account when assessing the application for international protection.<sup>70</sup> This is a big improvement which has the power to improve the position of refugee women in practice. This lays down the judicial grounds for women to seek asylum based on gender and all the side factors relating to this, not only judicial factors. In case of refugee women, the decisions cannot be made based on judicial facts only, otherwise the outcome might not be fair. This gives actual tools for women to hold on when seeking asylum and ensuring that their biggest

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<sup>68</sup> Arbel, E., Dauvergne, C., & Millbank, J. (Eds.). (2014). *Gender in Refugee Law: From the Margins to the Centre*. Routledge p. 176-178

<sup>69</sup> Council Directive 2011/95/EU art. 9

<sup>70</sup> Ibid. art. 4

form of discrimination in asylum processes – gender discrimination, including gender violence – is being recognized and thus it is possible for women to overcome it.

All in all, CJEU has a very important task in taking all these crucial directives into practice and therefore, easily cited for national courts. CJEU is able to give new approaches to refugee women's rights and make them more dynamic. Despite of being overburdened, CJEU's judges are showing the lead to national courts and CJEU's efficacy depends a lot of the national courts judges' receptiveness.<sup>71</sup>

### **3.2. Prevention of sexual and gender-based violence**

Encountering sexual and gender-based violence is often very traumatic experience. It shall be understood that, i.e. in cases of asylum, when assessing the credibility of women refugees, the standards of proof must be lowered in cases of sexual and gender-based violence, trauma or rape. This fact should be acknowledged in judicial processes, traumatic experiences which they have encountered cannot come between them and a fair court decision. Also, it shall be avoided to ask precise details of rape or other form of sexual violence in the interviews or hearings regarding asylum. Maybe the most important factor is to understand that it must be ensured that when it is difficult to talk about these traumatic experiences, this will not affect negatively to the grant of asylum or in other way which may considered to be a disadvantage.<sup>72</sup> Vulnerability should be acknowledged on all levels in legislative procedures and in cases of refugee women, the decision cannot be made based solely on legal norms and rules.

However, there should be found a legislative way to decrease the gender-based and sexual violence already in the beginning. UNHCR has published several documents to fight against this phenomenon. UNHCR's Policy on Refugee Women and Guidelines on Their Protection is aiming in addressing SGBV and raising awareness. It has stated that women and girl refugees are at a great risk because they have a little or no protection and their situation often makes it hard to monitor the execution of their human rights. Later, UNHCR issued *Sexual Violence Against Refugees: Guidelines on Prevention and Response (Sexual Violence Guidelines)*. Staff was affirmed to hold the responsibility of prevent and provide the protection to cases of violence. Governments were given the obligation to

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<sup>71</sup> Costello, C. (2016). *The Human Rights of Migrants and Refugees in European Law*. Oxford University Press.

<sup>72</sup> Arbel, E., Dauvergne, C., & Millbank, J. (Eds.). (2014). *Gender in Refugee Law: From the Margins to the Centre*. Routledge. p. 112-113

prosecute and recommendations were drafted for different situations from prevention to action to field workers. The Sexual Guidelines is multidimensionally describing the whole issue around SGBV; when it occurs, what effects it has, why the incidents are sometimes left unreported, what particular needs women have and, finally, what practical skills field workers need and how they should handle the related matters around this issue, such as media.<sup>73</sup> The Sexual Guidelines should be taken more broadly in account and emphasize more. It should be given a more normative position than what it holds now, and states should be encouraged to pay attention to these guidelines and rely on the Guidelines in every complex situation in their jurisdiction.

The obligation to reduce the discrimination against women comprises both *de jure* and *de facto* rights for women. Women's rights must be legally recognized and executed in practice. Both, the direct and indirect discrimination must be eliminated, and equality should be based on non-discrimination. As mentioned above, states have the great responsibility and they are obliged to provide sufficient protective measurements<sup>74</sup>, such as (Dairiam, 2004):

- to incorporate the principle of equality and non-discrimination of men and women in the legal system, abolish all the discriminatory laws and practices, adopt appropriate laws prohibiting discrimination against women;
- to establish tribunals and other public institutions to ensure the effective protection
- to ensure elimination of all acts of discrimination against women by the public and private sector, including persons, organizations or enterprises;
- to implement programs and make relevant institutional arrangements and other laws necessary that will enable women to exercise the equality rights given in the law;
- to accelerate the achievement of *de facto* rights by implementing temporary special measures;
- to eliminate cultural and traditional practices and attitudes, including stereotypical roles for men and women.

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<sup>73</sup> UNHCR Policy on Refugee Women and Guidelines on Their Protection: *An assessment of Ten Years of Implementation* 2002, p. 24

<sup>74</sup> Dairiam, S. (2004). CEDAW: Achievements and Challenges. *New Gender Mainstreaming Series on Development Issues*, p. 2-30

### **3.3. Law reforms**

The biggest problem in making the international laws more applicable on the national level, has been the implementation. The Refugee Convention has not been reached on all levels and national courts have not cited Refugee Convention or other tools regulated for this purpose. Actions inside the European Community, such as agreeing on different directives in order to improve the position of refugee women, have been a direction into better treatment but more will be needed.<sup>75</sup> It is important to acknowledge this and take remedial procedures so that the situation can in practice equate the ideal legal situation as much as possible.<sup>76</sup> The national laws should be formed in a way that all refugees, especially women, are in a position that safety and protection is easily achieved relying on the principle of non-refoulement as well.<sup>77</sup>

It is good to question, why has the Refugee Convention been given such a small role in national legislation and in court decisions. It is a shame because it shrinks the amount of laws applied in different cases and thus there is great danger decisions will not be given based on EU or international laws, only national laws. The outcome might be the national laws conflict with EU laws which burdens the whole process and the successful result cannot be reached. This is an issue which should be fixed immediately.

The importance of a sufficient implementation and the Refugee Convention should be reminded to all member states and European Union should challenge states to reform their legislation to correspond the situation today. Law reforms would have many benefits, other than just improving the gender-equality, such as the reorganization of resources would create more efficiency asylum system policy. Law reforms should be done from the feminist point of view and therefore it would diminish the gap between genders.

However, it is a fact that a mass migration is a true challenge for every states economy and it is truly difficult to put required amount of resources on this matter and therefore create a functional laws on every level.<sup>78</sup> In addition, usually people who do not benefit the society economically – like women

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<sup>75</sup> Simeon, J. C. (Ed.). (2013). *The UNHCR and the supervision of international refugee law*. Cambridge University Press.

<sup>76</sup> Hathaway, J. C.; Neve, R. (1997). Making International Refugee Law Relevant Again: Proposal for Collectivized and Solution-Oriented Protection. *Harvard Human Rights Journal* 10, 115-212

<sup>77</sup> Hathaway, J. C. (Ed.). (1997). *Reconceiving international refugee law* (Vol. 30). Martinus Nijhoff Publishers

<sup>78</sup> Juss, S. (1998). Toward a morally legitimate reform of refugee law: the uses of cultural jurisprudence. *Harv. Hum. Rts. J.*, 11, 311.

refugees in the beginning of their journey in a receiving country – they become easily excluded.<sup>79</sup> Assessing resources gender-equality should be acknowledged and it represents one of the most important goals in EU.<sup>80</sup> By emphasizing the gender-equality the correct fulfillment of human rights can be guaranteed, as well as social rights which are important especially for refugee women.<sup>81</sup>

New laws should guarantee that despite of the socio-economic status refugees possess, they should be able to have the same possibilities as others. This applies specifically with refugee women due to their poor economical input to the society. Therefore, it is not indifferent how new legislation will be formed. The pressure to create new and more functional refugee legislation has increased year by year while states have experienced that they have no economic resources enough to bear this current system.

Also, directives and other human rights documents have been criticized of not being effective enough. What is the reason a human right tool does not achieve a binding effect? Sometimes they have a very specific nature, or a solution have been tried to find from a situation which has never been tried before. It is always a challenge to find the best legislative option, especially in legislation drafting process, therefore these should be straightforward enough so that the courts can easily cite them.<sup>82</sup> These human rights documents seem to be acknowledged on theoretical level, but they have not been brought into practice. Different practices in different countries would be brought closer to each other and create one coherent system, which makes the cooperation on refugee matters easier to member states, which therefore benefits refugee women to achieve a proper legislative position in the field of refugee law.<sup>83</sup>

Gender-equality as a part of human rights has been recognized better but due to the hidden structures of a society it has not been fully reached.<sup>84</sup> Legislature measures have been one way to bring the treatment of two different gender closer to each other. EU has done a great work in acknowledging this situation and by regulating important directives it has been a start point of a new attitude.

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<sup>79</sup> Baderin, M. A., & McCorquodale, R. (Eds.). (2007). *Economic, social and cultural rights in action*. Oxford: Oxford University Press.p. 361-388.

<sup>80</sup> De Búrca, G., De Witte, B., & Ogertschnig, L. (Eds.). (2005). *Social rights in Europe*. Oxford, UK: Oxford University Press p. 339-366

<sup>81</sup> De Búrca, G., De Witte, B., & Ogertschnig, L. (Eds.). (2005). *Social rights in Europe*. Oxford, UK: Oxford University Press p. 367-382

<sup>82</sup> Baderin, M. A., & McCorquodale, R. (Eds.). (2007). *Economic, social and cultural rights in action*. Oxford: Oxford University Press. p. 27-44

<sup>83</sup> Gibney, M., J., The Ethics and Politics of Asylum. Cambridge: Cambridge University Press, 2004

<sup>84</sup> Beitz, C., R., The Idea of Human Rights. Oxford: Oxford University Press, 2009

## **Conclusions**

Responding to the current situation among refugee women and their treatment it requires crucial changes in different organizations and in attitudes. Critical analyzation is a key to changes on national and international level and it is good to question which the main problems on the field are, and in the legislation. There are no possibilities in our societies to maintain the structures created for asylum process decades ago and we need to start scrutinizing the situation from the “what is necessary” point of view when planning the new structures and better legislation. However, changing the environment and attitudes is extremely challenging and take time, but possible. It is a fact that when gender-related violence increases, broad interventions are needed which control the practices and attitudes to achieve a better and more equal situation generally.

In my opinion, we can admit that refugee women are being treated non-equally and they are not being heard. The number of refugees has been increasing year by year and thus there is a danger that so does the gender-related violence, too. Refugee flows are a challenge across the world, therefore the position of refugee women must be taken into account even more carefully, otherwise the direction is downwards. Refugee women should be able to be heard in every section and receive the help she is entitled to. The attitudes towards women who have encountered sexual abuses and other negative sexual related treatment are somewhat negative and it does stigmatize women still today and these stigmas prevent women from getting help. States should emphasize such acts which enable these changes in attitudes and general thinking. Women are the victims. Workers on the field of asylum should remember the professionalism in their everyday work.

Experiencing sexual and gender-related violence is a very traumatic experience and is one of the most common reasons for women to seek asylum. Therefore, it is important to give legal assistance to employees working with these women and thus ensure these women can get the help they need and, in addition, make a successful asylum claim. This also helps to control the number of applications in asylum process and does not burden the system even more. However, employees should keep the legislative obligation in mind: also, immigrants and refugees are entitled to help if they need it and these employees have the obligation to help. Even though major part of refugees are men, it does not decrease the importance of women and their treatment. It has been acknowledged this is a broad and difficult problem and the odds to be treated non-equally are remarkable.

This issue is clearly global, but even more, it concerns European Union. The GENSEN Report provided interesting data how different countries have been acting with this issue and how they have scrutinized the problem. Practices used in member states varied a lot and no common system were used in any procedure. The lack of coherent system in asylum process and in attitudes among European Union member states is a clear weakness. It prevents from creating a successful and universal asylum process system which is specifically customized to suit better for refugee women and takes their needs and rights better into account. Co-operation is a key to a better and more coherent system, which also burdens the European Union asylum process less and dispenses the existing resources better.

In my opinion, the CJEU should focus to reflect and consider its very basic function in the field of refugee legislation. CJEU should consider whether it is ruling out the verdicts from the feminist point of view in the best possible way. Are their verdicts gender-equal enough? CJEU should acknowledge its role as a pioneer in this matter and should take a leading role even more publicly. National courts will follow CJEU's example and therefore it is possible to create more gender-equal atmosphere across the Europe. By showing an example, CJEU would enhance the better and more coherent system and give an inspiration to decision-makers in European Commission and Parliament. It would be a strong message also to the heads of different member states that refugee women need to be heard and their position must be improved. Also, they need to realize refugee women have not been treated equally and their voices have left unheard. CJEU need to target to lively communication between European decisive organs and member states and try to create the atmosphere of a good conversation and information sharing.

This is an interesting issue also when speaking of further examination, because this have gained a lot of attention in different medias in different countries. Also, needs for changes in asylum processes and legislations have been strongly acknowledged, therefore this subject need to be highlighted in future as well. It would be interesting to follow whether rapid, successful and effective changes could be possible to create and does the practices turn into more feminine and gender-equal? Also, the economic situation of every state and how much economical resources member states are ready to sacrifice for the sake of refugee flows, is an unsure fact. However, the most important target is to change the general atmosphere and try to affect to it as much as possible in many legislative ways. Laws can direct attitudes and social structures to prefer more women. It is an important starting point.

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