

# WHY DOESN'T SHE SEEK INTERNATIONAL PROTECTION IN THE EUROPEAN UNION?

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*In the European Union, only about thirty-six percent of first-time asylum applicants are women. The gender dimension of international refugee law gained international attention as the interpretation of the Convention Related to the Status of Refugees of 1951 (Refugee Convention) evolved over time. The European Union reflected this development in its Qualification Directive, which establishes the criteria for qualification for international protection. This article argues that, while the European Union made efforts to better consider the situation of asylum seekers who are fleeing gender-related persecution, both procedurally and substantively, significant shortcomings remain, leading to the denial of refugee status to applicants who would have deserved it.*

*This article argues that the Qualification Directive is not in line with the Refugee Convention as interpreted by the United Nations High Commissioner for Refugees (UNHCR), and that more clarity on gender-related persecution is needed. It calls for the analysis of those claims primarily under the political opinion ground, as women's resistance to gender oppression is political. This approach would not only avoid the uncertainties surrounding the membership of a particular group ground, but more importantly, it would also send a strong message in favor of the effective achievement of gender equality. This article also calls for the adoption of a broader approach to the ground of membership of a particular social group. A preliminary ruling by the European Court of Justice on the interpretation and/or validity of E.U. law concerning gender-related persecution would be very valuable.*

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I. INTRODUCTION<sup>1</sup>

Largely men. In the news, in documentaries, in images showing makeshift boats at sea. Men are heavily portrayed in the narratives of migrants in the Mediterranean and of refugee camps in Europe. Statistics confirm these narratives and the public representations of distress migration. For example, less than twenty percent of people in distress arriving in Europe by the Mediterranean Sea in 2015 and less than eight percent in 2021 were women.<sup>2</sup> Moreover, in 2020, about 63.8 percent of first-time asylum applicants in the European Union were men and only about 36.1 percent were women.<sup>3</sup> This observation raises questions about the reasons why women do not leave situations of distress in their country of origin and do not seek asylum as frequently as men.<sup>4</sup>

This topic fits within the broader context of current asylum issues. While the reasons for distress—conflicts, climate change, massive human rights violations—continue to multiply,<sup>5</sup> current policies are increasingly unwelcoming to asylum

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1. The title of this article of section III were inspired by the title of Diane L. Rosenfeld, *Why Doesn't He Leave? Restoring Liberty and Equality to Battered Women*, in *DIRECTIONS IN SEXUAL HARASSMENT LAW* 535 (Catharine A. MacKinnon and Reva B. Siegel eds.)

2. UNHCR, Operational Data Portal, Mediterranean Sea Arrivals in 2015: by Arrival Location, Country, Demographic and Country of Origin breakdown, <https://perma.cc/YX27-MTZ7> (last visited Dec. 13, 2021). The year 2015 was chosen as an example as it was the year with the most arrivals of people in distress in Europe by the Mediterranean Sea UNHCR, Operational Data Portal, Demography of Mediterranean Sea Arrivals from January 2021, <https://perma.cc/3DLY-NYWV> (last visited Dec. 13, 2021). This dataset distinguishes adults from children.

3. Eurostat, Age and Gender of First-time Applicants, 2020, <https://perma.cc/LNA5-CXMG> (last visited Dec. 13, 2021). These numbers encompass both adults and children.

4. A factor to consider, and which would require further research, is the fact that women are more at risk of being trafficked during their refugee-seeking journey. See, e.g., Council of Europe Gender Equality Strategy, *Protecting the Rights of Migrant, Refugee and Asylum-seeking Women and Girls* 2, 6, 9 (2019) (describing the particular social and economic circumstances of women refugees that make them especially vulnerable to trafficking).

5. See, e.g., Hum. Rts. Watch, *World Report 2021, Events of 2020* (2021) (listing by country different developments worldwide related to human rights, including many situations described as new).

seekers.<sup>6</sup> The current political climate in host countries is mainly driven by the “floodgates” argument, i.e., the fear of mass inflows of refugees.<sup>7</sup> This fear also necessarily impacts the determination of the refugee status of women. Within the E.U. context, asylum is a topical issue as, in the aftermath of the refugee crisis,<sup>8</sup> the European Commission issued a New Pact on Migration and Asylum,<sup>9</sup> which revived the ongoing project of asylum policy reforms.

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6. This may change in the United States with President Joe Biden’s new policies. *See, e.g.*, John Hudak & Christine Stenglein, Biden’s Immigration Reset, BROOKINGS INST.: FIXGOV BLOG, *Biden’s Immigration Reset* (Feb. 19, 2021), <https://perma.cc/4HFU-7EUK> (describing the new administration’s shifts in narrative, policy and bureaucratic organization); Exec. Order No. 14010, 86 Fed. Reg. 8, 267 (Feb. 2, 2021) (establishing a multi-prong migration policy for the southern border and directing actions to restore the United States asylum process). For examples of unwelcoming policies in Europe, *see, e.g.*, Marton Dunai, *Hungary approves ‘STOP Soros’ law, defying EU, rights groups*, REUTERS (June 20, 2019), <https://perma.cc/9G3D-XQKZ> (describing the 2018 legislative reform that made conditions for accessing international protection procedures and for assisting applicants more difficult). The Court of Justice of the European Union recently held that Hungary, with this legislative reform, violated its obligations under EU law as it impinges on the exercise of the rights guaranteed by EU law concerning procedural guarantees and assistance for applicants for international protection. Case C-821/19, *Comm’n v. Hungary*, EU:C:2021:143 (Nov. 18, 2021). *See also* Poland, which was found to have violated the European Convention on Human Rights for its repeated refusal to accept asylum applications, which the Court held amounted to collective expulsion. *M.K. and Others v. Poland*, App. Nos. 40503/17, 42902/17, 43643/17 (July 23, 2020), <https://perma.cc/6ALV-RMUW> (holding that Poland has violated the European Convention on Human Rights for its repeated refusal to accept asylum applications, which amounted to collective expulsion).

7. *See, e.g.*, Elizabeth Zambrana, *The Social Distinction of “Invisible” Harms: How Recent Developments in the Particular Social Group Standard Fall Short for Victims of Gender-Based Harms Committed by Private Actors*, 36 WOMEN’S RTS. L. REP. 236, 253 (2015) (describing a recent dissent by Chief Justice Easterbrook that relied on a floodgate argument).

8. In 2019, European Commission First Vice-President Frans Timmermans said that “Europe is no longer experiencing the migration crisis we lived in 2015.” European Commission Press Release IP/19/1496, *The European Agenda on Migration: EU needs to sustain progress made over the past 4 years* (Mar. 6, 2019).

9. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on a New Pact on Migration and Asylum*, at 22, COM (2020) 609 final (Sept. 23, 2020) [hereinafter *New Pact on Migration and Asylum*].

This article is also informed by the monumental work of feminist scholars and advocates, who, since the 1980s, have criticized refugee law for ignoring gender and thereby excluding women from its scope.<sup>10</sup> Gender-related advocacy has been crucial in advancing the consideration of gender in refugee law. The international women's human rights movement challenged the public/private distinction to elevate so-called private acts of violence to public concern and characterize them as persecution for the purposes of refugee law, due to the State's failure to fulfill its obligation to protect them from harm by nonstate actors. Thus, certain types of harm perpetrated mostly against women, such as rape and other acts of sexual violence, including by nonstate actors, could be consid-

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10. See, e.g., Mattie L. Stevens, *Reorganizing Gender-Specific Persecution: A Proposal to Add Gender as a Sixth Refugee Category*, 3 CORNELL J.L. & PUB. POL'Y 179 (1993) (arguing a sixth, gender-based refugee categories is necessary to ensure harms specific to women are covered and is consistent the term's history and evolution in the U.S.); Todd Stewart Schenk, *A Proposal to Improve the Treatment of Women in Asylum Law: Adding a "Gender" Category to the International Definition of "Refugee,"* 2 IND. J. GLOB. LEGAL STUD. 301 (1994) (arguing the current U.S. asylum system inadequately serves women refugees and that a gender-specific category would help better recognize violations involving violence against women); Alice Edwards, *Age and Gender Dimensions in International Refugee Law*, in REFUGEE PROTECTION IN INTERNATIONAL LAW, 46 (Erika Feller et al. eds., 2003) (describing the need to better recognize age and gender in refugee law); Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 Hum. Rts. Q. 213, 222 (1995) ("A variety of psychological, cultural and financial impediments render women less able than men to undertake the hazardous, uncertain and expensive journey into Canada."); Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 139 (2002) (describing the advantages of a transformation in interpretation of refugee law rather than merely adding a new category for women); Georgina Firth & Barbara Mauthe, *Refugee Law, Gender and the Concept of Personhood*, 25 INT'L J. REFUGEE L. 470 (2013) (rejecting an "essentializ[ation] of female refugees based on their gender" in favor of better recognizing complex individual experiences); Connie Oxford, *Where are the Women?*, in GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTER 157 (Efrat Arbel et al. eds., 2014) (describing the recent history of greater scholarly attention to women in migration law); Isabelle Carles-Berkowitz, *Ce que le droit fait au genre: les femmes migrantes dans la législation europe enne*, 69 DROIT ET CULTURES 1 (2015) (applying a feminist legal studies approach to European migration law); Ask a Feminist, *Deborah Anker Discusses Gender and US Asylum Law with Aziza Ahmed*, J. WOMEN CULTURE & SOC'Y (2019) [hereinafter Anker & Ahmed] (identifying the women's movement's breakdown of public-private barriers as integral to recognizing violence against women as a form of persecution).

ered as constituting acts of persecution.<sup>11</sup> Thanks to the work of nongovernmental organizations and other activists, the 1990s saw the adoption of the first gender guidelines in asylum processes by Canada,<sup>12</sup> followed by the United States.<sup>13</sup> In 2004, the United Kingdom Home Office adopted the gender guidelines drafted by the nongovernmental organization Refugee Women's Legal Group.<sup>14</sup> Gender-related developments in other areas of international law, such as international criminal law, also helped progress refugee law towards encapsulating a more thorough consideration of gender.<sup>15</sup>

This article focuses on gender-related persecution. According to the Office of the United Nations High Commis-

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11. See, e.g., Anker, *supra* note 10, at 142 (describing how U.S. asylum advocates worked towards greater inclusion of gender); Alice Edwards, *Feminist Theories in International Human Rights Law*, in *VIOLENCE AGAINST WOMEN UNDER INTERNATIONAL HUMAN RIGHTS LAW*, 36, 64–71 (2010); Anker & Ahmed, *supra* note 10 (calling the showing of how a state failed to protect the applicant is a “critical element” that can be met by forms of persecution by private actors).

12. *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, IMMIGR. & REFUGEE BD. CAN. (Apr. 29, 2021), <https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx> (effective Nov. 13, 1996).

13. Memorandum from Phyllis Coven, U.S. Dept. of Just., Off. of Int'l Affs., on Considerations for Asylum Officers Adjudicating Claims from Women (May 26, 1995); Anker, *supra* note 10, at 142; Oxford, *supra* note 9, at 157–58 (Efrat Arbel et al. eds., 2014) (tracing the adoption of national guidelines recognizing gender-based persecution); Anker & Ahmed, *supra* note 10, at 158.

14. IMMIGR. APP. AUTH. (U.K.), *ASYLUM GENDER GUIDELINES 3* (2000). See also Anker, *supra* note 10, at 151–52 (noting that these guidelines were modeled on work by the Refugee Women's Legal Group, a U.K.-based NGO).

15. Acts of rape and other acts of sexual violence gained international awareness during the conflicts in Rwanda and in the former Yugoslavia, notably thanks to the work of feminist activists. Anker, *supra* note 10, at 141. Feminist lawyers, judges and activists were also crucial in recognizing gender as part of the analysis of genocide, which led to the case *Prosecutor v. Akayesu* of the International Criminal Tribunal for Rwanda in 1998, which notably was the first case to determine that rape and other acts of sexual violence could constitute genocidal acts. *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Trial Judgment (Int'l Crim. Trib. for Rwanda Sept. 2, 1998), <https://perma.cc/6G4V-L3NV>. However, as highlighted by the Global Justice Center, despite progress, there still is a failure to acknowledge the importance of gender in the commission of the crime of genocide and in its consequences. GLOB. JUST. CTR., *BEYOND KILLING: GENDER, GENOCIDE, & OBLIGATIONS UNDER INTERNATIONAL LAW*, 2, 61 (2018).

sioner for Refugees (UNHCR), this term “does not have legal meaning per se. It is rather used to encompass the range of different claims in which gender is a relevant consideration in the determination of refugee status.”<sup>16</sup>

Gender may be relevant in two senses. In some situations, the specific harm suffered by victims may be particular to their sex or gender, for example, in cases of female genital mutilation. In other instances, the reason for persecution may be connected to their gender. This is the case, for example, when women are persecuted because they wish to pursue an education, love who they want, dress as they please, seek employment, or live free from male violence. Scholars have distinguished those two situations by naming the former “gender-specific persecution,” which refers to acts of persecution that are specific to gender, i.e. when women are persecuted *as* women, and the latter as “gender-related persecution,” which refers to persecution *because* they are women.<sup>17</sup> These two situations may overlap.

It is now well-known that the terms “sex” and “gender,” while often used interchangeably, in fact have different meanings. Sex, on the one hand, refers to biological, physiological, and anatomical attributes of female and male, while gender, on the other hand, refers to the expectations about characteristics, aptitudes, and behaviors that are socially constructed (femininity and masculinity).<sup>18</sup> On that basis, concerning gender persecution, the term gender appears more pertinent for emphasizing the social constructions that exist behind such persecution, but considerations of sex may also be relevant, for example when determining a common innate and immutable characteristic in the assessment of membership to a particular social group.

This article will focus its analysis on gender considerations in the grounds for persecution. Therefore, it will mostly focus

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16. UNHCR, Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 1, UN Doc. HCR/GIP/02/01 (May 7, 2002) [hereinafter UNHCR Gender Guidelines].

17. Rodger Haines QC, *Gender-Related Persecution*, in REFUGEE PROTECTION IN INTERNATIONAL LAW 319, 326 (Erika Feller et al. eds., 2003).

18. WHO Reg'l Off. Europe, Gender: Definitions (2002), <https://perma.cc/W75S-VFHV>; UNICEF Reg'l Off. So. Asia, Gender Equality: Glossary of Terms and Concepts 3 (2017), <https://perma.cc/6Q6J-5HPQ>.

on gender-related persecution as defined above and thus consider the situation of women who are subject to persecution because they are women. In particular, this article focuses on the assessment of the situation of women who are persecuted because they do not conform to what is socially and culturally expected of them within a specific society, thereby transgressing gendered social norms.<sup>19</sup>

This article does not seek to promote a binary view of gender and the primary focus on women's cases by no means seeks to undermine the situation of people of diverse gender identity and LGBTIQ+<sup>20</sup> people more generally. The focus of this article is on the treatment of female refugees because it is based on the observation of sex statistical differences in asylum seekers in the European Union and seeks to provide elements for analyzing this observation. The available data is not further disaggregated based on diverse gender identities, but only provides numbers on men, women, and children.<sup>21</sup> Moreover, the

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19. Gender norms is defined as

[a]ccepted attributes and characteristics of male and female gendered identity at a particular point in time for a specific society or community. They are the standards and expectations to which gender identity generally conforms, within a range that defines a particular society, culture and community at that point in time. Gender norms are ideas about how men and women should be and act. Internalized early in life, gender norms can establish a life cycle of gender socialization and stereotyping.

*Id.*

20. LGBTIQ+ stands for lesbian, gay, bisexual, transgender, intersex, queer and/or questioning, asexual and/or ally. The + acknowledges that there are other identities and sexual orientations that are not included in this acronym. The terms used to talk about people of diverse sexual orientation and gender identity are continually evolving. Bex Montz, *Acronyms Explained*, OUTRIGHT ACTION INT'L (Sept. 20, 2021), <https://perma.cc/29HA-Y58N>.

21. See, e.g., UNHCR, *Refugee Data Finder, Demographics 2020*, <https://perma.cc/JH54-QP5A> (last visited Nov. 10, 2021); Eurostat, *Age and gender of first-time applicants, 2019*, <https://perma.cc/RJ7V-ATYU> (last visited Nov. 10, 2021). There is not enough data that allow to have a clear number of LGBTIQ+ asylum seekers. Most Member States do not collect data on the number of LGBTIQ+ asylum seekers. Sabine Jansen & Thomas Spijkerboer, *FLEEING HOMOPHOBIA* 15 (2011); Johannes Lukas Gartner, *(In)credibly Queer: Sexuality-Based Asylum in the European Union* (Feb. 2015), <https://perma.cc/UZQ6-ZTZK>. The European Union Agency for Fundamental Rights also raised the issue that almost no Member State were able to provide statistics on asylum seekers whose claims are based on sexual orien-



persecution of LGBTIQ+ people and their refugee status determination present unique challenges, as additional UNHCR Guidelines<sup>22</sup> and specific work<sup>23</sup> show. Therefore, while this article will occasionally mention the persecutions of LGBTIQ+ people as, in many cases, they are persecuted for their refusal to abide by gender norms,<sup>24</sup> their situation will not be evaluated extensively in this article. The persecution of LGBTIQ+ people and their refugee status determination should be the subject of further research.

This article argues that, while the European Union made efforts to better consider the situation of asylum seekers who are fleeing gender-related persecution, both from a procedural and a substantive standpoint, significant shortcomings remain, leading to the denial of refugee status to applicants who would have deserved it. This is due to three main difficulties. First, gender-related aspects are not considered relevant for all grounds for persecution. Second, E.U. law adopts an unjustifiably restrictive approach to the membership of a particular social group ground, which is the main ground for persecution under which those claims are analyzed. Third, this narrow approach leads to further difficulties when assessing whether applicants who suffer gender-related persecution are socially perceived as distinct, the so-called “social perception test” required for the ground of membership of a particular social group. This article puts forward three main arguments: (1) to analyze gender-related persecution primarily under the politi-

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tation or gender identity. EU Agency Fundamental Rts., Current Migration Situation in the EU: Lesbian, Gay, Bisexual, Transgender and Intersex Asylum Seekers 2–3 (2017), <https://perma.cc/TB72-5HW8>. The European Asylum Support Office acknowledged that there was no reliable data and that there is an identification issue, as many people do not talk about their sexual orientation or gender identity during their first interview. *EU fails to identify and protect gay, lesbian, and transgender asylum seekers*, IRIN (Nov. 20, 2017), <https://perma.cc/7M4Z-X2Z6>.

22. UNHCR, 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 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, ¶ 1–4, UN Doc. HCR/GIP/12/09 (2012) [hereinafter UNHCR SOGI Guidelines].

23. See, e.g., Jansen & Spijkerboer, *supra* note 21.

24. See UNHCR SOGI Guidelines, *supra* note 22, ¶ 15 (“The societal norms of who men and women are and how they are supposed to behave are commonly based on hetero-normative standards.”).

cal opinion ground in order to send a strong message in favor of the effective achievement of gender equality; (2) in the meantime, to adopt a broader approach to the membership of a particular social group ground, as required by the UNHCR, (3) including when interpreting the social perception test.

Several reasons and a variety of factors may prevent women from leaving their country of origin for the European Union to seek asylum. This article does not intend to demonstrate an evidence-based causal link between the inadequate assessment of female asylum applications and the reason why women in distressed situations do not migrate to Europe. There are a variety of reasons that may explain why women do not seek asylum in the European Union. This article merely aims to provide some elements of analysis when considering the obstacles in women's journey to find refuge.

Moreover, strengthening the protection of female refugees will require several steps, including more robust substantive provisions, procedural protections, and reception conditions. Therefore, by focusing on the determination of refugee status, in particular, the grounds for which women may apply for asylum in the European Union, this article addresses one step within the E.U. legal framework among a vast array of diverse measures that could be taken in different contexts.

This article will first provide an overview of the protection of refugees and gender in international law and regional instruments (Part I). Then, the article will briefly assess how gender norms in the countries of origin may impede women from leaving, followed by an overview of the resettlement process which may explain why men leave by their own means (Part II). Lastly, this article will analyze the Refugee Convention grounds, as taken over by E.U. law, relevant in female asylum claims, focusing on the membership of a particular social group ground and analyzing French practice as a case study (Part III).

## II. OVERVIEW OF THE PROTECTION OF REFUGEES AND GENDER IN INTERNATIONAL LAW AND REGIONAL INSTRUMENTS

### A. *The Refugee Convention*

#### i. A “framework of male experience”<sup>25</sup>

The 1951 Convention Relating to the Status of Refugees,<sup>26</sup> in line with the context of “complete blindness to women, gender and issues of sexual inequality,”<sup>27</sup> did not include any reference to gender. The 1951 Refugee Convention emerged from the aftermath of World War II and was drafted when the ground was becoming fertile for the Cold War, followed by a Protocol in 1967<sup>28</sup> (hereinafter, “the Refugee Convention” will refer to both of these instruments). The instruments originally envisioned refugees as persons who fled repressive regimes, embracing their ideals rather than surrendering to oppression. The traditional oppressor therefore was the state.<sup>29</sup> This relationship was thus a public and direct one between the state and the refugee. While women certainly formed part of those targeted by repressive regimes, harms that disproportionately affected women—gender-related persecution—were deemed to be private matters. Women were confined to the private sphere and not considered to have a significant role in the public, political field, which was the privilege of men. Their concerns therefore remained invisible.<sup>30</sup> As the UNHCR explained, “the refugee definition

25. UNHCR Gender Guidelines, *supra* note 16, ¶ 5.

26. Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

27. Alice Edwards, *Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950-2010*, 29 REFUGEE SURV. Q. 21, 22 (2010).

28. Protocol relating to the Status of Refugees, Jan. 31, 1967, 606 U.N.T.S. 267. This Protocol removed the geographic and time limitations of the 1951 Refugee Convention, which mainly covered persons who had become refugees as a result of events occurring in Europe before 1 January 1951. Refugee Convention, *supra* note 26, arts. 1A(2), 1B(1).

29. Efrat Arbel et al., *Introduction: Gender in Refugee Law – From the Margins to the Center in GENDER IN REFUGEE LAW: FROM THE MARGINS TO THE CENTER 1*, 3 (Efrat Arbel et al. eds., 2014).

30. Nora Honkala, *She, of Course, Holds No Political Opinions: Gendered Political Opinion Ground in Women’s Forced Marriage Asylum Claims*, 26 SOC. & LEGAL STUD. 166, 167, 173 (2017).

has been interpreted through a framework of male experiences.”<sup>31</sup>

As the UNHCR states in its introductory note to the Refugee Convention, it is “grounded in Article 14 of the Universal Declaration of Human Rights,” (UDHR) which provides for the right to seek asylum. The Refugee Convention imposes several obligations on Contracting Parties, such as the obligation of “non-refoulement” (Article 33),<sup>32</sup> the obligation to afford basic human rights to refugees,<sup>33</sup> and the broader obligation of “burden sharing,” or, more accurately, responsibility sharing.<sup>34</sup>

Article 1(A)(2) of the Convention defines the term refugee as a person who:

. . . 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 residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

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31. UNHCR Gender Guidelines, *supra* note 16, ¶ 1.

32. The obligation of non-refoulement is now considered customary international law, as recognized in the Declaration of States Parties to the Refugee Convention. Declaration of States Parties to the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees UN Doc. HCR/MMSP/2001/09, at 1 (Jan. 16, 2002). That Declaration was welcomed by a Resolution of the UN General Assembly. G.A. Res. 57/187, ¶ 4 (Dec. 18, 2001).

33. This includes granting them the right to access courts, Refugee Convention, *supra* note 26, art. 16, the right to engage in employment, *id.*, art. 17, and the right to public education, *id.*, art. 22, and freedom of movement, *id.*, art. 26.

34. This obligation stems from the preamble of the Refugee Convention, which states that “the grant of asylum may place unduly heavy burdens on certain countries, and that a satisfactory solution of a problem of which the United Nations has recognized the international scope and nature cannot therefore be achieved without international co-operation.” Refugee Convention, *supra* note 26, at 13. The preamble further insists on the need for Contracting states to cooperate with the UNHCR, a need which is also provided for under Art. 35 of the Refugee Convention. *Id.*

The conditions for being granted refugee status are therefore fivefold. Asylum seekers need to show (1) a well-founded fear (2) of persecution (3) on the basis of one or more of the following five grounds: race, religion, nationality, membership of a particular social group, or political opinion; (4) that they are outside the country of their nationality or of their former habitual residence as a result of such fear of persecution; and (5) that they are unable or unwilling, owing to such fear, to avail themselves of the protection of that country. Thus, there are several grounds for persecution under which refugee status may be sought, but none of them expressly includes gender. Moreover, only the masculine pronoun is used in this definition.

The absence of gender may seem odd, as the UDHR, adopted three years before the Refugee Convention, prohibits discrimination on the basis of a non-exhaustive list of grounds which include sex. Thereby, the Declaration recognized that the rights it promulgated were also applicable to women on a nondiscriminatory basis. This includes the right to seek asylum, provided for in Article 14. However, the UDHR did not have the same moral and political weight that it has now acquired, and the recognition of women's rights as human rights was only in its nascent phase. Therefore, the Refugee Convention relied and built on the idea of a male experience of public political activity.<sup>35</sup> Indeed, while the principle of nondiscrimination is affirmed in the very first paragraph of the Preamble of the Refugee Convention, Article 3 of the Convention, which provides that “[t]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin,” does not include sex among the grounds for discrimination.

Although gender was excluded from the dominant traditional interpretation of the Refugee Convention, the Convention was drafted in sufficiently broad terms to leave room for inclusive interpretation.<sup>36</sup> Over the years, the development of international human rights law and global awareness for previously neglected issues led to a broader understanding of refu-

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35. Honkala, *supra* note 30, at 173.

36. *European Parliament Briefing on Gender aspects of migration and asylum in the EU: An overview* 7 (2016) [hereinafter European Parliament Briefing].

gee status.<sup>37</sup> In recent decades, there has been increased public discussion on several grounds of persecution, notably gender and sexual orientation, as the basis of refugee status determination. This wider interpretation was made possible thanks to the connections drawn by human rights advocates between international refugee law and international human rights law.<sup>38</sup> This meant that the harms constitutive of persecution did not necessarily have to originate from states, fitting the traditional notion of a male political dissident persecuted by the state, but could also be inflicted by private individuals, in the case where the state failed to afford protection to victims.<sup>39</sup>

The UNHCR contributed to this more inclusive interpretation by publishing guidelines explaining that gender was part of the grounds of persecution under the Refugee Convention and developing principles to encourage the consideration of gender when applying the Convention.

ii. *Development of gender sensitivity through UNHCR Guidelines*

The UNHCR<sup>40</sup> is a crucial actor in refugee law, as it serves as the guardian of the Refugee Convention<sup>41</sup> with State Parties obligated to cooperate with it.<sup>42</sup> As part of its mandate, it has adopted several guidelines which, over the years, have enabled the development of an expansive interpretation of the Refugee Convention. These guidelines, as their names suggest, are not legally binding, but are designed to provide “legal inter-

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37. See, e.g., UNHCR, Guidelines on International Protection: “Membership of a Particular Social Group” Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/GIP/02/02 (2002). [hereinafter UNHCR Membership of a Particular Social Group Guidelines].

38. Firth & Mauthe, *supra* note 10, at 472.

39. Anker, *supra* note 10, at 133–35; Edwards, *supra* note 11, at 64–71; Anker & Ahmed, *supra* note 10.

40. The UNHCR was established in 1951 by a UN General Assembly (UNGA) Resolution. UN General Assembly, UNHCR, Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428 (V), annex, A/1775 (Dec.14, 1950) [hereinafter UNHCR Statute].

41. UNHCR, The 1951 Refugee Convention, <https://perma.cc/RG4E-S97T> (last visited Nov. 10, 2021).

42. For more details about the role of the UNHCR and state cooperation, see Refugee Convention, *supra* note 26, at 18, art. 35; G.A. Res. 57/187, ¶ 4 (Dec. 18, 2001); UNHCR Statute, *supra* note 41.

pretative guidance” for governments, legal practitioners, decision-makers, and the judiciary.<sup>43</sup> However, states have the obligation under the Refugee Convention to cooperate with the UNHCR in the exercise of its functions,<sup>44</sup> and the effectiveness of its work is predicated on such cooperation.

In 2002, the UNHCR issued targeted guidelines on gender-related persecution<sup>45</sup> which provided helpful clarifications. These guidelines emphasize that “it is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions,”<sup>46</sup> an approach which has been endorsed by the U.N. General Assembly and the Executive Committee. They also clarify that, thanks to developments particularly in international human rights law and international criminal law since the 1990s which have advanced gender-sensitive interpretations, the refugee definition encompasses gender-related claims and therefore, it is unnecessary to add a corresponding ground to the Refugee Convention definition.<sup>47</sup> Importantly, the UNHCR stresses the importance of performing a holistic assessment and of having “a full picture of the asylum-seeker’s personality, background and personal experiences,” as well as understanding the situation in the country of origin.<sup>48</sup>

The UNHCR provides further guidance on how the different elements of the refugee definition in the Convention may be interpreted in a gender-sensitive way. It specifies that certain forms of persecution are sex-specific<sup>49</sup> and affirms that nonstate actors may also be persecutors if their acts are “knowingly tolerated by the authorities, or if the authorities refuse, or are unable to, offer effective protection.”<sup>50</sup> The guidelines acknowledge that the causal link element between the act of persecution and the ground for persecution (“for reasons of,” i.e., one or more of the Convention grounds must be a “relevant contributing factor”) is a difficult element to satisfy in many gender-related claims and clarify that, in the case of per-

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43. UNHCR Gender Guidelines, *supra* note 16, at 1.

44. Refugee Convention, *supra* note 25, art. 35.

45. UNHCR Gender Guidelines, *supra* note 16.

46. *Id.* ¶ 2.

47. *Id.* ¶¶ 5–6.

48. *Id.* ¶ 7.

49. *Id.* ¶ 9.

50. *Id.* ¶ 19.

secution—or a real risk of persecution—by a nonstate actor, the causal link may be satisfied even if only the act of persecution or the absence of state protection is related to a Convention ground.<sup>51</sup> The UNHCR gives the example of domestic violence, where it may be difficult to demonstrate that the husband abused his wife for the reason of a Refugee Convention ground, but a valid claim for refugee status may still be established when the state is unwilling to afford her protection for reasons of such ground.<sup>52</sup> In terms of the Refugee Convention grounds, the UNHCR emphasizes the need to “ensure that a gender-sensitive interpretation is given to each of the Convention grounds.”<sup>53</sup> It further highlights that the ground of persecution may be imputed to women, who, in several societies, are often considered as having the same political, religious, or social affiliations as their relatives or community.<sup>54</sup>

In separate guidelines,<sup>55</sup> the UNHCR delved deeper into the Refugee Convention ground of membership of a particular social group, acknowledging that some States had recognized women as constituting a particular social group under this ground.<sup>56</sup> The guidelines highlighted that the concept of membership of a particular social group should be interpreted in an evolutionary way, in order to take into account “the diverse and changing nature of groups in various societies and evolving nature of groups in various societies and evolving international human rights norms.”<sup>57</sup> The UNHCR stressed that gender was often analyzed under this Convention ground, but this should not render the other grounds superfluous, and one should not overlook the grounds of political opinion and religion, which may be particularly relevant for gender-related claims.<sup>58</sup> Relying on State practice, the UNHCR reconciled the

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51. *Id.* ¶¶ 20–21.

52. UNHCR Membership of a Particular Social Group Guidelines, *supra* note 37, ¶ 22.

53. UNHCR Gender Guidelines, *supra* note 16, ¶ 22.

54. *Id.*

55. UNHCR Membership of a Particular Social Group Guidelines, *supra* note 37.

56. *Id.* ¶ 1.

57. *Id.* ¶ 3.

58. UNHCR Gender Guidelines, *supra* note 16, ¶ 28.



two main approaches regarding this ground<sup>59</sup> and provided the following definition:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.<sup>60</sup>

This definition thus incorporates the two dominant approaches, namely the “protected characteristics” approach and the “social perception” approach, as alternative rather than cumulative conditions.

The UNHCR further complemented its guidance on gender-related persecution with a Handbook for the Protection of Women and Girls<sup>61</sup> which discusses the specificity of persecution experienced by women in their country of origin and during their entire displacement journey. The UNHCR also adopted guidelines about persecution related to sexual orientation and gender identity, as mentioned in the introduction.<sup>62</sup>

## B. *Other international instruments*

### i. *International conventions on women's rights*

Other international instruments have complemented the protection of female asylum seekers. The Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) is a key international instrument in the protection of female refugees. Although CEDAW does not explicitly address female refugees and asylum seekers in its text, the Committee on the Elimination of Discrimination against Women

59. The Guidelines specify that these two approaches were especially developed in common law jurisdictions. UNHCR Membership of a Particular Social Group Guidelines, *supra* note 37, ¶¶ 5–6. In civil law jurisdictions, this ground is less well developed, because decision-makers analyze especially whether a risk of persecution exists, rather than focusing on the definition of a particular social group, but both approaches were mentioned. *Id.* ¶ 8.

60. *Id.* ¶ 11.

61. UNHCR Handbook for the Protection of Women and Girls 5–11 (Jan. 2008), <https://perma.cc/J8SX-645E>.

62. UNHCR SOGI Guidelines, *supra* note 22, ¶¶ 1–4.

(CEDAW Committee) issued a General Recommendation on the gender-related dimensions of, notably, refugee status and asylum of women.<sup>63</sup> The CEDAW Committee acknowledged that gender-related persecution is lacking in the text of the Refugee Convention and states that the CEDAW provisions “reinforce and complement the international legal protection regime for refugees . . . women and girls.”<sup>64</sup> In that vein, the Committee recommended that State Parties adopt a gender perspective in the interpretation of all five grounds, “us[e] gender as a factor in recognizing membership of a particular social group,” and “further introduce other grounds of persecution, namely sex and/or gender, into national legislation and policies relating to refugees and asylum seekers.”<sup>65</sup> Its recommendation further complements the definition of gender-related forms of persecution provided by the UNHCR Guidelines by drawing an analogy from its definition of violence against women, noting, these are “forms of persecution that are directed against a woman because she is a woman or that affect women disproportionately.”<sup>66</sup> The Committee specifies that such forms of persecution may include female genital mutilation, forced/early marriage, trafficking in women, rape, serious forms of domestic violence, “political or religious persecution for holding feminist or other views and the persecutory consequences of failing to conform to gender-prescribed social norms and mores or for claiming their rights under the [CEDAW].”<sup>67</sup> Importantly, emphasizing that gender-related claims of persecution are often categorized under the membership of a particular social group ground, the CEDAW Committee highlights that this “may reinforce the stereotyped notions of women as dependent victims.”<sup>68</sup> Relying upon Article 5 of the CEDAW,<sup>69</sup> the Committee notes that State Parties

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63. CEDAW, General Recommendation No. 32 on the Gender-related Dimensions of Refugee Status, Asylum, Nationality and Statelessness of Women, UN Doc. CEDAW/C/GC/32 (2014) [hereinafter CEDAW General Recommendation No. 32].

64. *Id.* ¶ 10.

65. *Id.* ¶ 13.

66. *Id.* ¶ 15.

67. *Id.*

68. *Id.* ¶ 31.

69. Convention on the Elimination of All Forms of Discrimination Against Women art. 5, Sept. 3, 1981, 1249 U.N.T.S. 13.

should “assess women’s claims to asylum without prejudiced and stereotyped notions of women that are based on the inferiority or superiority of either sex,” but instead recognize that “[w]omen are active agents who play important roles” and that “[t]hey are [also] targeted on account of their political opinions and/or activities, including the expression of women’s rights.”<sup>70</sup>

Moreover, the Council of Europe Convention on Preventing and Combatting Violence Against Women and Domestic Violence, also known as The Istanbul Convention, plays a major role in the protection of female refugees. The Istanbul Convention, which entered into force in 2014, is the first human rights instrument in Europe that defines violence against women as a human rights violation and a form of discrimination against women.<sup>71</sup> It also recognizes that violence against women is a manifestation of gender inequalities and “one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.”<sup>72</sup> Additionally, the Convention includes a chapter on migration and asylum, which supplements the Refugee Convention. Article 60 focuses on gender-based asylum claims and obliges State Parties to adopt measures “to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of [the Refugee Convention] and as a form of serious harm giving rise to complementary/subsidiary protection” and requires them to “ensure that a gender-sensitive interpretation is given to each of the Convention grounds.”<sup>73</sup> Under Article 61(2), the Istanbul Convention furthermore extends the obligation of non-refoulement to “victims of violence against women who are in need of protection, regardless of their status or residence.”<sup>74</sup>

At the time of this writing, thirty-four Member States of the Council of Europe ratified the Istanbul Convention. All E.U. Member States signed it, and twenty-one E.U. Member

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70. CEDAW General Recommendation No. 32, *supra* note 63, ¶ 31.

71. Convention on Preventing and Combatting Violence Against Women and Domestic Violence art. 3(a), May 11, 2011, Council of Europe [hereinafter Istanbul Convention].

72. *Id.* at 2.

73. *Id.* art. 60.

74. *Id.* art. 61.

States ratified it. The European Union itself signed it but did not adopt a decision on its conclusion.<sup>75</sup>

ii. *Regional instruments*

Compared to the Refugee Convention's definition of refugee, which has a narrower, more individualistic focus, the regional organizations of the African Union (AU) and the Organization of American States (OAS) have adopted a much more progressive refugee definition.<sup>76</sup> For example, the 1984 OAS Cartagena Declaration on Refugees<sup>77</sup> expanded the refugee definition in the Refugee Convention and included within its scope "persons who have fled their country because their lives, safety or freedom have been threatened by generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order."<sup>78</sup> While neither the AU nor the OAS instruments make special mention of gender, in the African Union context, the Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa provides that State Parties shall "ensure that women and men enjoy equal rights in terms of access to refugee status determination procedures and that women refugees are accorded the full protection and benefits guaranteed under international refugee law, including their own identity and other documents."<sup>79</sup>

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75. Council of Europe, Chart of signatures and ratifications of Treaty 210, <https://perma.cc/H2YV-B49K> (last visited Oct. 26, 2021). Note that Poland is considering leaving the Istanbul Convention. *Turkey, Poland consider leaving Istanbul Convention on Violence Against Women*, INT'L JUST. RES. CTR. (Aug. 6, 2020), <https://perma.cc/9E2P-8G3S>. An opinion finding the European Union concluding the Convention was compatible with EU law was recently issued by the Court of Justice of the European Union after a request by the European Parliament. Case C-413/21, Request for an opinion submitted by the European Parliament pursuant to Article 218(11) TFEU, ECLI:EU:C:2021:198, ¶ 371 (Oct. 6, 2021).

76. *See* Convention Governing the Specific Aspects of Refugee Problems in Africa art. 1, Sept. 10, 1969, 100 U.N.T.S. 45 adopted by the then-Organization of African Unity); Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, *Cartagena Declaration on Refugees* (Nov. 22, 1984) [hereinafter *Cartagena Declaration*].

77. *Id.*

78. *Id.* § III(3).

79. African Union, Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, art. 4(k) (July 11, 2003).

Although not legally binding, it is worth mentioning the 1966 Bangkok Principles on Status and Treatment of Refugees, adopted by the Asian-African Legal Consultative Organization.<sup>80</sup> After their revision in 2001, the refugee definition was expanded to include new grounds for persecution, notably gender.<sup>81</sup> However, this expanded definition has not made a large impact on the situation of refugees in Asia, where many countries are not parties to the Refugee Convention.<sup>82</sup>

### C. *European Union*

All E.U. Member States ratified both the Refugee Convention and CEDAW, and many have also ratified the Istanbul Convention. These instruments, along with their respective bodies' interpretations, oblige E.U. Member States to adopt a gender-sensitive interpretation of the refugee definition. The E.U. legal framework further provides extensive obligations in that area.

#### i. *Treaty law*

E.U. treaties place the principle of nondiscrimination, equality, especially between women and men, and respect for human rights among European Union's founding values and primary objectives.<sup>83</sup> The Charter of Fundamental Rights of the European Union furthermore provides for the principle of equality before the law,<sup>84</sup> the principle of nondiscrimination, including on the ground of sex,<sup>85</sup> and equality between wo-

80. Asian-Afr. Legal Consultative Org. [AALCO], Bangkok Principles on Status and Treatment of Refugees (June 24, 2001) (revising the 1966 Principles).

81. *Id.* art. I(1).

82. Andreas Zimmermann & Claudia Mahler, *Part Two General Provisions, Article 1A, para. 2, in THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND ITS 1967 PROTOCOL: A COMMENTARY* 298, 320 (Andreas Zimmermann et al. eds., 2011).

83. Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Community arts. 2, 3(3), 8, Dec. 13, 2007, 2007 O.J. (C 306) 1. Moreover, Art. 157 of the Treaty on the Functioning of the European Union anchors the principle of equal pay for women and men for equal work. Consolidated Version of the Treaty on the Functioning of the European Union art. 157, May 9, 2008, 2008 O.J. (C 115) 47.

84. Charter of Fundamental Rights of the European Union art. 20, Oct. 26, 2012, 2012 O.J. (C 326/02) 391.

85. *Id.* art. 21.

men and men in all areas, including the possibility of providing specific advantages in favor of the under-represented sex.<sup>86</sup>

With regard to asylum, the main provisions in treaty law are found in the Charter of Fundamental Rights of the European Union, which provides that the right to asylum ought to be guaranteed with due respect for the rules of the Refugee Convention and its Protocol.<sup>87</sup> Additionally, Article 3(2) of the Treaty on European Union (TEU) places asylum among the objectives and values of the European Union.<sup>88</sup>

The Treaty on the Functioning of the European Union (TFEU) details the heart of the provisions related to the area of freedom, security and justice, and asylum policy is addressed in Title V. Article 67(2) provides for the obligation of the Union to “frame a common policy on asylum . . . based on solidarity between Member States, which is fair towards third-country nationals.”<sup>89</sup> Article 78(1) provides that the European Union “shall develop a common policy on asylum, subsidiary protection and temporary protection” with the aim of “offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of *non-refoulement*,” in accordance with the Refugee Convention. Article 78(2) provides the basis for the adoption of a common European asylum system (CEAS).<sup>90</sup> The obligation to develop a CEAS is the result of the Tampere European Council in October 1999, where it was agreed that a common European asylum system “based on the full and inclusive application of the Geneva Convention” would be established in two phases: the approximation of rules and common minimum standards in the short term, followed by uniform rules on procedures and status for those who are granted asylum.<sup>91</sup> Accordingly, the first phase of the CEAS took place between 1999 and

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86. *Id.* art. 23.

87. *Id.* art. 18.

88. TEU art. 3(2).

89. TFEU art. 67.

90. *Id.* art. 78.

91. Presidency Conclusions, Tampere European Council, ¶¶ 13–15 (Oct. 15–16, 1999).

2004 and the second phase was adopted with the entry into force of the Treaty of Lisbon.<sup>92</sup>

Article 78(2) TFEU details the European Union's obligation regarding the establishment of the CEAS, which shall include, inter alia, a uniform status of asylum and subsidiary protection for nationals of third countries, common procedures for the granting and withdrawing of uniform asylum or subsidiary protection status, criteria and mechanisms for determining which Member State is responsible for considering an application for asylum or subsidiary protection, and standards concerning the conditions for the reception of applicants.<sup>93</sup> Article 80 further states that the implementation of, notably, the asylum policy "shall be governed by the principle of solidarity and fair sharing of responsibility, including its financial implications, between the Member States."<sup>94</sup>

ii. *Secondary law: The Qualification Directive*

Following the mandate for completing the establishment of a common European asylum system, the European Union adopted several measures to actualize such a system. These measures have built up and they now provide a developed and comprehensive legal framework for several aspects of asylum in the European Union and address the specificity of gender both in procedures and in substance. Most acts are subject to proposals by the European Commission to amend and replace them under the reform process started in 2016, which has been revived with the recent New Pact on Migration and Asylum.<sup>95</sup>

This section focuses on the legal framework governing the establishment of a uniform status of asylum, which is established by the recast Directive on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted, commonly referred

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92. European Parliament, Fact Sheets on the European Union: Asylum Policy (Sept. 2021), <https://perma.cc/DEW7-WTZ7>.

93. TFEU art. 78.

94. *Id.* art. 80.

95. See New Pact on Migration and Asylum, *supra* note 9 (offering "a fresh start" to addressing migration).

to as the “Qualification Directive.”<sup>96</sup> This Directive outlines common standards to identify third-country nationals and stateless persons to whom international protection is to be granted,<sup>97</sup> to define a uniform status for refugees or for beneficiaries of subsidiary protection, and to establish the minimum content of protection.<sup>98</sup>

This Directive is a crucial text, as it expressly defines the term “refugee” for the European Union. Article 2(d) takes over almost verbatim the definition provided for by the Refugee Convention, with the noteworthy deletion of the exclusive masculine pronoun, and the limitation of that term to third-country nationals and stateless persons.<sup>99</sup> Article 9 further defines what acts may be considered acts of persecution to qualify for refugee status. Such act:

must (a) be sufficiently serious by its nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (these are the right to life, prohibition of torture, slavery and forced labor, and punishment without law); or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in point (a).

According to Article 9(2), such acts can take the form, of, in particular, “acts of physical or mental violence, including acts of sexual violence,” “legal, administrative, police and/or

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96. Council Directive 2011/95/EU, 2011 O.J. (L 337) 9 [hereinafter *Qualification Directive*]. That Directive is subject to a European Commission proposal for a Qualification Regulation to replace it. *Commission Proposal for a Regulation of the European Parliament and of the Council on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection and for the Content of the Protection Granted and Amending Council Directive 2003/109/EC of 25 November 2003 Concerning the Status of Third-country Nationals who are Long-term Residents*, COM (2016) 466 final (July 13, 2016) [hereinafter *Proposal for a Qualification Regulation*].

97. Art. 2(a) clarifies that international protection means both refugee and subsidiary protection status. *Qualification Directive*, *id.* art. 2(a).

98. *Id.* art. 1.

99. *Id.* art. 2(d).



judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner,” or “acts of a gender-specific . . . nature.”<sup>100</sup> Since the Qualification Directive does not define what may constitute an act of a gender-specific nature, this omission may provide an opportunity for E.U. Member States to adopt progressive interpretations.

Following the UNHCR Guidelines on Gender-Related Persecution discussed above, Article 9(3) specifies that there must be a connection between the grounds of persecution and the acts of persecution, or between those grounds and the absence of protection against such acts.<sup>101</sup> By providing for this latter connection, the recast Directive, therefore, made improvements to the previous Directive.<sup>102</sup> This is crucial because it may be easier to demonstrate this latter connection for gender-related claims in particular.<sup>103</sup>

Regarding the reasons for persecution, which are identical to the Refugee Convention, the Directive specifies that Member States shall take gender into account, but only under the membership of a particular social group ground. In that regard, the Directive states that “[g]ender-related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group.”<sup>104</sup> Recital 30 further specifies:

[f]or the purposes of defining a particular social group, issues arising from an applicant’s gender . . . which may be related to certain legal traditions and customs, resulting in for example genital mutilation, forced sterilization or forced abortion, should be given due consideration in so far as they are related

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100. *Id.* art. 9(2).

101. *Id.* art. 9(3).

102. Compare Qualification Directive, *supra* note 96, art. 9(3), with Council Directive 2004/83/EC, art. 9(3), 2004 O.J. (L 304) 12 [hereinafter 2004 Qualification Directive] (“In accordance with Article 2(c), there must be a connection between the reasons mentioned in Article 10 and the acts of persecution as qualified in paragraph 1.”).

103. See *supra*, section 1.A.2 (discussing the UNHCR Gender Guidelines, *supra* note 16).

104. Qualification Directive, *supra* note 96, art. 10.

to the applicant's well-founded fear of persecution.<sup>105</sup>

Article 10(1)(d) of the Directive follows the UNHCR's two-prong definition of that ground, providing that

a group shall be considered to form a particular social group where in particular: - members of that group share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or conscience that a person should not be forced to renounce it, and - that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.<sup>106</sup>

However, there is a significant difference between the Directive's definition and the definition given by the UNHCR. The Directive prescribes the two approaches as cumulative conditions, whereas the UNHCR arranges them as alternatives, first advising to consider the protected characteristics approach and, only where it may not be met, to consider the social perception test. Article 10(2) acknowledges that applicants may be attributed a characteristic, rather than actually possessing it.<sup>107</sup>

The Directive also addresses the concept of subsidiary protection, defined in Article 2(f), as a further form of international protection.<sup>108</sup> Beneficiaries of that protection are third-country nationals or stateless persons who do not meet the requirements for being qualified as refugees, but for whom there are "substantial grounds" for believing that they "would face a real risk of suffering serious harm" if returned to their country of origin or of former habitual residence, and are unable or unwilling to avail themselves of the protection of that country. "Serious harm" includes death penalty, "torture or inhuman or degrading treatment or punishment," and "serious and individual threat to a civilian's life or person by reason of indiscriminate violence in situations of international or internal armed conflict."<sup>109</sup>

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105. *Id.* recital 30.

106. *Id.* art. 10(1).

107. *Id.* art. 10(2).

108. *Id.* art. 2(f).

109. *Id.* art. 15.

The Directive specifies that for both refugee and subsidiary protection statuses, nonstate actors may also be considered actors of persecution or serious harm if it can be demonstrated that the state—or parties or organizations controlling the state territory, including international organizations—is unable or unwilling to provide protection against such persecution or serious harm.<sup>110</sup>

The Directive further mentions gender in an article concerning the assessment of facts and circumstances relating to applications for international protection, where it states that such assessment is to be carried out on an individual basis and is to take into account “the individual position and personal circumstances of the applicant, including factors such as . . . gender.”<sup>111</sup>

Thus, the Qualification Directive, together with the other legal acts adopted under the CEAS,<sup>112</sup> while not perfect, provides for comprehensive protection measures, with the inclusion of gender considerations, both in procedural and substantive terms.

However, there are several protection gaps. To begin with, most of these acts are directives, rather than regulations.<sup>113</sup> They provide for minimum standards and, thus, Member States are free to adopt more favorable conditions.<sup>114</sup> Significant discrepancies exist in the implementation of these measures across the Member States. Moreover, the European Union has not adopted E.U.-wide gender guidelines in the framework of its asylum policy. Therefore, there is no guarantee that gender considerations will be uniformly considered

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110. *Id.* art. 6(c).

111. *Id.* art. 4.

112. The CEAS is governed by five legislative instruments: the Qualification Directive, *supra* note 96, the Asylum Procedures Directive, the Reception Conditions Directive, the Dublin Regulation, and the EURODAC Regulation. Parliament and Council Directive 2013/32, 2013 O.J. (L 180) 60; Parliament and Council Directive 2013/33, 2013 O.J. (L 180) 96; Parliament and Council Regulation 604/2013, 2013 O.J. (L 180) 31; Parliament and Council Regulation 603/2013, 2013 O.J. (L 180) 1.

113. “A regulation shall have general application. It shall be binding in its entirety and directly applicable in all Member States,” while “[a] directive shall be binding, as to the result to be achieved, upon each Member State to which it is addressed, but shall leave to the national authorities the choice of form and methods.” TFEU art. 288.

114. *See, e.g.*, Qualification Directive, *supra* note 96, art. 3.

throughout the different Member States. With regard to gender-related persecution, several provisions account for the protection of gender-related claims, such as the consideration of nonstate actors as actors of persecution and the satisfaction of the connection condition where there is a link between the ground of persecution and the absence of protection from the state. Nonetheless, the mention of gender exclusively under the ground of membership of a particular social group and the departure from the definition of that same ground in the UNHCR Guidelines, which adopt an alternative rather than a cumulative approach, constitute further obstacles to the appropriate assessment of gender-related claims, as described in Part III below. The 2016 European Commission Proposal for a Qualification Regulation,<sup>115</sup> which is still pending, has maintained an almost verbatim wording on gender considerations, while its nature as a regulation may ensure greater harmonization in implementation.

The protection of gender in the international, regional, and E.U. legal framework is therefore well developed and yet suffers from several significant shortcomings.

Before turning to the analysis of the protection of women asylum seekers under E.U. law, since fewer women than men seek asylum in the European Union, it is important to briefly assess the various obstacles in the refugee journey to determine what may explain these gender differences.

### III. HURDLES IN THE COUNTRY OF ORIGIN AND SYSTEMIC HURDLES: WHY DOESN'T *SHE* LEAVE AND WHY DOES *HE* SEEK ASYLUM?

While the proportion of female asylum applications has increased over the years, it is important to reflect on the potential reasons for the statistical difference between men and women's asylum applications.

From the perspective of the country of origin, gender norms may explain why women do not leave as readily as men. From the perspective of the so-called "refugee receiving" countries, resettlement, namely the process through which refugees are transferred from their country of origin to another country

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115. *Proposal for a Qualification Regulation*, *supra* note 96.

that agreed to admit them,<sup>116</sup> due to eligibility criteria, does not favor single male applicants, who may therefore be constrained to leave by their own means and at their own risks, and directly seek asylum in the European Union.

A. *Why doesn't she leave? Gender norms and hurdles in the country of origin*

Gender norms, which create psychological, cultural, legal, and financial obstacles, may heavily account for the reason why women leave less than men. Many countries of origin are strong male-dominated societies. Women may not be allowed to move freely without their husband's or father's approval, at the risk of humiliating their families. Consequently, if their asylum application is not successful and they are returned home, they might be at risk of severe punishment and sometimes death. Moreover, the journey is dangerous, uncertain, and costly.<sup>117</sup> Yet, they have many reasons to leave.

To avoid generalizations—although length considerations and the complexity of the issues do not allow complete avoidance of this flaw—a brief description of the situation of women in the main countries of origin of asylum applicants in the European Union in 2019 and 2020 follows.<sup>118</sup>

i. *Syrian Arab Republic*

While the Syrian Constitution provides for equal opportunities for women<sup>119</sup> and nondiscrimination on the basis of sex,<sup>120</sup> laws governing women's lives, which are mainly found in the Syrian Personal Status Law, reflect a dominant patriar-

116. See UNHCR USA, Resettlement, <https://perma.cc/J6M4-XZ5Z> (last visited Nov. 18, 2021).

117. Mélanie Glodkiewicz, Protection des Femmes Migrantes dans le Régime d'Asile de l'Union Européenne et Vulnérabilité Liée au Genre 37 (2017) (M.A. thesis, Université catholique de Louvain); Macklin, *supra* note 10, at 220.

118. Eurostat, Asylum Statistics, Citizenship of first-time applicants: largest numbers from Syria, Afghanistan and Venezuela, 2019 (Mar. 16, 2021), <https://perma.cc/SY2L-Y9ZZ>.

119. CONSTITUTION OF THE SYRIAN ARAB REPUBLIC art. 23, 26 Feb. 2021.

120. *Id.* art. 33(3), 26 Feb. 2021.

chal culture<sup>121</sup> and contain discriminatory provisions. Women may not marry without the consent of their male guardian, who signs the marriage contract. Most marriages are arranged, and polygamy is permitted under Sharia law (as it is interpreted).<sup>122</sup> Early marriage is practiced, particularly among displaced and refugee families who believe that marrying their girls will protect them from rape, or who do so for economic reasons.<sup>123</sup> The law further discriminates in relation to divorce and inheritance.<sup>124</sup> Women are not allowed to travel abroad with their children without their father's written approval and husbands may request the Interior Ministry to prohibit their wives from leaving the country.<sup>125</sup> Married women may only work outside their home when their husband expressly permits it if the right to work was not included in the marriage contract.<sup>126</sup> A wife may not disobey her husband, at the risk of losing her right to spousal support.<sup>127</sup> It is therefore very difficult for her to leave. No law addresses violence against women,<sup>128</sup> and the Penal Code provides for less serious penalty for crimes committed in defense of honor.<sup>129</sup> No law addresses domestic violence, which is considered taboo, nor recognizes marital rape.<sup>130</sup> With regard to homosexuality, the Penal Code criminalizes "unnatural sexual intercourse" with imprisonment.<sup>131</sup>

In practice, in the context of the ongoing conflict, women have been subjected to arbitrary arrest, abduction, torture, gender-based violence, and execution on the basis of multiple

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121. Nisren Habib, *Gender role changes and their impacts on Syrian women refugees in Berlin in light of the Syrian crisis* (Leibniz Info. Ctr. for Econ., WZB Discussion Paper No. SP VI 2018-101).

122. OECD, *Social Institutions & Gender Index, Syrian Arab Republic 2* (2019) [hereinafter OECD Syria].

123. *Id.* at 3.

124. *Id.* at 3–4.

125. *Id.* at 7.

126. In most cases, women are not aware of the possibility of including such condition in the marriage contract. Amnesty Int'l, *Letter to CEDAW Chairperson re: 58th Pre-Sessional Meeting of CEDAW – Syrian Arab Republic*, at 6, TIGO IOR 40/2013.078 (Sept. 16, 2013) <https://perma.cc/KT5Y-DS9F>.

127. OECD Syria, *supra* note 122, at 3.

128. *Id.* at 4.

129. *Id.* at 4–5.

130. *Id.* at 5.

131. LUCAS RAMÓN MENDOS ET AL., *ILGA WORLD, STATE-SPONSORED HOMOPHOBIA 2020: GLOBAL LEGISLATION OVERVIEW UPDATE*, 137 (2020).

grounds, including their own attributed, or perceived political views or activities, as well as their religion, ethnicity, place of origin or residence, or family links.<sup>132</sup> Women also endure domestic violence, honor crimes, trafficking for the purpose of sexual exploitation and forced prostitution, and early and forced marriages.<sup>133</sup> Female members of religious and ethnic minorities, such as Assyrian Christian women and Iraqi Yezidi women, are especially subjected to sexual slavery, including through forced marriages.<sup>134</sup> In areas under the control of extremist Islamist armed groups, women are obliged to follow certain rules, such as remaining in their home unless accompanied by an immediate male relative, and wearing a wide cloak. Failure to follow these rules may subject them to public humiliation, inhuman and degrading treatment, or the death penalty.<sup>135</sup>

Therefore, several reasons may explain why women from Syria may not leave their country, despite having a well-founded fear of persecution. These include the trauma experienced, the poor physical conditions after such violence, and the risk of serious harm if their attempt to leave is unsuccessful.

## ii. *Afghanistan*

In Afghanistan, Sharia law (as it is interpreted), customary laws, traditional rules, and state law all impose discriminatory

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132. UNHCR, International Protection Considerations with Regard to People Fleeing the Syrian Arab Republic Update V, UN Doc. HCR/PC/SYR/17/01, 59–60 (Nov. 2017).

133. Perpetrators may either be parties to the conflict or families, who may believe that child marriage may protect her from violations. Christine Chinkin & Madeleine Rees, *A Commentary on the Conference Room Paper of the Independent International Commission of Inquiry on the Syrian Arab Republic: "I Lost my Dignity": Sexual and Gender-based Violence in the Syrian Arab Republic*, WILPF 5 (May 2018), <https://perma.cc/B9MF-8V7T>.

134. UNHCR, *supra* note 132, at n.314 (quoting U.N. Secretary-General, *Rep. of the Secretary-General on Conflict-Related Sexual Violence*, U.N. Doc. S/2016/361 (Apr. 20, 2016).

135. UNHCR, *supra* note 132, at n.319 (quoting U.S. DEP'T OF STATE, 2016 COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES – SYRIA 48 (Mar. 3, 2017)); U.N. Secretary-General, *Rep. of the Secretary-General on Situation of Human Rights in the Syrian Arab Republic*, ¶ 45, U.N. Doc. A/70/919 (June 9, 2016).

provisions.<sup>136</sup> Women are disproportionately victims of harmful traditional practices, which include forced and child marriage,<sup>137</sup> forced isolation in the home,<sup>138</sup> and honor killings.<sup>139</sup> Tradition dictates that male family members are the head of the household, while women are typically caregivers and take care of the house.<sup>140</sup> The law provides that women are not entitled to alimony if they leave the residence without their husband's permission or do not respect their marital duties.<sup>141</sup> Under the law, women must obey their husbands.<sup>142</sup> The law further discriminates against women in divorce and inheritance matters.<sup>143</sup> With regard to homosexuality, same-sex sexual conduct is criminalized, with no legal certainty about the application of the death penalty.<sup>144</sup>

The 2009 End Violence Against Women Law criminalizes several acts of violence, including forced marriage, deprivation of inheritance, prohibition from accessing education, work, and health services, and psychological violence—but not domestic violence—and provides for the rights of victims to prosecute their abuser, access shelter, and legal and health assistance.<sup>145</sup> However, violence against women remains common, which has been aggravated by years of conflict. The Taliban's control of certain areas of the country rendered health, education, and legal services hardly accessible, which further restricts domestic violence victims' access to those services.<sup>146</sup> Honor killings are socially accepted, and therefore are rarely reported and receive a more lenient punishment.<sup>147</sup> Sex outside of marriage is prohibited and punished, which often deters women from reporting rape and may lead to arranged

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136. OECD, *Social Institutions & Gender Index, Afghanistan* 2–4, 7–9 (2019) [hereinafter OECD Afghanistan].

137. *Id.* at 2–3.

138. *Id.* at 4.

139. *Id.* at 5.

140. *Id.* at 3.

141. *Id.*

142. *Id.*

143. *Id.* at 3–4.

144. MENDOS ET AL., *supra* note 131, at 129.

145. OECD Afghanistan, *supra* note 136, at 4.

146. *Id.* at 5 (“In border areas the proliferation of armed disputes and Taliban presence mean a lack of health, education and legal services meaning victims of domestic violence lack access to support and legal services.”).

147. *Id.*



marriage or killings.<sup>148</sup> Women are often deprived of their property rights under customary practices.<sup>149</sup> Women face hurdles in accessing work due to illiteracy, social norms regarding working women, and cultural traditions, notably the requirement for the husband's approval.<sup>150</sup> Women also need their husband's approval to obtain a passport.<sup>151</sup>

Women who are perceived as transgressing social norms may be deemed to have committed a "moral crime" and may face detention for breaches of customary or Sharia law as a result. Most cases of violence against women are dealt with by traditional dispute resolution mechanisms, which often strengthen harmful traditional practices.<sup>152</sup>

In August 2021, the Taliban regained control of Afghanistan. While they claim to respect women's rights, experts have stated that the Taliban will likely impose further discriminatory rules on women. At the time of this writing, the new male-only regime has already announced gender segregation in universities, with the likelihood of completely excluding women due to financial and logistical implementation difficulties.<sup>153</sup> They have also announced compulsory Islamic dress, prohibition from appearing in public without a male chaperone, and prohibition from going to work.<sup>154</sup>

Leaving Afghanistan in the midst of conflict without travel documents, an education, financial means, or in poor health, and facing high risks if the flight is unsuccessful is a hazardous experience which may deter many women.

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148. *Id.* at 5–6.

149. *Id.* at 7.

150. *Id.* at 8.

151. *Id.* at 9.

152. UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, UN Doc. HCR/EG/AFG/16/02, 57–64 (2016).

153. Lindsay Maizland, *Backgrounder: The Taliban in Afghanistan*, COUNCIL ON FOREIGN RELATIONS (Sept. 15, 2021), <https://perma.cc/ZB45-YMWN>; Hannah Ellis-Petersen, *Afghan Women at University Must Study in Female-only Classrooms, Taliban Say*, THE GUARDIAN (Sept. 12, 2021) <https://perma.cc/5BWS-9KUJ> (discussing the cost of segregating higher education); Heather Barr, *How the International Community Can Protect Afghan Women and Girls*, JUST SEC. (Sept. 2, 2021) <https://perma.cc/H9H2-Y33C> (stating that only 14% of professors are female compared with 27% of students).

154. Ellis-Petersen, *supra* note 153.

iii. *Bolivarian Republic of Venezuela*

The role that extreme gender norms play in female asylum applications is illustrated by the counterexample of applications from Venezuelan asylum seekers, which come from both men and women in approximately equal proportions.<sup>155</sup> Since 2018, Venezuela is the third most-common origin-country for asylum applicants in the European Union,<sup>156</sup> while Iraq previously held that position.<sup>157</sup>

The law in Venezuela generally does not discriminate against women in family matters.<sup>158</sup> The Civil Code provides for equality between women and men, including in marriage.<sup>159</sup> Child marriage still exists and is permitted by law with parents' permission.<sup>160</sup> Both spouses have the right to initiate divorce, which is increasingly common, and a divorced woman usually does not face social stigma.<sup>161</sup> Regarding inheritance, men and women have equal rights.<sup>162</sup> Same-sex sexual relationships are not criminalized, except in the military, however same-sex unions are not recognized.<sup>163</sup>

To counteract violence against women, Venezuela ratified the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women and adopted the Law on the Right of Women to a Life Free of Violence, which criminalizes femicide, domestic violence, sex-

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155. Eurostat, Asylum Applicants by Type of Applicant, Citizenship, Age and Sex -Annual Aggregated Data (Rounded) (Oct. 28, 2021), <https://perma.cc/337V-QPLV>.

156. Eurostat, Asylum Statistics (Mar. 16, 2021), [https://ec.europa.eu/eurostat/statistics-explained/index.php?title=asylum\\_statistics#Age\\_and\\_gender\\_of\\_first-time\\_applicants](https://ec.europa.eu/eurostat/statistics-explained/index.php?title=asylum_statistics#Age_and_gender_of_first-time_applicants). This source analyses data for the years 2019 and 2020.

157. Eurostat News Release No. 46/2019, Asylum in the EU Member States: 580 800 first-time asylum seekers registered in 2018, down by 11% compared with 2017: Syrians, Afghans and Iraqis continued to be the top citizenships, at 2 (Mar. 14, 2019).

158. See OECD, *Social Institutions & Gender Index, Bolivarian Republic of Venezuela* 2–3 (2019) [hereinafter OECD Venezuela].

159. *Id.* at 2.

160. See *id.* (“[T]he minimum age [for marriage] with parental consent is now [sic] 16 for both women and men.”)

161. *Id.* at 3.

162. *Id.*

163. MENDOS ET AL., *supra* note 131, at 98, 283, 327.

ual harassment, and rape, including marital rape.<sup>164</sup> However, rapists do not face penalties if they marry their victims, and reports show that implementation remains slow and violence against women remains rampant and is increasing.<sup>165</sup> The police are generally unwilling to intervene in domestic violence cases and ninety-six percent of cases that appear before courts do not result in convictions.<sup>166</sup> Institutionally, the Law also establishes tribunals specialized in gender-based violence and Venezuela created the National Council for Depatriarchalizing the State and the National Feminist Training Plan, which provide education, training, and awareness to government officials and promote gender equality.<sup>167</sup>

Women and men enjoy equal rights with regard to land and assets, but in rural areas men are traditionally the head of the household and the administrator of their wife's property.<sup>168</sup> Women do not need their husband's permission to work.<sup>169</sup> Women have the right to hold public office and, due to a 2015 law regulating political parties, are increasingly elected in legislative elections;<sup>170</sup> however, they remain underrepresented in the post-crisis discussions.<sup>171</sup>

While women and men are mostly equal under the law, social norms dictate different expectations for both genders, as men are expected to work outside the house and support their families.<sup>172</sup> Although women increasingly work,<sup>173</sup> fifty-four percent more women than men remain outside the workforce for family reasons.<sup>174</sup> Women's access to education and health services is also inadequate. Their financial, social,

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164. OECD Venezuela, *supra* note 158, at 4–6.

165. *Id.* at 4–5.

166. *Id.* at 4.

167. *Id.*

168. *Id.* at 7.

169. *Id.* at 8.

170. *Id.* at 9.

171. See Arianna Kohan & Moises Rendon, *From Crisis to Inclusion: the Story of Venezuela's Women*, CTR. FOR STRATEGIC & INT'L STUD. (Mar. 4, 2020), <https://perma.cc/XG9F-FKTD>.

172. OECD Venezuela, *supra* note 158, at 3.

173. *Id.*

174. Kohan & Rendon, *supra* note 171.

and economic situation has worsened with the economic crisis and the current humanitarian crisis.<sup>175</sup>

Therefore, women in Venezuela are far from equal to men. However, gender norms do not appear to constitute as much of an obstacle for women to leave and seek asylum in the European Union as they do in Syria and Afghanistan, where the need for their husband's or father's permission to travel and to obtain a passport, for example, are major impediments.

While this article has identified some reasons in the country of origin that may impact women's ability to leave, it is important to address the possible reasons that compel men to leave using their own means, resulting in a much higher proportion of male asylum applicants in the European Union.

B. *Why does he leave by his own means? Systemic hurdles in resettlement*

Resettlement under E.U. law is defined as “the process whereby, on a request from the [UNHCR] based on a person's need for international protection, third-country nationals are transferred from a third country and established in a Member State where they are permitted to reside with” refugee status, subsidiary protection status or “any other status which offers similar rights and benefits under national and Union law.”<sup>176</sup> This process stemmed from the desire to provide persons in need of international protection with safe, legal arrival in the European Union to reduce irregular migration and smuggling, show solidarity with third countries that host a large number of persons in need of international protection, and share the responsibility of protection with those countries.<sup>177</sup> This process is therefore distinct from asylum applications.

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175. *Id.* (“As the economic crisis in Venezuela worsens, many women find themselves unable to participate in the remnants of the formal economy given their lack of work experience.”). See also Angela Chavez, *Venezuelan Women: The Unseen Victims of the Humanitarian Crisis*, ATLANTIC COUNCIL: DIVERSITY, EQUITY & INCLUSION BLOG (Mar. 5, 2020) (explaining that women have been disproportionately affected by the crisis in Venezuela).

176. Parliament and Council Regulation 516/2014, art. 2(a), 2014 O.J. (L 150) 168 [hereinafter AMIF Regulation].

177. *Proposal for a Regulation of the European Parliament and of the Council Establishing a Union Resettlement Framework and Amending Regulation (EU) No 516/2014 of the European Parliament and the Council*, at 2–3, COM (2016) 468

Member States may voluntarily participate in this resettlement process. The UNHCR, who has the obligation to undertake resettlement,<sup>178</sup> sets criteria to establish a pool of candidates for resettlement. Countries may also inform the UNHCR of the number of people they wish to resettle and whether they have specific criteria.<sup>179</sup> Very few refugees are resettled—less than one percent of refugees of concern to the UNHCR at the end of 2019 were resettled<sup>180</sup>—and resettlement generally concerns refugees who are particularly vulnerable people. Women and girls feature among the highest resettlement submission categories.<sup>181</sup> The AMIF Regulation further specifies that, in order to maximize the strategic impact of resettlement, persons who are “in greatest need of resettlement” should be prioritized.<sup>182</sup> The European Commission Proposal for a Union Resettlement Framework puts “women and girls at risk” as the highest vulnerability category among eligibility criteria.<sup>183</sup> The recent European Commission’s New Pact on Migration and Asylum further describes resettlement as a way “to provide protection to the most vulnerable refugees.”<sup>184</sup>

The prioritization of the most vulnerable population, among whom women and girls hold an important position, has resulted in very low chances for men, especially single men, to benefit from resettlement. The example of Syrian men is particularly telling, as host states try to limit their numbers. Turner gives the example of Canada’s and the United Kingdom’s policies in 2015 of not resettling unaccompanied heterosexual men, while prioritizing women, children, families, and sexual minorities. According to Turner, those policies further convey the image of women as inherently vulnerable and always in need of external aid, and an Islamophobic image of Muslim Arab men as dangerous and po-

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final (July 16, 2016) [hereinafter the *Proposal for a Union Resettlement Framework*].

178. UNHCR Statute, *supra* note 40, ¶ 9.

179. Gianna-Carina Grün, *How the EU’s Resettlement Plan is Failing to Meet its Goal*, DW (Nov. 28, 2018), <https://perma.cc/9S35-LBEA>.

180. UNHCR USA, *supra* note 116.

181. UNHCR, RESETTLEMENT HANDBOOK 261–69 (2011).

182. AMIF Regulation, *supra* note 176, recital 41.

183. *Proposal for a Union Resettlement Framework*, *supra* note 177, at 10.

184. New Pact on Migration and Asylum, *supra* note 9, at 22.

tential terrorists.<sup>185</sup> Moreover, exclusion grounds from resettlement eligibility typically include being considered as a threat to security, which single men are arguably more likely to be suspected of.<sup>186</sup>

Therefore, as women and girls are more likely to be considered for resettlement, single men prefer to leave by their own means and directly seek asylum in the European Union. Having considered gender norms in the countries of origin and systemic hurdles that may explain the statistical gender difference in asylum applications, the next section addresses specific hurdles in the European Union which affect female asylum applications.

#### IV. HURDLES IN THE “RECEIVING COUNTRIES”: THE MEMBERSHIP OF A PARTICULAR SOCIAL GROUP GROUND IN THE EUROPEAN UNION

The European Union has made conscious efforts to more adequately consider gender-related aspects in refugee status determination in its newer acts, while ensuring both substantial and procedural guarantees. However, the discrepancy between international standards and E.U. law regarding the membership of a particular social group ground, combined with the lack of harmonization of gender considerations, constitute significant hurdles in women’s journey to gain access to refugee status.

##### A. *The ground of membership of a particular social group as a default category*

From a substantive standpoint, the recast 2011 Qualification Directive improved several aspects related to gender considerations compared to the prior 2004 Directive. The European Commission proposal for the 2011 recast Directive<sup>187</sup> mentions that women’s access to protection is enhanced by several amendments, including the “nexus requirement”—

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185. Lewis Turner, *Who Will Resettle Single Syrian Men?*, 54 FORCED MIGRATION REV. 29, 29 (2017).

186. *Id.* at 30.

187. *Commission Proposal for a Directive of the European Parliament and the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted*, COM (2009) 551 final (Oct. 21, 2009).

which now includes both cases where the persecution by a nonstate actor is linked to one or more of the Convention grounds, as well as cases where the state's unwillingness or inability to provide protection is linked to one or more of those grounds. This in turn reinforces the principle of nondiscrimination. Amendments also include changes to the membership of a particular social group ground. Indeed, the 2004 Directive already provided that "gender related aspects" could be considered under this ground, but "without by themselves alone creating a presumption" for the applicability of this ground. While the explanatory memorandum in the proposal for the 2011 Directive mentions that "gender as such is normally not sufficient as a criterion for the definition of a particular social group" but "is generally used in combination with other factors, such as class, marital status, ethnic or clan affiliation," it specifies that "women may form a particular social group in some societies, as evidenced by discrimination in their fundamental rights."<sup>188</sup> Now, the last sentence of Article 10(1)(d) provides instead that "[g]ender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group." Article 10(1)(d) also states that "depending on the circumstances in the country of origin, a particular social group might include a group based on a common characteristic of sexual orientation."<sup>189</sup> The Court of Justice of the European Union held that:

[I]t is common ground that a person's sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it. That interpretation is supported by the second subparagraph of Article 10(1)(d) of the Directive, from which it appears that, according to the conditions prevailing in the country of origin, a specific social group may be a group whose members have sexual orientation as the shared characteristic.<sup>190</sup>

188. *Id.* at 8.

189. Qualification Directive, *supra* note 96, art. 10.

190. Joined Cases C-199/12, C-200/12, C-201/12, *Minister voor Immigratie, Integratie en Asiel v. X and Others and Z v. Minister voor Immigratie, Integratie en Asiel and UNHCR*, EU:C:2013:720, ¶ 46 (Nov. 7, 2013).

This sentence in Article 10(1)(d), and its interpretation by the Court, is very helpful for applicants of diverse sexual orientation seeking asylum due to persecution on the basis of their sexuality. Nevertheless, the Directive does not go so far as to affirm the same for the common characteristic of sex or gender, instead limiting the obligation to merely giving “due consideration” to gender-related aspects.<sup>191</sup> Therefore, the European Commission proposal and the Directive send mixed messages regarding gender as a possible basis for forming a particular social group, which is presumably a reflection of Member States’ diverging views.

It is commendable that both the amendment to Article 10(1)(d) was enacted and that the Directive mentions that gender-related aspects should be given due consideration. Nonetheless, the need to take gender considerations into account is still addressed only under the ground of membership of a particular social group. This gives the impression that, whenever claims for refugee status include gender-related aspects, they will automatically be considered under that specific ground. As such, membership of a particular social group appears as the default category for considering gender-based claims. This observation raises several issues.

i. *A default ground may be helpful in recognizing the particularity of women’s experiences*

Utilizing a ground as a default category for assessing women’s claims may build recognition for the specificity of women’s experiences and oppression. Women’s experience of persecution, flight, and asylum-seeking is distinctive, as recognized by several scholars and reports,<sup>192</sup> therefore it may be useful to acknowledge this specificity. For example, analyzing acts of persecution against women under the prism of the particular social group of women can draw attention to the social construction that exists behind the category of “women,”<sup>193</sup> including, the gender norms that underlie how women are per-

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191. Qualification Directive, *supra* note 96, art 10(1)(d).

192. *See, e.g.*, European Parliament Briefing, *supra* note 36 (discussing the need to strengthen and harmonize gender-sensitive asylum treatment in the EU due to the gender-specific risks and vulnerabilities asylum-seekers face).

193. Macklin, *supra* note 10, at 259–60.



ceived, how they are expected to behave, and what they are expected to think and want.

Moreover, regarding women as constituting a particular social group would not be problematic in legal terms. The UNHCR stressed that sex may form such a group, both under the protected characteristics approach and the social perception approach, as women are “a clear example of a social subset defined by innate and immutable characteristics [or by a characteristic otherwise fundamental to their identity or conscience], and who are frequently treated differently by men.”<sup>194</sup> Some jurisdictions have in fact recognized “women” as a particular social group.<sup>195</sup>

Furthermore, as raised by several scholars and the UNHCR,<sup>196</sup> recognizing women as forming a social group does not mean that all women would automatically be granted refugee status, as all of the remaining conditions still need to be fulfilled, such as the requirement of having a well-founded fear of persecution and the absence of state protection, and the analysis of refugee status determination is always performed on an individual and personalized basis.<sup>197</sup> Not all women experience persecution or fear thereof and even those who do may be more or less likely to be protected by their state of origin depending on their family links or economic resources.<sup>198</sup>

In sum, by analogy to the argument raised by some scholars<sup>199</sup> on the need to add the ground of gender to the Convention grounds, contemplating the ground of membership of a particular social group as a default category for gender-related claims may have the advantage of simplifying the assessment and giving an important place to gender in this assessment.

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194. UNHCR Membership of a Particular Social Group Guidelines, *supra* note 37, ¶ 12.

195. *Id.* ¶ 33. For examples of such jurisdictions in the European Union, see Hana Cheikh Ali et al., Eur. Parliament, Dir. Gen. Internal Policies, *Gender Related Asylum Claims in Europe: A Comparative Analysis of Law, Policies and Practice Focusing on Women in nine EU Member States*, 47-55 (2012).

196. UNHCR Gender Guidelines, *supra* note 16.

197. Haines, *supra* note 17, at 323.

198. Anker, *supra* note 8, at 398.

199. See, e.g., Stevens, *supra* note 10 (proposing adding gender as a sixth category of refugee under U.S. law).

ii. *Inclusion by exclusion*

However, the mention of gender considerations only under that particular ground in the Qualification Directive includes women in the refugee status assessment by effectively excluding gender from the rest of the grounds.<sup>200</sup> This strengthens the notion that the traditional refugee is male and reinforces the original and dominant interpretation of the Refugee Convention through a male perspective. Since gender considerations are segregated from the rest of the Refugee Convention and relegated to a separate ground, gender therefore has no place in the remainder of the Convention grounds.<sup>201</sup> This segregation reinforces the marginalization of women's experiences and sustains the stereotype that the mainstream refugee is male. Thus, "[m]en 'own' the categories of oppression that are not explicitly 'gendrified.'"<sup>202</sup>

Furthermore, by limiting the identity of women to a specific aspect of their experience, this segregation approach leads to a fragmentation of their identity, which contributes to their victimization.<sup>203</sup> It does not allow women's experiences to be appreciated to their full extent, as survivors and strong leaders who made the courageous decision to flee and, in some cases, to oppose well-established social and cultural norms. This approach also reduces their experiences to victimhood and essentializes them to their gender.<sup>204</sup> Therefore, while having a separate, default category for gender may simplify the assessment of female refugee claims, in the long term it may lead to further gender inequality. Underscoring their special needs as "weaker" individuals could exclude women from the mainstream model of refugee experiences.<sup>205</sup>

Relatedly, having a default category for gender-related claims reinforces the divide between the public and private spheres. The remaining grounds relate to public characteristics and opinions, which have typically been analyzed through a male lens. Thus, this segregation approach would perpetuate

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200. Firth & Mauthe, *supra* note 10 at 482.

201. Haines, *supra* note 17, at 327.

202. Macklin, *supra* note 10, at 259–60; Firth & Mauthe, *supra* note 10, at 482.

203. Firth & Mauthe, *supra* note 10 at 473.

204. *Id.* at 473.

205. *Id.* at 473, 481–82.

the notion that women's activities, traditionally considered private and confined to the home, are seen as fundamentally different from men's activities, and, thus, do not fit neatly within the remaining grounds. This reinforces the "persistent paradigm of the State as the agent engaging in persecution."<sup>206</sup> Conceiving the persecution suffered by women, whose perpetrators typically are nonstate actors, as warranting the granting of refugee status amounts to recognizing the possibility of persecution in the private sphere. This is in direct opposition to the general conception of the persecuting state, whose victim in traditional thinking is a man fleeing because of his political opinions.<sup>207</sup> Secluding women to a residual ground further marginalizes them and their experiences—often considered as "private"—fall under a subcategory of persecution.<sup>208</sup>

A default category for gender-related claims also assumes that all women live the same experience, failing to recognize the diversity of their journey and identity, even where they depart from the same country of origin.<sup>209</sup> For instance, not all women flee and seek refuge because they were persecuted for reason of their gender. Some women may flee for more conventional political or religious reasons, but those other grounds may be overlooked if the claimant is a woman. Thus, since these cases would not fit the typical scenario suited for the default category, this approach would undermine their likelihood of success.<sup>210</sup> Consequently, including a default category for women obscures the more nuanced and diverse experiences of women.

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206. Zambrana, *supra* note 7, at 245.

207. Carolina Jiménez Sánchez, *La Persecución de Género en el Derecho Internacional de los Refugiados: Nuevas Perspectivas*, 33 REVISTA ELECTRÓNICA DE ESTUDIOS INTERNACIONALES 1, 5 (2017).

208. Firth & Mauthe, *supra* note 10, at 473; Macklin, *supra* note 10, at 238.

209. Akram gives the example of persecution because of refusal to wear the veil in Iran. She specifies that considering all women as a unified category obscures that not all women in the Muslim world oppose wearing a veil and more generally not all oppose the religious interpretation imposed on them, hence the importance of having more nuanced analyses. Susan Musarrat Akram, *Orientalism Revisited in Asylum and Refugee Claims*, 12 INT'L J. REFUGEE L. 7, 33–34 (2000).

210. Firth & Mauthe, *supra* note 10, at 482.

iii. *Gender needs to pervade all grounds*

The second subparagraph of Article 10(1)(d) of the Qualification Directive contradicts the UNHCR Guidelines, which specify that a gender-sensitive interpretation should be given to all the Convention grounds.<sup>211</sup> The Guidelines further clarify that a woman's "transgression of social or religious norms" could be analyzed as persecution on the basis of religion, political opinion, and/or membership of a particular social group.

With regard to political opinion, Zimmermann and Mahler, in their commentary of the Refugee Convention, cite the Oxford dictionary which defines the term "political" as what is "connected with the state, government or public affairs."<sup>212</sup> They emphasize that the term is given a liberal and broad understanding.<sup>213</sup> The UNHCR Guidelines also specify that that ground should be interpreted broadly and may encompass an opinion as to gender roles.<sup>214</sup> Article 10(1)(e) of the Qualification Directive provides that political opinion includes "the holding of an opinion, thought or belief on a matter related to the potential actors of persecution mentioned in Article 6 and to their policies or methods, whether or not that opinion, thought, or belief has been acted upon by the applicant."<sup>215</sup> The ground of political opinion therefore includes the holding of an opinion, thought, or belief on a matter related to nonstate actors and thus arguably encompasses opinions related to gender norms.

Yet, difficulties remain in recognizing women's nonconformist opinions and behaviors as falling within grounds other than membership of a particular social group. These difficulties are linked to the entrenched divide between the public and the private sphere mentioned above. Political opinion is traditionally considered as direct opposition to the state, as members of an opposition party, or as people fleeing a revolution. Therefore, it has traditionally been understood as opinion and acts in the public sphere.<sup>216</sup>

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211. UNHCR Gender Guidelines, *supra* note 16, ¶ 23.

212. Zimmermann & Mahler, *supra* note 82, at 398.

213. *Id.*

214. UNHCR Gender Guidelines, *supra* note 16, ¶ 16.

215. Qualification Directive, *supra* note 97, art. 10(1)(e).

216. *See, e.g.*, Honkala, *supra* note 30, at 173 (identifying that the "traditional image of the Convention refugee is a male exile fleeing from political

Nevertheless, “the personal is political,” and so-called private questions may also be viewed as political.<sup>217</sup> Gender questions may also be considered political, as the norms, behaviors, and cultural perceptions of gender roles are often deeply entrenched in society. In patriarchal societies, female subordination to men is often encouraged, or to a minimum tolerated, by the state itself. This subordination is reflected in the state’s absence of or ineffective involvement in domestic violence cases, its lack of enforcement against harmful practices such as female genital mutilation, or the punishment of “socially unacceptable” behaviors such as adultery.<sup>218</sup> In that sense, the state is guilty of directly or indirectly perpetuating patriarchy. Opposition to acts that perpetuate patriarchy, whether publicly by state officials or privately by nonstate actors, should be recognized as an act of resistance to a public force. As the Refugee Women’s Legal Group powerfully states, “[i]f a woman resists gendered oppression, her resistance is political.”<sup>219</sup> Similar to how refugee law was initially conceived as providing refuge to dissidents and protecting the freedom of disobedience, women may also be seen as exercising disobedience to norms governing behaviors they deeply disagree with. This interpretation of political opinion is “profoundly feminist” and recognizes that gender-related refugee claims are often linked to a system of power relations that is implemented from the highest spheres of societal organization down to the level of individual and private relationships.<sup>220</sup> In that sense, acts of flight due to domestic violence may warrant refugee protection on the basis of political opinion, as they may be the expression of opposition to a system that encourages or tolerates men’s domination and control over women.<sup>221</sup>

Moreover, similar remarks may be expressed with regard to the reason of religion. Article 10(1)(b) of the Qualification Directive defines the concept of religion as including:

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persecution” by the State, an inherently public assumption, which prevents an appreciation of the “political nature of women asylum-seekers’ claims”).

217. Macklin, *supra* note 10, at 260.

218. *Id.*, at 234.

219. Refugee Women’s Legal Group, *Gender Guidelines for the Determination of Asylum Claims in the UK*, ¶ 4.17 (1998).

220. Macklin, *supra* note 10, at 260.

221. Macklin, *supra* note 10, at 260; Firth & Mauthe, *supra* note 10, at 473, 476, 489; Edwards, *supra* note 10, at 68–69; Haines, *supra* note 17, at 348.

the holding of theistic, non-theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.<sup>222</sup>

The Court of Justice of the European Union held that this provision gave a “broad definition of ‘religion’ . . . which encompasses all its constituent components, be they public or private, collective or individual.”<sup>223</sup> This definition thus arguably includes women’s resistance to religious tenets which aim to govern the role they play in society, the behaviors they should adopt, and the way they should dress. The holding of such beliefs, the expression of such views, and such conduct may fit this ground, beside or instead of being part of a particular social group of women. The religion ground also connects to the ground of political opinion, as resistance to certain religious norms may be viewed as resistance to gender norms more broadly. Women may interpret these norms as not being directly mandated by their religion itself—which they may still belong to—but by the broader social and political systems of their country or their community.<sup>224</sup>

In reality, gender needs to pervade all grounds.<sup>225</sup> Only with this approach would we achieve real women empowerment, as opposed to their victimization, and gender equality. Viewing gender horizontally, across all Refugee Convention grounds, would effectively place women on an equal footing with men before refugee status determination, thereby actual-

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222. Qualification Directive, *supra* note 96, art. 10(1)(b).

223. Joined Cases C-71/11 and C-91/11, *Bundesrepublik Deutschland v. Y and Z*, ECLI:EU:C:2012:518, ¶ 63 (Sept. 5, 2012).

224. With regard to Islam for example, Akram writes that “the ideas supporting the current unequal and oppressive treatment of women in much of the Muslim world is not based on the Qur’an or Qur’anic framework, but on misinterpretations of the Qur’an by a succession of male patriarchal interpreters working in male-dominated systems for whom such religious interpretations serve political ends.” Akram, *supra* note 209, at 15. *See also* Haines, *supra* note 17, at 344 (“Where religious tenets require certain kinds of behaviour from a woman, contrary behaviour may be perceived as evidence of an unacceptable political opinion regardless of what a woman herself actually believes.”).

225. Firth & Mauthe, *supra* note 10, at 483; Haines, *supra* note 17, at 327.

izing the European Union's commitment to promoting gender equality in all of its policies.<sup>226</sup> This approach would also take into account the diversity of women's experiences, recognizing that their experience may not always be linked to their gender and not always in the same way.

Therefore, while the Qualification Directive provides for the consideration of gender in several areas, two main issues remain. First, there is no explicit provision requiring all Refugee Convention grounds to take gender into consideration.<sup>227</sup> Second, gender is only explicitly mentioned under the ground of membership of a particular social group, and there is no guidance for how "gender related aspects" should be given due consideration in practice. Recital 30 aims to elaborate on which gender-related aspects to take into consideration and could indicate that victims of gender-specific harm related to certain traditions and customs, such as genital mutilation, may form a particular social group. However, its significance is unclear, as it seems to focus on gender-specific acts of persecution, as opposed to providing guidance on the ground itself, and appears to conflate the requirement of having a well-founded fear of persecution with the requirement of satisfying the membership of a particular social group ground.<sup>228</sup> Further guidance would be all the more helpful, given that refu-

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226. Treaty of Lisbon art. 9.

227. This obligation however applies to EU Member States that are parties to the Istanbul Convention, whose Art. 60(2) provides that they "shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds." Istanbul Convention, *supra* note 71, art. 60(2). Note also that the Proposal for a Qualification Regulation provides in its explanatory memorandum that "[i]n the light of the Commission's proposals for Council decisions for the signing and conclusion of the Istanbul Convention, and in view of guaranteeing women in need of international protection who have been subject to gender-based violence with a suitable level of protection, a gender-sensitive approach should be adopted when interpreting and applying this Regulation and will in any event be required after the conclusion of the Istanbul Convention by the EU." *Proposal for a Qualification Regulation*, *supra* note 97, at 12.

228. See Volker Türk, Dir. Int'l Protection, UNHCR Geneva, *Protection Conventionnelle et Protection Subsidaire, Complementarite ou Concurrence? L'Exemple de la Notion d'Apparence a' un Certain Groupe Social*, Keynote Address at the 60th Anniversary Colloquium of CNDA 8 (Oct. 29, 2012), <https://perma.cc/D8ND-UV95> (arguing that using persecution as a defining element of a particular social group conflates two elements of the definition).

gee law commentators disagree on the exact meaning of a particular social group, with some concluding that “no one really knows what the social group category really means.”<sup>229</sup>

These issues are problematic as they lead to divergent interpretations and applications of the Qualification Directive among the different Member States. First, the interpretation of the membership of a particular social group ground under the second subparagraph of Article 10(1)(d) differs significantly. Some Member States accept the group of “women” to form a particular social group in some countries of origin, either explicitly in their domestic law<sup>230</sup> or in its interpretation.<sup>231</sup> In France however, gender is insufficient to constitute a particular social group. French courts have adopted a more restrictive interpretation of the membership of a particular social group ground, recognizing a limited list of social groups such as victims of forced marriage,<sup>232</sup> victims of female genital mutilation,<sup>233</sup> human trafficking victims,<sup>234</sup> and LGBTQIA+

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229. Akram, *supra* note 209, at 19.

230. This is the case for example in Germany, *see* Asylverfahrensgesetz [AsylVfG] [Asylum Procedure Act], Sept. 2, 2008, BGBl. I at 1798, § 3(b)(1)(4) (“[I]f a person is persecuted solely on account of their sex . . . this may also constitute persecution due to membership of a certain social group.”), and in Spain, *see* Law Regulating the Right of Asylum and Subsidiary Protection, art. 3 (B.O.E. 2009, 90860) (recognizing fear of persecution for reasons of one’s gender as a basis for refugee status).

231. This is the case for example in Italy. *See* Ali et al., *supra* note 195, at 49 (“belonging to a particular social group is always interpreted as encompassing gender and sexual orientation”).

232. *See, e.g.*, Commission des Recours des Réfugiés [CRR] [Refugee Appeals Commission], SR, July 29, 2005, No. 04046266 R (finding that being subjected to a forced marriage in a society where refusing to agree would be considered transgressive qualifies as membership of a particular social group under asylum law).

233. *See, e.g.*, CE Ass., Dec. 21, 2012, ECLI:FR:CEASS:2012:332491, ¶ 3 (holding that where female genital mutilation is so commonly practiced as to constitute a social norm, not being mutilated qualifies as being a member of a particular social group). *See also* Cour Nationale du Droit d’Asile [CNDA] [National Court of Asylum Law], Apr. 1, 2019, No. 17024972 C, ¶ 5 (finding that female genital mutilation is so commonly practiced in Sierra Leone that women who choose not to circumcise their daughters constitute a particular social group).

234. *See, e.g.*, CNDA, Mar. 24, 2015, No. 100012810 C+ (finding that women who tried to escape from human trafficking in Edo state were a particular social group).



people.<sup>235</sup> A deeper analysis of France's assessment of the membership of a particular social group ground will be discussed in the section below.

Second, a study by the European Parliament shows, not surprisingly, that E.U. Member States mostly address gender-based persecution under the ground of membership of a particular social group.<sup>236</sup> There is very limited case law analyzing gender-based persecution under political opinion or religion grounds.<sup>237</sup> This indicates that women who fear persecution because of their gender are unlikely to be granted international protection in Member States that do not give a gender-sensitive interpretation to the ground of membership of a particular social group.<sup>238</sup>

Case law in France reveals that it is simpler for women to be afforded international protection on the ground of political opinion when their opinion or behavior fits the typical male stereotype of political opposition. For example, the Cour Nationale du Droit d'Asile (CNDA)<sup>239</sup> recognized that female asylum seekers had a well-founded fear of being persecuted on the ground of their political opinion for their political opposition to the current government in Burundi.<sup>240</sup> While it used to be more common, presently, few judiciaries would interpret an act of gender-related persecution as being committed on the basis of political opinion.<sup>241</sup> Worth mentioning is the case of a Malian male artist committed to fighting female genital

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235. See, e.g., CNDA, Oct. 3, 2019, No. 18031476 C (finding that LGBTI people in Algeria constitute a particular social group). For a broader discussion on French recognition of social groups, see Ali et al., *supra* note 195, at 53–54.

236. Ali et al., *supra* note 195, at 45.

237. The European Parliament study gives the example of Italy, where the Rome Territorial Commission recognized that a Somali woman who was involved in a campaign against female genital mutilation in Somaliland feared persecution on the basis of both membership of a particular social group and political opinion. *Id.* at 56, 58.

238. *Id.* at 60.

239. The CNDA, the National Court of Asylum Law, is a French special administrative court which rules on actions brought against decisions of the Office français de protection des réfugiés et apatrides (OFPRA, French Office for the Protection of Refugees and Stateless Persons). Its judgments are subject to review by the Conseil d'Etat (Council of State). *Compétences de la CNDA*, CNDA <https://perma.cc/B9WJ-U4A3> (last visited Oct. 26, 2021).

240. CNDA, Apr. 11, 2019, Nos. 18043056, 18043057 C 1.

241. Ali et al., *supra* note 195, at 56.

mutilation by helping NGOs through his work. The CNDA recognized this as a political opinion transgressive of the religious and social norms of Mali, on the ground of which he had a well-founded fear of persecution due to several occasions of violence against him by traditionalist groups.<sup>242</sup> Therefore, in order for one's opinions and beliefs to be deemed political, French courts appear to impose a condition of public commitment and activism, beyond mere private refusal or opposition.

Moreover, the then-Commission des Recours des Réfugiés (CRR)<sup>243</sup> stated that, even when a woman is not considered as belonging to a given social group, in particular, when the behavior is not perceived as transgressing the social order, she is nonetheless likely to be exposed to inhuman and degrading treatment, which justifies the granting of subsidiary protection.<sup>244</sup> This case law clearly reflects the position of French courts that gender-based persecution is to be analyzed first under the prism of membership of a particular social group and, if that ground does not apply in the specific case, the following step in the analysis is not another Convention ground, such as political opinion or religion, but the assessment of whether a risk of inhuman and degrading treatment exists to grant subsidiary protection.

To achieve full gender equality in the ambit of refugee law, an asylum claim based on the transgression of social and cultural norms should by default be primarily analyzed under the political opinion ground. The United Kingdom provides an example of good practice. It adopted guidance on gender issues in asylum claims which emphasizes that “non-conformist opinions or behaviour [which include pursuing an education or choosing a partner] may, in certain circumstances, be an expression of political opinion or may result in a woman having a political opinion attributed to her whether she holds one or not.”<sup>245</sup> This article takes a step further and argues that

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242. CNDA, Mar. 10, 2010, No. 06007191 C+, *quoted in* TRENTE ANS DE JURISPRUDENCE DE LA COUR NATIONALE DU DROIT D'ASILE ET DU CONSEIL D'ÉTAT SUR L'ASILE (Martine Denis-Linton & Florence Malvasio eds., 2012) [hereinafter CNDA JURISPRUDENCE].

243. The CRR became the Cour Nationale du Droit d'Asile in 2007. *Histoire de la Cour, CNDA nationale du droit d'asile*, <https://perma.cc/S7M2-JBEF> (Oct. 26, 2021).

244. CRR, SR, July 29, 2005, No. 519803.

245. UK Home Office, *Gender Issues in the Asylum Claim 23* (2018).

claims of gender-based persecution should be analyzed primarily under the political opinion ground.

Because Member States' domestic laws and practices differ greatly, women are not guaranteed coherent and gender-sensitive treatment in the different Member States.<sup>246</sup> Some Member States also fail to resort to international refugee guidelines to interpret unclear gender-related terms in the Qualification Directive. In responding to gender-related refugee claims, a preliminary ruling of the Court of Justice of the European Union interpreting the extent of gender-based persecution would be a welcome advancement for harmonizing Member States' laws and practice.

Considering that the ground of membership of a particular social group is most commonly used in E.U. Member States when assessing gender-based persecution, further analysis of that ground and the difficulties it raises is important.

B. *A cumulative approach to the membership of a particular social group ground*

i. *The Qualification Directive imposes cumulative conditions for the membership of a particular social group category*

The UNHCR specified in its Guidelines that the two dominant approaches to the membership of a particular social group ground used in state practice, which are both incorporated in the UNHCR definition, should be read as alternative, rather than cumulative, conditions. Those two approaches consist of: (1) the protected characteristics test and (2) the social perception test. The Guidelines further specify that this latter test is to be undertaken only where the group is determined not to be based on an unalterable or fundamental characteristic.<sup>247</sup>

On the contrary, the Qualification Directive defines a particular social group as requiring those two conditions to be

246. Carles-Berkowitz, *supra* note 10, at 4.

247. UNHCR Membership of a Particular Social Group Guidelines, *supra* note 37, ¶ 13. *See also* Brief of UNHCR as Amicus Curiae Supporting Petitioner at 10, *Valdiviezo-Galdamez v. Att'y Gen. of the U.S.*, 663 F.3d 582 (3d Cir. 2011) (No. 08-4564) [hereinafter UNHCR Brief] (explaining that the social perception test is to be applied after the protected characteristics test and can only provide further evidence of a group's existence rather than be used as a basis for exclusion).

met. The question was considered before the adoption of the Directive, with several stakeholders arguing for an alternative approach. However, the cumulative approach was ultimately preferred.<sup>248</sup> This approach is also followed by the majority of E.U. Member States.<sup>249</sup>

The Court of Justice of the European Union confirmed and adopted that definition, stating that, according to the definition in Article 10(1)(d) of the Directive of a particular social group, “a group is regarded as a ‘particular social group’ where, inter alia, two conditions are met.”<sup>250</sup> While it may be understandable that the Court confirmed the cumulative approach mandated by the Directive to the extent that its judgments were in reply to preliminary ruling questions on the interpretation of the Directive, as opposed to its validity,<sup>251</sup> it is

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248. Directorate-General for Migration & Home Affairs, European Commission, *Evaluation of the Application of the Recast Qualification Directive (2011/95/EU), Final Report* 94 (2019) [hereinafter *Commission Evaluation*]; UNHCR, *Comments on the European Commission’s Proposal for a Directive of the European Parliament and of the Council on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Beneficiaries of International Protection and the Content of the Protection Granted (COM(2009)551, 21 October 2009)* 8 (2010) [hereinafter *UNCHR Comments*]; European Council on Refugees and Exiles, *Information Note on the Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on Standards for the Qualification of Third-country Nationals or Stateless Persons as Beneficiaries of International Protection, for a Uniform Status for Refugees or for Persons Eligible for Subsidiary Protection, and for the Content of the Protection Granted (Recast)* 9 (Oct. 7, 2013) (recommending that the tests be applied alternatively rather than cumulatively). The cumulative approach is also maintained in the 2016 European Commission Proposal for a New Qualification Regulation. *Proposal for a Qualification Regulation*, *supra* note 96, at 3.

249. *Commission Evaluation*, *supra* note 248, at 97.

250. Joined Cases C-199/12, C-200/12, C-201/12, *Minister voor Immigratie, Integratie en Asiel v. X and Others and Z v. Minister voor Immigratie, Integratie en Asiel and UNHCR*, EU:C:2013:720, ¶ 45 (Nov. 7, 2013). This definition has been confirmed in subsequent case law. See, e.g., Case C-652/16, *Ahmedbekova and Ahmedbekov v. Zamestnik-predsedatel na Darzhavna agentsia za bezhantsite*, EU:C:2018:801, ¶ 89 (Oct. 4, 2018) (“For it to be found that there is a ‘social group’, within the meaning of that provision, two cumulative conditions must be satisfied.”).

251. TFEU art. 267 (“[T]he Court of Justice of the European Union shall have jurisdiction to give preliminary rulings concerning: (a) the interpretation of the Treaties; (b) the validity and interpretation of acts of the institutions, bodies, offices or agencies of the Union.”). National courts therefore have two options when they have questions about an EU act: they can either submit a question about its interpretation or about its validity, in which case

regrettable that the Court did not go beyond a literal interpretation of this definition. Indeed, in a previous case, the Court recalled that the Qualification Directive was adopted notably on the basis of Article 78(1) TFEU (then Article 63(1)(c) EC), which requires the Union to adopt a common policy on asylum in accordance with the Refugee Convention,<sup>252</sup> and that Recital 4 of the Directive stated that the Refugee Convention “constitutes the cornerstone of the international legal regime for the protection of refugees” and that the Directive was adopted “to guide the competent authorities of the Member States in the application of that convention on the basis of common concepts and criteria.”<sup>253</sup> Therefore, the provisions of the Directive must be interpreted “in the light of its general scheme and purpose,” in the respect for the Refugee Convention.<sup>254</sup> The Court further held that “as is apparent from recital [16] in the preamble . . . the [Qualification] Directive must also be interpreted in a manner consistent with the rights recognized by the Charter.”<sup>255</sup> This case law builds upon the E.U. treaties, which give a special place to the Refugee Convention, and the fundamental rights and the principles recognized in the Charter.<sup>256</sup> The obligation to respect the rules of the Refugee Convention, combined with the principle of nondiscrimination and gender equality—two of the European Unions’ founding values and primary objectives—mandates a less restrictive approach regarding this ground. Moreover, while the

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the Court of the Justice of the European Union has exclusive jurisdiction to declare it invalid. *See, e.g.*, Case 314/85, *Foto-Frost v. Hauptzollamt*, 1987 E.C.R. 4199 (Oct. 22, 1987).

252. *Joined Cases C-175/08, C-176/08, C-178/08 & C-179/08, Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, EU:C:2010:105, ¶ 51 (Mar. 2, 2010).

253. *Id.* ¶ 52; *Joined Cases C-71/11 & C-91/11, Bundesrepublik Deutschland v. Y and Z*, ECLI:EU:C:2012:518, ¶ 47 (Sept. 5, 2012).

254. *Abdulla and Others*, EU:C:2010:105, ¶ 53; *Y and Z*, ECLI:EU:C:2012:518, ¶ 48.

255. *Y and Z*, ECLI:EU:C:2012:518, ¶ 48. *See also Abdulla*, EU:C:2010:105, ¶ 54. Qualification Directive, *supra* note 96, recital 16 (“This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union.”). *See also* 2004 Qualification Directive, *supra* note 102, recital 10 (containing the same text).

256. *See supra* Part I (discussing that legal framework). *See also* Charter of Fundamental Rights of the European Union art. 18, Oct. 26, 2012, 2012 O.J. (C 326/02) 391; TFEU art. 78(1).

UNHCR Guidelines are not strictly legally binding, the Refugee Convention grants the UNHCR a significant role and important responsibilities. What is more, the UNHCR Guidelines on the Membership of a Particular Social Group Ground were the result of the Global Consultations on the International Protection of Refugees launched by the UNHCR in 2000, which gathered broad participation by governments, the International Association of Refugee Law Judges, legal practitioners, NGOs, and academia.<sup>257</sup> Therefore, UNHCR Guidelines cannot simply be ignored.

At the national level, in a seminal U.K. House of Lords case, a woman from Sierra Leone fearing female genital mutilation claimed refugee protection due to her membership of a particular social group. Lord Bingham recognized the existence of “women in Sierra Leone” as a particular social group, highlighting that a cumulative approach would “propound [. . .] a test more stringent than is warranted by international authority.”<sup>258</sup>

Importantly, the European Commission recognized the existence of the two approaches in its 2019 report on the application of the Qualification Directive, explicitly stating that it “could consider amending the relevant Article as to foreseeing the protected characteristics approach and the social perception approach alternatively instead of cumulatively (replacing ‘and’ with ‘or’).”<sup>259</sup> The Commission also praised those Member States who applied the alternative approach because it demonstrates “good application of the Directive as it goes beyond the literal requirements and is in line with the spirit of the Directive and international refugee law.”<sup>260</sup> Furthermore, it went as far as to recognize that the cumulative approach “is arguably not in accordance with the objective of Article 10(1)(d) and the spirit of the Directive and international law.”<sup>261</sup>

Although the cumulative approach does not align with international refugee law, is it actually problematic in practice

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257. UNHCR Brief, *supra* note 247, at 7–8.

258. *Fornah v. Secretary of State for the Home Department*, linked with *Secretary of State for the Home Department v. K* [2006] UKHL 46, ¶ 16 (appeal taken from Eng.) (Bingham, L.).

259. *Commission Evaluation*, *supra* note 248, at 98.

260. *Id.* at 97.

261. *Id.*

when considering gender issues? It may be argued that, as underlined by the UNHCR itself, at any rate, women may form a particular social group under both approaches, since they share an innate and immutable characteristic, or one that is otherwise fundamental to their identity or conscience, *and* they are usually perceived as different from and treated differently than men.<sup>262</sup> However, as explained above, the social group of women is not uniformly recognized among E.U. Member States. Therefore, a narrow definition of group members' common attributes, combined with the additional requirement of social perception, may give rise to several shortcomings regarding gender-related persecution, and ultimately deny protection to female applicants who arguably should have benefitted from it. The social perception test raises some particular difficulties in that regard.

ii. *The difficulties behind the social perception test*

The UNHCR Guidelines define the social perception test as the requirement to examine “whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large.”<sup>263</sup> Subsequent UNHCR documents further develop this definition by specifying that “the focus is on whether the members share a common attribute that is understood to exist in the society or that in some way sets them apart or distinguishes them from the society at large.”<sup>264</sup> According to Article 10(1)(d) of the Qualification Directive, this test is met where the “group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.”<sup>265</sup>

There are particular difficulties with the requirement that a group must be perceived as distinct by society. In some cases, members of the group will not openly express the opinion or behavior they would wish to adopt, to avoid being exposed to persecution. For example, LGBTIQ+ people will often avoid

262. UNHCR Membership of a Particular Social Group Guidelines, *supra* note 37, ¶ 12.

263. *Id.* ¶ 7. This approach was established in the case from High Court of Australia. *A and Another v Minister for Immigration and Ethnic Affairs* (1997) 190 C.L.R. 225, 236.

264. UNHCR Brief, *supra* note 247, at 11.

265. Qualification Directive, *supra* note 96, art. 10(1)(d).

openly expressing their sexual orientation or gender identity, for instance in countries where same-sex relationships are criminalized or where transgender people are discriminated against, for fear of being persecuted. Under these circumstances, society may not perceive the existence of such groups of people in opposition to these rules and instances of discrimination.

In the United States, case law evolved from an initial requirement of social visibility to a requirement of social distinction. Zambrana argued that there is a significant issue in requiring that the surrounding society, as opposed to the perpetrator, perceives the group as different in the case of gender-related persecution.<sup>266</sup> This is especially the case with regard to violence against women, such as domestic violence and human trafficking, whose victims may not be perceived by society as forming a particular social group. Indeed, the harm is often hidden from society, by the perpetrator—e.g. when the act is criminally punishable—and/or the victim herself for shame and fear of stigmatization. Moreover, “internalized misogynistic attitudes” generate the cultural and social acceptance of patriarchal behaviors and female subordination to men. Those cultural and social norms may then instill the invisibility and unimportance of the harm within society. Requiring the perception of the group by society presumes that society is aware of the harm, which may not always be the case in instances of violence against women. What is more, even where the society knows about the harmful conduct, it may still not perceive victims as forming a particular social group where the conduct is considered socially and culturally acceptable and therefore nothing would make that group distinct enough to render them “different” or a “cognizable group” from the rest of society. The conduct may be so normalized that victims may not be socially distinct. Admittedly, the harm they suffer may not define the social group, but “the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society.”<sup>267</sup> In the case of violence against wo-

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266. Zambrana, *supra* note 7, at 245, 262–64 (describing the difficulties in relying on societal perception of private harms against women like domestic violence).

267. The UNHCR Membership of a Particular Social Group Guidelines, *supra* note 37, ¶ 14, cite a well-known decision from the High Court of Australia:



men, which is often not openly carried out or reported, the test of societal perception of the social group is more difficult to meet. Like Zambrana argues, the preference for having to show perception by society rather than by the perpetrator shows a persistent unwillingness to consider victims of private harms worthy of refugee protection.<sup>268</sup>

iii. *The example of the social visibility requirement in France*

The case of France is particularly helpful for illustrating the difficulties raised by the cumulative approach in gender-related persecution cases in the absence of clear guidelines at the E.U. or national level, and the difficulties with the interpretation of the social perception test. The French courts' interpretation of the definition of the ground of membership of a particular social group has been criticized for being too restrictive.<sup>269</sup>

Regarding the protected characteristics test, French courts have notably required the presence of a circumscribed and sufficiently identifiable character to recognize a particular social group. The group may thus not be of a large size, the characteristics that its members share must have some specificity, and those must be shared by a small part of the population. It is therefore not enough that the characteristic is fundamental—it must be unique.<sup>270</sup> Needless to say, such interpretation is not in line with the Qualification Directive nor with UNHCR Guidelines, which clarify that the size of the group is irrelevant

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While persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society. Left-handed men are not a particular social group. But, if they were persecuted because they were left-handed, they would no doubt quickly become recognizable in their society as a particular social group. Their persecution for being left-handed would create a public perception that they were a particular social group. But it would be the attribute of being left-handed and not the persecutory acts that would identify them as a particular social group.

*A and Another*, 190 CLR 225, 264 (McHugh, J.).

268. Zambrana, *supra* note 7, at 245, 262–64.

269. See, e.g., UNHCR, *supra* note 228 (endorsing an alternative rather than cumulative application of the concepts).

270. Alexandra Korsakoff, *Les Victimes de Persécution de Genre, de "Nouveaux" Réfugiés? Réflexion sur l'Étendue de la Mobilisation du Motif du Groupe Social*, 13 CAHIERS DE LA RECHERCHE SUR LES DROITS FONDAMENTAUX 77, 84 (2015).

and the group does not need to be cohesive, as is the case for the other Convention grounds.<sup>271</sup> But since the female sex and gender is widespread in society, French case law does not recognize “women” as a circumscribed group fitting its definition of a particular social group.<sup>272</sup>

Difficulties in French case law also arise in relation to the social perception arm of the definition of the particular social group. In a case concerning a transgender Algerian national, the French Conseil d’État enshrined its first definition of a “particular social group” as a group whose members would likely be exposed to persecution because of common characteristics that define them in the eyes of the authorities and society of the country of origin.<sup>273</sup> This judgment formalizes the social perception approach to the definition of a particular social group followed by French case law, that does not thoroughly analyze the nature of the characteristic shared by its members, but focuses on the social visibility of the group, which is further actualized by a risk of being exposed to common persecution.<sup>274</sup> The social perception approach in French law thus seems to require both the identification of the group by society and the exposure of the group to persecution.<sup>275</sup> This case law has been further expanded in cases involving homosexuality, with the requirement that the applicants ostensibly manifest or claim the characteristic shared by members of the particular social group concerned.<sup>276</sup> In a well-known case involving a lesbian national from Moldova, the CRR refused to recognize a particular social group because the applicant had not sought to ostensibly manifest her homosexuality in her behavior nor was she exposed to persecu-

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271. UNHCR Membership of a Particular Social Group Guidelines, *supra* note 37, ¶ 18.

272. Korsakoff, *supra* note 270, at 86–88.

273. CE, 10/7 SSR, June 23, 1997, No. 171858 (known as *Ourbih*).

274. Korsakoff, *supra* note 270, at 81.

275. *Id.*

276. See, e.g., CRR, SR, May 12, 1999, No. 98006017/328310 R, *quoted in* CNDA JURISPRUDENCE, *supra* note 237, at 115 (holding that people who claim their homosexuality and intend to manifest it in their external behavior are, as a result, exposed to persecution in the form of criminal sanctions); CE, Aug. 23, 2006, No. 272680 (recalling the same definition as in the *Ourbih* case).

tion.<sup>277</sup> French courts also excluded from this ground girls who, due to their young age, were unable to manifest their refusal of female genital mutilation.<sup>278</sup> This case law thus further grounded social visibility as a core requirement of the particular social group definition, which necessitated a visible external behavior manifesting the characteristic shared by its members.

This restrictive interpretation has been criticized in particular by the UNHCR which recalled that, in cases where no fundamental characteristic was identified, the analysis should focus on “whether the social group is cognizable—that is, understood to exist—in the society irrespective of its visibility.” While the visible identification of a group or a characteristic “may reinforce a finding that an applicant belongs to a particular social group . . . it is not a precondition for recognition of the group. In fact, a group of individuals may seek to avoid visibility in society precisely to avoid attracting persecution.”<sup>279</sup> In fact, the UNHCR further convincingly emphasized this issue:

if you are a member of a group that has been targeted for assassination or torture or some other mode of persecution, you will take pains to avoid being socially visible; and to the extent that the members of the targeted group are successful in remaining invisible, they will not be ‘seen’ by other people in society as a segment of the population.<sup>280</sup>

Following the first Qualification Directive of 2004, French courts had to adapt to E.U. law. Six years after the adoption of the Directive, the Conseil d’État departed from its previous case law by citing Article 10(1)(d) of the Directive and affirming that the notion of a particular social group must be

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277. CRR, Mar. 25, 2005, No. 04039953/513547 C+, *quoted in* CNDA JURISPRUDENCE, *supra* note 237, at 81–82.

278. *See, e.g.*, CNDA, Mar. 12, 2009, No. 639908 (finding the applicant was too young to object to the mutilation herself and was not therefore part of a particular social group).

279. Brief for UNHCR as Amicus Curiae Supporting Petitioner at 16–19, *Henriquez-Rivas v. Att’y Gen. of the U.S.*, 707 F.3d 1081 (9th Cir. 2013) (en banc) (No. 09-71571).

280. UNHCR, *supra* note 228, at 6-7. *See also* UN Women, Report on the Legal Rights of Women and Girl Asylum Seekers in the European Union 33 (2017) (describing use of the social perception approach in French jurisprudence and its demanding visibility requirement).

interpreted in line with the E.U. definition.<sup>281</sup> As a result, an ostensible manifestation or a claim of the common characteristic is no longer required.

This case law has been further developed by the Conseil d'État in two 2012 cases. First, in a case involving sexual orientation, the Conseil d'État held that the granting of refugee status due to persecution related to membership of a social group based on common sexual orientations cannot be made conditional on the public manifestation of that sexual orientation by the applicant.<sup>282</sup> It annulled the CNDA's judgment which had refused to grant refugee status on the ground that the applicant had not manifested his homosexuality in his outward behavior.<sup>283</sup> Second, the Conseil d'État confirmed this case law by annulling a CNDA decision that refused to grant refugee status to a girl from Côte d'Ivoire at risk of female genital mutilation on the ground that she could not manifest her refusal given her young age. The Conseil d'État emphasized that the manifestation of the applicant's membership of a particular social group was not required for recognition as a member of a particular social group. Membership of a particular social group is defined as an objective social fact that does not depend on its manifestation by its members or if they are unable to do so, their relatives.<sup>284</sup>

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281. CE, June 14, 2010, No. 323669 A (stating that it is necessary to take into account Article 10(1)(d) of the Qualification Directive to interpret the Geneva Convention); CE, June 14, 2010, No. 323671 C (stating the same principle). A year earlier, the CNDA had already adopted an interpretation of a social group as not requiring a claim or an ostensible manifestation of the shared characteristic, in those cases sexual orientation. The CNDA however gave great significance to the fact that homosexuality in those countries was criminally penalized. *See, e.g.*, CNDA, July 7, 2009, No. 634565/08015025 C. (Tunisia); CNDA, Jan. 10, 2011, No. 09012710 C+, *quoted in* CNDA JURISPRUDENCE, *supra* note 237, at 83–84 (Cameroon). Korsakoff, *supra* note 270, at 81.

282. CE, July 27, 2012, No. 349824, ¶ 3 (the granting of refugee status cannot be made conditional on the public manifestation of sexual orientation by the person seeking refugee status, since the social group is not established by those who make it up, nor even by the objective existence of characteristics attributed to them, but by the way in which these persons are viewed by the surrounding society or institutions) (translation by the author).

283. *Id.* (reversing the CNDA decision).

284. CE, Dec. 21, 2012, No. 332491 A (reversing the decision of the CNDA, which rejected the request for refugee status of the applicant, be-

However, some difficulties persist. Although the Qualification Directive adopts neutral terms with regard to the perception of the group by society, with society only having to perceive the group as being different, French courts have interpreted social perception as necessarily negative: society must disapprove of the existence of the social group. French courts implicitly tweak the social perception test, thereby further narrowing the applicability of the ground.<sup>285</sup> In a telling example, French courts held that victims of human trafficking were considered a social group in Kosovo because prostitution has thrown on them a heavy social discredit and they are subjected to opprobrium by society.<sup>286</sup> On the contrary, in Nigeria, victims of human trafficking were not considered a social group, since those women would not be subject to opprobrium by all or part of the society in their country of origin.<sup>287</sup>

Therefore, for French courts, the key factor determining the social perception of the group is whether social disapproval exists. Moreover, searching for the existence of social disapproval requires an analysis of whether the group is subject to social stigmatization, for instance through the criminalization of their fundamental characteristic or through their discrimination, and therefore an analysis of whether members of the group face a common risk of persecution. However, by including the condition of stigmatization, French case law conflates the definition of a particular social group and the separate requirement of (a risk of) persecution.<sup>288</sup> Therefore, this approach further perpetuates the requirement of exposure to

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cause the court erred in requiring an outward manifestation of the applicant's membership in a social group, namely not having been genitally mutilated).

285. Korsakoff, *supra* note 270, at 86–88.

286. CNDA, Mar. 15, 2012, No. 11017758.

287. CNDA, Apr. 3, 2012, No. 11020945, *quoted in* CONTENTIEUX DES RÉFUGIÉS: JURISPRUDENCE DU CONSEIL D'ÉTAT ET DE LA COUR NATIONALE DU DROIT D'ASILE 65–66 (Martine Denis-Linton ed., 2012). In 2015, however, the CNDA departed from that conclusion and recognized that women victims of human trafficking who try to escape are subject to a disapproving look from society in Nigeria. CNDA, Mar. 24, 2015, No. 10012810 C+. *See also* CE, Oct. 16, 2019, No. 418328 A (reaching the same conclusion for women victims of human trafficking who actually managed to escape). *See generally* Korsakoff, *supra* note 270, at 86–88 (describing the implications of the court's evolution).

288. UNHCR, *supra* note 228, at 8.

persecution from the *Ourbih* case law, that was then suppressed in subsequent judgments. Korsakoff, an academic in France, describes this approach as a denaturation of social perception, which unduly restricts the ground of membership of a particular social group.<sup>289</sup>

This requirement of exposure to persecution for recognition as a member of a particular social group brings to mind the case *Commission v. Jégo-Quéré* of the Court of Justice of the European Union in 2004,<sup>290</sup> which led to the amendment of Article 263 TFEU. The applicant, a fishing company, was affected by an E.U. Regulation which limited fish catches to preserve the conservation of fish stocks. The company sought to annul the concerned provisions under the then Article 230 CE (now Article 263 TFEU) which did not yet include the possibility of instituting proceedings “against a regulatory act which is of direct concern to them and does not entail implementing measures,” as is now provided by Article 263 TFEU.<sup>291</sup> The applicant had no legal remedy enabling it to challenge the legality of those provisions before national courts, as the Regulation did not provide for the adoption of any implementing measures by the Member States. The Court concluded in essence that, while this Regulation concerned it directly, it did not concern it individually.<sup>292</sup> This left the applicant without any legal remedy, reviving the argument that in such a case, the only possibility for contesting the validity of the Regulation was to first contravene it and thus breach the law in order to gain access to justice.<sup>293</sup> Realizing the significant shortcoming in the Treaties, Article 263 TFEU was later amended to include this possibility.<sup>294</sup> The absurdity of having to breach the law to gain access to justice is analogous to the absurdity of exposing oneself to persecution to gain recognition as a member of a particular social group and thus be granted refugee status.<sup>295</sup>

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289. Korsakoff, *supra* note 270, at 86–88.

290. Case C-263/02 P, *Comm'n v. Jégo-Quéré*, Apr. 1, 2004, 2004 E.C.R. I-3443.

291. TFEU art. 263.

292. *Jégo-Quéré*, 2004 E.C.R. I-3443, ¶¶ 13, 35, 48.

293. *Id.*

294. TFEU art. 263.

295. See also UNHCR, *supra* note 228, at 7 (“[I]t would be against the object and purpose of the 1951 Convention, and in fact absurd to require per-

The case study of French law illustrates that the uncertainties surrounding gender-related aspects under the membership of a particular social group ground lead to divergent interpretations in Member States, which are inconsistent with both E.U. law and international refugee law, resulting in the rejection of some applicants' cases that should have been granted refugee status. Therefore, a clarification of this ground in E.U. law, in line with international law, together with gender guidelines at national level, is necessary.

## V. CONCLUSION

This paper has provided some elements for the analysis of the reasons why women do not leave their country of origin as often as men and of the assessment of claims of female asylum seekers, notably those whose claim is based on a transgression of social and cultural norms. While the European Union's efforts to provide greater consideration for women asylum seekers, both procedurally and substantively, should be recognized, significant shortcomings remain, leading to the denial of refugee status to women who would have rightly deserved protection, in contradiction with the Refugee Convention, as interpreted by the UNHCR. Shortcomings include the fact that (1) gender considerations, which are not well defined, are only mentioned under the specific ground of membership of a particular social group, as opposed to being relevant for all grounds, (2) the Qualification Directive adopts a cumulative approach to the membership of a particular social group, and (3) the social perception test leads to certain difficulties when assessing claims of gender-related persecution.

This analysis leads to several conclusions. First, claims based on gender-related persecution should be primarily analyzed under the political opinion ground, as women's resistance to gender oppression is political.<sup>296</sup> This would not only avoid the uncertainties surrounding the membership of a particular group ground, but more importantly, it would also send a strong message in favor of the effective achievement of gender equality. Second, since this approach is not currently followed at the E.U. level or within Member States, as such

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sons to expose themselves to persecution in order to be able to seek protection from it.”).

296. Refugee Women's Legal Group, *supra* note 214, ¶ 4.17.

claims are analyzed under the membership of a particular social group ground by default, in the meantime, the European Union should adopt an alternative approach to that ground, as mandated by the UNHCR. The last European Commission Report on the application of the Qualification Directive sends a hopeful signal in that regard. Third, as long as the cumulative approach is retained, the social perception arm of the membership of a particular social group ground should be clarified. It should not require an external manifestation of the characteristic shared by the group, nor should it require exposure to persecution. A preliminary ruling by the Court of Justice of the European Union on the validity of Article 10(1)(d) of the Qualification Directive in light of international refugee law and/or on the interpretation of that article with regard to gender-related persecution—including on questions of gender-sensitive interpretation of all grounds and on the meaning of “gender related aspects” under the membership of a particular social group ground—would be very valuable.