

MASTER'S THESIS IN INTERNATIONAL LAW AND HUMAN RIGHTS

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WOMEN FEARING GENDER-BASED PERSECUTION FOR REASONS OF TRANSGRESSING
SOCIAL MORES BY BEING “TOO WESTERN” – A PARTICULAR SOCIAL GROUP OR NOT?

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Abstract:

This thesis seeks to find an answer to the following question: *Can women who fear being subjected to gender-based persecution for reasons of transgressing social mores due to being "too western", primary in terms of clothing, be seen as members of a particular social group and therefore granted refugee status if the fear of persecution due to that reason is well-founded?*

This thesis begins by explaining the concept of a particular social group through the UNHCR Handbook and Guidelines, where the two different requirements for a group to be considered a particular social group is presented, *i.e.*, the social perception approach and the protected characteristics approach. Also relevant regional definitions and national case law is provided in order for the reader to better understand what is required of the applicant to be seen as a member of a particular social group. Many of the states require both approaches to be met.

As this thesis studies women fearing gender-based persecution for reasons of transgressing social mores by being "too western", also gender-based violence is explained through different international instruments. Also, the UNHCR's interpretation on gender-based persecution is discussed. The thesis continues by discussing women as a particular social group, and relevant national case law is provided. This functions as a basis for comparison, when analysing, if women transgressing social mores by being "too western", primary in terms of clothing, can constitute a particular social group.

The country of origin information plays a significant role when discussing this issue, as the fulfilment of the social perception approach is highly dependable on it. In order for the applicant to fulfil the protected characteristics approach, she must have "an immutable characteristic" or "a characteristic that is fundamental to human dignity that a person should not be compelled to forsake it". Women being "too western", can be seen to fulfil the social perception approach as they are distinct from the others in their societies. Therefore the question is, whether being "too western", primary in terms of clothing, is a characteristic that a person should not be compelled to forsake it, or not. The finding of this thesis is that the applicant needs to demonstrate, that being "too western" for her society, is a crucial or fundamental part of her identity. In other words, if the applicant a well-argued reason, why she must be allowed to dress in a western manner, she can fall under the Convention ground membership in a particular social group.

Key words:

refugee law, membership in a particular social group, protected characteristics approach, social perception approach, gender-based or gender-related violence and persecution, women transgressing social mores, "too western"

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1. Introduction

1.1 Background

The Convention of 28 July 1951 relating to the Status of Refugees, as amended by the New York Protocol of 21 January 1967 (hereafter the 1951 Refugee Convention), is the key United Nations legal document in international refugee law. The 1951 Refugee Convention covers only those persons who had been persecuted in Europe before 1 January 1951, but the 1967 Protocol relating to the Status of Refugees removed the geographical and time limitations.¹ Even if there have been no other amendments made to the 1951 Refugee Convention, it has been supplemented by other refugee and subsidiary protection regimes on regional levels.² The Convention defines the term *refugee* as well as outlines the rights for refugees and the legal obligations of States parties to protect them.³ The 1951 Refugee Convention only stipulates the “basic minimum standards for the treatment of refugees, without prejudice to States granting more favourable treatment”.⁴ The core principle of the Refugee Convention is non-refoulement which means that a refugee shall not be returned to his or her country of origin or another country where he or she faces serious threats to life or freedom, and this principle is so fundamental that no reservations or derogations can be made to it.⁵ An asylum seeker can base his or her claim for refugee status on five different categories or Convention grounds; membership in a particular social group is one of them.⁶ According to the 1951 Refugee Convention, a refugee is any person

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.⁷

¹ United Nations, The Convention relating to the Status of Refugees, 28 July 1951, Geneva, entry into force 22 April 1954, signatories: 19, parties: 146, as amended by its Protocol relating to the Status of Refugees, 31 January 1967, New York, entry into force 4 October 1967, parties 147 (hereafter the 1951 Refugee Convention and its 1967 Protocol relating to the Status of Refugees), page 2

² *Ibid.*, page 2

³ UNHCR, Intro to the Convention

⁴ United Nations, the 1951 Refugee Convention and its 1967 Protocol relating to the Status of Refugees, page 3

⁵ *Ibid.*, page 3

⁶ *Ibid.*, page 3

⁷ *Ibid.*, article 1 of the 1951 Convention and article 1 of the 1967 Protocol [emphasis added].

Claims based on the membership of a particular social group have increased dramatically in recent years, and the cases that have been analysed under this ground have been pushing the boundaries of refugee law.⁸ What does membership in a particular in social group then actually mean? In fact, no definitive answer has been given to that question. The breadth of the Convention ground “makes it a plausible vehicle for refugee claims that do not easily fall under the other grounds set out in” the 1951 Refugee Convention.⁹ However, the breadth of the Convention ground does not necessarily lead to the desired outcomes as it allows the States parties to the 1951 Refugee Convention to interpret it in different ways. In this sense, the equality of refugees in different parts of the world is not secured. Different countries, even within the European Union (hereafter the EU), are interpreting this ground in different ways in their national legislation regardless of the fact that they are all bound by the Directive 2011/95/EU of the European Union 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 granted¹⁰ (hereafter the Qualification Directive). The Qualification Directive “sets out the common criteria for determining ‘reasons for persecution’”¹¹, including the membership of a particular social group, and have a common asylum system. Asylum seekers wishing to base their claim under this Convention ground, however, do have to meet some requirements in order for them to be seen as members of a particular social group, and therefore not everyone can fall under this Convention ground. For instance, within the context of the EU, if everyone were categorized as a member of *some* particular social group, everyone who has a well-founded fear of being subjected to human rights violations amounting to acts of persecution would be granted refugee status. In order to clarify, an extremely simplifying example could be the following: if every person belonged to some particular social group, then a man who is working in construction, and who is doing poorly at work, is threatened to be murdered by his manager due to the fact that he is doing so poorly at work, this man could argue that he belongs to a particular social group called *men doing poorly at work* and would be granted refugee status if all the other requirements are met. If this was the case, one could even argue that setting out any Convention

⁸ Aleinikoff, Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’, p. 264

⁹ *Ibid.*, p. 264

¹⁰ Directive 2011/95/EU of the European Union 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. Entry into force 9 January 2012 (hence European Union, Qualification Directive, 2011/95/EU)

¹¹ Michelle Foster, Legal and Protection Policy Research Series, The ‘Ground with the Least Clarity’: A Comparative Study of Jurisprudential Developments relating to ‘Membership of a Particular Social Group’, August 2012, p. 16

grounds would be unnecessary because everyone would be a member of *some* particular social group. This, in turn, would lead to the fact that subsidiary protection¹² within the context of the EU would lose its meaning.

Gender plays also a significant role in international refugee law. This is at least partly the consequence of the changes in warfare. Armed conflicts today are not anymore wars between two different states, but wars take place within the states, and thus, wars do not only take place between combatants, but also civilians, especially women and children, are internationally targeted by combatants and for instance sexual violence is used as a method in modern day warfare.¹³ As a consequence of gender becoming a more dominant part of refugee law, women as a particular social group has risen a great amount of discussion. For women to fall under the definition of a refugee, they must fulfil the requirements set out in the 1951 Refugee Convention. What is important to notice here, is the wording that they must have a well-founded fear of persecution **for reasons of** race, religion, nationality, membership in a particular social group or political opinion. This wording demands for a causal link between the persecution and the reason why a person or group of persons is subjected to acts of persecution. Women, of course, can be persecuted due to different reasons and can base their asylum claims on any of the five grounds set out in the 1951 Refugee Convention depending on the actual reason why they are subjected to acts persecution. However, if women are subjected to acts of persecution due to their sex or gender, they could base their asylum claim on the membership of particular social group. For instance, women who transgress social mores of their societies and fear gender-based violence for that reason, could base their claims on being members of a particular social group. Transgression of social mores of a particular society can, for instance, occur through a woman being “too western”, primary in terms of clothing. In these kinds of situations, persecution is gender-based or gender-related, and we can talk about gender-based or gender-related persecution. Female genital mutilation is a well-known example on gender-based violence as will be explained later on in this study. It has been argued that women are more vulnerable than men in some societies and, in fact, “women as a group tend to be positioned differently than men in their relation to the state and

¹² For the purposes of the Qualification Directive, “‘person eligible for subsidiary protection’ means a third country national or a stateless person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin, or in the case of a stateless person, to his or her country of former habitual residence, would face a real risk of suffering serious harm as defined in Article 15, and to whom Article 17(1) and (2) do not apply, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”. Source: the Qualification Directive, 2011/95/EU

¹³ Eeva Nykänen, *Fragmented State Power and Forced Migration*, 2012, p. 5

the public sector” which in turn makes them particularly vulnerable to violations by private actors.¹⁴ Here the example on female genital mutilation is again in place due to the fact that in different societies it is exactly private actors, and not state actors, who practice this harmful tradition. Even if there are many different reasons for women to face gender-based persecution, this study will concentrate on analysing the matter of women transgressing social mores by being “too western”, and therefore being subjected to gender-based persecution.

1.2 Research question and limitations

This study will answer to the following question: *Can women who fear being subjected to gender-based or gender-related acts of persecution for reasons of transgressing social mores due to being “too western”, primary in terms of clothing, be seen as members of a particular social group and therefore granted refugee status if the fear of persecution due to that reason is well-founded?*

This study will begin by introducing the concept of a particular social group through the Guidelines from 2002 made by the United Nations High Commissioner for Refugees. Also, the different possibilities that can constitute a particular social group will be discussed in this chapter. This is done in order to be able to explain the breadth and vagueness of the concept *a particular social group*.

After that, gender-based or gender-related violence is explained in more detail, in order to be able to understand the types of persecution, discrimination or violence women can be subjected to. This will be done by explaining different examples on gender-based violence, such as female genital mutilation, domestic violence and forced marriage. Also, some central gender-related international instruments will be discussed, in order to understand gender-related violence and the work done against it on the international field. International documents are crucial when discussing gender-based violence also due to the fact they provide definitions or explanations of different types or forms of gender-based violence. Gender-based violence is also important to discuss, as the purpose of this thesis is to understand, if women who fear being persecuted due to being “too western”, can be considered as members of a particular social group, and usually women basing their claim on this ground for that reason plead to face gender-based or gender-related violence if they were deported to their country of origin.

¹⁴ Eeva Nykanen, *Fragmented State Power and Forced Migration*, 2012, p. 2

As this study will concentrate on gender-based violence or persecution and the concept of the membership in a particular social group, the main focus will be on women as asylum seekers in cases where they base their claim on fearing persecution for reasons of being members of a particular social group. Gender-based violence can occur even along the migration route and not only in the country of origin and it might not have been the reason why a person has left their country of origin. However, this study will only focus on gender-based violence that could occur in the country of origin if that person were to return there. This includes even the *sur place*¹⁵ refugee claims.

As mentioned already, there has been a great amount of discussion on women as a particular social group and even on women transgressing social mores as a particular social group. However, there is still lack of discussion on women fearing persecution due to transgressing social mores or norms by being “too western”, primary in terms of clothing, for which they fear of being subjected to acts of persecution, if they were to return to their country of origin. Due to the rather unclear and vague definition of the concept of a particular social group, it has made it possible for this Convention ground to develop over time and therefore this topic is actual and interesting to do research of.

In order to be able to discuss the research question, it is necessary to discuss the point of view of the United Nations High Commissioner for Refugees (hereafter the UNHCR) on particular social group as well as what different states have considered to constitute a particular social group regarding women. This is necessary in order to have a base for comparison, when discussing, whether women who transgress social mores by being “too western”, primary in terms of clothing, fulfil the requirements set for the Convention ground membership in a particular social group, or not. This question is interesting with regard to the fact that women who are not believed to be members of a particular social group, or that any other of the asylum grounds does not fit their asylum claim, will not be granted refugee status even if their fear of being subjected to gender-based acts of persecution is well-founded. Instead, they are (only) granted complementary or subsidiary protection. As will be demonstrated through already existing national case law, women transgressing social mores of a society can also fall under different Convention grounds, such as political opinion or religion.

¹⁵ In the *global context*, a person who is not a refugee when they leave their country of origin, but who becomes a refugee, that is, acquires a well-founded fear of persecution, at a later date. In the *EU context*, a person granted refugee status based on international protection needs which arose *sur place*, i.e. on account of events which took place after they left their country of origin. Source: European Commission, Migration and Home Affairs, refugee *sur place*

Similarly, women who are “too western” for a particular society could also fall under these Convention grounds. However, political opinion and religion, or the other Convention grounds, will not be discussed in depth in this study, as the purpose of this study is to analyse, whether this group, that is, women who are “too western”, can be considered to constitute a particular social group, or not.

1.3 Material and method

As primary sources are used the 1951 Refugee Convention, as amended by the 1967 Protocol, the Qualification Directive, the United Nations Convention on the Elimination of All Forms of Discrimination against Women (hereafter the CEDAW) and the Council of Europe Convention on preventing and combating violence against women and domestic violence. These Conventions constitute hard law, and therefore they are binding for states parties. They will be discussed in order to be able explain or provide definitions on different concepts, such as the meaning of refugee status and gender-based or gender-related violence and persecution.

In addition to hard law, this study will also discuss international documents that are not binding to states parties, but are considered soft law. These international documents, such as the UNHCR Guidelines and the UNHCR Handbook, aim to give guidance for states and other relevant actors. The UNHCR Handbook as well as the UNHCR Guidelines are discussed in order to be able to introduce some kind of a definition of the concept of a particular social group. Other UNHCR documents and other articles will also be discussed in order to explain the gender-specific nature of refugee claims. The UNHCR documents function as guidance for states and they are not legally binding. National case law and written custom by immigration services or officials concerning the membership of a particular social group will be used to clarify the concept as well.

In order to further explain the concept and development of gender-based violence, also General Recommendations to the CEDAW as well as the Vienna Declaration and the Beijing Declaration and Platform for Action will be discussed in subchapter 3.2. These General Recommendations and Declarations, however, are not binding to states, but they address central issues and function as guidance and provide recommendations for states. The General Recommendations and Declarations are discussed also in order to be able to in a greater amount explain the history and development of gender-based violence and its recognition on the international field and refugee law.

The presented national case law will also function as a base for comparison when discussing the research question, that is, whether women who have a well-founded fear of facing gender-based persecution because they have transgressed social mores of their societies, primary in terms of clothing, can be seen as members of a particular social group. In order to further explain the concept of a particular social group as well as gender-based violence and persecution, and to give examples on particular social groups and discuss them, this study will also refer to other legal writings and sources. The discussion on these will be provided in order to introduce the breadth and vagueness of the concept a particular social group.

2. What is a particular social group in international refugee law?

2.1. UNHCR Handbook

As was stated in the introduction, the concept of a particular social group is rather vague, and different countries define it differently when comparing to each other and also to the UNHCR. The UNHCR, is an international organization “mandated by the United Nations to lead and coordinate international action for the worldwide protection of refugees and the resolution of refugee problems”.¹⁶ Its “primary purpose is to safeguard the rights and well-being of refugees”.¹⁷ In this subchapter, the UNHCR’s requirements for membership in a particular social group will be looked into more closely by discussing the UNHCR Handbook. In subchapter 2.2 membership in a particular social group will be discussed through the UNHCR Guidelines from 2002. Also, the UNHCR’s two approaches, that is, the protected characteristics approach and the social perception approach will be discussed in the next subchapter. These UNHCR documents are not legally binding for states but their purpose is to provide guidance for states and other relevant actors. In subchapter 2.3, the opinions of different regions on what constitutes a particular social group will be examined. After that, some examples on what different states have understood to constitute a particular social group will be introduced, in order to better understand the concept of a particular social group.

The UNHCR Handbook¹⁸ includes a discussion of the term membership in a particular social group. The discussion is, however, only on a general level and rather brief, and according to Thomas Alexander Aleinikoff, it is, no doubt, a follow-up of the fact that there were not that many claims made under that Convention ground at the time of writing of the Handbook.¹⁹ The Handbook defines the concept of a particular social group as following:

77. A “particular social group” normally comprises persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.

78. Membership of such a particular social group may be at the root of persecution because there is no confidence in the group's loyalty to the Government or because the

¹⁶ Mission Statement, UNHCR – The United Nations Refugee Agency, 2007

¹⁷ *Ibid.*

¹⁸ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva, 1979, reissued in 1992 and 2019) (hereafter ‘the Handbook’).

¹⁹ Cambridge University Press, Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’, by T. Alexander Aleinikoff, June 2003, p. 266

political outlook, antecedents or economic activity of its members, or the very existence of the social group as such, is held to be an obstacle to the Government's policies.

79. Mere membership of a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be special circumstances where mere membership can be a sufficient ground to fear persecution.²⁰

From the Handbook's writings, it is important to note, that the claim that is based on this particular ground may, however, overlap with other grounds as well. In other words, the different Convention grounds do not exclude one another. Otherwise, the definition is rather vague due to its general and rather brief form.

2.2. UNHCR Guidelines from 2002 and the two approaches – protected characteristics approach and social perception approach

The UNHCR has, after the 1992 re-edited Handbook, published Guidelines concerning the membership of a particular social group in 2002. As was stated in the previous subchapter, the definition of the concept of a particular social group was rather brief and made only on a general level in the Handbook, and therefore the new Guidelines in that sense can be seen valuable. However, already before the guidelines from 2002, UNHCR has stated its opinion on the meaning of a particular social group in the appeals *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*²¹. The difference between the Handbook's writings and the UNHCR's brief submitted to the *Islam* and *Shah* appeals is that in the Handbook there is no mention about a characteristic that is unchangeable or fundamental.²² Among other things, the UNHCR mentions in the brief submitted to the above-mentioned appeal, that

'Particular social group' means a group of people who share some characteristic which distinguishes them from society at large. That characteristic must be unchangeable, either because it is innate or otherwise impossible to change or because it would be wrong to require the individuals to change it. Thus, where a person holds beliefs or has values such that requiring them to renounce them would contravene their fundamental

²⁰ UNHCR, Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Geneva, 1979, re-edited 1992) (hereinafter 'Handbook').

²¹ *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999

²² Cambridge University Press, Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group', by T. Alexander Aleinikoff, June 2003, p. 267. This chapter is taken from *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (edited by Erika Feller, Volker Türk and Frances Nicholson, Cambridge University Press, 2003). It was originally presented as an expert paper at a round table in the context of the Global Consultations on International Protection, which were organized by UNHCR in 2000-2002. More information on the complete publication is available on UNHCR's website.

human rights, they may in principle be part of a particular social group made up of like-minded persons.²³

The UNHCR also notes in its Guidelines that the group must already exist before the act of persecution, that is, “persecution alone cannot determine a group where none otherwise exists”.²⁴ Thus, in order to fulfil the requirement of nexus between the persecution and the Convention ground, the act of persecution must have been made due to the fact that the person is in fact a member of this particular social group.

The UNHCR explains in its Guidelines on international protection relating to membership in a particular social group, these requirements. The Guidelines were made to “provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as the UNHCR staff carrying out refugee status determinations in the field”.²⁵ In the Guidelines, it is stated that there are two approaches, which states have adopted while evaluating cases concerning membership of a particular social group, that is, **protected characteristics approach** and **social perception approach**.

Protected characteristics approach is also known as the immutability approach. This approach “examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it”. Such immutable characteristic can be innate, *e.g.*, sex or ethnicity, or unalterable for some other reasons, *e.g.*, past occupation or status. In the Guidelines, it is stated that if a decision-maker adopts this approach, it will

examine whether the asserted group is defined: (1) by an innate, unchangeable characteristic, (2) by a past temporary or voluntary status that is unchangeable because of its historical permanence, or (3) by a characteristic or association that is so fundamental to human dignity that group members should not be compelled to forsake it.

²³ Cambridge University Press, Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’, by T. Alexander Aleinikoff, June 2003, page 267

²⁴ *Ibid.*, page 267

²⁵ 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, UNHCR, HCR/GIP/02/02, 7 May 2002, p. 1

It has been concluded by courts and other administrative bodies applying this approach that for instance women, homosexuals and families can be seen as a particular social group.²⁶

Social perception approach, in turn, focuses on the fact “whether or not a group shares a common characteristic which makes them a cognizable group or sets them apart from society at large”. Depending on the circumstances of the society in which the group exists, women, homosexuals and families have also been seen to fit in the description of a particular social group while applying this approach.²⁷

However, the UNHCR has come to the conclusion that these two approaches can easily and often overlap, due to the fact that often a group that shares a common immutable characteristic also is a social group in the society. However, they may also differ considerably. For instance, the social perception approach could recognize as a particular social group a group that is not based on a characteristic that is immutable or fundamental to human dignity, such as occupation or social class.²⁸ An example of this type of group could be shop owners that sell alcohol in a country or a society where this type of business is not allowed for instance due to religious reasons. Due to the differences in the two approaches and the protection gap they may cause, the UNHCR believes that the two approaches should be reconciled. According to the UNHCR, “[t]he protected characteristics approach may be understood to identify a set of groups that constitute the core of the social perception analysis”, and therefore it is well-founded to combine the two approaches to a one 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.²⁹

However, as a noteworthy notion is that regardless the fact that the UNHCR decided to create one definition, the wording of the definition is still giving the opportunity to only choose one of the approaches, that is, only one of the approaches must be met. The UNHCR noted that if the asylum seeker does not fulfil the requirements of the protected characteristic approach, it should still be

²⁶ 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, UNHCR, HCR/GIP/02/02, 7 May 2002, para. 6

²⁷ *Ibid.*, para. 7

²⁸ *Ibid.*, para. 9

²⁹ *Ibid.*, paragraphs 10-11

examined whether this group is still perceived as a cognizable group in that society. The UNHCR gave as an example a shop keeper. If it first was determined that the title “shop keeper” is neither unchangeable nor a fundamental aspect of human identity, “a shopkeeper or members of a particular profession might nonetheless constitute a particular social group if in the society they are recognized as a group which sets them apart”.³⁰ However, many states do require that the requirements of both of these approaches must be fulfilled. This matter will be discussed in subchapter 2.3.

Another important factor when examining whether a claimant is a member of a particular social group is the role of the persecutory act. The membership of a particular social group cannot exclusively be based on the persecutory act, but persecution can still play a (significant) role while determining the visibility of a group in a particular society.³¹ The UNHCR cites in its Guidelines a decision:

“[W]hile 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 lefthanded 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.”³²

A particular social group does not have to be cohesive, that is, the persons of the group do not have to know each other but the members of the group must share a common element in order to be seen as a particular social group.³³ The UNHCR reminds in its Guidelines that just because a person is part of a particular social group, it does not normally mean that he or she has the right to refugee status. However, in some circumstances mere membership can be a sufficient ground to fear persecution.³⁴ Likewise in the other grounds, there is also no need for an applicant to show that everyone in that particular social group is at risk of persecution, as some members of that group might hide their characteristic, the persecutors do not know them or they might even cooperate with the persecutor.³⁵ In addition to the fact that a particular social group does not have to be cohesive nor everyone does not have to be at risk, the size of the group does not play any role. The UNHCR stresses that even if an

³⁰ 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, UNHCR, HCR/GIP/02/02, 7 May 2002, paragraphs 12-13

³¹ *Ibid.*, para. 14

³² *Ibid.*, para. 14

³³ *Ibid.*, para. 15

³⁴ *Ibid.*, para. 16, and see Handbook para. 79.

³⁵ *Ibid.*, para. 17

applicant is believed to be a member of a particular social group, he or she must still demonstrate a well-founded fear of being persecuted due to being a member of a particular social group, that is, the causal link must be established.³⁶ The UNHCR concludes that

The causal link may be satisfied: (1) where there is a real risk of being persecuted at the hands of a non-State actor for reasons which are related to one of the Convention grounds, whether or not the failure of the State to protect the claimant is Convention related; or (2) where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for a Convention reason.³⁷

In this subchapter, some possible particular social groups have been mentioned in short. The next subchapter will introduce how the EU, the United States and Canada have implemented these guidelines in their own legislations concerning the membership of a particular social group, after which some examples on particular social groups will be discussed slightly in more detail. These examples will help to explain the concept of a particular social group and help to explain what types of elements or factors must be taken into consideration while discussing whether someone can be seen as a member of a particular social group or not.

2.3. “Definitions” of particular social group in the EU, the United States and Canada

As it already has been mentioned, there is no clear and definitive definition of the concept of particular social group. However, there are some guidelines for states which set out the minimum criteria which must be fulfilled in order for a person to be able to be granted asylum status by being a member of a particular social group.

The Qualification Directive states the following about membership of a particular social group:

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

³⁶ 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, UNHCR, HCR/GIP/02/02, 7 May 2002, para. 18

³⁷ *Ibid.*, para. 23

- that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.³⁸

As can be read, membership in a particular social group requires a person to have a characteristic shared with others in that same group, that he or she cannot or cannot be required to renounce. Also, the group has to be different from the mainstream in that country or society in question. In a practical guide published by the European Asylum Support Office (hereafter EASO), one decision from the Court of Justice of the European Union (CJEU) is highlighted concerning the membership in a particular social group, that is, the judgement of the court concerning cases *Minister voor Immigratie en Aisiel v X and Y*, and *Z v Minister voor Immigratie en Aisiel* from the Netherlands. This case handled the question of sexual orientation, as the three asylum seekers (X, Y and Z) in the Netherlands claimed that they were homosexuals and therefore were to be seen as members of a particular social group in their country of origin.³⁹ This judgement by the CJEU will be discussed later on in the next chapter, where some examples on different particular social groups are introduced.

According to a panel discussion, the United States Citizenship and Immigration Services (hereafter the USCIS) asylum officers “use a three-part test to adjudicate claims involving” particular social group, which are the following: immutability/fundamentality of the characteristic; whether the particular social group is socially distinct; and ensuring that a persecutory act or terrorist activity is not the basis of the trait.⁴⁰ As one of the panellists state, “case law serves as the sole means for the definition” of particular social group, and it is still being developed by new case law.⁴¹ What is important to notice from these guidelines by the USCIS, is the fact that the persecutory act cannot be the basis for the claim, that is, the claim has to have existed before the persecutory act does, and the act must have been made because that person or the group of persons belong to that certain group. When it comes to cases that have modified the meaning of particular social group in the United States, Lay – one of the panellists – noted that the *Matter of Acosta* from 1985 and the *Case of C-A-* have had a great influence.⁴² The *Matter of Acosta* was the ground for the “principle of immutability of the characteristic” and in the *Case of C-A-* it was outlined as following:

³⁸ Qualification Directive, article 10(d)

³⁹ *X, Y, Z v Minister voor Immigratie en Aisiel*, C-199/12 – C-201/12, European Union: Court of Justice of The European Union, 7 November 2013

⁴⁰ Official Website of the Department of Homeland Security, CIS Ombudsman, Roundtable 2: Hot Topics in Asylum: An Examination of Particular Social Group and Other Serious Harm, 24 August 2015

⁴¹ *Ibid.*

⁴² *Ibid.*

The members of a particular social group must share a common, immutable characteristic, which may be an innate one, such as sex, color, or kinship ties, or a shared past experience, such as former military leadership or land ownership, but it must be one that members of the group either cannot change, or should not be required to change, because it is fundamental to their individual identities or consciences.⁴³

In the same case, the board continued that also “social visibility of the members of a claimed social group is an important consideration in identifying the existence of a ‘particular social group’ --“.⁴⁴

The *Matter of Acosta* will be introduced in more detail in sub-chapter 2.4.

In Canada, there are three possible categories of particular social groups:

1. Groups defined by an innate or unchangeable characteristic;
2. groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
3. groups associated by a former voluntary status, unalterable due to its historical permanence.⁴⁵

Two important cases concerning the matter of a particular social group in Canada are *Canada (Attorney General) v. Ward* and *Chan v. Canada (Minister of Employment and Immigration)*.⁴⁶ As can be seen, Canada has similarities in their requirements when it comes to the United States and the European Union. United States, Canada and all the EU Member States are States Parties to the 1951 Refugee Convention and the similarities concerning the membership of a particular social group between these countries in that sense are self-evident, and the UNHCR protective characteristics approach and the social perception approach can both be seen in the legislation of the United States, Canada and the EU. The United States, Canada and many European states, in line with the Qualification Directive, implement the cumulative interpretation of two approaches whereas the UNHCR implements the non-cumulative interpretation of the two approaches. However, there are still exceptions within Europe as some states, for instance Hungary and Italy, implement the non-cumulative interpretation that is in line with the UNHCR.⁴⁷ This has naturally led to the fact that the

⁴³ Official Website of the Department of Homeland Security, CIS Ombudsman, Roundtable 2: Hot Topics in Asylum: An Examination of Particular Social Group and Other Serious Harm, 24 August 2015.

⁴⁴ *Ibid.*

⁴⁵ Immigration and Refugee Board of Canada, Chapter 4 – Grounds of Persecution – Nexus, 4.5. Particular social group (hereafter the IRB, Chapter 4.5. Particular social group)

⁴⁶ *Ibid.*

⁴⁷ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, page 50

applicability of particular social group as a reason for persecution is broader in these states when compared to some other European states and for instance the United States and Canada.⁴⁸ However, the line is not always completely clear, when, for instance in Belgium, “the legislation provides a cumulative approach”⁴⁹ while “jurisprudence seems to be more flexible by referring to either one or both elements of the definition”.⁵⁰ As was mentioned earlier, the international legislation on what constitutes a particular social group only sets the minimum rights that must be provided but states are free to provide rights that are more favourable for the asylum seekers.

2.4. Examples of different particular social groups and cases concerning determination of particular social group

As was mentioned in subchapter 2.2, the UNHCR has given a few examples of groups that can constitute a particular social group. However, countries are not actually bound by these examples and they can have differing opinions with the UNHCR about what constitutes a particular social group.

There are a few groups that are almost universally seen to constitute a particular social group. An example of these is sexual orientation. For example, homosexuals can be seen to fulfil the requirements of both the approaches (protected characteristics and social perception).⁵¹ For instance, in a case by the Court of Justice of the European Union concerning three individuals, who were homosexuals from Senegal, Sierra Leone and Uganda, and applied for international protection in the Netherlands, homosexuality as a particular social group was discussed.⁵² In its decision, the court found, among other things, that an individual’s “sexual orientation is a characteristic so fundamental to his identity that he should not be forced to renounce it” and “that the existence of criminal laws, [...], which specifically target homosexuals, supports a finding that [homosexuals]

⁴⁸ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, page 50

⁴⁹ See Article 48/3 4 of the Aliens Act of Belgium, 15 December 1980

⁵⁰ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, page 49.

⁵¹ Cambridge University Press, Protected characteristics and social perceptions: an analysis of the meaning of ‘membership of a particular social group’, by T. Alexander Aleinikoff, June 2003, p. 304

⁵² *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12 – C-201/12, European Union: Court of Justice of The European Union, 7 November 2013

form a separate group which is perceived by the surrounding society as being different”.⁵³ In other words, the two approaches established by the UNHCR are met. Therefore, the court found that these three individuals were to be seen as members of a particular social group in their countries of origin.

In addition to sexual orientation, also other groups can constitute a particular social group. For instance, the Immigration and Refugee Board of Canada has made a list of possible particular social groups, which include “homosexuals (sexual orientation)”, “single women without male protection (in some countries and circumstances)”, “persons suffering from mental or physical illness”, et cetera.⁵⁴

In the United States, [t]he first case to interpret the meaning of ‘particular social group’ was *Matter of Acosta*,⁵⁵ as was introduced in sub-chapter 2.3. The *Matter of Acosta* is actually not an example of what constitutes a particular social group but what does not constitute a particular social group. Another example of a case, where the applicant was not seen to be a member of a particular social group, is *Canada (Attorney General) v. Ward* – that also was mentioned as an influential case concerning the determination of particular social group. These both cases are similar due the fact that they evaluate the possibility of one’s profession or status in an organization to lead to the fact that the person in question should be considered a member of a particular social group due to his or her profession or the status he or she possesses in a particular organization.

The *Matter of Acosta* is a case of a taxi driver from El Salvador who applied for asylum in the United States and appealed to the BIA after receiving a negative decision on his claim for asylum.⁵⁶ The applicant was a cofounder of an organization named COTAXI in El Salvador, and a couple years after the company was founded, COTAXI and its drivers started receiving requests to participate in work stoppages. Anti-government guerrillas were believed to be the ones behind these requests, and after the taxi drivers refused to participate, they started receiving threats which led to physical violence, such as taxis being seized and burned as well as drivers assaulted or killed. Later on, the applicant started receiving anonymous notes that threatened his life and he claimed to be assaulted

⁵³ *X, Y, Z v Minister voor Immigratie en Asiel*, C-199/12 – C-201/12, European Union: Court of Justice of The European Union, 7 November 2013, paragraphs 46 and 48

⁵⁴ IRB, Chapter 4.5. Particular social group. For the full list and more detailed information on different particular social groups in Canada, see the website.

⁵⁵ Catholic Legal Immigration Network, Inc., BIA requires asylums seekers to identify particular social group, author: Reena Arya

⁵⁶ *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985

by the guerrillas. In order to back up the story, the applicant submitted objective evidence of his membership in the organization called COTAXI. In this case, the BIA concluded that the applicant's fear of persecution was not objectively well-founded and thus, that the applicant did not meet the requirements of a particular social group. Regarding the determination of a particular social group in this case, the BIA concluded the following:

The characteristics defining the group of which the respondent was a member and subjecting that group to punishment were being a taxi driver in San Salvador and refusing to participate in guerrilla-sponsored work stoppages. Neither of these characteristics is immutable because the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages. It may be unfortunate that the respondent either would have had to change his means of earning a living or cooperate with the guerrillas in order to avoid their threats. However, the internationally accepted concept of a refugee simply does not guarantee an individual a right to work in the job of his choice.⁵⁷

The case *Canada (Attorney General) v. Ward*⁵⁸, is a case of a man of Northern Irish origin. He arrived in Canada and sought asylum basing his claim on fear of being persecuted for reasons of his membership in a particular social group, that is, the Irish National Liberation Army (hereafter the INLA). Ward joined the INLA as a volunteer in 1983, and his first task was to guard two of the organizations hostages. He found out, that the hostages were to be executed, in which he did not want to have any part of, and therefore he helped these two hostages to escape without the INLA knowing. However, later on the INLA suspected Ward and tortured him after which he was sentenced to death by a kangaroo court, although he never admitted his role in the escape of the hostages. He managed to escape and sought police protection. However, he was charged "for his part in the hostage incident" and was later on sentenced to jail for three years. Before his sentence, he found out that her wife and children were being kept hostage by the INLA in order to keep Ward from speaking. After his time in jail, Ward left the country and arrived in Toronto in December in order to be safe from the INLA. Ward "became a subject of an inquiry in May 1986 and claimed Convention refugee status". The Minister of Employment and Immigration concluded that he did not meet the requirements of a Convention refugee, after which Ward filed an application to the Immigration Appeal Board in order to get his claim determined again. His application was re-examined by the Board and he was found to be a Convention refugee. However, the Attorney General appealed to the Federal Court of Appeal,

⁵⁷ *Matter of Acosta*, A-24159781, United States Board of Immigration Appeals, 1 March 1985

⁵⁸ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993

and, among other things, reasoned that the Board had failed to determine whether the INLA was a particular social group or not. The Federal Court of Appeal referred the matter back to the Immigration Appeal Board.⁵⁹

The case, when it comes to determining particular social group⁶⁰, was commented on by the judges of the Federal Court of Appeal.⁶¹ For instance, the following was concluded in the case *Canada (attorney General) v. Ward*:

Urie J.A. was not persuaded that Ward, who feared persecution from the organization to which he belonged, was entitled to the protection afforded bona fide refugees who meet all the elements in the definition of Convention refugee. The fact that he was a member who had acted contrary to the interests of the INLA did not bring him within the definition. Urie J.A. remarked [...] that "[i]f such a view were to be taken anyone who dissents on anything could be said to be a member of a particular social group", a proposition he considered absurd. He rejected the argument that any group engaged in political activity would fall under the definition of a social group. Such an approach, he reasoned, would render the "political opinion" segment of the "Convention refugee" definition redundant.⁶²

In dissent to Urie J.A.'s opinion, another argument was presented in that case:

MacGuigan J.A. opined that there could be no serious argument that the INLA is not literally a particular social group since its members (at p. 689) "are united in a stable association with common purposes". [...] For MacGuigan J.A., the "true gravamen" of Ward's fear of persecution sprang from his membership in the organization, rather than from his misbehaviour as a member, since the INLA's motivation in sentencing him to death was, at least in part, to prevent future disclosures about the activities of the group.⁶³

In the analysis section of this case, members – or former members – of the INLA was discussed. In this case, it was concluded that Wards fear of being persecuted did not base on his status as a **former** member of the INLA but as a member because “[t]he fact that Ward might no longer be a member is merely a result of the persecution feared, not its foundation”.⁶⁴ As was mentioned in subchapter 2.3., there are three different categories when it comes to determination of a particular social group, and

⁵⁹ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993

⁶⁰ In this study, only the determination 'membership in a particular social group' will be discussed. In order to learn about other aspects of the case, see *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993.

⁶¹ Federal Court of Appeal, [1990] 2 F.C. 667

⁶² *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993

⁶³ *Ibid.*

⁶⁴ *Ibid.*

in light of those categories, the following was stated regarding a particular social group in the case of *Canada (Attorney General) v. Ward*:

Clearly, the INLA members are not characterized by an innate or unalterable characteristic. The third branch of the definition is not applicable to Ward, since the group is associated in the present and membership is not unchangeable owing to its status as a historical fact. [...] As for the second branch, the INLA is a voluntary association committed to the attainment of specific political goals by any means, including violence, but I do not believe that this objective can be said to be so fundamental to the human dignity of its members such that it constitutes a "particular social group".⁶⁵

It was concluded that the fear of persecution Ward has, did not come from his membership in the INLA but rather, he was persecuted on individual grounds that are separate from the group's characteristics. It was also argued that even if Ward's membership in the INLA was the reason why he ended in a situation that he was threatened, "the fear itself was based on his action, not on his affiliation".⁶⁶ As can be seen, in this case, in addition to determination of membership in a particular social group, the nexus between the acts of persecution and that particular group was discussed.

To conclude, one's status in a group or organization, or one's profession does not necessarily lead to the fact that the applicant could base his or her claim on membership in a particular social group. However, it could be argued, at least in theory, that in some circumstances one's profession or (former) status in an organization could lead to the fact that he or she would be considered a member of a particular social group, even if in the two cases presented in this chapter, it was not the case. This would, however, be possible in cases where an individual is stigmatized by his or her profession or status, and leaving that job or that status would not remove that stigma, but that individual would still be considered to be part of that group of persons. As this chapter presented cases concerning particular social group in general, women as a particular social group will be discussed and cases will be presented in chapter four.

⁶⁵ *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, 30 June 1993

⁶⁶ *Ibid.*

3. Gender-based or gender-related violence

3.1 What is gender-based violence?

This chapter seeks to provide the basic knowledge of gender-based violence, first in general, following the recognition of gender-based or gender-related violence on the international field. After this, gender-based or gender-related violence will be discussed through the UNHCR's point of view in the context of asylum claims, that is, the concept of gender-based or gender-related persecution is explained. Gender-based or gender-related violence will be discussed in this chapter due to the fact that this thesis aims to discuss whether women who fear gender-based violence for being "too western" can be seen as a particular social group or not. Gender-based or gender-related violence was chosen as a topic because usually this type of violence or acts of persecution are used on women if they break the norms that normally apply them in their country of origin or in the society where they come from. Gender-based or gender-related violence is in other words usually the persecution women fear and for what they might apply asylum if they have transgressed social mores of her own society.

Gender-based or gender-related violence is something that affects a person due to his or her gender. In order to understand gender-based violence it is important to explain what the term *gender* refers to. The term *gender* has a different meaning than the term *sex*. The term *sex* "refers to the biological characteristics of males and females", whereas the term *gender* refers to "the social characteristics assigned to men and women".⁶⁷ The United Nations High Commissioner for Refugees has in its report on gender-based violence from May 2003 explained how these social characteristics establishes gender:

These social characteristics are constructed on the basis of different factors, such as age, religion, national, ethnic and social origin. They differ both within and between cultures and define identities, status, roles, responsibilities and power relations among the members of any society or culture. Gender is learned through socialisation. It is not static or innate, but evolves to respond to changes in the social, political and cultural environment.⁶⁸

In other words, people are born either female or male (sex) but they learn how first become girls and boys and later on how to develop into women and men. The UNHCR has continued to explain that

⁶⁷ United Nations High Commissioner for Refugees (UNHCR), *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response*, May 2003, page 11

⁶⁸ *Ibid.*, page 11

we learn from the society what the “expected attitudes, behaviours, roles and activities” are, and “the roles, responsibilities, constraints, opportunities and privileges of men and women in any context” are defined by gender. This behaviour that we learn is called gender identity.⁶⁹ This study will later on discuss women applying asylum for transgressing social mores of their societies. This transgression of social mores deals with women not acting the way that they are supposed to act, or not to act, because of their *gender*.

Now, when the concept of gender is explained, the explanation for gender-based violence is presented. For instance, the European Commission⁷⁰ has defined gender-based violence as “violence directed against a person because of that person’s gender or violence that affects persons of a particular gender disproportionality”.⁷¹ Also the UNHCR has defined gender-based violence similarly when it stated that gender-based violence “targets individuals or groups of individuals on the basis of their gender”⁷². Something that is characteristic for gender-based violence is that it most often affects women and girls due to their more vulnerable position in a particular society. The UNHCR has argued that women are usually in a position that is more disadvantaged than men who are on the same level socially and economically.⁷³ An example could be a family where there is one girl-child and one boy-child where the only differences between them are sex and gender. In some societies where the men, so to say, are the dominating party in every aspect, such as in the field of education and work, women are put in a position where they do not usually have the same opportunities than men. Women can for instance be under pressure to stay at home and take care of the children while men educate themselves and work in order to provide for their families. The UNHCR has stated that “[g]ender roles and identities that usually involve inequality and power imbalance between women and men”.⁷⁴ Moreover, the disadvantaged or more vulnerable position that women, and children, possess is visible especially during the time of conflicts. For instance, sexual violence is a form of violence that is “tragically prevalent in many modern conflicts”. Typical for sexual violence is the thought that it is “an unavoidable consequence of warfare”. It also remains

⁶⁹ United Nations High Commissioner for Refugees (UNHCR), *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response*, May 2003, page 12

⁷⁰ European Commission’s work is run by a College of Commissioners, and it is led by its President (at the time: President von der Leyen). The Commissioners work on specific policy priorities that are assigned by the Commission President. For more detailed information about the European Commission’s structure and duties, see: European Commission, *About the European Commission*

⁷¹ European Commission: *What is gender-based violence*

⁷² United Nations High Commissioner for Refugees (UNHCR), *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response*, May 2003, page 10

⁷³ *Ibid.*, page 12

⁷⁴ *Ibid.*, page 12

hugely un-reported and underestimated.⁷⁵ Sexual violence can naturally be directed to men as well but women, being the more disadvantaged and vulnerable party, usually suffer more from this kind of violence. Violence against women and the acceptance of this violence in societies and cultures is one of the consequences of this inequality and imbalance between powers.⁷⁶ It could be argued that this inequality and imbalance is one of the main reasons for persecution of women due to them transgressing social mores of their societies. For instance, if a young woman wishes to study and work but her family is more traditional and pressures her to get married instead, whereas this family's son is encouraged to study, there is an unequal situation between the daughters and sons of that said family. If the daughter then refuses to marry a man that her family has decided to marry her off for, it means that the young woman is transgressing the social mores set out for her by her society. Forced marriage, in turn, can be seen as an act of persecution. Forced marriage will be presented in this chapter as one form of gender-based violence.

Gender-based violence can take various forms: physical, sexual and psychological or emotional. Harmful traditional practices and socio-economic violence are also forms of gender-based violence.⁷⁷ According to the European Commission, physical violence can for instance be “beating, strangling, pushing, and the use of weapons”. It has been stated that only in the European Union, 31 percent of women have suffered from this form of violence since the age of fifteen. European Commission defines the sexual form of gender-based violence as something that “includes sexual acts, attempts to obtain a sexual act, acts to traffic, or acts otherwise directed against a person's sexuality without the person's consent”. Psychological form of violence “includes psychologically abusive behaviours, such as controlling, coercion, economic violence and blackmail”⁷⁸. Also, according to the UNHCR, abuse or humiliation and confinement or isolation are types of physical and emotional violence.⁷⁹

The European Commission has given some examples on what can constitute gender-based violence. The list provided by the European Commission includes domestic violence, sex-based harassment,

⁷⁵ The International Committee the Red Cross (ICRC): Q&A: sexual violence in armed conflicts

⁷⁶ United Nations High Commissioner for Refugees (UNHCR), Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response, May 2003, page 12

⁷⁷ European Commission: What is gender-based violence; and United Nations High Commissioner for Refugees (UNHCR), Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response, May 2003, page 15

⁷⁸ European Commission: What is gender-based violence

⁷⁹ United Nations High Commissioner for Refugees (UNHCR), Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response, May 2003, page 17

female genital mutilation, forced marriage and online violence.⁸⁰ The UNHCR has in its report provided a more comprehensive list of types of sexual and gender-based violence including their descriptions and examples. To mention a few, sexual violence includes different types of rapes, sexual abuse and exploitation, forced prostitution and sexual harassment. Physical violence can be physical assault, human trafficking and slavery. In addition to female genital mutilation and forced marriage, the UNHCR mentions as examples of harmful traditional practices among others early marriage, honour killings and maiming, neglect and denial of education for girls and women. As types of socio-economic violence, the UNHCR has given as an example discrimination or denial of opportunities and services, social exclusion such as denial of access to services or social benefits as well as obstructive legislative practice for which women are denied access to enjoy civil, social, economic, cultural and political rights.⁸¹ Domestic violence is violence that takes place “within the family, domestic unit, or between intimate partners”.⁸² It goes without saying that any person can suffer from domestic violence but in the world we live in today it is more common for persons who belong to vulnerable groups to suffer from this kind of violence. As was stated above, usually women and children are seen more vulnerable than men and therefore they are easier targets for domestic violence. Sex-based harassment as a form of gender-based violence “includes unwelcome verbal, physical or other non-verbal conduct of a sexual nature with the purpose or effect of violating the dignity of a person”⁸³. Female genital mutilation “is the ritual cutting or removal of some or all of the external female genitalia”. This practice violates women’s bodies and often also shatters their sexuality, mental health, well-being and even their ability to participate in their community. In some circumstances it may even lead to death.⁸⁴ Forced marriage is often linked to child or early marriages in which children are forced to marry before they reach the minimum age for marriage. Forced marriages are concluded under force or coercion which can be either physical or emotional and psychological pressure.⁸⁵ An example of emotional and psychological pressure could be a threat of being abandoned by own family whereas physical pressure could be for instance torture or the threat of torture. Online violence covers a larger amount of illegal or harmful actions taken against women on the internet. The European Commission explains that violence taking place online “can be linked

⁸⁰ European Commission: What is gender-based violence

⁸¹ United Nations High Commissioner for Refugees (UNHCR), *Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response*, May 2003, page 16-18. For more detailed explanations and examples see the report and mentioned pages.

⁸² European Commission: What is gender-based violence

⁸³ *Ibid.*

⁸⁴ *Ibid.*

⁸⁵ *Ibid.*

to experience of violence in real life, or be limited to the online environment only”. It continues by stating that these kind of behaviours “can include illegal threats, stalking or incitement to violence, unwanted, offensive or sexually explicit emails or messages, sharing of private images or videos without consent, or inappropriate advances on social networking sites”.⁸⁶

As can be seen from the definition and examples above, gender-based violence is not alone physical violence. Gender-based violence can, as stated above, also be for instance verbal oppress and it can even occur online through persons that the victim of the violence never meets in real life. However, usually sexual and gender-based violence is perpetrated by someone the victim already knows⁸⁷. As there are many types of gender-based and gender-related violence, not all of them are applicable when discussing women fearing gender-related persecution for being too western. Usually women who break social norms face persecution from their families or relatives, due to the fact that these women have brought shame or dishonour to their families or even for their extended families. This type of gender-based persecution is common for instance among the Kurdish people in the Kurdistan Regional Government Area of Iraq⁸⁸. This topic will be discussed in chapter 4 of this study.

3.2 Recognition of gender-based violence on the international field

There are several international legal instruments and resolutions that concern violence against women at the United Nations level.⁸⁹ In addition to Conventions, this subchapter will discuss international documents that are non-binding for states. Soft law will be discussed in order to explain the development of the recognition of gender-based violence on the international field.

One of the most important international conventions regarding gender-based violence is the United Nations Convention on the Elimination of All Forms of Discrimination against Women⁹⁰ (hereafter the CEDAW). The CEDAW is the culmination of over thirty years of preparation by the United

⁸⁶ European Commission: What is gender-based violence

⁸⁷ United Nations High Commissioner for Refugees (UNHCR), Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons, Guidelines for Prevention and Response, May 2003, page 13

⁸⁸ UK Home Office, Country Policy and Information Note, Iraq: ‘Honour’ crimes, Version 2.0, March 2021, paragraph 2.4, pages 5-6

⁸⁹ European Union Agency for Fundamental Rights (FRA), Violence Against Women: an EU-wide survey, Main Results, 2014, page 10

⁹⁰ Convention on the Elimination of All Forms of Discrimination against Women, adopted and opened for signature, ratification and accession by General Assembly resolution 34/180 of 18 December 1979, entry into force 3 September 1981, in accordance with article 27(1).

Nations Commission on the Status of Women⁹¹, and it is the central and most comprehensive document among other several declarations and conventions concerning the rights of women.⁹² It was not until 1979 that discrimination against women was recognized through the CEDAW. Gender-based violence was however not yet in 1979 seen as discrimination but it became recognised as discrimination on the international field in line with CEDAW first in 1992.⁹³ This happened through the General Recommendation No. 19 of the United Nations Committee on the Elimination of Discrimination Against Women⁹⁴ (hereafter the CEDAW Committee⁹⁵). The General Recommendation is not binding for states but its purpose is to provide guidance for them. In General Recommendation No. 19 it is stated in article 6 that gender-based violence is “violence that is directed against women because she is a woman or that affects women disproportionately”⁹⁶. According to that same article, gender-based violence “includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty”⁹⁷. In 1993, the Declaration on the Elimination of Violence Against Women was established and “since then, gender-based violence has become recognised as a violation of women’s human rights and the concept of violence has expanded to include different forms”⁹⁸, even if the Declaration is not binding for states. Along the Declaration, became the first internationally agreed definition of violence against women.⁹⁹ The Declaration on the Elimination of Violence against Women defines *violence against women* as

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life.¹⁰⁰

⁹¹ The United Nations Commission on the Status of Women is a body that was established in 1946 in order to monitor the situation of women and to promote the rights of women (source: United Nations Office of the High Commissioner on Human Rights (OHCHR), Convention on the Elimination of All Forms of Discrimination against Women, Introduction)

⁹² United Nations Office of the High Commissioner on Human Rights (OHCHR), Convention on the Elimination of All Forms of Discrimination against Women, Introduction

⁹³ Handbook on counselling asylum seeking and refugee women victims of gender-based violence, page 14

⁹⁴ The CEDAW Committee is a body of 23 independent experts on women’s rights around the world, which monitors the implementation of the Convention on the Elimination of All Forms of Discrimination against Women. Source: United Nations Office of the High Commissioner on Human Rights (OHCHR), Committee on the Elimination of Discrimination against Women

⁹⁵ European Union Agency for Fundamental Rights (FRA), Violence Against Women: an EU-wide survey, Main Results, 2014, page 10

⁹⁶ United Nations, CEDAW Committee (1992), General Recommendation No. 19 on Violence against women, adopted at the 11th session, 1992, A/47/38, 29 January 1992, article 6.

⁹⁷ *Ibid.*, article 6

⁹⁸ Handbook on counselling asylum seeking and refugee women victims of gender-based violence, page

⁹⁹ European Union Agency for Fundamental Rights (FRA), Violence Against Women: an EU-wide survey, Main Results, 2014, page 9

¹⁰⁰ UN, General Assembly, Declaration on the Elimination of Violence Against Women, A/RES/48/104, 20 December 1993, page 3.

Also in 1993, it was stated in the Vienna Declaration Programme of Action¹⁰¹ that it is important to work towards “the elimination of violence against women in public and private life”.¹⁰² The Declaration is not legally binding for states but it addresses central issues and provides guidance for states. In 1994, the Commission on Human Rights at that time for the first time expressed disapproval of gender-based violence and the Commission appointed a Special Rapporteur on violence against women, its causes and consequences¹⁰³ the same year.¹⁰⁴ Also in 1994, it was stated in a resolution on Declaration on the Elimination of Violence against Women by the General Assembly that

violence against women is a manifestation of historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women, and that violence against women is one of the crucial social mechanisms by which women are forced into a subordinate position compared with men.¹⁰⁵

Later on, in the United Nations World Conference on Women that was held in Beijing in 1995, and where the Beijing Declaration and Platform for Action¹⁰⁶ was adopted, the conclusions of the Vienna Conference from 1994 were reaffirmed as violence against women was listed “as one of the critical areas of concern”.¹⁰⁷ The Beijing Declaration and Platform for Action is also not binding for states but seeks to provide clarification or guidance. Accordingly to the definition of the concept *violence against women* in the Declaration on the Elimination of Violence against Women from 1992, the 1995 Beijing Declaration has provided a non-exclusive list on what can constitute violence against women

(a) physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;

¹⁰¹ Vienna Declaration and Programme of Action, Adopted by the World Conference on Human Rights in Vienna on 25 June 1993.

¹⁰² Ibid., article 38

¹⁰³ The first Special Rapporteur on violence against women, its causes and consequences was Ms. Radhika Coomarsawamy (Sri Lanka) from 1994 until July 2003. (source: OHCHR, Special Rapporteur on violence against women, its causes and consequences)

¹⁰⁴ United Nations Human Rights Office of the High Commissioner (hereafter OHCHR), Violence against women

¹⁰⁵ UN, General Assembly, Resolution on the Declaration on the Elimination of Violence against Women, A/RES/48/104, 23 February 1994

¹⁰⁶ The Fourth World Conference on Women, Beijing Declaration and Platform for Action, Adopted at the 16th plenary meeting, on 15 September 1995.

¹⁰⁷ OHCHR, Violence against women

- (b) physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs.¹⁰⁸

In 1998, The Rome Statute of the International Criminal Court¹⁰⁹ recognized gender-based violence and made “provision for the application of gender-sensitive justice”.¹¹⁰ Another significant step was taken in 2017, when the General Assembly updated its General Recommendation No. 19 with its General Recommendation No. 35¹¹¹, which “further elaborated international standards on gender-based violence against women”.¹¹² It was recognized “that the prohibition of gender-based violence against women has evolved into a principle of customary international law”.¹¹³

As can be seen, the elimination of discrimination against women and violence against women has developed over time by many international conventions, declarations and resolutions as well as recommendations on the United Nations level. The progress has led to the fact that gender-based violence against women is today seen as a human rights violation.¹¹⁴ As this type of violence is a consequence “of structural, deep-rooted discrimination”, the states have a positive obligation on taking action against it. The prevention of gender-based violence is in other words not a voluntary act but there “is a legal and moral obligation requiring legislative, administrative and institutional measures and reforms and the eradication of gender stereotypes which condone or perpetuate gender-based violence against women and underpin the structural inequality of women with men”.¹¹⁵ The Declaration on the Elimination of Violence Against Women together with the CEDAW General Recommendation No. 35 provide for the concept of states’ due diligence obligation. This obligation seeks the states “to take positive action to prevent and protect women from violence, punish perpetrators of violent acts and compensate victims of violence” (= positive obligation).¹¹⁶

¹⁰⁸ The Fourth World Conference on Women, Beijing Declaration and Platform for Action, Adopted at the 16th plenary meeting, on 15 September 1995, pages 48-49, article 113

¹⁰⁹ Rome Statute of the International Criminal Court, Done at Rome on 17 July 1998, in force on 1 July 2002, United Nations, Treaty Series, vol. 2187, No. 38544

¹¹⁰ The United Nations work on violence against women, Information Note, Division for the Advancement of Women

¹¹¹ United Nations, CEDAW Committee, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 26 July 2017.

¹¹² OHCHR, Violence against women

¹¹³ United Nations, CEDAW Committee, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 26 July 2017, Introduction, article 2

¹¹⁴ OHCHR, Violence against women

¹¹⁵ *Ibid.*

¹¹⁶ *Ibid.*

Moreover, there has been a growing awareness of violence against women in many countries around the world and there has been a significant progress in forms of comprehensive legal frameworks as well as specific institutions and policies.¹¹⁷ For instance, in the European level there is the Council of Europe Convention on preventing and combating violence against women and domestic violence, also known as the Istanbul Convention¹¹⁸. For the most part, the Istanbul Convention follows the earlier definitions and has defined both violence against women and domestic violence:

- a. “violence against women” is understood as a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life;
- b. “domestic violence” shall mean all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim;¹¹⁹

The Istanbul Convention obliges its parties to criminalise acts of gender-based violence, such as psychological violence, stalking, physical violence, sexual violence – including rape, forced marriage, female genital mutilation, forced abortion and forced sterilisation.¹²⁰ However, at the European Union level, “there is no specific comprehensive legislation addressing violence against women”¹²¹.

In addition, there are a number of international legal instruments and other international framework that cover trafficking in human beings which can also be a form of gender-based violence but those conventions fall outside the sphere of this study.

¹¹⁷ OHCHR, Violence against women

¹¹⁸ Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.210, adopted by The Council of Europe Committee of Ministers on 7 April 2011. The convention opened for signature on 11 May 2011 in Istanbul, entry into force 1 August 2014, source: Council of Europe, Treaty Office, Details of Treaty No.210; Information Platform, humanrights.ch

¹¹⁹ Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.210, article 3

¹²⁰ *Ibid.*, articles 33-39. For more, see the Council of Europe Convention on preventing and combating violence against women and domestic violence, CETS No.210, 2011

¹²¹ European Union Agency for Fundamental Rights (FRA), Violence Against Women: an EU-wide survey, Main Results, 2014, page 11

3.3 The UNHCR's interpretation of gender-based or gender-related persecution

As was stated above, those who are in a more vulnerable or disadvantaged position are easier targets for violence. One could argue that by being an asylum seeker or a refugee, you already are in a vulnerable position. As was previously mentioned, women are usually in a higher risk of being targeted with violence due to their vulnerability. Consequently, refugee women or women as asylum seekers are in an even more vulnerable position than just women or just refugees. However, the purpose of this study is not to examine the vulnerability of refugee women and what causes this vulnerability or what are the consequences of it. Instead, the purpose is to find an answer to whether women who break the norms of their society or culture can be seen as members of a particular social group due to the fact that they have a well-founded fear of facing gender-based violence if they were to return to their countries of origin. In this situation gender-based violence is seen as the act of persecution. In order to do that, this chapter will be looking into more detail what is gender-based or gender-related persecution instead of *just* gender-based or gender-related violence in general, that was explained in the previous sub-chapters.

The UNHCR has in its guidelines explained that gender-based or gender-related persecution as a term does not have a legal meaning *per se*.¹²² The term “is used to encompass the range of different claims in which gender is a relevant consideration in the determination or refugee status”. The UNHCR continues by stating that asylum claims that are related to gender “have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals”.¹²³ It is still important to remember that not all women are automatically entitled to refugee status just because they are women but they must also establish that they have a well-founded fear of being persecuted for the reasons listed in the 1951 Refugee Convention article 1 A(2), that is, race, religion, nationality, membership of a particular social group or political opinion.¹²⁴ As an example could be used a case, where the claimant is a Somalian citizen with a new born baby or a young child who is a girl. She bases her claim on the fear of having her child becoming a victim of female genital mutilation if they were to return to Somalia. If the fear that

¹²² UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 2, para. 1

¹²³ *Ibid.*, page 2, para. 3

¹²⁴ *Ibid.*, page 2, para. 4; UN, the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, article 1 A(2)

she bases her claim on is well-founded, she would be granted refugee status due to most likely being a member of a particular social group if her state of origin cannot offer protection for her and her child. As female genital mutilation is a cultural and traditional practice in most parts of Somalia and seen as a natural part of being a woman there is no protection available from the authorities of Somalia. The UNHCR has in its guidelines explained that “it should be noted that harmful practices in breach of international human rights law and standards cannot be justified on the basis of historical, traditional, religious or cultural grounds”.¹²⁵ In other words, the woman and her child of the example cannot be deported on the grounds that female genital mutilation is a cultural and traditional practice in their country of origin. In sub-chapter 3.1 was given an example of the young woman who wanted to study and work instead of marrying the man of her family’s choosing, and for that she would break the norms of the society if she did not obey. Despite the fact that arranged, or forced, marriages are seen as cultural practice, arranging a marriage against one’s will is considered forcing, and it is a violation of that person’s human rights. As this is one type of transgression of social mores, also women being “too western”, primary in terms of clothing, are seen to transgress the social mores of some societies. When handling asylum cases concerning this issue, to put it plainly, it is crucial to analyse whether making someone to wear clothes that are suitable for her society is a violation of human rights or not. The issue, however, is not that simple and it will be discussed in chapter five of this study.

The UNHCR has argued that although gender is not *per se* referenced in the refugee definition in the 1951 Refugee Convention and its 1967 Protocol, “it is clear – and thus accepted – that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment”¹²⁶, and continues by claiming that the definition of a refugee covers gender-based claims if it is properly interpreted. As a result, it is not necessary to add an additional ground, that is, a ground called *gender*, to the Convention definition of a refugee.¹²⁷ However, as was explained in chapter two of this study, most of the states’ national legislation do not follow the UNHCR’s guidelines about women, as only by being women, being members of a particular social group, under which purely gender-related

¹²⁵ 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, 7 May 2002, HCR/GIP/02/01, page 3, para. 5

¹²⁶ Cambridge University Press, Summary Conclusions: Gender-Related Persecution, June 2003. Adopted at the expert roundtable organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law, in the context of the Global Consultations on International Protection in San Remo, Italy, 6-8 September 2001, no. 3

¹²⁷ *Ibid.*, para. 1

asylum claims usually fall. Keeping this in mind, one could argue that the UNHCR's argument does not in real life actually hold true. If that would in reality be the case, a woman, only due to her gender, would be entitled refugee status if her fear was well-founded solely because she is a woman. However, in reality, she would in this situation be granted subsidiary protection unless she fell under another category, such as political opinion or if she is considered to have some other characteristic for which she could be seen as a member of some particular social group. As has been stated, the UNHCR is of the opinion that women should fall under the category of the membership in a particular social group but state practice shows us that there must be another factor present, such as women who are in a lack of a safety net in a particular society where a safety net that includes men is a necessity in order to be able to live safely in the society in question.

It is also important to remember in gender-related or gender-sensitive asylum claims that in order for an applicant to fulfil the requirements to be granted refugee status, he or she must have a well-founded fear of being persecuted. According to the UNHCR guidelines, “[w]hat amounts to a well-founded fear of persecution will depend on the particular circumstances of each individual case”.¹²⁸ Persecution in itself does not have any universally accepted definition but in the UNHCR Handbook on procedures and criteria for determining refugee states and guidelines on international protection it has explained to cover in the minimum “a threat to life or freedom on account of race, religion nationality, political opinion or membership in a particular social group”. In addition, other serious violations of human rights for the same reasons also constitute persecution.¹²⁹ An applicant can in other words be subjected to “smaller” or less grave violations of human rights that would not in themselves constitute persecution, but taken together, the applicant can “reasonably justify a claim to well-founded fear of persecution on ‘cumulative grounds’”. Discrimination can in some circumstances be seen as this kind of human rights violation. There is, however, no general rule on what amount or what types of cumulative reasons would be enough to constitute persecution.¹³⁰

In addition to harms that both male and female applicants can be subjected to, they may also face harm or acts of persecution that are specific to their sex. These can for instance be sexual violence,

¹²⁸ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 3, no. 9

¹²⁹ UNHCR, Handbook on procedures and criteria for determining refugee states and guidelines on international protection, Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, first published in 1979 and re-issued in 1992 and in February 2019, Geneva, page 21, paragraph 51

¹³⁰ *Ibid.*, page 21, para. 53

such as rape.¹³¹ In 2015, it was stated in a report presented by the UNHCR, that the Middle East and North Africa regions, such as Syria, Iraq, Yemen and Libya, are areas where humanitarian crises and forced displacement are widespread problems.¹³² The countries affected by these conflicts have had an increase in sexual and gender-based violence, which is also often one of the reasons for people to seek refuge elsewhere than in their home countries or countries of origin.¹³³ The conflicts for instance in Syria and Iraq has led to the fact that women and girls as well as men and boys are facing “increased risks and multiple forms of violence”, such as “forced and early marriage, sexual violence, including sexual abuse and exploitation and domestic violence”.¹³⁴ However, it is important to remember that women, children, older persons and persons with disabilities are in a higher risk of being subjected to sexual and gender-based violence.¹³⁵ Women for instance are especially vulnerable for human trafficking, which is a form of gender-based violence, and this phenomenon is extremely common in for instance Nigeria where women and girls are trafficked for instance for sexual and labour exploitation.¹³⁶ The UNHCR does in fact list “rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking” as acts that cause extreme physical and mental pain and suffering and therefore they “have been used as forms of persecution, whether perpetrated by State or private actors”.¹³⁷

Laws can be persecutory themselves as they might originate from (harmful) traditional or cultural practices, and these in turn might not be in line with international human rights standards.¹³⁸ And even if a certain state has prohibited a harmful tradition by law, such as female genital mutilation, this harmful practice might still be condoned or tolerated by that state or alternatively the state is not able to stop this practice from happening.¹³⁹ Let us go back to the example of the Somalian woman who fears that her child will be subjected to female genital mutilation if they were to return to Somalia. In Somalia, the Constitution prohibits circumcision of girls due to its cruelty and degrading

¹³¹ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 3, para. 9

¹³² UNHCR, Sexual and Gender-based Violence Prevention and Response in Refugee Situations in the Middle East and North Africa, 25 November 2015, pages 4 and 6

¹³³ *Ibid.*, page 4

¹³⁴ *Ibid.*, page 5

¹³⁵ *Ibid.*, page 9

¹³⁶ Human Rights Watch, “You Pray for Death”, Trafficking of Women and Girls in Nigeria, 27 August 2019

¹³⁷ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 4, no. 9

¹³⁸ *Ibid.*, page 9, para. 10

¹³⁹ *Ibid.*, page 9, para. 11

nature which is tantamount to torture. However, there is no national legislation in Somalia that would expressly criminalise and punish the practice of female genital mutilation and there is no evidence that the perpetrators of this harmful practice would have been prosecuted under other laws.¹⁴⁰ Therefore, the law itself, even if existing, does not provide protection from female genital mutilation and the woman's asylum claim stays valid. This same example applies for women transgressing social mores of her society, if that said society does not offer sufficient protection against the act of persecution. However, it is important to bear in mind that this matter can also be reversed, because even if there is a law in a certain state that is a persecutory law, it does not necessarily mean that the individual automatically is granted asylum. The applicant must "establish that he or she has a well-founded fear of being persecuted as a result of that law".¹⁴¹ For instance, the existence of a persecutory law would lead to an invalid asylum claim if the law, even if existing, is no longer being enforced.¹⁴² The UNHCR continues to explain in its report that punishments and penalties for non-compliance with or breach of a law or a policy that is disproportionately severe and has gender dimension, amounts to persecution.¹⁴³ It is, however, pointed out that usually individuals trying to avoid prosecution or punishment by fleeing do not usually meet the requirements for refugee status.¹⁴⁴ However, the punishment cannot be so severe that it is unreasonable compared to the breach that was made. As an example, the UNHCR mentioned that women who transgress social mores in a society which amounts to a breach of law, receive a severe punishment, could be considered persecution.¹⁴⁵ There are also laws and policies that have reasonable objectives but the methods of implementation are still unreasonable. These unreasonable methods in turn would amount to persecution. For instance, it is a normal and accepted policy to use family planning measures in order to control population pressure but if this policy is for instance implemented through the use of forced abortions and sterilisations it would amount to persecution.¹⁴⁶ All in all, it does not automatically mean that a certain law is, or is not, seen as persecution just because of the formulation of that law but the actual application of that law in a particular society tells the true nature of that law and whether it amounts to persecution or not.

140 28 Too Many, Somalia: The Law and FGM, July 2018, pages 3 and 5

141 UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 4, no. 10

¹⁴² *Ibid.*, para. 10

¹⁴³ *Ibid.*, para. 12

¹⁴⁴ *Ibid.*, page 4, footnote 6

¹⁴⁵ *Ibid.*, para. 12

¹⁴⁶ *Ibid.*, para. 13

As was mentioned above, discrimination in itself, and as a separate action, is not seen as persecution but it might amount to persecution on cumulative grounds and therefore a certain amount of discrimination caused by at least one of the five grounds for persecution, that is, race, religion, nationality, membership in a particular social group and political opinion, might lead to the fact that the applicant is granted refugee status. Also, a certain amount of less favourable treatment could amount to persecution and granting of international protection.¹⁴⁷ In the UNHCR Handbook it is stated that discrimination will for instance amount to persecution “if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, e.g. serious restrictions on his right to earn his livelihood, his right to practise his religion, or his access to normally available educational facilities”.¹⁴⁸ For instance, transgression of social mores is more often applicable to girls or women, and usually it is a follow-up of differing treatment of women and men, where usually women do not have the same opportunities as men. For instance, men might have a better chance to decide if they want to marry a girl or not, and men might be able to choose what to wear, whereas women might not have the same opportunity.

Gender-related claims can also be about a certain state’s ability or will to protect individuals against certain types of harm. In these situations, discrimination would take place if the state fails to provide this type of protection.¹⁴⁹ If the state fails to protect some individuals or does not grant the same rights for this group than the “others” due to a matter of policy or practice then this type of discrimination could constitute persecution.¹⁵⁰ Examples of these kinds of cases could be cases concerning domestic violence or abuse of those who differ from the “normal” in relation to sexual orientation.¹⁵¹

The UNHCR has given two examples on gender-related or gender-based violence as claims for refugee status. The first one is persecution due to one’s sexual orientation, and the second one is

¹⁴⁷ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, para. 14

¹⁴⁸ UNHCR, Handbook on procedures and criteria for determining refugee states and guidelines on international protection, Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees, first published in 1979 and re-issued in 1992 and in February 2019, Geneva, page 21, paragraph 54

¹⁴⁹ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 5, para. 15

¹⁵⁰ *Ibid.*, page 5, para. 15

¹⁵¹ *Ibid.*, page 5, para. 15

trafficking¹⁵² of women or children for the purposes of forced prostitution or sexual exploitation.¹⁵³ These both contain a gender element. Regarding the claims based on one's sexual orientation, the question is about those situations where the applicant "has been subject to persecutory (including discriminatory) action on account of his or her sexuality or sexual practices".¹⁵⁴ These cases usually involve that the claimant has not acted according to the norms of that society and culture he or she lives in.¹⁵⁵ When talking about homosexuality, it can either be illegal in a certain society, and therefore it imposes severe criminal penalties that could amount to persecution, or homosexuality in itself might not be criminalised but the state condones or fails to protect these minorities from discriminatory or harmful practices, and therefore it might in some circumstances amount to persecution.¹⁵⁶ The UNHCR compared this to women who refuse to wear headscarf and therefore are subjected to violence or other harmful practice in some societies where the norm, and/or rule, for women is to wear a headscarf.¹⁵⁷ The issue concerning this matter is the purpose of this study, and it will be discussed in chapter five, whether women being "too western", primary in terms of clothing, can credibly demonstrate that they are members of a particular social group.

Regarding the claims based on being a victim of human trafficking for instance for purposes of forced prostitution and sexual exploitation, the question is about gender-related violence or abuse which may even lead to death. Trafficking can be seen as torture or other forms of cruel, inhuman or degrading treatment. It can also restrict women's freedom of movement for instance by not letting a person outside without supervision or taking away one's passport or other identity documents. Thus, "trafficked women and minors may face serious repercussions after their escape and/or upon return, such as reprisals or retaliation from trafficking rings or individuals, real possibilities of being re-

¹⁵² Similarly to the UNHCR guidelines concerning gender-related persecution, according to article 3 (a) in the Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime (adopted and opened for signature, ratification and accession by General Assembly resolution 55/25 of 15 November 2000), also known as the Palermo Protocol, trafficking in persons means "the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs".

¹⁵³ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, paragraphs 16-18

¹⁵⁴ *Ibid.*, para 16

¹⁵⁵ *Ibid.*, para. 16

¹⁵⁶ *Ibid.*, para. 17

¹⁵⁷ *Ibid.*, para. 17

trafficked, severe community or family ostracism, or severe discrimination”.¹⁵⁸ Therefore one could base a refugee claim for being a victim of human trafficking in situations where a particular state has not been able to or has not had the will to protect persons against this type of harm or threats of harm.¹⁵⁹

Persecution is usually perpetrated by authorities of a particular country but also “serious discriminatory other offensive acts committed by” private actors, can be considered persecution with the condition that states are unable or unwilling to provide protection against these private perpetrators.¹⁶⁰ As has been stated, gender-based violence is mostly perpetrated by private actors, for instance domestic violence, forced prostitution, forced marriages et cetera. Also in gender-related asylum claims there must be a causal link between the act of persecution and one of the five grounds listed in the 1951 Refugee Convention.¹⁶¹ However, if the perpetrator is a non-state actor, this causal link does not necessarily have to be established between the action of this private perpetrator and one of the grounds listed in the 1951 Refugee Convention. In these situations, the link must be established when examining the willingness of a state to provide protection for this person in question. If the state is unwilling or unable to provide protection against this private perpetrator’s actions for reasons of race, religion, nationality, membership in a particular social group or political opinion, the causal link is established.¹⁶² For instance, in cases concerning domestic violence in a form of abuse by one’s husband where the abuse is directed against a woman by her husband, even if the perpetrator, that is, the husband is not using violence against his wife for reasons of race, nationality, religion, membership in a particular social group or political opinion, but if the state is unwilling or unable to provide protection for this woman due to those reasons, the causal link is established.

Gender-related asylum claims can be for one or more of the 1951 Refugee Convention grounds and for instance, a claim based on breaching the socially accepted or religious norms of a particular society may fall under the following grounds: religion, political opinion or membership in a particular social group. It is, however, important to note that the applicant herself or himself does not have to

¹⁵⁸ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 5, para. 18

¹⁵⁹ *Ibid.*, para. 18

¹⁶⁰ *Ibid.*, para. 19

¹⁶¹ *Ibid.*, para. 20

¹⁶² *Ibid.*, para. 21

know under which ground she or he is basing her claim on, but it is rather a legal matter.¹⁶³ In the matter of race, men and women might face persecution in different ways. As the UNHCR explains in its guidelines concerning gender-related persecution, “the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and persecuted in a different way, such as through sexual violence or control of reproduction”.¹⁶⁴ Nationality as a ground can overlap with race.¹⁶⁵ The UNHCR states that even if “persecution on the grounds of nationality (as with race) is not specific to women or men, in many instances the nature of the persecution takes a gender-specific form”, such as sexual violence.

In the matter of religion, women and men are usually assigned certain roles they must obey, and if they fail to do so, they can be punished in a way that amounts to persecution.¹⁶⁶ In other words, one could say that the gender-aspect is visible in religion in that sense that men and women have different rights and obligations when it comes to religion in a particular society, and if a woman crosses the line she might face persecution. However, religion might in some cases overlap with political opinion as by acting contrary to one’s expected behaviour may be seen “as evidence of an unacceptable political opinion”.¹⁶⁷ One could argue that this is more characteristic in societies where religion is an important and even ruling part of a particular society due to the fact that in these types of societies religion is not only religion but something that is an inevitable part of that society, that is, the society cannot in a way function without religion. An example could be for instance countries in Middle East where Islam is a ruling part of the society and where imams are highly appreciated and where they might even due to their position related to religion be a part of a city’s leadership and through that position have an effect on how the society functions and what are the rules or norms in that society. The UNHCR has, in fact, stated in its guidelines that the overlapping on religion and political opinion is “particularly true in societies where there is little separation between religious and State institutions, laws and doctrines”.¹⁶⁸ Usually, women applicants who base their claim on the fact that they have transgressed the social mores of their societies, come from countries where religion is a

¹⁶³ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 5, para. 18, para. 23

¹⁶⁴ *Ibid.*, para. 24

¹⁶⁵ *Ibid.*, para. 27

¹⁶⁶ *Ibid.*, para. 25

¹⁶⁷ *Ibid.*, para. 26

¹⁶⁸ *Ibid.*, para. 26

dominant factor when establishing the rules of that said society. As the purpose of this study is to analyse whether women being “too western”, primary in terms of clothing, can constitute a particular social group, this matter will be discussed further in chapter five.

When basing a claim for refugee status under political opinion, the “claimant must show that he or she has a well-founded fear of being persecuted for holding certain political opinions (usually different from those of the Government or parts of the society), or because holding such opinions has been attributed to him or her”.¹⁶⁹ As the UNHCR explains in its guidelines regarding gender-related persecution, claimants basing their claim on political opinion do not necessarily mean that they actively participate in politics in their country of origin. In order for the claimant to base his or her claim under political opinion, it is required that “the claimant holds or is assumed to hold opinions not tolerated by the authorities or society”.¹⁷⁰ In the countries where the majority of asylum seekers come from, women are not as likely to engage themselves in high profile political activity as men but rather take part in political activities that can be said to be on a lower level, such as nursing sick rebel soldiers, and vice versa; women can be seen to hold a political opinion if she refuses to engage in certain activities the government expects her to, such as preparing meals for government soldiers.¹⁷¹ Also, women can be seen to hold a certain political view due to belonging to a family holding that view, and therefore she could base her asylum claim under political opinion due to imputed political opinion.¹⁷² However, as the UNHCR continues to explain, she might also be seen as being a member of a particular group due to belonging to that family, where the family is the group that is being persecuted.¹⁷³

As political opinion can overlap with religion, it can also overlap with membership of a particular social group. Gender-based claims are in fact often “analysed within the parameters of” membership of a particular social group.¹⁷⁴ The UNHCR continues to state that this is in fact insofar usual that other grounds, such as religion or political opinion, are overlooked. As was explained in chapter two of this study, the UNHCR claims that women should be considered to belong to this particular social

¹⁶⁹ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 5, para. 18, para. 32

¹⁷⁰ *Ibid.*, para 32

¹⁷¹ *Ibid.*, paragraphs 33-34

¹⁷² *Ibid.*, para. 33

¹⁷³ *Ibid.*, para. 33

¹⁷⁴ *Ibid.*, para 28

group as they are “defined by innate and immutable characteristics” and “are frequently treated differently than men”.¹⁷⁵ However, as was stated in chapter two, this does not in fact hold true in practice among states, which the UNHCR has also noticed and given its comments on:

The size of the group has sometimes been used as a basis for refusing to recognise ‘women’ generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that members of it voluntarily associate, or that every member of the group is at risk of persecution. It is well-accepted that it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context.¹⁷⁶

In addition to sex, also gender and gender identity can function as a basis for a refugee claim under membership of a particular social group, that is, the definition provided by the UNHCR, also includes for instance homosexuals and transsexuals.¹⁷⁷

As has been explained above, nationality and race are usually not gender-specific themselves but the way the act of persecution is directed against men and women might, and usually does, differ, whereas religion, political opinion and membership in a particular social group might be gender-related in that sense that women can be subjected to acts of persecution due to the fact that they do not abide by the roles or norms assigned to them by a particular society. The question still stays: are women who do not abide by the roles that the society has assigned to them a particular social group or not? The question here is whether not abiding by her role is something that she cannot or should not be compelled to forsake, or not. In other words, is the protective characteristics approach met or not.

The next chapter will continue the discussion with the gender-aspect in relation to membership in a particular social group. Women as a particular social group will be discussed in general and cases concerning this will be provided. In chapter five, it will be analysed whether or not, in the light of previous case law in different countries, women who transgress social mores or norms in a particular society, for which she has a well-founded fear of being targeted with gender-based persecution, can constitute a particular social group.

¹⁷⁵ Cambridge University Press, Summary Conclusions: Gender-Related Persecution, June 2003, no. 5

¹⁷⁶ UNHCR, Guidelines on international protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and or/its 1977 Protocol relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01, page 8, para. 31

¹⁷⁷ *Ibid.*, page 8, para 31

4. Women as a particular social group

4.1. Women as a particular social group in general

This chapter will discuss women as a particular social group. In this first subchapter, women as a particular social group will be discussed in general through the views of the UNHCR and different countries that are state parties to the 1951 Refugee Convention. In order to better demonstrate this concept in practice, case law from countries that are states parties to the 1951 Refugee Convention will be provided in the second subchapter. In the light of the findings made in the first two subchapters, the third subchapter will discuss the question, whether women who are considered to be “too western”¹⁷⁸ in their countries of origin, and therefore fearing gender-based violence, would be considered as members of a particular social group. The concept of breaking the norms of the society by being “too western” will be discussed, after which the question whether being too western meets the requirements of both of the UNHCR’s approaches that were presented in chapter two, that is, the protective characteristics approach and the social perception approach.

As was explained in chapter two, the UNHCR is of the opinion that only one of the two approaches, that is, the protective characteristics approach or the social perception approach, must be met in order for a person to belong to a particular social group. In other words, the UNHCR supports the non-cumulative interpretation of the two different approaches. The other possible way of implementation is the cumulative interpretation, in which the criteria of both of the two approaches are to be met. Women as a particular group has raised a great amount of discussion, and the opinion regarding women as a particular social group in many countries is different from the opinion of the UNHCR, likewise when it comes to whether states parties should implement the non-cumulative interpretation of the approaches as the UNHCR sees fit. The UNHCR has, in fact, concluded “that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men”.¹⁷⁹ However, many countries remain sceptic for this statement as can be seen from the case law

¹⁷⁸ In this study, being “too western” as freedom of expression means, for example, wearing clothing that is not appropriate in the country of origin and not wearing a headscarf in countries where it is demanded from women

¹⁷⁹ 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, UNHCR, HCR/GIP/02/02, 7 May 2002, para. 12

where this dilemma has been handled.¹⁸⁰ For instance, the Netherlands has provided a counterargument regarding the UNHCR's opinion on women constituting a particular social group by providing the following argument:

Sex cannot be the sole ground to determine membership of a 'particular social group'. Women in general are too diverse a group to constitute a particular social group. In order to establish membership of a particular social group one should be put in an exceptional position compared to those whose situation is similar. In addition, the persons should be targeted individually.¹⁸¹

In other words, according to the Netherlands, women cannot constitute a particular social group because not all women are the same. Let us use an example: women who are doing well economically in a particular society might not have a well-founded fear of being persecuted due to them being women whereas women who are poor might have a greater risk of being persecuted due to their gender and the fact that they suffer from poverty. This example is similar to the one where comparing women who have a safety net with women who do not. In these examples women are being persecuted due to their so-called weaknesses combined with their womanhood and not solely because they are women. This is what countries having the same or similar opinion with the Netherlands can mean by stating that women are too diverse a group to constitute just one group. Conclusively, this would in practice mean that in some countries, such as the Netherlands, women with some particular characteristics can be considered to form a particular social group. Also, for instance, in Canada, as in the Netherlands and many other countries, women can constitute a particular social group only in some circumstances. In fact, the Immigration and Refugee Board of Canada has listed the following, among others, as examples of women as a particular social group: women subject to domestic abuse, women forced into marriages, women subject to circumcision, women without male protection and abandoned children.¹⁸² What is important to remember is that every asylum claim and every particular social group must be determined in the context of the asylum seeker's country of origin. This means, regarding the determination of membership of a particular social group, that a particular social group in one country would be a particular social group in another country. For instance, as was mentioned as an example from the Immigration and Refugee Board of Canada, women without male protection

¹⁸⁰ The case law of different, randomly selected countries will be provided in the next subchapter, in order to demonstrate this difference with the UNHCR.

¹⁸¹ Cambridge University Press, Protected characteristics and social perceptions: an analysis of the meaning of 'membership of a particular social group', by T. Alexander Aleinikoff, June 2003, p. 285

¹⁸² IRB, Chapter 4.5. Particular social group. For full list with references to case law, see the website.

are considered to constitute a particular social group for instance in Somalia, but it does not mean that it would constitute a particular social group in every state.

Like Canada and the Netherlands, many other countries are among the same lines with regard to women as a particular social group. In a study made in 2012 on gender-related asylum claims in Europe, there are a few countries that have been selected in order to show and compare state practice in different European countries regarding gender-based claims.¹⁸³ It was stated in chapter three in this thesis, that gender-based persecution can fall under other Convention grounds than just membership in a particular social group, namely political opinion and religion. However, according to this study or comparative research, “gender-based persecution is almost always considered under the Convention ground of membership of a particular social group as defined in the Qualification Directive”.¹⁸⁴ Therefore, it has been argued that “[i]f only ‘membership of a particular social group’ is applied to cases where women risk gender-related persecution, it hinders the development of the interpretation of the other persecution grounds and thereby limits the scope of the refugee definition”.¹⁸⁵ This chapter will, however, only concentrate on discussing women as a particular social group, and therefore the other Convention grounds will not be discussed.

As an example of gender-based persecution directed against women, an immigration court in the United States “issued a landmark decision” in 1996, when it was concluded that a woman who had fled her country of origin in order to escape female genital mutilation, which is a form of gender-based violence, should be granted asylum.¹⁸⁶ Still, asylum officers and immigration judges did not agree on the fact that should violence directed against women (or men) by their intimate partners be “qualified as a basis for asylum”, not until 2014. Until the year 2014, “[c]ourt decisions reflected a belief that while gender-based violence could constitute persecution, violence by a partner remained a personal and private issue and was not the responsibility of the state”. However, as we now know, domestic violence can amount to persecution if the applicant’s state of origin is unable or unwilling

¹⁸³ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012

¹⁸⁴ *Ibid.*, pages 9 and 49. For the Qualification Directive definition on membership of a particular social group, see subchapter 2.3.

¹⁸⁵ Lund University, Faculty of Law, Amanda Hägglund: Gender-related persecution of refugee women, A feminist analysis of the persecution grounds of the refugee definition, Graduate Thesis, 2015, page 86

¹⁸⁶ Migration Policy Institute, Anja Parish, Gender-based violence against women: Both Cause for Migration and Risk along the Journey, 7 September 2017

to provide protection against that violence. This was also the case in the United States in 2014, when the BIA came to the conclusion “that a Guatemalan asylum seeker who had been beaten and raped by her husband belonged to the social group, ‘married women in Guatemala who are unable to leave their relationship’”.¹⁸⁷ This case is an appropriate example on persecution that is directed against women by private actors, and where the state is either unable or unwilling to provide protection against that violence.

As has been stated, women constitute a particular social group in most states only when they possess certain characteristics. This, however, is not the case in all countries. For instance, in Spain gender – and sexual orientation – are listed as a ground or basis for asylum in addition to the Convention grounds in the 1951 Refugee Convention.¹⁸⁸ Thus, the interpretation of Article 7 in the law 12/2009 of 30 October, regulating the right of asylum and subsidiary protection, has led to the fact that women are considered to form a particular social group.¹⁸⁹ As in Spain, also in Sweden, gender is listed as one of the grounds for refugee status.¹⁹⁰ In fact, the Swedish Aliens Act places gender on the same level with the concept of particular social group in its definition for refugee by stating that a refugee is a person outside his or her country of origin and has “a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group”.¹⁹¹ Sweden, however, does not properly analyse or identify the concept of a particular social group in cases concerning gender-related asylum claims.¹⁹² This will be demonstrated in subchapter 4.1.1, where case law from different countries, Sweden included, will be provided. In the study from 2012 on gender-related asylum claims in Europe, a few countries are introduced as countries that recognize that women can constitute a particular social group, either in their legislations or in practice. These are Romania, Spain, Belgium, Sweden and the United

¹⁸⁷ Migration Policy Institute, Anja Parish, Gender-based violence against women: Both Cause for Migration and Risk along the Journey, 7 September 2017

¹⁸⁸ Article 3 of the Law 12/2009 Of 30 October, Regulating The Right Of Asylum And Subsidiary Protection, Spain. Original language title: Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria

¹⁸⁹ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, page 50

¹⁹⁰ *Ibid.*, page 50

¹⁹¹ Chapter 4, Section 1 of the Swedish Aliens Act 2005:716, 31 March 2006

¹⁹² European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, page 51

Kingdom.¹⁹³ For instance, in the United Kingdom, the following have been found to form a particular social group by the courts: women in Pakistan, women in the Ivory Coast, women in Somalia, women in Afghanistan, and many more.¹⁹⁴ As can be seen, solely being a woman in a certain society is enough for an applicant to being recognized as a member of a particular social group. Also in some other countries, there has been development with regard to women being recognized as a particular social group, without any additional requirements. In Belgium, in early 2000 and onward, women would be considered to form a particular social group in, for instance, the following instances: young women, women who are victims of trafficking, divorced Iranian women and isolated women.¹⁹⁵ However, later on the Belgian Council for Aliens Law Litigation, made decisions with the outcome that women without reference to age or country of origin. These cases were about women who had been subjected to domestic violence.¹⁹⁶ Even if in these cases domestic violence was a determinative factor, they were granted refugee status because they were women. As has been concluded, women who are subjected to domestic violence can in many countries be seen to form a particular social group. Here the act of persecution is that domestic violence, and as it has been stated, the act of persecution cannot be the factor that determines a particular social group but the group must exist before the act of persecution takes place, and that the act of persecution must occur because the person belongs to that certain group of people, that is, the nexus requirement. In this sense, one could argue that every country that considers women subjected to domestic violence being a particular social group thinks – or should think – that women themselves are the social group and domestic violence is just the act of persecution. However, that might not be the whole picture, as it could be argued that domestic violence amounts to persecution only in those countries where the authorities do not get involved in cases or situations where the violence takes place between family members. In this sense, it could be argued that domestic violence is not the act of persecution but rather, the way domestic violence is executed is. In other words, if a man rapes her wife, the act of persecution is rape even if it is considered domestic violence. Let us imagine a society where rape is punishable by law and the perpetrator is in practice punished, but if the rape takes place at home, that is, between family members, the perpetrator is not in practice punished. So, in this sense, not all women are being

¹⁹³ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, pages 51 and 52. Notice, however, that the study is limited to nine European countries so this list is selected only amongst those nine countries.

¹⁹⁴ *Ibid.*, page 55

¹⁹⁵ *Ibid.*, page 52

¹⁹⁶ *Ibid.*, pages 52-53

persecuted but only those who live in a household where domestic violence appears. This goes well in line with the statement from the authorities in Netherlands, where it was noted that women are not all the same and are therefore too diverse a group to form one particular social group. This example could be considered in that sense, that this group of women is being persecuted because they are subjected to domestic violence and the state does not provide protection. One could perhaps even argue that the act of persecution is in fact the inability or unwillingness of that state to take action rather than domestic violence itself.

Let us go back to the study from 2012 on gender-related asylum claims in Europe. In this study, a case study from Hungary was considered to be good practice with regard gender-based or gender-related asylum claims. This particular case was about an Afghan woman who had originally come to Hungary in order to “join her husband via the family reunification procedure”.¹⁹⁷ However, the couple divorced, for which the woman lost her right to her residence permit, and she sought asylum in Hungary claiming that she would face persecution if she was to return to Afghanistan. The Hungarian asylum authorities, namely the Office for Immigration and Nationality, recognized her “as a *sur place*¹⁹⁸ refugee [...], as a ‘repudiated’ woman”.¹⁹⁹ This claim could be considered as women transgressing social mores of her society, and the UNHCR has stated that “[s]tates [...] are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’”.²⁰⁰ However, the Hungarian migration authorities do not reason positive decisions, and therefore it is unclear, on which Convention ground the refugee status was granted in this particular case.

Even if these countries, that have been presented, might have differing views on what can constitute a particular social group, they still acknowledge that women, and therefore gender, can constitute a particular social group at least in some circumstances. In many countries, solely being a woman is not enough for that applicant to be able to claim she should be granted refugee status, but she must

¹⁹⁷ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, page 52

¹⁹⁸ See page 5, footnote 15 of this thesis.

¹⁹⁹ *Ibid.*, page 52

²⁰⁰ Executive Committee of the High Commissioner’s Programme, Refugee Women and International Protection No. 39 (XXXVI) – 1985, 18 October 1985

have a special characteristic. For instance, in France “women fleeing a forced marriage”, “women fleeing ‘honour’ crimes”, “women fleeing humiliating or degrading widowhood rites” and “women who gave birth to albino children” have been recognized by case law as forms of particular social groups.²⁰¹ Regarding women fleeing forced marriages, the French authorities concluded that due to the current situation in some areas, such as Pakistan and some rural areas of Eastern parts of Turkey, women not agreeing to marry according to the wishes of the marriage arrangers, are seen to transgress social mores in her society, and therefore are subjected to gender-based violence, such as honour crimes, against which the state does not provide adequate protection. Due to these circumstances, women fleeing forced marriages constitute a particular social group.²⁰² According to the 2012 study on gender-related asylum claims in Europe, another country of the nine selected countries, that does not think gender alone is enough to constitute a particular social group, is Malta.²⁰³ The study provides the following explanation:

In Malta, women who have suffered from gender-based violence (such as within the domestic context), have been granted subsidiary protection only because their persecution was seen in the context of generalised violence (e.g. Somali women). One of the difficulties is that gender alone may not be enough for the applicability of the particular social group, which means that international protection is not granted. Unless the reasons for persecution include gender in addition to another ground, there is a restrictive interpretation.²⁰⁴

So, in Malta, asylum seekers basing their claim on being members of a particular social group due to their gender, would not be seen as members of a particular social group but they would also have to base their claim on another Convention ground, such as political opinion or religion, in order to be granted refugee status, or they would only be granted subsidiary protection if they “would face a real risk of suffering serious harm”²⁰⁵. However, subsidiary protection is only to be “complementary and additional to the refugee protection enshrined in the [1951 Refugee Convention]”.²⁰⁶ In other words, if an applicant is a woman, and owing to a well-founded fear of being subjected to acts of persecution, such as different forms of domestic violence, cannot return to her country of origin, she would in some countries be granted refugee status whereas in others only subsidiary protection. However, if

²⁰¹ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, page 52

²⁰² *Ibid.*, page 52

²⁰³ *Ibid.*, page 51

²⁰⁴ *Ibid.*, page 46

²⁰⁵ European Union, Qualification Directive, 2011/95/EU, article 2(f)

²⁰⁶ European Union, Qualification Directive, 2011/95/EU, no. 33

she can argue that she is subjected to violence by a private or an official party because she has or is believed to have a political opinion, she could be granted refugee status on a basis for her political opinion even though in some countries she would be seen as a member of a particular social group. An example of this could be opposing female genital mutilation. The UNHCR has provided guidance concerning claims relating to female genital mutilation, and has stated the following when it comes to women basing their claims on being members of a particular social group:

UNHCR defines a particular social group as “a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights”. Applicants in FGM-related claims will frequently meet either of these tests. Their gender and age are both innate and cannot be changed at a given moment in time. Moreover, their plea not to undergo physical alteration can be considered so integral to their human dignity that it becomes fundamental to the exercise of their human rights.²⁰⁷

However, even if women fleeing their society’s traditional practice, female genital mutilation, can constitute a particular social group according to both broad definitions, such as women of certain age or young women, or just as women, and narrow definitions, such as “girls belonging to ethnic groups that practice female genital mutilation”,²⁰⁸ women with same circumstances could also, according to the UNHCR, base their claim on political opinion:

Women and girls opposing FGM may also be seen as facing persecution on account of their political opinion. They may be viewed by local leaders and others who support the practice as holding opinions that are critical of their policies, traditions and methods. The notion that challenging prevailing gender roles may be political has received some attention both in case law and academic commentary. UNHCR has for its part noted that political opinion should be understood in the broad sense to encompass “any opinion on any matter in which the machinery of State, government, society, or policy may be engaged. This may include an opinion as to gender roles”.²⁰⁹

So, in these types of asylum claims, women would also in those countries, where they would not meet the requirements of a particular social group base their claim also on having a certain political opinion. The UNHCR continues to discuss female genital mutilation by stating that claims based on a woman’s or a girl’s fear of being circumcised “may also be analysed within the Convention ground of religion”, as female genital mutilation can be a part of some religion as well²¹⁰. However, this can be seen as

²⁰⁷ UNHCR, Guidance Note on Refugee Claims relating to Female Genital Mutilation, May 2009, para. 23

²⁰⁸ *Ibid.*, para. 24

²⁰⁹ *Ibid.*, para. 25

²¹⁰ *Ibid.*, para 27

problematic in that sense that the different Convention grounds should not exclude one another. In these types of situations, if a woman is granted refugee status and the decision is reasoned, one could argue that all of these grounds should be presented in the reasoning.

4.2 National case law in relation to women constituting a particular social group

In order to better understand women as members of a particular social group, some already existing national case law from different countries will be provided. The provided national case law will also function as base for comparison, when discussing whether women who transgress the social norms of their own society, should be seen as members of a particular social group or not.

4.2.1 Pakistani women subjected to domestic violence with no possibility to state protection (1999)

*Islam v Secretary of State for the Home Department, R v Immigration Appeal Tribunal and Another, ex parte Shah (Conjoined Appeals)*²¹¹ (hereafter *the case of Islam and Shah*), is a decision made in the United Kingdom by the House of Lords. The case *Islam and Shah* concerns two Pakistani women who were subjected to domestic violence by their husbands and forced to leave their homes. Both of the women arrived in the United Kingdom and applied for asylum in the early 1990's. First, some background information about how these cases were handled, will be presented.

In the *Shah case*, the appellant was a 43-year-old woman whose husband forced her to leave their home. She based her claim on being afraid of her husband to “accuse her of adultery” and that her husband “may assault her or denounce her under Sharia law for the offence of sexual immorality”.²¹² Her claim was rejected and therefore she appealed to the special adjudicator. As a result of the appeal, her fear of being persecuted if she was to return to Pakistan was well-founded on 25th of July 1995. However, the special adjudicator still did not see her as a member of a particular social group. The appellant received a decision of a refused leave to appeal on 7th August 1995 by the Immigration Appeal Tribunal. After this, she “sought for judicial review of the refusal leave”, and the Secretary of State was of the opinion that she should have been granted the appeal leave.²¹³

²¹¹ *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999

²¹² *Ibid.*, p. 3

²¹³ *Ibid.*, p. 3

In the *Islam case*, the appellant was a 45-year-old woman with two children.²¹⁴ Her husband was violent towards her for which she left their home and after spending a while at her brother's house, she arrived in the United Kingdom. Her claim differed a bit from the claim that Shah presented²¹⁵ and therefore she applied asylum because she had a well-founded fear of being persecuted "for reasons of (1) membership of a particular social group and (2) political opinion". Her claim was first rejected after which she appealed to the special adjudicator. In a decision made in 7th of December 1995, the special adjudicator "found that the appellant had been persecuted in Pakistan", and "that the authorities in Pakistan are both unable and unwilling to protect the appellant". However, the special adjudicator did not find the appellant to be a member of a particular social group due to the fact that "the group could not exist independently of the feared persecution". The Immigration Appeal Tribunal also dismissed the appeal made by the appellant on 2nd of October in 1996. It found in its decision the following: "the appellant cannot be said to belong to a particular social group because the 'sub-group does not . . . have any innate or unchangeable characteristic, nor is it a cohesive homogeneous group whose members are in close voluntary association.'"²¹⁶

Both of the appellants took their case to the Court of Appeal where their cases were brought together. The issue that the Court of Appeal took into consideration was the question whether these two Pakistani women could be seen as being members of a particular social group as it is meant in the 1951 Refugee Convention article 1A(2). In *the case of Islam and Shah*, Lord Steyn concluded that the three members of the Court of Appeal took the following opinions regarding the matter:

Waite L.J. based his decision on the ground that independently of the feared persecution there was no common uniting attribute which could entitle the appellants to the status of "membership of a particular social group" under article 1A(2)[...]. Staughton L.J. went further. He held that that what is required is a number of people "joined together with some degree of cohesiveness, co-operation and interdependence"[...]. And this requirement was not satisfied. Henry L.J. agreed with the ground on which Waite L.J. decided the matter. It is not clear whether there was a second ground for his decision. Henry L.J. agreed with Waite L.J. that "cohesion" was not "not necessary in every case"[...]. Henry L.J. added that "it is not necessary where the particular social group

²¹⁴ *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, p.3

²¹⁵ For a more thorough description of the case, see for instance *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999. This thesis will not discuss the political or perceived political opinion but will only concentrate on the facts about the membership in a particular social group.

²¹⁶ *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, p. 3-4

is recognised as such by the public, though is not organized . . ." It would seem that Henry L.J. contemplated that cohesiveness is sometimes a requirement.²¹⁷

As can be seen from the citation above, the three members of the Court of Appeal come to conclusion, that some sort of cohesiveness was required in order for a person to be held as a member of a particular social group. The Court of Appeal found that the appellants in this particular case did not fulfil this requirement and therefore they could not be held as members of a particular social group. In the House of the Lords decision, Lord Steyn named the first problem as whether cohesiveness is a requirement for a group to be held as a particular social group within the meaning of the 1951 Refugee Convention article 1A(2).²¹⁸ After discussing case law from different countries regarding this issue, Lord Steyn comes to the conclusion that "[c]ohesiveness may prove the existence of a particular social group. But the meaning of "particular social group" should not be so limited: the phrase extends to what is fairly and contextually inherent in that phrase".²¹⁹ As the second issue, he addresses "the different theories of 'particular social group'". In this case, two different options as what might constitute a particular social group are discussed, namely "Women in Pakistan" and the "narrower group". The narrower group would come to existence through these two appellants first, being women (gender), second, "suspicion of adultery", and third, "their unprotected position in Pakistan".²²⁰ While discussing the narrower group, Lord Steyn reasoned against the Court of Appeal and the counsel for the Secretary of State who came to the conclusion that the argument for the narrower group "falls foul of the principle that the group must exist independently of the persecution". Lord Steyn claimed that these three elements that defines the narrower group "do not involve an assertion of persecution". He used the following reasoning to back up his point of view:

The cases under consideration can be compared with a more narrowly defined group of homosexuals, namely practising homosexuals who are unprotected by a state. Conceptually such a group does not in a relevant sense depend for its existence on persecution. The principle that the group must exist independently of the persecution has an important role to play. But counsel for the Secretary of State is giving it a reach which neither logic nor good sense demands.²²¹

Thus, in *the case of Islam and Shah*, Lord Steyn brought forth the explanation by McHugh J. in *A v. Minister for Immigration and Ethnic Affairs*, that is similar to the one that the UNHCR has used in

²¹⁷ *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, p. 4

²¹⁸ *Ibid.*, p. 6

²¹⁹ *Ibid.*, p. 9

²²⁰ *Ibid.*, p. 9-10

²²¹ *Ibid.*, p. 10

its guidelines. This explanation uses the example of left-handed people who, for the time being, are not being persecuted and therefore they are not considered to form a particular group today. However, if left-handed people were to be persecuted due to their characteristic of being left-handed, they would soon become a particular social group.²²² This example simplifies the issue of the principle that the group must be existing independently, without any persecutory acts.

Lord Steyn finally came to the conclusion that both of the appellants' appeals should be allowed. Lord Hoffmann, Lord Hope of Craighead and Lord Hutton also were of the opinion that the appeals should be allowed.²²³ One of the Lords, however, were of different opinion. Lord Millett argued among other things with the following statement:

The group cannot, therefore, consist of the victims of persecution who share no other common characteristic. Nor in my opinion can it consist of victims of persecution who do share a common characteristic if that is not the reason for their persecution. Non-causative characteristics are irrelevant. Battered wives do not form a social group because, if the group is limited to battered wives, it is defined by the persecution, while if it is extended to include all married women, those who are battered are not persecuted because they are members of the group.²²⁴

The case of *Islam and Shah* was the first decision that the highest court in the United Kingdom “recognised gender as a protected characteristic and women as a particular social group”²²⁵.

4.2.2 Married Guatemalan women unable to leave their relationships (2005)

The *Matter of A-R-C-G- et al., Respondents* (hereafter the *Matter of A-R-C-G-*) handled a case of women seeking asylum for the reasons of being members of a particular social group called “married

²²² See page 10 of this thesis for the example of the UNHCR. For the explanation of McHugh J., see either *A v. Minister for Immigration and Ethnic Affairs* or *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, p. 10.

²²³ As this case is only supposed to function as one example in this thesis, not all of the arguments of the different Lords are explained. In order to see full reasoning by all of the Lords, see *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999.

²²⁴ *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999, p. 26

²²⁵ Honkala, N. (2018) *Islam v Secretary of State for the Home Department, R v Immigration Appeal Tribunal and Another, ex parte Shah* (1999). In: Rackley, E. and Auchmuty, R. (eds.) *Women's Legal Landmarks: Celebrating the history of women and law in the UK and Ireland*, p. 1

women in Guatemala who are unable to leave their relationship”.²²⁶ The respondents were a mother with three minor children who are natives and citizens of Guatemala. They arrived the United States on 25th of December 2005. The main respondent’s, that is, the mother’s story about how her husband had continuously used violence against her, was found credible. The main respondent had contacted the police on many occasions but the police did not interfere due to the fact that the abuse occurred between husband and wife. Once, the police did come to their house but the abuser was not arrested, after which he threatened the main respondent that he would kill her if she ever contacted the police again. Also, “[t]he respondent repeatedly tried to leave the relationship by staying with her father, but her husband found her and threatened to kill her if she did not return to him”. She tried to leave her husband again but without success. Finally, in December 2005 she left Guatemala and sought for asylum in the United States. She feared that her husband would harm her if she was to return to Guatemala. The Immigration Judge, however, “found that the respondent did not demonstrate that she had suffered past persecution or has a well-founded fear of future persecution on account of a particular social group comprised of ‘married women in Guatemala who are unable to leave their relationship’”.²²⁷

This particular case discusses the issue of victims of domestic violence and membership of a particular social group. The Board of Immigration Appeals had previously discussed this issue in the *Matter of R-A-*,²²⁸ where stated that “that the respondent in that case was eligible for asylum on account of her membership in a particular social group consisting of ‘Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.’”²²⁹ The Board of Immigration Appeals continues to discuss the concept of a particular social group by stating the three pillars, or requirements, that must be met in order for a particular social group to exist:

[...] an applicant seeking asylum based on his or her membership in a “particular social group” must establish that the group is (1) composed of members who share a common

²²⁶ *Matter of A-R-C-G- et al., Respondents*, 26 I&N Dec. 388, U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, Decided August 26, 2014.

²²⁷ *Matter of A-R-C-G- et al., Respondents*, 26 I&N Dec. 388, U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, Decided August 26, 2014, p. 389

²²⁸ Full case name: *Matter of R-A-*, 24 I&N Dec. 629, U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, Decided December 4, 2008.

²²⁹ *Matter of A-R-C-G- et al., Respondents*, 26 I&N Dec. 388, U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, Decided August 26, 2014, p. 389

immutable characteristic, (2) defined with particularity, and (3) socially distinct within the society in question.²³⁰

Concerning the abovementioned first pillar, they continue by stating that in the *Matter of A-R-C-G-*, there is a group that has gender as a common immutable characteristic. Thus, “marital status can be an immutable characteristic where the individual is unable to leave the relationship.”. With regard to the second pillar, the Board argues “that the group is defined with particularity” as the group is described by the terms “married”, “women” and “unable to leave the relationship”. According to information and the respondent’s story about the interaction with the police, these terms are accepted as particular in the Guatemalan society. The third pillar requires the distinctiveness in that particular society. The Board of Immigration Appeals highlights the fact that in order for this requirement to be met “a group need not to be seen by society; rather it must be perceived as a group by society”.²³¹ A good example of this is sexual minorities, which is commonly seen as constituting a particular social group. The Board of Immigration Appeals states in the *Matter of A-R-C-G-* that there is evidence on the fact that Guatemalan society does make a distinction when it comes to married women in relationship that she is unable to leave. The evidence can include for instance whether a particular country recognizes that there is a need for protection for people who suffer from domestic abuse, “including whether the country has criminal laws designed to protect domestic abuse victims, whether those laws are effectively enforced, and other sociopolitical factors”. The Board reasons the existence of this type of evidence with the following statement in the *Matter of A-R-C-G-*:

Supporting the existence of social distinction, [...] the record in this case includes un rebutted evidence that Guatemala has a culture of “machismo and family violence.” [...] Sexual offenses, including spousal rape, remain a serious problem. [...] Further, although the record reflects that Guatemala has laws in place to prosecute domestic violence crimes, enforcement can be problematic because the National Civilian Police “often failed to respond to requests for assistance related to domestic violence.”²³²

The Board of Immigration Appeals concludes with regard to domestic violence the following:

the issue of social distinction will depend on the facts and evidence in each individual case, including documented country conditions; law enforcement statistics and expert

²³⁰ *Matter of A-R-C-G- et al., Respondents*, 26 I&N Dec. 388, U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, Decided August 26, 2014, p. 392

²³¹ *Ibid.*, p. 393

²³² *Ibid.*, p. 394

witnesses, if proffered; the respondent's past experiences; and other reliable and credible sources of information.²³³

In this case, in order for the nexus requirement to be fulfilled, the respondent had to demonstrate, *with regard to past persecution*, that Guatemalan government was either unable or unwilling to protect the individual from this non-state actor, that is the respondent's husband. If she is able to demonstrate this, the burden of proof shifts to the country where she sought asylum from, in this case the immigration authorities of the United States.²³⁴

As can be seen from the given explanations above, this case demonstrates well the fact that gender-based persecution often is practiced by non-state actors. The persecution in this case is existing only because the state is not able or willing to provide protection against this type of persecution. In this sense, it is important to observe both the legislation of a particular country as well as how the legislation is interpreted in that said society. Due to the fact that in Guatemala the authorities are not able or willing to provide protection against violence that takes place in private households between the spouses, persecution does indeed exist. Due to the fact that the applicant was found to fall under the Convention ground "a member of a particular social group", she was granted asylum in the United States²³⁵.

4.2.3 Kurdish women in Turkey transgressing social mores by divorcing their husbands (2008)

In a case from New Zealand, a 40-year-old citizen of Turkey arrived in New Zealand in the beginning of the year of 2000. Her first application for refugee status did not succeed and she applied asylum again because she feared being killed for honour if she returned to her country of origin, that is, Turkey.²³⁶ In this said case, the applicant was granted asylum for reasons of her political opinion, and therefore her membership of a particular social group was not discussed in depth.²³⁷ This particular case handled the matter of an Alevi Kurd from a family, where women, especially daughters, took care of the household and working for the family's farm. Due to this, the appellant had to drop out

²³³ *Matter of A-R-C-G- et al., Respondents*, 26 I&N Dec. 388, U.S. Department of Justice, Executive Office for Immigration Review, Board of Immigration Appeals, Decided August 26, 2014, p. 394

²³⁴ *Ibid.*, p. 395

²³⁵ Migration Policy Institute, Anja Parish, Gender-based violence against women: Both Cause for Migration and Risk along the Journey, 7 September 2017

²³⁶ *Refugee Appeal No. 76044*, No. 76044, New Zealand: Refugee Status Appeals Authority, 11 September 2008

²³⁷ *Ibid.*, paragraph 91

from school. The father was in charge in the family and the appellant, her sisters and her mother faced violent behaviour by him. The appellant as well as her sister did not have the permission to talk to any male persons who were not family. The appellant was forced to marry against her will and when she did not want to stay there, her father threatened to kill her.²³⁸ As was mentioned above, the appellant's first claim did not succeed together with her husband. When she applied asylum for the second time, she was still living with her husband but their claims were later on separated due to a violent situation before Christmas in 2006, where the appellants husband tried to kill the appellant and the appellant's husband left New Zealand in the beginning of 2007.²³⁹ After these events, the appellant claimed that "should she return to Turkey, she would be killed by her husband or his family or by the appellant's own family" and she told that since June 2007 her own family had threatened to kill her after her husband had contacted them and told them about the separation. The motive for this was that her family was ashamed of her.²⁴⁰ Her fear was being well-founded for reasons of her political opinion.²⁴¹ The Refugee Status Appeal Authority came to this conclusion with the following statement:

In the specific context we are satisfied that the appellant's assertion of her right to life and of her right to control her life was a challenge to the collective morality, values, behaviours and codes of the two families and beyond them, of the greater "community" of which they are a part. This challenge to inequality and the structures of power which support it is plainly "political" as that term is used in the Refugee Convention. The appellant's wish to be liberated from those structures is in this context a political opinion. It is for holding that opinion that she is at risk. Applying the causation standard discussed earlier, the appellant has established that she is at risk of being persecuted "for reasons of" political opinion.²⁴²

Due to the fact that the Refugee Status Appeal Authority come to the conclusion that the political opinion was established in this case, it concluded that it is not necessary to discuss membership of a particular social group in depth. However, it briefly presented why the claim would have succeeded with this ground as well. The Refugee Status Appeal Authority was of the following opinion, based on the country of origin information from Turkey:

Without re-sifting the country information earlier set out in this decision, we find that

²³⁸ *Refugee Appeal No. 76044*, No. 76044, New Zealand: Refugee Status Appeals Authority, 11 September 2008, paragraphs 3-5

²³⁹ *Ibid.*, paragraph 15

²⁴⁰ *Ibid.*, paragraph 17 and 26

²⁴¹ *Ibid.*, paragraph 59 and 90

²⁴² *Ibid.*, paragraph 90

on the facts the appellant has established that she is a member of a particular social group, namely women in Turkey. It is because she is a member of that group that she is at risk of harm from non-state agents (her husband, his family and her own family) and the reason why effective state protection is not available to her. [...]²⁴³

This case can be seen as to some amount different from the other cases, as the authorities in New Zealand were of the opinion that the Convention ground “political opinion” was demonstrated by the appellant. However, this thesis will not discuss in depth this Convention ground and therefore the ground and the reasoning for “choosing” this ground before membership of a particular social group will not be discussed further. This case handled one type of transgression of social mores of the applicant’s society. In chapter five, transgression of social mores by being “too western” will be discussed. One could, however, already argue that transgression of social mores might bring dishonour to the applicant’s family or relatives et cetera, and therefore she might face gender-based acts of persecution, such as being killed for honour, inflicted by her own family.

4.2.4 Kurds in the Kurdistan Regional Government Area of Iraq opposing their families wishes regarding marriages (2011)

In Sweden, the Migration Court of Appeal (Migrationsöverdomstolen) gave a differing decision relating to honour crimes, when comparing to the one from New Zealand.²⁴⁴ The case was not in detail similar, but it did have some similarities. The case from Sweden concerned a couple from the Kurdistan Regional Government Area of Iraq. They were both Kurds. The man is referred as asylum seeker A and the woman as asylum seeker B. They applied asylum in Sweden in 2009, claiming that they have a well-founded fear of being killed by asylum seeker B’s father and family or extended family. The motive for this was that asylum seeker B’s family wanted asylum seeker B to marry her cousin but she did not want to because she had an extramarital relationship with asylum seeker A. In other words, the asylum seekers claimed that they were in a risk to become victims of honour-killings if they were to return to Iraq.

²⁴³ *Refugee Appeal No. 76044*, No. 76044, New Zealand: Refugee Status Appeals Authority, 11 September 2008, paragraph 94

²⁴⁴ MIG 2011:6, Migrationsöverdomstolen, 3 September 2011 (in Swedish)

The Swedish Migration Agency did not hold the asylum seekers' stories credible²⁴⁵, and also came to the conclusion that the asylum seekers did not sufficiently demonstrate that the state authorities were unable or unwilling to provide protection for them against a threat from non-state actors. The asylum seekers A and B appealed to the Administrative Court, and the majority of the Court's members found that the asylum seekers were in need of subsidiary protection because their fear for becoming victims of honour-killings was well-founded. The Swedish Migration Agency appealed to the Migration Court of Appeal which provides country of origin information in its decision. The Court concludes that women can be seen as being members of a particular social group if she can demonstrate that she is in risk of being killed with the motive of honour of the family and she cannot rely on state protection and intern flight is not an option. The Court notes, however, that women usually have sufficient amount of protection available in order for them to be safe and therefore in majority of the cases there is no need for them to be granted refugee status or humanitarian protection. The Court also discusses honour-killings when it comes to men but does not come to the same conclusion as with women. The Court concludes that according to country of origin information, men can also be victims of honour-crimes but there is not much information available due to its sensitive character. The Court notes that unlike women, men do not have the same opportunity to be protected against honour-killings. The Court finds, that the appellants have a well-founded fear of being killed by asylum seeker B's family with the motive of honour, but according to the Court, this act of persecution is not for reasons of one of the grounds listed in the 1951 Refugee Convention. They are therefore granted subsidiary protection instead of refugee status.²⁴⁶

The Migration Court of Appeal does not in its decision reason any further why the two asylum seekers are not granted refugee status but only subsidiary protection. However, one could argue that it can be read in between the lines, that the couple were granted subsidiary protection because the male asylum seeker was in need of protection outside his country of origin, and that men who fear honour-killings for having extramarital relationships do not constitute a particular social group. In this sense, gender does play a significant role when determining whether an asylum seeker fearing honour-crimes due to having extramarital relationships and for that brings dishonour to the family, can fall under the ground membership in a particular social group.

²⁴⁵ For more detailed reasoning, see the case summary in decision MIG 2011:6 by the Migration Court of Appeal in Sweden (Migrationsöverdomstolen), 3 September 2011 (in Swedish)

²⁴⁶ MIG 2011:6, Migrationsöverdomstolen, 3 September 2011 (in Swedish)

As was stated in chapter three, the perpetrators of gender-based persecution are usually non-state actors. Therefore, in cases where gender-based violence is the form of persecution, the question is whether the authorities of the applicant's state of origin are able or willing to provide protection for that individual or not. This was also the case in all of the cases that were presented above. The next chapter will discuss the issue of women being "too western" in relation to falling under the Convention ground membership in a particular social group.

5. Women transgressing social mores by being “too western” – a particular social group?

This final chapter will discuss the issue, whether women who transgress social mores²⁴⁷ by being “too western”, primary in terms of clothing, can fall under the Convention ground membership of a particular social group. In this study, it is considered that the imaginary applicants who claim that they belong to a particular social group, have sufficiently demonstrated that they would indeed become victims of gender-based acts of persecution if they were to return to their country of origin. Also, in this study, it is considered that these applicants have demonstrated that their fear is for reasons of them being “too western”, primary in terms of clothing. In other words, the causal link between the act of persecution and the possible particular social group is demonstrated. Hence, this chapter will only focus on the issue, whether this above-mentioned group fulfils the requirements for being considered a particular social group in the meaning of the 1951 Refugee Convention.

In order for applicants basing their claim on belonging to this type of group to be considered members of a particular social group, the two different approaches, according to majority of the states, must be fulfilled. These approaches are the **protected characteristics approach** and the **social perception approach**, which were discussed in chapter two. To begin the discussion, we will first take a closer look at the social perception approach relating to this matter and thereafter discuss the protected characteristics approach.

The social perception approach is highly dependable on the country of origin information and the society’s in question tradition, legislation and interpretation of this legislation. It is important to draw attention to this type of country of origin information as was seen in the previous sub-chapter where national case law from different states parties to the 1951 Refugee Convention was presented. It was stated, that usually state actors are not the instances who practice the acts of persecution but they are unable or unwilling to provide protection against these types of actions and therefore it is seen as persecution. As was mentioned, in this chapter it is held that the applicants have a well-founded fear of being targeted with acts of persecution of this type and therefore it is assumed in this study, that

²⁴⁷ In an article called “Mores (Strongest Social Norms): Meaning and Characteristics”, mores are described as following: “Mores are the strongest of the social norms, which relate to the basic moral judgments of a society. They tell us to do certain things, such as pay proper respect to our parents and teachers. They can also tell us not to do certain things, such as not to kill other human beings or do not indulge into adultery or homosexuality. They are considered more important than folkways or customs, and reactions to their violations are more serious. They are more closely associated with values a society consider important.” Citation: *Mores (Strongest Social Norms): Meaning and Characteristics*, Article shared by Puja Mondal, undated.

the country of origin information supports the presumption that the society in question is strict in this sense. Let us use as an example Iran, where all women are required to wear the hijab in public and it is also a Muslim tradition that women wear loose-fitting clothes. If a woman in Iran did not wear her hijab when going outside, she would definitely be distinct from other women²⁴⁸. Therefore, in these types of societies the social perception approach is met, concerning women who are “too western” when comparing to the norm in terms of clothing.

Therefore, the issue while discussing this matter is whether these women transgressing social mores of a certain society by being “too western”, primary in terms of clothing, have an immutable characteristic or not. In other words, does these women fulfil the requirement of the protected characteristics approach. As has been stated before in this study, the UNHCR is of the point of view that solely gender can form a particular social group. However, not every state is willing to accept this statement and it has been argued against the UNHCR’s point of view that women are too diverse a group in order to be seen as one particular social group. The UNHCR has therefore also discussed different types of factors that could lead to women with certain features to be considered as members of a particular social group. One of these is women transgressing social mores of a particular society. The Executive Committee of the High Commissioner’s programme has stated the following in 1985 in its 36th session:

[...] States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a “particular social group” within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention.²⁴⁹

However, there are different ways that women can transgress social mores of the society they come from. Some acts may have been done in a way that there is no way of going back and then there are ways that can be changed back to the way that the society requires. An action that is final and cannot be changed could be, for instance, having children outside of wedlock or having an extramarital relationship. These are something that cannot be changed, as the transgression of mores of that

²⁴⁸ As was stated previously in this study, it is not necessary to be visibly different from others to be considered as different from the norm. It is enough that the society perceives the person as distinct. An example of this was sexual minorities.

²⁴⁹ Executive Committee of the High Commissioner’s Programme, *Refugee Women and International Protection No. 39 (XXXVI) – 1985*, 18 October 1985, No. 39 (XXXVI)

particular society has already happened in the past. For instance, in Hungary this type of case was decided as following:

An Azerbaijani and a Syrian woman alleged that during their stay outside of their countries of origin, they gave birth to babies from extramarital sexual relations. They can no longer return to their home countries because their families and the whole society would no longer accept them. They feared being subjected to ‘honour’ killings because of transgressing the rules of Islam. In the cases of these two women, the OIN considered that there is no State protection since the local authorities refuse to interfere in such cases. The OIN found that the situation of women, who breached the rules of Sharia, is so severe – because of their isolation in society and the fact that they can be subjected to ‘honour’ killings – that it can amount to persecution. Therefore, the OIN recognised both women as refugees.²⁵⁰

Then there are those types of actions that could be changed back to comply with the norms of the society. Let us use an example; a woman being or becoming so western during her asylum process in a western country that she refuses to wear her headscarf and dresses in a western way. This type of asylum claim is called a *sur place* claim, that is, the claim did not exist while the person was living in his or her country of origin and it was not the reason why he or she left the country, but it came into existence later on.

So, the question lies as following: is being “too western” and choosing clothing that does not fit in to the expectations and social norms of a particular society so fundamental to human dignity that it should be protected and the individual should not be compelled to forsake it? It was previously stated while discussing the *Matter of Acosta*, that one’s profession is not so fundamental to human dignity that it should be protected. In other words, it does not meet the requirements of the protected characteristics approach. Is wearing clothing of one’s own choosing comparable to profession or occupation, or not? If it was concluded that being “too western” is comparable to profession or occupation, one could draw a conclusion that this type of action is not something that should be protected and therefore it does not violate one’s fundamental human rights if it is stated in a decision that the person can start wearing clothes that fit into the society’s norms.

²⁵⁰ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens’ Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, p. 48

However, it could also be argued that being “too western” and therefore, for instance, choosing not to wear the hijab and also in other ways clothing in a manner that is considered un-Islamic, is a way of expressing oneself. The UN Universal Declaration of Human Rights provides in article 19 the following fundamental right to people:

Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.²⁵¹

In these types of situations, it is justified to argue that asylum seekers basing their claim on transgressing social mores of their society by being “too western”, should be able to demonstrate the reason, why it is so fundamental to them that it would be recognized as an immutable characteristic. In other words, it is a question of identity, and whether the reasons are credible or not.

In Finland, the Supreme Administrative Court has given a decision on this type of matter. The case concerned a claim by an Iraqi woman, who was Sunni Muslim and unmarried.²⁵² She sought for asylum in Finland, because her ways of life, attitudes and way of thinking were distinct from conservative Islamic norms or otherwise traditional customs set for women in her area of residence, Baghdad, and also elsewhere in Iraq. The Court concludes that the applicant’s way of dressing herself or appearance in general did not comply with the way of dressing of traditional appearance for women in Iraq. The applicant had in her interview credibly demonstrated that she had received different types of threats from a well-known Shi’a militia. The Finnish Immigration Service had concluded that the applicant could avoid this threat by forsaking her way of clothing. The Supreme Administrative Court, however, came to a different conclusion. It stated that when considering the up-to-date country of origin information, in Baghdad and also elsewhere in Iraq, if women are distinct from the conservative Islamic norms or other traditional customs, it can lead to the need for international protection. The Court stated that only wearing clothes that do not fit into the Islamic norm is not by itself enough to establish a need for international protection. In this decision, the Court, however, came to the conclusion, that the applicant had succeeded, in a credible way, to tell about her identity, and due to that reason, the Court held that the applicant had a belief or conviction²⁵³ and view of life, which was distinct from the norm of the society, and which had developed into a crucial part of the

²⁵¹ United Nations, *Universal Declaration of Human Rights*, Adopted by the UN General Assembly on 10 December 1948, article 19

²⁵² KHO 30.8.2018/3954, The Supreme Administrative Court (in Finnish)

²⁵³ Compare with religion or political opinion.

applicant's identity and therefore she should not be compelled to forsake it. The Court stated that the applicant could fall under three different grounds for refugee status, depending on the situation, either separately or cumulatively. These three different grounds are religion, membership of a particular social group or political opinion.²⁵⁴

As the Court stated, the Convention ground depends on the situation. It is therefore important to keep in mind that every case is different and every matter shall be handled on a case-by-case basis. As was presented on chapter 4.1, female genital mutilation can be analysed under three different Convention grounds for refugee status, that is, religion, political opinion and particular social group. The same applies for women transgressing social or religious norms²⁵⁵, and this can also be seen in the reasoning of the Supreme Administrative Court in Finland. However, this type of reasoning does not always become fulfilled when discussing matters concerning gender. For instance, one research concerning asylum cases in Europe has stated the following:

[...] gender-based persecution is predominantly interpreted within the parameters of the [particular social group] ground in all of the countries considered. In all the countries in this comparative analysis, the Convention ground of particular social group is disproportionately used in gender-related cases compared to the other Convention grounds. When a person is considered to have a well founded fear of gender-based violence or punishment by the State or a non-State actor due to transgression of gendered social norms of law, [particular social group] is almost exclusively the Convention ground applied, although the [particular social group] is often neither properly analysed nor defined.²⁵⁶

As can be seen, the problem might not be that women were not granted asylum but that the ground for the asylum might not be fully and carefully analysed. However, as was explained in the case from New Zealand, when one of the grounds is fulfilled, there is no need to analyse all the other grounds. The question then remains: is it important to analyse all the grounds or not, if one of the grounds is fulfilled? This, however, is not the purpose of this study and therefore it will not be discussed further.

²⁵⁴ KHO 30.8.2018/3954, The Supreme Administrative Court (in Finnish)

²⁵⁵ 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, HCR/GIP/02/01, 7 May 2002, para. 23

²⁵⁶ European Parliament, Directorate General for Internal Policies, Policy Department C: Citizens' Rights and Constitutional Affairs, Gender-related asylum claims in Europe, A comparative analysis of law, policies and practice focusing on women in nine EU Member States, France, Belgium, Hungary, Italy, Malta, Romania, Spain, Sweden and the United Kingdom, November 2012, page 45

6. Conclusion

Membership in a particular social group as a ground for refugee status does not have any closed list of particular social groups and it does not have any clear definition. The UNHCR has published guidelines concerning particular social groups for states and other relevant actors. As particular social group does not have a closed list or clear definition, it is still being developed through new case law. States have different opinions on what constitutes a particular social group with each other and the UNHCR. It is important to notice that according to the UNHCR only one of the two approaches (protected characteristics and social perception) must be met, as for instance the EU, the United States and Canada require that both of these approaches are met in order for an applicant to fall under the ground membership in a particular social group. In other words, the UNHCR implements a non-cumulative interpretation whereas many states parties to the 1951 Refugee Convention implement the cumulative interpretation of the two approaches. Thus, even if there is an established particular social group, it does not automatically mean that they are granted international protection. They have the obligation to demonstrate that they have a well-founded fear of being persecuted due to their membership in a particular social group, or some other ground listed in the 1951 Refugee Convention. In the next chapter, gender-based or gender-related violence as well as gender-related persecution will be discussed in order to move forward to discussing women as refugees by basing their claim on membership in a particular social group.

Gender-based or gender-related violence is something that is directed against a person due to his or her gender. Gender-based violence can also be violence that affects an individual's gender disproportionality. It is important to notice that the terms *gender* and *sex* differ from each other, as *gender* refers to the social characteristics for men and women, and *sex* refers to the biological characteristics of men and women. Women and girls are considered more vulnerable than men in particular societies and therefore they are also more vulnerable to gender-based violence. This more disadvantaged or vulnerable position of women and girls is, in particular, visible during the times of armed conflicts when for instance sexual violence as a form of gender-based violence is used as a method of warfare. Other types or forms of gender-based violence include, for instance, forced and early marriages, female genital mutilation and domestic violence. Gender-based violence is, in fact, a type of violence that can take various forms, that is, physical, sexual and psychological or emotional. Harmful traditional practices and socio-economic violence are also included in gender-based violence.

Central international instruments regarding gender-based or gender-related violence are the CEDAW and its General Recommendations as well as the CEDAW Declaration following with the Vienna Declaration Programme of Action and Beijing Declaration and Platform for Action. However, only the CEDAW is binding for its states parties whereas General Recommendations and Declarations are soft law, and therefore states are not bound by them. In Europe, the Istanbul Convention is a fundamental regional instrument in fighting violence against women.

There is no ground called *gender* in the 1951 Refugee Convention but the UNHCR has argued that this is not necessary. The UNHCR has indicated that if the definition of a refugee is interpreted properly, it will in practice include claims based on gender as well. In order for an asylum claim to be adequate, the applicant must establish that he or she has a well-founded fear of being persecuted for reasons of race, nationality, religion, membership of a particular social group or political opinion. All of these can have a gender-aspect of some kind. Persecution for reasons of race and nationality can take gender-related forms, such as sexual violence, and persecution for reasons of religion, political opinion and membership in a particular social group can be directed against a person due to his or her gender, for instance, if a woman breaches the norms she is assigned by her religious community and is therefore punished. Perpetrators of gender-based persecution are often private actors rather than state actors, but it amounts to persecution if the states are not able or willing to provide protection against it. This was demonstrated through the provided national case law.

The UNHCR is of the opinion that women can constitute a particular social group solely due to their gender, if they can demonstrate that they are persecuted for the reasons of their gender, whereas many states have differing opinions with the UNHCR on this matter. For instance, it has been argued that women are too diverse a group for constituting only one particular social group. Some states, therefore, require some specific characteristics from women in order for them to establish a particular social group, such as women transgressing social mores of their societies. In other words, women are not targeted with persecution solely because of their gender, but because of their gender, and that they act in a manner that is not seen as appropriate for them, such as having extramarital relationships, divorcing their husbands without their families' consent, giving birth to babies outside of wedlock, et cetera.

The question of this study was to find an answer, whether women who are “too western”, primary in terms of clothing, can be seen as members of a particular social group, or not. It was stated that this

type of group does meet the required social perception approach. Therefore, the question remained, if this group also fulfilled the protected characteristics approach.

As a result of the discussion in this study, it safe to say that every case is different, and therefore every application for asylum must be handled on a case-by-case basis. Depending on the nature of the concept, being “too western”, primary in terms of clothing, the applicant could be seen as a member of a particular social group within the meaning of the 1951 Refugee Convention if she has a well-founded fear of being persecuted for that reason. In order to be seen as a member of a particular social group due to these characteristics, the applicant must be able to demonstrate that it is a crucial or fundamental part of her identity, and therefore she should not be compelled to forsake it. In other words, if the applicant has a well-argued reason, why she must be allowed to dress in a western manner, she can fall under one or more Convention grounds in the 1951 Refugee Convention article 1 A(2). As this study has shown, the usual grounds for this may vary from political opinion to religion and to membership in a particular social group. However, usually, when discussing gender-related asylum claims, political opinion and religion are overlooked, and states are more prone to interpret the ground membership in a particular social group.

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