



“exchange

for

CHANGE”

Guide for
an effective
protection of
refugee victims
of gender-related
persecution in
Europe

CEAR. The **Spanish Commission for Refugees** was established in 1979. CEAR works with asylum seekers, refugees, stateless people and vulnerable immigrants, providing legal and social aid, as well as vocational and employment guidance. CEAR also offers legal aid to asylum seekers in the major airports and ports in Spain. The organization runs programs of awareness-raising and campaigns to promote human rights and the right to asylum. CEAR is a member of the European Council on Refugees and Exiles (ECRE).

CIR. The **Consiglio Italiano per i Rifugiati**, established in 1990, defends the rights of refugees and asylum seekers. CIR provides legal and social aid to international protection applicants, and also to victims of torture and unaccompanied minors. The Consiglio Italiano per i Rifugiati performs information and awareness-raising activities and also collaborates with different academic institutions in training seminars. The CIR is a member of ECRE and the Euromediterranean Human Rights Network (EMHRN).

FTDA. **France terre d'asile** defends and promotes the right to seek asylum and the rights of refugees and immigrants since 1971. It offers legal aid, shelter, social assistance and integration activities to asylum seekers and refugees in its 40 reception facilities throughout the country. FTDA provides legal aid to migrants held in detention centers. France terre d'asile runs advocacy activities, shares its legal expertise through its ECRE's membership and is regularly consulted by parliamentary committees.

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The views expressed are purely those of the authors and may not in any circumstances be regarded as stating an **official position of the European Commission.**

PRESENTATION OF THE PROJECT



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Exchange FOR Change

The 1951 Geneva Convention and the 1967 New York Protocol do not specifically include gender-based persecution as one of the reasons for determining refugee status.

Although the United Nations has provided a positive legal framework for the international protection of people persecuted for reasons of gender, the European Union does not present any common criteria.

The European Commission has identified the need to establish such criteria and recommended the Member States to carry out activities and develop common policies in favour of this group, guaranteeing access and protection to the victims of gender-related persecution.

Therefore, the aim of the project **EXCHANGE for CHANGE** is to improve identification, access to procedure and assistance to asylum-seekers and refugees who are victims of gender-related persecution, through the exchange of information and good practices, as well as promoting the training of professionals involved in assisting and advising this group, thus providing an efficient response to their needs.

With this purpose and within the framework of the project EXCHANGE for CHANGE, co-financed by the European Refugee Fund of the European Commission and carried out by the Comisión Española de Ayuda al Refugiado (CEAR), together with the Consiglio Italiano per i Rifugiati (CIR) and France terre d'asile (FTDA), the following activities have been implemented:

- Elaboration of national diagnosis on social and legal intervention practices with regard to gender-related persecutions in each of the participating States.
- Organization of a European Seminar on gender-related persecution held in September 2008.
- Training of the specialised and professional staff involved in the identification and assistance of asylum-seekers victims of gender-related

persecution in each of the States participating in the project.

- Publication of the current Guide.
- Organization of a Final Seminar to introduce this Guide and to submit conclusions and recommendations of the project in each of the participating States.

PART I

THE DEFINITION OF REFUGEE

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1. THE DEFINITION OF REFUGEE

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1. THE DEFINITION OF REFUGEE

1.1 The definition of refugee

The definition of refugee according to Article 1.2.A of the Convention **Relating to the Status of Refugees** of 28 July 1951, also known as the **Geneva Convention** and the **Protocol on the Status of Refugees** of 31 January 1967, known as the **New York Protocol**, states that a refugee is:

“The person who, owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of nationality and is unable or, owing to such fear, is unwilling to avail himself or herself of the protection of that country; or who, not having a nationality and being outside of the country of former habitual residence for the same reasons mentioned above, is unable or, owing to such fear, unwilling to return to it”.

This is nearly the same as the definition provided by most European States in their respective legislations, given that it is also enshrined in the **Council Directive 2004/83/EC of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted**, which is known as the **Qualification Directive**.

However, Article 3 of the new Spanish Asylum Law of 30 October 2009¹, which refers to the definition of a refugee, accepts the grounds of gender and sexual orientation as reasons for granting refugee status.

1.2 Refugee “sur place”

Nevertheless, it must be considered that well-founded fears may not necessarily be the reason for having fled the country of origin or residence, but that the reason may arise afterwards. Thus, people can also become refugees due to:

- Events which have taken place in the country during his/her absence, such as the breaking of an armed conflict, a coup or the banning of a particular group or political party in a certain country.
- Events that have taken place after having left the country, e.g. activities in which the applicant has been engaged, especially if they are the expression and continuation of convictions or orientations held in the country of origin.

THE INTERPRETATION OF THE DEFINITION

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2. THE INTERPRETATION OF THE DEFINITION.

According to the definition above, the main elements to be taken into account are:

2.1 Persecution

The Geneva Convention does not provide a definition for persecution; therefore, analysis of its existence depends on the standards of respect for human rights in the different States, which determine whether the act suffered, or feared by the applicant, seriously violates his/her rights.

Nevertheless, the European Union defines some of the acts that could result in persecution. Thus, according to the Qualification Directive, these acts can take the form of:

- a.** Acts of physical or mental violence, including acts of sexual violence (e.g. rape and sexual abuse).
- b.** Legal, administrative, police and/or judicial measures which are in themselves discriminatory (such as laws recognizing different rights for people depending on their gender, sexual orientation, ethnic origin, religious confession or political opinions), or which are implemented in a discriminatory manner (e.g. depriving the person of rights such as access to education, employment or health services which would have ill effects on the person).
- c.** Disproportionate or discriminatory prosecution or punishment (as could occur in some countries for reasons of sexual orientation or gender identity).
- d.** Denial of judicial redress resulting in a disproportionate or discriminatory punishment.
- e.** Prosecution or punishment for refusal to perform military service in a conflict, where that service would include crimes or acts falling under the exclusion clauses.
- f.** Acts of a gender-specific or child-specific nature (e.g. trafficking for sexual exploitation and sexual slavery).

A gender perspective: Although these acts, which can serve as grounds for the recognition of persecution, are shared by men and women, some of them are committed almost exclusively or, at least, more frequently, against women. This is the case of, for instance, acts of sexual violence, such as rape, or discriminatory practices, legislation or policies in a particular State that place women in a position of clear inequality in relation to men.

Nonetheless, we should not consider every act of this kind to be an act of persecution each time it occurs. According to the Qualification Directive, these acts must:

- a. Be sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular the rights from which derogation cannot be made, including right to life, prohibition of torture and other inhuman and degrading treatment or punishment, as well as slavery or servitude, and not to be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed.
- b. Be an accumulation of various measures, including violations of human rights, which is sufficiently severe as to affect an individual in a similar manner.

In order to be recognized as a refugee, it is necessary for these acts of persecution to be linked to those outlined in the Geneva Convention and in the Qualification Directive, that is to say, race, religion, nationality, political opinion or membership of a particular social group, as well as internal legislation of each State, for instance, gender and sexual orientation in Spain.

It is also necessary for the persecution to be clearly committed against the person applying for protection. This does not mean that a group of people cannot be subject to persecution, but it is necessary to determine, individually, what grounds exist for the fear of each one of the members of the group².

What is persecution on gender grounds? According to UNHCR's

Guidelines³, it is persecution in which gender represents a relevant consideration in the determination of refugee status.

According to these Guidelines, it is important to emphasize the difference between sex and gender.

Sex simply refers to the biological description of men and women, that is to say, to their physical attributes, whereas **gender** refers to the relationship between men and women, based on identities, status, roles and responsibilities, as they have been built up and defined by society and culture and assigned to one sex or another. Therefore, gender is not static or innate but acquires socially and culturally constructed meaning over time.

2.2 Well-founded fear

The person must be in fear of being persecuted. This condition is one of the elements that may become decisive when determining whether a person meets the requirements to be recognized as a refugee. It is, in particular, because of this fear that the person decides to leave his/her country - or does not return ("sur place") - and seeks protection in another State, thus becoming a refugee.

That fear must be well-founded. The evaluation of whether a person's fear of being persecuted is well-founded must consider the particular circumstances of each case and the situation that exists in his/her country of origin or residence.

To establish whether a fear is well-founded, it is not necessary to prove that the applicant has already been persecuted, but that there is a reasonable and credible possibility of persecution if he/she is forced to go back to his/her country due to his/her particular circumstances and the specific situation in the country of origin.

Therefore, in order to carry out this assessment, both the subjective (the existence of a fear of persecution) and objective elements (that fear must be considered a well-founded fear according to the situation of the country of origin) must concur.



A gender perspective. This subjective element is particularly relevant when considering applications for international protection based on gender grounds, and especially of those filed by women, due to the unequal situation of women in a number of States. This inequality not only refers to their legal or social situation, but also to access to justice and protection from their own authorities. All of this places women in conditions of higher vulnerability and lack of protection which may further justify their fear.

The same occurs on the case of LGBTB applicants (lesbians, gays, transsexuals and bisexuals). In many States, these people are submitted to severe discrimination, which prevents them from applying and enjoying the protection of the authorities of their country of origin.

2.3 Grounds of persecution

In order to be recognized as a refugee, the well-founded fear of persecution must be based on the reasons stated in the Geneva Convention and the Qualification Directive, that is, race, religion, nationality, political opinion or membership of a particular social group, or on the internal legislation of each State. Therefore, it is important to consider that:

- Persecution may arise for one of these reasons or from a combination of two or more of them, and it may be difficult to determine which of them originates the persecution. For example, a woman who opposes imposed dress rules could come under various different headings, such as religion, political opinion, membership of a particular social group or gender.
- It may also be possible that the person in question is not aware of the origin or the reasons for the feared persecution; in this case, the person assessing the application only has to explain all relevant facts and/or the persecution that have taken place, in order to decide whether or not the facts may have been based on one of the reasons stated for recognition of the status of refugee.
- The person applying for international protection does not have to belong to a particular group or necessarily hold the racial, religious, national, social or political characteristic that causes the persecution. The important point is that this characteristic is attributed to the ap-

plicant by the actor of persecution.

Interpretation of these reasons for persecution

The Geneva Convention does not include a definition for race, religion, nationality, political opinion or membership of a particular social group. The Qualification Directive enshrines an interpretation of these reasons based on UNHCR's Handbook on Procedures and Criteria for Determining Refugee Status, UNHCR's Guidelines and doctrine and case law from the different States.

a. Race. The concept of race shall include considerations of colour, descent, or membership of a particular ethnic group.

A gender perspective. Persecution for reasons of race may be expressed in different ways against men and women. Whereas it is common for men to be tortured, incarcerated or killed, women are frequently raped so as to get them pregnant. Otherwise they are forcibly sterilized in order to wipe out that particular race.

b. Religion. Several international mechanisms such as the Universal Declaration of Human Rights and, at European level, the European Convention on Human Rights, among others, claim the right of every person to freedom of thought, conscience and religion.

According to the Qualification Directive, this ground shall include the holding of theistic and atheistic beliefs, the participation in, or abstention from, formal worship in private or in public, either alone or in community with others, other religious acts or expressions of view, or forms of personal or communal conduct based on or mandated by any religious belief.



A gender perspective. It frequently occurs that, if a religion assigns particular roles or behavioural codes to women and men, those who do not fulfil them may have a well-founded fear of being persecuted. Such is the case of dress codes or behavioural rules imposed in certain States which are usually founded on religious norms.

c. Nationality. The concept of nationality shall not be confined to citizenship or lack thereof but shall include membership of a group determined by its cultural, ethnic, or linguistic identity, common geographical or political origins or its relationship with the population of another State.

A gender perspective. It is frequent for this kind of persecution to take different forms in the case of men and women. When directed at women, it usually manifests itself in acts of sexual violence, since its purpose is the elimination of that particular national group.

d. Political opinion. The concept of political opinion shall include the holding of an opinion, thought or belief on a matter related to the potential actors of persecution and to their policies or methods, whether or not that opinion, thought or belief has been acted upon by the applicant.

A gender perspective. It is common to interpret this ground from a purely male perspective. For this reason, it is important to make the following considerations:

- It is frequent to attribute to women political opinions that are actually held by male members of her family, which, in many States, often results in persecution against political opponents that is extended to other family members, particularly women.
- The activities that women can, or are forced to carry out in certain countries, may be different to those carried out by men. One example could be the assistance given to certain sectors of the population or the contribution made, on either a voluntary or compulsory basis, to different armed groups by taking care of the injured or supporting the logistical arrangements at their camps.



- Opposing laws or practices that are persecutory or, at least, discriminatory for certain sectors of the society, such as for women or the LGTB community, may also be considered to be an expression of a political opinion.

e. Membership of a particular social group. A group shall be considered to form a particular social group when:

- Members of that group share an innate characteristic or a common background that cannot be changed, or when they share a characteristic or belief that is so fundamental to the identity or conscience that a person should not be forced to renounce it, and
- That group has a distinct identity within the country in question, because it is perceived as being different by the surrounding society;

Normally, persecution against the group will take place because it is considered a threat to those in power or to government policies. Examples of social group can include family or certain professional groups such as teaching staff, journalists or human rights defenders, among others.

A gender perspective. In those countries in which gender-based persecution is not specifically stated as one of the grounds that may result in the granting of refugee status, depending on the circumstances in the country of origin of the person, a group based on a common characteristic of gender, also including sexual orientation and/or gender identity, might be included under this concept of a particular social group.



2.4 Persecution and gender. Main causes and forms of gender-related persecution

Although, as has already been mentioned, gender is not one of the grounds established either in the Geneva Convention or in the Qualification Directive for granting refugee status, it has been included in the legislation or jurisprudence of different States (such as Spain) as being a valid reason for membership of a particular social group.

Gender-based persecution exists when the damage caused or the violations of the rights of a person are related to the role assigned to him/her due to his/her belonging to a particular gender or due to his/her sexual orientation or gender identity.

Gender-related persecution includes:

a. Gender-based persecution. The grounds of the persecution lie in the gender role attributed to a person in a particular context. In this case, persecution would not exist if the person did not belong to this particular gender (such as women in Afghanistan).

b. Gender-specific persecution and punishment because of gender. It frequently happens that mechanisms used to persecute women are different to those used to persecute men; that is to say, the type of punishment relies on the gender of the person (for instance, to persecute men physical violence is often used such as beatings, whereas with women it is more common to perform acts of sexual violence such as rape). There are forms of persecution that are more frequent, or only used, against women that can be considered torture or cruel, inhuman or degrading treatment and, therefore, equivalent to persecution. In these cases, such as violence within the family, forcible abortion or sterilization and female genital mutilation, women may be granted the recognition of refugee status.

Main causes and forms of gender-related persecution. The main causes and forms of gender-related persecution include, but are not limited to, the following:

TRADITIONAL, CULTURAL AND RELIGIOUS PRACTICES,
such as:

- Honour crimes
- Dowry
- Early and/or forced marriage
- Female genital mutilation (FGM)
- Repudiation
- Rites of widowhood
- Transgression of codes: behaviour, dressing...

VIOLATION OF SEXUAL AND REPRODUCTIVE RIGHTS,
such as:

- Abortion
- Forced abortion
- Forced sterilization
- Early and/or forced marriage
- Female genital mutilation
- Forced family planning policies
- Preference for sons: Female infanticide and foeticide
- Virginity testing

VIOLENCE WITHIN THE FAMILY

TRAFFICKING FOR SEXUAL EXPLOITATION

SEXUAL ORIENTATION AND GENDER IDENTITY

Among all these causes and forms of persecution, the most frequent and significant when it comes to applying international protection relate to female genital mutilation, trafficking for sexual exploitation, early and/or forced marriage, violence within the family, honour related crimes, sexual orientation and gender identity.



a. Female Genital Mutilation

Women applying for international protection on the grounds of having been compelled to undergo, or being afraid of being subjected, to female genital mutilation (FGM) can qualify for refugee status under the Geneva Convention and the Qualification Directive. This protection can also be extended to her father and mother if they fear persecution for refusing to perform FGM on their daughter.

Definition. According to the World Health Organization, “*Female genital mutilation comprises all procedures involving partial or total removal of the external female genitalia, or other injury to the female genital organs, carried out for traditional, cultural or religious reasons and not for medical reasons*”.

Female Genital Mutilation is classified into four **types**:

Type I: *Clitoridectomy*, partial or total removal of the clitoris and/or the prepuce.

Type II. *Excision*, partial or total removal of the clitoris and the labia minora, with or without excision of the labia majora.

Type III. *Infibulation*, narrowing of the vaginal orifice with creation of a covering seal by cutting and appositioning the labia minora and/or the labia majora, with or without excision of the clitoris.

Type IV. All other harmful procedures to the female genitalia for non-medical purposes, for example, pricking, piercing, incising, scraping and cauterization.

Since when and where is it performed? It is difficult to determine the origin of this practice. It seems to have originated from ancestral tribal practices, although it is also placed in Southern Egypt 2000 years ago. Nevertheless, in many countries this practice only began in the twentieth century. FGM is often considered a Muslim practice and, although it is carried out in some Muslim countries, there are many other Muslim countries that do not practice it. There are also other non-Muslim countries in which it is carried out. Nowadays, it is enforced in about 40 countries where it is performed on different population groups professing the Muslim religion (Senegal, Gambia, Egypt, Sudan and Somalia), Christian religion (Egyptian Copts, Ethiopian and Eritrean Orthodox) and Jewish

faith (Egyptian Falashas).

When is it performed? These practices are usually performed on girls between 4 and 12 years old, as a ritual act that represents the transition from childhood to adulthood. In certain groups it is performed a few days after birth, in others before marriage and in some others, after the first pregnancy.

Causes. There are all kind of causes regarding this practice, among them:

- Traditional, social and cultural factors, and religious beliefs.
- Health, hygiene and, even, aesthetics.
- “Protection”, such as increased opportunities to get married, preservation of virginity, prevention of promiscuity and the control of women’s sexuality.

Consequences. All forms of FGM are considered harmful for the integrity and health of girls and women, but their effects or consequences will be more severe depending on the type of FGM practiced. In any case, all those women who are subjected to this practice are going to have physical consequences in the short, medium or long term, such as extreme pain and/or bleeding, infections, HIV, damage to nearby organs, fistulae, urinary or anal incontinence, complications during pregnancy and childbirth or infertility.

Consequences are not only physical but also psychological.

The most common ones include: anxiety, depression and eating, sleeping, behavioural and psychosomatic disorders.

Can refugee status be granted due to female genital mutilation?

Female genital mutilation must be considered a form of gender-related violence that inflicts severe harm that is both mental and physical, and amounts to persecution. According to the UNHCR Guidelines relating to female genital mutilation⁴, girls or women who have been compelled to undergo FGM, or who are likely to be subjected to FGM, can qualify for refugee

status. In this respect, since the early 1990's, an increasing number of States have recognized this possibility both at administrative and legal levels. Therefore, it is important to consider the following points:

If female genital mutilation has not been performed. To force a woman or a girl to return to a country where she would be subjected to female genital mutilation could be a violation by the State of its obligations regarding the International Human Rights Law.

If it has already been performed. It is often considered that, if a person has already suffered FGM, her fear is not a well-founded one because "she cannot suffer it again". However, this is not always true. Depending on the individual circumstances of her case and the practices of her community, the person may fear being subjected to another form of FGM and/or suffering particularly serious consequences of the FGM she has already undergone, such as opening and subsequent stitching after each childbirth. It may also be the case that physical and psychological effects make the idea of her returning to the country of origin intolerable.

"Sur place". It can also happen that, despite having lived for years outside their country of origin, the birth of a daughter may give rise to a claim of asylum ("sur place") when her parents oppose the practice of female genital mutilation and fear being persecuted for that reason.

Nonetheless, to be able to assess the existence of a risk of persecution and, therefore, to decide whether the fear of the claimant (or her parents) is well-founded, information about the country of origin must be studied, especially the information relating to the customs, traditions and rites of the ethnic and/or religious group of the applicant, as well as the existing legislation relating to FGM and its practical application. It can happen that, in certain States, laws have been enacted against FGM but, in fact, State authorities continue to tolerate it because they are unwilling or unable to protect women and girls.

b. Trafficking in persons for sexual exploitation

Trafficking in persons is a gross violation of human rights and can even be considered as the modern form of slavery. For this reason, and regardless of the legal provisions established in each State in relation to victims of trafficking, some of them could be recognized as refugees.

Definition. The 2000 Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, supplementing the 2000 United Nations Convention against Transnational Organized Crime, provides an international definition of trafficking in persons in its Article 3:

Trafficking in persons “shall mean 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”.

This definition contains three essential **elements**:

- The **act**: recruitment, transportation, transfer, harbouring or receipt of persons.
- The **means**: threat or use of force or other forms of coercion, fraud, deception, abuse of power; vulnerability, payments or benefits of a person having control over the victim.
- The **purpose**: exploitation of the victim.

Difference between trafficking in human beings and smuggling of migrants

It is necessary to distinguish between these two concepts, which are often considered to be very similar.

The 2000 Protocol against the Smuggling of Migrants by Land, Sea and Air, complementing the 2000 United Nations Convention against Transnational Organized Crime, stated the following in Article 3 “**Smuggling of migrants** shall mean the procurement, in order to obtain, directly or indirectly, a financial or other material benefit, of the illegal entry of a person into a State Party of which the person is not a national or a permanent resident”.

Therefore, smuggling of migrants refers only to illegal entry, so that the person, upon entering the destination country, begins his/her life in that country in an independent way, without being connected to the traffickers. This is not so in the case of victims of human trafficking, who, regardless of whether they entered the country legally or illegally, are bound to the traffickers after entry, with whom they “have incurred a debt” that has to be paid back through working in conditions of exploitation.

Causes. Trafficking is not the result of a single factor, but a series of inter-related circumstances, such as the following:

- Discrimination on grounds of gender, which has negatively affected the situation of women in areas such as education, employment and health.
- Traditional, religious and cultural practices.
- Situations of war and/or serious conflict.
- Economic factors and feminization of poverty and migration.
- Immigration Laws which, being increasingly restrictive, complicate access to the destination countries by legal means.
- Laws of the market, supply and demand for certain “services”.
- Inappropriate Criminal Law.

Consequences. Trafficking has important consequences for the victims. Some of them are:

Health: traumatic injuries due to beatings, sexually transmitted diseases, unwanted pregnancies, chronic fatigue.

Psychological: depression, insomnia, decreased or loss of self-sufficiency or self-esteem, posttraumatic stress disorder.

Social isolation, difficulties in interpersonal relationships, lack of skills and social exclusion, all of which are aggravated by the fact that they find themselves in a country with a different language and customs.

Effects are more severe in girls and young women since, in addition to the above, their physical, emotional, cognitive and social development may be severely impaired.

It is important to note that these consequences, in addition to the victim, may be suffered by other members of the family apart from the victim, whose rights are equally violated. For this reason it is very common for victims of trafficking to remain in situations of exploitation in order to protect their families, especially their sons and daughters. There are documented cases of children being abducted by the traffickers in order to keep the victim threatened and ensure that she does not flee before “paying” the debt.

Can trafficking in persons result in recognition of the victims' refugee status?

Trafficking in persons may be considered a crime against humanity and, in armed conflict, a war crime. Trafficking is not limited to sexual exploitation, especially of women and girls. It also includes forced labour, slavery or practices similar to slavery, servitude or the removal of organs. The situation that we shall consider refers to trafficking for the purpose of sexual exploitation, given that this is the form that we encounter most frequently in the international protection claims.

According to UNHCR Guidelines on victims of trafficking and persons at risk of being trafficked, an application for protection presented by a victim, or potential victim, of trafficking for purposes of sexual exploitation can arise in different circumstances:

- The victim may have been trafficked within the country of origin, may have escaped from his/her traffickers and have fled abroad and sought protection.
- The victim may have been trafficked abroad, may have escaped her or his traffickers and may seek the protection of the State where he/she now is.
- The person may not have been trafficked but may fear becoming a victim of trafficking and may have fled abroad in search of international protection.
- In any of these cases, what will determine whether the applicant's fear of persecution is founded depends on the



particular circumstances of the person applying for international protection. These would include:

- If the harm suffered and/or harm feared would amount to persecution.
- The person may suffer reprisals from traffickers and/or the State, ostracism or discrimination from their family or community, or be re-trafficked. We must also assess the risk of persecution or reprisal that family members of the victims may suffer.
- While considering that persecution usually comes from non-State actors, the State authorities must have the will and the ability to protect the victim. When a State fails to take reasonable measures to prevent trafficking and to provide effective protection and assistance to victims, it becomes, by default, responsible. It is, therefore, likely that the fear of the person is well founded.

c. Honour crimes

These include all crimes committed in the name of honour. They find justification in the behaviour of the woman, which is perceived or considered to be immoral. It is believed that, since the woman has brought shame to the family and/or the community, she must be punished in order to restore honour. This happens irrespective of whether the woman has committed the act involuntarily, been forced to commit the act or whether the offence even really exists. Mere gossip can sometimes be enough to bring dishonour to the family and, therefore, justify a killing or punishment.

What are the acts committed by women that can be considered to dishonour or bring shame to the family? Acts of this kind make up a long list. They mostly depend on social and cultural customs of the area and the specific group the woman belongs to. Some of them include the following: maintaining “illicit relationships” (such as pre-marital or extra-marital), having been raped, choosing a spouse and marrying him instead of marrying the man imposed by the family, wishing to divorce from her husband or not fulfilling the expectations of the male family members.

How and where are these crimes of honour performed? Among other countries, they are performed in Pakistan, India, Bangladesh, Afghanistan, Iran, Iraq, Syria, Kuwait, Morocco, Egypt, Somalia and Sudan. These practices depend on the countries and, within them, on the different areas, but the most common examples include: stoning, rape, face disfigurement, acid attacks disfigurement, poisoning and killing.

Causes. The main causes and justifications are:

- Traditional, cultural and religious beliefs or customs.
- The situation of women, who are considered to be the property of the males of the family, who are the ones who make their decisions. Women are the incarnation of their honour so that, in some contexts, they must keep their virginity intact, as well as conforming to the kind of behaviour imposed by men. The honour of the family is defined in terms of the submission of women to the men of the family.

Consequences. These can take many forms, such as:

Physical: blows or punches, traumatisms, burns, wounds, disfigurements and, in the most extreme cases, death.

Psychological: fear, depression, suicidal thoughts.

Social: In some cases, the woman is also repudiated by her family, remaining damned to ostracism and/or begging.

Can these acts result in the recognition of refugee status?

These acts represent a gross violation of human rights and States are responsible for their prevention, investigating criminal acts and punishing those who commit them. They must also provide a woman victim of a punishment imposed due to an accusation of having dishonoured her family and/or her community with the necessary protection and support to face the situation or to escape from such persecution. When this does not happen, whether the State is unable to provide such protection to the woman or it does not wish to, the victim can be recognized as a refugee. This lack of protection from the State can be due to:

- a. Being unable to provide the necessary protection.
- b. Being unwilling to carry out its duty to end these traditions and practices and to establish a system to protect its own nationals.
- c. Being unwilling to fulfil its obligation to protect the victims of these acts for reasons of race, religion, nationality,

political opinion or membership of the woman to a particular social group.

Other important matters to be considered:

In certain contexts, it can be understood that these crimes are the result of the woman's refusal to play the gender role imposed on her by society or to abide by certain political, religious, social or cultural norms and, therefore, it can be considered that persecution is caused by political or religious opinions.

It can also be relevant to examine, besides the situation in the country of origin, information regarding legislation and the judicial and procedural system. This is essential with regard to assessing the real opportunities that women have when they come to reporting cases and seeking protection, as well as gaining access to Courts, which in many States is extremely limited for women. It is common for these crimes to remain unpunished, since the States authorities do not do anything to prevent them, investigate cases or punish the perpetrators and, even if they do so, the sentence is always attenuated because the crime has been committed on the grounds of honour.

d. Violence within the family

Until some years ago, violence within the family remained hidden because it was considered a private matter and only in exceptional cases was it subject to prevention measures or penal prosecution. Nonetheless, since 1993 this problem has emerged significantly in terms of regulations surrounding this matter, due to the adoption of the Declaration on the Elimination of Violence against Women by the General Assembly of the United Nations.

Definition. The United Nations Declaration on 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 in private life”*. Domestic violence is the kind that occurs in the family.

The European Council, as part of its Campaign to combat violence against women, including domestic violence, defines it as any action or omission committed within the family by one of the members 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.

Where does it take place? This type of violence is present in all countries and it affects all ages, levels of education, social and economic classes, cultural, ethnic and religious groups. However, depending on the region, certain groups of women are particularly vulnerable, including those involved in armed conflict situations, those belonging to minority or indigenous groups, refugees, disabled, girls and old women.

Causes. This violence can be originated by several factors and these very concur. The main causes are:

- The idea of the family as a private matter, beyond the reach of the State.
- Under-representation of women in the governing classes.
- Economic factors, due to the usual dependency of women on men, which often derives from the discrimination against women in areas as important as education, training and employment.
- Legal aspects, due to the existence of discriminatory legislation against women or discriminatory legal practices.
- Religious norms, traditions and social codes affecting gender roles.

Consequences. The consequences can be both physical and psychological:

- Physical: Wounds and fractures, pain, headache, gynaecological problems, sexually transmitted diseases, unwanted pregnancy, spontaneous abortion and drug dependencies. In more extreme cases, it can produce death or lead to suicide.
- Psychological: Fear, anxiety, depression, low self-esteem, eating disorders, stress.



Can this result in the recognition of refugee status?

Violence within the family represents a gross violation of human rights and States are responsible for prevention and the investigation and punishment of those who practise it. They must also provide women who are victims of this type of violence with the necessary support in order to escape from such situations. When this does not occur, either because the State is unwilling or because it is unable to provide such protection, the woman may be recognized as a refugee. This lack of protection from the State can be due to:

- a. Being unable to provide the necessary protection.
- b. Being unwilling to carry out its obligation to establish a system to protect its own nationals from these type of violence.
- c. Being unwilling to fulfil its obligation to protect the victims of such acts due to reasons of race, religion, nationality, political opinion or the victim's membership of a particular social group.

Other matters to be considered:

In certain countries, it can be understood that violence within the family is the result of the woman's refusal to play the role imposed on her or to abide by the political, religious, social and cultural norms imposed and, therefore, in certain contexts this form of persecution may be considered to be based on political or religious opinions.

In these cases, it can also be relevant to examine, besides the situation in the country of origin, information relating to family legislation, especially in relation to the possibilities of separation, divorce and child custody, all of which would be essential for women to really be able to report the case and seek and receive protection from the State.

Depending on the country of origin, internal relocation may or may not be possible. In order to assess this possibility, it is important to consider aspects such as the victim's ability to travel, to gain access to health and training services, to work and to integrate in a new area. In short, we must consider the possibility of her being able to start a new and dignified life in safe conditions without being stigmatised.

e. Sexual orientation and gender identity

According to the UNHCR Guidance note⁶, an applicant's sexual orienta-

tion can be relevant to a refugee claim where he/she fears persecutory harm on account of his/her actual or perceived sexual orientation, which does not, or is seen not to, conform to prevailing political, cultural or social norms.

Important concepts⁷:

Sexual orientation. Refers to a person's capacity for profound emotional, romantic, affective and sexual attraction to individuals of different gender or the same gender, or more than one gender.

Gender identity. Refers to each person's felt internal and individual experience of gender, which may or may not correspond to the sex assigned at birth. It refers to the feeling of belonging to a particular gender.

Gay and lesbian. Refers to a person whose enduring physical, romantic and emotional attraction is to people of the same sex. Gay refers to men whereas lesbian refers to women.

Bisexual. Refers to a person who is physically, romantically and emotionally attracted to both men and women.

Transgender. Refers to men and women whose gender identity does not align with regard to their assigned sex. It refers to transsexuals and transvestites.

Where are LGTB individuals persecuted? In more than 70 countries, LGTB persons may face punishment or prison and, in at least 7 of them, the death penalty (Iran, Sudan and Saudi Arabia among them). In other countries, sexual orientation other than heterosexuality is considered a mental disease and the person may be confined in a special or psychiatric centre.

Can a LGBT person be recognized as a refugee?

According to the above mentioned UNHCR Guidance note, an applicant's sexual orientation or gender identity can be pertinent if he/she fears being persecuted for this reason.

LGBTB persons can be subject to physical, sexual and/or psy-

chological violence, as well as to discrimination by their authorities, their communities or even by their own families. This is mainly due to:

- The existence of laws that punish these forms of behaviour directly, by prohibiting relationships between people of the same sex, or indirectly, by considering them contrary to public morals. In these cases, it will be considered that persecution exists when these laws impose severe punishments or do not adjust to international human rights regulations. Examples include flagellation or the death penalty.
- Measures and attitudes that hinder the access of LGBTB individuals to protection from the State, which could mean that the State authorities tolerate or allow these serious harms or discriminatory practices, or that the State is unable to grant the person real and effective protection.

Sur place. Nevertheless, LGBTB people who have abandoned their country of origin and revealed their sexual orientation or gender identity after entering the country of asylum could be recognized as refugees if they can demonstrate a well-founded fear of future persecution.

Other factors to consider:

While asylum claims based on sexual orientation or gender identity may also be analyzed in terms of religion or political opinion, it is normal to consider them on the grounds of membership of a particular social group, as stipulated in the Qualification Directive, unless internal laws of the State in question contain specific provisions in this respect, as in the case of Spain.

Sexual orientation is a fundamental part of human identity and it could amount to persecution if the State requires, instigates or permits a person to be forced to change, to renounce or to conceal his/her sexual orientation and gender identity in order to avoid persecution.

A person cannot be expected to renounce to his/her sexual orientation or gender identity or to be discreet. A requirement for discretion would furthermore imply that a person's sexual orientation is confined to a mere sexual act, thereby overlooking a range of different forms of behaviour and everyday activities otherwise affected by that person's sexual orientation or gender identity.

Finally, internal flight alternatives cannot normally be considered applicable in claims relating to sexual orientation and gender identity.

f. Early and forced marriage

Early and forced marriage may cause deep suffering and serious harm to individuals. For this reason, girls and women seeking protection for having been forced or fearing to be forced, to get married may be recognized as refugees according to the provisions of the Geneva Convention and the Qualification Directive.

Early marriage is a form of marriage in which at least one of the partners is a minor.

According to the Convention on the Rights of the Child, a considerable number of States has set the legal minimum age of marriage at 18. This is also the age suggested by the World Health Organization. Nevertheless, in some other countries, the legal minimum age of marriage is set lower.

However, these marriages are usually practiced at ages at which the partners do not have the capacity to consent to the marriage and, therefore, in most cases, they should be considered also forced.

Forced marriage is a form of marriage in which the valid consent of one or both partners is absent. This consent must be free and full.

Where are these marriage performed? Nowadays, early and forced marriages take place in various countries such as India, Bangladesh, Nepal, Afghanistan, Nigeria, Ethiopia, the Democratic Republic of the Congo and Mali.

Causes. The main causes are:

- Social and cultural traditions.
- Economic reasons.
- Protection. In certain societies and cultures these marriages are justified as a way of protecting girls.

Consequences. Early and forced marriages have important effects on individuals at a physical, psychological, intellectual and emotional level.

In girls, these marriages, besides limiting their access to education and employment, will also cause domestic and sexual servitude, violence within the family, unwanted pregnancies and high-risk pregnancies and childbirths.

Can early and/or forced marriage justify the recognition of refugee status?

As we have already pointed out, early and forced marriage may cause deep suffering and serious harms. For this reason, girls and women seeking protection for having been forced, or for fearing to be forced, to get married may be recognized as refugees.

- If the marriage has not been performed. An assessment can be based on the consequences and reprisals that may derive from having escaped without performing the marriage, such as the possibility of being forced to marry, in case of return to the country, being forced to marry, which would be a violation of the victim's rights.
- If the marriage has already taken place. It would be important to assess its consequences on the woman and the impairment of her rights. It is also important to assess whether the woman would be forced to live with her spouse if she has to return to her country, as well as the practical application of laws regarding marriage, divorce, economic aspects of the marriage and children's custody.

Other aspects to consider:

In order to decide whether there is a risk of persecution and the fear of the claimant is well-founded, information about the ethnic and/or religious group to which the person belongs, as well as all available information on the country of origin, must be taken into account. It is important to analyze marriage laws, in particular their practical application, and the access of women to justice. It might happen that, even if a State has enacted marriage laws regarding the minimum legal age for marriage, these might not actually be implemented and marriages may continue to be performed without any sanctions for those who violate the laws. This practice of allowing or tolerating the holding of such marriages should be understood as a clear lack of protection by the authorities. In such cases, the possibility of internal flight should also be assessed.

2. 5 Other elements to be taken into consideration

a. Actors of persecution and actors of protection

Actors of persecution or serious harm. Even though the Geneva Convention does not establish that persecution has to come from the State authorities, practice shows that, for many years in various States, State persecution has been the only kind that might lead to the recognition of refugee status, despite the provision established by UNHCR in paragraph 65 of its Handbook on Procedures “persecution is normally related to action by the authorities of a country, it may also emanate from sectors of the population that do not respect the standards established by the laws of the country”.

This possibility has been directly expressed by the Qualification Directive, which states that the actors of persecution or serious harm could be:

- a. The State, e.g. civil servants and members of the army or security forces.
- b. Parties or organisations controlling the State or a substantial part of its territory.
- c. Non-State agents, e.g. members of the family or the community.

Actors of protection. Although the Geneva Convention does not refer to this subject at all, the Qualification Directive mentions the fact that protection can be provided by:

- a. The State.
- b. Parties or organizations including international organizations, controlling the State or a considerable part of its territory.

On this basis, to recognize a person as a refugee it is necessary for the State or those parties or organizations, including international organizations, to be unable or unwilling to provide him/her protection.

It is considered that these agents provide protection when



they take reasonable steps to prevent persecution or the suffering of serious harm; for example, by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm. However, in order to determine whether this protection exists, the applicant must have access to such protection and it should be effective.

b. Internal flight or relocation alternative⁸

To determine whether a person is in need of international protection it is important to assess the possibility of internal flight or a relocation alternative.

The Qualification Directive establishes that member States may determine that an applicant is not in need of international protection if, in a part of the country of origin, there is no well-founded fear of being persecuted or no real risk of suffering serious harm and the applicant can reasonably be expected to stay in that part of the country. In order to determine whether this possibility of internal re-location exists, the general circumstances in that part of the country must be considered, as well as the personal circumstances of the asylum seeker, not only at the time of leaving his/her country of origin, but also at the time of resolution of the claim.

A gender perspective. When assessing an international protection claim, especially when the person fears being persecuted for gender reasons, it is essential to consider three important elements: actors of persecution, agents of protection and the possibility of internal flight.

Authorities in different States often use these arguments to refuse international protection applications due to the fact that gender-related persecution frequently takes place within the scope of the family and/or community, so they consider that protection must be provided by his/her authorities, who have the duty to protect their citizens. In cases where this protection is not provided, it is important to report its absence or highlight the insufficient nature of the measures adopted. However, this is not always possible since, in most cases, applicants are women who tend to have limited access to the authorities and courts or who are in a clear situation of inequality and discrimination with regard to men.



A similar case relates to many States' application of the possibility of internal flight. States frequently consider that the alleged persecution will not take place in a particular area of the country, obviating other circumstances and conditions that the person would have to cope with if he/she had to relocate, such as the possibilities of making a living or integrating into a new community or group.

In this respect, in order to assess whether a person really has the possibility to move and live in a different part of the country, it is important to consider all the personal circumstances, as well as the general situation of the woman or the LGTB community in the country of origin or residence, not to mention other political, religious, social, cultural or economic factors that may be relevant.



THE SUBSIDIARY PROTECTION

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THE SUBSIDIARY PROTECTION

3. THE SUBSIDIARY PROTECTION

Subsidiary protection status is not included in the Geneva Convention, but it arises from the increasingly widespread practice of States to grant “types of protection”, other than refugee status to the persons whose life or integrity could be at risk if returned to their country of origin or residence, but who do not qualify as refugees under that Convention.

So the Qualification Directive states that a person eligible for subsidiary protection is:

“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, of former habitual residence, would face a real risk of suffering serious harm, and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country”.

The serious harm that a person would face if returned to his/her country may consist of:

- a. Death penalty or execution.
- b. Torture or inhuman or degrading treatment or punishment of an applicant in the country of origin.
- c. Serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict.

A number of States have included subsidiary protection in their national legislation and, as we shall see later, it is granted to people applying for asylum on gender-based grounds.



THE EXCLUSION CLAUSES

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4. THE EXCLUSION CLAUSES

However, not all people who qualify for refugee status or are eligible for subsidiary protection are worthy of the protection that such status implies. Both the Geneva Convention (Articles 1.2.F and 33.3) and the Qualification Directive (Article 12), have established certain provisions in order to exclude a person from being a refugee.

A person is excluded where there are serious reasons for considering that:

- a.** He/she has committed a crime against peace, a war crime, or a crime against humanity.
- b.** He/she has committed a serious non-political crime outside the country of asylum prior to his/her admission as a refugee.
- c.** He/she has been guilty of acts contrary to the purposes and principles of the United Nations.
- d.** He/she, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that Member State, or there are reasonable grounds for regarding him/her as a danger to the security of the Member State in which he/she is present.

A person will also be excluded, based on the grounds that there is no need for international protection when:

- e.** He/she is already receiving protection or assistance from agencies of the United Nations other than the United Nations High Commissioner for Refugees.
- f.** He/she is recognized by the competent authorities of the country in which he/she has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country; or rights and obligations equivalent to those.

THE GRANTING OF INTERNATIONAL PROTECTION AND THE PRINCIPLE OF NON REFOULEMENT

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5. THE GRANTING OF INTERNATIONAL PROTECTION AND THE PRINCIPLE OF NON-REFOULEMENT

Refugee and subsidiary protection status are granted by the State to persons who qualify as refugees or are eligible for subsidiary protection.

The principle of non-refoulement

The main effect is the recognition of the “principle of non-refoulement”, as set out in the Geneva Convention (Articles 33 and 34) and in the Qualification Directive (Article 21). According to this principle, no State shall expel or return a refugee to a country where his/her life or freedom would be threatened because of race, religion, nationality, membership of a particular social group or political opinions.

This principle may be revoked when there are reasonable grounds for considering the person a danger to the security of the country or, having been convicted of a particularly serious crime, he/she constitutes a danger to the community of that country.

Other important effects of this recognition are:

- The granting and issuing of a residence permit whose validity depends on the protection granted and on the State granting it. Permits shall be renewable unless compelling reasons of national security or public order.
- The issuing of a travel document, unless compelling reasons of national security or public order.
- Provision of access to rights such as: health and social care, education, employment, housing and any integration programme or instrument that may exist in the State, as well as assistance in case of voluntary repatriation.

IDENTIFICATION AND INTERVENTION WITH GENDER- BASED CLAIMANTS OF INTERNATIONAL PROTECTION

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6. IDENTIFICATION AND INTERVENTION WITH GENDER-BASED CLAIMANTS OF INTERNATIONAL PROTECTION

6.1 Identification and access to the procedure

- a. **Difficulties linked to the departure of the country of origin or residence and the access to the country where international protection is sought**
- b. **Difficulties of identification and access to the procedure**
- c. **Good practices of identification**

6.2 Submission of the application

6.3 Main aspects to consider in the intervention with applicants of international protection for gender-related persecutions

6.4 Main aspects to consider in assessing the need of international protection

6. IDENTIFICATION AND INTERVENTION WITH GENDER-BASED CLAIMANTS OF INTERNATIONAL PROTECTION

To correctly identify people persecuted for gender reasons and adequately intervene with them, it is important to consider the situations and circumstances which can affect them from the time they are forced to flee their country of origin or residence until their claims for international protection are resolved. Some of these circumstances are:

6.1 Identification and access to the procedure

a. Difficulties linked to the departure of the country of origin or residence and the access to the country where international protection is sought:

- In many States women cannot obtain or have serious problems when trying to obtain their documents or travel documents if they are not accompanied by their husband or a male family member.
- Due to increasingly strict migration policies in developed countries, it can be quite difficult, if not impossible, to comply with all the procedures to enter these countries established by the law. This results in an increased involvement of gangs that are implicated in people smuggling and trafficking.
- The effects of travelling and the events surrounding it. If fleeing their country and travelling is difficult for everyone, even going on for years - this can be even worse for women or LGTB community members who often have to face serious violations of their rights such as rape or sexual abuse by the authorities of transit countries or members of the networks or mafias transporting them.

b. Difficulties of identification and access to the procedure:

- A lack of knowledge about the possibility of applying for asylum and, above all, that gender-based persecution may lead to international protection.



- An internalization of the situation and difficulties in expressing the abuse and discrimination of which they are victims.
- Fear that the family or the community find out what happened.
- When people come through networks or mafias, it is common that they get instructed over what to say so it becomes difficult for them to understand the importance of telling the truth.
- A lack of training and sensitivity on the part of the different agents involved in the reception and assistance of immigrants.

c. Good practices of identification:

- To start, explanations must be given about what international protection is and specify that the procedure is confidential. We cannot always expect the person to say that he/she wants to apply for asylum or international protection because they may not even know this possibility exists or that what happened to them or they fear could happen may justify a claim for this protection.
- People should be interviewed individually and separately, especially women, to find out the reason why they left their country and/or the possible difficulties they have had.
- Interviews will be conducted according to the indications given in the section relating to interviews to applicants seeking protection on gender-related grounds. Regardless of this, the following standards must be respected:
 - The interview should preferably be conducted by professionals of the same sex.
 - An atmosphere of trust must be created, and other relevant factors such as fear, trauma, internalization of the situations and shame must be considered.
 - Using a language understandable to the person applying for protection and keeping a perspective of gender and considering the different cultural, social and/or religious realities is necessary.
- International protection may be needed for those who flee their country of origin due to gender-related persecution, and also for those who,

during the journey or migration process had their rights violated if there are substantial reasons to believe that their lives and/or integrity could be endangered in the event of having to return to their country of origin or residence.

6.2 Submission of the application

The application for international protection is usually formalized by personal appearance before the competent administrative body.

At this appearance, the person must provide the data requested which in general will be related to:

- Personal identity and family circumstances.
- Travel route followed until arrival to the country where the application for international protection is requested.
- Presence of any of the grounds specified in the applicable legislation for the recognition of a person as a refugee, that is: ethnic or national group he/she belongs to, religion professed, membership to a particular group or whether he/she or a family member belongs to a political group.
- A clear, detailed and precise statement about what happened and about the facts on which his/her fear of persecution is based.

They should also provide any documentation they might have and which may include:

- Identity card or travel documents indicating identity, age and nationality.
- Any other document proving the facts exposed in the application for international protection such as information about the place of residence, involvement in a particular religion, political party or group, any detentions or prosecutions, police reports, medical or psychological statements or photographs.



6.3 Main aspects to consider in the intervention with applicants of international protection for gender-related persecutions

The greatest difficulties we will encounter in handling such applications are:

- That the person provides the necessary information and for this to be sufficient to make an accurate assessment of the exact needs for protection.
- The lack of evidence.
- Assessing the credibility of these allegations.

Therefore, besides material for identification, it is also important to consider:

- a. That the person understands the relevance of the procedure because it is not frequent for a woman, due to the role assigned to her in her country and culture, to carry out any type of proceedings or formalities.
- b. The main element of an application is the person's statement. This is why it is important that it be as detailed as possible and that it clearly reflects not only the problems he/she had in his/her country of origin or residence, but also the problems the person would face if he/she had to return to it. Therefore, it is important:
 - To earn the trust of the person, which is difficult to achieve in just one interview.
 - To bear in mind that some people will be reluctant to explain how they were persecuted or could be persecuted because of the shame they feel for what has happened to them. The trauma or psychological after-effects may compound this. Also, they may fear rejection and/or reprisals from the family or community.
 - To consider that the person may not know or be aware of what information is accurate and necessary. In this respect, it is important to note that by internalizing certain situations, the facts are not always given the importance they should have. This would be the case, for instance, of sexual abuse during detention, violence exerted by a partner or discrimination or repression suffered for

years by the LGTB community.

- To consider that the person may not know or may not have all the information, as is often the case, for instance, when the persecution derives from the political activities of a family member.
 - To note that in relation to the LGTB community the person may be reluctant to talk about intimate matters when his/her sexual orientation or gender identity may be embarrassing or a taboo in their own country.
- c.** It is often difficult to prove the events that took place or the fear of persecution on which the claim for international protection is grounded. However, the lack of proof for some of these facts must not be a reason to reject the claim.

For a person to be recognized as a refugee, it is enough to establish that there is a reasonable possibility of certainty. It is not necessary to demonstrate each allegation made by the claimant. This makes it essential, from the very beginning, to choose the pieces of evidence that may lead to the conclusion that the person's fears persecution for any of the reasons set out in the Geneva Convention or in the internal legislation of each State, is founded, and to provide an adequate explanation for the lack of evidence and any other circumstances that may cause that the protection claim be denied.

- d.** In certain situations or circumstances, it is possible to prove the veracity of the facts by providing reports from the different professionals involved with the person such as doctors, psychologists, social workers or educators. For this reason, it is convenient to conduct an interdisciplinary intervention in this type of applications.
- e.** Moreover, in order to assess the credibility of the allegations made, it is important to take into consideration the information about the country of origin or residence. In gender-based applications, this information, besides the general situation of the country, must include:
- Social, economic and political rights of women and their representation in political circles.



- Legislation, traditions and social and cultural practices of the different ethnic, national or religious groups of the country and the existence of legislation ruling these practises, particularly in relation to their penalization or not and to the possibility of receiving real and effective assistance and protection from the authorities.
 - The position of women before the law and the courts, including religious courts and the real possibility of reporting and gaining access to these courts.
 - The ability of women to obtain identity and/or travel documents and to travel both within the country of origin or residence or outside it.
 - Major forms of violence against women and their frequency.
 - Specific situation of the LGTB community and the legislation related to sexual orientation and gender identity and its implementation thereof.
 - Finally, the possible reception and protection of the person upon return to the country of origin or residence.
- f. **Credibility.** Assessing the general credibility of a protection claim should include elements such as:
- i. Consistency and reasonability of the allegations. Note that the fact of having some false statement or allegation does not necessarily mean that the whole account is false or vice versa.
 - ii. The particular circumstances of the person.
 - iii. The evidence (as a whole) filed to support the statements.
 - iv. The situation of the country of origin or residence.

According to this, we can say that, credibility is established when the person has filed a consistent and credible application that does not contradict the information available in his/her country of origin or residence and that, therefore, seems credible as a whole.

- g. Finally, and according to the Qualification Directive, when the applicant's statements have aspects that are not supported by documents or other evidence they will be considered valid if the applicant:

- i. Has made a real effort to substantiate his/her request.
- ii. Has submitted all the information available and has given a satisfactory explanation for the lack of other elements.
- iii. Statements are coherent and plausible and do not contradict the information available.
- iv. Has applied for international protection at the earliest possible time.
- v. His/her general credibility has been proved.

6.4 Main aspects to consider in assessing the need of international protection

All applications for international protection must be assessed individually, taking into account all the circumstances, particularly:

- a. The seriousness of the facts presented by the person to determine whether they can result in persecution. In this sense, it is important to note that, the fact that the person applying for protection has been a victim of persecution or suffered severe damage, or has received direct threats of such persecution or such damage, would be an indication that the fears of being persecuted or of being at real risk of serious harm, are well-founded, unless there are reasonable grounds to consider that such persecution or harm will not be repeated.
- b. If the persecution is due to any of the reasons included in the Geneva Convention or in the internal legislation of each State. It is important to remember that the person fearing persecution does not necessarily belong to a particular ethnic, national, religious, political or social group but the actor of persecution imputes him/her that membership or those features, and this is the reason for persecution.
- c. The person fears persecution and this fear is well-founded.
- d. The actor of persecution, in order to evaluate the possibility of receiving protection in the country of origin or residence.

- e. The ability to request and receive a real and effective protection.
- f. The possibility of fleeing within the country, that is, the possibility for the person to go and live in another part of the country of origin or residence. If it were necessary assessing whether in this area the person is not going to suffer from ostracism and he/she will be able to lead a dignified life.
- g. The risk of an eventual return to the country of origin or residence.

The concurrence of these circumstances will determine the applicant's "need of the applicant for international protection.

PART II

VULNERABILITY AND TRAUMA

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7. VULNERABILITY AND TRAUMA

7.1 Refugees' psychic processes

- a. **Melancholic disorientation**
- b. **Crisis and Re-definition of Identity**

7.2 Traumatic experiences and consequences on the psychic, emotional and relational bindings

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7.4 Specificity of the gender violence

- a. **Concept of gender**
- b. **Gender-based violence and persecution**
- c. **Specific consequences of gender-based violence**

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7.1 Refugees' psychic processes

Refugees are people, women and men, who have experienced, during their flee from their home country and the trip to the country of refuge, violent and traumatic events; some of these events are common to women and men, some others are specifically differentiated and can destroy the gender identity in the core. Refugees bear the marks of these traumatic events in their body, mind and soul.

Before we focus on the consequences of violence and extreme traumas and analyze their specific features, it is important to describe in a few words the psychic processes of the experiences refugees had; e.g. the experiences of people who leave their native country and seek asylum somewhere else. The psychic stability is thrown into a deep crisis when a person loses all he/she has in such a short time. The losses vary from one person to another, but they all lose something: family, home, country, friends, language, and identity.

The psychic processes connected to such an event can be schematised as follows:

- Melancholic disorientation: it is due to multiple, contemporary and ineluctable losses, first of all the loss of 'home', representing both a physical and emotional place.
- Crisis and identity re-definition: it is due to forced, and often sudden, abandonment of what constituted up to that moment the individual identity.

a. Melancholic disorientation

The concept of **Melancholic disorientation** has been presented by Renos K. Papadopoulos¹⁰ in order to describe the specific problems of female and male refugees.

Although refugees are not a homogeneous category with similar characteristics, they all share a common loss: the "home-



loss". The home-loss represents both the loss of the house itself and the loss of the symbolic function it had in organizing and keeping together the psychic experiences and relationships contributing to the development of the personal identity. "To feel like home" means to be safe and this feeling involves also a collective level. "To go back home" means to go back to the country of origin among known people, not necessarily to the physical place (house).

According to Papadopoulos the home-loss represents a primary loss which refugees are only partially aware of. They perceive only the pragmatic aspects of this event but the loss in terms of the psychic role of the house is impalpable. This impalpable function of the house-loss triggers disorientation characterized by a deep suffering and a distressing homesickness defined by Papadopoulos as "nostalgic disorientation". "It generates a primary and crucial vacuum overwhelming refugees imperceptibly beyond all other losses they consciously face and mourn for"¹¹.

b. Crisis and Re-definition of Identity

The building up of identity is enhanced by lifelong integration and elaboration of identifications and differentiations operated by the individual. The Identity process is developed through a continuous dialogue between the the Self and the Other (other than oneself), where the link to the Other paves the way for the feeling of identity. Nevertheless the link between Other and Self shares several aspects with the relationship "individual-collectivity", positioning individual identity within the community the person belongs to.

Amin Malouf writes: "thanks to my single senses of belonging, perceived one by one, I have a kinship relationship with a great number of human beings; thanks to the same criteria, as a whole, I have my own identity which is not confused with any other's"¹².

The feeling of identity grows on the basis of the relationship with the other: "be yourself" lives together with "be similar" and "be different" according to the aspects under consideration. The "be yourself" feeling stands up to time-flow and also to the changes deriving from it. Human beings have always tried to understand how to define identity also in the light of the inevitable change produced by time. John Locke resorted to the function of memory: I am the same person as I was 20 years ago since I remember all different states of my identity during the years.

Later on, we will analyze whether the “be yourself” ability, both at individual and collective level, resists also after dramatic and violent events such as the ones usually experienced by asylum seekers.

Let us go in depth into the process which builds up identity following Leon and Rebeca Grinberg¹³, psychoanalysts expert on migration. They state that this process is the result of a continuous interaction process among three bindings of integration: space, time and social life.

- **The binding of space** implies the relationship among all the different parts of the “Self”, including the corporal “Self”. It maintains the cohesion making the relation with external objects possible, furthermore it enhances the differentiation between the “Self” and the “non Self”, namely the <identification> feeling.
- **The binding of time** joins the different representations of the “Self” in the years, establishing among them a continuity and paving the way for the <be yourself> feeling.
- **The binding of social integration** implies the relation between the features of the “Self” and the external objects’, established through introjective and projective identification mechanisms enhancing the feeling of <affiliation>¹⁴.

According to Grinberg, emigration affects these three bindings as a whole creating a problem at the level of identity. The condition of asylum seekers, especially when torture and violence have been experienced, leads to a breach in the identity integration bindings. Traumatic experiences affect all the three bindings that pave the way to the feeling of “being yourself” and represent a fragmentation of the identity feeling.

7.2 Traumatic experiences and consequences on the psychic, emotional and relational bindings

The short description of the psychic processes which are responsible of the refugees’ vulnerability allows us to better understand the bad consequences on people of those tortures

and/or violences linked to identity. They violate the integrity of the body, alter its limits, attack the feeling of identity in a specific way according to gender, stop the time and fix it at a specific hour and place with no limits, blurring the mind.

All violence and extreme trauma experienced by refugees are often caused intentionally with the aim of destroying the personality of the victim and dehumanize it. **Torture** is defined as “any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person in order to punish him/her or to punish a third person linked to him/her”.

With reference to the implications and consequences of highly traumatic experiences, we will take into consideration the recent and comprehensive study carried out by Massimo Germani, doctor and psychoanalyst, executive director of the Center for the Treatment of Post-Traumatic Stress Disorders at the hospital San Giovanni Addolorata, Rome, and Fiorella Rathaus, director of the Project Vi.To. – Reception and care of the victims of tortures – implemented by the Consiglio Italiano per i Rifugiati¹⁵.

In the preface, they write: “The experience of torture leaves indelible marks in the person who underwent them, it causes persistent alterations of identity, self-perception and self-confidence. The consequences of torture pervade every aspect of the life of the survivor’s, and nothing is the same as it was before”.

The intrapsychic, interpersonal, social and cultural levels are deeply damaged and broken up. Torture does not occur only when the victim meets his/her torturer; it consists also in having the dramatic experience of the breach of the pact which links people together in the community, enshrining protection and help by the State and its representatives, who show themselves with no ethic and moral values and sympathy.

The experience of a catastrophic trauma, in particular of torture, may trigger archaic, violent, aggressive and destructive fantasies in the victim’s unconscious, unthinkable and potentially annihilating which Winnicott defines “primitive anguishes”, Kohut “anguish from disintegration”, inherent to all human beings¹⁶.

In the same study we read: “Extreme traumatic experiences cause deep repercussions in the psyche, to such an extent that basic functions such as associations and recollections are involved, making the psyche plunge

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into a status of sound fragmentation”.

Post-traumatic life is characterised by a peculiar vulnerability towards situations that, even though completely different from past events, could re- evoke the pain of the deep wounds caused by them.

Any event eventually leading the survivor to experience again insecurity, lack of self - and social confidence, eclipse of the values of identity and autonomy, tends to be lived as a traumatic event through a mechanism of unconscious re-enactment due to assimilation.

Such susceptibility becomes even more pervasive in refugees who survived tortures because of their precarious life and absolute uncertainty about their future.

These events tend to accentuate the experiences of re-traumatization which are supported by “secondary traumatic events” hindering the recovering of a perspective thought in order to keep alive hope and confidence in the future.

All this unfavourably colludes with the alterations of the “temporal” dimension deriving more specifically from the extreme traumatic experience. In patients who survived tortures the “here and now”, obsessively haunted by the past, is absent or somehow slender and inconsistent. Such tightness between past and present nullifies any possible representation of the future and condemns the individual to the persistent and tearing torment of a reiterated re-actualization of the traumatic experience. Alterations of the temporal dimension are strictly related to dissociative disorders and autobiographical memory disorders, specific consequences of extreme traumas testifying the deep and pervasive nature of the damage¹⁷.

Now we go back to the three main bindings of the feeling of identity and try to see what happens when a person undergoes torture. It is very important to take into account that, even though extreme violences are treated separately for descriptive reasons, their function is always interrelated and their impact is simultaneous.



The attack to the integrity of the body and the psyche, accomplished through torture, destroys the space binding of integration, because it destroys the relationship among the different parts of the Self, especially of the corporal Self. Torture uses the body as the entrance into the process of annihilation of the whole personality. “The body becomes the proof of visible and invisible wounds, of wicked sexual pene-trations that, piercing the frontier between inside and outside, invade the internal space, private and secret, and tie it up to shameful perceptions to derisive, brutal and in-expressible copulations¹⁸. The uniqueness of the body and psyche, their interrelation, become fragmented and the victim loses his/her feeling of individualization, e.g. the integration among the different parts of his/her Self, both conscious and unconscious.

The experiences of torture and extreme violence attack the binding of time integration because they interrupt permanently the continuity of the Self. It is impossible to preserve a sense of continuity with the Self after the body and the mind have been devastated by extreme and intentional violences. When the violence surpasses the individual capacity to face it, it is not registered into the explicit memory, where remembrance is kept, but only in the implicit memory, which the victim cannot remember consciously. Anna Sabatin Scalmati writes: “Paradoxically, we could argue that victims of tortures have no memories, but hallucinatory episodes. This is the reason why the remembrances of the trauma are not perceived as a tragic memory of the past, they are experienced again, sometimes through hallucinations, as a present event”. The consequence of this is obsession and “freezing” of the traumatic experience hiding the pre-traumatic past, torments the present with nightmares and flash-backs making the traumatic events real, hindering the projection towards future. The temporal perspective is reduced to a unique timeless dimension where the feeling of the Self has been broken.

Finally, the binding of social integration, as the others contributing to create the identity, is attacked by torture because it tears the individual out of his/her community and destroys his/her feeling of belonging to it. The feeling of non-belonging to a community is experienced at various levels:

- For many asylum seekers the State itself perpetrates violence, or is unable to protect their safety.
- Violences and humiliations are often inflicted in front of the victim’s relatives or the victim is obliged to witness infliction of violence on

his/her relatives. In this way the relationship between the individual and his/her emotional and affective environment is brutally undermined.

- Escaping asylum seekers are condemned to live in exile and not to feel at home in their own country.

The damage inflicted to the binding of social integration causes social and relational isolation from former relationships, and undermines the capacity of building new ones.

7.3 Defence strategies and dissociative disorders of identity

When the extent of pain to which an individual is exposed goes beyond his/her capacity of containing it, auto-protective mechanisms are started representing an adaptive answer to the impossibility to contain the traumatic reach of the experience he/she is living. Such mechanisms represent the best self-protective strategies for the individual in that particular moment.

A self-protective strategy, described by Renos K. Papadopoulos¹⁹, is the “freezing”: e.g. the losses and conditions of deprivation to which the majority of asylum seekers have to survive, produce a “**freezing**” reducing their repertoire of feelings, perceptions and functions the individual have.

The term “freezing” derives from the most recent developments of the medical traumatology. It has been observed that highly traumatized individuals left with no assistance under cold environmental conditions do not bleed to death as it would be expected. During the war in the Falklands (1982), it was observed that, among those soldiers with severe multiple wounds abandoned in the cold for a long time, differently from expectations, the death rate was surprisingly low. Following several researches it was discovered that cold weather conditions increase self-protective mechanisms. This discovery has revolutionized traumatology to such an extent that nowadays such self-protective mechanisms are enhanced inducing a controlled hypothermia to the injured while in the past he/she was wrapped with hot clothes.



According to the above mentioned developments, psychological hypothermia limits individual activity, stops functions, feelings and relationships, temporarily and drives the available energy to a limited range of vital functions deserving concentration. It does not necessarily implicate a pathological traumatic dissociation, but we may consider it as a normal reaction to abnormal situations or as a self-protective mechanism potentially auto-therapeutic.

It is possible, though, that traumatic experiences, if internal and external resources are not sufficient, lead to pathological dissociation.

“Dissociation is the most typical consequence of extreme traumatic experiences. It is the result of the lack of integration of the aspects of perception, memory, identity and consciousness.

Dissociation is part of the so-called defence mechanisms of the psyche. It, in fact, when facing difficult, painful, hostile and openly traumatic situations, adopts unconsciously, defensive strategies in order to protect itself from pain, chaos, annihilation. These defensive mechanisms are distinguished in primary and secondary. Primary defence mechanisms are the strongest, the most archaic and the most “expensive” for the global psychic activity. (...) In front of annihilating and overwhelming traumatic experiences, such as torture, rapes and extreme violence, common defences are not sufficient to prevent the psyche from being invaded by contents which could completely distress it. In order to create a final barrier hindering the invasion of contents menacing a total annihilation of the human personality and the destruction of the individual spirit, the most primordial defences, particularly the dissociative ones are put in place: to prevent the unthinkable from becoming experience. (...) Also dissociative defences, then, initially accomplish a highly positive task, i.e. contributing to preserve the individual psychic life itself. The “advantages” of the dissociative defence when facing unbearable and annihilating conditions are obvious: complete detachment from pain, terror, horror and from the idea of an imminent death. The main “disadvantage” is that, once occurred, especially after extreme traumas, the dissociation has an obstinate tendency to work autonomously, in the form of real and autonomous traumatic complexes. Unelaborable fragments of trauma embed into one or more parts of the personality which then gains dissociative features, highly unstable which threaten, in case of re-activation, the still sane areas.

The dissociated parts will tend to re-appear, according to a completely un-

conscious “automatic” activation mechanism, in positive, negative or stressful situations, when the common borders of the Self are threatened.

Some memories, with peculiar and intense affective features, will be dissociated into separate states of the mind, and might re-appear suddenly in different moments. Traumatized people may suddenly become amnesic, with relation to specific situations or particular experiences (unconscious memory gaps) and their behaviour may appear different, often confused or “puzzled”. The observer, unless he/she is an expert or has experienced a similar trauma, would never suspect dissociation, but, on the contrary, it would be concluded that the interlocutor is unstable, “strange”, in a bad mood, or a liar.

From a clinical point of view, post-traumatic dissociative disorders are characterized by sudden outbreaks often urged by stimuli which, through associations, sometimes inscrutably, drive back to experiences of torture, to environmental context or to any possible amnesic trace related to it.

Situations that may start up a dissociation are those when a relation with the authority is involved, especially if it is perceived as judging, powerful and threatening. The duration of dissociative episodes is not foreseeable but it is unusual that they last more than some hours. In cases of a dissociation persisting more than 24-36 hours, it is more appropriate to define it as a “dissociative status”. (...)

Among the dissociative disorders appearing more frequently in people who experienced an extreme trauma or torture we find:

- **Depersonalization.** The person feels detached or as an external observer of its own mental processes and body; he/she feels like a robot or as in a dream, “numbness” and detachment from affectional reactions, fear to loose control.
- **De-realisation.** Feeling of detachment from the surrounding environment or perception of the external world as unreal (it often is connected to relatives).



- **Numbing.** Individual sense of numbness and psychic blunting with a sharp retardation of emotional reactivity.
- **Freezing.** Block, “freezing” of motion and, sometimes, sensitivity.
- **Identity confusion.** Sensation of uncertainty, bewilderment, or conflict on identity. As an internal fight to define the Self.
- **Identity alteration.** Changes of identity, the others observe it as a completely or partly different personality, with different memories, features and behaviours.
- **Dissociative amnesia.** It is the impossibility to recall important and specific events of his/her life (“holes” in the memory or “lost time”). The memory is not completely lost, it is not located in consciousness, but in unconsciousness. This is considered a reversible disability of the memory. It is featured as a gap or a series of gaps related mainly to traumatic events, which sometimes return to conscience but cannot be held entirely and for a long time.”²⁰

7.4 Specificity of the gender violence

a. Concept of gender²¹

Gender violence directly attacks the identity of male and female gender. The term “gender” refers to economic, social and cultural opportunities associated to being a woman or a man. In most modern societies this does not only mean being biologically different, but corresponding to different expectations as for appearance, qualities, behaviours and job. These expectations are related to the condition of being woman or man, and they act with the strength of interiorised norms.

Even the relationships between women and men – in family, workplace, public relations – represent the consciousness of qualities, roles and behaviours distinguishing women from men.

Gender, thus, differs from sex because of its social and cultural nature, more than biological. Its specific connotations and features vary from one society to another and evolve in time.

The concept of **gender** is:

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Relational. It does not describe characteristics of women and men as such, but the relationship between them and the ways through which they are socially established.

Hierarchical. Because it is supported by factors evolving in time and space and are subject to modifications.

Historical. Because it is supported by factors evolving in time and space and are subject to modifications.

Contestuale. Gender difference is structured according to some other factors belonging to each context, as for example ethnics, social class, education, etc. Thus it is necessary to take into account the context when analysing the relationships between men and women.

Institutional. The concept of gender does not only refer to personal relationships between sexes, but also to those established within social institutions such as family, schools, health care services reaching out to the social system as such, founded on values, laws, religions, etc.

Gender relationships are:

Personal. Since the gender roles we have internalized define who we are, what we do and the idea we have of ourselves.

Political. Since gender roles and rules are supported and promoted by social institutions and disagreeing with them means disagreeing with the organizational model of the society²².

b. Gender-based violence and persecution²³

The United Nations General Assembly adopted the Declaration on the Elimination of Violence against Women on 20 December 1993. For the first time, this Declaration provides a wide definition of violence against women: “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 in private life”.



The gender-based violence or persecution may affect both women and men but, since power relationships between men and women are based on a male predominance, gender violence or persecution, actually, affects mainly women. It is also exercised in relation to sexual orientation. In this case women and men not meeting the social expectations related to their gender are both harassed/persecuted.

Most asylum seekers who experienced violence or gender persecution, mainly women but also homosexuals and transgenders, experienced severe physical and psychological violence, rape, humiliating and degrading acts. Sexual violence is used both to directly hit the victim and his/her family. It often is acted in the presence of husbands, fathers, mothers, sons and daughters. This, besides affecting the victim in her dignity as a woman, attacks also her family relationships inflicting incurable wounds and modifying them for ever. Sexual violence is a gender violence affecting both the individual woman and her family and social context, and for this reason she is used as a mean to destroy a community.

As the Special Reporter of United Nations stated, “sexual harassment wants to be a demonstration of victory on the men of the group who were unable to protect their women. It is a message of enemies’ neutering. **It is a war among men on women’s bodies**”²⁴.

It is more and more frequent during armed conflicts to use rape as a weapon, for political repression or ethnic cleansing, through it, in fact, the core of the man-woman relationship system is hit. The United Nations²⁵ and other sources have largely documented the use of such a weapon in various contexts: during the war in former Yugoslavia, for example, tens of thousand of Muslim women were kept in “fields of rape” where they were repeatedly raped and obliged to give birth to babies against their will. The rape for genocide, often followed by murdering, was used against an even higher number of Tutsi women during the war in Rwanda in 1994.

Rape is forbidden by international law and recognised as a humiliating and degrading act of torture, when it is used for political repression, punishment, coercion or threat by state officers, or when the State itself is unable to avoid it and to punish the guilty.

Whatever the reason, rape may have devastating effects on the female reproductive health. Often, the physical and psychological damage provoked by rape affects permanently or temporarily women’s sexual and

reproductive life with long-lasting consequences.

Many researches carried out in the USA demonstrate that 30 per cent of women who experienced rape contract a sexually transmitted disease. Victims of rape are more subject to contracting AIDS, gonorrhoea, syphilis and genital herpes, as well as long-term consequences on health such as cervical cancer. Women are biologically more subject to contracting sexually transmitted diseases and the consequences are worse than for men; moreover they are exposed to the risk of unwanted pregnancies.

Rape can also cause an emotional trauma and victims show depression, lack of concentration, sleep and eating disorders, anger, humiliation and self-reproach, serious sex disorders, among which inhibited sexual excitement, fear of sex, lowered sexual functioning²⁶.

c. Specific consequences of gender-based violence

The typology of torture that women suffer has a strong sexual connotation and it threatens their social and cultural identity. The victims are not only women but homosexual, transgender, and, more than known, also heterosexuals asylum seekers: men, especially if heterosexual, talk about it much less than women. We will not examine here the specificities of sexual violence experienced by male asylum seekers, but many of its implications are specular to the ones observed in women; the core of being a man or a woman, is brutally attacked upsetting the respective gender-based roles.

The psychic and physical devastations described in section relating to “traumatic experiences and its consequences on the psychic, emotional and relational level”, are true also for gender-based violence, accomplished mainly through physical, psychic and sexual violence and mainly interesting women. It is acted above all through rape and the accompanying multiple violences and humiliations divesting the victim of his/her human dignity.

We will synthetically describe hereby its specific implications:

- It infringes the sexual taboo provoking violent feelings of shame and guilt.
- It breaches, more than any other physical violence, the border separating the physical, psychic and emotional “inside” and the “outside”.
- It threatens identity deeply, in particular its gender-related features.
- It breaches the role that the victim had in his/her family and in his/her wider social system.

The consequences at the psychic, emotional and relational level are even more devastating when the victim comes from a patriarchal traditional culture, where pride and shame are deep-rooted values. In such contexts, where culture is communitarian and leaves a small space to individualism, the victim of rape is often expelled by his/her community, refused by her husband and often even by his/her family. The moral pain caused by this violence often cannot be soothed by solidarity and, when possible, it must be kept secret. What has been said explains the difficulties in identifying victims of gender-based violence because they often hide the violence experienced. In order to obtain international protection asylum seekers have to be able to tell their story coherently, to explain the logic-causal connections between one event and the other, to have an emotional tone adequate to the contents: it is very often impossible to obtain all that because of the trauma experienced. We will see in the following paragraph how to manage these cases and to enhance identification of victims of gender-based violence or persecution.

THE INTERVIEW WITH ASYLUM SEEKERS

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8. 8. THE INTERVIEW WITH ASYLUM SEEKERS²⁷

8.1 Transcultural approach

The particular vulnerability of asylum seekers victims of gender-based violence or of any other kind of extreme violence influences the quality of the interview they are able to engage during the process necessary to the recognition of international protection. The interview is also influenced by the fact that asylum seekers come from countries, the culture of which, generally traditional and patriarchal, differs immensely from ours. This diversity may constitute an obstacle to mutual understanding. First of all, let us express explicitly what we mean with culture. For this purpose, we will use Cecil Helman's definition evidencing the complexity of this concept: **"Culture is a set of guidelines, both explicit and implicit, which individuals inherit as members of a particular society. These indicate to them how to consider the world, how to emotionally experiment it, how to behave in relation with other people, with supernatural forces or with gods and nature"**²⁸.

It describes various aspects of the complexity of this concept of culture:

- The reciprocity of the relationship between individuals and society in the building up of culture.
- Its temporal dimension crossing generations.
- Its influence on the vision of the world, emotional experience, behaviours.
- Its depth affecting the relationship between individuals and nature, and the supernatural dimension.

The transcultural approach is a model which aim is encountering the Other in very different contexts: healthcare, social, legal. The encounter is possible only if the identity of the Other is recognised and its cultural logics are respected; it helps appreciate the pluralism and the dynamism of those elements which enhance the shaping of identities.



This approach derives from the teachings of George Devereux, who on the basis of the developments of psychoanalysis and anthropology, in particular the studies carried out by Lévy-Strauss, argues that to understand and care people belonging to a different culture from the therapist's it is necessary a complementary, but not simultaneous, use of both an anthropological and psychoanalytic perspective.

Anthropology serves for decoding the collective meaning, psychoanalysis for decoding the internal and individual meaning. Such a theoretical model is called "**Complementarism**".

The developments of the complementaristic theory – matching, without blending them together, techniques and methods of psychology and anthropology – have been under experimentation for more than 20 years in France, by Tobie Nathan, a student of Devereux's, and later by Marie Rose Moro, student of Tobie Nathan's. We will mainly refer to the model followed by Mrs Moro at the Avicenne hospital, in Bobigny, in the banlieue of northern Paris. By now, the developments of Complementarism are not only pertinent to psychoanalysis. Several theoretical models, not only psychological, use the complementaristic method: the anthropologic key of interpretation is applied to various professions. This allows us to define such a model as "**transcultural approach**" and to promote its dissemination among various professionals: medical doctors, nurses, social workers, legal operators, psychologists, teachers and many others. We believe that this approach has to be part of the professional background of those working with asylum seekers.

The axis of the transcultural approach:

- **Psychic universality.** "What defines the human being is his/her psychic functioning. It is the same for everybody". From this premise derives the need of assigning the same statute (ethical and scientific also), to all human beings, to all their cultural and psychic productions, to their lifestyles and ways of thinking even if they are sometimes different and disconcerting (Devereux, 1970). Enunciating such a principle may be considered as obvious, the implicit features of numerous "scientific" researches, carried out in the past and nowadays, help us remember that this theoretical principle is not always respected"²⁹. The notion of psychic universality is presented as both an ethical principle and technical instrument: it represents the need of understanding from within the elements deeply influencing body, environment and thought.

- **Cultural coding.** If every human being is inclined to the Universal, this is accomplished through the Particular of his/her culture.

Cultural coding is a system of categories allowing, in a specific culture, to better understand the world and the individual place in the world; it builds up the meanings shared within the same cultural system.

The way of reading the reality surrounding us is made up of representations, conscious and unconscious, both individual and collective. In order to realise an actual encounter with the Other it is important to listen and try to understand his/her representations avoiding to compare them with ours. It is important to de-centralise oneself, and try to understand what the Other wants to say according to his/her reading grid, not ours.

There are three main levels of cultural coding which have always to be taken into account to understand, host and care.

The three levels of cultural coding:

- The first level is the **being**: man and woman. This means to understand how “being a man” or “being a woman”, during the whole course of life, is culturally built: son/daughter, husband/wife, father/mother. Every status involves a myriad of expectations, feelings, duties on which gender-based violence has devastating effects.
- The second level is the **sense**. It refers to the meaning that the individual gives to the events happening to him/her. The building up of the sense is cultural and individual, but the cultural sense always remains the first one. It is necessary to look for the sense until it is found, it always exists: it is the explanation that people give to themselves in order to manage the cycle of life; these explanations are often manifold and it is important to explore them. This is valid also when the event is not part of the cycle of life, but it is something which bursts into it all of a sudden, devastating it, as it is in case of torture and gender-based violence.



- The third level is the **making**. It is what people must do to accompany an event in order to carry it out as well as possible and with no damage. All the most important events of the cycle of life deserve much attention and it is good to be well informed on the way these events are managed in the country of origin. Facing a violent event such as gender-based persecution, which destroys the gender identity in its core, it is necessary to understand how it can be inserted in a process allowing the victim to survive it. The asylum seeker, victim of extreme violence, must find a new context of reception/care where it is possible to accede to his/her cultural coding in order to understand how to help the person to rebuild him/herself in relation to the being, the sense and the making.

What we have exposed so far is useful for interviewing asylum seekers, victims of torture or of gender-based persecution, because the interview will be strongly influenced by their specific cultural coding and by the psychological consequences of the violence suffered.

8.2 Communication

Professionals who have to interview asylum seekers in order to identify the ones in need of international protection, are to be skilled to recognize, to manage and to overcome communication obstacles which might hinder the identification of victims of violence or gender-based persecution. As we have seen, the consequences of torture or extreme violence can cause problems to the ability of remembering and telling the traumatic events which obliged them to flee and to their ability to relate to the interviewer. Moreover, different cultures may codify experiences in an incomprehensible way for the operators with completely different cultural codes, such as ourselves. During the interview this may take the asylum seeker to behave enigmatically, which may lead the interviewer to evaluation mistakes. Such a circumstance might hinder asylum seekers from the right of obtaining the recognition of international protection.

Following you can find some examples of behaviours which may be encountered during interviews, which can make evaluation more difficult.

Asylum seekers' behaviours hindering interviews

- **Denial, avoidance, silence.** These are defence mechanisms only partially conscious. People who have experienced tortures or gender-based violence are particularly reluctant to talk of such experiences

both because they would be obliged to live such events again and also because those events are accompanied by a deep sense of shame. Tortures and sexual violence humiliate the individual and violently and devastatingly shatter the taboos connected to sexuality. Often such violences are impossible to be translated into words.

- **Difficulties in reconstruction and narrative coherence.** Extreme traumas have consequences on the function of memory and on the capability to highlight logical nexus among different events. This makes the narration incoherent or unintelligible to the listener.
- **Emotional inconsistency and inadequacy.** It is not only the logical coherence to defect. Very often the content of the story and the emotion accompanying it is inconsistent. Sometimes, the nonverbal behaviour is inadequate for the verbal content, the context or the listener.
- **Over-alert, hostility, distrust.** These are all behaviours characterising interviews with asylum seekers who experienced extreme traumas. They are consequences of the violences experienced and of the need to maintain the level of vigilance and control at the highest. These behaviours unfortunately may hinder the possibility to interview these persons with the appropriate level of in-depth examination.
- **Submission, passivity.** It is not rare to meet the opposite behaviour. The asylum seeker interviewed may manifest a passive behaviour to such an extent that he/she is unable to draw on his/her resources to tell his/her experiences as both a protagonist and a victim. His/her attention is, in fact, focused on the attempt to please and conquer the interviewer's benevolence to such an extent that his/her tale may result insincere.
- **Detachment, torpor.** Very often asylum seekers, as a consequence of the traumas experienced, present an absent attitude, as if nothing could really interest them. The repertory of their emotions is reduced and the possibility to provide all the necessary information to prepare the procedure for their asylum application is scarce.

All these behaviours strongly influence the communication process and make the management of the interview itself and the analysis of the case particularly difficult.

The complete understanding of an event within the communication process cannot disregard the context of communication.

This is true for any kind of communication but it is more relevant in the context we are now discussing about, where the interview aims at identifying victims of torture and/or of gender violence who need to be supported for their request of international protection. If the interviewer cannot catch the correlations between an event and its matrix, the story may result very difficult to understand or to believe and the opinion the interviewer draws may eventually compromise the correct support the asylum seeker has the right for.

Now, we are going to outline the context of communication where a professional interview with asylum seekers, potentially victims of violence or gender-based persecution, may take place.

Any communication gains a clear meaning only within the relational and environmental context where it takes place. The professional interviewer needs to be aware of the variables intervening in the communication process, in order to manage them and to prevent them from invalidating the result of the interview.

Context. The context that gives meaning to communication is characterised by:

- The physical space where the interview takes place.
- The people involved.
- Feelings and ideas that participants have of themselves, of the others and of the place.

Variables relate to space. The meaning that people give to space affects the result of communication. It is related to the emotional symbolization of space in people's perception. This is true for both the asylum seekers and the operators involved in providing them with orientation and reception. The emotional symbolization of operators is the result of what they think and feel in relation to their function and the institution they work for. On the other hand, the emotional symbolization of asylum seekers, poten-

tial victims of gender-based violence, is the result of what they think and feel in relation to the space, the aim and the function of the institution they have addressed their requests to.

Variables related to people and their position. In all professions providing help, power is unbalanced. Operators have a more powerful position. In the context we are discussing this unbalance is enormous. It is very important that operators are aware of this, because such a marked asymmetry could obstruct the building up of a relationship of reciprocity necessary for an efficient and productive communication. The effect of such an unbalance is strengthened by the way of perceiving the authority in the majority of asylum seekers' countries of origin. In those countries, very often, it is forbidden to express doubts or to disagree with the authority. This attitude hinders the possibility of asking the necessary clarifications and to make use of the opportunities proposed.

Variable related to operators' ideas. The feelings, ideas and knowledge that the interviewer have before the interview, will influence them at both conscious and unconscious level. It is fundamental that the person conducting the interview in order to identify the victims of violence or gender-based persecution has a good knowledge of the political, social and cultural context of the asylum seeker's country of origin. It is also important that the operator is aware of the feelings and ideas that this knowledge generates in order to limit the influence of preconceived ideas and to improve his/her abilities to listen.

Relational competences of the interviewer. These are the main relational competences to establish an efficacious communicative relationship:

- **Empathy.** Ability to establish an emotional contact with the Other and to understand his/her experience and reality; to understand the unique vision that an individual has of his/her life and world. Empathy implies the ability to put oneself at the right "distance", a distance that allows the understanding of the Other and his/her emotions avoiding to be overwhelmed.
- **Appropriate distance.** It is the shortest distance within which the operator may manage the relationship without

being overwhelmed. If the distance is “too far” it hinders an empathic relationship with the Other. There are no fixed criteria on the right distance: everyone has to establish it case by case through his/her professional skills, experience, exchange with his/her team, individual or group psychological support.

- **Acceptance.** Open mindedness, absence of judgment, human warmth. Accepting the Other does not mean sharing or approving what he/she does or says, but welcoming and respecting him/her as a person. An accepting attitude facilitates asylum seekers’ expression of feelings and individual experiences.
- **Honesty.** People are often reassured without any particular reason to do it, the operator may tend to hide part of the truth. Reassuring asylum seekers when we do not have sufficient elements to do it is a lack of honesty. Honesty is a corner stone in the relationship with asylum seekers.
- **Active listening.** It is an ability and also a technique to conduct interviews requiring attention and concentration. It is necessary to be able to ask appropriate questions and to facilitate the expression of thoughts, experiences and feelings. In order to listen actively it is necessary to set aside any personal worry and **de-centrate**, in other words to take the asylum seeker and his/her traumatic experience as a centre. The active listening implies that the operator puts him/herself in the asylum seekers’ shoes, accesses his/her schemes of reference, his/her world.

Some interventions, verbal and non verbal, facilitate the communication exchange and the expression of the point of view and feelings of the Other. These interventions should be part of all professional interviews and in the ones with asylum seekers gain even a higher importance.

Components of the active listening are:

- Using an adequate language at the level of asylum seekers’ linguistic and cultural competence. The use of a technical or complex language, besides resulting incomprehensible at the level of contents, communicates closure and scarce interest.
- Clearing up doubts, providing information, evidencing resources, both of people’s and the context’s is useful to help asylum seekers in

facing the situation.

- Paying attention to the time-frame of the interaction, pressing questions and/or verbal interventions, or too scarce ones, may hinder the communication flux and do not facilitate the other's openness. Furthermore, a non adequate time-frame may cause the asylum seeker being interviewed a feeling of not being understood. Nodding, smiling and a reassuring tone of the voice support the person and help him/her to open. An efficacious communication resembles a dance, any step of the operator's is to be in synchrony with the asylum seeker's.
- Mirroring the asylum seeker's feelings, it is a verbal intervention of the active listening. It consists in returning the feelings behind a problem or an event, which the asylum seeker tells and the operator perceives. Mirroring the asylum seeker's feelings communicates interest, participation and demonstrates giving value to his/her sentiments. Such an intervention is particularly precious, because it makes the person feel the understanding of the operator and reassures him/her on his/her fear of being judged as non credible.
- Rephrasing some of the contents. It is a useful intervention during the interview because it allows verifying what has been understood and communicates interest. While mirroring the feeling concerns the emotional aspect of communication, rephrasing concerns its contents. If both aspects are returned, empathy and understanding are communicated. Mirroring feelings and rephrasing contents shows that the listening is active and personalised.
- Using the non linguistic aspects of communication in order to enhance a welcoming and reassuring climate. A calm tone of the voice, a normal rhythm of the speech (not too rapid, nor too slow), the use of pauses and silences at the right moment are all elements contributing to instil trust and facilitating the narration of the story.
- Use of non verbal behaviour, communicating attention, empathy, and interest. It is important to take into account



that when there is incongruence between verbal and non verbal communication, the latter assumes a higher importance for the understanding of the real meaning of a message. The expression and the eye contact are the most meaningful channels of non verbal communication and are also the most powerful in order to communicate interest and empathy.

In many cultures looking at someone's eyes directly and for a long time may be considered as a lack of respect or an excessive invasion of the others' vital space or a judging interference. It is, then, opportune to calibrate moments and duration of the contact in order to be present with the Other without being incumbent.

8.3 The interpreter's role during interviews

Interviews with asylum seekers are often facilitated by interpreters, very often non professional interpreters. For this reason we believe that it is very important to dedicate some attention to the role the interpreter plays. The presence of interpreters often makes the management of the interview more complex since communication passes through a third person who may introduce variables very often beyond the control of the interviewer. Which role should the interpreter play in social, legal, psychological and medical interviews?

There are different opinions on this role, some institutions require a linguistic and cultural mediation; in this case the interpreter often has an active role and also interprets the meanings that specific contents may have in the culture of origin. Others, like the Consiglio Italiano per i Rifugiati (CIR), ask the interpreter to translate exclusively. In this case, the role of the interpreter should be to bridge communication with the least interference, his/her presence must be characterised by discretion and neutrality. In our approach the operator is the person who must have the required legal, social, medical, psychological skills, together with relational skills and the knowledge of the main social contexts of the asylum seeker's country of origin. If the interpreter needs further information and/or clarification, these should be requested before or after the interview.

Following we are listing the main competences which, according to our approach, that are to be requested to the interpreter:

- Good linguistic competence in both the languages used.

- **Faithful translation:** to do this, it is necessary to be able to interrupt the asylum seeker to be able to translate sentence by sentence and avoid, as it usually happens, to leave the person talking for a long time and then summarize. In fact, in that case, the synthesis would be strongly influenced by the resonance that the asylum seeker and his/her story have on the interpreter. In addition, the operator would lose all nonverbal information, since it would not be possible to catch punctually the correspondence between the verbal and the non verbal.
- **Neutrality:** the interpreter must hide his/her opinion on the contents translated at both verbal and non verbal level, even when he/she thinks that they do not correspond to reality. The operator always needs to consider a lapse of time after the interview to have an exchange with the interpreter.

Together with the quality requirements, it is also important to pay particular attention to the work of the interpreter in order to protect him/her from the risks of “vicarious traumatization”. The interpreter, in fact, especially when he/she comes from the same country of origin of the asylum seeker’s, is affectively and culturally more subject to identification. Secondly, also the interpreter as a migrant, even more if he/she is a refugee, may have experienced traumatic events similar to the ones he/she called to translate, which may reactivate past traumas. For these reasons, it is very important that the interpreter has the opportunity to exchange views with the operator after the interview, receive a specific training on the consequences of torture and extreme violence, and eventually make use of an individual psychological supervision or support.



PART III

**INCLUDING
GENDER-RELATED
PERSECUTIONS
IN THE REFUGEE
STATUS
DETERMINATION
PROCESS:
CASE LAW AND
PROCEDURES**

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9. INCLUDING GENDER- RELATED PERSECUTIONS IN THE REFUGEE STATUS DETERMINATION PROCESS: CASE LAW AND PROCEDURES

9.1 To include a gender sensitive approach in the interpretation of the 1951 Geneva Convention and the **Qualification Directive**

- a. **The interpretation of the notion of a particular social group**
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9.2 A gender sensitive asylum procedure

- a. **Normal procedure**
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 - i. Accelerated procedures
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9. INCLUDING GENDER-RELATED PERSECUTIONS IN THE REFUGEE STATUS DETERMINATION PROCESS: CASE LAW AND PROCEDURES

According to an established principle, the interpretation of the refugee definition needs to take into account cases of persecution in which either gender is a decisive factor in the persecution, or the fear of persecution, or gender violence is utilised as a means of persecution³⁰. Although “gender-related persecution” is an expression without any legal value in itself, both international refugee law and European law call upon Member States to include a gender perspective in the interpretation of the refugee definition, in the asylum procedure and in reception conditions. The 1951 Geneva Convention was adopted within a political and historical context in which refugees were mainly male political opponents. Women were either engaged in less visible political activities (organisation and providing of the means of subsistence for combatants) or the victims of acts which were violent and discriminatory but considered as specific to their cultures and thus a part of private life. The growing importance of the role of women in society and the interpretation of both harmful traditional practices and violations of women’s rights have fostered the emergence of gender-related questions in international refugee law. Subsequently, questions of gender identity which affect both women and men also surfaced in issues linked to changes in the interpretation of the Geneva Convention and national asylum law.

*Council Directive 2004/83/EC of 29 April 2004, on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted (the **Qualification Directive**) and Council Directive 2005/85/EC of 1 December 2005, on minimum standards on procedures in Member States for granting and withdrawing refugee status (the **Asylum Procedures Directive**)* are the two European texts which supervise both the interpretation of the refugee definition in national asylum law and the minimum rules which Member States must comply with in asylum procedures. As far as questions of gender in asylum are concerned, the Qualification Directive recognises that:



- The acts of persecution may take the form of sexual violence and acts against persons on grounds of gender (Article 9.2.a) and f).
- Discriminatory legal, administrative, police and/or judicial measures and also disproportionate prosecutions or punishments may also be considered as acts of persecution (Article 9.2.b) and c).
- Gender is an element which the authorities determining status must taken into consideration in order to assess a request for protection (Article 4.3.c).

As international refugee law was framed within the aforementioned historical and political context, the failure to take the notion of gender into account by national case laws and in the asylum procedures have an unfavourable impact on the examination of asylum applications made by persons who have suffered gender-related persecution. At European level, in spite of the resolutions of the European Parliament in this area and the guidelines set out by the Qualification Directive, gender-related persecution is still not taken into account in such a way as to guarantee the fair examination of asylum applications.

9.1 To include a gender sensitive approach in the interpretation of the 1951 Geneva Convention and the **Qualification Directive**

a. The interpretation of the notion of a particular social group

i. **The definition of a particular social group according to the Qualification Directive.** Although the 1951 Geneva Convention does not recognise sex or gender as grounds for persecution, when the victims of gender-related persecution are recognised as refugees, this is usually on the grounds that they belong to a particular social group whose members suffer serious discrimination or persecution due to behaviour which transgresses the social and cultural norms of the country of origin.

The Qualification Directive sets out the criteria which must be fulfilled by asylum seekers in order to obtain international protection in the European Union. This text states that a group is considered to be a particular social group when its members share an innate characteristic which cannot be altered and which is perceived as being different by society in the country of origin. It goes without saying that sex and gender fall fully within the scope of this definition of a social group: both sex and gender

identity are innate characteristics which cannot be changed without damaging the person's identity and, in certain countries, they are subject to non-egalitarian, discriminatory or degrading treatment. A particular social group, as defined by the Qualification Directive and by the Guidelines of the UNHCR³¹, must not be an organised group, show characteristics of cohesion and its members do not need to suffer persecution in order for the group to exist. Finally, the size of the group must not be a criterion for the purposes of defining a particular social group.

The fairly wide definition of a social group offered by the Qualification Directive allows interpretations which diverge from one Member State to another. In spite of the fact that, in 1984, the European Parliament adopted a resolution³² which calls upon Member States to recognise the status to women who are victims of persecution on the grounds of belonging to a particular social group as defined by the Geneva Convention, the Qualification Directive adopted in 2004 makes only an optional mention of the taking into account of aspects relating to gender in the determination of status. The result of this is that gender-related persecution is taken into account in different ways in the various European Union Member States.

ii. **Divergences in the interpretation of the notion of a particular social group by Member States.** French case law gives a highly restrictive definition of a particular social group. In order for a group to be considered as a social group in the way which is meant by the Geneva Convention, its members must have shared characteristics which define them in the eyes of the authorities and society and be exposed to persecution. The social group must also be of a limited nature. For instance, women in Pakistan or in Afghanistan cannot be considered as constituting a social group. However, in view of the criterion of persecution suffered by the members of the group, and in accordance with the limited nature of the group, "women who refuse to agree to forced marriages in Pakistan" are a particular social group.

So this definition is different from that of a particular social group offered in the United Kingdom. In 1999, the House of Lords laid down the criteria for defining a social group in a



case brought by two female Pakistani plaintiffs. According to the House of Lords, “women in Pakistan” are a particular social group “because they share a common immutable characteristic and because they suffer serious discrimination and do not enjoy the protection of the State”. This definition, which is emblematic of the way that gender is taken into account in defining a social group, is included in the Home Office Asylum Policy Instructions.

A divergence of this kind between French and British practices can be explained by factors including a wider phenomenon: whether or not the national authorities adopt specific gender-related guidelines. Very few Member States have adopted official guidelines in national Law or administrative instructions on the refugee status determination in order to include a gender perspective in the interpretation of membership of a particular social group. The United Kingdom and Sweden are the only countries in Europe to have adopted official instructions of this kind.

The UK Home Office included gender guidelines in its Asylum Policy Instructions in 2004. These guidelines are part of the overall instructions on asylum which apply both to protection officers and to all police officers, including border police. This document lists immutable characteristics which may define the membership to a particular social group including sex, age, marital status, sexual and ethnic characteristics, and specifies that women who are at risk of suffering female genital mutilation have also been considered by the British authorities as members of a particular social group.

Sweden adopted guidelines on the examination and assessment of women’s protection needs in 2001. These guidelines are aimed at all immigration officers. Since 2005 and the revision of the Aliens Act, gender is considered a ground of persecution as the other grounds stated in the 1951 Geneva Convention are. The new law defines a refugee as a person who “is outside of his/her country of origin because he/she has a well-founded fear of being persecuted for reasons of race, nationality, religious or political opinion, or on grounds of gender, sexual orientation or membership of a particular social group”.

In 2009 Spain, which has no guidelines on gender, passed a new asylum law which recognises gender and sexual orientation as a reason for persecution in addition to the reasons defined by the 1951 Geneva Convention.

b. To include a gender sensitive perspective in the interpretation of all the grounds of persecution defined by the 1951 Geneva Convention

In many cases, the tendency to examine asylum applications by victims of gender-related persecution based on the grounds of membership of a particular social group overlooks a gender sensitive interpretation of the other reasons stated in the Geneva Convention.

The UNHCR's Guideline³³ recommend that the interpretation of each of the grounds defined in the 1951 Convention should take into account gender in order to better determine whether or not the asylum seeker fulfils the criteria for the definition of refugee. In many cases, the agents of persecution of victims of gender-related persecution accuse them of transgressing social, religious or political norms in ways linked to their behaviour and gender. Furthermore, an asylum claim may be founded upon more than one ground of persecution stated in the Geneva Convention at the same time. This is why, in order to take greater account of all of the factors involved in assessing the application, it is important to consider the gender perspective in the analysis of all of the reasons stated in the Convention.

A woman who is persecuted because she refuses to wear the veil in an Islamic country may be a victim of persecution because she refuses to comply with the religious norms which are implemented by agents of the State as political instructions. This woman should be able to receive equal recognition on grounds of political opinion or religion, especially in countries where the restrictive definition of the notion of a particular social group cannot be applied to her own case.

i. The causal link in the examination of applications made by victims of gender persecution. In order for gender-related persecution to be taken into account in the interpretation of all of the reasons stated in the Geneva Convention, it is essential that we look at the causal link ("for reasons of") in the light of the accusations made by the agents of persecution against victims of persecution. Although this principle is valid for the



examination of any application for protection, the fact that it is not sufficiently taken into account has a significant impact on the examination of applications for protection made by victims of gender-related persecution.

In many cases, victims of gender-related persecution do not suffer persecution because of any visible political or militant activity. Even so, the agents of persecution attribute political or religious opinions which transgress the social, political or cultural norm in the country of origin to them. As far as grounds of race or nationality are concerned, rapes and mass or collective sexual violence are forms of gender violence used as weapons of destruction against a particular ethnic group. This is why it is important for these asylum claims to be examined in the light of the accusations made by the agents of persecution against the applicant, even if the latter does not make the link explicitly in his/her application.

ii. Political opinion. The UNHCR's Guidelines specify that women's political activities do not take the same form as the engagement of men in certain societies where the difference between the roles attributed to the two sexes is clearly demarcated. In many countries, top level political roles are reserved exclusively for men and women carry out work which is considered to be of lesser importance and are either less visible or not visible at all. This is why the grounds of political opinion must be interpreted in the wider sense and must include any opinion or question relating to the apparatus of State, government, society or a policy. Going against the roles attributed to men and women is also a political opinion which goes against an established norm in a particular society. In this sense, there are no fundamentally political or non-political opinions unless the context of the society and country of origin are taken into account in order to analyse the political content of the opinion or the activity under examination.

According to a comparative analysis of how gender-related persecution is taken into account in national asylum systems in Europe, carried out for the UNHCR in 2004, only Austria, the Czech Republic, Denmark, France, Greece, Ireland, the Netherlands, Sweden and the United Kingdom have recognised - either in their national legislations or in their case laws – that the political activities of women may be of a different nature to those of men³⁴.

iii. Religion. Persecution on grounds of religion and of a failure to comply with social and religious mores particularly affects victims of gender

violence. According to the UNHCR's recommendations, this reason must apply to people, in certain States, who refuse to comply with the roles or norms of behaviour attributed to their genders, irrespective of their actual religious beliefs.

In many cases, the grounds of political opinion and religion overlap. For instance, this is the case in countries in which State institutions and religious doctrine are not separate or when there is no clear separation between them.

In Spain, certain decisions relating to applications for protection made by women from Afghanistan, Algeria and the North Caucasus who had transgressed social and religious mores were examined from the point of view of this reason.

In France, the appeal body has already ruled in favour of recognising the refugee status of an Afghan woman who, due to her lifestyle - and including her desire to continue with her education, to work and not to practice any religion – ran the risk of persecution by the Taliban³⁵. In spite of this decision, the Cour Nationale du Droit d'Asile (National Court of Asylum Law) has failed to take any clear position in this respect: similar applications are often examined from the point of view of grounds of belonging to a certain social group interpreted restrictively, as we have already said, without considering the grounds of religion or political opinion and moving on, without any apparent justification, to subsidiary protection as an alternative.

In the United Kingdom, the Guidelines on taking gender into account in asylum applications issued by the appeal body, the Immigration Appellate Authority, and the administrative authority, the Home Office, refer clearly to the religious and political aspects which may have behaviour which is considered as deviating from the roles attributed to the sexes in certain countries.

iv. Race and nationality. The Geneva Convention states that race, nationality and ethnicity may be grounds for persecution. Persecution for this reason usually takes a very different form depending upon the gender involved.



Mass and/or collective rapes, forced pregnancies, sterilisations and abortions, and also sexual exploitation, are all practices which are used as weapons of war and ethnic cleansing in the same way as others. The aim of these practices is to destroy the target group either by the collective humiliation of women or men (their inability to protect the women), or the introduction of the enemy into the group through unwanted pregnancies³⁶.

c. Subsidiary protection must remain a genuine extension of protection

The subsidiary protection introduced by article 15 of the Qualification Directive provides for the protection of persons who do not fulfil the criteria laid down in order to be recognised as refugees according to the Geneva Convention but who can establish that they are exposed to the following serious threats: the death penalty, torture or degrading punishments and treatment and, with regard to civilians, serious, direct and individual threats against their lives or persons due to a situation involving indiscriminate violence in the event of an internal or international armed conflict.

This provision represents an extension of protection. Subsidiary protection helps to protect certain victims of gender-related persecution. A woman who has suffered conjugal violence in a country in which the agents of the State do not have the ability to offer her protection and against whom there are serious threats which are not covered by any of the grounds stated in the Geneva Convention can be recognised as entitled to subsidiary protection in some States members.

Even so, there is still an important difference between the rights of those people who are entitled to refugee status and those who are entitled to subsidiary protection. The latter enjoy less favourable rights than the former and the annual renewal of subsidiary protection promotes the insecure nature of the status whereas questioning refugee status requires a formal revocation procedure.

Since the Member States transposed the Qualification Directive into national law, subsidiary protection has increasingly been used to grant protection to people who have suffered from kinds of persecution which match the refugee definition according to the Geneva Convention. In many Member States the lack of any clear doctrine and case law on the criteria for the application of the Geneva Convention and subsidiary pro-

tection gives rise to confusion in the application of these two forms of protection. As a result, similar applications receive different kinds of protection, favouring the kind which is less protective. Above all, there is a genuine risk of subsidiary protection being used excessively for applications made on the grounds of gender-related persecution.

This is the case in France, where the administrative body which determines status draws parallels between the rise in the number of decisions recognising subsidiary protection and the increase in the number of women applying for asylum in its 2007 annual report. According to the French administrative authority women accounted for 56% of the subsidiary protection applications which were granted, playing a part in the “development of a new form of social asylum”³⁷.

In practice establishing a direct link between gender-related persecution and subsidiary protection means recognising a hierarchy among the various kinds of persecution in which gender-related persecution is less highly valued than other kinds. Subsidiary protection is an instrument which helps to extend protection, especially for certain kinds of gender-related persecution, but in order for this to remain true, it is essential that a gender perspective be taken into account transversally in the interpretation of all the grounds and provisions stated in the Geneva Convention.

9.2 A gender sensitive asylum procedure

There are many reasons why the asylum procedure may fail in taking into account the needs and experiences of victims of gender violence:

- The roles assigned to men and women by the societies in the countries which “produce” refugees (such as the condition that women must be sexually “pure” and that men must be able to defend both their own honour and that of the women of their families) are an immediate obstacle to admitting to and accepting past suffering;
- Although sexual violence is commonly used against women, it is also employed against men, and the trauma



and shame which are often linked to it create inhibition which requires special sensitivity and training;

- Definition of the roles attributed to women from certain countries, by both partners or spouses, families, the authorities which determine status and social participants, may lead to the supposition that a woman should not make an individual asylum application.

In this section we will be looking at aspects of the procedure which should take the gender dimension into account in order better to respond to the needs of the victims of gender violence. The aspects specific to the conducting of interviews and hearings relating to asylum applications and to the support provided to applicants have been dealt with in a chapter devoted entirely to these questions.

a. Normal procedure

i. Access to information. One factor which determines whether or not an asylum procedure runs smoothly is access to reliable information about all of the stages of the procedure and about applicants' rights in a language that they can understand. From entering the country and in all contacts with the administrative authorities of the host country, it is important for widespread interpreting and information about the ability to apply for asylum to be provided.

This is all the more important because asylum may be associated exclusively with persecution on grounds of political engagement. It is common for a newly-arrived foreign national who has been the victim of gender violence to think, first of all, that the reasons which have led to his/her flight do not match the criteria for obtaining refugee status and, secondly, that the violence suffered, or some of it, is interpreted as normal, especially when the internalisation of social norms supporting violence of these kinds is strong. Becoming aware that, violence of these kinds is not legitimate in a process which may take place once the refugee has reached Europe and after comparison with social and cultural norms which condemn these practices.

Misinformation at this stage of the procedure can have negative effects if the applicant is staying with members of his/her own community and is dependent on it for access to information. The information about the asylum procedure and the rights pertaining thereto circulating in communities is often either incorrect or inaccurate. Misinformation is further

strengthened because the links with the compatriots with whom they are staying may be indirect. These situations may extend or cause gender violence in the host country, such as sexual harassment and forced prostitution in exchange for accommodation or other services.

Always providing information in a suitable language at all points at which new arrivals are received - such as airports, border posts, administrative authorities, associations, local communities, State and local social services - has a decisive impact on the outcome of the applications made by victims of gender-related persecution.

ii. **Separate asylum applications.** The lack of reliable information about the asylum procedure has a tendency to increase the vulnerability of women who arrive accompanied by their spouses still further. Although the notion of asylum and the interpretation of the Geneva Convention have developed since 1951, the image of the male refugee who is the victim of persecution by a State on the grounds of his political activities, still affects the procedure for women asylum seekers who are often seen as refugees' "wives, partners, daughters or mothers".

The gender guidelines issued by the British appeal body refer to this aspect and specify that there are many factors which can also lead to the supposition by certain foreign women that their applications would not be valid, even though they have firm grounds for an asylum application, indeed sometimes firmer than those of their husbands. Presuppositions such as the idea that men should manage administrative matters, a fear of the authorities and concerns about confidentiality and the revelation of episodes which are considered to be humiliating further reinforce the difficulties in accessing the procedure.

Being dependent upon the asylum application made by her spouse or another family member reinforces a woman's lack of independence on the administrative, economic and social levels. This can lead to greater vulnerability if, for private reasons or due to violence within the family, the woman wishes to break off ties with her spouse or the members of her family. This is why the individual interview with each family member needs to be a widespread practice at all stages of the proce-



ture and the social support and be regular. In the same way, it is important to explain things several times and to stress that an asylum application can be made independently from those of other family members when circumstances allow.

Individual interviews with each family member are often conducted when the asylum application is first examined, in general in all Member States. However, at the appeal stage, proceedings held behind closed doors are less common and the applications are often less well-informed that this is a possibility.

iii. Interviews and hearings of asylum seekers. The interview is the key stage of the asylum application, which is a procedure of a special kind. The applicant does not have to produce any evidence of either the persecution he/she has suffered or any fears of persecution. On the other hand, based on the applicant's story, it is up to the protection officer to identify and establish whether the risks run by the applicant if he/she were to return to his/her own country match the grounds for persecution as defined by the Geneva Convention and the Qualification Directive.

This requires special attention, approachability, sensitivity and an ability to listen on the part of the protection office, together with a detailed understanding of the difficulties that applicants may have faced in order to assess the persecution suffered or feared properly. In return, the applicant must give as accurate and extensive an account as possible of the reasons which have driven him/her to leave the own country.

Most victims of gender-related persecution have experienced violence which directly affects their ability to talk about it. Whether this is because they have led to symptoms of psychological trauma which affect the way they behave or because they represent something shameful to which they are unable to admit, gender violence has a direct negative impact on asylum application interviews.

As a result, it is essential that aspects which are linked to intercultural matters and to the symptoms of psychological traumas always be taken into account by protection officers and interpreters in order to ensure a fair assessment of asylum applications made by victims of gender-related persecution. There is a detailed analysis of these aspects in section 8 of this guide.

b. Special procedures

i. **Accelerated procedures.** The Asylum Procedures Directive allows Member States to set up fast-track procedures when the asylum application is considered to be unfounded or is made by a national of a country which is considered to be safe. This procedure has an immediate disadvantageous impact in decisions affecting the victims of gender-related persecution.

The fast-tracked examination of an asylum application forces the applicant to put together an application very quickly (in just a few days) which makes it difficult for him/her to make contact with a legal adviser, gain an understanding of the various stages of the procedure and gain access to an interpreter, if necessary. According to the Member States, the fast-track procedure may not lead to a residence authorisation, instituting a significantly vulnerable situation with regard to accommodation and the means of subsistence, or involve systematic detention. This vulnerable situation, which may be either material or moral, is likely to reinforce exposure to gender violence.

In certain States, such as France and Spain, an asylum application may be considered as unfounded either because the authorities consider it to be abusive (several attempts to make an asylum application, the making of an asylum application once intercepted by the police or in detention, applications for a case to be re-examined after the emergence of new information). The victims of gender-related persecution often find themselves in these circumstances for miscellaneous reasons which are directly linked to the specific features of the kinds of persecution that they have suffered:

- Due to a strong internalisation of cultural norms in their countries of origin, many women only realise that they have well-founded reasons for making an asylum application on the grounds of the persecution that they have suffered several months after their arrival in the host country;
- The false conviction that asylum is only granted to political militants is a genuine obstacle for men who have to flee from persecution on the grounds of their homosexuality. It is often only once they have been intercepted by the police



or placed in a holding centre that they find out about the opportunity to make an asylum application;

- The victims of prostitution are very often forced by their procurers to make false asylum applications in order to resolve the question of residence for a few months. When they manage to escape from prostitution rings and attempt to apply for asylum on their own behalfs, their applications are immediately considered as abusive because their credibility has been damaged.

These examples clearly show that fast-track procedures are unsuited to asylum applications made by victims of gender-related persecution. This is firstly because these configurations, which are specific to the cases of victims of gender-related persecution themselves, give rise to asylum applications which are considered to be unfounded. The failure to take such details into account has an impact on the equality of treatment of their applications. Secondly, fast-track procedures do not always give rise to a hearing. In an asylum procedure, the interview needs to allow the officer to establish and classify the grounds on which the person is being persecuted even though the latter does not have to prove that he/she fears persecution and on what grounds. When victims of gender-related persecution are placed on a fast-track procedure and do not have interviews with a protection officer, they are the victims of a twofold inequality: because the specific features of these kinds of persecution are overlooked, their applications are made under more vulnerable conditions and, to make matters worse, they may not get a hearing, which deprives them of the opportunity to talk about the facts which lie behind these fears. The interview and the ability to identify the victims of gender-related persecution play a crucial role in these people's asylum procedures.

Asylum seekers from so-called "safe" countries are also subject to a fast-track procedure. According to the Qualification Directive, countries of origin are deemed to be safe by the Member States (for the national lists) and by the Council (for the European list) after a study of the judicial situation, the application of national legislation and the country's general political situation. Provisions as wide-ranging as this lead to considerable divergences in the drawing up of lists of this kind among the Member States. Although the general geopolitical situation (the existence of wars or conflicts) is the primary criterion for designating countries of origin as safe, this is rarely true of the application of legislation and especially the reality of gender-related persecution in countries of origin. The application of fast-track procedures to victims of gender-related persecution

because they come from a safe country is totally inadequate when examining applications made for these reasons. Some countries which certain Member States consider to be safe - such as Turkey, Mali or Mongolia - are countries of origin which “produce” a large number of asylum seekers for gender-related questions.

ii. **The procedure at the border.** Asylum at the border is a procedure which arouses special concern for all asylum seekers generally. The identification and assessment of needs are carried out in a summary manner at borders which are considered to be transitory crossing points for migrants. The examination of their situations should lead either to authorisation to enter the country or to immediate removal. In spite of the provisional nature of these places it is essential for certain conditions to be fulfilled in order to assess the needs of victims of gender violence properly.

Border police officers have to have skills and a specific awareness in identifying vulnerable people who have suffered traumas and gender violence. The ability to identify these people has a direct impact on the outcomes of their applications for protection. In the same way, it is important for the assessment of needs, interviews and asylum applications to be handled by officers of the same gender as the applicants when the latter request this. This option should be general practice in all cases at all borders posts along with assistance by an interpreter of the same gender, trained and with an awareness of intercultural aspects and the main consequences of psychological trauma.

Border posts must have rooms which are suitable for receiving people suffering from vulnerability linked to the journey, arrival and interception by the authorities, but also as a result of traumatic experiences which may be directly associated with the forces of order and the authorities in their countries of origin. The rooms must be designed to foster the gaining of the person’s trust, the conducting of individual interviews and looking after any children during the interviews, especially with single-parent families.

In certain Member States, such as France, which has no official



guidelines on taking gender aspects into account in the procedure, and the United Kingdom which does, not all individual interviews are carried out without the children being present. When the children are not old enough to remain without their mothers or fathers, facilities are rarely provided in order to allow effective individual interviews to be conducted for the adults.

Another difficulty presented by the procedure at the border lies in gaining effective access to reliable legal support guaranteed by the presence of NGOs at borders and to specific medical and psychological care. These two aspects are essential to fostering trust and to maintaining the kind of relatively stable mental balance which is necessary if the interviews are to be conducted properly and to an appropriate assessment of applicants' needs.

There are wide variations in the extent to which these two aspects are guaranteed at Member States' borders. Some Member States, such as France, Spain, Italy and the United Kingdom, take these two aspects partially into account by always ensuring either access to independent legal advice, provided by the presence of NGOs, or psychological and medical help with proceeding to perform an assessment of the needs. However, other Member States, such as Greece, Poland and Hungary, offer neither of these two guarantees at their borders.

iii. The Procedure in detention. Although practices vary from one Member State to another, the detention of asylum seekers and refugees is becoming increasingly frequent within the European Union.

Detention presents characteristics which are unsuited to the smooth running of the asylum procedure. Although this is true for all asylum seekers, victims of gender-related persecution have particular features which, if they are not taken into account, amount to an additional obstacle to a fair examination of their applications.

The authorities often consider asylum applications made in detention to be a means of escaping from detention or removal and thus unfounded or fraudulent. This justifies the fact that asylum procedures while people are being held are very quick as far as both the making of the application and its examination are concerned. The time constraint reduces the chances of these applicants being granted refugee status, especially when they present mental vulnerabilities which in turn undermine the credibility of their stories in the eyes of the officers.

Detention, which can last for several months in some Member States, is itself damaging to the smooth operation of the asylum procedure. Asylum seekers who flee their own countries because of gender-related persecution and find themselves placed in detention - sometimes for long periods - without having committed any serious offence or crime can easily develop a strong mistrust of any authority, including both police and protection officers. Furthermore, the place of detention itself can reinforce the lack of clear reference points where asylum seekers do not understand whether or not they are in prison, why they have been deprived of their liberty and also do not know that they have the right to make asylum applications.

These constraints are further reinforced when asylum seekers do not understand the language of the host country and do not have access to legal assistance and psychological support throughout the period of detention. With the exception of France, the lack of independent legal assistance - guaranteed by NGOs always being present - in a language which is effectively understood by applicants is one of the realities of detention in Europe. As has previously been said about the procedure at borders, access at any time to psychological support in a language understood by the applicant is essential in order to guarantee a fair procedure for victims of gender-related persecution.



RECOMMENDATIONS



RECOMMENDATIONS

In order to facilitate an improved identification, examination and assessment of gender-based applications of international protection, it is important to consider the following:

- The application of the concept of gender to the context and social and cultural diversity of the country of origin of the person claiming international protection.
- The different events and causes that could lead to a claim for asylum on gender grounds.
- The need for international protection, not only of those who flee their country of origin for gender reasons, but also of those who, during the travel or migration process, found that their rights were violated, in which respect there are substantial grounds to believe that their integrity and/or life could be endangered in the event of having to return to their country of origin.
- The need to establish a climate of trust, understanding and respect for applicants. Those who flee from their countries of origin and arrive in countries applying for protection must be interviewed independently and separately.

If the person has been or is suspected of having been a victim of gender violence or if specifically requested, the interview must preferably be carried out - like any other to be carried out during the process - by interviewers of the same sex, based on a gender and intercultural perspective and taking into account the different cultural, ethnic, social and/or religious realities, as well as other relevant factors such as trauma, fear, internalization of situations and/or shame.

If an interpreter is needed, in addition to the factors mentioned above, it must be ascertained whether he/she can easily communicate with the applicant. It is also essential to make sure that there is no impediment or conflict (ethnic, religious, political, social or cultural) between them. If any difficulty should exist (such as lack of mutual understanding, the

translation is not properly carried out, any inappropriate comments, etc.) the interview should be stopped.

- The importance of informing the person of the possibility of claiming for international protection as well as the stages and processes he/she will have to go through and the feasibility of obtaining a positive response.
- In this respect, it is necessary to improve access of such persons to information and legal advice during the procedure, all in a language they can understand, which means that properly trained interpreters should be available.
- The complexity of this type of application, not only in terms of identification but also in terms of credibility of the allegations and the lack of evidence to prove them.
- It is, therefore, particularly important to take into consideration the social and political situation of the country of origin of the claimants, as well as the practices performed in the country itself.
- It is also important to carry out an interdisciplinary and coordinated handling of each case by the professionals themselves, which not only prevent the applicant from having to give the same information on several different occasions - which can originate a rejection- but will also allow them to make a proper assessment of the facts and situation of the person applying for protection, at legal, social and psychological levels. In this sense, it is important to emphasize the validity of the reports made by the different professionals when proving the allegations that have been made and the possible circumstances or traumas that may affect the coherence and credibility of the facts that are related.
- In addition to the above, and due to the lack of evidence, in these applications it is vital for the person who is applying for protection to have an opportunity to attend an interview or a hearing with the authority in charge of assessing his/her application.
- The need to process applications for the protection of persons who are victims of persecution or gender-based violence by means of normal procedure.

RECOMMENDATIONS

- The importance of reliable data. In this sense, it would be necessary to have access to statistics according to sexes and according to reasons or grounds for persecution.
- The need for training and awareness of the security forces and officials who attend people who arrive in our country. This will allow them to carry out a better identification of gender-based asylum seekers. The same applies to the bodies / authorities responsible for assessment and resolution of these applications for international protection.
- Adequate staffing provision, especially those who work directly with victims of violence and/or torture, so that they can provide psychological care and support and help to mitigate the possible effects caused by having to listen regularly to allegations and descriptions of these facts.

FINAL RECOMMENDATION:

The adoption of European and National Guidelines by Member States in order to incorporate gender-related persecution into the definition of the international protection status and the inclusion of a comprehensive gender perspective in the asylum procedure, in accordance with the recommendations outlined above.

ANNEXES



ANNEX I. LEGISLATION

a. Relevant International Refugee Law Instruments:

- Convention relating to the Status of Refugees, 28 July 1951.
- Protocol relating to the Status of Refugees, 30 January 1967.

b. Relevant European Directives:

- Council Directive 2001/55/EC of 20 July 2001, on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof.
- Council Directive 2003/9/EC of 27 January 2003, laying down minimum standards for the reception of asylum seekers.
- Council Directive 2004/83/EC of 29 April 2004, on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection and content of the protection granted.
- Council Directive 2005/85/EC of 1 December 2005, on Minimum Standards on Procedures in Member States for granting and withdrawing refugee status.

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NOTES



NOTES

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