



Consiglio Nazionale delle Ricerche

Migration Issues before International Courts and Tribunals

Edited by Giovanni Carlo Bruno
Fulvio Maria Palombino
Adriana Di Stefano



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National Research Council of Italy
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11.

ESCAPING VIOLENCE: THE ISTANBUL CONVENTION AND VIOLENCE AGAINST WOMEN AS A FORM OF PERSECUTION

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SUMMARY: 1. Introduction and Scope of the Analysis. – 2. The Silence of the UN Convention on Refugee Status on Gender-Based Violence as Ground to Recognise Refugee Status. - 3. Is Violence against Women a Form of Persecution? From the UN Guidelines to the Council of Europe Istanbul Convention. - 4. Violence *Because* They are Women or *As* They are Women. The Case of Female Genital Mutilation and Domestic Violence in the Jurisprudence of the European Court of Human Rights. - 5. How to Assess Violence against Women as a Form of Persecution? Issues of Credibility and the Situation in the Country of Origin. - 6. States' Due Diligence Obligations in Protecting Women from Violence: Setting a Higher Standard of Protection in Refugee Law in Light of the Istanbul Convention. - 7. Conclusions.

1. – Introduction and Scope of the Analysis

According to the data included in the 2018 report of the International Organization for Migration, women comprise marginally less than half of the global international migrant stock.¹ The share of female migrants has declined from 49.1 per cent in 2000 to 48.4 per cent (125 million) in 2017. The proportion of women migrating

¹ IOM GMDAC, *Global Migration Indicators 2018*, p. 43, available at: <https://publications.iom.int/system/files/pdf/global_migration_indicators_2018.pdf>.

varies considerably across regions and since 2000 the proportion of female migrants slightly increased in all regions except for Asia.²

Women have always migrated, and what has changed over the decades is not, or not significantly, the number of women leaving their country of origin, but rather the reasons for migration, the “causes and consequences of the migration gender balance, which [has shifted] over time and varies considerably across cultures and nations”.³ What has been called the “feminization of migration” does not consist in “an absolute increase in the proportion of women migrants”,⁴ but rather in a “feminization of international refugee law”, an increasing interest in female migrants’ rights, starting as late as the 1980s.⁵ The ‘absence’ of women from the narrative on migration mirrored the absence of women’s rights in the international arena and the late recognition of violence against women as a violation of human rights.⁶ And yet, even though the presence of women in international migration flows have been gradually recognised at the international level, women still face numerous obstacles to demonstrate that they have been victims of gender-based violence, and, because of that, they are entitled to international protection.

According to the definition that has consolidated at the international level, codified in the Council of Europe Istanbul Convention on preventing and combating violence against women and domestic violence of 2011 (hereinafter the “Istanbul Convention”), gender-based violence against women consists in “violence that is directed against a woman because she is a woman or that affects women disproportionately”, a violation of human rights and a form of discrimination against women and shall mean “all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”.⁷

² PAIEWONSKY, *The Feminization of International Labour Migration*, UN-INSTRAW, 2009, p. 4.

³ DONATO, GABACCIA, *The Global Feminization of Migration: Past, Present, and Future*, last update 2016, available at: <<https://www.migrationpolicy.org/article/global-feminization-migration-past-present-and-future>>.

⁴ *Ibid.*

⁵ SPIJKERBOER, *Gender and Refugee Status*, Farnham, 1999/2000, p. 1.

⁶ CHINKIN and CHARLESWORTH, *The Boundaries of International Law*, Manchester, 2000, p. 4. Violence against women was recognised at the international level as a violation of human rights in 1992 with the adoption of General Recommendation No. 19 of the CEDAW (A/47/38).

⁷ Istanbul Convention, Article 3, letters d) and a). In the General Recommendation No. 35, the CEDAW Committee stressed the importance of using the notion of “gender-based violence against women” to stress “gendered causes and impacts of the violence” (CEDAW/C/GC/35, 14 July 2017, para. 9).

The purpose of this chapter is to demonstrate that the Istanbul Convention can be used as means of interpretation of national refugee laws and of the provisions of the European Convention on Human Rights in assessing the situation of women who request refugee protection to escape from gender-based violence, in particular from two forms of inter-personal violence, on which this analysis is focused, namely female genital mutilation ('FGM') and domestic violence. The choice of these two cases is determined by their being forms of inter-personal violence, committed by non-State actors, and because they constitute illustrative examples of "cultural" violence, rooted in societies. Despite these similarities, as we will see, the approach of the European Court of Human Rights has not been thus straightforward and will be investigated in these pages from a feminist human rights law perspective. The chapter contends that judges should assess, in deciding the request for refugee status, or, in the case of the European Court of Human Rights, in determining whether violations of the woman's rights have occurred, whether the State of origin – where the migrant woman could be expelled failing her application – complies with its *due diligence* obligations in preventing and prosecuting gender-based violence. We will start our analyses from the silences of international refugee law with regard to women, then we will explain the reasons and the means – mainly soft law, with the relevant exceptions of the Istanbul Convention and the European Union "Qualification Directive"⁸ – through which gender-based persecution has been gradually recognised, we will then delve into issues of credibility of women asking for refugee status as a consequence of violence against women and we will assess how relevant the situation of the country where the woman can be expelled might be. We will then make some remarks on how the judges could use the Istanbul Convention as a means for interpretation of national and European law in the assessment of requests for refugee status coming from women who suffered forms of inter-personal violence because of their gender and/or as women. The chapter will limit the analysis to the jurisprudence of the European Court of Human Rights, being its focus on the Istanbul Convention adopted within the legal framework of the Council of Europe.

⁸ Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (*Qualification Directive*), *OJ L 337*, 20 December 2011, p. 9 ff.

2. – *The Silence of the UN Convention on Refugee Status on Gender-Based Violence as Ground to Recognise Refugee Status*

In immigration and nationality law, women have been treated differently from men.⁹ The 1951 Convention on the status of refugees (hereinafter the ‘Geneva Convention’) defines the refugee as an individual who, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality, and is unable to, or owing to such fear, is unwilling to avail himself of the protection of that country”. From the text, it is clear that it was drafted “in the male form”.¹⁰ The use of language that is not gender-neutral in the definition of refugee does not come as a surprise, given the time in which the Convention was adopted, but it is clear that the provisions of the Convention were not conceived to deal with cases of gender-based violence against women.¹¹

Women’s rights started to emerge at the international level in the 1970s only, thanks to the adoption of the Convention on the elimination of all forms of discrimination against women (‘CEDAW’), and violence against women was brought within the terms of the Convention as late as 1992 with the adoption of the General Recommendation No. 19 on violence against women by the CEDAW Committee¹². Women were absent and invisible in the international arena, relegated to the “private” realm, where States could not interfere. Being in the “private” sphere, women’s activities were denied the quality of “political”, which has traditionally belonged to men’s experiences¹³. Even their rights as migrants were completely neglected, because women used to migrate with their family and, as part of the family and *not* as individuals entitled of rights, they were relevant for international refugee law¹⁴. One could contend that, in the definition of refugee provided by the 1951 Convention, there is the

⁹ See the evolution of the history of immigration and nationality law in BHABHA and SHUTTER, *Women’s Movement: Women Under Immigration, Nationality and Refugee Law*, Trentham Books, 1994.

¹⁰ SPIJKERBOER, *cit. supra* note 5, p. 1.

¹¹ According to Kelly, another element should be added to explain the absence of women in international refugee law: it is “a product of the general failure of refugee and asylum law to recognise social and economic rights and its emphasis on individual targeting and specific deprivation of civil and political rights”. KELLY, “Gender-Related Persecution: Assessing the Asylum Claims of Women”, *Cornell International Law Journal*, 1993/26, p. 625 ff., p. 627.

¹² CEDAW Recommendation No. 19, *cit. supra* note 6.

¹³ INDRA, “Gender: A Key Dimension of the Refugee Experience”, *Refuge*, 1987/7, p. 3 ff.

¹⁴ It refers to the fact that the application is generally filed by the husband and that the woman is heard

“catch-all category” of “membership of a particular social group”,¹⁵ in which women victims of violence might be always included. Nonetheless, asylum seekers must demonstrate that they have a “well-founded” fear of persecution *for reasons of* belonging to a particular social group. As Meyersfeld has pointed out, “this gives rise to a number of difficulties, not least whether ‘women’ can be said to comprise a particular social group.”¹⁶ Furthermore, “sex” was not a ground of discrimination explicitly mentioned in Article 3 of the Convention on the status of refugees. During the negotiations for the elaboration of the Convention, the Yugoslav representative proposed to add the words “or sex” after the words “country of origin” to the article on non-discrimination, but he was opposed by the representatives of Austria, Colombia, Italy, Switzerland, Turkey, the UK and the US.¹⁷

It can be argued that the ground for persecution “membership of a particular social group” alone cannot grasp the complexity of women’s experiences. As acknowledged by Firth and Mauthe, reporting the debate in international feminist legal scholarship, “framing all persecution of women as persecution because of gender has reinforced the image of men as the only ‘real’ refugees, and has also marginalised women by implying that only men have political or religious opinions, racial status, etc.”¹⁸

The absence of women from the Geneva Convention was confirmed in legal scholarship. As outlined by Spijkerboer, female migrants did not receive much attention until 1980s. In particular, he noted that in some classic works of international legal scholarship, women were mentioned “only in passing”, and that Goodwin-Will was the first to use “his or her” country of origin, although he had doubts on the

by the authorities in the same room as her husband.

¹⁵ MEYERSFELD, *Domestic Violence and International Law*, London, 2010, p. 280.

¹⁶ *Ibid.* National jurisprudence has not been clear in the definition of the “particular social group”. See, for example, the controversial US jurisprudence. In 2014 only the Board of Immigration Appeals recognised the particular social group of “married women in Guatemala who are unable to leave their relationship” whose members can qualify for asylum. *In Matter of A-R-C-G 26 I & N* Dec. 388 (see the comment in Harvard Law Review, available at: <<http://harvardlawreview.org/wp-content/uploads/2015/05/Matter-of-ARCG.pdf>>). See the position of the Board with regard to FGM as early as the 1990s in *In re Kasinga* of 1996 (21 I & N Dec. 357).

¹⁷ *The Refugee Convention 1951. The Travaux préparatoires analysed with a commentary by Dr. Paul Weis*, available at: <<https://www.unhcr.org/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>>, p. 36.

¹⁸ FIRTH and MAUTHE, “Refugee Law, Gender and the Concept of Personhood”, *International Journal of Refugee Law*, 2013, p. 470 ff., p. 482. See also MACKLIN, “Refugee Women and the Imperative of Categories”, *Human Rights Quarterly*, 1995, p. 213 ff.

possibility of recognising discrimination on the basis of sex, as such, “sufficient to justify the conclusion that [women], as a group, have a fear of persecution”.¹⁹ In 1991, Hathaway clearly argued that rape can be a form of persecution, and that the refusal to wear a chador had to be considered as expression of a political opinion.²⁰ In the 1990s, women’s rights received much more attention at the international level, a fact that had an impact on international legal scholarship on refugee rights as well. This does not mean to equate the experiences of women and men, without considering the specificity of women’s experiences in migration. Women can flee from their country of origin because of the forms of violence to which women are subjected *because they are* women or because they are disproportionately affected. Experiences of migration are not gender-neutral, they are determined by gender. The gendered experience of migration characterises all phases of displacement: it starts with the reasons underlying the decision of fleeing a country, it continues during the journey, it persists after the arrival in the country of destination.²¹

3. – Is Gender-Based Violence against Women a Form of Persecution? From the UN Guidelines to the Council of Europe Istanbul Convention

Why and how gender-based violence against women entered the language of international refugee law, to the point of being considered as a form of persecution which legitimises the recognition of refugee status to women that are subjected to violence?

As for the reasons, it is necessary to go back to the public/private dichotomy that, as highlighted by feminist scholarship, characterises international law.²² International

¹⁹ SPIJKERBOER, *cit. supra* note 5, p. 2, referring to the work by GOODWIN-GILL, *The Refugee in International Law*, Oxford, 1983. In the second edition of the book, of 1996, Goodwin-Gill dedicated to women two sections of the book.

²⁰ SPIJKERBOER, *cit. supra* note 5, p. 2, referring to the work by HATHAWAY, *The Law of Refugee Status*, Cambridge, 1991.

²¹ See also objective No. 7 of the Global Compact for Safe, Orderly and Regular Migration, adopted by the UN General Assembly on 19 December 2018 (A/RES/73/195): “(b) Establish comprehensive policies and develop partnerships that provide migrants in a situation of vulnerability, regardless of their migration status, with necessary support at all stages of migration, through identification and assistance, as well as protection of their human rights, in particular in cases related to women at risk, [...] victims of violence, including sexual and gender-based violence”.

²² See, for example, SIFRIS, *Reproductive Freedom, Torture and International Human Rights: Challenging the Masculinisation of Torture*, Abingdon, 2014, p. 20.

law has traditionally regulated the public world, which is men's, completely neglecting the private world, characterised by issues that disproportionately affect women.²³ This perspective, simplistic that might be,²⁴ explains the reasons why women have not been considered by international law for years, including international human rights and refugee law. Talking about domestic violence as torture, Rhonda Copelon wrote in 1994 that this form of inter-personal violence is "rooted in and perpetuates the culture as well as the structure of the patriarchal State".²⁵ The right to privacy has been invoked to justify the State's refusal to interfere in matters of private violence against women.²⁶

International refugee law has ignored and marginalised the realities of migrant women subjected to violence for decades, even though, as we anticipated, women have always been present in migration flows. Violence occurring in interpersonal relations can be considered as a "threat of 'private' nature" and therefore not falling under the scope of the Geneva Convention.²⁷ Domestic violence and female genital mutilation, the two examples that we have chosen for this analysis, do not constitute State conduct and it seems difficult, at first sight, to identify women subjected to these practices as a particularly persecuted group.²⁸ Furthermore, it is challenging to assess whether there exists a minimum level of violence that justifies the use of the word "persecution". The drafters of the Geneva Convention conceived persecution as a "broadly inclusive concept, premised on the risk of serious harm but not necessarily of consequences of life and death proportion".²⁹ Even though it is not the pur-

²³ SIFRIS, *cit. supra* note 22, p. 21.

²⁴ What about the State interference in women's personal reproductive choice? See, in that respect, CHINKIN, CHARLESWORTH, WRIGHT, "Feminist Approaches to International Law", *American Journal of International Law*, 1991, p. 613 ff., p. 627, and the analysis of the two dimensions of violence against women's health in DE VIDO, *Violence against women's health in international law*, forthcoming for the Manchester University Press 2020.

²⁵ COPELON, "Recognizing the Egregious in Everyday: Domestic violence as Torture", *Columbia Human Rights Law Review*, 1994, p. 291 ff., p. 297.

²⁶ SIFRIS, *cit. supra* note 22, p. 118.

²⁷ FREEDMAN, *Gendering the International Asylum and Refugee Debate*, 2nd ed., Basingstoke, 2015, p. 77.

²⁸ FREEDMAN, *cit. supra* note 27, p. 45.

²⁹ HATHAWAY, "Reconceiving Refugee Law as Human Rights Protection", in MAHONEY and MAHONEY (eds), *Human Rights in the Twenty-First Century*, Dordrecht, 1993, p. 659 ff., p. 668. In 1989, an author argued for a human rights-based definition of persecution, without necessarily introducing a new

pose here to delve into the notion of persecution and how it has evolved in international and domestic jurisprudence, it is worth noting that the definition of refugee included in the 1951 Geneva Convention, broad it might be, seems however inadequate to grasp “pervasive, structural denial of rights”, such as pervasive and structural gender inequalities.³⁰ As pointed out by Freedman, “the consideration of gender-related claims is still a relatively arbitrary matter”, with the consequence that “women asylum seekers are still constructed in specific gendered ways which may mean that their claims will not be considered as ‘serious’”.³¹

The disruption of the public/private dichotomy started in the 1990s with the recognition of States’ obligations in the prevention and repression of violence against women also committed by private actors. In terms of international refugee law, it meant to acknowledge the experiences of women facing violence as critical cause of their decision to leave their own country, and as reason for fearing persecution which entitles them of the right to obtain international protection.

As to the second part of the question, how gender-based violence against women started to be considered as a form of persecution, the answer is that it mainly happened through acts of soft law, both at the international and national level, with the quite unique exception of the recent Istanbul Convention, which is binding for the ratifying States. It should be acknowledged that the issue of whether or not women victims of violence constitute a “particular social group” under the 1951 Convention has been tackled by national legislators and courts over time, without however developing a straightforward practice in that respect.³²

For the first time, in 1984, the European Parliament called upon States to recognise that women who “face harsh or inhumane treatment because they are considered to have transgressed the social mores of the country” constituted a particular social group.³³ The following year, the Executive Committee of the UN High Commission for refugee stated that States were “free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed

specific category of “gender”: GREATBATCH, “The Gender Difference: Feminist Critiques of Refugee Discourse”, *International Journal of Refugee Law*, 1989, p. 518 ff.

³⁰ CHINKIN, CHARLESWORTH, WRIGHT, *cit. supra* note 24, p. 632.

³¹ FREEDMAN, *cit. supra* note 27, p. 70.

³² FREEDMAN, *cit. supra* note 27, p. 76.

³³ European Parliament Resolution of 13 April 1984 on the application of the Geneva Convention relating to the status of refugees, OJ C 127, 14.5.1984, p. 137.

the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention”.³⁴ The document also stressed the “special needs and problems” of refugee women in the international protection.³⁵ Despite the positive step forward, both acts limited their scope to cases of women who did not respect the established rules in a given society (refusing to wear the veil, for example).

In 1991, the UNHCR adopted a set of guidelines to increase international protection for women, and asked States to improve their standards of asylum and refugee determination procedures.³⁶ These guidelines were followed by additional guidelines precisely dealing with the problem of sexual violence in 1995, and by the 2002 guidelines on international protection and gender-related persecution (‘Gender Guidelines’),³⁷ which complemented the interpretative guidance in the UNHCR Handbook.³⁸ In the “Gender Guidelines”, women are “a clear example of a social subset defined by innate and immutable characteristics [...] and who are frequently treated differently than men”.³⁹ However, as the UNHCR has repeatedly stressed, “mere membership in the group will not itself establish a valid claim to refugee status; the applicant must also demonstrate that she is specifically at risk because of such membership”.⁴⁰ Therefore, two cumulative requirements are needed: on one hand, the fact that the woman belongs to a particular group, for example women that are victims or risks to be victims of female genital mutilation, and, on the other hand, the fact that the applicant is “specifically” at risk.

³⁴ UNHRC, EXCOM, Conclusion No. 39, Refugees, Women and International Protection (1985), contained in United Nations General Assembly Document No. 12A, A/40/12/Add.1, letter k).

³⁵ *Ibid*, letter i).

³⁶ UNHCR, Guidelines on the Protection of Refugee Women (1991), available at: <<http://www.unhcr.org/3d4f915e4.html>>. FREEDMAN, *cit. supra* note 27, p. 91.

³⁷ UNHCR, Guidelines on International Protection No. 1: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002), HCR/GIP/02/01 (hereinafter ‘Gender Guidelines’). See also the most recent guidelines on persecution based on sexual orientation. Claims to Refugee Status based on Sexual Orientation and/or Gender Identity within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, HCR/GIP/12/09, 23 October 2012.

³⁸ *Handbook and guidelines on procedures and criteria for determining refugee status*, reissued in 2011. Available at: <<https://www.unhcr.org/3d58e13b4.html>>.

³⁹ Gender Guidelines, *cit. supra* note 37, para. 30.

⁴⁰ UNHCR’s Views on Gender Based Asylum Claims and Defining “Particular Social Group” to Encompass Gender, available at: <<https://www.unhcr.org/en-us/5822266c4.pdf>>, November 2016, p. 3.

The Gender Guidelines pointed out that a “well-founded fear of persecution” depends on the “particular circumstances of each individual case”, and listed some examples of violence that amounts to persecution: sexual violence, dowry-related violence, female genital mutilation, domestic violence, and trafficking, whether perpetrated by State or private parties, as acts which inflict “severe pain and suffering – both mental and physical”.⁴¹ In the Guidelines, no reference is made to the “seriousness” of domestic violence. A law can also be “persecutory in itself” when it emanates, according to the Guidelines, from “traditional or cultural norms and practices”.⁴² Other illustrative examples of persecution that legitimises the recognition of refugee status are the cases in which the State, though having prohibited the practice, condones it or is not able to stop it effectively; the cases of severe punishment for women who “by breaching law, transgress social mores in a society”; the implementation of laws or policies, such as those providing for forced abortions and forced sterilisations, which lead to “consequences of a substantially prejudicial nature for the person concerned”.⁴³ This approach is particularly interesting, because the UNHCR stresses the patterns of discrimination that emerge from State policies, and that materialise in specific cases of discrimination on which applicants can rely in presenting a request for refugee status. Discrimination on the basis of gender can amount to persecution “if the State, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity”.⁴⁴ Examples are domestic violence or abuse of one’s differing sexual orientation. Valerie Oosterveld observed that, even though gender can be “the true cause of the applicant’s predicament”, decision-makers “tend to adopt much narrower social groups”, such as “women belonging to a community where FGM are performed”.⁴⁵ Alice Edwards pointed out that “if one is able to establish that a woman has been persecuted because she is a woman, or for reasons of gender, then it seems less relevant whether she

⁴¹ Gender Guidelines, *cit. supra* note 37, para. 9.

⁴² Gender Guidelines, *cit. supra* note 37, para. 10.

⁴³ Gender Guidelines, *cit. supra* note 37, paras. 11, 12, 13.

⁴⁴ Gender Guidelines, *cit. supra* note 37, para. 15.

⁴⁵ OOSTERVELD, “Gender at the Intersection of International Refugee Law and International Criminal Law”, *Journal of International Criminal Justice*, 2014, p. 953 ff., p. 963.

belongs to a broad or narrow group of women”.⁴⁶ Why then creating “artificial” constructs?⁴⁷ The consideration of “women” as particular social group *in itself* hardly ever happens, though. It might be possible to argue that it cannot happen because women are discriminated in all societies on the basis of gender, and that the definition of persecution would remain excessively vague with the risk of potentially expanding the recognition of refugee status *ad infinitum*. One could counter-argue, however, that “decision-makers have accepted social groups consisting of, for example, ‘homosexuals’ or ‘homosexuals in a particular country’, in contrast to women’s claims on the basis of gender”,⁴⁸ with the consequence of perpetuating discrimination against women by virtue of patriarchal norms that do not recognise how women can be persecuted *because* of their gender.

At national level, guidelines have been adopted by national legislators, starting from Canada in 1993, and followed in 1996 by the United States.⁴⁹ The Canadian “model” proposed four gendered categories of persecution: gendered forms of harm, such as sexual violence, persecution on the basis of kinship, state collusion or negligence in protecting female citizens from severe discrimination or violence by private actors, and persecution for “transgressing certain gender-discriminating religious or customary laws and practices”.⁵⁰

General Recommendation No. 32, adopted by the CEDAW Committee in 2014, reinforced and complemented the UNHCR guidelines by noting that violence against women, as a form of discrimination against women,⁵¹ is “one of the major forms of persecution experienced by women in the context of refugee status and asylum”.⁵² Forms of violence recognised as legitimate grounds for international protection in law and in practice may include:

⁴⁶ Edwards, *Gender, Migration and Human Rights*, at the Conference of the European University Institute, Florence, Italy, 18-19 June 2012, available at: <<https://www.refworld.org/docid/4ffd430c2.html%20>>, pp. 10-11.

⁴⁷ *Ibid.*

⁴⁸ OOSTERVELD, *cit. supra* note 45, p. 964.

⁴⁹ Canadian Guideline 4 on Women Refugee Claimants Fearing Gender-Related Persecution, March 1993, updated in November 1996. US Guidelines, Office of International Affairs, Immigration and Naturalization Service, regarding adjudicating asylum cases on the basis of gender (May 26, 1996).

⁵⁰ Canadian Guideline, para. I. OOSTERVELD, “The Canadian Guidelines on Gender-Related Persecution: An Evaluation”, *International Journal of Refugee Law*, 1996, p. 569 ff.

⁵¹ As highlighted in General Recommendation No. 19, and now in General Recommendation No. 35 (CEDAW Committee).

⁵² CEDAW General Recommendation No. 32, CEDAW/C/GC/32 (2014), para. 15.

The threat of female genital mutilation, forced/early marriage, threat of violence and/or so-called ‘honour crimes’, trafficking in women, acid attacks, rape and other forms of sexual assault, serious forms of domestic violence, the imposition of the death penalty or other physical punishments existing in discriminatory justice systems, forced sterilization, political or religious persecution for holding feminist or other views and the persecutory consequences of failing to conform to gender-prescribed social norms and mores or for claiming their rights under the Convention.

The General Recommendation highlighted the “seriousness” of forms of domestic violence without however providing a “level” to distinguish which act can be considered as serious and which one cannot. Is it not psychological violence as serious as, though less easy to prove than, physical violence?⁵³ The General Recommendation also emphasised the existence of intersecting forms of discrimination, and the patriarchal attitude of many asylum systems, which “continue to treat the claims of women through the lens of male experiences”.⁵⁴ In its resolution of 2017, the European Parliament included gender-based violence among the “root causes of forced displacement and migration”, along with armed conflict, persecution on any ground, bad governance, poverty, lack of economic opportunities and climate change.⁵⁵ All the aforementioned instruments belong to the category of soft law, which surely has an impact in terms of State practice, but does not create legal obligations States must abide by.

Moving to the regional level – and limiting the scope to the European system for the purpose of our analysis – two different binding legal instruments must be mentioned: the so-called “Qualification Directive” within the EU legal system, and the Council of Europe Istanbul Convention. As for the former, which is binding for the EU member States, it includes among the acts of persecution the “acts of gender-specific nature”:⁵⁶ “Gender related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group”.⁵⁷ It is however very cautious when it comes to regulate the reasons for persecution. The preamble mentions some examples

⁵³ See, in that respect, the jurisprudence of the European Court of Human Rights, in particular *Valiuliene v. Lithuania*, Application No. 33234/07, judgment of 26 March 2013, which considered minor injuries as falling under Article 3 of the European Convention.

⁵⁴ CEDAW General Recommendation No. 32, *cit. supra* note 52, para. 16.

⁵⁵ European Parliament resolution of 5 April 2017 on addressing refugee and migrant movements: the role of EU External Action (2015/2342(INI)), para. 5.

⁵⁶ Qualification Directive, *cit. supra* note 8, Article 9.

⁵⁷ Qualification Directive, *cit. supra* note 8, Article 10, letter d).

of acts that can amount to persecution: acts “related to certain legal traditions and customs”, resulting in genital mutilation, forced sterilisation or forced abortion, “in so far as they are related to the applicant’s well-founded fear of persecution”.⁵⁸ It is quite striking that domestic violence is not specifically mentioned; this form of violence, which is dramatically common in European countries, does not seem to be perceived as belonging to ‘other’ legal traditions, and, for this reason, it appears to lose the character of being ‘cultural’. We know, however, that all forms of violence against women are ‘cultural’ inasmuch as they are rooted in societies and ‘normalised’.

The most innovative binding legal instrument, adopted at regional level, on violence against women is the Council of Europe Istanbul Convention, which dedicates to migration issues an entire chapter (Chapter No. VII). The Convention, which defines violence against women and gender-based violence, is based on the four pillars prevention, protection, prosecution, and policies, which correspond to specific legal obligations for States parties (34 at the time of writing).⁵⁹ Despite its origin in a regional legal system, it has the potential to become universal, given the fact that States that are not parties to the Council of Europe can ratify the treaty.⁶⁰ Article 60 of the Convention provides that:

1. Parties shall take the necessary legislative or other measures to ensure that gender-based violence against women may be recognised as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection. 2. Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments. 3. Parties shall take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection.

As clarified in the explanatory report, the Convention codifies what has emerged in international refugee law over time. The report, which complements and interprets

⁵⁸ Qualification Directive, *cit. supra* note 8, preamble, recital No. 30.

⁵⁹ For a general analysis of the Convention, see DE VIDO, *Donne, violenza e diritto internazionale. La Convenzione di Istanbul del Consiglio d’Europa del 2011*, Milano, 2016.

⁶⁰ Article 76(1) of the Convention.

the provisions of the treaty, acknowledges the “gender blindness” in the determination of refugee status, and the silence surrounding the requests of women fleeing from gender-based violence.⁶¹ Rape and other forms of gender-related violence, such as female genital violence, dowry-related violence, serious domestic violence, or trafficking, are “acts which have been used as forms of persecution, whether perpetrated by state or non-state actors”.⁶² The disruption of the public/private divide emerges when States are responsible for what occurs to women victims of violence perpetrated by non-State actors. The report also recognises that women can be persecuted *because* of their gender⁶³ and *as* women.⁶⁴ When gender-based violence constitutes a form of serious harm, Parties must ensure that women are entitled to complementary/subsidiary protection. It is worth pointing out that the report refers to *all* the grounds of persecution included in the Geneva Convention. If it is true that victims of gender-based violence have been considered as belonging to a “particular group”, a gender-sensitive interpretation of the Geneva Convention, which is encouraged by the Istanbul Convention, implies the understanding of how relevant the other grounds of persecution included in the definition of “refugee” are.⁶⁵ For example, persecution on the ground of race or on the ground of nationality, combines – *rectius*, intersects – gender with other forms of discrimination. As acknowledged by a scholar, “women who transgress social norms are not being persecuted solely because they are women but because ‘they are actively opposing a political/religious norm’”.⁶⁶ When they form a “particular group”, women must share a “common innate, unchangeable or otherwise fundamental characteristic other than the common experience of fleeing persecution”.⁶⁷ The use of the sole category of “particular social group” should not be encouraged, because it “fixes an opposition between ‘them’ and ‘us’, between ‘Western women’ and ‘other women’, which might obscure the real structures of gender inequalities in different societies”.⁶⁸

⁶¹ Explanatory report to the Convention, Details of Treaty No.210, para. 310.

⁶² *Ibid.*

⁶³ Explanatory report to the Convention, *cit. supra* note 61, para. 311.

⁶⁴ Explanatory report to the Convention, *cit. supra* note 61, para. 313.

⁶⁵ Explanatory report to the Convention, *cit. supra* note 61, para. 312.

⁶⁶ CRAWLEY, *Women as Asylum-Seekers: A Legal Handbook*, London, 1997, p. 144-145.

⁶⁷ *Ibid.*

⁶⁸ FREDMAN, *cit. supra* note 27, p. 85.

Article 61 of the Istanbul Convention then invokes the well-consolidated principle of *non-refoulement*,⁶⁹ which, when applied to the situation of migrant women victims/survivors of violence, means that States must ensure that women in need of protection “shall not be returned under any circumstances if there were a real risk, as a result, of arbitrary deprivation of life or torture or inhuman or degrading treatment or punishment”.⁷⁰

Learning the lessons from the precedent acts adopted at UN level, the Istanbul Convention clearly acknowledges how migration law cannot be gender-neutral, and how it is compelling to recognise the specific gendered experiences women face.

4. – Violence Because They are Women or As They are Women. The Case of Female Genital Mutilation and Domestic Violence in the Jurisprudence of the European Court of Human Rights

We have chosen as case studies for our analysis female genital mutilation and domestic violence. Both forms of violence are rooted in societies, they are forms of discrimination against women, which perpetuate the unequal power relations between women and men. They are both paradigmatic cases to discuss with regard to international refugee law. Domestic violence, as stressed by Mullally, challenges “not only the boundaries of refugee law’s categories, but also the continuing gap between ‘private harms’ and State accountability”.⁷¹ Furthermore, the ‘seriousness’ of domestic violence is often difficult to prove. In other words, is psychological violence as serious as bodily harms? Is a livid on the face a better evidence than psychological trauma? As posited by Freedman, “the normalisation of domestic violence is thus so pervasive that it is often not registered as being a proper ground for claiming asylum”.⁷² Psychological and economic acts of violence are difficult to detect, but they constitute violence against women according to the definition provided by the Istanbul Convention. FGM also challenges the boundaries of international refugee law with the addition of the fact that FGM, compared to domestic violence, is

⁶⁹ See, for example, ALLAIN, “The Jus Cogens of non-refoulement”, *International Journal of Refugee Law*, 2002, p. 533 ff.

⁷⁰ Explanatory report to the Convention, *cit. supra* note 61, para. 322.

⁷¹ MULLALLY, “Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?”, *The International and Comparative Law Quarterly*, 2011, p. 459 ff., p. 461.

⁷² FREEDMAN, *cit. supra* note 27, p. 58.

often depicted as part of the culture of the “other”, from which women must be protected.⁷³ However, both forms of violence are cultural, because they are rooted in society, normalised and absorbed.

The difference between domestic violence and FGM can be seen in the fact that the former is a form of violence against a woman *because* she is a woman, whereas female genital mutilation is a form of violence against a woman both *because* she is a woman and *as* a woman. In the latter case, indeed, violence takes a particular form – the cutting of women’s genitalia – which is specific for women. “Because she is a woman” stresses the reasons underlying violence, whereas “as a woman” put emphasis on the specific forms of violence. Macklin explained that “the idea of women being persecuted *as* women is not the same as women being persecuted *because* they are women”.⁷⁴ In Crawley’s words, “when social mores and norms dictate that women must be circumcised in order to access their social, cultural and economic rights, this may lead to discrimination which is sufficiently severe to constitute serious harm within the meaning of the refugee Convention”.⁷⁵ Turning to domestic violence, we argue, borrowing Crawley’s thought, that when a woman is victim of psychological or physical abuse within the household, when she is prevented from having access to money or from working, this may lead to discrimination which is sufficiently severe to constitute serious harm within the meaning of the Geneva Convention.

In this chapter, we are not interested in a comparative analysis of national jurisprudence regarding requests for refugee status coming from women escaping from their country of origin,⁷⁶ but, rather, in the jurisprudence of the European Court of Human Rights, with the specific aim to argue that the application of the Istanbul Convention could make a significant change if used as means of interpretation of the European Convention on Human Rights. The same reasoning can be extended to the interpretation of national (countries which ratified the Istanbul Convention) refugee law.

Let us start from the case of female genital mutilation, on which the European

⁷³ Consider the use of the expression “brutal practice” in the European Parliament Resolution on the Commission communication entitled ‘Towards the elimination of female genital mutilation’ (2014/2511(RSP), 6 February 2014.

⁷⁴ MACKLIN, *cit. supra note 18*, p. 259.

⁷⁵ CRAWLEY, *Refugees and Gender: Law and Process*, Bristol, 2001, p. 189.

⁷⁶ The process was not straightforward, considering that there was not a legal obligation stemming from the Geneva Convention to recognise gender as a form of persecution. See *supra note 16*, *In Matter of A-R-C-G et al.*

Court of Human Rights has rendered the highest number of cases in relation to migration issues, even though none of the cases led to the recognition of the violation of the applicants' rights.

Female circumcision, female genital surgery, female genital mutilation and female genital cutting all describe procedures which affect female genital organs for non-medical reasons. Female circumcision seems the most misleading word, since the procedure does not resemble male circumcision.⁷⁷ Female genital mutilation is the expression used by several international organisations, including the WHO, and NGOs, to describe "all procedures that involve partial or total removal of the external female genitalia, or other injury to the female genital organs for non-medical reasons", and is the expression that we are going to use in these pages.⁷⁸

In *Collins and Akaziebie v. Sweden*, Emily Collins and Ashley Akaziebie, mother and child, Nigerian nationals from Delta State, complained that, if expelled from Sweden (where they had sought asylum) to Nigeria, they would have faced a 'real risk' of being subjected to FGM.⁷⁹ The case was dismissed as inadmissible. It is worth noting that the government questioned the credibility of the applicant who did not mention during the first interview that she underwent FGM. The European Court of Human Rights first expressed the view that the applicants lived in a town situated in a province where the authorities passed laws prohibiting FGM; secondly, it endorsed the position of the government which doubted of the general credibility of the applicant;⁸⁰ thirdly, it questioned the fact that the applicant, instead of deciding to move to another part of Nigeria, put her life in the hands of a smuggler to reach Europe.⁸¹ The European Court of Human Rights decided similar cases on FGM in Nigeria in

⁷⁷ COOK, DICKSON, FATHALLA, *Reproductive Health and Human Rights: Integrating Medicine, Ethics, and Law*, Oxford, 2003, p. 265. *Contra*, according to some authors, the similarities of circumcision to FMG, as far as the permanent effects on a person and the absence of consent to the treatment are concerned, do not explain a legislation that admit the former, provided that it respects the right to health, but severely punish the latter (DENNISTON, HODGES, FAYRE MILOS (eds.), *Genital Cutting: Protecting Children from Medical, Cultural, and Religious Infringements*, Dordrecht-Heidelberg-New York-London, 2013, discussing the harm caused to boys by male circumcision).

⁷⁸ Available at: <<http://www.who.int/mediacentre/factsheets/fs241/en/>>.

⁷⁹ European Court of Human Rights, *Collins and Akaziebie v. Sweden*, Application No. 23994/05, Decision on admissibility of 8 March 2007.

⁸⁰ The Court acknowledged that, even though it is often necessary to give the applicants the benefit of the doubt in assessing the credibility of the applicant, information gathered by the authorities might give strong reasons to question the veracity of the asylum seeker's affirmation (p. 13 of the decision).

⁸¹ *Ibid.*

2011: *Enitan Pamela Izevbehai and others v. Ireland*, and *Mary Magdalene Omeredo v. Austria*.⁸² The complaints were considered inadmissible, as occurred in the *Collins and Akaziebie* case. With regard to two other applications, the Court found the case admissible, but did not conclude in the sense that there was a violation of the applicants' rights.⁸³ In *R.B.A.B. and others v. The Netherlands*, the applicants were members of a family who had asked for refugee status in the Netherlands, fearing that, once sent back to Sudan, their daughters X and Y would be subjected to female genital mutilation, whereas in *Sow v. Belgium*, a Guinean woman, aged 28, feared to be expelled back to her country of origin where she could be subjected to a mutilation of type I.⁸⁴ In *R.B.A.B. and others*, the European Court considered the complaint admissible, but rejected it in the merits arguing that some provinces of Sudan, including the applicants' one, passed laws prohibiting FGM as harmful practice affecting the health of the children, and that there was no real risk for a girl or a woman to be subjected to FGM at the instigation of persons who were not family members.⁸⁵ Since the girl would have been deported along with her family, who was contrary to the practice, there was no risk for her to undergo the practice. As for *Sow*, the Guinean woman asking for refugee status in Belgium, the Court decided that the applicant was "not particularly vulnerable", due to the fact that she received a progressive education and that her mother was herself contrary to the practice. The Court relied on the assessment conducted by national authorities, according to which the declaration of the applicant was not credible, and that she did not risk re-excision in

⁸² European Court of Human Rights, *Enitan Pamela Izevbehai and others v. Ireland*, Application No. 43408/08, Decision on admissibility of 17 May 2011; and *Id.*, *Mary Magdalene Omeredo v. Austria*, Application No. 8969/10, Decision on admissibility of 20 September 2011.

⁸³ The European Court of Justice has never directly dealt with cases of FGM. Nonetheless, in a case concerning the interpretation of Article 2(c) and Article 9(1)(a) of the Qualification Directive, Advocate General Yves Bot, in his opinion of 19 April 2012, argued that: "when [...] a man is at risk of being executed, tortured or imprisoned without any other form of trial, or a woman is at risk of being subjected to forced genital mutilation or reduced to the status of a slave, there is plainly and unanswerably an act of persecution" (Joined Cases C-71/11 and C-99/11, *Federal Republic of Germany v. Y and Z*, Opinion of Advocate General Bot, 19 April 2012).

⁸⁴ European Court of Human Rights, *R.B.A.B. and others v. The Netherlands*, Application No. 7211/06, Judgment of 7 June 2016; *Id.*, and *Sow v. Belgium*, Application No. 27081/13, judgment of 19 January 2016.

⁸⁵ *R.B.A.B.*, *cit. supra* note 84, paras. 54, 55, 57.

Guinea, not falling under the cases for which this practice was envisaged.⁸⁶ No violation of Articles 3 and 13 of the European Convention was found. The Court also used international reports on the situation of Guinea to conclude that, in the specific case of the applicant, despite the general situation of the country, the woman did not face a real risk of being forced to undertake the excision.⁸⁷

Turning to domestic violence as ground for persecution, the only case that can be found at the time of writing in the jurisprudence of the European Court of Human Rights is *N. v. Sweden*, decided in 2010.⁸⁸ The applicant, of Afghan nationality, asked for refugee status in Sweden where she arrived with her husband in 2004. Their request for asylum was rejected several times. The year after their arrival, she separated from her husband and asked for divorce in Sweden in 2008. Swedish courts refused the request because they had no authority to dissolve the marriage, given the absence of a legitimate reason for the applicant to stay in Sweden. Her husband opposed to the divorce. The woman asked the authorities to reassess her case and to stop deportation, claiming that she risked death penalty once back to Afghanistan due to her relationship with a Swedish man while in Sweden. Her family also refused to have her back. The Court acknowledged that “owing to the special situation in which asylum seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when it comes to assessing the credibility of their statements”; nonetheless, the applicant had to adduce evidence capable of proving that “there [were] substantial grounds for believing that, if the measure complained of were to be imple-

⁸⁶ *Sow*, *cit. supra* note 84, para. 66.

⁸⁷ For the sake of completeness, it should be said that it was not only the European Court of Human Rights which was reluctant to recognise refugee status to women subjected to violence against women, but also the CEDAW Committee. In a case of FGM, *M.N.N. v. Denmark* (Communication No. 33/2011, views of 15 July 2013), the CEDAW Committee declared the complaint inadmissible, because the applicant failed to provide information on “the real, personal and foreseeable risk” of being exposed to FGM. Similarly, in another case, *N. v. the Netherlands* (Communication No. 39/2012, views of 17 February 2014), the CEDAW Committee argued that the applicant, who was victim of rape and psychological violence, failed to “sufficiently substantiate the claims under Articles 3 and 6 CEDAW”, in particular to show how the denial of her asylum application violated her human rights, that the man was still a threat to her, that Mongolian authorities had not previously protected her and that there was a real risk that they could not effectively protect her, and why she had not followed-up her complaints with the police or complained to the prosecuting authorities or courts.

⁸⁸ European Court of Human Rights, *N. v. Sweden*, Application No. 23505/09, Judgment of 20 July 2010.

mented”, she would be exposed to a real risk of being subjected to a treatment contrary to Article 3.⁸⁹ The Court noticed that women are at risk of ill-treatment in Afghanistan “if perceived as not conforming to the gender roles ascribed to them by society, tradition and even the legal system”.⁹⁰ The Court posited that, if deported to Afghanistan, according to the law in force, the man may decide to resume the married life together even against the applicant’s wish, and that, according to data and international reports, women who find themselves in this situation risk more often than others to be subjected to domestic violence.⁹¹ Even if there was no evidence substantiating this affirmation, the Court concluded that it could not ignore “the general risk indicated by statistic and international reports”.⁹² The applicant argued that, if back to Afghanistan, she would risk persecution and she would be possibly sentenced to death, owing to her extramarital relationship in Sweden. Despite the absence of any relevant information submitted by the applicant in that respect, the Court acknowledged that, had the applicant been successful in living separated from her husband, she could have faced the same limitations unaccompanied women or women lacking a male tutor usually encounter in her country of origin.⁹³ The European Court of Human Rights concluded that, given the “special circumstances of the case”, there were substantial grounds for believing that if deported to Afghanistan, the applicant would run “various cumulative risks of reprisals which fall under Article 3 of the Convention from her husband X, his family, her own family and from the Afghan society”.⁹⁴

5. – How to Assess Violence against Women as a Form of Persecution? Issues of Credibility and the Situation in the Country of Origin

To assess when violence against women is a form of persecution, judges and authorities must consider both the personal situation of the applicant and the situation of the country to which the woman can be expelled absent the recognition of refugee status.

⁸⁹ *Ibid.*, para. 53.

⁹⁰ *Ibid.*, para. 55.

⁹¹ *Ibid.*, para. 57.

⁹² *Ibid.*, para. 58.

⁹³ *Ibid.*, para. 59.

⁹⁴ *Ibid.*, para. 62.

It is not easy for a woman to demonstrate, as required by the courts, that she runs the risk of being persecuted *because* she has been victim/survivor of violence, and that the harm is “serious”.⁹⁵ Credibility is highly problematic for claims where the experience of persecution is in some way related to a woman’s gender status.⁹⁶ Inconsistencies in the declarations to the authorities may undermine credibility, but might be dictated by the procedure, by the fact that, for example, a woman is heard along with her husband at the beginning of the procedure, and alone in second stance only.⁹⁷ Furthermore, medical evidence might not be available. In cases of rape and sexual violence that determined the escape from the country of origin, for example, physical evidence might be absent, unless the rape was particularly brutal or the woman was a virgin.⁹⁸ It must also be acknowledged that violence can take the form of psychological and economic violence, which might be very difficult to prove unless the woman has medical evidence supporting her psychological condition. The ‘likelihood’ of the risk of being subjected to violence should be determined by courts considering the ‘reasonable possibility’ of persecution. It seems obvious that the decision should be taken on a case-by-case basis. However, the processes followed in international refugee law have proved to be ‘insensitive to gender’: for example, as outlined by Valerie Oosterveld, some applicants might not be informed of the gender-related aspects of their experiences, interviews can be conducted without respecting the applicant’s privacy with the consequence of discouraging women from reporting episodes of rape or domestic violence or FGM, or interviews to women might be conducted by a male interviewer.⁹⁹ Advocates might not be sufficiently prepared to tackle cases of refugee women, with the consequence that “women’s cases are often formulated in ways which reflect the advocate’s understanding of the law rather than the reality of the applicant’s experiences”.¹⁰⁰ The effects of culture, trauma and post-traumatic stress disorder are rarely taken into consideration in the procedure for the recognition of refugee status. Furthermore, as highlighted in the judgments

⁹⁵ Victim/survivor is the language used by the General Recommendation No. 35 (CEDAW) of 2017.

⁹⁶ CRAWLEY, *cit. supra* note 75, p. 209. See also SINGER, “Falling at Each Hurdle: Assessing the Credibility of Women’s Asylum Claims in Europe”, in ARBEL, DAUVERGNE, MILLBANK (eds.), *Gender in Refugee Law. From the Margins to the Centre*, London, 2014, p. 98 ff.

⁹⁷ CRAWLEY, *cit. supra* note 75, pp. 209-210.

⁹⁸ CRAWLEY, *cit. supra* note 75, p. 218. See also UN Women report, *Report on the Legal Rights of Women and Girl Asylum Seekers in the European Union*, p. 23, stressing how courts sometimes show reluctance to tie the reason for the rape to a Convention ground.

⁹⁹ OOSTERVELD, *cit. supra* note 45, p. 968.

¹⁰⁰ KELLY, *cit. supra* note 11, p. 629.

examined in the previous paragraph, there is another element taken into consideration by courts: whether or not a person can move to another region of her country to escape from violence. Is relocation enough to protect women from violence, or, better, to assess the capacity of a State to protect women from inter-personal violence?

Turning to the second element, the situation of the woman's country of origin, Crawley pointed out that "the State in the country of origin is frequently unwilling or unable to offer effective protection to women", because of the existence of a legislation that condones violence in the family, or because of the authorities' refusal to investigate the individual case, or because of the incapacity (or unwillingness) of the police to respond to the woman's plea for assistance.¹⁰¹ In the aforementioned *Collins and Akaziebie* case, the European Court of Human Rights considered both the situation in Nigeria and the personal situation of the applicant. With regard to the former aspect, however, the Court did not delve into the fact that, despite the adoption of laws by the country where the applicant was supposed to be expelled, a practice might be so well rooted in the society to be unavoidable, even if the family of the woman is against it. In the case regarding domestic violence decided in 2010, *N. v. Sweden*, the Court demonstrated a gender-sensitive approach, considering the capacity of the State – as we will argue further, its capacity of respecting due diligence obligations – in protecting women from violence, through a series of reports elaborated by international bodies and organs that showed the general situation for women in Afghanistan and how this could have affected the applicant. As Deborah Anker observed, "the most critical issue today in refugee determinations is the evidentiary burden faced by women claimants in establishing the lack of state protection".¹⁰² In that respect, the application of the Istanbul Convention, with the definition of due diligence obligations States must abide by, could be considered as a useful tool to interpret in a more gender-sensitive way the provisions of the European Convention on Human Rights.

¹⁰¹ CRAWLEY, *cit. supra* note 75, pp. 133-134.

¹⁰² ANKER, "Rape in the Community as a Basis for Asylum: The Treatment of Women Refugees' Claims to Protection in Canada and the United States (Part 1)", *Benders Immigration*, 1997, p. 476 ff., p. 481.

6. – *States Due Diligence Obligations in Protecting Women from Violence: Setting a Higher Standard of Protection in Refugee Law in Light of the Istanbul Convention*

Under the Istanbul Convention, States have legal obligations to prevent and to repress violence against women and domestic violence, along with the obligation to protect the victims/survivors. According to Article 5 of the Istanbul Convention:

1. Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation. 2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.

As correctly pointed out in the explanatory report, due diligence obligations are obligations of means. It does not mean that *all* legal obligations included in the convention are of due diligence nature. Obligations under the Convention are obligations of result, of means and of progressive realisation.¹⁰³

In this paragraph, we will show how the Istanbul Convention can be useful in applying the due diligence standard in the assessment of the adequacy of the protection granted by the State of origin to the woman who is fleeing from gender-based violence. This would determine a paradigmatic shift from the need for the woman to prove that she has no alternative to escape violence to the assessment by the Court, with which the request for refugee status has been filed, of the situation of the country of origin in protecting women from gender-based violence. Mullally already pointed out, in her remarkable work, how due diligence is never applied in asylum cases,¹⁰⁴ and how, as we will show, it should (and *must* according to the legal obligations stemming from the Istanbul Convention). The paradigmatic shift concerns the passage from the centrality of women credibility – of the woman that must prove to concretely fear of being persecuted and subjected to serious violence once back to her country of origin – to the examination of the capacity of the State of origin to grant protection to women. Only when the State of origin is capable of complying with due diligence obligations, then the request for refugee status can be refused.

At first sight, this argument might seem an undue interference in the State of

¹⁰³ This is part of a broader research, *Violence against women's health*, *cit. supra* note 24.

¹⁰⁴ MULLALLY, *cit. supra* note 71.

origin's sovereignty. We argue that it is not. Through this paradigmatic shift, the protection of women would occur *par ricochet*, by assessing whether the State of origin from which the woman escapes is capable of protecting her, in her specific situation, from violence. To borrow the legal reasoning which is applied in relation to the prohibition of torture, inhuman or degrading treatment, the State that refuses expulsion to a country where there is a risk of torture or inhuman or degrading treatment decides thus on the basis of international reports, and reports of NGOs, which depict the situation of the country. That is not seen as an interference with the State's sovereignty. Why should it be in the case of examining the situation of a country from which a woman escapes fearing gender-based violence? In cases of FGM and domestic violence, the European Court of Human Right has applied Article 3 of the European Convention, namely the prohibition of torture, inhuman or degrading treatment,¹⁰⁵ without dwelling too much upon the "level of severity" of the harm suffered by the applicant. One could object that the standard of due diligence is applicable to those States of origin which ratified the Istanbul Convention only, but we can argue that, on the one hand, this standard is well established in international human rights law, and, on the other hand, that the protection of the woman's right only occurs *par ricochet*, because the persecution derives from an inaction of the State of origin. This hypothesis is not thus far-fetched. As early as 1992, the UNHCR wrote in its Handbook on Procedures and Criteria for Determining Refugee Status that:

Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.¹⁰⁶

It means, in other words, that the State is not responsible for a direct violation of rights, but for an omission in its compliance with its due diligence obligations.¹⁰⁷

¹⁰⁵ See, for example, *Opuz v. Turkey*, Application No. 33401/02, judgment of 9 June 2009.

¹⁰⁶ Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees HCR/IP/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979, para. 65, available at: <<https://www.unhcr.org/4d93528a9.pdf>>. See also HAINES QC, "La persécution liée au genre", FELLER, TÜRK, NICHOLSON (eds), *Refugee Protection in International Law*, Cambridge, 2003, p. 319 ff., p. 375: "la persécution est composée de deux éléments séparés mais essentiels, à savoir le risque de préjudice grave et l'absence de protection de l'Etat. On peut l'exprimer avec la formule: la persécution = un préjudice grave + l'absence de protection de l'Etat".

¹⁰⁷ KORSAKOFF, "Femmes et droit international des réfugiés: la définition du réfugié renouvelée", in JÄNTERÄ-JAREBORG, TIGROUDJA (eds.), *Women's Human Rights and the Elimination of Discrimination*,

Hathaway interestingly contended in 1993 that a “conceptualization of persecution as the failure of basic State protection demonstrated through the denial of core, internationally recognised human rights is a helpful means of breathing new life into refugee law”.¹⁰⁸ He also added that, given the role of international human rights law in defining the basic duties of the States to their nationals, “individuals ought not to be required to endure life in societies which fail to meet its standards”.¹⁰⁹

Using this argument for our purposes, the question is the following: Has the State of origin put in place reasonable measures to protect women from violence?

In the *Collins and Akaziebie* case, and in the other cases on FGM that have been examined by the European Court of Human Rights, the assessment conducted by national authorities and by the Strasbourg judges concerned the situation in the applicant’s country of origin in terms of adoption of laws prohibiting FGM. This argument – based on the obligation of result to adopt laws criminalising FGM – does not seem enough to effectively protect women from violence. The legal argument proposed in *N. v. Sweden*, concerning domestic violence, was much more attentive in considering the situation of the State in which the woman could be forced to return whether expelled. The problem is that courts have hardly ever contextualised – which does not mean to adopt a relativistic approach to human rights law, but to consider the cultural and societal context in which the violation of women’s rights is perpetrated – the forms of violence that manifest in one country or the other. For example, the fact that a family is contrary to FGM in Sweden, or in another European country where the woman has escaped, does not automatically ensure that it will not be induced by the society of origin to change its mind.

As a consequence, relocation within the country, which is suggested in European Court of Human Rights decisions with regard to FGM, “puts the burden back on the [...] victim to escape the perpetrator(s) of abuse”.¹¹⁰ In domestic violence asylum cases, “the reasonableness of the relocation alternative [...] and the effectiveness of State protection [...] tend to be assessed from the perspective of the resources and opportunities available to the asylum applicant, rather than through scrutiny of the actions of the State, or of its due diligence obligations”.¹¹¹ The UNHCR Handbook

Leiden-Boston 2016, p. 218 ff., p. 260.

¹⁰⁸ HATHAWAY, *cit. supra* note 29, p. 669.

¹⁰⁹ *Ibid.*

¹¹⁰ MULLALLY, *cit. supra* note 71, p. 481.

¹¹¹ *Ibid.*

for the protection of women and girls illustrates the option of “voluntary relocation elsewhere in the country”,¹¹² which sounds interesting to support our argument. The possibility of relocation should be contemplated whether the woman wishes to do so, and after scrutiny of the capacity of the State to comply with its due diligence obligations. The obligation of the State to provide protection cannot be replaced by the work of NGOs or by the willingness of family members to protect the woman from violence. The European Court of Human Rights, except for the *N. v. Sweden* judgment, has not followed this line of reasoning yet, but it could do so in the application of the Istanbul Convention as a tool for the interpretation of the relevant provisions of the European Convention of Human Rights, in particular the prohibition of torture, inhuman or degrading treatment, and the right to privacy, which are applicable in cases of FGM and domestic violence. The standard of due diligence, in particular, would determine the paradigmatic change in perspective and would enhance the protection of women’s rights, with no need to scrutinise the “seriousness” of the harm suffered by the woman.

This approach is not new to domestic courts. In Italy, for example, the Italian Supreme Court, the *Cassazione*, decided on 5 December 2016 the appeal of a woman, of Moroccan nationality, whose request for international protection was denied by the competent authorities.¹¹³ Her request for reconsideration of the case was dismissed by the court of first instance and later by the court of appeal in Rome. The woman asked for international protection because she feared of being subjected to domestic violence perpetrated by her former husband once back home. The authorities rejected the application, arguing that she could receive protection in her country of origin. Not only she obtained divorce in Morocco, but also her former husband was criminally prosecuted and convicted for the perpetrated violence. The applicant complained that the protection offered by the Moroccan authorities was not enough, and that the Moroccan system did not grant forms of protection such as restraining or protection order. The Italian Court referred to Article 60 of the Istanbul Convention on gender-based asylum claims, pointing out that violence against women is a form of persecution under the 1951 Convention on refugee status, and that domestic violence suffered by the woman clearly fell under the notion of violence against

¹¹² UNHCR Handbook for the protection of women and girls, 2008, p. 88. <https://www.refworld.org/docid/47cfc2962.html>

¹¹³ Corte di Cassazione, sez. VI Civile - 1, ordinanza 5 dicembre 2016 – 17 maggio 2017, n. 12333.

women. The Court interpreted the notion of “inhuman and degrading treatment” under the Italian legislative Decree No. 251/2007,¹¹⁴ concerning international protection, as encompassing domestic violence. Such interpretation – the Court stressed – is not contrary to the text of the provision of domestic law, on the one hand, and is *compulsory* according to Article 60(1) of the Istanbul Convention, on the other hand. The *Cassazione* quashed the Court of Appeal’s judgment and referred the case back to the lower court to decide on the merits. The *Cassazione* did not focus on the existence of laws on domestic violence in Morocco, but rather considered whether Morocco “was able to offer her adequate protection”.¹¹⁵ The Italian Supreme Court stressed how the lower court “limited” its analysis “to circumstances which were not signal of adequate protection, such as, for example, the criminal conviction of the former husband [...] or completely unrelated to forms of national protection, such as the support of the applicant’s family”.¹¹⁶ There was no reference to the “seriousness” of domestic violence.

The standard of due diligence might reveal its usefulness also in the consideration of intersecting forms of discrimination against women,¹¹⁷ and to avoid the paternalistic position of judges that try to protect women from their culture of origin. When considering whether the State of origin has adequate measures to protect women from violence, judges should consider whether there are intersecting axes of persecution.¹¹⁸ In other words, a woman can be persecuted as victim of domestic violence because she is a woman, but also because she belongs to another “particular” group or because she adheres to a certain political opinion. Applying the standard of due diligence would allow a legal analysis of what is done by the State of origin to protect women, and more specifically women that face intersecting forms of discrimination,

¹¹⁴ Decreto legislativo 19 novembre 2007 No 251, Attuazione della direttiva 2004/83/CE recante norme minime sull’attribuzione, a cittadini di Paesi terzi o apolidi, della qualifica del rifugiato o di persona altrimenti bisognosa di protezione internazionale, nonché norme minime sul contenuto della protezione riconosciuta.

¹¹⁵ Corte di Cassazione, n. 12333, para. 2.1.

¹¹⁶ *Ibid.*

¹¹⁷ On intersectionality, see, *inter alia*, CRESHAW, “Mapping the margins: intersectionality, identity politics, and violence against women of color”, *Stanford Law Review*, 1991, p. 1241 ff.; BOND, “International intersectionality: a theoretical and pragmatic exploration of women’s international human rights law”, *Emory Law Journal*, 2003, p. 71ff.; BRAH and PHOENIX, “Ain’t I a woman? Revisiting intersectionality”, *Journal of International Women’s Studies*, 2004, p. 75 ff.; SOSA, *Intersectionality in the Human Rights Legal Framework on Violence Against Women*, Cambridge, 2017.

¹¹⁸ MULLALLY, *cit. supra* note 71, p. 480.

from interpersonal violence.

The burden of proof should not be placed on the woman that must prove she can relocate. It would be up to courts to assess whether the State of origin has adequate measures to respect its due diligence obligations and whether relocation, when accepted by the woman, would be a feasible option. This can be done using the Istanbul Convention as a tool for interpretation of the provisions of the European Convention on Human Rights and of domestic refugee laws, as the Italian case clearly demonstrates.¹¹⁹

7. – *Conclusions*

The Istanbul Convention can be a powerful tool for national judges and the European Court of Human Rights alike when they interpret national law and the rights enshrined in the European Convention on Human Rights in cases of women requesting refugee status. Given the provisions on migration included in the Convention and its conceptualisation of due diligence obligations, the Istanbul Convention can be used to assess, in the analysis of a request for refugee status, whether the State of origin complies with its due diligence obligations in preventing and prosecuting violence against women, as well as in protecting victims/survivors. The paradigmatic change from the centrality of women's experience to the situation of the country of origin would be pivotal for the jurisprudence of the European Court of Human Rights, that only timidly approached the issue in the *N. v Sweden* case. As observed by Sjöholm, the Court has not adopted an overt gender-sensitive method in its case-law so far, although 'it has successfully integrated several forms of violence [of which women are victims], as human rights violations.'¹²⁰ A gender-sensitive approach means to consider the gendered causes and effects of violence and to recognise that harm exclusively or mainly affects women. It also implies the acknowledgement of the gendered effects of a violation, such as the social stigma that women might face as a consequence of violence. A gender-based approach, which is possible through the Istanbul Convention, will imply that Courts should not only assess whether in the country of origin there is a legislation concerning domestic violence or female genital mutilation – the adoption of a law corresponds to an obligation of

¹¹⁹ See, extensively, forthcoming, DE VIDO, "The Council of Europe Istanbul Convention as interpretative tool at European and national level", in NIEMI, PERONI, STOYANOVA (eds), *International Law and Violence Against Women: Europe and the Istanbul Convention*, Abingdon, 2020.

¹²⁰ SJÖHOLM, *Gender-Sensitive Norm Interpretation by Regional Human Rights Law Systems*, Leiden/Boston, 2018, p. 116.

result – but also evaluate whether the State *complies with* its due diligence obligations to prevent, to protect and to prosecute. This approach extends to issues of relocation as well. The burden should not be on the woman that “might have escaped somewhere else”, but on courts that should assess whether in another area where the person could, and wishes, to relocate, the country of origin respects its obligations of prevention, protection and prosecution with regard to gender-based violence.

When tackling cases of refugee status, there are however some risks that must be avoided. First, if, on one hand, persecution can never be “normalised” by invoking culture,¹²¹ on the other hand, it is necessary not to commit the mistake of stereotyping other States as “others” with the risk of considering courts in the so-called “Western countries” as the ones that can “save women” from the brutality of other cultures. We are perfectly aware indeed of the stereotypes and the biases existing in European and national courts as well. The approach should be gender-sensitive in the sense that it should shift from focusing on the woman – the woman that should have relocated somewhere else, the woman who should have declared in the first interview to have been victim of violence, the woman who should demonstrate the “seriousness” of the harm suffered as a consequence of domestic violence – to focusing on the State of origin and its capacity of protecting women, and of preventing and prosecuting violence.

¹²¹ FREEDMAN, *cit. supra* note 27, p. 82.

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