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**Implementation of a
Gender Perspective
in Norwegian Refugee Law**

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Summary

This report discusses Norwegian immigration administration practice in relation to asylum applications with a gender aspect. The concept gender aspect such as it is used in this report covers both the biological and social gender. The report is based on a review of 300 asylum applications handled by the Directorate of Immigration and / or Immigration Appeals Board during the period 1998-2000 and is a result of the project “The Boundary between Asylum and a Residence Permit granted on Humanitarian Grounds”. The project was commissioned by the Ministry of Local Government and Regional Development.

Starting with the international principle of non-discrimination, the conclusion of this project work is that a *holistic gender perspective* should be included in Norwegian refugee law. The purpose of including such gender perspective is non-discrimination, or equal consideration, of asylum application. In relation to asylum cases with a gender aspect the legislators have thus far focused on *gender-based persecution*, cases in which gender is important to why an asylum seeker is persecuted. Implementation of a holistic gender perspective will entail recognition of the fact that gender can be a relevant factor in the interpretation of all the conditions contained in Article 1 A (2). It is thus accepted that the gender of an asylum seeker can be of importance for more than the cause for persecution.

The review of asylum applications with a gender aspect has shown that no direct discrimination has taken place in relation to the question of granting of asylum or residence on humanitarian grounds for protection reasons. Both female and male applicants, if the applications contain a gender aspect, are granted asylum in Norway. One of the finds in the analysis, however, is that relatively similar asylum applications have a different outcome at times. Seemingly neutral case consideration results in different treatment in some cases, that is to say, indirect discrimination.

On the basis of the finds which are presented in the report a specific cause cannot be identified which explains why asylum seekers are more often granted a residence permit than asylum. Several factors seem to contribute to why the number of grants of permits on humanitarian grounds for

protection reasons (hereafter “residence permits”) is higher than the number of grants of asylum in asylum applications with a gender aspect.

The administration’s interpretation of the concept ”persecution”, is of great importance for the outcome of an asylum application. There are several examples in the cases which were reviewed for the project where very serious human rights violations are not recognised as persecution in the sense of the Convention. Finds show that when an asylum seeker’s gender is of importance for how he or she is persecuted, a residence permit is often granted instead of asylum. Serious *gender-specific violations* are not always accepted as persecution.

The study of asylum cases shows that violations of human rights which are regarded as *jus cogens*, for example, the right to life, are more easily recognised as persecution than other serious violations of human rights, as for example, serious sexual assaults and rape. Asylum seekers exposed to types of violations which are not regarded *jus cogens* are thus more likely to be granted a residence permit than asylum. This has an unfortunate effect for the asylum seekers if the asylum applications contain a gender aspect, since these applicants are often exposed to human rights violations which are not regarded as *jus cogens*.

The immigration administration bases decisions on the fact that the Convention’s persecution concept is future-oriented. The requirement that persecution must be future-oriented is of importance to the boundary between asylum or residence permit. This particularly concerns asylum seekers who have been exposed to *gender-specific infringements*. As a result of this condition, asylum is granted to very few women who have been exposed to rape and/or sexual assault.

The agent of persecution in most asylum cases with a gender aspect is one or more private persons. Recognition of the fact that persecution in the sense of the Convention can be carried out by both private persons and officers of public authorities is therefore of importance for the outcome of asylum cases with a gender aspect.

It is not a condition of the Convention that persecution must take place in public. Violations which take place in the private sphere can also be persecution. The immigration administration cannot reject an application

for asylum on the grounds that violations that have taken place in the home are a “private problem” which falls outside the Refugee Convention.

When the agent of persecution is a private person, the asylum seeker must show that his or her homeland is not capable of or willing to provide protection against persecution. The immigration administration’s general opinion of the legal conditions in a country, based on country reports and reports from international NGOs, has often been of importance as to whether asylum or a residence permit is granted. This is because general opinions mean that at times no individual assessment of the necessity for protection in the individual asylum case is undertaken.

It is the individual asylum seeker who carries the burden of proof that the home country is not capable of or willing to provide protection against persecution. Many asylum seekers, if the application for asylum contains a gender aspect, have problems with fulfilling the burden of proof since they have never sought protection in their home country. For many women it can appear as very difficult, or almost impossible, to seek protection in the home country either because they do not have permission to leave their home, or because contacting the police or judicial system will put them in danger of further assaults. Recognition that an asylum seeker’s problem with fulfilling a burden of proof can have other reasons than a lack of credibility is of importance for granting asylum or residence permit on humanitarian grounds for protection reasons.

In relation to asylum cases with a gender aspect the Convention ground “particular social group” is of distinct relevance. There is great uncertainty in the immigration administration regarding the interpretation of this Convention ground. Uncertainty with regard to interpretation means that asylum applications which could have resulted in the granting of asylum in several cases are given a residence permit, alternatively rejected.

The report ”Implementation of a Gender Perspective in Norwegian Refugee Law” shows that there is no clear boundary between the granting of asylum and residence permits for protection reasons, concerning asylum applications with a gender aspect. Uncertainty and lack of clarity surrounding the present rules affect the decisions which are made. In some cases there is direct discrimination in the relationship between asylum

applications with a gender aspect. Asylum applications which seem comparatively alike receive different outcomes.

Non-discrimination of asylum seekers and a clearer definition of the boundary between asylum and residence permit on humanitarian grounds for protection reasons can best be achieved by changes in the law. There is a need for more detailed body of rules and clearer use of concepts. The solution is assumed to lie in the inclusion of a *holistic gender perspective*, where the focus to a larger degree is directed toward relevant international sources of law.

1. Introduction

1.1 Presentation of theme

Applications for asylum with a gender aspect represent a large and comparatively complex theme within refugee law.

Asylum seekers are persons who have fled their home country because they have been persecuted. According to the Act concerning the entry of foreign nationals into the Kingdom of Norway and their presence in the Realm (Immigration Act)¹, (hereafter IA) a “refugee who is in the Realm or at a Norwegian border has the right to asylum”. The theme of this report is whether asylum seekers whose applications contain a gender aspect have equal rights and opportunities of achieving asylum in Norway as other asylum seekers. Is there evidence of discrimination regarding asylum applications with a gender aspect?

Discrimination denotes different assessment which has no objective grounds and which is not justifiable as an objective different assessment.² The non-discrimination principle enjoys a central position in refugee law and in international human rights in general. In the Preamble to the Refugee Convention relating to the Status of Refugees³ (hereafter “the Convention”), it is established that:

”Considering that the Charter of the United Nations and the Universal Declaration of Human Rights approved on 10 December 1948 by the General Assembly have affirmed the principle that all human beings shall enjoy fundamental rights and freedoms without discrimination.”

Asylum cases with a gender aspect are cases where gender is a relevant element to an asylum seeker’s refugee history. Gender can *inter alia* be a factor of importance as to **how** and **why** a person is being persecuted. Religion, culture and history make the lives of individuals, both women and men, in the different societies of the world extremely different.

¹ Act of 24th June 1988 No. 64

² Official Norwegian Report 2002: 12 p. 32, first column, second paragraph

³ 189 U.N.T.S. 150, *entered into force* April 22

Religious and cultural differences mean *inter alia* that women's and men's opportunities to become involved in politics and religion vary from society to society. The context which is used for the interpretation of the Convention will therefore often be different depending on whether the asylum seeker is a woman or a man and where he or she comes from. In this manner an asylum seeker's gender can have a more indirect effect on an individual's grounds for asylum. In practice, this will for example mean that women's political involvement can be expressed in other ways than men's political involvement. Gender, in other words, can be a relevant and decisive factor in the interpretation and application of the Convention, and thus a *gender-sensitive interpretation* should be used.

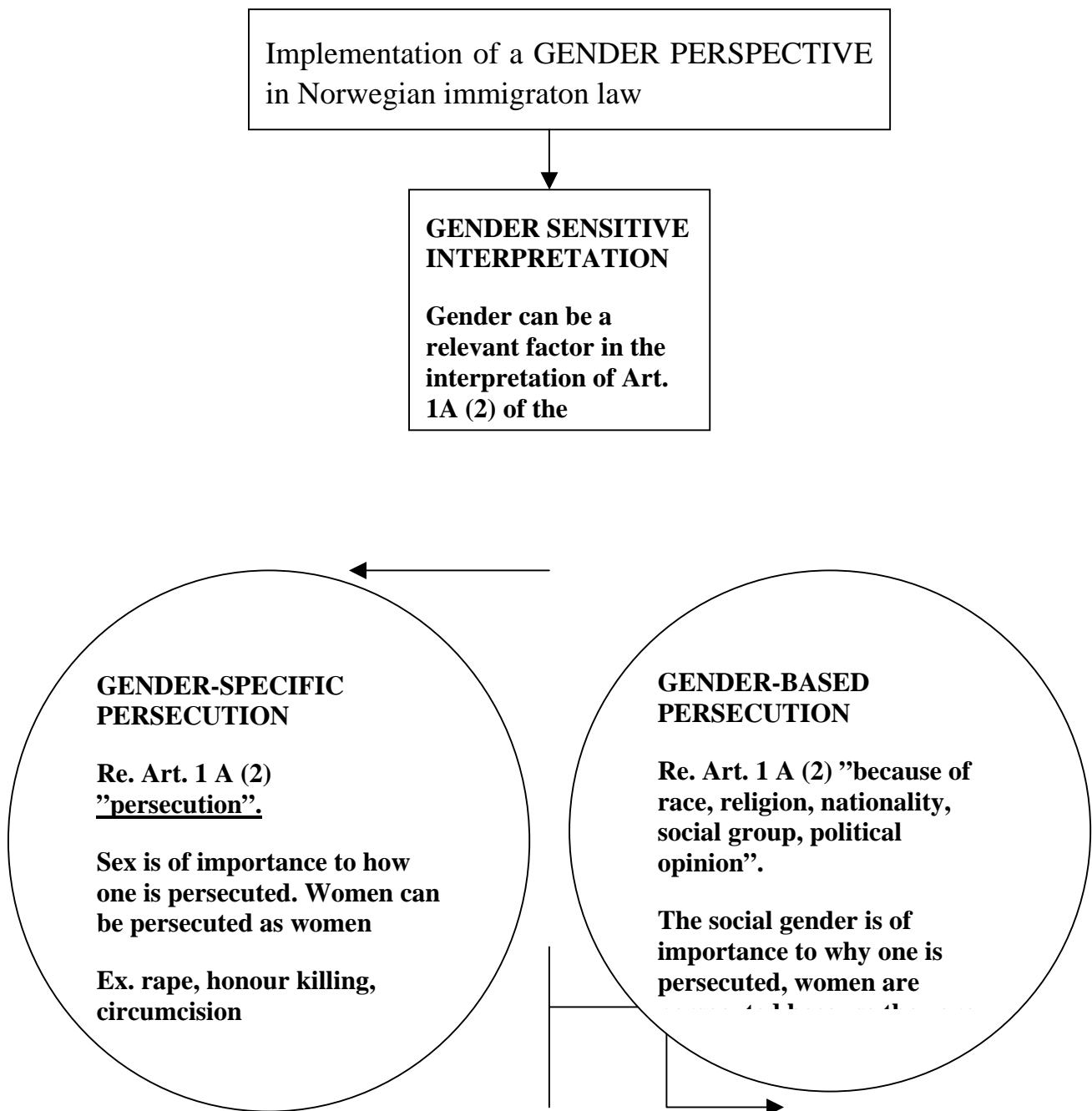
The concept gender, which is very central to the theme of this report, must be defined further. In the Norwegian language the word gender is used both of the biological gender, woman and man, and the social gender, the role of the gender. In English one differentiates between these two different meanings by applying two concepts, "sex" for the biological gender and "gender" for the social gender. In the following the two different meanings of the designation gender will be kept apart in that 'sex' will be used in the meaning of the biological gender, and the designation 'social gender' used in the meaning of the socially created role of the sexes.

Gender can be of importance to **how** a person is persecuted. For example, women can be persecuted in other ways than men. Women are more often exposed to rape and sexual assault, honour killing and domestic violence than men. Men can also be raped, but women are exposed to sexual assault more often than men. Persecution which is connected to the biological gender is referred to in this report as *gender-specific persecution*.

The social gender, the role of the sexes, can be of importance as to **why** a person is persecuted. Based on an individual's biological gender, society has certain expectations as to how one shall behave. For example, women shall be married before they have children, women shall not wear trousers, men shall not fall in love with other men or dress in women's clothes, or women are subordinate to men and shall not have any opinions of their own. Social expectations of how women and men shall behave make up the role of the sexes, the social gender. The role of the sexes will vary from society to society, conditional upon *inter alia* culture, religion and history.

Persons who by their mode of living break with the role of the sexes can be persecuted. For example, when women wear trousers or when men dress in women's clothes. When the social gender is of importance as to *why* an asylum seeker is persecuted, it is referred to as *gender-based persecution*.

In Norwegian immigration law there has so far been a focus on gender-based persecution, which is a result of the implementation of the Ministry of Justice guidelines dated 13.01.1998. The gender aspect entails, however, so much more than only gender-based persecution. The gender aspect is of importance to both the context which is used for the application of the Convention and how an asylum seeker is persecuted. In this report it is argued that Norway, in the light of the non-discrimination principle, should implement a **holistic gender perspective** in Norwegian refugee law. This is illustrated in the following figure:



The focus in this report is directed towards how the Norwegian immigration administration assesses asylum cases with a gender aspect. The purpose of the work has been to try and give answers to the following questions:

- 1) To what extent is the gender element taken into consideration in the individual case?

- 2) How is the protection element safeguarded in the consideration of the individual case?
- 3) To what extent in the cases are the human rights conventions referred to in general and the text of the conventions concerning the human rights of women in particular?
- 4) To what extent is country knowledge which also includes the particular situation of women in the area concerned used in the decisions?
- 5) How is discrimination assessed in relation to the persecution concept?
- 6) Which asylum grounds are used in the decisions – how are these grounds interpreted by the Directorate of Immigration (hereafter "UDI") and the Immigration Appeals Board ("UNE")?
- 7) What is required so that cases with a gender element, which are not granted asylum, will be granted a residence permit on humanitarian grounds?
- 8) How are cases handled which contain (alleged) persecution by non-state actors – what is required for these to be granted asylum, and when are they given residence permits on humanitarian grounds?
- 9) Is the interpretation of the definition of refugee discriminating in practice as regards gender in that it results in women having greater difficulty in getting asylum granted than men, in spite of equal need for protection?

1.2 Delimitation

It is the persons who come to Norway through the institution of asylum who represent the theme for this report. The further discussion is delimited against transfer refugees, persons who are seeking family reunification and those who immigrate to Norway.

In the discussion regarding refugee rights to remain in Norway, one must distinguish between two different questions. The first is to what extent an alleged refugee who comes to Norway is allowed to remain, alternatively whether he or she must leave the country, either voluntarily or by force. The second question concerns only the asylum seekers who are allowed to remain in the country, and concerns what sort of status they will receive. The latter is referred to in Norwegian law as the status question. The status question in relation to asylum applications with a gender perspective is the theme of this work.

In Norway, persons who are allowed to remain in the country after having sought asylum receive either asylum or a residence permit on humanitarian grounds. Only the person who fulfils the conditions contained in § 17 of the Immigration Act (IA or “the Act”) cf. § 16 of the Refugee Convention⁴ (hereafter “the Convention”) Article 1 A(2) will be granted asylum. A residence permit on humanitarian grounds can be granted on three different grounds, because of the prohibition against non-refoulement, on grounds similar to those of a refugee and on compassionate grounds, or particular connection to the Realm respectively. Persons who are granted residence in the country based on § 15 (1), item 1 or 2 (prohibition against non-refoulement and grounds similar to those of a refugee) "shall" be granted protection in accordance with § 8, subsection 2 of the Regulations concerning immigration (hereafter "IR.") § 21, subsection 1. These persons have a legal right to protection and receive a “residence permit for protection reasons” (hereafter ”**othum**”). Persons who for “compassionate grounds” or who have a ”particular connection to the Realm” are granted a residence permit (hereafter ”**permit**”) in Norway in accordance with the IA § 15, subsection 2, cf. § 8, subsection 2, cf. IR § 21, subsection 2, do not have a legal right to a permit. It is up to UDI and UNE to assess whether a permit should be granted.

An asylum seeker can thus be granted residence in Norway on four different legal grounds. One of them will be the status as a refugee, two others will give the right to a residence permit for protection reasons, and

⁴ Convention Relating to the Status of Refugees, 1951

the fourth ground can give a permit on humanitarian grounds. The first three grounds will give the person concerned protection against being returned to his or her home country.

The discussions in the report are delimited against a permit granted on “compassionate grounds” or “particular connection to the Realm”, in accordance with the Act, § 15, subsection 2, cf. § 8, subsection 2, cf. IR § 21, subsection 1. Further, as mentioned only asylum applications with a gender aspect will be discussed. In the centre of the further discussion are thus only the persons who can be granted protection against return based on the Act § 17 cf. § 16, that is to say, asylum or othum pursuant to § 15, subsection 1, item 1 or 2.⁵ All the three possible grounds for protection against return for refugees will be discussed.

This report focuses on the material aspects of the implementation of a gender perspective in Norwegian refugee law. The report is delimited against procedural questions.

1.3 Factual materials and Selection Procedure

In connection with the project, almost 300 cases have been reviewed by UDI and UNE. The cases were selected by UNE and UDI respectively on the basis of the following criteria:

”Project colleague will review/analyse cases which have a gender aspect. This will *inter alia* mean cases with one or more of the following characteristics:

- (Alleged) sexual assault or danger of such
- (Alleged) persecution because of liberal attitudes/transgression of social norms –

⁵ Cf. IR § 21, subs. 1.

- ex. dress, lack of religious connection, works outside the house, single, children out of wedlock, etc.
- (Alleged) domestic violence
- (Alleged) danger of forced pregnancy, forced abortion or forced sterilisation,
- (Alleged) persecution because of refusal to accept family's choice of spouse, standpoint against mutilation of female genitalia
- (Alleged) danger of honour killing
- (Alleged) state discrimination, for example, refusing women access to health care, education, working life, ("discrimination within social and economic rights")
- (Alleged) persecution because of male family member's political activity and connection
- (Alleged) persecution by non-state actors"⁶

Of the 300 cases reviewed, 56 have been selected and applied in the report. The basis for the selection is the criteria given in the project description cf. above-mentioned. In order to preserve the anonymity of the persons whose asylum applications are used in the report, the traditional FK numbers which are used by the Norwegian immigration administration are changed. Each case is assigned its own code consisting of the letters **GPRL** which stands for the first letters in the title of the report (**G**ender **P**erspective **R**efugee **L**aw) and a number from 01 to 56.

The 56 cases which are applied all contain a gender aspect. The focus of the report is directed towards certain types of violations. These are: Sexual assault, persecution because of liberal attitudes, domestic violence, refusal to accept the family's choice of spouse, bride kidnapping and persecution

⁶ Cite, Project description for "Project boundary between asylum and residence permit on humanitarian grounds"

by non-state actors. The distribution of the number of cases of the selected types of violations are as follows: 8 cases where the asserted asylum grounds are rape and/or sexual assault, 15 cases where the asserted asylum grounds are domestic violence and assault, 13 cases where the asserted asylum grounds are refusal to accept the family's choice of spouse, 7 cases where the asserted asylum grounds are persecution because of too liberal attitudes, and 4 cases where the asserted asylum grounds are bride kidnapping. Nearly all the cases contain allegations of persecution by one or more non-state actors.

The reason that the above-mentioned types of violation have been chosen, is that within these categories of violation there has been the richest and most varied selection of examples.

It has not been possible to give a detailed legal analysis of all the 56 cases. The time frame for the project has not allowed it. A short presentation of the majority of the asylum cases, together with the grounds given by the immigration administration for the outcome of the application, will be presented in Chap. 4.3 – 4.7. The purpose of such a brief, but at the same time relatively extensive presentation is to give the reader an insight into the complex problems faced by the immigration administration in the work with asylum applications with a gender aspect. Further, there is a wish to show a diversity of fates and stories which are hidden behind the label one has often chosen to stick on these cases in Norwegian immigration law, namely, “gender-based persecution”. Further, we will seek to show trends for how applications with a gender aspect are treated.

It is hoped that the presentation of the cases will give a certain insight into the present administrative practice where asylum applications with a gender aspect are concerned. In this regard it must be emphasised that practice reviewed in connection with the report only represents a small part of the cases with a gender aspect which the immigration administration decides annually. The basis for this report is a thorough analysis of 56 asylum cases from the period 1998-2002. It is remarked that only during the year 2002 almost the same number of cases with a gender aspect were granted asylum or othum by UDI. The practice which is presented thus represents only a small selection of asylum cases with a gender perspective which were considered by the immigration administration during this period. There will

almost certainly be found deviations from and exceptions to the cases which are presented in the report. Based on the number of cases which are used in the work, however, this report attempts to give such holistic a picture of practice as possible.

1.4 Remarks

The time frame for the project asylum/othum in Norwegian law, which has resulted in this report, has been 9 months. Taking into consideration the relatively large number of cases which have been reviewed, the time has been brief. Because of time limitations it has not been possible to go in-depth into several of the problems which are outlined in the following chapters. The report is incomplete in the sense that the condition regarding causal relationship, "for reason of", in Article 1 A (2) of the Refugee Convention has not been discussed. In order to show to a greater degree the diversity which asylum applications with a gender aspect represent, it would have been desirable to implement a chapter on asylum seekers who assert sexual orientation as a ground for asylum, but there has not been time for it.⁷ However, it is hoped that the report can contribute to increased understanding for the theme gender perspective in refugee law. The report gives an introduction to the central theoretical problems within the theme, as well as a relatively wide insight into Norwegian administrative practice in the area.

1.5 The further discussion

The theoretical framework for the right to asylum in Norway will be presented in Chapter 2. In Chapter 3 the theory behind the development of a female gender perspective in refugee law will be presented. Chapter 4 is

⁷ In several of the asylum applications which have been reviewed in connection with the project, the asserted asylum ground has been persecution because of homosexual or lesbian orientation.

the most extensive chapter in this report. In this chapter the importance of implementation of a gender perspective in relation to the persecution concept contained in the Convention will be discussed. In Chapter 4, item 4.3 to 4.7 the account from 34 of the cases reviewed in connection with the project is presented. Chapter 4 also discusses the importance of a gender-sensitive interpretation in relation to the condition regarding "agents of persecution". The theme for Chapter 5 is the application and interpretation of the Convention ground "particular social group". Finally, there will be a short presentation of theory and practice surrounding the theme cultural relativism in Chapter 6.

2. Right to residence in Norway

2.1 Presentation of the problem

In order to find out whether asylum seekers, whose asylum applications contain a gender aspect, have equal rights and opportunities as regards asylum and residence in relation to other asylum seekers and where the boundary between asylum and residence on humanitarian grounds for protection reasons goes, it is necessary in the introduction to briefly describe the right to residence in Norway pursuant to IA § 17 cf. § 16 and § 15 subsection one. Furthermore as a result of the fact that the principle of equal treatment and non-discrimination is central for the content of the report, the content of this principle will also be presented below.

The problem which is sought answered in this chapter is: When has a person right to asylum in Norway and when has he/she the right to residence for protection reasons? Further, have persons, whose applications contain a gender aspect, de jure equal rights to and opportunities for asylum or residence on humanitarian grounds pursuant to § 15, first subsection, cf. IR. § 21, subsection 1 in relation to other asylum seekers? And, how is the immigration administration bound by the international non-discrimination principle in its work with asylum cases?

2.2 The status question

An asylum seeker who is allowed to remain in Norway can receive the status of refugee, cf. IA § 17 cf § 16 possibly a residence permit on humanitarian grounds for protection reasons (hereafter "othum") cf. § 15, subsection 1, or residence on humanitarian grounds for compassionate reasons (hereafter "permit"), cf. § 15, subsection 2.

The purpose of this project has been to find the boundary between asylum and a permit on humanitarian grounds for protection reasons in relation to

asylum cases with a gender aspect. Which elements are relevant and decisive in the assessment of the so-called status question⁸?

The status question has not traditionally been attached great weight in Norwegian immigration law. In a meeting with refugees, the Norwegian view has been to regard it as central to offer protection to the asylum seekers who need it,⁹ either by granting asylum, permit on humanitarian grounds for protection reasons, or permit for humanitarian reasons on compassionate grounds. The protection element has taken a central place, while the status question has been given subordinate priority. That the main emphasis in Norwegian immigration law has been laid on the protection element can be seen inter alia from the structure of the Immigration Act, Chapter 3 on refugees. The title of the chapter is “Protection against persecution” and the first provision § 15 deals with “Protection against persecution”, and the protection element is in focus. In the preparatory works it is expressly stated that the protection rules are the most important, and they are therefore placed first.¹⁰ In connection with inter alia the critique from the UN High Commissioner for Refugees that Norway has a too strict asylum practice, the status question has been put on the agenda in recent years.

The reason that the focus in Norwegian immigration law has been on the protection element can be that the international Refugee Convention itself does not give any right to asylum¹¹ or direct member states to grant asylum. The Convention makes no stand regarding the status question.¹² As a party

⁸ The status question is the question of whether asylum shall be given pursuant to the Immigration Act § 17 cf. § 16 Definition of the status question, see for example the Ministry of Justice guidelines for new asylum criteria dated 13.01.98, item 5, second para.

⁹ Proposition to the Odelsting No. 46 (1986-87), p. 103, first column, third para.

¹⁰ Proposition to the Odelsting No. 46 (1986-87) p. 103, first column, third para.

¹¹ The latter is based on the international principle of non-refoulement, and is at present expressed in IA § 15, subsection one, item one.

¹² UN Declaration on Human Rights (1948) Art. 14 states, however, that everyone who is persecuted has the right to seek asylum and receive asylum in another country. However, the article does not direct member

to the Convention, Norway is not obligated to give refugees asylum, but protection.

In connection with the drafting of a new immigration law, one wished to give protection to a larger group of people than those falling directly under the refugee definition in the Convention. The legislators thus wanted to exceed their international obligations concerning the group of people one is obligated to protect. It was decided that Norwegian law should open for protection of persons who were in what one chose to call a “similar situation to refugees”.¹³ The protection provision in § 15 of the Act was therefore expanded by a new second item in the first subsection.¹⁴ Further, it was decided that pursuant to § 15, subsection 2, cf. § 8, subsection 2, refugees should also be given residence in Norway even though he or she did not fulfil the conditions in § 17 cf. § 16 or § 15, subsection one, if “compassionate grounds” indicated it, or the individual had a “particular connection to the Realm”.

In spite of the fact that the parties to the Refugee Convention do not have any legal obligation to give refugees asylum, Norway through IA § 17 cf. § 16 has taken on the obligation to grant asylum to those persons who according to the Refugee Convention are to be regarded as refugees.¹⁵ In accordance with IA § 17 cf. § 16 everyone who fulfils the conditions of the Convention Art. 1 A (2) a legal right to asylum. As a result of the expansion of IA § 15, subsection 1, persons falling under this provision also have a right to protection in Norway, and thus cannot be returned to his or her home country.

As regards the further discussion it is of interest to describe the conditions for the right to asylum pursuant to IA § 17 cf. 16, and residence for protection reasons pursuant to § 15, subsection one, first or second item. A

states to grant asylum on its territory, cf. White Paper No. 17 (2000-2001), p. 22, first column, third para.

¹³ Proposition to the Odelsting No. 46 (1986-87) p. 103, first column, fourth para.

¹⁴ Proposition to the Odelsting No. 46 (1986-87) p. 103, first column, fifth para

¹⁵ More about this in St. meld. No. nr. 39 (1987-88) p. 17

brief presentation of the provisions in the Immigration Act will be given in item 2.3 below.

2.3 Who has the right to protection?

2.3.1 Asylum, IA § 17 cf. § 16

It will be seen from IA § 17 (1) that “a refugee who is in the country or at the Norwegian border has upon application the right to asylum”. Decisive for the right to asylum is thus whether the person can be regarded as a “refugee”. Pursuant to § 16 (1) a ”refugee pursuant to law is a person who falls under the Refugee Convention of 28 July 1951 Art. 1 A, cf. Protocol 31 January 1967”. Article 1 A (2) of the Convention states the following;

”The term “refugee” shall apply to any person [...] 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 his country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country”¹⁶

The present text of the Act incorporates the Convention’s definition of a refugee directly in to the Act.¹⁷ To what extent a person can be regarded as a refugee and thus have the right to asylum rests on whether the individual fulfils the conditions laid down Art. 1 A (2) of the Convention. It is emphasised in the preparatory works that it is the “universal refugee concept which is the basis for who enjoys the advantage of the Norwegian

¹⁶ Art. 1 A (2) of the Convention ”a refugee is a person who [...] with justification fears persecution because of race, religion, nationality, membership in a particular social group or because of political opinion” and cannot or will not receive protection in his home country. Official Norwegian translation, cf. Official Norwegian Report 1983:47, Enc. 6

¹⁷ Incorporation, when an international convention is given direct application in Norwegian law. More on incorporation in relation to i.e. transformation, see for example Official Norwegian Report 1993: 18, Chap. 7 or E. Møse, ”Menneskerettigheter” (Human Rights), Cappelen Akademiske Forlag, Oslo 2002, Chap 8.

asylum provisions”¹⁸. The following was stated about the content of the definition in the Official Norwegian Report 1983:47 “in regard to this refugee concept there exists a rich and not always precise theory and practice internationally as well as within the individual state. The Committee finds it neither necessary nor appropriate in this context to analyse the details.”¹⁹ The present text of the Act leaves it to the administration and courts to determine the content of the persecution concept.²⁰

2.3.2 Residence permit on humanitarian grounds for protection reasons, IA § 15, subsection 1.

2.3.2.1 Immigration Act § 15, subsection 1, item 1

According to IA § 15, 1, 1 no foreigner shall be sent ”to any area where the foreigner can fear persecution which can give rise to recognition as a refugee or will not be safe from being sent further to such area”. This provision arises from Art. 33 of the Refugee Convention, the ”non-refoulement” provision. Persons who fall under this provision have a legal right to remain in Norway.

The condition that a foreigner “can” fear persecution entails that according to § 15, 1, 1 it is the same requirement for persecution as in the Act, § 17 cf. § 16. However, it is not a requirement that the persecution must be well founded. That the wording of the law is based on the fact that there must be persecution ”which can give rise” to recognition as a refugee means that the persecution must be due to one or more of the five Convention grounds.²¹ Regarding the probability assessment, it is stated in the preparatory works that: ”There is reason to emphasise that no preponderance of evidence is

¹⁸ Cite Proposition to the Odelsting No. nr. 46 (1986-87), p. 203, second column, third para.

¹⁹ Cite Proposition to the Odelsting 1983:47, p 144, first column, third para.

²⁰ Official Norwegian Report No. 46 (1986-87), p. 202, first column, first para.

²¹ E. Fisknes, ”Immigration Act with Commentary”, Universitetsforlaget, Oslo, p. 160 et. seq.

required for the conditions to be fulfilled, in order to give the foreigner protection against being returned. The more serious the consequences are, the less is required to give the person concerned protection.”²²

2.3.2.2 *Immigration Act § 15, subsection 2, item 2*

No foreigner shall be sent to any area where he or she for reasons similar to those given in the refugee definition “*is in obvious danger of losing his or her life or being exposed to inhumane treatment*”.

In the preparatory works it is stated regarding this provision that the persons who are protected according to the second item must be exposed to “serious danger” of losing his or her life or being exposed to inhumane treatment. The requirement for the type of danger a person fears being exposed to is therefore stricter than according to the persecution concept in § 17 cf. § 16. It is further a requirement that one must “be in obvious danger” of being exposed to something.

2.4 Application with a gender perspective

A presentation is given in item 2.3 above of when an asylum seeker has the right to asylum or a permit for protection reasons according to Norwegian immigration law. The question which is sought answered in the following is whether asylum seekers, whose applications have a gender aspect, according to IA § 17 cf. 16 and § 15, first subsection, have *de jure* equal rights in relation to other asylum seekers.

According to the text of the Immigration Act I, any “refugee” has the right to asylum. According to Norwegian immigration law, a refugee is a person who “*falls under the Refugee Convention of 28 July 1951, Art. 1 A*”²³. The

²² Cite, Proposition to the Odelsting. No. 46 (1986-87), p. 103, second column, third para

²³ Cite IA § 16, subs. 1

Refugee Convention is an international convention and must be interpreted on the background of legal sources in international law. The Convention text is the natural starting point in the interpretation of treaties and conventions.²⁴ The Vienna Convention²⁵ lays down guidelines in Art. 31-33 for the interpretation of treaties.²⁶ According to Art. 31:

”A treaty shall be interpreted in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”²⁷

In the interpretation of a treaty, the starting point shall be the natural understanding of the language of the text. The natural understanding of the language shall further be seen in the light of the context and purpose of the treaty. According to the natural understanding of the language, its context and the purpose of the Convention, do refugees whose applications have a gender aspect equal right to the status of refugee?

According to the Convention Art. 1 A (2) any person has the right to the status of refugee.

”The term refugee shall apply to any person.”

”Any” person has the right to the status of refugee, the natural understanding of the language (the ordinary meaning”) of the concept ”any” is that it is an including word. Gender is not a decisive factor, the language of the Convention is neutral as regards gender. According to the language of the Convention, the decisive factor for whether a person is to be regarded as a refugee is whether the person is persecuted or fears persecution and is outside his or her ”country of origin”. Further, whether his or her home country is capable or willing to provide protection against

²⁴ M. Ruud, G. Ulfstein and O.K. Fauchald, ”Utvalgte emner i folkerett”, (Selected themes in international law) Tano Aschehoug, Oslo 1997, Chap. 1, p. 25

²⁵ Vienna Convention on Treaties of 23 May 1969.

²⁶ For more on interpretation of treaties, M. Ruud and G. Ulfstein, ”Innføring i Folkerett”, (Introduction to international law) 2nd Ed. Universitetsforlaget, Oslo 2002, pp. 69-76

²⁷ Cite Vienna Convention on Treaties Art. 31 (1)

persecution, and whether the persecution, or fear of persecution, is caused by the person's race, religion, membership of a particular social group or political opinion. To what extent a person fulfils the conditions for being regarded as a refugee will rest on a holistic assessment of the individual's actual situation. Whether an application for asylum has a gender aspect is, according to the language in Art. 1 A (2), irrelevant for the right to asylum, given that the conditions of the refugee definition are fulfilled.

Art. 31 (1) of the Vienna Convention refers to the fact that in the interpretation of treaties, weight shall be attached to the context of the treaty. A natural starting point for the further interpretation is then the Preamble to the Convention. The Preamble to a Convention usually expresses the main purposes behind the establishment of the convention and what the drafters of the treaty seek to achieve. The Preamble to the Refugee Convention establishes that everyone has the right to protection of his or her fundamental rights without any form of discrimination, "human beings shall enjoy fundamental rights and freedoms without discrimination". It can be seen from the Preamble to the Convention that it builds on a non-discrimination principle. As a result of the non-discrimination principle, asylum seekers whose applications contain a gender aspect, have *de jure* equal rights under the Convention in relation to other asylum seekers.

Based on the preparatory works of the Convention (*travaux préparatoires*) it can further be seen that it was the intention of the treaty drafters that the definition which was chosen, cf. Art. 1 A (2), should include all persons with a need for international protection, provided that the conditions laid down in the definition were satisfied.²⁸

Art. 3 of the Refugee Convention confirms the importance of the non-discrimination principle further in that it establishes that the provisions of

²⁸ Note on International Protection, Executive Committee of the High Commissioner's Programme, Forty-Fifth session, UN doc. A/ AC.96/ 830, 7 Sept. 1994, published i IJRL Volume 6, No. 4. 1994, see too T. Einarsen "Retten til vern som flyktning" (Right to protection as a refugee), Cicero Publisher, Bergen 2000, p. 265

the Convention shall benefit everyone, without discrimination on the basis of race, religion or nationality. Discrimination on the basis of gender is not mentioned explicitly in the provision, but should not mean that such discrimination is allowed. The ad hoc committee which drew up the text of the Convention discussed, on a proposal from Yugoslavia, whether gender discrimination should be explicitly mentioned in Art 3²⁹, but elected to have the language as it is today. The fact that gender is not mentioned explicitly in Art. 3, however, should not be regarded as an argument for an *a contrario* interpretation³⁰ as regards gender. As shown above, both the Preamble to the Convention and the preparatory works speak against discrimination of gender on the application of the Convention. When one looks at the purpose of the Convention such as it is expressed in the Preamble, it becomes clear that all parties to a convention are bound by a general prohibition against discrimination, where all forms of discrimination are prohibited.

According to the Refugee Convention, all asylum seekers have *de jure* equal rights to protection, given that the conditions in Art. 1 A (2) are fulfilled. The discussion above is based on IA § 17 cf. § 16 cf. Art. 1 A (2) of the Refugee Convention. IA § 15, subsection one provides protection against return for a “foreigner” who fulfils the condition of the provision otherwise. The concept “foreigner” is neutral gender and based on the natural understanding of the language of the concept, one cannot draw any other conclusion than that the concept also includes the asylum applications which contain a gender aspect. *De lege* gives all women and men the same right to protection under IA § 15. As will be shown in item 2.5, the immigration administration is bound by the non-discrimination principle also as regards application of IA § 15, otherwise see the discussion above.

²⁹ P. Weis, “The Refugee Convention, 1951, The Travaux Préparatoires Analysed with Commentaries”, Cambridge International Documents Series, Volume 7, University Press Cambridge 1995, side 40

³⁰ On a *contrario* interpretation, J. Helgesen “Rettskildelære” (Doctrine of sources of law) 4th Ed, Tano Aschehoug 1997, p. 139

2.5 Non-discrimination principle

The non-discrimination principle is a fundamental principle within international human law and has its source in the principle of equality and universality.³¹ The latter establishes that human rights are applicable to everyone because he or she is a person.³² This is a fundamental starting point for the doctrine on the rights of the person. Discrimination on the basis of gender is contrary to the equality and universality principle. International human rights are intended to protect everyone and the equality principle shall ensure that everyone draws equal benefit from the protection which international human rights is intended to give.³³

The principle of non-discrimination is repeated in all the large international human rights conventions, including the Preamble to the UN Charter³⁴ where it is established that men and women shall have equal rights. The principle is repeated in Art. 1 (3) of the Charter where it is established that the UN's main purpose is to promote human rights for everyone without anyone being discriminated against on the basis of race, gender, language or religion. In the Preamble to the UN Declaration of Human Rights³⁵ it is established that all members of the "human family"³⁶ shall have the same rights. The principle of equality and non-discrimination is carried further in all UN's human rights conventions. The principle is based on the belief that discrimination which is carried out because of the particular characteristics of a person or group, is contrary to the principle of equality.³⁷

But what does the principle of non-discrimination entail in practice? Neither the UN Declaration of Human Rights or the International Covenant

³¹ It will be outside the scope of the purpose of this report to go in-depth into these principles, and they will therefore not be discussed further.

³² E. Møse, "Menneskerettigheter", (Human rights) Cappelen Akademiske Forlag, Oslo 2002, p. 96

³³ H.J. Steiner og P. Alston, "International Human Rights in Context", First Edition, Oxford, side 902

³⁴ Charter of the United Nations, 26.juni 1945

³⁵ Universal Declaration of Human Rights, 10 December 1948, Art. 2 and 7

³⁶ My translation

³⁷ S. Skogly, i G. Alfredsson og A. Eide, "The Universal Declaration of Human Rights", Kluwer Law International, Haag 1999, side 75-89. See also ICCPR Art. 2 (1), 3 og 26

on Civil and Political Rights³⁸ (hereafter "ICCPR") or the International Covenant on Economic, Social and Cultural Rights³⁹ (hereafter "ICESCR") defines what is regarded as discriminating. However, the UN Convention on the Elimination of All Forms of Discrimination against Women, CEDAW, does. CEDAW Art.1 establishes that discrimination includes:

"any gender-related distinction, exclusion or restriction which has the effect or purpose of weakening or excluding recognition, utilisation or exercise of women's human rights and fundamental freedoms in the political, economic, social, cultural or any other area, based on equality between women and men and without regard to marital status"⁴⁰.

The non-discrimination principle in the various UN conventions usually prohibits only discrimination of the rights which each convention protects. On the other hand, CEDAW prohibits gender discrimination in general and establishes in Art. 2 that "the parties to the Convention condemn discrimination of women in all its forms"⁴¹. Norway has ratified all the conventions which are mentioned above. Further, both ICCPR and ICESCR are incorporated in Norwegian law by the Human Rights Act. It has been an objective in Norway to work towards acceptance of the universal nature of human rights, including women's rights.⁴²

White Paper No. 21 (1999-2000) states that "respect for fundamental human rights applies fully to both women and men"⁴³. It is further stated that it is an objective in itself to integrate the perspective of equality in all public policy. White Paper No. 17 (2000-2001) gives a reminder that the Refugee Convention is based on the Universal Declaration of Human

³⁸ International Covenant on Civil and Political Rights, 16 December 1966

³⁹ International Covenant on Economic, Social and Cultural Rights, 16 December 1966

⁴⁰ CEDAW Art. 1, translation by the Norwegian Equal Opportunities Commission, is found in the original version at <http://www.un.org/womenwatch/daw/cedaw/>

⁴¹ See otherwise CEDAW Art. 1, 3, 4, 5

⁴² White Paper No. 21 (1999-2000), Human Worth in the Centre, Plan of Action for Human Rights.

⁴³ Cite, White Paper No. 21 (1999-2000), p. 40

Rights, Art. 14, that everyone shall have the right to seek asylum.⁴⁴ Member of Parliament Odd Einar Dørum presented in March 2001 a proposal to Parliament that the Government should conduct a review of laws, regulations and practice with a view to ensuring better protection for women who are persecuted.⁴⁵ As the reason for conducting a review of the Norwegian legislation to ensure better rights for women who have been persecuted, Dørum presented in his proposal the argument of the universal nature of human rights and the direction in CERD that a member country shall take measures to eliminate discrimination of women.⁴⁶

Norwegian authorities, however, are not only bound by the international non-discrimination principle. It will be seen from the Norwegian Gender Equality Act § 1 a, 1. subsection that:

”public authorities shall work actively, objectively and systematically towards equality between the sexes in all areas of society”.

2.6 Summary

The question of whether Norwegian refugee law is *de jure* oriented towards discriminatory treatment of asylum applications with a gender aspect in relation to other asylum cases, is answered negatively. It can be seen from both the Norwegian law and the part of the Refugee Convention, which is directly incorporated in Norwegian law, that decisive for whether a person is regarded as a refugee is whether he/she is persecuted and whether persecution is in context with the Convention grounds which are contained in the Convention. Whether the application of an asylum seeker contains a gender aspect is of no consequence for his or hers right to protection based on the current national and international rules.

It can be concluded that both the Immigration Act and the Refugee Convention operate *de jure* from a basis of neutral gender. In regard to

⁴⁴ White Paper No. 17 (2000-2001), p. 22, second column, fourth para.

⁴⁵ Document No. 8:67, (2000-2001), 6 March 2001

⁴⁶ Document No. 8:67, (2000-2001), 6 March 2001

international obligations, the Norwegian immigration administration is bound by the principle of non-discrimination in the work of consideration of applications for asylum.

In the comments to the proposal for changes to the Immigration Regulation⁴⁷ it is proposed to include a non-discrimination provision in § 58 a of the Regulation with the purpose of *”directing the spotlight on the fact that characteristics such as age and gender can be of consequence for the decision of whether the applicant is a refugee”*⁴⁸.

The proposed revised § 58 a) of the Regulation is as follows:

”The concept refugee shall be interpreted without any form of discrimination, such as age, colour of the skin, **gender**⁴⁹, sexual orientation, language, religion, political or other opinion, national or social origination, property, birth or status otherwise.”

⁴⁷ Ministry of Local Government and Regional Development, 19.05.2003, ”Proposal for changes to the Immigration Regulation, §§ 54-58, 79 and 81 (rules for consideration of asylum applications and conditions for recognition as a refugee)”, see www.odin.dep.no

⁴⁸ Cite ” Proposal for changes to the Immigration Regulation, §§ 54-58, 79 and 81 (rules for consideration of asylum applications and conditions for recognition as a refugee)”, item. 2.2

⁴⁹ My highlighting

3. Gender perspective

3.1 Introductory remarks

According to the conclusion in Chapter 2 the basis is that asylum seekers, whose applications contain a gender aspect, have *de jure* equal opportunities and rights to asylum and residence on humanitarian grounds for protection reasons in Norway. If asylum applications with a gender aspect are granted protection in accordance with IA § 17 cf. 16 and § 15 subsection one, to a lesser extent than other asylum applications, this cannot be due to the text of the law, but rather *de facto* application and interpretation. The question is, as defined in the project description, whether interpretation of the Refugee Convention in practice is discriminatory as regards gender for example in that it results in that women have greater difficulty being granted asylum than men, in spite of an identical need for protection?

It is important to point out that both asylum applications from both women and men can contain a gender aspect. For example, homosexual men can be persecuted because by their sexual orientation they can break with the traditional role of the sexes. Both women and men who refuse to accept the family's choice of spouse can be persecuted because they break the social rules by refusing. For the sake of simplicity, reference is made in the report's description of asylum cases with a gender aspect to women asylum seekers. It is pointed out that the reference to women must not be misunderstood such that only asylum applications for women seekers can contain a gender aspect. The gender aspect includes both the female and the male sex.

The traditional interpretation of the Refugee Convention has been based to a large degree on male refugees. This is often described as though the Refugee Convention has been interpreted based on a male paradigm.

”The law has developed within a male paradigm which reflects the factual circumstances of male applicants, but which does not respond to the particular protection needs of women.”⁵⁰

What, then, is the reason that the interpretation of the Refugee Convention to a large degree is based on male refugees? And what sort of meaning has an interpretation of the Convention within a male paradigm for those asylum seekers whose applications contain a gender aspect?

One explanation of the interpretation within a male paradigm is that the typical refugee has long been identified as a man. This is because few women have traditionally fled and sought asylum on their own. The main part of women asylum seekers have fled together with their husbands or other male family members. They have thus been regarded as having been accompanying asylum seekers and no attention has been paid to whether they alone have had an individual reason for asylum. The generally weak situation for women in international law⁵¹ is assumed also to have contributed to an interpretation within a male paradigm. This concerns particularly the division of international law into a private and a public sphere, ”the private/public distinction”⁵², where women have been regarded as having belonged to the first-mentioned.

Interpretation of the Convention within a male paradigm has entailed that the separate experiences and needs of women refugees have been marginalised in the interpretation process.⁵³ The refugee definition in Art. 1 A (2), such as it has been traditionally interpreted, does not reflect the assaults and experiences which women asylum seekers, asylum seekers

⁵⁰ Cite, N. Kelly ”Gender-related persecution: assessing the asylum claims of women”, *Cornell International Law Journal*, Volume 26, no 3, s. 625-674, s. 674

⁵¹ More on this, see H. Charlesworth and C. Chinkin, ”The boundaries of international law, A feminist analysis”, *Melland Schill Studies in International Law*, Manchester 2000

⁵² See on this H. Charlesworth og C. Chinkin, ”The boundaries of international law, A feminist analysis”, *Melland Schill Studies in International Law*, Manchester 2000, s. 30-31

⁵³ More about this, H. Crawley, ”Refugees and Gender, Law and Process”, *Jordans Bristol* 2001, p.5 flg, or E.K. Baines, ”Transnational Advocacy and the UN Policy on Refugee Women, 1980-1990”, *Refugee Survey Quarterly*, Volume 21 Special Issue 2002, s. 60-78

whose application contain a gender aspect, are often exposed to. One result of such traditional interpretation is that women can have their applications rejected with the reason that they do not fulfil the conditions laid in the refugee definition, when they in reality perhaps do meet the conditions, and could have been granted asylum if the refugee definition had been interpreted in a *gender-sensitive manner*. Traditional interpretation can entail that one excludes women asylum seekers with a justifiable requirement for protection in accordance with the Immigration Act.

The question which must therefore be asked is how one can ensure that asylum applications with a gender aspect, in the cases where the need for protection is identical with other asylum claims, and where the conditions contained in the refugee definition are met, are not discriminated against. How can one ensure equal treatment of all asylum claims?

Equal treatment is assumed best achieved by implementation of a gender perspective in refugee law. The need for implementation, as mentioned before, has its basis in the fact that women's experiences of violence and persecution in general have not been taken into consideration in the traditional interpretation of the Convention. The basis for the interpretation process is skewed. If one wished to achieve equal treatment, the basis for the interpretation process should be gender-neutral, and the assumption is that it can best be achieved by implementation of a gender perspective. This is also the solution one has chosen internationally and nationally in other member countries to the Convention. Over the last decade one has seen the development of an increased understanding of the particular situation of women refugees both internationally, by the High Commissioner,⁵⁴ and among the member countries.⁵⁵

⁵⁴ UNHCR Guidelines on International Protection: "'Membership of a particular social group' within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" HCR/GIP/02/02 og "Gender-Related Persecution within the Context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" HCR/GIP/02/01

⁵⁵ Australian Department of Immigration and Multicultural Affairs; Refugee and Humanitarian Visa Applicants, Guidelines on Gender Issues for Decision Makers", ECRE; "Position Paper on Asylum Seeking and Refugee

”The implementation of a gender perspective entails that the Refugee Convention must be interpreted in the light that gender is a relevant factor in the determination of whether or not a person is a refugee.”⁵⁶ Central concepts in the Refugee Convention such as persecution, political opinion and membership of a social group, must be interpreted with the view that the asylum seeker’s sex is of consequence for the application and interpretation.

The further discussion is based on the fact that women refugees are protected in the Convention text such as it is today⁵⁷, and that the reason for discrimination in asylum claims with a gender aspect is due to *de facto* application of the Convention. Implementation of a holistic gender perspective is regarded as leading to equal consideration. The further discussion is delimited against the discussion on whether a sixth Convention ground, namely, gender, should be implemented in national law or the Convention.⁵⁸

”Even though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted therefore covers gender-related claims. As such there is no need to add an additional ground to the 1951 Convention definition.”⁵⁹

Women”, South Africa National Consortium on Refugee Affairs; “Gender Guidelines for Asylum Determination”, England; “RWLG Gender Guidelines for the Determination of Asylum Claims in the UK”, USA; “Consideration for Asylum Officers Adjudicating Asylum Claims for Women”, Ireland; “Women and the Refugee Experience: Towards a Statement of Best Practice”, Canadian Immigration and Refugee Board; “Women Claimants fleeing Gender-Related Persecution: Guidelines”

⁵⁶ Cite, NyhetsBrev Nr. 8, 2001, 8. årgang, side 1

⁵⁷ H. Crawley defines the problem in this way, “ The main problem facing women as asylum seekers is the failure of decision-makers to incorporate the gender-related claims of women into their interpretation of the existing enumerated ground”, “Refugees and Gender, Law and Process”, Jordans Bristol 2001, p. 35

⁵⁸ More on the implementation of a sixth Convention ground, M.T. Falcón, “Gender Based Persecution”, in *Refugee Survey Quarterly*, Volume 21 Special Issue 2002, side 133-142

⁵⁹ Cite, UNHCR Guidelines on International Protection: “Gender-Related Persecution within the Context of Article 1A (2) of the 1951 Convention

3.2 A holistic gender perspective

3.2.1 General, gender-sensitive interpretation

The Refugee Convention shall be interpreted based on an equality aspect, and which the equality of the right to refugee status requires, on the basis of traditional interpretation in a male paradigm, that the Refugee Convention is interpreted in a gender perspective.⁶⁰ What does the interpretation in a gender perspective mean in practice?

Interpretation in a gender perspective entails that the Convention is interpreted in the light that gender is a relevant factor in the determination of whether or not a person is entitled to the status of refugee.⁶¹, a *gender-sensitive interpretation* must be used. This chapter will seek to give a brief overview of the practical significance of implementation of a gender perspective in Norwegian refugee law. It has not been possible within the time frame given to this project to provide an overview of the significance of a gender-sensitive interpretation in relation to all the conditions in the Refugee Convention, cf. Art. 1 A (2). Introductorily there will be a brief overview provided of gender-sensitive interpretation in general, and thereafter in items 3.2.2 and 3.2.3 there will be an introductory overview given of the practical significance of a gender-sensitive interpretation in relation to the persecution concept and the Convention ground “particular social group”. This is also the theme for Chapters 4 and 5 of the report.

The implementation of a gender perspective will entail that the Refugee Convention and its provisions in their entirety must be interpreted in light of that gender is a relevant factor in the determination of whether or not a

and/or its 1967 Protocol relating to the Status of Refugees”
HCR/GIP/02/01, para. 6

⁶⁰ NyhetsBrev No. 8 2001, p. 1 second para., further also UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of Article 1(A) of the 1951 Convention and /or its 1967 Protocol relating to the Status of Refugees, www.unhcr.ch

⁶¹ NyhetsBrev (Newsletter) No. 8, 2001, p. 1 second para.

person is a refugee. A *gender-sensitive interpretation* of, for example, the Convention ground "political opinion", indicates recognition of the fact that women can express political involvement in another way than men, and nevertheless have a claim to refugee status. The traditional interpretation of the Convention ground "political opinion" based on a male paradigm, is challenged by a gender-sensitive interpretation. This is necessary *inter alia* because women, whose home country for example is organised according to a patriarchal society structure⁶², often do not have the opportunity to participate in political life in the same way as men.⁶³ In spite of the fact that many women cannot present party evidence or refer to a central board position in a political party, they can nevertheless be politically involved and persecuted because of "political opinion". Women in resistance movements and political opposition movements in a patriarchal society can show political involvement by organising meetings, distributing medicines to wounded soldiers or by acting as messengers, and this can be the cause of persecution. A gender-sensitive interpretation of the Convention "political opinion" is conditional upon the fact that such activities are recognised as a form of showing political involvement.

The following citations from a case we have had access to at UNE shows the practical significance of a gender-sensitive interpretation in relation to the concept "political opinion";

"Distribution of medicines is in the first place a humanitarian act, but can also be regarded as a political act. Supporting Chechen soldiers in their fight for freedom can be said to be an active political act."⁶⁴

⁶² Male-dominated society

⁶³ The woman's place is regarding as being in the private sphere, she will not have the opportunity to participate in life in public society, opportunity to publicly engage in the political debate.

⁶⁴ Cite from the internal remarks in connection with UNE's consideration of an asylum claim by a woman from Chechnya.

3.2.2 Gender perspective in relation to the persecution concept

In relation to the concept “persecution”, an interpretation of the Refugee Convention in a gender perspective entails that it is recognised that those women who are victims for types of assault to which women are typically exposed, assaults which based on a traditional interpretation have not been regarded as persecution, can be exposed to persecution in the sense of the Convention. Genital mutilation is a typical example of a form of violation to which women are exposed. Another example is women who are exposed to violence or abuse by their husbands or other close family members. Internationally, violence to which women are particularly exposed is referred to as “*gender-specific persecution*”.

The implementation of a gender perspective will in relation to the concept of persecution entail that those who apply the law must use a gender-neutral interpretation of the persecution concept as a basis. Gender-specific persecution is recognised as persecution, given that the requirement for the seriousness and extent of the assault is fulfilled.

The significance of the implementation of a gender perspective in relation to the Convention’s persecution concept will be discussed further in Chapter 4 below.

3.2.3 Gender perspective in relation to requirement for cause and Convention ground

Implementation of a gender perspective also has significance in relation to the Convention's requirement that the alleged persecution must have a causal link with one or more of the five Convention grounds. This concerns in particular the asylum seekers where the cause of the persecution is linked to their sex⁶⁵, where their sex is significant for **why** a person is being

⁶⁵ This talks about sex as in the English concept gender, “the behavioral, cultural, or psychological traits typically associated with one sex”jf. Merriam-Webster Dictionary, <http://www.m-w.com/cgi-bin/dictionary>

persecuted. This aspect in Norwegian refugee law and internationally is referred to as "gender-based persecution".

When the cause of persecution has a causal link with the asylum seeker's sex, it can be due to the fact that the person has carried out acts which are contrary to the socially structured role of the sexes⁶⁶. Constructions which have their origin in social, cultural and religious traditions.⁶⁷ It is important to point out in this connection that this concerns the pattern of the roles of the sexes arising from both social, cultural and religious traditions⁶⁸, biological differences between man and woman are not of any relevance in this connection.

Gender is not one of the five Convention grounds mentioned in the Refugee Convention's definition of a refugee. The theme for consideration is thus whether a violation of the role of the sexes can fall under one or more of the Convention grounds which are stated Art. 1 A (2) of the Convention, "race, religion, nationality, membership of a social group or political opinion", and in this manner have a causal link with the persecution..⁶⁹

How an asylum seeker's sex can have a causal link with one or more of the five Convention grounds are illustrated by a case from UDI, where the asylum seeker came from Algeria.

The woman, who was a qualified teacher, had divorced from her violent husband. After the divorce she started wearing western-style clothes and she used makeup. In the asylum interview she asserted that the fundamentalists harassed and followed her because of her western style of dressing. She was called a whore, and this was also painted on public walls.

⁶⁶ pattern of the roles of the sexes

⁶⁷ K. Samara, "Gender Equality and Its Impact on Sexual and Gender Based Violence", *Cornell International Law Journal*, Volume 26, no 3, s. 30-35

⁶⁸ More on socially created hierarchy between the sexes, see A. S. Fraser, "Becoming Human, the Origins and Development of Women's Human Rights", M. Agosin (ed.), "Women, Gender and Human Rights", Rutgers University Press 2000

⁶⁹ H. Crawley, "Refugees and Gender, Law and Process", Jordans Bristol 2000, p. 7-9

At the school the pupils threw stones at her and she was exposed to bullying. She alleged that she received written threats, in which she was warned that if she did not stop dressing in an indecent manner, stopped working and engaging in hore activities, she would be killed. She gives the reason for dressing in western style clothes as being that she is a liberal muslim and does not wish to dress like muslim women. The woman experiences being persecuted because she breaks with social norms for how a muslim woman shall dress. The reason as to why she does not dress in muslim fashion can be said to be an expression of her political attitude and her religious beliefs, since she by using another type of dress wishes to express her dissatisfaction with the current system. She experienced persecution because of her “political opinion” and “religious beliefs”. She could be seen as a “refugee” under the 1951 Convention.

Gender-based persecution can affect both sexes⁷⁰. It is important to establish that transgression of the role of the sexes can be an expression for religious attitudes, political attitudes, or be in connection with membership of a social group.

The concept ”gender-based / gender-related persecution” is a concept with which great uncertainty is associated, both concerning its content and the legal effects. An assessment should be made of whether the use of the concept shall be carried forward in revised legislation and revised regulations. In many cases which were reviewed in connection with the project, the reason for granting asylum or othum been that ”the woman is exposed to gender-based persecution, asylum/othum is granted”. In this connection it is important to point out that “gender-related/based persecution” is only an auxiliary concept which describes a situation where the asylum seeker’s sex is of significance for the cause of the persecution. The establishment that a person has been exposed to “gender-based persecution” has basically no legal effect. This can be illustrated by a case from UNE, in which it is stated:

⁷⁰ Further on the definition of this concept below

”In the opinion of the Board a question can be raised as to whether the appellant can be regarded as persecuted on any of the grounds stated in the Refugee Convention. Gender-based persecution can form the grounds for asylum, but it is then an assumption that the appellant falls under any of the groupings which by definition give an entitlement to asylum.”

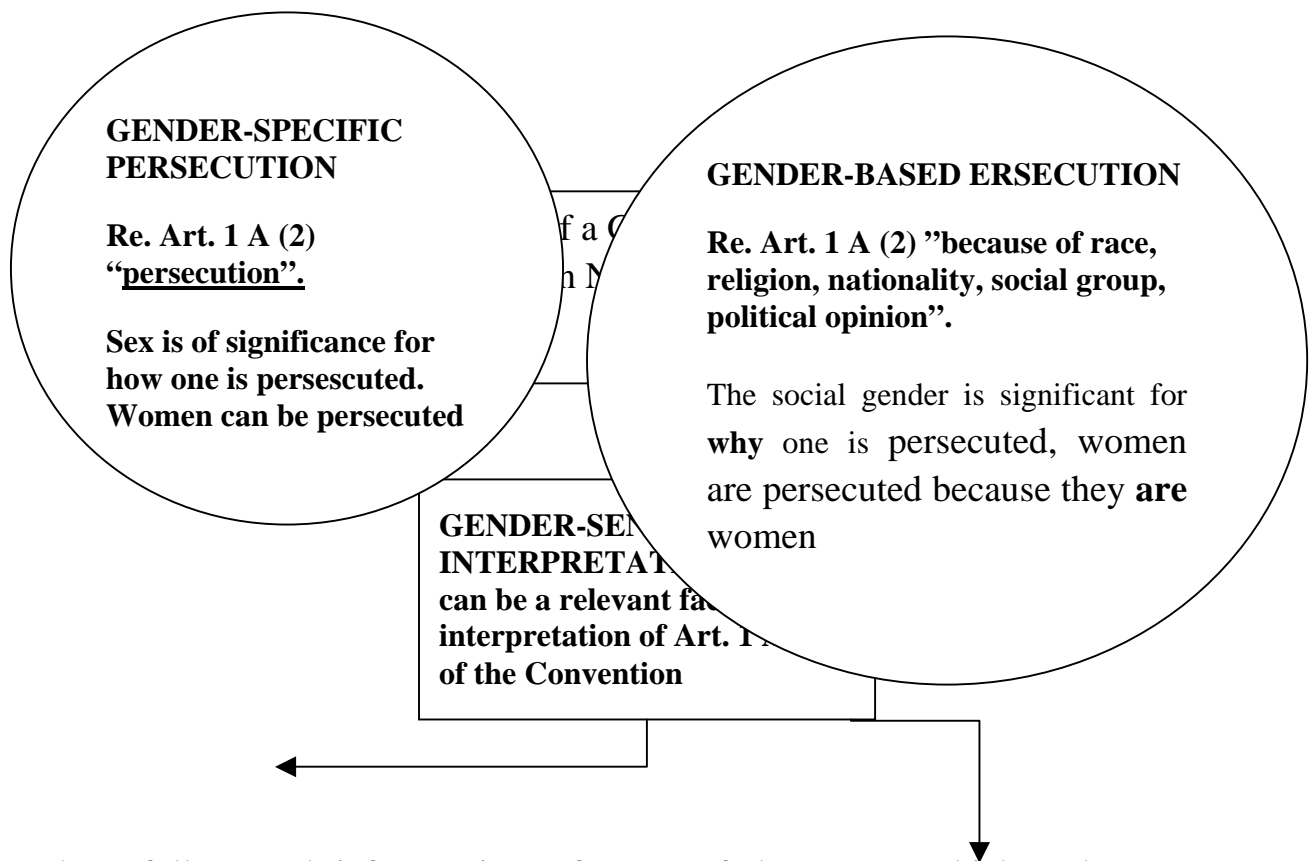
How gender-sensitive interpretation is of significance for application of the Convention ground “special social group” in relation to persons exposed to *gender-based persecution* will be discussed in Chapter 5.

3.2.4 Summary

In this section an argument has been presented for implementation of a gender perspective in Norwegian refugee law. It has been sought to explain how such implementation will be of significance for the interpretation and application of the Refugee Convention.

In the discussion of what significance a *gender perspective* will have for the interpretation of the persecution concept, requirement for causal link and Convention grounds in the refugee definition, the concepts of *gender-specific persecution* and *gender-based persecution* are applied. It is emphasised that these concepts are only auxiliary concepts which are used to differentiate between the different results of implementation of a gender perspective. The argument is that a gender perspective should be implemented, one should take a ”holistic approach”.⁷¹

⁷¹ The importance of a holistic implementation of a gender aspect in the work with women asylum seekers is also highlighted in the new guidelines from UNHCR, issued in May 2002. The new guidelines emphasise a holistic approach to the problem, and recommend that which in modern refugee law is often referred to as a ”holistic approach”, UNHCR 2002 Gender Guildelines para. 6.



There follows a brief overview of some of the causes which make an implementation of a gender perspective necessary in Norwegian immigration law.

3.3 Need for implementation of a gender perspective in Norwegian immigration law

3.3.1 Present legal situation

In the Ministry of Justice guidelines for new asylum criteria dated 13.01.1998 the Ministry expressed that persecution based on gender and homosexual orientation could provide grounds for asylum. It was established that women who through their acts, omission and expression of opinion have broken written and unwritten rules for social life and therefore were persecuted could fall under the Convention ground social group and thus be granted asylum.⁷² Newsletter dated 2001 discussed "gender-based persecution" and established, under reference to the guidelines of 1998, that gender-based persecution "can open for refugee status"⁷³.

Three circumstances in the guidelines from 1998 make them unsuitable tools in the work towards achieving equal rights to asylum for men and women.

Firstly, the guidelines suggest that gender-based persecution can give the right to asylum because such persecution can have a causal link with "membership of a social group". They speak neither for a gender-sensitive interpretation of the Convention in general nor for a gender-neutral interpretation of the concept of persecution.

Secondly, the guidelines establish that the so-called "gender-based persecution" can give the right to asylum because it can fall under the Convention ground "social group". Persecution which is due to a break with the constructed pattern of the role of the sexes, however, can be linked to the Convention grounds "political opinion" or "religion" and not only

⁷² Guidelines of 1998, item.4 "Forfølgelse av andre grunner" (Persecution for other reasons)

⁷³ Cite, NyhetsBrev om norsk flyktning- og innvandringspolitikk, (Newsletter on Norwegian Refugee and Immigration policy, No. 8 -20 August 2001, 8th Year p. 2

”social group”⁷⁴, in that respect the guidelines expresse too narrow an interpretation of the Convention. Recognition that persecution because of gender can fall under the Convention grounds ”political opinion” and ”religion” is especially important since there seems to be great uncertainty in the immigration administration connected to the interpretation of the concept ”social group”, more on this in Chapter 5.

A third circumstance which speaks for change to the existing sources of law is that many women who seek asylum in Norway are not exposed to what is referred to as gender-based persecution, and thereby they fall outside the protection given by the guidelines. Nevertheless it is possible that their sex is a relevant factor in the determination of whether these persons are entitled to status as a refugee. In order to ensure these women the same right to asylum as men, it is necessary to implement a gender perspective.

3.3.2 Diversity of women asylum seekers

The extent and breadth which women asylum seekers represent is another argument which speaks for implementation of a gender perspective in refugee law.

Most asylum applications from women do not contain a gender aspect. These women are therefore not distinguished from the “traditional” asylum seekers. Interpretation of the Immigration Act and Refugee Convention based on a male paradigm provides a good framework for the determination of these more ‘traditional’ applications.

On the other hand, other women come to Norway and seek asylum because they have been abused by their husbands and other close family member, others oppose their family’s choice of spouse and therefore flee from threats of forced marriage. Some women flee from threats of genital mutilation, others because they have behaved in such a way that the

⁷⁴ See asylum case from Algeria, GPRL 04

family's honour is at stake such that they fear being exposed to so-called honour killing. There are women who flee from areas where there is war where their personal security is threatened, where they live in constant fear of sexual assault, abuse and torture. Other women flee from war areas because as a result of rape they have given birth to an "illegitimate child" whose father is one of the enemies and the woman, as a result of this, is expelled from her family and the local society.

At present, then, women asylum seekers arrive who have been exposed to what is often referred to as *gender-based persecution*⁷⁵ and *gender-specific persecution*.⁷⁶ But also women who have been exposed to more traditional forms of persecution⁷⁷, but where gender nevertheless will be a relevant factor in the assessment of their asylum case. In the cases that have been reviewed in connection with the project, women are found who fall under all the above-mentioned examples.

The problem with the existing legislation and the other sources of law is that they do not sufficiently reflect the diversity which applications for asylum with a gender aspect represent, since they only refer to those exposed to what is referred to as "gender-based persecution". If the goal of equal right to protection for all refugees independent of sex is to be achieved, it is important to look at the overall picture of the refugee problem. The central message is therefore that implementation of a gender perspective in refugee law demands that all the aspects addressed in item 3.2 are included in refugee law.⁷⁸

⁷⁵ women who are persecuted because they have broken with socially created roles of the sexes, roles of the sexes which originate from cultural, religious and social customs, women who are persecuted *because* they are women

⁷⁶ women who are exposed to types of assault to which typically women are exposed, assault which from a male paradigm has not been counted as persecution, women who are persecuted *as women*.

⁷⁷ In the sense of the Refugee Convention

⁷⁸ The importance of an overall implementation of a gender aspect in the work with women asylum seekers is also highlighted in the new guidelines from UNHCR, issued in May 2002. The guidelines, the purpose of which is to give advice as to how Art. 1 A of the Refugee Convention shall be interpreted in a gender perspective, UNHCR 2002 Gender Guidelines para. 1 and 8. This is regarded as necessary so that the determination of whether a person has the right to refugee status shall be made in as accurate and

The practical significance of a gender-sensitive interpretation of the Refugee Convention's persecution concept will be discussed in the following chapter.

precise a manner as possible, UNHCR 2002 Gender Guidelines para. 2. It is emphasised in the guidelines that implementation of a gender-sensitive interpretation of the definition is not intended to result in all women being given the right to refugee status, UNHCR 2002 Gender Guidelines para. 4. Thereafter it is established that even though gender is not explicitly mentioned in the definition, it has been recognised over time that gender can affect and decide what type of violation a person can be exposed to (what in Chap. 3.2 is referred to as gender-specific persecution) and also the reason why a person is persecuted (what in Chap. 3.2 is referred to as gender-based persecution), UNHCR 2002 Gender Guidelines para. 7. The new guidelines emphasise a holistic approach to the problem, and recommend what in modern refugee law is often described as a "holistic approach", UNHCR 2002 Gender Guidelines para. 6.

4. Gender-sensitive interpretation of the persecution concept

4.1 Presentation of the problem

Only persons having a well-founded fear of persecution have the right to asylum.⁷⁹ The type of persecution a person is exposed to can vary with his or her biological and social gender. Because of their biological gender, their reproductive capabilities and in many societies a subordinate role (the social role of the sexes), women can be exposed to other forms of assault than men. Men who break with the social role of the sexes, for example, homosexuals and transsexuals, can also be exposed to other types of assault than those who live up to the traditional man's role⁸⁰.

The focus in this chapter is directed towards cases where the actual persecution an asylum seeker is exposed to has a gender aspect, the *gender-specific violation*. The question which sought answered is whether *gender-specific violation, de facto* in Norwegian immigration administration, is recognised as persecution in relation to the Convention in an equal manner to other more traditional violations. In order to answer this question, it is first necessary to consider how the Convention's Art. 1 A (2) is traditionally interpreted in Norwegian law. When can a person be regarded as being exposed to persecution in the sense of the Convention in relation to Norwegian law?

According to White Paper No. 39 (1987-88) it is the persons who risk violation of a more serious nature who fall under the concept persecution.⁸¹ "Persons who are exposed to violations [...] of a less serious nature, are not

⁷⁹ The concept of "can" is applied in this context because the other conditions in the Refugee Convention' definition Art. 1 A (2) must also be met so that a person shall have the right to asylum.

⁸⁰ However, it should be emphasised that many asylum seekers who break with the social role of the sexes are exposed to the same violations as other asylum seekers. "In other cases, however, the refugee claim of a female asylum seeker will have nothing to do with her sex." Cite, UNHCR 2002 Gender Guildelines para. 3

⁸¹ White Paper No. 39 (1987-88), p. 47, second column, third para.

included.”⁸² In the proposition⁸³ it is stated that the word “persecution” in itself points towards that a question of a more serious violation towards a person.⁸⁴ In the commentary to the law the basis is that a violation of a serious nature must have taken place. ”Death sentence, torture, long prison sentences or full exclusion from the work market and educational institutions are examples of serious violations. Rape and other sexual abuse are examples of serious violations to which especially women are exposed as a step in a persecution. Danger of domiciliary visits and short prison sentences are usually not sufficient. Violations must have a certain extent [...] to fall under the concept of persecution.”⁸⁵

According to Norwegian law, it is violations of a certain seriousness and extent which are regarded as persecution in the sense of the Convention. In the determination of whether the alleged assault is of such seriousness and extent that it can be said to be persecution, international human rights can be a good interpretation norm. Below, in Chapter 4.2 some of the international sources of relevance to interpretation of the concept of persecution will be presented.

The basis for the analysis of the concept of persecution in this report has been: Is *gender-specific violation* of sufficient seriousness and extent, for example, rape, honour killing and sexual abuse, recognised as persecution on the same lines as other violations? Is the Norwegian immigration administration’s application of the persecution concept *de facto* gender-neutral? The question will be attempted answered below on the basis of the practice which has been reviewed in connection with the project. In Chapters 4.3 to 4.7 below, the practice by UDI and UNE in cases where the grounds for asylum have been violence and abuse by the family, rape, forced marriage, bride kidnapping and persecution because of too liberal attitudes will be presented. In Chapter 4.8 the question of whether

⁸² Cite, White Paper No. 39 (1987-88), p. 47, second column, third para.

⁸³ Proposition to the Odelsting No. 46 (1986-87)

⁸⁴ E. Fisknes, ” Utlendingsloven med kommentarer”, (Immigration Act with Comments) Universitetsforlaget, Oslo, p. 177

⁸⁵ Cite, E. Fisknes, ”Utlendingsloven med kommentarer”, (Immigration Act with Comments) Universitetsforlaget, Oslo, p. 181

Norwegian practice in relation to the persecution concept is *de facto* gender neutral will be attempted answered on the basis of the cases which have been presented.

4.2 International sources of relevance to the assessment of the persecution concept

In the assessment of whether persecution has taken place, the caseworkers should have knowledge of and access to relevant international conventions.

International sources of law of particular relevance are regarding as being: The Refugee Convention, UN Declaration of Human Rights, ICCPR, ICESCR, ECHR, Torture Convention, Women's Convention, CEDAW, Declaration on the Elimination of Violence Against Women (1993), CERD, The Child Convention, Fourth Geneva Convention (1949), Additional Protocols (1977) to the Geneva Conventions, Genocide Convention, ICC Statute, FN Convention against Transnational Organised Crime (2000), FN Protocol to Prevent, Suppress and Punish Trafficking of Persons, Inter-American Convention of the Prevention, Punishment and Eradication of Violence Against Women, as well as reference to the reports from the UN's Special Rapporteur on Violence against Women^{86, 87}

Article 2 of the Declaration of the Elimination of Violence Against Women⁸⁸ defines what must be regarded as violence against women. The

⁸⁶ Ms. Radhika Coomaraswamy, appointed by Resolution 1994/45, 4 March 1994

⁸⁷ For complete name and reference to the various conventions, see the Bibliography

⁸⁸ Declaration on the Elimination of Violence Against Women (1994), General Assembly Resolution 48/104 av 20 December 1993, as a source of law the Declaration is to be regarded as legally binding, thus 'soft-law'. The relevance of the source as a source of law, however, is not of great legal importance here, since it can only be understood as an example which can illuminate the connection between violence against women and violations of human rights, a source which can contribute to the development of a clearer yardstick. The Declaration is the first international law instrument which only addresses violence against women.

provision can be a useful tool in the determination of whether assaults on women can be said to be persecution, since they draw the parallel between violence against women and women's international human rights. The Preamble to the Declaration states that violence against women is to be regarded as a violation of women's right to equality⁸⁹, security and freedom⁹⁰, integrity and dignity.

The same applies to CEDAW General Comment No. 19 (1992)⁹¹ (hereafter "the Comment") which discusses the so-called content of the concept "gender-based violence".⁹² In paragraph 7 of the Comments it is established that gender-based violence can entail a violation of a series of human rights. The rights that are mentioned are the right to life⁹³, prohibition against torture and inhumane treatment⁹⁴, and the right to equal human rights in wartime⁹⁵, the right to freedom and personal security⁹⁶, right to equality before the law⁹⁷, right to equality in the family⁹⁸, the right to health⁹⁹ and the right to equal rights at work¹⁰⁰.

⁸⁹ ICCPR Art. 26

⁹⁰ UN Declaration on Human Rights Art. 3, ICCPR Art. 9

⁹¹ <http://www.un.org/womenwatch/daw/cedaw/recomm.htm>. Such general statements by the Commission are not legally binding.

⁹² Gender-based violence is regarded as falling under the CEDAW Convention's definition of discrimination in Art. 1 and is defined as 'violence that is directed against a woman because she is a woman or that affects women disproportionately'.

⁹³ ICCPR Art. 6 (1), UN Declaration on Human Rights, Art. 3

⁹⁴ ICCPR Art. 7, ECHR Art. 3, Declaration on Human Rights Art. 5

⁹⁵ Fourth Geneva Convention Art. 27, and common Art 3 in the four Geneva Conventions,

⁹⁶ UN Declaration on Human Rights Art. 3

⁹⁷ ICCPR Art. 26, ECHR Art. 14

⁹⁸ CEDAW Art. 16

⁹⁹ CEDAW Art. 12

¹⁰⁰ CEDAW Art. 11

4.3 Agents of persecution

4.3.1 Who can be an agent of persecution?

The Refugee Convention is applicable in the cases where a person cannot achieve protection from the feared persecution in his or her home country.¹⁰¹ Even though “persecution” in the sense of the Convention is often carried out by the authorities, violations by non-state actors will often be included to the degree that the state does not have the ability or will to provide protection against such persecution by non-state actors.¹⁰² Persecution which does not originate from the authorities is regarded as being indirectly originated by the state if it does not have the

ability to protect its population against persecution.¹⁰³ Recognition that persecution by non-state actors can give the right to refugee status is of great importance to women seeking asylum. In Norway, it is stated in the guidelines of 1998 that “all persecution in relation to the question of asylum shall be equally regarded, independent of whom the persecutor is”.¹⁰⁴

In the assessment of the concept persecution in the refugee definition, one must first decide who the asylum seeker is being persecuted by. Thereafter, if the alleged agent of persecution is a non-state actor, the determination must be made as to whether the applicant’s home state has the ability or will to provide protection against the alleged persecution. In relation to the latter condition, it is a requirement that protection is *effective*. The theme for consideration is thus whether the state has the ability and will to provide

¹⁰¹ The state has a negative responsibility for not violating an individual’s rights, but also a positive responsibility to respect and protect an individual’s rights. Velasquez Rodriguez, Inter-American Court of Human Rights, 1988, Ser. C, No. 4, 9 Hum.Rts. L.J. 212 (1988), also Australian Guidelines para. 4.11

¹⁰² UNHCR Guidelines 2002, para. 20, see also UNHCRs Handbook 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

¹⁰³ E. Fisknes, “Utlendingsloven: med kommentarer”, (Immigration Act with Comments) Universitetsforlaget 1994, p.181

¹⁰⁴ Cite, Ministry of Justice Guidelines of 1998, item 2, page 3

actual protection. The condition is not met if the ability and will only exist in theory.

In the Newsletter on Norwegian refugee and immigration policy No. 8 of 2001, the Ministry of Local Government and Regional Development takes as a basis that a requirement regarding effective protection is interpreted into the condition for the state's ability and will.

”If a country neither can nor will provide protection against violations which are persecutory, she has a right to asylum. In this lies that it is not sufficient that a country has introduced a prohibition against certain acts, for example, honour killing, forced marriage, bride-burning, genital mutilation, etc. The decisive factor is whether an asylum seeker can in reality receive protection in his or her home country. It is not a requirement that the state can protect everyone against assault, but that the state takes sufficient measures to prevent assault in a non-discriminatory manner.”¹⁰⁵

On the basis of the asylum cases reviewed in connection with the project, there follows an elucidation of how the requirement for effective protection is applied by the Norwegian immigration administration.

4.3.2 Non-state actors

Based on the practice reviewed it seems as though parts of the Norwegian immigration administration do not accept that persecution by non-state actors can give the right to asylum. It also seems as though the practice by UNE and UDI is partially different in this area.

In asylum case GPRL 36, where the asylum seeker asserts an asylum ground of abuse in the marriage, UNE states that the conditions in the refugee definition are not regarded as met since the claimant's problem is of a “private nature”.

¹⁰⁵ Cite, “Newsletter on Norwegian refugee and immigration policy” No. 8. -20 August 2001, 8th year, p. 3

”Firstly, the Board views it thus that the part of the prostitution which has been carried on has been a part of the abuse which has taken place in the home...”

In another case concerning a woman from Iraq, the Board establishes that “the claimant’s problems are of a private nature”. As mentioned introductorily and established in the Norwegian guidelines of 1998, it is not relevant for the determination of the condition persecution whether the assailant is a private or public person. It seems as though the Board does not follow the practice which is stated in the guidelines of 1998 regarding so-called ”non-state actors”.

Rejection of an application for asylum where the asylum ground asserted is domestic violation by family members cannot in accordance with Norwegian law be based on the reason that the agent of persecution is a private person or that it is a family matter. Any rejection must be based on the fact that one or more of the conditions in the definition is not met, and that one therefore does not have the right to asylum or protection in accordance with Norwegian law.

Based on the cases we have had access to, it seems as though UDI has adopted an attitude which is more in keeping with the easing of the asylum criteria expressed in the guidelines of 1998.

In an internal memorandum dated as early as March 1998, it is stated in the remarks to an asylum case where the claimant was a woman from Iran who was abused:

”The persecution originated from the husband and there is nothing in the new asylum criteria to indicate that there is a boundary at the threshold. We can therefore not conclude that the home is excluded in this manner.”¹⁰⁶

¹⁰⁶ Cite internal document from UDI, in connection with asylum case concerning an abused woman from Iran.

In a decision dated March 2001 in case GPRL 34, concerning a woman from Iraq who had been exposed to serious abuse over 40 years of marriage, UDI established in its internal remarks that:

”The requirement regarding the agent of persecution is met. No longer requirement that there shall be persecution by the authorities”.

4.3.3 The state’s ability and willingness

Persecution by others than organs of official authorities will as mentioned only be regarded as persecution if one finds it substantiated that the authorities do not have the ability or will to protect against persecution. If a state is not able to protect the rights of its citizens this is a violation of the right to ”effective remedy”.¹⁰⁷

Relevant international law sources indicate what the obligations of states to protect their citizens entails, and thus what one can expect. Especially as regards women, relevant sources are: CEDAW Art. 2, which directs the states to eliminate the discrimination of women. Another relevant international law text which gives a good yardstick for a state’s positive obligations to protect individuals is the Declaration on Violence against Women¹⁰⁸ Art. 4. See also UNHCR Handbook, para. 65. Also Beijing Platform of Action, Part D1 mentions the measures one can expect states to take to protect women against assault. These sources can be good aids for the individual caseworker in the direct application of the Convention, since they provide standards for what can be expected of states.

In the consideration of the condition regarding the state’s ability and will to protect, a central element is whether the protection is effective. The theme for consideration is whether the state has the ability and will to actually

¹⁰⁷ Example ICICCPRR Art. 2 (1), 3 and 26 and ECHR Art. 14

¹⁰⁸ Declaration on the Elimination of Violence against Women, General Assembly resolution 48/104 of 20 December 1993

provide protection. The following is stated in UNHCR Handbook regarding the requirement for effective protection:

”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.”¹⁰⁹

Of relevance to such consideration is UNHCR 2002 Guidelines, para.19, “[...] if the authorities refuse, or are unable, to offer effective protection”. The new guidelines of 2002 thus continue the requirement for effective protection such as is expressed in the High Commissioner’s Handbook¹¹⁰ of 1979.

In the process of consideration it is important to seek information about the various countries’ legislation with regard to protection of women and how and to what extent the legislation is actually adhered to and enforced.¹¹¹ In countries where the state facilitates, accommodates, adapts, tolerates or excuses violence and assault in the private sphere the state can be said to be without ability or will to provide protection.¹¹² The state should seek to prevent, preclude, control, remedy and punish violations in the private sphere through its legislative, executive and judicatory organs.¹¹³ In many countries violations which women are typically exposed to are prohibited by law. However, this is no guarantee that the law will actually be applied and thereby provides women with effective protection.¹¹⁴ There can be certain customs, as for example circumcision, that are so widespread that in spite of statutory prohibition the local authorities do not manage to enforce

¹⁰⁹ Cite, UNCHR Handbook, 1979, para. 65 *in fine*

¹¹⁰ UNCHR Handbook, 1979, para. 65 *in fine*

¹¹¹ Australian Guidelines para. 4.11

¹¹² ECRE Guidelines p. 6

¹¹³ ECRE Guidelines p. 6, also South African Guidelines p. 8

¹¹⁴ "Even though a particular State may have prohibited a persecutory practice (e.g. female genital mutilation), the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. [...] The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine the individual's claim to refugee status is not valid." Cite, UNHCR 2002 Gender Guidelines para. 11.

the law. It can also be that customs and traditions are such an integral part of the culture that local authorities are involved in the violations.¹¹⁵

An example that statutory prohibition does not necessarily mean that individuals are given effective protection is given in the following citation from the internal remarks of the Directorate in case GPRL 06:

”The central element is whether the state can protect her against the perpetrator. Bride kidnapping is prohibited in Ethiopia. However, in accordance with our guidelines it is a requirement that protection shall be realistic. According to the Country Advisor there have been some reports and court cases, but that has been to a very limited extent. There are no crises centres to which she may turn for help. In order to succeed in the justice system one is dependent on having a family with strong resources behind one. Bride kidnapping takes place at all levels of society and without regard to the different religions. It is generally accepted and her only opportunity for protection is having a family which is willing to and which can protect her.”

As a result of the requirement for effective protection, it is sufficient in the process of determination of the opportunity an asylum seeker has to obtain protection to evaluate the actual legislation in the asylum seeker’s home country. UDI states the following in a case, GPRL 42, where the asylum seeker was an ethnic Bosnian from Croatia:

”Reference is made to the fact that abuse by a spouse can be persecution in the sense of the Convention. The decisive factor will be whether the authorities in the home country can provide adequate protection. [...] Reference is made to the fact that Croatia has introduced laws which are intended to improve protection against domestic violence. However, in an asylum interview the woman provided the information that she on several occasions had approached the police to give a report about her spouse. The police had told her that they did not wish to be involved in a family affair, and that the husband has offered his health for Croatia during the war. This shows that the woman does not have effective protection in her home country.”

¹¹⁵ Australian Guidelines para. 4.12

In a case from UNE, GPRL 36, the following explanation was given that it was up to the woman to seek protection in her home country, and should therefore not be given refugee status. From the interview:

”The claimant says that according to law in Iran, it should be possible for women to keep the children after a divorce if the husband is a drug abuser. The claimant says that this law does not work in practice. The claimant approached what she calls “the court” several times. By this she means the ‘Division for marriage guidance’ in the District Court. It is these officials who are *inter alia* responsible for granting of divorce. The claimant tried several times to report her husband to this court to get a divorce. She told them about his drug abuse and that he “sold her body” to friends. The mullah she talked to said she had to prove the occurrences by obtaining pictures. She said it was not possible to take pictures of the fact that she was ‘sold’ and forced to have intercourse. The mullah said she should go home and not be so impertinent towards her husband. The mullah also referred on one occasion to the fact that the claimant survived, and that she had no proof of her allegations.”

In its decision UNE states:

”Abuse of women is not socially accepted in Iran, and can provide grounds for divorce and compensation. Further, abuse can result in that she keeps the children if the husband is found to be an unsuitable father. UNE refers to the fact that the authorities in the home country are the correct channels to protect women against the violations acts of abuse are [...]. Concerning the claimant’s possibilities for achieving divorce on their own initiative, the majority would remark that in 1983 an Act was passed which gave Iranian women the right to divorce. Additions to the law in 1984 extended the possibility of divorce, and in 1993 it was decided that all divorce cases should be heard by a Court [...]

At the same time the following was taken as a basis:

”The majority understands that there are strict requirements as to evidence for abuse, and from here one cannot have any certain opinions about whether the claimant would be able to present the evidence the Court would find sufficient..”

In this case UNE decided that the claimant had effective protection, in spite of the fact that the basis was that "one cannot have a certain opinion about" whether the claimant actually can manage to fulfil the requirement for evidence. If the requirement for evidence which is the basis for a law is stricter for women than for men, and further contributes to facilitate, accommodate, adapt, tolerate or excuse violence and assault in the private sphere the claimant will not have effective protection.¹¹⁶ In this case UNE should have considered whether the particular evidence requirements referred to by the claimant in an asylum interview entail that the claimant does not have effective protection.

It is thus not the actual legislation which is decisive, the interesting part is how the law is applied in reality. The immigration administration must find out whether the asylum seeker's home country attempts to prevent, preclude, control, remedy and punish violations through their legislative, executive and judicatory organs.

The state in itself can be responsible for persecution and assaults on women if it introduces laws which discriminate against women in such a manner that it can be said to amount to persecution. Alternatively, the state has neither the ability nor the will to provide protection where laws are enforced in such a way that, for example, women are punished disproportionately to men for some breaches of the law.¹¹⁷

In the evaluation of an asylum seeker's possibility of getting protection in his or her home country, one must consider how strictly the requirement for effective protection shall be interpreted and applied. What evidence shall be required for the lack of ability and will on the part of a claimant's home country? Further, on whom does the burden of proof rest? Elements in this evaluation are whether it is a requirement that one must have approached the authorities. If one has approached the local authorities and not been given help there, is the question that one must seek help higher up in the hierarchy?¹¹⁸ Two asylum cases in UDI illustrate how complex this

¹¹⁶ See ECRE Guidelines p. 6

¹¹⁷ ECRE Guidelines p. 6

¹¹⁸ ECRE Guidelines p. 6

evaluation can be. The cases are a good example that an individual assessment must be carried out in each asylum case. Of interest to the cases is that both applicants came from the same country, both allege domestic violence as grounds for asylum and the decisions in the Directorate are made within a time period of six months.

In case GPRL 41 it is stated in the decision:

”The Directorate remarks that the local authorities will be the correct channels to give the applicant protection against the alleged threats/assaults. According to the Directorate’s knowledge of the conditions in Croatia the police have both the ability and will to provide protection to the country’s inhabitants to such a degree that it is not natural to characterise the mentioned allegations as persecution in the sense of the Convention. In this connection, reference is made to the fact that Croatian authorities in 1997 decided to introduce stricter sanctions for the above-mentioned domestic violence. (In the interview the claimant states: ”The claimant went to the police, but they said they would not involve themselves in their affairs because he had sacrificed himself and the life of his brother for Croatia.”)¹¹⁹ The claimant’s information regarding lack of follow-up by individual police officers has been reviewed, without any weight being attached to it. Reference is made to the fact that the claimant should be ensured necessary protection by contacting persons at a higher level in the police, or by contacting OSSE.”

In case GPRL 42 which was decided six months later, the following conclusion is arrived at, citation from the internal remarks:

”Even though the general assumption is that she finally will receive protection, if she presents her case high enough in the hierarchy, I am of the opinion that it cannot be used in this case. In theory it is said that one has a well-founded fear if the authorities cannot give adequate and effective protection. If this is not the case, for example, by discrimination on a local level, the consequences can be that the authorities assent to or tolerate violations of human rights. If we should require that the claimant in this case be referred to seek the

¹¹⁹ Information in parenthesis added by author

protection of the home country, it can entail that the claimant will be exposed to extremely serious assaults in the period before protection is achieved. Reference is made to the fact that we have assumed that the claimant will not be given help at the local level and that she is thus referred to seek protection higher within the system. This slow process can have very serious consequences on the basis of the allegations which are made in the case.”

In relation to women it is an element that they will expose themselves to increased danger if they try to contact the police at all. It is possible that women are in danger for further assaults if male relatives are given information that they have sought help outside the four walls of the house in a family matter. Further, it is such that many women live in such circumstances that it would be impossible for them to seek the aid of the authorities. The following case from Eritrea GPRL 11, shows how the individual claimant’s background can make it impossible for an asylum seeker to request help from the authorities.

”A question must be asked regarding the possibility for a claimant to break with this tradition (forced marriage) by seeking protection from the Eritrean authorities or by breaking the ties with her family and, for example, seek to make a new life in Amara. [...] It is assumed that the claimant operates within a relatively traditional network. This will mean that the claimant has lived within the framework of the family her whole life, and that her possibilities and limitations should be analysed within this framework. The claimant has no education and contact with Eritrean society as a whole seems small. This is an argument which can be used to render probable that the claimant’s opportunities outside the family network is very limited. It will be difficult to expect that a woman who has lived within such a closed context can break ties with her family, and in addition find possibilities for being able to notify someone of this break and seek protection from the relevant authorities..” [...] In the event of a return to Eritrea it seems unlikely to expect that the claimant on her own initiative will be able to break with her family given the assumptions that she has. It is therefore not likely that one can expect that Eritrean authorities will have the possibility of giving any protection to the claimant. This given that the central authorities are not very accessible regardless in the areas where the claimant lives, and that they have little possibility of being able to protect the claimant unless serious violence is used.”

Another element is that women who actually do approach the authorities for protection can experience difficulties in being believed. In some countries the administration of justice makes stricter evidence requirements for women than men, cf. discussion of case GPRL 36 above. All these elements can mean that women do not in actual fact approach these authorities, since they know that the chances of getting help are few, and that they expose themselves to further danger by requesting help.

In the Australian guidelines¹²⁰ and ECRE's guidelines¹²¹ it is established that the fact that a woman has not applied to her country's authorities for help should not be decisive in the case where she will either be exposed to greater danger by contacting the authorities, or where she is in doubt as to whether she will be able to get protection by applying to the authorities. Also the Irish guidelines¹²² state that no requirement should be made that women must actually have tried to obtain help from the authorities in the home country, if the woman can establish that this will either expose her to greater danger or not be effective.¹²³

On the background of the cases that were reviewed in connection with the project, it seems as though the immigration administration at times interprets the requirement for effective protection strictly. It appears as though one makes a requirement that the authorities must have been contacted, further that one does not regard it as sufficient proof of lack of ability and will of the state if one has only contacted the local authorities. In some of the cases we have reviewed it has been stated that if one cannot get help from the local authorities one must seek help further up in the hierarchy.

¹²⁰ Australian Department of Immigration and Multicultural Affairs; Refugee and Humanitarian Visa Applicants, Guidelines on Gender Issues for Decision Makers (1996)

¹²¹ ECRE; "Position Paper on Asylum Seeking and Refugee Women", South Africa National Consortium on Refugee Affairs; "Gender Guidelines for Asylum Determination"

¹²² Ireland; "Women and the Refugee Experience: Towards a Statement of Best Practice", Canadian Immigration and Refugee Board; "Women Claimants fleeing Gender-Related Persecution: Guidelines", (2000)

¹²³ Irish Guidelines, item 2.4

In theory it is assumed that one in the evaluation of whether there is effective protection cannot make an absolute requirement that a person must have sought help from the authorities. If the woman will risk further assault by, for example, her husband if she contacts the police, if she has a reasonable doubt that she will get help, or if she by contacting the police puts her life in danger, in theory it has been stated that the fact that a woman has not sought help from the local authorities shall not be decisive for the determination as to whether she is persecuted or not.¹²⁴

4.4 Rape and sexual assault

4.4.1 Rape as a violation of international law

Many women assert as asylum grounds that they have been exposed to persecution which has been expressed through rapes and sexual assaults. Sexual assault can be a means which is used in fights between different clans, different ethnicities or during war. Rape and sexual assault can amount to violations of the prohibition against torture and “cruel, degrading and inhumane treatment”¹²⁵, the right to personal security¹²⁶ and in certain cases right to life¹²⁷. Many risk being excluded socially because of rape.¹²⁸ In strong patriarchal societies or tribe societies, where the woman’s identity and security are dependent on her belonging to a family or tribe, social exclusion can have very serious consequences. The woman by such exclusion can come to be without right to freedom and security¹²⁹, without right to private life¹³⁰ and in danger of torture, cruel or degrading

¹²⁴ H. Crawley, “Refugees and Gender, Law and Process”, Jordans Bristol 2001, på s. 58,

¹²⁵ UN Declaration on Human Rights Art.5, ICCPR Art. 7, ECHR Art. 3

¹²⁶ UN Declaration on Human Rights Art.3, ICCPR Art. 9, ECHR Art. 5

¹²⁷ UN Declaration on Human Rights Art.3, ICCPR Art. 6 (1), ECHR Art. 2

¹²⁸ Australian Guidelines para. 4.8

¹²⁹ UN Declaration on Human Rights Art.3, ICCPR Art. 9, ECHR Art. 5

¹³⁰ UN Declaration on Human Rights Art.17, ICCPR Art. 12, ECHR Art. 8

treatment¹³¹ since in some societies excluded women are regarded as almost "free game".

As mentioned, sexual assaults and rape are often used as a medium in warfare.¹³² Many of the women asylum seekers who arrive in Norway are fleeing from war situations.¹³³ In order to be able to undertake an evaluation of whether these women are persecuted it is important for caseworkers in the directorate and Board to have knowledge about refugees' legal position and rights in a war situation. Knowledge of humanitarian law is in other words especially important in the assessment of these cases.

Systematic rapes can amount to 'ethnic cleansing' and is therefore genocide¹³⁴, systematic rapes as a medium in warfare is to be regarded as a violation of international humanitarian law and international criminal law. Examples of this can be found in recent case law from the international ad hoc courts¹³⁵. For example, ICTR¹³⁶ Prosecutor v Akayesu¹³⁷, ICTY¹³⁸ Prosecutor v Furundzija¹³⁹ or ICTY Prosecutor v Kunarac, Kovac and Vukovic¹⁴⁰. The *ad hoc* courts have established in their case law that rape and sexual assault can be regarded as torture (ICTY in the Celebici-case, IT-96-21-A), crimes against humanity, (ICTY in Kunarac, Kovac, Vukovic

¹³¹ UN Declaration on Human Rights Art. 5, ICCPR Art. 7, ECHR Art. 3

¹³² As an example of human rights violation towards women in war situations the Beijing Platform of Action para. 114 "murder, systematic rape, sexual slavery and forced pregnancy". See also South African Guidelines p. 7

¹³³ On "Women and Armed Conflict" - more can be read in ex. Beijing Platform of Action, E "Women and Armed Conflict" or J.G. Gradam and M.J. Jarvis, "Women, Armed Conflict and International Law", Kluwer Law International, The Hague 2001

¹³⁴ ICC Statute Art. 6 b) and d), (The Rome Statute, <http://www.un.org/law/icc/>), also Australia Guidelines para. 4.7

¹³⁵ The international ad hoc courts are at present the International Tribunal for the Former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR). See the Tribunal's home pages, <http://www.un.org/icty/> and <http://www.icttr.org/>

¹³⁶ International Criminal Tribunal for Rwanda

¹³⁷ The Prosecutor v Jean-Paul Akayesu, Case No. ICTR-96-4-T, <http://www.icttr.org/wwwroot/default.htm>

¹³⁸ International Criminal Tribunal for the former Yugoslavia

¹³⁹ Prosecutor v Anto Furundzija, Case No. IT-95-17, <http://www.un.org/icty/judgement.htm>

¹⁴⁰ Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic, Case No. IT-96-23, <http://www.un.org/icty/judgement.htm>

IT-96-23) (ICTR v Akayesu, ICTR-96-4-T) and war crimes (ICTY in Kunarac, Kovac, Vukovic IT-96-23, ICTY in Furudizija, IT-95-17).

In accordance with the statutes¹⁴¹ for the new international criminal court¹⁴² (hereafter "ICC") in the Hague, rape and other forms of gender-specific assault can be punished as 'crimes against humanity', Rome Statute Art. 7 (1) g, 'war crimes', Art. 8 (b) xxii and 'genocide', Art. 6. Norway ratified the Rome Statute on 16 February 2000¹⁴³ In accordance with the Geneva Convention (IV)¹⁴⁴ women shall be protected against assaults "on their honour, in particular against humiliating and degrading treatment, rape, enforced prostitution or any form of indecent assault".¹⁴⁵

In recent years important changes have taken place in international criminal law which could have significance for the consideration of asylum cases, possible particularly in relation to women asylum seekers. In the Criminal Law Commission's proposal for a new Criminal Code Official Norwegian Report 2002:4 it is sought to pass new provisions on war crimes, genocide and crimes against humanity in Chapter 16 of the new criminal code.¹⁴⁶ It is anticipated that these are areas within international law which will be in constant focus in future years, especially when the Court in the Hague starts its activity. In order for the immigration administration to make a

¹⁴¹ The Rome Statute, in Norwegian called "Roma vedtektene", cf. Official Norwegian Report 2:4, Chap. 9.2

¹⁴² International Criminal Court

¹⁴³ By Act of 15 June 2001 No. 65, the Rome Statute was incorporated into Norwegian law.

¹⁴⁴ Norway ratified the four Geneva Conventions 03.08.1951

¹⁴⁵ Geneva Convention IV Art. 127. The Geneva Conventions are applicable only to international war conflicts, between sovereign states, many of the women who arrive in Norway, however, are fleeing from internal war situations, civil wars and the like, for the application of the ICC on internal military conflicts see ICTY Prosecutor v Tadic, Case No. IT-94-1-AR72, Interlocutory Appeal on Jurisdiction, para. 96-137.

<http://www.un.org/icty/judgement.htm> The judgement is rendered med commentary in A.Klip and G.Slüiter (eds.), "Annotated Leading Cases of International Criminal Tribunals, The International Criminal Tribunal for the former Yugoslavia 1993-1998", p. 33-140. See also the distinction between international and internal conflicts in ICC Statute Art. 8 on "war crimes", 8 (2) a), b), c) og d)

¹⁴⁶ Proposed new Chapter 16 in new Criminal Code. Cf. Official Norwegian Report NOU 2002:4 Chap. 9.2

decision in accordance with Norway's international obligations, it is important to update and increase knowledge among caseworkers in this area.

4.4.2 Practice in the immigration administration

Of the 56 cases which were reviewed in connection with the project, there are a total of 8 cases where the applicant has asserted rape and sexual assault as grounds for asylum.

The following table give an overview of the result of the 8 asylum applications:

Asserted asylum grounds	Rape and sexual assault					
Result	Rejection	Asylum	Permit § 8, subs. 2	Othum § 15, 1, 1	Othum § 15, 1, 2	IR. § 21, subs. 3
Number	2	-----	3	-----	3	-----

The table below gives an overview of the reasons given for the immigration administration's decision.

Result	Id	Reason
REJECTION	GPRL 01	Isolated case of crime, not of such type or extent that it is persecution
	GPRL 13	Future-oriented assessment of fear of persecution.
Permit § 8, subs. 2. subsection, cf. § 15, subs. 2	GPRL 14	Future-oriented assessment of fear of persecution.
	GPRL 15	Violations far back in time, no causal link
	GPRL 16	Violations far back in time, neither are assaults of such type and extent that it is persecution.

OTHUM § 15, 1, 2	GPRL 02	Future-oriented assessment of fear of persecution, harassment feared by applicant upon return gives right to othum pursuant to § 15, 1, 2
	GPRL 03	Not exposed to assault of such type and extent that it can be called persecution, rape is a criminal act
	GPRL 17	Not persecution, not Convention ground, no causal link

4.4.2.1 Rejection

GPRL 01, woman, roma from Yugoslavia. The applicant tells in the interview about how she and the family as romas in Serbia have had a very difficult life, that they have no protection and nowhere to seek help when they need it. The applicant is of the opinion that roma are exposed to ethnic cleansing in the home country. The reason that the applicant left her home country was that she and her husband were attacked in their home. The applicant was raped and her husband beaten. The assailant expressed that "they should kill these gypsies". When the couple contacted the police to seek protection, they were requested to go to a safe place, and that the police could not help with anything.

The woman's application for asylum was rejected. The Directorate established that the applicant had not been exposed to persecution, but "an isolated case of crime". The Directorate states the following in the evaluation of whether the applicant fears "persecution":

"The Directorate has noted the applicant's allegations of harassment, but is of the opinion that the circumstances the applicant refers to have not been of such extent or such type that they can be characterised as persecution in the sense of the Act and Convention."

This is a case where it can be argued that asylum could and should have been granted. If one does not regard rape in itself as sufficient to meet the condition of "persecution", one will be able to say that the occurrences the

woman is exposed to on a daily basis, where she asserts that she lives without personal freedom and security¹⁴⁷, together with the attacks in her home¹⁴⁸ and the episode of the rape¹⁴⁹ cumulatively amount to persecution¹⁵⁰. It also seems relatively clear that the persecution has a causal link with the fact that the woman is a gypsy, roma. One argument for this is the fact that the man who raped her attacked her and her family because they are romas. The woman's lack of security in her daily life and the lack of help and protection from the authorities and police are because of the low position in the Serbian society in general. There is thus no question of an "isolated case of crime".

In **GPRL 13** the applicant is a young Albanian woman who asserts as grounds for asylum that she was raped during the war. As a result of the rape and assaults she experienced during the war she has developed epilepsy. The woman's application for asylum is rejected by both UDI and UNE.

The reason given for rejection is that the Convention points to future-oriented assessment of the persecution concept:

"The convention points to a future-oriented evaluation of whether the applicant upon return to the home country will be exposed to such reactions by the authorities or others. It is not sufficiently proved that the applicant upon return to the home country will be exposed to such persecution. The Directorate has noted that the applicant has been raped, but refers to the fact that this event took place three years ago, and that the Convention points to a future-oriented evaluation. The Directorate further remarks that the situation in Kosovo has changed considerably since 1999, and that there is no longer any general need for protection of the Albanian people.

¹⁴⁷ UN Declaration of Human Rights, Art. 3, ICCPR artikkel 9 (1), ECHR Art. 5

¹⁴⁸ "No-one must be exposed to arbitrary or illegal intervention in the private or family life, home..." ICCPR Art.17 (1), also UN Declaration of Human Rights Art. 12, ICESCR Art. 10, EKC Art. 8

¹⁴⁹ Violation of the prohibition that no-one must be exposed to "cruel, inhumane or degrading treatment", UN Declaration of Human Rights, Art. 5, ICCPR Art. 7, EKC Art 3

¹⁵⁰ UNHCR Handbook para. 53 og 55, also Australian guidelines item 4.15

The applicant is not granted asylum since she does not have a well-founded fear of future persecution.

4.4.2.2 Permit § 8, subs. 2, cf. §, 15 subs. 2

GPRL 14, where the applicant is a woman from Yugoslavia who was raped several times during the war. In the interview, the applicant tells that she has not been arrested, but that Serbian police came to their home, first to get money, later to get gold and jewellery, “after a while they only wanted women”. Serbian forces came to their home in May 1998, the applicant was raped several times by different men. The applicant was then brought to the police station where she was abused and raped again, in the view of several other prisoners, including men. The other prisoners could not intervene since their hands and feet were handcuffed. In order to avoid more attacks in the home the applicant and her family lived in the forest for three months, where they lived in the open and under very difficult circumstances.

The applicant states in the interview:

”she feels that she can never go back to Kosovo after everything she has experienced, even though peace and good times should be established there [...] ...the applicant says she will commit suicide if she is sent back to Kosovo. She doesn’t think she will have any reaction from the authorities if she goes back to Kosovo. But it is first and foremost difficult to go back because of the attacks that took place while the whole family looked on [...] The applicant’s eldest son still has bad dreams about what happened in Kosovo and doesn’t want to go back either.”

The Directorate finds that the applicant cannot be regarded as a refugee, and thus has no right to asylum in Norway. The following reason is given in the decision:

” The Convention points to a future-oriented evaluation of whether the applicant on return to her home land will be exposed to such reactions by the authorities or others. It is not sufficiently proved that the applicant upon return will be exposed to such persecution. [...] The Directorate has noted the applicant’s arguments regarding abuse by

Serbian forces in May 1998. The situation in Kosovo at present, however, is completely different to when the applicant left the area. UN Resolution 1244, passed by the UN Security Council 10.06.99 has been taken into consideration in the assessment.”

The applicant is not granted asylum since she does not have a fear of future persecution.

The applicant in **GPRL 15** is a woman from Somalia. She asserts as grounds for asylum that she has been raped, further she asserts that she has a generally difficult life situation in her home country. The applicant tells in the interview that she in 1994 was kidnapped and raped by three men who drove up in front of the house where she lived. She was set free immediately after the rapes.

The Directorate rejects the application for asylum, but grants a permit pursuant § 8, subs. 2. The woman cannot be regarded as a refugee because:

”The alleged rape took place far back in time, and according to the applicant’s statement does not appear as a link in a persecution of persons having the same ethnicity as the applicant.”

The applicant is not granted asylum, since the assaults she has been exposed to are not of such type or extent that they are to be regarded as persecution.

In **GPRL 16**, where the applicant is a woman from Somalia, the grounds for asylum are given as the generally difficult and uncertain situation in Somalia, as well as the fact that the applicant has been raped several times and taken prisoner as a result of the disturbances in the country. In the asylum interview she says that she in the years 1991-93 was taken prisoner three times by the militia, they came to her home and took her with them. She was held prisoner for 14 days at the longest period, she was raped many times, and they did what they wanted with her.

The Directorate establishes that the woman cannot be regarded as a refugee:

”The Directorate is of the opinion that the applicant has not been exposed to reactions which can be characterised as persecution in the sense of the Act and Convention, or that she will risk such persecution

upon her return. Neither the applicant's arguments regarding clan war/civil war nor the generally difficult situation in Somalia can provide the grounds for asylum. Reference is made to the fact the occurrences alleged by the applicant lie far back in time."

4.4.2.3 Othum § 15, subs. 1, item 2

GPRL 02, applicant is a young woman from Yugoslavia, she was exposed to serious sexual assaults during the war. As a result of the rapes she became pregnant, and later gave birth to a child. The woman was kidnapped and kept locked up for three days, and it was during this time that the assaults took place. In the interview the woman states the following about the period in captivity:

"During the period of captivity I was abused in different ways, but the very worst were the rapes, they used different methods. There were several who raped me. My back was injured because I had to lie on the table, because of the edge. During the interview the applicant shows a scar in the lumbar region. After they had finished raping they threw me in the shower. The second night, after they had finished with me, they washed me in wine. To the question of how many were in the room: There was always one who sat in the door, he just sat there. There were two more, one who held me down on the table, and one who stood in front. After they were finished, another one came. While they raped me they said in Serbian how much they liked Albanian women. [...] The night after I heard another woman screaming. It was almost worse listening to her. I never saw her. The applicant states further that: They said that if I didn't do what they said, they would come to find my sisters."

The woman had her application for asylum rejected, since the asylum assessment is future-oriented. She was granted othum pursuant to § 15, subs. 1, item 2. The following reason is given for the decision:

"The applicant asserts that she cannot go back to Kosovo because she has a Serbian child. Neither her family nor other Albanians will accept this. [...] The Convention points to a future-oriented assessment of whether the applicant upon return to her home country will be exposed to such reactions from the authorities or others. It is not sufficiently proved that the applicant upon return will be exposed to

such persecution. The Directorate has noted the suffering that the applicant has been exposed to during the war. Even though this can in no way be accepted, the Directorate would remark that the situation in Kosovo at present is completely different to when the applicant left the area. There is no longer a situation of war in the region. The security situation in Kosovo no longer indicates that there is a general need for protection for the Kosovo-Albanian population. The Directorate has further assessed the applicant's situation with a Serbian child. The Directorate is aware that women in such a situation can be exposed to harassment and be in a difficult situation upon return to Kosovo. However, the Directorate is of the opinion that what the applicant risks being exposed to cannot be characterised as persecution in the sense of the Act and Convention."

The reason that the woman is granted othum pursuant to § 15, subs. 1, item 2 is given as follows in the Directorate's internal remarks:

"The fact that she gave birth to a Serbian child as a result of the rapes [.....] means that this applicant will be in a situation similar to a refugee's, see subsection 1. Based on the knowledge we have regarding the mentality of *inter alia* Albanians, she will be in a vulnerable and exposed situation. She has a strong connection with Serbs by having a Serbian child. The child will also probably grow up with harassment and other problems. [...] The Directorate has further evaluated the applicant's situation with a Serbian child. The Directorate is aware that women in such a situation can be exposed to harassment and be in a difficult situation upon return to Kosovo. However, the Directorate is of the opinion that what the applicant risk being exposed to cannot be characterised as persecution in the sense of the Act and Convention."

In the evaluation of the boundary between asylum and othum it is interesting to look at the reason for granting the applicant othum pursuant to § 15, 1, 2. The Directorate bases its evaluation on the fact that the applicant upon return can be exposed to "harassment and be in a difficult situation", but not violations of such type and extent that they can be characterised as persecution. § 15, subs.1, item 2 of the Act lays down that a foreigner by law must not be sent to any area where he/she can be in obvious danger of losing their life or being exposed to inhumane treatment. The requirement for type and extent of violation is stricter pursuant to § 15, 1, 2 than pursuant to § 17 cf. § 16, and there is therefore a somewhat

strange interpretation of the law which is employed when the Directorate finds that the harassment the applicant will probably experience upon return cannot be called persecution in accordance with § 17 cf. § 16, but nevertheless satisfy the requirement in § 15, 1, 2.

GPRL 03, applicant is a woman from Somalia, she has been raped and is pregnant as a result of the rape. Because it is a great shame in Somalian society to be pregnant without living with the father of the child, she was talked about behind her back and felt expelled by society. She was afraid that she would be killed, and could therefore never leave the house.

The following is stated in the Directorate's decision about the rape and condition for persecution in the Convention:

"The Directorate is of the opinion that the applicant does not have a well-founded fear of persecution in the sense of the Act and Convention. The Directorate is of the opinion that the experience the applicant has had during pregnancy is not directed toward the applicant as a link in an individual and systematic persecution in the sense of the Act and Convention. The Directorate does not regard it as substantiated that the applicant will experience persecution on any return to the home country. The rape which the applicant was exposed to must be characterised as a criminal act and not an assault related to the applicant's race, religion, nationality, membership of a particular social group or political opinion.."

The applicant is granted othum pursuant to IR § 21, subs. 1, "after an individual assessment which shall be undertaken in all cases. Because of the rape she will be particularly exposed on return."¹⁵¹

In **GPRL 17** the applicant is a woman from Congo, whose husband is a professional military serviceman. The man is forced to serve on the front at the Equator. The woman is visited by three military men who ask where her husband is. She shows them letters she has received from her husband, and is requested to go with the soldiers since this letter must be shown to their superiors. During the car trip the soldiers started speaking

¹⁵¹ Cite, remarks

patronisingly about the applicant, placed a blindfold on her eyes and tied her hands behind her back. She was asked what her husband had done to become a rebel. The applicant was taken to a camp where she was interned for 15 days. She got out of the camp by escaping. She was held in the camp in a dark room of approx. 10 sq. m., there were no others in the room. There was no access to a toilet. She was raped on several occasions. If she tried to resist she was punched below the waist and her hair was cut off (she had a wig on during the asylum interview). The applicant was raped on three occasions, each time there were three persons who participated. The applicant tells at the interview that when she was rescued (when she escaped) she was so exhausted that she could not walk on her own.

”The Directorate is of the opinion that the applicant’s arguments do not provide the grounds for asylum since the fear of assault is not related to any persecution grounds in the Act or Convention. The applicant’s fear of assault is based on the fact that her husband has been accused of having joined the rebels in the home country. The Directorate has noted that the applicant says that she has been exposed to rape while she was in custody. According to the Directorate’s evaluation, however, these circumstances are not of such type that they can be regarded as persecution in the sense of Act and Convention.”

Asylum could have been granted to the applicant in this case. The Directorate argues that the applicant’s fear of persecution is not related to any of the persecution grounds in the Convention. However, the applicant’s case is an example of derived persecution, and this can be said to have a causal link with the Convention ground of membership of a special social group. The particular social group will be family.

The Directorate employs an extremely strict interpretation norm regarding the persecution concept when they establish that the violations to which the applicant has been exposed in captivity are not of such type and extent that “they can be regarded as persecution in the sense of the Act and Convention.”

4.4.3 Summary

8 cases where the asserted grounds for asylum have been rape and/or sexual assault are presented above. Perhaps the most interesting find is that none of the asylum seekers in this group have been granted asylum, on the other hand, the Immigration Act § 15, 1, 2 has been applied more frequently for this type of violation than for cases of domestic violence, forced marriages, and bride kidnapping.

The condition that the evaluation of the persecution concept is future-oriented seems to be the main reason why none of the applicants are granted asylum. The boundary between asylum and othum for this group can be explained by the fact that the person is only assumed to have a "well-founded fear of persecution" if the fear of persecution is future-oriented.

The decision in GPRL 17 is otherwise an example that the immigration administration, for some types of *gender-specific violations*, in this case rape, employs a very strict interpretation norm. Any assertion of sexual assault must, as other asserted grounds for asylum, be evaluated in relation to the conditions in the Convention definition. The possibility that the applicant can be exposed to persecution must not be rejected before a holistic and thorough assessment of the actual facts of the case against the conditions of the Convention has been undertaken.

4.5 Domestic violence

4.5.1 Domestic violence and international law

Domestic violence is a form of gender-specific violation which can be seen in many of the cases we have received for review in connection with the project. It is important to the achievement of equality of the sexes' right to asylum that it is recognised that the violence to which a woman is exposed in the home, whether it is by her husband or other family members, can

amount to persecution.¹⁵² Some women are exposed to assault to such a degree that it can be regarded as torture¹⁵³. In many cases the prohibition against "cruel, inhumane and degrading treatment"¹⁵⁴ is infringed. Many women experience being locked up in a room or denied leaving the house, and this is in violation of the right to free movement, "freedom of movement"¹⁵⁵. In accordance with CEDAW Art. 16 (1) c) women and men shall have equal rights in marriage. In its General Comment No. 19¹⁵⁶ the Committee states in connection with CEDAW Art. 16:

"Family violence is one of the most insidious forms of violence against women. It is prevalent in all societies. Within family relationships women of all ages are subjected to violence of all kinds, including battering, rape, other forms of sexual assault, mental and other forms of violence, which are perpetuated by traditional attitudes. Lack of economic independence forces many women to stay in violent relationships. The abrogation of their family responsibilities by men can be a form of violence, and coercion. These forms of violence put women's health at risk and impair their ability to participate in family life and public life on a basis of equality."¹⁵⁷

In several cases from UDI, reviewed in connection with the project, it is recognised that violence by the husband or other close family members can be "persecution" in the sense of the Convention.¹⁵⁸ Based on the cases we

¹⁵² In relation to violence against women, 'domestic violence', one should consult the reports from the UN Special Rapporteur on violence against women, on the Internet

<http://193.194.138.190/html/menu2/7/b/mwom.htm>

¹⁵³ UN Declaration on Human Rights, Art. 5, ICCPR Art. 7 ECHR Art. 3

¹⁵⁴ UN Declaration on Human Rights, Art. 5, ICCPR Art. 7 ECHR Art. 3

¹⁵⁵ UN Declaration on Human Rights, Art. 3, ICCPR Art. 12

¹⁵⁶ from the 11th Session 1992, on the Internet, www.un.org/womenwatch/daw/cedaw/recomm.htm

¹⁵⁷ Cite, CEDAW General Comment No. 19, para 23

¹⁵⁸ Example, GPRL 38, "The applicant says that she over a 17-year-long marriage has been abused by her husband and forced to prostitution. The applicant says that the husband has caused her permanent injuries to her left hand and right leg in addition to psychological problems. On two occasions he apparently tried to set fire to the applicant [...] The applicant says that she as a result of prostitution does not know who the children's biological father is. [...] Abuse in the case of this applicant is so serious and systematic that it must be able to be characterised as persecution."

have had access to at UNE it seems as though a more restrictive attitude has been adopted to these cases. It is unfortunate if the two administrative organs have different practice, and one should seek to change this.

In general it can be said that it is difficult to decide whether women who are exposed to violence by their husbands have the right to asylum, and this is due to the Convention's requirement that persecution shall have a causal link to one or more of the five Convention grounds. It can often be difficult for a woman to prove that the fact that her husband exposes her to violence on a daily basis has a causal link with, for example, her membership of a "social group". In relation to the interpretation of the persecution concept, however, these cases should not be more difficult to decide than other asylum cases.

4.5.2 Practice in UNE and UDI

Of the 56 cases, reviewed in connection with the project, which deal either with gender-specific violations or gender-based persecution, there are 15 cases where the grounds for asylum are asserted to be domestic violence. Violence in the family is often exercised by the husband, but it can also be the father, father-in-law or brothers who are responsible for the violations. Domestic violence is a typical example of a violation of human rights to which women are exposed to a greater degree than men, that is to say, a *gender-specific violation*.

Asserted asylum grounds	Violence and assault by close family					
Result of application	Rejection	Asylum	Residence § 8, 2 "compassionate grounds"	Othum § 15, 1, 1	Othum § 15, 1, 2	Immigration Regulation § 21, subs. 3
Number	2	7	5			1

In the search for the boundary between asylum and residence on humanitarian grounds for protection reasons, it is of interest to look at the reasons for the results. In this group of cases, however, none of the asylum seekers have been granted residence on humanitarian grounds for protection reasons, but residence on humanitarian grounds for compassionate grounds, pursuant to § 8, subs. 2 cf. § 15. subs. 2. Some of the reasons given in the cases will be presented below.

Result	Id	Reason
REJECTION	GPRL 45	Credibility
	GPRL 36	No well-founded fear, no persecution, home country has ability and will to protect, abuse is of a private nature, no causal link
Permit, cf. § 8, subs. 2 cf. § 15, subs. 2	GPRL 08, GPRL 24	Condition for persecution not met, neither is there danger of future persecution ikke fare for fremtidig forfølgelse
	GPRL 26	Private problem which is to be regarded as a crime
	GPRL 34	Private problem due to psychopathic husband, no causal link
	GPRL 41	No well-founded fear since state has ability and will
ASYLUM	GPRL 42, GPRL 33	Persecution and membership of a particular social group and causal link
	GPRL 32, GPRL 25, GPRL 37, GPRL 39	Persecution and membership of a particular social group

	GPRL 38	Persecution and no protection in home country, Convention ground not discussed
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4.5.2.1 *Rejection cases*

In **GPRL 36** the applicant had her application for asylum rejected by both UDI and UNE. As grounds for asylum the woman asserted that she had been exposed to serious domestic violence, and that she had not been successful in obtaining a divorce in her home country of Iran. On several occasions the woman had applied for a divorce through the local courts at her place of residence. UNE sums up the case circumstances as follows: "The appellant stated that she left Iran because she as a woman did not have any rights, and because her husband would not give her a divorce. [...] On several occasions the husband had forced the children to smoke opium. Just before the departure to Norway he pinned the applicant down, while he injected a syringe full of heroin in her body. [...] The appellant further stated that her husband forced her to have intercourse with his friends against payment. She has on several occasions contacted the "Division for marriage guidance" at the District Court which is responsible *inter alia* for granting of divorces."

In its rejection decision UDI states the following:

"the applicant has not been exposed to reactions by the authorities that can be characterised as persecution in the sense of the Act and Convention. In its assessment the Directorate of Immigration has emphasised that the applicant has not shown any form of political activity. Reference is made to the fact that the applicant has never been arrested, imprisoned or sentenced . [...] The fact that she had a difficult marriage with a drug addict is not in itself a circumstance which provides the grounds for asylum."

There is a more thorough legal analysis undertaken in UNE's assessment of the case. The first problem to be considered is the following:

"The first question will therefore be whether the domestic violence can provide grounds for the appellant to be granted refugee status.

[...] The appellant's fear of return is due in the first instance to the spouse and that he will bring a case of unfaithfulness against her which means that she can be given the death penalty. Further, the appellant fears her elder brother and his reactions. In addition, she fears that the husband will be able to get the parental responsibility / care of the children after a divorce, and that she can be charged with kidnapping the children. The Board finds that the appellant does not meet the conditions for being regarded as a refugee under the Immigration Act § 16. [...] In its evaluation, the Board has considered that the appellant's problems are of a private nature and not connected to the Convention grounds: race, religion, nationality, membership of a social group or political opinion. The appellant has *inter alia* asserted that the abuse and forced prostitution must be seen as gender-related persecution in accordance with the Ministry of Justice 'guidelines for new asylum criteria' dated 13.01.1998. The Board is not in agreement with this. From the guidelines it will be seen from the examples mentioned that the acts the woman has carried out must be directed towards written/unwritten rules for social life, or rules which especially affect women, such as regard for dress, the right to take work outside the home. In this case it is a question of a part of domestic violence by a husband who is a drug addict. The appellant got herself out of this situation when she left her husband, and does not want to be put into the same situation upon return as she was when she left. [...] Further, it has been asserted that the Ministry of Local Government and Regional Development in the Newsletter on Norwegian Refugee and Immigration Policy No. 8 dated 20.08.2001, in an article on gender-based persecution, mentions *inter alia* forced prostitution as an example of persecution because of gender. The value of this article as a source of law is little, but the Board has nevertheless considered the assertion itself further. The Board finds that this assertion cannot be successful either. In the first instance the Board regards the prostitution which has taken place to be a part of the domestic violence scenario, and that there is no causal link between the persecution and one or more of the Convention grounds which are mentioned above. The Board has therefore based its decision on the fact that the acts occurred while the appellant was married, but she at present is either already divorced from her husband or will be able to obtain a divorce on one or more grounds, since abuse is not socially accepted in Iran."

The main reasons for the rejection of the woman's application for asylum is that a difficult marriage to a drug addict "is not in itself a circumstance which provides grounds for asylum", furthermore that the appellant's problems are of a "private nature" and not connected to the Convention grounds, therefore there is no causal link is present. The Board does not find that abuse and forced prostitution can be regarded as gender-based persecution, since the appellant has not performed acts which break with written or unwritten rules for social life. The Board is of the opinion that forced prostitution to which the appellant asserts she has been exposed, cannot be regarded as gender-based persecution, because the prostitution is a part of the domestic violence scenario. It seems as though the Board is of the opinion that the guidelines must be interpreted narrowly with regard to the concept gender-based persecution. UNE's decision was made in May of 2002.

4.5.2.2 Permit, cf. § 8, subs. 2 cf. § 15, subs. 2

In **GPRL 08**, a residence permit was granted on "compassionate grounds" cf. § 8, 2. The woman, from Pakistan, asserted as grounds for asylum that she had been abused by her husband. The woman and her husband were divorced, but the applicant asserted in her application for asylum that the abuse continued after the divorce. In the asylum interview, the applicant tells how the husband abused her both physically and mentally, he accused her of being a bad mother and housewife, and she says that she lost her self-confidence because of it. The husband called her uneducated and said that she did not have a brain. The applicant was also beaten.

In its decision UDI writes:

" The Directorate of Immigration has carefully considered the information presented, but is of the opinion that the applicant has not been exposed to persecution of such type and extent that it falls under the Convention. Reference is made to the fact that the applicant has lived in a marriage which has been marked by violence for about 10 years. During this period the spouse has not been living at home very much and the violence has therefore only taken place in periods. The Directorate is aware that divorced women in Pakistan can have a difficult life, since divorce is not socially acceptable in local society.

The Directorate is also aware that domestic violence is prevalent in Pakistan, but abuse in itself is not a circumstance which automatically falls under the Convention. [...]”The Directorate is of the opinion that it is not sufficiently substantiated that the applicant upon return to Pakistan will be exposed to persecution in the sense of the Convention. It is very uncertain what the applicant’s husband will do. The spouse has not threatened future violence. On the other hand, the spouse has threatened to take the children away from the applicant, and reference is made to the fact that this is a circumstance which can be solved through the courts in Pakistan.”

From the remarks:

”The applicant pleads physical and mental violence over a period of years. I have come to the conclusion that the abuse in itself is not necessarily persecution pursuant to the Convention. I have also attached weight to the signal effect between a sign of equality between abuse and persecution.”

In this case the decisive element for not granting the applicant refugee status, has been that one is of the opinion that the conditions laid down in the Convention on persecution have not been met. The Directorate is of the opinion that the violations in this case are not of such type and extent that they fall under the Convention. Reference is also made to the fact that the abuse is not a circumstance which automatically falls under the persecution concept. In the Directorate’s evaluation it is not probable that the woman will be exposed to persecution in the future, and she is therefore not protected in accordance with § 15, subs. 1. The case is interesting for the interpretation of the persecution concept, particularly the lower boundary.

In another case from Pakistan, **GPRL 26**, the applicant asserted two grounds for asylum, of which one was that she had been seriously abused by her father-in-law. From the interview:

”The applicant states that she was ill-treated and abused by her father-in-law many times, every time her husband was not at home, she says that he put a pistol to her temple and asked her to take her clothes off.” (Later in the interview report it is stated that the interpreter interrupts to explain that when the applicant uses the word “abused” this can be

rape, since the word rape is not used directly in Pakistan. Upon request to explain herself further, the applicant states that she means rape.)

The applicant states that she on one occasion tried to tell her mother-in-law about the violations, with the result that the mother-in-law tried to set fire to her. The woman states that both she and her daughter have been beaten and the in-laws have threatened to kill her twice. She was beaten when she gave birth to a daughter, and had to spend all night outside, in spite of it being winter. The applicant states that she will not return to Pakistan because she fears that her in-laws will kill her when she returns with yet another daughter (the applicant was pregnant when she came to Norway).

Regarding these violations, the Directorate writes the following in the decision:

”The applicant is of the opinion that she cannot return to her husband and in-laws in Pakistan. She fears that the in-laws will kill her, and is afraid of what will happen to her children. She has no possibility of fleeing to her own family. The Directorate has considered the applicant’s arguments and found that they are not of such type or extent that they can provide the grounds for asylum. What the applicant has been exposed to is considered as criminal acts which fall under the general criminal legislation in the home country. These are not circumstances which are covered by the Refugee Convention.”

The Directorate’s evaluation of whether the abuse can be said to amount to persecution in the sense of the Convention is given a more in-depth explanation in the internal remarks:

”Where the ill-treatment by the father-in-law is concerned, the question is also whether this is really persecution in the sense of the Act, something which I in the first instance do not think. The ill-treatment by him is a criminal act / several criminal acts, and in the first instance falls under the criminal legislation in the home country. [...] Where ill-treatment by the father-in-law is concerned, I would believe that the applicant justifiably fears continued ill-treatment upon return. I assume that the applicant will not fare any better since she has been in Norway for a long time, and in addition has given birth to yet another girl child. [...] I am of the opinion that we should not

return the applicant, but I believe, in line with practice, that the case does not justify asylum.”

The applicant was finally granted a permit under § 8, subs. 2 on compassionate grounds.

The decisive element for the applicant not being granted asylum seems to be that the violations to which the woman has been exposed, in the opinion of the Directorate, are not of such type or extent that the conditions laid down in the Convention regarding persecution are met. From the viewpoint that the woman was repeatedly raped by her father-in-law, that she during the raping was threatened with a pistol, that the in-laws have tried to set fire to her, the Directorate employs a very strict norm for its interpretation. The case is thus very interesting in relation to the Norwegian immigration administration's interpretation of the Convention's *gender-specific* persecution.

It appears strange that in this case the Directorate in this case did not evaluate othum pursuant to § 15, subs. 1, item 2. In accordance with § 15, subs. 1, item 2, the refugee "must not" with the basis in law be sent to any area where they for "similar grounds as described in the Refugee Convention are in obvious danger of losing their life or being exposed to inhumane treatment". The woman states in an interview that the in-laws have attempted to kill her several times, and the caseworker in UDI establishes in the remarks that the woman justifiably fears persecution on return. Whether the applicant is protected against being returned because she "is in obvious danger of losing her life or being exposed to other inhumane treatment" should have been discussed in this case.

In case **GPRL 34** the applicant asserted the grounds for asylum that she had been exposed to serious abuse by the husband for many years. The applicant was not allowed to leave the house, neither was she allowed to be in the company of other people. Her husband used to hit her with his clenched fist such that she was given black eyes and her eyes swelled up. On one occasion he burned her with a lighted cigarette because her headscarf had fallen backwards such that her hair was visible. Her husband used a knife and stabbed/slashed her hands and feet. The applicant showed scars during the asylum interview. After the couple had had six children, the husband did not want any more. Her husband would not use

contraception, but interrupted intercourse instead. This functioned for twelve years, until the woman again became pregnant and gave birth to a son. The husband took this as a sign that she had been unfaithful, he had abused her throughout the pregnancy such that she had to be hospitalised once. The son was abused all through his years of growing up and development. The woman's husband referred to the son as "the bastard", and refused *inter alia* to pay for the son's education.

The woman was not granted refugee status, but was granted a permit pursuant to the Act § 8, subs. 2, on "compassionate grounds".

In this case the Directorate established that the woman belonged to a particular social group "women in Iran". The question which was discussed in the decision was whether the applicant had been exposed to 'gender-related persecution'. It is stated that gender-related persecution can provide the grounds for asylum pursuant to the guidelines of 1998:

"The abuse of a woman is not a circumstance which in itself provides grounds for asylum. The motive for the abuse must be determined. In this case there is no information given as to why the spouse struck the applicant. It is thereby not substantiated that the applicant has been exposed to or is in danger of being exposed to gender-related persecution."

This discussion is an example of the confusion which seems to prevail in the Norwegian immigration administration where the concept 'gender-related persecution' is concerned. In this case one should first have decided whether the abuse the applicant has been exposed to can be regarded as "persecution". Thereafter one should have evaluated whether the persecution was due to or had a causal link with one or more Convention grounds. The Directorate established that the woman belonged to a particular social group, and the question which should thus have been considered is whether the persecution is due to her membership of this social group. The concept gender-related persecution will be relevant in connection with the discussion of whether the requirement for causal link has been met. The concept gender-based persecution is not significant to the evaluation of whether the applicant has been exposed to persecution in the sense of the Convention.

From the decision:

”The Directorate is of the opinion that the applicant has not substantiated sufficiently that she in her home country will be in danger of being exposed to reactions which can be characterised as persecution in the sense of the Act and Convention. The applicant has not shown any form of political activity. The Directorate of Immigration has noted the applicant’s information that she has been abused by her husband over a period of many years, but the Directorate would also remark that the abuse in itself does not provide grounds for asylum. In its evaluation, the Directorate has established that the applicant has not substantiated that she has been exposed to or is in danger of being exposed to gender-related persecution.”

This case illustrates many of the traditional problems that surface during the treatment of asylum applications from women who assert that they have been exposed to gender-specific and gender-based persecution. It appears as though there are two main reasons why asylum has not been granted in this case. Firstly, the woman has not been exposed to persecution in the sense of the Convention, and secondly, the requirement for causal link ”for reasons of”, has not been fulfilled.

The caseworker in this case seems to draw the conclusion that if the conditions laid down in the Convention regarding causal link are not met, this cannot apply to the condition for persecution either. It is correct that the conditions laid down in the Convention Art. 1 A (2) are cumulative, only the person who fulfils all the conditions in the Convention has the right to asylum. The fact that the conditions are cumulative, however, does not rule out that the individual conditions in Art. 1A (2) can be fulfilled separately. The Convention’s conditions regarding persecution can thus be met even though the requirement for causal link is not. The conclusion in the remarks that the abuse must be regarded as a “pure criminal act” because it is a “result of the husband’s psychopathic orientation” is not logical. Violations can amount to persecution in the sense of the Convention, even though the requirement for causal link is not fulfilled.

The conclusion in this case is that violations in the form of hard blows with a clenched fist, cigarette burns and stabbing with a knife, together with a prohibition on leaving the house and being in the company of others, is not “persecution”. The case is an example of the extremely strict interpretation

of the persecution condition in Art. 1A (2) in relation to certain types of *gender-specific* violations, and that such violations are labelled as “criminal acts” instead of being recognised as persecution.

In case **GPRL 41** the asylum seeker is a woman from Croatia. As grounds for asylum the woman asserts that both she and her children were exposed to physical and mental abuse by the husband and father. The woman was unsuccessful in obtaining protection from the police against her violent husband. The woman tells in the interview that she went to the police to get help, but the police would not get involved in the couple’s affairs because the husband had sacrificed himself and his brother’s life for Croatia.

From the decision:

”It is taken as a basis that the applicant can be protected against her husband by the authorities in the home country. The Directorate remarks that the local authorities would be the correct channels to give the applicant protection against the alleged threats/violations. According to the Directorate’s knowledge of the circumstances in Croatia, the police have both the ability and will to protect the country’s citizens to such a degree that it is not natural to characterise the mentioned allegations as persecution in the sense of the Convention. In this connection reference is made to the fact that in 1997 the Croatian authorities decided to introduce stricter sanctions for domestic violence as mentioned above. The applicant’s information has been considered as regards lack of follow-up by individuals within the police, but no weight is attached to it. Reference is made to the fact that the applicant should be ensured the necessary protection by contacting persons at a higher level in the police, or by contact OSCE.”

The applicant is not granted refugee status because the Directorate is of the opinion that she can obtain protection against her husband’s abuse in her home country of Croatia. In the opinion of the Directorate, the home country has the ability and will to protect her. The Convention contains not only a requirement that the home country in cases where the perpetrator is a private person must have the ability and will to protect individuals, but also a requirement for effective protection. In spite of the fact that the applicant has contacted the police and not been given protection, the Directorate takes as a basis that ”the applicant should be ensured the necessary

protection by contacting persons at a higher level in the police.” The applicant was granted a permit pursuant to § 8, subs. 2, cf. § 15, subs. 2 on compassionate grounds.

4.5.2.3 *Asylum granted*

In case **GPRL 42** the applicant is a woman from Croatia who is granted asylum by the Directorate. The woman has been exposed to serious abuse and very serious assaults by her husband. The husband also exposed the couple’s son to abuse. The abuse continued after the divorce.

The following is stated in the internal remarks:

”In order for asylum to be granted, KRD (the Ministry of Local Government and Regional Development) states that it is a condition that the individual cannot be given protection by the home country because she is a woman, cf. letter from KRD (the Ministry of Local Government and Regional Development).” (First member)

”Must interpret the persecution grounds gender-sensitively.” (Second member)

It was found in the case that the abuse the woman had been exposed to amount to persecution in the sense of the Convention. The decisive question for the Directorate was whether the woman could be regarded as being given effective protection in the home country.

”Even though the general assumption is that she will finally receive protection, if she presents her case high enough in the hierarchy, I am of the opinion that it cannot be considered in this case. In theory it is stated that one has a well-founded fear, if the authorities cannot provide adequate and effective protection. If this is not the case, as for example, by discrimination at the local level, the consequences can be that the authorities approve of or tolerate violations of human rights. If we were to refer the applicant to seek the protection of the home country, it could mean that the applicant will be exposed to very serious violations during the period up until protection is given. Reference is made to the fact that we have taken as a basis that the applicant will not receive help at the local level and that she is thus referred to seek protection higher up within the system. In my opinion

this slowness can have very serious consequences on the background of the assertions which have been made in the case. [...] The question [is] whether the fear is linked to the Convention. Even though this tends towards gender-related persecution and social group I would not use it as a basis for the fear. The applicant fears attacks by her Croatian husband. She herself is a Serb. In my opinion the applicant's husband is psychologically unstable. Has attacked several other people. The ex-husband's motive for the assaults can therefore not be related to the Convention. The central point here in my opinion is the authorities' lack of motivation to give the applicant adequate protection. This can be related both to gender and ethnicity. It becomes then a kind of cumulative evaluation of the conditions contained in the Convention, where it is not necessary to establish that it is the one or other reason which is decisive. Take as a basis therefore that the fear is related to a collection of reasons in the Convention. The discrimination is also shown in that an ethnic Croatian man would have been given another sort of treatment by the authorities. The fear will therefore fall under the Convention in that the lack of follow-up is related to the Convention grounds.”. (Second member remarks)

In this case the applicant could have been granted othum in accordance with § 15, 1, 2. The Directorate assumes that the woman upon return would be exposed to very serious assault, in accordance with § 15, 1, 2 othum may be granted for protection reasons to persons who are in “obvious danger of losing their lives or being exposed to inhumane treatment”.

Cases GPRL 41 and GPRL 42 are relatively alike, both women come from the same country, assert domestic violence, fear for their lives and lack of police protection as grounds for asylum. The decision in application GPRL 41 was submitted in January 2002, GPRL 42 in June of the same year. The reason that GPRL 42 is granted asylum and GPRL 41 a permit on compassionate grounds seems to be that the Directorate in the latter case has greater faith in the home country's ability and will to provide protection in cases where othum is granted. However, if one interprets the second-hand reason in GPRL 42 to be that the reason that asylum is not granted is not that one has greater faith in the home country's ability and will, but that the consequences of the applicant not being able to obtain police protection in GPRL 42 are greater than in GPRL 41, it can be asserted that the applicant in GPRL 42 should have been granted othum in

accordance with § 15, 1, 2, or that asylum should have been granted in both cases.

In case **GPRL 32**, the applicant from Iraq asserted domestic violence as grounds for asylum. The applicant was granted asylum. In the remarks the following is stated about the assaults she has been exposed to:

”As early as after a couple of months [into the marriage] the husband began beating her. The applicant does not know why he hit her, she tried to be kind, but he beat her almost all the time. It was alleged that he threw an iron object at her. It was also alleged that he beat her during pregnancy, several times in the stomach such that she began to bleed. The applicant states that he has also beaten the son and on one occasion threw him against the wall. The applicant states that he hit the son 2-3 times a week. The husband was away a lot on the job, but the applicant was not allowed to go out during these periods. He threatened that he would kill the applicant if she went out.”

The professional supervisor states the following about the case:

”A case which in my opinion lies on the boundary between othum-asylum. [...] I am in agreement with granting asylum, since I have attached weight to the following circumstances: 1) The applicant was forced to marry against her will so that the family would not be internally displaced. 2) The husband was a man in authority. His strong position makes the assaults more serious. It also made it impossible for her to seek protection from the authorities. 3) The extent of the abuse and that he kept her locked in the house. 4) She attempted to obtain a divorce, but that would not be given before she agreed to give up the child.”

The caseworker puts forward the following problem in the remarks: ”Can the applicant be granted asylum because of gender-based persecution? The applicant has asserted domestic violence and that she therefore had to flee because she divorced and took the child with her. Firstly, the degree of violence must be discussed. How often, how much and how serious the violence was.” After an evaluation of the actual violence, the caseworker concludes that the violence has been “serious enough”. In the assessment weight is attached to the fact that the husband refused to allow the applicant to leave the house and has thus carried out a very strong social control. The

Directorate finds that the requirement for a "well-founded fear of persecution" is met.

In the remarks it is assumed that the Convention ground is fulfilled:

"in the guidelines for easing asylum criteria, women are regarded as being a social group."

The applicant is granted asylum because she has been exposed to serious assaults, great weight is attached to the fact that the applicant since she is married to a person in authority and cannot obtain help from the authorities. The applicant is regarded as having a well-founded fear of persecution.

In this case asylum is granted without the requirement for causal link, "persecuted for reasons of", being discussed in the decision. This is interesting because one of the elements which lead to rejection in, for example, GPRL 34 (permit on compassionate grounds) and GPRL 36 (rejection) is precisely that the requirement for causal link is not met. Further, the case is interesting since it assumes a very wide definition of the Convention ground social group, cf. "women are regarded as being a social group."

In this case, as in many others, it can appear as though the caseworker has an understanding of the fact that gender-based persecution is an independent ground for asylum, in addition to Art. 1 A (2). Cf. the problem: "Can the applicant be granted asylum on grounds of claiming to be a victim of gender-based persecution?"

GPRL 25, is a woman from Pakistan. She asserts domestic violence and that she fears for her life upon return as grounds for asylum. The husband divorced her while she was in Norway and threatens to kill her if she returns.

"The applicant could fall under the Convention in accordance with 'persecution because of membership of a particular social group, as a woman'. I am a little uncertain how this shall be interpreted in relation to women who experience domestic violence, cf., 'the new criteria' (dated 13.01.98), in relation to women and asylum. Even though she in her marriage did not behave contrary to the country's norms for how a Pakistani wife should behave, her former husband clearly

thinks that there are grounds to blame her *inter alia* because she has been educated and he has not. In accordance with the letter from the Minister concerning refugee women dated 23.10.98, the applicant can possibly fall under the Convention because she has been exposed to 'sexual and other violent assaults' by 'individuals in her home country', i.e. her husband." (From the remarks)

In this case it was found that the assaults the woman had been exposed to in her marriage could be regarded as persecution in the sense of the Convention. It was also assumed that the applicant had a well-founded fear of future persecution.

"According to the applicant, her former husband has threatened to kill her if she comes home to Pakistan. According to country knowledge it is not improbable that he will do it if he is given the chance." (From the remarks)

The decisive problem was whether the woman could be regarded as being persecuted according to one of the five Convention grounds, in this case "membership of a particular social group." As in GPRL 36 it appears as though one regards the examples in the guidelines of 1998 as exhaustive, such that they should be given an a contrario interpretation.¹⁵⁹ Cf. the statement: I am a little uncertain how this shall be interpreted in relation to women who experience domestic violence, cf., 'the new criteria' (dated 13.01.98), in relation to women and asylum. Even though she in her marriage did not behave contrary to the country's norms for how a Pakistani wife should behave, her former husband clearly thinks that there are grounds to blame her *inter alia* because she has been educated and he has not."

¹⁵⁹ Cf. following statement in the remarks: " Even though she in her marriage did not behave contrary to the country's norms for how a Pakistani wife should behave" and the following example given in the guidelines: "in the first instance one refers to situations where women through their actions, omissions and expression of opinions break written and unwritten rules for social life, rules which particularly affect women, for example, with regard to dress, the right to take work outside the home etc."

In case **GPRL 33** the applicant, from Somalia, had been exposed to particularly serious assaults by the husband and his new wife. In the asylum interview the woman tells of how the husband shaved off her hair when he was dissatisfied with her. The husband's new wife gave the applicant orders all day and treated her as a slave. Sometimes the applicant was refused food. She was beaten with a stick, with logs of wood, with a spade and cut with a razorblade. After the husband took a new wife, the applicant was sexually assaulted by the husband. The husband's new wife helped him carry out the assaults by holding the applicant down.

The requirement in Art. 1 A (2) for causal link has been thoroughly examined in this case. The following is stated in the remarks:

"The persecution (i.e. ill-treatment) and the intention of it *must* be able to be linked to Convention grounds in order to be able to grant asylum. That is to say that the basis for the husband's ill-treatment of the applicant must be due to 'race, religion, nationality, social group or political opinion'. [...] The intention of the ill-treatment is not clear" (First member)

"As a woman in Somalia the woman is subordinate to her husband. She is to a large degree dependent on his treatment of her. He knows that he to a great extent can do as he wants with her, particularly in this case where the applicant has no family to turn to. A man will never experience such type of ill-treatment as the applicant has experienced. Clear causal link." (Second member)

The applicant is granted asylum since it is found that she has a "well-founded fear of persecution", she belongs to a particular social group, and there is a causal link between the applicant's fear and her membership of the particular social group.

In **GPRL 39**, the applicant is from Pakistan, she asserts domestic violence as grounds for asylum. In this case there is a concrete discussion of whether domestic violence can be regarded as persecution in the sense of the Convention. Contrary to, for example, case GPRL 34, where it is established that ill-treatment of women in itself is not a circumstance which can give an entitlement to asylum, in this case there is a concrete assessment. The following is stated in the remarks:

”The applicant pleads physical and mental violence throughout the marriage (approx. 26 years). Am unsure as to whether continuous physical ill-treatment can be regarded as persecution. Am of the opinion that this must be an individual assessment and that violence to the extent the applicant has been exposed to must be regarded as persecution.”

The following is stated in the Directorate’s internal remarks regarding the assessment of the seriousness and extent of the violations:

”Is the persecution sufficient in intensity and extent? Here the extent of the violence must be evaluated. The applicant says she was hit and beaten every day for 26 years completely without reason and that he at the same time mentally harassed her by calling her names and swearing. She says that she also had to see the children beaten. I am of the opinion that the violations that the applicant here has been exposed to are serious.[...] The applicant lost one of her children because her husband hit her in the stomach, this must be something of the worst a woman can experience. In my opinion the applicant bears clear physical and mental signs of being subdued. Conclusion: Persecution is intense and serious enough to fall under the Convention.”

The discussion of the persecution concept in this case is very good. The Convention’s persecution concept is applied concretely to the individual facts in the case. The case is a very good example of a gender-sensitive interpretation of the Convention.

As in GPRL 32 the applicant is granted asylum, without the requirement for causal link in Art. 1 A (2) being discussed. In cases GPRL 36 and 34 the fact that the requirement for causal link is not met is one of the reasons given for not granting asylum. In this case it is assumed that the woman is a member of a particular social group based on the following conclusion: ”Persecution is because of membership of a particular social group. The applicant has been the victim of domestic violence, gender-based persecution. The applicant falls under the Convention.” The assessment of the Convention ground social group, in this case, is an example of the opinion which seems to prevail in parts of the immigration administration

that gender-based persecution entails that the Convention ground social group is met.¹⁶⁰

4.5.3 Summary

Parts of the reason for the decision taken by UDI and UNE in ten of a total of fifteen cases where the asserted ground for asylum is domestic violence are presented in this chapter.

The review of cases shows that it is applications are often rejected the requirement for “persecution” is not met. One impression is that this practice is originating from the fact the caseworker is unsure of how the Convention ground “social group” shall be interpreted. Hence the caseworker rejects that the requirement for persecution is met, in order to avoid entering into a further assessment of whether convention ground “social group” is met. This is unfortunate, since one by such practice gives the impression that the violations the women are exposed to are not of such serious character and extent that they amount to “persecution” in the sense of the Convention. It sends a signal that the domestic violence to which women are exposed is regarded by the Norwegian immigration administration as less grave than the violence a man is exposed to in a prison, for example. In Norway, which in the international arena presents itself as a country where human rights and equality are high on the agenda, one should strive to ensure that such signals are not given.

A common feature of the cases presented in this chapter is that the “agent of persecution” is a private person and that the assaults have taken place in the home of the applicant. It is thus of importance to the results of the asylum application that the immigration administration recognises that persecution in the sense of the Convention can be carried out by both private persons and persons in public authority.

¹⁶⁰ more on this in the chapter on social group

Furthermore, recognition of the fact that it is not a condition of the Convention Art. 1 A (2) that persecution must take place in public is of relevance. Violence carried out within the four walls of the house by a father, husband or brother can be persecution according to Art. 1 A (2).

In GPRL 36, 26 and 34 the conclusion is drawn that persecution in the sense of the Convention has not taken place, since the applicant has been exposed to a "private problem".

An interesting find in the review of the fifteen cases where the asylum ground is given to be domestic violence is that asylum is not granted in any of the cases. A possible reason can be that the condition regarding persecution is interpreted very strictly, and the violence which takes place in the home is therefore not regarded as being so serious that the applicants are exposed to such danger that they are protected in accordance with § 15, subsection one.

4.6 Arranged marriages

4.6.1 International law

General Recommendation No.21¹⁶¹, the UN Committee on the Elimination of All Forms of Discrimination against Women states the following regarding arranged marriages:

"A woman's right to choose a spouse and enter freely into marriage is central to her life and her dignity and equality as a human being. A woman's right to choose when, if, and whom she will marry must be protected and enforced at law."

Arranged, or forced, marriages are to be regarded as a violation of the UN Human Rights Convention Art. 16 (1) and (2) that marriage must only be entered into with the free consent of the parties, "free and full consent", cf. ICESCR Art. 10 (1) and ICCPR Art. 23 (2), CEDAW Art. 16 (1). It is to be

¹⁶¹ <http://www.un.org/womenwatch/daw/cedaw/recomm.htm>

regarded as a violation of the right to freedom and security in the UN Declaration on Human Rights, Art. 3, ICCPR Art. 9. For many women, the fact of being forcibly married to a man they do not wish to be married to entails that the right to life can be in danger. This concerns particularly women who are married off to very violent husbands, or women who wish to get out of a marriage to a man they have not chosen themselves. Some women are married off at a very young age, forced marriages involving children can be contrary to several of the provisions in the Child Convention, including Art. 2 and 3. To marry off a child is contrary to CEDAW Art. 16 (2).

4.6.2 Practice in UNE and UDI

In 13 of the 55 cases reviewed in connection with the project the asserted ground for asylum is persecution because the applicant has refused to accept the family's choice of spouse. Both women who allege they are persecuted because they are fleeing from threats of forced marriage and women who have opposed forced marriage by entering into a love marriage, belong in this category. Women who are fleeing from a forced marriage assert as a ground for asylum that they will not succumb to the parents' choice and therefore flee. Women who have entered into a love marriage assert that they fear being exposed to honour killing on return, since they have brought disgrace on the family by entering into a love marriage.

Women who have asserted bride kidnapping as a ground for their asylum application will be discussed in Chapter 2.4.

This table shows the results of the 13 applications for asylum.

Asserted asylum ground	Refusal to accept the family's choice of spouse					
Result of applicatio	Rejection	Asylum	Permit	Othum § 15, 1, 1	Othum § 15, 1, 2	Immigration Regulation

n			§ 8, 2 "compassionate grounds"	15, 1, 1	15, 1, 2	§21, subs. 3
Number	3	6	3	-----	1	-----

The table below shows which reasons are given for UNE and UDI decisions respectively.

Result	Id	Reason
REJECTION	GPRL 29	Applicant has married again while the application was being considered by UDI, assertion therefore ignored
	GPRL 30	Home country (Denmark) has ability and will to protect
	GPRL 18	Credibility
OTHUM § 15, 1, 2	GPRL 21	No well-founded fear of persecution
PERMIT § 8, 2 cf. § 15, subs. 2	GPRL 48	Not probable that the applicant will be killed on return, but exposed to harassment, harassment is not persecution
	GPRL 51	Forced marriage is not persecution, internal family conflict, expelled from family not protection in accordance with § 15, 1, 2
	GPRL 22	Credibility
ASYLUM	GPRL 11, GPRL 12	Forcing experienced by application in connection with marriage is persecution

	GPRL 27	Appellant fears for life because of love marriage
	GPRL 56, GPRL 23	Appellant fears honour killing, losing life is clear persecution
	GPRL 56	Forced marriage is not to be regarded as persecution, it is the consequences risked by refusing to enter into the marriage which can be characterised as persecution

4.6.2.1 Rejection

Applicant **GPRL 30**, a young woman from Somalia, with a residence permit in Denmark sought asylum in Norway because her father wanted to marry her off against her will. The Directorate rejected the application for asylum giving the reason that the applicant did not have a "well-founded" fear of persecution. The woman does not have the right to refugee status, since it is assumed that she can obtain protection against forced marriage in Denmark. The decisive factor for the case is that the Danish state is assumed to have the ability and will to protect against the alleged persecution.

4.6.2.2 Othum

Applicant **GPRL 21**, from Somalia, asserted as a ground for asylum that she had problems with her own family as a result of the fact that she had married a man of lower caste. Her father and brother had threatened to kill her. The Directorate rejects the application for asylum, on the basis that the applicant does not have a well-founded fear of future persecution. Reference is made to the fact that the applicant after the last attack by her family has lived in peace for a while, further that she has the support of her mother. In the remarks is stated that it is assumed that departure from Somalia has taken place independent of the problems with the marriage.

The applicant is granted othum in accordance with § 15, 1, 2, because she is in conflict with her father (because of the marriage). In accordance with the remarks weight is attached to the fact that the cause of the problems is that the applicant is married to a man of a lower caste. The Directorate is of the opinion that the conflict can entail that the application will be without protection from her clan.

The decision in this case is again an example of the fact that Directorate finds that the alleged persecution is not of such type and such extent that it is persecution according to § 17 cf. § 16, but that nevertheless the condition in § 15, 1, 2 is met. The Act's § 15 subsection one was appended a new second item so that persons in situations "similar to refugees" should have the right to protection.¹⁶² In order for asylum seekers to have a legal right to protection pursuant to § 15, 1, 2 they must be exposed to "great danger"¹⁶³ "Both the requirement as to type and the danger that threatens, as well as the foreseeability that it will occur, is somewhat stricter than according to the Refugee Convention."¹⁶⁴ The purpose of implementing the second point was to give the right to protection to a wider circle of persons than those having the right to refugee status, but that it is the person who are exposed to greater danger than those falling under § 17 cf. § 16 that have the right to protection under § 15, 1, 2. When the reason for not granting asylum is that the persecution concept is not fulfilled, it does not seem to be in line with the legislators' intention to grant protection in accordance § 15, 1, 2 because of the fear of the same persecution, since the condition contained in § 15, 1, 2 in relation to the preparatory works is stricter.

4.6.2.3 Permit § 8, subs. 2 cf. § 15, subs. 2

GPRL 48 is from UNE. The applicant asserted as an asylum ground that she was to be forcibly married to a man of 90 as a result of a clan settlement. Whether the fact that the applicant was forcibly married

¹⁶² Cf. Prop. to the Ot. No. 46 (1986-87) p. 103, first column, last para.

¹⁶³ Cf. Prop. to the Ot. No. 46 (1986-87) p. 202, second column, second para

¹⁶⁴ Cf. Prop. to the Ot. No. 46 (1986-87) p. 202, second column, second para.

because of a clan settlement can be regarded as persecution was not discussed in the decision. Because of the requirement that persecution must be future-oriented, the Board discussed the applicant's possible situation in the event of return to the home country. In this discussion it seems that the assumption is that the applicant will avoid the planned marriage as a result of the fact that she escaped. The Board uses a very strict norm in the interpretation of the persecution concept. The case was decided in September 2002.

The Board assumes that the woman will meet reactions both from her own clan and the clan into which she is to be married if she returns to Somalia. The Board is of the opinion that it is not probable that the applicant will be killed, but that it is probable that she will be harassed in various ways, it does not seem probable that she will seek protection from the country's authorities. On this basis the Board unanimously concluded that:

”one has concluded that the reactions which the applicant will be exposed to on return to Somalia are not of such type that they can be characterised as persecution”.¹⁶⁵

In this evaluation it is assumed that the woman upon return will be in a very difficult situation. It is anticipated that young, single women will have a very difficult life, but not so difficult that return to the country in inadvisable. It is asserted that belonging to a clan is very important in Somali society and that the appellant who will be expelled from her own clan will be in a very special situation. She will *inter alia* be without the protection of the clan regarding security, one result of this will be that her security situation will be “very uncertain”. It is stated that her future social situation in Somali society will be “difficult”, since job possibilities, access to health care, etc. are connected to belonging to a clan.

By applying § 8, 2 cf. § 15, 2 the woman is provided protection and is by that ensured against being returned to circumstances where there is uncertainty as to whether she will be exposed to persecution. It is doubtful

¹⁶⁵ Cite, appeal from UNE regarding women exposed to forced marriages in Somalia

whether it is of importance to the woman which provision is applied, since she is nevertheless protected. However, there can be discussion as to whether the woman should have been given asylum or othum for protection reasons in accordance with § 15, 1, 1.¹⁶⁶

The applicant in **GPRL 51** arrives in Norway by air lift from Kosovo and is granted collective protection. She was later sent back to Kosovo, but returns to Norway after a short while and seeks asylum. The applicant asserts as a ground for asylum that she was to be forcibly married. If she did not go through with the marriage she would be expelled from her family, and the situation for single women in Kosovo is very difficult. Because she refuses to go through with the marriage, she is expelled from the family. The applicant is granted a permit in accordance with § 8 (2).

”The question is nevertheless whether the conditions for asylum are met in this case. The Board refers to the fact that arranged marriages are very widespread in most muslim countries, including Kosovo, and can include both women and men. The Board is of the opinion that one should show caution in allowing such a widespread culture to provide the grounds for refugee status and right to asylum pursuant to IA § 17. Based on the appellant’s statement the Board otherwise assumes that the appellant’s family is not strictly conservative or bound by tradition. Based on the information available the Board also refers to the fact that the appellant upon return cannot be said to be in danger of being exposed to such serious reactions as to be characterised as persecution [...] The next question is whether the appellant is in obvious danger of losing her life or being exposed to inhumane treatment, cf. IA § 15, subsection one, second sentence. The Board is of the opinion that the appellant’s fear that the family will not have any contact with her and that she will have no network upon return does not fall under this provision. § 15 subsection one, second point of the act does not prevent return to the appellant’s home country.”

From the remarks:

¹⁶⁶ This assumes, however, that the conclusion after a holistic evaluation is that persecution is due to one or more Convention grounds and that there was a causal link between the persecution and Convention ground.

”Persecution because of gender is not mentioned as a cause which is covered by the Refugee Convention, see Art 1A. Through guidelines for new asylum criteria in a letter dated 13.01.98 from the Ministry of Justice it was established that also gender-related persecution should provide the grounds for asylum based on the criteria ”membership in a particular social group”. For several years UNHCR has expressed that the Convention must be interpreted in the light of the fact that gender is a relevant factor in the assessment of whether a person is a refugee. This also means that central concepts in the refugee definition, such as persecution, religion, political opinion and membership of a social group must be interpreted such that the types of persecution to which women are traditionally exposed, can fall under the concepts. The decisive factor for whether a person risks such persecution is that the Refugee Convention is applicable, and what the home country’s authorities can or will do to protect an individual against violations. In the first instance, who is the agent of persecution is not decisive.

During the last few years some people have been granted asylum because of fear for gender-based persecution. The reason for granting asylum has varied; some have been granted asylum because they fear persecution based on sexual orientation, others because of fear for being forced into an arranged marriage, or because they have entered into marriage against the family’s wishes.

However, there cannot be said to be a clear practice where grounded fear for entry into arranged marriages entails granting of asylum. In this case it seems more pertinent to regard the case as an internal family conflict. Reference is made *inter alia* to the appellant’s assertion that if she does not adhere to the parents’ wishes regarding marriage, she will be expelled from the family. She will therefore not risk persecution, and as a result there are no grounds for recognition as a refugee in accordance with § 17 or protection under IA § 15 subsection one, point one, cf. that in both provisions it is a condition that one can fear *’persecution’*. Neither will expulsion from the family entail that the appellant *’is in obvious danger of losing her life or being exposed to inhuman treatment’*, and thus does not fall under IA § 15, subsection one, second point. This provision is reserved for extreme cases.”

”In the evaluation of [othum] there is reason to attach weight to the fact that Kosovo is a male dominated society and she will in general have to be regarded as being in a more difficult situation in regard to

mastering the return situation than that which is usual. Over the whole of Kosovo the family is very central, and for women the family will be an important social security factor. The extended family help each other in difficult situation, they have a lot of contact and contribute to looking after relatives who, for example, are without income or a roof over their heads. Kosovo today is a society with extensive unemployment, and as a single woman it is thus not unthinkable that the appellant, if she should break with the family, will not be able to support herself. [...] Such a difficult situation for a single woman is about managing for herself in a daily perspective in an otherwise male-dominated society, there is no question of a situation where there is reason to fear assault or ill-treatment. The appellant is without work and housing, and this can create difficulties for her. However, the clear basis is that high unemployment, bad economy, lack of housing and social problems are not circumstances of such type that can provide grounds for a residence permit in Norway.”

4.6.2.4 *Asylum granted*

The applicant in **GPRL 11** is a young woman from Eritrea, who asserts two different grounds for asylum in the asylum interview.

”Q: ’Tell us why you left your home country?’

A: ’We were afraid because of the war. There was war and people fled. Father was arrested so were afraid and fled from the country.

Q: ’Are there other reasons why you are seeking asylum?’

A: ’I had problems in connection with having to be married off to an older man. He is already married and has children. I did not want it, but it was difficult to refuse. When the war came, we fled from the place. There is war and it is difficult to return there.’

A: ’If one refuses one is bound with rope and can be beaten.’ States that one is beaten until one accepts marriage.”

The applicant was granted asylum by the Directorate, because it is found that she belongs to a particular social group, ”afari women”, further it is found that the woman must be regarded as being perscuted, and that the

fear for persecution is "well-founded" since it cannot be said that the woman's home country has the ability and will to protect her. The case is interesting based on the fact that the Directorate makes the assumption that forced marriage is recognised as persecution.

"The basis is that the force the applicant experiences in connection with entry into marriage which is described in the applicant's case can be characterised as persecution."

The applicant, **GPRL 12**, is the sister of the woman in the case above (GPRL 11). The girl, who was a minor when she arrived in Norway, asserted three grounds for asylum in her application. Firstly that she fled the country in wartime, and this is not good because one is then regarded as a "traitor" when the country actually needed the person. Secondly, the girls' father had been imprisoned and all their property was confiscated. Thirdly, women have problems with marriage, they are forced into arranged marriages. The girl is granted asylum on the basis of the third ground asserted, forced marriage. The interesting point in this case is that there was no concrete threat of forced marriage. There was disagreement in the Directorate as to whether such hypothetical threat of arranged marriage was to be regarded as persecution in accordance with Art. 1 A (2). Finally, asylum was granted, since it was assumed that it was probable that the woman would be exposed to threats of forced marriage in the future. In both GPRL 11 and GPRL 12, the Directorate assumes that threats of forced marriage can amount to "persecution".

The caseworker was of the opinion that there was a theoretical possibility that the applicant will be forced into an arranged marriage in the future, but that this was not sufficient to say that the Convention's requirement for persecution was met.

"The risk borne by the applicant must be connected to the danger which exists in the event of any return that the applicant, against her wishes, will be married to a male relative on her mother's side in accordance with the tradition of 'Cross Cousin Marriage'. Questions must be asked regarding the possibilities for the applicant to break with this tradition by seeking protection from the Eritrean authorities, or by breaking the ties with her family and, for example, seeking to create a new life for herself in Asmara. Further, a discussion must be conducted as to whether the risk of a similar marriage was planned for

her sister in this case. [...] The applicant is 16 years old and there are no concrete plans for her to be married to any of her mother's relatives. The fear the applicant experiences must therefore be regarded as more hypothetical than that of X (her sister). Thus it seems that the applicant can be said to be in a situation where a theoretical risk exists for forced marriage, but it does not seem as though the risk is regarded as so large that the applicant at present can be said to qualify to fall under the Convention's concepts which give the right to asylum."

The second member was in agreement that there was initially a theoretical possibility for forced marriage, but was of the opinion that the applicant must be given the benefit of the doubt, and asylum is granted.

"I have under great doubt found that the applicant should be granted asylum. My doubt is based on the fact that there is no marriage planned and it is not decided who she shall marry. As XX writes, there is a theoretical possibility for a forced marriage taking place, taking into account the traditions among affairs. Whether this theoretical possibility is regarded as being a "well-founded fear" is somewhat uncertain, but the applicant is given the benefit of the doubt."

The third member took as the basis that it was probable that the applicant could be exposed to forced marriage in the future and that the Convention's other conditions were fulfilled, therefore asylum is proposed.

"Weight is attached to the fact that there is a real risk of forced marriage in the event of return, and that this fear can be related to the Convention. Even though the fear must be individualised, the applicant must be said to belong to an exposed group which is sufficiently individualised. The sister's case strengthens the applicant's "well-founded fear". Further reference is made to the signals which are given concerning the relationship between asylum and othum."

The woman in **GPRL 27** came to Norway with her husband. They asserted as asylum grounds that they feared for their lives since they had entered into a love marriage against the wishes of their families.

The couple were granted asylum. No reason for granting asylum is given in the decision. However, the following is stated in the internal remarks:

”the persecution must be said to be grounded in ‘membership of a particular social group’, gender-related persecution. The application therefore falls under the Convention. The basis is taken that the couple fear for their lives, as well as persecution through the justice system. [...] The persecution is related to their families, particularly X’s mother. [...] Nevertheless, the primary fear for persecution here is not persecution by the authorities, but in accordance with the new asylum criteria persecution can also be carried out by others.”

The basis is that the applicant has a well-founded fear of persecution, she is a member of a social group, and there is a causal link between her membership of the social group and persecution.

Applicant **GPRL 50**, is a woman from Pakistan. Asserts love marriage as a ground for asylum. Has married outside her caste and against her family’s wishes. Asserts that she fears honour killing.

The applicant was granted asylum by UNE after rejection by UDI.

”The Board bases its decision on the fact that the appellant has married in Pakistan against her family’s wishes. Further, the Board has concluded that the appellant justifiably fears persecution by family members even though it can be uncertain to what degree the family is willing to carry out assaults against, or in the worst case, kill the appellant. The appellant is regarded as belonging to a special social group. Such as the situation is in Pakistan it will be difficult for her to seek protection from the country’s authorities. In the opinion of the Board, internal movement is no alternative.”

From the remarks:

” What is feared by the appellant must be regarded as ‘persecution’. The appellant fears honour killing – losing your life must clearly be seen as ‘persecution’. [...] Can Pakistani women who have entered into love marriages, across caste boundaries and against the family’s wish be regarded as a “particular social group”? This is the doubtful question in this case. [refers to the fact that it is known that UDI has granted asylum in two cases where the asserted asylum grounds have been love marriages]. The Ministry of Justice ”Guidelines for new asylum criteria” dated 13.01.98, adjusts the lower boundary (boundary against othum) for granting of asylum [...] It is stated here: ‘Changes entail that persecution will in practice also affect women. In the first

instance one refers to a series of situations where women through their acts, omissions and expression of opinions break written and unwritten rules for social life, rules which especially affect women, for example, with regard to dress, the right to take work outside the home, etc. If breaking these rules is punished with reactions of such a serious nature that they can be characterised as persecution in relation to the 1951 Convention, then asylum should be granted.”

In a case **GPRL 56**, from the Board decided in March 2002 a woman from Gambia was granted asylum, since the Board concluded that ”the appellant justifiably fears gender-based persecution upon return to the home country. The woman sought asylum on the basis that she was going to be married to her uncle against her wishes.

The following is stated in the remarks concerning the concept and persecution:

”concerning asylum seekers alleging forced marriage, it is important to be clear about the fact that the marriage itself cannot form the grounds for asylum. It is the consequences which one risks by refusing to enter into the marriage which can possibly be characterised as persecution.”

This statement stands out from the decisions made by UDI in GPRL 11 and GPRL 12, where the Directorate seems to use as a basis that forced marriage can amount to “persecution” in the sense of the Convention.

The Board uses as a basis that the appellant upon return can experience “social reactions from the family as expulsion”, and that she will “be without help from close family” and that she will “risk reactions from the uncle” with whom there is an arranged marriage. A further basis is that the authorities will not involve themselves unless there is violence used. On this basis the Board found that the woman was protected against return and granted asylum in accordance with § 17 cf. § 16. The decision did not contain any identification of which Convention ground the Board thought the persecution had a causal link with. The requirement for causal link between persecution and Convention ground was not discussed either, because there was no identification of a Convention ground. It is interesting to compare this decision with the decision GPRL 48, where the Board used as a basis that expulsion from the family / clan and being without help from

the close family could not be regarded as persecution in the sense of the Act and Convention.

In GPRL 51 the basis was also that expulsion from the family would not have such consequences that persecution could be said to exist. The boundary between asylum and othum in these specific cases are decided by the immigration administration's country knowledge regarding the situation for single women in Gambia, Somalia and Kosovo respectively.

4.6.3 Summary

Based on the cases presented in this chapter, the conclusion can be drawn that asylum seekers who assert honour killing as grounds for asylum will often be granted asylum, if the immigration authorities find the applicant credible and the threat probable. Of the 200 cases reviewed in connection with the project there are examples of cases of rejection where the asserted asylum grounds have been honour killing. The reason for rejection of these cases has been given as lack of credibility and probability.

In relation to the interpretation of the persecution concept in cases where the asserted asylum grounds have been forced marriage, cases GPRL 11 and GPRL 12 stand in strong contrast to GPRL 51 and 56. In the first two cases the basis is that a threat of forced marriage can be regarded as persecution. In the last two the conclusion is that a threat of forced marriage or an actual forced marriage cannot be regarded as persecution, it is the consequences of refusing to be forcibly married which may reach such a level that it can be referred to as persecution.

GPRL 30 shows how the protection provided by the Convention is applicable in the cases where a person cannot be given protection in the home country against the violations he or she fears.

The application was rejected, since it was regarded as probable that she could obtain protection in Denmark.

4.7 Bride kidnapping

4.7.1 Bride kidnapping and international human rights

In several of the cases reviewed in connection with the project, the asserted asylum ground is bride kidnapping. Bride kidnapping entails a violation of the right to free choice of spouse, UN Declaration on Human Rights Art. 16 (1) and (2), ECHR Art. 10 (1) and ICCPR Art. 23 (2), CEDAW Art. 16 (1). Further, also a violation of the right to personal freedom and security. It is to be regarded as a violation of the right to freedom and security contained in UN Declaration on Human Rights, Art. 3, ICCPR Art. 9.

4.7.2 Practice by the immigration administration

In four of the cases reviewed from UDI the asylum ground asserted is bride kidnapping. In three of the cases asylum is granted, while the last is granted a permit in accordance with § 8, subsection 2.

The table below shows the outcome of the four asylum applications.

Asserted asylum ground	Bride kidnapping					
Result	Rejection	Asylum	Permit § 8, subs. 2 cf. § 15, subs. 2	Othum § 15, 1, 1	Othum § 15, 1, 2	IR. § 21, subs. 3
Number	-----	3	1	-----	-----	-----

The following reasons were given in the decisions made.

Result	Id	Reason
REJECTION	-----	-----
PERMIT § 8, subs. 2 cf. § 15, subs. 2	GPRL 19	Random criminal act

ASYLUM	GPRL 05	Applicant is kidnapped, ill-treated and forced to have sexual intercourse. Hun fears persecution, it is well-founded, she is regarded as belonging to a particular social group, and this membership is the reason for persecution.
	GPRL 06	She risks rape and forced marriage / bride kidnapping upon return, this is persecution. Also the other requirements in Art. 1 A (2) are met.
	GPRL 20	Because she has left her husband who kidnapped her, the reprisals she risks because she ran away, are regarded to be of such type that they amount to persecution. Causal link not discussed.

4.7.2.1 Permit § 8, subs. 2, cf. § 15, subs. 2

GPRL 19, woman from Somalia. In relation to the interpretation of the requirement “persecution” in Art. 1 A (2), this case stands out from the three other cases where the asserted asylum ground is bride kidnapping.

The case is treated by the Directorate as a case of forced marriage. Based on what the applicant states during the interview it would have been more pertinent to regard the fear of bride kidnapping as grounds for the asylum application. The applicant states during the asylum interview:

”I am afraid of a man who has come to kill me. Why are you afraid? He told me that he wants me, so I said that I would not get married, so he said he would take me by force. Do you know his name? I don’t know what his name is, he was militia. What did he do to try and marry you? He took a gun and looked for me. One evening he attacked us in the house. He killed my father’s brother. And wounded my mother. Do you know where he belongs? Don’t know what clan he belongs to, he does not live very far from us. When did this happen? Just recently, before I left. I left because of him. What did he actually threaten with? He said, I will kill you if you won’t marry me.”

The Directorate rejects the application for asylum on the following grounds:

”The Directorate is of the opinion that the applicant does not have a well-founded fear of persecution in the sense of the Act and Convention upon return to her home country. In the Directorate’s opinion the occurrence alleged by the applicant appears as a random criminal act and not as a link in the persecution of persons with the applicant’s ethnic or social membership. Such reactions do not give reasons for asylum.”

The ground for asylum in this case is the general fear of being kidnapped and being married to a person the applicant does not wish to marry. The threat of bride kidnapping has been present for a time, but culminates in the shooting episode in the applicant’s home. The shooting episode is also the reason that the applicant flees her home country. It appears as though the Directorate in its consideration of the application assumes that the shooting episode is the reason that the applicant fled. Cf. “*in the Directorate’s opinion the occurrence alleged by the applicant appears as a random criminal act*”. On the background of the information given during the interview such opinion must be characterised as a misunderstanding. The reason that the applicant fled from her home country Somalia is that she fears bride kidnapping. However, the Directorate has not understood this, cf. the following statement in the remarks:

”The applicant asserts as a ground for protection that she fears she will be killed because she will not marry a man. The applicant tells of a man who on several occasions has told the applicant that she is to marry him. On one occasion this man visits the applicant’s home and starts shooting at random. The applicant cannot give a name or any clan connection for this man. It is not a man the parents have chosen for the applicant. There is nothing in the applicant’s statement which indicates that it is a forced marriage situation which amounts to a potential asylum ground.”

The problem which should thus have been raised in the Directorate is: Can the threat of bride kidnapping in the applicant’s case be characterised as persecution in accordance with Art. 1 A (2)? Based on the decision made in GPRL 06, discussed above, there appears to be something strange that the conclusion can be drawn that persecution is indicated, while in this case the conclusion is that no persecution is indicated, but a “random criminal act”.

In this case the Directorate evaluates the asylum application based on the wrong facts. The applicant has not asserted forced marriage as an asylum ground, but bride kidnapping. The fact that the application has been considered based on the wrong facts seems to have had an effect on the outcome of the woman's application.

4.7.2.2 Asylum

GPRL 05, the applicant is a young woman from Ethiopia. The girl was kidnapped outside the hut where she lived, when she and her sister were going to the toilet. The applicant was brought by car to the 'husband's' town. She was forced to have sex with him and was ill-treated. The man already had three other wives. The applicant stole money from the man so she could escape.

The following is stated in the remarks regarding the persecution concept:

"First of all an evaluation is made as to whether this case concerns persecution in the sense of the Act and Convention. The applicant has been kidnapped and married off to a man she does not know. The man ill-treated physically and has forced her to sleep with him. In my opinion this must be regarded as a relatively serious assault on the applicant's personal integrity. The assaults must be regarded as serious, since the applicant has been married against her will, ill-treated (extent unknown) and not least that she has been forced to have sexual intercourse with her husband. Based on this I find that the assaults to which the applicant has been exposed up to now as persecution in the sense of the Act and Convention."

The caseworker finds that the requirement for persecution is met. Only persons having a "well-founded" fear of persecution have the right to refugee status under the Convention. The question is whether the applicant can have been given protection against the assaults in her home country. Does the state of Ethiopia have the ability and will to protect the applicant against bride kidnapping?

"Kidnapping according to the country advisor is illegal under the Ethiopian criminal code. Bride kidnapping is a widespread and accepted phenomenon in these areas of Ethiopia, including the area in

which the applicant's parents live. Until now there have only been a few cases of bride kidnapping brought before the Ethiopian courts." "In my opinion it cannot be expected that a minor will approach the courts independently to obtain protection. Neither will the applicant receive any support from her parents, nor the person who cared for her while she was growing up, as he is dead. In my opinion, all this indicates that the applicant cannot obtain protection from the authorities or the family in her home country."

The protection the applicant can receive from the home country is not effective, persecution is well-founded. Does the persecution have a causal link with one or more of the five Convention grounds in Art. 1A (2)?

"Of interest in this case is 'membership of a social group'. The social group in question here will therefore be 'Ethiopian girls who are in danger of bride kidnapping, and who refuse to obey'. The applicant is from an area where bride kidnapping is both widespread and accepted, and she has actually been exposed to bride kidnapping. The applicant lived with her husband for a month before she escaped. It can be said that the applicant by escaping has shown that she refuses to obey.[....] It must be regarded as sufficiently proved that the applicant has a well-founded fear because she is an Ethiopian girl who is in danger of bride kidnapping, and who refuses to obey. In addition, it must be assumed that the persecution takes place because the applicant is a woman, since this is a tradition which can affect women. [...] Therefore I am of the opinion that we must assume that there is a causal link between the persecution and membership of the social group in question."

The applicant is regarded as having a well-founded fear of persecution, she is regarded as persecuted because she is a member of a particular social group and there is a causal link between her membership in this special group and the persecution. The applicant is granted asylum.

GPRL 06, the applicant is a woman from Ethiopia. A man in the village where she lives has tried to force her to marry him. He follows her when she fetches water, and says that he wants to marry her. On one occasion the man tried to take her with him by force, but the applicant received help from farmers in the vicinity when she shouted for help. After this she has stayed in the house. The girl and her sister live with a friend of her father's,

since the father is not there, the girls are regarded as “easy prey” with regard to bride kidnapping.

The caseworker states the following about the persecution in the remarks:

”It is sufficiently proved that the consequences of return will be that she will be exposed to rape and forced marriage. This must be characterised as ‘persecution’.”

The following is used as a basis for the evaluation of the applicant’s possibilities of obtaining protection in her home country of Ethiopia:

”The central factor is whether the state can protect her against the agent of persecution. Bride kidnapping is prohibited in Ethiopia. However, in accordance with our guidelines it is a requirement that the protection shall be effective. According to the country adviser there have been some police reports and court cases, but to a very limited extent. There are no crises centres to which she can turn for help. In order to be successful in the justice system one is dependent on a resourceful family behind one. Bride kidnapping happens at all levels of society and without regard for the different religions. It is generally accepted and her only possibility for protection is to have a family which is willing to, and which can protect her.”

Concerning the requirement that the persecution must be due to race, religion, nationality, membership of a social group or political opinions, it is assumed that the applicant can be said to be a member of a particular social group:

”Gender is not one of the criteria in the Convention, but it can fall under the alternative “social group”. In my opinion the applicant will fall under a group which can be called “young woman who is in danger of being exposed to bride kidnapping and who is not willing to obey it” (cf. Einarsen, re. the Fatin case). The fact that she chose to leave the country shows that she was not willing to obey this tradition”.

The Directorate finds that the requirement of causal link is satisfied, since there appears to be sufficient causal link between gender and the risk of persecution.

”The applicant risks violations because she is a young girl, and in my opinion there is therefore sufficient causal link between gender and the risk of persecution. What she risks being exposed to is a dreadful tradition that oppresses women and which is only performed against women, and which they have difficulty in protecting themselves against.”

The requirements in Art. 1 A (2) have been satisfied, the applicant has the right to refugee status, and is thus to be regarded as a “refugee” having the right to asylum pursuant to Norwegian law.

4.8 Persecution because of liberal attitudes

4.8.1 International human rights

Some asylum seekers assert as grounds for asylum that they are persecuted because they have too liberal attitudes in relation to their family, the religion of their home state, culture or politics. In several cases which have been reviewed in connection with the project, applicants assert that they are persecuted because they refuse to following religious dress codes, they mark political opposition to a current regime by using make-up and wearing trousers, or they oppose a strict father by choosing their life partner themselves. This group of asylum seekers are often spoken of as being persecuted because of their too liberal attitudes.

In relation to international human rights it is fundamental that a person has freedom of thought, freedom of religion and freedom of conscience. A person shall be able to freely choose which religion him or her wishes to belong to, or perhaps not have a religion at all. This is in accordance with ICCPR Art. 18, UN Declaration of Human Rights Art. 18, ECHR Art. 9. The same concerns “freedom of expression”, ICCPR Art. 19, ECHR Art. 10, UN Declaration on Human Rights Art 19 and freedom of association in the UN Declaration of Human Rights Art. 20, ICCPR Art. 21, and ECHR Art. 11.

4.8.2 Practice in the immigration administration

In 7 of the 56 cases which were reviewed in connection with the project, the asylum ground asserted was persecution because of too liberal attitudes.

The table below shows the outcome of the 7 asylum cases.

Asserted Asylum ground	Too liberal attitudes					
Result	Rejection	Asylum	Permit § 8, subs. 2 § 15, subs. 2	Othum § 15, 1, 1	Othum § 15, 1, 2	IR § 21, subs. 3
Number	-----	3	1	-----	1	2

The table below shows the reason that was given for the decisions made in the cases which will be discussed below.

Result	Id	Reason
PERMIT § 8, 2 cf. § 15, subs. 2	GPRL 04	Harassment the applicant has been exposed to is not persecution, the applicant has not been politically active
IR § 21, 3	GPRL 43	No fear of persescution, no political activity of such type that it can give the right to asylum
	GPRL 31	Not exposed to persecution
ASYLUM	GPRL 46	Probable that the applicant can be exposed to persecution
	GPRL09 GPRL 07	Probable that the applicant can be exposed to persecution, Convention ground and causal link not discussed

4.8.2.1 *Permit § 8, subs. 2 cf. § 15, subs. 2*

GPRL 04, applicant, who was a qualified teacher, had divorced her violent husband. After the divorce she started to dress in western style clothes, and

use make-up. In the asylum interview she alleges that the fundamentalists, because of her western dress style, harassed her and followed her, she was called a whore, and that she was a whore was written on walls. At school the pupils threw stones at her and she was exposed to bullying. She allegedly received written threats, where she was warned that if she did not stop dressing indecently, stopped working and stopped the whoring activities, she would be killed. As a reason for using western style clothes she says that she is a liberal muslim who does not wish to dress like muslim women. The applicant experiences being followed because she breaks with social norms for how a muslim woman shall dress. The reason that she does not dress in muslim style can be said to be an expression of her political attitude and her religious belief, since by dressing differently she wishes to express her dissatisfaction with the current system.

The woman was granted a permit in accordance with § 8, subs. 2, cf. § 15, subs. 2. In its decision the Directorate gave the following reason for not granting the applicant refugee status:

”The Directorate is of the opinion that it is not probable that the applicant according to information received has a well-founded fear of reactions which can be characterised as persecution by the authorities in the home country or others in the sense of the Act. Reference is made to the fact that she has been exposed to harassment, both because of her status as a divorced woman, as well at the fact that she uses a western style of dress. The circumstances which the applicant has stated, however, are not of such type that they can be characterised as persecution. It is further remarked that even though she has received death threats, she has not been exposed to assaults which can be characterised as persecution in the sense of the Act and Convention either from the authorities or from fundamentalists. The applicant has further stated that she has not been a member of any organisation or associations and that she is not interested in politics.

According to the Directorate the applicant cannot be regarded as a refugee since ” the circumstances the applicant has stated, [...] are not of such type that they can be characterised as persecution”.

4.8.2.2 15-month rule, IR. § 21, subs. 3

GPRL 43, applicant is a woman from Sudan. She asserts the asylum ground to be that she is politically active, and has therefore been imprisoned several times. She has opposed effects of the Sharia laws on women. The applicant is a member of a political party. Imprisoned 5 times, both for her political involvement and because she has not adhered to the sharia-laws' rules for dress, for example, veil. Gives the reason for leaving her home country that she cannot dress as she wants, that she cannot move about freely, and is not allowed to think freely. Says that women have no rights, that one has to cover oneself and cannot use make-up, that women cannot go out on the streets alone. She says that the sharia-laws are strongest in the north of the country, where she comes from, and that she cannot live under such conditions any longer. The woman is granted othum in accordance with § 8, 2 on the basis of the 15-month rule.

”As the basis for her application for asylum the applicant says that she has been a member of a political movement called XX. [...] Further, the applicant says that she as a woman has no rights in the Sudan. She refers *inter alia* to the fact that it has been very difficult for her to get work in her home country. [...] The Directorate is of the opinion that the above-mentioned does not indicate that the applicant justifiably fears persecution in the sense of the Act and Convention upon return to the home country. Reference is made to the fact the applicant's activities have not been of such type or extent that they give grounds for asylum. Further, the mentioned arrests took place some time ago, and they have not been of considerable length. The applicant's allegations that it is difficult for her to get work in her home country do not provide grounds for asylum.”

According to the Directorate, the applicant does not have any right to asylum pursuant to Norwegian law, since she has no justifiable fear of persecution.

GPRL 31, applicant is a woman from Sudan. The applicant was taken in for interrogation by the police several times, this seems to have had two reasons, 1) they wanted to interrogate her about her brother who had deserted from the military 2) why she wore trousers. Taken in for interrogation by the police 11 times. In all interrogations she was asked about her brother, as well as why she wore trousers. The applicant has been

struck several times with the flat of the hand, once wounded by a knife on her left hand. She says in the interview that she wore trousers to the university, she feels harassed by Islam front and their sympathisers because she is not strictly religious.

”The Directorate is aware that episodes have occurred with harassment of women in Sudan on the basis of their lacking or incorrect dress. After a holistic evaluation of what the applicant pleads, the Directorate is nevertheless of the opinion that the applicant has not been exposed to reactions from the authorities in her home country which can be characterised as persecution in the sense of the Act and Convention.”

The applicant is not given refugee status since it is found that the requirement for persecution is not fulfilled.

4.8.2.3 *Asylum*

In case **GPRL 46** the applicant, from Iraq, says that she fears that her father will expose her to honour killing since she has been involved in political work in the home country. The applicant says the following about her political involvement in the interview:

”I worked as liaison for this organisation and other women. The women who came to me in connection with tailoring were given information about this centre from me. The women who were in the centre were given financial help by me, and sometimes I made clothes for them. The purpose of this organisation was to help women who were in a difficult situation.”

As regards the reason that she feared persecution from her own family was that she had too liberal attitudes, the applicant states the following in the asylum interview:

”Have been exposed to persecution by my family. Right from the beginning I had contact with this organisation without my family knowing about it. I married my husband, against my family’s wishes, they were against him being a communist. When X’s armed people came to the organisation and took us with them to the Security Police, one of my sisters’ husbands was there at the office. He was a lightly

armed X. I think he told my father's family about me. After this, my mother said that my father would kill me if he saw me because I had contact with such immoral people as in this organisation. My male relatives, i.e. as close as father, brothers, uncles, etc. were in agreement that my father should kill me. The background is that they are muslims and this organisation I was a member of was against islamic civil laws."

The Directorate finds that the applicant has a well-founded fear for "persecution":

"The applicant fears her father. With regard to the situation within the family sphere when women's rights in Northern Iraq are concerned, it is probable that the applicant can fear reactions which are of such intensity and extent that it can be characterised as persecution. That the applicant can seek protection at the crisis centre cannot be regarded as an effective form of protection since her freedom of movement will be very limited." (First member) [...] "The applicant has not played a central part, but since the statement is used as a basis it is not improbable that she can be exposed to persecution which the Kurdish authorities cannot protect her against." (Second member)

The applicant is granted asylum, since the Directorate finds that she has a well-founded fear of persecution.

GPRL 07, applicant from Iraq. She asserts as grounds for asylum that she fears honour killing by her father. The applicant has had a child out of wedlock by a man her father does not like. The father is a very strict practising muslim. According to the father's view of Islam it is absolutely unacceptable for an unmarried woman to be pregnant. The applicant and the applicant's sisters as well as her mother have been ill-treated by both the father and the brothers. The applicant has been kicked, beaten with objects and the father and brothers have thrown different objects at her. She has back problems and scars under her arm and on her hand after her brother has stabbed with a knife and broken a glass against her hand. The applicant has been kept locked in the house, and has had to cover herself with clothes since they were 11-12 years old. She left school after three years of education. One sister has taken her own life because of the father's treatment.

The applicant is first granted a permit in accordance with § 8, subs. 2, cf. § 15, subs. 2, but is granted asylum after an appeal by NOAS (the Norwegian Organisation for Asylum Seekers). It appears as though the Directorate first grants a residence permit because one does not find the applicant's statement substantiated. The following is stated in the remarks:

"the description the applicant gives of Northern Iraq through her arguments is moreover not in accordance with the Directorate's understanding of the circumstances in the area. [...] As far as the Directorate knows the islamists in the area the applicant comes from have not threatened or attacked individual persons in such a way that the applicant has described. The actions which have taken place have been of a demonstrative nature, and not directed towards any individuals."

The Directorate's decision was reversed and the applicant was granted asylum. Whether the persecution is due to one or more of the five Convention grounds and whether there is a causal link between the persecution and the Convention ground were not considered. Asylum is granted without all the requirements in Art. 1 A (2) being discussed.

GPRL 09, the applicant is KPRF 07's sister. As grounds for asylum she asserts that when the father found out that the sister (asylum seeker above) had fled, he harassed the applicant and her mother to find out where the sister was. On one occasion he hit the applicant such that he broke some parts of her skull, and the mother had her nose broken. The applicant had to spend a month in hospital because of it. After this, neither the applicant or the mother were allowed to leave the house. When the sister fled the mother was not allowed to cry. The father said that he would set fire to the mother if she cried.

The applicant is granted asylum. As in the sister's case, in the basis for granting asylum reference is made to the fact that the guidelines of 1998 are intended to include "women who through their acts, omissions and expression of opinions break written and unwritten rules for social life". The sisters, especially GPRL 07, have broken rules for social life and therefore fall within the wording of the guidelines. The decisions in these cases seem to be based on the conclusion that applicants exposed to gender-based persecution have a legal right to asylum. Whether the alleged

persecution has a causal link with one or more Convention ground is not evaluated in the decisions.

4.8.3 Summary

In this chapter, 6 cases where the asserted asylum ground is persecution because of too liberal attitudes are presented. After a review of the cases it seems that the seriousness of the violations the applicant fears is decisive for whether the applicant is granted asylum or othum. There seems to be a boundary set at the types of human rights violations which the applicant fears being exposed to. Violation of the right to dress as one likes, use make-up, be politically active, protect one's own personal integrity, is not to be regarded as persecution. Violation of the right to life and the prohibition against torture and inhuman treatment is to be regarded as persecution. In the cases where the result of the application has been othum the reason has been that it is based on the fact that the condition for persecution has not been fulfilled. In the cases where asylum has been granted the applicant has feared honour killing or very serious assaults by the close family and been granted asylum. Again we see that the interpretation of "persecution" is decisive for the outcome of several of the applications. The significance of the interpretation of the persecution concept becomes even greater, taking into consideration that in several cases asylum is granted on the basis that the persecution condition has been met, without discussing the other conditions for refugee status contained in Art. 1 A (2).

4.9 Summary of chapter

4.9.1 Discrimination of cases with a gender perspective?

The problem raised in this chapter is whether the Norwegian immigration administration's interpretation of the persecution concept is gender neutral. Alternatively where gender-specific persecution is alleged to be exposed to discrimination.

The review of the cases in Chapter 4.3-4.7 gives a somewhat mixed picture of how the immigration administration interprets and applies the persecution concept in asylum cases with a gender aspect. In some cases forced marriage, domestic violence and bride kidnapping is recognised as persecution. In other cases it is explicitly stated that forced marriage is not persecution and that domestic violence is not to be regarded as persecution in the sense of the Convention since it must be regarded as a private problem. In many of the cases presented above, however, gender-specific assaults are recognised as persecution. There is thus no clear and general discrimination of women exposed to gender-specific assaults.

Chapter 4.3-4.7 gives relatively many examples that very serious gender-specific violations are not recognised as persecution. One example is the decision in GPRL 17 where the applicant was imprisoned because of her husband's political activity. The applicant was held in a dark room measuring approx. 10 sq.m., there were no others in the room. There was no access to a toilet. The applicant was raped three times. If she tried to resist she was punched below the waist and her hair was cut off (she wore a wig during the interview). Each time the applicant was raped there were three persons who participated. In the decision, the Directorate states: "The Directorate has noted that the applicant states that she has been exposed to rape while she was in custody. According to the Directorate's evaluation, however, these are not circumstances of such a type that they can be regarded as persecution in the sense of the Act and Convention."

Another example is given by the Case GPRL 48 from UNE. The applicant was to be married to an old man as settlement between two clans. The woman asserted the asylum ground that she feared for her life upon return. The Board employed a very strict interpretation of the persecution concept. The Board states that its decision is based on the fact that the woman upon return will meet with reactions both from her own clan and the clan into which she is to be married. Further, it is not probable that she will be killed, but it is probable that she will be harassed in different ways, and it is not very probable that she will be able to seek protection from the home country's authorities. A unanimous Board concluded that "one has decided that the reactions the appellant will be exposed to upon return are not of such a type that they can be characterised as persecution". In the evaluation of whether "compassionate grounds" were present, the Board used the

following facts as a basis: that the woman upon return will be in a very difficult situation, that young, single women have a very difficult life, and that the woman will be expelled from her own clan, and that belonging to a clan is very important in Somalia, that her security situation without the support of her own clan will be "extremely uncertain", and that without belonging to a clan will not be able to get a job and will not have access to health care either. The Board therefore bases its decision on that the following of the woman's human rights will be in danger of being violated: the right to freedom and security¹⁶⁷, if "harassment" should lead to serious violence, inhumane and degrading treatment,¹⁶⁸ her right to enter into marriage with "free and full consent" is violated by forced marriage¹⁶⁹, by expulsion from society and without access to health care her right to social safety is violated¹⁷⁰, but nevertheless concludes that the woman is not in danger of being persecuted.

The conclusion which can be drawn from this chapter is, as mentioned, not that gender-specific violations are discriminated against in general. The main conclusion which can initially be drawn from practice is that the interpretation of the persecution concept is not particularly uniform. Gender-specific violations are sometimes recognised at persecution and sometimes not. Relatively similar violations are sometimes recognised as persecution, sometimes not. Discrimination takes place when the treatment of a person is worse than in another, equivalent situation. Based on the non-discrimination principle the purpose will therefore be that relatively similar cases are treated alike, in the sense that this is possible.

The question which thus is raised is how one can achieve a more uniform practice with regard to the persecution concept? This will be discussed in the following chapter.

¹⁶⁷ UN Declaration of Human Rights, Art. 3, ICCPR Art. 9, ECHR Art. 5,

¹⁶⁸ UN Declaration of Human Rights, Art. 5, ICCPR Art. 9, ECHR Art. 3,

¹⁶⁹ UN Declaration of Human Rights, Art. 16(2), ICCPR Art. 23 (3), CEDAW Art. 16, ECHR Art. 12

¹⁷⁰ UN Declaration of Human Rights, Art. 22

4.9.2 Human rights as an interpretation norm

The lack of guiding legal sources in the interpretation of the persecution concept is probably the cause of deviating practice. At present it is up to the individual caseworker's evaluation to decide which violations can be regarded as persecution, based on an evaluation of the seriousness and extent of the violations. With many hundreds of caseworkers, with different education, experience and personalities, it is not surprising that administration practice deviates.

"...international law can assist decision makers to determine the persecutory nature of a particular act."¹⁷¹

The initial basis for the analysis should be that it is not the type of persecution, but its degree of seriousness and extent which is decisive for whether the condition for persecution is fulfilled. In that women are often exposed to other forms of assault than men, it is essential for the achievement of equality that the type of persecution is not decisive. The main rule should be that the violation of all human rights can amount to persecution, and that the decisive factor is the seriousness and extent of it.¹⁷² Equality of human rights in relation to the evaluation of the persecution concept in the Convention will be in accordance with central statements at the World Conference on Human Rights in Vienna.¹⁷³ In Vienna the importance of the principle of universality was emphasised, "human rights and fundamental freedoms are the birthrights of all human

¹⁷¹ Cite, UNHCR 2002 Gender Guidelines, para. 9

¹⁷² As a result of the requirement for extent and seriousness there will be some cases where the so-called gender-specific violations in themselves amount to persecution in the sense of the Convention, ex. rape, honour killing. Other times the gender-specific violations will not be regarded as persecution, but in these cases it is possible that the consequences of refusing to yield to the violations can be so serious that they can amount to persecution. for example, the consequences of refusing to accept forced marriage/ arranged marriage. See more on this, ECRE Guidelines p. 6 and Australia Guidelines para 4.4

¹⁷³ Vienna Declaration and Programme of Action, from World Conference on Human Rights held in Vienna 14-25 June 1993, UN A/CONF.157/23. [http://www.unhchr.ch/huridocda/huridoca.nsf/\(Symbol\)/A.CONF.157.23.En/OpenDocument](http://www.unhchr.ch/huridocda/huridoca.nsf/(Symbol)/A.CONF.157.23.En/OpenDocument)

beings”¹⁷⁴. During the Conference it was established that the universality principle not only entails that human rights are due to *all individuals*, but that *all human rights* are due to all individuals.

”All human rights are universal, indivisible and interdependent and interrelated. The international community must treat human rights globally in a fair and equal manner, on the same footing and with the same emphasis.”¹⁷⁵

”The human rights of women and girl-child are an inalienable, integral and indivisible part of human rights.”¹⁷⁶

Equality of all individuals and recognition of the fact that human rights are both ”interrelated” and ”indivisible” are essential in order to reach the goal of equality of the sexes in refugee law. In this way, one will recognise that the violations to which women are typically exposed can be persecution. This will entail that one recognises that, independent of the victim’s sex, the position of the offender as a person in public authority or a private person and where the violations take place (in the private or public sphere)¹⁷⁷, basically all violations can give refugee status.¹⁷⁸ All the elements mentioned in an asylum application are, as will be shown in the further discussion, central to the interpretation of the persecution concept.

It should be pointed out that even though it is proposed that the basis for the analysis of the persecution concept shall be international human rights standards, no argument is made for that every violation of human rights will amount to persecution in the sense of the Convention.

The decisive factor will as mentioned be, the seriousness and extent of the violation. The main argument is that the type of human rights violation should not be decisive in the analysis. It is not a goal of the proposal for

¹⁷⁴ Cite, Vienna Declaration and Programme of Action, Part I para. 1 (3)

¹⁷⁵ Cite, Vienna Declaration and Programme of Action, Part I para. 5

¹⁷⁶ Cite, Vienna Declaration Part I, para.18

¹⁷⁷ the discussion regarding the division between public/private in international law, this discussion originated from the weak position of women in international law.

¹⁷⁸ ECRE Guidelines p. 3

equality of individuals and human rights that all asylum-seeking women shall be given the status as refugees.¹⁷⁹ As is stated in the South African guidelines, the goal with implementation of a gender perspective is not that all women who allege they are exposed to persecution shall be granted asylum. The goal is to achieve "equality of opportunity", opportunity to be able to seek asylum on equal conditions.¹⁸⁰ Whether persecution is present will thus rest on a holistic assessment of each individual application.¹⁸¹

By equalising human rights in the evaluation of the persecution concept it will not be necessary to enter into a discussion on which specific human rights violations amount to persecution in the sense of the Convention. In that way, one will be able to avoid unfortunate and incorrect reasons for rejection such as: "there is no reason to fear that she will be killed". Both the legislators and caseworkers avoid an assessment of whether the human rights which are violated in each individual asylum case are so-called "fundamental human rights", rights which are regarded as being *jus cogens*, or rights which are "non-derogable"¹⁸², including the theory of a hierarchy of human rights.¹⁸³

Another argument against the categorisation of human rights in the evaluation of the persecution concept is the fact that it is recognised that different violations, which in themselves will not amount to persecution, nevertheless cumulatively can be regarded as persecution. UNHCR's handbook emphasises that violations which in themselves are not sufficient to amount to persecution can, together with other violations, cumulatively amount to persecution.¹⁸⁴

Recognition of the fact that all human rights are "universal, indivisible and interdependent and interrelated"¹⁸⁵, as well as that human rights are due to

¹⁷⁹ UNHCR 2002 Guidelines on Gender Related Persecution, para. 4

¹⁸⁰ South African Guidelines, p. 20

¹⁸¹ UNHCR 2002 Gender Guidelines para. 9

¹⁸² Ex. ICCPR Art. 4 (2)

¹⁸³ T. Meron and also T. van Boven, "Distinguishing Criteria of Human Rights", in H.J. Steiner, P. Alston, "*International Human Rights in Context*", Second edition, Oxford University Press 2000, s 154-155.

¹⁸⁴ UNHCR Handbook para. 53 og 55, also Australian guidelines item 4.15

¹⁸⁵ Cite, Vienna Declaration and Programme of Action, Part I para. 5

everybody "without distinction of any kind"¹⁸⁶, principles which are fundamental to the theory of human rights, will lead to a more gender-neutral interpretation and application of the Refugee Convention.

¹⁸⁶ Cite, Preamble to the UN Declaration of Human Rights

5. The Convention ground "social group"

5.1 Introduction

Many refugees are persecuted because they break with the social role of the sexes. Refugees which are persecuted because of their gender are exposed to *gender-based persecution*. Only persons who can be said to be persecuted / fear persecution "for reasons of" one of more of the Convention grounds "race", "religion", "nationality", "membership of a social group" or political opinion"¹⁸⁷, have the right to refugee status.¹⁸⁸ In that gender is not one of the five, women refugees, if they shall have the right to refugee status, must show that the persecution is due to one or more of the Convention grounds in Art. 1 A (2). "Membership of a particular social group" is the Convention ground which is most invoked in applications for asylum submitted by a refugee¹⁸⁹ on the basis of gender-based persecution.

Membership of a particular social group is probably the Convention ground whose interpretation and application there is most uncertainty about. This is supported by the practice which has been carried out in connection with the project. It seems as though many caseworkers shrink from entering into a discussion about a Convention ground. In the cases where the Convention ground is discussed, the discussion in most cases is very brief. As a result of increased focus on asylum applications with a general aspect, the application of the Convention ground "particular social group" has been more of current interest.¹⁹⁰

The question which is often raised in the application of the Convention ground in connection with allegations of gender-based persecution is: Can

¹⁸⁷ These are the five Convention grounds in Art. 1 A (2)

¹⁸⁸ The requirement for causal link in accordance with Art. 1 A (2) "for reasons of" will be discussed in a separate chapter.

¹⁸⁹ It is important to point out that gender-based persecution can affect both sexes, both men and women. For the sake of simplicity reference is made in this Article to women, but this must not be understood such that gender-based persecution is a problem which only affects women.

¹⁹⁰ About this, see *inter alia* J.B. Condon, "Asylum Law's Gender Paradox", *Seton Hall Law Review*, 2002, s. 207- 256, on p. 211

women themselves be regarded as a particular social group? In other words, can the two different biological sexes, man and woman, be a particular social group in the sense of the Convention?

Recognition of women as a particular social group will on one hand remedy the situation for many women asylum seekers who have difficulty in being recognised as refugees. This is particularly relevant as regards forced marriages and women who suffer domestic violence. On the other hand the critics argue that such interpretation of this can entail that nearly all women are granted asylum, with an increased stream of refugees as a result. In English and American jurisprudence, the latter question is referred to as "the floodgate argument".¹⁹¹ Einarsen presents the problem in the following manner in his book:

" In recent years there has first and foremost been an extensive debate about women as a pertinent 'social group'. The interest springs on the one hand from a recognition that has gradually become widespread that women are exposed to violence to a great extent, including in the form of serious assaults which are directed towards the individual woman or which are suited to affect women in an unreasonable and disproportionate manner, and on the other hand by the fear that the refugee concept which includes repression of women and women as a "social group", will break the limits of refugee law."¹⁹²

In this chapter the content of the Convention ground "particular social group" seen in relation to asylum applications with a gender aspect can be discussed. What is meant by "social group" in the sense of the Convention? When can a refugee be said to belong to such group? How shall the Convention ground "particular social group" be interpreted and applied in relation to refugees exposed to gender-based persecution?¹⁹³ The questions

¹⁹¹ See on this: M. Randall, "Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution", *Harvard Women's Law Journal*, Spring 2002, p. 281-318, p. 299. Randall refers to US case law, where the "floodgate" argument is used by the courts, for example, *Sanchez-Trujillo v. INS* 801 F.2d 1571, 1576-77 (9th Cir. 1987)

¹⁹² Cite, T. Einarsen, "Retten til vern som flyktning" (Right to protection as a refugee), Cicero Publisher, Bergen 2000, p. 375

¹⁹³ Cf. *Canada (Attorney General) v. Ward*, File No.: 21937, 1993: June 30, p. 708

will be discussed in the light of soft-law guidelines issued by UNHCR, internationally recognised judgements on this theme from the US, England and New Zealand and Norwegian theory and practice in the area.

Under item 2 below, an overview will be provided of how one in the international fora, especially UNHCR, and nationally in other countries which are parties to the Convention, through guidelines and case law have prepared criteria for the interpretation of the Convention's "particular social group". The reason that the international sources and sources in other jurisdictions are attached weight in this chapter is that in Norwegian sources contain very little guidance in the area.

In item 3 of this chapter there will be a discussion as to whether the biological gender, women, can be regarded as a social group, alternatively whether the social gender, the role of the sexes, can contribute to defining a particular social group. In Chapter 3 both international and national practice and theory will be discussed. Finds made in connection with the review of cases for the project will be discussed in item 3.6.

5.2 Interpretation of the Convention ground "particular social group"

Both the preparatory works to the Immigration Act, the Regulations and commentary to the law give very little guidance as to how the Convention ground "particular social group" is to be interpreted. This is the reason that the further discussion is mainly based on international sources of law.

Case law from Anglo-American countries such as the US, Canada, New Zealand and England, has in recent years developed a relatively specific interpretation criteria for the concept "special social group". These interpretation criteria will be presented below. There is extensive case law in this area, but the focus here will be on three judgements which are regarded as being very central in connection with the interpretation of the

Convention ground “social group”.¹⁹⁴ It will be sought shown how case law from several countries which are parties to the Convention have contributed to develop the theory regarding the interpretation of the concept social group, and how this case law has gradually achieved recognition in the international fora, *inter alia*, in UNHCR.

For the sake of good order, a reminder is given that case law from other countries has limited weight as a source of law in Norway. The same concerns statements by the High Commissioner.¹⁹⁵

5.2.1 Case law

5.2.1.1 *Re Acosta (BIA*¹⁹⁶ *1985, USA)*

The asylum seeker in this judgement was not a woman but a man, who alleged that the association of taxi drivers of which he was a member, was a social group in the sense of the Convention. In the evaluation of how one shall define a social group, the court established that:

”..we interpret the phrase ‘persecution on account of membership of a particular social group’ to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable, characteristic.”¹⁹⁷

The Court established that a particular social group can only be said to exist if the members of the group have common characteristics which are either innate, or unchangeable, groups whose common characteristics are ”changeable” fall outside the Convention’s “particular social group”.

¹⁹⁴ Only the parts of the judgement which are of interest to the concept “particular social group” will be presented.

¹⁹⁵ See T. Einarsen, “Retten til vern som flyktning” (Right to protection as a refugee), Cicero Publisher, Bergen 2000, p. 71-77

¹⁹⁶ Board of Immigration Appeals

¹⁹⁷ Cite, T. Einarsen, “Retten til vern som flyktning” (Right to protection as a refugee), Cicero Publisher, Bergen 2000, s. 365

5.2.1.2 *Ward v Attorney General of Canada*¹⁹⁸, (1993)

The definition of a social group given by re Acosta was followed up and at the same time was somewhat extended in Canadian case law in Ward.

The court established that a group can be identified by common characteristics which are either "defined by an innate or unchangeable characteristic". Consequently, particular groups in society which are recognisable by separate qualities / characteristics which are either innate or impossible to change. The Court was of the opinion that this group will include persons who fear persecution because of 1) "gender, linguistic background and sexual orientation" 2) "groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association", groups whose qualities are not innate or impossible to change, but where these qualities are so fundamental to their worth as human beings that they shall not be forced to forsake such qualities. The Court was of the opinion that this group will *inter alia* include human rights activists. 3) "groups associated by a former voluntary status, unalterable due to its historical permanence", groups which are initially based on voluntariness, but for historical reasons the characteristics must be regarded as being permanent.

While re Acosta assumed that characteristics which are voluntarily acquired cannot define a social group, the Court in the Ward case adopted a somewhat different viewpoint. However, the Court established that this is only in the cases where voluntarily acquired characteristics are as fundamental to the worth of the members as human beings that they cannot be forced to forsake such characteristics.

Another point of interest in this decision is that the Court recognised that "gender", the social gender/the socially created role of the sexes, can be a quality or characteristic which in itself can be sufficient to define a social group. This will be discussed further in item 3 below.

¹⁹⁸ Canada (Attorney General) v. Ward, File No.: 21937, 1993: June 30

5.2.1.3 Refugee Appeal No. 71472/99, New Zealand (2000)

In a decision from New Zealand in 2000, the Court established on the background of the practice in *Ward, re Acosta and Shah/Islam*, which seven points of interest can be listed which are relevant to a discussion of the Convention ground “social group”. A short presentation of the seven points listed by the Court will be presented below.

Firstly, in the interpretation of social group, weight must be attached to the fact that the refugee institution can only be applied if a refugee can prove that he or she cannot obtain protection in the home country. Thus, a refugee institution is intended only as a substitute.¹⁹⁹ Interpretation of the Convention ground “social group” should not be so wide that everybody at any time can allege that he or she is a member of a social group. This will be contrary to the purpose of the Convention. Reference is made to the following citation from *Ward*:

“... the drafters of the Convention limited the included bases for a well-founded fear of persecution to ‘race, religion, nationality, membership in a particular social group or political opinion’. Although the delegates inserted the social group category in order to cover any possible lacuna left by the other four groups, this does not necessarily lead to the conclusion that any association bound by some common thread is included. If this were the case, the enumeration of these bases would have been superfluous; the definition of ‘refugee’ could have been limited to individuals who have a well-founded fear of persecution without more. The drafter’s decision to list these bases was intended to function as another built-in limitation to the obligations of signatory states.”²⁰⁰

Secondly, reference is made to the fact that the basis for interpretation of the Convention ground shall be the non-discrimination principle.²⁰¹

¹⁹⁹ Refugee Appeal No. 71472/99, New Zealand (2000), para. 94

²⁰⁰ *Sitat, Canada (Attorney General) v. Ward*, File No.: 21937, (1993), para.732

²⁰¹ Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/99, para.96

”In distilling the contents of the head of "particular social group" therefore, it is appropriate to find inspiration in discrimination concepts. The manner in which groups are distinguished for the purposes of discrimination law can be appropriately imported into this area of refugee law. [...] In short, the meaning assigned to "particular social group" should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative.”²⁰²

Items three and four deal with the categorisation of groups from the *Acosta* and *Ward* judgements. Item five highlights that the wording, especially the word "particular", indicates that it is not the intention to include all groups, and neither is the intention that the Convention ground shall be regarded as all-encompassing and thus subordinates the other four grounds.²⁰³ The sixth item mentioned is that it is a generally recognised principle that the group in question must be able to be described as existing independent of the persecution.²⁰⁴ The seventh and last item is that an asylum seeker does not have to prove "cohesiveness" with the group. This means that no requirement exists that the members of the group know one another or have contact with each other otherwise.²⁰⁵

5.2.2 UNHCR'S guidelines on social group, 2002

UNHCR issued new guidelines (hereafter 'the guidelines') on interpretation of the Convention's concept "social group" in May 2002.²⁰⁶ It

²⁰² Cite, Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/99, para. 96, see also *Canada v Ward*, para. 735-739, *Shah and Islam*, 639C-D

²⁰³ Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/ 99, para. 100

²⁰⁴ Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/ 99, para. 101

²⁰⁵ Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/ 99, para. 102

²⁰⁶ GUIDELINES ON INTERNATIONAL PROTECTION: "Membership of a particular social group" within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.

is interesting to see how the guidelines incorporate the case law referred to in item 2.2 above.

With regard to the interpretation of the Convention ground it is established in the guidelines that the Convention ground "social group" cannot be given such a liberal interpretation that it obliterates the other four Convention grounds. "This category cannot be interpreted as a 'catch all' that applies to all persons fearing persecution."²⁰⁷ This is the fifth point which the Refugee Appeals Authority refers to in its decision in item 2.2.3 above.

Further, it is a condition that the only common characteristic of the group cannot just be persecution²⁰⁸. This is item 6 in the judgement from New Zealand. In the guidelines it is pointed out that no requirement can be made that asylum seekers who allege they are persecuted because of belonging to a particular social group shall be able to show that members of the group know each other or have connections otherwise.²⁰⁹ The decisive element is whether there is a common characteristic among members in the alleged group.²¹⁰ In the attempt to identify a particular social group, no requirement can be made that the asylum seeker must prove that everyone in the social group he or she alleges to be a member of, is persecuted.²¹¹ This is item seven in the New Zealand judgement. The guidelines refer to the fact that there is no requirement that asylum seekers who allege they are persecuted because of their political attitudes must prove that other members of the

²⁰⁷ Cite, GUIDELINES ON INTERNATIONAL PROTECTION, para. 2 på side 2

²⁰⁸ GUIDELINES ON INTERNATIONAL PROTECTION, para. 2 on page 2. Re this in Norwegian immigration law, see UNE's Working Memorandum on "Arguments on gender-based persecution in asylum cases", written by Anne Bruland. The following is stated on page 16 of this memorandum: "It is difficult to establish the causal link in a classic legal sense if it is the persecution which gives the persecution ground. (The thesis 'persecution because she is a persecuted woman' contains in this way a logical flaw and entails a deviation from the theory on causal link otherwise in a legal context.)" Cite from Working Memorandum p. 16

²⁰⁹ GUIDELINES ON INTERNATIONAL PROTECTION, para. 15, p. 4

²¹⁰ GUIDELINES ON INTERNATIONAL PROTECTION, para. 15, p. 4, se Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/ 99, para 102

²¹¹ GUIDELINES ON INTERNATIONAL PROTECTION, para. 17, p.4

same political party are also persecuted. The same should apply to assessments of the Convention ground "particular social group".

There is no exhaustive list of which groups can fall within the Convention's "particular social group". In its guidelines, UNHCR expresses that the Convention ground must be interpreted dynamically.²¹²

"...the term membership of a particular social group should be read in an evolutionary manner, open to the diverse and changing nature of groups in various societies and evolving international human rights norms."²¹³

In relation to how case law has defined a social group, particularly in *re Acosta* and *Ward*, this is followed up in the new guidelines where the following definition is used as a basis:

"A particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be that one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights."²¹⁴

²¹² on interpretation of international law sources based on the efficiency principle, see M. Ruud, G. Ulfstein and O.K. Fauchald; "Utvalgte emner i Folkerett" (Selected topics in International Law), Tano Aschehoug, Oslo 1997, p. 62-63. The principle is mainly that one shall choose the interpretation which ensures a dynamic implementation of, for example, the treaty. A dynamic interpretation takes into consideration the basis that international law is dynamic.

²¹³ Cite, GUIDELINES ON INTERNATIONAL PROTECTION, para. 3, p. 2

²¹⁴ Cite, GUIDELINES ON INTERNATIONAL PROTECTION, para. 11, p. 3

5.3 Gender as a "particular social group"

5.3.1 Introduction

An important question in relation to asylum cases with a gender aspect and the Convention ground "particular social group", is whether women in general, that is to say, the biological sex, can be seen as a social group in the sense of the Convention. The notable thing about regarding women in general as a social group is that this group will then include nearly half of the world's populace. The fact that the group is so big is one of the reasons that this theory has been opposed.²¹⁵ Alternatively, whether the social gender, role of the sexes, can define a social group. Can gender in the sense of social gender be an "innate, unchangeable characteristic" which can define a social group?

The word "sex" in Norwegian encompasses both English concepts "sex" and "gender", the first question should therefore be defined, such that all nuances in the debate surrounding social group are highlighted. The question is namely both about the biological sex (man v. woman), and the social role of the sexes (role of the man v. role of the woman) can be seen as an "innate, unchangeable characteristic", and thus define a social group.

As regards the first question, whether the biological sex can be regarded as a particular social group one has in practice, in theory and other sources of law seen a reluctance to recognise women in general as a social group. This reluctance has entailed that one in case law has seen that those who apply the law instead of recognising women as a social group, have defined smaller sub-groups, under the general group of women. Sub-groups which are smaller, more specific and at times relatively "creative".

The following examples of different sub-groups the courts have chosen can be mentioned from the US and Canada: In the US social group has been defined as: "women who are members of the Tchamba-Kunsuntu Tribe of northern Togo who have been subjected to female genital mutilation, as

²¹⁵ Jf. Introduction under item 2, "the floodgate argument"

practised by that tribe, and who oppose the practice.”²¹⁶ In Canada the Court has recognised “Trinidadian women subject to wife abuse”²¹⁷ as a social group. Other examples from Canada are “single women suffering from abuse at hands of former spouses....who have been forced into prostitution”²¹⁸ and “women married according to traditional Youruba custom”²¹⁹.

Two judgements from England’s House of Lords and New Zealand’s appeal board for refugees respectively, represent a development with regard to the question of whether women in general can be regarded as a social group. In both judgements it is established that ”gender”, the socially creates role of the sexes, can be the characteristic which defines a group, ”gender can be the defining characteristic of a social group”²²⁰. On the background of this recognition, the courts come to the conclusion that ”women in Pakistan” and ”women in Iran” form a social group in the sense of the Convention.

The problem which is sought answered below is: Can women in general be regarded as a social group? Alternatively, can the social role of the sexes define a social group? How is the question solved internationally, in other countries which are parties to the Convention, and in Norway?

The main points of the two judgments will be reviewed below. Further, the practice of the Norwegian administration regarding the concept social group reviewed in connection with the project is presented. There will be a conclusion and summary in item 5. 4.

²¹⁶ re Fauziya Kasinga, 21 I. & N. Dec 357, 378 (B.I.A. 1996)

²¹⁷ Mayers v. Minister of Employment and Immigration, [1992] 97 D.L.R. 4th 729

²¹⁸ re D.J.P., [1999] C.R.D.D. No. 155

²¹⁹ re O.E.X., [1999] C.R.D.D. No. 79

²²⁰ Cite, Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/99, para. 106.

5.3.2 Case law

5.3.2.1 *Islam/Shah*²²¹, (1999)

These two cases deal with two Pakistani women who sought asylum in England on the basis of serious and prolonged ill-treatment by their respective husbands. One of the main questions in the cases was whether the women could be regarded as persecuted because of membership of a particular social group. When the UK Court of Appeal heard the cases in 1997, in connection with the Convention ground "social group" the Court established that the fact that the applicants were women did not make them members of a social group. The Court rejected that women in themselves can be a social group. In addition to being women the two applicants had nothing in common apart from domestic violence. The Court argued that the social group must be said to exist independently of the persecution.

"That they are simply women does not make them a social group: the only characteristic identified is that they are subject to violence within marriage, the only common features beyond their sex is the persecution, to which they are all alleged to be subject within marriage, that is the persecution itself."²²²

After rejection in the Court of Appeal the women appealed to the House of Lords (1999), where the question the Court had to decide was mainly the interpretation and application of the Convention's concept "membership of a particular social group". Three alternative definitions of the social group one was of the opinion the women belonged to were presented to the Court. One alternative was that the women's sex, the suspicion of unfaithfulness and their unprotected status as women in Pakistan indicated that they belonged to a particular social group. Another alternative was the social group women who do not live by current social norms in their society. The latter alternative entailed that women in Pakistan should be regarded as a social group. In a decision under dissent the majority concluded that

²²¹ Heard together by UK House of Lords, *Islam v SSHD; R v IAT ex parte Shah* [1999], INLR 44 [1999] Imm AR 283 HL)

²²² Cite from the judgement, by H. Crawley, "Refugees and Gender Law and Process", Jordans, Bristol 2001, p. 77

Pakistani women experience discrimination and that they as a group are not provided protection in their home since the state tolerates such discrimination.²²³ Thus, "Pakistani women" were regarded as forming a social group.²²⁴ The judgement is very important in the respect that it recognises that the reason for persecution is because the women come from a society where women's rights are violated. The majority of the judges recognise therefore that the persecution is due to "gender", the socially created role of women.

"The decision breaks new ground insofar as the legal analysis expressly recognizes that the persecution the asylum seekers suffered was perpetrated because they were women in a society in which women's rights are violated. [...] ...the decision is significant for its explicit and sustained analysis of gender as the fundamental basis for the oppression and persecution the claimants in these cases suffered."²²⁵

5.3.2.2 *Refugee Appeal No. 71472/99, New Zealand (2000)*

The case deals with an Iranian woman who sought asylum in New Zealand. The woman asserted as an asylum ground that she feared for her life upon return to Iran. The woman, who was divorced from her first husband, had for a number of years in spite of the divorce been subjected to assaults and threats from him. After a long battle in court she had been given the custody of their son. In connection with the Convention ground "social group" the Court sought to answer the following question:

²²³ H. Crawley, "Refugees and Gender Law and Process", Jordans, Bristol 2001, s. 74-77

²²⁴ D. Anker, "Refugee Status and Violence Against Women in the 'Domestic' Sphere: The Non-State Actor Question.", *Georgetown Immigration Law Journal*, Spring 2001, s. 391-402

²²⁵ Cite, M. Randall, "Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims Based on Gender Persecution", *Harvard Women's Law Journal*, Spring 2002, s. 281-318, s. 300

”...whether Iranian women are a particular social group as that term is understood in Article 1 A (2) of the Refugee Convention.”²²⁶

After a review of international and national case law, as well as listing of the seven points mentioned above in item 2.2.3 the Court arrived at the following general standpoint:

“...it is indisputable that gender can be the defining characteristic of a social group and that "women" may be a particular social group. Depending on the facts, it may be unnecessary to define the group any further as in "women in Iran" because the "in Iran" element goes not to the identification of the group but to the identification of those in the group who face a real risk of harm.”²²⁷

The Court stated the following regarding the question of whether the applicant in this case could be said to belong to a particular social group:

”...the evidence relating to Iran establishes that the overarching characteristic of those fundamentally disenfranchised and marginalised by the state is the fact that they are women. This is a shared, immutable, internal defining characteristic. Applying the principles identified, we find that the particular social group is therefore women.”²²⁸

In relation to the ”floodgate” argument the Court stated the following:

”We acknowledge that in one view, the group so defined has been a large and general one. However, two points must be made. The size of the group cannot be a limiting factor given the breadth of application of the other four categories. Second, our finding is country-specific.

²²⁶ Cite, Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/99, para. 91

²²⁷ Cite, Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/99, para. 106. It should be remarked that the appeal court found that persecution had a causal link with three Convention grounds, namely, ”religion”, ”political opinions” and ”membership of a particular social group”

²²⁸ Cite, Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/99, para. 108

Particular Islamic regimes such as Iran and Pakistan present an extreme picture of discrimination against women.”²²⁹

Even though “women in Iran” form a large group, the Court establishes that this cannot be decisive for whether an applicant can be said to belong to a “particular social group”. Firstly, the size of the group shall not be a decisive element in the evaluation of whether a social group exists. Secondly, the Court remarks that it has been limited to one country, Iran, and that it has therefore not been established that women in general are to be regarded as a social group.

5.3.3 UNHCR

The new guidelines clearly express that women are a clear example of a group which is identified by “innate and immutable characteristics, and who are frequently treated differently than men”²³⁰. The definition of social group which UNHCR uses as a basis²³¹, establishes that women can be said to form a social group based on the common feature of sex.²³²

5.3.4 “Gender Guidelines” in other countries’

5.3.4.1 *Australia*

The Australian guidelines establish in item 4.33 that even though gender is not a Convention ground, it can be a relevant factor in the evaluation of whether one is dealing with a social group. Gender in the meaning of both “sex” and “gender” can be a characteristic which can contribute to define and identify a social group.

²²⁹ Cite, Refugee Status Appeals Authority New Zealand, Refugee Appeal No. 71427/99, para. 109

²³⁰ Cite, GUIDELINES ON INTERNATIONAL PROTECTION, para. 12, p. 3

²³¹ see guidelines para.2

²³² GUIDELINES ON INTERNATIONAL PROTECTION, para. 12, p. 4

In Australia there is no national practice which decides whether women in general can be seen as a social group. But it is established that gender is an innate characteristic which can mean that women are more exposed to persecution than men.

It can appear as though the Australian guidelines go in for an either / or solution concerning the question of which characteristics can define a social group, since they recognise that both sex and gender can be characteristics which define a social group. However, there is nothing concrete to indicate that women in general should be regarded as a social group.

5.3.4.2 USA

In the American guidelines it is established that sex can be a common and innate characteristic which defines a social group. As regards the question of whether the role of the sexes ("gender") can be said to be the characteristic which defines a social group, it is established that case law has not been uniform, but that in any case it is certain that the role of the sexes in combination with other characteristics can contribute to define a social group. In other words: by the application of sub-groups, gender can be one of the decisive characteristics. It seems as though the American guidelines, with the background in the Fatin case ²³³, go in for that women in general can form a particular social group.

5.3.4.3 Canada

With regard to the Convention ground social group, the Canadian guidelines are based to a large extent on the decision in Ward. In Ward, as mentioned, it was established that a social group can be defined or identified by innate or other unchangeable characteristics. The Court

²³³ United States Court of Appeals, Third Circuit. 12 F.3d 1233. FATIN v. INS.

established that sex is such innate characteristic. The Canadian guidelines seem not to distinguish between gender and sex. The guidelines are consistent in the use of the word "gender", but it seems as though one then refers to the biological sex.

With regard to the question of whether women in general can be said to form a social group it is stated that women can form a particular social group (women in themselves can be said to be a social group) Whether these women will have the right to asylum, rests according to the guidelines on whether they can be said to have a well-founded fear of persecution in their home country because of their membership of the social group.²³⁴ However, the guidelines go in for those particular social groups which consist of sub-groups of women can also be a solution in cases where the asserted asylum ground is gender-based persecution. Gender can by the recognition of such groups be one of several innate or unchangeable qualities which characterise the members of a particular social group. As an example of other common qualities which women who are members of a particular social group can have in addition to being women, is: age, race, marital status and financial situation.²³⁵

²³⁴ "Gender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition. The relevant assessment is whether the claimant, as a woman, has a well-founded fear of persecution in her country of nationality by reason of her membership in this group."

²³⁵ Particular social groups comprised of sub-groups of women may also be an appropriate finding in a case involving gender-related persecution. These particular social groups can be identified by reference to factors, in addition to gender, which may also be innate or unchangeable characteristics. Examples of other such characteristics are age, race, marital status and economic status. Thus, for example, there may be sub-groups of women identified as old women, indigenous women, single women or poor women. In determining whether these factors are unchangeable, consideration should be given to the cultural and social context in which the woman lives, as well as to the perception of the agents of persecution and those responsible for providing state protection.

5.3.4.4 *England*

The English guidelines do not express that women in general can be regarded as a social group. They establish that a social group is identified by the members of the group having characteristics which are innate, unchangeable or characteristics which are changeable but so fundamental that it should not be required that they be changed. Thereafter is given a non-exhaustive list of characteristics which can contribute to identify a particular social group in the sense of the Convention.

The sex of a person is one of the characteristics which in relation to the English guidelines can identify a social group "Examples of such characteristics are [...] sex, age family and kinship, past economic status/class, occupational history, disability, sexual history and ethnic, tribal or clan affiliation."²³⁶

5.3.5 The Ministry of Justice guidelines dated 13.01.98

In item 4 of the guidelines, it is established that "persecution because of sex [...] which is a principle legal asylum starting point shall be included under the Convention's refugee concept, with the result that asylum is granted in these cases. It was thus established that persecution based on sex could be included in the Convention ground membership of a social group. It was further defined that:

"gender-related persecution will in practice affect women. In the first instance one refers to situations where women through their acts, omissions and expression of opinions break the written and unwritten rules for social life, rules which especially affect women with regard to dress, the right to take work outside the house, etc. If breaking such rules is punished by strict reactions of such a serious nature that they can be characterised as 'persecution' in relation to the 1951 Convention, then the basis is that asylum shall be granted. [...]"

²³⁶ Cite, Gender Guidelines for the determination of asylum claims in the UK, para. 4.22

Another example of gender-related persecution will exist in the cases where the rules in question concern both sexes, but where women who break them are punished considerably more strictly than men.”

Based on a natural understanding of the wording of the guidelines it seems as though the Ministry by these guidelines has intended to express that women in general can form a social group. The guidelines seem rather to tend toward the sub-group theory and recognition of the fact that the role of the sexes can be one of several characteristics which can define a social group in the sense of the Convention.²³⁷ Gender, the social, can be of one of a person’s several relevant characteristics which cumulatively can define a social group.²³⁸

Based on the wording of the guidelines it seems as though they provide the legal basis for women or men who are members of a separate sub-group, namely those who because of “acts, omissions, and expression of opinions, who break the written and unwritten rules for social life” can be said to form a social group. The definition of a social group which is applied in the guidelines, or the given criteria in the guidelines, for interpretation of the Convention’s “particular social group” is assumed to be based on the Memorandum from the Ministry of Justice Immigration Office to the Political Leadership, presented before the guidelines were drawn up.²³⁹ The Norwegian guidelines are different from other countries’ guidelines when they choose to define the sub-group of women who can fall under the Convention’s concept “particular social group.”

²³⁷ This is supported by the statement in the memorandum which was drawn up by the Ministry of Justice Immigration Office before the guidelines were drawn up. (Memorandum from the Immigration Office to the Political Leadership on “the Refugee Convention’s definition of a refugee – evaluation of Norwegian practice in relation to this – proposal for changes.”) In the memorandum the following is stated: “Where the question of gender-related persecution is concerned, it seems not to be natural to characterise more than 50% of the world’s populace as a particular social group ... [...] However, it nevertheless clear that the Refugee Convention in itself does not prevent inclusion of these cases in the refugee concept.” Cite, Memorandum, p. 11

²³⁸ Stated further in the Memorandum: “Persecution alone because of gender is as previously mentioned, not a current constellation.” Cite, Memorandum p. 38

²³⁹ Ibid

An interesting question is whether the legislators have intended the guidelines to be given an a *contrario* interpretation. An a *contrario* interpretation will mean that women, who do not actively “through acts, omission or expression of opinions” break the written and unwritten laws for social life cannot be regarded as a particular social group under Norwegian law. The problem is particularly relevant for women who are exposed to domestic violence. These women often experience that they are exposed on a daily basis to gross human rights violations in spite of the fact that they do everything which they should do according to the unwritten social rules for a wife and mother. Many women in the cases reviewed in connection with the project state they were obedient, had children, made food and kept themselves at home in the hope that the husband would be satisfied and therefore stop hitting them.²⁴⁰ The following citation from an asylum case in UDI exemplifies the problem with women exposed to domestic violence and the Convention ground social group such as it is defined in Norwegian law:

”The applicant could possibly have fallen under the Convention in accordance with ‘persecution because of membership of a particular social group, as a woman’. [...] am a little uncertain of how this shall be interpreted in relation to women who experience domestic violence, cf. ‘the new criteria’ (dated 13.01.98), in relation to women and asylum. Even though in her marriage she did not behave contrary to the country’s norms for how a Pakistani woman should behave, her former husband clearly thinks there is reason to blame her *inter alia* because she has been educated and he has not.”

In the interpretation of the guidelines it seems as though it was the legislator’s intention that they should be given an *a contrario* interpretation and regarded as being exhaustive. It is stated explicitly in the guidelines that “in the first instance one shall refer to” women who through their acts, omissions, etc. break the rules for social life. The words “in the first

²⁴⁰ In an asylum case where the applicant is from Pakistan and asserts the ground for asylum as domestic violence states in the interview: “husband made trouble when, for example, the washing was not put out in time. Husband was often away for long periods of time and when he came home he was angry if things were moved round.”

instance” point towards the guidelines not being interpreted as exhaustive on this point. Based on practice we have had access to in connection with this project, it does not seem as though the immigration administration interprets the guidelines a contrario either. As will be shown below in 3.6.1, in several cases in UDI, women from particular countries have been regarded as being a particular social group,²⁴¹ independent of whether they by acts, omissions or expression of opinions have broken the social rules.

5.3.6 Practice by UNE and UDI

5.3.6.1 Introduction

56 cases of the 200 cases involving women which have been reviewed in connection with the project deal with women who have been exposed to persecution *as* women or *because* they are women. In 17 of these cases it is sought to give a definition of a social group. Of these 17 cases, 11 were granted asylum, and in the remaining 6 othum was granted. In four of the cases othum was granted in accordance with § 8, subsection 2, cf. IR § 21, subsection 2, in one of the cases in accordance with IR § 21, subsection 3, the so-called 15-month-rule, and in one of the cases in accordance with IR § 21, subsection 1.

Number of cases	55
Social group is defined or evaluated	17
Number of cases where social group has not been evaluated	38

²⁴¹ Cf. also the decision in *Shah/ Islam* by England’s House of Lords, and New Zealand case discussed in para. 3.2.2 above

The table below gives an overview of why one has not evaluated the Convention ground social group.

Reason why social group is not evaluated (38 cases)	Asylum is granted, Convention ground not defined	No persecution, therefore no Convention ground discussed	Credibility	No future-oriented persecution	Private assaults	Other Convention ground
Number	4	17	7	5	2	3

The different definitions and evaluations of the Convention ground “social group” which has been found in the cases reviewed in connection with the project will be presented below.

5.3.6.2 Practice

Case GPRL 05 is a young woman asylum seeker from Ethiopia. The woman asserted the ground for asylum that she was exposed to bride kidnapping. The woman was taken in the man’s car to his village, where she was forced to have sex with him. The man already had three wives, but wanted a fourth, and kidnapped the applicant. The applicant lived with her husband for one month before she escaped. The woman was granted asylum by UDI. The following is stated in the internal remarks with regard to the requirement for a Convention ground: ” ‘Membership of a social group’ is pertinent in this case. The pertinent social group will be “Ethiopian girls who are in danger of bride kidnapping, who refuse to

obey’.” The definition given to a social group is thus: ” Ethiopian girls who are in danger of bride kidnapping, and who refuse to obey.”²⁴²

In another case, GPRL 06 where the applicant was a young girl from Ethiopia, this time exposed to threats of bride kidnapping, asylum was granted and social group identified. The definition from the case referred to above was repeated. In its evaluation of the criteria ”social group” the following is stated in the remarks: ”Gender is not one of the criteria in the Convention, but it can fall under the alternative ‘social group’. In my opinion the applicant will fall under a group which can be called ‘ young woman who is in danger of being exposed to bride kidnapping and who are not willing to go along with it’ (cf. Einarsen, re.. the Fatin case).” The definition which is given to the social group: ”young woman who is in danger of being exposed to bride kidnapping and who is not willing to go along with it”.

In GPRL 08, where the applicant was a young woman from Pakistan, othum was granted in accordance with § 8, subsection 2. UDI found that there were compassionate grounds present. The woman was not granted asylum, since it was found that the Convention’s requirements for “persecution” were not met. The following is stated on the Convention ground social group: ”The persecution is because of membership in a social group. The applicant has suffered domestic violence, gender-related persecution.” Without being able to state explicitly it seems as though one is of the opinion that women who suffer domestic violence for a social group. Assumed definition: women who suffer domestic violence.

One of the applications from Eritrea GPRL 11 was submitted by a young woman who feared forced marriage. The woman was granted asylum by UDI. The following is stated in the remarks: in connection with the Convention ground social group: "In this case one must evaluate the applicant’s arguments in relation to her membership in the social group which can be defined as ’afari women’.” Definition of social group: ”afari women”.

²⁴² My highlighting.

In connection with a case from Somalia, GPRL 21, the woman asserted as a Convention ground that she had entered into a love marriage with a man of lower caste. The woman was granted othum in accordance with § 21, subsection 1. Asylum was not granted because it was found that a "well-founded fear of persecution" existed. In the remarks the following is stated regarding the interpretation of the Convention ground social group: "The pertinent alternative will be 'social group'. It is difficult to regard women in general as a social group." Second member says the following about the interpretation: "'women in Somalia who are married to Midgan and who refuse to comply with the family's demands regarding divorce'. This is too vague since these women do not regard themselves as a social unit in society". In accordance with UNHCR's guidelines it is not a requirement "that the members of a particular social group know each other or associate with each other as a group"²⁴³. It seems as though the second member wishes to interpret a requirement into what one in English refers to as "cohesiveness". This is the opposite of what UNHCR recommends in its new guidelines.²⁴⁴ Assumed conclusion: "women in general are not a social group".

In case GPRL 23 a woman from Pakistan feared for her own and her spouse's life upon return to the home country since they had entered into a love marriage against the family's wishes. The woman and her husband were both granted asylum. In relation to the requirement that the persecution must be due to one of more of the Convention grounds, the following is stated: "the persecution must be said to be because of membership in a 'social group': gender-related persecution". Assumed conclusion: gender-based persecution entails that the Convention ground social group is fulfilled.

Case GPRL 25 is a woman from Pakistan who asserts domestic violence as an asylum ground. The woman fears for her life upon return since she alleges that the husband has threatened to kill her if she returns. The caseworker, who recommends othum in accordance with § 8, subsection 2

²⁴³ Cite, GUIDELINES ON INTERNATIONAL PROTECTION, para. 15, p. 4

²⁴⁴ See re this para. 5.2.1.3 *in fine*

writes the following with regard to social group: "The applicant could possibly fall under the Convention in accordance with 'persecution because of membership in a particular social group, as a woman' [...] little uncertain as to how this shall be interpreted in relation to women who experience domestic violence, cf. 'the new criteria' (dated 13.01.98), in relation to women and asylum. Even though she in her marriage did not behave contrary to the country's norms for how a Pakistani wife shall behave, her former husband clearly thinks that there are grounds to blame her *inter alia* because she has been educated and he has not." The wording of the guidelines is applied here. The guidelines express that it is the women who break with social norms who shall be regarded as a social group, in this case it is unclear whether the applicant has broken with social norms. The case is an example that the guidelines, such as they are formulated, do not encompass all women exposed to gender-based persecution, for example, those women who experience domestic violence. The woman in this case was finally granted asylum. Conclusion: only the women who by their acts, expressed opinions, or omissions break the rules for social life can be regarded as a social group, a contrario interpretation of the guidelines.

In case GPRL 27, also this from Pakistan, where the applicant and her husband had entered into a love marriage, the couple were granted asylum. The following is stated in the remarks: "The persecution must be said to be due to 'membership of a particular social group', gender-based persecution." Assumed conclusion: gender-based persecution entails that the Convention ground social group is fulfilled.

In case GPRL 33 a woman from Somalia was granted asylum. The woman asserted domestic violence as a ground for asylum, including that she had been held as a slave by her husband and his new wife. The caseworker writes the following in the remarks: "If there is to be any social group it must be 'the group of women in Somalia' – and that is not defined as a social group in accordance to practice from Somalia, as is the case in Afghanistan. In addition, a social group must have a distinctive character, which also goes beyond the fact that they are persecuted group." The second member writes this in the comments: "Fully possible to say that 'women in Somalia' form a social group. The decisive in the further evaluation is to decide whether the persecution took place because of

membership of this social group. (Causal link)". The woman was granted asylum.

Defined social group: women in Somalia.

In a case from Iraq, GPRL 32, where the asserted asylum ground was domestic violence, it is established in the remarks that women can be regarded as being a social group. Asylum was granted. "In the guidelines for easing of the asylum criteria, women are regarded as being a social group...." Defined social group, women.

In case GPRL 34, asylum was granted because of domestic violence. The woman and her son, who were from Iran, had over a lengthy period of time been exposed to serious violence. The following is stated in the remarks on social group: "Women in Iran must be regarded as being a social group." Defined social group, women in Iran.

In relation to regarding women in Iran as a social group, it is clear that there have been developments in UDI. The above case was decided in March 2001. In an asylum case from Iran GPRL 35, February 2000, in which the woman asserted the same grounds as the case above, domestic violence, the following has been stated in the remarks: "since women at present cannot be said to fall under the concept 'social group' in the Convention, the alleged violence will not give the right to asylum." Conclusion: women in Iran are not a social group. In the above-mentioned, from February 2000 the woman was granted othum in accordance with IR § 21, subsection 3.

A woman from Iraq, GPRL 37, who sought asylum because of domestic violence was granted asylum. The following is established in the remarks: "Women in Iraq are regarded as a social group." Defined social group, women in Iraq.

In GPRL 39 a woman from Pakistan who fled her home country because of domestic violence was granted asylum. The following is stated in the internal remarks regarding social group: "the persecution is due to membership in a particular social group. The applicant has experienced domestic violence, gender-based persecution. The applicant falls under the

Convention”. Assumed conclusion: gender-based persecution entails that the Convention ground social group is fulfilled.

In GPRL 49 from UNE, a young woman from Pakistan sought asylum because of domestic violence. The Board states the following regarding the Convention ground social group: ”The appellant’s arguments do not concern circumstances connected to any of the Convention grounds ’race, religion, nationality, membership of a particular social group, or political opinion’.” Further, in another paragraph of the decision: ”the Board finds it doubtful that the appellant can be regarded as included in the concept ‘membership of a particular social group’ “.

In another case, GPRL 50 from UNE, in which the applicant is a woman from Pakistan who fears honour killing because of a love marriage, the woman was granted asylum by UNE. In the discussion of the Convention ground the following is stated in the decision by the Board: ”The appellant is regarded as belonging to a particular social group”. There is more stated about the Convention ground in the remarks: ”Can ‘Pakistani women, who have entered into love marriages, across caste boundaries and against the family’s wishes, be regarded as a ‘particular social group’? This is the doubtful question in the case. [refers to the fact that one is aware that UDI has granted asylum in two cases where love marriage has been asserted as the asylum ground. The Ministry of Justice “Guidelines for new asylum criteria” dated 13.01.98; adjust the lower boundary (boundary against othum) for granting of asylum [..]. Here it is stated: ’The changes entail that also persecution will in practice affect women. In the first instance reference is made to situations where women through their acts, omissions and expression of opinion break written and unwritten rules for social life, rules which especially affect women, for example, with regard to dress, the right to take work outside the home, etc. If violations of such rules are punished with reactions of such serious nature that these can be characterised as persecution in relation to the 1951 Convention, asylum shall be granted-“Thereafter the caseworker concludes that the requirements for asylum are met.

5.4 Summary and overview

The different definitions of “particular social group” referred to above can be seen as follows in table:

Id	Particular social group defined as
GPRL 05	”Pertinent to this case is ‘membership of a social group’. The pertinent social group here is therefore ‘Ethiopian girls who are in danger of bride kidnapping, and who refuse to obey’.
GPRL 06	”Gender is not one of the criteria in the Convention, but it can fall under the alternative ‘social group’. In my opinion the applicant will fall into a group which can be called ‘young woman who is in danger of being exposed to bride kidnapping and who is not willing to go along with it’ (cf. Einarsen, re the Fatin case). The fact that she chose to leave the country shows that she is not willing to obey this tradition.”
GPRL 08	”The persecution is due to membership of a social group. The applicant has suffered domestic violence, gender-based persecution.”
GPRL 11	”In this case one must evaluate the applicant’s arguments in relation to her membership of the social group which can be defined as ‘afari women’.”
GPRL 21	”The pertinent alternative will be ‘social group’. It is difficult to regard women in general as a social group. Second member: ”’women in Somalia who are married to Midgan and who refuse to comply with the family’s demands regarding divorce’. This is too vague since these women do not regard themselves as a social unit in society.”
GPRL 23	” the persecution must be said to be because of membership in a ‘social group’: gender-based persecution.”
GPRL 25	”The applicant can possibly fall under the Convention in accordance with ‘persecution because of belonging to a particular social group, as a woman’. I am a little uncertain as to how this shall be interpreted in relation to women who experience domestic violence, cf. ‘the new criteria’ (dated 13.01.98), in relation to women and asylum. Even though she in her marriage did not behave contrary to the country’s norms for how a Pakistani wife shall behave, her husband clearly thinks there is reason to blame her <i>inter alia</i> because she is educated and he is not.

GPRL 27	''Persecution must be said to be because of 'membership of a particular social group', gender-based persecution
GPRL 32	"In the guidelines for easing of asylum criteria, women are regarded as being a social group...."
GPRL 33	"If there is to be a social group it must be 'the group of women in Somalia' – and that is probably not defined as a social group, in accordance with practice from Somalia, such as it probably is in Afghanistan. In addition, a social group must have a distinct character, which goes beyond the fact that they are a persecuted group." (First member) "Fully possible to say 'women in Somalia is a social group. The decisive in the further evaluation is to decide whether the persecution has taken place because of membership in this social group. (Causal link)" (Second member)
GPRL 34	''Women from Iran must be regarded as a social group''
GPRL 35	''since women at present cannot be said to fall under the concept 'social group' in the Convention the alleged violence will not give the right to asylum''. (This case also concerns a woman from Iraq)
GPRL 37	''Women in Iraq are regarded as a social group''.
GPRL 39	''The persecution is due to membership of a particular social group. The applicant has suffered domestic violence, gender-related persecution. The applicant falls under the Convention.''

6. Cultural relativism²⁴⁵

”..saying that human rights are universal is saying that they are the rights of all persons in the world [...] universality as general applicability implies the absence of any criterion restricting the in-group: time, place, nationality, race gender, age, language, religion, political or other opinion, origin, property, birth.....”²⁴⁶

“The rights of the Man in the twentieth century cannot be circumscribed by the standards of any single culture or be dictated by the aspiration of any single people.”²⁴⁷

Article 1 in the UN Declaration of Human Rights expresses the fundamental principle within the theory of international human rights, the principle of universality: ”all human beings are born free and equal in dignity and rights”.

The principle of universality is challenged by the theory of cultural relativism. Supporters of this theory are of the opinion that international human rights are a result of western imperialism, and that human rights challenges fundamental principles in many of the world’s largest religions and cultures. The basis of the theory of cultural relativism is an opinion that all cultures are alike, and human rights as a representative for a western culture, cannot be regarded as universal.²⁴⁸

²⁴⁵ The debate surrounding the principle of universality and the theory of cultural relativism is very extensive, and it will be outside the scope of the theme of this report to go into details. Two extremely good articles, which in many ways represent the extremes in the debate can be recommended to interested readers: J.S Watson, ”Legal Theory, Efficacy and Validity in the Development of Human Rights Norms in International Law” University of Illinois Law Forum, 1979 No. 3, p. 609-641 og M. Ignatieff, ”Whose Universal Values? The Crisis in Human Rights”, Premium Erasmianum Essays 1999

²⁴⁶ Cite, E. Brems, Human Rights: Universality and Diversity”, Martinus Nijhoff Publishers, The Hague 2001, p. 4

²⁴⁷ Cite, E. Brems, Human Rights: Universality and Diversity”, Martinus Nijhoff Publishers, The Hague 2001, p. 24

²⁴⁸ C.M Cerna, J.F.Wallace, ”Women and Culture”, i K.D.Askin og D.M.Koenig (eds.), ”Women, International Human Rights Law”, Volume 1, Transnational Publishers, New York 1999, pp. 623-651

”Relativists argue that the principles enshrined in the Universal Declaration reflect Western values and not their own, and they complain that the West is interfering in their internal affairs when it imposes its own definition of human rights upon them.”²⁴⁹

The debate on cultural relativism and the principle of universality concerns mainly whether the discord between different human rights, the right to culture²⁵⁰ and the rights of minorities²⁵¹ are in conflict with the right to individual rights, for example, freedom of religion or the right to choose a spouse. ”The claim is that if international human rights norms conflict with particular cultural standards, the particularity of culture must take precedence over universalising trends.”²⁵² The counter argument is that the right to culture can come into conflict with other fundamental rights, and that the right to culture must yield. ”The situation for women from minority groups and diverse ethnic and indigenous groups is more complex. One must read the provision on group rights together with the existing body of international law that guarantees the rights of women.”²⁵³ To apply the culture argument as a reason for discrimination of women is in conflict with the principle in CEDAW Art. 5, which directs member states to abolish cultural customs which support discrimination.

The culture argument has over time received less support, since it is recognised that the right to culture cannot take precedence over fundamental rights which are regarded as *jus cogens* or ”non-derogable”. Many of the *gender-specific violations* to which women are exposed are so serious that they entail violations of the prohibition against torture,

²⁴⁹ Cite, C.M Cerna, J.F.Wallace, ”Women and Culture”, i K.D.Askin og D.M.Koenig (eds.), ”Women, International Human Rights Law”, Volume 1, Transnational Publishers, New York 1999, pp. 623-651, s. 627

²⁵⁰ ICCPR artikkel 27

²⁵¹ Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, 1992, U.N. Doc. A/RES/47/135/Annex

²⁵² Cite, H. Charlesworth, C. Chinkin, ”The boundaries of international law, A feminist analysis”, Melland Schill Studies, Juris Publishing, Manchester 2000, s. 222

²⁵³ Cite, R. Coomaraswamy, ”Identity within: Cultural Relativism, Minority Rights and the Empowerment of Women”, *George Washington International Law Review*, 2002, Volume 34, p. 483-512, p. 491

inhumane and degrading treatment. The prohibition against torture is regarded as *jus cogens*.

”FGM, Sati and honour killings are the type of women’s human rights violations that most resemble torture. The prohibition of torture is *jus cogens*, a norm of international law that cannot be derogated from by nation states. [...] Because these cultural practices resemble torture, universal human rights must be seen to easily trump cultural relativist arguments that foster these particular practices.”²⁵⁴

The question which is of interest to this report in relation to the theory of cultural relativism is whether the culture argument can be applied as an argument against recognising certain types of violations as persecution in the sense of the Convention. For example, circumcision is not to be regarded as persecution, since it is based on a cultural custom. Can the fact that gender-specific violations or gender-based persecution are connected to cultural or religious traditions be of relevance to the asylum evaluation?

The Convention refers in its definition to the fact that it has as an aim to provide protection to individuals exposed to “persecution”. Whether or not the individual is exposed to a type of violation which originates in culture should not be of relevance to the evaluation. The purpose of the Convention is to protect the individual who has a well-founded fear of being persecuted.

In relation to women arguments are often put forward that a denunciation of cultural customs and traditions which repress women will offend the sovereignty of a state. As a continuation of this argument it is often expressed in a legal refugee context that violations against women as a result of such cultural customs and traditions are so widespread that asylum cannot be given in such cases. Arguments with the background in the discussion on relativism are not relevant to the right to refugee status, if the violations from which the asylum seekers are fleeing are of a sufficiently serious nature and extent. If a woman is exposed to violations which can be

²⁵⁴ Cite, Cite, R. Coomaraswamy, “Identity within: Cultural Relativism, Minority Rights and the Empowerment of Women”, *George Washington International Law Review*, 2002, Volume 34, p. 483-512, p. 498

regarded as persecution in the sense of the Convention she has no less right to protection than others if the cause of the violations is cultural or religious customs. Such attitude will be contrary to what was established at the World Conference on Human Rights in Vienna.²⁵⁵

"Gender-based violence and all forms of sexual harassment and exploitation [...] are incompatible with the dignity and the worth of human person, and must be eliminated."²⁵⁶ "The World Conference on Human Rights stresses the importance of [...] the eradication of any conflicts which may arise between the rights of women and the harmful effects of certain traditional and or customary practices cultural prejudices and religious extremism."²⁵⁷

Arguments that the violations the woman asserts as grounds for asylum are not of such an extent as to warrant the grant of asylum are contrary to the principle of universality which establishes that everyone is entitled to all rights. Women have a right to protection of their human rights to the same degree as men, independent of whether they are born into a particular cultural or religious tradition where their rights are violated on a daily basis.

"The right to safety, dignity of life, and freedom from cruel, inhumane or degrading treatment or punishment are not culturally derived, but stem from the common humanity of individual."²⁵⁸

In an internal memorandum from UNE on gender-based persecution, the following is stated regarding the relationship between the persecution concept in the Convention and the problems surrounding co-called "cultural relativism":

"Some will assert that the general norms women live in accordance with in, for example, Iran, Saudi-Arabia, Pakistan and Afghanistan are to be regarded as persecution of women. [...] If we look more closely

²⁵⁵ Vienna Declaration and Programme of Action, from the World Conference on Human Rights held in Vienna in June of 1993

²⁵⁶ Cite, Vienna Declaration and Programme of Action, Part I, para. 18

²⁵⁷ Cite, Vienna Declaration and Programme of Action, Part II, para. 38

²⁵⁸ Cite, South African guidelines p. 18

at the conditions in society in the countries in question, it will be seen that the problem is more complex. The legal and social norms these women live according to originate in religious and cultural conditions, in some countries reflected by the fabric of society. To characterise the fabric of society in the countries which live according to the norms of one of the world's most widespread religions – Islam – as persecution, the question is also raised regarding the requirement for respect for other people's way of thinking, culture, religion (which are also human rights). Many (most?) women in, for example, Iran and Pakistan will hardly see their situation as persecution. They live according to the religious and cultural norms of the society because they find it natural or as a result of their own beliefs. Other women obtain the consent they want or need from the male head of the family to be able to study or work, for example".²⁵⁹

In the evaluation of whether a person is persecuted, it is this person's subjective situation which is in focus. In the evaluation of whether the condition for persecution is met, it is the individual asylum seeker's situation which is considered, recognition that he or she is persecuted and is not given protection in their home country, is not the same as a denunciation of this person's home country's religion or culture in general. Cultural relativism cannot be applied as an argument in the evaluation of the persecution concept. The refugee institution is about giving protection to a persecuted person, recognition of a person's right to refugee status must not be confused with denunciation of other people's way of living in their home country.

Through the Women's Convention CEDAW Art. 2 f) signatory states, including Norway, are obligated to "take all appropriate measures, including legislation to change or repeal existing laws, regulations, customs and practice which discriminate against women."²⁶⁰ The Australian guidelines follow up on this line. ".It should be noted that harmful practices in breach of international human rights law and standards cannot

²⁵⁹ Cite, "Arguments on gender-based persecution in asylum cases", Memorandum from the Board of Immigration Appeals, p. 8

²⁶⁰ See also CEDAW Art. 5 and 10 c)

be justified on the basis of historical, traditional, religious and cultural grounds."²⁶¹

²⁶¹ Sitat, UNHCR 2002 Gender Guidelines, para. 5 *in fine*

7. Conclusion

7.1 A holistic gender perspective

Starting with the provision in the Immigration Act that a “refugee” has the right to asylum²⁶², The Refugee Convention’s Art. 1 A that ”any person” can have refugee status, and the international non-discriminatory principle, a gender perspective should be implemented in Norwegian refugee law. The purpose with such implementation is non-discrimination, or equal treatment, of asylum application.

The review of asylum cases in connection with this report has shown that there is no direct discrimination of asylum applications with a gender aspect in the Norwegian immigration administration. Based on the presentation of cases in Chapter 4 it is clear that many asylum seekers, whose applications contain a gender aspect, are granted asylum in Norway. However, the review of cases has shown that relatively similar asylum application sometimes have a different outcome, that forced marriages for example, in some cases are recognised as persecution in the sense of the Convention, and at other times are not. That seemingly neutral casework nevertheless at times results in discriminatory treatment is assumed to be due *inter alia* to uncertainty and confusion concerning the current rules, and possibly in particular with regard to the concept ”gender-based persecution”. Another reason can be that traditional interpretation of the Immigration Act and Refugee Convention has been undertaken in a male paradigm. Implementation of a holistic gender perspective followed up by new regulations and more detailed rules, as well as recognition of the significance of international human rights as an interpretation factor, will probably ensure a larger degree of equal treatment in refugee law.

The present legislation does not represent a satisfactory tool for the immigration administration in the decision of asylum applications with a gender perspective. In the work by the Ministry of Local Government and Regional Development with new regulations and in the Law Commission’s

²⁶² Cf § 17 cf § 16

work with a new Act, it is recommended that one goes in for the introduction of a gender perspective in refugee law. The gender aspect, which is found in very many asylum applications, represents a diversity of complex problems which are not reflected in the present legislation.

Introduction of a gender perspective entails recognition that gender can be a relevant factor in the evaluation of asylum applications. In this regard, the word “gender” reflects the biological sex, man/woman, and the social gender, the role of the sexes.

The following arguments speak then for implementation of a gender perspective in Norwegian refugee law:

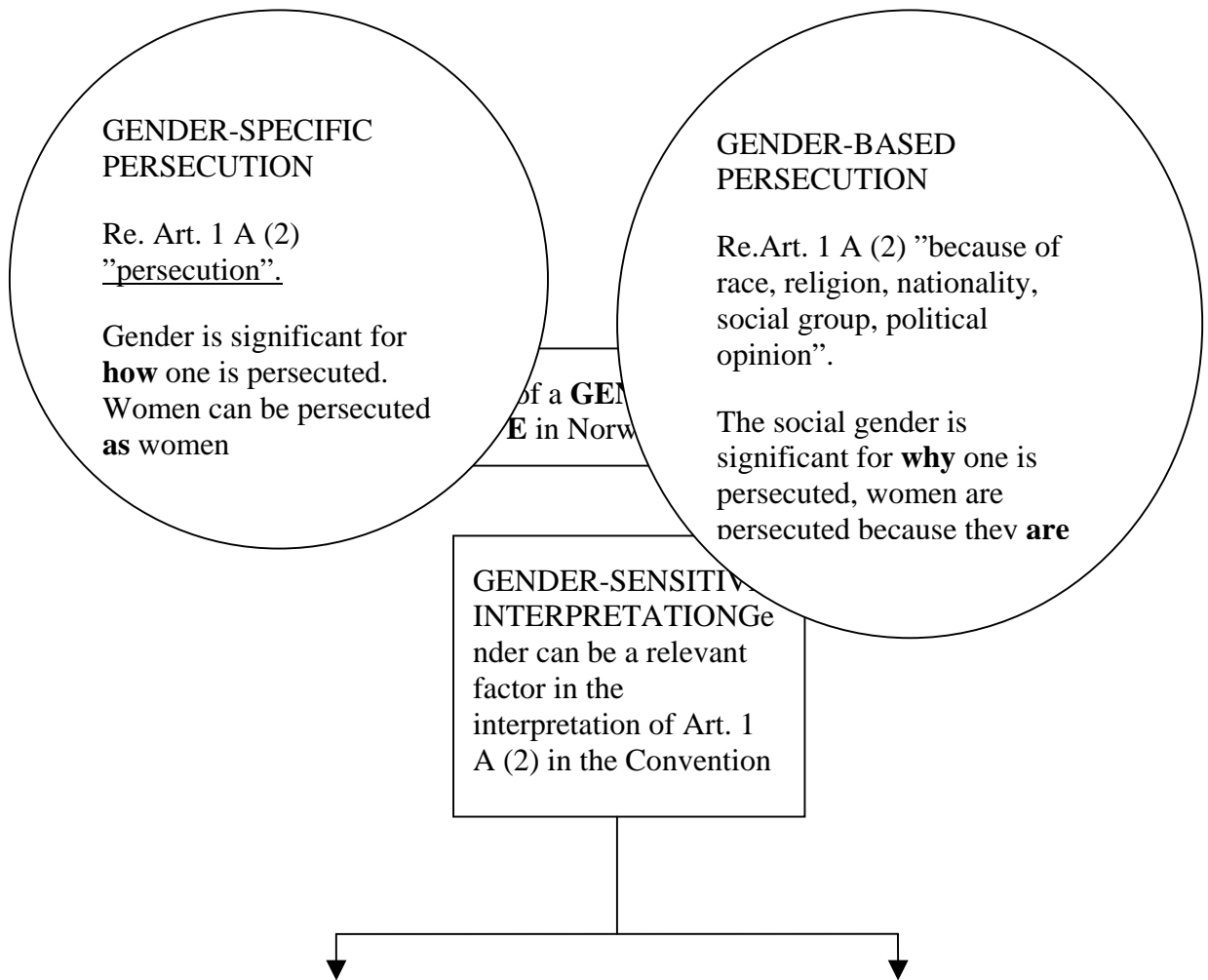
Norway is bound by the international non-discriminatory principle, *inter alia* through the Refugee Convention Art. 3 and the International Convention on civil and political rights (ICCPR) Art. 26, the latter implemented in Norwegian law by the Human Rights Act.

With the starting point in the non-discriminatory principle, a gender perspective should be included in Norwegian refugee law by a new Act and new Regulation.

The need for inclusion of a gender perspective is due *inter alia* to the fact that the traditional interpretation of the Refugee Convention has been undertaken in a male paradigm.

Another reason for the need for changes is the uncertainty which prevails in the present legislation. Clearer rules are necessary, which to a greater degree than the existing ones reflect the complex problems which asylum applications with a gender perspective represent.

Implementation of a gender perspective entails recognition of the fact that gender can be a relevant interpretation factor in the application of the Convention. A *gender sensitive interpretation* must be used as a basis. A gender-sensitive interpretation entails recognition of the fact that the biological or social gender can be of significance to *how* a person is persecuted, *gender-specific persecution*, and *why* a person is persecuted, *gender-based persecution*.



7.2 The persecution concept, *gender-specific persecution*

With regard to the application and interpretation of the persecution concept, it is decisive to achieve equal treatment of asylum cases with a gender aspect that there is recognition that gender can be a decisive factor for the type of violation a person is exposed to. Dynamic development of refugee law concerning asylum applications with a gender aspect requires recognition that gender-specific violations can amount to persecution.

The Law Commission and Ministry should, in the work with new regulations and new legislation, include international human rights as a relevant interpretation norm in the interpretation of the persecution concept. In the preparatory works and regulations one should explicitly refer to the relevant international law sources. Actual use of sources in the interpretation process assumes that those who apply the law have knowledge of and access to them. The following international law sources are relevant:

- UN Declaration on Human Rights
- ICCPR
- ICESCR
- ECHR
- Convention against Torture
- Women's Convention (CEDAW)
- Declaration on the Elimination of Violence Against Women (1993),
- CERD
- Convention on the Rights of the Child
- Fourth Geneva Convention (1949), Additional Protocols (1977) to the Geneva Conventions,
- Genocide Convention

- Rome Statute for the International Criminal Court
- UN Convention against Transnational Organised Crime
- UN Protocol to Prevent, Suppress and Punish Trafficking of Persons
- Inter-American Convention of the Prevention, Punishment and Eradication of Violence Against Women
- as well as consulting reports by the UN Special Rapporteur on Violence against Women²⁶³

Application of international law and international human rights in the interpretation of the persecution concept will give the interpretation process a legal aspect. Because international human rights set forth a general minimum standard, they will be able to contribute to asylum applications being treated according to the same yardstick. Because application of international human rights will lead to decision of asylum application based on a common standard, this will mean a greater degree of equality in treatment.

In nearly all the cases which are presented in the report, the asylum seeker has been exposed to or fears assaults from one or more private persons, and not the authorities. Recognition of the fact that persecution in the sense of the Convention can be exercised both by private persons and individual authorities is of relevance to asylum cases with a gender aspect.

It therefore follows that it is without significance for the right to asylum whether violations occur in the private or public sphere. In several cases presented in Chapter 4 arguments have been presented by the immigration administration that the Convention's conditions have not been met since the violations took place in the home or are of a private nature. Rejection of an application for asylum cannot be founded on the fact that the perpetrator is private and that it is a question of a family conflict. Only the fact that one

²⁶³ Ms. Radhika Coomaraswamy, appointed by resolution 1994/45, 4 March 1994

condition in the Convention's definition is not met can be the reason for rejection.

In the cases where the person behind the persecution is a private person, a refugee has the right to asylum if his or her home state does not have the ability or will to protect against private agents of persecution. In the interpretation of the condition regarding the home state's ability and will, attention should be paid to the international standards in CEDAW Art. 2, Declaration on Violence against Women Art. 4, Beijing Platform of Action Part D1 and UNHCR's new 2002 Guidelines para. 11. It is a condition that the home state does not have the ability and will to give effective protection against private agents of persecution. Legislation which prohibits gender-specific violations does not mean that a person has effective protection if the law is not enforced. The review of practice shows that there is uncertainty in parts of the administration concerning how strictly the requirement for effective protection shall be interpreted and applied.

As regards asylum cases with a gender aspect, it is important in the interpretation and application of the persecution concept, to recognise that gender can be a factor of significance for the type of violation a person is exposed to, **how** he or she is persecuted.

Gender-specific persecution can amount to persecution in the sense of the Convention. The violations to which women, for example, are typically exposed to, (honour killing, rape, bride kidnapping) can amount to persecution.

An objective of gender-neutral interpretation of the persecution concept can best be achieved by the application of international human rights conventions which set forth *de facto* gender-neutral standards for fundamental human rights as an interpretation norm.

Examples of *gender-specific violations* are: rape and sexual assault²⁶⁴, circumcision²⁶⁵ and domestic violence²⁶⁶.

Both private persons and persons having public authority are to be regarded as agents of persecution in the sense of the Convention.

In the evaluation of whether a person fears persecution because he or she cannot obtain protection in the home country, a central element to the assessment is whether he or she lacks protection in the home country either because the state itself is behind the acts (lack of vertical protection) or that the state does not have the ability or will to protect against violations committed by other individuals (the state does not fulfil its horizontal responsibility)²⁶⁷.

The fact that the state also has a responsibility for providing horizontal protection entails that persecution by private agents also falls under the Convention, if the state does not have the ability or will to protect against it.

The interpretation of the ability or will of an asylum seeker's home country to provide protection against private agents is of particular relevance in relation to asylum cases with a gender aspect, since the agent of persecution in these cases is most often a private person.

The requirement that the state must have the ability and will to provide protection also includes a requirement for effective protection.

The new preparatory works and new Act should define what the legislator means to include in a requirement for effective protection. In the work with

²⁶⁴ can be a violation of : UN Declaration on Human Rights, Art. 3 and 5, ICCPR Art. 7, 9, 6 (1), ECHR Art. 2, 3 and 5, Geneva Convention VI Art. 127, ICC Art. 7 (1) g), 8 (b) xxii

²⁶⁵ can be a violation of.: UN Declaration on Human Rights Art. 5, 25, ICCPR Art. 7, ECHR Art. 3, ICESCR Art. 12, CEDAW Art. 12(2), Child Convention Art. 2 (2), 24 (3) and the Council of Europe Resolution 1247

²⁶⁶ can be a violation of: UN Declaration on Human Rights, Art. 1 5, 3, ICCPR Art. 7, 12, ECHR Art. 3, CEDAW Art. 12 (2), CEDAW General Comment No. 19

²⁶⁷ Theory on *Drittwirkung*

drawing up such provisions the legislator should take into account CEDAW Art. 2, Declaration on Violence against Women, Art. 4, Beijing Platform of Action Part D1 and UNHCR's new 2002 Guidelines para. 11.

The new regulations and preparatory works should set forth the evidence requirements which are to be used in the evaluation of the state's ability and will. In this connection it should be decided whether the evidence requirement shall be the same for asylum cases with a gender aspect, and other asylum cases.

The Convention's persecution concept is future-oriented. Only persons with a 'well founded fear of persecution' have the right to refugee status. The future-oriented persecution concept means that very few women exposed to persecution in the form of rape and sexual assault will be granted asylum in Norway.

In the above overview of cases where the applicant has asserted rape and sexual assault as asylum grounds, none of the applications were granted asylum. Article 1 C (5) reads as follows:

“This Convention shall cease to apply to any person falling under the terms of section A if: He can no longer, because **the circumstances** in connection with which he has been recognized as a refugee have **ceased to exist**, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A (I) of this article who is able to invoke **compelling reasons** arising out of previous persecution for refusing to avail himself of the protection of the country of nationality;”

”Under the assumption that expression of persecution in the form of actual assaults in itself provides the basis for 'well-founded fear' in the context of the refugee definition, the wording of Art. 1 C (5) speaks against refugees who have personally been exposed to serious persecution – or who have experienced serious attacks on their family or friends – being included in the scope of the clause. In this connection it is the actual circumstances –

the proved *previous* persecution and the strong *subjective impression* by which it has been fixed in the memory – are circumstances which by their nature will not ‘cease to exist’.”²⁶⁸

UNHCR’ Handbook paragraph 136 states the following regarding the interpretation of the Convention Art. 1C (5) subsection two:

”The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to **very serious persecution** in the past and will not therefore cease to be a refugee even if fundamental changes have occurred in his country of origin. [...] It is frequently recognised that a person who – or whose family- has suffered under **atrocious forms of persecution** should not be expected to repatriate. [...] Even though there may have been a change regime in his country, this may not always produce a complete change in attitude of the population, nor, **in view of his past experiences, in the mind of the refugee.**”²⁶⁹

An interesting question which is not discussed further in this report is whether women exposed to serious rape can be said to fall under the provision and should thus be granted asylum.

7.3 ”Particular social group”, *gender-based persecution*

The Norwegian guidelines from 1998 express that women, who are persecuted because of their sex because they have broken social rules, can fall under the Convention ground ”particular social group”. The guidelines are silent with regard to which criteria shall be used for the evaluation of whether a woman asylum seeker can be said to belong to a social group. The international debate concerning the theme social group was about just this theme.

²⁶⁸ Cite, Einarsen p. 537, also Einarsen p 534-538

²⁶⁹ Cite, UNHCR Handbook para. 136

In the evaluation of the concept "particular social group" the caseworkers in the immigration administration have few sources to guide them. This is because neither the Act, preparatory works nor regulations, nor the guidelines give any guidance on interpretation. In Anglo-American law, with the aid of case law over time, one has developed theory concerning the concept social group such that caseworkers have been given relatively clear interpretation criteria to deal with. This is not the case in Norway, where the Refugee Convention's concept "particular social group" has not been the object of significant discussion in the justice system, and in addition the other sources are, as mentioned, silent on the matter.

In informal conversations, the caseworkers in UNE and UDI have expressed great uncertainty in the application of the Convention ground. Some have expressed that because of great uncertainty one avoids discussing the concept "membership of a social group" if it is possible. This can be some of the explanation of the fact that in the 55 cases which deal with gender-based persecution there are actually four cases where asylum has been granted, but where the Convention ground has not been discussed. Uncertainty concerning the interpretation of the concept social group is also probably the reason that the conclusion in four of the 17 cases seems to be that in cases of gender-based persecution, one is dealing with persons who can be regarded as a particular social group.

The lack of clear interpretation criteria makes the decision of asylum cases where the ground for asylum is asserted as gender-based persecution very difficult. As mentioned introductorily the application of the Convention ground social group has become more pertinent since focus has gradually been put on gender-based persecution. The guidelines of 1998 put the theme of gender-based persecution on the agenda, but the guidelines are incomplete in that they give little guidance on how the objective of protecting women who are persecuted because of breaking social rules shall be achieved in practice.

As shown in para. 2.2, foreign practice has over time drawn up clear criteria for how the concept "particular social group" shall be interpreted in practice. Case law from the US, Canada and New Zealand, however, has little weight as a source of law in Norway. Nevertheless it is interesting to see that three of the 17 cases apply the same definition of a social group as

the House of Lords in *Shah/Islam* and the New Zealand Appeal Court in Refugee Appeal No. 71472/99, namely that women in a particular country can be said to form a social group. All these three asylum cases were decided after 2000, the year in which the Refugee Appeal No 71472/99 was decided. One shall be cautious with drawing extended conclusions from this fact. No reference is made to the decisions in England and New Zealand in any of the Norwegian decisions. Nevertheless, it seems as though foreign judgements like these, in spite of having little weight as a source of law, can have certain significance in the absence of other clarifying sources.

In that UNHCR has chosen to implement the interpretation criteria listed in the judgements in their new interpretation criteria, it can be argued that the decisions will thus be given increased weight as sources of law in Norway too. A further discussion of weight these foreign sources carry as sources of law is no longer particularly interesting from a legal point of view if the Ministry of Local Government and Regional Development's proposal for changes to the Immigration Regulation are passed. In the proposal for a new § 58 c in the Regulation, the definition of social group in the new UNHCR guidelines is namely implemented.

The proposal for a new IR § 58 c reads as follows:

"Membership in a particular social group includes persons who have some common characteristics, or who are perceived as a group of the society. The common characteristics will often be innate, unchangeable, or otherwise so fundamental to their human worth that they should not be required to change them. The members of a social group do not need to be known to each other or behave as a group. Persecution alone cannot define a social group, but the circumstance that members of the group risk persecution, is a relevant factor in the evaluation of whether a particular social group exists."

The proposal sets forth criteria for the interpretation of "a particular social group", persons who can be said to belong to such group must have "common characteristics" and these can be "innate, unchangeable or otherwise so fundamental for the members' human worth, that they should not be required to change them", alternatively, the group must be perceived to be a group of society.

By the introduction of new regulations, the individual caseworker will have to evaluate the following questions in regards to the application of the concept "membership of a particular social group":

Can the asylum seeker be said to a member of a particular social group?

Is the group perceived to be a group of the society where the asylum seeker comes from?

If the group is not perceived to be a particular social group of the society in the asylum seeker's home country, does it include persons with common characteristics?

Does the group have several common characteristics than just persecution? For example, characteristics which are innate, unchangeable or so fundamental to the person's human worth that they cannot be required to be changed?

7.4 Final remarks, table

This table gives no uniform answers as to why the number of residence permits granted on humanitarian grounds for protection reasons is so much higher than the number of asylum cases where asylum is granted. However, it seems clear that there is no main reason to explain the differences. The boundary between asylum and residence permits on humanitarian grounds for protection reasons is affected by several factors, and there is hope that the report with its reference to and presentation of administration practice will give an insight into at least some of them.

The table below gives an overview of the cases which are presented in the report. The table presents an overview of the individual asylum seeker's home country, asserted ground for asylum in the asylum application, whether there is a Convention ground, and in which month and year a decision in the case is made.

Id. GPRL	Home country	Asylum ground	Conv. ground discussed	Year	Result
GPRL 01	Yugo ²⁷⁰	As gypsies no protection in home country, attacks, rape	No, because of no persecution	Apr 01	Rejection
GPRL 02	Yugo	Kept in captivity, ill-treated and raped during the war. Expelled from family because she became pregnant after rape.	No asylum because of future-oriented evaluation	Oct .02	Othum iaw § 15,1,2
GPRL 03	Somalia	Kidnapped, raped, pregnant, expelled from society		Jun 01	Othum iaw § 15, 1 either 1. or 2.
GPRL 04	Algeria	Bullied, stones thrown at, exposed to death threats because of western style dress	No	Oct 99	Othum iaw § 15,2
GPRL 05	Ethiopia	Bride kidnapping, forced to have sex, beaten	Yes, social group	Mar 02	Asylum
GPRL 06	Ethiopia	Bride kidnapping	Yes, social group	Jan 02	Asylum
GPRL 07	Iraq	Honour killing	No, nevertheless asylum	Dec 01	Asylum
GPRL 08	Pakistan	Domestic violence	Yes, social group	Dec 01	Othum "compassionate grounds" § 8, 2

²⁷⁰ Abbreviation for Yugoslavia

GPRL 09	Iraq	Honour killing (sister of GPRL 07)	No, nevertheless asylum	Dec 01	Asylum
GPRL 10	Sudan	Generally difficult situation in home country, discrimination and harassment	No	UDI Jan 01 UNE Dec 01	Rejection by UDI and UNE
GPRL 11	Eritrea	War situation and forced marriage	Yes, social group	Nov 02	Asylum
GPRL 12	Eritrea	Forced marriage	Yes, social group	Nov 02	Asylum
GPRL 13	Yugo	Rape	No, no persecution because of future-oriented evaluation	May 02	Rejection UDI and UNE
GPRL 14	Yugo	Rape	No, no persecution because of future-oriented evaluation	Apr 01	Othum
GPRL 15	Somali a	Rape and general unsafe situation	No	Jun 99	Othum iaw § 8,2
GPRL 16	Somali a	Rape, general unsafe situation	No	Mar 00	Othum iaw § 8,2
GPRL 17	DRC Congo	Rape, imprisoned and tortured	No	Feb 02	Othum iaw § 15,1,2
GPRL 18	Iran	Forced marriage	No	Jul 00	Rejection
GPRL 19	Somali a	Bride kidnapping treated as forced marriage	No	Jul 02	Othum iaw § 8,2
GPRL 20	Somali a	Bride kidnapping, escaped from it and fears killing	Yes, social group	Jul 02	Asylum
GPRL 21	Somali a	Love marriage	Yes	Aug 01	Othum iaw IR § 21,1
GPRL 22	Somali a	Forced marriage	No	Jun. 02	Othum iaw § 8, 2

GPRL 23	Pakistan	Love marriage, accused of unfaithfulness, threats from father	Yes, social group	Jan. 98	Asylum
GPRL 24	Sri Lanka	Persecuted by opposition and ill-treated by husband	No	Oct 01	Othum iaw § 8, 2
GPRL2 5	Pakistan	Domestic violence, he threatens killing on return	Yes, social group	Dec 01	Asylum
GPRL2 6	Pakistan	Ill-treated by father-in-law, raped, ill-treated and persecuted by police because of father-in-law	No	Oct 00	Othum iaw IR § 21, 2
GPRL2 7	Pakistan	Love marriage	Yes, social group	May 00	Asylum
GPRL2 8	Iraq	Fears killing by Baath party upon return because of political activity	Yes, political opinion	Jun 02	Othum iaw IR § 21, 1
GPRL2 9	Iran	Forced marriage to deceased husband's brother + danger of losing the children	No	Dec 01	Rejection
GPRL3 0	Somalia/Denmark	Forced marriage	No	Jul 02	Rejection
GPRL3 1	Sudan	Attacks by police	No	Nov 99	Othum because of 15-month rule, but rejection first
GPRL3 2	Iraq	Domestic violence	Yes, social group	Feb 02	Asylum

GPRL33	Somalia	Domestic violence	Yes, social group	Jun 02	Asylum
GPRL34	Iran	Domestic violence – husband and son	Yes, social group	Mar 01	Othum IR § 21,2 compassionate grounds
GPRL35	Iran	Domestic violence – husband and in-laws	Yes, not social group	Feb 00	Othum iaw IR § 21,3
GPRL36	Iran	Domestic violence – husband, he is heroin addict, exposed to forced prostitution	No	Feb 00, UNE May 02	Rejection
GPRL37	Iraq	Domestic violence	Yes, women in Iraq are a social group	Dec 01	Asylum
GPRL38	Pakistan	Domestic violence and forced prostitution	No, even though asylum granted	Oct 01	Asylum
GPRL39	Pakistan	Domestic violence – husband also hits children	Yes, social group	Oct 01	Asylum
GPRL40	Afghanistan	Forced marriage, fear of being killed because she refused marriage	Yes, social group women	Oct 98	Asylum
GPRL41	Croatia	Domestic violence, fears discrimination since she is a muslim and fears for her life on return	No	Jan 02	Rejection, then after reversal othum iaw § 8, 2
GPRL42	Croatia	Domestic violence which continued after marriage. Ill-treatment of children.	Yes, ethnicity and discrimination	Jun 02	Asylum
GPRL43	Sudan	Politically active therefore imprisoned several times, opposed effect of Sharia laws on women	No	Sept 01	Othum because of 15-month rule
GPRL44	Eritrea	Domestic violence	No	Oct 01	Rejection UNE +

					UDI
GPRL4 5	Iraq	Fears for her life because her father has threatened to kill her since she participates in feminist work	No, nevertheless asylum.	Nov 02	Asylum
GPRL4 6	Iran	Forced marriage	No	May 01	Othum iaw § 8, 2 because of 15-month rule
47	Turkey	Rape, sexual assault	No	-----	Othum iaw § 15, 2 cf § 8, 2
48	Somalia	Forced marriage	No, because no persecution	-----	Othum iaw § 8, 2
49	Pakistan	Domestic violence	No, because of no persecution	-----	Othum iaw § 8, 2
50	Pakistan	Love marriage	Yes	-----	Asylum
51	Kosovo	Forced marriage	Yes	-----	Othum § 8, 2
52	Russia	Harassment by public officer	Yes	-----	Othum § 15, 1, 2
53	Russia	Persecuted by political work for the opposition	Yes, political opinions	-----	Othum § 8, 2
54	White Russia	Persecuted because of political opinions	No, not persecution because of future-oriented evaluation	-----	Rejection
55	White Russia	Persecuted because of political opinions	No, no persecution	-----	Othum § 15, 1, 1

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