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The Public Persecution of Domestic Violence

A feminist critique of the exclusion of women's claims from the 1951
refugee definition

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Abstract

In recent years the gendered aspects of the 1951 refugee definition have been discussed within asylum law and amongst feminist theoreticians, claiming that women's persecution grounds often aren't defined legitimate within the definition. This thesis address the issue of women fleeing domestic violence; a persecution by a non-state actor. With a starting point in feminist theories critique of the liberal private/public divide, it criticize and describes the exclusion of women's asylum claims from the refugee definition as reflecting liberal thoughts separation of the public and private spheres. Women's given location in the private sphere excludes them from the public recognition of their claims. It then argues that domestic violence needs to be considered a legitimate asylum claim, by allowing women subjected to persecution by a non-state actor to count as members of a particular social group, hence gaining legitimate refugee status according to the definition - as has been decided in individual verdicts of some of these cases. It also argues that the Due Diligence standard needs to be adopted in deciding the state's responsibility, ability and willingness and in the end failure to protect women from non-state persecutors.

Key words: Private/public, Domestic violence, Refugee definition, Feminist theory, Normative Value Analysis

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List of Abbreviations

BIA	the United States Board of Immigration Appeals
CEDAW	the Convention on the Elimination of all sorts of Discrimination Against Women
EU	European Union
IVAWS	International Violence Against Women Survey
PSG	Particular Social Group
UN	United Nations
UNHCR	the United Nations High Commissioner for Refugees; the UN Refugee Agency
WHO	World Health Organization

1 A woman and the causality link

1.1 Rodi Alvarado Peña

Ms. Rodi Alvarado Peña was sixteen years of age when she married her husband Francisco Osorio, a former soldier in the Guatemalan military. From the inception of their marriage Osorio subjected her to violent physical and sexual abuse. He would hit or kick Ms. Alvarado whenever he felt like it, wherever they happened to be in the house, on the street, on the bus. He would mistreat her when he was drunk and when he was sober. Her husband dislocated her jaw when her menstrual period was 15 days late; kicked her violently in the spine when she failed to heed his demand that she abort her three to four month old fetus; kicked her in her genital area so violently that she suffered internal hemorrhaging; and brutally raped her time and time again, both vaginally and anally, beating her before and during the unwanted sex. She had repeatedly been turned down by the police and the authorities when she sought help, telling her to keep her problems at home.

After more than ten years of this violent abuse, Ms. Alvarado decided that the only way to save her life was to flee Guatemala, leaving her family, her two-year old son and seven-year old daughter (Musalo, Knight 2004:4-5).

In 1995 she came to the United States (U.S.), Bronswille, Texas. She was fortunate to obtain the help of the San Francisco Lawyers Committee for Civil Rights. In 1996, a San Francisco immigration judge granted Ms. Alvarado asylum. But the immigration service chose to appeal. In June 1999, the Board of Immigration Appeals (BIA) reversed the decision of the immigration judge, and ordered that Ms. Alvarado be deported to Guatemala. The BIA agreed that she had a well-founded fear of persecution and that Guatemala was unable or unwilling to protect her from her husband. Nonetheless, it held that she failed to demonstrate any of the characteristics protected by the statute or, even if she did, that her husband had persecuted her "on account of" these categories (Reimann 2009:1203). Because his persecution was bounded by their marriage and he had only, at that point, persecuted her, he was not an agent of persecution and she did not belong to a particular social group (Heyman 2008:124). The decision in the matter of Rodi Alvarado led to denials of asylum protection to women fleeing a broad range of serious human rights violations, including trafficking for prostitution, gang rape and honor killing, as well as domestic violence in the U.S. (<http://cgrs.uchastings.edu/campaigns/alvarado.php>).

Gross gender inequality in Guatemala is not a recent phenomenon; women have historically been oppressed and cultural norms persist to conceive of women as subordinate to men. All of this has led to a situation where the conditions women live in are among the worst in Latin America. The Guatemalan Civil Code accords legal primacy to the husband in the marital relationship. Members of the UN Committee on the Elimination of Discrimination against Women reported in April 2003 that Guatemala's report and presentation to the Committee increased their concern at the discrimination institutionalized in law in the country. The education of women is considered unimportant because a woman's place is in the home. More than 80% of the illiterate persons in Guatemala are female, and the country has the highest rate of females without formal education in all of Latin America. The subordinate status of women is inextricably related to the broad acceptance of violence against them; this violence is tolerated and legitimized by laws and customs. Domestic violence has reached epidemic proportions in Guatemala; a 1990 survey of 1,000 women reported that 48% had been battered by their partners, who used fists, feet, knives, razor blades, sledge hammers and pieces of wood to attack them (Musalo, Knight 2004:8). Out of every ten women murdered, four are killed by their husbands. Although they are the victims of these brutal assaults, women are most often portrayed as the provocateurs of the abuse, reinforcing the societal attitudes of discrimination and ignorance regarding the human rights of women. As was Ms. Alvarado experience, women who turn to the police or the courts confront the attitude that domestic violence is not a real problem, or even a human rights violation. Both the police and the courts generally encourage women seeking their help to keep the problem to themselves (Reimann 2009:1208-1210).

1.2 Gender-based persecution and the 1951 Refugee Definition

In 1985 the United Nations High Commissioner for Refugees (UNHCR) stated following about women asylum-seekers:

States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social more of the society in which they live may be considered as a "particular social group" within the meaning of Article 1A (2) of the 1951 United Nations Refugee Convention (UNHCR 1985).

Five years later the UNHCR issued the first guidelines concerning women in need of protection "Guidelines on the Protection of Refugee Women" (UNHCR 1991). These guidelines were revised and completed and reissued in 2002 as the *"Guidelines on International Protection No. 1: Gender-Related Persecution*

within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees". These were also completed with the "Guidelines on International Protection No. 2: *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". The first mentioned guidelines contain many definitions important to women asylum-seekers, concerning investigation and assessment of gender-based persecution. The UNHCR address several issues when encouraging a gendered perspective within the asylum-procedures, practical issues like the ability to choose a female administrator and interpreter but also the guidance for countries and how to apply the definition of gender-based persecution to the 1951 definition (Aguirre, 2008:30).

Considering the case of Rodi Alvarado this following chapter will address the refugee definition and the different parts that need to be defined with in the case of the asylum seeker to gain refugee status. The focus will be on asylum seekers alleging gender-based persecution, and their place within asylum legislations.

1.2.1 The causal link ("for reasons of") – an equation

The 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees had by September 2007 been signed by 147 states (<http://www.unhcr.org/4848f6072.html>). According to Article 1 A (2) of Convention the term "refugee" shall apply to any person who:

"As a result of events occurring before 1 January 1951 and owing to well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

Underlying the Refugee Convention is the international community's commitment to the assurance of basic human rights without discrimination (Anker 2002:133), but as can be seen in the definition above, the protection of the convention is limited to persons who can prove that they feel well-founded fear for persecution in their home county because of their religion, nationality, race, membership of a specific social group or political opinion. Although the refugee convention is nearly sixty years old the essential parts of the convention have not changed. Since 1951 the conventions application has been somewhat expanded, removing the conventions limitations to those who became refugees during to the events that

occurred before 1951 (UNHCR handbook 1992¹). Other changes in application of the refugee definition have occurred in the development of new legal interpretations, themselves shaped by new refugee movements and development in international human rights law (Kelley 2002:561). The Convention was negotiated mainly by the U.S. and its European allies, boycotted by the eastern bloc (the exception being Yugoslavia). This has shaped the Convention greatly, as stated by Loescher:

The Convention was intended to be used by the Western states in dealing with arrivals from the East, and largely reflected the international politics of the early Cold War era (2001:44).

Although suggestions were made to include gender as a persecution category during the drafting of the Convention text, the proposition was dismissed with the argument that it was unlikely that there would be any persecution on account of gender (Spijkeboer 2000:1).

One of the cornerstones of the refugee definition is the causality between the well-founded fear of persecution and one of the five persecution categories as specified in the convention.

The five categories aren't exemplifications but thorough instructions as to who is by the convention defined a refugee. There is a distinction between persecution and the grounds upon which a person has been persecuted; the two should not be confused. Persecution is the measures that are injuriously directed against a person, while the grounds of persecution are found in the question why these measures are directed at the person.

Persecution + persecution grounds = persecution because of... one of the five categories.

This demand of causality makes it clear that the authors of the convention did not mean to give shelter to everyone seeking refuge from persecution.

Another cornerstone within the refugee definition is the fact that only people who cannot gain refuge from persecution in the home country are entitled international shelter. Shelter by another country will always be the secondary solution and will be implemented only when the home county fails its responsibility to protect. Hence:

Persecution + loss of protection + persecution grounds = persecution as defined in the Geneva Convention

Loss of protection means that (a) the state doesn't want - or isn't able to protect the person against the persecution (b) the person because of his/her well-founded fear of persecution doesn't want or isn't able to require the protection given by the

¹ The Handbook has frequently been regarded as authoritative in asylum decisions throughout the world and, though not binding, has been enormously influential among the countries adhering to the Convention (Heyman 2008:118).

home country. In the latter there has to be well-founded reasons for the person in question not to require protection of the home country. Following is the explanation of this causality within the 2002 UNHCR guidelines concerning gender-based persecution.

The well-founded fear of being persecuted must be related to one or more of the five Convention grounds. That is, it must be “for reasons of” race, religion, nationality, membership of a particular social group, or political opinion. The Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause. In many jurisdictions the causal link (“for reasons of”) must be explicitly established (e.g. some Common Law States) while in other States causation is not treated as a separate question for analysis, but is subsumed within the holistic analysis of the refugee definition. In many gender-related claims, the difficult issue for a decision-maker may not be deciding upon the applicable ground, so much as the causal link: that the well-founded fear of being persecuted was for reasons of that ground. Attribution of the Convention ground to the claimant by the State or non-State actor of persecution is sufficient to establish the required causal connection (UNHCR Gender Guidelines 2002 (20)).

1.2.2 Membership of a Particular Social Group (PSG)

The last few years there has internationally been an increase in asylum cases claiming persecution because of membership of a particular social group. This category is the most discussed and vague of all in the refugee definition (UNHCR 2002 PSG guidelines 1(1)). Its frequent invokement the last few years may be an indication of the need for further definition beyond the categories of the Convention. The UNHCR PSG guidelines from May 7th 2002 say about the category:

“Membership of a particular social group” is one of the five categories enumerated in Article 1A(2) of the 1951 Convention relating to the Status of Refugees (“1951 Convention”). It is the ground with the least clarity and it is not defined by the 1951 Convention itself. It is being invoked with increasing frequency in refugee status determinations, with States having recognized women, families, tribes, occupational groups, and homosexuals, as constituting a particular social group for the purposes of the 1951 Convention. The evolution of this ground has advanced the understanding of the refugee definition as a whole.

The origin of the Geneva Convention gives no further clarity to the interpretation of the category. The category was added in a last minute attempt by the Swedish delegate who feared that some people, belonging to a particular social group, in need of protection risked being excluded from the definition. The proposition passed without a wider discussion (Aleinikoff 2001:4). No one knows who the

authors of the Convention defined as belonging to a particular social group, considering that the refugee definition in the Convention hasn't changed considerably since 1951, maybe the category is vague to be able to be applied depending on the political situation changing over time (see UNHCR 2002 PSG Guidelines 1 (3)).

Gender-related claims have often been analyzed within the parameters of this ground, making a proper understanding of this term of paramount importance. However, in some cases, the emphasis given to the social group ground has meant that other applicable grounds, such as religion or political opinion, have been overlooked. Therefore, the interpretation given to this ground cannot render the other four Convention grounds superfluous.

Thus the 2002 UNHCR PSG guidelines define the particular social group within the 1951 definition as following:

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

1.2.3 National Guide-Lines

In 1993 Canada became the first state party to the United Nations Convention relating to the Status of Refugees to issue specific guidelines supporting the inclusion of the claims of women, based on gender, in the interpretation of and protection afforded "refugees" under the terms of that treaty. The "*Women Refugee Claimants Fearing Gender-Related Persecution Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, 19*" were issued by the Immigration and Refugee Board of Canada (Anker et al. 1997:1, Aguirre 2008:31). In 1995, the U.S. followed Canada's lead with the guidelines "*US Immigration and Nationality Service, Considerations for Asylum Officers Adjudicating Asylum Claims from Women*", followed by the renewed issue of "*Gender Guidelines for Overseas Refugee Processing*" in 2000. In 2009 the U.S. moved towards, as first country, recognizing women victims of domestic violence as a legitimate group within the category of membership in a particular social group within the definition (McGral 2009). In 1996, Australia issued similar guidelines "*Guidelines on Gender Issues for Decision-Makers (Refugee and Humanitarian Visa Applications)*". The United Nations Human Rights Commission's Special Rapporteur on Violence Against Women has endorsed gender asylum guidelines, urging other states' parties to the Refugee Convention to adopt them. Since the beginning of the 21st century other states have started forming similar guidelines. The European Union (EU) has encouraged states to form guidelines in the last decade since the issue has gained attention around the world. Unfortunately only Sweden and Great Britain have today thoroughly

revised guidelines. In Britain the Home Office issued guidelines in 2000 which were later revised in 2006 and are now called the "*Asylum Policy Instructions (APIs) 'Gender Issues in the Asylum Claim'*". Sweden has passed a special law for the recognition of such claims, in 2001, revised to their current condition in 2006 and are now called "*Guidelines for investigation and assessment of women's needs for protection and needs for protection depending on sexual orientation*". Spain and Ireland are currently developing similar guidelines. Although this development has been positive, there are still a majority of states, parties to the Refugee Convention, that haven't addressed the issue (Anker et al. 1997:1, Aguirre 2008:31).

Although guidelines are made and gender put on the table of asylum politics in some countries, there are difficulties of fitting the new guidelines in the old doctrine, especially in cases that in more than one sense diverge from the norm within the refugee definition. Cases such as domestic violence.

1.3 In the end

Although there was no doubt in the horrifying details of Ms. Alvarados story, the causality link between her well-founded fear and her belonging to a particular social group, by her lawyer defined as "married women in Guatemala who are unable to leave the relationship", was considered harder to prove setting her on a 14 yearlong waiting list for a decision. In the end, on December 10th 2009, asylum was granted to Rodi Alvarado Peña by the U.S. authorities. The large legal question in her case was whether women who suffer domestic abuse are part of a "particular social group" that has faced persecution. The break came when the Department of Homeland security, in a separate asylum case in April 2009, pointed to some specific ways that battered women could meet this standard.

Excerpt from The Guardian 2009 "Obama moves to grant political asylum to women who suffer domestic abuse":

The Obama administration has moved to grant political asylum to foreign women who suffer severe physical or sexual abuse from which they are unable to escape because it is part of the culture of their own countries. The decision, made evident in a court case involving a battered woman from Mexico, ends years of dispute over the issue which saw the Bush administration stall moves toward recognizing domestic violence as legitimate grounds for asylum made during Bill Clinton's tenure. (...) But women who apply for asylum will still face significant obstacles. "These are not easy cases to prove," said Musalo. "LR must prove that in Mexico violence against women is pervasive and that there is a societal perception that this is acceptable. Then she has to prove that the Mexican government is unable or unwilling to protect her, and on top of that she has to show that there is nowhere in Mexico where she can be safe from her abusers (McGral 2009)."

Thereby Ms. Alvarado's lawyers could argue that her circumstances met the requirements that the department had outlined in April. The department agreed, in practice making the case a model for other asylum claims. The immigration judge issued a summary decision granting Ms. Alvarado asylum. The decision simply stated: "In as much as there is no binding authority on the legal issues raised in this case, I conclude that I can conscientiously accept what is essentially the agreement of the parties to grant asylum." With this decision, Ms. Alvarado's long struggle for protection was finally resolved (<http://cgrs.uchastings.edu/campaigns/alvarado.php>).

2 Gendering the 1951 Refugee Definition

In this chapter I will problematized the different components of the introductory chapter laying a foundation for my argument; that the claims of women fleeing their home countries because of domestic violence are excluded from the refugee convention. Considering this I argue that domestic violence should be a legitimate asylum claim.

2.1 Considering the Problem

The 1951 Geneva Convention's definition of a refugee has set the standard worldwide, binding the worlds asylum laws to one concept unthreatened by any world crises. Still slowly but surely ways have been found to incorporate those excluded by the definition but still in need of help. Through the years the concept of a refugee has therefore evolved and so have the problems of interpretation. Thus, as some components have proved reasonably manageable, others have been more unruly (Heyman 2005:730). While all participants in asylum proceedings are involved in a high stakes venture, asylum seekers alleging state failure to restrain domestic violence face additional difficulties because of enormous evidentiary problems, murky legal standards, and the fact that domestic violence claims depart from the usual paradigm for asylum cases – seeking protection “abroad” from the conducts of one's partner. Many courts have resisted these asylum claims because they view the issue a form of private conflict, which cannot be resolved by asylum law (Heyman 2008:115-116). Some states have even refused to grant refugee status under the Geneva Convention when the persecution suffered has been from a non-state actor, thus ruling out many forms of gender-based violence as grounds for granting asylum (Freedman 2007:83) and revealing a tragic protection gap in the Convention (Heyman 2005:730). The establishment of national guidelines in countries like Canada, the U.S. and Sweden, a development highly encouraged by the UNHCR, UNs Special Rapporteur on Violence Against Women and the EU, to tackle asylum seekers claiming gender-based persecution is in itself an indication that these claims have been excluded from the 1951 refugee definition.

To be granted refugee status, a person needs to prove not only that he or she has a well-founded fear of persecution, but that that fear exists “for reasons of” race, religion, nationality, membership of a particular social group, or political opinion and that the home state is unable or unwilling to protect you from that

persecution (Freedman 2007:84). As presented in the introduction, it is this causality link that is essential to one's case, and in cases of women fleeing domestic violence, very hard to prove:

First and foremost 'gender' is not one of the five categories recognized by the definition. The authors of the Convention set the standard when expressing that a gender category wasn't needed within the text "since it is unlikely that anyone would suffer persecution based on gender (Spijkeboer 2000:1). These views were typical for the time when the women's rights movement hadn't made its way into politics especially international politics. It is an implication of the prevailing attitude that permeated the Convention text, attitude embedded in liberal thought that will later be discussed in the theory chapter. In addition to this, the definition of a refugee was written using the male pronoun (see Seith 1996:1813). For a case of a woman seeking protection "abroad" from a non-state actor to be valid, the case has to fall within the existing standards of the definition. As can be seen in the empirical example of Rodi Alvarado in the introduction, these cases mostly invoke the category 'membership of a particular social group'. Because of pervasive attitudes among decision makers that gender alone cannot constitute a particular social group - largely out of fear that such an allowance would make half of a country's population eligible for asylum² - applicants have felt constrained to describe their claims in terms of extremely narrow subsets of 'women'. Gender alone, however, is often the single factor linking the persecution to the protected ground, both motivating the persecutor to harm the victim and accounting for the failure of the victim's state to adequately protect her. Thus, these applicants face the paradox of defining their particular social group very narrowly only to render nearly impossible their ability to establish the required causal nexus between the persecution and their narrowly defined particular social group (Reimann 2009:1201). For domestic violence victims the hardship isn't only getting the gender-based persecution to count as a well-founded fear, or fitting within the definition of a particular social group, but also proving that the state wasn't able to protect them from their non-state persecutor. As was seen in the introduction of the case of Ms. Rodi Alvarado, if there is no support within the law or the doctrine of asylum procedures, this causality link can be impossible to provide.

To say that states aren't responsible for violations of women's rights in the private sphere ignores the fact that such abuses are often condoned or even sanctioned by the state even when the immediate perpetrator is a private citizen. The distinction between the private and the public is the divide largely used to justify and exclude human rights abuses in the home from public scrutiny (Bunch 1995:14). Article 16 of the Convention on the Elimination of all sorts of Discrimination Against Women (CEDAW) is the article most states who have signed the convention have chosen to reserve themselves against, claiming just this, the sanctity of the private sphere. The article addresses equality in the family,

² See the discussion about comments made by The head of the French Refugee Appeal Commission (Freedman 2007:85, and a U.S. judge in Oxford (2005:23) on page 38.

the woman's right to choose if she wants to marry, have children and so on (UNIFEM Sverige 2008:42). Doesn't the refusal of states to allow human rights to percolate this sphere make them responsible for the violence in it?

The refugee convention provides protection to anyone under international law who falls within the frames of the definition, unbiased to gender. Many critics though have argued that the laws and conventions were drafted on the experiences of male refugees. Even if the definition per se didn't exclude women who felt well-founded fear of persecution, it excluded women persecuted in a gender specific or related way. Considering that, women were in fact excluded. Rape was long seen not as an act of persecution but as an act of lust, female circumcision as a cultural practice and wife battery as a private matter confined to the privacy of the home (Seith 1996:1813). In the last two decades much of this has changed, a change that needs to continue. Documents like the Refugee definition are not static, nor are they a property of any human group. They need to be criticized and reproduced (Bunch 1995:13).

2.2 Purpose and Aim

The main argument of this thesis is that: *domestic violence should be a legitimate asylum claim*. The main question is therefore: *Why should domestic violence be a legitimate asylum claim?*

In this thesis I will use a critical point of view to analyze the refugee definition basing my critique in feminist theory and argument in the empirical discussion that has arisen the last few decades surrounding women's exclusion and the overlooking of their claims and rights. With a foundation for my argument in feminist theory, where equality is valued above all, I argue that a part of the achievement of equality between men and women is the equal consideration of their different grounds for fleeing their home country and being in need of protection – an equal foundation within refugee law. I do not argue that equality will be achieved when this is done, because I acknowledge that the discrimination of women is far more complex and deeply rooted than so. But an acknowledgement of the different points of reference that women and men have in the society and the discrimination women are subjected to and, sometimes, in need of protection from, is a step towards eliminating that same discrimination. My valuing therefore in this thesis will be from a critical point of view, by first shining a light on the discrimination and then arguing for the elimination of it. Björn Badersten explains the importance of this kind of valuing, when saying that in one sense conflicts of value and normative dilemmas are the true essence of politics. When it comes down to it politics are about prioritizing between two, often incompatible values. A central part of normative political analysis is to expose and problematize these conflicts or dilemmas, and through a problematization show that different values lead to different outcomes of how society is organized. The point is not to justify a specific principle but to show that the answer to the normative "should" question is decided by the values that

constitute the analysis (Badersten 2006:29-30). Human rights documents like the Refugee convention are written to enable the rights of all human beings, valuing the equal treatment of humans per se. By seeking to transform these global policies so that they better incorporate and respond to women's lives, I am demonstrating that women's issues are not separate but a neglected part of the global agenda.

I use the feminist critique of the liberal private/public dichotomy to define the exclusion of women's claims from the refugee definition as a problem. The same critical approach is then used to justify why domestic violence should be a legitimate asylum claim. Hence, the purpose of this thesis is to argue for domestic violence as a legitimate asylum claim. The aim is to use the feminist critique of the private/public dichotomy in liberal thought to acknowledge the exclusion of women's claims from the refugee definition.

This thesis is mainly a theoretical discussion of the feminist critique of the liberal private/public dichotomy, with a foundation in an empirical problem. Hence, my method through which I will seek to answer my main question will be a theory consuming, critical literature review based in a normative standpoint.

2.3 Outline

This thesis is divided into two main parts. The first part contains a theoretical discussion surrounding the feminist critique of the liberal dichotomy of the private and the public. Because of the normative question that is essential for this thesis, the use of normative value analysis will also be presented here as the base of the theoretical standpoint of this thesis. The second part will consist of an analysis of the main components (as addressed in the introduction) of the refugee definition departing in this feminist critique. Imbedded and addressed in the conclusion will be the recommendations that women fleeing domestic violence should constitute a particular social group under the refugee definition. The Due Diligence standard needs to be used in deciding the state's responsibility, ability and willingness and in the end failure to protect women from non-state persecutors. But before the theory chapter, some considerations.

2.4 Considerations

I will now address some of the considerations that explain the reasoning of my argument.

2.4.1 A concern of *all* women

There are problems in speaking about women and their experiences in a global context. Obviously, differences of class, wealth, race and nationality will lead to differing power relationships among women. Some feminists of color and women from developing nations have questioned attempts to universalize a particular understanding of feminism, charging white western feminists with inappropriately assuming that their particular concerns are shared worldwide. The gender regime of asylum consists of nationally ordered constellations of protectors and victims. Postcolonial feminist Gayatri Spivak's discussion of subaltern subjectivity and global imperialism in her often-quoted statement that "white men are saving brown women from brown men" (1985:121) provides a point of departure for deciphering some of asylum's shifting images of protector and victim.

In this thesis I make no claim that women's experiences are shared throughout the world. The mere existence of human rights documents and the refugee convention can be criticized of generalizing experiences and claiming to provide a universal solution, this is a critique I will not address. I use the theoretical framework of the feminist critique of liberal thoughts dichotomy of the private and the public because I believe that it provides an insight in the need of reformation of the refugee definition to include women and their claims – by providing an insight of the foundation of the construction of the document. This critique is used because of the foundation of the documents, as the human rights and the refugee definition, within this ideology (see Loescher 2001:44). I focus on the dichotomy of the private and the public because I believe that in the historical context of the refugee definition this divide is important to analyze as a base of the exclusion of women and their claims form it. Although some feminists have criticized this divide and the feminist critique of it as only considering the lives and experiences of white western women, this is not to say, according to most of these critiques, that feminism should give up on the private/public divide as a tool for feminist analysis. Indeed, this duality is profoundly relevant to all women living in societies touched on by liberal or Marxist ideology, in that it is the theoretical underpinning for the political system in which all citizens must work and live (Arneil 1999:69). With a starting point in a discussion surrounding, and empirical cases of, women seeking asylum on grounds of persecution by a non-state actor I believe that a discussion about their place in the refugee definition needs to be held. I will put this in a more general discussion of the lack of gender perspective within the refugee definition. I believe that this is needed to lay foundation for reformation of the same and inclusion of a gender perspective.

In this thesis I will not distinct western women from women from third world countries, neither the responsibility of western countries from third world countries. I do not see the question posed in this thesis as in need of a cosmopolitan analysis. I will not separate the claims of women from developing countries with the ones of developed countries. I build my argument on the basis that an inclusion of gendered-based persecution as a legitimate asylum claim and an acknowledgement of women as a possible particular social group within the refugee definition, needs to be able to provide protection for women from

Guatemala as well as Sweden. The causality link in the refugee definition is one that needs to be proved in every individual case; I don't critique this per se. That being said, an inclusion of women persecuted through domestic violence as a legitimate particular social group will grant the individuals who have this claim; have sought asylum for it; and who can show that their country of origin was unable or unwilling to protect them. Many women subjected to domestic violence don't want or aren't in need of fleeing their countries. Many women even if they wanted to aren't able to leave their homes and countries because of different reasons. This ability of course differs geographically, because of the much more complex and rooted discrimination of women than I have the ability to address in this thesis (see Freedman 2007:25).

2.4.2 Domestic violence

When dealing with a complex issue as domestic violence it is very important to specify in what sense the issue will be addressed and to tackle the delimitations to ones approach early on in the process. In 2002 the World Health Organization (WHO) reported that between 40-70% (depending on country) of female murder victims were killed by their husbands or boyfriends, in contrast to male murder victims. In the United States for example 4% of men murdered between 1976 and 1996 were killed by their wives, ex-wives or girlfriends (WHO 2002:118). Considering this the report further on states that one of the most common forms of violence against women is that performed by a husband or an intimate male partner. This is in stark contrast to the situation for men, who in general are much more likely to be attacked by a stranger or acquaintance than by someone within their close circle of relationships. The fact that women are often emotionally involved with and economically dependent on those who victimize them has major implications for both the dynamics of abuse and the approaches to dealing with it. Intimate partner violence occurs in all countries, irrespective of social, economic, religious or cultural group. Although women can be violent in relationships with men, and violence is also found in same-sex partnerships, the overwhelming burden of partner violence is borne by women at the hands of men (WHO 2002:89). This thesis doesn't aim to discuss the occurrence of domestic violence; instead it aims to discuss its presence within asylum politics and will therefore be addressed and limited to women as victims of the persecution as exemplified by the cases and guidelines that constitute the empirical framework of this thesis. This specification allows an analysis of the historical context in which the refugee convention was written. This being said, the recommendations I make by an acknowledgement of cases where the persecution lies at the hand of a non-state actor includes women or men fleeing this same persecution by the hand of their partner. The emphasis being the validity of a claim where the persecutor is a private individual. I use the claims of women in this thesis because of the large extent of their exposure to this "private violence", a power exercised by men. I make no assumptions that this is the only discrimination or the most important

one in society. In the last few years sexual orientation has been addressed within the frame of gender-based violence as a persecution ground, but this will not be further addressed here.

2.4.3 Operationalizing Gender

The word, in everyday use, denotes the biological sex of individuals. However, in feminist theory, the word is given different attributes. Feminists define gender as distinct from sex and subscribe the meaning of the word culturally and socially constructed characteristics. The question of differences between men and women has been central to the feminist debate on the ontological basis of that difference. From its inception feminist politics have depended on the differentiation between sex and gender. Claims that sexual division of labour, power and dispositions are not biological (sex) but socially constructed (gender) have enabled feminists of various schools to argue that women's social position can and should be transformed towards sexual equality. Gender is the socially and culturally constructed meanings of masculinity and femininity. Although they differ depending on the socio-cultural context in which they are constructed, there are some meanings to the words that are more or less general throughout different societies. Characteristics such as power, autonomy, rationality and public, are associated with masculinity and what it means to be a "real man". Characteristics like emotionality, dependence, weakness and private are often associated with femininity. A woman in a high position that includes a lot of power can therefore be viewed as masculine, but still being a woman. "Gender" is the subscribed qualities to men and women, in its meaning acknowledging the construction of the norm it stands for and not a natural essence of the biological sex (Tickner 2008:265).

Christine Delphy has outlined the development of the debate about sex and gender in feminism, stating that none question the assumption that gender is based on a natural, sexual dichotomy (2001:411). Judith Butler adds that when gender is understood to be constructed by culture, as sex is by nature, then not biology, but culture becomes destiny (in Yuval-Davis 1997:8). In spite of their theoretical differences both Delphy and Butler point out that gender precedes sex and that the cultural construction of the social division of labour and meaning is the very means by which sexual differences are constructed as natural and pre-social. The construction of male and female qualities has also situated these in a spatial context. Much of the explanation of women's oppression has been related to their location in a different social sphere from that of men. This division plays a central role in feminist theory, more specifically the critique of it. In the next section I will address the critique of this divide, painting out the main theoretical framework of this thesis.

2.4.4 Operationalizing Gender-related persecution; Gender-specific persecution

In this thesis I use the term gender-based-persecution in referring to persecution against someone because they *are* a man or a woman or/and *as* a man or a woman. This term is important since it has defined gender as an asylum claim in guidelines and recommendations throughout the world. This term consists though out of two meanings – persecution because of gender and as gender. These are important to differentiate since they have different meaning in asylum claims, as will be explained below:

Both men and women are victims of persecution, often based on the same grounds; political opinion and religious beliefs being some of them. Even if the same circumstances direct the persecution it is often manifested in different ways. For example in conflicts, women are more often subjected to sexual violence while men are imprisoned and executed (Freedman 2007:49). The term gender-specific-persecution means that the method of the persecution in itself is gender-specific; the act of the persecution is often different depending on the victim's gender. Still the victim, man or woman, is persecuted on grounds as exemplified above; political, religious and so on. By acknowledging the different way of torture that men and women can be subjected to, we can define the acts as persecution. For example, acknowledging rape of women in war as not just an inevitable pillage, but as crime under humanitarian law, the persecution itself can be recognized, for example as a war crime against an ethnic group. In short the victim is persecuted as a woman or man (SOU 2004:31,74-75, UNHCR Gender guidelines 2002, Freedman 2007:47-48).

The term gender-related-persecution instead means that the grounds for the persecution itself are gendered. In order to understand the nature of gender-related persecution, it is essential to define and distinguish between the terms “gender” and “sex”. Gender refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another, sex being a biological determination. Gender is not static or innate but acquires socially and culturally constructed meaning over time. Gender-related claims may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women (UNHCR Gender guidelines 2002). An example of gender-related persecution is persecution on basis of not following the cultural or social norms of how women or man ought to behave in a specific context. For example, women refusing to wear a veil can be victims of persecution or women and men whose sexual orientation isn't accepted within the society. The persecution act itself doesn't have to be gender specific though. The persecution is gender-related when the persecution is based in prevailing conceptions about gender, the socially and culturally meanings constructed over time (SOU 2004:31 :74-75).

Domestic violence is a persecution in which one person exercises power over another, more often a man over a women. Because she *is* a woman and the meaning of that in a certain cultural and social setting, violating her *as* a woman

through rape and other sexually implicated violations, as in the case of Ms. Rodi Alvarado presented above (Musalo, Knight 2004:4-5). The cases of domestic violence, hence, often fall under both specific and related persecution grounds, that is why I will be addressing them in this thesis as just ‘gender-based persecution’, considering the operationalization above.

3 Valuing equality - a theoretical discussion

Representation of the world, like the world itself, is the work of men; they describe it from their point of view, which they confuse with the absolute truth.

- Simone de Beauvoir (1972:175)

3.1 Normative value analysis

A value is for the normative analysis what reality is for the empirical, without it no research can be done. Peace, freedom, justice, equality are all when prescribed positive or negative quality, different values. A value is therefore everything that is argued to be better or worse than something else. More precisely it is an expression for something that is desirable or abominable on basis of which we can justify or condemn an action or condition. A value is the basis upon which the answer to the question of how something *should* be, and how this can be justified, is based. The justification in this case is the argumentation that is presented and that underlies the values stated. Normative analysis seeks to specify and problematize these value statements. If empirical analysis seeks to answer the question how something *is*, then normative analysis seeks to answer the question how something *should* be (Badersten 2006:21-22, Hermerén 1972:12-14).

A normative analysis consist therefore not just from different values but also a value hierarchy in which different political values are placed in order of preference. This hierarchy can be more or less abstract. Within feminist theory for example the overall value is the value of equality between men and women, but this equality is defined differently amongst feminist theorists. A liberal feminist would say that equality is when men and women formally have the same opportunities, when no legislations in the society discriminate due to sex. A democracy theorist would instead say that there needs to be an absolute equality reached first when there are exactly the same amount of women and men in decision making positions. This clearly shows that value conflicts and hierarchies can substantially be very different. But all are based on value statements that first are defined and thereafter, explicitly or implicitly, are contrasted against and placed in order of preference in relation to other values (Badersten 2006:31).

The underlying stated value in this thesis is the equality between men and women, more precisely; the equality of men and women within the refugee definition.

3.1.1 With the reality as foundation

Normative value statements have often been accused of being abstract and utopist, grand ideas without any base in reality - impossible to realize. For the normative approach this isn't a problem per se. But there is a point in viewing empirically based arguments as more valid because of their ability to be tested in the reality and through that actually realized. Empirical examples can be used as an integrated part in the normative argumentation, examples that are highlighted to give validity to the argumentation. But the reality can also be the mere foundation of a normative statement, the empirical condition the catalyst to why the normative question was raised. For example, statements about the importance of human rights are often raised because of de facto human right abuses (Badersten 2006:169-171). Much of the discussion surrounding a normative standpoint in research is about the existence of values, of right and wrong. Some schools say that there are no objective truths and therefore a normative value dilemma is basically invalid. Others argue that there is such a thing as an objective truth but, what makes a value more or less true or false is differently interoperated (see Lundquist 1993:75-77).

3.1.2 Intersubjectivity

One important aspect of normative analysis is to differentiate one's own opinion from the normative argumentation. The argumentation needs to be well-founded within theories and/or empirical examples, one's own opinions are not scientifically valid and need to be distinguished especially when arguing from a normative point of view. Also a discussion about the scientist's personal effect on the work needs to be held, the personal effect on the question raised, the theory chosen and the methodological approach. Throughout the work the reader needs to be able to follow the train of thought and to be able to see through the methodology how and why all the decisions were made. This is called intersubjectivity within scientific work; one can say that it is the intersubjectivity that differentiates normative analysis in a scientific sense from one's own 'opinion in a certain matter' (Lundquist 1993:52-53). Intersubjectivity is defined differently though depending on which scientific approach one has. A realist/objective approach demands much more intersubjectivity than the relativist/subjective approach, it would say that scientific work should be able to be redone by anyone, at any given time and produce the same results, thus enabling the work to exist without the scientist. A relativist/subjective approach would argue that an objective reality doesn't exist and therefore the scientist will always affect the work she/he is conducting. This approach can be argued incompatible with normative analysis, depending on how heavily the subjectivity is emphasized, but one can say that all work produced to seek knowledge in some sense should be able to be criticized and reproduced to some extent, to be valid (Badersten 2006:74-79, see Hermerén 1972). In this thesis a critical feminist approach dominates and permeates the normative question that is raised. I move

away from the realist/objective perception of the world, common for the normative approach with its base in positivism, attempting a more subjective direction. Lennart Lundquist separates the *explaining*-, *understanding*- and *critical approaches* in political theory, inflicting them with different attributes. The critical theories, he says, are resting on a foundation of realism, contemplating that there is a reality out there that is independent from the observer. This is the ontology of the approach. Even though this is true, the critical approaches epistemology rests on an interactive subjective foundation. Asserting that even though there is a reality out there; it is the observer's values that characterize the knowledge, every observer has his/her own perception of the world. In an interactive epistemology the researcher and the subject of his research together create a unity; the facts are the results of this collaboration (Lundquist 1993:67-68). In this case it is difficult to talk about objectivity. For a political scientist this interaction can be expressed as following:

The political scientist is inseparable from his subject, not only because he is a part of it and as such is helping to make up the stream of its future development, but also because he is a product of it. He cannot look at it from the outside, because he sees what is happening through the spectacles of his own particular environment (Pickles in Lundquist 1993:68).

But does this mean that it doesn't matter who studies what and with which method, the methodology and the material could be which ever since it is the researcher that affects the outcome with his/hers situated perspective? Lundquist means that this is not the case. The fact that we can't achieve an objective truth doesn't mean that our choices are indifferent or all equally as good. In the search for truth we need to demonstrate and explain all aspects of that what we are studying and of ourselves. By demonstrating this in a coercive way we invite the observer to take a part in the process leading up to the results that are documented. This transparency that intersubjectivity calls for isn't only important when demonstrating one's theoretical and methodological foundations, but is also important in demonstrating one own position within the situation one is addressing (Lundquist 1993:69). In this thesis I seek to demonstrate my arguments, founding my standpoint in earlier literature, theory and empirical cases as presented.

3.2 Feminist theory

One of the most important aspects of feminist theory is that its core isn't the social sciences; it has its roots outside the academic sphere as a maladjusted criticizing social movement. It's infiltration within the social and political sciences has been partial and selective. Still today there is a significant wedge between feminism outside and inside the academia (Randall, 2002:109). Contemporary feminist political theory is extremely diverse, in both premises and conclusions. The commitment to eliminating the subordination of women unifies the different

strands of feminist theory. But this agreement soon dissolves into radically different accounts of that subordination, and of the measures required to eliminate it. Feminist theory covers a multiple convictions, practices and political views that all coincide and are integrated with other convictions, practices and political views. This makes it impossible to generalize about feminism as a homogeneous current since there will always be trends that don't fit in or don't want to fit in (Kymlicka 2002:377, Ramazanoglu, Holland 2002:5). Attempts to generalize are further made complicated because of the global aspect and the differences between countries and their social struggles and scientific society (Jindy Pettman, 2001:673).

In spite of their great quantity and variety, one may crudely reduce the preoccupations of feminist literature into three major questions. The first question was an attempt to analyze the main concern of feminism simply asking; why and how are women oppressed? In this question of a relatively descriptive character feminists have sought to organize the principles which determine the power differences between men and women. Dichotomous constructions of social spheres such as the private/public and the nature/civilization have been central to these analyses. The second question relates to the ontological basis of the difference between men and women and asks if these differences are determined socially or biologically or by a combination of the two. The discussion within this issue is generally known as "the gender and sex debate". The third question arose as a reaction to the more simplistic and ethnocentric perspectives of early feminism. It concerns the differences among women and among men and their affects upon generalized notions of gender relations (Yuval-Davis 1997:5).

3.2.1 Normative and descriptive Components

All forms of feminist theorizing are normative, in the sense that they help us question certain meanings and interpretations in international relations, because many are concerned, says Jane Flax (1987:62) with "gender relations" ... how we think or do not think ... about them (or avoid thinking about gender) (Sylvester 2002:248).

It could be argued that that feminist research is always, at least implicitly, normative. The starting point always being the drive to eliminate power divisions between men and women and bringing forth marginalized feminist perspectives (Robinson 2006:221). In many of its forms, feminism involves at least two groups of claims, one normative and the other descriptive. The normative claims concern how women ought (or ought not) to be viewed and treated and draw on a background conception of justice or broad moral position; the descriptive claims concern how women are, as a matter of fact, viewed and treated, alleging that they are not being treated in accordance with the standards of justice or morality invoked in the normative claims. Together the normative and descriptive claims provide reasons for working to change the way things are; hence, feminism is not just an intellectual but also a political movement (Halslanger, Tuana 2009). The quotation can therefore be seen in the light of combining the social movement of

feminism with political theory – feminist theorizing is always in some sense normative since it in itself is an argument against a social order and also, inevitably, an argument for a new one.

Addressing this Christine Delphy stresses the importance of the normative argument in feminist theory:

Feminism is above all a social movement. Like all revolutionary movements, its very existence implies two fundamental presumptions. First, that the situation of women is cause for revolt. This is a platitude, but this platitude entails a corollary, a second presumption, which is much less frequently admitted. People do not revolt against what is natural, therefore inevitable; or inevitable, therefore natural. Since what is resistible is not inevitable; what is not inevitable could be otherwise – it is arbitrary, therefore social. The logical and necessary implication of women's revolt, like all revolts, is that the situation can be changed. If not, why revolt? Belief in the possibility of change implies belief in the social origins of the situation (Delphy 1997:59).

Feminism is a critical approach, as a social movement and within political theory. A constructive critique is always split in two pieces; highlighting the problem that is being addressed with a value as a point of reference; an argument for change. If there was no possibility for change the critique; the argument, wouldn't exist.

3.3 Challenging the private/public divide

I will in this section focus on the historical development of western politics and how the concept of private/public has been constructed and reconstructed in these philosophical thoughts, with emphasis on liberal ideology. I believe it to be important to situate knowledge and place it in its particular historical and geographical context, rather than an attempt being made to reach conclusion for some larger notion of universal or global politics. It is here worth noting, nevertheless, that western political thought, especially in the modern period, has held as its main premise the universality of its scope and understanding. A premise strongly criticized by those in the margins (see Arneil 1999:232).

First I will shortly present the development of this divide, focusing on liberal ideology as the approach in which it is the foundation. Following I will present the feminist critique of the liberal dichotomy of the private and public. I will focus on the development of liberal thought and it's definition of the public and the private, mainly because it's affect on modern human rights policies and international law, the refugee convention being one of these and the focus of this thesis (see Loescher 2001:44). Feminist theory, as stated above, is very hard to generalize about. Instead of focusing on one school of thought within feminist theory I will address the scope of the critique within feminist theory as such and the development of it. Central in my approach will be the acknowledgement of the

creation of the divide of private and public in western political thought and that this divide rests upon a foundation of patriarchy.

3.3.1 Mapping out the private and the public in liberal thought

An important part of determining what politics is has always been determining what politics isn't: where the demarcation lies or should lie. The two dualities that have helped to define this divide within western political theory have been culture/nature and private/public. Politics, from its inception, has existed in the public domain. But public only has meaning when put in relationship to what is not public. In Ancient Greece a distinction was drawn between the two schools of inquiry; the study of goodness in the collective life of the community and the study of goodness of an individual, distinguishing city-state and the family. Plato in his writings, understands and accepts this division between the private and the public, but argues that the ideal republic is one where the private sphere is eliminated (Mill 2005:21). According to Plato the key to the ideal republic is the elimination of the internal divisions within state which pull leaders away from the collective good towards their own private interests. According to him, women fall within the category of these private interests; being the private property of men. Equality, within the guardian class (excluding servants and slaves) can be achieved when skills such as nurturing, caring and intuition are eliminated and make way for analytical thought, ambition, pride and military skills, all considered male qualities (Arneil 1999:28-29). Aristotle continues in by challenging Plato's utopist elimination of the private sphere. In the private sphere he argues, the basic natural needs of individuals are met; food, sex, shelter are provided in the domain inhabited by wives and slaves and ruled by free men. The public sphere is the world of reason and culture which meets the higher spiritual needs of the good life for free men alone (Arneil 1999:30-31). Modern thought continues this dichotomy. The emphasis on the importance of reason lies as foundation for contemporary liberal thought. In 1784 Immanuel Kant said that Enlightenment will be achieved only when reason was given full reign in our society and we dare to know all there is to know. But he also made the distinction between the use of this reason, saying that reason must be free in its public use, but restrained in its private use. In the private sphere reason is directed towards a specific end, while in the public it is unfettered by any constraints. The role of reason in women is to direct it towards a specific end; their husbands, not partaking in the free reason for sake of knowledge (Hampton 2005:286-287, Arneil 1999:33). Both Hobbs and Locke continue in this path. Without further foundation in his theories, Locke decides that it is because so many nations have ordered the subordination of women that it must be a foundation for it in nature. He through that asserts the natural authority a husband has over his wife, and the uniform nature of the marriage contract which needs to be embraced by civil law. In both Locke and Hobbs theories women don't exist in the political, public sphere as citizens in relation to men and other women since they are only extensions of their husbands. In the private sphere they become subject to the

natural authority of their men. Their authority extends only as far as the marriage contract, supported by civil law, giving them some authority over their children (Elshtain 1993:106-116, Arneil 1999:35-38, see Yuval-Davis 1997:2).

In political theory it is formerly liberalism that has developed the notion of the private and the public and brought it into the modern thought. A political theory with its origins in the critique of the dominant institutions of church and state – in its inception arguing for the notion of the self-interested individual who theoretically consented to the rules and laws of government, and a government limited by the rights of individuals within a private sphere. The first and most important principle of liberal thought is the free and rational individual with by the society given rights, free from government intrusion in his/hers private life (Mill 1982:68). The second principle is the consent of the governed as the basis of political authority. At the heart is the distinction drawn between a pre-political state of nature; wherein everyone is free to act according to his or hers own particular will, and civil society; where they consent to act within a given set of collective laws. The social contract establishes authority in government and the relations between the citizens who sign the contract. Given that the chief end of this contract is the protection and the preservation of the individual to exercise his private right to life, liberty and property, authority within the family is, explicitly and by definition, outside the purview of the social contract. The scope of the contract is limited to the public sphere. Thus, the split between public and private life fully emerges, and the atomistic individual of the state of nature becomes the head of a private household, namely the sphere of property, children and wife where he exercises his own natural authority (Kymlicka 2002:128-130). The third principle of liberal ideology is the rule of law. Liberal democratic states are often founded upon a fundamental constitution which lays out the limitations of any government in that state with regard to its citizens. The liberal laws were from their inception designed to govern the interaction of people in the public sphere and ensuring their rights of freedom from government intrusion in the private sphere and the family. The fourth principle is the belief in universal human rights and equality. Beginning with the right to life, liberty and property the theory of the so called “natural rights” was transformed into the “human rights”. The United Nations Declaration of Human Rights is a document sprung out of this belief, today including a long list of rights, often broken down into two categories; the political and the cultural rights. The document with the two sets of rights reflects a division in liberal thought which emerged after the Second World War: Classical liberalism that believed in a limited government, freedom of the market and the political and legal liberties of religion, expression, concisions and the judicial system. And the newly developed welfare liberalism that believed in equal rights of opportunity giving the state a larger role and responsibility in protecting those who are in the margins of society (Arneil 1999:122-125, Kymlicka 2002:60-66, Mill 1982).

3.3.2 Feminist critique of the liberal private/public dichotomy

As addressed previously, the distinction of private and public is central to western political theory as a whole. In some political thought it is explicit and held to be critical to the well functioning society as argued by Aristotle. In other theories it is also explicit, but one sphere is destroyed in order to make way for full flourishing in the other, as argued by Plato. With modern liberal thought the distinction is as profound but more implicit. As liberal practices have put the private realm of family and property beyond the gaze and touch of state, so has modern liberal theory made the private sphere beyond the touch of political thought. Feminist theory in the latter half of the twentieth century began to realize how potent this duality was for the ways in which male and female roles are constructed and the means by which women, from the very understanding of what is political, may be excluded or simply made invisible.

In the beginning the efforts were directed towards the search for a universal explanation or cause why women everywhere lack generally recognized and culturally valued authority; an uncausal explanation for a multicultural problem. An effort that was challenged by many feminists as being misguided and impossible since it presumed that women shared history and experience just because they were women. Instead the efforts were later directed towards a historical analysis of the development of (mainly western) political thought in which the concept of the private/public divide originated. The result was an analysis which urged that politics needed to be rethought and the private and public reconstructed. Jean Bethke Elstain is one of the first authors to criticize this historically constructed divide. By uncovering the private/public divide in western political thought she analyzed the implications of this division for the relationship between gender and politics (Elshtain 1993). Elstain's analysis of Plato's beliefs, as what can be seen as a belief in equality of women and men, is a mere misinterpreted byproduct of the society he in visions; moving women from being the sole possession of men to being the possession of the whole community. She concludes that far from viewing women of the guardian class as equals and embracing them in the public sphere, they are only allowed to enter the public realm if they reject everything that situates them as women; home, social relations and their identity through family (Elshtain 1993:33). Although some feminist have gone on arguing that this would mean stripping women of their identities and giving them male attributes, Elstain asks in her analysis if this would really occur? A question postmodern feminists have developed in arguing against the essence of women (1981:39).

Zilla Eisenstain argues that although the private/public divide has had a continuous history throughout western thought, liberal political philosophy underpinned by a capitalist economy has the most highly developed sense of a division between the spheres, which has helped both to obscure and strengthen patriarchy in liberal democratic states (1981:223, Pateman 1989:118). The heart of the critique against liberal thought as developed by Hobbs and Locke is the contradictions that appear in their ideology among the both spheres. Liberalism espouses a commitment to rationality, individualism and property and the inherent freedom involved here, while implicitly it embraces the paternalism and patriarchal values of the family that were a part of the foundation of the bourgeois

society (Eisenstein 1981:49). This is a contradiction that is central to the feminist critique of this liberal divide, a contradiction Carol Pateman addresses extensively in her work. In *"The Sexual Contract"* (1988) Pateman examined the writings of social contract theorist's most influential stories of modern time, many of whom are mentioned above. Stories which were written as an explanation for the binding authority of the state and civil law and for the legitimacy of modern civil government. Pateman reinterprets these social contracts as sexual contracts based upon and legitimized by the power that men exercise over women. In *"The disorder of Women"* (1989) Pateman addresses the concept of fraternity, as an element of the slogan of the French Revolution. Along with liberty and equality; fraternity explains Pateman is not just about social solidarity, but the transformation from the hegemonic power relations in the society from patriarchy, in which the king ruled over both men and women, to a fraternity in which men get the right to rule over the women within the private sphere but agree on a contract of a social order of equality amongst themselves within the public sphere. Women were therefore not excluded from the public sphere but the whole social philosophy which was at the base of the rise of the notion of state citizenship was therefore constructed in terms of the "rights of the man" (1989:41-43). The relationship between feminism and liberalism is a complicated one. Both doctrines are born out of the notion of individualism and that individuals are free and equal beings, emancipated from the ascribed hierarchical bonds of traditional society. Feminism is often seen as nothing more than the completion of the liberal revolution, as an extension of liberal principles and rights to women as well as men (Arneil 1999:127). The demand of equal rights has always been an important, if not the most important, part of feminism. However, feminism in the end, inevitably, is a critique of the liberal thought more than anything else. Except from challenging the notions and interoperations of the private and the public, feminism goes further and explicitly rejects liberal conceptions of the private and public and see the social structure of liberalism as the political problem, not a starting point from which equal rights can be claimed. Feminists raise the problem, generally neglected by other critiques, of the patriarchal character of liberalism (Pateman 1989:119).

Feminists argue that liberalism is structured by patriarchal as well as class relations, and that the dichotomy between the private and the public obscures the subjection of women to men within an apparently universal, egalitarian and individualist order. Women are excluded from the talk of individual rights and other, according to liberals, universal values. One reason why the exclusion goes unnoticed is that the separation of the private and the public is presented in liberal theory as it applied to all individuals in the same way.

One powerful, and representative, challenge to the distinction is that presented by Catharine MacKinnon here in relation to abortion:

For women the measure of the intimacy has been the measure of the oppression. This is why feminism has had to explore the private. This is why feminism has seen the personal as the political. The private is public for those for whom the personal is political. In this sense, for women there is no private, either normatively or empirically. ... To confront the fact that

women have no privacy is to confront the intimate degradation of women as the public order (1989:191).

MacKinnon (1989) lifts an important issue that feminists have been dealing with throughout the private/public debate; privacy. Privacy is mentioned by Stuart Mill as most important in the development of liberal thought, an issue that continues to be a critical in liberal-democratic states to this day. Feminist often find themselves arguing for more public involvement in areas traditionally associated with the private sphere such as childcare, domestic violence and so on, while at the same time defending the rights of choice and privacy in areas that explore women more than men for example reproductive freedom, sexual orientation, rape laws and so on (Arneil 1999:55). Ruth Gavison (1980) and Anita Allen (1983) address this same issue in agreeing on that specific privacy rights of women must be addressed, and they comprise secrecy, anonymity and solitude. Women's rights of solitude are violated in several ways; women are often asked about their personal lives on job interviews, female victims of sexual assault have limited protection of their privacy rights when it comes to counseling notes taken in the aftermath of the assault. The right of solitude of women is constrained both in the family home and outside of it. Women are advised not to walk alone in certain circumstances by their families, husbands, police and representatives of the state (Allen 1983:241). Finally Allen argues that women have to have the right to make private choices about marriage, sex, childbearing. Laws regarding inheritance, abortion and birth control often interfere with such privacy rights. Other feminists have argued beyond this stating that the freedom of making a choice is defected by the mere construction of the private sphere and women's location in it. When women "choose" to marry, when women "want" sex, when women "choose" to stay home and spend time with their children rather than pursue their careers, women are not choosing freely, but rather are selecting from choices mandated by social constraints and norms. The fact that many women feel happy and fulfilled in these "choices" is not evidence that these "choices" are free. Rather, the feeling of fulfillment is the insult added to the injury of the initial programming. Society has induced these feelings in women so that women will not rebel against their exploitation and oppression. Basically dependent upon men as breadwinners and sources of power and status, women are not free to "exit" and are therefore unable to negotiate the conditions of their relationships from positions of freedom and equality (MacKinnon 1989:160-170, Oikin 1978:137-138).

Feminists sympathetic to Marxist analysis question liberal ideology and the divide of the private and the public by creating a dual-system political theory to describe power relations in modern society, without subsuming one sphere to the other, as Marxists have done. In the public sphere or the realm of production on the one hand; is the system of capitalism which creates a class relation of power for the owners of the capital of the workers. On the other hand patriarchy or the power of men over women; is the system which dominates the relations of reproduction. Both must be given equal weight in the understanding of history if we are to understand the power dynamics at work in our society (western), between capitalist worker, and between men and women. The distinction long

drawn in political theory between a public and private sphere is transformed by socialist and Marxist feminists into a question about paid and unpaid labour.

Feminists such as Iris Marion Young have criticized the divide of the private and the public, as well as some of the other feminist critique, on the basis that it fails to take into account the various types of oppression different women may experience due to factors outside of either economics or gender, for example race and disability (1981:46).

The divide, as addressed by some feminists, is criticized to reflect only lives of white, middle-class, heterosexual women rather than those of working-class, single mothers, women of color or lesbians. Women as housewives are a focus not only in political traditional theory (on those occasions women were mentioned) but also in both the liberal and socialist feminist responses. In the former as a starting point from which to attack patriarchy, and in the latter as a starting point for analyzing the division of labour. In both cases, feminists of color and lesbian feminists have challenged the assumed and underlying perspective of such a model as a particular view rather than one universal to all women.

This is not to say, according to most of these critiques, that feminism should give up on the private/public divide as a tool for feminist analysis. Indeed, this duality is profoundly relevant to all women living in societies touched on by liberal or Marxist ideology, in that it is the theoretical underpinning for the political system in which all citizens must work and live (Arneil 1999:69). This politics of identity, the consideration of all human experiences and discrimination accounting to them is something that has been more and more emphasized by post-modern feminists. Moving away from the shared experiences of women to acknowledging differences among them (Yuval-Davis 1997).

The construction of a private and public realm has thus been attacked by feminists on all sides as a means by which women have been excluded from the political life, while simultaneously being subjected to its power. The response to this exclusion can perhaps best be summarized in the phrases adopted as the motto of the women's movement in the 1960s and 1970s 'The personal is political' (Arneil 1999:76). This claim opens up both the public and the private spheres for political analysis, for an understanding of how power works in all aspects of both men and women's lives. Its interpretation, as we have seen, varies enormously in accordance with different feminist views. Liberal feminists have tended towards trying to include women in the public sphere, while maintaining the family and the private sphere, supplemented by state intervention in the form of childcare and so on. At the same time they have argued that issues which have been traditionally seen as private must be subject to public laws, for example sexual assault, domestic violence and child abuse. Other feminists like Elsthain have argued that these arguments devalue the private sphere. Rather feminists should work towards bringing the values of the private sphere in to the public. Elsthain in this sense is one voice of many who believe that women embody values, nurturing and caring in the family, that are equally valuable to those of men, but different (see Elsthain 1993:336-337). Some radical and socialist feminist have instead argued that the only way forward for women out of the private sphere is through its abolishment. Others claim that the family is the one oasis of human values in a world otherwise

dominated by capitalist modes and relations of production. In general, the liberal, socialist and radical feminists' response to the private/public divide has been challenged by both women of color and lesbian feminist who argue that the universal claims about the public and the private sphere made by these groups of feminists continue to exclude their reality.

Considering the feminist critique of the private and public divide we must distinguish between two types of normative arguments. The first kind of argument, an internal challenge to a distinction, asserts that negative effects emerge from the particular way in which the distinction has been drawn (Gavison, 1992:2, see Badersten 2006:73-103). The distinction leads to society's mistaken belief that distinctions between realms, such as the public and the private, are givens of social life, rather than human determinations which can and should be assessed according to human values. Beyond this general criticism, however, this challenge acknowledges that the distinction can be used in beneficial ways. The second challenge, an external criticism, claims that there is no useful, helpful, or valid way to draw the distinction. In an important sense, only external challenges really challenge the distinction itself. Some critiques would use the external challenges to the divide to, through the use of the distinction; expose the false beliefs of others (see Badersten 2006:169-183). Others may use the external challenge if they believe that our social structure is so pervaded by misleading and dangerous uses of the terms that the only path to clear thought and to just solutions is through delegitimizing the distinction. Comprehensible discussion about endorsing or rejecting distinctions rests on presuppositions about reality, perception, thought, and language (Gavison 1992:3-4), as can be seen in the different feminist critiques of the private/public divide above. As a result of these varying descriptive or normative assumptions, challenges to distinctions may represent many different types of statements. Common for almost all of the different schools of feminism is the acknowledgement of the private/public divide, not as being natural, as liberal philosophers have argued, but as being created by the same politics that make the natural assumptions (Yuval-Davis 1997:80, Sullivan 1995:127). Even feminists who advocate versions of the 'no difference' claims agree that, in our social reality, pervasive differences exist between private and public, and that these differences, real and perceived, greatly affect the situation of women. The paradigmatic private sphere contains the realm of domestic and family life, whereas the paradigmatic public sphere encompasses the realm of politics-decision-making concerning the welfare of society as a unit. The economic realm, which includes production and marketing, lives in-between. While for the Greeks and for most liberal political theorists, the economic is an element of the private, for Marxists, Critical Legal Studies scholars, and radical and socialist feminists, it is an important part of the public (Gavison 1992:21). Feminist critique, therefore, argues that the divide exists and that the distinction itself plays a part in creating and perpetuating injustice, in reaching and justifying bad decisions, and in paralyzing the forces needed for reform. In short, excluding women from the public sphere in which decision about the world and their lives are made.

The construction of what is male and what is female is as central to the feminist perspective as the construction of the private and the public. It is merely a constructed location of constructed identities. Questioning the private and public divide is questioning the foundation of the female and male sex. Or as Catharine A. MacKinnon puts it in a quite radical manner:

If women are socially defined such that female sexuality cannot be lived or spoken or felt or even somatically sensed apart from its enforced definition, so that it is its own lack, the there is no such thing as a woman as such, there are only walking embodiments of men's projected needs. For feminism asking whether there is, socially, a female sexuality is the same as asking whether women exist (1982:20).

'The personal is political' is not a metaphor; it does not mean that what occurs in personal life is similar or comparable to what occurs in the public. It means that women's experience as women occurs in the by society created private sphere³ – to know the personal lives of women, is to know the politics of women. Feminism does not see its view as subjective, partial, or undermined but as a critique of the purported generality and universality of prior accounts. These have not been half right but have invoked the wrong whole. Feminism hence, not only challenges masculine partiality but questions the universality imperative itself, the objectivity of western political thought (see MacKinnon 1982:23). Finally, connecting to the quotation by Simone de Beauvoir in the beginning of this chapter, the parallel between representation and construction should be sustained: men create the world from their own point of view, which then becomes the truth to be described. This can be seen in the discussion of the natural within liberal theory, the natural power men have over women. This construction runs deep, even in struggles of modern society. Discovering and reconstructing these notions become crucial – putting a gender lens in front of the world.

³ Here it is once again important to lift the critique of black feminists; women of colour have been working in the "public sphere" parallel to the struggle of white feminists to enter it. But this does not mean that they were included, their experience of oppression and discrimination were just different (Hooks 1984:134).

4 Arguing for domestic violence as a legitimate asylum claim

Violence against women and girls continues unabated in every continent, country and culture. It takes a devastating toll on women's lives, on their families, and on society as a whole. Most societies prohibit such violence — yet the reality is that too often, it is covered up or tacitly condoned.

— UN Secretary-General Ban Ki-Moon, 8 March 2007

In this chapter I will now analyze the three components of the refugee definition important to women asylum seekers, as addressed in the introduction; the well-founded fear of persecution, membership of a particular social group and the protection responsibility by the state. The critical discussion of the private and the public divide in the last chapter will lay as a foundation for the analysis. Starting out in gendering the meaning of a well-founded fear of persecution I aim to shine a light on the gender-based violence women are subjected to focusing on domestic violence. From the feminist critique of the liberal private/public dichotomy I aim to show that these claims have been bypassed as not as severe because of their reference to the private sphere, a location state laws and regulations have had a hard time penetrating because of its political and cultural spatial definition. By showing on the extendedness of this violence, I will draw it out of the private sphere and put it in light of its political meaning. This well-founded fear that, not all women, but many women flee from in their home-countries I will then argue qualifies them for being a particular social group, as already defined by some states in some asylum verdicts. I argue that women who flee from persecution by a non-state actor have special circumstances making it difficult for them to prove a causality link between their persecution because of their group membership on the one hand and the home states unwillingness or inability to protect on the other. This I believe, considering the severity and how widespread this persecution they are subjected to is, makes them in need of being legally defined as a particular social group. Last but not least I will address the issue of state responsibility to protect women from persecution by a non-state actor. A responsibility outlined in many human rights documents, but still not implemented by asylum courts unwilling to acknowledge the failed responsibility of states to protect women from this persecution. The difficulty of demanding state responsibility for acts done by a non-state actor will be addressed here in the light of the first section; the private location of these acts. Following I will focus on the Due Diligence

standard as a standard that should be used even in asylum rulings, when defining the states responsibility, and failure, to protect.

4.1 Gendering the well-founded fear of persecution

4.1.1 Violence against women

Violence against women as defined by the General Assembly in the “Declaration of Elimination of Violence Against Women” in 1993:

Article 1

For the purposes of this Declaration, the term "violence against women" means any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.

Article 2

Violence against women shall be understood to encompass, but not be limited to, the following:

- (a) Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence and violence related to exploitation;
- b) Physical, sexual and psychological violence occurring within the general community, including rape, sexual abuse, sexual harassment and intimidation at work, in educational institutions and elsewhere, trafficking in women and forced prostitution;
- (c) Physical, sexual and psychological violence perpetrated or condoned by the State, wherever it occurs (Distr. General 1993).

In the in-depth study of “*All form of violence against women*” (2006) the General Assembly state that violence against women occurs in every country in the world as a persistent and pervasive violation of human rights and a major obstacle to achieving gender equality. They continue by condemning such violence as unacceptable ‘whether perpetrated by the state and its agents or by family members or strangers, in the public or private sphere, in peacetime or in times of conflict’ (2006:9). In a statement made by The Secretary-General in the same

study, he says ‘as long as violence against women continues, we cannot claim to be making real progress towards equality, development and peace’ (2006:9). The definition of violence against women as stated above in cooperates the important acknowledgement of the division of the spheres and the persecution of women in both of them, both equally important, an acknowledgement that only lately has started to be implemented by a few signatory states.

There have been many attempts in the last few decades to map out the occurrence of violence against women in the world. In early attempts problems arose due to the character of the national investigations often being general victimization surveys not taking account to the sensitivity of the issue at matter, in some cases leading to further trauma for the victims (Johnson et al 2008:12). Although the researchers have been facing various obstacles in obtaining the data, there has been significant improvement in quantitative data collection over the years. Already in the early 90s, several countries performed dedicated surveys in an attempt to map out the extent and the different forms of violence against women. Other forms of data collection have been done by including the problem within a survey designed to generate information about a different subject, for example Health Surveys. The main concern with these studies has been about the comparability and prevalence and how these correlate in different countries and over time (Johnson et al 2008:13-14). In the last couple of years a few internationally comparative studies have been conducted. Amongst the largest of these is the “*International Violence Against Women Survey*” (IVAWS)⁴. I will here focus on their statistic of women subjected to intimate partner violence. According to the IVAWS rates of intimate partner violence among women in the nine countries in the survey range from 9 % to 40 %⁵, similar numbers can be retrieved from the 2002 WHO survey “*World Report on Violence and Health*” where in 48 population-based surveys from around the world, between 10% and 69% of women reported being physically assaulted by an intimate male partner at some point in their lives. The percentage of women who had been assaulted by a partner in the previous 12 months varied from 3% or less among women in Australia, Canada and the U.S.; to 27% of women in Leon, Nicaragua; 38% of currently married women in the Republic of Korea; and 52% of currently married Palestinian women in the West Bank and Gaza Strip. For many of these women, physical assault was not an isolated event but part of a continuing pattern of abusive behavior (WHO 2002:89).

⁴ The IVAWS is a survey done in nine countries, Demark, Czech Republic, Poland, Switzerland, Hong Kong, Australia, Mozambique, Costa Rica and the Philippines. It’s primary focus being to strengthen legal measures and improve criminal justice response to violence. The survey was initiated in 1997 and was co-ordinated by HEUNI with inputs from the United Nations Office on Drugs and Crime (UNODC), United Nations Interregional Crime and Justice Research Institute (UNICRI) and Statistics Canada (Johnson 2008:17, Nevala 2005:2).

⁵ This represents the percentage of ever-partnered women who experienced violence by a male partner during their adult lifetime (Johnson et al 2008:38).

Amnesty International issued in 2001 a report titled “Broken Bodies, Shattered Minds: Torture and Ill-Treatment of Women” as one in a series of publications of its worldwide campaign against torture launched in October 2000. In a critical analysis of the report Gillian Youngs (2003) argues that it affirms the theoretical and policy-oriented feminist debates about women's rights as human rights, and links the private pain of women to questions of public peace. The report articulates that wherever and however violence against women occurs, it is a matter of general (public) concern (Amnesty International 2001, Youngs 2003).

It is impossible to go further into the discussion of a gendered view of migration without looking closer at the persecution that compels women to leave their homes. Violence against women falls into the realm of the private in a number of ways. It is private because it frequently takes place in the private sphere of intimate relations between husbands and wives, and in the physical locations of those relations, notably the home. Violence against women has sociospatial characteristics as well. Even when a man attacks a woman in a public space, the private patriarchal boundary around them may serve to keep others from interfering if he is perceived to be her intimate partner. The violence in such instances is regarded as a private matter, and much institutional change, including police action, has revolved around the recognition that violence against women is a public offense and one that should be dealt with and punished accordingly (Heise 1995:243-244, Youngs 2003). There are also sociospatial dimensions affecting women's exposure to violence in public: rape or other forms of attack, sexual harassment, or other forms of abuse by men in positions of power. Women's social identification with the private sphere puts them at risk from the exertion of male power, including its most violent manifestations, in public spaces. Feminists have therefore mapped the diverse forms of women's vulnerability to violence across public and private settings as intrinsic to an understanding of patriarchal oppression and gendered identities (Youngs 2003:1212). The operation of male power across public and private spheres frames women as under the control (or protection) of men (Yuval-Davis 1997:26-27). The patriarchal state serves to entrench this situation. Feminist ambivalence about the state runs deep. As Jan Jindy Pettman has explained;

There is a very complex politics here, as women's organizations and feminists direct demands at the state, for more services or protection, while many are profoundly suspicious of the state and its implication in the reproduction of unequal gender relations" (1996:9).

The state is at once representative of institutionalized inequalities between men and women and a powerful site of actual or potential change (see Pateman 1988; MacKinnon 1989). As the sole legitimate user of force to maintain internal and external order, the state also expresses patriarchal power as violence, for example, through masculine cultures of militarism (Yuval-Davis 1997:93-94).

4.1.2 A well founded fear of a private hurt

The phrase well-founded fear of being persecuted is the key phrase of the refugee definition. It replaces the earlier method of defining refugees by categories, persons of a certain origin not enjoying the protection of their country, by the general concept of “fear” for a relevant motive. Since fear is subjective, the definition involves a subjective element in the person applying for recognition as a refugee. Determination of refugee status will therefore primarily require an evaluation of the applicant's statements rather than a judgment of the situation prevailing in hers/his country of origin. To the element of fear, a state of mind and a subjective condition, the qualification “well-founded” is added. This implies that it is not only the frame of mind of the person concerned that determines his refugee status, but that this frame of mind must be supported by an objective situation. The term “well-founded fear” therefore contains a subjective and an objective element, and in determining whether well-founded fear exists, both elements must be taken into consideration (UNHCR Handbook 1992:(2) 37)

In reality the subjective implications of the assessment of how well-founded the individuals fear is, as stated by the UNHCR, means that it is up to the immigration officials and judges in different countries to assess the well foundedness of the fear by deciding what the objective frame of mind actually is (see Aguirre 2008). The question one inevitably asks here is about the subjectivity of the officials assigned to assess the objective frame of mind? Patriarchal systems have traditionally classified violence against women as private, denoting its distance, and to some degree protection from the legal gaze and thereby from accountability and punishment. This is fundamentally an issue of spatial politics, with private patriarchal power often exerted behind the closed doors of the home and in the private sphere of familial and personal relationships. The protection of the private sphere from the intrusion of public (state) interference has historically worked against women exposed to the excesses of unfettered male dominance and violence. Claims of domestic violence, because of their location in the private sphere without proper guidelines or regulations, risk being disregarded as a subjective matter between a man and his wife. In the end the definition here emphasizes everyone’s individual experience, if founded in an objective context. But the if the law initially excludes claims of persecution in the ‘private sphere’, the subjective element of a woman’s accounts of the persecution is set against the construction of the private and the public divide (see MacKinnon 1982:23). The reluctance of bringing the private in the public risks rejecting the severity of this persecution.

The abuse of women in the private sphere, by a non-state actor has been recognized as torture and inhumane abuse as severe as if it were executed by the state in documents by non-governmental organizations and the United Nations (Declaration of the elimination of violence against women 1993, Amnesty International 2001). This definition needs to be extended and institutionalized even within the refugee definition. Making it possible for these claims to afford women the protection they need, a protection their home state was unwilling or unable to provide.

The gender norms that often are the cause of men’s persecution against women are also the norms that justify the violence and dismiss it as a “not as

severe form of persecution” or as the authors of the Geneva Convention predicted “not likely to occur”. By looking at the widespread problem of violence against women and placing domestic violence within it, we can draw the conclusion that the problem can’t be dismissed as an individual one, between a man and his wife, but takes a leap into the public sphere as a global and structural issue, even a health issue as defined by the WHO (2002). The urgent appeal for countries to take responsibility to eliminate violence against women is hard to reconcile with the vague legislations surrounding gender-based persecution within asylum law and the unwillingness of states to clear them up. Inevitably the question of “whose responsibility” arises. The sovereignty of states seems to outweigh the importance of the issue. As long as the responsibility stays within the borders of the state, violence against women is recognized as ‘a persistent and pervasive violation of human rights and a major obstacle to achieving gender equality (...) in the public or private sphere, in peacetime or in times of conflict’ (Secretary General 2006). When seeking refugee status from those same violations in a ‘second country’, the definition of the violence experienced becomes suddenly very hard to define. The extreme struggle women face when trying to obtain refugee status based on gender-based persecution, and the Geneva Conventions gender bias is incompatible with statements about this very persecution. It becomes therefore crucial to situate this violence as a reason of.

4.2 ... for reasons of membership of a particular social group

Maybe at first, the notion of social group membership provides a bad fit for an asylum claim based on allegations of domestic violence. Yet the victim of domestic violence is simply the partner to someone who victimizes her within their home and relationship, and the concept of social group seems to contemplate a cognizable group oppressed by state action. What was ‘a little used term of art’ in refugee law, barely relied on during the first few decades of the Convention, has become a term both frequently used and just as frequently confused (Heyman 2008:118). This calls for a better definition of the term and which groups can rely on its protection.

The UNHCR guidelines (2002) for the use of the category “*Membership of a particular social group*” imply a very positive area of use of the least clear category in the Convention, the evolution of which ‘has advanced the understanding of the refugee definition as a whole’ (2002 1(1)), as stated in the quotation in the introduction chapter. Penny Dimopoulos (2002) argues a different side, an urgent need for a more precise definition to the category:

This is the most difficult and controversial ground in the Convention. Thomas Musgrave refers to it as a ‘somewhat amorphous category’.[2] The ambiguity of the term PSG has resulted in many variations in its interpretation, as noted by McHugh J in Applicant A &

Anor v MIEA & Anor: ‘Courts and jurists have taken widely differing views as to what constitutes ‘membership of a particular social group’ for the purposes of the Convention....In the result, courts and tribunals...have given many decisions which cannot be reconciled with each other, having regard to their material facts’ (2002).

The origin of the Geneva Convention gives no further clarity to the interpretation of the category, as has been discussed. The UNHCR guidelines state that maybe the category is vague to be able to be applied depending on the political situation changing over time (see UNHCR PSG Guidelines 1 (3)). Or as Dimopoulos (2002) argues, a vague category enables a more narrow interpretation and control over people crossing national borders, protecting the highly valued state sovereignty of the nation state.

Much of the debate surrounding the inclusion of gender-based violence within the frames of the refugee convention has been about the category “particular social group”. Although many cases of gender-persecution might be thought to fit within the framework of this category, as discussed previously this category and its vague definition instead of allowing openness for new definitions of entire groups, has caused an inconsistent interoperation on an individual case by case basis and a reluctance to recognize women as a particular social group (Freedman 2007:84). The argument against a more defined group within this category, such as women, is expressed through the fear of threatened state sovereignty and loss of border-control. The head of the French Refugee Appeal Commission commented the issue by expressing that a recognition of women as a particular social group within the refugee Convention would lead to the risk of receiving asylum claims from “half of humanity” (Freedman 2007:85). This flood of women that many fear is clearly unfounded since the barriers that women face leaving their countries are so great. Social norms in some communities have the woman so tightly bound to the domestic and private sphere that fleeing from it, especially alone with children is in most cases impossible, This is one of the paradoxes of the struggle these women face (Freedman 2007:25). Critique of women as a particular social group has also come from some feminists, addressing the complicated issue of grouping women just because they are women. As many feminists have argued women do not constitute a cohesive social group, as discussed above in the theory chapter. It also risks essentialising gender differences and portraying refugee women as victims of barbaric third world countries, fixing the opposition between “us” and “them” separating third world women from Western women. (Crawley 2001:73, Oswin 2001:350). I will put this critique in reference to the argument of letting women that have been subjected to domestic violence constitute a particular social group under the refuge definition, as I argue here. First, not all women have shared experiences and there is fundamentally no such thing as a generalized group of women. But women are most often subordinated in a power relation to men. The empirical cases of women seeking protection as refugees from persecution by a non state actor, most often their husband, stresses the need for legislation in this area, a legislation that has already started to take form in some countries. Second the reluctance to in cooperate gender as a persecution ground, or the category of

women as a particular social group, by states is based on a belief that half of the world's populations would storm the borders of the west. A belief sprung from the ethnocentric understanding of one's own society. As Connie G. Oxford puts it:

Unlike other forms of gender-based harm, domestic violence invokes floodgates discourse from immigration judges and asylum officers. "What are we supposed to do, let everyone in?" one judge responded when I asked about domestic violence asylum claims. The ethnocentric assumption in the judge's response is that like the U.S., all nations of the world are plagued by domestic violence (2005:23).

Hence domestic violence, and the discrimination of women, is not a third world issue of women not yet emancipated and free of the patriarchal bounds of their society, it is an issue founded in the patriarchal societies of the whole world. The western paradox is that it is still occurring and accepted despite politics of human rights and equality amongst women and men. This paradox is best shown in the quotations above from the Head of the French Refugee Appeal Commission and the judge interviewed in Oxford (2005). In the same breath this opposition acknowledges the oppression of women and the abuse of them in the private sphere, as it makes it no issue of violation of human rights. As Barbara Arneil (1999) states in her analysis of the development of liberal thought:

Hobbs and Locke (...) On the one hand they relegated wives to the private sphere without any political authority or rights. On the other hand they laid the foundation, in the state of nature, that all adults were born with equal rights, regardless of their position in civil society (1999:53).

Hence I argue that an acknowledgement of women fleeing domestic violence as a particular social group within the refugee definition in reality only will allow few of the women who have had an opportunity or been able to take the risk to flee their non-state persecutor and their homes, a legitimate ground for arguing their rights of protection. My argument is based in that this has been the solution in some of these cases and a change in policy recently in the U.S., clearly showing the ability of the fit of these cases within this category.

Because women who have suffered domestic violence aren't a recognized social group⁶ in itself, it has been up to every individual case to assert that specific woman's categorization. These applicants have thus faced the paradox of defining their group membership too widely or too narrowly (Reimann 2009:1201). The case of Islam and Shah (1999) clearly demonstrates the ability of including women persecuted by a non-state-actor within the refugee definition. In the judgment of the case of Islam and Shah in the Great Britain (U.K.), two women fleeing domestic abuse in Pakistan, the House of the Lords favored in majority with the women. Sue Kirvan (1999) writes that since it was not open to these women to say they were persecuted because they were women, they argued that

⁶ Exception being the development of this in the U.S. (see McGral 2009).

they were persecuted for reasons of “membership of a particular social group”. Identifying that the concern of the Convention is to protect against persecution which is based upon discrimination, some of the Lords in the ruling of *Islam and Shah* contextualized a following approach to Article 1(A)(2) - the refugee definition; even if sex or gender had not been specifically included by the framers, the inclusion of the term ‘a particular social group’ was one which may be seen to encompass sex or gender as well as other groups. In addition the court also examined decisions from other jurisdictions to assist its interpretation. In relation to identifying what kind of social group might qualify, the court quoted with approval the U.S. case of *In re Acosta* in which it was stated that a social group for the purposes of the Convention would be distinguished by:

An immutable characteristic . . . [a characteristic] that either is beyond the power of an individual to change or that is so fundamental to his identity or conscience that it ought not to be required to be changed.

Such an immutable characteristic could, of course, be gender. In addition, the Canadian case of *Ward* was agreed with, that ‘social group’ could be based on gender, linguistic background or sexual orientation. In the end the well founded fear was agreed upon, because of the women’s belonging to a particular social group “women in Pakistan”, a wide interpretation of the definition of the group membership (Kirvan 1999:336-337, see Lesley-Lloyd 1998:8-14).

As in the case of *Islam and Shah*, most women fleeing a non-state persecutor are claimed to have well-founded fear because of their membership in a particular social group. As I stated in the introduction to this chapter I argue that women fleeing domestic violence should be recognized as social group, as has been the case in some asylum verdicts in different countries, amongst them U.K and the U.S. Because of the complex causality-link these cases face to prove, the recognition of women subjected to domestic violence as a group in need of protection is crucial. This argument is not a farfetched one, it is merely an argument that the cases that already have been ruled in this matter should pose as a foundation for future similar cases, in all states that have signed the convention.

4.3 Gendering the responsibility to protect

Violence against women is caused by “the structural relationships of power, domination and privilege between men and women in society. Violence against women plays a central role in maintaining those political relations at home, at work and in all public spheres” The maintenance of a legal and social system in which violence or discrimination against women are endemic and where such actions are trivialized or discounted should engage state responsibility to exercise Due Diligence to ensure the protection of women (Charlotte Bunch in Charlesworth, Chinkin 2000:235).

Developments in human rights law have supported long-standing trends in refugee law, which grapples with fundamental questions of whether the failure of state protection arm of “persecution” requires direct or indirect, or any, state involvement. Although the refugee regime is not concerned with state accountability per se, both refugee and human rights law struggle with similar questions. For example, what should be the standard for assessing the adequacy of state protection? Should the state be required to provide some actual reduction in the level of risk? Or should formal or reasonable, however ineffective, actions of the state suffice? As noted, one of the most visible emerging bodies of refugee case law concerns family violence, which remains at the margins of human rights law although it is the most pervasive form of violence against women. In cases of violence by husbands and male domestic partners, the question of state protection is especially complex due to different levels of interweaving responsibility and enabling of the “private” harm by the State. This complexity is paradigmatic of gender-specific violence, committed by private actors. For most women, indirect subjection to the state will almost always be mediated through direct subjection to individual men or groups of men (Anker 2002:147).

There are several causes worth addressing concerning the silence surrounding the legal responsibility of gender-based violence in international law. First is the historic focus within international law on violations committed directly by the state against individuals. Many abuses against women, as has been discussed, have not been acknowledged as persecutions because they are committed by private persons rather than agents of state (Freidman 1995:21). Second the liberal ideology that underlines much of civil and political rights discourses views the law principally as a means of regulating state intervention in private life, generally without acknowledging the role of the state itself in constructing the separation of public from private (Arneil 1999:123-124, see also Arneil 1999:8). Certain violations of civil and political rights by private individuals or groups, including various forms of discrimination, clearly fall within the scope of state responsibility as defined by international instruments or international and regional jurisprudence. Systematic gender inequality has been addressed primarily within the framework of development policy rather than the affirmative human rights obligations of state (Sullivan 1995:127). Third, international liberal norms concerning the life of the family call on the state to protect the institution of the family and enshrine the right of privacy in the family. Both the duty to protect the family and privacy rights discourages direct state intervention in the life of the family (Arneil 1999:55). Because the family is the sight of many of the most egregious violations of women’s physical and mental integrity, any blanket deference to the institution of the family or privacy rights within the family have disastrous consequences for women (Sullivan 1995:127).

These factors account for much of the emphasis placed on direct violations of civil and political rights by the state and corresponding neglect of gender-specific abuses in the private life. Donna Sullivan writes as following about this issue:

The challenge is not to shift the focus away from gross violations of civil and political rights by the state but, first, to broaden the normative framework to include the abuses suffered by women that do not fit in this paradigm because they occur at the hands of private individuals; and then to develop effective international monitoring and implementation mechanisms in this area. The distinction between the public and the private life in international law is one of principal theoretical barriers of this effort (1995:127).

State responsibility within the context of the private and the public is defined differently depending on which side of the divide one is addressing. The state is responsible to address issues and acts committed in the public sphere, while the responsibility in the private sphere more is about not interfering, this very liberal notion can be seen as permeating the refugee convention, the definition in many ways obstructing victims of non-state persecution from gaining refugee status. But how correct is this non-interference policy? The boundary between the public and the private life has long been permeable when states have sought to exercise control over disempowered communities. For example the sanctity of home has not protected women from sterilization abuse or other forms of coercive reproductive health policies (1995:128). The liberal notion of the private as a free cluster from the public life that needs to be protected as the individual's right of freedom is criticized by feminist theories, not as being right or wrong per se, but as non-existent. Feminist critique addresses the notion of this divide by referring to it as created by the state, making the private and the public created by the state and inevitably realms within state control (Sullivan 1995:127). Today, especially in the modern welfare state, there is no social sphere which is protected from state intervention. Even in cases where there is no direct intervention, it is the state which has usually established, actively or passively, its own boundaries of non-intervention. This can beside the modern welfare state be applied to weak states controlled by religious institution or other groups. In other words, the construction of the boundary between the public and the private is a political act in itself. Political power relations with their own dynamics exist in each social sphere. The most important contribution of feminism to social theory has been the recognition that power relations operate within primary social relations as well as within the more impersonal secondary social relations of the civil and political domains (Yuval-Davis 1997:80). Wide spread abuse of women in the home therefore cannot be seen as an individual, case to case issue. It reflects a norm that consciously or unconsciously is condoned by the state, making the state responsible to eliminate it. In other words a yardstick for assessment of the states responsibility to protect women from violence wherever it may occur, is needed.

Michael Heyman (2005) addresses this issue of state responsibility in cases of violence by non-state actors and the development of a new kind of responsibility yardstick:

The state clearly fails its citizens when it persecutes them. However, consistent with the protection theory, it fails them in other, less direct ways. Justice Kirby also posited state failure when the state condones persecution, tolerates it or when the state refuses or is

unable to offer adequate protection. Each situation represents one in which the state can protect its people, but does not. The state obligation then is not to reduce all possibilities of harm to its citizenry, but, in the language Roger Haines ‘to reduce the risk of serious harm to below the level of well-foundedness’. At that, the protection, to be properly regarded as effective, must be ‘meaningful, accessible, effective and available to all regardless of sex, race, ethnicity, sexual orientation, disability, religion, class, age, occupation or any other aspect of identity’. These sentiments alter the view of state obligations and begin to usher in new norms. Under this emerging norm, state obligations should not merely be expressed negatively; rather, states must undertake positive measures to protect their entire populations. Thus, under this evolving norm, failure consists in not footing these positive obligations effectively (Heyman 2005:736).

In the “Declaration on the Elimination of Violence Against Women” (1993) the General Assembly not only defines violence against women and the term gender-based violence, as has been discussed above, but also the responsibility of states to prevent this violence through exercising Due Diligence:

States should condemn violence against women and should not invoke any custom, tradition or religious consideration to avoid their obligations with respect to its elimination. States should pursue by all appropriate means and without delay a policy of eliminating violence against women and, to this end, should:

(...) Exercise Due Diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons (Distr. General 1993);

According to Yakin Ertürk (2006) the UN:s former Special Rapporteur on Violence Against Women, the concept of Due Diligence provides a yardstick to determine whether a state has met or failed to meet its obligations in combating violence against women (2006:2). In her report to the coming session of the Commission on Human Rights, she outlined a brief historical background of the Due Diligence standard, originating it in the literature of some 17th century writers including Grotius. Ertürk claimed that the Due Diligence standard had established, under international law, the obligation of the State to prevent, investigate, punish and provide remedies for acts of violence regardless of whether these are committed by private or State actors.

The standard of Due Diligence was addressed in the Inter-American human rights system in 1988 with the landmark decision of the Inter-American Court of Human Rights in *Velásquez Rodríguez v. Honduras*, concerning the disappearance of Manfredo Rodríguez. Although the disappearance was not carried out by state agents, the Court held that Honduras had failed to fulfill its duties under Article 1(1) of the American Convention on Human Rights, which requires state parties to ensure the free and full exercise of rights and freedoms. The Court concluded that:

“an illegal act which violates human rights and which is initially not directly imputable to a State can lead to international responsibility of the State, not because of the act itself, but

because of the lack of Due Diligence to prevent the violation or to respond to it as required by the Convention”.

The standard has in the same meaning as mentioned above been applied to states responsibility to protect women from violence (Ertürk 2006:7). Both customary and conventional international law establish that states have Due Diligence obligations for preventing, responding to, protecting against and providing remedies for acts of violence against women whether such acts are committed by state or non-state actors⁷. States have an obligation to protect women from violence, to hold perpetrators accountable and to provide justice and remedies to victims (Ertürk 2006:3). This responsibility yardstick needs to be extended to asylum law, in the words of Deborah Anker: ‘international law has begun to address the complex issue of a standard for evaluating whether or not the state has failed to take reasonable action to protect against such non-state harm; that standard of “Due Diligence” can and should be applied in the asylum context, and specifically to claims based on domestic violence (Anker 1997:10).

Asylum provides surrogate international protection to those for whom there has been a ‘fundamental breakdown in state protection’ (see Anker et al 1997:4). Ordinarily, when the State is the persecutor, it is easy to see the breach of the duty of protection between the State and its citizens. However, that breach is no less when the persecution is at the hands of the non-state actor who is encouraged by the State’s failure to act against him (UNHCR Gender Guidelines 2002:5 (15)). An asylum grant does not punish the failed state, but protects the asylum seeker who, for whatever reason, could not turn to her home country for protection. If states are obliged to act accordingly to the Due Diligence standard, is this not a yardstick for that responsibility and, in case of, failure?

In 2008 a woman, HD, applied for asylum and a work permit in Sweden. Her claim was mainly; that she is a Kurd from Batman in Turkey. She has had a relationship and a child out of wedlock, with a married man. By that she has dishonored her family and risks being killed by her father and male relatives if she would return to Turkey. In her claim she stated that the authorities in Turkey are unable to provide sufficient protection in cases surrounding honor. In spite of legislations the violence against women in Turkey continues. A study made by the Turkish state department in 2008 shows that honor based violence had increased

⁷ The women-specific customary and conventional international human rights law that include obligations to act with Due Diligence are (Liu 2006:3): 1 The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), adopted its general recommendation No. 19 in 1992, calls on State parties to act with Due Diligence to prevent and respond to violence against women (186 states have signed). 2. The Declaration on the Elimination of Violence Against Women adopted by the General Assembly in 1993 urges States, in its Article 4(c), to “exercise Due Diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons”. 3. The above provision was reiterated in paragraph 125(b) of the 1995 Beijing Platform for Action, adopted at the United Nations Fourth World Conference of Women, and agreed by 189 participating governments including Hong Kong. 4. Another important development in the application of the Due Diligence standard was the creation of the mandate of the Special Rapporteur on the violence against women, its causes and consequences, by the Commission on Human Rights in 1994.

by 47 % comparing to the violence in 2002. There aren't enough women's shelters and the protection in these isn't sufficient since women are allowed only to stay for three months. Young women are forced to commit suicide or are strangled or poisoned by pills for it to look like suicide so that the family won't be charged. It would be a test of faith if HD had first tried to obtain protection in her home country (*Migrationsdomstolen vs. HD 2009*). The Swedish migration board refused HDs application stating that the Turkish government and its authorities do not support honor related violence, not through legislations or action. According to the board HD hadn't exhausted the possibilities for obtaining protection in Turkey and can't therefore prove that the Turkish authorities aren't able or willing to protect her. HD appealed the decision and the Swedish Migration board, a year later, granted her asylum. As in the case of Rodi Alvarado, another case changed the foundation of HDs claim. In *Opuz v. Turkey* the European Court of Human Rights for the first time elaborated State Obligation with respect to violence in the family, recognizing the gravity of domestic violence in Europe, acknowledging the problems created by the "invisibility" of the crime, and highlighting the seriousness with which states must respond. In a judgment relying heavily on international and comparative law, the Court emphasized that domestic violence is not a private or family matter, but is an issue of public interest which demands effective State action. While acknowledging the existence of laws in Turkey, criminalizing domestic violence, the Court emphasized the need for such laws to be implemented in practice. It found that the criminal law in place did not have an adequate deterrent effect capable of ensuring effective prevention of violence against the women in the case, and that there was widespread passivity on the part of police and prosecutors in responding to such complaints. The Court observed that 'the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors... indicated that there was insufficient commitment to take appropriate action to address domestic violence'.

State responsibility can't only be to legislate against domestic violence but also to implement those legislations. In cases of HD the Swedish government found that 'the Turkish government and its authorities do not support honor related violence, not through legislations or action' (*Migrationsdomstolen 2009*), a year later the European Court of Human Rights judged differently. The responsibility of the state needs to be extended to implementations and abolishing social and cultural structures in the private sphere, and the documents outlining the elimination of violence against women and the responsibilities of states to do so need to be accepted as foundations within asylum rulings; considering the facts of the land as well as the personal case of the applicant. In other words states need to be held to their responsibility of protection as severely as the agent persecuting the applicant.

5 Conclusion

In contrary to the refugee conventions aim to include everyone in need of protection, the persecution grounds and the causality link that needs to be established according to the convention clearly shows that not everyone in need of protection 'abroad' was meant to be defined as a refugee. One group that has been excluded is women. This thesis has aimed to shine a light on that exclusion, using the feminist critique of the liberal private/public dichotomy as a tool, explained in the first part.

By locating women in the private sphere, their claims are made a private matter, unreachable by the public realm in which international law and policies are situated. In the private sphere, as well as the public there are gendered power relations - women are most often subordinated to men. Hence, for most women, direct and indirect subjection to the state will almost always be mediated through direct subjection to individual men or groups of men, making their persecutors often non-state actors. The five categories included in the convention are all free for women to claim, but by excluding 'gender' the authors excluded most claims specific to women. In addition to this the definition is very vague on matters when the persecutor is not a state but a non-state actor. Refugee policy and law rests on the foundation of western liberal politics after the Second World War, politics that implicitly exclude women from the public – political sphere. Considering this; the foundation of politics that created the refugee convention was bias to men, explaining the decision not to include gender as one of the five persecution categories within the definition. While arguing none will be persecuted because of their gender, as the authors of the convention did, they chose to ignore the fact that up until then many already have been; mostly women. Because of women's subordinate role in the society, the persecution that women are subjected to most often is expressed in a gender-related or gender-specific way. So even when the state is directly responsible for persecution, for example in war, this persecution is expressed in a gendered way towards women, for example through rape. This culminates in cases of domestic violence. Feminists criticize liberal thinkers for their hypocrisy in the critique of the bourgeois society. While they state that all men should be free and equal in the public sphere, they condone a man's 'natural' subordinates to women and children in the private – home, at the same time as this sphere is made a safe haven from state intrusion. The violations women suffer in the home, therefore for a long time, have stayed in the home. Domestic violence cases in asylum law have proven very hard to consequently judge. Most often the victim's main reason for being persecuted is that she is a woman. The state she is fleeing from condones this violence, implicitly by allowing it to happen to the extent that she has to flee. Still her persecutor is not the state but a family member. In the asylum proceedings it is her individual responsibility to prove that

the state she is fleeing from is responsible for her persecution, by allowing it to happen or in failing to prevent it. It is her responsibility to prove that her husband wasn't beating her because he was drunk, but because she is a woman. In this thesis I have focused on women subjected to domestic violence and why their claims of persecution should be legitimate in reference to the refugee definition, because I have identified that these cases are an uneasy fit within doctrine and in my opinion need to be included.

'A well-founded fear of persecution', 'membership of a particular social group' and *'state responsibility to protect from violations by non-state actors'*, are attributes of the refugee definition that have been discussed and analyzed in the second part of this thesis, through the critical feminist approach taken.

In most cases the extreme violence that women are subjected to isn't questioned. I have shown the extension of violence against women, focusing on violence by an intimate partner, by the WHO viewed as a global health issue. The different human rights documents show a clear need for a definition of the violence and an urge for it to stop. I argue that this background of violence against women needs to be considered in asylum cases, strengthening the well foundedness of the applicants fear – in relation to the systematic discrimination against women through politics and at the hand of men. It can't only be up to the individual woman to prove her claim, when there is information about the systematic discrimination and abuse women are subjected for. For a gender sensitive approach within international law; for women and men to have the same opportunities of protection from discrimination and persecution, their different points of departure need to be recognized.

Most of the asylum cases where women are fleeing domestic violence categorize the women as belonging to a particular social group, the only possible space in the definition to apply gender as a reason for persecution. This is not in any way a perfect solution, but has been proven successful and applicable in many cases to the extent that some countries have started using this as a policy, as I have presented. This can be criticized of grouping women, giving them a shared experience. I acknowledge this complication but still argue that women fleeing domestic violence should be a legitimate social group because of the common foundation of power-relations between men and women that facilitate this violence and because of the difficulty for these women to prove their case without this recognition. By acknowledging women persecuted by a non-state actor as a group under the convention we are also moving women's rights issues from being a part of development politics to being a human rights issue. Giving it the recognition of severity it needs. Most importantly it cannot be at the hands of an individual administrative official or judge to decide cases of women fleeing their home, because of the lack of instruction and guidance from international law.

The last important causality to prove is the lack of will or ability of the home country to provide the protection one is seeking abroad. This I believe is one of the most important parts because of the acknowledgement that this point entails. Moving away from cases where the persecutor is the state, the main question here is the responsibility of the state for acts committed by a non-state actor. By holding the state responsible for acts of domestic violence the severity and the

nature of these crimes will be exposed as not just private acts but as a part of a larger gendered structure of power. Hence the discrimination of women will be put on the agenda as a human rights issue. I argue that the Due Diligence standard already defined in several human rights documents needs to be applied in asylum law. The standard helps to identify state responsibility beyond legislation and direct intervention and holds the state responsible also to actually advocate and implement these laws. When these human rights violations still occur, it is an indication of state failure.

I have in this thesis answered my main question by first identifying the problem, presenting a theoretical approach through which I have analyzed the problem and then made recommendations how the problem can be slowed. Thus the answer to the question '*why should domestic violence be a legitimate asylum claim*' must be viewed in respect to the main value stated; equality between men and women within the refugee definition. By identifying the ways in which women are excluded from the definition I have explained them through the feminist critique of the liberal private/public divide. Using empirical cases in relation to my feminist critical approach I have also made recommendations of how these cases could be legitimate in accordance to the refugee definition.

In the end, inevitably, the question of the mere construction of the refugee definition comes to mind. The definition is old, constructed in a different time to handle migration currents after the World War. The world has changed much since then and the migration of its inhabitants with it. Maybe it is time not just to reproduce the refugee definition, applying guidelines and new policies to alter it, but to reconstruct and redo based on the migration situation of our world today. The issue of equality of all human beings and their needs then, I believe, should be the priority. I urge future research in the field of law with a feminist perspective for seeking, not just a reformation and specification of the refugee definition so that it is applicable to the claims of women but, a reconstruction of the definition as a whole. Human rights policies and international law, in the end, are not fixed realities and need to change as the situation of the world does.

6 Executive Summary

In recent years the gendered aspects of the 1951 refugee definition have been discussed within asylum law and amongst feminist theoreticians, claiming that women's persecution grounds often aren't defined legitimate within the definition. While all asylum applicants are involved in a high stake venture, asylum seekers alleging state failure to protect them from domestic violence face additional difficulties because of enormous evidentiary problems, unclear legal standards, and the fact that domestic violence claims depart from usual asylum cases – seeking protection “abroad” from the conducts of one's partner. Many courts have resisted these asylum claims because they view the issue a form of private conflict, which cannot be resolved by asylum law. In recent years some countries, for example, Canada, the U.S. and Sweden have developed national guidelines to deal with cases of gendered-based persecution, a development highly encouraged by the UNHCR, UNs Special Rapporteur on Violence Against Women and the EU.

Trying to explain the exclusion of women from these documents and argue for their inclusion, this thesis poses the normative question: *Why should domestic violence be a legitimate asylum claim*, as its point of departure. In seeking to answer it, it takes on a critical feminist approach of the liberal private/public dichotomy. The focus on the development of liberal thought and its definition of the public and the private is mainly because it is this political thought that is the foundation of modern human rights policies and international law documents, the refugee convention being one of these and the focus of this thesis. The construction of a private and public realm is approached by feminists on all sides as a means by which women have been excluded from the political life, while simultaneously being subjected to its power. From this critical feminist approach, it then analyzes the three main components of the refugee definition; *a well-founded fear of persecution, membership of a particular social group and state responsibility to protect from violations by non-state actors*.

Starting out in gendering the meaning of a well-founded fear of persecution this thesis shines a light on the gender-based violence women are subjected to, focusing on domestic violence. By looking at reports written and studies done on intimate partner violence, it provides empirical examples of women's discrimination and persecution within in the private sphere. This well-founded fear that, not all women but many women, flee from in their home-countries is then presented as a base for women fleeing domestic violence to constitute a particular social group. It argues that women who flee from persecution by a non-state actor have special circumstances making it difficult for them to prove a causality link between their persecution because of their group membership on the one hand and the home states unwillingness or inability to protect on the other.

This is further made difficult by the refugee definitions unclarity surrounding cases of this kind. Considering the severity and how widespread this persecution they are subjected to is, makes them in need of being legally defined as a particular social group. Last but not least it addresses the issue of state responsibility to protect women from persecution by a non-state actor. A responsibility outlined in many human rights documents, but still not implemented by asylum courts unwilling to acknowledge the failed responsibility of states to protect women from this persecution. It argues that the standard of Due Diligence needs to be applied in asylum cases. The standard outlines states responsibility to prevent violence against women in the public and in the home. This needs to be a yardstick even for when the state's failure to protect needs to be assessed.

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