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Domestic Violence as a Ground
for Refugee Status – A Critical
Analysis
of the Requisites of the
Refugee Definition

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Summary

The thesis deals with domestic violence as a ground for refugee status in international law, and in Swedish law as an example of the implementation in a national system. Domestic violence against women occurs in all countries, cultures and social classes in the world. This kind of violence is the most common cause of injury of women in close to all countries of the world. It can be very difficult for a woman to leave an abusive relationship. If a woman despite this fact manages to escape from this kind of violence and flee to another country, will she then qualify as a refugee?

This thesis thoroughly analyses the different requisites of the refugee definition in order to assess whether a woman who has fled domestic violence could be considered a refugee and if so, under what circumstances. The analysis also serves to identify the requisites that are critical and difficult to fulfil. Further, in the end of the thesis, a proposal for reinforced protection for women who have fled domestic violence, within the scope of the refugee definition, is presented. The proposal is supported by information in the rest of the thesis.

It is established in the thesis that domestic violence against women can constitute a ground for refugee status under certain circumstances in international law and Swedish law. The requisites that generally may cause most difficulties are the “causal link between the persecution and a convention ground”, i.e. that the victim risks persecution due to a certain kind of characteristic, and “lack of state protection” in the country of origin. It is proposed that the requirement of causal link is to be applied slightly differently than in Swedish case law. Instead of focusing on why the state fails to protect the woman, one ought to focus on why the perpetrator subjects the victim to violence. The perspective to be used when seeking explanations for the individual behaviour is a structural one.

Sammanfattning

Uppsatsen behandlar våld mot kvinnor i nära relationer som grund för flyktingstatus i internationell rätt med svensk rätt som exempel på implementeringen i nationell rätt. Våld mot kvinnor i nära relationer förekommer i alla länder, kulturer och samhällsklasser i världen. Den här typen av våld är den vanligaste orsaken till skador hos kvinnor i näst intill alla länder i världen. Det kan vara mycket svårt för en kvinna att lämna ett våldsamt förhållande. Om en kvinna ändå lyckas fly den här typen av våld till ett annat land, kommer hon då att få flyktingstatus?

I uppsatsen utreds med hjälp av en utförlig genomgång av de olika rekvisiten i flyktingdefinitionen huruvida en kvinna som flytt undan våld i en nära relation skulle kunna anses som flykting och i så fall under vilka omständigheter samt vilka rekvisit som är kritiska och svåra att uppfylla. I slutet av uppsatsen presenteras vidare ett förslag på hur skyddet för kvinnor som flytt från våld i en nära relation skulle kunna förstärkas inom ramen för flyktingdefinitionen. Förslaget underbyggs i övriga delar av uppsatsen.

Det konstateras att våld mot kvinnor i nära relationer kan utgöra grund för flyktingstatus enligt internationell och svensk rätt under vissa omständigheter. De rekvisit som generellt sett kan innebära mest problem är kravet på ”orsakssamband mellan en konventionsgrund och förföljelsen”, det vill säga att förföljelsen kan sägas ha sin grund i en viss typ av egenskap hos offret, samt kravet på ”avsaknad av skydd i hemlandet”. Det föreslås att kravet på orsakssamband utformas något annorlunda än vad det gjort i svensk praxis. I stället för att fokusera på orsakerna till att staten misslyckas skydda kvinnan bör man fokusera på varför förövaren utsätter offret för våld, och då söka förklaringar för detta i ett strukturellt perspektiv.

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	Committee on the Elimination of Discrimination against Women
DEDAW	Declaration on the Elimination of Violence against Women
ECHR	(European) Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
UNHCR	United Nations High Commissioner for Refugees
WHO	World Health Organization

1 Introduction

The last resorts for a person whose human rights are violated and who cannot see a future in his or her native country can be to flee abroad and apply for asylum as a refugee. The widely ratified Convention Relating to the Status of Refugees from 1951 (“the Refugee Convention”) and the Protocol Relating to the Status of Refugees from 1967 (“the 1967 Protocol”) regulates who qualifies as a refugee and prescribes that a refugee cannot be sent back to his or her country of origin,¹ which is the most important consequence of the refugee status.

Domestic violence against women occurs in all countries, cultures and social classes in the world.² This kind of violence is the most common cause of injury of women in close to all countries of the world.³ Moreover, studies from several countries show that between 40 and 70 per cent of the female victims of murder have been killed by a man with whom they were or had been in an intimate relationship.⁴ Despite the pervasiveness and serious character of domestic violence, victims are denied help from the authorities in many parts of the world.⁵

If a woman manages to escape from this kind of violence and flee to another country, will she then qualify as a refugee? The refugee definition has traditionally been interpreted from the perspective of men’s experiences.⁶ Female victims of men’s violence such as rape or domestic violence have as a consequence been denied refugee status. Moreover, it has been even more difficult to obtain refugee status for women who face persecution by private actors than those who face violence by the state.⁷ Over the last twenty years, a gender-perspective has gradually been introduced into refugee law⁸ and many jurisdictions have now recognised violence such as female circumcision and wife-battery as forms of persecution.⁹

¹ The Refugee Convention, article 33.

² World Health Organization (WHO), *World Report on Violence and Health*, 2002, p. 89.

³ Ninette Kelley, *The Convention Refugee Definition and Gender-Based Persecution: A Decade’s Progress*, p. 564.

⁴ Mikael Rying, *Dödligt våld mot kvinnor i nära relationer, BRÅ-rapport 2001:11*, (Mortal violence against women in intimate relations), pp. 11-12, WHO, *World Report on Violence and Health*, 2002, p. 93.

⁵ Bonita Meyersfield, *Domestic Violence and International Law*, p. 1.

⁶ The United Nations High Commissioner for Refugees (UNHCR), *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* (“the Guidelines on Gender-Related Persecution”), para. 5.

⁷ Maria Bexelius, *Asylrätt, kön och politik: En handbok för jämställdhet och kvinnors rättigheter*, pp.112-113.

⁸ The Guidelines on Gender-Related Persecution, para.5.

⁹ Kelley, p. 562.

It thus seems to be possible to consider domestic violence as a ground for refugee status. In this context, it is of interest to assess in detail the different elements of the refugee definition to find out whether a female victim of domestic violence would fulfil them and to identify the critical requirements that may be difficult to meet. Sweden is one of the countries that have expressly recognised gender as a ground of persecution within the meaning of the refugee definition. The Swedish interpretation of this matter may therefore serve as an interesting example of the regulation of this issue in a national system.

1.1 Purpose and research questions

The purpose of this thesis is to assess if victims of systematic domestic violence against women may qualify as refugees, and in that case under what circumstances. The purpose is also to analyse the difficulties that may arise in relation to the different requisites of the refugee definition. Finally, the aim is to provide a proposal for reinforced protection for female victims of domestic violence within the framework of applicable refugee law, and to find support for this interpretation. The main focus is the refugee definition in the Refugee Convention and the 1967 Protocol, but Swedish law is also discussed as an example of how the issue has been interpreted in a national system.

The research questions of the thesis are:

- 1) Does systematic domestic violence against women constitute a ground for refugee status within the meaning of the Refugee Convention and the 1967 Protocol, and if so, under what circumstances?
- 2) What requisites of the refugee definition are particularly problematic for claims of refugee status based on domestic violence against women?
- 3) How has this issue been interpreted in Swedish law?
- 4) Could the protection of female victims of domestic violence be reinforced within the framework of applicable refugee law?

1.2 Delimitations

In relation to the definition of a refugee, the Refugee Convention is the main legal source of the thesis. The refugee definition in the Swedish Aliens Act is also assessed. Other instruments pertaining to refugees, such as the EU directive Council Directive 2004/83/EC on minimum standards for the qualification and status of third country nationals or stateless persons as

refugees or as persons who otherwise need international protection and the content of the protection granted (“the Qualification Directive”), is not further analysed, as it would render the thesis too comprehensive.

The kind of violence focused on is domestic violence against adult women carried out by a man. Focusing on domestic violence against women and not against men is motivated by the fact that men’s violence against women is much more widespread than the other way around.¹⁰ Another reason for focusing on domestic violence against women is that the protection from this kind of violence many times is unsatisfactory. In several countries, the violence could be said to be sanctioned or accepted by the state since it is formally or de facto allowed.¹¹ In this sense, this kind of violence is different from other kinds of violence for which there is generally less acceptance from the authorities. The thesis does not focus on honour-related violence or harmful traditional practices as such. Honour-related violence may in many cases fall under the definition of domestic violence and what is stated about domestic violence does then consequently apply to the honour-related violence as well. The reason for not specifically focusing on honour-related violence is the wish to treat domestic violence against women as a universal problem and not as a phenomenon occurring only in certain cultures or regions. Considerations of a strictly political nature are intentionally left out in the thesis. As a consequence, objections based on the increased number of refugees that enhanced protection could entail are not dealt with.

There are several reasons for why Swedish law serves as an example in the thesis. Firstly, it has been expressly recognised in Swedish law that persecution based on gender could constitute a ground for refugee status. There are thus statements in official documents and case law that demonstrate how the specific issue has been interpreted in the national system. Moreover, this recognition implies that there is in Swedish law a potential for accepting the enhanced protection that is proposed in the thesis. Secondly, the decision to analyse Swedish law is also explained by the fact that author of the thesis is Swedish and has been educated in the Swedish legal system.

1.3 Method and material

In order to answer the research questions, a traditional legal method is mainly used. In relation to issues of international law, treaties, customary international law, cases and doctrine¹² is presented and analysed. As regards Swedish law, relevant legislation, case law and preparatory works is applied

¹⁰ WHO, *World Report on Violence and Health*, 2002, p. 89.

¹¹ See chapter 4.1.2.2.1.

¹² These sources are enumerated in *The Statute of the International Court of Justice*, art 38 and are considered as sources of international law; see e.g. Hugh Thirlway, *The Sources of International Law*, pp. 116-117 in Malcolm D. Evans (ed.) *International Law*.

and analysed.¹³ In addition, different resolutions, general comments and reports from the UN system are used to shed light on issues that need further clarifications. Some of these sources are also referred to when discussing the possible existence of a customary international norm prohibiting domestic violence. Some information about domestic violence against women is presented in the thesis as I wish to put the legal issue in a context and since I deem it necessary for the legal analysis. Literature specialised on this topic is used for this purpose. When the literature on a certain issue is not very detailed, the reasoning is instead based on the more general information and principles that I apply to the specific situation.

1.4 Outline

Firstly, different aspects of violence against women and domestic violence are discussed. Violence against women and domestic violence are defined and the nature and different manifestations of the violence are described. Then the causes of the violence are discussed. This is of importance for whether a person qualifies as a refugee or not as one of the requisites of the refugee definition relates to the reason for persecution. Further, it is assessed whether domestic violence constitutes a human rights violation. This question is also of relevance for the fulfilment of the refugee definition. It is discussed whether there is an independent human right to be free from domestic violence and which other human rights that may be violated by domestic violence. Secondly, the definition of a refugee according to the Refugee Convention is described. The most important requisites of the definition are thoroughly examined by means of two different interpretations of the definition. Thirdly, it is assessed whether a victim of systematic domestic violence may qualify as a refugee. In this part it is systematically examined whether the different requisites could be fulfilled, based on the information in the previous chapters and with guidance from literature pertaining to the issue. Particular obstacles for the fulfilment of the requisites are identified. Fourthly, the regulation of domestic violence as a ground for refugee status in Swedish law is presented. The thesis is concluded by concluding remarks including a proposal for enhanced protection of female victims of domestic violence within the framework of applicable refugee law.

¹³ This is described as the conventional method, Ulf Bernitz, Ulf, Lars Heuman, Madeleine Leijonhufvud, Peter Seipel, Wiweka Warnling-Nerup, Hans-Henrik Vogel *Finna rätt: juristens källmaterial och arbetsmetoder*, (To find right: the lawyer's source material and working methods), p. 245.

2 Domestic violence against women

2.1 The nature and causes of domestic violence against women

For the purpose of this thesis, it is necessary to have some understanding for what is meant by violence against women, gender-based violence and domestic violence and what different acts it may include. It is also of relevance to have an idea of how widespread it is and to know some of the reasons behind this violence. Domestic violence against women is a complex issue, not least when it comes to the causes of the violence. It is not possible in this thesis to try to give a complete picture of the research and the theories pertaining to this issue. Moreover, the purpose of the thesis is to examine the application of refugee law to domestic violence against women rather than to examine the issue of domestic violence against women in itself. It is therefore not necessary to discuss this issue more than briefly. Hence, merely an overview of definitions, facts and some theories relating to causes of domestic violence against women is presented.

It can initially be said that domestic violence against women is different from other kinds of violence in several ways. While one can assume that physical violence is criminalised in most states, domestic violence against women is in many cases either formally sanctioned by the state since it is exempt from the violence prohibition, or de facto sanctioned as the state is inactive in relation to this particular kind of violence.¹⁴ Moreover, the victims of domestic violence against women are particularly exposed and vulnerable due to the dependency to the perpetrator at an economic, cultural and emotional level.

2.1.1 Definitions and nature of violence against women

Gender-based violence against women has by the Committee on the Elimination of Discrimination against Women (CEDAW Committee) been defined as:

“Violence that is directed against a woman because she is a woman or that affects women disproportionately”¹⁵

¹⁴ See chapter 4.1.2.2.1.

¹⁵ CEDAW General Recommendation 19, para.6.

The definition of violence against women that is applied in this thesis is the one from the Declaration on the Elimination of Violence against Women (DEDAW). An almost identical definition has also been adopted in the Council of Europe Convention on preventing and combating violence against women and domestic violence (“the European Convention on Violence against Women”).

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

The definition of domestic violence that is used for the purpose of the thesis is based on and a hybrid of definitions of several international instruments that are discussed in the next chapter:

All acts of physical, sexual, psychological violence that occur within the family or domestic unit or between former or current spouses or partners.

Domestic violence can be seen as one sort of violence against women as it does at least affect women disproportionately and perhaps could be said to be directed against women because they are women, as is further discussed in this and the next chapter. The thesis focuses on the kind of domestic violence that occurs between former or current spouses or partners, carried out by a man against a woman, and not on other kinds of violence within the family. The terms “domestic violence against women” and “domestic violence” are both used to refer to the kind of domestic violence which is directed against a woman and which is a form of violence against women. The term “intimate partner violence” is used by some authors instead of domestic violence and this term is therefore also used a few times in the thesis to refer to the same phenomenon.

Physical domestic violence can include inter alia beatings, punching, biting, kicking, stabbing, strangling, burning, and food deprivation.¹⁶ Sexual violence may take many different forms such as rape or coercion to watch pornography. Psychological violence may include isolation of the woman from family and friends, threats, insults and threats that the woman may lose the children.¹⁷ One thing that aggravates the effects of the violence is when the abuser switches between violence to care for the woman. This behaviour increases the control over the victim’s life.¹⁸ The violence and threats of violence are instrumental and serve to control the woman.¹⁹ It can be very

¹⁶ Heaven Crawley, *Refugees and Gender: Law and Process*, p. 131.

¹⁷ Ibid., and Carin Holmberg and Viveka Enander, *Varför går hon? Om misshandlade kvinnors uppbrottsprocesser* (Why does she leave? About battered womens’ processes of breaking up), p. 25.

¹⁸ Eva Lundgren, *Våldets normaliseringsprocess*, (The normalisation process of the violence), p. 31.

¹⁹ Gudrun Nordborg, *Kvinnofrid – att förstå bakgrunden till mäns våld mot kvinnor och dess effekter: Ett utbildningsmaterial för personal inom rättsväsendet, hälso- och sjukvården, socialtjänsten och kriminalvården*, (Women’s peace- to understand the

difficult for a victim to leave partly because her will has been broken down by repeated abuses.²⁰ Other obstacles for a breakup can be economic dependence and strong emotional ties to the abusive man including inter alia love, fear and feelings of guilt.²¹ Domestic violence is often practiced over a long period of time and in many cases it also escalates over time.²²

Women are victims of domestic violence more than any other group. They are also frequently denied help from the police, courts and prosecutors; this happens all around the world.²³ There are of course also cases where women subject their partners to violence but they are less. About 3-5 per cent of the intimate partner violence has been estimated to be perpetrated by women.²⁴ A study made by the World Health Organization (WHO) in ten different countries showed that domestic violence was widespread in all the countries studied. There were however significant variations between the different countries. Between 15 per cent and 71 per cent of the women interviewed had ever been victims of physical or sexual violence or both, by an intimate partner.²⁵

2.1.2 Causes of violence against women

The question why women are subjected to gender-based domestic violence does not have one simple answer. The question is complex and there are many different ways of explaining the violence. Therefore, the following chapter can only provide an indication on what the causes of the violence can be. According to one model of explanation, there can be said to be three levels of explanations for the violence; a structural level, a cultural level and an individual level. These three levels do partly explain reasons for the violence and factors contributing to its continuation. The individual chooses to carry out the violent acts towards his partner, but the cultural and structural factors facilitate, explain and excuse the violence.²⁶

2.1.2.1 Structural causes of violence against women

The UN Report *In-depth study on all forms of violence against women*:

background of men's violence against women and its consequences: Educational material for staff within the judicial system, healthcare, social services and correctional treatment), p. 19.

²⁰ Crawley, p. 131.

²¹ Holmberg and Enander, pp. 44-47 and WHO, *World Report on Violence and Health*, 2002, p. 96.

²² www.nck.uu.se/Kunskapscentrum/Kunskapsbanken/amnen/Vald_i_nara_relationer/Vald_i_nara_relationer_amnesguide/.

²³ Meyersfield, p.1.

²⁴ Mona Eliasson and Barbro Ellgrim, *Mäns våld mot kvinnor i nära relationer: en kunskapsöversikt* (Men's violence against women in intimate relations: an overview of knowledge), p. 21, with reference to Dobash & Dobash (1980).

²⁵ WHO, *Summary report: WHO Multi-country Study on Women's Health and Domestic Violence against Women*, p. 15.

²⁶ Eliasson and Ellgrim, p. 18.

*Report of the Secretary-General*²⁷ discusses some of the structural causes of violence against women, and initially points out the patriarchy and the hierarchically ordered gender roles. It states that violence against women occurs in all parts and all cultures of the world. The pervasive nature of the phenomenon is, according to the report, a sign of it having its roots in patriarchy- the systematic male domination over women.²⁸ The report moreover states that “violence against women is both a means by which women’s subordination is perpetuated and a consequence of their subordination”. One example of how it perpetuates the inferior status of women is when violence is committed against a woman because she has not complied with the existing gender roles concerning female sexuality or the family. This kind of violence serves to punish and control and it has the function of reinforcing the existing gender roles. Moreover, violence against women cannot be explained only with reference to individual circumstances such as alcohol abuse, unemployment or previous experience of violence; when focusing mainly on these kinds of causes one can be said to ignore the significance of gender inequality.²⁹

Furthermore, a study by the WHO found that one cause of intimate partner violence is that men believe that their masculinity is challenged when women transcend the traditional gender roles. The violence is then a punishment and has the function of upholding boundaries between the existing gender roles.³⁰ A similar view presented by a Swedish researcher is that men subject women to violence as means of recovering control in situations where they perceive a threat to their position.³¹ It can generally be said that the gender roles that ascribe to men dominance, toughness and power in the domestic sphere, have a great significance for intimate partner violence.³²

Moreover, economic reasons play an important role for the understanding of violence against women. Inequalities in relation to economic resources, access to land, employment etcetera may increase the risk of violence. Lack of economic independence reduces the possibilities of women to take decisions of their own and to leave a violent relationship. In addition, some forms of restrictions over women’s control of economic resources may qualify as a type of violence against women.³³

Another important factor is inaction by the state in relation to violence against women. Passivity by the judicial system leads to impunity which in its turn signals that violence against women is acceptable and encourages

²⁷ *In-depth study on all forms of violence against women: Report of the Secretary-General*, UN Doc. A/61/122/Add.1, (“the UNSG Report”).

²⁸ The UNSG Report para.69.

²⁹ *Ibid.*, paras.72-73.

³⁰ *Ibid.*, para.75.

³¹ Mona Eliasson, *Mäns våld mot kvinnor: en kunskapsöversikt om kvinnomisshandel och våldtäkt, dominans och kontroll* (Men’s violence against women: an overview of the knowledge about women’s battery and rape, dominance and control), p. 22.

³² The UNSG Report, para.76.

³³ *Ibid.*, paras. 86-87.

further abuses of this kind. Another consequence of a passive state is that it reinforces the powerless situation of the women.³⁴ Further, inaction on behalf of the state implies that discriminatory laws and policies continue to be applicable. By remaining passive, the state supports the subordinate position of women, which in its turn maintains the practice of violence against women.³⁵

2.1.2.2 Cultural causes of violence against women

Cultural factors also play an important role in this context. Culture is a broad concept that is difficult to define but it can at least be said that some of the components of culture are tradition, customs and religion. Many times culture is referred to as one of the causes of the violence, especially when it comes to harmful traditional practices (such as female genital mutilation), honour violence, or discriminatory punishments prescribed by religious laws.³⁶ Moreover, culture is used by several countries and social groups as justification for violence against women and limitations of women's rights.³⁷ It is however important to remember that cultural perceptions concerning the relations between men and women, gender roles and what constitutes accepted behaviours affects people in all parts of the world.³⁸ Culture forms violence against women in extremely varied ways depending on the society in question.³⁹

2.1.2.3 Individual causes of violence against women

As to the individual level, there are some factors identified as specific risk factors. Some of these factors, which apply in relation to the perpetrator as well as the victims of violence, are: having been victim of violence as a child or having witnessed domestic violence, abuse of alcohol or drugs, low educational or economic status and being part of a marginalised group. There are also some factors that are related to the couple or family. These are male authority and control in the family, conflicts within the couple and considerable differences between the educational, economic or employment status of the two spouses or partners.⁴⁰

Studies have showed that many female victims of violence by their partners believe that the violence was caused by jealousy, which occurred independently of real reasons for jealousy. Another explanation presented by women is that an argue between the partners gave rise to the violence. A study made by a Swedish researcher showed that in most cases, the first time a woman was subjected to violence, there was no single conflict triggering the violence, other than that she had expressed a dissentient

³⁴ The UNSG Report, paras.76 and 96.

³⁵ Ibid., para. 96.

³⁶ Ibid., para.78.

³⁷ Ibid., paras. 78 and 81.

³⁸ Eliasson and Ellgrim, p. 19.

³⁹ The UNSG Report, para. 83.

⁴⁰ Ibid., para. 98.

opinion concerning a subject matter. The opinion expressed could be for example denial of a false accusation or an alternative solution to a common problem. Most women had expressed that the first violent act came as a complete surprise. The researcher also found support for this result in a Canadian study.⁴¹

2.1.2.4 Sum-up of the causes of violence against women

None of the causes discussed can be considered the only reason for the violence and there are surely variations in the specific cases. The deficiency in focusing only on individual causes could be illustrated by the fact that not all men who for example have a history of abuse in the family are violent. Further, some of the problems which are held to be triggering the violence such as jealousy must also sometimes be felt by women, but women do not subject men to violence to the same extent as the other way around.⁴²

From what is stated above, it is possible to draw the conclusion that an underlying contributing factor to the violence is always a structural cause related to gender such as: the gender roles that are being maintained through the violence, the subordinate position of women and the wider acceptance for male violence. It does not appear as reasonable to disregard these causes. The other factors, especially the choice of the men in question are determinative in the end, but the other gender-related structural causes can be seen as being underlying and contributing causes.

2.2 Is there a human right to be free from domestic violence?

There is no universally ratified convention explicitly outlawing violence against women or domestic violence. However, many initiatives have been taken at the UN level concerning the issue, which has resulted in a number of resolutions, recommendations and other instruments. Some of the most important instruments on the issue are presented below. The question whether these could be used as an evidence of the existence of a human right to be free from domestic violence of customary international law is also briefly discussed. Further, it is discussed whether any other human rights are violated through domestic violence. Finally, some of the regulations of domestic violence in regional systems are presented. The choice of material presented in this chapter is motivated by the fact that they support the idea of the thesis.

⁴¹ Eliasson, pp. 21 and 177.

⁴² Nordborg, p. 18.

2.2.1 International instruments on violence against women

The main convention on women's rights, the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) adopted in 1979, does not explicitly prohibit violence against women. However, the CEDAW Committee, which is responsible for supervision of the implementation of CEDAW, has issued two general recommendations pertaining to violence against women.⁴³ General Recommendation No. 12 from 1989 mainly recommends states to provide information and statistics on violence against women and measures taken to combat and prevent it.⁴⁴ General Recommendation No. 19 from 1992 is more comprehensive. It states that gender-based violence may violate provisions of CEDAW notwithstanding that the provision does not explicitly refer to violence. Moreover, it explains that gender-based violence constitutes discrimination as defined by article 1 of CEDAW.⁴⁵ It should be mentioned here that discrimination against women according to article 2 of the convention is to be prohibited and countered through certain measures by state parties. The Recommendation addresses family violence and states that it implies a risk to women's health and that it decreases women's ability to participate in public life and family life on an equal basis; article 16, pertaining to family and marriage, and article 5 relating to gender stereotypes are referred to in this regard.⁴⁶ The state parties are recommended to take effective measures to overcome gender-based violence, perpetrated by private persons or public representatives.⁴⁷ To conclude, the Recommendation clarifies that the duty on states to eliminate discrimination also implies a responsibility to prevent violence against women. This is however not a legally binding instrument.⁴⁸

Another instrument pertaining to violence against women is the Declaration on the Elimination of Violence against Women (DEDAW), which is a General Assembly resolution from 1994.⁴⁹ This has been described as "the most explicit international instrument" concerning domestic violence.⁵⁰ Violence against women according to DEDAW encompasses violence in the family, in the general community, and violence perpetrated or condoned by the state.⁵¹ The declaration recognises that the violence is "a manifestation of historically unequal power relations between men and women".⁵² States

⁴³ Alice Edwards, *Violence against Women under International Human Rights Law*, p. 8.

⁴⁴ CEDAW Committee, *General Recommendation No. 12*, paras. 1-4.

⁴⁵ *Ibid.*, para. 6.

⁴⁶ CEDAW Committee, *General Recommendation No. 19*, para. 23.

⁴⁷ *Ibid.*, para. 24. (a).

⁴⁸ Meyersfield, pp. 36-37.

⁴⁹ General Assembly Resolution, *Declaration on the Elimination of Violence against Women*, UN Doc. A/RES/48/104 (DEDAW).

⁵⁰ Meyersfield, p. 37.

⁵¹ DEDAW, article 2.

⁵² *Ibid.*, preamble.

should, according to the declaration condemn violence against women and pursue a policy of eliminating the same phenomenon. To this end they should inter alia act with due diligence to prevent, investigate and punish acts of violence against women, perpetrated by the state or private persons; provide access for victims of this violence to the judicial system and ensure that there is available protection and rehabilitation services for the victims.⁵³

In 1995, a large world Conference on Women's right was held in Beijing.⁵⁴ The Beijing Declaration and Platform for Action was adopted by the conference. In the Declaration, the governments represented at the conference expressed their commitment to "prevent and eliminate all forms of violence against women and girls".⁵⁵ In the Platform for Action, violence against women was discussed under the heading "human rights of women" and was described as violating and impairing or nullifying women's enjoyment of human rights. Domestic violence was in this context discussed as one form of violence against women.⁵⁶ Bonita Meyersfield finds that while domestic violence was not explicitly pointed out as a human rights violation, the states at the conference at least committed themselves to prevent this violence due to its detrimental effect on women's human rights.⁵⁷ The Beijing Declaration is often implicitly referred to by other international documents on violence against women, despite not being considered a traditional source of international law.⁵⁸

The UN General Assembly adopted a resolution on the elimination of domestic violence against women⁵⁹ in 2004. It states that domestic violence in general occurs between "individuals who are related through blood or intimacy" and that it includes physical, psychological and sexual violence. It also recognises that states are required to take action to prevent the violence and to protect victims.⁶⁰ Further, it touches upon the responsibility of the states in relation to domestic violence: "*Stresses* that States have an obligation to exercise due diligence to prevent, investigate and punish the perpetrators of domestic violence against women and to provide protection to the victims, and also stresses that not to do so violates and impairs or nullifies the enjoyment of their human rights and fundamental freedoms".⁶¹ The description of the human rights aspect is hence the same as in the Beijing Platform for Action. In another resolution from 2005, the General Assembly urged the member states to take measures to eliminate violence against women occurring in the public or private sphere.⁶² Further, several resolutions have been adopted on the intensification of the efforts to

⁵³ DEDAW, article 4.

⁵⁴ Meyersfield, p. 39.

⁵⁵ The Beijing Declaration, paras. 1 and 29.

⁵⁶ The Beijing Platform for Action, para. 224.

⁵⁷ Meyersfield, p. 40.

⁵⁸ *Ibid.*, p. 41.

⁵⁹ General Assembly Resolution, UN Doc. A/RES/58/147.

⁶⁰ *Ibid.*, para.1.

⁶¹ *Ibid.*, para.5.

⁶² General Assembly Resolution, UN Doc. A/RES/59/167, para. 8.

eliminate violence against women.⁶³ These do inter alia stress the importance of criminalisation of violence against women, call for and enumerate other measures to counter violence against women, and stress the responsibility by the states in relation to violence against women.

Another category of influential documents on the issue is the reports of the Special Rapporteur on violence against women, its causes and consequences. The first one was appointed in 1993.⁶⁴ Some of the reports have focused on domestic violence against women.⁶⁵ Moreover, the Commission on Human Rights and the Human Rights Council (which replaced the Commission on Human Rights in 2006⁶⁶) have also adopted resolutions that concern women's rights and violence against women.⁶⁷

The above discussed instruments show that there is support for a prohibition of domestic violence from different UN institutions and from UN member states. But does this mean that there is a binding norm with such a content? As the instruments themselves are not binding, the possibility left is if they could constitute customary international law. Meyersfield states, in relation to several of the described documents, that it is uncertain whether they can constitute customary international and that it depends on whether a traditional or contemporary approach to customary international law is applied.⁶⁸ At least the General Assembly resolution from 2004 could, according to a contemporary approach confirm the existence of a binding customary norm prescribing that domestic violence is a human rights violation that states are responsible for.⁶⁹ Meyersfield finds that despite there being insufficient evidence for the establishment of a binding rule when applying a traditional theory, the states may be obliged to prevent domestic violence and punish the perpetrators, due to membership of international or regional bodies. She moreover holds that the fact that states respond to the international instruments and the actions by the treaty monitoring bodies pertaining to the issue, is an evidence of an on-going creation of a norm of customary international law.⁷⁰ In any case, it cannot be said with certainty whether customary international law prescribes that there is a human right to be free from domestic violence.

⁶³ General Assembly Resolutions, UN Doc. A/RES/61/143, A/RES/62/133, A/RES/63/155, and A/RES/64/13.

⁶⁴ Commission of Human Rights Resolution, UN Doc. E/CN.4/RES/1994/45.

⁶⁵ Reports by the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/2002/83, E/CN.4/1999/68 and E/CN.4/1996/53.

⁶⁶ Henry J. Steiner, Philip Alston, and Ryan Goodman, *International Human Rights in Context: Law, Politics, Morals*, p.739.

⁶⁷ Commission on Human Rights Resolution, UN Doc. E/CN.4/RES/2001/49 and Human Rights Council Resolution, UN Doc. A/HRC/RES/6/30.

⁶⁸ Meyersfield, pp. 37- 38 and 62.

⁶⁹ *Ibid.*, p. 62.

⁷⁰ *Ibid.*, p. 107.

2.2.2 Regulation of domestic violence in regional systems

Domestic violence is regulated and outlawed at least within the European and the Inter-American systems. In May 2011, the European Convention on Violence against Women opened for signatures. It will enter into force three months after the tenth ratification out of which eight needs to be by members of Council of Europe.⁷¹ It currently has eighteen signatures but no ratifications.⁷² The Convention is a comprehensive document consisting of 81 articles. One of the purposes of the convention is to protect women from violence and to prevent, prosecute and eradicate this kind violence, including domestic violence.⁷³ Violence against women is defined as:

“a violation of human rights and a form of discrimination against women and shall mean all acts of gender-based violence that result in, or are likely to result in, physical, sexual, psychological or economic harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life”⁷⁴

Domestic violence is defined as:

“all acts of physical, sexual, psychological or economic violence that occur within the family or domestic unit or between former or current spouses or partners, whether or not the perpetrator shares or has shared the same residence with the victim”⁷⁵.

The Convention hence clearly states that violence against women is a human rights violation. It also expresses in the preamble that serious forms of violence to which women and girls are often subjected, such as domestic violence, constitutes serious human rights violations.

Furthermore, domestic violence has been discussed in some cases by the European Court of Human Rights (ECtHR), in relation to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR). In the case *Kontrová v. Slovakia* from 2007, the applicant had alerted the police about severe beatings by her husband and a suspicion that that he would kill their two children. Despite this knowledge, the police took no action. The husband killed himself and the two children soon after she had contacted the police. The court found that the inactivity by the police constituted a violation of article 2 of ECHR, which guarantees the

⁷¹ The European Convention on Violence against Women, art. 75.

⁷² www.conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=210&CM=1&DF=&CL=ENG.

⁷³ The European Convention on Violence against Women, art 1. a.

⁷⁴ Ibid., art 3. a.

⁷⁵ Ibid., art. 3. b.

right to life, as the state had failed to comply with its positive obligations in relation to this right.⁷⁶

In *Opuz v. Turkey*,⁷⁷ the applicant's husband had subjected the applicant and her mother to serious physical violence and death threats during a period of several years. The applicant as well as the mother had repeatedly reported the offences to the police. For different reasons, the complaints never led to more than a fine. No considerable protective measures were provided to the applicant despite the express request for it. After many years of harassment, the husband shot the applicant's mother to death. He was convicted for the crime and sentenced to prison, but was released during the appeal of the judgment.⁷⁸ The court found that the right to life set forth in article 2 of ECHR had been violated in relation to the applicant's mother. This conclusion was based on the fact that the criminal law-system of the country had not been sufficiently deterrent in relation to the crime committed.⁷⁹ The court also referred to the reasoning in the case *Osman v. The United Kingdom* according to which a state has violated its positive obligations in relation to the right to life if "the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge".⁸⁰ Moreover, the domestic violence to which the applicant had been subject was considered to constitute ill-treatment and hence to be within the scope of article 3 of the convention.⁸¹ The court found that the state had violated article 3 by not fulfilling its positive obligation to ensure that individuals are not subjected to ill-treatment by other individuals, following from article 1 of the convention. This was based on the ineffective responses by the state to the threats against the applicant.⁸² Concerning article 14 the court found, with support of other international instruments, that failure to protect women from domestic violence violates the right to equal protection of the law, whether this failure is intentional or not.⁸³ Since the state had failed to protect the applicant and her mother, as an effect of judicial passivity mainly affecting women, they had been discriminated against in violation of article 2 and 3 in conjunction with article 14.⁸⁴

The Inter-American system addresses violence against women in a specific convention, and was the first to do so. The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women ("Convention of Belem Do Para") entered into force in 1995.⁸⁵ It states that it is the right of every woman to be free from violence in the in the public as

⁷⁶ *Kontrová v. Slovakia*, Application no. 7510/04, ECtHR, 31 May 2007.

⁷⁷ *Opuz v. Turkey*, Application no. 33401/02, ECtHR, 9 June 2009.

⁷⁸ *Opuz v. Turkey*, paras.1-58.

⁷⁹ *Ibid.*, para.153.

⁸⁰ *Ibid.*, paras. 130 and 153.

⁸¹ *Ibid.*, para.161.

⁸² *Ibid.*, paras.158-176.

⁸³ *Ibid.*, paras.184-191.

⁸⁴ *Ibid.*, paras.199- 202.

⁸⁵ www.oas.org/juridico/english/signs/a-61.html.

well as the private sphere.⁸⁶ This right includes inter alia freedom from discrimination.⁸⁷ Further, it states that violence against women impairs and nullifies the human rights of women.⁸⁸ Violence against women is defined as:

“any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or the private sphere”.⁸⁹

It includes among others domestic violence, which is defined as:

“physical, sexual and psychological violence...that occurs within the family or domestic unit or within any other interpersonal relationship, whether or not the perpetrator shares or has shared the same residence with the woman, including, among others, rape, battery and sexual abuse.”

Within the Inter-American system, domestic violence is thus considered to constitute a human rights violation. It has not clearly been expressed that there is an independent human right to be free from domestic violence; this could be subject to further interpretation. The same thing could be said about the Council of Europe system when the European Convention on Violence against Women enters into force. It is surely possible to argue that the two mentioned conventions prescribe an independent such right. Domestic violence can already today be considered to breach other human rights within the Council of Europe.

2.2.3 Domestic violence as a violation of human rights

Domestic violence may also violate several other human rights set forth in binding, widely ratified human rights instruments. To start with, it may fall under the prohibition of torture and other cruel, inhuman or degrading treatment or punishment set forth inter alia in the International Convention on Civil and Political Rights (ICCPR), the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) and regional human rights instruments such as the ECHR. The right to be free from torture is a non-derogable right according to all the mentioned instruments.⁹⁰ It has also been recognised to have the status of *jus cogens*.⁹¹ The Committee against Torture has expressed in some of its reports from

⁸⁶ Convention of Belem Do Para, art. 3.

⁸⁷ Ibid., art. 6.

⁸⁸ Ibid., art. 5.

⁸⁹ Ibid., art. 1.

⁹⁰ Art. 2.2 CAT, art. 4.2 ICCPR and art 15.2 ECHR .

⁹¹ Crawley, p. 132.

2006 that rape constitutes torture.⁹² In 2008, the then Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, issued a report in which he held that violence against women is one kind of torture. The different elements of the torture definition in article 1 of CAT were identified as follows: Severe physical or mental pain and suffering; Intent; Purpose; State involvement. He proposed “powerlessness” as an additional element, which he held would be fulfilled in many cases of violence against women. He held that the requisite of state involvement might be fulfilled if the state fails to protect persons within its jurisdiction from being subjected to torture and ill-treatment by private individuals. Concerning purpose, he stated that this requisite is always fulfilled when an act is gender-specific,⁹³ since discrimination is mentioned in the definition in the context of the purpose of the act. If the purpose of an act can be established, one can also consider the intent element fulfilled.⁹⁴ He specifically discussed intimate partner violence and presented many similarities between this violence and torture when it comes to nature and consequences.⁹⁵ The first Special Rapporteur on violence against women its causes and consequences, Radhika Coomaraswamy, proposed already in 1996 that domestic violence is a form of torture, based on a similar reasoning.⁹⁶ The Human Rights Committee has also made statements proposing that domestic violence falls within the scope of article 7 of ICCPR.⁹⁷ Moreover, the position that this violence constitutes torture or ill-treatment is supported by the judgment of the ECtHR in the case *Opuz v. Turkey*, which is discussed in the previous chapter.

Furthermore, the right to life may outlaw the most serious forms of domestic violence. This right is set forth in article 6 of ICCPR as a non-derogable right,⁹⁸ and in regional treaties such as the ECHR, which guarantees the right to life in article 2 while allowing for some exceptions. Both the mentioned provisions prescribe that the right to life shall be protected by law. The ICCPR and the ECHR set forth a positive obligation on the states to ensure the rights enumerated in the respective convention, hence to protect individuals from abuses by other individuals.⁹⁹ A violation of the right to life in the ICCPR exists when the relevant legislation is lacking or is insufficient if compared to the actual threat. Necessary legislation includes

⁹² *Report of the Secretary-General on the implementation of resolution 2005/42, integrating the human rights of women throughout the United Nations system*, UN Doc. A/HRC/4/104, para. 14.

⁹³ Nowak here refers to: “violence that is gender-specific in its form or purpose in that it is aimed at “correcting” behaviour perceived as non-consonant with gender roles and stereotypes or at asserting or perpetuating male domination over women.”

⁹⁴ Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, UN Doc. A/HRC/7/3, paras. 27-31.

⁹⁵ *Ibid.*, para. 45.

⁹⁶ Report of the Special Rapporteur on violence against women, its causes and consequences, Ms. Radhika Coomaraswamy, UN Doc. E/CN.4/1996/53, para. 44.

⁹⁷ Edwards, p. 216.

⁹⁸ ICCPR art. 4.2.

⁹⁹ ICCPR art. 2.1, ECHR art. 1.

prohibitions under criminal law.¹⁰⁰ In *Opuz v. Turkey* the ECtHR found that the right to life of the applicant's mother had been violated due to state passivity in relation to years of domestic violence which finally had a lethal outcome. The reasoning of the court may be useful in relation to other cases of domestic violence. However, the right to life was not discussed in relation to the applicant who survived the violence, despite the fact that her life had also been in danger. Hence, it is unclear whether this right is effective to base a claim upon for a survivor of domestic violence who applies for refugee status.

Another relevant human right is the right to equal protection by the law set forth in article 26 of ICCPR, which reads as follows:

“All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”

This provision entails obligation on the states to adopt non-discriminatory legislation, to prohibit discrimination by law and to provide effective protection against discrimination. It is related to a duty on the parties to guarantee substantive equality through legislation.¹⁰¹ This could be interpreted as prescribing both an obligation to protect women from the discrimination that domestic violence perpetrated by private actors constitutes, and a duty to provide legal protection against violence without discrimination, hence to take domestic violence against women as seriously as violence committed against men. In *Opuz v. Turkey*, the Court found that failure to protect women from domestic violence violates the right to equal protection of the law¹⁰² and that the applicant and her mother had been unlawfully discriminated against partly because of a judicial passivity mainly affecting women.¹⁰³ It is unfortunately a quite common phenomenon that authorities do not take cases of domestic violence seriously and do not respond appropriately to reported crimes of this kind.¹⁰⁴

Also relevant in this context is the right to health, or more precisely “the highest attainable standard of physical and mental health” set forth in article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR). The state parties are obliged to implement progressively the rights in the convention, to the maximum of its available resources. They are to be guaranteed without discrimination based on grounds such sex.¹⁰⁵

¹⁰⁰ Manfred Nowak, *U.N Covenant on Civil and Political Rights: CCPR Commentary*, p. 123.

¹⁰¹ Nowak, p. 607-608.

¹⁰² *Opuz v. Turkey*, paras. 184-191.

¹⁰³ *Ibid.*, paras. 199- 202.

¹⁰⁴ See examples in chapter 4.1.2.2.1.

¹⁰⁵ ICESCR, art 2.

The Committee on Economic, Social and Cultural Rights has stressed the importance to protect women from domestic violence, in a general comment on the right to health.¹⁰⁶ The Committee has also by other statements given expression to the view that article 2.2 of ICESCR entails an obligation to prevent private individuals from discriminating.¹⁰⁷ Domestic violence may therefore violate this right. The problem with the rights in ICESCR is that they are to be implemented progressively depending on the resources available, which makes it difficult to establish a clear-cut violation of such a right.

Domestic violence can also be treated as mere discrimination. It has already been proposed by the CEDAW Committee that violence against women is a sort of discrimination within the meaning of article 1 of CEDAW,¹⁰⁸ which entails obligations on the states to work for its elimination following from article 2 of CEDAW. It could surely be argued that domestic violence negatively affects other human rights; the above discussed are the human rights deemed most relevant for the purpose of the thesis.

¹⁰⁶ The Committee on Economic, Social and Cultural Rights, *General Comment No. 14* (2000), UN Doc. E/C.12/2000/4, para. 21.

¹⁰⁷ Magdalena Sepúlveda, *The Nature of the Obligations under the International Covenant on Economic, Social and Cultural Rights*, p. 390.

¹⁰⁸ CEDAW Committee, *General Recommendation No. 19*, para. 6.

3 The definition of a refugee

The definition of a refugee is of a central significance for the thesis. Whether a victim of domestic violence qualifies as a refugee or not depends on how a refugee is defined. The refugee definition is hence the starting point for the analysis in the thesis. According to the Refugee Convention, article 1 (A) 2, a refugee is 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.

In the case of a person who has more than one nationality, the term “the country of his nationality” shall mean each of the countries of which he is a national, and a person shall not be deemed to be lacking the protection of the country of his nationality if, without any valid reason based on well-founded fear, he has not availed himself of the protection of one of the countries of which he is a national.”

The refugee definition can be divided into several requisites. The first requisite is a date line, “As a result of events occurring before 1 January 1951”. The second requisite is “well-founded fear of being persecuted”. This can be divided into a requirement of “well-founded fear” on behalf of the applicant and “persecution”. The third requisite is represented by the formulation “for reasons of race, religion, nationality, membership of a particular social group or political opinion”, which means that there needs to be a causal link between the persecution feared and the status of the applicant in relation to one of the grounds enumerated (“convention grounds”). This requisite can be referred to as “causal link between the persecution and a convention ground”. The fourth requisite is formulated “is outside the country of his nationality [...] or [...] former habitual residence” (“country of origin”). The fifth element of the definition is the formulation “is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”. It indicates that there needs to be a lack of protection by the country of origin from the persecution feared. This can be treated as part of the persecution requisite in the sense that there is only persecution if there is also a lack of state protection.

Although all requisites need to be fulfilled in order for someone to qualify as a refugee, some of them need more clarification than others for the purpose of the thesis. To start with, it is not evident from the formulation itself what is meant by “well-founded fear”. Yet it is central to have an

understanding of the meaning of the requisite. This requisite is therefore elaborated on in this chapter. Further, the requisite “persecution” is a key element of the refugee definition. In order to determine whether a person qualifies as a refugee it is necessary to know what kinds of acts that can constitute persecution. One also need to know what the requirements in relation to the person carrying out persecutory acts within the meaning of the definition and when state protection can be considered to be lacking. These questions are discussed in this chapter. Finally, the requisite “causal link between the persecution and a convention ground” needs some further clarification. One relevant question is how significant role does the convention ground have to play in order for it to be considered to be causing the persecution within the meaning of the definition? Moreover, one of the convention grounds that can be considered most relevant for the thesis namely “membership of a particular social group” deserves to be further discussed as the notion itself is quite broad and vague. The dateline in the refugee definition is only briefly touched upon as it generally has lost its relevance due to the 1967 Protocol. As regards the requisite of being outside the country of one’s country of origin, the requisite as expressed in the definition is clear enough for the purpose of this thesis. Hence, it is not further elaborated on in this chapter.

The Office of the United Nations High Commissioner for Refugees (UNHCR) has according to the Refugee Convention the duty to supervise the application of the provisions in the convention and the state parties have a corresponding duty to cooperate with the Office as well as to facilitate its supervising role.¹⁰⁹ The UNHCR has issued a Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol (“the Handbook”). The Handbook is based on the knowledge of the UNHCR and takes into consideration state practice, exchanges of views between authorities in state parties and the office, and literature on the subject.¹¹⁰ The authority of the Handbook has been recognised in several ways. At the EU level, the joint position regarding the refugee definition¹¹¹ is based on the interpretations in the Handbook.¹¹² The joint position does also recognise the role of the Handbook as an important help for the states when determining refugee status.¹¹³ Moreover, in Swedish law it is stated in preparatory works that guidance concerning the application of the refugee definition normally can be sought in the interpretations in the Handbook and the conclusions by the UNHCR executive committee.¹¹⁴ Further, it is clear

¹⁰⁹ The Refugee Convention, preamble and para 35.

¹¹⁰ The Handbook, paras. V-VII (Foreword).

¹¹¹ Joint position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term ‘refugee’ in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (96/196/JHA).

¹¹² Prop. 1996/97:25, p. 97.

¹¹³ Joint position of 4 March 1996 defined by the Council on the basis of Article K.3 of the Treaty on European Union on the harmonized application of the definition of the term ‘refugee’ in Article 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (96/196/JHA).

¹¹⁴ Prop. 1996/97:25, p. 97.

from these kinds of Swedish Official Documents that the interpretations from the Handbook are very influential on the interpretations in Swedish law.¹¹⁵ It is also stated in preparatory works to the Swedish Alien's Act that the Handbook is an internationally recognised means of interpretation for the application of the Refugee Convention.¹¹⁶ Also other jurisdictions have recognised that the Handbook is an important source of law, despite not being binding.¹¹⁷ Given the authority the Handbook has for the interpretation of the refugee definition, this is used as one of the main sources for this thesis when it comes to the definition of a refugee.

The second main source of the thesis concerning the interpretation of the refugee definition is James C. Hathaway's book *The Law of Refugee Status*. Hathaway thoroughly interprets the requisites of the refugee definition by means of the ordinary meaning of the wording of the definition, the preamble of the convention, other treaties binding to the parties of the convention, practice by the states parties, and when the meaning is ambiguous, the travaux préparatoires to the convention. This is in accordance with articles 31-32 of the Vienna Convention on the Law of Treaties concerning the interpretations of treaties. Moreover, he uses the interpretations by other scholars. Hathaway's interpretations are very influential and widely referred to by other authors within refugee law¹¹⁸ and have been recognised in the practice of refugee law.¹¹⁹ Also national preparatory works uses his interpretations.¹²⁰ In the light of these facts, *The Law of Refugee Status* can be considered an appropriate source when it comes to the interpretation of the refugee definition. In most regards, the interpretations of the UNHCR and Hathaway are similar or could be said to complement each other. However, when it comes to the requisite "well-founded fear", the two interpretations do diverge. This discrepancy is particularly important for the assessment of a real case. However, for the purpose of this thesis it does not have a determinative significance. The interpretations are therefore used complementary to each other in the aspects possible.

The 1967 Protocol prescribes that a refugee is to be defined as in the Refugee Convention with the modification that the words "As a result of events occurring before 1 January 1951" and "as a result of such events", in article 1 A (2) are to be disregarded.¹²¹ Almost all states parties to the Refugee Convention have adhered to the protocol.¹²² Therefore, the requisite in question has little relevance today.¹²³ When discussing the

¹¹⁵ E.g. SOU 2004:31.

¹¹⁶ SOU 2006:6, p. 88.

¹¹⁷ Concerning Norweig, see Norges offentlige utredninger 2004: 20, p. 72.

¹¹⁸ See e.g. Rosemary Byrne *et al.* (eds.), *The Refugee Law Reader* and Heaven Crawley, *Refugees and Gender: Law and Process*, Gerhard Wikrén and Håkan Sandesjö, *Utlänningslagen: med kommentar* (The Swedish Alien's Act: with comments).

¹¹⁹ Bexelius, p. 106.

¹²⁰ See e.g. SOU 2004:31 and Norges offentlige utredninger 2004: 20, p. 72.

¹²¹ The 1967 Protocol, art. 1.

¹²² www.unhcr.org/3b73b0d63.html.

¹²³ The Handbook, para. 35.

refugee definition of the Refugee Convention in the rest of the thesis, the definition alluded to is the one in the Refugee Convention as amended by the 1967 Protocol.

3.1 The requisite "well-founded fear"

In order to decide whether a woman fleeing from domestic violence would qualify as a refugee it is important to know how the requisite "well-founded fear" is to be interpreted. Does the requisite necessitate that she is afraid of the violence or does it rather require that there is a risk of violence? The Handbook proposes that the requisite "well-founded fear of persecution" comprises a subjective and an objective element. It states that "fear" has a subjective character and refers to a mood or state of mind. The requirement that the fear needs to be well-founded implies that the subjective element (the fear) has to be supported by an objective information. The Handbook states that the personality of the applicant has an impact on the assessment of the subjective criteria since emotional reactions differ from person to person. In relation to the objective element, the statements are to be viewed in the light of the background situation such as information about the country of origin. This kind of information may be important for the credibility of the applicant.¹²⁴

Well-founded fear may be established based on facts that do not relate to experiences of the applicant. The fact that the other members of for example the racial or social group of the applicant have been persecuted can indicate that the applicant's fear of persecution is well-founded.¹²⁵ Normally, the applicant needs to show individual reasons for fearing persecution. In this regard, one may, according to the Handbook, assume that someone who has already been persecuted for reason of a convention ground, has a well-founded fear of being persecuted. In addition, persons who want to avoid a situation in which there is a risk of persecution are alluded to by the word "fear". Past persecution is not required for the existence of well-founded fear.¹²⁶

Hathaway has another perception of how the word "fear" is to be interpreted. He states that while it is possible to interpret the word itself as some kind of emotional state of mind, it could equally be used to indicate an estimation of a future risk. He argues that the latter is the correct understanding in the context of the refugee definition. To fear a certain event can mean to believe that it will happen but does not necessarily imply that the person is afraid of it.¹²⁷ Hathaway holds that the intention behind the use of this word was not to bring about an assessment of the feelings of the applicants, but a "forward-looking assessment of risk".¹²⁸ He finds

¹²⁴ The Handbook, paras. 37-42.

¹²⁵ Ibid., para. 43.

¹²⁶ Ibid., para. 45.

¹²⁷ James C. Hathaway, *The Law of Refugee Status*, pp. 65-66.

¹²⁸ Ibid., p. 66.

support for his view in the drafting history of the Refugee Convention.¹²⁹ Moreover, he argues that there are logical reasons for his choice of interpretation; application of the other interpretation would entail that international legal obligations would be decided by the character and personality of individuals, and that persons facing similar dangers would be granted different protection. Hathaway finds that the interpretation proposed is in line with the universal and objective character of the human rights standards to which states are bound.¹³⁰ Hathaway states, just like the Handbook, that it is not required that the applicant has already been subject to persecution. Past persecution is nevertheless a clear indication of a future risk of persecution.¹³¹

3.2 The requisite "persecution"

One of the key requirements of the refugee definition is the persecution requisite.¹³² This requisite is of great importance for the thesis. How the requisite is to be interpreted decides whether domestic violence against women, committed by a private person, constitutes persecution or not and thus, whether it is possible to base a claim of refugee status on this ground. In order for this to be fulfilled, it is first of all it is necessary that the treatment feared, and perhaps already experienced, is serious enough to be considered a form a persecution. Furthermore, it is required that protection from the harm feared is not provided by the country of origin.

3.2.1 Persecutory acts

According to the Handbook, there is no definition of persecution that has been generally recognised. It states that it can be derived from article 33 of the Refugee Convention that threats to life or freedom based on one of the convention grounds always constitutes persecution. So does also other serious human rights violations based on the same grounds. Other harmful measures or a combination of less serious actions and adverse factors can also amount to persecution depending on the fear it creates in the mind of the applicant.¹³³ Moreover, discrimination may under certain circumstances amount to persecution according to the Handbook. This is the case if discriminatory measures entail "consequences of a substantially prejudicial nature" for the applicant. A well-founded fear of persecution can also exist if less serious discrimination creates worry for the future existence. It should be taken into consideration whether the applicant has been subject to several forms of discrimination.¹³⁴

¹²⁹ Hathaway, pp. 66-69.

¹³⁰ Ibid., pp. 69-70.

¹³¹ Ibid., pp. 87-88.

¹³² Ibid., p. 99.

¹³³ The Handbook, paras. 51-53.

¹³⁴ Ibid., paras. 54-55.

The term persecution was according to Hathaway intentionally left undefined by the drafters of the Refugee Convention. He nevertheless finds some guidance regarding the intended interpretation of the concept in the drafting history. Firstly, the notion was intended to be inclusive and comprehend denial of civil and political rights as well as serious economic and social harm. Secondly, the intention was to protect persons from injury in violation of the duty of states to protect its own people.¹³⁵

Hathaway defines persecution as “the sustained or systematic violation of basic human rights demonstrative of a failure of state protection”. In relation to well-founded fear of persecution he states that this exists when staying in the country of origin can be expected to lead to serious harm through “specific hostile acts or...an accumulation of adverse circumstances such as discrimination existing in an atmosphere of insecurity and fear”, which cannot or will not be prevented by the government.¹³⁶

Hathaway describes which human rights are considered basic in the sense that sustained or systematic failure to ensure them constitutes persecution. To put it differently, he describes under what circumstances a state is considered to breach its basic obligation to protect its citizens, which is tantamount to persecution. For this purpose, he treats human rights group by group. The first group consists of the non-derogable rights set forth in the International Covenant on Civil and Political Rights (ICCPR). Among these are freedom from arbitrary deprivation of life and protection against torture or cruel, inhuman or degrading punishment or treatment.¹³⁷ A failure to ensure the rights in this group should be considered as persecution, irrespective of the reasons for the failure. The second group consists of the rights in ICCPR from which derogations can lawfully be made under the circumstances described in article 4.1 of ICCPR. This group includes numerous rights such as the freedom from arbitrary arrest or detention¹³⁸ and the right to equal protection.¹³⁹ A failure to ensure these rights is in breach with the state’s basic obligation, if it entails discrimination against a certain group or if it is not justified by a situation of emergency. The third group consists of some of the rights prescribed in the International Covenant on Economic, Social and Cultural Rights (ICESCR), which obliges states to take steps, to the maximum of its available resources, towards the full realisation of the rights in the covenant.¹⁴⁰ Hathaway points out some of the rights protected by the convention as being basic.¹⁴¹ If a state takes no action to implement these despite having the necessary resources, or if it

¹³⁵ Hathaway, pp. 102- 104.

¹³⁶ Ibid., pp. 104-105.

¹³⁷ Art. 4. 2 ICCPR enumerates the non-derogable rights: arts. 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 ICCPR.

¹³⁸ Arts. 9-10 ICCPR.

¹³⁹ Arts. 3 and 26 ICCPR.

¹⁴⁰ ICESCR art. 2.2.

¹⁴¹ These are according to Hathaway: the right to work including working conditions etc., the right to food, clothing, housing, medical care, social security, education, protection of the family and particularly children and mothers and freedoms relating to cultural and scientific expression.

excludes a minority group from the enjoyment of these rights, it is considered to breach its basic obligations.¹⁴²

3.2.2 Failure of state protection

A further requirement for the harmful treatment to constitute persecution is that protection is not available in the country of origin. The definition puts it: “owing to such fear, is unwilling to avail himself of the protection of that country”. This requisite is mainly relevant when the agent of persecution is not the state, as can be noted in the following chapter. As the agent of persecution in cases of domestic violence generally is a private person, the requisite is particularly important for the thesis.

If an individual risks any of the situations discussed above it may only be considered as persecution if it cannot be expected that meaningful protection will be provided by the country of origin. Status as a refugee thus serves as “substitute protection”. It needs to be assessed if the country of origin is able and/or willing to take measures in relation to the risk of persecution.¹⁴³ The analysis will be affected by who the agent performing the persecutory acts is. Another relevant question is whether there is protection available in other parts of the country of origin.

3.2.2.1 Agent of persecution

Hathaway states that the most evident kind of persecution is when representatives of the state, e.g. the police, carry out the persecutory acts. In those situations, protection from the state clearly cannot be expected.¹⁴⁴ Neither can meaningful protection be expected against human rights violations committed by private actors that are supported, condoned or implicitly approved by the government. These situations, where there is some kind of connection to the state, thus also constitute persecution.¹⁴⁵ Human rights violations committed by persons not related to the state, amount to persecution if the government is unable or unwilling to provide the protection that can legitimately be expected from it. This applies irrespective of whether the state had intent to harm or not.¹⁴⁶ Hathaway states that state protection cannot be said to be lacking if it is reasonable to believe that the individual could get protection but the authorities have not been given the chance to provide this.¹⁴⁷ In this context, he refers to a case¹⁴⁸ in which it was established that the applicant must show that he

¹⁴² Hathaway, pp. 105-112.

¹⁴³ Ibid., pp. 124-125.

¹⁴⁴ Ibid., pp. 125-126.

¹⁴⁵ Ibid., pp. 126-127.

¹⁴⁶ Ibid., pp. 127-128.

¹⁴⁷ Ibid., p. 130.

¹⁴⁸ *Jose Maria da Silva Moreira*, Immigration Appeal Board Decision T86-103070, April 8 1987.

sought the protection of the state if he was convinced that the state had no involvement in the persecution.¹⁴⁹

The agent of persecution is typically the authorities according to the Handbook. Harmful acts by private persons can also amount to persecution if the state consciously tolerates them, alternatively denies or is incapable to provide effective protection.¹⁵⁰ Hence, in order for a harmful act to constitute persecution, there needs to be at least some kind of connection between the harm and the country of origin. If the country of origin does not actively cause the harm, it is required that it through its passivity causes it in order for the persecution requisite to be fulfilled. This thesis proposes that certain forms of domestic violence are to be considered forms of persecution. It requires that acts by private individuals can be included in the persecution concept. This interpretation is thus consistent with the reasoning by the UNHCR and Hathaway.

3.2.2.2 Internal flight alternative

Refugee law is designed to provide protection when the state of origin fails to do so. This implies that a person who can get protection from the state if he or she moves to another part of the country does not qualify as a refugee. If an alternative safe home is offered by the authorities, the person does not qualify as a refugee. Hathaway states that this applies if the protection can be genuinely accessed and the protection is meaningful for the person in question.¹⁵¹ The Handbook also highlights the fact that in some situations, the applicant does not fear persecution in the whole country of origin. Ethnic conflicts for example could be located to certain parts of the country. The fact that the person did not escape to another safe part of the country nevertheless does not exclude the person from refugee status, if it would have been unreasonable to expect the person to do so.¹⁵²

3.3 The requisite “causal link between the persecution and a convention ground”

This requisite is expressed in the definition as “for reasons of race religion, nationality, membership of a particular social group or political opinion”. The reason for the well-founded fear of persecution thus needs to be one of the convention grounds in order for a person to qualify as a refugee. It may not be obvious from the formulation of the requisite that female victims of domestic violence do fulfil this requisite. As it could be a critical requisite to fulfil, it requires some further explanation for the purpose of the thesis. According to Hathaway, the convention ground does not have to be the reason for the totality of the risk faced. Persons generally at risk may qualify

¹⁴⁹ Hathaway, p. 130.

¹⁵⁰ The Handbook, para. 65.

¹⁵¹ Hathaway, pp. 133-134.

¹⁵² The Handbook, para. 91.

as refugees if the level of the risk is impacted by their civil or political status, hence by a convention ground. If for example, there is an emergency situation implying risks of harm serious enough to amount to persecution for the population of a country, and the government excludes a certain group from protection from this, members of this group may have valid claims for refugee status.¹⁵³

The requisite of causal link has been further developed in two different UNHCR guidelines. When the agent of persecution is a non-state actor and the reason for the risk of persecution is a convention ground, the requisite of causal link is fulfilled. If the risk of persecution by a non-state actor does not depend on a convention ground, the requirement is nevertheless fulfilled if the inability or unwillingness by the government to protect the person in question is due to a convention ground.¹⁵⁴ Moreover, UNHCR states just like Hathaway that while the convention ground needs to be a contributing factor to the persecution, it does not necessarily have to be the only or even the dominant reason.¹⁵⁵

3.3.1 Membership of a particular social group

The convention ground of most relevance for a claim of refugee status based on domestic violence is membership of a particular social group. Guidelines pertaining specifically to the interpretation of the notion membership in a particular social group have been issued by the UNHCR.¹⁵⁶

UNHCR states that “particular social group” has been interpreted in several different ways by decision-makers. It describes the two dominating interpretations in common-law jurisdictions.¹⁵⁷ According to the first approach, the “protected characteristic approach”, a particular social group is a group that is unified by a characteristic that is immutable or “so fundamental to human dignity that a person should not be compelled to forsake it”. Immutable refers to characteristics that are innate, e.g. sex or ethnicity, or otherwise unchangeable e.g. since they are related to something that happened in the past such as previous profession or association.¹⁵⁸ The second group has been called the “social perception approach”. The decisive fact according to this approach is whether or not a group is cognisable or may be distinguished from the rest of the society due to a common characteristic within the group.¹⁵⁹

¹⁵³ Hathaway, pp. 93-95 and p. 140.

¹⁵⁴ The Guidelines on Gender-Related Persecution, para. 21 and *Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, UN Doc. HCR/GIP/02/02, (“The Guidelines on Membership of a Particular Social Group”) paras. 21-23.

¹⁵⁵ The Guidelines on Gender-Related Persecution, para. 20.

¹⁵⁶ The Guidelines on Membership of a Particular Social Group.

¹⁵⁷ *Ibid.*, para. 5.

¹⁵⁸ *Ibid.*, para. 6.

¹⁵⁹ *Ibid.*, para. 7.

The two approaches may often lead to the same result. Both of them have recognised that groups such as women, families and homosexuals constitute particular social groups.¹⁶⁰ The UNHCR chose to adopt a definition that includes these two dominant views:

“A particular social group is a group of person 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.”¹⁶¹

The UNHCR states that women clearly may constitute a particular social group, united by innate and immutable characteristics as well as defined by differential treatment in relation to men.¹⁶² The size of a group is irrelevant for the assessment whether the group qualifies as a particular social group.¹⁶³ Further, it is not necessary that the group is cohesive or that the members thereof know each other.¹⁶⁴ Neither is it required that every member of the group risk persecution in order for the group to constitute a particular social group.¹⁶⁵ Moreover, the UNHCR clarifies that the fact that the members of a group fear persecution is not sufficient for it to qualify as a particular social group. The intention is not to cover all persons fearing persecution or to render the other convention grounds pointless. However, persecutory acts against a group may contribute to make this group visible in the society and the persecution is therefore of relevance for the assessment.¹⁶⁶

¹⁶⁰ The Guidelines on Membership of a Particular Social Group, paras. 6-9.

¹⁶¹ Ibid., para. 11.

¹⁶² Ibid., para. 12.

¹⁶³ Ibid., para. 18.

¹⁶⁴ Ibid., para. 15.

¹⁶⁵ Ibid., para. 17.

¹⁶⁶ Ibid., paras. 2 and 14.

4 Domestic violence as a ground for refugee status

4.1 International law

In order to assess under which circumstances domestic violence may constitute a ground for refugee status according to international law, the requisites described in chapter 2 are discussed one by one to see whether a woman who is at risk of domestic violence would fulfil the requisite. The fictive situation that is assessed is that a woman has fled from her country of origin to escape systematic physical, sexual or psychological violence from her current or former, boyfriend, husband, or partner, within the family or domestic sphere. She has hence already been a victim of domestic violence. Systematic violence refers to violence that has a persistent and recurrent character.

The Guidelines on Gender-Related Persecution, issued by the UNHCR in 2001 are referred to in this chapter. Moreover, what has been stated in the previous chapters as well as relevant literature on the specific issue are also used.¹⁶⁷ Two main sources of literature are used: *Refugees and Gender: Law and Process* by Heaven Crawley and *The Convention Refugee Definition and Gender-Based Persecution: A Decade's Progress* by Ninette Kelley.

4.1.1 Well-founded fear

The two models in the previous chapter diverge most significantly concerning the interpretation of this requisite. It may have an effect on the outcome of an asylum application, especially in a case where there is a risk of future persecution upon return, but the applicant does not show signs of the emotion fear. In many cases, it can be assumed that the result of the two interpretations would be the same though, as the applicant may show signs of fear when there is a risk of persecution in the country of origin. This requisite is difficult to discuss in general terms as it depends very much on the circumstances in the particular case. This is especially the case when applying the UNHCR interpretation since this depends partly on the psychological state of mind of the applicant. A couple of remarks are worth making anyway. Domestic violence often is practiced over a long period and often even increases over time.¹⁶⁸ The fact that a woman has already been a victim of systematic domestic violence could thus indicate that there is a great risk of continuing violence upon return. As this kind of violence many

¹⁶⁷ Concerning the use of Hathaway as a source, see notes 143-145.

¹⁶⁸ www.nck.uu.se/Kunskapscentrum/Kunskapsbanken/amnen/Vald_i_nara_relationer/Vald_i_nara_relationer_amnesguide/.

times is used to control the woman,¹⁶⁹ one can assume that there could even exist an additional risk of violence, as the woman could be punished for having escaped. Past persecution is according to Hathaway as well as the Handbook a very strong indication on that a person has a well-founded fear of persecution.¹⁷⁰

4.1.2 Persecution

4.1.2.1 Persecutory acts

The relevant question now is whether domestic violence against women may amount to persecution. The UNHCR has clearly stated that it is established that gender-related violence such as domestic violence is being used as a form of persecution.¹⁷¹ In this chapter, different lines of reasoning necessary for this conclusion are presented. The chapter particularly focuses on which specific human rights violation a claim of refugee status could be based on in order to be successful.

As stated in chapter 3.3.1, persecution according to Hathaway means “the sustained or systematic violation of basic human rights demonstrative of a failure of state protection”.¹⁷² The domestic violence discussed in the thesis has a systematic character. Therefore, the human rights violations constituted by the domestic violence will also be considered systematic. Hathaway also presents a model that describes violations of basic human rights, violations that accordingly amount to persecution provided that they are systematic or sustained.¹⁷³ In this chapter, Hathaway’s model is applied to different human rights violations that domestic violence may constitute to assess whether they amount to persecution. In addition, the UNHCR interpretations is applied in relation to the different human rights approaches to domestic violence.

Within the Inter-American system there is a right of women to be free from violence in the private sphere¹⁷⁴ and it is recognised that violence against women impairs and nullifies the human rights of women.¹⁷⁵ This could possibly be interpreted as prescribing that domestic violence is a violation of an independent right to be free from domestic violence or violence against women. Within the Council of Europe, it is hopefully a matter of time before the European Convention on Violence against Women, enters into force,¹⁷⁶ which states that domestic violence is a human rights violation,¹⁷⁷ arguably also of an independent human right. There is also a possibility that

¹⁶⁹ Nordborg, p. 18.

¹⁷⁰ Hathaway, p.88 and the Handbook, para. 45.

¹⁷¹ The Guidelines on Gender-Related Persecution, para. 9.

¹⁷² Hathaway, p. 105.

¹⁷³ *Ibid.*, pp. 108-112.

¹⁷⁴ Convention of Belem Do Para, art. 3.

¹⁷⁵ *Ibid.*, art. 5.

¹⁷⁶ See chapter 2.2.2.

¹⁷⁷ The European Convention on Violence against Women, preamble and article 3.a- b.

there is a norm of customary international law prescribing that there is a human right to be free from domestic violence or alternatively that there is an emerging norm of customary international law with the same content.¹⁷⁸ An assessment of whether a violation of a possible right to be free from domestic violence or violence against women could amount to persecution follows below.

Hathaway divides different human rights into three different groups for the purpose of his model. The human right to be free from domestic violence is not among those rights.¹⁷⁹ This could possibly be explained by the fact that this is a rather “new” human right. If any flexibility is allowed in the application of the model, this right could be placed in one of the groups anyway. The right to be free from domestic violence has similarities particularly with the civil and political rights, as it is a right to be free from something, just like the right to be free from torture and cruel, inhuman or degrading treatment or punishment. Moreover, nothing in the existing conventions or documents that would be the basis of a customary norm indicates that derogations from the right are allowed in e.g. situations of emergency. The rights within group one are all non-derogable civil and political rights.¹⁸⁰ Therefore this right is most likely to be placed within group one. A failure to ensure the rights in this group does always amount to persecution.¹⁸¹ Hence, if the relevant right can be placed in group one, the violence can be regarded as persecution. This reasoning requires that the claim is made in a jurisdiction that recognises the right to be free from domestic violence as a human right and that Hathaway’s model may be interpreted in a flexible manner.

A violation of the human right to be free from domestic violence may constitute persecution also according to the interpretation by the Handbook, provided that it can be considered a serious human rights violation.¹⁸² The Handbook does not explain what it means by a serious violation and it is therefore difficult to assess whether systematic domestic violence would qualify. It is nevertheless possible to argue that it does.

UNHCR has held that that while guidance shall be sought in human rights law as to what constitutes persecution, it is not an absolute requirement that the act breaches a codified human rights norm. For example, even before the prohibition of use of child soldiers in armed conflicts was codified in 2000, it would have been appropriate to recognise use of child soldiers as persecution.¹⁸³ It is possible that domestic violence, which appears to be in a process of being recognised as a human rights violation, could similarly be considered as persecution.

¹⁷⁸ See chapter 2.2.1.

¹⁷⁹ Hathaway, pp. 109-112.

¹⁸⁰ *Ibid.*, p. 109.

¹⁸¹ *Ibid.*

¹⁸² The Handbook, para.51.

¹⁸³ UNHCR, *UN High Commissioner for Refugees, Self-Study Module 2: Refugee Status Determination. Identifying Who Is A Refugee*, 1 September 2005, p. 31.

It is also possible to define systematic domestic violence as one form of persecution with reference to the non-derogable prohibition of torture and other cruel, inhuman or degrading treatment or punishment. As presented in the previous chapter, domestic violence may constitute a form of torture. Moreover, within the Council of Europe system, it has been deemed to constitute ill-treatment in the case *Opuz v. Turkey*. The right to be free from torture and other cruel, inhuman or degrading treatment or punishment belongs to group one in Hathaway's model. Failures to ensure rights in this group are, according to Hathaway, always considered to constitute persecution.¹⁸⁴ Moreover, the UNHCR recognises that serious human rights violations amounts to persecution.¹⁸⁵ Since the right to be tortured often is described as a basic human right,¹⁸⁶ there should be no doubt that systematic breach of this constitutes persecution also within the definition of the UNHCR. Hence, as soon as it is accepted that domestic violence breaches the torture prohibition, the requisite of persecution can be considered fulfilled. The interpretation is supported by inter alia UN Special Rapporteurs and the ECtHR although it is not certain to what extent states have accepted this.

Another possible way to approach the persecution requisite is through the right to equal protection by the law. This right may be violated if the legislation or application thereof in the country of origin is discriminatory against female victims of violence compared to male victims. This is also the case if the state does not provide adequate protection from violence against women in the domestic sphere, as this kind of violence constitutes one form of discrimination.¹⁸⁷ In *Opuz v. Turkey* it was found by the ECtHR that failure to protect women from domestic violence can violate the right to equal protection of the law.¹⁸⁸ The right to equal protection is part of group two of Hathaway's model as derogations from the right can be made under certain circumstances. A failure by the country of origin to ensure this right amounts to persecution, unless this is a consequence of a derogation which is strictly required by a serious emergency and which does not discriminate against e.g. women.¹⁸⁹ Hence, in most cases, the failure to ensure equal protection by the law will amount to persecution. As presented in chapter 4.1.2.2.1, it is quite common that the judicial system either provides unsatisfactory protection against domestic violence in general, or that it clearly discriminates against female victims of domestic violence. In those cases, the domestic violence can, following from the reasoning above, amount to persecution.

The Guidelines on Gender-Related Persecution recognises that discrimination by the state in extending protection from e.g. domestic

¹⁸⁴ Hathaway, p. 109.

¹⁸⁵ The Handbook, para.51.

¹⁸⁶ See e.g. Steiner, Alston and Goodman, p. 224.

¹⁸⁷ See e.g. CEDAW Committee, *General Recommendation No. 19*, para.6.

¹⁸⁸ *Opuz v. Turkey*, paras. 184-191.

¹⁸⁹ Hathaway, pp. 109-110.

violence may amount to persecution in cases where, as a result, serious abuses are committed with impunity.¹⁹⁰ It is according to the same source possible to consider laws of a country to be persecutory, particularly when they do not conform to human rights standards. This requires that the law causes a well-founded fear of persecution by the applicant.¹⁹¹ One can assume that e.g. legal provisions allowing for domestic violence and marital rape, could be considered persecutory if the applicant has a well-founded fear (e.g. if she has already been a victim of domestic violence) due to the failure to criminalise this violence. That kind of legal provisions exist in several countries, as presented in the next chapter.

Moreover, discrimination may, according to the Handbook also amount to persecution if it is of a serious nature or otherwise on cumulative grounds if the applicant has experienced many different forms of discrimination.¹⁹² Domestic violence against women as a form of discrimination may thus amount to persecution, independently or in combination with other forms of discrimination depending on the circumstances in the case. This requires acceptance of the idea that the violence itself is a form of discrimination. Other forms of discrimination that one can assume could be invoked as cumulative grounds are discriminatory laws and culture making it very difficult for a woman to leave her husband.

The persecution requisite can also be fulfilled based on the risk to the woman's life that serious violence can constitute. The fact that a woman applying for asylum has survived the violence may render it difficult to claim that her right to life has been violated. However, past persecution is not required for refugee status.¹⁹³ A well-founded fear of future persecution is sufficient. The right to life is part of group one of Hathaway's model. A failure by the state to ensure this right thus amounts to persecution under all circumstances.¹⁹⁴ The Handbook states that a threat to life or freedom always constitutes persecution.¹⁹⁵ Hence, if it can be established that the applicant's life would be at risk upon return, the persecution requisite can easily be fulfilled.

The right to health is another right that may be violated by domestic violence.¹⁹⁶ This right belongs to group three of the model proposed by Hathaway.¹⁹⁷ Consequently, if the country of origin takes no action to implement this right despite having the necessary resources, or if minority group is prevented from enjoying this right, it is considered to breach its basic obligations.¹⁹⁸ In the kind of case assessed, persecution could be

¹⁹⁰ The Guidelines on Gender-Related Persecution, para. 15.

¹⁹¹ Ibid., para. 10.

¹⁹² The Handbook, paras. 54-55.

¹⁹³ Hathaway, p. 87.

¹⁹⁴ Ibid., p. 109.

¹⁹⁵ The Handbook, para.51.

¹⁹⁶ See Chapter 2.2.2 and The Committee on Economic, Social and Cultural Rights, *General Comment No. 14 (2000)*, UN Doc. E/C.12/2000/4, para. 21.

¹⁹⁷ Hathaway, p. 110.

¹⁹⁸ Ibid., p. 111.

established if the country of origin has taken insufficient action to prevent violence against women in relation to its available resources. While it can be noted that “women” is not a minority group, it is reasonable to assume that Hathaway meant that exclusion based on any of the grounds enumerated in the discrimination prohibition in ICESCR, including sex, is a breach of the state’s basic obligation. It would also, based on this assumption be persecutory to exclude women from protection from violence. As previously noted, it is generally more difficult to establish a violation of this kind of right than the civil and political rights, since the economic, social and cultural rights are less absolute.

4.1.2.2 Failure of state protection

At first glance, the required absence of protection in the country of origin may appear to be easily fulfilled as many states do not provide adequate protection from domestic violence. A further examination of the requisite shows that this may be a critical requisite and that it may be difficult to fulfil.

4.1.2.2.1 Agent of persecution and failure of state protection

In cases of domestic violence, the agent or persecution is generally a private person, the present or former husband, boyfriend etcetera of the applicant. Out of the alternative descriptions of persecution in the previous chapter, only one points out the state as the agent of persecution namely the failure to ensure equal protection by the law. With this exception, the agent of persecution is a private person. Where the state is performing the persecutory acts, it is clear that the individual cannot expect protection by the state¹⁹⁹ and the requisite of failure of state protection is thus fulfilled. As the perpetrator in most cases is a private person, it needs to be established that the state of origin tolerates or is unable or unwilling to provide the woman with the protection that can be legitimately be expected from it.²⁰⁰ It is not necessary to establish an intention to harm by the state in this regard.²⁰¹ Some guidance as to what kinds of shortcomings do fulfil this requisite can be found in the literature on the subject. Many examples of the existence of these kinds of unsatisfactory protection are provided by the reports on human rights in the countries of the world 2010, issued by the Swedish Ministry for Foreign Affairs.²⁰²

One clear situation of a failure is that that domestic violence is condoned by the existing legislation of a country. One example of this is when marital rape is legal, which is the case in many countries.²⁰³ Moreover, in a range of states it is legal for a man to “discipline” his children and wife, including by

¹⁹⁹ Hathaway, pp. 125-126.

²⁰⁰ Ibid., pp. 127-128 and the Handbook para. 65.

²⁰¹ Hathaway, p. 128.

²⁰² The reports may be found at

www.humanrights.gov.se/extra/pod/?action=pod_show&id=33&module_instance=1.

²⁰³ Crawley, p. 134.

the use of violence,²⁰⁴ or to use violence as long as it is not severe or does not result in severe injuries.²⁰⁵ In some jurisdictions, the law prescribes no or reduced punishment for violence or homicide committed by a man against his wife as a defence of honour, or in fury or jealousy over the wife's behaviour.²⁰⁶

Another situation is that the state of origin despite having the necessary laws in place fails to provide adequate protection against domestic violence.²⁰⁷ One example is that the police or other state officials are reluctant to deal with domestic violence or even to let women report it to the police.²⁰⁸ In some countries, women are instead encouraged to "reconcile" with their abusive husbands.²⁰⁹ Reports do also witness about low rates of prosecution or convictions and for these crimes.²¹⁰

There are surely more examples of how states may fail to provide protection within the meaning of the refugee definition. One decisive question for the outcome of a case is what standard of protection that is to be applied for this requisite. It can be noted that the situations described by Crawley focus mainly on the lack of legal protection. One question that arises is whether lack of practical solutions such as shelters for victims of domestic violence could also be considered when assessing lack of state protection.

As noted above, many countries do not provide adequate protection against domestic violence. It can be assumed that women are reluctant to contact the authorities when it is generally known that they do not provide effective protection; reporting the crime to the police in such a situation may in the worst case scenario only lead to retaliation by the husband. The question is whether the requisite of failure of state protection is fulfilled in such a case. Hathaway's interpretation is that the requisite is not fulfilled if the applicant has never alerted the authorities if it can reasonably be expected that the authorities would provide protection if they knew about the situation of the applicant.²¹¹ The reasoning could be interpreted to indicate that if there exist no meaningful protection from domestic violence the requisite is fulfilled even if the woman has never alerted the authorities.

A problem common for refugee claims where the perpetrator is a private individual is potential difficulties to provide evidence for non-existing

²⁰⁴ *Mänskliga rättigheter i Förenade Arabemiraten 2010*, p. 10, *Mänskliga rättigheter i Irak*, p. 14, *Mänskliga rättigheter i Nigeria 2010*, p. 11.

²⁰⁵ *Mänskliga rättigheter i Oman 2010*, p. 8, *Mänskliga rättigheter i Algeriet 2010*, p. 13.

²⁰⁶ Crawley, p. 134 and *Mänskliga rättigheter i de palestinska områdena 2010*, p. 15, *Mänskliga rättigheter i Jemen 2010*, p. 12.

²⁰⁷ Crawley, p. 134.

²⁰⁸ Crawley, p. 136 and *Mänskliga rättigheter i Förenade Arabemiraten 2010*, p. 13, *Mänskliga rättigheter i Ecuador 2010*, p. 10, *Mänskliga rättigheter i Gambia 2010*, p. 6.

²⁰⁹ Crawley, p. 135, *Mänskliga rättigheter i Bolivia 2010*, p. 18.

²¹⁰ *Mänskliga rättigheter i Guatemala 2010*, p. 14, *Mänskliga rättigheter i Honduras 2010*, p. 4, *Mänskliga rättigheter i Panama 2010*, p. 8, *Mänskliga rättigheter i Sierra Leone 2010*, p. 8, *Mänskliga rättigheter i Rumänien 2010*, p. 11, *Mänskliga rättigheter i Turkiet 2010*, p. 14, *Mänskliga rättigheter i Kosovo 2010*, p. 16.

²¹¹ Hathaway, p. 130.

protection. It is generally difficult to prove that something does not exist. This is particularly the case when there is a discrepancy between legislation and practice by the authorities; this kind of discrepancy was demonstrated in some examples above. Crawley acknowledges that the fact that there is generally little documentation concerning how women are treated in this regard further complicates the situation.²¹²

4.1.2.2 Internal flight alternative

The next question is whether there is an internal flight alternative for the applicant in the country of origin. Hathaway describes this as a question about whether the applicant may obtain meaningful protection in another part of the country of origin.²¹³ According to Kelley, when the applicant is a victim of domestic violence, the question is whether the woman, by moving within the country may escape the violence by her husband.²¹⁴ These two formulations do not necessarily contradict each other. It can be concluded that the essence is about assessing whether the woman would be safe from the violence if she moved to another part of the country of origin. According to the Handbook, it needs to be reasonable to expect the applicant to move to another part of the country in order for this requirement to apply.²¹⁵ Not all states use this test, and among those who do, it differs what factors are taken into account in the reasonableness test and if it is flexible or not. With a flexible approach, it could for example be found unreasonable that a woman is to move alone to another part of the country if she has always before lived a life accompanied by male family members.²¹⁶ Hence, the assessment whether there is an internal flight alternative may have different outcomes in different jurisdictions, which has implications for whether the applicants will be considered as refugees or not.

4.1.3 The causal link between the persecution and a convention ground

There are a few alternative ways to connect the persecution, domestic violence, to one of the convention grounds.

It can be argued that the violence is committed against a woman due to her political opinion. There are examples of cases in the US where a woman has successfully claimed that her partner has subjected her to violence because she did not accept his violent domination or since she claimed her autonomy in relation to him.²¹⁷

²¹² Crawley, p. 133.

²¹³ Hathaway, p. 133.

²¹⁴ Kelley, p. 566.

²¹⁵ The Handbook, para. 91.

²¹⁶ Kelley, p. 567.

²¹⁷ Crawley, p. 140.

The most common way to relate the violence to a convention ground is by reference to a particular social group that is constituted by women or a certain group of women. One way of reasoning which have gained some success in the US and Canada is that the victim of domestic violence is a member of a sub-group of women. In Canada, courts have accepted that women who are particularly vulnerable to violence for different reasons and who are denied protection may constitute a particular social group, and that this vulnerability of women in society and the denial of protection are the reasons for persecution.²¹⁸ In the US, membership of a sub-group of women who are or have been in a relationship with men who consider themselves having the right to violently dominate women has been considered to be the reason for persecution.²¹⁹ Crawley points out two problems with referring to sub-groups of women defined by their capacity as victims of domestic abuse. She states that this kind of definition requires a history of abuse, something which is not required by the Refugee Convention. Moreover, she points out that it is superfluous to define a group by the persecution the members thereof have experienced.²²⁰ What also could be mentioned here is that UNHCR has expressed that persecution may be taken into consideration when determining if a particular social group exists but the persecution itself is not sufficient.²²¹

Another way to approach the requisite of convention ground is to regard women as one particular social group. Some criticise this approach, holding that “women” it is too broad, and that persecutory acts are directed against individuals rather than an attack against women in general.²²² However, according to the UNHCR, the size of group is of no relevance for the assessment whether a particular social group exists.²²³ Moreover, it is not necessary that all members of a group are targets for the persecution.²²⁴ It has also been clearly expressed by the UNHCR that women may constitute a particular social group.²²⁵ The arguments against the relevant approach do thus find little support in the UNHCR interpretations.

One possibility is to claim that the agent of persecution is inflicting the harm or threatening to do so due to the convention ground.²²⁶ This possibility appears to be possible to use when the convention ground is political opinion or a sub-group of women, once the idea of the respective approach described above is accepted. It is also possible to use this possibility when the convention ground is a particular social group constituted by women, although it might be somehow more difficult to establish that in the specific case, the man has subjected the applicant to violence because of her gender. The UNHCR has recognised that it may be particularly difficult to establish

²¹⁸ Crawley, pp. 139 and 141-142.

²¹⁹ *Ibid.*, p. 142.

²²⁰ *Ibid.*, p. 139.

²²¹ The Guidelines on Membership of a Particular Social Group, para. 14.

²²² Kelley, p. 564.

²²³ The Guidelines on Membership of a Particular Social Group, para. 18.

²²⁴ *Ibid.*, para. 17.

²²⁵ *Ibid.*, para. 12.

²²⁶ *Ibid.*, para. 21 and the Guidelines on Gender-Related Persecution, para. 21.

that the individual perpetrator has or threatens to commit violent acts because of a convention ground in cases of domestic abuse.²²⁷ The alternative is to consider the causal link established based on the fact that the inability or unwillingness by the government to protect the individual depends on one of the convention grounds.²²⁸

4.2 The application of domestic violence as a ground for refugee status in Swedish law

4.2.1 Legislation and Swedish official documents

There are several reasons for why Swedish law is discussed as an example of the implementation of the refugee definition. Firstly, it has been expressly recognised in Swedish law that persecution based on gender could constitute a ground for refugee status. There are thus statements in official documents and case law that demonstrate how the specific issue has been interpreted in the national system. Moreover, this recognition implies that there is in Swedish law a potential for accepting the enhanced protection that is proposed in the thesis. Secondly, the fact that author of the thesis is Swedish and has been educated in the Swedish legal system, also explains the choice of national example.

Sweden is party to the Refugee Convention and its additional protocol since 1954 respectively 1967.²²⁹ The Swedish Aliens Act²³⁰ contains the legislation relating to refugees. A refugee is defined in chapter 4, section 1 as follows.

“In this Act ‘refugee’ means an alien who
- is outside the country of the alien’s nationality, because he or she feels a well-founded fear of persecution on grounds of race, nationality, religious or political belief, or on grounds of gender, sexual orientation or other membership of a particular social group and
- is unable, or because of his or her fear is unwilling, to avail himself or herself of the protection of that country.

This applies irrespective of whether it is the authorities of the country that are responsible for the alien being subjected to persecution or these authorities cannot be assumed to offer protection against persecution by private individuals.

²²⁷ The Guidelines on Membership of a Particular Social Group, para. 22.

²²⁸ Ibid., para. 22 and the Guidelines on Gender-Related Persecution, para. 21.

²²⁹ www.unhcr.org/3b73b0d63.html.

²³⁰ Utlänningslag (2005:716).

A stateless alien shall also be considered a refugee if he or she
- is, for the same reasons that are specified in the first paragraph, outside the country in which he or she has previously had his or her usual place of residence and
- is unable or, because of fear, unwilling to return there.”²³¹

The definition is very similar to the refugee definition in the Refugee Convention. The most significant differences are that the Swedish definition explicitly points out gender and sexual orientation as two examples of particular social groups, and the clarification in relation to persecution by private individuals in the second paragraph. The reference to gender and sexual orientation were added to the definition through an amendment of the provision that entered into force in 2006.²³² Prior to this change, persons who feared persecution on these grounds could instead qualify as persons otherwise in need of protection. However, this possibility provided by law was rarely applied in practice and residence permit was often granted for humanitarian reasons instead.²³³ The reason why this possibility had not been introduced earlier was that the government did not believe that such an interpretation would be accepted by other EU member states. The government concluded in 2005 that there was wider acceptance than earlier for a broader interpretation of the refugee definition, in particular the notion particular social group. In several states, gender and sexual orientation had been considered to constitute membership of a particular social group. At the EU level the Qualification Directive had been adopted. The directive points out that sexual orientation may constitute membership of a particular social group and that gender related aspects can be taken into account when assessing belonging to such as group.²³⁴

In the proposition to the amendment, the government discusses whether persecution due to gender falls within the scope of the refugee definition. It clarifies the difference between gender related and gender specific persecution. Gender related persecution refers to persecution that somehow depends on the gender of the applicant whereas gender specific persecution refers to when persecution takes specific forms depending on the gender of the applicant. Two examples of gender specific persecution are female genital mutilation and forced abortions.²³⁵

The government expresses a need to adapt the Swedish interpretation of the refugee definition to the interpretations by the UNHCR and the regulation in the Qualification Directive pertaining to membership of a particular social group so that gender and sexual orientation may constitute membership of a particular social group, alone or together with other characteristics.²³⁶ It

²³¹ www.farr.se/download/Swedish%20Aliens%20Act%20in%20English.pdf. The translation is provided by the organisation FARR, and is hence not an official one.

²³² Prop. 2005/06:6, p. 1.

²³³ Ibid., pp. 19-20.

²³⁴ Ibid., pp. 20-21.

²³⁵ Ibid., p. 22.

²³⁶ Ibid., p. 25.

states that the members of a particular social group may have a common characteristic which is unchangeable either because it is congenital or due to its historical character such as former activity in an organisation.²³⁷ Persons who share a characteristic that is based on their conviction or dignity, and which is fundamental to their identity, conscious or the exercise of human rights can also constitute a particular social group. A woman who refuses to conform to the societal gender roles can be a member of a particular social group consisting of persons who out of conviction refuse to conform to these roles, and who therefore risk persecution. Moreover, a particular social group can exist if the members thereof are perceived by the society to constitute such a group. The characteristic shared by the group in this latter situation needs to be important for the person in a sense that expecting the person to renounce it would be contrary to the basis of the Refugee Convention. A combination of characteristics may also entail membership of a particular social group, such as gender and the right to be free from surgical operations without ones consent.²³⁸

The amendment was not intended to change the interpretation or application of the other requisites of the refugee definition.²³⁹ The proposition does however in short discuss some of the other requisites. The notion of well-founded fear is in Swedish law considered to consist of a subjective and an objective element. The fear of the applicant is well-founded if there is reason to believe that the applicant upon return may be subject to persecution. In the assessment, one should consider the personal facts of the applicant and the conditions in the country of origin.²⁴⁰ Prejudicial acts may amount to persecution if they have a certain intensity and if they are directed against the life or freedom of the applicant, or otherwise constitute serious human rights violations. Discrimination, harassment and other prejudicial measures may also constitute persecution if they are serious enough and are of certain intensity.²⁴¹

In relation to the requisite of lack of state protection and the thereto related question whether there is an internal flight alternative, the government holds that the necessary assessments are to be carried out in the same way irrespective of the relevant ground of persecution. In order for an internal flight alternative to exist, effective protection needs to be available to the individual in the country of origin. A further requirement is that there needs to exist realistic chances for the individual to support herself and to live without unnecessary suffering and hardship. Women's possibility to support themselves and their families shall be taken into consideration, particularly in the light of the fact that women as breadwinners often are more exposed than men in that capacity.²⁴²

²³⁷ Prop. 2005/06:6, p. 25, with reference to SOU 2004:31, p. 118.

²³⁸ Prop. 2005/06:6, pp. 25-26.

²³⁹ Ibid., p. 34.

²⁴⁰ Ibid., p. 9.

²⁴¹ Ibid., p. 10.

²⁴² Ibid., p. 28.

Concerning the causal link between the persecution and a convention ground when the persecution appears in the private sphere, the government holds that an individual may qualify as a refugee depending on the reasons for the unwillingness or incapacity by the state to provide protection. If the failure of the state to provide protection depends e.g. on lack of resources or inefficiency, the applicant cannot be considered a refugee. However if the denial of protection to a person who risks persecution from private individuals due to gender or sexual orientation, is an obvious consequence of the political, social, religious structures in the country, the person may qualify as a refugee. For example, there are cultures where it is impossible for a woman to get protection by the state from violence and honour-related crimes by male relatives since the right of men to exercise power over women is a fundamental part of the societal structure.²⁴³

These formulations give the impression that when persecution occurs in the private sphere, the causal link can only be established with reference to the reasons of the failure of state protection. However, the Swedish Government Official Report²⁴⁴ that preceded the proposition²⁴⁵ puts it differently. It states that the causal link is established if the person who inflicts or threatens to inflict harm does so because of a convention ground. It moreover notes that it may be difficult for the applicant to show that there is a connection between the risk of persecution and a convention ground when the agent of persecution is a private individual. One example provided is that in cases of domestic violence, the woman may have difficulties to show that her husband beats her because of a convention ground. In such a case, the causal link may be established anyway depending on the reasons for the lack of state protection.²⁴⁶ This reasoning is not rejected by the government in the proposition. The UNHCR also has the position that the causal link may be established with reference to the agent of persecution as well as to the lack of state protection.²⁴⁷ In the light of these facts, there is reason to believe that the government did not intend to exclude the possibility to consider the causal link to be established in cases where it is clear that one of the convention grounds was the reason for the persecutory acts by the individual perpetrator. However, it cannot be excluded that this was the intention, or that it simply assumed that it would never be possible to prove the existence of such a causal link.

The proposition refers to some examples provided by the Swedish Government Official Report where different specific kinds of persecution are discussed.²⁴⁸ Wife-beating is specifically addressed in one chapter. It initially states that when a woman is e.g. seriously battered for having been or is accused of having been unfaithful, the reasons for this could have many explanations. Jealousy is pointed out as the general primary reason. Further,

²⁴³ Prop. 2005/06:6, p. 28.

²⁴⁴ Sw: Statens offentliga utredningar, SOU.

²⁴⁵ SOU 2004:31.

²⁴⁶ SOU 2004:31, p. 90.

²⁴⁷ Guidelines on Membership of a Particular Social Group, paras. 21-22.

²⁴⁸ Prop. 2005/06:6, p. 28.

it states that in most of these cases it would be quite far-fetched to say that the persecution depends on the woman's membership of a particular social group. The reason for the lack of protection by the country of origin is to be assessed instead. If the unwillingness or incapacity to protect a woman in such as case depends on the state's strongly discriminatory view of women, expressed in discriminatory laws and/or practice, then the causal link between the violence and her belonging to the social group "women" is established. Another alternative is to view women who are persecuted because of accusation of unfaithfulness as a particular social group, which is possible if there is a causal link between the belonging to this group and the persecution.²⁴⁹

4.2.1 Case law concerning domestic violence against women as a ground for refugee status

Domestic violence was dealt with in a case from 2008 in the Migration Court of Appeal, MIG 2008:39. In this case, a woman from the north of Albania and her two children applied for asylum as refugees or persons otherwise in need of protection. The woman alleged that they had fled since the woman's ex-husband regularly had subjected her to violence during and after the marriage. He had also been violent towards the children. She had visited the police several times to report the violence but they did not even take any notes of her information. The husband got even more aggressive when he learnt that she had visited the police. The woman and the children finally escaped to her sister who lived in the mountains, but the husband found them. With the sister's help, they managed to flee the country. The woman held that they risked lethal violence upon return. Moreover, she claimed that as she lacked income and social contacts in other parts of the country, she ought not to be expected to move to another part of Albania.²⁵⁰ She added that the country was small and the ex-husband would find her in other areas as well.²⁵¹ The Migration Board declined the application. The main reason was that it considered an internal flight alternative to exist. The applicants appealed the decision to the Migration Court, which granted them asylum as refugees. The Migration Board appealed the judgment to the Migration Court of Appeal, which decided to decline the application.

The Migration Court of Appeal presented some of the relevant legislation and information in preparatory works including the reasoning in the proposition, prop. 2005/06:6, concerning the causal link in relation to violence in the private sphere. It also referred to the Qualification Directive, article 7 paragraph 2 according to which protection is considered to exist in the country of origin e.g. when there is an effective judicial system for detection, prosecution and punishment of persecutory acts, which is accessible for the applicant. The Court considered that the woman had a

²⁴⁹ SOU 2004:31 pp. 126-127.

²⁵⁰ MIG 2008:39, pp. 1-2.

²⁵¹ Ibid., p. 4.

well-founded fear of being subjected to further assaults upon return, based on the story of the woman and country of origin information. It also found that the authorities, represented by the police, had shown itself unwilling to protect her from the persecution. This unwillingness was according to the court based on social and cultural structures, and depended on the fact that she was a woman. It therefore found that she had a well-founded fear of persecution upon return to the northern part of Albania because of her gender. The court then tried if it would be reasonable to apply an internal flight alternative. Such an alternative exists if the individual, in the country of origin, has access to effective protection and chances to support herself and live a life without unnecessary suffering or hardship from a humanitarian perspective. The court stated that a new law against domestic violence had been adopted in Albania that prescribed the possibility to issue restraint orders and freedom for the women to move within the country. Moreover, there was information indicating that the authorities generally provided sufficient protection and that most women could move within the country to escape family members threatening them. The court held that the personal reasons invoked by the woman did not entail that it would be unreasonable for her to return to another part of the country, and that effective protection existed in the country. Consequently, an internal flight alternative was considered to exist and the applicants were thus not considered refugees or persons otherwise in need of protection.²⁵²

²⁵² MIG 2008/39, pp. 6-8.

5 Concluding remarks

Based on what has been presented in the previous chapters, it can be concluded that that systematic domestic violence against women may constitute a ground for refugee status under certain circumstances. In this chapter, I present the main findings regarding how the different requisites of the refugee definition can be fulfilled in international law and Swedish law, and I highlight some of the difficulties that may be connected with the different elements. Finally, I present my proposals for reinforced protection for female victims of domestic violence within the refugee definition.

5.1 Well-founded fear

The requisite of well-founded fear ought to be fulfilled for many victims of domestic violence. It is however difficult to do a general assessment of this requisite as it depends very much on the ^{circumstances} in the particular case, especially when applying the UNHCR model which takes into account the state of mind of the applicant. The fact that the applicant has experienced past persecution is a strong indication on the existence of well-founded fear of persecution, according to both models of interpretation. Swedish law applies a model with a subjective and an objective element. In the case from a Swedish court, MIG 2008:39, this requisite was not a critical requisite for the applicant and the court did not put particular focus on this requisite alone.

5.2 Persecution

The relevant question in relation to the persecution requisite is whether systematic domestic violence constitutes persecution. The UNHCR has stated that domestic violence may amount to persecution. Moreover, the application of Hathaway's model and the general statements by the UNHCR to the different human right violations that domestic violence constitutes, also led to the conclusion that systematic domestic violence may amount to persecution under certain circumstances. Based on the assessment made, there is reason to believe that the grounds most likely to lead to a successful claim are a violation of the torture prohibition, a violation of the right to equal protection by the law (alternatively failure to protect women from violence), or a threat to the life of the woman. It has been recognised by at least the ECtHR that the torture prohibition and the right to equal protection by the law can be violated in cases of domestic violence. However, some states do surely find it controversial that domestic violence would fall within the scope of the torture prohibition. Establishing persecution based on unequal protection requires that the legal protection from violence is discriminatory against women. If the idea is accepted that domestic violence

is a form of discrimination, the mere failure to protect from this may also constitute persecution.²⁵³ Further conditions are outlined in chapter 4.1.2.1. Other possible approaches are to claim persecution based on a violation of the right to health, discrimination or a violation of the right to be free from domestic violence, although they may require more argumentation. If there is not yet a binding human right to be free from domestic violence, reference could possibly be made to the emerging norm of this content. In MIG 2008:39, the court found that well-founded fear of persecution existed without any prior discussion about on what basis persecution could be established. In Swedish law, it thus seems to be clear that severe domestic violence amounts to persecution. Further motivation based on human rights violations appears not to be needed.

The requisite of failure of state protection ought to be fulfilled in many cases as the examples presented showed. There are nevertheless some problematic aspects of this requisite. Since the agent of persecution generally is a private person, it needs to be showed that the state is unable or unwilling to protect the applicant. It could be particularly difficult to prove that something, in this context state protection, does not exist. This is especially difficult since there is a lack of documentation concerning the treatment of women. Moreover, the question whether a woman must have sought protection from the state in order for the requisite to be fulfilled can be critical for the outcome of a case. One possible interpretation is that if there is no meaningful protection from violence, the requisite is fulfilled even if the applicant has never alerted the authorities. This question would however need further clarification due to its importance for the outcome of a case. Another crucial question is which standard of protection is to be applied for the purpose of this requisite. Focus seems to be on whether there exists legal protection and if the perpetrators are held accountable, and not on the existence of for example shelters for victims. Further research needs to be done also on this question.

The relevant question in relation to internal flight alternative is if the woman would be safe from the violence if she moved to another part of the country of origin. The question whether it would be reasonable to expect the applicant to move is to be taken into account in the assessment. This test can be more or less flexible; with a flexible approach to this test, women's special situations in different countries can be taken into consideration. The test is used in Swedish law, and women's possibilities to support themselves and their families should be taken into consideration in the test. In the Swedish case MIG 2008:39, the applicant, a victim of domestic violence, was found not to be a refugee since the court considered that there existed an internal flight alternative. The decision was mainly based on the findings by the court that necessary legislation and a generally effective protection by the authorities existed. The internal flight alternative may hence be a critical requisite when applying for asylum as a refugee. Difficulties to establish the lack of internal flight alternative could possibly be explained

²⁵³ This requires application of Hathaway's model.

by the fact that that violence occurs in the private sphere and that the perpetrator is one person (at least in the kind of case discussed). If a person is persecuted by a group of persons in his or her hometown, as part of for example ethnic, religious or political tensions in the country, there is perhaps more reason to expect that the persecution would continue also in another part of the country. The risk for a woman who escapes to be subjected to continuing persecution by other persons might be smaller than in the other kind of case discussed. However, what distinguishes the kind of case assessed is that the women have a close personal relationship with the abuser. This could imply an additional risk of being followed by the abusive man to another part of the country.

5.3 The causal link between the persecution and a convention ground

As concerns the causal link between the persecution and a convention ground, this could be fulfilled based on different lines of reasoning. The most common convention ground to refer to is membership of a particular social group. The social group could be women or a sub-group of women in some way defined with reference to the persecution. The use of sub-groups of women has been criticised *inter alia* for requiring past persecution, which goes beyond the requirements of the refugee definition. Criticism has also been directed against the application of women as a particular social group. This critique is however contradicted by interpretations and comments by the UNHCR.

The causal link is easily established between the acts of the individual perpetrator and the different sub-group of women due to the way these groups are constructed. This is more difficult when the social group referred to is women. The causal link can then instead be established between the failure of state to protect the victim and the fact that she is a woman. The dominant view in Swedish law seems to be that the causal link should be established in accordance with the latter alternative. This was the only possibility mentioned in prop. 2005/06 in relation to persecution in the private sphere. Moreover, in the case MIG 2008:39 the causal link was established between the unwillingness by the state to provide protection and the convention ground. The connection between the violent acts of the husband and a convention ground was not discussed. Nevertheless, the Swedish Government Official Report mentioned the theoretical possibility to establish a link between the behaviour of the individual and the convention ground, although it held that this would be difficult when the violence occurred in the private sphere. One of the reasons for why it generally is considered easier to point out the reasons for state passivity than for the violent acts committed by a person could be that in relation to the state, one can analyse the whole system of laws and actions by the state and conclude that it discriminates against women. When it comes to individuals,

it might be difficult to draw such conclusions since there is less information to base the assessment on.

It can generally be said that the requisites that may cause most difficulties are the lack of state protection including the internal flight alternative and the causal link between the persecution and a convention ground. Which requisites are difficult to fulfil obviously also differs from case to case; these are merely general conclusions based on the information used in the thesis. I believe that underlying problems are the facts that the violence is committed in the domestic sphere and by a private individual. The refugee definition was originally rather intended to protect individuals from harmful acts by the state in the public sphere. The fact that the domestic violence is committed by a private person entails that lack of state protection including internal flight alternative are actualised as requisites, and that the reasons for the violence are found to be difficult to establish.

5.4 Proposal for change

One starting point for my reasoning is that women generally are more exposed to domestic violence than men are due to structural reasons. My intention is to propose a change of the current application of the refugee definition to better protect women from this violence. I find that there is reason to criticise and propose a change of the way the causal link between the persecution and convention ground is dealt with, particularly in Swedish law. In the proposition and the case discussed, the only possibility brought up was to establish a causal link between the lack of protection and the convention ground and membership of the particular social group women. I think that in cases where the victim has been subjected to systematic domestic violence, it would be appropriate to seek to establish the causal link between the behaviour of the violent man and a convention ground. The convention ground I propose is membership of the particular social group women. According to the UNHCR there is at least a theoretical possibility to find the causal link established based on the reasons for the actions by the individual perpetrator. Moreover, according to Hathaway and the Handbook, the convention ground needs to be a contributing factor or an aspect increasing the risk, but not necessarily the only or dominant reason for the persecution. In chapter 2.1.2 it was found that while causes at an individual level matter in cases of violence against women, there are always underlying structural causes of the violence. These could be summarised: gender inequality and the subordinate position of women, gender roles and acceptance of men's violence against women.²⁵⁴ Hence, a factor contributing to the violence is the fact that the victim is a woman. This is not the only cause of the violence but, in the light of the interpretations by Hathaway and the UNHCR, it ought to be sufficient for establishing a causal

²⁵⁴ This is a conclusion drawn from the information used in the thesis. There might be other models of explanations of violence against women that contradict the information and the conclusions presented.

link between the violence and the fact that she is a woman. I thus find that the interpretations by Hathaway and the UNHCR allow of the establishment of the causal link in this way. I realise that it would be difficult for a woman in a particular case to show that the reason for the violence was her gender. I believe that it is necessary to assess the situation from a structural perspective instead and seek explanations for the general phenomenon violence against women, and in particular domestic violence against women. Instead of demanding evidence for the causal link between the persecution and a convention ground in a specific case, one should consider the requisite satisfied based on the fact that domestic violence against women can be at least partly explained that the victims are women. Research, statistics and other knowledge about domestic violence against women in general would serve as support for the individual claims for refugee status. This kind of reasoning generally implies a lowered standard of proof concerning the requisite causal link for this specific kind of violence. The assessment of the other requisites such as the persecution requisite and the components thereof would not be affected by the proposal. I am aware that this kind of reasoning could be perceived as controversial. A controversial proposal has the function of raising a discussion concerning a subject matter and I therefore consider that the proposal, despite being controversial, remains relevant and fulfils a purpose. In Swedish law, I consider that this change possibly could be introduced by application of the existing law by the Migration Court of Appeal as the official documents could be interpreted to allow this kind of interpretation.

One of the reasons for proposing this kind of reasoning is that I think that it is a more accurate and direct description of the causes of the violence than other options. I find that the other options, to refer to the causes of lacking protection or holding that the membership of a sub-group of women is a reason for the violence, are somewhat artificial solutions. Some criticism has also been directed against the alternative with sub-groups of women as mentioned earlier. Moreover, some attempts to point out more precise social groups for the purpose of establishing a causal link, may go quite wrong. In the section of the Swedish Government Official Report concerning wife-beating and the causal link, the point of departure is that violence is committed against women since they have been or are accused of having been unfaithful. No other possible explanations are mentioned. The possibility to regard women accused of unfaithfulness as a particular social group is then discussed in the report. Even though jealousy in many cases contributes to the violence, I find it misleading to discuss accusations of unfaithfulness as the only reason, especially as the violence also many times starts without any triggering conflict. Furthermore, the solution to establish the causal link based on the reasons for the lack of state protection, is a functioning solution as long as it can be showed that it depends on a discriminatory view of women. But if it is unclear why there is no protection, or if it depends merely on lack of resources, refugee status will be not be granted. If it is possible to establish the causal link already at the level of the perpetrator, the requisite of failure of state protection could be assessed without any requirements additional to those in the refugee

definition. This solution would from my point of view be fairer and offer a better protection to female victims of domestic violence.

As concerns the internal flight alternative, I propose that the more flexible test of the reasonableness should be used, as this allows trying whether the woman in reality could move to another part of the country. Moreover, special attention should be paid to the fact that the abusive man could follow the woman to another part of the country. It is possible that the risk of this is larger in these kinds of cases than others as the abuser and the victim have a personal relationship, and since the violence is used to control the woman.

Finally, a few words about the core requisite of the refugee definition, persecution. This requisite did not appear to be the most difficult one to fulfil from the assessment made. However, if the state where the application is made does not recognise that domestic violence constitutes discrimination or a violation of the human rights discussed, or if the violence is not serious enough to put the applicant's life at risk, it could be problematic. Recognition of the right to be free from domestic violence as a binding human rights norm at the international level would make it easier to claim that domestic violence amounts to persecution in any jurisdiction. It would consequently also lead to more predictability. In addition, the recognition of the human right to be free from domestic violence could ultimately be a step towards the elimination of domestic violence against women meaning that fewer women would be forced to pack their bags and leave.

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