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Gender-related persecution of refugee women

A feminist analysis of the persecution grounds of the refugee
definition

LAGM01 Graduate Thesis

Graduate Thesis, Master of Laws program
30 higher education credits

Supervisor: Anna Bruce

Semester of graduation: Autumn semester 2015

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Summary

Like many other international human rights law instruments, the 1951 Convention relating to the Status of Refugees was written from a male perspective, which has resulted in that the refugee definition of the Convention historically has been interpreted through a framework of male experiences. For this reason, many asylum claims of female applicants have been ignored.

In order to be granted refugee status, the applicant must show that the reason why he or she is at risk of persecution is related to one or more of the established persecution grounds: race, religion, nationality, political opinion or membership of a particular social group. A person who risks gender-related persecution, meaning persecution which is fully or partially based on notions of gender, must be able to show that the persecution in question can be considered to fall within the ambit of the persecution grounds. In the course of this, the persecution grounds must be interpreted in a gender-sensitive manner.

This thesis examines the consequences of how the persecution grounds of the refugee definition are interpreted and applied to encompass gender-related persecution. This is done by investigating how gender-related persecution has been included in international and national law in the interpretation and application of the persecution grounds; how these instruments, in their approach to encompass gender-related persecution, correspond to each other; and which feminist critiques these legal instruments answer to or remain sensitive to.

The research questions are divided into three categories. The first category concerns the legal examination of international and national law. The legal instruments that are examined are the 1951 Convention, CEDAW and the Swedish Aliens Act. The second category has to do with the correspondence between these legal instruments. The third category relates to how the law, in its interpretation and application of the persecution grounds, answers to and/or remains sensitive to different categories of feminist critique of refugee law identified by Thomas Spijkerboer.

According to the UNHCR, the refugee definition of the 1951 Convention covers gender-related persecution if properly interpreted, even though “sex” or “gender” are not included as persecution grounds. The UNHCR also states that each of the persecution grounds must be considered in gender-related claims and that they all have to be interpreted in a gender-sensitive manner. Although all of the persecution ground may be applicable in cases where someone risks gender-related persecution, it is “membership of a particular social group” that often is applied to these cases, much due to the fact that women may be considered to constitute a social group within the meaning of the Convention. The statements of the UNHCR have been echoed by the

CEDAW Committee. The Committee has also expressed that it is in accordance with CEDAW to add an additional ground, such as sex, into the national legislation in order to encompass gender-related persecution.

In 2005, the term *kön* was included into the Swedish refugee definition in order to adapt the Swedish Aliens Act to the international interpretation of “membership of a particular social group”. Swedish preparatory works also echo the statements of the UNHCR. They explicitly state that all of the persecution grounds, and not only “membership of a particular social group”, may encompass gender-related persecution and that they all should be considered, in no particular order, when an applicant claims that he or she is at risk of persecution for reasons of *kön*. However, the intentions of the legislator have not been followed by the Migration Court of Appeal. The Court only considers *kön* under “membership of a particular social group” in cases involving gender-related persecution and does not bring up the potential relevance of the other persecution grounds. Hence, the Swedish judicial application of the persecution grounds is not in accordance with the Aliens Act, the 1951 Convention and CEDAW.

This thesis also shows how the interpretation and application of the persecution grounds can be criticised from a feminist perspective. The interpretation and application of the persecution grounds of the 1951 Convention and the Aliens Act and the obligations identified by the CEDAW Committee mostly answer to the human rights approach, since the ground “membership of a particular social group” has been emphasised and there is a tendency to highlight the cultural context from which refugee women come. This approach is sensitive to the anti-essentialist critique, which means that the emphasis that is given to “membership of a particular social group” leads to a reinforcement of the view that only men can be considered as “real refugees” and sustains the stereotype that the persecution grounds that are not explicitly “gendrified” are meant for male applicants. The anti-essentialists opposed the emphasizing of the cultural context because it demonises the Third World and reproduces the distinction between the Western and the non-Western countries. However, there are indications of that there is a movement towards a more anti-essentialist thinking, especially within the CEDAW Committee. This, since the emphasis that has been given to the ground “membership of a particular social group” in gender-related claims has been recognised as being problematic.

Sammanfattning

Liksom flera andra internationella instrument för mänskliga rättigheter skrevs 1951 års flyktingkonvention från ett manligt perspektiv, vilket har resulterat i att flyktingdefinitionen i konventionen historiskt sett har tolkats utifrån manliga erfarenheter. På grund av detta har flera asylansökningar av kvinnliga sökanden blivit ignorerade.

För att erkännas flyktingstatus måste den sökande visa att anledningen till varför han eller hon riskerar förföljelse går att hänföra till en eller flera av förföljelsegrunderna: ras, religion, nationalitet, politisk åskådning och medlemskap i en särskild samhällsgrupp. En person som riskerar att utsättas för könsrelaterad förföljelse, det vill säga förföljelse som helt eller delvis bygger på föreställningar om kön, måste kunna visa att förföljelsen i fråga kan anses falla inom tillämpningsområdet för de etablerade förföljelsegrunderna. Detta kräver att förföljelsegrunderna tolkas på ett genusmedvetet sätt.

I denna uppsats undersöks konsekvenserna av hur förföljelsegrunderna i flyktingdefinition tolkas och tillämpas för att omfatta könsrelaterad förföljelse. Denna undersökning utförs genom att studera hur könsrelaterad förföljelse har inkluderats i internationell och nationell rätt i tolkningen och tillämpningen av förföljelsegrunderna; hur dessa instrument, i deras tillvägagångssätt för att omfatta könsrelaterad förföljelse, motsvarar varandra; och vilken feministisk kritik dessa instrument besvarar eller är känslig för.

Frågeställningarna är uppdelade i tre kategorier. Den första kategorin avser den rättsliga undersökningen av internationell och nationell rätt. De rättsliga instrument som undersöks är 1951 års flyktingkonvention, CEDAW och Utlänningslagen. Den andra kategorin behandlar hur dessa rättsliga instrument överensstämmer med varandra. Den tredje kategorin berör hur lagen, vid tolkningen och tillämpningen av förföljelsegrunderna, besvarar och/eller är känslig för de olika kategorierna av feministisk kritik av flyktingrätten som Thomas Spijkerboer har identifierat.

Enligt UNHCR täcker flyktingdefinitionen i 1951 års flyktingkonvention redan in könsrelaterad förföljelse om den tolkas på ett riktigt sätt. Detta fastän ”kön” eller ”genus” inte finns med som förföljelsegrunder. UNHCR har också uttryckt att alla förföljelse grunderna måste beaktas vid könsrelaterade asylskäl och att de alla måste tolkas på ett genusmedvetet sätt. Fastän alla förföljelsegrunderna kan vara tillämpliga i fall där någon riskerar könsrelaterad förföljelse är det ”medlemskap i en särskild samhällsgrupp” som oftast tillämpas i dessa fall. Detta beror till stor del på att kvinnor har ansetts kunna utgöra en särskild samhällsgrupp. UNHCR:s anföranden har tagits upp hos CEDAW kommittén. Kommittén har även uttryckt att det är i

enlighet med CEDAW att lägga till en förföljelsegrund, som kön, i den nationella lagstiftningen för att täcka in könsrelaterad förföljelse.

År 2005 lades termen kön till i den svenska flyktingdefinitionen i syfte att anpassa utlänningslagen till den internationella tolkningen av ”medlemskap i en särskild samhällsgrupp”. I de svenska förarbetena togs UNHCR:s anföranden upp och lagstiftaren påpekade uttryckligen att könsrelaterad förföljelse kan inrymmas inom alla förföljelsegrunderna och inte enbart ”medlemskap i en särskild samhällsgrupp”. Det fastställdes även att alla grunderna ska beaktas, utan inbördes rangordning, när förföljelse på grund av kön åberopas. Lagstiftarens intentioner har dock inte fått genomslag hos Migrationsöverdomstolen. Domstolen beaktar enbart kön under ”medlemskap i en särskild samhällsgrupp” i fall med könsrelaterad förföljelse och den tar inte upp huruvida de andra förföljelse grunderna eventuell kan vara relevanta i fallet. Följaktligen överensstämmer den svenska rättstillämpningen inte med Utlänningslagen, 1951 års konvention och CEDAW.

Denna uppsats visar även hur tolkningen och tillämpningen av förföljelsegrunderna kan kritiseras från ett feministiskt perspektiv. Tolkningen och tillämpningen av förföljelsegrunderna i 1951 års flyktingkonvention och Utlänningslagen samt förpliktelserna som identifierats av CEDAW kommittén besvarar till stor del ”the human rights approach” eftersom grunden ”medlemskap i en särskild samhällsgrupp” har framhävts och då det finns en tendens att betona den kulturella kontext som kvinnliga flyktingar kommer i fråan. Detta kan kritiseras enligt ”the anti-essentialist critique” som menade att den emfas som ges till grunden ”medlemskap i en särskild samhällsgrupp” leder till att man förstärker uppfattningen om att det bara är män som kan anses vara ”riktiga flyktingar” samt upprätthåller stereotypen om att de förföljelsegrunder som inte är ”gendrifierade” är till för manliga asylsökande. ”Anti-essentialisterna” var emot att man betonade den kulturella kontexten eftersom det demoniserar tredje världen och reproducerar distinktionen mellan västvärlden och övriga länder. Det finns dock indikationer på att man går mot ett mer ”anti-essentialistiskt” tänkande, särskilt hos CEDAW kommittén, eftersom emfasen som ges till grunden ”medlemskap i en särskild samhällsgrupp” vid könsrelaterade asylskäl har börjat ses som problematisk.

Preface

I want to thank Anna Bruce for all the support and invaluable advice along the way, I could not have wished for a better supervisor.

I would also like to thank Viktor Östlund for helping me with the proofreading and for supporting me throughout this process.

Amanda Hägglund

Lund, 7 January 2016

Abbreviations

CAT	Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment
CEAS	Common European Asylum System
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CEDAW Committee	United Nations Committee on the Elimination of Discrimination against Women
ECHR	European Court of Human Rights
EU	European Union
FGM	Female genital mutilation
ICCPR	International Covenant on Civil and Political Rights
ICERD	International Convention on the Elimination of All Forms of Racial Discrimination
ICJ	International Court of Justice
IDP	Internally Displaced Person
MIG	Migrationsöverdomstolens avgörande
Para.	Paragraph
Prop.	Proposition
SOU	Statens offentliga utredningar
UN	United Nations
UNHCR	United Nations High Commissioner for refugees

UDHR	Universal Declaration of Human Rights
UtlL	Utlänningslagen
VCLT	Vienna Convention on the Law of Treaties

1 Introduction

1.1 Background

The 1951 Convention Relating to the Status of Refugees was, like many other international human rights instruments, written from a male perspective. The relevance of gender was only brought up once during the drafting process of the Convention. The Yugoslav delegate suggested an inclusion of the wording “or sex” into the article that states that the Convention shall be applied “without discrimination as to race, religion or country of origin”. However, the suggestion was rejected since the equality of the sexes was considered a matter for national legislation. The then United Nations (UN) high commissioner for refugees expressed that he strongly doubted that there would be any cases of persecution due to sex.¹ It is therefore not surprising that the refugee definition of the 1951 Convention historically has been interpreted “through a framework of male experiences”, which has resulted in that many asylum claims of female applicants have been ignored.²

During the past decades, increasingly more attention has been brought to the issue of female refugees and asylum seekers. Today it is an established principle that the refugee definition of the 1951 Convention should be interpreted with an “awareness of possible gender dimensions in order to determine accurately claims to refugee status”.³

An important aspect of refugee claims is the question of the reason for the persecution, in legal terms what persecution ground is applicable in the determination of refugee status. The refugee definition of the 1951 Convention establishes five persecution grounds: race, religion, nationality, political opinion and membership of a particular social group. In order to qualify for refugee status, the applicant must show that the reason why he or she is at risk of persecution is related to at least one of these grounds.

It has been argued that the neglect of the issue of gender in the 1951 Convention can “be seen as an important factor leading to a failure to take into account gender-related persecution and the protection needs of women asylum seekers and refugees”.⁴ The term “gender-related persecution” has no legal meaning *per se*⁵ but is used in international refugee law when the reason for the persecution is fully or partially based on notions of gender.⁶ Since

¹ Freedman 2012, p. 48; Spijkerboer 2000, p. 1.

² UN High Commissioner for Refugees (UNHCR), *Guidelines on International Protection No.1: Gender-related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, HCR/GIP/02/01, 7 May 2002 (Hereafter: UNHCR Guidelines on Gender-Related Persecution), para. 5.

³ UNHCR Guidelines on Gender-Related Persecution, para. 2.

⁴ Freedman 2012, p. 48.

⁵ UNHCR Guidelines on Gender-Related Persecution, para. 1.

⁶ Crawley 2001, p. 7; Bexelius 2008, p. 17.

“sex” or “gender” are not included amongst the persecution grounds, the question if an applicant who risks gender-related persecution qualifies for refugee status will depend on whether the persecution in question can be considered to fall within the ambit of the established persecution ground. In the course of this, *the persecution grounds must be interpreted in a gender-sensitive manner.*⁷

The UN’s refugee agency, United Nations High Commissioner for Refugees (the UNHCR) and the UN Committee on the Elimination of Discrimination against Women (the CEDAW Committee) have stressed that a gender-sensitive interpretation must be given to *each* of the persecution grounds and established how the persecution grounds can be interpreted to cover certain gender-related grounds of persecution.⁸ However, although all of the persecution grounds may encompass gender-related motivations, gender-related grounds of persecution are mostly discussed under the persecution ground “membership of a particular social group”.⁹

Sweden has ratified the 1951 Convention and CEDAW and is thereby bound under international law to respect their provisions. The issue of gender-related persecution was raised in connection with the adoption of the new Aliens Act¹⁰ in 2005. By this time, Sweden adopted a new refugee definition which establishes that aliens who risk “persecution on grounds of *kön*, sexual orientation or other membership of a particular social group” can be recognized as refugees. As a result, persecution on grounds of *kön* can now be considered under the persecution ground “membership of a particular social group”, which was not possible before the amendment. This new wording of the Swedish refugee definition has resulted in that the persecution ground “membership of a particular social group” has been greatly emphasized in cases involving gender-related persecution in Swedish case law.

The development of the gender-sensitive interpretation of the persecution grounds has been both fuelled by and developed in tandem with feminist critique of refugee law. How the issue of gender has been, and ought to be, dealt with in refugee law has been discussed amongst feminist scholars. The interpretation and application of the persecution grounds has been central in this debate, in particular the question regarding how the persecution grounds can be considered to encompass gender-related persecution. Moreover,

⁷ Zimmermann & Mahler 2011, p. 415.

⁸ UNHCR Guidelines on Gender-Related persecution, para. 22; UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, CEDAW/C/GC/32, 5 November 2014, available at: <http://www.refworld.org/docid/54620fb54.html> [accessed 7 January 2016], (Hereafter: General recommendation No. 32), para. 13.

⁹ Zimmermann & Mahler 2011, p. 416.

¹⁰ *Utlänningslagen* (UtlL) (2005:716).

feminist scholars have identified different concerns that they consider should be recognized in refugee law.¹¹

1.2 Purpose

This thesis aims to investigate what is at stake for women asylum seekers depending on how the persecution grounds of the refugee definition are designed, justified and applied. More specifically, I want to investigate the consequences of how the persecution grounds of the refugee definition are interpreted and applied to encompass gender-related persecution. I do this by investigating how gender-related persecution has been included in international and national law in the interpretation and application of the persecution grounds; how these instruments, in their approach to encompass gender-related persecution, correspond to each other; and which feminist critiques these legal instruments answer to or remain sensitive to. The applicable persecution ground in cases involving gender-related persecution is decided by an interplay between international and national law and practice. I therefore set out to investigate both these levels and their interplay. My purpose is to map this and to evaluate from a feminist perspective what is at stake depending on which persecution ground is applied.

The interpretation and application of the persecution grounds are an important dimension in women's asylum claims. This is particularly evident in the feminist critique of international refugee law. Since considerations of gender aspects have been excluded from refugee law, many female applicants have not been granted refugee status since the reasons for the persecution that they have risked being subjected to have not been considered to fall within the scope of the established persecution grounds of the refugee definition. Furthermore, the emphasis that has been given to the ground "membership of a particular social group" in gender-related claims has been criticised for resulting in that women's asylum claims are regularly referred to this ground and not being properly assessed. Lastly, the way refugee law is designed and justified has been criticised for creating a division between refugee receiving Western States against refugee producing non-Western States by depicting the non-Western States as inferior.

1.3 Research question

My research questions in this thesis divides roughly into three categories. The first category of research questions concerns the legal examination of international and national law. More precisely, these questions concerns how the persecution grounds are interpreted and applied to encompass gender-related persecution under different legal instruments. The research questions of this category read as follows:

¹¹ See more about this in chapter 1.6.

- What are the main elements of determining who qualifies as a refugee?
- How do the persecution grounds of the 1951 Convention encompass gender-related persecution?
- What measures does the CEDAW Committee oblige its contracting States to take in order to fulfil its obligations under CEDAW when interpreting and applying the persecution grounds of the 1951 Convention?
- How do the persecution grounds of the Swedish Aliens Act encompass gender-related persecution?
- What is the legal meaning and coverage of the term “persecution on grounds of *kön*” in the Swedish Aliens Act?
- How has “persecution on grounds of *kön*” been interpreted and applied by the Swedish Migration Court of Appeal?

The second category of research questions has to do with the correspondence and interplay between these legal instruments and their interpretation and application.

- Is the approach to encompass gender-related persecution of the 1951 Convention and the obligations identified by the CEDAW Committee in accordance?
- Is the approach of the Swedish Aliens Act to encompass gender-related persecution in accordance with the approach of the 1951 Convention and the obligations identified by the CEDAW Committee?
- Is the approach to encompass gender-related persecution in the case law of the Migration Court of Appeal in accordance with the approach of the Swedish Aliens Act, the approach of the 1951 Convention and the obligations identified by the CEDAW Committee?

The third category relates to how the law, in its interpretation and application of the persecution grounds, answers to and/or remains sensitive to different categories of feminist critique of refugee law identified by Thomas Spijkerboer.

- How does the interpretation of the persecution grounds of the 1951 Convention answer to and/or remain sensitive to the feminist critique identified by Spijkerboer?

- How do the obligations identified by the CEDAW Committee answer to and/or remain sensitive to the feminist critiques identified by Spijkerboer?
- How does the interpretation of the persecution grounds of the Swedish Aliens Act answer to and/or remain sensitive to the feminist critiques identified by Spijkerboer?
- How does the case law of the Migration Court of Appeal answer to and/or remain sensitive to, the feminist critiques identified by Spijkerboer?

1.4 Methodology

In order to answer my research questions, I will use legal methods and a gender theory-driven analysis. In chapters two and three, I will apply the international legal method when examining the relevant provisions in the 1951 Convention and CEDAW. In chapters four and five, the traditional legal method will be used when studying the Swedish refugee definition and its persecution grounds. Lastly, gender theory will be employed at the end of each chapter and in chapter six. A more thorough presentation of these methods is given below.

1.4.1 International legal method

Interpretation of treaties under international law is primarily subjected to the principles of treaty interpretation codified in article 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT). These principles provide the starting point for the interpretation of treaties and are said to reflect the position of customary international law.¹² Article 31 contains the general rule of interpretation which establishes the following:

Article 31. General Rule of Interpretation

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:
 - (a) Any agreement relating to the treaty which was made between all the parties in connexion with the conclusion of the treaty;
 - (b) Any instrument which was made by one or more parties in connexion with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.
3. There shall be taken into account, together with the context:

¹² McAdam 2011, p. 82; Mechlem 2009, p. 910 – 911.

- (a) Any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
- (b) Any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;
- (c) Any relevant rules of international law applicable in the relations between the parties.

4. A special meaning shall be given to a term if it is established that the parties so intended.

The logical starting point for the interpretation is the general linguistic usage (the ordinary meaning of a term), which may only be deviated from if a special meaning was intended by the States parties.¹³ Although there has been some debate concerning whether a literal interpretation based on the ordinary meaning of a term has interpretive precedence, the view that paragraph 1 to 3 should be seen as steps to be taken in logical progression, rather than a hierarchy for interpretation, has been claimed to be a better reflection of contemporary judicial practice.¹⁴ This view has also been affirmed by the International Court of Justice (ICJ), which has argued that “the term ‘ordinary meaning’ cannot be read in isolation”.¹⁵ Hence, the text, the context and the overall object and purpose of the treaty should all be viewed together when interpreting the instrument and none of these three elements may be given more weight than the others.¹⁶

The context of a treaty, as described in article 31.2 VCLT, includes not only the text, preamble and annexes of the treaty, but also material related to the conclusion of the treaty. It is also shown that the context is not a static or purely historical concept, as article 31.3 includes subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions, subsequent practice in the application of the treaty, and any relevant rules of international law applicable in the relations between the parties.¹⁷

The third element, the object and purpose of the treaty, involves seeking the interpretation that is most appropriate in order to realise the aims and achieve the objectives of the treaty.¹⁸ The object and purpose of a treaty may be revealed by the text itself, but the treaties preamble is usually the starting point for analysis of the object and purpose.¹⁹ When it comes to human rights instruments, the main object is for States parties to protect the rights set out in the treaties.²⁰ However, the treaty may also contain other values, such as the security and integrity of a State, which may be included through derogations and limitation clauses. It should be noted that in contrast to other international treaties, which normally aim to achieve a reciprocal exchange

¹³ Nowak 2003, p. 65; Article 31.4 VCLT.

¹⁴ McAdam 2011, p. 83.

¹⁵ McAdam 2011, p. 83.

¹⁶ McAdam 2011, p. 83; Mechlem 2009, p. 911.

¹⁷ Hathaway & Foster 2014, p. 9.

¹⁸ Mechlem 2009, p. 912.

¹⁹ McAdam 2011, p. 91; Hathaway & Foster 2014, p. 10.

²⁰ Nowak 2003, p. 65.

of rights for the mutual benefit of the parties, human right treaties are geared toward third-party beneficiaries. Due to this particular characteristic, the interpretation of human rights treaties should be performed in a way that is adequately favourable to the effective protection of individual rights.²¹

Article 32 VCLT describes when supplementary means of interpretation can be applied:

Article 32. Supplementary Means of Interpretation

Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31:

- (a) Leaves the meaning ambiguous or obscure; or
- (b) Leads to a result which is manifestly absurd or unreasonable.

Although article 32 describes the preparatory work as supplementary, they are given much relevance in practice.

1.4.2 Traditional legal method

The traditional legal method, sometimes referred to as the legal dogmatic method, will be applied in chapter four and five where I examine the content of the Swedish persecution grounds in the Swedish Aliens Act. The legal dogmatic method aims to provide an authoritative statement of the applicable law.²² I have, in accordance with this method, interpreted the generally accepted legal sources in order to determine the prevalent legal position. The legal sources in question are ranked in the following order, starting with the most important of them: law, preparatory work, case law and doctrine.²³

1.4.3 Theory-driven analytical method

In addition to establishing the content of the law by using the legal methods which I have presented above, I will apply feminist theory²⁴ in order to identify what is at stake depending on what legal solutions are chosen. This means that I will analyse the law from different feminist perspectives in order to evaluate the rationale for and consequences of the legal solutions chosen.

²¹ Mechlem 2009, p. 912.

²² Olsen 2004, p. 111.

²³ Sandgren 2006, p. 37; Korling & Zamboni 2013, p. 21. It should be noted that this ranking of the legal sources is not established in law and the importance given to the various sources of law has varied over time, see Stern 2008, p. 18.

²⁴ Feminist theory is presented in section 1.6 below.

1.5 Material

In accordance with the international legal method, I have primarily studied the 1951 Convention with its 1967 Protocol relating to the Status of Refugees and CEDAW.

The 1951 Convention does not establish an international court, tribunal or committee that can resolve differences in the interpretation and application of the Convention's provisions.²⁵ Although there is a possibility provided under article 38 of the Convention and article IV of the 1967 Protocol to refer disputes about the interpretation or application of the Convention to the ICJ, it has never been applied.²⁶ It is therefore the domestic decision-makers that are ultimately tasked to determine the meaning of the Convention. Since the definition is applied by a widely divergent group of States, the domestic interpretations of the refugee definition may vary significantly.²⁷ The domestic decisions that I refer to²⁸ should therefore be interpreted cautiously and they cannot be expected to reflect how the rest of the States parties to the Convention interpret the refugee definition.

In my examination of the refugee definition, I have to a large extent studied documents issued by the UNHCR. The UNHCR is, amongst other things, commissioned to provide interpretive guidance regarding who qualifies for refugee status and what rights these persons have. I have mainly used the *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*²⁹ and *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 Handbook and Guidelines are intended to provide legal interpretive guidance to government officials, judges, practitioners and UNHCR staff.

It should be mentioned that there are some controversies regarding whether the agency's published positions should be treated as subsequent agreements between the parties within the meaning of article 31.3(a) VCLT. Most of these documents, issued by the UNHCR, have been agreed upon by only a select number of States and, in some cases, by non-party States. The creation of these documents may therefore be considered to deviate from what normally would be expected of a "subsequent agreement" between parties. Hence, the views of the UNHCR on how the provision of the 1951 Convention should be interpreted are not binding on States parties as a matter of treaty

²⁵ Hathaway & Foster 2014, p. 3.

²⁶ McAdam 2011, p. 79.

²⁷ Hathaway & Foster 2014, p. 3.

²⁸ I refer to the case from New Zealand, which I present in chapter 2.3 and the cases from the Migration Court of Appeal which are presented in chapter 5,

²⁹ UN High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, HCR/1P/4/ENG/REV. 3, December 2011, (Hereafter: UNHCR Handbook or Handbook).

interpretation.³⁰ However, given the duty of States parties under article 35 of the Convention to cooperate with the UNHCR in the exercise of its functions and to facilitate its duty of supervising the application of the provisions of the Convention, serious engagement with UNHCR advice can be expected and its policy documents should against this background be taken into account. Moreover, Swedish authorities are recommended to use, not only the preparatory works and case law of the Aliens Act, but also the Handbook and Guidelines when interpreting the Swedish refugee definition.³¹ The Handbook has even been recognized as an “important source of law” by the Swedish Migration Court of Appeal.³² Superior courts of the States parties to the 1951 Convention have made many statements regarding the importance of the Handbook when interpreting the Convention. It has even been claimed to constitute international practice within the meaning of article 31.3(b).³³ I have against this background concluded that UNHCR’s Handbook and its Guidelines are important and authoritative interpretation tools which are much relied upon by the domestic authorities of the contracting States.

In my study of CEDAW I have, in addition to the convention, consulted general recommendations, in particular *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, which is central to this study. Although the general recommendations are not legally binding as such, they are of great importance in order to understand the practical use of CEDAW. There is a wide agreement that comments and observations made by treaty bodies are important interpretation tools, however, opinions differ regarding whether findings of the treaty bodies constitute subsequent practice in accordance with article 31.3(b) VCLT.³⁴ Irrespective of this, I conclude that the CEDAW Committee in their general recommendations provide authoritative guidance to the States parties on appropriate measures to ensure the implementation of their obligations under CEDAW.

Furthermore, I have used legal doctrine in my application of the international legal method. In chapter two, I have primarily used *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol – A Commentary*, edited by Andreas Zimmermann and *The Law of Refugee Status* by James Hathaway and Michelle Foster. These authors are among the most prominent experts on refugee law and their work has received international recognition.

Further examples of legal doctrine that have been used in this study are: *Bevis 8. Prövning av migrationsärenden*, written by Christian Diesen, Annika Lagerqvist Veloz Roca, Karolina Lindholm Billing, Madelaine Seidlitz and Alexandra Wilton Wahren and *Migrationsrätt* written by Rebecca Stern in chapter 13 of *Mänskliga rättigheter – juridiska perspektive* edited by Anna

³⁰ Hathaway & Foster 2014, p. 10.

³¹ Prop. 2005/06:6, p. 8.

³² MIG 2006:1; MIG 2006:7, authors translation.

³³ See examples of such statements in McAdam 2011, p. 111 & 97.

³⁴ See for example Mechlem 2009, p. 919 – 922 and Villiger 2009, p. 431.

Lundberg. All of these authors are prominent actors within the field of migration law, both as academics and as practitioners.

In my application of the traditional legal method, I have studied the Swedish Aliens Act³⁵ and its preparatory works. I have primarily used the government bill *prop. 2005/06:6 Flyktingskap och förföljelse på grund av kön eller sexuell läggning* and the inquiry *SOU 2004:31 Flyktingskap och könsrelaterad förföljelse*. These documents have provided guidance in my understanding of the Swedish refugee definition and the legislator's aims and purposes of adding the term *kön* to the refugee definition.

In chapter five, I have chosen to study and analyse case law solely from the Migration Court of Appeal, which is the highest instance. It should be noted that leave to appeal is required in order to have a decision of one of the migration courts tried at the Migration Court of Appeal.³⁶ Leave to appeal may be issued on two grounds: if it is of importance for the guidance of the application of the law or if there are other exceptional grounds for examining the appeal.³⁷ An exceptional ground could be that the Migration Court has committed a so called procedural error.³⁸ A consequence of these requirements for leave to appeal is that the Migration Court of Appeal cannot accept a case to trial solely because one of the parties claims that the Migration Court has made an erroneous judgement. Hence, it is not possible for all cases that have been tried at the Migration Court to be examined by the Migration Court of Appeal.³⁹

Lastly, the dissertation *Gender and Refugee Status* by Thomas Spijkerboer⁴⁰ has been central in my application of the theory-driven analytical method. The academic articles and doctrine that Spijkerboer refers to in his study have also been explored in this regard. Furthermore, in order to develop the ideas of the authors that Spijkerboer refers to, I have looked into the works that they in turn have referred to. In order to define the common elements in all feminist theory, I have used *Split Decisions* by Janet Halley and *Feminist Legal Theory* by Nancy Levit and Robert Verchick.

1.6 Theory

As mentioned earlier, my aim is to analyse the legal material that I have studied for the purpose of this essay from a feminist perspective. I have therefore chosen to employ feminist theory. It should be mentioned that, although “feminists agree on the goal of equality, they disagree about its

³⁵ *Utlänningslagen* (2005:716)

³⁶ See chapter 16 section 11 UtIL.

³⁷ These grounds are called *prejudikatdispens* and *extraordinär dispens*, see chapter 16 section 12 UtIL.

³⁸ See for example Mål nr UM 4110-07, 2007-12-14.

³⁹ Stern 2008, p. 20.

⁴⁰ Professor of Law, Vrije Universiteit, Amsterdam.

meaning and on how to achieve it”.⁴¹ As a result, there is a huge variety of different schools and categories within feminist theory. It is not surprising that feminism has been described as “a house with many rooms”.⁴²

This study is based on Levit and Verchick’s description of the shared features of all feminist theories. In their view, all feminist theories share two things: an observation and an aspiration. The observation is that men, particularly white men, have shaped the world and “for this reason possess larger shares of power and privilege”. The aspiration is that “women and men should have political, social and economic equality”.⁴³

In addition, I take Halley’s definition of feminism as my point of departure in this study. She points out three characteristics that in her view are noticeable in every form of feminism. First, a position must distinguish between m (men/male/masculine) and f (women, female, feminine), in order to be feminism.⁴⁴ Second, feminism “must posit some kind of subordination as between m and f, in which f is the disadvantaged or subordinated element”.⁴⁵ Third, “feminism opposes the subordination of f”.⁴⁶

When it comes to international human rights law, feminist scholars argue that it constitutes a set of “male” rights that are “defined by the criterion of what men fear will happen to them”, resulting in that the content of the rules of international law privilege men and ignore women’s interests. Feminist theory further criticizes international human rights for “adopting the “male” sex as the standard against which all individuals are judged”, which results in that women become a deviation from this standard.⁴⁷

1.6.1 Spijkerboer’s three categories of feminist critique

As a natural consequence of the different categories of feminism, the feminist critique of refugee law varies as well. Although there is a shared view that gender matters in the refugee law discourse, the opinions differ greatly regarding for instance how and to what extent gender matters, as well as which strategies should be adopted in order to “solve the gender problem in refugee law”.⁴⁸

Migration law professor Spijkerboer has made important contributions to the research regarding the role of gender in refugee law and his studies have been recognized internationally. In his dissertation, *Gender and Refugee Status*, he

⁴¹ Levit & Verchick 2006, p. 16.

⁴² Levit & Verchick 2006, p. 8.

⁴³ Levit & Verchick 2006, p. 15 – 16.

⁴⁴ Halley 2006, p. 17.

⁴⁵ Halley 2006, p. 18.

⁴⁶ Halley 2006, p. 18.

⁴⁷ Edwards 2008, p. 9.

⁴⁸ Nykänen 2012, p. 120.

identifies three generations of feminist critique of refugee law that have developed during the past decades, namely “the early critics”, “the human rights approach” and “the anti-essentialist critique”. These categories of feminist critique of refugee law will be examined below. The focus will be on what concerns these categories of feminist critique have emphasised, which solutions they have recommended, and the critique that they in turn have attracted. As mentioned above, one of the purposes of the thesis is to determine how the interpretation and application of the persecution grounds and the obligations identified by the CEDAW Committee hold up to these feminist critiques.

I am aware of that this categorization by Spijkerboer gives a somewhat simplified picture of the complex criticism and analysis made by these authors. However, although these categories of feminist critique are not entirely coherent, they all have a distinct emphasis that differentiates them from one another. I will in the following sections explain what characterizes each group.

This study will mainly focus on the human rights approach and the anti-essentialist critique, since it is my point of departure to examine in which ways the law can be useful in dealing with this issue; assuming thusly, in contrast to the early critiques, that law can be of use here.

1.6.1.1 The early critics

The main purpose of the early critics was to get the issue of women and refugee status on the agenda.⁴⁹ Marijke Meijer and Doreen Indra were, according to Spijkerboer, at the forefront of this category of critique.⁵⁰ In Spijkerboer’s view, these authors saw themselves as engaging in a universal struggle against patriarchy, and what they wished to highlight was how the experiences of female applicants were different from those of men and that this was not sufficiently acknowledged in refugee law.⁵¹

Spijkerboer writes that the early critics identified two main factors that caused the specificity of female refugee experiences. First, women and men have different relationships to the State and the public sphere in the country of origin. Women, as opposed to men, are forced to live primarily in the private sphere. Second, “women are oppressed simply because they are women”.⁵² A risk of persecution could thus arise as a consequence of an infringement of the moral or ethical values of the society, for example by not complying with dress codes or refusing a contracted marriage. It could also arise if a woman is considered to have failed in her function as a wife or mother, or is engaged politically.⁵³ According to Spijkerboer, the early critics considered that refugee law did not address these specific experiences of female applicants

⁴⁹ Spijkerboer 2000, p. 163.

⁵⁰ Spijkerboer 2000, p. 163.

⁵¹ Spijkerboer 2000, p. 163.

⁵² Spijkerboer 2000, p. 164.

⁵³ Spijkerboer 2000, p. 164.

and they especially emphasized how women's private sphere activities were not seen as political.⁵⁴

It should be noted in this regard that this type of critique of the distinction drawn between the public and private spheres is not unique to refugee law. The so-called public/private dichotomy in international human rights law, which was conventionally premised on the liberal, minimalistic conception of the State, has been said to be one of the main obstacles to the protection of women's rights.⁵⁵ Since international law privileges the public sphere over the private sphere, thereby refusing to recognize the specificity of women's life in the private sphere, it ignores and marginalizes women's concerns and interests.⁵⁶ The private sphere has been seen as off limits to State intervention, resulting in that abuses against women many times have not been regarded as violations of their human rights. As expressed by the UN Commission on Human Rights: "In many parts of the world, the struggle for human rights seems to end at one's doorstep".⁵⁷

Now, we return to the early critics and look closer into Indra. She wrote that generalized references to refugees "obscure the ways in which gender may play a major role in how refugees are created, and how distinct the refugee situation can be for women and men".⁵⁸ Her conclusion was that women refugees have a lower probability of gaining refugee status, since "the key criteria for being a refugee are drawn primarily from the realm of public sphere activities dominated by men".⁵⁹ Indra argued that gender ought to be added as a persecution ground in the refugee definition. She mentioned the omission of gender from the 1951 Convention grounds as an illustration of "the depth of gender delegitimation in refugee contexts".⁶⁰ She considered it to be remarkable that sex and gender oppressions were not even mentioned in the refugee definition, while "oppression arising from parallel forms of invidious status distinction such as race or religious convictions are central".⁶¹

Meijer likewise considered that sex was one of the grounds that were specifically lacking in the refugee definition. She further argued that it was not impossible to include persecution because of social position, based on a person's sexual status, as an instance of persecution because of belonging to

⁵⁴ Spijkerboer 2000, p. 164.

⁵⁵ UN Commission on Human Rights, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women, E/CN.4/2006/61, 20 January 2006, available at: <http://www.refworld.org/docid/45377afb0.html> [accessed 7 January 2016], (Hereafter: UN Commission on Human Rights, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women), para. 59.

⁵⁶ Edwards 2008, p. 10.

⁵⁷ UN Commission on Human Rights, Report of the Special Rapporteur on Violence against Women, Its Causes and Consequences on the Due Diligence Standard as a Tool for the Elimination of Violence against Women, para. 60.

⁵⁸ Indra 1987, p. 3.

⁵⁹ Indra 1987, p. 3.

⁶⁰ Indra 1987, p. 3.

⁶¹ Indra 1987, p. 3.

a specific social group.⁶² The UNHCR and the Council of Europe had not yet recognized this position at this point in time, but the European Parliament had expressed in a resolution that women could be deemed to belong to a “specific social group” within the meaning of the refugee definition.⁶³ Moreover, on a national level, the Dutch Refugee Association had taken the position that persecution because of belonging to a specific social group also included persecution because of the social position based on sexual status.⁶⁴ Meijer hoped that the position of the Dutch Refugee Association would “contribute to the awareness and acknowledgement of women’s oppression and women’s resistance”.⁶⁵

Spijkerboer writes that the early critics engaged in an attack on the pretended neutrality of the law. Their claim was not that law would solve the problem when properly applied. Instead, even though they made specific suggestions for how the law should be used, they saw the law itself as the problem. Lastly, he claims that they considered that a fight was needed in order to make the oppression of women in the private sphere into a political issue.⁶⁶

Hence, what characterizes the early critics is, according to Spijkerboer, their will to unite all women in a fight against patriarchy and violence against women. They engaged in a politicized attack on refugee law, which they saw as an institution reflecting male domination.⁶⁷ They promoted a greater recognition of the specificity of female applicants’ experiences and that these should be acknowledged in refugee law. They argued that political activities in the private sphere should be recognized as political. What concerns the approach to encompass gender-related persecution, which is the focus of this thesis, they recommend that gender ought to be added to the enumerated persecution grounds “in order to cover the oppression of women”⁶⁸, although the social group ground “already provided the basis for recognizing the victims of women’s oppressions as refugees”.⁶⁹ Lastly, all the while engaging in efforts to reform the law, they remained sceptical about whether the law itself could bring a solution.⁷⁰

1.6.1.2 The human rights approach

The early critics have in turn been criticized by, what Spijkerboer calls, “the human rights approach”.⁷¹ Spijkerboer identifies Jacqueline Greatbatch as the pioneer of this approach. She argued that the early critics, such as Indra and Meijer, assume a “bifurcated version of social reality”, where men dominate

⁶² Meijer 1985, p. 33 – 34.

⁶³ Meijer 1985, p. 33.

⁶⁴ Meijer 1985, p. 34.

⁶⁵ Meijer 1985, p. 37.

⁶⁶ Spijkerboer 2000, p. 165.

⁶⁷ Spijkerboer 2000, p. 171.

⁶⁸ Spijkerboer 2000, p. 164.

⁶⁹ Spijkerboer 2000, p. 164.

⁷⁰ Spijkerboer 2000, p. 164 – 165.

⁷¹ Spijkerboer 2000, p. 163.

the public sphere while women are referred to the private sphere, which is presumed to be the site of gender oppression.

This analysis founders on its ahistoric, acultural approach to women's oppression, in addition to its inattention to key aspects of the Convention definition and its overarching limitations. The bifurcated version of society itself ignores the realms of women's lives outside domesticity, and creates a rhetorical and theoretical wall between domestic and social culture. It roots women's oppression in sexuality and private life, thereby disregarding oppression experienced in non-domestic circumstances, and the interconnections of the public and private spheres.⁷²

According to Spijkerboer, Greatbatch added two important issues to the debate. First, she opposed how the early critics homogenized women's experiences by erasing the specific context the asylum seeking women come from. Second, she criticized their implicit assumption of the inflexibility of the law.⁷³ Spijkerboer sees Greatbatch's article as the starting point for the generation of feminist critique of refugee law which he calls the human rights approach, which he means is characterized by a tendency to analyse the experiences of refugee women through a cultural lens. Instead of applying the internationalist perspective of the early critics, the human rights approach located women's problems in culture.⁷⁴ Much attention was directed to non-Western societies and these authors frequently expressed great concern "for those women who are caught in the barbaric hold of their cultures and religions".⁷⁵

One of the authors who Spijkerboer identifies as a supporter of the human rights approach is Linda Cipriani. Like the early critics, she argued that gender should be added as one more ground for refugee protection since "it would protect women from institutionalized misogyny in which the government carries out, sanctions or ignores oppression of or violence against women because they are women".⁷⁶ She expressed that Islam is the most notorious example of such persecution "with its strict rules regarding the status and behavior of women".⁷⁷ She also pointed out Hinduism in India, tribal practices in Africa and the tradition of machismo in Latin America as examples of contexts where women suffer human rights violations.⁷⁸

Another author who Spijkerboer refers to is David Neal. Neal wrote that the Third World is hardly alone in failing to provide sufficient protection to women, however, "the social relations of many third world nations are still dominated by religious, tribal, or societal customs which accommodate, if not sanction, the persecution of women".⁷⁹ He further expressed that "abuses within Islam, though obviously not unique, are perhaps the most conspicuous

⁷² Greatbatch 1989, p. 520; Quoted in Spijkerboer 2000, p. 165.

⁷³ Spijkerboer 2000, p. 165-166.

⁷⁴ Spijkerboer 2000, p. 166.

⁷⁵ Razack 1995, p. 55.

⁷⁶ Cipriani 1993, p. 513.

⁷⁷ Cipriani 1993, p. 513.

⁷⁸ Cipriani 1993, p. 513.

⁷⁹ Neil 1990, p. 207.

in contemporary times”.⁸⁰ Neil brought up the treatment of women in post-Revolution Iran as an example of “the type of milieu in which sex-persecution can be found”.⁸¹

Daniel McLaughlin is mentioned as a representative of the human rights approach as well. In his article *Recognizing Gender-Based Persecution as Grounds for Asylum*, he wrote that institutionalized gender discrimination is a pervasive reality in the Third World and among the developing countries, which permeates every segment of society and culture.⁸²

From the perspective of the human rights approach, says Spijkerboer, “refugee women suffer from tradition or, conversely, a lack of progress and modernity with emancipation and human rights as an important part”.⁸³

Spijkerboer notes that the authors within the human rights approach had different opinions concerning which persecution ground is the most appropriate to encompass gender-based persecution. Some recommended that gender should be added as a persecution ground,⁸⁴ others argued that victims of intimate violence and female genital mutilation (FGM) can be perceived as expressing a dissenting political opinion when they flee their home country.⁸⁵ The leading position within the approach was, however, that gender-based persecution could be address by considering categories of women as a social group within the meaning of the refugee definition.⁸⁶

In contrast to the early critics, the human rights approach argued that the problem could be solved by the law.⁸⁷ This display of faith in the legal system was, according to Spijkerboer, consistent with the tactics deployed by several authors of the human rights approach, who were in favour of adopting concrete rules. One of these authors was Nancy Kelly, who wrote *Guidelines for Women’s Asylum Claims*. Kelly emphasized the role of culture in women’s oppression, distinguished gender-neutral persecution of women from gender-related asylum claims⁸⁸ and favoured the use of the persecution ground “membership of a particular social group” to target gender-related persecution.⁸⁹

In sum, the human rights approach emphasized the cultural context refugee women come from and used culture as an explanation of why women are subjected to human rights violations in certain countries. The authors of the human rights approach especially highlighted traditional, cultural and religious practices affecting women in developing countries and Third World

⁸⁰ Neil 1990, p. 208.

⁸¹ Neil 1990, p. 204 & 210 – 222.

⁸² McLaughlin 1994, p. 222.

⁸³ Spijkerboer 2000, p. 166.

⁸⁴ For example Cipriani 1993, p. 538 & 545; McLaughlin 1994, p. 244 & 239.

⁸⁵ Spijkerboer 2000, p. 167.

⁸⁶ Spijkerboer 2000, p. 167 – 168; Greatbatch 1989, p. 526; Neil 1990, p. 228, 230 & 257.

⁸⁷ Spijkerboer 2000 p. 168.

⁸⁸ Kelly 1994, p. 143.

⁸⁹ Spijkerboer 2000, p. 169.

countries. As regards which persecution ground is more appropriate to encompass gender-based persecution, different positions were taken by different authors of the human rights approach. However, according to Spijkerboer, the persecution ground “membership of a particular social group” received the most recognition.⁹⁰ Lastly, they argued that the problems of refugee women could be solved in law and promoted the adoption of very concrete rules and guidelines to address the issue.

1.6.1.3 The anti-essentialist critique

Spijkerboer identifies himself with the so-called anti-essentialist critique. He describes it as a three-pronged critique, which is an elaboration of the critique of gender as well as ethnic essentialism in both general social and legal theory.⁹¹ Spijkerboer mentions the postcolonial feminist theorist Chandra Talpade Mohanty as one of the authors who inspired the anti-essentialists.

Postcolonial thinking is not a coherent theory, but it is frequently used to describe studies that analyse the remaining effects of colonialism and the resistance to this in different parts of the world.⁹² For instance, it highlights how Western culture gained its strength and identity by setting itself off against other cultures that were described as inferior.⁹³ Postcolonial theorists have claimed that the West has created a negative image of the non-Western world in order to show the superiority of the West and thereby legitimize Western imperialism.⁹⁴ Postcolonial feminist theory developed as a reaction against feminism that was perceived as only focusing on the experiences of women in Western cultures and thereby misrepresenting women living in non-Western countries.

In her article *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, Mohanty opposed how Western feminism⁹⁵ wrote about Third World women as a singular monolithic subject.⁹⁶ She criticized what she called “Eurocentric” feminism for homogenizing and systematizing the experiences of different groups of women in other cultures, which she believed erased all marginal and resistant modes of experiences. She showed how Third World women were constructed as a homogeneous powerless group and often located as implicit victims of particular socio-economic systems.⁹⁷

With this in mind, the anti-essentialists argued that the human rights approach relied on “stereotypes which locate gender oppression in the indigenous

⁹⁰ Spijkerboer 2000, p. 167 – 168.

⁹¹ Spijkerboer 2000, p. 163 & 169.

⁹² Mohanty 1984, p. 9.

⁹³ Said 1978, p. 3.

⁹⁴ Gemzöe 2002, p. 151.

⁹⁵ By using the term “Western feminism”, Mohanty wants to draw attention to “the similar effects of various textual strategies used by particular writers that codify Others as non-Western and hence themselves as (implicitly) Western”, see Mohanty 1984, p. 334.

⁹⁶ Mohanty 1984, p. 333.

⁹⁷ Mohanty 1984, p. 338.

cultures of the Third World and represent the Western countries of refuge as emancipated”.⁹⁸ The human rights approach was further described as “an extension of legal practice in which women’s claims are most likely to succeed when they present themselves as victims of dysfunctional, exceptionally patriarchal cultures and states”.⁹⁹ Hence, in order to be recognized as a refugee, the applicant must be recognized as “a cultural other”.¹⁰⁰ Spijkerboer explains that the anti-essentialist critics stressed the importance of analysing women’s experiences contextually, but they were against the tendency of the human rights approach to emphasize the *cultural* context of the applicants as well as “the tendency to describe it in terms of the West’s monolithic Other”.¹⁰¹

Concerning the focus of the thesis, the interpretation and application of the persecution grounds of the refugee definition in gender-related claims, Spijkerboer explains that the anti-essentialist critics were sceptical about the Convention ground “membership of a particular social group”. They saw a tendency of the human rights approach to frame any and all persecution of women as persecution because of gender, which the anti-essentialists feared would reinforce the view that only men can be considered as “real” refugees. “[I]t can reinforce women’s marginalization by implying that only men have political opinions, only men are activated by religion, only men have racial presence etc.”¹⁰² They meant that it may create and sustain the stereotype that the persecution grounds which are not explicitly “gendered” are meant for male applicants.¹⁰³ The persecution ground political opinion was instead considered to be the most effective and appropriate ground to frame women’s claims, for example when women refuse to conform to social mores.¹⁰⁴ According to Audrey Macklin, who Spijkerboer identifies as an anti-essentialist, political opinion “may well include women’s opposition to extreme, institutionalized discrimination”.¹⁰⁵ She wrote that political opinion does not suffer from the same partiality as religion or race, since it does not address only a single aspect of the persecution that female refugees experience. Instead, political opinion “equates resistance to gender oppression with a political opinion, thus seizing the language of liberal democratic rights discourse and refashioning it for feminist use”.¹⁰⁶ Macklin saw it as profoundly feminist to identify women’s resistance to gender subordination as political opinion, if one believes that “the personal is political, and that patriarchy is a system constituted primarily through power relations, not biology”.¹⁰⁷

⁹⁸ Spijkerboer 2000, p. 169.

⁹⁹ Spijkerboer 2000, p. 169.

¹⁰⁰ Spijkerboer 2000, p. 169; Razack 1995, p. 50.

¹⁰¹ Spijkerboer 2000, p. 169.

¹⁰² Spijkerboer 2000, p. 169.

¹⁰³ Spijkerboer 2000, p. 169; Macklin 1995, p. 260.

¹⁰⁴ Spijkerboer 2000, p. 169 – 170.

¹⁰⁵ Macklin 1995, p. 260.

¹⁰⁶ Macklin 1995, p. 260.

¹⁰⁷ Macklin 1995, p. 260.

The anti-essentialist critics argued that legal discourse was flexible enough to accommodate the asylum claims of women. However, like the early critics, they questioned whether legal reasoning in and of itself can bring about the solution, as suggested by the human rights approach. As Spijkerboer puts it: "Law is seen as a vehicle for arguments both for and against women, and legal reasoning is therefore seen as inconclusive. The real issue concerns the ideas about gender and ethnicity communicated through legal reasoning".¹⁰⁸ Spijkerboer refers to Sherene Razack, who argued that an analysis of women in refugee determination procedures "suggests that we work with the manner in which immigration decisions are made rather than the matter of law, that is, its specific content". In her discussion of the Canadian Guidelines on gender persecution, she wrote that "the matter of the law has changed, at least at the level of guidelines, but this change does not appear to have greatly interrupted the traditional lens through which refugees are viewed". In order to change, she suggested "an unmasking of the trope of pity and compassion and a move towards a more political understanding of why women flee and what our responsibilities are to them".¹⁰⁹

Spijkerboer considers that concrete rules and guidelines carry certain advantages, however, they also carry some disadvantages since they have been issued, not only out of concern for refugee women, but also for other goals that may conflict with those of the feminist critics. Spijkerboer explains that "the human rights approach was not successful in that their argumentations and the guidelines based on them reproduce the main distinctions underlying current practice: the distinction between "normal" versus "women's" cases and the opposition of the West to the Rest".¹¹⁰

To summarise, the anti-essentialist critique was influenced by postcolonial feminist thinking and was against the emphasising of the cultural context by the human rights approach, which they meant demonised the Third World and reproduced the already occurring distinction between the Western and the non-Western countries. They further considered that overusing the persecution ground "membership of a particular social group" in these cases produced a distinction between "normal" cases and women's cases, which may sustain the stereotype that men "own" the rest of the Convention grounds and that only men are "real" refugees.¹¹¹

1.7 Previous research

The problems that women encounter when applying for asylum have been studied by many authors around the world. Several of these authors are referred to above in chapter 1.6. Like this thesis, many of these works apply feminist theory. Since there is not enough space in this thesis to go through

¹⁰⁸ Spijkerboer 2000, p. 170.

¹⁰⁹ Razack 1995, p. 88; Quoted in Spijkerboer 2000, p. 170.

¹¹⁰ Spijkerboer 2000, p. 181.

¹¹¹ Spijkerboer 2000, p. 171.

all of the research that has been done in this area, I will mention two of the works that from my point of view are amongst the most important in this field of study.

Spijkerboer is one of the most prominent experts on the issue of gender in refugee law and the situation for women in the asylum process. I have had great use of his dissertation *Gender and Refugee Status*, where he studies the interrelation between gender and refugee law. His focus in this book is on Dutch refugee law.

Another important author is Heaven Crawley who has written *Refugees and Gender: Law and Process*. In this book, Crawley aims to ensure that gender-related aspects of women's experiences are taken into account. She deals with the concepts of gender persecution and provides a gendered framework for the interpretation of the key elements of the 1951 Convention. The focus is on refugee law in the UK, but she also does a comparative study and investigates case law from Canada, the US and Australia.

Unlike these works, my thesis focuses on Swedish refugee law. Maria Bexelius has written a comprehensive handbook, *Asyl kön och politik*, which deals with the issue of women and gender in refugee law and human rights law in general, with focus on Swedish refugee law.

Due to lack of time and space, this thesis does not study the issue of gender and women's situation in refugee law as extensively as these authors. This thesis is limited to investigate one element of the refugee definition, namely the persecution grounds.

Kristina Folkelius and Gregor Noll have written about the so called "gender provision" in the former Aliens Act. In this work, they studied, amongst other things, whether this provision could be considered to meet the requirements under CEDAW.

In this thesis, I study the persecution grounds of the current refugee definition, which have come to replace the gender provision. I examine whether the approach of the Swedish Aliens Act to encompass gender-related persecution within the scope of the refugee definition is in accordance with the obligations that Sweden is bound to respect under CEDAW. Furthermore, I employ feminist theory in order to see what is at stake for women asylum seekers depending on how the persecution grounds of the refugee definition are designed, justified and applied.

1.8 Delimitations

Although both women and men can be subjected to gender-related persecution, I have chosen to focus on women's gender-related asylum claims in this study. What I mean by "women" in this study are people who identify as women and people whose biological sex is female. It should be mentioned

that the Swedish term *kön* which was included in the Swedish refugee definition covers, not only to the biological concept of “sex” and the cultural and social concept of “gender”, but also transsexuals and transgender people in general “insofar the persecution directed at them is due to their attitudes regarding gender identity”.¹¹² I will, however, not analyse persecution of transsexuals and transgender people in this study. I will also leave out refugee claims based on sexual orientation, even though these claims also contain a gender element. This means that I will not study the term “persecution for reasons of sexual orientation” which, together with *kön*, was introduced in the Swedish refugee definition as an example of what falls within the scope of the persecution ground “membership of a particular social group”.

The refugee definition contains several criteria that a person has to fulfil in order to qualify for refugee status and some of these elements require a gender-sensitive interpretation. I have chosen to focus on the persecution grounds of the refugee definition, which are: race, religion, nationality, political opinion and membership of a particular social group. My aim is to establish how these criteria have been interpreted and applied in order to cover gender-related persecution. I thereby leave the interpretation of the other criteria to be investigated by others.

The question whether CEDAW should be taken into account in the interpretation of the 1951 Convention does not have to be investigated further in this essay, since Sweden is State party to both treaties. There is, however, a significant support for the view that other human rights instruments, such as CEDAW, need to be considered in the application of the 1951 Convention.¹¹³

I have not had enough time and space to examine and present all feminist critique of the refugee definition. My aim has therefore not been to present a complete description of the feminist critique of refugee law and the refugee definition. The feminist critique that I present in chapter 1.6 is painted with a broad brush and its objective is limited to providing an overarching view of how feminist critique of refugee law has developed and differed during the past decades.

The EU member States have committed to establishing the Common European Asylum System (CEAS), which aims to harmonize the asylum regulations of the member States “so that asylum seekers, 1951 Convention refugees, and beneficiaries of ‘subsidiary protection’ receive the same entitlements irrespective of which Member State they find themselves in”.¹¹⁴ The Qualification Directive¹¹⁵ forms part of the CEAS and contains a refugee

¹¹² Prop. 2005/06:6, p. 21 – 22 & 34, authors translation.

¹¹³ McAdam 2011, p. 104 – 108; Hathaway & Foster 2014, p. 9. Stern 2010, p. 297.

¹¹⁴ McAdam 2011, p. 108.

¹¹⁵ European Union: Council of the European Union, Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons Who Otherwise Need International Protection and the Content of the Protection Granted, 30 September 2004, OJ L. 304/12-304/23; 30.9.2004, 2004/83/EC, (Hereafter: Qualification Directive).

definition that is based on the refugee definition of 1951 Convention. I have therefore not studied the refugee definition of the Qualification Directive, although Sweden is bound to it.

1.9 Terminology

Asylum

In this essay, the term “asylum” is used in accordance with the Swedish Aliens Act¹¹⁶ where it is described as a residence permit that is granted to an alien because he or she is a refugee, or in need of subsidiary protection¹¹⁷.

Asylum seeker and asylum applicant

The terms “asylum seeker” and “asylum applicant” are used in this essay when referring to persons who seek protection from persecution or other abuses in their country of origin or country of residence, whether they fulfil the criteria of the refugee definition or not.

Gender, sex and kön

In this study, the term sex refers to the biological sex, while the term gender is used to describe the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another. Hence, the biological sex is fixed, while gender is constructed and varies in different cultures and can thereby be changed.¹¹⁸

The term *kön* will be used in accordance with its meaning in the Swedish refugee definition. *Kön* should be understood in a broad meaning to include, not only biological sex, but also socially constructed sex (gender).

Gender-specific persecution and gender-related persecution

The expression gender-specific persecution is used to describe a method of persecution that is specific to a given gender. Examples of gender-specific forms of persecution that solely, or predominantly, affect women are female genital mutilation (FGM), forced abortion, rape and other forms of sexual abuse. Gender-specific forms of persecution that men can be subjected to is for instance the administration of electric shocks to a man’s testicles.¹¹⁹

Gender-related persecution means that someone risks persecution due to reasons that fully or partially are based on notions of gender. For example, a woman who acts contrary to laws or norms that regulate how a “proper woman” should behave may risk gender-related persecution.¹²⁰

¹¹⁶ Chapter 1 section 3 UtL.

¹¹⁷ See chapter 1 section 3 UtL. In Swedish: *alternativt skyddsbehövande*.

¹¹⁸ UNHCR Guidelines on Gender-Related Persecution, para. 3. Note that there is no universally accepted definition of these terms and that this definition has been theoretically contested, see for example Butler 1999.

¹¹⁹ SOU 2004:31, p. 17.

¹²⁰ Crawley 2001, p. 7.

It is important to note that gender-specific persecution does not necessarily constitute gender-related persecution. A woman may for instance be raped (gender-specific persecution) because of her nationality. Conversely, an applicant may risk gender-related persecution even though the method of the persecution is not gender-specific. An example is when a woman risks being flogged (not gender-specific persecution) for refusing to wear a veil (gender-related persecution).¹²¹

Refugee

A refugee is a person who fulfils the criteria in article 1.A(2) of the 1951 Convention.

1.10 Structure

In chapter two, the 1951 Convention and its 1967 Protocol are presented, followed by a more thorough presentation of the criteria of the refugee definition. Thereafter comes a legal study of how the persecution grounds of the 1951 Convention encompass gender-related persecution. Lastly, the gender-sensitive interpretation of the persecution grounds is analysed from the perspective of different feminist approaches.

In chapter three, a brief introduction to CEDAW and the CEDAW Committee is given. After that, I present the statements that the CEDAW Committee has made in General recommendation No. 32 concerning the measures that the States parties to CEDAW are obliged to follow in the interpretation and application of the persecution grounds in order to fulfil its obligations under CEDAW. In the following section, I study how the approach of the 1951 Convention to encompass gender-related persecution within the scope of the persecution grounds correspond to the obligations identified by the CEDAW Committee. Lastly, I examine whether the statements of the CEDAW Committee answers to and/or remains sensitive to the feminist critique that has been identified and categorised by Spijkerboer.

In chapter four, the Swedish refugee definition is firstly presented. In the next section, I examine Swedish preparatory works and present how gender-related persecution was approached before the amendment in 2005, the reasons for the amendment of the Swedish refugee definition in 2005 and the legislative procedure that resulted in the new refugee definition. I also present the legislature's statements in these preparatory works concerning how the persecution grounds are interpreted and applied in order to encompass gender-related persecution. The meaning of the term *kön* in the Swedish Aliens Act is presented thereafter. After that, I examine what has been stated in the preparatory works regarding the legal meaning and coverage of the term "persecution on grounds of *kön*". Afterwards, the compliance of the Swedish approach to encompass gender-related persecution to the 1951 Convention

¹²¹ Crawley 2001, p. 8.

approach and the obligations of the CEDAW Committee is presented. The last section contains the feminist analysis, where it is examined how the interpretation of the persecution grounds of the Swedish refugee definition answers to and/or remains sensitive to the feminist critique identified by Spijkerboer.

In chapter five, the case law that has been studied for the purpose of this thesis is presented. After the presentations of the cases, I will analyse the approach of the Migration Court of Appeal to encompass gender-related persecution and examine whether this is in accordance with the approach of the Swedish Aliens Act, the approach of the 1951 Convention and the obligations identified by the CEDAW Committee. Lastly, I will examine whether the case law of the Migration Court of Appeal answers to, alternatively remains sensitive to, the feminist critiques identified by Spijkerboer.

In chapter six, I present my analysis and draw conclusions from the results of the thesis.

In chapter seven, some concluding remarks on the thesis is given.

2 The 1951 Convention and its 1967 Protocol

In this chapter, I will present the 1951 Convention and its 1967 Protocol and address the question of what the main elements are of determining who qualifies as a refugee. Thereafter, I will examine how the 1951 Convention grounds have been interpreted and applied to encompass gender-related persecution. Lastly, I will analyse the results of this examination from the point of view of the feminist critiques that have been identified and categorised by Spijkerboer.

2.1 Background

The 1951 Convention, together with its 1967 Protocol, remains the central instrument in international refugee law.¹²² The Convention was originally designed to solve the post Second World War refugee crisis in Europe.¹²³ It was intended to be applied by Western States in their dealings with arrivals from one of the Soviet bloc countries and it largely reflected the international politics of the early Cold War era.¹²⁴ The refugee definition in article 1A(2) was initially only applicable to refugees who had fled from events occurring before the 1st of January 1951, either only in Europe or in Europe and elsewhere in the world. The reason for the 1951 dateline was that the contracting States at the time the Convention was adopted wished to “limit their obligations to refugee situations that were known to exist at that time, or to those which might subsequently arise from events that had already occurred”.¹²⁵ These temporal and geographical limitations were removed by the adoption of the 1967 Protocol, which expanded the scope of the Convention and made it universal and applicable to contemporary refugees.

The Convention establishes who is to be recognized as a refugee and what legal protection, support and social rights a person with refugee status should receive from the contracting States.¹²⁶ Moreover, it specifies who falls outside the scope of the Convention and under what circumstances a person ceases to be considered a refugee.¹²⁷

¹²² Diesen et al. 2012, p. 112.

¹²³ UNHCR Handbook, para. 5.

¹²⁴ Freedman 2012, p. 47.

¹²⁵ UNHCR Handbook, para. 7.

¹²⁶ See article 1A, 4, 5, 12 – 34 1951 Convention.

¹²⁷ See article 1C and 1F 1951 Convention.

The Convention has today a total of 145 States parties, but there is still a number of big countries, such as India and the United States of America, that have not yet ratified the Convention.¹²⁸ However, these countries are bound to respect those articles in the Convention that have been recognized as norms of customary international law. An example is the principle of non-refoulement, which has been described as the cornerstone in international refugee law.¹²⁹ The principle of non-refoulement imposes a negative duty and minimum obligation on States in relation to people that come under its jurisdiction. Although it does not respond to the absence of an individual right to be granted asylum in international law,¹³⁰ it ensures that people that are at risk of being persecuted in their country of origin must be allowed to stay, even though their asylum application has been denied.

The principle of non-refoulement, as it is established in article 33(1) of the Convention, forbids the Contracting States to “expel or return” a refugee in any manner whatsoever to the frontiers of territories where his or her life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.¹³¹ This applies to both refugees and asylum seekers, which means that all asylum seekers are protected from refoulement both before, during and after their applications have been properly examined.¹³² However, according to article 33(2), there are two situations when an exemption can be made from article 33(1). First, if there are reasonable grounds for regarding the refugee or asylum seeker as a danger to the security of the receiving country. Second, if the refugee or asylum seeker has been convicted by a final judgement of a particularly serious crime and constitutes a danger to the community in the receiving country. However, it is not sufficient to solely apply the 1951 Convention in these situations. The principle of non-refoulement is also codified in several other international instruments which provide a complementary protection in cases where a person falls outside the scope of article 33 of the 1951 Convention. The provisions in question are: article 3 of the Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment (CAT), article 7 of the International Covenant on Civil and Political Rights (ICCPR), and article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR).¹³³ Hence, the principle of non-refoulement according to international customary law and as

¹²⁸ UNHCR, State Parties to the 1951 Convention relating to the Status of Refugees and/or its 1967 Protocol, June 2014, available at: <http://www.refworld.org/docid/51d3dad24.html> [accessed 6 January 2016].

¹²⁹ Kälin, Caroni & Heim 2011, p. 1335 & 1343 – 1345; Diesen et al. 2012, p. 142; Stern 2010, p. 303.

¹³⁰ Article 14 of the Universal Declaration of Human Rights establishes that everyone has the right to seek and to enjoy in other countries asylum from persecution, but it does not include a right to be granted asylum. It has been argued, however, that article 18 of the EU Charter on Fundamental Rights may recognize a right to asylum, see Gil-Bazo 2008.

¹³¹ Article 33 the 1951 Convention.

¹³² Diesen et al. 2012, p. 142.

¹³³ Regarding the protection that is provided in these instruments, see further in Stern 2010, p. 304 – 305 and Diesen et al. 2012, p. 143 – 148.

it is codified in these instruments must be considered as well in these situations.¹³⁴

2.2 The refugee definition

The refugee definition in Article 1A(2) is one of the core provisions of the 1951 Convention. It establishes the criteria that a person has to fulfil in order to qualify as a refugee within the meaning of the Convention. According to the Handbook, the determination of refugee status is declaratory. This means that a person is to be considered a refugee as soon as he or she fulfils the criteria set in the refugee definition, which already should have occurred before the refugee status was formally admitted by the competent authorities. Refugee status is thus not something that is granted by states – it is simply recognised by them.¹³⁵

Article 1A(2) states that the term “refugee” shall apply to any person who:

As a result of events occurring before 1 January 1951¹³⁶ 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.

The definition shows that far from all people in the world that have fled their homes are considered as refugees within the meaning of the 1951 Convention and its 1967 Protocol. For example, internally displaced persons (IDP) fall outside the scope of the refugee definition since they are not outside their country of origin.¹³⁷ It should also be noted that a forward-looking assessment is made when determining whether a person qualifies for refugee status. This means that the person in question does not have to prove that he or she already has been subjected to persecution. The focus of the assessment is to determine what may happen if the applicant would be sent back to his or her home country. Earlier experiences of persecution naturally make out important evidence of that the person is at risk of persecution, but such experiences are generally not decisive in the determination process.¹³⁸

Well-founded fear

The phrase “well-founded fear of being persecuted” is the key phrase of the refugee definition.¹³⁹ The term “well-founded fear” contains a subjective and an objective element, which both have to be taken into consideration in the

¹³⁴ Diesen et al. 2012, p. 143.

¹³⁵ UNHCR Handbook, para. 28; Hathaway & Foster 2014, p. 1.

¹³⁶ As mentioned above, the 1951 dateline has lost much of its practical significance after the adoption of the 1967 protocol, see UNHCR Handbook para. 35.

¹³⁷ Stern 2010, p. 297.

¹³⁸ Stern 2010, p. 297 – 298.

¹³⁹ UNHCR Handbook, para 37.

assessment. The subjective element “fear” requires an evaluation of the applicant’s statements and behaviour.¹⁴⁰ It is crucial that the authorities evaluate each applicant’s personality separately, since different individuals may not have the same psychological reaction when subjected to the same type of treatment.¹⁴¹

The words well-founded refer to that the person in question either already has been subjected to persecution or can show good reason why he or she fears persecution.¹⁴² What the objective element implies is that the applicant’s frame of mind must be supported by an objective situation.¹⁴³ The applicant’s statements must be viewed in the context of the relevant background situation, which includes the conditions in the country of origin and the applicant’s personal experiences. Reports from the UN or human rights organisations, such as Amnesty international or Human Rights Watch, can be used in order to examine the situation in the country of origin.¹⁴⁴ It is also relevant to study the laws in the country of origin, and in particular the manner in which they are applied. Consideration of the applicant’s personal experiences may also include for instance what has happened to his or her friends and relatives. If they have been subjected to persecution, it may well show that the applicant’s fear that something also will happen to him or her is well-founded.¹⁴⁵ According to the Handbook, an applicant’s fear should in general be considered as well-founded “if he can establish, to a reasonable degree, that his continued stay in his country of origin has become intolerable to him for the reasons stated in the definition, or would for the same reasons be intolerable if he returned there”.¹⁴⁶

Persecution

The type of treatment that the applicant fears must reach a certain level of intensity in order to be considered as persecution. The term “persecution” has no universally accepted definition and must therefore be determined based on the circumstances in each case. It can nonetheless be presumed from article 33 of the Convention that threats to life or freedom, or other serious violations of human rights, on account of race, nationality, religion, membership of a particular social group or political opinion would always constitute persecution.¹⁴⁷ An applicant can also claim that he or she is owing to a well-founded fear of persecution on “cumulative grounds”. This means that the applicant may fear various treatments that, not separately, but taken together can be considered to constitute persecution.¹⁴⁸ The agents of persecution can be both state authorities (for example police or military personnel) and non-

¹⁴⁰ UNHCR Handbook, para. 37.

¹⁴¹ UNHCR Handbook, para. 40.

¹⁴² Zimmermann & Mahler 2011, p. 337.

¹⁴³ UNHCR Handbook, para. 38.

¹⁴⁴ Diesen et al 2012., p. 129.

¹⁴⁵ UNHCR Handbook, para. 43.

¹⁴⁶ UNHCR Handbook, para. 42.

¹⁴⁷ UNHCR Handbook, para. 51; Zimmerman & Mahler 2011, p. 345 – 350.

¹⁴⁸ UNHCR Handbook, para. 53.

State actors (for example guerrilla groups, criminal networks or abusive partners).¹⁴⁹

In order to establish that a person is at risk of being persecuted, it has to be shown that the State approves or tolerates such actions, or alternatively is unable or unwilling to offer effective protection. Hence, the assessment of whether the applicant is at risk of being persecuted includes a determination of the State's ability and willingness to effectively respond to that risk. If the claimant can be expected to enjoy national protection, the requirement "fear of being persecuted" is not fulfilled.¹⁵⁰

In order to assess whether the asylum seeker can obtain effective protection in the country of origin requires thorough knowledge about the conditions in the country, including its laws and the implementation of the law. For example, in many countries where domestic violence is prohibited by law, it still is not enforced in practice or taken seriously as a violation of human rights. Therefore, it is not sufficient that the country has adopted legislation that prohibits certain forms of violence if these rules are not applied or taken seriously in practice.¹⁵¹

The causal link "for reasons of"

The "for reason of" clause establishes that the claimant's fear of being persecuted must be based on one (or more) of the Convention grounds, which I present below. The Convention ground does not have to be the sole reason for the persecution, but it has to be a relevant contributing factor. The requisite "for reasons of" is handled differently in different States. Some jurisdictions require that the causal link is explicitly established, while other States do not treat the causation as a separate question.¹⁵²

Establishing a causal link can be particularly difficult in cases where the persecutor is a non-State actor. For example, a woman who has been abused by her husband may not always be able show that his actions were for reasons of her membership of a particular social group or her political opinions. The UNHCR has clarified under what circumstances the causal link can be considered to be established in cases where a non-State actor performs the persecution. First, if an applicant is at risk of being persecuted by for example a partner or family member for reasons which are related to one of the persecution grounds, regardless of whether the absence of State protection is Convention related. Second, if the risk of being persecuted by a non-State actor cannot be linked to one of the persecution grounds, but the inability or unwillingness of the State to offer effective protection is for reason of one of the persecution grounds.¹⁵³

Internal flight alternative

¹⁴⁹ UNHCR Handbook, para, 65.

¹⁵⁰ Hathaway & Foster 2014, p. 292 – 293 & 297.

¹⁵¹ Stern 2010, p. 302.

¹⁵² UNHCR Guidelines on Gender-Related Persecution, para. 20.

¹⁵³ UNHCR Guidelines on Gender-Related Persecution, para. 21.

The refugee status determination also includes an assessment of whether there is an internal flight alternative in the country of origin. It could be the case that the applicant is not considered to be at risk of persecution in the whole territory of the country of origin. If it can be shown that the applicant could have sought refuge in another part of the country, and he or she could reasonably be expected to do so, that person falls outside the scope of the definition.¹⁵⁴ This is in principle only possible if the persecution has been performed by a non-State actor.

Outside country of nationality

An applicant must be outside the country of his or her nationality in order to qualify for refugee status. The term “nationality” refers to citizenship in this context. If the applicant’s nationality cannot be established, the assessment should be made as if it concerned a stateless person. In such cases, the country of former habitual residence is instead taken into account.¹⁵⁵

The refugee definition does not require that the person in question left his or her country due to his or her fear of persecution. The reason for this is that a risk of being persecuted may arise while the applicant is already outside the country of origin. A person may for instance become a refugee due to changes of the situation in the country of origin during his or her absence. It could also be so that a person’s actions outside the country of origin has put him or her at risk of being persecuted. A person who was not a refugee when he or she left the country of origin but later became one is called a refugee *sur place*.¹⁵⁶ When assessing whether a person is a refugee *sur place*, it should be considered whether the actions or opinions of the asylum seeker can be assumed to have come to the attention of the authorities in the country of origin or if there is a risk that this may happen in the future.¹⁵⁷

“[A]nd is unable or, owing to such fear, is unwilling to avail himself of the protection of that country”

Being unable to avail oneself of the protection of the country of origin refers to circumstances that are beyond the applicant’s control. The State authorities could for instance be unable to provide protection due to a state of war, civil war or other great disturbances.¹⁵⁸ The term unwilling means in this context that a refugee refuses to accept the protection of the country of origin due to his or her well-founded fear of being persecuted. However, if a person would claim to be willing to avail herself to the protection of the country of origin, it would be incompatible with a claim that she is outside her country “owing to a well-founded fear of persecution”. Hence, if there is available state protection and there is no ground based on well-founded fear for refusing it,

¹⁵⁴ UNHCR Handbook, para. 91.

¹⁵⁵ UNHCR Handbook, para. 87 – 89.

¹⁵⁶ UNHCR Handbook, para. 94 – 96.

¹⁵⁷ Prop. 2005/06:6, p. 9.

¹⁵⁸ UNHCR Handbook, para. 98.

the claimant can not be considered to be in need of international protection.¹⁵⁹ The same applies for stateless refugees.¹⁶⁰

The persecution grounds

As already mentioned, the reason for persecution must be linked to at least one of the five persecution grounds listed in the definition: race, religion, nationality, political opinion or membership of a particular social group. According to the UNHCR, a claim can be based on one or a combination of two or more of the 1951 Convention grounds. It will thus not be a problem for the applicant if the grounds would come to overlap.¹⁶¹ As regards the determination of the relevant ground for the claim, it is not the responsibility of the applicant, but of the examiner, to analyse the facts of the case, determine the reason or reasons for the persecution feared by the applicant and thereby determine whether the criteria of the definition are met.¹⁶² In the following sections, I will turn to how the persecution grounds of the refugee definition are to be interpreted.

Race

The persecution ground “race” should be understood in its widest sense to include all kinds of ethnic groups that are referred to as “race” in common usage.¹⁶³ Although the drafters did not specify the meaning of the term, some argue that the historical context speaks for the view that the ground was introduced to include Jewish victims of the Nazi regime who had been persecuted because of their ethnicity but who did not actively practice their religion.¹⁶⁴ What also speaks for a broad interpretation of the ground is that it is consistent with the recognition that “race” is a socially constructed notion and with the developments in international human rights law.¹⁶⁵

Religion

The freedom of religion is a deeply rooted principle in international human rights law. Religious belief has numerous times throughout history been the reason for persecution of individuals and groups.¹⁶⁶ The freedom of thought, conscience and religion is established in several treaties, such as article 18 ICCPR and article 9 ECHR. These articles include a right to have and practice a religion or belief, but they also include a right to atheism and to *not* have or manifest a religion or belief.¹⁶⁷ Persecution for reasons of religious belief may according to the Handbook assume various forms, such as prohibition of membership of a religious community or serious measures of discrimination against persons because they practice their religion or belong to a particular religious community.¹⁶⁸

¹⁵⁹ UNHCR Handbook, para. 100.

¹⁶⁰ UNHCR Handbook, para. 101 – 105.

¹⁶¹ UNHCR Handbook, para. 66.

¹⁶² UNHCR Handbook, para. 66 – 67.

¹⁶³ UNHCR Handbook, para. 68.

¹⁶⁴ Hathaway & Foster 2014, p. 394.

¹⁶⁵ Hathaway & Foster 2014, p. 395.

¹⁶⁶ Stern 2010, p. 299.

¹⁶⁷ Stern 2010, p. 299.

¹⁶⁸ UNHCR Handbook, para. 72.

Nationality

The term nationality in the refugee definition does not only refer to citizenship or former country of residence of a stateless person. It also includes membership of an ethnic, religious, cultural or linguistic group and it may come to overlap with the term “race”.¹⁶⁹ This type of persecution may consist of adverse attitudes and measures that is aimed towards a national, ethnic or linguistic minority. Belonging to such a minority may in certain cases in itself give rise to well-founded fear of persecution.¹⁷⁰ An example of persecution for reasons of nationality is the treatment that the Romani people is subjected to in many parts of Europe today.¹⁷¹

Political opinion

The persecution ground “political opinion” should be interpreted in a broad sense and include “any opinion on any matter in which the machinery of state, government, and policy may be engaged”.¹⁷² This liberal interpretation of “political opinion” is supported, not only by the ordinary meaning of the term, but also by the drafting history of the 1951 Convention. The drafters of the Convention emphasised that “political opinion” was not to be reserved for a political elite. They noted that “not only diplomats thrown out of office” or “persons whose political party had been outlawed” but also “individuals who fled from revolutions” should fall within the scope of the provision.¹⁷³ “Political opinion” was consequently given a broad meaning that also included members of the general public. The liberal reading of political opinion is further confirmed by the way the term, and other related terms, are interpreted in other international treaties, such as article 19 of the Universal Declaration of Human Rights (UDHR), article 19 ICCPR, article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD), and article 10 ECHR.¹⁷⁴ Hence, membership of a political party or association to a political ideology is not necessary to get refugee status on this ground.¹⁷⁵

Merely holding political opinions contrary to those of the Government is not in itself sufficient for claiming refugee status. What the applicant seeking refugee status must show is that he or she fears persecution for having political opinions that are not tolerated by the authorities and that the opinions in questions will or already have come to their attention.¹⁷⁶ The persecutor may for example be aware of the applicant’s political opinions if he or she has expressed them publicly. However, the applicant must not necessarily have expressed or acted on his or her convictions, which is confirmed by the fact that the Convention uses the term “political opinion” and not “political

¹⁶⁹ UNHCR Handbook, para 74; Stern 2010, p. 300.

¹⁷⁰ UNHCR Handbook, para. 74.

¹⁷¹ Stern 2010, p. 300.

¹⁷² Diesen et al. 2012, p. 137.

¹⁷³ Preparatory works quoted in Zimmermann & Mahler 2011, p. 400.

¹⁷⁴ Zimmermann & Mahler 2011, p. 399 – 400.

¹⁷⁵ Zimmermann & Mahler 2011, p. 400, Diesen et al. 2012, p. 137.

¹⁷⁶ UNHCR Handbook para. 80.

activity”.¹⁷⁷ It may for example have been impossible to express the opinions in question due to the risk of persecution. Another possible scenario is that the applicant was not aware of his or her political opinions or felt as strongly about them before leaving his or her country of origin.¹⁷⁸ The crucial question in cases concerning persecution due to political opinion is whether it can be presumed that the applicant’s decision to express or act on the opinion in question would place him or her at risk of being persecuted upon return to the country of origin.¹⁷⁹ The applicant must show that his or her opinions are or will come to the attention of the persecutor and, as a result of this, lead to persecution. Naturally, the more exposed a person’s political opinions are, the easier will it be to prove that the persecutor knows about his or her opinions.¹⁸⁰ Since freedom of expression is one of the most fundamental human rights, it would be inappropriate to deny someone refugee status on the basis that the applicant can conceal these opinions and keep silent in order to avoid persecution.¹⁸¹

The applicant is not required to actually hold the political opinion in question, or even a political opinion at all. This is due to the fact that an opinion can be wrongly attributed to the applicant by the persecutor.¹⁸² Attribution may be based on for example a person’s membership of an organisation, family connections, ethnicity or engagement in certain activities.¹⁸³ Even a position of neutrality can result in an attribution of a political opinion.¹⁸⁴ The behaviour or activities that have led to the imputation of the political opinions do not have to resemble traditional forms of political engagements. For example cooking and providing food or nursing sick rebel soldiers may be interpreted as an expression of a political opinion, which is something that I will return to later in the section regarding how the persecution grounds should be interpreted from a gender perspective. When determining whether an imputation of political opinion is likely to be made, the crucial issue will be “whether certain behaviour or actions on the part of the applicant are or have been perceived by the authorities as political opinion”.¹⁸⁵

Another relevant issue concerning the term “political opinion” is how the political nature of the opinion or activity in question should be evaluated. This could be a rather difficult task since what may be perceived as non-political in the State of refuge may be seen as being highly political in the applicant’s State of origin. It has been argued in legal doctrine that the different political contexts in different countries should be considered.¹⁸⁶

Membership of a particular social group

¹⁷⁷ Hathaway & Foster 2014, p. 407 – 408.

¹⁷⁸ Hathaway & Foster 2014, p. 407 – 408.

¹⁷⁹ Zimmermann & Mahler 2011, p. 403; Hathaway & Foster 2014, p. 408.

¹⁸⁰ Zimmermann & Mahler 2011, p. 403.

¹⁸¹ Hathaway & Foster 2014, p. 408.

¹⁸² UNHCR Handbook, para. 80; Zimmermann & Mahler 2011, p. 400 – 401.

¹⁸³ Hathaway & Foster 2014, p. 410 – 411.

¹⁸⁴ Hathaway & Foster 2014, p. 415.

¹⁸⁵ Hathaway & Foster 2014, p. 411.

¹⁸⁶ Zimmermann & Mahler 2011, p. 399.

The persecution ground “membership of a particular social group” has been pointed out as the ground with the least clarity.¹⁸⁷ The drafting history contains very limited information about the interpretation of this ground, probably due to the fact that it was introduced as a last minute amendment to the Convention.¹⁸⁸ “Membership of a particular social group” would prove to be of less practical importance after the adoption of the Convention, but it has gained in importance and practical relevance since the 1980s.¹⁸⁹

The UNHCR states that there is no exhaustive list of what groups may constitute a “particular social group” within the meaning of Article 1A(2). The agency recommends that the term should be read in an “evolutionary manner”, meaning that it should be “open to the diverse and changing nature of groups in various societies and evolving international human rights norms”.¹⁹⁰

The interpretation of what constitutes a social group within the meaning of the Convention has come to vary between the Contracting States. Two dominant approaches have been identified by the UNHCR. The first approach “examines whether a group is united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it”.¹⁹¹ This approach is called “the protected characteristics approach”. The immutable characteristic may be innate, such as sex or ethnicity, or unalterable for other reasons, such as past association or occupation. In order to identify characteristics that are so fundamental to human dignity that one should not be required to forego them, one can consult human rights norms.¹⁹² The second approach is called “the social perception approach” and it “examines whether or not a group shares a common characteristics which makes them a cognizable group or sets them apart from society at large”.¹⁹³

The UNHCR considers that these two approaches should be reconciled and has therefore recommended the following definition of “membership of a particular social group”, which incorporates both approaches:

a particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights.¹⁹⁴

¹⁸⁷ Zimmermann & Mahler 2011, p. 391, Hathaway & Foster 2014, p. 424.

¹⁸⁸ Zimmermann & Mahler 2011, p. 390 – 391.

¹⁸⁹ Zimmermann & Mahler 2011, p. 390.

¹⁹⁰ UNHCR, *Guidelines on International Protection No. 2: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, HCR/GIP/02/02, 7 May 2002 (Hereafter: UNHCR Guidelines on membership of a particular social group), para. 3.

¹⁹¹ UNHCR Guidelines membership of a particular social group, para. 6.

¹⁹² UNHCR, *Guidelines on membership of a particular social group*, para. 6.

¹⁹³ UNHCR, *Guidelines on membership of a particular social group*, para. 7.

¹⁹⁴ UNHCR *Guidelines on membership of a particular social group*, para. 11.

It is well accepted that the size of the group in question is irrelevant when establishing the existence of a particular social group. This applies for the other persecution grounds as well.¹⁹⁵ The UNHCR also states that “a particular social group cannot be defined exclusively by the persecution that the members of the group suffer or by a common fear of being persecuted”.¹⁹⁶ However, the persecution may be an important factor in the identification of a social group.

The applicant is not required to show that the members of the particular social group know or associate with each other. Neither does the applicant have to demonstrate that all members of the particular social group are at risk of persecution. Other members of the same particular social group may not be at risk, for example because the persecutor does not know them.¹⁹⁷

2.3 Gender-sensitive interpretation of the persecution grounds

After the examination above of who is to be considered a refugee, we can conclude that the wording of the refugee definition does not contain any considerations regarding gender aspects in the refugee status assessment. Furthermore, as mentioned in the introduction, the issue of gender was barely discussed in the drafting process of the Convention. However, during the past decades, increasingly more attention has been brought to the issue of female refugees and asylum seekers, largely thanks to the work of transnational networks of women’s organisations.¹⁹⁸ Today, it is an established principle that the refugee definition as a whole should be interpreted with an “awareness of possible gender dimensions in order to determine accurately claims to refugee status”.¹⁹⁹

In order to do a legal study of how the persecution grounds of the 1951 Convention encompass gender-related persecution, I will examine legal doctrine in which State practice has been investigated and study statements of the UNHCR on this issue.

As I have mentioned earlier, the UNHCR is amongst other things commissioned to provide interpretive guidance on the criteria of the refugee definition. The UNHCR has issued several so-called “Guidelines on International Protection” to complement its Handbook. The purpose of the Guidelines is to clarify how the provisions of the Convention should be interpreted and applied by the contracting States, and they are intended to be

¹⁹⁵ Hathaway & Foster 2014, p. 425; UNHCR Guidelines on membership of a particular social group, para. 18.

¹⁹⁶ UNHCR Guidelines on membership of a particular social group, para 14.

¹⁹⁷ UNHCR Guidelines on membership of a particular social group, para 14 – 17.

¹⁹⁸ UNHCR Guidelines on Gender-Related Persecution, para. 4; Freedman 2012, p. 591.

¹⁹⁹ UNHCR Guidelines on Gender-Related Persecution, para. 2.

used by governments, legal practitioners, decision-makers and the judiciary, and UNHCR staff in their application of the refugee definition.²⁰⁰

In the *Guidelines on Gender-Related Persecution*, the agency acknowledges that the refugee definition historically has been interpreted from a male perspective and that this has led to that many asylum claims by women have gone unrecognized.²⁰¹ The focus of these Guidelines is therefore to present how the criteria of refugee definition should be interpreted from a gender perspective. The agency also proposes procedural practices in order to ensure that gender-related claims are properly considered in the refugee status determination process.²⁰² The key message in these Guidelines is that the contracting States should ensure “a gender-sensitive application of refugee law” and especially of the criteria of the refugee definition.²⁰³

The UNHCR stresses that a gender-sensitive interpretation must be given to *each* of the Convention grounds of the refugee definition when determining whether the applicant qualifies for refugee status.²⁰⁴ As demonstrated above, the terms sex or gender are not included amongst the Convention grounds in the refugee definition. Nevertheless, adding an additional ground to the refugee definition is not considered to be necessary by the UNHCR. The agency claims that “[e]ven though gender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment”.²⁰⁵ The refugee definition, as it is formulated today, already covers gender-related claims if properly interpreted.²⁰⁶

2.3.1 Race

According to the UNHCR, persecution for reasons of “race” is not specific to women or men. However, the agency notes that:

Persecution for reasons of race may be expressed in different ways against men and women. For example, the persecutor may choose to destroy the ethnic identity and/or prosperity of a racial group by killing, maiming or incarcerating the men, while the women may be viewed as propagating the ethnic or racial identity and persecuted in a different way, such as through sexual violence or control of reproduction.²⁰⁷

Hence, the UNHCR means that the issue with persecution for reasons of race is that the persecution normally is gender-specific, rather than gender-related.

²⁰⁰ UNHCR Handbook, p. 1 – 2; Diesen et al. 2012, p. 115 – 166.

²⁰¹ UNHCR Guidelines on Gender-Related Persecution, para. 5.

²⁰² UNHCR Guidelines on Gender-Related Persecution, para. 1 & 36.

²⁰³ UNHCR Guidelines on Gender-Related Persecution, para. 8 & 38.

²⁰⁴ UNHCR Guidelines on Gender-Related Persecution, para. 22.

²⁰⁵ UNHCR Guidelines on Gender-Related Persecution, para. 6.

²⁰⁶ UNHCR Guidelines on Gender-Related Persecution, para. 6; Zimmermann & Mahler 2011, p. 415.

²⁰⁷ UNHCR Guidelines on Gender-Related Persecution, para. 24.

2.3.2 Religion

Regarding persecution for reasons of “religion”, the UNHCR brings up how, “[i]n certain States, the religion assigns particular roles or behavioural codes to women and men respectively”.²⁰⁸ If a woman breaches the role that has been assigned to her, or refuses to follow the behavioural codes, she may be perceived as holding unacceptable religious opinions, regardless of what she actually believes about religion. If she is at risk of being punished for this behaviour, she may, according to the UNHCR, be considered to have a well-founded fear of being persecuted for reasons of religion.²⁰⁹

In addition, the UNHCR has expressed the following remarks regarding “the impact of gender on religion-based refugee claims”.²¹⁰

In some countries, young girls are pledged in the name of religion to perform traditional slave duties or to provide sexual services to the clergy or other men. They may also be forced into underage marriages, punished for honour crimes in the name of religion, or subjected to forced genital mutilation for religious reasons. Others are offered to deities and subsequently bought by individuals believing that they will be granted certain wishes. Women are still identified as “witches” in some communities and burned or stoned to death. These practices may be culturally condoned in the claimant’s community of origin but still amount to persecution.²¹¹

Zimmermann and Mahler have observed that a woman who refuses to wear the Islamic veil may be considered to “be persecuted on religious gender-related grounds”.²¹²

2.3.3 Nationality

As mentioned earlier, the persecution ground “nationality” should not only be understood as “citizenship”, but also as membership of an ethnic, religious, cultural or linguistic group²¹³ and it may occasionally overlap with the ground “race”.²¹⁴ Like with “race”, the UNHCR notes that persecution for reasons of nationality is not specific to women or men, however, “in many instances the nature of the persecution takes a gender-specific form, most commonly that of sexual violence directed against women and girls”.²¹⁵

²⁰⁸ UNHCR Guidelines on Gender-Related Persecution, para. 25.

²⁰⁹ UNHCR Guidelines on Gender-Related Persecution, para. 25.

²¹⁰ UNHCR, *Guidelines on International Protection No. 6: “Religion-Based Refugee Claims under Article 1A(2) of the 1951 Convention and/or the 1967 Protocol relating to the Status of Refugees, HCR/GIP/04/06, 28 April 2004* (Hereafter: UNHCR Guidelines on Religion-Based Refugee Claims), para. 24.

²¹¹ UNHCR Guidelines on Religion-Based Refugee Claims, para. 24

²¹² Zimmermann & Mahler 2011, p. 417.

²¹³ UNHCR Handbook, para 74; Stern 2010, p. 300.

²¹⁴ UNHCR Guidelines on Gender-Related Persecution, para. 27.

²¹⁵ UNHCR Guidelines on Gender-Related Persecution, para. 27.

2.3.4 Political opinion

The UNHCR states that the Convention grounds “political opinion” and “religion” tend to overlap in gender-related claims, especially “in the realm of imputed political opinion” and when the applicant comes from a society “where there is little separation between religious and State institutions, laws and doctrines”.²¹⁶ As already mentioned, political opinion should be interpreted in a broad sense “to incorporate any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged”.²¹⁷ According to the UNHCR, this also includes opinions as to gender roles and “non-conformist behaviour which leads the persecutor to impute a political opinion” to the person in question. Against this background, the UNHCR claims that “there is not as such an inherently political or an inherently non-political activity”. Instead, it is the context of the case that ultimately determines its nature.²¹⁸

The agency points out a number of factors that need to be observed when interpreting political opinion in a gender-sensitive way. First, women are often excluded from the political elite and less likely than men to engage in high profile political activities.²¹⁹ In many societies, women participate more often in so called “low level political activities”, such as nursing sick rebel soldiers, hiding people, cooking and providing food or passing messages.²²⁰ Second, the agency stresses that it is important to recognize that women who do *not* wish to engage in certain activities, for example in providing meals to government soldiers, may be perceived by the persecutor as holding a contrary political opinion and may be subjected to persecution for this reason.²²¹ Third, women are often “attributed with political opinions of their family or male relatives”²²² and may thus be subjected to persecution due to men’s political activities. In such cases, the claim may be analysed in the context of an imputed political opinion. Alternatively, the claim may be analysed as persecution for reason of her membership of a particular social group, which then would be the applicant’s family.²²³

Zimmermann and Mahler mention as an example a woman who is persecuted for having shown “opposition to institutionalized discrimination against women in society or expressed views in opposition to the predominant social or cultural norms, e.g. by refusing to wear the Islamic veil”.²²⁴ Under such

²¹⁶ UNHCR Guidelines on Gender-Related Persecution, para. 26.

²¹⁷ UNHCR Guidelines on Gender-Related Persecution, para. 32.

²¹⁸ UNHCR Guidelines on Gender-Related Persecution, para. 32.

²¹⁹ UNHCR Guidelines on Gender-Related Persecution, para. 33; Zimmermann & Mahler 2011, p. 419.

²²⁰ UNHCR Guidelines on Gender-Related Persecution, para. 33; Hathaway & Foster 2014, p. 411.

²²¹ UNHCR Guidelines on Gender-Related Persecution, para. 34.

²²² UNHCR Guidelines on Gender-Related Persecution, para. 33.

²²³ UNHCR Guidelines on Gender-Related Persecution, para. 33; Zimmermann & Mahler 2011, p. 419.

²²⁴ Zimmermann & Mahler 2011, p. 419.

circumstances, the applicant may be perceived as owing to a well-founded fear of being persecuted for reasons of her political opinion.²²⁵

According to Hathaway and Foster, there is a significant support for the view that:

opposition to institutionalized discrimination of women, expressions of independence from male social and cultural dominance in society, and refusal to comply with traditional expectations of behavior associated with gender (such as dress codes and the role of women in the family and society) may all be expressions of political opinion. Feminism is a political opinion and may be expressed by refusing to comply with societal norms that subject women to severely restrictive conditions.²²⁶

Hathaway and Foster further note that there has been a general reluctance to acknowledge persecution in the private sphere as political, especially concerning claims involving “domestic violence, forced marriage, resistance to female genital mutilation, and sexual violence”.²²⁷ Hathaway and Foster refer to a decision on this matter from New Zealand, which has received considerable attention.²²⁸ The case concerned a claim by a Turkish woman who was at risk of being subjected to honour killing due to that she had left her husband. The court found that honour is an important value in Turkish society and that it enforces rigid control by men over women and their sexuality. It further discussed the interpretation of the persecution ground political opinion from a gender perspective and finally concluded that political opinion was the most relevant ground for the particular case:

In the specific context we are satisfied that the appellant’s assertion of her right to life and of her right to control her life was a challenge to the collective morality, values, behaviors and codes of the two families and beyond them, of the greater “community” of which they are a part. This challenge to inequality and the structures of power which support it is plainly “political” as that term is used in the Refugee Convention. The appellant’s wish to be liberated from those structures is in this context a political opinion. It is for holding that opinion that she is at risk. Applying the causation standard discussed earlier, the appellant has established that she is at risk of being persecuted “for reasons of” political opinion.²²⁹

Hence, in this case the Court recognised that private sphere activities, such as getting a divorce and expressing a wish to decide over one’s own life, may also be perceived as political and thereby developed the interpretation of the persecution ground political opinion.

²²⁵ Zimmermann & Mahler 2011, p. 419.

²²⁶ Hathaway & Foster 2014, p. 421.

²²⁷ Hathaway & Foster 2014, p. 422.

²²⁸ Hathaway & Foster 2014, p. 423.

²²⁹ *Refugee Appeal No. 76044*, No. 76044, New Zealand: Refugee Status Appeals Authority, 11 September 2008, available at: <http://www.refworld.org/docid/48d8a5832.html> [accessed 6 January 2016].

2.3.5 Membership of a particular social group

The UNHCR points out “membership of a particular social group” as the persecution ground under which gender-related grounds of persecution most often are analysed.²³⁰ In 1989, the agency stated the following regarding this ground:

States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live may be considered as a ‘particular social group’ within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.²³¹

Sex can according to the UNHCR properly be within the ambit of the social group category and women are pointed out as “a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men”.²³² However, the UNHCR notes that the emphasis given to this ground has in some cases resulted in that other relevant persecution grounds have been over-looked. The UNHCR therefore emphasises that, although women may rightfully be interpreted as constituting a particular social group within the meaning of the Convention, such an interpretation “cannot render the other Convention grounds superfluous”.²³³ As mentioned earlier, the size of the social group is irrelevant and it is not required that the group should be “cohesive or that members of it voluntarily associate, or that every member of the group is at risk of persecution”.²³⁴

Although there is a wide consensus in State practice that women, sex or gender may constitute a particular social group within the meaning of the Convention, Zimmerman and Mahler have noted that there is a tendency within State practice to narrow down social groups of women by adding more characteristics.²³⁵ This has also been observed by Hathaway and Foster, who mean that “there is an unfortunate tendency to formulate overly complicated and unnecessarily detailed social groups, rather than simply recognize that in most cases it is women *qua* women that constitutes the relevant social group”.²³⁶ The authors brought up the following description of a social group, made by the Board of Immigration Appeal in the USA, as an example of this phenomenon: “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice”.²³⁷

²³⁰ UNHCR Guidelines on Gender-Related Persecution, para. 28; Zimmermann & Mahler 2011, p. 416.

²³¹ UNHCR, Refugee Women and International Protection, EXCOM Conclusions, 18 October 1985, available at: <http://www.unhcr.org/3ae68c43a8.html> [accessed 6 January 2016].

²³² UNHCR Guidelines on Gender-Related Persecution, para. 30.

²³³ UNHCR Guidelines on Gender-Related Persecution, para. 28.

²³⁴ UNHCR Guidelines on Gender-Related Persecution, para. 31.

²³⁵ Zimmermann & Mahler 2011, p. 417.

²³⁶ Hathaway & Foster 2014, p. 439.

²³⁷ Hathaway & Foster 2014, p. 439.

2.4 Feminist analysis of the gender-sensitive interpretation of the persecution grounds

A concern of the early critics which the interpretation of the 1951 Convention grounds of the UNHCR answers to is that private sphere activities, such as cooking, hiding people or refusing to provide meals, may be recognized as expressions of a political opinion within the meaning of the refugee definition. As mentioned before, the early critics aimed to highlight how the experiences of refugee women were different from men and that this was not sufficiently recognized in refugee law. They especially emphasized how women's political private sphere activities were not seen as political and thereby not considered to be relevant in refugee law.²³⁸ This gender-sensitive interpretation of the 1951 Convention ground political opinion can be criticised from a human rights approach point of view. As Greatbatch argued, this type of reasoning assume a "bifurcated version of society" which "roots women's oppression in sexuality and private life, thereby disregarding oppression experienced in non-domestic circumstances".²³⁹ It implies that there is a "male-dominated public sphere and women are relegated to the private sphere"²⁴⁰, which is presumed to be the site of oppression.²⁴¹ The human rights approach was against how the early critics homogenized the experiences of refugee women by erasing the specific context from which the asylum seeking women come.²⁴²

Much emphasis has been given to the persecution ground "membership of a particular social group" in gender-related claims. It has been recognized in State practice and by the UNHCR that women may be interpreted as constituting a particular social group within the meaning of the refugee definition. This answers to the recommendations of the human rights approach, which argued that gender-related persecution of women can be covered by the ground "membership of a particular social group" by considering women as a social group.²⁴³ However, this approach is sensitive to the critique of the anti-essentialists. They meant that if all persecution of women is regarded as persecution because of gender and assessed under the social group ground, it may reinforce the view that only men can be considered as "real refugees". More precisely, it may create and sustain the stereotype that men "own" the persecution grounds which are not explicitly "gendrified"²⁴⁴ and thereby reproduce the distinction between "normal" cases

²³⁸ Spijkerboer 2000, p. 163

²³⁹ Greatbatch 1989, p. 520.

²⁴⁰ Spijkerboer 2000, p. 165.

²⁴¹ Spijkerboer 2000, p. 165.

²⁴² Spijkerboer 2000, p. 165.

²⁴³ Spijkerboer 2000, p. 167.

²⁴⁴ Spijkerboer 2000, p. 169.

versus “women’s” cases”.²⁴⁵ Hence, women continues to be regarded as a deviation from the male norm in refugee law.

Furthermore, there is a tendency in the gender-sensitive interpretation of the 1951 Convention grounds to emphasise the cultural context refugee women come from. The experiences of refugee women are analysed through a cultural lens and their problems are located in culture and religion in non-Western States. For instance, the UNHCR speaks of gender oppression that occurs “in certain States” and “in some countries” and that persecution of women there may be “culturally condoned”. In addition, it is evident that the focus in the gender-sensitive interpretation of the persecution grounds has primarily been on traditional, cultural and religious practices affecting women in non-Western societies, such as risk of being subjected to FGM or persecution for refusing to wear the Islamic veil.

This interpretation implies that gender-related persecution is something that only occurs in refugee producing non-Western countries and thereby presents Western refugee receiving States as superior and as if gender-related persecution does not occur in the Western countries. This can be criticized from an anti-essentialist point of view. As mentioned before, the anti-essentialists argued that the human rights approach, which “relies on stereotypes which locate gender oppression in the indigenous cultures of Third World”²⁴⁶ was an extension of the legal practice where “women’s claims are most likely to succeed when they present themselves as victims of dysfunctional, exceptionally patriarchal cultures and states”.²⁴⁷ Hence, when applying this interpretation of the 1951 Convention grounds, women must present themselves as victims and as “a cultural other”²⁴⁸ in order to be granted refugee status. They must fit in to the stereotypes that the refugee receiving states impose on them. According to the anti-essentialist, these arguments reproduce “the opposition of the West to the Rest”.²⁴⁹

Like the anti-essentialists, the UNHCR shows a scepticism of the emphasis that has been given to the persecution ground “membership of a particular social group” in gender-related claims. However, the agency does not motivate its scepticism in the same way as the anti-essentialists. The UNHCR simply states that the emphasis that has been given to this ground has meant that other grounds have been over-looked and it is therefore concerned that the interpretation of this ground will render the other grounds superfluous. It does not bring up the concerns of the anti-essentialists of how an overuse of this ground may create and reinforce the stereotype that only men can be considered as “real” refugees.

The fact that the persecution ground political opinion has received more attention in State practice answers to anti-essentialist recommendations. New

²⁴⁵ Spijkerboer 2000, p. 181.

²⁴⁶ Spijkerboer 2000, p. 169.

²⁴⁷ Spijkerboer 2000, p. 169.

²⁴⁸ Spijkerboer 2000, p. 169.

²⁴⁹ Spijkerboer 2000, p. 181.

Zealand has interpreted a woman's resistance to live with her ex-husband and to be subjected to honour killings as an expression of a political opinion. This implies that there is a development towards a broader understanding of the political opinion ground, which is what the anti-essentialists advocated. Mackling was in favour of an interpretation of "political opinion" which equated "resistance to gender oppression with a political opinion".²⁵⁰ However, as mentioned before, this decision must be interpreted cautiously and it cannot be expected to reflect how the rest of the States parties of the Convention interpret the refugee definition.

²⁵⁰ Macklin 1995, p. 260.

3 CEDAW

This chapter aims to address the question of what measures the CEDAW Committee obliges its contracting States to take in order to fulfil its obligations under CEDAW when interpreting and applying the persecution grounds of the 1951 Convention. I will first give a brief presentation of CEDAW and the CEDAW Committee. After that, I will present the measures that the contracting States to CEDAW are obliged to realise. Thereafter, I will examine how the approach of the 1951 Convention to encompass gender-related persecution within the scope of the persecution grounds correspond to the obligations identified by the CEDAW Committee. Lastly, I will examine whether the statements of the CEDAW Committee answer to and/or remain sensitive to the feminist critique that has been identified and categorised by Spijkerboer.

3.1 Introduction to CEDAW

CEDAW, many times described as the international bill of rights for women, was adopted by the UN General Assembly in 1979 and entered into force in 1981. Sweden was the first country to ratify CEDAW in 1980 and today it has a total of 189 States parties, although many of them have made extensive reservations to it.²⁵¹

CEDAW consists of a preamble and 30 articles, which include a definition of what constitutes discrimination against women and an agenda for how to end such discrimination. The definition of discrimination against women is contained in article 1 of the Convention, which states that “discrimination against women” shall mean:

[...] any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespectively of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.

CEDAW creates far-reaching obligations in relation to gender equality. More specifically, it establishes three obligations, which ought to be read as “sub-objectives” of the overall object and purpose of CEDAW: to eliminate all forms of discrimination against women.²⁵² Firstly, the contracting States are obliged to “ensure that there is no direct or indirect discrimination against women in their laws and that women are protected against discrimination –

²⁵¹ UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series, vol. 1249, p. 13, available at: <http://www.refworld.org/docid/3ae6b3970.html> [accessed 6 January 2016]; Tomasevski 2000, p. 16.

²⁵² Benninger-Budel et al. 2006, p. 246

committed by public authorities, the judiciary, organizations, enterprises or private individuals – in the public as well as the private spheres by competent tribunals as well as sanctions and other remedies”.²⁵³ States parties are thus not only obliged to eliminate direct discrimination, but also indirect discrimination, which “may occur when laws, policies and programmes are based on seemingly gender-neutral criteria which in their actual effect have a detrimental impact on women”.²⁵⁴

The contracting States are secondly obliged to “improve the de facto position of women through concrete and effective policies and programmes”.²⁵⁵ Article 4 of CEDAW allows States parties to adopt “temporary special measures”, which according to the CEDAW Committee is a central means to realise de facto or substantive equality for women.²⁵⁶

Thirdly, States parties must “address prevailing gender relations and the persistence of gender-based stereotypes that affect women not only through individual acts by individuals but also in law, and legal and societal structures and institutions”.²⁵⁷ This obligation is found in article 5(a) of CEDAW, which reads as follows:

State Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.

While all of these obligations are key to the promotion of women’s rights, the latter obligation in article 5 is central to this study for reasons which I will explore in the next section.

The members of the Committee are elected by the States parties and serve as independent experts that monitor the compliance of the States parties with CEDAW and contribute to its interpretation.²⁵⁸ The States parties are required to submit regular reports concerning the measures that have been taken in order to achieve the goals of CEDAW. The Committee’s mission is to consider these reports and address its concerns and recommendations to the States parties in the form of concluding observations.²⁵⁹

The Committee has further commitments under the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against

²⁵³ CEDAW, *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, 2004, available at <http://www.refworld.org/docid/453882a7e0.html> [accessed: 7 January 2016], (Hereafter: *General recommendation No.25*), para. 7; See article 2 CEDAW.

²⁵⁴ *General recommendation No. 25*, Note 1.

²⁵⁵ *General recommendation No. 25*, para. 7.

²⁵⁶ *General recommendation No. 25*, para. 14.

²⁵⁷ *General recommendation No. 25*, para. 7.

²⁵⁸ Article 17 CEDAW; Tomasevski 2000 p. 13.

²⁵⁹ Article 18 & 20 CEDAW.

Women,²⁶⁰ which contains two mechanisms to hold governments responsible to their obligations under CEDAW: a communications procedure and an inquiry procedure. The communications procedure gives individual women or groups of women a right to submit claims of violations of rights protected under CEDAW before the Committee.²⁶¹ This presupposes that all national remedies already have been exhausted.²⁶² The inquiry procedure enables the Committee to initiate inquiries into situations of grave or systematic violations of women's rights.²⁶³

Article 21 of CEDAW allows the Committee to make general recommendations based on the examination of reports and information received from the States parties. The general recommendations are addressed to the States parties and usually elaborate the Committee's view of the obligations assumed under the Convention.²⁶⁴ The recommendations can be made on any issue that affects women and that the Committee considers should be devoted more attention to. Last year, the Committee issued a general recommendation which brought up the issue of female refugees and asylum seekers and the problems they encounter. This indicates that the relevance of gender in asylum claims is still being developed and is considered to be an important and current issue. This general recommendation is presented in the next section.

CEDAW does not explicitly state whether its provisions apply to all women within the States territory or jurisdiction. However, the Committee has established that CEDAW applies to both citizens and non-citizens:

Although subject to international law, States primarily exercise territorial jurisdiction. The obligations of States parties apply, however, without discrimination both to citizens and non-citizens, including refugees, asylum-seekers, migrant workers and stateless persons, within their territory or effective control, even if not situated within the territory. States parties are responsible for all their actions affecting human rights, regardless of whether the affected persons are in their territory.²⁶⁵

Furthermore, the fact that the Committee has issued several documents concerning for example trafficked women, female migrant domestic workers, unaccompanied or undocumented female children and asylum seekers (which I will present in the next section below), speaks for the view that the Committee has based its works "on an assumption of broad applicability".²⁶⁶

²⁶⁰ Hereinafter: Optional Protocol.

²⁶¹ Article 2 Optional Protocol.

²⁶² Article 4 Optional Protocol.

²⁶³ Article 8 Optional Protocol.

²⁶⁴ UN Women, General recommendations, available at: <http://www.un.org/womenwatch/daw/cedaw/recommendations/index.html> [accessed 6 January 2016].

²⁶⁵ CEDAW, *General Recommendation No. 28 on the Core Obligations of State Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, CEDAW/C/GC/28, 16 December 2010, available at: <http://www.refworld.org/docid/4d467ea72.html> [accessed 7 January 2016], para. 12.

²⁶⁶ Gallagher, 2012[2010], p. 153.

My point of departure is therefore that CEDAW, in relation to a State party, covers all women and not only women who are citizens.

3.2 Interpretation and application of the persecution grounds in accordance with CEDAW

In 2014, the Committee adopted a new general recommendation, namely *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, which situates CEDAW within the context of the 1951 Convention. All women in need of international protection under the 1951 Convention are covered by this general recommendation.²⁶⁷ The Committee expressed that its aim was to ensure that the States parties fulfil their obligations under CEDAW in their dealings with asylum seekers and stateless women:

Through the present general recommendation, the Committee on the Elimination of Discrimination against Women aims to provide authoritative guidance to States parties on legislative, policy and other appropriate measures to ensure the implementation of their obligations under the Convention on the Elimination of All Forms of Discrimination against Women and the Optional Protocol thereto regarding non-discrimination and gender equality relating to refugee status, asylum nationality and statelessness of women.²⁶⁸

In this general recommendation, the Committee made several references to the statements of the UNHCR regarding gender-related persecution. Like the UNHCR, the Committee was concerned that claims of female applicants in many asylum systems continue to be assessed through the lens of male experiences and that this may result in that their claims are not properly assessed or even rejected. It further recognized that the refugee definition of the 1951 Convention covers gender-related claims if properly assessed and emphasized that “asylum procedures that do not take into account the special situation or needs of women can impede a comprehensive determination of their claims”.²⁶⁹

As regards the interpretation and application of the persecution grounds, the Committee pointed out three measures that the States parties are recommended to implement in order to fulfill its obligations under CEDAW: First, States parties are required to take proactive measures to ensure that *all* of the persecution grounds in the refugee definition are interpreted in a gender-sensitive manner.²⁷⁰

²⁶⁷ General recommendation No. 32, para. 12.

²⁶⁸ General recommendation No. 32, para. 1.

²⁶⁹ General recommendation No. 32, para. 16.

²⁷⁰ General recommendation No. 32, para. 13, 30 & 38.

Second, the States parties to CEDAW are encouraged to add sex and/or gender, as well as the reason of being lesbian, bisexual or transgender, and other statuses to the list of grounds for refugee status in their national legislation and policies relating to refugees and asylum seekers.²⁷¹

Third, States parties may use gender as a factor in recognizing membership of a particular social group. However, the Committee stressed that the frequent application of “membership of a particular social group” in women’s claims for refugee status may result in a reinforcement of “the stereotyped notions of women as dependent victims”.²⁷² With this in mind, the Committee highlighted that States parties are obligated under article 5 of CEDAW to “assess women’s claims to asylum without prejudice and stereotyped notions of women that are based on the inferiority or superiority of either sex”.²⁷³ The Committee stated that “[g]ender stereotyping affects the right of women to a fair and just asylum process and the asylum authorities must take precautions not to create standards that are based on preconceived notions of gender-based violence and persecution”.²⁷⁴

3.3 Correspondance between the obligations of the CEDAW Committee and the 1951 Convention approach to encompass gender-related persecution

As I mentioned in the previous chapter, the UNHCR has stated that *each* of the persecution grounds must be given a gender-sensitive interpretation when determining whether an applicant qualifies for refugee status.²⁷⁵ According to the UNHCR, it is not necessary to add an additional persecution ground to the refugee definition, since it is accepted that gender can influence or dictate the reason for the persecution. Hence, if properly interpreted, the refugee definition can cover different types of gender-related persecution.²⁷⁶

Moving on to the statements of the CEDAW Committee, we can see that the General recommendation No. 32 echoes the statements made by the UNHCR regarding gender-related persecution. Like the UNHCR, The Committee emphasizes that *each* of the Convention grounds must be interpreted in a gender-sensitive manner and that gender and sex may be used as a factor in recognizing a membership of a particular social group within the meaning of the refugee definition. Like the UNHCR, the CEDAW Committee is sceptical of the emphasis that has been given to “membership of a particular social

²⁷¹ General recommendation No. 32, para. 13, 30 & 38.

²⁷² General recommendation No. 32, para. 31.

²⁷³ General recommendation No. 32, para. 31.

²⁷⁴ General recommendation No. 32, para. 31.

²⁷⁵ UNHCR Guidelines on Gender-Related Persecution, para. 22.

²⁷⁶ UNHCR Guidelines on Gender-Related Persecution, para. 6; Zimmermann & Mahler 2011, p, 415.

group”. For this reason, the Committee clarifies that the States parties are obliged under article 5 of CEDAW to assess women’s claims to asylum without prejudice and stereotyped notions.²⁷⁷

Furthermore, the Committee shows an aspiration to include a special persecution ground for women. This is manifest in the recommendation to add sex and/or gender as grounds for refugee status in the national legislation of the contracting States.²⁷⁸ It is thus in accordance with CEDAW to add an additional persecution ground into the national legislation in order to encompass gender-related persecution. Hence, unlike the UNHCR, it appears as if the Committee in its interpretation of the persecution grounds does not consider that they may fully encompass all types of gender-related persecution and therefore recommends an additional ground to be added.

3.4 Feminist analysis of the obligations of the CEDAW Committee

The obligation to add sex and/or gender as persecution grounds into the national refugee definition is in accordance with the recommendations of the early critics, who argued that a specific ground should be included in order to cover the oppression of women. However, this approach is sensitive to the critique by the anti-essentialists, since they believed that it may reinforce the view that the persecution grounds which are not “genderified” are only applicable to men. As a consequence, men continue to be regarded as “real” refugees. The anti-essentialists opposed how this reinforced the distinction between “women’s asylum claims” and “other asylum claims”.

The Committee did not emphasise any particular culture or tradition where women are subjected to persecution. Neither did it bring up any examples of persecution of women in non-Western Countries. The only concern of the human rights approach that the Committee addressed is that gender may be used as a factor in recognizing a membership of a particular social group within the meaning of the refugee definition, which was the ground that the human rights approach preferred to be used on gender-related claims.

Like the anti-essentialists, the CEDAW Committee is critical of how women’s asylum claims are regularly assessed under “membership of a particular social group”. The Committee means that this may reinforce the stereotyped notion of women as dependent victims. According to the Committee, the contracting States are obliged under article 5 “to assess women’s claims to asylum without prejudice and stereotyped notions of women that are based on the inferiority or superiority of either sex” and must “take precautions not to create standards that are based on preconceived notions of gender-based violence and persecution”.²⁷⁹ This is in line with the

²⁷⁷ General recommendation No. 32, para. 31.

²⁷⁸ General recommendation No. 32, para. 30 – 31.

²⁷⁹ General recommendation No. 32, para. 31.

critique of postcolonial feminism, which opposed how Third World women are described as a homogeneous powerless group.²⁸⁰ Furthermore, it answers to the concern of the anti-essentialists, which were against “legal practice in which women’s claims are most likely to succeed when they present themselves as victims of dysfunctional, exceptionally patriarchal cultures and states”.²⁸¹ The anti-essentialist also opposed the overuse of the persecution ground “membership of a particular social group” in women’s asylum claims, since it may reinforce the distinction between women’s asylum claims and other asylum claims and thereby imply that women cannot be regarded as “real” refugees.²⁸²

To conclude, the obligations under CEDAW which the CEDAW Committee has established answer to all of the categories of feminist critique identified by Spijkerboer. However, the fact that the Committee expresses a concern of the use of “membership of a particular social group” in gender-related claims and of how women refugees are presented as dependent victims indicates that it moves towards a more anti-essentialist thinking.

²⁸⁰ Mohanty 1984, p. 338.

²⁸¹ Spijkerboer 2000, p. 169.

²⁸² Spijkerboer 2000, p. 169.

4 Swedish refugee law

As mentioned in the introduction, the issue of gender-related persecution was brought up in connection with the adoption of the new Aliens Act²⁸³ in 2005. This chapter aims to study how the persecution grounds of the Swedish Aliens Act encompass gender-related persecution. I will do this by examining the Swedish refugee definition in the Aliens Act and preparatory works. Furthermore, I will examine what the legal meaning and coverage of the term “persecution on grounds of *kön*” is. In order to understand the legal meaning of this term, I will present the discussions and proposals that were made during the legislative procedure of the new refugee definition. I will also explain the meaning of the term *kön*. Thereafter, I will examine the compliance of the Swedish approach to encompass gender-related persecution to the 1951 Convention approach and the obligations of the CEDAW Committee. Lastly, I aim to analyse whether the interpretation of the persecution grounds of the Swedish refugee definition answers to and/or remains sensitive to the feminist critique identified by Spijkerboer.

4.1 The Swedish refugee definition

Sweden has adopted both the 1951 Convention and the 1967 Protocol and is thereby bound under international law to respect their provisions. The regulation in the 1951 Convention and the 1967 Protocol is thus directly relevant to the content of Swedish refugee law.²⁸⁴ As mentioned in the previous chapter, Sweden is also bound to respect the provisions of CEDAW in the asylum process.

The refugee definition is incorporated in chapter 4 section 1 of the Swedish Aliens Act. A refugee, within the meaning of the Aliens Act, “is an alien who is outside the country of his or her nationality, because he or she feels well-founded fear of persecution on grounds of race, nationality, religious or political belief or on grounds of *kön*,²⁸⁵ 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 to the protection of that country”.²⁸⁶ This applies irrespective of whether the persecution is performed by State or non-State actors. The Swedish refugee definition is also applicable to stateless aliens, whose need for protection is assessed in relation to the previous place of residence. An applicant who fulfils the criteria of the refugee definition can be granted a residence permit according to chapter 5 section 1 of the Aliens Act.

²⁸³ *Utlänningslagen* (2005:716).

²⁸⁴ Prop. 2005/06:6, p. 7.

²⁸⁵ See more about the meaning of the term *kön* in chapter 1.9 and 4.2.2.

²⁸⁶ Authors translation.

4.2 Persecution on grounds of *kön*

4.2.1 Background

Before the terms *kön* and sexual orientation were added to the Swedish refugee definition in 2005, refugee status could not be granted solely on these grounds. An asylum seeker who had a well-founded fear of being persecuted on account of his or her *kön* or sexual orientation was thus not considered to be a refugee in Sweden. Instead, people who were at risk of persecution on grounds of *kön* or homosexuality could be granted a residence permit, first on “humanitarian grounds”,²⁸⁷ and after an amendment in 1997 under the so-called “gender provision” in chapter 3, section 3, first paragraph, point 3 concerning “persons otherwise in need of protection”.²⁸⁸

In connection with the adoption of the provision concerning “persons otherwise in need of protection”, it was explicitly stated in the preparatory works that *kön* could *not* constitute a membership of a particular social group within the meaning of the refugee definition.²⁸⁹ This meant that *kön* could only be considered under the persecution grounds race, nationality, religion or political opinion.²⁹⁰ More precisely, the government expressed in these preparatory works that an interpretation of the ground membership of a particular social group which meant that “women in general would be considered to belong to a specific social group”²⁹¹ would be “very extensive”,²⁹² but it acknowledged that the UNHCR had expressed support for this view. However, the legislator found reasons to believe that the majority of the EU member States would not accept such an interpretation of the ground membership of a particular social group. As a result, the legislator concluded that people who were at risk of persecution on grounds of *kön* or homosexuality should be granted protection as “persons otherwise in need of protection” and *not* as refugees.²⁹³ The legislator further emphasized that Sweden should not apply the Convention in a way that would “significantly deviate from the application in other countries”.²⁹⁴

After the adoption of the provision concerning “persons otherwise in need of protection”, the international interpretation of the persecution ground membership of a particular social group was expanded to include persecution on grounds of *kön*. Several States recognized that people who were at risk of persecution for reasons of *kön* or sexual orientation could qualify for refugee status. As presented above, the UNHCR stated in its Handbook and Guidelines that women may constitute a particular social groups within the

²⁸⁷ SOU 2004:31, p. 27; Prop. 1983/84:144, p. 36 – 37.

²⁸⁸ SOU 2004:31, p. 15, 27 & 40; Prop. 2005/06:6, p. 13.

²⁸⁹ Prop. 1996/97:25, p. 98.

²⁹⁰ Prop. 2005/06:6, p. 30 – 31 & 34.

²⁹¹ SOU 2004:31, p. 29, authors translation.

²⁹² SOU 2004:31, p. 29, authors translation.

²⁹³ SOU 2004:31, p. 29.

²⁹⁴ Diesen et al. 2012, p. 34; Prop. 2005/06:6, p. 8, authors translation.

meaning of the Convention.²⁹⁵ Furthermore, the interpretation changed within the EU by the adoption of the Qualification Directive.²⁹⁶ In this directive, it is explicitly stated that “a particular social group might include a group based on a common characteristic of sexual orientation” and that “gender related aspects might be considered, without by themselves alone creating a presumption for the applicability of this Article”.²⁹⁷

The Government appointed an inquiry which was tasked to “make recommendations as to the legislative changes necessary to permit individuals who have a well-founded fear of being persecuted on account of their gender or sexual orientation to be regarded as refugees under the 1951 Geneva Convention”.²⁹⁸ Its primary mission was to expand the Swedish application of the refugee definition by clarifying in the Aliens Act that a person who risks persecution for reasons of *kön* or sexual orientation can qualify as a refugee.²⁹⁹

Due to the fact that the wording of the Swedish refugee definition was almost identical to the refugee definition of the 1951 Convention, the inquiry concluded that the wording of the Swedish refugee definition already permitted an interpretation which encompassed persecution for reasons of *kön* or sexual orientation. Therefore, a removal of the gender provision in chapter 3, section 3, first paragraph, point 3 concerning “persons otherwise in need of protection” was considered sufficient in order to include persecution for reasons of *kön* into the refugee definition. The benefit of this solution was that the Swedish refugee definition and the refugee definition of the 1951 Convention would remain almost identical.³⁰⁰ However, as mentioned above, it had been stated in former preparatory works that *kön* or sexual orientation could *not* be considered under the ground “membership of a particular social group” and thereby not constitute a basis for refugee status. Therefore, the inquiry considered it to be more appropriate that the expanded application of the refugee definition was explicitly clarified in the Aliens Act. Another argument in favour of this solution was that the Swedish legislator is not allowed to change the application of the law through the preparatory work. Consequently, a change in the application of the law requires explicit support in the law.³⁰¹

Against this background, the inquiry suggested that it be explicitly stated in the Aliens Act that, “when an application for asylum is examined, it shall be taken into account that persecution which has its basis in an alien’s gender or sexual orientation can constitute a ground for refugee status”.³⁰² This wording was aimed to clarify that *gender-related persecution could also be covered by the other persecution grounds, depending on the circumstances, and that*

²⁹⁵ Prop. 2005/06:6, p. 20 – 21.

²⁹⁶ SOU 2004:31, p. 16; Prop. 2005/06:6, p. 20.

²⁹⁷ Article 10.1(d) of the Qualification Directive.

²⁹⁸ SOU 2004:31, p. 15.

²⁹⁹ SOU 2004:31, p. 26.

³⁰⁰ SOU 2004:31, p. 131.

³⁰¹ SOU 2004:31, p. 132; Prop. 2005/06:6, p. 30.

³⁰² SOU 2004:31, p. 18 – 19.

the ground “membership of a particular social group” was not the only applicable ground on cases involving gender-related persecution. The inquiry was concerned that an extensively detailed regulation would prevent an evolutionary interpretation of the refugee definition and therefore suggested that “it should be left to the authorities responsible for applying the law to develop the more specific criteria for the interpretation of this provision”.³⁰³

Furthermore, the inquiry proposed that “when an application for asylum is examined, the basic approach should be first to determine whether the persecution is attributable to the applicant’s race, nationality, religion or political opinion, and *only subsequently* [my italics] to determine whether the ground membership of a particular social group is applicable”.³⁰⁴ By this approach, the inquiry intended to prevent a discriminatory application of the persecution grounds. Moreover, the fact that the ground “membership of a particular social group” was included with the purpose to complement the other grounds was considered to indicate that the grounds should be assessed in such order.³⁰⁵

The government emphasized in the preparatory works that it was internationally accepted that the 1951 Convention should be given a broader interpretation than before, and especially the Convention ground “membership of a particular social group”.³⁰⁶ Therefore, it considered it to be of great importance that the refugee definition was reformed in accordance with internationally drafted and accepted definitions and guidelines.³⁰⁷ Furthermore, it had been noted that the gender provision concerning “persons otherwise in need of protection”³⁰⁸ had been applied to a very limited extent in cases concerning persecution on grounds of *kön* or homosexuality. Most applicants invoking persecution on these grounds, and granted a residence permit, were instead given this under the provision of “humanitarian grounds”, or on grounds other than *kön* or homosexuality in the provision concerning “persons otherwise in need of protection”.³⁰⁹

The government agreed with the inquiry’s proposal to remove the gender provision concerning “persons otherwise in need of protection”³¹⁰ and to explicitly state in the Aliens Act that the application of the refugee definition was now expanded. However, it rejected the more general wording that the inquiry had suggested. The government emphasized that it should be clear by the text of the Aliens Act that the grounds *kön* and sexual orientation were moved from the gender provision concerning “persons otherwise in need of protection” to the refugee definition and that a person who was at risk of persecution on these ground from now on would qualify for refugee status. It

³⁰³ SOU 2004:31, p. 19 & 132 – 133; Prop. 2005/06:6, p. 30.

³⁰⁴ SOU 2004:31, p. 18.

³⁰⁵ SOU 2004:31, p. 127 – 128.

³⁰⁶ Prop. 2005/06:6, p. 21.

³⁰⁷ Prop. 2005/06:6, p. 25.

³⁰⁸ SOU 2004:31, p. 15, 27 & 40; Prop. 2005/06:6, p. 13.

³⁰⁹ Prop. 2005/06:6, p. 19 – 20.

³¹⁰ SOU 2004:31, p. 15, 27 & 40; Prop. 2005/06:6, p. 13.

was for this reasons that the current refugee definition in chapter 4 section 1 was adopted, where the terms *kön* and sexual orientation are stated as examples of such characteristics that may constitute a membership of a particular social group.³¹¹

As I have mentioned earlier, the UNHCR has emphasized that the interpretation of the persecution ground “membership of a particular social group” cannot render the other Convention ground superfluous in gender-related claims. This was also highlighted by the legislator in the preparatory works.³¹² The legislator brought up how gender-related persecution in many cases may fall within the scope of the *other* convention grounds, especially “religion” or “political opinion”, and that more than one ground may be applicable at the same time. The statements made by the UNHCR regarding how the other Convention grounds should be interpreted in a gender-sensitive manner to include gender-related persecution were also brought up in the preparatory works.³¹³

The inquiry’s suggestion that the persecution grounds should be assessed in a particular order was not echoed by the legislator. The legislator stated that the persecution grounds are equivalent to each other and that they *all* should be considered, *in no particular order*, when an applicant claims that he or she is at risk of persecution for reasons of *kön* or sexual orientation.³¹⁴ Since one persecution ground may be more relevant than another and more than one ground can be applicable at the same time, the legislator underlined that it may be necessary to assess the asylum claim in relation to *each* of the persecution grounds in order to find the most relevant persecution ground and to establish a clear case law. Like the inquiry, the legislator concluded that it must be left to the competent authorities to develop the interpretation of the persecution ground membership of a particular social group with support from the preparatory works and international guidelines.³¹⁵

The adoption of the new refugee definition resulted in that the Swedish refugee definition now has a different wording compared to the definition of the 1951 Convention. The legislator argued in the preparatory works that although the amendment brought new criteria to the refugee definition, these criteria were not new in relation to how the definition was interpreted internationally. It further stated that it considered the amendment to be a codification of the Guidelines issued by the UNHCR concerning the interpretation of “membership of a particular social group”.³¹⁶

To conclude, *kön* may, alone or in combination with other characteristics, constitute a membership of a particular social group and a person who seeks protection from such persecution may now qualify for refugee status on this

³¹¹ Prop. 2005/06:6, p. 30 – 31.

³¹² Prop. 2005/06:6, p. 25.

³¹³ SOU 2004:31, p. 90 – 94; Prop. 2005/06:6, p. 23 – 24. See chapter 2.3.

³¹⁴ Prop. 2005/06:6, p. 27.

³¹⁵ Prop. 2005/06:6, p. 27.

³¹⁶ Prop. 2005/06:6, p. 32.

ground. Gender-related persecution may thus be considered under all of the persecution grounds in the Swedish refugee definition. In the following sections, it will be explained why the term *kön* was chosen and what type of asylum claims it is intended to cover.

4.2.2 The term *kön*

The Swedish legislator chose to include the term *kön* in the Swedish refugee definition instead of the term *genus*, which is what the English term *gender* as a rule is translated into. This decision was in accordance with the recommendation made by the inquiry.³¹⁷

The term *kön* has been used in Swedish legislation to describe, not only the biological concept of “sex”, but also the social and cultural concept of “gender”.³¹⁸ According to the inquiry, the term *genus* has a different meaning in Swedish compared to the English term *gender* and it therefore considered this term to be more suitable for academic than for legislative purposes.³¹⁹ The inquiry also found it to be difficult to determine how an inclusion of the term *genus* would affect the application of other rules where the term *kön* already had been used. As a result, it was considered to be more appropriate to continue using the term *kön* in Swedish law instead of introducing *genus* as a new term in the refugee definition.³²⁰

The government emphasized in the preparatory work that the term *kön* in the refugee definition should be used in its broadest sense and thereby include, not only biological differences between men and women, but also socially and culturally determined notions regarding the behaviour of men and women. The term *kön* also includes transsexuals and transgender people in general “insofar as the persecution directed at them is due to their approach to gender identity”.³²¹

4.2.3 *Kön* as “membership of a particular social group”

Kön may, alone or together with other characteristics, constitute a membership of a particular social group and it can thereby be described as a subcategory to this persecution ground. Consequently, in order to understand the meaning of “persecution on grounds of *kön*”, we must examine the statements in the preparatory works regarding the interpretation of “membership of a particular social group”.

³¹⁷ Prop. 2005/06:6, p. 21.

³¹⁸ SOU 2004:31, p. 73.

³¹⁹ SOU 2004:31, p. 77.

³²⁰ SOU 2004:31, p. 77.

³²¹ Prop. 2005/06:6, p. 21 – 22 & 34, authors translation.

In its reasoning regarding the interpretation of “membership of a particular social group”, the legislator made direct references to the statements made by the UNHCR in its Handbook and Guidelines on this issue.³²² It was also established that the Swedish authorities should seek further guidance for the interpretation of the ground “membership of a particular social group” in the Handbook and Guidelines by the UNHCR and in the Qualification directive.

The legislator further explained in the preparatory works how *kön* may constitute membership of a particular social group in different ways, depending on the circumstance.³²³ In accordance with the recommendations by the UNHCR,³²⁴ the legislator stated that a social group within the meaning of the Convention may consist of people who share an immutable characteristic. It could be a characteristic that they were born with or cannot change, such as sex, sexual orientation, appearances or disability. A characteristic may also be immutable because it originates from historical circumstances, such as former membership of an organization.³²⁵

Other characteristics that according to the legislator may constitute a membership of a particular social group are “those that are fundamental to an individual’s identity, conscience or practice of human rights and are rooted in the individual’s beliefs or sense of human value”.³²⁶ People that due to their personal beliefs have chosen a lifestyle that differs from those that are accepted by society, such as women who wish to stay unmarried or to work, are placed under this category. If their inability or unwillingness to conform to such social norms is not perceived as an expression of a political opinion or a religious belief, the persecution may instead be for reasons of a membership of a particular social group. The social group in question may then consist of “people that due to their beliefs refuse to comply with the societal norms on gender roles and because of this are subjected to persecution”.³²⁷ A social group may also consist of individuals who are perceived in society as being different.

The legislator further clarified that although the characteristic does not have to be immutable or related to personal belief, it must be of such importance to its members that it would be incompatible with the grounds of the 1951 Convention to require them to forsake the characteristic in question and adapt to the norms and values of the society.³²⁸

Lastly, the legislator stated that membership of a particular social group may be based on a combination of characteristics, such as gender identity in conjunction with the exercise of the right to decide if and with whom one

³²² Prop. 2005/06:6, p. 24 – 25. See chapter 2.2.

³²³ Prop. 2005/06:6, p. 25.

³²⁴ UNHCR Guidelines on membership of a particular social group, para. 6 – 13. See chapter 2.2.

³²⁵ Prop. 2005/06:6, p. 25; SOU 2004:31, p. 118.

³²⁶ Prop. 2005/06:6, p. 26, authors translation.

³²⁷ Prop. 2005/06:6, p. 26, authors translation.

³²⁸ Prop. 2005/06:6, p. 26.

wants to have a family, or the right not to be forced to submit to surgical procedures.³²⁹

In addition to these general statements by the legislator, the inquiry presented a few examples in order to illustrate how the competent authorities should reason when assessing whether an applicant can be considered to belong to a social group within the meaning of the refugee definition.

First, the inquiry noted that a social group may consist of people who have in common that they are subjected to discrimination since they often, but not always, share a certain characteristic. Women who live in countries where there is a wide gender gap and where they do not have the same legal rights as men were given as an example. The inquiry stressed that “the mere fact that these persons are subjected to discrimination cannot define them as a social group”,³³⁰ however, the discriminatory measures may help to identify a group of people that are discriminated because they all share a common characteristic. This certain characteristic, which is the reason why the members of the group are discriminated, then becomes the point of departure in the assessment of whether there exists a social group within the meaning of the refugee definition.³³¹

The inquiry further stated that women and girls who are at risk of being subjected to FGM are, with no doubt, considered to be members of a particular social group within the meaning of the Convention. FGM is said to be “a clear example of such inhumane treatment which is referred to in article 3 ECHR and CAT”.³³² “The biological sex is an innate and immutable characteristic and the right to keep ones genitals intact is a *human right* that no one should be required to forsake”.³³³ The inquiry further noted that “a woman is subjected to FGM because she is not circumcised or because tradition requires her to redo it, for example prior to her marriage”.³³⁴ There is for this reason considered to be a clear causal link between the risk of being subjected to FGM and a membership of a particular social group.³³⁵

The issue of forced marriages was also brought up. The inquiry noted that an applicant may claim that she has a well-founded fear of being forced into marriage or of the consequences of staying in a marriage which she was forced into. The inquiry argued that “it generally is the woman/girl who has the most vulnerable position in arranged marriages” and that they in some cases “are treated as commodities”.³³⁶ It was underlined that a woman who refuses to carry out the arrangement or manages to get a divorce may be punished in different ways. If a woman has a well-founded fear of being forced into a marriage, and she cannot enjoy protection against this in her

³²⁹ Prop. 2005/06:6, p. 25 – 26.

³³⁰ SOU 2004:31, p. 122, authors translation.

³³¹ SOU 2004:31, p. 121 – 122.

³³² SOU 2004:31, p. 122, authors translation.

³³³ SOU 2004:31, p. 122, authors translation.

³³⁴ SOU 2004:31, p. 122, authors translation.

³³⁵ SOU 2004:31, p. 122 – 123.

³³⁶ SOU 2004:31, p. 123, authors translation.

home country, the following reasoning can, according to the inquiry, be applied when examining if the social group ground is applicable.

The woman risks persecution due to the fact that she is a woman that already has been/ is at risk of being married to someone against her will. Other women with the same background are in the same situation and they run such risk as well *precisely because* they are unmarried women or women that are forced to live in a marriage that they have not chosen to enter.³³⁷

For this reason, women/girls who risk forced marriage may constitute a particular social group within the meaning of the Convention according to the inquiry.³³⁸

The inquiry examined whether there is a causal link between the risk of being subjected to honour killings and the ground membership of a particular social group. According to the inquiry, honour killings should not be regarded as “a personal vendetta between the persecutor and the victim, but rather as an unacceptable phenomenon which is supported by the norms and traditions of the society in question”.³³⁹ The inquiry chose to focus on honour killings where the victim, “who normally is a woman, has not behaved in accordance with what the tradition prescribes”.³⁴⁰ It further states that “[i]n order to avoid the risk of being murdered, a woman must act in accordance within the existing norms of her society or family”.³⁴¹ If she would fail to do so, for example by refusing to enter into an arranged marriage, and for this reason has a well-founded fear of persecution, it can reasonably be claimed that she belongs to “a particularly vulnerable group in society”.³⁴² What the members of the group have in common is that they are women who “according to others act outside the frames of what is considered to be an acceptable behaviour for women and for this reason are at risk of honour killings”.³⁴³ The inquiry finally concluded that women who are at risk of being subjected to honour killings could constitute a particular social group.³⁴⁴

One last example that was discussed was cases involving domestic violence. The inquiry described domestic violence in the following manner. “The reason why a woman is subjected to serious abuses (persecution) because she has been unfaithful or is accused of have being unfaithful has of course many different explanations. The main reason and driving force of the persecution is normally jealousy and the persecution is generally performed by the woman’s current partner or ex-partner”.³⁴⁵ The inquiry considered it to be farfetched to claim that such treatment, which was based on accusations of unfaithfulness, was for reasons of her membership of a particular social

³³⁷ SOU 2004:31, p. 124, authors translation.

³³⁸ SOU 2004:31, p. 124.

³³⁹ SOU 2004:31, p. 125, authors translation.

³⁴⁰ SOU 2004:31, p. 125, authors translation.

³⁴¹ SOU 2004:31, p. 125, authors translation.

³⁴² SOU 2004:31, p. 125, authors translation.

³⁴³ SOU 2004:31, p. 125, authors translation.

³⁴⁴ SOU 2004:31, p. 125 – 126.

³⁴⁵ SOU 2004:31, p. 126, authors translation.

group. Instead, the crucial question was said to be if and why the authorities are unable or unwilling to protect the applicant. Assuming that no protection can be expected in the country of origin and that the lack of protection is due to general reluctance, inefficiency or lack of resources, the claimant can *not* be considered to be persecuted for reasons of her membership of a particular social group. However, if it can be shown that the State is unable or unwilling to protect her due to the fact that she is a women, her chances to gain refugee status improve significantly. The inquiry stated that in “countries where the discrimination of women is particularly severe”, it often reflects on the legislation and “it is not unusual that the police refuses to deal with cases where a woman has reported her husband’s abuses”.³⁴⁶

The inquiry concluded that “women who are persecuted due to that they are accused of having an affair may under certain circumstances be considered to belong to a particular social group within the meaning of the 1951 Convention”.³⁴⁷ It emphasized that a direct causal link must be established between the persecution and the ground membership of a particular social group, and the reason why the State is unable or unwilling to protect the applicant generally becomes crucial in this assessment. To establish such a link almost always presupposes that the State’s inability or unwillingness to protect the applicant derives from a view of women that is “strongly discriminating”.³⁴⁸ The inquiry finally stated that if these circumstances can be established, then “the explanation for the persecution can be said to be the fact that the victim is *a woman* who lives in a society where the power structure supports the principle that a woman has a lower status than men and therefore is unable to invoke State protection against persecution”.³⁴⁹

4.3 Correspondance between the Swedish Aliens Act approach and the 1951 Convention approach and the obligations of the CEDAW Committee

To summarize the approach of the Swedish Aliens Act to encompass gender-related persecution, it is clear from the preparatory works that the Swedish legislator recognizes that all of the persecution grounds may encompass gender-related persecution, depending on the circumstances,³⁵⁰ and that they *all* should be considered, *in no particular order*, when an applicant claims that he or she is at risk of persecution for reasons of *kön*.³⁵¹ Hence, although the focus of the amendment was to expand the interpretation of the ground “membership of a particular social group” so that *kön* could be considered

³⁴⁶ SOU 2004:31, p. 127, authors translation.

³⁴⁷ SOU 2004:31, p. 127, authors translation.

³⁴⁸ SOU 2004:31, p. 127, authors translation.

³⁴⁹ SOU 2004:31, p. 127, authors translation.

³⁵⁰ SOU 2004:31, p. 132.

³⁵¹ Prop. 2005/06:6, p. 27.

under this ground, the Swedish legislator did not aim to give priority to this ground in gender-related claims.

Comparing this approach to the 1951 Convention approach, as interpreted by the UNHCR, it can fairly be claimed that they are in accordance with each other. It was even explicitly expressed that the amendment was considered to be a codification of the Guidelines of the UNHCR concerning membership of a particular social group.³⁵² The preparatory works also referred to the Guidelines of the UNHCR when stating that gender-related persecution may be covered by all of the persecution grounds, depending on the circumstances.³⁵³ As mentioned earlier, the UNHCR has expressed how each of the persecution grounds can be interpreted in a gender-sensitive manner to encompass gender-related persecution and these statements were also echoed in the preparatory works.³⁵⁴

As already mentioned, the CEDAW Committee also advocated that each of the persecution grounds should be interpreted in a gender-sensitive way and that gender could be considered under “membership of a particular social group”. The approach of the Swedish Aliens Act can therefore be considered to be in accordance with the obligations stated by the CEDAW Committee. However, it also deserves mentioning that while the inquiry brought up important and relevant examples of gender-related persecution, it also made many questionable statements, especially regarding domestic violence. The inquiry’s description of domestic violence is particularly noteworthy since it holds the applicant partially responsible for being persecuted.³⁵⁵ The inquiry takes the perspective of the persecutor and thereby ignores how the applicant experiences the persecution. Against this background, it can be argued that the description provided by the inquiry regarding domestic violence does not meet the requirements that were stated by the CEDAW Committee concerning how the contracting States of CEDAW must avoid to “create standards that are based on preconceived notions of gender-based violence and persecution”.³⁵⁶

4.4 Feminist analysis of the gender-sensitive interpretation of the persecution grounds of the Swedish Aliens Act

Like the authors of the human rights approach, the preparatory works primarily highlighted traditional, cultural and religious practices affecting women in developing countries and Third World countries when describing

³⁵² Prop. 2005/06:6, p. 32.

³⁵³ SOU 2004:31, p. 132.

³⁵⁴ Prop. 2005/06:6, p. 23 – 24.

³⁵⁵ SOU 2004:31, p. 126 – 127.

³⁵⁶ General recommendation No. 32 para. 31; See also CEDAW, *General Recommendation No. 19 Violence against Women*, 1992, available at: <http://www.refworld.org/docid/52d920c54.html> [accessed 7 January 016].

which types of gender-related persecution that can be encompassed by the term “persecution on grounds of *kön*”. The examples of persecution of women that were brought up involved FGM, forced marriage and honour killings.³⁵⁷ As mentioned earlier, this type of reasoning can be criticized from an anti-essentialist perspective as well as from a postcolonial feminist perspective. By emphasizing such examples of gender-related persecution in the interpretation of the persecution grounds, it implies that gender-related persecution only happens in the Third World and thereby demonises non-Western countries. The refugee receiving countries of the West are presented as emancipated and superior to the non-Western countries. This type of reasoning reproduces the distinction between the Western and the non-Western countries.³⁵⁸ Moreover, as mentioned earlier, the anti-essentialists considered the human rights approach to be “an extension of legal practice in which women’s claims are most likely to succeed when they present themselves as victims of dysfunctional, exceptionally patriarchal cultures and states”.³⁵⁹ This means that women must present themselves as defenceless victims in order to qualify for refugee status. There are several statements in the preparatory works which indicate that this approach has been adopted, for example the statements of how “it generally is the woman/girl who has the most vulnerable position in arranged marriages” and of how women “are treated as commodities”.³⁶⁰

³⁵⁷ SOU 2004:31, p. 121 – 125.

³⁵⁸ Spijkerboer 2000, p. 171.

³⁵⁹ Spijkerboer 2000, p. 169.

³⁶⁰ SOU 2004:31, p. 123, authors translation.

5 Judicial application

In this chapter, I will present four cases involving gender-related persecution that have been tried at the Migration Court of Appeal. These cases have been chosen from the databases Karnov and Zeteo. To find these cases, I used the search terms ”*könsrelaterad förföljelse*” and ”*förföljelse på grund av kön*”. After the presentations of the cases, I will address the question of whether the approach to encompass gender-related persecution in the case law of the Migration Court of Appeal is in accordance with the approach of the Swedish Aliens Act, the approach of the 1951 Convention and the obligations identified by the CEDAW Committee. Lastly, I will examine whether the case law of the Migration Court of Appeal answers to, alternatively remains sensitive to, the feminist critiques identified by Spijkerboer.

5.1 MIG 2008:39

The asylum applicants in this case were A and her two children B and C. A had for several years been abused by her ex-husband. Both the police and her own family had refused to help her. She claimed that she risked being persecuted by her ex-husband and killed by her own and her ex-husbands families if returned to Albania.

The Swedish Migration Board rejected their applications. Although the Board admitted that domestic violence was common in the northern parts of Albania, where the applicants came from, the abuses and threats that A had been subjected to were considered as criminal actions that had been performed by individuals and which had not been sanctioned by the authorities in Albania. The Board further considered it to be possible for A, B and C to seek protection from the claimed abuses in other parts of Albania.

The Migration Court ruled in favor of the claimants appeal and granted A refugee status. The Court found that A had proven it to be probable that she had been subjected to serious abuses by her ex-husband in Albania and that she, due to cultural and social structures in Albania, could not obtain protection by the authorities. Against this background, the Court ruled that A had a well-founded fear of being persecuted on grounds of *kön*. Contrary to the Migration Board, the Court did not believe that A had any possible internal flight alternatives in Albania

The Migration Court of Appeal also found that A had shown that she had a well-founded fear of being persecuted on grounds of *kön*. The authorities, in form of the police, had according to the Court been unwilling to offer A protection against her husband. With reference to the country of origin information, the Court held that the Albanian society is “strongly patriarchal”, especially in the rural areas and particularly in the northern parts of the country. The information also showed that domestic violence is very common

and a serious problem in Albania and that it is rarely reported or prosecuted. The Court concluded that the unwillingness of the authorities to protect A was due to the social and cultural structures in the society and the fact that A was a woman. However, the claimants were not granted protection in Sweden, since the Migration Court of Appeal found that there existed an internal flight option for them in Albania.

5.2 MIG 2011:6

The applicants in this case were A and B who were Kurds from Iraq. They were a couple and claimed that they risked being persecuted by B:s father and family due to that they had an extramarital relationship. A had proposed six times to B, but he had been rejected every time since B was promised to her cousin. B:s father and family had threatened to kill them if B refused to marry her cousin. A had been shot at one time and A:s father had also received threats. The couple had been hiding from B:s family for a year. They had not been willing to seek protection at the authorities since B:s father held a high position at the ministry of defence and belonged to a powerful clan.

Their applications were rejected by the Migration Board. According to the Board, they had not proved their identities to a sufficient level and their stories were considered to be vague, undetailed and not credible. The Board also stressed that protection against B:s family must primarily be provided by the authorities in the Kurdistan Regional Government Area of Iraq, which was considered to be possible according to the country of origin information.

At the Migration Court, the lay judges overruled the presiding judge and granted A and B permanent residence permit, not as refugees but as persons in need of subsidiary protection.³⁶¹ The lay judges considered the couple's stories to be credible and that it could not be expected to exist efficient protection against honour-related persecution in the Kurdistan Regional Government Area of Iraq.

The Migration Court of Appeal agreed with the Migration Board and the Migration Court in the sense that neither A or B were considered to have raised such grounds that they could be considered as refugees. No further explanations why it did not consider the couple to be eligible for refugee status was given. The Court finally concluded that they qualified for subsidiary protection.

5.3 MIG 2011:8

A was from Bureo in Somaliland and her family belonged to a religious clan. Her parents were divorced and she had been raised by her mother. Her father

³⁶¹ *Alternativt skyddsbehövande* chapter 4 section 2 UtLL.

was a teacher at a Koran school and she had two half-brothers on her father's side. A had two children with a man she once was married to. After her husband died, she met another man and the two of them decided to get married. The couple had sexual relations before marriage and A got pregnant and had a daughter. When her fiancé found out about this, he left her and said that he did not want to see their daughter. Her male relatives said that she had brought shame to the family. One of her half-brothers tried to kill her by stabbing her with a knife after he had heard that she had given birth to a daughter outside of marriage. Her half-brother was taken to the police but they let him go after they found out the reason for his actions. Her mother and aunt brought her to her aunt in Kismayo. She was treated at the hospital in Kismayo for her injuries. Shortly thereafter, she was taken to Halima Adde, a village outside of Kismayo, since she did not feel safe in Kismayo. In 2009, her aunt in Kismayo told her that her half-brothers and her dead husband's brother together with Al-Shabaab had come to Kismayo to look for her and they wanted to punish her for committing a crime against Sharia law. They had forced her aunt to tell them where she was by arresting her daughter.

The Migration Board rejected A:s application since it considered her story to be unclear and it questioned what she had said about her stay in Kismayo and Halima Adde. The Board did not find it probable that it was not until 2009 that her family had come to look for her. The Board also noted that the claimed threats were second-hand information.

The Migration Court rejected A:s appeal of the Migration Board's decision. The Court found it to be probable that A had a daughter outside of marriage and that she for this reason had been stabbed and therefore had fled to Halima Adde. The Court noted, however, that nothing had happened to her since 2002 and that she had not met any of her persecutors since then. Her claim that she had been sought in Kimayo was only second-hand information. She had not given any reasonable explanation to why they came to look for her in 2009, even though they already knew in 2002 that she had an aunt in Kimayo. The Court concluded that A had not proven it to be probable that there still existed any concrete and current threats against her. She had against this background not made it probable that she had a well-founded fear of being persecuted.

The Migration Court of Appeal considered that A had made her story credible and probable and that her claim for refugee status therefore could be assessed against these facts. The Court then stated, with no further explanation, that the relevant persecution ground in this case was "persecution on grounds of *kön*". The Court found it to be probable that A had a well-founded fear of being persecuted by her male relatives and Al-Shabaab if returned to the Kismayo area, since she, as a woman, had not followed the prevailing norms. Since Al-Shabaab were in control of southern Somaliland, her chances to gain effective protection there were considered to be non-existing or very low. Against this background, the Court concluded that she had fulfilled her burden of proof and was to be considered a refugee on grounds of *kön*. The Court did not consider that A had any internal flight possibilities, since her

male network in the area where the security situation was acceptable were also her persecutors.

5.4 MIG 2012:12

The asylum applicants were three sisters, A, B and C, who by the time for the application were 11, 10 and 3 years old. The girls claimed that they had a well-founded fear of being subjected to FGM if returned to their home country Somalia. FGM was practiced in their family and it had come to the attention of Al-Shabaab, amongst others, that the girls were not yet circumcised. The pressure on the girls was rising as they got older, and their possibilities to obtain protection had been reduced in relation to reasons connected to certain activities of the applicants' father.³⁶²

The Migration Board decided that the applicants A, B and C qualified for subsidiary protection, but not refugee status. In its reasoning, the Board claimed that it was not probable that there were any threats from Al-Shabaab as regards FGM.

The Board's decision was overturned by the Migration Court, which granted the girls refugee status. In its reasoning, the Court referred to the country of origin information, which stated that nearly 98 % of the female population in Somalia is circumcised. The procedure is often performed when the girls are between four to eleven years old and the parents' possibilities to protect their daughters against FGM are limited since the female relatives make sure to carry out the procedure when the parents cannot see their daughters. The Court held that the girls were at the age when the procedure normally is performed and the fact that their mother had managed to protect them for this long did not mean that they were not at risk of being subjected to FGM in the future. Against this background, the applicants were considered to be at risk of "gender-related persecution" in form of FGM if returned to Somalia.

The Migration Court of Appeal agreed with the Migration Court and decided that the applicants were to be considered as refugees. According to the Court, the applicants' parents had presented a cohesive and unchanged story and it was considered to be plausible that the pressure came, not only from Al-Shabaab, but also from relatives and others. The parents had given reasonable explanations to why the mother and the daughters were forced to flee in order to escape the procedure. The Court also believed that the parents had made it plausible that they would not be able to protect their daughters if returned to Somalia.

³⁶² The father's activities were not further specified in the case.

5.5 Correspondance between the judicial application and the Swedish Aliens Act approach and to the 1951 Convention approach and the obligations of the CEDAW Committee

In the cases above, all of the applicants have claimed that they are at risk of being subjected to different types of gender-related persecution. In the Court's reasoning, we have seen that it does not mention the meaning and potential relevance of *other* persecution grounds than "membership of a particular social group" in these cases. Instead, the Court has only stated whether the applicants can be considered to be persecuted on grounds of *kön* or not, except for in MIG 2011:6 where the Court concluded that the applicants had not raised such grounds that they could be considered as refugees. It appears thus as if the Migration Court of Appeal interprets the wording of the refugee definition as if *kön* may only be considered under the ground "membership of a particular social group" and fails to perform a gender-sensitive interpretation of the other grounds.

Considering the statements of the legislator, which were presented in the previous chapter, it is evident that the Court's application of the law is not completely in accordance with the legislator's intentions. The Court does acknowledge that *kön* can be considered under "membership of a particular social group". However, as mentioned before, the legislator emphasised that *kön* can be considered under all of the persecution grounds³⁶³ and that they *all* should be analysed, *in no particular order*, when an applicant claims that he or she is at risk of persecution for reasons of *kön*.³⁶⁴

Moving on to the statements of the UNHCR, which the Swedish legislator expressed that the Swedish authorities should follow³⁶⁵, it can also be claimed that the approach of the Migration Court of Appeal cannot be said to follow international law. The UNHCR has expressed that all of the persecution grounds may encompass gender-related persecution, if properly interpreted. These statements are also echoed in the obligations under CEDAW which have been identified by the CEDAW Committee.

Hence, the case law of the Migration Court of Appeal is partly in accordance with the approaches of the Swedish legislator, the UNHCR and the CEDAW Committee since it recognizes that *kön* may be considered under "membership of a particular social group". However, the approach of the Migration Court of Appeal significantly deviates from the approaches of the Swedish legislator, the UNHCR, the CEDAW Committee since it does not

³⁶³ Prop. 2005/06:6, p. 34.

³⁶⁴ Prop. 2005/06:6, p. 27.

³⁶⁵ Prop. 2005/06:6, p. 20.

consider *each* of the persecution grounds in a gender-sensitive manner in cases where an applicant claims gender-related persecution.

5.6 Feminist analysis of the gender-sensitive interpretation of the persecution grounds of the Migration Court of Appeal

It is evident from the cases that the Migration Court of Appeal prefers to apply the persecution ground “membership of a particular social group” in cases involving gender-related persecution. This answers to the recommendations of the human rights approach, which argued that “membership of a particular social group” was the most appropriate persecution ground to apply on gender-related claims. The application of the refugee definition by the Court can thereby be criticised from an anti-essentialist perspective, since they believed that this type of interpretation and application of the persecution grounds sustains the stereotype that a “real” refugee is male. By applying persecution grounds that are “gendrified” to women’s asylum claims, it may imply that only men have political opinions, only men are activated by religion etc. This results in a division between “women’s asylum claims” against “normal asylum claims” and reinforces the view that the grounds that are not “gendrified” are reserved for male applicants.

In sum, according to the critique of the anti-essentialists, the Court’s emphasising of the ground “membership of a particular social group” can sustain the stereotype that a “real” refugee is male, and women continues to be regarded as a deviation from this male norm in refugee law.

6 Concluding analysis

This thesis has addressed three categories of research questions. In this chapter, I aim to summarise my results, category by category, and draw some final conclusions.

Beginning with the first category, which concerned the legal examination of international and national law, I began by examining which the main elements of determining who qualifies as a refugee are. In chapter 2, we have seen that the refugee definition contains several complex criteria that a person has to fulfil in order to qualify as a refugee within the meaning of the 1951 Convention. As mentioned above, the refugee definition was not designed to include all people that have fled their home; instead, its wording reveals how the contracting States wished to limit their responsibilities in the Convention. However, every asylum seeker is covered by the minimum protection in form of non-refoulement.

The thesis has focused on the interpretation and application of the persecution grounds. In order to be granted refugee status, an applicant has to show that the persecution that he or she risks being subjected to if returned to his or her home country is linked to at least one of the persecution grounds: race, religion, nationality, political opinion or membership of a particular social group. If an applicant risks gender-related persecution, he or she needs to show that it can be considered to be covered by the scope of the established persecution grounds. This raises the question of how the persecution grounds encompass gender-related persecution.

In chapter two, I analysed the 1951 Convention in order to answer the question of how the persecution grounds of the Convention encompass gender-related persecution. In its interpretation of the 1951 Convention, the UNHCR has established that the refugee definition already covers gender-related persecution, if properly interpreted. This requires that all of the persecution grounds are interpreted in a gender-sensitive manner.

The UNHCR established that persecution for reasons of race or nationality normally is not specific to either women or men. According to the UNHCR, gender-related persecution will mainly be assessed as persecution for reasons of religion, political opinion or membership of a particular social group.

The persecution ground “religion” covers gender-related persecution, especially where “the religion assigns particular roles or behavioural codes to women and men respectively”.³⁶⁶ If a woman breaches the role that has been assigned to her, or refuses to follow the behavioural codes, she may be perceived as holding unacceptable religious opinions, regardless of what she actually believes about religion. We have also seen that a woman who refuses

³⁶⁶ UNHCR Guidelines on Gender-Related Persecution, para. 25.

to wear the Islamic veil may be considered to “be persecuted on religious gender-related grounds”.³⁶⁷

In gender-related claims, the persecution ground religion tends to overlap with the persecution ground political opinion, especially in cases where the applicant originates from a State where there is little separation between religious and State institutions.³⁶⁸ As mentioned earlier, political opinion should be interpreted in a broad sense “to incorporate any opinion on any matter in which the machinery of the State, government, society, or policy may be engaged”.³⁶⁹ Opinions as to gender roles, opposition to discrimination of women and “non-conformist behaviour which leads the persecutor to impute a political opinion” to the person in question fall within the scope of political opinion.³⁷⁰ Furthermore, when performing a gender-sensitive interpretation of political opinion, it has to be taken into account that women often engage in low level political activities, such as providing food to combatants, and that they are frequently “attributed with political opinions of their family or male relatives”.³⁷¹ We have also seen that a court in New Zealand has applied the persecution ground “political opinion” in a case where a woman had left her husband and for this reason was at risk of being subjected to honour related violence. However, there has been a reluctance to acknowledge persecution in the private sphere as political, especially concerning claims involving “domestic violence, forced marriage, resistance to female genital mutilation, and sexual violence” in State practice.³⁷²

Although gender-related persecution can fall within the ambit of *all* the persecution ground, much emphasis has been given to “membership of a particular social group” in gender-related claims.³⁷³ However, this is hardly surprising since the UNHCR has established that women may be considered as a social group within the meaning of the refugee definition.³⁷⁴ It has been identified that States parties to the Convention tend to narrow down these particular groups of women by adding more characteristics to the description of the group, which much likely is due to the fact that they wish to limit their responsibilities.

Moving on to the third question in the first category, which concerned the obligations that States parties to CEDAW are bound to respect when interpreting and applying the persecution grounds of the 1951 Convention, we have seen that the CEDAW Committee has made several remarks on this issue. Firstly, States parties are obliged to ensure a gender-sensitive interpretation of all of the persecution grounds. Secondly, the States are encouraged to add an additional persecution ground, such as gender or sex, to

³⁶⁷ Zimmermann & Mahler 2011, p. 417.

³⁶⁸ UNHCR Guidelines on Gender-Related Persecution, para. 26.

³⁶⁹ UNHCR Guidelines on Gender-Related Persecution, para. 32.

³⁷⁰ UNHCR Guidelines on Gender-Related Persecution, para. 32.

³⁷¹ UNHCR Guidelines on Gender-Related Persecution, para. 33; Hathaway & Foster, p. 411.

³⁷² Hathaway & Foster 2014, p. 422.

³⁷³ UNHCR Guidelines on Gender-Related Persecution No. 1, para. 28; Zimmermann & Mahler 2011, p. 416.

³⁷⁴ UNHCR Guidelines on Gender-Related Persecution, para. 30.

their national legislations. Thirdly, States parties should ensure that gender can be used as a factor in recognizing membership of a particular social group.³⁷⁵ Lastly, the CEDAW Committee established that States parties are obliged under article 5 of CEDAW “to assess women’s claims to asylum without prejudices and stereotyped notions of women that are based on the inferiority or superiority of either sexes”.³⁷⁶

I now turn to the Swedish refugee legislation. Sweden is State party to the 1951 Convention and thereby legally bound to respect its provisions. The Swedish legislator explicitly states in the preparatory works that Swedish authorities should use the Handbook and Guidelines of the UNHCR in their interpretation of the refugee definition.³⁷⁷ Consequently, the interpretation of the persecution grounds in the Swedish Aliens Act is much in accordance with the interpretation of the UNHCR. Concerning how the persecution grounds may be interpreted to encompass gender-related persecution, the legislator echoed the statements of the UNHCR, which I presented above, in the preparatory works.³⁷⁸

Now, I will address the question of the legal meaning and coverage of the term “persecution on grounds of *kön*”. The term *kön* is stated in the Swedish refugee definition as an example of what can constitute a social group within the meaning of the refugee definition. As a result, the Swedish interpretation of “membership of a particular social group” is in accordance with the international interpretation of this persecution ground. The legislator even expressed that the amendment of the refugee definition was aimed to be a codification of the Guidelines of the UNHCR about the ground “membership of a particular social group”.³⁷⁹

According to the preparatory works, persecution on grounds of *kön* can be applied in cases where a female applicant risks persecution because she wishes to stay unmarried or to work. The social group may then consist of “people that due to their beliefs refuse to comply with the societal norms on gender roles and because of this are subjected to persecution”.³⁸⁰ Furthermore, the legislator brought up that membership of a particular social group may be based on a combination of characteristics, such as gender identity in conjunction with the exercise of the right to decide if and with whom one wants to have a family, or the right not to be forced to submit to surgical procedures.³⁸¹

The inquiry provided a few examples of how the authorities should reason in the assessment of whether an applicant can be considered to belong to a social group within the meaning of the refugee definition. The examples of social

³⁷⁵ CEDAW General recommendation No. 32, para. 30.

³⁷⁶ CEDAW General recommendation No. 32, para. 31.

³⁷⁷ Prop. 2005/06:6, p. 20 & 24.

³⁷⁸ Prop. 2005/06:6, p. 23 – 24.

³⁷⁹ Prop. 2005/06:6, p. 32.

³⁸⁰ Prop. 2005/06:6, p. 26, authors translation.

³⁸¹ Prop. 2005/06:6, p. 26.

groups that were discussed were people subjected to discrimination, people at risk of being subjected to honour related violence, people at risk of being married against their will, people at risk of being subjected to FGM and victims of domestic violence.

The reason why the term *kön* was introduced in the Aliens Act was that the government wanted to clarify that the ground *kön* was moved from the gender provision concerning “persons otherwise in need of protection” to the refugee definition and that persons at risk of persecution on grounds of *kön* would qualify for refugee status. However, considering the case law of the Migration Court of Appeal, it appears as if the aim with the wording of the refugee definition has not been achieved.

I will now examine how the Migration Court of Appeal has interpreted and applied “persecution on grounds of *kön*”. In the cases from the Migration Court of Appeal, which are presented above, the Court recognized that a woman who had been subjected to domestic violence and refused protection in her home country was considered to be persecuted on grounds of *kön*. Furthermore, a woman at risk of being subjected to honour related violence and three girls at risk of being subjected to FGM were as well considered to fall within the scope of this persecution ground.

From a legal perspective, there are several shortcomings in the Court’s reasoning in these cases. First of all, the Court did not give a thorough explanation to why it considered “persecution on grounds of *kön*” to be the most relevant persecution ground. Instead, it stated whether it considered the ground to be applicable in the cases or not.

Furthermore, the Court failed to contribute to the interpretation of the term “persecution for reasons of *kön*”. There are no attempts to clarify under what circumstances a person can be considered to be at risk of persecution on grounds of his or her *kön* in these cases, neither does the Court discuss or interpret the social concept of *kön*. As stated in the preparatory works, the Court is tasked to develop the meaning and interpretation of the term “persecution on grounds of *kön*”, but this has not been performed in a satisfactory manner.

In MIG 2011:8, which involved honour related crimes, the Court acknowledged that the applicant could be considered to be at risk of persecution on grounds of her *kön*. However, motivating the applicability of “membership of a particular social group” by stating that the applicant is a woman who has departed from the norms is, in my view, not satisfactory. The Court should instead have taken the opportunity to clarify how it interprets the term “persecution on grounds of *kön*”. Moreover, it would have been relevant in this case to discuss how the persecution grounds religion and political opinion should be interpreted from a gender perspective and whether they could have been relevant to this case. This, since it is possible that the applicant was perceived as having a different political opinion or religious

belief when she decided to have a child outside of marriage and live independently.

In MIG 2008:39, the Court could have taken the opportunity to discuss the political aspects of domestic violence and whether the applicant could have been considered to be persecuted on grounds of her political opinion. Since the applicant reported the abuses of her husband, it can be perceived as if she was exercising her human rights and showed resistance to the power structures and patriarchal society in Albania. If “political opinion” would have been applied instead of “membership of a particular social group”, it is possible that the Court would have concluded that there were no internal flight alternatives for her and her family in Albania. The Court can also be criticized for describing cases of domestic violence as individual criminal acts rather than as part of a societal problem affecting many women .

In MIG 2011:6, it is quite remarkable that the Court did not even discuss whether the couple could be considered to be at risk of persecution on grounds of *kön*. This case involved honour related violence and forced marriage, which both were brought up by the inquiry as examples of gender-related persecution which could fall within the scope of “persecution on grounds of *kön*“.³⁸²

I now continue to the second category of research questions, which concerns the correspondence between different legal instruments and applications. I start by looking into the correspondence between the approach of the 1951 Convention to encompass gender-related persecution and the obligations of the CEDAW Committee. According to the interpretation of the UNHCR, the refugee definition of the 1951 Convention already covers gender-related persecution, if properly interpreted, and it therefore does not consider that an additional persecution ground must be added to the refugee definition. In order to include gender-related persecution within the scope of the established persecution grounds, they must all be interpreted in a gender-sensitive manner. No particular persecution ground should thus be given priority and all of the persecution ground may be applicable on cases involving gender-related persecution. Although membership of a particular social group may well be applied to cases where women risk gender-related persecution, the UNHCR has emphasised that the interpretation of this ground cannot render the other persecution grounds superfluous. These statements of the UNHCR are echoed in General recommendation no. 32 of the CEDAW Committee. States parties to CEDAW are obliged to interpret all of the persecution grounds in a gender-sensitive manner and they must consider gender within the social group ground.

Similar to the UNHCR, the CEDAW Committee expresses a concern of the emphasis that has been given to “membership of a particular social group”. According to the Committee, a frequent application of this ground in gender-related claims may reinforce “the stereotyped notions of women as dependent

³⁸² SOU 2004:31 p. 123 – 125.

victims”.³⁸³ It is therefore clarified in General recommendation No. 32 that the States parties are obliged under article 5 of CEDAW to avoid this by assessing “women’s claims to asylum without prejudice and stereotyped notions of women that are based on the inferiority or superiority of either sex”.³⁸⁴

However, the CEDAW Committee takes a step further and recommends the Contracting States to include an additional ground, such as gender or sex, into the national legislation. As mentioned earlier, this can be interpreted as if the Committee, in its interpretation of the persecution grounds, does not believe that the established grounds may encompass all types of gender-related persecution. Furthermore, it shows that the Committee is in favour of adopting special provisions for women.

I now move on to the correspondence between the approach of the Swedish Aliens Act, the 1951 Convention approach and the obligations of the CEDAW Committee. As established earlier, the approach of the Swedish Aliens act to encompass gender-related persecution in the interpretation and application of the persecution grounds is in accordance with the approach of the 1951 Convention. It is stated in the preparatory works that all of the persecution grounds may encompass gender-related persecution³⁸⁵ and that they all should be considered, in no particular order, when an applicant claims that he or she risks gender-related persecution.³⁸⁶ In addition, the legislator echoed the statements of the UNHCR regarding how the persecution grounds should be interpreted in a gender-sensitive way.³⁸⁷

The CEDAW Committee also advocated that each of the persecution grounds should be interpreted in a gender-sensitive manner and that gender could be considered under “membership of a particular social group”. The approach of the Swedish Aliens Act can therefore be considered to be in accordance with the obligations stated by the CEDAW Committee as well. However, the description of domestic violence in the preparatory works³⁸⁸ cannot be considered to fulfill the requirement established by the CEDAW Committee concerning that the authorities must take precautions to not “create standards that are based on preconceived notions of gender-based violence and persecution”.³⁸⁹

I now turn to the last question in this category of research questions: is the approach to encompass gender-related persecution in the case law of the Migration Court of Appeal in accordance with the approach of the Swedish Aliens Act, the approach of the 1951 Convention and the obligations

³⁸³ General recommendation No. 32, para. 31.

³⁸⁴ General recommendation No. 32, para. 31.

³⁸⁵ SOU 2004:31, p. 132.

³⁸⁶ Prop. 2005/06:6, p. 27.

³⁸⁷ Prop. 2005/06:6, p. 23 – 26.

³⁸⁸ SOU 2004:31, p. 126.

³⁸⁹ CEDAW General Recommendation No. 32 para. 31.

identified by the CEDAW Committee? It is here we find the greatest discrepancy amongst the approaches.

Although the preparatory works echo the statements of the UNHCR concerning that the State authorities must interpret *each* of the persecution grounds in a gender-sensitive manner in gender-related claims in order to conclude which is the most relevant in the case in question, the case law from the Migration Court of Appeal shows that it fails to follow these statements. Although other persecution grounds than “membership of a particular social group” could have been relevant in the cases, which I have mentioned above, the Court did not consider these grounds in its reasoning. Instead, it seems as if the Court interprets the wording of the refugee definition as if *kön* can only be considered in relation to “membership of a particular social group” and fails to perform a gender-sensitive interpretation of the other grounds. Hence, the intention of the legislator has not been followed in the case law of the Migration Court of Appeal and the case law of the Court can therefore not be considered to be in accordance with the approaches of the Swedish Aliens Act and the UNHCR to encompass gender-related persecution and the obligations of the CEDAW Committee.

Finally, the third category of research questions, regarding how the interpretations of the persecution grounds answer to and/or remain sensitive to the feminist critiques identified by Spijkerboer, will be addressed. In the chapters above, we have seen how the interpretation and application of the persecution grounds and the obligations of the CEDAW Committee have both answered to the feminist critiques, but also been sensitive to it, which is inevitable since these critics disagree with each other.

First, I will address the question of how the interpretation of the persecution grounds of the 1951 Convention answers to and/or remains sensitive to the feminist critique identified by Spijkerboer. As already mentioned above, the interpretation of the 1951 Convention answers to the critique of the early critics, since it has been recognized that private sphere political activities can fall within the meaning of the persecution ground political opinion. This is sensitive to the critique of the human rights approach. They mean that this type of reasoning assume a “bifurcated version of society” which “roots women’s oppression in sexuality and private life, thereby disregarding oppression experienced in non-domestic circumstances”.³⁹⁰

Furthermore, the fact that much emphasis has been given to the ground “membership of a particular social group” and that it has been recognized that women may be interpreted as constituting a social group answers to the recommendations of the human rights approach, which was in favour of applying this ground to gender-related claims.³⁹¹ However, this can be criticized from an anti-essentialist perspective, since they meant that if all persecution of women is regarded as persecution because of gender and assessed under the social group ground, it may reinforce the view that only

³⁹⁰ Greatbatch 1989, p. 520.

³⁹¹ Spijkerboer 2000, p. 167.

men can be considered as “real refugees” and reproduce the distinction between “normal cases” versus “women’s cases”.³⁹² Hence, women continues to be regarded as a deviation from the male norm in refugee law.

We have also seen how there is a tendency in the interpretation of the persecution grounds to emphasise the cultural context refugee women come from. Furthermore, practices which women in non-Western countries are subjected to are especially highlighted. This type of interpretation implies that gender-related persecution is something that only occurs in the refugee producing non-Western countries. As a result, the Western refugee receiving States are presented as superior and as if gender-related persecution does not occur in the Western countries. This can be criticized from an anti-essentialist point of view, since they mean that this results in that women have to present themselves as vulnerable victims of “dysfunctional, exceptionally patriarchal cultures and states”³⁹³ and as “a cultural other”³⁹⁴ in order to be granted refugee status. They must fit in to the stereotypes that the refugee receiving states impose on them. According to the anti-essentialist, these arguments reproduce “the opposition of the West to the Rest”.³⁹⁵

In the interpretation of the 1951 Convention, the UNHCR shows a scepticism of the emphasis that has been given to the persecution ground “membership of a particular social group” in gender-related claims, which is in line with the concerns of the anti-essentialists. Furthermore, the fact that the persecution ground political opinion has received more attention in State practice answers to anti-essentialist recommendations.

Now, we turn to the question concerning how the obligations of the CEDAW Committee answer to and/or remain sensitive to the feminist critiques. As I have stated above, the obligation to add sex and/or gender as persecution grounds into the national refugee definition is in accordance with the recommendations of the early critics. They were in favour of adding an additional ground to the refugee definition in order to encompass the specific claims of refugee women. From an anti-essentialist perspective, this can be criticised since it may reinforce the view that the persecution grounds that are not “gendrified” are only applicable to men and that only men therefore are regarded as “real” refugees.

The Committee has obliged the contracting States to ensure that gender can be used as a factor in recognizing a social group within the meaning of the refugee definition, which was the ground that the human rights approach preferred to be used on gender-related claims.

The obligations of the CEDAW Committee also correspond to the concerns of postcolonial feminism and the anti-essentialists. The CEDAW Committee is critical of how women’s asylum claims are regularly classified under

³⁹² Spijkerboer 2000, p. 181.

³⁹³ Spijkerboer 2000, p. 169.

³⁹⁴ Spijkerboer 2000, p. 169.

³⁹⁵ Spijkerboer 2000, p. 181.

“membership of a particular social group”. Against this background, the Committee makes it clear that the States parties are in fact legally obliged under article 5 of CEDAW “to assess women’s claims to asylum without prejudice and stereotyped notions of women that are based on the inferiority or superiority of either sex” and obliges them to “take precautions not to create standards that are based on preconceived notions of gender-based violence and persecution”.³⁹⁶ Against this background, it can be claimed that there is a movement towards a more anti-essentialist thinking in the CEDAW Committee.

Now, moving along to the interpretation of the persecution grounds of the Swedish Aliens Act, we have seen how traditional, cultural and religious practices affecting women in developing countries and Third World countries were highlighted in the preparatory works.³⁹⁷ This answers to the human rights approach, which were in favour of emphasising the context, in particular the cultural context, where refugee women are subjected to persecution. However, as mentioned earlier, this type of reasoning can be criticised from an anti-essentialist perspective and from a postcolonial feminist perspective. By emphasising such examples of gender-related persecution in the interpretation of the persecution grounds, it implies that gender-related persecution only happens in the Third World and thereby demonises non-Western countries.

Now finally, to the last research question in this category. The approach of the Migration Court of Appeal to apply membership of a particular social group in cases involving gender-related persecution answers to the human right approach which considered that it was the most appropriate persecution ground to apply on gender-related claims. However, this approach is sensitive to the anti-essentialists critique. The anti-essentialists meant that this type of interpretation and application of the persecution grounds sustains the stereotype that a “real” refugee is male since it reinforces the view that the grounds that are not “gendrified” are reserved for male applicants.

To conclude, this thesis has shown how gender-related persecution of women can be considered within the scope of the persecution grounds. I have looked at what the approaches of two international instances and the approaches of the Swedish law and judicial application to encompass gender-related persecution have in common. We have seen that the greatest discrepancy is found in Swedish judicial application, since the Migration Court of Appeal only considers the ground “membership of a particular social group” and does not bring up the potential relevance of the other persecution grounds in cases involving gender-related persecution. As regards the feminist analysis of the interpretation and application of the persecution grounds, we have seen that the instruments mostly answer to the concerns and recommendations of the human rights approach. However, the emphasis that has been given to the ground “membership of a particular social group” in gender-related claims

³⁹⁶ General recommendation No. 32, para. 31

³⁹⁷ SOU 2004:31, p. 121 – 125.

has more and more been recognised as being problematic, which indicates that there is a movement towards the anti-essentialist critique.

7 Concluding Reflections

This thesis has examined what is at stake for refugee women, depending on how the law is interpreted, justified and applied. From a short term perspective, it could be considered to be effective to apply the human rights approach. By emphasizing for instance how women who refuse to wear the Islamic veil may risk being subjected to persecution and applying the persecution ground “membership of a particular social group” to such cases, it may facilitate short term opportunities for women from such States where this type of persecution is performed to be granted refugee status.

However, this type of reasoning may affect women’s long term opportunities of gaining refugee status. If only “membership of a particular social group” is applied to cases where women risk gender-related persecution, it hinders the development of the interpretation of the other persecution grounds and thereby limits the scope of the refugee definition. Furthermore, by using this type of interpretation, which demonises the countries refugee women come from, it results in that women asylum seekers must present themselves as powerless victims of “barbaric cultures” and fit into the stereotypes that the refugee receiving States impose on them. This approach can be found in MIG 2012:12, where it was discussed whether the applicants could be considered to be at risk of persecution since the parents had been able to protect them from FGM so far. Hence, the applicants must present themselves as completely defenceless when this type of reasoning is applied. The problem this creates is, as explained by Freedman, “that it fixes an opposition between ‘them’ and ‘us’, between ‘Western women’ and ‘Other women’, which might obscure the real structures of gender inequalities in different societies and the reasons for the persecutions that women suffer as a result”.³⁹⁸ It should be noted that persecution of women happens in every country in the world, and not only the countries refugee women come from. In the words of Catharine MacKinnon: “[t]here is no state we can point to and say, ‘This state effectively guarantees women’s human rights. There we are free and equal’.”³⁹⁹

³⁹⁸ Freedman 2012, p. 56.

³⁹⁹ MacKinnon 1994, p. 15.

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