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## Gender-related claims for asylum

### Committee Opinion<sup>1</sup>

Committee on Equal Opportunities for Women and Men

Rapporteur: Ms Carina HÄGG, Sweden

### A. Conclusions of the committee

1. The Committee on Equal Opportunities for Women and Men commends the thorough and well-presented report by Mr Zernovski ("the former Yugoslav Republic of Macedonia", ALDE) and supports the draft resolution and the draft recommendation adopted by the Committee on Migration, Refugees and Population.

2. The committee would, however, like to propose some amendments to the draft resolution and draft recommendation.

### B. Proposed amendments to the draft resolution and the draft recommendation

In the draft resolution:

#### *Amendment A (to the draft resolution)*

In the draft resolution, paragraph 8.1., replace the words "as a social group" with the following words:

*"in the notion of a 'particular social group' under the refugee definition set out in the 1951 Geneva Convention".*

#### *Amendment B (to the draft resolution)*

In the draft resolution, after paragraph 9.4., insert the following paragraph:

*"similarly, avoid that spouses and relatives are present during the asylum interview, and ensure the confidentiality of the asylum process if the victim of gender-based or other form of violence requests it or if the sensitivity of the case so requires, including by holding in camera hearings during the appeal process;"*

#### *Amendment C (to the draft resolution)*

In the draft resolution, at the end of paragraph 10.5., add the following words:

*"as well as the prevailing cultural and social conditions in the country and the possibilities to earn a living;"*

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1. Reference to committee: [Doc. 11679](#), Reference 3484 of 29 September 2008. Reporting committee: Committee on Migration, Refugees and Population. See [Doc. 12350](#). Opinion approved by the committee on 10 September 2010.



*Amendment D (to the draft resolution)*

In the draft resolution, replace paragraph 10.6. with the following paragraph:

*“ensure that claims for asylum on the grounds of gender-based violence are examined under the relevant procedures for acquiring refugee status under the 1951 Geneva Convention; however, if dismissed, it should still be possible to examine them under complementary forms of protection.”*

*Amendment E (to the draft resolution)*

In the draft resolution, after paragraph 10.6., insert the following paragraph:

*“consider indiscriminate sexual violence in the context of armed conflicts as a form of persecution liable to engage the 1951 Geneva Convention and, in any case, as sufficient grounds for granting a complementary form of protection.”*

*Amendment F (to the draft resolution)*

In the draft resolution, after paragraph 10.6., insert the following paragraph:

*“recognise cumulative discrimination as a form of persecution for the purposes of the 1951 Geneva Convention and, in any case, as sufficient grounds for granting a complementary form of protection.”*

*Amendment G (to the draft resolution)*

In the draft resolution, after paragraph 10.6., insert the following paragraph:

*“recognise that some forms of domestic violence can amount to persecution for the purposes of the 1951 Geneva Convention and/or for the granting a complementary form of protection, in particular when such violence attains a certain level of severity and when the authorities are unable or unwilling to protect the victim.”*

*Amendment H (to the draft resolution)*

In the draft resolution, after paragraph 11.2., insert the following paragraph:

*“victims of rape, torture and sexual violence, and ensure, in particular, that they are excluded from accelerated asylum procedures and that they are given access to appropriate social and psychological care.”*

In the draft recommendation:

*Amendment I (to the draft recommendation)*

In the draft recommendation, after paragraph 3.1., insert the following paragraph:

*“instruct the Ad hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) to ensure that gender-based violence (including domestic violence) and gender-related persecution are adequately taken into account in the future Council of Europe convention on preventing and combating violence against women and domestic violence;”*

## **C. Explanatory memorandum by Ms Hägg, rapporteur**

### *Introduction*

1. I would like to thank Mr Zernovski, rapporteur of the Committee on Migration, Refugees and Population, for his precise and well-researched report, which fully captures the legal complexities of gender-related claims for asylum. This report explains in detail the challenges of having this kind of claim properly assessed, namely due to:

- the inadequate understanding of gender-related persecution by the authorities involved in the asylum process;
- the persistence, in Europe, of asylum procedures which are not gender-sensitive.

2. In the present opinion, I would like to expand on some specific aspects of gender-related claims, which have been touched upon by Mr Zernovski.

*Lack of gender-disaggregated statistics*

3. For a long time, the need for detailed statistics on asylum applications and decisions has been recognised as a priority and recommended by different organisations, including the United Nations High Commissioner for Refugees (UNHCR) and the Parliamentary Assembly itself.<sup>2</sup>

4. However, not all Council of Europe member states publish gender-disaggregated statistics on asylum applications, including important asylum countries such as Italy and the Netherlands. Even fewer countries produce gender-disaggregated statistics on the outcome of asylum claims.<sup>3</sup>

5. I agree with the Committee on Migration, Refugees and Population that Council of Europe member states should be asked to publish gender-disaggregated statistics (paragraph 13.4 of the draft resolution): without this data, it is not possible to monitor progress towards meeting the needs of victims of gender-related persecution; at the same time, whether or not a state produces gender-differentiated statistics is a preliminary indication of its sensitivity to gender issues in the context of asylum.

6. If the quantitative information about gender-related claims for asylum is poor, qualitative information is virtually absent: there is no official, systematic and accessible information on whether special safeguards are implemented during the procedure (for instance, the availability of same-sex interpreters, interviewers, etc.), on the form of persecution being at the origin of the claim, on the grounds for dismissing or recognising the claim, etc.

*Gender-related claims for asylum should be examined under the 1951 Geneva Convention, and not automatically referred to complementary forms of protection*

7. Despite this lack of data, it is well known that, in a number of Council of Europe member states, gender-related claims for asylum are treated as claims for complementary protection rather than refugee status.

8. This happens, in particular, in those countries which grant complementary forms of protection to victims of human rights violations, for instance under Article 3 of the European Convention on Human Rights (prohibition of torture and inhuman and degrading treatment or punishment) or other international human rights instruments.

9. For example, according to the Swedish Gender Guidelines, which are directed to all asylum decision makers, “gender” does not fall under the category of “particular social group” under the 1951 Geneva Convention Relating to the Status of Refugees (henceforth, the “1951 Geneva Convention”) and asylum seekers with well-founded gender-related claims can only be provided with complementary protection.

10. In my opinion, this automatic exclusion from refugee status is gender discrimination in the context of the asylum procedure and should be discontinued: although gender-based persecution is, without any doubt, a violation of human rights, this violation can be inflicted upon certain individuals as members of a social group (women, young girls, young men and boys, homosexual or transgender persons); in addition, these human rights violations may be inflicted on several grounds, including others listed in the refugee definition.<sup>4</sup>

11. Council of Europe member states should, therefore, in the first place assess gender-related claims under the 1951 Geneva Convention, and only if the claim is dismissed on its merits, examine it under the angle of complementary protection.

12. The issue is far from being a purely technical one, as the rights stemming from refugee status are more far-reaching and the relevant protection more durable than those stemming from other statuses. I believe that this matter should be made clearer in the draft resolution (see Amendment D).

*Cumulative discrimination can amount to persecution*

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2. [Recommendation 1374 \(1998\)](#) on the situation of refugee women in Europe, paragraph 2.

3. UNHCR, “Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe”, 2004.

4. The 1951 Refugee Convention defines a refugee as a person who “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”.

13. Afghanistan, Iraq, Somalia, Democratic Republic of Congo, Myanmar, Colombia, Sudan ...<sup>5</sup> These are, in this order, the main countries of origin of refugees in the world today. These are also countries where, in their everyday life, women face serious, widespread and endemic discrimination in the enjoyment of basic rights, against which the state is unable or unwilling to provide protection and redress.

14. Unfortunately, only a few Council of Europe member states, such as Sweden and the United Kingdom, explicitly recognise discrimination as potentially constituting persecution, while the great majority of European countries tend to have a more restrictive position.

15. In my opinion, to be fully consistent with the values to which they have vowed to adhere by becoming members of the Organisation, the member states of the Council of Europe should be at the forefront in upholding the universality of human rights, against any form of cultural or religious relativism. This requires that they accept that:

- cumulative discrimination based on gender is such a serious human rights violation as to justify the granting of a form of international protection;
- in some cases, cumulative discrimination based on gender can reach such a threshold of severity as to qualify as persecution under the 1951 Geneva Convention;
- similarly, the failure of a state to provide protection to certain individuals on gender grounds can be in itself a form of persecution.

16. My view is also supported by the UNHCR Guidelines on Gender-Related Persecution,<sup>6</sup> which state:

*“14. While it is generally agreed that ‘mere’ discrimination may not, in the normal course, amount to persecution in and of itself, a pattern of discrimination or less favourable treatment could, on cumulative grounds, amount to persecution and warrant international protection. It would, for instance, amount to persecution if measures of discrimination lead to consequences of a substantially prejudicial nature for the person concerned, for example, serious restrictions on the right to earn one’s livelihood, the right to practice one’s religion, or access to available educational facilities.*

*15. Significant to gender-related claims is also an analysis of forms of discrimination by the state in failing to extend protection to individuals against certain types of harm. If the state, as a matter of policy or practice, does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution. Particular cases of domestic violence, or of abuse for reasons of one’s differing sexual orientation, could, for example, be analysed in this context.”*

17. I would, therefore, like to propose an amendment to the draft resolution to encourage Council of Europe member states to take a more progressive stand on the issue of cumulative discrimination (see Amendment F).

#### *Unfeasibility of internal relocation*

18. As the Committee on Migration, Refugees and Population recommends in its draft resolution, Council of Europe member states should “restrict the use of internal flight alternatives for asylum seekers who invoke gender-related claims, taking carefully into account the availability of state protection in the area of relocation and the safety of the route” (paragraph 10.5.).

19. However, given the pattern of discrimination on gender grounds and the social and cultural conditions prevailing in most countries of origin, I think that Council of Europe member states should also take into account the practical feasibility for women and other victims of gender-violence to be able to start a new life and earn a living in a different part of the country (see Amendment C).

#### *Generalised violence in the context of armed conflicts*

20. In his report, Mr Zernovski mentions violence against women as a means of warfare (paragraphs 28 and 29). Regrettably, claims for international protection from women who have been subjected to sexual violence in the context of armed conflicts are often dismissed under the 1951 Geneva Convention, on the grounds that violence was indiscriminate (and therefore not targeting specifically the applicant) and/or due to lack of convention grounds.

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5. . UNHCR 2009 global statistics.

6. . UNHCR, “Guidelines on international protection: gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees”, 2002.

21. I cannot agree with this reasoning. In my opinion, Council of Europe member states should recognise the political nature of the systematic sexual violence in the context of armed conflicts, which is specifically directed to women as the mothers of future generations and is intended to leave durable scars on the victims as well as on the entire community.

22. Women and young girls who have fled their countries of origin and seek protection in Europe after having suffered such an experience should be given a chance to have their cases examined under the 1951 Geneva Convention in the first place and, if the case is dismissed, under a complementary form of protection.

23. I think that also this matter should be mentioned in the draft resolution (see Amendment E).

#### *Rape as torture*

24. In his report, Mr Zernovski has developed well the issue of gender-specific violence, which is at the origin of a large proportion of gender-based asylum claims. I will not duplicate the analysis that he has already conducted but I think that it should be recalled that, under the case law of the European Court of Human Rights, rape can be a form of torture<sup>7</sup> and that, in any case, a positive obligation of investigation and prosecution of this criminal act falls on the authorities.<sup>8</sup>

25. I believe that the draft resolution should make it clear that victims of rape and sexual violence should be entitled to all the range of procedural safeguards (such as the exclusion from accelerated procedures, as already recommended by the Assembly)<sup>9</sup> and the social and psychological assistance that Council of Europe member states should make available for victims of torture (see Amendment H).

#### *Domestic violence*

26. I would like to recommend that domestic violence is also specifically mentioned in the context of gender-related claims for asylum. In some circumstances – in particular when their country of origin is unable or unwilling to protect them – victims of domestic violence should be able to have access to the asylum procedures and be granted refugee status or, alternatively, a complementary form of protection. I also consider it very important that the relevance of domestic violence in the context of the asylum procedures is explicitly taken into account in the negotiations of the Ad hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (CAHVIO) and appears in the text of the future Council of Europe convention on preventing and combating violence against women and domestic violence.<sup>10</sup> Therefore, I would like to suggest an amendment to the draft resolution (see Amendment G) and to the draft recommendation (see Amendment I) of the Committee on Migration, Refugees and Population.

#### *Conclusions*

27. The policy and practice of Council of Europe member states in dealing with gender-related claims for asylum varies, with at the one end of the spectrum countries without a gender-sensitive approach and, at the other end, countries such as the United Kingdom which publishes gender-disaggregated statistics on asylum applications and decisions, has produced guidelines on gender issues for interviewing officers and decision makers, recognises women as members of a social group under the 1951 Geneva Convention and recognises sexual violence as persecution.

28. I believe that the merits of the draft resolution adopted by the Committee on Migration, Refugees and Population are manifold:

- it asks Council of Europe member states to acknowledge the specificity of gender-related claims;
- it aims at a harmonised approach to gender-related claims for asylum in Council of Europe member states;
- it promotes harmonisation of a high standard.

29. I encourage the members of the Assembly to support the draft resolution and the draft recommendation, as a valuable contribution to ensuring that women's rights are recognised as human rights and are fully protected.

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7. . European Court of Human Rights, *Aydin v. Turkey*, Application No. 29289/95, judgment of 25 September 1997.

8. . European Court of Human Rights, *M.C. v. Bulgaria*, Application No. 39272/98, judgment of 4 December 2003.

9. . [Resolution 1471 \(2005\)](#) on accelerated asylum procedures in Council of Europe member states.

10. . See [www.coe.int/violence](http://www.coe.int/violence).