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### **Refugee women are (not) welcome**

Critical analysis and possible solutions to gender-based human rights violation in refugee camps with a case study on the impact of the EU-Turkey agreement on women and girls' rights

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## INTRODUCTION

Feminist critics to international law underline how International Human Rights Law has ignored the specific concerns of women for a long time. The international law remained inattentive to the difficulties of women due to the lack of gender equality in law, but in the last decades, gender sensitivity in asylum adjudication, and studies regarding gender-based persecution have largely evolved, and have prompted the development of national and international jurisprudence in this area. These developments have been accompanied and supported by the progressive recognition that in some societies women may be persecuted on the base of their sex, or because of their non-compliance with traditional and social norms. But the discrimination that rises from historical differential in power relations still generates inequalities among men and women, which are more likely to be exacerbated in critical contexts.

The aim of this research is to study the different violations of women and girls' human rights in critical migration contexts (and in particular in refugee camps), to evaluate the existing legal instrument should safeguard them, and to analyze possible new solutions to this problem. The structure of the research reflects three different approaches to the issue of gender-based human rights violation in migration and refugee camps. A first one is the historical reconstruction of the evolution of human rights protection mechanism as encompassing a gendered approach. This part will use the relevant international acts and legislative materials, as well as an analysis of the literature on the topic, statistics, and several international reports. A second approach is given by the analysis of a case study, which is fundamental to gain an effective perspective on the topic. In this case, reports will be analysed in order to create a complete picture of the situation studied. A further contribution will be given by the analysis of the European Law on the topic. Finally, I will investigate possible solutions to severe violations of women and girls rights in camps on the base of the existing juridical and legal tools. This approach will be based on case-law jurisprudential, as I will analyse the admissibility of women's claims under the international courts on the base of already adjudicated cases.

In chapter one, I will discuss the existing mechanisms that protect women and girls rights in migration context and the reasons why they are necessary. This choice is motivated by the need to exemplify why women and girls are in need of a specific protection. While human rights are considered to be universal a) women access to these rights is often limited by historical, cultural and social differential in power relations; b) women necessary have gender specific needs; c) gender inequalities are exacerbated in critical contexts, including migration ones. In order to analyse the developments in women's protection mechanism and give them a justification, I will first frame the evolution of human rights in general: from the establishment of the global treaties on human rights within the context of the United Nations, to the production of women-related studies, treaties,

conventions, and legislations. Namely I will introduce the idea of a switch from the nominal gender-neutrality of human rights, to the introduction of gender-specific concerns such as gender discrimination. I will then specifically address the evolution of international refugee regimes from the 1950s to present time, and I will place specific attention to the issue of gender-based asylum claims. The main theme marking this historical evolution in human rights protection as well as in international asylum law, is the progressive recognition of the disproportional access to human rights historically enjoyed by women, so that gender-neutral provision stating equality have resulted to be insufficient to guarantee human rights for men and women in the same manner. This evolution in human rights law and international law can be explained only in vision of the recognition of gender-specific experience of women. In fact, women face specific forms of gender-based persecutions, experience some threats at a higher rate than their male counter part, have a disproportional access to resources, and are more vulnerable in critical contexts. With regards to this exposure to gender-specific risks, I will argue that whilst a gender protection under national and international it is necessary and justifiable, women cannot be considered vulnerable by definition, but due to the disproportional power relations in society. This will then require a critic of the victimisation of women, especially migration context, where the image of women has been largely used to publicize awareness campaign on refugees. While this approach has been useful to activate support for specific protection measures for women, it risk to generalize and depoliticize refugee women experience, as well to underestimate intersectionality, and further risks connected with ethnicity, disability, and age. The experience of refugees and asylum seeking women is often different from those of men due to different reasons that range from protection problems related to their gender, to cultural and socioeconomic position, to legal status, to discriminatory outcomes at level of integration in post-migration stages. For that reason I will consider women experience in migration, on the base of the distinction of Grieco and Boyd pre-migration stages, transit, and post-migration stages in their study on international migration theory.

A specific chapter will be focused on gender issue in refugee camps. I will first frame how cultural and structural factors are combined together in the social fabric of camps. In fact, the social and economic role of women in their sending society is often reflected in the organizational structure of the camps. On the other hand, the organizational and material structure of the camps may affect women refugees' freedom and safety in many ways. Camps planning and social power structure are interrelated elements that shape the experience of women in displacement situations. I will then address three specific fields: healthcare, including reproductive rights, female genital mutilation, maternal care, and the need of female examiners; physical safety, including risks of sexual, domestic, and gender-based violence; access to education. The results of this research will be then tested in a case study: the EU-Turkey Agreement of March 2016.

Among the cases and reported situation of refugee camps, I decided to focus on the situation created by the EU-Turkey deal for several reasons. First of, it allows to appreciate the subtitle connection between “refuge camps” and “detention camps”, so that the whole situation of migrant and asylum seekers involved in the deal appear to be characterized by sever violation of human rights. Furthermore, the case is of great interest for a) its contemporaneity, so that all the phases of the evolution of the situation can be closely monitored and evaluated; b) its replicability, as it is already possible to foresee other deals of externalisation of migration controls which would replicate the same infringement of human rights in reception/detention camps. To analyse the case, I will first introduce the context of the so-called 2015 migration crisis, connected with the Syrian civil war, and the legal framework of the European Union asylum procedures. Then I will briefly address the controversies connected with the legal status of the agreement as well as its implication under the principles of non-refoulement and identification of safe country. The chapter will then focus on the implementation of the agreement in Turkey and Greece, on the base of the reports already available. Camps Turkey are arbitrary used as detention camps for migrants and refugees who become beggars, where women have little or no access to healthcare and legal support. Moreover, women suffer specific forms of harsh treatment including: sexual and gender based violence often committed by officials; forces marriage and sexual exploitation by Turkish citizens, including alarming rates of abuses on girls and children. Those forms of violence are to be considered even more dangerous as the conditions created by the law lead to the dehumanization of female immigrants and refugees as well as to the acceptance of this “normalized” violence as part of the social order. Findings in Greece are not less disturbing. The hotspots created as temporary centres for registration and personal data collection, have been largely converted into refugee camps with high rates of SGBV and lack of adequate structural planning, including separate facilities for men and women. The cases of sexual and gender based violence and access to healthcare and reproductive care will be further analysed. Similar as well as possible future European agreement concerning externalization of migration and its implication will be further analysed.

The final chapter will focus on jurisprudential instruments and legal tools that would address gender-based violation of human rights in camps, as well as enhance a gender-sensitive approach to asylum policies. In order to do it so, this chapter will firstly analyse the side of the international organizations and NGOs, namely what are the limits of the current actions and what should be done according to their reports and future strategies. Then the system of the international courts will be analysed, as well as other quasi-judicial and non-judicial tools including: human rights committees and women’s tribunals. Finally I will consider the Integrated Impact Assessment as an instrument of formal evaluation of the current policies in order to foresee their effectiveness in tacking GBV, sexual violence, and limitation to the access of food, health, and education in camps



## Chapter 1

### **Women's & girls' rights protection mechanism in migration contexts**

Contents: 1. Gender and evolving refugee regimes; The evolution of human rights: the introduction of women rights' protection mechanisms; From the beginning of visibility for female refugees to mainstreaming diversity; The evolution of asylum law: the issue of gender-based asylum claims 2. Women and vulnerability in critical context: a general overview; why is a gendered protection necessary?; the risks of victimising women and ignore diversity 3.

Women's rights in migration: gender sensitivity and women at risk; Pre-migration stage: factors associated with the sending societies; Exposure to violence during transit; Post-migration stages: cultural adjustment and the interface to the receiving societies; Women and vulnerability in critical context: a general overview; Women's rights in migration: gender sensitivity and women at risk

#### **1. Gender and evolving refugee regimes**

The evolution of human rights in international law prompted the production of new legislation to protect specific rights or specific categories. In this context, specific provisions and actions have been undertaken in order to protect women rights and women in critical contexts such as forced migration. This first chapter aims to briefly clarify the evolution of the international debate on the topic, and specifically on the refugee regimes, with a focus on the United Nations and the European Union legislation and on other regional bodies' legal instrument for the protection of women. The first section will focus on the evolution of human rights in general: from the establishment of the global treaties on human rights within the context of the United Nations, to the production of women-related studies, treaties, conventions, and legislations. Namely I will introduce the idea of a progressive switch from a nominal gender-neutral approach to human rights to the introduction of gender-specific priorities starting from the 1980s. In the second section I will specifically address the evolution of international refugee regimes: the international debate on refugees started in the 1950s, while in the 1980s women refugees started to be given specific attention, and greatly influenced the international legal productions and policies in the next two decades. Finally, the last section briefly addresses the issue of gender-based asylum claims as product of the evolution of women rights protection in migration context. In fact, the evolutions in international human rights law and asylum law paved the way to the introduction of gender-based asylum claims, but there are still no clear regulations and no international standards on the topic.



## **The evolution of human rights: the introduction of women rights' protection mechanisms**

As for human rights, the establishment of women protection in international and national law has gone through a long evolution. Within the context of international law, it is possible to recognise a switch from a gender-neutral approach to human rights to the introduction of mechanisms aiming to safeguard women as specific category: until the 1980s the commitment to gender equality was expressed through general provisions included in international legislation, while then the international community started producing materials partially and then entirely focused on women rights protection. The mainstreaming of gender issues in the international debate can be explained through the proliferation of studies on the condition of women worldwide, and the recognition of the failure of certain gender-neutral approaches in encompassing women needs.

Human rights are a relatively new aspect of national and international law: even if the recognition of individual rights has ancient origins<sup>1</sup>, human rights started to be generalized in global and regional systems of protection in the aftermath of the Second World War (Shelton, 2007. P.27). In 1945 the Charter of the United Nations set out the need “to reaffirm faith in fundamental human rights”<sup>2</sup>, followed by the 1948 Universal Declaration of Human Rights and International Bill of Human Rights. Since the 1940s, the United Nations has adopted more than 20 principal treaties further elaborating human rights and shaped by specific priorities: initially came the proscription of genocide<sup>3</sup> and the protection for refugees and stateless persons in Europe<sup>4</sup>, facing the consequences of the Second World War. In the 1960s the experience of apartheid and former colonial countries' independence movements greatly influenced the establishment of treaties to eliminate racial discrimination<sup>5</sup>. In the 1970s and 1980s, civil, political, social, economic, and cultural rights gained more attention<sup>6</sup>, as well as the prohibition of torture<sup>7</sup>. Migrant workers and children were given

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<sup>1</sup> Examples Of Established Individual Rights Are The Magna Carta (1215), The English Bill Of Rights (1689), The French Declaration On The Rights Of Man And Citizen (1789), And The US Constitution And European Constitution Establishing Specific Citizens' Rights And So On.

<sup>2</sup> United Nations, Charter of the United Nations, 24 October 1945, 1 UNTS XVI, available at: <http://www.refworld.org/docid/3ae6b3930.htm>

<sup>3</sup> UN General Assembly, Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948, United Nations, Treaty Series, vol. 78, p. 277, available at: <http://www.refworld.org/docid/3ae6b3ac0.html>

<sup>4</sup> UN General Assembly, Convention on the Reduction of Statelessness, 30 August 1961, United Nations, Treaty Series, vol. 989, p. 175, available at: <http://www.refworld.org/docid/3ae6b39620.html>

<sup>5</sup> UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195, available at: <http://www.refworld.org/docid/3ae6b3940.html>

<sup>6</sup> The UN Endorsed The International Covenants On Civil And Political Rights And Economic, Social And Cultural Rights In 1966, But It Took Effect In 1976. UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>

<sup>7</sup> 1987 is the year of the UN Convention Against Torture, The Inter-American Convention To Prevent And Punish

treaty protection in 1989 and 1990<sup>8</sup>. The 2000s saw the introduction of new elements in the human rights debate, such as human rights and climate change<sup>9</sup>, rights of disabled persons<sup>10</sup>, and cultural diversity<sup>11</sup>. With regard to the introduction of gender-specific rights protection mechanisms, it was only from the late 1970s that treaties were adopted to protect women against discrimination, while only recent treaties cover other issues such as gender-based violence. Both in the UN and the EU, the founding treaties prohibit discrimination based on sex (inter alia), and aim to ensure the equal right of men and women<sup>12</sup>, but from the late 1970s national and international bodies have intervened to build women's rights protection mechanisms, mainstream gender equality, and to recognise forms of gender-specific issues or discriminations. As other categories, women had a disproportional access to human rights, so that the gender-neutrality of human rights law appeared to be only superficial as it has to interact with gendered state structures and discriminatory national laws/legal systems (Dorothy & Beasley, 1993, p.33-43). Feminist critics to international law further underlined how International human rights law ignored the specific concerns of women for a long time, remained inattentive to the difficulties of women due to the lack of gender equality in law (Freeman, 2007, p.413). Discrimination against women has been prohibited since 1979 United Nations Convention on the Elimination of Discrimination against Women. The CEDAW recognised that women still did not enjoy equal rights with men, despite the existence of other instruments (preamble), it allowed states to intake positive actions and temporary special measures against

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Torture, And The European Convention For The Prevention Of Torture And Inhuman Or Degrading Treatment

<sup>8</sup> In 1989 The Convention On The Rights Of The Child Was Established To Protect The Economic, Social And Civil Rights Of Children; And In 1990 The African Charter On The Rights And Welfare Of The Child. The UN International Convention On The Protection Of The Rights Of All Migrant Workers And Members Of Their Families Was Approved In December 1990.

<sup>9</sup>The UN produced resolution and studies on the topic from 2008 on. An example is the Resolution 16/11 Adopted By The Human Rights Council On 12th Of April 2011 Entitled "Human Rights And The Environment". Most Of UN Works On The Field Are Available At:

<http://www.ohchr.org/EN/Issues/Hrandclimatechange/Pages/Hrcaction.aspx>

<sup>10</sup> UN General Assembly, Convention on the Rights of Persons with Disabilities : resolution / adopted by the General Assembly, 24 January 2007, A/RES/61/106, available at: <http://www.refworld.org/docid/45f973632.html> And 2001 Inter-American Convention On The Elimination Of All Forms Of Discrimination Against Persons With Disabilities.

<sup>11</sup> UN Educational, Scientific and Cultural Organisation (UNESCO), UNESCO Universal Declaration on Cultural Diversity, 2 November 2001, available at: <http://www.refworld.org/docid/435cbcd64.html>;

<sup>12</sup> For Instance:

1945 Charter Of The United Nations Article 1 (Non-Discrimination Principle), Articles 13 (Mandate Of The General Assembly) And 55 (Promotion Of Universal Human Rights);

1948-1966 International Bill Of Human Rights, Articles 2 And 3;

1948 Universal Declaration Of Human Rights Preamble (Equality Between Man And Women);

1953 European Convention On Human Rights And Fundamental Freedoms Article 14 (Prohibition Of Discrimination);

Treaty On The Functioning Of The European Union Article 8 (Eliminate Inequalities And Promote Equality Between Men And Women) And Article 10 (Combat Discrimination), Article 157 (Former Article 119 EEC, Former Article 141 EC) And Treaty On The European Union Article 2 (Non-Discrimination) And 3 (Equality)

2000 Charter Of Fundamental Rights Of The European Union Articles 21 (Equality Between Men And Women) And 23 (Prohibition Of Discrimination);

gender discrimination (Art 4), and it acknowledged the existence of social, cultural and traditional patterns that perpetuate harmful gender stereotypes (Art. 5)<sup>13</sup>. On the basis of the Convention, a Committee on the Elimination of Discrimination Against Women was established in 1982. Political commitment to women rights led to the establishment of international treaties, conventions, and conferences, and to the creation of specialized committees, bodies, and tribunals. The United Nations Commission on the Status of Women promoted most of the UN initiatives in the fields of women rights. For instance, it promoted several World Conferences on Women: the first one in New Mexico City in 1975 (which was also International Women's Year as established by the UN), produced the World Plan of Action and designed the years between 1975–1985 as the United Nations Decade for Women; the second one was held in 1980 in Copenhagen; the third one in Nairobi; the fourth one in Beijing in 1995 that resulted in a global Platform for Action for women's equality, empowerment and justice. The same year The International Conference on Population and Development in Cairo creates a Program of Action, which goals include improving worldwide gender equality, reproductive health, birth control and family planning, women's health, as well as immigration and education of women<sup>14</sup>. Since the 1980s the European Union produced more than 15 directives addressing gender equality and protection of women, and Member States have established national equality bodies<sup>15</sup>. The 1990s witness the affirmation of a general expansion of studies and policies on women's rights, which led to gender mainstreaming becoming an international recognized strategy for achieving gender equality<sup>16</sup>. In the 21th century, women rights remain an important focus for the international community. The Security Council as well has adopted a series of resolutions on women, peace and security such as Resolution 1325 of 2000 underlines the need for all parties in conflicts to protect women and girls from gender-based violence in the context of armed conflict, and to recognise the need to actively encompass in peace building processes and systems of conflicts prevention and resolution<sup>17</sup>. The Human Rights Council was established in 2006 and regularly started holding special panels on women's rights and the integration of a gender perspective. In 2015 the UN launched the Sustainable Development Goals, including a gender equality goal and targets about ending violence against women and ensuring

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<sup>13</sup> 1980 United Nations Convention On The Elimination Of Discrimination Against Women (CEDAW) Available At <http://www.ohchr.org/Documents/Professionalinterest/Cedaw.Pdf>

<sup>14</sup> UN Population Fund (UNFPA), Report of the International Conference on Population and Development, Cairo, 5-13 September 1994, 1995, A/CONF.171/13/Rev.1, available at: <http://www.refworld.org/docid/4a54bc080.html>.

<sup>15</sup> Such As: Directive 2010/13; Directive 2010/18; Directive 2006/54; Directive 2004/113; Directive 97/80; Directive 96/34; Directive 92/85; Directive 79/7. Directives Are Accessible At: [http://ec.europa.eu/justice/gender-equality/law/index\\_en.htm](http://ec.europa.eu/justice/gender-equality/law/index_en.htm)

<sup>16</sup> Inter-Agency Standing Committee, Women, Girls, Boys and Men: Different Needs - Equal Opportunities. IASC Gender Handbook in Humanitarian Action, December 2006, available at: <http://www.refworld.org/docid/46978c842.html>

<sup>17</sup> UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325 (2000), available at: <http://www.refworld.org/docid/3b00f4672e.html>

equal participation<sup>18</sup>. In addition, the rights of particular groups of women such as elder women, women from ethnic minority or women with disabilities have been addressed in some international documents<sup>19</sup>. Other regional human rights treaties, too, started to include provisions pertaining to women's human rights: for instance the 1994 the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women; the 2003 Charter's Protocol on the Rights of Women in Africa; the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (also know as Istanbul Convention). Furthermore, many regional political organizations are committed to promote and protect women's human rights: the Association of Southeast Asian Nations, the South Asian Association for Regional Cooperation, the Economic Community of West African States and the Southern African Development Community.

### **From the beginning of visibility for female refugees to mainstreaming diversity**

For women in migratory contexts, formal recognition of gender-specific needs in international law systems begun in the 1980s. After the establishment of an international framework dealing with asylum regime, it is possible to recognise three main trends in the evolution of the international debate on this issue: in the 1980s women were recognised as target group in international migration policies; in the 1990s migration policies have been influenced by the progress of the debate on gender equality; from the early 2000s the international community has reviewed its approach to gender mainstreaming, and introduced an additional focus on age and diversity.

Until 1980s, little research on forced migration focused on gender issues (Martin, 2010, p.18). For a long time there was no consideration for gender issues in the international discourse refugees and asylum law, partially due to circumstances surrounding the drafting and adoption of the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol. In fact, the Convention remains the major international convention regulating the protection of refugees<sup>20</sup>, and it was mostly aimed at dealing with the cases of people arriving in the West from one of the Soviet bloc countries

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<sup>18</sup> UN High Commissioner for Refugees (UNHCR), Sustainable Development Goal 4 and Refugee Education, July 2015, available at: <http://www.refworld.org/docid/59c368ed4.html>

<sup>19</sup> Examples Are: The International Plans Of Action On Ageing (Vienna, 1982 And Madrid, 2002), The Durban Declaration And Programme Of Action (2001) And The World Programme Of Action Concerning Disabled Persons (1982).

<sup>20</sup> The 1951 Convention is the only universal treaty that provides for the protection of refugees; in those countries in which the convention has not been ratified and adopted into national legislation as the basis of asylum law, the unhr uses the convention as the basis for deciding refugee claims. The Organization Of African Unity (OAU) Convention On The Specific Aspects Of Refugee Problems In Africa (Addis Ababa, September 1969), And The Cartagena Declaration On Refugees (Cartagena, 1984) provide some elements of regional refugee definition that are applicable to situations in Africa and South America, respectively.

in a period when gender equality and women's rights were far from the centre stage of politics, and particularly of international politics (Freedman, 2011, p. 589). Other international organization developed a similar gender-neutral framework in the field of asylum and migration: in 1969 the Organization of African Unity (OAU) adopted the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention)<sup>21</sup>. Most African States are parties to the OAU Convention<sup>22</sup>. In 1984 the Cartagena Declaration on Refugees expands the definition of protected refugees in the Latin American region<sup>23</sup>, and has been endorsed by the General Assembly of the Organization of American State. Since its first establishment, the refugee regime was not static in dealing with displacement, but it evolved to respond to different kind of needs caused by Cold War, decolonisation movements, and civil and super-power conflicts. This adaptability allowed the international systems to encompass forms of gender-based persecution and progressively establish mechanisms to recognise gender-related issue in such contexts and deal with them (Martin, 2010, p.21).

From 1980 to 1990 it is possible to recognise the beginning of visibility for female refugees, traduced in the first attempts to introduce gender issues in asylum policies, and the creation of Internal Guidelines and a specific Office to address the issue. A first step in this direction was made in 1975, the year of the first World Conference on Women held in Mexico City, when the UN General Assembly proclaimed 1975–1985 as the UN Decade for Women: Equality, Development, and Peace<sup>24</sup>. This paved the way for the Copenhagen Women World Conference in July 1980 (the half decade meeting), that introduced the idea of a gender-specific a focus on refugees regimes: in its 1980 report for the World Conference of the United Nations Decade for Women, the UNHCR explained that “in the past, women have primarily been assisted as part of the group; only in certain cases were special provisions made to meet their particular needs<sup>25</sup>” and recognised the need for a “specifically targeted approach if women are to receive fair and equal treatment<sup>26</sup>” which called for specific measures designed to satisfy their “special needs<sup>27</sup>”. The meeting produced some general recommendations on the States' responsibility to protect and assists refugees, but it also specifically

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<sup>21</sup> OAU Convention Governing The Specific Aspects Of Refugee Problems In Africa, OAU Doc. CAB/LEG/24.3, 10 Sep. 1969 (Entry Into Force: 20 Jun. 1974) Available At <http://www.unhcr.org/about-us/background/45dc1a682/Oau-Convention-Governing-Specific-Aspects-Refugee-Problems-Africa-Adopted.Html> in the convention the refuge is also always referred to with male pronouns (he/il). Further, article iv containing the non discriminatory provisions, make reference to the prohibition of discrimination of the base of “race, religion, nationality, membership of a particular social group or political opinions”

<sup>22</sup> There Are Currently 45 States Parties To The OAU Convention

<sup>23</sup> Regional Refugee Instruments & Related, Cartagena Declaration on Refugees, Colloquium on the International Protection of Refugees in Central America, Mexico and Panama, 22 November 1984, available at: <http://www.refworld.org/docid/3ae6b36ec.html>

<sup>24</sup> Conference Available At <http://www.un.org/development/devagenda/gender.shtml>

<sup>25</sup> UNHCR, ‘The Situation Of Women Refugees The World Over’, July 1980, p.2.

<sup>26</sup> Ibidem

<sup>27</sup> Ibidem

addressed the issues of abused women and children, and underlined the need to establish programmes for dealing with displaced and refugee women's needs in the areas of health, domestic violence, family planning, education, employment, resettlement, and family reunification<sup>28</sup>. For instance, the resolution and decisions adopted by the Conference recognised that: “displaced and refugee women suffer more radical changes in roles and status than man; and “refugee women and girls are subjected to physical abuses”<sup>29</sup>. The Conference pointed out as well the need to actively ensure gender equality in the application of the international legislation regulating the condition of refugees: “the principles of the UN Convention and Protocol on Refugees should be applied without regard to sex (as well as race, age, religion or country of origin)”<sup>30</sup>. In the same year, the world assisted to the so-called Indochinese refugee crisis: after the establishment of a Communist regime in Indochina in 1975, out of a total Indochinese population of 56 million, more than 3 million of people flee the country due to the proliferation of summary executions, “re-education camps” and New Economic Zones, oppression of presumed “class enemies”, and as a consequence of the ethnic cleansing of the large Chinese minority and the Cambodian genocide<sup>31</sup>. One of the first signs of issues of gender in refugee crises becoming visible was during this period due to the plight of the “boat people” reported worldwide: women were particularly vulnerable on the boats, as they faced higher risk of sexual violence and rape if the boats were attacked by pirates; further young girls on were often used as exchange in return for the lives of the rest of the passengers on board of captured boats (Freedman, 2011, p. 595). These kinds of reports showed the vulnerability of women and girls to rape and sexual violence, putting pressure on the UN in providing specific protection measures. In this occasion the UNHCR drew attention on other women-specific issues in migratory context during the 1980 Workshop on Indochinese Refugees, recognising: “the double burdens places on women refugees in maintaining their traditional roles of nurturing and transmitting culture to their families while learning the skills necessary to contribute to their well-being in a new setting”<sup>32</sup>; “the need to outreach women unwilling or unable to attending regular orientation and training programmes”<sup>33</sup>; “the difficult of providing appropriate health and family planning services to women reluctant to deal with foreign, largely male, medical personnel, even when the translators

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<sup>28</sup>The World Conference Of The United Nations Decade For Women (1976-1985), Meeting In Copenhagen. Report Available At <http://www.un.org/womenwatch/daw/beijing/otherconferences/copenhagen/copenhagen%20full%20optimized.pdf>

<sup>29</sup> Ibidem

<sup>30</sup> Ibidem

<sup>31</sup> UNHCR State Of The World's Refugees, 2000 United Nations High Commissioner For Refugees, Pp. 81, 102;

<sup>32</sup> UNHCR Workshop On Integration Of Refugees From Indochina In Countries Of Resettlement. Geneva, October 30, 1980;

<sup>33</sup> Ibidem



are available”<sup>34</sup>; “the importance of special support and counselling for refugee women who had suffered traumatic experiences [...], especially for elderly and disable women, and for women heads of household”<sup>35</sup>. In 1981 the Intergovernmental Committee for Migration (former Intergovernmental Committee for European Migration, then International Organization for Migration in 1989) held a Seminar on the Adaptation and Integration of Refugee and Migrant women that is relevant for the recognition of women’s situation in refugee camps and first asylum areas as it gave visibility to female refugees need in a range of fields such as access to training and resources and specific medical assistance<sup>36</sup>. The Committee stated as general principle that “refugee women should be included in the design, management and implementation of assistance programmes, and support and specialized training should be provided to encourage self-help among refugee women”<sup>37</sup> and furthermore, that “the equal access of women to basic necessities in first asylum areas – food, shelter, protection, medical services, may require special services”<sup>38</sup>. Issues related with women health also emerged: “[...] in recognition of cultural and language barriers in providing medical services to refugee women, medical personnel should include women doctors, nurses, midwives and family planners with the same cultural background. Medical services should make available voluntary family planning and counselling and methods, and maternal child-care services”<sup>39</sup>. On the issue of equal treatment between men and women, the Committee stated that “efforts should be made to ensure that access to general counselling services in first asylum areas in not only nominally equal but effectively equal for women and man; when refugees are settled in the region of first asylum, women refugees should be given equal access to gainful employment and/or means of self-employment [...] special efforts should be made to assist widows and single women, particularly those with children, in becoming self-sufficient”<sup>40</sup>. At the conclusion of the UN Decade for Woman, the 1985 Nairobi Conference also gave and special attention to the situation of female migrants as in the reports is noted that “in addition to their lack of adequate education, skills and resources, migrant women may also face severe adjustment problems due to differences in religion, language, nationality, and socialization as well as separation from their original families. Such problems are often accentuated for international migrants as a result of the openly-expressed prejudices and hostilities, including violation of human rights in host countries”<sup>41</sup>. The UNHCR

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<sup>34</sup> Ibidem

<sup>35</sup> Ibidem

<sup>36</sup> Intergovernmental Committee On Migration. Report On The Fifth Seminar: "Adaptation And Integration Of Permanent Immigrants. Situation And Role Of Migrant Women: Specific Adaptation And Integration Programs." Geneva: ICM, 1981 (pp. 33-39).

<sup>37</sup> Ibidem

<sup>38</sup> Ibidem

<sup>39</sup> Ibidem

<sup>40</sup> Ibidem

<sup>41</sup> UN World Conference On Women, Equality, Development And Peace, UN Doc. A/CONF.94/35, 19 Sep. 1980.

organized a Roundtable on Refugee Women in April 1985, and in October of the same year, the Executive Committee of UNHCR included the issue of refugee women on its agenda and adopted a Conclusion on the Protection of Refugee Women stating that: “refugee women and girls constitute the majority of the world refugee population and that many of them are exposed to special problems in the international protection field [...] these problems result from their vulnerable situation which frequently exposes them to physical violence, sexual abuse, and discrimination”<sup>42</sup>. In 1987, the Executive Committee called upon the High Commissioner to report on refugee women to increase awareness about their situation as well as on the problems and needs of refugee women and on the measures taken to meet them. As a result, the next year the UNHCR established a Steering Committee on Refugee Women, under the Chairmanship of the Deputy High Commissioner, with the responsibility to outline, supervise, and coordinate a process of evaluating and strengthening of the existing policies and programmes. In August of the same year, the UNHCR issued the Internal Guidelines On The International Protection Of Refugee, and established the new position of the Senior Coordinator for Refugee Women (then Office of Senior Coordinator for Refugee Women and Gender Equality).

From the beginning of the 1990s there were general wider efforts amongst the international community to move away from a ‘Women in Development’ towards a ‘Gender in Development’ approach (Rathberger 2005, p.705). In fact, at the UN level the 1990s saw the conceptualization of “gender mainstreaming” and the UNHCR began speaking of the need to introduce gender analysis and gender equality in refugee law<sup>43</sup>. This approach stemmed from the 1997 Economic and Social Council Conclusions which define gender mainstreaming: “mainstreaming a gender perspective is the process of assessing the implications for women and men of any planned action, including legislation, policies or programmes, in any area and at all levels. It is a strategy for “making women’s as well as men’s concerns and experiences an integral dimension in the design, implementation, monitoring and evaluation of policies and programmes in all political, economic and societal spheres so that women and men benefit equally and inequality is not perpetuated”<sup>44</sup>. The global developments in the field of women’s rights led to gender mainstreaming becoming what globally recognized strategy for achieving gender equality<sup>45</sup>. And in October of the next year

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<sup>42</sup> UN (Executive Committee—36th Session) No. 39 (Xxxvi) Refugee Women And International Protection, 1985. Accessible Online: <http://www.refworld.org/Pdfid/4b28bf1f2.Pdf>

<sup>43</sup> UHNCR, Division Of International Protection, From 1975 To 2013: UNHCR’s Gender Equality Chronology, 2014

<sup>44</sup> ECOSOC Agreed Conclusions, 1997/2, Coordination Of The Policies And Activities Of The Specialized Agencies And Other Bodies Of The United Nations System. Available at: <http://www.un.org/womenwatch/osagi/pdf/ECOSOCAC1997.2.PDF>

<sup>45</sup> Inter-Agency Standing Committee, ‘Women, Girls, Boys And Men: Different Needs – Equal Opportunities, Gender Handbook In Humanitarian Action’, December 2006.



UNHCR developed a Strategy for Mainstreaming Gender Equality into UNHCR's Protection and Programs, which translated these UN objectives and key definitions in its migration policies. Before that date, anyway, the international community took important steps forward to incorporate gender-based persecution in migration policy. First of all, in 1991 UNHCR issued Guidelines on the Protection of Refugee Women, implementing partners on ways to identify and respond to the risks and issues facing refugee women and introducing important considerations on gender-based persecution such as the recognition of reasonable fear of persecution for "women who had made a religious or political statement in transgressing social norms of their society"<sup>46</sup>. Furthermore, the international recognition of sexual violence as a form of persecution by International Criminal Tribunals for the former Yugoslavia and Rwanda influenced the UNHCR policies: as thanks to the tribunals' jurisprudence, for the first time, rape was separated from the private sphere and connected with the relationship between culturally specific gender norms and the states' acceptance of crimes against women (Sanford, 2008, p.104). Since then, rape is being documented as a weapon of war, affecting women in many countries, including the former Yugoslavia, Rwanda, Bangladesh, Uganda, Myanmar and Somalia (Shanks, Schull, 2000, p.1152). The recognition of rape as part of the power relations between man and woman was translated into the UNHCR's Executive Committee adopted Conclusion No. 73 on Refugee Protection and Sexual Violence, and into the 1995 Guidelines on Prevention and Response of Sexual Violence Against Refugees<sup>47</sup>. Also, more practical analysis on women refugees' needs continued to be undertaken under the UN flagship: in 1996 UNCHR sent a survey to all field offices on the provision of sanitary supplies to refugee women. Based on the results, the Deputy High Commissioner sent a memorandum indicating that lack of sanitary supplies posed a significant health risk for refugee women and that it should be mandatory to include sanitary supplies in country programme budgets.

In 2000s the UNHCR introduced additional focus on age and diversity and promoted new and more specific guidelines, while many countries adopted Gender Guidelines to regulate the asylum procedures and the training and the organization of refugee camps. In the 2000s UNHCR developed its Age, Gender and Diversity Mainstreaming (AGDM) strategy, initiated with a pilot action in 2004, with the main purposes to ensure that countries would promote gender equality and respect for the rights of refugee women and children; apply an age and gender analysis to their operations; and operationalize policies relating to the protection of refugee women and children<sup>48</sup>. The UNHCR

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<sup>46</sup> Article 71 (2) this topic will be further analysed in the following section

<sup>47</sup> UN High Commissioner for Refugees (UNHCR), Sexual Violence Against Refugees: Guidelines on Prevention and Response, 8 March 1995, available at: <http://www.refworld.org/docid/3ae6b33e0.htm>

<sup>48</sup> Executive Committee Of The High Commissioner's Programme, Age, Gender And Diversity Mainstreaming, UNHCR's Age And Gender Mainstreaming Pilot Project 2004 Synthesis Report (UNHCR 2005) Available At: <http://www.unhcr.org/research/evalreports/4253dff82/Unhcrs-Age-Gender-Mainstreaming-Pilot-Project-2004->

further extended its approach to include diversity and released an Age, Gender and Diversity Mainstreaming Accountability Framework in 2007, and an Age, Gender and Diversity Mainstreaming Forward Plan 2011-2016. In 2011 under this strategy the UNHCR issued the following Need to Know Guidance: Working with Persons with Disabilities; Working with National or Ethnic, Religious and Linguistic Minorities and Indigenous People in Forced Displacement; Working with Lesbian, Gay, Bisexual, Transgender and Intersex Persons in Forced Displacement; Working with Older Persons in Forced Displacement; in 2012 the UNHCR also issued one Need to Know Guidance on Working with Men and Boys Survivors of Sexual and Gender-Based Violence in Forced Displacement. With regards to the production of new Guidelines, UN and several countries adopted new guidelines or adhered to the UN ones. In fact, in 2001 the Women's Commission for Refugee Women and Children carried out an assessment of the results of ten years of implementation of the 1991 Guidelines on the protection of refugee women that concluded that the overall implementation of the original Guidelines where inconsistent<sup>49</sup>. The 1991 Guidelines were then followed by the 2002 Gender Guidelines (that extended a interpretation of the refugee definition as covering gender-related claims<sup>50</sup>); the 2009 Guidelines on Child Asylum Claims; the Guidelines on Claims to Refugee Status based on Sexual Orientation and/or Gender Identity. In 2008, UNHCR developed a Handbook for the Protection of Women and Girls, which ultimately replaced the 1991 Guidelines on the Protection of Women. National guidelines with different levels of decision-making and degrees of binding influence were introduced in Canada, the United States, Australia, Sweden, the United Kingdom; now Costa Rica, European Union, Germany, Ireland, the Netherlands, Norway, South Africa, Spain, Switzerland, have some form of gender guideline for refugee decision makers (Arbel, Dauvergne, Millbank, 2014, p. 16). Further issues where addressed: in 2008 UN Security Council adopted the Resolution 1820, recognizing sexual violence as a war crime and calling for protection from violence in refugee camps<sup>51</sup>; the UNHCR also issued guidance on women trafficking (2006) and Female Genital Mutilation (FGM) in 2009. In 2010 in a report entitled "A Call to Better Protect Women and Girls: Visibility, Dignity and Livelihoods", UNHCR identified nine "core areas" related to women and girls in which it sought to improve reporting and data collection: (1) Women's participation in decision making that affects their lives; (2) individual documentation and registration; (3) prevention and response to

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<sup>49</sup> UN High Commissioner for Refugees (UNHCR), Policy On Refugee Women And Guidelines On Their Protection: An Assessment Of 10 Years Implementation. Available At [Http://Www.Refworld.Org/Pdfid/48aa83220.Pdf](http://www.refworld.org/Pdfid/48aa83220.Pdf)

<sup>50</sup> This issue will be briefly analysed in the next section

<sup>51</sup> UN Security Council, Security Council resolution 1820 (2008) [on acts of sexual violence against civilians in armed conflicts], 19 June 2008, S/RES/1820 (2008), available at: <http://www.refworld.org/docid/485bbca72.html>

Sexual and Gender-Based Violence (SGBV); (4) distribution of sanitary materials; (5) education; (6) shelter; (7) economic self-reliance; (8) health; and (9) access to legal remedies<sup>52</sup>. The issue of GBV has been further analysed in the 2015 New Guidelines for Integrating Gender-Based Violence Interventions in Humanitarian Action, stipulating that actors should take concrete action against GBV. Further, the Council of Europe's 2011 Istanbul Convention on preventing and combating violence against women and domestic violence also addressed the topic of GVB and refugees requiring that protection must be provided to women without discrimination on any grounds, including "migrant or gender aspects of migration and asylum in the EU refugee status, or other status". Namely, Article 60 affirmed that: "(1) parties to the Convention must provide the legislative framework to recognise gender-based violence as grounds for persecution within the meaning of Article 1 of the Refugee Convention; (2) parties must give a gender-sensitive interpretation to all the other grounds of Article 1; and (3) parties must provide gender-sensitive reception conditions, support services and asylum procedures<sup>53</sup>. In the same years the EU legal framework has evolved to give a more extensive recognition to gender-related issues in migration and asylum: gender-related aspects of asylum law can be found in the specific directives concerning the asylum procedures such as the recast Reception Conditions Directive (2013/33/EU) laying down standards for the reception of applicants for international protection; the recast directive on common procedures for granting and withdrawing international protection (2013/32/EU); the Qualification Directive (2011/95/EU), especially with regards to protection of women during the asylum application process, and to the need to enhance gender sensitive policies in camps and structures for migrants. With regard to family reunification, the EU legal system recognise that it can affect women differently from men, as principal applicants and dependents, the Directive on the right to family reunification (2003/86/EC) stipulates that the right to family reunification must be implemented in respect for the rights of women and children.

### **The evolution of asylum law: the issue of gender-based asylum claims**

In the last decades, gender sensitivity in asylum adjudication and studies regarding gender-based persecution have largely evolved and prompted the development of national and international

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<sup>52</sup>UN High Commissioner for Refugees (UNHCR), A Call to Better Protect Women and Girls: Visibility, Dignity and Livelihoods, October 2010, available at: <http://www.refworld.org/docid/4cd167132.html>

<sup>53</sup> Council Of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, Entered Into Force On 01/08/2014. Available At: <https://www.coe.int/en/web/conventions/full-list/-/conventions/Rms/090000168008482e>

jurisprudence in this area. These developments have been accompanied and supported by the progressive recognition that in some societies women may be persecuted on the base of their sex, or because of their non-compliance with traditional and social norms. The recognition of gender-based persecution paved the way to the rising of gender-based asylum claims, but their rate of success under the current refugee regime is still uncertain. As a deep analysis of this issue is not the purpose of this research, this section will only briefly consider two main problems that affect these claims: the technical problem of the definition of refugee and the difficulties of finding an appropriate balance between universal rights and cultural relativism that limits the adoption of binding international legal tools.

By definition, gender-based claims should be distinguished by gender-specific ones. While the former addresses the causal relationship between gender and persecution, the latter simply indicates forms of persecution that are gender-specific, such as female genital mutilation (Binder, 2001, p. 166). The evolution of the concept of gender-based persecution was already introduced by the jurisprudence of the International Criminal Tribunals for the former Yugoslavia and Rwanda. Thanks to the tribunals' jurisprudence, for the first time, rape was separated from the private sphere and connected with the relationship between culturally specific gender norms and the states' acceptance of crimes against women (Sanford 2008, 120). In 1984 the European Parliament passed a resolution on the need of recognizing that women may suffer "harsh or inhuman treatments for the transgression of social mores" (Freedman 2009, p. 590). In the Note on Refugee Women and International Protection submitted to the 41st Session of the UNHCR Executive Committee, the High Commissioner also encouraged Governments to recognize that some forms of persecution against woman occur because of their status as women within society. However, it was rejected because it raised huge controversies on culture relativism and state sovereignty among the Member States (Alfredson, 2009, p.97). In 1993, the Declaration on the Elimination of Violence Against Women recognized that "violence against women is a manifestation of historically unequal power relations between men and women"<sup>54</sup>. Today gender-based persecution is fully part of the human rights discourse, and largely set within the frameworks of protection of many international and national asylum law systems (Alfredson 2009, p. 97) and the development of a jurisprudence recognizing the cultural bases of forms of violence against women (such as the 2014 Istanbul Convention, or the establishment of the crime of femicide in many European countries) continue to consolidate the idea that such crimes can be committed against woman *qua* woman and that while men may also experience violence because of their gender, it is not systemic in the same way.

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<sup>54</sup> UN General Assembly, Declaration On The Elimination Of Violence Against Women, 20 December 1993, A/RES/48/104, Available At: <http://Www.Refworld.Org/Docid/3b00f25d2c.Html>

Legal instrument dealing with gender-based asylum claims started to be introduced with the 1990s' Policy and the Guidelines. The Guidelines recognise that women asylum-seekers may flee persecution such as rape, widow burnings, honour killings, domestic violence, forced marriages, female genital cutting, or other gender related persecutions due to traditional roles in society and non-willingness to conform to social norms and other forms of in refugee law<sup>55</sup>. First of all the Guidelines gave a clear definition of gender-based claim and specify that not all the claims brought by female refugees have to be considered as gender-based: "gender-related claims may be brought by either women or men, although due to particular types of persecution, they are more commonly brought by women. In some cases, the claimant's sex may bear on the claim in significant ways to which the decision-maker will need to be attentive. In other cases, however, the refugee claim of a female asylum-seeker will have nothing to do with her sex"<sup>56</sup>. The Guidelines also urged the need to:

- Promote acceptance in the asylum adjudication process of the principle that women fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status. Others may be seen as having made a religious or political statement in transgressing the social norms of their society
- Promote acceptance of the notion that sexual violence against women is a form of persecution when it is used by or with the consent or acquiescence of those acting in an official capacity to intimidate or to punish;
- Promote recognition that there may be a basis for granting refugee status where a government cannot or will not protect women who are subject to abuse for transgressing social standards. The government need not itself have been the instigator of the abuse<sup>57</sup>.

The already mentioned following Guidelines and Handbooks build on and complement the UNHCR guidance on aspects of gender-related persecution. Even if the Guidelines seems clear and progressive on this topic, they remain a non-binding instrument and States have a large discretionary power in recognising gender-based persecution as such and accept gender-based claims. This is true also at a EU level: within its legal framework, EU law has recognized gender-based persecution as a ground for granting refugee status, and Member States should then ensure that gender-based violence, FGM, and domestic violence need to be taken into account as grounds for persecution as required for a refugee status. Article 9 of the Qualification Directive of 2011 specifies that

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<sup>55</sup> UN High Commissioner For Refugees (UNHCR), Guidelines On The Protection Of Refugee Women, July 1991, Available At: <http://www.refworld.org/docid/3ae6b3310.html>

<sup>56</sup> Ibidem

<sup>57</sup> Ibidem

persecution can take different forms, including “acts of a gender-specific nature”<sup>58</sup>. The most relevant legal instrument is the of the Qualification Directive (Article 10), that relies on the five reasons for persecution of the 1951 Geneva Convention (race, nationality, religion, membership of a particular social group and political opinion), and it explicitly requires considering gender for the purposes of determining membership of a particular social group: “gender-related aspects, including gender identity, shall be given due consideration for the purposes of determining membership of a particular social group or identifying a characteristic of such a group”<sup>59</sup>. Anyway, the directives create only a loose guidance for Member States that have different national policies and approaches<sup>60</sup>.

The above instruments clearly advocate the need for recognising and protecting the human rights of women within situation of displacement. Yet the legal framework governing refugees often fails to grant asylum or refugee status to women who are fleeing systemic violations. A first issue lays in the definition and interpretation the refugee status. The 1951 Convention describes what is considered persecution and what criteria are necessary to determine eligibility of claimants: Article 1(A)(2) of the Convention defines a refugee as an individual who is outside his or her country of nationality or habitual residence who is unable or unwilling to return due to a well-founded fear of persecution based on his or her race, religion, nationality, political opinion, or membership in a particular social group<sup>61</sup>. As gender is not included in this list, the appropriate ground for gender-based claims is not always clear, or the persecution may fall under a combination of categories (religious, political, etc.) or claims can be granted on other grounds than gender as some grounds may be individuated more easily. For example a female activist may apply for asylum on the grounds of political opinion or a woman refusing to adhere to Islamic law code regarding social behaviours for women may apply for asylum on the grounds of religion, even if the deep causes of their discrimination may be individuated in non-adherence with women’s traditional roles (Neal, 1990, p. 203). In some cases gender has been considered as membership to a “particular social group”: the literature on the subject indicates that such interpretation of the Convention are that this would enhance women protection in general, and specifically the Convention’s potential to protect refugee women fleeing gender persecution (Lobo, 2012, p.361; Marouf, 2008, p.73). On the

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<sup>58</sup> Council Directive 2011/83/EC Of 29 April 2011 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, Articles 1(3)(C),9(2)(F),10(1)(D), 20(3), 29(3).

<sup>59</sup> Directive 2011/95/EU Of The European Parliament And Of The Council Of 13 December 2011 On Standards For The Qualification Of Third-Country Nationals Or Stateless Persons As Beneficiaries Of International Protection, For A Uniform Status For Refugees Or For Persons Eligible For Subsidiary Protection, And For The Content Of The Protection Granted

<sup>60</sup> Data on this topic can be found in yearly reports conducted by the EU parliament, such as study: Gender-Related Asylum Claims In Europe - November 2012 – Dg For Internal Policies; European Parliament

<sup>61</sup> 1951 Convention And Protocol Relating To The Status Of Refugees

other hand, opposition to this interpretation comes from both literature and jurisprudence. According to some commentaries and political activists, this definition would enhance victimization of women, contributing to link them with the idea weak individuals in need of protection. In this view, women are not persecuted because they are women only, but because they make the active choice not to conform to the standards of “proper women”, and the claims should reflect this active choice, while the identification of the social group tends to erase it (Crawley, 2001, p.9; Spijkerboer, 2010, p.533). Finally, countries have been historically sceptical in interpreting the concept of social group as encompassing women because of the fear that this would allow a larger number of asylum seekers to achieve the status refugee on the ground of the Convention, creating safety issues (Musalo and Knight, 2003, p.239).

The problems of cultural relativism are very extensive as well. There is a strong resistance in addressing gender-based asylum claims as while the ideal is to arrive at an appropriate balance between protection of the individual rights of women and cultural and traditional norms regarding the role of women, reaching such a balance is often difficult, particularly in the context of repression, conflict, instability, and resulting displacement (Martin, 2010, p.29). Many types of gender-based persecution (such as rape or domestic violence) have often been seen as a private or domestic issue especially when inflicted by “private actors”, and claims based on them have often been dismissed for that reason. As a consequence, international and national policies had often failed in recognizing gender persecution in the so-called “private sphere.” Linda Cipriani argues that, “international law has allowed the particular concerns of women to be ignored because of its structural distinction between public and private spheres” (Cipriani, 1993, p.511). For instance, sexual violence has often been considered illegitimate under refugee law exactly because of the assumption that it occurred in a private sphere, for which, the State should not be internationally answerable (Connors, 1997, p.114). Thus, even today, survivors of sexual violence perpetrated by the military, or state forces, or in prison or camps, may find difficult to establish that their experiences as eligible for asylum. Another example is violence within the family, including forced marriages, that is routinely addressed as “problem in the private sphere” (Spijkerboer, 2010, p.540). Commentators have suggested that this dichotomy reflects the traditional liberal view on the division between the private and public in the field and international law: the public sphere can be subjected to legal regulation and to the international jurisdiction; the private sphere is concern of individual states and not of the international community (Connors, 1997 p.120; Musalo 2014, p.59). Only the 1990s, the increasing demand to recognize forms of persecution such as domestic violence, rape, female genital mutilation and forced marriages as eligible for refugee status, become to question this private/public dichotomy (Musalo, 2014, p 61).

## **2. Women and vulnerability in critical context: a general overview**

At this point, it is important to underline the reasons why the acquisition of gender-specific measure in the legal system regulating asylum and migration is fundamental and why we assist to the proliferation of so many women-related international initiatives. As already stated, it has been recognised that women historically had a disproportional access to human rights so that gender-neutral provision stating equality have resulted to be insufficient to guarantee human rights for men and women in the same manner. In addition to this, it is necessary to recognise that women may face specific forms of gender-based persecutions, experience some threats at a higher rate than their male counter part, have a disproportional access to resources, and are more vulnerable in critical contexts. The first section will focus on these issues and on the women-specific condition of women in contexts of crisis as a result of their disproportional role in society. The second section will analyse the limits and the pitfalls of theoretical and legal framework of women's rights protection. Namely, I will start from the categorisation of women as "vulnerable" under international law, and analyse the main critics moved to the UN policy of gender mainstreaming (a policy that has been analysed in the previous chapter).

### **Why is a gendered protection necessary?**

A gendered protection is necessary to assess the differences in the experiences of men and women as beneficiaries of protection and reconstruction programmes in critical context. While conflicts, humanitarian crisis, and forced displacements may affect the whole population and have great impact on civilians and terrible consequences for the environment and the human heritage, women remain specifically exposed to risks in such contexts. It is further recognised that this specific exposure is also connected to the gender specific interlocking discrimination women face in their position in society in general, and to their legal status in many jurisdictions. Women are not vulnerable by definition, but due to the disproportional power relations in society that it is translated in a major exposure to risks when critical situation happens. In fact, the discrimination woman face in their society is exacerbated in conflict, humanitarian crisis and forced displacement situation. This section will first analyse the different spheres in which this conditions affect women rights, reporting namely on the following categories: social and economic rights, health, and security. The first element considered is women access to human rights as guaranteed by international conventions; the second one is gender-related persecution. In the second part of this section I will then discuss the theoretical and statistical link between discrimination and exposure to risks in



critical contexts. The same rights analysed in this chapter will be taken in consideration in cases of forced displacement.

Several conventions and actions contributed to the creation of the international framework of human rights and women's human rights<sup>62</sup>. Nevertheless, even if those rights are internationally recognised, in many cases women experienced more difficulties in accessing them freely. Social and economic rights include rights to adequate food, clothing and housing, and the continuous improvement of living conditions<sup>63</sup>, deeply linked with the right to sanitation, work and social security. In this context disaggregated statistics and data collections, literature, and data analysis for policymaking show up that women worldwide face multiple discriminations: they are the majority of the poor, have less access to food,<sup>64</sup> water<sup>65</sup>, and sanitation, education and employment opportunities<sup>66</sup>. Women's disadvantaged economic position in this regard creates a structural dependence on men for access to resources<sup>67</sup>. Within this context, for instance, women disproportionately lack security of tenure due to discriminatory legislation and lack of control over property, land and housing, as well as cultural, religious and customary practices (that for instance make women's access to control over land, property and housing dependent on a man of the family<sup>68</sup>). Female access to work and social security is controversial as well. In fact, given their disparate social and legal status in many jurisdictions, women enjoy limited legal capacity to contract, to access employment and equal payment, to own or transfer property, to access marital property, to dispose of inheritance due to discriminatory laws or customs that hinder women's exercise of those rights (Ni Aolain, 2011, p.22). Also, women's status in many countries affects their access to social and economic security. According to the International Labour Organization (ILO), women experience "systemic barriers in almost every aspect of work, ranging from whether they have paid work at all, to the type of work they obtain or are excluded from, the availability of support such as childcare, the level of their pay, their working conditions, their access to higher

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<sup>62</sup> As reported in the previous sections

<sup>63</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p.3 Article 11

<sup>64</sup> Women And The Right To Food: International Law And State Practice, Right To Food Studies (Rome, Food And Agriculture Organization Of The United Nations, 2008), p. 8.

<sup>65</sup> In 2010 The United Nations General Assembly Recognized The Right To Clean Water And Sanitation As A Human Right, Through Its Resolution 64/292.

<sup>66</sup> FMO (2007), Bermudez Torres, A. thematic guide: Gender and forced migration. Available at: <http://www.forcedmigration.org/research-resources/expert-guides/hiv-aids-conflict-and-forced-migration/fmo036.pdf>

<sup>67</sup> UN Office of the High Commissioner for Human Rights (OHCHR), Women's Rights are Human Rights, 2014, HR/PUB/14/2, available at: <http://www.refworld.org/docid/5566cfd14.html>

<sup>68</sup> Ibidem

paying male occupations, the insecurity of their jobs, the absence of pension entitlements or benefits, and the lack of time, resources or information necessary to enforce their rights”<sup>69</sup>. The European Institute for Gender Equality is monitoring women exposure to poverty all over Europe, and its latest reports shows that a series of interconnected problems largely disproportionately expose women to poverty: the lower relative wages of women; their higher rates of unpaid work within the household; a greater absence from the labour market; lower pay and lower pension<sup>70</sup>. Researches also underline that risk of poverty increases with age, and women receive retirement benefits that are on average 40 % lower than those of men<sup>71</sup>. A range of interrelated structural factors have been identified as explaining the greater risk of poverty and social exclusion experienced by women: gender roles, gender stereotypes and discrimination that produce unequal life chances and choices; social protection systems which do not take into account different working trajectories of women and men can particularly; poor access to services<sup>72</sup>. In a study of 173 countries 155 have at least one legal difference restricting women’s economic opportunities. Of those, 100 have laws that restrict the types of jobs that women can do, and in 18 husbands can prevent their wives from accepting jobs<sup>73</sup>. Further, due to these problems, Women’s participation to public life remain as well largely prevented so that female presence in power structures and decision-making is still limited and although women’s right to vote has been secured in nearly every country of the world, in practice this right can sometimes be meaningless or not fully exercised due to lack of access to relevant information, resources, or documents (Gaspard, 2007, p.145).

Health and security are strongly interrelated fields. Not only Gender plays a specific role in the incidence and the prevalence of specific pathologies for both men and women, but besides biological factors, social differences in economic resources can exacerbate gender inequalities in health and well-being<sup>74</sup>. Gender-based violence has also serious health consequences for women. Recent reports Between 15 % and 71 % of women around the world have suffered physical or sexual violence committed by an intimate male partner at some point in their lives<sup>75</sup>. Country visits by the UN Special Rapporteur on Violence Against Women have shown that domestic violence affects women of all social strata<sup>76</sup>. Forms of violence against women are considered: harmful and

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<sup>69</sup> ILO International Labour Conference, 98th Session, 2009. Report VI. Gender equality at the heart of decent work. Available at: [http://www.ilo.org/wcmsp5/groups/public/@ed\\_norm/@relconf/documents/meetingdocument/wcms\\_105119.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/@relconf/documents/meetingdocument/wcms_105119.pdf)

<sup>70</sup> Gender In Poverty And Social Inclusion, EIGE, 25 January 2017, Pag.5

<sup>71</sup> Ibidem

<sup>72</sup> Ibidem

<sup>73</sup> Women, Business And The Law 2016 , World Bank Available At:

<http://Wbl.Worldbank.Org/~Media/WBG/WBL/Documents/Reports/2016/Women-Business-And-The-Law-2016.Pdf>

<sup>74</sup> EIGE Gender In Health, 25 January 2017, Pag.3-5

<sup>75</sup> Ibidem

<sup>76</sup> Special Rapporteur On Violence Against Women’s Report On Gender-Related Killings Of Women (A/HRC/20/16),

degrading practices, such as dowry-related violence or so-called honour crimes; domestic violence such as assault (physical, psychological, emotional, financial or sexual violence), marital rape, femicide or gender-motivated killings (domestic murder, ritual killings or killings of women accused of witchcraft, lynching, as well as gender identity- and sexual orientation related or ethnic or indigenous identity-related killings), child marriage, female genital mutilation and sex-selective abortion<sup>77</sup>. Other forms of violence against women occur in the community, such as rape/sexual assault, sexual harassment, violence within institutions, violence against women migrant workers, witchcraft or sorcery-related violence or killings<sup>78</sup>. Further forms can be perpetrated and condoned by the State: gender-based violence during conflict, disappearance or extrajudicial killings, custodial violence, violence against refugees and internally displaced women, or women from indigenous or minority groups<sup>79</sup>. In the context of human rights, vulnerability to violence is understood as a condition created by the absence or denial of rights: a manifestation of historically unequal power relations between men and women, the specific causes of such violence and the factors that increase the risk of its occurrence are grounded in the context of systemic gender-based discrimination against women and other forms of subordination<sup>80</sup>.

Commentaries and data analysis suggest that critical situation exacerbates pre-existing patterns of discrimination and inequalities, including gender-based ones. This is applicable to humanitarian emergencies of various kinds, whether natural or human-contrived disasters, conflict related or not<sup>81</sup>. It is possible to underline such increased vulnerability in relations with social and economics rights, health, and safety connected with gender-based persecution. Violations of economic and social rights post-conflict aggravate earlier violations in many ways. First of all disasters place even greater stress on socio-economic capacities, and often led social nets and roles in the households to disintegration, destabilizing women's marginal status in families and communities (Ni Aolain, 2011, p.24). Furthermore, gender-based discrimination in the denial of economic and social rights is a critical factor in rendering certain persons more susceptible to trafficking than others: lack of economic independence due to their legal status (so owning of land and property and capacity do contract) or to the relegation in the work market, contribute to

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Para. 16.

<sup>77</sup> Women's Rights Are Human Rights, UN Human Rights Office Of The High Commissioner, 2014, United Nations Publication

<sup>78</sup> Ibidem

<sup>79</sup> Ibidem

<sup>80</sup> World Health Organization Understanding Gender-Based And Sexual Violence, Available At:

[http://www.who.int/reproductive\\_health/publications/RHR\\_00\\_13\\_RH\\_Conflict\\_And\\_Displacement/PDF/RHR\\_00\\_13/Chapter17.En.Pdf](http://www.who.int/reproductive_health/publications/RHR_00_13_RH_Conflict_And_Displacement/PDF/RHR_00_13/Chapter17.En.Pdf)

<sup>81</sup> The literature on the topic range from feminist critics of human security – see For Example Charlotte Bunch, “A Feminist Human Rights Lens On Human Security,” Peace Review. Vol. 16, No. 1, 2004, P. 4., to the literature integrated in the policy of international organization, or publications such The Women's Rights Are Human Rights, UN Human Rights Office Of The High Commissioner Show.

women's economic poverty and material insecurity and thus vulnerability to being trafficked. So, when crisis strikes, women's economic status is further compromised. Begging and prostitution, which may be resorted to as a means of redressing poverty, create further vulnerability to violence and trafficking (Chinkin, 2004, p.332). Further, such circumstance reduces the possibility of prosecution for those convicted in gender-based persecution. If victims are unable to access employment, health services or to acquire adequate food they may not consider criminal proceedings as priorities (Chinkin, 2004, p.335). Access to education is also affected: critical situation can contribute to low school enrolment and high drop out levels in general, but those levels are even more vulnerable to changes for of girls. Reasons are: the safety and security concerns about girls traveling to school; risk of sexual harassment from teachers; gender roles and stereotypes that require girls to leave school if their labour is needed at home, and to spend more time and energy traditional roles, such as collecting water for the family<sup>82</sup>. Further, in critical circumstance, as well as being affected as civilians, women and girls are targeted because of their gender and are more exposed to gender-based violence and sexual exploitation. Not only rape and sexual violence are used as a war weapon, but also, in times of stress and crisis women and girls suffer from increased domestic violence. In fact, in contexts of humanitarian crisis, women become even more exposed to violence as a result of the collapse of social structures and legal systems so that pre-existing violence against women can increase more easily (Kirk, 2003, p.89). Finally, the vulnerability of women and girls to sexualized violence in situations of conflict makes them also especially vulnerable to HIV/AIDS infection as consequence of rape, enforced prostitution and trafficking (Mckey, 2004, p.13).

### **The risks of victimising women and ignore diversity**

While female exposure to certain risk in critical situation is accepted and encompassed in international law<sup>83</sup>, there has been some huge critics to the UN policy on the issue, as well as on the risks of associating women's vulnerability with victimisation, or of conceptualize vulnerability without taking into consideration specific elements of each women experience and elements of intersectionality.

It has been argued that the use of strategic frames of women as vulnerable victims in need of protection is wide spread in the international community and, for a long time, symbols and signifiers of women as vulnerable victims has been used as a sort of "cultural tool kit" by

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<sup>82</sup> Women's Refugee Commission, *Refugee girls, the invisible faces of war*, 2014

<sup>83</sup> As expressed by the conventions, acts, policy planning showed in the previous chapters.

practitioners in the international policy community (Swidler, 1986, p.276). Even if such representation might be assumed to have been useful to activate support for specific protection measures for women, these frames are ignoring gender difference and women's agency and voice. In fact, those depictions are supporting gendered constructions of women's powerlessness and lack of agency in certain societies, and are shrinking the understanding of other variables such as class, ethnicity, age and other factors (Freedman, 2011, p. 593). In 1986, Harrell-Bond was the first one to explicitly put this issue to the fore: refugee images were imbued with a symbolism of helplessness, while she suggested that what she called the "dependency syndrome" is mainly caused by the anti-participatory manner in which humanitarian aid is provided (Harrell-Bond, 1986, p.90). This critique is relevant when referring international operations to overcome gender inequalities framing women merely in terms of their vulnerability (Hyndman, 1998, p.241; Indra 1999, p.221), but as well when it refers to critical contexts, humanitarian intervention, and refugee regimes. As Rajaram points, humanitarian responses to refugees has always the risk of generalizing and depoliticizing refugee women experience through the depiction of these refugees as helpless victims. Such representation contributes to define refugee in the words of Western experts depriving them of means to speak for themselves (Rajaram, 2000, p. 247). Furthermore, the tendency of academics and policymakers to treat "women" as homogeneous category means that the critical differences between women have often been ignored. This approach obscures the heterogeneity for the persecution suffered or feared in migration contexts: women identity is shaped by many factors including ethnicity, sexual orientation, social class, age (amongst others) and these differences have significant implications for their experience of persecution (Crawley, 2001, p.30).

Cockburn argues that women should only be treated as part of specific categories (such as mothers, dependents, vulnerable subject) when asking themselves for special treatment, so that they can be distinguished from "the family", from the "women and children" aggregation that otherwise would not take into consideration their personal experience (Cockburn 2004, p29). Similar criticisms have been moved to the UN strategy of mainstreaming gender in its policy, and especially to its refugee policy. In fact, in the same manner of generalizing women as vulnerable victims can lose contact with their differences, political abilities and voice, mainstreaming gender may lead to gender becoming dissolved within other concerns (Freedman, 2011, p 532). Similar criticisms have been moved to the UN Guidelines suggestions to consider women as a "social group" for their purpose of guarantee the refugee status: the focus of women as a special or separate group in migratory contexts can have the effect of further marginalizing women by targeting them as a "separate" group and so essentializing their difference. According to some commentaries and political activists, this definition would enhance victimization of women, contributing to link them with the idea weak individuals in need of protection. In this view, women are not persecuted

because they are women only, but because they make the active choice not to conform to the standards of “proper women”, and the claims should reflect this active choice, while the identification of the social group tends to erase it (Crawley, 2001, p.34; Spijkerboer, 2010, p. 542). Further literature on the subject indicates that of such interpretation of the Convention are that this would enhance women protection in general, and specifically the Convention’s potential to protect refugee women fleeing gender persecution (Lobo, 2012, p 364; Marouf, 2008, p.74).

In order to avoid those sorts of pitfalls in dealing with the experience of women refugee and interpretation of international tools for protection, it is possible to take into consideration different elements. First of all, the risks of an international policy depicting women not only as vulnerable, but also as helpless victims have been taken into consideration by international organizations’ strategies starting from the 2000s. Namely, UN Resolution 1325/2000 was a first step forward in departing from referencing to women as victims or vulnerable groups only. The resolution acknowledge that women are not mere victims of conflict, but also active agents with fundamental “role [...] in the prevention and resolution of conflicts and in peace-building” and stressed “the importance of their equal participation and full involvement in all efforts for the maintenance and promotion of peace and security, and the need to increase their role in decision-making with regard to conflict prevention and resolution”<sup>84</sup>. An interesting analysis of the phenomenon is provided by Martha Fineman (2008 p.110), who suggest to re-interpret vulnerability as a basic, universal, and inevitable human condition. She notes that “Our embodied humanity carries with it the ever-constant possibility of dependency as a result of disease, epidemics, resistant viruses, or other biologically-based catastrophes Our bodies are also vulnerable to other forces in our physical environment: there is the constant possibility that we can be injured and undone by errant weather systems, such as those that produce flood, drought, famine, and fire. These are natural disasters beyond our individual control to prevent” (Albertson, 2008, p.2) Accepting the inevitability of vulnerability is a useful way to re- think the nexus of gender and humanitarian crises, as it rejects the negative associations around vulnerabilities created by humanitarian crisis and supports the idea that a gendered dimensions of vulnerability require specific planning and a gendered approach to crisis (Ni Aolain, 2011, p.27). Another interpreter of the concept of vulnerability is Judith Butler that focuses on this issue in her recent works<sup>85</sup>. She stands against the idea that vulnerability is the

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<sup>84</sup>UN Security Council, Security Council resolution 1325 (2000) [on women and peace and security], 31 October 2000, S/RES/1325 (2000), available at: <http://www.refworld.org/docid/3b00f4672e.htm>  
Relevant Following Activities Includes: Security Council Resolutions 1325 (2000), 1820 (2008), 1888 (2009), 1889 (2009), 1960 (2010), 2106 (2013) And 2122 (2013); And The Reports Of The Secretary-General On Women, Peace And Security (S/2002/1154, S/2004/814, S/2005/636, S/2006/770, S/2007/567, S/2008/622, S/2009/465, S/2010/498, S/2011/598, S/2012/732, S/2013/525), On Women’s Participation In Peacebuilding (A/65/354–S/2010/466, A/67/499–S/2012/746), On Sexual Violence In Conflict And Implementation Of The Relevant Resolutions (S/2009/362, S/2010/173, A/65/592–S/2010/604, A/66/657–S/2012/33, A/67/792–S/2013/149, S/2014/181).

<sup>85</sup> See For Example “Vulnerability In Resistance” By Judith Butler, Zeynep Gambetti, And Leticia Sabsay, Duke

opposite of resistance, rather “understood as a deliberate exposure to power, [it] is part of the very meaning of political resistance as an embodied enactment”<sup>86</sup>. About whether the discourse on vulnerability is based on paternalistic political power taking care of the victims or not, she argues that vulnerability may not be associated to an ontological dimension (and this is indeed part of her constructivist approach), rather to a performative character of resistance: vulnerability enters into agency as a way of being related to other people (in protests, or in situation of vulnerability): “Vulnerability can emerge within resistance movements and direct democracy precisely as a deliberate mobilization of bodily exposure”<sup>87</sup>.

### **3. Women’s rights in migration: gender sensitivity and women at risk**

Research indicates that the experience of refugees and asylum seeking women often differ significantly from those of men (Crawley, 2001, p.29). Men and women are exposed to different types of risk and vulnerability during the different stages of migration. As stated before, due to their status in society and their sex, women and girls are particularly subject to discrimination and sexual and gender-based violence and have specific protection risks and needs that cannot be overlooked in reception procedures: women and girl refugees or internally displaced women and girls are exposed to specific protection problems related to their gender, cultural and socioeconomic position as well as their legal status<sup>88</sup>. In addition, failure to take due account of gender issues in asylum systems and integration measures may lead to discriminatory outcomes at level of integration in post-migration stages. Factors such as displacement amplify the discrimination women and girls already endure peacetime. Other factors, including age and sexual orientation, also affect vulnerability and needs<sup>89</sup>. Under the UN framework traditionally, protection of women refugee falls into three main categories: refugee status determination; physical security (also in case of resettlements); programming of fair distribution of food distribution, access to healthcare, education, and employment (Kelley, 1988, p.55). On the base of this distinction, this chapter will take into consideration women threats during pre-migration stages, transit, and post-migration stages of women displacement, as exemplified by Grieco and Boyd on their study on international

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University Press Books 2016; “Notes Toward A Performative Theory Of Assembly”, Harvard University Press, 2015; But Also "Bodily Vulnerability, Coalitions, And Street Politics." *Critical Studies* 37.1 (2014): 99-119.

<sup>86</sup> Butler, Judith. "Rethinking Vulnerability And Resistance." Madrid, June (2014). Available At: <http://www.institutofranklin.net/sites/default/files/files/Rethinking%20Vulnerability%20and%20Resistance%20Judith%20Butler.Pdf>

<sup>87</sup> Ibidem

<sup>88</sup> As Stated In The Previous Chapter.

<sup>89</sup> UN Office of the High Commissioner for Human Rights (OHCHR), Statement of the Global Migration Group on the Human Rights of Migrants in Irregular Situation, 30 September 2010, available at: <http://www.refworld.org/docid/4f7157bc2.html> .

migration theory (2003, p.345-68). The next chapter will focus on gender-related issues in refugee camps that will be the focus of Part II of this research.

### *Pre-migration stage: factors associated with the sending societies*

Pre-migration is a stage in the relocation process when the refugees are in their home countries and about to move to a safe country, considering leaving and preparing for their transfer (Bhugra & Jones, 2001, p.154). During pre-migration causes of distress can be physical or psychological trauma, that is a significant factor associated with mental health outcomes in refugee populations (Schweitzer et al., 2006, p.12). Apart from trauma, factors that influence the propensity of women and men to migrate have been analysed by Elizabeth M. Grieco and Monica Boyd according to different elements. The first one are gender relations, including gender-specific ability to make the decision to migrate and to access the necessary resources. Systems of gender stratification in families can affect women's ability to make decisions (for instance due to patriarchal power relations in public and private life) as well as their access to resources (for example due to social and economic seclusion). A second element is the status and role of women in the sending society, as it affects as well their capacity to leave the country: limited freedom connected with submission roles or a low status will negatively impact on the probability of intake migration. Finally, the characteristics of the sending society influence the migratory behaviour and have a large impact on their possibility of choice. These elements include for example the state of the economy; the types of economy; the level of displacement within the population; employability rates and so on (Grieco, Boyd, 1998, p.301).

### *Exposure to violence during transit*

Transit refers to the stage between leaving the home country and entering a country of destination (Bhugra & Jones, 2001, p 56). Destination country may differ from asylum or arrival country. Transit includes then 1) secondary migration processes<sup>90</sup>; 2) the stay in temporary camps

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<sup>90</sup> That indicates the travel from the arrival country to the final destination country of a migrant. According to Gerard and Pickering, the development of language around 'secondary migration' underlines that only the migration from country of origin to the first 'transit country' is presumed to be legitimate. See Gerard, Pickering (2013) "Gender, Securitization and Transit: Refugee Women and the Journey to the EU", Oxford University Press, Journal of Refugee Studies Vol. 27, No.3



during the evaluation of the asylum application. During this stage women may fear for especial exposure to violence during the transit, and their experience can be shaped by discrimination criteria of immigration law or asylum procedures , pthe issue of refugee camps will be taken into consideration in the details in the next chapters). A shared experience of transition is of instability of legal status or living in legal limbo, fear of being killed in travel, and feeling unsafe in transit (Wessels, 2014, p.4) but specific exposure to violence includes for example women experience of and systematic gender-based violence in crossing borders (Pickering, 2010, p.267). Violence often perpetrated by a mix of state and non-state agents and the mode of travel can influence exposure to it. For instance those perpetrating the violence may be the ones facilitating the transport and navigation, the price of passage. The conditions oft the transit are also determined by the amount of material and social resources to which women had access such as being part of family group, or a networks of family and access to financial resource. In some cases women are sexually exploited as form of payment for protection during the travel or for the travel itself: as limited access to social and economic security which can result in them being drawn into the informal economy of sex work in order to fund their migration (Gerald, Pickering 2013, p.675).

Another element to consider is the structural contradictions between the securitization of migration and refugee protection, connected with the policy of the country of origin, the policy of the country of destination, and the role of intermediary organizations (Grieco, Boyod, 1998, p.304). According to this view, in country of origin policies can more or less discourage emigration of women, for example when the juridical and contracting capacity of woman is limited, or on the base of assumption on the traditional roles of women in the family. In country of destination, although discriminatory criteria for their immigration law has been removed, value judgment are embedded in practices and lead to different outcomes for man and women on the base of their evaluation on the workforce. This means that if migrant women are perceived and portrayed as family members more than as active element of the work market they may face more difficulties in migration. Moreover the role of intermediaries such as ONG and advocacy networks can influence women migrations linking female migrants to the demand for female labour in destination countries. Those actors are not, anyway, exempted from potentially exercising violence or illegal practices against woman (Grieco, Boyod, 1998 p.304).

### ***Post-migration stages: cultural adjustment and the interface to the receiving societies***

The third and final stage of relocation, post-migration, indicate the moment when the refugees are living in a developed host country – for example where they are applying for asylum (Bhugra &

Jones, 2001), so that the main concern is of course the relation with the receiving society. Factors affecting integration are: despair connected with post-traumatic disorders, mental health damages; fear of the outcomes of eventual asylum procedures, deportation, repatriation; isolation due to cultural differences<sup>91</sup>. Common experiences may be social isolation, identity confusion and loss of valued societal and cultural rules, loss of cultural community, a lack of environmental knowledge, poverty (Keyes & Kane, 2004, et al.).

Namely, Kelley recognised a double type of barrier that contribute to inhibit refugee women's cultural adjustment: barriers within the host society and individual or personal barriers. The host society may discourage refugees' integration due to racial, sexual, and cultural discrimination - or the combination of the three things (Kelley, 1989, p.58) . Women face also gender-related problems in the adjustment and in the interface with the receiving society, for many reasons: the ability of the state to integrate and settle them; the levels of incorporation in the labour market; changing on their status (Grieco, Boyod, 1998, p.306). State ability to integrate female refugees is affected by structural conditions and hostile or positive reception of refugee in general ( McCrum, 1987, p 98). But women are also more likely to face problems connected with the acquisition of residency or employment related entitlement because waived as "dependent" on other family members (Grieco, Boyod, 1998, p.308).The work market has a huge role in integration of female workers, depending on its level of ability of incorporation. Bad integration into the labour market can cause further difficulties to social integration: uncertainties related to employment (part-time or temporary jobs), and problems at the workplace (language and discrimination) (Olsson, 2002, pp.111). Single female refugees are more likely to live in emergency housing for a long period rather than their male counterparts who have easier access to the labour market, and face more sever challenges that their male counterpart (Freedman, 2008, p.15). In general refugee and asylum- seeking women show also a huge professional and socio-economic gap between their pre and post-migration situations: this deterioration in living conditions is also affected by their role in family care activities (Ratković, 2013, p.223) Finally, the redefinition of social role and family structures create disorientation and isolation on both man and women<sup>92</sup>, but some differentials exist: women are often expected to adhere to previous family models in taking care for children, household care, language, and food with a severe impact on the integration process due to increased isolation and social, economic, and

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<sup>91</sup> EU Report On Female Refugee And Asylum Seekers: The Issue Of Integration, DG For Internal Policy, Policy Department Of Citizen's Rights And Constitutional Affairs, 2016

<sup>92</sup> On A Pilot Programme Conducted At Leiden University As Preliminary Study For A Research Proposal On The Level Of Integration Of Students With Migratory Background With The University Community, Women Refugees Enrolled At The University Faced Higher Level Of Isolation Due To Greater Differences With Local And International Students Of The Same Age Or Younger. For Instance, Being A Mother Was An Experience That Was Difficultly To Relate To The Life Of Other Female Students In The Campus, So That They Feel More Secluded And Less Integrated With The Rest Of The Students Community.

cultural dependency. This is also reflected on young girls and adolescents, as they are expected to maintain their original cultural identity while young boys are more often encouraged to integrate in the host society (Sharma, 2011, p.4).

Individual and personal barriers are of course interrelated with the external factors. One of them may be the dissolution of the traditional relationships in society and subsequent family conflict. The most common alteration in family roles and responsibilities results when women previously dedicated to house-caring activities undertake outside employment, subverting the demarcation of housework as women's domain paid work as male dominated area. In some cases, the combination of these subversions and uncertain situations affecting men, such as unemployment or underemployment, can have side effects on their wives or female companions and in some cases result in aggression against them and situation of reiterated domestic violence (Kelley, 1989, p.59). Furthermore when personal identity is strictly connected with the role in society, both man and women may feel unable to fit with the new community if their traditional role must be abandoned upon resettlement.

## **Chapter 2**

### **Refugee camps and gender issues**

Contents: 1. Cultural and structural issues 2. Healthcare for women and girls; reproductive rights; female genital mutilation; maternal care; mental care; female examiners 3. Physical safety, gender-based violence and domestic violence. 4. Disproportional access to education

Refugee camps create specific challenges to the protection of human rights in general, and to the protection of women and girls rights in particular. Women hosted or living in refugee camps deal with situations that impact their access to resources, their participation to the camps life, and their physical safety and mental health. Female refugees face specific treats due to both cultural and structural factors, and for that reasons, this chapter of the analysis will deal with the impact of the

social economic role of women in camps, as well as with the structure of the camps themselves as obstacles in granting female refugees safety and equal access to resources. The major part of researches and international actions on the topic focus on the risks of sexual violence and exploitation of women in refugee camps, but the life of female refugees is affected by many other factors. This section wants to analyse three of the domains in which women are disproportionately granted their rights in camps: physical safety, access to healthcare (including maternal and mental health, as well as family planning), education.

## **1. Cultural and Structural Issues**

The social and economic role of women in their sending society is often reflected in the organizational structure of the camps. On the other hand, the organizational and material structure of the camps may affect women refugees' freedom and safety in many ways. These two elements are strictly interrelated and converge in what we can identify in cultural and structural issues affecting women and girls' rights in the camps. For instance, if women are those supposed to be in charge of the household (due to their social role), they are also often in charge of collecting wood, a practise that put them in danger when the specific organization of camps force them to go outside of the camp to look for firewood (structural factors) (Friedman, 2007, p.41). Women in general may face discriminations: "whether it is economic security, food security, health security, personal or political security, women and young girls are affected in a very specific way due to their physical, emotional and material differences and due to the important social, economic, and political inequalities existing between women and men.<sup>93</sup>", but this condition assumes specific characteristics in refugee camps. The historical and widespread underestimation and stereotyping of women's participation within the economy has been reproduced in refugee camps and led to disparities in accessing training and ultimately economic independence (Kelley, 1989, p.19). As in some cases women are automatically seen as relevant for domestic roles only, men are often the ones expected to take part in trainings, skill-listings and selection procedures. As result, women are less likely to access credit or exertion services and employment projects. Furthermore, as in the organization of the camps life productive occupation are destined to men, women are often in a position of dependence of assistance for their livelihood (Kelley, 1989, p.23). Women appeared to be bearing a disproportionate burden of family duties - a dynamic that tends to become exacerbated in impoverished situations. Therefore, practical details of the life in the camp, such as food preparation, washing-up, and family healthcare appeared to be their main priorities. This does not

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<sup>93</sup> Ulf Kristofferson, Humanitarian Coordinator Of The Joint United Nations (UN) Program On HIV/AIDS

mean that social roles remain the same in sending societies and refugee camps. The literature on the topic covers basically two diametrically opposite situations: on one hand the disruption of the social roles and of the family balance often creates situations that are potentially dangerous for refugee women; on the other hand the shifts in traditional roles may have positive impacts on women and girls, allowing their empowering and self-sufficiency in camps and relocation contexts more than in their sending society. These processes of change may be at the expense of women, for example, involving women taking in extra activities which were not economically rewarding or income-generating. In other cases they may benefit women as they are empowered to take on roles not previously open to them, but they may also have other negative outputs in family and gender relations. For example, women that might be given an opportunity to work inside or outside the camp (for instance for an NGO) and thus become the 'breadwinner' in the household can be perceived as a threat to traditional gender relations and men's perceptions of their own roles, of masculinity, and of the role of their female partners (Freedman, 2014, p.37).

Some of the key difficulties that arise for women living in refugee camps concern the ways in which the camps are organised spatially and also the ways in which the camp routine is organised by those in charge as the physical layout of the camps may put women and girls at risk. Friedman in particular, underlines this issue in her analysis of women's condition in refugee camps: as camps are structured in such a way that facilitate the work of UNHCR and NGOs, access to health care, food and other services are often concentrated within one area in the camp, while women (especially single women) often remain relegated at the margins of the areas. Furthermore, the officers' housing compound is protected by barbed wire and armed guards, whereas women live in unsafe and unprotected spaces. The fact that firewood and water are often to be collected outside of the camps creates a further problem for women. As stated before, women are often the ones responsible for firewood and water gathering as they are in charge of the household and the dangers associated with these activities include exposure to rape, murder and assault (Friedman, 2007, p. 38). Already in 1991, the High Commissioner for Refugees underlined that poor design of camps may also include situations in which communal latrines and washing facilities are distant from the living quarters, thereby increasing the potential for attacks on women, especially at night<sup>94</sup>. In some cases the structural planning may affect women's access to healthcare due to inconvenient hours and impractical locations (Kelley, 1989, p.19). Cultural and structural issues are reflected in all the areas that are critical for women refugees' protection.

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<sup>94</sup> Guidelines On The Protection Of Refugee Women Prepared By The Office Of The United Nations High Commissioner For Refugees, Geneva, July 1991

## 2. Healthcare for women and girls

Healthcare issues range from malnutrition to gynaecological assistance, from access to healthcare services to the relationship with the camp examiners. Even if it may seem that healthcare should be considered a gender-neutral human right, specific differentials between man and woman affect their access to sanitation and medications. Many studies underlined how designing healthcare in a gender-sensitive manner has the double advantage of ensuring that women needs are met, while at the same time it enhances the well being of their family and often of their community. This is particularly true for women who are in charge of the family diet, food preparation and household, as well as pregnant and nursing women - as their health is determining for the survival and good health of their children (Kelley, 1998, p.26). In the way women and men access healthcare, we can distinguish from physically related differentials and culturally related ones. Of course, while the former ones refer to cares that are specifically destined to women and girls (such as gynaecological care) or categories of women (such as lactating or pregnant woman), the latter ones are the result of culturally built assumptions on their role within the family, the society, the camp. An example of indicator of health differential in camps is malnutrition. The lack of adequate food rations and the absence of dedicated health services become huge protection issue when the survival of refugee woman is in doubt. Women refugee in camps and displacement situation are more likely to die from malnutrition or its related illness than men. Reasons may encompass discriminatory food practices, such as preferential feeding, which favour men and leave women without enough food to sustain good health, as well as difficult conditions such as single mothers unable to leave their home or tends to acquire food and other supplies (Kelley, 1989 p. 19). Food requirements are also different on the bias of women needs. For example, women are particularly affected by deficiencies in iron, calcium, iodine and vitamin C, whose lack has often been connected with complications and death during childbirths reported in refugee camps<sup>95</sup>. The social role of women also exposes them to a higher number of water-related illness. As women are generally responsible for collecting and storing water, hygiene of the household, they have more contact with water that increase the risks already connected with water consumption (contaminated water accounts up to the 80% of the morbidity rates in refugee situation) and water collection outside the camp (exposure to violence). For instance women are more exposed to infections carried by insects which live near water such as: sleeping sickness, malaria, yellow fever and river blindness, worms (Kelley, 1989, p.31).

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<sup>95</sup> In Her Study "Working With Refugee Woman", Kelley Underlines The Cases Of Anemic Women, Calcium And Iodine Deficiency, Vitamine C Lacks, In Refugee Camps Especially On The Bias Of Studies That Took Place In The Horn Of Africa.

Gender specific health differentials include their access to reproductive rights, gynaecological and maternal care, and mental care. Access to proper care may also be obstacle by social and cultural elements connected with the status of women: this is for instance connected with the health differentials in the health services as less accessible due to lack of female examiners or (unsafe) distance of the care centres from home. Furthermore, a common policy in administering healthcare in refugee camps is dismissing traditional local health practices (Kelley, 1989, p.29). The main risks connected with this approach are: the tendency to overlook remedies and forms of care that may be more appropriated under certain circumstances; the tendency to discourage women refugee to seek help due to the mistrust of western medical approach. In some cases traditional healers have a recognised importance in the system of beliefs of refugees and the ICRC recognised that some illness or delicate conditions (such as pregnancies) are best treated within the patients' own culture (Bonnerjea & Spiro, 1985, p.10). Information is also a key element in healthcare services. In fact, the inability to recognise symptoms of disease and/or the lack of knowledge on the health services provided in camps are greatly affecting women's access to healthcare in camps (Kelley, 1989, p. 30). Furthermore, little attention is given to chronic diseases, psychosocial and reproductive health issues, as health organizations often focus their programmes on emergency-related diseases, even though refugees may remain in camps for many years (Hynes, et al. 2002, p.595)

### ***Reproductive rights***

Sexual and reproductive health is a key aspect of every woman's right to health<sup>96</sup>. The 2010 Reproductive Health Guidelines indicates that "reproductive health care covers a wide range of issues: pregnancy and childbirth; the protection of women, children, adolescents and men from emotional, physical and sexual abuse; family planning counselling and services to prevent unwanted pregnancies and the sequel of unsafe abortion; the treatment and prevention of sexually-transmitted diseases including HIV/AIDS; and the discouragement of harmful traditional practice"<sup>97</sup>. This section will consider only a few of these issues, while maternal assistance, sexual abuses and FGM will be discussed in dedicated sections. One point is important: the largest part of programs dealing with women's health in refugee camps put almost exclusively emphasis on maternal and child services. This direction, not only leave a large number of people outside the

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<sup>96</sup> Office Of The United Nations High Commissioner For Human Rights, World Health Organization. The Right To Health. Fact Sheet No. 31. Geneva, Switz: United Nations; 2008. Available From: [www.ohchr.org/Documents/Publications/Factsheet31.Pdf](http://www.ohchr.org/Documents/Publications/Factsheet31.Pdf).

<sup>97</sup> Reproductive Health Guidelines By United Nations High Commissioner For Refugees (UNHCR), January 2010. Available From: <http://www.unhcr.org/Protection/Health/4b015cec9/Reproductive-Health-Guidelines.Html>

orbit of more broadly conceived health care programs, but sends the dangerous message that women's health is important only as long as it is connected with their reproductive capacity (Wulf, 1994, p.3). So that women who are not pregnant, teenagers, single women, childless and sterile women in need of preventive reproductive health education are not considered as they should.

Increases in the number of sexual partners and of unprotected sexual activity, exposure of to rape, forced prostitution, and prostitution for economic survival lead to high rates of HIV risks in refugee camps<sup>98</sup>. Another critical issue can be the management of sanitary supplies including contraceptives and sanitary napkins. Gaps in services can be as basic as failing to provide menstruating women and girls with extra cloth, soap, and washing facilities (Kelley 1989, p. 29) In many cases, feminine hygiene is often forgotten: in many camps, women and girls are reported forced to reuse rags or pieces of garbage, which can lead to illness and infections: several the studies show how poor Menstrual Hygiene Management has been linked to Bacterial Vaginosis (BV), and Reproductive Tract Infection (RTI) (Bahram at al. 2009, p.228). Most refugee aid organizations greatly recognize the need to provide hygiene materials for both health and psychosocial reasons, however there are no clear programs to effectively provide materials and education. In fact, according to the UNHCR Global Appeal 2016-2017-Needs and Funding Requirements, 52% of women in refugee camps in 2015 did not receive sanitary materials due to the funding shortfalls. Disposable sanitary pads are expensive, and considered an extra in comparison with more necessary materials such as food, shelter and medical services<sup>99</sup>.

Family planning is as well an important aspect of reproductive health services: first of all frequent pregnancies are among the common causes of maternal and infant mortality or morbidity in camps (Kelley, 1989, p. 28); moreover, young girls are often exposed to accidental pregnancies with several risks for both mothers and their new-borns. In fact, pregnant adolescents are more likely than adults to have unsafe abortions, lasting health problems and maternal deaths<sup>100</sup>. Contraception and family planning are fundamental way to prevent deaths from pregnancy, childbirth-related complications, and health problems related to unintended pregnancies. But those tools are also fundamental to empower women and give them choice on their fertility pattern. For instance, many women may not want to become pregnant while living in a refugee camp; others simply want to space the births of their children. In general, according to different studies, there is no known fertility pattern among refugees: some refugees may decide to increase fertility to replace

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<sup>98</sup> Guidelines for HIV/AIDS interventions in emergency settings. Geneva, Inter-Agency Standing Committee (IASC), 2003 and 2009. <http://www.who.int/hac/techguidance/pht/IASCHIV2009En.pdf>.

<sup>99</sup> UNHCR Global Appeal 2016-2017. "Needs And Funding Requirement's." *UNHCR*.UNHCR, Nd. Web. 17 March 2016.

<sup>100</sup> WHO Factsheet N.334. Accessed From: <Http://Www.Who.Int/Mediacentre/Factsheets/Fs334/En/>



deceased children; others ones decrease fertility due to uncertainty about the future, economic instability, separation or general conditions of instability in the camps (Aptekman et al. 2014, p. 613). Furthermore, women in camps experience a lot of social pressure from their peers and their cultural, political, religious leaders to rebuild the population, so that they are more likely to carry pregnancies without adequate spacing and less interested in family planning (Wulf, 1994, p.3). Another service that has lagged far behind is abortion procedure: even if reproductive health recommendations for refugees include emergency contraception for women victims of rape, and post-abortion care (PAC) for women who face complications of unsafe or spontaneous abortion, most of the times, services for women who wish to terminate an unwanted pregnancy are not provided (Lehman, 2002, p. 151). The reasons behind this situation range from the paucity of data collected on the issue (in fact, if only little data is collected, there is a low perception of the need to create tailored intervention) to scarce information of refugees on the topic (for instance, women seeking refuge in a foreign country may be unaware of when abortion is permitted under local law), to social stigma for refugees in camps that decide to interrupt a pregnancy (Lehman, 2002, p. 154).

Humanitarian and international organizations rarely make reproductive and sexual healthcare services a priority. From the late 90's, reproductive health has been integrated in the agenda of agencies working in settings of refugee camps and internally displaced populations, including family planning, and sexually transmitted infections (Palmer, Lush & Zwi, 1999, p. 1689). However, the full and effective implementation of reproductive health services is made more difficult by the reticence to prioritise reproductive health of women as a fundamental issue in refugee camps, whereas it is well recognised that a better documentation on this topic would improve programs and policy planning for camps, conflict-affected countries, and developing ones (Hynes, Sheik, Wilson, Spiegel, 2002, p.595). In refugee situations, reproductive health is often not considered a priority because in situations where healthcare is at risk, life-saving measures are indeed of primary importance. In fact, reproductive health is not seen as a "life or death" issue, although it clearly is<sup>101</sup>. Moreover, before the already addressed UNHCR Guidelines, it was only relatively recently (at the 1994 International Conference on Population and Development), that a full and outline of reproductive was established.

Despite the progress, many relief programs still omit reproductive health care as part of their strategy. In November 2011, UNHCR and the Women's Refugee Commission started a study to document refugees' knowledge of family planning and the state of health services in specific refugee camps in Djibouti, Jordan, Kenya, Malaysia, and Uganda. Some of the conclusions underlined that: a) contraceptive use was lower in refugee camps than in more-stable environments

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<sup>101</sup> "Reproductive Health In Refugee Situations: An Interagency Field Manual". UNHCR. Retrieved 13 April 2011

surrounding the refugee camps; b) access to information and services was particularly difficult for adolescents; c) emergency contraception was available only in the context of rape violence; d) the poor quality of services limited women's propensity to use the services; e) women still faced limited availability of long-term and permanent methods<sup>102</sup>. Other issues includes cultural sensitivity and cultural relativism. The UNHCR, stated that reproductive services provided in camps "should respect the refugees' various religious and ethical values and cultural backgrounds while conforming to universally recognized international human rights standards"<sup>103</sup>, showing reproductive health remain an issue extremely sensitive to cultural relativism. In addition to this, several of the most needed and simplest reproductive health interventions for refugees, such as emergency contraception or condom distribution, remain affected by ideological controversies. Examples are: access to safe abortion services, which is crucial to reducing maternal mortality; conscientious objection; the use of cultural or religious arguments against human rights standards (Girard, Waldman, 2000, p. 167). Even if international treaties provide a clear mandate for governments, UN agencies and NGOs to meet the reproductive rights of refugees and the internally displaced, the policies of UN agencies and NGOs may fail to fully promote international human rights standards in this field. Finally, lack of coordination increases the problem: when camps are assigned to different organizations people in camps suffer serious gaps in services. In fact UNHCR review of nongovernmental programs indicates that nearly half of NGOs offering reproductive health services provide pregnancy, childbirth programs, programs for adolescents and victims of sexual violence<sup>104</sup>.

### ***Female genital mutilation***

Female genital mutilation and cutting (FGM and FGC) are widely considered a severe violation of human rights, despite the fact that many communities practise it as integral part of their culture (Berg, and Denison, 2012, p.154). Within the human rights context, the practice is considered an extreme form of discrimination against women, connected with the inequality between the sexes<sup>105</sup>. It is also considered under a violation of the rights of child (as is nearly always

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<sup>102</sup> Women's Refugee Commission and UNHCR, *Refocusing Family Planning in Refugee Settings: Findings and Recommendations From a Multi-Country Baseline Study* (New York and Geneva: United Nations, 2011). Accessed from: <http://www.unhcr.org/4ee6142a9.pdf>

<sup>103</sup> UNHCR *Reproductive Health In Refugee Situations, An Inter-Agency Field Manual*, 999 United Nations High Commissioner For Refugee. Accessed From: <http://www.unhcr.org/403a0f6c8.Pdf>

<sup>104</sup> *Reproductive Health For Refugees Consortium (RHRC), Refugees And Reproductive Health Care: The Next Step*, New York: RHRC, 1998.

<sup>105</sup> See Human Rights Committee (HRC), *General Comment No. 28: Article 3 (The equality of rights between men and women)*, 29 March 2000, (CCPR/C/21/Rev.1/Add.10) available at: <http://www.unhcr.org/refworld/docid/>

carried out on minors)<sup>106</sup>, of the rights to health, security and physical integrity of the person<sup>107</sup>, of the right to be free from torture and cruel, inhuman or degrading treatment<sup>108</sup>, and of the right to life when the procedure lead to the death of the patient. Furthermore strong support for the protection of the rights of women and girls to abandon female genital mutilation is found in many other international and regional human rights treaties and consensus documents<sup>109</sup>. All forms of FGM are considered harmful, with especially severe consequences for more extensive procedure. Factors such as social situation and age may gravely impact the health of women. Other than the physical consequences, the practice causes complications such as shock, psychological trauma, infections, urine retention, damage to the urethra and anus, and even death<sup>110</sup>. The circumstances under which FGM is performed also have severe impacts on the health of girls and women: as ritual practice formally condemned or criminalized in several countries, the procedure is often performed in spite of any sanitary conditions or anaesthesia. The “medicalization” of FGM, when the procedure is undertaken by health professionals rather than traditional practitioners, does not necessarily make it less dangerous<sup>111</sup>.

The UNHCR acknowledges that available data shows that even if measures have been taken by a number of States to eliminate the practice, it nevertheless continues in many areas<sup>112</sup>.

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[45139c9b4.html](#), para. 11

<sup>106</sup> Article 19 of the The UN Convention on the Rights of the Child spells out the obligations above and is relevant to the protection of children against FGM.

<sup>107</sup> See the Universal Declaration of Human Rights, Articles 1 and 3; International Covenant on Economic, Social and Cultural Rights, Preamble; International Covenant on Civil and Political Rights (ICCPR), Preamble and Article 9 (1); and

<sup>108</sup> See Committee Against Torture, *General Comment No. 2: Implementation of Article 2 by States Parties*, 24 January 2008, CAT/C/GC/2, available at <http://www.unhcr.org/refworld/docid/47ac78ce2.html>, para. 18; Human Rights Council, *Report of the Special Rapporteur on Torture and other cruel, inhuman or degrading treatment or punishment*, 15 January 2008, (A/HRC/7/3), available at <http://www.unhcr.org/refworld/docid/47c2c5452.html>, para. 51.

<sup>109</sup> Among others : a) International treaties: Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; Covenant on Civil and Political Rights; Covenant on Economic, Social and Cultural Rights; Convention on the Elimination of all Forms of Discrimination against Women (CEDAW); Convention on the Rights of the Child; Convention relating to the Status of Refugees and its Protocol relating to the Status of Refugees; b) Regional treaties: African Charter on Human and Peoples’ Rights (the Banjul Charter) and its Protocol on the Rights of Women in Africa; African Charter on the Rights and Welfare of the Child; European Convention for the Protection of Human Rights and Fundamental Freedoms; Article 38 of the 2011 Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention) criminalises ‘inciting, coercing or procuring a girl [or woman] to undergo’ FGM/C.

c) Consensus documents: Beijing Declaration and Platform for Action of the Fourth World Conference on Women; General Assembly Declaration on the Elimination of Violence against Women; Programme of Action of the International Conference on Population and Development (ICPD); UNESCO Universal Declaration on Cultural Diversity; United Nations Economic and Social Council (ECOSOC), Commission on the Status of Women. Resolution on Ending Female Genital Mutilation. E/CN.6/2007/L.3/Rev.1.

<sup>110</sup> See also, World Health Organization, *Female Genital Mutilation, Trends*, available at <http://www.who.int/reproductive-health/fgm/trends.htm>.

<sup>111</sup> *ibidem*

<sup>112</sup> For information about States where FGM is performed by health professionals (at public or private clinics), see Interagency statement, *ibid.*, p. 12; and Female genital mutilation/cutting: Data and trends (FGM/C: Data and trends), Population Reference Bureau, 2008, available at <http://www.prb.org/pdf08/fgm-wallchart.pdf>.

Moreover, the first connection between FGM and refugees is that UNHCR considers FGM to be a form of gender-based violence and as a form of persecution so that a large jurisprudence on the admissibility of claims on the base of FGM has been produced<sup>113</sup>, as well as a Guidance Note On Refugee Claims Relating To Female Genital Mutilation<sup>114</sup>. The insurgence of FGM practices in refugee camps is still not well documented, and there are no aggregated data collected on the issue. The little literature on the topic suggests though the importance of future research: while in some camps FGM is performed at significant lower rate than in the sending communities, and girls and woman who receive information on the risks of FGM become considerably less liable to have the procedure performed (on them or on their daughters), in other camps the levels remain high and FGM/C continues to be illegally performed. Factors inducing in perpetuating the performance of this practise range from cultural backgrounds and social expectation to religious believes and includes preserving the honour of young girls<sup>115</sup>. Efforts has been made in the camps to tackle the health fallout of female genital mutilation/cutting (FGM/C) as well as prevent new cutting, but eradicating this practice in refugee camps is particularly challenging because of the diverse backgrounds and cultures represented in the camps (Mitike et al. 2009, p. 264). Finally, FGM/C are not simply likely to happen in camps, but woman and girls already exposed to the procedure are subjected to increased risks of infections, HIV (Monjok et al 2007, p.33), difficulties during pregnancies and partum, as women with FGM/C are significantly more likely than those without FGM/C to have adverse obstetric outcomes such as caesarean section, postpartum haemorrhage, episiotomy, extended maternal hospital stay, resuscitation of the infant, and inpatient perinatal death<sup>116</sup>. Moreover, during childbirth, women have to be "defibulated" to allow the passage of the new-born head and re-infibulated after deliveries as a common practice in many communities (Johansen, 2017, p.15). When health workers are not acknowledgeable about the physical consequences of female circumcision, nor about the cultural beliefs that compel women to support the practice, they are unable to recognise treat infections related to FGM and infibulation and to be culturally sensitive in their treatment (Kelley, 1989, p.30).

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<sup>113</sup> 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, 7 May 2002, (HCR/GIP/02/01), available at <http://www.unhcr.org/refworld/docid/3d36f1c64.html>, para. 9.

<sup>114</sup> Available at: <http://www.refworld.org/pdfid/4a0c28492.pdf>

<sup>115</sup> Changing A Harmful Social Convention: Female Genital Mutilation/Cutting. 2005 United Nations Children's Fund (UNICEF) Accessed from: [https://www.unicef-irc.org/publications/pdf/fgm\\_eng.pdf](https://www.unicef-irc.org/publications/pdf/fgm_eng.pdf)

<sup>116</sup> WHO, New study shows female genital mutilation exposes women and babies to significant risk at childbirth <http://www.who.int/mediacentre/news/releases/2006/pr30/en/>

## *Maternal care*

Complications connected with pregnancy and childbirth are among the leading five causes of death among women between the ages of fifteen and forty-four and Maternal deaths are the second biggest killer of women of reproductive age<sup>117</sup>. Even though, little is known about the prevalence of maternal mortality in refugee camps for populations displaced by conflict, or about the factors contributing to such deaths (Hynes et al. 2010) Not only the health of pregnant women is affected by the general access to food (as stated before), but also (once again) by social factors. The direct, indirect and contributing causes of maternal death include not only medical reasons, but also social factors, many of which are avoidable. We can consider three specific types of delays that can play a role in maternal death: delay in seeking care, delay in reaching care and delay in receiving care (Thaddeus and Maine, 1994, p. 1091). The decision to seek care is influenced by several factors, ranging from a woman's control over making the decision, to financial conditions, to the effective availability of health care. Delays in reaching care may occur to cost, lack of access, transportation. Finally, delay in receiving care may be connected with the unavailability of supplies or trained providers, or a general poor health system. Often, more than one delay contributes to a maternal death. In 2007, the UNHCR developed, and introduced in all of its refugee camp programs, the Maternal Death Review Report, which investigate information on the demographic characteristics, pregnancies and deaths of women who die of pregnancy-related causes. The following year, the UNHCR introduced a maternal death review system in which health personnel, community leaders, the UNHCR and the host country's Ministry of Health staff reviewed every reported maternal death. Additional efforts in this field were made in 2009, and included improvements in facilities and transportation, addition of staff, and community sensitization campaigns. However, cultural preferences for home births, and resistance to emergency obstetric care continue to provide challenges to safe motherhood in these camps. In fact, as anticipated before, traditional practices are significant in camps and access to healthcare. When it comes to birthing practices, many women decide to choose Traditional Birth Attendants (TBA), mostly midwives with no formal training, but who are considered reliable and share with the pregnant woman the same language and culture. As such practices are preferred to local health centres, TBAs often work directly in the camps, with the risk of operating in unsanitary conditions (Martin, 2004, p. 68).

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<sup>117</sup> WHO Factsheet N.334. Accessed From: <http://www.who.int/mediacentre/factsheets/fs334/en/>

## *Mental care*

The WHO estimates that millions of people in the world suffer from defined mental disorder, and several others are especially exposed to the risk to develop mental illness. Among them, persons living in extreme poverty, children and adolescents experiencing disrupted nurturing, abandoned elderly, women and children experiencing violence, those traumatized by war and violence, refugees and displaced persons, and many indigenous people are particularly at risks. Furthermore, research shows that men and women are differently affected by (and exposed to) mental health problems due to differences between in roles and responsibilities, status and power, biological differences, health seeking behaviour, and the responses of the health sector and society as a whole<sup>118</sup>. Refugees are especially exposed to mental health problems due to the peculiar situation they have to face. Becoming a refugee involves dislocations and many dramatic changes<sup>119</sup>. In some cases the subversion of traditional gender roles creates tension between families and in the community as a whole. Furthermore, women refugee face high risks of violence, rape and gender-based persecution, which result can be a mental other than physical trauma. The results go from emotional problems and difficulties in adjustment to more serious mental health problems such as depression and post-traumatic stress (Kirmayer et al. 2011, p. E959). Symptoms common among refugees in camps range from anxiety, disassociation or psychic numbing, hyper-alertness, and sleeping and eating disorders to the most serious mental health manifestation, such as self-destructive behaviour, violent or disruptive behaviour and a high degree of psychosomatic illness<sup>120</sup>. According to Kelley, the mental health problems of refugee women include: those arising from torture; loss of traditional support systems; difficulties in cultural adjustment; overwork; nutritional imbalance; sexual abuse and domestic violence (Kelley, 1989, p.35). Counselling programs to face those situations are often insufficient. Rape counselling programme are few in number although many refugee women have been raped. Other mental health services are also lacking in most refugee camps. Nor are counselling programmes available for women who have undergone the trauma of dislocation<sup>121</sup>. Refugee women are also less likely to access mental health services when provided due to the multiple roles and responsibilities in the home and the workplace, lack of knowledge about specific health conditions such as postpartum depression and treatment options, reluctance to disclose, reluctance to accept medical treatment for a psychosocially perceived

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<sup>118</sup> WHO: Gender Disparities In Mental Health. Geneva. World Health Organization. Accessed from: [http://www.who.int/mental\\_health/media/en/242.pdf?ua=1](http://www.who.int/mental_health/media/en/242.pdf?ua=1)

<sup>119</sup> For further details see Chapter 1. 3 on pre-migrational, transit, and post-migrational contexts.

<sup>120</sup> Ibidem

<sup>121</sup> ibidem

problem, fears of social stigma, shame of being considered mentally ill (Kirmayer et al. 2011, p. E965).

### ***Female examiners***

It has been often observed that male refugees are more apt to seek medical attention in clinics and hospitals than women. Reasons have been recognised (among others) to the fact that health care services may be culturally inappropriate or inaccessible for women (Kelley, 1989, p.28) the absence of female health examiners, namely, is one of the most significant barriers that women refugees in need for treatment have to face. This is relevant especially in those cultures where a woman is not to be viewed by men outside her immediate family. The treatment of gynaecological problems can be especially delicate in this context as women may be more reluctant to disclose. Other cases includes for example girls and young refugees women who may lack the knowledge about how to take care of themselves during the pregnancy. In those cases advices from female professionals remain more acceptable, especially in absence of the traditional support of female relatives (Bonnerjea and Spiro, 1985, p.12).

### **3. Physical safety, gender-based violence and domestic violence.**

Men and women experience the erosion of security differently. Already A1994 United Nations Development Program (UNDP) report noted: “In no society are women secure or treated equally to men. Personal insecurity shadows them from cradle to grave [...] and from childhood through adulthood they are abused because of their gender.”<sup>122</sup>. In 1993, the UN Declaration on the Elimination of Violence against Women offered the first official definition of the term Gender-based Violence: “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivations of liberty, whether occurring in public or in private life.”<sup>123</sup> Gender-based violence has since then become an umbrella term for harm that results from power inequalities and stereotyping gender roles. The international commitment to eradicate GBV includes a large number of treaties, protocols, recommendations and acts that are internationally and/or regionally recognised. As a complete analysis of the phenomenon is not the purpose of this research, it will be

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<sup>122</sup>World Health Organization Tells Third Committee Debate On Advancement Of Women Female Genital Mutilation Could Be Eliminated In Three Generations Press Release .Accessed From:

<https://www.un.org/press/en/1998/19981019.Gash3477.html>

<sup>123</sup> UN General Assembly, Declaration on the Elimination of Violence against Women, 20 December 1993, A/RES/48/104, available at: <http://www.refworld.org/docid/3b00f25d2c.html>



sufficiently enumerate a few of them that are tailored to refugee and migration context - given that the jurisprudence on the topic is witnessing an extraordinary evolution on the topic, especially after the ratification by several states of the Istanbul Convention<sup>124</sup>. In 1990 the UNHCR adopted the first policy on refugee women's protection, from which evolved UNHCR's 1991 Guidelines on the Protection of Refugee Women, that explicitly acknowledge exposure to sexual violence. Since then sexual violence toward female refugees has been addressed by different documents, including: the 1995 "Sexual Violence Against Refugees: Guidelines on Protection and Response", then 2003 "Sexual and Gender-based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response"; followed by the 2010, the Handbook for Coordinating Gender-based Violence Intervention in Humanitarian Settings. The UN Guidelines for Gender-based Violence Interventions in Humanitarian Settings<sup>125</sup> acknowledge that "most reported cases of sexual violence amongst refugees involve female victims and male perpetrators [...] Men and young boys may also be vulnerable to sexual violence, particularly when they are subjected to detention and torture. Even less is known about the true incidence of sexual violence against men and boys than against women and girls in refugee situations". The general and widespread exposure of women to GBV, including violence by intimate partners, is exacerbated in refugee camps due to several reasons. High levels of domestic violence and marital rape among women in refugee camps have been reported largely (Vu et al. 2014). First of all, in addition to being displaced from their place of origin and temporarily homeless, refugee women lack protection in their traditional support systems. As they are strangers in the social and physical environment where they find themselves, they may be more easily targets for violence. The disruption of the social support systems has different consequences<sup>126</sup>, among others, the loss of family or community control systems (Freedman, 2011, p.38). For instance, some refugees attribute the violent behaviour of their partner, during camp permanence or resettlement, to the absence of the censorship of the elders (Kelley, 1994, p.59). The shift in social roles between men and women, also contribute to increase tension connected with GBV<sup>127</sup>. Violence against women refugees, including sexual violence, of course is not limited by its "domestic" assumption, but includes violence in the community and by the state – and the international community when humanitarian workers and officials are convicted. For instance, other reasons for GBV include the lack of resources they have at their disposal in the

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<sup>124</sup> Council of Europe, The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, November 2014,

available at: <http://www.refworld.org/docid/548165c94.html>

On this topic see for example: Sara De Vido, (2016) Donne, Violenza E Diritto Internazionale La Convenzione Di Istanbul Del Consiglio D'europa Del 2011, Milano, MIM.

<sup>125</sup> Available at: <http://www.unhcr.org/453492294.pdf>

<sup>126</sup> See chapter 2.1

<sup>127</sup> ibidem



camps environment. Many women are forced to use sex as a means to provide for themselves and their family and children, and severe cases of women forced to exchange sex for food, firewood, other resources, or protection are all well documented in refugee settings (Shanks, Schull, 2000; p.1152). Such violence is committed as well by military troops and police, fellow refugees, border guards and others, including humanitarian workers.<sup>128</sup> Despite all efforts, SGBV remains a huge problem in refugee camps, and too often scarce services, social disruption, the impunity of perpetrators, and threats and stigma facing victims, all contribute to multiple the existing barriers associated with disclosure.

#### 4. Disproportional access to education

Education is a fundamental right as stated by international human rights law in the Declaration of Human Rights (Article 26)<sup>129</sup>, in the International Covenant on Economic, Social and Cultural Rights (Article 13)<sup>130</sup> and in the Convention on the Rights of the Child (Article 28)<sup>131</sup>. Under refugee international law, the 1951 Convention Relating to the Status of Refugees, Article 22 distinguishes between elementary education and education other than elementary: while access to the former should be the same for refugee and nationals, the latter be not less favourable than that accorded to aliens<sup>132</sup>. The 1960 UNESCO Convention Against Discrimination in Education prohibits discrimination that deprives any person or group of persons of access to education of any type or at any level (Article 1)<sup>133</sup>. The CRC recognises the right to education without any discrimination of any kind, irrespective of the child's status (Article 2), and "on the basis of equal opportunity" (Article 28)<sup>134</sup>. Detailed information on planning education programmes for refugee schools is was in the Revised (1995) Guidelines for Educational Assistance to Refugees<sup>135</sup>, and the

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<sup>128</sup> See for example, Amnesty International reports on rape and sexual violence such as: Amnesty International. 2009. "No Place for Us Here': Violence against Refugee Women in Eastern Chad." London: Amnesty International Publications; and 2009 "Rape And Sexual Violence Human Rights Law And Standards In The International Criminal Court"

<sup>129</sup> UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III), available at: <http://www.refworld.org/docid/3ae6b3712c.html>

<sup>130</sup> UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966, United Nations, Treaty Series, vol. 993, p. 3, available at: <http://www.refworld.org/docid/3ae6b36c0.html>

<sup>131</sup> UN General Assembly, Convention on the Rights of the Child, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: <http://www.refworld.org/docid/3ae6b38f0.html>

<sup>132</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html>

<sup>133</sup> UN Educational, Scientific and Cultural Organisation (UNESCO), Convention Against Discrimination in Education, 14 December 1960, available at: <http://www.refworld.org/docid/3ae6b3880.html>

<sup>134</sup> See note 124

<sup>135</sup> UNHCR Revised (1995) Guidelines for Educational Assistance to Refugees (UNHCR), Geneva. Available at: <http://www.pitt.edu/~ginie/unhcr/pdf/rgfeatr.pdf>

following Progress Report on Refugee Children and Adolescents<sup>136</sup>. The international community has since then recognized the importance of education in emergencies and refugee camps. In fact, the international community required by treaty to provide education for children, and acknowledges that providing education in camps increases the chances that refugees and IDPs will be self-sustaining<sup>137</sup>. The importance of education is clear in emergency programs: before international assistance arrives in conflict-affected areas, displaced communities often start the schools<sup>138</sup>. Similar to food, water and shelter, education can be life saving and life-sustaining as it spreads the key survival information on important issue such as landmine awareness, HIV/AIDS prevention, basic hygiene and health care. Attending school can as well diminish the chance of children to join fighting group, face sexual or economic exploitation or become exposed to other risks. For girls, this is particularly important as that they are likely subject to rape and, gender-based violence and sexual exploitation<sup>139</sup>.

Nevertheless, girls and women in camps face many of the factors that inhibit refugee women from obtaining education. In many country of the developing world, women are less likely to access education for a variety of reasons. Those include for instance the cultural assumption that the women's place is the home. Another important reason is the fact that investing in girls' education offers far less economic return that investing in boys' education. In fact, since men generally earn more than women, families often regard girls' education as a poor investment. Girls' earning potential is also underrated because, once married, a woman enters her husband's family household (Kelley, 1989, p. 51). Those girls who can access education are more likely to dropout than boys due to family pressure, early marriage and pregnancy. Child brides are especially likely to drop out of school and complete fewer years of education. More than 41,000 girls under the age of 18 marry every day with consequences on their educational attainment, and potential earnings (Quentin et al, 2017 pp. 233). This situation is exacerbated in crisis situation: Girls in conflict-affected settings are 2.5 times more likely to be out of school than boys<sup>140</sup>. In refugee camps and long-term settlement where educational opportunities are limited, these cultural constrains often restrict women refugee from participating to educational programmes offered (Kelley, 1989, p. 53). The lack of previous education, the relative inferior educational qualification girls and women have access to, are then

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<sup>136</sup> UN High Commissioner for Refugees (UNHCR), Progress Report on Refugee Children and Adolescents, 25 May 1998, SC/1998/INF.1,

available at: <http://www.refworld.org/docid/49997afa0.html>

<sup>137</sup> Women's Commission for Refugee Women and Children, *Global Survey on Education in Emergencies*, February 2004.

<sup>138</sup> Ibidem

<sup>139</sup> Ibidem

<sup>140</sup> Education Cannot Wait. Proposing a fund for education in emergencies. May 2016. Overseas Development Institute for UNICEF. Accessed from:

<https://www.odi.org/sites/odi.org.uk/files/resource-documents/10497.pdf>

translated in fewer employment opportunities that lead them to occupy the lowest level of the labour market. Women without education are also excluded from access to decision-making authority in the camp and in the community.

Those critical situations have been reported in many camps in different part of the world. In the last two years, as the European Union is facing a “migration crisis”, migration management has been prioritized in the European Agenda, with consequences on the life of many refugee and asylum seekers. The next chapter will analyse in the detail the conditions that women and girls are living in many camps in Turkey and Greece, as a consequence of the EU-Turkey deal of March 2018 on the return of migrants. As the agreement as been created to face and emergency with provisory measures, many places that originally were built to be a transit area for refugees during security checking, have been transformed in camps. This situation has with dramatic consequences for all the people living there, and it is greatly affecting women’s and girls’ rights.

### **Chapter 3 The EU-turkey agreement: which challenges?**

Contents: 1. The (so-called) 2015 European migration crisis; 2. Legal framework: the EU external cooperation and asylum procedures; - 3. Content of the EU-Turkey agreement; Controversies on the legal status of the agreement; Controversies on repatriation to turkey; Security and human rights - 4. Implementation and impact of the agreement in turkey and Greece; The case of legal violence against female refugee in turkey(detention) camps; Women and insecurity; Sexual and gender-based violence; Forced marriage; A “legal” violence; Case analysis in Greek camps (the hotspots); Situation in the camps; Sexual and gender-based violence; Healthcare and reproductive needs; 5. Similar agreements and their implementation

#### **3) The EU-Turkey Agreement: which challenges?**

The EU-Turkey Agreement –also known as ‘deal’ due to its ambiguous nature- refers to the EU-Turkey statement of the 18<sup>th</sup> March 2016, following on from the EU-Turkey Joint Action Plan activated on 29<sup>th</sup> November 2015, and the 7<sup>th</sup> March EU-Turkey statement. The agreement between Turkey and the European Union established that from 20<sup>th</sup> March 2016 all irregular migrants arriving on the Greek islands who do not apply for asylum, or whose claims have been evaluated as inadmissible or unfounded, would be returned to Turkey. On the basis of a 1-1 scheme for each Syrian returned to Turkey from the Greek islands, another Syrian entitled with the refugee status will be resettled in the EU. The EU committed to mobilise a total of €6 billion by the end of 2018 to address the humanitarian and development needs of refugees in Turkey. While welcomed in Brussels as a positive step to address the “migration crisis”, the deal raised criticism among international human rights organisations and the civil society. The main oppositions goes from doubt on the legal value of the agreement, to the compliance of the deal with the EU migration and international refugee law, to the definition of Turkey as a “safe country” and the impact of the agreement on human rights of migrants and asylum seekers. This chapter will analyse each of these issues, focusing on the human rights violations committed against women and girls. In fact, one year after the creation of the statement, the agreement has been largely evaluated on the base of its impact on migration fluxes as well on the life of asylum seekers. This analysis will consider the main legal aspects under which the agreement has been examined (namely the type of agreement and its compliance with the EU law in place) and will then build up on the base of the evaluation of its impact on the life of refugee women and girls, especially in detention and relocation camps, as it

has been showed that the rights of woman in refugee camps are more likely to be challenged or violated. Furthermore, it is important to consider that the agreement paved the way to a future policy of externalization of migration control. For instance, already on 3rd February 2017 Europe's leaders in Malta developed an action plan with Libya in order to put an end to irregular migration passing through the Central Mediterranean route (so-called Malta declaration)<sup>141</sup>. It is then fundamental to assess the real impact of this kind of agreement and collaboration with external countries on human rights.

### **1. The (so-called) 2015 European migration crisis**

In analysing the migration agreement between Europe and Turkey and its impacts on human rights and migrant women, there are two key distinct phenomena to consider: the so-called Syrian crisis and the European migration crisis. The two emergencies are often (erroneously) considered as the same situation, while they are in fact two different phenomena often overlapping and greatly influencing one another. For the purposes of this research, it is not necessary to recollect the origins, the causes and the deep consequences of the "Syrian crisis" - that is indeed a significant humanitarian emergency of our time, and a key part of the contemporary international relations scenario<sup>142</sup>. This analysis will then only briefly consider the main framework of the Syrian civil conflict, and the escalation of the political situation, for the purpose of introducing the context of the EU-Turkey statement. With Syrian crisis we normally refer to the Syrian civil war that began in 2011 in the contexts of the so-called wave of 2011 Arab Spring protests, due to the popular insurrection against the Assad government. After violent suppression of the protests, the uprising escalated quickly evolving in an on-going multi-sided armed conflict between the government of President Bashar al-Assad and its allies, against various endogenous and exogenous forces opposing the government (Khalidoun, 2014, p.15). The forces involved include: the Syrian government, a large alliance of Sunni Arab rebel groups, the majority-Kurdish Syrian Democratic Forces (SDF), Salafi jihadist groups (including al-Nusra), the Islamic State, several of countries in the region and

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<sup>141</sup> European Commission - Press release

Managing migration along the Central Mediterranean Route – Commission contributes to Malta discussion, 2017 Available at: [http://europa.eu/rapid/press-release\\_IP-17-134\\_en.htm](http://europa.eu/rapid/press-release_IP-17-134_en.htm)

<sup>142</sup> On this topic, of extreme interest is the analysis of the Italian historian Calchi Novati, who recently passed away after many years of extraordinary contribution to the research on the Middle East: Calchi Novati (2012) *Verso un nuovo orientalismo Primavera arabe e Grande Medio Oriente*, Carocci. "*La guerra in Siria fa paura a tutti ma nessuno sembra interessato ad adoperarsi almeno per tentare di farla finire*".

beyond; Turkey; Russia, Iran and Hezbollah supporting the Syrian government; the NATO alliance of the Combined Joint Task Force<sup>143</sup> against the IS.

Since the beginning of the conflict, the UNHCR estimated approximately over 7,600,000 internally displaced and over 5,200,000 refugees<sup>144</sup>, with Europe receiving almost 1,000,000 first time asylum application from Syrians only between 2014 and 2017<sup>145</sup>. It is clear then how the Syrian crisis has been correlated with the European Migration Crisis of 2015. The EU migration crisis can be considered in part a consequence of the Syrian civil war, but indicates the general struggle of EU countries in dealing with the increasing number of asylum seekers and migrants coming from different countries (rather than from Syria only) since 2015. According to Eurostat, EU member states received in total over 1.2 million first-time asylum applications in 2015 (more than double that of the previous year). According to UNHCR, the top ten nationalities of Mediterranean Sea arrivals in 2015 were Syria (49%), Afghanistan (21%), Iraq (8%), Eritrea (4%), Pakistan (2%), Nigeria (2%), Somalia (2%), Sudan (1%), the Gambia (1%) and Mali (1%). Other migrants were from Western Asia and South Asia<sup>146</sup>. This sudden and continuous flow of population have been challenging the domestic politics of most European countries, generating new tensions and exacerbating pre-existing ones, as well as impacting domestic and international security and the EU-Middle East relations. It is important to consider that the migration crisis converged with a set of other challenges for the EU, including: the drama of the Greek crisis; a general economic instability; the rise of anti-Europe movements; the Brexit and other separatist movements in several countries; continuing tension in the EU-Russia relations; and the pervasive threat from ISIS (Heisbourg, 2015, p.10).

Nevertheless, the current flow of refugees is not unprecedented neither numerically speaking, nor for its human and strategic consequences (Heisbourg, 2015, p.15). The EUROSTAT data indicate that Prior to 2014, the number of asylum applications in the EU peaked in 1992 (672,000), 2001 (424,000), 2013 (431,000)<sup>147</sup>. In 2014 it was 626,000, a number reached as well during the conflict between Bosnia and Serbia in 1992. Previous emergencies include for instance the spill over migrations the eviction of the German-speaking population of Central and Eastern Europe at the end of the Second World War; the partition of India in 1947; the Palestinian Nakba of 1948; the

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<sup>143</sup> United States; France; United Kingdom; the Netherlands; Jordan; Germany; Norway

<sup>144</sup> UNHCR), United Nations High Commissioner for Refugees. "UNHCR Syria Regional Refugee Response". <http://data.unhcr.org/syrianrefugees/regional.php>

<sup>145</sup> Ibidem

<sup>146</sup> UNHCR 2015 Refugees & Migrants Sea Arrivals In Europe Data.Unhcr.Org/Mediterranean Available At: <https://data2.unhcr.org/ar/documents/docwnload/49921>

<sup>147</sup> EUROSTAT, Asylum statistics, 2016. Available at: [http://ec.europa.eu/eurostat/statisticsexplained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statisticsexplained/index.php/Asylum_statistics)

1979 Soviet invasion of Afghanistan (Heisbourg, 2015, p.17). Starting from 1985, the EU has been periodically interested by migratory fluxes that have been considered “migratory crisis”. From this point of view the EU is almost under an emergency situation, so that the definition of “2015 migratory crisis” should be used carefully. Nevertheless, some differences from previous situation exist. Namely the migration routes are different than in the past, and subsequently the arrival country is different as well; the origins of asylum seekers in Europe are more diverse than in previous refugee crises; the applicants arrives from more distant countries and are therefore paying higher fees to smugglers; the longest distances from home and host countries imply that is more difficult for asylum seekers, refugees and migrants to go back home, while previous migrations tended to be more provisory situations (Heisbourg, 2015, p.17). The result of all this factors is that the EU is actually facing unprecedented challenges in tackling the flows as well as in integrating the diverse groups of people.

## **2. Legal framework: the EU external cooperation and asylum procedures**

The legal framework of the EU-Turkey agreement has to be framed under both the body of the EU migration and asylum systems of law, and under the framework EU system of relations with Turkey. Migration into and within Europe is regulated by a combination of national law, EU law, and by other international obligations of European states. In the European Union, relevant sources of law include: Articles 18 (right to asylum) and 19 (protection in the event of removal, expulsion or extradition) of EU Charter of Fundamental Rights<sup>148</sup>, and Article 78 of the Treaty on the Functioning of the EU<sup>149</sup>. Both sources establish that the right of asylum shall be guaranteed with due respect for the Refugee Convention and in accordance with the Treaty establishing the European Community<sup>150</sup><sup>151</sup>. Furthermore, following the Schengen Agreement (1985) on the elimination of internal border controls and the following Amsterdam Treaty, since 1999 the EU set up a Common European Asylum System (CEAS)<sup>152</sup> to unify minimum standards related to asylum.

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<sup>148</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, available at: <http://www.refworld.org/docid/3ae6b3b70.html>

<sup>149</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>

<sup>150</sup> Art. 79 TFEU: “*The Union shall develop a common policy on asylum, subsidiary protection and temporary protection with a view to offering appropriate status to any third-country national requiring international protection and ensuring compliance with the principle of non-refoulement. This policy must be in accordance with the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees, and other relevant treaties*”.

<sup>151</sup> Art. 18 EU Charter on Fundamental Rights: “*The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union*”.

<sup>152</sup> European Commission, A Common European Asylum System, 2005. Available at:



The CEAS leaves up to EU Member States the discretion to establish procedures for obtaining and withdrawing international protection. This system relies on the Dublin regulation 604/2013<sup>153</sup>, the Revised Reception Conditions Directive<sup>154</sup>, the Revised Qualification Directive<sup>155</sup>, the New EURODAC Regulation<sup>156</sup>. Furthermore the Commission presented in July 2016 a Proposal for a new Asylum Procedure Regulation, intended to replace Directive 2013/32/EU, as part of a comprehensive package of Proposals for a CEAS reform<sup>157</sup>. The EU deals with migration also through different sets of policies focused specifically on: legal migration and integration; irregular migration & return; Schengen, borders & visas; industry for security; organised crime & human trafficking; crisis & terrorism; police cooperation; international affairs; Europe citizens. In dealing with the migrant crisis, EU adopted a specific Agenda on Migration. The Agenda is built upon four pillars: 1) Reducing the incentives for irregular migration; 2) Saving lives and securing the external borders; 3) Strengthening the common asylum policy 4) Developing a new policy on legal migration<sup>158</sup>. For each pillar, specific actions and programs (such as the actions of Frontex, Triton and Poseidon) have been implemented, as well as the activation of the emergency response system envisaged under Article 78(3) TFEU<sup>159</sup>, introducing a temporary European relocation scheme for asylum seekers who are in clear need of international protection on the basis of each country size of

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[https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/ceas-fact-sheets/ceas\\_factsheet\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/e-library/docs/ceas-fact-sheets/ceas_factsheet_en.pdf)

<sup>153</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast) (applicable from 1 January 2014).

Available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013R0604>

<sup>154</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection (recast) (applicable from 21 July 2015).

Available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32003L0009>

<sup>155</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) (applicable from 21 December 2013).

Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016PC0466>

<sup>156</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice (recast) (applicable from 20 July 2015). Available at: <http://eur-lex.europa.eu/legal-content/IT/TXT/?uri=celex%3A32013R0603>

<sup>157</sup> European Commission - Press release. Completing the reform of the Common European Asylum System: towards an efficient, fair and humane asylum policy 2016, Available at: [http://europa.eu/rapid/press-release\\_IP-16-2433\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2433_en.htm)

<sup>158</sup> European Union, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions: European Agenda On Migration, p.8-9 Available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf)

<sup>159</sup> European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>



population, unemployment rate, total GDP, and number of spontaneous asylum applications received.

The EU Agenda on migration includes as well actions towards thirds countries<sup>160</sup> and this external dimension of European migration and asylum policy is based on the delicate system of relations between the specific country and the EU. In the case of Turkey, the relations with the EU were established in 1959 and the institutional framework is shaped formally since 1963 Ankara Agreement<sup>161</sup>. Turkey started its negotiation for adhesion in 2005. Starting from 2015 bilateral agreement re-opened the discussion on pre-adhesion procedures with the Action Plan EU-Turkey as agreed on November 29<sup>th</sup> 2015<sup>162</sup>. The scope of the plan was to support the Turkish hosting community and its commitment in welcome and protect Syrian citizens under temporary protection, and to strength cooperation with the Turkish agencies in order to prevent irregular migration. The EU commitment to this plan resulted also in a financial support of 3E billion. In addition, on 15<sup>th</sup> December 2015, the Commission proposed a voluntary humanitarian admission scheme for Syrian Refugees in Turkey<sup>163</sup>. Between February and March 2016 the EU-Turkey cooperation on this issue was intensified, namely by the Statement of the EU Heads of State or Government 7<sup>th</sup> March 2016<sup>164</sup> and the following 28<sup>th</sup> March Agreement.

### **3. Content of the EU-Turkey Agreement**

Since 2014, Turkey received approximately 3,181,537 asylum applications<sup>165</sup>. Starting from 2015 bilateral agreement re-opened the discussion on pre-adhesion procedures with the Action Plan EU-Turkey as agreed on November 29<sup>th</sup> 2015<sup>166</sup>. The scope of the plan was to support the Turkish hosting community and its commitment in welcome and protect Syrian citizens under temporary protection, and to strength cooperation with the Turkish agencies in order to prevent irregular

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<sup>160</sup> ibidem

<sup>161</sup> The Ankara Agreement signed in 1963 and the Additional Protocol to the Ankara Agreement added in 1970 strengthen trade and economic relations between what was then the European Economic Community (EEC) and Turkey in light of a possible accession by the latter to the EEC.

<sup>162</sup> European Commission, EU-Turkey Joint Action Plan, Fact sheet, MEMO/15/5860, November 2015. Available at: [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_it.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_it.htm)

<sup>163</sup> European Commission - Press release. Commission presents Recommendation for a Voluntary Humanitarian Admission Scheme with Turkey for refugees from Syria Strasbourg, 15 December 2015. Available at: [http://europa.eu/rapid/press-release\\_IP-15-6330\\_en.htm](http://europa.eu/rapid/press-release_IP-15-6330_en.htm)

<sup>164</sup> European Council, Statement of the EU Heads of State or Government, 07/03/2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/>

<sup>165</sup> UNHCR, Syria Regional Refugee Response, updated to August 2017 <http://data.unhcr.org/syrianrefugees/country.php?id=224>

<sup>166</sup> European Commission, EU-Turkey Joint Action Plan, Fact sheet, 2015, [http://europa.eu/rapid/press-release\\_MEMO-15-5860\\_it.htm](http://europa.eu/rapid/press-release_MEMO-15-5860_it.htm)

migration. The EU commitment to this plan resulted also in a financial support of 3E billion. In addition, on 15 December 2015, the Commission proposed a voluntary humanitarian admission scheme for Syrian Refugees in Turkey. Already in the 2015 Agenda on Migration, it was indicated that: “A good example of where there is much to be gained from stepping up cooperation is Turkey”<sup>167</sup>. Since the beginning of 2014, Turkey has received EUR 79 million to contribute to its efforts to deal with the pressure on its refugee management system and to help prevent hazardous journeys in the Eastern Mediterranean<sup>168</sup>. Between February and March 2016 the EU-Turkey cooperation on this issue was intensified, namely by the Statement of the EU Heads of State or Government 7<sup>th</sup> March 2016<sup>169</sup> and the following 28<sup>th</sup> March Agreement. The purpose of the agreement is to “to end the irregular migration from Turkey to the EU” with the intention to “break the business model of the smugglers and to offer migrants an alternative to putting their lives at risk”<sup>170</sup>. The agreement is made up by nine key points. The first point of the agreement is that “all new irregular migrants crossing from Turkey into Greek islands as from 20 March 2016 will be returned to Turkey”<sup>171</sup>. This is clearly indicated as a “temporary and extraordinary measure, which is necessary to end the human suffering and restore public order”<sup>172</sup>. Migrants arriving in Greek islands are then registered and their application processed. Those who do not apply, or whose application is considered unfounded or inadmissible, are returned to Turkey. We have to notice that the indication “irregular migrants” includes here asylum seekers whose applications have been rejected. The second point introduces the 1-1 scheme: “for every Syrian being returned to Turkey from Greek islands, another Syrian will be resettled from Turkey to the EU”<sup>173</sup>. This provision is to be framed in the context of the previous agreement, including the commitment assumed with the 2015 regarding the “share” of relocations of asylum seekers each country has been designated to accept. This provision then does not enlarge EU countries availability to accept refugees. Point three elects Turkey as guardian of the sea and land routes that can be used for illegal migration from Turkey to the EU countries. Point four foresees a new a Voluntary Humanitarian Admission Scheme to be activated once the irregular crossing between Turkey and EU member states will be reduced or eliminated. Point five re-opens the issue of visa liberalisation roadmap,

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<sup>167</sup> European Union, Communication From The Commission To The European Parliament, The Council, The European Economic And Social Committee And The Committee Of The Regions: European Agenda On Migration, p.8-9 Available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication\\_on\\_the\\_european\\_agenda\\_on\\_migration\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/communication_on_the_european_agenda_on_migration_en.pdf)

<sup>168</sup> Ibidem

<sup>169</sup> European Council, Statement of the EU Heads of State or Government, 07/03/2016 <http://www.consilium.europa.eu/en/press/press-releases/2016/03/07-eu-turkey-meeting-statement/>

<sup>170</sup> European Union: Council of the European Union, EU-Turkey statement, 18 March 2016, 18 March 2016, available at: <http://www.refworld.org/docid/5857b3444.html>

<sup>171</sup> ibidem

<sup>172</sup> ibidem

<sup>173</sup> ibidem

planning a loosening of the Union's strict visa regime in Turkey's favour, along with new steps in the accession negotiation. However, this demand became subjected to stiff resistance from certain member states. Especially Germany, France, the Netherlands and Austria having significant shares of Turkish migrants continuously express their discomfort with such an option due to security reasons and fear of increased migration from Turkey to EU (Togral, 2012, p. 6). Point six analyses the EU economic commitment in supporting the different actions of the agreement, including the speeding up of the initially allocated 3 billion euros included in the 2015 strategy, and a new contribution of 3 billions euros to be delivered up to the end of 2018, for a total disbursement of 6 billion euro. Point seven express the support of both sides for the on-going work on the upgrading of the Customs Union. Point eight officially re-opens the accession process set out in the statement of 29<sup>th</sup> November 2015. Only finally, point nine briefly indicates the commitment of both sides to improve the humanitarian conditions in Syria, especially at the Turkish border.

One year after its implementation, in its report "EU-Turkey Statement: One Year On" the EU evaluated the EU-Turkey statement as a "game changer" in the context of the migration crisis, interpreting positively the huge shift downward in arrivals: "From 10,000 in a single day in October 2015, daily crossings have gone down to an average of around 43 today"<sup>174</sup>. Nevertheless, while welcomed in Brussels as a positive step to address the migration crisis, the deal raised criticism among international human rights organisations and the civil society. Major critics in this sense regards for instance its legal significance regarding the status deal as a source of law, as well as the relationship of the agreement with the EU system of law, especially with regards to the non-refoulement clause and the prohibition of expulsion and extradition. Moreover, other critics have been moved on the basis of the evaluation of the systematics violations of human rights of migrants, especially in virtue of the camps conditions and the recognition of Turkey as a safe country. In fact, it shifts the attention of the migration crisis from a humanitarian emergency to a security issue, so that the scope of the deal is limiting the access of illegal migrants (including asylum seekers) to EU countries rather than ensuring human rights protection in such a critical context.

### **Controversies on the legal status of the Agreement**

Before analysing the compliance of the agreement with the EU system of law, it is necessary to at least mention (without pretending to exhaust the topic ) the doubts related to the legal nature of

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<sup>174</sup> European Commission, 2016, EU-Turkey statement one year on Available at: [https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu\\_turkey\\_statement\\_17032017\\_en.pdf](https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/eu_turkey_statement_17032017_en.pdf)

the agreement, and whether it can be placed within the systems of soft law, or should be considered a treaty. The reasons why it is important to establish how the agreement should be framed in the soft law systems of international law are mainly two: the impact of the legal value of the agreement on the power of the European Parliament, and the admissibility of cases related to the agreement under international courts, especially under the ICJ. We claim that from a strictly procedural point of view the agreement cannot be considered a treaty. EU's procedure for negotiating and concluding treaties with third countries is laid down in Art. 218 TFEU and implies that the Council is not able to conclude a treaty with a third country without the final consent of the European Parliament<sup>175</sup>. On the basis of the relevant case jurisprudence, "Article 228 uses the expression agreement in a general sense to indicate any undertaking entered into by entities subject to international law which has binding force, whatever its formal designation."<sup>176</sup> On March 22 2016, the Parliament began a Parliamentary question on the Legal nature and binding nature of the so-called EU-Turkey Agreement<sup>177</sup>. The case was as well brought in November 2016 to the CJEU when three asylum seekers located in Greece requested the annulment of the EU-Turkey Statement, challenging its legality. The applicants argued that the deal fails to comply with the Treaty procedures on EU decision and international treaty making procedures. The case is *NF, NG and NM v European Council*, T-192/16, T-193/16 and T-257/16<sup>178</sup> and at the CJEU remanded the decision to the General Court stating that: "it is for the Court to assess whether the EU-Turkey statement, as published by means of that press release, reveals the existence of a measure attributable to the institution concerned in the present case, namely, the European Council, and whether, by that measure, that institution concluded an international agreement, which the applicant describes as the challenged agreement, adopted in disregard of Article 218 TFEU and corresponding to the contested measure". Surprisingly the Court indicates that the EU-Turkey Statement was not an act or international agreement attributable to the European Council, but rather that the real authors were the heads of state or government of the EU member states and their Turkish counterparts. Consequently, the Court declared that it did not have jurisdiction to assess the application, because none of the EU institutions featured among the authors of the EU-Turkey Statement. The case was

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<sup>175</sup> Article 218 (ex Article 300 TEC) European Union, Consolidated version of the Treaty on the Functioning of the European Union, 13 December 2007, 2008/C 115/01, available at: <http://www.refworld.org/docid/4b17a07e2.html>

<sup>176</sup> Judgment of the Court of 9 August 1994. *French Republic v Commission of the European Communities. Agreement between the Commission and the United States regarding the application of their competition laws - Competence - Statement of reasons - Legal certainty - Infringement of competition rules.* Case C-327/91. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:61991CJ0327>

<sup>177</sup> March 22 2016, Parliamentary question on the Legal nature and binding nature of the so-called EU-Turkey Agreement <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+OQ+O-2016-000053+0+DOC+XML+V0//EN>

<sup>178</sup> T-257/16 *NF, NG and NM v European Council*. See also <http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf>.

brought to the General Court in February 2017: On 28 February 2017, the EU General Court has given an order stating that the deal cannot be challenged directly before EU courts, since it is not considered an act of an institution of the EU but rather an act of Member States during a meeting of Heads of State or Government with their Turkish counterpart, which the President of the European Council and President of the European Commission only attended informally. As a consequence, in the absence of any act of an institution of the EU, the legality of which it could review under Article 263 TFEU, the Court declared that it lacks jurisdiction to hear and determine the actions brought by the three asylum seekers<sup>179</sup>. The implications of such conditions have a then great impact on the democracy, transparency, and control systems of the EU mechanism.

### **Controversies on repatriation to Turkey**

Another test of the legitimacy of the agreement is whether it complies with the EU framework on asylum procedures. In the same case analysed before (NF, NG and NM v European Council), the applicants also claimed that “the EU-Turkey Statement is unlawful because it violates inter alia the principle of non-refoulement and the prohibition of collective expulsion”<sup>180</sup>. In the text of the statement, the compliance with EU law is clearly underlined: point one, “all migrants will be protected in accordance with the relevant international standards and in respect of the principle of non-refoulement<sup>181</sup>”; point two, “migrants arriving in the Greek islands will be duly registered and any application for asylum will be processed [...] in accordance with the Asylum Procedures Directive”<sup>182</sup>. Even though major critics to the agreement are connected with the resettlement procedures. The legal framework for the returns is considered to be the bilateral readmission agreement between Greece and Turkey, and to the EU-Turkey Readmission Agreement. Namely, Article 4 of the EU-Turkey Readmission Agreement states that “Turkey shall readmit, upon application by a Member State and without further formalities to be undertaken by that Member State other than those provided for in this Agreement, all third-country nationals or stateless persons who do not, or who no longer, fulfil the conditions in force for entry to, presence in, or residence on, the territory of the requesting Member State” including persons who “[...] illegally and directly

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<sup>179</sup> Order Of The General Court (First Chamber, Extended Composition) 28 February 2017.

Available at: <https://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf>

<sup>180</sup> T-257/16 NF, NG and NM v European Council.

See also <http://curia.europa.eu/jcms/upload/docs/application/pdf/2017-02/cp170019en.pdf>.

<sup>181</sup> Non-refoulement is a fundamental principle of international law which forbids a country receiving asylum seekers to return them to a country in which they would be in likely danger of persecution based on "race, religion, nationality, membership of a particular social group or political opinion": Article 33 (1) of the 1951 Geneva Convention.

<sup>182</sup> European Union: Council of the European Union, EU-Turkey statement, 18 March 2016, 18 March 2016, available at: <http://www.refworld.org/docid/5857b3444.html>

entered the territory of the Member States after having stayed on, or transited through, the territory of Turkey.”<sup>183</sup>. As stated before, for asylum seekers to be considered in the category of illegal migrants, it is necessary that their claims is evaluated as inadmissible or not funded. There are two legal possibilities that could declare an asylum applications inadmissible, in relation to Turkey: 1) first country of asylum (Article 35 of the Asylum Procedures Directive)<sup>184</sup>: in case the person has been already recognised as a refugee or enjoys sufficient protection in the first country of arrival; 2) safe third country (Article 38 of the Asylum Procedures Directive)<sup>185</sup>: where third country can guarantee effective access to protection to the readmitted person. As for ‘migrants not apply for asylum the crucial question is whether they will be given an effective opportunity to apply for asylum, as the Directive requires. If an irregular migrant does not apply for asylum then in principle there is no legal obstacle to returning them to Turkey, subject to the conditions set out in the EU’s Returns Directive<sup>186</sup>.

The focus is then on Turkish asylum procedures and identification as safe country. For the first issue it is important to notice that the so-called “geographical limitation” to the 1951 Geneva Convention preserved by Turkey and its inadequate reception conditions characterizing have been constituting important contentious issues in the course of Turkey’s accession to the EU (Toğral, 2012, p. 170). In fact Turkey signed the 1951 Geneva Convention with but “geographical” and “time” limitation, which deny refugee status and permanent residence, permit to “non-European” asylum seekers<sup>187</sup>. Non-European asylum seekers can apply for temporary asylum: Turkey examines their applications in cooperation with the UNHCR, and grants only temporary protection to those recognized as refugees until they are resettled in another country. The fact that those asylum seekers may enjoy “sufficient protection” is then not guaranteed. Applicants have to wait for years to be resettled by the UNHCR (only small number of countries, such as the USA, Canada, Australia, Sweden, Finland and Norway accept refugees from Turkey), they are not likely to enjoy

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<sup>183</sup> European Union, Agreement between the European Union and the Republic of Turkey on the readmission of persons residing without authorisation.

Available at: <http://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A22014A0507%2801%29>

<sup>184</sup> European Union: Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013, available at: <http://www.refworld.org/docid/51d29b224.htm>

<sup>185</sup> *ibidem*

<sup>186</sup> European Union: Council of the European Union, Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection (recast), 29 June 2013. Available at: <http://www.refworld.org/docid/51d29b224.html>

<sup>187</sup> As indicated by official documents, following countries are defined as “European”: Estonia, Latvia, Lithuania, Moldova, Belarussia, Ukraine, Russian Federation (including the Asian part), Georgia, Armenia and Azerbaijan. Other countries located farther West on the European continent are also considered as European countries. Kazakhstan, Kyrgyzstan, Uzbekistan, Tajikistan and Turkmenistan are regarded as “non-European.” (see “(24) Justice, Freedom and Security: Bilateral Screening with Turkey,” Republic of Turkey Ministry for EU Affairs, accessed June 10, 2012, [http://www.abgs.gov.tr/tarama/tarama\\_files/24/sorular%20ve%20cevaplar\\_files/SC24\\_cevaplar.pdf](http://www.abgs.gov.tr/tarama/tarama_files/24/sorular%20ve%20cevaplar_files/SC24_cevaplar.pdf) .



social and economic rights in full-sense, they do not receive appropriated assistance on healthcare, education, legal advices (Toğral, 2012, p.177).

In addition to the controversial Turkish asylum procedures, the definition of Turkey as a safe country remains openly criticized. According to Article 42 of the Recast Asylum Directive, “the assessment underlying the designation [of a safe country] can only take into account the general civil, legal and political circumstances in that country and whether actors of persecution, torture or inhuman or degrading treatment or punishment are subject to sanction in practice when found liable in that country”<sup>188</sup>. As answer to the Parliamentary questions of 3 May 2017, submitted by Martina Anderson, and Lynn Boylan to the Commission on the grounds which would entitle Turkey to be considered as a “safe country”<sup>189</sup>, the Commission stated that “the application of the concept of safe third country is subject to national rules allowing an individual examination of whether the third country concerned is safe for a particular applicant” and that for this reason “The applicant must be allowed to challenge the application of this concept on the grounds that the third country is not safe in his or her particular circumstances”<sup>190</sup>. Many international NGOs and human rights associations have challenged this definition. For instance, Statewatch reports point out that Turkey does not fulfil many of the requirements for designation as a ‘safe country’ under the Procedures Directive: while Turkey adopted a new asylum legislation and is a state party to major human rights conventions (European Convention on Human Rights, the 1951 Refugee Convention and the Convention against Torture etc.) it is not considered as a country fully implementing its commitment to international human rights obligations. Namely, the right to asylum in Turkey presents inequalities in the protection system, which at the present moment is affecting Syrian refugees in particular. Moreover, further criticism includes the presence of actual Turkish national asylum seekers in other countries, and the fact that no Member States at present have chosen to place Turkey on its own safe country of origin list<sup>191</sup>. Furthermore during asylum evaluation, the

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<sup>188</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection

Available at: <http://eur-lex.europa.eu/legal-content/en/ALL/?uri=celex%3A32013L0032>

<sup>189</sup>Parliamentary questions 3 May 2017 E-003110-17. Question for written answer to the Commission on Rule 130, Martina Anderson (GUE/NGL), Lynn Boylan (GUE/NGL).

Available at:

<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+WQ+E-2017-003110+0+DOC+XML+V0//EN&language=en>

<sup>190</sup>Parliamentary question 31 July 2012, E-003110/2017, Answer given by Mr Avramopoulos on behalf of the Commission. Available at:

<http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2017-003110&language=EN>

<sup>191</sup>Statewatch, Analysis Why Turkey is Not a “Safe Country” (February 2016).

Available at: <http://www.statewatch.org/analyses/no-283-why-turkey-is-not-a-safe-country.pdf>

Greek Appeal Committee has overturned the vast majority of the appeals, arguing that Turkey does not qualify as a “safe third country” for them<sup>192</sup>.

### **Security and human rights**

In explaining this policy framing of migration, we can make a few considerations over the dichotomy of human rights and security priorities of the EU policies concerning the migration crisis. The justification of extraordinary security policies foresees the adoption of specific measure (such as the “extraordinary and provisory” measures of the EU-Turkey deal) as are legitimate only when dealing with security matters. Even if migration is not automatically considered as a security risk, government often considers it as a security problem in its implications. Huysmans for instance analyses how: “even when not directly spoken off as a threat, asylum can be rendered as a security question by being institutionally and discursively integrated in policy frameworks that emphasis policing and defence” (Huysman). In line with this theoretical and conceptual background, EU actions and policies integrate migration into a security framework that emphasise defence in order to secure the hosting (EU) communities against the collective dangerous force of migrants. Such policies try to prevent the arrival of unwanted migrants, including irregular immigrants and asylum seekers, before they entered and gained a ‘secure’ status in European societies. Of course this is not a recent trend, nor it is present in EU only: over the last two decades, the rising of security-related migration policies brought to the deterioration of the rights of foreigners in many host countries due to the connection made between immigration and criminality (Toğral, 2012, p 175). Especially after 9/11, restrictions imposed upon irregular migrants' basic political and civil rights have been accompanied by major obstacles to their access to economic and social rights, including the right to health. A major criticism to the EU-Turkey agreement remains the prioritizations of limit illegal arrivals rather than protect human rights, so that the migration crisis has been framed as a security crisis rather than a humanitarian one. Amnesty International defined the deal such as “a historic blow to rights”<sup>193</sup> and the first year after its implementation as a “year of shame” due to the inhumane conditions of applicants and migrants in both Greece and Turkey<sup>194</sup>. The UN Refugee

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<sup>192</sup>In June 2016, the Greek Parliament changed the composition of the Appeal Committees. By the end of 2016, the new Committee upheld 20 inadmissibility decisions of the Greek Asylum Service. See also Amnesty International, *A Blueprint for Despair. Human Rights Impact of the EU-Turkey Deal*, January 2017, <https://www.amnesty.org/en/documents/eur25/5664/2017/en>

<sup>193</sup> *Amnesty International*. Retrieved 1 March 2017.

Available at: <https://www.amnesty.org/en/latest/news/2016/03/eu-turkey-refugee-deal-a-historic-blow-to-rights/>

<sup>194</sup> *Amnesty International* so March 2017, *The EU-Turkey deal: Europe's year of shame*. Available at: <https://www.amnesty.org/en/latest/news/2017/03/the-eu-turkey-deal-europes-year-of-shame/>



Agency (UNHCR) has alleged that the asylum-seekers and migrants who arrived in Greece after the entry into force of the EU-Turkey deal (20 March) are being detained, to be subject to the new return policy. Human Rights Watch denounced that the deal “traps people in abuse and denies them refuge”<sup>195</sup>. It further documented the deteriorating mental health of asylum seekers and migrants, registering high rates of episodes of self-harm, suicide attempts, aggression, caused by the Greek conditions of detention on islands while waiting for processes and return to Turkey<sup>196</sup>. Some organizations such as The International Rescue Committee<sup>197</sup> and MSF<sup>198</sup> also stepped back from participating in transportation services and in activities in detention centres in Greece and Turkey, and condemned the deal as threatening for migrants, their rights, and their physical and mental health.

#### **4. Implementation and impact of the Agreement in Turkey and Greece**

The implementation of the agreement will be analysed under two lenses: the adoption of new legal provisions by the countries and their result, and the impact of the agreement on the life of migrants and asylum seekers involved. Turkey.? In the detail, the next section will address the gender-specific challenges of the deal in the two countries.

In Turkey the new Law on Foreigners and International Protection (LFIP)<sup>199</sup> has been implemented to offer conditional refugee and subsidiary protection status to non-Syrians. On the other hand Syrians fall under already analysed the Temporary Protection Regime (TRP)<sup>200</sup>. As stated before then the legal situation remains ambiguous, especially with regards to relocation after the end of the temporary protection regime, and to access to the asylum procedures. As far as the condition of migrants and asylum seekers is concerned, Amnesty International estimated that roughly

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<sup>195</sup> Human Rights Watch. Greece: A Year of Suffering for Asylum Seekers. March 2017. Available at: <https://www.hrw.org/news/2017/03/15/greece-year-suffering-asylum-seekers>

<sup>196</sup> Human Rights Watch. EU/Greece: Asylum Seekers’ Silent Mental Health Crisis: Identify Those Most at Risk; Ensure Fair Hearings. At: <https://www.hrw.org/news/2017/07/12/eu/greece-asylum-seekers-silent-mental-health-crisis>

<sup>197</sup> The International Rescue Committee will not transport refugees to closed facility at Moria, Lesbos, Press Release, March 2016. At: <https://www.rescue.org/press-release/international-rescue-committee-will-not-transport-refugees-closed-facility-moria>

<sup>198</sup> Save The Children. Press Release, Save The Children Suspends Services At Greek Detention Centres, March 2016. At:

[http://www.savethechildren.org.uk/save-the-children-suspends-services-at-greek-detention-centres?utm\\_campaign=refugee&utm\\_medium=naturalsocial&utm\\_source=tworcg032016](http://www.savethechildren.org.uk/save-the-children-suspends-services-at-greek-detention-centres?utm_campaign=refugee&utm_medium=naturalsocial&utm_source=tworcg032016)

<sup>199</sup> Law No. 6458 of 4 April 2013 (Official Gazette No. 28615 of 11 April 2013), Available at: [http://www.goc.gov.tr/files/files/eng\\_minikanun\\_5\\_son.pdf](http://www.goc.gov.tr/files/files/eng_minikanun_5_son.pdf).

<sup>200</sup> Temporary Protection Regulation (Official Gazette No. 29153 of 22 October 2014). Available at: [http://www.goc.gov.tr/files/\\_dokuman28.pdf](http://www.goc.gov.tr/files/_dokuman28.pdf).

3 million asylum seekers and refugees in Turkey are left without assistance and no support in their own shelters, openly in contrast with the notion of protection per UNHCR guidelines that include access to adequate living standards, work, education and health care and access to a secure legal status<sup>201</sup>.

Greece, together with Italy and Spain, is a major entry point for illegal immigrants trying to enter the EU. Just before the deal was hatched, Macedonia closed its border with Greece and like dominoes, every other country along the Balkan route followed suit. Numbers related with asylum applications and arrival exponentially increased in 2015<sup>202</sup>, while there was a huge shift downward starting from 2016<sup>203</sup>. Nevertheless, the deal has had significant repercussions for Greece, starting with the creation of two separate asylum procedures and changes in the legal framework. In fact, as a result of the deal, in April 2016 Greece adopted a new law (Law 4375/2016) to fast-track asylum procedures at the border.<sup>204</sup> The law envisages an admissibility test and then the consideration of the merit of the application. A critical point is that the new procedure applies for those in the islands, while those on the mainland have to undergo the eligibility process only<sup>205</sup>. As a consequence, the EU-Turkey deal impacted on the performance of the Asylum Service and placed an additional burden on an already bureaucratic and slow system (Dimitriadi, 2016, p. 5). Moreover, the impact of the Agreement however is not limited to asylum, but also to reception. Those who arrive after 20<sup>th</sup> of March remain in hotspots that transformed overnight into overcrowded detention facilities in dire condition<sup>206</sup>. The law prescribed 25 days of detention for in the hotspots in order to implement the necessary returns to Turkey. After that period, migrants have the right of movement but are restricted from leaving the island unless their application is accepted. But with no available accommodation, or services on offer, most end up returning to the hotspots. The practical challenges are endless. They go from safety issue, including risk of exploitation of children and women, to practical administration such as protection against the cold temperature, meals, to limited access to justice, as well as to healthcare and education due to the remote location of some

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<sup>201</sup> Amnesty International, No Safe Refuge. Asylum-Seekers and refugees Denied Effective Protection in Turkey, June 2016. Available at: <https://www.amnesty.org/en/documents/eur44/3825/2016/en>.

<sup>202</sup> Last Update September 2017 [Http://Data2.Unhcr.Org/En/Situations/Mediterranean/Location/5179](http://Data2.Unhcr.Org/En/Situations/Mediterranean/Location/5179)

<sup>203</sup> Ibidem

<sup>204</sup> Greek Council for Refugees, "Greece: Asylum Reform in the Wake of the EU-Turkey Deal", in Asylum Information Database, 4 April 2016, Available at: <http://www.asylumineurope.org/node/1962>

<sup>205</sup> European Commission, Fifth Report on the Progress Made in the Implementation of the EU- Turkey Statement, 2 March 2017, p. 5. Available at: <http://eur-lex.europa.eu/legal-content/en/TXT/?uri=celex:52017DC0204>

<sup>206</sup> The solution of the hotspots first appears in the European Agenda for Migration that indicate them as first stop service for arrivals, where nationality screening, fingerprinting collecting, medical assistance and vulnerability assessment are first undertaken. Those who apply for asylum have then to be transferred to specific facilities.

of the camps<sup>207</sup>. The results of overcrowded ‘hotspots’ and poor conditions increase tension and protection risks, including sexual and gender- based violence.

### **The case of “legal” violence against female refugee in Turkey**

The camps in Turkey are administrated by the state and the AFAD<sup>208</sup> in coordination with UNHCR. AFAD is responsible for providing camp refugees with their basic necessities. Very few humanitarian agencies are allowed to enter the camps to provide further support for the refugees, IHH is considered the main one with the most visible presence inside the camps. Also, very few NGOs, external monitors, foreign officials or journalists have been given the chance to visit and document their conditions<sup>209</sup>. As of August 2017, 231,252 Syrians are officially registered in 22 camps in 9 cities<sup>210</sup>. Returned refugees arrive in Turkey most often by boat or in some cases by air and then transported to one of two “removal centers”. Non-Syrians are largely sent to a center in the Kırklareli area near the Bulgarian border and Syrian refugees to the Düzi center, in southern Turkey<sup>211</sup>. The official description of the removal centers by the Turkey government is that they are temporary accommodations that for migrants that are undertaking checks and the registration procedures, but the external reporting indicates the facilities as detention centers<sup>212</sup>. For instance, freedom of movement is limited as it is impossible to leave the camps and possessions normally confiscated. Specialized medical care, legal counsel and other needed services are reportedly not available<sup>213</sup>.

#### ***(Detention) camps***

Before the entry into force of the Law on Foreigners and International Protection, the

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<sup>207</sup> Human Rights Watch, Greece: Refugee “Hotspots” Unsafe, Unsanitary, 19 May 2016, <https://www.hrw.org/news/2016/05/19/greece-refugee-hotspots-unsafeunsanitary>

<sup>208</sup> Afet ve Acil Durum Yönetimi Başkanlığı (Disaster and Emergency Management Presidency).

<sup>209</sup> Centre for Transnational Development and Collaboration (CTDC), Syrian Refugees in Turkey: Gender Analysis 2015. Available at: <http://ctdc.org/analysis.pdf>

<sup>210</sup> UNHCR, Syria Regional Refugee Response, updated to August 2017 <http://data.unhcr.org/syrianrefugees/country.php?id=224>

<sup>211</sup> Women’s Refugee Commission: EU-Turkey Agreement Failing Refugee Women and Girls, 2016. Available at: <https://www.womensrefugeecommission.org/images/zdocs/EU-Turkey-Refugee-Agreement-Failing.pdf>

<sup>212</sup> See, for example, Amnesty International, “Europe’s Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey,” (December 2015). <http://bit.ly/2aqRkyN>, GUE/NGL, “Delegation to Turkey. What Merkel, Tusk and Timmermans should have seen during their visit to Turkey,” (May 2-4, 2016). <http://bit.ly/2axtNhW>,

<sup>213</sup> See Patrick Kingsley, “Syrians returned to Turkey under EU deal have had no access to lawyers,” The Guardian (May 16, 2016). <http://bit.ly/1TVSqli> and GUE/NGL

detention of migrants and refugees in so-called foreigners' guesthouses was already in place. Detention was officially known as "administrative supervision" based on the administrative ruling from the Ministry of the Interior rather than on a court decision (Kivilcim, 2016, p.109). The European Court of Human Rights (ECtHR) ruled that the placement in the foreigners' guesthouses amounts to detention with no legal basis; it recognized the arbitrariness of the detention, as no adequate judicial review was provided; and condemned Turkey because it did not communicate to the detainees the reasons for their detention. It also denounced that the national legislation does not fix any time limit for detention nor provide any remedies to annul the deportation order<sup>214</sup>. UNHCR's commentators (whose access to detained individuals has been preliminary subject to authorization by the Ministry of Foreign Affairs and Ministry of Interior) underlined that detention is used as a formal deterrent on the potential applicant's access to refugee status determination interviews by UNHCR (Soykan 2012, p.44). The Report by Council of Europe Commissioner for Human Rights shows that detention periods can go from a week to more than a year, and that the average length of detention being 2 months<sup>215</sup>. Report by Amnesty International indicates that Turkish authorities make use of this "administrative flexibility": an increasing number of Syrian refugees, including children, have been arbitrarily transferred and kept in camps and removal centers<sup>216</sup>, where children are kept in detention together with adults - in contradiction with the UN Convention of the rights of the child. Another common practice is the forced confinement of Syrian beggars in refugee camps for disciplinary regulation. Article 35 of the Temporary Protection Regulation provides that if persons under temporary protection fail to comply with the obligations prescribed in the Regulation they can be temporarily or permanently prevented from living outside the temporary accommodation centres (Kivilcim, 2016, p.113). Even if begging is considered legal in Turkey, Amnesty International confirmed that refugees "were brought to the camp on the basis of a decision by the authorities, rather than of their own will, they were not permitted to leave the camp<sup>217</sup>"

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<sup>214</sup> Case of Abdolkhani and Karimnia v. Turkey, Application No. 30471/08, Judgment 22 September 2009, Final 01 March 2010, para 127; Case Mogaddas Moghaddas v. Turkey, Application no. 46134/08, Judgment 15 February 2011, para 42.

<sup>215</sup> Council of Europe, Commissioner for Human Rights, Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Turkey on 28 June–3 July 2009, CommDH(2009)30, Strasbourg, 1 October 2009

<sup>216</sup> Amnesty International, "Europe's Gatekeeper: Unlawful Detention and Deportation of Refugees from Turkey," (December 2015).

<http://bit.ly/2aqRkyN>

<sup>217</sup> Amnesty International. 2014. Struggling to survive: Refugees from Syria in Turkey. Available at: <https://www.amnesty.org/en/documents/EUR44/017/2014/en/>

## *Women and insecurity*

Women and children constitute 75 per cent of the whole refugee population in Turkey inside and outside camps, and key issues affecting women and girls include access to safe housing, legal protection, primary health care, sexual and reproductive health services and education<sup>218</sup>. According to a study conducted by the Syrian Research and Evaluation Organization on the implications of displacement as experienced by Syrian women refugees in Turkey, many women suffer for the instability or inadequacy of current residences including: lack of heating and indoor plumbing (on which several informants blamed their children's increased incidence of illness); the poor quality of tents in camps, and the general overcrowding also connected with insurgence of fire. In the same study emerged how more than half of the women taking part in the study's indicated that they had experienced stress-related illness since their displacement including in some cases complications with pregnancy and deliveries<sup>219</sup>. Due to their legal status in Turkey, many refugees also report to have very little higher education and employment opportunity, and this condition worsen their living conditions. Lack of opportunities for men also influence women as verbal and physical abuse by their partner and relatives are increased by the frustration connected with the lack of employment<sup>220</sup>.

## *Sexual and gender-based violence*

High levels of GBV have also been documented. The Council of Europe Convention on preventing and combating violence against women and domestic violence (known as the Istanbul Convention) is one of the legally binding instrument for Turkey providing specific guidance for eliminate and prevent GBV, also in migration and asylum context. Although Turkey is a signatory of the Convention, and has a system to respond gender-based violence (GBV) cases, this is now overloaded with the high number of Syrians in the country and many cases of violence against women committed by Turks or Syrians are not reported<sup>221</sup>. The issue of the sexual abuse of Syrian women and girls in camps and by camp officials has also been reported in Turkish media reported several cases of rape in camps (Kivilcim, 2016, p.120), and as well in a parliamentary question to

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<sup>218</sup> Women's Refugee Commission: EU-Turkey Agreement Failing Refugee Women and Girls, 2016. Available at: <https://www.womensrefugeecommission.org/images/zdocs/EU-Turkey-Refugee-Agreement-Failing.pdf>

<sup>219</sup> SREO, Rupture, Remembrance, Resiliency: The Impact of Displacement on Syrian Women Refugees in Turkey, 2013, Available at: <http://sreoconsulting.com/research/>

<sup>220</sup> Centre for Transnational Development and Collaboration (CTDC), Syrian Refugees in Turkey: Gender Analysis All rights reserved, 2015. Available at: <http://ctdc.org/analysis.pdf>

<sup>221</sup> *ibidem*

the Minister of the Interior - which has not received any answer<sup>222</sup>.

### ***Forced marriage***

A critical challenge to the rights of women and girl is their exposure to child, forced and polygamous marriage. Different research reports underlined cases of marriages between Turkish nationals and Syrian girls aged as young as 12, or with Syrian women as the second or third wife, in exchange for money paid to the refugee's family<sup>223</sup>. According to the Turkish Statistical Institute, 'Syrian brides' are at the first foreign brides in Turkey, with the 19 % of foreign women married to Turkish coming from Syria<sup>224</sup>. While polygamy is legal in Syria, it is not in Turkey, so that those women who marry Turkish men as second wife are not legally recognized as such. In many cases then those are not official marriages, but are legally prohibited partnerships that are religiously officiated by imams (Kivilcim, 2016, p. 208). The exact number of child or polygamous marriages with Syrian refugees in Turkey is unknown. The issue is extremely important on its impact on young girls. As they have often little hope, access to education, they are more easily taken on as second wives and child brides. In this case they also suffer from severe sexual abuse<sup>225</sup>. After the eruption of the refugee crisis, child marriage has become more organized, with actual fixers selling young brides to older men looking for wives, or sex. Fixers are also in charge of arranging marriages for men interested in taking on second or third wives, or as a cover for sex work<sup>226</sup>. Fear of this kind of predation has become also a large concern for several camps, also sometimes expressed through distrust of the Turkish camp guards and camp administrators, who are feared to be exploitative towards female camp occupants<sup>227</sup>.

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<sup>222</sup> Written parliamentary question by MP Pervin Buldan, No. 7/56532 3 December 2014.

<sup>223</sup> See for instance CARE. 2015. 'To protect her honor'. Child marriage in emergencies—The fatal confusion between protecting girls and sexual violence. CARE International UK. Gender and Protection in Humanitarian Contexts: Critical Issues Series No:1 Available at: [http://insights.careinternational.org.uk/media/k2/attachments/CARE\\_Child-marriage-in-emergencies\\_2015.pdf](http://insights.careinternational.org.uk/media/k2/attachments/CARE_Child-marriage-in-emergencies_2015.pdf)

<sup>224</sup> Turkish Statistical Institute. 2015. Marriage and divorce statistics. Press Release No: 21515. <http://www.turkstat.gov.tr/PreHaberBultenleri.do?id=21515>.

<sup>225</sup> Centre for Transnational Development and Collaboration (CTDC), Syrian Refugees in Turkey: Gender Analysis All rights reserved, 2015. Available at: <http://ctdc.org/analysis.pdf>

<sup>226</sup> Ibidem

<sup>227</sup> SREO, Rupture, Remembrance, Resiliency: The Impact of Displacement on Syrian Women Refugees in Turkey, 2013, Available at: <http://sreoconsulting.com/research/>

## *A “legal” violence*

Menjívar and Abrego indicate legal violence as the structural and symbolic violence codified in or amplified by law (Menjívar and Abrego 2012, 1413). The result is then that law and legal practices normalise and legitimise the social disparities connected with discrimination. According to the analysis of Kivilcim, in Turkey law contributes to the dehumanization of female immigrants and refugees as well as to the acceptance of this “normalized” violence as part of the social order. Furthermore even if the state is may not always be the direct agent of these forms of violence, it clearly allows violence against female refugees by leaving them exposed to various forms of abuse by different actors, and legal inaction by the Turkish authorities exposes Syrian female refugees to physical, sexual and economic violence (Kivilcim, 2014, p. 195). This is especially true when we consider the regime of temporary protection that refugees enjoy. The Law on Foreigners and International Protection as well as the Temporary Protection Regulation ensure that the dependency of women is acknowledged but also reinforced by law: while the rhetoric of the law recognises women as a vulnerable group, it fails to create structures that will adequately mitigate or prevent abuses.

### **Case analysis in Greek camps (the hotspots)**

Comparing to the situation in Turkey, there are more documents on Greek camps in the islands and on the mainland, as reporters, NGOs, and International Organizations are granted easier access to the camps and their facilities. Also, Greek camps are subjects of periodically evaluations and reports on the behalf of the EU and the UNHCR. Nevertheless, systematic information on the current conditions in which the refugee populations are living in Greece, is neither entirely available nor documented<sup>228</sup>. The administration of the camps is shared: the government has the responsibility for the leadership and coordination of the response, but it works with the UNHCR and 197, divided in Working Groups by sector, i.e. Protection (Child Protection, SGBV), WASH, Shelter and NFIs, Health/Nutrition, Education, Site Management Support and Cash<sup>229</sup>. There have been some changes after the EU-Turkey Agreement. Before the deal, UNHCR, I/NGOs, and volunteers were in charge

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<sup>228</sup> Oxfam, Gender Analysis The Situation Of Refugees And Migrants In Greece 2016. Available At: [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/oxfam\\_gender\\_analysis\\_september2016\\_webpage.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/oxfam_gender_analysis_september2016_webpage.pdf)

<sup>229</sup> Ibidem



of providing immediate and basic assistance (including as food and medical help). At the time the Agreement came into effect, several organizations stopped working in the hotspots and in a few camps on the mainland, as they reported deterioration in the treatment of refugees and migrants<sup>230</sup>.

### *Situation in the camps*

An estimated 19,850 people arrived in Greece in 2017<sup>231</sup>, with 35,114 people staying in the mainland (33 camps), and 14,354 people staying in the islands (9 camps) – out of a capacity of 8,685<sup>232</sup>. According to the UNHCR, The situation is most worrying on Lesbos, Chios, Samos and Leros, which have received the largest number of arrivals. The length of the staying on the islands is variable, but can go from months (in the hotspots) to years (in other camps or relocation facilities), and the conditions of the hotspots greatly affect migrants and asylum seekers physical and mental health. In many camps, risks to health and welfare include water shortages and poor hygienic conditions, as well as shortage of blankets, mats, sleeping bags, and hygiene kits<sup>233</sup>. According to interviews with the UNHCR in some of the camp, the overwhelming majority of adults, and even more so, of children (95%), have mental health issues and other vulnerabilities that need proper follow up and psychological assistance<sup>234</sup>. Women in camps are reported to have little opportunity (an less opportunity than men) to organize collectively to improve conditions of living in the camps, or to socialize, as well as taking part in the decision making processes of the camp life. The reason is the overwhelming responsibility for childcare, washing clothes and dishes and other house holding tasks that are extremely time-consuming<sup>235</sup>. Such tasks also strongly affect women's ability to receive and make use of the already limited and confused information necessary to make choices. According to a study carried out by the Refugee Rights Data Project in November

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<sup>230</sup> See Chapter 3.2

<sup>231</sup> UNHCR, Last Update September 2017 [Http://Data2.Unhcr.Org/En/Situations/Mediterranean/Location/5179](http://Data2.Unhcr.Org/En/Situations/Mediterranean/Location/5179)

<sup>232</sup> UN High Commissioner for Refugees UNHCR, Europe Refugee Emergency: Map Indicating Capacity And Occupancy (Governmental Figures) As Of 01 August 2017 10:00 A.M [Https://Data2.Unhcr.Org/En/Documents/Download/58630](https://Data2.Unhcr.Org/En/Documents/Download/58630)

<sup>233</sup> Un High Commissioner For Refugees (UNHCR), UNHCR Action To Ease Conditions On Greek Islands, 8 September 2017. Available At: [Http://Www.Refworld.Org/Docid/59b2663c4.Html](http://Www.Refworld.Org/Docid/59b2663c4.Html)

<sup>234</sup> Ecre, The Implementation Of The Hotspots In Italy And Greece, A Study Available At: [Https://Www.Ecre.Org/Wp-Content/Uploads/2016/12/Hotspots-Report-5.12.2016..Pdf](https://Www.Ecre.Org/Wp-Content/Uploads/2016/12/Hotspots-Report-5.12.2016..Pdf)

<sup>235</sup> Oxfam Gender Analysis The Situation Of Refugees And Migrants In Greece 2016. Available At: [Https://Www.Oxfam.Org/Sites/Www.Oxfam.Org/Files/File\\_Attachments/Oxfam\\_Gender\\_Analysis\\_September2016\\_Webpage.Pdf](https://Www.Oxfam.Org/Sites/Www.Oxfam.Org/Files/File_Attachments/Oxfam_Gender_Analysis_September2016_Webpage.Pdf)



2016, 33.9% of survey respondents said they did not know where a pregnant woman could ask for medical care; 75.4% of respondents (72.6% of women) did not have access to information about their rights and opportunities. Many of them had received only poor information from informal sources (other refugees, family members, volunteers in the camp, etc). 68% of respondents (70.8% of women) said they lacked access to information about European asylum and immigration law<sup>236</sup>. Furthermore, a few months after the EU-Turkey deal, the UNHCR “Initial Assessment Report On The Protection Of Women And Girls In The Europe Crisis”, reported that in camps “there is a dearth not only of prevention and response services to SGBV but of all services that specifically respond to the needs of women and girls, such as separate distribution lines for food, separate WASH facilities, separate accommodation for specific groups, including single women and female headed households, and for families. Furthermore, challenges were observed in the availability of dedicated and trained government and humanitarian staff able to promptly identify persons at risk and those in need of special attention and prioritization. Police personnel who are in charge of security and organizing the flow of refugees and migrants into transit centers are not equipped to identify, prioritize and respond to protection risks”<sup>237</sup>.

### ***Sexual and Gender-based violence***

A study of nine refugee camps found that insecure conditions left many women at constant risk of sexual and gender-based violence, including rape, forced prostitution, forced marriage and trafficking. Perpetrators, it said, have included volunteers and fellow refugees. Namely, reports shows that in camps there aren't effective mechanisms to report sexual harassment or to protect refugee women and girls facing gender-based violence, and that this situation are often exacerbated by the design and layout of many sites, as they fails to prevent and mitigate GBV In compliance with international guidelines<sup>238</sup>. Examples are poor lighting and a lack of safe or separate toilets and showers in the camps<sup>239</sup>; lack of policy and security presence; accommodation placement, as some sites do not have separate accommodations for single women<sup>240</sup>. It has been reported for example

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<sup>236</sup> Refugee Rights Data Project, Life In Limbo: Filling Data Gaps Relating To Refugees And Displaced People In Greece, 2016. Available At: [http://Refugeerights.Org.Uk/Wp-Content/Uploads/2017/03/Rrdp\\_Lifeinlimbo.Pdf](http://Refugeerights.Org.Uk/Wp-Content/Uploads/2017/03/Rrdp_Lifeinlimbo.Pdf)

<sup>237</sup> UNHCR, Initial Assessment Report: Protection Risks For Women And Girls In The European Refugee And Migrant Crisis, Greece And The Former Yugoslav Republic Of Macedonia. United Nations Refugee Agency, United Nations Population Fund, Women's Refugee Commission, 2016. Available at: <http://www.unhcr.org/protection/operations/569f8f419/initial-assessment-report-protection-risks-women-girls-european-refugee.html>

<sup>238</sup> Ibidem

<sup>239</sup> Amnesty International. Greece: Refugee Women Coping With Fear And Violence In The Camps, 2016. Available at: <https://www.amnesty.ie/greece-refugee-women-coping-fear-violence-camps/>

<sup>240</sup> UNHCR, A Summary of Assessment Findings and Recommendations The Situation of Refugee and Migrant Women, 2016. Availabe at: <https://data2.unhcr.org/fr/documents/download/52747>

that men often remain outside toilets and showers, leaving women feeling exposed and unsafe<sup>241</sup>. Women experiencing increased levels of domestic violence often report that they feel that they are lacking the support structure which they were accustomed to in their home country<sup>242</sup>. In terms of response, there are few organizations present with GBV capacity and GBV services in the sites are limited. Access to response services for SGBV survivors is limited especially with regards with the lack of ad-hoc medical facilities and skilled protection officers. In fact, there is an insufficient preparation and assistance for the adequate and safe disclosure of violence by survivors, prioritization and response to SGBV cases<sup>243</sup>. Moreover, there is anyway a widespread difficulty in obtaining quantitative data related to SGBV, mainly because of the sensitivities of the topics, the trauma, and the danger of stigmatization<sup>244</sup>

### ***Healthcare and reproductive needs***

Sexual and reproductive health services are not available in most sites. UNHCR assessments highlighted poor conditions of antenatal care postnatal care<sup>245</sup>. Moreover Reports show that although medical services are available in all the camps for maternal care, pregnant and lactating women, even those with health problems, are reluctant to access health services, as they do not wish to delay their journey and that of their families with the risk of spending more time in the hotspot camps. For instance, some cases have been reported of women leaving hospitals less than 24 hours after having given birth<sup>246</sup>. Women often report “female infections”, which they attributed to the use western toilets or to struggles in keeping the hygiene standards they were used to, and explicitly requested several times a female doctor to carry out examinations. In this sense women expressed discontent with the quality of health services, as some sites provides limited or no access to a female doctor or female nurse<sup>247</sup>. Need for family planning goes greatly unmet. Contraceptives are

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<sup>241</sup> Oxfam Gender Analysis The Situation Of Refugees And Migrants In Greece 2016. Available At: [https://www.oxfam.org/sites/www.oxfam.org/files/file\\_attachments/oxfam\\_gender\\_analysis\\_september2016\\_webpage.pdf](https://www.oxfam.org/sites/www.oxfam.org/files/file_attachments/oxfam_gender_analysis_september2016_webpage.pdf)

<sup>242</sup> Ibidem

<sup>243</sup> UNHCR, A Summary of Assessment Findings and Recommendations The Situation of Refugee and Migrant Women, 2016. Available at: <https://data2.unhcr.org/fr/documents/download/52747>

<sup>244</sup> Ibidem

<sup>245</sup> ibidem

<sup>246</sup> UNHCR, Initial Assessment Report: Protection Risks For Women And Girls In The European Refugee And Migrant Crisis, Greece And The Former Yugoslav Republic Of Macedonia. United Nations Refugee Agency, United Nations Population Fund, Women’s Refugee Commission, 2016. Available at: <http://www.unhcr.org/protection/operations/569f8f419/initial-assessment-report-protection-risks-women-girls-european-refugee.html>

<sup>247</sup> UNHCR, A Summary of Assessment Findings and Recommendations The Situation of Refugee and Migrant

not available in all sites despite high demand, and if they are available, women often do not have the proper information in order to access them as information provided to site residents about available services does not include sexual and reproductive health services<sup>248</sup>. Further, there is a significant demand for long acting contraceptives, but these options are not available. Greek women have access to condoms, pills and intrauterine devices (IUD). But religious norms and everyday prejudice can make condoms and pills unrealistic options. Medicine Sans Frontier used to promote and administer IUDs, but some women have reservations about using them due to the requirement medical procedure to be inserted. Injectable contraceptives have become the leading form of contraception for women of the developing world (especially Afghanistan, Eritrea and Somalia), but their import and sale is illegal in Greece (Holman, 2017, p.13). Finally, another issue is connected with women practicing unsafe abortion in the camps. As abortion is legal in Greece, but access to it is extremely complex for women living in sites, that have to reach hospitals outside the camps.<sup>249</sup>

## **5. Similar agreements and their implementation**

European policies such as the EU-Turkey statement of 18<sup>th</sup> March 2016, can be considered part of the EU strategy of externalization of migration control. By externalization of migration we refer to the tendency of externalize borders control to neighboring countries, that is the EU system of policies and agreement with non-member states that aims to involve them in securing their border and adopt strategies to reduce migration toward EU countries<sup>250</sup>. Another definition of externalization (not denying but completing the first one) indicates “extraterritorial State actions to prevent migrants, including asylum-seekers, from entering the legal jurisdictions or territories of destination countries or regions or of making them legally inadmissible without individually considering the merits of their protection claims” (Frelik et al., 2016, p.210) Such actions can include both direct interdiction and preventive policies (such as so called “non-entrée” policies) and indirect activities, such as providing support or assistance to migration procedures in third countries. In this latter sense, externalization has been a strategy of the EU for the last decade<sup>251</sup>, but

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Women, 2016. Available at: <https://data2.unhcr.org/fr/documents/download/52747>

<sup>248</sup> Ibidem

<sup>249</sup> ibidem

<sup>250</sup> ibidem

<sup>251</sup> United States and Australia have adopted the same approach in several cases, see for example: Wasem, Ruth Ellen. 2011. U.S. Immigration Policy on Haitian Migrants. Washington, DC: Congressional Research Service; and Hyndman, Jennifer, and Alison Mountz. 2008. “Another Brick in the Wall? Neo-Refoulement and the Externalization of Asylum by Australia and Europe.” Government and Opposition 43(249)

the resurgence of the migration crisis, and the entered into force of the EU-Turkey deal, suggest that this approach may soon witnesses an extensive application in future cases – as the Malta declaration of 3<sup>rd</sup> February 2017 suggests<sup>252</sup>. Historically, it is possible to recognize this approach in several EU initiatives (for instance, the Rabat process; the Khartoum process; the Valletta Summit), as well as in specific proposals of its member states (such as, among others the Italy-Libya agreement of 2008; the Spain and Morocco agreement of 2012). What is not surprising is that the implementation of such agreement and policies prioritize the securization of the EU borders to their impact on human rights –in a way that is similar to that analyzed in the previous sections.

In 2001 the Morocco-Spain migration partnership was implemented to ensure surveillance, border control and interception of illegal migrants. In 2002, the Seville European Council External dimension to asylum and migration policy introduced the idea the conditionality of aid to development as a means to reduce migration. In 2003, British Prime Minister Tony Blair’s cabinet and Home Office circulated a policy paper called “A New Vision for Refugees,” which basically proposed to create asylum seekers’ camps in transit countries: the European Union was supposed to establish Regional Protection Areas (RPAs) countries with the highest number of refugee applicants. The camps were supposed to contain refugees in countries of first arrival and relocate those applicants that had arrived in Europe could be returned<sup>253</sup> (a situation that, once again seems uncanny similar to the detention camps analysed in Turkey and Greece). Even if the suggestion was never formally considered, in September 2005 the European Commission proposed Regional Protection Programmes (RPPs), with the scope to strength protection capacity in regions interested by the refugee flows<sup>254</sup>. In 2006 the Rabat process was launched, as a direct consequence of the Ceuta and Melilla incidents (Collyer, 2012, p.506). After the Italy-Libya agreement of 2008<sup>255</sup>, and the Spain-Morocco agreement of 2012, another similar approach has been applied in the Khartoum process. Khartoum and Valletta are the two key steps in the shaping of relationships between the EU and Sub-Saharan Africa on the externalisation policy of border control. The Khartoum process, or the EU-Horn of Africa Migration Route Initiative of 2014 involve financial cooperation and EU funding of the International Organization for Migration (IOM) and the UNHCR, established with the aim of creating and managing migrant camps in the departure and transit countries and created

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<sup>252</sup> *ibidem*

<sup>253</sup> Human Rights Watch, An Unjust “Vision” for Europe’s Refugees, Human Rights Watch Commentary on the U.K.’s “New Vision” Proposal for the Establishment of Refugee Processing Centers Abroad, 2003. Available at: <https://www.hrw.org/legacy/backgrounder/refugees/uk/newvision.pdf>

<sup>254</sup> European Commission. 2005. “Communication from the Commission to the Council and the European Parliament on Regional Protection Programmes.” Brussels: European Commission. Available at: <http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:52005DC0388>.

<sup>255</sup> The Italy-Libya 2008 deal was followed by a period of human rights violations, for which Italy was sanctioned by the European Court of Human Rights for the collective expulsion of asylum seekers.

ten key areas for cooperation between the European and African states that go from tackling irregular migration and criminal networks and building local capacities in the field of migration management to assisting the participating countries in establishing and managing reception centres, providing access to asylum processes<sup>256</sup>. Since Khartoum, the externalization logic have been applied to the Horn of Africa, with the effect of establishing collaboration with countries like Eritrea, Sudan and Niger: dictatorships that had been previously excluded from negotiations<sup>257</sup>. With the 2015 Valletta summit, 25 EU member states, together with Norway and Switzerland, set up an EU Trust Fund for Africa (EUTF)<sup>258</sup>. The funds was to support countries of origin and transit for the Central Mediterranean route in an effort to block the flow of migrants to Italy, as well as to advance development projects aimed at removing the causes of migration, and to establish an African borders control system to identify transiting migrants. Also in Ukraine, the European Union and its member states delivered resources, readmission agreements, and cooperation actions that led to asylum seekers being warehoused in the country (Agreement between the European Community and Ukraine on the readmission of persons)<sup>259</sup> Finally, after the EU-Turkey Agreement, the 2016 Migration Compact replicates the same model in dealing with the main African countries of origin and transit of migrants along the Central Mediterranean route.

The approach of those agreements appears to be based on the allocation of developing funds (by the EU) or public and private investments (by the EU countries) to implement the policy of “helping them at home” and cooperate with third countries having them closing their borders and readmitting their nationals considered undesirable by the member states<sup>260</sup>. In all that cases, major concerns have been created by the systematic violation of human rights of those involved in migrations as border externalization directly affects the human rights of migrants as well as states’ international obligations to protect them in significant ways. Namely, those kind of agreements, pose a double burst on human rights: they are rights-threatening when they have the intention or effect of blocking access to territory in ways that frustrate the right of any person to seek and enjoy asylum outside their country; they are also rights-threatening when they have the effect of causing

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<sup>256</sup> Declaration of the Ministerial Conference of the Khartoum Process, Rome, 28 November 2014, [http://www.esteri.it/mae/approfondimenti/2014/20141128\\_political\\_declaration.pdf](http://www.esteri.it/mae/approfondimenti/2014/20141128_political_declaration.pdf).

<sup>257</sup> ARCI, Steps in the process of externalisation of border controls to Africa, from the Valletta Summit to today, 2016. Available at: [http://www.integrationarci.it/wpcontent/uploads/2016/06/analysisdoc\\_externalisation\\_ARCI\\_ENG.pdf](http://www.integrationarci.it/wpcontent/uploads/2016/06/analysisdoc_externalisation_ARCI_ENG.pdf)

<sup>258</sup> European Council, Informal meeting of EU heads of state or government, Malta, 03/02/2017 [http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/action\\_plan\\_en\\_pdf/](http://www.consilium.europa.eu/en/meetings/international-summit/2015/11/action_plan_en_pdf/)

<sup>259</sup> Human Rights Watch, . Buffeted in the Borderland: The Treatment of Asylum Seekers and Migrantsn Ukraine 2010. Availabe at: <https://www.hrw.org/report/2010/12/16/buffedborderland/treatment-asylumseekers-and-migrants-ukraine>

<sup>260</sup> ARCI, Steps in the process of externalisation of border controls to Africa, from the Valletta Summit to today, 2016. Available at: [http://www.integrationarci.it/wpcontent/uploads/2016/06/analysisdoc\\_externalisation\\_ARCI\\_ENG.pdf](http://www.integrationarci.it/wpcontent/uploads/2016/06/analysisdoc_externalisation_ARCI_ENG.pdf)

or making more likely violations of other human rights of migrants, including asylum seekers (Frelik et al., 2016, p.215). By directing migrant flows to third countries, externalization influences the state legal obligations to protect migrants, as well as *which* states are charged under international law with the protection of the rights of migrants. Externalization may also actually trigger, directly or indirectly, violations of rights: during transit, on the high seas and over land, when detained, and during the expulsion or deportation process. For instance, Human Rights Watch has reported the “Eritrean hunt” to arrest and deport hundreds of refugees back into their country conducted by Sudan forces<sup>261</sup>. A huge question in analysing this kind of policy is then what is the responsibility of EU Member States for fundamental rights violations which occur in the implementation of an externalised procedure of migration control and border management. The situation may be even more complicated when dealing with “deals” like the EU-Turkey one, where the EU does not recognise its responsibility in the conclusion of the negotiations.

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<sup>261</sup>Human Rights Watch. Sudan: Hundreds Deported to Likely Abuse, 2016  
Available at: <https://www.hrw.org/news/2016/05/30/sudan-hundreds-deported-likely-abuse>

## **Chapter 4. Towards a gender-sensitive asylum policy**

Contents: 1. From policy to implementation: gender sensitive planning, the role of women in project design and implementation; the role of data gathering; - 2. Possible adjudication under international courts and other quasi-judicial and non-judicial mechanism; - 3. the impact assessment approach

### **4) TOWARDS A GENDER-SENSITIVE ASYLUM POLICY**

It has been showed how the condition of women and girls in refugee camps is characterized by specific violation of their human rights. Their condition is not necessary worsen than their male counterpart, and specific categories of people are likely to be exposed to other forms of disruption of their rights (elderly, disable, children, persons belonging to specific ethnicities, etc.). Nevertheless, the needs and the violence to which women are more likely to be exposed are in many cases gender-specific, and require tailored actions and policies. As we have already analysed the international strategies, acts and treaties that have been implemented in this sense<sup>262</sup>, it is necessary to study how and way those measures may still fail in their purpose or may be not fully translated in the panning of camps and in the design of their policies (as showed by the study case and the other situation reported). In order to do it so, this chapter will firstly analyse the side of the international organizations and NGOs, namely what are the limits of the current actions and what should be done according to their reports and future strategies. Then the system of the international courts will be analysed. In fact, it is recognised how the effective application of any set of legal rule depends to a large degree to the judicial system established to rule on the interpretation, validity, legal effect and enforcement of those rules. For this reason, it is important to understand the possible adjudication the violation we have analysed so far under the existing court or specific tribunals. Finally, possible evaluative approach to the problem will be taken into consideration. In particular, the possible adoption of the impact assessment as an instrument of formal evaluation of the current policies in order to foresee their effectiveness in tacking GBV, sexual violence, and limitation to the access of food, health, and education in camps.

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<sup>262</sup> Chapter 1

## 1. From policy to implementation: gender sensitive planning

As it emerges from the analysis conducted so far, it is clear that refugee women and girls have gained full attention in the international refugee agenda. The near invisibility of the 1980s has been replaced by strategic efforts and multiple programs that aim to reach, include, and sustain migrant and refugee women<sup>263</sup>. Despite the results reached, the actual conditions of woman and girls in camps largely lag behind the achievements. Furthermore programmatic responses to migration and gender sensibility in policy planning still greatly differ among the different countries, including EU member states<sup>264</sup>. On reception conditions across the EU, in 2014 there appeared to be already a large disparity among EU, with little standards for ensure protection to vulnerable persons. In 2015 several countries were still under the expected standards, with high rates of risks of sex and gender based violence in reception centres. Also, the UNHCR Guidelines have been largely ignored in all the countries analysed. Where national gender guidelines existed, they were seldom implemented.<sup>265</sup>

We can recognise then a gap among knowledge on female refugees' issues (as given by studies and NGO's and International Organization reports) and practice in deal with women in migratory contexts. An example in this sense is clearly GBV programming. Many sources indicate how the current approach is focused on the response to GBV only, and thus it is insufficient in reducing and preventing it<sup>266</sup>. It is now clear that some of the factors that put women at risk of GBV are impunity of perpetrators, lack of legal rights, insufficient rations, economic dependence and lack of economic opportunities, shifts in household power dynamics, social and cultural norms, need for external collection of fuel/firewood and water. A proper response should be addressing all those risk factors in a preventive way and in a more detailed policy planning. The same approach is true for women safe access to food and cooking fuel or firewood. The Women's Refugee Commission's research on the topic underlined even when firewood is provided, women and girls may still leave camps to collect firewood to sell, as source of income for those who do not have other economic support<sup>267</sup>. Simply provide fuel/firewood, rather than work to extend women access economic independence and preventing measures against sexual violence would little improve the situation. Some pilot programmes started to be implemented in this sense. Namely, by the Inter-

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<sup>263</sup> See chapter 1

<sup>264</sup> UNWomen, Report On The Legal Rights Of Women And Girl Asylum Seekers In The European Union Istanbul, 2017. Available at: <http://www.refworld.org/pdfid/59201c884.pdf>

<sup>265</sup> EU Parliament, Gender aspects of migration and asylum in the EU: An overview. Available at: [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/579072/EPRS\\_BRI\(2016\)579072\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/579072/EPRS_BRI(2016)579072_EN.pdf)

<sup>266</sup> EIGE, Female genital mutilation in the European Union and Croatia Report, 2013

<sup>267</sup> UNWomen, Report On The Legal Rights Of Women And Girl Asylum Seekers In The European Union, Istanbul, 2017. Available at: <http://www.refworld.org/pdfid/59201c884.pdf>



Agency Standing Committee (IASC) working group as well as the World Food Programme. Example are the piloting the guidance documents in Darfur and Uganda<sup>268</sup>. With regards to women access to economic independence, this requires a broader and deeper understanding of women's economic empowerment. In part this is also connected with the traditional approach of organizations working with refugees. Many programs indeed focus on rapid responses to provide for the basic needs of the population. This place a double burden on the effectiveness of the programs: a) many refugees stay in camps for much more time than estimated at their arrival<sup>269</sup>; b) this approach builds on external decision, rather than on the existing resources of the camps and encouraging the participation of the beneficiaries, encouraging self reliance and independency (Brazeau, 1990 p.15). The gap between the existing policies and their implementation is then in the actual planning of programs, actions, and camps layouts. Two main link missing can be considered the lack of women refugees to camps planning and migration managing, and the lack of comprehensive data gathering on these issues.

### **The role of women in project design and implementation**

Camps planning strategies are analysed in handbooks, recommendations, workshops, and guidelines having non binding character<sup>270</sup>. Furthermore, while there are many programs implemented in order to improve the life of refugee women, we have to recognise that little effort has been undertaken to give them a role in their the planning and implementing. For instance, the UN is taking part (among others) in a program that creates safe spaces for Syrian women in Za'atari refugee camp, and that supplies "life skills support – literacy (English and Arabic), computer classes and awareness raising sessions on breastfeeding, domestic violence, early marriage & parental counselling" with "the United Nations Refugee Agency, the United Nations Children's Agency, Bright Futures, Save the Children and others using the space to discuss key protection and

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<sup>268</sup> IASC Task Force on Safe Access to Firewood and Alternative Energy in Humanitarian Settings, Decision Tree Diagrams on Factors Affecting Choice of Fuel Strategy in Humanitarian Settings, Version 1.1., April 2009 and IASC Task Force on Safe Access to Firewood and Alternative Energy in Humanitarian Settings, Matrix on Agency Roles and Responsibilities for Ensuring a Coordinated, Multi-Sectoral Fuel Strategy in Humanitarian Settings, Version 1.1. April 2009.

<sup>269</sup> Again, see the case of the Greek hotspots

<sup>270</sup> See for instance: UNHCR. *Handbook for Emergencies*. Geneva: UNHCR, 1982; Kent Harding D. *Camp planning*. [draft]. Geneva: UNHCR, 1987; Govaerts, P. *Report on UNHCR shelter workshop*, February 1993. [Internal report]. Brussels: Médecins Sans Frontières, 1993

basic needs issues”<sup>271</sup>. Women are then instructed, and international organizations and NGOs define their protection plans, but without letting them be a part of it. As Martin states “the participation of refugee women in decision making and program implementation is a necessary step to ensure that they are effectively protected, obtain assistance on an equal footing with men, have the opportunity to lead productive, secure, and dignified lives” (Martin, 2004, p.22). This is true especially with regards to the dissolution of family and community systems of control. Unlike participants in national development projects, refugees (especially in camps) can be almost entirely dependent on the refugee administrative structure and this can put them in a particularly vulnerable position (Ven Setter, 1990, p.16). Another evidence is given by the finding related to women and healthcare. As stated before, a huge limitation to women access to healthcare, family planning systems, and contraception is given by the fact some of them are not considered a priority<sup>272</sup>. Involving women refugee in planning operation will easily allow such issue to rise to prominence and become priorities before than crisis. On the basis of these assumptions, it is clear that additional work must be done to ensure that women’s participation in leadership structures and decisions affecting their lives in camps. Working towards access and resources and benefit will do more for refugee women’s than the innumerable women-focused programmes and policies designed and implemented. The achievements of the Bosnian, Rwandan, and Kosovo UNWomen’s Initiatives, for example, are positive, but not sufficient. Even though these initiatives wanted to realise targeted women’s programming, much of what was not enough to ensure women and girls protection. Many of the funded programmes were little more than safe places for women to meet and group discussion fora focused on women’s psychosocial recovery<sup>273</sup>.

### **The role of data gathering**

The lack of accurate sex-aggregated data clearly hampers the efforts to put in place programs that respond to gender-specific needs. Specific analysis has been made toward the lack of extensive data gathering on GBV in refugee camps. A recent report of the European Institute for Gender Equality (EIGE) linked low confidence with the authorities to low levels of reporting. For instance in Finland, where the average trust level is high (94% of the population trust the police in Finland

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<sup>271</sup> UN Woman “Enhancing Syrian Women’s Empowerment in Camp Settings”  
Available at: <http://jordan.unwomen.org/en/what-we-do/response-recovery-and-resilience/initiative5>

<sup>272</sup> See chapter 2

<sup>273</sup> <sup>273</sup> EIGE, Female genital mutilation in the European Union and Croatia Report, 2013

compared to 70% across the EU), there is as well and high average reporting of sexual harassment (71% of women have, compared to 55% across the EU). Moreover, recognising physical or sexual violence as such may be itself reasons why many cases go unreported and overlooked. This is even more relevant in refugee camps as refugees often distrust police officers and humanitarian workers – in some cases also due to the fact that they may be the first perpetrators of violence.<sup>274</sup> The legal recognition of violence is not unitary across the different countries (for instance with marital rape is not criminalised in all EU Member States<sup>275</sup>). Other factors include social norms and cultural behaviours. In the former case, social norms may influence what is considered a normal behaviour, especially in domestic relationship, so that private violence often remains unreported. In the latter case, obstacles such as cultural taboos can limit women capacity to report to the authorities as well as to the members of the family. Lack of report automatically leads to limit studies and data gathering on the issue. As the true extent of the problem is not clear, it is less addressed by analysis and then data informed policies. On the other hand, if data collection is not required by policies, protocols and guidelines then systematic data collection is impossible<sup>276</sup>. Another challenge is given by the fact that data gathered are often not homogeneous. Different international organizations and NGOs collect data using different software platforms and tools so that are then reported on a variety of databases across various sectors and departments. Moreover those data have little if any authority monitoring the collection process<sup>277</sup>. Standardization would create efficiencies by allowing for easier coordination among responders, for example, allowing smaller organizations and grassroots initiatives to benefit from data gathered by others. Standardized data would be easier to share, aggregate and combine so that governing bodies can make decisions based on more accurate information. Development organisations have also raised concerns about the gaps in and lack of useful data. For example, there is currently no accurate data on the numbers of young refugees living in urban settings, which are estimated to be large<sup>278</sup>.

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<sup>274</sup> See chapter 3

<sup>275</sup> FRA, Addressing forced marriage in the EU: legal provisions and promising practices, 2014, [https://fra.europa.eu/.../fra-2014-forced-marriage-eu\\_en.pdf.pdf](https://fra.europa.eu/.../fra-2014-forced-marriage-eu_en.pdf.pdf)

<sup>276</sup> EIGE, Report Female genital mutilation in the European Union and Croatia, 2014. Available at: <http://www.eige.europa.eu/sites/default/files/.../eige-report-fgm-in-the-eu-and-croatia.pdf>

<sup>277</sup> idem

<sup>278</sup> UNHCR, Annual Consultations With NGOS, International Conference Center Geneva Thematic Session Background, Paper, 2016. Available at: <http://www.unhcr.org/uk/partners/partners/57da95567/youth-data-game-changer-urban-settings.html>

## **2. Possible adjudication under international courts and other quasi-judicial and non-judicial mechanism**

As already stated, the effective application of international and national law depends largely to the effectiveness of the judicial system that rule on the interpretation, validity, legal effect and enforcement of those laws. The international courts and tribunals are established under international treaties or international organizations with the purpose to regulate the functioning of the organization or the relations among the member states (such as the ICJ, ECJ), human rights violations (such as the ECHR), or criminal prosecutions (such as the ICC, and the special tribunals for the former Yugoslavia, for Lebanon, for Rwanda etc.), as well as economic relations and disputes (such as the Appellate Body of the WTO) and other specific issues (patent, nuclear energy) or regional relations (AUJ, COMESA, ECSC, Commonwealth etc.). Furthermore we have to consider the impact of quasi-judicial and non-judicial mechanism as tools to address violation on human rights and raise awareness on specific issues. Quasi judicial mechanism have in fact all the characteristics of the judicial mechanisms, except that their decisions are not binding. For example, the various UN and regional Committees do have quasi-judicial mechanisms and reporting procedures. Relevant for women's human rights violation are: the Human Rights Committee, the Committee on the Elimination of Discrimination Against Women (CEDAW), the Committee against Torture (CAT), the European Committee on Social Rights (ECSR), the Committee on Migrant Workers (CMW), and the Committee on Economic, Social and Cultural Rights (CESCR). As for non-judicial mechanism, those includes bodies or organs that have no specific mandate to supervise a particular treaty and whose decisions or views are not binding<sup>279</sup>. Relevant for this analysis will be especially the Women Tribunals, which are unofficial public enquiries where woman can witness on their experience of violence and violation of their rights. This section aims to analyse the judicial (especially under the ECHR), quasi-judicial, and non-judicial tools that women refugees (and indeed refugee seekers as well as displaced women), can have access to with regards to their conditions in refugee camps. The purpose of this research is not merely informative, but aims at underline new possibilities for women and girls refugees on the basis of the existent judicial tools. For this reasons, a special attention will be given to the admissibility of claims from refugee and asylum seekers under the ICC.

The physical safeties of refugees and internally displaced persons, and the maintenance of the civilian and humanitarian character of refugee camps, are generally perceived as responsibilities of

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<sup>279</sup> ICJ, Migration and International Human Rights Law, A Practitioners' Guide, 2014. Available at: <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>

the host state. While States have the control on border protection, admission and evaluation of non-nationals asylum requests, and migrants detention, they are obligated to do so in accordance with international and human rights law to “guarantee, ensure and protect the human rights of all persons within their jurisdiction, regardless of nationality”<sup>280</sup>. It is indeed interesting to analyse the ECHR jurisprudence with this regards. Namely, in the recent decision, *Khlaifia and Others v. Italy*, the Court discussed in details States’ obligations in protecting migrants. The case was pledged by three Tunisian nationals who had been intercepted by Italian boats in the Mediterranean Sea and taken to a reception centre in Lampedusa, before being expelled to Tunisia. The Court ruled on: violation of the petitioners’ right to liberty and security; right to be informed on the reasons for detainment; right to examination of their detention; prohibition of inhuman and degrading treatment; right to effective remedies; prohibition of collective expulsion of aliens<sup>281</sup>. In general, poor or conditions of detention for migrants have regularly been found by international courts and human rights bodies in violation of the right to be free from cruel, inhuman or degrading treatment<sup>282</sup>. But the jurisprudence of the court support the view that a) detention does not in any case allow conditions that are not compatible with human dignity<sup>283</sup>, and b) difficulties connected with increased in migration fluxes cannot justify non-compliance with international human rights standards<sup>284</sup>. With regards to gender-specific facilities in the camps, the European Court of Human Rights ruling in the case *Aden Ahmed v. Malta* is important as it enlarges the definition of degrading treatment under the Article 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>285</sup>. The applicant was a Somalian national who fled Eritrea in 2003, and entered Malta irregularly in 2009, where she was registered by the immigration authorities and was placed in a detention centre awaiting expulsion under a Removal Order. She reported on detention conditions, and the ECHR held that the lack of female staff and otherwise inappropriate conditions of detention, were

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<sup>280</sup> The European Court of Human Rights (ECtHR) Factsheet – Migrants in Detention, 2017. Available at: [http://www.echr.coe.int/Documents/FS\\_Migrants\\_detention\\_ENG.pdf](http://www.echr.coe.int/Documents/FS_Migrants_detention_ENG.pdf)

<sup>281</sup> ECtHR, *Khlaifia and Others v. Italy*, no. 16483/12, ECHR 2015, Judgment of 1 September 2015. Available at: [https://hudoc.echr.coe.int/eng#{"itemid":\["001-156517"\]}](https://hudoc.echr.coe.int/eng#{)

<sup>282</sup> ICJ, *Migration and International Human Rights Law, A Practitioners’ Guide*, 2014. Available at: <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>

<sup>283</sup> *S.D. v. Greece*, ECtHR, Application No. 53541/07, Judgment of 11 June 2007, para. 45; *M.S.S. v. Belgium and Greece*, ECtHR, op. cit., fn. 324, para. 221.

<sup>284</sup> *M.S.S. v. Belgium and Greece*, ECtHR, op. cit., fn. 324, paras. 223–224

<sup>285</sup> Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms*, as amended by Protocols Nos. 11 and 14, 4 November 1950, ETS 5, available at: <http://www.refworld.org/docid/3ae6b3b04.html>

insufficient conditions taken individually, to be considered in violation of Article 3; but in combination, however, they constituted a degrading treatment as “diminished [her] human dignity and aroused in her feelings of anguish and inferiority capable of humiliating and debasing her and possibly breaking her physical or moral resistance”<sup>286</sup>. Access to healthcare has been similarly regulated as violating Article 3 on inhuman and degrading treatment as well as international law and standards on ill treatment, the right to health, and non-discrimination principles<sup>287</sup>, both in the case of prison detainment and camps. For example, in the case *Filiz Uyan v. Turkey* decided in 2009 by the ECHR<sup>288</sup>, the applicant, a woman detained in a Turkish prison, refused to undergo a gynaecological examination whilst handcuffed and in the presence of male staff. Such conditions were recognised as inhuman and degrading and are an important in the evolution of the jurisprudence on the issue. Gender based and sexual violence in camps can also be addressed on the base of previous jurisprudence on violations of human rights in detention conditions. For example, certain forms of gender base violence in detention, such as rape are considered as torture, as in the case *Aydin v. Turkey*<sup>289</sup>. Furthermore, the jurisprudence concerning the cases in which private violence, or rape perpetrated by non-statal actors, can be as well relevant in bringing claims of private GBV in camps to the ECHR<sup>290</sup>. A relevant case in this sense can be considered the case *Opuz v. Turkey*<sup>291</sup>, where the first time the Court concluded that a state’s failure to address domestic violence constituted a form of gender-based discrimination, as Turkey has been condemned because the response by the authorities to the conduct of the perpetrator was manifestly inadequate.

For our purpose, it is also relevant the jurisprudence of the ICC. The International Criminal Court Prosecutor Fatou Bensouda addressed the UN Security Council in May 2017, introducing the possibility that the ICC may investigate migrant-related crimes in Libya<sup>292</sup>. The involvement of the

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<sup>286</sup> ECHR.792 *Aden Ahmed v. Malta*, ECtHR, op. cit., fn. 765, para. 91–100.

<sup>287</sup> *Hurtado v. Switzerland*, ECtHR, Application No. 17549/90, Judgment of 28 January 1994; *Mouisel v. France*, ECtHR, Application No. 67263/01, Judgment of 14 November 2002, para. 40; *Keenan v. United Kingdom*, ECtHR, Application No. 27229/95, Judgment of 3 April 2001, para. 111; *Aleksanyan v. Russia*, ECtHR, Application No. 46468/06, Judgment of 22 December 2008, para. 137.

<sup>288</sup> *Filiz Uyan v. Turkey*, ECHR, Application No. 7496/03, Judgment of 8 January 2009

<sup>289</sup> *Aydin v. Turkey*, ECtHR, op. cit., fn. 403, paras. 83–86; *C.T. and K.M. v. Sweden*, CAT, op. cit., fn. 322, para. 7.5.

<sup>290</sup> The inclusion of sexual violence in the forms of torture is the product of long debate and different jurisprudential approach. As it is not the purpose of this research, the cases the led to the definition of domestic sexual violence as a form of torture, degradation and inhumane treatment little of the relevant cases has been reported. Nevertheless, the topic remain of huge importance for the condemn of sexual and gender base violence in the public and private sphere. See for example: Sara De Vido, (2016) *Donne, Violenza E Diritto Internazionale La Convenzione Di Istanbul Del Consiglio D’europa Del 2011*, Milano, MIM, especially chapter 3; 3.3.1; 3.3.2

<sup>291</sup> *Opuz v. Turkey*, Application no. 33401/02, Council of Europe: European Court of Human Rights, 9 June 2009, available at: <http://www.refworld.org/cases,ECHR,4a2f84392.html>

<sup>292</sup> UN News Centre: International Criminal Court may investigate migrant-related crimes in Libya, Security Council

ICC in this sort of adjudication, had been already foreseen again with the 14<sup>th</sup> February 2017 legal submission from the Global Legal Action Network (Glan) and the Stanford International Human Rights Clinic was submitted to the court, detailing what the network describes as the “harrowing practices of the Australian state and corporations towards asylum seekers”. The petition submits the office of the prosecutor of the ICC should open an investigation into possible “crimes against humanity committed by individuals and corporate actors”<sup>293</sup>. According to the report, “Since 2008, successive Australian governments have carried out a policy of preventing asylum seekers and refugees arriving by boat from accessing asylum procedures in Australia [...] Approximately 1246 asylum seekers and refugees are currently held on Manus Island, and on Nauru. The privatized camps entail indefinite detention in inhumane conditions, often including physical and sexual abuse of both adults and children. The conditions and resulting hopelessness have caused what experts describe as “epidemic levels” of self-harm among those held on these islands. The communication details the overcrowded and unsanitary conditions of detention; extensive physical abuse at the hands of guards and local gangs, in many instances meeting the threshold of torture; incidents of sexual violence, including against children; inadequate access to food, water and medical treatment; and extensive mental suffering of detainees, including children”<sup>294</sup>. The 108 page Communiqué deeply analyse violation of human rights in camps, including sexually exploitation of women, men, and children in exchange for “access to showers and other facilities,” as well as for cigarettes and drugs; rape and sexual violence; physical and sexual assault of men, women, and children by both other residents in the camps and officials. The Australian officials and their agents resulted accused of: knowingly committing prohibited acts as part of a widespread or systematic attack against refugees and asylum seeker<sup>295</sup>; knowingly imprisoning a civilian population in contravention of the fundamental rules of international law, within the meaning of article 7(1)(e) of the Rome statute<sup>296</sup>; torturing refugees and asylum seekers within the meaning of article 7(1)(f) of the Rome statute<sup>297</sup>; crime of deportation, within the meaning of article 7(1)(d) of the Rome statute<sup>298</sup>; crime of persecution within the meaning of article 7(1)(h) of the Rome statute<sup>299</sup>. The authors also explain

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told, 2017. Available at: <http://www.un.org/apps/news/story.asp?NewsID=56712#.WdY1Rkxyk0o>

<sup>293</sup>Communiqué to the Office of the Prosecutor of the International Criminal Court Under Article 15 of the Rome Statute: The Situation in Nauru and Manus Island: Liability for Crimes Against Humanity in the detention of refugees and asylum seekers. Available at: <https://www-cdn.law.stanford.edu/wp-content/uploads/2017/02/Communiqué-to-Office-Prosecutor-IntlCrimCt-Art15RomeStat-14Feb2017.pdf>

<sup>294</sup> ibidem

<sup>295</sup> ibi p. 58

<sup>296</sup> ibi p.63

<sup>297</sup> ibi p. 74

<sup>298</sup> ibi p. 87

<sup>299</sup> ibi p. 92



the jurisdiction of the ICC over the case. The admissibility of the case is explained *ratione temporis* as the fact referred happened after 2001. *Ratione materiae*, the admissibility is explained in virtue of the definition of “Crimes Against Humanity” given by Article 5, and as set out in Article 7 of the Rome Statute, where by crime against humanity we refer to any act “committed as part of a widespread or systematic attack directed against any civilian population, with knowledge of the attack”<sup>300</sup>, including “a) Murder; b) Extermination; c) Enslavement; d) Deportation or forcible transfer of population; e) Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law; f) Torture; g) Rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity; h) Persecution against any identifiable group or collectively on political, racial, national, ethnic, cultural, religious, gender [...] or other grounds that are universally recognized as impermissible under international law, in connection with any act referred to in this paragraph or any crime within the jurisdiction of the Court; i) Enforced disappearance of persons; j) The crime of apartheid; k) Other inhumane acts of a similar character intentionally causing great suffering, or serious injury to body or to mental or physical health<sup>301</sup>. Moreover the crimes described in this Communiqué are alleged to have been committed by nationals of States Parties to the Rome Statute as well as on the territory of States Parties (Australia and Nauru). It is clear that in case the admissibility of the case under the ICC would of course pave the way for further adjudications on this topic, thus allowing a new form of control and enforcement on human rights of migrants. Women and girls experience would fit under several of the points of Article 7, but it is important to notice anyway that the ICC, under the Statute recognise “gender” as “the two sexes, male and female, within the context of society. The term "gender" does not indicate any meaning different from the above”<sup>302</sup>.

Quasi-judicial mechanism have a relevant role in taking individual petitions to the attention of the international community, as well as in influencing the direction and policy planning of international organizations. Any person or group of persons reporting to be victim of violations can submit communication to these bodies: the Human Rights Committee (HRC) is competent for breaches of the International Covenant on Civil and Political Rights (ICCPR); the Committee against Torture (CAT) for the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT) the Committee on the Elimination of Discrimination against

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<sup>300</sup> UN General Assembly, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, ISBN No. 92-9227-227-6, available at: <http://www.refworld.org/docid/3ae6b3a84.html>

<sup>301</sup> *ibidem*

<sup>302</sup> *ibidem*



Women (CEDAW) for the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); At a regional level, the European Court of Human Rights (ECHR) is competent to hear complaints referring to the European Convention for the Protection of Human Rights and Fundamental Freedoms<sup>303</sup>. Certain bodies address directly the situation of women migrants in camps. For example, the CEDAW stated that: “states parties should ensure that women migrant workers who are in detention do not suffer discrimination or gender-based violence, and that pregnant and breastfeeding mothers as well as women in ill health have access to appropriate services<sup>304</sup>.” The Human Rights Committee suggested that the risk of being subject to arbitrary detention in the country of destination can be considered amount to a violation of Article 9 ICCPR. The Committee against Torture found that “human trafficking for the purpose of sexual and labour exploitation” falls under the practices prohibited by Article 16 CAT (cruel, inhuman or degrading treatment or punishment)<sup>305</sup>.

For the purposes of this research, the non-judicial mechanisms that will be analysed are “Women’s Tribunals, as non-judicial”, non-binding instrument of public hearing strictly connected with “People’s Tribunals”. People tribunals take the form of non-official trial composed of experts and activists, with the aim to examine severe violation of human rights on the base of victims’ witnesses (De Vido, 2016, p. 147). The first peoples’ tribunal was the so-called International War Crimes Tribunal, or Russell Tribunal. It was organised by British philosopher and Nobel Prize winner Bertrand Russell and hosted by French philosopher and writer Jean-Paul Sartre, with a focus on Vietnam crimes. The tribunal was constituted in November 1966, and was conducted in two sessions in 1967, in Stockholm and Roskilde (Zunino, 2016, p. 211). Further tribunals were set up in the following decades on the same model: Russell Tribunal on Latin America focused on human rights violations in dictatorships of Argentina and Brazil of 1973<sup>306</sup>; on Chile's military coup d'état between 1974-76; on Human Rights in Psychiatry in 2001 (Parker, 2010, p.120-22); on Iraq in 2004; on Palestine between 2009–12<sup>307</sup>. From the same inspiration, the Permanent People's Tribunal was established in Bologna on 23 June 1979, holding eight sessions since then (Argentina, Philippines,

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<sup>303</sup> ICJ, Migration and International Human Rights Law, A Practitioners’ Guide, 2014. Available at: <https://www.icj.org/wp-content/uploads/2014/10/Universal-MigrationHRLaw-PG-no-6-Publications-PractitionersGuide-2014-eng.pdf>

<sup>304</sup> CEDAW, General recommendation No. 26, op. cit., fn. 8, para.

<sup>305</sup> Concluding Observations on Spain, CAT, UN Doc. CAT/C/ESP/CO/5, 9 December 2009, para. 28.

<sup>306</sup> CIA, Constitution Of Second Russell Tribunal On Repression In Brazil, Chile, And Latin America, 1973 (collected in 2015) Available at: <https://www.cia.gov/library/readingroom/document/0005431000>

<sup>307</sup> See website: <http://www.russelltribunalonpalestine.com/en/about-rtop>

El Salvador, Afghanistan I and II, East Timor, Zaire and Guatemala)<sup>308</sup>. Similarly to those, the Women Tribunals, or World Women Court, are non-official hearings addressing a wide range of issues, with the purpose of educate and raise awareness, record injustice and human rights violations, give voice to marginalized women and promote lobbying on specific issues to a national and international level. The first women's tribunal was the International Tribunal on Crimes against Women of 1976 (Brussels Tribunal), followed over 40 Courts been established all over the world, such as the Women's International War Crimes Tribunal set in Tokyo in 2000, the Court of Conscience in Guatemala of 2010, the Women's Court in Sarajevo, and the World Court of Women in Bangalore of 2015 (De Vido, 2016, p. 162). In the case of the 2000 Tokyo tribunal, for instance, many survivors from the comfort stations held in Japan and the Asia Pacific region in the 1930s and 1940 witnessed their experience, during a three days mock trial and the late Emperor Showa was, as the leader of the country, found ultimately responsible for the sex-slave policy. According to Chinkin, (that was also a judge the Women 's International War Crimes Tribunal 2000 for the Trial of Japanese military Sexual Slavery) the tribunal major effects where: the possibility to design a Tribunal free from the implications of state constrictions in analyse the government and its actor responsibility for wrongful acts under international law; a significant contribution in collection and compilation of the historical record; and the possibility to take into consideration the effect of militarism and on gender relations<sup>309</sup>. It is possible to consider that a women tribunal (or several women tribunals or courts) focused on the violation of women rights in refugee camps, either in a specific reception area or taking in consideration a specific conflict situation would be an interesting tool in addressing the gap between policy and implementation in gender-sensitive and gender-inclusive planning in refugee camps by open a forum for the discussion of women and girls exploitation in camps and giving them an to the civil society the possibility to recognise their experience.

### **3. The Impact Assessment Approach**

In the context of the EU legislation and policymaking, the "Impact Assessment" is a document supplemented to draft legislative proposals and policy communications. The scope of the IA is to "examine whether there is a need for EU action and analyse the possible impacts of

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<sup>308</sup> See website: <http://permanentpeopletribunal.org>

<sup>309</sup> See ICCWomen, "Toward the Tokyo Tribunal 2000" By Christine Chinkin at: <http://www.iccwomen.org/wigidraft1/Archives/oldWCGJ/tokyo/chinkin.html>

available solutions”<sup>310</sup>. The further 2002 introduction of an Integrated IA ‘integrating’ aimed to facilitate policymakers and legislators in having the largest and more complete number of information on a single action. For instance identifying cross-cutting impacts or trade-offs that are complementary, such as minimising environmental impact versus the potentially negative economic impact of a future policy (Toner, 2006, p.113). The Impact Assessment document is not a definitive tool and does not directly modify acts and legislation. Rather, it can be a useful tool for assisting Commission in the policy and legislative process. Since its adoption by the Commission, this instrument has been mostly utilised in the fields of environmental protection. Nevertheless, the Impact Assessments could have a greater role in the context of migration law and policy, including asylum law, and in monitoring human rights, if some limits are overcome.

According to Toner, an extensive application of the Impact Assessment to migration law would require a shift from the identification of migrants dangerous outsiders to stakeholders of the actions and policies that have to be evaluated. Moreover such approach would require the burdens imposed on migrants in terms of securization and strict entry condition to be more explicitly justified. Another impact would be the necessity to deal with relevant standards of international refugee and human right law (Toner, 2006, p. 121) as it would have to open a confrontation with the “better law-making” requirement of the IIA<sup>311</sup>. Moreover, The Impact Assessment process and the resulting Impact Assessment Report are to be prepared by the Commission, in consultation with external expert policy consultant agencies. This engagement with the with the civil society could be a positive step in enhancing democratization and support of human rights. The nature of fundamental rights itself requires inclusiveness and support from the civil society and NGOs, but there is a real risk that their reports will be only limitedly able to influence the final shape of impact assessments, or even just being noted for the record and then ultimately dismissed. In fact, there have been some limits in the application of the IIA on migration law, with negative consequences on human rights protection. The author underlines how a limited use of the IIA has been determinant in setting the pitfalls of the Returns Directive (in its version 2008/115) with regards to protection of human rights, especially with regards to gender-based needs, and of the countries to which individuals are returned<sup>312</sup>. In fact, it seems that there was no specific consultation on the Returns Procedures Directive IIA. Moreover, in the Returns Directive Impact Assessment, only general issues were discussed relating to the type of legal instrument used, with little discussion surrounding the use of detention, protection of minors, access to justice and so on. In this case, the

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<sup>310</sup> European Commission, Impact Assessment: [https://ec.europa.eu/info/law-making-process/planning-and-proposing-law/impact-assessments\\_en](https://ec.europa.eu/info/law-making-process/planning-and-proposing-law/impact-assessments_en)

<sup>311</sup> Ibidem

<sup>312</sup> Directive 2008/115/EC of the European Parliament and of the Council of 16 December 2008 on common standards and procedures in Member States for returning illegally staying third-country nationals

Impact Assessment did little more than simply recording the concerns. Also, the report effectively assumes rather than questions the obligation to return, and it contains little arguments with regards to the detention conditions, its length, and the requirement of judicial oversight of such detention measures.

In issues strictly pertaining the migration and asylum law system, the Impact Assessment failed in the past to demonstrate in a convincing manner that the consultation and concerns expressed during it did have any significant relevance in shaping the detailed content of the legislation. It has to be acknowledged that not every comment will be followed or every point of view adopted, and it may be expected that these processes will to some degree be contentious and give rise to differences of opinion. Nevertheless, and extensive use of impact assessments to monitor fundamental rights in EU legislative drafting can be supported in light of the more detailed application of such tool in the environmental protection (Runhaar & Driessen, 2007, p. 14). Increased awareness of fundamental rights from the outset of legislative and policy planning is always to be welcomed, and IIAs may indeed be helpful in this sense.

## **CONCLUSIONS**

In the last decades, Human Rights Law evolved to largely acknowledge the specific conditions on women and their vulnerability under certain specific circumstances. While conflicts, humanitarian crisis, and forced displacements may affect the whole population and have great impact on civilians and terrible consequences for the environment and the human heritage, women remain specifically exposed to risks in such contexts. This specific exposure is also strictly to the gender specific interlocking discrimination women face in their position in society in general, and to their legal status in many jurisdictions. Women condition is not necessary worsen than their male counterpart, and specific categories of people are likely to be exposed to other forms of disruption of their rights (elderly, disable, children, persons belonging to specific ethnicities, etc.).. Neither women condition is a condition of “vulnerability” by definition, and generalizing women as vulnerable victims can let their differences, political abilities and voice vanish. Nevertheless, the

needs and the violence to which women are more likely to be exposed are in many cases gender-specific, and require tailored actions and policies.

In migration context, women are exposed to larger risk during the mobility, other than discrimination connected with the sending society and the receiving community. In the field of refugee camps, it has been showed how cultural and structural issue affect the safety of women and girls, as well as their access to resources, healthcare, information and education and employability opportunities. In the case of the EU-Turkey deal, severe violations of women human rights have been reported in both the two country interested in the agreement. The agreement has been reached on 18<sup>th</sup> March 2016, following on from the EU-Turkey Joint Action Plan activated on 29<sup>th</sup> November 2015, and the 7<sup>th</sup> March EU-Turkey statement. The agreement between Turkey and the European Union established that from 20<sup>th</sup> March 2016 all irregular migrants arriving on the Greek islands who do not apply for asylum, or whose claims have been evaluated as inadmissible or unfounded, would be returned to Turkey. On the basis of a 1-1 scheme for each Syrian returned to Turkey from the Greek islands, another Syrian entitled with the refugee status will be resettled in the EU. The EU will have an economic commitment for a total of 6 billion euros. While considered in the EU reports as a positive step to address the migration crisis on-going from 2015, the deal raised criticism among international human rights organisations and the civil society with regards to human rights violation. Not only the agreement has a difficult legal collocation, and the ECJ and the General Court ruled that the EU as a whole cannot be recognised as responsible for the deal, but it also actually created situations of severe violation of human rights both in Turkey and in Greece. In Turkey the new Law on Foreigners and International Protection (LFIP) has been implement to offer conditional refugee and subsidiary protection status to non-Syrians. On the other hand Syrians fall under already analysed the Temporary Protection Regime (TRP). The camps in Turkey are administrated by the state and the state agency in coordination with UNHCR. Very few humanitarian agencies are allowed to enter the camps as well as very few NGOs, external monitors, foreign officials or journalists have the chance to visit and document their conditions. Camps are reported to be actual detention camps, where women experience great insecurities, high levels of SGVB and sexual exploitation, including the phenomenon of forced marriage concluded by Turkish fixers that provides to Turkish citizens new wives and child spouses (not recognised by the Turkish law and so extremely vulnerable), or sexual favours in exchange for money. As a result of the deal, in April 2016 Greece adopted a new law (Law 4375/2016) to fast-track asylum procedures at the border, with huge administrative complications on the adjudication of refugee seekers, including the fact that at the moment there are different procedures for those coming from the Islands, and people arriving in mainland. The Greek hotspots remain critical. Thought to be first-arrival first-aid points, they have been reconverted in camps. In many camps, risks to health and welfare include water

shortages and poor hygienic conditions, as well as shortage of blankets, mats, sleeping bags, and hygiene kits. Women are at constant risk of sexual and gender-based violence, including rape, forced prostitution, forced marriage and trafficking – perpetrators include volunteers and fellow refugees. Women do not have proper access to healthcare and reproductive healthcare as well as to juridical assistance or information.

In this context, where EU actions and policies move towards the integration of migration into a security framework that emphasise defence in order to secure the hosting (EU) communities against the collective dangerous force of migrants, this appear not to be the first not the last of the EU programs of externalization of migration management. Moreover, even if refugee women and girls have gained full attention in the international refugee agenda, programmatic responses to migration and gender sensibility in policy planning are still not enough to guarantee women protection. It is clear that there is a gap among knowledge on female refugees' issues (as given by studies and NGO's and International Organization reports) and practice in deal with women in migratory contexts. Many programs indeed focus on rapid responses to provide for the basic needs of the population. Furthermore migrant women are not taken in consideration as active forces in camps planning and managing. Due to their missed contribution, local policy planning does not allow to involve their direct experience into the administration of the camps. Involving women refugee in planning operation will easily allow such issue to rose to prominence and become priorities before than crisis and women-targeting programmes won't be enough as long as women are not an active part of them. Another finding has been the lack of organized data gathering. Not only because reports are not always possible and are carried out with different methods, under different circumstances, and using different databases and digital tools, but also because they often fail to grasp the gendered dimension of refugees and migrants conditions. Further difficult in data gathering includes distrust issues as well as reticence to disclosure (that for example justify the paucity on SGBV reports by both men and women).

If improving those aspects is indeed necessary, another way to improve the conditions of women and girls in refugee camps is considering the effectiveness of the judicial system of reference. In order to do so, it is important to consider juridical, quasi-judicial, and non-judicial remedies. While States have the control on border protection, admission and evaluation of non-nationals asylum requests, and migrants detention, they are obligated to do so in accordance with international and human rights law. The primary responsible for the physical safety of refugees and internally displaced persons, and the maintenance of the civilian and humanitarian character of refugee camps, is generally the host state. The ECHR jurisprudence in this sense has been important in giving guidance on the interpretation of International Treaties and Convention on the topic. A major contribution has been given by the criminalization to rape and sexual violence in detention

conditions as comparable to torture. Some conditions such as access to healthcare, exposure to male examiners, etc. can be as well considered together in their cumulative effect of impact human dignity. Interestingly, there are new possibilities for the adjudication of such violations also under the ICC. The International Criminal Court Prosecutor Fatou Bensouda addressed the UN Security Council in May 2017, introducing the possibility that the ICC may investigate migrant-related crimes in Libya. Moreover, the Global Legal Action Network (Glan) and the Stanford International Human Rights Clinic already submitted to the ICC a Communiqué that wants to open an investigation into possible crimes against humanity committed by individuals and corporate actors in refugee camps in Australia. Quasi-judicial mechanisms have a relevant role in taking individual petitions to the attention of the international community, as well as in influencing the direction and policy planning of international organizations. Those include committees as well as People's tribunals. Certain committees have explicitly addressed the situation of women migrants in detention (such as the CEDAW), with an impact on the interpretation of their related conventions. Women's tribunals and Women's Court, on the other hand do not have any legal effect, but have shown to be able to give significant contribution to the recognition of specific crimes against women's. Even if there appear not to be previous WT specifically focused on women refugees, this will greatly enhance awareness on the topic, as well as creating a sort of support for the victims. Finally, a further instrument can be considered the Integrated Impact Assessment. It is necessary to underline that the IIA has been little with regards to migration policy, and with little results. Nevertheless, in light of its success in the field of environmental policy, extensive application of the Impact Assessment to migration law can be helpful if properly used, as it would enhance the participation of NGOs and the civil society to the evaluation new policies and human rights impacts.

In conclusion this research showed that women's peculiar experience in migration and refugee camps, still remain outrageously negative and that very much effort has to be done in order to change this situation. Bridging the gap between planning and implementing, involving women refugee as active stakeholders, increasing knowledge and data gathering in order to put pressure on the policy makers, ensuring persecution and other forms of comforts for victims as well as new systems to monitor new policies and actions will all contribute to create better and safer conditions.

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