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Article

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Non-State Actors of Protection and the Sliding Scale of Protection for Refugee Women

Christel Querton*

ABSTRACT

The article argues that although the gradual recognition of non-State actors as agents of *persecution* was hailed as a success in ensuring better protection for refugee women at risk of harm from their community or family, the associated development of non-state actors as agents of *protection* has had a detrimental impact on the protection of refugee women in Europe and more globally. More specifically, the article identifies various everyday practices of reliance on male family members and undefined social networks as actors of protection. These co-constructing practices are exercised by different entities involved in refugee status determination processes, including governments, national and regional courts, and regional and international asylum agencies. Although the trend has gone largely unnoticed, it has resulted in a sliding scale of protection for refugee women. The article argues that endorsing non-State actors of protection, such as male family members and undefined social networks, amounts to a requirement that women seeking asylum take action to avoid being persecuted by placing themselves under the protection of those private actors. This is contrary to international refugee law doctrine, fails to consider the possibility of new forms of harm and is, in itself, a breach of women's human rights.

KEYWORDS: Refugee law, women, non-state actors, protection, human rights, risk categories, avoiding action

1. INTRODUCTION

Recent reflections on the state of the international protection of refugee women suggest that the production of scholarship concerning women seeking asylum has slowed in the last decade and that the content of knowledge production has changed little since the 1990s.[1] These trends are partly attributed to major "wins" in refugee

* Law School, Faculty of Business and Law, University of the West of England, Bristol, UK. Email: Christel.Querton@uwe.ac.uk

1 C. Dauvergne, "Women in Refugee Jurisprudence", in C. Costello, M. Foster & J. McAdam (eds.), *The Oxford Handbook of International Refugee Law*, Oxford, Oxford University Press, 2021, 728–729.

law doctrine and the nature of academia with its emphasis on originality resulting in a significant lack of information.[2] This article seeks to contribute to the field by revealing an, as yet, unidentified obstacle to the effective protection of refugee women established through everyday practices by a variety of entities involved in refugee status determination processes, including international and regional asylum agencies, governments, and national and regional courts. Generally, despite the adoption of legally binding international instruments explicitly addressing the protection of refugee women,[3] international and national gender guidelines,[4] and the rejection of private individuals as non-State actors protection in both international refugee and human rights law, a new protection gap has emerged from the requirement that women seek protection against persecution and serious harm from non-State actors such as male family members and vague and undefined male networks.

States have traditionally been the central actors in international refugee law because the field is based on the concept of surrogate national protection for persons at risk of being persecuted.[5] Until the start of the 21st century, it was thus considered that only the actions of the State, if sufficiently severe, could amount to persecution. This view, however, led to the exclusion from refugee protection of persons who feared serious harm at the hands of non-State actors, such as other private persons, family members, members of the public, or armed groups.[6] When in the early 2000s, non-State actors were gradually recognised as agents of persecution, it was considered a breakthrough for the protection of refugee women at risk of harm from their family or community.[7] Nonetheless, refugee women were still required to demonstrate that their country of origin was unable or unwilling to provide protection from non-State actors in order for the harm to be considered persecution.[8] In addition, the concept of non-State actors has widened over time, whereby non-State actors may now be considered capable not only of being actors of *persecution* but also actors of *protection*. This article is concerned with the latter development and its impact on refugee women.

O'Sullivan has noted that despite there being extensive literature on the role of non-State actors in international law, the role of non-State actors as agents of

2 *Ibid*.

3 Convention on Preventing and Combatting Violence Against Women and Domestic Violence, CETS 210, 11 May 2011 (entry into force: 1 Aug. 2014), Arts. 60–61.

4 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', UN Doc. HCR/GIP/02/01, 7 May 2002; See for example, Immigration and Refugee Board of Canada, 'Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution', 1996; US Department of State, 'Guidelines, Office of International Affairs, Immigration and Naturalization Service, regarding adjudicating asylum cases on the basis of gender', 26 May 1996; UK Visas and Immigration, 'Gender Issues in the Asylum Claim', 2010, last updated 2018.

5 A. Grahl-Madsen, *The Status of Refugees in International Law*, Vol. 1, Leiden, A. W. Sijthoff, 1966, 79; J.C. Hathaway and M. Foster, *The Law of Refugee Status*, Cambridge, Cambridge University Press, 2014, 288–289.

6 UNHCR, 'An Overview of Protection Issues in Europe: Legislative Trends and Positions Taken by UNHCR' European Series Volume 1 – No 3 – 1995/09, 62.

7 D. Anker, "Refugee Status and Violence against Women in the Domestic Sphere: The Non-State Actor Question", *Georgetown Immigration Law Journal*, 15, 2001, 393.

8 H. Crawley, *Refugees and Gender: Law and Process*, Bristol, Jordan Publishing, 2001, 38.

protection in international refugee law has not been the subject of detailed enquiry.[9] In 2016, Hathaway and Storey engaged in a written dialogue on the meaning of State protection in refugee law.[10] These contributions have not, however, highlighted the particular trend of women fearing gender-based violence whose international protection claims are rejected as a result of reliance on the existence of non-State actors of protection.[11] More recently, scholars such as Querton, Peroni, and Wessels have uncovered the practice by the European Court of Human Rights (ECtHR) of relying on male family members and networks as actors of protection,[12] in cases where women claim that returning them to their country of origin would amount to ill-treatment contrary to Article 3 of the European Convention on Human Rights (ECHR).[13] This article argues that the recognition of non-State actors in international refugee and human rights law, which was originally perceived as ground-breaking for the protection of refugee women, has been co-opted into various forms of exclusionary practices to their detriment.

The concept of actors of protection is particularly relevant for asylum claims made by women who fear gender-based violence because perpetrators are generally non-State actors.[14] In order to demonstrate an international protection need under international refugee or human rights law, a person who fears being persecuted by individuals or the community must thus also show that the country of origin is either unwilling or unable to protect her.[15] It is therefore relevant to consider the type of actors that entities involved in refugee status determination have assessed as providing effective protection against serious harm and whether that protection is qualified by any necessary characteristics. Although there has been scholarly consideration of the issue of non-State actors of protection such as multinational forces or United Nations agencies,[16] there has been no analysis of reliance on private actors such as

9 M. O'Sullivan, "Acting the Part: Can Non-State Entities Provide Protection Under International Refugee Law?" *International Journal of Refugee Law*, 24, 2012, 87. For example, in her study on Non-State Actors in Refugee Law, Nykänen dedicates only six pages to the issue, E. Nykänen, *Fragmented State Power and Forced Migration: A Study on Non-State Actors in Refugee Law*, Leiden, Martinus Nijhoff Publishers, 2012, 196–201.

10 J.C. Hathaway and H. Storey, "What is the Meaning of State Protection in Refugee Law? A Debate", *International Journal of Refugee Law*, 28, 2016, 480–492.

11 *Ibid.*, 486, examples given by Hathaway include "a faction, armed militia, mercenary force, or drug cartel".

12 C. Querton, "The Role of the European Court of Human Rights in the Protection of Women Fleeing Gender-Based Violence in their Home Countries", *Feminists@Law*, 7(2), 2017; L. Peroni, "The Protection of Women Asylum Seekers under the European Convention on Human Rights: Unearthing the Gendered Roots of Harm", *Human Rights Law Review*, 18, 2018, 347–370; J. Wessels, "The Boundaries of Universality – Migrant Women and Domestic Violence before the Strasbourg Court", *Netherlands Quarterly of Human Rights*, 37(4), 2019, 336–358.

13 European Convention on Human Rights ETS No. 005, 4 Nov. 1950 (entry into force: 3 Sep. 1953) (ECHR); Art. 3 provides that "No one shall be subjected to torture or to inhuman or degrading treatment or punishment".

14 Crawley, *Refugees and Gender*, 52.

15 Hathaway and Foster, *The Law of Refugee Status*, 289.

16 O'Sullivan, "Acting the Part". Nykänen, *Fragmented State Power*. M. Karavias, "Non-State Actors in Control of Territory as Actors of Protection in International Refugee Law", *Revue Belge de Droit International*, 47(2), 2014, 487–507. Hathaway and Storey, "What is the Meaning of State Protection in Refugee Law?".

male family members in the cases of women fearing gender-based violence in their country of origin by entities others than the ECtHR.

The present article demonstrates how everyday practices by various actors in the asylum process, including governments, national and regional courts, the European Union Agency for Asylum (EUAA),[17] or even the United Nations High Commissioner for Refugees (UNHCR), require that women who may otherwise be at risk of persecution must seek the protection of male family members or vague and undefined "male networks" in their country of origin. Such everyday practices include the designation of risk categories, "migrating" issues across the different elements of the refugee definition, and inconsistent jurisprudence. Whereas these practices concern different stages of refugee status determination processes and are exercised by diverse actors involved in asylum procedures, these everyday practices of exclusion are reinforced and co-constituted due to the interrelationship between asylum processes and entities in the framework of international refugee protection, particularly in Europe. Some of the everyday practices identified in the article date back to the 1980s but the express acknowledgment of non-State actors of protection in European Union (EU) law in 2004 has enabled further entrenchment and widening of the concept to include private individuals. The discussion thus focuses largely on practice in Europe although UNHCR's role in endorsing male family members and social networks as actors of protection for refugee women indicates that the issue manifests itself more globally.

The article argues that these prevalent practices of exclusion have led to a largely unnoticed sliding scale of protection for refugee women. The article also suggests that the expectation that women seeking asylum return to seek protection from male family members or vague and undefined "male networks" amounts to a requirement to take action to avoid persecution contrary to international refugee law. Moreover, the requirement fails to acknowledge and assess any new risks of persecution or serious harm that may result from becoming dependent on the protection of male family members and networks, such as forced marriage, domestic violence, rape, and sexual violence. Finally, the requirement is, in itself, a breach of women's human rights, including freedom of movement and freedom of association with others. The range of rights limited by the condition of seeking protection from male family members and networks impacts on refugee women's right to dignity and personal autonomy, which is at the core of the Refugee Convention. It is concerning therefore that such a wide range of actors involved in assessing risk on return insidiously reinforce the practice. Broadly, the analysis of the development of the concept of non-State actors of protection in refugee and human rights law illustrates the fragile nature of progress and the emergence of new protection gaps in the protection of refugee women.

The article starts by examining the concept of State protection which lies at the heart of the refugee legal framework. It then sets out historical developments regarding the recognition of non-State actors in European refugee and human rights law,

17 Formerly the European Asylum Support Office; Regulation (EU) 2021/2303 of the European Parliament and of the Council of 15 December 2021 on the European Union Agency for Asylum and repealing Regulation (EU) No. 439/2010.

first as agents of persecution and then as agents of protection. The article demonstrates how everyday practices within refugee status determination processes by a multitude of entities including governments, national and regional courts, EUAA and UNHCR have resulted in a flexible concept of protection for refugee women. Reliance on male family members and undefined male social networks through the designation of "risk categories", "migrating" issues across the elements of the refugee definition, and the inconsistent jurisprudence of the ECtHR in expulsion cases is set out to expose this anomaly. The article ends by discussing how these everyday practices are equivalent to the, now discredited, expectation that persons at risk of being persecuted take action on return to their country of origin to avoid persecution. The approach fails to acknowledge and assess the risk of new forms of harm potentially created by this requirement. Furthermore, the approach is, in itself, a breach of refugee women's human rights.

2. THE CONCEPT OF PROTECTION IN INTERNATIONAL REFUGEE AND HUMAN RIGHTS LAW

International refugee law is based on the concept of surrogate or substitute national protection as "a remedy to a fundamental breakdown in the relationship between an individual and her state".[18] Grahl-Madsen in developing his theory of refugeehood described the characteristics of refugees' circumstances whereby the "normal mutual bond of trust, loyalty, protection and assistance between an individual and the government of his home country has been broken (or simply does not exist)".[19] Similarly, Shacknove describes refugeehood as the breaking down of the political relationship between a person and their State of origin or habitual residence rather than a relationship defined by territory.[20] The United Nations Convention Relating to the Status of Refugees defines a refugee as a person who "owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".[21] Thus, international refugee protection is based on the absence of national protection and the centrality of the State is reflected in the Refugee Convention definition.[22] In practice this means that when refugees claim asylum, they must show that their country of origin is either unwilling or unable to provide protection against the serious harm feared.[23] Where ill-treatment occurs at the hands of State officials, it is relatively straightforward to demonstrate this requirement. However, how that assessment is conducted where the well-founded fear involves non-State actors has proved problematic.

Although the gradual recognition of non-State actors as agents of *persecution* was hailed as a success in ensuring better protection for refugee women at risk of harm

18 Hathaway and Foster, *The Law of Refugee Status*, 288–289.

19 Grahl-Madsen, *The Status of Refugees in International Law*, 79.

20 A.E. Shacknove, "Who is a Refugee?", *Ethics*, 95, 1985, 283.

21 Art. 1A(2) Convention Relating to the Status of Refugees, 189 UNTS 137, 28 Jul. 1951 (entry into force: 22 Apr. 1954) ('Refugee Convention') (hereinafter the 'refugee definition').

22 O'Sullivan, "Acting the Part", 89.

23 Hathaway and Foster, *The Law of Refugee Status*, 289.

from their community or family, the associated development of the concept of non-State actors as agents of *protection* has had a detrimental impact on the protection of refugee women in Europe. More specifically, whereas the recognition of non-State actors of persecution enabled a better reflection of the forms of harm experienced by women worldwide, the concept of non-State actors of protection on the other hand, serves the function of restricting international protection for women at risk of gender-based violence.

2.1. Non-state actors of persecution

As noted above, the concept of protection in the wording of the refugee definition is limited to "the protection of that country" by reference to the person's country of nationality or former habitual residence, whereas the notion of non-State actors is not mentioned. In the 1990s however, the notion of non-State actors in refugee law became the subject of debate in the context of European harmonisation as a result of inconsistent State practice with respect to the recognition of non-State actors of persecution.[24] This arose when it became clear that there were protection needs for individuals who feared ill-treatment emanating from armed groups, communities, families, or other individuals, including women at risk of gender-based violence.[25] Women's claims for asylum were often rejected on the basis that the persecution was "private" and did not engage the responsibility of the State.[26] Failing to recognise the persecutory nature of actions and conduct by non-State actors had a disproportionate impact on women and girls because they are more likely to be at risk from communities or family members as a result of their status and role in society.[27]

The text of the Refugee Convention does not explicitly refer to the possibility of non-State actors being agents of persecution. Equally, however, the refugee definition does not limit the concept of persecution to action or conduct by the State. The *travaux préparatoires* of the Refugee Convention do not shed much light on the source of the persecution feared,[28] yet the UNHCR Handbook recognises that persecution may emanate from actors other than the State, such as sections of the population.[29] In support of this view, academic commentary has asserted that there is no necessary relationship between persecution and State authority.[30] Although harmonisation of the recognition of non-State actors of persecution was initially rejected by the

24 K. Hailbronner, "Asylum Law in the Context of a European Migration Policy", in N. Walker (ed.), *Europe's Area of Freedom, Security and Justice*, Oxford, Oxford University Press, 2004, 58.

25 See for example UK Court of Appeal (CoA), *Adan, R. (on the application of) v. Secretary of State For Department* [1999] EWCA Civ. 1948.

26 European Legal Network on Asylum (ELENA), *Research Paper on Non-State Agents of Persecution*, European Council for Refugees and Exiles (ECRE) 2000, para. 25; T. Spijkerboer, *Gender and Refugee Status*, Aldershot, Ashgate, 2000.

27 H. Crawley and T. Lester, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe*, EPAU/2004/05, May 2004, para. 232; Crawley, *Refugees and Gender*, 52.

28 ELENA, *Research Paper on Non-State Agents of Persecution*, 1.

29 United Nations High Commissioner for Refugees (UNHCR), *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, UNHCR, 2011 re-issue, para. 65.

30 G. Goodwin-Gill and J. McAdam, *The Refugee in International Law*, Oxford, Oxford University Press, 2007, 98; Hathaway and Foster, *The Law of Refugee Status*, 303–305.

Council of the European Union in its Joint Position of 1996,[31] State practice eventually converged.[32] Most States in Europe now generally recognise that non-State actors may be actors of persecution where the State is unwilling or unable to protect against serious harm on the basis of the surrogacy principle whereby international protection should be afforded to persons whose country of origin is unable or unwilling to protect them irrespective of the source of the harm.[33] In the EU, this was eventually codified in Article 6 of the Qualification Directive.[34]

The recognition of non-State actors of persecution in international refugee law was supported by developments within international human rights law in Europe. The ECtHR's jurisprudence has contributed to extending protection beyond the public/private divide by recognising that Contracting States may be in breach of their obligations under the ECHR where the harm suffered occurred at the hands of non-State actors. Thus, Contracting Parties may not return a person to a country where they are at real risk of treatment contrary to Article 3 ECHR at the hands of persons or groups of persons who are not public officials.[35] This is because Article 3 ECHR and the prohibition of torture or inhuman or degrading treatment or punishment is absolute.[36] Nonetheless, international protection claims based on a fear of ill-treatment from non-State actors require evidence that "the authorities of the receiving State are not able to obviate the risk by providing appropriate protection".[37] Similar to an assessment for refugee protection, treatment prohibited by Article 3 ECHR upon expulsion will only engage the responsibility of the

31 Joint Position of 4 March 1996 defined by the Council on the basis of Art. K.3 of the Treaty on European Union on the harmonized application of the definition of the term "refugee" in Art. 1 of the Geneva Convention of 28 July 1951 relating to the status of refugees (96/196/JHA) [1996] OJ L63/2, para. 5.2; Sweden issued a statement disagreeing with the Position in this respect, see ELENA, *Research Paper on Non-State Agents of Persecution*, 7 and the European Parliament in its Resolution on the Harmonisation of Forms of Protection Complementing Refugee Status in the European Union (A4-0450/98) [1999] OJ C150/0203 re-affirmed that the Refugee Convention applies where the State was incapable of providing protection from non-State actors, para. 5.

32 T. Magner, "Does a Failed State Country of Origin Result in a Failure of International Protection? A Review of Policies toward Asylum-seekers in Leading Asylum Nations", *Georgetown Immigration Law Journal*, 15(4), 2000, 712–714.

33 Crawley and Lester, *Comparative Analysis of Gender-Related Persecution*, 245.

34 "Actors of persecution or serious harm include: (a) the State; (b) parties or organisations controlling the State or a substantial part of the territory of the State; (c) non-State actors, if it can be demonstrated that the actors mentioned in (a) and (b), including international organisations, are unable or unwilling to provide protection against persecution or serious harm as defined in Article 7"; Council Directive 2004/83/EC of 29 Apr. 2004 on minimum standards for the qualification and status of third country nationals or stateless persons as refugees or as persons who otherwise need international protection and the content of the protection granted; Directive 2011/95/EU of the European Parliament and of the Council of 13 Dec. 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) [2011] OJ L337/9 ('Qualification Directive').

35 European Court of Human Rights (ECtHR), *H.L.R. v. France*, Judgment, Grand Chamber, Appl. No. 24573/94, 29 Apr. 1997, para. 40.

36 European Court of Human Rights (ECtHR), *J.K. and Others v. Sweden*, Judgment, Grand Chamber, Appl. No. 59166/12, 23 Aug. 2016, para. 80; J. McAdam, *Complementary Protection in International Refugee Law*, Oxford, Oxford University Press, 2007, 138.

37 ECtHR, *J.K. and Others v. Sweden*, para. 80. ECtHR, *R.H. v. Sweden*, Judgment, Appl. No. 4601/14, 1 Feb. 2016, para. 57.

Contracting State where the receiving State is unable to provide protection. The determination of complementary protection needs where the harm stems from non-State actors is thus also focused on the failure of State protection.[38]

However, although the recognition of non-State actors as agents of persecution and/or serious harm has been described as a success from a feminist perspective because many women are at risk of harm from private actors,[39] this development has shifted the focus of refugee status determination to the element of State protection, including what the standards for protection should be and how those guarantees should be constituted in practice. Significantly, it has raised questions as to whether non-State actors could amount to actors of protection in refugee and human rights law, and under what conditions.

2.2. Non-state actors of protection

O'Sullivan argues that the use of the term "country of nationality" in the Refugee Convention definition suggests that the Refugee Convention only envisaged State entities as capable of providing protection against persecution and notes that the *travaux préparatoires* do not indicate that the concept of non-State actors of protection was ever discussed by the plenipotentiaries.[40] Goodwin-Gill and McAdam note that the concept of lack of protection requires consideration of a State's duty to protect and promote human rights.[41] If refugee protection is conceptualised as surrogate or substitute protection, it is reasonable to suggest that the question of whether a person "is unable or, owing to such fear, is unwilling to avail himself of the protection of [the country of his nationality]" must be answered by reference to the State's ability and unwillingness to protect.[42]

However, a regional approach in the EU developed whereby non-State actors may provide protection against persecution. Article 7 of the Qualification Directive sets out the entities which may be considered "actors of protection" against persecution and serious harm. The relevant provision in the recast Qualification Directive states as follows:

1. Protection against persecution or serious harm can only be provided by:
   a. the State; or
   b. parties or organisations, including international organisations, controlling the State or a substantial part of the territory of the State;
   provided they are willing and able to offer protection in accordance with paragraph 2.
2. Protection against persecution or serious harm must be effective and of a non-temporary nature. Such protection is generally provided when the actors mentioned under points (a) and (b) of paragraph 1 take reasonable steps to prevent the persecution or suffering of serious harm, inter alia, by

38 ELENA, *Research Paper on Non-State Agents of Persecution*, 10.
39 Anker, "Refugee Status and Violence against Women", 393.
40 O'Sullivan, "Acting the Part", 98–99.
41 Goodwin-Gill and McAdam, *The Refugee in International Law*, 133.
42 J. Hathaway, *The Law of Refugee Status*, Toronto, Butterworths, 1991; This conceptualisation has been widely cited, see footnotes 24–25 in Hathaway and Foster, *The Law of Refugee Status*, 292–293.

> operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm, and when the applicant has access to such protection. [. . .]

Although the recasting of the Qualification Directive strengthened the characteristics of protection by adding requirements that the actors be "willing and able to offer protection" and that such protection "must be effective and of a non-temporary nature", it has nonetheless been argued that this provision is inconsistent with international law because non-State actors are not accountable under international (refugee) law.[43] In addition, UNHCR, non-governmental organisations (NGOs) and academics have highlighted the temporary nature of non-State actors' exercise of authority and their limited ability to enforce the rule of law.[44] The drafting history of Article 7 Qualification Directive shows that the provision was significantly enlarged by adopting the term "parties" rather than "quasi-State authorities who control a clearly defined territory of significant size and stability" and "who are able and willing to give effect to rights and to protect an individual from harm in a manner similar to an internationally recognised State".[45] It does suggest however that the European Commission's original intention was for protection to be interpreted as State protection or at the very least protection by State-like authorities. Entities with characteristics notably different from male family members or male networks.

Hence, in the same manner that the EU Qualification Directive ensured all EU Member States recognised non-State actors of persecution, it also codified the concept of non-State actors of protection in Article 7. However, the concept is narrow and complemented by additional safeguards. Thus, although Article 7 enshrines in law the concept of non-State actors of protection, those entities may only be defined as such, provided they exhibit State-like characteristics, such as controlling the State or substantial part of its territory but also in addition, that they maintain a system and legal framework to detect, prosecute and punish persecutory acts and serious harm. The additional safeguards here are clearly drawn from the positive human rights obligations on States to protect individuals within their jurisdiction.[46]

43 European Council on Refugees and Exiles (ECRE), *Information Note on the 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)*, 7 Oct. 2013, available at: https://www.refworld.org/docid/551922ae4.html (last visited 11 Jan. 2022) 7. Although there is increasing recognition of the accountability of armed non-State actors under international human rights law and international humanitarian law, see for example A. Bellal and E. Heffes "'Yes, I Do': Binding Armed Non-State Actors to IHL and Human Rights Norms Through Their Consent", *Human Rights & International Legal Discourse*, 12(1), 2018, 120–136.

44 UNHCR, *Comments on the European Commission's proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009)551, 21 October 2009)* 5; ECRE, *Information Note on the Directive 2011/95/EU*, 7; O'Sullivan, "Acting the Part".

45 Art. 9(3) European Commission Proposal for a Council Directive on minimum standards for the qualification and status of third country nationals and stateless persons as refugees or as persons who otherwise need international protection (2002/C 51 E/17) COM(2001) 510 final.

46 See for example European Court of Human Rights (ECtHR), *Osman v. UK*, Judgment, Grand Chamber, Appl. No. 87/1997/871/1083, 28 Oct. 1998.

Research conducted in 2007 by UNHCR into the implementation of the original Qualification Directive shows that EU Member States' practice in terms of transposition into domestic law and interpretation varied considerably.[47] Although UNHCR reported that none of the five EU Member States investigated[48] had identified an international organisation capable of taking reasonable steps to provide protection, including "by operating an effective legal system for the detection, prosecution and punishment of acts constituting persecution or serious harm",[49] jurisprudence from Sweden highlighted this jurisdiction's practice of relying on other non-State actors considered to have the ability to provide protection, including "tribes and clans".[50]

The Court of Justice of the European Union (CJEU) first considered the interpretation of Article 7 of the (original) Qualification Directive in *Abdulla and Others*, a case concerned with cessation of refugee status and the manner in which international organisations controlling a State or a substantial part of a State may meet the requirements of the provision.[51] The CJEU's judgment provided little guidance on the nature of protection required by EU law and the Court merely noted that actors of protection "may comprise international organizations controlling the State or a substantial part of the territory of the State, including by means of the presence of a multi-national force in that territory".[52] O'Sullivan argues that the concept of protection is defined by positive attributes including an ability to provide physical security and safety, the existence of effective governing structures, including a functioning legal and judicial system and an adequate infrastructure enabling persons to enforce their rights.[53]

As noted above, some of these safeguards were added during the recasting of the Qualification Directive, which aimed at providing greater clarity and preventing EU Member States from interpreting the provision broadly and falling short of the standards of the Refugee Convention. In particular, the European Commission noted that the recasting process sought to redress the practice in certain Member States of recognising clans and tribes for example "despite the fact that these cannot be equated to States regarding their ability to provide protection" or NGOs for women at risk of FGM and honour killings "despite the fact that such organisations can only provide temporary safety or even only shelter to victims of persecution".[54] The European

47 United Nations High Commissioner for Refugees (UNHCR), *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, Geneva, UNHCR, Nov. 2007, available at: http://www.refworld.org/docid/473050632.html (last visited 10 Jan. 2022) 9.

48 France, Germany, Greece, the Slovak Republic, and Sweden, which taken together received almost 50 per cent of EU asylum applications in 2006, UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, 22.

49 *Ibid.*, 48.

50 *Ibid.*, 50.

51 Court of Justice of the European Union (CJEU), *Salahadin Abdulla and Others v. Bundesrepublik Deutschland*, Judgment, Grand Chamber, Joined Cases C-175/08, C-176/08, C-178/08 and C-179/08, 2 Mar. 2010.

52 *Ibid.*, paras. 74–75; for a critique of the judgment, see O'Sullivan, "Acting the Part", 94–98, albeit on the basis of Art. 7 of the original Qualification Directive.

53 O'Sullivan, "Acting the Part", 89.

54 European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted, COM(2009) 551 final, 6–7.

Commission here was making a distinction between protection in terms of safety and protection in terms of financial and accommodation support. The CJEU more recently described the latter as "social support mechanisms" in the case of *OA v. Secretary of State for the Home Department*, which is discussed below.

Despite the added safeguards to the notion of non-State actors of protection brought in by the recast qualification Directive, there continued to be divergence in practice within the EU. France, for example, rejected the notion that family or clan affiliation are capable of providing protection as required by the Refugee Convention. In 2016, the French National Asylum Court (CNDA) noted that the domestic legislation transposing Article 7 Qualification Directive restrictively defines potential non-State actors of protection.[55] In a reported appeal concerning a woman at risk of forced marriage and sexual violence from her step-father, the CNDA specifically noted that family or clan/tribal protection is insufficient to meet the provisions of national legislation transposing Article 7 of the Qualification Directive.[56] Further, the CNDA has emphasised that protection by non-State organisations will only be accessible, effective and non-temporary where the State of origin or habitual residence is unable to offer protection, the organisations control a substantial part of the territory and have "stable institutional structures" allowing them to exercise exclusive and continual civilian and armed control subject to the condition that the organisation is not itself the actor of persecution.[57] However, other EU Member States, national and regional courts and regional and international asylum agencies continue to take private actors into account when determining asylum claims. Explicit and implicit approaches as discussed in this article demonstrate that there is reliance on the availability of protection from a clan, a community, or family members in order to reject asylum claims. It would appear that the reasoning adopted is that no well-founded fear of being persecuted arises because the person can turn to those entities for effective protection.

Nonetheless, the CJEU judgment of *OA* has now shed some light on the concept. In light of UK jurisprudence, the CJEU addressed the questions of whether the term "protection of the country of nationality" is to be understood as State protection and if so, whether the effectiveness or availability of protection is to be assessed solely by reference to the protective acts/functions of State actors or can regard be had to the protective acts/functions performed by private (civil society) actors such as families and/or clans. The UK Government argued that the additional safeguards of Article 7 Qualification Directive only applied to the question of whether the applicant "is unable or, owing to such fear, is unwilling to avail himself of the protection of that country" and not to the assessment of whether the individual has a well-founded fear of being persecuted. In respect of the latter, the Government argued that protection

55 CNDA, *M. G.* No 15036058 C, 18 Oct. 2016, para. 3.

56 CNDA, *Mme A.* No 15026470 C, 21 Dec. 2016, para. 9; CNDA, Contentieux des Réfugiés: Jurisprudence du Conseil d'État et de la Cour nationale du droit d'asile 2016, 20 Feb. 2017, available at: https://www.refworld.org/type,CASELAWCOMP,FRA_CNDA,,58d549194,0.html (last visited 18 Mar. 2022) 11.

57 CNDA, *Mme M.* No. 12005702 R, 3 May 2016, para. 4; CNDA, *M. S.* No. 15033525 R, 3 May 2016, paras. 4 and 7.

in any form, in particular support from family members or clans was relevant.[58] The CJEU concluded that mere social and financial support, such as that provided by a family or clan, is inherently incapable either of preventing acts of persecution or of detecting, prosecuting, and punishing acts of persecution. It cannot therefore be regarded as providing protection. As the element of well-founded fear of being persecuted and the element of protection are so closely interconnected, the safeguards of Article 7 applied to both.[59]

The most recent decision of the CJEU indicates that the concept of actors of protection in EU law and its interpretation now appears relatively settled on the characteristics of non-State actors of protection and the nature of protection required by the Refugee Convention. As States and non-State actors perform inherently different functions, the protective acts of the two types of entities cannot be assimilated or combined into an assessment of the sufficiency of protection. Nevertheless, as will be demonstrated below, everyday practices implicitly retain and engage reliance on male family members or male "networks" resulting in the exclusion of women at risk of gender-based violence from refugee and human rights protection.

3. A FLEXIBLE CONCEPT OF PROTECTION?

Despite the nature and standards of State protection against persecution and serious harm established in refugee and human rights law, some opinions and everyday practices indicate that the notion of actors of protection is being unduly expanded to include male family members and networks, in a manner that is particularly detrimental to the protection of refugee women. Storey, for example, advocates for a broader interpretation of the concept of State protection and suggests that the ability of a State to protect is a question of threshold. Accordingly, a relevant factor in the assessment of State protection is the existence of civil society such as "families, community associations, tribes, clans, or women's shelters and so forth" who play a role in reducing the need for the State to actively take positive steps.[60] In other words, he argues for a sliding scale of "protective functions" to be exercised by the country of origin, the more active civil society is, the less the State is required to take affirmative steps to reduce the risk of persecution.[61]

Whereas it may be the case that informal networks such as family members play a role in "protecting" women from persecution in practice, there are principled and doctrinal reasons not to take it into account as a form of protection in international refugee law, as explained in this article. Indeed, many scholars agree that one of the main issues with recognising non-State actors of protection is that they cannot be

58 Court of Justice of the European Union (CJEU), *Secretary of State for the Home Department v. OA*, Judgment, Case C-255/19, 20 Jan. 2021, para. 27.

59 For further analysis of the CJEU judgment's impact on practice in the UK, see C. Querton, "Case Notes and Comments: Secretary of State for the Home Department v OA [2021] EUECJ C-255/19", *Journal of Immigration, Asylum and Nationality Law*, 35(3), 2021, 281–285.

60 Hathaway and Storey, "What is the Meaning of State Protection in Refugee Law? A Debate", 489, para. 6.

61 See also H. Storey, "The Meaning of 'Protection' within the Refugee Definition", *Refugee Survey Quarterly*, 35, 2016, 1.

held accountable in international (refugee) law.[62] Indeed, international law sets limits on State power and individuals have rights against the State,[63] a framework of rights and obligations to protect from serious harm at the hands of other non-State actors clearly lacking in the relationship between an individual and their family members or civil society organisations. Ultimately, family members have no international legal obligations to provide women with protection from serious harm at the hands of others, let alone the ability to do so.

There is also a further distinction somewhat obscured by the concept of non-State actors. Storey's view implies that individuals, such as family members, are composite of civil society. However, whereas, civil society organisations are by their very nature set up with the objective of pursuing a public interest or common good, individuals plainly do not share the same inherent characteristics. In fact, civil society has been understood as "the space outside the family, market and state".[64]

Although the basic proposition that the acts of family members, clans or civil society organisations cannot and should not be taken into consideration in the assessment of whether there is protection from persecution in a country of origin appears to be supported by a majority of scholars and the recent CJEU judgment in *OA*, the notion of male family members and undefined social networks providing protection to women against gender-based violence persists through other overlooked practices and processes. These include the designation of risk categories, the "migration" of concepts from one element of the refugee definition to another, and inconsistent gender-based violence jurisprudence. The result has been a sliding scale of protection for refugee women.

3.1. Designation of "risk categories"

The first everyday practice discussed here is the designation of "risk categories" by various actors determining international protection needs, such as governments, judicial, supra-national, or international entities that determine their own or other States' *non-refoulement* obligations in international refugee and human rights law. Within refugee status determination (RSD) processes, it has become commonplace for governments, courts, EUAA, and UNHCR to issue guidance on how to determine the international protection claims made by particular categories of persons from certain countries. National authorities are concerned with ensuring consistency across individual decision-makers, courts across immigration judges, EUAA across EU Member States, and UNHCR across their RSD offices. This guidance takes different forms, yet it shares a method consisting of defining risk categories followed by an opinion

62 Hathaway and Foster, *The Law of Refugee Status*, 288–289; O'Sullivan, "Acting the Part", 99; ECRE, Asylum Aid, DCR and HHC, *Actors of Protection and the Application of the Internal Protection Alternative: European Comparative Report*, Jul. 2014, 11; Goodwin-Gill and McAdam, *The Refugee in International Law*, 133.

63 Goodwin-Gill and McAdam, *The Refugee in International Law*, 134.

64 R. Cooper, "What is Civil Society, its Role and Value in 2018?", Birmingham University, Oct. 2015, available at: https://assets.publishing.service.gov.uk/media/5c6c2e74e5274a72bc45240e/488_What_is_Civil_Society.pdf (last visited 11 Mar. 2021) 2; see also World Economic Forum, *The Future Role of Civil Society*, 2013, available at: http://www3.weforum.org/docs/WEF_FutureRoleCivilSociety_Report_2013.pdf (last visited 11 Mar. 2021).

of whether individuals falling within a category may be in need of international protection.

Certain national authorities responsible for determining asylum claims issue policy guidance on countries of origin to support their agents in meeting quality standards and caseload demands. For example, the UK Home Office publishes Country Policy and Information Notes[65] and the Dutch Deputy Minister for Immigration issues country-specific asylum policies including "at-risk groups".[66] Courts in some European States have developed processes to identify appeals that may be suitable for country guidance where a large number of asylum-seekers from specific countries of origin are appealing refusals by national authorities. This enables the judiciary to dedicate greater resources to one case, including using a panel of judges or having country experts give oral evidence, to more fully assess whether evidence concerning a particular country demonstrates a risk on return for certain categories of persons. This, in turn, provides authoritative guidance to other immigration judges who can then apply the country guidance case to the individual circumstances of the case before them. Both the French National Asylum Court[67] and the UK Upper Tribunal (Immigration and Asylum Chamber)[68] operate such a system, for example. EUAA publishes Country Guidance to fulfil its duties that include "to foster convergence in applying the assessment criteria established" in the Qualification Directive,[69] and at the time of writing, had issued reports on Afghanistan, Iraq, Nigeria, and Syria.[70] Since January 2022, EU Member States "shall take into account" the guidance when determining asylum claims.[71]

The legally binding judgments of the ECtHR have significant influence on the practices of Contracting States beyond the cases of individual applicants and they influence government policy and individual asylum decisions.[72] In this sense, the Court's jurisprudence acts as a form of country guidance within RSD in Europe.

65 UK Home Office, Country Policy and Information Notes, available at: https://www.gov.uk/government/collections/country-policy-and-information-notes (last visited 17 Jan. 2022).

66 The Deputy Minister responsible for immigration may establish country-specific asylum policies (section 42 paragraph 2 of the Aliens Act 2000). The Deputy Minister may also determine whether there are specific groups in the country in question whose members are systematically exposed to persecution on one of the grounds specified in Art. 1A of the 1951 Convention (groepsvervolging; section C2/3.2 of the Aliens Act 2000 Implementation Guidelines). The Deputy Minister may further designate so-called "at-risk groups" (risicogroepen) when it appears that persecution of individuals belonging to the population group at issue occurs in the country of origin; C2/3.3 of the Aliens Act 2000 Implementation Guidelines; see paras. 54–58 European Court of Human Rights (ECtHR), *A.S.N. and Others v. the Netherlands*, Appl. Nos. 68377/17 and 530/18, 7 Sept. 2020.

67 CNDA, *Formations de jugement de la CNDA: Grande Formation*, available at: http://www.cnda.fr/La-CNDA/Organisation-de-la-CNDA/Formations-de-jugement-de-la-CNDA (last visited 17 Jan. 2022).

68 Available at: https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/tribunals/tribunal-decisions/immigration-asylum-chamber/ (last visited 17 Jan. 2022); see also R. Thomas, "Consistency in Asylum Adjudication: Country Guidance and the Asylum Process in the United Kingdom", *International Journal of Refugee Law*, 20(4), 2008, 489–532.

69 Art. 11(1) EUAA Regulation 2021.

70 Available at: https://euaa.europa.eu/asylum-knowledge/country-guidance (last visited 16 Mar. 2022).

71 Art. 11(3) EUAA Regulation 2021.

72 Partly because Arts. 15(a) and 15(b) of the Qualification Directive reflect Arts. 2 and 3 ECHR but also due to Contracting States' obligations under the ECHR leading to various forms of domestic complementary protection mechanisms, see McAdam, *Complementary Protection in International Refugee Law*.

Finally, UNHCR has long issued its opinion on the international protection needs of certain "risk profiles" from specific countries in Eligibility Guidelines, International Protection Considerations and Positions on Returns.[73]

Whereas efforts to improve and maintain the quality of asylum decision-making and ensure consistency across individual decision-makers so that the law is applied more uniformly are essential to fairness in refugee law, the framing of risk categories has entrenched the expectation that women at risk of gender-based violence seek protection from their male family members and networks. This is enabled by various framings of "women without a male network" as a risk category in certain countries. With respect to risk on return to Afghanistan, EUAA defines the category as "single women and female heads of households"[74] and the Norwegian Directorate of Immigration as "single women without a male network".[75] The UK Upper Tribunal established in a country guidance case that "a Sikh or Hindu single woman without family protection from a husband, other male member of the family, or within a family unit in which there is no male member of the household able to provide effective protection" may be in need of international protection.[76] With respect to Somalia, the ECtHR concluded that "single women returning to Mogadishu without access to protection from a male network" would be at risk of serious harm[77] and the UK Home Office identifies the profile as women "without family/friends/clan connections".[78] On returns to Iraq, UNHCR defines the risk profile as "women and girls without genuine family support".[79]

Country guidance also tends to highlight "risk-enhancing factors" or "additional vulnerabilities" that decision-makers should take into consideration when determining various elements of the refugee definition. These factors further engrain the notion of male family members as non-State actors of protection for women fearing gender-based violence. To illustrate, EUAA's Country Guidance on Nigeria notes that although not all women will be at risk of gender-based violence, there are risk-enhancing factors such as a woman's "family status" or "support network (family or other)".[80] UNHCR notes that "women without male support and protection,

73 Available at: https://www.refworld.org/publisher,UNHCR,COUNTRYPOS,,,0.html (last visited 15 Mar. 2022).

74 EUAA, *Country Guidance Afghanistan*, Dec. 2020, available at: https://easo.europa.eu/sites/default/files/Country_Guidance_Afghanistan_2020_0.pdf (last visited 17 Jan. 2022) 78.

75 UDI, Praksisnotat Asylpraksis – Afghanistan, PN 2014-004, 5.3.4., cited in J. Schultz, *The Internal Flight Alternative in Norway: The Law and Practice with Respect to Afghan Families and Unaccompanied Asylum-Seeking Children*, 2017, available at: https://www.unhcr.org/neu/wp-content/uploads/sites/15/2017/11/SchultzIFAStudyJune2017-1.pdf (last visited 17 Jan. 2022) 19.

76 Upper Tribunal (Immigration and Asylum Chamber), *TG and others (Afghan Sikhs persecuted) Afghanistan CG* [2015] UKUT 00595 (IAC) [93].

77 ECtHR, *R.H. v. Sweden*, para. 70.

78 Home Office, *Country Policy and Information Note Somalia: Women Fearing Gender-based Violence*, Apr. 2018, available at: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/698322/somalia-women-fearing-gender-based-violence-cpin.pdf (last visited 17 Jan. 2022) para. 2.3.7.

79 UNHCR, *International Protection Considerations with Regard to People Fleeing the Republic of Iraq*, HCR/PC/IRQ/2019/05_Rev.2., May 2019, 7.

80 Available at: https://easo.europa.eu/country-guidance-nigeria-2021 (last visited 17 Jan. 2022) 83.

including widows and divorced women, are at particular risk" in Afghanistan.[81] In a country guidance case largely concerned with the availability and sufficiency of protection in Nigeria, the UK Upper Tribunal established that a former victim of trafficking would face an enhanced risk of re-trafficking in the absence of "a supportive family willing to take her back into the family unit" or a "social support network to assist her".[82] The Tribunal also established that Sikh or Hindu women are "particularly vulnerable in the absence of appropriate protection from a male member of the family".[83]

Whereas country of origin information on which these risk categories are based may demonstrate that women without "social support mechanisms" are at increased risk of harm and may not be able to relocate internally, the conclusion that women face a risk of being persecuted only if they do not have such support networks does not follow because as seen above this cannot be taken into account in the assessment of international protection needs. However, as a result of this presumption, women's gender-based violence asylum claims are then determined according to whether or not they have retained contacts with their male family members in the country of origin. In R.H.'s case, the ECtHR highlighted what it described as significant inconsistencies in the account of her personal circumstances, such that the Court concluded she would not be returning to Mogadishu as a "lone woman with the risks that such a situation entails".[84] As a question of fact, the protection of refugee women, becomes dependent on the assessment of credibility, which is demonstrably problematic.[85] In practice, the legal question of well-founded fear of being persecuted is being replaced by an assessment of whether to believe women's accounts of their family connections. The everyday practice of designating risk categories to streamline refugee status determinations that include the presumption of male family or networks as protection, may partly explain why the key reason women are refused asylum is because they are not believed.[86] As a question of personal credibility, rather than law or publicly available country of origin information, this constitutes the last peg on which decision-makers can hang their refusals on. Furthermore, despite being rejected by a broad scholarship and a recent CJEU judgment, the narrowing of risk categories to single women or women without male support networks has indirectly contributed to the unjustified development of the concept of non-State actors of protection in international refugee law.

81 UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, HCR/EG/AFG/18/02, 30 Aug. 2018, 77.

82 Upper Tribunal (Immigration and Asylum Chamber), *HD (Trafficked women) Nigeria CG* [2016] UKUT 00454 (IAC), paras. 66, 97, 146, 151, 163, 166–168, and 174.

83 Upper Tribunal (Immigration and Asylum Chamber), *TG and others (Afghan Sikhs persecuted) Afghanistan CG* [2015] UKUT 00595 (IAC) para. 119(iii)(a).

84 ECtHR, *R.H. v. Sweden*, para. 73.

85 D. Singer, "Falling at Each Hurdle: Assessing the Credibility of Women's Asylum Claims in Europe", in E. Arbel, C. Dauvergne and J. Millbank (eds.), *Gender in Refugee Law: From the Margins to the Centre*, Abingdon, Routledge, 2014. O'Nions addresses some of these obstacles in this special issue.

86 *Ibid.*

3.2. Migrating issues across elements of the refugee definition

Another everyday practice contributing to the entrenchment of the concept of male family members and networks as actors of protection for women at risk of gender-based violence is the "migration" of issues across the different elements of the refugee definition. RSD requires considering whether the person has a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country".[87] RSD entities however fail to clearly delineate their assessment of the different elements of the refugee definition by taking into consideration factors relevant to one aspect of the refugee definition in the determination of other elements of the refugee definition. This includes using aspects concerning the well-founded fear of being persecuted in the definition of Particular Social Group and factors concerning acts of persecution or internal relocation alternatives in the assessment of the well-founded fear. This tendency with respect to non-State actors of protection confirms Dauvergne's claim that problems of interpretation in women's asylum claims tend to "slip from one definitional element to another as the jurisprudence advances".[88] Migrating issues across the various elements of the refugee definition act as an exclusionary practice.

Foster identified a trend in jurisprudence with respect to the interpretation of the Refugee Convention ground of Particular Social Group, where factors of relevance to vulnerability, persecution and/or failure of State protection all unjustifiably made their way into the definition of the group.[89] The practice exists since at least the 1980s, when the Canadian Immigration Appeal Board[90] granted refugee status to an Armenian mother and daughter on the basis of their membership of a particular social group "made up of single women living in a Moslem country without the protection of a male relative (father, brother, husband, son)".[91] Foster found that particular social groups other than women do not appear to display the same tendency of importing other elements into the definition.[92] The narrowing of the definitions of particular social groups subsequently constitutes a significant barrier to the protection of refugee women.[93]

Alternatively, the migration of issues may occur between the element of persecution and the element of well-founded fear. For example, UNHCR identifies the following risk categories of Afghan women, "survivors and those at risk of sexual and gender-based violence" and "survivors and those at risk of harmful traditional

87 Art. 1A(2) Refugee Convention.

88 Dauvergne, "Women in Refugee Jurisprudence", 730–731.

89 M. Foster, "Why We Are Not There Yet: The Particular Challenge of 'Particular Social Group'", in E. Arbel, C. Dauvergne and J. Millbank (eds.), *Gender in Refugee Law: From the Margins to the Centre*, Abingdon, Routledge, 2014, 30–31.

90 The predecessor to the Immigration and Refugee Board of Canada.

91 Cited in the Immigration and Refugee Board of Canada, Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution 1996, fn 11.

92 Foster, "Why We Are Not There Yet: The Particular Challenge of 'Particular Social Group'", 35.

93 *Ibid.*, 32.

practices".[94] The circular reasoning in this framing is evident as women who have a well-founded fear of being persecuted will fall within these categories. In other words, the risk category is defined by virtue of the existence of the persecutory treatment rather than the shared characteristics of the group, in this case women.[95]

It is also possible to detect how pertinent factors related to whether there is an internal relocation alternative for women fearing gender-based violence have migrated into the separate assessment of risk on return. This might be due to a failure to distinguish between protection in terms of safety against persecution/serious harm and protection in terms of social support mechanisms, such as financial assistance to resettle in the country of origin, as highlighted by the CJEU in the *OA* judgment discussed above. The latter is part of the assessment of an internal relocation alternative intended to ensure that the returnee's living conditions do not fall below the minimum standard.[96] It seems that this aspect of RSD has been carried into the question of whether someone has a well-founded fear of being persecuted on return. This is partly due to a lack of clarity in the judicial reasoning of the ECtHR that contributes to migrating issues across the elements of real risk of serious harm and internal relocation. In the case of *R.H.* for example, the ECtHR concluded that a single woman returning to Mogadishu without access to protection from a male network would be at risk of treatment contrary to Article 3 ECHR.[97] Although the ECtHR cited women's "living conditions" as amounting to inhuman or degrading treatment rather than the treatment at the hands of actors of persecution, it also referred to serious and widespread sexual and gender-based violence, abuses and discrimination against women in Somalia in the same paragraph.[98]

Migrating issues across the different legal elements in international refugee and international human rights law results in a more exacting assessment of whether women have a well-founded fear of being persecuted for a Refugee Convention reason or whether there is a real risk of serious harm in their country of origin. The resulting additional requirements act as a practice of exclusion, further contributing to the sliding scale of protection for refugee women.

3.3. Inconsistent jurisprudence of the ECtHR

Although the ECHR was not devised for the purpose of protecting refugees, the ECtHR has become a significant regional player in the field of refugee protection. The complementary protection function of the ECHR has arisen largely due to the Court's legally binding jurisprudence and European States' restrictive interpretation of refugee law, including through everyday practices as discussed above. Asylum-seekers who have been refused refugee or subsidiary/complementary forms of protection by European countries, might bring a claim before the ECtHR under Article

94 UNHCR, *Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan*, 76.

95 For an analysis of the interpretation of particular social group in the cases of women fearing gender-based violence, see C. Querton, "One Step Forward, Two Steps Back? Interpreting 'Particular Social Group' in the European Union", *International and Comparative Law Quarterly*, 71(2), 2022, 425–451.

96 Qualification Directive, Art. 8.

97 ECtHR, *R.H. v. Sweden*.

98 *Ibid.*, para. 70.

3 ECHR, which prohibits torture, inhuman or degrading treatment or punishment. Human rights law is often described as providing complementary protection to persons at risk of serious harm in their country of origin and scholars have argued that it offers added protection to refugees as it bridges existing gaps in international refugee law.[99] In its jurisprudence, the Court has stated that it affords a wider scope of protection for asylum-seekers and refugees than the Refugee Convention in light of the absolute nature of Article 3 ECHR and the absence of requirements for applicants to show that the risk of serious harm is linked to one of the five Refugee Convention grounds, namely race, religion, nationality, membership of a particular social group, or political opinion.[100]

However, an examination of the Court's jurisprudence in cases concerning gender-based violence against women challenges the view that it provides added protection to (all) refugees.[101] The Court's case law is inconsistent in the way it treats "domestic" cases, where violence against women takes place within the territory of the Council of Europe, compared to "expulsion" cases, where the breach of the Convention is feared as a result of ill-treatment occurring after expulsion to the person's country of origin.[102] The Court's approach in expulsion cases fails to reflect general principles of non-discrimination and international refugee and human rights law and the Court fails to consistently apply its own principles developed within its jurisprudence on violence against women in domestic cases.

Accordingly, another example of everyday practices detrimental to the protection of refugee women is the ECtHR's inconsistent jurisprudence, characterised by the reliance on a concept of protection against gender-based violence by male family members and "male networks" in expulsion cases which conflicts with the principles of protection established by the Court in "domestic" cases. With little legal reasoning, the Court assumes in such cases that support by male family members and networks is sufficient to absolve Contracting States' responsibility to protect against serious harm, even where expulsion is to countries where discrimination against women is institutionalised through law. As a result, the Court has unjustifiably modified the concept of protection from treatment contrary to Article 3 ECHR in violence against women expulsion cases. The practice suggests that complementary protection for refugee women in Europe does not offer the same protective ambit as for other refugees, illustrating the sliding scale of protection for refugee women.

99 McAdam, *Complementary Protection in International Refugee Law*, 137–139; E. Nykänen, "Protecting Children? The European Convention on Human Rights and Child Asylum Seekers", *European Journal of Migration and Law*, 3, 2001, 317; H. Lambert, "Protection Against Refoulement from Europe: Human Rights Law Comes to the Rescue", *International and Comparative Law Quarterly*, 48, 1999, 543.

100 ECtHR, *Chahal v. the United Kingdom*, Judgment, Grand Chamber, Appl. No. 22414/93, 15 Nov. 1996, para. 80.

101 From a quantitative perspective, only 3 out of 29 cases (up to 30 June 2016) concerning women at risk of gender-based violence on return to their country of origin resulted in a finding of Art. 3 ECHR violation, see Peroni, "The Protection of Women Asylum Seekers", 350.

102 Querton, "The Role of the European Court of Human Rights".

3.3.1. The concept of protection in "domestic" cases

Numerous ECtHR cases concern applicants claiming that Contracting States' failure to protect them from domestic violence is a breach of the European Convention on Human Rights.[103] In this jurisprudence, the Court has emphasised the gravity of domestic violence[104] and noted the particular vulnerability of victims of domestic violence[105] who often fail to report incidents.[106] Article 14 ECHR provides that the rights set out in the Convention should be secured without discrimination on any grounds. Applying specialist international human rights standards pertaining to the rights of women, the Court has established that a "State's failure to protect women against domestic violence breaches their right to equal protection of the law".[107] In a case where domestic violence had been met by "general and discriminatory judicial passivity" which mainly affected women,[108] the Court found that the violence suffered by the applicant and her mother amounted to gender-based violence which is a form of discrimination against women.[109] In other cases, the Court has identified the discriminatory nature of authorities' response due to their failure to understand the particular nature of domestic violence.[110]

The Court has also increasingly taken into consideration other international human rights instruments on violence against women in order to develop its jurisprudence in accordance with established principles of international law.[111] In cases of domestic violence occurring within the territory of Contracting States, the Court has endorsed the principle of due diligence, a rule of customary international law, which places a positive duty on States for active involvement in the protection of victims of domestic violence. This duty includes the maintenance and application in practice of a domestic legal system which provides practical and effective protection[112] including "against acts of violence by private individuals".[113] The duty requires Contracting States to have in place a legislative framework which allows them to take measures against persons accused of domestic violence, the effective

103 For an analysis of this jurisprudence, see for example L. Hasselbacher, "State Obligations regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection", *Northwestern University Journal of International Human Rights*, 8, 2009, 190–215; R.J.A. McQuigg, "The European Court of Human Rights and Domestic Violence: Valiuliene v. Lithuania", *International Journal of Human Rights*, 18, 2014, 756–773.

104 European Court of Human Rights (ECtHR), *Opuz v. Turkey*, Judgment, Appl. No. 33401/02, 9 Sept. 2009, para. 132.

105 European Court of Human Rights (ECtHR), *Bevacqua and S. v. Bulgaria*, Judgment, Appl. No. 71127/01, 12 Sept. 2008, para. 65.

106 European Court of Human Rights (ECtHR), *T.M. and C.M. v. the Republic of Moldova*, Judgment, Appl. No. 26608/11, 28 Apr. 2018, para. 60.

107 ECtHR, *Opuz v. Turkey*, para. 191.

108 *Ibid.*, paras. 200, 202.

109 *Ibid.*, para. 200.

110 European Court of Human Rights (ECtHR), *Mudric v. the Republic of Moldova*, Judgment, Appl. No. 74839/10, 16 Oct. 2013, para. 63; ECtHR, *T.M. and C.M. v. the Republic of Moldova*, para. 59.

111 ECtHR, *Bevacqua and S. v. Bulgaria*, paras. 49–53.

112 European Court of Human Rights (ECtHR), *Valiuliene v. Lithuania*, Judgment, Appl. No. 33234/07, 26 Jun. 2013, para. 75.

113 ECtHR, *Bevacqua and S. v. Bulgaria*, para. 65.

punishment of perpetrators and the prevention of recurrent attacks.[114] The development of positive obligations in the field of domestic violence has led to the gradual erosion of the pubic/private divide in the international human rights norms as developed by the Court.[115]

This brief overview has highlighted the specific obligations of Contracting States to provide protection to women against violence perpetrated by non-State actors as articulated by the Court in domestic cases. These safeguards have been described as an attempt by the Court to engage in a more gender-sensitive interpretation and application of the ECHR in a manner that takes into account the inequalities between men and women.[116] Although the application of those principles in particular cases have been criticised by scholars due to a failure to apply them in a gender-sensitive manner[117] or through the prism of non-discrimination[118] and conceptualised as inhuman and degrading treatment rather than torture,[119] it appears that the Court fails to even apply those same standards consistently in expulsion cases and relies instead on non-State actors of protection.

3.3.2. The concept of non-state actors of protection in "expulsion" cases

In stark contrast to the ECtHR's conceptualisation of protection in domestic cases, the Court does not require the same guarantees for the protection of women at risk of gender-based violence on return to their country of origin. In expulsion cases, the Court considers relationships with male family members or undefined "male networks" sufficient to eliminate the real risk of ill-treatment. The Court has adopted this approach even where it accepts that the laws of the relevant country and their application discriminate against women. Peroni describes the ECtHR's mode of reasoning as a "formalistic, cursory, vague or simply non-existent assessment of the home state ability to protect women".[120] Furthermore, the Court's assessment of violence against women in expulsion cases is not only inconsistent with similar cases where the ill-treatment takes places within the territory of the Contracting Parties but also with its jurisprudence on expulsion more generally.[121] In its early case law on the recognition of ill-treatment at the hand of non-State actors, the Court established as a general principle in Article 3 ECHR expulsion cases that where there is a real risk of harm from non-State actors, it must be shown that "the authorities of the receiving State are not able to obviate the risk by providing appropriate protection".[122]

114 European Court of Human Rights (ECtHR), *Rumor v. Italy*, Judgment, Appl. No. 72964/10, 27 Aug. 2014, para. 76.

115 McQuigg, "The European Court of Human Rights and Domestic Violence", 761.

116 R.J.A. McQuigg, "Domestic Violence as a Human Rights Issue: Rumor v. Italy", *European Journal of International Law*, 26, 2015, 1020–1021.

117 *Ibid.*, 1017–1018.

118 P. Londono, "Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights", *Human Rights Law Review*, 9(4), 2009, 657.

119 R.J.A. McQuigg, "The European Court of Human Rights and Domestic Violence: Volodina v. Russia", *International Human Rights Law Review*, 10, 2021, 155.

120 Peroni, "The Protection of Women Asylum Seekers", 352.

121 Wessels, "The Boundaries of Universality".

122 ECtHR, *H.L.R. v. France*, para. 40.

To illustrate, AA was a Yemeni national who was married when she was 14 years old and suffered severe domestic violence. Whilst seeking a divorce through the Court she was told to solve her private problems with her husband.[123] One of her daughters had also been married aged 14 years. When her husband wanted to marry off their youngest daughter, AA fled Yemen to Sweden. Nonetheless, by six votes to one, the Court was satisfied that AA and her daughters could turn to AA's brother and her adult sons for protection.[124] Equally, the Court concluded AA's daughters would be accompanied on return by their two brothers and have a male network enabling them to live away from the husband of AA's eldest daughter and their father.[125] The principles developed by the Court regarding a State's positive obligations to take measures to protect the applicant from her husband as set out above were not applied by the majority here.[126] According to Peroni, the assessment of State protection was entirely lacking in this case.[127] Dissenting Judge Power-Forde noted that the case not only raised the failure by Yemen to protect the female applicants but also the complete absence of protection mechanisms against gender-based violence in a country where domestic violence, marital rape, forced early marriages, and limitations on women's freedom of movement are not prohibited by law.[128]

In the case of *N v. Sweden*, which concerned N's expulsion to Afghanistan, N had separated from her husband and attempted to divorce him. She claimed that she would be at risk of serious harm on return to Kabul as a separated/divorced woman whose family had disowned her and as a result she would be at risk of being accused of adultery.[129] Although N was ultimately successful, the Court's conclusion was premised on the fact N no longer had contact with her family and thus that she no longer had "a social network or adequate protection in Afghanistan".[130] In yet another case where the applicant was at risk of being forcibly remarried if expelled to Iraq, the Court stated that it must first "determine whether she would be alone without male protection upon return to Iraq".[131] Although it is the Court's role to determine the facts of the case,[132] the sequencing of the reasoning indicates that the Court is guided by the notion of male family members and networks, which it has elevated into a general principle.

The Court's jurisprudence shows a trend towards the development of a concerning normative concept of non-State actors of protection in expulsion cases. This concept implies that male family members and other undefined social networks have the

123 European Court of Human Rights (ECtHR), *AA and Others v. Sweden*, Judgment, Appl. No. 14499/09, 28 Sept. 2012, para. 10.

124 *Ibid.*, paras. 83, 95.

125 *Ibid.*, paras. 90, 94.

126 *Ibid.*, Dissenting Opinion of Judge Power-Forde.

127 Peroni, "The Protection of Women Asylum Seekers", 356.

128 ECtHR, *AA and Others v. Sweden*, para. 39 citing the US Department of State 2010 Human Rights report: Yemen.

129 ECtHR, *N. v. Sweden*, Judgment, Appl. No. 23505/09, 20 Oct. 2010, para. 10.

130 *Ibid.*, para. 61.

131 ECtHR, *W.H. v. Sweden*, judgment, Appl. No. 49341/10, 27 Mar. 2014, para. 63.

132 The ECtHR generally acknowledges however that domestic authorities are best placed to assess the credibility of an individual as they have had the opportunity to see, hear and assess their account, ECtHR, *F.G. v. Sweden*, Judgment, Grand Chamber, Appl. No. 43611/11, 23 Mar. 2016, para. 118.

necessary qualities to provide accessible and effective protection to women at risk of gender-based violence in countries where women are discriminated against by law. The analysis of these cases raises questions of consistency within the Court's jurisprudence related to violence against women. Thus, there is no justification in the Court's reasoning for its departure in "expulsion" cases from the principles regarding the nature and extent of State obligations to prevent gender-based violence and protect victims. This everyday practice detrimentally impacts the prospects of complementary protection for refugee women by further contributing to the sliding scale of protection.

4. TAKING AVOIDING ACTION TO AVOID PERSECUTION

The article so far has identified everyday practices by a variety of asylum actors that have unjustifiably expanded the concept of non-State actors of protection to include male family members and undefined social networks. This trend renders the return of women seeking asylum conditional on remaining under the protection of a "male support network" without considering how this may lead to future forms of harm and loss of autonomy. The reasoning implies an expectation that women claiming asylum return to seek protection from these undefined "male networks". This, in turn, amounts to a requirement to take action to avoid persecution, which has been firmly rejected by regional and national courts in other types of cases.[133]

National and regional jurisprudence concerning refugee claims based on individuals' sexual orientation, political opinion or religious identity establishes that refugees are not required, and cannot be expected, to take reasonable steps to avoid persecutory harm or to live "discreetly" in order to avoid it. In a case examining whether two members of the Muslim Ahmadiyya community could avoid exposure to persecution in Pakistan by abstaining from certain religious practices, the CJEU established that whether someone can avoid a risk of being persecuted by abstaining from certain religious practices is irrelevant.[134] A year later, the CJEU applied the same principle in a case concerning three gay men from Sierra Leone, Uganda, and Senegal where it confirmed that national "authorities cannot reasonably expect, in order to avoid the risk of persecution, the applicant for asylum to conceal his homosexuality in his country of origin or to exercise reserve in the expression of his sexual orientation".[135] With reference to the latter CJEU decision, the ECtHR has also endorsed the view that a "person's sexual orientation forms a fundamental part of his or her identity and that no one may be obliged to conceal his or her sexual orientation in order to avoid persecution".[136] In the UK Supreme Court, Lord Hope clearly set out that the

133 For critiques focusing on the ECtHR's approach in this respect see Querton, "The Role of the European Court of Human Rights"; T. Spijkerboer, "Gender, Sexuality, Asylum and European Human Rights", *Law Critique*, 29, 2018, 221-239.

134 Court of Justice of the European Union (CJEU), *Bundesrepublik Deutschland v. Y and Z*, Judgment, Joined Cases C-71/11 and C-99/11, 5 Sep. 2012, para. 79.

135 Court of Justice of the European Union (CJEU), *Minister voor Immigratie en Asiel v. X, Y and Z*, Judgment, Joined Cases C-199/12 to C-201/12, 7 Nov. 2013, para. 76.

136 European Court of Human Rights (ECtHR), *B and C v. Switzerland*, Judgment, Appl. Nos. 889/19 and 43987/16, 17 Feb. 2021, para. 57; see also European Court of Human Rights (ECtHR), *I.K. v. Switzerland*, Judgment, Appl. No. 21417/17, 19 Dec. 2017, para. 24.

Refugee "Convention does not permit, or indeed envisage, applicants being returned to the countries of their nationality 'on condition' that they take steps to avoid offending their persecutors" in a case concerning two gay men from Iran and Cameroon.[137] The principle was re-affirmed by the UK Supreme Court in a case concerned with whether a Zimbabwean national who had no political views could be expected to lie and feign loyalty to the ruling party in order to avoid the persecutory ill-treatment to which he would otherwise be subjected.[138] Lord Dyson said that the principle applied to those who had a well-founded fear of being persecuted due to a lack of political belief, irrespective of how important that lack of belief is to them.[139] The UK Supreme Court was persuaded by the practice of both the Australian High Court and New Zealand Refugee Status Appeals Authority that had long rejected the proposition that refugee status could be denied by requiring the person to avoid being persecuted by forfeiting a fundamental human right.[140]

The consequence of incorporating the notion of male family members and networks as actors of protection into everyday practices such as risk categories is that asylum decision-makers may expect women to return to their country of origin if they have male support and protection. Asylum decision-makers who work under increasing pressures may fail to appreciate that there is no obligation on women seeking asylum to place themselves under the protection of any male networks. This unintended effect can be observed in women's asylum claims that are subsequently being determined on the basis of whether women are believed to have lost contact with and lost the support of their male family members. As noted above, the tipping point in the ECtHR case of *R.H. v. Sweden* was the credibility of the applicant's account. The ECtHR relied on the applicant's alleged delay in claiming asylum, her late disclosure of gender-based violence and "significant inconsistencies" in her account to conclude that she would not be returning to Somalia as a "lone woman".[141] Peroni describes this approach as an over-emphasis on the capacity of women's male relatives to protect them to the detriment of an analysis of the broader socio-cultural and institutional structures that impact women's access to State protection.[142] As demonstrated by Spijkerboer, there is a substantial number of ECtHR judgments where women are expected to "adapt to" gender-based violence by seeking the protection of their male family members.[143]

Overall, everyday practices by numerous RSD entities at all levels implicitly require women to seek the protection of male family members and networks to avoid the persecution they may otherwise be subjected to. However, women seeking asylum are perfectly entitled to refuse to accept the necessary restraint on their liberties resulting from placing themselves under the guardianship of their male family

137 UK Supreme Court (UKSC), *HJ (Iran) v. Secretary of State for the Home Department* (Rev 1) [2010] UKSC 31, 7 July 2010, para. 26.

138 UK Supreme Court (UKSC), *RT (Zimbabwe) & Ors v. Secretary of State for the Home Department* [2012] UKSC 38, 25 July 2012.

139 *Ibid.*, para. 52.

140 Australia High Court, *Appellant S395/2002 v. Minister of Immigration* (2003) 216 CLR 473; New Zealand Refugee Status Appeals Authority, *Refugee Appeal No 74665/03* [2005] INLR 68.

141 ECtHR, *R.H. v. Sweden*, paras. 71–73.

142 Peroni, "The Protection of Women Asylum Seekers", 348, 361.

143 Spijkerboer, "Gender, Sexuality, Asylum and European Human Rights", 227.

members.[144] What is more, in accordance with refugee and human rights law, it is wrong in principle to expect them to do so irrespective of their views of the prevalent gender norms in their country of origin. There are clear flaws in the approaches to the protection of women at risk of gender-based violence in light of the established principle that refugees cannot be expected to conduct themselves in a certain way on return to their country of origin in order to avoid persecution.

Furthermore, these everyday practices entirely fail to consider the potentially serious human rights violations that might follow from a requirement of placing oneself and remaining under the protection of male family members and networks, not least forced marriage, domestic violence, rape or sexual violence. The failure to acknowledge and assess any additional risk of persecution or serious harm for refugee women resulting from being dependent on complying with the social mores prevalent in their country of origin may partly be attributed to the failure to specifically define the male networks considered to be willing and capable of providing protection. Without a precise identification of the private actors of protection constituting "male networks", it is unlikely that any resulting risk of persecution or serious harm can be adequately assessed.

Finally, the requirement of taking avoiding action is, in itself, a breach of women's human rights. Although EUAA acknowledges that there are countries where women's civil rights are limited and their access to basic services or basic means of survival is non-existent without a male support network, this consideration is limited to an assessment of internal relocation rather than risk on return.[145] Women's freedom of movement, freedom of association with others and freedom of self-expression is limited by not being permitted to leave the home without a male guardian and not being permitted to autonomously navigate any aspect of public or private life but rather to do so through the voice of a male guardian.[146] In the evidence available before the ECtHR in *R.H. v. Sweden*, the Swedish Migration Board's report on Women in Somalia from 2014 set out that "within the Somali clan system a woman has to be represented by a man when decision is to be made within customary law. It is always the man who decides for the woman. If there are no close male relatives, another older male relative can speak for and decide for the woman".[147] More broadly, the range of limitations to fundamental rights which women seeking asylum are expected to accept in order to avoid persecution undermines their human dignity and personal autonomy. The fact that these limitations are imposed on a discriminatory basis increases the severity of those human rights violations. Discrimination is at the heart of refugee protection, a framework that provides surrogate protection to individuals subject to differential treatment on the basis of real or perceived characteristics.[148]

144 See by analogy UKSC, *HJ (Iran) v. Secretary of State for the Home Department*, para. 26, see also para. 29.

145 EUAA, *Internal Protection Alternative Guide*, 2021, 15.

146 Again, by analogy with the case of UKSC, *HJ (Iran) v. Secretary of State for the Home Department*, para. 14.

147 ECtHR, *R.H. v. Sweden*, para. 30.

148 UNHCR, *Intervention before the Court of Appeal of England and Wales in the case of Islam (A.P.) v. Secretary of State for the Home Department Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.) (Conjoined Appeals)*, 25 Mar. 1999, available at: https://www.refworld.org/docid/3eb11c2f4.html (last visited 17 Jan. 2022).

There is no clearer evidence of this discriminatory treatment than the widely accepted fact that some women have to seek the protection of male family members and networks to avoid being persecuted. If, as Lord Dyson said in the UK Supreme Court, the right to dignity is the foundation of all the freedoms protected by the Refugee Convention,[149] it is surprising that the requirement of taking avoiding action and the potential human rights violations that follow have been so widely reinforced by a range of actors in the cases of women at risk of gender-based violence.

5. CONCLUSION

The article has demonstrated how everyday practices exercised by various governmental, national and regional judicial bodies, supra-national and international agencies reduce the protective ambit of refugee and human rights legal frameworks to the detriment of refugee women by explicitly and implicitly relying on male family members and networks as non-State actors of protection. Overall, despite broad scholarly opinion and a recent principled judgment from the CJEU, the practices of various actors assessing the *non-refoulement* obligations of States uphold the concept of male family members and social networks as actors of protection which offends against international refugee and human rights law with respect to the meaning of protection, the requirement of taking avoiding action and the protection of fundamental rights. As a result, the protection of women seeking asylum has become conditional on the credibility of their account concerning their relationships with and contacts to male family members and networks.

Although the everyday practices discussed in this article might at first glance appear disparate because they range from policies adopted by national authorities, supra-national and international agencies including EUAA and UNHCR, to the "migration" of relevant factors through the interpretation of refugee protection provisions and inconsistent jurisprudence by bodies concerned with complementary protection, the inter-relationship between all these entities means that everyday practices of exclusion reinforce and co-constitute each other. The following example based on the discussion above illustrates the point. Sweden was identified early on as a jurisdiction that relied on non-State actors of protection such as tribes or clans in its transposition of the Qualification Directive.[150] All of the judgments of the ECtHR that led to the development of recognition of male family members and networks as actors of protection were applications brought against Sweden.[151] In its assessment, the ECtHR also consider country guidance from other governments. It was one of those judgments, citing the UK Home Office Country Information and Guidance report entitled "Somalia: Women Fearing Gender-Based Harm/Violence",[152] which

149 Lord Dyson in UKSC, *RT (Zimbabwe) & Ors v. Secretary of State for the Home Department*, para. 39.

150 UNHCR, *Asylum in the European Union: A Study of the Implementation of the Qualification Directive*, 50.

151 ECtHR, *AA and Others v. Sweden;* ECtHR, *N. v. Sweden;* ECtHR, *W.H. v. Sweden;* ECtHR, *R.H. v. Sweden.*

152 The policy document concluded that "Being female does not on its own establish a need for international protection. The general level of discrimination against women in Somalia does not in itself amount to persecution. However, women who are without family/friend/clan connections or are without resources are in general likely to be at risk of sexual and gender based violence on return", ECtHR, *R.H. v. Sweden*, para. 33.

was invoked as a justification for the UK Upper Tribunal seeking a request for a preliminary ruling from the CJEU in the case of *OA* regarding the interpretation of the actors of protection clause in the Qualification Directive.[153] Although ultimately, the CJEU provided a principled and exacting judgment on how social and financial support provided by private actors (such as clans or families) falls short of what is required to constitute protection, the CJEU's authority is technically limited to the interpretation of EU law. It is to be hoped that the ECtHR and national authorities will take note of the ruling with respect to complementary forms of protection as well. The ECtHR's questions to the parties and request for further information from the applicant in *O.T.D. v. the Netherlands* however suggests its approach remains to be re-evaluated.[154]

In the meantime, the entrenchment of everyday practices will continue to contribute to the migration of the concept of male family members and networks as actors of protection across the practice of other refugee and human rights bodies. The recent Istanbul Convention for example, was welcomed by UNHCR as the first legally binding international instrument to explicitly refer to the need to interpret international protection provisions[155] in a gender-sensitive manner.[156] However, there is a clear interdependence between the Istanbul Convention and the ECtHR's jurisprudence. The Explanatory Report of the Istanbul Convention sets out that Articles 60 and 61 should be read so that they are compatible with the Refugee Convention and Article 3 ECHR as interpreted by the ECtHR. It is specified that these Articles do not go beyond the scope of application of the Refugee Convention and ECHR but merely give them a "practical dimension".[157] Although the Istanbul Convention is explicit in its structural approach to violence against women and codifies the due diligence principle, this framework does not necessarily enhance the existing protection of women at risk of gender-based violence on return to their country of origin beyond existing practice. In particular, by aligning its interpretation of States' *non-refoulement* obligations with existing ECtHR jurisprudence, the Istanbul Convention does not offer an opportunity for effective protection. This approach endorses by default the ECtHR's failure to apply the principles developed in its jurisprudence on protection against domestic violence including the due diligence principle in expulsion cases where applicants are at risk on return to their countries of origin.

153 Even if this was a judgment of the Fifth Section decided by 5 votes to 2. Upper Tribunal (Immigration and Asylum Chamber), *Secretary of State for the Home Department v. OA*, Appeal Number: RP/00137/2016, 22 Mar. 2019, para. 49; Storey, "The Meaning of 'Protection' within the Refugee Definition", 29–30.

154 The ECtHR has asked the parties to consider whether a "single woman with a daughter born out of wedlock in Europe, must be regarded as capable of protecting her daughter against FGM" in Guinea and asked O.T.D. to provide detailed factual information "about her current social network in Guinea"; ECtHR, *O.T.D. v. the Netherlands*, Communication, Appl. No. 49837/20, 6 May 2021.

155 Art. 60 covers the interpretation of persecution, the Refugee Convention reasons for persecution and reception procedures for "gender-based asylum claims". Art. 61 addresses States' *non-refoulement* obligation with regards to "victims of violence against women".

156 UNHCR, *UNHCR welcomes Council of Europe convention on combatting violence against women*, 1 Aug. 2014, available at: https://www.unhcr.org/news/latest/2014/8/53da56749/unhcr-welcomes-council-europe-convention-combatting-violence-against-women.html (last visited 17 Jan. 2022).

157 Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence, Istanbul 11.V.2011, Council of Europe Treaty Series 210, para. 300.

Ultimately, even a treaty designed explicitly to protect women at risk of gender-based violence imbeds the sliding scale of protection for refugee women established through the everyday practices of governments, asylum agencies such as EUAA and UNHCR, and national and international courts.

Although the recent principled judgment of the CJEU in *OA* renders it less likely that RSD entities will explicitly rely on male family members as actors of protection in the future, as everyday practices of exclusion of women from refugee protection through the concept of male family members and networks reinforce and co-constitute each other, we should remain alert in uncovering implicit practices.