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**Feminist Theory, Gender Mainstreaming and the European Union: Examining the effects of EU gender mainstreaming and national law on female asylum seekers in the United Kingdom and Republic of Ireland**

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December 2016

I hereby declare that this thesis has not been and will not be,  
submitted in whole or in part to another University for the award of  
any other degree.

Signature: .....

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### **Abstract**

The European Union (EU) policy of gender mainstreaming has been discussed at length in the context of embedding gender equality into the EU's internal market. The effectiveness of gender mainstreaming has been less analysed in other areas of EU competence. This PhD draws on feminist theory to explain the EU's gendered treatment of vulnerable women within the asylum system. Using a range of theories of gender equality, notably separate spheres, radical feminism, and intersectional feminism, the thesis analyses the relevant asylum legislation, judgements and guidelines in international law, EU law and the national legal systems of two EU member states: the United Kingdom and Ireland. These feminist theories provided a perspective which allowed this research to explain how the EU has failed to address significantly and meaningfully the gendered aspects of the asylum system in member states.

Despite the EU's stated attempts to ensure through gender mainstreaming that the member states rely on a theory of gender equality which provides protection to women in the asylum system, this PhD found both that the EU has not sufficiently embodied an intersectional approach to gender and asylum and that member states are still more influenced by their national political culture and treatment of gender equality than that of the EU. This thesis uses that research to make recommendations at both an EU and national level to help the EU and its member states better incorporate gender mainstreaming in order to ensure human rights protection for vulnerable women. As the EU manages increasing refugee applications and increasing nationalist sentiment, this presents an opportunity to embed more thoroughly intersectional gender mainstreaming in both EU asylum policy and the EU's political culture.

## Chapter 1: Introduction

The idea for this research began with a reading of the 2011 European Union Qualification Directive.<sup>1</sup> One of the landmark pieces of legislation of the Common European Asylum System (the CEAS), this Directive legislated the content of the asylum law of European Union member states: directly determining whether an asylum applicant would be eligible for protection as a refugee. When initially reading the Qualification Directive, the references to gender-based persecution were reminiscent both of gendered developments in UK law<sup>2</sup> and best practice recommended for asylum seekers by the United Nations.<sup>3</sup> This legislation seemed ideal to harmonise asylum practice in the EU; surely if the EU was creating legislation with gender-aware content, this was a progressive step for women in the asylum system and would press member states to use a more feminist approach to asylum seekers who had encountered gender-based violence?

Gender-based violence exists globally, in every society. One in three women will encounter domestic or sexual violence during their lifetimes.<sup>4</sup> Yet there are some major differences between state treatment of societal sexual violence – between attempts to raise public and law enforcement awareness of the unacceptable but insidious nature of gender-based violence to governments that deliberately choose not to interfere in intra-familial violence.<sup>5</sup> While women should be protected by their government from abusive partners and family members, international law now holds that if a government systematically denies women safety from gender-based violence, women have the right to seek asylum in another state.<sup>6</sup>

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<sup>1</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 (Recast Qualification Directive.).

<sup>2</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 (HL).

<sup>3</sup> UN High Commissioner for Refugees, 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1a(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (UN High Commissioner for Refugees, 7 May 2002.).  
<<http://www.refworld.org/pdfid/3d36f1c64.pdf>> accessed 09 June 2017.

<sup>4</sup> World Health Organisation, 'Violence Against Women: Intimate Partner and Sexual Violence Against Women'. (WHO Media Centre, November 2014.).  
<<http://www.who.int/mediacentre/factsheets/fs239/en/>> accessed 9 June 2017.

<sup>5</sup> See *ibid.*

<sup>6</sup> See *Islam and Shah* (n 2) and UN High Commissioner for Refugees.(n 3).

Not all gender-based violence is considered to reach the level of persecution. In order to determine whether domestic or sexual violence can constitute persecution, it is essential to examine societal context. Is there active protection for survivors in their member states, and efforts to impose criminal penalties on abusers? Most notably, does the state fail to protect survivors for a specific reason discussed in the Refugee Convention, such as their ethnicity or because the state deems them to be members of a specific social group, such as adulterers, unworthy of protection?<sup>7</sup> Not all women who encountered serious sexual or domestic violence will qualify as refugees; yet all asylum seekers who are vulnerable due to these trauma should be treated with support and care during the asylum decision-making process.

Both the EU and its member states have professed an interest in eradicating violence against women, within the EU and abroad. This thesis critically examines whether the treatment of asylum seekers within the EU is consistent with the fundamental rights espoused by the EU and international asylum law as to treatment of women who experienced gender-based violence. While human rights have been criticised from a feminist perspective previously, most notably by academics such as Catharine MacKinnon<sup>8</sup>, this research will determine whether member states have fully accounted for the multiple discriminations and oppressions that asylum seekers who have encountered gendered violence face.

This is the first research to use feminist theory, especially intersectional theory, in order to critique handling of gender-based violence claims within the EU. The Refugee Convention, the international instrument which sets standards for treatment and recognition of refugees, did not initially make any mention of gender or gendered discrimination.<sup>9</sup> This is an area of international refugee law which has evolved over time through supporting documents from the UN – and cases and practice of the EU and its member states.<sup>10</sup> This research focuses on a specific group of asylum seekers – women who have survived sexual

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<sup>7</sup> *ibid.*

<sup>8</sup> See Catharine MacKinnon, *Towards a Feminist Theory of State*. (Harvard University Press 1989) and Catharine MacKinnon, *Are Women Human? And Other International Dialogues*. (Harvard University Press 2006)..

<sup>9</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention.)

<sup>10</sup> See chapter 4, which exclusively focuses EU law, asylum and gender and the practices of member states in chapters 5 and 6.



violence or intimate partner violence, who have failed to receive protection or justice from their government. This could be because they were assaulted by state actors, or more likely, because the state does not take sexual violence prevention seriously, particularly when it occurs within the home. While these issues unfortunately do affect young girls (20% of girls experience childhood sexual abuse)<sup>11</sup>, this research will only cover adult women, choosing not to examine the additional legal protections and procedures which apply specifically to child asylum seekers.<sup>12</sup> Children will be considered as part of their families, and through their relationship with asylum seeker parents, rather than as independent actors.

Gender-based violence, including rape and physical abuse by a family member, is a deeply traumatic experience with effects which can manifest for years after the event.<sup>13</sup> This research argues that any survivor of gender-based violence should be categorised as a vulnerable survivor. While all asylum seekers should have their human rights respected and vindicated, states have a particular obligation to support vulnerable asylum seekers.<sup>14</sup> While this research specifically focuses on these vulnerable asylum seekers, certain findings will be more broadly applicable to the experience of all asylum seekers.

The thesis will argue that the EU has professed an awareness of the challenges and discriminations faced by women in the asylum system who have experienced gender-based violence. Yet the thesis will demonstrate that the EU has not been able to translate the awareness of the need for intersectional policies into practice. The EU has made many of the same fallacies and oversights as the radical feminist theories described by Catharine MacKinnon<sup>15</sup>: failing to recognise the differing support needed for migrant women dealing with culture shock, isolation and discrimination in a new state, as well as their trauma.

The research will demonstrate that the EU has not only been unable to develop an intersectional law and practice within its own organs, but has not imprinted a progressive,

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<sup>11</sup> See World Health Organisation (n 4).

<sup>12</sup> For more examination of these issues, see Helen Stalford, 'CRC in Litigation under EU law' in Ton Liefwaard and Jap E. Doek (eds.) *Litigating the Rights of the Child*. (Springer 2015).

<sup>13</sup> Jennifer A. Bennice, Patricia A. Resick, Mindy Mechanic and Millie Astin. 'The Relative Effects of Intimate Partner Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology.' (2003) 18 *Violence and Victims* 87.

<sup>14</sup> European Council on Refugee and Exiles. *European Comparative Report: Dublin II Regulation – Lives on Hold*. (ECRE.website, February 2013).

<<http://www.ecre.org/component/downloads/downloads/701.html>> accessed 09 June 2017

<sup>15</sup> *ibid*.

intersectional approach onto its member states either. The two member states highlighted in this research, the UK and Ireland, have chosen simply to use European law to enforce the status quo of their previous treatment of migrant women, rather than adjusting to the EU's advocacy of support for migrant women.

The second section of this chapter will discuss the methodology of this research. Like all theses, this work began with an interest in a particular gap in current academic research: the effects of gender mainstreaming in the EU's asylum processes. The methodology of this thesis, through a literature review, interviews with immigration professionals and observers and the connective independent research, was instrumental in developing the major thematic questions and then structuring the research in order to address the ideas which stemmed from the findings, threading the results of these research questions throughout the six substantive chapters. The research uniquely uses various feminist theories to better analyse the EU's understanding of gender mainstreaming – and the fallacies in its application to vulnerable women in the asylum system.

The research questions illustrated by the literature review and professional interviews constitute the third section of this introduction. These research questions, crafted to explain the treatment of vulnerable women under the EU's asylum processes, formed the skeleton of the research, providing a clear divide in chapters: providing the use of feminist theory, discussing the EU's competence and interest in incorporating gender mainstreaming into asylum, and comparing the treatment of women in the asylum process in two member states, the UK and Ireland. These research arguments crafted the final recommendations in chapter 7, which will demonstrate that the current increase in asylum applications from the Middle East has provided the EU with an opportunity to use these recommendations in order to embed better fundamental rights and equal treatment of women at a time of deep-seated changes for the EU's views of asylum and migration. Though the majority of this thesis was written before the United Kingdom's decision to leave the European Union,<sup>16</sup> the recommendations and research will provide an invaluable

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<sup>16</sup> Steven Erlanger. 'Britain Votes to Leave EU; Cameron Plans to Step Down.' *The New York Times*. (New York City, 23 June 2016..

<<http://www.nytimes.com/2016/06/25/world/europe/britain-brexiteuropean-union-referendum.html>> accessed 10 June 2017.

perspective as part of the British process to determine which EU legislation and policies to maintain within UK law after Brexit.<sup>17</sup>

The final section of this chapter will illustrate how the various chapters use the structure of the research questions and themes to present a clear argument that the EU and its member states have failed to promote an intersectional approach to support women within the asylum system – and to use intersectional feminist theory to suggest improvements to both the asylum applications process and living conditions of women who have encountered sexual violence and seek refuge within the European Union.

## **I. Methodology**

The data gathered and used in this thesis originated two major sources: a literature review and primary legal materials. These methods were supplemented by interviews, both unique to this research and publicly available government statements, which helped to clarify and develop the major research questions. Independent research was then assembled to provide the answers and recommendations for this original thesis in order to improve the EU and member states treatment of fundamental rights within the asylum system. All research was conducted with an emphasis on incorporating a feminist perspective and understanding.

The literature review included primary sources, academic commentary and media and NGO reports. Feminist scholars have historically been sceptical of qualitative research methods, claiming that traditional research methods reinforced existing male power structures.<sup>23</sup> Yet over time, feminist academics began to adopt qualitative methodology to criticise male oppression and to argue for a more just society for women.<sup>24</sup> Rather than simply using research to “objectively” observe, feminist work attempted to argue for the value of gender equality.<sup>25</sup> This thesis follows in that tradition. Agreeing with Sylvia Walby that the international community now recognises that freedom from gendered

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<sup>17</sup> See Jessica Elgot. ‘Theresa May to trigger Article 50 by end of March 2017..’ *The Guardian*, London, 02 October 2016.) <<https://www.theguardian.com/politics/2016/oct/01/theresa-may-to-propose-great-repeal-bill-to-unwind-eu-laws>> accessed 24 November 2016.

<sup>23</sup> Marcia Millman and Rosabeth Moss Kanter, ‘Introduction to Another Voice: Feminist Perspectives on Social Life and Social Science’ in Sandra Harding (ed) *Feminism and Methodology: Social Sciences Issues*. (Open University Press 1987.)

<sup>24</sup> Susan Hekman, ‘Feminist Methodology in William Outhwaite and Stephen P. Turner (eds). *The Sage Handbook of Social Science Methodology*. (Sage Publications 2007).

<sup>25</sup> Millman and Moss Kanter (n 23).

violence is a basic human right<sup>27</sup>, this research will argue for the greater prominence of fundamental rights, through women's rights within the EU and its member states, within their treatment of asylum seekers. This has meant that along with liberal use of primary sources such as legislation and judgements, this research also made use of observational reports from NGOs and interviews. These sources had strong viewpoints, challenging the traditional research value of objectivity. Feminist research continues to debate whether any research can be truly objective<sup>28</sup>, suggesting that if a professional or an NGO has developed strong opinions over time through exposure to asylum cases, those opinions should not be rejected or balanced simply in order to attempt to achieve an impartial perspective. This research is often critical of government positions and treatment of asylum seekers, although the government perspective is discussed and considered throughout the thesis.

The thesis will also rely extensively on the feminist concept of gender mainstreaming. A theory which entered into broad discourse within the Beijing Platform for Action,<sup>29</sup> gender mainstreaming was intended to prevent the isolation of gender equality within law – instead of separating out specific “women's issues”, gender should be entwined throughout government policies. Gender mainstreaming is intended to be a process which enshrines gender in every aspect of decision making. Yet the concept, and particularly how the theory of gender mainstreaming would translate into a process which provides a healthy protection of gender equality, still remains particularly broad and ill-defined within the EU. Gender mainstreaming is intended to incorporate gender into all areas of decision-making and constantly to attempt to reduce structural inequalities and indirect discrimination against women.<sup>30</sup> Throughout this thesis, the research will utilise the European Commission's definition of gender mainstreaming,

Gender mainstreaming can be defined as the integration of a gender perspective into every aspect of EU intervention – preparation, design, implementation, monitoring and evaluation of policies, legal

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<sup>27</sup> Sylvia Walby, 'Gender, Globalisation and Democracy' (2000) 8 *Gender and Development* 20.

<sup>28</sup> Sandra Harding, 'Is there a feminist method?' in Sandra Harding (ed.) *Feminism and Methodology: Social Sciences Issues*. (Open University Press 1987).

<sup>29</sup> European Institute for Gender Equality. Beijing+20: the 4th Review of the Implementation of the Beijing Platform for Action in the EU Member States. (EIGE website, 30 October 2014.) <<http://eige.europa.eu/rdc/eige-publications/beijing-20-4th-review-implementation-beijing-platform-action-eu-member-states-report>> accessed 6 July 2017.

<sup>30</sup> Teresa Rees, 'Reflections on the uneven development of gender mainstreaming in Europe.' (2005) 7 *International Feminist Journal of Politics* 555, 559.

measures and spending programmes - with a view to achieving equality between women and men.<sup>31</sup>

This research will demonstrate that while the organs of the EU have verbalised the importance of gender mainstreaming<sup>32</sup>, the actual processes put in place to enshrine gender in all areas of decision-making have fallen short of this lofty goal.

When beginning a literature review to better explain gender mainstreaming, it became clear that gender mainstreaming is an ideal that could be interpreted in many different ways. Theresa Rees cautioned that in states with existing patriarchal structures, these ideals can often be reinforced in gender mainstreaming. This can lead to equality law that reinforces gender stereotypes rather than attempting to eliminate gender roles.<sup>33</sup> Differing views of gender roles create different legislation from mainstreaming. While the various interpretations of gender equality and the connection with gender mainstreaming will be discussed throughout this thesis (which advocates for an intersectional approach to gender mainstreaming), the thesis does not dispute or debate whether gender mainstreaming is a worthwhile and appropriate aim in order to achieve gender equality, but instead makes the assumption that gender mainstreaming is an improved approach to achieve gender equality.

This research was originally intended to rely heavily on original interviews conducted with professionals. The initial interviews were conducted from January until August 2014, with the ethical approval of the University of Sussex.<sup>34</sup> The seven interview subjects were identified due to their long-term familiarity with the asylum processes of either the United Kingdom or Ireland, either as legal professionals, NGOs which work with those applying for asylum or as academic commentators. When determining whether to interview women who had been through the asylum application process or those who provided support in a professional context, there were several considerations. The first was a concern as to a power imbalance of interviewing refugees about traumatic experiences and asking them to

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<sup>31</sup> European Commission, 'Commission staff working document: Mid-term review of the Strategy for Equality between Men and Women' (2010-2015.) (European Commission website, 2013.) <[http://ec.europa.eu/justice/gender-equality/files/strategy\\_women\\_men/131011\\_mid\\_term\\_review\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/strategy_women_men/131011_mid_term_review_en.pdf)> accessed 06 July 2017.

<sup>32</sup> *ibid.*

<sup>33</sup> *ibid* 562.

<sup>34</sup> Social Sciences & Arts Cross-School Research, *Certificate of Approval 1112/07/02*

relieve a potentially painful and difficult experience.<sup>35</sup> The second is that refugees would only be able to speak to their own experience, rather than offer a more generalised perspective on various cases, and changes to asylum processes over time – particularly since the introduction of the Common European Asylum System. After careful consideration, it seemed clear that any benefit of interviewing particular asylum seekers about their own cases would be outweighed by the stress of asking them to recount a frustrating, and if unsuccessful, potentially traumatic process.

Representation of these interviews within this thesis was intended to minimise author interpretation as much as possible and to allow the interview subjects to express their views and findings without filters.<sup>36</sup> While a schedule of interview questions and discussion tactics were drafted and provided in advance, the interviews were semi-structured and interview subjects were not held to a strict list of questions.<sup>37</sup> The queries were facilitated to prompt interviewees to expand on themes that they believed to be essential and relevant to the discussion of asylum in the UK and Ireland. All interviews were transcribed and when applicable, quotes were directly placed into the thesis in order to allow the context and meaning of the interview to be clearly understood.<sup>38</sup> While the majority of the interviews merely provided background research, several are broadly quoted throughout the thesis's substantive arguments.<sup>39</sup>

When transcribed, the interviews contained evocative personal experience of the asylum process and frustrations of attempting to advocate for clients and service users. This was incredibly helpful in identifying topics for consideration within the research – one particular interviewee insisted that no conversation about the asylum process in the UK would be complete without a discussion of detention. Yet many of these views overlapped with NGO reports (particularly that of an Asylum Aid worker, who had assisted in preparing several of the reports cited within this research). Yet NGO reports were able to access many of the statistics and procedures which were inaccessible to practitioners. As a

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<sup>35</sup> Mary Gergen, Joan C. Chrisler and Alice LoCicero, 'Innovative Methods: Resources for Research, Publishing and Teaching' (1999) 23 *Psychology of Women Quarterly* 431.

<sup>36</sup> A. Opie, 'Qualitative Research, Appropriation of the 'Other' and Empowerment.' [1992] 40 *Feminist Review* 52.

<sup>37</sup> Sandy Ou and John Dumay, 'The Qualitative Research Interview' (2008) 8 *Qualitative Research in Accounting & Management* 238.

<sup>38</sup> See Opie (n 36.)

<sup>39</sup> Marjorie L. DeVault, 'Talking and Listening from Women's Standpoint: Feminist Strategies for Interviewing and Analysis' (1990) 37 *Social Problems* 96.

result, the interview transcripts eventually became more of a tool for crafting research questions and less part of the core literature review. When the interviews became less essential, this research ceased to request further interview participation and use NGO reports for the role envisioned by the personal interviews. As a result, the interviews will only be used to support thematic conclusions throughout the research, similar to the other literature reviews for the production of this thesis.

The research also drew on non-original interviews with public officials in the UK and Ireland regarding asylum policy and legislation. While these were not conducted for this research, they have been similarly transcribed and quoted. Requests for interviews with the UK and Irish governments to better understand the government's policies and positions were denied – public interviews and reports were thus the best example of the governments' arguments for their treatment of asylum seekers. While these reports and interviews did not directly answer criticism of the treatment of asylum seekers, they were extremely helpful in illustrating the government's balancing of security issues and protection of the human rights of asylum seekers. These statements were released for public consumption, intended to be dissected by interested analysts. There was no restrictions on use of these interviews and reports in a public context.

This research began with a comparison between the lofty gender mainstreaming goals of the European Union and the experiences of women who had experienced gender-based violence as asylum seekers within Europe. The various literature – from primary sources, secondary sources, and even the findings of non-profit analysts, academics and practitioners, allowed this research to find the gap and offer an explanation of the contradictory forces (the governments of both the UK and Ireland's advocacy for security and controlled borders) which have meant that the member states have failed to adequately protect these vulnerable women.

All researchers face subjective decisions as to how much of interview transcripts and conflicting opinions to include. This final thesis specifically included interviews topics which were directly relevant to research questions, although all interviews (including those not quoted or cited within the final thesis) were essential to forming the general background and helping to answer the research questions throughout the thesis.

## **II. Major research questions**

The original interviews for this research were essential, along with early reading of the literature and legal data, in identifying the major research questions, and well as the thematic elements which run throughout the thesis. The first question asked how the European Union has incorporated the ideal of gender mainstreaming into its asylum policy, specifically its major pieces of asylum legislation which provide the framework for the Common European Asylum System. This is not only a factual question, examining the extent of gender mainstreaming policies within the EU asylum policy, but will also require analysis of the strengths and weaknesses of the gendered aspect of this legislation and an understanding of the underlying themes of gender equality within the organs of the European Union. This thesis will demonstrate that the EU has, so far, failed to insert gender mainstreaming sufficiently into its asylum policy.

The second question will use the different strands of feminist theory to investigate how the political culture and views of gender equality in member states have influenced mainstreaming and whether this has led to greater protections for vulnerable women who have experienced gender based violence and are now claiming asylum? My response to this question will draw on three strands of gender theory: separate spheres, radical feminism and intersectional feminism and will provide an explanation as to why only the norms of intersectional feminism are able to provide sufficient support to women applying for asylum.

This discussion easily leads to the third major research question, which will provide an evaluation of how much the practice and views of member states has affected the asylum process, in contrast to the views of the EU. Every EU member state has a different history of migrant relations, different views of gender equality and, as this thesis acknowledges, despite EU attempts to harmonise asylum procedures, still differing treatments of asylum. This thesis will weigh the influence of various sources of asylum law: international law, EU law and national law of member states and argue that the culture of member states is the strongest influence on law and practical treatment of vulnerable women within the asylum system.

The final research question asks how applying an intersectional policy of gender mainstreaming could influence asylum seekers in various member states differently,



depending on how the broad theoretical aim of gender equality is applied? The question uses the research's findings around the current situation in EU member states, in order to make recommendations for the changes that can be made in EU legislation and within the legislation of member states (and even in the UK Parliament, post-Brexit.) With the increase of turmoil in the Middle East and related upsurge in numbers of asylum seekers applying for refuge within the European Union,<sup>41</sup> the Common European Asylum System is facing increased challenges. As more people seek to access their fundamental right to seek asylum within Europe, problems and weak spots in EU asylum and migration policy will be more apparent. This thesis will argue that now, while the EU and member states are re-evaluating the effectiveness of the CEAS,<sup>42</sup> that the EU and its member states should better implement an intersectional feminist approach to support vulnerable women in the asylum system and make tangible, practical suggestions for this enactment.

This thesis is aimed at impacting the policy of the European Union and two particular states, the UK and Ireland. The research conclusions and ensuing recommendations should better ensure that women in the asylum system are treated according to international best practice and European Union law. Throughout this thesis, best practice will be highlighted and problematic aspects of process explained in order to improve migrant rights, particularly since so many more applications for asylum will be processed from women now currently within the territory of the EU.

### **III. Chapter plan**

The thesis as a whole critically evaluates the treatment of women who have encountered gender-based violence and fled to the EU to seek asylum. As the EU has been granted competence over gender mainstreaming and asylum, it becomes more essential to analyse the influence of the EU along with other sources of international asylum law in

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<sup>41</sup> European Stability Initiative, The 2015 Refugee Crisis through Statistics. (European Stability Initiative website, 17 October 2015.). <<http://www.esiweb.org/pdf/ESI%20-%20Refugee%20Statistics%20Compilation%20-%2017%20Oct%202015.pdf>> last accessed 6 July 2017

<sup>42</sup> Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances [2013]. OJ L 295 1. Discussed in Clémentine d'Oultremont, 'The Migration Crisis: A Stress Test for European Values.' (2015.) 38 European Policy Brief. <<http://aei.pitt.edu/74541>> accessed 06 July 2016 and Philip L. Martin. 'Europe's Migrant Crisis: an American Perspective.' (2016.) 13 Migration Letters 307.

order to understand both the impact on current policies and to shape the future treatment of women seeking asylum for gender-based violence within the EU.

The second chapter of this thesis will set out and examine the three main strands of theory regarding gender equality used throughout this research: the separate spheres theory, which advocates for natural differing roles between men and women,<sup>43</sup> radical feminism, which seeks to challenge government's inaction in the private lives,<sup>44</sup> particularly within families, and intersectional feminism, which seeks to contextualise violence against women with other oppressions that women face, such as racism, xenophobia, or discrimination on the basis of migration status.<sup>45</sup> In chapter 2, the thesis will argue that intersectional feminism is the best approach to provide protection and support to vulnerable women in the asylum system who already face various oppressions due to their previous trauma and persecution, as well as their experience as migrants in an unfamiliar state.<sup>46</sup>

Chapters 3 and 4 discuss different aspects of the issue of EU competence to act in this field. The EU is evidently limited by its various ruling Treaties to only regulate areas in which it has been granted competence. Chapter 3 argues that the EU does indeed not only have competence, but since gender mainstreaming has been enshrined into Treaty law,<sup>47</sup> the EU has an obligation to ensure that all legislation and judgments related to the Common European Asylum System are fully cognisant of gender issues. Unfortunately, while chapter 3 establishes that the EU has considerable competence regarding asylum and gender, chapter 4 argues that the EU has made many of the same problematic assumptions about women as radical feminist approaches: failing to take into account that not all women

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<sup>43</sup> John Paul II, Apostolic letter of the Supreme Pontiff John Paul II on the dignity and vocation of women. (The Vatican website, 1988) <[http://w2.vatican.va/content/john-paul-ii/en/apost\\_letters/1988/documents/hf\\_jp-ii\\_apl\\_19880815\\_mulieris-dignitatem.html](http://w2.vatican.va/content/john-paul-ii/en/apost_letters/1988/documents/hf_jp-ii_apl_19880815_mulieris-dignitatem.html)> accessed 06 July 2017 and John Paul II, Letter of Pope John Paul II to women. (The Vatican website, 1995). <[https://w2.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf\\_jp-ii\\_let\\_29061995\\_women.html](https://w2.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf_jp-ii_let_29061995_women.html)> last accessed 06 July 2017.

<sup>44</sup> See MacKinnon, (1989) (n 8) and Catharine MacKinnon, (2006) (n 8).

<sup>45</sup> See Edna Erez, Madelaine Adelman and Carol Gregory, 'Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women' (2009) 4 *Feminist Criminology* 32.

<sup>46</sup> *ibid.*

<sup>47</sup> European Commission, Equal Guide on Gender Mainstreaming. (European Commission website, 2004) <[http://ec.europa.eu/employment\\_social/equal\\_consolidated/data/document/gendermain\\_en.pdf](http://ec.europa.eu/employment_social/equal_consolidated/data/document/gendermain_en.pdf)> last accessed 06 July 2017. The policy of gender mainstreaming has been analysed in, amongst others, Fiona Beveridge, Building against the past: the impact of gender on EU law and policy.' (2007) 32 *European Law Journal* 193 and Sonia Mazey, 'Gender Mainstreaming Strategies in the EU: Delivering on an Agenda.' (2002) 10 *Feminist Legal Studies* 227.

face the same discrimination and persecution and that their experiences are greatly influenced by the other oppressions in women's lives.

The next two chapters contrast the treatment of women in the asylum system in the United Kingdom and Ireland, two current member states of the European Union. Chapter 5 evaluates the UK's attempts to single out specific groups of asylum seekers (such as women who have encountered gendered based violence) to whom it grants assistance,<sup>48</sup> while reducing fair procedures and access to the asylum process generally.<sup>49</sup> The thesis maintains that this contradiction is inherently unstable and has resulted in the same oversights as the EU, with the same failure as radical feminist theory to really connect oppression as refugees with refugees as women – instead dealing with these issues separately. This has led to the criticism of this research and others regarding the ill-treatment of vulnerable women applying for asylum,<sup>50</sup> particularly when fast track procedures or detention are applied.<sup>51</sup>

Contrarily, Ireland remains rooted in a focus on Irish racial nationalism which applies totally contrary roles to Irish and migrant mothers.<sup>52</sup> Irish law has viewed women through their roles as mothers – trapping Irish women to primarily embrace a role as caregivers, while women in the asylum seekers are discouraged from giving birth, isolated from Irish society and have legal status withheld.<sup>53</sup> This view of vulnerable pregnant women, many of whom have suffered from gender-based violence, is deeply problematic and does not comply with international or European law and best practice.

Although the Irish treatment of women in the asylum system is very different from that of the UK, neither have been strongly influenced by the EU's treatment of migration and gender equality. Chapter 5 and 6 will definitively find that the EU has not been able to

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<sup>48</sup> BBC Radio 4, 'The Today Programme.' (BBC website, 04 September 2015.) .  
<<http://www.bbc.co.uk/programmes/b068c7n8>> accessed 06 July 2017.

<sup>49</sup> Victoria Canning, 'International conflict, sexual violence and asylum policy: Merseyside as a case study' (2014) 34 *Critical Social Policy* 23.

<sup>50</sup> Helen Muggeridge and Chen Maman, 'Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims'. (Asylum Aid website, January 2011.) <<http://www.asylumaid.org.uk/wp-content/uploads/2013/02/unsustainableweb.pdf>> last accessed 06 July 2017.

<sup>51</sup> Human Rights Watch, 'Fast Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK.' (Human Rights Watch website, February 2010.)  
<<https://www.hrw.org/sites/default/files/reports/uk0210webwcover.pdf>> last accessed 06 July 2017.

<sup>52</sup> Ruth Fletcher, 'Reproducing Irishness: Race, Gender and Abortion Law.' (2005) 17 *Canadian Journal of Women and Law* 365.

<sup>53</sup> *ibid.*

exert its competence to affect the underlying attitudes towards vulnerable female asylum seekers. These findings lead to chapter 7, which sets out policy ideas and recommendations for change within the EU. As noted previously, the Common European Asylum System is at a time of transition, and many member states believe that the EU's treatment of asylum seekers should be further fractured and decentralised.<sup>54</sup> This thesis will propose that the EU should harmonise and coordinate legislation better to ensure that fundamental rights are protected within the territory of the EU and that an intersectional approach is taken to protecting vulnerable women applying for asylum. While the UK is currently determining its relationship with the rest of Europe after leaving the EU, this research argues that the UK is still physically part of Europe and, as it shares borders with the EU, should attempt to echo the improved policy of the CEAS.

The entirety of these chapters will demonstrate to the EU that it has not yet coordinated an intersectional approach to gender within the Common European Asylum System and makes tangible proposals as to how to implement stronger protections of fundamental rights for vulnerable women. The lens of feminist theory is essential in order to describe and explain more effectively the core assumptions around gender (in)equality and the oversights in treatment of migrant women.

Following this initial chapter establishing the broad aims and structure of the thesis, as well as the methodology and thematic discussions, we move now to chapter 2 in which three key strands of gender theory are represented. These provide a feminist theoretical framework for the current research and demonstrate the three views of gender equality as understood in the member states: separate spheres, radical feminism and intersectional feminism. The subsequent chapter will demonstrate why it is intersectional feminism which is so essential to protecting the human rights of women who apply for asylum and why an intersectional approach is the theory which is most appropriate to improve the shortcomings in the EU's approach to vulnerable women seeking asylum.

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<sup>54</sup> See d'Oultremont (n 22) and Justin Borg-Barthet and Carole Lyons, 'The European Union Migration Crisis.' (2016) 20 *Edinburgh Law Review* 230.

## Chapter 2: Feminist Theory

### I. Introduction

International refugee law was initially crafted to ensure protection from organised genocides for minority groups and widespread oppression of political opponents. The preliminary drafting of the Convention on the Status of Refugees<sup>1</sup> was initially done without any awareness of the breadth of experiences of persecution that did not fit into a heterosexual male perspective.<sup>2</sup> Over time, drafters of international law norms have become more aware of the gendered implications of asylum law. International human rights organisations such as the United Nations have begun to consider a perspective which analyses the difficulties in the asylum process as intertwined with other oppressions that complicate it – such as gender or sexual orientation.<sup>3</sup> There has begun to be a greater understanding that women in the asylum system have particular needs and vulnerabilities that differ from those of male asylum seekers.<sup>4</sup>

Throughout the different jurisdictions examined in this research, there are varying understandings of how best to support women in their jurisdiction and emphases on gender and asylum status. There are contrasting lenses through which female asylum seekers are viewed. In order to understand the various procedures for women in the asylum process, it is important to consider the background of legal perspectives on the roles of women in society and how organs of states can achieve gender equality. Each of the four legal systems which will be considered (the EU, the UK, Ireland and international law) presents a differing view of the role of women in the asylum process and how best to deal with sexual violence against migrant women. This includes whether to include migrant women as part of generalised actions to eliminate violence against

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<sup>1</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) art 33 Hereafter the Refugee Convention.

<sup>2</sup> European Women's Lobby, Asylum is not Gender Neutral: Protecting Women seeking Asylum. (European Women's Lobby website, November 2007.)  
<<http://www.womenlobby.org/Asylum-is-not-gender-neutral-the-refugee-crisis-in-Europe-from-a-feminist>> last accessed 09 July 2017.

<sup>3</sup> UNHCR 'UNHCR Handbook for the Protection of Women and Girls' (Division of International Protection Geneva 2008)

<sup>4</sup> UNHCR, 'Guidelines on Prevention and Response to Sexual Violence Against Refugees' (Geneva 1995) and UNHCR 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1a(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.' (Geneva 2002.) This will be further examined in Chapter 4 (the EU). chapter 5 (the UK) and chapter 6 (Ireland.)

women or to treat migration status as an additional vulnerability in the violence that women may encounter. While theoretical influences are rarely explicitly stated, all of these legal systems can be described and analysed through specific theories of feminism, understandings of the role of women and recommendations for handling violence against women. In order to describe the actions which have been taken regarding processing asylum claims of women who have experienced sexual violence, it is helpful to better understand these various theories of feminism and how they relate to views of the asylum system.

The first section of this chapter deals with the theory of gender essentialism, or the separate spheres, consisting of traditional beliefs regarding women's roles and the regulation of rights in society. This is a philosophy which extolls the belief that men naturally fit working in the public world, maintaining a career for pay and participating in politics while women belong within the cocoon of family life within the home, focusing on nurturing their husbands and children.<sup>5</sup> In the European rights tradition, there are protections for family life<sup>6</sup> that have been judged to include non-interference by the state.<sup>7</sup> This theory argues that danger and risk occurs primarily through lack of state protection outside of the home. Inside the home is thought to be an area where state protection to regulate the interactions of family members would be actively harmful to family relationships.<sup>8</sup> Those who support the idea of gender essentialism have argued that men and women have different natures due to biological factors.<sup>9</sup> Women are considered to be better suited to family life while men are more apt at dwelling in the business or political spheres of the community.<sup>10</sup> This theory requires reinforcement of stereotypes as to what constitutes masculine or feminine behaviour in order to justify

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<sup>5</sup> Jurate Motiejunaite (ed), *Women's Rights: The Public/Private Dichotomy*. (International Debate Association Education, 2005) 1.

<sup>6</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 8.

<sup>7</sup> The EU and the ECHR have been particularly active in providing for cohabitations for families. See Cathryn Costello, *Metock: Free movement and 'normal family life' in the Union.* [2009] 46 CMLR 587 and Daniel Thym, 'Respect for Private and Family Life under Article 8 ECHR in Immigration Cases: A Human Right to Regularize Illegal Stay.' (2008) 57 ICLQ 87.

<sup>8</sup> Catharine MacKinnon, *Towards a Feminist Theory of State*. (Harvard University Press 1989) 163.

<sup>9</sup> Alice Eagly, 'The Science and Politics of Comparing Men and Women.' (1995) 50 American Psychologist 145, 147.

<sup>10</sup> John Archer and Barbara Lloyd, *Sex and Gender*. (2<sup>nd</sup> ed Cambridge University Press, 2002) 2

rigid gender roles, while ignoring behaviour which is less traditionally masculine or feminine.<sup>11</sup>

This is a theory that enforces a form of substantive equality, arguing that genders have different strengths and needs and so should be treated differently; this theory allows women to face discrimination in public life based on gender. This discrimination is strongly opposed by feminists.<sup>12</sup> This idea of a separation between the lives of men and women has traditionally been supported by the Catholic Church and is emphasised by *Bunreacht na hÉireann* (the Constitution of the Irish Republic).<sup>13</sup> While these ideals are not expressly stated in the Refugee Convention, they seem to have influenced the views of the treaty's drafters, who take this traditional perspective as to the type of persecution that refugees will face, focusing on actions more likely to be taken by men to protest political regimes.<sup>14</sup> While this theory is becoming less influential as feminist thinking becomes integrated into law and consciousness, it is essential to understand its complexities and continuing influence on perceptions of women's behaviour.

The second section will consider radical feminism, as most relevantly applied to a legal and political context by American academic Catharine MacKinnon.<sup>15</sup> MacKinnon sought to challenge traditional American fundamental rights, which, as noted, limited government interaction into home life while regulating interactions in public domains.<sup>16</sup> She argued that while this may be advantageous to men (who are more likely to face domination and uncertainty outside the home),<sup>17</sup> women are more likely to encounter violence and danger within the home,<sup>18</sup> violence that the government historically ignored by citing a public/private divide.<sup>19</sup> MacKinnon believes that it is essential for governments to focus on a feminist theory of state, which recognises that women need different support and protections than men do and that governments must focus on using

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<sup>11</sup> *ibid* 27.

<sup>12</sup> Catharine MacKinnon, *Are Women Human? And Other International Dialogues*. (Harvard University Press 2006).

<sup>13</sup> Patrick Hanafin, 'Defying the Female: The Irish Constitutional Text as Phallogocentric Manifesto.' (2008) 11 *Textual Practice* 249.

<sup>14</sup> As discussed in *European Women's Lobby* (n 2).

<sup>15</sup> See MacKinnon (n 8) and MacKinnon (n 12).

<sup>16</sup> MacKinnon (n 8) 169.

<sup>17</sup> *ibid* 161.

<sup>18</sup> *ibid* 163.

<sup>19</sup> *ibid* 169.

human rights to ensure that women are safe from family members within their homes.<sup>20</sup> While MacKinnon does not specifically criticise the Refugee Convention, she does argue that international law should be more responsive to gender inequality and the response to violence against women internationally.

This seems to be the theory that best describes policies regarding violence against women in the United Kingdom and by the European Union. They have focused on the universal experience of sexual violence that women face<sup>21</sup> rather than considering the distinctions that women of different races, socioeconomic status and immigration status must overcome when dealing with sexual violence or violence within the home. While this will be discussed in more depth in chapters 4 and 5, it is important to establish the theoretical descriptor for this radical feminist viewpoint, as well as the criticisms which have made by intersectional feminists.

The third section deals with the concept of intersectional feminism. Originally created from the writings of black American academics such as Kimberlé Crenshaw<sup>22</sup> and bell hooks,<sup>23</sup> intersectional feminism disputes the universal experience of women perceived by radical feminists such as MacKinnon.<sup>24</sup> As opposed to MacKinnon's view that all women are united by their common oppression as women, Crenshaw argues that gender is only one of several factors which determine women's inequality: along with race, sexual orientation and migration status.<sup>25</sup> They note that women's oppression cannot be treated as a monolith without considering these other factors; they greatly affect how women are able to deal with hardships and vulnerabilities.

This seems to be similar to the realities being identified by the United Nations High Commissioner for Refugees<sup>26</sup> and by various non-governmental organisations

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<sup>20</sup> MacKinnon (n 12) 23.

<sup>21</sup> One in three women worldwide encounter sexual violence. See World Health Organisation, 'Violence Against Women: Intimate Partner and Sexual Violence Against Women'. (WHO Media Centre, November 2014.). <<http://www.who.int/mediacentre/factsheets/fs239/en/>> accessed 9 June 2017.

<sup>22</sup> Kimberlé Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color.' (1990-1991) 43 Stanford Law Review 1241.

<sup>23</sup> bell hooks, *Talking Back: Thinking Feminist, Thinking Black*. (Taylor & Francis, 2014).

<sup>24</sup> MacKinnon (n 12) 51-53.

<sup>25</sup> Crenshaw (n 22).

<sup>26</sup> UNHCR (2002) (n 4) and UNHCR (1995) (n 4).



(NGOs).<sup>27</sup> Using an intersectional analysis, these commentators argued that it is not sufficient to simply advocate that support for sexual violence survivors amongst the asylum population should be the same services offered to middle class white women who encounter sexual violence.<sup>28</sup> It is essential to account for the additional difficulties and challenges that asylum seekers face. Unfortunately, an intersectional awareness of the asylum systems in the EU and its member states does not seem to have developed. An analysis of this theory can lead to suggestions and improvements for EU member states to better understand how to meet their obligations under international law.

In the conclusion, this section will explain in detail why these various theories are so relevant. Feminist theory can often seem removed from practical workings of law and governance, but theory is intended to also serve as a guide to better illuminate the weaknesses and absences of policy. In this section of the chapter, this thesis will provide a better understanding of the impact that a jurisdiction's choice of strategies for gender equality has had on the protection of the fundamental rights of female asylum seekers. These theories inform the decisions being made on priorities and treatment within asylum processes. While there have been previous considerations of the EU's treatment of women in the asylum system, and those of specific member states, there has been no analysis through the use of conflicting feminist theories. This chapter will lay the understanding for this analysis, which will be explored in more context throughout the rest of this research.

## **II. ✓ Separate Spheres Theory**

The idea of men and women having separate but complementary roles in society and within the family is an ancient one, dating back to ancient Greek and Roman cultures. These governments emphasised the importance of women within the home: managing the household, raising children and the labour within the home, while men were classed as citizens, encouraged to participate in the political process and to

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<sup>27</sup> Directorate General for Internal Policies of the European Parliament, 'Gender Related Asylum Claims in Europe.' (European Parliament website, 2012).

<[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM\\_ET\(2012\)462481\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM_ET(2012)462481_EN.pdf)> last accessed 10 July 2017 and European Women's Lobby (n 2).

<sup>28</sup> Crenshaw, (n 22) 1249.

financially profit from the household labour.<sup>29</sup> As a societal ideal, this became more popular during the industrial age, when households no longer functioned as family businesses and so there became a broader separation in the daily routines, and work, of men and women.<sup>30</sup>

This theory has historically been a source of what Glick, Lameiras and Rodriguez-Castro term to be hostile sexism.<sup>31</sup> Women were deemed to be too weak and delicate to survive in public life, inferior to men in their ability to reason and understand political arguments.<sup>32</sup> This philosophy also meant that women were often blamed when there was any kind of problem within the home, such as child neglect or marital problems, as they were assumed to be responsible for the family's health and well-being.<sup>33</sup> Women were isolated from the working world<sup>34</sup> and yet still had limited autonomy and freedom within the home.<sup>35</sup> This theory argues that the government should not apply a test of strict equality to laws affecting men and women, instead considering the different abilities and roles of men and women when legislating;<sup>36</sup> it has been used to justify denying women participation in political life or equal access to the workplace.<sup>37</sup>

Currently, the theory of separate spheres has become less focused on hostile sexism which emphasises the inferiority of women and more on a form of benevolent sexism which describes men and women as equal but different and complementary.<sup>38</sup> This is most notably the position taken by the Catholic Church. Former pontiff John Paul II has released several particularly relevant writings on the Church's views on the role of

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<sup>29</sup> Mary Ann Tetreault. "Frontier Politics: Sex, Gender and the Deconstruction of the Public Sphere" in *Motiejunaite* (n 1) 33.

<sup>30</sup> Linda McDowell and Rosemary Pringle, 'Defining Public and Private Issues' in Linda McDowell and Rosemary Pringle (eds), *Defining Women: Social Institutions and Gender Divisions*. (Polity Press, 1992) 15.

<sup>31</sup> Peter Glick, Maria Lameiras and Yolanda Rodriguez-Castro, 'Education and Catholic Religiosity as Predictors of Hostile and Benevolent Sexism Towards Men and Women.' (2002) 47 *Sex Roles* 433.

<sup>32</sup> Mary Ann Tetreault (n 29) 35.

<sup>33</sup> Myra Marx Ferree, 'Beyond Separate Spheres: Feminism and Family Research.' (1990) 52 *Journal of Marriage and Family* 866, 867.

<sup>34</sup> Tracy E. Higgins. "Reviving the Public/Private Distinction in Feminist Theorizing" in *Motiejunaite* (n 1) 53.

<sup>35</sup> *ibid* 57.

<sup>36</sup> Chris Baron and Liisa Past. "Controversy in Feminist Theorizing: Differing Approaches to the Public and Private" in *Motiejunaite* (n 1) 16.

<sup>37</sup> See, for example, *De Búrca v Attorney General* [1976] IR 38.

<sup>38</sup> Glick, Lameiras and Rodriguez-Castro (n 31) 433-441.

men and women.<sup>39</sup> He referenced Biblical teachings, noting that Mary was entrusted with giving birth to and raising Jesus as particular recognition of the need for maternal affection and the importance of women's vocations as mothers.<sup>40</sup> John Paul II focused on the differing but complementary natures of men and women.<sup>41</sup> Distancing himself from Biblical interpretations which stated only that women should be submissive to their husband, he explained it more as a system of mutual obligations; women's submission should incur equivalent protection, love and kindness from their husbands.<sup>42</sup>

The pontiff emphasised that though women may seek to find equality, they should continue to retain an essential female character, along with an emphasis on motherhood and family life. He stated,

The personal resources of femininity are certainly no less than the resources of masculinity: they are merely different. Hence a woman, as well as a man, must understand her 'fulfilment' as a person, her dignity and vocation, on the basis of these resources, according to the richness of the femininity which she received on the day of creation and which she inherits as an expression of the 'image and likeness of God' that is specifically hers.<sup>43</sup>

While he emphasises the importance of women's biblical role as mothers,<sup>44</sup> he also seeks to twine disrespect and abuse of women with a loss in male dignity.<sup>45</sup> Rather than simply focusing on the Biblical or moral argument not to abuse women, it is disappointing that equal treatment of women cannot be justified to the pontiff in its own right without a focus on the effect on men.

The views of the Catholic Church have evolved over time, which keeping to the same core principles. The teachings of the current pontiff, Francis, emphasise the importance of family life, focusing on the instability brought by individualism and

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<sup>39</sup> See John Paul II, 'Apostolic letter of the Supreme Pontiff John Paul II on the dignity and vocation of women,'. (The Vatican website, 1988). <[http://w2.vatican.va/content/john-paul-ii/en/apost\\_letters/1988/documents/hf\\_jp-ii\\_apl\\_19880815\\_mulieris-dignitatem.html](http://w2.vatican.va/content/john-paul-ii/en/apost_letters/1988/documents/hf_jp-ii_apl_19880815_mulieris-dignitatem.html)? last accessed 10 July 2017 and John Paul II, Letter of Pope John Paul II to women. (The Vatican website, 1995). <[https://w2.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf\\_jp-ii\\_let\\_29061995\\_women.html](https://w2.vatican.va/content/john-paul-ii/en/letters/1995/documents/hf_jp-ii_let_29061995_women.html)> last accessed 10 July 2017. Analysis provided in Glick, Lameiras and Rodriguez-Castro (n 31).

<sup>40</sup> John Paul II. (1988) (n 39).

<sup>41</sup> *ibid* para 8.

<sup>42</sup> *ibid* para 9.

<sup>43</sup> *ibid* para 10.

<sup>44</sup> *ibid* para 19.

<sup>45</sup> *ibid* para 11.

declining reproduction.<sup>46</sup> He notes that the family is the centrepiece of the Christian community.

Glick, Lameiras and Rodriguez-Castro found that the Catholic Church's view on gender roles was an influence for religious Catholics and that there was a correlation between active Catholicism and a belief in rigid gender roles and benevolent sexism.<sup>47</sup> They did not find that it was the most relevant factor (education was more strongly correlated)<sup>48</sup> but that there certainly was a relationship between Catholicism and benevolent sexism as to gender roles.<sup>49</sup>

This modernised view of separate spheres does not accord to a strict divide between public and private life. Pope John Paul II expressed his views on the unacceptable nature of abortion<sup>50</sup> and has maintained opposition to artificial forms of birth control,<sup>51</sup> both areas which would have historically been considered in the domain of a private life. This current theory of separate spheres seems to press for women to live their lives prioritising their roles as wives and mothers rather than existing in the public sphere of paid employment and public life; yet the home, considered to be the centre of the private life, is still affected by the strict standard of behaviour imposed by the Catholic Church. Higgins notes that in societies which strongly emphasise separate spheres and a divide between public and private lives, there are often also strong restrictions on women's access to abortion.<sup>52</sup> Pope Francis takes some views which are progressive and do not fit with the tradition of separate spheres. He notes that equality for women will not be achieved as long as domestic violence and female genital mutilation are used to abuse and control women<sup>53</sup> and advocates for women to be

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<sup>46</sup> Pope Francis, 'Amoris Laetitia' (Vatican website, 19 March 2016.)

<[https://w2.vatican.va/content/dam/francesco/pdf/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20160319\\_amoris-laetitia\\_en.pdf](https://w2.vatican.va/content/dam/francesco/pdf/apost_exhortations/documents/papa-francesco_esortazione-ap_20160319_amoris-laetitia_en.pdf)> accessed 02 July 2017, 24.

<sup>47</sup> This was first studied in Laura Sanchez and Carla S. Hall, 'Traditional Values and Democratic Impulses: The Gender Division of Labor in Contemporary Spain.' (1999) 30 *Journal of Comparative Family Studies* 659. This article was considered in Glick, Lameiras and Rodriguez-Castro (n 31).

<sup>48</sup> Glick, Lameiras and Rodriguez-Castro (n 31) 433.

<sup>49</sup> *ibid* 438.

<sup>50</sup> John Paul II, (1988) (n 39) para 14.

<sup>51</sup> For a further exploration of the history of the Catholic Church and contraception, see John Thomas Noonan, *Contraception: a History of its Treatment by Catholic theological and canonists*. (Harvard University Press 1966).

<sup>52</sup> Tracy E. Higgins. "Reviving the Public/Private Distinction in Feminist Theorizing" in Motiejunaite (n 1).

<sup>53</sup> Francis (n 6) 43.

granted equal access to employment and political power.<sup>54</sup> This is an updated view, one which seems to have responded to some feminist criticism of the Catholic Church. As will be discussed in chapter 6, this view of separate spheres has yielded considerable influence on the *Bunreacht na hÉireann* and Irish constitutional law.<sup>55</sup>

When discussing the role of women under his jurisdiction, the Catholic Church, however, it is interesting that Pope Francis maintains a very traditional view of gender roles. Women are lauded for their sensitivity and intuition, “which women tend to present more than men.”<sup>56</sup> This is a clear view of gender roles which does not allow for individual men and women to have varying personalities, interest in parenthood and characteristic. Francis continues that,

I think, for example, of the special concern which women show to others, which finds a particular, even if not exclusive, expression in motherhood. I readily acknowledge that many women share pastoral responsibilities with priests, helping to guide people, families and groups and offering new contributions to theological reflections.<sup>57</sup>

He notes that providing access to the priesthood for women is beyond discussion,<sup>58</sup> but argues that greater appreciation and respect should be given to the essential roles which women provide to the church.<sup>59</sup> While the dimensions of women’s roles have changed in Catholic theology, there are still strong ideas of the role women have to play within the church and roles and limitations placed on gender.

The doctrine of the Catholic Church is relevant so far as views supporting separate spheres and ideas have permeated jurisprudence of legal systems. Most notably in Irish law, women were granted early legal equality – with voting rights secured before either Britain or America provided women’s suffrage. Yet legal systems influenced by the view of separate spheres have prioritised protecting

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<sup>54</sup> *ibid* 43.

<sup>55</sup> Hanafin (n 13).

<sup>56</sup> Pope Francis. ‘Evangelii gaudium’ (Vatican website, 26 November 2013.)  
<[http://w2.vatican.va/content/francesco/en/apost\\_exhortations/documents/papa-francesco\\_esortazione-ap\\_20131124\\_evangelii-gaudium.html#V.%E2%80%82A\\_mother\\_with\\_an\\_open\\_heart](http://w2.vatican.va/content/francesco/en/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium.html#V.%E2%80%82A_mother_with_an_open_heart)> accessed 02 July 2017.

<sup>57</sup> *ibid* 82.

<sup>58</sup> *ibid* 82.

<sup>59</sup> *ibid* 82.

women's fertility and family protections rather than measures which would ensure flexible workplace access for men and women. When Pope Francis seeks to provide an example of crippling poverty and family decline, he points to single mothers forced to leave their children in daycare for long hours. The modern separate spheres analysis of Pope Francis argues that women should not be forced by economic necessity to leave their children in daycare; while providing lip service to social equality, he condemns marriage between same sex couples or single parenthood, noting that gender roles are not interchangeable and arguing that children need active parenting by both a mother and a father. This idea that men and women have unique and different roles to play within the family is the core of the views modern of separate spheres.

Virtually all strands of feminist theory agree that these understandings of separate spheres are problematic,<sup>60</sup> yet not all feminists completely reject the idea of a public/private divide. For example, liberal feminists support the idea of a stronger protection for private life, allowing women to access abortion and contraception without government interference.<sup>61</sup> Martha Albertson Fineman has specifically written about the extreme regulation that government has enforced on single mothers and limited privacy or autonomy that they are granted, advocating for an approach where the private family structure and behaviour are outside of the state's competence.<sup>62</sup> While Albertson Fineman does not agree with the traditional understanding of separate spheres, she argues for an adjustment of the doctrine to allow women to make decisions on motherhood without government oversight.<sup>63</sup>

Yet other academics disagree with the entire structure of a divide between public and private. Catharine MacKinnon has objections to any form of separate spheres, stating her belief that the limited right to privacy has been extended only so far as to allow men more unfettered sexual access to women. For example, she argues that abortion allows men to have sexual relationships without responsibility, as it can be

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<sup>60</sup> Linda J. Nicholson, 'Feminist Theory: The Private and the Public' in McDowell and Pringle (n 30).

<sup>61</sup> Baron and Past (n 36) 15.

<sup>62</sup> Martha Albertson Fineman, 'Beyond Identities: The Limits of an Anti-Discrimination Approach to Equality.' (2012) 92 Boston University Law Review 92 1713. Discussion of Albertson Fineman's similar relevant research in Tracy E. Higgins (n 52) 56.

<sup>63</sup> Albertson Fineman (n 62).

framed as women's private decision to either have an abortion or to decide to raise a child without support.<sup>64</sup> She suggests that the public/private divide has never actually been used to benefit women, instead providing a tool by men to subjugate and objectify women.<sup>65</sup> The concept of separate spheres has also been rejected by intersectional feminists, who note that this "cult of domesticity" has historically only applied to white women. Women of colour have always been expected to work, their families invisible to those who sought to encourage white women to stay within the home and manage household and family.<sup>66</sup> Crenshaw argues that this lack of understanding by white feminists helped to divide the feminist movement – white women fought for the right to enter the workplace into which black women had historically been economically forced.<sup>67</sup>

While there is currently debate and discussion amongst feminists as to whether the theory of separate spheres should be amended or totally rejected, there is an agreement that its traditional context is harmful and oppressive towards women. Vestiges of this theory still exist in law and society (particularly in Irish law)<sup>68</sup> and while current feminists may find it objectionable, its influence remains, particularly its sway on the constitutional role of women in Irish society.<sup>69</sup> There also appear to be echoes of these views within the asylum-decision making processes across Europe. Women are more likely to be granted asylum as part of a family than as individual actors. Migrant, and particularly asylum seeking women, have often been described in the media and public statements primarily through their roles as wives and mothers. The theory of separate spheres provides a better understand of the lens through which many asylum decision makers and politicians see the role and experiences of women, including women who are applying for refugee status.

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<sup>64</sup> MacKinnon (n 8) 192. Discussed in Tracy E. Higgins (n 52) 57.

<sup>65</sup> MacKinnon (n 8) 169.

<sup>66</sup> Myra Marx Ferree, 'Beyond Separate Spheres: Feminism and Family Research.' (1990) 52 *Journal of Marriage and Family* 868, 875.

<sup>67</sup> Kimberlé W. Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989 ) *University of Chicago Legal Forum* 39, 68.

<sup>68</sup> Hanafin (n 13).

<sup>69</sup> Discussed in chapter 6.

Yet criticisms of the philosophy of separate spheres and the reduction of women to their roles within the home, have lead to feminist academics developing alternative suggestions and recommendations for government and human rights structure. Over time, several governments would adapt their legal systems in a way which is best described by another theory of feminist state, radical feminism.

### **III. Radical Feminism**

Radical feminism initially evolved in the 1960s as an expansion of the suffragette movement. It was not enough, feminists argued, for women to be able to vote if societal conditions meant that women were not granted equality in their daily lives.<sup>70</sup> Radical feminists particularly sought to highlight the role that male violence and sexual objectification played in preventing women from ending their oppression.<sup>71</sup> One prominent radical feminist academic, Catharine MacKinnon, argues that government treatment of women is based around a patriarchal attempt to force women in subservient household roles and to pressure women into remaining sexually available to men. She considers the basis of human rights concepts and legal treatment of women through the prism of objectification.<sup>72</sup> She sought to apply radical feminism to human rights law, international law and state actions to protect women.<sup>73</sup>

MacKinnon, an American academic, specifically examines American constitutional law,<sup>74</sup> yet due to increasingly globalised content of human rights instruments and similar right-based content such as in the Universal Declaration of Human Rights,<sup>75</sup> the Charter of Fundamental Rights of the European Union<sup>76</sup> and the European Convention on Human Rights,<sup>77</sup> her argument can certainly be understood

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<sup>70</sup> For a memoir and discussion of the history of radical feminism, see Robyn Rowland and Renate Klein. "Radical Feminism: History, Politics, Action" in Diane Bell and Renate Klein (eds) *Radically Speaking: Feminism Reclaimed*. (Spinifex Press, 1996).

<sup>71</sup> See, amongst others, MacKinnon (note 8), MacKinnon (n 12), and Andrea Dworkin, 'Against Male Floods: Censorship, Pornography and Equality.' (1985) 8 Harvard Women's Law Journal 1.

<sup>72</sup> MacKinnon (n 8) 119.

<sup>73</sup> MacKinnon (n 8) and MacKinnon (n 12).

<sup>74</sup> MacKinnon (n 8) 163.

<sup>75</sup> Universal Declaration of Human Rights (adopted 10 December 1948 UNGA Res 217 A(III) (UDHR)

<sup>76</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

<sup>77</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)



more broadly in an American/European context.<sup>78</sup> MacKinnon argued that conventional human rights were created by men in order to preserve their power over women and reinforce male privilege while protecting men from exploitation by other men.<sup>79</sup> She considers the concept of privacy in a particularly strong manner, arguing that,

The law of privacy treats the private sphere as a sphere of private freedom. For men, it is. For women, the private is the distinctive sphere of intimate violation and abuse, neither free nor particularly personal.<sup>80</sup>

MacKinnon believed that privacy was a right which allowed men to retain their power over women in the home without interference, a protection from forced government equality which would have empowered women.<sup>81</sup> This criticism is incredibly relevant to the Refugee Convention. It was originally intended to protect political activists and minority groups from a persecuting government. There was no thoughts during the drafting of protecting women from the danger that was faced within the home, particularly if denied government protection. Instead, the Refugee Convention judged oppressive governments to be the major threats to safety and security.<sup>82</sup>

She then expanded her premise to consider the hierarchy of human rights in law. So-called “first generation rights,” such as those considered in the UN’s International Covenant on Civil and Political Rights,<sup>83</sup> dealing with issues such as freedom of speech and *habeas corpus*, are still prioritised within international law. “Second generation rights”<sup>84</sup> are those which are more concerned with freedom from hunger and economic

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<sup>78</sup> For a historical comparison of the American and European rights traditions, see Kathryn Sikkink. ‘The Power of Principled Ideas: Human Rights Policies in the United States and Western Europe’ in Judith Goldstein and Robert O. Keohane (eds) *Ideas and Foreign Policy: Beliefs, Institutions and Political Change*. (Cornell University Press 1993). For a direct comparison between the ECHR and the American Supreme Court, see Gerda Kleijkamp, ‘Comparing the Application and Interpretation of the United States Constitution and the European Convention on Human Rights.’ (2002) 12 *Transnational Law and Contemporary Problems* 307.

<sup>79</sup> MacKinnon (n 8).

<sup>80</sup> *ibid* 168.

<sup>81</sup> *ibid* 168.

<sup>82</sup> European Women’s Lobby (n 2.)

<sup>83</sup> International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR)

<sup>84</sup> For a better understanding of the generations of rights, see Stephen P. Marks, ‘Emerging Human Rights: A New Generation for the 1980s?’ (1980) 33 *Rutgers Law Review* 435.

instability; these tend to be considered less essential for states to provide.<sup>85</sup> Women who encounter violence within the home or sexual violence in their communities are not helped by freedom of speech or *habeas corpus* – protection from violence has never been a core enforceable human right. MacKinnon suggests that it is no coincidence that when rights disproportionately impact women, they are dismissed as more optional or niche, less necessary.<sup>86</sup> She noted that treaties for specific vulnerable categories of people, such as the Convention on the Rights of the Child<sup>87</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women,<sup>88</sup> are not considered to be essential cornerstones of international law, with a high number of reservations allowed for CEDAW, and lacking any state to state procedure, like those found in other UN treaties. MacKinnon notes that this is an example of a clear hierarchy being imposed by international treaties.<sup>89</sup> MacKinnon interprets this to mean that international law is more concerned with reinforcing existing power structures rather than empowering vulnerable minorities.<sup>90</sup> The Refugee Convention is obviously intended to protect minority groups from oppression and persecution. Yet, as a document, it also reinforces the views about the roles and protection of the state which MacKinnon criticises. The violence that is more likely to affect women, within the home and local community, perpetrated by friends and families, was not initially drafted to be within the remit of the Refugee Convention.<sup>91</sup> Only over time did it become more accepted that the Refugee Convention did apply to particular social groups of women who faced persecutions by partners or communities and were denied government protection.<sup>92</sup> MacKinnon was able to identify the male perspective implicit in international law, a

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<sup>85</sup> MacKinnon (n 12) 5.

<sup>86</sup> *ibid* 5.

<sup>87</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 20 November 1989) 1577 UNTS 3. For more information on the EU's incorporation on the Convention on the Rights of the Child, see Helen Stalford, 'The CRC in Litigation under EU Law' in Ton Kiefaard and Jaap E. Doek (eds.) *Litigation the Rights of the Child: the UN Convention on the Rights of the Child in Domestic and International Jurisprudence*. (Springer 2015)

<sup>88</sup> Convention for the Elimination of All Forms of Discrimination Against Women. (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

<sup>89</sup> MacKinnon (n 12) 6..

<sup>90</sup> *ibid* 5-6.

<sup>91</sup> European Women's Lobby (n 2.)

<sup>92</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629

perspective which this research will demonstrate, is still persuasive in determining the claims of female asylum seekers who have experienced this gender-based violence.

MacKinnon suggested that international human rights law was initially written without awareness of gender oppression and so seems to assume that such oppression does not exist. In order to combat this, she proposes, there needs to be specific and explicit recognition that gendered oppression does exist and it is the role of the government to eliminate its effects.<sup>93</sup> She notes that,

Rape law assumes that consent to sex is as real for women as it is for men. Privacy law assumes that women in private have the same privacy that men do. Obscenity law assume that women have the same access to speech men have. Equality law assumes that women are already socially equal to men. Only to the extent women have already achieved social equality does the mainstream law of equality support their inequality claims. The laws of rape, abortion, obscenity, and sex discrimination show how the relation between objectification, understood as the primary process of the subordination of women, and the power of the state is the relation between the personal and the political at the level of government.<sup>94</sup>

MacKinnon sees current human rights law as entrenchment of the social realities, rather than as a revolutionary force to protect vulnerable women.<sup>95</sup>

MacKinnon's solution, interestingly, can seem on the surface quite similar to the philosophy advocated by the Catholic Church<sup>96</sup> in that she also advocates for a more sensitive equality law that recognizes the effects of historical difference in treatment and status between men and women.<sup>97</sup> MacKinnon recognizes that these different legal roles have often been used against women, to justify discrimination and removal of legal and political freedoms in public life.<sup>98</sup> Yet she notes that, for example, if special circumstances of women are not recognised, women would be greatly disadvantaged for their treatment during pregnancy.<sup>99</sup> Laws which do not account for the particular health

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<sup>93</sup>MacKinnon (n 12) 17.

<sup>94</sup> MacKinnon (n 8) 169.

<sup>95</sup> *ibid* 169.

<sup>96</sup> Glick, Lameiras and Rodriguez-Castro (n 31) 433-441.

<sup>97</sup> MacKinnon (n 8) 249.

<sup>98</sup> MacKinnon (n 12) 106.

<sup>99</sup> MacKinnon (n 8) 222-223.

needs for pregnant women are theoretically “equal treatment,” but it is an equality which fails to account for basic biological gender differences.<sup>100</sup> MacKinnon argues that an understanding of the current reality of women and how their rights have not previously been adequately realised are required in order to ensure that women’s human rights are fully protected in future.<sup>101</sup> In order for the state to act, it must first acknowledge that women are mistreated and face inequality both at home and in the workplace and seek to redress this imbalance.<sup>102</sup> It is essential, in MacKinnon’s view, for state governments and international law to recognise that domestic violence and sexual abuse are a form of torture<sup>103</sup> and unacceptable to allow under international obligations.<sup>104</sup> MacKinnon would argue in favour of a refugee system which provides protection to all women denied protection and justice from gendered violence within their home or local community.

MacKinnon’s view on the roles of women and international law have been criticized both from those who believe that women are defying their natural roles by attempting to increase their social power<sup>105</sup> and by those who believe her analysis fails to take account of the divisions women face due to class and race.<sup>106</sup> In one of pontiff John Paul II’s Vatican addresses, he made comments that were assumed to reference the effect of radical feminism,<sup>107</sup> claiming that in order to escape male oppression, women have sought to deny their biological role and consider lesbian relationships to be a credible alternative to family life.<sup>108</sup> He urged women not to withdraw from men, but to accept their biological differences and cooperate in order to follow the Biblical example of family.<sup>109</sup> He argued that women could not achieve their full potential by viewing men as

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<sup>100</sup> *ibid* 222-223.

<sup>101</sup> *ibid* 224.

<sup>102</sup> *ibid* 224.

<sup>103</sup> MacKinnon (n 12) 23.

<sup>104</sup> *ibid* 23.

<sup>105</sup> John Paul II, ‘Letter to the Bishops of the Catholic Church on the Collaboration of Men and Women in the Church and in the World.’ (The Vatican website, 2004)  
<[http://www.vatican.va/roman\\_curia/congregations/cfaith/documents/rc\\_con\\_cfaith\\_doc\\_20040731\\_collaboration\\_en.html](http://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_con_cfaith_doc_20040731_collaboration_en.html)> accessed 10 July 2017.

<sup>106</sup> See Crenshaw (n 67) 139–167 and bell hooks, *Feminism is for Everybody: Passionate Politics*. (Pluto Press 2000.) MacKinnon discusses these criticisms in Catharine MacKinnon, ‘From practice to theory, or what is a white woman anyway?’ (1991) 4 *Yale Journal of Law & Feminism* 13.

<sup>107</sup> BBC News, ‘Vatican attack radical feminism.’ *BBC News* (London, 31 July 2004).  
<<http://news.bbc.co.uk/1/hi/world/europe/3940719.stm>> last accessed 10 July 2017.

<sup>108</sup> John Paul II (n 105) para 2.

<sup>109</sup> *ibid* para 8.

enemies.<sup>110</sup> John Paul seems to view radical feminists as disrupting the natural, biological role of women, although the statement is silent on the role that male oppression and objectification may have played in disrupting the natural harmony and diversity of family life. The Catholic Church chose not to consider whether women are currently discriminated against or how this could be improved. Unlike MacKinnon, the Catholic Church seems to be uninterested in the methods of achieving women's equality, choosing instead to focus on the importance of women maintaining their separate and specific societal obligations.<sup>111</sup>

Conversely, intersectional feminists are particularly concerned with ending oppression and achieving equality, rather than enforcing prescribed gender roles for women. Radical feminism has been criticized for narrowly focusing on the experiences of white women, rather than recognizing the diversity of the roles that race and class play in women's lives and their societal positions.<sup>112</sup> In her article, intended to serve as a rebuttal to these criticisms, MacKinnon argues for the universal nature of women's inequality, stating,

To see that these practices are done by men to women is to see these abuses as forming a system, a hierarchy of inequality. This situation has occurred in many places, in one form or another, for a very long time, often in a context characterized by disenfranchisement, preclusion from property ownership (women are more likely to be property than to own any), ownership and use as object, exclusion from public life, sex-based poverty, degraded sexuality, and a devaluation of women's human worth and contributions throughout society. This subordination of women to men is socially institutionalized, cumulatively and systematically shaping access to human dignity, respect, resources, physical security, credibility, membership in community, speech, and power. Comprised of all its variations, the group women can be seen to have a collective social history of disempowerment, exploitation and subordination extending to the present.<sup>113</sup>

MacKinnon sees this as the experience of all women, regardless of their ethnic background, socioeconomic status or sexual identity.<sup>114</sup> She disputes the idea that

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<sup>110</sup> *ibid* para 4.

<sup>111</sup> *ibid* paras 12 and 13

<sup>112</sup> See Elizabeth V. Spelman, *Inessential Woman: Problems of Exclusion in Feminist Thought*. (Women's Press 1990), as answered in MacKinnon (n 106).

<sup>113</sup> MacKinnon (n 106) 15.

<sup>114</sup> *ibid* 15.

feminist theory could be applicable to the lives of white women and yet incomplete for women of colour, arguing that if the theory did not apply to all women, it would not still be considered viable and descriptive.<sup>115</sup> MacKinnon ignores the obvious criticism – that academics like hooks<sup>116</sup> and Crenshaw<sup>117</sup> are responding because her theories do not account for aspects of their lives as black women.

It is disappointing that MacKinnon does not seem interested in allowing her theories to evolve with input from women of colour and in some ways seems quite hostile to their criticism.<sup>118</sup> This is particularly concerning in the context of asylum seekers – women in the asylum system often face multiple oppressions, as ethnic minorities or forced to communicate in a foreign language and cope with insecure migration status and cultural differences. She argues that while her analysis of gender discrimination is often criticized due to the absence of a racial understanding, analyses of race are not expected to include gender.<sup>119</sup> MacKinnon does not seem to be aware of authors such as Hill Collins<sup>120</sup> or Crenshaw,<sup>121</sup> who do not only object to the absence of race in feminism, but also discuss the masculine assumption of writings about blackness. Most disturbingly, MacKinnon offers a cynical analysis as to why women of colour were unwilling to accept white feminist theory: a desire to distance themselves from the stereotype of white women, preferring instead to racially identify, being part of a group which includes men.<sup>122</sup> She rejects the idea that racial privilege has a tangible influence on white women's lives, arguing,

This is not to say there is no such thing as skin privilege, but rather that it has never insulated white women from the brutality and misogyny of men, mostly but not exclusively white men, or from its effective legalization. In other words, the "white girls" of this theory miss quite a lot of the reality of white women in the practice of male supremacy.<sup>123</sup>

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<sup>115</sup> *ibid* 18.

<sup>116</sup> hooks (n 106).

<sup>117</sup> Crenshaw (n 67) 139–170.

<sup>118</sup> MacKinnon (n 106) 18–20.

<sup>119</sup> *ibid* 18.

<sup>120</sup> Patricia Hill Collins, 'Social Construction of Black Feminist Thought.' (1989) 14 *Signs: Journal of Women in Culture and Society* 745, 755–756.

<sup>121</sup> Crenshaw (n 67) 158.

<sup>122</sup> MacKinnon (n 106) 21.

<sup>123</sup> *ibid* at 20.

MacKinnon is refuting an argument that has not really been made. Black feminist academics do not dispute that white women face sexual violence<sup>124</sup> or discrimination in the workplace.<sup>125</sup> They simply argue that discrimination takes different forms and has more complex interlocking oppression for women of colour.<sup>126</sup>

It is the refusal of radical feminists like MacKinnon to account for an understanding of women's oppression which includes race, class and immigration status that has led to the development of a newer strand of feminism, intersectional feminism. MacKinnon provides a thorough explanation and increasingly a descriptive theory which aligns with how many legal systems are dealing with the issues of domestic violence and sexual abuse.<sup>127</sup> However, the weakness in MacKinnon's arguments are reminiscent of the oversights of these governments: a lack of understanding of the particular challenges involved in protecting women of colour and migrants from domestic violence.

#### **IV. Intersectional Feminism**

Intersectional feminism stemmed from the frustration of black<sup>128</sup> and lesbian feminists<sup>129</sup> that they felt the depth and broadness of their oppression had not been fully vocalized by most radical feminists. Similarly, black feminists often thought that anti-racist writings ignored the inequalities within black families and the harmful sexist behaviours of black men.<sup>130</sup> There was a definite lack of understanding by radical feminists such as MacKinnon that black women often felt that racial barriers were as essential to understanding their experiences as black women as feminist theory.<sup>131</sup> Not only did they ignore this important aspect of women's lives, they were actively hostile to its inclusion in feminism.<sup>132</sup>

Black women<sup>133</sup> felt compelled to write about their experiences having faced discrimination both through gender and race – and not always being able to pinpoint why

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<sup>124</sup> Crenshaw (n 22) 1249.

<sup>125</sup> Crenshaw (n 67) 168.

<sup>126</sup> hooks (n 23) 55.

<sup>127</sup> MacKinnon (n 12) 107.

<sup>128</sup> Hill Collins (n 110) 755-756.

<sup>129</sup> Adrienne Rich. *Blood, Bread and Poetry: Selected Prose 1979-1985*. (Virago 1986).

<sup>130</sup> hooks (n 23) 47-48.

<sup>131</sup> Maxine Baca Zinn and Bonnie Thornton Dill, 'Theorizing Differences from Multiracial Feminism.' (1996) 22 *Feminist Studies* 321, 322.

<sup>132</sup> See above discussion, in section on radical feminism.

<sup>133</sup> See the various works cited of bell hooks, Patricia Hill Collins, Kimberlé W. Crenshaw.

they encountered a specific instance of oppressions. In coining the term “intersectionality”, which would be used for this multilateral branch of feminism, Crenshaw described it as being similar to a traffic accident which occurs at an intersection, writing,

Discrimination, like traffic through an intersection, may flow in one direction, and it may flow in another. If an accident happens in an intersection, it can be caused by cars traveling from any number of directions and, sometimes, from all of them. Similarly, if a Black woman is harmed because she is in the intersection, her injury could result from sex discrimination or race discrimination.<sup>134</sup>

At other times, it is all too obvious that women of colour are discriminated against not solely as women or due to race, but because of a combination of both. The discrepancy between the average pay of white men and women of colour, for example, is wider than either white women or men of colour face.<sup>135</sup> As noted previously, Crenshaw also uses the example of the domestic violence women face – black women are abused within the home because they are women, but services intended for middle class white women fail them due to the economic and social discrimination they face as black women.<sup>136</sup>

bell hooks also writes extensively on black women’s struggles to carve a place for themselves both in the feminist movement and in the movement for racial equality. She notes that the first step is for black women to become the authoritative authors of their own experiences – writing by white men is still seen as the most authoritative, even when it relates to the lives of black women.<sup>137</sup> She also notes that failure of many feminists to focus on race could be related to the feminist cry that the “personal is political” – while it urged women to understand the wider oppressive context of the micro-aggressions they experienced, it also encouraged women to focus on their own discrimination in what hooks perceives as a self-absorbed manner.<sup>138</sup> This, she believes, has led white women to

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<sup>134</sup> Crenshaw (n 67) 149.

<sup>135</sup> See Wouter Zwysen and Simonetta Longhi, ‘Labour market disadvantage of ethnic minority British graduates: university choice, parental background or neighbourhood?’ (2016) Institute of Social & Economic Research 2016-02 <<https://www.iser.essex.ac.uk/research/publications/working-papers/iser/2016-02.pdf>> last accessed 23 July 2017.

<sup>136</sup> Crenshaw.(n 22) 1249.

<sup>137</sup> hooks (n 23) 83.

<sup>138</sup> Ibid 181.



focus on issues such as abortion<sup>139</sup> while ignoring the role that they, even while discriminated against as women, play in maintaining power structures which grant them advantage over black women. hooks argues that racism is commonly understood to mean hatred of those of colour, when often there is no particular malice involved, just a desire to continue to benefit from the structures of white privilege.<sup>140</sup> White women have the freedom to believe that patriarchy is the root of classism and racism and distance themselves from their role in perpetrating these oppressions.<sup>141</sup>

Intersectional feminists cite specific examples of the ways in which white women and black women have different needs from feminism and feminist theory. hooks references Betty Friedan's seminal work, *The Feminine Mystique*,<sup>142</sup> which explored the loneliness and the lack of emotional fulfilment of educated suburban white women who had opted to become housewives rather than enter the paid workforce in the 1950s and 1960s. hooks noted that this was a specific fear of educated, middle class women who were interested in intellectually challenging roles that white middle class men held; these women were not interested in the roles that black working class men and women were forced by economic necessity to fulfil.<sup>143</sup>

Black women have had very different experiences of exploitation within the workplace,<sup>144</sup> while also being denied autonomy in their homes. Instead of black families unifying within their homes as a form of protection against racism, hooks argued that black men chose to exert power within the home in order to combat feelings of powerlessness in larger society.<sup>145</sup> She notes that, unfortunately, this not only contributes to the hurdles of black women, but also means that marriage becomes a method of oppression rather than a partnership,<sup>146</sup>

Would men but generously snap our chains, and be content with rational fellowship instead of slavish obedience, they would find us more observant daughters, more affectionate sisters, more faithful wives, more reasonable mothers – in a word, better citizens. We should then love them

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<sup>139</sup> hooks (n 106) 32.

<sup>140</sup> hooks (n 23) 193.

<sup>141</sup> *ibid* 44.

<sup>142</sup> Betty Friedan, *The Feminine Mystique* (Penguin Modern Classics 2010).

<sup>143</sup> hooks (n 106) 40.

<sup>144</sup> *ibid* 5.

<sup>145</sup> *ibid* 65.

<sup>146</sup> *ibid* 65.

with true affection, because we should learn to respect ourselves; and the peace of mind of a worthy man would not be interrupted by the idle vanity of his wife, nor the babes sent to nestle in a strange bosom, never having found a home in their mother's.<sup>147</sup>

It is interesting that there are similarities between hook's writings and the Catholic Church's focus on the negative effects men face for perpetrating oppression,<sup>148</sup> as hooks also considers the pain that patriarchy causes men.<sup>149</sup> The distinction is that hook recognises that men who oppress black women are also often oppressed themselves as victims of racism.<sup>150</sup> She notes that in intersectionality, a more complex view of oppressors emerges. White women can be racist and black men can be sexist; it can be difficult for black women to ally themselves with either.<sup>151</sup>

Intersectional feminism is also a theory which continues to evolve over time, as awareness increases of various societal oppressions. bell hooks may understand the difficult intersection of race and gender, but her writings display a limited understanding about the barriers, discrimination and oppressions that LBT women face, even suggesting that most lesbian or transgendered women primarily face violence outside of gay bars rather than in the home.<sup>152</sup> While this may be hooks' belief, it is unsupported by academic research about the particular vulnerabilities that women in lesbian relationships<sup>153</sup> and transgendered women<sup>154</sup> may face within the home. It is interesting that while hooks is able to verbalise her own oppression, she is less understanding and knowledgeable about those of other women facing multiple discriminations, illustrating that understanding of oppressions is not necessarily transferrable. Women who understand the geography at their particular intersection cannot always read the map at another. Baca Zinn and Thornton Dill also caution that even women from minorities backgrounds do not necessarily have insights into each other's experiences: the racism

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<sup>147</sup> *ibid* 186.

<sup>148</sup> John Paul II (1988) (n 39).

<sup>149</sup> hooks (n 106) 186.

<sup>150</sup> Hooks (n 23) 47.

<sup>151</sup> *ibid* 46.

<sup>152</sup> hooks (n 23) 212.

<sup>153</sup> Ellyn Kaschak, 'Intimate Betrayal: Domestic Violence in Lesbian Relationships' (2001) 23 *Women & Therapy* 1.

<sup>154</sup> Kae Greenberg, 'Still Hidden in the Closet: Trans Women and Domestic Violence' (2012) 2 *Berkeley Journal of Gender, Law and Justice* 198.

black women encounter is distinct from that which Asian women combat.<sup>155</sup> As more women from diverse backgrounds continue to write about hurdles they face, intersectional feminism will become more complex and varied. One wonders if hooks would respond to black lesbian writers with the same venom as MacKinnon or whether she would embrace an increased understanding of the intersections between race, sexual orientation and gender.

Erez, Adelman and Gregory specifically focused on the difficulties and oppressions that immigrant status creates for women.<sup>156</sup> They note that the experience of migration can be quite isolating and lonely – women are separated from their family group and broader community to relocate to a new state.<sup>157</sup> Migrant women also face discrimination as migrants in their new community – while this can be linked to racism, it is still encountered by migrant women from an ethnic majority background.<sup>158</sup> These women are often left extremely vulnerable to violence within a relationship due to the vulnerabilities imposed by the migration process.<sup>159</sup> While plenty of spouses are able to use the threat of financial dependence and child custody to maintain power and dependency, this threat is obviously increasingly worrying to women who have insecure migration status and are constantly vulnerable to removal from their child's country of residence.<sup>160</sup> Migrant women often also receive mixed messages about abusive relationships – both from the culture they come from and from the receiving state, both of which likely condemn abusive relationships while urging women to put emotional energy into maintaining nuclear families.<sup>161</sup> It is naïve to expect that migrant women have the same support network for exiting abusive relationships that women with secure migration status are able to access. When planning services and legislation aimed at targeting refugee and migrant women, it is insufficient to simply expect women to separate from their husbands; services need to take a holistic view and understand the variety of

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<sup>155</sup> Baca Zinn and Thornton Dill (n 121) 326.

<sup>156</sup> Edna Erez, Madelaine Adelman and Carol Gregory, 'Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women' (2009) 4 *Feminist Criminology* 32.

<sup>157</sup> *ibid* 33.

<sup>158</sup> *ibid* 34.

<sup>159</sup> *ibid* 36.

<sup>160</sup> *ibid* 47.

<sup>161</sup> *ibid* 50.

dilemmas that these women face, and difficulties which can feel so insurmountable that remaining in an abusive relationship can feel like a necessary decision.

Intersectional feminism can often feel less like a series of answers and more like a list of questions – instead of, like MacKinnon, providing a clear road map to impose a feminist understanding of human rights, intersectional feminism is less directional and simply focuses on the myriad of different factors which complicate women's lives. Intersectional feminism challenges the idea of a universal experience of domestic violence and notes that the influences keeping women in violent homes differ greatly based on women's race, class, sexual orientation and immigration status. Unfortunately, this does not seem to be incorporated into many states' policies on combating domestic and sexual violence, instead opting to treat women as a universal monolith who require the same supports for domestic and sexual violence. Intersectionality considers gender to be one of a number of important factors, rather than a unique experience. This evolved lens through which to consider gender is an important change in perspective – from viewing gender as a monolith to a more fractured aspect of women's lives. Obviously, this change will greatly influence the type of legislation which affects migrant women's lives.

## **V. Conclusion**

These three varying theories of gender equality have very different opinions about the natural role of women and how gender functions should be legislated in society. It is worth noting that these theories have not necessarily influenced various governmental initiatives. Although some of this thinking has been influential, such as the Catholic doctrine on separate spheres' direct influence on the Irish policies on the role of women,<sup>162</sup> radical feminist analysis of the need for government involvement in private life is more descriptive than influential as to the increased awareness of the ways in which human rights, criminal law and privacy have been harmful towards women. Intersectional feminism attempts to link feminism with other movements for equality and liberation, such as the LGBT movement, anti-racism and support for migrants, and

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<sup>162</sup> Patrick Hanafin, 'Reproductive Rights and the Irish Constitution: From the Sanctity of Life to the Sanctity of Autonomy?' (1996) 3 *European Journal of Health Law* 179, 179. See further in chapter 6 below.

understand all of these in a broad holistic context.<sup>163</sup> All three of these theories would describe different priorities and assumptions which are enshrined in policies and legislation.

The entirety of this research is focused on understanding the treatment of female asylum seekers who are fleeing and combating violence within the home. In order to better understand the legislation which affects these women's lives (determining whether they are granted asylum, the resources that they are given, the procedures the government follows when interacting with them), it is essential to comprehend the assumptions behind these decisions and the sometimes unconscious, sometimes deliberate biases which have been enshrined into law. Examining feminist theory can be helpful to try to understand why policy makers are drawn to specific focuses and how they view the complexities of gender and migration.

In the following chapters, this research will argue for the development in national law of EU member states of an intersectional approach, encouraged and legislated by the EU. States need to consider their legislative biases in underestimating the difficulties that face women who are also handicapped by trauma, language barriers, racism, limited socioeconomic means and insecure migration status. Intersectional feminism recognises that these women do not have the same support and resources as women who are not burdened by many of these oppressions. Law dealing with gendered protection must work equally well for women encountering any of these hurdles. Intersectional feminist theory cannot signpost the specific actions which need to be taken to better support migrant women, but provides a verbalisation of the considerations which need to be taken into account by national and EU law.

The European Union and its two member states which will be examined in depth, the United Kingdom and Ireland, have failed to purposefully adopt an intersectional approach. Now that we have analysed what an intersectional perspective means, and how it differs from separate spheres and radical feminism, the next chapters will more fully discuss the intersectional approach which has been used in international law for gender-based asylum claims and the gap between international law and what has been enshrined in EU and member state law. In the next chapter, the context of EU asylum law will be

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<sup>163</sup> Crenshaw (n 67).

more fully discussed and explained, in order to understand how an intersectional understanding does not, at the moment, exist.

### Chapter 3: Laws Regulating Asylum by the European Union

#### 1. Introduction

It is clear that the legal areas of asylum and migration are considered and debated more broadly than simply a national level.<sup>1</sup> While the process of determining whether to grant asylum is still partially controlled by the member states of the European Union, an understanding of the laws regulating asylum must now have reference to the range of measures which have been crafted by the organs of the EU. This current research examines the legal experiences of women who are seeking asylum in the UK and Ireland and how this is influenced by the legislating within these states. National laws cannot be considered in isolation; it is important to look in depth at the variety of EU legislation, judgements and soft law regulating asylum, as well as the various organs of the EU and their differing views and contributions to asylum policy.

Throughout this thesis, the research seeks to examine the EU's effects on the process of asylum seeking; to explore whether there is a gap between the theory and the reality when an asylum seeker arrives at the borders of the EU. In order to understand that gap, there needs to be an understanding as to how the EU has crafted the Common European Asylum System (CEAS), as well as the debates and differing viewpoints which created the current legislation, treaties, judgements and opinions. A discussion of "EU asylum policy" does not only include the actual binding hard law, but also the values and culture which manifest in the EU legislation.<sup>2</sup> It is important to see if both these legalities and these social views translate into the national asylum processes.

Both the UK and Ireland have a complicated relationship with the CEAS. Both chose to opt into the first stage of legislation, which set minimum standards for asylum decisions and practices, but not the later stages, intended to more completely harmonise national laws.<sup>3</sup> This means that the EU's laws governing the asylum process are an

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<sup>1</sup> See Article 67(2) and Article 78 of the Consolidated version of the Treaty on the Function of the European Union 2008/C 115/01.

<sup>2</sup> Christian Kaunert, 'Liberty versus Security? EU Asylum Policy and the European Commission.' (2009) 5 *Journal of Contemporary European Research* 148.

<sup>3</sup> See Protocol (No 21) of the Consolidated version of the Treaty on the Function of the European Union 2008/C 115/01. As noted in chapter 6, Ireland has not opted into any form of the Reception Conditions Directive and neither the UK nor Ireland have opted into any recast directives (with the exception of the Dublin Regulation.)

essential aspect of the process that women undergo when attempting to access the status of refugees. In order to understand all the factors involved in the process of seeking asylum in the UK and Ireland, it is important to clarify the EU's position as a source of binding law and the substance of the Common European Asylum System.

The clash of legislative priorities are similar to those facing national governments. There are often natural conflicts between border protection and humanitarian-based rights concerns.<sup>4</sup> The EU is not immune from these same discussions and conflicts and there is a broad variety of agendas contained within the idea of "EU asylum law."<sup>5</sup> There has been considerable debate between academics about how the EU has balanced border security and migration control with meeting obligations under the Refugee Convention and applying humane standard to asylum seekers and refugees within Europe.<sup>6</sup> The first question is whether the EU has provided an excuse for member states to lessen the quality of their humanitarian protection through increased legislation at EU level. As Costello notes, there is an idea amongst certain national-level officials, including those who frequently make up membership of the European Council of Ministers, that humane and inclusive treatment of asylum seekers provides a "pull factor", which provides an incentive to asylum seekers to arrive in a particular state.<sup>7</sup>

As a result, there has been considerable academic exploration as to whether the EU has focused its asylum strategy primarily on reducing the perceived burden on specific member states<sup>8</sup> or a more complex agenda, which includes a desire to preserve the current legal situation and protect human rights.<sup>9</sup> There has also been broad interest as to whether asylum competence was moved to the EU specifically in order to "venue shop"<sup>10</sup> – make decisions in a forum in which there is less oversight of fundamental rights and less input from both NGOs and legislatures (such as members of the European

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<sup>4</sup> Kaunert (n 2).

<sup>5</sup> See *ibid*

<sup>6</sup> See Kaunert (n 2), Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 *European Journal of Migration and Law* 35 and Andreas Maurer and Roderick Parkes, 'The Prospects for Policy Change in EU Asylum Policy: Venue and Image at the European Level.' (2007) 9 *European Journal of Migration and Law* 173.

<sup>7</sup> Costello (n 6).

<sup>8</sup> See *ibid* 40.

<sup>9</sup> Maurer and Parkes (n 6).

<sup>10</sup> Christian Kaunert and Sarah Leonard, 'The development of the EU Asylum Policy: venue shopping in perspective.' (2012) 19 *Journal of European Public Policy* 1396.



Parliament) who have strong views about the importance of promoting fundamental rights protection for refugees.<sup>11</sup> These discussions all relate to how the EU has managed to resolve the conflict between attempting to manage number of asylum seekers and maintaining humanitarian obligations. At every level of the legislative process, there is a push and pull between these two factors. In this chapter, we will provide an analysis of how various EU laws navigate the balance and whether this has provided adequate protection for asylum seekers.

The first section considers the Treaty on the Functioning of the European Union (the TFEU). The EU treaties form the basis of all EU law, and the TFEU is the treaty signed by the member states which currently regulates the competence in asylum of the EU, including judgements of the CJEU and binding directives. Even in this initial provision, the most basic and brief description of the EU's role in regulating asylum, the tension between border control and humanitarian grounds is apparent, a tension which carries from the Treaty into other areas of European law.

The second section examines the legislation which makes up the Common European Asylum System.<sup>12</sup> This legislation has been composed by the European Parliament, the European Commission and the European Council of Ministers, with

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<sup>11</sup> See *ibid* at 1398.

<sup>12</sup> This primarily consists in the current secondary stage of recast directives of Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L160/60, Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. [2013] OJ L 18/96., 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) [2011] OJ L 337/9, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast.) OJ L 180/31. and Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. OJ L 180/1..

varying degrees of influence and priorities that appear in the final text of the legislation.<sup>13</sup> It is often argued that the European Parliament has historically represented rights-based concerns while the European Council of Ministers has a harsher, security-focused view of asylum law, with the European Commission providing a mediating balance between the two.<sup>14</sup> While this is reflected in reality to some degree, it is a more complicated relationship that has evolved over time,<sup>15</sup> but still retains an ongoing push and pull between these factors.<sup>16</sup>

The third section focuses on the case-law developed by the Court of Justice of the European Union. While asylum was historically not adjudicated by the European legal system,<sup>17</sup> there has increasingly been recent court decisions regarding human rights within the EU's asylum protection, especially echoing the close relationship between the Court of Justice and the Council of Europe's European Court of Human Rights. Since the European Court of Human Rights has found human rights violations within aspects of the Common European Asylum System, the Court of Justice has also expressed concern about certain features of the CEAS.<sup>18</sup> This would indicate that the Court of Justice is beginning to embrace a role defending the fundamental rights of asylum seekers and pushing back against some harsh initiatives to reduce asylum seeker numbers, while continuing to seek harmonisation and cooperation between member states.<sup>19</sup>

All of these sections together provide a comprehensive view of European law and a clearer understanding of the balance which is held between security and fundamental rights – a balance which impacts the experience of the most vulnerable asylum seekers.

## **II. Primary legal sources**

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<sup>13</sup> Doede Ackers, 'Negotiation on Asylum Procedures Directive' (2005) 7 *European Journal of Migration and Law* 1.

<sup>14</sup> Ariadna Ripoli Servent and Florian Trauner, 'Do Supranational EU Institutions make a difference? EU asylum law before and after "communitarization"' (2014) 21 *Journal of European Public Policy* 1142.

<sup>15</sup> See *ibid.* See also Simon Hix and Abdul Noury, 'Politics, Not Economic Interests: Determinants of Migrant Policies in the European Union' (2007) 41 *International Migration Review* 182

<sup>16</sup> See *ibid.*

<sup>17</sup> Kaunert and Leonard (n 10).

<sup>18</sup> Boštjan Zalar, 'Comments on the Court of Justice of the EU's Developing Case Law on Asylum' (2013) 25 *International Journal of Refugee Law* 377

<sup>19</sup> Eleanor Drywood, 'Who's in and who's out?' The Court's Emerging Case Law on the Definition of a Refugee.' (2014) 51 *CML Re* 1093.

The primary sources for all European Union legislation are the various EU treaties. They function most similarly to a constitution in a national legal system, establishing the competences of the European Union, the areas of law in which the EU has jurisdiction and which organs of the EU will be involved in the legislation process. Most significantly, these treaties have been ratified by the member states, allowing the states to consider and approve sharing their jurisdiction and competence in these areas with the European Union.

The treaties set the tone for the nuances of the EU's views on a particular area of law. The EU's competence on asylum is no exception. Two articles in particular within the Treaty of the Functioning of the European Union deal with the regulation of asylum by the EU. Article 67 states that the EU

shall ensure the absence of internal border controls for persons and shall frame a common policy on asylum, immigration and external border control, based on solidarity between Member States, which is fair towards third-country nationals.<sup>20</sup>

Article 78 expands into more detail on the role of this common asylum system, noting that the goal of the EU is to offer asylum, subsidiary protection and temporary protection in accordance with the principle of non-refoulement and specifically mentions that protection must be in line with the Refugee Convention.<sup>21</sup> It is important to note that Article 78 specifically encodes the Refugee Convention<sup>22</sup> as a source of EU law. All of the member states of the EU are signatories to the Refugee Convention; yet by incorporating the convention into European Union law, it is clear that the EU is not discarding the tenets of the internal law on refugees. but using it as a base for the EU common asylum. The Treaty also sets out that the goal of the asylum system is harmonisation and commonality, while working within principles of international law

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<sup>20</sup> Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 at Article 67(2)

<sup>21</sup> Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 at Article 78.

<sup>22</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

and fundamental rights. Within the current wording of the Treaty, it is clear the various tensions which exist in attempting to balance the priorities within EU asylum legislation.

The EU has historically had strong links with international refugee law. Ten of the original twenty six signatories of the original Refugee Convention are current members of the EU. The dissolution of internal borders, a key aspect of the Schengen Agreement, meant that the EU had an interest in regulating external borders and migration into the EU. Throughout the history of the European Union, there has been a desire to limit internal borders and coordinate treatment of third party nationals, including refugees and asylum seekers.<sup>23</sup> The concept of justice and home affairs coordination was introduced by the Treaty of Maastricht. The Treaty of Maastricht turned the then-European Community into one of three pillars of the European Union: with the other two pillars being built upon previous informal cooperations: the Common Foreign Security Policy and most relevantly, the Cooperation in Justice and Home Affairs.<sup>24</sup> The Justice and Home Affairs Pillar was intended to handle issues such as police cooperation, united investigation of international crime and asylum and migration.<sup>25</sup> It is interesting that asylum and migration were twinned with measures intended to combat crime, an insight into how the EU views third country asylum seekers.

The Treaty of Amsterdam rearranged these pillars, with asylum and migration moving to the European Community pillar, as part of Title IV of the European Community.<sup>26</sup> The move to the European Community pillar meant that the European Court of Justice would be able to rule on asylum issues and the European Parliament would be consulted, both changes which were considered helpful to increase the humanitarian protection for asylum seekers.<sup>27</sup> This was not deemed to be totally successful<sup>28</sup> and harmonisation of rights standards were further undermined by the decision of the UK and Ireland to opt out of Title IV (although both countries could and did choose to opt into specific legislative measures without permission of the other

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<sup>23</sup> Jef Huysmans, *The Politics of Insecurity: Fear, Migration and Asylum in the EU*. (Routledge 2006).

<sup>24</sup> Jörg Monar, 'The EU as an International Actor in the Domain of Justice and Home Affairs' (2004) 9 *European Foreign Affairs Review* 395

<sup>25</sup> See *ibid* 395.

<sup>26</sup> See *ibid* 397.

<sup>27</sup> See *ibid* 396

<sup>28</sup> Steve Peers, "'Mission Accomplished?'" *EU Justice and Home Affairs Law after the Treaty of Lisbon* (2011) 48 *Common Market Law Review* 661.

member states.)<sup>29</sup> Finally, in the Treaty of Lisbon, the three pillar system was abolished, with all areas of EU competence being judged to fall under the jurisdiction of the Court of Justice of the EU and with additional input involved from the European Parliament, often judged to be the European Union organ particularly concerned with human rights.<sup>30</sup> The Lisbon Treaty was considered by academics to be an opportunity to better harmonise the standard of treatments for asylum seekers.<sup>31</sup>

It is important to consider the meaning of the current Treaty articles in contrast to the former Article 63 Treaty of the EU established by the Treaty of Amsterdam.<sup>32</sup> In ex-Article 63, reference is made frequently to minimum standards – minimum standards to qualify as a refugee, minimum standards for the protection offered to refugees and general minimum standards of immigration policy.<sup>33</sup> Kaunert and Leonard argue that this represented a shift in focus after the Lisbon Treaty. Before the Lisbon Treaty, asylum was almost completely controlled by the European Council of Ministers, negotiated between governments, with minimal involvement by the European Parliament or the European Commission.<sup>34</sup> While the Lisbon Treaty (and the Amsterdam Treaty) are not considered primary sources of EU law, they have amended the two original treaties: the Treaty of the European Union and any subsequent treaties could amend the relevant articles and their regulation of the asylum process.

The argument was made that the European Council of Ministers was initially “venue-shopping”, attempting to handle asylum standards at a European level, therefore avoiding interference from national legislatures and courts which were sympathetic to the human rights of asylum seekers, instead handling it with like-minded governments on a European level.<sup>35</sup> This thesis would seem to be further supported by the initial lack of input from the European Parliament and the European Commission, as well as the

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<sup>29</sup> Maria Fletcher, ‘Schengen, the European Court of Justice and flexibility under the Lisbon Treaty: balancing the United Kingdom’s “ins” and “outs”’ (2009) 5 *European Constitutional Law Review* 71, 80

<sup>30</sup> Peers (n 28.)

<sup>31</sup> See *ibid* 664.

<sup>32</sup> Consolidated Version of the Treaty on European Union [2008] OJ C115/13 at Article 63.

<sup>33</sup> See *ibid*.

<sup>34</sup> Christian Kaunert and Sarah Leonard, ‘The European Union Asylum Policy after the Treaty of Lisbon and the Stockholm Programme: Towards Supranational Governance in a Common Area of Protection?’ (2012) 31 *Refugee Survey Quarterly* 1, 8

<sup>35</sup> Kaunert and Leonard (n 10).

minimal jurisdiction held by the Courts of Justice in Europe before the Lisbon Treaty.<sup>36</sup> At this time, the wording of the Treaty also mentioned minimum standards, which led to fears by academics that, by establishing minimum criteria, there would be a “race to the bottom” between member states aimed at eliminating pull factors, each state believing that by minimising protections they would lessen their share of the “burden” of asylum seekers.<sup>37</sup> At the least, it seemed that the European Council of Ministers wanted to ensure that member states did not have to completely overhaul their asylum systems to take account of additional fundamental rights.<sup>38</sup>

Regardless of whether this was true before the Treaty of Lisbon, the EU has responded to several of these criticisms in the evolved Common European Asylum System. The Treaty language changed to reflect that the next stage of the CEAS meant that instead of striving for minimum standards, the European Union now seeks to find common standards<sup>39</sup> – language which makes it more difficult to avoid responsibility for insufficient human rights protection or violations under the Refugee Convention.<sup>40</sup>

Legislation regarding asylum now uses the co-decision procedure, which provides a greater role for the European Parliament and more oversight by the European courts.<sup>41</sup> It is important, however, to note that along with changes to the framework of the EU treaties, there have also been changes to the membership of the European Parliament. Ripoli Servent and Trauner dispute the popular idea that all members of the European Parliament are necessarily sympathetic to the fundamental rights of asylum seekers.<sup>42</sup> In a climate where British nationalist group UKIP won over 20 seats in the last European Parliament, a trend echoed by other nationalist parties around Europe, there will obviously be repercussions in the views of the European Parliament.<sup>43</sup> It is also worth considering the research by Hix and Noury, which examines trends in the voting records of Members of the European Parliament (MEPs) on the topic of migration.<sup>44</sup> Hix and

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<sup>36</sup> See *ibid* 1398.

<sup>37</sup> See *ibid* 1402.

<sup>38</sup> Ripoli Servent and Trauner (n 14) 1147.

<sup>39</sup> Kaunert and Leonard (n 34) 15.

<sup>40</sup> Costello (n 6) 54.

<sup>41</sup> See *ibid* 1405-1406.

<sup>42</sup> Ripoli Servent and Trauner (n 14).

<sup>43</sup> This trend culminated in the British popular vote to leave the EU. Its effects not only on Britain, but the EU, are unknown. See discussion in chapter 7.

<sup>44</sup> Hix and Noury (n 15).

Noury found that female MEPs or MEPs from an ethnic minority background were more likely to be sympathetic to migrants and their fundamental rights,<sup>45</sup> as were MEPs from countries with historical links to colonialism and high numbers of asylum seekers.<sup>46</sup> While the European Parliament has traditionally been more diverse than other branches of the European Union,<sup>47</sup> its membership will obviously change both at every enlargement of the EU, as well as after every election. The European Parliament will not necessarily always be an advocate for the human rights of asylum seekers.

The complexities of whether the EU has been an ally to asylum seekers and refugees will be discussed throughout this chapter. Yet what is clear is that post-Lisbon Treaty, the EU has taken account of criticisms that they had swung too far towards emphasising a reduction in numbers of asylum rather than focusing on protecting the rights of asylum seekers. Although these changes in viewpoint and relationship between the organs of the European Union are not necessarily enough in themselves to redress the pendulum swinging between border protection and fundamental rights, it is important that the EU is attempting to redress this balance by enshrining a more balanced approach through the legislative process and the wording of the Treaty on the Functioning of the European Union.

### **III. Secondary legislation and asylum**

If the Treaty on the Functioning of the European Union is most comparable to a national constitution, it is logical that the Treaty is concerned primarily with broad principles and competences, while leaving more of the details to be spelled out by legislation. As stated earlier, Article 78 of the Treaty notes that the EU will set up a common asylum system.<sup>48</sup> The core of this Common European Asylum System is generally considered to be five specific pieces of legislation: the Asylum Procedures Directive,<sup>49</sup> on standards for the process of seeking and granting asylum and other forms

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<sup>45</sup> See *ibid* 196.

<sup>46</sup> See *ibid* 195.

<sup>47</sup> Emilie Hafner-Burton and Mark A. Pollack, 'Mainstreaming Gender in the European Union.' (2000) 7 *Journal of European Public Policy* 432.

<sup>48</sup> Consolidated version of the Treaty on the Functioning of the European Union [2008] OJ C 115/47 at Article 78.

<sup>49</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L160/60.

of protection, the Reception Conditions Directive,<sup>50</sup> which instructs member states on how to treat asylum seekers once they arrive in the EU, the Qualification Directive,<sup>51</sup> which explores the criteria for recognition for protection in the EU, the Dublin II Regulation,<sup>52</sup> which sets down guidelines as to which member state is responsible for processing an asylum claim and the Eurodac Regulation,<sup>53</sup> which governs use of the database of fingerprints from asylum seekers in the EU.<sup>54</sup> These are currently the second version of these directives. The initial versions, passed before the Lisbon Treaty amended asylum and migration procedures with the EU, were intended to create minimum standards of treatment of asylum seekers and to establish the criteria for recognition as refugees: a 'basement' which no member state could go below. The UK and Ireland both chose voluntarily to opt into this initial legislation, but have chosen not to adhere to the directives at the later stages. The majority of discussion in this chapter will concern the current recast directives, intended to increasingly harmonise asylum standards and treatment, unless otherwise noted.<sup>55</sup>

These five directives are the major legislation of the EU's asylum policy and by examining this legislation, the conflict between fundamental rights and border security can still be clearly read, at times co-existing in the same legislation. It has been debated

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<sup>50</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. [2013] OJ L 18/96..

<sup>51</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9

<sup>52</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast.) OJ L 180/31.

<sup>53</sup> Regulation (EU) No 603/2013 of the European Parliament and of the Council of 26 June 2013 on the establishment of 'Eurodac' for the comparison of fingerprints for the effective application of Regulation (EU) No 604/2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person and on requests for the comparison with Eurodac data by Member States' law enforcement authorities and Europol for law enforcement purposes, and amending Regulation (EU) No 1077/2011 establishing a European Agency for the operational management of large-scale IT systems in the area of freedom, security and justice. OJ L 180/1..

<sup>54</sup> There are several other legislative pieces which apply to asylum seekers, such as the Returns Directive and Family Reunification Directive, but discussed in this research is the core asylum legislation constituting the Common European Asylum System.

<sup>55</sup> Chapters 5 and 6 will discuss the impact of the initial CEAS legislation on the UK and Ireland, respectively.



by academics as to whether the EU has provided a forum which allows member states to ignore the needs of asylum seekers<sup>56</sup> or whether the EU's influence has resulted in a more liberalised asylum regime.<sup>57</sup> Part of the confusion seems to be that the EU has two different aims for the CEAS – both to ensure that the EU meets its obligation to refugees under international law and to equally divide the responsibility for processing the applications for asylum. These two aims can often conflict,<sup>58</sup> leading to member states attempting to shift what they perceive to be the “burden” of asylum seekers to another member state.<sup>59</sup>

Certain provisions of these directives seem to strongly support Costello's argument that the EU, particularly the European Council of Ministers, see asylum seekers as being drawn to specific countries based on their “pull factor” – stronger protection in regards to housing, benefits or access to employment.<sup>60</sup> This is obviously not a full and simple explanation for the behaviour and choices of asylum seekers – otherwise, all asylum seekers would have previously flocked to only one member state before the harmonisation under EU law.<sup>61</sup>

As a result, the EU has legislated under the shared idea that asylum seekers have a specific agenda as to which state in which they would like to claim asylum; they perceive the role of the EU as coaxing each state to take their fair share of the “burden” of asylum seekers,<sup>62</sup> convincing member states not to raise their asylum standards out of line with the other EU member states.<sup>63</sup> It also seems clear that member states, especially the UK, have tried to introduce measures in EU law which would echo the procedures that these states would like to include in national law, hoping to minimise the effects of the EU's influence.<sup>64</sup> At the Thessaloniki Council meeting of 2003, the UK suggested that asylum seekers could have applications processed outside the UK before being allowed to enter

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<sup>56</sup> Costello (n 6.)

<sup>57</sup> Kaunert and Leonard (n 10).

<sup>58</sup> Luc Bovens, Chlump Chatkupt and Laura Smead., ‘Measuring Common Standards and Equal Responsibility-Sharing in EU Asylum Outcome Data’ (2012) 13 European Union Politics 70, 71.

<sup>59</sup> Francesca Ippolito and Samantha Velluti, ‘The Recast Process of the EU Asylum System: A Balancing Act Between Efficiency and Fairness’ (2011) 30 Refugee Survey Quarterly 24, 26.

<sup>60</sup> Costello (n 6) 37-38.

<sup>61</sup> Costello (n 6.)

<sup>62</sup> Ippolito and Velluti (n 58) 26.

<sup>63</sup> Ackers (n 13) 2.

<sup>64</sup> Elspeth Guild, ‘Seeking Asylum: Storm Clouds between international commitments and EU legislative measures’ (2004) 29 European Law Review 198.

Europe. This suggestion was rejected by the other member states, specifically Germany and Sweden.<sup>65</sup> The UK also attempted to impose a provision which would remove access to benefits for any asylum seekers who had not immediately declared themselves to be accessing the asylum process upon arriving in the UK, out of a concern that economic migrants in the UK without valid visas would claim asylum once discovered.<sup>66</sup> This was not supported by the other European member states.<sup>67</sup> This would argue that the member states will in many ways self-regulate the level of fundamental rights protection. This will be particularly enforced by the states in the north-west of Europe, who aim to keep their own high rights protections embedded in European Union law, ensuring that there is not a “race to the bottom.”<sup>68</sup>

There has also been considerable disagreement amongst states as to whether access to legal employment versus benefits provides more of a pull factor. This arose as a debate between states which felt that providing benefits would place a massive burden on the state and those who feel that additional employment applicants would be more of a difficulty with the state’s economy.<sup>69</sup> This debate and compromise was reflected in the Standards Directive, which requires states to grant access to the employment market only after one year.<sup>70</sup> This examples indicates that member state priority disagreements can be a self-regulating factor which ensures that migrants in a variety of situations receive some level of protection.

During the drafting of the legislation, the UNHCR and other expert non-government organisations were not consulted or included during the process<sup>71</sup> - the legislation was the result of internal debate balancing international human rights obligations with the views of member states. While it is clear that there are many concerns about various aspects of the Common European Asylum System, it is also clear that the states did not lower their standards to a level that several member states would have preferred.<sup>72</sup> Yet it is argued by several academics that states were more concerned

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<sup>65</sup> See *ibid* 200.

<sup>66</sup> Maurer and Parkes (n 6) 195.

<sup>67</sup> See *ibid*,

<sup>68</sup> Maurer and Parkes (n 6) 197.

<sup>69</sup> Maurer and Parkes (n 6) 193.

<sup>70</sup> Kaunert (n 2) 153.

<sup>71</sup> Maurer and Parkes (n 6) 195.

<sup>72</sup> See *ibid* 197.

with trying to echo their own national law<sup>73</sup> and see their national practices reflected in European law as much as possible.<sup>74</sup> This has meant that while states have not completely decided to flaunt international law obligations, there are still areas of concern for the UNHCR.<sup>75</sup>

One area that has concerned the UNHCR,<sup>76</sup> and academics like Costello,<sup>77</sup> is the concept of a safe third country. The concept of safe third countries is one that does not exist in the 1951 Refugee Convention.<sup>78</sup> Instead, European member states have argued that since Article 31 of the Refugee Convention requires refugees to present themselves to the authorities in a timely fashion, asylum seekers should seek to make an application in the first safe state that they are able to access.<sup>79</sup> More than one member state sought, at the drafting process, to have their internal deportations processes to safe third countries recognised under EU law.<sup>80</sup>

The core of the Dublin Convention, and subsequent Dublin Regulations, is that the European Union is a group of safe third countries. The idea of the concept of safe third countries was seen to be a method of burden sharing between the European Union member states.<sup>81</sup> It has been argued, however, that the main distinction between the Dublin Regulation and other safe third country policies, is that it is not a unilateral decision to return an asylum seeker to the safe third country – the state to which the asylum seeker is being removed can theoretically choose to accept or decline responsibility for an asylum seeker.<sup>82</sup> While it is true that states should not be compelled to accept additional asylum seekers, it seems clear that the current Dublin Regulation is

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<sup>73</sup> See *ibid.*

<sup>74</sup> Ackers (n 13) 32.

<sup>75</sup> See *ibid* 31.

<sup>76</sup> UN High Commissioner for Refugees, 'UNHCR Regrets missed opportunity to adopt high EU asylum standards' UN High Commission for Refugees website, 30 April 2004.) .

<<http://www.unhcr.org/40921f4e4.html>> last accessed 01 June 2016

<sup>77</sup> Costello (n 6).

<sup>78</sup> See *ibid* 40.

<sup>79</sup> See *ibid*

<sup>80</sup> Ackers (n 13) 22.

<sup>81</sup> See *ibid* 12.

<sup>82</sup> Agnes Hurwitz, 'The 1990 Dublin Convention: A Comprehensive Assessment' (1999) 11 *International Journal of Refugee Law* 646, 647.

dependant on border states accepting the majority of asylum seekers<sup>83</sup> – the Dublin Regulation has been ineffective as a method of burden sharing,<sup>84</sup> with the states along the Mediterranean still taking the largest percentage of asylum seekers.<sup>85</sup> In the current unease which has led to the resettlement of many asylum seekers from political turmoil, it has become even more questionable that the conditions in several EU member states constitute a safe third country for these asylum seekers, particularly for lone women.<sup>86</sup>

Since the Common European Asylum System has not been successful in more evenly distributing the processing of asylum seekers, has it at least ensured that member states maintain a common human rights protection? The UNHCR noted concerns about the possibility of chain refoulement – asylum seekers being passed amongst countries which abdicate responsibility until they are eventually returned to the country of origin.<sup>87</sup> This is particularly true when member states treat asylum claims differently – Guild cites the example of the case of *R v. Adan & Aitseguer*.<sup>88</sup> Determined after the passing of the Dublin Convention, the House of Lords noted that since France and Germany did not recognise persecution by non-state actors, they were not safe third countries for the purpose of refoulement. While this case did occur before the subsequent Dublin Regulations, it provides an example of the gap between the lofty aims of the Common European Asylum System and the reality. While the EU was intended to function as a collection of state third countries that would theoretically reach the same decisions in every asylum application, the *Adan* case would demonstrate otherwise.<sup>89</sup> Furthermore, it has been noted by academics that the Dublin Regulation does not provide protection for recognised asylum seekers. If a state denies an asylum claim, it is judged to be rejected by all the member states. However, if a state grants refugee status, the other member states are not required to consider the applicant to be a refugee.<sup>90</sup> More current examples

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<sup>83</sup> Kriztina Than and Shadia Nasralla, 'Defying EU, Hungary suspends rules on asylum seekers' (Reuters.com, 23 June 2015) <<http://uk.reuters.com/article/2015/06/23/uk-europe-migrants-austria-hungary-idUKKBN0P31ZB20150623>> last accessed 01 June 2016. Discussed again in chapter 7.

<sup>84</sup> Bovens, Chatkupt and Smead (n 57) 92.

<sup>85</sup> Maurer and Parkes (n 6) 197.

<sup>86</sup> Human Rights Watch, 'Greece: Dire Risks for Women Asylum Seekers' (Human Rights Watch website, 15 December 2017) last accessed 07 January 2018,

<sup>87</sup> Costello (n 6) 45.

<sup>88</sup> [2000] UKHL 67.

<sup>89</sup> Guild (n 63) 208.

<sup>90</sup> Guild (n 63) 207.

of this disparity in protections to asylum seekers and refugees will be explored in relation to several court cases which have highlighted disparities between fundamental rights and treatment of asylum seekers under the Dublin Regulation. This split has been even more highlighted in the wake of the recent increase in Syrian and Afghan asylum seekers, where treatment of this refugee applicants has varied widely between member states.<sup>91</sup>

It seems clear that the legislation passed under the CEAS attempts to achieve two goals: burden-sharing of asylum claims and a common level of fundamental rights.<sup>92</sup> These goals have been contradictory and have resulted in both an inconsistent level of fundamental rights protection<sup>93</sup> as well as a lopsided distribution of asylum claims.<sup>94</sup> This seems to have resulted in a balancing act, where human rights standards are compromised but not ignored. The European Union has balanced compromises on fundamental rights with security concerns. Has this been effective and fair? Various organs of the EU (the Court of Justice of the European Union (CJEU)) and NGOs have considered whether the organs of the EU are sufficiently considering the rights of asylum seekers. Many of these criticisms predated the events of the recent wave of asylum seekers fleeing unstable governments and warfare in countries near the EU, but they do demonstrate that there were substantial problems and concerns of the effectiveness of the CEAS before it became tested by the increased number of applicants within the EU.

#### **IV. CJEU Jurisprudence**

In Doede Ackers' account of the negotiations of the Asylum Procedures Directive, he notes that the Commission reached a point at which, while they were sympathetic to European Parliament concerns about human rights, the Commission became unwilling to consider amendments which would adjust the balance between human rights and efficiency.<sup>95</sup> Yet the European Commission does not provide the final analysis as to whether the balance of human rights and security has been achieved – there is additional oversight and evaluation by two specific courts, the CJEU and the European Court of Human Rights (ECtHR). While the ECtHR is the judicial arm of an international human rights based treaty, the CJEU is the judicial arm of the European

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<sup>91</sup> See chapter 7.

<sup>92</sup> Ippolito and Velluti (n 58) 26.

<sup>93</sup> Maurer and Parkes (n 6) 197.

<sup>94</sup> Bovens, Chatkupt and Smead (n 57).

<sup>95</sup> Ackers (n 13) 8.

Union, which deals with the interpretation of the various EU treaties, as well as legislative compatibility with the sources of EU fundamental rights (arising from both international instruments and, within the EU, the primary source of fundamental rights, the Charter of Fundamental Rights of the European Union).<sup>96</sup>

This form of judicial review means that both courts have offered their own opinions on the balance between fundamental rights and securitisation. The ECtHR has released several decisions that have been critical of the CEAS, most specifically the Dublin system of transferring asylum seekers between member states.<sup>97</sup> It is important to note that the ECtHR is not an organ of the EU – it was the judicial organ of the international human rights treaty, the European Convention of Human Rights (ECHR), established by the Council of Europe, an international organisation with an emphasis on protecting human rights in Europe. Although all member states of the European Union are also members of the Council of Europe,<sup>98</sup> the European Union is not currently a member of the Council of Europe. Yet there has been considerable reference to the ECHR within EU legislation and judgements; the case-law of the ECtHR has been a strong influence on the CJEU on fundamental rights based claims.<sup>99</sup> The CJEU has been particularly concerned about ensuring that the two courts' case-law remains congruent.<sup>100</sup> While the EU is in talks to accede to the Council of Europe and be subject directly to the ECtHR's jurisdiction,<sup>101</sup> currently, the EU's acceptance of the guidance of the ECtHR case-law is totally voluntary. The ECtHR can, however, make binding judgements on member states, including, in certain circumstances, the member states' transposition of EU instruments.<sup>102</sup> The Bosphorus principle, based on an ECtHR cases, established that there is a rebuttable presumption that the CJEU will provide equivalent protection to the CJEU. Yet this is rebuttable and EU rights can prove to be inadequate in specific

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<sup>96</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

<sup>97</sup> See discussion in, among others, Morgades-Gil (n 55) and Francesca Ippolito, 'The Contribution of the European Courts to the Common European Asylum System and Its Ongoing Recast Process' (2013) 20 Maastricht Journal 261.

<sup>98</sup> See Council of Europe, 'Our Member States.' (Council of Europe website, 2016).  
<<http://www.coe.int/en/web/about-us/our-member-states>> last accessed 1 June 2016..

<sup>99</sup> Marie-Luce Paris, 'Paving the Way: Adjustments of Systems and Mutual Influences before the European Union Law Before Accession' (2014) 51 Irish Jurist 59.

<sup>100</sup> See *ibid.*

<sup>101</sup> Paris (n 100) 59.

<sup>102</sup> See Application 45036/98, *Bosphorus v. Ireland* (2006) 42 EHRR 1.

circumstances.<sup>103</sup> This includes the Dublin Regulations under the CEAS; the ECtHR has made several judgements considering whether or not the Dublin system adequately protects the fundamental rights of asylum seekers.<sup>105</sup>

The first ECHR judgement that dealt with the Dublin system in depth was *T.I v. United Kingdom*.<sup>106</sup> The case concerned an applicant who had been tortured by the Tamil organisation in Sri Lanka (a paramilitary force opposed to the current government.) The applicant initially applied for asylum in Germany; the case was rejected as those persecuting the applicant were not state actors.<sup>107</sup> The applicant then entered the UK and made an asylum application there. Although the UK Home Office did not doubt the applicant's credibility, the potential of the applicant being offered subsidiary protection in Germany (although subsidiary protection was very rarely offered to those who had been rejected for asylum claims)<sup>108</sup> was sufficient for the ECtHR to decide that the UK would not violate the Article 3 protection against torture in the European Convention on Human Rights<sup>109</sup> if the applicant was returned to Germany. The case of *TI* was eventually decided in a way which did not disrupt the EU's Dublin system, but certainly indicated a willingness to examine the Dublin system.<sup>110</sup> The case also demonstrates that while the CEAS was intended to harmonise the asylum system to the point that there would be an identical experience applying for refugee status in any member state, there were still major differences between the policies of the member states: *ie* the distinction between the UK, which considered actions by non-state actors to be persecution and Germany, which did not.<sup>111</sup> Although these differences were not sufficient yet for condemnation from the ECtHR, they clearly existed.

Yet over time, differences in the asylum system became more pronounced. Human rights groups began to be more vocal about the conditions surrounding asylum

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<sup>103</sup> See *ibid*.

<sup>105</sup> Madeline Garlick, 'Protecting Rights and Courting Controversy: Leading Jurisprudence of the European Courts on the EU Dublin Regulation' (2015) 29 *Journal of Asylum, Immigration and Nationality Law* 192, 200.

<sup>106</sup> Application 43844/98, *T.I. v. United Kingdom* [2000] INLR 211.

<sup>107</sup> See *ibid* 3.

<sup>108</sup> See *ibid* 17.

<sup>109</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

<sup>110</sup> Cathryn Costello, 'Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored' (2012) 12 *Human Rights Law Review* 287, 316.

<sup>111</sup> See *ibid* 317.

seekers in Greece; both the UNHCR and the European Parliament released statements cautioning other member states about transferring asylum applicants to Greece, as the care standards did not meet the fundamental rights standards required by either international law or the CEAS.<sup>112</sup> Yet oddly, these cautions were ignored by the ECtHR in the case of *KRS v. United Kingdom*.<sup>113</sup> The *KRS* case involved an Iranian applicant who the UK sought to transfer to Greece in order to have his asylum claim processed there. The applicant argued against the transfer on the basis that the conditions in Greece were a violation of Article 3 of the ECHR and so incompatible with his human rights.<sup>114</sup> Interestingly, the ECtHR chose to focus not on the risks presented by transferring the applicant to Greece, but aiming the judgement instead at whether there was a risk of refoulement to Iran, noting that regardless of the conditions in Greece, the applicant would not face refoulement.<sup>115</sup>

While protection against refoulement is an essential aspect of ensuring fundamental rights of asylum seekers, there are also strong protections both within EU and international law which go beyond refoulement, dictating the asylum seekers' treatment within the second country.<sup>116</sup> Protection from refoulement is far from the only criterion to be considered when examining a member state's human rights record; the level of humane treatment of applicants is also an essential consideration. The ECtHR also ignored the public information which had been released by NGOs and human rights bodies on the situation in Greece, stating that "in the absence of any proof to the contrary, it must be presumed that Greece will comply with that obligation in respect of returnees including the applicant."<sup>117</sup> While there was information in the public domain that Greece had violated the required standards for asylum seekers (the ECtHR even specifically mentioned the relevant UNHCR report),<sup>118</sup> the ECtHR instead chose to focus

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<sup>112</sup> See *ibid* 319.

<sup>113</sup> Application No 32733/08, *KRS v United Kingdom*, Admissibility, 2 December 2008.  
<<http://www.refworld.org/pdfid/49476fd72.pdf>> last accessed 01 June 2016.

<sup>114</sup> See *ibid* 2.

<sup>115</sup> See *ibid* 17.

<sup>116</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. [2013] OJ L 18/96. Analysed in Violeta Moreno-Lax, 'Dismantling the Dublin System: *MSS v. Belgium and Greece*.' (2012) 14 European Journal of Migration and Law 1.

<sup>117</sup> Application No 32733/08, *KRS v United Kingdom* (n 113) 18.

<sup>118</sup> See *ibid* 11.



on the procedure of the CEAS and ignore the practical evidence of the reality in which asylum seekers were living.<sup>119</sup> At this point, the ECtHR seems to have followed the EU's lead in emphasising European harmony over protection of human rights for asylum seekers, rather than analysing the information about the state of the asylum process in Greece.<sup>120</sup>

The *KRS* case allowed the EU to strongly strike a balance towards efficiency rather than human rights, placing procedure of the CEAS above protections. It is not completely clear why the ECtHR subsequently decided to readjust that balance. Costello argues that the awareness of deteriorating standards in Greece became too much for the ECtHR to ignore.<sup>121</sup> Regardless, the *MSS* case<sup>122</sup> focused in far more detail on the reality of the conditions for asylum seekers in Greece. The case involved an applicant who had travelled through Greece to arrive in Belgium and then made an asylum claim in Belgium. The Belgian government sought to return him to Greece for his asylum application to be processed there. When offering a judgement for this case, the ECtHR focused far more on the practical experience that MSS had encountered as an asylum seeker in Greece, including various reports on the conditions of detained asylum seekers<sup>123</sup> and analysis of the successful applications for refugee status (noting that at the initial point, less than 1% of applications were accepted, which only raised to 3% on appeal.)<sup>124</sup> The state of Greece also had not given MSS any means in order to support himself, so he ended up sleeping on the streets of Greece.<sup>125</sup> The ECtHR found this combination of factors meant that there was a violation of Article 3 if the applicant was returned to Greece to apply for asylum there.<sup>126</sup> The ECtHR changed its focus from the narrow perspective of only considering the human rights involved with a possible refoulement to understanding that the conditions in which an asylum applicant is

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<sup>119</sup> Moreno-Lax (n 116) 16.

<sup>120</sup> Costello (n 110) 220.

<sup>121</sup> See *ibid.*

<sup>122</sup> Application 30696/09, *MSS v. Belgium* (2011) 53 EHRR 2.

<sup>123</sup> See *ibid* para 162.

<sup>124</sup> See *ibid* para 126.

<sup>125</sup> See *ibid* para 222.

<sup>126</sup> See *ibid* para 234.

maintained while an application is processed can lead to serious human rights violations.<sup>127</sup>

This is an important point, because the mission of the CEAS was to harmonise the asylum process in every EU country; the previous case-law of the ECtHR accepted this policy as representing the actual state of the various asylum systems, despite evidence to the contrary. The ECtHR noted that it was not just for member states to assume that other states offered strong protections and well-organised asylum processes, but to respond to information in the public domain and to actively seek to ensure that by transferring an asylum applicant, they would still be protected.<sup>128</sup> Moreno-Lax notes that the system has clearly not succeeded in either evenly distributing asylum seekers or protecting their fundamental rights<sup>129</sup> – the Dublin Regulation has not been a successful aspect of the CEAS. It seems that the ECtHR is no longer willing to overlook the reality of human rights violations in favour of the theoretical aims of the CEAS.

The ECtHR's findings in the *MSS* case seems to have, in turn, influenced the CJEU to increase scrutiny of the Dublin system as well.<sup>130</sup> The ECtHR judgement was clearly a disruption to the Dublin system;<sup>131</sup> the CJEU seems to have found it important to offer its own analysis on the treatment of asylum seekers in Greece rather than merely voicelessly accept the ECtHR's judgement. The CJEU was not given jurisdiction over the area of asylum until the Treaty of Amsterdam, and so cases on asylum are still developing over the most recent decade and the Court finding its role in asylum policy oversight.<sup>132</sup> In the case of *N.S. v. Secretary of State for the Home Department*,<sup>133</sup> the CJEU considered several references from various member state courts (specifically the UK and Ireland) regarding the transfer of asylum seekers to Greece in order for their asylum applications to be processed. The title applicant was an Afghani national who applied for asylum in the UK after passing through Greece. He challenged the removal to Greece on the basis that it would violate his fundamental rights under both EU and

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<sup>127</sup> Moreno-Lax (n 116) 26.

<sup>128</sup> See *ibid* 27.

<sup>129</sup> See *ibid* 29.

<sup>130</sup> Ippolito (n 97) 269.

<sup>131</sup> Paris (n 100) 72.

<sup>132</sup> Drywood (n 19) 1094.

<sup>133</sup> Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department* (2012) 49 CML Rev 1735.

international human rights law.<sup>134</sup> Member states clearly were curious to know the CJEU's views on the Dublin system, after the ECtHR's decision in the *MSS* case.

The CJEU noted that the CEAS functioned on the basis of mutual confidence between member states; trust that asylum applications would be handled speedily and fairly in any state to which an applicant is transferred.<sup>135</sup> Although that trust underpins the system, infringements do not necessarily mean that other member states will not be bound by the Dublin system;<sup>136</sup> the CJEU considers the CEAS to allow for some individual human rights violations,<sup>137</sup> but if there are sufficient human rights violations so as to be incompatible with Article 4 of the Charter of Fundamental Rights of the European Union<sup>138</sup> (which prohibits inhumane and degrading treatment), then member states would have to put the well-being of asylum seekers above other goals of the Dublin system and refuse to transfer asylum seekers.<sup>139</sup> In this particular circumstance, the CJEU noted that member states had sufficient information available and so should be aware of the human rights situation in Greece. Asylum seekers should not be transferred to states where they will encounter serious human rights breaches.<sup>140</sup> Yet the solution, according to the CJEU, was not to ignore the Dublin system, but to simply use the other criteria within the system in order to determine where the asylum application should be processed,<sup>141</sup> while not further violating human rights by unreasonably delaying transfers. This judgement seemed to minimise disruptions to the status quo of the Dublin Regulation.<sup>142</sup> This would seem to be a judgement which continues the EU trend of balancing human rights and efficiency – to a degree, the CJEU will overlook individual rights violations in order to preserve the CEAS, but once flaws become an irreparable aspect of the asylum process in a particular country, the other member states must ensure

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<sup>134</sup> See *ibid* para 39.

<sup>135</sup> See *ibid* para 79.

<sup>136</sup> See *ibid* para 82.

<sup>137</sup> See *ibid* para 84.

<sup>138</sup> Charter of Fundamental Rights of the European Union [2012] OJ C 326/391.

<sup>139</sup> Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department* (2012) 49 CML Rev 1735, para 86.

<sup>140</sup> See *ibid* para 94.

<sup>141</sup> See *ibid* para 95.

<sup>142</sup> *Drywood* (n 19) 1113.

that the low standards do not affect asylum seekers. The CJEU has found an equilibrium that member states are expected to maintain.<sup>143</sup>

It is unclear how the EU Charter of Fundamental Rights will continue to affect this equilibrium. The Charter of Fundamental Rights had previously been an unenforceable list of rights which were considered to exist within EU law, but after the Treaty of Lisbon, the rights contained in the Charter became enforceable as part of EU law and EU citizens will be able to bring cases for EU provisions which are not compatible with the Charter.

The Charter does make specific reference to asylum, with Article 18 stating, The right to asylum shall be guaranteed with due respect for the rules of the Geneva Convention of 28 July 1951 and the Protocol of 31 January 1967 relating to the status of refugees and in accordance with the Treaty on European Union and the Treaty on the Functioning of the European Union. (hereinafter referred to as "the Treaties").

Article 19 also prohibits removal from the EU when there is a risk of torture or inhumane. It is unclear how much of a difference this change will make, since it was already clearly stated that EU asylum law would make reference to the Refugee Convention. Yet the ability to sue to enforce this law may change the EU's treatment of asylum seekers and refugees and increase inclusion of human rights provisions.

It seems clear to various commentators that the CJEU requires proof of serious, systematic flaws in a member state's asylum processes before halting the state's responsibility under the Dublin system.<sup>144</sup> Yet the CJEU has stopped short of criticising the tenets of the Dublin system, instead suggesting ways to work around the flawed human rights systems in Greece.<sup>145</sup> It seems clear that the CJEU is not an element of radical change, but simply a force to moderate between competing aims.<sup>146</sup> The CJEU has not made representations as to whether the Dublin system is an effective method to achieve its stated aims, simply sought to ensure that there is no fundamental collapse of human rights. In a way, the CJEU seems almost politically neutral, ensuring the system

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<sup>143</sup> Drywood (n 19) 1133.

<sup>144</sup> Garlick (n 105) 200 and Costello (n 110) 230.

<sup>145</sup> Moreno-Lax (n 116) 29.

<sup>146</sup> Ippolito (n 97) 278.

is maintained (albeit with a minimum level of human rights), rather than challenging the assumptions made in crafting the CEAS.<sup>147</sup>

## V. NGO Criticism of the CEAS

While the CJEU is in a unique position to enforce its concerns over the standards of fundamental rights in the CEAS, other human rights organisations both commissioned by and observing the EU have also considered the quality of rights protection for asylum seekers, as well as providing in-depth examinations of whether the CEAS currently protects human rights within the asylum system. This includes reports from organisations within the EU,<sup>148</sup> from within the Council of Europe<sup>149</sup> and non-governmental organisations which focus on human rights<sup>150</sup> and migrant protection.<sup>151</sup> It is interesting to consider the various perspectives on the balance between human rights and efficiency reached by the CEAS. It seems clear that even the organs of the EU understand that the CEAS has not fully achieved the dual aims of better distribution of asylum seekers and offering a common standard of protections throughout the asylum process.<sup>152</sup> Yet there is certainly disagreement as to which of these two aims should be prioritised and how best to improve the CEAS.

More than one organisation has specifically mentioned that CEAS has failed to adequately protect vulnerable asylum seekers. The Committee of Migration, Refugees and Displaced Persons for the Council of Europe has pointed to the lack of legislation specifically targeted as protecting categories of vulnerable migrants or even a definition of a “vulnerable” asylum seeker, which has led to inconsistent standards for protection of

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<sup>147</sup> Drywood (n 19) 1133.

<sup>148</sup> European Commission, ‘A European Agenda on Migration’ COM(2015) 240 final and Directorate-General for Internal Policies, ‘Study for the LIBE Committee: Enhancing the Common European Asylum System and Alternatives to Dublin.’ (European Parliament website, 13 May 2015.) <[http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL\\_STU%282015%29519234\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2015/519234/IPOL_STU%282015%29519234_EN.pdf)> last accessed 01 June 2016.

<sup>149</sup> Committee of Migration, Refugees and Displaced Persons, ‘After Dublin – the urgent need for a real European Asylum System’. (Council of Europe website, 10 September 2015). <<http://assembly.coe.int/nw/xml/XRef/X2H-Xref-ViewPDF.asp?FileID=22016&lang=en>> last accessed 08 January 2018.

<sup>150</sup> Human Rights Watch, ‘World Report 2013: European Union’ (Human Rights Watch website, 2013.) <<https://www.hrw.org/world-report/2013/country-chapters/france-germany-greece-hungary-italy-netherlands-poland-romania>> last accessed 01 June 2016.

<sup>151</sup> European Council on Refugee and Exiles. European Comparative Report: Dublin II Regulation – Lives on Hold. (ECRE website, February 2013). <<http://www.ecre.org/component/downloads/downloads/701.html>> accessed 09 June 2017.

<sup>152</sup> European Commission (n 148) 2.

asylum seekers across member states.<sup>153</sup> This is echoed by the European Council on Refugees and Exiles (ECRE), which also points out that despite EU insistence to the contrary, standards and procedures for treatment of asylum seekers remain inconsistent across member states.<sup>154</sup> While also mentioning that less than 30% of asylum seekers are ever transferred under the Dublin system,<sup>155</sup> the ECRE questions why the sovereignty clause (which allows member states to examine an asylum application made in their jurisdiction, regardless of the appropriate member state under the Dublin system) is not used more often and more consistently to protect vulnerable asylum seekers – and when the clause is used, this is not necessarily with the permission of the asylum seeker.<sup>156</sup> The ECRE suggests that the CEAS is particularly harsh on vulnerable asylum seekers; there is no Europe-wide specific definition of vulnerability.<sup>157</sup> The ECRE recommended that the EU Commission authorise research into the effects that the Dublin system has had on groups of vulnerable asylum seekers, allowing the EU to better support asylum applications.<sup>158</sup> Transferring between states under the asylum system can be difficult for vulnerable asylum seekers, particularly considering the treatment of asylum seekers who are earmarked for a transfer. These applicants can often be kept in separate accommodation and even given less financial support than asylum seekers remaining in a particular country<sup>159</sup> – differences which would obviously disproportionately affect vulnerable applicants.

It is interesting that when choosing researchers for a report on asylum conditions and procedures, along with recommendations for improvements, the European Parliament chose to request work from the academic commentators who had been producing strong criticism of the CEAS and specifically the Dublin Regulation.<sup>160</sup> It would indicate that the European Parliament was interested in receiving strong, objective feedback in order to improve the CEAS. Accordingly, the report provided a harsh view of the current

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<sup>153</sup> Committee of Migration, Refugees and Displaced Persons (n 149) 4.

<sup>154</sup> European Council on Refugee and Exiles (n 151) 5.

<sup>155</sup> European Council on Refugee and Exiles (n 151) 6.

<sup>156</sup> See *ibid* 6-7.

<sup>157</sup> See *ibid* 7.

<sup>158</sup> See *ibid* 11.

<sup>159</sup> See *ibid* 8.

<sup>160</sup> Including Elspeth Guild, who authored Guild (n 63), Cathryn Costello, who authored Costello (n 6) and Violeta Moreno-Lax, who authored Moreno-Lax (n 116).

reality of the asylum process within the EU, arguing that despite the massive amount of resources that have been directed into trying to improve the infrastructure of the CEAS, it has largely been ineffective both in protecting fundamental rights and in equally dividing asylum applications. In 2015, 70% of asylum applications were handled by 5 member states.<sup>161</sup> Only 3% of asylum applicants are eventually transferred within the EU.<sup>162</sup> While the chances of being transferred are low for any individual applicant, it can appear to asylum applicants, as well as officials in member states, to be a random and arbitrary process, which increases mistrust and fear of the common asylum system.<sup>163</sup>

The panel's final report included some proposals of changes which could be made within the current CEAS. The panel suggests that the EU lifts visa requirements on nationals from certain countries (these tend to be refugee-producing countries.) While this would increase the number of asylum seekers who are able to reach the borders of the EU, it would eliminate dangerous journeys aimed at reaching the EU without a valid visa<sup>164</sup> if migrants knew they would be able to lodge an asylum application upon reaching an EU member state.<sup>165</sup> Unfortunately, when considering changes made to reduce the number of asylum seekers within Europe, the Commission argues that maintaining visa requirements for nationals from specific countries is essential.<sup>166</sup> This would seem to support the idea that the Commission is prioritising reducing the number of asylum seekers over protecting fundamental rights of asylum applicants, ignoring the advice given which was aimed at providing more protections for asylum seekers. It seems unlikely that this advice would be taken by the member states in light of the current "migration crisis", but it could eliminate, for example, asylum seekers in camps at the Calais border, hoping to reach the UK.

The panel also recommends mutual recognition between member states not only for negative asylum decisions, but also when refugee status is granted.<sup>167</sup> Currently,

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<sup>161</sup> Committee of Migration, Refugees and Displaced Persons (n 149) 5.

<sup>162</sup> Directorate-General for Internal Policies (n 148) 16

<sup>163</sup> See *ibid* 18.

<sup>164</sup> Kalyeena Makortoff, 'Pressure mounts on Europe as migrant death toll soars' (CNBC.com, 31 August 2015). <<http://www.cnbc.com/2015/08/31/pressure-mounts-on-european-policymakers-as-migrant-death-toll-rises.html>> last accessed 01 June 2016.

<sup>165</sup> Directorate-General for Internal Policies (n 148) 21.

<sup>166</sup> European Commission (n 148) 13.

<sup>167</sup> Directorate-General for Internal Policies (n 148) 21.

rejection of an asylum decision in any member state is considered a rejection in all member states, yet a decision to grant asylum status will not extend to other member states. This effectively leaves asylum seekers stranded in the country in which they are eligible to apply for asylum under the Dublin Regulation, regardless of a common language, culture or distant family or community connections.<sup>168</sup> If there were an obligation to recognise refugee status, refugees would not be stranded in a single member state. The Commission does seem to agree with this argument, proposing mutual positive recognition.<sup>169</sup> While this will not have an effect on human rights protections during the asylum decision-making process so long as asylum seekers are still subjected to the Dublin Regulation, it will give refugees more options for living their lives within Europe. While the Commission could be motivated by a desire to protect the human rights of refugees, it is worth noting that this change could have the effect of more evenly distributing refugees (if not asylum applications) throughout Europe.

The panel set out two divergent options, either of which it believed could improve the asylum process within Europe. The suggestions were drafted from a perspective of suggesting essential improvements in order for the Dublin system to support asylum seekers, while not grouping all applications in a small number of member states. The first suggestion would be to almost abandon the Dublin system and allow asylum seekers their own choice of venue for asylum applications.<sup>170</sup> The panel reiterates that since such a small percentage of asylum seekers are eventually ever transferred, the reality is that most asylum seekers can already choose the member state they feel the greatest connection with. Yet even if they are likely to remain in their chosen state, there is still an omnipresent risk of deportation and fear.<sup>171</sup> Allowing asylum seekers to make honest and informed decisions around their choice of forum for an asylum application would be a way for asylum seekers to more directly seek protection from the EU and be able to be more open about their experience of applying for asylum in particular member states, thus illuminating fundamental rights violations.<sup>172</sup> This would remove the illusion that all member states follow the same procedures and hold the same standards of

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<sup>168</sup> See *ibid* 49.

<sup>169</sup> European Commission (n 148) 17.

<sup>170</sup> See *ibid* 55.

<sup>171</sup> See *ibid* p55.

<sup>172</sup> See *ibid* p55.



fundamental rights, allowing the member states and the EU to improve asylum systems from a more honest understanding of the current situation.<sup>173</sup>

The second alternative was a totally opposite solution – to create a centralised Europe-wide office that would have branches in each member state and would handle all asylum application. The panel seems to suggest that if handled by one agency, the response to applications will be more coordinated and consistent.<sup>174</sup> These two suggestions seem to be focused at the two different aims of the CEAS. While allowing member states to choose which state in which to lodge an application should mean that member states are less tightly grouped in several states, it would not necessarily have an effect on the divergent human rights standards. A centralised EU office to hear asylum applications would theoretically provide a more consistent standard of human rights but if the Dublin Regulation was still in place, would not change the disproportionate number of asylum seekers in certain member states.

The ECRE also reported extensively on the effect that EU and ECtHR judgements have had on the practice of member states.<sup>175</sup> After the cases of *MSS v. Belgium*<sup>176</sup> and *NS v. Secretary of State*,<sup>177</sup> there is now a responsibility on member states to ensure that they are not aware of any systematic human rights violations before transferring an asylum applicant under the Dublin Regulation. Despite the CJEU's decision that Greece was not currently a safe place for asylum seekers, several member states continue to assess transfers on an individual basis.<sup>178</sup> The ECRE interprets this to mean that member states and the EU are interested in superficial reforms, but are not willing to question the basic assumptions of the Dublin Regulation, which would be required in order to properly protect vulnerable asylum seekers.<sup>179</sup>

The ECRE would agree with the panel from the Directorate-General for Internal Policies that while there are some simpler improvements which can be made to the

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<sup>173</sup> See *ibid* 55.

<sup>174</sup> See *ibid* 59.

<sup>175</sup> See *ibid* 110.

<sup>176</sup> Application 30696/09, *MSS v. Belgium* (2011) 53 EHRR 2.

<sup>177</sup> Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department* (2012) 49 CML Rev 1735.

<sup>178</sup> European Council on Refugee and Exiles (n 151) 110.

<sup>179</sup> See *ibid* 117.

CEAS, a complete re-evaluation of the system is necessary.<sup>180</sup> The CEAS has been ineffective in terms of fairly allocating asylum seekers and protecting fundamental rights – it seems that member states and the EU are unwilling to address the rights deficit or the unreasonable burden placed on several member states. This can be seen by examining a statement by the Commission regarding the current migrant crisis in Europe.<sup>181</sup> The Commission did note that the current situation – and the response by the various member states – was insufficient, leading to an uncoordinated response that failed to respect either the integrity of member states asylum systems or to protect asylum seekers.<sup>182</sup>

In addition to suggestions regarding immediate emergency responses,<sup>183</sup> the Commission sought to consider longer-term changes that could reduce the number of asylum seekers over time. The Commission notes that foreign policy is an important aspect of asylum policy. Unstable global situations will always produce more refugees and so the EU member states have a responsibility through their diplomatic actions to ensure that human rights are respected, reducing the number of people forced to flee from their countries of origin.<sup>184</sup> This is a fairly uncontroversial proposition; of course, many asylum seekers would much prefer to remain in their home country, safe from threat of persecution. The Commission also argues that more bilateral agreements are needed in order to return asylum seekers to their country of origin.<sup>185</sup> While this may achieve the aim of reducing the number of asylum seekers processed by the EU, it is concerning from a human rights-based perspective. There is already an EU-wide list of “super safe” third countries, states from which asylum applicants will face accelerated procedures, which includes a presumption of safety from those countries.<sup>186</sup> Most of these countries have bilateral agreements with the EU.<sup>187</sup> It is worrying if asylum applicants from particular countries are denied the same protections and consideration as other asylum applicants.

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<sup>180</sup> European Council on Refugee and Exiles (n 151) 117 and Directorate-General for Internal Policies (n 148) 16.

<sup>181</sup> European Commission (n 148).

<sup>182</sup> See *ibid* 2.

<sup>183</sup> See *ibid* 3.

<sup>184</sup> See *ibid* 7.

<sup>185</sup> See *ibid* 8.

<sup>186</sup> Costello (n 110) 312.

<sup>187</sup> European Commission, Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin for the purposes of Directive 2013/32/EU of the European Parliament and of the Council on common procedures for granting and withdrawing

Most disturbing is the Commission's argument that the EU should be focusing resources on "abuses" within the asylum system. The Commission argues that 55% of asylum applications are rejected and assumes that these applicants are committing fraud against the EU. This is concerning, particularly that the Commission assumes that all of these applications are fraud or abuse, rather than ineligible applications made in good faith or, more troubling, mistakes by the evaluating member states. The ECtHR has noted that only 1% of asylum applications in Greece are approved at the initial application.<sup>188</sup> This is an incredibly low figure, even compared to other member states. It seems unlikely that the discrepancies in acceptance rates of asylum applications<sup>189</sup> across Europe are purely due to fraud; there are differences in procedure and treatment amongst member states.<sup>190</sup> Disappointingly, the Commission has chosen not to examine whether member state procedures are responsible for the high number of rejected applications, instead of interpreting the numbers as representing fraud.

It is concerning that the Commission is unwilling to consider the effectiveness of the CEAS or reconsider the system's methods and core aims. The Commission's response to these reports seems to deliberately ignore the evidence that the CEAS has forced the EU to make trade offs between fundamental rights and equally distributing asylum burdens – and yet not quite been successful with either. While there are comprehensive reports and improvement suggestions, it seems the EU is not yet willing to deal with the basic changes needed in order to make the CEAS more effective, both for member states and asylum applicants.

## **VI. Conclusion**

It is impossible to discuss the views of the EU without acknowledging the diverse views of the various organs within the EU towards changes to the CEAS. From the European Parliament, which has commissioned academics who have historically been critical of the CEAS to make proposals for changes,<sup>191</sup> to the CJEU, which has proposed short-term solutions to unacceptable transfers between member states to finally the

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international protection and amending Directive 2013/32/EU. COM (2015) 452 final 2015/0211 COD.

<sup>188</sup> Application 30696/09, *MSS v. Belgium* (2011) 53 EHRR 2, para 126.

<sup>189</sup> Bovens, Chatkupt and Smead (n 57) and Costello (n 110) 317.

<sup>190</sup> Costello (n 110) 315.

<sup>191</sup> Directorate-General for Internal Policies (n 148).

European Commission,<sup>192</sup> which has suggested conservative solutions to amending the Dublin Regulation,<sup>193</sup> there seem to be varying levels of awareness of the inadequacy of the Dublin Regulation both to protect the rights of asylum seekers<sup>194</sup> and to evenly distribute asylum applications across the EU.<sup>195</sup>

The proposals for the most recent recast of the Dublin system (the Dublin III Regulation<sup>196</sup>) is the best tool for understanding the EU's plan for the future of the Dublin system. Although several member states, including the UK and Ireland, have opted out of the Dublin III Regulation, it is still applicable to a majority of EU member states.<sup>197</sup> The recast process seems to specifically focus on several criticism made by NGOs and the CJEU. The ECRE has claimed that the older regulation was less protective of a wide variety of particularly vulnerable asylum seekers,<sup>198</sup> while the CJEU has argued that dependant family relationships should be interpreted broadly.<sup>199</sup> This was reflected in the recast directive, which broadens the protections for family members.<sup>200</sup> The regulation also responded to CJEU's concerns<sup>201</sup> about transferring asylum seekers to member states with systematic human rights abuses.<sup>202</sup> Asylum seekers now may appeal a transfer on the basis of inadequate standards, bringing information about human rights violation to

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<sup>192</sup> Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department* (2012) 49 CML Rev 1735.

<sup>193</sup> European Commission (n 148.).

<sup>194</sup> Costello (n 6).

<sup>195</sup> Committee of Migration, Refugees and Displaced Persons (n 149) 5.

<sup>196</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast.) OJ L 180/31.

<sup>197</sup> 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).' (ECRE website, 13 December 2011). <[http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast\\_October-2013.pdf](http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Information-Note-on-the-Qualification-Directive-recast_October-2013.pdf)> last accessed 01 June 2016.

<sup>198</sup> European Council on Refugee and Exiles (n 151).

<sup>199</sup> Case C-245/11, *K v. Bundesasylamt* [2014] 1 WLR 1895.

<sup>200</sup> European Council on Refugees and Exiles (n 197) 4.

<sup>201</sup> Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department* (2012) 49 CML Rev 1735.

<sup>202</sup> Steve Peers, 'The Dublin III Regulation: What Will be different?' (2014) 28 Journal of Immigration Asylum and Nationality Law 46, 48.

the attention of the member states in order to prevent referral to a particular member state.<sup>203</sup>

While the European Council of Ministers and the European Parliament did clearly draft the directive with the opinions of the CJEU in mind, the European Parliament seems to have chosen to ignore the advice from academics who argue that such changes will not resolve the fundamental complaints of the EU:<sup>204</sup> namely that the Dublin system does not lead to an even distribution of asylum seekers<sup>205</sup> and the CEAS has not adequately guarded human rights of asylum seekers.<sup>206</sup> Without any will from the organs of the EU or the member states to readdress this major policy aims and the methods of enforcement, the CEAS is unlikely to change on a more substantial level.

Yet major changes should not be considered impossible. Currently, EU migration policy is evolving in unexpected directions. The EU's long term plan has been disrupted by the extreme migration of displaced persons from Syria due to the country's internal conflict. Germany has, in light of the crisis, decided to ignore the Dublin system in order to process a large number of applications directly.<sup>207</sup> The Syrian migrant crisis is a reminder that, although the various EU organs can hold consultation processes and draft legislation, member states will still respond to changing current events. For that reason, it is impossible to totally predict the future of the CEAS; it cannot be divorced from the behaviour and intentions of member states, which is constantly evolving.

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<sup>203</sup> See *ibid.*

<sup>204</sup> Directorate-General for Internal Policies (n 148).

<sup>205</sup> Committee of Migration, Refugees and Displaced Persons (n 149) 5.

<sup>206</sup> Costello (n 110).

<sup>207</sup> Allan Hall and John Lichfield, 'Germany opens its gates: Berlin says all Syrian asylum-seekers are welcome to remain, as Britain is urged to make a "similar statement."' *The Independent* (London, 25 August 2015.)

## Chapter 4: The EU, Gender and Asylum

### I. Introduction

The European Union has been heavily criticized for the effects that its asylum legislation has had on particularly vulnerable migrants. In the Commission's ineffective attempts to more evenly proportion asylum applications across member states, measures specifically supporting some high-risk groups of refugees have not been prioritised.<sup>1</sup> This overall academic research is aimed at considering the EU's emphasis on protection of a specific vulnerable population of asylum seekers, women who are fleeing sexual and domestic violence. Unfortunately, fleeing violence against women is far from an atypical experience for women seeking asylum. In a report compiled by Women for Refugee Women of female asylum seekers detained in Yarl's Wood Immigration Removal Centre in the UK, the NGO found that over 72% of women interviewed had been raped in their home country. The number increased when taking into account sexual assaults in flight or upon arrival.<sup>2</sup> In one interview for this research, a solicitor expressed her assumption that if a female client disclosed a period of imprisonment, she had likely been raped, as it was unusual to be held without encountering sexual violence.

Unfortunately, sexual violence is a widespread experience for women worldwide – the World Health Organization estimates that at least 30% of women will encounter sexual violence during their lifetime.<sup>3</sup> While it is a common occurrence, it is still a

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<sup>1</sup> European Council on Refugee and Exiles, 'European Comparative Report: Dublin II Regulation – Lives on Hold.' (ECRE website, February 2013).

<<http://www.ecre.org/component/downloads/downloads/701.html>> 117, last accessed 20 August 2017. Also see: Directorate General for Internal Policies of the European Parliament. 'Gender Related Asylum Claims in Europe'. (European Parliament website, 2012). <[http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM\\_ET\(2012\)462481\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/etudes/join/2012/462481/IPOL-FEMM_ET(2012)462481_EN.pdf)>\_118 last accessed 20 August 2017.

<sup>2</sup> Marchu Gima, Sophie Radice, Natasha Tsangrides and Natasha Walter, Detained: Women Asylum Seekers Locked up in the UK.' (Women for Refugee Women website, January 2014). <<http://www.refugeewomen.co.uk/wp-content/uploads/2014/01/WRWDetained.pdf>> 5, last accessed 20 August 2017.

<sup>3</sup> World Health Organisation, 'Violence Against Women: Intimate Partner and Sexual Violence Against Women.' (WHO Media Centre, November 2014). <<http://www.who.int/mediacentre/factsheets/fs239/en/>> last accessed 20 August 2017.

deeply traumatic event for survivors.<sup>4</sup> Unfortunately, sexual and domestic violence still disproportionately plague women around the world, yet not all states have stronger legislative and cultural protections for survivors.. The EU has expressed in strong terms the need for measures that combat violence against women in a multitude of forms.<sup>5</sup>

While women experience disproportionate discrimination and fewer legal protections than men in many states, including the home states of asylum seekers,<sup>6</sup> women applying for asylum in their own right only consist of approximately 1/3 of applications.<sup>7</sup> Both the prevalence of gender-based violence and the discrepancy in protection would seem to violate women's human rights.<sup>8</sup> The European Union, since the initial landmark CJEU decision of *Defrenne v. Sabena (No. 2)*,<sup>9</sup> has considered gender equality to be one of its essential principles.<sup>10</sup> This has been expanded into the concept of gender mainstreaming, which has been interpreted to mean that the EU should consider the gendered implication of every policy in every area of competence.<sup>11</sup> This

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<sup>4</sup> Jennifer A. Bennice, Patricia A. Resick, Mindy Mechanic and Millie Astin, 'The Relative Effects of Intimate Partner Physical and Sexual Violence on Post-Traumatic Stress Disorder Symptomatology.' (2003) 18 *Violence and Victims* 87.

<sup>5</sup> European Commission, 'European Commission actions to combat Violence against Women.' (European Commission website, January 2015). <[http://ec.europa.eu/justice/gender-equality/files/documents/140303\\_factsheet\\_vaw\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/140303_factsheet_vaw_en.pdf)>, last accessed 20 August 2017. See also Article 1.6, European Commission, 'A Roadmap for equality between women and men 2006-2010.' (European Commission website, 2006). <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52006DC0092>>, last accessed 20 August 2017 and Celeste Montoya, 'The European Union, Capacity Building and Transnational Networks: Combating Violence against Women through the Daphne Program.' (2008) 62 *International Organization Foundation* 359.

<sup>6</sup> UN High Commissioner for Refugees. (6 March 2008.) 'UNHCR Handbook for the Protection of Women and Girls.' (UN High Commission for Refugees, 06 March 2008). <<http://www.unhcr.org/47cfae612.html>>, last accessed 20 August 2017

<sup>7</sup> Directorate General for Internal Policies of the European Parliament (n 1). This does not include women who are claimed as a family member of a male asylum applicant.

<sup>8</sup> There is a difference between biological sex and gender (society's perception of men, women, and those without binary gender.) See Rhonda K. Unger, 'Towards a Redefinition of Sex and Gender' (1979) 34 *American Psychologist* 1085. This research focuses on women whose abuse is condoned or ignored due to societal views about the role of women and while this includes sexual violence, will focus on gender as opposed to biological sex.

<sup>9</sup> C-43/75, *Defrenne v. Sabena (No 2)*. [1976] ECR 455. This case referred to then-article 119 of the Treaty of the European Community, now Article 157 of the Consolidated version of the Treaty on the Function of the European Union 2008/C 115/01.

<sup>10</sup> See Article 10 of The Treaty on the Function of the European Union (n 9.)

<sup>11</sup> European Commission, 'Equal Guide on Gender Mainstreaming'. (European Commission website, 2004). <[http://ec.europa.eu/employment\\_social/equal\\_consolidated/data/document/gendermain\\_en.pdf](http://ec.europa.eu/employment_social/equal_consolidated/data/document/gendermain_en.pdf)>, last accessed 20 August 2017. The policy of gender mainstreaming has been analysed in, amongst others, Fiona Beveridge, 'Building against the past: the impact of gender on EU law and policy.'

can often be a confusing concept to put into the practice of legislation governing the CEAS – the EU is also hampered by its limited competence in the field of asylum, as it is a shared competence with member states. Yet as well as being hampered by limited control of asylum policy, the EU has not emphasized protecting sexual violence survivors and ensuring gender equality within the asylum process.

This chapter will provide a broad analysis of the various gendered aspects of asylum law within the EU. The first section will focus on how far the EU's competence extends in order to incorporate gender equality into asylum law and existing EU law regarding gender and asylum. There are very few specific references to gender in the CEAS,<sup>12</sup> but it is important to consider the roles and views of various organs of the EU and their emphasis on support for fundamental rights of female asylum seekers. The EU has attempted to balance theoretical protection of the fundamental rights of women, ingrained in the TFEU,<sup>13</sup> with its preferred priorities for the CEAS. There is a gap between the theoretical intentions of gender mainstreaming and the applicable aspects of EU asylum policy.<sup>14</sup> This section will consider EU treaty provisions and legislation. These are essential to understand the EU's current policy regarding asylum and gender equality.

The second section will examine the international law on gender and asylum which has been incorporated into EU law. The EU frequently references international human rights law<sup>15</sup>, particularly in the area of specific vulnerabilities. Just as it is impossible to fully understand a member state's asylum policy without reference to EU law, it is essential to note the EU member state's international law obligations in order to better understand the theoretical framework in which states decide on asylum application

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(2007) 32 *European Law Journal* 193 and Sonia Mazey, 'Gender Mainstreaming Strategies in the EU: Delivering on an Agenda.' (2002) 10 *Feminist Legal Studies* 227.

<sup>12</sup> Directorate General for Internal Policies of the European Parliament (n 1) 35.

<sup>13</sup> See Article 10 of The Treaty on the Function of the European Union (n 9).

<sup>14</sup> Directorate General for Internal Policies of the European Parliament (n 1) and European Women's Lobby, 'Asylum is not Gender Neutral: Protecting Women seeking Asylum.' (European Women's Lobby website, November 2007). <<http://www.womenlobby.org/Asylum-is-not-gender-neutral-the-refugee-crisis-in-Europe-from-a-feminist>>, last accessed 20 August 2017.

<sup>15</sup> This has primarily been the ECtHR, as discussed in Cathryn Costello, 'The *Bosphorus* ruling of the European Court of Human Rights: Fundamental rights and blurred boundaries in Europe' (2006) 6 *Human Rights Law Review* 87. For an in-depth broader examination of the EU and international law, see Katja S. Ziegler, 'The Relationship between EU and International Law' (2013) University of Leicester School of Law Research Paper 13.



processes. While not all international agreements are binding or enforceable, they can set out several aspects of best practice, or simply illustrate ideal fundamental rights protection in refugee situations,<sup>16</sup> for the EU and member states to consider, as well as providing a guide for member state law and practice.

The third section will examine the NGO response to the gendered aspects of the asylum system. Several reports by NGOs have focused on how EU asylum law treats women applying for asylum,<sup>17</sup> examining the variety of practices throughout the national law of EU member states. As we noted in the previous chapter, NGOs often can offer a more unbiased and honest assessment as to whether policy has managed to achieve human rights aims. This section will criticize current EU policy towards sexual assault survivors and more fully explain the gap between international legal instruments and member state practice.

The final section offers feminist analysis of the current EU policy regarding asylum seekers fleeing violence against women. Academics note that original recognition of the asylum process, the Refugee Convention,<sup>18</sup> was not written from a gendered perspective and did not envision women fleeing persecution on the basis of gender.<sup>19</sup> While there is growing lip service in EU law about the importance of ensuring gender-aware legislation, including in the area of asylum,<sup>20</sup> there is not always an intersectional feminist understanding of how EU legislation in the area of asylum affects female asylum seekers. This section will examine the behaviour of the EU from an intersectional perspective and offer suggestions as to how the EU organs can better understand the needs of female asylum seekers. This chapter will provide insight into the

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<sup>16</sup> See, for example, UN High Commissioner for Refugees, 'Guidelines on Prevention and Response to Sexual Violence Against Refugees.' (UN High Commissioner for Refugees, 1995). <<http://www.unhcr.org/3b9cc26c4.html>>, last accessed 20 August 2017 and UN High Commissioner for Refugees, 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1a(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.' (UN High Commissioner for Refugees, 07 May 2002).<

<<http://www.refworld.org/pdfid/3d36f1c64.pdf>>, last accessed 20 August 2017.

<sup>17</sup> Directorate General for Internal Policies of the European Parliament (n 1) and European Women's Lobby (n 13).

<sup>18</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)

<sup>19</sup> Directorate General for Internal Policies of the European Parliament (n 1) 12.

<sup>20</sup> European Commission (2006) (n 5).

best practice expected of the EU and how that EU has translated that into policy – as well as where the gaps are in EU legislation.

## II. Gender Mainstreaming and the European Union competences

It is essential to establish whether the EU has competence to promote a more gender-aware form of asylum to its member states. While the EU has fundamental rights standards that are intended to guide the legislative work of the various organs of the EU,<sup>21</sup> there have been varying degrees of success in embedding human rights into the core of EU governance.<sup>22</sup> Yet the EU has become more vocal about the essential role that fundamental rights do and should play in shaping policy.<sup>23</sup> As previously noted, gender equality has now become an essential aim of the European Union. Article 10 of the most recent version of the TFEU notes that “In defining and implementing its policies and activities, the Union shall aim to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.”<sup>24</sup> The conceptual role of the EU in enforcing gender equality has progressed from its initial economically-focused ideal of ensuring equality within the workplace.<sup>25</sup> As seen in the case of *Defrenne v. Sabena (No. 2)*,<sup>26</sup> early in the history of the then-European Community, gender equality was initially seen as a providing limited support for equal treatment within the workplace, unsurprisingly for an international organization primarily concerned with free trade and open markets.<sup>27</sup>

The EU seemed to recognise that this economic focus did not fully deal with the complexities of gender inequality, especially the non-economic factors which affect the

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<sup>21</sup> Charter of Fundamental Rights of the European Union 2012/C 326/02.

<sup>22</sup> Beveridge (n 11).

<sup>23</sup> Beveridge (n 11). Also see the EU’s discussion of ascension into the ECHR, as considered in Noreen O’Meara., ‘A More Secure Europe of Rights?’ The European Court of Human Rights, the Court of Justice of the European Union and EU Accession to the ECHR.’ (2011) 12 *German Law Journal* 1813.

<sup>24</sup> See Article 10 of The Treaty on the Function of the European Union (n 9)..

<sup>25</sup> Emilie Hafner-Burton and Mark A. Pollack, ‘Mainstreaming Gender in the European Union. (2000) 7 *Journal of European Public Policy* 432.

<sup>26</sup> C-43/75, *Defrenne v. Sabena (No 2.)* [1976] ECR 455.

<sup>27</sup> For criticism of the EU’s economic focus, see Mazey (n 11). For more discussion on the then- EC’s influence on equal pay, see Erika Szyszczak, ‘Pay Inequalities and Equal Value Claims’ (1985) 48 *MLR* 139.

role of women within society.<sup>28</sup> A major shift in the EU's focus on gender policy came with the adoption of the concept of gender mainstreaming, which became embedded in the Treaty of Amsterdam.<sup>29</sup> Gender mainstreaming is a method of achieving equality, stemming from a desire for a more gendered focus on international law,<sup>30</sup> a way of reframing conversations about gender from simply focusing on achieving traditional feminist goals to instead more broadly analyse the process of legislating and the varying effects that all policies and legislation may specifically have on women. It is a relatively recent concept, meant to take a holistic approach regarding the role of women in society. Gender mainstreaming is intended to maintain constant gender awareness in government, using a variety of tools such as research and consultations with NGOs that focus on gender equality.<sup>31</sup> Gender mainstreaming provides recognition that the EU's traditional methods of correcting gender imbalance have not been effective in addressing global gender inequalities such as the gender pay gap and violence against women<sup>32</sup> - more thoughtful, researched and organised techniques are needed. Traditionally, as noted in chapter 3, organs of the EU such as the European Parliament have been more interested in the broader equality agenda than other organs such as the European Council of Ministers. Gender mainstreaming was intended to remedy this inconsistency.<sup>33</sup>

The European Commission has set out a definition for gender mainstreaming which can be used throughout the EU, stating:

Gender mainstreaming can be defined as the integration of a gender perspective into every aspect of EU intervention – preparation, design, implementation, monitoring and evaluation of policies, legal measures and spending programmes - with a view to achieving equality between women and men. It means assessing how such intervention impacts on both women and men and taking responsibility for any readjustment necessary. Gender mainstreaming makes EU interventions smarter and more effective by

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<sup>28</sup> Mazey (n 11) 227.

<sup>29</sup> The Treaty on the Function of the European Union (n 9)... As discussed in Beveridge (n 11).

<sup>30</sup> Office of the Special Adviser on Gender Issues and the Advancement of Women, 'Gender Mainstreaming: An Overview.' (United Nations website, 2002.)  
<<http://www.un.org/womenwatch/osagi/pdf/e65237.pdf>> 9, last accessed 20 August 2017. For an analysis of gender mainstreaming in international law, see Hilary Charlesworth, 'Not Waving but Drowning: Gender Mainstreaming and Human Rights in the United Nations.' (2005) 18 Harvard Human Rights Journal 1.

<sup>31</sup> Office of the Special Adviser on Gender Issues and the Advancement of Women (n 29).

<sup>32</sup> See *ibid* 1.

<sup>33</sup> Mazey (n 11) 228.

making their gender relevance visible so that women and men benefit equally and inequality is not perpetuated.<sup>34</sup>

The EU is making it clear that gender will not be treated as a “special interest” or cordoned off into a gender equality department, but considered in every policy area. The EU is expanding the idea of gender awareness to every area of its competence. This means that the EU no longer needs to justify trying to end oppression with economic arguments<sup>35</sup> – equality is now one of the key values of the EU.<sup>36</sup> Non-discrimination based on gender has been incorporated into the Charter of Fundamental Rights of the European Union, the source of human rights for all policies of the EU.<sup>37</sup> The EU is intended to constantly consider gender equality; this should include thoughtfulness when legislating for asylum, promoting best practice and when determining cases that relate to asylum.

Interestingly, the EU has focused on two major inequalities faced by women: the gender pay gap, which is the divide between the salaries that equally qualified men and women receive, and violence against women – these were even voted by European citizens to be the primary problems facing women within the EU.<sup>38</sup> The European Commission has emphasized the importance of using the EU’s competence in criminal law in order to prevent violence against women, as well as the necessity for the various organs of the EU to promote the rights of women in states outside of the EU.<sup>39</sup> The EU at times has even made the link between ending gender-based violence, promoting women’s rights and the asylum process. In the EU’s *Roadmap for Equality*, aimed at creating a strategy to achieve gender equality, the EU acknowledges that women from immigrant backgrounds and ethnic minorities disproportionately face discrimination within the EU. The *Roadmap for Equality* specifically notes that immigrant women often face double

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<sup>34</sup> European Commission, ‘Commission staff working document: Mid-term review of the Strategy for Equality between Men and Women (2010-2015)’ SWD(2013) 339 final.

<sup>35</sup> European Commission, ‘Strategy for Equality between Men and Women: 2010-2015.’ (European Commission website, September 2010). <[http://ec.europa.eu/justice/gender-equality/files/strategy\\_equality\\_women\\_men\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/strategy_equality_women_men_en.pdf)> 10, last accessed 21 August 2017.

<sup>36</sup> See *ibid.*

<sup>37</sup> See Charter of Fundamental Rights of the European Union 2012/C 326/02, Arts 21 and 23..

<sup>38</sup> European Commission (n 35) 11.

<sup>39</sup> European Commission, ‘Strengthening the Commitment to Equality between Men and Women: a Women’s Charter.’ (European Commission website, 05 March 2010). <<http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:em0033>>, last accessed 21 August 2017.

discrimination within society both as immigrants and as women – women of every ethnic background and social strata face more challenges than their male counterparts.<sup>40</sup>

It seems clear that gender mainstreaming has meant that every area of EU competence should be attempting to promote equality between men and women. This should include the EU's legislation and social programmes in the area of asylum. It is unsurprising that the EU has made more progress in certain areas of competence than others<sup>41</sup> – the EU has had an interest and competence in regulating the workplace for far longer than asylum and immigration. Yet while gender has not been fully incorporated into the EU's asylum process, more consideration and gender-aware legislation would be in accordance with the EU's gender mainstreaming aims.

At the moment, the EU has done little to translate this emphasis on gender mainstreaming, and focus on preventing gender-based violence, into action within the CEAS.<sup>42</sup> While the European Parliament has released a statement on the importance of equal consideration and treatment on the basis of gender in asylum claims,<sup>43</sup> there is minimal mention of gender in the CEAS legislation. The Procedures Directive<sup>44</sup> does not mention gender at all,<sup>45</sup> while the Receptions Directive<sup>46</sup> does not specifically mention gender, although there are references to specifically vulnerable groups of women.<sup>47</sup> In the recent recast Qualification Directive,<sup>48</sup> the references to gender have increased. The Qualification Directive does specifically mention that women can constitute a particular

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<sup>40</sup> European Commission. (2006) (n 5).

<sup>41</sup> Colette Fagan, Jill Rubery, Damian Grimshaw, Mark Smith, Gail Hebson and Hugo Figueiredo, 'Gender mainstreaming in the enlarged European Union: recent developments in the European employment strategy and Social Inclusion Process' (2005) 36 *Industrial Relations Journal* 568.

<sup>42</sup> Directorate General for Internal Policies of the European Parliament (n 1).

<sup>43</sup> European Parliament. (24 October 2006.) *Resolution on women's immigration: the role and place of immigrant women in the European Union* (2006/2010(INI)). (European Parliament website, 24 October 2006). <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P6-TA-2006-0437+0+DOC+XML+V0//EN>>, last accessed 21 August 2017.

<sup>44</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180/60.

<sup>45</sup> Directorate General for Internal Policies of the European Parliament (n 1) 19.

<sup>46</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection [2013] OJ L 180/96,

<sup>47</sup> See *ibid*, as discussed in Directorate General for Internal Policies of the European Parliament (n 1) 19.

<sup>48</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast.) OJ L 180/31.

social group,<sup>49</sup> reaffirming the reasoning found in some national law cases,<sup>50</sup> notes that persecution can be of a gender-specific nature<sup>51</sup> and finally states that the country of origin information used in state decision-making on refugee status should include reference to the role of women.<sup>52</sup> However, the most recently recast directives do not directly bind all of the EU's member states (Ireland the UK were not affected)<sup>53</sup> and so it is unclear if gender mainstreaming will mean that these gender-aware changes will be enforced upon all member states or if opting out of the recast directives will allow member states to avoid increased gender-based responsibilities.

The CJEU has also not always provided gender-conscious reasoning in its judgments. For a particular example, the case of *K v. Bundesasylamt*<sup>54</sup> involved an applicant who sought to challenge a transfer between member states under the CEAS. She sought to remain in Austria on the basis that she had strong family connections there – her daughter in law, who was caring for a newborn infant while dealing with post-traumatic stress after a sexual assault.<sup>55</sup> The CJEU sought to establish whether the clause allowing for family reunification of the CEAS would apply to this particular family relationship.<sup>56</sup> The Court did find that when there was a particular dependency, as in this specific case, the family reunification clause did apply to broad family relationships.<sup>57</sup>

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<sup>49</sup> See *ibid* Article 10(1)(d).

<sup>50</sup> *Islam v. Secretary of State for the Home Department* [1999] 2 AC 629.

<sup>51</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast.) OJ L 180/31 at Article 9(2)(f).

<sup>52</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast.) OJ L 180/31 at Article 4(3)(c.)

<sup>53</sup> Directorate General for Internal Policies of the European Parliament (n 1) 39.

<sup>54</sup> Case C-245/11, *K v. Bundesasylamt* [2014] 1 WLR 1895.

<sup>55</sup> This case was further examined in Sylvia Morgades-Gil, 'The Discretion of States in the Dublin III System for Determining Responsibility for Examining Applications for Asylum: What Remains of the Sovereignty and Humanitarian Clauses after the Interpretations of the ECtHR and the CJEU?' (2015) 27 *International Journal of Refugee Law* 433.

<sup>56</sup> See *ibid* para 32.

<sup>57</sup> See *ibid* para 42.

The CJEU did not use that specific case to consider the wider gendered effects of the family reunification rule and its requirement for a relationship of dependency. Caring responsibilities disproportionately fall on female asylum seekers.<sup>58</sup>

Amongst other complexities, adult siblings are not considered to be family for the purpose of the family reunification clause.<sup>60</sup> This means that extended family who could potentially be able to help with childcare and household management would not be allowed by the EU to relocate more closely in order to provide support. Not all cultures follow a European nuclear family model; plenty emphasise the role of extended family in caring for children.<sup>61</sup> This is clearly a situation in which isolation from family will disproportionately affect women and it is disappointing that the CJEU did not consider the gender implications of the reunification clause for women within families. This means that when asylum procedures and guidelines do not account for caring responsibilities, by not granting access to care while scheduling interviews with asylum applicants, when limiting access to education and care within the community or by denying reunification with family members who share caring responsibilities. Obviously these restrictions impact all asylum seekers, but since family care is disproportionately provided by women, policies which ignore family responsibilities will leave increasingly vulnerable.<sup>62</sup>

Many romantic relationships break down during a journey or once asylum seekers arrive in a new country, leaving women without emotional and practical support, amongst other situational difficulties inherent to the asylum process.<sup>63</sup> When migrant women face the common experience of violence within the home, they have little practical recourse. Without family links, ties to the community or secure legal status, domestic violence survivors often feel helpless to leave the relationship.<sup>64</sup> Women are disproportionately

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<sup>58</sup> Alice Bloch, Treasa Galvin and Barbara Harrell-Bond, 'Refugee Women in Europe: Some Aspects of the Legal and Policy Dimensions.' (2000) 38 *International Migration* 169.

<sup>60</sup> See *ibid* 184.

<sup>61</sup> James Georgas, Kostas Mylonas, Tsabika Bafiti, Ype H. Poortinga, Sophia Christakopoulou et al, 'Functional relationships in the nuclear and extended family: a 16-culture study' (2001) 36 *International Journal of Psychology* 1

<sup>62</sup> See Bloch, Galvin and Harrell-Bond (n 59).

<sup>63</sup> See Georgas, Mlonas, Bafiti, Poortinga, Christakopolou et al (n 60) 175.

<sup>64</sup> Edna Erez, Madelaine Adelman and Carol Gregory, 'Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women.' (January 2009) 4 *Feminist Criminology* 32.

granted refugee status not as individuals, but as members of a family<sup>65</sup> – leaving their marriage could mean deportation or remaining in a country without legal access to necessary services, as well as taking on the role of sole support and childcare for their family. Legally considering women as members of a family heightens their dependency, increasing the vulnerability to exploitation. Obviously this is not the experience of all women, but as the majority of women receive refugee status as a member of a family, they are additionally vulnerable and dependent.<sup>66</sup>

The EU's internal report on integration has focused on the particular vulnerability of refugee women at every stage of their journey: the danger in their country of origin which causes flight, sexual exploitation by human traffickers in attempts to cross borders and even mistreatment by the government officials and community workers tasked with supporting them in the country of reception.<sup>67</sup> The report noted that,

Policies aimed at guaranteeing asylum seekers and refugees' rights and wellbeing cannot be gender-neutral, because women have to face gender-specific challenges in the host country, as a consequence, reception and integration policies that are not gender-sensitive are destined to fail."<sup>68</sup>

Even the EU itself seems to recognise that women claiming asylum need specific and adequate protection for their increased vulnerability; there is a broad gap between the actions of the organs of the European Union and the theory of gender mainstreaming. Specifically in the area of asylum, the EU has neglected to confront all gendered effects and implications of its policies. The EU currently does not seem to be producing particularly progressive legislation and judgments in the area of gender and asylum. This has meant that the effectiveness of legislative tools to combat gender-based violence has not necessarily been carefully researched by the various EU organs. How could the EU be more aware and conscientious in incorporating gender? The most useful reference for the EU would be to use evolving international law on gender and asylum, including documents by the UN High Commissioner for Refugees (UNHCR) and the Convention

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<sup>65</sup> Directorate General for Internal Policies of the European Parliament (n 1) 8

<sup>66</sup> See Erez, Adelman and Gregory (n 64.)

<sup>67</sup> Directorate-General for Internal Policies, 'Female refugees and asylum seekers: the issue of integration' (European Parliament website, 2016)  
 <[http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556929/IPOL\\_STU\(2016\)556929\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/556929/IPOL_STU(2016)556929_EN.pdf)> last accessed 27 August 2017.

<sup>68</sup> See *ibid* 10.



for the Elimination of All Forms of Discrimination Against Women (CEDAW.) The next section will proceed to consider the amount of international law that has been incorporated into EU asylum law and how the EU could improve its focus on gender mainstreaming in asylum law.

### **III. International Law and the EU**

The undisputed primary source of international law regarding asylum is the Convention and Protocol Relating to the Status of Refugees (known as the Refugee Convention.)<sup>69</sup> The Refugee Convention was drafted in the aftermath of World War II and intended to ensure that the ethnic cleansing which occurred during the Holocaust was never repeated, allowing refugees to escape persecution in another country.<sup>70</sup> At the time of the drafting, women's suffrage was not yet universal even in Europe,<sup>71</sup> and discrimination based on gender was viewed as distinctive from the persecution encountered by ethnic minorities during the Holocaust.

All of the EU member states are signatories to the 1951 Convention and its 1967 Protocol.<sup>72</sup> The Charter of Fundamental Rights of the European Union cites a right to asylum in accordance with the Refugee Convention<sup>73</sup> – the Refugee Convention is clearly a strong influence on EU asylum law.<sup>74</sup> Unfortunately, this has meant that some of the original narrow focus of the Refugee Convention has been passed into EU law. The line between persecution (which is necessary for asylum seekers to be recognized as a refugees) and discrimination (which is wide-spread to greater or lesser degree against women globally<sup>75</sup> and does not equate to refugee status) can be difficult to determine in the cases of women who are not being directly persecuted by government officials,<sup>76</sup>

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<sup>69</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>70</sup> Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 AJIL 613.

<sup>71</sup> Lisa Villiani, Claire Provost, and Eric Hillaire, 'A timeline of women's right to vote – interactive.' *The Guardian*. (London, 6 July 2011). <<http://www.theguardian.com/global-development/interactive/2011/jul/06/un-women-vote-timeline-interactive>> accessed 21 August 2017

<sup>72</sup> See UN High Commissioner for Refugees (2002) (n 16).

<sup>73</sup> See Charter of Fundamental Rights of the European Union 2012/C 326/02, Article 18.

<sup>74</sup> See *ibid*. This article of the Charter specifically cites the Refugee Convention.

<sup>75</sup> Audrey Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 Human Rights Quarterly 213, 265.

<sup>76</sup> See *ibid* 229.

particularly since discrimination against women is a global problem. Women are far less likely to be involved in traditional political arenas or involved in decision-making at a national or international level.<sup>77</sup> Many women face violence not only in the course of governmental or political work, but within the home.<sup>78</sup>

This form of persecution faced by many women is not contrary to the concept of a refugee in the Refugee Convention or to the goal of refugee protection. Lack of political activism did not protect individual women in Bosnia, who were subject to sexual violence as a weapon of ethnic cleaning.<sup>79</sup> While women are often relegated into roles within the home, they can still experience violent actions without government protection. It is simply that national courts will not necessarily recognise the actions as constituting persecution.<sup>80</sup> Feminist academics had long debated the inadequacy of the Refugee Convention to the lived experiences of women, arguing that protests against patriarchal society can occur in a myriad of ways.<sup>81</sup>

The UNHCR sought to broaden the focus on the asylum system and to ensure that states would consider gender throughout the asylum process.<sup>82</sup> In the UNHCR's gendered guidelines, the UNHCR clarifies how gender-based persecution can be fitted within the Refugee Convention.<sup>83</sup> The UNHCR conceded that many asylum applications had previously been considered through a male-oriented perspective<sup>84</sup>, but disagreed with suggestions that gender should be added as a category of persecution, claiming that gender-based persecution should be judged to fall within the existing definition of a refugee.<sup>85</sup> The UNHCR clarified that certain repressive laws can constitute persecution –

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<sup>77</sup> Hilary Charlesworth, Christine Chinkin, and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 AJIL 613, 620-622.

<sup>78</sup> Jacqueline Greatbach, 'The Gender Differences: Feminist Critiques of Refugee Discourse' (1989) 1 International Journal of Refugee Law 518.

<sup>79</sup> Ruth Seifert, 'The second front: the logic of sexual violence in wars' (1996) 19 Women's Studies International Forum 35.

<sup>80</sup> Heaven Crawley, 'Women and Refugee Status: Beyond the Public/Private Dichotomy in UK Asylum Policy' in Doreen Indra, *Engendering Forced Migration: Theory and Practice*. (Berghahn Books, 1999).

<sup>81</sup> Macklin (note 69) 241.

<sup>82</sup> Heaven Crawley and Trine Lester, 'Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe' (UN High Commission for Refugees website, 2004) <<http://www.unhcr.org/40c071354.pdf>> last accessed 26 August 2017, 8.

<sup>83</sup> UN High Commissioner for Refugees (2002) (n 16).

<sup>84</sup> See *ibid* 3.

<sup>85</sup> See *ibid* 3.

such as women being stoned as punishment for extramarital relationships<sup>86</sup> – but mere gender-based discrimination is not enough to constitute persecution.<sup>87</sup> Yet the UNHCR did concede that sufficient discrimination over time could constitute persecution.<sup>88</sup> It also denied the argument that women could not constitute a particular social group (which is a Refugee Convention category for persecution)<sup>89</sup> because women make up such a large percentage of the population. The UNHCR noted that other categories cited, such as race and religion, can also constitute a large percentage of the population.<sup>90</sup> The UNHCR also stated that, contrary to the then-law in many states,<sup>91</sup> non-state actors can indeed persecute women, as long as the government refuses to provide protection for a reason stated in the Convention.<sup>92</sup> It also outlined procedures which would make it easier for women to feel comfortable with the procedural difficulties of applying for asylum, such as allowing for privacy to make disclosures, cases being heard by female case workers and translators, and for those making decisions to not only have information on the asylum seeker's country of origin, but also information on treatment of women in the country of origin – including whether women are supported and protected by authorities.<sup>93</sup>

The UNHCR further wrote guidelines for member states in order to better support survivors of sexual violence.<sup>94</sup> The UNHCR noted that while anyone could experience sexual violence, women and children are particularly a high-risk group for victimisation<sup>95</sup> and exploitation,<sup>96</sup> which can reflect dismissive or oppressive attitudes towards women within society.<sup>97</sup> The UNHCR warns states from assuming that sexual violence is just a concern in states of origin; unfortunately, assault can occur in countries of origin, during

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<sup>86</sup> See *ibid* 4.

<sup>87</sup> See *ibid* 4

<sup>88</sup> See *ibid* 4.

<sup>89</sup> See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention), Article 1(2).

<sup>90</sup> UN High Commissioner for Refugees (2002) (n 16) 8.

<sup>91</sup> *R v. Adan & Aitseguer* [2000] UKHL 67.

<sup>92</sup> UN High Commissioner for Refugees (2002) (n 16) 8.

<sup>93</sup> See *ibid* 10-11.

<sup>94</sup> UN High Commissioner for Refugees (1995) (n 16).

<sup>95</sup> See *ibid* 4 and 5.

<sup>96</sup> See *ibid* 9.

<sup>97</sup> See *ibid* 8.

flight or upon arrival.<sup>98</sup> It is important to emphasise patience and understanding from asylum decision-makers, as recounting sexual violence can be traumatic and requires developing a trust with officials.<sup>99</sup> Asylum seekers can also feel a sense of cultural shame after a sexual assault and feel fear or embarrassment in confiding in either officials or their family members.<sup>100</sup> The UNHCR urges sensitivity and respectful treatment of asylum seekers, along with prompt medical care for those who have become pregnant as a result of rape or have contracted sexually transmitted infections.<sup>101</sup> It is clear that the UNHCR encourages considerate and sympathetic treatment, promoting awareness of the various traumatic effects of sexual violence and has attempted to communicate good practice to the signatories of the Refugee Convention.

The other major UN agency which has produced work on gender and asylum is the Committee for the Elimination of all Discrimination Against Women. The committee was established as the monitoring of the Convention for Elimination of all Discrimination Against Women (CEDAW), which seeks to incorporate a gendered perspective and gender equality into international law.<sup>102</sup> The Committee had previously published statements on violence against women and treatment of female migrants and sought to expand their recommendations to support asylum seekers.<sup>103</sup> The current statement considered the obligations due to women both as a state's nationals and as asylum seekers. States have an obligation to promote women's role in public life and make sure that women achieve political equality, both through standing for elections, through allowing women's suffrage and through grassroots political activism.<sup>104</sup> States should also take claims of persecution by non-state actors (particularly family members) seriously and consider the difficulties involved in relocating from non-state persecutors, particularly for caregivers.<sup>105</sup> However, once asylum seekers have been unable to receive

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<sup>98</sup> See *ibid* 5 and 6.

<sup>99</sup> See *ibid* 7.

<sup>100</sup> See *ibid* 6.

<sup>101</sup> See *ibid* 30.

<sup>102</sup> Convention for the Elimination of All Forms of Discrimination Against Women. (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

<sup>103</sup> Committee on the Elimination of Discrimination Against Women, 'General recommendation 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women.' CEDAW/C/GC/32 (05 November 2014) 1.

<sup>104</sup> See *ibid* at 11.

<sup>105</sup> See *ibid* at 11.

protection in their state of origin, there are obligations on all signatories of the Refugee Convention to protect women, particularly vulnerable women, seeking asylum.

The CEDAW Committee reiterates that the role of CEDAW is to add gendered shading to international law.<sup>106</sup> The Committee notes that gender is not mentioned in the Refugee Convention, nor is there any reference to gendered violence or persecution and so it is important that signatory states apply a gendered-interpretation to all of the grounds for persecution.<sup>107</sup> The CEDAW Committee argues that it is essential to recognise that all migrant women face intersectional oppression, both as women and as members of the migrant community.<sup>108</sup> This can become more pronounced when women come from a cultural background of extreme discrimination against women or have been denied access to education,<sup>109</sup> or if they are a member of an ethnic minority or identify as LGBT.<sup>110</sup> Women and children also have particular risks of exploitation or mistreatment during flight or in arrival in another state.<sup>111</sup> The CEDAW Committee seeks to ensure that women are not perceived through the male-centric gaze of the Refugee Convention and are instead considered through a gender-aware asylum decision.<sup>112</sup> CEDAW also made some procedural recommendations for processing asylum claims, such as limited detention, particularly for pregnant women and nursing mothers,<sup>113</sup> providing childcare at the asylum processing centres so that women do not have to disclose in front of children and to develop a professional relationship of trust and empathy to make women more comfortable disclosing traumatic events such as sexual assault.<sup>114</sup>

The recommendations of both UN bodies are very similar and provide a comprehensive guide to improving the gendered asylum practice and decisions of EU member states. While the European Union is not a signatory to either the Refugee Convention or CEDAW, all member states of the EU are signatories of both.<sup>115</sup>

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<sup>106</sup> See *ibid* at 2.

<sup>107</sup> See *ibid* at 3.

<sup>108</sup> See *ibid* at 2.

<sup>109</sup> See *ibid* at 11.

<sup>110</sup> See *ibid* at 2.

<sup>111</sup> See *ibid* at 4.

<sup>112</sup> See *ibid* at 6.

<sup>113</sup> See *ibid* at 14.

<sup>114</sup> See *ibid* at 15.

<sup>115</sup> See Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) and Directorate General for Internal Policies, 'How

International law has increasingly concerned itself with gender and asylum – there are plenty of good practices which the EU could use to model its own legislation and guidelines. It is also worth noting that as signatories to these international treaties, the member states are already bound by these guidelines and the gendered interpretation of international asylum law. It is important to consider whether or not this international law has been truly effective – and if not, what is the place for the European Union in ensuring that member states meet these obligations both in international law and through gender-mainstreaming and the Charter for Fundamental Rights?

#### **IV. NGO Responses**

How has this plentiful publication of guidelines in international law actually affected the law and practice of EU member states? Both the UNHCR and CEDAW have been extremely detailed about specific factors which should be taken into account when determining women's asylum claims; detailed ideal procedural guidelines in order to protect vulnerable women have been explained. These UN bodies have thoughtfully considered best practice and communicated to the member states how to practically protect survivors of gender-based violence. Unfortunately, various NGOs have reported that the practice of member states does not accord with their international law obligations.<sup>116</sup> These recommendations and guidelines have not been adopted by the EU member states. When considering the diverse yet detailed instructions that have been proposed in international law in order to meet obligations for refugees, NGOs are able to make recommendations as to how the EU would be best able to legislate to ensure female asylum seekers, particularly vulnerable women such as those who have faced sexual violence, could be better supported.

The Directorate General for Internal Policies of the European Parliament supported research by various non-governmental organisations on the treatment of women asylum seekers by both the European Union and various member states.<sup>117</sup> The NGO-based authors reiterated that the EU had committed to gender-mainstreaming and

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could the Convention on the elimination of all forms of discrimination against women (CEDAW) be implemented in the EU Legal Framework'. (European Parliament website, 2011)  
<<http://www.europarl.europa.eu/document/activities/cont/201109/20110909ATT26166/20110909ATT26166EN.pdf>> last accessed 27 August 2017.

<sup>116</sup> Directorate General for Internal Policies of the European Parliament (n 1) and European Women's Lobby (n 14).

<sup>117</sup> Directorate General for Internal Policies of the European Parliament (n 1).

ensuring equality in all areas of legal competence, as well as signing the Convention to Eliminate All Forms of Discrimination Against Women, which should ensure protection for women in the asylum system.<sup>118</sup> Yet it is difficult to determine how effective most member states have been in achieving a gender-aware asylum system, as many EU member states have historically declined to release gendered statistics for their asylum process.<sup>119</sup> While the EU did pass a regulation forcing member states to gather more comprehensive statistics,<sup>120</sup> member states are only required to report these numbers to the EU, not to make them public within the member states or provide them for dissemination by NGOs.<sup>121</sup>

When examining the named sources of asylum law in member state practice, the UNHCR gender guidelines have not been incorporated into the national law of more than a few member states.<sup>122</sup> The UNHCR gender guidelines may be intended to increase awareness of gender issues in asylum, but this has not necessarily translated into implementation into national law.<sup>123</sup> The authors noted regardless of the current reality, all of the member states should implement gender-specific guidelines into national laws – even if these are not exact replica of the UNHCR guidelines, they should be inspired by the general principles contained within them.<sup>124</sup>

The study was able to identify several problematic areas of current member state practice, practice which deviates from UN recommendations or requirements of EU gender-mainstreaming. The majority of claims based on sexual violence or gender require women to be considered with the asylum category of membership of a particular social group;<sup>125</sup> not all states recognise women as a sufficiently narrow category as to constitute a particular social group.<sup>126</sup> Women can also often be denied asylum status based on the argument that they should have sought protection from their own

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<sup>118</sup> See *ibid* 17.

<sup>119</sup> See *ibid* 20. As discussed in chapter 6, this includes Ireland.

<sup>120</sup> Regulation (EC) No 862/2007 of the European Parliament and of the Council of 11 July 2007 on Community statistics on migration and international protection and repealing Council Regulation (EEC) No 311/76 on the compilation of statistics on foreign workers OJ L199/23

<sup>121</sup> Directorate General for Internal Policies of the European Parliament (n 1) 21.

<sup>122</sup> See *ibid* 27.

<sup>123</sup> See *ibid* 31.

<sup>124</sup> See *ibid* 32.

<sup>125</sup> See *ibid* 60.

<sup>126</sup> See *ibid* 51.

government against non-state persecutors (particularly family members.)<sup>127</sup> The study's authors caution that asylum decision-makers should not assume women face the same ability to seek protection from local authorities as men would. They agree with the UNHCR that country of origin information available to decision-makers needs to specify treatment of women within the country and whether the authorities are willing to provide protection and to help women to relocate internally.<sup>128</sup> This would also address the criticism that a majority of applications are dismissed on the basis of credibility<sup>129</sup> – more accurate information on the experiences of women in that country could be useful for understanding why a female asylum seeker might behave in a certain manner or if her account seemed different from those of male asylum seekers.<sup>130</sup>

The authors also argued that the member states have not adequately ensured procedures which support asylum seekers who have been victimized by sexual violence. Only Italy has put in place prompt support for survivors of sexual violence on their arrival at the border.<sup>131</sup> States also cannot guarantee that cases will always be heard by female caseworkers or female interpreters.<sup>132</sup> The authors were concerned that childcare is not provided in a majority of member states, which means that women are forced to recount their persecution in front of their children<sup>133</sup> – which would obviously mean that women feel nervous or unsure about recounting painful or traumatic experiences. These findings as to member states practice seem incompatible with the EU's stated objectives to promote prevention of sexual violence and support for survivors.<sup>134</sup> There would seem to be considerable scope for the EU to enforce these goals simply through incorporating the guidelines in member state practice.

It is disappointing that so many of these gaps accord with the recommendations of the UNHCR and CEDAW. The various member states have clearly not sought to ensure adequate protection for women seeking asylum in their state. The European Women's Lobby (EWL) is an NGO which serves as a lobbying organization on a European scale

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<sup>127</sup> See *ibid* 43.

<sup>128</sup> See *ibid* 43.

<sup>129</sup> See *ibid* 61.

<sup>130</sup> See *ibid* 77.

<sup>131</sup> See *ibid* 83.

<sup>132</sup> See *ibid* 95.

<sup>133</sup> See *ibid* 96.

<sup>134</sup> European Commission (2006) (n 5).



while supporting smaller NGOs to affect national governments. The EWL released guidelines on the EU's asylum legislation and created a lobbying guide to help member states use this legislation and international law to better support women asylum seekers in their state.<sup>135</sup>

The EWL notes that the Refugee Convention was drafted from a heterosexual male perspective and can often be an uneasy fit with asylum seekers who suffer from multiple oppressions. The EWL is careful to dispute that in the context of sexual violence, any country can be a safe third country, as women can be sexually assaulted in detention facilities or accommodation in any state.<sup>136</sup> The EWL is concerned that the CEAS does not allow for nationals of the EU to seek asylum in another member state; seeking asylum is a right under both international and EU law and the EU should not abridge that right for EU nationals.<sup>137</sup>

These EWL guidelines are particularly vocal in protecting those who have experienced sexual violence. They note that women will not always understand why they were targeted for sexual violence, particularly if it is to serve as a warning or punishment for family members' political activities. It is essential that staff and asylum decision-makers are patient and understanding, allowing a trust and respect to build up and giving women space and confidence to disclose painful and traumatic memories.<sup>138</sup> Since disclosure of sexual violence can require time for applicants to feel comfortable sharing details (although survivors should never be forced to describe the sexual violence itself); survivors should never be subject to enhanced procedures, but given time to build a relationship with the decision-making officials.<sup>139</sup> The EWL affirms several of the procedural demands of international law, including that women asylum seekers are able to deal with exclusively female staff, that it is essential to consider treatment of women in the asylum-seeker's state of origin and that women can have a variety of responses to trauma. They should not be judged based on their demeanour.<sup>140</sup>

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<sup>135</sup> European Women's Lobby (n 14).

<sup>136</sup> See *ibid* 5.

<sup>137</sup> See *ibid* 5.

<sup>138</sup> See *ibid* 7.

<sup>139</sup> See *ibid* 9.

<sup>140</sup> See *ibid* 16.

The EWL guidelines are extremely similar to the recommendations by the UNHCR and CEDAW; this is unsurprising, as the EWL report presents itself as a tool for enforcing international obligations at a national level.<sup>141</sup> Yet when reading these reports and recommendations, they can, at times, seem indistinguishable. This can be useful for member states; there are no conflicting reports of obligations, simply clear guidelines to be achieved within the asylum process. Unfortunately, though, the EU member states do not seem to have been able to meet their obligations under international law. In the NGO study, the authors summarized that

there are vast and worrying disparities in the way different EU states handle gender-related asylum claims. As a result, women are not guaranteed anything close to consistent, gender-sensitive treatment when they seek protection in Europe. Women seeking asylum are too often confronted with legislation and policy that fail to meet acceptable standards, while even gender-sensitive policies are not implemented in practice.<sup>142</sup>

There is a gap between the strong practical guidelines and policies provided by international law and the practice of EU member states. The study shows that harmonization is far from complete.<sup>143</sup> There seems to be a role for the EU in better harmonising the asylum system and providing a stronger gendered emphasis for member states.

International law is extremely specific on recommendations for better integrating gender into the asylum system of EU member states. Implementation has been erratic and varies between states. The EU's focus on gender mainstreaming has not led to results in the context of the CEAS, but there is competence to focus on gender equality and asylum in future. In analysing why the EU has not applied its focus on gender-mainstreaming, it is worth applying feminist criticism to the actions of the EU to better understand the priorities that the EU has taken within its gender mainstreaming agenda and how to reframe the discussion so that organs of the EU can better correct their inherent biases and focus on more effective legislation and soft law aimed at EU member states.

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<sup>141</sup> See *ibid* 4.

<sup>142</sup> Directorate General for Internal Policies of the European Parliament (n 1) 8.

<sup>143</sup> See *ibid* 10.

## V. Intersectional analysis of gender mainstreaming

It is enlightening to use an intersectional feminist analysis of the EU's gender mainstreaming policy. All EU directorate-generals are intended to create policy goals in order to achieve progress regarding gender equality<sup>144</sup> and the Charter of Fundamental Rights has broadened gender equality to a core fundamental right for women in the EU.<sup>145</sup> Yet despite that idea that gender should apply to all aspects of EU law, there has been far more progress made in certain areas of policy, particularly those linked to employment and the workplace,<sup>146</sup> than others, such as immigration and asylum policy.

To understand the EU's focus, it is worth considering whether the EU has always, as an organisation, primarily been focused on issues which affect white middle class women, rather than using a more intersectional understanding. The European Union's focus seems to have expanded in line with Catharine MacKinnon's criticism that for women, the home is often a place of violence and fear from which they seek protection.<sup>148</sup> The EU does seem to agree with MacKinnon's argument that a narrow economic focus simply reinforces male privilege by ignoring the disadvantages women face outside the workplace.<sup>150</sup> Accordingly, the EU's *Roadmap for Equality* pledges to deal with sexual violence and ensuring that women are able to consider their homes and family lives a place of safety.<sup>151</sup> The EU has also considerably developed the soft law programme DAPHNE in order to convince member states to adopt better practice at a national level and to fund studies that improve understanding of violence against women, along with methods of prevention as well as supporting survivors.<sup>152</sup>

The addition of the Charter of Fundamental Rights indicates the EU has accepted a more holistic view of the need for societal equality for women outside of a workplace context.<sup>153</sup> Yet similarly to a radical feminist view of the law,<sup>155</sup> the EU seems to be less

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<sup>144</sup> Beveridge (n 11) 199.

<sup>145</sup> Dia Anagnostou and Susan Millns, 'Gender Equality, Legal Mobilization and Feminism in a Multilevel European System.' (2013) 28 *Canadian Journal of Law and Society* 115, 121.

<sup>146</sup> Mazey (n 11) 227.

<sup>148</sup> See *ibid* 168.

<sup>150</sup> See *ibid* 161.

<sup>151</sup> European Commission (2006) (n 5).

<sup>152</sup> Montoya (n 5).

<sup>153</sup> See Charter of Fundamental Rights of the European Union 2012/C 326/02, Articles 21 and 23.

<sup>155</sup> See Catharine MacKinnon, 'From practice and theory, or what is a white woman anyway?' (1991) 4 *Yale Journal of Law and Feminism* 13.

focused in the ways that gender intersects with other oppressions, such as race and immigration status. The EU has historically been less active towards eradicating racial inequality. While gender equality within the workplace has been an issue that the EU has considered historically,<sup>156</sup> racial equality was not mentioned until the Treaty of Amsterdam in 1999.<sup>157</sup> The Charter of Fundamental Rights also recognizes the need for racial equality to be enmeshed into European Union law,<sup>158</sup> yet racial and ethnic diversity is not as developed as gender equality within EU law.<sup>159</sup> This seems to have resulted in intersectional oppressions, such as discrimination against migrant women not being prioritized in the way that issues facing white middle class women, such as domestic violence and workplace discrimination, have been. While the EU will acknowledge that multiple oppressions exist, notably in the *Roadmap to Equality*,<sup>160</sup> it seems that the EU's focus on gender has not extended to protecting female asylum seekers,<sup>161</sup> who are among the most vulnerable women in the EU.<sup>162</sup>

In their article focusing on the effects of intersectionality on abused migrant women, Erez, Adelman and Gregory argue that migrant status should be treated as a category which intersects with gender oppression, similar to sexual orientation and race.<sup>163</sup> While there can be overlaps between racism and anti-migrant oppression, there are distinctions. Not all migrants are from ethnic minority backgrounds and nationals from a minority background would often have more experience and exposure to the member state's culture and language.<sup>164</sup> It is also clear that asylum policy affects the amount that immigration status intersects with gender<sup>165</sup> – EU and member states asylum policies are crafted through a male perspective and over two thirds of asylum seekers in the EU are men.<sup>166</sup> Erez, Adelman and Gregory would argue that policy determines the

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<sup>156</sup> As discussed elsewhere in the chapter. See C-43/75, *Defrenne v. Sabena (No 2.)* [1976] ECR 455, Mazey (n 10) 227, and Mieke Verloo, 'Multiple Inequalities, Intersectionality and the European Union' (2006) 13 *European Journal of Women's Studies* 211, 211.

<sup>157</sup> Verloo (n 156) 212.

<sup>158</sup> See Charter of Fundamental Rights of the European Union 2012/C 326/02

<sup>159</sup> Verloo (n 156).

<sup>160</sup> See European Commission (2006) (n 5), Article 1.6.

<sup>161</sup> Directorate General for Internal Policies of the European Parliament (n 1).

<sup>162</sup> Gima, Radice, Tsangrides and Walter (n 2).

<sup>163</sup> Erez, Adelman and Gregory (n 64) 34.

<sup>164</sup> See *ibid.*

<sup>165</sup> See *ibid* 35.

<sup>166</sup> Directorate General for Internal Policies of the European Parliament (n 1) 8.

profile of asylum seekers<sup>167</sup>; this would indicate that if the EU attempted to enforce more gender-aware asylum policies, more women would feel comfortable applying for asylum in their own right (rather than simply as family members.)

They also found, similarly to Bloch, Galvin and Harrell-Bond,<sup>168</sup> that the process of migrants leaving their country of origin can be disruptive for family dynamics.<sup>169</sup> When an asylum seeker leaves her family and support system behind in her country of origin, or in another EU country, she would not be entitled to reunification with extended family members unless there was an unusual relationship of dependency.<sup>170</sup> It can be an isolating experience and often means that she is more vulnerable and dependent on her partner. This provides a power advantage that an abusive spouse may use to isolate and abuse her.<sup>171</sup> Of course, domestic violence occurs across racial and economic barriers, but irregular immigration status provides insecurity, fear and isolation that an abuser can exploit.<sup>172</sup>

The EU has not treated gender, race and migration status as interlocking factors which combine to oppress migrant women. Instead, initiatives working towards ending sexual violence, preventing racism and supporting asylum seekers have been handled separately. This is disappointing from an intersectional feminist perspective. In her article about intersectionality and domestic violence, Crenshaw uses the example of rape crisis services, noting that most mainstream American services at the time were catered to middle class white women, who were able to deal with their sexual assault in isolation.<sup>173</sup> Crenshaw noted that when African-American women came to use the rape crisis services, the centres did not have the resources to deal with the complexities of these women's lives, such as low-paying jobs and insecure housing.<sup>174</sup> The EU seems to have similar difficulties. While the *Roadmap for Equality* specifically mentions the

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<sup>167</sup> Erez, Adelman and Gregory (n 64) 35.

<sup>168</sup> Bloch, Galvin, and Harrell-Bond (n 60).

<sup>169</sup> See *ibid* 37.

<sup>170</sup> Case C-245/11, *K v. Bundesasylamt* [2014] 1 WLR 1895.

<sup>171</sup> Erez, Adelman and Gregory (n 64) 36.

<sup>172</sup> Michele Bogard, 'Strengthening Domestic Violence Theories: Intersections of Race, Class, Sexual Orientation, and Gender' (1999) 25 *Journal of Marital and Family Therapy* 275 and Erez, Adelman and Gregory (n 64) 51.

<sup>173</sup> Kimberle Crenshaw, 'Mapping the Margins: Intersectionality, Identity Politics and Violence against Women of Color' (1990-1991) 43 *Stanford Law Review* 1241, 1249.

<sup>174</sup> See *ibid* 1249.

double discrimination that immigrant women face,<sup>175</sup> this has not been reflected in the CEAS and the practice of member states.<sup>176</sup> Despite using rhetoric which seems to be aware of intersectional realities, the hard and soft law of the EU seems to be more reflective of a radical feminist viewpoint.

## VI. Conclusion

The European Union now has competence to affect asylum procedures. The Charter of Fundamental Rights has clearly stated that there is a right to asylum,<sup>177</sup> as well as a right to equality based on gender and race.<sup>178</sup> The CEAS is a mechanism for the EU to affect member state practice in the area of asylum. It is puzzling why the EU has not chosen to emphasise additional protections for women within the asylum system. Female asylum seekers face vulnerability throughout the asylum and resettlement process.<sup>179</sup> The EU does understand, at least in theory, the oppression and discrimination that migrant women face, as it was specifically mentioned in the *Roadmap for Equality*.<sup>180</sup>

While the difficulties for women in the asylum system have been cited, this does not seem to have translated into practice for improving the asylum system. It is concerning that very few of the UNHCR and CEDAW guidelines have been implemented into EU or member state laws.<sup>181</sup> Women are currently underrepresented in asylum decisions in their own right.<sup>182</sup> These bodies of the UN have provided clear, unequivocal guidelines in order to help member states improve treatment of women in asylum decisions. Yet despite rhetoric claiming that equality should be embedded in all areas of EU law,<sup>183</sup> there is minimal reference to gender in the CEAS<sup>184</sup> or exploration of the gendered aspects of the asylum process in cases before the CJEU.<sup>185</sup>

It seems unclear why the EU, if so dedicated to gender equality, has not implemented more policies intended to support women in the asylum process. The EU

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<sup>175</sup> See European Commission (2006) (n 5), Article 1.6.

<sup>176</sup> Directorate General for Internal Policies of the European Parliament (n 1).

<sup>177</sup> Charter of Fundamental Rights of the European Union 2012/C 326/02, Article 18.

<sup>178</sup> The Treaty on the Function of the European Union (n 9), Article 10.

<sup>179</sup> European Women's Lobby (n 14) and Gima, Radice, Tsangrides and Walter (n 2).

<sup>180</sup> European Commission (2006) (n 5), Article 1.6.

<sup>181</sup> Directorate General for Internal Policies of the European Parliament (n 1).

<sup>182</sup> See *ibid.*

<sup>183</sup> European Commission (5 March 2010) (n 39).

<sup>184</sup> Directorate General for Internal Policies of the European Parliament (n 1).

<sup>185</sup> Case C-245/11, *K v. Bundesasylamt* [2014] 1 WLR 1895.

seems to have prioritized less complex oppressions, focusing on issues such as equal pay and protection for pregnant workers<sup>186</sup> – issues which are less relevant to asylum seekers, many of whom are unable to enter the labour market. It seems that the EU has taken more of an approach advocated by radical feminists such as Catharine MacKinnon<sup>187</sup> rather than intersectional feminists such as Kimberlé Crenshaw,<sup>188</sup> stressing the need for increased protection in women's private lives and protection from family-based violence, as seen in the workplace protections and the DAPHNE programme's emphasis on soft law to prevent sexual violence, over the complicating factors, such as race, migration status and sexual orientation, which give rise to unique challenges. In order to achieve the goals of gender mainstreaming, it is essential that the EU stop viewing women as a monolith and consider the different challenges and oppressions that various women can face. International law has provided tangible methods of supporting women in the asylum system; the EU can choose to implement these recommendations and so achieve the goal of gender mainstreaming and ensure this specific area of policy making takes account of women's perspectives and experiences.

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<sup>186</sup> Fagan, Rubery, Grimshaw, Smith, Hebson and Figueiredo (n 41).

<sup>187</sup> Catharine MacKinnon, *Are Women Human? And Other International Dialogues*. (Harvard University Press 2006) and Catharine MacKinnon, *Towards a Feminist Theory of State*. (Harvard University Press, 1989)..

<sup>188</sup> Crenshaw (n 173).

## Chapter 5: UK National Law

### I. Introduction

In the last two chapters, this research has explored asylum law within the EU<sup>1</sup> and specifically the treatment of women in the EU's asylum legislation (with a broad feminist analysis of the existing policy.)<sup>2</sup> Yet in order to more completely understand immigration policy within the territory of the European Union, it is insufficient to just examine the law and initiatives created by the EU<sup>3</sup> – the European Union does not actually administer migration policy or deal with the asylum applications of refugees, instead relying on the cooperation of member states.<sup>4</sup> Member states will always interpret and use EU law and intertwine it with their own national law values and policies. As previously discussed in chapter 3, implementation of EU and international law has had varied results between member states.<sup>5</sup>

In light of this wide variation, this chapter is focused on a specific member state in order to provide a particular example of how much EU law influences that of member states. Does the EU's legislative content make a difference on the treatment of or decisions made regarding asylum seekers? Or is there a greater influence from the member state's legal and political culture? The UK government, through both the Home Office<sup>6</sup> and the Foreign Office<sup>7</sup>, have publicly and strongly condemned violence against women, both in Britain and globally, drafting strategies to prevent gender-based violence and hold perpetrators accountable. Does this emphasis on ending violence against women extend to an intersectional understanding of the asylum process and claims of women asylum seekers?

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<sup>1</sup> See chapter 3.

<sup>2</sup> See chapter 4.

<sup>3</sup> See Article 78 of the Consolidated version of the Treaty on the Function of the European Union 2008/C 115/01.

<sup>4</sup> Kay Hailbronner, 'European Immigration and Asylum Law under the Amsterdam Treaty' (1998) 35 CMLR 1047.

<sup>5</sup> Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 European Journal of Migration and Law 35, 45.

<sup>6</sup> HM Government, 'Ending Violence Against Women and Girls: Strategy 2016-2020' (Gov.uk website, March 2016)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/505961/VAWG\\_Strategy\\_2016-2020.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/505961/VAWG_Strategy_2016-2020.pdf)> accessed 01 September 2017.

<sup>7</sup> Foreign and Commonwealth Office, 'Summit Report: The Global Summit to End Sexual Violence in Conflict, London 2014' (Gov.uk website, 2014.)  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/390742/PSVI\\_post\\_summit\\_report\\_Online2.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/390742/PSVI_post_summit_report_Online2.pdf)> last accessed 01 September 2017



In order to try to better understand the connection between various international obligations and national laws of member states, this research will compare two EU member states and how they have integrated EU and international law into their national asylum processes. This chapter will concentrate on gaining a focused perspective of the treatment of women fleeing gender-based violence in the United Kingdom, while chapter 6 will provide a comparison to the national law of the Republic of Ireland. This chapter will consider the various influences on the experience of women within the UK asylum system— and whether the UK’s emphasis on gender equality and national security are coherent in the treatment of women and attitudes regarding gender-based violence.

The first section focuses on asylum law in the UK. The content of UK asylum law is very multi-layered, with sources and influences using a variety of formats. While the relevant legislation from the UK Parliament is an essential structure for the asylum regime<sup>8</sup>, there are various other binding British influences on UK asylum policy, such as case law<sup>9</sup> and administrative guidelines.<sup>10</sup> It is important to note that it

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<sup>8</sup> There are various nationality and immigration acts. See Nationality, Immigration and Asylum Act 2002, Asylum and Immigration (Treatment of Claimants, etc) Act 2004, and Immigration, Asylum and Nationality Act 2006. These are discussed, amongst others, in Dallal Stevens, ‘The Nationality, Asylum and Immigration Act 2002: Secure Borders, Safe Havens?’ (2004) 67 MLR 616, Emma Stewart and Gareth Mulvey, ‘Seeking Safety beyond Refuge: The Impact of Immigration and Citizenship Policy upon Refugees in the UK’ (2014) 40 Journal of Ethnic and Migration Studies 1023.

<sup>9</sup> See *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 and *SSHD v K and Fornah v SSHD* [2007] 1 AC 412. These cases are analysed in Sue Kirvan, ‘Women and Asylum: A Particular Social Group’ (1999) 7 Feminist Legal Studies 333, Susan Millns and Charlotte Skeet, ‘Gender Equality and Legal Mobilisation in the United Kingdom: Using Rights for Lobbying, Litigation, Defense and Attack’ (2013) 28 Canadian Journal of Law & Society 169, Sinead Conneely, ‘*Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another ex parte Shah*: Somewhere to Run To – Gender Persecution and Refugee Status’ (1999) 11 Child & Family Law Quarterly 321.

<sup>10</sup> See UK Home Office, ‘Gender Issues in the Asylum Claim’ (UK Visas and Immigration website, September 2010) <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257386/gender-issue-in-the-asylum.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf)> last accessed 31 August 2017. The UK’s historical and present gender guidelines are considered in Sophie Ceneda and Clare Palmer, ‘Lip Service’ or Implementation? The Home Office Gender Guidance and Women’s Asylum Claims in the UK’ (Asylum Aid website, March 2006) <<http://www.asylumaid.org.uk/lip-service-or-implementation-the-home-office-gender-guidance-and-womens-asylum-claims-in-the-uk/>>, Victoria Canning, ‘International Conflict, Sexual Violence and Asylum Policy: Merseyside as a Case Study’ (2013) Critical Social Policy 23. Human Rights Watch, ‘Fast Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK’ (Human Rights Watch website, February 2010) <<https://www.hrw.org/sites/default/files/reports/>>. (Asylum Aid website, January 2011). Helen Muggeridge and Chen Maman, ‘Unsustainable: The Quality of Initial Decision-Making in Women’s Asylum Claims’ (Asylum Aid website, January 2011). <<http://www.asylumaid.org.uk/wp-content/uploads/2013/02/unsustainableweb.pdf>> last accessed 31 August 2017..

is almost impossible to separate the human rights principles of British asylum law from its international and EU influences – not least because certain leading British cases have been influential on international law.<sup>11</sup>

Yet in the first section, it will be noted that there is already an interesting contradiction in British asylum law. Over the last several decades, generalised asylum policy through legislation has become more targeted at quickly processing asylum claims, allowing for limited success rates or appeals and then removing failed asylum seekers from the UK as quickly as possible.<sup>12</sup> Contrarily, case-law<sup>13</sup> and administrative guidelines have become more aware of the different types of persecution that women tend to be fleeing when seeking asylum and additional challenges that women face in leaving their countries of origin and seeking refuge from persecution.<sup>14</sup> It is an interesting contrast, with the philosophical underpinnings perhaps explained by the argument of Baroness Warsi, former Conservative party chairman, that the UK has specialist knowledge of certain types of asylum claims, such as women fleeing sexual violence, rather than a broader interest in protection of asylum seekers.<sup>15</sup>

The second part of this chapter will attempt to clarify how much EU legislation has actually influenced British law. Britain has always retained a certain amount of isolation from border and immigration measures of the EU<sup>16</sup> and has the option to opt-out of any aspect of the Common European Asylum System (CEAS) that it chooses. While this was not relevant in the initial stages of the CEAS (the UK chose to almost completely opt in to the initial directives),<sup>17</sup> the recent Coalition and

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<sup>11</sup> See Karen Musalo, 'Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence' (2003) 52 DePaul Law Review 777.

<sup>12</sup> See Partos and Bale (n 8), Stewart and Mulvey (n 8) and Marchu Girma, Sophie Radice, Natasha Tsangrides and Natasha Walter, 'Detained: Women Asylum Seekers Locked Up in the UK' (Women for Refugee Women website, January 2014) <<http://www.refugeewomen.co.uk/wp-content/uploads/2014/01/WRWDetained.pdf>> last accessed 31 August 2017

<sup>13</sup> See *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 and *SSHD v K and Fornah v SSHD* [2007] 1 AC 412. These cases are analysed in Kirvan (n 9) and Conneely (n 9).

<sup>14</sup> UK Home Office (n 10).

<sup>15</sup> BBC Radio 4, 'The Today Programme' (BBC website, 04 September 2015).

<<http://www.bbc.co.uk/programmes/b068c7n8>> last accessed 31 August 2017.

<sup>16</sup> Rachel Adler-Nissen, 'Behind the Scenes of Differentiated Integration: Circumventing National Opt-Outs in Justice and Home Affairs' (2009) 16 Journal of European Public Policy 62.

<sup>17</sup> See Cathryn Costello and Emily Hancox, 'Policy Primer: The UK, The Common European Asylum System and EU Immigration Law' (The Migration Observatory at the University of Oxford website, 02 April 2014).

Conservative governments have chosen to only participate in security measures and those which focus on removing third country nationals, with no plans to opt into any of the most recent recast directives.<sup>18</sup>

Yet despite not being bound directly by the recast directives<sup>19</sup> or international law, they are already influential on UK legislation and guidelines. It is also worth noting that as a signatory to the Convention Relating to the Status of Refugees,<sup>21</sup> the UK has committed to an asylum system in line with international norms codified by the UN High Commission for Refugees.<sup>22</sup> UK also has gender-based obligations as a signatory to the Convention for the Elimination of All Forms of Discrimination Against Women,<sup>23</sup> which has written recommendations for the treatment of female asylum seekers, particularly those fleeing gender-based violence.<sup>24</sup> While there is potential for conflicting rights and recommendations in these systems, the reality is that the EU and international law have very similar content in the context of gender-based asylum claims, which means that the UK should have clear guidance as to procedures and substance for deciding these asylum claims.<sup>25</sup>

The third section of this chapter will consider in more depth the divide between the political culture of the UK, with its “culture of disbelief” and harshening treatment of asylum seekers,<sup>26</sup> and the case-law and administrative guidelines which are far more in line with the principles of international law, as well as the UNHCR and the EU.<sup>27</sup> While the British government has proclaimed its desire to meet the standards of international law, unfortunately this is not supported by practice. Though Britain has implemented gender-aware procedures through the UK Home

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<[http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/UK\\_EU\\_Asylum\\_Law\\_0.pdf](http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/UK_EU_Asylum_Law_0.pdf)> last accessed 31 August 2017, 2.

<sup>18</sup> Lord Taylor of Holbeach CBE, ‘Commitment to Write: Debate on the Report of the European Union Committee on the EU’s Global Approach to Migration and Mobility’ (UK Parliament website, 22 June 2013) <<http://www.parliament.uk/documents/lords-committees/eu-sub-committee/GAMM/debateletterlord220613.pdf>> last accessed 31 August 2017.

<sup>19</sup> See *ibid.*.

<sup>21</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>22</sup> Alexander Betts, ‘Towards a ‘Soft Law’ Framework for the Protection of Vulnerable Migrants’ (2008) *New Issues in Refugee Research*: Research Paper 162.

<sup>23</sup> Convention for the Elimination of All Forms of Discrimination Against Women. (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

<sup>24</sup> CEDAW, ‘General recommendation 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women’ (5 November 2014) CEDAW/C/GC/32.

<sup>25</sup> See *ibid* section 3, chapter 4.

<sup>26</sup> See Stewart and Mulvey (n 8) and Partos and Bale (n 8).

<sup>27</sup> Ceneda and Palmer (n 10) 11.

Office,<sup>28</sup> it is clear that asylum decision-makers have not always followed their own guidelines in making refugee decisions.<sup>29</sup> Through the NGO reports on the treatment of women asylum seekers, it seems clear the UK has not lived up to its own view of itself<sup>30</sup> as extending special protection to women who have encountered gender-based violence.<sup>31</sup> Instead, women who have suffered sexual violence have suffered from the same culture of disbelief as all other asylum seekers<sup>32</sup> – one that seems rooted in political responses to the perceived “flood” of asylum seekers in Britain.<sup>33</sup>

The fourth section is a feminist analysis of the laws and reports discussed in the previous sections of the chapter. In chapter 2, feminist theory was introduced to this research and the various legal systems (international law, EU law) have been analysed through a feminist lens. This chapter will attempt to note the multifaceted layers of the British government’s views on violence against women and the failure to take an intersectional approach to dealing with violence against women. Both the Home Office<sup>34</sup> and the Foreign and Commonwealth Office<sup>35</sup> have vehemently condemned violence against women and cited the unacceptable nature of gender-based violence, both within the home and in combat situations.

It is disappointing that while the UK government is so opposed to gender-based violence within the UK and internationally,<sup>36</sup> there is not a similar attitude towards asylum seekers fleeing gender-based violence. The UK government has been dismissive of the idea that protesting domestic violence and abuse within the home can be a form of feminist political opinion,<sup>37</sup> regularly detained women who have encountered sexual violence<sup>38</sup> and allowed the trauma of sexual violence to negatively affect findings as to the credibility of the experiences of asylum seekers.<sup>39</sup> This is

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<sup>28</sup> UK Home Office (n 10).

<sup>29</sup> See Ceneda and Palmer (n 10) , Canning (n 10) 27 and Human Rights Watch (n 10).

<sup>30</sup> BBC Radio 4 (n 15).

<sup>31</sup> Human Rights Watch (n 10) and Muggeridge and Maman (n 10).

<sup>32</sup> See *ibid.*

<sup>33</sup> Stewart and Mulvey (n 8).

<sup>34</sup> HM Government (n 6).

<sup>35</sup> Foreign and Commonwealth Office, ‘2010 to 2015 Government Policy: Sexual Violence in Conflict.’ (Gov.uk website, 8 May 2015). <<https://www.gov.uk/government/publications/2010-to-2015-government-policy-sexual-violence-in-conflict/2010-to-2015-government-policy-sexual-violence-in-conflict>> last accessed 31 August 2017.

<sup>36</sup> HM Government (n 6).

<sup>37</sup> See *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 as discussed in Kirvan (n 9).

<sup>38</sup> Girma, Radice, Tsangrides and Walter (n 12).

<sup>39</sup> Muggeridge and Mama (n10).

concerning from an intersectional perspective. It is disappointing that the UK's views on the importance of ending sexual violence does not seem to be evenly applied across the British legal system. The British government's perspective seems reminiscent of Catharine MacKinnon's feminist theory of state<sup>40</sup> – with an understanding that in order to prevent domestic and sexual violence, the government must involve itself within the home and interfere in family relationships.<sup>41</sup> Yet there is not an understanding of the ways in which flight and migration status can complicate trauma<sup>42</sup> – and so women suffering from rape trauma syndrome can appear to be without credibility.<sup>43</sup>

An intersectional understanding is needed in order to protect female asylum seekers and treat them in line with international law. So far the UK has failed to consider that sexual violence affects different populations of women in different ways. In order to meet its EU obligations, a more intersectional approach needs to not only be discussed, but fully adopted by asylum decision makers.

## II. UK Asylum Law

The rhetoric of the British government, especially across its various branches, appears to be incredibly contradictory to the implementation of its asylum policy. The current Conservative government has spoken approvingly of its specific expertise in supporting survivors of sexual violence.<sup>44</sup> While the court decisions which have been most influential in this regard<sup>45</sup> date from before the current Parliament, the government has also continued the trend of limiting rights and protections for asylum seekers,<sup>46</sup> a policy which will obviously affect women and girls who are fleeing gender-based violence.<sup>47</sup> The UK government's attempts to isolate treatment of specific groups of asylum seekers,<sup>48</sup> such as pregnant women and women who have encountered gender based violence, while representative of its wider disjointed

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<sup>40</sup> See Catharine MacKinnon, *Towards a Feminist Theory of State* (Harvard University Press 1989) and Catharine MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2006).

<sup>41</sup> MacKinnon (1989) (n 40) 169.

<sup>42</sup> Edna Erez, Madelaine Adelman and Carol Gregory, 'Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women' (2009) 4 *Feminist Criminology* 32.

<sup>43</sup> Muggeridge and Maman (n 10) 6.

<sup>44</sup> BBC Radio 4 (n 15).

<sup>45</sup> See *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 and *SSHD v K and Fornah v SSHD* [2007] 1 AC 412.

<sup>46</sup> See Stewart and Mulvey (n 8) and Partos and Bale (n 8).

<sup>47</sup> See Ceneda and Palmer (n 10), Canning (n 10) 27 and Human Rights Watch (n 10).

<sup>48</sup> See, for example, Girma, Radice, Tsangrides and Walter (n 12) 38, which discusses the violation of the UK restrictions on detaining pregnant women.

strategy to combat violence against women and girls,<sup>49</sup> has not benefitted these vulnerable asylum seekers. Instead, these women have been caught up in the legislative focus on quickly making asylum decisions (which, due to the culture of disbelief, have primarily been rejections.)<sup>50</sup> This has certainly undercut the intersectional nature of UK court cases<sup>51</sup> and gender guidelines,<sup>52</sup> which urge gender-aware sensitivity and procedural support, and left survivors of sexual violence to deal with the harsher aspects of UK asylum law.

The UK government is a signatory to the 1951 Convention Relating to the Status of Refugees and its 1967 Protocol.<sup>53</sup> The Convention, and the supremacy of its interpretation of the international law related to asylum, is enshrined in the Asylum and Immigration Appeals Act of 1993.<sup>54</sup> The Common European Asylum System<sup>55</sup> has also been directly transcribed into UK law through statutory instruments<sup>56</sup> or through national law measures.<sup>57</sup> There have been considerable adjustments to the procedures<sup>58</sup> for treatment of asylum seekers over time, yet the Refugee Convention has remained an essential influence within national law of the British asylum system.

Legislative restrictions against asylum seekers began at the end of Margaret Thatcher's term as prime minister. The Conservative government imposed restricted appeals against rejection of asylum claims, limited asylum seekers' right to work and provided harsh punishments for those who entered the UK irregularly.<sup>59</sup> The increased limitations and restrictions on asylum seekers continued under the Labour government. The 1999 Asylum and Immigration Act placed strong restrictions on

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<sup>49</sup> Briefly mentioned in Girma, Radice, Tsangrides and Walter (n 12) 12 and discussed more broadly in section 4.

<sup>50</sup> Muggeridge and Maman (n 10).

<sup>51</sup> See *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 and *SSHD v K and Fornah v SSHD* [2007] 1 AC 412.

<sup>52</sup> UK Home Office (n 10).

<sup>53</sup> UN High Commissioner for Refugees, 'State Parties to the 1951 Convention Related to the Status of Refugees and the 1967 Protocol'. (UNHCR website, 2011).  
<<http://www.unhcr.org/3b73b0d63.html>> last accessed 31 August 2017.

<sup>54</sup> Asylum, Immigration and Appeals Act 1993, sections 1 and 2.

<sup>55</sup> See chapter 3.

<sup>56</sup> The Refugee or Person in Need of International Protection (Qualification) Regulations 2006, SI 2006/2525.

<sup>57</sup> See UK House of Commons European Scrutiny Committee, 'Implementation of the Asylum Procedures Directive'. (Publications.parliament.uk website, September 2010.)  
<<http://www.publications.parliament.uk/pa/cm201011/cmselect/cmeuleg/428-iii/428iii11.htm>> last accessed 31 August 2017.

<sup>58</sup> Partos and Bale (n 8) and Stewart and Mulvey (n 8).

<sup>59</sup> Partos and Bale (n 8) 178.

asylum seekers' eligibility for benefits,<sup>60</sup> a broad limitation which is likely incompatible with British fundamental rights.<sup>61</sup> Despite the intention for the 1999 Act to be the definitive asylum legislation by the Labour government, the UK Parliament introduced another act in 2002.<sup>62</sup>

The 2002 Nationality, Asylum and Immigration Act forbids asylum seekers from finding their own accommodation, forcing them to live in arranged accommodation centres.<sup>63</sup> It also attempted to limit in-country appeals before asylum seekers were returned to their country of origin.<sup>64</sup> This legislation also introduced a "white list" of countries which would be assumed to be safe countries for their citizens and for whom the citizens would be given accelerated procedures.<sup>65</sup> This idea of "safe countries of origin," for which accelerated procedures are used in EU legislation prevents citizens of a minority group from other EU countries from being given the same opportunities to present their case as those from outside the EU.<sup>66</sup> By 2005, the government had become focused on reducing the number of asylum seekers; resulting in accelerated procedures which quickly heard cases and then removed asylum seekers from the UK.<sup>67</sup>

It seems to be no coincidence that when asylum legislation became harsher, there was simultaneously public political opposition to asylum seekers in Britain. Partos and Bale argue that when there is an increased number of asylum seekers, opposition to refugees becomes more vocal in society.<sup>68</sup> While the Conservative government may appear to have softened in their rhetoric towards migrants, moving from a general opposition to a view which claims increased nuance, with a divide between good "genuine" migrants and dishonest, "bogus" asylum seekers who are denied refugee status.<sup>69</sup> While the rhetoric may have become more nuanced, treatment of asylum seekers indicates the government's attitude towards asylum seekers has not softened.

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<sup>60</sup> Immigration and Asylum Act 1999.

<sup>61</sup> Richard A. Edwards and Peter Billings, 'Safeguarding Asylum Seekers' Dignity: Clarifying the Interface Between Convention Rights and Asylum Law' (2004) 11 *Journal of Social Security Law* 83.

<sup>62</sup> Nationality, Immigration and Asylum Act 2002.

<sup>63</sup> Stevens (n 8) 618.

<sup>64</sup> Scott Blair, 'Asylum Appeals under the Nationality, Immigration and Asylum Act 2002 – new systems, new problems?' (2003) 21 *Scots Law Times* 173, 174.

<sup>65</sup> See *ibid* 176.

<sup>66</sup> See chapter 3.

<sup>67</sup> Stewart and Mulvey (n 8).

<sup>68</sup> Partos and Bale (n 8) 178.

<sup>69</sup> See *ibid* 175-178.

As one interview subject, a policy worker at Asylum Aid noted, the ruling Conservative party does not unanimously support ensuring a strong system of fundamental rights for asylum seekers.

There's a group of MPs called the [Conservative] Way Forward group, which is a bunch of right wing, back bench conservative MPs. For those who have worked in the area for ten years, we've seen these ideas. They cycle back around and every time they get shut down. Partially because they're illegal, but also because they're practically unworkable, but they're arguing the same thing. They're saying that what you do is between asylum refusal and asylum appeal, is that you send someone back to a safe third country in Africa where the UK will help by building refugee camps. So basically sending them to Kenya, holding them there – no matter where they're from and the Kenyan government would have a role in moving them back to their home country.

So we've already run into at least twenty major practical issues right there. But actually, again, it's particularly unviable – if you have a system where 33% of rape cases are overturned on appeal, that's putting thousands upon thousands of rape victims who have suffered from terrible Home Office decisions, flying them across the world and once a judge looks at the appeal and says 'this woman has clearly been the victim of horrible abuse, she deserves safety somewhere', flying them back again. And we're talking about people who have seen horrible things and are clearly traumatised.<sup>70</sup>

This is not a proposal that emphasises support and protection of the asylum seekers involved. Even asylum seekers who have not encountered sexual violence are often fleeing trauma, conflict and violation of human rights<sup>71</sup> and the idea of multiple moves between the UK and African camps is far from UNHCR-recommended best practice.<sup>72</sup>

In the same interview, the use of the phrase “bogus asylum seeker” was discussed. The phrase evokes the idea of asylum seekers who deliberately arrive in the UK to falsely claim asylum in order to gain access to economic benefits.<sup>73</sup> The interview subject noted that obviously there are plenty of asylum seekers who do not meet the necessary criteria to be recognised as refugees – there are plenty of people

<sup>70</sup> *Interview with Policy Officer for Asylum Aid* (London, United Kingdom, 26 February 2014.). Transcript and recording available upon request.

<sup>71</sup> D. Silove, I. Sinnerbrink, A. Field, V. Manicavasagar and Z. Steel, 'Anxiety, Depression and PTSD in Asylum-Seekers: Associations with Pre-Migration Trauma and Post-Migration Stressors' (1997) 170 *The British Journal of Psychiatry* 351.

<sup>72</sup> UN High Commissioner for Refugees, 'Chapter 4: Reception Arrangements' *Refugee Protection and Mixed Migration: A 10-Point Plan of Action*. (UN High Commission for Refugees website, 2007). <<http://www.unhcr.org/50a4c0e79.html>> last accessed 01 October 2017.

<sup>73</sup> Partos and Bale (n 8) 178.



fleeing environmental or economic disasters who would not be considered to have a well-founded fear of persecution for a reason listed in the Refugee Convention.<sup>74</sup> Yet he disagreed with the idea that these asylum seekers understood the Refugee Convention, understood that they would not qualify and thus were attempting to mislead or defraud the British decision-makers.<sup>75</sup> He noted that this view led to the idea of the “culture of disbelief”, when decision-makers believed that it was their job to try to find inconsistencies or untruths in the statement of asylum seekers, saying:

What that means is that someone comes in with an asylum claim and the Home Office believes it's their job to try and take hold of discrepancies. Someone will say, 'I was home, I was raped, soldiers kicked my door in and I fled' and the Home Office will say, 'how many soldiers? How many times were you raped? Were your kids there? How many of your kids were there? How old were your kids? Let's go back to that first question again. When was it? What time of day? How many times did they knock on your door? Was your husband there?' And it's an interrogation designed to find contradiction.<sup>76</sup>

The interviewee noted that this created a particular culture in the asylum decision-making, a culture created by the parliament of the UK government,<sup>77</sup> which disadvantages all asylum seekers.

Costello and Hancox described the two stereotypes of asylum seekers: the vulnerable and the abusive, noting that these caricatures are without context.<sup>78</sup> Vulnerable asylum seekers will often do things that authorities would view as abusive, such as entering the state illegally or delaying disclosure of crucial facts such as sexual violence.<sup>79</sup> This also describes the duality of thinking in the UK.<sup>80</sup> As much as these two groups can be separated in theory, it is impossible to do so in practice. The conclusion, found from a variety of NGO reports and interviews, is that the UK Home Office treats all asylum seekers as if they are potentially abusing the

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<sup>74</sup> See Melissa Fleming ‘Six Reasons why Syrians are fleeing to Europe in Increasing Numbers’ *The Guardian* (London 25 October 2015). <<http://www.theguardian.com/global-development-professionals-network/2015/oct/25/six-reasons-why-syrians-are-fleeing-to-europe-in-increasing-numbers>> last accessed 31 August 2017.

<sup>75</sup> *Interview with Policy Officer for Asylum Aid* (n 70).

<sup>76</sup> See *ibid.*

<sup>77</sup> Partos and Bale (n 8) and Stewart and Mulvey (n 8).

<sup>78</sup> See *ibid.* 41.

<sup>79</sup> See *ibid.* 44.

<sup>80</sup> See section 2.

asylum system.<sup>81</sup> As a worker from Asylum Aid noted in an interview, the Home Office seems to believe that it is their role to hear the evidence of asylum seekers and attempt to disprove it and focus on discrepancies in their evidence.<sup>82</sup>

#### **A. Initial asylum decisions**

The British NGO Asylum Aid has completed research specifically on the initial decision-making in women's asylum claims. As authors Muggeridge and Maman noted,

The research found that women were too often refused asylum on grounds that were arbitrary, subjective, and demonstrated limited awareness of the UK's legal obligations under the Refugee Convention. Many of the UKBA's decisions proved to be, in the words of an immigration judge examining one of the cases included in this research, "simply unsustainable", and 50% were overturned when subjected to independent scrutiny in the immigration tribunal.<sup>83</sup>

It is noteworthy that the most common reason for initial denial of women's refugee claims is credibility: almost 90% of claims were denied after the initial assessment.<sup>84</sup> This is particularly concerning due to the subjective nature of judging credibility, and the effects that gender-based violence, and other trauma, can have on credibility assessments.<sup>85</sup> Of course, not all women seeking asylum are survivors of gender-based violence, but evidence from both Women for Women International<sup>86</sup> and interviews with an immigration solicitor<sup>87</sup> would indicate there is a high overlap between women claiming asylum and sexual violence survivors. The Asylum Aid report also noted that late disclosure of sexual violence often counts against asylum seekers for determining credibility,<sup>88</sup> even though it has been clearly established that survivors might need time and the opportunity to develop trust in order to feel

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<sup>81</sup> Interview with Policy Officer for Asylum Aid (n 70), Interview with Immigration Solicitor (London, United Kingdom, 04 April 2014), transcript and recording available upon request, Ceneda and Palmer (n 10), Muggeridge and Maman (n 10).

<sup>82</sup> *Interview with Policy Officer for Asylum Aid* (n 70).

<sup>83</sup> Muggeridge and Maman (n 10) 5.

<sup>84</sup> See *ibid* 5.

<sup>85</sup> See Jane Herlihy, Peter Scragg and Stuart Turner, 'Discrepancies in autobiographical memories – implications for the assessment of asylum seekers: repeated interview studies.' (2002) 7333 *The BMJ* 324.

<sup>86</sup> Girma, Radice, Tsangrides and Walter (n 12) 4.

<sup>87</sup> *Interview with Immigration Solicitor* (n 81).

<sup>88</sup> Muggeridge and Maman (n 10) 18.

comfortable disclosing sexual violence to decision-makers.<sup>89</sup> It is concerning that the UK is not following its own internal guidelines in regards to understanding effects of trauma and cultural differences in determining credibility.<sup>90</sup>

The Asylum Aid report also noted that decision-makers generally did not seem to understand the meaning of the category of particular social groups,<sup>91</sup> despite extensive litigation on the issue in the UK House of Lords<sup>92</sup> and specific explanations of particular social group in the UK's gender guidelines.<sup>93</sup> The report noted that in gendered cases where applicants attempt to argue that they are members of particular social group,

in such cases, not only do women seeking asylum have to convince the case owner that their account is truthful, they also have to establish that they form part of a PSG and that they have no state protection. It was observed that case owners appeared reluctant to engage with the ground of membership of a PSG and this in effect created a very high threshold for women to cross in order to be recognised as refugees by the UKBA.<sup>94</sup>

As previously noted, particular social group is a category which is often used for gender discrimination and those who have suffered from gender-based violence<sup>95</sup> – if it is not correctly used when determining asylum applications, women and specific groups which do not easily fit into another Convention ground (such as those facing discrimination due to sexual orientation),<sup>96</sup> will not have their asylum claims judged with adequate awareness and sensitivity.<sup>97</sup> It is impossible to see this broad view of credibility without reference to the current government's focus on reducing migration, including that of asylum seekers,<sup>98</sup> and the portrayal of migrants as a threat to

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<sup>89</sup> UK Home Office (n 10) 18.

<sup>90</sup> UK Home Office (n 10) 18.

<sup>91</sup> Muggeridge and Maman (n 10) 6.

<sup>92</sup> See *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 and *SSHD v K and Fornah v SSHD* [2007] 1 AC 412.

<sup>93</sup> See UK Home Office (n 10) 11.

<sup>94</sup> Muggeridge and Maman (n 10) 51.

<sup>95</sup> Kirvan (n 9).

<sup>96</sup> For a discussion of treatment of LGBT asylum seekers within EU law, see Nuno Ferreira, 'Portuguese Refugee Law in the European Context: The Case of Sexuality-Based Claims' (2015) 27 *International Journal of Refugee Law* 411.

<sup>97</sup> Kelly (n 108).

<sup>98</sup> See Alan Travis, 'Theresa May announced drive to limit right to claim asylum in the UK' *The Guardian* (London, 06 October 2015) <http://www.theguardian.com/uk-news/2015/oct/06/theresa-may-announces-new-plan-to-limit-right-to-claim-asylum-in-uk> accessed 31 August 2017.

cohesive society,<sup>99</sup> as well as using dehumanizing language to describe displaced persons.<sup>100</sup>

This has had implications in asylum decision-making; as a policy officer at Asylum Aid noted, it has led to a lopsided perspective where refusals of asylum are defended less rigorously than decisions to grant refugee status and initial decision-makers are not corrected when inaccurately applying the Refugee Convention, to the asylum seeker's detriment.<sup>101</sup>

## **B. What constitutes gendered persecution?**

The UK judiciary, however, (in the Supreme Court's previous incarnation as the House of Lords) has been extremely willing to take a particularly protective and gender-sensitive approach to asylum cases. In the two leading House of Lords decisions, the *Shah and Islam* case<sup>102</sup> and the *Fornah* case,<sup>103</sup> the court not only deferred to the 1951 Refugee Convention, but clearly relied upon the UNHCR's supporting statements on gender in the asylum system. The first case was a conjoined appeal by two Pakistani women who sought to challenge the rejection of their asylum claims. While it was not disputed that the women had a well-founded fear of persecution by their husbands if returned to Pakistan (as both had been accused of adultery), it was disputed as to whether they would qualify as members of a particular social group, and thus as refugees under international and British law.<sup>104</sup> Both the Court of Appeal nor the House of Lords agreed that non-state actors, specifically family members, were capable of being agents of persecution.<sup>105</sup>

The majority of the Court's decisions were devoted to whether Pakistani women or women in Pakistan accused of adultery could constitute a particular social group for the purposes of the Refugee Convention. The House of Lords clearly

<sup>99</sup> See Peter Dominiczak, 'Theresa May: Mass immigration makes building a 'cohesive society' impossible' *The Telegraph*. (London, 06 October 2017) <<http://www.telegraph.co.uk/news/uknews/immigration/11913392/Theresa-May-Mass-immigration-making-cohesive-society-impossible.html>> last accessed 31 August 2017.

<sup>100</sup> See Jessica Elgot, 'How David Cameron's language on refugees has provoked anger' *The Guardian*. (London, 27 January 2016) <<http://www.theguardian.com/uk-news/2016/jan/27/david-camerson-bunch-of-migrants-quip-is-latest-of-several-such-comments>> last accessed 31 August 2017.

<sup>101</sup> Interview with Policy Officer for Asylum Aid (n 70).

<sup>102</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629

<sup>103</sup> *SSHD v K and Fornah v SSHD* [2006] 3 WLR 733.

<sup>104</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 629 and 630.

Discussed in Conneely (n 9) 322.

<sup>105</sup> Conneely (n 9) 324.

grappled with the universality of gender-based violence,<sup>106</sup> particularly in determining how Pakistan could be distinguished from the UK, where 1.4 million women faced domestic violence in 2014.<sup>107</sup> Because of the universal nature of domestic violence, it has clearly been a factor in the failure to historically accept it as a form of persecution or to define women as a persecuted social group.<sup>108</sup> The judges were eventually able to reconcile the differences between domestic violence in the UK and Pakistan by noting that women in the UK were able to seek societal support and punishments within criminal law when victimised by domestic violence.<sup>109</sup> Although this has not always been a realistic assessment of the British treatment of sexual violence,<sup>110</sup> the House of Lords seem to be comfortable with this distinction.<sup>111</sup>

The case was eventually decided in favour of the applicants, with a clear majority holding that the applicants were either members of a particular social group of Pakistani women<sup>112</sup> or Pakistani women who had been accused of adultery and were without protection.<sup>113</sup> Yet just as interesting as the decision were several other discussions within the judgements. The House of Lords was quick to dismiss the idea that these women could be persecuted due to their political opinions,<sup>114</sup> despite the reality that for many women, protesting their discriminatory treatment as women and embracing feminism in their personal lives is an incredibly political action.<sup>115</sup> The House of Lords also seemed unclear as to what amount of discrimination against women was, while not acceptable, also not equivalent to the level of persecution. They agreed that simply being a woman in a misogynistic society would not be sufficient to invoke the Refugee Convention.<sup>116</sup>

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<sup>106</sup> See *ibid* 326.

<sup>107</sup> Alan Travis, '1.4 million women suffered abuse last year, ONS figures show' *The Guardian* London, 12 February 2015). <<http://www.theguardian.com/society/2015/feb/12/14-million-women-suffered-domestic-abuse-last-year-ons-figures-show>> last accessed 31 August 2017.

<sup>108</sup> Conneely (n 9) 326.

<sup>109</sup> Conneely (n 9) 327.

<sup>110</sup> Government Equalities Office, *The Stern Review*. (Nationalarchives.gov.uk, 2010). <[http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/pdf/stern\\_review\\_acc\\_final.pdf](http://webarchive.nationalarchives.gov.uk/20110608160754/http://www.equalities.gov.uk/pdf/stern_review_acc_final.pdf)> last accessed 31 August 2017.

<sup>111</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 635.

<sup>112</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 644 and 652.

<sup>113</sup> See *ibid* 658.

<sup>114</sup> See *ibid* 647.

<sup>115</sup> Conneely (n 9) 329 and Kirvan (n 9) 340 and 341.

<sup>116</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 654 and Conneely (n 9) 326.

It is interesting that persecution has historically been linked to violations of fundamental human rights. Treatment of minority groups in Nazi Germany – and the coordinated denial of their human rights – was the inspiration for the 1951 Refugee Convention.<sup>117</sup> There is clearly a hierarchy within international asylum law as to importance of specific human rights.<sup>118</sup> Catharine MacKinnon has previously discussed the sexism of prioritising civil and political rights over socio-economic rights.<sup>119</sup> Yet from the discussion within the *Shah* and *Islam* case, it is unclear what level of discrimination and violation of essential fundamental human rights would be considered persecution<sup>120</sup> or if discrimination against women has been so normalised that it is difficult to meet the level of persecution – even when women are denied the right to vote, to be educated, to participate in public civil society, to be protected from violence within their own home, throughout the world.<sup>121</sup> This ambiguity is strongest in the dissent by Lord Millett, who notes that the delegates composing the 1951 Convention on the Status of Refugees did not consider the widespread discrimination faced by women as being worthy of mention as a particular category under the Convention,<sup>122</sup> arguing that:

The inclusion of sex as a basis of discrimination in the Universal Declaration and the failure to include it as a ground of persecution in the 1951 Convention is noteworthy. It may be due to the fact that, while sexual discrimination was widely practised in 1951, and women are condemned to a subordinate and inferior status in many societies even today, it is difficult to imagine a society in which women are actually subjected to serious harm simply because they are women.<sup>123</sup>

As noted by Conneely,

The omission was explained by Lord Millett in terms of the difficulty that one would have in imagining a society where 'women are actually subjected to serious harm simply because they are women'. I would have more difficulty in imagining a society in which they are not.

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<sup>117</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 652.

<sup>118</sup> Conneely (n 9) 323.

<sup>119</sup> See MacKinnon (2006) (n 40) 5. Discussed in chapter 2.

<sup>120</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 654, 660 and 661.

<sup>121</sup> For some current examples of current campaigns to end discrimination against women, see 'Stop Violence Against Women' (European Commission website) <<http://ec.europa.eu/justice/saynostopvaw/about.html>> last accessed 14 October 2017. Discussed further in MacKinnon (2006) (n 40).

<sup>122</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 660.

<sup>123</sup> See *ibid* 660-661.

Perhaps the delegates could not envisage a place to which women could escape.<sup>124</sup>

Lord Millett seems oblivious to the historical discrimination that women have faced in almost all societies. Yet the majority opinion does seem to interpret the Refugee Convention in line with the evolving international law, especially the strong protections against gender-based violence found in communications from CEDAW and the UNHCR,<sup>125</sup> and the House of Lords did seem to be able to draw a parallel between women in Pakistan and other populations who have been persecuted (for example, Jewish citizens of Nazi Germany.)<sup>126</sup>

The case of *SSHD v K and Fornah v SSHD*<sup>127</sup> built on the gender-aware principles established in the *Shah and Islam* case. *K and Fornah* also examined the definition of particular social groups, with the first applicant, K, claiming that membership of her marital family constituted a social group, while Fornah claimed membership within a group of Sierra Leonean women who had been targeted for female genital mutilation (FGM).<sup>128</sup> It is concerning that the Court of Appeal felt that FGM did not necessarily constitute persecution against members of a particular social group,<sup>129</sup> when both the Home Office and the Foreign and Commonwealth Office have been outspoken about FGM as a form of discrimination and persecution towards women.<sup>130</sup> Yet once the House of Lords heard the case, the debate seemed to be primarily between those who believed the relevant social group was all women in Sierra Leone<sup>131</sup> or whether it was women who had not yet had FGM performed on them.<sup>132</sup>

Most progressive was the decision of Baroness Hale (the first female member of the House of Lords – there were no women judges presiding in the *Shah and Islam* case), who argued that gender could play a role in determining what constituted persecution – Hale noted that she thought it was gender-sensitive to realise that K

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<sup>124</sup> Conneely (n 9) 330.

<sup>125</sup> Millns and Skeet (n 9) 181.

<sup>126</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 653.

<sup>127</sup> *SSHD v K and Fornah v SSHD* [2006] 3 WLR 733.

<sup>128</sup> See *ibid* 734.

<sup>129</sup> Millns and Skeet (n 9) 182.

<sup>130</sup> See Moira Dustin and Anne Phillips, 'Whose Agenda is it?: Abuses of Women and Abuses of "Culture" in Britain.' (2008) 8 *Ethnicities* 405.

<sup>131</sup> *SSHD v K and Fornah v SSHD* [2006] 3 WLR 733 752 and 772.

<sup>132</sup> See *ibid* 760, 768 and 780. Discussed in Brendan Kelly, 'What is a "particular social group?" A review of the development of the Refugee Convention in England.' (2010) 24 *Journal of Immigration, Asylum and Nationality Law* 9, 14.

would consider the pressing reason for flight to be not just a direct rape threat against her, but a threat to her young son.<sup>133</sup> She also argued that it was a common pattern for women to be considered vulnerable, and that persecuting them will place pressure on male relatives.<sup>134</sup> Baroness Hale is clearly viewing gender-based persecution in a holistic context, in which the role of women in their society is an essential framework for understanding the treatment of their persecutors.

### C. UK Home Office Gender Guidelines

This decision by Baroness Hale is clearly in line with the gender guidelines incorporated by the British Home Office.<sup>135</sup> While there are still some concerning provisions in the gender-based asylum cases, primarily the House of Lord's findings on the issue of political opinion in the *Shah and Islam* case,<sup>136</sup> the UK courts seem to be generally becoming more mindful of international law and aware of both international and UK gender guidelines.<sup>137</sup> The Home Office initially implemented gender guidelines in 2004, after various NGOs complained that the Home Office was not using international law on gender-based asylum claims and even created their own draft gender guidelines<sup>138</sup> (which were then referred to in the *Shah and Islam* case.)<sup>139</sup> The current guidelines drafted by the then-UKBA are the second generation of Home Office gender guidelines.<sup>140</sup>

The Gender Guidelines clearly state that asylum decision makers should make determinations not only in line with international asylum law, but also with regard to the gendered provisions of CEDAW and the ECtHR.<sup>141</sup> The guidelines also specifically note that several gendered provisions of the CEAS have been incorporated into UK law.<sup>142</sup> The gendered provisions of the EU Qualification Directive<sup>143</sup> are currently binding on British decision-makers.<sup>144</sup> The guidelines incorporate the argument put forth by the House of Lords in *Shah and Islam*, and

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<sup>133</sup> *SSHD v K and Fornah v SSHD* [2006] 3 WLR 733, 770.

<sup>134</sup> See *ibid* 176.

<sup>135</sup> UK Home Office (n 10).

<sup>136</sup> Kirvan (n 9) 340 and 341.

<sup>137</sup> See *ibid* 338.

<sup>138</sup> Millns and Skeet (n 9) 180 and Ceneda and Palmer (n 10) 11.

<sup>139</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 657.

<sup>140</sup> Muggeridge and Maman (n 10) 9.

<sup>141</sup> UK Home Office (n 10) 2.

<sup>142</sup> See *ibid* 4.

<sup>143</sup> See chapters 3 and 4.

<sup>144</sup> UK Home Office (n 10) 4.



expressly stated in the UNHCR gender guidelines,<sup>145</sup> regarding the need for protection from domestic violence, by affirming that, “the fact that violence against women is common, widespread and culturally accepted in a particular society does not mean that protection on an individual basis is inappropriate.”<sup>146</sup> While violence against women is a global problem, there are specific differences in how states respond to complaints against perpetrators and support survivors; context is essential in understanding whether this treatment is persecution.

The British gender guidelines closely resemble the UNHCR guidelines,<sup>147</sup> as well as provisions in the CEAS. There is recognition that persecution can be perpetrated by non-state actors<sup>148</sup> and that it is important to consider the actions in the context of the society (and whether a particular woman is able to access justice or protection from the state.)<sup>149</sup> The guidelines also emphasise importance of a gender-aware interpretations of the two specific Convention grounds of particular social group and political opinion.<sup>150</sup> While the House of Lords was dismissive of the idea that fighting against societal acceptance of domestic violence constituted political opinion,<sup>151</sup> it is expressly stated otherwise in the gender guidelines. The guidelines note that political opinion often takes different forms for women – it can include something as simple as feeding other political activists or passing messages. It certainly does not require the woman herself to feel that she was making a political statement if the government perceives it as political.<sup>152</sup> Interpretation of political acts depends greatly on the woman’s country of origin – in some states, simply refusing to wear a veil can be a political statement.<sup>153</sup>

The guidelines also focus on the procedural requirements for vulnerable women in the asylum system. It is important to provide the option for both a female decision-maker and an interpreter if the applicant prefers.<sup>154</sup> Childcare should also be

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<sup>145</sup> UN High Commissioner for Refugees, ‘Guidelines on Prevention and Response to Sexual Violence Against Refugees.’ (UN High Commissioner for Refugees, 1995).  
<<http://www.unhcr.org/3b9cc26c4.html>>, last accessed 20 August 2017, 8

<sup>146</sup> See *ibid* 6.

<sup>147</sup> UN High Commissioner for Refugees (note 145.).

<sup>148</sup> See UK Home Office (n 10) 7.

<sup>149</sup> See *ibid* 7.

<sup>150</sup> See UN High Commissioner for Refugees (note 145.).

<sup>151</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 as discussed in *Conneely* (n 9) 329.

<sup>152</sup> See UK Home Office (n 10) 12.

<sup>153</sup> See *ibid* 13.

<sup>154</sup> See *ibid* 17.

provided so that asylum seekers are not hampered from discussing details of their persecution by the presence of their children in the room.<sup>155</sup> It is also important when judging credibility of asylum seekers to remember that many societal cues are relative to particular societies. Certain indicators of demeanour which British decision-makers interpret as furtive or incredible could simply be cultural differences, particularly when women are forced to recount difficult or traumatic experiences.<sup>156</sup> The guidelines also strongly opposed forcing women to dwell too strongly on recounting the details of the sexual violence itself, stating,

For victims of rape or sexual violence, it is not necessary to obtain precise details about the act itself. However, information should be obtained about the events leading up to and following the assault, the context in which it took place as well as the motivation of the perpetrator (if known). It should be noted that a victim may not always be aware of the reasons for the assault or the identity of the attackers.<sup>157</sup>

The guidelines are clear that women should not be forced to recount the details of their trauma or abuse; there seems to be an implicit recognition throughout the guidelines that female asylum seekers often are dealing with psychological effects from their persecution, which can be triggered through recounting their experiences.

#### **D. Detention and Fast Tracked Asylum Claims**

It is noteworthy that there is no mention of detention in the gender guidelines. One of the most controversial aspects of British treatment of asylum seekers has been the increasing number of women who have been detained under the “fast track” system.<sup>158</sup> Intended to focus on manifestly unfounded applications,<sup>159</sup> the fast track allows the government to quickly make decisions and, if a decision is negative, hear appeals and then allow women to be speedily deported.<sup>160</sup> Detention is not mentioned in either the UNHCR gender or sexual violence guidelines, but has been increasingly used in the British asylum model.<sup>161</sup> Oddly, since detention has a high risk of human rights violations,<sup>162</sup> the UKBA gender guidelines are strangely silent on procedural requirements and treatment by staff and decision-makers for women in detention.

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<sup>155</sup> See *ibid* 17.

<sup>156</sup> See *ibid* 18.

<sup>157</sup> See *ibid* 18.

<sup>158</sup> Human Rights Watch (n 10) 15.

<sup>159</sup> See *ibid* 24.

<sup>160</sup> See *ibid* 10.

<sup>161</sup> See *ibid* 20.

<sup>162</sup> Human Rights Watch (n 10) and Girma, Radice, Tsangrides and Walter (n 12).

The UK has been fairly meticulous at incorporating the UNHCR's international asylum law regarding gender into national law in the form of case-law and gender guidelines. Yet this has simultaneously been contrasted with worsening conditions for asylum seekers through legislation. Much as the UK Gender Guidelines have put forth suggestions to recognize the traumatic effects of gender-based violence and provide necessary support for asylum seekers to feel comfortable disclosing their persecution,<sup>163</sup> women claiming gender-based violence are subject to the same "culture of disbelief" as other asylum seekers.<sup>164</sup> This is not to say that other applicants are rightly subjected to interrogations or attempts to disprove their experiences, simply that gender-based violence survivors have additional vulnerabilities and require specific accommodations during the asylum process.<sup>165</sup> Yet these needs cannot be met so long as the UK government continues to treat asylum seekers with suspicion. As noted by an Asylum Aid policy worker,

it's about changing that culture, and starting with the attitude of, "let's find out as much as we can and assuming at the beginning that it's true." That doesn't mean they'll actually be recognised as a refugees, it just means the decision will be founded on facts. Not some kind of swirl of misinformation. That needs to come from the top – from ministers and senior civil servants.<sup>166</sup>

There have also been concerns expressed by NGOs about the dearth of accurate country of origin information specifically related to the treatment of women in their country of origin and the handling of gender-based violence.<sup>167</sup> In her report focusing on inaccurate use of country of origin information, Collier notes that the Home Office compiles its own information, rather than relying on the information of NGOs such as Amnesty International or Human Rights Watch. These Home Office reports have been criticized for not including specific information on treatment of women within these states.<sup>168</sup> As Collier argues,

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<sup>163</sup> UK Home Office (n 10).

<sup>164</sup> Girma, Radice, Tsangrides and Walter (n 12) 10.

<sup>165</sup> UK Home Office (n 10).

<sup>166</sup> *Interview with Policy Officer for Asylum Aid* (n 70).

<sup>167</sup> Bethany Collier, 'Country of Origin Information and Women: Researching Gender and Persecution in the Context of Asylum and Human Rights Claims.' (Asylum Aid website, 2007)

<<http://www.asylumaid.org.uk/country-of-origin-information-and-women-researching-gender-and-persecution-in-the-context-of-asylum-and-human-rights-claims>> last accessed 12 June 2017

and Muggeridge and Maman (n 10) 8,

<sup>168</sup> Collier (n 167) 5

many organisations producing human rights and country of origin information focus on the male experience as indicative of the human rights situation in a country. Although women's human rights concerns are increasingly appearing on the agenda, information on women's human rights in country reports often constitutes only a paragraph unless the report is specifically focused on women. This paragraph does not adequately reflect the fact that women represent 50% of most populations and are frequently subjected to forms of persecution different from men.

Country of origin information is essential for determining the Convention ground of particular social group. As noted by Lord Millett in the *Shah and Islam* case, there is no universal definition of a particular social group, it will often vary between cultures. Landowners may not have been a particular social group in capitalistic societies, but they would be perceived as such during communist revolutions.<sup>169</sup> One of the requirements to be recognized as a particular social group is that the society regards them as a cohesive group<sup>170</sup> – in order to understand the views of that specific society, accurate country of origin information is necessary.<sup>171</sup> There are thorough reports produced by NGOs and even the Committee to Eliminate All Forms of Discrimination Against Women will regularly evaluate the treatment of women in a particular state. It is disappointing that the UK Home Office does not choose to take advantage of this information, particularly as the Home Office's own gender guidelines note the importance of understanding not just the law but also the reality of treatment of women in their country of origin.<sup>172</sup> Gender-based claims do not exist in a vacuum and an understanding of the context of a society in which a woman is seeking protection is essential for determining gender-based asylum claims. The use of detention for asylum seekers has also been extremely controversial amongst NGOs.<sup>173</sup> The UNHCR does not support the use of detention for asylum seekers (unless there is a necessary security reason.)

As noted in section 2, this process begun in the mid-1990s with the Labour government's emphasis on more promptly removing asylum seekers whose

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<sup>169</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 660.

<sup>170</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629.

<sup>171</sup> Collier (n 167) 9.

<sup>172</sup> See UK Home Office (n 10) 7.

<sup>173</sup> Human Rights Watch (n 10) and Girma, Radice, Tsangrides and Walter (n 12).

applications had been rejected.<sup>174</sup> The UK Home Office created a fast track system for applications which it judges to be manifestly unfounded on the surface or for applicants from a super-safe country of origin,<sup>175</sup> which involved administrative detention for asylum seekers who were not judged to be a security risk, but to be at risk of flight within the UK.<sup>176</sup> The UK government has presented this fast track as a fairly straightforward process, into which no one with a complex asylum claim would be sorted, and applications would be quickly determined and the applicant speedily removed from the UK.<sup>177</sup> Fast track claims do have an incredibly low rate of success,<sup>178</sup> which is attributed by the government to the lack of substance in the claim and by NGOs to the procedural difficulties in proving a fast track claim.<sup>179</sup> The speed of a fast track claim makes it difficult for solicitors to develop a rapport and trust with their clients<sup>180</sup> and it has been judged even by the Home Office to be incompatible with any complex cases, including any case with a gendered component.<sup>181</sup> Women for Women International have noted that only about one third of the women who are detained by the UK Visas and Immigration Service (UKVI) are eventually returned to their country of origin – meaning that administrative detention has been ineffective in ensuring that those with rejected asylum claims leave the UK.<sup>182</sup> The policy of detention is particularly questionable in light of the finding that detaining a woman costs over £30,000 more than allowing her to remain within the community.<sup>183</sup>

Regardless of the agreement that the fast track is unsuitable for gendered asylum cases, the UKVI has not been rigorous in ensuring that gendered claims are fully supported.<sup>184</sup> The guidelines note that at the initial meeting between asylum seekers and decision-makers, substantive claims should not be discussed, yet decision makers often use this meeting to make a decision as to whether or not an asylum seeker should be fast-tracked<sup>185</sup> – it is unsurprising that applicants are unwilling to disclose something as personal and traumatic as gender-based violence in an initial

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<sup>174</sup> Human Rights Watch (n 10) 20.

<sup>175</sup> Human Rights Watch (n 10) 24.

<sup>176</sup> Human Rights Watch (n 10) 20.

<sup>177</sup> Human Rights Watch. (n 10).

<sup>178</sup> Girma, Radice, Tsangrides and Walter (n 12) 28.

<sup>179</sup> Human Rights Watch (n 10) 31.

<sup>180</sup> See *ibid* 52.

<sup>181</sup> See *ibid* 2.

<sup>182</sup> Girma, Radice, Tsangrides and Walter (n 12) 4.

<sup>183</sup> See *ibid* 24.

<sup>184</sup> See *ibid* 2.

<sup>185</sup> See *ibid* 3.

meeting. Unfortunately, this means that women are often moved into the fast-track, regardless of whether this is where their cases should belong. As Human Rights Watch noted,

Solicitors and other practitioners told Human Rights Watch that it is not at all clear what the criteria for placing someone into the Detained Fast Track procedure actually are. The referral form only gives “case can be decided quickly” as a reason. The most commonly used reasons according to solicitors (who hear this from clients or from immigration officers) are the perceived lack of credibility of the person, whether bed space is available at immigration detention centers, the country of origin.<sup>186</sup>

The now-defunct anti-trafficking NGO, the Poppy Project, has noted that they have found women in the fast-track system who have been trafficked into the UK for sexual exploitation.<sup>187</sup> Over 72% of the women detained in Yarl’s Wood Immigration Removal Centre who were interviewed by Women for Refugee Women had been sexually assaulted either as an aspect of their persecution in their country of origin or while fleeing persecution.<sup>188</sup> Human Rights Watch has stated concern that the UKVI does not consider sexual violence claims to be immune from being transferred to the fast-track system; these are cases which often require additional time to build trust with legal representatives and to collect evidence. Human Rights Watch recommends that the UKVI enforce protection of sexual violence cases from the fast track or administrative detention.<sup>189</sup> Interestingly, Human Rights Watch recommends that this should be amended through EU legislation – that the Asylum Procedures Directive<sup>190</sup> should restrict use of the fast-track procedure and detention, along with providing EU-wide training for those who provide direct services to sexual violence survivors.<sup>191</sup>

Women for Refugee Women examined the experience of sexual violence survivors detained in Yarl’s Wood Immigration Removal Centre.<sup>192</sup> The Women for Refugee Women report noted that many of the women described their experiences of gender-based violence as being a form of torture.<sup>193</sup> This description is echoed in international and European law, which has concluded that sexual violence can be a

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<sup>186</sup> See *ibid* 38.

<sup>187</sup> See *ibid* 38.

<sup>188</sup> Girma, Radice, Tsangrides and Walter (n 12) 4.

<sup>189</sup> Human Rights Watch (n 10) 7.

<sup>190</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection OJ L 180/60

<sup>191</sup> Human Rights Watch (n 10) 9.

<sup>192</sup> Girma, Radice, Tsangrides and Walter (n 12).

<sup>193</sup> See *ibid* 15.

form of torture.<sup>194</sup> The UK has not set any limits regarding the length of time an asylum applicant can be detained<sup>195</sup> and while the UKVI will rarely extend the time that women are given to prepare their claims, there can often be delays during the process (while a woman continues to be detained.)<sup>196</sup> Women for Refugee Women also found that not all women were granted legal aid for an appeal and that the quality of the legal aid tended to be inconsistent.<sup>197</sup> Some of the women interviewed also complained of being sexually assaulted at Yarl's Wood or experienced inappropriate behaviour from male guards.<sup>198</sup> The report noted that there was no requirement to ensure that female, rather than male, officers worked within Yarl's Wood and recommended that the UK Gender Guidelines should advocate for female officers to work within centres which detain women.<sup>199</sup>

Overall, Women for Refugee Women were concerned that women in immigration removal centres would enter into a cycle where their claims were pre-judged to be abusive and unworthy of in-depth consideration, which would then lead to detainment, where the low rate of success amongst claims of detained women would be used as justification to make claims more difficult to succeed.<sup>200</sup> The UK government would be able to use this cycle to attempt to strengthen the narrative that the role of the asylum determination system is to quickly divide applicants into the abusive and the vulnerable.

The culture of disbelief of asylum claims within the UK Home Office is particularly concerning when compared to the approaches suggested by the Home Office and the Foreign and Commonwealth Office for dealing with sexual violence in other contexts. These stark policy differences, mentioned briefly by both Asylum Aid<sup>201</sup> and Women for Women International,<sup>202</sup> would indicate that the UK is not taking an intersectional approach to sexual violence, and ensuring that its opposition to gender-based violence was consistent, regardless of migration status. In the next section, the intersectional feminist rhetoric of the UK House of Lords and Foreign and

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<sup>194</sup> See Application 25660/94, *Aydin v Turkey* (2006) 42 EHRR 44 and Application 39272/98, *MC v. Bulgaria* (2005) 40 EHRR 20.

<sup>195</sup> Girma, Radice, Tsangrides and Walter (n 12) 22 and 24.

<sup>196</sup> See *ibid* 30.

<sup>197</sup> See *ibid* 23.

<sup>198</sup> See *ibid* 31.

<sup>199</sup> See *ibid* 32.

<sup>200</sup> *Ibid* at p30.

<sup>201</sup> *Interview with Policy Officer for Asylum Aid* (n 70)..

<sup>202</sup> Girma, Radice, Tsangrides and Walter (n 12) 12.

Commonwealth Office will be compared with the liberal feminist reality of women applying for asylum in Britain.

Examining the British asylum system, it seems clear that the current and previous governments have attempted to introduce a divide within the population of asylum seekers, perhaps best exemplified by Baroness Warsi's comments that the UK has a history of particular support for survivors of sexual violence.<sup>203</sup> While imposing increasingly difficult restrictions on asylum seekers in general,<sup>204</sup> the UK courts and the UKVI have focused on the greater gendered understanding of asylum law and particularly supporting sexual violence survivors.<sup>205</sup> It is obviously an unsustainable separation – stricter general asylum procedures and protections will necessarily affect female asylum seekers who have suffered from gendered violence. Yet this cognitive dissonance is unsustainable; to understand where this divide has come from, it is important to understand both the harsh political views of asylum seekers in Britain as well as Britain's international obligations to protect fundamental rights. In the next section, we will turn from British political views to a better understanding of Britain's obligations to protect the fundamental rights of asylum seekers under international and EU law.

### **III. UK obligations under international and EU law**

The UK government cannot craft its own asylum policies without guidelines or restrictions. As noted previously, the UK is a signatory to the 1951 Convention on the Status of Refugees.<sup>206</sup> The Preamble of the Refugee Convention speaks of the need to ensure that asylum seekers are not an undue burden to a small group of countries<sup>207</sup> (and therefore the need to distribute those in need of protection throughout the globe.) Similarly, Article 14 of the Universal Declaration of Human Rights argues that the right to seek asylum is a basic fundamental right.<sup>208</sup> Accordingly, as a signatory to the 1951 Refugee Convention, the UK has agreed to hear the asylum claims of anyone who arrives at the UK border asking for asylum and

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<sup>203</sup> BBC Radio 4 (n 15).

<sup>204</sup> Partos and Bale (n 8) and Stewart and Mulvey (n 8).

<sup>205</sup> See UK Home Office (n 10), *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 and *SSHD v K and Fornah v SSHD* [2007] 1 AC 412.

<sup>206</sup> UN High Commissioner for Refugees (n 53.)

<sup>207</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).13.

<sup>208</sup> Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR)Article 14.



to grant protection to anyone with a well-founded fear of persecution for a reason listed in Article 1 of the Refugee Convention.<sup>209</sup> The UK is bound by its Treaty obligations.<sup>210</sup> While the UK is obliged to follow the text of the Refugee Convention incorporated into national law, it is not bound by UNHCR guidance and interpretations of the Refugee Convention.<sup>211</sup> Anything produced by the UNHCR outside of the text of the Treaty itself is considered to be persuasive, rather than binding on the signatory states. The UK was not required to follow the UNHCR's suggested procedures as to gender-related persecution<sup>212</sup> or on supporting sexual violence survivors<sup>213</sup> until similar gender guidelines were incorporated into UK national law.<sup>214</sup>

The UK gender guidelines also obligate UK decision-makers to make determinations of asylum in accordance with two other specific international treaties:<sup>215</sup> the European Convention on Human Rights<sup>216</sup> and the Convention on the Elimination of All Forms of Discrimination Against Women.<sup>217</sup> The European Convention on Human Rights is primarily used for guidance on alternative, non-Convention forms of subsidiary protection. There are certain groups of asylum seekers who, while they do not qualify for protection under the 1951 Refugee Convention, cannot be returned to their country of origin without violation of Article 3 provision against torture or degrading treatment or the Article 8 right to family life of the ECHR.<sup>218</sup> The UK is bound by the decisions and caselaw of the ECtHR<sup>219</sup> and

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<sup>209</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention)14..

<sup>210</sup> While the Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) has not been fully incorporated into UK law, its provisions have been incorporated through legislation such as Asylum and Immigration Appeals Act 1993 and Immigration and Asylum Act 1999.

<sup>211</sup> Aubrey Macklin, 'Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims' (1998-1999) 13 Georgetown Immigration Law Journal 25.

<sup>212</sup> UN High Commissioner for Refugees, 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1a(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees.' (UN High Commissioner for Refugees, 07 May 2002). <<http://www.refworld.org/pdfid/3d36f1c64.pdf>>, last accessed 20 August 2017.>. Discussed in chapter 4.

<sup>213</sup> UN High Commissioner for Refugees (note 145).. Discussed in chapter 4.

<sup>214</sup> UK Home Office (n 10).

<sup>215</sup> See *ibid* 2.

<sup>216</sup> Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR)

<sup>217</sup> Convention for the Elimination of All Forms of Discrimination Against Women. (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13.

<sup>218</sup> For a discussion of this form of subsidiary protection, see Geoff Gilbert, 'Is Europe Living up to its Obligations to Refugees?' (2004) 15 The European Journal of International 963.

so cannot violate these protections of family life and prohibitions against torture, including in the UK's treatment of asylum seekers.

As noted in chapter 4, the CEDAW Committee has released statements on treatment of asylum seekers.<sup>220</sup> As part of its regular non-binding evaluation of states' compliance with the CEDAW treaty, the CEDAW Committee has included its assessment on the UK's treatment of female asylum seekers. In the 2011 report, the CEDAW Committee noted that in previous reports, they had emphasised the inability of women with insecure migration status to access domestic violence services.<sup>221</sup> The CEDAW Committee noted that by 2011, this had not been completely remedied.<sup>222</sup> The CEDAW Committee also emphasised the necessity of a gender-aware approach to migration decisions (particularly those of women who had suffered from sexual violence,)<sup>223</sup> as well as integrating migrant women into the healthcare and justice system.<sup>224</sup> CEDAW has placed a strong emphasis on persuading the UK to apply national and international law from a gendered perspective.

The UK also currently has strong obligations as a member state of the EU.<sup>225</sup> The UK has historically been reluctant to opt into measures regarding freedom of third party nationals (for example, the common travel area of the UK and Ireland is separate from the Schengen Agreement of free movement within continental Europe.)<sup>226</sup> The UK is not required to accept any of the EU's asylum legislation, however, it chose to participate in all the measures at the initial stage of the CEAS.<sup>227</sup> The UK also participated in crafting the CEAS, including attempts to introduce several measures which were incompatible with international law and EU fundamental rights, such as transferring all asylum seekers to a non-EU country while their applications were processed<sup>228</sup> or provisions to allow states to deny certain

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<sup>219</sup> Human Rights Act 1998.

<sup>220</sup> CEDAW (n 24), as discussed in Chapter 4.

<sup>221</sup> CEDAW, 'Concluding observations on the seventh periodic report of the United Kingdom of Great Britain and Northern Ireland' (30 July 2013) CEDAW/C/GBR/CO/7.

<sup>222</sup> See *ibid* 10.

<sup>223</sup> See *ibid* 10.

<sup>224</sup> See *ibid* 10.

<sup>225</sup> The UK is currently bound by EU law as a member of the European Union; this is subject to change throughout the negotiations of the British withdrawal from the EU.

<sup>226</sup> Maria Fletcher, 'Schengen, the European Court of Justice and flexibility under the Lisbon Treaty: balancing the United Kingdom's "ins" and "outs"' (2009) 5 *European Constitutional Law Review* 71.

<sup>227</sup> Elspeth Guild, 'Seeking Asylum: Storm Clouds between international commitments and EU legislative measures' (2004) 29 *European Law Review* 198, 198.

<sup>228</sup> See *ibid* 200.

groups of asylum seekers specific state benefits.<sup>229</sup> For perhaps related reasons (since the recast directives have attempted to increase the fundamental rights protections of refugees),<sup>230</sup> the UK has chosen to opt out of the most recent recast directives, meaning that the UK is restricted by the 2005 original directives.

Because the UK is not bound by any changes or amendments made to the directives, it is unclear how much these changes affect UK asylum law. The recast CEAS was developed to better take into account the concerns of NGOs and the CJEU as to fair treatment and standards of human rights protection for asylum seekers.<sup>231</sup> Yet the recast directives seem to have the same difficulty as previous incarnations of the CEAS – the inability to reconcile the focus on security of the EU border with ensuring fundamental rights for asylum seekers.<sup>232</sup> In the Council’s note on the Stockholm Programme (the blueprint for the recast asylum system),<sup>233</sup> this conflict is implicit – the section on “A Europe of responsibility, solidarity and partnership in migration and asylum matters” does not focus merely on the need for European cooperation or more accurate decisions regarding asylum seekers, but on the need to ensure border protection for European states.<sup>234</sup> This is echoed in the UK national legislation, which increasingly strips asylum seekers of support and fair processes.<sup>235</sup> With the recast CEAS falling short of hopes that it would raise the low threshold for fundamental rights in member states,<sup>236</sup> would an opt in by the UK actually have changed the content of national asylum decisions or EU regulations?

The UNHCR had complained about the lack of fundamental protections in the original Qualification Directive and thus the recast version has inserted various clauses intended to ensure a greater protection of fundamental rights in accordance

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<sup>229</sup> See *ibid* 216.

<sup>230</sup> 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)’ (ECRE website, 2011). <[http://www.ecre.org/index.php?option=com\\_downloads&id=805](http://www.ecre.org/index.php?option=com_downloads&id=805)>, last accessed 31 July 2017, 2

<sup>231</sup> Costello and Hancox (n 17) 3.

<sup>232</sup> See Mia-Maria Michels, ‘To What Extent does the European recast Qualification Directive protect Refugee Women seeking Asylum on the Basis of Gender-Related Claims’ (UCT Libraries website, 14 April 2014). <<http://open.uct.ac.za/handle/11427/9178>> last accessed 01 September 2017, 69 and Costello and Hancox (n 17) 5.

<sup>233</sup> Council of the European Union, ‘The Stockholm Programme – an Open and Secure Europe’.17024/09 CO EUR-PREP 3.

<sup>234</sup> See *ibid* 5.

<sup>235</sup> Partos and Bale (n 8),

<sup>236</sup> See Michels (n 165) 69 and Costello and Hancox (n 17) 5.

with the obligations suggested by the UNHCR.<sup>237</sup> For example, Article 10 of the recast Qualification Directive<sup>238</sup> now specifically recognises that gender identity should be considered when determining membership of a particular social group. While this may seem like a particularly important development, and a strong protection for those seeking asylum from gender-based violence, it is perhaps not such an essential requirement within the UK when case law has developed a similar understanding in the area of particular social group.<sup>239</sup> The recast Asylum Procedures Directive has also incorporated particular mentions of gender-sensitive approaches to interviewing sexual violence survivors,<sup>240</sup> asked that applicants be granted their choice of gender of interviewer,<sup>241</sup> and noted that country of origin information must be used in a gender specific manner in order to ensure that asylum decisions are accurate regarding treatment of women in these countries.<sup>242</sup> All of these suggestions are already found in the UK Gender Guidelines,<sup>243</sup> although not all have been completely implemented in practice within the UK.<sup>244</sup> It is certainly unclear as to whether additional binding legislation from the EU would have resulted in a better protection of fundamental rights for asylum seekers.<sup>245</sup>

Costello and Hancox note that the new Qualification Directive seems to divide asylum seekers into two stereotypes: vulnerable asylum seekers in need of protection and asylum seekers attempting to abuse the system. The EU still seems to believe that all asylum seekers can be neatly separated into these two categories.<sup>246</sup> The idea of siloing migrants, strictly dividing them into categories of worthy and sympathetic migrants versus those exploiting British laws and support, is not limited to asylum seekers. Instead it seems to be an aspect of the complicated British relationship with

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<sup>237</sup> Costello and Hancox (n 17) 6.

<sup>238</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9

<sup>239</sup> See *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 and *SSHD v K and Fornah v SSHD* [2007] 1 AC 412.

<sup>240</sup> Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on common procedures for granting and withdrawing international protection [2013] OJ L160/60.

<sup>241</sup> See *ibid* 63.

<sup>242</sup> See *ibid* 63.

<sup>243</sup> UK Home Office (n 10).

<sup>244</sup> Collier (n 167) and Muggeridge and Maman (n 10).

<sup>245</sup> Costello and Hancox (n 17) 3-4.

<sup>246</sup> See *ibid* 41

migration, culminating in a vote to leave the European Union.<sup>247</sup> Reducing migration was frequently cited as the leading factor in the popular vote to leave the EU.<sup>248</sup> Yet in an interview with the policy worker from Asylum Aid, he noted that any early attempts to divide asylum seekers into different categories would lead to unfairness and a violation of human rights. Instead, applicants should be treated as having an understanding of their own experiences, if not necessarily the legal procedures of refugee status. There should be a collaborative approach to understand if asylum seekers meet the legal definition of refugee.<sup>249</sup> This is certainly legally and practically possible, but for political reasons, the British government seems content to present the majority of claims as an adversarial process while claiming humanitarian concern for the small minority of “real” refugees.<sup>250</sup>

This has meant that the EU continually sees asylum policy as requiring balance between efficiency and fairness. Costello and Hancox argue that these are two contradictory aims, which will naturally clash when applied in practice.<sup>251</sup> The European Commission’s statement on the recast Qualification Directive has emphasised that the changed directive would be less open to abuse by asylum seekers.<sup>252</sup> This is reflected in several provisions of the recast Qualification Directive; for example, harsh sanctions on carriers who allow asylum seekers into the EU are not balanced by opportunities for asylum seekers to apply for asylum outside of the EU.<sup>253</sup> The recast Directive also accepts that detention will be used by member states and instead of attempting to prevent detention, works to ensure that asylum procedures can still be accessed while detained.<sup>254</sup> Despite the comments by the ECtHR stating that legal aid is an essential aspect of achieving fair treatment for asylum seekers, legal support is not offered throughout the process. Overall, Hancox and Costello feel that the recast Qualification Directive has only been moderately successful. It has incorporated some criticism as to the low level of protections for

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<sup>247</sup> Bridget Anderson, ‘Towards a New Politics of Migration’ (2017) 40 *Ethnic & Racial Studies* 1527

<sup>248</sup> See *ibid* 1533.

<sup>249</sup> *Interview with Policy Officer for Asylum Aid* (n 70).

<sup>250</sup> See Anderson (n 247.)

<sup>251</sup> Costello and Hancox (n 17) 5-6.

<sup>252</sup> See *ibid* 8.

<sup>253</sup> See *ibid* 9.

<sup>254</sup> See *ibid* 10.

asylum seekers and refugees,<sup>256</sup> but remains simply a minimum threshold for member states.<sup>257</sup>

Examining the entirety of the recast CEAS, Michels makes several of the same criticisms used by UK academics as to the UK interpretation of the Refugee Convention – including the focus on gendered interpretation of particular social group, rather than a broader gendered interpretation of any of the other grounds for refugee status.<sup>258</sup> She also notes that the requirements to establish persecution as a particular social group are higher than in UK law. In the *Fornah* case,<sup>259</sup> the UK House of Lords established that one of two factors is required in order to form a particular social group: either the group has immutable characteristics or they are perceived as a group by society, even without their persecution.<sup>260</sup> The recast EU Qualification Directive requires both categories to be present in order to qualify as a social group, making eligibility more difficult for the most gender-considered of the qualification categories.<sup>261</sup> Michels also notes that it is difficult to improve the recast CEAS as a whole without changing the Dublin Regulation system, stating:

As long as the Dublin regulation exists, member states are able to hand overexamination responsibilities to the countries at the edge of Europe. This scenario results in huge differences in asylum numbers and, without help or changes, it is not expected that these countries will be able to cope with situations of overstrained national asylum systems. Consequently, it is unlikely that the ‘better standards’ as set out in the recast Qualification Directive will be met accordingly.<sup>262</sup>

Warnings about this gap seem to be even more relevant after the events of the Syrian migrant crisis, which has resulted in a greatly uneven distribution of asylum seekers throughout the EU and a temporary abandonment of the Dublin system. The future of

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<sup>256</sup> See *ibid* 6.

<sup>257</sup> See *ibid* 5.

<sup>258</sup> See Michels (n 165) 48. Compare with the discussions on UK focus on particular social group for gender claims in Kelly (n 108), Kirvan (n 9) and Conneely (n 9).

<sup>259</sup> *SSHD v K and Fornah v SSHD* [2007] 1 AC 412.

<sup>260</sup> *SSHD v K and Fornah v SSHD* [2007] 1 AC 412

<sup>261</sup> Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L 337/9 Discussed by Michels (n 165).

<sup>262</sup> See Michels (n 165) 69.

the Dublin Regulation seems to be in doubt,<sup>263</sup> but it is clear that the UK does not have significantly different standards for granting asylum status or for treatment of asylum seekers than would be incorporated by the recast directives. While there is considerable discussion as to whether increased legislative harmonization would improve the level of fundamental rights,<sup>264</sup> refusing to opt in to the latest directives has not affected the content of UK national law. It would seem that the UK is far more internally focused, creating its own standards and interpretations of international asylum law.

#### **IV. Intersectional Feminism in UK Policy**

In order to understand why the UK government's approach to gender-based violence cannot be argued to be intersectional, three groups of survivors must be compared: British women (or women with strong legal migration status in the UK) facing gender-based violence within Britain, asylum seekers in Britain fleeing gender-based violence from their countries of origin, and survivors of gender-based violence seeking safety and redress in their own countries of origin. The British government's policies seem to be extremely varied, arguing for implementation of policies which would provide support and stronger protections for the first<sup>329</sup> and third<sup>330</sup> groups, but not the second.<sup>331</sup> This has led to a contradiction in which the British government conspicuously ignores the effects of gender-based violence depending on which women are victimized. It is particularly concerning from an intersectional feminist perspective, and undercuts the current UK government's verbalized commitments to end violence against women. "No woman should live in fear of violence and every girl should grow up knowing she is safe",<sup>332</sup> the UK Home Office strategy on eliminating violence against women and girls argues. It is unfortunate that this philosophy has not been equally applied to survivors detained in Yarl's Wood Immigration Removal Centre in order to strive for an intersectional approach to ending gender-based violence.

Part of this gap is likely due to a lack of coordination by UK government departments. Asylum decisions are made by the UK Visas and Immigration Service

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<sup>263</sup> Philip L. Martin, 'Europe's Migrant Crisis: an American Perspective' (2016) 13 *Migration Letters* - 307

<sup>264</sup> Costello and Hancox (n 17) 3-4.

<sup>329</sup> HM Government (n 6).

<sup>330</sup> Foreign and Commonwealth Office (n 7).

<sup>331</sup> See section 4.

<sup>332</sup> HM Government (n 6) 4.

(UKVI), a branch of the UK Home Office, which also sets domestic and sexual violence policy within Britain. Contrarily, the UK Foreign and Commonwealth Office (FCO) is responsible for violence against women outside the UK<sup>333</sup> – with the exception of the gender-based violence which has led to an asylum claim within the UK. The UK Home Office has not historically offered good practice with regards to sexual assault<sup>334</sup> and domestic violence,<sup>335</sup> including a lack of intersectional understanding of the effects of gender-based violence.<sup>336</sup> The current UK Home Office strategy to end gender-based violence focuses on two particular aims: preventing violence against women and girls through a strategy of societal education, particularly aimed at those in schools, as well as increasing prosecution of sexual offences.<sup>337</sup> The strategy cites the increase in prosecutions during the recent Coalition government as an example of good practice.<sup>338</sup> Interestingly, the report cites several times the importance of the UK's international work to eliminate gendered violence on both a European<sup>339</sup> and an international level.<sup>340</sup> The strategy also notes the importance of sharing best practice with the Foreign and Commonwealth Office for preventing sexual violence in conflict, as well as recognizing the importance in societal development of eradicating violence against women and girls.<sup>341</sup> Yet contrarily, the strategy also emphasizes the need for local control over policies and services for gender-based violence,<sup>342</sup> an interesting contrast to the focus on the need for international cooperation.<sup>343</sup> Changing the culture outside the UK may be politically palatable, but enforcing best practice on UK local area is not a priority for the current government.

The strategy has only one mention of the need to consider intersections of oppression within the British community (older women, LGBT women, those from

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<sup>333</sup> Sofia Strid, Sylvia Walby, and Jo Armstrong, 'Intersectionality and Multiple Inequalities: Visibilities in British Policy on Violence Against Women.' (2013) 20 *Social Politics* 558, 566.

<sup>334</sup> Government Equalities Office (n 110.)

<sup>335</sup> Anna Matczak, Eleni Hatzidimitriadou and Jane Lindsay, 'Review of Domestic Violence Policy in England and Wales.' (Kingston University website, 2011).  
<<http://eprints.kingston.ac.uk/18868/1/Matczak-A-18868.pdf>> last accessed 01 June 2017.

<sup>336</sup> Strid, Walby, and Armstrong (n 329).

<sup>337</sup> HM Government (n 6) 6.

<sup>338</sup> See *ibid* 8.

<sup>339</sup> See *ibid* 7.

<sup>340</sup> See *ibid* 31.

<sup>341</sup> See *ibid* 25.

<sup>342</sup> See *ibid* 10.

<sup>343</sup> See *ibid* 35 and 41.



minority ethnic communities), but this recommendation does not specifically include migration status.<sup>344</sup> There is a brief paragraph regarding the need to strengthen protections for women in the asylum system.<sup>345</sup> Most of these changes have been incorporated into the Gender Guidelines, including access to childcare while meeting with asylum decision-makers, and an option to meet with female decision-makers.<sup>346</sup> The strategy also noted the importance of access to sexual violence services to deal with the physical and psychological aftermath of gender-based violence.<sup>347</sup> While these ideas have been incorporated into the UK Gender Guidelines,<sup>348</sup> they have not necessarily been applied by the UKVI in practice,<sup>349</sup> providing another disappointing example of the gap between British government policy and reality.

The Foreign and Commonwealth Office is currently campaigning to end sexual violence in conflict; former Foreign Secretary William Hague organised a 2014 Summit Event on Ending Sexual Violence in Conflict, along with UN High Commission for Refugees ambassador Angelina Jolie.<sup>350</sup> The Summit produced a report after the various meetings in London, which was said to represent the Foreign and Commonwealth Office's commitment towards international cooperation to eliminate sexual violence in conflict.<sup>351</sup> Similarly to the Home Office's views on preventing sexual violence within the UK, the FCO emphasizes the importance of education to change societal attitudes towards sexual violence in conflict,<sup>352</sup> as well as greater focus on ensuring prosecution for offenders.<sup>353</sup> It is particularly notable that the FCO recognizes that gender-based violence in conflict is rooted in societal attitudes towards women and girls, arguing that:

overcoming the prevailing societal attitudes that perpetuate the subordination of women and girls and prevent their full participation in all areas of life is critical to challenging the culture of impunity for sexual violence crimes and its acceptance as an inevitable by-product of war. We all have an obligation to tackle the root causes and drivers

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<sup>344</sup> See *ibid* 10.

<sup>345</sup> See *ibid* 40.

<sup>346</sup> UK Home Office (n 10) 17.

<sup>347</sup> HM Government (n 6) 40.

<sup>348</sup> UK Home Office (n 10) 17.

<sup>349</sup> Muggeridge and Maman (n 10) 36 and 40.

<sup>350</sup> Foreign and Commonwealth Office (n 7) 4.

<sup>351</sup> See *ibid* 12.

<sup>352</sup> See *ibid* 4.

<sup>353</sup> See *ibid* 15.

of sexual and gender-based violence as an essential part of our fight against sexual violence in conflict.<sup>354</sup>

This is certainly a contrast to Lord Millett's assertion that it was hard to imagine a society where women faced discrimination solely because they were women (and so would need asylum based on societal views of women and lack of protection when they encountered gender-based violence).<sup>355</sup> Colliers' critique of the UK's country of origin information also focused on the lack of information provided to decision-makers about the role of women in society, including societal attitudes which allow sexual violence to occur without punishment or interference.<sup>356</sup>

If the UK government understands that discrimination against women can allow gender-based violence to flourish, why is this not reflected in decisions regarding asylum? The Home Office decision-makers do not seem to recognise that this discrimination makes certain actions by women (seeking protection from authorities, internal relocation, advocating for themselves to authorities) more difficult.<sup>357</sup> This would seem to be a clear example of the UK asylum decision-makers failing to take an intersectional approach to asylum claims. Canning's article emphasizing the treatment of sexual violence survivors claiming asylum in Merseyside criticises the Home Office, noting that their awareness of the long-term effects of sexual violence has not been extended to the asylum system.<sup>358</sup> She summarises the opinions of various NGOs, stating,

The wider reaching impacts of violence against women in conflict are arguably over-looked nationally and internationally, particularly in considering women's rights, well-being and access to sexual violence support when seeking asylum. Specifically, in the United Kingdom, small pockets of research have pointed to severe inequalities, rights violations and an inadequate asylum system for applicants generally.<sup>359</sup>

Like Asylum Aid,<sup>360</sup> Canning agrees that this lack of sensitive treatment of asylum seekers is motivated by the UK's political climate of fear towards asylum seekers.<sup>361</sup>

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<sup>354</sup> See *ibid* 4.

<sup>355</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 661.

<sup>356</sup> Collier (n 176) 15.

<sup>357</sup> Ceneda and Palmer (n 10) 58.

<sup>358</sup> Canning (n 10) 24.

<sup>359</sup> See *ibid* 24.

<sup>360</sup> Ceneda and Palmer (n 10) 11.

<sup>361</sup> Canning (n 10) 25.

She cites the example of the “sham marriage” unit of the UK Visas and Immigration service (UKVI)<sup>362</sup> – instead of considering possible exploitation of women who are used for their European Union passports, the UKVI simply views them as abusers of EU immigration law;<sup>363</sup> the UKVI is unwilling to consider asylum-seekers in complex roles both as victims and law-breakers.<sup>364</sup>

It seems clear that the UK Home Office’s determination to prioritise restricting refugees in the UK<sup>365</sup> has negatively affected gender-based violence survivors.<sup>366</sup> Despite the UK government’s stated commitments to ensuring protection of vulnerable asylum seekers,<sup>367</sup> this has simply not been reflected in Home Office practice. The effect has been that women who have been traumatized by sexual and gender-based violence have not received sufficient support navigating the asylum system<sup>368</sup> and access to practical support and health services,<sup>369</sup> and their treatment has fallen short of the UK’s international and European obligations.<sup>370</sup> To consider whether the UK’s failure of human rights protection is influenced by the EU, or if the EU would be able to enforce better gendered interpretations of asylum law, the next chapter will compare the EU’s influence on another member state, Ireland, with a similar relationship to the EU’s border and asylum policy. Does Ireland have similar concerns to the UK and if so, how much is rooted in Ireland’s internal political culture versus the views of the EU? If Ireland is as affected by the political views on asylum seekers as the UK, is there a place for the EU to ensure fundamental rights protection through legislation? Through the pressure between political culture of disbelief and fear of asylum seekers and international law ensuring protecting those subject to gender-based violence, the EU is forced to balance these two conflicting priorities. The “culture of disbelief” has clearly strongly influenced asylum policy in

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<sup>362</sup> Before March 2013, the UKVI was known as UKBA, with more autonomous services. Much of this research was conducted before this change. See Alan Travis, ‘UK Border Agency to be abolished, Theresa May announces’ *The Guardian* (London, 26 March 2013).

<<https://www.theguardian.com/uk/2013/mar/26/uk-border-agency-broken-up>> last accessed 13 May 2017.

<sup>363</sup> See *ibid* 26.

<sup>364</sup> Partos and Bale (n 8).

<sup>365</sup> See *ibid*.

<sup>366</sup> Canning (n 10).

<sup>367</sup> UK Home Office (n 10).

<sup>368</sup> Muggeridge and Maman (n 10).

<sup>369</sup> Canning (n 10) 30.

<sup>370</sup> CEDAW(n 221.)

the UK – but has it in Ireland as well, and is this culture able to be readjusted by the EU?

## Chapter 6: Irish National Law

### I. Introduction

The treatment of asylum seekers in the UK provides one clear example of how the EU's emphasis on incorporating international law and a minimum standard of human rights has been balanced with the political culture of a member state. In the UK, the fear of the idea of an overwhelming number of migrants has led to a culture of disbelief, in which the UK Home Office focuses on questioning the credibility of applicants in order to reduce the number of recognised asylum seekers in the UK.<sup>1</sup>

The political culture in Ireland is different in that, unlike the UK, there is no verbalised understanding as to the specific vulnerability of sexual violence survivors within the asylum process,<sup>2</sup> and instead there is a racialised treatment of female asylum seekers in Ireland.<sup>3</sup> The Irish government has chosen not to publish the majority of asylum decisions (with the exception of those which become court cases that reach the higher courts of appeal)<sup>4</sup> and instead criticism of the Irish government's violations of the rights of asylum seekers has been fixated on the conditions in which they are kept upon arrival in Ireland.<sup>5</sup> The "direct provision" system effectively isolates asylum seekers by dispersing them throughout the country<sup>6</sup> into dormitory style accommodation in which they are housed with other asylum seekers (often in shared rooms or bathrooms with

<sup>1</sup> See chapter 5.

<sup>2</sup> BBC Radio 4, 'The Today Programme.' (BBC website, 04 September 2015.) .  
<<http://www.bbc.co.uk/programmes/b068c7n8>> accessed 06 July 2017.

<sup>3</sup> Ronit Lentin, 'Illegal in Ireland, Irish Illegals: Diaspora Nation as a Racial State' (2007) 22 Irish Political Studies 433, Ronit Lentin, 'Pregnant Silence: (en)gendering Ireland's Asylum Space' (2003) 37 Patterns of Prejudice 301 and Ronit Lentin 'Strangers and Strollers: Feminist Notes on Researching Migration M/others' (2004) 27 Women's Studies International Forum 301.

<sup>4</sup> Samantha K. Arnold, 'Nexus with a Convention Ground: The Particular Social Group and Sexual Minority Refugees in Ireland and the United Kingdom' (2012) 1 Irish Law Journal 93, 108.

<sup>5</sup> See Free Legal Advice Centre, 'One Size Doesn't Fit All – A Legal Analysis of Direct Provision, 10 Years On' (FLAC website, November 2009).  
<[http://www.flac.ie/download/pdf/one\\_size\\_doesnt\\_fit\\_all\\_full\\_report\\_final.pdf](http://www.flac.ie/download/pdf/one_size_doesnt_fit_all_full_report_final.pdf)> last accessed 01 August 2017, Irish Refugee Council, 'Direct Provision: Framing an Alternative Reception System for People Seeking International Protection' (Irish Refugee Council website, 2013).  
<[http://www.irishrefugeecouncil.ie/wp-content/uploads/2013/12/DP\\_Report\\_Final.pdf](http://www.irishrefugeecouncil.ie/wp-content/uploads/2013/12/DP_Report_Final.pdf)> last accessed 01 June 2016 and Akidwa, 'No Place to Call Home: Safety and Security Issues of Women Seeking Asylum in Ireland' (Akidwa website, October 2012) <<http://akidwa.ie/publications/safety-and-security-issues-of-women-seeking-asylum-in-ireland.pdf>> last accessed 01 June 2016.

<sup>6</sup> Irish Council for Civil Liberties Women's Committee, 'Women and the Refugee Experience: Towards a Statement of Best Practice' (Irish Council for Civil Liberties website, June 2000).  
<<http://www.iccl.ie/-iccl-womens-committee-submission-to-cedaw-committee-may-2005.html>> last accessed 01 June 2016>, 26.

unrelated other residents).<sup>7</sup> The direct provision system both creates a risk for female asylum seekers, particularly traumatised survivors, who are forced to share close quarters with strangers and extremely vulnerable to exploitation by management,<sup>8</sup> and makes integration far more difficult, as asylum seekers are kept separate from the local Irish community, with strict timetables and limited financial means and childcare preventing community interaction.<sup>9</sup> A housing and community strategy which does not consider the risk to vulnerable asylum seekers from other asylum seekers and the government is not truly intersectional. Women can face gender-based violence from other refugees and even their own family members. The policy of direct provision seems to be aimed at providing a distinct division between asylum seekers and the Irish community. This sense of separation and facilitation of othering seems to have contributed to the idea of asylum seekers, particularly young female asylum seekers, as a threat to the Irish racial identity.<sup>10</sup> Unfortunately, Irish policy seems to perceive female asylum seekers through this lens and strive to isolate them and prevent them (and particularly their children) from being granted all the rights and responsibilities of Irish citizens.<sup>11</sup>

The second section will consider the national asylum law in Ireland. Ireland has historically been a country of emigration, from which a large percentage of the native Irish population left for economic reasons.<sup>12</sup> It was only in the 1990s that Ireland began to experience sizable immigration, including asylum applications,<sup>13</sup> and the 1951 Refugee Convention<sup>14</sup> was not incorporated into Irish law until the Refugee Act of 1996.<sup>15</sup> As a result, Irish asylum law is still relatively new in its development, as is reflected by the

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<sup>7</sup> Akidwa (n 5) 8.

<sup>8</sup> See *ibid*

<sup>9</sup> Akidwa, ‘“Am Only Saying It Now:” Experiences of Women Seeking Asylum in Ireland’ (Akidwa website, March 2010). <<http://akidwa.ie/publications/AmOnlySayingItNowAkiDwA.pdf>> last accessed 01 June 2016, 14.

<sup>10</sup> Lentin, 2004 (n 3) 304.

<sup>11</sup> See *ibid* 303.

<sup>12</sup> Patrick Fitzgerald and Brian Lambkin, *Migration in Irish History, 1607-2007* (Palgrave MacMillan 2008.)

<sup>13</sup> Pia Prütz Phiri ‘UNHCR, International Refugee Protection and Ireland’ in Ursula Fraser and Colin J. Harvey (eds), *Sanctuary in Ireland, Perspectives on Asylum Law and Policy*. (Institute of Public Administration 2003)

<sup>14</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention).

<sup>15</sup> Refugee Act 1996.

lack of progression of asylum law through case-law and legislation.<sup>16</sup> The few Irish cases regarding asylum seekers involve whether asylum seekers who have given birth to Irish citizens are entitled to the same family rights as non-migrant Irish families.<sup>17</sup> These cases focused on the perceived incompatibility between protecting the integrity of the asylum system versus the fundamental rights of asylum seekers.<sup>18</sup> Irish case-law seems to incorporate the idea of female asylum seekers, especially pregnant asylum seekers, as a threat to Irish identity.<sup>19</sup> This section will demonstrate the lack of intersectional awareness amongst Irish law and Irish decision-makers by noting that all women in Ireland have their childbearing choices restricted by the state – this simply manifests differently for Irish women and asylum seekers. This section will also describe the origins and content of the direct provision system.<sup>20</sup> Envisioned as a short-term solution to house new migrants,<sup>21</sup> this system has provided an isolating and dangerous experience for women who are at risk of sexual harassment and sexual abuse,<sup>22</sup> without reference to the human rights requirements of EU and international law.<sup>23</sup>

In the third section, there will be a focus on relevant EU law transposed into Irish legislation. Like the UK, Ireland has opted out of the recast Common European Asylum System (CEAS) directives.<sup>24</sup> Yet Ireland has also chosen not to incorporate the basic 2004 Reception Conditions Directive<sup>25</sup> into Irish law, on the basis that it would conflict with the current direct provision regime.<sup>26</sup> The Irish government has currently drafted the 2015 International Protection Act, which is intended to bring the Irish humanitarian

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<sup>16</sup> See the discussion in Irish Refugee Council (n 5).

<sup>17</sup> See *Fajujonu v. Minister for Justice* [1990] 2 IR 151 and *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 3. As discussed in Siobhan Mullally 'Defining the Limits of Citizenship: Family Life, Immigration and 'Non-Nationals' in Irish Law' (2004) 39 Irish Jurist 334 and Eithne Lubhéid, 'Childbearing against the state? Asylum seeker women in the Irish Republic.' (2004) 27 Women's Studies International Forum 335.

<sup>18</sup> *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC, para 363.

<sup>19</sup> See *ibid* para 418. As discussed in Lubhéid (n 17).

<sup>20</sup> See Irish Refugee Council (n 5) and Free Legal Advice Centre (n 5).

<sup>21</sup> Free Legal Advice Centre (n 5) 19.

<sup>22</sup> Akidwa (n 5) 7.

<sup>23</sup> Free Legal Advice Centre (n 5).

<sup>24</sup> Irish Refugee Council, 'Comments on the General Scheme of the International Protection Bill' Irish Refugee Council website, May 2015). < [http://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/IRCs-Comments-on-General-Scheme-of-International-Protection-Bill.final\\_.pdf](http://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/IRCs-Comments-on-General-Scheme-of-International-Protection-Bill.final_.pdf) last accessed 01 June 2016, 3.

<sup>25</sup> Free Legal Advice Centre (n 5) 119.

<sup>26</sup> See *ibid.*.

protection process more in line with EU standards.<sup>27</sup> It is argued by NGOs that this is a missed opportunity to improve the rights protection for asylum seekers in Irish law;<sup>28</sup> Irish lawmakers do not seem focused on ensuring Irish asylum law meets the minimum standards of European law, much less international human rights law.<sup>29</sup>

It also provides the broader context of international human rights law regarding gender-based violence and asylum. Ireland is bound by the 1951 Refugee Convention, as well as the Convention for the Elimination of All Forms of Discrimination Against Women (CEDAW). Yet interestingly, Ireland has offered certain derogations to the CEDAW Convention.<sup>30</sup> Ireland has maintained opposition to international human rights law which would undercut a strong defence of its constitutional-entrenched Catholic ethos, a philosophy which strongly supports defined gender roles and views women through their family position as wives and mothers.<sup>31</sup> The UK has at least incorporated progressive policies and rhetoric towards UK citizens – Ireland has not even developed this awareness of the need for gender equality and protection of body autonomy. While international law has provided an evolving understanding that women's rights are indeed a crucial aspect of human rights,<sup>32</sup> Ireland has attempted to maintain its autonomy to reject these fundamental rights in favour of its own sovereign view as to the appropriate treatment of women.<sup>33</sup> There seems to be a conflict between Irish constitutional law and international law as regards the content of Irish law and its treatment of all women – a conflict which is being increasingly utilised by Irish feminists as a tool against national policy-makers.<sup>34</sup>

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<sup>27</sup> International Protection Act 2015.

<sup>28</sup> Irish Refugee Council (n 24) 28.

<sup>29</sup> See *ibid* 2-3.

<sup>30</sup> Convention for the Elimination of All Forms of Discrimination Against Women. (adopted 18 December 1979, entered into force 3 September 1981) 1249 UNTS 13 at Declarations, Reservations and Objections.

<sup>31</sup> See *ibid*. The Republic of Ireland currently has reservations on Article 16, giving mothers pre-eminency in the areas of childcare and custody and on Article 11, regarding equal pay and equal rights in the workplace. This is discussed in Allan Cochrane, John Clarke and Sharon Gerwitz, *Comparing Welfare States* (Sage Publications, 2<sup>nd</sup> ed, 2001.)

<sup>32</sup> See, specifically in the asylum context, chapter 3. Also discussed in an Irish context in Niamh Reilly, 'Linking Local and Global Feminist Advocacy: Framing Women's Rights as Human Rights in the Republic of Ireland' (2007) 30 *Women's Studies International Forum* 1140.

<sup>33</sup> Gemma Carney, 'Feminism, The Women's Movement and the Internationalisation of Gender Equality Policy: The Case of Gender Mainstreaming' (2002) *Irish Political Studies* 17.

<sup>34</sup> Reilly (n 32).



This chapter will rely heavily on Ronit Lentin's theoretical work on female asylum seekers and the racialization of Irish citizenship.<sup>35</sup> Lentin argues that the Irish identity originally became racialised as part of the colonisation strategy of the British empire – to affirm a right to rule over Ireland, there was a need to portray them as racially separate, less civilised and educated.<sup>36</sup> While the Republic of Ireland has evolved into a post-colonial society, this idea of the Irish as a specific racial group has continued – as has the nationalistic view of the need to protect racial Ireland by marginalising female asylum seekers.<sup>37</sup> Unfortunately, case-law and policy in Ireland<sup>38</sup> is currently being conceived from the perspective which views asylum seekers, particularly female asylum seekers, are a threat to Irish identity who seek to misuse the asylum system and obtain a hollow, false citizenship for their children.<sup>39</sup> This means that instead of specifically attempting to protect these women from gender-based violence, the Irish government often seems concerned with protection from these vulnerable women.

It has been argued that feminism in Ireland has traditionally been concerned with the issues that most affect native ethnically-Irish women<sup>40</sup> – primarily reproductive rights<sup>41</sup> and economic security for women. Due to the need for constant feminist struggle against a Catholic-influenced constitution,<sup>42</sup> Irish feminist groups have primarily focused on these matters, perhaps motivated by the large numbers of women and families visibly affected by them.<sup>43</sup> Yet when directly asked, members of Irish women's group agreed that there was a need for more intersectional awareness in Irish feminist activism.<sup>44</sup> It seems that an awareness of intersectional feminist theory is only beginning to develop in Ireland, which means that feminist groups have only recently begun campaigning for

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<sup>35</sup> Lentin 2007 (n 3), Lentin 2003 (n 3) and Lentin 2004 (n 3.)

<sup>36</sup> Lentin 2004 (n 3) 304.

<sup>37</sup> Lentin 2003 (n 3) 312.

<sup>38</sup> Note that this will focus on the Republic of Ireland and its caselaw and migration policies. While those born and residing in Northern Ireland are also Irish citizens, Northern Irish migration law is considered as part of the UK government.

<sup>39</sup> Lentin 2004 (n 3).

<sup>40</sup> Reilly (n 32.)

<sup>41</sup> See Patrick Hanafin, 'Reproductive Rights and the Irish Constitution: From the Sanctity of Life to the Sanctity of Autonomy?' (1996) 3 *European Journal of Health Law* 179 and Siobhan Mullally 'Debating Reproductive Rights in Ireland' (2005) 27 *Human Rights Quarterly* 78.

<sup>42</sup> Patrick Hanafin, 'Defying the Female: The Irish Constitutional Text as Phallocentric Manifesto' (2008) 11 *Textual Practice* 249.

<sup>43</sup> Reilly (n 32).

<sup>44</sup> See *ibid* 31.

stronger protections for women within the Irish asylum system . While this delay in development compared to other states is unsurprising, considering the recent founding both of the Irish state<sup>45</sup> and of the existence of sizeable migration into Ireland,<sup>46</sup> it means that an intersectional understanding of the law, specifically one which recognises the vulnerability of migrant women, has not been implemented. This chapter aims to examine the conflict between international law, specifically international law which provides protection from gender-based violence, and the idea that female asylum seekers are a force which will undermine the Irish state. Finally, this chapter will argue that under EU and international law, Ireland is required to take a more intersectional and holistic approach to supporting asylum seekers who have experienced sexual violence.

## **II. Irish national law**

Irish migration and citizenship policy has historically been crafted in light of the large waves of emigrating Irish citizens. Irish citizenship law, conceived to maintain links with a widespread diaspora stemming from emigration, was exceedingly generous – citizenship could be granted by descent for up to the second generation to be born outside of Ireland.<sup>49</sup> However, in the 1990s, with an increased number of refugee applications,<sup>50</sup> the Republic of Ireland began to formalise the asylum application process. The 1951 Refugee Convention was incorporated into Irish national law through the Refugee Act of 1996.<sup>51</sup> The 1996 Refugee Act provides the definition of a refugee and sets out the process of applications and appeals in order to obtain refugee status.<sup>52</sup> The 1996 Refugee Act was initially created as a broad and liberal interpretation of international asylum law<sup>53</sup> – for example, both gender and sexual orientation were initially specifically mentioned as categories which could be used for membership of particular social

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<sup>45</sup> The founding of the Irish state, in a feminist context, is discussed in Hanafin (n 41), Carol Coulter, *The Hidden Tradition: Feminism, Women and Nationalism*. (Cork University Press 1993) and Yvonne Scannell. 'The Constitution and the Role of Women' in Brian Farrell (ed.) (1988.) *De Valera's Constitution and Ours*. (Thomas Davis Lecture Series 1988.)

<sup>46</sup> Peter O'Mahony. 'Supporting Asylum Seekers' in Ursula Fraser and Colin J. Harvey (eds). *Sanctuary in Ireland, Perspectives on Asylum Law and Policy*. (Institute of Public Administration 2003.)

<sup>49</sup> Bernard Ryan, 'The Celtic Cubs: Controversy over Birthright Citizenship in Ireland' (2004) 6 *European Journal of Migration and Law* 173.

<sup>50</sup> O'Mahony (n 46).

<sup>51</sup> Refugee Act 1996. Discussed in Irish Refugee Council (n 5) 11.

<sup>52</sup> Refugee Act 1996.

<sup>53</sup> O'Mahony (n 46) 131.

groups.<sup>54</sup> Yet as O'Mahony notes, this broad legislation was drafted when Ireland had a small number of asylum seekers – as the number of asylum applicants in Ireland increased, fundamental rights protections were gradually eliminated.<sup>55</sup> O'Mahony argues that the Irish government created the original Refugee Act without an understanding of the changing patterns of Irish asylum seekers and then later felt the need to edit the legislation in order to cope with the increased number of applications<sup>56</sup>. He concludes that,

the extent to which the Irish authorities were caught by surprise was evident in the delay in commencing the Refugee Act 1996, which was unworkable in the new context of increasing asylum applications. In this regard it appeared that progressive legislation relating to asylum seekers was dependant upon Ireland having a low level of asylum applications. The logic of this approach was that increased asylum applications would be matched by a diminution of the protections afforded to asylum seekers.<sup>57</sup>

Throughout this understanding of the history of Irish asylum law, it becomes clear that the Irish government does not view protection of vulnerable asylum seekers as an essential international obligation, but as a political issues. The Irish government is often influenced by political expediencies, rather than taking an intersectional humanitarian perspective. Perhaps the most dramatic example in Irish national law of this shift regarding its enforcement of fundamental rights of asylum seekers is exemplified in the series of cases regarding the family rights of Irish child citizens. Until 2004, Irish citizenship law was governed by a broad principle of *jus soli* (as well as a broad principle of citizenship by descent, applying the Irish diaspora) – every child born on the island of Ireland was entitled to Irish citizenship.<sup>58</sup> The effects of this law meant that there were situations where a child may be a citizen, but one or both parents were migrants, including those with irregular migration status.<sup>59</sup> Concurrently, Irish also has particularly

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<sup>54</sup> Irish Council for Civil Liberties Women's Committee (n 6) 17.

<sup>55</sup> O'Mahony (n 46) 131.

<sup>56</sup> See *ibid.*

<sup>57</sup> See *ibid.*

<sup>58</sup> Ryan (n 47).

<sup>59</sup> See *Pok Sun Shun v Ireland* [1986] IRLM 593, *Osheku v. Ireland* [1986] IR 733, *Fajujonu v. Minister for Justice* [1990] 2 IR 151, *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC. Discussed in Ryan (n 47).

strong protections of marital families. Article 41 of the *Bunreacht na h Éireann* (the Constitution of Ireland) states that,

The State recognises the Family as the natural primary and fundamental unit group of Society, and as a moral institution possessing inalienable and imprescriptible rights, antecedent and superior to all positive law.<sup>60</sup>

Despite the implication of the text, the Supreme Court has held it to be constitutionally allowable to override family rights,<sup>61</sup> specifically including immigration cases.<sup>62</sup> It is not intersectional to view migrant families as less essentially interconnected than Irish families. As noted in criticism of the *K v. Bundesasylamt*<sup>63</sup> case, asylum seekers who are the most vulnerable are in the most need of extended family support.<sup>64</sup> Whether dealing with post-traumatic stress after childcare or an abusive partner, isolation can further retraumatise women.<sup>65</sup> It is disappointing that in the cases of child citizens, there is no mention of the parent's experiences in their country of origin or the trauma that the family may have encountered. Certainly these experiences may affect the family's needs and should provide context for government treatment and decisions. In two early cases concerning the deportation of migrants, and the effect on the family rights of their citizen children, the Supreme Court noted that migrants could not evade deportation simply by marrying an Irish citizen or due to a parental relationship with Irish citizen children.<sup>66</sup> Yet the Irish government seemed to re-consider this judgement in the 1989 case of *Fajujonu v. Minister for Justice*<sup>67</sup>, in which the Irish government noted there was a high standard needed to deport the families of child citizens

It is impossible to ignore the political context of this decision. At the time, Ireland had fewer than 50 asylum applications<sup>79</sup> and less than 2,000 applications by parents to remain in Ireland due to a relationship with their citizen children.<sup>80</sup> In the

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<sup>60</sup> Article 41.1.1°

<sup>61</sup> *Murray v Ireland* [1985] IR 532

<sup>62</sup> *Pok Sun Shun v Ireland* [1986] IRLM 593 and *Oshoku v. Ireland* [1986] IR 733

<sup>63</sup> Case C-245/11, *K v. Bundesasylamt* [2014] 1 WLR 1895

<sup>64</sup> Alice Bloch, Treasa Galvin and Barbara Harrell-Bond, 'Refugee Women in Europe: Some Aspects of the Legal and Policy Dimensions.' (2000) 38 *International Migration* 169

<sup>65</sup> Edna Erez, Madelaine Adelman and Carol Gregory, 'Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women' (2009) 4 *Feminist Criminology* 32

<sup>66</sup> See *ibid.*

<sup>67</sup> *Fajujonu v. Minister for Justice* [1990] 2 IR 151.

<sup>79</sup> O'Mahony (n 46) 129.

<sup>80</sup> Mullally (n 17).

initial aftermath of the *Fajujonu* case, the Irish government routinely granted applications on the basis of parental relationships with Irish citizen children.<sup>81</sup> Academic Siobhan Mullally argues that government's attitude began to grow harsher as Ireland began to process an increased number of migrants.<sup>82</sup> The Minister for Justice began to increasingly scrutinize and even reject these residency applications.<sup>83</sup> It was against this background that the Supreme Court revisited residency applications from parents of Irish citizen children in the 2002 case of *Lobe v. Minister for Justice, Equality and Law Reform*.<sup>84</sup>

Unlike the migrants in previous cases, the Lobes were Czech nationals who did have permission to remain in Ireland as asylum seekers.<sup>85</sup> The Irish government had planned to transfer the Lobes to the UK in accordance with the Dublin Regulation when Mrs Lobe gave birth to a child with Irish citizenship.<sup>86</sup> The Lobes then applied for residency in Ireland due to their relationship with their Irish citizen child<sup>87</sup> and fought to challenge their transfer under the Dublin Convention.<sup>88</sup> It is unclear why the court at no point mentioned that the Irish government could choose to process the asylum claim within the Republic of Ireland and that there might be benefits to this for both the asylum seekers and their citizen children. There is no discussion of the country of origin experiences or vulnerabilities of the Lobe family. In his judgement, Keane CJ specifically noted that judgement of *Fajujonu* and argued that unlike the Lobes, the *Fajujonu* family had resided in Ireland for a long period of time.<sup>89</sup> He was far more concerned with the connection to Ireland and did not take an intersectional approach which would look at the entirety of the family's experiences. Interestingly, he then went on to distinguish between the rights of adult citizens and children

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<sup>81</sup> Siobhan Mullally, 'Citizenship and Family Life in Ireland: Asking the Question 'Who Belongs' (2005) 25 *Legal Studies* 578, 583.

<sup>82</sup> Mullally (n 17) 338.

<sup>83</sup> Siobhan Mullally, 'Citizen children, 'impossible subjects' and the limits of migrant family rights in Ireland' (2011) 1 *European Human Rights Law Review* 43, 45.

<sup>84</sup> [2003] *IESC* 3.

<sup>85</sup> See *ibid* para 2.

<sup>86</sup> See *ibid* para 3.

<sup>87</sup> See *ibid* para 3.

<sup>88</sup> See *ibid* para 3.

<sup>89</sup> See *ibid* para 15.

citizens. While noting that both had the right to reside within Ireland, he argued that children has less of a right to assert their choice in residence, writing,

The position of children of the age of the minor applicants is significantly weaker than that of adult citizens who are in prison or otherwise constrained from exercising a choice of residence, since the children have never been capable in law of exercising the right and in practical terms, as distinct from legal theory, it may reasonably be regarded as a right which does not vest in them until they reach an age at which they are capable of exercising it and, it may be, of asserting a choice of residence different from that which their parents would desire.<sup>90</sup>

Keane CJ also argued for the importance of the Supreme Court considering the political context of this decision, stating,

it cannot be right that this court should approach this case on the assumption, totally at variance with the facts known to us, that conditions in Ireland are as they were in the 1980's when there was a relatively high level of unemployment, many Irish people were emigrating to seek work abroad and there were relatively few immigrants or persons seeking asylum as refugees. I think it would be wrong for this court to approach the important issues which have arisen for resolution without having regard to the major changes in Ireland which have occurred over the past decade in this whole area.<sup>93</sup>

In the next paragraph, Keane CJ (without citation or references) states that increased volume of immigration leads to a strain on social services and difficulties integrating into society<sup>94</sup>. He did not mention any conflicting evidence as to the benefits brought by migration or the non-economic, social contributions that migrants bring to the community. He concludes by distinguishing the *Lobe* case from the *Fajujonu* case<sup>95</sup> on the basis that the Fajujonu family had been resident in Ireland for a number of years and Mr Fajujonu had even been offered employment – the Lobes were asylum seekers who had not spent an extended period of time in Ireland and did not have an opportunity to support their families.<sup>96</sup> Accordingly, he rejected the Lobe family's appeal.<sup>97</sup> It is disappointing that the political considerations were not deemed to include the experiences

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<sup>90</sup> See *ibid* para 35.

<sup>93</sup> [2003] IESC 3, para 55.

<sup>94</sup> See *ibid* para 56.

<sup>95</sup> *Fajujonu v. Minister for Justice* [1990] 2 IR 151.

<sup>96</sup> [2003] IESC 3, para 100-103.

<sup>97</sup> See *ibid* para 109.

of the Lobe family as asylum seekers. If this constitutional decision should reference context, it seems far from intersectional to only mention that the context of the Irish asylum system, rather than the background of the Lobes.

The emphasis on this perceived abuse of the asylum system and strain on Irish resources also featured in the judgement of Hardiman J.<sup>98</sup> Hardiman J notes that only a minority of applications for refugee status are granted<sup>99</sup> (without examining whether this is due to a flawed decision making process or because the applicants do not qualify for refugee protection) and argues that the large number of rejected asylum claims which are processed are responsible for the lengthy period of time that asylum seekers spend in Ireland waiting for asylum decisions.<sup>100</sup> Hardiman J used the term “anchor child” throughout the judgement,<sup>101</sup> a term which implies derision for Irish citizens entitled to equal protection under the law.<sup>102</sup> He then referenced the increasing numbers of applications for residency on the basis of “anchor children”<sup>103</sup> and while noting that his comments were *obiter* to the decision he reached,<sup>104</sup> the inclusion of these numbers in his judgement would indicate otherwise. He acknowledged the Irish tradition of emigration – and the moral argument for the necessity of reciprocity from a state whose citizens had often sought residence elsewhere.<sup>105</sup> However, Hardiman J seemed to distinguish between asylum seekers and the majority of migrants entering Ireland for economic reasons, writing,

It must however be recalled that asylum seekers are a small minority of potential immigrants to Ireland. The great bulk of such immigrants are people who come here in possession of work permits, and their families. Over 40,000 such permits were issued or renewed last year, to people from over 100 countries from Albania to Zimbabwe. They work in thousands

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<sup>98</sup> See *ibid* para 296-430.

<sup>99</sup> See *ibid* para 299.

<sup>100</sup> See *ibid* para 299.

<sup>101</sup> The effects of the originally American terms “anchor baby” and “anchor child”, particularly contributing to nativist attitudes, are discussed in Marjorie Faulstich Orellana and Sarah Jean Johnson, “Anchor Babies” and Dreams Deferred: Public Discourse about Immigrant Children and Implications for Civic and Educational Rights’ (2011) Program on International Migration.

<<http://escholarship.org/uc/item/53s32538>> accessed 01 June 2016..

<sup>102</sup> See Article 40.1. Discussed in Claire Breen, ‘Refugee Law in Ireland: Disregarding the Rights of the Child Citizens, Discriminating Against the Rights of the Child’ (2003) 15 *International Journal of Refugee Law* 750.

<sup>103</sup> [2003] IESC 3, para 361.

<sup>104</sup> See *ibid* para 363.

<sup>105</sup> See *ibid* para 365.

of Irish enterprises and manage some of them. They make a much needed contribution to Irish life by their skills and industry, just as Irish emigrants in the past made a valued contribution in their new homelands. This orderly process of immigration seems likely to continue, bringing further welcome and productive newcomers to Ireland. This case is not concerned with that large group of people which, however, constitutes the great bulk of immigrants to Ireland.<sup>106</sup>

The comparison between the two groups of migrants is almost certainly irrelevant as to whether family rights in the Irish Constitution require the Minister for Justice to limit interference with these rights through migration control, yet Hardiman J uses it to almost form a distinction between good migrants, which the Irish state should welcome, and bad migrants attempting to use their “anchor children” to route Irish migration laws. Instead of noting that Ireland, as a signatory to the Refugee Convention, has human rights obligations, Hardiman J focuses on the positive role of economic migrants. He also ignores that many asylum seekers also have skills which could make valuable contributions to life in Ireland. He then distinguished the case from *Fajujonu*,<sup>107</sup> both on the basis that the Fajujonu family’s long residence in Ireland, during which the family had become part of their community,<sup>108</sup> as well as the increased numbers of migrants in Ireland.<sup>109</sup>

The idea that parents had a restrained role in asserting their children’s fundamental human rights, is interestingly absent when discussing other specific personal rights guaranteed by the Irish constitution. Just a year earlier, in the *Northwest Health Board* case,<sup>136</sup> the Supreme Court had decided for parents who were attempting to claim, on their child’s behalf, a right to bodily autonomy and asserted that the protection of the family was superior to legislation of the Oireachtas. Keane CJ himself had even stated,

While there may inevitably be tensions between laws enacted by the State for the common good of society as a whole and the unique status of the family within that society, the Constitution firmly outlaws any attempt by

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<sup>106</sup> See *ibid*, para 366.

<sup>107</sup> *Fajujonu v. Minister for Justice* [1990] 2 IR 151

<sup>108</sup> [2003] IESC 3, para 386.

<sup>109</sup> See *ibid* at para 390.

<sup>136</sup> *North Western Health Board v. H.W. and C.W.* [2001] IESC 90.



the State in its laws or its executive actions to usurp the exclusive and privileged role of the family in the social order.<sup>137</sup>

This rapid devaluation of the importance of family autonomy points to a distinction in the treatment of Keane CJ between Irish citizens born to Irish parents and Irish citizens born to non-Irish parents. This othering of Irish citizens and the different enforcement of human rights in Ireland can also be seen in other policy areas,<sup>138</sup> but it is a particularly stark differentiation between Irish citizen children and “Irish born” children – a phrasing which ignores that both are citizens entitled to equal rights. This is not an intersectional response to the residency of asylum seekers – their families are treated as being different than families consisting totally of Irish citizens. The Irish government does not seem concerned with taking a more inclusive view of human rights; the context they include is the strain on the Irish economy<sup>139</sup>, rather than the experiences of these families. The Irish Supreme Court seems almost determined to reject an intersectional approach in favour of a protective approach towards Irish citizen parents.

This idea of a fundamental rights hierarchy between Irish citizens with citizen parents and Irish citizens with non-citizen parents violates international law protections against discrimination and protection of children’s family life. As Claire Breen writes,

the Irish judiciary have not only circumscribed the rights accorded to Irish-born children whose parents are non-EU nationals, it reinforced the notion that the effective protection and implementation of the citizen rights of Irish-born children will depend on the nationality of their parents, a notion which runs contrary to the non-discrimination provisions of national and international law regarding the rights of the child and the protection to be accorded to the family unit.<sup>140</sup>

This creates the possibility that the divide between children of Irish parents and children of non-Irish parents will continue to be reinforced with the decision the Supreme Court reached.

It is clear that the Irish government’s attempts, in the name of nationalism, to control women’s bodies, have had intersectional effects, varying quite differently on women of

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<sup>137</sup> See *ibid* para 69.

<sup>138</sup> See section 4, in the context of reproduction and abortion access.

<sup>139</sup> [2003] IESC 3 at para 56.

<sup>140</sup> Breen (n 102) 751.

various nationality.<sup>141</sup> Irish citizen women can currently only access abortions in Ireland in circumstances where their lives are in danger;<sup>142</sup> the Irish government has simultaneously used rhetoric that condemns migrant women for their reproduction and motherhood.<sup>143</sup> This rhetoric has had reverberations on Irish policy – from the decision in the *Lobe* case<sup>144</sup> to the government's strong support for amending the Irish constitution to limit access to citizenship for the children of migrants.<sup>145</sup>

This idea of the separate racial identity of the Irish people is not a recent national concept (and is, perhaps, an example of the continued consequences of colonialism),<sup>146</sup> but has become more of a prominently influential idea in Irish policies as the number of economic migrants and asylum seekers has increased.<sup>147</sup> While it is arguable whether the policy of direct provision is influenced by this idea of a need for the protection of Irish racial identity, it is notable that direct provision has meant that asylum seekers are isolated from Irish communities,<sup>148</sup> forced into overcrowded conditions with other asylum seekers within direct provision centres rather than being allowed to integrate into their local communities.<sup>149</sup> The Irish government enforces a strong separation between Irish citizens and asylum seekers – starting from birth, when children of migrants are not eligible for citizenship, there is clearly a difference in treatment between Irish families and non Irish families resident in Ireland.<sup>150</sup>

The legal situation that has created families like the Lobes (with citizen children and non-citizen parents) has now changed. In 2004, the Irish government, lead by Minister for Justice Michael McDowell, argued that a change was needed in citizenship

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<sup>141</sup> See Ruth Fletcher, 'Reproducing Irishness: Race, Gender and Abortion Law' (2005) 17 Canadian Journal of Women and Law 365 and Siobhan Mullally, 'Mainstreaming Equality in Ireland: A Fair and Inclusive Accommodation?' (2001) 21 Legal Studies 99.

<sup>142</sup> Protection of Life During Pregnancy Act 2013.

<sup>143</sup> Ryan (n 47) 188 and Steve Garner, 'Babies, Bodies and Entitlement: Gendered Aspects of Access to Citizenship in the Republic of Ireland' (2007) 60 Parliamentary Affairs 437.

<sup>144</sup> *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 3. Discussed in Ryan (n 47) 182-185 and Mullally (n 141).

<sup>145</sup> Ryan (n 47) 188, John A. Harrington, 'Citizenship and the Biopolitics of Post-Nationalist Ireland' (2005) 32 Journal of Law & Society 424, 445-449 and Lentin 2007 (n 3).

<sup>146</sup> Lentin 2003 (n 3) 309.

<sup>147</sup> O'Mahony (n 46) 131 and Mullally (n 81) 583.

<sup>148</sup> Akidwa (n 9).

<sup>149</sup> See *ibid.*

<sup>150</sup> Free Legal Advice Centre (n 5) and Breen (n 102).

laws.<sup>151</sup> McDowell claimed that maternity hospitals were unable to cope with the amount of migrant women giving birth in Ireland and that Irish resources were strained by these women and their young children.<sup>152</sup> The government did not have statistics or facts to back up this assumption,<sup>153</sup> but used it as the basis to introduce a referendum which denied citizenship to certain children of migrants (and all children of asylum seekers) in Ireland.<sup>154</sup> The government assured the Irish public that this would not apply to the generous citizenship laws regulating the Irish diaspora<sup>155</sup> or the children of British parents in Northern Ireland.<sup>156</sup>

While ending the direct conflict of Irish citizen children whose parents are not granted residency in the Irish state, this has confirmed the idea of Ireland as a racial state intent on protecting its racial identity<sup>157</sup> – including protection from childbearing migrant women and their citizen children.<sup>158</sup> While the Irish Supreme Court relied on the Dublin Regulation as essential to the integrity of the Irish asylum system, the then-Minister for Justice strongly relied on the European Court of Justice's decision in *Chen v. Secretary of State*<sup>159</sup> to limit Irish citizenship. The *Chen* case involved the Chen family who fled China while pregnant with their second child to avoid repercussions of the Chinese one-child policy.<sup>160</sup> Their second child was born in Belfast (and so acquired Irish citizenship) and the Chens sought to rely on Catherine's rights as an EU citizen outside her country of origin.<sup>161</sup> The UK attempted to argue first that it was a misuse of citizenship law (as the Chens admitted they had moved to Belfast purely to give Catherine Irish citizenship) and that it was an internal matter, as the Chens had never left the UK.<sup>162</sup>

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<sup>151</sup> John A. Harrington (145) 445.

<sup>152</sup> Ryan (n 47) 188.

<sup>153</sup> See *ibid* 188.

<sup>154</sup> Mullally (n 17) 335.

<sup>155</sup> Lentin 2007 (n 3) 434.

<sup>156</sup> Mullally (n 17) 341.

<sup>157</sup> Lentin 2007 (n 3) 435.

<sup>158</sup> Lentin 2004 (n 3) 303.

<sup>159</sup> Case C-200/02, *Zhu and Chen v. Secretary of State for the Home Department* (2006) 12 *Columbia Journal of European Law* 305.

<sup>160</sup> See *ibid* 306.

<sup>161</sup> See *ibid* 306.

<sup>162</sup> See *ibid* 306.

Interestingly, the Irish government argued against the Chens, claiming that a child as young as Catherine could not take advantage of free movement rights<sup>163</sup> – this seems in accordance with the Supreme Court’s decision in the *Lobe* case.<sup>164</sup> Yet contrary to the decision in the *Lobe* case, the European Court of Justice noted that to withhold residence from Mrs Chen would have the unacceptable effect of denying Catherine residency in Europe – and so agreed that through Catherine, Mrs Chen, who was financially self-dependent, had a right to remain in the UK.<sup>165</sup>

The British government claimed that Mrs Chen had abused European law by intentionally securing Irish citizenship for her daughter in order to take advantage of EU freedom of movement. The ECJ disagreed and interestingly, the Advocate General had argued that the problematic element was the Irish citizenship law which operated on a pure *jus soli* principle.<sup>166</sup> The opinion made no reference to the broad eligibility criteria for Irish citizenship based on descent. The ECJ rejected the idea this was solely a UK matter,<sup>167</sup> which avoids ongoing complications in nationality law.<sup>168</sup> As many EU citizens would be eligible for multiple passports based on their descent or if their parents have taken advantage of freedom of movement rights, isolating free movement from those who are eligible for multiple citizenship but have never left their state of origin would be extremely difficult in practice. It is notable that the ECJ did not attach importance to human rights concerns for the Chen family – Catherine was not eligible for Chinese citizenship (or reunification with her family in China), the violation of the family’s rights through China’s one child policy or the importance of non-distinction between citizens with fellow citizen parents and citizens with non-national parents. Bernard Ryan argues that parents of Irish citizen children would actually receive more

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<sup>163</sup> See *ibid* 307.

<sup>164</sup> *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 3

<sup>165</sup> Case C-200/02, *Zhu and Chen v. Secretary of State for the Home Department* (2006) 12 *Columbia Journal of European Law* 305, 310.

<sup>166</sup> See *ibid* 310.

<sup>167</sup> See *ibid* 311

• <sup>168</sup> The *Chen* case is only the most recent in CJEU decisions which grapple with migrant family rights. See the previous cases of Case C-480/08 *Teixeira v LB Lambeth* [2010] ECR I01107, Case C-310/08 *LB Harrow v Ibrahim* [2010] ECR I-01965 and C34/09 *Ruiz Zambrano* [2011] ECR I-117. This is discussed in Charlotte O'Brien "'Hand-to-mouth' citizenship: decision time for the UK Supreme Court on the substance of Zambrano rights, EU citizenship and equal treatment' (2016) 38 *Journal of Social Welfare and Family Law* 228.

protection in other EU member states then within Ireland.<sup>169</sup> Claire Breen also notes that this case creates a two-tiered system, where independently wealthy migrants are able to take advantage of nationality laws in a way that impoverished economic migrants and asylum seekers cannot.<sup>170</sup>

In the Irish government's campaign to pass the Twenty-seventh Amendment to limit citizenship, Michael McDowell relied heavily on the *Chen* case,<sup>171</sup> ignoring that the *Chen* case would only be applicable to a limited number of families with sufficient resources to live elsewhere in the EU without a need for employment.<sup>172</sup> While the EU has introduced various legislation within the CEAS intended to increase the minimum rights threshold for asylum seekers, the Irish courts and legislature have used the CEAS and EU rights to support the "othering" of asylum seekers, even asylum seekers with Irish citizen children. It is disappointing that the CEAS directives from the EU has not lead to more integration of asylum seekers within Ireland.

The idea of isolating asylum seekers, keeping them within separate communities which never integrate with Irish citizens, is also reflected in the policy of direct provision. Direct provision, an Irish executive policy rather than the result of legislation,<sup>173</sup> is the system in which the Irish government pays for asylum seekers to receive full room and board and a small personal amount of money.<sup>174</sup> This system was devised as the Irish government found it to be more economical than providing housing benefit to asylum seekers or finding self-catering accommodation.<sup>175</sup> However, the direct provision services are often provided by private companies who have not had previous experience of working with asylum seekers or specific training on intercultural awareness or dealing with trauma.<sup>176</sup> Asylum seekers are dispersed to centres throughout the country, without

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<sup>169</sup> Ryan (n 47) 186.

<sup>170</sup> Mullally (n 77) 589. For a broader history of discrimination between child migrants within the EU, see Louise Ackers and Helen Stalford, 'Children, Migration and Citizenship in the European Union: Intra-Community Mobility and the Status of Children in EC Law' (1999) 21 *Children and Youth Services Review* 987.

<sup>171</sup> Silvia Brandi, 'Unveiling the Ideological Construction of the 2004 Irish Citizenship Referendum: A Critical Discourse Analytical Approach' (2007) 2 *Translocations* 26.

<sup>172</sup> See *ibid* 34.

<sup>173</sup> Free Legal Advice Centre (n 5) 11 and 12.

<sup>174</sup> Irish Refugee Council (n 5) 7.

<sup>175</sup> See *ibid* 20.

<sup>176</sup> See *ibid* 7.

being given choices as to where in Ireland they are being sent.<sup>177</sup> More than any other aspect of the asylum system in Ireland, direct provision has received criticism from NGOs.<sup>178</sup>

Some of this criticism is broad, applying to almost all asylum seekers. The Irish government, concerned at increasing number of asylum seekers in Ireland, deliberately intended to limit the number of asylum seekers in Ireland by reducing the quality of conditions for applicants.<sup>179</sup> This has meant that despite concerns as to the safety and efficiency of direct provision, the Irish government is unwilling to reform the direct provision system.<sup>180</sup> Despite the direct provision centres being intended for short term occupation, applicants can remain in direct provision housing for up to 7 years;<sup>181</sup> at no point are asylum seekers eligible to begin employment and find individual housing.<sup>182</sup> NGOs have cited concerns about mental and physical health effects of malnutrition (since residents are not able to cook culturally appropriate meals or cook with healthy ingredients)<sup>183</sup> and of the overcrowded facilities.<sup>184</sup> Several women noted in interviews that they felt unsafe allowing their children to use bathroom facilities alone and that toilet training their children was exceedingly difficult in direct provision centres.<sup>185</sup> They expressed concerns about protecting their children from child abuse within direct provision centres.<sup>186</sup> Removing asylum seekers from the Irish community has also meant that they are isolated – due to lack of funds and childcare, women cannot participate in employment, study or vocational training<sup>187</sup> and have limited involvement in influencing their children's education or extracurricular activities.<sup>188</sup> There is no intersectional recognition that small children, or women who have been sexually assaulted, may have additional vulnerabilities and special needs.

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<sup>177</sup> See *ibid* 7.

<sup>178</sup> See Irish Refugee Council (n 5), Free Legal Advice Centre (n 5), Akidwa (n 9), Akidwa (n 5), Irish Council for Civil Liberties Women's Committee (n 6) and O'Mahony (n 46).

<sup>179</sup> Free Legal Advice Centre. (n 5) 11.

<sup>180</sup> Irish Refugee Council (n 5) 20.

<sup>181</sup> See *ibid* 13.

<sup>182</sup> Free Legal Advice Centre (n 5) 9.

<sup>183</sup> Akidwa (n 9) 17.

<sup>184</sup> Free Legal Advice Centre (n 5) 90.

<sup>185</sup> Akidwa (n 9) 15.

<sup>186</sup> Akidwa (n 5) 5.

<sup>187</sup> Akidwa (n 9) 22.

<sup>188</sup> See *ibid* 11.

In their report on the conditions of direct provision, the NGO Akidwa was particularly concerned that there is no provision within direct provision centres for vulnerable people, including women with a history of gender-based violence.<sup>189</sup> There are currently no centres specifically for single women, or women who need protection from abusive partners;<sup>190</sup> the Minister for Justice has rejected proposals to establish separate space for single women and households with single mothers.<sup>191</sup> Women have been forced to share rooms, bathrooms and kitchen space with unrelated individuals, including men.<sup>192</sup> Women are denied privacy, even from male residents and male employees, as bedrooms and bathrooms have master keys and private areas are accessible by CCTV.<sup>193</sup> As Akidwa noted,

Policies, procedures and practices in the Irish reception system do not provide all women security and safety whilst living in accommodation centres. One major obstacle to protection documented in this report is awareness amongst residents and advocates, as well as with potential perpetrators, of a weak complaints system for residents living in direct provision accommodation centres. Another obstacle cited in the report is a lack of effective follow-through of women's allegations of sexual misconduct by residents, staff, management and local community service providers. The imbalance of gender in some centre populations, that of a few single or single parenting women living amongst a majority of single men, and the often random mix of populations has, in some circumstances, contributed to unsafe and insecure living conditions for women in Ireland's reception system.<sup>194</sup>

There are reports of sexual harassment and abuse within direct provision centres,<sup>195</sup> but women noted that they felt uncomfortable reporting mistreatment to authorities for fear that they would be penalized.<sup>196</sup> Akidwa noted that this was not a baseless fear; women had been transferred after making sexual harassment complaints and in several cases, there was no investigation or punishment against the perpetrator.<sup>197</sup> Akidwa noted that

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<sup>189</sup> Akidwa (n 5) 4 and Rape Crisis Network Ireland, 'Asylum Seekers and Refugees Surviving on Hold.' (Rape Crisis Network Ireland website, 2014). <<http://www.rcni.ie/wp-content/uploads/RCNI-Asylum-Seekers-and-Refugees-Surviving-on-Hold.pdf>> last accessed 01 June 2016, 27.

<sup>190</sup> Akidwa (n 9) 12.

<sup>191</sup> Akidwa (n 5) 17.

<sup>192</sup> See *ibid* 4-8.

<sup>193</sup> Akidwa (n 9) 17.

<sup>194</sup> Akidwa (n 5) 15.

<sup>195</sup> Akidwa (n 5).

<sup>196</sup> See *ibid* 10.

<sup>197</sup> Akidwa (n 5).

there was a culture of disbelief against claims brought by women – that the centre staff and the government seemed invested in personally attacking women’s claims of sexual harassment rather than granting them a fair hearing.<sup>198</sup> There was also an insufficient number of female staff to work with female asylum seekers<sup>199</sup> and staff providing services to asylum seekers had not received training in trauma or dealing with women who had experienced gender-based violence.<sup>200</sup>

The reports by various NGOs note that the Irish government has refused to reconsider the complaints regarding treatment of residents in direct provision centres<sup>201</sup> and have even restructured policies regarding government benefits in order to make asylum seekers more dependent on direct provision.<sup>202</sup> It is concerning that the government has forced asylum seekers into an insular community, without sufficient opportunities for integration or protection and support services for trauma survivors. As will be discussed in section 4, this seems to support Ronit Lentin’s writings that the Irish government views asylum seekers as threatening damage or pollution of the Irish racial identity.<sup>203</sup>

Aspects of the Irish government’s policies on asylum seekers clearly violate international human rights law.<sup>204</sup> Yet the Irish government has also avoided binding legislation from the EU, which would prevent policies like direct provision. The Irish government has simultaneously used the EU as a scapegoat for certain treatment of asylum seekers, such as denying residency and citizenship to asylum seekers family, while attempting to protect the *status quo* of Irish asylum law. This complicated relationship between Ireland and EU asylum law continues to both provide some protections for asylum seekers while allowing the Irish government to use the EU as a reason for failing to protect fundamental rights.

### **III. The EU and Irish asylum law**

Ireland has had a complex relationship with the EU’s rulings on migration and asylum. This is partially due to the influence of the UK. Historically skeptical of greater

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<sup>198</sup> See *ibid* 11.

<sup>199</sup> See *ibid* 12.

<sup>200</sup> Akidwa (n 9) 5.

<sup>201</sup> Irish Refugee Council (n 5) 22, Free Legal Advice Centre (n 5) 9 and Akidwa (n 5).

<sup>202</sup> Free Legal Advice Centre (n 5) 9.

<sup>203</sup> Lentin 2007 (n 3), Lentin 2003 (n 3) and Lentin 2004 (n 3).

<sup>204</sup> Bree(n 102.).



involvement in the border and migration aspects,<sup>205</sup> the UK chose not to join the Schengen Agreement<sup>206</sup> nor the recast Asylum Directives.<sup>207</sup> This has influenced Irish policy, particularly since Ireland has sought to maintain an open border with Northern Ireland as part of the Common Travel Area.<sup>208</sup> It is unclear how the UK's referendum to leave the EU<sup>209</sup> will influence Irish integration into the CEAS, particularly if Ireland wishes to retain its open border with Northern Ireland.<sup>210</sup>

The Irish courts and legislature have made use of parts of the CEAS – particularly the Dublin Regulations,<sup>211</sup> to justify the removal of Irish citizen parents and to argue for changing Irish citizenship laws.<sup>212</sup> Yet the Irish government has been reluctant to enforce the levels of human rights protection inherent in the CEAS. As the Irish Refugee Council describes it,

CEAS foresees a sharing of the same fundamental values and the need for a joint approach among Member States to guarantee high protection standards for refugees and persons otherwise fleeing serious harm. However, Ireland's engagement with CEAS has been piecemeal at best in that Ireland retains an option to opt in or out of Directives in the field of international protection. Increasingly Ireland is out of step with its European counterparts and has only signed up to the following minimum standard Directives: the Qualification Directive, the Temporary Protection Directive and the Asylum Procedures Directive whilst continuing to engage in the Dublin system by recently adopting the recast Dublin III Regulation.<sup>213</sup>

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<sup>205</sup> Cathryn Costello, 'EU Asylum Law and Policy' in Ursula Fraser and Colin J. Harvey (eds). *Sanctuary in Ireland, Perspectives on Asylum Law and Policy*. (Institute of Public Administration 2003) 27.

<sup>206</sup> Antje Wiener, 'Forging Flexibility – The British 'No' to Schengen' (1999) 1 *European Journal of Migration and Law* 441.

<sup>207</sup> Discussed in chapter 5.

<sup>208</sup> Elizabeth Meehan, 'Britain's Irish Question: Britain's European Question?' *British-Irish relations in the context of European Union and the Belfast Agreement* (2000) 26 *Review of International Studies* 83.

<sup>209</sup> Steven Erlanger. 'Britain Votes to Leave EU; Cameron Plans to Step Down.' *The New York Times*. (New York City, 23 June 2016.. <<http://www.nytimes.com/2016/06/25/world/europe/britain-brexit-european-union-referendum.html>> accessed 10 June 2017.

<sup>210</sup> Emer O'Toole, 'Ireland faces partition again. Preserving the peace is critical' *The Guardian*. (The Guardian website, 26 June 2016). Available at: <<https://www.theguardian.com/commentisfree/2016/jun/26/northern-ireland-republic-peace-brexit-border>> last accessed 01 January 2017.

<sup>211</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast.) OJ L 180/31.

<sup>212</sup> *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 3.

<sup>213</sup> Irish Refugee Council (n 24) 2 and 3.

This conundrum – welcoming the ability to transfer asylum seekers under the Dublin Regulation, but rejecting incorporation of the humanitarian guarantees of the Reception Conditions Directive<sup>214</sup> or any of the recast directives, encapsulates the contradictory views that the EU is both a force to aid isolation of asylum seekers while the Irish government also attempts to resist its attempts at integrating fundamental rights into Irish asylum law. The Irish government has not sought to use the humanitarian measures of the CEAS to benefit the vulnerable asylum seekers currently unprotected by the direct provision system and harsh treatment of child citizens.

Ireland is able to choose whether to opt into various measures of the CEAS. Ireland has been particularly supportive of the Dublin Regulation<sup>215</sup> (the original Dublin Convention was agreed in Ireland during Irish Taoiseach Charlie Haughey's presidency of the European Council of Ministers). The Dublin Regulation has meant that southern states such as Greece and Italy have processed a disproportionate number of asylum seekers in Europe; Ireland has taken far fewer.<sup>216</sup> In the *Lobe* case, when heard in the High Court, Smyth J rejected the applicant's appeal against a transfer to UK under the then-Dublin Convention, citing that transfer was required under the Dublin Convention.<sup>217</sup> This was discussed by the Supreme Court. Keane CJ<sup>218</sup> and Denham J<sup>219</sup> argued that the existence of the Dublin Convention was a major change from the situation in *Fajujonu*, claiming this change required the Minister for Justice to transfer the Lobe family to the UK in order to maintain the integrity of the asylum system.<sup>220</sup> Yet other judges noted that the Dublin Convention did not require member states to transfer asylum seekers – Ireland had the discretion to choose to process any asylum claims that it

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<sup>214</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. [2013] OJ L 18/96.

<sup>215</sup> Office of the Refugee Applications Commissioner, 'Annual Report – 2014.' (Office of Refugee Applications Commissioner website, 2014).  
<[http://www.orac.ie/website/orac/oracwebsite.nsf/page/CRSE-9XQK2A15304722-en/\\$File/2014%20Annual%20Report.pdf](http://www.orac.ie/website/orac/oracwebsite.nsf/page/CRSE-9XQK2A15304722-en/$File/2014%20Annual%20Report.pdf)> last accessed 01 June 2016, 27.

<sup>216</sup> Andreas Maurer and Roderick Parkes, 'The Prospects for Policy Change in EU Asylum Policy: Venue and Image at the European Level.' (2007) 9 European Journal of Migration and Law 173, 197.

<sup>217</sup> Breen (n 102) 780.

<sup>218</sup> *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 3, para 107.

<sup>219</sup> *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 3.

<sup>220</sup> Mullally (n 77) 584.

chose.<sup>221</sup> The insistence in the judgment that Ireland was obligated to transfer the Lobe family to the UK certainly gives the impression that the Supreme Court was using the Dublin Convention to reinforce the idea that an intact asylum system often would require deportation of the family members of Irish citizens and that Irish decision-makers are powerless to prevent this movement.

In 2015, the Irish Oireachtas passed the International Protection Bill,<sup>235</sup> intended to rectify some of the criticism by NGOs and international organisations as to the gaps in protection in Irish asylum law.<sup>236</sup> The most notable of these was the streamlining of subsidiary protection and asylum processes,<sup>237</sup> which also served as the first comprehensive overhaul of the Irish asylum system since it was initially created in 1996.<sup>238</sup> The Irish Refugee Council (IRC) noted that despite rhetoric from the Irish government about the importance of further harmonization of the asylum system, Ireland had not opted in to any of the recast directives,<sup>239</sup> yet interestingly, many of the provisions from the various recast CEAS directives were contained in the International Protection Bill, such as a definition of refugees which could include other EU nationals.<sup>240</sup> Yet the Irish Refugee Council noted that simply streamlining the process would not fix many of the problems with the Irish asylum system and in fact, there were some concerning aspects of the bill – including provisions which allowed for detention in specific circumstances<sup>241</sup> and the lack of emphasis on training staff members who come into contact with asylum seekers, but the major concern by the Irish Refugee Council was that this was a missed opportunity to incorporate a strong intersectional understanding of refugee rights into Irish law.<sup>242</sup>

Unfortunately, Ireland has, instead of using its membership and accountability to international organisations such as the EU and the European Convention on Human Rights in order to craft a more intersectional approach to supporting female asylum

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<sup>221</sup> See *ibid* paras 128 and 572.

<sup>235</sup> International Protection Act 2015.

<sup>236</sup> Irish Refugee Council (n 24).

<sup>237</sup> See *ibid* 4.

<sup>238</sup> See *ibid* 2.

<sup>239</sup> See *ibid* 3..

<sup>240</sup> See *ibid* 6.

<sup>241</sup> See *ibid* 4.

<sup>242</sup> See *ibid* 28.

seekers, sought to create exceptions for itself in international law. This has included incorporating reservations to international treaties protecting Ireland's entrenched gender roles – as in the case of CEDAW<sup>243</sup> and the Maastricht Treaty.<sup>244</sup>

Ireland has also created an opt in agreement with the CEAS, which allows the Irish government to decide not to abide by the Reception Conditions Directive or the recast CEAS directives.<sup>245</sup> The Irish government seems reluctant to commit to further harmonization within Europe<sup>246</sup> or to respond to criticism by international organisations.<sup>247</sup> While the Protection of Life in Pregnancy Bill<sup>248</sup> was passed after the ECHR decision of *A, B and C v. Ireland*,<sup>249</sup> the decision did not seem to be the catalyst; the Irish government seemed to be far more influenced by the death of Savita Halapanavar, an Indian migrant who was denied an abortion and later died.<sup>250</sup> The Irish government seems reluctant to evolve national law in line with international norms. Disappointingly, the International Protection Bill, which was intended as a major adaption of the Irish asylum system, with additional rights protections in line with European law, has failed to reconsider the direct provision system, and even these limited changes have not been implemented into Irish law.<sup>251</sup>

NGOs have criticized the gap between the level of protections contained in EU law and the reformed system in the International Protection Bill.<sup>252</sup> The recast Asylum Procedures Directive requires training to be incorporated into national law, yet Ireland is able to avoid the legal requirement of sufficiently trained and aware staff by not opting

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<sup>243</sup> Convention on the Rights of the Child (adopted 20 November 1989, entered into force 20 November 1989) 1577 UNTS 3, at Declaration, Reservations, and Objections. Discussed in Siobhan Mullally, 'Taking Women's Rights Seriously: The Convention on the Elimination of All Forms of Discrimination Against Women' (1992) 10 Irish Law Times 6

<sup>244</sup> Bryan Mercurio, 'Abortion in Ireland: An Analysis of the Legal Transformation Resulting from Membership in the European Union' (2003) 11 Tulane Journal of International and Comparative Law 141, 163.

<sup>245</sup> Irish Refugee Council (n 24).

<sup>246</sup> See discussion of Ireland's decision to opt out of the recast directives in Irish Refugee Council.(n 24).

<sup>247</sup> See Committee on the Elimination of Discrimination Against Women, 'Concluding Comments: Ireland'. CEDAW/C/IRL/CO/4-5 (22 July 2005) and Human Rights Committee, 'Views adopted by the Committee under Article 5(4) of the Optional Protocol, Concerning Communication No. 2324/2013' CCPR/C/116/D/2324/2013 (17 November 2016.)

<sup>248</sup> Protection of Life in Pregnancy Act 2013.

<sup>249</sup> *A, B and C v. Ireland* [2010] ECHR 2032

<sup>250</sup> See Kitty Holland, *Savita: The Tragedy that Shook a Nation*. (Transworld Publishing 2013.).

<sup>251</sup> International Protection Act 2015. Discussed in Irish Refugee Council. (May 2015) *supra* note 24.

<sup>252</sup> Irish Refugee Council. (n 24).

into the recast Asylum Procedures Directive.<sup>253</sup> The International Protection Bill seems intent on limiting the amount of asylum seekers within Ireland by considering asylum claims to be inadmissible if there is judged to be another first country of asylum (contrary to the intentions of the 1951 Refugee Convention, which allows applicants to apply for asylum in any or every signatory country).<sup>254</sup> The more vulnerable an asylum seeker is, the more difficult it is for them to relocate and resettle their families and so they can be disproportionately affected by rigid adherence to the Dublin Regulation. This strict adherence to the Dublin Regulation, which ignores Ireland's flexibility to process applications, The IRC also references the European Court of Human Rights' findings of the human rights violations of migrants in other European Union countries<sup>255</sup> and notes that asylum seekers do not currently have a mechanism to protest removal under the Dublin Regulation to problematic EU states.<sup>256</sup> The IRC complained that there was an assumption in the bill that certain countries were safe countries of origin;<sup>257</sup> this is a dangerous assumption, particularly if country of origin information does not take into account differing treatment for women and minorities.<sup>258</sup> In a country which is generally safe, but incredibly repressive for women's rights, there should never be an assumption that women will be treated fairly and safely.

There was a particular notable absence in the International Protection Bill of any improvement of the reception conditions.<sup>259</sup> In particular, the IRC argues that the direct provision system was not compatible with international refugee law.<sup>260</sup> International law, specifically codified in the provisions contained in the Reception Conditions Directive,<sup>261</sup> requires that asylum seekers eventually be allowed to work and move into a self-

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<sup>253</sup> See *ibid* 6.

<sup>254</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention). Discussed in Irish Refugee Council (n 24) 9.

<sup>255</sup> Discussed in chapter 3.

<sup>256</sup> Irish Refugee Council (n 24) 10.

<sup>257</sup> See *ibid* 12.

<sup>258</sup> See *ibid* 11.

<sup>259</sup> See *ibid* 26 and 27.

<sup>260</sup> See *ibid* 26 and 27.

<sup>261</sup> Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 laying down standards for the reception of applicants for international protection. [2013] OJ L 18/96. Discussed in Irish Refugee Council (n 5).

sustaining role in their community. This was ignored in the drafting of the International Protection Bill.<sup>262</sup>

The Irish Refugee Council was also concerned that the bill would disproportionately affect vulnerable asylum seekers. There is no stated definition in Irish law of a vulnerable asylum seeker and so no particular protections for vulnerable asylum seekers within legislation.<sup>263</sup> Similarly, the exclusion clauses, which allow rejection of asylum claims on the basis of “national security” and “public order” – are not defined, allowing the possibility of an interpretation of exclusion being extremely broad and left to the discretion of the decision maker.<sup>264</sup> This could lead to discrepancies in the application of exclusion clauses and does not adequately ensure protection of the asylum seeker’s rights to fair treatment and fair procedures.<sup>265</sup> The IRC also criticized the lack of legislative emphasis on family reunification – the bill would only allow for reunification for families formed in their country of origin, rather than ones formed after the asylum seekers had fled.<sup>266</sup> The definition of family is extremely narrow – married children were not judged to be part of a family.<sup>267</sup> This is disappointing from an intersectional feminist perspective; families could be fleeing a forced marriage of their daughter or their child’s abusive partner. Dependent family members (those whose protection status stems from the claim of a family member) are also given fewer rights than their relevant family members;<sup>268</sup> this is particularly concerning due to the prevalence of domestic violence within families of asylum seekers.<sup>269</sup> Women could feel pressure to remain with an abusive partner in order to ensure protection within the Irish asylum system.

The International Protection Bill is not simply disappointing for the lack of adequate fundamental rights embedded in its content. The Bill has not yet been activated by statutory instrument and so is not yet part of Irish law.<sup>270</sup> After a recent 2016

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<sup>262</sup> Irish Refugee Council (n 24) 26 and 27.

<sup>263</sup> See *ibid* 17..

<sup>264</sup> See *ibid* 16.

<sup>265</sup> See *ibid* 16.

<sup>266</sup> See *ibid* 23.

<sup>267</sup> See *ibid* 23 and 24.

<sup>268</sup> See *ibid* 24.

<sup>269</sup> Akidwa (n 9) 11.

<sup>270</sup> International Protection Act 2015.

election,<sup>271</sup> it is unclear whether it will be brought into Irish law by the next Irish government. The bill itself is particularly inadequate; instead of taking an opportunity to redraft the Irish asylum system to be more in line with European and international law, the Irish government chose to maintain the same violations of humane treatment for asylum seekers<sup>272</sup> and to continue to ignore an intersectional approach. Ireland seems to be enthusiastic about using relevant portions of EU law for specific policy objectives (removing asylum seekers and migrants from Ireland), but unwilling to abide by the fundamental rights protections contained in European law. In the next section, a pattern will be established of an Irish government that opposes any international law, whether from the EU or international organization, which tries to impose a level of protection of minority rights. The Irish government's strategy, to opt out of international agreements which attempts to enforce human rights of minorities, will be discussed in more depth.

#### **IV. Ireland, women's rights and international law**

The intersection between Ireland and international women's rights law cannot be understood without reference to Ireland's colonial past. Despite the active role that many Irish feminists played in the independence movement,<sup>273</sup> once Ireland became an independent state, the Irish constitution was drafted with a strong influence from a Catholic ethos.<sup>274</sup> This Constitution accordingly envisioned women not as participants in public life,<sup>275</sup> although women were allowed and encouraged to vote<sup>276</sup> (perhaps because women disproportionately supported the drafting government party, Fianna Fail),<sup>277</sup> but as wives and mothers.<sup>278</sup> This is certainly reflected in Article 41, which states

“1° the State recognises that by her life within the home, woman gives to the State a support without which the common good cannot be achieved.

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<sup>271</sup> Kevin Doyle, ‘Fine Gael and Fianna Fail finally reach minority government deal.’” *The Irish Independent*. (Independent,., 29 April 2016) <<<http://www.independent.ie/irish-news/election-2016/news/fine-gael-and-fianna-fil-finally-reach-minority-government-deal-34672359.html>> last accessed 01 January 2018.

<sup>272</sup> Irish Refugee Council (n 24) 28.

<sup>273</sup> Coulter (n 45).

<sup>274</sup> Hanafin (n 42) and Frances Gardiner and Monique Leijenaar, ‘The Timid and the Bold: Analysis of the “Woman-Friendly” State in Ireland and the Netherlands’ in Frances Gardiner (ed). *Sex Equality Policy in Western Europe* (Routledge 1997) 130.

<sup>275</sup> See *ibid* 254.

<sup>276</sup> Scannell (n 45) 124.

<sup>277</sup> Coulter (n 45) 24.

<sup>278</sup> See *ibid* 28.

2° The State shall, therefore, endeavour to ensure that mothers shall not be obliged by economic necessity to engage in labour to the neglect of their duties in the home.”<sup>279</sup>

The Irish government constitutionally enshrined women (not parents, women) as having their primary role in the private sphere of the home.<sup>280</sup> The interchangeable nature of the mentions of women and mothers lays bare the Irish government’s post-colonial view on women: that the appropriate role of women in shaping Irish society and public life was to raise a family and caretake the ideals of Irish nationalism within the home.<sup>281</sup>

The Catholic influence in the Irish constitution quite deliberately applied a “separate spheres” theory to the role of men and women.<sup>282</sup> Even the guarantee of equal treatment under the Irish constitution references that in considering equal treatment, there should be due regard for the differences in ability and function between the genders.<sup>283</sup> This is obviously concerning from an equality law perspective, in that it enshrines stereotypes and rigid gender roles into Irish law.<sup>284</sup>

Irish feminism has been criticized for its lack of intersectional awareness; As Niamh Reilly writes, most Irish feminist groups are opposed to racism – and while they acknowledge that migrant women face racism, there is still an emphasis on the issues which face the majority of native white Irish women, rather than a broader understanding that feminist organisations should embrace a more intersectional form of activism.<sup>290</sup> Ruth Fletcher notes that Irish nationalism has asserted control over women’s reproductive choices in Ireland<sup>291</sup> – a control which has different consequences for Irish women and migrant women, although both are restricted and regulated.<sup>292</sup> The relationship between reproductive access in Ireland and international law is an example of the balance between Ireland’s obligations under international human rights law and the varying effects of these rights violations on Irish women and migrant women in Ireland. Irish feminist

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<sup>279</sup> Article 41.2.

<sup>280</sup> Hanafin (note 42) 260-261.

<sup>281</sup> See judgment of Denham J in *Sinnott v. Minister for Education* [2001] 2 IR 505 and Evelyn Mahon. ‘Women’s rights and Catholicism in Ireland’ (1987) 166 New Left Review 53.

<sup>282</sup> Siobhan Mullally, ‘Mainstreaming Equality in Ireland: A Fair and Inclusive Accommodation?’ (2001) 21 Legal Studies 99, 107.

<sup>283</sup> See *ibid* 107.

<sup>284</sup> Committee on the Elimination of Discrimination Against Women (n 246) 4.

<sup>290</sup> Reilly (n 32).

<sup>291</sup> Fletcher (n 141) 372.

<sup>292</sup> See *ibid* 372.



groups have focused on issues like abortion access and sexual violence, without specifically noting and campaigning on the intersectional nature of the experiences of migrant women.<sup>293</sup>

The context of Ireland and the UK, and the legislative protection of gender equality, are very different. The early Irish feminist movement in the 1960s did challenge prohibitions on contraception and policies preventing married women from holding paid employment, but were careful not to campaign on decriminalizing abortion.<sup>301</sup> Regardless, the backlash against Irish feminism led to the Eighth Amendment to the Constitution of Ireland;<sup>302</sup> the constitution was amended to reflect the life of the unborn, equal to that of the mother,<sup>303</sup> preventing any legislative access to abortion.<sup>304</sup> This is quite different from the situation in UK, in which abortion is regulated by the more liberal Abortion Act of 1967<sup>305</sup>.

Access to abortion has obviously provided a challenge to the nationalistic Catholic tradition of the Irish constitution and laws.<sup>306</sup> Feminist groups and international organizations confronting these restrictions over women's bodies have often been dismissed as anti-Irish and as a threat to the identity of Ireland.<sup>307</sup> Despite this effective restriction on women's groups within Ireland, Reilly argues that international law developments in the area of women's rights have allowed Irish feminist groups to position themselves not as opposed to Irish identity, but as protectors of Ireland's obligations in international agreements as a moral leader in international human rights – although with mixed success.<sup>308</sup> There is a marked contrast between this treatment of women's autonomy in the Great Britain and Ireland – while there is a campaign to improve abortion access within the UK<sup>309</sup>, outside of Northern Ireland, it lacks the same

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<sup>293</sup> Reilly (n 32).

<sup>301</sup> See *ibid* 379.

<sup>302</sup> See *ibid* 380.

<sup>303</sup> Eighth Amendment to the Constitution Act 1983

<sup>304</sup> Mullally (n 81).

<sup>305</sup> Abortion Act 1967. The exception is Northern Ireland, in which abortion access still attracts criminal penalties, similar to the Republic of Ireland.

<sup>306</sup> Mercurio (n 243), 142-143.

<sup>307</sup> Fletcher (n 141) 384

<sup>308</sup> Reilly (n 32) 119.

<sup>309</sup> Sandy Goldbeck-Wood, 'Reforming Abortion Services in the UK: Less Hypocrisy, More Knowledge of Complexity' (2016) 43 *BMJ Sexual & Reproductive Health* 95.

controversy and harsh rhetoric as the Republic of Ireland and Northern Ireland.<sup>310</sup> The two provide different legislative starting points for discussions of bodily autonomy and migrant women's rights.

The Irish government has attempted to make reservations with the European Union in regards to abortion access.<sup>322</sup> Obviously, freedom of movement and services provided a challenge to Irish abortion restrictions, as women could more easily travel throughout Europe to avail of abortion services.<sup>323</sup> Yet Ireland seems to have had a mixed relationship with the EU – the referendum on the Maastricht Treaty and Treaty of Amsterdam had overwhelming support amongst voters,<sup>324</sup> but the Irish government inserted a protocol into the Maastricht Treaty to agree that the EU would not interfere with Irish abortion law.<sup>325</sup> Accordingly, the EU, and particularly the Court of Justice, has attempted to avoid directly discussing the human rights issue of abortion laws.<sup>326</sup> While the European Court of Justice has ruled that abortion is a service,<sup>327</sup> in the case of *SPUC v. Grogan*,<sup>328</sup> the Court attempted to avoid the substantive issue of whether British abortion clinics could advertise their services in Ireland and instead focused on the lack of connection between the student groups providing abortion information and the British abortion clinics.<sup>329</sup> This would indicate that Ireland has developed a pattern not of yielding to human rights norms, but of attempting to negotiate exceptions.<sup>330</sup>

The Court of Justice has deferred to member states on the issue of abortion, perhaps because the member states of the EU have a wide variety of levels of abortion access. It is interesting, however, to compare the active role that the EU has played in ensuring economic equality between men and women<sup>331</sup> (despite the broad variations between

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<sup>310</sup> S Mills, 'Brief Background to Irish Abortion Law' (2017) 124 BYOG 1216.

<sup>322</sup> Mercurio (n 243).

<sup>323</sup> See Department of Health, 'Abortion Statistics, England and Wales.' (Gov.uk website, 1 June 2016) <<https://www.gov.uk/government/collections/abortion-statistics-for-england-and-wales>> last accessed 01 January 2018..

<sup>324</sup> Mercurio (n 243) 149.

<sup>325</sup> See *ibid* 163.

<sup>326</sup> See *ibid* 158.

<sup>327</sup> C-159/90, *SPUC v. Grogan*, 1991 E.C.R. 1-4685. Discussed in Mercurio (n 243) 149 and 160.

<sup>328</sup> C-159/90, *SPUC v. Grogan*, 1991 E.C.R. 1-4685.

<sup>329</sup> C-159/90, *SPUC v. Grogan*, 1991 E.C.R. 1-4685. Discussed in Mercurio (n 243) 149 and 158.

<sup>330</sup> See discussion also of CEDAW in Mullally (n 242).

<sup>331</sup> See C-43/75, *Defrenne v. Sabena (No 2.)* [1976] ECR 455.

member states when the EU initially advocated for gender equality.)<sup>332</sup> The EU has historically presented itself as an advocate for women's rights within its member states. While it is logical that in 1991, the EU would have more competence to interject into workplace and economic matters, subsequently, the EU has introduced the concept of gender mainstreaming<sup>333</sup> and its organs are bound by the Charter of Fundamental Rights of the European Union.<sup>334</sup> The EU now has the competence to be able to argue for an increased protection of access to abortion services, particularly in extreme cases. Mercurio argues that the EU has been a strong influence on Irish recognition of the right of women to travel to access abortions and to receive information about overseas abortion services within Ireland.<sup>335</sup> It is unclear whether the EU will use its competence to argue for greater integration of abortion laws or if the EU will continue to avoid this politically sensitive topic.

Ruth Fletcher also argues that the constitutional protection as to the right to life for the unborn is also ignored in the circumstances of migrant women.<sup>366</sup> When in the case of *Baby O*,<sup>367</sup> a young pregnant Nigerian asylum seeker attempted to prevent a deportation back to Nigeria on the basis that infant morality rates were far higher in Nigeria than in Ireland.<sup>368</sup> The Irish government hypocritically argued that no rights should be granted to the unborn child,<sup>369</sup> while the Supreme Court argued that this provision was only intended to limit abortion access, not create a broader right to protection for the unborn foetus.<sup>370</sup> Pro-life groups did not become involved or protest

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<sup>332</sup> European Commission, 'Strategy for Equality between Men and Women: 2010-2015' (European Commission website, September 2010) <[http://ec.europa.eu/justice/gender-equality/files/documents/strategy\\_equality\\_women\\_men\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/documents/strategy_equality_women_men_en.pdf)> last accessed 01 January 2017.

<sup>333</sup> See European Commission (n 331) and European Commission, 'Commission staff working document: Mid-term review of the Strategy for Equality between Men and Women (2010-2015.)' SWD(2013)339 final (2013.)

<sup>334</sup> European Union, 'Charter of Fundamental Rights of the European Union' 2012/C 326/02 (26 October 2012)

<sup>335</sup> Mercurio (n 243) 179.

<sup>366</sup> Fletcher (n 141).

<sup>367</sup> (*Baby O (Suing by Mother and Next Friend IAO) v Minister for Justice, Equality and Law Reform* [2002] I.E.S.C. 53

<sup>368</sup> (*Baby O (Suing by Mother and Next Friend IAO) v Minister for Justice, Equality and Law Reform* [2002] I.E.S.C. 53. Discussed in Fletcher (n 141) 391.

<sup>369</sup> (*Baby O (Suing by Mother and Next Friend IAO) v Minister for Justice, Equality and Law Reform* [2002] I.E.S.C. 53. Discussed in Fletcher (n 141) 392.

<sup>370</sup> (*Baby O (Suing by Mother and Next Friend IAO) v Minister for Justice, Equality and Law Reform* [2002] I.E.S.C. 53. Discussed in Fletcher (n 141) 394.

this decision, instead focusing on the upcoming referendum intended to limit abortion in the cases when a woman's life was threatened by suicidal intent.<sup>371</sup> This example of this provision being used to prevent abortion access for Irish women while refusing to support pregnant migrants, demonstrates not only a lack of intersectional feminism in Irish law, but a lack of feminist understanding of the suppressive effect of the Eighth Amendment law on all women in Ireland.

Academic Ronit Lentin argues that Ireland views migration policy through an extremely racial lens.<sup>372</sup> The Irish government seems to be unable to equate the experience of asylum seekers in Ireland with the vulnerabilities experienced by Irish citizens who have historically fled famine and economic depression in Ireland.<sup>373</sup> The Irish government seems to view its obligations as a member of the European Union as a tool to avoid integration of asylum seekers into Irish society – vigorously defending the Dublin Regulation<sup>374</sup> while arguing that the EU required narrower definitions for citizenship<sup>375</sup> while avoiding the human rights standards contained in the recast CEAS system.<sup>376</sup> This seems to place a serious limitation on the ability of the EU to continue to implement a more intersectional approach to women seeking asylum on the basis of gendered violence in Irish law.

Unlike the UK,<sup>377</sup> the Irish government has not considered an intersectional feminist approach in any aspect of its national law<sup>378</sup> – it still has not totally developed from a Catholic-inspired philosophy which pressures women into a caring role, rather than economic action outside the home<sup>379</sup> and attempts to limit women's bodily autonomy in favour of a reproductive role.<sup>380</sup> As Mullally argues,

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<sup>371</sup> Mullally (n 242) a24.

<sup>372</sup> Lentin 2007 (n 3), Lentin 2003 (n 3) and Lentin 2004 (n 3).

<sup>373</sup> Lentin 2007 (n 3) 434.

<sup>374</sup> Office of the Refugee Applications Commissioner (n 214) 27, Breen (n 102) 780 and Mullally (no 81) 584.

<sup>375</sup> Garner (n 143).

<sup>376</sup> Irish Refugee Council (n 24).

<sup>377</sup> *R (Begum) v. Headteacher and Governors of Denbigh High School* [2006] UKHL 15. Discussed in Pragna Patel, 'Faith in the State? Asian Women's Struggles for Human Rights in the UK' (2008) 16 *Feminist Legal Studies* 9.

<sup>378</sup> Fletcher (n 141).

<sup>379</sup> Committee on the Elimination of Discrimination Against Women (n 246) and Department of Justice, Equality and Law Reform, 'National Women's Strategy: 2007-2016' (Department of Justice, Equality and Law Reform website, April 2007).  
<<http://www.justice.ie/en/JELR/National%20Womens%20Strategy%20PDF>.

Appeals to the sanctity of family life and to ‘pro-life’ traditions, have served to limit women’s human rights claims in Ireland since the foundation of the State. The priority accorded to such appeals have led to repeated attempts to restrict women’s freedom to travel and to a notion of citizenship that is deeply gendered. While such attempts have often focused on restricting women’s freedom to exit the State, legal responses to migrant women’s assertion of reproductive autonomy have sought to restrict entry to the State. Common to both sets of legal responses is the curtailing of women’s reproductive autonomy.<sup>381</sup>

Akidwa has agreed, arguing that, contrarily to the pressure placed on Irish women to prioritise parenting,<sup>382</sup> – the direct provision system does not allow women freedom to parent<sup>383</sup> – restricting the food they can serve their children,<sup>384</sup> the location they can raise their children<sup>385</sup> and even limiting privacy for such mundane activities as toilet-training.<sup>386</sup> This double isolation – complaints of migrant women being ignored both by the Irish government and their marginalization by feminist groups – seems to have resulted in the Irish government disregarding the ill-treatment of the direct provision system and no real strong feminist movement opposing the intersectional oppression of migrant women.<sup>387</sup>

Siobhan Mullally notes that there is a need for an intersectional interpretation of the effects of this repression of reproduction in Ireland.<sup>388</sup> This is clearly also representative of the view of CEDAW,<sup>389</sup> which has argued that Ireland must ensure that marginalized women, such as asylum seekers, are protected both economically and from their particularly vulnerability to gender-based violence.<sup>390</sup> Unfortunately, a more

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[pdf/Files/National%20Womens%20Strategy%20PDF.pdf](#)> last accessed 01 June 2016.

<sup>380</sup> Harrington (n 145) 431, Mullally (n 81) and Ursula Barry ‘Movement, Change and Reaction: The Struggle over Reproductive Rights in Ireland’ in Ailbhe Smyth (ed) *The Abortion Papers, Ireland* (Cork University Press 1992.)

<sup>381</sup> Mullally (n 242).

<sup>382</sup> Hanafin (n 42).

<sup>383</sup> Akidwa (n 9) 11.

<sup>384</sup> See *ibid* 17.

<sup>385</sup> Free Legal Advice Centre (n 5) 13.

<sup>386</sup> Akidwa (n 9) 15.

<sup>387</sup> Reilly (n 32).

<sup>388</sup> Siobhan Mullally, ‘Migrant Women Destabilising Borders: Citizenship Debates in Ireland’ in Emily Grabham, Davina Cooper, Jane Krishnadas and Didi Herman (eds.) *Intersectionality and Beyond: Law, Power and Politics of Location*. (Routledge 2009.)

<sup>389</sup> Committee on the Elimination of Discrimination Against Women (n 246).

<sup>390</sup> See *ibid*.

intersectional feminist approach does not seem to be a priority to the current Irish government. Is there a role for the EU in enforcing this intersectional theory through legislation and judgments on Irish legislature and courts? The CJEU has missed opportunities to discuss intersectional treatment of migrant women and reproduction (specifically in the *Chen* case,<sup>391</sup> when the European Court of Justice did not discuss the ill-treatment of women and violation of their rights protection due to China's one child policy, which strictly punished women for reproduction.)<sup>392</sup> While there is additional potential for the EU to include additional intersectional rights through gender mainstreaming and the Charter for Fundamental Rights (to which Ireland is bound),<sup>393</sup> the EU's ability to influence Irish asylum law will become more limited if Ireland continues to opt out of the majority of the CEAS.

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<sup>391</sup> Case C-200/02, *Zhu and Chen v. Secretary of State for the Home Department* (2006) 12 Columbia Journal of European Law 305.

<sup>392</sup> Case C-200/02, *Zhu and Chen v. Secretary of State for the Home Department* (2006) 12 Columbia Journal of European Law 305. Discussed in Mullally (n 387).

<sup>393</sup> European Union, 'Charter of Fundamental Rights of the European Union' 2012/C 326/02 (26 October 2012)

## Chapter 7: The EU Going Forward

The EU currently faces a turning point in its treatment of vulnerable asylum seekers. During the recent migrant “crisis”, the reaction of various EU member states has been to both impose internal borders<sup>1</sup> or to create barriers to the right of all migrants to apply for asylum under international and European Union law.<sup>2</sup> This increase in asylum applications<sup>3</sup> has starkly illustrated the unsuccessful nature of the burden-sharing aim of the Common European Asylum System and provides a possible turning point for the European Union. It has created an opportunity for the EU to make major changes in the CEAS. The EU clings to a dichotomy which attempts to paint asylum seekers as either fraudulent or vulnerable, assuming that removing safeguards will penalise uncooperative, fraudulent asylum applications, without affecting those dealing with the effects of trauma.<sup>4</sup> The media narrative of this migration has also sought to portray gender equality as directly oppositional to protection of migrants. Periodical articles have noted that the majority of migrants are young unmarried men, unaccompanied by wives and children.<sup>5</sup> These arguments are often cited in line with scepticism that these men represent genuine asylum seekers and is often discussed as problematic for host countries, both for population reasons and for the safety of European women.<sup>6</sup>

This attempt to directly oppose protection for migrants and gender equality is far from intersectional, particularly as many of these men have female family members

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<sup>1</sup> Clémentine d'Oultremont, 'The Migration Crisis: A Stress Test for European Values.' (2015.) 38 European Policy Brief. <<http://aei.pitt.edu/74541>> accessed 06 July 2016, 4 and Justin Borg-Barthet and Carole Lyons, 'The European Union Migration Crisis.' (2016.) 20 Edinburgh Law Review 230, 232. This was endorsed by the European Union in Regulation (EU) No 1051/2013 of the European Parliament and of the Council of 22 October 2013 amending Regulation (EC) No 562/2006 in order to provide for common rules on the temporary reintroduction of border control at internal borders in exceptional circumstances [2013]. OJ L 295 1.

<sup>2</sup> See National Public Radio, 'Are We There Yet?' (This American Life, 29 July 2016) <<http://www.thisamericanlife.org/radio-archives/episode/592/transcript>> accessed 01 September 2017 and Godfrey Baldacchino and Carmen Sammut, 'The Migration Crisis: No Human is Illegal' (2015) The Round Table 1.

<sup>3</sup> d'Oultremont(n 1).

<sup>4</sup> See the EU's discussion of eliminating fraudulent claims in European Commission, 'A European Agenda on Migration' COM(2015) 240 final, 12-13. See a discussion of the effects of trauma on survivors of gender-based violence in an asylum context in chapter 4.

<sup>5</sup> Valerie Hudson, 'Europe's Man Problem' *Politico* (Washington DC, 05 January 2016.) <<https://www.politico.com/magazine/story/2016/01/europe-refugees-migrant-crisis-men-213500>> accessed 11 December 2017.

<sup>6</sup> See *ibid*.

remaining in home countries or refugee camps, hoping to flee in order to claim asylum.<sup>7</sup> Women and asylum seekers are not mutually exclusive groups whose human rights must be gained in opposition to each other; gender equality should not be an excuse to deny rights and protections to asylum seekers. Increasing the difficulty of crossing borders simply makes it more difficult for the most vulnerable women to come to Europe to seek asylum.<sup>8</sup>

Unfortunately, it seems unlikely that in the current political circumstances, the European Commission will reverse the trend of nationalism and increased internal borders and promote greater understanding of the need for support for asylum seekers. Yet this research has recommendations for improving the rights-based focus of the Common European Asylum System in order to ensure a more consistent standard of protection for vulnerable asylum seekers across the European Union.

The current trend seems to be the reinforcing of the autonomy of member states to secure their internal borders and voluntarily choose whether to process additional applications from Syrian migrants.<sup>10</sup> Particularly for the UK and Ireland, who are able to opt out from specific measures of the CEAS, the national governments have autonomy to choose which rights protections embedded into the CEAS to enshrine in national legislation and practice.<sup>11</sup> UK voters have now decided to leave the EU through a recent referendum.<sup>12</sup> Once the UK activates Article 50 in order to leave the EU,<sup>13</sup> UK laws regarding asylum will be completely reconsidered on a national level.<sup>14</sup> Reports

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<sup>7</sup> See *ibid.*

<sup>8</sup> BBC Radio 4, 'The Today Programme.' (BBC website, 04 September 2015.) .  
<<http://www.bbc.co.uk/programmes/b068c7n8>> accessed 06 July 2017.

<sup>10</sup> See d'Oultremont (n 1) and Philip L. Martin, 'Europe's Migrant Crisis: an American Perspective' (2016) 13 *Migration Letters* 307.

<sup>11</sup> See chapters 5 and 6.

<sup>12</sup> Anushka Asthana, Ben Quinn and Rowena Mason, 'UK votes to leave EU after dramatic night divides nation' *The Guardian*. (London, 24 June 2016).  
<<http://www.theguardian.com/politics/2016/jun/24/britain-votes-for-brexit-eu-referendum-david-cameron>> accessed 12 December 2017.

<sup>13</sup> See Consolidated Version of the Treaty on European Union OJ C 326/13. The EU is likely to trigger Article 50 before the end of March 2017. See Jessica Elgot, 'Theresa May to trigger Article 50 by end of March 2017' *The Guardian*. (London, 02 October 2016)  
<<https://www.theguardian.com/politics/2016/oct/01/theresa-may-to-propose-great-repeal-bill-to-unwind-eu-laws>> last accessed 01 June 2017.

<sup>14</sup> See Graham Butler, Mads Dagnis Jensen and Holly Snaith, 'Slow Change May Pull us Apart': Debating a British Exit from the European Union' (2016) *Journal of European Public Policy* 1 and Jessica Elgot, 'Theresa May to trigger Article 50 by end of March 2017' *The Guardian*. (London, 02



regarding British treatment of asylum seekers,<sup>15</sup> as well as the current government's emphasis on reducing all forms of migration, including asylum seekers,<sup>16</sup> would indicate that the British government would not seek to increase protections for asylum seekers. At a minimum, this research suggests that Britain should choose to retain the current CEAS legislation in order to meet its international law obligations. Ideally, when reevaluating migration policies during the negotiations, the UK would make commitments to better protect vulnerable asylum seekers within the UK and seeking to enter the UK.

While Ireland remains a member state of the EU, it would likely be affected by Britain's removal from the EU, as the two share a Common Travel Area.<sup>17</sup> The Irish government, which currently has not opted into the Reception Conditions Directive,<sup>18</sup> has used that vacuum of enforceable rights to continue to place asylum seekers in direct provision, sometimes for years.<sup>19</sup> The EU has cited the importance of improving access to the labour market for refugees and asylum seekers<sup>20</sup> – this should be an influence on Irish policy in limiting the use of direct provision. Yet with increasing control over Irish national asylum law, the Irish government is unlikely to continue to evolve the human rights standard in the law and treatment of asylum seekers – particularly the treatment of mothers and families seeking asylum in Ireland.<sup>21</sup>

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October 2016) <<https://www.theguardian.com/politics/2016/oct/01/theresa-may-to-propose-great-repeal-bill-to-unwind-eu-laws>> last accessed 01 June 2017.

<sup>15</sup> See interviews and NGO reports discussed in chapter 5.

<sup>16</sup> For a discussion of these targets in the recent coalition government, including the effects on asylum seekers, see David Robinson, 'Migration Policy under the Coalition Government' (2013) 7 *People, Place and Policy* 73. For a discussion of the continuing policy under the current UK government, see Atif Bostan, 'Cutting Immigration Down to the Tens of Thousands: Assessing the Coalition's Efforts' (2015) *University of Bradford Law School Journal* 1.

<sup>17</sup> Tim Oliver and Michael John Williams, 'Special relationships in flux: Brexit and the Future of the US-EU and US-UK Relationships' (2016) 92 *International Affairs* 547, 557 and Sylvia de Mars, C.R.G. Murray, Aoife O'Donoghue and Ben T.R. Warwick. (June 2016.) 'Policy Paper: Brexit, Northern Ireland and Ireland' (June 2016) *Constitutional Conundrums Policy Paper*. <<http://niconstitution.org/docs/Policy%20Paper%20-%20Brexit%20Ireland%20and%20Northern%20Ireland.pdf>> last accessed 11 June 2017.

<sup>18</sup> Free Legal Advice Centre, 'One Size Doesn't Fit All – A Legal Analysis of Direct Provision, 10 Years On' (FLAC website, November 2009). <[http://www.flac.ie/download/pdf/one\\_size\\_doesnt\\_fit\\_all\\_full\\_report\\_final.pdf](http://www.flac.ie/download/pdf/one_size_doesnt_fit_all_full_report_final.pdf)> last accessed 01 August 2017, 119.

<sup>19</sup> See *ibid* 12.

<sup>20</sup> European Commission, 'Completing the Reform of the Common European Asylum System: Towards an Efficient, Fair and Humane Asylum System' (European Commission website, 13 July 2016). <[http://europa.eu/rapid/press-release\\_IP-16-2433\\_en.htm](http://europa.eu/rapid/press-release_IP-16-2433_en.htm)> last accessed 15 December 2017, 2.

<sup>21</sup> See discussion in Chapter 6.

The EU has attempted to divide the treatment of vulnerable asylum seekers from those it views as fraudulent.<sup>22</sup> The UK, in particular, has repeatedly cited its advocacy for women who have experienced sexual violence – and yet continued to detain women affected as part of their routine detention of asylum seekers.<sup>23</sup> Yet it is impossible to better protect vulnerable asylum seekers while chipping away at protections for all asylum seekers. In order to increase support for asylum seekers who have encountered gender-based violence, it is essential to improve the fundamental rights incorporated into member states' asylum processes. There should, of course, be particular protections for vulnerable asylum seekers. There is currently no EU-wide definition of asylum seekers or a directive discussing essential accommodations to be made to better help vulnerable asylum seekers through their applications.<sup>24</sup> In order to take an intersectional approach to asylum, which recognise the many barriers that women who have experienced gender-based violence face, the EU and member states need to recognise multiple vulnerabilities through legislation. It is fundamental to the purpose of the CEAS not only to recognise the difficulties and discrimination that all asylum seekers face, but also to enshrine in legislation an appreciation of the impact other forms of discrimination have on asylum seekers.

## **I. The EU: migration crisis and the future**

It is indisputable that the Common European Asylum System (CEAS) is in a time of transition. Since the beginning of the Arab spring political movement in 2013, there has been an increase of asylum seekers crossing into Europe both through land borders (such as Turkey) and through the waters of the Mediterranean Sea.<sup>25</sup> Over a million asylum seekers have fled the Middle East hoping for asylum. Particularly concerning is that 2,000 migrants drowned while trying to enter Europe – there is clearly a growing demand for humanitarian protection within Europe.<sup>26</sup> According to UNICEF, over half

<sup>22</sup> European Commission (n 4) 12-13.

<sup>23</sup> May Bulman, 'Home Office detaining sexual violence victims in breach of its own guidelines, finds report' *The Independent* (London, 01 November 2017) <<http://www.independent.co.uk/news/uk/home-news/home-office-sexual-violence-victims-detain-guidelines-breach-report-a8029316.html>> accessed 12 December 2017.

<sup>24</sup> See chapter 4.

<sup>25</sup> d'Oultremont (n 1).

<sup>26</sup> See *ibid.*

of women and children have reported sexual harassment or abuse while fleeing from these war-torn states.<sup>27</sup>

Unfortunately, the response throughout Europe to this increased number of asylum seekers has fragmented the EU.<sup>28</sup> It is indisputable that certain countries, like Germany, have welcomed those in need of humanitarian protection and suspended transfers under the Dublin Regulation;<sup>29</sup> yet primarily, this increase in the need for humanitarian protection has caused conflict between member states regarding the burden-sharing agreements<sup>30</sup> while the EU itself has seemed reluctant to enforce a human rights standard for the asylum process or to confront some of the fundamental contradictions and problems of the CEAS.<sup>31</sup> It is disappointing that the impact on asylum seekers, and particularly vulnerable asylum seekers, such as those suffering from gender-based violence, has not been an essential consideration in amending the asylum system. The European Commission has made several proposals for the next stage of the CEAS,<sup>32</sup> but these proposals do not question the underlying assumptions of the CEAS. Without a reconsideration of the basic tenets of the CEAS, new legislation is unlikely address the long-standing issues which have faced EU member states and their asylum processes, harming asylum seekers.<sup>33</sup>

The stated goals of the CEAS have been standardisation (both of procedures and of protection of human rights) and burden-sharing (both through amount of applicants and financially).<sup>34</sup> It is indisputable that these aims have never been met.<sup>35</sup> EU member states have always had wide variations in acceptance rates of asylum claims.<sup>36</sup> The number of applicants processed in each country – and the treatment of these received

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<sup>27</sup> Mark Hanrahan, 'Refugee Crisis: Women, Children Report Sexual Violence, Abuse on Migration Trail, Says UN' *NBC News* (New York, 28 February 2017) <<https://www.nbcnews.com/news/world/refugee-crisis-women-children-report-sexual-violence-abuse-migration-trail-n726731>> last accessed 15 December 2017.

<sup>28</sup> d'Oultremont (n 1) 4, Martin (n 10) 318 and Borg-Barthet and Lyons (n 1) 230.

<sup>29</sup> Martin (n 10) 309 and Baldacchino and Sammut (n 2) 2.

<sup>30</sup> d'Oultremont (n 1) 4, Martin (n 10) 311 and Borg-Barthet and Lyons (n 1).

<sup>31</sup> Borg-Barthet and Lyons (n 1).

<sup>32</sup> See European Commission (n 4) and European Commission (n 20).

<sup>33</sup> With regards to the migrant crisis, see Borg-Barthet and Lyons (n 1), but also discussed in depth in chapters 3 and 4.

<sup>34</sup> Discussed in chapter 3, but recently restated by the EU in European Commission (n 4).

<sup>35</sup> See chapters 3 and 4.

<sup>36</sup> d'Oultremont (n 1) 4. See discussion in chapter 3.

asylum seekers – has also been far from uniform.<sup>37</sup> The overwhelming number of applicants in Greece and the government's inability to provide a sufficient standard of human rights to these applicants led to both the European Court of Human Rights<sup>38</sup> and the Court of Justice of the European Union<sup>39</sup> finding that transferring asylum seekers to Greece under the Dublin Regulation was a violation of their fundamental rights. As previously noted, the high rates of sexual violence amongst asylum seekers, both in transit and dwelling within displacement camps, would demonstrate that the EU is not sufficiently protecting the most vulnerable asylum seekers or providing support and protection services for those who have encountered sexual violence.<sup>40</sup>

The EU has not taken the recent increase in asylum seekers as an opportunity to reconsider the CEAS and to provide a better plan for times of political and economic crises, times when more people are pushed to leave their states of origin. For example, the most-cited reason for transferring an asylum applicant under the Dublin Regulation is to transfer to the state of first legal entry into the EU.<sup>42</sup> This has created an imbalance of the number of asylum seekers in countries such as Greece and Italy, on the edge of the EU, as opposed to countries such as Ireland and the UK, harder to access for fleeing refugees.<sup>43</sup> The high numbers of asylum seekers in Greece, Italy and Malta, overwhelming the facilities of their respective governments, has long been a concern for human rights organisation.<sup>44</sup> Reliance on displacement camps has meant that many women and children are in a vulnerable situation, often experiencing sexual violence.<sup>45</sup> The EU has never released a detailed explanation as to why this burden sharing, which

<sup>37</sup> See *ibid* 4. Also discussed in chapter 3.

<sup>38</sup> Application 30696/09, *MSS v. Belgium* (2011) 53 EHRR 2. See discussion in chapter 3.

<sup>39</sup> Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department* (2012) *Common Market Law Review* 49(5) pp1735-1753. See discussion in chapter 3.

<sup>40</sup> Professor Jane Freedman, 'Left Behind: How the World is Failing Women and Girls on Refugee Family Reunion' (Care International, December 2017) <[https://insights.careinternational.org.uk/media/k2/attachments/CARE\\_Left-behind\\_policy-report\\_final\\_2017.pdf](https://insights.careinternational.org.uk/media/k2/attachments/CARE_Left-behind_policy-report_final_2017.pdf)> last accessed 16 December 2017.

<sup>42</sup> Madeline Garlick, 'Protecting Rights and Courting Controversy: Leading Jurisprudence of the European Courts on the EU Dublin Regulation' (2015) 29 *Journal of Asylum, Immigration and Nationality Law* 192, 194.

<sup>43</sup> d'Oultremont (n 1) 4.

<sup>44</sup> Borg-Barthet and Lyons (n 1) 232. For NGO commentary, see Amnesty International, 'Amnesty International Report 2015/2016: The State of the World's Human Rights. (Amnesty.org, 2016). <<https://www.amnesty.org/en/countries/europe-and-central-asia/greece/report-greece/>> last accessed 01 July 2017.

<sup>45</sup> Freedman (n 40.)

would obviously disproportionately affect member states on the borders of the European Union and the refugees there, is consistently reaffirmed in legislation which is intended to more fairly divide asylum applications. Using the “first legal country of entry” as a criteria in the Dublin Regulation has not been helpful in securing burden-sharing<sup>46</sup> and the European Commission should certainly discuss whether this aspect of allocation should remain in proposed future legislation.

The response of many EU member states has been to pull away from common agreements and act individually, rather than by consensus, in the area of asylum.<sup>47</sup> The actions of various member states have been portrayed as an avowal of the CEAS. A German decision to apply their discretion to process all Syrian refugees currently within Germany was viewed and reported on as a rejection of the Dublin Regulation,<sup>48</sup> rather than a commitment to sharing applications within Europe. Campaigners advocating for the recent British referendum to leave the European Union produced harsh posters linking the increase of Syrian refugees to membership of the EU.<sup>49</sup> Member states politically and geographically have sought to block free movement within Europe. The United Kingdom’s vote to withdraw from the European Union occurred in the context of many critics advocating the end of all free movement to and from the UK. Several countries such as Hungary and Austria,<sup>50</sup> have chosen to close their borders to asylum seekers altogether. American academic Philip L. Martin argues that recent terrorist attacks by asylum seekers and crimes such as the sexual assaults in Cologne have stoked fears of migrants.<sup>51</sup> It is disappointing that when sexual assaults are discussed, the focus is on European women who would potentially be assaulted by migrants, rather than migrant women fleeing sexual violence. Some commentators argue there are links between

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<sup>46</sup> Luc Bovens, Chlump Chatkupt and Laura Smead, ‘Measuring Common Standards and Equal Responsibility-Sharing in EU Asylum Outcome Data.’ (2012) 13 *European Union Politics* 70 and Cathryn Costello, ‘Courting Access to Asylum in Europe: Recent Supranational Jurisprudence Explored’ (2012) 12 *Human Rights Law Review* 287, 317. Discussed in chapter 3.

<sup>47</sup> d’Oultremont (n 1) and Borg-Barthet and Lyons (n 1).

<sup>48</sup> Borg-Barthet and Lyons (n 1) 231.

<sup>49</sup> Heather Stewart and Rowena Mason, ‘Nigel Farage’s anti-migrant poster reported to police.’ *The Guardian*. (London, 16 June 2016). <<http://www.theguardian.com/politics/2016/jun/16/nigel-farage-defends-ukip-breaking-point-poster-queue-of-migrants> last accessed 01 January 2017.

<sup>50</sup> Associated Press, ‘Austria: Limits on Migrants Imposed.’ *The New York Times*. (New York City, 17 February 2016). <<http://www.nytimes.com/2016/02/18/world/europe/austria-limits-on-migrants-imposed.html>> last accessed 01 June 2016.

<sup>51</sup> Martin (n 10) 311.

support of far-right nationalist parties and worries over migration.<sup>52</sup> As even the EU notes,

Emergency measures have been necessary because the collective European policy on the matter has fallen short. While most Europeans have responded to the plight of the migrants, the reality is that across Europe, there are serious doubts about whether our migration policy is equal to the pressure of thousands of migrants, to the need to integrate migrants in our societies, or to the economic demands of a Europe in demographic decline.<sup>53</sup>

Instead of responding through cooperation to ensure humanitarian protection throughout the EU, a majority of member states seem to prefer to retreat behind strengthened internal borders, regardless of the humanitarian needs of asylum seekers.<sup>54</sup>

The EU's response has not been to prioritise the protection of a human rights standard, but to compromise in response to the demands of member states. In the 'European Agenda on Migration',<sup>55</sup> the EU notes the importance of providing humanitarian protection both within Europe and around the world,<sup>56</sup> citing the essential nature of frontline services and development aid to end the conflicts and unrest that create the need for asylum.<sup>57</sup> The EU did not acknowledge some of the major criticisms aimed at the current CEAS. For example, the EU cites approvingly the measures taken to provide Turkey with financial support in order to prevent asylum seekers passing through Turkey in order to reach the EU.<sup>58</sup> Yet Turkey's recent political upheaval and human rights record<sup>59</sup> add weight to criticism that treating Turkey as a safe third country (both for processing asylum seekers and to consider Turkish nationals as having manifestly

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<sup>52</sup> See Ian Bremmer, 'These 5 Facts Explain the Worrying Rise of Europe's Far-Right' *Time*. (London, 15 October 2015) <<http://time.com/4075396/far-right-politics-rise-europe/>> last accessed 1 June 2016, Peter Foster, 'The Rise of the Far-Right in Europe is not a False Alarm' *The Telegraph* (London, 19 May 2016). <<http://www.telegraph.co.uk/news/2016/05/19/the-rise-of-the-far-right-in-europe-is-not-a-false-alarm/>> last accessed 01 June 2016.

<sup>53</sup> European Commission (n 4) 2.

<sup>54</sup> d'Oultremont (n 1) and Borg-Barthet and Lyons (n 1).

<sup>55</sup> European Commission (n 4).

<sup>56</sup> See *ibid* 4.

<sup>57</sup> See *ibid* 7.

<sup>58</sup> See *ibid* 5. Discussed in Martin (n 10).

<sup>59</sup> Adam Withnall, 'Turkey suspends European Convention on Human Rights in wake of attempted coup' *The Independent*. (London, 21 July 2016) <<http://www.independent.co.uk/news/world/europe/turkey-coup-attempt-human-rights-president-erdogan-purge-turkish-military-a7148166.html>> last accessed 01 June 2016

unfounded claims for asylum within the EU)<sup>60</sup> ignore the reality of Turkey's human rights record, particularly towards women and other vulnerable minorities.<sup>61</sup> Similarly, the document cites the importance of the Return Directive,<sup>62</sup> which allows those with rejected asylum claims to be removed from Europe,<sup>63</sup> rather than emphasising the importance of ensuring all asylum claims and humanitarian concerns are adequately addressed.

The 'European Agenda on Migration' also cites the need to ensure that there are not disparate rates of asylum recognition in member states,<sup>64</sup> noting that this affects trust between member states, as well as leading to a public perception that treatment would be different throughout the EU.<sup>65</sup> The document does not address the human rights concern which may be caused by these disparate acceptances, simply arguing for the need to reduce "fraud" within the asylum system.<sup>66</sup> It is concerning that rejected applications are cited as being obviously abusive; the EU does not address whether some of these rejections may stem from inadequate standards for asylum status being applied in member states. The EU is not debating whether member states could improve their procedures or better incorporate human rights, but simply assuming that rejected claims are fraudulent<sup>67</sup> and relying on harsh penalties for rejected asylum seekers.<sup>68</sup>

In a recent press release, the European Commission has expanded on their ideas for the next stage of the CEAS and changes to regulation.<sup>69</sup> It notes that asylum procedures are intended to be conducted more quickly, with accelerated procedures concluding within a month or two and all cases resolved within six months.<sup>70</sup> While this would certainly be an improvement on the long delays affecting asylum seekers in direct

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<sup>60</sup> Martin (n 10) 311.

<sup>61</sup> For a discussion of the relationship between the EU and Turkey's mistreatment of women and other minorities, see Meltem Müftüler Bac, 'Turkey's Political Reforms and the Impact of the European Union' (2005) 10 *South European Society & Politics* 16.

<sup>62</sup> Directive 2008/115/EC of 16 December 2008, on common standards and procedures in Member States for returning illegally staying third-country nationals OJ L 348/98.

<sup>63</sup> European Commission (n 4) 10.

<sup>64</sup> See *ibid* 12-13.

<sup>65</sup> See *ibid* 12.

<sup>66</sup> See *ibid* 12-13.

<sup>67</sup> See *ibid* 12-13.

<sup>68</sup> See *ibid* 12-13.

<sup>69</sup> European Commission (n 20).

<sup>70</sup> Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) COM(2016) 465 final 2016/0222 (COD)

provision in Ireland,<sup>71</sup> the criticism of the accelerated procedures in the UK's Yarl's Wood would indicate that it is incredibly difficult to ensure consistent human rights protections without allowing applicants sufficient time to prepare an asylum application, confer with legal counsel and, if necessary, appeal.<sup>72</sup> Women also need more time to be able to open up to a legal representative or decision-maker about a deeply traumatic, painful experience such as gender-based violence.<sup>73</sup> The legislation will also increase sanctions imposed on asylum seekers who are judged to be insufficiently cooperative, including removing access to social welfare.<sup>74</sup> The EU also emphasised a need for a list of safe third countries.<sup>75</sup> The EU's use of safe third countries violates international law;<sup>76</sup> this list of safe third countries seems to be compiled on a political basis, including countries with whom the EU wishes to have open relationships, regardless of the treatment of political dissidents or minorities in the state.<sup>77</sup>

The EU continues to legally enshrine the idea of two categories of asylum seeker: "fraudulent" asylum seekers (who seem to attract the title simply by applying for refugee status which is not granted – regardless of whether the fault was government error, the applicant's lack of understanding of international law or deliberate misinterpretation) and vulnerable asylum seeker.<sup>78</sup> This simplistic view leaves no room for migrants who fail to understand the nuances of international law, traumatised survivors reluctant to share details of their ordeals with strangers, or vulnerable children smuggled into Europe without legal entry. If trauma is treated as a sign of fraud, women who have experienced gender-based violence will certainly be affected. The EU is allowed to deport migrants or deprive them of financial support if migrants do not fit a stereotype of vulnerability.

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<sup>71</sup> See chapter 6.

<sup>72</sup> See chapter 5.

<sup>73</sup> Interview with Immigration Solicitor (London, United Kingdom, 04 April 2014), transcript and recording available upon request

<sup>74</sup> European Commission (note 20) 2.

<sup>75</sup> See *ibid* 2.

<sup>76</sup> Gretchen Borchelt, 'The Safe Third Country Practice in the European Union: a Misguided Approach to Asylum Law and a Violation of International Human Rights Standards' (2002) 33 *Columbia Human Rights Law Review* 473.

<sup>77</sup> European Council on Refugees and Exiles. (October 2015.) 'ECRE Comments on the Proposal for a Regulation of the European Parliament and of the Council establishing an EU common list of safe countries of origin and amending the recast Asylum Procedures Directive (COM(2015) 452)'. (ECRE website, October 2015). <[http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Commission-Proposal-for-an-EU-common-list-of-safe-countries-of-origin\\_Oct-2015.pdf](http://www.ecre.org/wp-content/uploads/2016/07/ECRE-Comments-on-the-Commission-Proposal-for-an-EU-common-list-of-safe-countries-of-origin_Oct-2015.pdf)> last accessed 1 June 2016.

<sup>78</sup> Also discussed in chapter 3.



This is concerning for any applicant who has suffered trauma and particularly for the asylum applicants who have entered Europe through unapproved passage across the Mediterranean<sup>79</sup> and so are easily dismissed as uncooperative and fraudulent, regardless of the validity of their claims.

The EU suggests that the updated Qualification Directive will impose harsher restrictions against asylum seekers: such as further prohibition of secondary movement of asylum seekers within the EU<sup>80</sup> and specific circumstances in which access to social welfare and state protection will be removed.<sup>81</sup> While this will not affect asylum seekers in the UK and Ireland, the changes to the Reception Conditions Directive do include more attention to fundamental rights; as well as including contingency plans for times of crisis,<sup>82</sup> the directive will also focus on earlier access to the labour market for refugees<sup>83</sup> and particular recognition of the needs of vulnerable asylum seekers.<sup>84</sup> While the EU should acknowledge that vulnerable asylum seekers need specific protection, the EU is simultaneously removing support for all asylum seekers, a strategy which will affect and harm all asylum seekers, including ones who need additional care. The EU cannot provide additional support to vulnerable asylum seekers while removing protections from the general asylum system. The two aims are contradictory. In order to improve the fundamental rights within the CEAS, the EU has several basic principles of the CEAS which need to be re-examined.

The first change would be to allow asylum seekers to choose the member state in which to apply for asylum. The CEAS has never been effective in equally dividing the number of asylum applications processed in each member state.<sup>85</sup> The current migrant crisis has made this gap more vivid, with certain states such as Germany voluntarily

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<sup>79</sup> d'Oultremont (n 1) 1.

<sup>80</sup> Proposal for a Regulation of the European Parliament and of the Council 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 and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents COM(2016) 466 final 2016/0223 (COD)

<sup>81</sup> See *ibid* ..

<sup>82</sup> Proposal for a Directive of the European Parliament and of the Council laying down standards for the reception of applicants for international protection (recast) COM(2016) 465 final 2016/0222 (COD).

<sup>83</sup> See *ibid* 2.

<sup>84</sup> See *ibid* 2.

<sup>85</sup> Borg-Barthet and Lyons (n 1) 232.

choosing to process more asylum claims<sup>86</sup> while others such as Ireland<sup>87</sup> and the UK<sup>88</sup> are reluctant to allow entry to Syrian migrants. Clémentine d'Oultremont suggests that instead of treating migration by asylum seekers as a burden to be passed onto member states, EU border officials should help asylum seekers find the appropriate member state for them – whether through discussion of the needs of each state's labour market or through a decision based on a common language, family ties, cultural connection.<sup>89</sup> The *K v. Bundesasylamt*<sup>90</sup> case demonstrated that a strict reading of regulations (such as what constitutes a family member) will disproportionately affect the most vulnerable asylum seeker. An intersectional approach takes into account the vulnerabilities of asylum seekers and would allow them to choose the state with the most specific match to their complex needs.<sup>91</sup> If the EU is invested in ensuring that financial support will be available to any member state processing a larger percentage of asylum claims, then natural ebbs and flows based on the culture and connection of refugee-producing countries will adjust over time.

The EU has assumed that if given a choice, most asylum seekers would “asylum shop”, placing an application in the state with the highest recognition rate.<sup>92</sup> Yet Bulgaria and Sweden, which have the highest rates of recognition, have not been the top destination states for asylum seekers.<sup>93</sup> Would it be so problematic for asylum seekers to “asylum shop” on the basis of childcare or rape crisis services or would this highlight problematic resources in some EU member states? The Dublin Regulation has not been able to better divide asylum applications throughout the EU,<sup>94</sup> which raises serious

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<sup>86</sup> Martin (n 10) 309 and Baldacchino and Sammut (n 2) 2.

<sup>87</sup> John Downing, ‘Government hits back at Merkel’s claim Ireland not doing enough in migrant crisis.’ *The Irish Independent* (Dublin, 29 August 2015). <<http://www.independent.ie/irish-news/politics/government-hits-back-at-merkels-claim-ireland-not-doing-enough-in-migrant-crisis-31486753.html>> last accessed 01 June 2016.

<sup>88</sup> d'Oultremont (n 1) 4.

<sup>89</sup> See *ibid* 5.

<sup>90</sup> Case C-245/11, *K v. Bundesasylamt* [2014] 1 WLR 1895

<sup>91</sup> See chapter 4.

<sup>92</sup> European Commission (n 20) 1.

<sup>93</sup> European Stability Initiative, ‘The 2015 Refugee Crisis through Statistics’ (European Stability Initiative website, 17 October 2015) <<http://www.esiweb.org/pdf/ESI%20-%20Refugee%20Statistics%20Compilation%20-%202017%20Oct%202015.pdf>> last accessed 01 June 2016.

<sup>94</sup> Discussed in chapter 3.

questions about whether the aim of burden-sharing, which intrudes on the human rights of asylum seekers, is a worthwhile goal of the CEAS.

The next suggestion is for the EU to move forward on denationalising border forces.<sup>95</sup> Commentators have noted that it would be politically difficult to centralise control of migration at a time when member states are increasingly receding from EU-wide asylum policy<sup>96</sup> yet, as noted in interviews, the political aims of state governments can often interfere with the humanitarian decisions reached by border officials.<sup>97</sup>

There has been an increased reliance on the EU to provide frontline service in areas which have needed to process a large number of asylum seekers.<sup>98</sup> While this does not necessarily mean that member states are willing to relinquish political control of the asylum process within their states, it does indicate that there are circumstances in which states will accept the services of an EU-wide organisation processing asylum claims. In order to ensure that the EU member states meet their obligations under the Refugee Convention, officials must not face political pressure to reject applications or impose quotas that ignore the state's international and European commitments.

While a centralised European border force may not be a workable solution, it is essential that the EU attempts to separate the member states political views on migration from humanitarian protection for those in need of asylum. Ideally this border force would be trained to be responsive to the intersectional needs of asylum seekers, able to facilitate the needs of vulnerable asylum seekers, whether reproductive health services for survivors who have been sexually assaulted, childcare provisions and any other accommodations to meet specific intersectional requirements.

The EU's current focus seems to be on providing harsher punishments for asylum seekers who move within the EU;<sup>99</sup> a more humane and effective method would be to focus on meeting international obligations toward asylum seekers, including those with

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<sup>95</sup> d'Oultremont (n 1) 4.

<sup>96</sup> d'Oultremont (n 1) 4, Baldacchino and Sammut (n 2) 1, Borg-Barthet and Lyons (n 1) 231.

<sup>97</sup> Discussed in a UK context in *Interview with Policy Officer for Asylum Aid* (London, United Kingdom, 26 February 2014.). Transcript and recording available upon request. Discussed in an Irish context in Free Legal Advice Centre (n 18).

<sup>98</sup> European Commission, 'The Hotspot Approach to Managing Exceptional Migratory Flows' (European Commission website, 12 May 2016). <[http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2\\_hotspots\\_en.pdf](http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/european-agenda-migration/background-information/docs/2_hotspots_en.pdf)> last accessed 01 June 2016

<sup>99</sup> European Commission (n 20) 2 and European Commission (n 4) 12.

vulnerable needs. Further research should be done to evaluate the best method of divorcing national asylum procedures from political pressures of EU member states and instead treating asylum decisions as an EU obligation to fundamental rights.

Finally, the ability of member states to opt out of aspects of the CEAS will obviously prevent the EU from completely harmonising the asylum system. The resistance of the Republic of Ireland to opt into the Reception Conditions Directive has meant that Ireland does not allow asylum seekers access to the labour market, regardless of the length of their time in Ireland.<sup>100</sup> The prohibition on internal movement means that despite the need for additional workers in Germany's labour market,<sup>101</sup> asylum seekers must remain in Ireland indefinitely on direct provision. This is obviously a wide discrepancy in treatment and so when the EU, in its 2015 agenda, discussed the public perception that treatment of asylum seekers varies,<sup>102</sup> it seems indisputable that this is not simply a public perception, but a reality. Basic treatment of asylum seekers does vary according to which EU member state they are being processed in; when member states do not opt in to certain pieces of legislation, this treatment is even more varied. It has been politically essential in some member states (such as Euroskeptic UK)<sup>103</sup> to allow an opt out from EU legislation, but the EU must accept that this opt out undercuts the EU's ability to harmonise asylum legislation in the CEAS, rather than ignoring this reality and citing a "public perception" of differences.<sup>104</sup> Refusing to allow member states to opt out of key CEAS legislation would better provide the harmonisation that the EU is aiming to provide.

The EU is currently navigating between the xenophobic political pressure of member states due to the increase in asylum seekers<sup>105</sup> and its obligation in international

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<sup>100</sup> Irish Refugee Council, 'Direct Provision: Framing an Alternative Reception System for People Seeking International Protection' (Irish Refugee Council website, 2013).

<[http://www.irishrefugeecouncil.ie/wp-content/uploads/2013/12/DP\\_Report\\_Final.pdf](http://www.irishrefugeecouncil.ie/wp-content/uploads/2013/12/DP_Report_Final.pdf)> last accessed 01 June 2016, 12.

<sup>101</sup> Baldacchino and Sammut (n 2) 2.

<sup>102</sup> European Commission (n 4) 12.

<sup>103</sup> See Cathryn Costello and Emily Hancox, 'Policy Primer: The UK, The Common European Asylum System and EU Immigration Law.' (The Migration Observatory at the University of Oxford website, 02 April 2014).

<[http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/UK\\_EU\\_Asylum\\_Law\\_0.pdf](http://www.migrationobservatory.ox.ac.uk/sites/files/migobs/UK_EU_Asylum_Law_0.pdf)> last accessed 1 June 2016

<sup>104</sup> European Commission (n 4) 12.

<sup>105</sup> Martin (n 10) 311.

law, and European law, to ensure an equal and fair treatment of asylum seekers across Europe.<sup>106</sup> With member states strengthening internal borders and attempting to limit the rights of asylum seekers, there is likely little political will for the EU to make these changes. Yet it is concerning to consider the potential erosion of protections for asylum seekers in the name of emergency circumstances. This would disproportionately affect the most vulnerable and traumatised asylum seekers. It seems unlikely that member states will choose independently to increase protections for asylum seekers, but the EU trend against protection and solidarity could mean that policy will be increasingly left to member states.

## **II. The UK and Ireland**

The current trend towards allowing member states to protect their internal borders and determine whether they are willing to process additional asylum applications from migrants currently in refugee camps<sup>107</sup> does not seem likely to change the EU's relationship with the UK and Ireland in the area of asylum. The UK and Ireland have always remained at the periphery of the EU's focus on border control, both by declining to participate in the Schengen Agreement in favour of a Common Travel Area<sup>108</sup> and by maintaining an opt out for any legislation within the CEAS.<sup>109</sup> Both member states have historically maintained a great deal of autonomy within this area of competence.<sup>110</sup>

Far more likely to be influential should be the United Kingdom's decision to leave the EU. It is currently unclear what the relationship between the UK and the EU will be or which legislation from the EU will be maintained within UK domestic law.<sup>111</sup> There have been no decisions released regarding the future of the UK's current national asylum legislation. Statements made by Britain's new Prime Minister in her previous role

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<sup>106</sup> See discussion in chapters 3 and 4.

<sup>107</sup> d'Oultremont (n 1) 4 and Borg-Barthet and Lyons (n 1) 232.

<sup>108</sup> Maria Fletcher, 'Schengen, the European Court of Justice and flexibility under the Lisbon Treaty: balancing the United Kingdom's "ins" and "outs"' (2009) 5 *European Constitutional Law Review* 71, 75.

<sup>109</sup> See *ibid* 91.

<sup>110</sup> See *ibid*.

<sup>111</sup> Jessica Elgot, 'Theresa May to trigger Article 50 by end of March 2017' *The Guardian* (London, 02 October 2016) <<https://www.theguardian.com/politics/2016/oct/01/theresa-may-to-propose-great-repeal-bill-to-unwind-eu-laws>> last accessed 01 June 2016.

as Home Secretary,<sup>112</sup> as well as her desire to remove Britain's obligations under the European Convention of Human Rights<sup>113</sup> would indicate that Prime Minister May may seek to uncouple Britain's asylum law from the human rights protections set out by the CEAS. This is concerning not only for asylum seekers who are particularly vulnerable, but for all applicants for refugee protection in the UK. As Home Secretary and Prime Minister, Theresa May has been an advocate for increased legal protection for survivors of gender-based violence.<sup>114</sup>

It is disheartening that this advocacy does not extend to vocal protection for refugees who have experienced similar violence. The UK government has maintained a culture of disbelief,<sup>115</sup> which has meant that asylum seekers are often treated as dishonest and ineligible for protection until proven otherwise.<sup>116</sup> It can be incredibly re-traumatising for gender-based violence survivor to be questioned in a harsh manner, from the viewpoint of disproving and finding inconsistencies in their stories. Traumatic memories are inconsistent<sup>117</sup>. Instead of using the asylum process as an opportunity to build trust, listen to the applicant's narrative and then determine if the Refugee Convention is applicable, asylum applications have often been treated as an adversarial process between the government and the asylum seeker.

When the UK government uses a circular thinking which treats low acceptance rates as evidence of abusiveness and fraud amongst asylum seekers, providing justification to impose more difficulties and procedural barriers to asylum applications,<sup>118</sup> asylum seekers should be protected by international treaties which create obligations on behalf of member states.

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<sup>112</sup> Alan Travis, 'Theresa May criticised for 'compassion quota' in asylum strategy' *The Guardian*. (London, 27 February 2016). <<https://www.theguardian.com/uk-news/2016/feb/27/theresa-may-criticised-for-compassion-quota-in-asylum-strategy>> last accessed 31 August 2017.

<sup>113</sup> Anushka Asthana and Rowena Mason, 'UK Must Leave European convention on human rights, says Theresa May' *The Guardian*. (London, 25 April 2016) <<http://www.theguardian.com/politics/2016/apr/25/uk-must-leave-european-convention-on-human-rights-theresa-may-eu-referendum>> last accessed 01 June 2016.

<sup>114</sup> Rowena Mason, 'Theresa May: I want to transform how we think about domestic violence' *The Guardian* (London, 17 February 2017) <<https://www.theguardian.com/society/2017/feb/17/theresa-may-domestic-violence-abuse-act-laws-consultation>> last accessed 18 December 2017.

<sup>115</sup> See discussion in chapter 5.

<sup>116</sup> See discussion in chapter 5.

<sup>117</sup> Patricia A. Resick, 'Psychological Effects of Victimization: Implications for the Criminal Justice System' (1987) 33 *Crime & Delinquency* 468.

<sup>118</sup> Victoria Canning, 'International Conflict, Sexual Violence and Asylum Policy: Merseyside as a Case Study' (2013) *Critical Social Policy* 23, 25. Discussed in chapter 5.

While the UK is unlikely to ever completely repudiate its commitments under the Refugee Convention, the treaty does not provide an enforcement mechanism for the rights within. Although the EU has not vigorously enforced the rights-based content of the CEAS, the CJEU's decision in *NS v. Secretary of State for the Home Department*<sup>119</sup> indicates that there is a minimum threshold of treatment which the EU will enforce on member states. Membership of the Council of Europe<sup>120</sup> will ensure some procedural protections to asylum seekers in Britain<sup>121</sup>, but by keeping its obligations under the CEAS, Britain would ensure that all asylum seekers, including those with particular vulnerabilities, are given a minimum standard of human rights enshrined in legislation. Unfortunately, the culture of disbelief for asylum seekers seems unlikely to change, limiting the effects that legislation and guidelines have on improving the treatment of all those applying for protection under the Refugee Convention.

It is also unclear how the UK's exit from the EU will affect the Common Travel Area and thus Irish migration and asylum policy.<sup>122</sup> Ireland currently seems removed from the core of the CEAS – having opted out of all the recent recast directives as well as the minimum standards Reception Conditions directive.<sup>123</sup> The recent increase in migrants within the EU has not been a catalyst to reconsider Ireland's treatment of asylum seekers. Ireland has announced its intention to accept up to 4,000 resettled migrants – and to process additional applications for family reunification.<sup>124</sup> As of the beginning of July 2016, only 273 asylum applicants had been resettled in Ireland from

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<sup>119</sup> Cases C-411/10 and C-493/10, *N.S. v. Secretary of State for the Home Department* (2012) 49 CMLR 1735. Discussed in chapter 3

<sup>120</sup> Application 30696/09, *MSS v. Belgium* (2011) 53 EHRR 2. Discussed in chapter 3.

<sup>121</sup> The European Court of Human Rights has enforced a minimum standard of protection for survivors of gender-based violence. See Case 392/72 *MC v Bulgaria* (2005) 40 EHRR 20 and Case 33401/02 *Opuz v. Turkey* (2010) 50 EHRR 28.

<sup>122</sup> See discussion in Sylvia de Mars, C.R.G. Murray, Aoife O'Donoghue and Ben T.R. Warwick (n 17.)

<sup>123</sup> Irish Refugee Council, 'Comments on the General Scheme of the International Protection Bill.' (Irish Refugee Council website, May 2015). <[http://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/IRCs-Comments-on-General-Scheme-of-International-Protection-Bill.final\\_.pdf](http://www.irishrefugeecouncil.ie/wp-content/uploads/2011/08/IRCs-Comments-on-General-Scheme-of-International-Protection-Bill.final_.pdf)> last accessed 01 June 2016, 2-3..

<sup>124</sup> Irish Refugee Council, 'Protection, Resettlement and Integration: Ireland's Response to the Refugee and Migrant Crisis' (Irish Refugee Council website, December 2015) <<http://www.irishrefugeecouncil.ie/wp-content/uploads/2016/01/Protection-Resettlement-and-Integration-Ireland's-Response-to-the-Refugee-and-Migration-Crisis-Dec-2015.pdf>> last accessed 01 June 2016, 3.

Greece.<sup>125</sup> Yet it is unclear whether a move from a resettlement camp to the Irish direct provision provides additional safety to women vulnerable to sexual violence.

Prominent Irish NGOs have noted that the Irish government's handling of this situation, potentially resettling a larger concentration of asylum seekers, has highlighted deficiencies in the Irish resettlement and asylum system.<sup>126</sup> Ireland still has separate processes for refugee protection under the Refugee Convention versus humanitarian protection and resettlement.<sup>127</sup> The International Protection Act 2015 was intended to combine these processes and incorporate a higher standard of fundamental rights.<sup>128</sup> It includes several elements of the recast directives which Ireland had rejected opting into as part of the CEAS.<sup>129</sup> While the International Protection Act was disappointing to NGOs as the attempt to redraft Ireland's humanitarian protections,<sup>130</sup> it was an attempt to ensure a higher level of human rights protection in the Irish asylum system.<sup>131</sup> The International Protection Act has not been activated, nor has a replacement act been announced or considered.<sup>132</sup> This would indicate that any changes to the Irish asylum system have been postponed. The Irish asylum scheme has come under criticism by NGOs, particularly for the policy of direct provision,<sup>133</sup> and if Ireland does indeed allow 4,000 migrants to be resettled in Ireland, these problems and lack of support for asylum seekers will be magnified if not solved.

The NGOs suggest that this increase in refugees within Europe creates an opportunity for Ireland to rethink its asylum process, to make changes in order to better embed rights protections.<sup>134</sup> They have made several recommendations for permanent changes that would not only improve the treatment and application process for recent Syrian migrants, but for all asylum seekers within Ireland.<sup>135</sup>

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<sup>125</sup> Michelle Hennessy, 'Tánaiste agrees to allow an extra 260 refugees resettle in Ireland,' *The Journal*. (Dublin, 06 July 2016) < <http://www.thejournal.ie/refugees-ireland-2-2865069-Jul2016/>> last accessed 18 December 2017.

<sup>126</sup> Irish Refugee Council (n 121).

<sup>127</sup> See *ibid* 6.

<sup>128</sup> Irish Refugee Council (n 123). Discussed in chapter 6.

<sup>129</sup> See *ibid* 3. Discussed in chapter 6.

<sup>130</sup> See *ibid* 28. Discussed in chapter 6.

<sup>131</sup> See *ibid* 3. Discussed in chapter 6.

<sup>132</sup> International Protection Act 2015.

<sup>133</sup> See chapter 6.

<sup>134</sup> Irish Refugee Council (n 124).

<sup>135</sup> See *ibid*.



The direct provision system is currently insufficient for the need of asylum seekers.<sup>136</sup> The Irish Refugee Council has emphasised the importance of accommodation provision by non-profit organisations trained in supporting survivors of trauma who can assist asylum seekers both legally and psychologically.<sup>137</sup> As noted in chapter 6, the isolating concept of direct provision is contrary to an intersectional understanding of the difficulties asylum seekers, particularly vulnerable women and children, experience in the Irish asylum system. Yet if the Irish government is not currently willing to prioritise humanitarian protection over financial concerns and eliminate direct provision in favour of integration within the community, a minimum requirement of trained NGO providers would improve the treatment within direct provision. The Irish government should end the current practice of allowing profit-making companies to run direct provision services which ignore the most vulnerable asylum seekers.

As discussed in chapter 6, the Irish government has embraced the Dublin Regulation and the opportunity to transfer asylum applications to other EU member states. However, several member states have sought to deny applicants the opportunity to apply for asylum in accordance with international standards.<sup>138</sup> As a result, NGOs recommend that the Irish government makes greater use of their option to process asylum applications within Ireland, rather than transferring them to member states with overwhelmed asylum systems or poor treatment of asylum seekers.<sup>139</sup> Of course, these recommendations should be taken in conjunction with an improvement of Irish treatment of asylum seekers. This should similarly extend to the EU's idea of "safe third countries." The only way to determine whether an applicant is safe in their country of origin is through processing an asylum application.<sup>140</sup> The Irish government should ensure that all applicants receive the same sensitive examination of their individual circumstances. Lists of "safe countries of origin" can lead to applicants having to meet a higher standard of proof, being given fewer resources to prove their application and

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<sup>136</sup> See chapter 6.

<sup>137</sup> Irish Refugee Council (note 124) 6.

<sup>138</sup> d'Oultremont (n 1) and Borg-Barthet and Lyons (n 1).

<sup>139</sup> Irish Refugee Council (n 124) 5.

<sup>140</sup> See *ibid* 7.

receiving only cursory consideration by Irish decision-makers.<sup>141</sup> The Irish government should ensure to never transfer an asylum applicant without having assessed that the applicant will receive treatment in accordance with the principles of the CEAS.

Both the UK and Ireland should guarantee that national asylum systems reflect not only the minimum of their obligations under international law, but the constantly evolving norms regarding humanitarian protection. These norms include specific protection for women who have experienced gender based violence: interactions with female staff members, childcare, accommodation without access to male asylum seekers and staff, and sensitivity during questioning. The EU has previously increased the protections in the CEAS over time by drafting recast versions.<sup>142</sup> This focus on a slow increase of human rights has been jeopardised by the EU's reliance on internal borders during the increase in migration.<sup>143</sup> The UK and Ireland should seek to dismiss the EU's assertions of a divide between abusive and vulnerable asylum seekers – by ensuring fair, uncomplicated, non-adversarial procedures for all asylum seekers, national decision makers are better able to determine if applicants are eligible for protection and can provide support for particularly vulnerable asylum seekers.

### **III. Intersectional approaches to supporting women claiming asylum**

The EU's focus in the wake of the increase in asylum seekers is concerning from a human rights perspective. Focusing on the need to fund development aid to third countries in order to reduce the number of asylum seekers<sup>144</sup> is a worrying strategy, as it could result in insufficient resources being devoted to supporting and processing asylum seekers.<sup>145</sup> The EU seems to find reducing the push factor to be more politically palatable to member states than focusing on ensuring a level of protection for those fleeing.<sup>146</sup> But regardless of support for development and the economic situation in their countries of origins, there will be applicants who have a well-founded fear of persecution

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<sup>141</sup> See Cathryn Costello, 'The Asylum Procedures Directive and the Proliferation of Safe Country Practices: Deterrence, Deflection and the Dismantling of International Protection?' (2005) 7 *European Journal of Migration and Law* 35.

<sup>142</sup> See chapter 3.

<sup>143</sup> d'Oultremont (n 1) and Borg-Barthet and Lyons (n 1).

<sup>144</sup> European Commission (n 4) 5.

<sup>145</sup> Irish Refugee Council (n 124) 3.

<sup>146</sup> Interview with Policy Officer for Asylum Aid (n 97.)

for a Convention reason.<sup>147</sup> Unfortunately, gender-based violence, and deliberate state ignorance or perpetration of gender-based violence is far too common and unlikely to be eliminated in the near future.<sup>148</sup> These applicants should be protected under the Refugee Convention and the CEAS and their human rights need to continue to be prioritised, regardless of world events.

Feminism has been able to increasingly vocalise the discrimination that women, including and especially women who also face other forms of oppression, experience worldwide.<sup>149</sup> In many states, vulnerability and ill-treatment of women, ignored by their government, can reach the status of persecution.<sup>150</sup> This is unlikely to be remedied merely by funding and development. These women are guaranteed international protection by the Refugee Convention, which all EU member states have ratified.<sup>151</sup> In order to truly apply gender mainstreaming to the EU's legislation in the CEAS, it is essential for the EU to incorporate some of the intersectional norms proposed by the UNHCR,<sup>152</sup> including particular awareness of the effects of the trauma of gender-based violence.<sup>153</sup> This requires a complete reconsideration of the more problematic elements of the EU's rhetoric, and treatment, of asylum seekers.

The EU's divide between genuine and abusive asylum seekers<sup>154</sup> is concerning from an intersectional feminist perspective. It completely fails to acknowledge the struggles of a traumatised woman, which can often appear to decision-makers to be an abuse of the system.<sup>155</sup> For example, the EU has cited the need for stricter rules to ensure

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<sup>147</sup> Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) at Article 1A(2).

<sup>148</sup> World Health Organisation, 'Violence Against Women: Intimate Partner and Sexual Violence Against Women'. (WHO Media Centre, November 2014.).  
<<http://www.who.int/mediacentre/factsheets/fs239/en/>> accessed 9 June 2017

<sup>149</sup> See chapter 2.

<sup>150</sup> Sinead Conneely, '*Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another ex parte Shah*: Somewhere to Run To – Gender Persecution and Refugee Status' (1999) 11 Child & Family Law Quarterly 32. Discussed in chapter 5.

<sup>151</sup> Discussed in chapter 2.

<sup>152</sup> See chapter 4 for discussion of the UNHCR and its guidelines.

<sup>153</sup> UN High Commissioner for Refugees, 'Guidelines on International Protection: Gender-Related Persecution within the context of Article 1a(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees' (UN High Commissioner for Refugees, 07 May 2002  
<<http://www.refworld.org/pdfid/3d36f1c64.pdf>> last accessed 01 June 2017.. See discussion in chapter 4.

<sup>154</sup> European Commission (n 4) 12-13.

<sup>155</sup> Asylum seekers and trauma discussed in chapter 2.

that asylum seekers in the EU swiftly cooperate with asylum decision makers.<sup>156</sup> Yet the Rape Crisis Network Ireland noted that a high percentage of the asylum seekers who used their services cited their state's government or security forces as their abusers<sup>157</sup> – forcing these trauma survivors to immediately trust government agents in the EU is dismissive of their disturbing experiences with government. An intersectional approach requires a better understanding of the trauma of sexual violence and how it may influence a reaction to insensitive treatment by government officials. While it is certainly arguable that accelerated asylum processes are not appropriate to any asylum claims,<sup>158</sup> it is certain that decisions on gender-based violence cannot be rushed. Accelerated procedures should never be allowed for gendered asylum claims.<sup>159</sup> The EU should also set out enforceable codes of treatment of gendered asylum claims. The UK Gender Guidelines,<sup>160</sup> which draw on those of the UNHCR,<sup>161</sup> have set out best practice, but unfortunately have not been followed by the UK Home Office in practice,<sup>162</sup> perhaps because these guidelines are not binding on UK law. The EU should create enforceable guidelines as part of the CEAS, based on the suggestions of the UNHCR. The EU could then better incorporate this aspect of gender mainstreaming into the CEAS, forcing member states to take account of the needs of asylum seekers making gendered asylum claims.

The EU should also ensure that there is a gendered awareness of the protection of reception conditions in the member states. In both Ireland and the UK, female asylum seekers have complained of sexual violence and sexual harassment upon arrival.<sup>163</sup>

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<sup>156</sup> European Commission (n 4) 12-13.

<sup>157</sup> Rape Crisis Network Ireland, 'Asylum Seekers and Refugees Surviving on Hold.' (Rape Crisis Network Ireland website, 2014) <<http://www.rcni.ie/wp-content/uploads/RCNI-Asylum-Seekers-and-Refugees-Surviving-on-Hold.pdf>> last accessed 01 June 2017, 12.

<sup>158</sup> Human Rights Watch, 'Fast Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK'. (Human Rights Watch website, February 2010) <<https://www.hrw.org/sites/default/files/reports/uk0210webwcover.pdf>> last accessed 01 June 2016.

<sup>159</sup> See *ibid.*

<sup>160</sup> UK Home Office, 'Gender Issues in the Asylum Claim'. (UK Visas and Immigration website, September 2010). <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257386/gender-issue-in-the-asylum.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf)> last accessed 01 June 2016.

<sup>161</sup> UN High Commissioner for Refugees (n 153).

<sup>162</sup> Human Rights Watch (n 158) 3.

<sup>163</sup> See Marchu Girma, Sophie Radice, Natasha Tsangrides and Natasha Walter, 'Detained: Women Asylum Seekers Locked Up in the UK' (Women for Refugee Women website, January 2014) <<http://www.refugeewomen.co.uk/wp-content/uploads/2014/01/WRWDetained.pdf>> last accessed 31 August 2017 and Akidwa, 'No Place to Call Home: Safety and Security Issues of Women

Changing relationship dynamics and cultural expectations for women in a new country are also risk factors for experiencing domestic violence in their relationships.<sup>164</sup> Unsafe living conditions, such as detention in the UK<sup>165</sup> or direct provision in Ireland,<sup>166</sup> have left women vulnerable to exploitation by staff and fellow asylum seekers. A large number of asylum seekers who have recently arrived in Europe are currently housed in large resettlement camps,<sup>167</sup> a living situation which does create a risk of sexual violence.<sup>168</sup>

It is essential that the EU's guidance on reception conditions includes provisions to prevent gender-based violence, and protections for women with specific vulnerabilities. This could include separate facilities for women and families, access to women-only and women-focused services and areas, and better training for those who work directly with asylum seekers as to the effects and experiences of those with trauma. The EU also needs to develop an understanding that women often have additional obligations and limitations which are not placed on male asylum seekers, such as a need to find childcare for appointments.<sup>169</sup> Minimum standards for reception conditions should never be relaxed due to an increase of asylum seekers, nor barriers to the asylum system increased.

EU member states must also facilitate integration by refugees into existing communities. Both the direct provision system<sup>170</sup> and the recent resettlement camps<sup>171</sup> isolate asylum seekers from local communities, making it difficult to form normal lives

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Seeking Asylum in Ireland' (Akidwa website, October 2012) <<http://akidwa.ie/publications/afety-and-Security-Issues-of-Women-Seeking-Asylum-in-Ireland.pdf>> last accessed 01 June 2016, 4.

<sup>164</sup> Edna Erez, Madelaine Adelman and Carol Gregory, 'Intersections of Immigration and Domestic Violence: Voices of Battered Immigrant Women' (2009) 4 *Feminist Criminology* 32, 44.

<sup>165</sup> See Girma, Radice, Tsangrides and Walter (n 163).

<sup>166</sup> Akidwa (n 163).

<sup>167</sup> See National Public Radio (n 2).

<sup>168</sup> Amnesty International, 'Female refugees face physical assault, exploitation and sexual harassment on their journey through Europe' (Amnesty.org, 18 January 2016).

<<https://www.amnesty.org/en/latest/news/2016/01/female-refugees-face-physical-assault-exploitation-and-sexual-harassment-on-their-journey-through-europe>> last accessed 01 June 2016.

<sup>169</sup> See Helen Muggeridge and Chen Maman, 'Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims' (Asylum Aid website, January 2011) 40 on difficulties of finding childcare for appointments.

<sup>170</sup> Akidwa, '“Am Only Saying It Now:” Experiences of Women Seeking Asylum in Ireland' (Akidwa website, March 2010). <<http://akidwa.ie/publications/AmOnlySayingItNowAkiDwA.pdf>> last accessed 01 June 2016

<sup>171</sup> See National Public Radio (n 2).

and routines in their new home.<sup>172</sup> There is also extreme difficulty in accessing vocational training and employment, in order to be eventually self-supporting.<sup>173</sup> This is particularly essential if dependent on an abusive partner.<sup>174</sup> Women have also complained about the difficulties of childcare in communal living – unsafe conditions for toilet training and inadequate control of children’s diet.<sup>175</sup> The EU should emphasise the importance of reception conditions which meet international standards for vulnerable women in children, regardless of whether states believe an increased number of asylum applications creates extenuating circumstances; as the EU noted, it is essential to have plans for these circumstances,<sup>176</sup> plans which do not violate human rights.

The best way to create a more intersectional feminist asylum system is to ensure that all asylum seekers have access to fair procedures which are considerate of both international law (particularly UNHCR guidance to interpret the Refugee Convention<sup>177</sup> and of the oppression that each individual asylum seeker faces. Relying on stereotypes of asylum seekers, their reaction to trauma and their trust in government decision-makers is unhelpful. EU member states cannot rely on a culture of disbelief<sup>178</sup> which judges that a massive percentage of asylum seekers are abusive of the asylum system;<sup>179</sup> this will disproportionately affect asylum seekers who seem unresponsive due to vulnerability or trauma.<sup>180</sup>

Improving treatment of vulnerable asylum seekers is both linked to that of all other asylum seekers – fair procedures and ending the culture of disbelief are helpful to ensure decision makers gain the trust of applicants and make the most informed decisions regarding asylum applications. Yet a policy of gender mainstreaming, particularly gender mainstreaming from an intersectional perspective, proposed by the EU would be invaluable. Member states should look at policies which may seem sensible when applied to traditional male applicants (asking them to share a communal kitchen and

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<sup>172</sup> See *ibid.*

<sup>173</sup> In an Irish context, see Akidwa (n 170) 6. Discussed in chapter 6.

<sup>174</sup> See Erez, Adelman and Gregory (n 164) and discussion in chapter 2 regarding domestic violence of asylum seekers.

<sup>175</sup> Akidwa (note 170) 15.

<sup>176</sup> European Commission (n 4) 2.

<sup>177</sup> See discussion of UNHCR guidelines in chapter 4.

<sup>178</sup> See discussion of culture of disbelief in the UK context in chapter 5 and in the Irish context in chapter 6.

<sup>179</sup> European Commission (n 4) 12-13.

<sup>180</sup> See discussion of culture of disbelief in the UK context in chapter 5 and in the Irish context in chapter 6.

living area) and understand the less neutral effects that this would have on traumatised women who are now forced to share space with men. The EU's current response to the crisis, by allowing member states to more fully control internal borders,<sup>181</sup> does not coordinate an intersectional feminist emphasis within the CEAS or even demonstrate a commitment to gender mainstreaming.

#### **IV. Conclusion**

The EU and the CEAS are at a time of evolution. The recent increase of migrants in the EU is not a crisis. As the Irish Refugee Council notes, it is ridiculous to describe less than a million people seeking refuge in an area as large as the European Union as a crisis.<sup>182</sup> The EU is one of the wealthiest regions in the world, contains over 500 million people and is currently dealing with the effects of declining birthrates.<sup>183</sup> To describe the current situation as a “crisis” speaks of a political viewpoint that wishes to close internal borders and deny access to asylum seekers. The EU has allowed member states to exert increasing control over borders and internal policy towards asylum seekers.<sup>184</sup> It is reassuring that the EU has expressed its commitment to protecting human rights and unifying the treatment of asylum seekers throughout the EU.<sup>185</sup>

It is less reassuring that EU communications have not emphasised improving the fundamental rights record of the CEAS or rethinking some of the problematic core assumptions of the CEAS. There is no mention of the need for an intersectional approach to the CEAS in the EU's *European Agenda on Migration*.<sup>186</sup> There is instead a dismissal of clear problematic elements of the CEAS as the result of abusive asylum seekers or poor public understanding of the Dublin Regulation.<sup>187</sup> If the EU is serious about engaging with the weaknesses of the CEAS – the lack of success in dividing applications and the varying standards of human rights protection – it is essential to acknowledge that these issues exist. The EU should deliberately attempt to apply intersectional gender mainstreaming to the CEAS, ensuring that measures are introduced both to ensure fair procedures in all applications and to protect the most vulnerable asylum seekers.

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<sup>181</sup> Borg-Barthet and Lyons (n 1).

<sup>182</sup> Irish Refugee Council (n 124) 3.

<sup>183</sup> See *ibid* 3.

<sup>184</sup> Borg-Barthet and Lyons (n 1) 232.

<sup>185</sup> See European Commission (n 20).

<sup>186</sup> European Commission (n 4).

<sup>187</sup> See *ibid* 12-13.

Yet recommendations must be applied at every level. The EU does not have sole competence over the asylum system and as noted, in times of economic pressure, there seems to be more autonomy granted to the member states.<sup>188</sup> It is essential that this commitment to intersectional gender mainstreaming be expressed through tangible, enforceable actions at every level of the EU. Political pressures in the EU may currently seem aimed at restricting human rights of asylum seekers,<sup>189</sup> but this will always result in a breach of international obligations – and abandoning the most vulnerable to a lack of protection.

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<sup>188</sup> Borg-Barthet and Lyons (n 1) 232.

<sup>189</sup> Borg-Barthet and Lyons (n 1). Also see discussions in chapter 3, chapter 5 and chapter 6.



## Chapter 8: Conclusion

This interdisciplinary research has used several perspectives and disciplines in order to examine critically the treatment of vulnerable asylum seekers, particularly women who have experienced gender-based violence, within the European Union. The EU's policy of gender mainstreaming, in which implications for both men and women should be considered in all legislation and policy making, was intended to be applied to all areas of competence for the EU.<sup>1</sup> Previous research had left gaps as to how exactly gender mainstreaming had been applied within the EU outside of the internal market. This thesis found that while elements of feminist thinking had been incorporated through gender mainstreaming, the Common European Asylum System (CEAS) had not made a concerted effort to ensure that member states regulated an intersectional awareness of the barriers and oppressions that vulnerable women in the asylum system may face.

This thesis engaged with several areas of law and culture, feminist theory, migration policy within the EU, and the treatment of women within member states. The first section of this conclusion will summarise the findings of the research. From the analysis of the theoretical assumptions underpinning treatment of women, and migrant women, to the recommendations for improvement within the CEAS and EU member states, the totality of this research combines to provide a complete perspective of fallacies and solutions within the CEAS and the asylum process of two particular member states.

This conclusion also recognises that no thesis can provide a complete understanding; a comprehensive examination of the effects of gender mainstreaming on all vulnerable migrants in EU member states and the influence of the CEAS would be far beyond the scope of the PhD. Along with highlighting the findings of this research, the second section of this concluding chapter will include a focus on opportunities for future complementary research. This thesis has contributed to academic knowledge of the effects of gender mainstreaming within the EU and its member states in the hope of

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<sup>1</sup> European Commission, Equal Guide on Gender Mainstreaming. (European Commission website, 2004) <[http://ec.europa.eu/employment\\_social/equal\\_consolidated/data/document/gendermain\\_en.pdf](http://ec.europa.eu/employment_social/equal_consolidated/data/document/gendermain_en.pdf) last accessed 30 August 2017. The policy of gender mainstreaming has been analysed in, amongst others, Fiona Beveridge, 'Building against the past: the impact of gender on EU law and policy' (2007) 32 European Law Journal 193 and Sonia Mazey, 'Gender Mainstreaming Strategies in the EU: Delivering on an Agenda' (2002) 10 Feminist Legal Studies 227.

inspiring further examinations of the treatment of other vulnerable asylum seekers, such as lone children or the LGBT community, and suggestions for a more humane asylum process for all applicants in accordance with international law.

As discussed throughout chapter 7, the EU is at a time of transition, in which the aims and objectives of the CEAS are being tested; stress points are being revealed. This research is better able to advise both Britain and the EU as to how to use the British departure from the EU and the migrant “crisis” as an opportunity. It is an opportunity to not simply abandon the CEAS and its rights protections in favour of division and internal borders, but to harmonise the effects of CEAS in member states in a way that ensures that intersectional gender equality is embedded throughout the asylum system, from reception conditions upon arrival through the decision-making process to integration within the EU. The idea of a British redrafting of asylum laws<sup>2</sup> is potentially concerning, yet this reconsideration could be used to impose a stronger rights standard and end detention for vulnerable asylum seekers.<sup>3</sup>

This research was conducted in order to impact EU policy – to utilise feminist theory to better understand what the CEAS and the political culture of member states has meant for vulnerable female asylum seekers and to use that understanding to propose improvements within the CEAS. The various organs of the EU, particularly the often feminist-influenced European Parliament,<sup>4</sup> as well as NGO commentators, can use this research to embed better intersectional fundamental rights into the CEAS. The chapter concludes with my final thoughts on the future of the CEAS and European asylum policy.

### **I. Essential findings of this research**

My research began with broad questions – I had identified the gaps in current publications, which have discussed the EU’s gender mainstreaming in broad terms, with an emphasis on economic policy. There was far less focus on gender mainstreaming’s practical effects in broader areas of EU competence. Gender mainstreaming in the CEAS and the EU member states had not been explained and understood through the lens of feminist theory which could be used to better explain policies and their everyday

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<sup>2</sup> Jessica Elgot, ‘Theresa May to trigger Article 50 by end of March 2017’ *The Guardian* (London, 02 October 2016.) <<https://www.theguardian.com/politics/2016/oct/01/theresa-may-to-propose-great-repeal-bill-to-unwind-eu-laws>> accessed 31 August 2017.

<sup>3</sup> See chapter 5 for discussion of British detention of asylum seekers.

<sup>4</sup> See chapter 4 for discussion of European Parliament and gendered legislation.

consequences for asylum seekers. After an extensive literature review and interviews, this research's focus narrowed into four major research questions; the answers to these questions were then embedded throughout the six substantive chapters of the thesis. The first asked how has the EU incorporated the concept of gender mainstreaming into asylum and migration law, particularly into the CEAS? This major question relied on feminist theory to examine critically the use of gender in EU legislation, soft law and judgements. The second question asked how have the political culture and views of gender equality in member states influenced mainstreaming to provide greater protections for vulnerable women who have experienced gender based violence and are now claiming asylum?

My initial literature review clearly found that the EU does not have sole jurisdiction in asylum nor does it provide the main influence in the political culture of asylum within the member states. It was essential for this thesis to discuss EU treatment of asylum seekers while balancing recognition of the influence of the member state in which the individual asylum seeker is making an application. The aim of gender mainstreaming within the CEAS is to embed gender throughout the asylum process of all EU member states. However, this research found that any influence of the CEAS is clearly outweighed by the treatment of gender equality mainstreamed into the law of member states.

In various chapters of this research, the CEAS and the member states' treatment of women, particularly within asylum policies, were described in terms of different strands of feminism in order to better analyse treatment of vulnerable women. This question directly led to the third major research question, asking what theoretical view of feminism and gender equality is more applicable to the EU and member states' view of gender mainstreaming? After demonstrating that the EU's legislation has the same pitfalls and inequalities as the theories espoused by Catharine MacKinnon and other radical feminists, this research then compared the EU's policies with the lack of intersectional understanding of the needs of vulnerable migrant women in the UK and Ireland. This thesis found that the EU has not affected gendered policy or practice within member states. These interlinked conclusions lead to the final question, which asked how could applying intersectional gender policy of gender mainstreaming influenced

asylum seekers in various member states differently? The thesis culminated with recommendations for improvements both within the CEAS and member states, suggestions which stem from the results of this research which emphasise the importance of adopting an intersectional approach to violence against women, including women in the asylum system.

Each chapter of this research was pivotal in answering one or more of these research questions and presenting the recommendations for improvements with the CEAS and member states asylum systems. Chapter 2 found that an intersectional understanding of gender mainstreaming is essential in meeting the needs of asylum seekers. The other two theories discussed, separate spheres and radical feminism, do not produce a legal perspective with an awareness of the multiple oppressions that migrant women face and result in campaigns to eliminate gender-based violence which do not take into account race, culture and migration status.

Chapter 3 noted that the EU presented a unique opportunity for research amongst international organisations in that it has assumed some competence for migration and asylum, a sensitive area of national concern, for its member states. This chapter both clearly established that the EU does have the competence to set asylum policy for its member states and dispelled myths that the EU itself can be perceived as one unified actor with a clear hierarchy of priorities for its asylum policy. The research found that attempts to combine the agenda of a variety of actors within the EU – such as the European Council of Ministers and the European Parliament – has created the problematic aspects of the current CEAS.<sup>5</sup> This chapter concluded that the CEAS has two main goals: to fairly share asylum applications and the financial responsibility for these applications and to harmonise a minimum human rights standard. These two goals have often messily conflicted. Understanding the EU's attempt to balance these two priorities has been essential for this research to explain the CEAS's ever-evolving equilibrium between imposing stricter controls to restrict asylum seekers and improving the treatment and

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<sup>5</sup> Ariadna Ripoli Servent & Florian Trauner, 'Do Supranational EU Institutions make a difference? EU asylum law before and after 'communitarization' (2014) 21 *Journal of European Public Policy* 1142. Discussed in chapter 3.

fundamental rights of asylum seekers.<sup>6</sup> While chapter 3 clearly determined that the EU had competence to increase support for asylum seekers, it also observed that the EU had not always used this competence to focus on human rights within the asylum procedure.

In the subsequent chapter, this research forcefully demonstrated that the EU had not only a right, but an obligation, under the gender mainstreaming provision of the TFEU to ensure that a gendered perspective was applied to all legislation, policies, and judgements regarding the CEAS. Unfortunately, the EU has not released an intersectional agenda for the CEAS which sets forth enforceable goals for support and integration for women in the asylum system. While the EU and its member states have not completely ignored obligations under international law, and have even provided written advocacy for the importance of intersectional policies, chapter 4 found that the EU has not sought to draft enforceable, specific proposals or plans targeted at improving the treatment and integration of women in the asylum system in an intersectional manner. Without a clear understanding and adoption of an intersectional feminist perspective, EU organs can obviously not signpost these values to the EU member states.

Unfortunately, the EU's lack of an intersectional focus has allowed a gap which has been filled by the theoretical perspectives of gender roles in the member states. This has not benefitted vulnerable women in the asylum system. My research recognised that simply reading the content of the CEAS provided an incomplete picture of the legislation, guidelines and cultures which affect vulnerable women throughout EU member states. The research concluded that regardless of the EU's attempts to adopt one uniform asylum process which would be treated identically in every member state, asylum decisions in each member state are a complicated mix of international legal commitments, binding EU legislation and judgements and national law measures.

In order to understand how effective the CEAS has been in practice, the thesis provided an indirect contrast of the treatment of this segment of asylum seekers and refugees in two particular member states. The research contained in the national law chapters focusing on the UK and Ireland found that despite some legislative similarities echoing the CEAS, asylum decisions were increasingly influenced by the national views

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<sup>6</sup> Luc Bovens, Chlump Chatkupt and Laura Smead, 'Measuring Common Standards and Equal Responsibility-Sharing in EU Asylum Outcome Data' (2012) 13 *European Union Politics* 70, 71. Discussed in chapter 3.

of asylum and gender equality within the member states. This thesis found that member state views on gender equality and intersectional treatment of women within national law were far more influential than the efforts of the CEAS.

Chapter 5 was influenced heavily by the prior work of NGOs such as Asylum Aid<sup>7</sup> and Human Rights Watch.<sup>8</sup> Access to UK Home Office internal information has allowed NGOs to document deficiencies in the human rights protections within the UK. This thesis was able to build on previous NGO findings to demonstrate that the gaps in fundamental rights protection have disproportionately affected women in the asylum system who have encountered gender-based violence.

The CEAS has been ineffective in combating a political narrative within the United Kingdom which disbelieves and seeks to disenfranchise asylum seekers. This thesis illustrated the dissonance of the UK's attempts to better support survivors of gender-based violence both in British criminal law and through foreign aid while limiting protection and provision for asylum seekers who have experienced gender-based violence. There is a lack of coherent intersectional awareness – creating the discrepancy of a legal system which treats survivors differently depending whether they are reporting a rape to a police officer or an asylum official. While the UK government has acknowledged an understanding of the trauma and persecution of violence against women, this has not been reflected in intersectional policies or practices.

The research in chapter 6 concluded that Ireland has not even incorporated the trappings of intersectional understanding in Irish national law. Unlike the UK, in which at least some thoughtful intersectional arguments<sup>9</sup> have been presented and argued, the focus regarding women asylum seekers in Ireland is almost entirely through their role as

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<sup>7</sup> Helen Muggeridge and Chen Maman, 'Unsustainable: The Quality of Initial Decision-Making in Women's Asylum Claims' (Asylum Aid website, January 2011).  
<<http://www.asylumaid.org.uk/wp-content/uploads/2013/02/unsustainableweb.pdf>> last accessed 31 August 2017. Discussed in chapter 5.

<sup>8</sup> Human Rights Watch, 'Fast Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK' (Human Rights Watch website, February 2010).  
<<https://www.hrw.org/sites/default/files/reports/uk0210webwcover.pdf>> last accessed 31 August 2017. Discussed in chapter 5.

<sup>9</sup> See *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629 and *SSHD v K and Fornah v SSHD* [2007] 1 AC 412. Both discussed in chapter 5.

mothers.<sup>10</sup> This original thesis was able to apply the research from Irish academics such as Ronit Lentin<sup>11</sup> and Ruth Fletcher<sup>12</sup> to apply the constitution<sup>13</sup> role of women to the treatment of migrant women and the (lack of) influence of the CEAS.

This chapter concluded that the system of direct provision for Irish asylum seekers is an extension of the Irish government's racialised perception of women's roles. The opposite of intersectional feminism, the Irish government has pressured Irish women into the role of mothers while denying asylum seekers the resources to help them parent. Ireland's focus on the racial nature of motherhood has meant that Ireland has failed to develop an intersectional treatment of women who have experienced gender-based violence. The non-binding and non-enforceable nature of the CEAS has left a void for Ireland's view of women to be, instead of challenged, replicated in legislation.

These five substantive chapters argue that the EU has been granted the competence to incorporate gender mainstreaming into asylum law, although organs of the EU have been more concerned with integration and burden sharing between member states rather than vigorously enforcing gendered protections for vulnerable women in the asylum system. My research found that the EU has enforced minimum standards for asylum seekers, but has not met best practice within international law in incorporating gender into the CEAS. The EU has certainly promoted a strong or intersectional feminist approach to asylum. The weakness of the CEAS (particularly on the UK and Ireland, which have strategically chosen to opt out of certain directives) has allowed these member states to simply continue the status quo of their treatment of migrant women in national law without having to make changes to accommodate the CEAS.

In deference to these disappointing conclusions, the next section of this chapter will explain opportunities for related future research which would continue to scrutinise the CEAS and its relationships with member states.

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<sup>10</sup> See *Fajujonu v. Minister for Justice* [1990] 2 IR 151 and *Lobe v. Minister for Justice, Equality and Law Reform* [2003] IESC 3. Discussed in chapter 6.

<sup>11</sup> See Ronit Lentin, 'Illegal in Ireland, Irish Illegals: Diaspora Nation as a Racial State' (2007) 22 *Irish Political Studies* 433, Ronit Lentin, 'Pregnant Silence: (en)gendering Ireland's Asylum Space' (2003) 37 *Patterns of Prejudice* 301 and Ronit Lentin, 'Strangers and Strollers: Feminist Notes on Researching Migration M/others' (2004) 27 *Women's Studies International Forum* 301. Discussed in chapter 6.

<sup>12</sup> Ruth Fletcher, 'Reproducing Irishness: Race, Gender and Abortion Law' (2005) 17 *Canadian Journal of Women and Law* 365. Discussed in chapter 6.

<sup>13</sup> *Bunreacht na hEireann*. Discussed in chapter 6.

## II. Opportunities for future research

As with all independent research, the thesis had a limited focus and so was not able to explore all areas of the CEAS and the asylum processes within member states. This section of the conclusion will discuss gaps in the current research which could be filled in future in order to improve the effectiveness and human rights protection of EU asylum policy.

Chapter 3 discussed the two primary goals of the CEAS: to evenly distribute asylum applications throughout Europe and to ensure a minimum threshold of rights protection. It is outside the focus of this current research to evaluate whether these are worthwhile objectives which the EU should be pursuing through legislation within the CEAS. Yet the Dublin Regulation<sup>14</sup> is a particularly confusing example of this conundrum. The Dublin Regulation is the main legislation within the CEAS intended to evenly divide asylum applications. The most utilised provision of the Dublin Regulation is the clause which allows transfers of asylum applications to the first country of entry into the EU.<sup>15</sup> The existence of this clause seems incredibly counter-intuitive. Instead of allowing asylum seekers to move to member states with fewer asylum applications, it means that applications are often clustered in a few member states. Having access to the *travaux préparatoires* of the various versions of the Dublin Regulation, or a statement justifying this imbalanced clause, would have been helpful in better understanding why this clause, which has not helped to disperse applications or protect human rights in the EU,<sup>16</sup> has remained embedded in the CEAS. The Dublin Regulation has been a cornerstone of the EU's attempts to allow asylum applications to be processed in a broad manner across Europe and research which touches on why the EU has never addressed

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<sup>14</sup> Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast.) OJ L 180/31.

<sup>15</sup> Madeline Garlick, 'Protecting Rights and Courting Controversy: Leading Jurisprudence of the European Courts on the EU Dublin Regulation' (2015) 29 *Journal of Asylum, Immigration and Nationality Law* 192, 194.

<sup>16</sup> Discussed in chapter 3.



this discrepancy within the Dublin Convention would be illuminating and invaluable for better explaining the CEAS and its objectives.

The research in Chapter 5 was aided by the work of Asylum Aid and the access that Asylum Aid was given to Home Office internal statistics regarding their decisions for women in the asylum system.<sup>17</sup> Unfortunately, the Irish government has never granted similar access to its asylum statistics, neither releasing gender-aggregated statistics nor discussing its treatment of gender-related asylum claims.<sup>18</sup> Almost all of the discussions of the Irish asylum system contained in this thesis are derived from findings by NGOs without the support of the Irish government. Accordingly, there is a greater emphasis on the easily observable reception conditions in Ireland, rather than decisions on refugee status within chapter 6. Reception conditions in Ireland were particularly relevant to this research, as the isolation of the asylum seekers within the Irish asylum process was demonstrated to be clearly linked to the Irish view of separate spheres. Yet it would have benefitted this research to be able to also compare gendered asylum decisions between the UK and Ireland. In the future, this research would suggest that governments should submit to analysis by NGOs of asylum statistics in order to create a more complete picture of women in the Irish asylum process.

These gaps in the research present options and possibilities for further academic exploration. The EU's role in asylum, the CEAS and the relationship between the EU and its member states in the area of asylum and migration are areas rich with possibilities for research and publication, both from the perspective of gendered asylum claims, but also for other categories of vulnerable asylum seekers.

My research used feminist theory to increase understanding of the failures of treatment of female asylum seekers within the EU. It certainly did not include all member states or all aspects of the asylum process. Undoubtedly, my findings would be complemented by certain specific types of future research, including notably, a better understanding of the interaction between the rights of minority and marginalised groups and international refugee protection.

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<sup>17</sup> Muggeridge and Maman (n 7.) Discussed in chapter 5.

<sup>18</sup> Samantha K. Arnold. (2012.) "Nexus with a Convention Ground: The Particular Social Group and Sexual Minority Refugees in Ireland and the United Kingdom." (2012) 11 Irish Law Journal 93,108.

This research focused on two specific member states: the UK and Ireland. These two particular countries provided an interesting contrast due to their similarities (both use Anglo-inspired common law systems, with judicial review for human rights laws) and their differences (the United Kingdom was historically an imperialist power, while Ireland was directly under colonial control for hundreds of years.) Both are able to strategically opt out of CEAS Directives. Other contrasts would prove just as enlightening as to the effectiveness of the CEAS, if not more so. A comparison between Bulgaria (with the highest rates of accepted asylum applications)<sup>19</sup> and Portugal (with the lowest rate of acceptance rates)<sup>20</sup> could be useful in illustrating the strong distinctions between EU member states and attitudes towards asylum seekers. Similarly, Sweden, which has opted into the CEAS has a lower acceptance rate than its neighbour Denmark, which has not.<sup>21</sup> These specific member states comparisons would spark further useful discussion on how effective the CEAS has been at ensuring protections and fair treatment across Europe.

### **III. The Future of the EU and the CEAS**

The final chapter of the thesis, chapter 7, examined the current events regarding migration in Europe. The recent increase in asylum applications in the EU, after the political turmoil in the nearby Middle East, has disrupted the evolution of the CEAS.<sup>22</sup> The EU responded to political pressure by member states to allow the strengthening of internal borders,<sup>23</sup> ignoring doubts as to the effectiveness of the Dublin Regulation<sup>24</sup> and, unfortunately, has chosen not to engage with concerns as to the effectiveness of the CEAS in guaranteeing human rights, instead deciding to dismiss rejected applications as

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<sup>19</sup> Eurostat, 'Asylum Statistics' (European Commission website, 02 March 2016).

<[http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum\\_statistics](http://ec.europa.eu/eurostat/statistics-explained/index.php/Asylum_statistics)> last accessed 31 August 2017.

<sup>20</sup> Eurostat (n 19). For a more in-depth understanding of the Portuguese asylum process, see Nuno Ferreira, 'Portuguese Refugee Law in the European Context: The Case of Sexuality-Based Claims' (2015) 27 *International Journal of Refugee Law* 411.

<sup>21</sup> Eurostat (n 19),

<sup>22</sup> See Justin Borg-Barthet and Carole Lyons, 'The European Union Migration Crisis' (2016) 20 *Edinburgh Law Review* 20 pp230-235 and Clémentine d'Oultremont, 'The Migration Crisis: A Stress Test for European Values.' (2015) *European Policy Brief* 38.

<sup>23</sup> Borg-Barthet and Lyons (n 22). Discussed in chapter 7.

<sup>24</sup> European Commission, 'A European Agenda on Migration'. COM(2015) 240 final. Discussed in chapter 7.

abuses within the asylum system.<sup>25</sup> This is not mainstreaming gendered awareness into the CEAS. The importance of ensuring an intersectional feminist approach to asylum decisions and reception conditions has not been emphasised by communications from the EU. My research has found that in EU's renewed emphasis in the aftermath of the political unrest in the Middle East has been to ignore the human rights concerns inherent in the Dublin Convention and instead focus on accelerating asylum decisions. The EU has effectively disregarded the majority of ill-treatment of asylum seekers stemming from inadequate procedures within member states.

The thesis has focused in particular on the UK as one key example of an EU member state struggling to apply EU migration and asylum policy. The future of the UK and its relationship with the EU is unclear after a popular vote to exit the EU, colloquially known as "Brexit."<sup>26</sup> The UK will need to carefully consider, in accordance with negotiations with the EU, which EU legislation will be retained within UK national law. As discussed in chapter 5, the UK has had a complex relationship with the CEAS.<sup>27</sup> While certain provisions of the CEAS seem to echo the UK case-law and perspective on asylum policy,<sup>28</sup> the UK continually retained the right to opt out of legislation.<sup>29</sup> While the UK did draft guidelines that promoted best gender practice,<sup>30</sup> political pressure and migration targets have meant that these guidelines, and national case-law are often divorced from the reality of asylum decision-making. While this research did not find that the CEAS acted a strong counterbalance to the UK's system of disbelief,<sup>31</sup> the more recent developments in UK asylum law would indicate that the UK is currently not interested in enforcing a minimum rights standard within the EU. Brexit, worryingly, now grants the UK additional opportunities to ignore enforceable international law obligations to asylum seekers.

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<sup>25</sup> See *ibid.*

<sup>26</sup> Discussed in chapter 7.

<sup>27</sup> Elgot. (n 2)

<sup>28</sup> See *R v. Adan & Aitseguer* [2000] UKHL 67, discussed in chapter 3

<sup>29</sup> See chapter 5.

<sup>30</sup> UK Home Office, 'Gender Issues in the Asylum Claim.' (UK Visas and Immigration website, September 2010).  
<[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/257386/gender-issue-in-the-asylum.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/257386/gender-issue-in-the-asylum.pdf)> last accessed 31 August 2017.

<sup>31</sup> See chapter 5.

As this research was concluded, the UK was still negotiating its exit from the UK and legislation could be changed. Yet the UK's attempt to regain pure control of its migration and asylum policy is part of a larger trend within Europe against EU influence in these policy areas.<sup>32</sup> The EU has so far expediently chosen to accommodate this national autonomy, but future research should continue to evaluate the balance between CEAS harmonisation and member states' fear of increased migration.

Above all, it seems clear that the member states of the EU are reconsidering the usefulness of the CEAS and whether it is an effective method of fairly processing asylum applications throughout Europe. My research has concluded that there have always been gaps in the CEAS, both in its ability to ensure fundamental rights (including gender equality) and in creating a fair division of asylum applications across the EU. Gender mainstreaming has been incorporated into the CEAS, but its integration has not been enforced within member states. Nor has the EU continued to review and critique the treatment of gender equality within the asylum systems of member states. At a time of such profound change within Europe and the world, it is essential that the EU takes advantage of the present opportunity to examine why the current CEAS has not been effective in achieving its goals. This thesis has made recommendations as to how the EU can better incorporate intersectional gender mainstreaming into the CEAS and enforce a better understanding of the oppressions faced by migrant women within the member states. The CEAS does face political pressure to decentralise asylum policy; yet as discussed throughout this research, the EU is granted competence over both asylum policy and gender mainstreaming by the EU Treaties, signed by the member states. It is essential that the EU uses this competence to promote an intersectional consideration of gender equality, particularly if the EU seeks to lead human rights protections in the asylum process.

While the CEAS has incorporated aspects of an intersectional feminist approach to asylum, drafting legislation with UNHCR influences, the EU has chosen to take a softer approach to member states, allowing opt outs and declining to enforce gendered protections through the CJEU.<sup>33</sup> This has meant that member states are not challenged to

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<sup>32</sup> See chapter 7.

<sup>33</sup> Discussed in chapter 4.

change their treatment of women in the asylum system. The ensuing autonomy provides a more comfortable, less pressured relationship between the EU and member states at a time when member states are reluctant to affirm fundamental rights for asylum seekers.<sup>34</sup> It seems unlikely that the organs of the EU will push for a stronger emphasis on intersectional gender mainstreaming while member state governments attempt to secure internal borders and the EU itself seeks to dismiss asylum applications as abusive. However, it is suggested that by adopting some of this research's recommendations, the asylum process could become a more uniform and humane experience across the member states.

Violence against women is often dismissed and minimised within international law due to its prevalence across the world. One British judge stated, when confronted with evidence of a government dismissal of domestic violence, that it was hard to imagine a society in which women faced discrimination simply for being women.<sup>35</sup> An academic commentator wryly noted that it was harder to imagine a society where women did not face discrimination due to their gender.<sup>36</sup> The EU's commitment to eradicating gender-based discrimination in all areas of competence is laudable, but, as this research has shown, incomplete. At the time of writing, the EU is responding to some great transitions: the political turmoil in Syria, the UK's denouncement of the EU and increased nationalism within Europe. There is an opportunity for the organs of the EU to make changes in the asylum system that can more effectively benefit women in the member states who have experienced gender-based violence. Hopefully this PhD will be of benefit to those seeking to understand in more depth how the EU can better enforce gender equality within the asylum system of its member states.

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<sup>34</sup> Philip L. Martin, 'Europe's Migrant Crisis: an American Perspective' (2016) 13 Migration Letters 307. Discussed in chapter 7.

<sup>35</sup> *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, 660.

<sup>36</sup> Sinead Conneely, '*Islam v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another ex parte Shah*: Somewhere to Run To – Gender Persecution and Refugee Status' (1999) 11 Child & Family Law Quarterly 321, 330.

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