



Comments on Articles 48 and 48 bis of the Draft Council of Europe Convention on preventing and combating violence against women and domestic violence

The Ad Hoc Committee on Preventing and Combating Violence against Women and Domestic Violence (hereinafter “CAHVIO”) established by the Council of Europe’s Committee of Ministers to prepare a legally binding instrument (hereinafter “Convention”) to prevent and combat violence against women, and to protect and support the victims of such violence and prosecute the perpetrators, issued its fourth draft of the Convention on preventing and combating violence against women and domestic violence on 12 November 2010.

The Office of the United Nations High Commissioner for Refugees (hereinafter “UNHCR”) issued recommendations on the draft Convention on 29 March 2010, followed by comments to the first meeting of the CAHVIO dated 29 April 2010. While these two papers covered the full range of issues in the draft Convention as they relate to violence against women and girls who are refugees, asylum-seekers, stateless, and those otherwise potentially in need of international protection, the following comments relate specifically to Articles 48 on Gender-based asylum claims and Article 48 bis on Non-refoulement.

1. UNHCR’s supervisory role

These comments are made in the context of UNHCR’s supervisory responsibility, which is set out under its Statute as well as in Article 35 of the 1951 Convention (hereinafter “1951 Convention”),¹ and Article II of its 1967 Protocol (hereinafter “1967 Protocol”) relating to the Status of Refugees.²

UNHCR has been entrusted by the United Nations General Assembly with the mandate to provide international protection to refugees and, together with Governments, to seek solutions to refugee problems.³ Its Statute confers responsibility on UNHCR for supervising international conventions for the protection of refugees. As set forth in Paragraph 8, UNHCR fulfils its mandate *inter alia* by, “[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto.”⁴ Mirroring these responsibilities, the 1951 Convention and its 1967 Protocol oblige States to cooperate with UNHCR in the exercise of its mandate, in particular

¹ UNHCR, 1951 Convention and 1967 Protocol Relating to the Status of Refugees, <http://www.unhcr.org/3b66c2aa10.html>.

² UN General Assembly, *Protocol Relating to the Status of Refugees*, 30 January 1967, United Nations, Treaty Series, vol. 606, p. 267, available at: <http://www.unhcr.org/refworld/docid/3ae6b3ae4.html>.

³ UN General Assembly, *Statute of the Office of the United Nations High Commissioner for Refugees*, 14 December 1950, A/RES/428(V), at: <http://www.unhcr.org/refworld/docid/3ae6b3628.html>.

⁴ *Idem.*, paragraph 8(a).

facilitating UNHCR's duty of supervising the application of the provisions of the 1951 Convention and 1967 Protocol.

UNHCR's supervisory responsibility extends to all Council of Europe States (except San Marino and Monaco). While the 1951 Convention does not explicitly regulate asylum procedures, appropriate procedures are essential, and therefore implicitly required, for States' compliance with their obligations under the 1951 Convention. As such UNHCR has the responsibility and authority to pronounce itself on the provisions contained in the draft Convention and the safeguards they contain regarding gender-based violence and asylum claims, and *non-refoulement* i.e. ensuring that nobody is sent back to persecution.

In accordance with its supervisory role, UNHCR has issued a number of guidelines on this topic including the 2002 Guidelines on gender-related persecution⁵ and Guidelines on the interpretation of "Membership of a particular social group",⁶ the 2007 Guidelines on the application of the 1951 Convention to victims of trafficking,⁷ the 2008 Guidance Note on sexual orientation and gender identity,⁸ and the 2009 Guidance Note on female genital mutilation.⁹

2. Article 48 - Gender-based asylum claims

UNHCR welcomes the inclusion of an article dealing specifically with violence against women seeking asylum, as it provides a legal framework for how asylum and reception procedures may apply to women and girls whose claims involve gender-based violence aspects.

In 2009, women and girls represented, on average, 49% of persons of concern to UNHCR worldwide. In the European Union, according to Eurostat data, 30% of all applications for asylum were lodged by female applicants in 2009. For some national groups, this proportion rises to about half. Many asylum claims by women involve fear of gender-based violence such as trafficking for sexual and labour exploitation, forced marriage, forced sterilization, domestic violence, female genital mutilation, threat of "honour" killings, and rape. These cases often involve complex legal issues; the violence feared was or could be inflicted by non-state actors; state failure to provide protection should be considered; and a reasonable proportion of claimants are survivors of violence and may suffer from trauma.

A recent study on the implementation of the Asylum Procedures Directive carried out by UNHCR in 12 European Union Member States¹⁰ highlights inconsistencies in how asylum

⁵ 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, 7 May 2002, available at: <http://www.unhcr.org/publ/PUBL/3d58ddef4.pdf>

⁶ UNHCR, Guidelines on International Protection No 2: "Membership of a particular social group" within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, 7 May 2002, available at: <http://www.unhcr.org/refworld/docid/3d36f23f4.html>

⁷ UNHCR, Guidelines on International Protection: The application of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees to victims of trafficking and persons at risk of being trafficked, 7 April 2006, available at: <http://www.unhcr.org/443b626b2.html>

⁸ UNHCR, Guidance Note on Refugee Claims Relating to Sexual Orientation and Gender Identity, 21 November 2008, available at: <http://www.unhcr.org/refworld/pdfid/48abd5660.pdf>

⁹ UNHCR, Guidance Note on Refugee Claims relating to Female Genital Mutilation, May 2009: available at: <http://www.unhcr.org/refworld/docid/4a0c28492.html>

¹⁰ UNHCR, Improving Asylum Procedures: Comparative Analysis and Recommendations for Law and Practice. Key Findings and Recommendations, March 2010: <http://www.unhcr.org/4ba9d99d9.html>,

claims involving gender-related aspects are dealt with; others show how gender-sensitive procedures have been introduced in some countries but not others.¹¹

Draft Article 48 as it stands iterates well established international and regional standards, and provides much needed guidance in this field. This article, if adopted, will also allow more consistency among Member States, and promote compliance with state obligations under the 1951 Convention and the CEDAW provisions relating to access to justice and equality before the law.¹² Without Article 48, this Convention would not, in its provisions, provide the legal grounds to safeguard asylum-seeking women from violence, and good intentions to protect all women from violence may prove insufficient.

Of note is the fact that the adoption of a gender-sensitive interpretation of the 1951 Convention does not mean that all women are automatically entitled to refugee status. The individual still must establish that she has a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.

3. Article 48 (1): Gender-based violence as a form of persecution

Article 48 as proposed states that gender-based violence may amount to persecution within the meaning of Article 1A(2) of the 1951 Convention, and is a form of serious harm giving rise to complementary/subsidiary protection.

For the past decade, UNHCR has stressed the importance of interpreting the refugee definition with an awareness that gender can influence or dictate the type of persecution or harm suffered, and the reasons for this treatment, and that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to determine accurately claims to refugee status.

Gender-related persecution refers to the experience of women who are persecuted because they are women, i.e. because of their identity and status as women, and to the particular forms of persecution to which women are particularly vulnerable.

UNHCR's Executive Committee (hereinafter "ExCom"), of which many Council of Europe States are members,¹³ has endorsed in several of its Conclusions the fact that Article 1A(2) encompasses gender-based forms of persecution. In its 1999 Conclusions, UNHCR's ExCom "not[ed] with appreciation special efforts by States to incorporate gender perspectives into asylum policies, regulations and practices; encourage[d] States, UNHCR and other concerned

and UNHCR, Key Gender Related Findings and Recommendations, March 2010:

<http://www.unhcr.org/4be01d0a9.html>

¹¹ Asylum Aid, Gender issues in assessing asylum claims: spreading good practice across the European Union, Briefing by the Refugee Women's resource Project at Asylum Aid tabled by the UK Government at the Intergovernmental Consultations on Asylum, Refugees and Migrations on 15-16 November 2005.

¹² UNGA, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), Article 15, at: <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm>

¹³ CoE States members of UNHCR ExCom: Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Luxembourg, Montenegro, Netherlands, Norway, Poland, Portugal, Republic of Moldova, Romania, Russian Federation, Serbia, Slovenia, Spain, Sweden, Switzerland, The former Yugoslav Republic of Macedonia, Turkey, United Kingdom.

actors to promote wider acceptance, and inclusion in their protection criteria of the notion that persecution may be gender-related or effected through sexual violence”.¹⁴

In its 2006 Conclusion, ExCom also recommended “partnerships and actions to ensure that refugee status determination procedures [...] recognize that gender-related forms of persecution in the context of Article 1(A)2 of the 1951 Convention may constitute grounds for refugee status”.¹⁵

International human rights law and international criminal law clearly identify gender-based violence as a violation of human rights, and support its characterization as serious abuses, amounting to persecution. UNHCR’s Guidelines on gender-related persecution in the context of Article 1(A)2¹⁶ state that:

“Rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering – both mental and physical – and which have been used as forms of persecution, whether perpetrated by State or private actors.”¹⁷

In addition, as part of the Common European Asylum System, the European Union has developed binding legislation, which recognizes acts of a gender-specific nature as acts within the meaning of Article 1A(2) of the Geneva Convention.¹⁸

UNHCR strongly cautions against the introduction of amendments, which would bring Article 48 below established international and regional standards by limiting its scope to existing national legislation. The Terms of Reference of the CAHVIO instruct the Committee to “take into account the existing universal and regional international legal instruments relevant to such violence”.¹⁹ Article 1A(2) of the 1951 Convention and the European Union Qualification Directive constitute two such agreed and well-established international and regional standards.

UNHCR also notes the amendment put forward by the Council of Europe Parliamentary Assembly (hereinafter “PACE”), which specifies that claims should be considered first under the 1951 Convention; and in case claimants do not qualify, their claims should then be examined against the criteria for complementary/subsidiary protection. UNHCR welcomes the additional guidance provided by this amendment, or similar amendments introduced by States, relating to the way claims for international protection should be examined. However

¹⁴ UNHCR, Compilation of Conclusions adopted by the Executive Committee on the international protection of refugees: Conclusions No. 1 – 101, Legal Publications, January 2005, Conclusion No. 87 (L) – General, 1999, (n), available at: <http://www.unhcr.org/41b041534.html>

¹⁵ UNHCR ExCom, *Conclusion on Women and Girls at Risk*, 6 October 2006, No. 105 (LVII) - 2006, available at: <http://www.unhcr.org/refworld/docid/45339d922.html>

¹⁶ UNHCR 2002 Guidelines on gender-based persecution, *Ibid.*, para. 9 to 19.

¹⁷ *Idem*, para. 9.

¹⁸ Council Directive No.2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Nationals or Stateless Persons as Refugees or as Persons otherwise in Need of International Protection and the Content of the Protection Granted, OJ L 3004/12, 30 May 2004 (hereinafter “Qualification Directive”), Art. 9(f), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0083:EN:HTML>

¹⁹ Council of Europe, Ad Hoc Committee on Preventing and Combating Violence Against Women and Domestic Violence (CAHVIO), Terms of Reference, 23 February 2009, available at: http://www.coe.int/t/dghl/standardsetting/violence/CAHVIO_2009_1%20Terms%20of%20reference.pdf

UNHCR is of the opinion that this level of detail is better placed in the Explanatory Memorandum. Article 48 (1) should limit itself to clarifying the fact that gender-based violence may amount to persecution under Article 1A(2) of the 1951 Convention or to serious harm.

Finally, for applicants who do not qualify under the 1951 Convention or do not meet the threshold of serious harm, States may still wish to grant protection under existing domestic provisions. Several Council of Europe States have in place national legislation allowing the grant of a humanitarian status. Though UNHCR welcomes the existence of broader protection categories, such national legal provisions, often discretionary in their nature, cannot substitute for or be equated to the well-established concept of international protection under the refugee definition or complementary/subsidiary protection.

4. Article 48 (1) bis: Gender-sensitive interpretation of the 1951 Convention grounds

Draft Article 48 (1) bis provides for a gender-sensitive interpretation to be given to each of the 1951 Convention grounds.

In terms of Article 1A(2) of the 1951 Convention, it must be demonstrated that applicants have a well founded fear of persecution, and that the fear is based on at least one of the five “reasons” enumerated in the definition. While Article 48 (1) covers the first part of the assessment, Article 48 (1) bis provides guidance for the second requirement: “for reason of”.

Historically, the refugee definition was interpreted through a prism of male experiences, which meant for instance that harm which occurred in the private sphere (domestic violence, female genital mutilation or rape) was not necessarily acknowledged as persecution, or not considered to be linked to a 1951 Convention ground. Likewise, the variety of ways in which women’s political or religious dissent might be manifested, for example through their personal conduct rather than by direct articulation of their resistance or participation in a political organization, was not always recognized as relevant with regard to their eligibility for refugee status.

It is now well established in many countries that the principle of non-discrimination must inform the interpretation of Article 1A(2) of the 1951 Convention, including its five grounds. Nonetheless, there is evidence that gender-based violence is often seen to fall within the 1951 Convention ground of “membership of a particular social group”. It is therefore important that at the same time, other grounds are not overlooked due to the emphasis placed on the particular social group.

It is important to emphasize that gender-related claims may also be made under other grounds, particularly “political opinion” and “religion”. UNHCR’s Guidelines on gender persecution²⁰ provide examples of how persecution for reason of “race” may be expressed in different ways against men and women – for example, through the killing or incarceration of men, and through sexual violence towards women as a means of control of reproduction. A woman may have a well-founded fear of persecution for reasons of “religion” where she does not fulfil the role assigned to her by religion, or refuses to practice a prescribed religion and is punished as a consequence. As for the ground of “political opinion”, women in many societies are less likely to engage in public political activity than men. Women are also frequently attributed with the political opinions of their male relatives, and persecuted on

²⁰ UNHCR Guidelines, *Ibid.*, Para. 22-34.

that account. That a woman may not wish to engage in particular activities may also be taken by the persecutors as holding a contrary political opinion.

Finally, draft Article 48 (1) bis supports the recommendation by the Council of Europe TaskForce to Combat Violence against Women, including Domestic Violence, which identified in its Final Activity Report the need for harmonised legal standards to ensure that victims across Europe benefit from the same level of protection and support, and this would include refugee women.²¹

5. Article 48 (2): Gender-sensitive reception conditions and asylum procedures, as well as gender guidelines

While Article 48 (1) and (1) bis address key legal standards for refugee status determination, draft Article 48 (2) provides the basis for a gender-sensitive framework with regard the reception conditions in host countries and their asylum procedures.

5.1. Gender-sensitive reception conditions

Through its work with refugees across Europe, UNHCR has found that in addition to those issues identified by asylum-seeking men, women seeking asylum have specific protection concerns and worries. In particular, single women often feel exposed to attempts of exploitation in different ways. At the reception centres, some women complain about being sexually harassed by single men and feel unable to address this. Other women raise concerns that local men are aware that they are financially vulnerable and would target them outside the centre and solicit them for sexual favours.

In addition to the violence they may have been subjected to prior to or during their flight from their country of origin, women seeking asylum in Europe and accommodated in reception centres are vulnerable to violence. UNHCR therefore calls upon States to adopt an approach that ensures full protection for asylum-seeking women in reception centres, to avoid their re-victimization.

UNHCR's ExCom has also issued numerous conclusions relating to State obligations to provide safe and gender-sensitive reception conditions. The ExCom:

"Stressed the need [...] for all appropriate measures to be taken to guarantee that refugee women and girls are protected from violence or threats to their physical safety or exposure to sexual abuse or harassment".²²

"Called for the reinforcement of preventative measures to enhance the physical security of refugee women".²³

"Recommends that the reception of asylum-seekers should be guided by the following general recommendations (iii) gender and age sensitivity should be reflected in reception arrangements."²⁴

²¹ Council of Europe Task Force to Combat Violence against Women, including Domestic Violence (EG-TFV), Gender Equality and Anti-Trafficking Division, Directorate General of Human Rights and Legal Affairs, Final Activity Report, September 2008, p. 82, available at: [http://www.coe.int/t/dc/files/ministerial_conferences/2009_justice/EG-TFV\(2008\)6_complete%20text.pdf](http://www.coe.int/t/dc/files/ministerial_conferences/2009_justice/EG-TFV(2008)6_complete%20text.pdf)

²² UNHCR, Compilation of ExCom Conclusions, Ibid., Conclusion No. 39, 1985, (e).

²³ Idem, Conclusion No. 54, 1988.

“Strongly encourages states [...] to strengthen action to prevent and respond to sexual and gender-based violence, in particular through carrying out their respective responsibilities for the introduction of standard operating procedures”.²⁵

*“Secure environments are to be established and strengthened, including by partnerships and actions to [...] establish and/or implement codes of conduct, including on the elimination of sexual exploitation and abuse, for those working in the delivery of services and for other staff in authority”; and “provide women and girls at risk with information, counseling, medical and psychosocial care, as well as access to safe houses if they face domestic violence and abuse or attacks by other members of the community, especially where there are no mechanisms to remove perpetrators.”*²⁶

Gender-sensitive reception conditions may encompass *inter alia*:²⁷

- single women and single men accommodated separately
- separate toilet and bath/shower facilities in different areas or, at a minimum, different timetables established and monitored for their use by males and females
- rooms that can be locked by their occupants
- adequate lighting throughout the reception centre
- reception centre protected 24 hours a day by guards, including female guards, trained on the gender-specific needs of residents
- training and sensitization of staff working in reception facilities
- code of conduct for the prevention of gender-based violence
- formal arrangements for intervention and protection in instances of gender-based violence
- provision of information to women and girls on gender-based violence and available assistance services.

UNHCR recommends that the Explanatory Memorandum provide more detailed guidance to States on the implementation of the Article 48 (2) provision on gender-sensitive asylum procedures.

UNHCR recognizes that genuine operational constraints with respect to gender-sensitive reception procedures currently exist in some Member States. However States should seek to ensure their capacity to implement gender-sensitive asylum reception conditions in line with the commitment of the Council of Europe through CAHVIO that the “Convention will comprise important obligations to offer adequate support and protection to all victims of violence against women and domestic violence”.²⁸

In addition, UNHCR recalls that the European Court of Human Rights (hereinafter “ECtHR”) has held that the protection of human rights must not be theoretical or illusory, but practical

²⁴ Idem, Conclusion No. 93, 2002, (b).

²⁵ Idem, Conclusion No. 99, 2004 (r).

²⁶ Idem, Conclusion No. 105, 2006, (j) vi. and (n) ii.

²⁷ UNHCR Handbook for the Protection of Women and Girls, January 2008, section 5.8.1, available at: <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=47cfc2962>

²⁸ CoE, Working towards a convention on preventing and combating violence against women and domestic violence, prepared by the Secretary to CAHVIO, May 2010, available at: http://www.coe.int/t/dghl/standardsetting/violence/Flyer_CAHVIO_EN.pdf

and effective, and may therefore also require the State to take positive action.²⁹ Likewise, the ECtHR has stressed that state authorities have a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual.³⁰

Of note though is the fact many of the above steps to ensure gender-sensitive reception conditions do not necessarily have a financial impact. Codes of conduct, intervention protocols, information to women and girls, and training modules for staff have already been developed in several States. These good practices need to be better shared.

UNHCR thus urges States in the CAHVIO to provide for gender-sensitive reception conditions, which will allow for the protection of asylum-seeking women from violence, including domestic violence.

5.2. Gender-sensitive asylum procedures

In order to ensure that gender-related asylum claims are properly considered in the asylum procedure, UNHCR's Guidelines outline a number of measures that should be borne in mind.³¹ In particular, gender-sensitive asylum procedures need to encompass *inter alia*:

- the provision to women seeking asylum of information on reception and asylum procedures
- opportunity for women dependents to have a personal interview, separately and without the presence of other family members
- opportunity for women to raise independent needs for protection and gender-specific grounds leading to a separate application for international protection
- asylum interviews conducted by an interviewer, assisted by an interpreter when necessary, of the sex preferred by the applicant
- confidentiality of information gathered through interviews separate from other family members
- gender guidelines on the adjudication of asylum claims
- decision-makers and interviewers trained in how to interpret the 1951 Convention definition and the definition of serious harm in a gender-sensitive manner
- the use of gender-relevant country of origin information.

UNHCR recommends that the Explanatory Memorandum provide more detailed guidance to States on the implementation of the Article 48 (2) provision on gender-sensitive asylum procedures.

Of note is the fact that those Council of Europe States that are also Member States of the European Union are already bound by the provisions of the European Union Asylum Procedures Directive, which requires that the opportunity of a personal interview be given to each dependent adult, and without the presence of family members.³²

²⁹ ECtHR, *Airey v. Ireland*, *Application no. 6289/73*, 9 October 1979, available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=2&portal=hbkm&action=html&highlight=airey%20%7C%20v.%20%7C%20ireland&sessionid=62742370&skin=hudoc-en>

³⁰ ECtHR, *Branko Tomasic and Others v. Croatia*, *Application no. 46598/06*, 15 April 2009, available at:

<http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=Branko%20%7C%20Tomasic%20%7C%20v.%20%7C%20Croatia&sessionid=62742370&skin=hudoc-en>

³¹ UNHCR Guidelines, *Ibid*, para. 36. i. to xii.

³² Council Directive 2005/85/EC of 1 December 2005 on minimum standards on procedures in Member States for granting and withdrawing refugee status (hereinafter "Asylum Procedures

In addition, UNHCR's ExCom has also adopted several conclusions relating to the need for gender-sensitive asylum procedures. Of note:

*“Recommends the development by states of appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experience persecution differently from refugee men”.*³³

*“Further encourages UNHCR and other concerned actors to develop, promote and implement guidelines, codes of conduct and training programmes on gender-related refugee issues, in order to support the mainstreaming of a gender perspective and enhance accountability for the implementation of gender policies.”*³⁴

*“Partnerships and actions to ensure that refugee status procedures provide female asylum-seekers with effective access to gender-sensitive procedures”.*³⁵

UNHCR also recalls the PACE Resolution on gender-related claims for asylum,³⁶ which provides recommendations to ensure that asylum procedures³⁷ and the decision process³⁸ are sufficiently sensitive to gender-related claims. Likewise, the PACE Resolution on Improving the quality and consistency of asylum decisions³⁹ calls upon Council of Europe member states to ensure that the assessment of evidence is gender- and child-sensitive,⁴⁰ and that training is provided to all those involved in the asylum process [including] on gender and age sensitivity.⁴¹

However, gaps remains in state practice, as shown by the recent UNHCR study on the implementation of the Asylum Procedures Directive carried out by UNHCR in 12 European Union Member States.⁴²

The implementation of gender-sensitive asylum procedures does not necessarily involve significant additional costs. In particular, States can easily develop gender guidelines. Two European Union Member States already have such guidelines in place, and several others have included gender-related points within their general refugee status determination procedures or other guidance. Good practices exist in this field around Europe, which could be shared and further adopted at a minimal or no cost to States.

Directive”), OJ L 326/13, Articles 12 (1) and 13 (1), available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2005:326:0013:0034:EN:PDF>

³³ UNHCR, Compilation of Conclusions, Ibid, Conclusion No. 73, 1993 (e).

³⁴ Idem, Conclusion No. 87, 1999, (n)

³⁵ Idem, Conclusion No. 105, 2006, (n) iv.

³⁶ CoE PACE, Resolution 1765 (2010), Gender related claims for asylum, *adopted by the Assembly on 8 October 2010*, available at:

<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta10/ERES1765.htm>

³⁷ Idem, para 9.1 – 9.8.

³⁸ Idem, para 10.1 – 10.9.

³⁹ CoE PACE, Resolution 1695 (2009), Improving the quality and consistency of asylum decisions in the Council of Europe member states, adopted by the Standing Committee, acting on behalf of the Assembly, on 20 November 2009 available at:

<http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta09/ERES1695.htm>

⁴⁰ Idem, para. 8.2.1.

⁴¹ Idem, para 8.5.1.

⁴² UNHCR, Improving Asylum Procedures, Ibid.

UNHCR reiterates its readiness to support States in training asylum adjudicators and interpreters to enhance their awareness of gender-related issues and their ability to examine claims involving gender-based violence. UNHCR notes that several States currently participate in regional projects led by UNHCR, which aim at strengthening the quality of asylum procedures across Europe.

6. Article 48 bis – *Non-refoulement*

The inclusion of Article 48 bis on *non-refoulement* has been proposed by UNHCR in its previous submissions.

6.1. Article 48 bis (1): Respect for the principle of non-refoulement

UNHCR considers it essential to reiterate in the Convention the fundamental principle of *non-refoulement*. The principle of *non-refoulement* constitutes an essential component of asylum and international refugee protection. The essence of the principle is that a State may not return a refugee to a territory where he or she may be exposed to persecution. The wording used in Article 33 of the 1951 Convention is “where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion”.

Council of Europe States that are also Member States of the European Union are bound by Article 19 of the Charter of Fundamental Rights of the European Union on protection in the event of removal, expulsion or extradition, which now has Treaty status, and by European Union asylum legislation, which also prohibits *refoulement*. The European Union Reception Conditions,⁴³ Qualification and Asylum Procedures Directives all explicitly refer to the full and inclusive application of the Geneva Convention, thus affirming the principle of *non-refoulement*. Given the fundamental nature of this principle, the Qualification Directive also dedicates a full article to protection against *refoulement*.⁴⁴

As recalled above,⁴⁵ the Terms of Reference of the CAHVIO instruct the Committee to “take into account the existing universal and regional international legal instruments”. In UNHCR’s view, the principle of *non-refoulement* constitutes a rule of customary international law. This conclusion is supported by the fact that the principle has been incorporated in international treaties adopted at the universal and regional levels to which a very large number of States have now become parties. The principle has, moreover, been reaffirmed in the 1967 United Nations Declaration on Territorial Asylum. Finally, the principle has been systematically reaffirmed in conclusions of the UNHCR Executive Committee and in resolutions adopted by the United Nations General Assembly.

UNHCR therefore strongly urges the Council of Europe to adopt in this Convention clear provisions to ensure effective refugee protection from *refoulement* in the framework of their commitment to combat violence against women.

⁴³ Council Directive 2003/9/EC of 27 January 2003 laying down minimum standards for the reception of asylum-seekers, OJ L 31/18, available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2003:031:0018:0025:EN:PDF>

⁴⁴ Qualification Directive, *Idem*, Art. 21.

⁴⁵ See above at 3. Article 48 (1).

6.2. Article 48 bis (2) – prohibition of return to torture or inhuman treatment

Article 48 bis (2) reiterates in this Convention the commitment to Article 3 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter “ECHR”). Case law of the ECtHR has also long established State responsibilities under Article 3 ECHR in cases of removal.⁴⁶

Some States have argued that the Convention need not include a reference to both the principle of non-refoulement and the prohibition of return to torture and degrading treatment. Of note is the fact that Articles 48 bis (1) and (2) are complementary to each other, and each have a distinct scope of application. While Article 3 ECHR covers prohibition of return to torture or to inhuman or degrading treatment or punishment of any person regardless of status, Article 33 of the 1951 Convention deals with prohibition of return of refugees to persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion. Article 33 includes the obligation not to expel or return (*refouler*) a refugee in any manner whatsoever to a territory where he or she would be at risk of persecution. It encompasses any measure attributable to a State which could have the effect of returning a person to the frontiers of territories where his or her life or freedom would be threatened, or where he or she would risk persecution. This includes refusal of entry at the border, interception, and forced return to a territory from where the person may be returned to a country where he or she may face persecution (indirect *refoulement*). Article 33 also includes the obligation not to return an asylum-seeker whose status has not yet been determined by a fair and effective procedure.

UNHCR thus calls upon the Council of Europe States to adopt the proposed Article 48 bis (2).

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⁴⁶ ECtHR, *Ahmadpour v. Turkey*, *Application no. 12717/08*, 15 June 2010, available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=ahmadpour%20v.%20turkey&sessionid=62742370&skin=hudoc-en>
ECtHR, *Soering v. United Kingdom*, *Application no. 14038/88*, 7 July 1989, Available at: <http://cmiskp.echr.coe.int/tkp197/view.asp?item=1&portal=hbkm&action=html&highlight=soering%20v.%20united%20kingdom&sessionid=62742370&skin=hudoc-en>