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TED UNIVERSITY

GRADUATE SCHOOL

MIGRATION STUDIES

ASSESSMENT OF GENDER-BASED ASYLUM CLAIMS UNDER THE INTERNATIONAL PROTECTION REGIME: THE CASE OF AFGHANISTAN

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ANKARA, 2023

ASSESSMENT OF GENDER-BASED ASYLUM CLAIMS UNDER THE INTERNATIONAL PROTECTION REGIME: THE CASE OF AFGHANISTAN

A Thesis Submitted To
The Graduate School
of
TED University

by

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In Partial Fulfillment of The Requirements
For
Master of Science
in
Migration Studies

ANKARA, 2023

I hereby declare that all information in this document has been obtained and presented in accordance with academic rules and ethical conduct. I also declare that, as required by these rules and conduct, I have fully cited and referenced all material and results that are not original to this work.

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ABSTRACT

ASSESSMENT OF GENDER-BASED ASYLUM CLAIMS UNDER THE INTERNATIONAL PROTECTION REGIME: THE CASE OF AFGHANISTAN

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January, 2023

The main aim of the thesis is to deliberate in which conditions gender-based violence can be evaluated as persecution and analyze legal documents concerning international protection regimes within the gender lens by considering gender-based potential asylum seekings from Taliban-governed "new" Afghanistan. The study also explores precedents about gender-based violence and gender-based asylum claims from international judicial and quasi-judicial organs and consists of a guide for their assessment of administrative courts, PMMs, and PDMMs regarding the particular social group. Parties of the international protection regime must protect against violation of women's and LGBTIQ+'s rights in Afghanistan because of the positive obligations in gendered violence, including Turkey. Within this context, the 1951 Convention and the 1967 Protocol generally cover the conditions for recognizing and ceasing refugee status and the rights enshrined in that status. In addition, the Istanbul Convention and CEDAW protect gender-based asylum claims, and these conventions are related directly to the study subject. Although after the withdrawal decision from the Istanbul Convention, this Convention is no longer applicable in Turkish law, it is also examined because of its noteworthiness and some arguments about the unlawfulness of withdrawal.

Keywords: Gender-based asylum claims, membership of a particular social group, refugee status determination, refugees from Afghanistan.

ÖZET

ULUSLARARASI KORUMA REJİMİ KAPSAMINDA TOPLUMSAL CİNSİYET TEMELLİ SIĞINMA İDDİALARININ DEĞERLENDİRİLMESİ: AFGANİSTAN ÖRNEĞİ

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Ocak, 2023

Tezin temel amacı, Taliban yönetimindeki "yeni" Afganistan'dan gelen toplumsal cinsiyet temelli potansiyel sığınma başvurularını ele alarak, toplumsal cinsiyet temelli şiddetin hangi durumlarda zulüm olarak değerlendirilebileceğini tartışmak ve buna ilişkin hukuki belgeleri toplumsal cinsiyet merceği altında analiz etmektir. Çalışma aynı zamanda uluslararası yargı ve yarı-yargı organlarının toplumsal cinsiyete dayalı şiddet ve toplumsal cinsiyete dayalı sığınma taleplerine ilişkin içtihatlarını araştırmakta ve idare mahkemeleri, Göç İdaresi Başkanlığı ve İl Göç İdaresi Müdürlüklerinin belirli bir toplumsal gruba ilişkin değerlendirmeleri için bir rehber oluşturmaktadır. Uluslararası koruma rejiminin tarafları Afganistan'da kadın ve LGBTIQ+ haklarının ihlaline ve buna bağlı toplumsal cinsiyete dayalı şiddete karşı koruma sağlamalıdır. Bu kapsamda 1951 Sözleşmesi ve 1967 Protokolü genel olarak mülteci statüsünün tanınması ve sona erdirilmesine ilişkin koşulları ve bu statüde yer alan hakları kapsamaktadır. Ayrıca İstanbul Sözleşmesi ve CEDAW toplumsal cinsiyet temelli sığınma taleplerini korumaktadır ve bu sözleşmeler çalışma konusuyla doğrudan ilgilidir. Her ne kadar İstanbul Sözleşmesi'nden çekilme kararından sonra bu Sözleşme'nin Türk hukukunda uygulanabilirliği kalmamış olsa da, kayda değerliği ve çekilmenin hukuksuzluğuna dair bazı tartışmalar nedeniyle İstanbul Sözleşmesi de bu çalışma kapsamına dahildir.

Anahtar Kelimeler: Toplumsal cinsiyet temelli sığınma talepleri, belirli bir sosyal gruba mensubiyet, mülteci statüsü belirleme, Afganistan'dan gelen mülteciler.

ACKNOWLEDGEMENTS

Bu tez, yaşam muhasebemi çıkarırken bir kadın olarak çalışmanın konusunu oluşturan deneyimlerden azade hissetmediğim zorlu bir sürece denk düşmüştür. Bu süreçte yaşanmaya değecek deneyimleri ıskalamadan çalışmayı tamamlayabildiğim için naçizane bir teşekkürü kendime borç biliyorum.

Çalışma sırasında plana uygun seyretmeyen anlarda dahi kaybetmediği sabrı, hoşgörüsü ve rehberliği için değerli danışman hocam Şebnem AKİPEK ÖCAL'a, fikrine başvurduğumda içtenlikle ve titizlikle yol gösteren hocam Gülçin CON WRIGHT'a verdikleri destek için minnettarım.

Uzun bir zamana yayılan yüksek lisans öğrenciliğim süresince tüm zorlukların üstesinden gelebilme gücünü bana hatırlatan Sıla Deniz BEYARSLAN'a, her sorunda çekinmeden ulaşabildiğim Serkan KARACA'ya verdikleri destek için sevgilerimi sunarım.

Yaşamımda olduğu kadar çalışmamda da emeği olan İpek'e, yerine getiremediğim sorumluluklarım konusunda hep desteğini hissettiğim Anneme, her zaman yanımda olmasını arzu ettiğim canım kardeşim Dilara'ya ve daha iyi bir yol arkadaşı bulunamayacağına inandıran Eren'e varlıkları için teşekkür ederim.

Bu araştırmayı, en nihayetinde eşitlik arayışına ufak bir katkı sunması temennisiyle yalnızca akademik alanda değil yaşamın her alanında eşitsizliklerin farkında olan ve ve buna göre konumlanan mücadeleci kadınlara ithaf ediyorum.

Ankara, 2023

Rüya

To all women and LGBTIQ+'s who are struggling to survive…

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1951 Convention	Geneva Convention on the Status of Refugees
1967 Protocol	Protocol on the Legal Status of Refugees
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
DGMM	General Directorate for Migration Management
ECOSOC	United Nations Economic and Social Council
ECtHR	European Court of Human Rights
ECHR	European Convention on Human Rights
EU	European Union
HIV	Human Immunodeficiency Viruses
ExCom	Executive Committee
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social, and Cultural Rights
IRO	International Refugee Organization
LFIP	Law on Foreigners and International Protection
LGBTIQ+	Lesbian, Gay, Bisexual, Transgender, Intersex, and Queer
NGO	Non-Governmental Organization
OAU	Organization of African Unity
PMM	Presidency of Migration Management
PMMM	Provincial Directorates of Migration Management
SOGIESC	Sexual Orientations, Gender Identities, Gender Expressions, and Sex Characteristics
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNHCR	United Nations High Commissioner for Refugees

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CHAPTER 1

INTRODUCTION AND METHODOLOGY

1.1. Introduction

As of mid-2022, 53.2 million are internally displaced people, 32.5 million are refugees, and 4.9 million are asylum-seekers (UNHCR, 2022b). The need for international protection is increasing with the highest levels of refugees. Therefore, many scholars have pointed to international protection from different points of view, including refugee law and gender. On the other hand, most researchers have concentrated on Syrian refugees since they are considered the largest population among the refugees. Yet, Afghans and residents fleeing from Afghanistan are the second-largest groups in the world.

The severe and dramatic circumstances in Afghanistan after the Taliban take-over entail researching whether the extensive changes are a reason for being a refugee, particularly for women and LGBTIQ+. Although existence human rights violations, there is a significant increase in the number of Afghan nationals deported by Turkey from 2021 to 2022. The 44,768 Afghan nationals deported by Turkey in the first eight months of 2022 represent a 150 percent increase compared to the number of Afghan nationals deported in the first eight months of 2021 (PMM, 2021).

In 2021, in a public opinion survey conducted to determine the attitude of the Turkish public towards Afghans, Syrians, Iraqis, and other irregular migrants and asylum seekers, 76 percent of the respondents stated that they agreed with the statement that "These people should be prevented from entering the country and those already in the country should be deported immediately." (*Metropoll*, 2022). The rejection of the status and deportation of asylum seekers may cause crucial abuses of their rights. The status determination process of Turkey for asylum seekers from Afghanistan in particular women, girls, and LGBTIQ+`s gain importance in this political situation with the approach of the society about refugees.

It is appealed to the international protection regime from the legal side to acknowledge this complex issue of both legal and political nature. After the Taliban take-over, the pressure and violations had effects on especially women and girls. Therefore, the target is restricted gender-based asylum claims in this study. The main source of international protection is the 1951 Convention, and it does not define gender-based asylum claims and include directly sex, sexual orientation, or gender. However, it does not mean that gender-based claims cannot evaluate on the basis of international protection. These claims take into account the title of membership in a particular social group.

Refugee law and human rights law should be constructed together by reason of meanings of the Articles of the 1951 Convention on the Status of Refugees (hereinafter the 1951 Convention) are restricted to elucidating claims in today's world. Besides, the international protection regime includes international protection law, the law's practice, and the institutions' approaches. Overlapping more than one source of international protection serves a holistic view. As a result, this international protection concept is preferred in the study instead of refugee or asylum law.

The gender composition of migrants and their shifts changed over the years. This is also a subject of scientific research since the 80s, and the phenomenon that the majority of the applicants are women is stated as the feminization of migration (Castles et al., 2014; Gabaccia, 2016). Chapter 2 explains the history of refugee law, changing trends, and the feminization of migration. And then, the 1951 Convention, which is the main instrument of refugee law, and Protocol on the Legal Status of Refugees (hereinafter 1967 Protocol), Law On Foreigners and International Protection (hereinafter Law No. 6458) are touched on to understand the history and development of international protection law. Regional instruments such as the 1974 Organisation of African Unity (OAU) Refugee Convention and the 1984 Cartagena Declaration cover international protection. However, these regulations are beyond the scope of this study. Refugee status determination procedures are assessed in the scope of the 1951 Convention and the 1967 Protocol.

Human rights agreements duly put into effect under Article 90 of the Constitution have the superior force of law. Human rights treaties which are duly enacted, take precedence over laws in case they conflict with the law. In other words, according to

the last paragraph of article 90 of the Turkish Constitution, the international treaties that regulate fundamental rights and freedoms rank above laws in the hierarchy of norms. These international conventions are essential to being directly applicable and binding in domestic law and establishing monitoring and evaluation mechanisms. Hereby the Violence against Women and Domestic Violence Convention (hereinafter Istanbul Convention) and the Convention on the Elimination of All Forms of Discrimination Against Women (hereinafter CEDAW) are utilized for definitions of gender-based violence and gender-based asylum claims.

In Chapter 3, a brief history of the Islamic Emirate of Afghanistan, the foundation of the Taliban, the situation in Afghanistan after the Taliban government, the inhumane treatment of the government, and the gendered nature of these incidents are figured out through news and international reports. Reaching Afghanistan's legal regulations for the study after the Taliban government has not been possible. The law is not published in an accessible format. Therefore, secondary data reports and news are mainly used to show the reverting to a previous condition. This chapter gives some thought to a fully effective protection system for asylum seekers and information on the country of origin stemming from gender-based violence in diversity.

Determining refugee status and the system of Turkey are researched overall in Chapter 4. Consequently, evaluation methods of asylum claims ought to be debated from the perspective of the human rights concept, not from the pragmatic. Since the rejection of an applicant erroneously may be a violation of the right to life. The determination of well-found fear of persecution and the efficiency of state protection are interpreted by taking into the current situation of Afghanistan after the Taliban governed and the inhumane treatment, restrictions, and violations of rights by the government.

The application of asylum seekers who have gender-based asylum claims is interpreted under a particular social group. It examined methods and case-law of legal systems granting refugee status based on a particular social group for epitomizing in Chapter 5. The aim is not to examine law implementation in these legal systems deeply. It provides a conception by delineating points of view and approaches to the same subjects.

Gender-based asylum claims involve all individuals exposed to gender-based violence and are non-protected. Moreover, the right to asylum is vital mainly for women, girls, and LGBTIQ+, yet the convention's provisions may be applied exceptionally for boys and cisgender men since gender-based violence is an umbrella term. Any human out of gender structure and heteronormativity may face gendered violence. The one may be a woman, man, or LGBTIQ+. The point to be discussed is not the sex or gender identity of the subject. The cause of the persecution should be related to gender. In the study and Chapter 6, gender is addressed as a social structure. To present distinct treatments which are faced by persons from various backgrounds and group affiliations applied. Gender-based violence has not appeared only legal notion in the study. Definitions and explanations on gender are thrown in the study from a sociological point of view and a legal basis together.

The conclusion leads to rethinking and improving the implementation of existing international protection regulations and instruments for refugees from Afghanistan in the light of gender lenses.

1.2. Research Problem

The main aim of this thesis is to examine the refugee status determination process under refugee law regarding gender-based asylum claims and its deficiencies of gender dimension if and to the extent international protection law. This study investigates the international protection system by means of implementing the rules to the Afghanistan case, particularly for the probable refugees who have gender-based asylum claims and come from unordinary situations in Afghanistan.

Conducting a case study makes it easier to understand the impact of gender-blind refugee law on status-determination processes. In this context, international protection law is preferred with international human rights treaties including the concept of gender which is more current and has been the subject of research.

1.3. Definition of Terms

Asylum seekers from Afghanistan cannot be granted refugee status because of the geographical limitation of Turkey to the 1951 Convention. They may be conditional refugees after the status determination process. In addition, an asylum seeker means someone who applied for international protection and has not been still granted status. “Refugee” is preferred in most of the chapters and it is irrelated to recognizing status. Since, recognizing refugee status is descriptive, not constructive (UNHCR, 2019). It means that when someone is granted refugee status, the status is gained from the moment of the asylum application.

Despite the legal definition of the phrase, the “refugee” is used on the basis of rights regardless of the restrictions on status in the study.

Using gender-neutral language rather than a gender-specific language was preferred, and was used "they, them, and their" as a pronoun for also individuals (*Kent Law School*, n.d.).

1.4. Research Method

To better analyze the topic, I chose to use the qualitative method in this study. The research is based on the explanatory case study, one of the qualitative research types because it is suitable for its purpose.

The importance of a case study lies in its ability to draw attention to what can emerge from a single situation. It allows focusing on the complexity and uniqueness of the situation or the connections with a social context of which it is a part (Glesne, 2020). In research designed with this type, the elements of the situation can be examined with a holistic approach, and how they are affected by the situation under investigation can be revealed. (Patton, 2014)

1.5. Data Collection and Data Sources

The data was collected on the Afghanistan situation from September 2022 to January 2023. Secondary data has been used to reflect trends on gender-based issues in Afghanistan. Since the legal regulations as primary data could not be directly accessed, the legal structure was represented through the sources organization's reports and news expressing the regulations. Especially the period from 15 August 2021 to January 2023 is chosen to argue the situation and specific changes in Afghanistan.

The first criterion is to reach reliable content. In order to ensure the reliability of the data, the information obtained from sources was compared and then added to analyze. The data was from local and international reports, media outlets, websites, and statistics of institutions. one of the qualitative data collection techniques was used to obtain research data.

Text-based and audiovisual-based sources were mostly used as data. The data obtained includes the gender and legal structure in Afghanistan, related violence and statistics, and attitudes towards women and LGBTIQ people under Taliban rule. In order to access this information, websites, relevant books and guides were mostly used. The data were analyzed using the explanatory analysis approach.

1.6. Significance of the Study

Bauman notes that millions of people abandon their homes/countries and producing refugees continues through “developing countries”. (Bauman, 2013). From his perspective, "being a refugee" will not end at a specific time. Thus, the difficulties that refugees faced and the solutions maintain importance in general. On the other hand, the destructiveness and harm of violence against women are studied in the literature. At this point, international protection is one of the core elements against gender-based violence.

Today, refugee status determination processes are driven by legal concerns, as well as political interest and border regimes which in some cases mean the rejection of applications and disanimation of international protection. Like many other legal

instruments, refugee law does not incorporate a gender lens, making it necessary to interpret the 1951 Convention and Law No. 6458 in the context of other legal texts. The political changes in Afghanistan, more specifically the Taliban takeover, have severely impacted the lives of women, girls, and LGBTIQ+ people in the country, depriving them of many rights. It is vitally important to protect those who flee these restrictions, which could affect a generation. It is necessary to emphasize the ideal assessment and its legal instruments to access effective protection. The contribution of this study is to expose which conditions gender-based asylum claims evaluate as persecution regarding the current situation of Afghanistan based on international protection law, not only refugee law but also human rights law with gender lenses.

1.7. Limitations

This research includes an assessment of gender-based international protection claims through a gender lens in the context of the 1951 Convention, 1967 Protocol, CEDAW, and Istanbul Convention. This assessment has been specialized around developments in Afghanistan as of 21 August 2021. As the situation and country of origin of each applicant vary, it is not intended to provide an opinion on every applicant with a gender claim. Moreover, gender-based asylum claims are very diverse. Especially considering the theories about the fluidity of gender identity and sexual orientation, the research can't provide detailed explanations for every concrete case and situation.

CHAPTER 2
THE FRAME OF INTERNATIONAL PROTECTION FOR REFUGEES

2.1. The Short History of The Refugee Law and Its Gendered Nature

UN General Assembly charged the UN Economic and Social Council to respond to refugee crises after World War II. Thereafter, International Refugee Organization (IRO) was established. The United Nations High Commissioner for Refugees (UNHCR) was generated in 1950. The Geneva Conference, which was convened at the call of the UNHCR, led to the emergence of the 1951 Convention to provide international legal protection. It is constituted to protect and resettle displaced people and refugees appreciatively probable future crises. Subsequently, the 1951 Convention entered into force as a binding international instrument of refugee law (*History of UNHCR*, n.d.)

The 1951 Convention, written in the aftermath of the Holocaust, obliges governments to ensure the safety of individuals seeking protection from persecution. It, therefore, aims to protect people from possible dangers in the circumstances of that day (Tahirih Justice Center, 2020). When we look chronologically at the treaties examined in this study, we can see a change in terms of the sensitivity of their content. For example, the 1951 Convention and the 1967 Protocol do not refer to gender. In the wording of the Convention, the pronoun "he" is used even to refer to a person. Race, religion, nationality, political opinion, or membership of a particular social group are valid grounds for asylum. Gender is not included. In this case, it would be a great expectation to look for sexual orientation among the reasons.

The refugee appeared as white, male, and anti-communist. 1967 Protocol was constructed on the idea that the 1951 Convention can be applied by people from all over the world. It is clear that refugees are no longer an exclusively European phenomenon, asylum can occur as a result of conflicts all over the world.

Migrants have been able to find a place in migration studies simply as individuals without identity. Such a reductionist approach has made it more difficult to understand both migration in general and the impact of migration on different social groups. The proportional size of women migrants is actually not a new phenomenon, and the share of women in migration has been quite close to that of men almost since the 1960s. However, especially the increase in the proportional weight of female migrants among migrants in Europe and North America, even reaching 70-80% in some regions, has brought the concept of feminization of migration to the agenda (Fleury, 2016).

Domestic work and sex trafficking are included in the increasing migration ratios of women. These phenomena are connected with the inegalitarian gender structure.

Globalization changes gender relations and mobility. Refugee flows have gender balancing especially after World War II, as appropriate to other mobilities. However, the concept of feminization of migration appeared afterward of the shift, in the 1990s.

The instability of the middle east and since the 1990s the concept of the refugee has changed. In this study, it is argued that a better understanding of migration (including asylum) within this context can be possible by understanding the situation of different social groups (women, children, unaccompanied minors, etc.) involved in migration processes.

The United Nations had gleaned census data on the sex ratios of migrants and they published that gender balance or the female majority was dominant all over the world (UNFPA 2006). The gender composition of migration gives us also clues about gender relations.

"Feminisation of migration" basically refers to trends in distinct areas associated with the situation. One of the causes is economic: The proportion of female migrants in developed countries is higher and there is an increase in the number of women migrants in general. Furthermore, the number of female migrants increase in general. And also motivations of women change. Instead of classical reasons for migration as marriage or family unification, the new causes of the increase in the women migration movements become labor migration, trafficking in human beings, and asylum-seeking with its involvement in all forms of migration. One of the reasons why women are

more involved in migration is the difficulties for men to find full-time jobs in their countries and for women to seek employment in other geographies.

In addition, the trend is the tendency, in the target countries, to focus on jobs that are "identified with women" (nursing, patient care, house cleaning, caring, etc.) and increase in demand (Piper, 2006).

To put it briefly, today, the feminization of migration is not associated with just a quantitative phenomenon, the numbers are insufficient to explain it. It can be said that women's households increase their contribution to the economy or undertake increased participation in the labor market due to migration; individual migration tendency; as in all areas of social life, in daily life increased visibility has made women's migration more visible. This necessitates the inclusion of women's experiences or, more broadly, a gendered perspective. As can be seen in the following legal arrangements, the concept is beginning to be taken into account to some extent over time.
In order to apply this legal framework, which includes gender and is more up-to-date and in line with the needs of the time, it is preferred international protection law, which refers to a broader field, rather than refugee law, in the study.

2.2. Concept of International Protection Regime

International protection is significant during the state's inability to protect its citizens, and the citizens and residents flee from their state. It may be in evidence, mostly in war and chaos, where states lose their power and cannot protect their citizens.

International protection law has irreplaceable rules that prohibit refoulement, not punish due to illegal entry, provide applicants access to opportunities, as well not restrict the freedoms of applicants for protection necessities, take care of those with special needs, and do not deport masses in principle (European Union Agency for Fundamental Rights. & Council of Europe, 2016).

Refugee law refers to regulations concerning refugees and asylum seekers. On the other hand, the international protection regime has many components of international

human rights instruments for entire protection. Human rights instruments ensure to asses of persecution because they have definitions of acts incompatible with human dignity. Indeed international protection is more convenient for also raising gender-based asylum claims, especially for this study. Therefore international protection law is preferred on behalf of refugee law during implementation provisions to Afghanistan context.

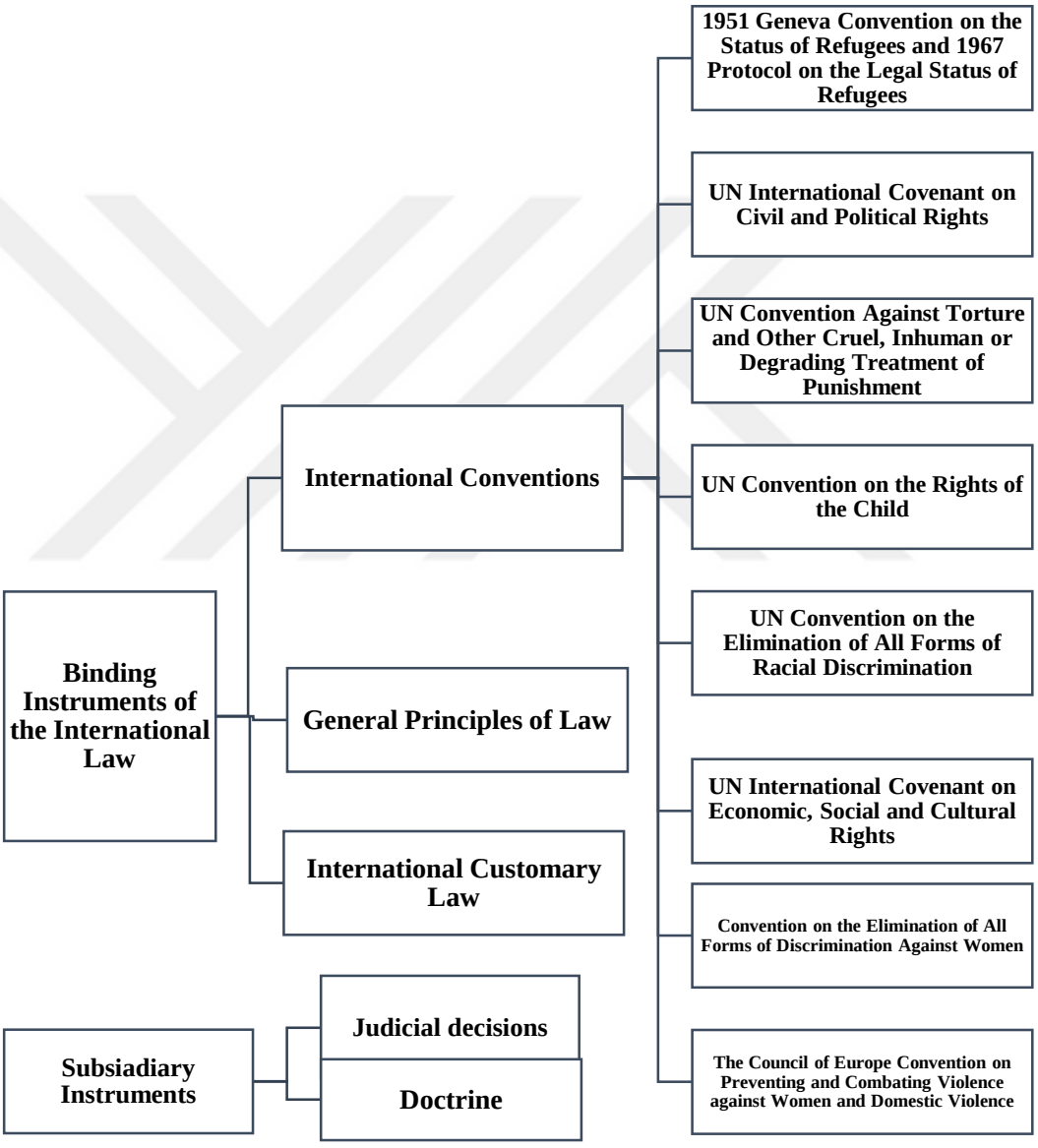

Figure 2.1 The Instruments of the International Protection Referred in this Study

The binding instruments of international law are deemed in Article 38 1 of the Statute of the International Court of Justice ICJ is a judicial organ of the UN as international conventions, international customary law, and general principles of law are accepted by civilized nations. In addition, subsidiary sources are judicial decisions and doctrine. (Statute of the International Court of Justice, 1945)

Law matters for migration politics cause law and politics have an association. Legal rules are a natural and compulsory consequence of social circumstances (Montesquieu, 2002). The claim of liberal legal scholarship that the law is objective and the judicial system impartial is gender-blind and serves to reinforce the discrimination suffered by women. What is needed to change this situation is a feminist legal system that can look through a gender lens (Mackinnan, 2020).

The biggest help in this oppression of society is the norms of law. Many actions are prohibited through laws. By ensuring their continuity, the aim is to transmit these rules to other generations without questioning them. In this way, the regime is intended to be permanent.

Therefore, legality contains power relations as an indivisible part of sociality. On the other hand, another fundamental element is the use of power. What makes a society a society is the fact that the Law is implemented through the use of force. Practices whose source is power relations gain legitimacy and become the law through their continuation with stability. The existence of the use of power means the existence of inequality.

The roots of the troubles in the status determination process are concealed within the gender blindness of refugee law on this issue. Since legal regulations carry the spirit of the time and are not isolated similar to other social concepts. Gender term has been recognized in the field of migration with the feminization of migration. However, the 1951 Convention does not give us enough information to explain gender concepts. Therefore, other instruments must be used. The Istanbul Convention protects gender-based asylum claims with Articles 60 and 61 to match international protection law and contains gender-sensitive measures. The Istanbul Convention is also examined, although the withdrawal decision from the Istanbul Convention. The cause is to give

place to the Istanbul Convention regarding its noteworthiness and the presence of some arguments about the unlawfulness of withdrawal in the literature. However, the Turkish government's withdrawal from the Istanbul Convention means applying general provisions in lieu of explicit provisions about gender-based asylum claims in Turkey's context.

2.3. Main Instruments of Refugee Law

The protection of refugees and the protection of human rights go hand in hand. This is why organizations such as the ECtHR, and human rights bodies, are involved in international protection. The 1951 Geneva Convention is only the second of a series of human rights treaties created by the UN. The first is the UN Convention on the Prevention and Punishment of the Crime of Genocide. Another important regulation in the area of protection is the International Covenant on Civil and Political Rights. According to this, foreigners should be able to enjoy the rights in the covenant without discrimination. The rights in the Covenant are granted to all persons or everyone. They include the right to life, the right to found a family, and the right to freedom of thought and expression. It, therefore, extends refugee protection and rights.

Universal Declaration of Human Rights, UN Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment of Punishment, UN Convention on the Rights of the Child, UN International Covenant on Civil and Political Rights, UN International Covenant on Economic, Social and Cultural Rights, UN Convention on the Elimination of All Forms of Racial Discrimination, UN General Assembly Resolutions And Declarations, UNHCR Executive Committee Conclusions, UNHCRHandbook, And Guidance; European Convention on Human Rights (hereinafter ECHR), Council Of Europe Recommendations, are sources of international protection regime in addition to the 1951 Convention and gender-based international conventions. Due to restrictions of the study subject main and related sources investigated deeply, the principal instruments of refugee law, which are the 1951 Convention, 1967 Protocol, and Law No. 6458 for Turkey's context, in addition to the gender-related human rights conventions which are the CEDAW and the Istanbul Convention are reviewed in this chapter.

Article 14 of the Universal Declaration of Human Rights, adopted by the UN General Assembly, includes the right to asylum regulated.

Turkey signed the ECHR in 1950, and it entered into force for Turkey in 1954. The ECHR does not directly regulate the right to asylum. However, according to the current case law of the ECtHR, the supervisory body of the Convention, deportation decisions and procedures are linked to Articles 2, 3, 8, and 13 of the ECHR (Ekşi, 2010, pp. 14–15).

2.3.1. International Law

2.3.1.1. 1951 Convention

The Universal Declaration of Human Rights was adopted by the UN General Assembly in 1948, laying down "*a common standard of achievement for all people and all nations*" before the constitution of the 1951 Convention. The Declaration also covers the right to seek and enjoy asylum from persecution with Article 14. Everyone, in the face of persecution, may seek refuge in another country. The right to seek and enjoy asylum does not embody the application of crimes not of a criminal nature or contrary to the purposes and principles of the United Nations, similar to the 1951 Convention. However, the Declaration is a decision of the UN General Assembly, and it is advisory and has no sanctioning power (United Nations, 1948)

The 1951 Convention is the primary, detailed, and binding legal instrument concerning refugees of the international order that is desired to be rebuilt after the World War II. Turkey signed the 1951 Convention as well as quite early, in 1961, and in 2022, 146 states are parties to the Convention (UNHCR, 2022a).

The 1951 Convention issues provisions about who needs international protection besides the obligations of the state's party to the convention and the rights of asylum seekers and refugees. An asylum-seeker basically means a person who has an asylum

claim and has not been granted refugee by officials yet. A refugee is someone who is granted status after the determination and evaluation of claims.

According to the 1951 Convention, a refugee is defined as:
"someone who is unable or unwilling to return to their country of origin owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion."

One of the temporary specialized agencies of the United Nations, and later it is also the source of the 1951 Convention of the IRO, which joined the UNHCR. In its charter, someone is recognized as a 'refugee' because of their race, religion, nationality, or political opinion. The expression "membership in a particular social group," which is one of the main concepts of this study, was added to the 1951 contract, unlike the IRO statute (Constitution of the International Refugee Organization, 1946).

According to the 1951 Convention, the status of refugee applied to any person who were subjected to persecution as a consequence of events actualized before 1 January 1951. In addition, well-founded fear of being persecuted should be associated with race, religion, nationality, membership of a particular social group or political opinion. The applicant should be out of their country of nationality. State protection is one of the determinants. The applicant should be "*unable or, owing to such fear, is unwilling to avail themselves of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it"* to be eligible for international protection.

The refugees have been granted the right to prohibit refoulement, which is one of the basic principles of international protection law with the 1951 Convention. The principle of non-refoulement of refugees is a norm of customary international law.

Also, the refugee definition and the principle of non-refoulement require that the threat of persecution is based on five fundamental reasons in the 1951 Convention. Apart from these five reasons, people experience to face the threat of persecution. Considering these restrictions, the definition of the 1951 Convention is insufficient to

meet the needs in every situation. International convention about human rights and international court decisions expands the principle of non-refoulement. Protection in the remaining areas is expressed as complementary protection in the literature apart from the five main reasons mentioned above.

2.3.1.2. 1967 Protocol

The fact that the 1951 Convention offered the state parties the option of providing protection only due to events that occurred before 1951 did not respond to changing needs; due to the events that took place after the World War II, many people needed international protection. To meet this need, a new Protocol is enacted, and 147 States are party to the 1967 Protocol on the Status of Refugees, the "New York Protocol" as of 2022. The 1967 Protocol removed the temporal and geographic limits found in Article 1(B)(1)(a) of the 1951 Convention.

Turkey's declaration regarding the geographical limitation while becoming a party is the first feature of the Turkish International Protection Law that should be known. With this declaration, Turkey stated that she would grant refugee status in the 1951 Convention to persons coming from European countries but not those coming from outside Europe. Since Turkey applies the 1951 Convention with geographical limitation, she does not grant refugee status to those who come from outside the Council of Europe countries, and she ensures protection under different statuses until they resettle in a safe third country or return to their country.

2.3.1.3. UNHCR Contribution to International Protection Regime

UNHCR is mandated by the UN General Assembly to develop international refugee law and is specialized, unlike any other international organization, and operates to protect a single right (Lewis, 2017).

The additional and up-to-date resources like UNHCR's guides intensify principles of international protection and all 1951 Conventions' essential explanations. UNHCR pointed out that accessing durable solutions such as refugee status and resettlement is in the scope of protection of refugee women. Adequate protection against violence for women also includes a systematic international protection regime (UNHCR, 1991). Similarly, the UNHCR Turkey Office fulfills an advising and consultative mission rooted primarily in the UNHCR Statute's paragraph 8 titled functions of high commissioner (Statute of the Office of the United Nations High Commissioner for Refugees, 1950).

The UN Economic and Social Council (ECOSOC) established The UNHCR Executive Committee (ExCom) in 1958 (UNHCR, n.d.). The Executive Committee's recommendations have contributed to international protection law and also encouraged UNHCR to develop guidelines for the provision of international protection.

UNHCR publishes country-of-origin reports and policy papers. The Handbook on the Criteria and Procedures for Determining Refugee Status is a highly important one of the contributions (UNHCR, 2019). In this context, UNHCR principles may influence the practices of states and even create customary rules in international law.

UNHCR Executive Committee Conclusions and UNHCR Handbook and Guidance are utilized in international and national judgments (*Eiza Kashkoeva*, 2016; *Mahira Karaja*, 2015).

2.3.2. Domestic Law

There was no specific legislation on international protection in Turkey, and regulations on foreigners were included in various laws until Law No. 6458. [1]

[1] It was adopted on 04.04.2013 and published in the Official Gazette on 11.04.2013.

The domestic law on international protection also includes four regulations, and these have been issued regulating the implementation and provisions of Law No. 6458 in detail. These are Regulation No. 29656 on the Implementation of the Law on Foreigners and International Protection, dated 17 March 2016; Temporary Protection Regulation 2014/6883, dated 22 October 2014, Regulation No. 28980 on the Establishment and Operations of Reception and Accommodation Centres and Removal Centres, dated 22 April 2014 and Regulation No. 31953 on Alternative Obligations To Administrative Detention, dated 14 September 2022.

The regulations are not examined in detail since the principles of the 1951 Convention and Law No. 6458 are significant issues for the status determination of refugees.

2.3.2.1. The Law on Foreigners and International Protection

Afterward the mass influx from Syria, Turkey needed a legal regulation about migrants as an attachment to the 1951 Convention. The most related regulation on the subject was the defunct Regulation on Asylum, dated 1994 before Law No. 6458 entered into force (Soykan, 2012; Regulation on Asylum, 1994).

The domestic legislation had not included a particular social group in the period before Law No. 6458 except for references to the 1951 Convention. The concept of membership in a particular social group took its source from Law No. 6458 in domestic law (Öztürk, 2016)

Law No. 6458 has provisions in detail on the basis of the 1951 Convention. Definitions of refugee and conditional refugee in the Regulation on Implementation also do not include any difference from the law (Regulation on Implementation, 2016). It is appropriate to apply the interpretation by analogy because particular social groups are figured similarly both in Article 1(2) of the 1951 Convention and in Articles 61 and 62 of Law No. 6458.

The difference emerges in whether they fled as a result of events that took place in the member countries of the Council of Europe or as a result of events that took place in another country because of the geographical limitation of Turkey. Depending on geography, the status is determined as a refugee or a conditional refugee status according to Articles 61 and 62 of Law No. 6458 (LFIP, 2013). In addition to "refugee status" and "conditional refugee status," the Law also provides for subsidiary protection (Article 63 of the Law) in very similar terms to Article 15 of the EU Qualification Directive. There is also a separate "temporary protection" status for Syrians governed by a separate regulation.

The conditional refugee status is important for this study because asylum-seekers from Afghanistan cannot be granted refugee status. They may be recognized as a conditional refugee. The status in Turkey ensures protection for conditional refugees until they enjoy protection in safe third country. The difference between refugee status and conditional refugee status is timeless protection from Turkey's side. The evaluation and decision become more of an issue for this reason. If the authorities of Turkey grant conditional refugee status, the applicant's case may be eligible to examine for resettlement and third safe countries estimated the claims of them.

2.3.2.2. Case Law of Turkey

In order to analyze the practice of Turkey on gender-based asylum claims, it has been tried to reach the acceptance and rejection decisions regarding international protection applications and then the judicial decisions. However, the decisions of the PMM and PDMMs affiliated with the governorates and the courts are not open access. It was not possible to reach the assessment and cases finalized by the PMM and governorates for the reasons explained. However, administrative court decisions can be seen through various case-law applications and programs. Through Lexpera, one of these applications, and the website of the Council of State[2], research was conducted with the keywords: ‘belonging to a certain social group’ (belirli bir toplumsal gruba

[2] https://karararama.danistay.gov.tr/

mensubiyet), ‘woman’ (kadın), ‘LGBTIQ+,’ ‘LGBT”, gender (toplumsal cinsiyet), and ‘gendered-violence’ (toplumsal cinsiyete dayalı şiddet), ‘violence against women’ (kadına karşı şiddet). However, no decision describing the related social group was found.

According to Article 80 of Law No. 6458, the administrative refusal decision of the asylum application or deportation order is finalized after the decision has been reviewed and rejected by the administrative court and, in some cases, the regional administrative court (appeal). Once the decision is finalized, the applicant can take the case to the Constitutional Court, which is the final recourse. Since the individual application right is used against public force regarding the rights and freedoms in the ECHR, its amendments, and the Constitution, the Court rejects the individual applications against the cases about granting status (Law on Constitutional Court, 2011, art. 45). The Court examines the applications against deportation orders. Therefore, the individual applications submitted to the Constitutional Court[3] are examined to acknowledge interpretations of international protection law through the website of the Court[4]. There are 18 applications with the keyword "membership of a certain social group" decisions. However, in these decisions, there is no definition of a social group and no indication that gender will be evaluated in this context.

2.4. Legal Basis of Gender-Based Violence

For Turkey's context, the main principal rules on preventing gender-based violence and protection of subjects are in CEDAW and Istanbul Convention. These conventions also guide to refugee status determination process with not only their direct provisions on women refugees but also their recommendations about gender lenses.

Provisions of the conventions mostly are in reference to women. Some articles of these conventions may also be applied to LGBTIQ+, yet there are no specific, direct, and

[3]Decisions of the Court are binding and the Court is the “first judicial organ among High Courts" https://www.anayasa.gov.tr/en/court/short-history
[4] https://kararlarbilgibankasi.anayasa.gov.tr/

binding legal instruments for protection risks faced by LGBTIQ+. Sexual orientation and gender identity are clearly mentioned just in Yogyakarta Principles. An organization of international human rights experts prepared a guide that includes international principles and the legal criterion that all states ought to hew to the regarding sexual orientation and gender, identity (*The Yogyakarta Principles*, 2006). It was issued Yogyakarta+10 with some changes in 2017 (*Yogyakarta Principles plus 10*, 2017)**.** Under the Yogyakarta Principles, people can identify their sexual orientation and gender identity as an inbuilt part of their personhood and a key fact of self-determination, freedom, and honor.

In domestic law, protection against gender-based violence, which is also mentioned in the Istanbul Convention and CEDAW, is detailed utilizing Law No. 6284, which was accepted by the Turkish Grand National Assembly on 8 March 2012. The law aims to protect women from violence with measures (divided into two protective and preventive). However, Law No. 6284 is not the primary source of especially gender-based violence definition and it gives detailed information distinctively for protection measures. Therefore, it has been contented with international law.

2.4.1. International Law

2.4.1.1. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)

Convention on the Elimination of All Forms of Discrimination Against Women is an international convention adopted by the UN General Assembly in 1979. CEDAW is recognized as a solid and comprehensive “International Declaration of the Rights of Women” in terms of its content. The Convention defines discrimination against women and sets the agenda for actions to be taken and measures to be taken to end this discrimination. In addition, it points up gender-based violence as a sort of discrimination.

Efforts by state parties to fulfill their obligations under the CEDAW are evaluated by the CEDAW Committee, which consists of 23 independent experts. These assessments are based on the reports presented by the state parties every four years.

The UN General Assembly adopted the Optional Protocol to CEDAW on 6 October 1999, and the Optional Protocol enables individuals or groups to apply directly to the CEDAW Committee for alleged violations of their rights protected by the CEDAW. Another way that the Optional Protocol provides for the more effective implementation of CEDAW by the state parties is the right of "review" granted to the Committee. The Committee can initiate an *ex officio* "investigation" in cases where women's rights have been systematically violated**.**

Turkey has been a party to the CEDAW Convention since 20 December 1985 and to the Optional Protocol to CEDAW since 29 October 2002. Thereby, applications from Turkey may also be submitted by means of the Optional Protocol. If any women come from Afghanistan may demand to be implemented CEDAW and may want to apply CEDAW Committee.

CEDAW gives place equally to dimensions of de facto (indirect) and de jure (direct) discrimination. Furthermore, it aims to provide equal provisions for women and men in public and private areas, in addition to preventing discrimination in every situation. Equal provisions mean real equality, which is in every sphere of life, and it entails gender-sensitive policies. Since the 1951 Convention and its 1967 Protocol do not contain direct provisions on gender equality, CEDAW strengthens and complements women and girls in the international protection regime.

Another feature that international sources and documents unquestionably accept when defining women's human rights is that these rights are universal for all women and are equally valid. Violation of women's human rights cannot be accepted or ignored for reasons like beliefs, traditions, and customs. It is necessary to have an insistent attitude toward evaluating the extent to which women's rights are legally realized and in practice.

The CEDAW Committee is not a court with jurisdiction. However, since it has introduced the individual application mechanism, which Turkey accepts, it is also an important legal application authority in terms of asylum claims made within the framework of gender-based violence. The CEDAW should be applied combined with the Committee's general recommendations. The general recommendation about especially refugee women is No. 32 on the gender-related dimensions of refugee status, asylum, nationality, and statelessness of women. Deciding the violence that the applicant is subjected whether it is persecution or not, is based on their case and claims of them, and in General Recommendation No. 32, the Committee is concerned that asylum claims by individuals who are subjected to violence do not assess gender-sensitive points of view. The Committee also suggests considering intersections such as class, race, age, health, sexual identity, and orientation (statement of the recommendation is; being lesbian, bisexual, and transgender) with General Recommendation No. 32.

In addition, connected recommendations are No. 19 on violence against women, No. 26 on women migrant workers, No. 28 on the core obligations of State parties under Article 2 of the Convention, and No. 30 on women in conflict prevention, conflict and post-conflict situations. General Recommendation No. 28 explained that gender-based discrimination includes gender identity and sexual orientation, class, race, religion, age, health status, etc.

2.4.1.2. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)

Gendered violence has been normalized for years and years inconvertibly and explained with the culture. Moreover, the outcome of this truth has become disclaiming the violence and not titling it.

The Istanbul Convention is the most recent international legal text in the field of violence against women. Moreover, it was created exclusively to make regulations

regarding the issue of violence against women. The İstanbul Convention was opened for signature by the Council of Europe Committee of Ministers in Istanbul on May 11, 2011. It is the first convention with the power of sanctions for violence against women "On the Prevention and Combating Against Violence" in international law (Peroni, 2016). The convention inured on 1 August 2014. Turkey was the first country to sign and ratify as a signatory to the Convention signed by 13 countries at the opening ceremony.

According to scholars, governments tend to restrict the rights, especially for women and LGBTIQ+'s, because of conservative policies and right populism. Concordantly, Turkey's Presidential Decision No. 3718 to withdraw from Istanbul Convention was published on 20 March 2021, announcing the withdrawal. Bar associations, political parties, civil society organizations, and individuals have filed lawsuits to annul this decision. On June 28, 2021, Turkey's Council of State, Tenth Chamber ruled to uphold President's Decision No. 3718, withdrawing Turkey from the Istanbul Convention. As a result of the plaintiff's objection, the case was appealed to the Council of Administrative Chambers of the Court of Appeals, which made the final decision and rejected the appeals. Thus, Turkey officially withdrew from the Istanbul Convention. Nevertheless, there is always a probability of opting into the Convention again as a result of resistance and demands of the feminist movement and critics of scholars about the unlawfulness of withdrawal (Amnesty International, 2021; Bianet, 2020; Gözler, 2021a, 2021b; Güneş & Ezikoğlu, 2022; ICJ, 2021; Šimonović, 2021; Şirin & Orcan, 2022). To summarise, the Istanbul Convention still carried its characteristics of being life-sustaining. Consequently, the Istanbul Convention is one of the parts of the study.

Defining gender-based violence is a complex issue. The Istanbul Convention defines the types of violence in point, and prevention, protection, prosecution, and policy of establishing victim support mechanisms are included to create a legal framework. It underlined that violence against women historically stems from the inequality of power between men and women, and it has taken an important step in eliminating this inequality.

The monitoring mechanism of the convention is GREVIO, which consists of experts, and GREVIO observes the implementation of the Convention in the state parties, which increases the Convention's binding power and sanction power.

Violence against women and domestic violence are stated in Article 3(a),(b) of the Istanbul Convention.

The Istanbul Convention establishes that violations of women's rights are a violation of human rights. Violence is also a form of discrimination. It does not depend on whether this violence occurs in the private or public sphere, it is defined as violence in both spheres. These actions can cause physical, sexual, psychological, or economic harm. It may take the form of threats, coercion, or arbitrary deprivation of liberty for the purpose of women's suffering.

Domestic violence is a more specific form of violence. Perpetrators may be partner, or from family members. The main motivation is that it occurs in a close relationship. In order to define a violence domestic violence, it is not considered whether the perpetrator shares the same residence with the victim or not. Violence occurs between family members, within the home, or between ex-partners. Domestic violence, which is one type of violence against women, can be physical, sexual, psychological or economic violence as other types of violence.

Article 3(d) of the Istanbul Convention on gender-based violence against women includes the phrase "*violence that is directed against a woman because she is a woman or that affects women disproportionately*." This definition overlaps with the definition of discrimination set out in Article 6 of CEDAW General Recommendation No. 19.

Moreover, some treatments, including forced marriage, physical, and psychological, sexual violence, stalking, female genital mutilation, forced abortion and forced sterilization, and sexual harassment, are elucidated as views of gendered violence.

Article 18 of the Istanbul Convention embodies the protection mechanism, and signatory states are charged to implement it:

The state parties should accept that violence against women and domestic violence is based on unequal gender relations. They should have a gender-sensitive view of and focus on human rights.

The violence affects the survivors and their relations and their social environment. It includes children and other intimate relatives. This approach may affect also the asylum process. Relatives of survivors may enjoy asylum rights with them. The Istanbul Convention assigned the parties to prevent secondary victimization. The evaluation should be appropriate to the situation of survivors in the refugee determination process. The questions, quality, and turn of phrase should not harm the applicant for instance.

The state parties purpose the empowerment and economic independence of women. The asylum applications should be asses from a country ban on work accordingly. Besides, the state respects the specific needs of persons. This article also refers to intersectionality with this frame.(Council Of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, 2011).

Article 18 of the Istanbul Convention proposes a holistic and comprehensive protection system. It is stated that the Convention is based on four pillars. These are sometimes referred to as the 4Ps: Prevention, Protection, Prosecution, and Coordinated Policies (Council of Europe, 2020). Signatory states are obliged to prevent violence in society and protect women and companies who may be subjected to gender-based violence; when violence occurs sufficient investigation and prosecution should be, and ultimately establish appropriate policies to ensure equality.

When evaluating asylum claims of women and LGBTIQ+ without gender lenses and the principles mentioned in Article 18, claims may be refused since being unaware of a critical characteristic of gendered violence in the subjects' life or thought of protection provided by the home country. The Istanbul Convention may guide the country of asylum to define gender-based violence and sufficient protection provided by the country of origin.

The essential concept of the Istanbul Convention for this study is that it issued obviously gender-based asylum. The Istanbul Convention, with all its statements, felicitously establishes tangible regulations about violence. Nevertheless, Articles 60 and 61 are dedicated to international protection law. These articles settle the concept of gender-based asylum, the non-refoulment principle, and the necessity of gender sensitivity.

Article 60 of the Istanbul Convention provides that acts of violence against women on the grounds of gender differences fall within the scope of "persecution" as enumerated in the 1951 Convention and its 1967 Protocol.

Article 61 regulates the prohibition of refoulement. Survivors of violence against women should not be returned to a place where their lives are at risk, or they may be subjected to torture or ill-treatment. This principle is in line with the prohibition of expulsion or returns in Article 33 of the 1951 Convention. While the non-refoulement principle does not directly require the applicant to be granted refugee status, it is an integral part of international protection law.

Women and LGBTIQ+ were not clearly defined as a refugee under Article 1, (A) 2 of the 1951 Convention. On the other hand, when they have been subjected to violence/ persecution solely because of gender structure or who have a well-founded fear of being persecuted, the assessment should be in a manner sensitive to gender differences and the granting of refugee status in accordance with the Istanbul Convention. Thus it is maintaining the importance for Turkey and all member states of the Council of Europe in the field of international protection.

CHAPTER 3

THE CASE OF THE ISLAMIC EMIRATE OF AFGHANISTAN: HISTORY OF A SYSTEMATIC GENDERED DISCRIMINATION AFTER THE TALIBAN GOVERNMENT

3.1. A Brief Look at the Islamic Emirate of Afghanistan

Afghanistan is a state in the south of central Asia and she consists of Pashtuns, then Tajiks, Hazaras, Uzbeks, Turkmens, and other peoples. The population is approximately 40 million. The political history of the Islamic Republic of Afghanistan (Constitution of Afghanistan, 2004, art. 1) (and now Islamic Emirate) (Verma, 2021)over the last few hundred years shows that the country has been under the sovereignty of another state or an independent state organization has been formed from time to time. The Taliban take over lies for a long time with changes in the balance of power. However, it is examined the situation in Afghanistan that progressed after September 11, 2001, within these changing political spheres of influence in order to give a general opinion.

The roots of patriarchal norms and heteronormativity have connections with the institutions and the policies of the state, and it has directly impacted women, girls, and LGBTIQ+'s in Afghanistan for years. It is necessary to inquire about the history and practices of the Taliban, the most influential element in the geography, to understand the ongoing and expected increase in human rights violations and atrocities in Afghanistan and how they will re-create a new flow of forced migration (DGMM, 2020).

On September 11, 2001, following the terrorist attacks in the Manhattan and Virginia districts of New York City in the United States of America (USA), the USA launched a campaign called the "War on Terrorism." Following September 11 attacks, the United Nations Security Council convened on September 12, 2001, to address the issue. Both in its Resolution 1368 of the same day and in its Resolution 1373 of September 28, 2011, the Security Council, referring to the inherent right of self-defense, stated that terrorism threatens international peace and security and that it is

ready to take all necessary measures to combat all forms of terrorism (Kuğu, 2020: 180; Örnek, 2012: 108-134).

Some NATO countries and other states joined the war on terrorism initiated by the United States (Webber, 2009). Believing that Al-Qaeda was responsible for the September 11 attacks, USA asked the Afghanistan state to hand over or deport Osama Bin Laden, the leader of the Al-Qaeda terrorist organization. Since Afghanistan rejected this demand, the international powers, claiming to have declared war on terrorism, started a military intervention in Afghanistan based on Article 51 of the UN Charter (UN Charter, 1945). While Afghanistan declined to deliver Osama Bin Laden to the United States, Afghanistan had been ruled by the Taliban.

The Taliban's seizure of power in Afghanistan again took place in an atmosphere of instability and violence. The militarist group comes from Diyubendiecol (*Deobandi Islam:The Religion of the Taliban*, 2001), calls itself the Islamic Emirate of Afghanistan, and has waged war inside the country. It was founded in 1994 by Mullah Mohammad Omar to spread Islamic Sharia. Between 1992 and 1996, the country was in complete chaos, with no political authority. In 1994, the Taliban emerged as an organization when Mullah Mohammad Omar and a group of Talibs raided a mujahideen camp and rescued two young women who had been kidnapped and raped. Pakistan, which wanted to shift its trade with Central Asia to the south of the country due to the conflicts in Kabul, supported the Taliban, which quickly gained a reputation for taking down mujahideen commanders in Kandahar.

Advancing northward, the Taliban seized weapons, secured highways, set up courts, and enforced strict Sharia law. In 1996, it defeated the forces led by Rabbani and Massoud and took Kabul. Soon after, it controlled ninety percent of the country.

The Taliban government did not find much international support and was recognized by the United Arab Emirates, Saudi Arabia, and Pakistan. Between 1996 and 2001, when the Taliban were in power, Afghanistan was represented at the UN by people working on behalf of Prof. Rabbani, and the Organization of the Islamic Conference followed an "empty chair policy" (DEİK, 2022).

The Taliban's approach to governance, which ruled Afghanistan at the time in question, can be briefly described as a combination of religious texts and related practices with Pashtun customs and rules of feudal society. While these religious impositions were a new phenomenon even in conservative areas such as the predominantly Pashtun city of Kandahar, they were particularly shocking for the predominantly Hazara, Tajik, and Uzbek populations or the urban population in Kabul, where women participated more freely in public life. In these places, the Taliban were also understood to have tightened the rules for rapid and radical change and therefore increased repression. In addition, the Taliban cracked down on drug use and addiction, banned the practice of 'bacha bazi'(death penalty), the sexual enslavement of poor boys by adult men, mostly those with political or economic power, and banned customs such as the marriage of widows to the brother of the deceased husband and the marriage of women to members of the other side's family to settle blood feuds. Despite the political pressure and Islamic Sharia law, some scholars call this era “counter-modernity” because of some modern instruments used by the Taliban (Cole, 2003).

It is also worth noting that the Taliban have continued the practices that had been decided under previous administrations. The Ministry of Enjoining Good and Preventing Evil (Amr-iBi'l-Ma'rufwaNehy-iAni'l-Munker) was established under Rabbani. This institution was continued. Again under Rabbani and Massoud, the name of the country was changed to the Islamic State of Afghanistan. In 1996, when the Taliban took control of Kabul, cinemas were closed, the sale and consumption of alcohol were banned, and women were already required to cover themselves. Under Hekmatyar, the Taliban banned the playing of music in public spaces and the 'aimless wandering' of women in the streets (Ewans et al., 2002; Runion, 2017).

The first government of the Taliban in Afghanistan, which began in 1996, was ended by military intervention in 2001. Subsequently, a conference was convened in Bonn, Germany, in December 2001 to prepare Afghanistan for the new order. Some decisions were taken at this conference: The establishment of an interim government and support for interim President Hamid Karzai, the establishment of a regular budget, the Preparation of a National Development Draft and a National Development Budget, preparing a good basis for Afghanistan's transition to coherent governance and development.

A 35-member commission was formed from the Afghan notables attending the conference. Its first task was to draft a new constitution. The Loya Jirga convened in December 2003 to discuss the constitution and approved the new administration by adopting the constitution in January 2004.

The name Loya Jirga means 'great shura' in the language of the Pashtuns, the most populous community in Afghanistan. It is a parliament with hundreds of years of history. It appears from time to time in the history of Afghanistan. In June 2002, after the overthrow of the Taliban government in 2001, the grand shura, which assumed responsibility for the establishment of a new administration, elected Hamid Karzai as interim head of state. For the first time, women participated in recent meetings where the new constitution was discussed and adopted. In the last meetings, approximately 25 percent of the delegates were women (A.B.C. News, n.d.).

Despite the presence of the US and NATO forces in Afghanistan, the Taliban regained strength in the following years and took control, especially in rural areas (Kugu, 2020). As a result of the decisions taken at the Bonn Conference, the new administration established under the presidency of Hamid Karzai failed to ensure stability. The existing and new ethnic problems in the country could not be resolved. The necessary organization could not be established to ensure the broadest representation of the existing political structure in the country.

3.2. New Taliban Era of Afghanistan

In years of instability and chaos, security issues have never been off the agenda, and the process of economic progress has not been orderly. In every sense, security issues were prioritized over development and the consolidation of state organization. The inability of the administration to find a solution to the problem of unemployment and the continued strengthening of the Taliban increased external migration. It is estimated that 3 million Afghans left their country during this period.

At the end of this period of instability, the international powers and the Taliban leadership negotiated and reached a compromise. This opened up the possibility for the Taliban to regain power (Dashti, 2021).

Following negotiations between the US and the Taliban, an agreement was signed on 29 February 2020 in Doha, Qatar. According to the agreement between the US and the Taliban, the Taliban committed to preventing the activities of Al-Qaeda and groups that the US considers "terrorist organizations" on the territory of Afghanistan. On the other hand, the US committed to withdrawing all American troops from Afghanistan by the end of May 2021 (*Doha Agreement*, 2020). However, the new US President Joe Biden, who was elected instead of the US administration that signed the agreement, announced that the US troops would withdraw on the 20th anniversary of the September 11 attacks. In Doha, the Taliban negotiated with the United States and the current Afghan government. While the negotiations were ongoing, the Taliban quickly increased its attacks across the country and captured 85 percent of the country. On 15 August 2021, they reached and took control of Kabul. Former President Ashraf Ghani secretly fled the country. Taliban take control of Kabul in a row (Dashti, 2021, p. 202).

As a result of this chaos, Afghanistan has always been a region of high migration. The total number of refugees under the UNHCR mandate and asylum seekers of Afghan nationality in the World appears to be 3.111.205 and second after Syrians, according to the data of UNHCR for the year 2020 (UNHCR, 2022b).

In a similar way, the Norwegian Refugee Council announced that approximately 4,000-5,000 Afghans transition to Iran every day in 2021. The asylum seekers state they cannot enter Turkey owing to illegal push-backs (Amnesty International, 2022c). International protection applications from Afghanistan to Turkey in 2021 are 21.926, according to statics from the Presidency of Migration Management of Turkey (PMM, 2021).

The decrees issued by the Taliban restricting the rights and freedoms of individuals shave different practices in Afghanistan according to the provinces. The Taliban are factions without a fully centralized administration that is a Sunni group known for its

different practices in different regions. Under the roof of the Taliban, some are autonomous, and sometimes it is possible to see split structures whose interests conflict with the Taliban. Despite the general amnesty granted after August 2021, when the Taliban took control of the country, people affiliated with the former government continue to be targeted (EASO, 2022). The attacks against people affiliated with the previous government and their families continued, especially in September and October 2022; it is stated that there are serious problems in implementing the general amnesty issued by the Taliban. As a result of the attacks, civilians were dead. According to some media, organs state flogging videos and pictures of some persons who are accused of crimes appeared, and members of the Taliban show in public the body of the persons whom the Taliban killed (France-Presse, 2022).

3.2.1. Gender Segregation and Status of Women, Girls, and LGBTIQ+`s

Women in Afghanistan are deprived of their economic, political, and educational rights. The socio-political events that developed due to religious understanding and long-lasting wars limited the rights of women. Established cultural motifs such as the roles of women in the family, the transmission of religious knowledge as a cultural force, tribal community, and its resistance to modernization also have an impact on this situation (Ahmed-Ghosh, 2003).

The United Nations High Commissioner for Refugees stated that girls and boys are prevented from accessing education due to the state's concern. The statistical data on the number of children attending school are unreliable; girls' access to education is considerably lower than boys' reported (UNHCR, 2018). Equal education rights in Afghan society, even before the Taliban government, appears to be unavailable.

At the beginning of the Taliban takeover on August 15, 2021, they promised not to restrict rights, and the wording has been vague and softer. However, the situation worsened for women and LGBTIQ+’s day by day. The retrograde human rights situation of especially women and girls, discriminatory restrictions on the right to work and education, absence of monitoring and data collection about gender-based violence,

and not to reach of basic needs are highlighted in the reports (Protection Cluster Afghanistan, 2021). Afghanistan was 166. among 167. countries on gender equality regarding 2019 statistics (UNDP, 2020). She was the last country among 170 countries in the Women, Peace, and Security Index (Georgetown Institute for Women, Peace and Security and Peace Research Institute Oslo, 2021). In 2022, Afghanistan was still 146 Among 146 states (World Economic Forum, 2022).

3.2.1.1. Gendered Violence

Gender-based violence has been an important topic of discussion in Afghanistan for many years. For this reason, many civil institutions and international organizations strongly pay attention to this situation. It carries out many programs in the name of struggle. Nevertheless, despite all these efforts, gender-based violence and its various injustices are not stopped; on the contrary, observations and according to published reports, violence against women is increasing.

The reports say %87 of women and girls have been subjected to intimate partner violence in their lifetime (UN Women, 2021). Considering the restriction of freedom along with the Taliban administration, the possibility that political developments may impact violence should be considered as they fuel inequality (United Kingdom: Home Office, 2016).

Even if there was a hierarchy based on gender and inequality, gender segregation has been more clear after the Taliban government and the implementation of Sharia. The Taliban banned women from parks, gyms, and public baths in the capital in November 2022 and banned women from universities in December 2022 (BBC News, 2022).

Crises mostly affect women, LGBTIQ+, and children. Similarly, in Taliban-ruled Afghanistan, increased rates of child, early, and forced marriage and gender-based violence. Nevertheless, the violations were under-reported. Feminists and women's rights defenders have been threatened, arrested, forcibly disappeared, and tortured (Amnesty International, 2022b).

In order that asylum seekers who are faced with violence have not been evaluated as "victims" under misogyny in the study, a reflection of distinctive sides of violence (a way of struggle) elaborates. On the other hand, making women heroic and claiming that they resist androcentrism in every circumstance is also a debatable issue in the literature (Harding, 2008). Therefore, the subjects should not be defined with only violations in Afghanistan during the international protection process.

Although the high rates of gendered violence, there is no longer even the possibility to applying to shelters for protection from violence after the Taliban government cause the shelters have been closed, or women have voluntarily stopped their activities out of fear of the government.

Contrary to other types of violations, the information about female genital mutilation being practiced in Afghanistan could not be substantiated (UNICEF, 2019).

3.2.1.2. Gendered Ban on Fundamental Rights

Women in Afghanistan are out of the mechanisms to make decisions, especially after the Taliban takeover. It means they do not make policies and appear in public areas. After the Taliban, women could not participate in politics. The right to education, work, and health are restricted or erased despite all the protests and resistance of courageous feminist organizations. Similarly, various governments have reinforced human rights violations and discrimination against LGBTIQ+ persons by implementing discriminatory and criminalizing laws in Afghanistan (ILGA, 2022).

Women have been out of work life since August 2021 despite women having the right to work due to the 2004 Constitution of Afghanistan. In Taliban-governed Afghanistan, some jobs are forbidden for women, such as working for NGOs or the media sector (*These Reactions to the Taliban's Ban on Women & Girls' Education Show Why We Must All Speak Up,* 2023). More than 250 women judges and hundreds of women lawyers and prosecutors have already been dismissed. According to the UN Expert "*Alleged perpetrators are often detained, sentenced and punished on the same*

day by the police." And also the Special Rapporteurs added *"Many women judges have fled the country or gone into hiding"*(UN, 2023).

Girls continue their education below sixth grade in January 2023. Secondary schools and universities, like some jobs, are banned for women and girls. On 24 December 2022, women were banned from universities. %60 of girls and %40 of boys do not enroll in school, and after the Taliban take-over %60 of girls were out of school, and school enrolment of girls declined more (UNESCO, 2022).

The restrictions and violations do not affect only women's lives. For instance, the ban on women's right to labor causes a lack of basic needs and poverty. It directly impacts all individuals in the society because women in Afghanistan are %33 of the labor force in rural areas (Khullar, 2022).

The participation of women in parliament was %28 before the Taliban ruled Afghanistan. There are no women in policy after 15 August 2021, and the former parliaments characterized this situation as "gender apartheid." (Ministry of Foreign Affairs of Afghanistan, 2015; *These Reactions to the Taliban's Ban on Women & Girls' Education Show Why We Must All Speak Up*, 2023). %77 of women's organizations did not find a fund, and most have carried out their activities (UN Women, 2022).

Amnesty International announced high numbers of women arrested. Justification of arrest is vias rules requiring women to appear in public only when accompanied by a male chaperone and to cover their bodies entirely. (CFR, 2023).

It is announced that On 29 October 2021, LGBTIQ+ rights would not be recognized under sharia law according to the Taliban spokesperson. Afghanistan's Criminal Code criminalizes consensual same-sex sexual interactions. Moreover, the Rainbow Railroad reported a Taliban list that included people to kill. The list targets queer people (Cooper, 2021). Same-sex sexual acts have been already risking punishment by death before. However, the punishment had not been applied since 2001. Gays were sentenced to death in Kabul, Kandahar, and Herat after the Taliban`s first government in the 1990s (HRW, 2022).

Pederasty (bacha bazi) was undefined before the amendments to the Afghanistan Penal Code in 2018. However, under the Penal Code amendment, sexual intercourse between consenting adult men was also subject to penalty of imprisonment of between 5 and 15 years. Under the Penal Code, which entered into force in 2018, consensual same-sex sexual acts between women (Musaheqeh) are prohibited, while consensual same-sex sexual acts between men (Lavat) and (Tafkhiz) are criminalized. (Penal Code of Afghanistan, 2017)

Under the Criminal Code adopted by the Afghan government in 2017, sexual intercourse outside marriage is a criminal offense, punishable by death or imprisonment, depending on the evidence. If there is more than one eyewitness, the penalty is death (HRW, 2022).

Before 2018, the previous penal code of Afghanistan contain ambiguous rules and it needed interpreting as making same-sex relations a criminal offense. However, the situation has become even more serious after the Ashraf Ghani Government. The Penal Code clearly criminalized same-sex sexual relations. Some of the representatives of the Taliban repeated criminalization of sexual orientation, unsurprisingly.

3.2.2. Sharia Law

The state of Afghanistan, and therefore the current Taliban rulers, has a number of obligations under international instruments to which they are a party. These include respecting and protecting human rights. Afghanistan has also been a member state of the United Nations and has been a signatory to the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights, the International Covenant on Economic, Social and Cultural Rights, and the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment. Therefore, its law should be in line with this. However, since it adopts sharia law, its universal international law and sharia are not compatible.

The UN Rapporteurs and Experts state that only men rule the country and there is no independent legal system. The Taliban applies Sharia law. Laws have also been suspended and the Taliban also does not apply the 2004 Constitution and dismissed members of the judiciary, especially those in important positions. Therefore, the Taliban has made the judiciary dependent on itself. For de facto judicial bodies such as the Muftiate (Muslim legal experts), Taliban members have been appointed. Suspects are often detained, convicted and sentenced on the same day (UN, 2023).

In Islamic family law, as a rule, the right and authority to dissolve the marriage contract with a unilateral decision are reserved for the husband. However, it is also possible for the wife to offer to pay a price to her husband and for the husband and wife to agree on the termination of the marriage through hul (muhālaa). The last method is to apply to the judiciary for the termination of the marriage if certain reasons exist; this is considered a right granted primarily to the woman. In this way, the termination of the marriage can be realized firstly through the exercise of a power granted to the husband, secondly through the wife's persuasion of her husband to agree to divorce through hul, and finally through the judiciary based on certain reasons.

In a tweet on November 16, 2022, Zabihullah Mujahid the Taliban's chief spokesman, narrated statements of Haibatullah Akhundzada, the supreme leader. Haibatullah Akhundzada ordered Afghanistan's judges to apply the methods of punishment of Islamic law. Islamic law methods that which is indicated include retaliation (eye on the eye), execution, flogging, amputation of limbs, and stoning (France-Presse, 2022).

Sharia prescribes punishment for certain offenses. One of the categories of offenses and punishments defined by the Sharia is the had or hudud punishment. Hudud crimes are certain mandatory types of punishment. Zina-adultery is one of the hudud crimes (Bambale, 2003).

A Taliban spokesperson said, *"LGBT... That's against our Sharia law.".* A judge said that before the fall of Kabul, a Taliban judge told gays and lesbians to be punished recm (either stoning) or standing behind a wall that would fall down on them.

Afterward, the Ministry of Vice and Virtue of Taliban published a regulation in 2020. Regarding the regulation, same-sex relations are forbidden. In addition, “strong allegations” of same-sex relations judges (Human Rights Watch, 2021). The killings, death penalty, arbitrary detention, unjust imprisonment, and other threats to human rights had in mind at least for February 2022 (UNHCR, 2022c).

Under Sharia, the punishment for sexual acts of the same sexes classified as hudud offense may vary depending on various factors and different interpretations.
A Taliban judge vowed that the Taliban would execute gays or lesbians under Sharia, stating that *"there can only be two punishments for homosexuals: either stoning (Sangsar) or he must stand behind a wall that will collapse on him. The wall must be 2.5 to 3 meters high.”*
The Taliban declared sex reassignment surgery illegal. The Taliban group's Minister of Public Health, Qalandar Ebad, announced at a press conference in Kabul on 24 August 2022 that "gender reassignment" requires a Sharia fatwa, which this ministry has requested. According to Islam, it is not permissible for a man to be a woman and a woman to be a man. Before the Taliban, there was some cases of these type of surgeries. (ILGA, 2022; Nimrokh, 2022)

3.2.3. Life and Security

In a gender-equal society, there is fair access to resources and equality in the use of resources. All individuals are informed about the resources available to them and what they can benefit from. Resources include health services, education, employment opportunities, social services, capital, property, etc. The Taliban-governed Afghanistan is explicitly founded on inequality; she enforces strict Sharia law and consolidates the reactionist policies day by day.

A pregnant woman was killed along with her child by the Taliban for expressing opposition to the Taliban government and calling the war "illegitimate", In March 2019. In January 2020, the Afghan government accused the Taliban of executing six

members of the same family, including two children (EASO, 2019; US Embassy in Afghanistan, 2019).

UNAMA also reported about the places of detention after the Taliban takeover. The Taliban leader issued guidelines on detention. However, the authorities appear to be struggling to fulfill their obligations with regard to detainees. Rapid progress has not been possible because there is no financial capacity to meet it. For example, food, hygiene items and the inclusion of detainees in vocational education and training. (UNAMA, 2022).

3.2.4. Abuses in the Justice System

Traditional justice mechanisms were one of the ways to solve the disputes for people in Afghanistan. The formal legal system is often absent in rural areas and local elders and shuras are the main courses for both criminal and civil matters. According to USDOS, such informal institutions and the Taliban imposed sentences without regard to the formal legal system. It appears that the Taliban had already established a system of sanctions before they took power, with unclear boundaries, and this is not predictable. (EASO, 2019)

Even before the Taliban takeover, the Taliban courts had become significantly more widespread, reaching far beyond the areas under Taliban control. Taliban courts hear cases from people living in government-controlled cities who do not support Taliban rule but feel they have no viable alternative. Increasing numbers of Afghans across the country are reportedly seeking justice in Taliban courts, frustrated by the state bureaucracy, corruption, and long processing times (Glinski, 2019; Jackson & Weigand, 2019). Punishments used by the Taliban parallel justice system include execution, mutilation, and stoning to death (Amnesty International, 2019).

UNAMA noted that the Taliban sentenced women for adultery or "immoral relationships" according to their own justice system. that he had documented four

cases. In three of these cases, women were flogged and in one case a woman was accused of running away from home and executed.

Despite the criminalization of the practice of pederasty (bacha bazi) in the Criminal Code introduced in 2017, there are reports that such offenses maintain to exist and are often committed by Afghan National Security Forces. As far as UNAMA`s information, prosecution is possible for these offenses under the provisions of the revised Penal Code. Since there's only one case in which he was prosecuted (EASO, 2019).

A look at the development of the law shows that harmful practices are still changing. If we consider that the law is fed by social norms, the law changes only when there are social changes. To this extent, late development is also a sign of social backwardness.

3.2.5. Freedom of Expression, Association, and Assembly

Most Afghan media organizations did not carry on their work because of censorship and pressure, and the Taliban restricted the activities of the rest of the organizations after the Taliban takeover. Some of the journalists were arrested (Ani News, 2021).

The Afghanistan Independent Human Rights Commission announced on 18 September 2021 that the Taliban terminated their buildings and monitoring activities without the AIHRC (Afghanistan Independent Human Rights Commission, 2021). Thus, accessing reliable information is hard.

UNAMA reported that the de facto authorities committed 163 human rights violations against members of the press. There were 122 cases of arbitrary arrest and detention, 58 cases of ill-treatment, 33 cases of threats and intimidation and 12 cases of incommunicado detention. In addition, five journalists were reportedly killed by the Islamic State of Iraq and the Levant (ISIL)(UNAMA, 2022).

In addition, the violence of Taliban, including violation of right to live is not public because of restrictions on freedom of the media and because women and LGBTIQ+ family members and friends are too frightened to speak out about what is happening (ILGA, 2022).

CHAPTER 4
DETERMINING REFUGEE STATUS

International asylum law and human rights law provide international protection for refugees' admission to the country of asylum and their treatment in that country by human dignity. International protection is referred to all activities aiming to respect the rights of refugees and asylum-seekers in line with human rights and humanitarian law.

Nevertheless, recognizing claims as a “persecution” by states for international protection has failed because of gender blindness. Discriminatory behaviors and regulations also may have a characteristic of persecution. Interpretation gains importance at this stage. Treaties shall be interpreted in good faith in the light of their theme and purpose following their ordinary meaning According to Article 31 of the 1969 Vienna Convention on the Law of Treaties (Vienna Convention on the Law of Treaties, 1969)

According to the Convention, the conditions of being a refugee can be listed as follows:
- The person must have a well-founded fear of being persecuted.
- Fear of persecution must exist because of a person's race, religion, nationality, membership of a particular social group, or political opinion.
- It is not entitled to the protection of their country of nationality (if the person is stateless, the country is understood as the country of residence)

Applicants must be met for the recognition of refugee status.

There are applied methods in different legal systems and countries to determine the term's restrictions (Binder &Tošić, 2005; Cory, 2018; Foster, 2012; Hathaway & Foster, 2014). However, the effect of recognizing the status of someone means enjoying rights in a country of asylum. Therefore, it should be noted that the person who provides the conditions in the Convention gains the title of refugee as soon as they meet the conditions. The granting of refugee status has a declarative feature, not a constructive one. A person is not a refugee with the recognition of status, but a person is a refugee beginning from declaring their claims when the status is recognized.

4.1. Refugee Status Determination in Turkey

Regarding the procedure of recognition status by reason of persecution and membership of a particular social group, there is no difference between the 1951 Convention and Law No. 6458. As stated above, it remains the case that Turkey, under its '*geographical limitation*' to the 1951 Convention, distinguishes between refugees from European and non-European countries - only the former are eligible for refugee status in Article 61 of the Law No. 6458 while the latter are only eligible for "conditional refugee status" in Article 62 of the Law No. 6458. Since the interview and investigation are essential in assessing the claims and PMM and PDMM are responsible, the effects on the status determination process are argued below.

On the other hand, political discourse and rhetoric embedded in institutions have a determinative impact on status determination. The court decisions, acceptance rates, and decision to grant refugees are related to the claims as much as the migration policy outcomes and perception of the country of asylum. For context of Turkey, the deportation orders and international protection applications steadily increased in 2021-2022 (See Figure 2) [5]. This is also related to the spread of hatred against migrants (HRW, 2022; PMM, 2021, 2023).

There is a significant increase in the number of Afghan nationals deported by Turkey from 2021 to 2022. The 44,768 Afghan nationals deported by Turkey(PMM, 2022b) in the first eight months of 2022 represent a 150 percent increase (PMM, 2022a) compared to the number of Afghan nationals deported in the first eight months of 2021. "*With 124,441 irregular migrants we managed to deport in 2022, the Return Success Rate reached 71 percent*", PMM shares this information in the Turkish version of its website. This information is not available in the English version.

In 2021, in a public opinion survey conducted to determine the attitude of the Turkish public towards Afghans, Syrians, Iraqis, and other irregular migrants and asylum-seekers, 76 percent of respondents agreed with the statement that "these people should

[5] https://en.goc.gov.tr/international-protection17

be prevented from entering the country and those already in the country should be deported immediately" (Foreign Policy, 2021).

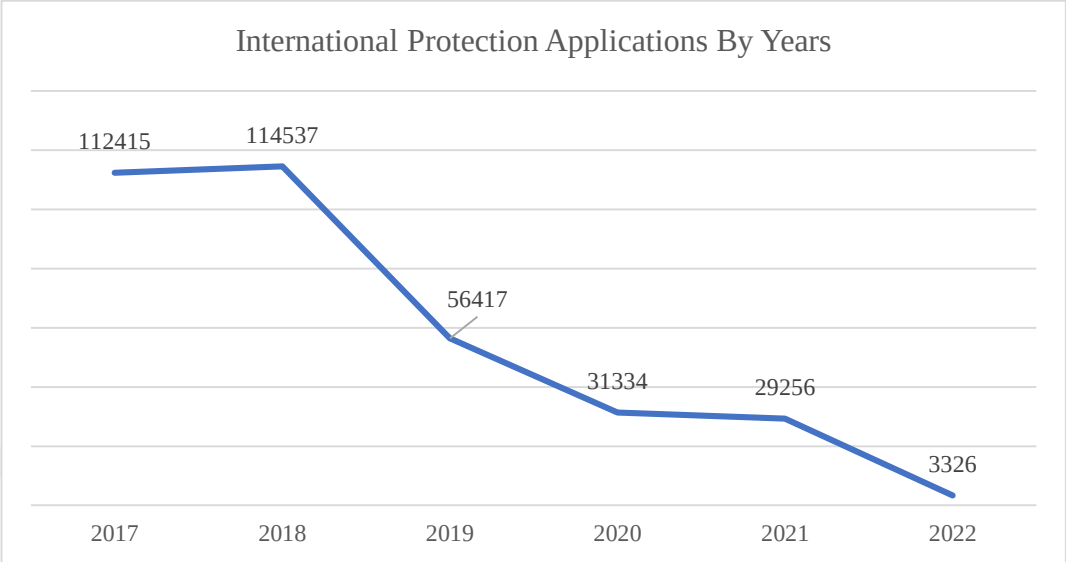

Figure 4.1. International Protection Applications By Years

It is clear that the pattern and determination process depends on nationality in some cases. After the war in Ukraine, some observations and comparisons about different treatment, pushbacks, and violence at borders and between Ukrainians, and people from other nationalities or geography, especially from Syria and Afghanistan, present discriminative attitudes and policies or different nationalities (Costello et al., 2021, p. 237).

In order to examine the refugee status determination in-depth, one should elaborate on the meaning of displaced people and migration for transit and receiving countries. The request and prediction are to honor their obligations by the state's parties. Yet, legal regulations explain the principles and concepts. There are many variables, most of which are political, for instance, the EU-Turkey readmission agreement. Turkey signed readmission agreements with many countries. However, one of the most used routes for refugees to reach Europe in recent years lies down through Turkey. For this reason, the Readmission Agreement between the European Union and the Republic of Turkey signed on 16.12.2013, is newsworthy and debatable from the point of EU policies and human rights law. According to the readmission agreement, irregular

migrants traveling from Turkey to the Aegean islands are sent to Turkey from the Aegean islands. If persons do not apply for asylum, their asylum application is found inadmissible or rejected. Every Syrian is sent to Turkey, and one Syrian from Turkey is resettled in the European Union.

4.1.1. Presidency of Migration Management and Provincial Directorates of Migration Management (PMM and PDMM)

According to Law No. 6458, Provincial Directorates of Migration Management (PDMM) in cities and PDMMs are subordinated to the Presidency of Migration Management. The General Directorate of Migration Management (DGMM) hierarchic position in administration has been changed, and DGMM has rosed the status to the "Presidency" with Presidential Decree (Presidential Decree No.85, 2021).

Article 65 of Law No. 6458 states that asylum seekers must make an application request in a reasonable period following their entry into the country. After PDMMs registration of international protection applications is made by individuals, applicants are expected to initiate and undertake refugee status determination.

UNHCR carried out the registration and status determination of asylum seekers in Turkey jointly with the General Directorate of Migration Management before 10 September 2018. UNHCR was also responsible for deciding on a satellite city to live in for refugees. The aim here is to support the general directorate, which is in the establishment phase and has not yet mastered an established registration, interview, and protection practice. As indicated in the law, the only interlocutor has become PMM since September 2018, asylum seekers who want to apply for protection in terms of registration and status determination in this sense, and UNHCR stopped the registration process in Turkey. Yet, it announced that it would continue protection activities. These include advisory services for international protection applicants and refugees.

4.1.2. Interview and Investigation

The refugees are called for an interview after their application by PDMM. Interviews play an essential role in determining refugee status. Basic principles should be implemented, such as being aware of gender gaps and differences, not asking about circumstantial violence, especially sexual violence, not discussing cultural values, and remembering that experiences may be traumatizing and may be told in an unexpected way. Over and above this, interviews for each family member should be prepared alone to narrate claims free from the influence of others. Interviewing only the "head of household" leads to thrown-away statements from other family members (UNHCR, 1991). Article 75 of Law No. 6458 regulates that interviews ought to occur considering applicants with special needs considering their needs. In order to eliminate the damage, it should be provided priority to persons with special needs who are *"…victims of torture, sexual assault or, other serious psychological, physical or sexual violence"* according to Article 67 (2) (LFIP, 2013).

Assessing the case and recognizing the applicant's status depends on the evaluator's line of vision. Nationality, gender, sexual identity, and sexual orientation or age effects on the applicant's case are indeclinable. By comparison, regions' inequation of reaching sources is at a level incommensurable. After the 1970s, the multi-crises of the Fordist economic model led to the working class migrating from south to north as an instance of resistance and a survival strategy (Georgi, 2019). Asylum seekers from Western countries may be encouraged and assessed in the other way in terms of credibility (Akin, 2017; Berg & Millbank, 2009; Dawson & Gerber, 2017 as cited in (Selim et al., 2022).

Similarly, the fact that women are not trusted and the supposition that they make up stories to get refugee status are not independent of prejudices based on gender (Binder &Tošić, 2005). It is possible not to make a complaint or ask the protection before fleeing from their country for survivors (CEDAW Committee, 2014). Survivors may have some reasons, such as not providing sufficient protection from the state. While evaluating applications in this regard, experts must be aware of the possibility of an unlawful concern. Moreover, being in touch traumatizing effects of gender-based persecution and the particular procedure of survivors are a must. Migration experts

ought to be chosen from cognizant and sensitive candidates about complex intersections, inequalities, and prejudices.

Another principle that enhances the quality of interviews is a turn of phrase. The interviewers or experts ought to use the same terminology with subjects during questioning. If the experts cannot determine their terminology or expression of them, it is preferable to use an inclusive attitude, verbal or non-verbally. For instance, some materials expressing respect for all identities, sexual orientations, and other characteristics that may cause discrimination can be placed in the interview area.

Another challenge is that providing international protection is interpreted as using the country's resources by people in many protection-providing or destination countries and ends with limiting access to the countries and hence not providing protection. The xenophobic attitude may have an impact on the officers instead of right-based.

Organs or representatives of the Council of Europe pointed out difficulties in accessing asylum procedures. Some of these obstacles are:

-The requests of applicants who are found in Turkey are not received and registered by the Turkish authorities,

-In some cases, applications for international protection are rejected without being subjected to an adequate and quality examination,

-Interviewers of asylum applicants working for the PMM should be trained in this regard,

-The applicants cannot access legal aid,

-There is no official data regarding the international protection status granted or rejected; for young Afghan men, it was determined that the applications were not registered (Council of Europe Special Representative for Migration and Refugees, 2021).

According to the observations, the designation of the process is an option for public authorities to improve the asylum system.

Finally, the principles should be pursued from the beginning to the end of refugee status determination. After investigation and decision International Protection Assessment Committee, under the coordination of PMM, assess rejections of international protection applications according to Article 115 of Law No. 6458 if applicants apply administration for reversing.

The Committee also ought to be designed in compliance with the letter and spirit of legal regulations argued in Chapter 2, in a similar manner to migration experts who interview. And also, asylum-seekers whose application for international protection has been rejected can file a lawsuit before administrative courts for the annulment of the decision. According to Article 81 of Law No. 6458, they can benefit from legal aid and represent themselves with a lawyer for these cases if their economic situation cannot afford the legal service fee. Legal aid is crucial to access asylum right since providing a court review of the decision. As a matter of fact, the ECtHR emphasized that the deported applicants, who lack access to civil society organizations or legal aid, may also affect prevents access to the court. The judgment highlights the legal aid, although it is not related to granting status (*O.s.a. And Others v. Greece*, 2019).

4.2. Legal Requirements for the Recognition of a Refugee

The requirements for granting refugee status are well-founded fear of being persecuted; the fear of persecution must exist because of a person's race, religion, nationality, membership of a particular social group, or political opinion, and the country of origin does not protect the applicant.

The Convention recognizes refugee status if and only if there is a claim linked to at least one of five grounds. "*Being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion*" is stated in Article 1(2)(a) of The 1951 Convention. The most ambiguous of these five reasons is belonging to a particular social group. As detailed in Chapter 3, gender-based persecution is in the frame of membership of a particular social group. Thus other four reasons are out of the subject of the study.

4.2.1. Well-founded Fear of Persecution

The refugee law was built on the well-founded fear of persecution. While examining the well-founded fear of persecution, first of all, it is necessary to dwell on the meaning of the concept of "persecution." Since the concept of persecution is not defined in the 1951 Convention, the meaning and scope of the concept have been tried to be determined by interpreting it by application.

The United Nations Development Program (UNDP) Human Development Report published in 1994, defines human security as *"being free from fear and need"* (being away from the fear of endangerment of their life or property). In addition, some categories are imposed to explain security. These categories are "*political security, social security, economic security, environmental security, food safety, health safety, and personal safety.*" (UNDP, 1994). International protection is a tool to maintain security in the circumstances absent state protection.

UNHCR states that being well-founded fear of persecution consists of subjective and objective elements. Reactions, backgrounds, relations, and effects of the incidents may changeable depending on the people they are. Fear refers to subjective elements, and well-founded refers to objective elements. Also, it is formulated as *"Persecution = Serious Harm + Lack of State protection*" in the sense of the 1951 Convention for women, according to UK Guide.

Violating fundamental human rights and being subjected to discrimination may be defined as persecution when it properly lasts (Goodwin-Gill & McAdam, 2021).
The claims should be more severe than a mere possibility (*Ambroise v. Canada*, 2021, para. 26)**.**

Discriminatory behaviors may be initiated in a "so-called" legal way. For instance, conditions in which punishment or detention may be implemented because of on the basis of five categories. In addition, disproportionate punishments are understood as persecution. Severe violations of human rights such as physical, sexual, or mental violence and restrictions to economic and social rights may amount to a well-founded

fear of persecution in addition to non-derogable rights [6](*EASO Practical Guide: Qualification for International Protection*, 2018). Whether or not the act is persecution depends on the seriousness of the discrimination and violence. Moreover, the act's seriousness is based on each case's circumstances (*M.N.N. v. Denmark*, 2013). In other words, the inquiry of circumstances is case-by-case, like UNHCR Handbook's suggestion about subjectivity.

As stated in many judgments of the European Court of Human Rights (Klein v. Russia; N-Sweden; M.S.S. - Belgium and Greece cases), on the situation of the country to be deported, reports prepared by governments, intergovernmental and non-governmental organizations should be taken into account when specifying the well-founded fear and state protection. Whether a claim is genuine and serious or not can only be understood when the conditions of that country are known.

As to UNHCR, it is sufficient for persons to show their fear of persecution with a cause in international protection law to become a refugee. Although the fact that gendered violence and issues are considered related to a particular social group does not necessarily mean that "all women" or "all LGBTIQ+'s " in society are eligible for refugee status, an asylum-seeker may be granted refugee status if they can demonstrate that they have a well-founded fear of persecution on account of their membership of a particular social group. They may not have the documentation to substantiate their claims (UNHCR, 2019).
In our opinion, in cases of asylum on the grounds of being a woman, where other requirements are also met, the particular social group may be "women in Afghanistan" or, as a sub-group, "women university students deprived of their right to education" (Kelly, 1993).

Historically, the definition of a refugee has been drawn up based on male experiences in the 1951 Geneva Convention, reflecting patriarchy and heteronormativity. (Fiddian-Qasmiyeh, 2014). In addition, other hegemonic interrelations may have effects on granting status. Therefore, it is possible to decide that claims are ordinary in a gendered

[6] These are right to life, prohibition of slavery and servitude, prohibition of torture, and inhuman or degrading treatment or punishment, the principle of legality in criminal law.

world when evaluating “the fear” for experts. In this way, gender-based violence is excluded from valid reasons for granting refugee status (Freedman, 2015: 72-73).

In addition, this point of view provides a suitable legal basis for the misconception that some gender-based violations are related to the domestic sphere, intimate partnership, and private. All these perspectives come into play when determining whether a claim is serious. In this issue, it is vital to avoid normalizing violence and internalize equal treatment, facilities, and rights.

Refugee or any other status is focused on future protection, and the most important aspect is that if someone is granted refugee status, it will not violate the rights of another person. In this regard, the applicant will not have to reach a definitive conclusion about the statement; on the contrary, the reasonable probability will suffice.

Women and girls who want to continue their education or working life, survivors who are not protected with some measures of all types of gender-based violence (as mentioned in Chapter 6 in detail), LGBTIQ+ because of practices and rules of sharia law may have a well-founded fear of persecution in the context for survivors of gender-based violence. Such claims may be instances of serious harm, they relate to the limitation of fundamental rights, they are about life safety, and they have a high probability of occurring in the current situation of Afghanistan. Documentation may also help support an asylum claim, but in many cases, applicants do not have documentation. For example, in Afghanistan, membership of LGBTIQ+ or feminist organizations and documents of it, statements from family and friends confirming identity and orientation, statements from past partners confirming sexual orientation, and police records or judgments of any incidents of violence. However, especially in regions such as Afghanistan, it is not possible to go to the police station and obtain records. By the way, the documentation should not be compulsory for the host country to prove fear.

4.2.2. Reasons and Nexus

For granting refugee status, fear of persecution must exist because of a person's race, religion, nationality, membership of a particular social group, or political opinion.

It is emphasized with ‘for reasons of” in Article 1 of the 1951 Convention and added five reasons.

The nexus is explicitly a criterion according to the interpretation of five reasons by drafters at the conference. There may be many reasons to flee a country for safety reasons, but the reasons were restricted in the preparatory conferences for the drafting of the convention. There was no reference to forced migration due to natural disasters, such as fire, earthquakes, or floods. It was stated that exposure to these disasters could not be considered to discriminate on the basis of race, religion, or political opinion. In other words, 1 Article of the 1951 Convention did not cover all events that affect human beings (UN General Assembly, 1951). Already the UN Human Rights Committee, in Ioane Teitiota v. Kiribati/New Zealand (Safi, 2020), has notified the five grounds for international protection and the impossibility of extending Article 1 of the 1951 Convention.

In cases where the fear is based on reasons other than these five, refugee status cannot be applied through a literal and historical interpretation of the article. The gender-based violence and gendered ban on fundamental rights have a connection with the gender structure, particularly being a girl or woman, or having sexual orientation and identity out of heteronormativity. By the way, these reasons are under particular social groups and appropriate to implement provisions of international protection.

4.2.3. State Protection

The international protection system ensures applicants' protection that their country is unable to protect or applicants are unwilling to be protected by their country because of well-founded fear. Therefore, international protection emerges when the absence of internal protection alternative.

United Kingdom has guides titled "Gender Issues in Asylum Claims" and "Refugee Women's Legal Group, Gender Guidelines for the Determination of Asylum Claims in the UK," which covers and highlights debated issues about gender-based asylum claims along the study. The role of the country of origin and the effectiveness of the

protection canalize the assessment of claims for the country of asylum. Failing to provide adequate protection to survivors by country of origin ought to be comprehended as well-founded fear for asylum seekers and finally ought to be evaluated as suitable claims for status.

In some cases, gender-based violence arises directly from the legislation. For instance, where traditions lead to violence, such as honor killings, encouraging those who practice them, and marital rape is not criminalized.

Following the legal tools, in cases where the law-enforcement officers of the origin country are insensitive or reluctant to requests for protection due to violence or refuse to investigate, prosecute and ultimately punish perpetrators of violence, the failure to prosecute and punish should be accepted that there is a state of gender-based persecution of women linked to the State. In the case of Afghanistan, if assessing the persecution looks to "serious harm" and "lack of state protection" requirements mentioned in the UK Guide, it would be unreasonable for an applicant who claims to have been subjected to systematic discrimination and denied access to fundamental rights to expect protection from Afghanistan as a state that has itself enacted discriminatory legal regulations.

During their investigation, the receiving states consider internal flight alternatives (IFA) as a way of fleeing persecution in the country of origin. IFA is under Article 8 of the 2004/83 Qualification Directive about the protection of refugees for the European Union Countries and the asylum system of the EU (The Council of The European Union, 2004). Moreover, the administrative courts in Turkey argue the possibility of providing safety if applicants change their locations in their judgments.

Parliamentary Assembly Council of Europe suggests "*restricting the use of internal flight alternatives for asylum seekers who invoke gender-related claims, taking carefully into account the availability of state protection in the area of relocation and the safety of the route, as well as the prevailing cultural and social conditions in the country and the possibilities to earn a living*." (PACE, 2010).

The situation and possible changes are still unpredictable, and after the Taliban takeover, the threats and risks are in every region. UNHCR also suggests not to pay regard to an internal flight or relocation alternative for asylum seekers from Afghanistan (UNHCR, 2022c). In other words, IFA does not always ensure safety, particularly in cases; persecution implemented by the country of origin or country of origin does not effectively protect the applicant from persecution. Afghanistan is an example of this after the Taliban takeover.

As detailed in Chapter 3, Afghanistan cannot provide effective protection to women and LGBTIQ+s because it rules the state with discriminatory regulations and restrictions on fundamental rights and freedoms. Despite providing protection to their citizens, the government vanished from women`s shelters and destroyed women`s self-organizations (The New Humanitarian, 2022)

4.3. Importance of Sur Place in Afghanistan Context

Human rights organizations have allied to follow the human rights situation and advocate for the protection of human rights in Afghanistan abuses with the maxim "There has never been a greater need." in March 2022 (Amnesty International, 2022a).

Meanwhile, arguing the Afghanistan context, the term sur place refugee should be paid regard to. Cause people who migrate somewhere before Taliban governing should assess from the point of international protection. The concept of sur place refugee can be explained as a person who is a resident of a country and migrate to another country without the threat of persecution after migration, and the origin country becomes unsecured, so the person may have a risk of facing persecution (‘Glossary on Migration’, 2019).

The case officers should examine when forming an estimate of sur place situations whether the actors of persecution have the knowledge related to the applicant’s actions or its probability and are unfavorably disposed towards them. The applicant’s opinions or activities would cause to have a well-founded fear of persecution or meet with a risk

of serious harm. Expressing and maintaining orientations held in the country of origin does not require that they were previously expressed in the country of origin. The applicant may choose not to do so, as these opinions or orientations may already be penalized or prohibited. However, the fact that the acts have already taken place will clearly help to explain and prove that the opinions or orientations in question were previously held views or orientations.

According to the QD in the European asylum system, Member States may determine, without prejudice to the 1951 Convention, that an applicant who subsequently makes an application will not normally be granted refugee status if the risk of persecution is based on circumstances created by the applicant's own decision after leaving the country of origin (Article 5(3) QD). The introduction of such an exception does not alter the requirement that the assessment of whether an applicant's fear is well-founded must always be prospective. Nevertheless, in such cases, the onus is on States to interpret the status determination process more deeply. It should be borne in mind that the principle of non-refoulement must be respected in all cases.

Asylum seekers from Afghanistan may also be eligible for Temporary Protection Status since 16 March 2022 in the USA, according to the Department of Homeland Security (DHS). Applicants who are already residing in the US as of the regulation date apply for TPS (The US Department of Homeland Security, 2022).

A small group of LGBTIQ+'s from Afghanistan resettled to the UK in October 2021 after the announcement of the UK because of their risks in Afghanistan (BBC, 2021).

UK and US cases also show the need to protect refugees from Afghanistan. In addition, previously rejected cases in Sweden will be subjected to a new review in the context of the human rights situation in Afghanistan (*A.A. v. Sweden*, 2022).

CHAPTER 5
MEMBERSHIP OF A PARTICULAR SOCIAL GROUP AS A BASIS FOR REFUGEE STATUS

5.1. Concept of Particular Social Group

The concept of membership in a particular social group has a legal basis in the 1951 Convention and Law No. 6458, considering Turkish Law. Despite the body of current law, it has rough edges for embodying the concept in question.

The 1951 Convention begins with humanitarian statements, aiming to ensure the protection refugees' home country does not provide. The term of particular social group amended the refugee definition later other four reasons. In addition, the term has not been explained at length in the Handbook (UNHCR, 2019) or other relevant sources of the UN (UNHCR, 1991, 2012, 2018). The concept of membership of a particular social group is the most ambiguous category, as it was added to the 1951 Convention without any explanation, unlike other reasons (Foster, 2012). One of the predictions about it is abstention from drawing concepts with definite boundaries (Helton, 1983).

Also, in Turkish Law, it is noteworthy that no opinion and framework has been formed on the subject. Considering that the refugees fleeing from Afghanistan mostly took refuge in Turkey via Iran, it is expected that there will be judicial decisions explaining the boundaries of these concepts regarding the concept of membership of a particular social group and the phenomenon of gender-based violence evaluated within this framework. As a matter of fact, during the research for this study, there is no work based on this subject in the doctrine, and in practice, the courts have not decided to clarify the concept. The PMM affiliated with the Ministry does not provide detailed information, and the institution recommends being content with the statistics on the site. On the other hand, lawmakers cannot always determine what events they desire to enact fully, and interpretation begins here. Norms are mostly abstract to ensure applicability.

5.2. Methods of Determining Particular Social Group

In Turkish law, no case law defines and explains terms on a particular social group and gender-based asylum claims, as examined in Chapter 1 under the heading 2.3.2.2., Case Law of Turkey. This situation reveals that it is deficient in this field and needs to be improved. It also shows the concept's ambiguity and the fact that there is not even a discussion about it, that it should be owned and raised by more rights defenders and lawyers.

To draw a frame for a "particular social group," two methods which *are "ejusdem generis"* and *"social perception method,"* are utilized mainly by judges and scholars in the literature. These are commonly used methods.

The "*ejusdem generis"* method is preferred in the common law system and suggests applying an immutable characteristic test to identify social groups in this method. Canada is chosen for ejusdem generis method (or the immutable characteristics method) as an example of implementation.

The method of social perception is based on how members of certain social groups are perceived by society, starting from external characteristics. The case law of Australia is studied to acknowledge the concept.

On the other hand, UNHCR applies "*the cumulative approach"* (dual requirements test) that includes both ejusdem generis and social perception as an alternative.
The European Union (hereinafter EU) system is also preferred as an instance of *"the cumulative method."* Nevertheless, the EU asserted this approach in a restrictive way.

The reason for including EU Countries and Canada is that these countries are a number of the target countries. In addition, since the 1951 Convention is a UN Convention and UNHCR has many guiding studies on status determination, how the concept was understood from the perspective of UNHCR was examined.

5.2.1. Canada: As An instance Of *"Ejusdem Generis"* Method

Canada ratified the 1951 Convention and its 1967 Protocol on June 4, 1969, and is a State Party (UNHCR, 2022a). While Canada has various legal instruments for international protection, like the EU asylum system, it is based on the 1951 Convention. Therefore, its practices and interpretations pursuant to the 1951 Convention are precedent-setting and may shed light on the assessments by PMMs, PDMMs, and administrative courts in Turkey.

To determine assigning to a particular social group vis-à-vis the Handbook of UNHCR is not clear enough. Thus it became unsurprising to set the framework and enlarge the concept for states. (Shacter, 1997). There are two fundamental cases for both particular social group definitions and also refugee women and sexual orientation-based claims, in Canada: Ward and Chan cases (*Canada v. Ward*, 1993; *Chan v. Canada*, 1995). These decisions' roots lie in the US judgment. Similarly, the ejusdem generis approach originated in the USA in pursuit of "Acosta" (*Matter of Acosta,*1985) decision and then has been applied to other common law countries such as Canada. To take a look at the decision, a citizen of El Salvador, Acosta, founded a cooperative called COTAXI with several taxis and taxi drivers who are members of the cooperative who received threats. Subsequently, the members' taxis were destroyed, and members were killed. Following the events, Acosta arrived in the United States and requested refugee status, claiming that they feared persecution because of their membership in a particular social group called "COTAXI drivers." However, the application was rejected, and finally, the United States Board of Immigration Appeals upheld the denial since the social group and members of it to which Acosta claimed to belong did not possess any immutable characteristics (*Matter of Acosta*, 1985).

With "C-A-" decision of the US Board of Immigration Appeals in 2006, social groups based on immutable characteristics such as gender or family relationships can be distinguished externally (*C-A-*, 2006). This decision added the visibility criterion to the immutable characteristics method. Visibility means that people belonging to social groups can be understood by society, and the Board has made the requirement of belonging to a social group more difficult (Bresnahan, 2011).

In the practice of Canada, The Supreme Court interpreted "membership of a particular social group" over three questions in Ward decision. The applicants should be a member of these categories:

- Members of this social group may share an innate trait that cannot be changed.
- The other possibility is that the person has a member of a group voluntarily and the motivation is so fundamental to identity or conscience that one should not be forced to renounce it.
-The applicant may be a member of a group associated with a former voluntary status, unalterable due to its historical permanence.

The Supreme Court of Canada repeated the three categories as Ward categories in its subsequent decisions (IRB Legal Services, 2019).

This approach may be insufficient for some cases related to gender issues. For instance, women or girls subjected to a child or forced marriage may fulfill the unchangeable characteristics. However, gender expression may be acknowledged as changeable. Other categories are groups whose members voluntarily associate for fundamental reasons and groups associated with a former voluntary status. These groups already can not identify asylum-seekers who have gender-based claims. If an asylum-seeker is a right defender and their aim is to defend gender equality and they are persecuted, these categories may ensure meaningful explanation.

Persons ought not to be forced to abandon groups whose members voluntarily associate. The approach is based on human rights orders' compitablence with human dignity.

5.2.2. Australia: As An Instance Of The *"Social Perception"* Method

In the social perception method, there is no consensus on determining the substantial separation of social groups from society. However, as explained in the Australian judgment, although different methods are adopted from time to time, how the group appears and is defined externally is important in this approach.

The method of social perception has emerged and was developed by the High Court of Australia (HCA), and the occurrence of the method is with decision A in 1977.

In the decision of Applicant A, the group consists of people, according to the HCA. The word "social" means association with other people. The particular means are identifiable.

The combined meaning of social and group is the quality of group members that stands apart from society due to their social characteristics. Thus, the concept refers to a group of people who are set apart from society because of a particular characteristic. According to the HCA, the determinant is being set apart of human groups from society because of a characteristic they share.

Moreover, the mere existence of a fear of persecution does not qualify a community as a social group. The particular social groups must be *objectively* recognized as social groups in a country. Therefore, the group must have common characteristics and backgrounds and be distinguishable from others. Hence, it is not necessary to be any definition by society that the group in question constitutes a particular social group.

The Federal Court of Australia imposed a *subjectivity requirement* on the social perception method in the Deyse Paquita Cedeno Zamora decision (*Minister for Immigration & Multicultural Affairs v Deyse Paquita Cedeno Zamora*, 1998). The communities are perceived by society as a group separate from society and can be considered a social group if they are perceived as such.

Finally, the HCA reinterpreted the concept in Applicant S.'s decision (*Applicant S v. Minister for Immigration and Multicultural Affairs*, 2004) that a group must be identifiable by virtue of a characteristic shared by its members. Moreover, the mere fear of persecution does not confer group status. The members of the group must be distinguishable by society.

5.2.3. The Alternative Test Method of UNHCR

UNHCR's guidance on social group identification is a very prominent and newsworthy resource in this regard. UNHCR embodied that the two methods in the literature, protected characteristics (in other words, ejusdem generis/immutable characteristics) and social perception, are mostly similar and come up with similar results. It adopted a cumulative test to confirm the accuracy of the decision.

The current concept of UNHCR about the particular social group is as follows:
- *"share **a common characteristic** other than their risk of being persecuted, or*
*-is **perceived as a group by society.***
The characteristic will often be one ;
-which is innate, unchangeable,
-or fundamental to identity, conscience or the exercise of one's human rights"(UNHCR, 2002).

As the definition suggests, if an applicant is assessed as a member of the particular social group according to the method of social perception or ejusdem generis, it will be possible to characterize the group as a particular social group and evaluate the claims.

In the first part of the definition, a particular social group is defined as one that shares a common characteristic other than the possibility of persecution. For the second part, UNHCR added the phrase "by society," and the tendency of UNHCR is the subjectivity among objective and subjective perception methods. Nevertheless, this method does not mean that members of the group or their common features should be publicly known in society. In the most basic sense, the group should be "cognizable" or "set apart from society." (UNHCR, 2002, para. 48).

The assessment is more competent because the alternative test method interprets claims in two ways.

The alternative test does not refer to if and only if pass both social perception and ejusdem generis tests for UNHCR. It supplies a more comprehensive ground for the

study of gender-related persecution. On the contrary, the EU does not apply the test with the style suggested by the UNHCR, as can see below.

5.2.4. The Cumulative Approach of the European Union (EU)

The main pieces of the EU legislation on international protection are the Convention on the Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities (Dublin Convention, Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 put the rules for deciding the State responsible for assessing an application by a third-country national or stateless person for asylum in a Member State Directive 2013/33/EU of the European Parliament and of the Council of 26 June 2013 criteria for the receiving of applications for international protection (Dublin III Regulation/Reception Conditions Directive), Directive 2013/32/EU of the European Parliament and of the Council of 26 June 2013 on ways of granting and annulment of status (Procedures Directive) and Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on procedures about qualification of third-stateless persons and third country citizens as right holders of international protection for the standardized status for refugees or applicants fulfilled the requirements for subsidiary protection (Qualification Directive). Apart from the documents mentioned above, the decisions of the Court of Justice are considered sources of refugee law.

Under European Union law, Member States have an obligation not to make any regulations contrary to the directives. Thus, within the framework of The Common European Asylum System (hereinafter CEAS), Member States must not violate the provisions of the QD and the 1951 Convention. Therefore, the standards to be described should be applicable to all EU members (Peers, 2012).

CEAS was in 1999. For the EU, the most related regulation for the study from the main sources mentioned above are QD (2004/83/EC) and the Recast QD (2011/95/EU) in addition to the 1951 Convention (Lülf, 2019). QD is about the protection of refugees for third-country nationals and stateless persons.

Although no direct provision in the European Convention on Human Rights reassures women and LGBTIQ+ to live free from violence and seek asylum in another country, it is important to point out that all people enjoy equal human rights. Moreover, the decisions delivered by the European Court of Human Rights (hereinafter the ECtHR), which is the supervisory body of the European Convention on Human Rights, are binding. There are no cases of the Court about direct refugee status determination of asylum seekers. The court does not examine how states applied the 1951 Convention. It draws a general framework through these decisions and judgments to non-refoulment, and it is also possible to benefit from these decisions and judgments in terms of international protection law.

Applications to the Court about deportation, especially the "right to life" regulated in Article 2, "prohibition of torture" regulated in Article 3, "prohibition of inhuman or degrading punishment or treatment is contained" "right to liberty and security" in Article 5, "right to respect for private and family life" in Article 8 of the European Convention on Human Rights.

Protocol No. 4, amending the European Convention on Human Rights, entered into force on 1 November 1988, and Protocol No.7 entered into force on 1 November 1988. These amendments regulated the "*collective expulsion of aliens*" with Article 4 of Protocol No.4 and "*procedural safeguards relating to expulsion of aliens*" with Article 1 of Protocol No.7. In addition "*right to an effective remedy*" with Article 13 of the Convention is implemented in cases regarding all these articles. These articles are the source and scope of review of the Court related non-refoulment and deportation cases.

The cumulative approach that the EU provided in the QD is stated. The QD is based on the concept of a particular social group in Article 10(1) (d). In the relevant article, it is explained what the member states will take into account when defining the social group. Accordingly, members of this social group may share an innate trait or a common past that cannot be changed. The other possibility is that the person has a trait that is so fundamental to identity or conscience that one should not be forced to renounce it (which may be due to human rights). If these two categories are seen as different by society, they may be members of a particular social group(Qualification Directive 2011/95/EU, 2011).

In other words, the asylum case on membership of a particular social group is enquired by means of elements that are common characteristics and distinct identities according to the cumulative approach in the EU system, and sex and gender, including gender identity and sexual orientation, are mentioned as an example of a particular social group (*EASO Practical Guide: Qualification for International Protection*, 2018).

The important part of the explanation of belonging to a particular social group is to seek two requirements, which are common characteristics and distinct identities, together at the same time. If they have both elements, they can form a particular social group. It is also stated that the process of recognizing the group and granting refugee status, should be supported by emphasizing gender perspectives. (*EASO Guidance on Membership of A Particular Social Group*, 2020).

5.2.5. Evaluation of Methods

For refugee status, the western countries and anglophone systems are preferred to examine in the study. Refugee law originates from Western scholars, even if it is not the only source of international protection law (Costello et al., 2021, p. 11). Regarding the income inequality between eastern and western countries, wars, and instability, the development of refugee law in the west is not surprising.

Canada case law includes the phrase "*those who have voluntarily united for fundamental reasons of human dignity and should not be forced to give up this unity*" While listing three categories under specific social groups, this principle, which is also included in the UNHCR guidelines, is highly decisive to social groups. It is also an attitude that respects individuals' own informed choices. The Canadian approach interprets the conditions of social group formation from a human rights perspective. This perspective has a comprehensive approach and interiorizes rights-based categories (Daley & Kelley, 2000). Indeed, as noted in Ward's decision of the Supreme Court of Canada, persons who may be persecuted on the grounds of sex, language, and sexual orientation may be considered a social group according to the term and definition of 1951 Convention.

Although the UNHCR method offers a more comprehensive view, all four methods provide an understanding of the Afghanistan case. When considering girls, women, LBGTIQ+s, and even cis-gender men who are subjected to gendered violence, the reasons for this violence are historical power inequalities according to both CEDAW and the Istanbul Convention. This violence is directed against individuals because of their gender, sexual orientation, gender expression, or sexual identity (SOGIESC). For these groups, the category of immutable characteristics in the Canadian approach is appropriate. This is because, although some of the concepts included in this scope, such as sexual expression, are not immutable (according to the queer theory concepts related to gender are fluid), in a state structure that respects human rights, individuals cannot be forced to change these characteristics without their pleasure. In the Australian method, segregation from society is expected. In Afghanistan, inequality and exclusion are evident in the regulations and prohibitions.

Two common methods in the literature, ejusdem generis (immutable characteristics) and social perception, which are described in this study concerning Canada and Australia, have been interpreted more comprehensively by UNHCR by drawing on these experiences. In our view, the EU's interpretation is far from abstractionist and seems to combine two requirements, which may lead to forfeiture. The alternative method evolved by UNHCR is reasonable to apply to the claims.

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CHAPTER 6
GENDER-BASED ASYLUM CLAIMS AND EVALUATION UNDER THE CATEGORY OF MEMBERSHIP OF A PARTICULAR SOCIAL GROUP

Gender-based asylum claims are assessed under the 1951 Convention in terms of belonging to a particular social group. Therefore, it is essential to reveal how individuals can appear as a member of a gender-based social group. The idiosyncrasy and characteristics of gender-based persecution should be pointed out more than the others. In gender-based persecution, the perpetrator or actors of the persecution have persecuted, or it is probable. Gender-based persecution targets those with an "inappropriate" gender structure at its simplest. According to the 1951 Convention, protected legal value is being a particular social group. The question for the country of asylum is in which circumstances persons are subjected to gender-based violence are under the particular social group.

6.1. The Link between Gender Structure and Displacement

To determine gender-based asylum claims recognizing gender is a must. In feminist literature, researchers adopt many methods and approach to acknowledge gender. In this study, gender is addressed as a social structure. The gender structure basically consists of individual, interactional, and institutional components as this approach (Risman& Davis, 2013). It is the whole of social and cultural constructions of masculinity and femininity.

UNHCR emphasizes gender as *"the relationship between women and men based on socially or culturally constructed and defined identities, status, roles, and responsibilities that are assigned to one sex or another*" (UNHCR, 2008). However, gender-based violence and persecution are not only related to being a woman. It also means the rejection of orientation which is from society's view (Costello et al., 2021, p. 164).

Rosenfeld focuses on the location of women in structures and social life and the effects on their lives by referring to gender literature. It includes inequalities and gender differences created in the cultures, rules, and institutions. It is indicated that gender is produced and also shapes the world (Rosenfeld, 2002).

On the other side, Butler's theory is also based on the performativity of gender. Performativity is only about doing and acting. There is no identity, subject, or being behind or before it. The performative is misleading. Butler says that she has put a lot of effort into trying to explain what the performative is and that their ideas have changed in line with the criticisms they have received. They mean "what we consider to be the inner essence of gender is produced through a series of ongoing performances and manifested through the gendered stylization of the body".

According to Butler, two elements that play an important role in identity construction are continuity and consistency. Through the continuity and consistency of prohibitions and masculine norms, a heterosexual matrix is formed. The claim of this matrix is that the relationship between sex, gender, and desires is consistent. What is considered masculine and what is considered feminine behave according to these assumptions and their desires are directed toward each other. On the other hand, performative language/discourse makes gender appear to be related to the substantial, while at the same time, it serves to conceal the impossibility of being a sex or gender. Language and discourse have always been performative tools for producing and legitimizing the binary norms of gender. At this point, Butler argues that gender constitutes an identity, citing the forced existence of the essentiality of gender through the aforementioned norms and prohibitions. What is at stake here is only an act of pretense; therefore, it is not possible to speak of an identity or a subject behind it. Since gender expressions are only expressions and manifestations, it is not possible to say that there is a gender identity behind them. To summarise, Butler argues that the essential parts of gender are performative, fictive, and forcibly brought into existence by social regulatory practices (Butler, 1999).

Policies and legal regulations are not exempted from being gendered, e.g., defining refugee women and LGBTİQ+'s as 'vulnerable' and men as 'baleful' is about

gendered constructions in policies (Freedman, 2015). In the literature, it is given attention to the wrongness of the reflected women as dependent, vulnerable, and passive victims. They can decide to migrate, develop migratory strategies, and cope with insecurity. "*Migration becoming would produce more positive outcomes if refugees were not constantly put in the position of being a victim or a pathological 'problem"*"(Ozkaleli, 2018). In the same concern, Freedman gives place to the Syrian woman's statement, "She was pleased to be alone with her husband and children, and no longer "controlled" by her husband's family." (Freedman et al., 2017, p. 136). Finally, although they are subjected to violence, they can succeed in overcoming and if it is not possible, they try to handle the negative situation as much as possible. Asylum may be seen as one of the strategies to cope with the gendered world for subjects. This viewpoint ensures examining the strategies and struggles of women against gender-based persecution and subjects (women and LGBTIQ+'s) participation as effective social agents.

Social attitudes change with this approach, and lower oppression is identified ingenuously as violence. From this point, asylum may be one of the ways or options for women and LGBTIQ+'s to feel freedom. In many cases, the migration process changes people positively, although it may include hard experiences.

The research about Syrian worker women revealed that they gained strength while facing difficulties thanks to beginning to work in the host country Turkey (Körükmez et al., 2020). Freedman's statement puts another dimension to the issue. Migration can change power relations and it has some effects on the behaviors of the member of the families. It is possible that the displacement makes it deepens gender-based violence in relations of some couples (Freedman et al., 2017, p. 136). From this point, asylum may be one of the ways or options for women and LGBTIQ+'s feel freedom. Consequently, people who are subjected to violence flee from the perpetrators or, in some cases, from oppressive culture. Since the gender structure is unstable and modernization has affected oppressed subjects. Kandiyoti indicates that women are demanding their rights and lives, and men resist not to lose their privileges (Kandiyoti, 2016).

Connected to this trend, the gender composition of migrants and their shifts changed over the years. This is also a subject of scientific research since the 80s, and the phenomenon that the majority of the applicants are women. Beyond this, it is important to recognise that, like children, LGBTIQ+`s, women, who are exploited in different ways, even under favourable conditions, may be much more affected by the state of "being a migrant".

6.2. Gender-Based Violence

6.2.1. Gender-Based Violence Against Women

Violence against women is elucidated by means of literature and international reports of institutions and treaties in this part. First of all, definitions of violence against women in some UN documents and literature help embody the ambit theoretically, which are appropriate tools for interpretation.

Firstly, as explained in General Recommendation No. 19, violence against women targets women because of their gender. It impacts women disproportionably. Acts of violence may be physical, mental, or sexual harm or threats of these acts, oppression, and other restrictions on liberty.

Gender-based acts restrict the enjoyment of women's human rights and their liberties within the scope of human rights and international law or conventions is discrimination (Committee on the Elimination of Discrimination against Women general recommendation No. 19, para. 7).

In the UN Declaration on the Elimination of Violence against Women, violence against women is defined under Article 1 as *"any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."* (General Assembly, 1993).

General Assembly resolution on the Elimination of Domestic Violence against Women recognizes that "*domestic violence can include economic deprivation and isolation and that such conduct may cause imminent harm to the safety, health or well-being of women"* (General Assembly, 2003).

As Istanbul Convention defines gender-based violence against women as *"violence that is directed against a woman because she is a woman or that affects women disproportionately*." (Council Of Europe Convention On Preventing And Combating Violence Against Women And Domestic Violence, 2011). The Istanbul Convention establishes that violations of women's rights are a violation of human rights.

Another essential term in the field is domestic violence or violence in intimate relationships. In some sources, it is stated intimate partner violence (IPV). Violence in intimate relationships is a newer term and means phycological, sexual, physical harm, and controlling behaviors. However, most of the legal instruments still use domestic violence for violence in intimate relationships (WHO, 2012)

Domestic violence is described in Article 3 (b) of the Istanbul Convention as violence occurs between family members, within the home, or between ex-partners. Domestic violence, which is one type of violence against women, can be physical, sexual, psychological or economic violence as other types of violence. The concept depends mostly on intimacy. The question is in which conditions domestic violence is understood as persecution.

Domestic violence can be considered persecution depending on the consequences it raises for victims. In some cases, the act of violence constituting persecution does not emanate directly from the state or public authorities. Nevertheless, there is state-related persecution with reference to international human rights law. States also ought to establish protection mechanisms against the violence that individuals are subjected to in their private lives. The ECtHR held that with Opuz v. Turkey decision. From this perspective, in the International protection regime, receiving countries also have an obligation to protect against domestic violence. In this situation, the receiving states ought to have knowledge of threats and risks in the country of origin. In the contrary case, the state fails to fulfill an obligation to threats related to violence**.**

States ought to take action to ensure the effective enjoyment of a fundamental right and the classical negative obligation to avoid human rights violations. Obligations of states, especially for private life, are positive obligations in the main cause that the state (also all institutions and individuals) promotes to create a society without violence, as in preventing domestic violence.

On the other hand, Russo and Pirlo state that gender expectations, male domination, power, and status imbalance cause violence against women. Women may be the perpetrator of violence against men. However, gendered practices affect women and (cisgender) men. On the other hand, women are the main subjects of many studies because women are damaged in gendered social structure as a consequence of hegemonic masculinity (Freedman et al., 2017; Russo & Pirlott, 2006).

Although violence against women is recognized as a human rights violation and health problem (Heise et al., 2002), quantitative rising and alteration of the nature and tools of violence led to discern violence as ordinary. Kandiyoti uses "the normalization of violence" term to explain violence in also gendered violence in Turkey and declares that there is a major gap between legislation about protecting women's rights and its implementation. However, the law is enough to punish the perpetrators of violence. Nevertheless, perpetrators utilize remission and unjust provocation (Kandiyoti, 2016)

Considering the situation in Turkey and the passivation against gendered violence, it is possible not to have a gender-sensitive approach during assessing asylum cases compared to an ideal world. Since violation of fundamental rights, including the right to live, is normalized, and the verge of violence is high in Turkey.

6.2.2. Gender-Based Violence Against LGBTIQ+

LGBTIQ+ refers to lesbian, gay, bisexual, transgender, intersex, and queer people. The terms are difficult to define. The arguments, debates, and terminology about sexual orientation, gender identity, gender expression, and sex characteristics (SOGIESC) are growing and rising area and creating new approaches in the light of feminist and

queer theories. In addition, it may depend on the region. There is different terminology. E.g., different cultures use different persons who are gay or lesbian and non-binaries such as; hijra, meti, lala, skesana, motsoalle, mithli, kuchu, kawein, travesty, muxé, fa'afafine, fakaleiti, hamjensgara and two-spirit (Free&Equal United Nations, n.d.). Indeed, courts confuse their identities to determine the social groups to which individuals belong. For e.q. in 2000, in the Hernandez-Montiel judgment, a person's status is "a homosexual with a female gender identity."
They were recognized for their membership in the "male" social group. In doctrine, the person in question is not a "gay male with female gender identity" group; It is stated that they belong to the social group "trans woman." (McDonald, 2014, p. 49).

There is no legally binding legal source directly on SOGIESC within the UN and EU Conventions scope. It is mentioned just in Yogyakarta Principles. The principles are not binding (*The Yogyakarta Principles*, 2006). In 2017 some provisions changed and published Yogyakarta+10 (*Yogyakarta Principles plus 10*, 2017)**.**

Sexual orientation and gender identity were outlined in Yogyakarta Principles, Yogyakarta Principles plus 10 attached explanations of gender expression and sex characteristics after observations, for ten years from 2007 to 2017.

Yogyakarta principles understand sexual orientation as: address emotional, affectional, and sexual attraction to, and intimate and sexual relations with, individuals. The feeling may be towards anyone of a different gender or the same gender or more than one gender.

Gender identity is an internal and individual experience of gender. It is not associated with the sex assigned at birth.

Yogyakarta Principles plus 10 are favored for definitions of the undermentioned. Gender expression individual presentation of the person's gender. It refers person's sense of body, and expressions oral or physical (with their style) through- "*dress, hairstyles, accessories, cosmetics and mannerisms, names, speech, behavioral patterns, and personal references*". Gender identity and gender expression are not signing the same concept. Therefore, the gender expression of an individual may

symbolize their identity or not. And also, gender identity includes gender expression in the Yogyakarta Principles, and all references to gender identity refer to gender expression.

Sex characteristic is about sex and anatomic features such as genitals, hormones, and other physical effects from adolescence. Sex characteristics emerged thanks to international human rights case law, which applies as much as gender identity, gender expression, and sexual orientation, considering Yogyakarta Principles plus 10.

The concept of heteronormativity in relation to sexual orientation heterosexuality is accepted as the only and correct orientation. Heteronormativity argues that an individual should live in harmony with social behavior patterns determined in parallel with his/her biologically assigned gender.

The related concept of heterosexism, on the other hand, not only determines with whom a person can have a sexual approach but also interferes with other gender behavior practices. In this context, heterosexism is expressed as the projection of heteronormativity. These two concepts expose the individual to discrimination and exclusion in case the individual deviates from gender behaviors. Similarly, defining all identities, expressions, and orientations related to SOGIESC may lead to congestion in this area. The "+" in the expression of LGBTIQ+ means that these orientations and identities are unlimited and that there may be transitions and should not be considered as a "mold."

It is possible to produce stereotypes and representations for any group in society. Even if out of heteronormativity, homonormative representations may be obstacles for applicants. It results in recognizing refugees as soon as it suits the homonormative representations (Koçak, 2020). Some cases or generalizations about SOGIESC do not mean restrictions, and the aim is to only illustrate in this part.

Some of the common grounds for persecution of LGBTIQ+ may be that they do not have a predominant sexual orientation in societies (heterosexuality) because of heteronormativity, or gender identity does not correspond to the sex assigned, or nonbinary (gender identity cannot describe male or female).

In most countries, LGBTIQ+ are apart from society and are assailable, especially when visible. UNHCR accepts claims of LGBTIQ+'s under the particular social group according to its alternative method and lists specific protection risks faced by LGBTIQ+ refugees, and these risks may guide the evaluation of refugee claims.

- One of the motivations for physical and sexual violence (beatings, abductions, honor killings, and rape) is making LGBTIQ+'s assimilate, making them suitable to heteronormative gender structure and showing to others as "an instance."

- Concealing the identity and orientation to living in peace because of the fear of violence.

- Being rejected by close relatives, friends, or forced marriage.

- The possibility of subjecting harassment, insults, and honor-related violence sometimes in public.

- They cannot find safe and appropriate housing or be evicted from them because of their sexual orientation and/or gender identity. It increases the risk of right violation.

- They have psychological impacts of physical, psychological, and sexual violence, and harm.

- The high possibility of exposure to health risks or dangers of violence because of survival sex work.

- Criminalization of same-sex relations as in Afghanistan and punishments, arrest, detention, and punishment, in addition to risks in detention centers.

- Restrictions on enjoying fundamental rights such as employment, housing, health care, education, civil law, or the situation of children. (*Resettlement Assessment Tool*, 2019).

Principle 23 of Yogyakarta Principles rough in asylum and persecution based on sexual orientation, gender identity, gender expression, and sex characteristics:

"Everyone has the right to seek and enjoy in other countries asylum from persecution, including persecution related to sexual orientation or gender identity. A State may not remove, expel or extradite a person to any State where that person may face a well-founded fear of torture, persecution, or any other form of cruel, inhuman, or degrading treatment or punishment on the basis of sexual orientation or gender identity."

Interpreting legal documents and tools over a wide frame prevents failures in status determination. It is possible not to have identified a range of notions about SOGIESC. If being queer is defined by way of stereotypes, experiences are recognized as persecution if and only suitable to these typologies and discourses. It culminates in the violation of the right to asylum and freedom and liberty of LGBTIQ+'s.

Because of stereotyping, states may query "sexual veracity," "the 'facticity of sexuality," and "visible and recognizable performances of one's SOGI (sexual orientation and gender identity) by Western spectator" when assessing the circumstances and eligibility of survivors fleeing persecution (Costello et al., 2021).

The asylum procedure, status determination, and protection, particularly for states, are detailed in Yogyakarta Principles plus 10 and may be used as a guide. As these principles, discrimination, violence, and oppression are some causes of persecution based on sexual orientation, gender identity, gender expression, or sex characteristics. Respecting self-identification and privacy and taking into consideration the needs of survivors in a sensitive manner is crucial throughout the assessment of the claims.

According to the ECtHR ruling, if the ill-treatment to which a person is subjected is based on their sexual orientation or gender identity, they cannot be expected to renounce this orientation or identity in order to flee persecution (*I.K. v. Switzerland*,

2018). Correlatively Canadian approach, persons ought not to be forced to abandon groups whose members voluntarily associate It based on human rights orders compitablence with human dignity.

Decision-makers must decide whether the person can live freely and openly as LGBTIQ+ if they return to their country of origin. This is a wide range of behavior that goes beyond simply receiving attention from and maintaining relationships with partners. If it is determined that the person will hide their sexual orientation/identity if they return to their country, decision-makers should consider why the person would do so.

If the person would conceal their identity not out of fear of persecution but because of social pressure or for self-selected cultural or religious reasons, there may not be a well-founded fear of persecution. However, if the reason for concealment is indeed fear of persecution, it is necessary to assess whether this fear is well-founded.

According to UK case law, a significant proportion of Afghan men may have had the same sexual experience without having a same-sex sexual orientation. What matters for credibility here is whether it was an orientation or a singular experience. In order to ensure this, it is particularly important to have practices of the applicant and their extent. One of the ways may be to assess the applicant's behavior in the host country.

6.3. The Connection between Gender and Particular Social Group

The European Parliament first accepted in 1984 that the status applications of persons who have been persecuted on the grounds of gender could be based on membership of a particular social group (Querton, 2022). The Parliament has accepted that in some countries, women may form a social group if they face inhuman treatment or various difficulties due to non-compliance with the social norms existing in the societies in which they live.

After the European Parliament, this practice started to be accepted by the courts in European Union countries, especially France, Germany, and England.

In 1985, the UNHCR Executive Board accepted that women could form a particular social group, similar to the European Parliament. In 1993, the Canadian Immigration and Refugee Board (IRB); In 1995, it was stated by the Immigration and Indigenization Administration (INS) in the United States that women could form social groups. Today, it is accepted in most national laws that social groups based on sex or gender can be formed.

In our opinion, the need for legal arrangements such as the 1952 Convention on the Political Rights of Women, the CEDAW, the 1980 Convention against Discrimination in Education, the Istanbul Convention, and other women's rights documents reveal the existence of gender oppression. In this regard, "women" are a group that should be addressed within the 1951 Convention's scope.

The fear of applicants who have suffered and are in danger of persecution is similar, according to the Handbook (UNHCR, 2019). Also, it may be found sufficient that the group's probable persecution to which the person belongs. Claims do not have to be directly related to applicants' own experiences. In addition, all these fears are related to the applicant and should be evaluated in terms of features and holistically in the scope of education level, past life, cultural level, etc (UNHCR, 2019).

Suggesting behaving in another way (more clearly, being matching gender codes) for applicants who live in a country gender oppression is highly felt is not compatible with rights.

Gender-based violence against women and girls is one of the main forms of persecution. Therefore, an application for asylum can be presented as a justification for the subsequent granting of status or a residence permit. (UNHCR, 2020).

The guideline summarize some instances of myths and bias about survivors of gender-based violence by means of the caselaw of Canada. Although gender structure changes from country to country, it is related to unequal power relations and patriarchy.

Therefore the examples give information for possible similar situations. Some of these myths are; expecting the survivor to file a complaint against the perpetrator, to make this complaint in the most reasonable time, not to return to them, and not to establish a relationship with them, assuming that the person will not be subjected to violence in cases of high socio-cultural status and education level, past sexual experiences (these experiences may also include sex work) negatively affecting the society's view of the survivor and reducing their credibility (IRB Legal Services, 2022).

Particular social groups based on gender and SOGIESC can describe as the main or subgroup, such as; “LGBTIQ+s and women in Afghanistan,” “trans women from Afghanistan deprived of financial support or protection,” and "men who are bisexual." Although it is accepted that “women” constitute the social group, according to some restricted approaches, particular social groups should be divided into subgroups and made "specific." For human rights-based evaluation, it ought to depart from this point. The “particular” is not related to the number of social group users; "idiosyncrasy" and "distinctiveness" are considerable (Aydınlı, 2017).

The United Kingdom Supreme Court, in a 2011 decision, ruled that the assessment of whether lesbians or gays have a well-founded fear of persecution due to membership of a social group can be made by determining the fears of persecution of lesbians or gays living in the country without concealing. The openness criterion is also in the case law of European Union member countries (Spijkerboer, 2013).

Similarly, the Court of Justice of the European Union stated that the authorities evaluating the status application could not be expected the applicants to hide their sexual orientation in order to avoid persecution (*X, Y, Z v Minister voor Immigratie en Asiel*, 2013).

In some cases, applicants are not a member of a social group. However, the opinion of the persecution actors in this direction may be sufficient. The Supreme Court of Australia accepted the status application of the person who was the subject of the incident on the grounds that he was perceived as such, even though he was not gay (Russ IV, 1998). Similarly, in the Conseil d'Etat of France decision of 2017, membership of a particular social group is not because of the innate qualities shared

by social groups. It has been pointed out that the people belonging to these social groups exist in the society or institutions' perception of them (Conseil d'État, 2017). Indeed, the social perception method is a more reasonable method. On the other hand, it would be hard to explain how people do not have the qualifications to form social groups but are even members of a particular social group if the method is based solely on immutable characteristics (of ejusdem generis) qualities.

6.4. Regarding Other Determinants: Intersectionality

Intersectionality helps to connect patriarchy, and other relations and patriarchies are shaped historically and geographically (Patil, 2013). CEDAW Committee also suggests taking different characteristics into account. The separation of gender from political and cultural intersections is not possible. Because there is no "universal patriarchy" (Butler, 1999), it would not be wrong to say there are patriarchal structures; similarly, there are different identities, sexual orientations, femininities and masculinities, and queer experiences in different forms. One strict standpoint and generalizing lead the study to the reductionist trap.

Bell Hooks also contributes to intersectionality theory in an overarching and holistic way. Firstly, Hooks refers to patriarchy in the USA as white supremacist capitalist patriarchy, including all its aspects. It is understood from the definition that she does not consider patriarchy in one axis. She suggests that 90s feminism originated around wealthy white heterosexual women, and feminist struggle is used opportunistically by women with class power, which ensures the continuation of the patriarchal system (Hooks et al., 2012).

When assessing applicants' claims, those concerned should be aware of the diversity. According to UNHCR, some women have vulnerabilities and special needs, for instance, "unaccompanied adolescent girls and women, elderly women and disabled women." This lens comprises employing and training gender-sensitive and neutral staff whose positions are officers, interpreters, etc. (UNHCR, 1991). Also, HIV status may contribute effects of discrimination and violence (UNHCR, 2012). Similarly, in

the case of Deri v. Canada, the Federal Court took into consideration that the stigma affiliated with infected HIV+ could come to mean persecution according to the case about a Ghanaian man who was HIV+ (*Deri v. Canada (Minister of Citizenship and Immigration)*, 2015).

If all people are evaluated the same, it will be impossible to find an answer to why some people migrate while others do not. Among women migrants, some women are more likely than their fellow women to face more risks, and therefore face more need for protection. Some of the qualities listed in the more current report of UNHCR refer to women in the group:

- Unaccompanied and isolated single women,
- Single female heads of households,
- Women survivors of sexual violence,
- Lesbians and transgenders
- Mentally ill and traumatized women refugees,
- Women in detention or similar (UNHCR, 2018).

Similarly, poor women in the country who are single parents tell they sell their daughters because they have no income. They sell their daughters because they bring in more income than their sons (DW Türkçe, 2022). Children and especially girls live at risk of deep poverty.

In the case of Afghanistan, one of the groups to need a sensitive determination process is the Hazaras. Hazaras are the third largest ethnic group in Afghanistan. They are predominantly of the Shia faith, and some are Sunni or Christian. The group makes up about 15% of Afghanistan's population, after Pashtuns and Tajiks. They are the poorest and most marginalized and are one of the groups that are vulnerable but receive no special attention. It should also be recognized that when combined with gender it can create sensitivities. The Taliban, along with ISIS, consider Shia Muslims to be infidels and have refused to respect the ethnic and religious honor of minorities, particularly the Shia Hazara. Meanwhile, the Hazaras have declared that they will take up arms to defend themselves against the Taliban's return to power (Verma, 2021, p. 181).

On the other hand, anti-immigrant, discriminating and victimizing policies and laws of host countries (or countries of asylum) especially affect poor and undocumented migrants instead of rich ones. Migrant women have been trafficked because of their financial impossibility. They cannot afford the costs of travel and travel documents (Chapkis, 2003; Freedman, 2016).

Freedman explains the EU's approach to the vulnerability of women. Migrant women's vulnerability to violence during and after the migration is not inherent to their being women. However, migration creates the conditions and EU policies do not eliminate them, but rather enhance them (Freedman, 2019, p. 8). This vulnerability is obtained through male-dominated assumptions and narratives of weakness in acknowledging patriarchal social structure and perpetrator-based (Purkey, 2022)

When the subject is transgender, violation or effects may be more severe compared with heterosexual cisgender. Similar comparisons may be between lesbian, gay, and heterosexual women. Because LGBTIQ+'s rights are not perceived in the manner of rights of women, children, or people with disabilities (D'Elio, 2015).

According to the Human Rights Watch report and interviews by it, none of the Afghans surveyed were allowed to seek asylum at any stage from arrest to deportation, and those who attempted to seek international protection were ignored. In particular, all single men in the study said that the possibility to register for international protection in Turkey was closed to them (HRW, 2022). We can observe that men cannot even access the international protection regime due to prejudices. Considering that immigration authorities do not fulfill these requirements, they may be deported without even receiving their requests. Perhaps the authorities have an idea about a person's gender identity and sexual orientation just by looking at their gender expression. Or they are not even interested in these variations.

For "developed countries' " restrictions on displacement and border is like a "global police state" to separate privileged people and locations from unprivileged and precarious people. Migration also has relations with class, race, gender, and other hierarchies in society, and as a consequence of the capitalist value system and unequal allocation, refugees are regarded as surplus (Georgi, 2019; Rajaram, 2018).

Colonization also explains the exclusionary behaviors of the receiving countries on non-European migrants (Mayblin, 2014). This also makes a difference among refugees depending on the country of origin. It's like the difference between Afghan refugees and Ukrainian refugees; some are welcomed.

As a result, it seems that decisions, implementation, and evaluation are without regard to the barriers that can prove subjects' identity, orientation, cultural status, educational status, dependence on their partners, and capacity to reach competent units. It increases the existing vulnerabilities of refugees further.

CONCLUSION

The rights of LGBTIQ+'s and women are still being denied worldwide despite legally binding regulations and propaganda by feminist organizations. They are almost punished by discriminatory social norms, particularly when their behaviors and demands are opposite of societies. They may be freed from the persecution arising from gender-based violence if and only if fleeing. Their claims have the probability of serious harm, and lack of state protection and their cause is within the scope of the 1951 Convention claims in the country of asylum for international protection.

It is reasonable that the shaping of gender-based roles in Afghanistan with patriarchal codes significantly affects life. This effect puts women, girls, and LGBTIQ+s in a disadvantaged position, and they are exposed to bans on their fundamental rights.

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Lawful refugee status determination for asylum-seekers from Afghanistan should be evaluated within international protection law rather than refugee law alone. The 1951 Convention, which is the main source of refugee law and has gender-blind features, is insufficient to understand and interpret current problems. For this reason, an assessment should be made in the framework of other international instruments, namely the CEDAW, the Istanbul Convention, and even soft law, utilizing non-binding Yogyakarta principles and the methods used by target countries in identifying a particular social group, violence, and gender should be interpreted with these texts. In this case, violations of rights based on gender will not be ignored.

After the Taliban takeover, women and girls are deprived of the most basic right to education. Women are almost banned from working. They are excluded from many sectors and they are almost not represented in politics. They can not go to public areas without a male and they have to be covered with burqa. Shelters for women seeking protection from violence have been closed, and same-sex sexual acts and sex outside marriage are prohibited and criminalized under Islamic law. Gender reassignment surgeries are not permitted or practiced. In the country under the rule of the Taliban, it can be seen that the possibility of violators undergoing an effective investigation is low, and even the state is in a position to implement direct discrimination and violation of rights.

Fittingly to the mentioned human rights conventions, physical, psychological, and sexual harm, forced and child marriage, stalking, female genital mutilation, forced abortion and forced sterilization, stalking, harmful cultural implementations, and discrimination based on sex SOGIESC are comprehended as gender-based violence.

Methods of determining particular social groups are researched based on cases in Canada, Australia, and the EU. The alternative way of UNHCR, which includes both ejusdem generis and social perception methods, is elucidator. As can be easily understood, social groups based on sexual orientation and gender identity can be objectively separated from society through sexual orientation or gender identity. In addition, the social groups for which sex, sexual orientation, and gender identity constitute a common characteristic are so distinguishable that discriminatory legal arrangements can be made about them.

For asylum-seekers to qualify as belonging to a particular social group, not all group members were persecuted or at risk of persecution. Therefore, if some persons are not subjected to violence or do not have the risk of persecution, it is not a cause not to grant refugee status on gender-based violence for the country of asylum. Moreover, creating a block list that includes certain social groups, their persecution, and acts against them may narrow down the concept. Listing can only be done for illustrative purposes.

The law and practices of it may cause increased insecurity. In this issue, gender sensitivity of law and its praxis gain even more importance. Against violation of women's and LGBTIQ+'s rights in Afghanistan, parties of the international protection regime must ensure protection and have positive obligations in gendered violence according to the conventions on gender-based violence like the CEDAW, the Istanbul Convention, and the case law of ECtHR. Otherwise, the inactivity of the states as a perpetrator gives a place in legal violence (Kivilcim, 2016). The concept makes connections between institutional and indirect discrimination and the logic of state dimension on gender structure example, Afghanistan. Some legal instruments in Afghanistan harm the fundamental rights of people and discriminate against women

and LGBTIQ+'s. On the other hand, forcing people to renounce or hide their gender identity or sexual orientation may constitute persecution.

Consequently, women and LGBTIQ+ in Afghanistan are at risk and they may have a well-founded fear of persecution because of their identities if there are other necessary conditions in their cases. The country of origin information read with the prevalence of violence in new Afghanistan reveals the impossibility of state protection, particularly gender-based violence, because of the perpetrator feature of the state. The take-over cancels out the improvements that occurred after the first rule of the Taliban, and probably gaining rights again will take time.

The protection might not even be ensured if the applicants had changed their location in Afghanistan. Therefore, IFA should not implement asylum seekers subjected to gender-based violence in Afghanistan, in the light of all studies and implementations, mostly of western countries. Since the perpetrator, promoter, and accomplice of violence are the epitome of Afghanistan and the state does not serve a protection response. In addition, protection means protecting against violations of rights in the narrow sense. On the other hand, its broad meaning includes residence at the state of the application (Battjes, 2006, p. 5). Ensuring rights including residence to refugees from Afghanistan is one of the primary parts of international protection.

Migration can be the subject of research in many fields ranging from international relations to political science, law, sociology to anthropology. Naturally, these disciplines define migration according to their own conceptual foundations and shape their discussions on migration around this axis. However, whichever way one looks at it, it is clear that we need to understand migration by revealing the different social groups and dynamics it harbors, rather than attributing meaning to migration that expresses a singular phenomenon with unclear borders.

Political discourse and rhetoric embedded in institutions have a determinative impact on the law. The court decisions, acceptance rates, and decisions to grant refugees are related to the claims as much as the migration policy outcomes and perception of the country of asylum. In this sense, the courts may also inclusively push politics and constitute social and moral legitimacy for refugees with judgments (Dauvergne, 2021).

The deportation orders and international protection applications steadily increased in 2021-2022. This is also related to the spread of hatred against migrants (HRW, 2022; PMM, 2021, 2023). For Turkey, it is difficult to expect a gender-related assessment at a time when international protection is already limited and deportations are increasing. Because the first obstacle that needs to be overcome first: Registration; applying for international protection. Therefore, the international protection regime needs to be improved. An accurate assessment cannot be made in a situation where foreigners who enter regularly are directly deported.

It suggests that all responsible persons have awareness about the intersections and impacts of class, race, age, health, sexual identity, gender identity, sexual orientation, gender expression, and sex characteristics from the application to finalizing the case. Moreover, judges and experts ought to prefer rights instead of positive law when principle and rule break a lance. This attitude does not mean arbitrariness while making decisions. Since the side of a judge is the protection of rights and freedoms. If there is a conflict of rules and principles as a political choice, the court must act as an activist and protect the rights-based principle against the positive rule. Considering that the most important duty of the judiciary at this point is to protect rights and freedoms, it should be natural for the judge to be a party to rights and freedoms (Dworkin, 2013).

Some obligations of the international community include supporting women, girls and LGBTIQ+ asylum seekers and refugees. There should therefore be no reluctance to provide international protection. Refugees should not be treated as a burden. Afghans seeking asylum in Turkey will have conditional refugee status and can only remain in Turkey until they are resettled in a safe third country. Therefore, safe third countries should accelerate the resettlement process.

The international protection system in Turkey has become generally dysfunctional. Some applicants do not even have their applications received and are deported directly. This situation affects all asylum seekers as well as those with gender-related claims. The general application system needs to be improved, as well as the assessment through a gender lens.

Bar associations should prioritize the provision of legal assistance to those in particular need.

UNHCR should take responsibility for all these processes and fulfill its protection mandate. In this context, the UNHCR may present an opinion as a third-party amicus curiae (friend of the court) in international protection legitimations. The intervention has the potential to have legal precedents, and its importance comes from this effect (Lülf, 2019). Regarding one of the responsibilities of UNHCR, improving the refugee law, the UNHCR may actively exercise the possibility of preventing serious violations in asylum cases from Afghanistan. In this field, wrong decisions can have fatal consequences.

The findings of the study may implement in states which are party to at least one of the conventions; the 1951 Convention, the CEDAW, and the Istanbul Convention, and the study suggests practitioners that assessing the claims under particular social groups by means of all human rights instruments under international protection regime is instead of only refugee law.

A country of asylum, particularly Turkey in the thesis, that interprets the claims and evaluates the cases within the scope of international protection should act with the knowledge that these categories are particular social groups, if they also carry other requirements, in the new Afghanistan.

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