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**A Global Network of Courts among Common Law Jurisdictions with Regard to Refugee  
Rights**

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**By**

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**Abstract**

Is there a global network of courts emerging? There has hardly been any systematic empirical research on this issue. Focusing on the implementation of the informal human rights norm that expects states to interpret the 1951 Convention relating to the Status of Refugees, also known as Refugee Convention, in a gender-sensitive way, I show that at least in Common Law Jurisdictions, such a network exists. I take the English and German legal systems as starting points for my analysis. While English high courts referred *inter alia* to decisions of high courts in other common law jurisdictions (horizontal *stare decisis*), thus justifying their compliance with the international norm, German high courts made it clear that they were not interested in how other jurisdictions dealt with the international norm. Instead, they referred to the positive law set by the legislative. What is more, none of the other civil law jurisdictions of Western states was among the precursors in applying the international norm. It has been implemented in Common Law systems such as the US, Australia, Canada, New Zealand and the UK before any Civil Law system seized any measures to do so. Thus, processes of norm implementation may be facilitated or impeded by the form of the legal system and the possibilities the respective system creates for making use of the horizontal *stare decisis* and for referring to international soft law.

## I. Introduction<sup>1</sup>

Is there a global network of courts emerging as predicted in the literature (Slaughter 2003; 2004)? There has hardly been any systematic empirical research on this issue. Focusing on the implementation of the informal human rights norm<sup>2</sup> that expects states to interpret the 1951 Convention relating to the Status of Refugees, also known as Refugee Convention, in a gender-sensitive way, I show that at least in Common Law Jurisdictions, such a network exists. I take the English<sup>3</sup> and German legal systems as starting points for my analysis. While English high courts referred *inter alia* to decisions of high courts in other Common Law jurisdictions (horizontal *stare decisis*), thus justifying their compliance with the international norm, German high courts made it clear that they were not interested in how other jurisdictions dealt with the international norm. Instead, they referred to the positive law set by the legislative. What is more, none of the other Civil Law jurisdictions of Western states was among the precursors in applying the international norm. It has been implemented in Common Law systems such as the US, Australia, Canada, New Zealand and the UK before any Civil Law system seized any measures to do so. Thus, processes of norm implementation may be facilitated or impeded by the form of the legal system and the possibilities the respective system creates for making use of the horizontal *stare decisis* and for referring to international soft law. This may ultimately lead to a fragmentation in the application of international law along the Common Law/Civil Law divide.

The literature generally defines norms as “collective understandings about proper behaviour for a given identity” (Jepperson et al. 1996: 54; cf. Checkel 1999: 551). This is the same for formal and informal norms (McNeely 1995: 6). The latter arise from self-commitments of states to act in a specific situation in a specific manner. States have increasingly employed time and resources to adopt such commitments as for example in the resolutions of the General Assembly of the United Nations and the Platforms of Action of the international world conferences. What is more, in recent times, monitoring mechanisms have

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<sup>1</sup> This paper summarizes some of the findings of my Ph.D. thesis. I am grateful to my supervisors Gunther Hellmann and Fritz Kratochwil for their invaluable advice as well as Rainer Baumann, Nicole Deitelhoff, Klaus Dingwerth, Tine Hanrieder and Bernhard Zangl.

<sup>2</sup> The right to seek asylum belongs to the classical human rights. For example, art. 14 of the Universal Declaration of Human Rights states: “Everyone has the right to seek and enjoy in other countries asylum from persecution.

<sup>3</sup> In the following, I use the term English judiciary and English legal system as it is generally used in the literature. The latter refers to the legal system of England and Wales (Gillespie 2007: 2-3). The English legal system is different from the Scottish legal system that continues to exist by way of the Act of Union (1707) and the Northern Irish legal system (Gillespie 2007: 3-4). Despite the differences between these legal systems in the UK, in the area of asylum and immigration law, the jurisdiction of the highest English Court, the House of Lords, pertains to the whole UK (JWCI 2006: 637-704; 1133-1149).

been institutionalised for supervising states' compliance with informal norms even though this used to be the prerogative of formal ones (Shelton 2000b: 10). Nevertheless, the role of informal norms has been largely neglected in IR.

Research on international norms has mainly focussed on the emergence and establishment of new norms (Clark 2001; Finnemore 1996; Weiss/Gordenker 1996; see also the overview in Finnemore/Sikkink 1998). With the exception of the research groups around Thomas Risse and Kathryn Sikkink (Risse/Ropp/Sikkink 1999; Risse/Jetschke/Schmitz 2002), the process of successful or difficult/respectively failed instances of norm implementation has hardly been analysed in detail. The literature considers (inter)national norm entrepreneurs decisive for international norms to have an impact (Archaya 2004; Brysk 1993; Cortell/Davis 2005; Gurotowitz 1999; Keck/Sikkink 1998: 35; Locher 2007; Risse/Ropp/Sikkink 1999). There is some disagreement, however, as to what other factors are necessary for norm success. Some authors argue that international norms are implemented more rapidly when they converge with domestic norms (Archaya 2004; Checkel 1999; Checkel 2001; McIntosh Sundstrom 2005). However, this argument, also known as "goodness of fit"-argument (see Mastenbroek 2005), entails the danger of a tautological fallacy: If identical norms pre-dominate on the national level it comes as no surprise if concurrent international norms are "implemented". Other studies work with the concept of domestic structure and focus in particular on the nature of state-society relations (Risse/Ropp 1999: 262-263; Keck/Sikkink 1998). They argue that the chances for norm success are high if the latter are "open" and enable norm entrepreneurs to gain access to decision-makers. These approaches have been unsatisfying for other reasons. Those who focus on the implementation of international human rights norms concentrate on dictatorships and state-society relations. The few exceptions who explore the impact of international norms on democracies mention a range of different properties that may influence the implementation of international norms. However, they do not explain how these gain effect (see Checkel 1999; Cortell/Davis 1996; Cortell/Davis 2005). In sum, there is no sufficient knowledge about the factors that facilitate or impede the process norm implementation in established democracies that may inform future theory-building. Research, as for example in the form of heuristic studies, is missing that analyses processes of successful and difficult norm implementation and identifies the causal mechanisms responsible for it (Eckstein 1975: 104-106; see also George/Bennett 2004: 75).

In the beginning of the new century, women refugees who had suffered from gendered persecution received much better protection in the UK than in Germany. In the UK, mainly by

virtue of the judiciary, the four measures the international norm expects states to seize were almost completely implemented with three of them displaying rule-consistent behaviour and one remaining somewhere between prescriptive status and rule-consistent behaviour. Most of these had been established by 2000, the last one by 2004. In contrast, in Germany, by the end of 2004 only one of the measures had been implemented and only incompletely. Apart from Germany, norm implementation proved difficult in other Civil Law jurisdictions, as for example in France and Italy, too. Only in 2001/2002 German political decision-makers began to seize first steps in order to change German laws and policies according to the requirements of the international norm. In 2004, they passed the “Zuwanderungsgesetz” that came into force in January 2005 rendering two more measures prescriptive.

I focus on the time-period from 1993 to the end of 2004. At the 1993 World Conference on Human Rights women’s rights were recognized as human rights. This recognition created the basis for the development of the international norm expecting states to interpret the Refugee Convention from a gender-sensitive perspective. I finish in the end of 2004. This enables me to analyse the processes that led to the mentioned changes in German asylum laws and policies.

In what follows, I will first provide a short introduction into the Refugee Convention and the development of the international norm expecting states to interpret it from a gender-sensitive perspective. In so doing, I will also identify the measures states are expected to seize in order to comply with the international norm. Next, I will give an overview of the state of norm implementation in the UK and Germany by the end of 2004 and how it came about focusing in particular on the role of the judiciary in the process. In comparing the differences between both cases, it becomes obvious that, on the one hand, the legal system served as a facilitator for norm implementation (UK) because it allowed for the reference to international informal norms and the horizontal *stare decisis*. On the other hand, the legal system impeded the norm implementation (Germany). I then analyse the differences between these two legal systems and how they contributed to the respective processes of norm implementation. Next I will show that the UK and Germany are no solitary cases but that they are representative of the norm implementation in Common Law Systems and Civil Law Systems vice versa. Finally, I will provide a summary of my findings and their normative implications.

## II. Gender and the Refugee Convention

The 1951 Convention relating to the Status of Refugees, also known as Refugee Convention, is considered the Magna Carta of international refugee law. It came into force in 1954. Designed against the backdrop of the National-Socialists' atrocities, it was meant to provide protection to those who had to flee because of the events before 1 January 1951. According to the refugee definition of article 1 A 2 a refugee is a person who

... owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion is outside his country of origin and is unable or, owing to such fear, is unwilling to avail himself 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.

The Protocol Relating on the Status of Refugees from 31 January 1967 removed the original Convention's time limit.<sup>4</sup> Asylum has been granted on the basis of the Refugee Convention without geographical or temporal restrictions ever since (Gareis/Varwick 2003: 263). According to its preamble, the United Nations' High Commissioner for Refugees (UNHCR) is charged with the task of supervising the Refugee Convention. The signatory states are obliged to co-operate with the UNHCR (article 35) which is itself subject to control of the General Assembly and the Economic and Social Council (ECOSOC) (Gareis/Varwick 2003: 264; Goodwin-Gill/McAdam 2007: 23). The policy directives of these two organs are binding on the UNHCR (Hathaway 2005: 429; see also Goodwin-Gill/McAdam 2007: 23). The UNHCR Executive Committee exercises similar influence on the work of the UNHCR as the General Assembly and the ECOSOC. It is comprised by representatives of the signatory states (Goodwin-Gill 2007: 23). Founded by the General Assembly in 1958, the Executive Committee currently consists of 76 states and examines the programmes of the UNHCR and gives assent to its budget (Goodwin-Gill/McAdam 2007: 23). Since 1972, it has addressed the states directly in the form of conclusions that provide explicit directions about appropriate behaviour and that are adopted unanimously. Not only the legally binding Refugee Convention but also these conclusions are considered sources of international refugee law.

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<sup>4</sup> In most signatory states to the Refugee Convention the persons seeking status under it are called "asylum-seekers" and being recognised under the Convention is referred to as receiving "asylum". In Germany, however, the term "asylum" is reserved for the refugees who are recognised under the provision of the constitution that "the politically persecuted enjoy the right to asylum" (former article 16 2 II GG, now article 16a I GG).

The same holds for the recommendations and guidelines of the UNHCR and the resolutions of other international institutions within the family of the UN as for example those by the General Assembly (Brandl 1997: 208-215). These phenomena are referred to collectively as soft law (Brandl 1997: 203). Soft law indicates what behaviour is expected: [States] ... feel obliged to explain the reasons for disregarding a resolution. If they adhere to it, they “observe” international standards” (Brandl 1997: 209).

The Refugee Convention has always aimed at protecting refugees regardless of their sex. In the past, however, mainly refugees benefited from it who had insisted on exercising classical political activities in the public sphere. Because of the traditional gender-roles predominant in most parts of the world, these persons had usually been male (Anker 1997: 131). In fact, international refugee law has evolved through an examination of male asylum applicants and their activities: “men have been considered the agents of political action and therefore the legitimate beneficiaries of protection for resulting persecution” (Crawley 2001: 5; see also Bhabba/Shutter 1994: 246; Kelly 1993: 674; UNHCR 2002: 3). Thus, abuse by state organs or state agents was considered the standard reason for an individual’s persecution. In contrast, crimes against women by members of their families or their local communities were regarded a private matter. Thus, severe forms of domestic violence, female genital mutilation, compulsory marriage, honour killings, acid attacks and other atrocities in the private realm did not count as human rights violations in the meaning of the Refugee Convention; even if the state tolerated them or was complicit in them. This unequal treatment of men and women results from the public-private distinction that underlies classical contract theories (Thomas Hobbes, John Locke and Jean-Jacques Rousseau). As has been shown by political theorists, women were “not party to the original contract through which men transform their natural freedom into the security of civil freedom” (Pateman 1988: 6). The assumptions of the classical contract theories underlie Western liberal states. As a consequence, international human instruments were designed to protect human rights in the public sphere<sup>5</sup> and the realm of the family remained invisible. However, the 1993 UN World Conference on Human Rights changed this situation: The community of states recognized women’s rights as human rights and acknowledged the political character of crimes against women in the private sphere. Ever since, international norm-providing institutions have expected states to apply the Refugee Convention in a gender-sensitive way, so that women refugees who fled gendered persecution<sup>6</sup> have a fair chance to receive refugee status.

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<sup>5</sup> See for example the Universal Declaration of Human Rights.

<sup>6</sup> The concept of “gendered persecution” refers to gendered *forms* of persecution as well as persecution for gender-related *reasons*. The first are also known as *gender-specific persecution*. Mainly females suffer from

This expectation finds expression in the resolutions of the UN General Assembly<sup>7</sup>, the Human Rights Commission<sup>8</sup> and the conclusions of the UNHCR Executive Committee<sup>9</sup> all of which have been agreed upon unanimously. It can be also found in the recommendations of the UNHCR as well as the final documents of the World Conferences on Human Rights (1993) and Women's Rights (1995). These sources provide further information on what states are *precisely* meant to do in order to interpret the Refugee Convention in a gender-sensitive manner:

**First**, states are expected to produce public Gender Guidelines in order to raise awareness among decision-makers and lawyers that women refugees may suffer from different forms of persecution and may be persecuted for different reasons than men but may nevertheless be recognised under the Refugee Convention.<sup>10</sup> Such guidelines are supposed to provide a gender-sensitive definition of “persecution” and of the convention grounds enumerated in article 1 A 2 (Crawley/Lester 2004; United Nations 1996: 92).

**Second**, states are expected to recognise persecution by non-state actors under the Refugee Convention if the country of origin does not provide any effective protection from it. In this respect, the term “non-state actor” is not only meant to cover actors from the public domain (as for example opposition parties) but also those traditionally viewed as “private” such as husbands, partners, brothers and members of the extended family.<sup>11</sup>

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such forms of persecution as for example female genital mutilation, rape, compulsory abortion, compulsory marriage or acid attacks. In contrast, persecution for gender-related *reasons*, which is also known as *gender-related persecution*, does not necessarily take gender-specific forms as for example in the case of whipping of women because of non-compliance with dress codes. The reasons for the persecution, nevertheless, lie in the gender of the victim (Crawley 2001: 6-9). It is important to note that, in particular in gender-specific forms of persecution, the perpetrators are frequently private actors such as members of the victim's family or of the local community. That is, these violations of women's rights often occur in the private sphere and are not caused by agents of the state.

<sup>7</sup> See for example United Nations General Assembly 1993; 1996; 2000.

<sup>8</sup> See for example the following resolutions by the United Nations Human Rights Commission entitled “The elimination of violence against women”: United Nations Human Rights Commission 1996; 1998; 2001; 2002; 2003.

<sup>9</sup> See the following conclusions by the UNHCR Executive Committee: no. 64 (1990); no. 73 (1993); no. 79 (1996); no. 81 (1997); no. 87 (1999); no. 95 (2003).

<sup>10</sup> See for example (1) the conclusions of the UNHCR Executive Committee; (2) the recommendations of the UN Special Rapporteur on violence against women, its causes and consequences and (3) the Platform of Action of the Fourth World Women's Conference. (1) See conclusion no. 73 of the UNHCR Executive Committee from 1993, paragraph (e); conclusion no. 77 from 1995, paragraph (g); conclusion no. 79 from 1996, paragraph (o) and resolution no. 87 from 1999, paragraph (n). (2) See the report of the UN Special Rapporteur from 26 January 1998 “Violence perpetrated and/or condoned by the state”, paragraph 223 (E/CN.4/1998/54). (3) see the UN Platform for Action and the Beijing Declaration, Fourth World Conference on Women, Beijing, China, 4-15 September 1995, paragraph 147 (i).

<sup>11</sup> See for example the 1979 UNHCR Handbook on Procedures and Criteria for Determining Refugee Status under 1951 Convention and the 1967 Protocol relating to the status of refugees; the 1991 UNHCR Guidelines on the Protection of Refugee Women; the UNHCR Guidelines on International Protection: Gender-Related Persecution within the context of article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees and the 2002 UNHCR Guidelines on International Protection: “Membership of a particular

**Third**, the convention ground “membership of a particular social group” is expected to be interpreted in an open manner. That is, refugee women who do not fit under any of the other convention grounds (race, religion, nationality and political opinion) but nevertheless have a well-founded fear of persecution because they do not receive any effective protection should be recognised under this convention ground.<sup>12</sup>

**Fourth**, states are expected to provide gender-specific statistics on the number of asylum applications as well as on the resulting decisions so that a possible gender bias in decision-making can be detected.<sup>13</sup>

Even though not legally binding, this international human rights norm complements the legally binding complex of the Refugee Convention’s norms. It amounts to a self-commitment by the signatories to the Refugee Convention and the member states of the UN more generally. The UK and Germany belong to both. They have also been members of the UNHCR Executive Committee since its foundation (<http://www.unhcr.org/excom/EXCOM/40112e984.pdf> [23.02.2010]) and of the Human Rights Commission during the period in which the mentioned resolutions were concluded (<http://www2.ohchr.org/english/bodies/chr/membership.htm> [23.02.2010]). Furthermore, they participated in the UN World Conferences on Human Rights and Women’s Rights and therefore, agreed upon their final documents, too.<sup>14</sup>

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social group” within the context of article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees.

<sup>12</sup> See for example conclusion no. 39 of the UNHCR Executive Committee from 1985, paragraph (k); the 1991 UNHCR Guidelines on the Protection of Refugee Women; the 2002 UNHCR Guidelines on International Protection: “Membership of a particular social group” within the context of article 1 A (2) of the 1951 Convention and/or its 1967 Protocol relating to the status of refugees and the 1995 as well as the 1998 report of the UN Special Rapporteur on violence against women, its causes and consequence, E/CN.4/1998/54 and E/CN.4.1995/42 respectively. For the 1995 report refer to paragraph 309(g) and for the 1998 report to paragraph 178.

<sup>13</sup> See for example the following conclusions of the UNHCR Executive Committee: no. 39 from 1985, paragraph (i); no. 64 from 1990, paragraph I and no. 81 from 1997, paragraph (t). See also the 1991 UNHCR Guidelines on the Protection of Refugee Women and the 2003 UNHCR Agenda for Protection.

<sup>14</sup> In my thesis I show that before the development of the international norm, neither Germany nor the UK had – with one exception – adopted the measures expected by the norm for norms prevailing on the national level. The exception are gendered statistics on the number of asylum seekers (not on decisions, however) in the UK that already existed in the early 1990s.

<b>International Norm Expecting States to Interpret the Refugee Convention in a Gender-Sensitive Manner</b>			
<b>First Measure</b>	<b>Second Measure</b>	<b>Third Measure</b>	<b>Fourth Measure</b>
Introduction of <i>Gender Guidelines</i>	Recognition of Persecution by Non-State Actors	Gender-Sensitive Interpretation of the Convention Ground „Membership of a Particular Social Group“	Comparable and Gender-Differentiated Statistics on the Number of Asylum-Seekers and the Decisions on all Levels of Decision-Making

### **III. Norm Implementation in the UK and Germany**

The different dealings with the norm in the UK and Germany are remarkable because the initial situation in both countries was comparable in three decisive points. First, in both a wealth of norm entrepreneurs campaigned for the norm's implementation. For example, both, norm entrepreneurs in the UK and Germany, independently carried out campaigns for norm implementation in the time from 1997-1999. Second, both countries had supported the recognition of women's rights as human rights on the international level. Third, both share the same regional subsystem via their membership of the EU. Even more so, in the framework of the European Communities, they have co-operated with the aim of harmonising their asylum policies since the 1980s. The Treaty on the European Union (1991/1992) specified immigration- and asylum policies as one of the issue-areas to be dealt with in the third pillar. In the Treaty of Amsterdam (1997/1999), member states decided to communitarise their immigration- and asylum policies by 1 Mai 2004. In addition to these three similarities, the number of asylum-seekers rose in the UK from 1997 onwards – that is, before any measures to implement the international norm were seized – while it declined steadily in Germany. Already in 1999, in relative numbers, more refugees applied for asylum in the UK than in

Germany. Since 2000, this has also been the case in absolute numbers.<sup>15</sup> For this reason, a slightly worse implementation of the norm in the UK would have come as no surprise. This is because one can assume that at any point in time, at which the number of asylum-seekers is on the rise, measures that may lead to its further increase are hardly enforceable. Therefore, the differences in the implementation of the international norm in the UK and Germany form a puzzle whose solution may contribute to theory-building.

With the exception of Gender Guidelines for first-instance decision-making<sup>16</sup>, in the UK, most of the measures expected by the international norm had been implemented in the period between 1999 and 2001 and led to rule-consistent behaviour. In contrast, in Germany only one of these measures had been implemented in the same time frame and only partially: Since the year 2000 the administrative instance<sup>17</sup> has been publishing gendered statistics on the numbers of asylum-seekers, thus, showing rule-consistent behaviour in this respect. However, these statistics do not provide any information on decisions.

Why did the UK comply with the international norm in a rather short period of time? Why was even partial norm compliance difficult to achieve in Germany?<sup>18</sup> For the part of the UK, it is striking to see that most of the measures were initiated by the judiciary that justified this move by making reference to international soft law and the horizontal *stare decisis*. This is the case for the Gender Guidelines for second- and third-instance decision-making, the recognition of persecution by non-state actors under the Refugee Convention and the gender-sensitive interpretation of the convention ground “membership of a particular social group”. The executive only provided gender-differentiated statistics on the decisions of asylum applications in first-instance decision-making in early 2001 and introduced Gender Guidelines for the same instance in March 2004. However, the German judiciary did not play a similar role. It rather impeded the process of norm implementation by explaining in seminal judgements why this new international norm was of no significance to Germany. Thus, it provided the respective governments with a legitimate reason for refraining from initiating relevant parliamentary initiatives for a change of law in an issue-area deemed highly sensitive.

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<sup>15</sup> For a detailed overview on the development of the number of asylum seekers for the UK see Heath/Jeffries/Pearce 2006: Table 2.5.; Home Office 1997: Table 1.2.; for the Federal Republic of Germany see Bundesamt für Migration und Flüchtlinge 2005: 37; Gerber 2003: 34.

<sup>16</sup> The British Home Office introduced Gender Guidelines for first-instance decision-making in 2004.

<sup>17</sup> The German “administrative instance” or “Verwaltungsinstanz” is comparable to what British lawyers refer to as “first-instance decision-making” by the Home Office.

<sup>18</sup> In my thesis I show that before the development of the international norm, neither Germany nor the UK had – with one exception – adopted the measures expected by the norm for norms prevailing on the national level. The exception are gendered statistics on the number of asylum seekers (not on decisions, however) in the UK that already existed in the early 1990s.

In what follows, I will illustrate the state of norm implementation by the end of the period of investigation. On the one hand, this serves to pinpoint the actors responsible for it and on the other hand, it provides insights into the process through which the respective measures were seized and, therefore, will help to substantiate my claim that a global network of courts exists in the area of refugee rights within the Common Law world. For matters of brevity, I will, in so doing, focus on the first three measures for, regardless of the respective legal system, the last one falls into the responsibility of the executive.

### ***Introduction of Gender Guidelines***

#### *UK: Asylum Gender Guidelines for the Appeal Level*

In 2000, the Immigration Appellate Authority (IAA)<sup>19</sup>, during the period of investigation responsible for second and third instance decision-making and thus part of the judiciary, introduced *Asylum Gender Guidelines*<sup>20</sup> independently from the executive and legislative. The Guidelines refer *inter alia* to the relevant sources of domestic law, to international soft law such as provided by the UNHCR and to the legal practice in other signatory states of the Refugee Convention, in particular in Australia, Canada, New Zealand and the USA. Thus, they provide a gender-sensitive definition of persecution in the sense of the Refugee Convention as well as of the five convention grounds. In support of such a gender-sensitive definition of persecution and the convention grounds, they quote decisions by the New Zealand Refugee Status Appeals Authority, the Canadian Federal Court of Appeal, the US Court of Appeals (Third Circuit), the US Board of Immigration Appeals and the Australian High Court. In so doing, they demonstrate that these requirements have already been recognised by high courts in other Common Law Jurisdictions.

In 2002, an Immigration Appeal Tribunal of the IAA decided that the *Asylum Gender Guidelines* had the same significance as the country information of the Home Office and the UNHCR Handbook. If not considered, a decision is considered faulty (*Terbas* [2002] UKIAT 03713, 13 August 2002). In contrast, in the following year, another tribunal decided that the *Asylum Gender Guidelines* had not be considered in order to reach a legally valid decision (*Sierra Leone* [2003] UKIAT 00121; see also *Crawley/Lester* 2004: 30). However, a study of the NGO Refugee's Women Resource Project that analysed the status of women's asylum

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<sup>19</sup> The *Asylum and Immigration Act 2004* abolished the two-tier system of appeals that had been institutionalized in the form of the IAA. The new single-tier body is called the "Asylum and Immigration Tribunal" (JWCI 2006: 8).

<sup>20</sup> In the second instance, adjudicators decided, in the third instance *Immigration Appeal Tribunals* consisting of two or more persons.

applications from January 2000 to December 2001 (n = 77), indicates that the existence of the Guidelines improved the applicants' chances of being recognised at the appeal level considerably (RWRP 2003: 167). Another study, conducted from January 2001 to December 2003 focused on the perceptions of actors involved in the application process such as by adjudicators and lawyers and found that the Guidelines are of continued relevance.

The majority of Adjudicators interviewed expressed the view the Guidelines reflect "common sense", and are used daily – sub-consciously – with the Guidelines only being specifically referred to as and when required. Nevertheless a number of Adjudicators acknowledged should a legal Representative not be conversant with the Guidelines that could adversely affect the Applicant's claim (Wallace/Holliday 2005: 3).

Thus, even though the consideration of the *Asylum Gender Guidelines* may not be necessary to reach a legally valid decision, there are strong indicators that they assume the role of guidelines for *Best Practice* and do not miss their aim. We can, therefore, assume rule-guided behaviour. What is more, the *Asylum Gender Guidelines* make frequent use of the horizontal *stare decisis* in order to justify the need for a gender-sensitive interpretation of the Refugee Convention.

*UK: Asylum policy instructions on gender issues in the asylum claim for first-instance decision-making (Home Office)*

The Home Office had refused to publish Gender Guidelines for a long time because "... we have not yet identified a need to issue *separate* guidance on dealing with female asylum seekers in the UK" (quoted after Crawley 2001: 15; emphasis in original) as it had led know the UNHCR in 1996. Rather, it had scattered references to gender-related issues across a range of Asylum Directorate Instructions (ADI) resp. their successors, the Asylum Policy Instructions (API). A comprehensive document on gender issues in the asylum claim was missing. In March 2004, the Home Office made good for that. It introduced the *Asylum Policy Instructions on gender issues in the asylum claim*. In order to do so, no consent from the legislative was necessary. Even though the API are not as detailed as the *Asylum Gender Guidelines* by the IAA, they are in vast sections identical with them. They also refer to them as source of further information. Unlike the *Asylum Gender Guidelines*, they do not cite judgements from the UK or other signatories to the Refugee Convention. However, they are legally binding for the caseworkers of the Home Office. In January 2005, three experts of the

civil society network *Refugee Women's Legal Group* that was instrumental in convincing the Home Office to introduce their own gender guidelines (Brabandt 2008) trained 80 Home Office caseworkers in the application of the API (Interviews with Alison Stanley, London, 01.11.2005 and with Heaven Crawley, Horsham, 04.11.2005).

An empirical study basing on 20 asylum decisions, all of them negative, conducted by the NGO *Refugee Women Resource Project* about the impact of the API a year after their institutionalization, came to mixed results (RWRP 2006: 23): The authors did identify a few exemplary cases in which the API had been applied but also a range of cases where this had not happened. They complemented their analysis with qualitative interviews about the asylum determination process. The problem with their findings is that their procedure was not methodologically sound. The “n” is too small and there is a selection bias with all decisions chosen being negative. Also, to a great part, the 17 interviewed experts have mutually suggested themselves for participation (RWRP 2006: 22). This is why we can assume that the study does have a bias which is for its purpose – the lobbying of the Home Office – quite understandable. For the purpose of this article, it is not suitable. What is more, the fact that the Home Office had some of their caseworkers trained by members of the civil society network which had pushed it to introduce gender guidelines in the first place, indicates its will to support their application. Given this mixed evidence, we must assume that the truth lies in the middle, that is, somewhere between prescriptive status and rule-guided behaviour.

### *Germany*

In Germany, in the period of investigation and beyond Gender Guidelines for the gender-sensitive interpretation of the Refugee Convention did not exist. Neither the administrative instance (Bundesamt für die Anerkennung ausländischer Flüchtlinge) nor the appeal level had introduced such guidelines. The instructions provided by the Bundesamt for the handling of women who had suffered from gendered persecution were only procedural and cannot be compared with the Gender Guidelines issued by Anglo-American countries (BT-Drucks. 13/9715: 10; Hailbronner 1998: 155; Bundesministerium des Innern 2000: 13; Jensen 2002: 73-75; Interview with Uta Rieger, Berlin, 08.09.2005). The Bundesamt shares this opinion (Ellinger 1999: 33). In this vein, civil servant Susanne Ellinger rejected the demand to interpret the Refugee Convention in a gender-sensitive manner for she considered this unnecessary (Ellinger 1999: 19-22). Thus, Germany does not fulfil one of the expectations raised by the international norm and is still in denial.

## ***Recognition of persecution by non-state actors including family and other “private” actors***

### ***UK***

According to English law, for receiving refugee status under the Refugee Convention, it is not of relevance whether the measures constituting the persecution can be accounted to the state. Rather, the absence of effective means of protection is relevant (Vermeulen et al. 1998: 11). This view is known as protection theory. According to English case law, persecution under the meaning of the Refugee Convention can result from

- (1) direct persecution by state actors
- (2) indirect persecution by state actors (if the state encourages the persecution by third parties)
- (3) persecution by groups that rule over a territory that has not been recognised as a state
- (4) persecution by third parties if the applicant cannot receive any effective protection in her country of origin (Vermeulen et al. 1998: 19-20, 23).

However, in the early 1990s, the protection theory was applied in a form that was marked by the image of a male refugee who suffered from persecution because he had engaged in some sort of protest in the public sphere. Female refugees who had suffered from persecution in the private sphere, as for example from massive domestic violence did not have any chance to be recognised under the Refugee Convention (Bhabba/Shutter 1994: 251-252). This changed within the 1990s. In a number of cases, the House of Lords<sup>21</sup> confirmed the application of the protection theory and its extension to the private sphere. There are two seminal judgements dealing with this matter and which are relevant for this study: That is, *Shah and Islam* [1999]<sup>22</sup> with regard to the recognition of persecution by actors deemed previously private and *Adan and Aitseguer*<sup>23</sup> [2000] for more fundamental questions concerning the recognition of persecution by non-state actors and the practice of other signatory states.

### ***Shah and Islam [1999]***

Shahana Shah and Seyda Islam had suffered from domestic violence and been wrongly accused of adultery. Being Pakistani, they feared to be punished according to the Sharia with 100 whippings or even with the stoning sentence. This is why they fled to the UK. Arriving

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<sup>21</sup> The House of Lords is the final court of appeal on points of law for the whole of the UK in civil cases.

<sup>22</sup> *Islam (A.P.) v. Secretary of State for the Home Department; R. v. Immigration Appeal Tribunal and Another; Ex Parte Shah* [1999].

<sup>23</sup> *R v Secretary of State for the Home Department, Ex Parte Lul Omar Adan: R v. Secretary of State for the Home Department, Ex Parte Hamid Aitseguer* [19/12/2000].

there, they argued that they were members of a particular social group and thus to be recognised under the Refugee Convention. It is intriguing to see that all instances recognized their fear of persecution by their husbands even though their membership to a particular social group was disputed. Because of the latter, they ended up in front of the House of Lords. However, all instances show an understanding of the consequences of the predominant gender relations in Pakistan for women. For example, the Law Lords stated that domestic violence had to be regarded as persecution if the Pakistani state proved unwilling or unable to protect the victims (HL, 2 ALL ER 545, 560). Notwithstanding a constitutional guarantee against discrimination on the grounds of sex, the Lords pointed out that the Pakistani state did not seize any measures to implement it. The decisive feature of the case was therefore that Pakistani women remained without protection. According to the Lords, the persecution Shah and Islam had suffered from could therefore be explained by two factors: First, the personal threat of violence issued by their husbands against both women. Second, the inability or unwillingness of the state to seize measures to their protection: “There is nothing personal about this. The evidence was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men” (HL, 2 All ER 545, 566). As will become clear in the following, the Lords’ decision reflects a general attitude of the English judiciary with regard to the recognition of non-state persecution.

*Adan and Aitseguer [2000]*

In August 1997, Lul Omar Adan, a woman from Somalia, had applied for asylum in Germany because she feared persecution because of her membership to the particular social group of her clan. Her application was refused because no state existed in Somalia, and, therefore, Adan could not suffer from political persecution. Next, Adan travelled to the UK and applied for asylum there. Hamid Aitseguer, a refugee from Algeria, had arrived in France in 1998. He continued to travel to the UK where he applied for asylum for fear of persecution by the *Groupe Islamique Armé* (GIA). He argued that the Algerian state was not able to protect him from the GIA. However, in both cases, the British secretary of state approached the German and French authorities and asked them whether they would be willing to deal with Adan’s and Aitseguer’s respective asylum claims in line with the provisions of the Dublin Convention. Both agreed to this and as a consequence, the secretary of state refused Adan’s and Aitseguer’s asylum applications without further consideration. He, then, instigated their deportation to Germany and France according to section 2(2)c of the *Asylum and Immigration Act* 1996, which provides for the deportation of asylum-seekers to safe third countries subject

to these countries' adherence to the non-refoulement principle enshrined in the Refugee Convention. Both, Adan and Aitseguer, applied for a judicial review against their deportation and argued that Germany and France were no safe countries because they were likely to be deported to their countries of origin from there.

This is because, then, the accountability theory was applied in Germany and France. In contrast to the protection theory, it bases on the assumption that persecution must be "political" and, therefore, accountable to the state, in order for it to be recognised on the basis of the Refugee Convention. This is why the German authorities had initially refused Adan's asylum application for a lack of a Somalian state and why it was most likely that Aitseguer's asylum application would be refused in France because the Algerian state had forbidden the GIA and made it indictable. Their cases went before the English Divisional Court and then the Court of Appeal. Meanwhile, the secretary of state informed both, Adan and Aitseguer that he would not deport them to Germany resp. France. Rather, he would decide himself about their applications independently of the Court of Appeal's decision. This was because he intended to use the lawsuit in order to present new evidence of sufficient protection in both, Germany and France. In the face of more than 200 pending cases with similar issues at stake, this was deemed necessary in order to ensure future deportations.

However, the secretary of state's hope on a favourable decision by the Court of Appeal was in vain. Even though the judges decided that not all signatory states to the Refugee Convention could be expected to interpret every detail of the Convention unisonous, they still found that Germany and France stretched their interpretation of the Convention too far: "If a signatory state were to take a position which was as a matter of law at variance with the Convention's true interpretation, and act upon it, it could not be regarded as a safe third country" (CA, 2 AC 477, 498-499). The scope of the definition of a refugee was a matter of law, otherwise "the protection offered by the Convention would in effect be reduced to a discretionary exercise by the signatory states" (CA, 2 AC 477, 499). The Supreme Court of Canada and the High Court of Australia had decided similarly (ibd.). Thus, the judges argued that it was among the duties of the secretary of state to ensure that the legal practice in third countries was in line with the Convention's true interpretation. This was not the case for Germany and France. Under the provisions of the *Immigration and Asylum Act 1996* Adan and Aitseguer could therefore not be deported there.

Now, the secretary of state applied for judicial review against this decision and the cases went before the House of Lords. The Law Lords decided that it was necessary to determine the autonomous meaning of the relevant treaty provision in the Refugee

Convention. This was because according to them, an international contract was to be interpreted “unconstrained by technical principles of English law, or by English legal precedent, but on broad principles of general acceptance” (HL, 2 AC 477, 516). Article 31 of the Vienna Convention on the Law of Treaties reads “(1) A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” Therefore, context of the purpose of the interpretation of a treaty was held to comprise, according to the Law of Treaties, *inter alia*, the text’s preamble and annexes. From this it followed that the Refugee Convention was to be given an independent meaning derivable from the Convention’s text and “without taking colour from distinctive features of the legal system of any individual contracting state.” This view was also supported by the European Court of Justice. On this assumption, the Lords held that if article 33 of the Refugee Convention (the non-refoulement principle) had intended states’ obligation to be limited to cases where a state carried out or tolerated the persecution, article 33 would have said so. What was more, under articles 35 and 36 of the Refugee Convention the UNHCR played a critical role in the application of the Convention. The Handbook issued by the UNHCR, although not binding on states, implied a similar interpretation to theirs. In addition, the protection theory was accepted by a majority of states: “It is fair to say that, internationally, the view adopted by the group which includes the United Kingdom is generally preferred and is supported by the UNHCR” (HL, 2 AC 477, 528). Therefore, the Lords argued that the Secretary of State had “materially misdirected himself” and that his decisions had to “quashed” because Germany and France were not to be considered safe third countries under the *Asylum and Immigration Act 1996*.

In *Shah and Islam* all instances were unanimous about the fact that the claimants had suffered from persecution by their husbands and that this fell under the Refugee Convention. Thus, unlike in the first half of the 1990s, persecution by non-state actors including those previously deemed private could now receive recognition. What is more, the judges of the Court of Appeal and the Law Lords made it clear in *Adan and Aitseguer* that this was a question of principle. In so doing, they referred *inter alia* to decisions by Canadian and Australian Courts, the Vienna Convention and the soft law issued by the UNHCR. In sum, rule consistent-behaviour can also be found with regard to the second measure, the international norm expects states to seize.

## *Germany*

In Germany, in the period of investigation, the accountability theory was applied. Its underlying assumption is that political persecution must *per definitionem* be persecution emanating from the state. According to this view, the question is critical, whether the persecution feared comes from the state or may be attributed to it. In contrast, it is irrelevant whether the refugee may find adequate protection or not. That is, even without adequate protection, an asylum-seeker would not be recognised as refugee if his/her persecution did not emanate from the state. This is what the Federal Administrative Court (Bundesverwaltungsgericht) had decided in a seminal judgement that endured during the period of investigation (see Marx 2005: 640 and BVerwGE, NVwZ 1994: 5).<sup>24</sup> The judges explained their decision with the substance of the Refugee Convention's regulations at the time when the Federal Republic of Germany had ratified and transformed it into domestic law by virtue of an Act of Parliament in September 1953 (BGBl II, 559). Then, it was the content of the Refugee Convention that only a person with a well-founded fear of persecution by the state was covered by article 1 A 2 of the Refugee Convention. It follows from this that only such persons could not be deported because of article 33 of the Refugee Convention. This is because the Refugee Convention was meant to protect persons who had become refugees because of the events before January 1, 1951. These persons had suffered from persecution by state actors and would not be protected by their country of origin. At the time of the Refugee Convention's emergence, it was considered the basic characteristic of a refugee that the connection between him and his state had broken and that as a consequence, the state oppressed and intimidated the individual. The judges explained that the development of international law and its application in other signatory states of the Refugee Convention such as the United States of America, Canada and Australia and the UK had led to recognition of persecution by non-state actors and that this was in sync with the recommendations of UNHCR. However, these developments bore no meaning for the Federal Republic of Germany:

The interpretation of a binding international contract through national courts of individual signatory states pertains to the contract in its property as respective transformed national law. The development of law through the jurisdiction of a signatory state in relation to the contract as transformed into national law of this state does not cover the contract as transformed into national law of another signatory state (*author's translation*; NVwZ 1994: 5, 499).

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<sup>24</sup> See also the similar judgement by the Bundesverwaltungsgericht from 15 April 1997 – BVerwG 9 C. 15.96).

The judges proceeded that in reform of the Foreigner's Law in 1990, the German legislative had made it clear that the Refugee Convention was meant to continue to adhere to the requirement of persecution by state actors (NVwZ 1994: 5, 499). Thus, they concluded that protection from deportation according to § 51 AuslG (status of refugees recognised according to the Refugee Convention) demanded very much like article 16 a of the German Basic Law that the persecution feared resulted from the state.

The respective German governments followed the Courts. They justified the equation of "political" with "state" with the jurisdiction by the German High Courts and argued that asylum as well as protection from deportation according to § 51 AuslG was not meant to offer protection as such, from the family or society, but only protection from grasp of the state.<sup>25</sup> As a consequence, women who fled from fear of genital mutilation or honour killings hardly had any chance to be recognised under the Refugee Convention (nor to receive asylum under the German Basic Law). This protection gap for those suffering from non-state persecution was not only made out by the Law Lords in *Adan and Aitesguer*, but also by the European Court of Human Rights in *TI v. United Kingdom*<sup>26</sup> (see also Meyer-Ladewig 2006: Rn 25a). Both, the judiciary and resp. German executives thus denied the significance of the development of the international norm.

### ***Gender-Sensitive Interpretation of the Convention Ground „Membership of a Particular Social Group“***

#### ***UK***

Up until the late 1990s, hardly any woman refugee had been recognised as a member of a particular social group in the UK because the question as to what group she belonged was hard to be resolved. In order to avoid tautological reasoning, no reference to the persecution feared was allowed in the definition of the group. The question if a particular social group could reasonably be expected to be cohesive turned out to be another problem. The British secretary of state felt that at least a minimum of cohesiveness should be given for a particular social group to exist (HL, 2 All ER, 545, 545). Therefore, "women" as such could not be considered a particular social group because not *every* woman in a country would be

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<sup>25</sup> The governments by Helmut Kohl (CDU/CSU and F.D.P.) and Gerhard Schröder (SPD and Green Party) did not cease to emphasize this. For the government Kohl see BT-Drucks. 13/9715 and for the government Schröder see BT-Drucks. 14/6682.

<sup>26</sup> *TI v United Kingdom* [2000] INLR 211 (see also InfAuslR 7-8/2001, 321-326).

threatened or concerned from the same form of persecution. The persecution could thus not be because of “reasons of” their membership of a particular social group (Kirvan 1999: 335). *Shah and Islam*, the judgement discussed with regard to the recognition of persecution by non-state actors is seminal to the institutionalisation of a gender-sensitive interpretation of the Convention Ground “Membership of a Particular Social Group” in the UK.

*Shah and Islam [1999]*

Even though all instances had considered Shah and Islam as possessing a well-founded fear of persecution, the secretary of state had refused their asylum application in first-instance decision-making and offered them *Exceptional Leave to Remain*<sup>27</sup> instead, for he could not see how their fear of persecution was linked to one of the five Convention Grounds. Shah and Islam appealed against this decision and went through all instances including the Court of Appeal. Very much the same as the secretary of state, who was one of the parties of the court proceedings, the judges decided that in the case of Shah and Islam a degree of “cohesiveness, co-operation and interdependence” was missing that would be required for a particular social group to exist (HL, 2 All ER 545, 550-551) and dismissed their appeal. However, with one dissenting vote, the House of Lords quashed the decision of the Court of Appeal. The Law Lords Steyn, Hoffmann and Hope of Craighead decided that Shah and Islam were members of the particular social group of “women in Pakistan.”<sup>28</sup> In so doing, they followed the definition of this Convention Ground provided by the representative of the UNHCR. He had intervened in the proceedings and referred the judges to the position of the UNHCR-Executive Committee, namely, that women who are at odds with the social mores of the society they live in or are perceived to reject them can constitute a particular social group. The mentioned Law Lords expanded this definition: They did not only recognise the concerned women as members of a particular social group but Pakistani Women in general (HL, 2 All ER 545, 558, 565, 569). The Law Lords justified this move with the preamble of the Refugee

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<sup>27</sup> Exceptional Leave to Remain (ELR) was conferred upon asylum-seekers for “compassionate grounds” if they could not be recognised under the Refugee Convention but nevertheless had a well-founded fear of persecution. After seven years of ELR (four years after 1998), they could apply for Indefinite Leave to Remain which they would usually get without further examination (JWCI 2002: 218). However, ELR did not entail the right of abode for the children or spouse of the asylum-seeker.

<sup>28</sup> Law Lord Hutton also decided in favour of Shah and Islam. However, he defined the particular social group they belonged to differently. In so doing, he followed more closely the argument of Shah and Islam’s lawyers. They considered the particular social group determined by a) the sex of the claimants; b) the suspicion of adultery and c) their unprotected position in Pakistan (HL, 2 All ER 545, 569-570). Only Lord Millett dissented for he was unable to determine a particular social group: “Battered wives do not form a social group because, if the group is limited to battered wives, it is defined by the persecution, while if it is extended to include all married women, those who are battered are not persecuted because they are members of the group (HL, 2 All ER 545, 573).

Convention that referred to the Universal Declaration of Human Rights “which proclaimed the principle of the equality of all human beings and specifically provided that the entitlement to equality means equality ‘without distinction of any kind, such as race, colour, sex ...’ (see arts 1 and 2)” (HL, 2 All ER 545, 551-552). Therefore, they concluded that this premise underlies the Refugee Convention, too and that the fundamental aim of the Refugee Convention was the fight against discrimination. Against this background the Lords saw themselves confronted with the problem to determine the definition of the Convention Ground “membership of a particular social group” and also, whether a minimum of cohesiveness had to be required for a particular social group to exist.

While the judges of the Court of Appeal had based their decision on an US-American judgement – *Sanchez - Trujillo*<sup>29</sup> by the Ninth Circuit - that had required a degree of cohesiveness, the Law Lords declared that “on circuits other than the Ninth Circuit, a less restrictive interpretation of the words ‘particular social group’ has been adopted. The foundation of the contrary view is the earlier decision of the Board of Immigration Appeals in *In re Acosta* (1985) 19 I & 211. This decision was not mentioned in *Sanchez-Trujillo*” (HL, 2 All ER 545, 551-552). Above, the Law Lords found support for the approach taken in *Acosta* in further United States decisions they proceeded to cite. From this, they concluded that “there are divergent streams of authority in the United States. And it may be right to say that the preponderance of U.S. case law does not support *Sanchez-Trujillo*” (HL, 2 All ER 545, 554) but rather *Acosta*.<sup>30</sup> In *Acosta*, the US Board of Immigration Appeals had decided that the Convention Ground “membership of a particular social group” requires that an individual fears persecution because they are a member of a group of persons that share an inalienable characteristic: “The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience...” (quoted after HL, 2 All ER, 545, 553). They also disagreed with the interpretation of the counsel for the Secretary of State who tried to rely on *dicta* by two members of the majority in the High Court of Austria in *A. v. Minister of Immigration and Ethnic Affairs* (1997) 2 BHRC 143 . Rather they found “[f]ar from assisting the argument of the Secretary of State the trend of the dicta in A.’s case ... is against a requirement of cohesiveness” (HL 2 All ER 545, 554). Moreover, they pointed out that the Supreme Court in Canada had adopted a broader approach which depended on the reasoning of *Acosta* and was inconsistent with *Sanchez-Trujillo* (see *Attorney-General of Canada v. Ward* (1993) 103 D.L.R. (4<sup>th</sup>) 1), too. In addition,

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<sup>29</sup> *Sanchez-Trujillo v Immigration and Naturalization Services* (1986) 801 F. 2d 1571, US Ct of Apps (9<sup>th</sup> Circ).

<sup>30</sup> *Acosta, Re Interim Decision 2986* (1985) 19 I & N 211, US Board of Immigration Appeals.

there was no English authority – except for the Court of Appeal in the present case - that considered cohesiveness a requirement for the existence of a “particular social group”. Also, the *New Zealand Refugee Authority* had concluded in continuation of *Acosta* that homosexuals were to be considered a particular social group, even though they were not necessarily cohesive (HL, 2 All ER, 545, 555). What was more, the restrictive interpretation of *Sanchez-Trujillo* was at odds with article 31 of the Vienna Convention on the Law of Treaties (HL, 2 All ER, 545, 555). Thus, the Law Lords found that Shah and Islam were persecuted because of their membership to the particular social group of women in Pakistan: “Given the central feature of state-tolerated and state-sanctioned gender discrimination, the argument that the appellants fear persecution not because of membership of a social group but because of the hostility of their husbands is unrealistic” (HL, 2 All ER, 545, 558).

Subsequently, *Shah and Islam* was regarded a seminal judgement. By review of the US-American and other, mainly Anglo-Saxon jurisdictions, it determined the criteria for the establishment of a particular social group. It had a significant impact on English law. As a consequence, the secretary of state decreed the binding Asylum Directorate Instructions on the meaning of “particular social group” (Crawley 2001: 336) for first-instance decision-making:

The Lords rejected the notion previously held by the Court of Appeal that for a social group to exist there had to be a degree of cohesion... In applying their definition of social group to the individual cases of *Shah* and *Islam*, the Lords held that in the particular context of Pakistani society women are a social group and that Mrs Shah and Mrs Islam were persecuted by reason of their membership of that group. This means in the context of a society in which women are subject to serious discrimination *of the kind and severity that their Lordships found to exist in Pakistan* women are a social group (being singled out by society as shown by their discrimination)... The effect of widening the interpretation of social group is that those applicants, like Mrs Shah and Mrs Islam,...*will now be granted asylum*” (quoted after Crawley 2001: 336; emphasis in original).

In addition, the gist of judgement was included into the *Asylum Gender Guidelines* by the Immigration Appellate Authority mentioned above. It also shaped the future jurisdiction (Mac/Donald/Webber 2005: 735): „The decision of the House of Lords in *Shah & Islam* is now the leading case on ,particular social group’“(JWCI 2006: 607; emphasis in original). In particular Pakistani and Afghan women suffering from gendered persecution benefitted from it (MacDonald/Webber 2005: 735). Thus, rule-consistent behaviour can be assumed.

## *Germany*

Up until 1988, German Courts had applied the Convention Ground “membership of a particular social group” quite frequently. Among others, women from Iran had benefitted from it who had refused to submit themselves to the new religious norms brought about by the revolution (Crawley/Lester 2004: 87; Jensen 2002: 131-132). In 1988, a seminal judgement by the Federal Administrative Court 9 C 278/86 changed this situation. It emphasized that this particular Convention Ground was of no significance for Germany. The judgement endured the period of investigation. As a consequence, the Convention Ground “membership of a particular social group” was hardly applied between 1988 and 2004 (Luopajarvi 2003: 93-95; see also Jensen 2002: 131-132). In order to understand the significant impact of the judgement, it is important to keep in mind that in Germany, the term “asylum” has been reserved for the recognition of foreigners under the Basic Law as opposed to their recognition as refugees under the Refugee Convention.

Whether homosexuals from Iran may be considered as members of a particular social group according to article 1 A 2 of the Refugee Convention was the question in the centre of the judgement. The previous instance, the Verwaltungsgerichtshof, had found that this was the case. However, the Federal Commissioner for Asylum Matters (Bundesbeauftragter für Asylangelegenheiten) had successfully applied for judicial review against this decision.<sup>31</sup> He argued that the claimant was neither a member of a particular social group nor did any of the other Convention Grounds apply. This is why he could neither be recognised under the Refugee Convention nor as asylum-seeker under the Basic Law.<sup>32</sup> The Federal Administrative Court agreed that it was in fact ambiguous whether the claimant was a member of a particular social group. However, the Court argued, that this was not the relevant question anyway. Rather, the Commissioner had overlooked that not the immediate application of article 1 A 2 of the Refugee Convention was of relevance but the meaning of “the politically persecuted” according to the Basic Law. The protection offered by the constitution based on the general view that those should enjoy asylum who fear persecution because they possess inalienable traits that render them different (BVerwGE, NVwZ 1988: 9, 839). A homosexual disposition had to be counted as such an inalienable trait. Against the background of the “Third Reich”

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<sup>31</sup> The Federal Commissioner for Asylum Matters formed the counterweight against the independent case-workers at the Bundesamt für die Anerkennung ausländischer Flüchtlinge who decided about asylum applications, for both asylum according to the Basic Law and according to the Refugee Convention, in the administrative instance. The Commissioner had the right to appeal against decision by case-workers and Courts (Heinhold 2003: 29, 116; Marx 2000: 506).

<sup>32</sup> During the period of investigation, the scope of the Refugee Convention was considered largely congruent with the scope of the article on asylum in the German Basic Law. Lawyers spoke of a so-called “Vollidentität” (complete identity) (see Marx 2000: 446). This is why the Commissioner assumed that the claimant could be neither recognised as one or the other.

and the so-called “Special Treatment” (Sonderbehandlung) of homosexuals in concentration camps, this was particularly the case (BVerwGE, NVwZ 1988: 9, 839). The Iranian state considered homosexuals as a category of people to be annihilated and persecuted them like political opponents. Therefore, the claimant had a right to asylum according to the Basic Law while the issue of his recognition under the Refugee Convention was of no significance.

The refusal of the Court to discuss whether the concerned Iranian was a member of a particular social group under the Refugee Convention and the judges’ statement that the immediate application of article 1 A 2 Refugee Convention was not standing at debate, anyway, had severe consequences: the Convention Ground was hardly ever applied in the years to come. Even the introduction of the new Foreigners’ Law in 1990 in which all five Convention Grounds were listed in § 51 AuslG did not change the prevalence of the 1988 judgement (see also Marx 2005: 640). Rather, the executive supported its domination in the German jurisdiction, as a response by the Kohl government to a parliamentary question by the Green Party in January 1998 shows. The government emphasized that the application of the Convention Ground “membership of a particular social group” was of no relevance to Germany (BT-Drucks. 13/9715:6).

In the period of investigation, women suffering from gendered persecution who did not fall under any of the other four Convention Grounds, could, therefore, not be recognised as members of a particular social group because of the judiciary’s and the governments’ denial of the Convention Grounds’ significance for the German refugee determination process.

### ***The state of norm implementation in the UK and Germany***

With one small exception<sup>33</sup>, the UK seized the measures expected by the international norm on the gender-sensitive interpretation of the Refugee Convention. At the end of the period of investigation, we found rule-consistent behaviour with regard to a) the *Asylum Gender Guidelines* for the appeal level; b) the recognition of persecution by non-state actors and c) the gender-sensitive interpretation of the Convention Ground “membership of a particular social group”. Only with regard to the Gender Guidelines for first-instance decision-making, that is, the *API on gender issues in the asylum claim*, by the Home Office, rule-consistent

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<sup>33</sup> Only gender-differentiated statistics on the outcome of decisions at the appeal level are still missing.

behaviour could not be clearly ascertained. Rather, their impact seems to be somewhere between prescriptive status and rule-consistent behaviour.

It is striking to see that, with the exception of the *API on gender issues in the asylum claim*, every single of these measures was institutionalised by the judiciary, usually in reference to international soft law and by making use of the horizontal *stare decisis*, that is, referring to the decisions of high courts in other Common Law jurisdictions. Therefore, the implementation of these measures did not involve a political process but could be achieved rather smoothly. Rather than by means of parliamentary debates and a legislative decision-making process, the judiciary decided what appropriate behaviour was. Because of the checks and balances of democratic states, the judiciary had the power to enforce its judgements against the explicit wishes of the executive (see *Shah and Islam* and *Adan and Aitseguer*).

Why proved the norm's implementation so cumbersome in Germany? As we have seen, the judiciary contributed nothing to it. Rather, it impeded the institutionalisation of the necessary measures. In the case of the recognition of persecution by non-state actors the highest German Administrative Court, the Federal Administrative Court, did even acknowledge that in particular in Common Law jurisdictions, such persecution was recognised. However, at the same time it made it clear that this was of no relevance to the German jurisdiction as long legislative did not change the existing law correspondingly. Only then courts could comply. As I have shown elsewhere (Brabandt 2008), the parliamentary controversy about whether the remaining three measures should be adopted continued through the whole period of investigation up until early 2004. It was highly contested because asylum policies were considered an extremely sensitive matter. Only in 2004, the red-green government and the opposing Christdemocratic Party (CDU) that had the majority in the second chamber (Bundesrat) agreed to the recognition of persecution by non-state actors and a gender-sensitive interpretation of the convention ground "membership of a particular social group" (measures 2 and 3). This change of opinion was caused by the negotiations on the EU Qualification directive that occurred in parallel to the national controversy over the international norm (Brabandt 2008).<sup>34</sup> Due to Germany's rejection to recognise persecution by non-state actors and to allow for a gender-sensitive interpretation of the convention ground "membership of a particular social group", the negotiations had come to a halt. By spring 2004 it became clear that the German government could not hold up to the pressure exerted by other EU states and the Commission to accept some compromise. Thus, the German government abandoned their opposition on the EU level and agreed to the Qualification

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<sup>34</sup> According to the treaty of Amsterdam that directive as well as others on asylum issues had to be finalized by 1 May 2004; see also note 3.

directive. This, however, gave leeway for the implementation of the two mentioned measures into the “Zuwanderungsgesetz” the argument being that they would become EU law and therefore had to be implemented sooner or later in any case (Interview with MP Reinhard Grindel, CDU, Berlin, 30 November 2006). In Germany, the process of norm implementation did not proceed as smoothly as in the UK for a political process was necessary to bring about the relevant changes. What is more, none of the measures expected by the norm would have been implemented if there had not been any external pressure on Germany via the EU.

In sum, while in both countries norm entrepreneurs unfolded a vast number of activities, the difference between the processes of norm implementation lay in the role of the judiciary. In one case, the judiciary referred to international soft law and to decisions in support of the international norm taken by other jurisdictions, in the other case, the judiciary refrained from doing so and concentrated on the existing positive law only as well as how it was interpreted when it was created. The operating principles and possibilities for action of the judiciary are determined by the respective legal system. However, the form of the legal system – Common Law or Civil Law? – has received no attention in the literature on the implementation of international norms so far. That is, neither the literature that works explicitly with the concept of domestic structure nor other studies have found the legal system, and the diverse possibilities it entails as for example making use of the horizontal *stare decisis*, to be of any significance when exploring processes of norm implementation. In contrast, most studies have found the existence of norm-entrepreneurs to be of significance. This is why I dedicate the remaining part of this paper to discussing this issue and to examining whether the correlation between the English Common Law System and the comparatively easy process of norm implementation on the one hand, and the German Civil Law System and the difficult process of norm implementation on the other hand, are representative of Common Law and Civil Law Systems per se or rather idiosyncratic to the specific cases at hand.<sup>35</sup> In so doing, I will particularly focus on the role of the horizontal *stare decisis* or in other words, the role of global networks of Courts, in furthering processes of norm implementation.

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<sup>35</sup> It is interesting to note, however, that with the exception of Moravcsik 1995 no study has mentioned the role of norm-entrepreneurs in the judiciary. Unfortunately, for reasons of space, I cannot delve into this issue in this paper.

#### **IV. The legal system as facilitator for the implementation of international norms**

##### ***The Common Law system in the UK***

Common Law originally evolved under the inquisitorial system in England during the 12<sup>th</sup> and 13<sup>th</sup> centuries with collective judicial decisions based on tradition, custom and precedent. The form of reasoning prevalent in Common Law is known as casuistry or case-based reasoning. Thus, Common Law is a law developed through decisions of courts and similar tribunals and not through legislative statuses or executive action. In Common Law systems, law is created and/or refined by judges. A decision in a pending case depends on decisions in previous cases and affects the law to be applied in future cases. Thus, a body of case law is created. If there was no authoritative statement of the law in a relevant area, common law judges have the authority and duty to create law by making precedence.

Traditionally, only a small part of law has been codified in Common Law jurisdictions. In the 20<sup>th</sup> and 21<sup>st</sup> century this part has been increasing even though statute law still tends to be less detailed than in Civil Law jurisdictions. This is because in Common Law system, the main function of statute law is to amend the legal norms created by case law (Bernstorff 2006: 9-10). Thus, in the process of creating law, there is, by virtue of the legal system, no high degree of politicization to be found. In addition to case law, further sources of law are custom, reason, books of authority and the *norms of international law* (Bernstorff 2006: 10).

Rather than through statutes, the British executive rules through administrative orders “The government can often establish policies without an Act of Parliament. Thus, much public policy for which the government is accountable is not based on statutes...” (Jacob 1996b: 397). The *API on gender issues on the asylum claim* are an example for a policy established without the consent of the parliament. Decisions by the executive can be examined by courts (judicial review). However, until the last quarter of the 20<sup>th</sup> century, this possibility was not used often (Morrison 1973: 217-224; Kritzer 1996: 156). What is more, Prime Ministers Margaret Thatcher (1979-1990) and Tony Blair (1997-2007) used the power of the executive and assumed a presidential style. In this “elected dictatorship” (Stevens 2005: 147), the judiciary forms the only counter-weight against the strong executive (ibd.) while the legislative has considerably less power.

In *Shah and Islam* and in *Adan and Aitseguer*, the Law Lords recognised persecution of non-state actors under the Refugee Convention and the need for a gender-sensitive interpretation of the Convention Ground membership of a particular social group. In so doing,

they referred on the one hand to international soft law and on the other hand to the legal practice of other signatory states to the Refugee Convention citing mainly decisions from other Common Law jurisdictions. The *Asylum Gender Guidelines* by the IAA also point to international soft law and make use of the horizontal *stare decisis*, too. The English judiciary used both, the references to international soft law and to the decisions by other Common Law jurisdictions, to justify the need for a gender-sensitive approach for the Refugee Convention. This move was facilitated by the fact that according to English case law, international conventions ought to be interpreted “unconstrained by technical rules of English law, or by English legal precedent, but on broad principles of general acceptance.”<sup>36</sup> Among those “broad principles of general acceptance” are not only legally binding international norms but also instruments of international soft law as expressed in the recommendations of the UNHCR and the UNHCR Executive Committee.<sup>37</sup> Another means to learn more about these “broad principles of general acceptance” is a review of the decisions taken by other jurisdictions that are also signatories to the Refugee Convention. The latter method is quite typical for the legal system of the UK (Interviews with Alison Harvey, London, 6 March 2006; Law Lord Leonard Hoffmann, London, 1 November 2005; Catriona Jarvis, London, 2 November 2005). This is in particular the case for international administrative law which speaks directly to states and to which the Refugee Convention belongs. Because of British colonial history, worldwide, every fourth person is subject to common law (Bernstorff 2006: 2), thus not sharing only the same principles of jurisdiction but also the same language. This facilitates the reception of high court decisions from other (former) Commonwealth countries. In addition, there is the feeling of a shared legal area among the jurisdictions of (former) Commonwealth countries: “we fit in a larger community of lawyers and judges” (Interview with Alison Harvey, London, 6 March 2006; see also Slaughter 2004: 65-103). Against this background, it is not surprising that in *Shah and Islam*, the starting point in the discussion about the adequate interpretation of the convention ground “membership of a particular social group” was a US-American decision (*Sanchez-Trujillo*) that had been considered authoritative by the British Home Office and as such been confirmed by the English Court of Appeal. Even though the Law Lords overruled the Court of Appeal, it is interesting to see that they did so on the basis of another – but adverse – decision of an US-American court (*Acosta*) and in reference to more decisions by other US courts in support of *Acosta* as well as to Courts by other Common Law jurisdictions also in support of *Acosta*. In addition, they cited the recommendations of the

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<sup>36</sup> *James Buchanan & Co. Ltd. V. Babco Forwarding % Shipping (UK) Ltd* [1978] A.C. 141, 152. Diesem Grundsatz ist auch in *H & Others (Minors) (Abduction: Acquiescence)* [1998] A.C. 72, 87 gefolgt worden.

<sup>37</sup> See for example the Law Lords’ argument in *Shah and Islam* and in *Adan and Aitseguer*.

UNHCR and the preamble of the Refugee Convention. They declared *Acosta* to be the decision that dominates US-American case law. On this basis, they determined the criteria for the application of the convention ground “membership of a particular social group” in the UK. Over and above, until the mid-1990s, in the UK, little statute law existed that dealt with issues of asylum. British High Court judges had, therefore, great freedom to make precedent according to the legal sources they deemed relevant.<sup>38</sup>

### *The Civil Law System in Germany*

In contrast to the UK, Germany has a “Civil Law” or “Code” jurisdiction. The main difference between Civil Law and Common Law Systems is that Civil Law starts with abstracts rules which judges must then apply to the various cases before them, while Common Law draws abstract rules from specific cases. Civil Law originates from Roman law, Canon law and the Enlightenment. The legal systems in many Civil Law countries ground in one or several codes of law as the German *Bürgerliche Gesetzbuch* or the French Code Civil. In Civil Law jurisdictions, legislation is seen as the primary source of law. Courts ground their judgements in codes and statutes, from which solutions in specific cases are inferred. Therefore, judges argue extensively on the basis of general rules and principles of the respective code. In so doing, they take the genesis and the legal development of the relevant norm into account (historical method). As a consequence, courts do not have much leverage in their decisions. Unlike their counterparts from Common Law systems, judges in a Civil Law tradition do not necessarily make law by creating precedent.<sup>39</sup> Rather, they adhere to legal norms codified in books of law and apply these to concrete cases. They do not necessarily consider any other legal sources. Because of the inner logic of civil law systems, the establishment of new international norms requires their codification. This, however, can only be achieved by involving parliaments and exposing new norms to the political process.

The workings of the Civil Law system was at odds with respect to the introduction of Gender Guidelines (measure 1), the recognition of persecution by non-state actors (measure 2) and the gender-sensitive interpretation of the convention ground “membership of a particular social group” (measure 3). While the last two measures had both been implemented by seminal judgements in the UK, German Courts failed to do so. Unlike in the UK, in Germany,

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<sup>38</sup> There has been a similar situation in the area of rights of people with special needs (Interview with Alison Harvey, London, 6 March 2006).

<sup>39</sup> However, in highly differentiated societies, the legislative does not always manage to create new laws with the necessary pace and precision. For the first time in 2001, the German legislative established in statute law that in the process of judicial review existing statute law could be refined (Horn 2007: 127). However, the law that is created in this manner remains subordinate to statute law (Bell 2006: 171).

the introduction of Gender Guidelines for first-instance decision-making as well as for the administrative courts would have needed the consent of the second chamber, the Bundesrat, while in the UK they were implemented by the judiciary and the Home Office respectively. In Germany, the recognition of persecution by non-state actors failed because of the historical method applied by German courts. In 1994, the Federal Administrative Court decided in a seminal judgement (9 C 48/92) that the status of a Convention Refugee requires that the persecution is caused by, that is, originates from the territorial sovereign. The Court argued that this requirement arose out of the historical genesis of international refugee law, that is, the original purpose of the Refugee Convention. When the Federal Republic of Germany ratified the Refugee Convention and transformed it into national law by virtue of legislation in September 1953 (BGBl II, 559), it was the content of the Refugee Convention that only a person having a well-founded fear of persecution by the state was covered by article 1 A 2 of the Refugee Convention. Therefore, the development of the interpretation of the Refugee Convention in other signatory states of the Refugee Convention such as the United States of America, Canada and Australia and the UK was of no significance for the Federal Republic of Germany.

Some years later, in a parliamentary hearing, one of the judges of the Federal Administrative Court who had been a member of the senate that had given that 1994 judgement, expounded that it was up to political decision-makers to make it explicit in the relevant legislation if they wanted to recognise persecution by non-state actors. It was not for the courts to incorporate new practices in their dispensation of justice even if these were recommended by the UNHCR and applied by a number of signatory states. Rather, it was the task of the legislative. As long as the legislative did not introduce corresponding statute law, the courts had to assume that it agreed with their interpretation of the Refugee Convention basing on the Convention's meaning at the time of its ratification by Germany (Innenausschuss 2002: 338-339).

With regard to the interpretation of the convention ground "membership of a particular social group", the Federal Administrative Court had already decided in 1988 that the direct application of the Refugee Convention including the Convention Ground "membership of a particular social group" was of no significance for Germany but only the provisions of the constitution which the judges interpreted from a historic perspective (9 C 278/86). This judgement was never overruled. In this vein, in 1998, the federal government quoted from this judgement when explaining that the interpretation of the convention ground "membership of a

particular social group” was of no significance when determining whether a person deserved asylum or refugee status under the Refugee Convention (Bundestagsdrucksache 13/9715: 6).

Thus, while in the UK, the measures required for the international norm’s implementation could be seized by the judiciary (Gender Guidelines for the appeal level, recognition of persecution by non-state actors, gender-sensitive interpretation of the convention ground “membership of a particular social group”) and by the executive (Gender Guidelines for first-instance decision-making and gender-differentiated statistics), in Germany, the implementation of all these measures except for the introduction of gender-differentiated statistics had to receive the assent of the legislative. Therefore, due to the German legal system, the issue of norm implementation was moved to the political arena and became susceptible to party politics. In contrast, by virtue of the English legal system, the issue remained within the judiciary and the executive. What is more, the UK and Germany are no solitary cases but they are representative of the process of the implementation of the norm in question in Common Law Systems and Civil Law Systems vice versa.

## **V. The UK and Germany as representatives of a more general trend**

The finding that the national impact of international informal norms may depend on the legal system and in particular its features with regard to international soft law and the horizontal *stare decisis* seems accurate for the international norm focused on in this paper. As soon as the issue of norm implementation is moved to the political arena, it may be difficult to succeed, in particular in highly contested policy fields such as immigration and asylum politics. The existing literature that describes states’ dealings with women refugees in the refugee determination process has been largely edited by UNHCR (for example Crawley/Lester 2004; Tadjbaksh 2001a; Tadjbaksh 2001b). I analysed it with regard to the first three measures that the international norm expects states to seize. According to the respective legal system, it must be implemented by the judiciary and the executive (common law system) or by the legislative (civil law system). Even though none of the works I analysed detected a correlation between the state of norm implementation and the form of the legal system, my findings are surprisingly clear. They show that in democracies, at least, in the case of the norm explored here, a connection exists between the form of the legal system and the chances of norm implementation.

1) *Gender Guidelines*. Canada (1993), the USA (1995), Australia (1996), all common law countries, were the first to publish Gender Guidelines for first-instance decision-making (Crawley/Lester 2004: 22). The Canadian, the US-American as well as the Australian Gender Guidelines refer extensively to the development of the relevant international soft law by the UNHCR and the UNHCR Executive Committee. The Asylum Gender Guidelines of the British Immigration Appellate Authority were the first comparable Guidelines that have been published in Europe (even though for the appeal level). In 2004, the British Home Office published Gender Guidelines for first-instance decision-making. Except for the British Gender Guidelines no such guidelines exist in Europe (Crawley/Lester 2004: 21-32).<sup>40</sup>

2) *Recognition of Persecution by Non-State Actors*. The second measure, the recognition of persecution by non-state actors under the Refugee Convention was also seized initially by countries with a common law tradition. Thus, the Canadian Supreme Court complied with this expectation in *Ward* in 1993 (Canada Attorney General v Ward [1993] 2 SCR 689). This seminal judgement exuded to other common law jurisdictions, as for example New Zealand (Tadjbaksh 2001a: 12; Tadjbaksh 2001b: 186). Also, the US *Board of Immigration Appeals* decided in *Kasinga* that female genital mutilation was to be considered as persecution under the Refugee Convention if the country of origin does not protect girls/women from it (Tadjbaksh 2001b: 186). The Australian *Gender Guidelines* also state:

A Convention refugee is someone who is at risk because their country of nationality has failed to protect them from persecution. A failure to protect can occur in several ways. ... However, it may be that the perpetrator is another party from whom the authorities do not protect the person either because they are unwilling or unable to do so. Claims of gender-based persecution often involve persecution committed by non-state agents (ADIMA 1996: 4.11.).

In the European codification systems such as the legal systems of France, Norway, Italy and Lithuania, persecution by non-state actors was only recognized in the new millennium (Crawley/Lester 2004: 58-60).

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<sup>40</sup> The Swedish Gender Guidelines do not refer to protection under the Refugee Convention but only to subsidiary protection (Crawley/Lester 2004: 22, 25).

3) *Gender-sensitive interpretation of the convention ground “membership of a particular social group”*. In the common law tradition, the gender-sensitive interpretation of the convention ground “membership of a particular social group” was enabled by the US-American judgement *Acosta* from 1985.<sup>41</sup> In *Ward*, the Canadian Supreme Court referred to *Acosta* when creating the basis for a gender-sensitive interpretation of the convention ground “membership to a particular social group” in Canada (Lupajärvi 2003: 67-89). Thus, the Canadian Gender Guidelines state: “Gender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition” (CIRB 1996: A.III). Jurisdiction from New Zealand followed *Acosta* as well as the Law Lords in *Shah and Islam*. In contrast, the gender-sensitive interpretation of the Convention ground “membership of a particular social group” created many civil law systems great difficulties. For example, the Swedish and the Dutch asylum authorities explicitly prohibit the recognition of women as members of a particular social group (Crawley/Lester 2004: 95). Only in the new millennium, Austrian and Finish authorities created rules that allow for a gender-sensitive interpretation of this Convention ground (Crawley/Lester 2004: 86, 95).

Thus, none of the three measures required by the international norm was initially seized by a civil law country. They were first seized by common law jurisdictions. With the exception of Gender Guidelines for the appeal level, the first three measures were institutionalised rather quickly in common law systems such as Canada, Australia and the US. In contrast, their institutionalisation proved difficult in civil law countries in general and not only in Germany. It is striking to see that the recognition of persecution by non-state actors and the gender-sensitive interpretation of the Convention ground “membership of a particular social group” were introduced by way of seminal judgements in the common law countries mentioned. In these, the judges referred to international soft law and also made use of the horizontal *stare decisis*. In contrast, their implementation in civil law countries was owed to legislative measures. To date, Gender Guidelines (first measure) have not been institutionalised in any of the civil law countries mentioned in the literature, while common law countries such as Canada, the USA and Australia had introduced such guidelines for first-instance decision-making by the Mid-1990s. Thus, the form of the legal system and the possibilities the

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<sup>41</sup> The seminal decision *Kasinga* (13 June 1996 Interim Decision 3278) by the US Board of Immigration Appeals based on *Acosta*, too. Here young women from the Tachamba-Kunsuntu Tribe of northern Togo who had not been subjected to female genital mutilation and oppose the practice, have been recognised as members of a particular social group. In so doing, the US Board of Immigration Appeals referred to international norms and the jurisprudence in the United States and Canada.

possibilities the respective system creates for making use of the horizontal *stare decisis* and for referring to international soft law, seem to have indeed influenced the chances for norm implementation in the case at hand. However, further research is necessary to investigate whether this is the case for international norms in other issue-areas.

## V. Conclusion

In this paper, I have shown that the national impact of international informal norms may depend on whether the respective legal system allows for references to international soft law and the horizontal (and vertical) *stare decisis*. Common Law systems allow for both, while Civil Law systems do not. Even though a trend toward the vertical *stare decisis* can be found here, too, it is not very distinct as of yet. At least in the issue-area at hand, high court judges in the Common Law world frequently referred to the decisions made in other Common Law jurisdictions thus legitimizing their own decision-making. The example of the English Law Lords in *Shah and Islam* illustrates this. They did not dispute the fact that the previous instance had referred to an US-American decision. Rather, they provided evidence for the fact that it was the *wrong* decision, that is, that the preponderance of U.S. case law did support another decision which was in line with their own interpretation of the case at hand. What is more, my overview of the state of norm implementation in other democracies of the Global North shows that the UK and Germany are representatives of a more general trend. That is, the UK for Common Law systems in which the reference to international soft law and decisions of Courts from other jurisdictions is quite common and facilitates norm implementation and Germany, for Civil Law systems, in which international informal norms do not take hold easily for a lack of these characteristics.

It has become clear that with regard to the protection of women refugees, a global network of Courts among Common Law jurisdictions seems to exist. In contrast, in Civil Law systems international norms need to go through the parliamentary process before they can achieve prescriptive status or even lead to rule-consistent behaviour. However, if the issue of norm implementation is moved to the political arena, it may be difficult to succeed. This is in particular the case for highly contested policy fields such as immigration and asylum politics. In line with this, I have shown that the English legal system served as a facilitator for norm implementation; the German legal system at best contributed nothing to the process of norm

implementation or at worst, impeded it. The different functions of the respective legal systems lie in their internal logic. Thus, the process of norm implementation may be facilitated by a legal system in which a) the law is developed through decisions of courts and created by judges by making use of the horizontal and vertical *stare decisis*; and in which b) norms of international law are considered a source of domestic law. Alternatively, Civil Law systems in which a) legislation is seen as primary source of law and b) the existing statute law tends to be very detailed cannot assume this role. Here international norms are not considered a source of domestic law and the horizontal and vertical *stare decisis* is not provided for. Thus, states may be more prone to comply with international refugee in Common Law than in Civil Law systems. More research is necessary whether this is indeed in the area of refugee law the case and whether this holds for other issue-areas, too.

## VI. Bibliography

ADIMA 1996: ADIMA Guidelines on Gender Issues for Decisions-Makers, o.O.. Abgedruckt in: Crawley, Heaven: Refugees and Gender: Law and Process, Bristol: Jordans, 253-267 (Annex 4).

Anker, Deborah E. 1997: Women refugees: Forgotten no longer?, in: Carlier, Jean-Yves/Vanheule, Dirk (Hrsg.): Europe and Refugees: A Challenge? L'Europe et les réfugiés: un défi?, The Hague: Kluwer, 125-155.

Archaja, Amitav 2004: How Ideas Spread: Whose Norms Matter? Norm Localization and Institutional Change in Asian Regionalism, in: International Organization 58:2, 239-275.

Bell, John 2006: Judiciaries within Europe: A Comparative Review, Cambridge: Cambridge University Press.

Bernstorff, Christoph Graf von 2006: Einführung in das englische Recht, Third Edition, München: C. H. Beck.

Bhabba, Jacqueline/Shutter, Sue 1994: Women's Movement: Women under Immigration, Nationality and Refugee Law, Stoke-on-Trent: Trentham Books.

Brabandt, Heike 2008: Die Umsetzung internationaler Normen: Der Umgang mit geschlechtsspezifisch Verfolgten im Vereinigten Königreich und der Bundesrepublik Deutschland, Inauguraldissertation, Unpublished Manuscript, Frankfurt.

Brabandt, Heike 2007: *Gender Mainstreaming* in der Asyl- und Flüchtlingspolitik in Großbritannien und Deutschland. Ein Beispiel für eine erfolgreiche Politikimplementation?, in Holzinger, Katharina/Jörgens, Helge/Knill, Christoph (eds.): Transfer, Implementation und Konvergenz von Politiken, in: PVS Sonderheft 38: 297-326.

Brandl, Ulrike 1997: Soft Law as a Source of International and European Refugee Law, in: Carlier, Jean-Yves/Vanheule, Dirk (Hrsg.): Europe and Refugees: A Challenge? L'Europe et les réfugiés: un défi?, The Hague: Kluwer, 203-226.

Brysk, Alison 1993: From Above and Below. Social Movements, the International System, and Human Rights in Argentina, in: Comparative Political Studies 26:3, 259-285.

Checkel, Jeffrey T. 2001: Why Comply? Social Learning and European Identity Change, in: International Organization 55:3, 553-588.

Checkel, Jeffrey T. 1999: Norms, Institutions and National Identity in Contemporary Europe, in: International Studies Quarterly, 43, 83-114.

CIRB 1996: CIRB Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution, Update, o.O.. Abgedruckt in: Crawley, Heaven: Refugees and Gender: Law and Process, Bristol: Jordans, 228-236 (Annex 2).

Clark, Ann Marie 2001: Diplomacy of Conscience: Amnesty International and Changing Human Rights Norms, Princeton, NY: Princeton University Press.

Cortell, Andrew P./Davis, James W. 2005: When norms clash: international norms, domestic practices, and Japan's internalisation of the GATT/WTO, in: *Review of International Studies* 31, 3-25.

Cortell, Andrew P./Davis, James W. 2000: Understanding the Domestic Impact of International Norms: A Research Agenda, in: *International Studies Review*, 2:1, 65-87.

Cortell, Andrew P./Davis, James W. 1996: How Do International Institutions Matter? The Domestic Impact of International Rules and Norms, in: *International Studies Quarterly*, 40, 451-478.

Crawley, Heaven/Lester, Trine 2004: Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe, Geneva. On behalf of the UNHCR Evaluation and Policy Analysis Unit (EPAU) (EPAU/2004/05).

Crawley, Heaven 2001: *Refugees and Gender: Law and Process*, Bristol: Jordans.

Eckstein, Harry 1975: Case Study and Theory in Political Science, in: Greenstein, Fred I./Polsby, Nelson W. (Hrsg.): *Handbook of Political Science*, VII: Strategies of Inquiry, Reading, MA: Addison-Wesley, 79-137.

Finnemore, Martha 1996: *National Interests in International Society*, Ithaca, NY: Cornell University Press.

Finnemore, Martha/Sikkink, Kathryn 1998: International Norm Dynamics and Political Change, in: *International Organization*, 52:4, 887-917.

Gareis, Sven/Varwick, Johannes 2003: *Die Vereinten Nationen: Aufgaben, Instrumente, Reformen*, Bonn: Bundeszentrale für politische Bildung.

George, Alexander L./Bennett, Andrew 2004: *Case Studies and Theory Development in the Social Sciences*, Cambridge, MA: MIT Press.

Gillespie, Alisdair 2007: *The English Legal System*, Oxford: Oxford University Press.

Goodwin-Gill, Guy S./McAdam, Jane 2007: *The Refugee in International Law*, Third Edition, Oxford: Oxford University Press.

Gurowitz, Amy 1999: Mobilizing International Norms: Domestic Actors, Immigrants, and the Japanese State, in: *World Politics* 51:3, 413-445.

Hamm, Birgit/Fues, Thomas 2001: *Die Weltkonferenzen der 90er Jahre: Baustellen für Global Governance*, Bonn: Dietz.

Hathaway, James C. 2005: *The Rights of Refugees under International Law*, Cambridge: Cambridge University Press.

Henkin, Louis et al. 1993: *International Law, Cases and Materials*, Third Edition, St. Paul, MN: West Publishing Company.

Horn, Norbert 2007: *Einführung in die Rechtswissenschaft und Rechtsphilosophie*, 4., neu bearbeitete Auflage, Heidelberg: C.F. Müller.

Innenausschuss 2002: Öffentliche Anhörung von Sachverständigen zum Thema „Zuwanderung“, Protokoll, 83. Sitzung des Innenausschusses am Mittwoch, dem 16. Januar 2002, von 10:00 bis 18.30 Uhr im Reichstagsgebäude, Saal 3 N001, Platz der Republik 1, 10011 Berlin, Vorsitz Abg. Ute Vogt (Pforzheim), Protokoll Nr. 83, Berlin: Innenausschuss.

Jacob, Herbert 1996a: Introduction, in: Jacob, Herbert et al. (eds.): *Courts, Law & Politics in Comparative Perspective*, New Haven, CT: Yale University Press, 1-15.

Jacob, Herbert 1996b: Conclusion, in: Jacob, Herbert et al. (eds.): *Courts, Law & Politics in Comparative Perspective*, New Haven, CT: Yale University Press, 389-400.

Jepperson, Ronald L./Katzenstein, Peter J./Wendt, Alexander 1996: Norms, Identity and Culture in National Security, in: Katzenstein, Peter J. (Hrsg.): *The Culture of National Security: Norms and Identity in World Politics*. New York, NY: Columbia University Press, 33-75.

JWCI 2006: *Immigration, nationality & refugee law handbook*. London: JWCI.

Keck, Margaret E./Sikkink, Kathryn 1998: *Activists Beyond Borders. Advocacy Networks in International Politics*, Ithaca, N.Y.

Kelly, Nancy 1993: Gender-related persecution: assessing the asylum claims of women, in: *Cornell International Law Journal*, 26:3, 625-674.

King, Gary/Keohane, Robert O./Verba, Sidney: *Designing Social Inquiry: Scientific Inference in Qualitative Research*, Princeton, NJ: Princeton University Press.

Kritzer, Herbert M. 1996: Courts, Justice, and Politics in England, in: Jacob, Herbert et al. (eds.): *Courts, Law & Politics in Comparative Perspective*, New Haven, CT: Yale University Press, 81-176.

Kymlicka, Will 1990: *Contemporary Political Philosophy: An Introduction*, Oxford: Oxford University Press.

Liese, Andrea 2006: *Staaten am Pranger. Zur Wirkung internationaler Regime auf innerstaatliche Menschenrechtspolitik*, Wiesbaden: VS Verlag für Sozialwissenschaften.

Locher, Birgit 2007: *Trafficking in Women in the European Union – Norms, Advocacy-Networks and Policy-Change*, Wiesbaden: VS-Verlag.

Luopajarvi, Katja 2003: *Gender-related Persecution as Basis for Refugee Status: Comparative Perspectives*, Åbo: Institute for Human Rights Åbo Akademi University.

Mastenbroek, Ellen 2005: EU Compliance: Still a ‘Black Hole’?, in: *Journal of European Public Policy*, 12:6, 1103-1120.

- McIntosh Sundstrom, Lisa 2005: Foreign Assistance, International Norms, and NGO Development: Lessons from the Russian Campaign, in: *International Organization* 59:2, 419-449.
- McNeely, Connie L. 1995: *Constructing the Nation-State, International Organization and Prescriptive Action*, Westport: Greenwood.
- Moravcsik, Andrew 1995: Explaining International Human Rights Regimes: Liberal Theory and Western Europe, in: *European Journal of International Relations*, 1:2, 157-189.
- Morrison, Fred L. 1973: *Courts and the Political Process in England*, Beverly Hills, CA: Sage Publications.
- Pateman, Carole 1988: *The Sexual Contract*, Cambridge: Stanford University Press.
- Pateman, Carole 1987: Feminist Critiques of the Public/Private Dichotomy, in: Phillips, Anne (ed.): *Feminism and Equality*, Oxford: Blackwell Publishers, 103-126.
- Risse, Thomas/Jetschke, Anja/Schmitz, Hans Peter 2002: *Die Macht der Menschenrechte. Internationale Normen, kommunikatives Handeln und politischer Wandel in den Ländern des Südens*, Baden-Baden: Nomos.
- Risse, Thomas, Sikkink, Kathryn und Ropp, Stephen C. (eds.) 1999: *The Power of Human Rights. International Norms and Domestic Change*, Cambridge: Cambridge University Press.
- Risse, Thomas/Ropp, Stephen C. 1999: International Human Rights Norms and Cosmetic Change: Conclusions, in: Risse, Thomas, Sikkink, Kathryn und Ropp, Stephen C. (Hrsg.): *The Power of Human Rights: International Norms and Domestic Change*, Cambridge: Cambridge University Press, 234-278.
- Schreuer, Christoph 1977: Recommendations and the Traditional Sources of International Law, in: *German Yearbook of International Law*, 20, 103-118.
- Shelton, Dinah 2000a (ed.): *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford: Oxford University Press.
- Shelton, Dinah 2000b: Introduction: Law, Non-Law and the Problem of 'Soft Law', in: Shelton, Dinah (ed.): *Commitment and Compliance: The Role of Non-Binding Norms in the International Legal System*, Oxford: Oxford University Press, 1-18.
- Sikkink, Kathryn 1993: Human Rights, Principled Issue-Networks, and Sovereignty in Latin America, in: *International Organization*, 47:3, 411-441.
- Slaughter, Anne-Marie 2004: *A New World Order*: Princeton: Princeton University Press.
- Slaughter, Anne-Marie 2003: A Global Community of Courts, in: *Harvard International Law Journal*, 44:1, 191-219.

Stevens, Robert 2005: *The English Judges, Their Role in the Changing Constitution*, Oxford: Hart Publishing.

Tadjbakhsh, Shahrzad 2001a: no title, in: Canadian Council for Refugees (ed.): *International Conference on Refugee Women Fleeing Gender-Based Persecution*, Montréal, 4-6 May 2001, Conference Proceedings, o.O.: Canadian Council for Refugees, 12-13.

Tadjbakhsh, Shahrzad 2001b: *The Refugee Definition and Gender-Related Persecution: An Overview*, in: Canadian Council for Refugees (ed.): *International Conference on Refugee Women Fleeing Gender-Based Persecution*, Montréal, 4-6 May 2001, Conference Proceedings, o.O.: Canadian Council for Refugees, 184-189.

UN 1996: *Platform for Action and the Beijing Declaration*, Fourth World Conference on Women, Beijing, China, 4-15 September 1995, New York: UN.

UN Commission on Human Rights 1996: *The elimination of violence against women*, Commission on Human Rights resolution 1996/46, Geneva: UN.

UN Commission on Human Rights 1998: *The elimination of violence against women*, Commission on Human Rights resolution 1998/52, Geneva: UN.

UN Commission on Human Rights 2001: *The elimination of violence against women*, Commission on Human Rights resolution 2001/49, Geneva: UN.

UN Commission on Human Rights 2002: *The elimination of violence against women*, Commission on Human Rights resolution 2002/52, Geneva: UN.

UN Commission on Human Rights 2003: *The elimination of violence against women*, Commission on Human Rights resolution 2003/45, Geneva: UN.

UN Commission on Human Rights 2004: *The elimination of violence against women*, Commission on Human Rights resolution 2004/46, Geneva: UN.

UN General Assembly 1993: *Declaration on the Elimination of Violence Against Women*, Resolution 48/104, New York: United Nations. A/RES/48/104. URL: <http://www.un.org/documents/ga/res/48/a48r104.htm> [14.08.2007].

UN General Assembly 1996: *Resolution adopted by the General Assembly [on the report of the Third Committee (A/51/613)]*, 51/69. *Follow-up to the Fourth World Conference on Women and full implementation of the Beijing Declaration and Platform of Action*, New York: United Nations. A/RES/51/69. URL: <http://www.un.org/ga/documents/gares51/gar51-69.htm> [25.08.2008].

UN General Assembly 2000: *Further actions and initiatives to implement the Beijing Declaration and Platform for Action*, Resolution S-23/3, New York: United Nations. A/Res/S-23/3. URL: <http://www.un.org/womenwatch/daw/followup/ress233e.pdf> [14.08.2007].

Weiss, Thomas G./Gordenker, Leon S. (eds.) 1996: *NGOs, The UN & Global Governance*, Boulder, CO.: Lynne Rienner Publishers.

## **Interviews**

Interview with Alison Harvey, *Legal Officer* der *Immigration Law Practitioners' Association* (ILPA), London, 6 March 2006.

Interview with Catriona Jarvis, *Senior Immigration Judge*, London, 2 November 2005.

Interview with Lord Leonard Hoffmann, *Law Lord*, London, 1 November 2005.

Interview with MP Reinhard Grindel, CDU, Berlin, 30 November 2006.