
Introduction

1.1 Introduction

The number of forcibly displaced persons in the world today is the highest ever recorded, and in the last decade alone, their number has doubled.¹ Violence associated with armed conflict has become the main cause of forced displacement in the twenty-first century,² and most refugees originate from countries experiencing protracted armed conflicts such as Syria, Afghanistan, South Sudan, Myanmar, Somalia, Democratic Republic of Congo, Sudan and Iraq. Global trends are reflected in the number and origins of persons seeking asylum in the European Union (EU). However, there are many misconceptions and disagreements as to whether persons fleeing armed conflicts are refugees as defined by the Refugee Convention. This book is thus an enquiry into the continued relevance of the 1951 Convention relating to the Status of Refugees (Refugee Convention) for the growing number of persons fleeing contemporary armed conflicts.

The book takes as a starting point the claim made in security studies that the nature and characteristics of armed conflicts across the world today have changed, and have important gendered dimensions that affect the reasons why persons flee their homes.³ More specifically, this scholarship identifies the fundamental characteristics of contemporary armed conflicts as including the rise of non-state actors and their relative control over the conduct of hostilities, weakening of state institutions, identity politics as drivers of violence and the gendered strategies and tactics of fighting parties. Scholars in this field thus highlight that one of the main strategies of fighting parties is to exercise political control over territory by forcibly displacing and terrorising populations through highly visible forms of human rights violations. Further, it has been claimed that the role of violence cannot be understood without reference to gender.⁴ Drawing on this knowledge, the book conceptualises violence exercised in situations of contemporary armed conflict as being imbued

¹ A total of 89.3 million by the end of 2021, United Nations High Commissioner for Refugees (UNHCR), 'Global Trends 2021' (16 June 2022) <www.unhcr.org/62a9d1494/global-trends-report-2021> accessed 26 July 2022, 2; UNHCR, 'Global Trends: Forced Displacement in 2020' (18 June 2021) <www.unhcr.org/uk/statistics/unhcrstats/60b638e37/global-trends-forced-displacement-2020.html> accessed 12 July 2021, 6.

² Volker Türk, Alice Edwards and Cornelis Wouters, 'Introduction' in Volker Türk, Alice Edwards and Cornelis Wouters (eds), *In Flight from Conflict and Violence: UNHCR's Consultations on Refugee Status and Other Forms of International Protection* (CUP 2017) 1.

³ Mary Kaldor, *New and Old Wars: Organized Violence in a Global Era* (3rd edn, Polity Press 2012); Laura Sjoberg, *Gendering Global Conflict: Toward a Feminist Theory of War* (Columbia University Press 2013).

⁴ Laura Sjoberg, 'Gender/Violence in a Gendered/Violent World' (2014) 42 *Millennium: Journal of International Studies* 532.

with strategic logic and highly gendered. Viewed in this manner, the nature of violence experienced by persons in situations of armed conflict presents itself as motivated, tactical and, most importantly, political. Accordingly, the book challenges the perception that violence in situations of armed conflict is indiscriminate,⁵ and the perceived dichotomy between direct violence resulting from armed fighting and indirect violence resulting from the breakdown of law and order.⁶

The book examines the extent to which asylum appellate authorities in the EU take into account the changing nature of contemporary armed conflicts. It focuses on judicial practice in the EU owing to the regional codification of a distinct international protection status for persons fleeing armed conflicts. The book also explores how the Refugee Convention may be interpreted in a manner that better responds to the changed nature of contemporary armed conflicts from a gender perspective, thus reconceptualising the concept of the refugee. To answer these questions, the book provides an empirical analysis of how appellate authorities in six EU Member States (MS) interpret the Refugee Convention definition in Afghan, Iraqi and Syrian asylum appeals between 2013 and 2016.⁷ Hence, this research contributes to existing debates regarding the continued relevance of the Refugee Convention some seventy years after it was adopted, and supports existing views that the Refugee Convention can be interpreted in a way that includes groups of individuals perceived as falling outside its scope.⁸ Accordingly, the book rejects widely held opinions that the Refugee Convention requires reform in order to respond to contemporary forms of forced displacement.⁹

The introduction starts by setting the scene of international protection in the EU. It provides an overview of the international and regional refugee and human rights obligations of its MS and identifies some of the pitfalls of the creation of a new form of subsidiary protection for persons fleeing indiscriminate violence in situations of armed conflict. It then introduces the concepts at the core of this book, including violence, contemporary armed conflicts and the gender-differentiated impact of violence in conflict. The second part of the introduction explains the methodology designed for this empirical study. Finally, the structure of the book is set out.

⁵ As noted in UNHCR, *Guidelines on International Protection No. 12: Claims for Refugee Status Related to Situations of Armed Conflict and Violence under Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees and the Regional Refugee Definitions* (HCR/GIP/16/12, 2 December 2016) para 33; see also Cornelis (Kees) Wouters, 'Conflict Refugees' in Cathryn Costello, Michelle Foster and Jane McAdam (eds), *The Oxford Handbook of International Refugee Law* (OUP 2021) 817.

⁶ As conceptualised in Hélène Lambert and Theo Farrell, 'The Changing Character of Armed Conflict and the Implications for Refugee Protection Jurisprudence' (2010) 22 *International Journal of Refugee Law* 237; Hélène Lambert, 'The Next Frontier: Expanding Protection in Europe for Victims of Armed Conflict and Indiscriminate Violence' (2013) 25 *International Journal of Refugee Law* 207.

⁷ Belgium, Denmark, France, Spain, the Netherlands and the UK. Although the UK left the EU on 31 January 2020, it was a member of the EU during the study reference period.

⁸ Michelle Foster, *International Refugee Law and Socio-Economic Rights: Refuge from Deprivation* (CUP 2007); Jane McAdam, *Complementary Protection in International Refugee Law* (OUP 2007); Maria-Teresa Gil-Bazo, 'Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship' (2015) 34 *Refugee Survey Quarterly* 11; Jane McAdam, 'The Enduring Relevance of the 1951 Refugee Convention' (2017) 29 *International Journal of Refugee Law* 1.

⁹ See for example Alexander Betts, 'Survival Migration: A New Protection Framework' (2010) 16 *Global Governance* 361; Colin Harvey, 'Time for Reform? Refugees, Asylum-Seekers, and Protection under International Human Rights Law' (2015) 34 *Refugee Survey Quarterly* 43.

1.1.1 *International Protection in the EU*

The principal international legal instrument for the protection of refugees is the Refugee Convention, which defines a refugee as a person who ‘owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country’.¹⁰ However, various regions such as the EU have created distinct protection statuses for persons fleeing ‘indiscriminate violence’ in situations of armed conflict. A beneficiary of subsidiary protection in EU law is a ‘person who does not qualify as a refugee but in respect of whom substantial grounds have been shown for believing that the person concerned, if returned to his or her country of origin [...] would face a real risk of suffering serious harm [...] and is unable, or, owing to such risk, unwilling to avail himself or herself of the protection of that country’.¹¹ Serious harm is defined in Article 15(c) of the Qualification Directive as a ‘serious and individual threat to a civilian’s life or person by reason of indiscriminate violence in situations of international or internal armed conflict’. A third protection status in the EU provides for temporary protection ‘in the event of a mass influx’ of persons unable to return to their country of origin owing to the prevailing situation, in particular ‘persons who have fled areas of armed conflict or endemic violence’ and ‘persons at serious risk of, or who have been the victims of, systematic or generalised violations of their human rights’.¹² The Common European Asylum System (CEAS) thus establishes different legal categories of international protection, creating a distinction between refugees and complementary protection beneficiaries whose rights and entitlements differ.¹³ Current practice by EU MS is to grant different length of residence permits and substantive rights to Convention refugees and beneficiaries of subsidiary protection. For example, Belgium grants five-year residence permits to refugees and one year to subsidiary protection beneficiaries, whereas France issues ten-year residence permits to refugees and four years to subsidiary protection beneficiaries.¹⁴ Residence permits for persons with temporary protection is harmonised at EU level, and they are granted an initial one-year residence permit that can be extended up to three years.¹⁵ Moreover, the European Commission’s proposal for a Regulation to replace the EU Qualification Directive would mandate different residence permit lengths,¹⁶ and access to

¹⁰ Article 1A(2) Convention Relating to the Status of Refugees (adopted 28 July 1951, entered into force 22 April 1954) 189 UNTS 137 (Refugee Convention) (hereinafter the ‘refugee definition’).

¹¹ Article 2(f) Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast) [2011] OJ L337/9 (Qualification Directive).

¹² Articles 1 and 2(c) Council Directive 2001/55/EC of 20 July 2001 on minimum standards for giving temporary protection in the event of a mass influx of displaced persons and on measures promoting a balance of efforts between Member States in receiving such persons and bearing the consequences thereof (Temporary Protection Directive).

¹³ In addition, some MS provide various forms of humanitarian protection based on domestic law.

¹⁴ See Appendix A for further details. ¹⁵ Article 4 Temporary Protection Directive.

¹⁶ European Commission, Proposal for a Regulation of the European Parliament and of the Council on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection and for the content of the protection granted and amending Council Directive 2003/109/EC of 25 November 2003 concerning the status of third-country nationals who are long-term residents (COM(2016) 466 final, 2016) Article 26.

travel documents,¹⁷ and enable MS to limit social assistance for beneficiaries of subsidiary protection compared with refugees.¹⁸

Globally, state practice in interpreting the Refugee Convention has been inconsistent when the asylum claims of persons fleeing armed conflicts are assessed.¹⁹ Many require claimants to be 'singled out' for persecution,²⁰ thereby excluding from refugee protection persons who have fled situations of armed conflict and widespread violence.²¹ In her research, Holzer considers that one of the main issues that courts struggle with is the assessment of whether a person has a well-founded fear of being persecuted *for reasons of* the Refugee Convention grounds in the context of armed conflicts.²² This difficulty may reflect UNHCR's traditional approach of treating 'war refugees' as 'special cases',²³ with the UNHCR Handbook stating that 'persons compelled to leave their country of origin as a result of international or national armed conflicts are not normally considered refugees'.²⁴ However, it goes on to note that 'foreign invasion or occupation of all or part of a country can result – and occasionally has resulted – in persecution for one or more of the reasons enumerated in the 1951 Convention'.²⁵ UNHCR has since recognised that persons fleeing conflicts may have a well-founded fear of being persecuted for a Convention reason in many situations.²⁶ In recognition of this important issue and restrictive trends in state practice, UNHCR issued Guidelines on International Protection on claims for refugee status related to situations of armed conflict and violence in 2016,²⁷ recognising that the majority of these situations lead

¹⁷ Ibid., Article 27. ¹⁸ Ibid., Article 34(2).

¹⁹ Türk, Edwards and Wouters, 'Introduction' (n 2) 2.

²⁰ James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014) 174; James Hathaway, 'Refugee Status Arising from Generalized Oppression' in Gudmundur Alfredsson and Peter Macalister-Smith (eds), *The Living Law of Nations: Essays on Refugees, Minorities, Indigenous Peoples and the Human Rights of Other Vulnerable Groups* (N. P. Engel 1996) 61; Volker Türk, 'Protection Gaps in Europe? Persons fleeing the Indiscriminate Effects of Generalized Violence' (UNHCR 2011) <www.refworld.org/publisher,UNHCR,4d37d8402,0.html> accessed 12 July 2021, 6.

²¹ Guy Goodwin-Gill and Jane McAdam, *The Refugee in International Law* (3rd edn, OUP 2007) 126–127; Cornelis Wouters, 'Protecting People Fleeing Conflict and Generalized Violence' in UNHCR and Council of Europe (eds), *Joint UNHCR/Council of Europe Colloquium on the Role of Regional Human Rights Courts in Interpreting and Enforcing Legal Standards for the Protection of Forcibly Displaced Persons: Conference Report* (Council of Europe 2011) 65.

²² Vanessa Holzer, *Refugees from Armed Conflict: The 1951 Refugee Convention and International Humanitarian Law* (Intersentia 2015) 183.

²³ Elena Fiddian-Qasmiyeh, 'Gender and Forced Migration' in Elena Fiddian-Qasmiyeh et al. (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* (OUP 2014) 399–400.

²⁴ UNHCR, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees* (UNHCR 2019 (reissue)) para 164.

²⁵ Ibid., para 165.

²⁶ United Nations General Assembly (UNGA), Note on International Protection: International Protection in Mass Influx (submitted by the High Commissioner) (A/AC.96/850, 1 September 1995) para 11; UNHCR, *Summary Conclusions on International Protection of Persons Fleeing Armed Conflict and Other Situations of Violence; Roundtable 13 and 14 September 2012, Cape Town, South Africa* (UNHCR 2012) para 9, 19; UNHCR, *Expert Meeting on Complementarities between International Refugee Law, International Criminal Law and International Human Rights Law* (UNHCR 2011) para 25; UNHCR, *Guidelines on International Protection No. 11: Prima Facie Recognition of Refugee Status* (HCR/GIP/15/11, 24 June 2015); Vanessa Holzer, 'The 1951 Refugee Convention and the Protection of People Fleeing Armed Conflict and Other Situations of Violence' (UNHCR, PPLA/2012/05, September 2012) 12.

²⁷ UNHCR, *Guidelines on International Protection No. 12* (n 5).

to gender persecution.²⁸ Despite state parties highlighting the continued significance of the Refugee Convention,²⁹ important differences remain in the manner in which they implement their international obligations under the Refugee Convention, including in terms of who qualifies as a refugee. Divergent state practice and sometimes restrictive interpretation in the application of the refugee definition to persons fleeing armed conflicts and widespread violence has created an ‘implementation gap’.³⁰

In the EU, the European Commission for example has noted that diversity in national legal frameworks and decision-making practices and different levels of rights awarded by various MS continued to lead to the secondary movement of asylum seekers,³¹ and concluded that the objective of creating a level playing field in the qualification of beneficiaries of international protection in the EU had not been achieved.³² This practice has resulted in varying rates of recognition of refugee and subsidiary protection status despite attempts at harmonising the practice of EU MS in the context of the CEAS.³³

The uneven application and interpretation of the law in respect of asylum applicants originating from the same countries of origin characterised by protracted armed conflicts is particularly stark, as the risk of violence is likely to impact a greater number of persons in a similar way. The empirical study discussed in this book focuses on Syria, Iraq and Afghanistan because the majority of persons granted international protection in the EU in 2016 came from those three countries.³⁴ However, the percentage of persons granted refugee status at first instance across the EU decreased from over 38 per cent in 2015 to just 21 per cent in 2021.³⁵ Moreover, statistics demonstrate that within nationality groups, the outcome of first-instance decisions and appeals varied significantly. For example, whereas the proportion of positive first-instance decisions for Iraqi asylum applicants across the EU in 2016 was 63 per

²⁸ Ibid., para 1.

²⁹ Ministerial Meetings of State Parties to the Refugee Convention in December 2011 reiterated ‘the continuing relevance and resilience of this international regime of rights and principles’ and confirmed that the Refugee Convention and the Protocol ‘are the foundation of the international refugee protection regime and have enduring value and relevance in the twenty-first century’, see Guy Goodwin-Gill, ‘The International Law of Refugee Protection’ in Fiddian-Qasmiyeh et al. (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* 45.

³⁰ Volker Türk and Rebecca Dowd, ‘Protection Gaps’ in Fiddian-Qasmiyeh et al. (eds), *The Oxford Handbook of Refugee and Forced Migration Studies* 280.

³¹ European Commission, Proposal for a Directive of the European Parliament and of the Council on minimum standards for the qualification and status of third country nationals or stateless persons as beneficiaries of international protection and the content of the protection granted (COM(2009) 551 final, 21 October 2009) 6.

³² European Commission, Report from the Commission to the European Parliament and the Council on the Application of Directive 2004/83/EC of 29 April 2004 on the Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who Otherwise Need International Protection and the Content of the Protection (COM(2010) 314 final, 2010) 15.

³³ Ibid., 281.

³⁴ Eurostat, ‘Asylum Decisions in the EU – EU Member States Granted Protection to More than 700 000 Asylum Seekers in 2016: Over Half of the Beneficiaries were Syrians’ (26 April 2017) <www.europeanmigrationlaw.eu/documents/Eurostat-AsylumDecisions-2016.pdf> accessed 12 July 2021.

³⁵ Eurostat defines first-instance decision as ‘a decision made in response to an asylum application at the first instance level of the asylum procedure’. Statistics compiled from Eurostat, ‘First Instance Decisions on Applications by Citizenship, Age and Sex – Annual Aggregated Data (Rounded)’, <https://ec.europa.eu/eurostat/databrowser/view/MIGR_ASYDCFSTA__custom_3117264/default/table?lang=en> last updated 15 July 2022, accessed 26 July 2022. Figures from 2020 exclude the UK.

cent, this figure varied from 12 per cent in Denmark and the UK to 81 per cent in France and 100 per cent in Spain.³⁶ The proportion of positive first-instance decisions for Afghan nationals across the EU in 2016 averaged 57 per cent. However, the figure varied from about 35 per cent in the Netherlands and the UK to 60 per cent in Belgium and 82 per cent in France.³⁷

Although the proportion of positive first-instance decisions for Syrian nationals was more consistent across the EU in 2016, the outcome of those decisions varied greatly across EU MS. Thus, whereas 85 per cent of Syrian applicants were awarded refugee status in the UK, less than 1 per cent were recognised as refugees in Spain. Conversely, less than 1 per cent of Syrian applicants were granted subsidiary protection by first-instance decision makers in the UK compared with 97 per cent in Spain.³⁸ Outcome of appeals across the EU for Afghan, Iraqi and Syrian appellants also varied widely.³⁹

The question of how the Refugee Convention is and should be interpreted in the cases of persons fleeing contemporary armed conflicts is highly relevant, as the type of international protection granted, namely refugee or subsidiary protection status, has important consequences for the rights and entitlements awarded to beneficiaries of international protection. Most noteworthy is the length of the residence permit, which gives effective access to the socio-economic rights attached to international protection and impacts on prospects of integration in the host country.⁴⁰ The enquiry is particularly pressing in light of the significant increase in persons fleeing armed conflicts worldwide and ongoing reforms of a CEAS, which despite creating a hierarchy of protection status nonetheless reiterates the foundation of the Refugee Convention as the international legal regime for the protection of refugees. This book is the first systematic, comparative and interdisciplinary enquiry into judicial interpretation of the Refugee Convention definition in the cases of persons fleeing armed conflicts in Europe.

1.1.2 *Violence in Contemporary Armed Conflicts*

The book is premised on an analytical distinction between the notions of armed conflicts and violence. As Kalyvas argues, the distinction is essential because the severity of an armed conflict and the level of violence in a country characterised by an armed conflict are not necessarily causally related.⁴¹ The onset of armed conflicts and the exercise of violence in situations of armed conflict display different dynamics, and it is argued here that the latter should be the frame of analysis for the purpose of refugee protection. The book thus avoids the term ‘generalised violence’ because it is often misconceived as meaning ‘indiscriminate violence’, and ultimately the type of violence covered by subsidiary protection under Article 15(c) Qualification Directive.⁴² Although UNHCR originally widely used the term ‘generalised violence’ in

³⁶ Eurostat, ‘First Instance Decisions on Applications by Citizenship, Age and Sex Annual Aggregated Data (Rounded) [migr_asydcfstata]’ <<https://ec.europa.eu/eurostat/web/asylum-and-managed-migration/data/database>> accessed 1 April 2019; see also Section 2.4.1 in Chapter 2 and Appendix B.

³⁷ Ibid. ³⁸ Ibid.

³⁹ This is discussed in further detail in Section 2.4.1 in Chapter 2 and Appendix B.

⁴⁰ Céline Bauizou and Géraldine Ruiz, ‘Refugee Status and Subsidiary Protection: Towards a Uniform Content of International Protection?’ in Vincent Chetail, Philippe De Bruycker and Francesco Maiani (eds), *Reforming the Common European Asylum System: The New European Refugee Law* (Brill Nijhoff 2016) 264.

⁴¹ Stathis N. Kalyvas, *The Logic of Violence in Civil War* (CUP 2006) 20.

⁴² Jean-François Durieux, ‘Of War, Flows, Laws and Flaws: A Reply to Hugo Storey’ (2012) 31 *Refugee Survey Quarterly* 161, 165.

the context of persons fleeing armed conflicts, it eventually opted to drop the adjective from its International Guidelines.⁴³ Instead, the book uses the adjective ‘widespread’ to infer that violence is distributed over a large area and/or impacts a large number of persons.

In discussing the changing nature of contemporary armed conflicts, the book draws on Kalyvas and Balcells’ typology of armed conflicts. Thus, the term ‘nature’ of armed conflicts is used to indicate the particular type of armed conflicts such as conventional or asymmetric.⁴⁴ Further, the book refers to the ‘characteristics’ of armed conflicts to mean the individual features that together characterise contemporary armed conflicts such as the rise of non-state actors and their relative control over the conduct of hostilities, weak states, identity politics as drivers of violence, and gendered strategies and tactics of fighting parties.⁴⁵ The term ‘situations of (contemporary) armed conflict’ is used throughout to refer to situations in the country of origin of persons seeking international protection characterised by high levels or spread of violence that impact on civilians.⁴⁶ The term is utilised to avoid the limitations of the definitions of international or non-international armed conflicts as found in international humanitarian law, and may include different combinations of state and non-state fighting parties.⁴⁷

1.1.3 Gender-Differentiated Impact of Armed Conflicts

There has been a wealth of research looking not only at the experiences of women in conflict but also at how women and men are ‘differentially involved in, and affected by, conflict situations which lead to mass displacement’.⁴⁸ Importantly, research into the experiences of men and women during conflict now recognises that men and boys may be the victims of gender-based violence and persecution and that women may directly participate in or instigate acts of violence.⁴⁹

Nevertheless, it is now generally accepted within the international community that women are disproportionately affected by armed conflicts,⁵⁰ and that perpetrators enjoy

⁴³ UNHCR, *Guidelines on International Protection No. 12* (n 5); compare with for example Türk, ‘Protection Gaps in Europe?’ (n 20).

⁴⁴ Stathis N. Kalyvas and Laia Balcells, ‘International System and Technologies of Rebellion: How the End of the Cold War Shaped Internal Conflict’ (2010) 104 *American Political Science Review* 415.

⁴⁵ Those are discussed in turn in Chapter 3.

⁴⁶ The term was also used by UNHCR in its Guidelines on Situations of Armed Conflict, UNHCR, *Guidelines on International Protection No. 12* (n 5) para 5.

⁴⁷ See further Section 2.2.1 in Chapter 2.

⁴⁸ Fiddian-Qasimiyeh, ‘Gender and Forced Migration’ (n 23) 401. ⁴⁹ *Ibid.*

⁵⁰ UN Secretary-General, Report to the Security Council on the Protection of Civilians in Armed Conflict, UN Doc S/1999/957, 8 September 1999, para 18; UN Security Council (UNSC) Resolution 1265 (17 September 1999) UN Doc S/RES/1265, preamble; UNSC Res 1296 (12 April 2000) UN Doc S/RES/1296, para 9; UNSC Res 1325 (31 October 2000) UN Doc S/RES/1325; UN Secretary-General, Women, Peace and Security: Study submitted by the Secretary-General pursuant to Security Council Resolution 1325 (2000) (UN 2002) ix; UNSC Res 1820 (19 June 2008) UN Doc S/RES/1820; UNSC Res 1888 (30 September 2009) UN Doc S/RES/1888; UNSC Res 1894 (11 November 2009) UN Doc S/RES/1894, preamble; UN Committee on the Elimination of All Forms of Discrimination Against Women, Concept Note: General Discussion on the Protection of Women’s Human Rights in Conflict and Post-Conflict Contexts (UN 2011) 7; Committee on the Elimination of All Forms of Discrimination Against Women (CEDAW Committee), ‘General Recommendation No 19’ in ‘Note by the Secretariat, Compilation of General Comments and General Recommendations Adopted by Human Rights Treaty Bodies’ (29 July 1994) UN Doc HRI/GEN/1/Rev.1, para 16.

widespread impunity in this context.⁵¹ This has been attributed to their sex and status in society.⁵² It has been documented that civilian women face different risks and threats than civilian men owing to prescribed gender roles and social attitudes.⁵³ Martin, for example, noted that there is a fine line between discrimination and persecution, and concluded that women who are the targets of military attacks may find it difficult to convince decision makers that they are the victims of persecution rather than random violence. She refers to Bosnia, Eritrea, Guatemala, Mozambique, Rwanda and Somalia as examples where attacking women has been a deliberate tactic.⁵⁴ The United Nations (UN) Secretary-General stated that women are the ‘targets of specific forms of violence and abuse, including sexual violence and exploitation’.⁵⁵ Women are disproportionately affected by conflict through the use of rape and sexual violence as wartime strategy,⁵⁶ although men and boys are also victims of rape and sexual violence and have been described as the unrecognised minority.⁵⁷ In addition to these deliberate tactics, in situations where violence against women and discrimination is already prevalent, armed conflict further exacerbates this trend.⁵⁸

Feminist perspectives in international refugee law have also explained how asylum decision makers consider state-sanctioned violence more serious than violence within the family or the community by the emphasis on state sovereignty in international refugee law.⁵⁹ This emphasis on state sovereignty has resulted in an interpretation of the concept of persecution by non-state actors as comprising two distinct elements requiring separate legal assessment, namely the existence of a risk of serious harm coupled with the absence of state protection.⁶⁰ Initially, this approach was welcomed for its recognition of non-state actors as agents of persecution with the potential to better cater for asylum claims on the basis of gender-based violence.⁶¹ Nevertheless, the breaking down of the elements of the refugee definition in this

⁵¹ UNSC Res 1674 on Protection of Civilians in Armed Conflict (UN 2006) paras 7, 8, 11.

⁵² UN Fourth World Conference on Women, Platform for Action: Women and Armed Conflict (UN 1995) para 135; UN Secretary-General, Women, Peace and Security: Study (n 50) para 6.

⁵³ UN Secretary-General, Women, Peace and Security: Study (n 50) paras 51–57.

⁵⁴ Susan Forbes Martin, *Refugee Women* (2nd edn, Lexington Books 2004) 31–32.

⁵⁵ UN Secretary-General, Women, Peace and Security: Study (n 50) ix, paras 58–63.

⁵⁶ UN Special Rapporteur on Violence against Women Its Causes and Consequences, 15 Years of the United Nations Special Rapporteur on Violence against Women Its Causes and Consequences (UN 2009) 15.

⁵⁷ Sandesh Sivakumaran, ‘Sexual Violence against Men in Armed Conflict’ (2007) 18 *European Journal of International Law* 253; Médecins Sans Frontières, ‘Shattered Lives: Immediate Medical Care Vital for Sexual Violence Victims’ (MSF, June 2009) 11.

⁵⁸ UN Secretary-General, Women, Peace and Security: Study (n 50) para 6.

⁵⁹ Heaven Crawley, ‘Engendering the State in Refugee Women’s Claims for Asylum’ in Susie Jacobs, Ruth Jacobson and Jennifer Marchbank (eds), *States of Conflict: Gender, Violence and Resistance* (Zed Books 2000) 92.

⁶⁰ See for example Lord Hoffmann in *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v* [1999] UKHL 20: ‘These two elements have to be combined to constitute persecution within the meaning of the Convention. As the *Gender Guidelines for the Determination of Asylum Claims in the UK* (published by the Refugee Women’s Legal Group in July 1988) succinctly puts it (at p. 5): “Persecution = Serious Harm + The Failure of State Protection”.’

⁶¹ Rachel Bacon and Kate Booth, ‘Persecution by Omission: Violence by Non-State Actors and the Role of the State under the Refugees Convention in Minister for Immigration and Multicultural Affairs v Khawar’ (2002) 24 *Sydney Law Review* 584, 602.

manner has been said to create a stricter test for meeting the requirements of that definition because it focuses the assessment on whether the state of origin has done enough to protect the person rather than the risk of serious harm.⁶² Feminist scholarship has concluded that as a result, women (although not exclusively) are insufficiently or unequally protected under international refugee law because violence by non-state actors is the most prevalent form of ill-treatment against women.⁶³ What is more, the issue of state protection is further compounded in the context of armed conflicts and failed states.⁶⁴

In light of this, the book is also concerned with how violence in contemporary armed conflicts impacts on men and women differently, and the extent to which this is taken into account when the Refugee Convention is applied and interpreted. It thus aims 'to question the assumptions of neutrality and universal applicability of norms of international law'.⁶⁵ Feminist scholars have argued that the apparent neutral, universal and general application of international law has hidden the manner in which gender may play an essential role in how refugees are created,⁶⁶ and revealed that the lived experiences of women were not adequately represented by the legal framework both in its substance and application.⁶⁷

The gender lens adopted in this book thus challenges law as a 'neutral', 'objective' and universal source of authority,⁶⁸ and instead demonstrates that international refugee law is interpreted in a manner that fails to recognise the gender-differentiated impact of violence in situations of armed conflict. This critical approach seeks to counter mainstream legal scholarship whose ideas have remained so resistant to the inclusion of a gender analysis.⁶⁹ The book adopts the concept of 'gender' as a social phenomenon in which identities are socially constructed.⁷⁰ Adopting a gender lens thus involves an enquiry into 'a set of cultural institutions and practices that constitute the norms and standards of masculinity and femininity'.⁷¹ The book also engages with the notion of 'gender subordination', a process whereby relations of power and dominance are characterised by the valorisation of masculinities over

⁶² Daniel Wilsher, 'Non-State Actors and the Definition of a Refugee in the United Kingdom: Protection, Accountability or Culpability?' (2003) 15 *International Journal of Refugee Law* 68, 83; see all the questions raised by Anker in attempts to define the required level of protection by the state in cases of non-state actors of persecution, Deborah Anker, 'Refugee Law, Gender, and the Human Rights Paradigm' (2002) 15 *Harvard Human Rights Journal* 133, 147.

⁶³ Siobhán Mullally, 'Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?' (2011) 60 *International and Comparative Law Quarterly* 459.

⁶⁴ Tara Magner, 'Does a Failed State Country of Origin Result in a Failure of International Protection? A Review of Policies toward Asylum-Seekers in Leading Asylum Nations' (2001) 15 *Georgetown Immigration Law Journal* 703.

⁶⁵ Hilary Charlesworth, Christine Chinkin and Shelley Wright, 'Feminist Approaches to International Law' (1991) 85 *American Journal of International Law* 613, 644.

⁶⁶ Doreen Indra, 'Gender: A Key Dimension of the Refugee Experience' (1987) 6 *Refuge* 3, 3.

⁶⁷ Colin Harvey, 'Engendering Asylum Law: Feminism, Process and Practice' in Susan Millns and Noel Whitty (eds), *Feminist Perspectives on Public Law* (Cavendish 1999) 223.

⁶⁸ Jo Shaw, 'Importing Gender: The Challenge of Feminism and the Analysis of the EU Legal Order' (2000) 7 *Journal of European Public Policy* 406, 412.

⁶⁹ Joanne Conaghan, *Law and Gender* (OUP 2013) 16; Carol Smart, *Feminism and the Power of Law* (Routledge 1989).

⁷⁰ Sally Engle Merry, *Gender Violence: A Cultural Perspective* (Wiley-Blackwell 2009) 180.

⁷¹ Christine Chinkin and Mary Kaldor, 'Gender and New Wars' (2013) 67 *Journal of International Affairs* 167, 167.

femininities.⁷² Gender dynamics are influenced by situations of armed conflict and violence as these impact on traditional gender roles, norms and expectations within a given society.⁷³ As will be discussed, international human rights norms are particularly significant for the interpretation of international refugee law as they identify unequal gender relations as a cause and continuation of violence.⁷⁴

1.2 Methodology

The book explores how the Refugee Convention is applied and interpreted in situations of armed conflict by reviewing a large stratified and systematic probability sampling of asylum appeals of persons fleeing Afghanistan, Iraq and Syria determined between 2013 and 2016 in six EU MS. The methodology adopted enables the identification of current practice and trends in the EU in respect of the determination of approximately one-third of asylum claims made in the EU.

1.2.1 Comparative Legal Research

The focus of this book is on appellate decision-making because the role of the judiciary in interpreting the Refugee Convention is fundamental. Lambert argues that refugee law ‘has evolved mostly under the influence of judges’ and that this area of law has become ‘fundamentally judicialised’.⁷⁵ In the absence of an international court empowered to provide a common interpretation to the Refugee Convention,⁷⁶ courts have developed a key role as ‘agents of normative change’.⁷⁷ In the EU, the way in which MS conceive of refugee protection can be gleaned by enquiring into judicial interpretation of international protection provisions in EU law. The Qualification Directive has been transposed into each EU MS and is currently being interpreted by domestic appellate authorities. As appellate authorities’ role is to review the decisions of the executive, they play an essential role in safeguarding the rule of law.⁷⁸ Analysis of judicial interpretation thus provides significant

⁷² Characteristics generally associated with masculinity include domination, strength, protection, aggression, public life, leadership and rationality, whereas characteristics generally associated with femininity include submission, weakness, vulnerability, passivity, private life, care and emotion; see V. Spike Peterson and Anne Sisson Runyan, *Global Gender Issues* (Westview Press 1993) 5–8.

⁷³ Alexis Henshaw, ‘Masculinity and New War: The Gendered Dynamics of Contemporary Armed Conflict’ (2017) 25 *Gender & Development* 343; Rosemary Grey and Laura J. Shepherd, ‘“Stop Rape Now?” Masculinity, Responsibility, and Conflict-Related Sexual Violence’ (2013) 16 *Men and Masculinities* 115; Fidelma Ashe, *The New Politics of Masculinity: Men, Power and Resistance* (Routledge 2011).

⁷⁴ For a detailed exposition of these norms, see Christel Querton, ‘Gender and the Boundaries of International Refugee Law: Beyond the Category of “Gender-Related Asylum Claims”’ (2019) 37 *Netherlands Quarterly of Human Rights* 379, 392–395; see Section 2.2.2 in Chapter 2.

⁷⁵ H el ene Lambert, ‘Transnational Law, Judges and Refugees in the European Union’ in H el ene Lambert and Guy S. Goodwin-Gill (eds), *The Limits of Transnational Law: Refugee Law, Policy Harmonization and Judicial Dialogue in the European Union* (CUP 2010) 4.

⁷⁶ Although the International Court of Justice (ICJ) has jurisdiction to determine any dispute between states regarding the interpretation of the Refugee Convention, it has never been invoked; Article 38 Refugee Convention.

⁷⁷ Lambert, ‘Transnational Law, Judges and Refugees in the European Union’ (n 75).

⁷⁸ See for example Article 2 Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union 2012/C 326/01, Official Journal C 326, 26/10/2012 P. 0001–0390.

insight into practice and trends as to how the EU and its MS interpret the Refugee Convention definition.

More specifically, the empirical study is based on decisions of first-instance appeal authorities. Existing empirical research on judicial practice in international refugee law tends to focus on decisions of the higher courts.⁷⁹ The current approach supports a richer analysis, as first-instance appeals generally include questions of facts and law – compared with higher courts whose jurisdiction may be limited to errors of law. A more limited number of (but potentially informative) judgments from higher instances are also examined because lower courts are required to or may follow the jurisprudence of higher courts. Accordingly, reference to some judgments from higher courts supports the analysis by providing a more comprehensive data set and subsequent conclusions. Thus, the enquiry involves a comparative analysis of the extent to which issues of gender and violence in the context of contemporary armed conflicts are addressed in judicial determinations.

1.2.2 Sampling

The judgments for this study were collected using a stratified and systematic probability sampling method that allows for the making of generalisations about judicial practice in the EU in a manner that an analysis of published asylum judgments collected in a purposive or ad hoc manner could not. Probability sampling is associated with the minimum level of sampling bias and is sometimes referred to as representative sampling because each unit of analysis in the population from which the sample is drawn has an equal and independent chance of being included in the sample. Statistical inferences can thus be drawn.⁸⁰

The sample was selected by reference to appellants' country of origin, namely Afghanistan, Iraq and Syria. These countries were selected because they represented the top three nationalities of asylum applicants in the EU between 2015 and 2018 and they are characterised by armed conflicts and widespread violence.⁸¹ Moreover, in 2017 and 2018 applicants from those three countries constituted 30 per cent of all first-time asylum

⁷⁹ See for example Lambert, 'The Next Frontier' (n 6); Valerie Oosterveld, 'Women and Girls Fleeing Conflict: Gender and the Interpretation and Application of the 1951 Refugee Convention' in Türk, Edwards and Wouters (eds), *In Flight from Conflict and Violence*; although note some exceptions in Goodwin-Gill and Lambert (eds), *The Limits of Transnational Law*; see also Appendix A for an overview of the appellate procedure in the relevant EU MS.

⁸⁰ R. B. Jain, 'Sampling Method in Legal Research' in Shashi Kant Verma and Mohammad Afzal Wani (eds), *Legal Research and Methodology* (Indian Law Institute 2001) 322.

⁸¹ Although the number of first-time asylum applicants from Venezuela and Colombia overtook those from Iraq in 2019 and 2020, Syria, Afghanistan and Iraq remained in the top five countries of origin in the EU; Eurostat, 'Asylum Applicants by Type of Applicant, Citizenship, Age and Sex – Annual Aggregated Data (Rounded)' <https://ec.europa.eu/eurostat/databrowser/view/MIGR_ASYAPPCTZA__custom_1616346/default/bar?lang=en> last updated 18 November 2021, accessed 21 November 2021. Significant changes in the geopolitical situation in Afghanistan occurred in August 2021 when the Taliban seized power. For an analysis of international protection needs following these changes, see Christel Querton, 'The Fall of Kabul: International Protection in the Context of the Armed Conflict and Violence in Afghanistan' (Refugee Law Initiative, 1 September 2021) <<https://rli.blogs.sas.ac.uk/2021/09/01/the-fall-of-kabul-international-protection-in-the-context-of-the-armed-conflict-and-violence-in-afghanistan/>> accessed 26 July 2022.

applicants in the EU.⁸² A sample constituted of appellants from those countries is thus representative of a significant number of claims being lodged in the EU. Furthermore, as these three countries are characterised by protracted armed conflicts, this selection is fitting for an examination of judicial decisions in the appeals of persons fleeing armed conflicts over time.

The judgments selected were determined between 1 January 2013 and 31 December 2016. The selected time period allows the identification of trends from 2013 to 2016. This period experienced a significant shift in asylum applications in the EU and the sample thus comprises a time frame when the number of asylum claims in the EU rose sharply from 431,100 applications in 2013 to 1,322,850 applications in 2015.⁸³

Judgments were collected from six EU MS (Belgium, Denmark, France, the Netherlands, Spain and the UK).⁸⁴ These MS were selected because there are sufficient similarities between them to make meaningful comparisons whilst simultaneously some differences exist thereby constituting a representative sample of MS in the EU. Although all six of those MS are signatory parties to the Refugee Convention and the European Convention on Human Rights (ECHR), they have some different obligations in the context of the CEAS. Thus, whereas Belgium, France, the Netherlands and Spain are bound by the recast Qualification Directive 2011, the UK was bound by the earlier 2004 version of the Qualification Directive⁸⁵ and Denmark has opted out of the CEAS altogether.⁸⁶ Furthermore, the locations of those six MS provide a geographical variation of Southern and Northern states.

Finally, there are differences in the asylum appeal processes within the six MS, which may have an impact on the outcome of decisions. The principal differences in the asylum appellate procedures include the type of appellate system, the grounds of appeal and the characteristics of the hearing.⁸⁷ Thus, whereas asylum appeals in Belgium, Denmark, France and the UK are determined by specialist asylum appellate bodies, they are determined by general administrative law courts in Spain and the Netherlands. Appeals against the grant

⁸² Eurostat, 'Asylum in the EU Member States – 650 000 First-Time Asylum Seekers Registered in 2017: Syrians, Iraqis and Afghans Continued to Be Top Citizenships' (20 March 2018) <<http://ec.europa.eu/eurostat/documents/2995521/8754388/3-20032018-AP-EN.pdf/50c2b5a5-3e6a-4732-82d0-1caf244549e3>> accessed 12 July 2021; Eurostat, 'Asylum in the EU Member States – 580 800 First-Time Asylum Seekers Registered in 2018, Down By 11% Compared with 2017: Syrians, Afghans and Iraqis Continued to Be the Top Citizenships' (14 March 2019) <<https://ec.europa.eu/eurostat/documents/2995521/9665546/3-14032019-AP-EN.pdf/eca81dc5-89c7-4a9d-97ad-444b6bd32790>> accessed 12 July 2021.

⁸³ Eurostat, 'Asylum and First Time Asylum Applicants – Annual Aggregated Data (Rounded) (tps00191)' (6 February 2020) <<https://ec.europa.eu/eurostat/databrowser/view/tps00191/default/table?lang=en>> accessed 9 February 2020; the total number of applicants in 2014 was 626,965 and 1,260,920 in 2016.

⁸⁴ As noted, although the UK is no longer an EU MS, it left the EU on 31 January 2020. The discussion that follows summarises the UK's legal obligations whilst it was an EU member.

⁸⁵ The UK withdrew from the EU on 31 January 2020 but continued to be bound by EU law until the end of the implementation period on 31 December 2020, European Union (Withdrawal Agreement) Act 2020. Since that time, the UK is no longer bound by the Qualification Directive, although the Refugee or Person in Need of International Protection (Qualification) Regulations 2006 SI No. 2525 that were adopted to transpose the Qualification Directive into domestic law constituted EU-derived domestic legislation, European Union (Withdrawal) Act 2018, s 2, until 28 June 2022 when they were revoked. The definition of a refugee is now found in the Nationality and Borders Act 2022, ss 30–35.

⁸⁶ Protocol (No) 22 on the Position of Denmark annexed to the Treaty on the Functioning of the European Union (TFEU).

⁸⁷ See Appendix A.

of subsidiary protection on Refugee Convention grounds may be brought in all the EU MS surveyed except the Netherlands, where the District Courts do not have jurisdiction to hear 'upgrade appeals'.⁸⁸ Finally, although all asylum appeals in Belgium, France, the Netherlands and the UK envisage an oral hearing, asylum appellants in Denmark may be routed into the written procedure,⁸⁹ and in Spain no hearing of asylum appellants is explicitly required unless requested by the parties.⁹⁰ Accordingly, whereas there are essential similarities between the selected countries, particularly in relation to their legal obligations, there are also slight variations such as the legal frameworks, processes and geographical locations, which may shed light on any differences in legal interpretation, if any. The aim was to collect sixty judgments in total from each of the six EU MS, comprising twenty judgments from each of the three countries of origin. Some of the differences in their national asylum systems, however, meant this was not possible for each, as will be discussed.⁹¹

The sample of judgments contains asylum appeals filed by men and women. The reason for this is two-fold. Firstly, understanding and analysing how appellate authorities in the EU take into consideration gender requires that the research data includes the cases of both men and women in order to make meaningful and robust comparative findings. According to Yuval-Davis, a proper understanding of gender requires examination of both masculinity and femininity. Thus conclusions on the gender sensitivity of judicial determinations are likely to be more comprehensive by considering issues of gender generally. Secondly, this methodology addresses criticism of equating gender with women and treating women's claims for international protection as 'special' cases, calling for exceptional or 'outside the norm' application of the international refugee law framework.⁹² Thus, the methods are rooted in a theoretical framework aiming to move away from researching and analysing women's asylum claim as 'special cases' and aiming to adopt a gendered approach to the identification, analysis and interpretation of international refugee law. This approach is embedded in the understanding that gender is an essential lens for the proper application of international refugee law in general and indispensable to an adequate understanding of the nature of violence in contemporary armed conflicts more specifically.

The analysis presented in this book is predominantly qualitative in nature. This is because if gender is understood as the construction of social relations between men and women, the manner in which international refugee law is interpreted and applied does not lend itself well to a quantitative analysis. As Cockburn highlights, although the relative position of men versus women suggests statistics, they always reveal exceptions.⁹³ Thus, pointing to a higher rate of refugee protection granted to women seeking asylum does not necessarily

⁸⁸ The Netherlands (NL): RvS N° 20010591481 28.03.2002.

⁸⁹ For example, where the appeal is deemed unfounded or the appellant is seeking a status upgrade, see s. 56(4)(1)–(2) Udlændingeloven: Lov nr. 226 af 8 juni 1983, Lovtidende A 1983, as amended by Lov om ændring af udlændingeloven: Lov nr. 239 af 10 marts 2019, Lovtidende A 2019.

⁹⁰ Art. 62 of the Ley 29/1998, de 13 de julio, reguladora de la Jurisdicción Contencioso-administrativa; Article 29(1) Ley 12/2009, de 30 de octubre, reguladora del derecho de asilo y de la protección subsidiaria BOE núm. 263, de 31 de octubre.

⁹¹ See Section 1.2.3.

⁹² Querton, 'Gender and the Boundaries of International Refugee Law' (n 74).

⁹³ Cynthia Cockburn, 'The Gendered Dynamics of Armed Conflict and Political Violence' in Caroline O. N. Moser and Fiona C. Clark (eds), *Victims, Perpetrators or Actors? Gender, Armed Conflict and Political Violence* (Zed Books 2001) 15.

demonstrate that there is no discrimination in the application of international refugee law.⁹⁴ Such findings cannot be made on the basis of statistics alone. For example, the success of an asylum claim may be related to the reasons for fleeing. Furthermore, although women represent 50 per cent of the refugee population worldwide, only 30 per cent of asylum applications in the EU are made by women. It is therefore considered necessary to analyse the basis of asylum claims and applicants' individual circumstances against the decisions to determine the existence of any disparity in decision-making. Overall, although the data collected has yielded some quantitative findings, the substantive analysis of the book is qualitative.

Despite the advantages of large stratified and systematic probability sampling methods there are a few limitations due to the individual characteristics of each EU MS. Firstly, although an almost equal number of appeals were selected for each of the EU MS surveyed, the total number of appeals decided for appellants from Afghanistan, Iraq and Syria vary considerably across MS. Thus, the sample from MS with higher numbers of decided appeals from a given country of origin will be less representative than another with fewer decided appeals. Secondly, although Afghans, Iraqis and Syrians are the main asylum applicants since 2015 in the EU, each MS has different 'top three' countries of origin. Finally, judgments themselves may not reveal the entirety of judges' reasoning because the extent and transparency of reasoning within judgments is highly dependent on the legal traditions and cultures within different MS. In the future, further research based on different methods, such as interviews with judges, may provide an additional dimension to the findings of this study.

1.2.3 *Application of the Sampling Method*

As public access to asylum appeal judgments varies significantly across the EU MS selected for this study, the application of the sampling method required adaptation in some cases. It is summarised for each jurisdiction.

The sample from the Belgian Council for Alien Law Litigation (*Conseil du Contentieux des Étrangers/Raad voor Vreemdelingenbetwistingen, CCE/RvV*) was collected using its online database.⁹⁵ The CCE/RvV's publication of judgments policy is that that all decisions are published online since 1 November 2010.⁹⁶ Accordingly, the sample was generated entirely randomly as each appeal had an equal chance of being included in the sample and was evenly spread across the relevant period.

The Danish Refugee Appeals Board (*Flygtningenævnet, DRAB*) regularly publishes anonymised summaries of selected decisions described as a representative sample of the DRAB's practice regarding certain countries.⁹⁷ The summaries contain the full reasoning of the DRAB in the particular case.⁹⁸ The selection criteria for publication are not clear however, and it is only since May 2015 that the DRAB publishes summaries of all its decisions online.

⁹⁴ Thomas Spijkerboer, *Gender and Refugee Status* (Ashgate 2000) 26.

⁹⁵ CCE/RvV, 'Arrêts' <www.rvv-cc.be/fr/arr> accessed 12 July 2021.

⁹⁶ Except where the Commissioner General for Refugees and Stateless Persons' decisions are withdrawn, appellants are absent, adjournments happen, or in the case of unfounded or inadmissible appeals, although a selection of those cases are nonetheless included, see CCE/RvV, 'Politique de Publication' (1 November 2010) <www.rvv-cc.be/fr/arr/politique-publication> accessed 12 July 2021.

⁹⁷ DRAB, 'Praksis' <<https://fln.dk/da/Praksis>> accessed 12 July 2021.

⁹⁸ DRAB, 'Information om nævnets offentliggørelse af praksis på fln.dk' (27 May 2010) <https://fln.dk/da/Information_til/Advokater/Naevnets_praksis> accessed 12 July 2021.

However, the DRAB sends all of its decisions and accompanying interview transcripts to the Danish Refugee Council (DRC) that stores the information in its own database. Accordingly, a data collection visit was undertaken to the DRC in Copenhagen in September 2017 to access their database of DRAB decisions. The random systematic sampling method was applied to the DRC database.

The French National Asylum Court (Cour Nationale du Droit d'Asile, CNDA) publishes thematic and yearly reports with extracts of its jurisprudence,⁹⁹ but no other data is available publicly. Therefore, a data collection visit was undertaken to the Centre for Research and Documentation of the CNDA in Paris in September 2017 to access the Court's database of judgments. The random systematic sampling method was applied to the CNDA database. During the data collection visit, asylum appeal hearings at the CNDA were observed during a full day, enabling a better understanding of the context in which the CNDA judges made their decisions.

Not all decisions by the Dutch District Court (Rechtbank, Rb) are published on the official database of judicial decisions in the Netherlands.¹⁰⁰ The judiciary has adopted a Decree that sets out the criteria for publication of judgments in the database.¹⁰¹ The database thus is not exhaustive and contains only judgments that the courts have selected on the basis that they are particularly interesting and may influence other courts sitting elsewhere. The lists of Afghan, Iraqi and Syrian appeals for the period 1 January 2013 to 31 December 2016 were created by cross-referencing the public database with two other private databases, namely Migratieweb and VluchtWeb, the latter being managed by the Dutch Refugee Council. The random systematic sampling method was thus applied to the most exhaustive lists of Rb asylum decisions that could be created. However, these three databases contain different types of appeals ranging from substantive asylum appeals to applications for injunctive relief against removal and unlawful detention claims and therefore the random probability sampling method when applied did not result in the full sample of sixty asylum appeals judgments.

The total number of asylum appeals by Afghan, Iraqi and Syrian nationals in Spain between 2013 and 2016 was significantly smaller than in the other EU MS surveyed and even fewer than the sixty judgments which were to be selected for the sample of each jurisdiction. Accordingly, the totality of Afghan, Iraqi and Syrian appeals determined by both the Spanish National High Court (Audiencia Nacional, AN) and the Supreme Court (Tribunal Supremo, TS) between 2013 and 2016 were collected using the public database of judicial decisions (General Council of the Judiciary – Consejo General del Poder Judicial, CENDOJ).¹⁰² The final sample of Spanish appellate decisions concerning appellants from Afghanistan, Iraq and Syria thus includes thirty-six judgments from both the AN and the TS.

As none of the decisions of the UK First-Tier Tribunal (FTT) are published online, access to FTT decisions was obtained through the Data Access Panel of Her Majesty's Courts and

⁹⁹ CNDA, 'Recueils de Jurisprudence' <www.cnda.fr/Ressources-juridiques-et-geopolitiques/Recueils-de-jurisprudence> accessed 12 July 2021.

¹⁰⁰ Rechtspraak, 'Uitspraken' <<https://uitspraken.rechtspraak.nl/>> accessed 12 July 2021.

¹⁰¹ Rechtspraak, 'Selectiecriteria' (26 March 2012) <www.rechtspraak.nl/Uitspraken/Paginas/Selectiecriteria.aspx> accessed 12 July 2021.

¹⁰² CENDOJ, 'Centro de Documentación Judicial' <www.poderjudicial.es/search/indexAN.jsp> accessed 12 July 2021.

Table 1.1 *Sample of asylum appeals*

Sample	Afghanistan	Iraq	Syria	Total
BE	20	20	20	60
DK	20	20	20	60
ES	4	3	29	36
FR	18	20	20	58
NL	16	18	12	46
UK	20	20	20	60
Total	98	101	121	320

Table 1.2 *Outcome of sample appeals by country of origin and EU Member State*

Country of Origin	Outcome	BE	DK	ES	FR	NL	UK	Total	%
Afghanistan	Allowed	1	6	2	15	8	10	42	42.86
	Dismissed	19	14	2	3	8	10	56	57.14
Iraq	Allowed	3	3	1	8	7	6	28	27.72
	Dismissed	17	17	2	12	11	14	73	72.28
Syria	Allowed	9	6	4	5	2	6	32	26.45
	Dismissed	11	14	25	15	10	14	89	73.55

Tribunals Service (HMCTS). Accessing decisions of the FTT is particularly difficult,¹⁰³ and to the author's knowledge there is only one other study based on FTT asylum decisions obtained through HMCTS, although the focus of the research was the quality of administrative justice.¹⁰⁴ For this study, HMCTS applied the random systematic sampling method to their database themselves and access to the sample was provided at a secure location in September 2018.

Thus, the total sample collected for this study over the course of twenty-one months, between January 2017 and September 2018, amounted to 320 asylum appeal decisions as detailed in Table 1.1.

The total sample size is adequate to make inferences about the manner in which the judiciary in EU MS determine asylum appeals of persons fleeing armed conflicts. Overall, 32 per cent of all the appeals in the sample were allowed and 68 per cent were dismissed.¹⁰⁵ The outcome of appeals by country of origin and EU MS is set out in more detail in Table 1.2.

¹⁰³ See for example challenges identified in Asylum Aid, Migrants Resource Centre and NatCen Social Research, 'Through Her Eyes: Enabling Women's Best Evidence in UK Asylum Appeals' (November 2017) 12–13 <www.natcen.ac.uk/media/1499615/through-her-eyes_full-report_nov17.pdf> accessed 12 July 2021.

¹⁰⁴ Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Hart 2011) 29.

¹⁰⁵ Totalling 102 appeals and 218 appeals respectively.

1.3 Structure of the Book

Having set out the broad subject of the book, the conceptual notions and empirical study that underpin this contribution, Chapter 2 reviews the legal frameworks that apply to the international protection of persons fleeing contemporary armed conflicts from a gender perspective. It critically engages with international and EU refugee and human rights law, international humanitarian law and international criminal law and argues that the effective protection of persons fleeing situations of armed conflict requires consideration of present-day realities, including the nature and dynamics of violence in contemporary armed conflicts. In turn, understanding the nature and dynamics of violence in contemporary armed conflicts requires engagement with knowledge in security and feminist studies. Accordingly, Chapter 3 proposes a conceptual framework drawing on gender and security studies to reframe the interpretation of the Refugee Convention definition. Chapters 4 to 6 discuss the findings of the empirical enquiry. Chapter 4 explores how appellate authorities in the EU understand and approach situations of armed conflict. Chapters 5 and 6 examine how two essential elements of the Refugee Convention definition, namely the 'well-founded fear of being persecuted' and reasons for persecution respectively, are applied and interpreted by appellate authorities when individuals flee contemporary armed conflicts. Finally, Chapter 7 draws the findings together and makes some recommendations for interpreting the Refugee Convention in a manner that better responds to the characteristics of contemporary armed conflicts.