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Recognizing Sexual and Gender-Based Violence as Persecution Grounds for Women Seeking
Refugee Status and Asylum

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Abstract

This thesis will explore both the possibility and necessity of establishing the question of whether or not gender-related claims are valid persecution grounds for women seeking refugee status or asylum, particularly in the form of SGBV. Through a human rights-based approach, this thesis will make a case for the recognition of SGBV as a persecution claim for refugees and asylum seeking women through a multi-sectoral approach using different entities and mechanisms to ensure that states are able to adopt legislation on gender-based persecution. In order to demonstrate the importance of recognizing gender as a factor in refugee claims, this thesis will examine the ways in which 3 countries - Canada, Germany, and the United States - have adopted policies towards refugees and asylum seekers making claims based on gender. Ultimately, this thesis will argue for a framework that not only holds individuals and states accountable for gender persecution but that also creates a specialized category of persecution based on gender. In doing so, this thesis will also unpack the legal definition of a refugee and discuss the ways in which the law has been used to support SGBV claims, as well as the implications of how the law is used. The current bodies of international human rights and refugee will be examined and discussed in detail to show that despite the absence of references to SGBV in significant conventions, there is a growing movement that recognizes SGBV as a human rights violation and as valid persecution grounds for individuals seeking refugee status or asylum.

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I. Introduction

When crossing borders, the inaccessibility of relief and protection as well as the complex and varied policies on migration place women in a challenging position as their struggles are multilayered and their identities as refugees and as women pose doubled vulnerabilities. Kavitha Sreeharsha captures this struggle in her assertion that, “Immigrant women are, in fact, the silent victims of the broken immigration system” (4). The pervasiveness of gender considerations in refugee claims is demonstrated by international human rights law and the refugee status determination process facilitated by the United Nations High Commissioner for Refugees (UNHCR) and country governments. While it is not clearly stated as grounds for persecution in the 1951 Refugee Convention, gender is commonly and increasingly regarded as a factor to be considered in persecution claims of individuals seeking refugee status or asylum. This understanding is reached by recognizing the influence of gender in human rights; for example, there is a strong argument that Sexual and Gender-Based Violence (SGBV) is a form of torture and can amount to war crimes or crimes against humanity (Copelon 323). A January 2016 Report of the Special Rapporteur on torture addresses gender violence through the lens of the Convention Against Torture, noting that “full integration of a gender perspective into any analysis of torture and ill-treatment is critical to ensuring that violations rooted in discriminatory social norms around gender and sexuality are fully recognized, addressed, and remedied” (Human Rights Council, 3). The report recognizes that rape and sexual violence can amount to torture and that domestic violence may also amount to torture “whenever states acquiesce in the prohibited conduct by failing to protect victims and prohibited acts, of which they knew or should have known, in the private sphere” (Human Rights Council, 14-15). Rhonda Copelon discusses the strong relationship between gender-based violence and torture, arguing for the

importance of recognizing domestic violence as torture at the same level as state-sanctioned torture (330). This thesis will explore both the possibility and necessity of establishing the question of whether or not gender-related claims are valid persecution grounds for women seeking refugee status or asylum, particularly in the form of SGBV. Through a human rights-based approach, this thesis will make a case for the recognition of SGBV as a persecution claim for refugees and asylum seeking women through a multi-sectoral approach using different entities and mechanisms to ensure that states are able to adopt legislation on gender-based persecution. This thesis is not suggesting that the existing guidelines be reopened and amended, but rather that the creation of new guidelines adds weight to the existing guidelines.

The refugee status determination process is very different across countries, and refugee law is localized based on domestic laws (Arbel, Dauvergne and Millbank 9,11). When it comes to gender-related claims, women are more likely to censor and craft their claims to make them more in line with social norms and more "typical" refugee claims (Arbel, Dauvergne and Millbank 13). Ultimately, this thesis will argue for a framework that not only holds individuals and states accountable for gender persecution but that also creates a specialized category of persecution based on gender. In doing so, this thesis will also unpack the legal definition of a refugee and discuss the ways in which the law has been used to support SGBV claims, as well as the implications of how the law is used.

In order to demonstrate the importance of recognizing gender as a factor in refugee claims, this thesis will examine the ways in which 3 countries - Canada, Germany, and the United States - have adopted policies towards refugees and asylum seekers making claims based on gender. Some countries have adopted policies that protect those who seek asylum or refugee status based on gender persecution, while other countries overlook the urgency and prevalence of

gender-related claims. Each country will be presented as a case study, where an analysis will be conducted of how each country interprets and incorporates international human rights law into its domestic law, as well as how the different entities involved in refugee status determination, asylum determination, and resettlement adopt such standards. These entities include UNHCR, country governments, and NGOs. Through the analysis of these countries, successes and gaps in policy will be identified through case studies of different populations that were resettled or granted asylum based on gender persecution. Crawley and Lester emphasize the importance of having gender asylum guidelines: “they are an important policy mechanism for ensuring a gender-sensitive perspective on the 1951 Convention” and to ensure that gender-related and gender-specific aspects of asylum claims are considered in the determination process (“Comparative Analysis” 22). Using the above analysis, this thesis will seek to answer the following research questions: How are claims of refugee or asylum status based on gender and SGBV manifested in both international and domestic law, and what are the implications of these manifestations? Are laws related to refugee/asylum claims gendered? What barriers do women face in seeking refugee status/asylum based on SGBV claims, even when a legal framework exists to protect them from SGBV? Is gender-based persecution sufficiently accounted for in refugee law?

A key to unpacking these questions is understanding the theory behind the legal definition of a refugee. This thesis will discuss different persecution grounds upon which women may seek refugee status or asylum as a potentially added barrier to the success of their claims as, depending on the country, restrictive domestic laws leave refugee law less open to interpretation. Gender persecution as a category for refugees seeking asylum or refugee status is often sought under the “membership of a particular social group” category of the Convention definition of a

refugee. However, this categorization can be problematic because it assumes that all refugees experiencing gender-based persecution have similar identities and experiences when grouped together by their sex, gender, or the violation itself as a uniform social group. Thus, the social group formulation can de-politicize a woman's experience because it does not recognize resistance to persecution as an act of political opposition and as a reflection of structural inequalities and injustices (Crawley "Refugees and Gender,"17). This analysis will be expanded upon in a later section. An important part of this thesis will trace the emergence of changing attitudes around state responsibility in the public vs. the private sphere, particularly with regards to domestic violence claims. The emerging consensus that the state can indeed interfere in the private sphere in its responsibility to offer protection and justice to women who are unsafe in their own homes supports the growing acceptance of gender-related refugee/asylum persecution claims and expands SGBV to include domestic violence claims (Anker 47, 60).

A human rights analysis towards refugee law is imperative because it places SGBV on par with other human rights norms, thus increasing global awareness around the topic. Gender-based persecution claims are often made under the guise of other claims and do not stand on their own. While this can strengthen the claim in some contexts, it can also weaken the claim and de-value the severity of gender-based persecution on its own by attaching it to other human rights violations. SGBV as a human rights violation has not quite been mainstreamed into human rights law and discourse while other human rights issues have, such as civil and political rights or the right to be free from torture. In the US, using a human rights framework helped push lawmakers to recognize gender-related asylum claims as persecution grounds. It is imperative that human rights guide different sectors that address SGBV issues, such as the humanitarian and political sectors. Ultimately, analyzing gender-based persecution from a human rights standpoint will

allow for more successful recognition of claims, adequate forms of justice, and empowerment of survivors.

Recognizing SGBV as grounds for persecution among refugees and asylum seekers has the potential to impact not only the human rights but also humanitarian efforts towards refugee populations, as well as to increase the number of refugee referrals, improve the effective treatment of SGBV survivors, and shift global norms around gender equality. Shifting these norms can effectively encourage more refugees who are survivors of SGBV to come forward and share their experiences, creating a culture where reporting is standard, thus improving the referral pathway for refugees and increasing the likelihood of reliable statistical data around SGBV reporting, consequently allowing for more funding opportunities in SGBV programming. While statistics are important in observing trends and the effectiveness of policy changes, statistical data around gender asylum that is open to the public is difficult to find and is nonexistent for many countries. According to the Senior Statistician at UNHCR Geneva, UNHCR does not collect systematic data at the global level on the number of refugee and asylum persecution claims granted based on gender, at least not on a public level (Abou Chabake, email dated 25 Sep 2016). Therefore, statistics have had a minimal role in this thesis. Recognizing gender persecution as a refugee claim can help solve the funding paradox where data is needed to increase funds, but is limited due to the sensitive nature of sexual violence. A very small percentage of global humanitarian funds are allocated to the SGBV sector. In 2014, 24.5 billion dollars funded humanitarian aid on a global level (Global Humanitarian Assistance Report, 2). The sectors that receive the most funding are those related to food (\$2.9 billion), health (\$1 billion), and multi-sectoral programs (\$3.1 billion) (Global Humanitarian Assistance Report, 3). Comparatively, only \$107 million was spent on SGBV programming in 2014 (Global

Humanitarian Assistance Report, 85). The recognition of SGBV as a persecution claim can have a domino effect, motivated not only by a moral imperative but also by practical needs for NGOs making funding appeals in the protection sector. The significance of this topic is demonstrated by the fact that the global refugee crisis is as high as it has ever been in history; by the end of 2015, 65.3 million people were displaced worldwide (Edwards, *UNHCR*). Among the over 60 million refugees worldwide, UNHCR estimates that women and girls make up 50% of “any refugee, IDP, or stateless population” ([UNHCR, "Women"](#)). Given the sheer numbers, there is an evident need for the recognition of refugee and asylum SGBV claims, as well as a need to acknowledge the added vulnerability of being a woman who is displaced. Later chapters will demonstrate the difficulty in obtaining asylum claims based on gender persecution and the power of lawyers and advocates from the ground up pushing for policy change.

The current bodies of international human rights refugee law will be examined and discussed in detail to show that despite the absence of references to SGBV in significant international human rights law conventions, there is a growing movement that recognizes SGBV as a human rights violation and as valid persecution grounds for individuals seeking refugee status or asylum. This movement is supported by legally-binding regional conventions, some of which expand the refugee definition, supplement other forms of international human rights law related to gender and refugees, and/or reinforce regional compliance with regards to gender equality and refugee status. Regional conventions are also important tools that can protect refugees experiencing gender-related violence. The various regional tools will be discussed, and those that pertain to the US, Canada, and Germany will be discussed in detail, regardless of whether or not those countries are signatories to their respective regional conventions.

Importantly, regional conventions may not represent an international standard and are limited to their regional capacities and signatories.

In contexts where SGBV is not recognized as persecution grounds for individuals seeking refugee status or asylum, whether the lack of recognition is a result of insufficient international human rights law mechanisms, insufficient regional conventions related to gender and refugee status, or noncompliance by state parties, other institutions and instruments may stand in. When country governments do not have laws that sufficiently protect refugees, the UNHCR may step in as the entity mandated with the responsibility to protect refugees in accordance with the laws of the country in which it is operating. The UNHCR may also work in countries that do have comprehensive policies on refugee protection; the extent of UNHCR cooperation with country governments varies, as well as the extent to which countries rely on UNHCR for assistance. UNHCR guidelines, handbooks, and recommendations around gender-related persecution, refugees, gender violence, and the refugee status determination process will be examined. According to UNHCR's guidelines on gender persecution, it is "widely accepted" that gender is a factor that is considered when refugees are making a persecution claim; thus, "there is no need to add an additional ground to the 1951 Convention Definition" (*Guidelines...Gender-Related Persecution*, 3). This thesis will explore and, in some cases, challenge UNHCR's claim that there are sufficient mechanisms to protect refugees and asylum seekers with gender-related persecution claims.

For the purposes of this thesis, "gender" is defined as, "the social construction of power relations between women and men, and the implications of these relations for women's and men's identity, status and roles. It is not the same as sex which is biologically defined" (Crawley, "Refugees and Gender" 7). Audrey Macklin emphasizes the difference between women being

persecuted *as* women, which involves gender-specific persecution, vs. women being persecuted *because* they are women (Macklin 259). While gender persecution affects women and men generally, as well as LBGTI and people with conforming or nonconforming Sexual Orientations or Gender Identities (SOGIs), this thesis will focus specifically on Violence against Women (VAW). Thus, here, gender-related persecution “refers to the experiences of women who are persecuted *because* they are women, i.e. because of their identity and status as women,” whereas gender-specific persecution “refers to forms of serious harm which are specific to women” (Crawley, “Refugees and Gender” 7). In this thesis, SGBV and VAW will be used interchangeably.

II. The emergence of sexual and gender-based violence as a human rights violation

Tracing the emergence of awareness around SGBV as a human rights violation on a global scale is important in understanding and analyzing the recognition of refugee persecution claims based on gender. The recognition of VAW as a human rights violation began to surface in the decade between 1975 and 1985, when VAW emerged as a topic of international concern during the UN Decade for Women ([UN Women](#), “Timeline of Policy Commitments”). In 1979, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and its Optional Protocol were adopted ([UN Women](#), “Timeline of Policy Commitments”). CEDAW is a legally binding Convention to state parties that aims to end discrimination against women and outlines different forms of discrimination in its various articles. State parties must incorporate this Convention into their national law and report back to the CEDAW committee on the progress of their obligations. CEDAW does not mention VAW, but General Recommendations 12 and 19 state that VAW is a form of discrimination in CEDAW ([UN](#)

[Women](#), “Timeline of Policy Commitments”). These Conventions, along with other instruments of international human rights law, will be discussed in a later chapter.

Additional Conventions, Declarations and Resolutions that were adopted demonstrate the shifting norms around SGBV as a human rights violation. In 1985, the General Assembly Resolution on Domestic Violence was adopted. The Convention on the Rights of the Child was then adopted in 1989, marking an important milestone in the recognition of children’s rights, including protection from sexual exploitation and trafficking ([UN Women](#), “Timeline of Policy Commitments”). In 1993, Violence Against Women became recognized as a human rights violation at the World Conference of Human Rights through the development of the Vienna Declaration and Programme of Action, which called for a Special Rapporteur on Violence Against Women to be appointed. This advocacy and action led to the drafting of the Declaration on the elimination of Violence Against Women ([UN Women](#), “Timeline of Policy Commitments”). In 1993 and 1994, international criminal tribunals for the former Yugoslavia and Rwanda were established, prosecuting sexual crimes and classifying rape as a form of genocide ([UN Women](#), “Timeline of Policy Commitments”). The Special Rapporteur on VAW was appointed in 1994 ([UN Women](#), “Timeline of Policy Commitments”). The Special Rapporteur is tasked with researching violence against women, its causes and consequences in different countries through governments, organizations, and other special rapporteurs and to provide recommendations on how violence against women can be prevented, eliminated, and remedied. The Special Rapporteur on VAW works closely with the Human Rights Council and the Commission on the Status of Women to ensure a gender perspective in their work, conducts country visits, and submits reports on VAW in those countries ([OHCHR.org](#), “Special Rapporteur”).

The Belem Do Para Convention on the Prevention, Punishment, and Eradication of VAW was adopted in 1994 by the Organization of American States. In 1995, VAW was at the forefront of the Beijing Platform for Action, where recommendations were made for governments to establish guidelines to prevent as well as respond to VAW. The definition of VAW was also expanded upon to identify different forms of Violence ([UN Women](#), “Timeline of Policy Commitments”). The [Beijing Declaration and Platform for Action](#) acknowledges that refugee women are more vulnerable to violence (49) and encourages governments, NGOs and INGOs to implement UNHCR’s *Guidelines on the Protection of Refugee Women* and *Guidelines on the Prevention of and Response to Sexual Violence Against Refugees* (54). It also recognizes that refugee women are vulnerable to human rights violations before, during and after their flight and that the experiences of refugee women are different from those of refugee men (92). The establishment of the ICC in 1998 to prosecute sexual violence and gender crimes with a Gender and Children’s Unit for crimes related to rape, gender inequality, and sexual violence against Women and Children further solidified the recognition of SGBV as a human rights violation ([UN Women](#), “Timeline of Policy Commitments”).

Security Council Resolution 1325 was passed in 2000 to encourage the participation of women in preventing and resolving conflicts, as well as in post-conflict reconstruction and peacekeeping initiatives ([UN Security Council](#), *Resolution 1325*). The South Asian Association for Regional Cooperation (SAARC) Convention on Preventing and Combating Trafficking in Women and Children for Prostitution was established in 2002, a legally binding regional instrument ([UN Women](#), “Timeline of Policy Commitments”). In 2003, the Protocol to the African Charter on Human and People’s Rights on the Rights of Women in Africa, which included an article on violence against women ([UN Women](#), “Timeline of Policy

Commitments”). A Special Rapporteur on Trafficking was appointed in 2004 and in 2008, and a Global Campaign to end VAW was launched by the UN Secretary General, UNiTE to End Violence Against Women ([UN Women](#), “Timeline of Policy Commitments”). The Security Council adopted Resolution 1820, which addressed sexual violence in conflict and post-conflict settings ([UN Women](#), “Timeline of Policy Commitments”). Resolution 1888 was adopted in 2009, which outlined corrective actions in response to sexual violence in armed conflict settings. Resolution 1889 was also adopted, reinforcing Resolution 1325 and addressing women’s needs in post-conflict and peace-building settings ([UN Women](#), “Timeline of Policy Commitments”). A Special Representative on Sexual Violence in Conflict was appointed by the Secretary General in 2010 and Resolutions 14/12 by the Human Rights Council and Resolution 1960 were adopted to strengthen global commitments to ending all forms of VAW and sexual violence in Conflict ([UN Women](#), “Timeline of Policy Commitments”). In 2011, the Council of Europe Convention on preventing and combating VAW and Domestic Violence, also known as the Istanbul Convention, was adopted as a legally binding instrument. In 2013, member states produced conclusions on the prevention and elimination of all forms of VAW during the 57th Commission on the Status of Women ([UN Women](#), “Timeline of Policy Commitments”).

It is clearly evident that the past nearly 30 years have demonstrated the development of a global intolerance of violence against women in all its forms and contexts, whether domestic, public, in conflict settings or in flight. Decades of formal and informal actions have solidified this intolerance, at least on a UN, NGO, and intergovernmental level. While public displays of intolerance demonstrate some level of progress, they don't always translate into concrete preventative measures or solutions to eliminate VAW, especially among such marginalized populations as refugee women. This next chapter will analyze the existing tools available to

protect women and girls seeking refugee status and asylum whose claims are made on the basis of gender persecution, whether in the form of International Law, UN Conventions or regional Conventions.

III. Sexual and gender-based violence in international law and UN bodies

A. Violence against women in international human rights law

The emergence of VAW as a human rights violation has produced a myriad of documents, reports, conferences, guidelines, and recommendations. This section will focus on those elements that relate directly to violence against refugee women and gender-related persecution. Beginning with international human rights law, this section will address the relevance of each component of law and its effectiveness in addressing gender persecution as a valid claim for refugee status.

The human rights conventions that are legally binding upon state ratification are CEDAW and the Optional Protocol to CEDAW—neither of which explicitly address Gender-Based Violence as a form of discrimination. The CEDAW defines discrimination against women as “any distinction, exclusion, or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment, or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil, or any other field” (UN General Assembly, *CEDAW* Article 1). CEDAW outlines the political, social, cultural, and economic rights of women.

The Optional Protocol to CEDAW allows state parties to submit claims to the CEDAW committee (UN General Assembly, *Text of the Optional Protocol* 2). Though legally binding to

state parties, CEDAW and its Protocol are limited in scope as none of their provisions directly discuss or define violence against women, nor do they discuss the rights of refugee or migrant women. However, CEDAW's importance is not lost as it calls upon state parties to end discrimination against women, and violence against women is a form of discrimination, though not directly stated in the Convention. General Recommendation 19 clarifies this, stating that gender-based violence "is a form of discrimination that seriously inhibits women's ability to enjoy rights and freedoms on a basis of equality with men" (UN CEDAW Committee *GR No. 19*, 1). Specifically, SGBV includes "acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty" (UN CEDAW Committee *GR No. 19*, 6). General Recommendation 19 cites specific articles of CEDAW and how the anti-discrimination clauses within those articles include SGBV as a form of discrimination. For example, the Recommendation discusses the relevance of family/domestic violence to articles 16 and 5 of CEDAW, noting that cycles of abuse can perpetuate discrimination within the family unit and put women at risk (UN CEDAW Committee *GR No. 19*, 23). As part of General Recommendation 19, the CEDAW committee recommended a number of measures for state parties to take to eliminate violence against women, including the implementation of laws against gender-based violence, complaints mechanisms and effective remedies for survivors, and reporting, to name a few (UN CEDAW Committee *GR No. 19*, 24b, 24i, 24j). General Recommendation 12 recommends that state parties report back to the CEDAW Committee on measures taken to prevent violence against women, including the progress of legislation they have adopted, support services for survivors and statistics on the frequency of abuses (UN CEDAW Committee *GR No. 12*).

General Recommendation 32 takes these definitions a step further by contextualizing violence against women, gender equality and nondiscrimination as applicable specifically towards women seeking refugee status or asylum. General Recommendation 32 recognizes the link between gender discrimination and other factors such as race, ethnicity, religion/belief, health, age, class, caste, sexual orientation and gender identity that affect women disproportionately from men (UN CEDAW Committee *GR No. 32*, II.6) and calls for an intersectional approach towards recognizing these factors’ “compounded negative impact on the women concerned;” there is an emphasis on recognizing that gender discrimination impacts women to different degrees and in different ways (UN CEDAW Committee *GR No. 32*, I.3). In discussing refugee women, the Recommendation notes that women’s experiences during displacement and the refugee/asylum seeking process is dependent on state actors, who are responsible for ensuring that the rights of women experiencing displacement are not violated (UN CEDAW Committee *GR No. 32*, II.7). The Recommendation urges state parties to prevent discrimination against stateless women when they are being discriminated against by both public and private actors; state parties are responsible for taking all measures to protect women from discrimination, as well as giving them access to justice and services (UN CEDAW Committee *GR No. 32*, II.8). The Recommendation acknowledges that gender is absent from the 1951 Refugee Convention and the 1967 Optional Protocol, as well as the 1954 Convention relating to the Status of Stateless Persons and the Convention on the Reduction of Statelessness. Thus, CEDAW’s importance carries greater weight because it is necessary in order to protect refugee women in the absence of gender equality clauses in refugee conventions (UN CEDAW Committee *GR No. 32*, III.10). Furthermore, the purpose of General Recommendation 32 is to ensure that state parties incorporate gender perspectives towards refugee persecution claims, “use

gender as a factor in recognizing membership of a particular social group for purposes of granting refugee status...and further introduce other grounds of persecution...into national legislation and policies relating to refugees and asylum seekers” (UN CEDAW Committee *GR No. 32*, IVA.3).

General Recommendation 32 further discusses the importance of ensuring that SGBV is prevented at each step in the process of a woman’s displacement, from the moment she is displaced up until she reaches a durable solution to her displacement (UN CEDAW Committee *GR No. 32*, III.11). The Recommendation cites examples of violence against women that are considered forms of persecution, including but not limited to trafficking, female genital cutting, sexual assault, domestic violence, and honor crimes (UN CEDAW Committee *GR No. 32*, IVA.15) and classifies SGBV as a form of torture under article 3 of the Convention Against Torture (CAT) (UN CEDAW Committee *GR No. 32*, IVB.19).

The CEDAW committee advises that every step of the refugee/asylum determination process should be considered through a gender lens (*GR No. 32*, IVC.25). It is the responsibility of states to ensure that this happens. The Committee advises using other grounds besides solely the particular social group distinction in refugee claims because it can entrench stereotypes of women as powerless victims and advises state parties to adopt sex and gender as persecution grounds for determining refugee status, as well as acknowledging the expression of women’s rights as a political act (*GR No. 32*, IVC.30-31). State parties are also encouraged to remove all reservations to the Convention, ratify the Optional Protocol, and accede to the 1951 Convention and its 1967 Protocol (*GR No. 32*, IVC.35), as well as remove reservations on those Conventions. The Committee encourages cooperation with UNHCR in ensuring that women refugee and asylum seekers are protected (*GR No. 32*, IVD.41) and advises that interviewers,

asylum officers and decision makers are trained on adjudicating gender asylum claims. The Committee recommends using UNHCR's "Guidelines on international protection: gender-related persecution within the context of article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees" as an effective training tool for practitioners. This document will be discussed in a later section. The Committee advises state parties to ensure that all women are able to present their cases based on equality and non-discrimination, are informed about the asylum determination process, and have access to it, ensuring that they have a right to an independent claim and to be interviewed individually without male family members. Interviewers must be trained in having a gender-sensitive approach when making these claims. The interview environment must be supportive, and appropriate services for women such as counseling must be available. Women also have the right to appeal their cases if they are denied asylum (*GR No. 32, IVD.50*).

CEDAW's General Recommendations are important because they create an international space where SGBV is recognized as a form of discrimination against women that is also a human rights violation. At the same time, they don't have the same legal weight as Conventions and thus may be overlooked by state parties. CEDAW's General Recommendations address violence against women in CEDAW, as well as violence against refugee women as valid persecution grounds, despite the absence of gender in the Refugee Convention, which will be discussed in a later section. There is no Convention open for signature or ratification to eliminate Violence against Women, but the Declaration on the Elimination of Violence against Women provides guidelines and reinforcement of SGBV as a human rights violation.

The Declaration on the Elimination of Violence against Women was adopted in 1993 to strengthen and complement CEDAW. It recognizes violence against women as a result of

“historically unequal power relations between men and women, which have led to domination over and discrimination against women by men and to the prevention of the full advancement of women,” thus placing women in a position subordinate to men (UN General Assembly, *Declaration*, Intro). The Declaration recognizes the added vulnerability of certain groups of women to violence such as indigenous women, refugee women, and women with disabilities (UN General Assembly, *Declaration*, Intro). Violence against women as per the Declaration is defined as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life” (UN General Assembly, *Declaration*, 1). VAW includes physical, psychological and sexual domestic/family violence, violence in the workplace and in education institutions, and violence perpetrated or sponsored by the state (UN General Assembly, *Declaration*, 2). The Declaration references the necessity of equal rights for women from a human rights standpoint and urges states to criminalize, prevent and eliminate VAW through a variety of mechanisms, including through domestic legislation, accession to CEDAW, the development of preventative mechanisms and national plans, the sanctioning of violence, working with NGOs and education campaigns to prevent VAW, and supporting data and research on VAW. Article 5 calls for International cooperation among UN systems, governments and NGOs to promote awareness and action around eliminating VAW (UN General Assembly, *Declaration*, 3-4, 5).

B. Violence against women in regional conventions

In the absence of International Conventions related to Violence against Women, regional Conventions can help ensure that human rights standards are being upheld on a regional level,

should eligible countries wish to sign or ratify these Conventions. This section will discuss the regional Conventions related Violence Against Women in Africa, Latin America, and Europe.

The Belem Do Para Convention was adopted in Brazil by the Organization of American States in 1994 and states that “the adoption of a convention on the prevention, punishment and eradication of all forms of violence against women within the framework of the Organization of American States is a positive contribution to protecting the rights of women and eliminating violence against them” (OAS *Inter-American Convention*, Intro). Article 9 advises state parties to “take special account of the vulnerability of women to violence by reason of, among others, their race or ethnic background or their status as migrants, refugees, or displaced persons” (OAS *Inter-American Convention*). The Convention defines VAW as “any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere” (OAS *Inter-American Convention*, 1.1) and states that all women have the right to be free from violence in both the public and private spheres (OAS *Inter-American Convention*, 2.3). This includes family and domestic violence, trafficking, violence in the workplace, violence in various institutions, and violence that is either perpetrated or condoned by the state (OAS *Inter-American Convention*, 1.2). The equal rights of women to men are also enforced, including their civil and political rights, the right to be free from discrimination and their basic human rights (OAS *Inter-American Convention*, II.3-6), and it is the responsibility of the state to “prevent, punish, and eradicate” violence against women through legal measures (OAS *Inter-American Convention*, 3.7), awareness-raising campaigns, education and training in the public and private sector, training employees involved in the justice system, and data collection on violence against women (OAS *Inter-American Convention*, 3.8). The Convention notes that women in marginalized groups are even more subject to violence, such as

refugee and migrant women, women who are ethnic or racial minorities and socioeconomically disadvantaged women (OAS *Inter-American Convention*, III.9). Other regional Conventions related to gender and refugee status include the *SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution* and the *Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa*. The *Convention Governing the Specific Aspects of Refugee Problems in Africa* does not mention gender, nor does it mention the concerns of refugee women (OAU, *Convention Governing*).

The African Charter on Human and People's Rights contains a provision calling for "the elimination of discrimination against women" and "the protection of the rights of the woman and child as stipulated in international declarations and conventions" (OAU *African Charter*, 6) and calls for equal rights for all individuals and non-discrimination, including the equality of sexes (OAU *African Charter*, 2). The Protocol to the African Charter expands upon articles 2 and 18 to discuss women's rights and promote gender equality (OAU *Protocol*, 1-3). The Protocol defines harmful practices and violence against women and calls for their elimination through legal measures, gender perspectives in policy development, education, prosecution of perpetrators, preventing trafficking, and supporting efforts to eliminate violence and discrimination against women, to name a few (OAU *Protocol*, 4, 6). Women have the right to dignity, and the state is responsible for protecting them from violence, "particularly sexual and verbal violence" (OAU *Protocol*, 5). Women with refugee status should have equal access and rights as men in the refugee status determination process and thereafter, according to the rights granted to refugees under International law (OAU *Protocol*, 6). Women asylum seekers, refugees, IDPs and returnees should have legal and social protection (OAU *Protocol*, 11). They should be protected from violence, rape, and sexual exploitation and they should have access to justice (OAU

Protocol, 12). Women and girls should also be protected from sexual harassment and exploitation in education and employment settings (*OAU Protocol*, 12-14). The Protocol addresses other rights of women such as their right to Reproductive Health, food security, housing, and widow's rights, (*OAU Protocol*, 15-16, 18).

The Council of Europe *Convention on Preventing and Combating Violence Against Women and Domestic Violence*, also known as the *Istanbul Convention*, was adopted in 2011 by the Council of Europe and was drafted to “protect women against all forms of violence, and prevent, prosecute, and eliminate violence against women and domestic violence,” as well as create policies to protect victims, promote International cooperation, combat discrimination against women, and “adopt an integrated approach to eliminating violence against women and domestic violence” (Council of Europe *Istanbul*, 2). The convention recognizes the historical unequal power relations between men and women as a cause of violence against women and that forms of gender-based violence include sexual harassment, domestic violence, rape, forced marriage, honor crimes, and genital cutting (Council of Europe *Istanbul*, 1-2). Domestic violence affects women disproportionately from men, and women are more vulnerable to it (Council of Europe *Istanbul*, 2). Violence against Women is defined as “a violation of human rights and a form of discrimination against women...all acts of gender-based violence that result in, or are likely to result in physical, psychological, sexual, or economic harm to such women, including threats of such acts, coercion or arbitrary deprivation of liberty...in public or private life” (Council of Europe *Istanbul*, 3). States are obligated to protect women from discrimination and, in their protection, should not discriminate against anyone based on a number of factors, including gender identity, sexual orientation, migrant or refugee status (Council of Europe *Istanbul*, 3). States should collect data and support research around SGBV, aim to erase

prejudices, and implement programs supporting the empowerment of women (Council of Europe *Istanbul*, 5-6). State parties should also raise awareness and promote education around the prevention of SGBV and gender equality, provide training on dealing with victims and perpetrators, and adopt laws to prevent SGBV and protect women from violence (Council of Europe *Istanbul*, 6-7). State parties should ensure that survivors receive support services such as hot lines and rape crisis centers, as well as access to justice and complaints mechanisms (Council of Europe *Istanbul*, 7-8). The Convention condemns various forms of SGBV such as forced marriage, female genital cutting, stalking, physical and sexual violence, honor crimes, and harassment (Council of Europe *Istanbul*, 10-11).

Most relevantly, the Convention explicitly addresses gender-based asylum claims, noting the following:

“[State parties should] take the necessary legislative or other measures to ensure that gender-based violence against women may be recognized as a form of persecution within the meaning of Article 1, A (2), of the 1951 Convention relating to the Status of Refugees and as a form of serious harm giving rise to complementary/subsidiary protection...ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments...take the necessary legislative or other measures to develop gender-sensitive reception procedures and support services for asylum-seekers as well as gender guidelines and gender-sensitive asylum procedures, including refugee status determination and application for international protection” (Council of Europe *Istanbul*, 17).

The European Parliament produced Resolution 8 on the situation of women refugees and asylum seekers in the EU in March 2016. This resolution recommends safe and legal routes for refugee women and girls fleeing persecution, and calls upon EU member states to implement resettlement programs with gender considerations (European Parliament, Y.1). The Resolution also recommends measures taken to prevent smuggling and that women and girls are registered individually to ensure their safety (European Parliament, Y.2, Y.3). The Resolution calls for

principles of gender equality to be observed in all aspects of refugee issues and advises member states to sign the Istanbul Convention (European Parliament, Y.4, Y.5). The EU also recommends that women who experienced trauma be provided with counseling at all stages of the asylum process and is concerned with the trafficking of women (European Parliament, Y.6, Y.7). The EU calls for the prevention of sexual exploitation, abuse and trafficking of refugee and asylum-seeking women, and that all EU policies towards refugees incorporate gender considerations (European Parliament, Y.9, Y.10). Most importantly to this thesis, the EU recommends the production of EU-wide gender guidelines on migration and gender policy and to be inclusive of LGBTI individuals in such policies (European Parliament, Y.11, Y.12).

The EU recognizes rape, sexual violence, female genital cutting, forced marriages, domestic violence, honor crimes, and state-sanctioned gender discrimination all as forms of persecution (European Parliament, Y.13). The EU also calls upon members to collect gender-disaggregated data on asylum statistics and specifically calls for special guidelines to be developed around female genital cutting (European Parliament, Y.14-15). The EU calls for a more gender-sensitive approach in the credibility assessment during the asylum determination process and to ensure that women are provided with resources, information on, and access to the asylum process (European Parliament, EU Y.19, Y.21). The EU resolution also recommends that women are informed about their rights in the asylum process and that they may request female interpreters and interviewers. Women should be interviewed separately and interviewers should be trained on implementing a gender lens in the interview process (European Parliament, Y.26). Women should be granted their asylum or immigration status separately from male family members or partners (European Parliament, Y.32). These are just some highlights addressed by

the EU Resolution. Other provisions address the situation of children, detention of refugees, and social inclusion and integration of refugee women and girls.

The existence of these regional conventions and instruments that explicitly condemn violence against women and provide recommendations on how to address women's human rights in different contexts, including the rights of refugee women, can help fill the gap where such guidance is absent or carries less weight in human rights law related to refugees and women. This next section will examine the body of international refugee law, which arguably has the largest gender gaps, and how those gaps are filled by UNHCR and country governments.

C. International refugee law

Despite the efforts of the CEDAW committee to mainstream gender in human rights, International Refugee Law makes little to no mention of gender. The 1951 Convention on the Status of Refugees defines a refugee as an individual 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; 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” (UNHCR *Convention and Protocol*, 14).

Beyond this definition, the Convention is limited in scope in its definition of a refugee and does not mention persecution based on gender or sex. In the same way that CEDAW's failure to mention SGBV has been supplemented by General Recommendations and Declarations, the 1951 Convention's failure to address gender and refugee status has been supplemented by the guidance of UNHCR and the Executive Committee.

The 1951 Convention was drafted in response to the refugee crisis that resulted from World War II and continuously refers to refugees in the third person as “he” while noting that

state parties must apply this Convention without discrimination against an individual's race, religion, or country of origin (UNHCR *Convention and Protocol*, 14-17). The only reference to protecting women lies in the introduction, which discusses family reunification and the protection of refugee minors and unaccompanied children and girls (UNHCR *Convention and Protocol*, 15). The 1967 Protocol expands the definition of a refugee beyond the geographical and historical limitations of the Convention. The 1951 Convention was only inclusive of refugees fleeing Europe after World War II; the Protocol removed these requirements (UNHCR *Convention and Protocol*, 47). However, the Protocol does not mention whether or not SGBV is a factor in the expanded definition of a refugee. The Cartagena Declaration was adopted by the Organization of American States in 1984 and also expands the refugee definition to include refugees that are fleeing "generalized violence, foreign aggression, internal conflicts, massive violation of human rights or other circumstances which have seriously disturbed public order" (*Cartagena Declaration* Article 3.3). However, the Declaration also makes no reference to gender or the protection of women and girls. The *Convention on the Status of Stateless Persons* addresses the rights of individuals "who [are] not considered [nationals] by any state under the operation of its law" (UNHCR *Convention on Stateless Persons*, 6). While it contains a non-discrimination clause in article 3, it does not mention the status of women, nor does it mention equality based on sex/gender or violence against women. The *Convention on the Reduction of Statelessness* also does not address gender issues (UNHCR, *Convention on Reduction of Statelessness*).

D. UNHCR Resources

Refugee protection on a global scale is under the mandate of the UNHCR, whose mandate and responsibilities are outlined in the UNHCR Statute. According to its Statute, UNHCR is tasked with endorsing the ratification of Conventions to protect refugees, collaborating with advising governments on refugee protection and durable solutions, advocating for refugee admissions and for refugees' right to transfer their assets when migrating or resettling, and collecting data from governments on refugee populations. UNHCR also must be informed about the laws that pertain to refugees and migration in-country and must work with governments and organizations on promoting refugee protection (UNHCR *Statute*, 10). UNHCR's mission is to protect refugees by responding to emergencies, ensuring that refugee camps are in safe areas, ensuring that refugee women have equal access to food and social services, promoting family reunification, informing refugees about conditions in their countries of origin, assessing their refugees' resettlement needs, visiting areas where refugees are detained and advising country governments on refugee law and policy (Jastram and Achiron 21). UNHCR's annual budget is \$1 billion dollars, and the UNHCR Statute is considered to be UNHCR's constitution (Jastram and Achiron 21).

According to UNHCR's Guidelines on Refugee Protection, Gender-related persecution involves acts of sexual and family violence, forced family planning, female genital cutting, punishment for resisting social norms, and homosexuality (Jastram and Achiron 70). Usually, people aren't being persecuted for their gender itself but for resisting the expected, socially constructed behavior that surrounds ideologies of their gender (Jastram and Achiron 71). UNHCR emphasizes confidentiality and respect for human rights of the claimant in the refugee status determination process (Jastram and Achiron 108, 111). In refugee camps, women and girls are often forced to engage in sexual acts in order to obtain basic necessities (Jastram and

Achiron). It is important that refugee women and girls seeking asylum are informed of their rights and given access to durable solutions, as well as have the right to submit an independent refugee claim separate from that of their family members, and have female interpreters and interviewers who are aware of cultural barriers and sensitive to the claimant's needs (Jastram and Achiron 58). UNHCR cites protecting refugee women as one of the most common protection challenges, followed by responding to a refugee emergency and seeking durable solutions for refugees in crisis (Jastram and Achiron 64). To address these challenges, UNHCR has established a set of guidelines to protect refugee women and girls and to advise country governments on refugee status and asylum determination processes. Relevant to this thesis are guidelines that were created to address gender-related persecution claims of refugee and asylum seeking women. The myriad of resources, guidelines, and summary conclusions produced by UNHCR will be discussed in this section. The abundance of resources demonstrates an effort to mainstream gender in the refugee status determination process, and many of these resources are geared not only towards country governments but also towards practitioners in the field. At the same time, such an abundance of guidelines is overwhelming as it is difficult to determine which guidelines should take precedence and which guidelines carry the most weight.

The San Remo expert roundtable that was held in 2001 produced a set of UNHCR Summary Conclusions addressing gender persecution and refugee status. UNHCR concluded that the Convention refugee definition should incorporate gender-related claims when “properly interpreted” and that the 1951 Convention should be read and interpreted through a gender lens (UNHCR *Summary Conclusions*, 351). UNHCR notes that because the Convention can be interpreted through a gender lens, it is not necessary to add gender as another persecution ground in the Convention definition of a refugee (UNHCR *Summary Conclusions*, 351). The

Conclusions accept membership of a particular social group as valid grounds to prove gender persecution claims (UNHCR *Summary Conclusions*, 352).

UNHCR also has published resources with case studies that are useful for practitioners. One such resource, *Ensuring Gender Sensitivity in the Context of Refugee Resettlement*, is helpful because it addresses how to approach the very specific context of refugee resettlement from a gender lens. This resource was designed to serve as a training tool for UNHCR, NGO, and legal staff when serving refugee populations at various steps in the refugee status determination and resettlement process (UNHCR *Ensuring Gender*, 2). In the format of a learning module, this tool presents a case study that discusses the connection between gender persecution, refugee protection, and human rights, stressing the importance of an intersectional approach towards serving vulnerable populations (UNHCR *Ensuring Gender*, 2). Using the UNHCR Resettlement Handbook, which will be discussed later on in this thesis, this tool advises on how to maintain gender sensitivity during the refugee resettlement process (UNHCR *Ensuring Gender*, 2).

The *UNHCR Guidelines on International Protection: Gender Related Persecution* provide a more formal approach to establishing protocols around refugee status determination based on gender. The guidelines were designed to “provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determination in the field” (UNHCR *Guidelines on Gender-Related Persecution*, 2). Operating within the context of the 1951 Refugee Convention and its 1967 Protocol, these guidelines present a helpful but limiting approach to assessing refugee claims based on gender from a UNHCR standpoint. The Guidelines define gender-related persecution as a term that refers to refugee claims where gender is a factor, but make a point to establish that

gender-related persecution is a principle through which to interpret the law, and not the law itself (UNHCR *Guidelines on Gender-Related Persecution*, 2). The Guidelines are designed to address the concerns of refugee women specifically and make a distinction between sex and gender when interpreting gender-related persecution claims (UNHCR *Guidelines on Gender-Related Persecution*, 2). The interpretation of claims through a gender lens is based on the 1951 Refugee Definition; therefore, individuals have to establish a well-founded fear based on one of the 5 grounds, of which gender is not a category (UNHCR *Guidelines on Gender-Related Persecution*, 2). The Guidelines address the absence of gender in the refugee definition but conclude that it is not necessary to add an additional ground to the Convention definition because it is “widely accepted” that gender is a factor to be considered in refugee status determination. They stress the importance of understanding the full story behind the claimant, as well as country conditions, cultural norms, and geography (UNHCR *Guidelines on Gender-Related Persecution*, 3). Sexual violence such as rape and gender-related violence such as FGM, domestic violence, trafficking, and dowry-related violence constitute forms of persecution. Harmful laws imposed by the state can amount to persecution, as well as the penalties for breaking laws that are gendered. Domestic and family violence can also amount to persecution (UNHCR *Guidelines on Gender-Related Persecution*, 3). There is an emphasis on establishing a causal link between the persecutory act and one of the Convention grounds through a gender lens, while acknowledging that gender-related claims can be based on multiple grounds (UNHCR *Guidelines on Gender-Related Persecution*, 6). The Guidelines go through each persecution ground and cite examples of gender-related persecution within the context of those grounds. For example, racial persecution can manifest in the form of ethnic cleansing through sexual violence or reproductive control, and a woman’s failure to act a certain way or abide by certain laws that are gendered can amount to

religious and/or political persecution (UNHCR *Guidelines on Gender-Related Persecution*, 6-7). Membership of a particular social group is perhaps the most difficult to identify because it requires proof that the group shares a common immutable characteristic, which is difficult to prove (UNHCR *Guidelines on Gender-Related Persecution*, 7). Gender persecution based on the political opinion ground can include the persecution of women due to their male relatives' involvement in oppositional politics, or women's opposition to gender norms as women are less likely to be involved in politics according to the Guidelines (UNHCR *Guidelines on Gender-Related Persecution*, 8). When being interviewed for consideration of refugee or asylum status, women should be interviewed separately without male family members present and should be informed about the process of refugee status determination, as well as access to legal services (UNHCR *Guidelines on Gender-Related Persecution*, 9). Women should also be given the option to select female interviewers and interpreters, who should introduce themselves to claimants, be aware and culturally sensitive of their background, and be able to establish a sense of trust with claimants while ensuring confidentiality of the interview (UNHCR *Guidelines on Gender-Related Persecution*, 9). The interviewer should remain compassionate, neutral, and sensitive to the questions they ask; women might not disclose information about sexual violence due to trauma, but this does not mean that it did not take place (UNHCR *Guidelines on Gender-Related Persecution*, 9). Prior to the interview, the interviewer should collect country of origin information and should acquaint themselves with the laws of that country in relation to women's rights, as well as cultural norms and practices, systems that are/aren't in place to address VAW and perpetrators, instances of VAW and how it is reported, whether or not there are protection mechanisms, and the level of risk a woman may face returning to her country. The interviewer should not allow the emotions evoked by the claimant to affect the credibility of her claim,

especially when cultural differences affect modes of self-expression among different people (UNHCR *Guidelines on Gender-Related Persecution*, 10). It is not necessary to collect the details of the actual rape or incident of sexual violence, but contextual evidence may be required such as events leading up to the act of violence, where it took place, and so forth. If needed, the woman should have access to psychosocial support, and the Guidelines recommend having trained psychosocial counselors on staff. UNHCR recommends that states implement gender-sensitive interpretations of refugee law and is available to assist states in doing so (UNHCR *Guidelines on Gender-Related Persecution*, 10).

Many gender-related claims fall under “membership of a particular social group” because UNHCR guidelines recommend using the social group grounds to support gender-related persecution claims. UNHCR’s *Guidelines on International Protection No. 2* advise on the interpretation of “membership of a particular social group” Convention ground in refugee claims. The Convention does not specify any social groups that qualify for this interpretation, and the different grounds are not mutually exclusive (UNHCR *Guidelines No. 2*, 2). Therefore, the analysis of social group as a qualifying ground for refugee status is open to interpretation. However, there are two main interpretations of social group membership that have set precedents in rulings. The first is the immutability of characteristics within the members of the group, such as one’s sex or ethnicity. UNHCR cites examples of rulings where women, homosexuals, and families were granted refugee status under “membership of a particular social group” (UNHCR *Guidelines No. 2*, 2-3). The second interpretation involves finding characteristics that set the group apart from society, and UNHCR also cites women, homosexuals and families as people who were granted refugee status under this category (UNHCR *Guidelines No. 2*, 3). UNHCR combines these two interpretations in the following definition: “A particular social group is a

group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights" (UNHCR *Guidelines No. 2, 3*). UNHCR advises that sex can be a social group category and that women are an example of a social group because they are treated differently from men (UNHCR *Guidelines No. 2, 3*). The group does not need to be cohesive and it is not required that the persecutor be a state actor. As long as the state fails to protect the group from harm, that harm is considered grounds for persecution. In addition, groups may not be able to prove that they experienced persecution; for example, a woman may not be able to prove that she was abused by her husband in a domestic violence case. If the state fails to offer her protection, that is enough evidence to show that she is being persecuted (UNHCR *Guidelines No. 2, 4-5*). Later on, this thesis will discuss how the social group distinction is useful, but can be narrowing and problematic in gender-related claims, particularly in the US. UNHCR concludes by reinforcing the importance not only of interpreting the refugee definition through a gender lens, but also of considering gender through every step of the refugee status determination process (352).

In addition to advisory guidelines on establishing persecution grounds based on gender, UNHCR has also created *Guidelines on the Protection of Refugee Women*, which address the special protection needs of refugee women due to the added vulnerability of their gender (UNHCR *Guidelines on Protection, 1*). These guidelines serve as a tool for UNHCR staff in determining the protection needs of refugee women (UNHCR *Guidelines on Protection, 3*). Protection concerns are relevant during each stage of a refugee woman's plight, from the onset of an emergency to the durable solution. It is important for women to be given access to durable

solutions – resettlement, repatriation, and local integration - and information about the options available to them (UNHCR *Guidelines on Protection*, 5). Refugee women face the risk of violence during flight, as well as in the country of asylum (UNHCR *Guidelines on Protection*, 12). These guidelines address the absence of gender in the refugee definition and encourage the social group distinction in determining refugee status based on gender persecution. The guidelines continue to address different protection risks for refugee women, the most common being sexual assault. The guidelines address the challenges women may face in seeking access to justice (UNHCR *Guidelines on Protection*, 16-17). They stress the importance of recognizing that women can be persecuted based on gender, thus meriting grounds for granting of refugee status. Sexual violence is a form of persecution, and gender persecution should fall within the social group formulation of refugee status determination as per the guidelines. The state's failure to protect women from violence and discrimination also serves as valid grounds for granting refugee status to women, and it is important to ensure that interviewers and interpreters are well trained and approach cases with gender sensitivity (UNHCR *Guidelines on Protection*, 19).

UNHCR's *Resettlement Handbook* advises on conditions under which gender-related persecution claims are submitted for resettlement referrals. The resettlement submission categories include legal and/or physical protection needs, survivors of torture and/or violence, medical needs, women and girls at risk, family reunification, children and adolescents at risk, and lack of foreseeable alternative durable solutions (UNHCR *Resettlement Handbook*, 243). Refugees must qualify for resettlement under at least one of these categories in order to be submitted for a referral. Cases are classified by their level of urgency. Emergency priority cases are those that need immediate attention within a matter of days or even hours. Urgent priority cases are those that require expedited resettlement within a matter of weeks, while normal

priority applies to cases that don't require immediate attention related to medical, social, or security concerns (UNHCR *Resettlement Handbook*, 246). Gender-related persecution can fall under a number of these categories. Refugee women and girls face physical safety threats in the form of sexual violence (UNHCR *Resettlement Handbook*, 249). Rape and sexual violence are also considered forms of torture (UNHCR *Resettlement Handbook*, 251). The women and girls at risk category refers to women and girls who experience unique forms of persecution on account of their gender (UNHCR *Resettlement Handbook*, 261). It is important to identify these cases early on and address the needs and necessary responses for these women and girls (UNHCR *Resettlement Handbook*, 262). In addition to the protection needs of all refugee populations, women and girls face additional needs and challenges that require partnership with multiple entities, including country governments, UN organizations and the community, according to the Executive Committee Conclusion on Women and Girls at Risk No. 105 (UNHCR *Resettlement Handbook*, 262). The Conclusion advises countries to “strengthen the use of resettlement as a protection and durable solutions tool for refugee women and girls at risk; enhance identification of refugee women and girls at risk for resettlement, including through training; and streamline processing further, including by establishing measures to enable the speedier departure of refugee women at risk and their dependents” (UNHCR *Resettlement Handbook*, 262). The Women and Girls at Risk category is meant to ensure that refugee women and girls are given the attention, services, and are that they need, as well as the equal opportunity to be put forward for expedited resettlement referrals based on their gender (UNHCR *Resettlement Handbook*, 262).

The Resettlement Handbook also acknowledges the intersectionality of struggles for women related to culture, ethnicity, disability, and other factors that create additional barriers to gender equality (UNHCR *Resettlement Handbook*, 263). Refugee women and girls at risk are those who

face protection issues due to their gender and have experienced violence in the form of sexual violence, security threats, torture, rape, exploitation, and a host of other concerns (UNHCR *Resettlement Handbook*, 263). Because refugee women may have less visibility than men in their communities, less of a voice, and less opportunity to put forth complaints in such settings, it is important to ensure that their surrounding environment supports them and that they can access justice (UNHCR *Resettlement Handbook*, 263). The guidelines reinforce previously-mentioned guidance on ensuring gender sensitivity in the interview process, including allowing women to speak to female interpreters and applying sensitive interview tactics that make women feel at ease. There is an emphasis on giving special attention to refugee girls at risk and ensuring that careful consideration and thought is given to the durable solution that is appropriate for them (UNHCR *Resettlement Handbook*, 264).

UNHCR's Executive Committee Conclusion on *Refugee Protection and Sexual Violence No. 73* "condemns persecution through sexual violence" and calls upon country governments to implement laws that prevent sexual violence and allow survivors to seek justice, develop training programs for law enforcement and military personnel, promote the rights of refugee women, and ensure that women have equal access as men to seeking refugee/asylum status. Conclusion No. 73 also pushes for states to recognize sexual violence as a form of persecution, adopt guidelines for refugee/asylum seeking women, give survivors medical and psychosocial support, ensure that refugee status determination procedures are gender-sensitive, and include female staff in refugee programs. Country governments should support and collaborate with UNHCR, increase awareness on the rights of refugee women and girls, and address sexual violence towards refugee women and girls (UNHCR, *Conclusion No. 73*). UNHCR's Executive Committee Conclusion No. 39 on *Refugee Women and International Protection* acknowledges that refugee women and girls make up

a majority of the world's refugee population and experience violence, sexual abuse and discrimination. Thus, country governments and UNHCR must take measures to guarantee that refugee women and girls are protected from violence. The Committee also encourages state cooperation with UNHCR in these efforts and the involvement of refugee women in designing and implementing programs for refugee women. It is important to recognize the unique need and protection concerns of refugee women by gathering statistical data and reporting regularly on the needs of refugee women. States should recognize that women qualify for refugee status under the "membership of a particular social group" category (UNHCR *Conclusion No. 39*). Conclusion No. 60 reinforces the need for preventative measures to protect refugee women from violence and ensure that their rights are respected. The Committee called for a number of measures such as encouraging the High Commissioner to increase awareness around violence against refugee women and encouraging partners to collaborate with the High Commissioner to improve training around gender issues (UNHCR *Conclusion No 60*).

IV. Shifting norms on gender persecution and refugee/asylum claims

Dr. Radhika Commaraswamy, a former UN Special Rapporteur on Violence Against Women, discusses how the recognition of women's rights as human rights has helped mainstream gender in human rights and has helped classify gender-based violence as a human rights violations ("Reinventing International Law," 1252). She also discusses the shift from state responsibility in the public sphere to the private sphere, where the family is no longer viewed as an entity that the state cannot interfere in but becomes a political unit ("Reinventing International Law," 1257). This shift is important especially for cases of domestic violence, where violence occurs in the home. Charlesworth, Chinkin and Wright discuss how International Law

historically privileges men and is in dire need of a feminist perspective (“Feminist Approaches,” 614-615). They suggest that applying a feminist interpretation of International Law will open up feminist discourses of other types of law, such as refugee law and human rights law (“Reinventing International Law,” 644). Indeed, their suggestions have rung true over the course of 20+ years since *Feminist Approaches to International Law* was published. While much work remains to be done, the previous chapters demonstrate attempts to apply a feminist perspective in certain aspects of international law; there is a growing movement towards and acceptance of refugee and asylum persecution claims based on gender. The existing gaps in refugee law are supplemented by the abundance of UNHCR guidelines, training resources, and Executive Committee Conclusions that are meant to complement both refugee and human rights law. The next chapters will explore the feasibility of translating international law into domestic policy through the country case studies of the US, Germany, and Canada.

V. Gender-based persecution in the German resettlement and asylum process

A. Introduction to the German framework

It is very difficult for women to seek asylum in Europe; their claims are often not believed, which only re-traumatizes them further (Arbel, Dauvergne and Millbank 12-13). Germany is perhaps the exception as it has welcomed an unprecedented number of refugees and asylum seekers in the past year. However, such rapid welcome has compromised the services needed for women and girls and has muffled persecution claims based on gender. The limited guidelines and processes available to identify vulnerable asylum seekers, especially survivors of SGBV, as well as the lack of guidelines and training around gender persecution, will be discussed in a later section. First, an analysis of the existing legal framework and refugee law in

Germany, as well as how it applies to asylum seekers with SGBV claims, is necessary in order to come to this conclusion.

B. Refugee law in Germany – the German refugee and asylum system

Germany has ratified CEDAW and the Convention Against Torture (UNHCR, “[Status of Ratification](#)”) and has signed the 1951 Refugee Convention and its Optional Protocol (*Convention and Protocol 3*). The German government entity tasked with handling refugees and migration is the BAMF, also known as the Federal Office for Migration and Refugees. Asylum seekers must report to a state organization when they reach the German border. Asylum-seekers can request asylum prior to or after arriving in Germany. Those that made the request prior to arriving must go to the border authority, which then sends them to the initial reception center. Those who did not request asylum ahead of time report to a security authority, an immigration authority, a reception facility, or an asylum center. All asylum seekers are registered and receive arrival and temporary identity documentation at the Federal Office (Federal Office, “Arrival and Registration”).

Asylum seekers are sent to different reception facilities depending on the capacity of the facilities, location, any family ties in other facilities, as well as the country of origin of the asylum seeker. Germany allocates asylum seekers to different regions of the country through a method called the EASY quota system for fair distribution to ensure that the population of asylum seekers is distributed fairly across the country (Federal Office, “Initial Distribution”). Asylum seekers can stay in reception facilities for up to 6 months, where they are provided with housing, food, and benefits that cover their health and living needs (Federal Office, “Responsible Reception Facilities”). Asylum seekers submit applications for asylum while legally residing in

reception facilities; they are granted this right by German law (Federal Office, “Personal Asylum Applications”).

The Dublin Procedure is implemented in evaluating applications. The Dublin Procedure determines which EU member state is responsible for examining an asylum application. If it is found that the application has to be processed according to the laws of another member state, the member states can facilitate a transfer request. The asylum seeker can appeal this decision, and it cannot be carried out until the emergency court proceedings initiated by the asylum seeker are completed (Federal Office, “Examining the Dublin Procedure”). Asylum seekers then have their interview, where they present their claims (Federal Office, “The Personal Interview”). There are different forms of protection that can be granted to asylum seekers: refugee protection, asylum, subsidiary protection, or a ban on deportation. In Germany, refugee protection and asylum are not synonymous forms of protection. Refugee protection is based on the 1951 Convention and covers the five persecution grounds. Acts that can be considered persecution include physical or psychological violence, sexual coercion, discrimination during legal procedures and/or prosecution, failure to provide legal protection, and “acts linked to sexuality or which target children.” Those granted refugee status receive residency permits for up to 3 years, settlement permits after 3 or 5 years if they find employment and learn German, access to family reunification, and access to the labor market. Asylum status is reserved for those who are being persecuted solely on political grounds because of their race, nationality, political opinion, religion, or membership in a particular social group and whose country of origin cannot provide protection. Benefits for asylum seekers are the same as for those granted refugee status. Additional forms of temporary protection are available for those who do not qualify for refugee or asylum status. Subsidiary protection and the ban on deportation are such options for those who

are not found to have a legal basis for refugee or asylum status but who still face serious protection concerns at different degrees. Their residency benefits are for shorter periods of time with possibility of renewal, but they are not entitled to family reunification (Federal Office, “Forms of Protection). The Federal Office for Migration and Refugees provides different integration projects and programs that may sponsor and support refugees and asylum seekers depending on the region in Germany that they are located within (Federal Office, “Local Integration Projects”).

Germany also participates in a refugee resettlement program where referrals are conducted by UNHCR overseas. In 2016, the resettlement target for Germany was 800. In 2017, the target is projected to be up to 14,300 refugees (UNHCR, “Germany” 2). It is evident that Germany accepts a much larger portion of refugees crossing the border outside of the refugee resettlement program. The German Resettlement Program is operated under the Resident Act, which allows certain groups to temporarily or permanently reside in Germany. Refugee referrals are conducted by UNHCR’s recommendations and must meet the Convention definition of a refugee. However, this referral doesn’t guarantee that someone granted refugee status is given a resident permit to Germany; this is dependent on the German government’s evaluation of other factors such as language and education background (UNHCR, “Germany” 3). While resettled refugees fall under the purview of the Residence Act, refugees that apply for asylum fall under the Asylum Procedures Act. These are just two different forms of protection offered for individuals seeking refugee status or asylum in Germany (UNHCR, “Germany” 3).

Important factors that qualify a refugee for resettlement to Germany include family reunification, language and employment skills, ability to become integrated, and the need for protection. Like the asylum applicants, refugees seeking resettlement are allocated to different

regions of Germany depending on the capacity of that region (UNHCR, “Germany” 4). The Federal Office for Migration and Refugees (BAMF) conducts final interviews to determine if someone is eligible to resettle to Germany (UNHCR, “Germany” 5). Germany accepts vulnerable cases as part of the resettlement program, including survivors of violence and torture, medical cases, women and girls at risk, children and adolescents at risk, and unaccompanied children (UNHCR, “Germany” 5). Refugees are given cultural orientation prior to arrival and their travel is facilitated by the International Organization of Migration (IOM), paid for by the German Government. Upon arrival, different government and non-government agencies are responsible for assisting refugees with basic needs as well as providing social services and integrating them into society (UNHCR, “Germany” 6-7). There is an emphasis on family reunification in the German refugee and asylum granting process; the German government seems to value family unity as a priority when seeking eligible candidates for refugee status or asylum.

C. Refugee law in Germany – the Immigration Act

In Germany, advocacy between the UNHCR, refugee women activists, and the government successfully resulted in the adoption of legislation stating that persecution based on gender is a particular social group that qualifies an individual for refugee status. Germany is referenced as a case study in the UNHCR *Handbook for the Protection of Women and Girls* and is an example of how UNHCR can influence government policy. In the absence of hard law related to gender persecution, UNHCR stepped in and successfully influenced legislation on gender persecution in Germany. UNHCR is a participant in the Federal Working Group of Refugee Women organized by an NGO called “Diakonisches Werk der EKD.” The group includes social work practitioners who work as psychotherapists, sociologists or refugee

counselors in order to address issues related to refugee and asylum seeking women and girls in Germany. The group meets 3 times per year to discuss relevant issues. UNHCR sets up meetings with this group and with policy experts at the Federal Office for Migration and Refugees (BAMF), where refugee women have a space to discuss their experiences fleeing persecution and seeking asylum/refugee status. According to UNHCR, such a collaborative approach has allowed policymakers to better understand the experiences of refugee women and girls, and “has proved more persuasive than purely legalistic arguments” (UNHCR, *Handbook for Protection* 141).

UNHCR’s collaboration with the German government has demonstrated some measure of success. In 2005, a new piece of legislation was introduced in German law through the adoption of the Immigration Act, which specifically included gender persecution as grounds for refugee status under the particular social group category of the refugee definition ((UNHCR, *Handbook for Protection* 141). The Immigration Act states that “gender-specific persecution is now also recognized, i.e. a threat to a person's life or threatened bodily harm also constitutes persecution if it takes place solely on account of their gender” (Federal Foreign Office, “Immigration Act”). As a result of this law, 25% of cases granted refugee status in 2006 were on the basis of gender-related forms of persecution, including cases of domestic violence, forced marriage, sexual orientation, and threats of FGM or honor killings (UNHCR, *Handbook for Protection* 141). While this demonstrates some progress for Germany’s consideration of gender asylum cases in a legal sense, Germany has no comprehensive process for identifying gender-based persecution and providing the adequate services and resources that survivors may need. It is evident that Germany welcomes refugees; but in doing so, Germany does not offer enough specialized attention to vulnerable populations.

D. The impact of policy on refugee women and girls

While Germany is welcoming towards refugees and asylum seekers and has adopted legislation on gender-related persecution claims, there are no legal mechanisms in place to identify and assist vulnerable individuals in the asylum determination process itself, except for unaccompanied children. It is up to government staff in reception centers to identify such individuals (AIDA, “Country Report” 39). However, some states have implemented pilot programs to help identify vulnerable refugees. In Berlin, NGOs work with government officials to identify vulnerable refugees and are advised to look out for unaccompanied children, victims of “gender-specific persecution,” and “victims of torture and traumatized asylum seekers.” While the pilot program has resulted in the identification of some vulnerable refugees, others fell through the cracks, and it was reported that the existence of these officers doesn’t necessarily result in higher quality interviews (AIDA, “Country Report” 40).

The Women’s Refugee Commission (WRC) did a study in March 2016 on the treatment of refugee women and girls that migrate to Germany and Sweden and how both countries address violence against women and girls in this context. The WRC interviewed women and girls in accommodation centers, staff and volunteers working in the centers, local and national government officials, and NGOs that work on human rights, migrant rights, and women’s rights (WRC *Falling Through the Cracks*, 4). WRC found that although Germany welcomes many more refugees than its European counterparts, the price of rapid migration has led to short-term solutions that “do not address, and in some cases perpetuate, the risks of violence against women and girls experience along the route” (WRC *Falling Through the Cracks*, 1). WRC reports that women in accommodation centers are not separated from men; there are no sex-separated restrooms or living spaces, which makes women prone to sexual violence. In addition, there is no

standardized process for identifying SGBV claims among refugee women, and there is little support offered to survivors. Although Germany recognizes SGBV as a form of persecution in theory, “women and girls must navigate increasingly complicated legal and bureaucratic barriers without sufficient support” in practice (WRC *Falling Through the Cracks*, 1).

WRC recommends that Germany implements procedures in place to identify vulnerable refugees and to train adjudicators on how to identify such cases (WRC *Falling Through the Cracks*, 2). Mechanisms should be in place to ensure that women and girls are protected in reception centers and that the risk of SGBV is mitigated. SOPs should be implemented to ensure that survivors have access to care and support from the moment they flee their country, while they are in route, and upon arrival. Survivors should have access to healthcare, psychosocial services, and shelter. SGBV claims should be adjudicated fairly and women and girls should have access to family reunification. The EU as a whole should protect women and girls by giving them access to asylum, legal protection, and family reunification (WRC *Falling Through the Cracks*, 2).

In January and February of 2016, more than 130,000 people fleeing persecution sought refuge in Europe, and more than 55% of them were women and children. In 2015 as a whole, over 1 million asylum seekers arrived in Germany (WRC *Falling Through the Cracks*, 3). Because Germany has welcomed such large numbers of refugees, the country’s resources and systems are strained in providing adequate support services to those refugees, resulting in poor and dangerous conditions for refugee women and girls. Reception centers are overcrowded and don’t offer sufficient support to women and girls; Germany is in dire need of increased resources and protection for refugee women and girls (WRC *Falling Through the Cracks*, 3). WRC calls

upon European countries to strengthen services, access to asylum, and integration for women and girls (WRC *Falling Through the Cracks* 4).

WRC found that vulnerable women and girls are often overlooked due to the lack of mechanisms in place to identify and support survivors. While vulnerable populations are offered some assistance based on subjective assessments, most people are overlooked due to lack of infrastructure, training, and resources around assisting vulnerable populations. Germany should increase resources and training to support women and girls and ensure that staff are trained to identify and support survivors (WRC *Falling Through the Cracks*, 5). WRC notes that although Germany has signed the Istanbul Convention, which specifies the need to provide support services to protect refugee women, such support is lacking in Germany's accommodation centers. The Istanbul Convention also calls for safe shelters and accommodations to be provided for women. However, reception and accommodation centers in Germany often are overcrowded, with no privacy, and some centers don't have separate bathrooms or even locks on doors in bathroom facilities; there have even been reports of no walls to separate rooms, or women being forced into sharing one large room with many asylum seekers of mixed genders (WRC *Falling Through the Cracks*, 6-7). Overcrowding and lack of privacy increase the risk of violence and discrimination against women and girls. Women are also vulnerable to sexual abuse by staff and volunteers in accommodation centers; this has already happened in Cologne, where 9 security guards were accused of rape and sexual assault against asylum seekers, including minors (WRC *Falling Through the Cracks*, 7).

WRC recommends that Germany uses the guidance of the Istanbul Convention, the EU Reception Directive on housing standards in reception centers, and the Inter-Agency Standing Committee Guidelines for Integrating GBV Interventions in Humanitarian Action to ensure

better and safer housing for refugee women and girls. WRC also recommends that women and girls should be housed separately in safe spaces, and that Germany should implement zero tolerance policies for sexual exploitation (WRC *Falling Through the Cracks*, 8). Survivors know little about their rights and have minimal access to services such as medical and psychosocial support. Most women in reception centers don't report SGBV and aren't even aware that sexual assault, sexual violence, domestic violence, and violence against children are crimes in Germany. Women may also experience shame and fear around reporting SGBV. WRC recommends that women and girls should have access to healthcare, psychosocial support, emergency services and emergency post-rape care (WRC *Falling Through the Cracks*, 9-10).

Although there are women's shelters open to the general public in Germany, they are poorly resourced. Refugee women and girls don't occupy beds in shelters for more than a few days because they feel that the space is needed for other women. While there is a hotline that connects women to shelters, most women don't call the hotline because they do not know the person on the other end of the phone (WRC *Falling Through the Cracks*, 11). WRC recommends that SOPs are implemented to identify and support women and girls who experienced violence at any point in their journey and ensure that they are given access to medical care, psychosocial support, shelter, and other support in line with the Istanbul Convention. Accommodation centers should also have complaints mechanisms in place and better trained staff. Refugees should receive clear information about their rights and the asylum process so that they can more easily navigate their options (WRC *Falling Through the Cracks*, 12).

An unfortunate consequence of expedite procedures for asylum seekers in Germany results in rapid processing of asylum seekers, but creates more challenges for refugee women and girls. Through this process, women are sent to other countries deemed "safe" without their

consent, and are thus forced to make their SGBV claim in a rushed manner with less attention and consideration from adjudicators (WRC *Falling Through the Cracks*, 12-13). WRC recommends that each claim be given the time and attention needed so that claims are fairly adjudicated and the voices of refugee women and girls are heard. WRC notes that because Germany and the EU are focused mainly on the transit of refugees, there are no long-term solutions that adequately address the needs of refugees in general, especially vulnerable populations like at-risk women and girls (WRC *Falling Through the Cracks*, 13-14).

Some European governments, including that of Germany, collect gender-differentiated data on asylum applications and decisions; but this number is small. According to a survey conducted by UNHCR in 2004, less than half of countries in Europe collect data around gender and asylum applications, and less than 20% collect such data around initial asylum decisions (Crawley and Lester, 13). According to data collected in 2002, 29% of asylum applications in Europe are filed by women. Germany is one of the countries that includes gender-differentiated statistic in their asylum data and in 2015, a total of 362,153 asylum applications were filed in Germany. 31.5% of applications were filed by women, and 81,647 people in total were granted refugee status (AIDA, “Statistics – Germany”). According to a study done by the London Refugee Women’s Resource Project (RWRP), more women seek asylum in Europe fleeing from war or civil unrest, while less women seek asylum from countries where their rights are not respected (Crawley and Lester, 18). UNHCR recommends that European governments produce gender-differentiated asylum statistics (Crawley and Lester 18), and the EU Women’s Lobby has recommended drafting EU Gender Guidelines using existing instruments produced by UNHCR and other European countries as there are currently no EU Guidelines on Gender Asylum (Crawley and Lester 23).

The EU adopted a resolution in 2003 that called upon member states to take gender persecution into consideration in women's asylum claims (Crawley and Lester 33). Germany is one of the EU countries that has recognized sexual violence and rape as a form of persecution or serious harm whenever the state "or a state-like entity" cannot provide protection (Crawley and Lester 35, 40). In 1991, the Hessen Administrative Court granted refugee status to a Kurdish woman who was raped by Turkish soldiers. The Court recognized the treatment of Kurdish women by Turkish soldiers as persecution. In 1997, Germany recognized the rape of ethnic Albanian women by Serbian police as persecution. In 2002, similar cases of Kurdish women raped by Turkish soldiers were found to constitute persecution, and women were granted refugee status based on their treatment. Women in similar situations were also granted refugee status from the DRC, Angola, Azerbaijan, and Chechnya in 2002 (Crawley and Lester, 40). However, Germany has a history of failing to recognize "private acts" as persecutory. In 1996, a Sri Lankan woman who was raped by Indian Soldiers was denied refugee status on the basis that her claim was outside the responsibility of the state (Crawley and Lester 41), although Germany does recognize that "FGM is not merely a private act, but an 'objectification of women caused by dominant societal perceptions' which results in serious damage, both physically and psychologically" (Crawley and Lester, 42).

While there is little up-to-date data on asylum statistics by country, a UNHCR report on FGM and Asylum in the EU dated from 2011 helps provide a snapshot into a very specific area of gender persecution claims, though it is important to note that female genital cutting is just one form of gender persecution and does not account for the many other forms discussed in this paper, such as domestic violence, for which data is not collected. The fact that European countries collect data around female genital cutting also points towards the easy acceptance of

gender violence as persecution through the othering of cultures and through the emphasis on cultural differentiation rather than on human rights violations that transcend culture. Each year, approximately 20,000 women seek asylum from female genital cutting in the EU, and this number has increased from 2008 to 2011. In 2011, Germany was one of the main countries where these women sought asylum with 1,720 women. In 2011, 19,630 women in Germany applied for asylum; 13.94% of those women (1,720 women) experienced female genital cutting (UNHCR “Too Much Pain,” 5-6). As of 2011 data, 35.29% of girls seeking asylum from female genital cutting practices had positive decisions on their cases (UNHCR “Too Much Pain,” 26).

E. Conclusion on Germany

The case of Germany has clearly demonstrated that focusing only on refugee welcome and not on infrastructure for programs and vulnerable populations can defeat the purpose of refugee and asylum seeking programs, especially for women and girls that have experienced persecution based on their gender. While the EU has made some efforts to identify persecution claims based on gender and legally supports such initiatives through the Istanbul Convention, Germany has not demonstrated in practice a commitment to the needs of refugee women and girls and is not placing enough attention on the value of the refugee or asylum claim itself. Therefore, women and girls are rendered voiceless as they are rushed into reception centers, where decisions are made without their consent and conditions are less than favorable. The nature in which refugees and asylum seekers are interviewed and placed throughout the country demonstrates a lack of resources and a lack of national commitment to the needs of specialized populations. Refugees in Germany have little agency in the asylum seeking process and are not given the tools, resources, or information they need to navigate their rights and options along the

way. The case of Germany demonstrates the difficulty in applying international law to domestic policy. While gender has become more relevant in international law, it is more difficult to apply in specific country contexts; as a result, Charlesworth, Chinkin and Wright's conclusions are applicable to German refugee law.

VI. Gender-based persecution in the Canadian resettlement and asylum process

A. Introduction to the Canadian framework

Canada did not sign on to the Belem Do Para Convention (OAS *Inter-American Convention*). However, Canada ratified CEDAW and the 1951 Refugee Convention, as well as its 1967 Protocol (OHCHR, "Status of Ratification"; Arbel, Dauvergne and Millbank 4). In 1993, Canada created its gender asylum guidelines (Anker 54). Canada was the first country to adopt national guidelines that allowed women fleeing persecution based on their gender to be formally recognized as refugees, and these guidelines strongly influenced the guidelines that were later developed for the United States (INS, "Considerations for Asylum Officers" 3-4). Despite these comprehensive guidelines on paper, Canada does not implement them as successfully in practice, suggesting that there is a discrepancy in the relationship between domestic refugee law guiding gender-based persecution and actual refugee claims that are made. The case of Canada provides an analysis of the effectiveness of domestic mechanisms that are legally binding and how International law and the UNHCR have influenced the formulation of national guidelines. The implementation of refugee law in Canada with regards to gender persecution provides an analysis of the relationship between law and practice and the impact of international guidelines on the development of local guidelines, as well as whether or not formalizing the recognition of refugee status based on gender actually improves national consensus on the topic. The case of

Canada will explore the effectiveness of domestic mechanisms and the relationship between law and practice. The Canadian process of recognizing refugee persecution claims based on gender is, in many ways, similar to that of the US. There are parallels in the law, as well as in definitions of the different forms of gender violence that merit refugee status.

B. Refugee law in Canada – the Canadian refugee and asylum system

Canada resettles refugees through the Department of Citizenship and Immigration Canada (CIC). The Immigration and Refugee Protection Act of 2002 shifted the Canadian resettlement program to focus on family reunification, protection, multi-year planning of resettlement, group processing, expedited processing of vulnerable cases, and managing partners effectively (UNHCR “Canada,” 3). Among the vulnerable populations Canada assists are refugees with medical needs, women at risk, survivors of violence and torture, children, and the elderly. The women at risk program is based on UNHCR’s guidelines on protection for women at risk, and acknowledges that special attention may be needed for certain refugee women who are vulnerable. Women at risk cases are evaluated by the Canadian visa office for possible expediting eligibility (UNHCR “Canada,” 11).

Canada’s refugee system has two components. The Refugee and Humanitarian Resettlement Program is for refugees outside Canada in need of protection, while the In-Canada Asylum Program is reserved for those seeking protection within Canada (Government of Canada, “The Refugee System”). For the Refugee and Humanitarian Resettlement Program, Canada partners with UNHCR and private sponsors to identify refugees in need of resettlement. Much like refugees bound to the US, refugees bound to Canada are then screened for health and security through Immigration, Refugees and Citizenship Canada (IRCC) and the Canada Border

Services Agency. Private sponsors may assist refugees upon their resettlement to the US by signing sponsorship agreements with the Canadian government. They may also sponsor refugees on their own or in groups, known as Community Sponsors and Groups of five (Government of Canada "The Refugee System"). Refugees may also be matched with a private sponsor through the Blended Visa Office-Referred (BVOR) Program. Canada works with partners to support refugees in their integration process upon arrival. Assistance for refugees can come from the federal government, the Province of Quebec, private sponsors, organizations, or groups of people in Canada. Refugees selected under the Government Assisted Refugee program (GAR) receive assistance for up to 1 year or until they become self-sufficient. The GAR program also assists with airport pickup, temporary housing, and case management (Government of Canada, "The Refugee System").

Much like the other countries in question, Canada is undergoing a shift in refugee admission policy in response to the Syrian refugee crisis. In 2015, Canada resettled 20,045 refugees. Between January and July of 2016, Canada resettled 31,245 refugees (Government of Canada, "Resettled Refugees"). In response to the Syrian refugee crisis, Canada resettled 30,862 Syrian refugees as of September 18th, 2016 (Government of Canada, "Welcome Refugees"). Syrian refugees are resettled through Canada in a five step process wherein Canada works with UNHCR to identify refugees in Jordan and Lebanon. Their cases are processed through visa offices in Amman and Beirut, and their travel to Canada is facilitated through government-chartered and commercial flights (Government of Canada, "The First 25,000").

C. Refugee law in Canada – the Canadian Gender Asylum Guidelines

The Canadian Gender Asylum Guidelines, published with the title “Women Refugee Claimants Fearing Gender-Related Persecution,” were issued by the Immigration and Refugee Board of Canada (IRB) in 1993 (Macklin 214). The IRB is the division of Canadian government that handles immigration and refugee claims (IRB, “About the Board”). The purpose of these guidelines is to ensure that refugee claims are interpreted through a gender lens (Macklin 214). These guidelines are very comprehensive and emphasize the challenges of making persecution claims based on gender (Macklin 216). The definition of a refugee in Canadian law is the same as that of the 1951 UN Convention, in that an individual must have fled due to fear of persecution on account of “race, religion, nationality, membership in a particular social group, or political opinion” (Macklin 218-219). Audrey Macklin critiques Canada’s refugee definition as limiting and excluding of refugee women and girls who may have fled for reasons not mentioned in the refugee definition, such as environmental disasters and war, especially since the majority of the world’s displaced population includes women and children (Macklin 218-219).

Refugees in Canada may seek two avenues of asylum – they are either selected overseas or request asylum upon entry into Canada (Macklin 218-219). Historically, more men than women have been given the opportunity to attain refugee status in Canada; even referrals from overseas makeup a largely male population. In 1995, an estimated 2/3 of asylum seekers in Canada were male (Macklin 218-219, 220) and in 2015, more men were resettled to Canada than women (Government of Canada, “Resettled Refugees”). Women are less likely to have the opportunity to even travel to Canada due to their disadvantaged status (Macklin 220). Much like US policy and guidelines on gender persecution in asylum claims, the Canadian gender guidelines don’t add an additional persecution ground to the refugee definition; the IRB cannot fundamentally change this definition (Macklin 222). Instead, the guidelines state the following:

“Although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection to women who demonstrate a well-founded fear of gender-related persecution by reason of any, or a combination of, the enumerated grounds” (Macklin 222).

Thus, the Canadian guidelines aren't suggesting adding an additional persecution ground, but, much like UNHCR and US guidelines, are suggesting an intersectional approach towards recognizing gender persecution claims in the refugee status determination process (Macklin 222). According to Canadian Law, anyone who qualifies for refugee status must be able to prove that they have a well-founded fear of persecution based on one of the Convention grounds (Macklin 223). According to the Supreme Court of Canada, persecution is defined as “sustained or systematic violation of basic human rights demonstrative of a failure of state protection” (Macklin 223). In defining the types of human rights violations worthy of persecution, the guidelines advise referring to existing human rights instruments (Macklin 223). For gender-related claims, the guidelines “observe that women are punished, abused, violated, and terrorized for reasons that only apply to women, and in ways that can only be committed against women” (Macklin 225). These acts violate the right to life and security of person and can constitute rape, infanticide, genital cutting, “bride-burning,” forced marriage, domestic violence, forced abortion and forced sterilization (Macklin 225).

Despite having such comprehensive guidelines for gender persecution claims, Canadian jurisprudence does not have a strong track record of setting precedents in the same way that the US courts have. Although the guidelines classify rape as a form of persecution, this doesn't guarantee that women are guaranteed asylum based on this claim; the credibility of the claim may be questioned by adjudicators, or the act of violence may be dismissed as a “common crime” not meriting the granting of refugee status (Macklin 227). According to the Canadian

guidelines, gender persecution claims are only validated if the claimant can prove that the state was either complicit in the crime or failed to protect the claimant from violence, recognizing that certain acts such as domestic violence can be committed in the private sphere without state protection (Macklin 232).

The Canadian guidelines advise that women “or some subcategory thereof” can be considered members of a particular social group in order to establish persecution grounds, attributing this categorization to UNHCR’s Executive Committee Conclusion No. 39 (Macklin 238). In an important case that set a precedent for Canadian adjudicators, *Ward vs. Canada*, an Irish man who sought asylum from the IRA in Canada led the Supreme Court of Canada to characterize the particular social group category for individuals seeking refugee status in Canada, including the consideration of gender as a basis for membership in a particular social group (Macklin 242-244). The Canadian guidelines also classify the family as a possible particular social group (Macklin 242). The guidelines also suggest that gender persecution can be found upon political opinion/belief or religious grounds and recognize that women can also be persecuted for multiple reasons, such as race and gender (Macklin 28-239). According to the guidelines, a “woman who opposes institutionalized discrimination of women, or expresses views of independence from male social or cultural dominance in her society, may be found to fear persecution for reasons of political opinion” (Macklin 240). Macklin notes that this is quite a progressive approach for state-sponsored guidelines on gender and refugee status; the question lies in whether or not such approaches are implemented in Canadian jurisprudential practice. The guidelines advise adjudicators to familiarize themselves with the UNHCR gender guidelines for guidance on how to conduct an interview for a possible claimant seeking gender persecution and advising similarly as the US guidelines on interview tactics. Interviewers are advised not to

judge the credibility of the individual based on body language due to cultural difference, and not to ask for details on the act of sexual abuse, (Macklin 248). The Canadian guidelines also address the problem of women's refugee claims being subsumed under those of their husbands or male partners and advocate for women's independent claims to be heard, especially in domestic violence cases where the abuser may be the husband, partner, or male family member (Macklin 251).

D. Canadian refugee law in practice

Although Canada has adopted the most comprehensive and progressive gender asylum guidelines in theory, their implementation in practice is limited, especially with cases of domestic violence. Efrat Arbel examines how adjudicators interpret the law depending on the type of persecution claim that women are seeking, and ultimately concludes that domestic violence cases are the least successful adjudications because adjudicators often attribute violence to an inherent aspect of non-western culture. The guidelines classify private acts as forms of persecution when the state fails to protect the claimant from violence (Arbel 735). However, while Canadian adjudicators saw crimes like female genital cutting and forced sterilization as human rights violations and persecutory acts, domestic violence was not classified as a human rights issue and was attributed to culture (Arbel 732). The US has had similar trends in adjudications of gender asylum cases; female genital cutting was more easily recognized and classified as a persecutory practice, while domestic violence was long seen as an act occurring in the private sphere. However, the US case still demonstrates progress in domestic violence adjudications than the Canadian case, as the BIA recently set precedent that domestic violence can be considered valid persecution grounds for refugee status; this will be analyzed further in the next section. Arbel argues that "the adjudicative tendency to locate domestic violence

persecution in cultural difference both stems from and reflects a defensive anxiety” (732). While forced sterilization and genital cutting are seen as non-Western, “exotic” practices, domestic violence is common within Canada and thus “[locating] persecution in cultural difference can be seen as a protective device that distinguishes the violence suffered by refugee women from the violence suffered by the Canadian women” (Arbel 732). Arbel critiques Canadian adjudicators and lawmakers and calls for better legal measures to address gender violence claims, especially domestic violence claims (733).

Arbel observes how Canada’s claimed commitment to human rights in refugee protection puts Canada in a leading position internationally (742). However, how much do these commitments demonstrate real success in practice? In Canada, the most common classification of refugee persecution claims is membership of a particular social group (Arbel 44). In Arbel’s case study of 528 domestic violence cases, 421 had negative outcomes while only 107 had positive outcomes (Arbel 744). The main reasons that these cases had negative adjudications were because claimants couldn’t prove that the state failed to protect them and/or because according to the judge, the claimants lacked credibility (Arbel 746). Between January 1, 2002 and December 31st, 2006, the acceptance rate of domestic violence cases was only 43.9%. While it rose between 2008 and 2012, it only rose to 48.7% (Arbel 747). In Arbel’s case study, the cases with forced sterilization and genital cutting claims were recognized by adjudicators as human rights violations and were largely adjudicated with positive outcomes. The persecution claims were generally categorized under broad particular social group definitions, and the availability of state protection was rarely a factor in the decision-making process (Arbel 748). On the other hand, domestic violence claims were not seen as rights violations; instead, adjudicators

blamed culture for domestic violence practices, and a heavy emphasis was placed on the availability of state protection.

In *Mayers, Marcel v. Minister of Employment and Immigration*, a Trinidadian woman sought asylum in Canada after being physically and sexually abused. Due to the police's failure to act on her reporting of the crime, the Canadian court ruled that domestic violence can constitute persecution when the state fails to protect the individual (Macklin 235). In the case of Dularie Boodlal, also involving a Trinidadian woman pleading asylum due to domestic violence, Dularie's gender was accepted by the court as a particular social group due to the abuse she faced and the state's failure to protect her (Macklin 244-245). Although forced sterilization was less common than domestic violence in Arbel's case study, forced sterilization was recognized by adjudicators as a crime against humanity and was described as an act of "barbarous cruelty," that was "contrary to human dignity" (Arbel 751). In *Cheung v. Canada*, forced sterilization was recognized as a form of persecution when a woman sought asylum in Canada for being forced to go through the procedure in China (Macklin 228). Genital gutting cases had a similar reaction by adjudicators. In *Annan v. Canada*, genital cutting was classified by the Federal Court as a "cruel and barbaric practice" worthy of persecution (Arbel 741). Adjudicators determined that genital cutting was a "sustained and systemic violation of several of the most fundamental human rights," citing the right to life, liberty, health, security of person, the right to be free from cruel treatment, the right not to be forced into marriage, and protection rights for motherhood (Arbel 752). For domestic violence cases, adjudicators did not consider domestic violence to be a human rights violation, rarely referencing human rights at all even in the positive decisions. This is not to say that adjudicators did not view domestic violence as a form of persecution for the

refugee definition, but the way in which these claims were interpreted were not through a human rights lens, were much more scrutinized, and resulted in fewer positive outcomes (Arbel 753).

While the issue of state protection was irrelevant in forced sterilization and genital cutting cases, state protection in domestic violence cases was one of the main reasons why claims were denied (Arbel 753). In domestic violence cases, adjudicators concluded that claimants could not prove a lack of state protection because of cultural norms in their countries of origin (Arbel 757). In *Re L.T.D.*, for example, the IRP judged that although wife battering in Ghana was a “criminal offense,” they could not prove a lack of state protection due to alleged cultural norms that condoned wife battering (Arbel 757). Arbel discusses the unintended consequences of blaming persecution on culture (Arbel 758). The social group formulations used to classify women with domestic violence claims were highly specific compared to women with forced sterilization or genital cutting claims (Arbel 749). While genital cutting and forced sterilization had very general definitions such as “women” or “women facing genital mutilation,” domestic violence cases had very specific formulations such as “Ghanaian women subject to spousal and family abuse” (Arbel 759-560). Arbel concludes that, “when legal actors portray domestic violence as the product of a foreign culture...they construct domestic violence as an ‘othered’ harm perpetrated against only certain subcategories of (non-Western) women” (761). This approach is problematic because it ignores the root causes of domestic violence as well as why women are more vulnerable to domestic violence as persecution, and does not give women seeking asylum from domestic violence a voice (Arbel 762). Furthermore, this approach ignores the fact that domestic violence is a problem within Canada as well (Arbel 770). In doing so, Canadian adjudicators assume that other cultures are opposed to women’s rights, which ignores factors that have historically contributed to cross-cultural global gender inequality patterns

(Arbel 763). Through this approach, refugee women are presented as “victims of culture” (Arbel 766).

Krista Daley of the Nova Scotian Human Rights Commission and Ninette Kelley of UNHCR advocate for a human rights-based approach in Canadian law’s interpretation of the particular social group categorization of refugee claims (149). In domestic violence claims, a human rights-based approach towards the analysis of the refugee claim can lead to decisions that categorize women who fear domestic violence in a particular social group because in their attempt to seek asylum from domestic violence, they are attempting to exercise fundamental human rights, including their right to security of person (Daley and Kelley 167). Women seeking asylum from domestic violence can also be argued to be exercising their rights to freely associate and to not to be held in slavery or servitude due to the fact that their subjection to domestic violence can leave them trapped (Daley and Kelley 167).

E. Conclusion on Canada

As case law, national guidelines, and case adjudications have shown, much work needs to be done in Canada to translate law and guidelines into practice. In the Canadian context, gender influenced refugee law significantly and had a greater impact domestically than internationally. However, this translation did not take effect in practice, mirroring the effects in international law where changing norms don’t always incite action in state practice. The comprehensiveness and progressiveness of Canada’s refugee law and gender asylum guidelines demonstrate success; there is a strong recognition of gender persecution as valid grounds for refugee status. However, the breadth of gender considerations on paper results in a façade of progress. Canadian adjudicators seem to pick and choose the cases that are “comfortable” to adjudicate, where

violence is conflated with culture, to avoid facing the fact that domestic violence is a problem within Canada, as Arbel suggests. By only recognizing particular forms of gender violence as persecution and associating such violence with culture, Canadian adjudicators depoliticize gender persecution as a refugee claim. In doing so, adjudicators view and interpret women's experiences as uniform instances, thus muffling the voices of women experiencing violence. Depoliticizing gender persecution results in a failure to acknowledge the historically disadvantaged status of women and lessens the weight of accountability that should be placed not only on the perpetrators of violence but also on the root causes that lead to such violence. Gender persecution claims are often overlooked, especially when attached to other causes of migration such as war. Depoliticizing gender persecution makes the claims of women even more invisible, the impact and theory of which will be discussed in the following section on gender persecution in the US. While Canada's laws and guidelines around gender and refugee status resulted in a systematized interpretation of international law into domestic policies on paper with less effectiveness in practice, US policies and guidelines were created through the successful practice of law, as the successful adjudication of gender asylum cases set precedents and influenced national policies on gender asylum.

VII. Gender-based persecution in the US resettlement and asylum process

A. Introduction to the US framework

In the US, 51% of immigrants are women (Ruiz, Zong and Batalova). Women are more vulnerable than men, both during flight and after, and are more likely to experience exploitation in flight (Sreeharsha 4). It is estimate that 70% of women will experience sexual assault when crossing the border into the US (Sreeharsha 4). Women anticipate this and are even encouraged to take birth control (Sreeharsha 6). Rhonda Copelon and Heaven Crawley suggest that violence

against women is a political act because by failing to prevent such acts, the state demonstrates complicity in the act (Copelon 327; Crawley “Gender, Persecution”17). Despite the explicitly political nature of gender persecution, both on behalf of the persecutor and the resistance of the survivor, gender persecution is sometimes depoliticized in the US, making it more inaccessible and difficult to prove claims. The complexity of the US immigration system results in a calculated process of adjudicating gender claims. Case studies and legal analyses demonstrate the ways in which a woman’s “burden of proof” is presented and the complicated way of navigating persecution grounds. The asylum determination process for gender-based claims can often result in a pigeonholing phenomenon where such claims are lumped into a homogenous stack when in fact, women’s experiences are far from homogenous. An examination of the US’s domestic and international policy on refugees and asylum seekers is necessary in order to analyze the emergence of gender persecution as a recognized refugee and asylum claim in the US. Ultimately, this analysis will show that this emergence was largely dependent on a grassroots approach by advocates and activists who used direct representation as a method of inspiring change.

B. Refugee law in the US – the US refugee and asylum system

The international human rights commitments of the US are limited. The US did not sign on to the Belem Do Para Convention (OAS 5.25). The US signed CEDAW, but did not ratify the Convention or its Optional Protocol (OHCHR “Status of Ratification”). In addition, the US did not sign the 1951 Refugee Convention, but did accede to the 1967 optional protocol (UNHCR, “State Parties” 4) and was the second country to adopt guidelines recognizing gender persecution as grounds for refugee and asylum status (Arbel, Dauvergne, and Millbank 4). The US has

ratified the Convention against Torture (CAT), but did not sign or ratify the Optional Protocol to the CAT (OHCHR, “Status of Ratification”). US Immigration Law is embodied in the Immigration and Nationality Act (INA), which contains provisions and policies on refugee admissions, immigration, and the asylum determination process. Through the Refugee Act of 1980, the US created the Office of Refugee Resettlement within the Department of Health and Human Services and established a federal program to resettle refugees in the US. The INA adopted the Convention’s definition of a refugee (USCIS 101[a][42]). The US Refugee Admissions Program allows for a certain number of refugees to be admitted to the US each year based on the Presidential Determination (USCIS Sec. 411. [8 U.S.C. 1521]). Eligibility for refugee resettlement to the US is determined overseas in the host country, through a process that involves various steps and UNHCR referrals. However, the final eligibility determination for an individual’s admission to the US is made by an officer of US Citizenship and Immigration Services (USCIS). The asylum process is different; an individual must request asylum after entering in the US.

According to the INA, any individual who is “physically present” in the US is eligible to apply for asylum if they apply within 1 year of their arrival in the US. The INA discusses the “burden of proof,” through which the asylum applicant is responsible for proving that they have been persecuted and have a credible fear according to the five persecution grounds defined in the Convention (USCIS 208)[b]). Throughout the INA, gender persecution is not mentioned neither in the section on refugee status nor in the section on asylum. However, section 106 discusses the possibility of employment authorization for battered spouses of US Citizens. This section allows spouses of certain individuals to seek employment authorization by filing a petition with the Attorney General if they’ve been subject to abuse at the hands of their spouse and can

demonstrate that the marriage with the US Citizen spouse was entered “in good faith” with proof that the spouse was subject to abuse during the marriage (USCIS 106. [8 U.S.C. 1106] 2). Relief through employment authorization does not mean that individuals are guaranteed permanent pathways to residency and citizenship, and oftentimes their immigration status is limiting.

The Violence against Women Act (VAWA) is a piece of legislation introduced to Congress in 1994 that allows women with abusive spouses to self-petition for status if their spouses are Legal Permanent Residents or US Citizens (Sreeharsha 8). VAWA is a positive step towards criminalizing domestic violence in US law, resulting in reduction of Intimate Partner Violence, more reporting of domestic violence to police, and legal reform in some states (White House Resources, *Fact Sheet*). However, VAWA has its limitations and backlogs. The immigration benefit women receive is Deferred Action, which is an impermanent status that just prevents individuals from being deported, placing them under similar restrictions as undocumented individuals by restricting travel. Work authorization under VAWA is also impermanent as it requires renewal (Sreeharsha 9). Although VAWA is a positive step towards criminalizing VAW in the US, it is not a form of asylum and has a limited scope in terms of eligibility, benefits received and access to rights.

C. Refugee law in the US – The US Gender Asylum Guidelines

The US gender asylum policy is based on Canada’s gender-asylum guidelines (Anker 54). The US was one of the first countries to adopt guidelines related to gender persecution and has uniquely interpreted its commitment to human rights and refugee law in a domestic context with regards to gender persecution, particularly the ways in which US law picks and chooses gender asylum claims. The US guidelines on gender-based asylum claims, which were first

introduced in 1995, place an emphasis on creating a “customer friendly” interview environment for the claimant (Crawley, “Gender, Persecution”14). In 1995, the Immigration and Naturalization Service (INS), today known as USCIS, established a set of guidelines for asylum officers meant to serve as a training tool for officers adjudicating claims for women with gender-related persecution claims (INS 18). The guidelines are formatted in the form of a memo. The memorandum was designed to help asylum officers apply gender sensitivity to asylum claims. The US guidelines were influenced heavily by UNHCR guidelines, the Canadian gender guidelines, and the Women Refugees Project of the Harvard Immigration and Refugee Program (INS 1). The memo cites relevant human rights instruments and UNHCR guidance such as CEDAW, UNHCR Conclusion No. 39, Conclusion no. 73, and the Guidelines on the Protection of Refugee Women as influencers of the US Guidelines (INS 2-3). The Canadian guidelines were the first national guidelines that formally recognized gender persecution for women as a valid refugee claim (INS 2).

The US Guidelines advise that the asylum officer have a human rights background and be trained on cultural sensitivity (INS 4). The guidelines note that women’s experiences are unique to their gender. Rape, female genital cutting, and other crime are usually directed at women and girls and can be a form of persecution based on one of the 5 grounds (INS 4). The death of a male household member can also make women and girls more vulnerable to violence and persecution (INS 4). Women who were raped or sexually abused are at risk for stigmatization and are also vulnerable to more violence or abuse (INS 5). Asylum officers interviewing women with such experiences should allow female officers to conduct interviews and acknowledge that women may not be able to recount the actual act of sexual violence in the interview due to trauma. Women should be given the chance to be interviewed separately from other family

members (INS 5). Asylum officers should also be sensitive to the trauma of claimants in their interviewing tactics, and should not ask for details of the act of violence but instead should focus their questions on whether or not such an act occurred and the motive of the perpetrator. Officers should introduce themselves to the claimants so as to establish a sense of trust (INS 6). Officers must also look out for body language and behavior of claimants that may signify trauma, such as memory loss, or the inability to speak about the event. Importantly, such body language and behavior should not be interpreted as being untruthful as different cultures have different forms of self-expression. In addition, a woman's claim should be evaluated independently of that of her husband or relative if she is attached to another case, even if the claim of that family member was denied and she did not file a separate I-589 form (INS 7).

Asylum officers should be objective and aware of the legal and cultural context of the claimants' countries of origin, as well as the situation of violence, availability of state protection, and country profiles (INS 8). Asylum officers then must determine if the violence is considered to be persecution under the legal refugee definition, noting that rape and sexual violence can amount to persecution (INS 9). A violation of fundamental beliefs can also count as persecution, as well as political opinion related to gender issues (INS 10-11). The guidelines note that membership in a social group is not clearly defined as it is difficult to prove that a group shares a common, immutable characteristic that the group cannot or should not change (INS 12). However, the guidelines note that at the time that they were created, more gender asylum cases were being adjudicated based on the particular social group distinction (INS 13). A family unit can also be considered a social group, according to the case *Gebremichael vs. INS* (INS 15). A claimant must be able to prove a history of past persecution or fear of future persecution in order to establish a refugee claim (INS 16). The guidelines cite the Convention refugee definition to

support this and note that private acts can be valid persecution claims if the state fails to remedy the act (INS 16). A refugee claim can be valid whether the act of persecution was perpetrated by the government or a private actor if the government failed to protect the claimant (INS 16).

D. Asylum policy in the US – setting precedent for gender asylum claims

While the gender asylum guidelines are important and helpful, much of the policy in the US is shaped by precedential decisions of cases that evolved over time through advocacy efforts, rather than on one singular set of laws and guidelines. The success of gender asylum claims in the US can be attributed to advocates and attorneys who pushed for the recognition of gender-related asylum claims using a human rights framework. This advocacy and grassroots approach has proven successful. Today, US guidelines recognize rape, as well as other forms of sexual violence, as persecution, and thus allow consideration of the claims of women who are beaten, tortured, or persecuted for their beliefs on equality towards women (Crawley, 14). The case of the US has demonstrated the shift from recognizing gender persecution, especially domestic violence as a private matter to a public concern where the state is held accountable for its failure to protect or its perpetration of violence (Arbel, Dauvergne and Millbank 3). The politicization of gender persecution is important in order to validate the claims of refugee women and acknowledge gender violence as a clear violation of the human rights of women. In addition, politicizing gender violence gives women a voice, and the empowerment of women is essential in shifting global norms around gender equality.

Because of the lack of domestic law on gender asylum in the US outside of the guidelines developed for asylum officers, the movement to advocate for gender asylum cases took on a human rights framework, “grounded in persuasive, normative, but non—binding instruments,

including US and international asylum guidelines, agency guidance and training materials...and International Human Rights Law” (Anker 47-48). Anker argues that because of the lack of hard law around gender persecution in refugee/asylum cases, activism through representation was the most effective way to instigate changing legal precedents around such decisions (48). The localized nature of refugee law results in states creating their own bodies to interpret refugee law from a domestic standpoint (Anker 490). The Refugee Act of 1980 was an interpretation by the US of Articles 1 and 3 of the 1951 Refugee Convention and an implementation of refugee policy in the US (Anker 49). Anker argues that the challenge to gender asylum claims is due to the lack of interpretation of policies and human rights from a gendered perspective; “gender should...pervade the interpretation of every element of the refugee definition” (51).

The movement towards recognizing gender violence as a form of persecution for refugees began in the 1980s, coinciding with the feminist movement and the increasing international attention on women’s issues. The movement was focused on using domestic legislation to recognize gender persecution claims. National guidelines on gender asylum were first introduced in Canada, the US, Australia, Sweden, and the UK. Such guidelines are useful in advising governments on how to adjudicate gender asylum cases, but they are not legally binding on an international level (Arbel, Dauvergne and Millbank 4). Scholars and advocates suggest an approach that doesn’t try to find the flaws in the law itself but rather in how the law is interpreted in the refugee status determination process (Arbel, Dauvergne and Millbank 6). Arbel, Dauvergne and Millbank write that “women's existence precedes the edifice of a refugee status definition” (7); structural inequality poses a barrier towards women's opportunity to make their claims because it is more difficult for women to obtain resources, to leave their countries of origin, or to be documented, especially when their legal status or refugee claims are “subsumed

by that of a male partner" (Arbel, Dauvergne, and Millbank 7). It is also difficult to make claims based on gender because the way that the claim is supported in order to successfully grant a woman refugee status or asylum can "ungender" the claim. While gender should be acknowledged as a pervasive characteristic of all women's experiences, it is often viewed as a separate entity (Arbel, Dauvergne and Millbank 7).

The history of changing norms around gender asylum decisions in the US is mapped by the direct representation of refugee women seeking claims such as rape, domestic violence, and female genital cutting (Anker 51). Through the hard work of lawyers that advocated for their clients, certain precedents were set in the US that transformed domestic asylum law (Anker 46). Through direct representation, lawyers successfully implemented social and legal change through genuine, non-hierarchical relationships with their clients (Anker 46). The key to their success was the way in which refugee women were portrayed "not as simple victims, or fitting only within the Refugee Convention's social group ground, but rather...as having feminist political opinions that led to them standing up to their abusers" (Anker 46). Violations like domestic violence, female genital cutting, rape, and psychological harm were not recognized as persecution claims in the US until lawyers from advocacy organizations, such as the Harvard Immigration and Refugee Clinic (HIRC), began representing women with such claims (Anker 47).

Successful adjudications of gender asylum cases in the US took place either with USCIS or with the immigration court judge (Anker 47). Until August 2014, the Board of Immigration Appeals (BIA) remained silent on the issue of whether or not domestic violence can amount to a form of persecution for asylum claims. The case of *A-R-C-G* demonstrates the success of this advocacy as the first case to recognize domestic violence as a basis for asylum in the US. In

Matter of A-R-C-G, a woman sought asylum in the US after fleeing her abusive husband in Guatemala, who raped her, beat her and broke her nose. The Guatemalan government failed to intervene, informing her that they could not interfere in a marital relationship. Eventually she and her children fled to the US in 2005 as undocumented immigrants, certain that if they returned to Guatemala, her husband would harm her. She filed for asylum and withholding of removal, and the immigration judge determined that she had the credible fear, but did not find sufficient evidence of past persecution or a well-founded fear of persecution under the social group of “Guatemalan women who are unable to leave their relationship,” concluding that the abuse was a criminal act for “no particular reason,” and not valid grounds for persecution (CGRS). The claimant appealed the decision and, through the work of advocates and lawyers, particularly *The Center for Gender and Refugee Studies*, the Board of Immigration Appeals (BIA) ruled in August 2014 that women fleeing domestic violence can be members of a particular social group in US asylum claims based on *Matter of A-R-C-G*. The case is still with the Immigration Judge for the final asylum decision, but the BIA ruling set a strong precedent that has the potential to impact undocumented women across the country. Advocates have already reported a number of successful asylum cases based on domestic violence from detention centers and are working with these women, estimating that half the detainees have asylum cases based on domestic violence (CGRS, “Domestic Violence – Groundbreaking Ruling”). The BIA is the administrative body in the US tasked with interpreting immigration and asylum law. Thus, it can issue precedential statements which practitioners are legally obligated to follow (Anker 47). The BIA can apply immigration law and hear appeals, and BIA decisions are legally binding unless overruled by the Attorney General or a federal court (Department of Justice, “Board of Immigration”). While the final asylum decision must be made by the Immigration Judge, the BIA ruling set a strong

precedent that has the potential to impact undocumented women across the country (CGRS, “Domestic Violence – Groundbreaking Ruling”).

In *Matter of Acosta*, the BIA decided that in order for a claim to be considered under the particular social group, that group must be defined by a “common, immutable characteristic” (Anker 53). That same year, UNHCR’s Executive Committee Conclusion No. 39 was released, which recognized gender persecution claims for women under the particular social group grounds (Anker 53). Conclusion No. 39 was discussed in the previous section of this paper. In the late 1980s and early 1990s, attorneys and activists created the Women’s Refugee Project to push for a gender-sensitive interpretation of refugee law (Anker 53). In *Fatin vs. INS*, a woman sought an asylum claim from Iran for refusing to wear the veil but was denied asylum. The HIRC filed an amicus brief under the theory that feminism could constitute a political opinion, gender could define a particular social group, and women who were vulnerable to abuse because of their gender deserve protection (Anker 54). In *Matter of R-A*, a woman sought and was denied asylum in the US until the Center for Gender and Refugee Studies put pressure on the BIA to reverse the decision. In 2009, she was granted asylum based on the particular social group of married women who are unable to leave their abusive relationships (Anker 56-57). In another case, *Matter of D-V*, a woman was granted asylum from Haiti on the basis of her claim that she was gang-raped (Anker 54). However, this decision was initially kept hidden until activists, advocates and academics through various NGOs and institutions made the decision public, leading the BIA to establish a precedent that gang-rape constitutes a form of persecution in asylum cases (Anker 55). They submitted a report to the Inter-American Commission on Human Rights, leading the Commission to establish rape as a form of torture. Haitian women’s groups collected affidavits from Haitian women who were raped and beaten for their political beliefs.

This decision was the first recognition of rape as torture by an international human rights body (Anker 55). In *Matter of Kasinga*, female genital cutting was recognized as a form of persecution through the social group distinction (Anker 56), when the BIA ruled that women fleeing gender-based persecution, specifically FGM, were eligible for asylum in the US (CGRS, “Matter of Kasinga”). During that time, there was a growing global consent that the state was responsible for both protecting and preventing gender violence (Anker 56). The claimant was Fauziya Kassindja, who fled Togo at the age of 17 to escape female genital cutting and forced polygamous marriage. While her father was protecting her, he passed away, and her paternal aunt took over, forcing her to marry an older man with multiple wives and warning her that she would be forced to undergo genital cutting. Kassindja fled to the US in 1994 and requested asylum but was denied and placed in detention for 1 year. During her detention, attorney Karen Musalo took over the case and brought international attention to Kassindja’s story. She was released from detention and the BIA granted her asylum in 1996, ruling that she had a well-founded fear of persecution. Kassindja’s persecution claim was based on membership of a particular social group of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice” (CGRS, “Matter of Kasinga”).

The case of *Garcia-Martinez vs. Ashcroft* differs from the previously mentioned cases because the ruling recognized rape as a weapon of war and a form of persecution based on political opinion rather than membership of a particular social group. In 1993 during the Guatemalan civil war, soldiers came into Ms. Garcia-Martinez’s home and physically and sexually assaulted her, threatening to kill her if she went to the police. The government had targeted her village because they believed the villagers supported guerilla forces, and other women in the village had reported similar attacks (CGRS, “Garcia-Martinez”). Ms. Garcia-

Martinez fled to the US and requested asylum, but her request was denied in 2001 by the immigration judge. She appealed the decision to the BIA, which affirmed the decision of the judge. The case was then appealed to the US court of appeals and an amicus brief was submitted by the Center for Gender and Refugee Studies arguing that Ms. Garcia-Martinez had a valid persecution claim under both political opinion and social group membership grounds because the motivation for the attack was the assumed belief that she was pro-guerilla and that she belonged to the particular social group defined as “women from a village perceived to be sympathetic to guerrillas.” The court ruled in her favor, and the BIA reversed its ruling, granting her asylum on political opinion grounds (CGRS, “Martinez-Garcia”).

Anker sums up the potential power of international law and how a lack of policy can serve as creative grounds for advocates to shape policy through a grassroots approach:

“Through the use of creative legal arguments, advocates help to shape the development of the law at lower levels by piecing together language from different law sources and decisions and creating compelling legal arguments to persuade adjudicators that women asylum seekers met the requirement of the law” (58).

The case of the US demonstrates a tension between the negative impact of a lack of policy and the lack of policy itself as an opportunity for advocates to create social change using their own interpretations of human rights law. Here, the importance of human rights in shaping such policies is evident in the approaches used by advocates to push for precedential decisions. Today, gender-based persecution claims in the US are recognized as valid persecution claims thanks to the work of these advocates (Anker 60). Gender asylum cases in the US have also successfully expanded the type of persecutory harm recognized as valid for an asylum claim, such as psychological and emotional harm, and adjudicators have begun to dissolve public/private divide in terms of when acts constitute persecution grounds (Anker 60). While this success is important, there is much work yet to be done with regards to gender-asylum claims in the US. Most claims

are adjudicated under the social group formulation rather than on political opinion grounds, which can have negative and discriminatory implications. Adjudicators have increasingly recognized resistance to domestic violence as persecution under the political opinion grounds (Anker 63). Anker describes this success as “strategic optimism,” where direct representation has the power to instigate legal and social change (65).

E. Asylum policy in the US – political opinion vs. membership of a particular social group

Heaven Crawley critiques the social group formulation, arguing that this assumption fails to acknowledge women’s participation in politics and resistance to the state. Women are just as vulnerable as men to political violence, if not more vulnerable, as is evidenced by the nature of violations and the fact that their involvement puts them at greater risk than men (Crawley “Gender, Persecution” 17). Gender persecution is thus an overtly political act endorsed by the state and anchored in institutionalized discrimination. Crawley notes that women who go against cultural norms are seen as defiant; any expression of resistance is indicative of having a political opinion. For example, women’s refusal to wear the veil in Islamic countries is seen as an act of political resistance (Crawley “Gender, Persecution” 17). Crawley argues that women’s identities are linked to the identity and honor of the nation, and nations implement policies that discriminate against women as an act of suppressing their political expression (Crawley “Gender, Persecution” 19). By only using the social group distinction in gender persecution claims, Crawley argues, such claims are reduced to sex stereotyping and are depoliticized, thus absolving the accountability of the perpetrator and the state. It is essential to understand gender persecution as a political act and to recognize the diversity and specificity of survivors’ experiences so as not to disempower survivors (Crawley “Gender, Persecution” 20). US Immigration policy illustrates Crawley’s conundrum of depoliticized persecution.

While the US has had important precedent-setting asylum cases that have criminalized certain forms of gender-based violence, previously discussed, most of these cases have been adjudicated based on the “membership of a particular social group” persecution ground. Human Rights First attorney Vanessa Allyn notes that the social group distinction trend in asylum cases is much more difficult to prove and requires a level of expertise that is not necessarily available in the legal field (“Recent Developments”). The social group formulation requires proving that the members of the group share a common, immutable characteristic, that individuals in the group are socially distinct, and that the group has particularity (“Recent Developments”). While the first requirement of having immutable characteristics is outlined in UNHCR’s guidance, the last two requirements are absent from UNHCR and International standards (“Recent Developments”). Allyn emphasizes that while other persecution grounds require proof that the persecutor views the applicant a certain way, the social group formulation requires proof that society views the applicant a certain way, making it more difficult to prove the claim (“Recent Developments”).

VIII. Conclusion on the US

The rulings of these cases demonstrate the long and emerging process of norm-building in the US. In all the cases discussed, the initial ruling did not grant women asylum; it took the hard work of the claimants and their advocates and many years of appeals to shift the national discourse on gender-based persecution. The US case shows a shift from Charlesworth, Chinkin and Wright’s conclusions that International Law lacks a feminist approach; in the absence of gender considerations in domestic law, advocates applied feminist approaches in international law to the domestic movement. The US case demonstrates the pervasiveness of gender in all

areas of human rights; a commitment to refugee rights, to the CAT, and to any other human rights issue requires a commitment to gender issues and a gender-sensitive approach during each step of the process. In the absence of formal guidelines in the US, advocates turned to human rights in order to develop those guidelines and push for change (Anker 47). Ultimately, The US government has demonstrated some level of success in its incorporation of human rights commitments into domestic law by recognizing gender persecution in asylum cases. However, such success is fairly recent and much work remains to be done to normalize the classification of gender persecution not only as a human rights violation but as a valid refugee or asylum claim.

The US case also presents the complexity of the US immigration system as well as the refugee admissions process. Many barriers and obstacles stand in the way of admitting refugees or granting an individual asylum. These systems and processes are backlogged and limited in scope. The average wait time for an initial interview after filing for asylum is more than 2 years. In March 2016, 144,500 applications were pending; the total number of asylum case backlog grew by over 40,000 in the first 6 months of Fiscal Year 2016 (Human Rights First, ii). Furthermore, the refugee referral process for resettlement is politicized in the US, as well as limiting. The US only admits a designated list of nationalities and groups each year to the US Refugee Admissions Program, a list that is updated annually (DOS, DHS, HHS, *Proposed Refugee Admissions*). Furthermore, the US historically resettled only 70,000 refugees annually—a drop in the bucket—but at the end of Fiscal Year 2016, the US resettled 84,995 refugees and will welcome 110,000 refugees in Fiscal Year 2017 (US Dept. of State, “Fact Sheet”). This increase is a response to the international attention on the Syrian refugee crisis. Still, these numbers are a drop in the bucket when compared to the global refugee crisis. Refugees and asylees in the US thus face an added challenge due to their historically disadvantaged status. It

remains to be seen whether or not the US's increased commitments to assisting refugees will give refugee and asylum-seeking women a stronger voice in articulating their claims, or if gender and refugee status will be overshadowed with the demand of resettling more refugees under strained resources.

VIII. Conclusion – the current state of policies on refugee status and gender persecution

The examination of policies towards refugee women with gender persecution claims in Germany, Canada, and the US has demonstrated the diverse interpretations of laws, policies and guidelines around gender and refugee status. The case of Germany demonstrates that the rush to admit large numbers of refugees and asylum seekers in a limited amount of time results in poor evaluation claims and a lack of attention given to each individual case, as well as a neglect of vulnerable populations like SGBV survivors. By establishing policies that prioritize rapid processing of refugees and asylum seekers, Germany has created a gap in services and attention towards people with gender persecution claims. Although Germany has committed to the Istanbul Convention, Germany's lack of sufficient national guidelines around gender and refugee status only perpetuates this gap.

While Germany has almost completely disregarded gender in their refugee law and policy, Canada has adopted comprehensive guidelines and policies towards gender persecution. However, in practice, it is clear that these policies have not resulted in sufficient progress towards establishing precedential decisions that solidify policies. In Canada, there has been a tendency to select very particular cases of gender violence and to associate violations with cultural practices, such as female genital cutting or forced sterilization. This is problematic because it fails to recognize other forms of gender persecution such as domestic violence as valid

refugee claims, thus demonstrating a regression in the rights of refugee women seeking asylum based on gender.

The US guidelines and policies towards gender persecution were carved out by the work of lawyers and advocates who used direct client representation to influence policy. The US created gender asylum guidelines that were based on the Canadian and UNHCR guidelines. However, the most effective method of setting standards and precedents was through the successful adjudication of gender asylum cases. The way in which domestic advocacy around gender asylum coincided with the larger global movement to promote and recognize women's human rights helped anchor and strengthen the movement in the US as activists and advocates pushed for change in both spheres. The lack of guidelines (prior to their creation) gave lawyers some leverage in that they were free to creatively develop these guidelines with an emphasis on human rights law. Without the existence of international human rights law, advocates in the US would not have successfully set precedents for gender asylum cases. Therefore, the power and importance of human rights was especially evident in the case of the US. This is not to say that the movement in the US is at the height of progression; it took decades for just a few precedents to be established, and some women asylum seekers waited years for decisions on their cases to be heard, especially with domestic violence claims.

The analysis of refugee law in Germany, Canada and the US demonstrates that it is difficult to measure the effectiveness of changing norms around gender persecution in international law. However, because of a historic lack of feminist approaches to international law, feminist approaches towards domestic law become open to interpretation. For the case of the US, the conclusions of Charlesworth, Chinkin and Wright are somewhat relevant on paper, but significantly less relevant in practice because international law was essential in setting

precedents in gender asylum claims. For Canada, the opposite holds true in that there are comprehensive guidelines on consideration of gender persecution claims, but such guidelines are less effective in practice. In Germany, there is a commitment to refugee law but a severe lack of gender considerations and feminist approaches; as such the conclusions of Charlesworth, Chinkin and Wright ring true in the German context. Despite the variance in practice and scope of gender guidelines, all countries recognize different forms of gender persecution on paper. Domestic violence, female genital cutting, forced sterilization, forced marriage, rape and sexual violence are some of the forms of gender violence that are recognized as forms of persecution in all three countries, and it is evident that domestic violence is the most difficult claim to make. The next step is for countries to ensure that gender persecution claims are properly adjudicated in practice and that women are informed of their rights and options, as well as given a voice in the process. Countries should utilize the plethora of UNHCR resources to guide their policies, as well as adhere to their commitments to the CEDAW, the 1951 Convention and Protocol, and regional commitments such as the Istanbul Convention. Countries should establish comprehensive and systematized processes for identifying vulnerable populations like survivors of SGBV and should ensure that there are adequate resources and training of staff to ensure that survivors can make their claims and that their needs are addressed during every step of the asylum seeking process. While significant progress has been made, the global community should adopt policies that recognize gender persecution as a valid refugee and asylum claim not only on paper, but also in practice, and should apply those practices with the necessary expertise of practitioners through adequate resources and feminist approaches towards the law.

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