

2018

The Forgotten Convention Ground: A Comparative Study of Women Asylum Seekers and Gender-Based Persecution

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The Forgotten Convention Ground: A Comparative Study of Women Asylum Seekers and
Gender-Based Persecution

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Submitted in Partial Fulfillment
of the
Prerequisite for Honors
In Political Science
under the advisement of Craig Murphy

April 2018

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Acknowledgements

This thesis would not have been possible without the love and support from those surrounding me. First, I would like to thank my family. My sister, Samantha, who has taught me to look at the world with unending kindness, my brother, Doug, who has been my Political Science role model to look up to, and my Parents for their infinite support who were Wellesley's biggest fans even before I figured that it was the school for me.

My two amazing advisers Professor Craig Murphy and Professor Catia Confortini whose constant support and wisdom has infinitely improved this project and allowed me to combine my two academic passions in this thesis.

Professor Lois Wasserspring whose class on Gender and Development sparked the idea behind this thesis and re-wrote the trajectory of my post-graduate plans.

The Barnette Miller Foundation which generously supported my archival research.

Finally, my incredible friends who have kept me sane and loved throughout this process. First my two Wellesley families: Bates-McAfam and the Wellesley Debate Society. The Bates-McAfam crew who are always there for a lively meal and late night conversation. Your constant support surrounds me with love. To my Wellesley Debate Family who constantly energize me and make me laugh. Third, to my thesising partner only three states away, Zoe Rankin, whose encouragement and commiseration has pushed me through to the end. Finally to Zach whose patience, kindness, and understanding stretches for miles.

“Introduction”

There are 16.5 million refugees, 36.6 million Internally Displaced Persons (IDPs), 10 million Stateless persons, and 2.8 million asylum seekers worldwide as of 2016.¹ These categories are legal labels, used to describe the general population of those affected by forced migration, those who are coerced to move from their home due to a variety of circumstances, in particular the rights that are afforded to them and whose responsibility it is to provide for these groups. These legal labels trace their roots back to the 1951 Convention Relating to the Status of Refugees, which solidified both what would be internationally recognized as the definition of a refugee and the rights that legal status that would provide for them. Those that cannot prove that they meet the burdens of this legal definition are marginalized in terms of their rights, subjected to the individual countries’ immigration regulations. However, these legal labels can also homogenize the experiences within each of these groups, covering up the narratives of those not dominant within a group or who have been historically excluded. One such narrative is of women asylum seekers, especially considering the different barriers they face due to their gender identity. Despite women and girls making up about half of the forced migration population, their stories and experiences are either ignored or grouped together to form one alternative narrative.

Despite their diversity in claims, all asylum seekers are expected to navigate a complex legal system that determines what legal label applies to them. The UNHCR defines an asylum seeker as, “individuals who have sought international protection and whose claims for refugee status have not yet been determined, irrespective of when they may have been lodged.”²

¹ “Global Trends: Forced Displacement in 2016,” *United Nations High Commissioner on Refugees* (2017): 64.

² “UNHCR Population Statistics Database,” *United Nations High Commissioner on Refugees*, accessed April 22, 2018, <http://popstats.unhcr.org/en/overview>

Therefore, this label is a temporary one, which they receive before they receive a more permanent one and which can control the future of an applicant. In order to receive refugee status, in most countries, applicants who are outside the boundaries of their country of origin, must prove that they meet the burdens set up in the 1951 Convention definition which states that a refugee is someone who has a “well founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”³ Therefore, refugee status is granted to those outside the borders of their country of origin, who have a “well-founded fear” of persecution, and whose fear of persecution is directly linked to one of five Convention grounds: race, religion, nationality, political opinion, or membership of a particular social group. The Convention grounds that fulfill the third requirement of this definition are quite limited in scope, as most countries have agreed, as they are thought to be characteristics that are either immutable or fundamental to a person.⁴ However, there is one characteristic that is blatantly left out of this definition: gender.

Because gender has been left out of the Convention grounds, claims to persecution due to gender-based violence (GBV) do not cleanly fit into the current asylum system. In this work, I will define gender-based violence using the Reproductive Health for Refugees Consortium’s definition, “an umbrella term for any harm that is perpetrated against a person’s will; that has a negative impact on the physical or psychological health, development and identity of the person, and that is the result of gendered power inequities that exploit distinctions between males and

³ UN General Assembly, *Convention Relating to the Status of Refugees*, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 152, available at: <http://www.refworld.org/docid/3be01b964.html>.

⁴ Heaven Crawley and Trine Lester, “Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe, *United Nations High Commissioner for Refugees*, EPAU/2004/05 (2004): 83.

females, among males, and among females.”⁵ While GBV can happen to both male and female asylum seekers, because of historical power inequities, women tend to be victims of GBV more than men, which means that they are disproportionately negatively affected by this lack of inclusion in the 1951 Convention. Instead these claims to GBV must be interpreted under one of the other Convention grounds, commonly the “Membership of a Particular Social Group”, forcing asylum seekers to fit within a category that might not suit them. Since interpretations of these categories is left to individual countries, there can be varying degrees of latitude in accepting gender-based claims.

Scholars have already identified how the legal text and interpretations of the international asylum system have not been set up to serve the needs of women. They have identified barriers in the bureaucracy of the asylum system in both the intake and claims process of women asylum seekers, which can cause women to be less likely to be open about their experiences.⁶ Other scholars have assessed the effectiveness of using the five Convention grounds in processing women’s claims, as some experiences of political protest may also be gendered, and whether the category of “Particular Social Group” is sufficient to serve the needs of claims that do not easily fit into the other four categories.⁷ Finally, some scholars have looked at how GBV claims and women’s claims are processed within a specific country, to understand how the legal text of the 1951 Convention has been implemented.⁸

⁵ “Gender-based Violence Initiative,” *Reproductive Health for Refugees Consortium*, accessed January 1, 2018, <http://www.prb.org/pdf/GBVpressrelease2page1.pdf>

⁶ Thomas Spijkerboer, “Stereotyping and Acceleration: Gender, Procedural Acceleration, and Marginalised Judicial Review in the Dutch Asylum System,” in *Proof, Evidentiary Assessment, and Credibility in Asylum Procedures*, ed. Gregor Noll (Boston: Brill, 2005).

⁷ Susan Kneebone, “Women within the Refugee Construct: ‘Exclusionary Inclusion’ in Policy and Practice- the Australian Experience,” *International Journal of Refugee Law* 17, no. 1 (2005): 8.

⁸ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (New York: Palgrave MacMillan, 2007).

This thesis aims to fill the gaps in this literature in three ways. First rather than asking how the asylum system has traditionally disadvantaged women asylum seekers, I look at why gender was not included in the 1951 Convention in the first place. Secondly, I investigate why as conversations around the specialized needs of women asylum seekers have grown, there has not been a push to change this refugee definition at the international level. Third, I will look at the effects of this lack of inclusion of gender as a Convention ground on women's claims in three different asylum systems: United States, Sweden, and South Africa. Despite all being signatories to the original 1951 Convention, each has created a distinct asylum system with different impacts on the needs of women asylum seekers. This comparison will come in two parts. First, I will examine gendered language and assumptions surrounding claims based on the first four Convention grounds (race, nationality, religion, and political opinion) and how this language and assumptions then affect the outcome of asylum cases. Second, I ask whether in the category of gender-based violence, in which claims are filed under the ground of Membership of a Particular Social Group, certain types of violence are more likely to be accepted than others and why might that be.

Before I lay out the structure of the remaining chapters, I will establish a few key definitions of terms that will be used throughout this thesis. I define gender using Joan Scott's work as, "a constitutive element of social relationships based on perceived differences between the sexes...a primary way of signifying relationships of power."⁹ Therefore by extension, what I mean by gendered is the way in which institutions, processes, and norms are shaped to reflect this relationship of power within society. This relationship has often been characterized as

⁹ Joan Wallach Scott, *Gender and the Politics of History* (New York: Columbia University Press, 1999), 42.

hierarchical, meaning that men have held societal power over women. Of course this relationship of power is only one in a multitude of power relationships based on other perceived differences such as race and class. The interactions between these relationships shape everyday actions and behaviors. Gendered institutions, processes, and norms are often used to reinforce the historical shape of this relationship of power which assumes male experiences and masculinity are the norm, and those that do not fit within these ideas are seen as deviant. Gender-based asylum claims are ones in which GBV is the predominant reason for an applicant's decision to flee. Second, a refugee regime is the system, either international or national, that process claims of asylum and determines whether they are legitimate or not, using a particular standard. These regimes cross over with many of the immigration systems within a country, but they are still seen as distinct and separate aspects of these larger immigration systems. Finally, often times in popular media the term refugee is used to describe all those that have been affected by forced migration. However, as mentioned above, this term is defined in the 1951 Convention as individuals who have met specific qualifications with their claim. Therefore, I will be using the term to refer to the legal status afforded to those that have been deemed to have met that burden, and those applying for asylum either as asylum seekers or applicants.

Chapter One seeks to answer the question of why was gender (or sex as that particular terminology was not utilized during that time period) not included as a Convention ground in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocols. It traces the evolution of the international asylum system up and through the early years of the UN, documenting a shift from granting asylum due to membership to a group towards individual actions. My research offers four potential explanations for this lack of inclusion of gender in this

document and why this discussion did not enter the discourse in the 1967 Protocol which amended the refugee definition.

Chapter Two focuses on how the international refugee regime has evolved since the 1967 Protocol in order to create a more gender aware system that meets the needs of both women and gender-based claims. It also investigates why there was not an international push to amend the 1951 Convention to create a more expansive and inclusive refugee definition. Because of the lack of systematic international change on this issue, I explore what other policies advocates have pushed for to create a more gender inclusive refugee regime and problems associated with pushing for dispersed change.

Chapter Three identifies how women asylum seekers may have a different asylum narrative than men asylum seekers because of their gender. Although there is no “typical” asylum narrative, there are common obstacles throughout the entire asylum process that women asylum seekers may face that men do not. This chapter identifies these potential roadblocks stretching from making the decision to flee to receiving their asylum decision after an appeals process.

Chapter Four establishes background on each of the asylum systems of the three case studies, studying how they have differently evolved and incorporated gender guidelines into their systems. After, it begins to compare the outcomes of claims of women asylum seekers under three Convention grounds (race, religion, and political opinion). Through this comparison we can broadly see that narratives that follow a typical masculine image of dissent are more likely to be accepted than other forms of dissent.

Chapter Five explores how gender-based violence claims are processed under the Convention ground of Particular Social Group. While the gender guidelines that are explored in Chapter Four for each of these countries theoretically allow for the acceptance of these claims, in practice many claims such as forced marriage or sterilization are not always accepted due to the perceived “lack of credibility” of the applicants. Therefore, I argue that there needs to be more emphasis on the monitoring of the implementation of these guidelines, in order to create a truly gender aware system.

“Chapter One”

The 1951 Convention and 1967 Protocol Relating to the Status of Refugees are the key founding documents for the modern refugee regime. These documents are noteworthy, because they create the first broadly recognized international standards of who is a refugee and the rights that come along with this legal distinction. Because they set up this standard, the document created the current distinction between a refugee and as a migrant. This is important not only in law, but also in how the public perceives these groups. As discussed in the Introduction, The 1951 Convention defines who qualifies for this refugee label in Article 1 (A). The first half of Article 1 (A) has provisions to include those who had been previously defined as refugees under earlier systems in this refugee regime. The second half provides a new definition, “The term “refugee” shall apply to any person who...as a result of the events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion.”¹⁰ Under the 1967 Convention, the time limit was removed allowing it then to be applied as the standard in international asylum cases.

However, while many of the grounds for persecution are fundamental characteristics, one category which is considered to be that is left out, sex. For this chapter I will use the term “sex” interchangeably with the term gender. This is because the term “gender” did not appear in UN documents until much later than the drafting of these founding documents. For example at the 1995 Beijing Women’s Conference, the use of “gender” was still a contentious issue for many

¹⁰ UN General Assembly, *Convention Relating to the Status of Refugees*, July 28, 1951, United Nations, Treaty Series, vol. 189, p. 152, available at: <http://www.refworld.org/docid/3be01b964.html>.

delegates.¹¹ If the UN were to include gender as a ground of persecution it would have done so under the term of “sex”. It is key to note that the drafters may not have seen sex as series of social relationships, but rather biological differences between males and females and subsequent discrimination based off these differences. However, though the language of sex would have most likely been interpreted as Scott’s definition of gender today as it describes the relationship that causes this discrimination.

Like other grounds of persecution, if an applicant deviates from the gender norms in a society, they can face violent consequences. Therefore, it seems unusual that it was not included in this definition. In this chapter, I plan to explore why sex was not originally included as a ground of persecution in the 1951 Convention Relating to the Status of Refugees. What political conditions influenced this decision? Were there structural issues in the UN that also affected it? Was this lack of inclusion the norm for UN documents regarding human rights at the time, or is this an unusual phenomenon? Finally, since the 1967 Protocol amended Article 1 (A), why was sex as a Convention ground not included then?

Pre-WWII Refugee Regimes

In order to understand why sex was not included in the 1951 Convention, it is crucial to identify what problems the Convention was trying to address and the gaps it was trying to fill with this definition. Skarn argues that the beginning of refugee regimes, broadly, is correlated with the birth of the nation-state. The persecution of groups such as the Kurds in Iraq were part of a greater process of turning a “multiethnic empire into a homogenous nation-state.”¹² Because

¹¹ Hilikka Pietilä, *Engendering the Global Agenda: The Story of Women and the United Nations*. (UN Non-Governmental Liaison Service, 2002), 64.

¹² Claudena M Skarn, “The International Refugee Regime: The Historical and Contemporary Context of International Responses to Asylum Problems,” in *Refugees and the Asylum Dilemma in the West*, ed. Gil Loescher (Pennsylvania: The Pennsylvania State University Press, 1992), 8.

a nation-state defines itself within a binary of those a part of the nation, usually citizens, and those outside the nation-state's purview, those who do not identify with the nation may be more likely to be pushed out of it to create stronger in-group cohesion. As nation-states received recognition as legitimate legal areas, states then become the primary unit of analysis of entities who can grant asylum since they have the right to control the flow of people within their border.

¹³ As states became more invested in controlling this flow in the 19th century, there was a greater need to create a subset of people protected outside the normal immigration stream. Refugee rights first emerged in the 1889 Montevideo Treaty on Penal Law.¹⁴ This document, ratified by the South American Congress, protects the right of political refugees to stay in their country of asylum unless they fall under the rules governing extradition, which is also established in the treaty.¹⁵ However, the document fails to classify what counts as a “political refugee” or even what a political offense is. Because of this ambiguity, it was more likely for states to accept individuals fleeing on a case by case standard, especially those that did not threaten the state’s interests.

Due to World War I, there was the beginning of a shift to having international organizations work on formalizing protocols and protections for refugees. This war triggered this response for three reasons. First, the technological advances of the 19th and 20th century dramatically changed the scope of war. Because of the increased destructive quality of weapons, it became more likely that a greater number of European civilians would be uprooted during wars.¹⁶ For instance in Belgium after Germany’s 1914 invasion, a million refugees were created

¹³ Ibid., 14.

¹⁴ Stina Ljungdell, “Female Asylum-Seekers and Refugee Status: Guidelines for Assistance,” (1989): 5.

¹⁵ Regional Treaties, Agreements, Declarations and Related, “Treaty on International Penal Law,” January 23 1889, available at <http://www.refworld.org/docid/3ae6b3781c.html>.

¹⁶ Skarn, “The International Refugee Regime,” 9.

from both being on or near the front or forcible displacement by invading armies.¹⁷ In addition, these technological advances encouraged armies to attack the civilian bases supporting the war efforts. Often while aiming for industrial targets, both sides dropped bombs on homes, schools, and hospitals, uprooting the civilian populations more than other eras.¹⁸ Second, the countries that had received the fleeing refugees during the war were under severe economic conditions born out of having to reconstruct their country after their participation in the war.¹⁹ Third, because of a crackdown on immigration streams, more countries required passports for refugees, which they did not always have, placing their legal status and protection in jeopardy.²⁰ A gathering of voluntary agencies, who had traditionally given relief to refugees marked a call to action to deal with these problems of refugees in Geneva, February 1921.²¹ This call to action reverberated to the League of Nations when they appointed Dr. Fridtjof Nansen to be the “High Commissioner on behalf of of the League in connection with the problem of Russian refugees in Europe.”²² Examining the language of the appointment, it is clear how the League of Nations would define refugees in the early part of the regime. Early definitions of being a refugee centered on being a part of a national or ethnic group that was persecuted by a State. For instance, Russian refugees were defined as, “Any person of Russian origin who does not enjoy or who no longer enjoys the protection of the Government of Socialist Soviet Republics and who has not acquired another nationality.”²³ It did not focus on the reason for persecution as there

¹⁷ Kevin Hillstrom, *World War I and the Age of Modern Warfare* (Detroit: Omnigraphics, 2013), 68.

¹⁸ *Ibid.*, 62.

¹⁹ Louise Holborn, *Refugees: A Problem of Our Time Volume I* (Metuchen, NJ: The Scarecrow Press, 1975), 4.

²⁰ Terje Einarsen, “Drafting History of the 1951 Convention and the 1967 Protocol,” in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann (New York: Oxford University Press, 2011), 43.

²¹ Holborn, *Refugees*, 5.

²² *Ibid.*, 7.

²³ Einarsen, “Drafting History,” 44.

were at least six different categories of Russian refugees fleeing during this period, but instead they were all swept under this one label.

More than just defining refugees by group affiliation, this period was also significant because of the development of the “Nansen passport”. This was an internationally accepted document that provided special legal and judicial status to refugees.²⁴ While not all countries adopted the use of Nansen passport, it did provide a first step towards internationally recognizing refugees as a separate migrant group with different rights.²⁵ However, the regime ran into problems since its inception as the Covenant for the League of Nations did not provide any measures for providing international aid or protection for refugees.²⁶ In addition, the Council was reluctant to fund this endeavor unless it was a temporary one. The office of the High Commissioner was largely designed to be a network between the different components of refugee aid: host countries, private relief organizations, and refugees.²⁷ Finally, the Great Depression made European countries more likely to stop the flow of immigrants, which included refugees.²⁸

While the regime did have implementation roadblocks, it did continue to evolve before World War II, most dramatically through the 1933 Convention Relating to the International Status of Refugees. This document not only restructured the refugee office, but it also sought to provide specific social and economic rights for refugees. This would become the basis for the 1951 Convention, which focuses on determining the rights of resettled refugees.²⁹ It continued

²⁴ Holborn, *Refugees*, 9.

²⁵ *Ibid.*, 10.

²⁶ *Ibid.*, 6.

²⁷ *Ibid.*, 7.

²⁸ *Ibid.*, 14.

²⁹ *Ibid.*, 17.

with the original League of Nations approach in defining refugees by group affiliation, but provided some flexibility by allowing signers to add different refugee groups to this classification.³⁰ While women were included in this definition, such as if their nationality matched with the group affiliation, there was no provision for the protection of them based on gender persecution. However, a big drawback of this Convention is the small international impact. Because the document was trying to create a legally binding system, Holborn reasons that the comprehensive nature of it decreased international support for the measure.³¹ Only eight states ratified the 1933 Convention, and three states ratified it with objections to the rule on non-refoulement, which prevents countries from returning asylum seekers to their country of origin if they have a substantial threat to their life or liberty.³² This led to the system becoming inefficient, losing support for it, eventually leading to its collapse. The refugee problem hardly disappeared prior to World War II, as the Jewish refugee population grew to between 402,000 to 431,000 by 1941.³³ Because non-refoulement was not a widespread legally binding rule, the majority of Jewish refugees on twelve ocean liners coming to the U.S. and Caribbean were turned away.³⁴

Events Leading to 1951 Convention

After World War II, it was clear that the events that occurred during that period through the Holocaust would be monumental in influencing the shape of the next refugee regime. Skarn argues that after WWII the term “refugee” became “synonymous with victims of Nazi

³⁰ League of Nations, *Convention Relating to the International Status of Refugees*, October 28 1933, League of Nations, Treaty Series Vol. CLIX No. 3663, p.2, available at: <http://www.refworld.org/docid/3dd8cf374.html>.

³¹ Holborn, *Refugees*, 16.

³² Einarsen, “Drafting History,” 44.

³³ Holborn, *Refugees*, 13.

³⁴ Catherine Cassara, ““To the Edge of America”: U.S. Newspaper coverage of the 1939 Voyage of Jewish Refugees aboard the M.S. St. Louis,” *Journalism History* 42, no. 4 (2017): 226.

persecution.” This widened policymakers’ images of refugees from just being a particular ethnic group, to individuals that were persecuted for a fundamental characteristic like their religion.³⁵ Second, like in World War I, there was an urgency in resolving the “refugee problem” because of the pressure that post-WWII refugees placed on refugee receiving countries like Italy and Austria.³⁶ By the end of WWII, 10 million refugees were displaced outside their country of origin.³⁷ Like after WWI, many of the countries that received these refugees also suffered deep losses during the war, leading to economic instability. The international community recognized the need for burden sharing of these refugees or they would become an undue political, economic, and social burden on the countries of reception creating more instability.³⁸ Finally, because of these events, Einarsen argues that the international spirit towards refugees had changed to become more humanitarian, therefore more likely to give them broad-reaching rights.³⁹ Because of the horrors that had gone on during the war, the UN Special Committee on Refugees and Displaced Persons decided to re-open the discussion on who was a refugee.⁴⁰ Simply because of its timeframe there was a greater momentum to create institutions based on humanitarian aspirations. It would seem more likely that the definition eventually created by the UN could be more widely reaching, thus potentially including gender-based protections.

Before there was this concrete decision to create a radically new refugee definition and regime, there was the creation of two regimes that were quite similar to the interwar period. The system created by the 1933 Convention did not stand the test of time during WWII, and it was

³⁵ Skarn, “The International Refugee Regime,” 20.

³⁶ Holborn, *Refugees*, 24.

³⁷ Einarsen, “Drafting History,” 45.

³⁸ Holborn, *Refugees*, 33.

³⁹ Einarsen, “Drafting History,” 45.

⁴⁰ Holborn, *Refugees*, 28.

instead replaced by the United Nations Relief and Rehabilitation Administration (UNRRA). This agency was created before the founding of the post war-UN, and it was tasked to start aiding refugees and displaced persons, in which there was little distinction, in 1943.⁴¹ It was part of the Allied powers' efforts to support areas that had been liberated and had been severely affected by the war. Therefore, its efforts were not solely focused on refugees but rather rehabilitating the area through rebuilding of infrastructure and famine relief.⁴² A major limitation of UNRRA was that it could not resettle refugees, only repatriate them. This proved to be an unsustainable model as many refugees refused to be repatriated in 1945.⁴³ To resolve this, the newly formed UN created another organization, the International Refugee Organization (IRO). Unlike UNRRA, the IRO had the option to either repatriate, integrate refugees into the country of asylum, or resettle them in a third country.⁴⁴ This is much more similar to the UNHCR's scope today, showing a clear progression of regime evolution. However, though created by the UN, the IRO did not gain automatic support from all member countries. In fact, only 18 out of 54 member countries joined the burden sharing endeavor.⁴⁵ The agency was controlled by a steering committee of those select member states, which included the U.S., who was the dominating interest.⁴⁶ The IRO reflected the U.S.'s interests as the U.S. wanted a temporary agency that was autonomous from the UN with a very specific function, instead of a broader mandate. On the other hand, the U.K. and France wanted an agency that was directly under the UN's authority.⁴⁷ The refugee definition in the IRO's constitution reflected this intended temporary lifespan.

⁴¹ Holborn, *Refugees*, 24.

⁴² Dan Plesch, *America, Hitler, and the UN* (New York: I.B. Tauris & Co., 2011), 119.

⁴³ *Ibid.*, 26.

⁴⁴ Einarsen, "Drafting History," 46.

⁴⁵ Holborn, *Refugees*, 30.

⁴⁶ Einarsen, "Drafting History," 45.

⁴⁷ Holborn, *Refugees*, 29.

The IRO constitution starts out by declaring that, “genuine refugees and displaced Persons,” require aid at the international level.⁴⁸ This sentiment alone demonstrates that states were cautious that there may be “ingenuine” refugees that could abuse the system that they were aiming to create. Therefore, founding states wanted to ensure that the scope of the definition would be precise to limit this possibility. This is reiterated by the fact that the preamble also calls for the organization to achieve, “the foregoing purposes in the shortest possible time.”⁴⁹ The document goes on to define refugees, breaking somewhat from past regime’s pattern of defining through group affiliation. The first qualifying feature is the individual must be outside the country of habitual residence, discounting internally displaced persons from being refugees. It then goes on to list victims of Nazi and fascist regimes, Spanish Republicans and victims of the Falangist regime, and “persons who were considered refugees before the outbreak of the second world war, for reasons of race, religion, nationality or political opinion,” as qualifying for this legal status.⁵⁰ All of these categories have a time limit on them, meaning those that may have become refugees after the war, may not qualify. This again emphasizes the intended temporary nature of the agency. However, the last category of the definition marks the shift to an individualistic way of determining refugee status. This is a key shift which acknowledges that a whole ethnic group may not be persecuted, but individuals inside that group may be if they deviate from social norms. However, that time limit prevents the definition from being widely used, which ultimately is the IRO’s downfall. While the 1951 Convention was being debated, the General Council of the IRO expressed the problem with having a temporary organization,

⁴⁸ United Nations, *Constitution of the International Refugee Organization*, (December 15, 1946), 284, available at <https://www.loc.gov/law/help/us-treaties/bevans/m-ust000004-0284.pdf>.

⁴⁹ *Ibid.*, 285.

⁵⁰ *Ibid.*, 297.

because it was likely that the problem of refugees would not disappear.⁵¹ However, the member organizations refused to continue funding, particularly the U.S. who was the major source as it provided 39.89% of the Administrative funding, three times higher than any other country. The IRO was unlikely to continue if the U.S. pulled out.⁵²

Because of this temporary nature of the agency, the lack of burden sharing between the majority of UN member states, and the tendency for the IRO to still use a categorical definition of refugees, the regime proved to be unsustainable. While the IRO did start to move towards an individualistic definition, the vast majority of the definition still granted refugee status based on group affiliation. The last category for refugee status could be seen as a catch all for the other group categories listed before it. Therefore, the two groups assisted by this regime were either victims of Nazi persecution or Spanish Republicans/ victims of the Falangist regime. By contrast, the UN Secretary General, Trygve Lie, wanted to create a more general definition for refugees, breaking from this categorical tradition.⁵³ This may have been because of his background as Norwegian Labour Party organizer where Dolivet writes, “individual freedom is a sacred tradition.”⁵⁴ Therefore, he may have wanted a definition that maximizes an individual’s right to political liberty, considering specific acts of protests they have performed instead a group affiliation. By having an individualist approach to granting refugee status, it allows countries to consider specific contexts for claims. This is especially important for gender-based claims, when all women of a country may not be persecuted, but rather particular individuals who decide to deviate from traditional gender roles are.

⁵¹ United Nations Economic and Social Council, *Comments of the Specialized Agencies on the Report of the Ad Hoc Committee of Statelessness and Related Problems*, E/1704 (May 29, 1950).

⁵² UN, *Constitution*, 301.

⁵³ Einarsen, “Drafting History,” 53.

⁵⁴ Louis Dolivet, “Three Roads Before Trygve Lie,” *Free World* 11, no. 5 (1946), 38.

Drafting of 1951 Convention

While the idea of creating a more permanent refugee agency was floated at the UN founding in San Francisco 1945, it was not until the GA Resolution 8 (I) in 1946 when the refugee issue was addressed. This document authorized the Economic and Social Council (ECOSOC) to investigate the problem of deciding who was a “genuine refugee” and who was “war criminals, quislings, and traitors.”⁵⁵ The Economic and Social Council acting upon the recommendations of the resolution, creating an Ad Hoc Committee to discuss this issue, composed of 13 countries, including both the U.S. and USSR. None of the country representatives were women. There was only one woman who was a NGO representative at the committee meetings, Gertrude Baer, representing both the Women’s International League for Peace and Freedom (WILPF) and International League of the Rights of Men.⁵⁶ However, because she was a NGO representative, she could not vote or propose amendments to the committee during the sessions. During the drafting, the committee made two key decisions which drastically shaped the 1951 Convention. First, even though the Ad Hoc Committee was tasked with dealing both with stateless persons and refugees, the committee ultimately decided to focus on solely defining refugees and their rights.⁵⁷ Secondly, the Committee decided that their conclusions should be enshrined in a convention.⁵⁸ This allowed for the 1951 Convention to have a legally binding effect at the international level, making its conclusions more powerful. This Convention was finalized at the UN Conference of Plenipotentiaries on July 28, 1951.⁵⁹

⁵⁵ General Assembly Resolution 8/1, *Question of Refugees*, (February 12, 1946).

⁵⁶ United Nations Economic and Social Council, *Report of the Ad Hoc Committee on Statelessness and Related Problems*, E/1618, (February 17, 1950), 2-3.

⁵⁷ *Ibid.*, 38.

⁵⁸ *Ibid.*, 5.

⁵⁹ Einarsen, “Drafting History,” 49.

The definition that was finalized at the UN Conference of Plenipotentiaries was not the same as earlier versions. The first half of the definition, which stayed the same, deals with needing to prove that an individual has a, “well-founded fear of being persecuted”. However, this standard must be interpreted in relation to a ground for persecution, one of the established fundamental characteristics: race, religion, nationality, political opinion, or particular social group. This is why the Convention grounds are so important because if an applicant cannot fit their narrative into one of the grounds of persecution, it can be rejected. This begs the questions of whether, throughout the drafting process, was sex ever considered to be a ground for persecution? Following historical records throughout the process, sex never appears as a reason for persecution, at least not explicitly.

The wording for grounds of persecution can be traced back to the 1945 Charter of the International Military Tribunal, also known as the London Charter, which set up how military leaders would be prosecuted after WWII. Article VI sets up the jurisdiction for the tribunal, and in doing so defines several crimes. “Crimes against humanity” is defined as, “Namely, murder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecution on political, racial, or religious grounds.”⁶⁰ Because these were grounds that the international community had accepted as possible reasons for persecution before the drafting of the 1951 Convention, it was most likely easier to include in a new document. Nationality, which is included as a ground of persecution under the IRO Constitution, followed the tradition of giving refugee status to groups of a particular nationality in the interwar period. Therefore, in a 1950 report to ECOSOC from the Ad Hoc Committee,

⁶⁰ United Kingdom of Great Britain and Northern Ireland, United States of America, France, Union of Soviet Socialist Republics, *Agreement for the prosecution and punishment of major war criminals of the European Axis*, United Nations Treaty Series no. 251, August 8, 1945.

they defined a refugee, “As a result of events in Europe after 6 September 1949 and before 1 January 1951 has well-founded fear of being the victim of persecution for reasons of race, religion, nationality or political orientation.”⁶¹

The Ad Hoc Committee welcomed comments on this definition before the Conference of Plenipotentiaries. Criticism from countries focused on the geographic and time limits, burden sharing, criminal prosecution, and potential system abuse, not on the grounds for persecution. Pakistan objected that the definition was limited to events in Europe as refugees were not an exclusively European phenomenon.⁶² Austria was concerned that because of the flow of refugees from the Soviet bloc, the time limit would put additional strain on refugee receiving countries as they would not receive burden sharing support.⁶³ France also wanted a broader definition without the time limit, worried that the High Commissioner’s scope would be too narrow.⁶⁴ Egypt⁶⁵, India⁶⁶, and Lebanon⁶⁷ all expressed concern that they would not be able to give financial resources for this endeavour as they were supporting refugees from Palestine and Pakistan so they could not take on European refugees too. The United Kingdom⁶⁸ and Canada⁶⁹ were both worried that the refugee protections in the 1951 Convention would obstruct the criminal justice process by not allowing them to deport refugees who have broken the law. Finally, Italy was concerned that the

⁶¹ ECOSOC, *Report of the Ad Hoc Committee*, 10-11.

⁶² United Nations Economic and Social Council, *United Nations Economic and Social Council Official Records Eleventh Session*, E/SR.399 (July 31, 1950), 216, available at <http://undocs.org/E/SR.399>.

⁶³ United Nations Economic and Social Council, *Comments of Governments on the Report of the Ad Hoc Committee of Statelessness and Related Problems*, E/1703/ Add. 4, June 26, 1950, 4.

⁶⁴ United Nations Economic and Social Council, *Comments of Governments on the Report of the Ad Hoc Committee of Statelessness and Related Problems*, E/1703/ Add. 5, June 26, 1950, 4

⁶⁵ United Nations Economic and Social Council, *Comments of Governments on the Report of the Ad Hoc Committee of Statelessness and Related Problems*, E/1703, May 26, 1950, 1.

⁶⁶ United Nations Economic and Social Council, *Comments of Governments on the Report of the Ad Hoc Committee of Statelessness and Related Problems*, E/1703/ Add. 2, June 19, 1950, 2.

⁶⁷ *Ibid.*, 4.

⁶⁸ *Ibid.*, 2.

⁶⁹ United Nations Economic and Social Council, *Comments of Governments on the Report of the Ad Hoc Committee of Statelessness and Related Problems*, E/1703/ Add. 3, June 20, 1950, 2.

system did not set up a way to process refugees' claims, leading the refugee flow from the Soviet Bloc to go unchecked, placing a strain on refugee receiving countries.⁷⁰ These comments focused on economic concerns and restrictions of member states' sovereignty, not expanding the definition to include new Convention grounds, least of all sex.

Though NGOs did not have the right to vote on this document, they were invited to submit comments on this draft. Since NGOs often have different agendas from states, their statements may be more radical than governments, therefore leaving a potential window open to talk about sex as a Convention ground. However, this was not the case. The European Movement Rome Conference and International Student Service both wanted an expanded refugee definition, but in what way, it is unclear. The Confederation of Free Trade Union wanted German refugees, those displaced internally, to be included in the Convention while the Inter-Parliamentary Union wanted the geographic and time limits removed. Finally, both the Commission of Churches and Friends World Committee wanted an expansion of the High Commissioner's powers.⁷¹ Because sex was never explicitly stated in these comments, it is unlikely that at any point during the drafting it was seriously considered as a potential Convention ground for persecution.

However, the draft submitted to the ECOSOC in 1950 was not the final draft of the definition, and an additional ground for persecution was added which would be used in the future to include gender persecution, though it was not intended as such. "Membership of a particular social group," did not appear as a Convention ground until the ratifying conference, the Conference of Plenipotentiaries. The phrase itself, like other grounds included in the Convention,

⁷⁰ United Nations Economic and Social Council, *Comments of Governments on the Report of the Ad Hoc Committee of Statelessness and Related Problems*, E/1703/ Add. 6, July 14, 1950, 4.

⁷¹ United Nations Economic and Social Council, *Statelessness and High Commissioner: Analysis of Statements Made by Governments and Non-Governmental Organisations*, (July 29, 1950), 3, available from Louise W. Holborn Archives, Cambridge, Massachusetts.

does not get any further clarification of its intended meaning. However, a 1992 UN Handbook that provides asylum claims processing guidelines explains, “A “particular social group” normally comprises [of] persons of similar background, habits, or social status.”⁷² Other UN guidelines elaborates to state that this shared characteristic must be something more than just a risk of being persecuted.⁷³ This definition then could be used to cover women who face gender-based violence as they are seen as a group that has a similar characteristic (sex), but I will analyze about whether this is enough to grant these claims in the Chapter Five.

This proposed ground emerged at the Conference of Plenipotentiaries when it was proposed by the Swedish delegation. They provide very little justification for this amendment other than that there have been cases where people have been persecuted because of their “membership to a particular social group” and that these cases should be explicitly recognized.⁷⁴ The Swedish delegation does not elaborate on examples of these cases and neither do any of the other countries. There is no objections to this amendment, and the discussion again focuses on the geographic and time limits of the definition.

Though there is few historical documents on the inclusion of this ground, there is potentially two reasons why Sweden proposed this amendment. The first is that this term was a compromise between the countries that wanted a broad definition and the ones that wanted it to be narrower. McAdam argues that the 1951 Convention is a product of political compromises,

⁷² United Nations High Commissioner for Refugees, *Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status* (Geneva: United Nations, 2011), 17, available from <http://www.unhcr.org/3d58e13b4.pdf>.

⁷³ United Nations High Commissioner for Refugees, *Guidelines on International Protection: “Membership of a Particular Social Group” within the context of Article 1A (2) of the 1951 Convention and/or its 1967s Protocol Relating to the Status of Refugees* (Geneva: United Nations, 2002), 5, available from <http://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

⁷⁴ United Nations General Assembly, *Conference of Plenipotentiaries on the Status of Refugees and Stateless People*, A/CONF.2/SR.19 (November 26, 1951), 14, available from <http://undocs.org/A/CONF.2/SR.19>.

which led to the ambiguous wording.⁷⁵ This category makes the definition more flexible, allowing countries to grant refugee status off of particular circumstances. Since countries like the U.S. wanted a narrower definition using the geographic and time limits, this amendment could have been used to satisfy countries like France and Austria who wanted a broader definition. This explanation is supported by the fact that the 1951 Convention did not include a fixed list of social groups that could use this ground to apply for refugee status.⁷⁶ The second potential explanation for the inclusion of this ground was that it aligned with Cold War interests. Einarsen argues that the “social group” label could be applied to those fleeing the Soviet Bloc for economic or social reasons. Sweden already included this phrase in its domestic immigration law, demonstrating that it was aware that it could be receiving refugees of this nature.⁷⁷

Though gender related persecution was largely ignored in these discussions on the refugee definition, women were discussed twice in the 1951 Convention. The first is respect to marriage rights. The Ad Hoc Committee hesitated to make a specific resolution that dealt with the nationality of married refugee women or those whose marriage dissolved when they were refugees, as the Commission on the Status of Women was discussing this issue⁷⁸ In the final Convention under Article 12, it was decided that the the rights associated with marriage would be recognized in the refugee receiving country.⁷⁹ Connected to this, there was also an emphasis on keeping a family unit together in the 1951 Convention. Starting with the Universal Declaration of Human Rights (UDHR), essentially every human rights treaty after that has

⁷⁵ Jane McAdam, “Interpretation of the 1951 Convention,” in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary* ed. Andreas Zimmermann (New York: Oxford University Press, 2011), 86.

⁷⁶ UNHCR, Guidelines on International Protection, 2.

⁷⁷ Einarsen, “Drafting History,” 62-63.

⁷⁸ ECOSOC, *Report of the Ad Hoc Committee*, 9.

⁷⁹ UN GA, *Convention Relating to the Status of Refugees*, 162.

facilitated the protection of the family unit.⁸⁰ Therefore, if a man was granted refugee status under this Convention, it was assumed that his wife and children would receive the same protections. Outside the consideration of the family unit, women's needs were not addressed in the 1951 Convention.

Since women's needs outside of a family context were not thought about in the 1951 Convention, and the definition is a gender blind one, this begs the question if this definition could be applied equally. Despite its neutral looking exterior, the definition has numerous masculine leaning aspects. Overall, a masculine definition means that men have an easier time accessing the rights associated with the definition, because their actions more easily fit into the grounds of persecution due to historical domination of certain spheres and social expectations. This is particularly prominent for the ground of "political opinion". Historically, political acts have been seen as being out in public and criticizing state actors. Women have faced barriers accessing these spaces. Therefore, they have participated in other acts of resistance that often are not recognized as explicitly political. This has two implications for the refugee definition. First is if a woman transgresses gender-based social norms, this often happens in the private home. She may face violence from her family, the level of such could be classified as persecution. However, because the action is pursued in private it may not be considered a political activity.⁸¹ Actions like protesting, making speeches, publishing opinions are visible political acts and have been more accepted as such, but those spheres have been dominated by men historically. Therefore, men find it easier to fit their political actions into the grounds for persecution.⁸² The second

⁸⁰ UNHCR, Handbook and Guidelines, 29.

⁸¹ Alice Edwards, "Age and gender dimensions in international refugee law," in *Refugee Protection in International Law*, ed. Erika Feller, Volker Türk, and Frances Nicholson, (Cambridge: Cambridge University Press, 2003), 65.

⁸² Anders B. Johnson, "The International Protection of Women Refugees: A summary of principal problems and issues," *International Journal of Refugee Law* 1, no. 2 (1989), 222.

implication is whether the state needs to be the agent that persecutes the individual or not. The 1951 Convention does not state who needs to persecute the individual, only that they are persecuted. Past definition such as in the interwar regime have largely focused on groups that have been persecuted by their governments, such as the Armenians by the Turkish government.⁸³ However, if the persecution is pursued by a non-state actor, then it breaks from the interwar tradition and the claim is more likely to be rejected. In addition to these two implications based on what is considered political, the 1951 Convention uses a large number of male pronouns when talking about the rights of the refugee. While in practice, this does not matter as the definition is applied to both men and women, it does suggest who the typical individual is that the document was aiming to protect. One study found that when male pronouns were used for terms that aimed to be applied gender neutrally, there often was a male bias.⁸⁴ This means that if masculine language was used, it was more likely that men would be thought of as refugees. Women governmental representatives at the drafting of the UDHR paid close attention to the use of male pronouns and fought for the word “men” to be changed to a more gender neutral term when they were referring to all people.⁸⁵ This paid off as 63.3% of the language that could be gendered was gender neutral using terms like “one” and “human” in the UDHR.⁸⁶ Comparing it to the 1951 Convention, in which using the same measures, only 26.6% of that language was gender neutral and 72.3% used male pronouns.⁸⁷ Therefore, comparing it to other international human rights

⁸³ Einarsen, “Drafting History,” 44.

⁸⁴ Janice Moulton, George Robinson, and Cherian Elias, “Sex Bias in Language Use,” *The American Psychologist* 33, no. 11 (1978), 1034.

⁸⁵ Pietilä, *Engendering the Global Agenda*, 17-18.

⁸⁶ Coded the potentially gendered language in UDHR as 1= male, 2= gender neutral, 3= female and calculated total percentage from this coding.

⁸⁷ Used same methodology explained above in previous footnote to code potentially gendered language in 1951 Convention.

treaties at the time, the Convention uses more masculine language, excluding women from the average image of who is a refugee, placing them at a disadvantage.

Explanations for the exclusion of sex as ground for persecution

Throughout this chapter, I have explored the events leading up to the drafting of the 1951 Convention and whether sex was ever considered to be a ground for persecution. Since it has been established that it was never explicitly considered, and most likely not implicitly considered, it is important to ask why. I propose four potential answers for why the UN created a document that disadvantaged half the applicants applying for refugee status, which are not mutually exclusive of each other and in all likelihoods it was a combination of these answers: the stereotypical refugee was not a woman, women were not at the drafting table, states were too preoccupied with other interests, and drafters thought the document could eventually be universally applied.

The first factor that led to this decision was that the stereotypical refugee that the 1951 Convention was aiming to protect was not a woman. Because the document was not set up to be universal as it limited where the refugees were from and the time period, the drafters had in their mind a particular idea about the refugees they wanted to protect. Skarn argues, “Officially, accepting a refugee is not a purely humanitarian response. In fact, assisting refugees is often interpreted by refugee-producing countries as a hostile act.”⁸⁸ This is because, in doing so, a country is officially recognizing that another country is persecuting its citizens or not adequately protecting its citizens from non-state actor persecution. Because of that when the Ad Hoc Committee was tasked with drafting the Convention, state interests were not going to be set aside

⁸⁸ Skarn, “The International Refugee Regime,” 12.

completely for humanitarian endeavours. WILPF observed ECOSOC's proceedings in 1948 remarked that, "the eighteen Member-States on ECOSOC represented their own country and spoke in its interest rather than in terms which concerned the welfare of all people in UN."⁸⁹ Therefore, it is likely that the States in the Ad Hoc Committee would have acted in the same manner seeing as it is a subcommittee of ECOSOC. During the drafting period of 1946-1951, the international interest that weighed on all states was the Cold War. This was particularly pronounced in the Ad Hoc Committee as both the United States and the Soviet Union were members.⁹⁰ There was tension even before the drafting of the Convention as the Soviet Bloc had protested the IRO after WWII because it did not exclusively repatriate refugees, and instead assisted in resettlement too.⁹¹ By allowing resettlement, citizens from countries in the Soviet Bloc were able to start a new life in a Western country, thus decreasing the Soviet's power base. In the early UN debates on the issue, the U.S. delegation continued to advocate for the "right of the individual to free choice" while the USSR delegation stressed that a state had power over its citizens and by extension could control their movements.⁹² This was a particular point of tension in the committee as the USSR declared that individuals who voluntarily refused the protection of their home state should not be considered to be refugees and be returned home instead. However, this position was outvoted during the session reviewing the draft, thus allowing for it to move forward.⁹³ The U.S., on the other hand, was not shy about its preference for refugees from Soviet

⁸⁹ "LOWUN International News No. 1/ 1949 with a Study of UN Economic and Social Council," *Women's International League for Peace and Freedom*, (January 1949), 1, available from Women's International League for Peace and Freedom, 2nd Accession, Boulder, Colorado.

⁹⁰ ECOSOC, *Report of the Ad Hoc Committee*, 2.

⁹¹ Skarn, "The International Refugee Regime," 14.

⁹² Holborn, *Refugees*, 28.

⁹³ United Nations General Assembly, *Official Records of the General Assembly Fifth Plenary Meetings*, A/PV.325, December 14, 1950, 671-672, available from undocs.org/A/PV.325.

Bloc countries in its refugee admission policy, leading to further evidence that the UNHCR was being used as a tool to set up a regime that would protect refugees from the East.⁹⁴ Therefore, it would be advantageous to the U.S.'s interest if a refugee regime was set up that easily protected these refugees. Though the U.S. did not originally join the 1951 regime, as Congress had vetoed the use of any funds for international organizations that included the USSR., it did set up a regime to allow European allies to accept these refugees.⁹⁵ The typical refugee fleeing from the Eastern bloc was one that was outspoken about their political opinion regarding the Soviet regime.⁹⁶ Women refugees did not fit this image, as much as, because as discussed above women's political activity can often happen in the private sphere such as hiding fugitives.⁹⁷ In addition, if they were persecuted it was less likely to be for their gender and more likely for their political opinion, therefore there was not a need to have sex as one of the grounds of the Convention.

The second factor that led to sex not being included as a Convention ground was the fact that women were not at the decision making table. As stated earlier, none of the governmental representatives at the drafting session at Lake Success were women.⁹⁸ This is both surprising and not. It is surprising considering the efforts that previous women had completed in order to force themselves into the international system. Pre-UN, women had been organizing at an international scale, particularly when they saw their interests being stalled at the domestic level.⁹⁹ Latin American women were central to early organizing when they helped convene the Inter-American

⁹⁴ Skarn, "The International Refugee Regime," 22.

⁹⁵ Holborn, *Refugees*, 59.

⁹⁶ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (New York: Palgrave Macmillan, 2007), 72.

⁹⁷ Freedman, *Gendering the International Asylum and Refugee Debate*, 81.

⁹⁸ ECOSOC, *Report of the Ad Hoc Committee*, 2.

⁹⁹ Pietilä, *Engendering the Global Agenda*, 7.

Commission of Women, the first intergovernmental body that addressed women's issues, starting with the Montevideo Convention on the Nationality of Married Women.¹⁰⁰ During the League of Nations, women fought to attend meetings that had previously been closed off to them, gaining entrance for the first time at the League of Nations World Disarmament Conference in 1932.¹⁰¹ Pietilä credits these early efforts to being key to setting the tone of women's participation in the international sphere allowing them to network and grow their expertise. As a result, four Latin American women served as governmental delegates at the UN San Francisco Founding Conference.¹⁰² This milestone was also marked by Eleanor Roosevelt's speech at the first session of the UN General Assembly which praised the eleven women governmental representatives and encouraged a united effort to break down, "barriers of race, creed, and sex."¹⁰³ Therefore, with all this momentum building, it is surprising that no woman governmental representative was present on the Ad Hoc Committee. However, it is not surprising as women and gender issues were severely underrepresented and ignored at the time. The presence of women governmental representatives then comes a factor to consider when comparing the end product of the UDHR, which included Eleanor Roosevelt as the U.S. representative on the drafting committee, to the 1951 Convention.¹⁰⁴ As discussed above, the UDHR had less gendered pronouns and included protections against freedoms restricted on the basis of sex. This could mean that having women representatives at the table who are akin to issues regarding gender pronouns and persecution on the basis of sex could be a factor in whether the issue gets discussed.

¹⁰⁰ Ibid., 5.

¹⁰¹ Ibid., 6.

¹⁰² Ibid., 9.

¹⁰³ Eleanor Roosevelt, "An Open Letter to the Women of the World," *UN Special* <https://www.unspecial.org/2012/03/an-open-letter-to-the-women-of-the-world/>.

¹⁰⁴ "Drafting Committee- Members," *Dag Hammarkjöld Library*, <http://research.un.org/en/undhr/draftingcommittee>.

While there was not a governmental representative who was a woman, there was an NGO representative who sat on the drafting committee, Gertrude Baer. She was a German-American woman, who worked for WILPF. Originally, she rose through WILPF by becoming the executive secretary for its German Branch after briefly serving as the head of the women's division for the Ministry for Social Welfare of the Bavarian Republic.¹⁰⁵ In 1933, she fled to Geneva, where WILPF was headquartered, because she was Jewish and the city soon became a refuge for other exiled German pacifists. However, she later moved to the U.S. fearing German spies. Baer's background is particularly interesting in relation to the Ad Hoc Committee seeing as she had been a refugee. After WWII, she became the international coordinator for WILPF.¹⁰⁶ The organization was allowed to sit in on these meetings because of Article 71 of the UN Charter which allowed NGOs to gain consultative status in relation with ECOSOC, which many women's international organizations, including WILPF took advantage of.¹⁰⁷ Baer writes in her 1953 WILPF report that the organization has actively supported the creation of the UNHCR since 1949. She stresses that because of the narrow definition stemming from the 1951 Convention, there are many people living in refugee like situations but do not qualify for this legal status.¹⁰⁸ Baer was also well aware of how gender issues intersected within the UN just from its day to day functions. She describes in a letter to Roger Baldwin, founder of the International Rights of Man, how she works in comparison to other male representatives. She described how she follows every meeting and session while other, "gentlemen...turn up once or not at all, and then return to New

¹⁰⁵Kathryn Kish Sklar, Anya Schuler, and Susan Strasser, *Social Justice Feminists in the United States and Germany* (Ithaca, New York: Cornell University Press, 1998.), 341.

¹⁰⁶ *Ibid.*, 73.

¹⁰⁷ Pietilä, *Engendering the Global Agenda*, 13.

¹⁰⁸ Gertrude Baer, "WILPF Report of its Work with United Nations," *Paris Conference XII WILPF* (1953), 16-17, available from Women's International League for Peace and Freedom 2nd Accession, Boulder, Colorado.

York with “inside” reports and information.”¹⁰⁹ Baer implies that she works harder than other delegates and the particular wording of “gentleman” indicates this is a gendered observation. Because of that she is clearly well versed in subtle ways gender operates within the UN and was likely aware of how governmental policies may affect women differently. This potentially means that she would advocate for the inclusion of sex as a Convention ground. However, the historical documents in which she referred to the drafting meetings do not point to this conclusion, though there is a possibility that this discussion happened off paper documents. Either way, it would have been difficult for Baer to create a substantial push for this inclusion as she was only an NGO representative, without the power to propose amendments.

The third factor is that states were too preoccupied with other concerns, that any thought regarding sex being included or not did not reach the drafting table. Throughout the drafting of the 1951 Convention, states were concerned about the geographic and time limitations of the definition. This was carried over to the Conference of Plenipotentiaries along with the discussion of the Palestinian refugee crisis. Before the Conference, the Convention had gone through a draft in which the geographic limitation had been removed. This caused the French government to introduce an amendment in which the phrase “In Europe” would be added to the definition, limiting the qualifying scope. The French government wanted to have a broader definition, but based on other governmental representatives’ statements they believed the broad definition would not pass without the geographical limit.¹¹⁰ This would then kill all protections from the Convention. Italy¹¹¹ and the United States¹¹² also threw their support behind this amendment.

¹⁰⁹ Gertrude Baer to Roger Baldwin, January 20, 1953, box 10, International League for Human Rights Archives, New York Public Library, New York, New York.

¹¹⁰ UN GA, *Conference of Plenipotentiaries*, 8-11.

¹¹¹ *Ibid.*, 14.

¹¹² *Ibid.*, 21.

Canada was the only country that dissented and continued to support a broader based definition.

¹¹³ Since this issue was a deal breaker for some governments, it received the most attention. The second prominent issue that is connected to the geographic limit is the application of the Convention to Palestinian refugees. The United Nations Relief and Works Agency (UNRWA) founded in 1949 was tasked to give relief to Palestinian refugees after the 1948 Arab-Israeli War to prevent starvation and promote stability in the region.¹¹⁴ Since this population could be classified as refugees under the 1951 Convention without the geographic limit, there was a concern that the burden sharing regime would be extended to the 100,000 refugees in the region, raising the fiscal costs.¹¹⁵ Therefore, as the Iraqi delegate highlighted, a clause was added to Article 1 of the Convention that excluded Palestinian refugees from this regime as long as they received continued support from other UN agencies.¹¹⁶ Because these problems were identified by multiple states, this pair of issues needed the most attention to resolve differences.

Finally, there is some evidence that the drafters of the 1951 Convention thought the regime would be universally applicable through the ground of “Particular Social Group.” While some scholars believe that the definition is simply a product of the Cold War, others have argued that the drafting was approached through a humanitarian lens and the drafters left flexibility for new groups of refugees to be included through “particular social group.”¹¹⁷ The document gives an impressive range of rights to refugees from the right to create non-political associations (Article 15) to employment rights (Article 17 and 18) to public education (Article 22). It is

¹¹³ Ibid., 6.

¹¹⁴ United Nations General Assembly Resolution 302, *Assistance to Palestine Refugees*, A/RES/ 302 (IV), (December 8, 1949), available from <https://www.unrwa.org/content/general-assembly-resolution-302>.

¹¹⁵ UN GA, *Conference of Plenipotentiaries*, 27.

¹¹⁶ Ibid., 17.

¹¹⁷ Einarsen, “Drafting History,” 52.

extraordinary that this broad range of rights was enshrined in a legally binding document, proving that state interests were not the only factor at play as these rights often placed more pressure on states. In terms of “Particular Social Group” being a flexible category, Ljungdell argues that all of the grounds for persecution have the common characteristics of, “abuse of power, violence and its threat, a subservient, inferior and dependent state often economic dependence, and the reduction of people to chattels.”¹¹⁸ The drafters thought that other forms of oppression identified with these types of qualities would be included under the ground “Particular Social Group”. For instance, other groups like the Roma who had been persecuted under the Nazi regime, may not have originally qualified for persecution under the previous definition, but the addition of Particular Social Group allows for the protection of this specific ethnic group. Sex could eventually follow along Ljungdell’s analysis of this label. Therefore, using this catch all ground could potentially create a universal definition that would allow any group that were being persecuted to gain protection.

1967 Protocol

Though sex was not included as a Convention ground in the 1951 Convention, there was another point in time when there was a legally binding effort to modify the 1951 Convention refugee definition. I focus on the legally binding efforts of international law for two reasons. First, because it gives the highest chance for countries to comply to the regime’s standards. Unlike a declaration, a convention comes with the expectation that it will be ratified by the country’s domestic legislature and be enshrined in its laws. Second, because it would make countries more likely to accept gender-based claims to asylum. Ljungdell argues that states may

¹¹⁸ Ljungdell, “Female Asylum-Seekers,” 35.

be unwilling to grant asylum to gender-based claims because they fear that it will set up a jurisprudence for any woman who has suffered from severe discrimination, and this will create a watershed effect in which many women will apply for refugee status because of that one decision.¹¹⁹ While other UN representatives have assured states that this will not be the case, particularly because women who face the most extreme forms of violence will not be able to flee their country, there is still an atmosphere of distrust around refugees.¹²⁰ Therefore, if sex is included in international law, it would be harder for the state to avoid compliance.

In 1967 there was a push to modify the refugee definition in the 1951 Convention, however sex as a persecution ground was not included as one of the modifications. I attribute this largely to the fact that the Protocol was not focused on filling a gap created by the absence of this Convention ground, but rather the geographic and time limits, and that gender mainstreaming had not risen to prominence at the UN. Unsurprisingly, soon after the 1951 Convention had been ratified, new refugee situations emerged that defied both the geographic and time limitations. The first major crisis that defied this was the 1956 Hungarian Revolution where 200,000 people fled after its failure.¹²¹ These refugees while outside the time limit were not outside the geographic limitations. The UNHCR had a hand in assisting these refugees because of its statute. The UNHCR statute differs slightly from the 1951 Convention, because it allows for General Assembly resolutions to direct assistance towards populations not covered by the Convention definition.¹²² This trend of helping refugees outside of the Convention's geographic limitation in

¹¹⁹ Ibid., 58.

¹²⁰ "Report of the UNHCR Symposium on Gender-Based Persecution," *International Journal of Refugee Law* 9, Special Issue no. 1 (1997), 22.

¹²¹ Ralf Alleweldt, "Preamble 1967 Protocol," in *The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol: A Commentary*, ed. Andreas Zimmermann (New York: Oxford University Press, 2011), 243.

¹²² Guy S. Goodwin-Gill, "The Refugee in International Law," (New York: Oxford University Press, 1996), 32-33.

countries such as Angola, Ghana, Rwanda, and Sudan continued.¹²³ The office's work continued despite protests from some Western countries like France when they assisted Tunisian refugees. Using diplomacy, they demonstrated its independence as an agency and its commitment to refugees outside of the originally mandated scope. Funding for these activities continued despite these protests because the UNHCR was able to merge its humanitarian interests with state interests. Since UNHCR was funded completely through Western donations, these states also saw the benefit of funding missions in developing countries in order to stabilize political situations and prevent the rise of communism in these states.¹²⁴ But without the full power of the Convention, the UNHCR still lacked some tools for addressing the refugee situation in these countries. Therefore, starting in 1964, the UNHCR began looking into solutions that would bridge the gap between the Convention and the Statute. The agency formally submitted its proposal to remove the geographic and time limitations to the Executive Committee of the UNHCR in 1966.¹²⁵ The High Commissioner, Sadruddin, presented his case to ECOSOC stressing the similarities between the refugees in Africa and Asia and refugees in Europe, calling upon the international community to give assistance to these groups too.¹²⁶ No country dissented against these proposed changes.¹²⁷ The Commissioner presented the desired modifications as only a removal of these two conditions and not as a re-negotiation of the Convention. This may have made it more likely for the UN to not venture into thinking about adding an additional ground.

¹²³ Alleweldt, "Preamble," 243.

¹²⁴ Gil Loescher, "The UNHCR and World Politics: State Interests vs. Institutional Autonomy," *The International Migration Review* 35, no.1 (2001): 37-39.

¹²⁵ Einarsen, "Drafting History," 69-70.

¹²⁶ United Nations Economic and Social Council, *United Nations Economic and Social Council Official Records Forty-First Session*, E/SR.1438, (July 26, 1966), 143-144, available at <http://undocs.org/E/SR.1438>.

¹²⁷ Einarsen, "Drafting History," 71.

Secondly, the inclusion of sex may have not come about because of the lack of gender mainstreaming at the time. As will be elaborated in the next chapter, gendered issues did not become mainstream in UN politics until the UN Decade for Women, starting in 1975. Second Wave Feminism was growing at this time period, but it was still in its early stages between 1964-1966 when the agency was considering what changes it needed in order for it to keep functioning effectively.¹²⁸ The idea of being persecuted on the basis of sex simply had not pierced the UNHCR barrier yet. If the Protocols were passed 10-15 years down the line, it may have been different, as women's rights organizing could have been in a stronger place to push for this change.

¹²⁸ Ljungdell, "Female Asylum-Seekers," 37.

“Chapter Two”

The lack of consideration for gender or women’s issues during discussions on the 1951 Convention and 1967 Protocol was unsurprising as it was the norm for most UN agencies at the time. But that would not be the case in the decade after the 1967 Protocol. By 1967, policymakers realized that the problem of refugees would never be temporary. The passing of the 1967 Protocol marked a departure from the idea that “true” refugees would only be ones from the aftermath of World War II or from the Soviet Bloc. This stance, eventually partnered with another one, gender mainstreaming, created the ripe environment for the UNHCR to include gender aware policies and create state guidelines for processing claims on gender-based violence (GBV). Between 1975, the International Year of Women and first UN Women’s Conference, and 1995, when the Fourth Women’s Conference took place, there was a huge push in the UN to integrate gender sensitive policies and programs. However, unlike in the 1967 Protocol, when new circumstances forced a redefinition of the term “refugee”, this period did not have a substantial push towards modifying the 1951 Convention to include protection for gender-based persecution.

The main puzzle for this chapter is: why has there not been a substantial international legally binding effort to amend the 1951 Convention in order to include the recognition of gender as a Convention ground? To answer this larger question, in this chapter I will address four key questions. First, what factors led to the UNHCR to incorporate the needs of women refugees into its discourse and policies? What needs were prioritized at first? Second, what did the evolution of the conversation on gender-based violence look like at the UN? How did this discourse coincide and collide with the conversation on refugee women? Third, has there been any

movement towards creating an internationally binding policy for the inclusion of gender-based persecution as a Convention ground? If not, why has there not been more momentum for this? Finally, how have activists inside and outside the UN pushed for the inclusion of gender issues within this forum? Why did activists ultimately settle for small changes within the UNHCR system instead of an overhaul of this system? What resistance was there to an overhaul of the system and did this shift activists' strategies?

Growth of Gender Issues at the UNHCR

As including gender-based persecution would be a part of the UNHCR's gender mainstreaming efforts, it is crucial to understand the circumstances that grew the integration of gender-aware policies after the 1967 Protocol at the agency. The first factor was the international attention directed towards refugee women in the late 1970s and 1980s, stemming from the Southeast Asian refugee crisis. During this time period there was an influx of refugees from Southeast Asia due to regime changes in Vietnam. Unlike other growing refugee situations before the 1967 Protocols in sub-Saharan Africa, where the UN General Assembly authorized the UNHCR to set up refugee camps in the region, these refugees crossed borders on boats to other Southeast Asian countries, like Malaysia. They also hoped to be permanently resettled in Western countries like the U.S. and Australia.¹²⁹ However, the Association of Southeast Asian Nations declared that they could no longer take more refugees than those already in the camps in the beginning of 1980s, leading to refugee smuggling becoming a more dangerous endeavor, with overloaded boats.¹³⁰ Those traveling in still departing boats were vulnerable to attacks by pirates, who often used tactics of sexual violence. Because of the lack of gender aggregated

¹²⁹ Zakaria Haji Ahmad, "Refugees and ASEN," *Contemporary Southeast Asia* 1, no. 1 (1979): 68-69.

¹³⁰ Erin Baines, *Vulnerable Bodies: Gender, the UN, and the Global Refugee Crisis* (Burlington, VT: Ashgate Publishing Company, 2004), 20.

statistics, it is unclear if levels of sexual violence increased during this time period or whether there was just greater media and agency attention on the issue. One 1981 UNHCR study found that 77% of boats had been attacked by pirates on an average of three times in their journey, and 578 women and girls admitted to being raped (a lower number than in actuality due to underreporting). When they were crossing borders, due to technological advances, it was easier for images of these women to be spread throughout the globe, raising attention for this issue. As this worldwide attention grew, more Western nations and organizations became invested in resolving this situation. The U.S. saw intervention in this conflict as consistent with its international interests as many of the refugees were fleeing from Communist governments.¹³¹ Therefore, the U.S. could forward their Cold War interests by highlighting this plight and resettling a larger number of refugees. The media and international interests increased the visibility of sexual violence against women refugees, answering the question of why these conversations rose when they did.

Vulnerability to sexual violence did not stop after the journey to refugee camps, but continued inside the camps, increasing attention on how “gender neutral” policies were not meeting the needs of women refugees.¹³² The inadequacies of these policies were spotlighted by NGOs who partnered with UNHCR to deliver services at these camps.¹³³ Some NGOs’ staff noticed resource distribution bias. The model for distributing aid to refugees was one in which the aid was given to the head of house and assuming that it would be shared within family units. In this model, aid workers assumed that there would be a male head of house. However, this assumption did not account for the fact that there were female heads of house, as often times

¹³¹ Ibid., 21.

¹³² Ibid., 19.

¹³³ Ibid., 24.

families were split up during the fighting or husbands had died in a conflict. In addition, it made women dependent on their husbands to receive any aid. Therefore, it would be harder for women to potentially leave abusive relationships.¹³⁴ This model, while “gender neutral” was criticized by NGO staff. As there was a greater number of women working for these NGOs, they could more easily see the model’s potential issues or women refugees may have been more comfortable with discussing these concerns with these female staff members. After learning of these issues, they reported it to their superiors who would have more weight at an international level.¹³⁵ It is important to remember that these concerns came out of the field, as the UNHCR internal atmosphere valued the knowledge coming from the “field” over “academic expertise”, therefore these concerns held greater sway.¹³⁶ Therefore, sexual violence and resource distribution were the two priorities in the coming discussions on women refugees.

The second set of events that raised awareness for women’s issues in the UNHCR was the UN Women’s Conferences and its parallel NGO Forums, which allowed gender issues to be discussed internationally and encouraged governments to take actions to address these issues. These conferences grew out of the Commission on Status of Women (CSW), which had been established in 1947 as a subcommittee of ECOSOC, whose mandate focused on women’s legal and political equality, a priority for Western feminists at the time.¹³⁷ However, as more formerly colonized states gained their independence and joined the Commission, tripling the number of representatives from developing countries, there was a decisive shift in its priorities towards

¹³⁴ Ibid., 22-23.

¹³⁵ Ibid., 24.

¹³⁶ Ibid., 59.

¹³⁷ Margaret Snyder, “Unlikely Godmother: The UN and the Global Women’s Movement,” in *Global Feminism: Transnational Women’s Activism, Organizing, and Human Rights*, ed. Myra Marx Ferree and Aili Mari Tripp (New York: New York University Press, 2006), 26.

addressing global economic inequality in addition to these legal rights.¹³⁸ During the late 1960s and 1970s, the UN began holding more international conferences addressing development and human rights issues, leading it to be a ripe time to also hold a conference about women's rights and the needs of women in development.¹³⁹ Therefore, in 1972 the Women's International Declaration Federation, using its observer status, asked the CSW to declare an International Year of Women to mark the Commission's 25th anniversary. ECOSOC approved the request in 1974, as themes years were common with little change emerging from them.¹⁴⁰ However, the first Women's Conference in Mexico and the subsequent ones in the Decade for Women would prove to deviate from this trend.

These conferences were necessary for the development of women's issues at the international level, because they allowed women's groups to connect, growing a stronger transnational network, thus obtaining more political power. Jaquette argues that the point of these UN issue conferences is to identify both the roots of the issues and lay out a plan to resolve a current issue.¹⁴¹ This was especially necessary for the UN Women's Conferences because there was a large global divide on what should be the priorities of the movement. Unlike in most UN conferences, the NGO base was split on fundamental issues, down to the use of the term "feminism."¹⁴² Keck and Sikkink argue that transnational advocacy networks need to have three components to function: multiple and effective actors, a shared group of common values, and

¹³⁸ Ibid., 27.

¹³⁹ Jain Devaki and Amartya Sen, *Women, Development, and the UN: A Sixty Year Quest for Equality and Justice* (Bloomington, IN: Indiana University Press, 2005), 65.

¹⁴⁰ Ibid., 67.

¹⁴¹ Jane Jaquette, "Losing the Battle/ Winning the War: International Politics, Women's Issues, and the 1980 Mid-Decade Conference," in *Women, Politics, and the United Nations*, ed. Anne Winslow (Westport, CT: Greenwood Press, 1995), 50.

¹⁴² Ibid., 48.

“dense exchanges of information and services”.¹⁴³ But in creating this shared group of values or goals, the transnational women’s movement had to negotiate between regional priorities: legal equality or deconstructing colonialism and imperialism. Therefore, to have any political power, there needed to be a space where they could reconcile these differences and cross pollinate ideas beyond their own borders. By bringing people together, conferences help overcome communication barriers and help strengthen these networks by sparking debates.¹⁴⁴ The theme of the Women’s Conferences, “Equality, Development, and Peace”, provided fertile direction for both Northern and Southern women’s organizations to negotiate these differences in priorities.¹⁴⁵

This negotiation hardly resolved itself in the first Conference in Mexico, as during that conference, ““Development” was the major issue for Asian and African representatives, “Imperialism” for Latin American delegates, and “Sexism” was the major issue for Western countries.”¹⁴⁶ In addition, the conference itself was small compared to the subsequent ones as only 113 NGOs attended while 163 attended the third Women’s Conference, only a decade later, demonstrating the huge growth in women’s organizations during this period.¹⁴⁷ In addition to this split in attention, at the first conference all three themes were not addressed equally. The issue of “Peace” was often misunderstood between representatives, giving it only a cursory look at the first Conference.¹⁴⁸ Luckily this would not be the only conference as born out of it was the UN Decade for Women which held two subsequent conferences in 1980 and 1985. The 1980

¹⁴³ Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca, NY: Cornell University Press, 1998), 2.

¹⁴⁴ *Ibid.*, 12.

¹⁴⁵ Baines, *Vulnerable Bodies*, 24.

¹⁴⁶ Carolyn Stephenson, “Women’s International Nongovernmental Organizations at the United Nations,” in *Women, Politics, and the United Nations* ed. Anne Winslow (Westport, CT: Greenwood Press, 1995), 143.

¹⁴⁷ *Ibid.*, 139-140.

¹⁴⁸ *Ibid.*, 149.

Copenhagen Conference, Jaquette argues, was the most combattative of the three.¹⁴⁹ However, conflicts in perspective between structuralist and feminist voices facilitated lively debate which built the foundation for compromise in the future.¹⁵⁰ By Nairobi, in 1985, activists from the Global South were able to have their voices heard at these conferences, and many of their interests were prioritized. This was first achieved because of an increase in their numbers as between 1980 and 1989, over half of the new women organizations formed were based in the Global South.¹⁵¹ In addition, Stephenson argues that the location of the last Women's Conference in the UN Decade for Women signalled the prioritization of their issues.¹⁵² Therefore as Pietilä argues, these conferences and the 1990s marked a shift from how the international women's movement had functioned historically, focusing mostly on the priorities of Western white middle-class women, to those in the Global South.¹⁵³ This shift would allow for women refugees' needs to be met more throughout the decade as discussed below.

In parallel to these three Women's Conferences, there were three NGO Forums which also substantially propelled the discussion on women refugees forward, as they were not as constrained by formal proceedings rules. Because of ECOSOC's strict rules regarding consultative status of NGOs, governmental representatives participated more in these Conferences than NGO representatives. Therefore, NGOs found it easier in these Parallel Forums to make an impact, increasing the power of their organizations' voices.¹⁵⁴ Forums, while outside the UN, can still influence the international system, such as the focus on violence against

¹⁴⁹ Jaquette, "Losing the Battle/ Winning the War," 45.

¹⁵⁰ *Ibid.*, 57.

¹⁵¹ Stephenson, "Women's International Nongovernmental Organizations," 138.

¹⁵² *Ibid.*, 148.

¹⁵³ Pietilä, *Engendering the Global Agenda*, 96.

¹⁵⁴ *Ibid.*, 33.

women was so strong at the Vienna NGO Forum, that the UN could no longer ignore the issue. In the following year, the Declaration on the Elimination of Violence against Women was adopted.¹⁵⁵ Though this is hardly a direct causation, it does demonstrate how outside organizing can put pressure on relevant actors. In addition, they were more radical than the UN Conferences, because they drew their information in debates not just off theory which has been traditionally seen as “expertise” and can often be embedded with Western bias, but also off lived experiences, increasing the accessibility of participation in these Forums.¹⁵⁶ In fact, many of the organizations participating in the first Mexico Forum did not have previous experience in international conferences, allowing them to grow their political strategies and strength, particularly important for new NGOs which as discussed above were predominantly originated in the Global South. Finally, these Forums more equally focused on the three themes for the Decade than the actual conferences, allowing for the discussion that would come out in Nairobi to be discussed earlier and more in depth at these Forums.¹⁵⁷

Though the UN Women’s Conferences were important for women’s issues as a whole, they were also one of the first international stages to specifically address the needs of women refugees. Copenhagen acted as the launching pad for these conversations. At the UN Conference, the resolutions adopted aligned with the focus of international media discourse: sexual violence and humanitarian assistance for refugees.¹⁵⁸ The official Conference Conclusions do not mention gender-based asylum claims. While it does recognize women as a substantial part of the refugee population and recognizes that their needs may not be the same as refugee men, it tends to group

¹⁵⁵ Ibid., 53.

¹⁵⁶ Ibid., 42.

¹⁵⁷ Stephenson, “Women’s International Nongovernmental Organizations,” 142.

¹⁵⁸ United Nations General Assembly, *Report of the World Conference of the United Nations Decade for Women: Equality, Development, and Peace*, A/CONF.94/35 (September 19, 1980), 77-78.

their needs with children, falling into the trap of the “womenandchildren” label.¹⁵⁹ By doing this, they are involuntarily assuming that the needs of these groups are the same and that the agency of these groups are similar. While both are vulnerable during their flight, the issues they face are simply not the same. In addition, by grouping women and children it can invoke a paternalistic type of protectionism of these groups, ultimately undermining these women’s agency to advocate for solutions, instead invoke a “rescue paradigm” in which external actors believe they know best.¹⁶⁰

At the Copenhagen NGO Forum, the issue also emerged. It was one of the 18 substantive panels that made up the Forum. The panel was grounded in the assumption that experience could be shared as valid knowledge. Five out of the six speakers had lived as refugees and shared their experiences with the audience. Suzanne Howard, an attendant wrote, “All of this took place in a highly emotional, accusatory atmosphere. There was barely a word spoken by anyone which did not bring emotional cries and jeers from various political elements in the audience.”¹⁶¹ Therefore, the focus of this NGO forum was on the living standards for women refugees rather than their rights within the asylum system.

These issues emerged at Copenhagen most likely because of the events discussed above in Southeast Asia. It was around the late 1970s and early 1980s when the issue was gaining more media attention in the Global North, and countries from Southeast Asia recognized it as a growing problem for their own security. Therefore, there was most likely a growing international

¹⁵⁹ Ibid., 76

¹⁶⁰ Aili Mari Tripp, “Challenges in Transnational Feminist Mobilization,” in *The Women, Gender and Development Reader*, ed. Nalini Visvanathan et al. (London: Zed Books, 2011), 404.

¹⁶¹ “Report from Copenhagen: Summaries and Impressions by Participants in the NGO Forum,” *Equity Policy Center*, accessed December 28, 2017, http://pdf.usaid.gov/pdf_docs/PNAAX128.pdf.

need for these discussion, making Copenhagen the right time to start, but the following conferences in Nairobi and Beijing would discuss these issues even more.¹⁶²

These events also coincided and propelled a push towards incorporating more women into the leadership structure of the UN, in addition to create women-oriented programming. Before the UN Women's conferences, there had been a lack of women in high level leadership positions. Many of the governmental representatives at the Mexico Conference were men.¹⁶³ In addition Margaret Anstee, the first woman UN undersecretary, argued that it was not just the high level positions that lacked gender diversity, but as the push towards integrating more women into this structure gained momentum, the mid-level positions lacked this diversification.¹⁶⁴ That did not mean that these higher level positions were easy to access, as when she was bidding for the position of UNHCR High Commissioner in the mid 1980s, she was told by the UN Secretary General that although she was his "preferred candidate", he could not see a woman being the High Commissioner.¹⁶⁵ This would prove to be untrue five years later when Sadako Ogata was appointed High Commissioner.¹⁶⁶ The UN Decade for Women also influenced the UN programming. Before this decade, UN Conferences were described as "male enclaves" where women's voices were only taken into account in the periphery.¹⁶⁷ However, these Women's Conferences brought greater attention to women's voices, and the delegates began demanding institutional spaces for the research and funding of women's issues. UNIFEM, started as the Voluntary Fund for the UN Decade for Women, focused on funding women's development

¹⁶² Jaquette, "Losing the Battle/ Winning the War," 50.

¹⁶³ Ibid., 51.

¹⁶⁴ Thomas G. Weis et al., *UN Voices: The Struggle for Development and Social Justice* (Bloomington, IN: Indiana University Press, 2005), 22.

¹⁶⁵ Ibid., 330.

¹⁶⁶ Ibid., 331.

¹⁶⁷ Pietilä, *Engendering the Global Agenda*, 33.

projects. Two other institutions, the International Research and Training Institute for the Advancement of Women (INSTRAW) and Gender Awareness Information and Networking System (GAINS) were also established during this decade, in which they focused on conducting gender-oriented research. GAINS, the latter program to be established, functioned as a facilitator of a global network of independent research, sharing gender related research and statistics, to ultimately produce more effective and comprehensive research.¹⁶⁸ INSTRAW, on the other hand focused, more on actually conducting gender equality research in three target areas: human security, development, and human rights.¹⁶⁹ These focus areas roughly aligned with the themes of the UN Women's Conferences, demonstrating their impact. This was especially important because one of the main problems identified at these conferences was the lack of "gender-aggregated statistics".¹⁷⁰ The increased media and NGO attention on narratives of women refugees, the UN Women's Conferences, and the beginning of gender mainstreaming all contributed to making the time ripe to re-evaluate how the international system defines refugees, possibly including gender into the definition.

Evolution of Gender-Based Violence Discourse and its Connection to Women Refugees

As the conversation about gender issues was evolving at the international level, the conversation around GBV and Violence against Women (VAW) was also evolving simultaneously. Both of these discourses are critical to the argument that gender should be a form of persecution in the international refugee regime. As stated before, when defining who was a refugee, drafters felt the need to distinguish between discrimination and persecution, to convince

¹⁶⁸ Ibid., 37-40.

¹⁶⁹ "UN-INSTRAW," *United Nations Foundation*, last updated 2012, <http://www.unfoundation.org/how-to-help/donate/instraw.html>.

¹⁷⁰ Ibid., 35.

states to embark on this burden sharing regime. The scale that has generally been used has been based on the severity of the offense, in relation to a person's health and safety, in addition to how much protection the country of origin is currently providing.¹⁷¹ Therefore, violence, by which I am referring to as physical violence for now, is more likely to fall under the persecution level. This is because it provides a clearer threat to an individual's bodily autonomy and safety, than other forms of persecution such as ghettoization. However, to qualify for refugee status, an individual must prove this persecution is happening because of a particular trait or personal action. Therefore, in theory it may be easier for facts of GBV which are physical in effect to be accepted than other types of GBV.

As stated in the introduction, I define gender-based violence as, "an umbrella term for any harm that is perpetrated against a person's will; that has a negative impact on the physical or psychological health, development and identity of the person, and that is the result of gendered power inequities that exploit distinctions between males and females, among males, and among females."¹⁷² This is a broad reaching definition, and the UN's definition which will be discussed below conflates GBV and VAW, while some scholars such as Carpenter argue against this conflation.

While discussions of VAW has been in feminist discourse since First Wave Feminism, this discourse, like others discussed above, it did not enter the UN arena until the last decade of the 20th century. This area was blatantly left out of the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), which Merry describes as acting as the

¹⁷¹ UNHCR, *Handbook and Guidelines*, 11.

¹⁷² "Gender-based Violence Initiative," *Reproductive Health for Refugees Consortium*, accessed January 1, 2018, <http://www.prb.org/pdf/GBVpressrelease2page1.pdf>

“international bill of rights for women”.¹⁷³ Instead this document assumed that creating legal and political gender equality would achieve the elimination of violence against women.¹⁷⁴ This Convention was built off of three decades of work at the Commission on the Status of Women. Previously, this independent commission had worked to secure marital and political rights for women. While individual conventions like the Convention on the Political Rights of Women and Convention on Consent to Marriage, Minimum Age for Marriage, and Registration for Marriage, were key starting points, many within the UN felt that the approach to discrimination against women was fragmented. Thus, the General Assembly in 1963 requested that the Commission on the Status of Women create a declaration in support of equal rights of men and women. Five years after this declaration was created, the CSW requested that the Secretary General consider translating this declaration into a binding convention.¹⁷⁵ Much of the original declaration was translated into this Convention, which is one of the most widely ratified treaties. However, it is also a convention with one of the largest number of substantive reservations, meaning that countries have objected to particular parts of the content and have exempted themselves from it.

¹⁷⁶

These reservations generally fall into one of three categories: conflict with state sovereignty, conflict with labor regulations, and cultural objections in relation to the domestic sphere. Numerous countries have objections in allowing for international bodies to resolve conflicts in the interpretation or application of CEDAW between two or more states. Countries

¹⁷³ Sally Engle Merry, “Constructing a Global Law-Violence against Women and the Human Rights System,” *Law & Social Inquiry* 28, no. 4 (2003): 950.

¹⁷⁴ *Ibid.*, 945.

¹⁷⁵ “Short History of CEDAW Convention,” *UN Women*, last updated 2009, <http://www.un.org/womenwatch/daw/cedaw/history.htm>.

¹⁷⁶ Sally Engle Merry, “Gender Justice and the CEDAW : The Convention on the Elimination of All Forms of Discrimination Against Women,” *Journal of Women of the Middle East and the Islamic World* 9, no. 1-2 (2011): 62.

like Australia have objected to implementing labor regulations like paid maternity leave across the country.¹⁷⁷ Finally, one of the most contentious objections is regarding how CEDAW is implemented when the principles are at odds with cultural traditions, especially those regarding domesticity and marital rights. The universalizing nature of CEDAW is built off the notion that there should be universal minimum standards of how citizens should be treated across societies. When cultural traditions are in contest with that, CEDAW's vision is that these cultural traditions need to be changed.¹⁷⁸ However, countries like Bahrain, New Zealand, and Malta have objected that CEDAW erases these cultural traditions and they need to be preserved in light of this. Therefore, they have exempted themselves from applying CEDAW in certain contexts.¹⁷⁹ This likely plays into one of the reasons why the U.S. has refused to ratify CEDAW, in which opponents have argued that it would change educational, parental, and healthcare policies, which have been typically seen more in the private sphere.¹⁸⁰

As mentioned above, Violence Against Women was blatantly left out of CEDAW even though it was a document that was supposed to create at least legal equality for women. Merry argues that Violence Against Women was not included in the convention because at the time that the convention was being drawn up, it had yet to enter the discourse.¹⁸¹ Chinkin argues that this is because that while the conclusions coming from the Mexico Women's Conference mentioned eliminating acts that compromise the moral and physical integrity of a person, it did not

¹⁷⁷ United Nations Convention on the Elimination of All Forms of Discrimination against Women. *Declarations, reservations, objections and notifications of withdrawal of reservations relating to the Convention on the Elimination of All Forms of Discrimination against Women*. CEDAW/SP/2006/2. April 10, 2006.

¹⁷⁸ Merry, "Gender Justice," 53-55.

¹⁷⁹ UN CEDAW, *Declarations, Reservations, Objections, and Notifications*.

¹⁸⁰ Luisa Blanchfield. *The U.N. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW): Issues in the U.S. Ratification Debate*. Congressional Research Service, 2011, 2.

¹⁸¹ Merry, "Gender Justice," 60.

explicitly discuss VAW. These conversations would emerge more at the Copenhagen Conference, after which the drafting of CEDAW had already begun. Belgium and Portugal tried to draft an amendment that would protect women from, “attacks on the physical integrity”, but this got little support.¹⁸² In addition, since some of the vocal opposition focused on how CEDAW may be interfering with cultural traditions within the household, in terms of rights to children and residence, VAW that may have occurred in the household would most likely be under attack. Since Merry argues that countries are more likely to sign this treaty in order to increase their international reputation, by recognizing that they have a problem of VAW in country reports, mandated by the Convention, they may hurt their international standing. Therefore, they may be less likely to include a provision that would damage this reputation and risk being seen as “uncivilized”.¹⁸³

It was not until 1989 with CEDAW’s General Recommendation No. 12 do UN agencies entered the VAW discourse. The recommendation encouraged States to gather data on, “all kinds of violence in the everyday.” These terms are not defined until 1992, in General Recommendation No. 19 which declares that GBV as “a form of discrimination”, and is “violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental, or sexual harm or suffering, threats of such acts, coercion, and other deprivations of liberty.”¹⁸⁴ However, this definition only focuses on VAW, which excludes men and boys as victims of GBV. Carpenter argues that it is

¹⁸² Christine Chinkin, “Violence Against Women,” in *The UN Convention on the Elimination of All Forms of Discrimination against Women: A Commentary*, ed. Marsha Freeman, Christine Chinkin, and Beate Rudolf (Oxford: Oxford University Press, 2012): 444-445.

¹⁸³ *Ibid.*, 69.

¹⁸⁴ “General Recommendations Made by the Committee on the Elimination of Discrimination against Women,” *UN Women*, accessed December 29, 2017, <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>

essential to recognize male victims of categories like sexual violence, which sits under the GBV umbrella, in order to re-imagine social relationships.¹⁸⁵

As this discourse was gaining traction in the 1980s to mid-1990s, it paralleled the rise of conversations about GBV as a Convention ground for persecution, illuminated by three Women's Conferences: Copenhagen, Nairobi, and Beijing. Though the needs of asylum seekers and refugee women and their vulnerability to violence emerged in all three Conference conclusions, it is not until the Beijing Conference's Platform for Action that fleeing on the basis of GBV is discussed. Though Copenhagen was groundbreaking for starting to conversations on refugee issues at these conferences, it did not go further than discussing issues at the refugee camp, highlighted due to historical events.¹⁸⁶ The resolutions adopted at this Conference only address VAW in specific situations such as violent conflict such as in El Salvador.¹⁸⁷ However, an overarching theory of VAW or GBV was not discussed in length at this conference.

At Nairobi, there was a continuation of the discussion about the needs of refugee women in camps. The Forward Looking Strategies recognized vulnerability to violence due to a change in women's roles and being in a new environment, giving the refugee camp experience a new gendered analysis.¹⁸⁸ However, these Strategies have the same criticism as the Copenhagen Conclusions, as the official Conference Conclusions only focus on the needs in the camp, not while applying for refugee status. This conference does give a more thorough look at VAW, defining it in Paragraph 258 as, "Violence against women exists in various forms, in everyday

¹⁸⁵ R. Charli Carpenter, "Recognizing Gender-Based Violence against Civilian Men and Boys in Conflict Situations," *Security Dialogue* 37, no. 1 (2006): 86.

¹⁸⁶ United Nations General Assembly, *Report of the World Conference*, 76.

¹⁸⁷ *Ibid.*, iii-v.

¹⁸⁸ United Nations General Assembly, *Report of the World Conference of the United Nations Decade for Women: Equality, Development, and Peace*, A/CONF.116/28/Rev.1 (July 15-26 1985), 73.

life in all societies. Women are beaten, mutilated, burned, sexually abused and raped.”¹⁸⁹ This focuses more on physical violence than other forms such as coercion in reproductive rights. In addition, it does not analyze why this violence occurs, but it does state that it is all encompassing. This is an important step forward in facilitating the acceptance of GBV asylum claims.

Finally, at the Fourth Women’s Conference in Beijing in 1995, there was finally a conversation on GBV asylum claims. In the Beijing Declaration and Platform of Action, they again discuss VAW defining it 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.”¹⁹⁰ As in Nairobi, the official Conference Conclusions focuses on women as the victim of these crimes, but it does also bring in the term “gender” to describe what has caused this violence. It later identifies the root cause of it as, “a manifestation of the 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 women’s full advancement.”¹⁹¹ By identifying the roots of GBV in the social relations between different sexes, it leaves open the possibility of this kind of violence being exploited for political purpose, leading it to be used as a strategy for persecution of a particular group. Indeed, this Conference goes one step further than the past Conferences which only addressed women’s experiences in refugee camps. For the first time, the Declaration recognizes that women may flee on the basis of GBV, focusing particularly on sexual violence. The Conference argues that their flight and claim is valid under the 1951 Convention,

¹⁸⁹ Ibid., 60.

¹⁹⁰ United Nations General Assembly, *Beijing Declaration and Platform for Action*, (September 15, 1995), 48.

¹⁹¹ Ibid., 49.

because it is a “well-founded fear of persecution”, though asylum seekers have a hard time in proving this claim in the current system.¹⁹² The Conference calls upon UNHCR, governments, and NGOs, to consider recognizing these asylum seekers as refugees under the Convention, in addition to training their staff to be sensitive and aware of women’s past sexual violence experiences in the interviewing stage.¹⁹³

Attempts to Internationally Redefine Who is a Refugee

Because of the evolving conversation on the concerns of refugee women and gender-based violence, it would seem like the late 1980s and 1990s would have a major push towards including gender as a Convention ground for persecution. However, since the definition has not changed internationally since the 1967 Protocol, it is clear that if a movement was there, that they ultimately failed. This is unfortunate because no matter how many UNHCR ExCom Conclusions, yearly recommendations from the UNHCR’s steering committee, are issued, they will only be able to recommend standards for asylum claims, and states may opt out of these recommendations at any time.¹⁹⁴ Therefore, it is more likely for countries to only apply these standards when it is convenient for their interests, ultimately treating women’s asylum claims as a political tool to either send a clear message to one state or protect the actions of an ally.

During this time period, there were two international efforts, albeit outside the UN system, to gain momentum for ultimately changing the 1951 refugee definition. The first was at the European Parliament. After the 1979 Iranian Revolution, there was greater international attention for women who were fleeing due to non-compliance with the strict religious regime,

¹⁹² Ibid., 57.

¹⁹³ Ibid., 63-64.

¹⁹⁴ McAdam, “Interpretation of the 1951 Convention,” 112.

especially in Europe.¹⁹⁵ Countries like Germany struggled with the question of whether to accept these asylum claims as they did not clearly fit into the 1951 Convention grounds. Although it was religious deviance, it was targeted specifically at woman. Governments recognized that these women had a “well-founded fear of persecution”, as sometimes their lives were threatened. Ultimately, Germany decided not to grant full refugee status to these applicants, but granted them admittance to the country on a humanitarian basis.¹⁹⁶ While similar to granting refugee status, it did not come along with the full sets of rights and protections of that status, but it was a less political stance so easier for countries to grant. When the Council of Europe agreed with this decision of granting humanitarian status instead of refugee status, some European Parliament members in the early 1980s did not think it went far enough. They formed an informal group that aimed to ultimately change the 1951 Convention, adding in “sexual status” as a form of persecution. A draft resolution was introduced to the European Parliament by Anne-Marie Lizin, a Belgian representative.¹⁹⁷ Lizin, who would become Belgium’s first woman president of its Senate, was described by Annie Sugier, the president of the International Women’s Law League, as being an asset in the fight to extend the rights to asylum to gender-based persecution throughout her career.¹⁹⁸ The draft resolution, prepared with assistance from Parisian lawyer Louis Edmond Pettiti, did not actually include the word “sex” in its wording. Instead it sought to more thoroughly define the situations in which the 1951 Convention could be applied. These situations included, “People who are victim of (moral) blackmail or of inhuman treatment

¹⁹⁵ Baines, *Vulnerable Bodies*, 29.

¹⁹⁶ C.E.J de Neef and S.J. de Ruiter, “Sexual Violence against Women Refugees: Report on the nature and consequences of sexual violence suffered elsewhere,” *The Netherlands Ministry of Social Affairs and Labour*, January 1, 1984, p. 63, available from: http://repository.forcedmigration.org/show_metadata.jsp?pid=fmo:3842.

¹⁹⁷ *Ibid.*, 64-65.

¹⁹⁸ Josyane Savigneau, “Anne-Marie Lizin,” *Le Monde*, Oct 21, 2015, *Global Newsstream*, <https://0-search.proquest.com.luna.wellesley.edu/docview/1724209685?accountid=14953>.

because they have not complied with the rules of behaviour required of the group they belong to and which are part of a religious or cultural tradition,” and in which, “Those responsible for the inhuman treatment connected with blackmail enjoy immunity of punishment or (at least) are silently tolerated because they themselves are part of this social group.”¹⁹⁹ By drafting the resolution to focus not on sex, but rather on inhumane treatment that did not comply with previous UN conventions and the Declaration of Human Rights, it was a smart political move. Countries not on board with gender mainstreaming yet could still frame this as increasing human rights. But, it could still open the possibility for some gender-based asylum claims to be accepted. However, the down side of this is that it blames the cultural or religious aspects of the practices, without acknowledging the gendered aspects of it. Unfortunately, this resolution did not go further than being introduced in the European Parliament.

The second known international attempt at changing the 1951 Convention definition, happened outside of governmental channels at the Socialist International Conference in 1983. There the Socialist International Women presented their position on the issue of gender-based asylum claims saying, “More and more women in the Third World are exposed to oppression and terrorism, or inhuman treatment. Socialist International Women calls on all Governments and Member parties to amend the Geneva Convention relating to the legal position of refugees to include the victims of oppression and discrimination on the basis of sex as well as race and religion.”²⁰⁰ While it does have an international focus, the actions that the Socialist International Women call upon is at the domestic level, seeing as that is where its members had the most influence. It is unclear of how the members reacted to this statement, but it was not abandoned

¹⁹⁹ de Neef and de Ruiter, “Sexual Violence Against Women Refugees,” 65.

²⁰⁰ Stina Ljungdell, “Female Asylum-Seekers and Refugee Status: Guidelines for Assistance,” (1989): 61.

after this conference. Anita Gradin, a former Swedish politician and ambassador, delivered this statement to a 1985 UNHCR roundtable on the issue of women refugees.²⁰¹ Gradin had a long interest in refugees, describing her encounter with Finnish refugee children in WWII as greatly influencing her character.²⁰² While there are not minutes of the discussions at this roundtable, UNHCR ExCom did release recommendations in 1985 derived from two events that year, the Geneva roundtable and the Nairobi Women's Conference. In this statement, it does encourage countries to consider interpreting the category of "particular social group" to include "women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of society."²⁰³ Again, while these recommendations do show progress towards recognizing these asylum claims, by only integrating them into domestic policy, it creates uneven standards across countries of asylum.

Some have debated why these efforts failed to make any larger changes and I identify three main reasons. First is the strong political implications of this decision would force change in both the domestic sphere of many states and potentially cause international conflicts. This was discussed above already using the example of Germany, in which they were willing to give refugees fleeing due to gender persecution permanent residential status, but not refugee status. Ljungdell argues that it would impact the domestic sphere too, because it would condemn all practices such as sexual assault, Female Genital Mutilation, domestic violence, and all countries

²⁰¹ Ibid., 61.

²⁰² Harry Krelsler, "Securing the Rights of Women: Conversation with Ambassador Anita Gradin Former European Union Commissioner from Sweden," *Institute of International Studies, University of California Berkeley*, February 28, 2001, <http://globetrotter.berkeley.edu/people/Gradin/gradin-con1.html>.

²⁰³ Executive Committee of the High Commissioner's Programme, *Refugee Women and International Protection*, A/40/12/Add.1 (October 18, 1985), available from: www.unhcr.org/en-us/excom/exconc/3ae68c43a8/refugee-women-international-protection.html.

bound to the 1951 Convention did not adequately protect women from these practices.²⁰⁴ In the 1980s, all states party to the 1951 Convention were not ready to do that, for example rape had not been classified as a war crime until the 1993 Vienna Declaration.²⁰⁵ Because of these negative political consequences that would have raised tensions between countries, it seems unlikely that the movement would have gotten any real support on the intergovernmental stage.

The second reason has to deal with the type of refugee fleeing during the period, and biases against them. De Neef and de Ruttier argue that a treaty change would only be likely if a large number of states interpreted the 1951 Convention in a comprehensive manner, easily allowing for these women asylum seekers to be accepted.²⁰⁶ The 1967 Protocol was a direct response to the changing face of the refugee crisis in the 1960s, and it continued to change throughout the 1970s and 1980s. Wars, economic deprivation, population pressures, and environmental degradation all were producing more refugees from the Global South.²⁰⁷ Loescher argues that this mattered, because as technology evolved it was easier for refugees to access airplanes and directly claim asylum in Western countries.²⁰⁸ This led to more restrictive immigration measures in these countries, and stricter scrutiny at asylum seekers' claims, making it harder for them to appeal their case decision.²⁰⁹ This stricter atmosphere was also found outside the West when refugee-receiving Southeast Asian countries also looked to reduce the number of refugees arriving on their shores.²¹⁰ Because the time period had lost its humanitarian spirit that was present during the original 1951 drafting, it was likely that states were less enthusiastic

²⁰⁴ Ljungdell, "Female Asylum-Seekers and Refugee Status," 62.

²⁰⁵ Baines, *Vulnerable Bodies*, 50.

²⁰⁶ de Neef and de Ruttier, "Sexual Violence Against Women Refugees," 63.

²⁰⁷ Skarn, "The International Refugee Regime," 10.

²⁰⁸ Loescher, "The UNHCR and World Politics," 41.

²⁰⁹ *Ibid.*, 45-46.

²¹⁰ Ahmad, "Refugees and ASEAN," 70-71.

about interpreting the Convention more broadly, to include new groups of refugees, particularly ones from the Global South, thus not causing that majority needed to push forward a change.

Finally, some have suggested that even a change in the Convention grounds would not have made much of a difference in whether gender based claims were accepted or not, and instead advocacy should focus attention on other issues would create the desired effect of helping women asylum seekers. Ljungdell also argues that if the claims of refugees were invalidated due to their occurrence in the domestic sphere, then many of the claims of women asylum seekers in general would also be invalidated.²¹¹ The same goes for if only actions perpetrated by a state actor are accepted. As the 1951 Convention does not indicate one way or another on these issues, feminist activists may have been pushing for changes in these issues over a change in the legal language.

Successful Attempts at Gender Mainstreaming the International Refugee Regime

Though the larger systematic attempts failed at including gender-based persecution claims at an international level, refugee women advocates did not stop their efforts there. The transnational advocacy network for this issue, which often crossed over with issues about environmental justice and human rights campaigns, sought to enact change in two spheres: the UNHCR and at a state level.²¹² The activism aimed at changing these two arenas often overlapped with each other, and actors learned from each other, sharing information about what strategies were most successful.²¹³ NGOs, especially those that have consultative status with ECOSOC, work in these networks to pressure governmental representatives, provide new

²¹¹ Ljungdell, "Female Asylum-Seekers and Refugee Status," 64.

²¹² Keck and Sikkink, *Activists Beyond Borders*, 9-10.

²¹³ *Ibid.*, 2.

information and ideas, and lobby for policy changes.²¹⁴ They also act as an important bridge in between the UN and their individual governments. Women's groups have taken documents produced in the UN signed by either their country or a majority of countries, to force change domestically and hold their governments accountable.²¹⁵ Efforts to change policies within the UN are also valuable, especially when change at a domestic level has stalled and these actors still need to exert pressure.²¹⁶ In UN Conferences, advocates can not only use the stage to grow global awareness of certain issues, but also create a clear plan for action and financial backing to make this plan a reality. By creating monitoring mechanisms, in the way of a follow-up conference or annual reports, activists can evaluate about whether UN agencies are sticking to these plans and assess their effectiveness.²¹⁷

Efforts inside the UNHCR

The start of these smaller changes is marked by the previously discussed 1985 UNHCR ExCom recommendations which, “stressed the need for UNHCR and host governments to give particular attention to the international protection of refugee women.”²¹⁸ In 1987, ECOSOC became involved in these efforts requesting a study from UNHCR on refugee women.²¹⁹ When High Commissioner Hocke resigned in late 1989, Baines writes that this sudden departure, led to a state of disarray in which transnational advocates were able to catch the attention of the senior UNHCR managers to push for substantial change within the agency. It was key for these outside advocates to push for this change as before this time period, few staff members took seriously the

²¹⁴ Ibid., 9.

²¹⁵ Weiss et al., *UN Voices*, 413.

²¹⁶ Keck and Sikkink, *Activists Beyond Borders*, 12.

²¹⁷ Weiss et al., *UN Voices*, 401.

²¹⁸ United Nations High Commissioner for Refugees, *UNHCR Policy on Refugee Women* (Geneva, United Nations, 1990), p.3, available from <http://www.refworld.org/docid/3bf1338f4.html>.

²¹⁹ Baines, *Vulnerable Bodies*, 35.

need for gender awareness. But throughout the decade, as gender mainstreaming efforts and pushes from the Women's Conferences trickled down, more women began occupying key decision making positions, leading to "insider" allies.²²⁰ During the decade of the late 1980s to early 2000s, there were three marked changes in how the UNHCR executed its programs to be more gender aware and begin to advocate for the inclusion of gender persecution at a national level.

The first change is how the UNHCR shifted its interpretation of the 1951 Convention definition to one that was more gender aware. Though they could not legally change the interpretation of the text, as it is up to the individual countries' courts to decide on the manner, they could issue recommendations and guidelines for these interpretations.²²¹ These can be used as persuasive evidence during asylum cases as the United Kingdom call these types of guidelines, "good evidence of what has come to be international practice."²²² The first re-interpretation that helps gender-based cases is expanding the term "persecution". 2002 Guidelines state that even if a state has prohibited a practice, if that policy is not enforced then it can be considered persecution, and that the policy needs not be explicitly prejudicial to be persecutory.²²³ This policy is key because it localizes the legitimacy of the claims, meaning that while policies could be enforced in one region of the country, they may not be enforced in another area. But if the state is still not providing adequate protection, an applicant's claim can still stand. The second interpretation is fitting gender-based claims within the framework of the four explicit Convention grounds: race, religion, nationality, or political opinion. The same

²²⁰ Ibid., 24-26.

²²¹ UNHCR, *Guidelines on International Protection*, 1.

²²² McAdam, "Interpretation of the 1951 Convention," 97.

²²³ UNHCR, *Guidelines on International Protection*, 4.

Guidelines also argue that women who do not adhere to a dominant “behavior code” or “particular role” within a religious society, can apply for protection on the basis of religion.²²⁴ In addition, the document argues that women’s political activities may differ from men’s, and instead may participate in “ ‘low-level’ political activities” which are still a valid persecution claim.²²⁵ By gendering these interpretations, some gender-based claims can fit into an established category, making it more likely to be accepted. Finally, the Guidelines also take the position that gender-based claims can fall under the Convention ground of “Particular Social Group”. While the 2002 Guidelines state that this is the most ambiguous Convention ground, they unequivocally declare that gender-based claims fall within this category as, “sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently to men.”²²⁶ This position stretches back to the early days of gender mainstreaming the UNHCR in 1985, in which UN ExCom declared that women asylum seekers facing “harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live may be considered as a “Particular Social Group”.”²²⁷ However at the time, this was only implanting the idea that states could adopt this standard within their interpretations of the Convention, and not recommending them to do so. In 1997, ExCom began to urge states to integrate this guideline into their domestic laws.²²⁸ This recommendation, though not globally accepted, has been

²²⁴ Ibid., 6.

²²⁵ Ibid., 8.

²²⁶ Ibid., 2-3.

²²⁷ “No. 39 (XXXVI) Refugee Women and International Protection,” in *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, ed. Office of the United Nations High Commissioner for Refugees, p.50 (December 2009), available from: <http://www.refworld.org/pdfid/4b28bf1f2.pdf>.

²²⁸ “No. 81 (XLVII) General,” in *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, ed. Office of the United Nations High Commissioner for Refugees, p.122 (December 2009), available from: <http://www.refworld.org/pdfid/4b28bf1f2.pdf>.

adopted by many countries as explained below and in the following chapters. However, there is still the question about whether this recommendation adequately addresses the problem of gender-based persecution asylum claims.

The second change coming from the UNHCR office was the recommendation to modify asylum intake interview procedures both for its field staff and in each country, so that they would be more gender aware. In 1988, the recommendations for these changes were directed at UNHCR staff and the ExCom asked for the High Commissioner to create training modules that educated staff about specific problems that women refugees face.²²⁹ One of these training models was the People Oriented Planning (POP) model, which, “introduced an analytical framework that differentiated the roles of refugee men and women, and highlighted the relevance of understanding these roles to assistance and protection activities.” This model was launched in 1991 and by 1996, 40 % of staff had received this training. However, high staff turnover and the need to staff emergency situations proved to be barriers for full implementation. In addition, when the program was first launched there was little incentive to hold staff members accountable to this training, making it harder to overcome office resistance to gender mainstreaming.²³⁰ The UNHCR later recommended specific interview policies to supplement this training. In 1990, it recommended that female staffers interview women asylum seekers in order to increase the comfort level of these women in recounting instances of sexual violence.²³¹ This was facilitated

²²⁹ “No. 54 (XXXIX) Refugee Women,” in *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, ed. Office of the United Nations High Commissioner for Refugees, p.72 (December 2009), available from: <http://www.refworld.org/pdfid/4b28b1f2.pdf>.

²³⁰ Baines, *Vulnerable Bodies*, 47-49.

²³¹ “No. 64 (XLI) Refugee Women and International Protection,” in *Conclusions Adopted by the Executive Committee on the International Protection of Refugees*, ed. Office of the United Nations High Commissioner for Refugees, p.85 (December 2009), available from: <http://www.refworld.org/pdfid/4b28b1f2.pdf>.

by increasing recruitment of women staff members in the agency in the 1990s.²³² In 1996, at a Conference addressing these issues, the UNHCR representative also recommended that interviews should be offered alone, in case women do not feel comfortable talking about their experiences in front of male family members.²³³ The 2002 Guidelines go even further calling on states to investigate how the setup of the interview room may create power imbalances between the interviewer and interviewee, which could make women hesitate in sharing the details of their experiences. In addition, they strengthened their position in believing women's testimony insisting that "no documentary proof" is needed in granting asylum claims, but rather background knowledge on the conflict or country of origin may strengthen a women's claims.²³⁴ For example, the UNHCR does not require medical documentation of sexual violence to prove that it occurred to a specific woman, but knowing that it may occur within specific political prisoner situations can help supplement an applicant's claims. All of these measures were implemented to shift the burden of proof away from applicants and increase the strength of a woman's claims.

Finally the UNHCR also created data collection and programs specifically for women. Starting in 1994, the UNHCR began to publish data on women refugees in its Statistical Overview. This allowed for greater and more accurate awareness about women refugees as a vulnerable population.²³⁵ In addition to this increase in data collection, the ExCom recommendations during this time period also advocated for more women oriented programs, conducted both by UNHCR and individual states. One of the most important additions for the

²³² UNHCR, *UNHCR Policy on Women*, 9.

²³³ "Report of the UNHCR Symposium," 15.

²³⁴ UNHCR, *Guidelines on International Protection*, 10.

²³⁵ Keiko Osaki, "When Refugees are Women: Emergence of the Issue on the International Agenda." *Refugee* 16, no. 4 (1997): 9.

UNHCR was the creation of the position Senior Coordinator of Refugee Women. This position was first filled by Canadian Anne Howeth-Wiles in 1989. When she first arrived, she had no staff and little office equipment.²³⁶ Howeth-Wiles continued to find resistance during her tenor. Her first action was writing the *Policy on Refugee Women*, a document to guide gender mainstreaming in UNHCR's operational goals, creating training programs, including POP, and building a transnational network between internal and external actors to maintain pressure on the agency to progress.²³⁷ However, a lack of staff enthusiasm for gender issues led to the decreased impact of these programs.²³⁸ In addition, she was accused of imposing Western feminist values on the agency because as Baines writes, "UNHCR discourse often locates "women's oppression" within the cultural values and norms of the refugee population or host state. Gender equality then, is regarded by some staff as a cultural imposition."²³⁹ Despite this resistance, the position did not disappear after Howeth-Wiles held it. Rita Reddy took the position in 1996²⁴⁰, before Joyce Mends-Cole assumed the position in 2001. She encountered less resistance than the previous Senior Coordinators as she was formerly a Liberian refugee. Because of UNHCR's high valuing of field experience, her former status most likely helped her be respected professionally. In her tenure, she made a first, bringing five refugee women to an ExCom meeting, enabling them to speak about how displacement had affected them and what they demanded from UNHCR.²⁴¹ All of these actions made the UNHCR a more gender aware agency and greater advocate for refugee women.

²³⁶ Baines, *Vulnerable Bodies*, 44.

²³⁷ *Ibid.*, 46.

²³⁸ *Ibid.*, 48.

²³⁹ *Ibid.*, 63.

²⁴⁰ *Ibid.*, 54.

²⁴¹ *Ibid.*, 58-59.

Outside the UN

As discussed above, when there were groups and individuals pushing to change the 1951 Convention, there was also early efforts to change the definition at a domestic level. In fact, many of the UNHCR recommendations focused on states voluntarily adopting these new gender aware guidelines. Therefore, most of the change aimed by activists ultimately happened at a domestic or regional level. The earliest efforts were seen at the European Parliament in April 1984 where a resolution called upon states to recognize women facing inhumane treatment as members of a “Particular Social Group”.²⁴² However, since this resolution only called upon states to adopt this change, it was not immediately implemented in all EU member states. Instead, many countries continued the trend of granting permanent residency status to these women asylum seekers, which left them less protected.²⁴³

But as the UNHCR was starting to push for the adoption of gender-based persecution as a “Particular Social Group”, some countries began accepting these recommendations. The 1996 UNHCR Symposium on Gender-Based Persecution provides a snapshot of the status of this movement. Canada was the first country to fully integrate gender-based persecution in its asylum law in 1993. These efforts started in a Working Group on Women Refugee Claimants in 1991.²⁴⁴ The Guidelines created stated, “gender is an innate characteristic and therefore, women may form a Particular Social Group within the Convention refugee definition.”²⁴⁵ However, it also seeks to emphasize that mere membership of PSG is not enough, and that each applicant must

²⁴² Ljungdell, “Female Asylum-Seekers and Refugee Status,” 33.

²⁴³ *Ibid.*, 57.

²⁴⁴ Mawani Nurjehan, “Introduction to the Immigration and Refugee Board Guidelines on Gender-Related Persecution,” *International Journal of Refugee Law* 5, no. 2 (1993): 240.

²⁴⁵ “Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution,” *Canadian Immigration and Refugee Board*, p.5, (November 13, 1996), available from: <http://www.refworld.org/docid/3ae6b31c98.html>.

demonstrate “genuine fear of harm”.²⁴⁶ There is not a clear list of practices or circumstances that define what counts as gender-based persecution but rather the Guidelines lay out four categories of women who may apply for refugee status: under one of the four established Convention grounds, persecution due to kinship, fear of severe violence or discrimination from public or private actors, or women who transgress religious or customary practices.²⁴⁷ All of these circumstances could potentially grant refugee status. At the 1996 Symposium, delegates discussed adopting guidelines similar to Canada. The U.S. also had developed gender guidelines. At the time of the Symposium Austria, Switzerland, and Denmark were developing guidelines for gender-based applicants.²⁴⁸ A weakness of this conference though is that only Western countries attended it, so it does not give a global picture of how gender guidelines were being adopted.²⁴⁹

The biggest contention during this Symposium was whether the adoption of these guidelines would create a flood of applicants, and based off of past judicial decisions, countries would then be obligated to accept them.²⁵⁰ However, UNHCR staffers tried to present a counter narrative at this Symposium arguing that most states see very few asylum seekers of this nature, stressing that women who face this type of persecution often do not even have the resources to consider fleeing.²⁵¹ Because the UNHCR was advocating on the behalf of these women, through this counter narrative, it shows the evolution of the office from the mid-1970s, when these claims

²⁴⁶ Ibid., 6.

²⁴⁷ Ibid., 2-3.

²⁴⁸ “Report of the UNHCR Symposium,” 15-16.

²⁴⁹ Ibid., 13.

²⁵⁰ Edwards, “Age and gender dimensions in international refugee law,” 70.

²⁵¹ “Report of the UNHCR Symposium,” 22.

were not even discussed to the mid-1990s where they were trying to persuade states to adopt these guidelines.

Since 1996, more countries like Australia, the United Kingdom, and South Africa have adopted these types of guidelines.²⁵² However, though these guidelines represent progress in addressing the lack of having gender or sex as a convention ground for persecution, not all of them are to the same standards or cover all gender persecutions. In the coming chapters, I will examine how these guidelines function using three case studies, and how they may not adequately address this problem.

²⁵² “Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisprudence: A Resource for U.S. Attorneys.” *Center for Gender and Refugee Studies* (2014): 6-60.

“Chapter Three”

To fully understand the shape of policies today, it is necessary to examine how and why policies evolved in a specific fashion. In the past two chapters, I have investigated how the modern international asylum regime, starting with the 1951 Convention, developed, and how that evolution left out “sex” as a form of persecution. As a result of the international conditions that I have identified in the last chapter, some policies at a state level have aimed to close this gap in the asylum system. This paralleled the development of UNHCR guidelines that identified differences in women’s asylum experiences, and how the international system could accommodate for these differences. At least 17 states have policies or guidelines that either allow for the acceptance of gender-based claims or gender-sensitive intake strategies.²⁵³ International governance bodies, such as the EU, have also created directives regarding this subject in which all member states must comply. Despite the growing number of state level guidelines, because of a lack of international standards, there is immense variation in the content and strength of these policies. Some, like Costa Rica, have no formal guidelines either regarding a gender aware approach in processing asylum cases or granting asylum on the basis of gender persecution, but have provided asylum on this ground in the past.²⁵⁴ Others, like Canada, have a robust and legally binding set of gender procedures.²⁵⁵ Because some states have developed formal policies while others have taken the route of legal precedent, the force of these guidelines has also varied.²⁵⁶ For instance in the UK, their “IAA Gender Guidelines” have generally been praised as being a

²⁵³ “Review of Gender, Child, and LGBTI Asylum Guidelines,” *Center for Gender and Refugee Studies* (2014): 6-60.

²⁵⁴ *Ibid.*, 18-20.

²⁵⁵ *Ibid.*, 15-18.

²⁵⁶ Heaven Crawley and Trine Lester, “Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe,” *United Nations High Commissioner for Refugees*, EPAU/2004/05 (2004): 1-2.

comprehensive set, however “first-instance decision-makers” of asylum claims are not bound to these guidelines, and it is unclear if the Appeals circuit is bound to these or not.²⁵⁷

Despite the progress that has been made in the past 30 years, we are nowhere near having a fully gender equitable asylum system. In past chapters, I have alluded to some of the problems that women asylum seekers face by filing their claim in a gender blind system. This chapter will more deeply explore the different barriers these women asylum seekers may face, specifically because of their gender. To do this, I will trace an asylum seeker’s journey from when they are considering to flee to when they receive their asylum decision. What are different considerations that women may need to take into account? How do gender roles and norms shape external actors’ perceptions of women asylum seekers? How do conditions outside the formal intake process affect women’s testimony in their claims? In the final two chapters, I will more narrowly look at three states’ asylum systems and procedures to compare the outcomes of these cases, between gender-based persecution and non-gender based persecution and within the category of gender-based persecution.

Before I begin tracing an asylum seeker’s journey, I would like to make three important notes about this chapter that the reader should be aware of. First is that the differences that I will identify are not a comprehensive list. It would be nearly impossible to create such list of all the differences women may experience on their journey as gendered actions and reactions are deeply embedded in our daily interactions. Instead I will identify common trends or barriers that some women face in this asylum process. This aims to give the reader a better picture on how gender

²⁵⁷ Ibid., 30.

dynamics play out in this experience and enable researchers to identify these gendered processes in further research.

Second, the obstacles that I identify in this chapter do not happen to every asylum seeker. One of the biggest criticism of the study of women asylum seekers and refugees is that by grouping them by one common characteristic, their gender, it can homogenize their needs and leave out other factors of their identity like age, class, country of origin, etc.²⁵⁸ Research on “women’s interests” or “women’s issues” have often focused on the experiences of white middle class Western women. When these experiences have been generalized for all, it erases the power dynamics and inequalities in the group of “women”.²⁵⁹ Therefore, many of the different experiences or barriers that I will identify throughout this chapter may be more or less intense due to intersecting identities and because of the procedures of the country in which they are applying for asylum. However, I still believe that it is valuable to analyze this process using a gendered lens as it can identify how one part of someone’s identity affects their asylum experience.

Finally, I would like to clarify whose experiences I am referring to in this chapter. Gender roles and expectations affect everyone in the asylum process, not just women applicants. Examining the experiences of men, trans, and non-binary applicants are incredibly important as they tell us how gender roles may constrain other experiences and can help guide reforms of the current system. However, for this chapter I will focus on the experiences of cis-women. In

²⁵⁸ Alice Bolch, Galvin, Treasa, and Harrell-Bond, Barbara, “Refugee Women in Europe: Some Aspects of the Legal and Policy Dimension,” *International Migration* 38, no. 2 (2000): 170.

²⁵⁹ Georgina Waylen, “Analysing Women in the Politics of the Third World.” *Review of Japanese Culture and Society* 9, “Gender, Colonialism, Technology and ‘Development’” (1997): 2.

addition, I compare cis-women's experiences to cis-men's in explaining the differences, however this should not be taken as a comprehensive analysis of how gender affects cis-men.

Gender Roles and the Interplay with the Asylum System

To be able to examine the international asylum system with a gendered lens, we need to first briefly establish a baseline on what gender dynamics are embedded in this system. As the international asylum regime on paper affords the same rights to asylum to men and women, many of the gendered critiques, focus more on how gender roles and expectations play out in this system. Both the ideas of roles and expectations are culturally specific, which means that in the asylum system there may be clashing ideas of what is the "correct" role for women. This will be expounded upon below when these expectations come into clash in the judgement process, particularly with the idea of credibility. Broadly, women have been stereotyped to fulfill a submissive role in hierarchical power relations to men. This stereotype is usually justified due to biological differences where women's physical strength may not be socially valued as much as men's, therefore they are seen as weaker. However, this "biological justification" for explaining these differences are shaped by societal preconceptions about gender and sex, demonstrating that these differences are used to dictate power relations.²⁶⁰

Because women are associated with this weaker and submissive role, women's roles have often been associated or restricted to undervalued parts of society, such as caregiving or domestic labor. As they are seen as the "weaker" sex and their work is undervalued, characteristics that are seen as "feminine" are also undervalued and seen as deviating from the norm. This includes stereotypes about women being naturally nurturing individuals who are also more emotional than

²⁶⁰ Anne Fausto-Sterling, "Society Writes Biology/ Biology Constructs Gender," *Daedalus* 116, no. 4 (1987): 65-66.

men.²⁶¹ Because of this, the expression of their experiences may not be validated and instead may be labeled as “hysterical”. They are not expected to be the Western liberal ideal of a “model rational citizen”, which is why they might not be seen as a “natural” part of the political realm.

²⁶² Though complying with these roles and expectations may have negative implications for women, if women act outside these norms they may be viewed as deviant and punished as such. Therefore, gender roles and expectations govern what society deems as normal and prudent to its functioning. This is no difference in the international asylum system, where if women act outside this established norm, they oftentimes face penalization in the form of a rejected claim.

Fleeing for Asylum

The first step in an asylum journey is not the actual claim for asylum, but rather when an individual makes the decision to flee internationally from their home. One could consider the incidents of repetitive violence against someone to be the start of the asylum journey, as this leads to a well-founded fear of persecution. However, I argue what makes an asylum journey different from repetitive acts of violence is making the decision to flee to try to escape this persecution, placing the first step on an individual’s decision to flee. This is also the point where gendered differences come out of the woodwork. A 2004 UNHCR study focusing on asylum in Europe found that only about 1/3 of asylum claims are filed by women.²⁶³ Freedman argues that this is not because women experience less persecution than men, but rather there are social, economic, and political obstacles that affect this decision to flee or not.²⁶⁴

²⁶¹ V. Spike Peterson, “An Archeology of Domination: Historicizing Gender and Class in Early State Formation,” PhD dissertation in International Relations, American University, 1998, 32.

²⁶² *Ibid.*, 232-237.

²⁶³ Crawley and Lester, “Comparative Analysis,” 14.

²⁶⁴ Jane Freedman, *Gendering the International Asylum and Refugee Debate* (New York: Palgrave MacMillan, 2007), 25.

The first is that of family constraints. Traditional migration patterns, which Mascini and van Bochove argue translates to forced migration, follow the model of family reunification meaning that men usually arrive first claiming asylum and after their claim is granted reunify with their wives and children.²⁶⁵ This aligns with the notion that men are seen as the ideal asylum seeker and their claims are more legitimate than women's. However, for women who do flee, another difficult choice is whether they want to flee with their children or not. As will be discussed below, women who flee are often vulnerable to sexual violence. Because of the gender roles discussed above, women globally have been assumed to be the primary caretakers.²⁶⁶ If they do take their children with them, then they may be potentially exposing them to more violence. However, if they choose to leave their children, they can be judged negatively by immigration officers. Oxford who has conducted a qualitative study on the experiences of women asylum seekers in the U.S. has observed that, "numerous judges reprimand female applicants for "abandoning " their children to the care of other family members." This decreases the credibility of their claims, however, conversely, male asylum seekers do not face this criticism.²⁶⁷ Therefore, women asylum seekers who are also mothers face a double bind in this decision when fleeing, which could cause them not to migrate.

The second constraint women may face regarding their decision to flee is the vulnerability they face when traveling alone, which may be particularly important for women who are fleeing from violent domestic situations. As discussed in Chapter 2, early organizing around refugee women was centered on their vulnerability to sexual violence during their

²⁶⁵ Peter Mascini and Marjolein van Bochove, "Gender Stereotyping in the Dutch Asylum Procedure: "Independent" Men v. "Dependent" Women," *International Migration Review* 43, no. 1 (2009): 117.

²⁶⁶ Freedman, *Gendering*, 26.

²⁶⁷ Catherine Oxford, "Where are the Women?" in *Gender in Refugee Law: From the Margins to the Centre*, ed. Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (New York: Routledge, 2014), 166.

journey. There are already greater barriers to claiming asylum in specific countries due to Safe Third Country policies, which forces asylum seekers to declare asylum in the first country they enter. For example, if an asylum seeker wanted to claim asylum in Canada, they would need to fly directly there. If they had a connecting flight in the U.S., they would need to declare asylum in the U.S. and their claim in Canada would be automatically rejected.²⁶⁸ However this can be a more costly option and if desperate enough, women asylum seekers may turn to smuggling to ensure a more successful claim. Smuggling can sometimes involve conditions of forced prostitution in lieu of payment.²⁶⁹ Though asylum seekers may not be 100% aware of Safe Third Country policies, they do receive advice from others fleeing therefore they may know which countries are more receptive of asylum seekers than others.²⁷⁰ Because of the possible coercion into forced prostitution, Freedman argues that some women may decide it is better to tolerate the persecution that they are experiencing at home rather than face new types of violence in this journey.²⁷¹ These two factors demonstrate how making the decision to flee is not gender neutral and may have strong implications for the acceptance of a claim.

Restrictions on physical movement within a country may also make this process more difficult for women. Countries that are highly restrictive to women, including limiting internal solo travel may also be places where women may be more likely to flee. However, due to those restrictions it may be simply more difficult to move and leave the country. In addition, resources needed to flee such as contacts to leave the country and economic resources to fuel their journey,

²⁶⁸ Janet M Haynes, "Safe Third Country Agreement: Closing the Doors on Refugee Women Seeking Protection," *Families in Society: The Journal of Contemporary Social Services* 95, no. 2 (2014): 140.

²⁶⁹ Freedman, *Gendering*, 149.

²⁷⁰ Amy Shuman and Carol Bohmer, "Representing Trauma: Political Asylum Narratives.," *Journal of American Folklore* 117, no. 466 (2004): 397.

²⁷¹ Freedman, *Gendering*, 26.

may also play into whether asylum can even be considered as a option for women.²⁷² Because of this traditional association in the private sphere, they may not have access to the economic resources kept outside the family, which disproportionately hurts women fleeing gender-based persecution as the perpetrators can often be inside the family.

The next decision that potential asylum seekers have to make is whether they will flee internally or internationally. Crawley writes that international protection is only invoked if the applicant can show that there is not adequate available domestic protection. This includes demonstrating that internal movement would not have allowed them to escape persecution.²⁷³ This judgement is ultimately in the hands of the decision maker who may view a country as “safe” if it has relative stability. For instance, the UK’s list of countries they view as safe take into consideration, “the political stability of the country, the existence of an independent judiciary, and democratic institutions.”²⁷⁴ This does not include information on the socio-cultural climate of the country which affects how women are treated. Therefore, they may be excluded as decision makers believe that to they could have avoided an instance of individual “persecution” if they had moved to another area in the country. For instance, in Germany of the 173 cases in which an applicant was applying for asylum to avoid FGM, the claim was rejected as the decision maker thought that an internal flight would have allowed the applicant to have avoided persecution. This may have been because the country had legislation outlawing the practice, which the decision maker used as proof to justify that the country was “safe”.²⁷⁵ However, this

²⁷² Bolch et al., “Refugee Women in Europe,” 172.

²⁷³ Heaven Crawley, *Refugees and Gender: Law and Process* (Bristol: Jordans Press, 2001), 59.

²⁷⁴ Freedman, *Gendering*, 139.

²⁷⁵ Crawley and Lester, “Comparative Analysis,” 41.

does not engage with the idea that laws are not always properly enforced, the implications of which will be discussed further below.

A final concern that asylum seekers may have when they are either making their decision to flee is if the atmosphere towards asylum seekers has become so vitriolic that the risks in fleeing may not be worth the benefits of this legal status. As mentioned in Chapter 2, over the years countries have decreased the percentage of asylum seekers they have admitted. Between 2001 and 2005, in fifty countries of asylum the acceptance rate on average dropped by 50%.²⁷⁶ As of 2004 only 19% of European countries issued gender-differentiated statistics on the initial decision of cases, so it is hard to tell if this comparatively hurts women more.²⁷⁷ Though a larger percentage of countries, 44%, produced gender differentiated statistics that year, it was mainly focused on how many women applied for asylum.²⁷⁸ Without detailed gender differentiated statistics, advocates are not able to hold states accountable to their promise of gendering their asylum system. But, we can use the general statistics indicating that percent of favorable asylum claim decisions has decreased over time as justification for the idea that the barriers for asylum seekers to have their claims accepted are higher than ever. Freedman argues that these restrictive barriers differently affect women asylum seekers.²⁷⁹ The first barrier revolves around the idea that asylum seekers have become a “security concern”. Countries of asylum have increased the rhetoric that there may be some who try to use the asylum system to essentially “fraud” themselves into a country and pose as a security risk to the citizens of a country.²⁸⁰ This has especially increased as the global “War on Terror” has gained steam. For instance, the REAL ID

²⁷⁶ Freedman, *Gendering*, 23.

²⁷⁷ Crawley and Lester, “Comparative Analysis,” 13.

²⁷⁸ *Ibid.*, 13.

²⁷⁹ Freedman, *Gendering*, 24.

²⁸⁰ *Ibid.*, 152.

Act passed in 2005 in the U.S. expanded the category of people who would be immediately ineligible for refugee status to include those who provide terrorists with “material support”.²⁸¹ However, what counts as providing material support does not always need to be consensual. A Sierra Leonean asylum seeker filed her claim in the U.S. but was ultimately rejected as she was found to have provided this material support. However, this instance of material support occurred when her home was seized by a rebel group, during which she was forced to cook for her captors, which was determined to be material support for terrorists.²⁸² Magdalena was forced into this role as she was assumed to be the caretaker of the house due to gendered expectations, demonstrating that this restriction on “providing material support” can differentially affect women and men. A second barrier is again the perception of whether a country is safe or not. The Refugee Women’s Resource Project (RWRP), an independent organization in the UK, found that women’s asylum claims’ success vastly depended upon their country of origin. 86% of all women’s claims from Iran and Sudan were rejected in one year while only less than 44% of women’s claims from Eritrea had been rejected, showing a clear favoritism in the country of origin.²⁸³ While the differing political situations obviously have a large effect on this disparity, I believe that the perception of these countries especially by Western states also influences this, particularly in deciding who is “worthy of protection.”

Interview Process

After an applicant reaches a country, they have a limited amount of time in which they need to file a claim for asylum. This starts a process of gathering evidence for their case to test if the claim is legitimate or not. The effects of gender roles start to influence the process

²⁸¹ Haynes, “Safe Third Country Agreement,” 144.

²⁸² *Ibid.*, 144.

²⁸³ Crawley and Lester, “Comparative Analysis,” 18.

immediately when the claim is filed, because men are often assumed to be the primary asylum applicant. Because of the traditional gendered associations of women being in the private sphere, they are assumed to be less political at first glance, both because they are thought of as apolitical and the maternal image places them in a dependent position on their husbands. Kneebone argues that the stereotypical image of women as mother negatively affects them as they may be more likely to be exclusively defined by this family role, while men are not viewed as fathers but rather as individuals.²⁸⁴ An individual is assumed to have more agency over their decisions and as a rational actor who can make political choices. If women asylum seekers are seen as less political than their traveling partner, then they may not be offered the option of applying for asylum either independently or as the primary applicant in a family unit by an asylum intake officer, even if her claim is stronger than her partners'. If this claim is not submitted initially, and is instead submitted some time after her arrival, her credibility may be decreased as she may either look like she is hiding something and lying, therefore decreasing her chances at asylum.²⁸⁵ Bolch et. al. also suggest that even if legally she has the right to file a claim, she may not do so because of social constraints in her kinship networks as she is viewed to be in a "subordinate position".²⁸⁶

There are two main effects of this association of women being less political when applying for asylum. First, is that women asylum seekers are not immediately offered to independently file for asylum. In 2004, only 41% of European countries automatically informed all adults of the right to independently file their claims.²⁸⁷ This means that the majority of

²⁸⁴ Susan Kneebone, "Women within the Refugee Construct: 'Exclusionary Inclusion' in Policy and Practice- the Australian Experience," *International Journal of Refugee Law* 17, no. 1 (2005): 10.

²⁸⁵ Crawley and Lester, "Comparative Analysis," 99-100

²⁸⁶ Bolch et al., "Refugee Women in Europe," 174.

²⁸⁷ Crawley and Lester, "Comparative Analysis," 102.

countries will assume that either only one adult may have a claim or if they do have a claim that they have the legal knowledge to submit it on their own. However, due to varying educational levels, women asylum seekers may not be aware of this right. Additional literacy and language barriers in the country of asylum may also put women at a disproportionate disadvantage. In the UK, the lack of being informed of the option to file independently correlates with the lowered number of women applying for asylum.²⁸⁸ One study found that out of 17 cases where couples arrived to file asylum together, 16 of the principle applicants were men.²⁸⁹ Again, this ignores the legitimacy of women's claims and ultimately could put these asylum seekers at a disadvantage. A second consequence of this assumption is that women asylum seekers may be more likely to tolerate violence in their intimate relationships. Due to the stress of applying for asylum and legal constraints, couples often have higher rates of marital breakdowns. This can be linked to prescribed gender roles. One study of Somali applicants in the UK suggested that couples faced increased levels of stress as men were not able to fulfill their traditional gender role of being the family provider.²⁹⁰ Marital breakdowns can result in increased levels of emotional or physical abuse, which can be particularly harmful if the victim feels they cannot leave the situation. Some countries have rejected women's claims to asylum after a marital breakdown as they are no longer seen as "dependents" on their husband's applications.²⁹¹ Therefore, some women may choose to stay in an abusive relationship in order to resist being sent back to another potentially dangerous situation.

²⁸⁸ Ibid., 104.

²⁸⁹ Bolch et al., "Refugee Women in Europe," 175.

²⁹⁰ Ibid., 175-176.

²⁹¹ Ibid., 176.

After the claim is filed, applicants will go through an interview process conducted by an interviewing official and oftentimes a translator. How the interview is conducted deeply affects the outcome of the case. Hinshelwood stresses the need to build trust between the interviewer and interviewee, establishing a dialogue between the participants instead of jumping straight into the details of the case.²⁹² In the UNHCR's 2002 Gender Guidelines this is highlighted through its recommendation of policies to increase the comfort level of the women interviewees.²⁹³ Crawley and Lester argue that although it is difficult for any asylum seeker to recount details of their experiences, the pressures on women applicants may be higher as their experiences, especially ones involving sexual violence, may carry a greater stigma. The effect of trauma caused by sexual violence will be discussed in full below, but one recommendation to mitigate this stigma and increase women's comfort level is to have interviewers and translators of the same sex as the applicant in the room. The reasoning behind this recommendation is that women are more likely to speak honestly of their experiences of sexual violence with other women.²⁹⁴ This recommendation has been generally accepted by countries surveyed in which 86.5% of them claimed to put some effort into matching applicants to interviewers of the same sex.²⁹⁵ While these policies have been written, they are not always executed as such. 40.5% of countries have reported that they have had to decline requests for this matching due to bureaucratic constraints of not having enough women interviewers employed in an office.²⁹⁶ This is even worse for

²⁹² Gill Hinshelwood, "Interviewing Female Asylum Seekers," *International Journal of Refugee Law* 9, no. Special Issue 1 (2016): 163.

²⁹³ United Nations High Commissioner for Refugees, *Guidelines on International Protection: "Membership of a Particular Social Group" within the context of Article 1A (2) of the 1951 Convention and/or its 1967s Protocol Relating to the Status of Refugees*. Geneva: United Nations, 2002, available from: <http://www.unhcr.org/en-us/publications/legal/3d58de2da/guidelines-international-protection-2-membership-particular-social-group.html>.

²⁹⁴ *Ibid.*

²⁹⁵ Crawley and Lester, "Comparative Analysis," 108.

²⁹⁶ *Ibid.*, 109.

translators in which countries could only meet these requests 28.5% of the time.²⁹⁷ Without having both people in the room be of the same gender, women applicants may be more likely to withhold information ultimately harming the legitimacy of their claim.

In addition to considering the gender of the interviewer and interpreter, advocates have also identified that the body language of the officers can play a key part in building trust in this setting. Legal representatives have objected to officers' body language identifying hostile tones or an unwillingness to stop an interview, even if the applicant was feeling uncomfortable.²⁹⁸ This can increase uneven power dynamics in the room, making it feel more authoritative. Asylum seekers from countries with authoritative regimes may adversely react to this atmosphere and turn to survival instincts such as refusing to looking at a superior's eyes while speaking. Eye contact may be viewed as impolite in authoritarian regimes, even more so for women. However, in many Western cultures a lack of looking in someone's eyes can be viewed as lying and may discredit their claims.²⁹⁹

The final consideration in the interview set up that may affect how women's asylum claims are viewed is whether they are interviewed on their own. Because sexual violence is often stigmatized, feelings of shame may be magnified if they are forced to recount these experiences before their male partners or children. Again, without the option to be interviewed alone, it may force women to withhold information. While 90% of European countries claimed that they give the opportunity to be interviewed separately, in practice this number is much smaller. In the UK, the need to have an efficient interview process may outweigh this right. In one case, a woman was threatened with immediate rejection due to non-compliance unless she gave her testimony

²⁹⁷ Ibid., 109.

²⁹⁸ Ibid., 123.

²⁹⁹ Hinshelwood, "Interviewing," 162.

immediately. She had wanted to wait until her husband had finished his interview, in order to pass child caring duties over to him. However, she was not allowed to do this and was forced to recount multiple instances of sexual assault in front of her children.³⁰⁰ This thread of disconnect between guidelines and reality continues throughout the asylum process, flagging a problem in holding decision makers accountable to written practices.

In order to address some of these uneven power dynamics discussed above, the UNHCR has recommended that countries conduct gender sensitivity training for their employees. Because of the high caseload that many decision makers have, often employees are pressured into making swift decisions. Therefore, they need to be aware of existing guidelines and policies in order to accurately implement them.³⁰¹ The majority of countries in 2004 in Europe did offer gender sensitivity training, however it was often not mandatory. At the time, only 39.5% of countries had made it a mandatory component for its case workers' training.³⁰² Therefore, it may be up to chance in whether the caseworker an applicant receives has this kind of training to appropriately implement policies. It is unclear if translators receive this kind of training either, therefore even if the case workers receive this training, not all individuals in the room may have this gender sensitivity training.

After considering the interview set up, it is important for advocates to focus on the content of the interview may be processed in relation to the claim. UNHCR stresses that an applicant's testimony is the only necessary evidence for the acceptance of a claim.³⁰³ While in practice, states may require more than just personal testimony, the content from the interview

³⁰⁰ Crawley and Lester, "Comparative Analysis," 106.

³⁰¹ *Ibid.*, 112.

³⁰² *Ibid.*, 113.

³⁰³ UNHCR, *Guidelines on International Protection*, 10.

plays a key deciding factor in many asylum claims. During this process, decision makers have to decide if they believe that an applicant's testimony is credible, therefore worthy of refugee status. However, how trauma is factored into testimony from interviews also is influential and gendered, especially when discussing trauma derived from sexual violence. A lack of consideration of the effects of trauma could decrease a woman's credibility even more. Asylum seekers are more likely to have trauma as persecution is often associated with instances of repeated torture or abuse. This can be exacerbated in the journey to claim asylum as they can be socially isolated from their communities and have a loss of sense of purpose or role in society.³⁰⁴ Trauma is loosely defined as a behavioral response after an emotionally harmful or life threatening experience that negatively impacts an individual's well being.³⁰⁵ Common symptoms from both trauma and post-traumatic stress disorder can be, "sensory encoding, dissociation, circumscribe memory retention, recall deficit, avoidance, and poor concentration."³⁰⁶ This especially affects the interview process, because memory recall problems may prevent applicants from consistently recalling dates or details of specific events.³⁰⁷ Small details as such are often used as markers for credibility. Many officers will disbelieve an applicant's story if details are left out of a first interview but later introduced as evidence.³⁰⁸ This includes minute details about events such as number of people present. These details are used as markers for "real events" which officers assume that everyone who would be telling the truth could consistently remember these small

³⁰⁴ Ibid., 114.

³⁰⁵ "Behind the Term: Trauma," *National Registry of Evidence Based Programs and Practices*, 2016, https://www.nrepp.samhsa.gov/Docs%5CLiteratures%5CBehind_the_Term_Trauma.pdf

³⁰⁶ Debora Singer, "Falling at Every Hurdle: Assessing the Credibility of Women's Asylum Claims in Europe," in *Gender in Refugee Law: From the Margins to the Centre*, ed. Efrat Arbel, Catherine Dauvergne, and Jenni Millbank (New York: Routledge, 2014), 108.

³⁰⁷ Crawley and Lester, "Comparative Analysis," 118.

³⁰⁸ Sara L. McKinnon, "Citizenship and the Performance of Credibility: Audiencing Gender-based Asylum Seekers in US Immigration Courts," *Text and Performance Quarterly* 29, no. 3 (2009): 210.

details.³⁰⁹ In reality, this is a poor way to judge credibility as many of those who do not have trauma would have trouble recalling these small details, especially as asylum proceedings may last more than a year.³¹⁰ Therefore it is even worse for those likely to be victims of trauma.

Those who have trauma face a double jeopardy in their testimony. First, since the trauma centers around an incredibly difficult experience in their life, and interview conditions can often create a distrustful atmosphere, applicants may not be able to overcome shame associated with their experiences. Hinshlewood writes of an exercise he wished all asylum officers would perform, “For a couple of seconds, close your eyes. Just think of the most embarrassing moment in your whole life. Something you have never told mother, spouse or children. Now imagine telling the person next to you, in front of someone else.”³¹¹ Therefore, in order to preserve some privacy and dignity, applicants may keep details to themselves and provide vague descriptions which works against them in terms of credibility.³¹² In addition, trauma may also prevent them from ever filing a claim as they may still be trying to come to terms with the series of events that led to them fleeing.³¹³ Finally, those that may need the legal status the most due to them not having the financial ability to move abroad may also be the most vulnerable. Without having the financial capability for services like mental health support to help applicants work through their trauma, they are less likely to overcome some of the barriers that identified above.³¹⁴

Though trauma can affect all asylum seekers, scholars have argued that women asylum seekers are particularly vulnerable to it due to their increased vulnerability to sexual violence.

³⁰⁹ Shuman and Bohmer, “Representing Trauma,” 403.

³¹⁰ Crawley and Lester, “Comparative Analysis,” 118.

³¹¹ Hinshelwood, “Interviewing,” 161.

³¹² McKinnon, “Citizenship and the Performance of Credibility,” 214.

³¹³ Crawley and Lester, “Comparative Analysis,” 117.

³¹⁴ McKinnon, “Citizenship and the Performance of Credibility,” 217.

Haynes argues that rape of women is used as a weapon of war as it can as a strategy to maintain control over an oppressed population as it plays on gender stereotypes of men having to protect “their women”. Therefore, if they are not able to protect “their women” from rape, especially from an outside group, then the oppressors may have emasculated the men of the oppressed group, shaming them to prevent further resistance.³¹⁵ For the victims of these crimes, trauma is common and additional pressures of shame may be compounded upon it.³¹⁶ Cultural and religious values may make women and their communities feel “permanently dishonored” as sexual violence victims, therefore they may be more likely to leave out details of these instances in interviews if they do not want a stigma attached to them.³¹⁷ Countries have varying policies regarding trauma from sexual violence. The Swedish Gender Guidelines are progressive in their goals in which they want staff to understand these potential barriers in women’s experiences in the asylum process and give women “good opportunities” to discuss these traumatic events to the extent they are willing to.³¹⁸ However, other countries like the UK have shown that the consideration of trauma in these interviews is inconsistent both in the initial and appeals stages.

³¹⁹

Another component gathered in the interview stage is that of corroborative evidence. While this kind of evidence is not necessary in all cases according to the UNHCR, asylum attorneys have stressed that these pieces of documented evidence, such as personal identification documents or membership cards for a political group, can play a key role in asylum cases. Establishing evidence of a “well founded fear” to persecution can be easier and obtained through

³¹⁵ Haynes, “Safe Third Country Agreement,” 141.

³¹⁶ Crawley and Lester, “Comparative Analysis,” 99.

³¹⁷ Haynes, “Safe Third Country Agreement,” 141.

³¹⁸ Crawley and Lester, “Comparative Analysis,” 121.

³¹⁹ *Ibid.*, 124.

testimony. However, decision makers can be doubtful in whether the applicant was the victim of persecution or the persecutor themselves.³²⁰ This plays off the fears that many will try to use the asylum system to fraud themselves into a country. Therefore, while officially asylum cases do not need corroborative evidence as a level of proof as applicants only have to show a “reasonable degree of likelihood” to past and future persecution as it is hard to gather corroborative evidence to past persecution, a higher standard is often invoked.³²¹

This need for corroborative evidence disadvantages women asylum seekers as they may not be able to access personal identity documents, their activities are harder to formally document, and they may not be willing to provide corroborative evidence in cases of sexual violence. Keeping personal identification documents may be a problem that many asylum seekers face when escaping violence, because keeping hold of birth certificates may not be a priority. However, women asylum seekers may struggle more with this requirement as in some states women may not be afforded rights to hold personal identity documentation independently from their male relatives. If a male relative is in charge of these documents and a woman decides to flee that male relative or becomes separated from them in the process, she will lose her chance at obtaining these documents.³²² Second, the activities under which women may apply for protection due to may be harder to document than activities traditionally conducted by men. Political activities, like sheltering political dissidents, are conducted in the private sphere. These instances may be harder to create documentation for but women may have easier access to as they have been relegated to the private sphere. Political activities in the public sphere such as attending a protests or joining a political group may be easier to document either with

³²⁰ Shuman and Bohmer, “Representing Trauma,” 408.

³²¹ Singer, “Failing at Every Hurdle,” 101.

³²² *Ibid.*, 104.

photographs or party membership cards.³²³ Corroborative evidence in relation to gender-based persecution, such as repeated attacks of sexual assault, may also prove to be more difficult to document as it is harder to verify medically.³²⁴ Since women are at a higher risk of sexual assault, this lack of documentation may disproportionately hurt them. Finally, even if a women is able to prove medically that she has faced gender-based persecution, she may chose not to document it. Since sexual violence is so stigmatized globally, women applicants may find that medical examinations only exacerbate these feelings of shame, therefore may forgo them in order to maintain their personal dignity.³²⁵

If it is harder for women to produce corroborative evidence, it means that their interview testimony carries more weight in the decision making process, and the problems identified above are exacerbated. If they do not fit the requirement of being a rational individual that can consistently and coherently remember dates in their testimony, without corroborative evidence, they may be more likely to be rejected.³²⁶ An applicant's demeanor may be taken into account if other evidence is not provided to support the claim to a decision maker. If an applicant does not "speak well", meaning convey the performance of her testimony in a linear fashion, then she may be seen as lying. However, the ability to "speak well" and access additional legal support that may help an applicant organize their testimony is largely associated with class. Therefore, the most vulnerable applicants may be the most penalized.³²⁷ Finally, if there are technical errors with the interview, such as translation errors, without the provision of additional evidence to correct these technical errors, the applicant may be penalized. In one case of an Iranian woman

³²³ Crawley and Lester, "Comparative Analysis," 100.

³²⁴ Singer, "Failing at Every Hurdle," 105.

³²⁵ McKinnon, "Citizenship and the Performance of Credibility," 177.

³²⁶ McKinnon, "Citizenship and the Performance of Credibility," 213.

³²⁷ *Ibid.*, 211.

asylum seeker, a judge decided to reject her claim as two statements regarding her arrest were translated as, “(Indiscernible) during the reign of (indiscernible),” missing the fact that she had been arrested in Iran. When she tried to correct this, her correction was seemed as incredible as she was changing the facts of her case.³²⁸ This example demonstrate that the need for corroborative evidence may disadvantage women asylum seekers in the interview process.

To compensate for the lack of corroborative evidence in asylum cases but to provide some verification of the testimony of asylum seekers, some countries have compiled background information on applicants’ countries of origin. UNHCR writes, “It is essential to have both a full picture of the asylum-seeker’s personality, background, and personal experiences, as well as an analysis and up-to-date knowledge of historically, geographically, and culturally specific circumstances in the country of origin.”³²⁹ The agency also stresses that this is particularly important for gender-based claims as they recognize the limitations in corroborative evidence in those types of claims.³³⁰ Gender aware background information would not only look at what rights women are afforded in the political, economic, and social spheres, but also how these rights are being protected or how they might only be implemented for certain privileged women. There is no standardization on the collection of this information. Half of European countries in 2004 did not source their own data, but rather tried to draw their background information from a mixture of independent watchdog groups, UNHCR, and foreign governments.³³¹ In addition, it is unclear that while 78% of countries claim to include gender-specific background information, how deep this information goes and how applicable it may be for specific cases.³³²

³²⁸ Ibid., 211.

³²⁹ UNHCR, *Guidelines on International Protection*, 3.

³³⁰ UNHCR, *Guidelines on International Protection*, 10.

³³¹ Crawley and Lester, “Comparative Analysis,” 130.

³³² Ibid., 131.

While accurate and detailed information could benefit both states and asylum applicants alike, there are still problems with the collection and use of this information which disproportionately harms women applicants. First is the prevalence of incorrect information. After a review by the Immigration Advisory Service in the UK of this information they found that “a significant amount of material in a number of CIPU Assessments was inaccurate, wrongly sourced and/or did not give information of key relevance to assessing asylum claims.”³³³ While the problem of incorrect background information could harm all applicants, it may carry a greater weight for women applicants who do not have corroborative evidence to counteract these factual inaccuracies. Second, the information that is collected may only focus on the political stability of the country and not for instance “the cultural and social mores of the country” or “the prevalence of violence against women in that country and the availability of state protection from such violence.”³³⁴ The danger of creating a gender blind set of information is that it does not give a full picture of the applicant’s experiences, especially in gender-based claims. Finally, there may be too much focus on the official policy of the country and not the reality of the implementation. While there may be policies outlawing FGM, forced marriage, or honor killings, they may not be implemented equally throughout a country. However, on the books it appears that state protection exists, which could lead to a rejection of these gender-based claims.³³⁵

Finally, throughout the interview process, it is necessary to look at the living situations of asylum applicants during legal proceedings. Living situations can strongly influence how comfortable they may be when they enter the interview, and the level of trust they may have towards those of a specific country of asylum. Freedman writes that as the number of asylum

³³³ Ibid., 134.

³³⁴ Singer, “Failing at Every Hurdle,” 106.

³³⁵ Crawley and Lester, “Comparative Analysis,” 132.

seekers have increased, there has been a greater pressure to “manage” the flow of asylum seekers before they reach the country of asylum.³³⁶ One aspect of this is to restrict the kind of housing that asylum seekers receive while their claim is being processed, forcing them into uncomfortable situations. There has been a greater trend towards three kinds of housing situations. The first is that of temporary housing. In Ireland, asylum applicants are first placed in temporary bed and breakfast accommodations, eventually receiving a stipend for housing. However, this stipend along with a tight housing market, oftentimes forces asylum seekers to stay for an extended period in these temporary accommodation situation. This may mean that they are forced to leave their accommodations during the day due to the guest houses’ regulations.³³⁷ The second trend is towards the use of detention centers to house applicants. Freedman argues that the use of detention centers is part of a larger wave to criminalize asylum seekers and frame most of their claims as bogus, hereby justifying the decreasing acceptance rates. In the U.S., asylum seekers from 33 countries in which Al Qaeda operates must stay in detention centers while their claim is being processed.³³⁸ The detention system is not used as widely in European countries, but there are still some problematic aspects, such as in Italy there is no time limit in which asylum seekers may be held in these detention centers.³³⁹ Finally, some countries have been using the process of forced dispersal, meaning scattering asylum seekers accommodations across the country and confining them to that area, instead of having them congregate in urban areas.

³³⁶ Freedman, *Gendering*, 147.

³³⁷ Bolch et al., “Refugee Women in Europe,” 181.

³³⁸ Freedman, *Gendering*, 152.

³³⁹ *Ibid.*, 153.

All of these housing trends can have negative effects on women asylum seekers. The first is that it may decrease access to both the mental and physical health services that these women need. For temporary housing, if they are not allowed to have a safe place to recover during the day, they may not be able to process the trauma that they experienced before or during their journey. In detention centers, there has been evidence of reproductive health needs not being met by not having access to sanitary products in Australia, partially because of the high male guard population who are not responsive to women's needs.³⁴⁰ In instances of forced dispersal asylum seekers can be isolated from social, legal, and health services. For instance in Sweden one forced dispersal center is 200 km away from the closest bank. Forced dispersal decreases the family and community support that asylum seekers, especially mothers rely on when raising their children.

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The second consequence is that these housing situations may place more women in vulnerable positions to abuse. In temporary accommodations where they are not allowed to stay during the day, women asylum seekers are at a higher risk of harassment and violence if they are forced to wander the streets during this period.³⁴² Because of the power dynamics between guards and asylum seekers living in detention centers, Freedman writes, "Women may be subjected to sexualised and racialised abuse by guards, abuse which relies on cultural and racial stereotypes and constructions of difference between "Western" women and those "other" women who have come to seek protection, but who are treated as criminals."³⁴³ There is a lack of privacy in these situations in which there are sometimes no separate bathing facilities for men or women

³⁴⁰ Ibid., 154-155.

³⁴¹ Ibid., 161-162

³⁴² Bolch et al., "Refugee Women in Europe," 181.

³⁴³ Freedman, *Gendering*, 154.

and guards have entered women's rooms without any warning when women were changing or naked.³⁴⁴ Because of the lack of legal resources these women can access, the abuse of power can be ever more present in these situations creating gender-based persecution in the country of asylum, not just in the country of origin.

Judgement Process

The final stage in an asylum process is judging whether the claim is valid, therefore granting the applicant refugee status, ensuring them the rights that are granted in the 1951 Convention. However, as we have seen throughout this chapter, there have been biases that have unfairly affected women asylum seekers, and this final stage is no different. In order to receive refugee status, an applicant must demonstrate a "well-founded fear" of persecution. This standard is open to a broad interpretation, and even advocates' recommendation of defining persecution as a, "violation of human rights or serious harm" and, "the failure of state protection", does not truly clarify this interpretation.³⁴⁵ While this does allow for a variety of cases to be accepted for refugee status, on the flip side in an atmosphere of growing restriction on the number of asylum seekers accepted, the standard can be narrowly interpreted to reject applicants. In addition, to demonstrate a "well founded fear", there must be a clear link between being persecuted and one of the Convention grounds. Making this link significantly depends on a favourable credibility ruling on the evidence presented to a decision maker.³⁴⁶ This is where biases can start to play into the judgement process as decision makers must decide if the standard of evidence has been met. McKinnon writes that usually judges will first evaluate the background evidence for the context of the claim and then make a judgement off this and the

³⁴⁴ Ibid., 155-156

³⁴⁵ Crawley and Lester, "Comparative Analysis," 9.

³⁴⁶ Singer, "Failing at Every Hurdle," 98.

applicant's credibility including the content of their story and emotional performance. Countries such as the U.S. have been giving decision makers more leeway on determining if this standard has been met or not.³⁴⁷

Storytelling is a key component in legal proceedings. As stated before, when gathering evidence for a case, decision makers expect evidence to be presented in a linear manner. Wilson points out that individual memories are not recalled in a linear fashion though, and often things that are considered to be extraneous are critical for remembering certain events.³⁴⁸ With the expectation that applicants can recall events in a clear timeline, too many "extraneous" details can detract from their credibility. But storytelling is more than how the content is organized, it is how applicants present themselves to decision makers. Officials may be more likely to rely on the style that the information is presented in, rather than its content as it is easier to dismiss a case on credibility issues that can be discerned from physical signaling to the judge during their testimony.³⁴⁹ By signaling, I mean, non-verbal cues such as looking at the judge in the eye, portraying the right amount of emotion, being able to speak well, which in many Western contexts are interpreted as telling the truth. However, this fails to take into account that these non-verbal cues may not be universally true or that they may be affected by trauma. For instance, while cultural sensitivity training supposedly is designed to address this subject, decision makers have dismissed cases when applicants appear to be inattentive or smiling during traumatic testimony.³⁵⁰ Without monitoring whether this training is being implemented, it can still allow

³⁴⁷ McKinnon, "Citizenship and the Performance of Credibility," 206.

³⁴⁸ Richard A. Wilson, *The Politics of Truth and Reconciliation in South Africa* (Cambridge: Cambridge University Press, 2001), 50-51.

³⁴⁹ *Ibid.*, 206.

³⁵⁰ Crawley and Lester, "Comparative Analysis," 126-127.

for biased judges to make unfavorable decisions, especially towards those they are culturally different from.

Therefore, when asylum seekers are presenting their case, advocates stress that applicants must keep their audience in mind. McKinnon writes that, “asylum seekers have numerous audiences including immigration and detention center officers and asylum interviewers, but, inevitably immigration judges serve as the key audience.”³⁵¹ When they are presenting their story they must consider how multiple audiences, all coming from specific historical, geopolitical, and cultural backgrounds will receive it. The final decision maker’s perception is the most important though and if that story is not presented in a compelling way to officials before that decision maker, it could also harm their chances at a successful application as information may not be accurately passed on. This disadvantages though who do not have legal representation that may help them navigate this complex performance.

Women asylum seekers face gender specific expectations from these multiple audiences and if they do not conform to these expectations, linked historically to gender roles, their claim may be rejected. The first expectation is the amount and type of emotion that is displayed during their testimony. For women, they are expected to be achieve a balance between showing enough emotion to fit their gender, meaning more emotional than a perfectly rational actor, but not too much to fall into the stereotypical image of the “hysterical woman”.³⁵² Bloch et al. find this balance troubling as during their work very few applicants have cried when recounting traumatic instances.³⁵³ As discussed above, a symptom of trauma can be disassociation, in which the applicant may appear to be disconnected from the story that they are telling. However, this

³⁵¹ McKinnon, “Citizenship and the Performance of Credibility,” 209.

³⁵² *Ibid.*, 215.

³⁵³ Shuman and Bohmer, “Representing Trauma,” 406.

disassociation is condemned as not being emotional enough, therefore the decision maker may find their claim incredible. The consequences of this can be exemplified of the case of Congolese woman who had been arrested for passing out pamphlets of an opposition party and was raped by five soldiers in custody. When she recounted this story, she spoke in short sentences and did not display any emotion. This was noted in her application file, and she was ultimately rejected due to the incredibility of the story.³⁵⁴

The second stereotype that women asylum seekers face is the idea that all women applicants are “defenseless victims”, this in turn depoliticizes the actions of women asylum seekers and penalizes those that do not fit this image. Freedman writes that the origins of this image traces back to when advocates were first trying to gain attention for refugee women’s needs and stressed that they were the “forgotten majority” and particular vulnerable to violence to garner funding for humanitarian missions.³⁵⁵ This rhetoric implies that she is the opposite of a male asylum seeker: dependent, vulnerable, part of a family unit. She therefore is not seen as being capable of independent political action, and her role in a “social group” is emphasized over her role as a “political” actor.³⁵⁶ Officials in Western countries may be more likely to play into this position by characterizing these women as, “victims of a dominating patriarchal culture.” This grants them moral superiority over “refugee producing” countries. This parallels the origins of the the modern refugee regime in which Western nations were more likely to provide asylum to dissidents from the Soviet Union as it met their political and moral motivations.³⁵⁷

³⁵⁴ Thomas Spijkerboer, “Stereotyping and Acceleration: Gender, Procedural Acceleration, and Marginalised Judicial Review in the Dutch Asylum System,” in *Proof, Evidentiary Assessment, and Credibility in Asylum Procedures*, ed. Gregor Noll (Boston: Brill, 2005), 70.

³⁵⁵ Freedman, *Gendering*, 23.

³⁵⁶ Kneebone, “Women within the Refugee Construct,” 22.

³⁵⁷ Mascini and van Bochove, “Gender Stereotyping in the Dutch Asylum Procedure,” 118.

If officials favor women who fit into this stereotypical image, then it has huge implications for asylum decisions. While there is a lack of comprehensive statistics on how many women versus men asylum seekers are admitted comparatively, some studies in individual countries suggest that while there are less women who apply for asylum, they are admitted at a higher rate than men asylum seekers. In the Netherlands, scholars point to this idea of the dependent vulnerable woman as an explanation for this, as men are more likely to look like autonomous actors who are posing as “bogus refugees”.³⁵⁸ Statistical models tracking these admissions in the Netherlands also suggest that those who travel with children have a greater acceptance rates than those that do not.³⁵⁹ This reinforces the notion that women who do not travel with their children are punished for being “bad mothers” and instead should be seen as part of a family unit. In addition, it may be harder for women asylum seekers to prove that their acts are political, as they may be only seen as victims of gendered violence. This not only undermines the agency of the applicants, but can obscure the validity of their claim if their actions were political and but not explicitly gendered.³⁶⁰ By reducing women asylum seekers to a one dimensional image, it reduces the complexities of their actions and can ultimately force them to act as someone they are not in order to gain protection.

In judging a case, a decision maker must first decide if the act in question falls under one of the five Convention grounds, before making the judgement in whether the claim amounts to the level of persecution. The Convention ground of political opinion is particularly tricky for women asylum seekers, not only because many of their actions are depoliticized due to the stereotypical image of the “dependent weak woman”, but also what is seen as political is aligned

³⁵⁸ Ibid., 119.

³⁵⁹ Ibid., 124.

³⁶⁰ Oxford, “Where are the Women?,” 162-163.

with the public private dichotomy. Actions in the public are more likely to be seen as political than the private, which is viewed as to be outside state regulations and the realm of politics.³⁶¹ This dichotomy, often a key part of Western political thought, creates a hierarchy of the importance of actions taken in each sphere, prioritizing those that take place in the public sphere, associated with men.³⁶² Therefore, if women face harm in the private sphere and act out to protest against it, their action may not be seen as political and therefore does not require international and state protection.³⁶³ Of course this dichotomy between public and private is constructed, and Crawley argues that it should be treated like a continuum, meaning that the boundaries are fluid, which can be demonstrated by how the state chooses to regulate actions within the home.³⁶⁴ Still this traditional dichotomy holds weight in our conception of politics in which we assume that men are “naturally” more invested in “political” issues while women are more interested in “social” or “moral” issues located in the private sphere.³⁶⁵

Despite the work of feminists in trying to debunk the “natural” dichotomy myth, it still holds true today including in the asylum system where women may have a harder time proving that their act is political, therefore qualifying under the “Political Opinion” Convention ground if it happens in the private sphere. Only 27% of European countries has standardized the belief that women’s political actions may differ from men’s in either their guidelines or policies.³⁶⁶ Because oftentimes women are given the role of the primary caregiver in the house, they may face restrictions to participating in politics in the public sphere, such as demonstrating, due to their

³⁶¹ Kneebone, “Women within the Refugee Construct,” 38.

³⁶² Crawley, *Refugees and Gender*, 22.

³⁶³ Oxford, “Where are the Women?,” 161.

³⁶⁴ Crawley, *Refugees and Gender*, 18.

³⁶⁵ *Ibid.*, 22-23.

³⁶⁶ Crawley and Lester, “Comparative Analysis,” 27.

caregiving responsibilities. However, political actions conducted in the private sphere such as hosting a safe house or signaling when political dissidents may be in danger, which still critically support political operations, may be passed to women. These actions may be seen as less important though due to the hierarchy of “public” over “private” actions, therefore giving women asylum seekers who conduct these critical support missions less of a chance for asylum.³⁶⁷ Movements that use maternal identities as part of organizing can also be pushed off as “private”. For instance, women who protest against the disappearance of their children are seen as being motivated by “emotion” and not political opinion.³⁶⁸ Because of the traditional association of emotion with femininity, the value of these actions is diminished. Actions that are aimed at resisting gender oppressive regimes, institutionalized by state regulations on women’s bodies, are often seen as private acts too, depoliticising this organizing. For instance, claims that involve a violent fiancé or husband, in which they may find not state protection in their society due to the lack of rights given to women may still be seen as a “personal problem” and therefore not amounting to the standard needed for international protection.³⁶⁹ All of these examples demonstrate the raised standard women asylum seekers may face when they are trying to prove that their action is political and worthy of protection.

Like the category of political opinion, gender-based persecution also contains hierarchies of what actions qualify for refugee status or not. This hierarchy will be explored with greater nuance and depth in Chapter 5, when I compare the outcomes of gender-based persecution in three countries. However, I will briefly discuss the hierarchies that many states use when they are deciding these cases. One thing to keep in mind when considering these hierarchies is that the

³⁶⁷ Bolch et al., “Refugee Women in Europe,” 171-172.

³⁶⁸ Mascini and van Bochove, “Gender Stereotyping in the Dutch Asylum Procedure,” 118.

³⁶⁹ Spijkerboer, “Stereotyping and Acceleration,” 78.

violence that can sometimes qualify as gender-based persecution can also been seen in countries that receive asylum seekers. Randall writes, “The danger of confronting the universality of women’s oppression lies in the rejoinder that women are always and never refugees- always, because they cannot confidently rely on state protection wherever they live; and never, because there is no place to which they can flee.”³⁷⁰ By granting asylum for gender-based violence, it reinforces the moral superiority of the refugee receiving country. In terms of structuring the types of gender-based persecution Kneebone separates it into three categories: sexual violence, punishment for break social codes or harm from cultural practices, or domestic violence.³⁷¹ Typically claims of physical harm especially enacted on “innocent” individuals, like cases of FGM, have been more successful.³⁷² However, the type of action is not the only consideration, but the context in which the action was performed in is hugely influential. For instance, rape may not normally be seen as a claim easily accepted as gender-based persecution, but if it is happening during a conflict, officials may be more likely to accept it.³⁷³ Some countries have argued that the types of action that qualify for gender-based persecution must only happen to females, such as FGM or forced abortion.³⁷⁴ However, this is not the case for all countries, and it seems that instead the level of violence of the action, in terms of physical violence, may be more important than whether the practice is exclusively enacted on women.

The next consideration decision makers need to take into account is who can qualify as an agent of persecution, more specifically does the person performing the action need to be a

³⁷⁰ Melanie Randall, “Refugee Law and State Accountability for Violence Against Women: A Comparative Analysis of Legal Approaches to Recognizing Asylum Claims based on Gender Persecution,” *Harvard Women’s Law Journal* 25 (2002): 282.

³⁷¹ Kneebone, “Women within the Refugee Construct,” 20.

³⁷² Freedman, *Gendering*, 128.

³⁷³ Oxford, “Where are the Women?,” 164-165.

³⁷⁴ Crawley and Lester, “Comparative Analysis,” 38.

state actor or can they also be a non-state actor. Since refugee claims are based on the idea that states must protect their citizens, if citizens are experiencing persecution they are not receiving adequate state protection. If a state agent, meaning an official associated and acting on the orders of a government, persecutes an individual, it is clear that the state has failed in protecting them. However, there has been discussions in whether states need to be held responsible for the potential persecutory actions of non-state actors. Many scholars and countries agree that an asylum seeker can qualify for refugee status based on non-state persecution if the state tolerates or does not effectively provide protection to those facing “serious harm” by non-state actors.³⁷⁵ This is of special importance for women asylum seekers who may be fleeing violence originating in the private sphere by family members.³⁷⁶ However, while many countries do on paper recognize that non-state actors can be agents of persecution, it is unclear whether this policy is implemented in practice.³⁷⁷ For instance, a study in Sweden revealed that after examining more than 130 women’s application, there was no successful gender-based claim at the hands of a non-state agent. The RWRP had similar findings stating that one of the most common reasons for rejecting an asylum application was that the abuser was a non-state agent.³⁷⁸ Therefore, women applicants may be disadvantaged if their persecution is conducted by a non-state actor, regardless of what the policies say.

In addition, women may be targeted by non-state actors due to their kinship ties. Due to the stereotype of “dependent weak women”, women are often seen as integral to a family unit. Persecutors might see that controlling, threatening, or harming women that are close to political

³⁷⁵ Crawley, *Refugees and Gender*, 49.

³⁷⁶ Kneebone, “Women within the Refugee Construct,” 24.

³⁷⁷ Crawley and Lester, “Comparative Analysis,” 58.

³⁷⁸ *Ibid.*, 64.

dissidents or an ethnic minority as an effective way to control for a larger population. Women may face sexual violence in order to emasculate their spouses or male relatives.³⁷⁹ Though a woman may not take a political stance, she still may face serious harm because of it. This can be difficult to prove in asylum claims as they may not have a detailed knowledge on the political activities of their male relatives, therefore their stories may be more likely to be incredible and rejected.³⁸⁰

Finally, even if women receive a positive outcome for their claim, they may receive residential status instead of refugee status. Residential status refers to a kind of “temporary or subsidiary form of protection” which is used in place of granting refugee status, when decision makers believe that the applicant has not demonstrated the clear link of being persecuted under a Convention ground, but it would be cruel to send them back to their country of origin.³⁸¹ As discussed last chapter, this option is a popular alternative for countries who may want to control the number of women asylum seekers they admit, and the assistance given to them, but also want to appear as a state exemplifying gender equality.³⁸² Some statistical evidence seems to support this theory. Although the percentage of these permits have decreased for both men and women, in the Netherlands there is still an almost doubled disparity between the distribution of these permits to men and women.³⁸³ While these permits do allow women to stay in the country of asylum which is better than being outright rejected, there are still negative consequences to this subsidiary status. Women may need to renew this permit annually and it may not allow for

³⁷⁹ Waylen, “Analysing Women,” 7.

³⁸⁰ Singer, “Failing at Every Hurdle,” 105.

³⁸¹ Freedman, *Gendering*, 148-149

³⁸² Mascini and van Bochove, “Gender Stereotyping in the Dutch Asylum Procedure,” 118.

³⁸³ *Ibid.*, 123.

family reunification.³⁸⁴ On a larger scale, the granting of temporary residence permits over refugee status demonstrates a decreased value in gender persecution globally.³⁸⁵

Throughout this chapter, I have explored the many roadblocks and differences that women asylum seekers may face during their asylum journey. These problems stretch from before they decide to embark on this journey to the kind of outcome at the end of it. One thing that has yet to be explored, in detail, is the trends of the outcomes of asylum cases for women applicants. In the next two chapters, I will examine these trends in three distinct contexts: the United States, Sweden, and South Africa. By examining the trends from these countries, I hope to be able to knit together a story that more accurately depicts some of the current downfalls of the international asylum system and best practices for the future.

³⁸⁴ Freedman, *Gendering*, 149.

³⁸⁵ Bolch et al., “Refugee Women in Europe,” 175.

“Chapter Four”

Women asylum seekers face a variety of different barriers when applying for refugee status because of their gender. However these obstacles do not occur for all women applicants, varying based on intersecting identities and country policies. Since these obstacles can depend on country policies, it is key to examine if there is a disconnect between legislative text and implementation in various contexts. To do this, in the next two chapters, I will explore the outcomes of asylum claims in three different countries: United States, Sweden, and South Africa. All three of these countries have gender guidelines on asylum determination. The United States was one of the earliest countries to “gender” their asylum system, announcing their guidelines shortly after Canada, which was the first country to launch gender guidelines.³⁸⁶ Sweden was noted earlier as being the country that advocated for the inclusion of “Membership of a Particular Social Group” as a Convention ground at the Conference of Plenipotentiaries. It originally excluded “gender” as a potential characteristic unifying a group under the PSG Convention ground in the late 1990s and early 2000s.³⁸⁷ However, Sweden have since reversed this legislation and aligned itself with the EU Qualification Directive, Asylum Procedure Directive, and Dublin Regulations, which aim to standardize how asylum is determined among EU member states. South Africa’s asylum system is the youngest of the three case studies. The country became party to the 1951 Convention and 1967 Protocol in 1994, and national legislation regarding refugee and asylum seeker rights came into force in 2000.³⁸⁸ Legally, it is also one of

³⁸⁶ “Report of the UNHCR Symposium,” 15-16.

³⁸⁷ Crawley, “Comparative Analysis,” 28.

³⁸⁸ Aurelia Segatti, “Reforming South African Immigration Policy in the Postapartheid Period (1990-2010),” in *Contemporary Migration to South Africa: A Regional Development Issue*, ed. Loren B Landau and Aurelia Segatti. (Washington D.C.: World Bank Publishing, 2011), 57.

the strongest asylum systems in the Global South, enshrining a liberal amount of rights to those waiting to have their claim processed in a backlogged system.³⁸⁹

These three systems, all party to the same international refugee conventions, demonstrate how diverse the interpretation of these conventions can be and the potential problems stemming from this lack of standardization. Through this comparative study, I hope to be able to draw trends in how gender is incorporated into three systems, both in regard to a gendering of the Convention grounds and how gender-based claims are processed. Do countries implement the recommendations of their gender guidelines in asylum determination? Are the four Convention grounds of race, religion, nationality, and political opinion interpreted in a way that incorporates feminine narratives? Or is anything that does not fit a traditional masculine narrative rejected? Keeping these questions in mind, are there substantial differences between the three case studies? Is there one country that is more favorable to women asylum seekers compared to the others in terms of asylum determination? Are there similar trends found in these three case studies? I will begin by first establishing a foundational background on each of the three systems, focusing on how asylum claims are processed and what gender guidelines have been incorporated into each of the countries. However, what is written in law is not always implemented correctly, so I will next examine individual decisions on asylum claims to see how the gender guidelines are applied in each of these contexts. This will allow me to explore whether these guidelines are reaching their intended purpose or whether they are being essentially ignored.

Background on Asylum Systems

United States

³⁸⁹ Lindsay Harris, "Untold Stories: Gender-Related Persecution and Asylum in South Africa," *Michigan Journal of Gender and Law* 15, no. 2 (2009): 296.

The United States asylum system, managed by the United States Citizenship and Immigration Services (USCIS), routinely receives more than 25,000 applications each year.³⁹⁰ It was one of the most powerful voices at the UN table during the creation of the 1951 Convention, though it did not originally sign and ratify the document, opting first to run its own asylum system that prioritized political dissidents from the USSR.³⁹¹ However, the U.S. chose to ascend to the 1967 Protocol in 1968, ultimately opting into the international system. The Refugee Act of 1980 codified these conventions into domestic law by establishing policies for processing asylum claims in the U.S. These procedures were instructed to be uniform throughout the U.S., but as explained below, that would not ultimately happen.³⁹² These procedures would be modified by the Illegal Immigrant Reform and Immigrant Responsibility Act of 1996, creating more stringent requirements for applicants including a time limit on filing claims and limiting the breadth of judicial review for certain cases.³⁹³ Filing procedures were again modified in 2002 when Canada and the U.S. agreed on implementing a Safe Third Country rule, preventing applicants from applying in both countries and instead forcing them to apply in the country in which they first set foot.³⁹⁴ The REAL ID Act of 2005 was the last major legislative change in asylum law and procedures. This bill makes numerous changes to asylum policy including forcing applicants to prove that their persecution was primarily based on one of the five Convention grounds, not just

³⁹⁰ Jie Zong and Jeanne Batalova, "Refugees and Asylees in the United States," *Migration Policy Institute*, June 7, 2017 <https://www.migrationpolicy.org/article/refugees-and-asylees-united-states#Asylees>.

³⁹¹ Holborn, *Refugees*, 59.

³⁹² Ruth Ellen Wasem, *U.S. Immigration Policy on Asylum Seekers*, (Washington D.C.: Congressional Research Service, 2005), 3.

³⁹³ *Ibid.*, 5.

³⁹⁴ *Ibid.*, 11.

one of the perpetrator's motives, and that immigration judges (IJs) receive more jurisdiction on dismissing claims due to credibility issues.³⁹⁵

In the United States, there are two different kinds of asylum claims which determine who is responsible for the initial judgement. Affirmative claims are ones that are either filed at the border or within the one year time limit that is set out by the Illegal Immigrant Reform and Immigrant Responsibility Act. What sets them apart is that they are initiated voluntarily by the applicant. Defensive claims are ones filed by applicants during removal proceedings. In the first case, the application is initially reviewed by asylum officers from the Department of Homeland Security while in the second case, they are first reviewed by an immigration judge.³⁹⁶ These two types of cases are significant as affirmative claims have a much higher acceptance rate (37%) compared to defensive claims (26%).³⁹⁷ However, after this initial judgement, the appeals process is the same for the two types of claims, because if an affirmative case is denied, the applicants would be placed in removal proceedings. The next step in the appeals process is going to the Board of Immigration Appeals (BIA) within the Department of Justice (DOJ). Either the applicant or Immigration Customs Enforcement (ICE) can appeal an IJ's decision within 30 days of it being announced. The BIA is the highest immigration body within the DOJ. If the applicant is again rejected, they can file "a petition for review" in the U.S. Court of Appeals, which could ultimately be reviewed by the Supreme Court if Constitutional issues are at stake.³⁹⁸ In addition to this appeals process, IJs also have the ability to deny asylum but give another form of

³⁹⁵ Aubra Fletcher, "The REAL ID Act: Furthering Gender Bias in U.S. Asylum Law," *Berkeley Journal of Gender, Law, & Justice* 21 (2006): 119-123.

³⁹⁶ U.S. Government Accountability Office, *U.S. Asylum System: Significant Variation in Asylum Outcomes across Immigration Courts and Judges*, GAO-08-940, (Washington D.C., 2008), 2.

³⁹⁷ *Ibid.*, 23.

³⁹⁸ *Ibid.*, 16.

subsidiary protection which is either withholding or deferral of removal. As the U.S. is a signatory to the 1984 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), the U.S. is prevented from returning individuals to countries where there is substantial evidence that they would be subjected to torture. This means that applicants do not need to connect their persecution to a specific Convention ground. However, there is a higher bar for evidence in these cases as applicants need to prove that they would “more likely than not” be subjected to this kind of torture.³⁹⁹ In addition, these types of protections do not come with many of the benefits associated with refugee status such as permanent resident status or family reunification. Finally, a judge may choose to grant voluntary departure within a certain time period instead of placing the applicant through full removal proceedings and being deported.⁴⁰⁰

As stated above, the U.S. asylum gender guidelines were launched relatively early, emerging in May 1995. Like in Canada, they were formed in consultation with domestic NGOs and law clinics.⁴⁰¹ The guidelines cover two areas: training asylum officers to receive applications in a gender sensitive manner and adjudicating claims with gender dynamics in mind. In their training, asylum officers are encouraged to consider how trauma can affect how an applicant recalls their stories, warning against relying on physical signals, and excusing memory loss as a symptom of trauma. In addition, it requires reliance on country of origin reports that are generated by the Resource Information Center, specifically including the conditions of sexual

³⁹⁹ Andrea L. Courtney, “Addressing the Horror Stories: How the Convention Against Torture Offers a Promising Answer to U.S. Asylum Seekers Fleeing Female Genital Mutilation,” *The Georgetown Journal of Gender and the Law* 1 (2000): 900-901.

⁴⁰⁰ U.S. GAO, *U.S. Asylum System*, 16.

⁴⁰¹ *Guidelines, Office of International Affairs, Immigration and Naturalization Service, regarding adjudicating asylum cases on the basis of gender*, Immigration and Naturalization Services, May 26, 1996, <https://www.state.gov/s/l/65633.htm>

and domestic violence in countries of origin.⁴⁰² As identified last chapter, one of the problems that women asylum seekers can face is that the information on the socio-cultural conditions are not included in these country reports. Therefore, the U.S. guidelines are an encouraging sign, that in theory, should prevent this problem. In terms of the interview process, the guidelines state that all asylum officers can conduct interviews, but that women asylum seekers can request female officers to interview them. However, if there are personnel restraints, these requests will not be honored, signaling a problem discussed previously about bureaucratic constraints. The second part of the gender guidelines focus on claim determination. The guidelines recognize that there are valid gender-based claims, and that they must be adjudicated considering other international documents such as Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) and the Declaration on the Elimination of Violence Against Women. The U.S. guidelines mainly focuses on how certain acts of gender-based violence can amount to the level of “persecution”, and therefore be accepted as asylum claims. It lists acts such as domestic violence, Female Genital Mutilation (FGM), forced marriage as types of GBV, but it also stresses that the acts themselves do not constitute a successful claim. Rather, “whether an instance of harm amounts to persecution on the basis of the general principles set out above,” is a situation with a successful claim. Therefore, the guidelines do not limit what can constitute as a persecutory act of GBV, but rather define it more broadly as “forms of harm” that are more commonly enacted upon women.⁴⁰³ However, this logic then equivocates gender-based violence with violence against women (VAW) and does not discuss if men are able to file asylum claims of GBV. In terms of the binding strength of these guidelines, they are only binding to USCIS

⁴⁰² Ibid.

⁴⁰³ Ibid.

asylum officers and not immigration or appellate judges.⁴⁰⁴ This lack of binding strength disproportionately affects defensive asylum claims which are never heard by an asylum officer, but rather go directly to an immigration judge. Therefore, it is more likely that defensive claims will be adjudicated without adherence to these gender guidelines.

The lack of binding strength of the guidelines reflects a unique challenge of the U.S. asylum system, decentralization. Immigration judges are located all across the country and according to a 2008 GAO report, following asylum cases from October 1994 to April 2007, there are numerous significant judge-centered factors that affect the outcome of asylum cases. Theoretically, as IJs follow the same law, draw off the same country reports, and adhere to the same guidelines, their decision making process should be similar. But factors such as the gender of the judge and their geographic location significantly matter. For instance, male IJs are only 60% as likely to grant asylum as compared to their female counterparts.⁴⁰⁵ There are also disparities in the acceptance rates of regional immigration offices. When comparing the success rates of Peruvian affirmative applicants in the New York and Newark office, they were 2.5 times as likely to receive asylum in New York than in Newark, despite their geographical proximity and most likely similarity in claims.⁴⁰⁶ Since immigration judges are appointed to their position by the Attorney General, it is not the politics of the local district that is causing this disparity.⁴⁰⁷ The study does not speculate why this may be the case, but it may be something within the office atmosphere of the regional offices. This decentralization has only increased with the REAL ID

⁴⁰⁴ Aubra Fletcher, "The REAL ID Act: Furthering Gender Bias in Asylum Law," *Berkeley Journal of Gender, Law & Justice* 21, no. 1 (2006): 114-115.

⁴⁰⁵ U.S. GAO, *U.S. Asylum System*, 8.

⁴⁰⁶ *Ibid.*, 24.

⁴⁰⁷ "Immigration Judges," *U.S. Citizenship and Immigration Services* (accessed April 24, 2018), <https://www.uscis.gov/tools/glossary/immigration-judge>.

Act in terms of the increased the judicial discretion of IJs on the applicant's credibility.⁴⁰⁸

Therefore, despite their early progress with gender guidelines, the U.S. system has a huge potential to being particularly unfair towards women asylum seekers.

Sweden

Parusel argues that Sweden's immigration policies and by extension its asylum policies are one of the most "progressive and ambitious" in the world.⁴⁰⁹ It is one of the most popular countries to claim asylum in the EU, registering the second highest per capita number of applicants in 2014.⁴¹⁰ It is one of the few states that provide gender aggregated data on the number of asylum seekers supplying that 114,728 men, 70,384 children, and 48,149 women applied for asylum in 2015.⁴¹¹ However, its liberal policies have been under threat in recent years due to domestic pressures responding to the Syrian refugee crisis. Public pressure, along with bottleneaking in processing asylum seekers, changed the granting of open-ended residence permits to fixed terms ones in cases of subsidiary protections. These measures also made family reunification harder to obtain. However, these tightened policies were only limited and are set to expire in October 2018.⁴¹²

Despite these temporary policies, the country remains one of the most liberal in affording asylum seekers rights throughout the application process. When applicants apply for asylum they can declare at the border or at one of the Sweden Migration Agency offices. Unlike in the U.S.,

⁴⁰⁸ Fletcher, "The REAL ID Act," 121.

⁴⁰⁹ Bernd Parusel, "Sweden's Asylum Procedures," *Bertelsmann Stiftung* (2016): 3.

⁴¹⁰ *Ibid.*, 2.

⁴¹¹ *Ibid.*, 2.

⁴¹² *Ibid.*, 3-4.

Sweden does not appear to have a strict time limit for filing a claim.⁴¹³ The next step is a screening interview which determines what Convention ground their claim fits under. Unlike in the U.S., this first interview is not used to determine the legitimacy of their claim, but rather allow officials to better understand an applicant's claim. If it does not cleanly fit under one of the five Convention grounds, they will receive legal assistance. However, like in the U.S., not all applicants receive legal representation in the first part of their claim. Rather those that are in deportation proceedings or on appeal receive this legal representation.⁴¹⁴ The Migration Agency is the first body that reviews each claim to asylum, and they base their decision on relevant refugee law. If rejected they may file for appeal in the Migration Court within three weeks of their decision.⁴¹⁵ On appeal, this claim is first reviewed by the Migration Agency who may revise their earlier decision. If the Agency does not revise this, then it moves onto the Migration Court and finally it may be appealed to the Migration Court of Appeals.⁴¹⁶ This is the highest immigration court in Swedish jurisdiction, but as will be explained below, a case can then be appealed to the European Court of Human Rights (ECHR) under specific circumstances. Only the Migration Court of Appeals can issue precedent setting decisions.⁴¹⁷ Asylum claims appeals are usually unsuccessful. In 2015, there were 11,000 appeals in which 4.6% were granted favorable protection status (refugee or subsidiary) by the Migration Court.⁴¹⁸ In addition to granting asylum status, Swedish courts favor granting subsidiary protection and have higher rates

⁴¹³ "How to Apply for Asylum," *Sweden Migration Agency* (accessed April 25, 2018), <https://www.migrationsverket.se/English/Private-individuals/Protection-and-asylum-in-Sweden/Applying-for-asylum/How-to-apply-for-asylum.html>.

⁴¹⁴ *Ibid.*, 8.

⁴¹⁵ *Ibid.*, 12.

⁴¹⁶ "Short Overview of the Asylum Procedure, Sweden," *Asylum Information Database*, (accessed March 1, 2018), <http://www.asylumineurope.org/reports/country/sweden/short-overview-asylum-procedure>.

⁴¹⁷ *Ibid.*

⁴¹⁸ Parusel, "Sweden's Asylum Procedures," 13.

of granting this than other EU states.⁴¹⁹ Prior to November 2015, there were three types of legal protection status that could be granted: refugee status, “persons deemed in need of subsidiary protection”, and “persons in need of other protection”. To receive the second type of protection, an applicant does not need to qualify for refugee status, but they must prove that they may face inhumane treatment or “serious risk of injury” due to violent circumstances if they are returned to their country of origin. The third type of legal protection was awarded to applicants who needed protection due to armed conflicts or tensions within a country. This type of protection had the lowest threshold to prove a threat to an applicant's safety, and it was removed from Swedish law in 2015, aligning its domestic legislation with other EU states.⁴²⁰ However, the second type of protection is still available. Finally, some asylum seekers are able to switch tracks in the immigration process if they, “have been employed for at least four months when receiving a final negative decision”. They are able to apply for an employment-based residence permit, but this is typically awarded to a very small number of applicants, only 237 in 2014.⁴²¹

Since Sweden is one of the only countries that provides comprehensive gender aggregated statistics, it is possible to see its popularity and success rates compared to other EU countries and male asylum applicants. Between EU countries, they received the highest percentage of women asylum seekers (38%) compared to male asylum seekers in 2010. In terms of the applications, women asylum seekers have a higher positive decision rate, meaning being granted refugee status or subsidiary protection, compared to male asylum seekers in that same period. 8% of women applicants received refugee status compared to 5.15% of men and 23.5%

⁴¹⁹ *Gender Related Asylum Claims in Europe*, (Brussels: European Parliament Policy Department: 2012), 23.

⁴²⁰ “Refugee Law and Policy: Sweden,” *Library of Congress* (Last Updated June 21, 2016), <https://www.loc.gov/law/help/refugee-law/sweden.php>.

⁴²¹ Parusel, “Sweden’s Asylum Procedures,” 14.

of women received subsidiary protection while only 19.5% of men received this decision.⁴²² This demonstrates two things. First that Sweden favors subsidiary protection over refugee status and has a high acceptance rate compared to other countries, like the U.S.. Second, either women's claims may fit into Swedish ideas of asylum and humanitarian protection or there is a gender bias in favor of women that may come out of Western countries thinking they gain moral superiority by admitting women due to gender based claims.⁴²³

While not being the first country to adopt gender guidelines, Sweden was one of the earlier ones to do so in 2001. It issued guidelines specifically for LGBTQ claims in 2002, which are usually thought of as under the umbrella of gender-based claims. Unlike in the U.S., these guidelines have been regularly revised in 2006, 2009, and 2010. However, like the U.S., these guidelines are not legally binding which again poses the problem of inconsistent implementation.

⁴²⁴ One methodological problem I encountered while trying to investigate what these gender guidelines seek to protect is that there was not a copy of the guidelines translated into English that could be easily accessed. Therefore, I had to rely on secondary source analysis on both the guidelines and preparatory works to gain a clearer idea of the aims and protections embedded in these guidelines. Preparatory works are influential in Swedish law as they are considered to be "important sources of law" and are used to guide decision makers at both the Migration Board and Courts of Appeal.⁴²⁵ Analysis on preparatory works and domestic legislation reveals that there are two major components of Swedish gender guidelines. First is the gendering of the Convention grounds. It states that all five Convention grounds may be relevant for gender-based

⁴²² *Gender Related Asylum Claims*, 22-23.

⁴²³ Mascini and van Bochove, "Gender Stereotyping in the Dutch Asylum Procedure," 118.

⁴²⁴ *Ibid.*, 30.

⁴²⁵ *Ibid.*, 30.

claims. The preparatory works give examples about how the grounds of political opinion and religion, including violations of gendered social roles and norms, could be valid asylum claims.

⁴²⁶ Though the preparatory works claim this, originally the guidelines did not explicitly require decision makers to take a gender sensitive approach to these grounds. However, with the adoption of the 2011 Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, Sweden has been required to take a gender sensitive approach to these grounds.⁴²⁷ Secondly, the guidelines mainly focus on how gender-based claims fit into the category of Particular Social Group (PSG). Swedish domestic asylum policy supplements this as it explicitly states “gender, sexual orientation, or other membership of a particular social group,” are grounds for asylum.⁴²⁸ Therefore, it should not be a question whether gender-based claims qualify as a PSG under asylum law. Instead, the focus on these claims should be whether they are considered severe enough to qualify as persecution. The preparatory works give decision makers even more guidance when adjudicating this, stating that forced abortion or sterilization may amount to persecution. However, other actions like gender discrimination are not discussed if those acts reach the threshold of persecution.⁴²⁹

The unique aspect of the Swedish asylum system is that it is not only governed by domestic legislation, but as an EU state, it is subjected to various EU policies that govern this process. As party to the Treaty of Lisbon, European Convention on Human Rights, and other legislation, Sweden is legally bound to certain agreements and when this is not followed properly, it can be appealed to courts above Sweden, particular the European Court on Human

⁴²⁶ Ibid., 57.

⁴²⁷ Ibid., 45.

⁴²⁸ Ibid., 50.

⁴²⁹ Ibid., 11.

Rights (ECHR). One of the earliest pieces of legislation is the Qualification Directive of 2004, which was revised in 2011. This aimed to standardize the requirements to qualify as a refugee or for subsidiary protection across EU countries. It used the 1951 Convention as its base but goes further to help define Particular Social Group. The Directive did not require EU member states to include gender or sexual orientation as a group under this Convention ground but says that those groups must be “given due consideration” to qualify as such.⁴³⁰ It also required states to broaden their definition of what is considered to be persecution, not simply physical violence but also mental trauma and legal restrictions on identity such as laws prohibiting homosexuality.⁴³¹ It also stated that non-state actors can be the agents of persecution in the absence of adequate state protection.⁴³² The next major legislation on the subject was the Dublin Convention of 2013 which standardized a system for which countries examine an asylum claim, preventing it from being heard by two different member states.⁴³³ It established a system and set of criteria to determine whether one country or another hears the case.⁴³⁴ It presumed that because of the Qualification Directive, asylum outcomes should be either the same or very similar country to country, therefore if they are tried more than once it will only backlog the system. However this logic is problematic for two reasons. First, it assumes that all member states party to this are essentially safe and “comply with the EU Charter of Fundamental Rights”, however gender-based violence is still prevalent in the EU.⁴³⁵ Second, it assumes that gender guidelines

⁴³⁰ “Directive 2011/95/EU of the European Parliament and of the Council,” *Official Journal of the European Union* 337, (2011): 11.

⁴³¹ *Handbook on European law relating to asylum, borders and immigration/* (Luxembourg: Publications Office of the European Union, 2014), 67.

⁴³² *Gender Related Asylum Claims*, 43.

⁴³³ “Convention Determining the State Responsible for Examining Applications for Asylum Lodged in One of the Member States of the European Communities,” *Official Journal of the European Communities* No C 254, (2013): 3.

⁴³⁴ *Handbook on European law*, 82.

⁴³⁵ *Ibid.*, 81.

between EU countries will be the same, but they vary in strength and substance.⁴³⁶ The final EU legislation relating to asylum law is the Asylum Procedures Directive of 2013, which like the previous legislation sought to standardize the intake and timeline procedures for adjudicating claims. This includes guaranteeing applicants' rights to being informed of the asylum appeals process and having access to an appropriate translator. In addition, it strongly recommends that the interview is conducted without family members present, which might make women asylum seekers more likely to recall their experiences.⁴³⁷

Finally, this legislation, along with the European Convention on Human Rights, allows for cases to be appealed above the Swedish national system to the ECHR. Not all asylum cases do qualify on this appeal as they have to demonstrate they have reasonable belief that their removal would violate an article of the European Convention on Human Rights, not just that they think that their asylum claim was inappropriately judged according to the Qualification Directive.⁴³⁸ This convention applies to all people living in member states, not just member states' citizens, which is why asylum seekers can use this convention. Articles pertinent to asylum are Article 2 (right to life) and Article 3 (prohibition of torture or inhuman treatment or punishment).⁴³⁹ General violent conditions of a country usually do not constitute a violation of these articles, but rather the applicant needs to demonstrate individual circumstances that may exacerbate the intensity of violence.⁴⁴⁰

South Africa

⁴³⁶ "Review of Gender, Child, and LGBTI Asylum Guidelines," 6-60.

⁴³⁷ *Handbook on European law*, 97-98.

⁴³⁸ *Ibid.*, 45.

⁴³⁹ *Ibid.*, 63.

⁴⁴⁰ *Ibid.*, 71.

Of the three systems in this study, South Africa is the only country that has gone from a “refugee producing” to a “refugee receiving” country in the past 30 years. Until the democratic transition in 1994, their strong border largely prevented migration to the country. In addition, it produced its own refugees due to the country’s harsh conditions, and the policies of President Botha in the 1980s which launched a “regional destabilization” strategy that ultimately contributed to the creation of new regional conflicts which produced more refugees.⁴⁴¹ However, since the 1994 democratic transition, the country has flipped and receives more asylum seekers than any other country. In 2006, 20.2% of those asylum seekers were women.⁴⁴² Legally, it has been viewed as one of the most progressive asylum systems, but it faces huge bureaucratic challenges.

South Africa did not opt into the international asylum system until 1998, therefore the filing process is quite new. The 1996 Constitution is the foundation for asylum law. This document provides fundamental rights to all within the borders of South Africa, therefore it applies to asylum seekers. In addition, the 1998 Refugee Act not only incorporated South Africa into the system and rights created in the 1951 Convention, but they also joined the 1969 African Union Convention Regarding the Specific Aspects of Refugee Problems. This convention broadens the refugee definition compared to the 1951 Convention as it includes individuals who are facing generalized violence not just those that have been individually targeted in armed conflicts.⁴⁴³ Unlike in the U.S. or Sweden, asylum seekers have a much shorter timespan to claim asylum, within fourteen days of entry into the country. They must either claim it at the border or at one of five Refugee Reception Offices. The Department of Home Affairs (DHA) manages this

⁴⁴¹ Segatti, “Reforming South African Immigration Policy,” 50.

⁴⁴² Harris, “Untold Stories,” 292.

⁴⁴³ Ibid., 295- 297.

process. Afterwards, they are issued a residential permit, which needs to be renewed every 30 days at one of these offices. Refugee Status Determination Officers (RSDOs) interview applicants, and they can either accept the claim, reject it as “unfounded”, or reject it as “manifestly unfounded”.⁴⁴⁴ This distinction is important, because it affects who the asylum claim will be appealed to. If the claim is found to be unfounded, the appeal can move to the Refugee Appeals Board (RAB), in which the applicant usually appears without legal representation. If it is manifestly unfounded, meaning that the application is, “failing to fall within reasons for asylum granted by the Refugee Act” then it moves to the Standing Committee for Refugee Affairs (SCRA), which is a three person review board with one Chairperson.⁴⁴⁵ Finally, it can be referred to a judicial review by the South African High Court.⁴⁴⁶ If the application does not succeed, the asylum seeker is subject to arrest and deportation.⁴⁴⁷

South Africa’s gender guidelines are rooted in two distinct sources. First is domestic legislation that explicitly includes gender as a ground for asylum. In 2007, South Africa amended its 1998 Refugees Act to include gender as a ground for asylum, not simply as an interpretation of what a Particular Social Group is like in Sweden and the U.S.. Globally, this is significant as South Africa is the first country to add a ground to the 1951 Convention definition.⁴⁴⁸ Therefore, the definition now reads, “Owing to a well-founded fear of being persecuted by reason of his or her race, gender, tribe, religion, nationality, political opinion or membership of a Particular

⁴⁴⁴ Ibid., 298-299.

⁴⁴⁵ Ibid., 300.

⁴⁴⁶ Moyosore Odunayo, Lucky E. Asuelime, and Andrew E. Okem, “South African Policy on Migration and its Alignment with the UNO Charter on Refugees and Asylum-seekers,” *Journal of African Union Studies* 6, no. 1 (2017): 89.

⁴⁴⁷ Ibid., 88.

⁴⁴⁸ Harris, “Untold Stories,” 300.

Social Group.”⁴⁴⁹ The second source originates from the National Consortium for Refugee Affairs, a coalition of NGOs, who have created a set of non-legally binding guidelines for the South African government to adopt.⁴⁵⁰ The government has referenced these guidelines in the past, but it is unclear how they have been integrated within Department on Home Affairs on a day to day basis. In addition, these guidelines are hard for the public to access which makes it difficult for scholars or advocates to monitor the recommendations in these guidelines, and if the DHA is following them.

There are two unique aspects of the South African asylum system that sets it apart from the other case studies. First, as mentioned before, is the relative youth of this system which turns out to be beneficial for gender-based claims. Since the creation of an asylum system occurred during the democratic transition, there was an obvious need to break from the past policies. Segatti explains that the migration policy in apartheid South Africa functioned to allow those that matched the background of the ruling minority to migrate, while at the same time preventing Africans from permanently migrating, instead only allowing temporary permits for cheap labor.⁴⁵¹ Only in the early 1990s did South Africa start engaging with the UNHCR and created agreements to give Mozambicans, who had fled to South Africa, refugee status, even though the country was not party to the 1951 Convention. However, this agreement was tenuous at best as many of those who should have qualified under this agreement continued to be deported into the late 1990s.⁴⁵² While these were certainly the drawbacks for not having a system in place, it meant that during and right after the democratic transition, politicians were building from scratch.

⁴⁴⁹ South Africa, “Refugees Amendment Bill”, (Act No. 33, 2008) *Government Gazette* 31643: 4, November 26, 2008.

⁴⁵⁰ Harris, “Untold Stories,” 306.

⁴⁵¹ Segatti, “Reforming South African Immigration Policy,” 49.

⁴⁵² *Ibid.*, 51.

Constructing this system would not prove to be as easy as some advocacy groups would have hoped. These groups had incorrectly equated democratization with liberalization of immigration policies, which did not initially happen. Instead critiques pointed to the increasingly xenophobic tone that the government and citizens were taking on the subject, pointing out the hypocrisy in it because of South Africa's past regional destabilization measures.⁴⁵³ This surge of xenophobia was tackled by advocacy groups who utilized their networks and mobilized to push for a migration policy that was strongly anchored in human rights.⁴⁵⁴ In 1996, the Minister of Home Affairs, created a committee of these NGOs to assist the government in creating new policies on refugees, asylum seekers, and immigrants.⁴⁵⁵ Since 1994, these activist groups had been thinking about how they could use legal strategies to achieve favorable rights for asylum seekers and migrants, so they already had the expertise in identifying which rights needed to be prioritized and protected.⁴⁵⁶ Therefore, this opportune moment of institutional reform combined with the experience of organizations within the Task Team helped facilitate the creation of a more liberal asylum regime, where gender came as an additional Convention ground. The timeline also coincided with the period when many countries were re-evaluating gender in their asylum system, therefore these conversations around how gender-based asylum claims could be integrated into current systems would have been happening at the international stage and most likely trickled down to the domestic level.

Despite the victory of having a progressive asylum regime, the system faces bureaucratic challenges including a huge backlog, placing many asylum applicants in a legal limbo for years.

⁴⁵³ Ibid., 54-55.

⁴⁵⁴ Ibid., 56.

⁴⁵⁵ Odunayo et al., "South African Policy on Migration," 85.

⁴⁵⁶ Segatti, "Reforming South African Immigration Policy," 57.

⁴⁵⁷ It currently has the largest backlog of any asylum system with more than 1 million cases pending in 2014.⁴⁵⁸ This is mainly because the system managed by the DHA simply does not have the capacity to review the number of asylum applications it receives.⁴⁵⁹ For the cases that it examines each year, South Africa has a notoriously low acceptance rate, granting only 15.5% refugee status in 2011, a percentage drastically lower than both the U.S. and Sweden.⁴⁶⁰ Therefore, the major problem in this system is not the legal rights afforded on paper but how and when these rights are afforded to asylum seekers.

Methodology for Comparative Study

In order to understand and compare how these gender guidelines are implemented in these three different contexts, I first drew off published case decisions for asylum claims. While looking at a case, I identified who was the applicant, where they were from, whether this was a favorable or negative decision, and what was their primary reasons for claiming asylum. I limited my scope to those claims in which women or gender minorities (trans/ non-binary applicants) were either listed as the primary applicant or a dependent to the applicant. The one exception to this is when I looked at cases of sexual orientation, in which I investigated claims of both male and female homosexuality. I discarded cases if I could not distinguish the gender of the applicant or their reason for their claim. I grouped cases together under similar categories for persecution (ex. forced sterilization or gang rape). Afterwards, I identified the legal justification for whether an asylum claim was granted refugee status, given subsidiary protection, or outright rejected. I prioritized looking at primary sources of case law or translated versions of these primary sources

⁴⁵⁷ Harris, "Untold Stories," 296.

⁴⁵⁸ "Global Trends, Forced Displacement 2015," *UNHCR*, (2016): 44.

⁴⁵⁹ Harris, "Untold Stories," 302.

⁴⁶⁰ Odunayo et al., "South African Policy on Migration," 83.

in Sweden's case. However, I supplemented my research with secondary sources drawing on independent NGOs' records, for instance in the U.S. using the *Center for Gender and Refugee Studies* database, or scholars' interviews with asylum applicants, Roni Amit's and Kelsey VanOverloop's work with South African asylum seekers, in order to create a more comprehensive and comparative picture between the three systems. I understand the potential bias in secondary sources as there might be self selection of which cases to highlight in research articles or databases, but I weighed having a more comprehensive case comparison over this potential bias. In addition, this is only a sampling of the case law, especially for the United States, but one in which I tried to include at least one positive and negative outcome for a certain type of claim to understand the differing reasons behind the conclusion of a claim. It is also important to note that in the United States, I only looked at cases up until January 2017 due to the change in Presidential administration which vastly affected the tone and direction of the Department of Justice, and in which cases may still be in the appeals process before it sets a precedent.

My three main limitations in this study were barriers to translation in Swedish case law, the lack of public electronic decisions in South Africa, and the types of cases available in the U.S.. Since I am not fluent in Swedish, I had to rely on the translated versions of case law, therefore there could be more cases that either offer an alternate outcome or discuss a specific type of claim that have yet to be translated. For South African cases, though they had been released in English, because of the low resources already allocated to the Department of Home Affairs, many of the decision were not posted online. Instead I needed to supplement these primary source documents with secondary source research. Finally, in the United States, cases

that had been heard by the U.S. Court of Appeals were more likely to be available online than individual decisions from immigration judges where claims are first processed. Therefore, there might be a self selective pool of those who know how or are informed of their rights to appeal and therefore be heard by a circuit court. These might have been more successful than the majority of cases processed in the asylum system in the U.S..

Comparison of Race, Religion, and Political Opinion Claims in Case Law

The four Convention grounds of race, religion, political opinion, and nationality are more clearly defined in international asylum law than membership of a Particular Social Group. However, often times when talking about gender-based claims they are assumed to be under the fifth, unclearly defined category, which as explained before and which will be elaborated on in the fifth chapter can severely disadvantage women asylum seekers in the asylum process. But as discussed before, Sweden and the U.S. have recommended that these first four categories can be interpreted to include many gender based claims or women's claims which do not fit masculine narratives. Therefore, it is important to look at women's claims in these categories. Claims on nationality were not as common in my research, therefore I will be looking at the first three Convention grounds.

Race

In the three cases considered by both Sweden and South Africa, all the claims of persecution due to race involved fleeing a violent conflict where the applicants felt that they were at a heightened risk due to their ethnicity. In terms of asylum law, race and ethnicity are not seen as distinct categories. Both Sweden and South Africa decide whether the armed conflict is “vastly over” to first judge whether a claim is valid or not. In *NACIC and Others v. Sweden*, a

Roma family had fled during the Kosovo war, because the father did not want to join the armed forces, which caused the family to be threatened and beaten by the Serbian military. They hid from 1999-2006 in complete isolation, before applying for asylum in Sweden. They were originally rejected under Swedish domestic courts and appealed to the ECHR under Article 3 of the Convention, because of the harassment they faced and the lack of medical facilities in post-war Kosovo and Serbia. The majority of the family members suffered from trauma requiring medical treatment. However, the court rejected the argument that, “institutional and societal discrimination” or having an underdeveloped mental health system was a high enough level of violence to be considered, “inhuman treatment”. The Court also questioned why the applicants waited for 7 years between when the traumatic events occurred and when the application was lodged, indicating that despite documented discrimination, the Court thought it would be safe for the applicants to return to Kosovo.⁴⁶¹ Therefore, discrimination does not meet the threshold of persecution in Sweden.

However, in the South African cases, the High Court reviewed the country information and found that the cases had been improperly assessed, and because of the applicants’ ethnicity, they would be at a greater risk to violence in these regions. In *FAM v. Minister of Home Affairs et al.*, a woman of mixed Ethiopian and Eritrean heritage applied for asylum, fleeing after the Ethiopian-Eritrean war. Her mother, ethnically Eritrean had been expelled from Ethiopia when the applicant was young, while her father had been killed by Eritrean soldiers. The Court did not question this mixed heritage even though she never held Ethiopian identity documents⁴⁶², while in Sweden the Roma family’s heritage was questioned for this reason.⁴⁶³ Therefore, corroborative

⁴⁶¹ *Nacic and Others v. Sweden*, Application No. 16567/10, (ECHR 2012).

⁴⁶² *FAM v. Minister of Home Affairs et al.*, Case No. 6871/2013, (High Court 2014).

⁴⁶³ *Nacic and Others v. Sweden*.

evidence may be more highly valued in Sweden than South Africa. FAM made the case that neither country would give her citizenship because of her mixed heritage, therefore she would be made stateless.⁴⁶⁴ While in *Ekachi v. SCRA*, a young woman of the Bembe ethnic group in Democratic Republic of the Congo had been targeted by the Wanyamurenge rebels throughout her childhood because of her ethnicity.⁴⁶⁵ In both cases, the High Court assessed that tensions were still present in either conflict due to the country information, therefore they were at risk for future persecution. It is important to note that both of these cases mentioned sexual assault experienced by the applicants, but only in *Ekachi* was that examined as an additional claim. The judge stated that she was not only targeted because of her membership to the Bembe group, but also because of her gender, and that rape had been used to fulfill “military/ political objectives”, demonstrating that he believed that the act was not a private matter but rather had a political reason. Therefore, by compounding the risk of persecution by placing a gendered claim on top of the ethnicity claim, the judge was making it more likely for the applicant to be granted asylum.⁴⁶⁶ The opposite happened during the appeals process for *FAM* in which the Chairperson for SCRA stated that the applicant’s rape should be, “downgraded to sexual assault” in her testimony, implying that sexual assault is a lesser form of violence, not meeting the threshold of persecution. While the High Court does reprimand the Chairperson for this statement, it demonstrates that the treatment of sexual violence depends on the judge in South Africa.

Religion

Traditionally, religious persecution has been interpreted as either being prevented from practicing one’s religion due to harsh state laws or being forced to practice a religion that stands

⁴⁶⁴ *FAM v. Minister of Home Affairs*.

⁴⁶⁵ *Ekachi v. SCRA and Others*, Case No. 22970/16 (High Court 2017).

⁴⁶⁶ *Ibid.*

in opposition to an individual's beliefs. However taking into account that religion, especially conservative interpretations of religions, can regulate a woman's appearance, rights, and role in society, a gendered lens on religion-based claims would include claims where women are acting outside of dominant religious norms. Since religion deeply influences social interactions, violation of social norms must be included under this. This Convention ground often crosses over with political opinion as violating a religious norm may also be a protest against a religiously grounded government.

In U.S. cases where women are protesting or violating religious norms, courts are more likely to accept a claim of a woman who can prove she has violated these norms in the past. Women stating objections to these norms and then complying with them are looked at with doubt. For instance, in *Fisher v. I.N.S.*, an Iranian woman applied for asylum due to repeated interactions with state agents in which she was accused of violating religious laws. She was detained after a neighbor reported that she was present when a man was changing into a swimsuit and for having some hair outside her veil. In her testimony, she states that she finds that the Iranian moral codes are, "abhorrent and because the regime is attempting to suppress her beliefs through sanctioning her for noncompliance." Because of these past incidents of non-compliance, the Court of Appeals ruled that she was at risk for future persecution.⁴⁶⁷ However in *Sharif v. I.N.S.*, testimonial opposition to these moral codes was not seen as reaching the level of persecution. Rather she was negatively judged by the Court for conforming to the social codes, despite her "pro-western" beliefs. Therefore, she was not seen as being at more risk than the general population and that her beliefs were not fundamental to her identity.⁴⁶⁸ In order to

⁴⁶⁷ *Fisher v. I.N.S.*, 79 F.3d 955 (9th Circuit 1996).

⁴⁶⁸ *Sharif v. I.N.S.*, 87 F.3d 932 (7th Circuit 1996).

receive asylum in the U.S. for violating religious norms, it appears that an applicant may have to put themselves at risk of ostracization or torture.

At Sweden's national level, the Courts are less likely to look at whether an individual has performed an exceptional act that violates religious norms, but rather if the country information lines up with the claim. For instance, a Senegalese woman converted to Christianity from Islam when marrying a Nigerian man. However, when living in Nigeria her husband disappeared and she could not live there as a single mother as she did not have a right to residence. Therefore, she fled to Sweden rather than being forced back to her mother's family where she claimed she was at risk for being killed due to her conversion. The Migration Board ruled that this woman qualified for international protection, but had originally ruled against her as they thought she could have obtained the protection in Nigeria.⁴⁶⁹ Sweden had never ruled against the legitimacy of her claim despite it not being an extraordinary act of protest. A second case regarding a converted Iranian Christian couple also demonstrates that Sweden is willing to use country information to verify claims. In this case, there was confusion over who had harassed and beaten the couple which is why they were originally rejected. However, the Migration Court ruled in favor of the application, because they noted that there had been a gradual worsening of conditions for Christian converts in Iran, and this group was regularly punished with long jail sentences.⁴⁷⁰

Finally, for cases coming to the ECHR, the Court cares about whether these strict religious norms are spread geographically, and like the U.S. cares more about the individual

⁴⁶⁹ *UM 2675-10*, (Migration Court 2010),

<http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-4-november-2010-um-2675-10#cont>.

⁴⁷⁰ *UM 20800-10*, (Migration Court 2011),

<http://www.asylumlawdatabase.eu/en/case-law/sweden-%E2%80%93-migration-court-27-april-2011-um-20800-10#cont>.

circumstances. In *Case of M.Y.H and Others v. Sweden*, an Iraqi Christian family fled Baghdad after facing increased harassment, fear of their daughter being kidnapped, especially after their son was part of an attempted kidnapping, and fear of being forced to wear a veil. However, the Court attributed the individual circumstances of the man owning a shop as the reason for a fear of blackmail and kidnapping. Therefore, it would be a economic motivation rather than a religious motivation. In addition, while the Court acknowledged that Iraqi Christians faced severe discrimination and risk for violence in Baghdad, the conditions were not the same throughout the country. The Court pointed to the Kurdistan Region in which many non-Muslims had fled to, considered it to be “relatively secure”. Despite objections by the family that they could not speak Kurdish and had no ties to the region, this was deemed as reasonable internal flight and therefore their claim was rejected.⁴⁷¹ However, the country information that is used to justify this skips over whether it is safe for men and women or whether women’s safety was taken under consideration in this assessment. Conversely, in the case *N v. Sweden*, an Afghan woman who had fled with her husband due to their political activity, but while in Sweden wanted to divorce him was granted asylum. She argued that she would not be able to divorce her husband in Afghanistan, and because she had started a relationship with another man, that she would be at risk for persecution due to “adultery”. The country information supported this claim and did not suggest that there were areas in which these religious norms were less conservative, therefore she was granted asylum.⁴⁷²

Political Opinion

⁴⁷¹ *M.Y.H and Others v. Sweden*, Application No. 50859/10, (ECHR 2013).

⁴⁷² *N. v. Sweden*, Application No. 23505/09, (ECHR 2010).

Claims of persecution due to political opinion have the potential to be interpreted broadly to incorporate acts of civil disobedience, providing support to dissident groups, or facilitating safe house networks. However, often times as explained in Chapter 3, political opinion has been interpreted as only acts in the public sphere, directly condemning a government or policy and calling for collective action against it. This follows a masculine narrative as many women have been excluded from this public sphere. While UNHCR gender guidelines encourage gender aware analysis on political opinion, in all three case studies, traditionally public actions are more likely to be accepted than other forms of political activity.

In the United States, there is little discussion about how gender may shape these actions and instead the assumption is that public, overtly political actions are the ones that qualify. In *Matter of Krome*, a Haitian woman who was a part of a political church group that raised money for an ex-president. She was originally rejected as the immigration judge had ruled that her activities were not substantial enough to create a link between persecution and the Convention ground. However, she had been targeted by soldiers, threatening her life and ultimately gang raping her.⁴⁷³ The Court of Appeals overruled this decision and granted her asylum, but this demonstrates that some judges see the work of party leaders is inherently more political than the work of grassroots organizers, which has a gender bias too as leaders tend to be more male-dominated. Actions that are not directly linked to the traditional political sphere have an even harder time being accepted. In *Wei v. Attorney General*, Wei argued that she was at risk for persecution for selling a product related to her practice of qigong, which she believed controlled the gender of a fetus. Gender differentiation activities are banned in China, therefore her

⁴⁷³ *Matter of Krome*, Interim Decision #3252 (BIA 1993).

company was shut down by the state and two employees were arrested. However, she viewed this law as discriminatory against qigong practices, and by breaking it she was engaging in a form of political protest against the state. The Court did not buy this link, therefore she was not given asylum.⁴⁷⁴

Sweden, both at the national level and at the ECHR, follows the same logic of prioritizing the public acts of political opinion over other forms but also indicates that applicants need to exhaust other domestic protections first. A Syrian woman of the Maktoumeen minority group was imprisoned and tortured after a demonstration, which falls in line with masculine narratives of political dissent. She was granted asylum not simply because she had been discriminated due to her minority status, but because of those public political actions on top of it.⁴⁷⁵ Even if an application aligns with a masculine narrative, it does not always succeed. One case involving a politically active couple from Belarus was denied because the general authoritative political atmosphere did not constitute to be a high enough level of violence to be considered persecution, and the Court ruled that they could have used other domestic forms of protection. The woman applicant, a member of the BPSN, the political party of President Lukashenko was employed at a local branch and discovered financial corruption within the party. When she reported this to the police, she began receiving death threats, and the police eventually discontinued the investigation. She was assaulted twice when men broke into her hotel room and home. However, this was not considered a higher level of persecution than the general atmosphere, which is why the claim did not stand.⁴⁷⁶

⁴⁷⁴ *Wei v. Attorney General*, 169 Fed.Appx 143 (3rd Circuit 2006).

⁴⁷⁵ UM 1802-07, (Migration Court of Appeal 2008),

<http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-23-may-2008-um-1802-07#content>.

⁴⁷⁶ *Matsiukhina and Matsiukhin v. Sweden*, Application No. 31260/04, (ECHR 2005).

Finally, in South Africa, secondary source material on women's claim of political opinion reveal that there are often difficulties in translating the details of a claim on an application. One woman applicant was a part of the Movement for Democratic Change in Zimbabwe, and she was arrested, beaten, and raped multiple times by Zanu-PF members due to her political actions, forcing her to go into hiding. However, her refugee status decision did not touch on any of these details and instead attributed the violence she faced to a personal dispute with her brother over a house.⁴⁷⁷ On a different application, a Congolese woman who was a member of the UDPS also had her claim minimized by the Refugee Appeals Board who stated that the country information described the treatment of low level UDPS members as non-persecutory. However, her experiences painted a different picture as other female members of the party had been arrested and raped.⁴⁷⁸ Therefore, this generalization of the political situation left out the experiences of women and mistranslated her true fear of persecution.

In addition to being persecuted due to their personal political opinion, women asylum seekers sometimes face persecution due to imputed political opinions, usually because of their connection to family members. Judges can skeptically look at these claims because it can be difficult to verify them. Applicants may not have direct knowledge of their family member's political activities, despite being targeted for it. These applications often involve sexual assault as it is another way to humiliate or shame the politically active family member into halting their activities. In all three countries, demonstrating direct and physically violent threats towards an applicant makes it more likely for the application to succeed. In the United States, in cases where there is not a direct violent threat that has been enacted on an applicant, the credibility of the

⁴⁷⁷ Roni Amit, "All Roads Lead to Rejection: Persistent Bias and Incapacity in South African Refugee Status Determination," *African Centre for Migration & Society*, June 2012, 74.

⁴⁷⁸ *Ibid.*, 81.

claim is more likely to be called into question. In *Rodriguez Galica v. Gonzales*, Rodriguez's husband had been found to be materially supporting the URNG guerrillas and participating in anti-government protests. Her husband went missing and was later found dead near a military base which was a sign that state agents had carried out this murder. She was later informed that state agents had visited her home looking to question her and later following her, but she did not experience direct physically violent threats. Despite fleeing internally, she continued to receive threatening phone calls, and she eventually fled to the U.S.. The IJ who presided over her first hearing was critical of her testimony, limiting her time to bring expert witnesses and refusing to listen to evidence given over the telephone. On appeal, it was found that the IJ's actions were so abusive that it violated her Due Process rights. However, the IJ's judgement on the case was focused on an adverse credibility assessment pointing to small inconsistencies in details such as details of a vehicle registration.⁴⁷⁹ The belligerence of the IJ may have been connected to the idea that this claim was not as severe as the applicant did not face any direct physical violence. On the other hand in *Lopez-Galarza v. I.N.S.*, where the applicant was also targeted due to her family member's political support of the former Somoza regime, she faced direct violence being imprisoned, raped, and tortured for 15 days. The lower courts believed that the level of violence in this claim constituted past persecution, but it was questioned if she would face future persecution as there had been a regime change during the hearings process. The Court of Appeals ultimately ruled that past persecution had reached a high enough level of severity to be granted asylum regardless of the regime change.⁴⁸⁰

⁴⁷⁹ *Rodriguez Galicia v. Gonzales*, 422 F.3d 529 (7th Circuit 2005).

⁴⁸⁰ *Lopez-Galarza v. I.N.S.*, 99 F.3d 954 (9th Circuit 1996).

For cases of imputed political opinion that involve sexual violence, in the U.S., applicants need to demonstrate that the sexual violence they experienced was directly linked to this Convention ground. In *Lopez-Galarca v. I.N.S.*, this link is clearly demonstrated as the applicant faced sexual violence during her imprisonment which was directly connected to her father's political position, since a member of the Sandinista military had accused her of this political position directly before she was imprisoned. However in *Ochave v. I.N.S.*, the claim was ultimately rejected, because the applicant could not make this link. Ochave had testified that her and her daughter were raped by a guerrilla group on the way home from the market due to her father being a "Municipal Conselor". However, she could not demonstrate that the guerrilla group that attacked her identified her because of her father's political opinion and therefore, the judge attributed this event to a "random act of violence" rather than persecution on the basis of political opinion.⁴⁸¹

Sweden also prioritizes claims of direct physical violence over threats and harassment due to an applicant's grassroots politics. An Iranian couple that applied for asylum due to their political activity for Kurdish rights was rejected by the Swedish Migration Board because, "The Board also found that the applicants had only been active in the KDPI at a very low level and that only activists higher up in the hierarchy would be of any interest to the Iranian authorities." However, at this point four state agents had broken into their home to look for connections to the KDPI, demonstrating that the governmental authorities had been interested in their activities despite it being only at a grassroots level.⁴⁸² This line of reasoning emerged again in a case involving a Uzbek couple in which the husband had been arrested and accused of being a

⁴⁸¹ *Ochave v. I.N.S.*, 254 F.3d 859 (9th Circuit 2001).

⁴⁸² *S.F. and Others v. Sweden*, Application No. 52077/10 (ECHR 2012).

Muslim separatist. Despite this, the Migration Court rejected the appeal because they saw the applicant as being a “low level” member of the Birdamlik party.⁴⁸³ However, when an Iraqi family had been targeted by al-Qaeda after the father had worked with the U.S. military in his business, they faced multiple murder attempts, in which one daughter had been killed and their house had been burned down. The discussion on this case was not whether the family truly faced these threats, but rather if the security situation had improved enough since 2008 for them to return to Iraq.⁴⁸⁴ This again points to a trend where the credibility is not questioned as in depth in cases of direct physical violence.

However in cases where these threats are not as physically violent, Sweden also judges credibility harshly. Applicants are expected to be able to verify their identity with documents, and if not this is seen as a strike against the credibility of their entire claim. In the case of the Uzbek couple the government stated, “the applicants had not proved their identities, which reduced their general credibility and vastly reduced the value of the evidence submitted by them since it could not be concluded that those documents actually related to them.”⁴⁸⁵ This again emerged in a Chechen’s family claims in which the government mentioned the lack of identity documents along with other small inconsistencies like the date in which the family was reunited after imprisonment.⁴⁸⁶ This reasoning is used to discredit the legitimacy of the claim and as discussed in the previous chapter is particularly harmful to applicants who have experienced trauma.

⁴⁸³ *F.N. and Others v. Sweden*, Application No. 28774/09 (ECHR 2012).

⁴⁸⁴ *J.K. and Others v. Sweden*, Application No. 59166/12 (ECHR 2016).

⁴⁸⁵ *F.N. and Others v. Sweden*

⁴⁸⁶ *I. v. Sweden*, Application No. 61204/09 (ECHR 2014).

Finally, South Africa falls in line with the other two case studies of focusing on granting asylum to claims of fear of direct physical violence. In one case involving the daughter of a political activist in the DRC, she claimed that her and her family had been repeatedly harassed by state agents, and eventually her father was tortured and killed. While it was unclear from the case law if she was originally rejected by the RAB because she, herself, had not directly faced this violence, the High Court eventually ruled in favor of the applicant stating that, “There appears to be a reasonably high probability that the applicant might be killed as her father was killed due to him being a member of the Congolese Movement for Democracy and Integral Development.”

⁴⁸⁷ This judge ruled that the violent threats that the family faced were directly linked to the Convention ground instead of a general atmosphere of violence and that the threats were enough to constitute a successful asylum claim. Finally, this is again seen in *Bolanga v. Refugee Status Determination Officer and Others* in which a pastor and his family were persecuted due to his preaching not to join the rebels and fight. However, he also refused to support the government, and therefore he and his family had been targeted by two separate groups. He and his wife had been repeatedly beaten despite internally relocating in the country. They had originally been rejected, as the RSDO thought that the reason for leaving was to avoid compulsory military service. However, this does not accurately line up with the applicant’s testimony, raising questions about how this testimony is translated in South African claims like in the case involving the Zanu-PF member discussed above.

The three case studies illuminate so far the inconsistencies in how gender is integrated within asylum systems globally. In the cases involving claims of persecution based on race or

⁴⁸⁷ *Dorcasse v. Minister of Home Affairs and Others*, Case No. 2012/17771 (High Court 2012).

ethnicity, the U.S. appears to care more about exceptional acts of dissent than Sweden and South Africa. The latter two countries have demonstrated that they are willing to use country information to verify persecutory claims. However, it is unclear if these reports are truly gender aware in Sweden. In all three case studies, political actions that fit a masculine narrative in which the persecution was due to a public action and where the applicant faced threats of direct physical violence were more likely to be accepted. In South Africa, there appears to be a larger problem of translating the details of the case into the initial judgement, more so than the other two countries. However, the inclusion of gender-based acts of violence as a form of direct physical violence instead of a “personal problem” in all three countries does demonstrate a favorable sign of beginning to gender the system. This demonstrates mixed international progress towards gendering the four established Convention grounds.

“Chapter Five”

The final Convention ground of Particular Social Group (PSG) is where the majority of gender-based claims are processed in these three countries. This catch all ground was designed to give decision makers flexibility in accepting claims outside the other four Convention Grounds. The UNHCR has recommended that this category be used in gender-based claims in to have a textual basis for accepting these types of claims, especially important for a time period when countries party to the 1951 Convention have been less willing to accept more refugees.⁴⁸⁸ This flexibility also has a downside, as discussed previously, as adjudicators have less preparatory work that helps guide their decision making. Therefore, they are more likely to insert their own personal biases and perceptions about the case and country of origin of the applicant. As explained below, tests setting the parameters of of a PSG vary from country to country and even within a country. Therefore, applicants are subjected to luck of the draw in terms of their claims instead of having a functioning international asylum system.

In this chapter, I will examine how the ground of Particular Social Group has been interpreted and used in gender-based claims in the three case studies. To do this, I will not only investigate how these countries have adjudicated gender-based claims in the past, but within this large category, how have different kinds of gender-based claims been adjudicated? For instance, are claims rooted in a fear of Female Genital Mutilation (FGM) more likely to be accepted than a claim regarding forced sterilization? Through this, I hope to understand if there are any broader trends in regards to which kind of gender-based claims are successful or not? Alternatively, does it depend more on the country of asylum in which asylum seekers are applying? How is

⁴⁸⁸ UNHCR, *Guidelines on International Protection*, 1-2.

persecution defined in relation to these claims? After comparing these three systems, I have found that despite some differences between systems there are four main trends in the systems: procedural issues are used to avoid deciding on the substance of a claim; verification of actions using medical or legal documents substantially help claims; applicants must demonstrate that they are at a higher risk for violence than other population members; and decentralized control or underfunding leads to a gap in the implementation of gender guidelines.

Particular Social Group

Being the last Convention ground added to the 1951 Convention, Particular Social Group thus had the least amount of preparatory work with it, causing substantial trouble for refugee advocates and decision makers. Advocates have utilized this category to try to encourage a broad interpretation of the Convention, especially for claims that do not cleanly fit within the other four Convention grounds. On the other hand, some decision makers focus on its potential for abuse by, “opening the floodgates” to unlimited migration.⁴⁸⁹ The UNHCR addresses this tension through its recommendation of defining it as, “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. This characteristic will often be one which is innate, unchangeable, or otherwise fundamental to identity, conscience or exercise of one’s human rights.”⁴⁹⁰ All three countries broadly share this UNHCR definition, however, decision makers still struggle with defining the limits of the breath of this uniting characteristic.

In the United States, conversations around defining PSG started a decade before their gender guidelines were launched, in the *Matter of Acosta*. In this case, an applicant from El

⁴⁸⁹ Edwards, “Age and gender dimensions in international refugee law,” 70.

⁴⁹⁰ *Ibid.*, 3.

Salvador argued that he belonged to a Particular Social Group of taxi drivers in the country. He claimed that guerrilla fighters were organizing a taxi drivers strike, but he refused to comply to this. Other taxi drivers who took the same stance had been killed or had their taxis stolen. The applicant had received direct threats to his life and therefore fled to the U.S. and applied for asylum under the PSG Convention ground. The Court argued that this ground was defined as, “members of a group of persons all of whom share a common, immutable characteristic that either is beyond the power of the individual members of the group to change or is so fundamental to their identities or consciences that it ought not be required to be changed.” The Court ruled that employment was not a common, immutable characteristic because, “the members of the group could avoid the threats of the guerrillas either by changing jobs or by cooperating in work stoppages.” Therefore, under this standard, characteristics that qualify under this Convention ground are ones that an applicant cannot change. There is no discussion about whether changing jobs may be economically infeasible for the applicant or whether this job was particularly important to their personhood. However, this case further lists examples of “innate” characteristics such as, “sex, color, or kinship ties”. This sets the precedent of using this Convention ground to cover gender-based claims as sex and gender are often conflated in case law. In *Accosta*, the Court also ruled that the uniting can sometimes be a shared past experience such as “former military leadership or land ownership.”⁴⁹¹ This follows the same logic as applicants cannot change their past.

However, the utilization of this second type of characteristic is undermined in the case of *Carmen Gomez v. I.N.S.* Gomez explained that during her youth she was a victim of guerrilla

⁴⁹¹ *Matter of Acosta*, Interim Decision #2986 (BIA 1985).

violence on five occasions, being raped and beaten. She fled to the U.S. where she claimed that due to her past experience, she was a member of a social group which was, “women who have been previously battered and raped by Salvadoran guerrillas.” She argued that this group was singled out for further sexual violence in El Salvador. However, the Court dismissed this argument with the reasoning that the uniting characteristic, “must be recognizable and discrete.” Therefore, past experience of rape which does not leave any visible physical markers does not meet this threshold. In addition, categories of characteristics like gender or youth are too broad as they do not single her out from the general population. Instead, the Court argued that Gomez had failed to prove that she would be at risk more than any other young woman in the country. Even though young women may face an increased chance of this kind of violence compared to other demographic groups, it is not enough to qualify under PSG.

The standard of Particular Social Group in Sweden is governed by the Qualification Directive which defined the group as those, “that share an innate characteristic, or a common background that cannot be changed, or share a characteristic or belief that is so fundamental to identity or concise that a person should not be forced to renounce it and that group has a distinct identity in the relevant country, because it is perceived as being different by the surrounding society.”⁴⁹² Therefore, like the U.S. this characteristic is either seen as immutable or central to a person. However, a judge deciding whether a characteristic is fundamental to someone’s identity can be subjective and abused by conservative judges. In Sweden, like in the U.S., a person’s economic livelihood is not viewed as fundamental. In one case involving an Iraqi female academic, the Migration Court originally ruled in favor of the applicant’s claim as it ruled that

⁴⁹² “Council Directive of 2004/83/EC,” *Official Journal of the European Union* (2004): 17.

her past education was central to her identity and there was a characteristic which could be considered a PSG. However, the Migration Court of Appeals overruled this decision, first, because academics, “do not constitute a homogenous group in terms of having common, unchangeable backgrounds or characteristics.” Second, the Court argued that someone’s career was not fundamental to their identity and that it can be given up without comprising an individual’s personal values and identity.

In South Africa, defining Particular Social Group is still important but because gender is now explicitly included as an additional Convention ground it is less significant to gender-based claims. However, the 1998 Refugee Act defines a Social Group as one that, “ includes, among others, a group of persons of a particular gender, sexual orientation, disability, class, or caste.”⁴⁹³ Therefore, like the other two countries, South Africa is likely to include characteristics that are seen as “fundamental” to a person’s identity. But it also includes characteristics in which applicants have little control over, such as income, which is largely influenced by economic structures and histories of exclusion from wealth. While the Refugee Act give concrete examples to aid decision makers in the determination of this group, it facilitates flexibility beyond what was explicitly listed.

Sexual Violence

This form of GBV was incredibly important in terms of starting the international movement towards gendering the international asylum system, as it was the coverage of sexual violence that Indo-Chinese women faced while fleeing in the 1970s that sparked international conversation on how women’s experiences may differ both in refugee camps and in the legal

⁴⁹³ South Africa, “Refugee Act 1998,” (Act No. 130, 1998) *Government Gazette* 19544: 6, December 2, 1998.

process.⁴⁹⁴ Sexual violence is defined by the WHO as, “any sexual act, attempt to obtain a sexual act, unwanted sexual comments or advances, or acts to traffic, or otherwise directed, against a person’s sexuality using coercion, by any person regardless of their relationship to the victim, in any setting, including but not limited to home and work.”⁴⁹⁵ It is prevalent in every state around the world, but certain conditions can increase the likelihood of it. Because of this, asylum cases involving a single experience of sexual violence are hardly ever accepted, even though applicants may be targeted because of a characteristic that is fundamental to their personhood, their gender. Instead, in most cases there either needs to be an extenuating circumstance or another layer of persecution in order for the claim to be accepted.

In the United States, applicants have received asylum due only to rape under the ground of Particular Social Group. However in this case, the applicant in question had cerebral palsy and was mentally disabled. She had been raped at the hospital in which she had been placed to receive care and became pregnant because of this. Due to her mental health, she was deemed incapable of giving informed consent, and because of, “the lack of a strong male presence in her family,” the Court ruled that she would be at risk of being abused by other men. She was granted asylum due to persecution as a, “disabled woman”.⁴⁹⁶ This first assumes that women cannot protect themselves. Second, it assumes that it is a male family member’s responsibility to protect the women in their family and if she did have a father or brother as part of her family that could be deemed to be a “strong male presence”, then she may not have received asylum. In addition,

⁴⁹⁴ Baines, *Vulnerable Bodies*, 20-21.

⁴⁹⁵ Rachel Jewkes, Purna Sen, and Claudia Garcia-Moreno, “Chapter 6: Sexual Violence,” In *World Report on Violence and Health*, ed. Etienne G. Krug, Linda L. Dahlberg, James A. Mercy, Anthony B. Zwi, and Rafael Lozano. (Geneva: World Health Organization, 2002), 149.

⁴⁹⁶ “Case 4211,” *Center for Gender and Refugee Studies*, last updated August 25, 2006, <https://cgrs.uchastings.edu/case/case-4211>.

she did not receive this asylum only because of this past experiences of rape, but because she was deemed to be incapable of giving consent, demonstrating additional circumstances in her case.

Sweden has recognized that rape can amount to persecution, like in the U.S., but under specific circumstances. Even if the act is perpetrated by a state agent, if the rape has occurred outside official state settings, then it is assumed that the state agent's actions were fueled by personal motivations, and therefore does not classify as state persecution. Instead, this action is classified as a random act of violence.⁴⁹⁷ This logic is used in *H.N. and Others v. Sweden* in which a Burundian family applied for asylum in Sweden after the first applicant's sister and adopted daughter had been raped by five men in their home. This was after the first applicant and her husband had started to inquire why a man, referred to as G, who had raped another daughter, would receive an early prison release. The family reasoned that G was most likely a spy for the government and that the state released him early to carry on this function. However after they began these inquires, the family started to receive death threats in addition to the above mentioned rape in their home. Therefore, they believed that their claim to asylum was not just a gender-based claim but also political one, and they were facing an additional form of violence, death threats. However, this claim was ultimately rejected, because while the credibility of the applicants was not doubted, the link to persecution based on political opinion was. Because the applicants had involved the police in the latest incident of rape and they had started an investigation on the matter, the Court ruled that it was most likely private individuals who had

⁴⁹⁷ *Gender Related Asylum Claims in Europe*, 39.

conducted this act and not state agents trying to dissuade the family's inquiries. Therefore, this additional circumstance was not deemed credible and Sweden then rejected the claim.

South Africa also follows this trend of granting asylum for claims in which rape is only one aspect of the claim, but applicants can prove that the action was motivated by an asylum ground other than gender or that the state was unwilling to address this claim. For instance in *ON v. SCRA and Others*, a young woman's father was a part of the UDPS in the Democratic Republic of the Congo (DRC) which had been targeted by the Kabila presidency. UDPS meetings were held in her home, and intelligence officers started to directly threaten her father, causing him to flee. When the area became more militarized due to an influx of Internally Displaced Persons, her proximity to state agents endangered her and she was raped by two of them in her home. She suffered social shame on top of this claim as she became pregnant and rumors spread that she had consented to this act. The applicant tried to flee internally, but she was forced to live in destitution. There were rumors that opposition members were still being targeted, forcing her to flee to South Africa. The Court set out the standard for what level of sexual violence could be considered persecution in this case. It stated, "Harassment is not in itself considered as persecution, but when sustained, systematic or relentless it may be considered as such." It later stated, "Not all women who are subject to sexual violence, domestic violence or female genital mutilation, and who cross borders are refugees. Whether an individual faces a risk of persecution requires identification of the serious harm faced in the country of origin and an assessment of the state's willingness or ability to respond effectively to that risk."

⁴⁹⁸ This 2017 case could use the ground of "gender" as its reason for persecution, but the pressing

⁴⁹⁸ *O.N. v. SCRA and Others*, Case No. 15376/16 (High Court 2017).

question of the case was not whether an applicant could establish a legitimate ground for their claim, but rather if that claim was able meet the threshold of persecution. The applicant was ultimately granted asylum because she had demonstrated, “fear of being persecution by reason of her imputed political opinion or as a woman belonging to a family which has been repeatedly and persistently persecuted.”⁴⁹⁹ Although in South Africa, there have been cases where even this extra level of persecution has not been enough to receive asylum. One Congolese woman had been tortured and raped due to her father’s political stance, much like in the case above, however the Refugee Status Determination Officer (RSDO) ruled that she faced no risk of being persecuted.⁵⁰⁰ Therefore, like in the U.S., South Africa may have a problem with asylum officer’s individual biases influencing the case, particularly if they believe that the link between violence and the asylum ground is present or if the intensity of the violence is enough to reach the threshold of persecution. This bias can also omit the details of sexual violence from the claim. In another claim from the DRC, the applicant’s husband had deserted the army after seeing the abuses in the civil war. The applicant was targeted by soldiers because of this, being beaten, stabbed, and raped. However, the RSDO decision failed to mention this beating and rape and stated that she had fled just because she was “afraid”.⁵⁰¹ This minimizes the violence that she faced, therefore minimizing the level of persecution.

Proving persecution due to sexual violence perpetrated by a private actor, such as a family member, can have an additional burden in each of these countries, requiring applicants to show that there are no domestic alternatives that could address this claim. In the U.S., the case *Camara v. Attorney General*, a young woman’s father was a founding member of the Rally of the

⁴⁹⁹ Ibid.

⁵⁰⁰ Amit, “All Roads Lead to Rejection,” 81.

⁵⁰¹ Ibid., 80.

Republicans, an opposition party in the Ivory Coast. He was abducted from her home. When he did not return, she was sent to live with relatives in Guinea, in which she suffered extreme abuse, including sexual violence. She was able to flee to the U.S. and the Immigration Judge (IJ) initially rejected her claim as the abuse happened in a country in which she was not a citizen, therefore it was “irrelevant” to her claim. The Court of Appeals agreed with this assessment, “we agree that [the] petitioner’s experience in Guinea, though tragic, do not qualify her for asylum.” Instead she was accepted on the fear of political persecution in the Ivory Coast.⁵⁰² The case does not discuss why she does not meet this persecutory threshold though, other than she is not a citizen of Guinea.

In Sweden, an applicant from Montenegro was rejected because she did not exhaust all forms of domestic protection. After her husband died, she had been subjected to rape and forced prostitution perpetrated by her brother in law. She argued that the lack of having a functioning male network in Montenegro put her at higher risk to these actions and the entire family did not support her. The Court of Appeals ultimately ruled that because the brother in law had been prosecuted and convicted, that Montenegro authorities demonstrated an adequate effort to protect the applicant.⁵⁰³ However, this reasoning does not consider if legal avenues may not be enough to protect women against this type of domestic abuse, especially since the father in law had also threatened the applicant, demonstrating that the threats were perpetrated by the whole family, who were not in custody and therefore could pose a threat.

Not only is the linkage to a ground for asylum considered in sexual violence claims, there is also a question about whether the type of violence that an applicant experiences meets the

⁵⁰² *Camara v. Attorney General*, 580 F.3d 196 (3rd Circuit 2009).

⁵⁰³ *UM 4230-09* (Migration Court of Appeal 2010),

<http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-17-march-2010-um-4230-09#c>.

“threshold” of persecution in its level of intensity. Generally, cases involving gang rape due to one of the four enumerated Convention grounds meets this threshold. In *Matter of Krome*, discussed before as a Haitian woman applying for asylum in the U.S. because she was gang raped for her political activities, the decision focused on the intensity of violence. It details that she had sustained internal shock from the incident that was preventing her from successfully carrying a pregnancy to term. Describing this incident as “brutal”, the Court took a clear stance in demonstrating that the persecutory threshold was met, and rather the question was whether this incident could be clearly linked to the Convention ground of political opinion.⁵⁰⁴

Similar, in South Africa, an applicant, Esther, tried to focus on the brutality of her experience, including in her claim a trauma clinic assessment that proved she had been physically tortured with electric shocks and sexual assault. Like *Krome*, the problem that Esther faced with this case was connecting her torture to the Convention ground of political opinion as she had been an active member of the MDC, but the Court claimed that not all MDC members were persecuted, and she was not high enough in the structure to face this persecution. Again, South Africa claimants have trouble translating these details of sexual violence into their application, as another claimant who was gang raped by a rebel group had been rejected. The asylum decision did mention the details of her rape and stated that she had only left because of her proximity to the war, and the country information indicated that the area’s security had improved. This did not discuss the additional violence she suffered because of her vulnerability due to her gender.⁵⁰⁵

⁵⁰⁴ *Matter of Krome*, Interim Decision #3252 (BIA 1993)

⁵⁰⁵ Amit, “All Roads Lead to Rejection,” 74.

Forced prostitution claims, another type of sexual violence, has had an evolution in the U.S. since the early 2000s until today, demonstrating a greater acceptance of these claims over time. Three cases have originated from Albanian applicants, the first two resulting in a negative decision, while the last in 2013 granted asylum to the applicant. The three circumstances are similar. In *Lleshanku v. Ashcroft*, a young Albanian woman had been harassed since the age of 12 by a criminal gang who suggested that she could “make money somewhere else” implying that she should become a prostitute. She was threatened with kidnapping and rape when she ignored these men. The last incident to occur before she fled was when Lleshankau and her mother were harrassed with similar threats in the town square. The pair hid at a relative’s home afterwards, but Lleshankau’s home received hourly phone calls harassing them, demonstrating that this was a targeted incident. The family did not report this incident to the police as they thought the police were intimidated by gangs, therefore they would be ineffective in aiding them. This case aimed to create a test to determine if threats of sexual violence are severe enough to amount to persecution which is, “if the perpetrators have the ability and apparent inclination to carry through on their threats or actually attempt to do so.”⁵⁰⁶ Since these threats were not executed or attempted, without any attempts on the behalf of the applicant to involve the police, the Court of Appeals ruled that the applicant did not meet the threshold of persecution. However, in *Rreshpja v. Gonzales*, it does appear that the applicant would meet this threshold as was the victim of an attempted kidnapping in which the attacker implied that she would be forced into prostitution in the near future. Unlike in *Lleshanaku*, she reported this attack to the Albanian police who claimed that they could not do more as there was insufficient information to identify the attacker.

⁵⁰⁶ *Lleshanaku v. Ashcroft*, 100 Fed.Appx. 546 (7th Circuit 2004).

She claimed that she was part of a PSG of, “attractive young woman who risks being kidnapped and forced into prostitution.” However, the Court placed an additional burden on Rreshpja to prove that this was a sustained threat and not just a “random attempt”.⁵⁰⁷ Therefore, persecution in the U.S. is defined not just by the intensity of the act, but the quantitative frequency of the threat. In addition, this case used the watershed argument that is used to disparage attempts to include gender as an additional Convention ground. The Court ruled that if the PSG was to be “young, attractive Albanian women” then being attractive would make them eligible for asylum, increasing the number of legitimate applications.⁵⁰⁸ However, this argument makes little sense as it is forgetting that an applicant still needs to prove a well-founded fear of persecution in addition to being a part of a PSG. In addition, it assumes that only “attractive” women would be at risk of being forced into prostitution. Using this as a standard would force judges to decide if the applicant was “attractive” enough to fall into this PSG. The PSG of “young Albanian women” would be more suitable for these cases. Ultimately, there has been a progression towards accepting this PSG logic in *Cece v. Holder*, in which the applicant like Lleshanaku had received threats from a local gang member when she resisted his attempts to pursue her. When she reported this to the police, they dismissed it stating she had no proof. While an IJ initially granted asylum, the BIA vacated this decision stating that she did not meet the ground of constituting as a PSG. However, the Court of Appeals argued that the category of, “women who fear prostitution” is not dissimilar to the accepted PSG of, “women who fear female genital mutilation,” and that the BIA did not adequately prove that this social group was in a different category than others that they approved.⁵⁰⁹ Therefore, she was granted asylum.

⁵⁰⁷ *Rreshpja v. Gonzales*, 420 F.3d 551 (6th Circuit 2005).

⁵⁰⁸ *Ibid.*

⁵⁰⁹ *Cece v. Holder*, 733 F.3d 662 (7th Circuit 2013).

In cases where forced prostitution crosses border, Sweden has sent mixed signals about whether they would grant asylum to those victims. A Nigerian woman had paid smugglers to help her leave her abusive home in Nigeria and migrate to Italy. The smugglers demanded she pay off her debt to them by forcing her into prostitution, where she later became pregnant. The smugglers tried to force her to have an abortion, but she was able to escape to Sweden. The applicant claimed that she would be at risk of retaliatory violence from the smugglers if returned to Nigeria and her daughter would be at risk of FGM because her abusive uncle, who was her only contact in Nigeria and she would not be able to solely support herself. Ultimately, the Board ruled that she was not at danger of being found by either party, because she could easily relocate within Nigeria as the country was large enough. Because she could internally relocate, she was not granted asylum, but Sweden granted her a residence permit as the Court ruled it would be difficult for her to support her child and herself without an education or social ties in Nigeria. Therefore, she would most likely be coerced back into prostitution as a survival mechanism.⁵¹⁰ Though Sweden does not believe that past experience with forced prostitution meets this threshold of persecution, it did believe that forcing someone back into a situation where they may be at risk for continuing that work is considered cruel or degrading. However, it should be noted that this kind of work is considered to be especially cruel or degrading, but other claims focused on economically exploitative work would probably be rejected as it would be classified as migration due to “economic reasons”. As discussed in the previous chapters, accepting claims

⁵¹⁰ *UM 22097-10* (Migration Court 2011), <http://www.asylumlawdatabase.eu/en/case-law/sweden-%E2%80%93-migration-court-22-february-2011-um-22097-10#content>.

on forced prostitution due to “humanitarian reasons” would boost the moral superiority of Western countries and minimize the prevalence of that form of violence within their borders.⁵¹¹

Finally, under this broader category of sexual violence, there are few claims based solely on repeated sexual harassment, even though this is a form of sexual violence under the WHO definition, which can place irreversible damage on an individual. Of the three case studies, I only identified one case based on this, in the U.S., which was decided before the implementation of gender guidelines which could change the reasoning in future cases. However, in this case, the Polish woman applicant alleged that she was facing repeated sexual harassment from a governmental official in the secret police. Therefore, this case could have been interpreted under the ground of political opinion as it was a case in which the government was refusing to stop this harassment due to the perpetrator’s political position. She was also placed under the surveillance of the Polish authorities, because she refused to become a member of the communist party, demonstrating that she had clear oppositional views to the government. Klawitter alleged that she had been repeatedly pursued by Niedzwiecki who had threatened to destroy her career using this governmental position. However, this claim was dismissed as the motivation was a, “personal interest”, therefore minimizing the impact of these threats, making it more likely for it to be rejected.⁵¹² Therefore, in sexual harassment claims, applicants not only need to show that the action’s intensity meets the threshold of persecution, but that it is motivated by one of the Convention grounds. This is particularly difficult when it easily could be brushed aside as a rogue individual actor.

Physical Forms of Violence/ Control over Bodily Autonomy

⁵¹¹ Mascini and van Bochove, “Gender Stereotyping in the Dutch Asylum Procedure,” 118.

⁵¹² *Klawitter v. I.N.S.*, 970 F.2d 149 (6th Circuit 1992).

As discussed earlier, when envisioning the typical refugee in the 1951 Convention, it was thought of as the political dissident from the Soviet Bloc who may risk torture enacted by the state due to his political views. This was considered to be the standard masculine narrative. Therefore, there has always been a high correlation with acts of violence or restriction on bodily autonomy as legitimate complaints. However, the link in these cases is to prove that these acts of violence are connected to one of the five Convention grounds. The following physical acts of violence or restrictions to individual autonomy (Female Genital Mutilation, domestic violence, forced marriages, honor related acts of violence, high rates of femicide, and violent circumstances) are usually interpreted under the Convention ground of PSG because either women face higher rates of these actions (again equating gender-based violence with Violence Against Women) or because those targeted by these actions are singled out due to their gender.

Of all the types of gender-based claims in the U.S. studied here, the claim of Female Genital Mutilation is the one of the most likely to succeed, regardless of procedural issues. There are generally three types of FGM claims: fear of future subjugation to FGM, past persecution of FGM, and derivative claim due to fear of subjugating a child to FGM. For the first type of claim, the case that set a precedent for future claims being accepted was *Matter of Kasinga*, which was decided a year after the gender guidelines emerged. The applicant was a member of the Tchamba-Kunsuntu Tribe in northern Togo, in which usually young women undergo FGM at age 15. Her father prevented this from happening until he passed away, and she was forced into a marriage in which she would be required to undergo FGM before the marriage could be consummated. The government was aware of this practice but refused to intervene. In addition, internal relocation was not an option as the police were looking for her to return her to her

husband on the case she was refouled to Togo. She used corroborative evidence to prove that she would be subjected to a more severe form of FGM, requiring a 40 day recovery period.⁵¹³ This was used as justification that the level of violence she would face would meet persecution if she were to undergo this procedure, however as will be seen in other cases, the U.S. does not meaningfully distinguish between variations of FGM in asylum claims. The Court ruled that her PSG was, “young women of the Tchamba-Kunsuntu Tribe who have not had FGM.” It justified this group because being a “young woman” and her tribal affiliation could not be changed, and that, “the characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”⁵¹⁴ Therefore, because of the lack of state protection, she was clearly granted asylum.

U.S. courts have been less clear when the claim is based in past FGM experience. The Government in *Mohammed v. Gonzales* argued that past FGM cannot be a reason for persecution as it is an act that happens once, therefore this act cannot derive future fear of persecution. However on appeal, this argument did not hold as the Court highlighted that coerced sterilization is another act that occurs once but has continuing health and life implications. The Court drew a parallel to this for FGM highlighting that it, “permanently disfigures a woman, causes long term health problems, and deprives her of a normal and fulfilling sexual life.” Therefore it is seen as a permanent and continuing act of violence instead of simply a past experience, granting asylum to those that have faced it in the past. In addition, the Court argued that there are different types of FGM, therefore she could face a more severe form of FGM on top of what she already has experienced demonstrating it is not a “one time” act.⁵¹⁵

⁵¹³ *Matter of Kassinga*, Interim Decision #3278 (BIA 1996).

⁵¹⁴ *Ibid.*

⁵¹⁵ *Mohammad v. Gonzales*, 176 Fed.Appx. 718 (9th Circuit 2006).

Finally, there have been negative outcomes in which a parent tries to derive an asylum claim on the fear that their child will be subjected FGM if returned to the country of origin. In *Niang v. Gonzales*, a Senegalese woman, whose daughter was born in the U.S. claimed that her daughter would be at risk for FGM if the applicant were to be deported to Senegal. The applicant had been receiving threatening letters from the daughter's paternal grandparents requesting for the child to undergo FGM. However, the Court dismissed this claim because the daughter in question was a U.S. citizen, therefore would not be deported to Senegal with her mother, but rather has the option to stay in the U.S. with her father. The Court argued that the daughter would only face this risk in Senegal, therefore the "only" harm that comes out of this woman being deported is the potential mental harm that Niang may experience, being separated from her daughter. The Court stated that this a "heart-wrenching dilemma" but it does not constitute a claim to asylum.⁵¹⁶ Therefore, the daughter's citizenship status is what makes this case different from others, however this does not devalue the Courts' assessment that past or future persecution of FGM in the U.S. generally is accepted.

While Sweden is usually favorable to cases of FGM, it tends to examine the claims more skeptically than in the U.S. One case involving a Nigerian woman stated that the applicant needed to prove that it would be unlikely that internal relocation would not solve the risk of being subjected to FGM as the applicant was personally against FGM and the only person in her family that would push for this would be her uncle. The Court ruled that she could internally relocate, therefore this claim did not stand.⁵¹⁷ A Somali woman who was applying for asylum due to the FGM risk for her three daughters was also doubted, at first, because she had been able

⁵¹⁶ *Niang v. Gonzales*, 492 F.3d 505 (4th Circuit 2007).

⁵¹⁷ *UM 22097-10*, <http://www.asylumlawdatabase.eu>.

to protect her daughters from FGM for some time. However, their claim was accepted because as the girls aged, they had a greater risk of being subjected to FGM and circumstances like the growth of al-Shabaab in the area, who had noted that the girls had not undergone FGM compelled this claim to be accepted.⁵¹⁸ Therefore, unlike the U.S., in Sweden the individual country circumstances matter more for these cases.

In South Africa, advocates have stressed that FGM should constitute persecution, either as a PSG or on the ground of gender, but this is not always applied at the lowest level.⁵¹⁹ A Kenyan woman who was fleeing FGM was rejected by a Refugee Status Determination Officer, because they thought that threat of FGM could not be connected to any of the 1951 Convention grounds, OAU Convention, Refugee Act, or “other related legal instrument” therefore could not be the basis for any claim.⁵²⁰ However, this directly goes against CEDAW which South Africa is a part of and the addition of the 2008 Refugee Act ground of gender. Therefore, this demonstrates a consistent problem in misapplying the legislative text in these asylum decisions.

Domestic violence is found in all three countries of asylum, as one of the more common physical acts of violence. However, domestic violence asylum claims must demonstrate that state agents are actively not taking action to protect these applicants. In the U.S., this means proving that the applicant sought help from state agents who refused to attempt to protect the applicant and that internal relocation is not an option. One case involving a disabled Mexican woman met this standard. The applicant claimed she reported instances of battery twice to the police,

⁵¹⁸ *UM 1173-12* (Migration Court of Appeal 2012), <http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-12-october-2012-um-1173-12-mig-201212#content>.

⁵¹⁹ Nahla Valji, Lee Anne de la Hunt, and Helen Moffett, “Where are the Women? Gender Discrimination in Refugee Policies and Practice,” *Agenda: Empowering Women for Gender Equity*, no. 55 (2003): 68.

⁵²⁰ Amit, “All Roads Lead to Rejection,” 76.

including an murder attempt by her husband, before she fled to the U.S. The police did not intervene on either occasion. She also met the standard of proving she could not internally relocate because her disability made her dependent on friends who live close to her husband, meaning she could not substantially relocate away from the dangerous situation.⁵²¹ The standard for qualifying for Particular Social Group due to domestic violence is clarified in *Matter of A-R-C-G*, which argued that marital status can be a qualifying characteristic, but the applicant must prove that they are unable to leave the relationship. For the U.S. courts this means that they may be constrained due to legislation surrounding divorce or that there may be “societal expectations about gender and subordination” which prevent a woman from leaving an abusive relationship.⁵²² It is also unclear if there needs to be persistent abuse for these cases to be successful as the focus has been more more on whether applicants qualify for PSG. However, applying the reasoning used in the forced prostitution cases in which the applicant must prove that either kidnapping attempts or threats are not a “random act of violence”, I would predict that a case based off one instance of domestic violence would not meet the level of persecution.

Sweden recognizes that domestic violence can constitute a legitimate asylum claim, however like in the U.S., the test is whether the applicant has exhausted all other domestic alternatives. This includes waiting for all the domestic processes to conclude before being able to claim asylum. In the *Case of A.A. and Others v. Sweden*, a Yemeni mother and children tried to claim asylum both because of the domestic violence that the mother faced and to avoid having the youngest daughter forced into a marriage that the father, who was still in Yemen, arranged. The mother, who was the main applicant, claimed that she tried to pursue a divorce in Yemen

⁵²¹ “Case #548,” *Center for Gender and Refugee Studies*, last updated November 17, 2000, <https://cgrs.uchastings.edu/case/case-548>.

⁵²² *Matter of A-R-C-G et. al.*, Interim Decision #3811 (BIA 2014).

after facing severe physical abuse by her husband. However, the Yemeni judge rejected the request and stated that this was a private matter. She did not involve the police as she claimed that they did not intervene in cases of domestic violence. When the youngest daughter had been informed of her arranged marriage, the first applicant tried to use the Yemeni legal system and petition to stop it. However before the case was adjudicated, the family fled to Sweden. Therefore, the claim was rejected because not all “avenues of mediation and protection” had been pursued in full.⁵²³

In South Africa, as of 2009, there had been no successful domestic violence claim at either the level of the RSDO or the RAB. While the RAB had indicated that certain claims of domestic violence could be seen as legitimate under refugee law, this would only be if there was medical proof that the abuse had occurred and like the other two countries, documentation that the state would not intervene. The Chairperson of the Standing Committee has explained that he personally does not believe women who experience domestic violence can constitute a PSG and that the main difference between this claim and a claim based on FGM is that FGM needs a clear state intervention to prevent. However state assistance is not needed to prevent domestic violence.⁵²⁴ The implications of this is that the states should be more clearly held accountable for allowing FGM, therefore if the state fails in doing this, then it is failing to protect its citizens. However it is unclear why domestic violence is not seen as under the jurisdiction of state protection. Perhaps domestic violence is seen as a much more private act that the state cannot regulate as clearly.

⁵²³ *A.A. and Others v. Sweden*, Application No. 14499/09, (ECHR 2012).

⁵²⁴ Harris, “Untold Stories,” 310-311.

Forced marriages are considered to be a restriction of bodily autonomy, because the woman who is forced into the marriage loses the right to choose where and whom she lives with. In the U.S., claims of forced marriage are more likely to be accepted if there is a financial transaction involved in which the family is paid for a daughter to become a bride. In *Gao v. Gonzales*, Gao had been sold by her family to Chen Zhi in order for her family to receive money that would pay off her family's debts. However, once she learned that Zhi was badly tempered and beat her before the marriage, she determined that she was no longer willing to marry him. The family was threatened with arrest when she tried to break off the engagement, showing not only a lack of state intervention on the matter, but state collusion to facilitate this arrangement to come to fruition. The applicant tried to internally relocate within China, but Zhi continued to harass the family and followed her once after she had visited her family. The IJ classified this claim as a "personal matter" minimizing the threat of violence and fear that she experienced. However, on appeal the government conceded that forced marriage could amount to a level of persecution, counteracting this claim. In addition, the IJ had reasoned that the PSG under which she was applying was too broad and would only be linked because of a common gender. The Court of Appeals disagreed arguing that the social group Gao was a part of was women who had been sold into marriage and lived in a part of China in which forced marriages were enforced by state agents. Therefore, because of the lack of state intervention, she was granted asylum.⁵²⁵ However, in cases in which there was not a financial transaction, it appears that the U.S. is less likely to grant asylum. In *Xiu Yun Chen v. Gonzales*, a Chinese woman also applied for asylum based on forced marriage, because the son of the village chief had consistently threatened and

⁵²⁵ *Gao v. Gonzales*, 440 F.3d 62 (2nd Circuit 2006).

harassed her after she refused his marriage proposal. It forced her to flee to a different city, where Lin had tracked her down again, continuing to harass her. There were small inconsistent details because there was some confusion about whether she had seen Lin again after internally relocating, in which she claimed she had meant that she had not seen Lin in the village, but he had tracked her down in Guangzhou. This inconsistency was used to discredit the claim of receiving a marriage proposal and subsequent harassment. In addition, she was not viewed as being part of the same PSG as in Gao because she was not sold into marriage.⁵²⁶ But this case demonstrates how the Court uses procedural issues to more easily dismiss a claim. However if it is the financial transaction that distinguishes these two groups, the U.S. assumes that despite constant harassment without that financial transaction, applicants can still maintain their autonomy and refuse marriage proposals. This would indicate that the U.S. fails to analyze how constant harassment may threaten an applicant's safety so much so that they would be coerced into accepting the proposal.

Sweden focuses less on the financial transactions involved in forced marriages and rather if the claim was viewed as credible. An applicant from Somalia had been forced into a marriage with an older man, while she at the same time had been in a clandestine relationship with her boyfriend. Both of them fled the capital a few days after the marriage, but the boyfriend had died in their journey to claim asylum. She had claimed asylum in both Italy and the Netherlands previously, under slightly different variations of her name, placing some doubt on to whether this claim could even be heard by Sweden due to the Dublin Regulations. However, once it was determined it could be heard by Sweden, because of the use of several slightly different identities

⁵²⁶ *Xiu Yun Chen v. Gonzales*, 229 Fed.Appx. 413 (7th Circuit 2007).

in other claims, her claim was already looked upon suspiciously. Therefore, when the claim of forced marriage emerged later in the asylum process, it was doubted, especially since the Court ruled that the applicant did not have a compelling reason for delaying recalling this information. Since this part of the claim was essentially dismissed, the Court only considered if the general violence in Somalia was enough to reach the level of persecution, ignoring the individualized circumstances of the applicant.⁵²⁷

South Africa, like the other two countries, demonstrates that forced marriage claims can be accepted. One case involving a 14 year old girl from Cameroon who had been sold into marriage after her parents passed away was accepted. Like in the U.S., this case declared that her PSG was women who have been sold into a marriage and face prolonged physical abuse at the hands of their spouse and cannot seek protection from the state as they are considered to be property of their husbands. The RAB was a bit more sweeping in its justification for this as they stated, “she is a woman and as a group they are unprotected by the state in Cameroon.” Therefore, there is less focus on the individual circumstance of the case and a greater focus on the general country conditions. This differs from the U.S. and Sweden. However, Harris argues that this is not usually the case with forced marriage claims and that usually if they are not coupled with a fear of FGM, they are rejected. Since the Cameroon case also involved domestic violence, it may be that the claims are not accepted unless there are physical acts of violence in addition to forced marriage present.⁵²⁸

In cases involving honor related acts of violence, in which a member of a family or community feels the need to enact an act of physical violence on an individual in order to restore

⁵²⁷ *R.H. v. Sweden*, Application no. 4601/14 (ECHR 2015).

⁵²⁸ Harris, “Untold Stories,” 311-312.

the family or community's honor, the U.S. has been favorable to cases in which the applicant can prove a likely threat of death and lack of state protection. The applicants in *Sarhan v. Holder* claim that the female applicant was at risk of being killed by her brother due to an alleged extramarital affair. The family had been visiting the U.S. when they learned of these threats in which the brother claimed that he could not kill his sister in the U.S., but would wait until she returned to Jordan due to the lack enforcement of punishment for honor related crimes. The IJ initially rejected this claim because the judge questioned if the female applicant could qualify as a PSG, and that the laws in Jordan provided adequate state protection. However, the Court of Appeals disagreed with this ruling reasoning that based on past PSG decisions the characteristics of being a Jordanian woman who has allegedly flouted repressive moral norms qualify as such. In addition, the Court contested that the applicant was safe drawing off country information to prove that prosecution for these crimes was lax.⁵²⁹

For Sweden, in cases of claims regarding honor related acts of violence or threats, there is a correlation between having the claim accepted either as refugee status or subsidiary protection if they provide corroborative evidence (i.e. country of origin information or medical documentation). It is more likely in these particular cases that the credibility of the applicants are called into question, therefore providing this type of information that can verify claims which can lead to a greater likelihood of a positive outcome. Country reports can be especially important for claims in which there is no physical evidence of the threats. For instance, an Iraqi Kurdish couple had applied for asylum on the reason that their families did not approve of their relationship, and they were trying to force the woman into an arranged marriage. They could not

⁵²⁹ *Sarhan v. Holder*, 658 F.3d 649 (7th Circuit 2011).

turn to the authorities as the woman's father was the clan leader. The Court used the country information to justify that the woman faced little protection against family violence. This verified their fear, and they were granted asylum.⁵³⁰ Without medical documentation, credibility can be doubted if this type of persecution emerges at a later stage. For instance a Kurdish woman's application for asylum was denied despite revealing that she faced honor-related violence due to her past experience with sexual abuse as a child. This was not corroborated with medical documentation, and she raised this claim later in the asylum process. She was declared incredible, because the Court of Appeals deemed that she had not proposed a compelling reason for withholding this information.⁵³¹ However if she had further documentation of her mental health status, this lateness may have been excused.

High rates of femicide have also been used as a ground for gender-based persecution as it is a form of violence that only affects women, and it puts them at a higher risk of violence than what has been deemed acceptable by states. In *Perdomo v. Holder*, a Guatemalan woman tried to appeal on this ground arguing that if she was sent back to Guatemala she would face a high risk of murder due to her age and gender. She also argued that she would be at a higher risk, because she had lived in the U.S. for an extended period of time, therefore would be considered an American with a considerably greater amount of financial resources. She provided country reports to verify her claims that the police do not adequately protect young Guatemalan women against murder. The BIA argued against this claim by saying that the PSG was too broad to be cognizable. However, the Court of Appeals surprisingly did not agree with this argument, siding

⁵³⁰ *UM 3363-10* (Migration Court of Appeal, 2011), <http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-9-march-2011-um-3363-10-3367-10#content>.

⁵³¹ *UM 6770-09* (Migration Court of Appeal, 2010), <http://www.asylumlawdatabase.eu/en/case-law/sweden-migration-court-appeal-19-april-2010-um-6770-09#content>.

with the applicant by justifying their decision that they had granted PSG status to other women who belong to a certain tribe and age demographic. Therefore, young women from Guatemala could qualify under this standard.⁵³² This contradicts other Appeals Circuits' arguments about women from a certain country being too large a PSG, demonstrating the decentralized nature of the U.S. system in which two different circuits can have opposite rationales.

Finally the last kind of claim under this category is violent circumstances, in which an applicant does not have a clear claim under one of the four other grounds, but feels that their gender may place them at a higher risk for violence in a specific area. In the United States, generally this is usually not an accepted form of GBV. In *Valles-Montes v. Attorney General*, an El Salvadoran woman applied for asylum after her father's car had been attacked, and she was raped. There was some discrepancies between her account and her father's which the court amounted to the traumatic nature of the incident. She was rejected for multiple reasons, the first was that she had not proven that the state refused to investigate this claim. Next, the Court of Appeals did not agree that she was part of a PSG vulnerable to persecution as the group must exist independently of persecution. Therefore victims of rape would not be considered a PSG despite it being a past experience. However, even if gender was to be considered a PSG it would not amount to persecution as rape was just considered to be "criminal activity".⁵³³ This discounts the times that rape is used as a form of intimidation or as a political tool.

Because of the European Convention on Human Rights, in order to receive international protection, applicants do not need to necessarily prove that their claim falls under the five Convention grounds, but rather that their deportation would violate this convention. Therefore,

⁵³² *Perdomo v. Holder*, 611 F.3d 662 (9th Circuit 2011).

⁵³³ *Valle-Montes v. Attorney General*, 342 Fed.Appx. 854 (3rd Circuit 2009).

applicants applying due to violent circumstances, comparatively have a greater chance in receiving a favorable outcome than in the U.S. In the *Case of J.K. and Others*, an Iraqi family applied due to violent threats from al-Qaeda and past persecution by the group. By proving that the state was not able to protect them from this threat and that internal relocation will not resolve the problem, they were able to prove that their deportation would result in a violation of Article 3 of the Convention, which protects against torture or inhuman treatment.⁵³⁴ Therefore, despite the 1951 Convention not protecting against persecution in the form of generalized violence, some claims are able to be accepted due to other legal treaties.

This is similar in South Africa, who as mentioned above is party to the OAU Convention Governing the Specific Aspects of Refugee Problem in South Africa, which does allow for persecution based on violent circumstances.⁵³⁵ Therefore in the case of *Ekachi v. SCRA*, in which the applicant recounted violent experiences throughout her life due to her ethnicity, she was able to have her claim heard and accepted on the basis of violent circumstances in addition to ethnicity.⁵³⁶

Reproductive Violence

Like the other forms of violence discussed in this chapter, this kind of violence still affects women in refugee receiving countries, however asylum advocates have still lobbied for its inclusion in GBV claims. I define reproductive violence as any act enacted upon a woman's reproductive capabilities without her informed consent. All of the cases considered in both the U.S. and South Africa have originated from China in relation to its One Child policy, but they

⁵³⁴ *J.K. and Others v. Sweden*.

⁵³⁵ Organization of African Unity, *Convention Governing the Specific Aspects of Refugee Problems in Africa*, September 10, 1969.

⁵³⁶ *Ekachi v. SCRA and Others*, Case No. 22970/16 (High Court 2017).

often involve fear of different actions or consequences (forced abortion, sterilization, or monetary fines). Though the preparatory works of Sweden have revealed that forced abortion or sterilization could amount to the level of persecution that would be accepted under PSG, there is yet to be any published, translated cases in which to verify the implementation of these guidelines.⁵³⁷ However, the U.S. has received several of these cases and *Mei Xiang Chen v. U.S. Attorney General* created a standard for applicants coming from China. First, the applicant must establish the pregnancies or births are a violation of family planning policies, and second that the violation of these policies would lead to punishment by state agents that would amount to the level of persecution. The applicant must demonstrate, “a pattern of persecution tied to the applicant personally” not just fear due to past harm that family members have faced.⁵³⁸ While applicants may be able to meet the first step, in implementation, the second standard is harder to meet. Monetary fines are usually not recognized as persecution, especially if the applicant has the financial means to pay those fines.⁵³⁹ Sterilization on the other hand has generally been seen as a consequence that could amount to persecution. One case involving a Chinese applicant who had given birth to a second child and sterilized was granted asylum based on this specific past experience.⁵⁴⁰ A second case which also involved forced sterilization for violation of this family planning policy was not dismissed because of the legitimacy of a claim, but rather a procedural issue in which the applicant applied for asylum outside the time window mandated by the REAL ID Act and she did not adequately explain why she submitted this claim late or if there had been

⁵³⁷ *Gender Related Asylum Claims in Europe*, 41.

⁵³⁸ *Mei Xiang Chen v. Attorney General*, 444 Fed.Appx. 442 (11th Circuit 2011).

⁵³⁹ *Ibid.*

⁵⁴⁰ “Case #898,” *Center for Gender and Refugee Studies*, last updated August 26, 2001, <https://cgrs.uchastings.edu/case/case-898>.

significant “changed circumstances” in which she no longer felt safe in returning to China.⁵⁴¹

This demonstrates it is incredibly important for advocates to critically examine procedural regulations as they can easily be used to dismiss claims. Therefore, it is more likely, especially considering how past sterilization was used as a justification for accepting claims of past FGM, that these types of cases would be accepted in the U.S.

South Africa has also received one case in which the applicants had violated China’s One Child policy, but ultimately it was rejected like in the U.S., because the applicants could only show economic consequences. The couple, who had met abroad after the husband participated in political protests in China. After fleeing first to Lesotho, where he had met his wife, the second applicant, they moved to South Africa. In South Africa, they had four children. Though Fang had held a residence permit for some time, it had been revoked which is why he had applied for asylum. He had been rejected first on his political plea as this claim did not have corroborative evidence that the Chinese authorities still wanted to arrest him and because of the 16 years that had passed since the protests. On the second claim regarding forced sterilization, the High Court focused more on the applicant’s fears for having to pay fines instead of potentially being forcefully sterilized as she had already violated this policy. Because of this, the Court ruled, “economic considerations per se does not qualify a person as a refugee,” meaning that the applicants had not met the standard of persecution. In addition, the Court claimed that since the policy was applied uniformly on the Chinese population, that it was not discriminatory.⁵⁴²

LGBTQ+ Claims

⁵⁴¹ *Xiao Ji Chen v. U.S. Department of Justice*, 471 F.3d 315 (2nd Circuit 2006).

⁵⁴² *Fang v. Refugee Appeals Board and Others*, Case No. 40771/05 (High Court 2006).

Claims either based in sexual orientation or gender identity are grouped under the broader category of gender based persecution. Sexual orientation is part of this category as it involves individuals who are acting outside their perceived gender roles, and therefore seen as a threat to the norm. Gender identity is more clearly linked to gender-based persecution because it is directly linked to perpetrators not accepting and violently reacting against gender identification that is seen as outside the norm. However, consideration of claims of gender identity can often challenge the accepted standard that gender is an immutable characteristic, revealing that most of the time asylum officials will equate gender with biological sex, not considering gender as the basis of power relations.⁵⁴³ As mentioned before, Sweden does provide protections for asylum claims based on sexual orientation in its domestic legislature, but again, there are not translated cases based on this.

In terms of cases regarding the sexual orientation of an individual, there is not any meaningful difference in claims by men or women on the subject. In the U.S., it is key to prove not only a threat to one's life, but also that the state is not adequately protecting the individual. There is a certain amount of performance of identities associated with these claims. In *Hernandez-Montiel v. I.N.S.*, in which a Mexican gay man successfully claimed asylum, he was able to demonstrate both persecution by state agents and prove that he was "out" in his country of origin. The applicant had faced harassment since the age of 12 for both his sexual orientation and possible gender fluid identity (the language the case uses is "gay man with female sexual identity", including instances of the applicant crossdressing, since the case uses male pronouns, I will be refer to the applicant as such). His parents had thrown him out of their home after his

⁵⁴³ Sima Shakhsari, "The Queer Time of Death: Temporality, Geopolitics, and Refugee Rights," *Sexualities* 17, no. 8 (2014): 1002.

school discovered his sexual orientation. He faced persecution by police officers who sexually assaulted him twice and threatened to imprison him if he reported the incident. He unsuccessfully tried to flee to the U.S.. Afterwards, his extended family forced him into a gay conversion program. Eventually he was able to successfully flee to the U.S. and filed for asylum.

⁵⁴⁴ Because it was state agents who had raped him and using expert testimony, he proved that the police had targeted him because of his sexual and gender identities, it demonstrates a clear failure in state protection. In addition, because of his willingness to crossdress in Mexico, it demonstrates that the applicant was clearly “out” to the greater society, publicly performing his sexual identity. Thus he was granted asylum. However, in cases such as *Salkeld v. Gonzales*, in which the applicant is not “out” in his country of origin, the claim appears to be less likely to be accepted. The Court ruled that because he had not personally experienced past persecution because of this lack of being publicly out, he did not establish a clear enough threat of persecution. In addition, the Court seemed more skeptical when it was non-state actors perpetrating violent threats. Though the Peruvian government fired employees who were gay, the threat of physical violence against the general population stems from paramilitary groups. The Court labeled these instances as irregular, therefore not constituting systematic harassment or persecution.⁵⁴⁵ This is similar to the reasoning in *Korenchenkova v. Attorney General* in which the court rules that, “the harm Korenchenkova experienced in Russia- consisting of bruising to her arms, hands, and body as a result of isolated incidents over a period of several years- certainly amounts to harassment, the record does not compel us to find that it meets the “extreme” threshold for persecution.”⁵⁴⁶

⁵⁴⁴ *Hernandez-Montiel v. I.N.S.*, 225 F.3d 1084 (9th Circuit 2000).

⁵⁴⁵ *Salkeld v. Gonzales*, 420 F.3d 804 (8th Circuit 2005).

⁵⁴⁶ *Korenchenkova v. Attorney General*, 453 Fed. Appx. 908 (11th Circuit 2011).

In South African sexual orientation claims, there is less emphasis on whether the applicant has adequately performed their identity to receive asylum, but rather if the anti-gay legislation of the countries in which the applicants are fleeing from is enforced. In the two cases where claims failed, the country's enforcement of its anti-gay legislation was questioned. In *Refugee Appeal Board Decision (Nigeria)*, the applicant claimed that he faced persecution by state agents as he had been occasionally harassed by the police and arrested because of his alleged sexual orientation twice, where he had been tortured. However, the Court doubted this story due to small differences in details such as the claim that he had researched that South Africa was the most progressive African country for LGBT rights, but claimed he did not know he could apply for asylum on that ground and originally applied under political opinion. The Court ruled that even though Nigeria had anti-gay legislation, it was rarely enforced, especially as it was the act of homosexual sex not the sexual identity that was criminalized, meaning the times when the applicant would face the greatest risk would most likely happen in private.⁵⁴⁷ They used the fact that there was an active gay clubbing culture in Lagos to justify that this legislation was rarely enforced, therefore the applicant did not face a threat of persecution. This logic was applied again in *Refugee Appeal Board Decision (Tanzania)* in which similarly a gay man claimed asylum due to threats from both his tribe and the anti-gay legislation of Tanzania. The Court ruled, "the fact that there is a Penal Code which criminalizes sodomy does not mean that a homosexual person is being persecuted." Rather instead, applicants must point to specific instances of systematic harassment to meet this level. South Africa is more understanding though if the details of this persecution come up later in a claim than in the U.S..⁵⁴⁸ *Esnat Maureen*

⁵⁴⁷ *Refugee Appeal Board Decision (Nigeria)*, (Refugee Appeal Board 2002).

⁵⁴⁸ *Refugee Appeal Board Decision (Tanzania)*, (Refugee Appeal Board 2011).

Makumba v. The Minister of Home Affairs and Others established this precedent involving a Malawian woman who originally did not include her sexual orientation in her first application for asylum as she was unsure of South Africa's position towards the LGBT community and when she filed her claim with a friend, she was worried she would be ostracized by her only friendly contact in the country. However, once this had been established the Court ordered a review of her case with this new claim stating that it would violate her Constitutional rights if not reviewed.⁵⁴⁹

Finally the U.S. has had cases in which the applicant was trying to apply under the claim of persecution due to gender identity (*Hernandez-Montiel v. I.N.S.*, while including aspects of gender identity focused much more on the sexual orientation of the applicant).

Avendano-Hernandez v. Lynch's claim is rooted in persecution due to gender identity in which the applicant appealed for withholding of deportation through the Convention Against Torture. However, applicants who wish to apply for this kind of relief have to demonstrate a greater threshold of threat to torture or persecution than asylum claims. They must show that if returned to their country of origin they are "more likely than not to be tortured".⁵⁵⁰ This is greater than the asylum threshold in which an applicant must show a "reasonable possibility" to being persecuted, which the Supreme Court has defined as being at least a 10% chance of being persecuted.⁵⁵¹ On balance, the applicant does not need to fit their claim into one of the five Convention grounds, which may give them more flexibility in proving their case, especially if it is outside the "ideal image" of an asylum claim. In this case, the applicant is able to meet the CAT threshold, demonstrating that she had faced harassment since she was a child for her gender

⁵⁴⁹ *Esnat Maureen Makumba v. The Minister of Home Affairs*, Case No. 6183/14, (High Court 2014).

⁵⁵⁰ *Avendano-Hernandez v. Lynch*, 800 F.3d 1072 (9th Circuit 2015).

⁵⁵¹ *Abebe v. Gonzales*, 432 F.3d 1037 (9th Circuit 2005).

identity. As a transwoman, she was not only harassed by non-state actors, but like in *Hernandez-Montiel v. I.N.S.* was harassed by the police and raped by them, multiple times. Though Mexico had anti-discrimination laws, like in South Africa, it is more important to the Court in how they are enforced. Since Mexico City still has one of the highest rates of trans-murders in the world, the Court ruled that the state does not adequately enforce this law and that she is still at “more than likely risk” to face this kind of violence, which the Court ruled amounts to torture.⁵⁵²

Though the applicant received a favorable outcome, this case still revealed concerning parts of the asylum system, especially in how gender guidelines are implemented in the training of asylum decision makers. The Court of Appeals reprimanded the IJ for using the wrong gender pronouns and failing to recognize the difference between gender identity and sexual orientation.⁵⁵³ Because the gender guidelines are not legally binding and gender sensitivity training is required for asylum officers but not IJs, there can still be an incredible amount of internal bias and ignorance in these decisions, demonstrating a downside in having a decentralized system.

Concluding Remarks

While comparing the adjudication of these types of gender-based claims, there are four key trends. First, claims are at risk of being dismissed on procedural issues such as an adverse credibility assessment of the applicant, applying outside the established time window, and having small inconsistent details that undermine the truthfulness of a claim. This is illustrated best in the U.S. in the case of the Chinese applicant who like in *Mei Xiang Chen v. U.S. Attorney General* applied due to past experience of forced sterilization but was rejected as she filed after the

⁵⁵² *Avendano-Hernandez v. Lynch.*

⁵⁵³ *Ibid.*

mandated time limit.⁵⁵⁴ This logic is also seen in the Case of *R.H. v. Sweden*, where the applicant had applied in other European countries, already marking herself as likely to be incredible in Sweden, regardless of the claim.⁵⁵⁵ While South Africa also uses this kind of reasoning to dismiss some claims, it is not as prevalent. In *Maureen Makumba v. The Minister of Home Affairs and Others*, details that were brought to light later in a case were not dismissed as being irrelevant or undermining credibility, but rather demanded a second review of the application in order for the applicant to have a fair hearing and access their Constitutional rights.⁵⁵⁶ Therefore this trend differs slightly between the case studies.

Second, there is a strong tendency to side with claims that can be verified by either medical or legal documents. Therefore, cases in which there is violence enacted on a body that has scars that verify the kind of abuse that the applicant has faced are more likely to be granted asylum. This is demonstrated in the U.S. in the claims of FGM, in which medical staff can determine if a woman has undergone this procedure or not. However, without this type of documentation, the claims are less likely to be believed, such as in the cases involving sexual harassment. The Court was more likely to rule against applicants even if the police were not taking action as they agreed there simply could be insufficient evidence. Therefore, this does not demonstrate a lack of state protection for the U.S.. There may be some implicit bias in decision makers that cases which do not leave evidence of physical harm do not meet the level of persecution, therefore sexual harassment, forced marriage, and threats due to sexual orientation may not be as likely to be accepted. This prioritizes physical violence, associated with masculine narratives, over all other forms of violence. For South Africa, country information that verifies

⁵⁵⁴ *Xiao Ji Chen v. U.S. Department of Justice*, 471 F.3d 315 (2nd Circuit 2006).

⁵⁵⁵ *R.H. v. Sweden*, Application no. 4601/14 (ECHR 2015).

⁵⁵⁶ *Esnat Maureen Makumba v. The Minister of Home Affairs*, Case No. 6183/14, (High Court 2014).

the intensity of the general situation or the enforcement of certain laws can also have this positive correlation. Those in which the country information does not match up with the claim such as in *Refugee Appeal Board Decision (Nigeria)*, are more likely to be rejected.⁵⁵⁷

Third, for Sweden and the U.S., it is imperative that the applicant shows that there are extraordinary circumstances in a claim that put the applicant at a higher risk to violence than others in the country. Rarely does either country grant asylum due to general violent circumstances, but rather because an applicant's political opinion, ethnicity, or connection to family members puts the applicant at a higher risk for sexual violence or other forms of persecution. South Africa differs from the other two countries on this, because of its commitment to the OAU Convention Governing the Specific Aspects of Refugee Problems in Africa which allows for claims due to the generalized violence of a country. However, putting this higher bar of having to prove violent circumstances above the norm can be harder for women as the country reports may not consider the types of insecurity that women face in these conflict zones.

Finally, there continues to be problems with the implementation of gender guidelines in each of the three countries. Through this comparative research, I have found that countries often state that hypothetically an act could qualify for an granting of asylum, but because of the details of the case, this specific claim does not meet that threshold. This is shown in the U.S. cases of Forced Prostitution, in which without consistent harassment then they are generally not accepted. However, if there continues to be a trend in which only gender claims are hypothetically granted asylum, it does not help the women who are applying for asylum, leading again for more focus to be directed at the implementation of these guidelines rather than the text behind them. In

⁵⁵⁷ *Refugee Appeal Board (Nigeria)*, (Refugee Appeal Board 2002).

addition, South Africa and the U.S. struggle with having all their asylum decision makers understand and follow the gender guidelines. South Africa has severe understaffing in its bureaucracy, leading to cursory trainings that often do not adequately prepare asylum officers to intake claims in a gender sensitive manner. This pressure can also make it more likely that details of the claims are either mistranslated or not recorded, which ultimately hurts the applicants. Because the U.S. is leaning towards a more decentralized asylum system with the enactment of the REAL ID Act, IJs who decide on the majority of these cases are not held to the standards that USCIS has set out to adjudicate these claims. Without this, internal biases, including implicit sexism and racism, undermine the legitimacy of some gender based claims.

“Conclusion”

Close to 65 years have passed since the 1951 Convention Relating to the Status of Refugees entered into force at the international stage, a document created to fix a “temporary problem” which never disappeared. In order to adequately support the changing face of refugee crises, it is imperative to have a responsive and evolving refugee regime to address their needs. As discussed in Chapter One, past refugee regimes that could not change to meet the pressing needs of the international system collapsed, and new ones emerged slowly moving us towards the international regime present today. If the system today refuses to evolve to meet current needs of women asylum seekers and gender-based claims, the regime is on course to collapse just like past ones and these groups of people will continue to be harmed.

However, all hope is not lost. Although this regime was created in a very specific context to resettle displaced persons post-WWII and dissidents from the Soviet Bloc, it has evolved over time. The 1967 Protocol embodies this evolution and has created a consensus among member states to expand the refugee definition to include those outside the original geographic and temporal limits in a legally binding manner. Efforts driven by the UN Decade for Women forced the UNHCR to shift from a gender-blind agency to one that created specialized programs for women refugees and advocated for the inclusion of gender-based claims under the Convention ground of Particular Social Group. Local NGOs have pressured domestic legislatures to integrate gender guidelines into their asylum policies when there was not backing to create a legally binding change at the international level. Though the inconsistent application of gender guidelines and the distrust of women asylum seekers persist, there are avenues where advocates and future scholars can enact change to begin to ameliorate these inequities. It is unlikely in the

immediate future that there will be an overhaul of the current refugee regime, but there are still international pressures that could force the system to regress, restricting rights or access to rights laid out in the 1951 Convention. Therefore, based on the research conducted through this project, I have three concluding recommendations where advocates and future scholars should direct their attention.

First, I recommend increased independent monitoring of national gender guidelines. All four trends identified in Chapter Five are linked to implementation problems of gender guidelines. The lack of strength in these guidelines is striking, as often times they are only binding to the lowest level of asylum decision makers, such as asylum determination officers in the U.S..⁵⁵⁸ Therefore, pushing for an increase in the strength of the binding nature of these guidelines can help hold countries accountable to what is written on paper. Continuing to re-evaluate these guidelines can also help to ensure that they are responsive to continuing conversation on gender and asylum. As discussed earlier, Sweden and South Africa have both revised their guidelines, while the U.S., an early leader, has lagged behind. Finally, conducting work outside this legal system is also key by helping making gender guidelines and asylum procedures clear and accessible to asylum seekers, especially considering literacy and language barriers. This is even more pressing for the majority of asylum seekers who do not have access to legal representatives throughout the process. Identifying what barriers there are to accessing these documents and asylum rights is a key question for scholars who can convey this information to community organizations to help inform their strategies.

⁵⁵⁸ Fletcher, "The REAL ID Act," 114-115.

My second recommendation is to place greater attention on critically examining regulatory asylum procedures, not just the interpretations of the 1951 refugee definition. As explored in Chapter 5, oftentimes decision makers will try to avoid judging on the substance of a case if they can dismiss it due to procedural errors. Policies like the REAL ID Act have only increased these restrictive regulatory procedures, making it more likely in the future that asylum seekers will be rejected due to these types of policies. These policies may disproportionately affect women as they may have lower literacy rates, which places another obstacle in understanding these complex procedures. Greater research on how these policies may disproportionately affect women will allow advocates in the future to recognize these patterns and advocate either for the repeal of these policies or the prevention of the adoption of similar ones.

Finally, there must be greater attention directed towards the rights and living conditions of asylum seekers during the asylum process. This thesis focused more on examining the outcomes of asylum applications and less on the conditions that caused a woman's testimony to be shaped in a certain manner. In the future, scholars and activists need to continue to focus on talking to women during this asylum process to understand how inadequate housing, childcare support, and health services may affect the substance of their case. Conducting ethnographic studies on different communities of women, highlighting when intersecting identities may change their experience in these living situations, will allow community services to better meet the diverse needs of this community.

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