Golden Gate University School of Law
GGU Law Digital Commons

Theses and Dissertations Student Scholarship

4-19-2023

Humanitarian Protection in International Refugee Law, Sexism and Exclusion: Case for Human Rights Assessment

Carol Ijeoma Njoku

Follow this and additional works at: https://digitalcommons.law.ggu.edu/theses

Part of the International Humanitarian Law Commons, International Law Commons, and the Law and Gender Commons

GOLDEN GATE UNIVERSITY SCHOOL OF LAW
SAN FRANCISCO

Humanitarian Protection in International Refugee Law, Sexism and Exclusion: Case for Human Rights Assessment

By

Carol Ijeoma Njoku

A Dissertation Submitted to Golden Gate University School of Law in Partial Fulfilment of the Requirements for the Degree of Scientiae Juridicae Doctore (S.J.D)

April 19, 2023

Dissertation Committee

Professor Benedetta Faedi Duramy, Associate Dean and Professor of Law, Chair

Professor Chris Nwachukwu Okeke, Director of SJD International Legal Studies & the Sompong Sucharitkul Center for Advance International Legal Studies, Supervisor

Professor Remigus Chibueze, Adjunct Professor/Senior Fellow & Sompong Sucharitkul Center for Advance International Legal Studies, Reader

DEDICATION

This dissertation is dedicated to the memory of my beloved brother, Ifeanyi Wisdom Linus Njoku

AND

To my parents—Linus Odom Njoku and Callista Ukachi Njoku

ACKNOWLEDGMENT

All glory and thanksgiving to God! I express my profound gratitude to Golden Gate University School of Law for awarding me the International Legal Studies Merit Scholarship for this program. Equally, I deeply appreciate my Vice Chancellor, Professor Charles A. Igwe, and the University of Nigeria Nsukka for an award of partial scholarship for this study. I thank Fr Dr. Michael McNulty (SJ) and the Marquette University, Center for Peacemaking for granting me a Research Fellowship that reinforced the completion of my research work.

I am very grateful to the Associate Dean and Professor of Law, Professor Benedetta Faedi Duramy for her mentorship and acceptance to chair my dissertation committee. Also, I am deeply grateful to the Director of SJD International Legal Studies and my Supervisor, Professor Chris Nwachukwu Okeke, and Professor Remigus Chibueze, the Reader and my Research Professor, for accepting to participate as members of my dissertation committee. To Professors Michael Daw and Mohamed A. Nasralla of Golden Gate Law Library, I say: Thank you!

My deepest appreciation goes to the members of my biological and religious families. I sincerely thank my parents—Mr. Linus O. Njoku and Mrs. Callista U. Njoku for inspiring me to hard work, excellence, and resilience. I appreciate the support of my relatives, especially Chief Tony Chukwu, Jude and Patricia Obasi, and Marcel and Juliet Udeogu. I equally appreciate the moral support, prayers, and encouragement from my religious family—the Daughters of Mary Mother of Mercy Congregation, Nigeria. I am grateful for the support received from other religious institutions—the Archdiocese of San Francisco, the Salvatorian Sisters, Milwaukee, and the Jesuit Community at Marquette. I sincerely thank Sr. Rosina Conrotto, Mother Marie Therese Ego Okpala, Sr. Jean Schafer, Sr. Beverly Heitke, Sr. Virginia Honish, Sr. Callistus Nwaezeakor, Sr. Caroline Onuoha, and Fr Mathias Ndulaka, for your encouragements. To those I am unable to mention, I appreciate you deeply in my heart.

ABSTRACT

The overall purpose of the 1951 Convention Relating to the Status of Refugee (Refugee Convention) and its 1967 Protocol is to protect refugees fleeing persecution and threat to life. Established in the aftermath of World War II (WW II), Article 1. A(1) of the Refugee Convention centered the meaning and criteria for refugee protection on the circumstances of the War. Thus, the status of a refugee is framed from persecution feared or suffered "on account of" race, religion, nationality, political opinion, and membership in a particular social group. More than seven decades after WW II, the scope of the definition has subsisted, despite the changing paradigm in the circumstances and responses to involuntary migration. This is not without consequences. With compelling demands in forced migration, the international community has developed different approaches towards the refugee crisis, yet with minimal solutions.

Despite the massive outcry to address the complex challenges of refugees, hostile attitudes to protection seekers remained daunting and overly pervasive in the international arena. Humanitarian protection of refugees is one of the most crucial yet mismanaged obligations of international law. With increasing demands for humanitarian protection, many destination countries perceive refugees as symbols of conflict, economic burden, and insecurity. This results in rejection, denials, pushback, detention, and refoulement, as well as a clash between political interests and international obligations to protect. Even where host states may exercise discretion to protect, such commitment is subject to the eligibility requirements of Article 1. A(1) and subject to excludability. Because the state functions as an operational instrument for international refugee law (IRL), the limitations of IRL are replicated in domestic laws with detrimental consequences on "unCovention" refugees. Women are the most disadvantaged given that sex is excluded from the status of refugees and grounds of protection. This gives cause to interrogate

the nondiscriminatory principle of the Refugee Convention and its 1967 Protocol, and conformity with the norms of international human rights law.

This dissertation explores sexism in IRL and the exclusion of women's experience from the framework of humanitarian protection. It traces the problems of nexus generated from the limitations of refugee inclusion and their intersectionality with gender exclusion and the framing of laws of excludability. The analysis of state practice stresses the interconnection between law, policy, and practice. Centering on the United States jurisprudence, the study investigates the irregularities in the construction of the refugee inclusion and exclusion laws and the associated interpretative barriers that affect the application. The findings are contextualized with lessons from other jurisdictions of selected common law countries—Australia, Canada, and the United Kingdom (UK). Law and human needs are dynamic. Therefore, this study examined the effects of inflexibility and lack of diversity in a seventy-two-year Refugee Convention and the prospects of change for a sustainable inclusive refugee regime. In view of these, this study makes recommendations including re-conceptualizing the criteria of refugee eligibility that reflect human realities in contemporary society and taking cognizance of the human rights principles of IRL under the Convention Against Torture (CAT).

LIST OF ABBREVIATIONS

AG	Attorney General
AG	Attorney General
AGG	Guidelines on Gender Issues for Decision Makers
AIF	Alternative Internal Flight
AMRT	Australian Migration Review Tribunal
AP1	Additional Protocol 1
BIA	Board of Immigration Appeal
BNF	Bifurcated Nexus Formular
CAT	Convention Against Torture, Other Inhuman or Degrading Treatment or Punishment
CCG	Canadian Chairperson's Guidelines
CDC	United States Center for Disease Control and Prevention
CDR	Cartagena Declaration on Refugees
DHS	Department of Homeland Security
CPCP	Chinese population control policy
DIMA	Department of Immigration and Multicultural Affairs
DOJ	U.S. Department of States
DV	Domestic Violence
ECHR	European Convention for the Protection of Human Rights
ECtHR	European Court of Human Rights
ECOSOC	Economic and Social Council
ECRE	The European Council on Refugees and Exiles, Position on Exclusion from Status
EOIR	Executive Office for the Immigration Review
EUQD	European Union Law on Qualification Directive
EU	European Union
FCA	Canadian Federal Court of Appeal

GBP	Gender-Based Persecutions
GBV	Gender-Based Violence
GC IV	Fourth Geneva Convention
GKM	Guidelines on Gender Knowledge and Management
HRW	Human Rights Watch
INA	Immigration and Nationality Act
IRB	Canadian Immigration and Refugee Board (CIRB or IRB)
CEDAW	Convention on Elimination of All Forms of Violence Against Women
CIRO	Constitution of the International Refugee Organization
GBP	Gender Based Persecution
GBV	Gender Based Violence
IAT	Immigration Appeal Tribunal
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic Social and Cultural Rights
ICA	Israeli Court of Administration
ICRC	International Committee for Red Cross
ICTY	International Criminal Tribunal for the Former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
IJ	Immigration Judge
IMC	International Monitoring Center
IHRL	International Human Rights Law
IHR	International Human Rights
IHL	International Humanitarian Law
IHRL	International Human Rights Law
INLA	Irish National Liberation Army
IOM	International Organization for Migration
IRFA	International Religious Freedom Act
LCILO	Labor Conventions of the International Labor Organization

ILO	International Labor Organization
INA	Immigration and Nationality Act
INS	Immigration and Naturalization Service
IRL	International Refugee Law
IRRIRA	Illegal Immigration Reform and Immigration Responsibility Act
KGB	Soviet Intelligence Service
MPP	Migration Protection Protocol
MPSG	Membership in a Particular Social Group
NIAA	Nationality Immigration and Asylum Act
NPSC	Non-Political Serious Crime Bar
OIRF	Office of the International Religious Freedom
PIRA	Provisional Irish Republican Army
POO	Persecutors of Others
PSG	Particular Social Group
RLUIPA	Religious Land Use and Institutionalized Person Act
RLPA	Religious Liberty Protection Act
RFRA	Religious Freedom Restoration Act
RRT	Australian Refugee Review Tribunal
SSHD	Secretary of State for the Home Department
STCA	Safe Third Country Agreement
QD	Law on Qualification Directive
UAE	United Arab Emirate
UCA	UK Court of Appeal
UDHR	Universal Declaration of Human Rights
UKBA	DFT Procedure by the UK Boarder Authority
UKIA	UK Immigration and Asylum Act
UNHCR	United Nations High Commissioner for Refugees
URG	UNHCR Religious Guidelines

USCIS	U.S. Citizenship and Immigration Services
USC	United States Citizen
USRAP	United States Refugee Admission Process
USRVAW	UN Special Rapporteur on Violence Against Women
VAWA	Violence Against Women Act
VCLT	Vienna Convention on the Law of Treaty
WFF	Well-Founded Fear
WHO	World Health Organization

TABLE OF CONTENT

CHAPTER ONE
INTRODUCTION

1.1 Introduction ……………………… ………………………………………………. 1-9
1.2 Operational Components of Humanitarian Protection in International Law………… 9-11
1.3 Discrepancies Between and IRL International Law…………………………………… 11-15
1.4 IRL and the Development of the United States Refugee Regime ……………….…... 15-21
1.5 Development and Structure of the United States Asylum Jurisprudence ……………... 21-23
1.6 Gender or Sex as Recurrent Site of Refugee Persecution …………………………….. 23-29
1.7 Theorizing Sexism within the Framework of Humanitarian Protection ……………… 29-31
1.8 Changing Paradigm in Humanitarian Protection and Refugee Circumstances ……... 31-37
1.9 Covid-19 Pandemic and New Burden on Humanitarian Protection ………………... 37-42
1.10 Structural Mapping ……………………………………………………………... 42-46
1.11 Conclusion ……………………………………………………………………… 46-46

CHAPTER TWO
LEGAL FRAMEWORK OF REFUGEE PROTECTION

2. 1 Introduction…………………………………………………………………….. 47-48
2.2 Judeo-Christian Perspectives of Sanctuaries and Humanitarian Protection ……………. 48-54
2.3 Islamic Tradition on Humanitarian Protection of Refugees …………………………… 54-58
2.4 Development of States' Sanctuaries and the Intersectionality with Religious Practice… 58-64
2.5 Development of Alien Protection Laws – A Presage to Migrants' Rights protection….. 64-66
2.6 Early Efforts to Protect the Rights of Minorities: Pathway for Refugees' Rights …….. 66-69
2.7 League of Nations and Establishment of International Refugee Protection ……………. 70-72
2.8 Establishment of the 1933 Convention Relating to the Status of Refugees …………..... 73-75
2.9 UNHCR Roles in Refugee Humanitarian Protection ..………………………………… 75-80
2.10 United Nations and the 1951 Convention Relating to the Status of Refugees ……….. 80-86
2.11 Post-Convention Refugee Laws and the 1967 Protocol Relating to the Status of Refugees ……………………………………………………………………. 86-89
2.12 Regional Refugee Laws ………………………………………………….………… 89-92
2.13 International Human Rights Law (IHRL) and IRL ….……………..…………….…... 92-94

2.14 International Humanitarian Law (IHL) and Protection of Refugees …………………. 94-97
2.15 States and Refugee Law ……………………………………………………………… 97-99
2.16 State Laws as Source of IRL: the United States Refugee Law ……………….…..... 99-100
2.17 Conclusion ………………………………………………………………………..….. 101

CHAPTER THREE

ELEMENTS OF HUMANITARIAN PROTECTION—ASYLUM, NONREFOULEMENT, AND CONCEPT OF PERSECUTION

3.1 Introduction ……………………………………………………………………. 102-103
3.2 Definition of a Refugee ………………………………………………………... 103-110
3.3 Asylum and the Right to Protect Refugees ……………………………………. 110-114
3.4 Principle of Nonrefoulement …………………………………………………... 114-123
3.5 Defining Persecution …………………………………………………………... 124-126
3.6 Persecution as Human Right Violation ………………………………………... 126-127
3.7 Jurisprudential Perspectives of Persecution …………………………………… 128-134
3.8 Elements and Sources of Persecution …………………………………………...134-135
3.9 Persecutor—State Actor or Non-State Actor …………………………………135-139
3.10 The Persecuted ……………………………..…………………………………..139-140
3.11 Forms of Persecution …………………….…………………………………… 140-141
3.12 Serious Physical Form of Persecution …….………………………………….. 141-142
3.13 Mental or Psychological Harm as Persecution ……….………………………. 142-145
3.14 Economic Related Persecution ……………………….………………………. 145-150
3.15 Discrimination as Persecution ………………………………………………150-156
3.16 Severe Persecution or Torture under CAT (Humanitarian Protection) ……………..156-159
3.17 Conclusion …………………………………………………………………………..159-160

CHAPTER FOUR

GROUNDS FOR PERSECUTION, INTERPRETATIONS OF STATES AND CHALLENGES OF ESTABLISHING VIABILITY

4.1 Introduction ……………………………………………………………………… 161-162

4.2 Persecution on Account of Race ………………………………………………… 163-165
4.3 United States Jurisprudence of Refugee Claims on Account of Race ……………… 165-167
4.4 Persecution on Account of Nationality ……………………………………..….. 167-169
4.5 United States Jurisprudence and Asylum Based on Nationality …………………..… 169-175
4.6 United Kingdom (UK): Asylum on Account of Nationality ……………………..….. 175-180
4.7 Persecution and Claims on Religious Grounds …………………………………… 180-186
4.8 Asylum Claims on Religious Grounds ……………………………………….… 186-197
4.9 United Kingdom and the Jurisprudence of Religious Claims …………………..…… 197-203
4.10 Persecution on Account of Political Opinion …………………………………… 203-204
4.12 United States Case Laws on Political Asylum ……………………………….... 204-209
4.13 Intervention of the UNHCR ………………………………………………….... 209-210
4.14 Challenges with Interpretation of Imputed Political Opinion ……………………… 210-212
4.15 Neutrality as Political Opinion …………………………………………….... 213-214
4.16 Political Rebellion, Refusal to Serve, Evasion or Desertion ……………………... 214-217
4.17 Political Coercion as Persecution on Account of Political Opinion ………………... 217-222
4.18 Persecution and Claims on Account of Particular Social Groups …………………... 222-224
4.19 UNHCR Interpretations of Membership in a Particular Social Group (MPSG) …… 224-226
4.20 United States Interpretation of MPSG …………………………………….... 226-233
4.21 Conclusion …………………………………………………………………….. 233-235

CHAPTER FIVE

CHALLENGES WITH ESTABLISHING VIABILITY IN GENDER RELATED CLAIMS AND THE PROBLEM OF NEXUS

5.1 Introduction ………………………………………………………………..… 236-240
5.2 Framing Persecution in IRL and Lack of Gender Perspectives ……………………... 240-242
5.3 UNHCR Guidance on Making Gender Based Claims …………………………..... 243-245
5.4 Responses of Domestic Jurisdictions to the UNHCR Guidelines ……………….….. 246
5.4.1 Canadian Gender Guidelines ……………………………………………..….. 246-248
5.4.2 Australian Gender Guidelines ……………………………………….....… 248-252
5.4.3 United States Gender Considerations ……………………………………..… 252-254
5.5.1 United States Jurisprudence of Gender Asylum …………………………………… 255

5.5.2 Claims on Female Genital Cutting (FGC) …………………………………………. 255-259
5.5.3 Rape and Other Forms of Sexual Violence …………………………………...... 259-265
5.5.4 Domestic Violence ……………………………………………………...…. 265-273
5.5.5 Claims on Persecution for Non-Compliance to Repressive Gender Norms ……….. 273-280
5.5.6 Forced Marriage and Bride Price …………………………………………………... 280-285
5.5.8 Honor Killing ………………………………………………………………………. 285-290
5.5.9 Inconsistencies Defining of Gender PSG in the United States Jurisprudence …….. 290-298
5.6 Canada and the Definition of MPSG ……………………………………………... 298-300
5.7 Australian Jurisprudence of PSG ……………………………………………….…. 300-306
5.8 UK Definition of PSG ……………………………………………………………….. 306-308
5.9 Examples from Other International Jurisdictions …………………………….... 308-310
5.10 Nexus Issues in Gender Asylum and Conclusion .....……………………………... 310-312

CHAPTER SIX

ASYLUM BARS AND EXCLUSION LAWS—UNITED STATES APPLICATION AND HUMAN RIGHTS EFFECTS

6.1 Introduction ……………………………………………………………………… 313-316
6.2 Overview of the Convention's Exclusion Law under Articles 1F ………………….. 316-318
6.3 Evaluating Exclusion under Articles 33(2) and 1.F ……………..……………….. 319-322
6.4 Statutory Bars and Enforcement Under the United States Laws ….………………... 322-326
6.4.1 Implementing Bars Against Persecutors of Others (POO) ………..………………. 326-343
6.4.2 Non-Political Serious Crime Bar (NPSC) ……………………………………..….. 343-347
6.4.3 Serious Crimes and Danger to National Security of Host Country Bar …….……. 347-349
6.4.4 Applying Security and Particularly Serious Crime (PSC) Bar ………………..….. 350-354
6.4.5 Danger to Security and Terrorism Bar ……………………………………………..… 354-358
6.4.6 Implications of the Terrorism Bar for Women Making Gender Claims ………..…. 358-361
6.5 Other Forms of Inadmissibility and Exclusion Policies …………...……..…….. 361
6.5.1 National Security Threat Bar and Inadmissibility under the Trump Administration. 361-365
6.5.2 Impacts of Trump's Executive Orders on Immigration Laws—Expedited Removal.365-368
6.6 Racism and the Trajectory of Exclusion Laws—The Past and Present ……………... 368-370

6.7 Effects of Exclusion and Criminalization Breaches …………………………………. 370-374
6.8 Enforced Exclusion Under Title 42 ……………………………………………….. 374-382
6.9 Exclusion Under the Migration Protection Protocol (MPP) …………………………. 382-384
6.10 Exclusion Under Safe Third Country Agreements (STCA) …………………..…… 384-390
6.11 Exclusion under Article I.E and Jurisprudence of Firm Resettlement …………..…. 390-392
6.12 Art. 1.C Exclusion by a Change of Circumstance, "No Longer a Refugee" ……..… 392-395
6.13 Exclusion on Basis of Default in Filing Deadlines ……………………………..... 395-397
6.14 Conclusion ……………………………………………………………………….…. 397-401

CHAPTER SEVEN

ASYLUM BARS AND EXCLUSION LAWS—UNITED STATES APPLICATION AND HUMAN RIGHTS EFFECTS

7.1 Introduction ……………………………………………………………………….. 402-405
7.2 Chapter Review and Summary ………………………………………………… 405-413
7.3 Review of Findings on Gender Exclusion and Recommendations ………………... 413-423
7.4 Exclusion under the Security and Terrorism Bar: Impacts and Recommendation …423-427
7.5 A Review of the United States Exclusion Under Inadmissibility Bar ……………...427-429
7.6 Findings on the Penalization of Protection Seekers and Expedited Removal ………430-431
7.7 Analysis of the Intersections of Racial Profiling and Racially Motivated Exclusion 431-432
7.8 A Re-assessment of Deportation under Title 42 …………………………………… 432-434
7.9 The MPP "Remain in Mexico" Policy—A Pushback on Asylum Seekers ………… 435-436
7.10 Exclusion Based on Change in Circumstances or STC ………………………….... 437-440
7.11 Revisiting the Rights of Refugees and Some Identified Breaches ………………… 440-449

7.12 Recommendations and Suggested Reforms………………………………………… 449
7.12.1 Legal Reforms—Inclusion of Sex Criterion and Bifurcated Nexus Reform……….449-451
7.12.2 Establishing Effective Monitoring Measures ……………………………………. 451-452
7.12.3 Redefining the Burden Sharing Obligations in IRL …………………………….. 453-454
7.12.4 Suggested Review and Reformation of the United States Exclusion Law............. 454-457
7.12.5 Structural Reforms: Limiting Executive Influence on Immigration Reviews ….... 457-459

7.13 Conclusion ………………………………………………………………………….. 459-463

Bibliography ………………………………………………………………………….. 464-487

CHAPTER ONE

INTRODUCTION

Humanitarian migration is one of the most vital but poorly managed issues in international refugee law (IRL).[1] At present, there are more than 281 million aliens, approximately, 3.6% of the world's population living outside their country of origin because of varying circumstances of involuntary migration.[2] The UNHCR 2023 Global Figures estimated that 117.2 aliens are forcibly displaced or stateless in different countries around the, [3] which makes forced migration one of the highest perennial crises in contemporary history. The continuous surge in the refugee population is attributed to several factors such as conflicts,[4] terrorism and counterterrorism, the proliferation of borders and climate change.[5] These as well as the restrictive construction of laws of refugee inclusion and exclusion contribute to exacerbating the mishandling of compelling refugees' needs. Apparently, all countries are affected by humanitarian migration either as sources, transit, or destination states.[6] As displacements continue to accelerate, the fate of forced migrants compels international attention, yet responses

[1] Susan F. Martin, *Global Refugee Crisis*, 17 GEO. J. INT'L AFFAIRS 5-11 (2016).
[2] *See, e.g., OHCHR and Migration,* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/migration?gclid=CjwKCAjw6vyiBhB_EiwAQJRoppRK1XnCNteV9U195R4YqXuQPP_bKbvbMmYsmijktxvRkAgCc9xKLRoCJnoQAvD_BwE.
[3] 2023 Global Focus, UNHCR Operation Worldwide, UNHCR, THE UN REFUGEE AGENCY, https://reporting.unhcr.org/globalappeal2023#:~:text=117.2%20million%20people%20will%20be,2023%2C%20according%20to%20UNHCR's%20estimations; *The Refugee Agency, Figure at a Glance,* UNHCR, USA, July 16, 2022, https://www.unhcr.org/en-us/figures-at-a-glance.html [indicating an estimate of 89.3million displaced persons and 27.1 million refugees and 53.2 million internal displaced persons (IDPs) [*hereinafter* "UNHCR Figure 2022"].
[4] Martin, *supra* note 1 at 5-11.
[5] Patryk Kugiel, *The Refugee Crisis in Europe: True Causes, False Solutions*, 4 THE POLISH Q. OF INT'L AFFAIRS 41-59 (2016); Sadako Ogata, *Refugee Crisis in Africa: Challenges and Solutions*, ADDRESS BY MRS. SADAKO OGATA, UN HIGH COMM'NER FOR REFUGEES TO THE PARLIAMENT OF SOUTH AFRICA, CAPE TOWN (March 25, 1997), https://www.unhcr.org/en-us/admin/hcspeeches/3ae68fbcc/ refugees-crisis-africa-challenges-solution-address-mrs-sadako-ogata-united-nations.html.
[6] Martin, *supra* note 1 at 5.

from destination countries differ depending on political interests and domestic laws. Sometimes mass exodus of refugees across territorial borders are greeted with hostility, rejection or even punitive detentions as seen in Greece,[7] United States (US), [8] and United Arab Emirate (UAE).[9] In some cases, governments perceive involuntary migrants (refugees) as a burden, public charge, or threat to national security.[10] These as well as the current impact of the pandemic has caused international humanitarian burden sharing and nonrefoulement obligations to wane. The situation, debilitating as it is, gives cause to question the efficacy of international refugee law (IRL) in meeting the demands of contemporary refugees and the role of international law to provide humanitarian safeguards for refugees. Considering the current situation, this study investigates potential problems militating against the humanitarian protection of refugees from gender and human rights perspectives. It examines the intersection between law, the policy of gendering, and interpretations while seeking possible remedies that could address emerging problems of protection seekers.

Humanitarian protection (HP) of refugees – the effort to protect the fundamental rights of aliens from persecution – is a concern of international law. The interterritorial movement of

---

[7] *Investigate Pushbacks, Collective Expulsions—EU Should Press Athens to Halt Abuses,* H.R.W. (July 16, 2020) [*hereinafter* "2020 Greece Pushback on Protection Seekers"]. Greece: Investigate Pushbacks, Collective Expulsions | Human Rights Watch (hrw.org).

[8] Order Suspending Introduction of Certain persons from Countries Where Communicable Diseases Exist, CDC Order ss. 362 & 365 of Publ. Health Service Act 42 U.S.C. §§265, 268 (March 2020), CDC-Order-Prohibiting-Introduction-of-Persons_Final_3-20-20_3-p.pdf [hereinafter "2020 CDC Order"]; Chris N. Okeke and James A.R. Nafziger, *United States Migration: Essentials for Comparison,* 54 AM. J. COMP. LAW 532, 531-556 (2006).

[9] *Migrant Workers Illegally Expelled During the Covid-19 Pandemic,* AMNESTY INTERNATIONAL (April 15, 2020), Qatar: Migrant workers illegally expelled during COVID-19 pandemic | Amnesty International [*hereinafter* "2020 Migrant Workers illegally Expelled"]; *Covid-19 Makes Gulf Countries' Abuse of Migrant Workers Impossible to Ignore,* AMNESTY INTERNATIONAL (April 30, 2022), COVID-19 makes Gulf countries' abuse of migrant workers impossible to ignore | Amnesty International.

[10] KAREN MUSALO eta al. REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 3, 96-7 (5th ed. 2018); *Protection the Nation from Foreign Terrorist Entry into the United States* Exec. Order No. 13,769,82 Fed. Reg. 8977 (Jan. 27, 2017)*; Trump v. International Refugee Assistance Project,* 127 S. Ct. 2080, 2089 (2017).

persons is among the oldest culture of humanity. Traditionally, the practice of sheltering persons fleeing persecution evolves from the Judeo-Christian religious culture and the Islamic Customary *Ijara* society.[11] Ideally, international legal frameworks have adopted HP custom and strategy for preventing the violation of the rights of individuals who feared returning to their home countries because of persecution.[12] The rationale embodies the overall purpose of IRL as well as international humanitarian law. Apparently, the Refugee Convention and the Protocol are legal embodiments of the ancient traditional sanctuary practice. But while both reflect the fundamental values of HP and human rights safeguards, the scope of protection guaranteed is not mutually inclusive to all deserving persons. Given the simmering situations of wars, inter-ethnic conflicts, terrorism, trafficking, and proliferation of arms, the refugee law is framed to adapt peculiarly to the needs of certain vulnerable persons who flee persecution for lack of protection and are unable to return home for a similar purpose, hence become new citizens of international law. Historical events following the World Wars illustrated such kinds of circumstances and needs that made the development of IRL necessary.

Legal protection of refugees became a matter of international law in the aftermaths of World War I and World War II, with the dismantling of Empires and rapid growth of movement

[11] *Id.* at 3.
[12] *See*, *e.g.*, Convention Relating to the Status of Refugees, July 28, 1951, art. 33 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter "1951 Convention or Refugee Convention"]; Report of the Eighth Session of the Asian-African Legal Consultative Committee held in Bangkok, 335 art. III (1) (Aug. 1966) [hereinafter 'Asian-African Refugee Principles']; Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA), Resolution 2132 (XXII), A/RES/2132 (XXII) (14 December 1967); 1969 Organization of Africa Unity (OAU) Convention Governing the Specific Aspects of Refugee Problems in Africa, art. II (3) (1967) 4 1001 UNTS 45 [hereinafter "OAU Refugee Convention"]; American Convention on Human Rights, art. 22(8) [1969]; Cartagena Declaration, sec. III, para. 5 (1984); UNHCR, Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons vol. II, pp. 206–11 (UNHCR, Geneva, 1995), (hereinafter "Cartagena Declaration")

across international borders.[13] The responses by the League of Nations [14] were precursory to the development of the Refugee Convention, following the crisis of refugee after the World War II.[15] Impacts of these moved humanitarian emergencies of refugees from the periphery to the center of international law. The birth of the United Nations High Commissioner for Refugees (UNHCR) on January 1, 1951, paved the way for the speedy establishment of the United Nations Conventions Relating to the Status of Refugees, July 1951.[16] But most significantly, the developments created obligations for States to protect refugees. The binding obligation to protect refugees and asylum seekers applies to all Contracting Parties to the Convention or the 1967 Protocol.[17] Under the doctrine of State Responsibility, the acts, duties, or functions performed by a State, a member of its organ, agency or delegates empowered by the State are deemed to be an act of the State.[18] Relevant to this is the determination of a State's obligation to nonrefoulement of refugees[19] and discretion to grant asylum.[20] IRL set specific standards for safeguarding the rights and protective needs of refugees under the Refugee Convention and the 1967 Protocol Relating to the Status of Refugees.[21] Both draw from the mainstream of international law as complementary instruments established for regulating the well-being and treatment of refugees driven away by persecutions. Potentially, the sources of refugee rights and protection are derived from international law—international human rights law and international humanitarian law as

[13] Maria-Teresa Gil-Bazo, *Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship,* 34 REFUGEE QUART'LY, 11, 11-42 (2015).
[14] League of Nations, Convention Relating to the International Status of Refugees, 28 October 1933, League of Nations, Treaty Series V. CLIX No. 3663 [hereinafter: "1933 Convention"].
[15] 1951 Convention, *supra* note 12 at art. 33(1).
[16] *Id*.
[17]Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, art. 1(1) [hereinafter "1967 Protocol"] [Art. 1(1) recognized parties to the Protocol as bound to the obligations of the Refugee Convention as we well].
[18] International Law Commission of the United Nations (ILO), Responsibility of States for Internationally Wrongful Acts, 4 May 2001, A/CN.4/L.602, art. 4.
[19] 1951 Convention, *supra* note 12 at art. 33(1).
[20] *Id.* at art. 34.
[21] *Id.*

well as related laws. These create specifications for host States alongside their domestic laws to regulate the provision of sanctuary, an obligation that transcends the boundaries of territorial sovereignty.[22] However, whereas States Parties are required to develop their asylum laws from the international refugee regime, the human rights prohibition not to expel or return a refugee or asylum seeker in "any manner whatsoever" applies to all States under the Convention Against Torture, Other Inhuman or Degrading Treating, whether or not they have ratified the Refugee Convention.[23] The import and general obligations created by the principle of nonrefoulement is consistently emphasized in the evaluation of inclusion and exclusion laws.

In defining the status of a refugee. Article 1A(2) of the Refugee Convention[24] set certain characteristics of inclusion for aliens who would meet the eligibility under five enumerated grounds and subject the exclusion under Article 1. C-F. [25] Potentially, meeting the refugee status requires a demonstration of a well-founded fear (WFF) of persecution subject to five stipulated grounds. Thus, Article 1A(2)[26] specifically defines the scope to apply to:

---

[22] JAMES C. HATHAWAY, THE RIGHTS OF REFUGEE UNDER INTERNATIONAL LAW 156-160; 1-1073 (2005).

[23] Advisory Opinion on the Extraterritorial Application of Non-Refoulement Obligations under the 1951 Convention relating to the Status of Refugees and its 1967 Protocol, UNHCR GENEVA, 26 January 2007, at para 21 [*hereinafter* "UNHCR Advisory Opinion on Nonrefoulement"].

[24] *Id* at art. 1A(2); Inclusion criteria under this provision is also incorporated into Article 1 of the 1967 Protocol, the term "refugee" shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country....

[25] Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A(2) of the 1951 Convention, but who are not eligible for protection under the Convention because - they are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because - they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because - they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).

[26] 1951 Convention, supra note 11 at art. 1A(2).

> *any person who… owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*[27]

Article 1A(2) restricts meaning and the eligibility for refugees under five grounds—race, religion, nationality, membership of a particular social group (MPSG), or political opinion. Similar to this, Article 33(1)[28] proscribes refoulement or return of "a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened" on account of race, nationality, religion, MPSG and political opinion .[29] Going by the above standard, the scope of refugee protection is framed within the five enumerated for individuals who demonstrate a WFF, inability or unwillingness of government's protection and are unable to return home for such reasons, subject to the exclusion criteria. Under the above calculus, only individuals who meet the Convention's inclusion are sheltered from torture and possibly provided a pathway to their resettlement and assimilation.[30] Unlike other international legal frameworks,[31] the Refugee Convention made no consideration for persecution occurring

---

[27] *Id.* at art. 1A(2).

[28] 1967 Protocol, supra note 17 at art. I(1) [State Parties to the Protocol also undertake to apply the provisions of the 1951 Convention].

[29] *Id* at art. 1 (1); 1951 Convention *supra* note 12 at art. 33.

[30] *Id.* at art. 34. Art. 34 urged Contracting States to "as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceeding."

[31] United Nations Charter, Charter of the United Nations, 1 UNTS XVI, 24 October 1945, art. 1(3) [*hereinafter* "UN Charter 1945"]; Universal Declaration of Human Rights UNGA Res 217 A (III) 10 December 1948 [*hereinafter* "UDHR 1945"], art. 2 [stating that human rights shall apply without distinction of

exclusively on gender grounds. Debates on the status and protection of refugees have questioned the rationale behind the sexist construction of refugee law to favor the male experience,[32] while some have argued that all persons are protected under the expansive scope of the Convention's MPSG.[33] Discussion in Chapter five of this study tests the validity of each argument as well as the human rights imperative of reconsidering reintegrating gender experience in the refugee inclusion and exclusion laws.

Although IRL has for more than half a century sought protective solutions for aliens fleeing persecution, the scope of inclusion and exclusion has not sufficiently addressed the protection needs of deserving refugees of all genders. The omission of gender or sex from the grounds of refugee category and the criteria for identifying the Convention's related persecution deeply created disadvantages for women and other claimants who seek refugee protection on such grounds. This study interrogates the legitimacy of gendering refugee inclusion and its impacts on the application of the exclusion laws as well as the construction of "otherness" in the laws of excludability.

Also critical to this analysis is the discussion of the Refugee Convention as a product of history, structured to meet the needs of World War II refugees. Article 1.B(a)(1) affirms this referring to the scope of application to events "occurring in Europe before January 1, 1951" or

---

any kind, such as race, colour, sex, language, religion, political other opinion]; International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976, art. 3; International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 3, GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS 1249 (CEDAW), arts. 1 and 2, GA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981.

[32] Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claim* 29 REFUGEE SURV. Q 46 (2010).

[33] UNHCR, Guidelines on the Protection of Refugee Women, UN Doc. EC/SCP/67, July 1991 [*hereinafter* "1991 UNHCR Guidelines"].

events occurring anywhere else.[34] This alludes to the Nazi Germany persecution that uprooted millions of Jewish Europeans, causing them to flee politically, racially, and religiously motivated attacks.[35] Apparently, the Refugee Convention was written under such a political climate following the World War II and part of the Cold War. Its structure best addressed the refugee concern of the time, but whether the efficacy is sustainable today is subject to research investigation. Of course, the changing paradigm in circumstances and needs of refugees caused the establishment of the 1967 Protocol to mitigate limitations in the Convention in terms of geographical time and space, making it applicable to all. [36] Although the trajectories of refugee flight circumstances have expanded over time, the Convention has failed to reflect the dynamics of gender and diversity. Potentially, such sensitive gaps in equal protection of persons on the ground of sex make the 1951 Convention obsolete to current demands. In addition, differing legislations and conceptual construction of gender create serious hurdles for women and others making gender related claims.

Contemporary circumstances of humanitarian migration stretch beyond race, political, social group, or religious persecutions to incidents like gender-based violence, human/child trafficking, crime-related persecutions, human rights abuses by non-state actors, and life-threatening environmental disasters. These unclassified circumstances are unlikely to fit within the narrow spectrum of the Convention's MPSG and in most cases, adjudicators are circumspect

[34] 1951 Convention, supra note 12 at art. 1.B(1)(a).
[35] *See, e.g.*, Karen Musalo & Stephen Knight, *Unequal Protection*, 58 BULL. ATOMIC SCIENTISTS 56, 59 (2002); Stephanie Robins, Note, *Backing It Up: Real ID's Impact on the Corroboration Standard in Women's Private Asylum Claims*, 35 WOMEN'S RTS. L. REP. 435, 442–43 (2014); Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence* 58 UNIV' OF MICHI. JOUR. OF LAW REFORM 351, 242-499 (2019).
[36]The 1967 Protocol removed the temporary and geographical, giving the Convention a universal application. The term "refugee" shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country.... *See, e.g.,* 1967 Protocol, *supra* note 17 at art. 1(1).

to define PSG beyond the board. Common sense and objective reasoning require that protection laws apply equitably regardless of identity class or status. Moreso, with the surging statistics of forcible displacement caused by armed conflicts, natural disasters, terrorism, and counterterrorism that create serious vulnerabilities for women and children, millions of such "un-Convention" are likely to face exclusion under the nexus of various State exclusion laws. A typical example is the United States' application of the terrorism bar, which defines terrorist activity and material support to include people who may have been forcibly captured to provide even domestic services to terrorist groups, wives, and children of such members, irrespective of whether it was a forced marriage.[37] In as much as security vetting is a crucial aspect of refugee and asylee admission, a misclassification of victims of terrorists persecution as terrorists makes cynic of the humanitarian purpose of IRL. Therefore, this study compels investigation into the United States security bars and case reviews alongside the gamut of the Convention's exclusion to highlight flaws and areas of conflict with the rights of refugees in international law. The aim is to seek human rights solutions and make propositions for reforms to address the shortcomings of IRL and wrongful applications in domestic jurisdictions. The recommendations set functional strategies for grappling with the increasing demands of "non-Convention" refugees in international law.

1.2 Operational Components of Humanitarian Protection in International Law

As earlier indicated, the sources of refugee rights and protection are derived from international law, mainly international human rights law, and international humanitarian law. Refugees as citizens of the international community occupy a profound position in international

---

[37] INA §212 (a)(3)(B)(i)(I), 8 U.S.C. §1182(a)(3)(B)(i)(I) [codified in the Immigration Act of 1990 Pub. L. No. 101-649, 104 Stat. 4978(1990)].

law as protected persons. The background to this protection is partly discretional and obligatory, as demonstrated in a subsequent analysis of asylum and nonrefoulement. Consistent with the international legal framework, the grant of asylum or protection from nonrefoulement is part of international cooperation undertaken through burden sharing among States.[38] It follows then that the Convention and Protocol draw extensively from the humanitarian character of mainstream international law, but somewhat with total dependence on States' mechanism for enforceability. Ordinarily, because IRL lacks the strength of self-enforceability, it largely depends on the jurisdiction of States for interpretation and implementation. Although the United Nations High Commissioner for Refugees (UNHCR) plays an advisory role in regulating the treatment of refugees in the states,[39] its interpretative guidance is not binding. In some conflicting cases, domestic courts like the United States have deferred to their local laws, as opposed to the authoritative views of the UNHCR guidelines.[40]

The conflict of laws, as well as inconsistency in the interpretation of refugees' law, constitutes a serious problem that undermines applicability. On its face value, it could be argued that the Refugee Convention and Protocol have received a strong affirmation in international law, with a total number of 149 states as signatories to the Refugee Convention and 191 states as parties to at least one of the treaties that ratified a non-refoulement component.[41] However, the attempts by 149 States Parties to interpret the Convention sometimes give rise to convoluted versions of refugee jurisprudence with detrimental consequences on protection seekers. Coupled

[38] 1951 Convention, *supra* note 12 at Preamble para. 4.
[39] *Id.* at art. 35.
[40] Referring to a doctrine developed in *Chevron U.S.A., Inc. v. NRDC* U.S. 837 (1984) [stating that when a legislative delegation to an administrative agency or question is not explicit in conflict or implicit, the court may not substitute of the statute for a reasonable interpretation made by an administrative agency but give deference to agency. This has been applied even to treaty interpretation contrary to art. 27 VCLT].
[41] Elihu Lauterpacht and Daniel Bethlehem, THE SCOPE AND CONTENT OF THE PRINCIPLE OF NON-REFOULEMENT: OPINION 177 (2003).

with other clashes between political interests and treaty obligations, refugee rights in destination countries suffer an enormous backlash. With the overwhelming increase in human mobility caused by several humanitarian factors including climate change, it becomes more crucial than ever to explore human rights solutions to utility than eviction and exclusion. This study evaluates these issues alongside the ability of State parties to navigate through the Convention's limitations amidst changing trends in refugees' humanitarian demands vis-à-vis human rights consequences of sexism. Viewed from the United States refugee jurisprudence, focused attention is given to the "malestream" scope of IRL and the extent to which this has influenced domestic laws of states, limits inclusiveness and equal humanitarian protection to all deserving potential refugees.

1.3 Discrepancies Between IRL and International Law

As earlier established, IRL derives its existence from international law. Human rights and humanitarian protection are central to the purpose of IRL as entrenched in international law. This connection is reflected in the principal objective of the United Nations Charter is "to maintain international peace and security; and to achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and promoting and encouraging respect for human freedoms for all without distinction as to race, sex, language, or religion."[42] However, IRL differed in scope to the exclusion of sex as a protected ground. The primary goal of the Charter was to restore international security, and unity among Member States and to reaffirm commitments to the preservation of rights and inherent dignity of every person irrespective of color, race, nationality, sex, or religion,[43] especially recovering from the

[42] UN Charter 1945, *supra* note 31 at art. 1(1) and (3).
[43] *Id.*

atrocities of World War II. Apparently, the Charter espouses an all-inclusive scope that incorporates sex.

Sequel to the Charter, the Universal Declaration of Human Rights (UDHR)[44] equally advances the similar objectives of preserving human rights and dignity from violations, as parts of lessons in recovering from the ravages of World War II. Among others, the UDHR guarantees freedom and equality of all persons, equal entitlement to rights created under the Bill without distinction as to race, sex, language, religion, political or other opinions, national or social origin, property, birth or any other status.[45] Article 14(1) specifies that "everyone has right to seek and to enjoy in other countries asylum from persecution."[46] Significantly, it granted equal opportunities to the rights created without distinction to gender. The principle of nondiscrimination and equal protection is replicated in other human rights instruments that developed from the UDHR. Following the Declaration was the two human right Covenants—International Covenant on Civil and Political Rights (ICCPR)[47] and International Covenant on Economic Social and Cultural Rights (ICESCR).[48] Article 2 of the ICCPR "undertake to ensure the equal right of men and women to the enjoyment of civil and political rights set forth in the … Covenant."[49] Accordingly, Article 3 of the ICESCR "ensure(s) the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the…Covenant. The nondiscriminatory human rights standard set under these legal frameworks formed the foundation of international human rights that applies to all international treaties. IRL is deficient

[44] UDHR 1945, *supra* note 31.
[45] *Id.* at arts. 1 and 2.
[46] *Id.* at art. 14(1).
[47]ICCPR, *supra* note 31.
[48] ICESCR, *supra* note 31.
[49] *Id.* at art. 2.

in this principle as this study will demonstrate. Such lack of inclusiveness affects the determination of gender related claims and has deepened the gap in refugee exclusion laws.

At face value, the 1951 Convention and Protocol demonstrated commitment to international human rights instruments. Specifically, the Preamble to the 1951 Convention considered the provisions of the United Nations Charter and the UDHR, and affirmed the fundamental human rights principles contained in these treaties, in paragraph 4 affirmed the principle of discrimination.[50] It further acknowledged the United Nations' profound concern for refugees, and the need for "refugees to enjoy the widest exercise of fundamental rights and freedoms" through humanitarian protection in host states.[51] However, the preliminary assertion was contradicted by Article 1.A(2) of the Refugee Convention which limited the status and criteria for refugee protection to race, religion, nationality, membership in a particular group or political opinion to the exclusion of sex and other grounds. Evidently, this stands in marked contrast with the nondiscriminatory principle of international law, which accords equal protection to everyone without exception.[52]

In accordance with the mainstream international law, the Convention on Elimination of All Forms of Violence Against Women (CEDAW)[53] strongly condemns all forms of discrimination against women and guarantees equal enjoyment of human rights by men and women.[54] Article 1 defines discrimination to mean:

> …any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or

[50] 1951 Convention, *supra* note 12 at Preamble.
[51] *Id* at para. 4.
[52] UN Charter 1945, *supra* note 31 at art. 1(1) and (3).
[53] CEDAW, *supra* note 31. The CEDAW is popularly referred to as Women's Bill of Rights.
[54] *Id* at art. 2.

> exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[55]

The gendered structure of the Convention and Protocol contravenes the CEDAW by excluding the experiences of women as refugees and their need for protection from gender-related persecutions. Seventy-two years after the 1951 Convention, female survivors of GBP still battle with interpretive biases at immigration courts trying to prove their status as a protective ground because of the common argument that the 1951 Refugee Convention never intended to protect victims of GBP.[56] The same applies to other victims of human rights violation who seek asylum on other grounds other than the Convention's enumerated grounds. Unfortunately, IRL is shaped by the malestream experiences of World War II to date. Because of these, adjudicators reject gender-based claims on membership of a particular social group (PSG) as too broad for fear of floodgates.[57] Some others reject gender-based claims on the basis of nexus, holding that an applicant on a gender-based claim, who had suffered persecution due to his or her gender, was rather because of "personal reasons."[58] The uncertainties associated with gender-related claims have put many female refugees in limbo or crucible of human insecurities faced with the danger of denials and deportation.

This dissertation confronts the limitations of Article 1.A(2) that disenfranchise protection seekers especially women and others making gender claims, and the enormous obstacles caused

---

[55] CEDAW, *supra* note 31 art. 1.
[56] In *re A-B-* 27 I. & N. Dec. 316 (AG 2018); *Matter of R-A-,* 22 I&N Dec. 906 (BIA 1999) [asylum was denied to a female survivor of domestic violence, who claims viability a particular social group].
[57] NIJC: NATIONAL IMMIGRATION CENTER, A HEARTLAND ALLIANCE PROGRAM, PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B* 1-32, 2 (January 2019). [hereinafter NIJC, 2019].
[58] *R-A-, Op Cite* 56.

to claimants. Besides, the gaps between inclusion and exclusion have been broadened by States' legislation and jurisprudence. Part of the task of this research is to investigate examples from the United States refugee law, thus using them as experimental analysis for other common law jurisdictions. Throughout this dissertation, the argument hypothesizes the impact of the void created by IRL on humanitarian protection relating to gender and other non-Convention grounds. Research appraises equally underscore the supplementary roles of the UNHCR, developments as well as restrictions enforced in domestic jurisdictions like the United States, Canada, and Australia. This discussion seeks to highlight some obstacles caused by discrimination and exclusion laws on gender and other negated claims. The goal is to prescribe solutions to the emerging refugee crisis that puts humanitarian migration at a crossroads.

1.4 IRL and the Development of the United States Refugee Regime

In 1980, the United States Congress enacted the Refugee Act to bring it to conformance with IRL.[59] The Refugee Act of 1980[60] derives its definition of a "refugee," from the language of the Refugee Convention and the 1967 Protocol on the status of a refugee.[61] Specifically, the Immigration and Nationality Act (INA) INA § 101(a)(42)(A), 8 U.S.C § 1101(a)(42)(A) defined a refugee as:

> [A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such last habitually resided, and who is unable or unwilling to return to, and is unable or

[59] 8 USC 1101 Refugee Act of 1980, 96th Congress (March 17, 1980); Pub. L. No. 82-414, 66 Stat. 163 (1952). (Codified as amended in scattered sections of 8 U.S.C.); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) [on asylum and refugee protection and withholding removal].

[60] 8 U.S.C 1101 Refugee Act of 1980, 96th Congr. (s. 643, 1980).

[61] …owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion...owing to such fear, is unwilling to avail himself of the protection of that country…; INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).

> unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

The above definition replicated the standard of Article 1A(2) on the status of eligibility for Convention refugees but significantly added a "himself or herself" pronoun gender demonstrative. Unlike the previous requirement, INA eliminated reference to aliens fleeing communist related persecution and conformed to the Convention's definition.[62]

The relationship is not just mere coincidence but reaffirms Congressional intent to adapt to the United Nations' definition of a refugee. As a demonstration of compliance with nonrefoulement, the INA,[63] made it mandatory rather than discretionary for the A.G. to withhold deportation of a foreign national, having met the refugee requirements, "if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion."[64] However, congruity with IRL here underpins homogeneity in gender limitations. INA is influenced by the enumerated five grounds—on account of—that reinforce its scope of eligibility as well as the construction of nexus requirements. This dissertation evaluates the gender and human rights implications of these on State practice, especially in the strict requirements of nexus, which in many situations limit the access to protection for bona fide refugees whose fear of persecution is gender related. Many of these are likely to suffer denials or rejections for failure to establish a nexus to the enumerated Convention's grounds. Even emerging refugees fleeing

---

[62] *See, e.g.* Hart-Celler Act of 1965, Pub. L. 89-236.
[63] Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).
[64] 8 U.S.C. § 1253(h)(1) (2012); *American Courts and The U.N. High Commissioner for Refugees: A Need for Harmony in The Face of a Refugee Crisis,* 131, HARV. L. REV. 1401, 1399-1420 (2018).

female trafficking or sexualized war or terrorism who make claims outside the Convention's scope will face similar painful exclusion, including a return to the risks they have fled. IHRL, which forms the backbone of refugee law, does not impose unbearable burdens on individuals. Therefore, this study seeks solutions to an inclusive interpretation of humanitarian claims of refugees from diverse gender and human rights perspectives.

Over the years, the United States achieved remarkable success in the progressive accommodation of the emerging needs of refugees. Notably, for decades the United States has developed a progressive standard for navigating certain nexus limitations created under IRL by expanding the Refugee Act to accommodate new areas of needs, even beyond the enumerated scope of the Convention and Protocol. Among these glaring examples under the INA include the accommodation for specific individuals who survived crimes,[65] domestic violence,[66] natural disasters[67] or alien children who seek protection from violence and abuses.[68] In these laws, Congress increasingly demonstrated awareness of the vulnerabilities of special categories of "unConvention" refugees like women, children, victims of crime and disaster. Such aliens are granted humanitarian relief based on human rights violations suffered and are authorized to self-petition. For instance, the victims of domestic violence under the Violence Against Women Act

---

[65] INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m).

[66] US Congress enacted Violence Against Women Act of 1994 to protect immigrants/immediate relatives who are victims of human rights abuses in the hands of US citizens (USC) or legal permanent residence (LPR) and to provide them a pathway to permanent residency. The Act was updated in 2000 under the Battered Immigrant Women Protection Act of 2000 and the Violence Against Women Reauthorization Acts of 2005 and 2013. The latter authorized "self-petition" for victims to prevent an abuser from frustrating the immigration process. *See, e.g.,* INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g). A VAWA petitioner may seek adjustment of status under INA § 245(a). If such victim is under removal proceeding, he or she can seek VAWA Cancellation of removal under INA § 240 A (b)(2); 8 CFR § 1229(b)(2).

[67] Humanitarian parole or temporary protected status are granted to victims of disaster and humanitarian emergency. *See, e.g.,* INA § 244; 8 CFR § 244. Such alien may equally claim asylum if they meet the requirement of refugee. *See, e.g.,* INA § 101(a)42(A); 8 CFR § 208. If such alien is under a removal proceeding, he or she may equally seek withholding removal under INA § 241(b)(3); 8 CFR §§ 208; 1208.16(b).

[68] Unaccompanied refugee children or undocumented children who are victims of human rights abuses may claim humanitarian protection under Special Immigrant Juvenile Status (SIJS). *See, e.g.,* INA §§ 101(a)(27)(J); 245(h); 8 CFR § 204.11.

(VAWA)[69] can self-petition and seek cancellation of removal under VAWA.[70] Other categories of protection include the victims of crime under U non-immigrant status, protection of victims of human trafficking under T-visa status and other humanitarian reliefs available to unaccompanied refugee children, victims of conflicts and environmental disasters. However, the VAWA reliefs applied exclusively to only women who suffer domestic violence in the hands of their spouses who are United States citizens or permanent residents. The relief is not extended to women fleeing domestic violence or gender related abuses from their home countries. In as much as the precedent-setting standard is recommended in this research analysis and supported with other examples of best practice, the gap in the application is critically reviewed to support the dissertation's argument to reinforce gender inclusiveness as well as human rights in IRL. Humanitarian protection of refugees is an acceptable standard in international law. Achieving the profound purpose of IRL requires responsive action of States to the dynamic needs of protection seekers rather than setting international barricades against bona fide refugees. However, the research discussion does not lose sight of certain variables that militate against refugee protection such as security, economic impacts, and the surging crisis of refugees.

Until recently, the United States maintained a progressive record since World War II as the world's top country in the admission and resettlement of refugees with the establishment of the 1980 Refugee Act.[71] Regardless of the rigorous vetting process and other restrictive policies that came as an aftermath of 9/11, the United States Refugee Admission Process (USRAP) set procedures for resettlement programs of refugees.[72] Other western countries like Canada,

---

[69] INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g), *supra* note 34.
[70] INA § 240 A (b)(2); 8 CFR § 1229(b)(2) *supra* note 34.
[71] 8 U.S.C 1101, *supra* note 47.
[72] USRAP is one of the procedures established under the 1980 Refugee Act for admission of refugees outside United States, whereas the second procedure applies to refugees within the United States or at the border.

Australia, Germany, New Zealand, Norway, saying the least, have their varied standards of resettlement programs. Under the United States law, INA §207, 8 U.S.C. §1157 empower the President, in consultation with Congress, to make an annual determination on several admission and ceilings for refugees based on humanitarian concern. Similarly, the President can equally in consultation with Congress respond to "special humanitarian concern" when "justified by grave humanitarian concern."[73] In practice, response to this statutory requirement has fluctuated with different political regimes and fundamentally declined since Trump-era. Moreso, debates on the implementation of USRAP have been criticized for lack of neutrality and inherent interest in geographical and ideological factors.[74] Other factors associated with the exercise of executive power and policies as well as how these affect the implementation of the statutory requirements of humanitarian protection are imperative to the research investigation.

Apparently, critique on non-neutrality is to be extended to the interpretation of gender and "other," including people of certain religious or racial backgrounds who seek protection in the United States. Despite the innovative reforms introduced in the 1980s and 90s, refugee protection for certain individuals is largely de-prioritized and enforced under a new rhetoric of security fear that excludes entrants blindly through restrictive benchmarks or nexus thresholds. This practice is given critical scrutiny in this study while comparing their jurisprudential applications with practice in other States and their attendant gender constraints. In certain circumstances, as the research examples demonstrate, gender-based persecutions (GBP) are described as private affairs and survivors as not possessing a protective social group or

---

[73] INA §207(b), 8 U.S.C. §1157(b).

[74] Musalo et aal, *supra* note 10 at 85; Silva Mathema and Sofia Carratala, *Rebuilding the US Refugee Program for the 21st Century,* 26 October, 2020, https://www.americanprogress.org/article/rebuilding-u-s-refugee-program-21st-century/.

particularity under the Convention's nexus.[75] Deprioritizing the human rights experiences of women and other non-Convention refugees would imply making their rights and dignity less human as well as unprotected. Imposing such limitations to narrow the rights of any individual because of sex or any other social identity undermines the principle of equality. Nevertheless, some asylum adjudicators in the immigration institutions, comprising of lawyers, non-lawyers, other DHS officials, and even judges who preside over asylum claims promote political interests other than the statutory principles of equality and nondiscrimination. This dissertation challenges discriminatory laws, policies and practices that create hurdles to equal protection access to all refugees and asylum seekers irrespective of sex, color, socio-political or religious background. As an intellectual search for solutions, it devotes conscious analytic attention to the variables that impact the rights of all refugees as well as the construction of inclusion and exclusion laws.

Besides, the United States Congress has achieved some innovative reforms that are worthy of appraisal. Notably is the establishment of the VAWA, T-Visa, U-Visa, and Child Protection Act to address the compelling needs of refugees beyond the Convention's five grounds. However, these do not translate to automatic protection for survivors of gender persecution. Women making claims under domestic violence or other related gender issues still face an interpretative dilemma on the reasoning that GBPs are too broad for asylum viability.[76] In some cases, immigration courts have adopted inconsistent standards in defining gender viability because of a lack of inclusion in the scope of the Convention's enumerated grounds.[77] Such judicial hiccups obviously destabilize the human rights objective refugee protection under the CAT. With the changing dynamics affecting the flight circumstances of refugees in several

---

[75] *See, e.g. R-A-, supra* note 56 at 906 (BIA 1999); *Saideh Fisher v. INS* 79 F. 3d 955 (9th Cir. 1996).
[76] *Id; Saideh Fisher v. INS* 79 F. 3d 955 (9th Cir. 1996)*; Fatin v. INS,* 12 F. 3d 1233 (1993).
[77] *Id.; Gatimi v. Holder* 578 F. 3d 611, 615 (7th Cir. 2009) [holding that social visibility "cannot be squared" with previous Seventh Circuit or BIA decisions and, "more important, social visibility makes no sense"].

countries, the need to redefine the scope of inclusion and exclusion has become more imminent than ever, hence the intellectual attention in this dissertation.

1.5 Development and Structure of the United States Asylum Jurisprudence

The United States asylum jurisprudence is born out of a complex judicial structure. Historically, the immigration judicial system is the product of the United States's INS.[78] INS was originally an agency of the Department of Labour, established in 1933 through an executive order to enforce and administer immigration regulations and policies in the United States.[79] In 2002, the Homeland Security Act dissolved INS and created the DHS.[80] This resulted in a reorganization of the judicial structure for asylum and other immigration services between the agencies of the DHS and the Department of Justice (DOJ). Each agency was given the authority to promulgate asylum laws and policies—8 C.F.R. § 208 (DHS) and 8 C.F.R. § 1208 (DOJ)—that are enforced concurrently in asylum jurisprudence. In practice, the process has been described a convoluted because of the complex structure of the judicial system.[81] Generally, the DHS administers the U.S. Citizenship and Immigration Services (USCIS), which adjudicates on affirmative asylum and represents the government in removal proceedings, before immigration courts and the BIA.[82] Also, the DOJ supervises the immigration courts and the BIA through the

---

[78] *See, e.g.* U.S. CITIZENSHIP & IMMIGRATION SERVS., USCIS HISTORY OFFICE AND LIBRARY, OVERVIEW OF INS HISTORY 7, 11 (2012), https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf.

[79] The US Immigration and Naturalization Service was established in 1933 by Executive Order 6166. The order combined existing separate agencies of immigration and naturalization services. The INS was then part of the Department of Labor. Executive Order 6166 cited section 16 of the act of March 3, 1933 (Public, No. 428, 47 Stat. 1517); NATIONAL ARCHIVES, https://www.archives.gov/federal-register/codification/executive-order/06166.html.

[80] Homeland Security Act of 2002, Pub. L. 107-296; 6USC 101.

[81] *See, e.g.,* Marisa Silenzi Cianciarulo & Claudia David, *Pulling the Trigger: Separation Violence as a Basis for Refugee Protection for Battered Women,* 59 AM. U. L. REV. 337, 355–56 (2009); Vogel, *supra* note 35 at 343, 348.

[82] *See*, *e.g.,* 8 C.F.R. §§ 2.1, 100.1, 208.2, 1103.3, .4, .7 (2018); 8 C.F.R. § 100.1 (2009); Vogel at 348.

Executive Office for the Immigration Review (EOIR).[83] It is the duty of the Attorney General (AG) to appoint immigration judges who preside over immigration proceedings in the courts.[84]

Generally, an adjudication of affirmative asylum is first done by an asylum officer under the USCIS. An affirmative asylum is made when an applicant is not on a removal proceeding.[85] Ordinarily, an asylum officer may deny a claim or refer to an IJ for asylum hearing. The latter takes a process of defensive asylum, which is conducted *de novo* either as a new hearing or defense to removal.[86] However if found inadmissible, he or she may be removed by the expedited process. Such removal requires no court hearing.[87]

An asylum decision by an IJ is reviewable by the BIA. BIA is the highest administrative body, comprising of twenty-one Board members appointed by the AG to interpret, apply immigrations laws, and review cases submitted on appeal from immigration courts, including asylum determinations.[88] Like any other judicial officer, BIA is charged with the responsibility of probity, neutrality, and independent judgement as an impartial arbiter.[89] The decision of the BIA is binding on both the IJ and DHS officers. However, the AG may overrule or modify any of BIA's decisions through certifications,[90] as subsequent analysis in *Matter of A-B-*[91] and *Matter of R-A-*[92] would show. The decisions of BIA and other determinations of the AG are reviewable

---

[83] 8 C.F.R. §§ 208.14, 1003.0 (2018); Vogel, *supra* note 35 at 349; ABOUT THE OFFICE, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/about-office.
[84] 8 C.F.R. § 1003.10; Immigration Judge, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/tools/glossary/immigration-judge.
[85] OBTAINING ASYLUM IN THE UNITED STATES, U.S. CITIZENSHIP & IMMIGRATION SERVS., https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states.
[86] *Id.*
[87] INA § 235(b)(1)(A)(i), 8 U.S.C. § 1225(b)(1)(A)(i) (2018). Expedited removal is done without hearing or review. However, if an individual indicates an intention to seek asylum or fear of persecution, he or she must be given a "credible fear" interview with a USCIS asylum officer. INA § 235(b)(1)(A)(ii), 8 U.S.C. § 1225(b)(1)(A)(ii) (2018).
[88] Vogel, *supra* note 105 at 349; BOARD OF IMMIGRATION APPEALS, U.S. DEP'T OF JUSTICE, https://www.justice.gov/eoir/ board-of-immigration-appeals.
[89] *See, e.g. Qun Wang v. Attorney Gen. of the U.S.*, 423 F.3d 260, 261 (3d Cir.2005).
[90] *See, e.g.* 8 C.F.R. § 1003.1(h)(1) (2018).
[91] In *re A-B- supra* note 56 at 316.
[92] *R-A-, supra* note 56 at 906.

by the United States Circuit Courts.[93] In practice, administrative case reviews can be conducted deferentially. For instance, the Circuit Courts are required to give deference to the agency's interpretations of the INA[94] and in some cases conduct *de novo* review on issues. This is to determine whether there are reasonable or substantial grounds, supported by probative evidence to uphold or reverse the decisions of IJ and BIA.[95] It is imperative to assess how the United States asylum jurisprudence grapples with the complex structure in the determination of Convention and unConvention claims, especially gender.

1.6 Gender or Sex as Recurrent Site of Refugee Persecutions

Women and minors represent the highest percentage of global refugees as survivors of armed conflicts, human trafficking, sexual exploitation, domestic violence, socio-cultural oppression, and economic marginalization.[96] Women make up about 49 percent of displaced persons globally.[97] Yet, survivors or persons who demonstrate fear of persecution on gender related grounds would not meet the Convention's ground for protection due to nexus requirement. Although studies have generally shown that sex is a common site of attack during conflicts likewise at peacetimes,[98] IRL has for more than seven decades centered on other

---

[93] *See, e.g.,* In *re M-E-V-G-,* 26 I. & N. Dec. 227, 230 (B.I.A. 2014); *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 844 (1984).
[94] *Cece v. Holder,* 733 F.3d 662, 668–69 (7th Cir. 2013) (citing *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842–43.
[95] *Id.,* 733 F.3d at 669 (citing Escobar, 657 F.3d at 545).
[96] 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 EVALUATION AND POLICY ANALYSIS UNIT, DEPARTMENT OF INTERNATIONAL PROTECTION, AND REGIONAL BUREAU FOR EUROPE AMRE Consulting, EPAU/2004/05 1-161, 50 (May 2004); Council of Europe, *Refugee Women, and the Istanbul Convention* 3 PARLIAMENTARY ASSEMBLY OF THE COUNCIL OF EUROPE, 23 January 2013.
[97] UNHCR Figure 2022, *supra* note 2 [stating that 89.3 people are forcibly displaced around the world].
[98] Sondra Hale, *Rape as Maker and Eraser: Darfur and the Nuba Mountains (Sudan)*, in GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 105-113, 106 (eds. Laura Sjoberg and Sandra Via, PRAEGER 2010); Liz Kelly, *The Everyday/Everynightness of Rape: Is it Difference in War?* in GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 114-123 (eds. Laura Sjoberg and Sandra Via, PRAEGER 2010); Gloria Gaggioli, *Sexual Violence in Armed Conflicts*' 96 *IRRC* 503–538 (2014); JAMILLEBIGIO AND RACHEL VOLGESTEIN, COUNTERING SEXUAL VIOLENCE IN CONFLICT 3 (2017).

grounds other than sex. Research evidence abounds to show that women are disproportionately affected in gender-related human rights attacks occurring in public or private spheres.[99] Perpetrators of such violence attack primarily if not exclusively the membership of the female sex.[100]

As a recurrent situation, women and girls are common targets of sexualized persecution and human rights attacks during armed conflicts. World War II was no exception. Reports on World War II featured egregious incidences of rape, and other sexualized crimes tactically deployed as military strategies of conquest, defeat, and terror on victims. A typical example is the military-organized brothels enforced as "comfort women," a heinous practice of organized prostitution of Asian women.[101] In the Chinese city of Nanjing alone, over 20,000 to 80,000 women (approximately 8 to 32 percent of the 250,000 female civilian population) were raped and executed at the time of military take-over during World War II.[102] Besides, the War featured other harrowing effects of sexualized battle on women's bodies. Impacts of these produced unprecedented fear and refugee crisis after World War II with so many Asian women seeking to escape the onslaught of comfort women enslavement.[103] Yet, one would wonder why the

---

[99] Rebecca M. M. Wallace, *Making the Refugee Convention Gender Sensitive: The Canadian Guidelines*, 45, INT'L AND COMP. LAW Q. 702-711, 709 (1996).
[100] *Id.*
[101] *Military Sexual Slavery, 1931-1945,* COLUMBIA LAW SCHOOL, CENTER FOR KOREA LEGAL STUDIES, Military Sexual Slavery, 1931-1945 | Korean Legal Studies (columbia.edu) [From 1931 to 1945 between 50,000 and 200,000 girls and young women, euphemistically described as comfort women, were forced into sexual servitude in the Japanese military brothels. The victims were systematically raped and abused by the military personnel].
[102] Elizabeth Jean Wood, *Sexual Violence during War: Toward an Understanding of Variation,* in GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 124-154, 127 (eds. Laura Sjoberg and Sandra Via, PRAEGER 2010).
[103] Patricia Hynes, *On the Battlefield of Women's Bodies: An Overview of the Harm of War to Women*, 27 WOMEN'S ST. INT'L FORUM 231-445 (2004); Marlene Epp, *The Memory of Violence: Soviet and East European Mennonite Refugees and rape in the Second World War,* 9 J. OF WOMEN'S HIST. (1997) 58-89.

Refugee Convention was created to address the concern of World War became insensitive to sex or GBP.

Gender norms as tools of wartime are still common in post-World War II armed conflicts. Stories of armed conflicts, torture, and sexual violence dominate the historical civil war narratives in Nigeria (Nigeria-Biafra war), Sierra Leone, Syria, Rwanda, Darfur, [104] and the Former Yugoslavia, to say the least. Human rights report on the Sierra Leonean civil war indicated that over 250,000 women were tortured and raped.[105] Similarly, a survey report on the Rwandan genocide documented the atrocities against Tutsi women. More than 15,700 of them were raped by the *Interahamwe* and other men in a horrific genocide. [106] According to the World Health Organization (WHO), it was estimated that about 5000 babies were born out of genocide-related rape,[107] while over two million Rwandese, mostly women, and children, were forced to flee their country as refugees in neighboring states.[108] In Darfur also, genocidal rape created a public scene as perpetrators display massive gang-rape, abduction, and maiming.[109] These

---

[104] ICRC: *People on War: Country Report: Nigeria ICRC Worldwide Consultation on the Rules of War,* VI GREENBERG REPORT (Geneva: Greenberg, 1999); OGBU C AJA, THE JURISPRUDENCE OF WAR CRIMES (DEMI, 2012): 99; Arua Oko Omaka, *Victor's Justice: Atrocities in Postwar Nigeria*, 32 ROUTLEDGE228–246 (2016): CHINUA ACHEBE, THERE WAS A COUNTRY: A PERSONAL HISTORY OF BIAFRA 167 (2012); JAMILLEBIGIO AND RACHEL VOLGESTEIN, COUNTERING SEXUAL VIOLENCE IN CONFLICT 3 (2017).

[105] *See, e.g., Sierra Leone: Sexual Violence in Sierra Leone Conflict* 15 HRW 25-60 (2003). https://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf [*hereinafter* "HRW 2003"].

[106] A survey report in Rwanda indicated that at least 15,700 (mainly Tutsi) women were raped by the *Interahamwe* and other men participating in the genocide. Additional report by the World Health Organization estimated about 5000 babies born out of genocide-related rape with over two million Rwandese refugees (mostly women and children) scattered across neighbouring states. *See, e.g., Health needs of women and children affected by violence in Rwanda,* WORLD HEALTH ORGANIZATION (2000) [*hereinafter* "WHO 2000"]. http://www.unesco.org/courier/1998_08/uk/ethique/txt1.htm; John Eriksson, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience: Synthesis Report,* JOINT EVALUATION OF EMERGENCY ASSISTANCE TO RWANDA (March 1996), a769.PDF (riskreductionafrica.org); *Id* at 215.

[107] *See, e.g., Health needs of women and children affected by violence in Rwanda,* World Health Organization (2000), http://www.unesco.org/courier/1998_08/uk/ethique/txt1.htm.

[108] *Id*.

[109] Hale *supra* note 94 at 106.

resulted in the displacement of more than two million Darfurians, mostly women and children.[110] Likewise, in the era of terrorism and counter-terrorism, the connection between conflict and conflict-related sexual crimes have taking high-tech dimensions as seen in the Nigerian Boko Haram and ISIS sexualized war.[111] Effects of insurgency, war and sexual crime increase female vulnerabilities and displacements. The ongoing situation and reports of rape war in Syria have continued to send a shockwave to the international community as Syria is currently labeled a hotspot for wartime rape.[112] It is evident, therefore that conflict-related rape constitutes a major factor in humanitarian migration, with women and children as the commonest victims. Ordinarily, survivors of such human rights violations would have no choice but to flee their homes to seek safety in other countries. Notwithstanding the normal causality of conflict-related sexual crimes and involuntary migration, IRL did not give attention to sex/gender as a protected ground for seeking humanitarian relief.

Outside conflict or politically motivated persecution, sex-related persecution occurs in peacetime, and is usually perpetrated by non-state actors in private settings. In some conservative societies, sexualized human rights abuses prevail in cultural communities, and they are naturalized as consequences of culture, religion or armed conflicts.[113] In some African and

---

[110] Joshua Kaiser and John Hagan, *Gendered Genocide: The Socially Destructive Process of Genocidal Rape, Killing, and Displacement,* 49 LAW & SOCIETY REV. 69-107 (2005); John Hagan, Wenona Rymond and Alberto Palloni, *Racial Targeting of Sexual Violence in Darfur,* 99 AJPH, (2011), https://ajph.apha.publications.org/doi/full/10.2105/ajph.2008.141119.

[110] *Id*.

[111] A. C. Okoli and P. Iortyer, *Terrorism and Humanitarian Crisis in Nigeria: Insights from Boko Haram Insurgency*, 14 GJHSS: F POLITICAL SCIENCE 39-50 (2014); *Nigeria: Abducted Women and Girls Forced to Join Boko Haram Attacks,* AMNESTY INTERNATIONAL (April 14, 2015), https://www.amnesty.org/en/latest/news/2015/04/nigeria-abducted-women-and-girls-forced-to-join-boko-haram-attacks/.

[112] Timothy Abington, *Armies of Women: The Syria Crisis and the New War Thesis,* E-INTERNATIONAL RELATIONS. SOAS. Armies of Women: The Syria Crisis and the New War Thesis (e-ir.info).

[113] CYNTHIA ENLOE, MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN'S LIVES, 234 (Berkeley, 2010); Sandra Via, *Gender, Militarism, and Globalisation: Soldiers for Hire and Hegemonic Masculinity*, in GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 42-53 (eds. Laura Sjoberg and Sandra Via, PRAEGER 2010); L. Sjoberg, *Gendering the Empire's Soldiers: Gender Ideologies, the U.S.*

Muslim traditional societies, women, and young girls are made to bear the brunt of obnoxious cultural practices—such as female genital cutting (FGC), forced marriage, religious rituals, honor killing, and forced labor.[114] Rural communities act as vanguards in legitimizing such offensive cultural norms, while family members and even intimate partners enforce same as custodians of culture against women as the susceptible victims. In such situations, government agencies oftentimes show unwillingness or inability to interfere with such matters tagged private. A typical example is the traditional practice in some Muslim and African communities where family members, mostly male heads arrange with advanced men to marry young female teenagers leaving them with no choice than conformity.[115] Such category of GBP perpetrated at the family level prevail with impunity because the perpetrators are perceived as custodian of power, hence governments and their agents condone or ignore such malignant acts as a family affair. Given their ubiquity, the UNHCR Gender Guidelines recognized that different forms of gender-based harm pervasively occur within a family or community setting such as rape, sexual abuses, domestic abuses, FGC, forced marriage, dowry-related violence, honor killing, oppression or punitive measures for the transgression of gender norms, and trafficking.[116] The purpose of this awareness is to ensure that adjudicators identify life-threatening nature, noting that these constitute potential causes of forced migration. Although not fully addressed in

---

Military, and the "War on Terror, in GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 209-230 (eds. Laura Sjoberg and Sandra Via, PRAEGER 2010); Linda Ahall, SEXING WAR/POLICING GENDER (MOTHERHOOD, MYTH AND WOMEN'S POLITICAL VIOLENCE, 1-168 (London: Routledge, 2015).

[114] Some cultural communities in South Sudan and most Islamic cultures practice forced and teenage marriage. Choice of marriage belongs to the male heads of families and not to the girl-child. Likewise, some African communities like… practice FGC, despite the state's obligations to the international human rights treaties.

[115] A Personal Interview with Fr. (Abuna) Noel Uzoagwu in 2017 revealed that in the rural community of Torit where he worked as a pastor coercive teenage marriage, widow inheritance and even female abduction was prevalent; *Pakistan Court Frees a Rapist After "Agreement" to Marry His Victim,* CBS, https://www.cbsnews.com/news/pakistan-rape-rapist-released-agreement-marry-victim/.

[116] *See, e.g.,* UNHCR GUIDELINES ON INTERNATIONAL PROTECTION NO. 2: MEMBERSHIP OF A PARTICULAR SOCIAL GROUP WITHIN THE CONTEXT OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR ITS 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES,UN Doc. HCR/GIP/02/02, 155, para. 9 (7 May 2002), [hereinafter "2002 UNHCR Guidelines"].

contemporary IRL, in 2000, the UN Special Rapporteur on Violence Against Women (USRVAW) expressed concern about "the apparent link between protectionist, anti-immigration policies and the phenomenon of trafficking." It acknowledged the harsh situations of undocumented immigrants, especially female survivors of trafficking, as they face frustrations of denials of humanitarian protection in host states. [117] Another comprehensive Guideline by the UNHCR further identified female survivors of sexual violence to be eligible for asylum protection under a particular social group.[118] The 2002 Gender Guidelines expanded the scope of the gender related claims like the 1985 Gender Guidelines, EXCOM Conclusion No. 39, [119] and recognizing gender as a viable ground for asylum.

Despite the authority accorded to the UNHCR under Article 35 of the Refugee Convention, its exercise of advisory and supervisory role in the interpretation of the IRL[120] is not non-binding on States. Given the unpredictable nature of the GBP and lack of uniformity in States' legislation, sometimes the UNHCR guidance meets a backlash, sideline, or rejection at the domestic level. Therefore, exploring effective reforms and measures for a treaty binding document to accommodate the needs of women and other persons making gender claims is highly recommended. As the perennial refugee crisis continues to weigh heavily on international borders, the quest for humanitarian protection increases with new circumstances of persecution and life-threatening disasters. The need for an effective legal framework for refugee protection becomes more imminent in international law. Because flights from danger—war, persecution, violence, and threat to freedom—do not end the plight of refugees, it begins a new struggle for

---

[117] Heaven Crawley and Trine Lester, *supra* note at 1-161, 50, 51.
[118] 2002 UNHCR Guidelines, *supra* note 116.
[119] EXECUTIVE COMMITTEE OF THE UNHCR PROGRAMME, REFUGEE WOMEN AND INTERNATIONAL PROTECTION, No. 39 para. (k)(36th Session 1985) [hereinafter "EXCOM Conclusion No. 39"].
[120] 1951 Convention, supra note 12 at art. 35(1-2) [the UNHCR is empowered to perform supervisory roles and to make regulations/recommendations towards the interpretation of the Convention].

survival and protection in a host country. Therefore, it is imperative to strengthen the human rights mechanisms for refugee protection according to contemporary and emerging needs. This dissertation pursues this task as a necessity. It prescribes human rights remedies to strengthen State practice in maintaining a sustainable refugee regime that is inclusive.

1.7 Theorizing Sexism within the Framework of Humanitarian Protection

In this study gender and sex are used interchangeably as related binaries,[121] although each espouses conceptual uniqueness in a strict sense. Generally, sex as defined in *Matter of Acosta* possesses innate and immutable characteristics,[122] unlike gender considered to be socially and culturally constructed.[123] Although the concept of gender as used in this study encompasses sex generally, the analysis centers more on female gender experiences as refugees. The case analysis highlights the male-centered structure of the 1951 Convention and its impact in creating female invisibility, which creates hurdles for gender viability.[124] Significant to this analysis is the role of the politics of gendering and how this reinforces the relationship between lawmaking, jurisprudence, and practice.

Just as theory and lawmaking affect practice, historically, dominant gendered traditions shaped legal practice. Debates have proven their corresponding impact in the adjudication of

---

[121] *See, e.g. Price Waterhouse,* 490 U.S at 239 [I speaking about Title VII the Court completely collapses the sex/gender binary: "Congress' intent to forbid employers to take gender into account in making employment decisions appears on the face of the statute."]; Diane S Meier, *Gender Trouble in the Law: Arguments against the Use of Status/Conduct Binaries in Sexual Orientation Law* 15 WASH & LEE J CIVIL RTS & SOC JUST 147, 160 (2008); *Attorney General v. Dow* BCLR (6) 1994*,* the High Court of Botswana used the "sex" and gender interchangeably holding that although "sex" is not included in the proscribed forms of discrimination listed in Section 15(3) of the Botswanean Constitution, it was deemed a proscribed form of discrimination.

[122] *Matter of Acosta,* 14 I&N Dec. 338 (BIA 1973).

[123] *Id.* at para. 326.

[124] *R-A-, supra* note 56 at 906; *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014); *Matter of A-B-* 27 I&N Dec. 227 (A.G. 2018).

gender-related humanitarian claims.[125] Equally, Dorothy Smith emphasizes a similar idea in her sociological theory on the effects and power privileges of maleness and its dominant impact on the intellectual worldview, which makes femaleness insignificant.[126] Consistent with dominant theory, the latter asserts that male-centeredness has a dominant influence in the structures of power. This makes men's characteristics the focal point for constructing socio-political norms and laws.[127] Central to the dissertation's argument is the effects of gendering or male-focal construction of the Refugee Convention, framed from male persecutory experiences to the exclusion of women and impact on gender claims. In deconstructing the politics of gendering, this study analyzes the construction of private/public dichotomy and how they affect the interpretation of female-related persecutions as well as a WFF.

Part of the task of this dissertation is to confront gender related discrimination in IRL and its consequences. In view of this, the analysis adopts a liberation but negotiating approach toward redressing sex discrimination and epistemic violence in IRL. As E. Grosz observes feminists' quests for visibility provoke "reaction…to the overwhelming masculinity of privileged and historically dominant knowledge" resulting from "male monopoly of production and reception of knowledge" that negates equality.[128] Setting a gender inclusive standard in IRL requires democratizing refugee protection, reconsidering humanitarian protection as they would benefit needs and wellbeing of men and women and all category of persons irrespective of race, sex, religion, PSG, nationality or political opinion. To this extent, the dissertation's arguments on

---

[125] Cynthia Grant Boivman and Elizabeth Al. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and The Legal Profession,* 67 FORDAM L. REV. 249-271, 249 (1998).
[126] Dorothy E. Smith, *Women's Perspective as a Radical Critique of Sociology,* 4 SOCIOLOGICAL INQUIRY 7-13 (1974).
[127] *Id.*
[128] E. Grosz, *A Note on Essentialism and Difference,* S. Gunew (ed), FEMINIST KNOWLEDGE: CRITIQUE AND CONSTRUCT 332 (London: Routledge, 1990).

gender “differences” and the peculiarities foreground gender equality, inclusiveness, and human rights as the ultimate measures to confront the smoldering refugee crisis internationally.

1.8 Changing Paradigm in Humanitarian Protection and Refugee Circumstances

Forced migration has witnessed stages of dramatic paradigm shifts since World War II. In the early 1960s, the refugee movement was triggered by prevailing conflicts linked to political struggles of decolonization, mainly in the African continent. Between early the 1960s and 1970s, individuals fleeing persecutions relating to national liberation poured out from different parts of Africa in places like Algeria, Angola, Zaire, Zambia, Guinea-Bissau, and Zimbabwe to seek haven in neighboring countries.[129] With the support of UNHCR, most of the refugees at that time received the hospitality of host states on the optimism that they would return to their native country after independence. Indeed, many eventually returned to their countries after gaining freedom.[130]

In the late 1960s and 1970s, the trend changed. Civil wars and internal armed conflicts became the major cause of involuntary migration that produced a mass exodus of refugees across different borders of Africa and the Middle East. Countries affected include but not limited to Nigeria, Mozambique, Ethiopia, Sudan, Somalia, Liberia, Angola, and Indochina.[131] The situation was recurrent also in Asia during the Vietnam War, which also produced migration

[129] *See, e.g.,* Jérôme B. Elie and Jussi Hanhimäki. *UNHCR and Decolonization in Africa Expansion and Emancipation, 1950s to 1970s* 48 ARCHIV FÜR SOZIALGESCHICHTE 61, 53-72 (2008); Sadako Ogata, Challenges of Refugee Protection, Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees at the University of Havana, Cuba (May 11, 2000), https://www.unhcr.org/en-us/admin/hcspeeches/3ae68fc914/challenges-refugees-protection-statement-mrs-sadako-ogata-united-nations.html.
[130] Sadako Ogata *supra* note 5.
[131] *See, e.g.,* Constance G. Anthony, *Africa's Refugee Crisis: State Building in Historical Perspective*, 25 INT’L MIGRATION REV. 25 574-91 (1991); *Relief Problems in Nigeria-Biafra: Hearings before the Subcommittee to Investigate Problems Connected with Refugees and Escapees of the Committee on the Judiciary*, United State Senate, 91st Congr. 207 (2nd Session, Pt. 2, 1970); Telegram: *Genocide*, WASH. POST, July 2, 1969.

crisis in the United States.[132] Similarly in the wake of 1990s, a combination of and genocidal armed conflicts and political crisis produced unprecedented humanitarian emergencies,[133] with estimated population of eight to seventeen million refugees seeking protection in neighboring states.[134] At the same period other related circumstances like political crisis provoked humanitarian emergence and migration influx in different regions like Latin America, South and Central America.[135] These and other guerrilla attacks including drug-related persecutions have exacerbated forced migration and refugee crisis in countries like, for example political killings by military and communist regimes in Cuba, Mexico, Guatemala, Nicaragua, Chile, El Salvador and Haiti,[136] saying the least.

In the last two decades also, the upsurge of refugee movements has acquired new dimensions with increased threats to international security, forced recruitment, and terrorist related attacks. Effects of insurgency, terrorism, counterterrorism, and other militarized attacks by state or non-state actors have orchestrated displacements, loss of nationality, flight, and fear of returning home.[137] While these constitute a new concern in international security, IRL did not contemplate the ubiquity of terrorist persecution and the workings of its network orchestrated by religious extremists. Instead affected countries resort to domestic measures in response to terrorism and threat to national security. For example, the 9/11 attack in the United States

---

[132] Henry Kamm, *Vietnam Goes on trial in Geneva Over its Refugees,* N.Y. TIMES, July 22, 1978, at 2.
[133] Bonny Ibhawoh, *Refugees, Evacuees, and Repatriates: Biafran Children, UNHCR, and the Politics of International Humanitarianism in the Nigerian Civil War,* 63 AFRICAN STUD. REV 568-592 (2020).
[134] Ogata, *supra* note 5; The Rwandan Genocide and its Aftermath, *The State of the World's Refugees* 246, 245-273. The State of The World's Refugees 2000 - Chapter 10 (unhcr.org).
[135] *Id.*; Silva Mathema, *They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries,* CENTER FOR AMERICAN PROGRESS, June 1, 2018, https://www.amerianprogress.org/issues/immigration/reports/2018/06/01/451474/still-refugees-continue-flee-latin-america-countries; Desipio L. Immigrants, *Denizens, and Citizens: Latin American Immigration and Settlement in the 1990s*, 143 DAEDALUS PUB MED 48–64 (2013).
[136] Mathema, *Op Cite.*
[137] A. C. Okoli and P. Iortyer, *supra* note 111 at 39-50; UNHCR: *Nigerian Refugee Situation.* (2019), https://data2.unhcr.org/en/situations/nigeriasituation.

compelled action by Congress in creating an anti-terrorism law that bars individuals that have participated, supported, or belonged to a terrorist network from admission as well as obtaining any refugee benefits in the United States. Such security exclusion is enforced in the interest of national security and public policy. Several other legislative innovations have been established to ensure that terrorists or fugitives of justice do not exploit the advantage of refugee reliefs. However, such sophisticated attempts have not sufficiently addressed the needs of refugees fleeing terrorist persecution. In fact, as this dissertation has argued the expansive definition of terrorist organization and activity bar overly excluded victims of terrorist attacks and even individuals fleeing persecution on account of the politically motivated revolution.[138] IRL has remained static and reticent on such issues, amidst the changing trends of refugee needs and circumstances. This creates a potential void for determining the rights and status of contemporary refugees. Whereas terrorist related attacks today produce compelling humanitarian concerns as seen in Afghanistan, Syria, and other parts of the Middle East where Muslim extremism has a stronghold, the effects of these on international security are enormous. Worse still, conflict-induced migration as well as rejection or push-back by host countries increase risks of human trafficking, torture, death, abduction, sexual enslavement, forcible recruitment into banditry and proliferation at borders. According to the findings of the Council on Foreign Relations in 2019, many of the Rohingya refugees fleeing genocide in Myanmar between 2012-2015 were tortured, raped, and subjected to forced labor by natives who ostensibly had promised to provide them with shelters or jobs.[139] Some were abducted and enslaved at the camps of Malaysia-Thailand border, with their captors demanded thousands of dollars for their release.

[138] INA §212 (a)(3)(B)(i)(I), 8 U.S.C. §1182(a)(3)(B)(i)(I).
[139] Alexandra Bro, *Fleeing Home: Refugees and Human Trafficking,* COUNCIL ON FOREIGN RELATIONS, 31 December 2019, https://www.cfr.org/blog/fleeing-home-refugees-and-human-trafficking.

Similar heinous stories prevail in Libya recurrently, as African refugees are being tortured, sold as slaves in slave markets, or trafficked to Europe, while some are incarcerated in arbitrary detentions where they are tortured and raped.[140] Women and children are not spared of these terrors, and are most often high targets. Regrettably, although these human rights violations dominate media headlines, they are rarely addressed by the international community, or prevented by the governments of destination countries. Having a functional and monitoring international refugee system would be the only hope for such vulnerable forced migrants.

Apparently, exclusion laws, punitive immigration policies as well as rejection compound the insecurity of refugees by making them susceptible to traffickers, slave marketers, drug cartels, and other related criminals. Many victims especially women who face such vulnerability rarely seek government assistance for fear of arrest, retributive attack by their exploiters or related risks such as seen in countries like Venezuela, Nicaragua, Columbia, and other parts of Central or Latin America. Although Congress has established the T-Visa and U-Visa categories to address the claims of survivors of crime and trafficking, adjudication of some of these claims is sometimes disconnected from the realities of victims' gender experience. Similarly, the United States refugee policy, as well as security legislation, have not addressed broader issues of conflict prevention and security initiatives that could support mitigating the cause of refugee influx at grassroots levels.

Outside security issues, the effects of natural disasters, climate change displacement, and connected economic depression have pushed millions of persons through crossing various barren deserts, Pacific Islanders, and even the Mediterranean in search of a haven. In 2019, the

[140] Stephanie Nebehay, *Executions, Torture, and Slave Markets Persis in Libya: U.N.*. COUNCIL ON FOREIGN RELATIONS, 21 March 2018, https://www.reuters.com/article/us-libya-security-rights/executions-torture-and-slave-markets-persist-in-libya-u-n-idUSKBN1GX1JY.

International Monitoring Center (IMC) estimated that 24 million people were displaced due to extreme weather conditions while 8.5 million people were displaced due to conflict. Drought, flood, wildfires, hurricanes, and related disasters displacement have in recent times induced an increase in involuntary movements. The Word Bank has predicted increase of such, movement across Sub-Saharan Africa, Latin America, and Asia by 2050.[141] Men, women, children, and the elderly are largely affected by climate change human mobility. Yet, neither the Refugee Convention nor the 1967 Protocol articulated the complexities of this category of refugees. Faced with protection barriers, climate change affected refugees who are denied protection find themselves at the crossroad of human rights realities. In the New Zealand case of Mr. Teitiota, the applicant was forced by the effects of climate change to migrate with his family from the Island of Tarawa, Kiribati to New Zealand. He was denied protection as an "unConvention" refugee and was deported with his family. Frustrated by the outcome of his decision and the risks that await him upon removal, Mr. Teitiota challenged the denial pursuant to Article 6 of the ICCPR and Article 7 of CAT under the United Nations Human Rights Committee. Although the Committee found that a potential claim can be made under the above human rights frameworks, it ruled in favor of New Zealand.[142] Obviously, claims on climate change are still emerging and underdeveloped in IRL. Hence, legislative, and judicial bodies are not willing to negotiate the rights of climate change refugees. The research recommendation also makes a case for the inclusion of climate change refugees under a humanitarian consideration by bifurcated nexus formula as individuals whose threat to life is neglected by their native governments.

---

[141] *Groundswell: Preparing for Internal Climate Migration,* THE WORLD BANK, 19 March 2018, https://www.worldbank.org/en/news/infographic/2018/03/19/groundswell---preparing-for-internal-climate-migration.

[142] *See, e.g., Ioane Teitiota, Human Rights Committee,* CCPR/C/127/D/2728/2016.

Recently too, the covid-19 pandemic and related policies by governments have equally fractured humanitarian migration with different restrictions on border closure, halt to admission and resettlement of refugees. The wave of the Covid-19 pandemic from 2019 through 2022 caused a significant decline in the international commitment to nonrefoulement, as subsequent findings will demonstrate. With global documentation on millions of infections and fatalities,[143] and prevailing fears of contamination, some states adopted restrictive policies, altering international refugee policy, with considerable impact on asylum and nonrefoulement.[144] For example, on March 20, 2020, the United States government reached joint agreements (JDSA) with the governments of Canada and Mexico to suspend "non-essential" travel through ports of entry on each border as part of the differing responses to the Covid-19 (novel coronavirus) pandemic.[145] Attempts to implement this caused mass expulsion of asylum seekers under Title 42. An estimate showed that more than 183,552 aliens were expelled by the Order from October to December 2020.[146] Deportation of protection seekers under Title 42 has endured to this day. This study questions the legitimacy of Title 42 statutorily and under international human rights frameworks. Because of these factors, the rights of refugee in the last few decades have suffered serious assault. Nonetheless, the underlying effects of the mismanagement of the migration crisis have triggered a global increase in the population of refugees to record levels.[147] Recent statistics

---

[143] *Coronavirus World Map: Tracking the Global Outbreak,* N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html.

[144] 2020 Greece Pushback on Protection Seekers, *supra* note 6; 2020 CDC Order, *supra* note 7; Amnesty International, *supra* note 8.

[145] Joint Declaration and Supplementary Agreement Between the United States of America and Mexico Signed, June 7, 2019, 19 TIAC 5, 19-607 [hereinafter "JDSA 2019"], https://www.state.gov/mexico-19-607; Jorge Loweree, Aaron Reichlin-Melnick and Walter Ewing, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System,* AMERICAN IMMIGRATION COUNCIL (Sept. 30, 2020), https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system.

[146] *See, e.g., Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions,* U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (updated Jan. 7, 2020) [*hereinafter* "Nationwide Enforcement Enc."].

[147] Max J. Rosenthal, *Despite Pandemic, Refugee Numbers Grow to Unprecedented Levels*, BLOG HIAS (June 18, 2021). Despite Pandemic, Refugee Numbers Grow to Unprecedented Levels | HIAS

by the United Nations Higher Commissioner for Refugees (UNHCR) indicate that over 89.3 million people are forcibly displaced across the world today; and more than 27.1 million are refugee seeking asylum in other countries.[148] While the UNHCR identifies over 80 million displaced persons as "persons of concern" their status is undetermined in international refugee law. While the UNHCR identifies over 89.3 million displaced persons as "persons of concern" their status is undetermined in international refugee law. In seeking human rights solutions for excluded refugees mostly women, this dissertation also makes suggestions for inclusive protection that will address the simmering crisis of refugees, gender, and human rights issues, as well as "persons of concern."

1.9 Covid-19 Pandemic and New Burden on Humanitarian Protection

Since 2019, the impact of the Covid-19 pandemic coupled with a mixed effect of an already prevailing refugee crisis has considerably stultified humanitarian migration, especially on refugee admission and resettlement. At the outbreak of the "coronavirus," now referred to as Covid-19, which began spreading in Wuhan, China in 2019, many governments including the United States issued restrictions on travel and refugee policy.[149] With globally recorded infections and fatalities,[150] travel restrictions were imposed in many countries.[151] Even the UNHCR and the International Organization for Migration (IOM) suspended temporarily resettlement program.[152] Implementing covid-19 restrictions gradually altered the landscape of

---

[148] UNHCR Figure 2022, *supra* note 2; *UNHCR: The UN Refugee Agency*, Global Appeal Update, 5, 3-85 (2021), Global_Appeal_2021_full_lowres.pdf (unhcr.org) [an earlier statistics in 2021].

[149] *See, e.g.,* Andrea Salcedo, Sanam Yar & Gina Cherelus, *Coronavirus Travel Restrictions, Across the Globe,* N.Y. TIMES, 8 May, 2020, https://www.nytimes.com/article/coronavirus-travel-restrictions.html (describing border closures by country [discussing border closure in many countries].

[150] *Coronavirus World Map: Tracking the Global Outbreak,* N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html.

[151] Salcedo, Yar & Cherelus, *Op Cite,* 149.

[152] *IOM*, *UNHCR Announce Temporary Suspension of Resettlement Travel for Refugees,* THE UN REFUGEE AGENCY USA, https://www.unhcr.org/enus/news/press/2020/3/5e7103034/iom-unhcr-announce-temporary-suspension-resettlement-travelrefugees.html.

immigration in many states, although some authorized essential travels and immigration processes for persons in need.[153] The changing landscape thus impacted heavily on migration and the increasing burden on nonrefoulement. With the already rising demographic flow across international borders and the surging effects of the pandemic, states like Greece and Turkey took recourse to forcible removal, expulsion and even the use of lethal force on potential asylum seekers.[154] The United States was not an exception.

In March 2020, the United States Center for Disease Control and Prevention (CDC) issued an Order in consultation with the Department of Homeland Security (DHS), barring the "introduction" of undocumented persons to the fear that they would be "potential vectors" of communicable diseases.[155] The implementation of this Order caused rapid deportation of over 147,000 entrants, including unaccompanied minors. [156] Although the United Nations High Commissioner for Refugee (UNHCR) had warned governments not to enforce any blanket measures that would preclude the admission of refugees or processing of asylum claim during the wave of the pandemic.[157] This was to prevent the risk of breaching nonrefoulement obligations, a principle that prohibits turning back to the frontiers of persecutions refugees who

---

[153] CDC Order, *supra* note 7 at Act 42 U.S.C. §§265, 268; *Covid-19 & EU Travel Restrictions,* SCHENGENVISAINFO NEWS (September 11, 2021), Covid-19 & EU Travel Restrictions (schengenvisainfo.com).

[154] *See, e.g. Greece/Turkey: Asylum-Seekers and Migrants Killed and Abused at Borders,* AMNESTY INTERNATIONAL, 3 April 2020, https://www.amnesty.org/en/latest/news/2020/04/greece-turkey-asylum-seekers-andmigrants-killed-and-abused.

[155]*Id*.

[156] Molly O'Toole, *Trump Administration, citing Coronavirus, Expels 10,000 Migrants in Less Than Three Weeks,* L.A. TIMES (April 9, 2020), .https://www.latimes.com/politics/story.2020.04.09 accessed 2 April 2020; Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors,* STANFORD LAW SCHOOL BLOGS: LEGAL AGGREGATE (April 15, 2020), https://law.stanford.edu/2020/04/15/coronavirus-border-expulsions-cdcs-assault-on-asylumseekers-and-unaccompanied-minors/.

[157] *Key Legal Considerations on Access to territory for persons in need of international protection in the context of the COVID-19 response,* UN High Commissioner for Refugees (UNHCR) (March 16, 2020), https://www.refworld.org/docid/5e7132834.html.

demonstrate a WFF.[158] Regardless of the warnings, amnesty international documented several illegal expulsions and punitive detention of refugees, undocumented persons, migrant workers and those who became undocumented due to prolonged travel restrictions in places like Dubai United Arab Emirate (UAE), Qatar and Greece.[159] In Greece, for instance, cases of human rights violations against asylum seekers during the pandemic captured international spectacle, with law enforcement officers' involvement in push back and summary return of refugees at the land and sea borders even during the covid-19 lockdown.[160] In the United States, asylum seekers who were already at the border before the outbreak of the pandemic were equally expelled.[161] Consequently, victims of such Covid-related removals were made vulnerable to potential risks of contamination, danger of sex trafficking and other forms of human insecurities, with greater impact on women and children.[162] Again, more than 20,000 refugees who were forced to remain in Mexico became stranded under the CDC Order, some of whom (non-Mexicans) faced the danger of detention by Mexican immigration officials, sex trafficking, rape, abduction or robbery.[163] As result, IHRL and nonrefoulement suffered the greatest threat under the hostile measures, reprehensible in refugee law as well as international law.

---

[158] *Id* at 1-4.

[159] *Migrant Workers Illegally Expelled During the Covid-19 Pandemic, Op Cite* 96; Amnesty International, *Covid-19 Makes Gulf Countries' Abuse of Migrant Workers Impossible to Ignore* (30 April, 2022). COVID-19 makes Gulf countries' abuse of migrant workers impossible to ignore | Amnesty International.

[160] *Greece: Investigate Pushbacks, Collective Expulsions—EU Should Press Athens to Halt Abuses,* HUMAN RIGHTS WATCH (July 16, 2020), Greece: Investigate Pushbacks, Collective Expulsions | Human Rights Watch (hrw.org).

[161] *See, e.g.,* Yael Schacher & Chris Beyrer, *Expelling Asylum-Seekers Is Not the Answer: U.S. Border Policy in the Time of COVID-19, Refugees International,* (Apr. 27, 2020), https://www.refugeesinternational.org/reports/2020/4/26/expelling-asylum-seekers-is-not-the-answer-usborder-policy-in-the-time-of-covid-19.

[162] Jenni Bowring-McDonugh, *CVT Denounces Trump Administration's Misguided Attempt to Ban Individuals from Seeking Asylum at U.S. Southern Border*, THE CENTER FOR VICTIMS OF TORTURE (July 15, 2019), https://www.ctv.org/news-events/press-release.

[163] *Id.*

Refugees enjoy a unique position in IHRL. Legal instruments that articulate the basic protection of persons fleeing persecution or torture are embedded in IHRL, IHL and IRL. As a general practice, openness to the admission of refugees, and respect of nonrefoulement is the acceptable practices of states reflecting *opinio juris* of the global community.[164] The strength of this principle is derived from international custom and judicial prohibition of torture, *jus cogens* that admits no derogation.[165] Contrary to international standard, the responses of states in the above situations raise the question of responsibility and commitment to customary rules as well as good faith observance. The principle of nonrefoulement proscribes rejection, expulsion, forceful removal or return of refugees in "any manner whatsoever" to places where their lives or freedom would be threatened. Given the exigent circumstances of the pandemic, refoulement of protection seekers raises fundamental concerns on *jus cogens* obligations,[166] and governments' commitments to treaties. This dissertation blames the situation partly on the lack of an effective implementation mechanism in IRL and the limited scope of nonrefoulement. Further, the intellectual inquiry examines the legitimacy and effects of some of the Covid-related legislations like the United States Title 42 and other related measures that have endured to date.

Substantially, the actual effects of states' conformity or breach of international obligations to refugees are not just for awareness creation or intellectual assessment but a pointer to the underlying impact on human lives, rights, and dignity. For example, an assessment of the

---

[164] UN Charter 1945, *supra* note 31 at art. 36, Okeke and Nafziger, *supra* note 8.
[165] Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51 entered into force 26 June 1987, reprinted in 23 I.L.M. 1027 (1984), substantive changes noted in 24 I.L.M. 535, arts. 1 and 3 [*hereinafter* "CAT"]; Human Rights Committee, General Comment No. 29: art. 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11 [The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, para. 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant] [*hereinafter* "General Comment No. 29]; Okeke and Nafziger, at 536.
[166] *Id*.

effects of noncompliance to nonrefoulement implies deconstructing the impacts of pushing refugees back to persecution, torture, or death. It becomes necessary to evaluate the cause and effects of implementing the pandemic regulations and the extent to which the doctrine of necessity excused the refoulement actions of states. Laws developed during the emergency of the pandemic are analyzed in this dissertation as part of the historical legislation of IRL, their validity and effects. Part of the task of this study is to explore functional solutions in international law to address the current humanitarian needs of refugees. Because the humanitarian needs of refugees may "place unduly heavy burdens on certain countries," the United Nations has devised standards for international cooperation and burden sharing to ensure that refugees' rights and humanitarian needs receive sufficient international attention. To achieve the noble ideal, the UNHCR with other monitoring bodies of the United Nations General Assembly should oversee the treatment of refugees and collaborates with non-profit as well government in seeking permanent solutions to the problem of refugees.[167] Part of the research task is to evaluate the effectiveness and limitations in realizing these objectives within domestic jurisdictions given differing standards. Also significant to this investigation are changes in policies and legislation and how they refugee protection. Viewed from the United States jurisprudence, the study explores its various grounds of inclusion, exclusion, inadmissibility, deportability (removals), and related bars. Significantly, it deconstructs the security and crime bars, as well as other circumstantial exclusions and how these impact the jurisprudence of humanitarian protection. Arguably international law recognizes the government's discretion to admit, resettle and assimilate refugees,[168] however such sovereign powers must be exercised in

[167] Statute of the Office of the United Nations High Commissioner for Refugees, G.A. Res. 428(V), Annex, U.N. Doc. A/1775, para. 1 (1950) [*hereinafter* "UNHCR Statute"].
[168] 1951 Convention, *supra* note 12 at art. 34.

conformity with international obligations. Against this background, this dissertation assesses the United States immigration laws and refugee policies, while making inferences from selected jurisdictions, to seek broader resolution to the compelling challenges of refugees.

1.10 Structural Mapping

This dissertation is grouped into seven chapters. Chapter One introduces the background of the study, thesis, and scope of the dissertation. Discussion on background traces the events that led to the framing of refugee status and criteria, and how the narrow-minded construction of Article 1.A(2) has shaped the meaning and application of IRL. The analysis is contextualized with issues relating to the inclusion and exclusion laws of refugees and their relationship with normative international human rights frameworks. The purpose is to underscore the limitations of contemporary IRL and some issues that have continued to negate the effective enforcement of refugee rights in destination states. Chapter Two examines comprehensively the historical development of IRL from the era of the 1933 Convention, through the 1951 Convention and 1967 Protocol. Specific attention is given to the scope of these legal instruments and their connections with other relevant instruments that protect the rights of persons fleeing persecution or torture. Significantly, the intersection between nonrefoulement character and humanitarian protection under Convention Against Torture, Other Inhuman or Degrading Treatment (CAT) is highlighted as the foundation of refugee law. Against this background, the study analyzes the structure of nonrefoulement, and asylum from different legal perspectives—IHRL, IHL, international security, and their levels of applications—UNHCR, regional and state institutions. In doing this, it highlights some sensitive issues and limitations common to all or peculiar to some to underscore the existing legal trajectories, policies, and practices. This knowledge is necessary to show the investment of international law in IRL, the contributions of legal

institutions in seeking to grapple with refugees, the treaty obligation to protect, and their overall impact on humanitarian protection.

Chapter Three attempts to deconstruct persecution from varied legal, scholarly, and jurisprudential perspectives. Neither the Refugee Convention nor the 1967 Protocol provided any clear-cut definition of persecution. Apparently, the first articulation of meaning is inferred from the refugee status[169] and grounds for refugee protection.[170] Lack of definition, claims of persecution are subject to conflicting interpretations. The effects of this omission on applicants making persecutory claims, especially on gender, are analyzed to demonstrate the narrow perspectives of IRL and the need for reforms. Centering on the United States, the analysis also highlights related interpretational dilemmas in the applications of nexus requirements. In some situations, as the case analysis demonstrates, the United States courts have deferred to the Convention's restricted grounds but in many other cases relating to gender, the courts have rejected the UNHCR advisory while upholding narrow domestic precedents. Such inconsistencies are given critical evaluation in line with the obligation to good interpretation.[171] This forms the benchmark for challenging the restrictive definition of persecution as well as the problem of sexism created under the Refugee Convention. The goal is to reinforce the dissertation's argument that IRL has inherent limitations that largely undermine access to protection for women and the excluded "other," hence the need to rethink the Convention's "malestream" perspectives. The discussion establishes a causal connection between interpretational biases with sexists' laws and denials of protection. International law and current

[169]*Id* at art. 1(A)(2).
[170] *Id* at art. 33(1).
[171] Vienna Convention on the Law of Treaties, 26 May 1969, 1155 UNTS 331, art. 31(1) [stating that [A] treaty shall be interpreted in good faith in accordance with the ordinary meaning and context and in the light of its object and purpose] [*hereinafter* "VCLT"].

development in the jurisprudence of IHL under the International Criminal Court (ICC) indicate that protection of all persons from the danger of persecution is a fundamental practice of international law,[172] given the human rights imperative of safety. It becomes necessary then to challenge discriminatory laws and the associated interpretational biases that create barriers to seeking protection from persecution.

Chapter Four explores the five protected grounds in the Refugee Convention—race, nationality, religion, political opinion, and MPSG—and how different state jurisdictions have interpreted this in setting the threshold of inclusion and exclusion. Additionally, it retraces the historical background of refugee eligibility—a WFF for persecution on account of race. By analyzing several case laws from the United States, Canada, Australia, and the United Kingdom (UK), it showed the divergence and relationship in the interpretation of the grounds of persecution, gender connection with the five grounds, as well as other elements. Also significant to the discussion is the illustration of the strengths and limitations of state practice as they grappled with interpretation problems. This knowledge is crucial to support research findings and recommendations.

This chapter examines the challenges in establishing viability in gender claims by case laws from the United States and how other common law courts have interpreted the same gender related asylum claims. Part of the discussion negotiates gender viability, gender politics and a reconstruction of the gendered scope of IRL and the problem of nexus. The analysis centers on the practice in the United States jurisprudence and important lessons from other common law countries like Canada, Australia, and the United Kingdom. The aim is to reinforce the research

---

[172] *See, e.g., Prosecutor v. Jean-Paul Akayesu*, ICTR-96-4, 598 (1998) [Judgment by Trial Chamber]; *Prosecutor v. Anto Furundžija,* Case No. IT-95-17-1, 271 (1998); *Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*, Case No. IT-96-23-A and IT-9623/1-A (2002).

argument on gender exclusion and to provide insight to the diverse judicial responses to gender related claims and the extent to which courts' decisions perpetuate inequality in IRL.

Chapter Six analyzes the refugee exclusion laws, asylum bars, and other rules of inadmissibility and how they on the United States gender and security bar jurisprudence. The exclusion laws are explored from diverse perspectives. First, we examine the Convention's exclusion under IRL, that is criminal or security bar pursuant to Article 1. F and Article 33(2), and other categories stipulated in Articles 1.D-E applies to aliens who lose their status simply because of a change of circumstances.[173] Subsequent segments of this Chapter evaluate how the exclusion laws are framed and interpreted in the United States. Significant to this is the analysis of the historical events that influence their legislation like the Communist-related persecutions after World War II, 9/11, racial biases, the pandemic, and the migration crisis at the southern border. The discussion seeks to balance the legitimacy of the legislative and jurisprudential measures with human rights consequences.

Chapter Seven discusses the rights of refugees in international law. The central focus is on how these rights are enforced or neglected, excluded, as well as violated. At this point, the findings of each Chapter are analyzed, followed by recommendations. This dissertation suggests among others effective measures for creating inclusiveness, diversity, and functional jurisprudence that will accommodate the contemporary needs of refugees of all genders, classes, and other social identities. Building a balance between human rights and humanitarian protection will help States traverse the walls set by antisemitic policies and to create bridges between them. In addition, establishing an effective reform for an inclusive refugee regime would address the

[173] *Id.* at art. 1.C-1. E

current limitations of IRL amidst the rising crises of refugees, and international security. Lessons from the global pandemic have shown that crises human-related crises mismanaged in one country may affect its neighbors, therefore, the principle of international cooperation and burden sharing are re-addressed from different non-politicized perspectives. Thus, solutions to the rising refugee concerns cannot be divorced from human rights remedies.

1.11 Conclusion

In all, this work aims at contributing new ideas that will serve as part of a global solution to resolving the compelling refugee crisis and to build a consistent international refugee regime that is gender and all-human inclusive. Considering the frustrations of asylum seekers especially women and unaccompanied children who face the uncertainties of rejection, denials, expedited removals and sometimes detentions for proof of viability, there is an urgent need to reconceptualize jurisprudence of humanitarian protection to accommodate the peculiarities of all refugees. The sole objective of the 1951Convention and the Refugee Act is to respond to the legitimate needs of refugees when local states fail in their human rights duties to protect them from persecution.[174]As the refugee crisis continues to command international attention, necessity calls for commitments towards maintaining a humane refugee regime. Given the life-threatening consequences of asylum denials and removal, it becomes imperative to integrate human rights requirements in gender asylum to maintain progressive jurisprudence and reduce the risks of refoulement.

[174] JAMES HATHAWAY AND MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 128 (1991).

CHAPTER TWO

DEVELOPMENT OF THE LEGAL FRAMEWORK OF REFUGEE PROTECTION

2.1 Introduction

This Chapter traces the sources and historical development of international refugee law (IRL). Every law has got a source(s) and a trajectory of jurisprudential past. The legal tradition of asylum for individuals fleeing persecution dates to the ancient Judeo-Christian sanctuary and Islamic *ijara*.[175] As would be analyzed subsequently, the fundamental tenets of humanitarian protection to grant asylum and prohibit refoulement evolved from here and later became an acceptable custom among nation-states. Hence, the birth of an IRL. In the pre-historic age, the granting of protection to fugitives was considered an honorable act. No matter the circumstance, a denial of protection that is likely to expose fugitives to danger was considered dishonorable and a violation of common and inviolable humanity. The human rights concept of asylum and nonrefoulement takes root from this tradition. Generally, international law is a product of symbiotic laws. Sharing in these characteristics, IRL draws from interwoven complex structures of pre-existed religious practices, public international law, and civil legal instruments. The task of this chapter is to analyze the contours and tentacles of refugee law—drawing from varieties of primary and secondary sources. The discussion explores the source(s) of fundamental principles of humanitarian protection—its priorities on the preservation of human life and dignity—that is the basis for modern IRL.

This Chapter is organized into four parts. The first part examines the religious concepts of sanctuary practice as the ancient harbinger of modern asylum and nonrefoulement. Part two evaluates the overlapping of religion and politics in the practice of asylum in the ancient Greek

[175] Musalo et aal, *supra* note 10 at 3, 96-7.

and Roman states and their impact on the development of alien protection laws. Building on the discursive framework, we examine the advancement of minorities' rights as a presage to the beginning of a regime of international rights for non-citizens. Part three assesses the events leading to the creation of earlier refugee treaties—the League of Nations Convention relating to the status of refugees[176] and other significant arrangements following the World War I humanitarian disasters. On this platform, part four analyzes the aftermaths of World War II and the impact of other events like the Holocaust and the Cold War in the creation of a new international refugee regime. Some aspects of the discussion examine the formation and impact of the United Nations High Commissioner for Refugees (UNHCR) as well as the significant roles of the United Nations General Assembly in the development of legal instruments on the status of refugees. Three primary documents of IRL—the 1951 Convention relating to the Status of Refugees,[177] 1967 Protocol,[178] and the 1984 Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment[179]—are evaluated alongside other secondary instruments. The discussion underscores a possible overlapping with other branches of public international law as well as regional treaties and domestic laws refugee laws.

2.2 Judeo-Christian Perspectives of Sanctuaries and Humanitarian Protection

Generations of human history are the product of migration. Within the realm of this history, hospitality and respectful treatment for migrants interweave with the culture of sheltering strangers from persecution.[180] This practice has endured as part of traditional religious values among the Judeo-Christian and Islamic cultures.[181] Theologically, Christians are

[176] 1933 Convention *supra* note 14.
[177] 1951 Convention, supra note 12.
[178] 1967 Protocol, supra note 17.
[179] CAT, *supra* note 165.
[180] Musalo et aal, *supra* note 10 at 3.
[181] *Id*.

described as generations of pilgrims on a journey to a promised haven or "heaven."[182] Biblical literature reproduces this notion in the epic migrations of Abraham, the patriarch who prefigures the Christian image of a wayfarer. According to the Christian Bible, God commanded Abraham to migrate from his nationality to other countries for resettlement, a deeper spiritual encounter, and economic as well as political expansion.[183] As reflected in the Biblical map, Abraham journeyed from Ur to Haran and to Egypt not only as an economic migrant but in search of refuge in Egypt.[184] Concerned about his alien identity and the potential risk of his beautiful wife, the Book of Genesis Chapter 12 demonstrated Abraham's feelings of insecurity, fearing that the Egyptian men may murder him and take his wife, Sarah.[185] His experience and fears mirror a potential aspect sex related risks in international migration, peculiar challenges that resonate often, yet are neglected in the assessment of the vulnerabilities of female migrants. Women are potential targets for persecution both in native, transit and even destination countries. The significance of these gender experiences is underscored in the research thesis in the analysis of "sexism" in IRL.

The Old Testament Bible depicts varied aspects of movements, notably the Israeli migration into Egypt because of famine[186] and mass exodus from the persecutions of Pharoah.[187]

---

[182] The Holy Bible urged Christians to see themselves as pilgrims on a temporary residence on earth and on a journey to eternity. *See, e.g,*. 1 Peter 2:11; A Letter to the Hebrew 11:13 ["…people…are foreigners and travelers on earth"]; Hebrew 11:1 [stating about hope for things not yet seen, which faith inspires us to hope for and to be accomplished when we reach our destination place in heaven]; Isaiah 40:31 ["Those who wait for the Lord shall renew their strength…they shall run and not be weary, they shall walk and not faint"].

[183] Genesis 12:1-3 [God calls Terah's son Abram to "Lease your country…and go to the land I will show you…"].

[184] *See, e.g., Map of the Journey of Abraham,* BIBLICAL HISTORY, https://bible-history.com/maps/abrahams-journeys; To prevent his being persecuted by suitors who may covet his wife, Abraham Sarah to claim that she was his sister, even at that one of the Egyptian—Pharaoh's did desire Sarah and took her to his house, until the Lord afflicted his house with plagues. Gen. 12-15-17.

[185] *Id.*

[186] Genesis 47:1-12.

[187] Exodus 13:17-27; 14: 1-12.

While the exilic journeys into Egypt signify a search for economic survival,[188] Israel's flight from Egypt represents a typology of humanitarian asylum and a forced divinely necessitated migration to a promised sanctuary, reflective of Christian religious sanctuary.[189] The symbolic encounter contributed to the construction the Hebrew Mosaic Law for sanctuary seekers.[190] According to the theological literature, God commanded Moses to create "sanctuary cities" from the land of the Levitical tribe for protecting persons who kill another without intent.[191] He equally ordered them to make laws for protecting immigrants, refugees and the powerless.[192] Religiously, the Mosaic sanctuaries represent a response to divine law to protect.

Vestiges of the Hebrew sanctuary evolved into the Christian tradition, identifying the altar or sanctuary as a symbol of preservation, refuge, and protection for fugitives and sinners. This notion has gained traction with some scholarly arguments that the religious practice of asylum prefigures contemporary asylum.[193] To a large extent, this study concurs with this claim but underscores numerous areas of divergences, as subsequent analysis would demonstrate. Originally, in the ancient Hebrew tradition, an avenger of blood is authorized to kill the accused before he or she reaches the sanctuary. But upon entering the sanctuary, the accused becomes inviolable and preserved by the legal authority of the sanctuary.[194] The practice among the

---

[188] *Id.* at 13:17-27; 14: 1-12.
[189] King David fled with his army from threatened attack by his son, Absalom. See, e.g., 2 Samuel 13:14-16; Joseph and Mary fled with the Baby Jesus and sought asylum in Egypt from the persecution of King Herod. Mathew 2:14-15.
[190] Numbers 35:6-34 (Such manslayer could be one of the Israelites or a sojourner).
[191] *Id*.
[192] Exodus 22:21-27 ["Do not mistreat or oppress a foreigner, for you were foreigners in Egypt....Do not oppress or take advantage of the widows or fatherless…"].
[193] IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 124-133 (Paulist Press, 1985); Musalo, *supra* note 5 at 10.
[194] *Id* at 124; *Id*. at 11; CHINUA ACHEBE, THINGS FALL APART, 124 (LONDON HEINEMANN, 1958) [Chinua Achebe fictionalized the traditional sanctuary in Okonkwo's exile from Umuofia to his maternal home, after committing an involuntary manslaughter, *nne-ochu*, to preserve him from the wrath of the land, *ani*].

ancient Hebrew tradition was entwined with the Hebrew law of blood feud. We see here an implicit reference to the Mosaic law, which provides that:

> Anyone who by violence causes a death must be put to death. If, however, he has not planned to do it, but it comes from God by his hand, he can take refuge in a place which I shall appoint for you. But should any person dare to kill another with deliberate planning, you will take that person even from my altar to be put to death.[195]

Under the above Law, intentional killing is expiated by another death, while involuntary manslaughter is mitigated by an exile or refuge into any of the sanctuary cities.[196] Comparatively, accountability for intentional murder is synonymous with criminal accountability, which is a potential bar to asylum. Whereas asylum protects victims of involuntary killing. These religious principles would be revisited in Chapter Six in the analysis of asylum bars, the criminal jurisprudence of *mens rea* (guilty mind)*, actus reus,* and voluntariness.

The rationale for the custom was based on absolute respect and preservation of human dignity from violation or abuse. Thus, sanctuary operates as a shield to any person fearing retributive justice such as death, torture, or persecution for an unconscious violation of life or sacred tradition. Ignatius Bau reinforces this theological notion of sanctuary espoused with the Judeo-Christian heritage,[197] highlighting its theological link with the preservation of the sacredness of human dignity from torture and violation.[198] It should be noted that the religious

---

[195] Exodus 21:12-14
[196] *Id.;* Numbers 35:6-34.
[197] Bau, *supra* note 193 at 124-131.
[198] *Id.*

asylum practice is somewhat complex and disparate from contemporary state practice given its duty to preserve fugitives and to guide them through a transformative process. Additionally, sanctuary seekers are accorded certain humanitarian privileges and socio-economic benefits—food, clothing, and escorts to shelter them from harm. Besides, they were entitled to participate in commercial activities and live their normal lives but with certain restrictions to prevent exposure to their blood avengers.[199] Traditionally, the revered notion of sanctuary presages the religious image of salvation or redemption.

Subsequently, following different historical ages, the Christian religion became interwoven with secular politics, with the Papacy at the center.[200] This impacted differently on sanctuary practices with the interphase of religion and civil authorities. For example, under the reign of Theodosius the Great, the ancient Theodosian Code (CT) 392 was introduced that ushering in restrictions on the regulation of sanctuary practices.[201] The CT excluded certain persons like public debtors (people who embezzle state money), Jews, heretics, and apostates from seeking sanctuaries. Under the new criteria, eligibility and prohibitions became altered. Apparently, the consideration for "asylum" sanctuary became anchored on the nature of crime and the character of the accused. [202] By implication, this was antithetical to the initial redemptive notion of sanctuary, which prefigured what today exists as exclusion criteria for asylum.[203]

---

[199] Fugitives were excluded from trades like hunting tools, ropes or arms that may expose them to their blood avengers. *Id* at 130-2.

[200] *See, e.g. Mariano* P. Barbato, *International Relations and the Pope,* (ed. Edward Elgar) HANDBOOK ON RELIGION AND INTERNATIONAL RELATIONS 289-301 (2021) [stating that until the final fall of the Papal States in 1870, the popes reigned from Rome as princes of their principality with religious and political sovereignty in the center of Italian peninsula and beyond].

[201] Codex Theodosianus, XVI.10.12 (8th Nov. 392 CE) [*hereinafter* "CT"].

[202] *Id.; Theodosius I Roman Emperor,* BRITANICA, https://www.britannica.com/topic/religion; Bau, *supra* note.

[203] 1951 Convention, *supra* note 12 at arts. 1F, 32, and 33(2).

Over time, the Judeo-Christian concept of sanctuary became premised "not so much on territorial sanctity" but on the sanctity of bishops and clerics as intercessors in the active roles of securing pardons and humane treatments to fugitives. At this stage, the Council of Mayence in 813 reinstituted the redemptive perception of the sanctuary, reaffirming humanitarian protection for fugitives as a major decree that is inviolable. It thus declared that:

> Let no one dare to remove a wrongdoer who is a fugitive to a church, nor give him up to from there to punishment or death, that the honor of the churches may be preserved; but let the rectors be diligent in securing his life and limb. Nevertheless, he must be lawfully compound for what he had wrongfully done.[204]

Significantly, the Council of Mayence acknowledged the preservation of the Church's fugitives as an honorable obligation for the Church.[205] Rectors as custodians of the sanctuary were charged with the obligation to protect fugitives from removal or exposure to punishment or death.[206] The prohibition of refoulement under this decree was fundamental and admits no derogation, contrary to contemporary jurisprudence. Subsequently, the Council of Orange expanded the redemptive roles of clerics as protectors and custodians of sanctuaries, authorizing bishops to intervene between fugitive slaves and their masters. [207] Ultimately, the impact

---

[204] Council of Mayence, 813; Edward H. Landon, *A Manual of Councils of the Holy Catholic Church,* CATHOLICS ONLINE, https://www.ecatholic2000.com/councils2/untitled-16.shtml; Mayence 813, *Concilium Moguntinum* (June 9, 813) [held by order of Charlemagne, composed of thirty bishops and twenty-five abbots and presided over by Hildebald, Archbishop of Cologne. The objective was to restore the discipline of the Church].
[205] The Christian traditional sanctuary for fugitives was described as "honour of the churches."
[206] *Id;* Mayence, *Op Cite* 813.
[207] Council of Orange (France), (529 A.D) [called by Pope Felix IV], https://www.theopedia.com/Council_of_Orange.

empowered the early Christian clerics to function not only as physical protectors of fugitives but as spiritual intercessors and advocates. It is imperative to examine the practice in Islamic asylum.

2.3 Islamic Tradition on Humanitarian Protection of Refugees

Like the Judeo-Christian sanctuary, the Islamic religion is reckoned with cultural humanism. A show of friendly hospitality to strangers and a grant of asylum protection (*amān*) were common practices in the ancient Islamic culture and religion.[208] Among primitive Arabs, wayfarers and fugitives enjoy certain immunities from the wrath of the law.[209] *Amān* operates as an inviolable custom that grants automatic rights to an alien whose life or freedom is being threatened, and who seeks refuge within a Muslim territory. Conceptually, this right flows from the Islamic culture of *ijara* and *amān* that are absorbed in the humanitarian practice of neighborhood principles, being each other's keepers.[210] Metaphorized as *istijara,* which is a search for neighborhood or protection from danger, *amān* is entrenched in the profound tenets of brotherhood, equality and tolerance that gives meaning *ijara.*[211] Thus, *Istijara* (plea for protection), *ijara* (granting protection) and *iwaa* (sheltering) all evolve from the same expression of humanism for strangers or asylum seekers.[212] As Al-Dawoody and Rodenhauser ideated, the

---

[208] AHMED ABOU-EL-WAFA, THE RIGHT TO ASYLUM BETWEEN ISLAMIC SHARI'AH AND INTERNATIONAL REFUGEE LAW A COMPARATIVE STUDY, 3-254 (SAUDI ARABIA, 2009), https://www.unhcr.org/4a9645646.pdf; Universal Islamic Declaration of Human Rights, adopted by the *Islamic Council* of *Europe on* 19 September 1981/*21 Dhul Qaidah 1401.*, art. IX(a) ["Every persecuted or oppressed person has the right to seek refuge and asylum. This right is guaranteed to every human being irrespective of race, religion, colour and sex."]

[209] Musalo et aal, *supra* note 10 at 3; Almed Al-Dawoody and Tilman Rodenhauser, *The Principle of non-refoulement under Islamic law and international law: complementing international legal protection in Muslim contexts,* HUMANITARIAN LAW AND POLICY (June 20, 2021), https://blogs.icrc.org/law-and-policy/2021/06/20/non-refoulement-islamic-law/.

[210] Abou-El-Wafa, *supra* note 30 at 3-4.

[211] *Id.* at 3.

[212] *Id; See, e.g.,* Ghassan Maarouf Arnaout, *Asylum in the Arab-Islamic Tradition,* INT'L INST. HUM. L 15-21 (1987).

objective of *amān* is *ḥaqn al-dam,* which is premised upon the prevention of bloodshed, protection of life as well as protection from persecution or oppression.[213]

Muslim chronicles have it that as early as 612 CE, about 83 Muslims fled to Abyssinia (modern day Ethiopia) to seek asylum with Negus, King of Abyssinia following persecution from Meccan enemies.[214] Another record of a second *hijira* (flight from persecution) occurred on 16th 622 CE[215] with Muslim refugees fleeing Mecca to Medina to seek asylum in *Yathrib* (now Medina, Saudi Arabia).[216] As a practice, the tradition of granting *amān* applies to everyone regardless of religion, race or sex.[217] The benefits extend to family members, dependents and possessions of the refugee.[218] Like the Hebrew-Christian practice, a denial of asylum protection or violation of *amān* was perceived as a dishonorable act tantamount to the violation of the sanctity of individual humanity and the collective humanity of a community. Hence, the abuser of the asylum principle is characterized as having lost his religious honor or integrity.[219] To this extent, *amān* share semblance with the Judeo-Christian concept of sanctuary and the African notion of *ubuntu* (brotherhood, neighborhood) as entrenched in the philosophy of collective humanism—living for each other's humanity and acting as one another's keepers.[220] These make the violation of *amān* a taboo. Thus, an abuser faces consequential actions like ostracization from the sacred community or institution of honor.[221] Because of its humanitarian nature, a Scottish

---

[213] Al-Dawoody and Rodenhauser, *supra* note 209.
[214] *Id.*
[215] *Id.* [The date 612 CE marked the beginning of Islamic calendar.]
[216] *Id*.
[217] Abou-El-Wafa, *supra* note 208 at 43-46.
[218] *Id.*
[219] *Id.*
[220] Barbara Nussbaun, *Ubuntu: Reflections of a South African on Our Common Humanity,* REFLECTION, 4(4) 21-26 (2003); R. English, *Ubuntu: The Quest for an Indigenous Jurisprudence,* 12 S. AFR. J. ON HUM. RTS 641 (1996).
[221] *Id*. at 3-5, 27-30.

episcopalian cleric described the *amān, istijara* and *ijara* customs as "the tribal humanism of the desert Arabs.[222] This resonates the traditional values of humanity, neighborhood, and morality.

Essentially, the two religious' norms, the *ijara/aman* and the Judeo-Christian sanctuary can be described as the harbingers of modern asylum law as well as the principle of nonrefoulement. The Islamic *amān* (safety) guarantees protection for an asylum seeker (*musta' men*) and thus, prohibits a return, refoulement or extradition of such individual to the danger of persecution.[223] According to Abou-El-Wafa, the prohibition of refoulement was among the highly reputed Islamic principles of the prophet Mohammed, who equally benefitted from *amān.*[224] Therefore, a refoulement of a refugee in an Islamic jurisdiction would conflict with the jurisprudence of "inadmissibility of breaching *amān* conduct" or "inadmissibility of reneging on the covenant of protection."[225]

Amān applies universally to anyone who meets the status of an asylum seeker and demonstrates fear of persecution, whether Muslims or non-Muslims. The notion is that if a non-Muslim seeking refuge in the territory of Islam (Dar-el Islam) is granted *amān* in Muslim territory, "he may hear the word of Allah, and then convey him to safety."[226] Therefore, seeking *amān* makes the *musta'aman* inviolable and integrates him or her within the host community. Like the Christian Hebrew sanctuary, a *musta'aman* participates actively in commercial activities and can exercise the privilege of inter-marriage and conversion into Islam.[227] This is reflected in

[222] Ghassan Maarouf Arnaout, *supra* note 212 at 14-21.
[223] Abou-El-Wafa, *supra* note 208 at 3-295, 54-5, 75.
[224] *Id.* at 3-7, 44-55, 75.
[225] *Id.* at 54.
[226] *Id.* 44-45.
[227] *Id.* at 44-45.

the Persian word *mistras,* connoting safety, implicit in the protective obligation of a native to safeguard a stranger who does not understand the native language.[228]

Undoubtedly, the Islamic as well as Christian jurisprudence of asylum and nonrefoulement created a remarkable platform for the conceptual framing of contemporary IRL. Like the Hebrew-Christian traditional sanctuary, *amān* comes with some socio-economic benefits[229] that last throughout the period of *amān.* The durations may vary depending on certain circumstances and jurisdiction. For example, under the ancient Bedouin customs, *amān* is granted for only a period of three days, after which the asylee is expected to leave the hospitality camp or tent.[230] But according to Islamic law, *amān* duration may be extended to one year after which the beneficiary may choose to leave or reside permanently. If a Jew or Christian, the beneficiary wishing to reside permanently may be granted a benefit of permanent status regardless of being a non-Muslim.[231] Such consideration accords with the human rights principle of nondiscrimination, canvassed as invaluable in asylum consideration.

Overall, the Christian and Islamic concepts of asylum and nonrefoulement are premised upon protection of human life and dignity. Literally, their shared commonalities underpin the primary purpose of contemporary refugee law, which seeks to protect individuals fleeing persecution and threat to life, freedom, or dignity.[232] In relation to current refugee law, the Islamic *amān* has two exceptional circumstances under which an asylum may be denied or

---

[228] *Id.* at 44-45.
[229] These benefits include right to shelter, active roles in a cultural community, labour or commercial activities, freedom of marriage, religion, and family privacy.
[230] While the Islamic law strongly prohibits refoulement, but an *amān* can choose to leave after expiration of his term. If withdrawn or after the expiration of its term (in case of temporary *amān*), according to the Qur'an (9:6) a *musta'min* must be escorted to a place of safety, presupposing that *refoulement* to the place the person fled from and where life and freedom will be threatened is totally forbidden.
[231] *Id.* 33-45.
[232] 1951 Convention, *supra* note 12 at 33(1); CAT *supra* note 165 at 3; 1967 Convention, *supra* note 17 at 1(1).

withdrawn—where a refugee engages in hostilities or espionage.[233] In contrast, the Christian sanctuary and prohibition of refoulement are absolute. The clerics, as custodians of the sanctuary, operate as spiritual intercessors to mitigate the sins of fugitives, who are expected to pass through purgation or transformative healing within the precinct of the sanctuary.[234] In subsequent analysis, the differences between the two legal frameworks and their overlapping with states' sanctuary laws will be re-examined.

2.4 Development of States' Sanctuaries and the Intersectionality with Religious Practice

A study of the Greek and Roman temple mythologies indicates that the concept of ancient sanctuary predates Christianity.[235] Nonetheless, the advent of the Christian religion introduced a redemptive perspective to sanctuary practice. In the medieval age, the Church's sanctuary represents both a place of worship and a temporary place of refuge for fugitives seeking temporary protection from death or punishment before they are released into permanent exile.[236] The practice was premised upon the preservation of the sanctity of human life.[237] But under the ancient Empire of Rome, the asylum tradition became more integrative and utilitarian. The first king of Rome Romulus was reputed for using asylum to increase the male population of Rome for military purposes.[238] In Titus Livinus's *The History of Rome,* the mythical image of abandoned twins Romulus and Rema that were suckled by a she-wolf, is a metaphorical image

---

[233] AHMED AL-DAWOODY, *THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS* 134 (NEW YORK: PALGRAVE MACMILLAN, 2011).
[234] *See, e.g.,* Council of Orange, *supra* note 207.
[235] Greek and Roman temples traditionally practiced sheltering fugitives from execution and punishments even before the advent of Christianity. *See, e.g.,* Becky Little, *Claiming Sanctuary in the Medieval Church Could Save Life But Lead to Exile,* HISTORY (April 18, 2018), https://www.history.com/news/church-sanctuary-asylum-middle-ages.
[236] *Id.*
[237] *Id.*
[238] Bau, *supra* note 193 at 124-33; Musalo, *supra* note 10 at 9.

an asylum abode, refuge or sanctuary.[239] The notion is linked to the Romulus' establishment of asylum space in a valley between two hills—Arx and Capitolium, that was dedicated to preserving and rehabilitating fugitives to start a new life as a way of integration into the asylum community.[240] Thus, Roman asylum pattern was structured within the principle of preservation and assimilation, a philosophy that gave vitality to its ancient ideology of conquest and open society.[241] This fostered diversity, economic globalization, and political expansion as well as human development, hence the slogan "[C]ome to Rome and you will thrive."[242] The optimism was reflected in ancient Rome's asylum gate, named *Pandania,* which means "always open." The standard would serve as a point of contrast with the recent ideology that asylum seekers constitute a burden to the national economy, a notion that has sparked numerous xenophobic responses against protection seekers, especially in the United States and current Greece.

Asylum practice in the ancient Greek city state was not different from the Roman practice. But unlike Rome, the ancient Greek asylum shares certain semblance with the Hebrew-Christian concept of redemptive asylum based on divine guidance. The word asylum is interpreted in Greek as *asulia,* which connotes the condition of a person protected by the gods.[243] As early as 6th century BC, the Greek asylum favored refugees fleeing war related persecution, civil or political unrest, especially migrants from across the Mediterranean. The practice was procedural following a formal sanctuary that is suppliant, allowing an asylum seeker upon entry

---

[239] TITUS LIVINUS, HISTORY OF ROME TRANS. GEORGE BAKER, A.M. FIRST AMERICAN FROM THE LONDON LAST ED. I-VI, I (LONDON, 1823) [provided historical insight into the early history of Rome and asylum]; Paola Favaro, *Asylum in the Ancient and Medieval Rome,* THE CONVERSATION, (Sept. 5, 2019), https://brewminate.com/asylum-in-ancient-and-medieval-roome/.
[240] *Id.*
[241] *Id.* [Asserting that the belief in diversity and the open society reinforced the adoption of the Antonine Constitution that granted citizenship to all free in the empire.].
[242] *Id.*
[243] Robert Garland, *Asylum Seekers in the Ancient Greeks: Requirements and Amnesty,* THE GREAT COURSES DAILY, https://www.thegreatcoursesdaily.com/asylum-seekers-in-ancient-greece-requirements-and-amnesty/.

into the Greek land "to clutch an olive branch wound around with a white wreath in their left hand," indicating that they are now under the protection of the gods.[244] Asylum seekers were expected to maintain acceptable conducts and for any reason if natives report an asylee to *demos,* the people of Athens, the contingent soldiers may ask him to leave or require the asylee to make a convincing representation before the Assembly of citizens why he would be allowed to stay.[245] This practice evolved into modern day refugee law, requiring asylum seekers to certain legal decorum in conformity with the regulations of a host state. Asylum seekers who satisfy these requirements, including active participation in the military, would be granted protection and even permanent residence inside Attica, while unsuccessful ones are expelled.[246] The practice reflects the contemporary process of affirmative and defensive asylum, although the former placed no emphasis on the fear of persecution. Instead, it gives primacy to a value-based asylum and the character of the asylee.

Arguably, the Greek and Rome's progressive approach to an integrative asylum became the secret to their military and even political expansion. For both institutions, asylum practice was a potential route to globalization. Of course, this is reflected in Rome's legacy of liberty and open society, perhaps a prototype that was adopted in the United States values of liberty and diversity. Under Rome's asylum arrangement, foreigners could not only become citizens but enjoy the benefits of rising to the highest political office.[247] It is important to investigate the boundaries between the past legacies, and how the values of integration become subverted in the later practice of building city walls of separatism against asylum seekers. Against this

---

[244] *Id.* [noting that in the Greek mythology, it was believed that asylum seekers are protected by the gods, foremost among whom was Zeus *Hikêsios*, the general overseer of *hikêteia* or asylum-seeking.]
[245] *Id.* [stating that such reason must be to the best interest of the host community, which includes to contribute to its military strength.]
[246] *Id.*
[247] *Id*. [cited examples of non-Latin emperors like Septimius from Libya and Philip the Arab from Syria.]

background, the study investigates the veracity of the claim that asylum seekers are a potential "threat" rather than a strength to national security, and economic burden rather than the important instruments in economic expansion.[248]

Evidently, there is no doubt that some formalities on sanctuary practice came with the emergence of new structures of nation-state in the medieval ages. Part of the changes came with the integration of some aspects of the religious sanctuary practices with civil political rules and the introduction of formal restrictions based on character assessment.[249] In the sixteenth century, rules and expectations regulating the treatment of aliens especially fugitives were expanded to accommodate diverse political and economic interests.[250] For example, by end of the fourth century, sanctuary practice became part of the imperial law.[251] Even after the Western Roman Empire fell in 476, the Church carefully preserved the redemptive sanctuary tradition. It protected religious sanctuaries in consecrated Churches as "protected space."[252] Although, with time, the granting of asylum for individuals with criminal records received enormous criticism, and clerics became trivialized for extenuating punishments. Subsequently, stricter civil regulations were developed on requirements for the admission of fugitives and procedural assessment of eligibility through evidence.[253]

---

[248] Political ideologies enforced under the Trump Administration vitiated the viable notion of economic migration and utilitarian asylum that prevailed in ancient Rome and Greek sanctuary practice.
[249] *Id.*
[250] Bau, *supra* note 193; Musalo et aal, *supra* note 10.
[251] Little, *supra* note 235; Imperial Law and Letters Involving Religion, AD 395-431, https://www.fourthcentury.com/imperial-laws-chart-395/ [part of the Roman Imperial law was that "…it was inappropriate to the extreme to carry weapons into the church or to arrest someone or to exercise force within the church."]
[252] KARL SHOEMAKER, SANCTUARY AND CRIME IN THE MIDDLE AGES, 400-1500, 4-292 (FORDHAM, 2011).
[253] *Id.*

Essentially, the medieval ages and later part of the sixteenth century retained vestiges of religious sanctuary tradition where sanctuary seekers are expected to obtain penance or go into exile. The combined practice of integrating religious sanctuary with political policies was predominant in the twelfth century[254] up until the sixteenth century when sanctuary protection was abolished throughout Europe and replaced with new sets of jurisprudence on law, crime, and punishment. Prior to this time, the religious sanctuary was anchored on protection and reformation—restoring a moral balance between the wrongdoer and God by following the path of conversion, although the latter also incorporated punishment (penance) for crimes.[255]

The culture of protecting the rights of sanctuary seekers evolved into civil laws guaranteeing religious freedom,[256] and protection of not only religious sanctuaries but aliens who seek sanctuary. Under Dutch law, for example, police officers are prohibited from entering religious institutions during rites.[257] Likewise, the United States First Amendment authorized the free exercise of religion.[258] Also, certain states are still recognized today as sanctuary states because of their major roles in the admission, resettlement, and integration of refugees.[259]

---

[254] *Id.,* [The England sanctuary law was entwined with Protestant Reformation, authorizing a royal pardon for fugitives in extreme cases.]; Little, *supra* note 235.
[255] *Id.*
[256] Protection of religious freedom and the rights of religious minorities is one of the oldest forms of human rights. In1556 treaty between France and the Sultan of the Ottoman Empire, guaranteeing religious freedom for French merchants in Turkey. Also, following the aftermath of World War I, the international community through the League of Nations entered multilateral treaties for the protection of minorities, including religious minorities. The Charter of the United Nations, 1945 art. 1 expressly prohibited discrimination. Additionally, the Universal Declaration of Human Rights, 1945 guarantees freedom of thoughts, conscience, and religion. Robert E. Burns, The International Nature of Religious Liberty, 41 U. DET. L.J. 83 (1963); Karen Musalo, Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms, 15 MICH. J. INT'L L. 1214-1219 (1994).R
[257] *Id.*
[258] U.S. CONST. amend. 1; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409 (1990).
[259] See, e.g., *Sanctuary Jurisdiction Policies by States,* BALOTPEDIA, https://ballotpedia.org/Sanctuary_jurisdiction_policies_by_state.

Religious institutions are still constitutive functionaries in resettlement of sanctuary seekers, indicating remnants of traditional asylum.[260]

Ordinarily, contemporary international law entrusts states with the fiduciary powers to govern and represent their citizens, and equally assigns them with supranational or surrogate responsibilities to protect all humanities.[261] Between states' fiduciary responsibilities and surrogate duties to aliens, international treaties create obligations that bind state parties to act on behalf of all humanities. The obligations to protect refugees or sanctuary seekers are immanent and constitutive on human security.[262] Without this, international migration for aliens especially the undocumented would amount to trespass. While territorial sovereigns may insist on certain rules guiding transborder movements in terms of admission and conduct of aliens, some governments have long understood the need to facilitate economic migration as way of expansion.[263] These important principles are emphasized throughout this study.

Evidently, economic, and martial-oriented migration played significant roles in the development of ancient Greek and Roman Empires' asylum practices. Hathaway illustrates the relevance of these in the development of international aliens' law.[264] Therefore, laws protecting aliens are not limited to humanitarian protection but contributed to enriching the quality of

---

[260] Recently, a church in The Hague, Netherlands was reputed for holding round-the-clock 96-day church to protect families seeking asylum. Rosanne Roobeek and Simon Cullen, *A 96-Day Church to Protect Asylum Seekers Ends with Government Deal,* CNN (January 30, 2019), https://www.cnn.com/2019/01/30/europe/dutch-church-service-stops-deportation-scli-intl/index.html. United States Catholic Bishops conference have offered several humanitarian assistants to immigrants, unaccompanied children and families seeking for shelter, asylum, and socio-economic benefits through different social justice institutions like the Catholic Charities established in all the dioceses of the United States for assisting immigrants with needed services for assimilation.

[261] Evan J. Criddle & Evan Fox-Decent, *The Authority of International Refugee Law* 62 WILLIAM & MARY LAW REVIEW 1-45, 4 (2021).

[262] Little, *supra* note 235; Livinus, *supra* note 239 at I-IV.

[263] Hathaway, *supra* note 22 at 76.

[264] *Id.* at 75; COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, 122–209 (MACMILLIAN, 1911)

communal interaction, economic migration, and settlement. Thus, Hathaway highlighted the influence of foreign economic exchange between craftsmen and the ancient Greek empires in the development of medieval law for merchants. [265] This allowed traveling merchants the leverage to negotiate immunities and privileges with European rulers for economic growth[266] as well as autonomy for foreign merchants to govern themselves and make their own laws.[267]

2.5 Development of Alien Protection Laws – A Presage to Migrants' Rights Protection

The development of trade treaties with foreigners laid the foundation for alien's rights.[268] With the emergence of nation-state between the thirteenth and sixteenth centuries, economic migration enjoyed greater efflorescence that expanded trade networks and negotiation of treaties.[269] These gave foreign merchants the rights of juridical personalities. Hathaway explains the corresponding impact of commercial growth with the creation of alien law and international human rights law.[270] Although the primary focus of alien law was to protect economic migration, contingent rights were equally created that formed important sources of refugee rights, especially as refugees became identified as persons outside their country of origin desirous of the protection of a host state.[271] Nonetheless, international aliens law was framed to benefit the state at the expense of the alien because. Hence, it did not endow aliens with rights of remedies.[272] In reality,

---

[265] *Id.* at 76
[266] *Id*. at 76.
[267] *Id*.
[268] *Id.* 76-77; Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens*, INT'L AFFAIRS 113 (1949).
[269] *Id.*; Herman Jr. Walker, *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 823 (1958).
[270] *Id.* at 78.
[271] ''[T]he term 'refugee' shall apply to any person who ... is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country'': Refugee Convention, at Art. 1(A)(2). GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 40 (OXFORD, 1996); Hathaway, *supra* note 22 at 29–63; Walker, *supra* note 86 at 812.
[272] *Id.,* at 78.

the rights created were rights of national states enforceable at its discretion. Aliens can only claim the benefits of these rights through their national state. In a subsequent discussion, this research examines the overlap of alien international rights with contemporary rights of refugees in terms of enforceability and possible rights of remedies available for aliens within the precinct of the law.

Because of the preservation of the rights of aliens' incumbent, the governments of native states, refugees by their definitions are not direct beneficiaries of these rights but are protected by international human rights law through surrogate protection. As such the development of international law was a significant breakthrough that laid the background to the modern international refugee regime. Historically, international law has played fundamental roles as a legal shield for aliens. Of course, when individuals leave their nationality, they abandon certain rights and privileges derived from municipal laws as citizens. International law recognizes these limitations, which sometimes create vulnerabilities for aliens and put them at the mercy of destination states and their agents.[273] Nevertheless because it lacks an effective mechanism for direct enforcement of the rights of aliens, international law cannot directly mitigate the conditions of aliens[274] but leans on the cooperation of states and their agencies. The consequences of failed cooperation or the lack thereof are far-reaching. Even in policymaking and enforcement, diplomatic evaluations or international arbitration are not sufficient mechanisms of accountability, even where the international community develops policies for regulating international relations. For instance, humanitarian obligations to protect refugees require the international community to cooperate with surrogacy following the principle of

[273] *Id*., at 79; Roth, *supra* note 268 at 113.
[274] UN Charter 1945, *supra* note 31 at art. 1 [stressing the overall purpose of the Charter is to, among others, foster respect for equality of rights, promote human rights and fundamental freedom of all and cooperation of State Parties in solving problems relating to socio-economic rights of all persons.]

preservation of life and respect for human dignity, yet effective measures of realization seem minimal.

Compared to other migrants, refugees as involuntary migrants face greater vulnerabilities in host states, and in some cases are victims of human rights violations. Whereas states may prioritize fiduciary responsibility to citizens under citizen-based loyalty, the government's response to the needs of refugees is usually determined by several factors, mainly the prevailing political interest, which may even be overstretched for xenophobic reasons. Scholars like Hanna Arendt and Meg Wagner associate the uncanny ties with ethnic nationalism,[275] which is reminiscent of a political or politicized passion that preceded the Holocaust and World War II. The detrimental effects of nativist politics and identity-based discrimination have a profound grip on contemporary IRL.[276] Unfortunately, the search for solutions for the increasing humanitarian needs of refugees has remained an unaccomplished task in international law.

2.6 Early Efforts to Protect the Rights of Minorities: Pathway for Refugees' Rights

Minorities Treaties (MT) was an initiative of the League of Nations and a significant response to the concerns of minorities following the events of World War I. Proponents of the treaties were the principal allied and associate powers of the League of Nations[277] and the then newly created states of Europe and the Middle East.[278] The primary purpose was to advance the

---

[275] Dorian Bell, GLOBALIZING RACE ANTISEMITISM AND EMPIRE IN FRENCH AND EUROPEAN CULTURE 3-34(ILLINOIS, 2018) [cited Hanna Arendt and Meg Wagner's notion of race and antisemitism against the Jews].

[276] *See, e.g.,* Reflective of antiimmigration policies under the Trump Administration, mass refoulement and zero tolerance for the undocumented.

[277] These are the United States, the British Empire, France, Italy and Japan. *See, e.g.,* David Engel, *Minorities Treaties,* THE YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE, https://yivoencyclopedia.org/article.aspx/Minorities_Treaties; Gershon Bacon, *Polish Jews and the Minorities Treaties Obligations, 1925: The View from Geneva,* 18 GAL-ED 145–176 (2002).

[278] They are Albania, Austria, Bulgaria, Czechoslovakia, Hungary, Estonia, Greece, Iraq, Latvia, Lithuania, Poland, Romania, Turkey, and Yugoslavia. *Id.*

interest of states, the protection of minorities and emerging states. Mostly stressed here were the plans for maintaining respectful dealings with racial, religious, linguistic, and collective minorities. The treaties required conquered states to respect the "human dignity of resident ethnic and religious minorities" in view of averting possibilities of future conflicts.[279] Reflected also in these were the rights articulated in Woodrow Wilson's fourteen points agenda, which encouraged among others the rights to achieve self-determination.[280] In essence, the minorities laws advocated the creation of new borders and state-based assertion of rights. Ultimately, the emphasis on territorial borders and military occupation reinforced the ideology of nation-state. This was a turning point in international human rights law, and equality of states and nationals, including refugees.

Significantly, the minorities rights created mutual obligations for the protection of alien minorities, bringing both host states and native governments into responsibilities of humanitarian protection. The obligations range from civil and political entitlements to socio-cultural and economic rights of the minorities.[281] Notably, the Bernheim Petition of 1933, an action of the League of Nations, forced a temporary suspension of the Nazi anti-Jewish legislation against the Jews of German Upper Silesia. The legislative development was inconsistent with Minorities Treaties, thus abrogated the League-guaranteed German-Polish Convention of 1922.[282]

---

[279] Hathaway, *supra* note 22 at 81; Péter Kovács, *The Protection of Minorities under the Auspices of the League of Nations*, THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW (ed. Dinah Shelton, Oct. 2013).
[280] *Id.*
[281] *See e.g.,* Greco-Bulgarian Communities, Advisory Opinion (1930) PCIJ R., S.B, 17; *Minority Schools in Albania,* Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 64 (Apr. 6). [emphasizing the rights and entitlements of the minorities under the treaties].
[282] *See, e.g.,* J.W. Brugel, *The Bernheim petition: A challenge to Nazi Germany in 1933,* PATTERNS OF PREJUDICE 17:3, 17-25 (1983).

Pursuant to the established standard, petitions were authorized for issues relating to territorial disputes, land confiscation or restrictions, individual harassment due to race, religion, and parents' agitations to have their children schooled in minority languages.[283] Also, issues accommodated under the framework include obstacles in the use of minority languages for commerce, advertisements, and interventions to abuse of minority rights in public order. It empowered the Council of the League of Nations with monitoring the commitments of State Parties with the implementation, while the Permanent Court of International Justice (PCIJ) played advisory roles at the request of the Council. Parties alleging violation were allowed to file complaints with the League of Nations before the Council.[284] Unlike contemporary human rights institutions, there was no provision for the exhaustion of local remedies. In other words, petitioners could submit local complaints that have not been adjudicated or resolved domestically.

In practice, MT had inherent problems with the implementation of rights. Minorities who were petitioners and their representatives were not identified as legal subjects of international law and were denied procedural rights. While State respondents could participate actively in proceedings, individual petitioners could only be notified about the status of their petitions, even though a Council may be authorized to contest some aspects of a government's position.[285] In practice, petitioners merely played passive roles in their case, which naturally undermine the outcome, making it less satisfactory and ineffective for the minorities.[286] For obvious reasons, the MT did not mitigate the prevailing hegemony of some states on the minorities. In an actual

---

[283] Kovács, *supra* note 279 at 3.
[284] *Id.*
[285] Advisory Opinion, 1932, *supra* note 281.
[286] *Id.* at no. 64.

sense, the process was handled as a source of information that never enfranchised minorities' participation effective enforcement.[287]

With time, MT lost public relevance and efficacy especially in the 1920s when the efforts to invoke the treaties as well as the League of Nations' attempt to stop mass killings of Jews in Ukraine, and expulsion of Galician Jewish refugees in Vienna failed.[288] Minorities rights faced fundamental threat with Hitler's ascendance into power in 1933. As the root of antisemitism becomes deepened with Hitler's radicalization of Germans on the Nazi ideology, through the *volksbund* movement.[289] Protection of Minorities Rights faced a dead end as the emerging political issues subverted the League Nations' efforts, thus setting an irreversible stage for World War I (WW I).

Nonetheless, MT laid the foundation for the evolution of international human rights especially for the protection of certain minorities based on race, religion, nationality, and membership in a particular social group.[290] The Treaties established propriety and focus of international legal attention on aliens or at risk-persons in a sovereign state.[291] Equally relevant is the creation of a process of collective international responsibility in international human rights protection.[292] This is very significant in contemporary IRL. Essentially, the development was imperative to the codifications of the League of Nations that specifically addressed the status of refugees after WW I.

---

[287] Hathaway, *supra* note 22 at 82.
[288] Engel, *supra* note 277.
[289] *Id.*
[290] These became imperative even in the definition of the identity of refugees and grounds for refugee protection.
[291] Hathaway, *supra* note 22 at 83.
[292] *Id*.

2.7 League of Nations and Establishment of International Refugee Protection

The League of Nations is reputed as the first institution to introduce "collectivized surrogacy."[293] This stirred international concern to facilitate the protection of individuals whose interests were neglected or not adequately protected by national governments.[294] Originally, the alien law was the first to initiate protection for aliens. It recognized the vulnerabilities of aliens in host states and prohibited any mistreatment of such aliens by destination states.[295] However, the practical application in states was unrealistic. Building on the precedent, the MT created the enforcement of minorities rights but with minimal success. As illustrated by Hathaway, the legacy derived from the two laws gave impetus to operational bilateral accountability.[296] Remarkably, the elements of collectivized surrogacy became emphasized. By implication, international communities could hold State Parties accountable for their actions and inactions in breach of surrogate protection of aliens in their jurisdiction. The development is critical to IRL.

In the post-World War I, a series of political conflicts and associated impacts of mass exodus increased the migration crisis.[297] Rapid effects of involuntary movements across international borders provoked different responses from governments. In many Western countries such as parts of Europe, different restrictive checks have been implemented, including the use of passports and visas to regulate movements at the borders. Additionally, governments establish policies emphasizing their commitments to the well-being of their citizens like access to socio-economic rights, as opposed to aliens.[298] Unauthorized aliens face greater restrictions.

---

[293] *Id.* at 82-3.
[294] *Id.* at 83.
[295] *Id.*
[296] *Id.*
[297] *Id.* at 83 [Noting that over two million Russians, Armenians and other nationals were forced to flee their countries between 1917 to 1926].
[298] Maria-Teresa Gil-Bazo, *Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship,* 34 REFUGEE QUART'LY, 11, 11-42 (2015).

To this effect, many governments limited access to housing, rights to work and other important social securities to persons able to demonstrate citizenship.[299] Except for aliens whose governments are in any bilateral agreements, an absence of such reciprocity for the early group refugees was detrimental. Refugees by their status have lost national protection or have no nationality.[300] Therefore, the deficiency makes any requirement of valid travel documents unreasonable. For example, the evidence of about 1.5million Russian refugees that became denationalized in the then new Soviet government after fleeing the Bolshevik revolution, is demonstrable of the consequences of making such aliens unable to claim the benefits of any bilateral agreements.[301] Generally, refugees face harsh conditions due to loss of identity as well as rejection by the destination state. Lack of access to socio-economic needs work authorization and better living conditions exacerbate their circumstances while pursuing asylum. The League of Nations' Advisory Committees recognized these vulnerabilities and strongly recommend solutions to protection in host states,[302] hence refugees live at the mercy of host states.[303]

In seeking solutions to the refugee crisis, the League of Nations[304] and the international community negotiated possibilities for creating refugee rights and enfranchise refugees as "protected aliens."[305] Pursuant to this, the League of Nations initiated collectivized surrogacy[306] as a solution to addressing the concerns of refugees following the predecessor laws—aliens law

---

[299] Hathaway, *supra* note 22 at 83.
[300] *See, e.g.,* 1933 Convention, *supra* note 14 at arts. 1 and 3[Art. 1 defined the status of refugees, Art. 3 prohibited nonrefuoulement of refugees either by expulsion, non-admittance, or police order].
[301] Hathaway, *supra* note 22 at 84.
[302] *Id*; *Report by the Secretary-General on the Future Organisation of Refugee Work,* LN Doc. XIII. 2, 3 (1930).
[303] COMMUNICATION FROM THE INTERNATIONAL REFUGEE ORGANIZATION TO THE ECONOMIC AND SOCIAL COUNCIL, UN Doc. E/1392, July 11, 1949 at App. I.[defined refugees as unprotected aliens denied of national protection and not assured of surrogate protection of host governments].
[304] 1933 Convention, *Op Cite*.
[305] Hathaway, *supra* note 22 at 85.
[306] *Id.*

and minorities treaties.[307] Although the mechanics taken did not guarantee refugees as holders of any specific rights but merely as beneficiaries of the actions of the High Commissioner of the League of Nations.[308] The framework empowered the League of Nation to substitute documentation and surrogate consular protections for refugees. In implementing obligation, the High Commissioner performed duties reserved for states such as providing identification, civil status, and educational and professional identifications to refugees as adopted citizens of international law. The response did not exceed the documentation process. Consequently, the primary focus was to have refugees assimilated in destination states or have them returned to their countries when situations normalized.[309]

Gradually, a series of non-binding recommendations have been developed to address the status of refugees such as the Inter-Governments Arrangements of 1922, 1924, 1926, and 1928.[310] Remarkably, the Arrangements of 1928 set standards for the recognition of refugees' rights such as the rights to benefit from national reciprocity, right to work, access to court, protection from expulsion, equality in taxation and duties on states to honor the League of Nations identity certificates.[311] However, in practice, refugees could not claim any specific right from the Arrangements but benefitted indirectly from certain protective rights available to nationals through the negotiations of the League of Nations High Commissioner on their behalf. Thus, the Arrangement emphasized the state's moral obligation to respect the human dignity of refugees, a standard that overlaps with the traditional religious notion of sanctuaries.

[307] Collectivized replicated the religious notion of collective humanity that formed the basis for preserving sanctuary seekers as inviolable and honor for the community institution.
[308] *Id.*
[309] *Id.* at 86; REPORT BY THE SECRETARY GENERAL ON THE FUTURE ORGANISATION OF REFUGEE WORK, LN Doc. 1930.XIII.2 (1930) [On Inter-Governmental Arrangements of 1922, 1924, 1926 and 1928].
[310] *Id.*
[311] *Id;* Hathaway, *supra* note 22 at 87.

2.8 Establishment of the 1933 Convention Relating to the Status of Refugees

The Great Depression was a major event that affected the history of refugee humanitarian protection. Prompted by the then prevailing scarcity, many states prioritized their fiduciary responsibilities over the humanitarian challenges of refugees. Because of the compelling circumstances, the League of Nations collaborating with the UN High Commissioner and the Inter-Governmental Arrangements worked for the establishment of the 1933 Convention Relating to the International Status of Refugees[312] to address the concerns of refugees.[313] For the first time, the 1933 Convention articulated not just refugees' needs but legitimized the humanitarian protection of refugee rights as a collective obligation of States—collectivize surrogacy—a notion derived from minorities rights.[314] The innovation was glaring. Debates on the needs and possible stabilization of the legal status of refugees in the post-World War I and the period of the Great Depression dominated international dialogues, thus creating rights under the 1933 Convention.[315] For the first time, the latter articulated internationally binding human rights for protecting refugees and set mechanisms for voluntary monitoring, taking precedent from the 1926 Slavery Convention.[316] Whereas the aliens laws focused on the needs of economic migrants, 1933 Convention addressed the human rights concerns of vulnerable population of forced migrants, who by their circumstances were unable to return to their countries.

Significantly, the 1933 Convention prohibited nonrefoulement of refugees, and defined refugees to include "non-admittance into frontiers" of destination states.[317] Article 3 of the 1933

---

[312] 1933 Convention, *supra* note 14.
[313] *Id*.
[314] *Id*.; Hathaway, *supra* note 22 at 85.
[315] REPORT OF THE INTERGOVERNMENTAL COMMISSION AND COMMUNICATION FROM THE GOVERNING BODY OF THE NANSEN INTERNATIONAL OFFICE, LN Doc. C.311, 1 (1933).
[316] 60 LNTS 253, drafted Sept. 25, 1926, entered into force Mar. 9, 1927.
[317] ''Each of the Contracting Parties undertakes not to remove or keep from its territory by application of police measures, such as expulsions or non-admittance at the frontier (refoulement), refugees who have been authorised to

Convention clearly forbade Contracting Parties from removal, expulsion or rejection of refugees from their territories to frontiers of risks, except under strict circumstances relating to national security or public policy.[318] We see here a correlation with the traditional Christian sanctuary and principles of the Islamic *aman,* which outrightly proscribed refoulement and holds a refugee or asylum seeker (*musta' men)* as inviolable.[319] Under the 1933 Convention, this right became legitimized as essential obligations of international law binding on Parties. Connected to the rights include—the rights of admission and protection from removal,[320] freedom of movement,[321] rights of marriage,[322] free access to courts of law and benefits of legal assistance,[323] right to work,[324] access to social security,[325] welfare needs[326] and education.[327]

Despite growing optimism, the 1933 Convention did not record sufficient cooperation from the Parties. Only eight states ratified the treaty with several reservations.[328] Even with few Parties, the impact of economic crisis and massive unemployment forced governments to turn their attention to nationals, neglecting refugees, and some were mistreated as vagrants or national burdens.[329] In the 1936 Provisional Arrangements were made to accommodate the surging population of refugees. This urged governments to consider the integration and assimilation of refugees from Germany. Yet, lack of cooperation from countries of Europe caused the League of

---

reside there regularly, unless the said measures are dictated by reasons of national security or public order'': 1933 Refugee Convention, at Art. 3.

318 *Id.*

319 Abou-El-Wafa, *supra* note 208 at 3-5.

320 1933 Convention, *supra* note 14 at art. 3.

321 *Id.* at art. 2 [Contracting Parties undertook to issue refugees residing in their territories with Nansen certificates that allowed them freedom of exit and return into the territory].

322 *Id.* at art. 4.

323 *Id.* at art. art. 5.

324 *Id.* at art. 7.

325 *Id.* at art. 9-11.

326 *Id.*

327 *Id.* at art. 12.

328 Hathaway, *supra* note 22 at 88.

329 REPORT SUBMITTED BY THE SIXTH COMMITTEE TO THE ASSEMBLY: RUSSIAN, ARMENIAN, ASSYRIAN, ASSYRO-CHALDEAN, SAAR AND TURKISH REFUGEES, LN Doc. A.45, XII, 2 (1935).

Nations to resettle German refugees with willing oversee countries, who provided them with facilities for naturalization.[330] Ultimately, the 1938 Convention on the Status of Refugees[331] addressed the concerns of German refugees resettled abroad and their socio-economic rights.[332] But Article 25 allowed states accede[333] and renounce any provision abruptly, without specific commitment for notice.[334] The two Conventions of the 1933 and 1938 paved way for expansive negotiations on the rights of refugee following the aftermath of World War II. As Hathaway recognized, 1933 Convention remarkably brought transition "in the modern refugee rights regime."[335] Revolutionizing refugee rights as human rights gave impetus to collectivized surrogacy and enfranchisement of refugee rights.[336]

2.9 UNHCR Roles in Refugee Humanitarian Protection

Understanding the rationale for the emergence of UNHCR is important for us to appreciate its role in the development of other legal instruments. The United Nations General Assembly (UNGA) established the International Refugee Organization (IRO) in 1946,[337] as a

---

330 REPORT SUBMITTED TO THE SIXTH COMMITTEE TO THE ASSEMBLY OF THE LEAGUE OF NATIONS: RUSSIAN, ARMENIAN, ASSYRIAN, ASSYRO-CHALDEAN, SAAR AND TURKISH REFUGEES, LN Doc. A.45, XII (1935).

331 192 LNTS 4461, Feb. 10, 1938 [hereinafter "1938 Refugee Convention"].

332 *See, e.g.* 1938 Convention, art. 15 ["…[w]ith a view of facilitating the emigration of refugees to oversea countries, every facility shall be granted to the refugees and to the organizations which deal with them for the establishment of schools for professional re-adaptation and technical training."]

333 1933 Convention, *supra* note 14 at art. 25(1).

334 1938 Convention, *Op Cite*, art. 25(4). ["The High Contracting Parties shall have the right at any time to extend their obligation to cover further chapters of the Convention, or to withdrawn all or part of their exceptions or reservations, by means of a declaration addressed to the Secretary-General of the League of Nations. The Secretary General shall communicate such declaration to all the Members of the League of Nations and to the non-member states referred to in Article 19, stating the date of receipt."]

335 Hathaway, *supra* note 22 at 90.

336 *Id*. at 91.

337 IRO was established on December 15, 1946, by the Constitution of IRO as a temporary specialized agency of the United Nations, adopted by UNGA at its 101st meeting held 15 February 1952. It terminated its work in 1952, having resettled approximately 1,000,000 persons. IRO was replaced by UNHCR. *See, e.g., International Refugee Organization 1946-1952,* NATIONAL ARCHIVES CATALOG, International Refugee Organization. 1946-1952 (archives.gov); IRO- the Convention on the Privileges and Immunities of the Specialized Agencies (CPIA), 33 U.N.T.C. Geneva, March 29, 1949, https://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20III/III-2-10.en.pdf.

specialized agency with limited duration to work with the United Nations on the status of refugees. Following its prospective termination amidst overwhelming concerns of refugees, the UNGA, by Resolution 319(IV) of December 1949, created the UNHCR as a subsidiary organ of UNGA pursuant to Article 22 of the United Nations Charter to discharge the functions enumerated in the Resolution and other functions as may be assigned by the UNGA.[338] In a subsequent Resolution 428(V) of 14 December 1950,[339] UNGA adopted the Statute for the Office of UNHCR. The Statute stipulated the roles of UNHCR especially in contributing to the development of IRL by promoting the conclusion, ratification, application, and amendment of IRL.[340] Additionally, sub-paragraph 8(b) highlighted the role of UNHCR in the development and interpretation of treaties relating to the status of refugees.[341] Its mandate was for an initial period of three years beginning January 1, 1951—to provide international protection for refugees through the United Nations, and to facilitate voluntary repatriation or assimilation within new national communities.[342]

Following the above mandate, the UNHCR exercised protective competence over any person outside his nationality or having no nationality, who is unable to return home because of a well-founded fear (WFF) of persecution and is unwilling to avail himself of the protection of the government of his country,[343] except for aliens guilty of extraditable crimes under the treaties.[344] The mandate to protect noncitizens with WFF has no jurisdictional boundaries. However, the prior focus of the UNHCR was exclusively on European refugees. The exclusionary structure

---

[338] Resolutions 319(IV)A. 3 December 1949 A/RES/319 (IV), 3 Dec. 1949, at para. 1.
[339] A/RES/428 (V), 14 Dec. 1950 (*hereinafter* "the Statute").
[340] *See, e.g.,* Para. 8(a) of UNHCR Statute. [stating that "[p]romoting the conclusion and ratification of international conventions for the protection of refugees, supervising their application and proposing amendments thereto."]
[341] *Id.* at para 8(b).
[342] *Id.* at para. 1.
[343] *Id.* at para. 6.
[344] *Id.* at para. 7.

influenced the definition of refugees and grounds for refugee protection under the Refugee Convention.[345] Efforts to mitigate the restrictive scope of refugee protection[346] caused the creation of the 1967 Protocol Relating to the Status of Refugees.[347]

Apparently, the UNHCR Statute provided a legal framework for the development of the Refugee Convention. Article 35 of the Convention and Para. 8(b) give legitimacy to the UNHCR. Although the UNHCR Statute lacks binding characteristics of a treaty, technically Article 35 makes its Advisory opinions persuasive. Notably the *Handbook,* Conclusions on the International Protection of Refugees and the several UNHCR Guidelines addressed a range of emerging issues relating to refugees and their humanitarian protection. Among these issues include status and grounds of eligibility, guidelines for defining PSGs,[348] gender viability for asylum,[349] and Conclusions nonrefoulement.[350] The Conclusions addressed several other issues relating to the rights of refugees like family unity,[351] employment,[352] security,[353] education[354] and identification documents.[355]

---

[345] 1951 Convention, *supra* note 12 at art. 1B [stating that the Convention applies to only refugees from Europe].
[346] GUY S GOODWIN-GILL AND JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 572 (4th ed., OXFORD PRESS, 2021); Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination against Refugees,* 45 GEORG. J. INT'L L. 323 (2013).
[347] 1967 Convention, *supra* note 17.
[348] 2002 UNHCR Guidelines, *supra* note 116.
[349] EXECUTIVE COMMITTEE OF THE UNHCR PROGRAMME, REFUGEE WOMEN AND INTERNATIONAL PROTECTION, No. 39 para. (k)(36th Session 1985) [*hereinafter* "EXCOM Conclusion No. 39"].
[350] *See*, *e.g.,* UNHCR Executive Committee Conclusions Nos. 1 (1975), 5 (1977), 6 (1977), 17 (1990), 22 (1981), 29 (1983), 50 (1988), 52 (1988), 55 (1989), 62 (1990), 65 (1991), 68 (1992), 71 (1993), 74 (1994), 77 (1995), 81 (1997), 82 (1997), and 85 (1998); Hathaway, *supra* note 80 at 114.
[351] *Id.* at Nos. 1 (1975), 9 (1977), 15 (1979), 22 (1989), 24 (1989), 47 (1987), 74 (1994), 84 (1997), 85 (1998), and 88 (1999); Hathaway, *supra* note 22 at 114.
[352] *Id.* at Nos. 20 (1980), 25 (1982), 29 (1983), 44 (1986), 45 (1986), 46 (1987), 48 (1987), 54 (1988), 55 (1989), 58 (1989), 72 (1993), 74 (1994), 77 (1995), 87 (1999), and 98 (2003).
[353] *Id.* at Nos. 20 (1980), 25 (1982), 29 (1983), 44 (1986), 45 (1986), 46 (1987), 48 (1987), 54 (1988), 55 (1989), 58 (1989), 72 (1993), 74 (1994), 77 (1995), 87 (1999), and 98 (2003); Hathaway, *supra* note 80 at 114.
[354] *Id* at Nos. 47 (1987), 58 (1989), 59 (1989), 74 (1994), 77 (1995), 80 (1996), 84 (1997), and 85 (1998).
[355] *Id.* at Nos. 8 (1977), 18 (1980), 24 (1981), 35 (1984), 64 (1990), 65 (1991), 72 (1993), 73 (1993), and 91 (2001).

In some situations, domestic courts have given real deference to the Conclusions as an authoritative guide for the determination of refugee status but in certain circumstances not. For instance, in *Rahaman v. Minister of Citizenship and Immigration,* the Federal Court of Appeal Canada recognized the Excom Conclusion as an authoritative document pursuant to Article 35, which gives a considerable weight to UNHCR guidance in determining the status of refugees.[356] In *Cardoza-Fonseca,* the United States Supreme Court recognized the reliable opinion of UNHCR submitted in a detailed amicus brief[357] and equally accepted guidance from the *Handbook on the Procedure and Criteria for Determining Refugee Status*[358] as significance source of the Protocol.[359] However, in *INS v. Elias Zacarias*,[360] the Supreme Court shifted from this standard and, subsequently declined initial position in *Cardoso-Fosenca'*s precedent to assert authority of its domestic jurisprudence.[361] Similar argument was advanced by the Supreme Court in *Sale v. Haitian Centers Council, Inc,*[362] which interpreted nonrefoulement in favor of the then US policy of interception at the sea to prevent irregular migration. Basically, *Sale* decision conflicted with the advisory opinion of the UNHCR, which specified that Article 33(1) admits no geographical limitations.[363]

Also, in *R v. Secretary of State for the Home Department,*[364]Per Lord Steyn acknowledged the *Handbook* as an important source of evidence guiding the interpretation of

---

[356] *Rahaman v. Minister of Citizenship and Immigration,* ACWSJ Lexis 1026 (Can. FCA, Mar. 1, 2002), per Evans JA; *Attorney General v. E,* [2000] 3 NZLR 257, 269 (NZ CA, 2000).
[357] *INS v. Cardoza-Fonseca,* 480 U.S. 421, 436–37 (1987).
[358] OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS (1979) [hereinafter "THE HANDBOOK"].
[359] *Cardoza-Fonseca, Op Cite* 357 at 439.
[360] *Zacarias v. INS,* 921 F.2d 844, 478 (9th Cir. 1990), rev'd 112 S. Ct. 812 (1992).
[361] *Id.* at 478.
[362] *Sale, supra* note 362 at 155.
[363] Brief Amicus Curiae of the United Nations High Commissioner for Refugees in support of Respondent at 16, *Zacarias v. INS,* 112 S. Ct. 812 (1992) (No. 90-1342) [*hereinafter* "UNHCR Amicus Curiae 1992"].
[364] [2001] 2 WLR 143 (UK HL, Dec. 19, 2000).

refugee law as well as the persuasive authority of UNHCR to provide such guidelines.[365] Yet, the House of Lords stresses the non-binding effect of the *Handbook* either in international or municipal laws.[366] The situation is not quite different in other jurisdictions. In Zealand, for example, the Zealand Court of Appeal maintained that the *Handbook* "cannot override the function of [the decision maker] in determining the meaning of words [the Refugee] Convention.[367] Subsequently, the New Zealand Court declined to follow the *Handbook,* rather gave deference to the views of the Committee, found to be most valuable and appropriate.[368] Likewise, in *NADB of 2001 v. Minister for Immigration and Multicultural Affairs, [2002],*[369] the Australian Full Federal Court recognized the *Handbook* more as a practical guide rather than as an interpretative document for the Refugee Convention.[370]

Although there seems to be a general reference to the *Handbook* and appraisal of UNHCR guidelines, these have no binding effect. Hence, Article 35 faces interpretative tests in different jurisdictions. Attempts to reconcile the non-binding opinions of UNHCR with jurisdictional precedents create manifest confusion, especially as courts try to push boundaries with domestic policies. In some situations, courts have deferred to municipal laws rather than the UNHCR advisory opinions.[371] Chapters Three and Four evaluate the effects of these in the interpretation of refugee laws at domestic levels and the disparate issues of homogeneity. Specifically, Chapter Five examines the impacts of the UNHCR guidelines in advancing

---

[365] *Id.* at 143.
[366] *R v. Secretary of State for the Home Department,* ex parte Bugdaycay, [1987] AC 514, 525 (UK HL, 1987); *M v. Attorney General* [2003] NZAR 614 (NZ HC, 2003); Hathaway, *supra* note 22 at 115.
[367] *S v. Refugee Status Appeals Authority,* [1998] 2 NZLR 291, 300 (NZ CA, Apr. 2, 1998); *M v. Attorney General,* [2003] NZAR 614 (NZ HC, Feb. 19, 2003); Hathaway, *supra* note 22 at 115.
[368] *Attorney General v. Refugee Council of New Zealand* Inc., [2003] 2 NZLR 577, 111 (NZ CA, Apr. 16, 2003).
[369] [2002] FCAFC 326 (Aus. FFC, Oct. 31, 2002).
[370] *Id*; *Todea v. MIEA,* 20 AAR 470, 484 (Aus. FC, Dec. 22, 1994).
[371] *Attorney General, supra* note182; *Elias-Zacarias*, *supra* note 212 at 478.

humanitarian protection and the Convention's viable grounds for protection, especially on gender. With the proliferation of new guidelines, recommendations, and advisory opinions by the UNHCR, there is a need to explore how corresponding laws reinforce or diminish the roles of the UNHCR. Therefore, we turn our attention to the primary sources of IRL that create binding obligations on States.

2.10 United Nations and the 1951 Convention Relating to the Status of Refugees

The impact of forced migration provoked by World War II (WW II) and the attempt by the international community to seek solutions for hundreds of thousands of refugees across Europe[372] gave rise to a new refugee regime. First, it caused the establishment of IRO in 1949[373] and later the creation of the Refugee Convention.[374] In an attempt to mitigate a pattern of repatriation of European refugees years following WW II, IRO pursued a scale of resettlement projects taking advantage of the postwar economic boom that came with the creation of new states.[375] Approximately, over one million European refugees were relocated to Americas, South Africa, Israel, and Oceania under this structure.[376] By June 1950 it became obvious that IRO would not be able to relocate all refugees before the termination of its mandate. A new mechanism was needed to address the concerns of refugees, especially with the flow of stateless persons and refugees from the communist states.[377]

---

[372] *Refugee Convention at 50,* UNHCR, THE REFUGEE AGENCY USA, (July 02, 2001), https://www.unhcr.org/en-us/news/editorial/2001/7/3b4c06f0d/refugee-convention-50.html.
[373] The Constitution of the International Refugee Organization, Annex I, December 1946, 18 U.N.T.S. 3 [hereinafter: "IRO"].
[374] 1951 Convention, *supra* note 12.
[375] ILO-CPIA, *Op Cite,* 183; Hathaway, *supra* note 22 at 91.
[376] *Id*. at 91; LOUISE W. HOLBORN, THE INTERNATIONAL REFUGEE ORGANIZATION: A SPECIALIZED AGENCY OF THE UNITED NATIONS (1956); INDEPENDENT COMMISSION ON INTERNATIONAL HUMANITARIAN ISSUES, REFUGEES: THE DYNAMICS OF DISPLACEMENT, 32–38 (1986).
[377] *Id*; *United Nations Department of Social Affairs,* A STUDY OF STATELESSNESS, UN Doc. E/1112, Feb. 1, 1949.

The origin of the latter is traced to the work of the Ad Hoc Committee on Statelessness and Related Problems appointed by the ECOSOC with the mandate to consider the revision and consolidation of the Convention Relating to the International Status of Refugees and Stateless Persons.[378] At the request of the ECOSOC, the UN Secretary General prepared a preliminary report that highlighted various arrangements and initiatives of refugees since the League of nations on which the preliminary draft of the convention was developed in preparation for the conference of Plenipotentiaries convened by UNGA from 2 to 25 July 1951.[379]

In a memorandum by the Secretary General (SG) to the Ad Hoc Committee on Statelessness and Related Problems, SG envisaged the dominant needs to be addressed by the emerging regime, stating that:

> …The phase, which will begin after the dissolution of the International Refugee Organization, will be characterized by the fact that refugees will lead an independent life in the countries which have given them shelter…They will be integrated in the economic system of organization of the countries of asylum and will themselves provide for their own needs and for those of their families. This will be a phase of settlement and assimilation of refugees. Unless the refugee consents to repatriation, the final result of that phase will be his integration in the national community which has given him shelter. It is essential for a refugee to

[378] *See, e.g.,* Resolution 248 (IX) of 8 August 1949.
[379] Final Act of the United Nations Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons, UN doc. A/CONF.2/108/Rev.1, 26 Nov. 1952 [*hereinafter* "1952 UN Plenipotentiaries on Refugees"].

enjoy an equitable and stable status, if he is to lead a normal existence and become assimilated rapidly.[380]

The Memorandum outlined significant rights of refugees—right to shelter, work, security for families, right to resettlement, integration, and assimilation as well as social security—that would foster "normal existence" as well as active participation in the host community. These mirrored some significant aspects of the pre-existed ancient Roman and Greek asylum anchored upon full integration to achieve human and national development.[381] It equally reflected a prevailing structure in post-World War II human rights regime— the Universal Declaration of Human Rights, 1949[382] and the United Nations Charter, 1948.[383] The arrangement paved a way for the conference of Plenipotentiaries 1951 Convention, which[384] culminated in the adoption of the Refugee Convention. This marked a turning point in modern IRL.

As stated in the preamble, the primary objective of the Convention was to provide refugees with the "widest possible exercise of fundamental rights and freedom as enshrined in the UN Charter and Universal Declaration of Human Rights.[385] The Refugee Convention—comprising forty-six articles and seven chapters—ushered in a new regime of rights for refugees. Article 1(A)(1) of the Convention connects the present with the past legal frameworks—the Arrangements of 12 May 1926 and 30 June 1928, the Conventions of 28 October 1933 and February 1938, the Protocol of 14 September 1939 and the Constitution of the IRO.[386] Article

---

[380] MEMORANDUM BY THE SECRETARY-GENERAL TO THE AD HOC COMMITTEE ON STATELESSNESS AND RELATED PROBLEMS, UN DOC. E/AC.32/2, Jan. 3, 1950 at 6–7.
[381] Favaro, *supra* note 239; Garland, *supra* note 243.
[382] UN General Assembly, Universal Declaration of Human Rights, 10 December 1948, 217 A (III).
[383] UN Charter, *supra* note 31.
[384] 1951 Convention, *supra* note 12.
[385] UDHR 1945, *supra* note 31 at preambular paras. 1 and 2.
[386] *Id*. at art. 1(A)(1) [referring to the definition of refugees, which forms criteria of rights and eligibility].

1A(2) defined the status[387] of a refugee as any person who due to fear of persecution is outside his country, unable "to avail himself of the protection of that country" or as stateless persons having no nationality and cannot return for fear of persecution "on account of" race, religion, nationality, political opinion or membership in a particular social group.[388] Paragraph D-F articulates the conditions for exclusion from Article 1A.[389] The substantive parts of the Convention introduced a new landscape in refugee rights that recognized the rights to nondiscrimination,[390] freedom of religion,[391] freedom of association,[392] right to acquire movable and immovable properties,[393] access to courts and legal representation.[394] It equally identified socioeconomic rights fundamental to protect refugees from economic vulnerabilities. These include access to labor (work) and earn wages,[395] rights to shelter,[396] education,[397] health and social security.[398] These underpins the linkage between the Convention's new structure of socio-economic rights and the predecessor laws like the 1939 and 1949 Labor Conventions of the International Labor Organization (LCILO).[399]

The Convention obligates State Parties to ensure realization of rights created.[400] Upon resettlement, refugees are entitled to freedom of movement for refugees[401] and rights to travel documentation.[402] These rights form necessary prelude to procedural asylum and assimilation,

---

[387] *See e.g.,* Advisory Opinion, 1930, *supra* note 281.
[388] 1951 Convention, *supra* note 12.
[389] *Id.* at art. 1F (a)-(c) [refugees may be denied protection having committed certain delineated serious crimes].
[390] *Id*. at art. 3.
[391] *Id*. at art. 4.
[392] *Id*. at art. 15.
[393] *Id*. at art. 13.
[394] *Id*. at art. 16.
[395] *Id*. at art. 17.
[396] *Id*. at art. 21.
[397] *Id*. at art. 22.
[398] *Id*. at art. 24.
[399] Hathaway, *supra* note 22 at 95.
[400] 1951 Convention, *Op Cite* 398 art. 34.
[401] *Id*. at art. 26.
[402] *Id*. at art. 27 and 28.

subject to State's discretion.[403] Contracting States are expressly prohibited from rejection, denial of territory, return, or expulsion (refoule) of refugees "in any manner whatsoever" to the frontiers where they would face risk of life or threat to their freedom.[404] Because of circumstances that may compel involuntary migration, States are barred from imposing penalties on refugees for illegal entry or unlawful presence in host community.[405] Equally, Parties are disallowed from making reservations to any of the substantive rights—nondiscrimination, nonrefoulement, freedom of religion, and access to courts.[406] To guarantee, full protection of refugee life and freedom, nonrefoulement admits no derogation,[407] except in strict circumstances of threat to national security.[408] Also, the application of the exclusions under D-1F are not presumed but determined through legitimate due process.[409] The principle intersect with several other human rights treaties, as would be discussed later. In reverse, refugees are required to comply with laws and general rules to maintain public order within their host states.[410]

Most importantly, the rights set by the Refugee Convention are accessible only to aliens who meet the definition of a refugee under Article 1(A)(2).[411] The status of a refugee is determinable by specific elements and five grounds—race, religion, nationality, MPSG and political opinion.[412] Chapter two will elaborate on the scope of consequences elements and

---

[403] *Id*. at art. 34. [Essentially Parties to the Convention are urged to facilitate assimilation and naturalization of refugees, through affordable means.]
[404] *Id*. at art. 33(1).
[405] *Id*. at art. 31.
[406] *Id*. at art. 42.
[407] *Id*. at art. 42.
[408] *Id*. at art. 1F.
[409] *Id*. at arts. 1(F) and 32.
[410] Hathaway, *supra* note 22 at art. 2.
[411] "…the term refugee shall apply to any person who: ... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."
[412] *Id.* at art. 1. A(2) and 33(1).

grounds for protection in determining refugee eligibility. Notably, the Convention's definition of a refugee[413] reflected the identity of WW II refugees who could no longer return home either because they become stateless or due to a WFF and have by their circumstances become subjects of the international community. Art. 1B(1) underscored this in the image of WW II geographical boundary and Eurocentric identity of refugees belonging to specific events occurring before January 1, 1951, to the exclusion of other persons, including women.[414] The implications of the above limitations amidst the changing circumstances are examined in Chapters Four and Five.

Again, despite the promising expansion of rights in the Refugee Convention, the mechanism for enforcement is minimal and largely dependent upon the level of cooperation with the Contracting States. Article 35 mandates the UNHCR with (super)advisory roles on the implementation of the Convention and regulations relating to refugees.[415] Of course, UNHCR recommendations are not binding on states. UNHCR's advisory opinions cannot override states' policies or judicial decisions. In addition, IRL allows reasonable grounds for derogation from nonrefoulement pursuant to exclusion criteria regardless of any possible danger.[416] In many ways, states play predominant roles as the sole arbiters in determining asylum claims and the validity of refugee status. Moreso, Article 1F, Article 32 and Article 33(2) create exceptions that permit States to derogate from nonrefoulement as opposed to a related provision under CAT.[417] Even though, Article 33(1) proscribes refoulement "in any manner whatsoever,'[418] Article 34

[413] *Id.*
[414] *Id.* at art. 1B.
[415] *Id.* at art. 35.
[416] *Id.* at arts. 1F, 33(2) and 32.
[417] CAT, *supra* note 165 at art. 3.
[418] *Id.* at art. 33(1).

makes a grant of asylum discretionary.[419] Therefore, it is within the ambit of state's discretion to protect and grant full integration to refugees or reject. Evidently, the legal structure embodies an inherent lacuna that could give room for interpretation biases. Chapters Four, Five, and Six devote intellectual attention to these vis-à-vis domestic responses.

2.11 Post-Convention Refugee Laws and the 1967 Protocol

The Refugee Convention operates in consonance with the 1967 Protocol as a primary document of IRL. The latter complements the limitations of the former by removing the geographical restrictions on the scope of refugee protection.[420] As earlier indicated, the Refugee Convention was structured to address only the needs of European refugees fleeing World War II related politically, racially, and religiously motivated persecution,[421] to the exclusion of emerging categories of post-World War II refugees from other countries. Apparently, fear of and flight from persecution as a recurrent situation have given rise to new refugee vulnerabilities, hence the need to reconsider the scope and limitations brought by the Protocol. The 1967 Protocol came as an outcome of a colloquium on the Legal Aspects of Refugee Problems, organized in Bellagio, Italy, in 1965.[422] Focusing on the agreement of the 1951 Convention "to meet new refugee situations" that have arisen thereby overcoming the discrepancy between the Convention and the UNHCR Statute, the 1967 Protocol was created to accommodate the needs

---

[419] *Id.* at art. 34 ["The Contracting States shall as far as possible facilitate the assimilation and naturalization of refugees. They shall in particular make every effort to expedite naturalization proceedings and to reduce as far as possible the charges and costs of such proceedings."]

[420] *Id.* art. 1(3) [stating that this present Protocol shall apply without any form of geographical restriction unlike the 1951 Convention that limited application to Europe].

[421] *See, e.g.,* 1951 Convention, *supra* note 165 at art. 1B(1) [stating that "[F]or the purposes of this Convention, the words "events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"]; Musalo & Knight, *supra* note 35 at 56, 59; Stephanie Robins, Note, *Backing It Up: Real ID's Impact on the Corroboration Standard in Women's Private Asylum Claims*, 35 WOMEN'S RTS. L. REP. 435, 442–43 (2014).

[422] Colloquium on the Legal Aspects of Refugee Problems, Note by the High Commissioner, A/AC.96/INF.40, 5 May 1965, at para. 2 [*hereinafter* "1965 Colloquium"].

of majority of states in international law, taking cognizance of the emerging concerns of refugees.[423]

Remarkably, the 1967 Protocol expanded the scope of the Convention and eliminated the limitations in terms of geographical time and space, making it applicable to all.[424] The Colloquium accepted that the most appropriate way of adapting to the Convention would be by removing the limitations to place and time.[425] Whereas Article 1A of the Refugee Convention defines a refugee to apply to events occurring before January 1, 1951,[426] Article 1(3) of the 1967 Protocol extends applications to State Parties without any geographical limitations.[427] Significantly, the 1967 Protocol incorporates the 1951 Convention making it binding on Parties to the Protocol.[428] Giving its unique structure, the Protocol is not an amendment of the Convention but stands as an independent treaty relating to the status of refugees. With its coming into force, two different treaties exist as primary instruments on the status of refugees.[429] Parties are of liberty to accede to the Protocol without becoming parties to the Convention, yet they are bound to it under Article 1(1) of the 1967 Protocol.[430] Article 2 (a)-(c) of the Protocol reiterated

---

[423] 1967 Convention, *supra* note 17.
[424] The 1967 Protocol removed the temporary and geographical, giving the Convention a universal application. The term "refugee" shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country...." 1967 Convention, *supra* note 17 at art. 1(1).
[425] Colloquium, *Op Cite* 422 at para. 3.
[426] *Id.* "…any person outside the country of his nationality" with a WFF of persecution and unable or unwilling to avail himself of the protection of such country.
[427] 1967 Convention, *supra* note 12 at art. 1(3).
[428] *Id.* art. 1(1) explicitly stated that "[T]the States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined."
[429] P. Weis, *The 1967 Protocol relating to the Status of Refugees and Some Questions relating to the Law of Treaties,* 39 BRITISH YEARBOOK OF INT'L L. 60 (1967); Hathaway, *supra* note 80 at 111.
[430] 1967 Convention, *supra* note 12 at art. 1(1); *Minister for Immigration and Multicultural Affairs v. Savin,* (2000) 171 ALR 483 (Aus. FFC, Apr. 12, 2000), per Katz J. Justice Katz thus concludes that "for parliament to describe the 1951 Convention as having been 'amended' by the 1967 Protocol is inaccurate. At the same time, however, for a state like Australia, which was already bound by the 1951 Convention before acceding to the 1967 Protocol, the error is one of no practical significance;' In 1968, US Congress ratified the 1967 Protocol making the Protocol and

the provisions of Convention mandating UNHCR to exercise supervisory roles, monitoring the conditions of refugees and implementation of the Protocol. Equally, Article 3 urges State Parties to communicate to the Secretary-General on the domestic measures taken to ensure compliance with the Protocol.[431]

Contrary to the Refugee Convention, the Protocol created a provisor that allows a Party at the time of accession to deny other State Parties the right to refer a dispute regarding their interpretation or application of the Protocol.[432] Article 42 of the Convention addresses the same subject matter, but clearly outlined specific articles 1, 3, 4, 16(1), 33, 36-46 that protect the substantive rights of refugees, which admit no reservation.[433] As it stands, states can choose to accede to both the Protocol and Refugee Convention, or either of. The United States is an example of a State Party to the Protocol that did not ratify the Convention. The subsequent discussion in Chapter Four examines the impact on United States' jurisprudence as well as its response to international refugee obligations.

There is no doubt that the post-1951 Convention prompted new issues requiring attention in the Protocol. Nevertheless, the Protocol retained the normative of the Convention's enumerated five grounds for refugee protection. Emerging humanitarian situations and other likely grounds to constitute WFF—include persecution based on one's gender or sex, flight based on child/human trafficking or crime-relating persecution, and even environmental

---

1951 Convention enforceable in the US. *See, e.g., Matter of Dunar,* 14 I. & N. Dec. 310 (BIA 1973); *Cardoza-Fonseca, supra* note 357 at 421, 436–37.

[431] *Id* at art. 3.

[432] 1967 Protocol, *supra* note 17 art. 7 (1) [stating that "[A]t the time of accession, any State may make reservations in respect of article IV of the present Protocol and in respect of the application in accordance with article I of the present Protocol of any provisions of the Convention other than those contained in articles 1, 3, 4, 16(1) and 33 thereof, provided that in the case of a State Party to the Convention reservations made under this article shall not extend to refugees in respect of whom the Convention applies.]

[433] 1951 Convention, *supra* note 12 at art. 42.

disasters. These were uncontemplated. The discernable gaps pose a potential dilemma that may require attention to secondary instruments, especially in the face of ever-surging refugee demands.

2.12 Regional Refugee Laws

Regional treaties form additional legal instruments and are the source of IRL. The 1950 European Convention for Protection of Human Rights and Fundamental Freedoms (ECPHRF) is one of the oldest regional documents that protect the rights of nationals as well as aliens.[434] Coming barely two years after 1948 UDHR, ECPHRF iterated fundamental human rights created under the UDHR such as the obligation to respect the human rights of everyone,[435] right to life,[436] prohibition against torture,[437] slavery and forced labor.[438] It emphasized the rights to liberty,[439] fair trial,[440] and prohibits abuse of rights[441] and discrimination.[442] Although there was no specific mention of refugees, the framework created significant binding obligations as a secondary source IRL.[443] Nonrefoulement appeared in varying forms in regional instruments. Article III (3) of the 1966 Principles Concerning Treatment of Refugees explicitly prohibits rejection at the frontier, return or expulsion (except for reasons of threat to national security) of an asylum seeker to a territory where he fears persecution, a threat to life integrity or liberty.[444]

---

[434] European Convention for the Protection of Human Rights and Fundamental Freedoms [as amended by the Protocols Nos. 11 and 14], 4 November 1950, ETS 5 entered into force September 3, 1953 [*hereinafter* "ECHR"].
[435] *Id.* at art. 1.
[436] *Id.* at art. 2.
[437] *Id.* at art. 3.
[438] *Id.* at art. 4.
[439] *Id.* at art. 5.
[440] *Id.* at art. 6.
[441] *Id.* at art. 17.
[442] *Id.* at art. 17.
[443] Article 3 on prohibition against torture is a necessary prelude to the principle of nonrefoulement that became the foundation of IRL. *See, e.g.,* 1951 Convention, *supra* note 12 art. 33(1); CAT, *supra* note 165 at art. 3.
[444] Asian-African Legal Consultative Organization (AALCO), Final Text of the AALCO's 1966 Bangkok Principles on the Status and Treatment of Refugees, Adopted on June 24, 2001 at the AALCO's 40th Session, New Delhi, art.

In Africa, the Convention Governing the Specific Aspects of Refugee Problems in Africa (OAU Convention) is one of the first regional instruments to create auxiliary rights for refugees.[445] Article 1 defined a refugee within the Convention's meaning[446] but further expanded application to "every person" fleeing persecution, aggression or public disorder, unwilling to avail himself of the protection of that country.[447] Articles I(4)[448] and (5)[449] outlined the conditions for derogation from the Convention. Article II(1) obligates Member States to the Organization of African Unity, now African Union, to receive and "use their best endeavour" in a manner consistent with the Convention to secure asylum for aliens who meet the refugee definition.[450] This presupposes friendly humanitarian protection and resettlement process[451] that bolsters burden sharing[452] with member States and eschews expulsion as much as possible.[453] The OAU Convention precludes any form of "rejection at the frontier, return or expulsion, which would compel him to return to or remain in a territory where his life, physical integrity or liberty would be threatened…"[454] on account of the five grounds and other related grounds such as "external aggression, occupation, foreign domination or events of seriously disturbing disorder."[455] OAU Member States are required to implement the rights guarantee in the

---

III(3); Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII), 14 December 1967, A/RES/2132 (XXII) of 14 Dec. 1967, art. 3.

[445] Convention Governing the Specific Aspects of Refugee Problems in Africa, 10011 UNTS 14691, Sept. 10, 1969, entered into force June 20, 1974 (hereinafter "OAU Convention").

[446] 1951 Convention, *supra* note 12 at art. 1A(2).

[447] OAU Convention, art. 1.

[448] *Id.,* art. I(4), [denial of protection based on change of circumstance).

[449] *Id.,* art. I(5), [denial of protection based on criminal liability or threat to national security].

[450] *Id.,* art. II(1).

[451] *Id.,* art. II(2).

[452] *Id.,* art. II(4) [stating that if "[M]ember State finds difficulty in continuing to grant asylum to refugees, such Member State may appeal directly to other Member States and through the OAU, and such other Member States shall in the spirit of African solidarity and international co-operation take appropriate measures to lighten the burden of the Member State granting asylum."]

[453] *Id.,* art. II(3).

[454] *Id.*

[455] *Id.*

international bill of rights and to provide friendly security and burden sharing solidarity.[456] Comparably, the treaty urges refugees to maintain public order by avoiding subversive activities against Member States.[457] To ensure compliance, the African Commission on Human Rights[458] and Peoples Rights and African Court of Human Rights[459] were established to protects the rights created under the Charter.

Similarly, the 1969 American Convention on Human Rights (ACHR)[460] and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (IAC) represent binding multilateral treaties that protect internationally guaranteed rights of persons within the regional jurisdictions. ACHR specifically ensures freedom of movement—entry and exit from any state.[461] Article 22(6) prohibits the expulsion of entrants or denial of territory, except by legal due process.[462] Equally, it secures rights to equal protection, applicable to aliens, and nationals.[463] Article 22(8) proscribes deportation or return of an asylee to a country where his life or freedom may be threatened. IAC protects and enforces the rights of women, which as indicated in Chapter One, was expressly omitted in the Refugee Convention.

---

[456] *Id.* at arts. I and 2.
[457] *Id.* at art. III.
[458] African Charter on Human and Peoples' Rights, June 27, 1981, 21 I.L.M. 58 (1981) (entered into force on October 21, 1986), art. 30 [on establishment of the Commission], [*hereinafter* "African Charter"].
[459] *See, e.g.* Protocol to the African Charter on Human And Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III) [*hereinafter* "African Charter Protocol"]
[460] 1969 American Convention on Human Rights A/RES/2132 (XXII) of 14 Dec. 1967 [*hereinafter* "ACHR"].
[461] *Id.* at (1)-(2), subject to certain exceptions under (3) [stating that [T]he exercise of the foregoing rights may be restricted only pursuant to a law to the extent necessary in a democratic society to prevent crime or to protect national security, public safety, public order, public morals, public health, or the rights or freedoms of others].
[462] *Id.* at 22(6).
[463] *Id.* at 24,

The elements of nonrefoulement are central almost in every human rights treaty as protection of rights to life.[464] In 2014, the Brazil Declaration and Action Plan (BDAP),[465] reaffirmed the exceptional clarity to the *jus cogens* nature of nonrefoulement.[466] Likewise, the AOS Cartagena Declaration commits State Parties to provide regional protection to refugees.[467] These include obligations to integrate refugees in the host state, right to employment and family unification.[468] Although, the Declarations lacked binding force on Parties, there are other contingent rights under the international human right framework.

2.13 International Human Rights Law (IHRL) and IRL

Post-World War II was marked by a treaty revolution on human rights. Foremost was the 1948 UDHR, preceded by the Convention on the Prevention and Punishment of the Crime of Genocide.[469] The international bill of rights preceded the Refugee Convention and is foundational to its human rights framework. Predominantly, UN Charter and UDHR were major human rights treaties that heralded the Convention before other primary[470] and secondary[471] instruments. A sequel to these was the 1966 Covenant on Civil and Political Rights (ICCPR).[472] The latter created binding human rights obligations for protecting "…all individuals,"[473] urging State Parties to safeguard the rights of persons "…without distinction of any kind. The

---

[464] Cartagena Declaration of 1984 OAS Doc. OEA/Ser.L/II.66, Doc.10, Rev.1, 19–22 Nov.1984 [*hereinafter* "OAS Cartagena Declaration"]; UNHCR, Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons, Geneva, 1995, II, 206–11 [*hereinafter* "UNHCR on Cartagena Declaration"]; CAT, CAT, *supra* note 165 at art. 3; ICCPR, *supra* note 31 at art. 7.
[465] BDAP is unanimously accepted by the Latin American and Caribbean states.
[466] Brazil Declaration and Plan of Action, Dec. 3, 2014, https://www.refworld.org/docid/5487065b4.html [*hereinafter* "Brazil Declaration"].
[467] OAS Cartagena Declaration, *supra* note 464 at Part III(5), (6), and (7).
[468] *Id.* at Part III(6), (11), and (13).
[469] Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, UNGA Res. 260A(III), entered into force Jan. 12, 1951 [*hereinafter* "1951 CPPCG"].
[470] CAT, *supra* note 165.
[471] ICCPR, *supra* note 31; ACHR, *supra* note 267; OAU Convention, *supra* note 445.
[472] *Id*.
[473] The term "all individuals" presupposes everyone, citizens, and aliens alike. *Id.* art. 2(1).

nondiscriminatory principles extend to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth, or other status.''[474] Thus, human rights protection is inclusive and applicable to everyone. This common characteristic underpin every human right instrument, excluding the Refugee Convention, despite the manifest overlap with other instruments.[475] The ICCPR emphasizes nondiscriminatory principle and equal applicability.[476] It guarantees obligations not to extradite, deport, expel or other remove a person to the territory where there is substantial ground to believe that he or she would likely face irreparable harm, torture, or threat to life.[477] Again, this constitutes a point of divergence with Refugee Convention's exclusion under 1F that will be elaborated in Chapter six.

Whereas refoulement is prohibited in almost all IHR treaties, its scope of protection differs with IRL. Article 3(1) of CAT specifically proscribes repatriation to "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[478] Refoulement, as described here, includes calculated acts of expulsion, return, or extradition.[479] Unlike Article 33(1) of the Refugee Convention, nonrefoulement under Article 3(1) of CAT admits no derogation.[480] Thus, the latter creates illimitable obligations on Parties, which apply without exception.[481]

---

[474] *Id.* art. 2(1).
[475] *Id.*; African Charter, *supra* note 458; OAU Convention, *Op Cite*; UDHR, *supra* note 31 art. 14; OAU Convention.
[476] Hathaway, *supra* note 22 at 120; UN Human Rights Committee, General Comment No. 15: The position of aliens under the Covenant, May 12, 2004, UN Doc. HRI/GEN/1/Rev.7, 140, para. 2.
[477] ICCPR, *supra* note 31 at art. 6 [referring to right to life contemplated prohibition of nonrefoulement]; art. 7 expressly prohibits refoulement stating that "States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement."]
[478] CAT, *supra* note 165 at art. 3(1).
[479] *Id.*
[480] *Id.* at para. 20; General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 12.
[481] *See, e.g.,* Committee Against Torture, General Comment No. 4 on the Implementation of Article 3 of the Convention in the Context of Article 22, 8, 9 (2017) [asserting that "no exceptional circumstances whatsoever,

Viewed from a global perspective, nonrefoulement is a substantive principle of IRL that intersects with different aspects of public international, especially IHRs and humanitarian law as well as customary international law.[482] Human rights treaties as well as judicial institutions recognize the peremptory nature of nonrefoulement,[483] given its inextricable link with right to life and prevention against torture.[484] Obligations created under these precedents are akin to nonrefoulement in IRL and serve as reference documents in interpreting its principles for prevention of torture and arbitrary deprivation of life.[485] The principle of nonrefoulement is core to humanitarian protection. Its primary objective is to ensure uninterrupted access to protection from persecution. International law entrusts this responsibility to states as custodians and functionaries for providing surrogate protection. Applying this consensus, therefore, States Parties make their own laws supposedly to conform with IRL.

2.14 International Humanitarian Law (IHL) and Protection of Refugees

Apparently, no single legal system can be said to be self-sufficient or apply independently without others. International law is mutually inclusive, the same as IHL and IRL. Laws of armed conflicts regulate the conduct of armed conflicts and humane treatment of

---

whether a state of war or . . . any public emergency, may be invoked as a justification of torture…[t]he principle of non-refoulement . . . is . . . absolute"], [*hereinafter* "General Comment No. 4"].

[482] Okeke & Nafziger *supra* note 8 at 532, 531-556.

[483] ACHR, *supra* note 460 at art. 22(8) [on prohibition of refoulement]; IAC, *supra* note at art. 13(4); Charter of Fundamental Freedoms of the European Union, 2012, O.J. C 326/391, art. 19(2); International Convention for the Protection of all Persons against Enforced Disappearance, Dec. 20, 2006, 2715 U.N.T.S. 3, art. 16.

[484] *See, e.g., Chahal v. United Kingdom,* Application No. 22414/93, Nov. 15, 1996, 75-82 (holding that the prohibition against refoulement of a person to a territory where he or she would face a real risk of torture admits no exceptions or derogations and applies even when the person poses a threat to national security); *Soering v. United Kingdom,* Application No. 14038/88, July 7, 1989, 88 (stating that extradition violates the ECHR when it subjects a victim to "a real risk of exposure to inhuman or degrading treatment or punishment" in the receiving state).

[485] General Comment No. 4, *supra* note at art. 22, 8, 9 [emphasizing that "no exceptional circumstances whatsoever…may be invoked as a justification of torture…non-refoulement...is…absolute"); Human Rights Committee, General Comment No. 24: Issues relating to reservations made upon ratification or accession to the Covenant or the Optional Protocols thereto, or in relation to declarations, 4 November 1994, under art. 41 of the Covenant U.N. Doc. CCPR/C/21/Rev.1/Add.6 para. 8.

persons who are not or no longer taking part in armed conflicts.[486] IHL protects the rights of people in armed conflicts through the International Committee for Red Cross (ICRC), IRL protects the rights of persons displaced by armed conflicts, disasters, or fear of persecution through the supervision of the UNHCR. Both derive their source and application from the general principle of IHRL.[487]

During armed conflicts, the tendency for displacement or pre-existing conditions for belligerent persons is almost inevitable. Hence, Article 44 of the Fourth Geneva Conventions relative to the Protection of Persons in Time of War[488] enunciated measures applicable for the protection of refugees and human treatment of belligerent persons.[489] Generally, Article 35-36 of the Fourth Geneva Convention (GC IV) protects aliens especially those whose States are not represented among the belligerent States where they find themselves.[490] These apply to refugees and asylum seekers, whom the Convention protects from repatriation,[491] who can voluntarily relocate to a safe third country. Ordinarily, UNHCR, ICRC, and the National Red Cross monitor the protection and treatment of such aliens.[492] The importance of humanitarian protection in armed conflicts featured at the 1949 Diplomatic Conference where IRO, the Israeli delegation and ICRC emphasized the need to retain Article 44 to protect "enemy aliens in the territory of

---

[486] Geneva Convention Relative to the Protection of Civilian Persons in Times of War, Aug. 12, 1949, 75 U.N.T.S. 287 [*hereinafter* "1949 Geneva IV or GC IV"], art. 3 [*jus in bello and jus ad in bellum.*]
[487] International Criminal Tribunal for the former Yugoslavia (ICTY), Judgment, Prosecutor v. Furundzifa, ICTY, 10 December 1998, para. 183 [holding that the "general principle of respect for human dignity is the basic underpinning and indeed the very raison d'etre of international humanitarian law and human rights law."].
[488] 1949 GC IV, *Op Cite*.
[489] *Id.*
[490] Chibueze, Remigius Oraeki, *The 1998 Rome Statute of the International Criminal Court: Scope of the Subject Matter and Personal Jurisdiction of the Court Towards Individual Criminal Accountability*, 51 THESIS AND DISSERTATIONS 53 (2006) [stating that "Geneva Convention IV of 1949 for the first time, provided for the protection of civilians in enemy territory during armed conflict…was as a result of the treatment suffered by civilian populations of occupied territories during World War II."]
[491] GC IV, *supra* note 296 at art. 45.
[492] *Id.* at art. 30 [on protection of aliens and detainees].

State Parties" who may be refugees or have sought asylum during armed conflicts.[493] In consistency with the general norm of humanitarian protection, Article 44 GC IV and Article 73 of its First Protocol Additional (AP1) to the Geneva Conventions, 1949[494] created a platform for the Refugee Convention's protection for victims of persecution. Although the Convention made no reference to the Geneva Convention, Articles 1.A(2) and 33(1) specifically underscored the principles of humanitarian protection under the Geneva Convention and AP1. In as much as Article 44 GC IV does not create absolute rights for refugees, it makes recommendations for the humane treatment of belligerent aliens. Article 45 prohibits the transfer of refugees or protected persons to State powers that are not Parties to the Convention.[495] The provision is consistent with nonrefoulement principle in IRL. Even though the former is limited to two grounds—political opinion and religious beliefs, the human rights character is in tandem with the Convention's principle of nonrefoulement.[496] Additionally, Article 73 AP1 protects of refugees and stateless persons, and further guarantees the privilege to seek asylum.[497] The prohibition of nonrefoulement here applies absolutely to prevent any arbitrary removal of asylum seekers to countries where they would face persecution.[498]

---

[493] ICRC Commentary to Convention (IV) relative to the Protection of Civilian Persons in Time of War, Geneva, 12 August 1949, art. 44, http://www.icrc.org/IHL.NSF/COM/380 -600050?OpenDocument; Pablo Antonio Fernandez-Sanchez, *The Interplay between International Humanitarian Law and Refugee Law,* 1 J. INT'l HUMAN. LEGAL Stud. 329 (2010).
[494] Protocol Additional to the Geneva Conventions, 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, 1977, 1125 UNTS 3, entered into force 7 December 1978. [*hereinafter* "AP I"].
[495] "[...] in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."
[496] 1951 Convention, *supra* note 12 at art. 33(1).
[497] AP 1 *supra* note 487 at art. 73; Fernandez-Sanchez, *supra* note 493.
[498] GC IV, *supra* note 487 at art. 45; 1951 Convention, *supra* note 12 at art. 33(1); *Id.*, 301; P.A. Fernindez-Sinchez, *The Principle of Non-refoulement of Refugees in Situations of Armed Conflict or Occupation,* INT'L CONF. ON REFUGEES AND INT'L LAW: THE CHALLENGE OF PROT. (2006), http://repository.forcedmigration.org/show metadata .jsp?pid=fmo:5369.

So far, the research analysis indicates that the legal framework of nonrefoulement traverse aspects of IRL, IHL and IHRL. It applies not only to refugees but to those whose status has not been formally declared.[499] The jurisdictional application extends to those whose status is not yet determined or ineligible to meet the criteria of refugee definition but they have WFF of persecution.[500] The subject of refugees and nonrefoulement are expansive, and apply also as general principle of customary international law, binding on States whether or not they have ratified the Refugee Convention.[501] The reason is simply because of its wide application across different aspects of international law is complementary. A state that may not have ratified the Convention yet is bound to other treaties and local laws that incorporated nonrefoulement.[502]

2.15 States and Refugee Law

Ordinarily, the rights created under the refugee law accrue when a refugee enters the territory of a State either lawfully or unlawfully, with or without travel documents. Generally, Contracting States have obligations to protect refugees who are physically present in a state or at the border of a state's territory,[503] even at water spaces, wherever a state can exercise territorial or extra-territorial jurisdiction.[504] The reason is simple because states function as custodian

---

[499] UNHCR Advisory Opinion on Nonrefoulement, *supra note* 23 at para 6.
[500] *Id.*
[501] UNHCR, HANDBOOK FOR EMERGENCIES, 2007, SECTION ONE - UNHCR PRINCIPLES, (3rd ed.), para. 25, http://www.unhcr.org/publ/PUBL/471db4c92.html.
[502] GC IV, *supra* note 487 at art. 45; Caracas Convention on Territorial Asylum, 1954, OAS Treaty Series 34 entered into force 29 December 1954; ACHR, *supra* note 460 at art. 22; CAT, *supra* note 165 at art. 3; Inter-American Convention to Prevent and Punish Torture (1985), OAS Treaty Series No. 67, entered into force 28 February 1987, art. 13(4) [*hereinafter* "IAPP"]; UN General Assembly Declaration on Territorial Asylum of 1967, 14 December 1967, Resolution 2312(XXII), GA Res. 2312 (XXII), art. 3(1); International Convention for the Protection of All Persons from Enforced Disappearance, 2006, Doc. A/61/488 (not yet in force) art. 16(1); International Convention for the Suppression of Terrorist Bombings (1997), 2149 UNTS 284, entered into force 23 May 2001, art. 12.
[503] 1951 Convention, *supra* note 12 at 33(1).
[504] *See, e.g., Coard et al. v. the United States,* Case No. 10.951, Report No. 109/99, 29 September 1999, para. 37 [IACHR held that "…under certain circumstances, the exercise of its jurisdiction over acts with an extraterritorial locus will not only be consistent with, but required by the norms which pertain."]

international law in providing surrogate protection for aliens. Basically, a refugee is under the jurisdictional authority of a host state, while the UNHCR monitors the treatment of refugees. However, such monitoring is not always available or effective to prevent abuses.

In effect, states assume the role of international law not only in determining the identity or status of refugees but by providing humanitarian protection through asylum or withholding removal in compliance with international law. In exercising these obligations, state courts interpret IRL as well as statutory laws to determine refugee eligibility, taking cognizance of good faith interpretation.[505] For example, to determine the validity of a refugee, certain factors are considered "(i) a threat of persecution; (ii) a real risk of torture or cruel, inhuman or degrading treatment or punishment; or (iii) a threat to life, physical integrity, or liberty."[506] Obligations to nonrefoulement and even discretion for asylum are compelled by the above circumstances. The responsibility applies *mutatis mutandis* to other international human rights commitments that preclude the exposure of an alien to persecution or threat of freedom.[507]

States are bound to observe the treaties of IRL as Parties or have ratified related treaties that incorporate nonrefoulement. So far, IRL have received sufficient acceptance from the international community with a total number of 149 states as signatories to the Refugee Convention and 191 states as parties to at least one of the treaties that ratified a non-refoulement

---

[505] VCLT, *supra* note 171 at art. 31. [emphasizing interpretation of treaty in good faith].
[506] Lauterpacht and Bethlehem, *supra* note 41 at 150; 1951 Convention, *supra* note 22 at arts. 1A(2) and 33(1).

[507] The principle of nonrefoulement is an inherent component of the Convention Against Torture. *See, e.g.,* CAT, *supra* note 4 at art. 3(1) provides that [No State Party shall expel, return ("refouler") or extradite a person to...where he would be in danger of being subjected to torture.]; Derogations during a State of Emergency, General Comment No. 29, HUMAN RIGHTS COMMITTEE, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11, art. 4 [The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in art. 4, para. 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant].

component.[508] Nonetheless, the attempts by 149 States Parties to interpret the provisions of the treaties within the context of domestic jurisprudence pose conflicts, or waiver of rights created under IRL, as seen in *INS v. Stevic,*[509] and *INS v. Zacarias.*[510]Also, the wrongful interpretation of the IRL have collateral undermining effects on the rights of refugees. Chapter Four evaluates these challenges that often emanate from a clash of political interest and treaty obligations.

2.16 State Laws as Source of IRL: the United States Refugee Law

The United States is among the few countries that ratified the 1967 Protocol alone without the Convention. Congress demonstrated commitment to being bound by IRL by ratifying the 1967 Protocol in 1968,[511] and invariably accepting an obligation to the Refugee Convention.[512] Thirteen years after, Congress enacted the 1980 Refugee Act[513] to bring the United States to comply with the obligations in the 1967 Protocol. It incorporated verbatim its definition of a refugee and grounds for refugee protection.[514] As part of its commitments to international refugee regime, United States Congress amending the Immigration and Nationality Act (INA),[515] made it mandatory rather than discretionary for the A.G. to withhold deportation of a foreign national, having met the refugee requirements, "if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[516] Except for

[508] Lauterpacht and Bethlehem, *supra* note 41 at 188–213; Maja Janmyr, *The 1951 Refugee Convention and Non-Signatory States: Charting a Research Agenda,* 33 INTNL J. REF. L., 188–213 (2021).
[509] 467 U.S. 407 (1984) [On the meaning of "on account of"].
[510] 112 S. Ct. 812, 478 (1992) [On a "well-founded fear" for persecution].
[511] 1967 Convention, *supra* note 17; INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).
[512] Signatories to the 1967 Protocol also demonstrate obligation to be bound to Articles 2-34 of the 1951 Convention. See, e.g., 1967 Protocol, *supra* note 17 at art. 1(1).
[513] 8 USC 1101 Refugee Act of 1980, *96th Congress* (March 17, 1980); Pub. L. No. 96-212, 94 Stat. 102; *Cardoza-Fonseca,* 480 U.S. at 429.
[514] 1951 Convention, *supra* note 12 at art. 1A; art. 33(1); 1967 Protocol, *supra* note 17 at art. 1; 8 U.S.C. § 1101(a)(42)(A).
[515] 66 Stat. 163 (1952), *Op Cite* (codified as amended in scattered sections of 8 U.S.C.).
[516] 8 U.S.C. § 1253(h)(1) (2012); *American Courts and The U.N. High Commissioner for Refugees: A Need for Harmony in The Face of a Refugee Crisis,* 131, HARV. L. REV. 1401, 1399-1420 (2018).

overriding reasons of public safety and national security, the principle of nonrefoulement admits no derogation.[517] Even in extreme circumstances where an exception is permitted, refoulement is applied with caution and construed restrictively following due process of law that may even require securing transfer of the concerned aliens to a safe third country.[518]

In ratifying the Protocol and subsequent enactment of the 1980 Refugee Act, the United States submitted to the legal obligations of the international refugee regime. The commitment is currently put to test in the face of current massive deportations under Title 42.[519] Although the right of asylum appertains to States' discretion and as a correlative duty, the discretion must be exercised legitimately. However, the right to seek withholding removal is respected and upheld as part of the State's obligation to refugees. Nonetheless, in some situations, as seen in the prevailing covid-19 pandemic, some States, including the United States have wavered in their obligations to nonrefoulement.[520] Chapters Four, Five, and Six investigate the United States interpretation of IRL in varied circumstances with the intention to deconstruct binaries between IRL and states' jurisprudence and how they affect humanitarian protection. The research analysis examines also lessons from other common law jurisdictions like Australia[521] and Canada[522] to appraise and contest interpretational issues in the United States case laws.

---

[517] 1951 Convention, *supra* note 2 at art. 1F. [Referring to the exclusion criteria.].
[518] Lauterpacht and Bethlehem, *supra* note 41.
[519] Title 42, *supra* note 8 at 1-43.
[520] *See, e.g., Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions,* U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (updated Jan. 7, 2020) [*hereinafter* "Nationwide Enforcement Enc."].
[521] Australia is an unusual common law country not having Constitutional Charter of Bill of Rights. Although common law courts have the power to provide significant protection of human rights, this is largely dependent upon overriding legislative principles. *See, e.g., Common Law, Human Rights Principles, and the Rule*
[522] Canada is a bijural State where common law and civil law coexist. *See, e.g. Introduction to the Country's Legal System*, http://www.oas.org/dil/flpc/docs/canada/substantive/introduction%20canada.pdf; Canada's System of Justice at: http://canada.justice.gc.ca/eng/dept-min/pub/just/; Constitution Act, 1967;

Conclusion

This chapter examines the evolution of IRL, from religious sanctuary tradition to the ancient Greek and Roman utilitarian concept of asylum or refugee protection. The discussion unfolded the originating principle of haven and nonrefoulement as inviolable from traditional perspectives to contemporary IRL. Research findings indicate that the development of refugee rights from the 1933 Convention of the League of Nations and the contemporary United Nations' Convention of 1951 drew extensively from past legacies of religious sanctuaries and collective surrogacy principles under minorities treaties. Throughout the analysis, the discussion resonated with the intersection of religions, politics, and civil jurisprudence in the framing of the tenets of humanitarian protection. It equally illustrates the sources and interdependence of refugee law with IHRL, IHL, and customary international law, an inextricable bond that finds resonance with the principle of nonrefoulement. Nonrefoulement is underscored as the cornerstone of IRL and the humanitarian conduit for prevention against torture, persecution, or human rights violations against refugees. Finally, the analysis in this Chapter underscores the rich and interdependent legal structure of IRL established with the primary objective to respond to the needs of refugees when local states fail in their human rights duties to protect them.[523] However, IRL has an outstanding weakness of enforceability, hence leans on the states' implementation and discretions. Given this limitation, when the desired cooperation of states fails, the fate of refugees for humanitarian protection is emasculated in judicial inertia. This and other limitations have continued to weaken the efficacy of IRL, while the increasing demands for migrants' protections reach a brink.

[523] 1951 Convention, *supra* note 12 art 31(1); INA, 8 U.S.C. § 1231(b)(3)(A); 8 C.F.R. § 208.16(c).

CHAPTER THREE

ELEMENTS OF HUMANITARIAN PROTECTION—ASYLUM, NONREFOULEMENT, AND CONCEPT OF PERSECUTION

3.1 Introduction

Whereas the existence of refugees dates to antiquity, new circumstances of flights have continued to evolve to justify the need for updating the scope of refugee's humanitarian protection. Discussion in this Chapter examines the status of a refugee and important elements of refugee protection. The analysis is necessary given that the 1951 Convention was originally framed from the needs and circumstances of World II, with attendant influence on the import of persecution, and limitations. Although persecution is a key aspect of refugee definition and basic condition for humanitarian protection, neither the 1951 Convention nor the 1967 Protocol offered any clue to the meaning of persecution. Instead, Paragraph 51 of the UNHCR Handbook suggested that meaning be inferred from the Convention's five grounds. In this analysis, the study examines the challenges and prospects of construing persecution within the fundamental frameworks of IRL—asylum and the principle of nonrefoulement. These important principles are evaluated from different legal sources to underpin their legal applications, convergence, and boundaries. Asylum and nonrefoulement are necessary remedies for persecution. However, each is determined differently and according to case by case, depending on the circumstance and available evidence.

Although persecution is not expressly codified in IRL, it is fundamental in the definition of refugee identity and has evolved as a doctrinal reason for refugee protection. The second segment of this Chapter analyzes the meaning and forms of persecutions from different human rights, jurisprudential and scholarly perspectives. It builds a logical premise for evaluating

relevant case laws. Against this backdrop, the study examines the sources of persecution—state actors and non-state actors—as well as victims of persecution. In the second part, attention is given to different forms of persecution like serious physical persecution, mental or psychological harm, economic related persecution, discrimination rising to persecution, and severe torture under the Convention Against Torture, Other Inhuman or Degrading Treatment (CAT). In doing this, the study analyzes decisions of courts, comparative as well as conflicting interpretations on the various interpretations of persecutory experiences, and their possible consistency with human rights. In all, the intellectual effort is to establish a relevant conceptual framework and understanding of the important terms that form the backbone of the discourse analysis in the subsequent Chapters.

1.2 Definition of a Refugee

To be eligible for asylum, aliens seeking protection must meet the definition of a refugee. Article 1A(2) of the Refugee Convention defines the term refugee to apply to:

> [A]ny person who…as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.[524]

[524] 1951 Convention, *supra* note 12.

Article 1(B) clarified "events occurring before 1 January 1951" in Article 1(A) to mean:

> "…events occurring before 1 January 1951" in article 1, section A, shall be understood to mean either (a) "events occurring in Europe before 1 January 1951"; or (b) "events occurring in Europe or elsewhere before 1 January 1951"; and each Contracting State shall make a declaration at the time of signature, ratification or accession, specifying which of these meanings it applies for the purpose of its obligations under this Convention. (2) Any Contracting State which has adopted alternative (a) may at any time extend its obligations by adopting alternative (b) by means of a notification addressed to the Secretary-General of the United Nations.

Primarily, the refugee definition is derived from the Refugee Convention, which shifted slightly from the 1933 definition of refugees. The latter applied specifically to "to Russian, Armenian and assimilated refugees, as reflected in the Arrangements of May 12th, 1926, and June 30th, 1928."[525] It equally articulated some aspects of the IRO Constitution on the definition of refugees and displaced persons as indicated in the Economic and Social Council (ECOSOC) of the United Nations. [526] Thus, the latter defines refugees to apply to:

> a person who has left or who is outside of his country of nationality or of former habitual residence, and who whether or not he has retained his nationality, belongs to one of the following categories:

[525]1933 Convention *supra* note 14 at art. 1.

[526] IRO, *supra* note 323; Musalo et aal, *supra* note 10 at 31-33; *Zhang Jian Xie v. INS,* 434 F.3d 136, 140-41 (2d Cir. 2006).

(a) Victims of the Nazi or fascist regimes or of regimes which took part on their side in the second world war, or of the quisling or similar regimes which assisted the United Nations, whether enjoying international status or not;

(b) Spanish Republicans and other victims of the Falangist regime in Spain, whether enjoying international status as refugees or not;

(c) Persons who were considered "refugees" before the outbreak of the second world war, for reason of race, religion, nationality, or political opinion.[527]

Section B defined displaced persons complying with the meaning under Part 1, Section A, paragraph 1(a). It added that such persons "may have been deported or obliged to leave his country of nationality or habitual residence, such as persons who were compelled to undertake forced labour or who were deported for racial, religious, or political reasons."[528] Other categories of persons contemplated were "unaccompanied children who are orphans or whose parents have disappeared, and who are outside their countries of origin,"[529] persons of Jewish origin or foreigners or stateless persons who have resided in Germany or Austria and were victims of Nazi persecution or were detained for a similar purpose or obliged to flee those countries as a result of persecution.[530]

The IRO Constitution essentially defined refugees by enumerating the categories of the direst protective needs of persons affected by events of World War II and the Holocaust. Contemporary refugee definition draws from this standard but limited the grounds of refugee

---

[527] *Id.* at Part I, Section A(1)(a-c). Displaced persons here also include persons who are outside their country of nationality or former habitual residence, and who, as a result of events subsequent to the outbreak of the second World War, is unable or unwilling to avail himself the protection of his country of nationality or former nationality. *Id.* Part I(2).
[528] *Id.* at Section B.
[529] *Id.* Part 1, Section A(4).
[530] *Id.* Part 1, Section A(3).

protection to—race, nationality, religion, political opinion, and membership in a particular social group. By implication, it retained a Eurocentric focus on the refugee definition. Tracing history behind the limited classification, the 1933 Convention of the League of Nations framed the status and criteria of a refugee on the events of a particular history, reflecting the events of WW 1. It was on this premise that Hathaway argued that the Refugee Convention gave priority to the protection of persons whose persecution and flight were motivated by pro-Western political values.[531] By implication, the restriction of the scope of international refugee protection to pro-Western ideology and circumstances that provoked its creation apparently narrowed the perception of post-World War II refugees and the construction of the humanitarian protection beyond the pro-European countries. Whereas the Eurocentric conceptualization of refugee status addressed World War II related humanitarian issues, the solutions were not gender responsive. The restricted threshold eliminated the needs of emerging refugees, whose flight circumstance(s) may emanate from issues outside the five enumerated grounds or other events are unrelated to those that had occurred then in Europe.[532]

Evidently, the lack of gender visibility in the definition of refugees showed that the status of millions of women and girls who were survivors of sexualized persecution such as the "comfort women" during World War II[533] were excluded from protection, so also in the future. Such framing of a "he-category" refugee definition is gender specific and discriminatory. Although the consequences of the holocaust and the effects of World War II produced an

---

[531] JAMES C. HATHAWAY, THE DEVELOPMENT OF THE REFUGEE DEFINITION IN INTERNATIONAL LAW, THE LAW OF REFUGEE STATUS 6 (BUTTERWORTHS CANADA, 1993).
[532] 1951 Convention, *supra* note 12 at art. 1A & B.
[533] *Military Sexual Slavery, 1931-1945,* COLUMBIA LAW SCHOOL, CENTER FOR KOREA LEGAL STUDIES, Military Sexual Slavery, 1931-1945 | Korean Legal Studies (columbia.edu). From 1931 to 1945 between 50,000 and 200,000 girls and young women, sarcastically framed comfort women, were forced into sexual servitude in the Japanese military brothels. The victims were systematically raped and abused by the military personnel.

unprecedented humanitarian crisis for men and women, the latter is disadvantaged. The Refugee Convention made no consideration for women. Subsequent attempts by the UNHCR to create gender viability under a particular social group ground[534] have been unsuccessful as proven by many barriers in domestic interpretations, especially in the United States jurisprudence.[535]

Besides, the omission of sex or gender as a ground of persecution, Article 1B(1) restricted the applications to the "events occurring in Europe before 1 January 1951."[536] Not until after fifteen years after the establishment of the 1967 Protocols that the limitations with time and space were removed to make the definition of refugees applicable to aliens from all regions of the world. The 1967 Protocol removed geographical and periodic limitations that restricted refugees to only persons whose migration was prompted by persecutions relating to Europe's pre-1951.[537] Even with this expansion, the constraints on the status and grounds of refugee protection did not receive any substantive reform. Hence, the Convention has remained exclusive and not inclusive for all categories of refugees in dire need of protection. This makes the current Refugee Convention problematic.

Nonetheless, countries like the United States,[538] Canada[539] and Australia[540] have traversed the limited scope of refugee definition through progressive legislation. For example, the 1980 Refugee Act made provisions for categories of humanitarian claims such as the

---

[534] 2002 UNHCR Guidelines, *supra* note 116 at para. 9.
[535] In *re A-B- supra* note 56*; A-R-C-G-*, *supra* note 124; *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).
[536] 1951 Convention, *supra* note 12 art. 1B(1).
[537]The 1967 Protocol removed the temporary and geographical, giving the Convention a universal application. The term "refugee" shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country...." 1967 Protocol, *supra* note 17 at art. I(1).
[538] *See, e.g.,* INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m) protection for survivors of crime, self-petition for survivors of domestic violence INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J).
[539] *Canada (Attorney General) v. Ward,* 2 SCR 689.
[540] *Minister of Immigration and Multicultural Affairs v. Khawar* [2002] HCA 14.

survivors of victims of crimes,[541] domestic violence,[542] natural disasters[543] or alien children who seek protection from violence and abuses.[544] Although as subsequent discussions will demonstrate, impacts of the Convention's restrictive scope still undermine its gender jurisprudence. Nonetheless, the responsive actions to mitigate the limitations of the Refugee Convention are worth noting. But given the changing circumstances in humanitarian, this study investigates the fate of "unConvention" refugees excluded from the framework of humanitarian protection, especially women, other survivors of gender-based violence, human trafficking, crime-related persecutions, and unaccompanied children. While this Chapter explores how courts have interpreted persecution affecting different categories of persons, Chapters Four and Five subsequently examine how adjudicators have pushed the boundaries of the nexus threshold.

Comparably, the regional instruments differed from IRL. The former created expansive scope for the framing of refugee identity. For example, Article 1(1)-(2) of the OAU Convention Governing the Specific Aspects of Refugees Problems in Africa (OAU Convention) and the Cartagena Declaration departed from the limitations of the Refugee Convention.[545] Whereas, the

[541] INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m).
[542] US Congress enacted Violence Against Women Act of 1994 to protect immigrants/immediate relatives who are victims of human rights abuses in the hands of US citizens (USC) or legal permanent residence (LPR) and to provide them a pathway to permanent residency. The Act was updated in 2000 under the Battered Immigrant Women Protection Act of 2000 and the Violence Against Women Reauthorization Acts of 2005 and 2013. The latter authorized "self-petition" for victims to prevent an abuser from frustrating the immigration process. *See, e.g.,* INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g). A VAWA petitioner may seek adjustment of status under INA § 245(a). If such victim is under removal proceeding, he or she can seek VAWA Cancellation of removal under INA § 240 A (b)(2); 8 CFR § 1229(b)(2).
[543] Humanitarian parole or temporary protected status are granted to victims of disaster and humanitarian emergency. *See, e.g.,* INA § 244; 8 CFR § 244. Such alien may equally claim asylum if they meet the requirement of refugee. *See, e.g.,* INA § 101(a)42(A); 8 CFR § 208. If such alien is under a removal proceeding, he or she may equally seek withholding removal under INA § 241(b)(3); 8 CFR §§ 208; 1208.16(b).
[544] Unaccompanied refugee children or undocumented children who are victims of human rights abuses may claim humanitarian protection under Special Immigrant Juvenile Status (SIJS). *See, e.g.,* INA §§ 101(a)(27)(J); 245(h); 8 CFR § 204.11.
[545] Article 1(A)(2) of the 1951 Convention defined refugees as individuals outside their countries of origin or original habitual place of residence, possessing a "well-founded fear" of being persecuted on account of the five enumerated grounds. By implication, thousands of persons who may be uprooted by conflicts or displaced within their countries are excluded from this scope.

Convention's restrictive scope of humanitarian protection uprooted thousands of potential refugees from its structure of refugee definition. In contrast, Article 1(2) of the OAU Convention incorporated victims of armed conflicts, external aggression, occupation or foreign domination to the identity of refugees.[546] Similar flexibility is reflected in the Colloquium adopted by the Cartagena Declaration on Refugees (CDR), which cited Article 1 paragraph 2 the OAU Convention, in an attempt to address the surge of refugees whose flights were motivated by human rights violations in the 1980s.[547] Ideally, the CDR established significant connections between refugee definition with norms of international human rights law.[548] The provision created viability for survivors of human rights violations to claim refugee status by demonstrating a WFF for persecution, contrary to the Convention.[549]

The collective purpose of humanitarian protection whether for refugees or other survivors of conflicts, and human rights violations is to protect individuals from persecution, torture, and threat to life or freedom.[550] Thus, the protection of refugees from persecution is central in international law and create an intersection between IRL, international humanitarian law (IHL), and international human rights law (IHRL). The relationship signifies what Jennifer Moore conceptualized as "sister fields of international law."[551] While IRL is a subsect of international human rights law, its primary purpose to preserve the rights and dignity of refugees from

---

[546] …anyone meeting the 1951 Convention Article 1 definition. The term refugee shall also apply to every person, who owing to external aggression, occupation, foreign domination, or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of origin and nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality.
[547] Musalo et aal., *supra* note 3 at 62.
[548] *Id.* at 63.
[549] JENNIFER MOORE, HUMANITARIAN LAW IN ACTION WITHIN AFRICA 153-74 (Oxford University Press 2012)
[550] 1949 Geneva IV, *supra* note 487, art. 3 protect persons not taking active part in hostilities and prohibits any form of attack or violence on such persons; 1951 Convention, supra note 12 art. 33(1) prohibits rejection or refoulement of refugees to frontiers where they would face danger or threat to life or freedom.
[551] Moore, *Op. Cite.*

persecution has not received holistic consideration. Therefore, rearticulating the scope of inclusion is necessary given that people become refugees not by choice but by persecutory circumstances as well as the unwillingness or inability of native governments to offer them the required protections from persecution. Generally, IRL guarantees the rights to nonrefoulement and the discretion to asylum. Article 34 urges State Parties to create pathways to the assimilation and naturalization of refugees in host countries.[552] Thus, destination countries are obligated by the Convention to exercise a fair discretion in granting asylum and to prevent refoulement of aliens who show a WFF for persecution.[553]

1.3 **Asylum and the Right to Protect Refugees**

Certain rights accrue once a refugee enters the territory or jurisdiction of a State Party. As earlier indicated Article 34 of the 1951 Convention enjoins Contracting Parties to "as far as possible facilitate the assimilation and naturalization of refugees" and "to make every effort to expedite the naturalization proceedings and to reduce the cost of such proceedings."[554] For full disclosure Article 34 does not create an absolute obligation on states to grant asylum. Rather the right remains discretional. Therefore, the duty to process the determination of status and assimilation rests on individual asylum seekers.[555] Given that the term refugee exists within the meaning of Article 1A(2), any person who fulfilled the condition is deemed to be a refugee by declaration even before a formal determination of status. An alien who is physically present in an asylum state or seeking entrance at a border, who demonstrates a WFF for persecution is potentially assumed to be an asylum seeker.[556] While such a person is protected from

[552] 1951 Convention, *supra* note 12 at art. 34.
[553] *Id.* art. 33(1).
[554] 1951 Convention, *supra* note 12 at art. 34.
[555] *Id.*
[556] *Id.* at 34.

refoulement[557] or punitive measures on account of "illegal" entry or presence,[558] the grant of asylum is determined through a procedural process.

Under the United States asylum law, for instance, any alien who is physically present in the United States who arrives at the United States whether or not at the designated port of entry or after having been interdicted in waters, irrespective of the alien's status, may apply for asylum.[559] Generally, the United States refugee law has two procedures from admitting refugees—either by asylum[560] or withholding removal.[561] The Attorney General (AG) may grant asylum to an alien in accordance with the statutory procedures and having met the definition of a refugee under INA 101(a)(42)(A). Even where the conditions are not met, the AG may withhold removal upon finding that such a removal could result in the alien's life or freedom being threatened.[562] To meet the eligibility criteria for asylum, an individual must demonstrate that he or she is a Convention refugee as reproduced in INA § 101(a)(42), 8 U.S.C §1101(a)(42). But for eligibility for withholding, an individual must meet a higher standard of showing a "threat to life and freedom."[563] While asylum may lead to acquiring a lawful permanent resident status, withholding removal only prevents the return of an alien to where "his" life or freedom would be threatened. [564] Again, an asylum confers derivative status to a beneficiary's spouse or (and) child but withholding does not extend any beyond the prohibition of removal of an applicant.[565]

[557] *Id.* at art. 33(1).
[558] *Id.* at art. 31(1) [stating that "[T]he Contracting States shall not impose penalties, on account of their illegal entry or presence, on refugees who, coming directly from a territory where their life or freedom was threatened in the sense of article 1, enter or are present in their territory without authorization, provided they present themselves without delay to the authorities and show good cause for their illegal entry or presence.]
[559] INA § 208; 8 U.S.C § 1158.
[560] *Id.*
[561] INA § 241(b)(3); 8 U.S.C.
[562] *Id.*
[563] Musalo et aal, *supra* note 10 at 99; *Elias-Zacarias*, *supra* note 212 at 478, 812.
[564] 8 U.S.C. § 1253(h)(1) (2012); *American Courts and The U.N. High Commissioner for Refugees: A Need for Harmony in The Face of a Refugee Crisis,* 131, HARV. L. REV. 1401, 1399-1420 (2018).
[565] Musalo, *supra* note 10 at 99.

A person who fulfills the criteria of a refugee is protected from discrimination pursuant to Article 3. Although Article 3 retained the lacuna of Articles 1.A(2) and 33(1) that exclude certain categories of persons from the refugee definition, which makes the Convention's scope of nondiscrimination discriminatory. Nonetheless, each state makes yearly policy arrangements for the number of admissions and resettlement with the cooperation of the UNHCR. While State Parties may exercise their duty of surrogate protection towards resettling preselected refugees, incidences of an unauthorized influx of refugees and trans-national mobility continue to storm the borders of European countries and North America.[566] Therefore, the need to balance the causes and effects of forced migration with the humanitarian needs, as well as rights of refugees, requires evaluation and compromise.

One of the critical issues considered by the Drafters of the Refugee Convention was the assessment of the circumstances of the refugee movement and admission. Commenting on this, the Belgian Representative, Mr. Cuvelier stated that:

> [T]he initial reception countries were obliged to give shelter to refugees who had not, in fact, been properly admitted but who had, so to speak, imposed themselves upon the hospitality of those countries. As definition of refugee made no distinction between those who had been properly admitted and others, however, the question arose when the initial reception countries would be required under the convention to grant the same

[566] UNHCR, *Europe,* THE UN REFUGEE AGENCY, USA, https://www.unhcr.org/en-us/europe.html [stating that over 12 million people of concern to the UNHCR are living in Europe]; Astounz, *Refugee and Global Migration,* WAC, https://wachouston.org/student-resources/discussions/memberships-landing-page-3/?gclid [stating that authorized migration into the United States borders has reached an overwhelming peak in the United States, since the crisis in Syria, Ukraine, the pandemic and climate change.]

protection to refugees who had entered the country legally and those who have done so without prior authorization.[567]

The duty to protect both authorized and unauthorized refugees received unanimous affirmation during the drafting process. Humanitarian protection as reflected here is inclusive, hence extends to all refugees within the territory of a state that are seeking admission into a state.[568] Although such refugees may automatically obtain the rights of "regularly admitted" refugees, that is those pre-selected and authorized to enter as refugees, they are authorized by the Convention to pursue a due process of determination of their status. Thus, Article 16 of the Convention gives refugees free access to courts in the asylum state.[569]

Ideally, every refugee is a potential asylum-seeker. Therefore, to protect refugees, asylum-seekers must equally "be treated on the assumption that they may be refugees until their status has been determined."[570] Otherwise, the concept of nonrefoulement would not make sense or provide effective protection for refugees. Hence, a misapplication would result in applicants being rejected at borders or otherwise returned to persecution on the grounds that their claim has not been established. Because of this, the UNHCR stressed the obligations of State Parties to admit and protect aliens who by their circumstances meet the presumption of refugees, until their status is determined. Of course, such responsibility can be relieved or reinforced through expedited determination. However, the Convention's protective rights may be withdrawn on

---

[567] Statement of Mr. Cuvelier of Belgium UN Doc. E/AC/ 32/SR.7, Jan. 23, 1950, at 12; Hathaway, 22 at 157.
[568] '"It did not, however, follow that the convention would not apply to persons fleeing from persecution who asked to enter the territory of the contracting parties ... [W]hether or not the refugee was in a regular position, he must not be turned back to a country where his life or freedom could be threatened'': Statement of Mr. Henkin of the United States, UN Doc. E/AC.32/SR.20, Feb. 1, 1950, at 11–12, Hathaway, *supra* note 8 at 157.
[569] 1951 Convention, *supra* note 10 at art. 16(1) [stating that [A] refugee shall have free access to the courts of law on the territory of all Contracting States.]
[570] UN HIGH COMMISSIONER FOR REFUGEES (UNHCR), *Note on International Protection* (submitted by the High Commissioner), 31 August 1993, UN Doc. A/AC.96/815, at para. 11 (1993).

grounds of national security pursuant to Articles 33(2) and 32(1),[571] which create a bar to humanitarian protection.

In practice, refugees in many countries face different challenges including punitive detentions while waiting for the validation of their status.[572] According to the Convention, the rights of refugees accrue by their circumstances and physical presence in host states and are not predicated upon the regularization of their status.[573] Chapter Seven re-evaluates the domestic application of these rights. Interpreting the basic elements of asylum, the analysis of the significant aspects of refugee definition is imperative such as a.) a WFF for persecution, b.) past persecution and risk of future persecution upon return, c.) on account of race, nationality, religion, membership in a particular social group and political opinion, and d.) wherein the persecutor is a government actor or a non-government actor whom the government is unwilling or unable to control.[574] In determining refugee eligibility, the refugee or asylum seeker bears the burden of proof to show that he or she meets the credibility requirements; this may shift.[575]

1.4 **Principle of Nonrefoulement**

The principle of nonrefoulement is the foundation of IRL. Its key tenet cuts across international human rights, humanitarian, and customary international law. Essentially, nonrefoulement prohibits the returning, transferring, or removing a protection seeker from the jurisdiction of the asylum state to the frontiers where there are substantial grounds to believing

---

[571] 1951 Convention, *supra* note 12 art. 32(1) [provides that "[T]he Contracting States shall not expel a refugee lawfully in their territory save on grounds of national security or public order."]
[572] *See e.g.*, *Krishnapillai v. Minister of Citizenship and Immigration,* [2002] 3(1) FC 74 (Can. FCA, Dec. 6, 2001), in which the court expressed the view that ''in a case involving a Convention refugee claimant and not, as in this case, a Convention refugee ... [t]he Convention ... did not apply.''
[573] 1951 Convention, *Op Cite* at art. 1. A(2); *Note on International Protection*, *Op Cite* at para. 11; Hathaway, *supra* note 8 at 159.
[574] *Id.* at art. 1A(2).
[575] *Matter of Fefe*, 20 I&N Dec. 166, 118 (BIA 1989).

that the individual's life or freedom may be threatened.[576] The purpose of this law is to prevent the risks of returning a refugee to irreparable harm, torture, a threat to freedom, and other human rights violations. Article 33(1) of the 1951 Convention[577] explicitly provides that:

> 1. No Contracting State shall expel or return ('refouler') a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.[578]

In analyzing the literal meaning of nonrefoulement, four things come into mind—first, the person entitled to protection against refoulement, second the grounds for eligibility, three, what would constitute a threat to life or freedom, and finally the frontiers of territories. The Convention uses a gender exclusive pronoun "his" to identify the characteristic of a human beneficiary of nonrefoulement. Although the UNHCR Advisory Opinion clarified that Article 33(1) applies to any person who meets the definition of a refugee in Article 1A(2),[579] and is not excluded in Article 1F or 33(2),[580] the gender implications of the he-personification of refugees per the Refugee Convention will be reviewed subsequently.

---

[576] *See, e.g.,* 1951 Convention, *supra* note 10 at art. 33(1).
[577] 1967 Protocol, *supra* note 17 at art. I(1) [States Party to the Protocol undertake to apply the 1951 Convention].
[578] 1951 Convention, *supra* note 10 at art. 33(1); 1967 Protocol, *supra* note 16 at art. 1(1).
[579] *Id.* at art. 1A(2); Inclusion criteria under this provision is also incorporated into Article 1 of the 1967 Protocol, the term "refugee" shall apply to any person who "owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his [or her] nationality and is unable or, owing to such fear, unwilling to avail him [or her]self of the protection of that country...;" UNHCR Advisory Opinion on Nonrefoulement, *supra note* 23 at para 6.
[580] *Id*. at 2 at para 6; Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A(2) of the 1951 Convention, but who are not eligible for protection under the Convention because - they are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because - they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or

Nonrefoulement is relevant to asylum seekers. Because of this, the principle applies not only to recognized refugees but to those for whom their status is yet to be determined. However, the obligations of Article 33(1) do not entail the rights of individuals to be granted asylum in host states,[581] but a duty to protect such persons from imminent persecution consequent upon return or transfer. Nonetheless, the grant of asylum remains discretional for host states. But even where an asylum seeker is judged evidentially unfit and unqualified for asylum, a host state is obligated to adopt measures that do not result in refoulement of aliens to where there is substantial ground to believe that such a person would face persecution, a threat to life, or freedom. Hence, the primary purpose of the refugee law is to protect aliens who meet these requirements from "(i) a threat of persecution; (ii) a real risk of torture or cruel, inhuman, or degrading treatment or punishment; or (iii) a threat to life, physical integrity, or liberty."[582] As earlier indicated, the principle of nonrefoulement forms the hallmark of IRL and applies *mutatis mutandis* to other relevant international law.[583]

Under the United States 1980 Refugee Act,[584] the Congress amending the Immigration and Nationality Act (INA),[585] made it mandatory rather than discretionary for the A.G. to

because - they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention).

[581] PAUL WEIS, THE REFUGEE CONVENTION, 1951: THE *TRAVAUX PRÉPARATOIRES* ANALYSED WITH A COMMENTARY BY DR. PAUL WEIS, 341 (CAMBRIDGE PRESS 1995); UNHCR Advisory Opinion on Nonrefoulement, *supra note* 23 at para 8.

[582] Lauterpacht and Bethlehem, *supra* note 41 at 150 (2003).

[583] The principle of nonrefoulement is an inherent component of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment. *See, e.g.,* CAT, *supra* note 165 at art. 3(1) provides that [No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.]; Derogations during a State of Emergency, General Comment No. 29, HUMAN RIGHTS COMMITTEE, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11, art. 4 [The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, para. 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant].

[584] The 1980 Refugee Act was enacted to bring US to compliance with the obligations in the 1967 Protocol, thus incorporating verbatim its definition of a refugee and grounds for refugee protection. 8 USC 1101 Refugee Act of 1980, *96th Congress* (March 17, 1980); Pub. L. No. 96-212, 94 Stat. 102; *Cardoza-Fonseca,* 480 U.S. at 429

[585] 66 Stat. 163 (1952), *Op Cite* (codified as amended in scattered sections of 8 U.S.C.).

withhold deportation of a foreign national, having met the refugee requirements, "if the Attorney General determines that such alien's life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group, or political opinion."[586] Except for overriding reasons of public safety and national security, the principle of nonrefoulement admits no derogation.[587] Even in extreme circumstances where exception is permitted, refoulement is applied with caution and construed restrictively following due process of law that may even require securing transfer of the concerned aliens to a safe third country.[588] This forms the benchmark for evaluating the United States application of nonrefoulement in the subsequent Chapter especially following a recurrent trend of mass deportations under Title 42.

Generally, Parties to the 1951 Convention and the 1967 Protocol willingly demonstrate commitment to respect the principles of nonrefoulement, which include providing access to aliens seeking protection and preventing their being returned to frontiers of risks. States' duty to grant access to territory, therefore, entails an obligation to provide fair and efficient asylum procedures and withholding removal subject to international obligations and domestic jurisdictions.[589] Such an obligation to nonrefoulement is binding on all State Parties to the 1951 Convention and (or) the 1967 Protocol, as well as on States that are not yet parties to either of the

---

[586] 8 U.S.C. § 1253(h)(1) (2012); *American Courts and The U.N. High Commissioner for Refugees: A Need for Harmony in The Face of a Refugee Crisis,* 131, HARV. L. REV. 1401, 1399-1420 (2018).

[587] 1951 Convention, supra note 12 art. 1F. [Referring to the exclusion criteria. Exclusion from international refugee protection means denial of refugee status to persons who come within the scope of Article 1A(2) of the 1951 Convention, but who are not eligible for protection under the Convention because - they are receiving protection or assistance from a UN agency other than UNHCR (first paragraph of Article 1D of the 1951 Convention); or because - they are not in need of international protection because they have been recognized by the authorities of another country in which they have taken residence as having the rights and obligations attached to the possession of its nationality (Article 1E of the 1951 Convention); or because - they are deemed undeserving of international protection on the grounds that there are serious reasons for considering that they have committed certain serious crimes or heinous acts (Article 1F of the 1951 Convention)].

[588] Lauterpacht and Bethlehem, *supra* note 41.

[589] UNHCR Advisory Opinion on Nonrefoulement, *supra note* 23 at para 8; Article 31 of the 1951 Convention prohibits penalizing asylum seekers for illegal entry.

treaties.[590] The evaluation of the practice of States in Chapters Five and Six with regard to the protection of the rights of refugees will assess the jurisprudential application of nonrefoulement.

In the analysis of legal sources of IRL in Chapter Two, we identified the various perspectives of nonrefoulement from traditional religious norms,[591] international treaty instruments and *jus cogens* principles of customary international law.[592] These demonstrate that prohibition of refoulement is broad, and encompasses all acts of expulsion, forcible removal, deportation, informal transfer, "rendition," extradition or non-admission at the border.[593] Article 3(1) of the Convention Against Torture, Other Inhuman or Degrading Treatment or Punishment(CAT) specifically prohibits repatriation of an alien to "where there are substantial grounds for believing that he would be in danger of being subjected to torture."[594] The proscription of torture is a fundamental aspect of the peremptory norm of customary international law.[595] It applies absolutely to prevent the removal of asylum seekers to countries

---

[590] *Id*. at para 9; Nonrefoulement obligation is binding on States under Article 3(1) CAT to prevent torture. Pursuant to Articles 4–8 of the Articles of State Responsibility, the conduct of a person or group of persons shall be considered an act of a State under international law if the person or group of persons is in fact acting on the instructions of, or under the direction or control of, that State in carrying out the conduct (Articles on State Responsibility, Articles 4–8); *See, e.g.* JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARY (CAMBRIDGE PRESS, UK: 2002). The General Assembly annexed the Articles on State Responsibility to its resolution 56/83 of 12 December 2001 on Responsibility of States for Internationally Wrongful Acts.

[591] Sanctuary practice and the tradition of sheltering migrants fleeing persecution evolved from the ancient Judeo-Christian tradition and the Islamic *Ijara* culture. *see, e.g.,* Musalo eta al, *supra* note 10 at 3.

[592] CAT, *supra* note 165, art. 3(1) [prohibited State Parties from expulsion, return or extradition of a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture. VCLT, *supra* note 171 at art. 53 [defined a "peremptory norm of general international law" as "accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character"]; Evan J. Criddle & Evan Fox-Decent, *supra* note 261.

[593] UNHCR, Advisory Opinion, *supra* note 43, 3 at para 7.

[594] CAT, *Op Cite* 165 at arts. 3(1).

[595] UNHCR, Advisory Opinion, *supra* note 43 note at para. 21; Human Rights Committee, General Comment No. 29: Article 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11, para. 11, 31 August 2001 [stating that "[T]he proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, para. 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant]; ICTY, *Prosecutor v Delalic and Others,* the Trial Chamber, Judgement of 16 November 1998, para. 454; *Furundžija, supra* note 172 at 134–164 (1998); *Kunarac and Others, supra* note 172 at

where they would face persecution.[596] Basically, the protection from refoulement affects all persons irrespective of their citizenship status, nationality, statelessness, or migration status. Also, it pertains to wherever a State can exercise jurisdiction or effective control, even outside of its territory.[597] Therefore, State Parties are barred from enforcing measures of refoulement that would expose an alien to risks of torture and irreparable harm within its territorial boundaries or power control.[598] While the scope of this principle is absolute in all treaties of international law, IRL admits exception subject to criminal conditions or security threat.[599] In contrast, the central obligation not to return a refugee to persecution or torture is nonderogable under IHRL. As an acceptable principle of customary international law, nonrefoulement is binding on States whether they have ratified the 1951 Convention or not.[600] A state that may not have ratified the Convention yet bound to other treaties and local laws that incorporated nonrefoulement.[601] The reason is simply the wide applicability of the peremptory norm to prevent torture and protect the right to life and human dignity.

466; The judgement of the House of Lords in *Pinochet Ugarte, re*. [1999] 2 All ER 97, 108–109; *Filartiga v. Pena Irala*, 630 F.2d 876 (2d. Cir. 1980).

[596] 1949 Geneva IV, *supra* note 487, art. 45; 1951 Convention, *supra* note 12 at art. 33(1); Fernindez-Sinchez, *supra* note 498.

[597] UNHCR Advisory Opinion on Nonrefoulement, *supra note* 23 at paras. 23 & 24; UNHR, The Principle of Non-Refoulement under International Human Right Law.

[598] *Suresh v. Canada (Minister of Citizenship and Immigration),* [2002] 1 S.C.R. 3, 2002 SCC 1; UNHCR Advisory Opinion, *supra* note at para 11; Lauterpacht and Bethlehem, *supra* note 41 para. 159(ii), 166 and 179.

[599] 1951 Convention, *supra* note 12 arts. 1F and 33(2).

[600] UNHCR, HANDBOOK FOR EMERGENCIES, 2007, SECTION ONE - UNHCR PRINCIPLES, (3rd ed.), para. 25, http://www.unhcr.org/publ/PUBL/471db4c92.html.

[601] 1949 Geneva IV, *supra* note at art. 45; Caracas Convention on Territorial Asylum, *supra* note 502; ACHR, art. 22, Freedom of Movement and Residence; CAT, *supra* note 165 at art. 3; IAPP, *supra* note 502 art. 3(1); International Convention for the Protection of All Persons from Enforced Disappearance, 2006, Doc. A/61/488 (not yet in force) art. 16(1) [*hereinafter* "ICPA"]; International Convention for the Suppression of Terrorist Bombings, 1997, 2149 UNTS 284, entered into force 23 May 2001, art. 12.

Equally, international human rights treaties, as well as judicial institutions, recognize the intrinsic principles of nonrefoulement[602] for the preservation of life and prevention of torture.[603] Article 7 of the 1966 International Covenant on Civil and Political Rights gives affirmation to Article 3(1) of CAT, stating that "[n]o one shall be subjected to torture or cruel, inhuman or degrading treatment or punishment."[604] Article 33(1) has been incorporated into several human rights treaties including extradition treaties[605] and anti-terrorism law.[606] Also, given its fundamental nature, the UN Human Rights Committee recognized nonrefoulement components under its human rights structure.

Except for overriding reasons of public safety and national security, the principle of nonrefoulement admits no derogation.[607] Even in extreme circumstances where an exception is permitted, refoulement is applied with caution and construed restrictively following due process

---

[602] *See, e.g.,* ACHR, *supra* note 81 at art. 22(8) [on prohibition of refoulement]; IAC, *supra* note at art. 13(4); Charter of Fundamental Freedoms of the European Union, 2012, O.J. C 326/391, art. 19(2); ICPA, *supra* note 601 art. 16.

[603] *See, e.g., Chahal v. United Kingdom,* Application No. 22414/93, Nov. 15, 1996, 75-82 (holding that the prohibition against refoulement of a person to a territory where he or she would face a real risk of torture admits no exceptions or derogations and applies even when the person poses a threat to national security); *Soering v. United Kingdom,* Application No. 14038/88, July 7, 1989, 88 (stating that extradition violates the ECHR when it subjects a victim to "a real risk of exposure to inhuman or degrading treatment or punishment" in the receiving state).

[604] CAT, *supra* note 73 at art. 3(1).

[605] *See, e.g.,* 1957 European Convention on Extradition, art. 3(2), ETS 024, 359 U.N.T.S. 273 entered into force 18 April 1960 [stating that "[E]xtradition shall not be granted if the requested Party has substantial grounds for believing that a request for extradition for an ordinary criminal offence has been made for the purpose of prosecuting or punishing a person on account of his race, religion, nationality or political opinion, or that that person's position may be prejudiced for any of these reasons."]; 1981 Inter-American Convention on Extradition, art. 4(5), 20 I.L.M. 723 (1981), entered into force 28 March 1992 [stating that "[E]xtradition shall not be granted … when, from the circumstances of the case, it can be inferred that persecution for reasons of race, religion or nationality is involved, or that the position of the person sought may be prejudiced for any of these reasons."]

[606] *See, e.g.,* International Convention against the Taking of Hostages, 1979, 1316 U.N.T.S. 205, entered into force 3 June 1983, art. 9(1); 1997 International Convention for the Suppression of Terrorist Bombings, I.L.M. 249 (1998), entered into force 23 May 2001, art. 12, 37 [stating that "[N]othing in this Convention shall be interpreted as imposing an obligation to extradite or to afford mutual legal assistance, if the requested State Party has substantial grounds for believing that the request for extradition for offences set forth in article 2 or for mutual legal assistance with respect to such offences has been made for the purpose of prosecuting or punishing a person on account of that person's race, religion, nationality, ethnic origin or political opinion..."); International Convention for the Suppression of the Financing of Terrorism, 1999, art. 15, 39 I.L.M. 270, entered into force 10 April 2002.

[607] 1951 Convention, *supra* 12 note 1 at art. 1F. [Referring to the exclusion criteria.].

of law that may even require securing transfer of the concerned aliens to a safe third country.[608] Article 1F and Article 33(2) of the 1951 Convention[609] create exceptions to nonrefoulement. In contrast, a similar provision under Article 3(1) of the CAT admits no derogation.[610] Hence, nonrefoulement under international human rights creates illimitable obligations on Parties at all times to prevent its violations.[611] The implication is that the restrictions of Articles 33(2) and 1F neither affect the obligation of host States to nonrefoulement, nor vitiate its non-derogability.[612] Article 42(1) of the Convention affirmed the non-derogable character of Article 33(1) by classifying under the provisions to which no reservations are permitted. This position was reflected by the United Nations General Assembly[613] and in the several Conclusions of the Executive Committee to the UNHCR since 1977.[614]

---

608 Lauterpacht and Bethlehem, *supra* 62 note 36.

609 Stating that "[T]he benefit of [Article 33(1)] may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he [or she] is, or who, having been convicted by a final judgement of a particularly serious crime, constitutes a danger to the community of that country."

610 *Id.* at para. 20; General Comment No. 31 on the Nature of the General Legal Obligation on States Parties to the Covenant, 26 May 2004, U.N. Doc. CCPR/C/21/Rev.1/Add.13, para. 12.

611 *See, e.g.,* Committee Against Torture, General Comment No. 4 on the Implementation of Article 3 of the Convention in the Context of Article 22, 8, 9 (2017) [asserting that "no exceptional circumstances whatsoever, whether a state of war or . . . any public emergency, may be invoked as a justification of torture…[t]he principle of non-refoulement . . . is . . . absolute"], [*hereinafter* "General Comment No. 4"].

612 *Németh v. Canada, Supreme Court of Canada* 2010 SCC 56. 3 SCR 281 (2010); *Suresh, supra* note [stating that deportation or extradition cannot be permitted where there exist grounds to believe that such would expose an alien to risk of being tortured].

613 A/RES/51/75, 12 February 1997, para. 3; A/RES/52/132, 12 December 1997, at preambular para. 12.

614 *See, e.g.,* UNHCR Advisory Opinion on Nonrefoulement, *supra note* 23 at para 12; Executive Committee, Conclusion No. 6 (XXVIII), (1977), para. (c) (reaffirming "the fundamental humanitarian principle of non-refoulement has found expression in various international instruments adopted at the universal and regional levels and is generally accepted by States."); Conclusion No. 17 (XXXI) "Problems of extradition affecting refugees" (1980), at. para (b) (reasserting "the fundamental character of the generally recognized principle of nonrefoulement."); Conclusion No. 25 (XXXIII) "General" (1982), para. (b) (reaffirming "the importance of the basic principles of international protection and in particular the principle of nonrefoulement which was progressively acquiring the character of a peremptory rule of international law."); Conclusion No. 65 (XLII) "General" (1981), para. (c) (emphasizing "the primary importance of non-refoulement and asylum as cardinal principles of refugee protection…"); No. 79 (XLVIII) "General" (1996), para. (j) (reaffirming "the fundamental importance of the principle of non-refoulement); No. 81 (XLVIII), supra footnote 14, para. (i) (recognizing "the fundamental importance of the principle of nonrefoulement"); No. 103 (LVI) "Provision of International Protection Including Through Complementary Forms of Protection" (2005), at (m) (calling upon States "to respect the fundamental principle of non-refoulement"). 21, A/RES/51/75, 1.

Nonrefoulement is profoundly relevant to international humanitarian law. Article 45 of the Fourth Geneva Convention relative to the Protection of Persons in Time of War[615] prohibits the transfer of refugees or protected persons to State powers that are not Parties to the Convention.[616] Thus, the provision is consistent with nonrefoulement obligations in IRL. Other international frameworks like the 1966 Principles Concerning the Treatment of Refugees adopted by the Asian-African Legal Consultative Committee[617] and the 1967 Declaration on Territorial Asylum[618] expressly proscribed refoulement directly or indirectly.

Other regional instruments like the 1969 OAU Convention[619] and the 1969 American Convention on Human Rights[620] explicitly prohibit deportation, rejection or any measures of return that would expose a protection seeker to risks of persecution or harm. Likewise, the protection rights under Article 3 of the 1950 European Convention for the Protection of Human Rights and Fundamental Freedom (ECHR) were interpreted by the European Court of Human Rights (ECtHR) in *Soering v. United Kingdom* to impose a nonrefoulement obligation.[621]

Notably, the jurisdiction of nonrefoulement draws from a range of human rights instruments that protect the right to life. These include deportation, or forceful return to torture, other cruel, inhuman or degrading treatment,[622] risks of violation of the right to life,[623] integrity,

---

[615] 1949 Geneva IV, *supra* note 487.
[616] "[...] in no circumstances shall a protected person be transferred to a country where he or she may have reason to fear persecution for his or her political opinions or religious beliefs."
[617] Report of the Eighth Session of the Asian-African Legal Consultative Committee held in Bangkok, 8–17, 335 Aug. 1966, [hereinafter "Asian-African Refugee Principles"], art. III(3) [reiterated the principle of norefoulement].
[618] Unanimously adopted by the United Nations General Assembly (UNGA) as Resolution 2132 (XXII), 14 December 1967, 3 art, 3.
[619]OAU Convention, *supra* note 445, 4 art. II(3).
[620] ACHR, *supra* note 460 at art. 22(8).
[621] *See, e.g., Soering, supra* note at 88; Lauterpacht and Bethlehem, *supra* note 41 at 92; *Cruz Varas v. Sweden* [1991], 201, 108 ILR 283, para. 69; *Ahmed v. Austria* [1997], Reports of Judgments and Decisions 1996, VI; 24 EHRR 278, at paras. 39–40; *T.I. v. United Kingdom,* [2000] INLR 211.
[622] *Cardoza-Fonseca, supra* note 584 at 62.
[623] Human Rights Committee, General Comment No. 31, para 12.

and freedom,[624] including the serious forms of sexual or gender-based violence, [625] female genital cutting,[626] death penalty,[627] prolonged solitary confinement[628] and access to a fair trial.[629] In some cases courts and human rights institutions have construed credible fear for extreme violations of economic, social and cultural rights to fall within the scope of protection from refoulement because of their inextricable connection with the violation of the right to life or freedom from torture, other inhuman or degrading treatment. For instance, the fear of being deprived of access to medical treatment,[630] degrading living conditions,[631] or mental illness[632] have been recognized as viable grounds for preventing return or deportation. International law gives significant attention to persons of concern in determining nonrefoulement claims, such as unaccompanied minors and other children. Because of the sensitive nature of such claims, states are enjoined to refrain from measures of return or deportation of minors that would result in risks and violations of their fundamental rights. Due consideration is, therefore, given to policies of nonrefoulement that are in the best interest of children, especially unaccompanied minors.[633] Subsequent discussion examines how the sensitivity of asylum and nonrefoulement principles are articulated in the interpretation of persecution.

---

[624] Inter American Convention on Human Rights, art. 22(8). IACtHR, Pacheco Tineo Family v. Bolivia, Judgment of November 25, 2013, para 135.
[625] General Recommendation No. 32, para 2, CEDAW 3 *Njamba and Balikosa v Sweden,* 322/2007 [2010] para 9.5.
[626] Human Rights Committee, *Kaba v Canada,* 21 May 2010, para 10.1; CEDAW, General Recommendation No. 32, para 23; *In re Fauziya Kasinga* 21 I. & N. Dec. 357 (BIA 1996).
[627] Human Rights Committee, *Judge v Canada,* 829 [2003] para 10.3; ECtHR, *Soering, supra* note 83 at para 111.
[628] Human Rights Committee, General Comment No. 20, 1994, para 6.
[629] ECtHR, *Othman (Abu Qatada) v United Kingdom,* 8139/09, [2012] para 235, 258.
[630] Human Rights Committee, *C v Australia,* 900/1999; ECtHR, *Paposhvili v Belgium,* 41738/10, [2016], IACtHR, Advisory Opinion OC-21/14, 19 August 2014, para 229.
[631] ECtHR, *MSS v Belgium and Greece,* 30696/09 [2011].
[632] Human Rights Committee, *A.H.G. v Canada,* 2091/2011 [2015] para 10.4.
[633] CRC, General Comment No. 6, para 27 (*see also* para 84).

3.5 Defining Persecution

Persecution is a key aspect of IRL. To meet eligibility for asylum or protection against refoulement an alien must show that he or she meets the requirements of the Convention having suffered persecution in the past or demonstrates a WFF for future persecution upon return. Articles 1A(2) and 33(1) emphasized that such persecution or fear of persecution would be "on account of race, religion, nationality, membership in a particular social group or political opinion."[634] But neither the Refugee Convention nor the 1967 Protocol defined the term "persecution." In fact, the UNHCR Handbook admitted the gap, acknowledging that there is no accepted universal definition for "persecution," hence "various attempts to formulate such a definition have met with little success."[635] Volker Türk and Frances Nicholson further warned that any attempt to define persecution "…could limit a phenomenon that has, unfortunately, itself all too adaptable in the history of humankind."[636] In practice, state jurisprudences have assessed the meaning and scope of persecution based on a case by case analysis. Therefore, in the evaluation of the concept, this study focuses on the different analyses, while seeking to highlight the elements of persecution that gives reasoning to asylum and nonrefoulement.

In the absence of a formal definition, there have been different efforts by scholars and courts to analyze the meaning of persecution. For example, although the United States 1980 Refugee Acts offered no clue to the meaning of persecution, decisions by the Board of Immigration Appeal (BIA) and Circuits, largely deferred to the illustration in the *Matter of Laipenieks.*[637] It defined persecution as "a threat to life or freedom on account race, religion,

---

[634] 1951 Convention, *supra* note 12 at arts. 1A(2) and 33(1); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).
[635] The Handbook, *supra* note 34 at para. 51.
[636] V. Türk & F. Nicholson, *Refugee protection in international law: an overall perspective* E. FELLER, V. TÜRK & F. NICHOLSON (eds.), REFUGEE PROTECTION IN INTERNATIONAL LAW 39, PPT 5 (CAMBRIDGE PRESS, 2003).
[637] *Matter of Laipenieks*, 18 I&N Dec. 433, 457 (BIA 1983).

nationality, political opinion or membership of a particular group" or infliction of suffering or harm on those who share differing identities in a way regarded as offensive.[638] A common denominator in the definitions is that persecution flows from an act of hate and calculated attempt to harm the persecuted. This notion is linked to the Convention's illustration of a WFF. Likewise, Section 5J of the 1958 Australian Migration Act defines persecution within the Convention's meaning of WFF for persecution. According to the Australian Migration Act, a person has a WFF for persecution if he or she "fears being persecuted for the reason of race, religion, nationality, membership of a particular social group or political opinion, and there is a real chance that if the person returned to the receiving country, the person would be persecuted for one or more of the reasons mentioned…."[639]

The UNHCR Handbook affirmed the analysis of persecution from the Convention's import of a refugee and the meaning of nonrefoulement. From the onset, it acknowledged that there is no universally accepted definition for "persecution." Therefore, Paragraph 51 recommended that meaning be inferred from the Convention's five enumerated grounds. It, thus, stated that:

> From Article of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other

---

[638] *Korablina v. INS*, 158 F.3d 1038, 1043 (9th Cir. 1998); *Miranda v. INS*, 139 F.3d 624, 626 (8th Cir. 1998).
[639] 1958 Australian Migration Act, Sect. 5J(a)-(b). Section 5J specifically defines "WFF of persecution." It finds meaning in Section 5H. Migration Act 1958 (Cth), Section 5H defines a refugee as a person who is outside their country of nationality and due to WFF of persecution cannot rely on that country's protection or a person who does not have a nationality and has left their former country of residence and due to a WFF of persecution cannot return there. The definition is similar to Article 1(2) of the Convention and Protocol.

> serious violations of human rights—for the same reasons—would constitute persecution.[640]

The Handbook's conceptualization of persecution within the Convention's five grounds falls within the trappings of sexism by excluding persecutory experiences that are outside the Convention's restricted grounds. Thus, its merger of the Convention and other human rights frameworks does not obviate the problem. Whereas some scholarly views on what constitutes persecution seem to be more integrative, considering that acts that threaten an individual's life, rights, and dignity, whether within or outside the Convention's five grounds would constitute persecution.[641]

3.6 Persecution as Human Right Violation

The views of James Hathaway and Guy Godwin-Gill are significant in the assessment of the human rights perspectives of persecution. Both scholars identified serious violations of human rights or threats to human life and dignity as persecutory.[642] Godwin-Gill argued that although efforts to list all measures of persecution may seem unimaginable, the assessments must take a case by case approach taking into account "the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured." [643] By implication persecution may take varied dimensions, depending on situations and circumstances. Therefore, formulating a close-circuit definition may create a bulwark for case-by-case analysis. Apparently, the precondition for analyzing the circumstance(s) of persecution is the seriousness of a harmful act that constitutes a threat to individual integrity, human life, and

[640] The Handbook, *supra* note 349 at para. 51.
[641] Goodwin-Gill, *supra* note 269 at 69; Hathaway, *supra* note 174 at 112.
[642] *Id.*
[643] *Id.* at 69.

dignity. James Hathaway gives an elaborate definition of this concept. He, thus, stated that "[i]n sum persecution is most appropriately defined as the sustained or systemic denial of basic human rights demonstrative of failure of state protection in relation to one of the core entitlements which have been recognized by the international community."[644] Like Godwin-Gill, Hathaway expanded the import of persecution to include a "sustained or systemic denial of basic human rights demonstrative of failure of state protection."[645]

If we may adopt the Hathaway standard of persecution as human rights denial[646] or Godwin-Gill's theorization of persecution, the Convention's threshold for identifying a refugee or grounds for protection is bound to expand. Hathaway indicates that acts that violate or threaten to violate international human rights are inherently persecutory. The central argument of this research concurs with Hathaway and Godwin-Gill noting that persecution may take varied forms, and under different grounds beyond the Convention's five enumerated grounds. It can take place through direct actions or inactions of state actors resulting in human rights violations. Perpetrators include non-state actors whom the government is unable or unwilling to control. Thus, acts of persecution may take varied forms of physical torture, beating, rape, female genital cutting, a threat to life or freedom, discrimination resulting from denial or deprivation of civil and political rights, or socio-economic as well as religious rights, including unfair trial or disproportionate capital punishment.[647] Subsequent discussion will explore these dimensions of persecution and how they impact in the understanding of refugee circumstances.

---

[644] *Id.* at 112.
[645] *Id.*
[646] *Id.* at 108 ["actions which deny human dignity in any keyway, and that the sustained or systemic denial of core human rights is the appropriate standard].
[647] 2002 UNHCR Guidelines, *supra* note 116 at paras. 6, 5, 9, and 22.

3.7 Jurisprudential Perspectives of Persecution

Hathaway's formulation of persecution has been adopted in several domestic jurisprudences. It was first endorsed by the Supreme Court of Canada in *Canada (Attorney General) v. Ward.*[648] The Court held that the underlying obligation of the international community towards the Convention is a commitment to protect and guarantee basic human rights without discrimination.[649] Similarly, the UK House of Lords adopted Hathaway's classical formulation in *R. v. Immigration Appeal Tribunal, ex parte Shah*[650] and in the decision by the English Court of Appeal in *Sandralingham Ravichandran.*[651] In New Zealand also, various threats to human rights or cumulative breaches or denial of human dignity have been recognized to amount to persecution for the purpose of the Convention.[652]

But comparably, the interpretation of persecution under the United States jurisprudence has not been consistent. For example, in *Stenaj et al v. Alberto Gonzalez,* [653] the Sixth Circuit Court of Appeals cited the theory of Hathaway holding that "[W]hether the treatment feared by a claimant violates recognized standards of basic human rights can determine whether persecution exists."[654] The reason followed a previously endorsed standard in the *Matter of Laipenieks* and *Korablina,* which linked persecution to Convention's threat to life and freedom or infliction of harm and suffering. In like manner, the Australian High Court, recognized Hathaway's human

[648] [1993] 2 SCR 689.
[649] *Id.* at 733.
[650] [1999] 2 AC 629 at 653 (Lord Hoffmann); *Horvath v. Secretary of State for the Home Department* 1 AC 489, 495 [2001] (Lord Hope, for the majority), 512 (Lord Clyde); *R. v. Special Adjudicator, ex parte Ullah*; *Do v. Secretary of State for the Home Department* 2 AC 323 at 355 [2004], (Lord Steyn); *Sepet v. Secretary of State for the Home Department* 1 WLR 856, 862–863 [2003] (Lord Bingham).
[651] [1996] Imm AR 97.
[652] *See, e.g. Refugee Appeal No. 2039/93 Re MN* 16 [12 Feb. 1996].
[653] *Stenaj et al v. Alberto Gonzalez,* 227 Fed. Appx. 429 [26 Feb. 2007].
[654] *Id.*

rights formula in *Multicultual Affairs v. Khawar,* [655] holding that government's inability and unwillingness to protect a victim of persecution amounts to a denial of human rights protection. It considers a state's failure in its fiduciary obligation to provide protection to a victim of persecution as persecutory, hence a ground for refugee protection.[656]

Notwithstanding the popular adoption of the human rights formula for persecution, some courts have in certain cases resorted to dictionary semantics to define persecution. For example, in *R v. Immigration Appeal Tribunal* ex p. Jonah [1985] Immi AR 7, Nolan J. gave a denotative meaning of persecution as "to pursue, hunt, drive" and "to pursue with malignancy or injurious action; especially to oppress for holding a heretical belief or opinion."[657] A similar approach was adopted in the Australian *Applicant A. v. Minister for Immigration and Ethnic Affairs* (1987).[658] Gummow J. cited the Oxford English Dictionary to in define persecution as "[T]he action of persecuting or pursuing with enmity and malignity; especially the infliction of death, torture or penalties for adherence to a religious belief or an opinion, with a view to the repression or extirpation of it…."[659] The danger of framing persecution from a denotative semantics is two-fold. First, it can erroneously focus on generalized English meaning that is fluid or far removed from contextual reality. The implication is to focus directly on the act and possible intent of the persecutor rather than the effects on the persecuted, which is the basis of refugee eligibility. Secondly, to deconstruct persecution from denotative meanings would obviously cause a deviation from principled analysis, and equally lose grip with purposeful investigation. While a persecutor-intent definition may thrive in criminal law, the standard is unthinkable in IRL.

---

[655] *Khawar, supra* note 540 at 27-30 [per Justice Kirby at 111 and Chief Justice Gleeson].
[656] *Id.*
[657] *R v. Immigration Appeal Tribunal* ex p. Jonah [1985] Immi AR 7.
[658] *Applicant A. v. Minister for Immigration and Ethnic Affairs* [1987] 190 CLR 225, 284
[659] *Id.* at 284.

Neither the definition of a refugee nor the grounds protection refugee protection paid significant attention to the persecutor's intent. Thus, the basic elements of refugee protection center on acts of persecution, grounds and forms of persecution, the identity of the persecutor, and persecuted, and persecution suffered or feared. Wrongful interpretation of persecution or refugee identity would obviously deviate from the scope and purpose of the refugee law that is premised on humanitarian protection from and prevention of persecution.

Ideally, Articles 1A(2) and 33(1) underlined the elements of persecution as refugee-based and not persecutor-implied. While the flight from persecution or fear of persecution forms the determinants for a refugee identity, deciphering the intent of the persecutor is not as crucial as the proving nexus with the five Convention's grounds. Against this backdrop, the New Zealand Status Appeals Authority, endorsing Canada's *Ward,* affirmed that an unbiased interpretation of persecution ought to follow the principles of Article 31 of the Vienna Convention on the Law of Treaty (VCLT)[660] and the rule of *pacta sunt servanda*.[661] Of course, a good faith interpretation of any treaty would be guided by an observance of the ordinary meaning or wordings of black letter law as well as analytical interpretation of the spirit (purpose) of law rather than semantic specifications. This takes a deeper and holistic approach that is beyond surface semantics.

Because persecution cannot solely be defined on the basis of human rights violation or restricted to the Convention's five enumerated grounds, in some cases some shrewd adjudicators have adopted a circumstantial approach following a case by case evaluation of acts that give rise

[660] VCLT, *supra* note 171 at art. 31 specified that a treaty should be interpreted in good faith in accordance with ordinary meaning and in the context of its object and purpose.
[661] *Id.* at art. 26 [on *pacta sunt servanda* stating that "[E]very treay in force is binding upon the parties to it and must be performed by them in good faith.

to a WFF for persecution, which is the basis of refugee eligibility.[662] But for lack of uniformity, domestic precedents are not binding on other jurisdictions. Moreso, framed from World War II persecutory experiences the application of the Convention's five grounds of persecution as a threshold for measuring persecution under today's changing paradigm of human rights violations and circumstances of humanitarian migration seem to be challenging for contemporary "un-Convention refugees" especially women whose persecutory experiences are mostly gender specific. Whereas different states' jurisprudence and regional framework try to adapt to the Convention to conceptualize the meaning and scope of persecution, issues arising from gender-based claims are uncontemplated.

Section 91R of the Australian Migration Act defined persecution to relate to Article 1A(2) of the Convention "amended" by the Protocol. Essentially, it identifies persecution to involve "serious harm to a person; and the persecution involves systematic and discriminatory conduct…."[663]

Section 91R (2) outlined the elements or forms of persecution including:

> (2) Without limiting what is serious harm for the purposes of paragraph (1)(b), the following are instances of serious harm for the purposes of that paragraph: (a) a threat to the person's life or liberty; (b) significant physical harassment of the person; (c) significant physical ill-treatment of the person; (d) significant economic hardship that threatens the person's capacity to subsist; (e) denial of

[662] *See, e.g., INS v. Stevic,* 467 U.S. 407, 413 (1984); *Cardoza-Fonseca, supra* note 357 at 421, 436; *Elias-Zacarias*, *supra* note 360 at 478. 478, 812 (1992) [referring to the conflict on the question of the burden of proof and "on account of."]*;* UNHCR Handbook para. 52 [stating that "[W]hether other prejudicial actions or threats would amount to persecution will depend on the circumstances of each case, including the subjective element to which reference has been made in the preceding paragraph…"]
[663] Section 91R of the Migration Act 1958 (as amended) (1)(a)-(c).

access to basic services, where the denial threatens the person's capacity to subsist; (f) denial of capacity to earn a livelihood of any kind, where the denial threatens the person's capacity to subsist. (3) For the purposes of the application of this Act and the regulations to a particular person: (a) in determining whether the person has a well-founded fear of being persecuted for one or more of the reasons mentioned in Article 1A(2) of the Refugees Convention as amended by the Refugees Protocol….[664]

Section 91R identifies an expansive category that is relevant to the research analysis, including behavior or acts that could amount to persecution such as: serious physical harm, a threat to life and liberty and serious humanly inflicted hardships. Likewise, the United States 8th and 9th Circuit Courts of Appeals defined persecution as "the infliction of suffering or harm upon those who differ in a way regarded as offensive."[665] The notion of infliction harm here could be physical, emotional, and psychological.[666] The extensive reason underpins the research argument that persecution can occur outside the five grounds.

In Article 9 of the European Union (EU) Law on Qualification Directive (QD), we equally see a more profound definition of persecution that integrated Hathaway's human rights formula. Essentially Article 2(c) of the QD adopted the provisions of Article 1A(2) of the 1951 Convention in framing persecution within the identity of a refugee. But Article 9(1)-(2) presented an improved concept of persecution under the subsection entitled "Act of Persecution." It defines Acts of persecution as acts:

[664] *Id.* at 91R(2).
[665] *Korablina v. INS*, 158 F.3d 1038, 1043 (9th Cir. 1998); *Miranda v. INS*, 139 F.3d 624, 626 (8th Cir. 1998).
[666] *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004); *Duarte de Guinac v. INS*, 179 F.3d 1156, 1163 (9th Cir. 1999).

(a) sufficiently serious by their nature or repetition as to constitute a severe violation of basic human rights, in particular, the rights from which derogation cannot be made under Article 15(2) of the European Convention for the Protection of Human Rights and Fundamental Freedoms; or (b) be an accumulation of various measures, including violations of human rights which is sufficiently severe as to affect an individual in a similar manner as mentioned in (a).

Article 9(1)-(2) QD underscores an overlap between a range of human rights violations, threats to life, human dignity, and freedom. Although in a strict sense, it is not in all circumstances that persecution can be attributed to physical violation of human rights. Some persecutions in the form of law or policy may target an individual's freedom, deny, or deprive him or her of the freedom of existence, dignity, and enjoyment of other fundamental rights. Therefore, a holistic and in-depth analysis of persecution would require deconstructing the core elements of the term—persecutor, persecuted, acts or forms of persecution. Persecution is a determining characteristic for refugees fleeing different forms of attacks due to race, religion, nationality, political opinion, and social identity, who could no longer return to their country, and therefore, had to seek international protection. The 1951 Convention and the 1967 Protocol consolidated the identity as well as persecution experiences of such person in the definition of a refugee[667] and the principle of nonrefoulement.[668] Such doctrinal and jurisprudential analysis of persecution[669] form the standard of assessment in Chapter Four and Five of this study. The evaluation of persecution largely focuses on states' interpretations of terms and how these

[667] 1951 Convention, *supra* note 12 at art. 1A(2).
[668] *Id*. at 33(1).
[669] *Matter of Laipenieks*, 18 I&N Dec. 433, 457 (BIA 1983); *Ward, supra* note 539 at 689.

respond to the questions—who (the identity of the persecutor and the persecuted)? What is or how (action(s) that amount to persecution)? What are the (putative reasons that form the ground of persecution), when and where it was carried out, and which rights were breached?

3.8 Elements and Sources of Persecution

In interpreting persecution in IRL, a wide range of thoughts are put into consideration. These include—the identity of the persecutor and victim, how is the action carried out, what are the possible reasons for the persecution, and the effects on the victim. Over time, some controversies exist on what or who would constitute the source(s) of persecution—whether state actors and their agents alone are enough or if non-state actors can be instrumental to persecution. The debates have arisen from divergent thinking on whether the persecution of private individuals could form a ground for refugee protection. Practical realities from conflict and peace situations have proven recurrent incidents of the involvement of state and non-state actors in persecutions, as subsequent discussion would demonstrate.

Whereas persecution by state actors may occur in any of the five enumerated grounds,[670] gender related persecutions are commonly perpetrated by intimate partners, family members, members of ethnic or religious communities whom the government may be unwilling or unable to control.[671] The UNHCR Gender Guidelines identified some common areas of such GBPs to include rape, sexual violence, domestic abuses, FGC, forced marriage, dowry-related violence, honor killing, oppression or punitive measures for transgression of gender norms, and trafficking.[672] Perpetrators of gender-based human rights violations target primarily if not

---

[670670] Five Convention's grounds for persecution are race, religion, nationality, membership in a particular social group and political opinion. *See, e.g.,* 1951 Convention, *supra* note 1 at art. 1A(2).

[671] *See, e.g. R-A-, supra* note at 906; *Saideh Fisher supra* note at 76; *Fatin, supra* note 76 at 1233; *Cardoza-Fonseca, supra* note 357 at 438-39.

[672] 2002 UNHCR Guidelines, *supra* note 116 at para. 9.

exclusively sex or gender.[673] Because of the disproportionality of non-state actors related GBPs on women, the UNHCR Guidelines and Conclusions have advanced numerous strategies for tackling the interpretational barriers of these persecutions to ameliorate the harsh experiences of women asylum-seekers.[674] As part of the contributions to solution-seeking, this analysis explores significant elements in the deciphering of persecution—actors and victims.

3.9 Persecutor—State Actor or Non-State Actor

From the onset, it is important to note that neither the 1951 Convention nor its 1967 Protocol specifically defined the sources of persecution. However, Paragraph 65 of the UNHCR Handbook recognized the agents of persecution to be both state and non-state actors. According to Paragraph 65:

> Persecution is normally related to actions by the authorities of a country. It may also emanate from sections of the population that do not respect the standards established by the laws of the country concerned. A case in point may be religious intolerance, amounting to persecution, in a country otherwise secular, but where sizeable fractions of the population do not respect the religious beliefs of their neighbours. Where serious discriminatory or other offensive acts are committed by the local populace, they can be considered as persecution if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection.[675]

[673] Rebecca M. M. Wallace, *supra* note 99 at 702-711, 702.
[674] 1991 UNHCR Guidelines, *supra* note 33 at para. 55.
[675] The Handbook, *supra* note 349 at para. 65.

The Handbook illustrated the sources of persecution in two forms, first a persecution in a broader perspective relating to actions of the government and second, a persecution by "fractions of the population" that may be tolerated or acquiesced by the government. Significantly, Paragraph 65 identified the state's unwillingness and inability to protect a victim of persecution as putative evidence of persecution.

Equally, in the several decisions of states, courts have identified persecution as a common act or harm inflicted by either state actors or non-state actors whom the government may be unwilling or unable to control.[676] Nevertheless, different jurisdictions have advanced diverse approaches to analyzing acts of persecution to decipher the involvement of state or non-state actors. In *Minister for Immigration and Multicultural Affairs v. Khawar,*[677] the Australian High Court held that the applicant's inability to seek police or court assistance would not constitute a bar to applicant's claim especially given the prevalence of government's inability to protect victims of gender related persecution.[678] Likewise, in *AATA* 3566, the Australian court re-invoked *Khawar*'s holding that the viability of credible fears can be linked to past persecutions especially in domestic violence and gender-related harm inflicted by non-state actors or intimate partners whom the governments are unwilling or unable to control.[679] Like the Australian precedent, the United States Seventh Circuit has interpreted persecution as acts of commission or omission by either state actors or non-state actors whom the government is unwilling or unable to protect.[680] However, in certain decisions the courts have amplified the requirements of governments of unwillingness and inability to protect, while shifting the threshold of persecution

---

[676] *Cardoza-Fonseca, supra* note 357 at 438-39, 421 (1987); *Elias Zacarias, supra* note 360.
[677] [2002] HCA 14, 130.
[678] *Id.* at 912.
[679] *AATA* 3566 [2015], https://www.refworld.org/cases,AUS_RRT,4f69e9212.html.
[680] *See, e.g.* 8 C.F.R. § 1208.13(b)(1); *Yasinskyy v. Holder*, 724 F.3d 983, 989 (7th Cir. 2013); NIJC, 11 [Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Presumption of Future Persecution].

beyond Convention's framework.[681] This is testamentary to judicial inconsistency in the interpretation of the elements of persecution.

Comparably, Australian Law largely attributes persecution to state actors, where there is prima facie evidence of lack of protection or where an act of persecution is perpetrated by rebels whom the government is unwilling to control.[682] Likewise in Switzerland, persecution by non-state actors is imputed on state in order to give it legal recognition for asylum protection.[683] Like *Khawar,* the judicial presumption on state's inability or unwillingness to protect a victim of persecution is a significant claim because an act of omission or denial is taken to be persecution by indirection. Under Belgian Law, this can be attributed to third party liability.[684] It recognizes that an agent of persecution need not be limited to one's country of origin, but extends to a third country, where the government of that country is unable to provide the needed protection.[685] Government's unwillingness and inability to protect assumes a dual meaning here that connects the country of origin with the third country. Under Danish Law, a government's tolerance of persecution or inaction amounts to acquiescence or evidence of unwillingness or inability to protect. Because such failure gives vent to private actor-based persecution, the defaulting government shares in the persecutory liability as a state actor.[686] Essentially, the laws support the bifurcated nexus formula by establishing a close boundary of persecution by non-state actors and state actors. While state actors may be agents of persecution, the government's inability to

[681] *Id* at 338.
[682] JOSÉ H. FISCHEL DE ANDRADE, *On the Development of the Concept of 'Persecution' in International Refugee Law* 2 III ANUÁRIO BRASILEIRO DE DIREITO INTERNACIONAL, 125.
[683] *Id.* Office fédérale des réfugiés (ODR), 24 June 1992, N 249 173.
[684] DE ANDRADE, *supra* note 159 at 128; Commission permanente de recours des réfugiés (C.P.R.) (1 ch), 21 November 1991, F035; C.P.R., 8 November 1990, F015.
[685] *Id.*
[686] *Id*. at 125; R. Marx, *The Notion of Persecution by Non-State Agents in German Jurisprudence*, 16 GEO. IMMI. L. J. 447-461 (2001-02); W. Kälin, *Non-State Agents of Persecution and the Inability of the State to Protect,* 16 GEO. IMMI. L. J. 415-431 (2001-02).

protect victims of persecution by non-state actors, regardless of whether state laws prohibit such acts, is persecutory. Hence, it gives leverage for Convention's protection.

Other states like the United States[687] and Canada have recognized not only the UNHCR Handbook's analysis of persecution but the involvements of state and non-state actors in defining how persecution affects individuals, "fractions of the population," or agents whom the governments are unable or unwilling to control. In *McMullen v. INS,*[688] the United States Ninth Circuit Court of Appeal articulated the above standard after the passage of its 1980 Refugee Law.[689] Similarly, the Supreme Court of Canada in *Canada v. Ward*[690] recognized that the rationale for refugee protection rests, not only on persecution but on the unwillingness of the home state to offer protection to a persecuted.[691]

Comparably, Articles 6 and 7 of the European Union QD[692] reflected the standard in the Handbook by identifying the perpetrators of persecution or serious harm to include—the "State, parties or organisations controlling the State or substantial part of the territory of the State, non-State actors…including international organisations, are unable or unwilling to provide protection against persecution or serious harm…."[693] Article 7 elaborated the scope of protection, denial of which would be persecutory, to include the duties to protect such as exercised by "the State, parties organisations, including international organisations, controlling the State or a substantial

---

[687] *McMullen v. INS,* 658 F.2d 1312 (9th Cir. 1981). [The United States Ninth Circuit Court of Appeal articulated this standard after passage of its 1980 Refugee Law].
[688] 658 F.2d 1312 (9th Cir. 1981).
[689] Musalo, *supra* note 10 at 329.
[690] *Id.* 2. S.C.R. 689 (1993).
[691] *Id.* at 717.
[692] European Union: Council of the European Union, Directive 2011/95/EU of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted (recast), 20 December 2011, OJ L. 337/9-337/26
[693] *Id.* at art. 6.

part of the territory of the State…."[694] While the QD acknowledged the state and non-state actors as agents of acts of persecution, certain members of the EU like France and Germany historically adopt a different principle of "Accountability and Complicity."[695] States, which follow the "Accountability and Complicity" standard will ordinarily reject refugee claims even where there exists a prima facie evidence of government's willingness to protect, especially where a state is unable or ineffective to accomplish it. The same measures are applied to claims of applicants from failed states.[696] Such lack of uniformity and restrictive threshold of complicity ultimately subverts the humanitarian purpose of the IRL. While different states are at liberty to develop their refugee jurisprudence, adopting the "Accountability and Complicity" approaches will likely limit the chances of protection for bona fide refugees or cause their return to risk.

3.10 The Persecuted

To understand the identity of a victim of persecution, we merge the act with the sufferer. Not all persecutions generate physical harm. Persecution occurs in diverse forms including enforcement of laws and prohibitions that limit peoples' enjoyment of fundamental human rights. For example, laws that require women to dress in a particular form may be persecutory where those who choose to be free from such restrictions face severe punishments and threats to their lives.[697] In *Saideh Fisher v. I.N.S.*[698] an Iranian feminist who transgressed the dress code religious norms faced serious victimization, GBPs, and threat that caused her to seek asylum on grounds of her social group identity. Generally, anyone who meets the definition of a refugee

---

[694] *Id*. at art. 7.
[695] Musalo, et aal, *supra* note 10 at 333; Jemmifer Moore, *Whither the Accountability Theory: Second-Class Status for Third-Party Refugees as a Threat to International Refugee Protection,* 13 INT'L J. REFUGEE L. 32 (2001).
[696] *Id.*
[697] *Fisher, supra* note 76 at 955; *Fatin, supra* note 76 at 1233.
[698] 79 F. 3d 955 (9th Cir. 1996).

shares the characteristics of a persecuted person, that is a victim of persecution by the state or a non-state actor. Article 1A(2) defines the identity of refugees as individuals with a WFF of persecution "on account of race, religion, nationality, membership in a particular social group or political opinion."[699] Article 33(1) guarantees the right to nonrefoulement to such individuals who meet the refugee definition and demonstrate a WFF on account of the five enumerated grounds. Thus, the identity of the victim of persecution by state or non-state actor is illustrated by Articles 1A(2) and 33(1). But to deconstruct the components of persecution, we need to go beyond who to what and how. The analytic effort takes us to assess the forms of persecution IRL.

3.11 Forms of Persecution

Under this sub-section, our discussion centers on the forms of persecution. It analyzes the different ways that acts of persecution are being carried out. Generally, persecution can take varied approaches such as physical, emotional, psychological, and economic dimensions. Although the jurisprudence of persecution or harm stretches beyond the enumerated threshold, many adjudicators would rightly prefer to determine the constituents of persecution on a case by case basis. In this section, we take a survey of the different jurisprudential methods in interpreting persecution, with a central focus on the United States. Basically, there are five broad perspectives on the forms of persecution. These include:

a. Serious physical persecution,
b. Mental or psychological harm,
c. Economic related persecution,

[699] 1951 Convention, *supra* note 12 at art. 1A(2); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).

d. Discrimination rising to persecution,

e. Severe torture under CAT

3.12 Serious Physical Form of Persecution

The commonest form of persecution is the infliction of physical harm. These include but are not limited to beating, torture,[700] FGC, rape, other forms of sexual violence, confinement, kidnap,[701] forced sterilization, forced abortion, and assault.[702] Generally, all forms of serious physical harm would equally contravene human rights and would, hence constitute a ground for refugee protection. In *Thirunavukkarasu v. Canada (Minister of Employment and Immigration),*[703] the Canadian Federal Court held that brutality by state actors in the furtherance of a legitimate end constitutes a persecution for which refugee protection may be granted. In some cases, courts consider the disproportionality and severity of the harm suffered.[704] Under Belgian law, an assault to a person's physical integrity is recognized as persecution.[705] Also a ruling by the Council of State of Netherlands held an act of murder of a family member and physical mistreatment to constitute persecution.[706] Generally, a physical persecution relates to an actual infliction of physical harm. The term harm is by nature fluid and may extend to emotional and psychological harm, especially in the case of rape, or other sex related assaults. A mere a

---

[700] *Ndom v. Ashcroft*, 384 F.3d 743, 752 (9th Cir. 2004) [the Ninth Circuit Court recognized two detentions under shackles and forced to urinate on one's cloth for twenty-five days in a crowded and dark cell without formal charges to amount to persecution]

[701] *Tarubac v. INS*, 182 F.3d 1114, 1118 (9th Cir. 1999) [the court identified applicant's experiences of kidnap, beating, and detention without food to be persecutory]

[702] *Lazo-Majano v. INS* 813 F2d 1432, 1434 (9th Cir., 1987); *Matter of Sharmin,* A73-556-883 (1996).

[703] *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)* 1 F.C.R. 589 (C.A.) [1993].

[704] *Lai, Quang v. M.E.I.* (F.C.T.D no. IMM-307-93), McKeown (20 May 1994) [the court defined forced abortion as an invasion of a woman's body].

[705] C.P.R. (1 ch.), 21 May 1992, F095.

[706] *Raad van State, Afdeling Rechtspraak (ARRvS),* R.V. (1982) 3; DE ANDRADE, *supra* note at 127.

threat is not sufficient to establish past persecutions or a WFF for future persecution unless such threat leads to or could potentially result in significant harm.[707]

Therefore, physical harm can occur in the form of rape and other sexual related harm inflicted by state and non-state actors during conflicts and in peaceful times. In *Lopez Garlaza v. INS,* the Ninth Circuit Court of Appeals identified rape and sexual assault as forms of persecution. Likewise, in *Abay v. Aschcroft*, the Ninth Circuit Court recognized the mental anguish of a nine-year-old and her Ethiopian mother, who fled their home country to escape a cultural practice of FGC as having a WFF for persecution.[708] Strikingly, the fear of persecution relating to FGC is described not only as physical, but emotional and psychological. Because of the severity of FGC, even a change of circumstances may not easily rebut the presumption of a WFF for persecution.[709] The gender experiences in *Abay* is testamentary to the fact that women and girls are common targets in sex related persecutions.[710] Other identified victims of physical GBPs are members of the LGBTQ/H, who sometimes face beatings, torture and even rape in some religious or cultural communities.[711] In *Hernandez-Montiel v. INS,* the Ninth Circuit Court of Appeals recognized the harmful experiences of a gay man with a female identity, physical assault, strip-search, detention, and rape, as physical persecution.[712]

3.13 Mental or Psychological Harm as Persecution

Whereas the physical form of persecution constitutes an infliction of physical harm on an individual, in psychological persecution the victim suffers an infliction of mental pain or

[707] *Li v. AG of US,* 400 F.3d 157, 164 (3d Cir. 2005), citing *Lim v. INS,* 224 F.3d 929, 936 (9th Cir. 2000).
[708] *Abay v. Ashcroft*, 368 F.3d 634, 641-41 (6th Cir. 2004).
[709] *Id. Mohammed v. Gonzales*, 400 F.3d 785, 800 (9th Cir. 2005).
[710] 2002 UNHCR Guidelines, *supra* note 116 at para. 9.
[711] *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000).
[712] *Id.*at 1084.

anguish, probably triggered by physical torture, epistemic violence, or stereotypes. CAT defined torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person."[713] In other words, acts constituting torture, may be physical or psychological. An example of such an act includes forcing a person to witness the torture or killing of a family member or intimate friend. Of course, the tormenting impact of such acts leaves lasting mental anguish on a victim. Also, a persistent threat to kill, abduct, detain, or deprive an individual of his or her liberty can inflict psychological pain and fears that are persecutory, depending on the severity of the circumstances, age, or pro file of the personality. In *Gagagnini-Ore, Gianina Evelyn v. S.S.C.,* [714] the Federal Court recognized that the applicant suffered psychological persecution through repeated torment, punitive detention, and physical mistreatment by Peruvian authorities during her detention.

Psychological persecution may take varied forms. In the German jurisprudence, forced conversion of a person has been held to amount to a psychological form of persecution.[715] Equally in British case law, a forced exile, and estrangement of a Union leader from family as well as a lifelong career was held to be mentally and economically persecutory.[716] The most significant holding on psychological persecution in the United States jurisprudence was in the case of *Pitcherskaia v. INS.*[717] Here a Russian lesbian was arrested and imprisoned several times for protesting discrimination and violence against the Russian LGBTQ/H. Besides, she was threatened with forced institutionalization and even coerced into attending therapy sessions. Her testimony showed that she was prescribed a tranquilizer, which she successfully refused. A

---

[713] CAT, *supra* note 165 at art. 1.
[714] *Gragagnini-Ore, Gianina Evelyn v. S.S.C*, F.C.T.D., IMM-2243-93, (1994); *Ammery, Poone v. S.S.C.*, F.C.T.D., IMM-5404-93, MacKay (1994).
[715] *Verwaltungsgericht Hessen* (VGH) (12th senate) 21 December 1992, 12 EU 1847/89.
[716] *R.*, Ex parte Jonah, *supra* note 657.
[717] *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997).

girlfriend of hers who faced a similar torturous experience was institutionalized against her will and was subjected to inhuman treatments including electric shock treatment, which was ostensibly applied as a “cure” for her “queer” sexual orientation. The Ninth Circuit Court found these experiences to be physically and psychologically persecutory.[718] *Pitcherskaia*’s expanded a previous holding in *Sagermark v. INS* that recognized forced institutionalization, electroshock, and drug injections as forms of persecution.[719] Additionally, the United States Asylum Manual recognized coercive form of family planning imposed by the Chinese government may constitute a form of psychological and emotional persecution within the meaning of the Act.[720]

Equally, a deprivation or lack of adequate medical care has been considered persecutory, especially for persons with terminal diseases.[721] The rationale for this decision is based on an intersection between the right to health and the right to live dignified health. Nonetheless, since 1987, INA labeled HIV among the communicable diseases of public significance, which renders victims inadmissible, that is preventing them from entering the United States or obtaining a permanent residence status except for those who meet the stringent waiver under the Act.[722] Paradoxically, the statutory restriction existed in parallel with asylum law, thus creating leeway for HIV positive status who suffer discrimination, lack of medical care and government’s protection to seek asylum in the United States under membership in a PSG. Following the precedent in the *Matter of Acosta,*[723] HIV has been considered as possessing inadmissible status

---

[718] *Id*. at 647; 65 Fed. Reg. 76588-98 (Dec. 7, 2000); *Elements of Asylum,* ASYLUM MANUAL, https://immigrationequality.org/asylum/asylum-manual/asylum-law-basics-2/asylum-law-basics-elements-of-asylum-law/#:~:text=The%20elements%20of%20an%20asylum,a%20particular%20social%20group%20(PSG).
[719] *Sagermark v. INS*, 767 F.2d 645, 650 (9th Cir. 1985).
[720] INA §101(a)(42)(B), 8 USC §1101(a)(42)(B)(2005; Immigration and Equality, *supra* note 195.
[721] *Id.*
[722] *See, e.g.* INA § 212(a)(g)(1) waives communicable diseases inadmissibility based on certain conditions that includes family unification.
[723] *Acosta, supra* note 122 at 211, 233.

because of its incurable attributes.[724] But without prejudice to the inadmissible principle, such applicants who meet refugee definition may seek protection. But whereas persecution based on sexual orientation has gained recognition, comparably BIA has refused to grant asylum solely based on nonavailability of medical care for HIV patients.[725] For such a claim to gain viability other factors such as physical and mental harm suffered, or feared as well as government inability to provide needed quality care will be determined.

3.14 Economic Related Persecution

Generally, economic harassment alone would not be a valid basis for refugee claims. But when a deliberate imposition of economic disadvantage threatens a claimant's life and freedom by limiting his or her ability to pursue means of livelihood it becomes persecutory.[726] Discriminatory economic harm may constitute persecution when it becomes severe resulting in a threat, imposed financial misfortune, denial of economic freedom or and harsh conditions. Prior to 1965, an applicant for withholding removal in the United States would be required to show "physical persecution," but under INA §243(h) amended in 1965 Congress changed this requirement to a demonstration of persecution to a "threat to life or freedom." The latter aligns INA with Article 33 of the Refugee Convention.[727] The standard was reflected in *Kovav v. INS,*[728] a claim of withholding removal by a former Yugoslavian citizen who entered the United States through voyage ship and worked as a cook on a merchant's vessel in defiance to his

[724] *See, e.g.,* Victoria Neilson, HIV-Based Persecution in Asylum and Immigration Decisions, AMERICAN BAR ASSOCIATION, https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/human_rights_vol31_2004/fall2004/irr_hr_fall04_persecution/.
[725] *People Living with HIV,* IMMIGRATION EQUALITY, https://immigrationequality.org/legal/legal-help/people-living-with-hiv/.
[726] *See, e.g., Kovac v. INS,* 407 F.2d 102 (9th Cir. 1969).
[727] Pub. L. No. 96-212, 94 Stat. 102; *Cardoza-Fonseca,* 480 U.S. at 429
[728] *Kovac v. INS,* 407 F. 2d 102, 106-07 (9th Cir. 1969).

communist government. The applicant alleged fear of abuse, confinement, a threat to life, and economic freedom upon return.[729] Kovac's claim provided insight into the relationship between physical and economic persecution.

Earlier in *Dunat v. L.W. Hurney*,[730] economic persecution was recognized to mean a deliberate economic restriction and deprivation of means of livelihood.[731] In its reasoning, the Third Circuit Court maintained that mere discrimination in employment would not be enough to establish economic persecution, except with evidence of a "denial of all types of employment" that implicates even physical persecution.[732] Seven years after *Dunat,* in *Kovav v. INS,*[733] the Ninth Circuit Court found that severe economic harm such as a denial of employment extends to all means of livelihood and could lead to bodily injury.[734] *Kovac* precedent has been influenced several other cases.[735] Notably also, the definition of persecution in the *Matter of Acosta,*[736] as applied in *Fatin v. INS*[737] recognized persecution to include "threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom."[738]

Linking persecution with threats to economic life and freedom is precedential not only in the United States but in other jurisdictions. Thus, in *He v. Canada (Minister of Employment and Immigration),*[739] an applicant who participated in a pro-democracy was prohibited from pursuing

---

[729] *Id.*
[730] 297 F.2d 744, 746 (3d Cir. 1962) [one of the earliest recognitions of economic persecution in the United States jurisprudence]
[731] *Id.*
[732] *Id*; Musalo, *supra* note 10 at 277.
[733] *Kovac, Op Cite* at 106-07.
[734] *Id.* at 107 [Later became part of INA Section, 234(h)].
[735] *Bera v. Attorney General of U.S.; Li v. Attorney General of the US*, 400 F.3d 157 (3d Cir. 2005).
[736] *Acosta, supra* note 122 at 211.
[737] *Fatin, supra* note 76 at 1233 (1993).
[738] *Id.*; *Ahmed v. Ashcroft,* 341 F. 3d 214 (3d Cir. 2003) [a former Saudi Arabian resident who suffered discriminatory employment due to his Palestinian background]
[739] *He v. Canada (Minister of Employment and Immigration)* (1994), 25 Imm. L.R. (2d), 128 (F.C.T.D.).

the profession, in which he was trained. The Canadian court recognized this to be persecutory. However, the judicial position was different in *Chan v. Canada (Minister of Employment and Immigration).*[740] Chan demonstrated a WFF for persecution upon return, having fled China for fear of threatened sterilization after his wife had a second baby in defiance of the Chinese one-child-policy. The Applicant indicated that his wife suffered punitive economic loss. Her professional teaching career was terminated, and she was threatened with sterilization. Nonetheless, the Federal Court of Appeal failed to recognize their fear of persecution either as physical or economic. Upon appeal, in a strong dissent of three Justices out of seven, the Canadian Supreme Court denied the appeal on the ground that Mr. Chan would not face strong sterilization upon return. The decision of the Court attracted criticisms on human rights grounds, especially for failing to acknowledge the applicant's economic and threatened physical persecution upon return, as an outright deviation from *Ward,* especially given that their WFF was state based.[741] It is evident that jurisdictional interpretations of economic and physical persecutions are inconsistent with human rights framework.

In *Burog-Perez v. INS,* the United States Ninth Circuit Court held that a lesbian dentist from the Philippines who alleged lack of patronage because of her sexual orientation did not experience economic persecution in her country since an inability to pursue one's desired profession is not the same as absolute lack of means of livelihood. *Burog-Perez*'s rationale was that there was no evidence to show the government's unwillingness or inability to protect Ms. Burog-Perez.[742] In other words, to justify economic reasons to persecutory viability there must be evidence of a deliberate imposition of economic disadvantage on a claimant by a state or non-

---

[740] *Chan v. Canada (Minister of Employment and Immigration)* (1995).
[741] Shacter, Ron. *The Cases of Ward and Chan,* OSGOODE HALL L. J. 35.3/4, 723-736, 726 (1997) [identified the Supreme Court's decision as guided by a fear of the floodgate].
[742] *Burog-Perez v. INS*, No. 03-70520, 95 Fed. Appx. 886, 2004 U.S. App. LEXIS 8003 (9th Cir. 2004).

state actor, as well as government's inability or unwillingness to protect the victim.[743] While an imposed economic disadvantage may be persecutory depending on the scope and intensity, not all forms of economic discrimination would qualify as persecution.

Some case laws have shown that an economic discriminatory act is usually directed to a minority group,[744] showing "more than a few isolated incidents of verbal harassment or intimidation…or significant deprivation of liberty."[745] From the foregoing, it is evident that while economic deprivation is not a sole measure of harm, it could be persecutory when it prohibits a person from pursuing or achieving means of livelihood like denial of work permit, restriction of one's trading rights, imposition of huge taxes or total denial of employment.

In proving eligibility, the court's requirement of proof severity and proportionality makes the proof of economic persecution somewhat elusive for claimants even where a potential threat to life or freedom exists. For example, in *Nagoulko v. INS*[746] the Ninth Circuit Court of Appeals affirmed the BIA's decision in rejecting the claim of economic persecution by a Ukrainian-born Pentecostal Christian who suffered economic discrimination under a Communist regime. She was fired from her teaching job in a Kindergarten school for refusing to stop practicing her religion. She later got a job at a furnace factory and was harassed by a co-worker for the same purpose. In addition, she suffered harassment and was beaten by a police officer on account of her religion. After Ukraine got independence, she worked for a Christian mission. Despite the economic impact of her mistreatment, as the government equally threatened mission workers, the

---

[743] *Baballah v. Ashcroft*, 335 F.3d 981, 988 (9th Cir. 2003); *Li v. Attorney General of the US*, 400 F.3d 157 (3d Cir. 2005).
[744] *Fisher, supra* note 76 at 955, 961; *Bucur v. INS*, 109 F.3d 399 (7th Cir., 1997).
[745] *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998); *Kvartenko v. Ashcroft*, No. 00-71076, 33 Fed. Appx. 262 (9th Cir. 2002).
[746] 333 F.3d 1012 (9th Cir. 2003).

Ninth Circuit Court held that Nagoulko's harm did rise to the level of persecution. Despite evidence of loss of her job and inability to secure another job because of the experience, the court maintained that Nagoulko did not demonstrate a WFF for economic or physical persecution since there were likely to be other members of the same religious groups living in Ukraine. Nonetheless, the Seventh Circuit Court took a different position in *Koval v. Gonzales*[747] by reversing a denial of asylum to a Ukrainian couple who alleged economic persecution because of their Mormon religion. Ms. Koval became a Mormon in the university and later suffered harassment by KGB. She was denied the opportunity to pursue a Ph. D program despite her top grades in the master's program. Her subsequent professional job hunts were declined. She ended up doing menial jobs that required no education, as a means of survival. The Seventh Circuit Court reversed the judgment of the IJ that Ms. Koval's mistreatments did not rise to the level of persecution and held to the contrary.[748]

Following the challenges involved in evaluating cases of economic persecution, a renowned IRL scholar, Atle Grahl-Madsen in his *The Status of Refugee Law* provided a useful guide to analyzing the essential constituents of economic persecution as well as the threshold for the "not enough" to amount to persecution. According to Grahl-Madsen economic persecution can occur in any of the following circumstances—economic proscription that is severe enough to deprive a person of all means of earning livelihood, such proscription could exist as a systematic denial of employment. It is considered persecution when a person is denied all work commensurate with or suitable to his or her career, training, or qualification.[749] Although, depending on the severity and circumstance, denial of opportunity for promotion or better-paid

[747] 418 F.3d 798 (7th Cir. 2005).
[748] *Id.* at 805-06.
[749] ATLE GRAHL-MADSEN'S THE STATUS OF REFUGEE LAW, 208-09 (1972); Musalo et aal *supra* note 10 at 283.

jobs, and expropriation or confiscation of property such as land or business may not constitute persecution for claiming refugee status.[750] Our discussion in Chapter Four on the grounds of persecution and the problem of nexus will examine state's application of the above formula in analyzing different forms and grounds of persecutions and their linkages with deprivation of means of life, freedom or means of livelihoods.

3.15 Discrimination as Persecution

The term discrimination is a product of prejudice, hate, contempt, or disrespect that may lead to unjustified differential treatment, abuse, or indignity. Several international human rights instruments prohibit discrimination.[751] Generally, act(s) of discrimination would naturally lead to a breach of human rights principles such as racial, gender, family, or minority related discrimination. An act of discrimination can occur as a denial of access to basic economic, social, and cultural rights as well as civil and political rights. Paragraph 54 of the UNHCR Handbook provides clues to certain differences in societies and the possibility that certain persons or groups may "receive less favourable treatment as a result of differences."[752] It indicates that "if measures of persecution lead to consequences of substantially prejudicial nature" especially serious restriction to earn a livelihood, right to religion and educational facilities, these evidently amount to persecution.[753] Almost in every form of persecution, as analyzed previously, traces of discrimination are immanent. Thus, discrimination is a potential

---

[750] *Id.*

[751] UN Charter 1945, *supra* note 31 at art. 1(1); United Nations Declaration on the Elimination of All Forms of Racial Discrimination, art. 2 [Stating that "[N]o State, institution or group or individual shall make any discrimination whatsoever of persons, groups or person or institutions on the ground of race, colour or ethnic origin"]; CEDAW, *supra* note 31 at arts. 1 & 2 [prohibit discrimination against women on the basis of sex, and any act or policies that prevent women from the exercise or and enjoyment of their rights, freedom and dignity.].

[752] The Handbook, *supra* note 349 at para. 54.

[753] *Id.*

trigger for persecution, but not all types of discrimination would qualify as persecution. Paragraph 55 of the UNHCR Handbook, thus stated that:

> Where measures of discrimination are, in themselves, not of a serious character, they may nevertheless give rise to a reasonable fear of persecution if they produce, in the mind of the person concerned, a feeling of apprehension and insecurity as regards his future existence. Whether or not such measures of discrimination in themselves amount to persecution must be determined in the light of all the circumstances. A claim to fear of persecution will of course be stronger where a person has been the victim of a number of discriminatory measures of this type and where there is thus a cumulative element involved.[754]

In other words, acts of mistreatment may constitute discrimination or harassment, yet such may not be serious enough to amount to persecution.[755] If discriminatory acts occur in cumulative severity, such may be persecutory depending on the severity.[756]

Whereas discrimination may take different forms, there are common sites of discrimination such as economic or racial, gender or sexual orientation, and health status. Discrimination against women, minority groups, and members of other sexual orientations are common forms of discrimination that can easily lead to persecution because of their severity and prevalence. Therefore, international human rights law prohibits all forms of discrimination—racial, social group, religious or gender that limit or deny equality, offend human dignity or deny

---

[754] *Id.* at para. 55.
[755] *Moudrak, Vanda v. M.C.I.* (F.C.T.D., no. IMM-1480-97), Teitelbaum (1998).
[756] The Handbook, *supra* note 349 at para. 55; *Madelat, Firouzeh v. M.E.I., Mirzabeglui, Maryam v. M.E.I.* (F.C.A., nos. A-537-89 and A-538-89), MacGuigan, Mahoney, Linden, (1991); *Iossifov, Svetoslav Gueorguiev v. M.E.I.* (F.C.T.D., no. A-854-92) 2 [1993].

peoples' freedom as well as access to socio-economic rights.[757] For instance, the primary objective of the United Nations Charter is to seek "to maintain international peace and security" by "promoting and encouraging respect for human freedoms for all without distinction as to race, sex, language, or religion."[758] The goal is consistent with the Universal Declaration of Human Rights (UDHR)[759] that guarantees freedom and equality of all persons, equal entitlement to all rights without distinction as to race, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.[760] Article 14(1) specifies the right to "seek and to enjoy in other countries asylum from persecution" as an entitlement of everyone.[761] Also, Article 2 of the ICCPR "undertake to ensure the equal right of men and women to the enjoyment of civil and political rights set forth in the … Covenant."[762] Article 3 of the ICESCR "ensure(s) the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the…Covenant." Prohibition and elimination of all forms of discrimination against women is the hallmark of the CEDAW, which is largely enforced as the Women's Bill of Rights. Nevertheless, the Refugee Convention did incorporate gender perspectives in the enumerated grounds for persecution and protection of the persecuted. The consequences are far-reaching, as subsequent analysis would highlight.

For several reasons, applicants to gender asylum claim face numerous interpretative challenges because some adjudicators reject gender-based PSGs as being too broad for fear of

---

[757] *See, e.g.,* UN Charter, *supra* note 228 at art. 1; International Covenant on Economic, Social and Cultural Rights entered into force 3 January 1976, 993 UNTS 3, art. 3 [hereinafter "ICESCR 1976]; International Covenant on Civil and Political Rights 999 UNTS 171 entered into force 23 March 1976, art. 2 [hereinafter "ICCPR 1976"]; CEDAW, *supra* note 228 at art. 1.
[758] UN Charter 1945, *supra* note 31 at art. 1(1) and (3).
[759] UDHR 1945, *supra* note 31.
[760] *Id.* at arts. 1 and 2.
[761] UDHR 1945 *Op Cite* at art. 14(1).
[762] ICCPR, *supra* note 31 at art. 2.

floodgates.[763] In some cases, asylum courts deny gender-based claims for lack of nexus, holding that an applicant on a gender-based claim, who had suffered persecution due to his or her gender, was rather because of "personal reasons."[764] For example, in the *Matter of A-B-,*[765] the United States Attorney General (A.G.) Jeff's Session issued a precedential decision that overruled a landmark decision in the *Matter of A-R-C-G-,*[766] which held that in some circumstances, domestic violence survivors could receive asylum protection. The changing paradigm in *A-B-* overturned efforts of years of human rights struggle to fill a void in gender and domestic violence asylum and foreclose domestic violence (DV) and gang-based claims involving harm by non-state actors. Implementing the precedents from *A-B-* heightened the evidential requirements and standard of proof in asylum claims of DV in the United States. To prove eligibility for gender or DV claims, courts have required applicants to demonstrate a well-founded fear of persecution and nexus to the enumerated grounds, "race, religion, nationality, membership in a particular social group (PSG), or political opinion."[767] Since gender and DV are not expressly specified as Convention's ground, the UNHCR has issued Gender Guidelines,[768] which identified different forms of gender discrimination and violence[769] as persecutory. Nonetheless, in some cases, US courts have held that they are neither bound to the Convention nor the interpretative guidelines of the UNHRC.[770]

[763] NIJC, 2019, *supra* note 57.
[764] *R-A-, supra* note 56 at 906; *Fisher, supra* note 76 at 955.
[765] In *re A-B- supra* note 56 at 316.
[766] *A-R-C-G-*, *supra* note 124 at 388.
[767] INA § 101(a)(42)(A).
[768] *Id.* at para. 6; Musalo et aal., *supra* note 10 at 765.
[769] *Id.* at para. 9.
[770] *Cardoza-Fonseca, supra* note 357 at 421, 438-39 (1987); *INS v. Aguirre-Aguirre*, 526. U.S. 415, 427-28 (1999).

In *Saideh Fisher v. I.N.S.*[771] as earlier indicated, the Ninth Circuit denied asylum relief to an educated Westernized Iranian woman who suffered persecution because of her gender having transgressed imposed gendered religious and cultural norms (dress code). The court boldly asserted that persecution on account of sex is not included in the protected grounds under the Act.[772] A similar position was taken by the Third Circuit Court in *Fatin v. INS*[773] to uphold BIA's denial of asylum to an educated westernized Iranian woman who suffered punitive discriminations for refusing to comply with wearing a religious *chador*.[774] Apparently the United States Federal courts have taken several inconsistent positions in interpreting gender-related claims and PSG, regardless of the Congressional protection to female survivors of domestic violence[775] and crimes.[776] Despite the increasing awareness to the vulnerabilities of female noncitizens who suffer discriminatory persecution by intimate partners, access to humanitarian protection are not always readily available. Even though, in a recent decision part of the precedents in *A-B- 1* and *A-B- 11* were overturned to reinstate have *A-R-C-G-,*[777] gender-related claims still suffer adjudicatory challenges, as subsequent analysis will demonstrate.

Discriminatory persecution can occur in other varied forms like selective crime, harassment, extortion, and robbery attack on individuals or persons belonging to a PSG like gay

---

[771] *Fisher, supra* note 76 (*Fisher II*) at 955.
[772] In reversing *Fisher I,* 37 F.3d 1371 (9th Cir. 1994).
[773] 12 F.3d 1233 (3rd. Cir. 1993).
[774] *Id.*; *Safaie v. INS,* 25 F. 3d 636 (8th Cir. 1994).
[775] US Congress enacted Violence Against Women Act of 1994 to protect immigrants/immediate relatives who are victims of human rights abuses in the hands of US citizens (USC) or legal permanent residence (LPR) and to provide them a pathway to permanent residency. The Act was updated in 2000 under the Battered Immigrant Women Protection Act of 2000 and the Violence Against Women Reauthorization Acts of 2005 and 2013. The latter authorized "self-petition" for victims to prevent an abuser from frustrating the immigration process. *See, e.g.,* INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g). A VAWA petitioner may seek adjustment of status under INA § 245(a). If such victim is under removal proceeding, he or she can seek VAWA Cancellation of removal under INA § 240 A (b)(2); 8 CFR § 1229(b)(2).
[776] INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m).
[777] *See, e.g., Matter of A-B-* 28 I&N Dec. 307 (A.G. 2021).

members, and ethnic or racial groups.[778] However, the above circumstances alone may not be sufficient, depending on the severity, without evidence of government's inability or unwillingness to protect the victim. Also, under economic persecution, an imposed economic distress or extreme deprivation of means of livelihood may be linked to discriminatory persecution. This can occur in varied forms. In *Hernandez-Montiel,* the Ninth Circuit Court recognized the applicant's discriminatory mistreatment on account of his sexual orientation as persecutory.[779] But, in *Burog-Perez,* the same court did not identify the discriminatory experience of a Philipino lesbian, which resulted in her being stereotyped, resulting in a lack of patronage in her dental career, as persecution.[780] Also, the BIA took a different position in interpreting persecutory discrimination relating to the right to health and adequate treatment in *Re: Oscar Alberto Aguetta*.[781] It stressed the significance of protecting victims of HIV/AIDS, who are stigmatized and denied access to medical treatment. Because of the expansive scope of discrimination and its close bond with persecution, Paragraph 69 of the UNHCR Handbook provided illustrations to the varied links of discrimination that could potentially lead to persecution under the Convention. For instance, when an act of discrimination is perpetrated on racial grounds such act will often amount to persecution,[782] same with other protected grounds.[783] Thus, in *Ouda v. INS*,[784] the Sixth Circuit held that the inability to travel freely within home country and forced expulsion from a country amount to persecutory.[785] Also, in *Kadhm*

---

[778] *See, e.g., Desir v. Ilchert*, 840 F.2d 723, 727 (9th Cir. 1988); *Yazitchian v. INS*, 207 F.3d 1164, 1168 (9th Cir. 2000) [stating that extortion can be persecutory when it selectively occurs in any of the five grounds].
[779] *Hernandez-Montiel, supra* note 714.
[780] *Burog-Perez, supra* note 742.
[781] In *Re: Oscar Alberto Argueta*, A91-051-087 (BIA Nov. 14, 2003).
[782] UNHCR Handbook, *supra* note 349 at para. 69.
[783] 1951 Convention, *supra* note 12 at arts. 1A(2) and 33(1).
[784] *Ouda v. INS,* 324 F.3d 445, 454 (6th Cir. 2003).
[785] *Id.* at 454.

Suhan Mohamed v. M.C.I.[786] the court of Canada stressed the import of past persecution in the analysis of the effects of cumulative discrimination to future persecution.[787] Such creative analysis is necessary but cannot to be employed as one-way traffic since case-by-case circumstances of each discriminatory persecution may vary.

3.16 Severe Persecution or Torture under CAT (Humanitarian Protection)

A severe breach of human rights under CAT may constitute sole grounds for asylum relying on past persecution even in the absence of a WFF for future persecution. The United States jurisprudence warrants humanitarian grant of asylum to aliens who have suffered severe past persecution.[788] Specifically, humanitarian asylum constitutes one out of the three pillars of the United States immigration law—family-based immigration,[789] economic immigration and humanitarian.[790] Generally, the humanitarian reliefs under the 1980 Refugee Act reflects arrays of protections available to victims of human rights persecutions and humanitarian disasters such as victims of crimes,[791] domestic violence,[792] natural disaster[793] or alien children who seek

[786] *Kadhm, Suhad Mohamed v. M.C.I.*, F.C.T.D., IMM-652-97 (Muldoon, January 8, 1998).
[787] *Id.*
[788] 8 C.C.R 208.13; *Mambwe v. Holder*, 572 F.3d 540, 549 (8th Cir. 2009); *Ben Hamida v. Gonzales*, 478 F.3d 734, 741 (6th Cir. 2007), *Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012).
[789] *See*, *e.g.,* Kyle Rabin, *The Zero Child Policy,* 101 NW. U. L. RE. 965, 988 (2007) ("[F]amily unification has long been a primary policy goal of the INS and of the INA . ..”].
[790] Stephen H. Legomsky, *Immigration Policy from Scratch: The Universal and the Unique,* 21WM. & MARY BILL RTs. J. 339, 355 (2012) (referring to family reunification, labor immigration, and refugees as the “three main pillars” of the US immigration policy); Humanitarian-Based Immigration Resources, DEP'T OF HOMELAND SEC., https://www.dhs.gov/humanitarian-based-immigrationresources.
[791] INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m).
[792] US Congress enacted Violence Against Women Act of 1994 to protect immigrants/immediate relatives who are victims of human rights abuses in the hands of US citizens (USC) or legal permanent residence (LPR) and to provide them a pathway to permanent residency. The Act was updated in 2000 under the Battered Immigrant Women Protection Act of 2000 and the Violence Against Women Reauthorization Acts of 2005 and 2013. The latter authorized “self-petition” for victims to prevent an abuser from frustrating the immigration process. *See, e.g.,* INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g). A VAWA petitioner may seek adjustment of status under INA § 245(a). If such victim is under removal proceeding, he or she can seek VAWA Cancellation of removal under INA § 240 A (b)(2); 8 CFR § 1229(b)(2).
[793] Humanitarian parole or temporary protected status are granted to victims of disaster and humanitarian emergency. *See, e.g.,* INA § 244; 8 CFR § 244. Such alien may equally claim asylum if they meet the requirement of

protection from violence and abuses.[794] INA allows aliens under the above categories to seek humanitarian reliefs either under VAWA,[795] cancellation of removal under VAWA,[796] protection of victims of crime under U-visa non-immigrant status, protection of victims of human trafficking under T-visa status and other humanitarian reliefs available to unaccompanied refugee children, victims of conflicts and environmental disasters. However, VAWA benefits female noncitizens who are abused in intimate relationships with United States citizens or permanent residents. Others who face who seek asylum in the United States under similar circumstances do not enjoy the privilege of VAWA, hence would be required to prove their eligibility before an asylum adjudicator.

Basically, the ground for humanitarian protection is consistent with the CAT to prevent torture, and inhuman and degrading treatment, which is the key of nonrefoulement.[797] Where an applicant demonstrates severe past persecution, and evidence that the country's condition has not changed, a presumption of future persecution is considered well-founded.[798] Thus, the grant of humanitarian asylum appears to be an open check where an applicant demonstrates compelling reasons based on the severity of the past persecution, and an evidence of inability or unwillingness to return to his or her country of origin.[799] The burden is shifted on the DHS to show a change in country condition. If the burden is successfully discharged, the onus would lie on the applicant to demonstrate WFF for future persecution and eligibility for humanitarian

refugee. *See, e.g.,* INA § 101(a)42(A); 8 CFR § 208. If such alien is under a removal proceeding, he or she may equally seek withholding removal under INA § 241(b)(3); 8 CFR §§ 208; 1208.16(b).

[794] Unaccompanied refugee children or undocumented children who are victims of human rights abuses may claim humanitarian protection under Special Immigrant Juvenile Status (SIJS). *See, e.g.,* INA §§ 101(a)(27)(J); 245(h); 8 CFR § 204.11.

[795] INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g).

[796] INA § 240 A (b)(2); 8 CFR § 1229(b)(2) *supra* note 34.

[797] 1951 Convention, *supra* note 12 at art. 33(1).

[798] *See, e.g. Mambwe v. Holder*, 572 F.3d 540, 549 (8th Cir. 2009), *Ben Hamida v. Gonzales*, 478 F.3d 734, 741 (6th Cir. 2007), *Matter of L-S-*, 25 I&N Dec. 705, 710 (BIA 2012).

[799] 8 C.F.R. § 1208.13(b)(1)(ii)(A).

asylum.[800] In other words, a grant of humanitarian asylum is dependent on the applicant's ability to show compelling evidence of the severe past persecution, and governments inability to protect the victim, as grounds to prevent a return to a home-country.[801]

In the *Matter of L-S-*[802] BIA held that an applicant who has suffered an atrocious form of persecution resulting in continuous physical pain is eligible for humanitarian asylum. It expanded previous reasoning in the *Matter of S-A-K & H-A-H-,*[803] where BIA considered a prolonged severe physical and mental torture experienced by mother and daughter, survivors of FGC, as persecution for humanitarian protection. Such torture, according to BIA, may be physical, mental, or both. In *Kone v. Holder,*[804] the Second Circuit Court acknowledged as persecutory the mental anguish of a mother forced with the choice of either abandoning her child or witnessing her subjection to a culturally imposed circumcision. In evaluating the degree or severity of such harm the court examined the length of time and magnitude, which create a degree of certainty for a WFF.[805] In like manner the Eight Circuit Court provided a clue for claiming such humanitarian asylum in *Abrha v. Gonzales,*[806] stating that applicant must establish that his or her persecution was so severe that repatriation would be inhuman.[807] In some cases, the Ninth Circuit Court has identified as severe harm a deprivation of adequate health care in life-threatening situation, punitive or discriminatory denial of employment to a gay, including dearth of medication to patients suffering from terminal diseases critical health issues.[808]

---

[800] *See, e.g.,* 8 C.F.R. § 1208.13(b)(1)(ii)
[801] 8 C.F.R. § 1208.13(b)(1)(ii)(A).
[802] 25 I&N Dec. 705, 712 (BIA 2012).
[803] 24 I&N Dec. 464 (BIA 2008).
[804] *Kone v. Holder*, 596 F.3d 141, 152-53 (2d Cir. 2010).
[805] *Id.*
[806] 433 F.3d 1072, 1076 (8th Cir. 2006).
[807] *Id.*
[808] *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1090-91 (9th Cir. 2005); *Kholyavskiy v. Mukasey,* 540 F. 3d 555, 577 (7th Cir. 2008) [Eight Circuit Court recognized the unavailability of psychiatric medication that was necessary for the applicant's mental health as ground for humanitarian asylum].

In contrast, while humanitarian asylum is available as a safeguard to prevent torture, it cannot be granted merely to prevent the prosecution from crime.[809] However, the prosecution may be considered as persecution on certain conditions that are pretextual, evidencing sentence that is disproportionate, severe and deliberately beyond the scope of the law.[810] In evaluating proportionality, adjudicators compare the legal standard in the applicant's home country in consistency with IHRL, IRL as well as the United States law.[811] Nevertheless, this is not without flaws given the peculiarities domestic human rights applications and cultural relativism.

Conclusion

This chapter explored important elements in refugee identification and protection. The analysis of the Refugee Convention and other international law frameworks has given clarity to the meaning of a refugee and the conditions for refugee protection. Our evaluation of these concepts gave prioritized attention to "persecution" as a primary cause for being a refugee and a fundamental reason for asylum or nonrefoulement. Although not defined by any legally binding treaty of IRL, our discussion draws from different doctrinal sources to illustrate the meaning, elements, and applications of the concept and how they have been interpreted in different jurisdictions, especially the United States. Without a clear knowledge of the identity of refugees, cause of flight, meaning, and dimensions of persecution, the reasons for protection and rationale for prohibiting expulsion would make no sense to Contracting Parties. Whereas many countries today respond to the pressures of a mass influx of humanitarian migration as a burden, subsequent analysis will counteract the misconception that has reinforced the trivialization of the

[809] *Ngure v. Ashcroft*, 367 F.3d 975, 991 (8th Cir. 2004) [stating that asylum cannot be granted for criminal prosecution due to a violation of law].
[810] *Fisher, supra* note 76 at 955, 962.
[811] *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992); *Chang v. INS*, 119 F.3d 1055 (3d Cir. 1997); *Senathirarajah v. INS*, 157 F.3d 210, 221 (3d Cir. 1998).

human rights obligations to refugee protection as a charity a binding responsibility on States. The analysis of the elements of persecution in this Chapter reinforced the duties of States to humanitarian protection and prevention of torture, as well as severe human rights violations. Chapter Four examines the Convention's grounds for persecution, and how these have been interpreted in domestic jurisprudence.

CHAPTER FOUR

GROUNDS FOR PERSECUTION, INTERPRETATIONS OF STATES, AND CHALLENGES OF ESTABLISHING VIABILITY

4.1 Introduction

In the previous Chapter, we discussed the meaning of a refugee and elements of refugee protection—focusing on the eligibility for asylum and nonrefoulement, and the imperatives demonstrating the existence of persecution for the Convention's eligibility. As earlier established, the fear of persecution is the rationale for flight and the criterion for refugee identity, which justifies the need for protection in a destination state. Given the prominence of the word "persecution," we examined the meaning and forms of persecution from diverse perspectives. This Chapter explores the five enumerated grounds of persecution—race, nationality, religion, political opinion, and MPSG. Generally, to be eligible for protection, an individual claiming asylum or nonrefoulement must meet the definition of a refugee and equally demonstrate "a well-founded fear for persecution" on the above five grounds.[812] As indicated in Chapters Two and Three, the definition of a refugee and protective grounds have a historical context that is rooted to the World War Two, the Cold War and the events, which took place in Europe "… before January 1, 1951."[813] Influenced by the Constitution of the International Refugee Organization (IRO), the drafters of the Refugee Convention framed the identity of refugees and the grounds for refugee protection following the category of persons affected by the persecutions of Nazism, Fascism, displaced Jewish and other nationalities, including related victims of religious or racial persecutions in Europe.[814]

---

[812] 1951 Convention, supra note 12 at arts. 1A(1) and 33(1); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).
[813] *Id.* at art. 1B(1).
[814] Musalo et aal, *supra* note 10.

By establishing five grounds of persecution, the drafters of the Convention delicately drew a margin of exclusion for those who seek refugee protection under the Refugee Convention and the 1967 Protocols. By implication, a person claiming a WFF for persecution must show that such fear is linked to any of the five grounds and not on account of personal experience(s) or external events.[815] The challenges of establishing nexus are significant to the assessment of the grounds of persecution and how State Parties have grappled with nexus interpretation. The research discussion here evaluates case laws in the United States and relates findings with other common law countries like—Canada, Australia, and the United Kingdom (UK). The aim is to highlight the different and related approaches taken by the different jurisdictions in the interpretation of the persecutory grounds, as well as other elements. Apparently, the selected States share a commonality in the traditional practice of analyzing country conditions in the determination of claims to avoid broad generalizations of issues. The subtle comparative approach is critical to our analyses to demonstrate how varied domestic interpretations affect states' interpretations of the five grounds. This is equally necessary given the intersectionality of persecution. A matter that affects one persecutory ground like political opinion may as well impact religious, racial, nationality, social groups or even gender. A typical example is the claim relating to population control in China or women's religious dress code in Iran, or circumcision in some parts of Africa. These cut across politics, religion, culture, and gender. While gender is not classified under the Convention's grounds, it is imperative to explore how states' jurisprudence has navigated these claims within and outside the five grounds as well as the problem of nexus.

---

[815] STEPHEN H. LEGOMSKY AND CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY, 900 (5th ed 2009); *Matter of R-A-,* 22 I&N Dec. 906 (BIA 1999).

4.2 Persecution on Account of Race

Race is a complex phenomenon conceptualized from different theoretical perspectives. The pseudo-scientific concept, though outdated, conceptualized the human race into a pseudo-racial taxonomy—such as "Negroids/blacks," "Mongoloids/Asians," and "Caucasians/whites."[816] Whereas modern social scientists disagreed with the classification,[817] vestiges of the above categorization of race still subsist and have caused the pushing of the boundaries of color, linguistic and cultural differences of people and their social groups. The origin of any form of human exploitation and racial contempt, be it in the form of United States slave history, or Nazi genocide and South African apartheid are all traced to racial superiority.[818] Whereas the instances of racial superiority and attacks are not new in the world's history, dimensions of these take varied forms at different ages. The establishment of the United Nations and subsequent codification of the 1951 Refugee Convention were all necessitated by the humanitarian consequences of the Nazi's racial persecution of the Jews and other minorities between the 1930s and 1940s, followed by the international response to the Holocaust, and the aftermath of WW II.

Also, in recent years, the international community has witnessed several egregious human carnages in countries like Rwanda, Burundi, Nigeria, Sierra Leone, and East Timor, caused by ethnic/racial related persecutions, discrimination, hate, racial profiling, and superiority. Responses to these situations have provoked the advancement in international criminal justice and human rights law in efforts to create accountability. While actors seek justification in political domination, impacts of racial or ethnic attacks result in extermination, torture, killing,

---

[816] Musalo et aal, *supra* note 10 at 575.
[817] Rutledge M. Dennis, *Social Darwinism, Scientific Racism, and the Metaphysics of Race,* 64 THE J. NEG. ED. 243–52 (1995); SEAN ELIAS AND JOE FEAGIN, RACIAL THEORIES IN SOCIAL SCIENCE: A SYSTEMIC RACISM CRITIQUE, 3-295 (2016).
[818] Musalo, *Op Cite* at 575.

inhuman and degrading treatment as well as forced displacement of the ethnic minorities.[819] Survivors of such gruesome racial persecution would have no option than to flee for haven.

Individuals who meet the refugee definition having suffered persecution on grounds of race or ethnicity can claim refugee protection pursuant to Articles 1A(2) and 33(1). A claim on racial grounds may be demonstrated in the form of ethnicity or nationality, depending on the cultural, historical, or socio-political background. According to the UNHCR Handbook race "…has to be understood in its widest sense to include all kinds of ethnic groups that are referred to as "race" in common usage."[820] In another sense it "entails membership of a specific social group of common descent forming a minority within a larger population."[821] On a broader range of community descent, cultural groups and nationalities would meet the definition of a race like the Jewish race, the Igbo race, Yoruba or Ethiopian race. Although modern science may dispute the idea of racial affiliations. Nonetheless, historical categorization of racial labels plays significant roles in cultural anthropology, especially in the construction of power and superiority in continents like Africa, the United States, and some parts of Asia.[822]

Racial doctrines and ideologies are the products of differences. By implication, the term racism is a falsified thinking or misconstrued idea of people's racial identity, which naturally leads to antisocial beliefs that are based on a fallacy, hate, and contemptuous profiling of others.

---

[819] A typical example of the debilitating impact of racial profiling and ethnic domination include the genocidal attacks in Rwanda, Darfur Region and the Former Yugoslavia, consequences of which resulted into refugee crisis.
[820] The Handbook, *supra* note 349 para 68.
[821] *Id.*
[822] Musalo et aal., *supra* note 10 at 576-7; ASHLEY MONTAGU, RACE, SCIENCE, AND HUMANITY iii, vi (1963) [stating that the idea of race was developed as a direct response to exploitation of other peoples as a pretext to justification of the most unjustifiable conduct such as enslavement, murder, colonialism, and degradation of millions of human beings]; UNESCO Statement on Race, ENCYCLOPEDIA, https://www.encyclopedia.com/social-sciences/encyclopedias-almanacs-transcripts-and-maps/unesco-statements-rac. [stating that race persist in popular definition but cannot be captured in scientific definitions and studies, but still provoke need for clear demarcation with regard to human diversity].

According to the UNESCO Statement, racism was the essence of Nazism.[823] Montago describes it as the most unjustified conduct, premised upon enslavement, exploitation, and degradation of human beings.[824] When discrimination becomes persecutory on a racial minority it would naturally constitute human rights violation requiring protection and even redress. Racial persecution is globally condemned yet represents one of the commonest aspects of refugee flights. This makes it imperative to decipher states' interpretation of the concept of refugee claims. According to the UNHCR Handbook racial discrimination that amounts to persecution would essentially affect an individual's human dignity "to such an extent that is incompatible with inalienable human rights" leading to other harmful consequences.[825]

2.2 United States Jurisprudence of Refugee Claims on Account of Race

Race, ethnicity, and nationality have recurrently featured as concurrent or interdependent elements in United States asylum claims. Commonly in making claims on race, the United States courts require an asylum seeker to prove an individualized fear of persecution, which is "a singled-out requirement."[826] However, there are exceptions to this where there is systematic persecution or evidence of pattern and practice.[827] In *Matter of Tan,* BIA denied asylum to an Indonesian citizen of Chinese descent for failing to establish a claim on how he would be singled out for persecution on account of his racial nationality.[828] Similarly, in *Matter of Rodriguez,* an applicant's refugee claim was denied because the BIA found his evidence insufficient to prove that he would suffer racial persecution by the East Indian mobs in British Guiana.[829]

---

[823] *Id.* at vi-vii.
[824] *Id*.
[825] 1951 Convention, *supra* note 12 at art. 33(1); UNHCR Handbook, *supra* note 349 at para. 66.
[826] *See, e.g., Matter of Tan* 12 I. & Dec. 564 (BIA 1967).
[827] 8 C.F.R. §1208.13(b)(2)(iii)(2001).
[828] *Matter of Tan, Op Cite*.
[829] *Matter of Rodriguez,* 10 I & N. Dec. 488 (BIA 1964).

In the last few decades, with the upsurge of racial, ethnic, and gender-based persecutions instigated by armed conflicts, asylum seekers bring complex claims under race and nationality and even religion. In interpreting these claims the United States courts examine the applicant's claims alongside the country's condition, usually documented by the Department of States (DOJ). In the *Matter of O.Z. & I.Z.,*[830] the IJ granted asylum to a Jewish national pursuant to Section 208(a),[831] who suffered persecution and anti-Semitic threat because of his Jewish nationality in such an aggregate that rises to persecution under the Act. The Immigration and Naturalization Service (INS) appealed against the decision of the IJ. Upon appeal, BIA concurred with the decision of the IJ and dismissed the appeal, holding that the respondent has suffered past persecution as defined by the Act[832] on account of his nationality[833] and that the respondent is entitled to a regulatory presumption of a WFF of persecution in Ukraine. While INS failed to challenge the respondent's claim of WFF for persecution on race, the court equally acknowledge its inability to discharge the duty on a preponderance of evidence that the condition in Ukraine has changed to the point that a reasonable person in the respondent's position would not have a WFF fear for persecution in Ukraine.[834]

Although judicial opinions may differ, an analysis of the diverse approaches in the interpretations of the Convention's grounds is imperative for the evaluation of the strength and limitations of domestic laws. For example, in *Nigist Shoafera v. INS,*[835] an Ethiopian lady of an Amharic ethnic group claimed persecution and fear of future persecution on account of her Amharic ethnic identity. Nigist Shoafera testified before the IJ that she was raped due to her

---

[830] 22 I & N Dec 23 (1998).
[831] Section 208(a) of the Immigration and Nationality Act, 8 U.S.C. § 1158(a) (1994).
[832] Section 101(A)(42)(a) of the Act; 8 C.F.R § 208.13(b)(1).
[833] *In re O.Z. & I.Z.* (1998)
[834] *Id.*; *Matter of H-,* supra; 8 C.F.R § 208.13(b)(1)(i).
[835] 228 F. 3d 1070 (9th Cir. 2000).

Amharic identity. Although the IJ found her testimony credible and even acknowledged her rape to amount to persecution, the applicant's claim was rejected on grounds of nexus. The IJ held that Shoafera's persecutor could have raped her because he found her "attractive" and not because of her Amharic personality. In contrast, BIA and the Ninth Circuit Court shifted from IJ's narrow-minded reasoning during the appeal and found Shoafera's testimony credible, thus linking her rape to her Amhara ethnicity. The court applied the rule of regulatory presumption to ascertain the high probability of WFF for future persecution based on Shoafera's past persecution. Therefore, it maintained that such presumption can only be rebutted where there exists evidence of change in a country's condition. Strikingly, *Nigist Shoafera* indicated that an asylum claim on race or ethnicity can overlap with other grounds like MPSG, nationality, religion and even gender. To avoid misclassification, adjudicators have usually required a proof of causal link between the actual or imputed identity of the persecuted and the persecution suffered. Sometimes identity may exist only in the perception of the persecutor and can be interpreted by words, actions, or patterns of persecution. Related issues on these will be elaborated on subsequently.

4.4 Persecution on Account of Nationality

While no single society exists without nationhood, deconstruction of the meaning of nationality generally can be likened to the description of a proverbial elephant by a group of blind people by a simple body touch. The term nationality as used in the Refugee Convention does not necessarily mean citizenship,[836] but also refers "to membership of an ethnic and linguistic group and may occasionally overlap with the term race."[837] Whereas nationalism refers

[836] UNHCR Handbook, *supra* note 9 at 349.
[837] *Id.*

to a political ideology of nationality or governance, nationality encompasses the distinctive characteristics that categorize or separate people of common cultural, social, political, and historical identity from the other. This could be a common ancestry, ethnographical, religious, political, geographical, or linguistic boundaries. Some typical examples include the Hungarian, Polish, and Jewish nationalities. A nationality may comprise other taxonomies like the nobles, minorities, serfs, and peasants, as seen among the Hungarian nationalities.[838] Within a sovereign nation, there may be several other nationalities that exist, like the Rwandan Hutu and Tutsi, and the Nigerian Igbo, Hausa-Fulani, and Yoruba.

In most cases, ethnic or nationality differences may constitute a major cause of conflicts, that can lead to organized violence or persecution such as seen in many African countries Nigeria, Rwanda, Burundi, Sudan, and Somalia, to say the least.[839] Commonly, the conflict dynamics may be traced to differing ethnic history, religious, linguistic, and socio-cultural identities, which may provoke superiority, differing treatments and persecutions such as seen among the Hausa-Fulani, Igbo and Yoruba Nigeria, as well as the Arab Northern and Christian Southern Sudan, now the Republic of South Sudan. While such conflicts may conceptually be distinguished from political conflicts, in actual sense, there can be some interconnections. Nationality-based conflicts, whether culturally or religiously constructed, largely depend upon the political atmosphere of a regime or belligerent force. Therefore, an understanding of persecution on account of nationality in IRL draws our attention to the events that gave birth to the Refugee Convention. Apparently, the prevailing situation and aftermath of World War II

---

[838] Musalo et aal., *supra* note 10 at 579.
[839] *Id.* at 580; LIISA H. MALKKI, PURITY AND EXILE: VIOLENCE, MEMORY, AND NATIONAL COSMOLOGY AMONG HUTU REFUGEES IN TANZANIA 1-5, 16-18 (1995); UNITED NATIONS, *Report of the Independent Inquiry into the Actions of the United Nations during the 1994 Genocide in Rwanda*, New York, 15 Dec. 1999, http://www.un.org/News/ossg/rwanda_report.htm; GENDER, WAR, AND MILITARISM 105-113 (Laura Sjoberg And Sandra Via, eds. 2010).

provoked a symbiosis of totalitarianism, denationalization, displacement, and statelessness. In Hannah Arendt's *The Origin of Totalitarianism,* she illustrated the term nationality and denationalization to demonstrate how nationality-based persecution and deprivation of nationality rights could justify the need for refugee protection.[840] A typical example is the Burundian refugees who sought refuge in Tanzania in the 1990s and the Rwandan Tutsi refugees who fled to neighboring countries of Great Lake of Africa from the 1994 genocide.[841]

According to the UNHCR Handbook, persecution on account of nationality "may consist of adverse attitudes and measures directed against a national (ethnic, linguistic) minority and in certain circumstances, the fact of belonging to such minority may in itself give rise to a well-founded fear of persecution."[842] Although such persecutions can emanate from a majority to minority groups, there may still be other circumstances when such persecution can originate from a majority to another majority group or from even an influential minority to the majority.[843]

4.5 United States Jurisprudence and Asylum Based on Nationality

Under United States law, an asylum seeker who brings a claim on account of nationality will be required to show evidence of individualized persecution, which is proof that the respondent was singled out for persecution. In other words, persecution on nationality cannot be generalized based on a prevailing circumstance in a state, except where there is systematic persecution that targeted a particular group or sub-group within a location.[844] However, the exception on "pattern and practice" obviates the requirement of proving "singling-out,"

---

[840] HANNAH ARENDT, THE ORIGINS OF TOTALITARIANISM 208-09, 582 (NEW YORK, 1973).
[841] Malkki, *supra* note 28 at 16-17.
[842] UNHCR Handbook, *supra* note 349 at para 74.
[843] *Id.* at 76 [emphasis added].
[844] 8 C.F.R § 1208.13(b)(2)(iii)(2001) [exception on pattern and practice].

especially where there is widespread persecution on grounds of nationality, race, or religion,[845] such that can occur during a crime against humanity or genocide. According to the Ninth Circuit Court, in *Kotasz v. INS,*[846] in a pattern-and-practice persecution a sub-group may be targeted without affecting a larger community of the sub-group.[847] Based on this illustration, the court faulted BIA's reasoning in requiring Kotasz to demonstrate that he was "singled-out" for persecution, given that there was no evidence of "pattern and practice" persecution against the anti-communist generally.[848] In the BIA's decision, an asylum to a Hungarian anti-communist was reversed because the court found that Kotasz belonged to a sub-group of anti-communists that had been systematically targeted, which reflects the pattern and practice exception.

Subsequently, the *Kotasz* precedent was applied in *Makonnen v. I.N.S.*[849] Here, the respondent and her family were active members of sub-communities within a larger ethnic group. Makonnen, the respondent was an Ethiopian national of Oromo descent, who belonged to the Oromo Liberation Front. She claimed that she was persecuted in the 1980s and 1990s because of her ethnic identity. At first, BIA denied Makonnen's claims for failing to produce evidence of a "pattern and practice." But the Ninth Circuit Court reversed the decision and found that the BIA erred. Citing *Kotasz,* it held that Makonnen belonged to a sub-community and that she was politically active in an ethnic group within a larger nationality that could face systematic persecution. On similar bases, she needed not to prove pattern and practice.[850] Significantly, the court attached a strong weight to the evidence on the respondent's political activism and membership in a sub-group of a larger ethnic nationality. Suffice to note that whereas

---

[845] *Id.* at § 1208.13(b)(2)(iii).
[846] 31 F.3d 847 (9th Cir. 1994).
[847] *Id.*
[848] *Id;* Musalo et aal., *supra* note 10 at 589.
[849] 44 F.3d 1378 (8th Cir. 1995).
[850] *Id.*

persecution on grounds of nationality or ethnicity may vary in situations involving groups, sub-groups, or political reasons, each of these demonstrates that the fear of persecution has a causal link with power dynamics in countries and could be provoked by state or non-state actors. In many cases also, ethnicity or nationality-based persecution may intersect with "politics, gender, religion, and/or social status," which can form the heart of their fear of persecution.[851]

Makonnen precedent further showed other possible linkages of persecutions that intersect political, PSG and nationality, and even racial grounds. Sometimes applicant's active political involvement may be the connection to persecution on account of nationality. For example, in *Banks v. Gonzales,*[852] the Seventh Circuit Court remanded the decision of the IJ that denied asylum to a Liberian of the Krahn ethnic group who was involved in the Unity Party that opposed the then Liberian President, Charles Taylor. Even though neither the respondent nor her attorney alleged pattern and practice, the IJ held that Banks did not show evidence that she was singled out for persecution. But on appeal, the Seventh Circuit Court adopting 8 C.F.R § 1208.13(b)(2)(iii),[853] recognized that Banks's active political involvement and evidence of widespread persecution of members of certain groups or sub-groups made her fears well-founded. It equally linked these to an attack on her ethnic identity.[854]

Nigist Shoafera[855] is dimensional with nationality-based persecution. The thirty-one old Ethiopian lady of Amharic ethnicity presented evidence that was corroborated by medical and family evidence that she suffered a rape related persecution in Ethiopia during an ethnic clash

[851] Musalo et aal., *supra* note 10 at 590.
[852] 453 F.3d 449 (7th Cir. 2006).
[853] [On eligibility—required applicant to establish his or her own inclusion in, and identification with a group of people to demonstrate fear of persecution upon return].
[854] 453 F.3d at 452, 453.
[855] 228 F. 3d 1070 (9th Cir. 2000).

between the dominant Tigray and the Amhara. Despite her uncontested testimony and documentary evidence, the IJ found her illegible for asylum. During the appeal, BIA failed to consider Shoafera's application, even on a presumption of WFF based on past persecution.[856] In contrast, the Ninth Circuit Court attached a serious weight to the applicant's rape by a Tigrean man name Belay, who equally imprisoned Shoafera's brother in their Local Community Council at the time when the two ethnic communities were in conflicts. The documentary evidence further indicated that the Tigrean ethnicity was politically the dominant power in Ethiopia. The court's reasoning here underscores an eloquent acknowledgment of the ubiquity of conflict-related rape. During ethnic conflicts, state and non-state actors may exploit conflict opportunities to carry out sexual depravities against women, especially those from the minority class. Despite the omission of GBPs in the Refugee Convention, the prevalence of case laws is conspicuous, as affirmed by Shoafera's testimony. She testified that the reason for her rape was "because I am Amhara."[857] The commonality of GBP in conflict and even non-conflict situations is evident. Yet, gender has not sufficiently received a fair adjudication in refugee jurisprudence.

Shoafera's case can be likened to *Kumar v. I.N.S.*[858] Applicant Kumar was a Fijian woman of Hindu religion who claimed asylum because of persecution on account of her Fiji Indian ethnicity, Hindu religion, political affiliation with the Labor Party, and gender. Her testimony indicated that she suffered a physical attack three times, including a sexual assault in the presence of her parents. During her attack, her persecutors warned her parents to end their support of the Labor Party. Subsequently, Kumar and her mother were assaulted in the Hindu temple and threatened to be converted to Christianity. Subsequently, she was harassed publicly

---

[856] *See,* 8 C.F.R. §208.13(b)(1)(i).
[857] 228 F. 3d 1070.
[858] 204 F.3d 931 (9th Cir. 2000).

alongside other Indians by soldiers who entered their school and were shouting that Indians should return to India. In addition, she was beaten, harmed, and left unconscious. Even though all the applicant's testimonies indicated evidence of physical attacks by state actors on several connected grounds—nationality, race, religion, political opinion or imputed political opinion, and even gender, the court failed to recognize the applicant's credibility for humanitarian asylum. The court neither gave fair discretion to Kumar's GBP nor the political link to her persecution. In contrast, in nationality and social group blended claims, IJ granted asylum to Tenorio who sought asylum based on his ethnicity and sexual orientation.[859] Tenorio was a Brazilian man and claimed that his black and gay identities made him vulnerable to anti-gay attacks in the urban gay ghetto where he resided. Nonetheless, neither the Convention nor the UNHCR Handbook identified Tenorio's kind of social group.[860] The IJ granted asylum pursuant to Section 208 INA, the recognizing respondent's group within a "common descent."[861]

Claims about social groups relating to ethnic minorities can intersect with nationality. In *Duarte de Guinac,*[862] an Indian of Mayan ethnicity sought asylum on ethnic persecution. At first, IJ denied his claims and BIA affirmed the denial. But the Ninth Circuit Court reversed both denials, holding that the respondent, Guinacs was eligible for refugee status on account of race, having suffered persecution because of his "Mayan or Indian" ethnicity.[863] Citing the *Kovac*, the Ninth Circuit criticized BIA for equating Guinacs' death threats with trivial consequences and overruled its decision that Guinac lacked fear of persecution and misconstrued it to be fear of discrimination. The court relied on credible testimonies of the respondent's persecutory

---

[859] *Matter of Marcelo Tenorio,* A72-093-558 (9th Cir. 1993).
[860] Musalo et aal., *supra* note 10 at 597 [referring to the UHNCR Handbook Para. 68, which explores the potential relationship between race, ethnic and other social groups]
[861] *Id.*
[862] 179 F. 3d 1156 (9th Cir. 1999).
[863] *Id*; Musalo et aal., *supra* note 10 at 605.

experiences like physical abuse, hate, violence, and extreme intimidation. Its analysis aligns with Paragraph 41 of the UNHCR Handbook in the assessment of subjective fears under WFF for persecution. It maintained that the elements of subjected fear cannot be separated from the personality of the applicant, his social identity, convictions, reactions, and response within the environment and social group, which make him or her intolerable to his persecutor(s).[864] In the assessment of such fears, therefore, an applicant's statements and actions should be viewed objectively within the context of a country condition and the prevailing consequences that could possibly generate WFF.[865] Comparably, both the IJ and BIA erred in *Duarte de Guinac* in terms lack of logical and contextual assessments of personal experiences that gave rise to a WFF.

Barely seven years after *Duarte,* the Second Circuit handed another important decision in *Jorge-Tzoc v. Gonzales*[866] that involves a Guatemalan national who claimed fear of persecution by state actors because of his Mayan identity. *Jorge-Tzoc* submitted evidence showing that the Guatemalan military targeted and killed many members of the Mayan community, where he has lived since his childhood. Fearing death by his putative persecutors, he escaped to the United States for asylum. IJ denied his claims and the denial was affirmed by BIA. The Second Circuit Court vacated and remanded the BIA's denial, holding that *Jorge-Tzoc* feared persecution by the Guatemalan Army on account of his Mayan identity. The court further criticized the IJ for likening the Mayans' massacre with a generalized civil strife, instead of persecution.[867]

Apparently, the Seventh Circuit Court's position was influenced by the interpretation that evidence of widespread attacks could make fear of persecution glaring.[868] Thus, the common

---

[864] The Handbook, *supra* note 349 at para. 41.
[865] *Id.* at para. 42.
[866] 435 F.3d 146 (2nd Cir. 2006).
[867] *Id.*; Musalo et aal., *supra* note 10 at 605
[868] *Banks v. Gonzales* 456 F.3d 449 (7th Cir. 2006); *Ghaly v. I.N.S,* 58 F.3d 1425 (9th Cir. 1995).

attribute in *Duarte* and *Jorge-Tzoc* is the evidence of the government's direct involvement in the persecution. In accordance with *Ghaly, Jorge-Tzoc* reaffirms that "private" discrimination may rise to the level of persecution where there is the government's complicity or condonation. The principle has been established by other jurisdictions like Canada[869] and Australia,[870] indicating that meeting the requirements of Article 1A(2) includes showing evidence of the government's unwillingness and inability to protect qualifies protection. In *Minister for Immigration and Multicultural Affairs v. Khawar,*[871] the Australian High Court held that a government's failure to a victim of persecution amounts to persecution.[872] The reasoning is clear and accords to *Ghaly'*s principle of complicit or condonation.

4.6 United Kingdom (UK): Asylum on Account of Nationality

Like the United States, the UK asylum follows a due process of asylum determination to ascertain eligibility for refugee protection. This includes a demonstration of the existence of a well-founded fear of persecution. In doing this, courts evaluate the home country's condition to establish if safe for the asylee to return pursuant to Article 1. C(1)[873] or in the case of an alleged fear of persecution by non-state actors, if the government is unable or unwilling to protect the victim.[874] In doing these, the Secretary of States examines whether the alleged persecution occurred within a particular state that the asylum seeker has fled from and if the class of persons affected shares similar characteristics with the asylum seeker, and the endemic nature or possible

[869] *Ward, supra* note 539 at 689.
[870] *Khawar , supra* note 677*; Wahk v. Minister for [Australian] Immigration and Multicultural & Indigenous Affairs* FCAFC 12 (2004).
[871]*Id.* at 1130.
[872]*Id.* at 723.
[873] 1951 Convention, *supra* note 12 at art. 1C(1)
[874] *Id,* at art. 1A(2); *Horvath v. Home Secretary* I AC 489 (2001).

gravity. Applying the analytical process alongside the applicant's testimonies and supporting evidence would substantiate a judicial exercise of discretion.

Thus, in *Olga Puzova & Others v. Secretary of State for the Homeland Department* (2001), the Immigration Appeal Tribunal (IAT) heard five appeals by applicants from the Roma ethnic nationality of the Czech Republic. All alleged brutal attacks and persecutions by skinheads and lack of sufficient protection from the police. Their voluminous testimonies were corroborated by expert evidence from Dr. Chirico and additional evidence on country conditions. Despite considering the objectivity of the claims, IAT denied all the asylum claims on the ground that there was no evidence to show that the state of the Czech Republic was unable and unwilling to provide protection. Although the Tribunal recognized that the situation in the Czech Republic at that time was volatile, the reasonable likelihood of causing vulnerabilities for the Roma population[875] who were targeted randomly by the skinheads, none of these were found sufficient to justify the UK's surrogate protection on the claimants. Apparently, this contradicts the jurisprudential standard. Following *Olga Puzova & Others*' interpretation, establishing nexus viability on any of the five grounds would require another complex formula, beyond the IAT.

Nonetheless, in a related case involving a Czech citizen of Roma ethnic nationality, *Hrbac v. Secretary of State for the Home Department* (SSHD) (2002), the Tribunal re-advanced its position. Here the applicant has sought asylum based on discrimination and fear of persecution on account of Roma nationality. Referring to the U.S. State Department Report, the Tribunal found that:

[875] The term Roma refers to the Romani people widely used to describe the Armenia Romani I Persia. *See, e.g.* Musalo et aal. *supra* note 10 at 597.

> Roma faces discrimination in such areas as education, employment, and housing. But positive steps are being taken to deal with discrimination…However, we recognize that there is still an attitude of mind which results in discrimination against, and occasions violence towards Roma…and that the government measures are not as effective as they should be.[876]

Based on the findings, the Tribunal held that the position in the Czech Republic pertaining to discrimination against the Roma or attack relating to the same issue would not establish a WFF of persecution that meets the eligibility of Article 3 or Article 1A(2) of the 1951 Convention.[877] The position of the Tribunal is questionable on human rights grounds given that the evidence submitted here showed that persecution against the Roma by the skinheads was growing in Czech Republic at the time of the decision and the Tribunal was not unaware of the situation. By implication, the attacks were viewed as "localized persecutions," a construction that disqualifies any evidence of the local government's inability and unwillingness to protect the victims. Evidently, the decision failed to acknowledge the discrepancy between empirical evidence and the inefficiency of Czech's national law.

Barely one year after, the *Hbrac* precedent was invoked by the Supreme Court of Judicature, Court of Appeal Civil Division to justify the denial of asylum to a Roma mother and her son from the Czech Republic in *ZL and VL*.[878] The respondents alleged discrimination and persecution on account of their Roma ethnicity. Their testimonies showed ZL suffered violence

---

[876] The US State Department Report on Czech Republic submitted as evidence in *Hrbac v. Secretary of State for the Home Department* (2002).
[877] *Id.*
[878] *ZL and VL,* [United Kingdom] Secretary of State for the Home Department and Lord Chancellor's Department EWCA Civ 25 (2003) 1 All ER 1062 (Supreme Court of Judicature, Court of Appeal [Civil Division].

(the Roma) by the skinheads, including rape by a police officer, evidence that came up later during an appeal. The AIT found the claims of ZL and VL to be "clearly unfounded." Both were denied asylum under an expedited review popularly known as "fast track." The fast-track decision pursuant to s.115(6) of the Nationality, Immigration and Asylum Act 2002[879] authorizes a prompt removal of those whose claims for asylum are "clearly unfounded." Even though it grants a statutory right of appeal, such right can be exercised from outside the jurisdiction, unlike the United States practice of expedited removal that precludes access to judicial review.[880] Both practices violate the principle of nonrefoulement and procedural asylum.

In the case of *ZL and VL,* the respondents were denied asylum by AIT and by the Secretary of State, which held that their claims were unfounded under the 2002 Act. They appealed against the denial and prayed that the decision be set aside. The appellants argued that: (a) their applications were processed, rejected, and certified prior to the 2002 Act; (b) the decision was taken in the absence of procedural safeguards; (c) and that they were subjected to an unfair procedure.[881] In evaluating these claims, the Court first reviewed the precedent in *Hrbac,* which viewed asylum claims of Roma ethnicity-based persecution in the Czech Republic in an unfavorable light as a "localized persecution." In surprising analogy, the court referencing *Hrbac,* compared the UK security and discriminatory experience with that of the Czech Republic, holding that "it is impossible to guarantee safety from attacks by individual elements," in both countries.[882] Apparently, the discriminatory persecutions of the Roma people were trivialized as personal and even so the court made an ambiguous qualification to the "safe

[879] s.115(6) of the Nationality, Immigration and Asylum Act 2002 [*hereinafter* "The 2002 Act]
[880] *See, e.g. Dep't of Homeland Sec. v. Thuraissigiam,* 140 S. Ct. 1959 (2020) [holding that individuals subjected to expedited removals do not have right to challenge their removals].
[881] *Id.* at para 15.
[882] *Hrbac, Op Cite* 876.

country," in a reasoning that seemed antithetical with the Convention's rationale for asylum. Overall, the court adopted the standard in *Hrbac* that the discriminatory attacks on the Roma nationality would not amount to a WFF of persecution. This was in a total disregard of a detailed expert report on the persecutory experiences of the Roma people by the skinheads of the Czech Republic, even evidence of serious crimes committed against them, and police complicity, including failure to investigate or prosecute alleged crimes.[883] The decisions in *ZL and VL,* and *Hrbac* underscore the challenges of asylum seekers in establishing claims on gender, ethnicity, or nationality alongside evidence of a change in the country's condition.

Invariably, the persecutions of ZL and her family by the skinheads, including her rape by Czech police resonate with the experiences of many women in conflicts societies, whose sex is targeted by their persecutors, even where race, nationality, religion, or political opinion are at the center of the conflict. Children are no exception. As part of the discriminatory persecution, ZL's son, a UK citizen by birth was baby, was denied medical treatment for not having a Czech Health Registration Card.[884] Yet, the Court did not find any of these systematic abuses credible to meet the threshold of "a well-founded fear for persecution." Most importantly, the court's failure to investigate applicant ZL's claims of rape by Czech police and the reason behind her concealment of such a traumatic experience from her husband. Thus, the troubling precedent conflicts with the conventional standard for subjective and objective assessment. Whereas *ZL and VL* decision accentuates the interpretational barriers in many domestic jurisdictions because of the fear of the floodgate, the survivors represent images of hundreds of asylum seekers across the world whose yearning for protection is abated despite the severity of their persecution.

[883] *ZL and VL, supra* note at 70-74; Presented by Dr. Chirico, a then Post-Doctoral Fellow at the School of Slavonic and European Studies brought expert evidence on the prevailing persecutions of the of the Roma.
[884] *Id.* at 84-87.

Ethnic-national differences and persecutions are common in many societies as seen in many societies like the Igbo and Hausa-Fulani nationalities of Nigeria, the Nuer and Dinka of South Sudan, the Tutsi and Hutu of Rwanda and other nationalities in Burundi, Indians in North America, saying the least. Evidently, discrimination or power tussles arising from ethnic nationality differences may give rise to persecution. Individuals who play active roles in such conflicts either in support or resistance are usually targets of persecution and would fit into the Convention's refugee.[885] However, the gender variables associated with such persecution are not recognized. Following the standard set in *ZL and VL* as well as *Hrbac* such category of persons will be excluded from refugee relief in asylum countries.

4.7 Persecution and Claims on Religious Grounds

The protection of religious freedom is core in international law. Historically, the advocacy for the freedom to express one's religion and conscience in respect of religious freedom dates to the time of early philosophers, theologians, and religious minorities.[886] Even though religious freedom dominates the ethical teachings of different religions, thinkers, and institutions, yet religion has been a cause of conflicts, hatred, and civil discriminations at different age. Despite recorded incidents of historical religious persecutions, the actual codification of international laws on the protection of the rights of (religious) minorities did not exist until after the events of World War I and the establishment of the League of Nations.[887] Nonetheless, some traces of religious treaties survived the earlier centuries to protect trade and

[885] 1951 Convention, *supra* note 12 at art. 1A(2).
[886] *See, e.g.* The writings of Athenian philosophers like Socrates, Plato, and Sophocles about gods and morality.
[887] ILO 2001 *supra* note 18. [This inspired other human rights instruments protecting the rights of minorities.] *See, e.g.* ICCPR, *supra* note 31 at art. 27; ICESCR, *supra* note 31 at art. 2(2); CRC, *supra* note at art. 30; International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, art. 1.

religious merchants such as seen in the 1556 Treaty between France and the Sultan of Ottoman Empire that guaranteed freedom for French merchants in Turkey.[888]

History reckons that United States President Woodrow Wilson with earlier efforts to codify the protection of religious freedom in the Covenant of the League of Nations.[889] Although religious freedom appeared neither in the Peace Conference agenda nor in Wilson's famous Fourteen Point speech as preconditions for peace and international security. But beyond the vision of collective security and internationalism, which was the focus of the League of Nations, Wilson stresses the impact of religious intolerance and discrimination on international security.[890] This makes it necessary to reinforce the rights of people to a free exercise of religious belief, subject to limitations of public order and morals.[891] The persistent efforts led to the legalization of religious freedom. Article 22 of the Covenant of League of Nations guaranteed freedom of conscience and religion.[892] Also, in post-World War II, the protection of the rights of religious minorities was central to the allied powers' objectives and goals expressed as "…essential to defend…religious freedom and to preserve human rights and justice."[893] For instance, the post-World War II Paris Peace Treaty of 1947 emphasizes the achievement of religious freedom by taking measures "to secure all persons under its jurisdictions, without distinction as to race, sex, language, or religion, the enjoyment of human rights and fundamental

---

[888] *See*, *e.g.,* Robert E. Burns, *The International Nature of Religious Liberty,* 41 U. DET. L.J. 83 (1963); UNITED NATIONS, SUB-COMMISSION ON PREVENTION OF DISCRIMINATION AND PROTECTION OF MINORITIES; STUDY OF DISCRIMINATION IN THE MATTER OF RELIGIOUS RIGHTS AND PRACTICES; REPORT BY SPECIAL RAPPORTEUR ARCOT KRISHNASWAMI, U.N. Doc. E/CN.4/Sub.2/200/Rev. 1 (1960).
[889] Anna Su, *Wodrow Wilson and the Origins of the International Law of Religious Freedom,* 5 J. INT'L L. 235-267 (2013).
[890] *Id.* at 239.
[891] *Id.*
[892] 1933 Convention *supra* note 14 at art. 22.
[893] Musalo, *supra* note 256 1179 at 1214-18.

freedoms, including freedom…of religious worship….”[894] Consequently, the UN Charter and the UDHR gave strong affirmation to freedom of thought, conscience and religion.[895]

However, international law did not proffer a clear definition of the term religion or what it means for people to express beliefs and conscience. Under Article 18 UDHR, the right to freedom of thought, conscience and religion "includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, manifest his religion or belief, practice and observance."[896] Article 18(1) of the ICCPR replicates the same wordings but create limitations "to protect public safety, order, health, or morals or the fundamental rights and freedom of others."[897] The restrictions are necessary to guard against cases of religious intolerance, discrimination and violence in the practice of religion or an extreme demonstration of one's belief.[898]

The 2004 UNHCR Guidelines attempted to define religious freedom as people's right to freedom of thought, conscience, belief, and religion. This presupposes the right to practice, worship, teach, live, and observe one's belief individually or collectively, in public and private.[899] Against this backdrop, religious freedom can be analyzed in three ways—a belief, identity, and a way of life. Religion as a belief would include non-belief, theistic, non-theistic or

---

[894] *Id; See, e.g.* The Peace Treaties, 10 February 1947 [Treaties made with allied powers after World War].
[895] UN Charter, *supra* note 31 at art. 1 and 3; UDHR, *supra* note 31 at art. 18 [stating that "stating that everyone has right to freedom of thought, conscience, and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, manifest his religion or belief, practice, and observance.]
[896] *Id.* at art. 18.
[897] ICCPR, *supra* note 31 at art. 18(3).
[898] *See, e.g.,* Declaration on Elimination of All Forms of Intolerance and of Discrimination Based on Religious Belief, UN General Assembly, 1962.
[899] *See, e.g.* GUIDELINES ON INTERNATIONAL PROTECTION: RELIGION-BASED REFUGEE CLAIMS UNDER ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, HCR/GIP/04/06, 28 APRIL 2004, para 11 [*hereinafter* "2004 UNHCR GUIDELINES."]

atheistic, even the beliefs of heretics, schismatics, and pagans.[900] Generally, such a generic term for religious belief can be expressed individually or collectively as theological beliefs of members of a group, rituals, traditions, historical, national traditional or even ancestorial values.[901] Also, religion can be expressed as "a way of life" that requires people to behave, dress or comply to certain religious norms common to the adherents.[902]

Regardless of the form of expression, all rights to religious freedom, belief, conscience and demonstration of religious way, or life are protected under international law and domestic human rights of states. It is worthy of note that freedom to practice one's religion individually or as a community, privately and publicly is not absolute but subject to certain limitations like the protection of public safety, order, health or morals and the fundamental rights of others.[903] According to the proviso, in evaluating religious claims to distinguish the expression of religious belief from mere extremism and frivolous claims of religious persecutions. Nonetheless, the history of religious intolerance as well as persecution has been recurrent in international and domestic conflicts. According to the Handbook, religious persecutions may take different forms such as discrimination or prohibition on members of certain religious groups, forced conversion or indoctrination, sanction for forced compliance or conformity with religious practice, imposed economic disadvantage on individual members or religious groups and physical harm.[904] Such persecutions may target minority groups, community or nationality that have a dominant religious identity like the ongoing anti-Christian religious persecution in Nigeria, which largely targets the Igbo-Christian Nigerians. Similar persecution prevails in other parts of Africa, the

[900] *Id.* at para. 6.
[901] *Id.* at para 7.
[902] *Id.* at para 8.
[903] ICCPR, *supra* note 31 at art. 18(3).
[904] UNHCR Handbook, *supra* note 349 at 72; 2004 UNHCR Guidelines, *Op Cite* 899 at para. 12.

Middle East, Asia, and some parts of North America. Religious persecutions may cut across state institutions to inter-religious and intra-religious organizations, and people of different religious sects.[905] In Pakistan, for example, there are records of prevailing cases of religious intolerance and persecutions against the Ahmadiyya religious minority groups by the Muslin sect.[906]

Making religious claims under the 1951 Convention may be fluid or somewhat overlapping with other grounds like nationality, race, or even gender. Because of this, the UNHCR Guidelines have advised adjudicators to avoid a narrow or even restrictive interpretation of religious claims that may limit the analysis of persecutions or sources. [907] Considering the sensitive nature, an assessment of religious claims requires applying all the necessary parameters to determine the existence of objective and subjective fears.

To be eligible for religious asylum, an applicant must meet the Convention's definition of a refugee.[908] Article 1A(2) defined the term a "refugee" to apply to any person "who…owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself the protection of that country…."[909] These important elements must be established to meet the viability for protection and

---

[905] INTERIM REPORT OF THE SPECIAL RAPPORTEUR ON RELIGIOUS INTOLERANCE, IMPLEMENTATION OF THE DECLARATION ON THE ELIMINATION OF ALL FORMS OF INTOLERANCE AND OF DISCRIMINATION BASED ON RELIGION OR BELIEF, UN DOC. A/53/279, 24 August 1998, para. 129.
[906] *See, e.g.* AMNESTY INTERNATIONAL, *Report on Religious Intolerance,* May 1986, POL03/03/86 [noting that the Ahmadis were prohibited from calling themselves Muslims or using Muslim religious practice. Many suffered harassment, arrest and punishments for violating the imposed rule.]; Musalo et aal., *supra* note 10 at 523.
[907] 2004 UNHCR Guidelines, *supra* note 899.
[908] 1951 Convention, *supra* note 12 at arts. 1A(2) and 33(1) [the status of refugee and prohibition of nonrefoulement]
[909] *Id.*; 1967 Protocol, *supra* note 17 art. 1(1) ["The States Parties to the present Protocol undertake to apply articles 2 to 34 inclusive of the Convention to refugees as hereinafter defined"].

nonrefoulement pursuant to Article 33(1).[910] In case of religious persecution, a victim of religious persecution may claim refugee status for a persecution suffered or feared because of their religious beliefs, or non-beliefs, or even for belonging to a particular targeted religious group or for having transgressed religious norms—certain religious standard.[911] In many situations people may be targeted for belonging to a religious group or for failing to demonstrate adherence to a religious community. Generally, when making claims for such persecution, adjudicators evaluate the existence of a WFF of persecution on religious grounds.[912] Claims of religious persecution are evaluated on merit through inquiries into the profile, experience, belief, and way of life of the claimant and how these have provoked the persecutor, and the possible harm suffered or feared. Part of the investigatory analysis would include the experiences of the members of the claimant's family, religious group, or community and how these contribute to a WFF. A mere membership of a particular religious group may be insufficient to prove a WFF. A claim for a membership identity needs to be substantiated with circumstantial evidence and even an overall political and religious climate in the country.[913]

Again, a claimant may not need to have experienced persecution directly to prove a WFF. What happens to a family member, close relative, members or his or her religious group or community would qualify to prove the claimant's WFF for future persecution.[914] While the proof of a level of belief or commitment to a such religious group may be unnecessary, establishing one's religious identity or evidence of an imputed or attributed opinion of the persecutor on the

---

[910] *Id.* at 33(1).
[911] 2004 UNHCR Guidelines, *supra* note 899 at paras. 12 (b)-(c).
[912] *See, e.g.* 1951 Convention, *supra* note 12 at art. 1A(2); *Matter of Liadakis* 10 I. & N. Dec. 252 (BIA 1963); *Ahmad and Others v. Sect'y of State for the Home Department* (1990) Imm AR 61 (Court of Appeal, Civil Division 1990).
[913] 2004 UNHCR Guidelines, *supra* note 899 at 14.
[914] *Id.*

religion of the individual or group is necessary.[915] This underscores a necessary intersection between asylum claims on grounds of religion, MPSG, and even ethnicity. People may belong to any of these either by birth, adherence, or demographics, hence, be classified into persecutory circumstance(s) on any of these grounds. It is important to evaluate how different jurisdictions interpret religious claims, with a particular focus in the United States.

4.8 Asylum Claims on Religious Grounds

Religious freedom is at the core of American values, cherished by the founding fathers who were mostly survivors of religious persecution from England. Inspired by their experiences they strived to establish America as a land of freedom. Therefore, a free exercise of religion received a paramount position in the United States Constitution and Bill of Rights.[916] Consequently, the United States constitutional history on liberty contributed to the universalization of religious freedom.[917] The First Amendment to the United States Constitution guarantees the right to exercise of religion or non-religion.[918] The legislative history on religious freedom provided under the First Amendment[919] conforms to the standard IHRL.[920] In the analysis of religious rights jurisprudence here, we examine matters affecting nationals and religious asylum cases that affect aliens, possible cross-connection in the judicial reviews.

---

[915] *Id.* at para 9.
[916] U.S. CONST. amend. 1 [stating that "…Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof…"]; Jason W. Rockwell, *When Congress Answers Religion's Prayer: The Religious Liberty Protection Act of 1999* 25 SETON HALL LEGIS. J. 135 (2001).
[917] William Lee Miller, The First Liberty: America's Foundation in Religious Freedom (New York: Knopf, 2003)
[918] *Id.,* Pub. L. No. 105-292, 112 Stat. 2787 (1998), 22 U.S.C. §§ 6401-6481 (2000)).
[919] U.S. CONST. amend. 1, *Op Cite*.
[920] UDHR, *supra* note 31 at art. 18; ICCPR, *supra* note 31 at art. 18(1).

The United States law for the free exercise of religion was first interpreted in *Reynold v. the United States.*[921] Reynold, a Mormon, was sentenced to two years of hard labor and a $500 fine for violating an anti-bigamy law. He claimed that polygamy was part of his Mormon faith, and that the anti-bigamy law was in violation of his religious rights. The Supreme Court ruled that a Federal Law prohibiting polygamy was not in violation of Reynold's right under the First Amendment on the free exercise of his religion. Part of the decision affirmed that a free exercise of religion is not absolute but subject to legitimate restrictions.[922] In Cantwell *v. Connecticut,*[923] the United States Supreme Court interpreted the provisions of the First Amendment in two dimensions—as the freedom to believe and freedom to act. While the first is absolute "the second is subject to regulation for the protection of human society."[924] Subsequently, in *Minersville School District v. Gobitis,*[925] two Jehovah's Witness Children were expelled from school for failing to salute the American flag, which they considered contrary to their religious tenets. The court interpreted the concept of Free Exercise of Religion as a requirement that is not binding on neutral government's institutions or legislative bodies.[926] In a related case, *West Virginia Board of Education v. Barnette,* the Court reversed *Gobitis* holding that government has a duty to balance religious freedom against the interest of the state. Barnette violated the statute and public school requirement to pay allegiance to and salute the American flag in deference to

---

[921] *Reynolds v. United States,* 98 U.S. 145 (1878) [holding that a religious duty was not a valid defense to criminal indictment].
[922] *Id.* at 145-6.
[923] 310 U.S. 296, 303, 304 (1940).
[924] *Id.*
[925] *Minersville Sch. Dist. v. Gobitis,* 310 U.S. 586 (1940), overruled by West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).
[926] *Id.*

his religious belief. The court held that restriction to freedom of religion should be applied "only to prevent grave and immediate danger to the interest which state may lawfully protect."[927]

A major controversy affecting the interpretation of the First Amendment's free exercise of religion is whether, in the plain language of the First Amendment, the federal, state and local governments could be prohibited from passing laws that expressly impose burdens or prohibits the free exercise of religion. Thus, in *Sherbert v. Verner,*[928] the Supreme Court ruled that even neutral statutes could infringe on the free exercise of religion. Twenty-seven years after, the Supreme Court dramatically reversed itself in *Employment Division v. Smith,*[929] and changed the religious free exercise law. It held that generally, neutral laws that burden a free exercise of religion without specifically targeting religious practice do not violate the First Amendment. *Smith's* decision provoked criticism among scholars.[930] This caused Congress to pass Religious Freedom Restoration Act ("RFRA").[931] The overall purpose of the Congressional intervention was to ensure an application of the "compelling governmental interest test" as in pre-*Smith* jurisprudence and to ensure fair proceedings on religious claims as well as defense. However, the legislative developments did not significantly alter the Supreme Court's position on *Smith.* In fact, the Court struck the implementation of RFRA freedom in *City of Boerne v. Flores.*[932] Following the decision, Charles T. Canady introduced a Bill on the floor of Congress, the Religious Liberty Protection Act ("RLPA")[933] that was not enacted into law. But two years after,

[927] *Id.* at 639.
[928] 374 U.S. 374 U.S. 398 (1963).
[929] 494 U.S. 879 (1990) [stating that [A] law is constitutional under the Free Exercise Clause if it is facially neutral and generally applied].
[930] Musalo et aal., *supra* note 10 at 531; Musalo, *supra* note 256, 1221-3.
[931] Religious Freedom Restoration Act of 1993, Publ. No. 103-141, 107 Stat. 1488 (Nov. 16 1993) Codified 42 U.S.C. & 2000bb through 42 U.S.C. 2000bb-4.
[932] 521 U.S. (1997).
[933] Religious Liberty Protection Act ("RLPA"), H.R. 1691, 5 May 1999, 106th Congress (1999-2000).

Congress passed the Religious Land Use and Institutionalized Person Act (RLUIPA),[934] which attempted to incorporate the *Sherbert* compelling interest principle. The controversy between Congress and the Court on the black letter principles of religious freedom is significant and speaks volumes about the jurisprudential difficulties in the interpretations of refugees' claims on religious grounds.

In the *Matter of Liadakis,*[935] a Greece national who entered the United States as a crewman on July 15, 1960, and married a United States citizen, sought asylum on religious grounds. At first, he was not represented by counsel and conceded to a deportation charge. Subsequently, he applied for withholding removal arguing that he would suffer physical persecution on account of his religious beliefs and practice as a member of Jehovah's Witness in Greece.[936] His testimony indicated that the Greek Constitution recognized the Eastern Orthodox Church of Christ as a dominant religion, and any other religion is allowed to perform its worship without proselytism.[937] But according to the respondent, proselytism is fundamental to his Jehovah Witness religious practice since he cannot avoid this in Greece, he fears that his deportation would expose him to religious persecutions. His evidence on country conditions showed that some members of the Jehovah's Witness in Greece have been subjected to persecutions like arrests, prosecution, imprisonment, and fines for proselytism. Upon assessment, BIA maintained that even though United States law authorizes proselytism the act would not be offensive to public policy, since the practice of any religion is subject to state regulation. Based on this argument, the Board held that the right to religious proselytism is not without limitation

[934] 42 U.S.C. § 2000cc (2001).
[935] 10 I. & N. Dec. 252 (BIA 1963).
[936] Submitted pursuant to Section 243(h).
[937] Citing Section 1 of the Greek Constitution on Religious Freedom.

whether in the United States or Greece[938] and cannot justify "our labeling actions" taken under that policy as "physical persecution."[939] Therefore, BIA denied Liadakis' claims for lack of evidence of individualized persecution and particular circumstances of religious persecution. It thus concluded that the extent of the sanction imposed by the Greek authorities on the Jehovah's Witness members would not fall within the purview of Section 243(h) INA.

However, the BIA's interpretation of religious freedom and WFF in *Liadakis* conflicts with the standard of the Convention and the 1980 Refugee Law. In as much as neither the Convention nor the Act explicitly defined religious persecution, Article 32 of VCLT provided a guide to the interpretation of an "ambiguous or obscure" treaty through recourse to supplementary materials.[940] The Convention's *travaux preparatoires* indicated that the proposal for right to religious freedom advocated by the Luxembourg representative[941] was complete freedom to practice religion in private and public as well as to teach religion to others. Additionally, under the UNHCR advisory opinion,[942] it is suggested that the basis for interpreting persecution on religious grounds would include any prohibition of religious worship or practice of one's belief in a community with others in private or public as well as discrimination,[943] forced conversion or compliance to religious practice, imposed gender restrictions and conscience objections.[944] Article 31 of VCLT urged "good faith" interpretation of treaty in accordance with ordinary meaning, context, object and purpose.[945] According to the

---

[938] At 511 citing the Third Circuit's decision in *Blazina v. Bouchard,* 286 F.2d 507 (3rd Cir. 1961).
[939] *Id.*
[940] *Id.* Preparatory works of *travaux preparatoires* documents containing discussions like the "negotiating and drafting history... and the postratification understanding of the contracting parties" to a treaty. *Zicherman v. Korean Air Lines Co.,* 516 U.S. 217, 226 (1996).
[941] The proposal made after the state Pax Romana was supported by the representatives of Austria, Belgium, Egypt, France, the German Federal Republic, the Holy See, Netherlands, Sweden, the UK and Venezuela.
[942] 1951 Convention, *supra* note 12 at art. 35.
[943] The UNHCR Handbook, *supra* note 349 at para. 72.
[944] *Id.* 2004 UNHCR Guidelines, *supra* note 899 at para. 24 B
[945] VCLT, *supra* note 171, art. 31.

Preamble to the 1951 Convention, the purpose of the Convention among others is to "consolidate previous international agreements relating to the status of refugees and to extend the scope of and the protection accorded by such other instruments."[946] The Preamble recognized the existing instruments human rights framework the UN Charter and UDHR—that laid the foundation for other human rights instruments. Of course, the reference is purposeful considering that IHRL forms the basis of protection from persecution and WFF.[947] The BIA's decision in *Liadakis* contradicted the Congressional rights established under the First Amendment.[948] Although BIA failed to classify religious proselytism under legal limitations, it did not recognize respondent fear for persecutions because of proselytism as WFF.

More than four decades after the *Matter of Liadakis,* the Tenth Circuit Court reversed and remanded BIA's summary order affirming a denial of asylum by IJ to a Chinese national who alleged religious persecution by the communist Chinese government because of his belief and practice of Christianity.[949] Mr. Yan sought asylum and withholding removal in the United States. He submitted a passionate testimony of how he was converted on his sick bed by a Christian, whose preaching saved him from depression and inspired him to participate actively in the weekly meetings, worship, and faith-sharing of Christian families and friends.[950] He later received Christian baptism. Subsequently, the Chinese authority broke up his home church, confiscated his Bible, and had him put in jail. At the same time, he was beaten and tortured on account of his Christian belief and practice. However, the IJ expressed skepticism about Mr.

[946] 1951 Convention, *supra* note 12 at Preamble, para. 3.
[947] The UNHCR Handbook, *supra* note 349 paras. 51-53; Hathaway, *supra* note 22 at 112; Goodwin-Gill, *supra* note 269 at 69; *Matter of Laipenieks*, 18 I&N Dec. 433, 457 (BIA 1983) [defined persecution as a threat to life or freedom...]
[948] Pub. L. No. 105-292, 112 Stat. 2787 (1998), 22 U.S.C. §§ 6401-6481 (2000)) [religious freedom and free expression of one's belief].
[949] *Yong Ting Yan v. Gonzales* 438 F.3d 1249 (10th Cir. 2006)
[950] *Id.* at 74-77.

Yan's religious "credibility,"[951] as a Christian, holding that he has failed to demonstrate "that he would be or would have been targeted by the authorities in China on account of his religious activity."[952] Th IJ's first conclusion relied on a result of "trick questions" on cross-examination by the DHS, which focused on Biblical quiz and some doctrinal questions. However, despite the uncontroverted demonstration of his Christian beliefs and practice, the IJ doubted his religious credibility merely for his inability to answer certain theological questions posed by DHS as well as his regular attendance of worship in the United States. The applicant was denied asylum and BIA affirmed IJ's decision summarily, adding that there was no reasonable ground to counter the decision.[953]

Yan created an uncommon precedent that required a claimant to demonstrate knowledge of his religious belief and evidence of the practice of religion. Of course, the burden imposed on Yan is inconsistent with the principles of the First Amendment and the United States refugee jurisprudence on WFF.[954] Ordinarily, persecutors of Christians do not set any overt measures on target victims, but merely attack them for their belief and practice of the Christian faith. For obvious reasons, the standard adopted by IJ and BIA in determining Mr. Yan's eligibility for withholding on grounds of religious persecution was overbroad and inconsistent with the benchmark. Yan's counsel was right in raising the issue in his defense that Mr. Yan is merely a Christian believer persecuted for his faith and not a seminary student.[955] Neither the refugee law nor the United States asylum law supports the position taken by IJ and BIA. According to the UNHCR Guidelines, religious persecutions may take varied forms including prohibition and

---

[951] I*d.*; Admin. R. at 41.
[952] *Id.* at 43.
[953] Relying on 8 U.S.C. § 1252(b)(4)(B)…
[954] U.S. CONST. amend. 1, *supra* note 122 [on free practice of one's religious belief]
[955] Admin. R. at 8.

punishments of individual believers or members of religious minority groups by state or non-state actors.[956] To assess the merit of such claims, individual profile, experience, belief and way of life are imperative than doctrinal knowledge.[957] Acknowledging this standard, the Tenth Circuit faulted the IJ's deference to "formal, doctrinal knowledge of Christianity," as opposed to the respondent's "highly personal and emotional testimony." Although the test of credibility is an acceptable skill of factfinding in the United States jurisprudence to ascertain an applicant's involvement with a claimed expertise, knowledge, or matter. IJ misapplied this practice in *Yan* in seeking to ascertain evidence of religious persecution. The test on respondent's knowledge, belief and practice of his avowed Christian religion was an excess.

Outside individual based attacks, religious persecutions may target groups and sometimes coalesce into political animus, intolerance, or hate. In *Masood Shirazi-Parsa, et al. v. I.N.S.*[958] Masood Shirazi-Parsa, a native of Iran and his wife, Georgina, a Mexican filed asylum, and withholding deportation in the United States on religious and political grounds. Masood alleged that he was a victim of persecution by state actors in Iran who suspected him to have connections with the West in the United States. According to their testimony too, his wife's religion as a Mormon-Christian and employment with the Argentina Embassy caused an imputation of political and religious identity. Apparently, the couple met and married as students in the United States, and later relocated to Iran. While in Iran, Masood served in the Iranian army. During this period, he suffered discrimination because of his wife's identity and what was suspected to be an affiliation with the West. His wife, Georgina visited the United States twice while in Iran to have her two kids.

---

[956] 2004 UNHCR Guidelines, *supra* note 899 at para. 12.
[957] *Id.* at para. 14.
[958] 14 F. 3d 1224 (9th Cir. 1994).

The incident that led to their flight began in 1988 when the couple were invited to a dinner at an army officer's home and the officer's wife insulted Georgina because of her Mormon religion. Subsequently, the Iranian Revolutionary officer raided their house for a search, seized and had Masood beaten up. He was questioned about his wife's employment at the Argentine Embassy and their connections with the Argentinian soldiers in the United Nations. Afterward he was interrogated weekly on the same issues as an army officer under suspicion as Western espionage. These allegations and threats caused Georgina to flee Iran for Mexico. She later entered the United States as a visitor. Subsequently, Masood fled Iran after he received a summon from the prosecutor that ordered him to appear at their office without specifying any charge. He first traveled through Turkey to Mexico, where he first sought protection but was denied for failing to meet the Mexican government's requirement of a capital of $200,000 to start a business.[959] He later entered the United States without inspection.

In March 1989, a petitioner applied for asylum and withholding in the United States.[960] He asserted fear of being "imprisoned by the regime, and perhaps tortured and killed" because of his and his wife's political and religious beliefs. His claims were denied by the IJ on what the court termed a failure to demonstrate evidence of a "well-founded fear of political and religious persecution." According to the IJ, Masood relied heavily on the evidence of his summons rather than providing a causal connection between the summons and the persecution he feared. Based on this reasoning, the IJ interpreted the summons to be a cause of the regime's suspicion that Masood was a spy. There was no additional investigation into the country's condition. Instead, the IJ held that neither the summons nor the prior event at the dinner could meet the standard of a

[959] *Id.* at 5-6.
[960] pursuant to 8 U.S.C. §§ 1158(a) & 1253(h)(1).

reasonable basis for persecution on religious or political grounds.[961] Therefore, the petition was denied, and the petitioner granted an option for voluntary departure pursuant to 8 U.S.C. § 1254(e).

The petitioner appealed for a review with the BIA. Unfortunately, the BIA affirmed the denial and held that the Iranian regime's interest in Masood was not on account of his religious or political views but on an assumption that he was a spy.[962] However, the BIA failed to recognize that the reason behind Masood's imputed identity of a spy that was linked to his wife's Mormon-Christian religion and connection with the west—the Argentina Embassy and the United States. The Board equally trivialized the reason behind the embarrassing experience of the petitioner's wife at a dinner party especially the insult on Georgina's Mormon religion, subsequent search in their house and summons by the prosecutor.[963] It was unsurprising that the Ninth Circuit Court excoriated the BIA's error in failing to conduct a total examination of facts. To remedy the error, the court made a cumulative assessment of the applicants' persecutory experiences—the dinner incident, the physical attack on Masood in his house, his arrest and detention, weekly interrogations by the Iranian army on his marriage with a Mormon, his wife's employment with Argentine Embassy, and suspicion of their relationship with the United Nations. Further, the court underscored the specific threats on Masood, including arrest, and interrogations as tantamount to an imputed opinion. This was proved by the evidence that he was bullied and ridiculed by his persecutors who called him "you American," and "you spy." Linked to other cumulative incidents on the pattern of political arrest and persecutions by the Iranian regime, the court concluded that a political opinion was imputed on Masood and his wife.[964] It

---

[961] Admin. Rec. at 7.
[962] *Id.* at 7-8.
[963] *Id.*
[964] *Masood Shirazi-Parsa* citing *Canas-Segovia v. INS,* 970 F.2d 599, 602 (9th Cir. 1992)

further held that the petitioner's receipt of the summons indicated that he could be persecuted in the future. Against all odds, that Masood fled to Turkey without a passport makes his persecution more evident upon return. Based on the established evidence of WFF, the court reversed BIA's decision and held that the petitioners could be persecuted on political grounds because the regime attributed to them the identities of political enemies. Therefore, it ruled that the petitioner and his wife be granted asylum, and BIA's decision was reversed and remanded[965] to be reconsidered pursuant to *INS v. Cardosa-Fosenca*.

Masood illustrated some of the delicate issues in asylum jurisprudence. A petitioner who has not his kind of courage, resources, and dogged pursuit of justice would likely face a risk of deportation, despite his or her WFF. Whereas the United States judicial review process of the Circuit Courts and other superior courts is necessary to ensure a fair exercise of asylum jurisdictions, developing a standard formula for evaluating refugee claims in accordance with Articles 1A(2) and 33(1) is necessary to ensure a fair assessment. Masood's decision exemplifies the intersect between religious and political claims as his wife's religion and work with the Argentine received a political imputation. Apparently, his persecutory experiences reflect prevailing situations in other countries where religious groups are singled out for political persecution as seen in the former Northern and Southern Sudan, Nigerian Muslim North and Southeastern Nigeria, Nicaragua, Guatemala, El Salvador, and Honduras.[966] While the UNHCR identified these as potential areas of asylum, in many situations claimants do not receive plausible assessment because of poor analysis of the country's condition and the involvement of state actors. Mostly neglected here are the gender issues in political or religious persecutions. For

[965] 480 U.S. 421, 428 n.5 (1987).
[966] *See,* UNHCR, Guidance Note on Refugee Claims Relating to Victims of Organized Gangs (2010) [stating that some of the named persons suffer persecution either by preaching or resistance, in case or gangsters]; Musalo et aal., *supra* note 10 at 550-1.

instance, even though Georgina's experience overlaps between gender and the Convention's ground, the intersectionality of her female sex in her persecution was largely discountenanced. Our discussion in Chapter Five will explore specifically gender claims and challenges of establishing eligibility as well as the problem of nexus.

4.9 United Kingdom and the Jurisprudence of Religious Claims

To be eligible for asylum in the UK, an applicant must in the asylum country and is unable to return to the country of origin for fear of persecution.[967] The Secretary of States makes the determination to grant or refuse entry.[968] Such application can be made upon arrival or as soon as one becomes aware that it would be unsafe to return to his or her country. The asylum claim can be made on the Convention's or human rights grounds pursuant to section 113(1) of the Nationality Immigration and Asylum Act (NIAA). Late applications are likely to face denial.[969] An application for refugee relief is made to the immigration officer, also referred to as a screening officer. If it received a favorable adjudication by the Home Office, the claim would be referred to a case worker for final review, which may take about six months. While the United States jurisprudence grants asylum seekers working authorization to enable them to support themselves and to get legal representation, the UK law does not.

Part IV of the UK Immigration and Asylum Act (UKIA) defined an asylum seeker as:

> …a person who is not under 18 and has made a claim for asylum which has been recorded by the Secretary of State but which has not been determined…it would be contrary to the United Kingdom's obligations

[967] Immigration and Asylum Act (1999), UK PGA, c33 pt. 1, sections 1[right to enter] and 2 [right to remain].
[968] *Id.*
[969] section 113(1) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (subject to subsection (9) below).

> under the Refugee Convention, or under Article 3 of the Human Rights Convention, for the claimant to be removed from or required to leave the United Kingdom.[970]

UKAI enunciates the relevant requirements of asylum law as—not under 18, and claims made pursuant to the Refugee Convention and Article 3 of the Human Rights Convention, which are determinants for the analysis of a WFF. As earlier indicated, it is incumbent on the Secretary of State for the Home Department to grant or deny asylum. His decisions are reviewable by the UK Courts, as it is in other common law countries. Generally, section 8(7) identified other officers involved in the decision-making process as—an immigration officer, Secretary of State, F1- the First Tier Tribunal or Special Immigration Appeal Commission. These collaborate to review and determine asylum claims. Any applicant whose asylum application is denied has the right of appeal in Federal Court to seek a judicial review of claims and such an individual's right is protected by law.[971]

In *Ahmad and Others v. Secretary of State for the Home Department* (SSHD)*,*[972] applicants, some Pakistan citizens of the Ahmadiya religious group in their 20s arrived at Heathrow Airport on August 2, 1984, and applied for asylum alleging fear of persecution by the Pakistan government and the Muslim community in Pakistan who are opposed to their belief and practice of their Ahmadiya religion. The Ahmadiya was a religious sect founded by Mirza Ghulam Ahmed, who claimed to be the last prophet of Islam and had then gathered about four million adherents in Pakistan alone; they were constantly persecuted by orthodox Muslims and

---

[970] Immigration and Asylum Act, 1999, UK Public General Act, c.3 Part VI.
[971] S. 15 (1.4. 2003) repealed by Nationality, Immigration and Asylum Act 2002 (c. 41), ss. 77(5), 162(1), Sch. 9 (with s. 159); S.I. 2003/754, art. 2(1), Sch. 1 (with arts. 3, 4, Sch. 2 paras. 1(2), 5).
[972] (1990) Imm. AR 61 (Court of Appeal, Civil Division, 1990).

the Pakistan government.[973] The applicants testimony indicated that on April 26, 1984, the President of Pakistan published an Ordinance in 1984 that criminalized religious practice of the Ahmadiyas especially their practice or demonstration of Muslim faith making such act punishable with three years' imprisonment and a fine.[974] Although neither any of the applicants nor their family members suffered attack by the state agents, they narrated the physical attacks on many of their religious members, which caused them to escape for fear of persecution. One of them indicated that he would be killed if forced to return to Pakistan. The Secretary of State denied their application, holding that their fear of persecution was not well founded.

The applicants appealed against the decision of the SSHD and submitted evidence of individual physical violence and the lack of the government's willingness and ability to protect them. Overall, the appellants demonstrated fear of persecution under the regime's enforcement of anti-Ahmadiya Ordinance. They further testified how its enforcement has caused increased harassment of the members of their religion and would likely affect them if they return to Pakistan. Their claim was on the basic requirement of their religion to proselytize and argued that proselytization would cause their being persecuted by the political regime. The appellant court interpreted the appellants' proselytism as an act of inviting persecution. Therefore, it found the claim to be inconsistent with the Refugee Convention.[975] On this reasoning, the appellants' submission was found to be unrealistic and without a justification for a WFF of persecution.

In the decision, the UK Court of Appeal (UCA) shifted from the standard set under the UNHCR Religious Guidelines (URG) to religious claims. The Guidelines identified persecutory

---

[973] *Id.* at 61.
[974] *Id*. citing Ordinance, No. XX of 1984.
[975] Citing *Mendis v. Immigration Appeal Tribunal and The Secretary of State for the Home Department,* [1989] Imm. AR 6.

restrictions within any act that impedes people's enjoyment and practice of the tenets of their religious belief[976] as well as discrimination on such basis.[977] Although the Court acknowledged the act of religious proselytizing to be integral to the Ahmadiya sect, it failed to recognize a state-imposed punishment on account of religious belief as persecutory, instead associates same with a breach of national status. Paragraph 10 of the URG defines religious freedom as the right to express and practice one's religious belief freely as an individual or a community, in public or private. This is consistent with Article 18 of ICCPR. Except for the restrictions, under Article 18(3) of the ICCPR,[978] the freedom to express one's thoughts, freedom of conscience or belief is unfettered under any law. The Pakistan Ordinance does not fall within the approved limitations. Therefore, the prohibition imposed by the Pakistan Ordinance amount to what the UNHCR has classified as inhibiting laws that could limit people's fundamental rights to practice their religion.[979] Its enforcement against the adherents' Ahmadiya religion could provoke a WFF of persecution. To determine whether a discriminatory or restrictive law can amount to persecution, URG urged decision-makers to consider an applicable human rights standard.[980] Here, the UK Court has failed to adopt the analytical process in assessing applicants' WFF and the impact of Pakistan state's involvement in appellants' alleged fear of religious persecution.

Likewise, in a similar case, in *Ahmed v. Canada (Minister of Citizenship and Immigration),*[981] the Canadian court examined claims of an Ahmadiyya adherent on religious persecution. Ahmed, a Pakistan citizen claimed a Convention's refugee and alleged fear of

---

[976] 2004 UNHCR Guidelines, *supra* note 899 at para. 15.
[977] *Id.* at para. 17.
[978] Limitations "necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others". Article 18(3).
[979] 2004 UNHCR Religious Guidelines, *Op Cite* at para. 17.
[980] *Id.* at para. 16.
[981] (1997), 134 F.T.R. 117.

persecution by the Taliban. He testified that he was “taunted and beaten” regularly as a child, denied admission to colleges, dismissed from his job; on one occasion beaten and hospitalized for expressing his Ahmadiyya religion. He was equally arrested and jailed for the same reason. The Canadian Court found his testimony credible but held that his discriminatory treatment and harassment does not amount to persecution. Although the court failed to establish, to the contrary, what level of discrimination could necessarily rise to the threshold of persecution and why the applicant’s experiences could meet the threshold test. So far, the two decisions in UK and Canada indicate the fluidity of judicial interpretations of persecution and WFF on refugee claims despite manifest evidence of human rights violations and persecutory threats. It gives cause to question the meaning of refugee law without human rights protection for an asylum seeker.

Ten years after *Ahmed & Others,* UCA modified its position on religious claims relating to members of the Ahmadiyya. In *Ahmed* (*Iftikhar*) *v. Secretary of State for the Home Department,*[982] the UK court reversed SSHD’s denial of asylum to a 30year old Pakistan Ahmadi. Respondents have alleged severe persecution in his village because of his religion and practice of proselytism. He argued that if returned or relocated he would still proselytize because it was part of his religious tenets in “proclamation of Amhadi beliefs.”[983] The lower court rejected Ahmed’s claims on the ground that he had internal flight alternatives or might refrain from proselytizing or speaking out about his beliefs. The Court of Appeal faulted the ruling, holding that it was “unreasonable” because the applicant is entitled to protection if his speaking out in the performance of his religious faith resulted in a risk of persecution. The decision of the

[982] [2000] I.
[983] *Id.* at 3.

Court of Appeal aligns with the purpose of Article 1A(2) on the meaning of a refugee and Article 33(1) on the purpose of nonrefoulement, which are the hallmarks of IRL. Nonetheless, the precedent set forth in *Ahmed* has not been consistently applied. In many cases, the UK SSHD has rejected asylum claims by merely recommending internal flight alternative to protection even when state actors are primary agents of persecution.[984]

When compared with the United States, recent decisions in the United States courts showed a more favorable exercise of discretion on religious claims, with fewer exceptions. Generally, courts in the United States have held that religious claims may not be denied merely because of an applicant's poor knowledge of basic religious doctrines.[985] Moreover, the establishment of the International Religious Freedom Act (IRFA) in 1998 by the United States Congress[986] and the creation of the Office of the International Religious Freedom (OIRF) within the U.S. Department of States (DOS) have served as effective monitoring instruments for religious persecutions across different countries and even the documentation of human rights abuses on religious grounds in the Annual Human Rights Reports. Equally, these have contributed as a useful resource for evidence on country conditions for asylum adjudicators.[987] The standard is highly recommended in other asylum jurisdictions as an investigative reference to support applicant's testimonies on the country's conditions, especially where such information is not accessible to asylum seekers considering the urgency of their flight.

[984] *See, e.g. IA and Others (Ahmadis: Rabwah) Pakistan v. Secretary of State for the Home Department*, CG [2007] UKAIT 00088; *MJ and ZM (Ahmadis - Risk) Pakistan v. Secretary of State for the Home Department*, CG [2008] UKAIT 00033.
[985] *See, e.g., Rizal v. Gonzales,* 442 F.3d 84 (2d Cir. 2006); *Zhen Li lao v. Gonzales,* 400 F.3d 530 (7th Cir. 2005).
[986] Pub. L. 105-292, 112 Stat. 2787 (Oct. 27, 1998) [IRFA].
[987] *See, e.g.* IRFA, ON ANNUAL REPORT ON INTERNATIONAL RELIGIOUS FREEDOM, IRFA §§ 101, 102, § 601; *See also,* U.S. Dept. of State, 2006 Report on International Religious Freedom, http://www.state.gov/g/drl/rls/irf/2006/, digested in 83 IR 2112 (Oct. 2, 2006) [Reported religious persecutions in countries like Eritrea, Sudan, Iran, North Korea, Saudi Arabia, Burma, China, and Vietnam].

But regardless of the milestone attained with the implementation of IRFA, the United States asylum jurisprudence has met with recorded challenges in the post-9/11 regime, especially with the introduction and enforcement of the REAL ID Act. The latter has ushered in new measures of national security evidential burden, which authorizes courts to deny claims on grounds of national security, lack of additional corroboration as well as what is termed credulity claims and inconsistency. Implementing this has caused numerous hardships for claimants almost on all grounds but more especially on religious and gender claims.[988] Impacts of the REAL ID Act challenges will be revisited in Chapter Six.

4.10 Persecution on Account of Political Opinion

In defining the meaning of a refugee, Article 1A(2) of the 1951 Convention[989] included political opinion as the ground (on account of) for refugee claims. Similarly, Article 33(1)[990] identified politically motivated persecution as one of the five enumerated grounds for nonrefoulement. However, none of these defined the meaning of political opinion or the import of persecution on account of political opinion. Goodwin-Gill attempted a definition of the term political opinion under the 1951 Convention. He stated that:

> In the 1951 Convention, "political opinion" should be understood in the broad sense, to incorporate, within substantive limitations of developing generally in the field of human rights, any opinion on any matter in which the machinery of State, government, and policy may be engaged.[991]

[988] *See, e.g. Cao He Lin v United States Department of Justice*, 2005 U.S. App. LEXIS 23842 (2d Cir. Nov. 4 2005) [The Second Court denied asylum to a Chinese woman fleeing persecution (sterilization) having transgressed the communist's law on family planning and birth control.]
[989] 1951 Convention, *supra* note 12 at 1.A(2).
[990] *Id*. at 33(1).
[991] Goodwin-Gill, *supra* note 269 at 49.

The concept of human rights as used by Goodwin-Gill correlates with Hathaway's ideation of persecution as "the sustained or systemic denial of basic human rights." Persecutory limitations on political opinion would imply a violation of a person's right to express his or her political views or an attack on the expressed opinion or imputed opinion. Either of these would include a "demonstrative failure of state protection in relation to one of the core entitlements which have been recognized by the international community."[992] Generally, persecution on account of political opinion is perpetrated by state actors or non-state actors whom the government is unable or unwilling to control. The prong of persecution on account of political opinion applies to the opinion of a victim and not that of the persecutor.[993] Our case review examines these issues and how they are being interpreted to underpin motivations or conditions that provoke political persecution, imputed opinions, and consequences of neutrality.

4.12 United States Case Laws on Political Asylum

Political history since World War I and II, and the impact of the Cold War revealed a series of conflicts from the polarized West and East, as well as politically related persecution, consequent upon these. Earlier in Chapter Two, we underscored the impacts of political conflicts on humanitarian migration and the development of IRL. Since World War II, the United States has played remarkable roles in the international arrangements for political asylum and the protection of other refugees. Notably, its refugee jurisprudence has made special provisions for anti-communist refugees fleeing persecution from Eastern Europe.[994] Generally, refugees may claim political asylum in the United States under the following areas—anti-communism,[995] trade

[992] *Id.;* Hathaway, *supra* note 22, 112.
[993] Defined pursuant to the 1951 Convention, *supra* note 12 at art. 1A(2) and INA § 101(a)(42).
[994] Musalo *et aal., supra* note 10 at 412-3.
[995] *See, e.g. Fidele Sanon v. I.N.S.* 52 F.3d 648 (7th Cir. 1995).

unionism,[996] political neutrality,[997] whistle blowers,[998] imputed political opinion,[999] and in few circumstances through an expression of feminism or those who have transgressed gender norms and survivors of domestic violence.[1000] Nonetheless, the determination of eligibility criteria in any of these claims is interpreted case by case, taking cognizance of the import of WFF of persecution on account of political opinion pursuant to INA § 101(a)(42). In practice, the decisions of courts on politically related claims and what constitutes "on account of" political claims have been elusive and somewhat inconsistent. For example, in *INS v. Elias-Zacarias,*[1001] a young Guatemalan male of eighteen years was denied asylum and withholding in the United States, having fled from forced conscription, and threatened attack of anti-government guerrillas. His testimony indicated that two armed uniformed guerrillas entered his house to coerce him and his parents to join their guerilla. Upon refusal, due to fear that the government would come after him and his family if they join the guerrillas, the two-armed guerrilla men left but threatened to come back in greater force possibly to invade them. Convinced that they would come back, Elias-Zacarias fled shortly after the threat and entered the United States without inspection. He was arrested and put on a deportation proceeding. He conceded deportation but sought asylum and withholding. The IJ denied him asylum holding that Zacarias's claim was merely based on his "one attempted recruitment by guerrillas," which did not demonstrate persecution or a WFF for persecution on account of race, religion, nationality, membership in a particular social group or political opinion, hence not eligible for asylum.[1002]

---

[996] *See, e.g., Vicente Osorio v. I.N.S.* 18 F.3d 1017 (2nd. Cir. 1994).
[997] *See, e.g., Bolanos-Hernandez v. I.N.S.* 767 F.2d 1277 (9th Cir. 1985).
[998] *See, e.g., Dioneesio Calunsag Grava v. I.N.S.* 205 F.3d 1177 (9th Cir. 2000).
[999] *See, e.g., jose Dosey Argueta v. I.N.S.* 759 F.2d 1395 (9th Cir. 1985).
[1000] *See, e.g., R-A-, supra* note 74*; Fisher supra* note 74*; Fatin, supra* note.
[1001] *Elias-Zacarias*, *supra* note 360 at 478, 112, 812, 117.
[1002] Pursuant to INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).

On appeal, BIA upheld IJ's decision and summarily dismissed the appeal on procedural grounds, refusing to reopen the deportation hearing at the request of the respondent. Instead, BIA held that the respondent has failed to make a prima facie case of eligibility for asylum that would be capable of changing the result of his deportation hearing. However, the Ninth Circuit Court reversed BIA's decision and granted political asylum to the respondent. In its view, the Ninth Circuit interpreted the guerillas' coercive attempt to conscript Zacarias as persecution on account of political opinion because "the person resisting forced recruitment is expressing a political opinion hostile to the persecutor and because the persecutor's motive in carrying out the kidnapping is political."[1003]

The matter went to the Supreme Court on a petition for certiorari brought by the INS. In a majority decision of six to three Justices, the Supreme Court held Elias-Zacarias was not a refugee within the meaning of the 1980 Refugee Act and that he failed to prove that his fear of persecution was on account of his political opinion within the Act. First, in the view of the Court Zacarias failed to prove that his refusal to join the guerrillas was politically motivated. Even though his testimony in part showed that he was partly motivated by fear that government forces would retaliate against him, and his family if they joined the guerrillas. Secondly, the Court held that Zacarias failed to prove that his prosecutor's motives were political. Based on these, the Court held that his alleged threat that his persecutors would retaliate was not on account of any political opinion of Zacarias but simply "because of his refusal to fight with them." The decision has been the subject of criticism for several reasons, which this study expounds.[1004] Primarily, *Elias-Zacarias* set a controversial precedent that requires a claimant of political asylum to prove

[1003] *Elias-Zacarias*, *supra* note 360 at 478.
[1004] *See, e.g.* Musalo et aal, *supra* note 10 at 1191.

the persecutor's intent, rather than the Convention's standard of showing a WFF for persecution on account of the five grounds.[1005] Apparently, the Court leaned towards BIA intent-based position, requiring the applicant to demonstrate nexus by linking persecution suffered or feared with proof of persecutor's motive.[1006] By implication, the Supreme Court reversed its own precedent in *Cardozo-Fonseca* on subjective and objective fear, and set the most unrealistic standard of discharging a burden by proof of persecutor's intent. By shifting from *Cardoso-Fosenca'*s standard to bring the US conformance with the 1967 Protocol,[1007] the Court inconsiderably heightened the evidential proof for the claim of asylum or withholding on political grounds. A significant achievement in *Cardoso-Fosenca* that was reversed in *Elias-Zacarias* was the requirement for applicants to demonstrate WFF for persecution rather than the reason behind his or her persecution.[1008]

Going by the *Elias-Zacarias* standard, it would be nearly impossible for aliens to obtain political asylum or related humanitarian reliefs in the United States. The principle of nonrefoulement, as well as the United States law on withholding removal, does not intend to impose such a burden on persons fleeing persecution,[1009] otherwise the motive of prohibiting refoulement of refugees would be almost inconceivable. Section 208(a)[1010] INA authorizes the Attorney General to exercise the discretion to grant asylum to an alien who meets the definition of a "refugee" because such an alien is unwilling and unable to return to his home country due to

[1005] 1951 Convention, *supra* note 12 at art. 1A(2); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).
[1006] *Elias-Zacarias*, *supra* note 360 at 816-7.
[1007] In a dissenting opinion Justice Stevens referred to *Cardoza-Fonseca* that: "Our analysis of the plain language of the Act, its symmetry with the United Nations Protocol, and its legislative history, lead inexorably to the conclusion that to show a 'well-founded fear of persecution,' an alien need not prove that it is more likely than not that he or she will be persecuted .... *Zacarias,* 112 S. Ct. at 818-19, (quoting *Cardoza-Fonseca,* 480 U.S. at 449) (Stevens, J., dissenting).
[1008] *Cardoza-Fonseca, supra* note 357 at 196; 1951 Convention, *supra* note 12, art. 33(1); 1967 Protocol, *supra* note 17, art. 1(1); Musalo, *supra* note 10 at 1191.
[1009] *Id.*
[1010] 8 U.S.C § 1158(A).

"fear of persecution or a well-founded fear of persecution on account of race, religion, nationality, MPSG, or political opinion."[1011] Basically, a credible fear for persecution and inability to return home are the core for nonrefoulement. Unfortunately, *Elias-Zacarias'* decision turns a blind eye to the Act, and shifted to proof of intent, which is a principle in criminal jurisprudence.[1012] The unconventional standard displaced victim-based remedy that is the essential of refugee jurisprudence[1013] with persecutor-based investigation. By focusing on the acts of persecutors, it ignored the human rights effects of persecution on victims and the need for humanitarian relief. Regrettably, the Zacarias precedent has remained a primary standard of proof in nexus requirements in the United States. The consequences of this are revisited in Chapter Six.

Elias-Zacarias' experience resonates with the fate of hundreds, if not thousands, of asylum seekers in the United States, especially individuals fleeing forced conscription, threat, or homicide from the northern triangle states—Honduras, El Salvador, and Guatemala. Studies have shown that these three countries have pervasive gang presence with the highest rate of homicide and ineffective government to protect the lives of victims or stem the tide of gangs whose powers seem to have become *de facto* authorities in those countries.[1014] Moreso, with the effects of armed conflicts smoldering in Ukraine and different parts of Europe, Africa and the Middle East, survivors of political persecutions are bound to seek asylum in other countries. The overall

---

[1011] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).

[1012] Proof of *mens rea* is a common law principle in criminal jurisprudence that only conscious wrongdoing constitutes a crime. *See, e.g.,* 21 AM. JUR. 2d Criminal Law § 129 (1981); *Duncan v. State, 26 Tenn.* 148, 150 (Tenn. 1846).

[1013] 1951 Convention, *supra* note 12, art. 1(1); 1967 Protocol, *supra* note 35, art. I(2)–(3) [protects aliens who meets the refugee definition, demonstrating a WFF for persecution on five grounds and because of such fears are afraid of returning to their home country.]; and 1951 Convention, *supra* note 34, art. 33(1) [prohibits refoulement of refugees "in any manner whatsoever"].

[1014] Musalo et aal., *supra* note 10 at 442.

purpose of the Refugee Convention would be meaningless if such individuals are denied haven from politically organized persecutions. Of course, the narrow (mis)interpretation of a real political or imputed political opinion as in *Elias-Zacarias* has fallen short of this role.

4.13 *Intervention of the UNHCR*

Nearly two decades after *Elias-Zacarias*, the UNHCR established a guideline for interpreting claims relating to victims of organized gangs.[1015] Paragraph 23 identified agents of gang-related persecutions to include primarily non-state actors who are involved in criminal acts and sometimes state actors engaged in extra-judicial killings, torture and arrest, to defeat the gangsters.[1016] In many cases, individuals in politically volatile environments may have a high risk of persecution for resisting to join any of the opposing groups either on political, religious, particular social group, racial or any of the Convention's grounds. Such persons are usually vulnerable to persecution on imputed political, religious, or social group opinions, hate crimes, and other related violence that could give rise to a WFF for persecution. Paragraph 45 specified that "[G]ang-related refugee claims may also be analyzed based on applicant's actual or imputed political opinion vis-à-vis gangs, and/or the State's policies towards gangs or other segments of society that target gangs (e.g. vigilante groups)."[1017] Because of this, UNHCR has urged adjudicators to review political opinion from a broader perspective that accommodates "any opinion on any matter in which the machinery of State, government, society or policy may engage"[1018] and taking cognizance of political issues as well as the geographical, legal, judicial,

[1015] UNHCR, GUIDANCE NOTE ON REFUGEE CLAIMS RELATING TO VICTIMS OF ORGANIZED GANGS (MARCH, 2010).
[1016] *Id.* at paras. 23 and 24.
[1017] *Id.* at Paras. 45.
[1018] *Id.*

and socio-cultural context of the country of origin.[1019] Going by this sound reasoning, the majority decision in *Elias-Zacarias* would have been different. For obvious reasons, knowledge of a country's conditions and activities of gangs and state agents are important for a fair determination of refugee claims especially on political opinion or PSG.

4.14 *Challenges with Interpretation of Imputed Political Opinion*

In certain circumstances, a refugee claim may be sought because of an applicant's fear of persecution on account of his or her position or opposition to a political regime or an anti-government group. Such political opinion may intertwine with other Convention's ground(s). To review such a claim, there is a need to examine the role of government and its agents in guaranteeing protection and the efficacy of the laws to ascertain if protection is reasonably probable. In *Lazo-Majano v. INS,*[1020] a Salvadorian woman sought asylum in the United States, having experienced a repeated beating and rape by an army sergeant. Her abuser kept her in a bondage, abused her sexually and threatened to accuse her of subversion if she could report her ordeals to the police. In evaluating her claims, the Ninth Circuit Court interpreted her savage experiences as persecution based on imputed political opinion. In its view, even though the persecutor was aware that Lazo-Majano was not subversive, his cynical and false claim or intent to impute her with an opinion suffices for an imputed political opinion.

Of course, this classical reasoning aligns with the dissenting opinion on *Elias-Zacarias* and accords with the accepted principles in some international jurisdictions. In 1996, for instance, the Canadian Immigration and Refugee Board (CIRB) issued guidelines that

---

[1019] *Id.* at Paras. 45.
[1020] *Lazo-Majano, supra* note 702 at 1432.

specifically addressed the persecution of civilian non-combatants in civil war situations.[1021] The Guidelines provided certain frameworks for differentiating harms suffered in a civil war that are relating to the Convention, and those that unrelated to it. Paragraph A state that:

> A) Individualized harm that is distinguishable from the general dangers of civil war:
>
> Certain individuals, although not taking any part in the hostilities, may nevertheless face the reasonable chance of persecution because of their civil or political status, or due to a status which is imputed to them by combatants in civil war.
>
> 1) persons facing persecution for refusing to join either side in the armed struggled out of a desire to remain neutral, a conscious political choice or other valid reasons of conscience;
> 2) human rights activists, journalists or other citizens threatened with measures of persecution for investigating and/or criticizing military, paramilitary or guerrilla activities and atrocities;
> 3) a person facing persecution for certain views attributed or imputed to them, such as "sabotaging the war efforts" or "collaborating with the ."[1022]

Likewise, women and minors may be common victims of persecution as non-combatant victims of persecution. In many recorded cases of armed conflicts in Rwanda, Darfur, Sierra Leone and

---

[1021] Immigration and Refugee Board of Canada Guidelines on Civilian Non-Combatants Fearing Persecution in Civil War Situations, 10 (1996) ["*hereinafter"* 1996 Canadian Guidelines].
[1022] *Id.* at Para. A.

Liberia, rape of women and abduction of children were used as weapons of war.[1023] Similar situation is recurrent in the ongoing situation in Ukraine as was the case in Syria.

Apparently, the standard of the 2010 UNHCR Guidelines is congruous with the Canadian Guidelines and other scholarly views of Goodwin-Gill and Hathaway in terms of wrongful, cynical, or actual interpretations of people's political actions, inactions, or choices.[1024] As the Ninth Circuit recognized in *Lazo-Majano*, opinion can be cynically imputed. This is consistent with the decision by the German Constitutional Court in *Desir v. Ilchert*[1025] that affirmed the possibility of a cynically imputed political opinion.[1026] If the case of *Elias-Zacarias* was determined in line with the above standard, the result would have been different. Nonetheless, the interpretation of imputed political opinion seems to be somewhat subtle given the difficulties in attributing reason to some unexpressed thoughts or acts of the persecutor. The controversy was evident in the *Matter of R-A-,*[1027] where a Guatemalan woman who was a victim of prolonged physical and mental abuses by her husband claimed that her husband harmed her to overcome her resistance to male subjugation. She further asserted that the police could not protect her because the act of male dominance is naturalized in the Guatemalan culture and that domestic violence is perceived as a private matter. Even though BIA found her testimony credible, her asylum was denied for lack of nexus. It took fourteen years for the court to decide otherwise.

[1023] Jamille Bigio and Rachel Volgestein Countering Sexual Violence in Conflict 3 (2017); SARA MEGER, RAPE LOOT PILLAGE: THE POLITICAL ECONOMY OF SEXUAL VIOLENCE IN ARMED CONFLICT 1 (OXFORD: 2016).
[1024] Hathaway, *supra* note 174; Goodwill-Gill, *supra* note 269.
[1025] *Desir v. Ilchert,* 840 F.2d 723 (9th Cir. 1988).
[1026] *Id*; Legomsky, *supra* note 790 at 924.
[1027] *R-A-, supra* note 56 at 906.

4.15 *Neutrality as Political Opinion*

Commonly in conflict situations, individuals may be threatened for taking part in the conflict or choosing to be neutral. While causes are usually linked to political, racial, ideological, economic, or religious factors, people may take different opposing sides, while some demographic few can choose to remain neutral, without identifying with any faction. In such circumstances, one may still face persecution for being neutral. In *Bolanos-Hernandez,*[1028] a citizen of El Salvador who was threatened for being neutral, refusing to join a leftist guerrilla organization, fled into the United States for asylum in 1982. Apparently, not having a valid entry requirement, he applied for asylum and was denied asylum by IJ. BIA upheld the denial. He appealed to the Ninth Circuit Court. The court overturned the denial, holding that "Bolanos meets both the clear probability and well-founded fear standard,"[1029] and that his choice to remain politically neutral constituted a political opinion within sections 243(h) and 208(a).[1030] Although *Bolanos-Hernandez* predated *Elias-Zacarias,* the favorable decision did not influence the Supreme Court's decision on Zacarias's political neutrality. The precedent in *Bolanos-Hernandez* established that neutrality can be an expression of political opinion, which makes persecution suffered or feared on such account political.[1031]

However, scholars like Legomsky[1032] and S. Prakash Singha[1033] seem to have divergent views on the attribution of political opinion to neutrality. According to Legomsky, a political asylum should be granted exclusively to protect an individual whose persecution was suffered

---

[1028] *Bolanos-Hernandez v. INS,* 767 F. 2d 1277 (9th Cir. 1984).
[1029] *Id.* at 1322-26.
[1030] *Id.* at 1324-26.
[10311031] *Id.*; *See, e.g., Maldonado-Cruz v. INS,* 883 F.2d 788, 791 (9th Cir.1989).
[1032] Legomsky and Rodriguez, *supra* note 815 at13-1397, 927.
[1033] S. PRAKASH SINHA, ASYLUM, AND INTERNATIONAL LAW 103 (1971).

because of a political act(s) or held opinion in defiance of the state.[1034] Sinha argues that the Convention applies only to those cases where political opinion held by individual is an outstanding to the point of being offensive or rupturing normal relationship between refugee and his state.[1035] Both conceptualizations appear plausible but narrow-minded compared with the expansive scope of political opinion provided under the UNHCR Guidelines and contemporary refugee jurisprudence.[1036] Going by Legomsky and Sinha's ideation, an imputed political opinion or neutrality would be excluded from the protected scope of political opinion. But case laws in different jurisdictions underscore practical evidence of recurrent instances of persecutions relating to imputed opinion and political neutrality. In a simple analysis, the choice to remain neutral is a decision not to support either side of a disputing party like a state government or a rebel group. Such a choice has consequences that are likely to jeopardize the choice-maker and could trigger persecution from either or both sides or severe political discrimination. Again, such neutrality-choice can easily be misconstrued as support to an opposite side or even mistaken as a differing political opinion as was the case in *Rivera-Moreno v. INS*.[1037]

4.16 *Political Rebellion, Refusal to Serve, Evasion, or Desertion*

Refusal to fight during wartime or evasion of military service could be a potential reason for political persecution. The UNHCR Handbook tried to differentiate imputed political opinion or neutrality from a deserter or draft evader.[1038] In many countries where military service is compulsory, desertion is often considered a military offense. Individuals escaping from such acts

---

[1034] *Id.* at 103.
[1035] *Id.*
[1036] UNHCR, GUIDANCE NOTE ON REFUGEE CLAIMS; UNHCR GUIDELINES ON RELIGIOUS CLAIMS; IMMIGRATION AND REFUGEE BOARD OF CANADA GUIDELINES ON CIVILIAN NON-COMBATANTS FEARING PERSECUTION IN CIVIL WAR SITUATIONS, 10 (1996).
[1037] *See, e.g. Rivera-Moreno v. INS,* 213 F. 3d 481 (9th Cir. 2000).
[1038] The Handbook, *supra* note 349 at para. 167.

may or not successfully claim a WFF for persecution. According to the Handbook, a deserter or draft-evader may claim refugee status "if it can be shown that he would suffer disproportionately severe punishment for a military offence on account of" the five Convention's grounds.[1039] Equally, "the necessity to perform military service" may be a ground for claiming refugee status, especially where such duty contradicts one's "genuine political, religious, moral conviction and for valid reasons of conscience."[1040] Also, either of the above reasons may constitute a valid reason for neutrality or actual expression of political opinion.

Reported cases have shown evidence of successful claims of refugee relief by applicants who asserted disproportionate punishment for refusal to serve. In *Duarte de Guinac v. INS,*[1041] a Guatemalan citizen was granted asylum relief by the Ninth Circuit Court on the evidence that the respondent would suffer disproportionately severe punishment for desertion and had already suffered racially motivated violence in the military.[1042] Similarly, the Seventh Circuit Court granted asylum to an Albanian who deserted the Yugoslavian army after he suffered ethnically motivated persecution while in the military. The court his past persecutions, threats from the Serbian officers on account of his ethnicity, and other discriminatory treatments to be persecutory. He was access to basic military training skills for frontline combat and was forced to perform such roles without training or bullets, while faced with the heavily armed Serbian opponents. This was acknowledged to be potential evidence that he would suffer a disparate severe punishment upon return.

[1039] *Id.* at 169.
[1040] *Id.* at 170.
[1041] 179 F.3d 1156, 1163 (9th Cir. 1999).
[1042] Musalo *et. aal., supra* note 10 at 478.

Despite the recorded few exceptions, there is evidence of denials of claims for not reaching the threshold of disproportionately severe punishment.[1043] In some cases too, the BIA has set its own standard or adopted the Handbook without express reference to it. For instance, in *re Salim,*[1044] BIA maintained that the respondent's escape and refusal to join the army would lead to a disproportionate punishment because it was considered a desertion from a Soviet-backed Afghan army,[1045] without reference to Paragraph 169.[1046]

Likewise, the E.U. Qualification Directive[1047] did not adopt the guidelines of the UNHCR Handbook in determining "Special Cases" but created a slimmer approach to defining eligibility for claims based on a refusal to serve in the military. According to Article 9.2(e) of the Directives, prosecution or punishment for refusal to serve at the military would only constitute persecution if "performing military service would include crimes or acts falling under the exclusion clauses as set out in Article 12(2)[.]"[1048] In the United States case of *Barraza-Rivera v. I.N.S.*[1049] an El Salvador Barraza-Rivera fled from forcible recruitment to evade a command to commit an assassination of such crime or human right violation underscored by the Directive.[1050] Worthy of note is that the Directives does not recognize the Handbook's concept of disproportionate severe punishment for a military offence on account of race, religion, nationality, membership of a particular group or political opinion. Individuals who fear

---

[1043] *See, e.g., Foroglou v. INS,* 528 U.S. 819 (1999) [The First Circuit recognized that the claims of a Greek atheist and follower of Ayn Rand did not meet the requirements of proportionate punishment for his belief.]; *Padash v. INS,* 358 F. 3d 1161 (9th Cir. 2004) [The Ninth Circuit denied asylum to an Iranian for failing to link his claim or qualify the attempt to recruit him with the Convention's ground].
[1044] 18 I & N Dec. 311 (BIA 1982).
[1045] *Id;* Musalo, et aal., *supra* note 10 at 476.
[1046] opposed to In *re A-G*-19 I. & N. Dec. 502 (BIA 1987),
[1047] Directive 2011/95/EU of European Parliament OJ L. 337/9-337/.
[1048] The crimes set out under Article 12(2)[.] include crimes against peace, war crimes, crimes against humanity, serious non-political crimes and acts contrary to the purpose of the United Nations.
[1049] 913 F. 2d 1443 (9th Cir. 1990).
[1050] *Id.*

persecution on the above Convention's grounds for having committed a "military offence" may be unlikely to have access to refugee relief in the E.U. countries who have domesticated the Directive. Of course, this has detrimental effects on seekers of asylum on political or any of the enumerated grounds.

4.17 *Political Coercion as Persecution on Account of Political Opinion*

The term coercion suggests duress or an oppressive act that limits people's freedom of choice. International human rights law proscribes coercion of any form, which constitutes a violation of fundament rights.[1051] Coercion could be persecutory where an attempt to resist a coercive order or authorities leads to punishment or threat to life. In *Islam v. Gonzales,*[1052] the Second Circuit Court emphasized that a claim may be made based on the applicant's refusal to join a military whose actions are condemned by the international community. A typical example of this is an Albanian petitioner who flee the coercive Serbian-dominated military that were persecuting Albanians, or an individual that resists a coercive order of a political regime, which is inconsistent with his or her religion, family choice, cultural or political standards.

In the Canadian case of *Slavko Circic and Slavica Circic v. Canada,*[1053] a husband and wife who served in the Yugoslav army in the late 1980s prior to the outbreak of civil war in 1991 opposed the coercive measures of the regime to fight in the civil war. Both previously served in the army and were kept in the reserves prior to the outbreak of war. But they were not in support of the then military action on moral grounds and political grounds. As a result, they resisted the pressure to fight because they did not support the Yugoslavia (Serbian) government's position.

[1051] UDHR, *supra* note 31 at arts. 1,2,4 and 18; ICCPR, *supra* note 31 at art. 18.
[10521052] 412 F. 2d 391 (2nd Cir. 2005).
[1053] (*Minister of Employment and Immigration)* 2 F F.C. 65 (1994) (Federal Court of Canada, Trial Division).

Having worked with a diverse military group comprising Serbs, Croatians, Slovenians, and other ethnic nationalities, Slavko argued that it was morally wrong for him to fight his brothers and friends. Therefore, he boldly asserted his opinion in his testimony that he would fight other countries in defense of his country, but not his own brothers and friends. Fearing persecution because of his position, the applicants fled to Canada for asylum, convinced that the regime would persecute them because of their noncompliance. Slavko indicated that if they returned to Yugoslavia, they would be forced to partake in the war or face punishment by the government and its military. Upon review, the Canadian Immigration and Refugee Board (CIRB) denied their asylum and found their claims to be insufficient. It further held that their evidence did not show that the then military action in Yugoslavia was one that was condemned by rules of human conduct of the international community, which according to CIRB makes them "unConvention" refugees. On appeal, the judicial review found that the Board erred by a narrow-minded interpretation of the scope of the Convention's refugee and the UNHCR Handbook.

Sound decisions of some domestic jurisdictions and opinions of scholars have shown that the analysis of intent or motivation that gives rise to a WFF should lean towards a claimant's needs and fears. This requires a thorough assessment of a contrary opinion or position that provokes a persecutor's attack or threat.[1054] The Board failed to recognize the petitioners' political and moral standing as major motivations of their objection to fighting, instead it made a cursory reference to the Handbook. The UNHCR Handbook clarified that "where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for

[1054] *Cardoza-Fonseca, supra* note 375 at 196; *Fatin, supra* note 76; Musalo et aal, *supra* note 10 at 1191.

desertion or draft-evaders could…in itself be regarded as persecution."[1055] Given the provisions of the Handbook, the Board merely trivialized the import of the term "condemnation by the international community." Unsurprising, a subsequent judicial review countered the Board for failing to attach weight to the documentary evidence on the reports of Amnesty International, Helsinki Watch and I.C.R.C., which condemned the abhorrent killings and torture in the war. More serious still, it faulted its contention that the only punishment for the applicants for their desertion of a most vicious civil war would only be a fine. In the light of these errors, the previous denial was squashed, and the applicants' petition was resubmitted for hearing.

The UK Federal Court reviewed a related case in *Krotov v. Secretary of State of the Home Department.*[1056] Here, the court set a persuasive precedent that gave deference to UNHCR Handbook on international condemnation and international norms. The facts of the case indicated that a citizen of the Russian Federation sought asylum in the UK having deserted from military service in the Chechen war and claimed refugee status. The issue for determination among others was whether Paragraph 171 of the Handbook requires a particular war to be subject to international condemnation or whether evidence of "breaches of international standards" would suffice.[1057] The court ruled in favor of the latter. It linked the meaning of the Convention's refugee to persons protected under the fundamental norms and values of international law. These include IHRL and the core humanitarian norms as provided under IHL such as the Common Article 3 to the Geneva Convention of 1949 and its Additional Protocol II.[1058] In the court's opinion, an individual who refused to part in a widespread brutal military action that causes systemic deliberate violation will come within the Convention's definition of a

[1055] The UNHCR Handbook, *supra* note 349 at para. 171.
[1056] [2004] EWCA (Civ) 69, [2004] I W.L.R. 1825.
[1057] *Id.* at 33.
[1058] *Id.* at 33.

refugee. The classical decision in *Krotov,* although compelling may not influence the discretion of other international jurisdictions in determining coercive persecution in all circumstances.[1059]

Coercion is not limited to military action. Sometimes policies of government like the Chinese population control policy (CPCP or PCP) of one-couple/one-child has been the subject of persuasive action or punitive enforcement on those who transgress or rebel against it. Violators of the Chinese PCP may be forced to undergo abortion, sterilization, imposition of fines or destruction of their personal property. In the *Matter of Chang,*[1060] a male applicant alleged persecution from the Chinese government, having been forced to submit to sterilization after the birth of their second child. BIA held that the imposition of measures of forced abortion or forced sterilization was not persecution on account of the Convention's enumerated grounds. Although the decision did not rule out possible connections with the Convention's grounds, especially when the enforcement of such a policy singles out certain groups of persons for Convention's reasons like race, religion, nationality, political opinion, or PSG. Consequently, in *Guo Chung Di v. Carroll,*[1061] an applicant who opposed the Chinese PCP and involuntary sterilization was granted asylum in the United States because the court found the government's action in confiscating applicant's personal property and a subsequent threat of the sterilization to constitute a WFF of persecution. Although the decision was later reversed by the Fourth Circuit Court for failure to meet the requirements of "on account of," Congress resolved the lacuna through an amendment following INA $ 101(a)(42)(A).[1062] It provides that:

[1059] *See, e.g. Hughey v. Canada (Minister of Citizenship and Immigration)* 2006 F.C. 421; *Hinzman v. Canada (Minister of Citizenship and Immigration),* 2006 F.C. 240 [2007] 1F.C.R. 561 [The Canadian Court rejected applicants reliance on the UNHCR Handbook 171 to justice their evasion of service in the US and that the US's war in Vietnam and Iraq respectively violates rules of war].

[1060] 20 I. & N. Dec. 38, 44 (BIA 1989).

[1061] 842 F. Supp. 858 (E.D. Va. 1994).

[1062] 8 U.S.C. $1101(a)(42)(A).

> [A] person who has been forced to abort a pregnancy or to undergo involuntary sterilization, or who has been persecuted for failure or refusal to undergo such a procedure or for other resistance to a coercive population control program, shall be deemed to have been persecuted *on account of political opinion,* a person who has a well-founded fear that he or she will be persecuted or forced to undergo such a procedure or subject to persecution for such failure, refusal, or resistance shall be deemed to have a well-founded fear of persecution on account of political opinion.[1063]

By an extension, the principle established in the amendment law can equally apply to other claims relating to coercion whether to military service, religious, racial, or other policies that can militate against people's freedom of choice and fundamental human rights. A similar standard was adopted in the decision of the FCA in *Cheung v. Canada.*[1064] It reversed a previous decision of the Board that denied asylum to a Chinese woman threatened with sterilization for violating the PCP after she submitted to three abortions and refused to accept a fourth. FCA defined the policy of forced sterilization as Draconian and persecutory.[1065] It held that the enforcement of PCP amounts to a violation of the fundamental right to life[1066] and freedom from torture, cruel, inhuman, or degrading treatment. Additionally, the UNHCR issued Guidance Notes in 2005[1067] to guide adjudicators in the interpretation of claims on coercive related persecutions. This was a remarkable response to the prevailing claims on the Chinese PCP. The 2005 UNHCR Notes recognized that whereas family planning is consistent with the international human rights

---

[1063] *Id;* Musalo *et aal.*, *supra* note 10 at 502.
[1064] *(Minister of Employment and Immigration),* 102 D.L.R. 4th 214 (1993).
[1065] *Id*. at 5.
[1066] Citing UDHR adopted in the UN General Assembly 217 A (III), December 10, 1948, art. 3.
[1067] UNCHR, Note on Refugee Claims Based on Coercive Family Planning Laws or Policies, August 2005 [*hereinafter* "2005 Guidance on Coercive Family Planning Law or GCFPL"].

standards,[1068] enforcement of coercive family planning will amount to a breach of this standard. Likewise, any imposition of sanctions on individuals who breach the "compulsory or coercive" policies either by forced abortion or sterilization will "always" constitute persecution because of the serious human rights violations victims suffer.[1069] These include torture, inhuman or degrading treatment. Furthermore, the Notes emphasized that victims of such persecution can bring viable claims on political opinion,[1070] race,[1071] religion,[1072] and social group.[1073]

4.18 Persecution and Claims on Account of Particular Social Groups

Notably, the inclusion of the MPSG was ascribed to a Swedish delegate at the deliberations of the *travaux Préparatoires* to the 1951 Convention. Whereas the refugee definition originally came from IRO, the framers did not contemplate inserting such a liberal and expansive notion of a PSG into the Convention. Towards the end of the Conference Plenipotentiaries, a Swedish delegate recommended the addition of a kind of "catch-all" to a social group, since "experience had shown that certain refugees had been persecuted because they belonged to a particular social," distinct from the four grounds. Reinforcing this argument, he suggested the need to add a social group category that would guarantee security to all refugees without distinctions.[1074] The "catch-all" mentality was reaffirmed in the preamble of the 1951 Convention, stating that the purpose of the Convention is to "assure refugees the widest possible exercise of these fundamental rights and freedom…."[1075] Nonetheless, the UNHCR Guidelines

[1068] *Id.* at para. 2.
[1069] *Id.* at paras. 6 and 11.
[1070] *Id.* at paras. 28 and 29.
[1071] *Id.* at para. 31.
[1072] *Id.* at 32.
[1073] *Id.* at paras. 33-39.
[1074] *See, e.g.* Legomsky, *supra* note 790 at 933; Goodwin-Gill, *supra* note at 269.
[1075] 1951 Convention, *supra* note 12 at Preamble.

has iterated that the Convention is not established as a "catch-all."[1076] Yet, the inclusion of PSG ground in refugee protection reflects an attempt to accommodate the needs of myriads of individuals whose persecutory "experiences" may not fit into the four other grounds but their circumstance, still demonstrate a WFF for persecution on account of their social group. Examples of such social groups include members of different gender or sex, sexual orientations, ethnic groups not classified as nationality, people with disabilities, migrant workers, unionists, or any other related PSG. Commonly, the delineated groups may be singled out as individuals or groups for persecution because of actual or imputed social characteristics, which he or she holds fundamentally with a group. Ideally, different international law instruments guarantee protection for people of diverse social groups.[1077] As Legomsky rightly observes international human rights obligations operate in two forms—first to proscribe persecutory activities by state and non-state actors, and secondly by providing sanctuaries to individuals fleeing PSG persecutions from their states. The latter explains the primary purpose of the IRL.[1078]

Whereas persecution on account of MPSG may be driven by an abuse of power, the human rights impact on the individual(s) as well as groups is far-reaching. Neither the Refugee Convention nor its Protocol provided clues for deciphering the meaning of MPSG and the scope of persecution occurring within the context. In earlier debates, some scholars associate victims of PSG persecution with individuals fleeing persecution from socialist governments such as capitalist members, landowners, independent businessmen and some middle-class families, to

[1076] 2002 UNHCR Guidelines, *supra* note 116 at para. 2.
[1077] Convention on the Elimination and Punishment of Genocide, 1949; CAT, *supra* note 165; Convention on the Rights of Persons with Disabilities; CEDAW, *supra* note 31.
[1078] Legomsky, *supra* note 790 at 933.

say the least.[1079] Some attempts to interpret PSG in asylum jurisdictions are fraught with controversies due to the indeterminate nature of the term. In the United States, for example, courts and adjudicators are circumspect in providing expansive interpretation to PSG for fear of the floodgates by making PSG a "catch-all" for asylum.[1080] Although scholars like Musalo et aal think differently given that the viability of a PSG is dependent on other factors such as nexus ground, evidence of government's inability and unwillingness to protect, and non-feasibility of internal relocation.[1081] This is true. Nonetheless, other manifest complexities and dilemma that are associated with the interpretations of PSG indicate that its inclusion into the Convention's protective grounds did completely bridge the gap of exclusion. Moreso, for a dearth of definition of refugee status, decisionmakers construct the Convention's PSG criteria according to State jurisprudence as opposed to human rights. Discussions on PSG asylums examine the judicial analyses of the term and the extent to which these align with international instruments.

4.19 *UNHCR Interpretations of Membership in a Particular Social Group (MPSG)*

In discussing the meaning of MPSG, Paragraph 77 of the UNHCR Handbook stated that "[A] particular social group normally comprises persons of similar background, habit or social status."[1082] It recognized that a claim on PSG may overlap with other grounds such as race, religion, or nationality. People's MPSG may be a target of persecution especially where such a group is perceived to be antithetical, apolitical, disloyal to the government or engage in other social or economic opposition activities.[1083] With the exception of a few circumstances,

---

[1079] Goodwin-Gill, *supra* note 269 at 74; Hannah McCuiston*, Membership in a Particular Social Group": Why United States Courts Should Adopt the Disjunctive Approach of the United Nations High Commissioner for Refugees*, 88 ST. J LAW REV. 535 (2014).
[1080] Musalo et aal, *supra* note 10 at 658.
[1081] *Id.*
[1082] The Handbook, *supra* note 349 at para 77.
[1083] *Id.* at para. 78.

Paragraph 79 asserted that mere MPSG is not enough to claim viability[1084] without the proof of other important elements like nexus to persecution, government's involvement or unwillingness to protect and evidence of a failed attempt or lack of possibility for internal relocation. In practice, some courts impose heavier burdens than these in proving the viability of a PSG.

In view of the above circumstances, the UNHCR has published several Guidelines and Conclusions to supplement the meaning of MPSG, especially for women and another gender who face hardships on gender claims. In 1985[1085] and 1991[1086] respectively, the UNHCR issued guidelines urging State Parties "to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group' within the meaning of Article 1 A(2) of the 1951 United Nations Refugee Convention."[1087] It further recognized "severe sexual discriminations" as part of gender-based violence.[1088] An additional EXCOM Conclusion[1089] was established in 1993, which urged State Parties to recognize asylum seekers who are survivors of sexual violence as refugees protectable under PSG and for adjudicators to set fair procedures for deciding such matters.[1090] The scope was further expanded in the comprehensive Guidelines of 2002, which provided the procedural guidance for the interpretations of gender asylum claims.[1091] The latter recognized gender related persecutions as protected grounds[1092] and further showed that GBPs may occur as part of human rights violations[1093] in the form of rape,

---

[1084] *Id.* at 79.
[1085] EXCOM Conclusion No. 39, *supra* note 119 at para. (k).
[1086] 1991 UNHCR Guidelines, *supra* note 33 at para. 55.
[1087] *Id.*
[1088] *Id.* at para. 5-6.
[1089] *Id.* at para 5.
[1090] *Id.* at 5.
[1091] 2002 UNHCR Guidelines, *supra* note 116.
[1092]*Id* at para. 6.
[1093]*Id.* at para. 5.

sexual violence, dowry-related violence, domestic violence, FGC, DV or trafficking.[1094] Paragraph 22 emphasized that survivors of such persecutions would meet the requirements of MPSG.[1095] The outcome gave authoritative affirmation to gender viability and nexus to a PSG[1096] referring to the elements of "immutable/fundamental characteristic(s), or by social perception."[1097] Also, the Guidelines underscored the connection between GBP and a government's unwillingness to protect and their fundamentality in asylum claims.[1098] Nonetheless, the Guidelines are not binding on States. This makes it imperative to evaluate the differing responses of State Parties in the interpretation of the Convention's social groups and attitudes to UNHCR Guidelines.

4.20 *United States Interpretation of MPSG*

A landmark interpretation of PSG in the United States was given in the *Matter of Acosta.*[1099] It was a case of a Salvadorian who claimed membership in a social group of taxi cooperative leaders that refused to join forces with guerrillas' insurgency. In analyzing the case, BIA set criteria for determining cognizable social groups. It held that to prove MPSG, a claimant must show that he or she is "an individual who is a member of a group of persons all of whom share common, immutable characteristics…members of a group cannot change… because it is fundamental to their individual identities or consciences."[1100] According to BIA's standard, a social group must possess common characteristics that the members of the group cannot change, or should not be required to change because it is fundamental to their individual identity and

---

[1094] *Id.* at para. 9.
[1095] *Id.* para. 22.
[1096] 2002 UNHCR PSG Guidelines, *supra* note 295.
[1097] *Id.* at paras. 12-13.
[1098] *Id.* at para. 21-23.
[1099] 19 I. & Dec 211 (BIA 1985).
[1100] *Id.* at 217.

conscience. It further enunciated some examples of the defined social groups as possessing certain immutable characteristics like "sex, color, or kingship ties, or…a shared past experience such as former military leadership or land ownership."[1101] BIA proceeded to apply its PSG analysis with the doctrine of *ejusdem generis,* which attributes fundamental characteristics and immutability to MPSG as well as the other four Convention's grounds—race, religion, nationality, and political opinion. Based on this analysis, *Acosta* refused to recognize COTAXI cooperative organization as a social group.

The impact of *Acosta* has largely influenced asylum decisions on PSG within and outside the United States jurisdictions. For example, in 1996, BIA successfully applied the *Acosta* to grant asylum to Fauziya Kassindja, a Togolese teenager who sought asylum relief from FCT. This was the first United States precedent that acknowledged a survivor of gender or sex persecution under MPSG.[1102] Subsequently, the *Acosta* social group test was applied in other claims relating to sexual orientation,[1103] past experiences,[1104] family,[1105] clan, and membership.[1106] These eloquently showed that the United States courts then largely embraced the standard set forth in *Acosta,* likewise some other highest courts in the UK[1107] and Canada[1108] who cited *Acosta* test in their major decisions.

However, subsequent developments in the United States courts indicated another era of interpretational dilemma as PSG faces a new burden of nexus requirements. In the *Matter of R-*

[1101] *Id.* at 217-8.
[1102]*Matter of Kasinga,* 21 I&N Dec. 357 (BIA 1996); *Mohammed v. Gonzales,* 400 F.3d 785 (9th Cir. 2005).
[1103] *Matter of Toboso-Alfonso,* 20 I&N Dec. 819 (B.I.A. 1990).
[1104] *Matter of Chang,* 20 I&N Dec. 38 (B.I.A. 1989).
[1105] *Lwin v. INS,* 144 F.3d 505, 511-12 (7th Cir. 1998) [Identified as parents of Burmese student dissident]
[1106] *In re H-*, Int. Dec. 3276 (1996).
[1107] *Secretary of State for the Home Department v K, Fornah v Secretary of State for the Home Department* [2006] [A 15-year-old Sierra Leonean claimed asylum on a risk of FGM. The House of Lords found her PSG to be viable].
[1108] *Ward, supra* note 539 at 689 [*Ward* approved and followed the principles set in *Acosta*].

A,[1109] BIA rejected the claim of a social group by a Guatemalan woman who suffered abhorrent domestic violence, holding that she claimed PSG lacked nexus and was not cognizable.[1110] Following an intense public outcry on BIA's decision,[1111] Attorney General (A.G.) Janet Reno certified BIA's decision to herself and vacated the decision on January 19, 2001. She remanded the case to BIA with instructions to stay the case until asylum rules proposed by the DOJ in December 2000 were issued as final.[1112] Later, when the proposed asylum rules were finalized, the then A.G. Ashcroft certified the case to himself in February 2003, after the DHS submitted a brief[1113] in Ms. Alvarado's favor, arguing that she had "established statutory eligibility for asylum." Ashcroft failed to take any further action in the case, and instead remanded it to the BIA. In 2008, A.G. Michael Mukasey certified the case to himself and lifted the stay, which had been ordered by the two prior A.G.s, thus remanding the case to the BIA for decision. The DHS later recognized that Ms. Alvarado meets the refugee definition. Finally, she was granted asylum through a summary decision of IJ, following an agreement reached between the DHS and the applicant's attorneys.[1114] It took fourteen years of persistent human rights efforts to obtain asylum for Ms. Alvarado. Nevertheless, the decision did not set a precedent for future cases, and there still exist vestiges of BIA's decision that impact negatively on applicants to gender-related asylum.[1115] *R-A-* was the first departure from *Acosta,* which, of course, set a troubling standard for claimants seeking gender related reliefs within the Convention's scope of PSG.

[1109] 4 I&N Dec. 629 (A.G. 2008).
[1110] *R-A-, supra* note 56 at 906 (BIA 1999).
[1111] *See*, *e.g.* KAREN MUSALO, CENTER FOR GENDER & REFUGEE STUDIES, *Matter of R-A-* .https://www.bing.com/search?q=Matter+of+R-A-+%7C+Center+for+Gender+and+Refugee+Studies+(uchastings.edu)&cvid=81e0e48203b1.
[1112] In *re R-A-*, 22 I. & N. Dec. 906 (A.G. 2001).
[1113] 2004 DHS Brief in R-A-, RA_DHS Brief.pdf (immigrantjustice.org).
[1114] *Id.* at 920–21; see also: Barbara R. Barreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, at 237 (2011).
[1115] In *re A-B-,* 27 I. & N. Dec. at 336 (citing, In *re W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)). Although, this does not mean ocular visibility. The Attorney General applied the social distinction requirement set forth in *Matter*

Barely five years after the final decision in *R-A-,* BIA made it clear in *Matter of C-A.,*[1116] that *Acosta'*s immutability test was only a starting point.[1117] Thus, the Board introduced an additional requirement of proving social visibility as an important element in the consideration of PSG[1118] and a reason to reject the respondent's claim of "former noncriminal drug informants working against the Cali drug cartels" a social group. Later in the *Matter of S-E-G-*[1119] the Board adopted *A-M-E & J-G-U,* and even imposed yet narrower standard requiring proof of social visibility and particularity.[1120] Following the new standard, the claim of PSG by a group of youths who have resisted gang recruitment and their family were rejected, although they were found to have met the *Acosta* test of immutability.[1121] In the midst of the dilemma and lack of consistency on PSG standard, the Ninth Circuit Court emerged with another standard of "voluntary association relationship" like "young working class." Yet in *Gatimi v. Holder,*[1122] the Seventh Circuit Court refused to follow the bandwagon and challenged the complicated construction of social groups as illogical and without legal basis. The apparent controversy lingered in the *Matter of M-E-V.G-,*[1123] and *Matter of W-G-R-.*[1124] In these, the BIA neither deferred to nor affirmed the requirements of social visibility, although the proposed rationale for deference. The conflicting interpretations were partly resolved in the *Matter of A-R-C-G-,*[1125] in which BIA issued a landmark decision that recognized "married women in Guatemala who are

---

of M-E-V-G- in such a manner, it was contrary to the BIA's articulation of this requirement set forth In *re M-E-V-G-* 26 I. & N. Dec. 227, 240–41 (B.I.A. 2014).

[1116] *Matter of C-A-*, 23 I. & N. Dec. 951, 956-57 (BIA 2006) *aff'd, Castillo-Arias v. U.S. Att'y Gen.,* 446 F.3d 1190 (11th Cir. 2006), *cert. Denied sub nom Castillo-Arias v. Gonzales,* 446 F.3d 1190 (11th Cir. 2006).

[1117] 23 I. & N. Dec. at 955.

[1118] *Id.* at 960.

[1119] 24 I. & N Dec. 579 593 (BIA 2008).

[1120] *Id.*

[1121] *Id; See also Matter of E-A-G-,* 24 I. & N. Dec. 591 (BIA 2007) [holding that gang members or young persons who are perceived to be gang members are not a social group].

[1122] *Id.*

[1123] 26 I. & N.

[1124] 26 I. & N. Dec. 208 (BIA 2014).

[1125] *A-R-C-G-*, *supra* note 124 at 388.

unable to leave their relationship" as a "cognizable particular social group that could form the basis for a claim for asylum or withholding."[1126] The precedential decision became binding and applicable in all immigration cases throughout the United States.

Barely four years after *A-R-C-G-,* the A.G. Jeff's Sessions vacated the BIA's decision in *A-R-C-G-* and overruled the decision that in some circumstances, survivors of domestic violence could receive asylum in the United States.[1127] The *Matter of A-B-* decision shifted from the standard of proof that requires showing of persecution "on account of"[1128] and government's unwillingness or inability to protect.[1129] The verdict confused the normative sequence of ascertaining credible fears for persecution (WFF) through past persecution and government's unwillingness to protect.[1130] The A.G.'s reasoning set a contradictory precedent that presupposes persecution to mean an act by a non-state actor with the government."[1131] The ruling amplified the evidential requirement proof of MPSG.[1132] Recently, like the precedent in *Elias-Zacarias, A-B-* has recently undergone modifications, such as the vacation of *A-B-* in 2021 and reinstatement of *A-R-C-G-*. However, some vestiges of the burden still affect courts' interpretations of nexus requirements as subsequent analyses in Chapters Five and Six will demonstrate. Apparently, the lack of consistency in the definition of PSG has continued to create numerous disadvantages for

---

[1126] *Id.,* at 389.
[1127] *A-B-,* 27 I&N Dec. at 320.8 [holding, "…generally, claims . . . pertaining to domestic violence or gang violence perpetrated by no-governmental actors will not qualify for asylum"].
[1128] 8 C.F.R. § 1208.13(b)(1).
[1129] *A-B-, Op Cite*.
[1130] *See, e.g.* 8 C.F.R. § 1208.13(b)(1); *Yasinskyy v. Holder*, 724 F.3d 983, 989 (7th Cir. 2013); NIJC, *supra* note 57. [Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Presumption of Future Persecution].
[1131] 27 I&N Dec. at 337; NIJC *Op Cite* [Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Persecution].
[1132] *Id* at 338.

those who seek protective reliefs on this ground, especially victims of persecution by non-state actors like women, and children.

Regardless of the several recommendations by the UNHCR on the interpretations of claims on PSG, in practice, the United States courts have commonly followed its precedents more than the UNHCR Guidance. Whereas countries like Canada[1133]and Australia[1134] have integrated the Guidelines into their asylum laws, the United States courts in several decisions have maintained that they are neither bound by the UNHCR Guidelines nor the Consideration.[1135] In contrast, the Supreme Court of Canada in *Canada v. Ward* (1993)[1136] has set a standard for defining PSG that is consistent with *Acosta* and the UNHCR Guidelines. It stated that MPSG should encompass:

> 1) groups defined by innate or unchangeable characteristics; [gender, linguistic background, sexual orientation] 2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the associations; [human rights activists] and 3) groups associated by a former voluntary status, unalterable due its historical permanence.[1137]

[1133] Immigration and Refugee Board of Canada (IRB), *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (March 1993).www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx.
[1134] Migration Act 1958 (amended 2012) (Cth) s 36. http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118; see also: Department of Immigration and Multicultural Affairs (DIMA), *Guidelines on Gender Issues for Decision Makers* (July1996).
[1135]*Cardoza-Fonseca, supra* note 357 at 421, 438-39 (1987); *Aguirre-Aguirre*, *supra* note 770 at 415, 427-28; *Ndom v. Ashcroft,* 384 F.3d 743, 753, n4 (9th Cir. 2004).
[1136] *Ward, supra* note 539 at 689.
[1137] 103 D.L.R. (4th) at 33-34 [“holding that one’s past is an immutable part of that person.”]

Comparably, *Ward's* immutability test interprets one's past as immutable. It added voluntary associations, different from the notion articulated in *Sanchez-Trujillo,*[1138] but based on characteristics of human rights and dignity. Two years after the *Ward,* the Canadian court recognized a woman who suffered a violation of her basic human rights (the right to enter freely into marriage) to meet the requirement for asylum having fit within the first category of a PSG identified in *Ward.*[1139] The difference between the Canadian and the United States jurisprudence is that while the former conforms to the UNHCR Guidance, the latter follows its domestic precedents.

Canada and Australia have maintained almost a similar consistent standard in deference to the UNHCR Guidelines. In the Australian *SZBFQ v. Minister of Immigration,*[1140] the Federal Court faulted a decision of the Refugee Review Tribunal (RRT) in holding that women do not constitute a social group. The Federal Court's decision is consistent with the *Minister for Immigration and Multicultural Affairs v. Khawar,*[1141] which recognized the PSG viability for a female survivor of domestic violence in Australia. The analyzed case laws have proven that Australia is exemplary in progressive gender asylum jurisprudence given its consistent recognition of a larger social group comprising survivors of sex related crimes like trafficking affecting mostly women, children,[1142] sex workers,[1143] "young women in Albania"[1144] and other minority groups. Comparably, the standard can be likened to the Congressional innovations in granting T-visa to victims of trafficking, U-Visa to victims of crimes, and the VAWA reliefs

[1138] (9th Cir. 1986).
[1139] *Vidhani v. Canada (Minister of Citizenship and Immigration),* 3 F.C. 60, 86 (T.D.) [1995].
[1140] SZBFQ v. Minister of Immigration [2005] FMCA 197 (10 June 2005).
[1141] HCA 14 [2002] at 1130.
[1142] *VAO-02635,* 22 Mar 2001.
[1143] *RRT V01/13868,* 6 Sep 2002.
[1144] *Id*.

applicable in the United States.[1145] However, the latter's legislative history has not influenced the United States gender asylum or court's interpretations of PSG. The impact that has created a serious void in gender asylum will be re-evaluated in Chapter Five.

4.21 Conclusion

This Chapter examined the five grounds of persecution pursuant to Articles 1A(2) and 33(1) of the Refugee Convention and Article 1(1) of the 1967 Protocol. It acknowledged the Convention's paucity of definitions and effects on interpreting the eligibility grounds. The Convention's failure to define persecution can be explained in two ways. First, it suggests the drafters' intention to create flexibility for State Parties to exercise discretion on different circumstances of refugee claims. On the other hand, it presupposes a blank check for adjudicators to exercise their discretion based on an understanding of law and precedents while pushing boundaries for the Convention's grounds. In both ways, the interpretation of the persecutory grounds has been somewhat elusive, partly because of the conflict of States' policies with refugee rights and attempts by some states to construct difficult burdens to restrict asylum floodgates. A typical example is the precedent in *Elias-Zacarias* that required proof of the persecutor's intent by a victim who has escaped from gang threat. The Respondent was denied asylum for what was construed as a lack of nexus or the respondent's failure to prove his persecutors' political or imputed intent. The decision upended the United States' history of refugee claims and the proof of WFF established in *Cardozo.* Similar conflicting jurisprudence

[1145] In 1994, Congress passed the Violence Against Women Act (VAWA) that provided funding and support for the police departments implementing pro-arrest policies in matters relating to IPV, and provided training for police officers, judges, and prosecutors on violence against women. The Act made special provisions for "self-petitioning" process allowing immigrant survivors of IPV who suffered abuse by their US citizen or permanent resident family members to submit their own petitions for permanent residency.

abounds in the interpretations of GBPs and nexus to a PSG. Besides, the research findings underscore manifest incongruities in the judicial analyses of PSG, lack of uniformity and their debilitating effects on aliens claiming refugee status, especially women. In the United States courts, for instance, there were several conflicting decisions on the test of a PSG as seen in the deviation from *Acosta* to *A-B-*. The situation is not different in the UK. It is evident that States do not voluntarily grant refugee rights and, in some cases, create domestic policies or standards that restrict access for the fear of the floodgate.[1146] While procedural asylum is one step to negotiating the rights of refugees, navigating the hurdles of state laws and practice requires additional measures of monitoring, which the current IRL is lacking. Chapter Five will evaluate the challenges imposed by jurisprudential inconsistencies, especially in the interpretation of gender claims. The findings will build a premise for recommendations in Chapter Seven.

Apparently, the Refugee Convention created a definitive gap that undermined the easy assessment of refugee relief. This requires urgent amendment for inclusiveness. Setting proper definitive criteria and practice guidelines for proving eligibility in the five grounds of persecution are imperative to making successful claims. Since the 1951 Convention was drafted seventy-two years ago in view of the circumstances of World War II refugees, several other needs have emerged in contemporary international security and humanitarian migration, that make an amendment necessary. Prominent among these are non-state actors related persecution by drug cartels, human traffickers, and terrorists' networks with women and children as common targets. Recently too, the vulnerabilities of climate change related disasters have created emergency demands on humanitarian migration and asylum. While claims on the above areas

[1146] NIJC, 2019, *supra* note 57 1-32, 2; Vogel, *supra* note 35 at 353; Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?,* 14 VA. J. SOC. POL'Y & L. 119, 132 (2007). [stating that "[P]erhaps the overarching basis for the opposition to gender claims is the fear that acceptance of these cases will result in the floodgates."].

pervade asylum jurisdictions, they are uncontemplated by the Convention. As asylum seekers and courts strive to overstretch the boundaries of the scope of Article 1A(2) and 33(1), the limitations to elasticity become more conspicuous, hence suggesting the need for a review of the protective grounds. Recurrent cases of asylum denials for bona fide refugees give cause to question the ability of IRL to meet the realities of the contemporary refugee crisis. Despite the progress in some jurisdictions, lack of consistency and abuse of discretion in so many situations undermine the purpose of procedural asylum. Where the benefit of appeal fails to offer a fairer judicial review, the consequence would be denial and the risk of deportation. Considering the findings so far, there is a need to expand the grounds of persecution in light of the contemporary refugee experience and to establish a common procedural guideline in an additional refugee protocol that will be applicable in all jurisdictions for the interpretation of the grounds of persecution. Such development will accommodate the claims of women, children, victims of crime and other categories of persons persecuted for their neutrality, actual or imputed opinion in conflicts. Moreso, given the dynamic nature of refugee experiences, an assessment of claims should look beyond the five grounds to examine their connections with human rights and other relevant aspects of international law.

CHAPTER FIVE

CHALLENGES WITH ESTABLISHING VIABILITY IN GENDER RELATED CLAIMS AND THE PROBLEM OF NEXUS

5.1 Introduction

Despite the global outcry to end gender-based violence (GBV), human rights violations committed against women in private and public arenas have remained pervasive. Yet, women fleeing gender or sex related persecution receive minimal protection because of the common interpretations of GBP as private or lacking in nexus grounds. Even though the primary purpose of the Refugee Convention is to protect refugees fleeing persecution and threats to life, GBP is clearly excluded from the definition of refugee in Article 1A(2)[1147] or as a ground for refugee protection. The lack of a nondiscriminatory clause in IRL unlike normative international law treaties[1148] poses serious problems to claimants, especially women whose persecutory experiences center exclusively on gender or sex. Because gender is not expressly depicted as a ground of persecution, claimants and adjudicators seek a causal connection with the Convention, especially on grounds of MPSG. Many of such evidential claims fail for lack of nexus.

Obviously, the membership in gender or female sex constitutes a site of persecution.[1149] Women and girls are disproportionately common targets gender related attacks like rape, marital rape, domestic violence, and human trafficking during armed conflicts and in peacetime. In many situations, they are primary victims of human rights attacks whether in public or private spheres, peace, or wartimes. Even in some cultural and religious communities too, women are subjected to obnoxious cultural and religious practices like FCT, forced sterilization, honor killings, forced

[1147] 1951 Convention, *supra* note 12 at arts. 1.A(2) and 33(1); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005), art. 1A(2).
[1148] 1945 UN Charter, *supra* note 31 at art. 2; UDHR, *supra* note 31 at art. 3; ICESCR, *supra* note 31 at art. 3; CEDAW 1981, *supra* note 31 at art. 1 and 2 at 193.
[1149] Rebecca M. M. Wallace, *supra* note 99 at 702-711, 709.

marriages and punishment for noncompliance to strict gender codes.[1150] Such gender restrictions are enforced through discriminatory, oppressive, or gender biased religious or cultural norms.[1151] In societies where they are prevalent, women are socially constructed to be second class beings inferior to men, controlled by men and "protected" by the male dominant hierarchy. For example, among some Islamic states women's freedom of movement is restricted, including international travel, education, driving, economic independence, and even choice of marriage. These are highly controlled by their patriarchal power structure that cut across both biological and marital structures.[1152] Women who violate the code of the male dominant society face serious sanctions as well as persecution.[1153] Against this background, female survivors of such GBPs seek refugee claims.[1154]

Despite the prevalence of such persecutions, asylum claims on gender have not received sufficient attention partly due to biases, and because gender is not expressly recognized as a separate protected ground under the Refugee Convention and 1967 Protocol. Applicants making gender asylum claims are often required to link persecution suffered to one or more of the five enumerated grounds to meet the viability test.[1155] For this and several other reasons, as this Chapter will demonstrate, applicants making gender claims face numerous interpretative and adjudicatory challenges. In some cases, adjudicators reject gender based PSGs as being too broad for fear of floodgates.[1156] As a consequence, courts interpret persecution suffered on account of

---

[1150] 2002 UNHCR Guidelines, *supra* note 116 at para. 9.
[1151] *Id.* Rebecca M. M. Wallace, *supra* note 99 at 702-711, 702 (1996).
[1152] *Fisher, supra* note 76 at 955; *Fatin, supra* note 76 at 233 [The two cases illustrated male dominance and control of women's dress code and overall way of life in the Iranian Muslim society.]
[1153] *Id.; Elizabeth Simeni Ngengwe v. Mukasey,* 543 F. 3d 1029 (8th Cir. 2008).
[1154] *Id.*
[1155] *See, e.g.,* art. 33(1) 1951 Convention, *supra* note 12.
[1156]NIJC: NATIONAL IMMIGRATION CENTER, A HEARTLAND ALLIANCE PROGRAM, PRACTICE ADVISORY: APPLYING FOR ASYLUM AFTER *MATTER OF A-B* 1-32, 2 (January 2019) [hereinafter NIJC, 2019].

one's gender as rather a persecution based on "personal reasons."[1157] The dilemma creates serious hardships for women and other gender seeking refugee protection on sex grounds.

Regrettably, IRL did not provide any clue on the meaning and actual constituent of persecution. Although Article 1A(2) and Article 33(1) enumerated five grounds of persecution—race, religion, nationality, MPSG and political opinion, these were articulated from the male-dominated experiences of persecution from World War. Article 1A(2) excluded the experiences of millions of women who today are fleeing GBP like domestic violence, human trafficking, FGC, forced marriage, rape, honor killing, and other sex-based persecutions inflicted by non-state actors whom their government is unable and unwilling to control. Divorcing the meaning and interpretation of persecution from the international law's nondiscriminatory principle, create a problem of sexism for IRL. Given the prevailing crisis of forced migration and proliferation of border crimes, involuntary migrants especially women will face greater vulnerabilities in destination countries, seeking to discharge heavier evidential burdens on gender and nexus. This Chapter, therefore, examines the consequences of gendering the IRL and the effects of nexus applications on gender claimants. The analysis is necessary to demonstrate how these contribute to undermining refugee women's access to protection and perpetuate female vulnerabilities and gender inequalities. The fact is obvious that IRL did not make any express provision for the rights of women as refugees, although the UNHCR guidance has authoritatively made recommendations for the recognition of gender claims under MPSG. The discussion here examines the challenges and prospects of the establishment of gender viability within MPSG. In many situations, interpreting gender within a PSG has proved to be unsuccessful given the reluctance of many states to recognize GBP within the criteria of Article 1.A(2). This creates

[1157] *R-A-, supra* note 56 at 906.

biases in the assessment of gender related asylum claims. Recurrent challenges of female asylum claimants provoke criticisms,[1158] and hardships for victims, especially as there are persecutions that by their nature gender specific.

This chapter examines attempts by the United States and other foreign courts to interpret gender related asylum claims, some potential issues, and challenges, ranging from problems of definition, scope, and nexus as well as gender politics. Findings from the United States jurisdiction are compared with other common law countries like Canada, Australia, and the United Kingdom as well as other foreign courts to have a wide range of jurisprudential examples. Although this research is not a comparative study, the knowledge is necessary to provide insight into the diverse judicial responses to gender related claims and the extent to which courts' decisions contribute to reinforcing claimants' protection or naturalizing female vulnerability. This analytical discourse is imperative to answer the question [W]hy should gender be made an independent ground for refugee protection and not be defined as part of MPSG? Why must the omission of gender or sex be a problem in contemporary IRL? Are gender experiences of persecutions serious enough to meet the viability for refugee protection? Would the inability or unwillingness of a native government to protect a claimant be substantial evidence for surrogate protection?

To respond to the above questions, this chapter briefly re-evaluates the import of persecution from the Convention and other refugee jurisprudence. The purpose is to examine the shortcomings of Article 1A(2) in framing refugees to the exclusion of women's experiences and the extent to which this affects the judicial interpretations of gender claims. The findings are

---

[1158] S. Parekh, *Does Ordinary Injustice Make Extraordinary Injustice Possible? Gender, Structural Injustice, and the Ethics of Refugee Determination,* 8 JOURNAL OF GLOBAL ETHICS 269 (2012).

critical to the dissertation thesis in seeking to strengthen our research argument on the gender biases of IRL and the need for reconstruction of the grounds of refugee protection and the elements of persecution to align with the framework of IHRL.

5.2 Framing Persecution in IRL and Lack of Gender Perspectives

From the onset, the UNHCR Handbook admitted that there is no accepted universal definition for "persecution," because the "various attempts to formulate such a definition have met with little success."[1159] Nonetheless, Paragraph 51 inferred the meaning of the term from the Convention. It recognized persecution as "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution" as well as "[O]ther serious violations of human rights—for the same reasons…."[1160] Apparently, the Handbook constructs persecution from the framework of Articles 1A(2) and 33(1), which emphasized that persecution or fear of persecution must be "on account of race, religion, nationality, membership in a particular social group or political opinion."[1161] But additionally, the Handbook included other serious violations of human rights that may occur on similar enumerated five grounds. The second segment of the illustration of persecution as a "violation of human rights" is critical to the discussion in this Chapter. Scholars like Hathaway[1162] and Good-Will Gill[1163] have given credence to this analysis that persecution refers to a systemic violation of rights and denial of human rights protection by one's government.[1164] The idea is consistent with international human rights instruments, which make persecution or human rights breaches

[1159] The Handbook, *supra* note 349 at para. 51.
[1160] *Id.* at para. 51.
[1161] 1951 Convention, *supra* note 12 at arts. 1A(2) and 33(1); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).
[1162] Goodwin-Gill, *supra* note 269 at 69.
[1163] Hathaway, *supra* note 22 at 112.
[1164] *Id.*

enforceable and protected.[1165] In its Preamble, IRL affirmed consistency with IHRL and the principle of nondiscrimination.[1166] Contrary to the claims, the Convention created a discriminatory structure that gendered persecution and grounds for refugee claims in favor of male experiences. Unlike other international legal frameworks,[1167] the Convention excluded the requirement of nondiscrimination in the protection of refugees.

As earlier indicated, there are forms of persecution that are gender specific, which affect women disproportionately because of their sex. Contemporary IRL did not make provision for such GBPs. This has created a void for interpretative barriers in asylum courts. Framed from male-centered experiences, as Parekh observes IRL "…virtually ignores forms of oppression […] specific to women."[1168] A common rationale for this is that the Refugee Convention was constructed to give priority to WW II categories of refugees motivated by pro-Western political values.[1169] The Eurocentric conceptualization of refugee status made millions of women and girls who may flee their country because of sexualized attacks invisible for refugee protection, as was the case with the famous "comfort women" during WW II.[1170] The impacts of framing a "he-category" of persecutory grounds have continued to exclude thousands of women from refugee protection, despite the prevalence of GBPs decades after the WW II.[1171]

[1165] ICCPR, *supra* note 12; UN Charter, *supra* note 31 at art. 1(3); CEDAW, *supra* note 31 at 2-15.
[1166] 1951 Convention, *supra* 12 at Preamble, para 1.
[1167] *Id.*
[1168] Parekh, *supra* note 12 at 206.
[1169] Hathaway, *supra* note 22 at 93.
[1170] *Military Sexual Slavery, 1931-1945,* COLUMBIA LAW SCHOOL, CENTER FOR KOREA LEGAL STUDIES, Military Sexual Slavery, 1931-1945 | Korean Legal Studies (columbia.edu). From 1931 to 1945 between 50,000 and 200,000 girls and young women, sarcastically framed comfort women, were forced into sexual servitude in the Japanese military brothels. The victims were systematically raped and abused by the military personnel.
[1171] Patricia Hynes, *On the Battlefield of Women's Bodies: An Overview of the Harm of War to Women*, 27 WOMEN'S ST. INT'L FORUM 231-445 (2004); Marlene Epp, *The Memory of Violence: Soviet and East European Mennonite Refugees and rape in the Second World War,* 9 J. OF WOMEN'S HIST. 58-89 (1997).

Ultimately, new circumstances in involuntary migration arising from border crimes like the proliferation of arms, drug dealings, sex trafficking, terrorism, and other kinds of banditry affecting women and children are obviously neglected. Other factors like displacement by climate change, intimate partners persecutions, human trafficking, enforced prostitution, and other forms of culturally imposed gender vulnerability, though ubiquitous, are uncontemplated in the reasons for refugee claims.[1172] It is obvious that the Refugee Convention is "founded on a highly individualistic conception of persecution" and premised on a highly restrictive environment[1173] and spectacle that consciously excludes potential refugees in dire need of protection. Women are the most disadvantaged, hence the argument that the Convention does not intend to protect victims of GBPs.[1174] In as much as the drafting of the Refugee Convention was influenced by the events of WW II, seventy-two years after the Convention has remained static despite the significant changes in the circumstances and motivations of refugee flights. These have created a serious lacuna in humanitarian asylum and gender jurisprudence that have provoked several interventions by the UNHCR as part of its supervisory roles on states[1175] to guide adjudicators on the determination of gender-based asylum claims.[1176] While we evaluate the UNHCR advisory guidance, the analysis underscores the extent to which decisionmakers balanced need with the changing realities on gender asylum jurisprudence.

[1172] UNHCR Urges Support to Address Worsening Gender-Based Violence Impact on Displaced Women and Girls, 25 November 2021, https://www.unhcr.org/en-us/news/press/2021/11/619e5ec94/unhcr-urges-support-address-worsening-gender-based-violence-impact-displaced.html.

[1173] Goodwin-Gill, *Asylum: Law and Politics of Change,* INTL. J. REFUGEE L 1-18, 8 (1995).

[1174] Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claim* 29 REFUGEE SURV. Q 46 (2010).

[1175] *See, e.g.,* pursuant to Article 35 of the 1951 Convention and Article II of its 1967 Protocol [Article 35 obligates State Parties to ensure implementation and protection of refugees in their countries by cooperating with the United Nations High Commissioner for Refugees or any other agency of the United Nations geared towards the application of the Convention].

[1176] EXCOM Conclusion No. 39, *supra* note 119; The UNHCR, *Guidelines on the Protection of Refugee Women,* UN Doc. EC/SCP/67, July 1991; Executive Committee of the UNHCR Programme (EXCOM Conclusion No. 73), *Refugee Protection and Sexual Violence*, (44th Session 1993).

5.3 UNHCR Guidance on Making Gender Based Claims

Because of the barriers in the interpretation of female asylum claims and the requirements of nexus, the 1985 EXCOM Conclusion No. 39 on Refugee Women and International Protection was developed to guide adjudicators. It urged State Parties to adopt an interpretation that recognizes:

> …women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of society in which they live… as a "particular social group" within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.[1177]

Basically, the EXCOM Conclusion 39 identified GBPs such as "harsh or inhuman treatment" for noncompliance to gender "social mores" as viable for refugee protection. Since the Convention made no expressed provision for such a category of refugees, EXCOM Conclusion 39 classified them within a PSG. It is imperative to examine how domestic courts have evolved with the interpretation of such claims, including domestic violence, especially considering the non-binding effects of the UNHCR advisory opinions.

In 1991, the UNHCR issued the second Guideline—UNHCR Guidelines on the Protection of Refugee Women.[1178] This expressly acknowledged that "the grounds for establishing refugee status do not include gender." Yet, by referencing the 1995 EXCOM Conclusion, it recognized that women persecuted for violating social norms or customs may be considered a social group.[1179] Beyond this, even without accepting the viability of gender claims, it recognized various scopes of GBPs like "severe sexual discriminations," rape and other forms

[1177] EXCOM Conclusion No. 39, *supra* note 119 at para. k.
[1178] 1991 UNHCR Guidelines, *supra* note 33.
[1179] *Id.* at para 54.

of sexual violence occurring at war or peacetimes, noting that survivors can legitimately seek refugee status under MPSG.[1180]

Two years after, in 1993, UNHCR EXCOM issued another Conclusion that centered on gender asylum for refugee determination.[1181] Significantly, the EXCOM Conclusion No. 73 urged adjudicators to recognize the peculiarities of female experiences of persecutions and the need to treat them differently from men's considering the sensitivity as well as disproportionality of GBP around the world.[1182] Subsequently, the 2002 Guidelines gave comprehensive attention to GBPs and the possible guidelines in the assessment of gender related claims. [1183] First and foremost, it identified the different categories of GBPs to include rape, sexual violence, dowry-related violence, FGC, DV or trafficking[1184] and other related human rights violations.[1185] Notably, it identified the above GBPs as protectable under MPSG[1186] and further that discriminatory treatments like the implementation of coercive laws or punishments for non-compliance as persecutory can fit within the same grounds.[1187] As part of the innovation, the 2002 Guidelines addressed the controversy on whether GBP can be protected within the scope of the Refugee Convention and 1967 Protocol. Paragraph 6 specifically recognized that proper interpretation of refugee claims pursuant to Article 1A(2) covers the scope of gender related claims. By implication, the 2002 Guidelines found that survivors of domestic violence or other forms of GBP can meet the requirements of the Convention's MPSG.[1188]

[1180] *Id.* at para. 56.
[1181] EXCOM Conclusion No. 73, *supra* note 1176.
[1182] *Id.* at para. (e).
[1183]2002 UNHCR Guidelines, *supra* note 116.
[1184]*Id.* at para. 9.
[1185]*Id.* at para. 5.
[1186]*Id* at para. 6.
[1187] *Id.* at para. 10-15.
[1188] *Id.* para. 22.

Similarly, in the same year, UNHCR released another authoritative document that affirmed the existence of nexus on all GBPs. Specifically, it readdressed the question of gender as a PSG and re-established that gender has "immutable/fundamental characteristic(s), or by social perception."[1189] It further emphasized the need for showing a causal connection between GBP and a government's unwillingness to protect, which are the fundamental elements for asylum.[1190] This a major document of the UNHCR that gave affirmation to the bifurcated nexus formula (BNF) as pertinent to our analysis of credibility. Subsequently, in 2008, the UNHCR issued a Handbook that addressed the impacts of displacement on women and girls and other problems of gender diversity as well as women at risk.[1191] Significantly, the two sets of Guidelines clarified the underlying connections between harm committed by non-state actors and the Convention's ground for protection, as well government's unwillingness and inability to protect.[1192] In other words, the Guidelines identified that nexus exists first where the risk(s) of being persecuted linked to a Convention's ground and there are reasonable circumstances or evidence showing government's unwillingness or inability to protect.[1193] Subsequent the analysis of states' practice will examine the applications of the BNF in some jurisdictions like United Kingdom, New Zealand, and Australia,[1194] and some aberrations in other states.

[1189]*Id.* at paras. 12-13.
[1190]*Id.* at para. 21-23.
[1191] UNHCR, HANDBOOK FOR THE PROTECTION OF WOMEN AND GIRLS, JANUARY 2008, 9-12, 5-361. https://www.refworld.org/docid/47cfc2962.htm.
[1192] 2002 UNHCR Guidelines, *supra* note 116 at paras. 21-23.
[1193] *Id*. at paras. 28-29.
[1194] *See e.g. Islam v, Secretary of State for the Homeland Department* [1999]; Musalo eta al. *supra* note 10 at 766.

5.4 Responses of Domestic Jurisdictions to the UNHCR Guidelines

5.4.1 Canadian Gender Guidelines

The UNHCR has a clear role of advisory and guidance in the interpretation of IRL pursuant to Article 35.[1195] This is demonstrated potently in the several Gender Guidelines, which strived to supplement the gaps in the interpretation of gender asylum claims. But the extent to which the extensive guidelines have impacted gender asylum decisions is another issue. In many domestic courts, gender asylum claims are still viewed from a male-centered lens. On the one part, the reason is because of the non-binding nature of the UNHCR Guidelines. Another obvious reality is the lack of uniformity in domestic laws and their applications. For instance, whereas countries like Canada[1196]and Australia[1197] have tried to incorporate the UNHCR Gender Guidelines into their asylum laws, the United States courts have argued in several cases that they are neither bound by the UNHCR Guidelines nor their own Considerations.[1198] In contrast, Canada was the first to respond to the 1993 EXCOM Conclusion,[1199] through the establishment of the Guidelines on Women Refugee Claimants (Canada's Chairperson's Guidelines or CCG).[1200] CCG articulated its primary purpose to promote consistency and fairness in the determination of gender related claims, including an understanding of GBV, discriminations, and equality needs.[1201] Ultimately, it broadens the understanding of the gender identities of women,

---

[1195] 1951 Convention, *supra* note 12 at 35.
[1196] 1993 Canadian Gender Guidelines, *supra* note 1133.
[1197] Migration Act 1958, *supra* note 1134; 1996 Australian Gender Guidelines (DIMA), *supra* note 1134.
[1198] *Cardoza-Fonseca, supra* note 357 at 421, 438-39; *Aguirre-Aguirre*, *supra* note 1135 at 415, 427-28; *Ndom, supra* note 1135 at 743, 753.
[1199] The 1993 UNHCR EXCOM Conclusion 73, para. (k) urged State Parties to develop their own guidelines on women asylum seekers.
[1200] CANADA: IMMIGRATION AND REFUGEE BOARD OF CANADA, COMPENDIUM OF DECISIONS: GUIDELINE 4 – WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION, FEBRUARY 2003, https://irb.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx [*hereinafter* "2003 Canadian Gender Guidelines"].
[1201] *Id.* at para. 1.

girls, and people of other sexual orientations who are disproportionately affected in GBPs,[1202] focusing on persecutory harm, nexus analysis, evidential proof on gender claims and other special problems. Citing the 1985 EXCOM Conclusions, CCG recognized that female related claims can be made under PSG. It found that gender may fit within a social group as possessing innate (immutable) characteristics such as "age, race, marital status, and economic status."[1203]

Following the landmark decision by the Supreme Court of Canada in *Canada (Attorney General) v. Ward* (1993), the 1993 Guideline was updated in November 1996 affirming that gender was a valid basis for refugee protection on account of PSG.[1204] It further examined the issue of nexus to the Convention's grounds in making gender claims, and found that women who are persecuted for expressing feminist views or non-compliance to religious, political views may claim protection on PSG and other related grounds.[1205] Significantly too, the Guidelines affirmed that GBPs should be interpreted within the framework of international human rights (IHR) instruments. Primarily, the protective needs of female refugees are recognized to be human rights, which should be analyzed alongside the country's condition as well as the claimant's ability or reluctance to seek a state's protection. According to Paragraph 11.5 such reluctance would not rebut the presumption of a WFF.[1206] Against this backdrop, it acknowledged certain factors that may undermine the attempt to seek state protection in GBV such as "negative past experience with state authorities, internalized and community shame, fear of not being believed or personal risks associated with seeking assistance."[1207] Thus, the Guidelines reaffirmed the

[1202] *Id*. at para 2.
[1203] *See, e.g.* the Updated Guidelines of 1996 following the decision in *Canada (Attorney General) v. Ward* (1993) [affirming that refugee protection may be claimed]
[1204] Canadian Gender Guidelines, *supra* note 1200 at para. 3(2).
[1205] *Id.* at para. 11.2.5.
[1206] *Id.* at 11.5; *Canada (Minister of Citizenship and Immigration) v. Olah,* 2002 FCT 595 at para. 6 [noting that evidence to determine the issue of state protection was not because of claimant's subjective reluctance but her personal circumstances, supported by documentary evidence].
[1207] *Id.*

findings of the United Nations Women documents on GBV that only fewer than ten percent women who experience violence are able to seek police help. Many confide in family and friends. They become more vulnerable when their persecutors are members of their family.[1208] Therefore, given the complex nature of GBPs by state or non-state actors, it would be most unfair to reject a claim for failure to seek the government's protection if it would be objectively unreasonable to do so. Likewise, on internal flight alternative (IFA), the Canadian Guidelines have recommended to adjudicators consider "religious, economic and cultural factors" that may affect the claimant in a particular country and militate against successful IFA. Equally, the Guidelines considered "Special Problems at Determination Hearings" that may impede female survivors of GBV from disclosing details of their violent experience in testimonies such as trauma, shame, stigma, and fear.[1209] Subsequent analysis of the Canadian jurisprudence examines the concerted efforts by Canadian courts to integrate the Gender Guidelines in its decisions in the determinations of gender asylums.

5.4.2 Australian Gender Guidelines

Like Canada, Australia incorporated the UNHCR Gender Guidelines into its gender asylum laws. In 1996, the Department of Immigration and Multicultural Affairs (DIMA) developed Guidelines on Gender Issues for Decision Makers (1996 Australian Gender Guidelines—AGG),[1210] which considered sensitive procedural issues relating to GBPs and gender asylum claims.[1211] AGG took cognizance of the rights of refugees and displaced women

[1208] UN Women, "Facts and Figures: Ending Violence Against Women" (updated March 2021) https://www.unwomen.org/en/what-we-do/endingviolence- against-women/facts-and-figures#note.
[1209] 2003 Canadian Gender Guidelines, *supra* note 1135 at Section C, at para 8(2).
[1210] Department of Immigration and Multicultural Affairs, Refugee and Humanitarian Visa Applicants – Guidelines on Gender Issues for Decision Makers (July 1996), http://refugeestudies.org/UNHCR/66%20%20Refugee%20and%20Humanitarian%20Visa%20Applicants.%20Guidelines%20on%20Gender%20Issues%20fo r%20Decision%20Makers.pdf; Review of Gender, Child, and LGBTI..
[1211] *Id.* at s 1.

under the IHR frameworks as well as EXCOM Conclusions. It further acknowledged the increasing vulnerabilities of women fleeing GBPs who may face new threats in their asylum country.[1212] Significantly, the 1996 Guidelines recognized that although women represent many refugees worldwide, only a small portion of female refugees are resettled in Australia for several reasons. These include poverty, lack of resources or courage to escape their abusers due to cultural restraints, subjugation, and male superiority.[1213]

Given the peculiarities, the Guidelines urged adjudicators to evaluate gender asylum with caution because of some cultural barriers that make women's experiences of persecution sensitive and different from men's.[1214] Among other reasons, AGG recognized that GBP may occur in varied forms that are directly connected to the Convention's grounds such as the imposition of religious or cultural restrictions on women and even societal suppression of women through State sanctions, denial of rights of participation in political, civil or economic life, forced marriage, and infanticide.[1215] Other dimensions of GBP can occur in the form of rape, domestic violence, discrimination, and other forms of sexual violence. Despite the prevalence of these in many cultural societies, female asylum seekers do not always receive assessments. AGG recognized that emotional and psychological challenges constitute major inhibitions in testimonies by the survivors of GBPs, especially in they try to recall traumatic experiences of GBP. Therefore, it urged adjudicators to respect the emotion, and sensibilities of such claimants, considering differing gender sensitivities.[1216] It is important too to avoid the danger of over-generalization in gender claims, which may subjectively have retraumatizing effects. Against this

---

[1212] *Id.* at para. 2.5 [citing the UNHCR Reports and showing that most of the millions of refugees in the world are women and children.]
[1213] *Id.* at para 2.10 [emphasis added].
[1214] *Id.* at 12.11-12
[1215] *Id.* at para. 3.12 [emphasis added].
[1216] *Id.* at 4.3.

backdrop, AGG recommended that the adjudication of refugee claims including GBPs be based on IHRL and the strict consideration of CAT.[1217] In assessing the evidence and role of perpetrators, the Guidelines found that agents of state and non-state actors may be perpetrators of GBV.[1218] Even where a state is not directly involved, its inability or unwillingness to protect a victim may still make a claimant eligible for surrogate protection. The 1996 Guidelines recognized two approaches to the assessment of WFF—first, by showing a "real chance" of persecution or that the person has been persecuted in the past and there is no change of circumstances.[1219] Under this criterion, a person who suffered past persecution need not prove a "real chance" of future persecution. Instead, a WFF is presumed unless the presumption is rebutted by a change of circumstances. But the Guidelines urged officers to apply a "change of circumstances" test with caution on gender claims. This is in consideration that the subjective state of mind of an applicant has obvious lasting implications, especially on matters relating to rape and other forms of sexual violence.[1220] Considering that the perpetrators of GBP are usually non-state actors whose actions may be ignored or condoned by the state, returning an asylum seeker on GBPs to her country would trigger a spiral of risks. Even in making the decision on internal relocation, AGG urges officers to consider the demographic scope of the persecution, whether it would affect rural, urban, or regional populations, and if there is a likelihood that such relocation would avert the danger feared by an applicant.[1221]

In May 2010, the Australian Migration Review Tribunal (AMRT) was established. This facilitated the development of the 2012 Refugee Review Tribunal's Gender Guidelines, which

---

[1217] *Id.* at 4.3.
[1218] *Id.* at 4.11.
[1219] *Id.* at 4.17 [change of circumstances test was set by the Australian High Court in Chan).
[1220] *Id.* at 4.19.
[1221] *Id.* at 4.21.

was directed to guard the adjudication procedures by the members of the Tribunal.[1222] Among other innovations, it improved the review process on gender-sensitive claims affecting "discrimination against lesbian, gay, bisexual and transgender persons."[1223] Some of the advancements centered on promoting a gender inclusive and sensitive process that would recognize the social and cultural difficulties affecting applicants on gender related claims.[1224] Three years after, the Administrative Appeal Division established more expansive Guidelines on Gender Knowledge and Management (GKM),[1225] which addressed the meaning of gender, gender identity and GBPs. It defined GBP to apply to an attack on one's biological sex, but more frequently describes the harm that affects women disproportionately such as "sexual violence, societal legal discrimination, forced prostitution, trafficking, refusal of access to contraception, bride burning, forced marriage, forced sterilisation, forced abortion, and (forced) female genital mutilation, enforced nakedness/sexual humiliation."[1226] GKM identified the relationship between GBP and GBV, which may occur as violence—sexual, physical or psychological, including a threat to harm—directed to a person on the basis of gender or sex.[1227] Notably, it found that women's experience of persecution for reasons of sex or gender may vary, given that some women may suffer GBPs for reasons not related to gender. A common example is the rape of a woman for being a member of a political party or flogging a woman for refusing to wear a veil

---

[1222] MIGRATION REVIEW TRIBUNAL - REFUGEE REVIEW TRIBUNAL, GENDER GUIDELINES (Mar. 24, 2012), http://www.mrt-rrt.gov.au/Files/HTML/GenderGuidelines-GU-CD.html.
[1223] *Id.*
[1224] ADMINISTRATIVE APPEALS TRIBUNAL, MIGRATION & REFUGEE DIVISION, GUIDELINES ON GENDER, KNOWLEDGE MANAGEMENT, JULY 2015. https://www.aat.gov.au/AAT/media/AAT/Files/MRD%20documents/Legislation%20Policies%20Guidelines/Guidelines-on-Gender.pdf. Cited in Hastings: *Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions: A Resource for U.S. Attorneys,* CENTER FOR GENDER & REFUGEE STUDIES 8 (MAY 2014).
[1225] *Id.*
[1226] *Id.* at pp. 3-4; (Former) UNITED KINGDOM IMMIGRATION APPELLATE AUTHORITY (IAA), ASYLUM GENDER GUIDELINES, NOVEMBER 2000, para. 1.13.
[1227] *Id.* at p. 4.

prescribed by a civil authority. To this extent, a victim of non-gendered persecution because of gender is differentiated from GBP like FGC.[1228] But generally, gender related claims may be made on the basis of acts of GBV such as all forms of sexual violence, domestic violence, coerced family planning, harmful traditional practices, punishment for transgression of social mores, societal and legal discrimination, and discrimination based on peoples' sexual orientation.[1229] Considering the sensitivity, the Guidelines suggested the need for adjudicators to consider certain inhibiting factors that may affect applicant's testimonies during the hearing such as shame, fear, and trauma, especially for victims of sexual violence, domestic violence and other gender related crimes.[1230] This view aligns with the 2002 Guidelines and the Canadian Gender Guidelines respectively.[1231] Awareness of these limitations is necessary for reviewers to respect the demeanor, and sensibility of the respondent and to avoid imposing further circumstances that may retraumatize asylum seekers on gender or jeopardize the chances of a fair review.

5.4.3 United States Gender Considerations

With the prevailing international awareness provoked by the UNHCR Gender Guidelines, the United States, like Canada and Australia, established a gender consideration guide for adjudicators called the—*Consideration for Asylum Officers Adjudicating Asylum Claims From Women* (The Consideration).[1232] The Preamble to the Consideration specified the purpose among others to enhance understanding on the sensitivity of gender related claims and for adjudicators

[1228] *Id.* at para. 7.
[1229] *Id.* at para 8.
[1230] *Id.* at para. 15.
[1231] 2002 Gender Guidelines, *supra* note 116 at para. 36(xi) [Urging adjudicators to understand the role of trauma and cultural differences and while assessing women's experiences and credibility].
[1232] United States Bureau of Citizenship and Immigration Services, Consideration for Asylum Officers Adjudicating Asylum Claims from Women, 26 May 1995 (*hereinafter* "INS Gender Guidelines"). https://www.refworld.org/docid/3ae6b31e7.html.

to keep pace with developments in the international refugee regime.[1233] Its background affirmed the need for its conformity with existing human framework such as the CEDAW, the UN Declaration in 1993 and the UNHCR EXCOM Conclusions of 1985, 1991 and 1993 in consistent with exiting Guidelines like the Canadian.[1234] It expressed a primary purpose to urge adjudicators to consider the cross-cultural effects of human rights.[1235] Against this backdrop, the Consideration recognized the harmful experiences that may be suffered by women solely because of their gender such as domestic violence, rape, infanticide, and FGC.[1236] It further acknowledged that women who live under the protection of their male family members—father, husband or brother—may face greater vulnerability that are linked to cultural norms or religion of such community.[1237] These may exist as discriminatory or abusive treatments imposed on women either for a breach or for non-compliance with socio-cultural norms. Such GBPs vary from the male experience in the same cultural community. Notably, the Considerations acknowledged that consistent serious physical harm as well as discrimination, accumulates over time and may rise to persecution under the Convention.[1238] This is because their pervasive nature can constitute a reason for flight and refugee claims. Among the identified GBPs are rape, sexual violence, slavery, forced marriage, forced abortion, and severe forms of discrimination.[1239] Also, the Considerations recognized that gender claims may emanate from punishments for violations of one's religious beliefs, political opinions, and social groups. Generally, in making such claims, applicants are required to establish nexus to the grounds implicated.

[1233] *Id.* at Preamble.
[1234] 1985 EXCOM Conclusion No. 39, *supra* note 119 at para. k; 1991 UNHCR Guidelines; EXCOM Conclusion No. 73, *supra* note 1176; Canadian Gender Guidelines, *supra* note 1200.
[1235] Section II(a) Purpose and Overview.
[1236] *Id.* at para. a.
[1237] *Id.*
[1238] INS Gender Guidelines, *supra* note 1232 at 6-16.
[1239] *Id.*

Despite the promise under the Considerations, the document was not binding in any form. Whereas the United States immigration courts, BIA and Circuit Courts were advised to take note of the guidelines, they were not bound to them, unlike Canada's Guidelines. Moreso, the Considerations were directed at asylum officers and not at immigration judges. Our case analysis evaluates the response of the United States courts to gender asylum claims and the extent to which the courts have been able to keep pace with the international refugee regime.

Overall, the Considerations were significant developments in the determination of gender claims. Nonetheless, the non-binding guidance was directed to asylum officers mainly and not directed to the judicial bodies.[1240] In contrast, countries like Canada and Australia incorporated their Gender Guidelines into their asylum jurisprudence. The effects of the discrepancy are revisited in the analysis of the courts' responses to gender claims in the United States to demonstrate their impacts on the interpretation of gender claims. For the same reasons too, gender asylum faces unfair discretion mainly because of the requirements of nexus or gender biases, which give cause to suggest the inclusion of gender as a specific ground for a refugee claim. Despite the concerted efforts of the United States Congress in innovating policies for protecting female survivors of gender abuses, trafficking, and crimes, other categories of asylum seekers who flee GBPs from their countries encounter prongs of limitations in trying to discharge complicated burdens of nexus. Because the legislative efforts have not translated into positive actions in asylum decision making, the case analysis evaluates the issues in the United States gender asylum determinations to seek human rights resolutions applicable to other states.

[1240] Musalo et aal., *supra* note 10 at 768.

5.5.1 United States Jurisprudence of Gender Asylum

5.5.2 *Claims on Female Genital Cutting (FGC)*

As earlier indicated gender or sex is a potential site of persecution in both public and private, at war and in peacetimes mostly by state agents or non-state actors. When it occurs, perpetrators may attack victims because of their gender, or on account of any of the five Convention's grounds. A typical example of conflict related gender attack was the rape of Tutsi women by the Hutu during the Rwandan genocide, which was perpetrated as political and ethnic conflicts.[1241] Another striking example was the attack on the Serbian women during the religious and political armed conflicts in the former Yugoslavia.[1242] The latter was a combination of religious, ethnic, and racial political armed conflicts that resulted in the rape of women and children, other forms of sexualized war and abduction. Potentially, such category conflict-related violence is associated with displacement as many survivors seek asylum protection in nearby countries. In many situations, conflict-related gender crime may compel international attention. Yet, there are other forms of GBPs that occur in private by intimate partners, members of the same family as well as social and cultural communities. These include domestic violence, rape by an intimate partner or family member, honor killing, FGC, imposed gender restrictions, and punishment for violating coercive gender norms. For lack of expressed recognition, asylum adjudicators, and courts have often questioned the viability of gender claims on grounds of nexus to the Convention.[1243] Despite the robust guidance by the UNHCR Gender Guidelines, EXCOM Conclusions and the United States Considerations, gender asylum claims in the United States have been questioned on nexus grounds. Although the 2002 UNHCR Guidelines suggested that

[1241] Ericksson, *supra* note at 17-26.
[1242] Jovanka Stojsaljevic, *Women, Conflict and Culture in the Former Yugoslavia,* 3 GENDER AND DEVELOPMENT, 36-41 (1995).
[1243] *Fisher, supra* note 76; *Fatin supra* note 76*, Ngwengwe supra* note 1153.

claims under gender can be brought under MPSG, in practice, the interpretations of gender claims within the Convention's social groups have faced numerous barriers. The consequences, as discussions will uncover, retraumatize victims and continue to perpetuate female invisibility and inequality in IRL.

In responding to asylum claim under PSG, the United States BIA set a remarkable precedent for defining MPSG in *Matter of Acosta.*[1244] Under *Acosta* as seen earlier, BIA established that an asylum seeker on the ground of MPSG must show that he or she is "an individual who is a member of a group of persons all of whom share a common, immutable characteristics…members of a group cannot change… because it is fundamental to their individual identities or consciences."[1245] Significantly, *Acosta* recognized sex as cognizable because it is fundamental and immutable characteristic to form a PSG.[1246] In 1996, BIA applied the criteria to grant asylum to Fauziya Kassindja, a Togolese teenager who sought asylum in United States, having escaped the practice of FCT.[1247] Basically, it acknowledged gender and sex as PSG, holding that women who flee GBP like FCT could be eligible for asylum in the United States.[1248] Thus, BIA recognized that "the practice of female genital mutilation, which results in permanent disfiguration and poses a risk of serious potentially life-threatening complications, can the basis for a claim of persecution."[1249] Therefore, BIA defined Kasinga's social groups as "[y]oung women who are members of Tchamba Kunsuntu tribe of northern Togo who have not

[1244] *Acosta*, *supra* note 1102 at 211-4.
[1245]*Id.* at 217.
[1246]*Id.*
[1247] In *re Fauziya Kasinga* 211. & N. Dec. 357 (BIA 1996).
[1248] *Kasinga, supra* note 1102 at 357.
[1249] *Id.* at 357.

been subjected who have not been subjected to female genital mutilation as practiced by the tribe and who oppose the practice…."[1250]

Kasinga's fear of being coerced into FGC reflects a kind of gender specific persecution that only women can experience, consistent with the 2002 Guidelines.[1251] Similarly, many other jurisdictions have largely accepted the viability of FGC under PSG. For instance, France was the first country in the world to recognize fear of FGC as a legitimate ground for asylum and link same with the government's condonation, acquiescence, or approval.[1252] Ten years after, the French Refugee Commission (des recours des réfugiés (CRR)) reaffirmed the legitimacy of a woman's refusal to submit to FGM or FGC within a PSG category. It further recognized that the fear of persecution goes beyond the victim to a mother who may be forced witness to her daughter's excruciating pain and trauma of genital cutting. Thus, the CRR maintained that:

> [W]omen of Somalia who refused to submit their daughters to FGM risked their daughters' forced infibulation as well as persecution with the general population and of a faction which ruled the country without it being possible for them to claim the protection of a legally constituted authority.[1253]

Also, CRR acknowledged other important elements of persecution including an inability to return home due to a WFF, and the government's unwillingness or inability to protect the asylum

[1250] *Id.*
[1251] 2002 UNHCR Guidelines, *supra* note 116 at para. 9.
[1252] Commission des recours des réfugiés (CRR), Mlle Diop Aminata Decision No 164078, 17 July 1991 (UNHCR Ref World, 1991).
[1253] *Id* ; T. Aleinikoff, *Protected characteristics and social perceptions: an analysis of the meaning of "membership of a particular social group,* E. Feller, V. Türk, and F. Nicholson (eds) REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR"S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION 282 (Cambridge, 2003).

seeker. The classical analysis of the torturous practice of FGM, a type of GBP on women by fellow women, meets the UNHCR's threshold of persecution as well as human rights standard.

Other jurisdictions like Australia, Canada, and the UK have likewise affirmed the viability of FGM as a ground to seek gender asylum claims under a PSG. Canada's IRB recognized FCT as torturous harm feared or suffered only on the ground of being a woman, hence making a claimant's fear of persecution eligible for refugee protection.[1254] Similarly, in *RRT N97/19046,* Australia's RRT found a Yoruba woman of Yomba tribe who fled circumcision to have a WFF that meets the requirement of MPSG for asylum protection. It likened the practice of FCT with the torturous infliction of bodily harm that causes the extirpation of females with serious detrimental consequences on victims.[1255] In the above cases, FCT was interpreted as both a breach of human rights and CAT. Consistent with this reasoning, the UK Court in *Fornah v. Secretary for the Home Department (SHD)*[1256] linked FCT to the infliction of torture, inhuman, and degrading treatment.[1257] Comparably, Lord Bingham observed that FCT demeans the nature and status of women and reinforces discrimination and female inferiority.[1258] The analyzed cases collectively upheld viability of FCT claims based on human rights considerations. Such an exercise of fair discretion on the protection of FCT asylum claimants reinforces the global fight against GBPs and female subjugation, as much as condonation or interpretative barriers by asylum countries would support female vulnerability.

[1254] *See, e.g.* Khadra Hassan Farah, Mahad Dahir Buraleh, Hodan Dahir Buraleh IRB Decision T93- 12198, 13 July 1994);
[1255] N97/19046 [1997] RRTA 4090 (16 October 1997).
[1256] [2006] UKHL 46.
[1257] *Id.* at 94.
[1258] *Id.* at 119.

Apparently, the horrible practice of FCT has survived in many cultural societies because members of the society tolerate it or show unwillingness and inability to stop it or even punish perpetrators, who are mostly non-actors. Notwithstanding the health implications, women or girls who rebel against FCT face the risk of coercive circumcision or ostracization. Yet, in some countries, the survivors are required to show proof why internal relocation alternatives should not be accessed. Alternative Internal Flight (AIF) in FCT-related claims can be successful where the practice is less widespread and not generally prevalent.[1259] So far, the case analysis has shown that a targeted victim of FCT can claim asylum under MPSG as well as the mother of a female minor being forced to subject her daughter to and witness her circumcision.[1260] Also, a woman who has refused to be a cutter, fearing exclusion and other harsh physical and psychological persecutions may make a successful claim on gender. In some cases, too, claims of refugee status on FCT have been associated with a grant of a humanitarian asylum rather than the PSG category.[1261] This is because of the physical, emotional, and psychological effects of FGC. Arguably, similar torturous experiences exist in other categories of GBPs, yet the latter has not received the same successful adjudication as FCT. This underscores the inconsistency of gender asylum claims.

5.5.3 Rape and Other Forms of Sexual Violence

While FCT asylum claims have received strong judicial affirmation, GBPs like rape and other forms of sexual violence have received minimal attention, and in some cases trivialized as personal or private affairs.[1262] Yet, in many developing countries, rape and sexual crimes are

[1259] *K and others (FGM) The Gambia CG v. Secretary for the Home Department* [2013] UKUT 00062 (IAC),
[1260] *Yayeshwork Abay & Burhan Amare v. Ashcroft* 368 F.3d 634 (6th Cir. 2004).
[1261] *See, e.g. Matter of S-A-K- & H-A-H-,* 24 I. & N. Dec. 464, 465 (BIA 2008).
[1262] *R-A-, supra* note 56 at 906; *In re S-A-* Interim Decision 3433 (2000).

being naturalized as normal consequences conflicts or tools of female subjugation.[1263] Rape, whether in armed conflicts or peacetime are politically motivated or gendered to show gender or power superiority. War narratives from World War II to contemporary armed conflicts indicate the prevalence of sexualized war as military tactics and tools of domination, genocide,[1264] and displacement.[1265] Like any other coercive gender crime, rape is a gender specific persecution that dehumanizes victims, especially women.[1266] The target among others is target to deny or conquer their femininity or humanity.[1267] Regardless of its seriousness, adjudicators of asylum claims on rape underestimate both the seriousness and potential danger upon return. As indicated by Paragraph 9 of the 2002 UNHCR Guidelines, victims of sexual crime suffer not only physical and emotional harm but suffer lasting psychological violence, fear, and trauma, including shame and danger of ostracization on them. These issues are largely neglected by courts, especially in the review of non-state actors related to sexual violence, downplayed as private or familial matters[1268] and in strict requirements on nexus.[1269]

In *Lazo-Majano v. INS,* a thirty-four-year-old Salvadorian woman and mother of three sought asylum in the United States. She claimed to have suffered brutal rape, and emotional and psychological violence by a Sergeant of Salvadorian. She was twenty-nine when her husband flees El Salvador for political reasons. He belonged to a right-wing paramilitary group known as ORDEN. In his absence, Sergeant Rene Zuniga subjected Lazo-Majano to forced domestic labor,

---

[1263] C. ENLOE, MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN'S LIVES, 108 (BERKLEY, 2000).
[1264] *The Prosecutor v. Jean-Paul Akayesu,* ICTR-96-4-A (June 1, 2001).
[1265] SJOBERG, LAURA AND VIA SANDRA GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES, (CALIFORNIA, 2010).
[1266] SONDRA HALE. GENDER POLITICS IN SUDAN (WESTVIEW PRESS, 1996); EGODI UCHENDU, WOMEN AND CONFLICT ON THE NIGERIAN CIVIL WAR. (NEW JERSEY, 2007).
[1267] War narratives from World War II to contemporary civil wars and terrorisms indicate military actions in deploying rape and other forms of sexual violence as tactics of war and domination.
[1268] *R-A-, supra* note 56 at 906; *In re S-A-* Interim Decision 3433 (2000).
[1269] *Olimpia Lazo-Majano v INS,* A 24 345 083, (9th Cir. 1987).

rape, sexual enslavement, and physical torture. Ms. Lazo-Majano could not seek the government's protection for fear, and because of her persecutor's position in the government. Bereft with no other choice, she fled. Despite the gravity of harm she suffered, BIA interpreted Lazo-Majano's brutal experience as "…strictly personal actions that do not constitute persecution within the meaning of the Act."[1270] Upon appeal the Ninth Circuit Court reversed and remanded the BIA's denial for further review. While the underlying motivations of such attacks may vary, war narratives indicate that women are usually targeted and defiled for political reasons and as captives or symbols of defeat.[1271] The Ninth Circuit Court clarified these to demonstrate that rape or any sexual crime could be motivated by political opinion as well as gender reasons.[1272] This can occur as a deliberate act to control, conquer, objectify, or torture targeted victim(s) for political, amorous, or repressive purpose. On this reasoning, the court found that Sergeant Zuniga held a political (machismo) opinion that a man has the right to dominate a woman.[1273]

However, Judge Poole dissented from the majority decision holding that although the respondent may have suffered physical and emotional abuse during her relationship with Sergeant Zuniga such mistreatment is personal and would not constitute persecution within the meaning of the immigration laws.[1274] Such holding is far-reaching in setting controversial precedents that are likely to undermine successful claims for survivors of sexually related persecutions. Notably, BIA and Judge Poole re-emphasized a cardinal principle in refugee protection—that is the existence of persecution within the meaning of the Act. INA did not

---

[1270] *Id.* at 8.
[1271] *Id.*
[1272] *Id.*
[1273] *Id*.
[1274] *Id.* at 25.

specifically define persecution or the scope of persecution but drew its meaning verbatim from Article 1A(2) on the definition of a refugee. Neither of the two instruments explicitly defined persecution. Instead, both specified the fact that persecution may occur on five grounds—race, religion, nationality, political opinion, and membership in a particular social group, to the exclusion of gender. Although rape and other forms of sexual violence may constitute a crime in international law, IRL was hesitant to incorporate rape or sex-related harm into the requirements for refugee claims. Also, the dearth of definitions of persecution has created an interpretational void on gender claims, which specifically affected sexual crimes. Apparently, to interpret sexual violence as a private matter would reinforce what Alice Edward described as a dilemma of public-private dichotomy in international law.[1275] Such a standard has created a gulf between the international law concept of non-discrimination and the practice of female marginalization.

Regardless of diverse opinions that dominate the debates on the bifurcation of human rights, IHRL affirms the importance of all rights whether civil and political rights or economic social and political rights.[1276] Contemporary human rights jurisprudence recognizes the inextricable ties between the two generations of human rights.[1277] But in contrast, IRL reinvents the private/public dichotomy by gendering the grounds of persecutions to five male-centered grounds that excludes GBVs perpetrated in private. By demarcating human and gender rights persecutions occurring on racial, political, or related grounds, IRL creates an artificial and

---

[1275] A. Edwards, *Age and gender dimensions in international refugee law,* E. Feller, V. Türk, and F. Nicholson (eds) REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTERNATIONAL PROTECTION, 48 (CAMBRIDGE, 2003).

[1276] UN General Assembly. Vienna Declaration and Program of Action, 12 July 1993, A/CONF.157/23.

[1277] The Universal Declaration of Human Rights was bifurcated into the two generations of human rights in 1966—the ICCPR and the ICESCRs. During the Vienna Declaration in 1993, the indivisibility, interdependence and inseparability of the two covenants were re-affirmed.

unsustainable sphere of human rights jurisprudence.[1278] Therefore, it could be right to assert that the Refugee Convention reinforces a sexist's construction of human rights by gendering persecution and even the fundamental imports of *jus cogens* rights.[1279] Gendering the meaning of persecution or creating interpretative barricades on women who suffer violent abuses in private or public ranks at par with male-centered construction of refugee protection to the exclusion of women. Consequently, the danger of sustaining such a precedent is enormous and can perpetuate female vulnerabilities in asylum countries. Gender exclusion in the framing of refugee status and the ground of persecution has a pervasive impact on the interpretation of rape testimonies as seen in *Lazo-Majano*. The United States is not alone in this stance. The Administrative Court of Stuttgart and the Higher Administrative Court of Berlin have ruled in a dismissive rape asylum that rape is a common fate of women at war times and does not meet the level for persecution.[1280] Such troubling precedent would naturally perpetuate inequalities.

In *Sofia Campos-Guadado v. I.N.S*[1281] a Salvadorian woman who entered the United States without inspection in the Fall of 1984 sought asylum and withholding on account of MPSG and imputed political opinion. Ms. Campos suffered brutal rape and was forced to witness the gruesome killing of her uncle and cousins who were tortured and dismembered by their attackers. The facts had it that his uncle was the Chairman of a local agricultural cooperative. The Petitioner's testimony indicated that his political position and the result of a controversial land reform movement were necessary factors in his attack. Unfortunately, Ms. Campos visited

---

[1278] J. Oloka-Oyango, *The Plight of the Larger Half: Human Rights: Human Rights, Gender Violence and the Legal Status of Refugee and Internally Displaced Women in Africa,* 24 DENVER J' INT'L. L. 362 (1996).
[1279] H. Charlesworth and C. Chinkin, *The Gender of Jus Cogens,* 15(1) HUMAN RIGHTS QUARTERLY 63, 69 (1993).
[1280] *See, e.g.* Ankerbrand, *Refugee Women Under German Asylum Law* 14 IRL 1, 45, 48-9 (2002), [citing the referred case numbers by the Administrative Court of Stuttgart 18 K 14880/96 and the decision by the Higher Administrative Court of Berlin in the case of 9 B 103/86].
[1281] 809 F. 2d 285 (5th Cir. 1987).

her uncle's house at the time of the attack. Her torturous experience caused her a serious nervous breakdown and led to her being hospitalized for fifteen days. But the IJ denied her application for asylum, while BIA affirmed the denial. On appeal, the Fifth Circuit Court interpreted her brutal experience as merely a "…random expression of spontaneous sexual impulses by an individual military officer towards a woman, who happened to be captured while in the company of an uncle suspected of subversive political activities…"[1282] Such lackluster analysis of Ms. Campos' traumatic experience merely trivialized her rape attack like the Berlin court as a common price paid by women, hence not credible for refugee relief. The court rejected the respondent's evidence that she has suffered persecution under a PSG and an imputed political opinion relating to her uncle's political position. It equally ignored the respondent's testimony indicating that their assailants shouted a political slogan during the attack. The rejection was based on what the court construed as a failure to establish nexus. Invariably, the nexus requirement here is subtly centered on proof political motivation of the persecutors rather than the WFF of Campos who has suffered severe (rape) past persecution, and the probability of her having WFF of future persecution. Also, in disapproving of her claim for imputed opinion, the BIA asserted that her attack was random and circumstantial. The Board reasoned that her attackers could not have targeted her on actual or imputed political opinion because they were not expecting her on the scene of the attack. At face value, this may sound plausible. Nonetheless, the BIA failed to assess if the respondent's fear was WFF. Ms. Campos's attack represents the experiences of myriads of women who suffer random rape attacks during armed conflicts and civil disturbances because of their sex. Female refugees like her come into asylum countries with fear and desperation given their horrible experiences in their countries. The

[1282] *Id.* at 289.

trauma and desperation of such refugees explain the necessity of their flight, thus justifying the need for protection. To deny protection to such aliens would simply mean returning them to their abusers. Such a decision questions the fundamental purpose of nonrefoulement.

Comparably, gender or sex-related attacks may take other forms like coerced birth control, enforced sterilization or involuntary insertion of birth control. In *Zheng v. Gonzales,* IJ denied the applicant's claim of WFF for persecution by involuntary assertion of an IUD, a birth control device. BIA affirmed the denial and held that Zheng did not suffer past persecution and has not demonstrated WFF of future persecution. The BIA's assessment of persecution here is based on a "significant degree of pain or restriction" as a test of level and degree of aggravation.[1283] Eight years after the decision, a debate on whether involuntary insertion of IUD would constitute torture for refugee protection featured again in the *In re Matter of M-F-G & L-G.*[1284] In this case, BIA asserted that whereas involuntary insertion of IUD may be intrusive and hinders a person's ability to control procreation, such would not perse constitute persecution.[1285] The BIA's requirement of degree for persecutory threshold here contradicts the human rights import of persecution especially given that torture, inhuman or degrading treatment may be non-physical, yet leaves a victim with deep psychological impact.

5.5.4 *Domestic Violence*

Domestic violence is widespread in a common type of GBV by non-state actors mainly countries with systemic patriarchy. Among cultural or religious societies where it is prevalent where women's bodies, sexuality, gender affairs, and even reproductive rights are deeply controlled by men. Viewed from a traditional standpoint, some feminist theorists have associated

---

[1283] *Id.; Matter of M-F-W- & L-G-,* 24 I. & N. Dec. 633, 639 (BIA 2008).
[1284] *Id.*
[1285] *Id.* at 633.

GBV with female subjugation, gender inequalities, sexism, and racism in different cultural and patriarchal societies.[1286] As Leonora Walker observed domestic violence is naturalized and even tolerated in different cultural societies where men enjoy privileged social and political significance than women.[1287] This is because their privileged position legitimizes the control of women's body and entire life. Historically, as Rhonda Copelon observed in societies where women are relegated to the background, female subordination and violence tend to be more prevalent and tolerated, hence naturalized in a structure of male superiority and female inferiority.[1288] Therefore, domestic violence is at the center of and the by-product of male superiority and female inferiority. The reason is clear. In many cultural societies, socialization, power hierarchy, and even state laws empower men to control women as daughters, wives, intimate partners, students, and workers. Such power dynamics extend beyond physical control, to excessive "protection" and abuse. An abuse of gender superiority over women has been commonly viewed as private matters, undeserving of public interference, even in the face of abhorrent human rights violations because society perceives them as either discipline or protection of a weaker sex. For example, as Jessica Marsden observed that until the nineteenth century, the Anglo-American common law protected a man's right to subject his wife to corporal punishment, including battery, in so far as no permanent injury is sustained.[1289] In consequence, a man's powerful influence over his wife is perceived as part of his marital right and gender superiority.[1290] Cultural influence and lack of effective gender-balance laws contribute to perpetuating female subjugation. Invariably, domestic violence has preyed on a machismo

[1286] LENORE WALKER, THE BATTERED WOMAN 11-14, 5-288(William Morrow, 1980).
[1287] *Id.*
[1288] Rhonda Copelon, *Recognizing the Egregious in the Everyday: Domestic Violence as Torture,* 25 COLUM. HUM. RTS. L. REV. 291, 305 (1994).
[1289] Marsden, *supra* note 2519; *See, e.g.* Reva B. Siegel, *The Rule of Love, Wife Beating as Prerogative and Privacy,* 105 YALE L.J. 2117, 2122-23 (1996).
[1290] *Id.* at 2520; *Id.* at 2122.

pattern. The normalization of GBV, especially domestic violence in many societies potentially explains the fact that both perpetrators and their government perceive the act as disciplinary or protective rather than persecutory. Of course, this has serious consequences on claimants who flee their countries to seek asylum on grounds of domestic violence.

Reports on the United Nations Facts and Figures on Domestic Violence indicate that 736 million women, almost one in every three are subjected to domestic violence, sexual violence, and other forms of GBV by intimate partner, non-partner, and other males (non-state or state) actors.[1291] A study by Amnesty International showed that domestic violence is a major cause of female death and disability between the ages of 16 and 44.[1292] Despite the prevalence of domestic violence in many developing countries, only forty percent of victims seek the help of any sort, while only about ten percent seek police help either because of shame or for lack of police's intervention in domestic matters.[1293] Proportionally, many cases of domestic violence are undocumented because victims are afraid or ashamed to report their persecutors knowing that such action would not have any effect. Women who flee their country for domestic violence do so out of desperation because their persecutors are either members of their families, or communities whom the government is unwilling or unable to control. Those who have the courage and wherewithal are compelled by fear and risks of death to flee their domestic abusers to seek asylum elsewhere. The choice of forced migration is always a necessity where internal flight relocation is untenable either because of a lack of government protection or fear of greater

---

[1291] *Facts and Figures: Ending Violence Against Women,* UN WOMEN, Facts and figures: Ending violence against women | What we do | UN Women – Headquarters. World Health Organization, on Behalf of The United Nations Inter-Agency Working Group on Violence Against Women Estimation on Data, 2021.
[1292] Amnesty International, *It's in our hands: Stop violence against women,* AMNESTY INTERNATIONAL (2004), https://www.amnesty.org/en/wp-content/uploads/2021/08/act770012004en.pdf.2.
[1293] *United Nations Economic and Social Affairs,* THE WORLD'S WOMEN 2015 AND STATISTICS, 159 (2015) [emphasis added].

harm by the abuser. Regardless of the precarious circumstances of GBP, some adjudicators interpret the circumstances of claimants with biases through the Convention's male-centric lens.[1294] It is imperative to evaluate how such interpretations deepen the void of gender inequalities, female vulnerabilities, and invisibility of refugee law.

IHRL has an established framework that creates complaint procedures and remedies for survivors of GBP,[1295] unlike IRL. Despite the advancement in the UNHCR interpretative guidelines for gender claims, in many cases, asylum claims are rejected on grounds of nexus and as lacking viability for refugee protection. In some situations, violence against women in public and private are not essentially viewed in the light of the Convention's status. These have serious detrimental effects on individuals making gender claims, especially on GBPs. Undoubtedly, domestic violence has an inextricable connection with gender inequality, which reinforces the biases of masculinity and femininity. The sociocultural risks and power dynamics associated with the binaries cannot be ignored, especially on how they undermine the rights, dignity, and "risks" of being a woman in society. Asylum States have strong roles to play in the prevention of GBP and the protection of victims of torture, other inhuman and degrading treatment. The UNHCR Guidelines and asylum jurisprudence support the grant of refugee claims based on domestic violence.[1296] *Acosta*'s principle is clear in identifying sex or gender among the fundamental and immutable characteristics of a social group.[1297] It is imperative to examine how these translate into responsive actions in domestic violence asylum claims.

[1294] *R-A-, supra* note 56 at 906.
[1295] *Complaint Procedure Under the Human Rights Treaties,* UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, https://www.ohchr.org/en/treaty-bodies/human-rights-bodies-complaints-procedures/complaints-procedures-under-human-rights-treaties.
[1296] *Ward, supra* note 539 at 689; *Acosta*, *supra* note at 21; *A-R-C-G-*, *supra* note 124 at 388.
[1297] *Id.*

In the *Matter of R-A-*[1298] BIA reversed a grant of asylum to a Guatemalan woman, Ms. Alvarado who suffered abhorrent domestic violence by her husband, holding that she did not demonstrate evidence of a cognizable PSG or political opinion. According to the fact, Ms. Alvarado suffered brutal physical violence by her husband, including rape, dislocated jaw, pulling of her hair, beating, whip by gun, and electric cord attack. Worst still, her testimony indicated that her abuser kicked her abdomen and vagina, which caused her to abort her second baby.[1299] Under this risk of death, she fled her abuser because she was unable to obtain her government's protection. Regardless of her desperate condition, BIA denied her claims for lack of nexus but recognized that she has suffered severe persecution by someone whom the government was unwilling to protect.[1300] BIA required a show of a higher threshold of suffering like bodily injury or aggravating circumstance for harm, as wells as a concrete evidence government's inability to protect.[1301] The troubling precedent set in *R-A-*shifted from the *Kasinga*'s precedent, and the benchmark on PSG set in *Acosta,* which recognized gender under a social groups for a general understanding of refugee eligibility.[1302]

Following an intense public outcry on BIA's decision,[1303] A.G. Janet Reno certified BIA's decision to herself and vacated it on January 19, 2001, and remanded same to BIA with instructions to stay the case until the publication of asylum rules proposed by the DOJ in December 2000.[1304] After the proposed asylum rules were finalized, a new A.G., Ashcroft certified the case to himself in February 2003. Compelled by human rights outcry on *R-A-*

[1298] *R-A-, supra* note 56 at 906.
[1299] *Id.* at 907.
[1300] *In re R-A-,* 22 I. & N. Dec. 908 (B.I.A. 1999).
[1301] *Id.*
[1302] *Id* at 907.
[1303] *See*, *e.g.* KAREN MUSALO, CENTER FOR GENDER & REFUGEE STUDIES, *Matter of R-A-*. Matter of R-A- | Center for Gender and Refugee Studies (uchastings.edu).
[1304] *In re R-A-*, *Op Cite*.

decisions, the DHS finally submitted a brief[1305] in favor of Ms. Alvarado, asserting that she had "established statutory eligibility for asylum." Still, Ashcroft failed to take any further action in the case, and instead remanded it to the BIA.

In 2008, A.G. Michael Mukasey certified the case to himself and lifted the stay, remanding the case to the BIA for a decision. The DHS recognized that Ms. Alvarado met the refugee definition. Following an agreement reached between the DHS and the applicant's attorneys, she was granted asylum through a summary decision of IJ.[1306] Basically, it took fourteen years of persistent human rights efforts to obtain asylum for Ms. Alvarado, a success made possible by political transitions and response to public policy. Also, *R-A-* decision ushered in some changes in domestic violence asylum jurisprudence. First, the UNHCR responded to the situation by issuing an advisory opinion that recognized Ms. Alvarado's experience within the Convention's meaning of PSG and political opinion.[1307] Under the Obama Administration too, some innovative policies were developed to reverse the previous biases on domestic violence asylum. These were integrated as parts of the DHS's Supplemental Brief. *R-A-* was a significant milestone in domestic violence asylum that helped to open new vistas in gender asylum claims, including domestic violence.[1308] Nevertheless, neither *R-A-* nor *L-R-* decisions set a precedent for future cases. Subsequent decisions showed vestiges of the initial judicial skepticism on gender asylum claims.[1309]

[1305] 2004 DHS Brief in R-A-, RA_DHS Brief.pdf (immigrantjustice.org).
[1306]*Id* at 920–21; Barbara R. Barreno, *In Search of Guidance: An Examination of Past, Present, and Future Adjudications of Domestic Violence Asylum Claims*, 64 VAND. L. REV. 225, at 237 (2011).
[1307] UNHCR, MATTER OF RODI ALVARADO PEÑA (A73 753 922) ADVISORY OPINION ON INTERNATIONAL NORMS: GENDER-RELATED PERSECUTION AND RELEVANCE TO "MEMBERSHIP OF A PARTICULAR SOCIAL GROUP" AND "POLITICAL OPINION, UNHCR, 9 JANUARY 2004.
[1308] *See, e.g. In re L-R- & K-A-* (2021)..
[1309] In *re A-B-,* 27 I. & N. Dec. at 336 (citing, In *re W-G-R-*, 26 I. & N. Dec. 208, 217 (B.I.A. 2014)). Although, this does not mean ocular visibility. The Attorney General applied the social distinction requirement set forth in *Matter*

In *re S-A-*[1310] petitioner, a young citizen of Morocco fled domestic violence by her father. Her testimony showed that she was physically and emotionally battered by her father because of her liberal Muslim views on women, which were opposed to her father's orthodoxy as a core Muslim fundamentalist. Because of the conflict, she was battered, tortured, whipped once a week by hand, belt, or feet and degraded to renounce her liberal stance. Her brothers assaulted her for the same reasons about an actual or imputed opinion of liberal attitude. At fourteen, she suffered burnt of hot iron on her lap as punishment inflicted by her father as a deterrent for wearing a short skirt that exposed her thighs. In addition, she was beaten up in public by her father for conversing with a male. This prevented her from going to school and at one point she was subjected to punitive house arrest. Frustrated by her domestic abuse, she sneaked out to visit her girlfriends in 1997. Unknown to her that her father had secretly marked the sole of her shoes, upon return, she was severely beaten, punched, kicked, and pulled her hair by her father. According to the petitioner, she was deeply traumatized because of her spiral of domestic abuse and even contemplated suicide on two occasions, presuming that to be a quick solution to evade her father's domestic abuses. She testified to her mother's helplessness and vulnerability in all this, especially given her inability to defend her. Even worse, the respondent demonstrated her inability to seek the government's protection because of its futility, as such attempts are usually counter-productive in Morocco. In accordance with the social, religious, and cultural norms, she would be expected to submit to her father or spousal in a society where such power is unfettered.[1311] Hence, an attempt would aggravate her physical abuses.

---

of M-E-V-G- in such a manner, it was contrary to the BIA's articulation of this requirement set forth In *re M-E-V-G-* 26 I. & N. Dec. 227, 240–41 (B.I.A. 2014).

[1310] *In re S-A-* Interim Decision 3433 (2000); 22 I. & N. Dec. 1328 (BIA 2000).

[1311] *Id.*

Apparently, the respondent's flight was motivated by persecution and threats. Her helpless mother made a clandestine arrangement with her aunt living in the United States to support her to escape from her abusive father. Prior to her departure, her aunt had previously taken her picture to a man in the United States, who began to develop a long-distance relationship with her with the intention to marry her. But shortly before her immigration document was finally processed, her fiancé died. The respondent's claim was corroborated by her aunt, although she denied any knowledge of her alleged suicide attempts. During the case assessment, the IJ expressed skepticism on the credibility and even severity of the respondent's physical attacks, hence interpreting the respondent's testimonies and corroborating evidence as mere embellishments. The review failed to consider the severity of the respondent's physical persecution and any presumption of WFF upon return to Morocco at least for violating religious gender norms.[1312] Upon appeal, the Board found the respondent's testimony to be consistent with the country conditions in Morocco as published in the United States Department of States.[1313] On this basis, the previous decision was reversed. The Board found that the Respondent has made a credible claim, which makes her statutorily eligible. But despite the manifest overlapping of religion and GBPs in this case, BIA centered only on religious grounds, ignoring the gender motivations of respondent's persecutions, and the intersections with PSG. The latter anonymity created on the gender dimensions of *re S-A-* indicates a calculated attempt to downgrade GBPs to personal or familial issues. The subsequent analysis underscores this fact. Regrettably, in many cases, courts

[1312] *Id.* citing *Matter of Kasinga,* 21 I. & N. Dec. 357 (BIA, 1996); *Matter of B-,* 21 I. & N. Dec. 66 (BIA 1995).
[1313] *See, e.g.* Committees on the International Relations and Foreign Relations, 105th Cong., 2nd Sess. Country Reports on Human Rights Practices for 1997 1538 (Joint Comm. Print 1998) [hereinafter 1997 Country Reports] (stating that "few women report abuse to authorities" because the judicial procedure is skewed against them and when such process fails in court or with the police, the return to their abuse homes to face greater vulnerabilities).

have treated domestic violence under the pretext that such claims do not meet the persecutory or protective threshold.

In all, the reluctance of courts to recognize domestic violence as meeting the grounds for refugee protection contradicts the *Acosta* and *Kasinga* principles.[1314] Moreso, to deny asylum to a young lady that has suffered such a brutal experience of domestic violence by her father in a society where such a victim is unprotected by her civil authorities would question the ultimate purpose of IRL and even the Congressional commitment in passing the VAWA in 1994.[1315] Although, VAWA has been established to protect only the survivors of domestic violence by their US citizen or permanent resident family members,[1316] the pathetic cases of *S-A-* and *R-A-* compel the need to extend the relief to female survivors of domestic violence who seek protection in the United States. Knowing that GBPs constitute a violation of human rights, survivors who are unprotected in their home countries deserve surrogate protection in destination countries to reduce the untold hardships of female victimhood. In addition, the sensitivity of GBPs as well as social and political gender impacts should be considered during case reviews to ascertain the country's conditions as well as consequences denials.

5.5.5 Claims on Persecution for Non-Compliance with Repressive Gender Norms

Generally, the precedents handed under *Acosta,* and *Kasinga,* and the non-binding recommendations under the Considerations brought enlightenment and a better understanding of GBP. But in practice, neither of these has substantially enhanced the consistent success of gender asylum jurisprudence. Many female asylum seekers in the United States still face numerous hurdles in trying to prove their social group and the credibility of their persecution. Yet, research

---

[1314] *Acosta* set the principle of *ejudem generis,* while *Acosta* applied it to FGM asylum.
[1315] Vogel, *supra* note 35 at 242-499, 409.
[1316] *Id* at 410.

evidence has proved that GBV has been prevalent in countries with repressive gender-cultural norms.[1317] Likewise, women who contravene gender-cultural and religious restrictions in such countries face punitive risks, including physical abuses, and threats to life and freedom. Repression and gender related human rights breaches in cultural societies may include, but are not limited to, prohibitions on female education, marriage, employment, and driving, as well as gender restrictions on the freedom of movement and dress codes like wearing the Muslim burka or hijab. Such boundaries come with forced compliance, and severe punishments for violations, including ostracization, torture, degrading, and humiliating treatments and even honor killing. Unfortunately, these laws are imposed and enforced only on women by a male power hierarchy. According to the UNHCR Gender Guidelines, women fleeing any of the above human rights threats may seek asylum under PSG.[1318] Similarly, the 1985 ExCom Conclusion[1319] and the 1991 UNHCR Guidelines[1320] provided guidance for interpretations of the above gender experiences to avoid biases that could retraumatize survivors. However, these have proved to be largely unsuccessful.

In *Gomez v. INS,*[1321] the Second Circuit Court ruled that gender alone would not constitute persecution on account of MPSG, except if there are other related Convention grounds. Likewise, in *Fatin v. INS,*[1322] the Third Circuit upheld a denial of asylum by the BIA to Fatin, a Westernized educated Iranian woman who opposed Islamic law's requirement for women to cover their head with *chador* while in public. During the case review, the court set two test probabilities—first on people who were opposed to the wearing of a *chador* but would comply

[1317] Vogel, *Op Cite* 1315.
[1318] 2002 UNHCR Guidelines, *supra* note 116 at para. 9.
[1319] 1985 ExCom Conclusion at para. k.
[1320] 1991 UNHCR Guidelines, *supra* note 33 at para. 54.
[1321] 947 F.2d 660 (2nd Cir. 1991).
[1322] 12 F.3d 1233 (3rd Cir. 1993).

with it to avoid punishment and a second category of persons who would not comply with it because they found it abhorrent.[1323] Ironically, it rejected both categories as unqualified to constitute a social group.[1324] Although the court recognized forced compliance to be severely distasteful to members of a small group and could constitute persecution, it held that Fatin was not identified with such a smaller group. By implication, the Second Circuit indirectly suggested options to women in Fatin's circumstance—that is to acquiesce with gender discriminatory laws to avoid punishment or the opposite. Subtly, these options are preferred to fleeing to seek asylum. Apparently, the decision has been criticized for lacking human rights justifications. Paradoxically, it requires women to remain martyrs in their countries rather than liberated refugees.[1325] Specifically, the court expressed skepticism that feminism would qualify as a political opinion.[1326]

Barely one year after *Fatin* rejection, another Iranian woman, Safaie sought asylum on similar grounds. She objected to a gender dress code and female behavior imposed by the Khoeini regime in Iran and sought asylum under PSG.[1327] The Eight Circuit Court held that a PSG comprising of Iranian women was too broad for the Convention's scope. Besides, the court introduced an uncommon test of compliance to avoid punishment or non-compliance, which vitiated the respondent's proposition of PSG and claims of persecution as ineligible for asylum claim under the Act.[1328] Going by Eight Circuit Court's proposition, women's right to freedom and choice would be drastically reduced to mere acquiescence to rules, even when oppressive to human rights. If all refugees would contend with persecution in their home country either by

[1323] *Id.* at 1242.
[1324] *Id.* at 1240-42.
[1325] Musalo et aal, *supra* note 10 at 837.
[1326] *Fatin, supra* note 76 at 1242.
[1327] *Safaie, supra* note at 636, 638.
[1328] *Id.* at 638.

forced compliance or forfeiting their religious or political opinion and freedom, the Refugee Convention would be meaningless. The consistent judicial reasoning in support of conformity to gender-oppressive rules to avoid punishment or flight contradicts human rights principles and even the primary purpose of the 1980 Refugee Act. Women's protection needs are not inferior to other refugees. By their compelling circumstances, women asylum seekers deserve dignity and fairness. Regrettably, this standard has not been achieved under the test of nexus.

In *Saideh Fisher v. INS,*[1329] an Iranian woman sought asylum, having suffered severe persecution for transgressing norms. She claimed persecution on account of religious, political opinion, or PSG grounds. The court found that her alleged persecution for forced compliance was insufficient to meet the requirement for persecution, nexus, and overall refugee protection under the Act.[1330] The applicant was a Westernized Iranian woman who suffered physical attacks by government officers for violating dress codes and other strict cultural and moral regulations for Muslim women. At first, she was arrested for wearing a bathing suit to observe her host at a party and for allowing her hair to be exposed on her chador. On another occasion, four government officials stopped her and ordered her into their car at gunpoint. Terrified by these experiences and fearing that she had been singled out for persecution as a nonconformist she fled to seek asylum in the United States. She alleged persecution, arguing that her Westernized views were opposed to that of her religious and highly gendered society, which was the primary motivation for her persecution. During her asylum proceeding, the decision took two dimensions. At first, BIA citing *Fisher v. INS* recognized that "dress codes and conduct rules pertaining to women may amount to persecution if a woman's refusal to comply is on account of her religious

[1329] *Fisher, supra* note 76 at 955.
[1330] *Fisher II, supra* note 76.

or political views."[1331] In this reasoning, the Board held that Fisher's attacks did not rise to persecution merely because she held contrary religious views with her society. In *Fisher I,* the court held a contrary view that forced compliance or the government's enforcement of moral codes could amount to persecution. It contended that "one of the reasons for the existence and enforcement of a generally applicable law is to oppress those with minority religious views."

However, in *Fisher II en banc*[1332] the court overturned BIA's decision holding that "[T]he mere existence of law permitting detention, arrest, or even imprisonment of a woman who does not wear the chador in Iran does not constitute persecution any more than it would if the same law existed in the United States."[1333] Although the Ninth Circuit Court *en banc* agrees with the Board's definition of persecution within the meaning of physical and mental suffering, consistent with *Kovac,*[1334] it disagreed with Fisher's claim of persecution based on the possibility of being prosecuted by the Iranian government for violating an act deemed criminal, which applied exclusively to women. Also, citing *Abedini,*[1335] the court disagreed with Fisher's claims of persecution for—an inability to show that she was selectively targeted by her supposed persecutors and that her prosecution or feared prosecution was or would be disproportionately severe to amount to persecution. Overall, the court found that Fisher failed to provide any evidence to match her government's action with persecution and proof of its connection with her religious and political opinion. Therefore, the court held that Fisher has failed to carry her burden under *Ghaly.*[1336] Still referencing *Ghaly,* the court interpreted Fisher's experience as mere

---

[1331] *Id.* at 954-6.
[1332] *Fisher, supra* note 76 at 955.
[1333] *Id.* at 962.
[1334] *Kovac* 407 F. 2d at 106-107.
[1335] *Abedini,* 971 F. 2d at 191.
[1336] *Ghaly,* 58 F. 3d at 1431 [defining persecution as an infliction of suffering on those who differ on account of religious or political beliefs].

discrimination on account of her sex and not on account of religious or political opinion.[1337] For the sake of clarity, *Ghaly* excludes discrimination as persecutory, although the UNHCR explicitly recognized that certain discrimination may be offensive with severe proportion to meet the threshold of persecution.[1338]

Apparently, the decision adopted the precedential standard in related cases, which rejected the claim of harm suffered either by coercion or non-compliance.[1339] Apparently, going by the reasoning individuals who alleged a WFF for forced or non-compliance like Fisher and Fatin would not be identified as Convention's refugees for not meeting the nexus threshold. This is supported by *Elias Zacarias,* where the Supreme held that a political or imputed political opinion may not be claimed where there is evidence that a particular restriction or forced compliance is required of all persons.[1340] Applied in *Fisher v. INS,*[1341] the Ninth Circuit Court *en banc* reversed *Fisher 1* and held that the physical harm suffered by Fisher—arrest, detention, and gun-threat by state actors—did not amount to persecution on account of her political and religious opinion. Both the Ninth Circuit's decision and the reference to *Ghaly* on the burden of "on account of" rather counters the standard in the UNHCR Guidelines, thus signaling a judicial caution to restrict gender asylum floodgates.

Whether the grant of asylum on GBPs can increase the asylum floodgates has remained a conjecture. In contrast, research evidence has shown that only very few female victims of

---

[1337] *Id.* at 1431.
[1338] UNHCR Handbook, *supra* note at paras. 54-5; *Fisher, supra* note 76; *Mikhailevitch v. INS*, 146 F.3d 384, 390 (6th Cir. 1998).
[1339] *Fatin supra* note 76; *Ngengwe*, *supra* note 1153; *I.N.S V. Elias-Zacarias* 502 U.S. 478 (1992).
[1340] *Elias-Zacarias*, *supra* note 360 at 482 (1992) [The requirement to prove "on account of" characteristics belong the victim. The Supreme Court further cited that the Jews in Nazi were not persecuted on account of their political opinion rather as members of a social and religious group]*;* Musalo *et aal, supra* note 10 at 829.
[1341] *Fisher, supra* note 76 [*Fisher I*].

persecution have the courage and wherewithal to flee their home countries for asylum.[1342] This is true considering the socio-economic and cultural impacts on the survivors, many of whom may be poor, semi-literate, or traditionally minded persons. This makes the floodgate assumption baseless and unsupported by human rights principles. Of course, relying on such a mindset could lead to an abuse of discretion.[1343] Such a capricious exercise of discretion in gender asylum would violate women's rights to personal freedom and enjoyment of their full rights in society. The Consideration recognized that "women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered a 'particular social group'" for asylum purposes.[1344] It further recognized that such persons could have imputed political opinion that could form the basis of their persecution because of their gender, consistent with *Acosta's* definition of PSG.[1345] These insights were ignored in *Fisher*, regardless of the respondent's demonstration of harm suffered because of nonconformity to a politically enforced moral code by a regime that is theocratic. Obviously, Fisher's gender experiences were trivialized in a bid to project a restrictive nexus standard.

Fisher and Fatin's persecutory experiences reflect the records of gender-repressive attacks on thousands of women in many cultural societies, many of which remain undocumented. As Dorothy Smith has theorized, gender politics and men's central influence intersect in the world of women both in public and private as the center for female subjugation and epistemic violence. While women form the striking metaphor in their world, their activities, and existence in society

---

[1342] Vogel, *supra* note 35 at 242-499, 219-421.
[1343] Noonan, Circuit Judge, joined by Circuit Judge Fletcher, dissenting; INS Gender Guidelines, *supra* note 1232.
[1344] *Id.* at 3 and 4 [Para. 4 recognized gender discriminatory provisions, punishment for the breach of social mores arranged marriage, wearing lipstick, failing to comply to other gendered cultural or social norms within the meaning of violations deserving state's protection].
[1345] *Acosta, supra* note 122 at 211, 233. [stating that a PSG "share a common immutable characteristic. The shared characteristic might be an innate one such as sex…].

"are determined outside them and beyond the world which is their place."[1346] Fatin and Fisher, as feminists are opposed to that world order controlled by men. Their lack of conformity is a motivation for persecution and punishment, very sensitive issues which their asylum reviewers have totally ignored. As much as nonconformity to gender norms can motivate GBP, persecutors like the attackers of Fatin and Fisher have imputed on them a political opinion and religious identity of non-conformists. The question is whether their persecutory threats and experiences meet the requirements for refugee protection. Examples from the two cases showed the interpretative challenges for women to prove that their gender-exclusive persecution meets the Convention's requirements. Problems relating to proof of credibility for GBPs either on a PSG or other grounds have been a major inhibition to gender asylum cases.

5.5.6 Forced Marriage and Bride Price

Forced marriage is among the categories of GBPs recognized by the UNHCR Gender Guidelines.[1347] Freedom of marriage and the right to choose one's marital partner is protected by human rights and nondiscriminatory principles.[1348] Under the United States Law, the First Amendment protects people's right to enter marriage with a person of their choice. In *Obergefell v. Hodges,*[1349] the United States Supreme Court affirmed the right of an American to marry anyone he or she loves. International human rights frameworks recognize the right to marriage and prohibit coercive marriage whether by a family or religious arrangement.[1350] In *Gao v. Gonzales,* the Second Circuit Court observed that in some countries like China and India women

[1346] Dorothy E. Smith, *Women's Perspective as a Radical Critique Of Sociology,* 44(1) SOCIOLOGICAL INQUIRY, 7-13, 13 (YEAR).
[1347] 2002 UNHCR Guidelines, *supra* note 116.
[1348] UN Charter, *supra* note 31 at art. 1(3); UDHR, *supra* note 31 at art. 2; CEDAW, *supra* note 31 at art. 1 and 2.
[1349] *Obergefell v. Hodges,* 135 S. Ct. 2584 (2005).
[1350] *See, e.g.* ICCPR, *supra* note 31 at art. 23(2); ECHR, *supra* note 31 at art. 12 [emphasis added].

can be sold into marriage or coerced into accepting a marital arrangement organized by parents for pecuniary interest. In the opinion of the court, to be forced into such an involuntary lifelong marital relationship would amount to persecution and can form grounds for refugee claims. The classical decision aligns with Paragraph 9 of the UHCR Advisory Opinion Gender Guidelines.[1351] However, the standard has been shifted in several decisions by the United States courts.

In *Gao v. Gonzales,*[1352] Hung Ying Gao—a Chinese national sought asylum and withholding in the United States having fled from threat and harassment by a fiancée for declining parental arrangement to sell her to a suitor, Zhi. Upon rejecting the proposed marriage, Zhi harassed Gao's family demanding they fulfill the terms of the marital agreement or return his marital fee. According to Gao, her parents had spent the money on family bills. Gao fled into the city for fear of her suitor. But Zhi continued to trace her destination and threaten her to comply with his marital request or return the bridal money.

During her proceedings, the IJ denied Gao's asylum and withholding. The court held that her alleged persecution was mere a "dispute between two families" over a breached contractual arrangement. It further held that Zhi's anger was motivated by a potential denial of a bride and subsequent failure to refund his bridal money.[1353] Apparently, Gao's claim of PSG as—females who are in arranged marriages—was rejected as not having no immutable characteristics that she would unable or unwilling to change.[1354] She was equally faulted for failing to provide evidence why internal relocation or government's protection cannot be accessed.[1355] Gao appealed against

---

[1351] 2002 UNHCR Guidelines, *supra* note 116 at para 9.
[1352] 04-1894 (2nd Cir. 2006).
[1353] *Gao* at 20a-26.1, 24a.
[1354] *Id.* at 25a.
[1355] *Id.* at 24a-25a.

the denial and reframed her PSG as "young women of Fuchow ethnicity, who have not [sic] had a traditional marriage, arranged by parents and go-between, as practiced by that Fuchow ethnicity, and who oppose the arrangement and do not have protection against it."[1356] Unfortunately, the BIA rejected the claim of PSG and summarily affirmed IJ's decision.

Frustrated by the two decisions, Gao appealed to the Second Circuit Court for a review. The court reversed BIA's decision and considered Gao's PSG to possess immutable characteristics. Contrary to BIA's holding, the Second Circuit found that Gao lived in a region of China where "parents routinely sell their daughters into marriage, and this practice is sanctioned by society and by the local authorities."[1357] Therefore, the court held that Gao had a WFF for persecution in China in the form of "lifelong involuntary marriage" and on account of her PSG, "women in forced marriages."[1358] It further rejected IJ's holding on the possibilities of internal relocation on the ground that Zhi had once followed Gao to the boat to trace her location at Mawei. Finally, the matter went to the Supreme Court for a writ of certiorari. The Court granted the certiorari, vacated the decision of the Circuit Court, and remanded the case for further consideration in the light of *Thomas v. Gonzales.*[1359] One critical problem that is recurrent in all the decisions is the difficulty of framing GBP within acceptable criteria of PSG. The impacts of this are far-reaching in gender asylum claims.

In *Elizabeth Simeni Ngengwe v. Mukasey,*[1360] a female citizen of the Republic of Cameroon appealed to the Eight Circuit Court to review a denial of asylum and withholding of removal under the CAT, after denials by the IJ and BIA respectively. Ngengwe's testimony

---

[1356] Gao BIA Br. 6-7 (Admin. R. 10-11).
[1357] *Gao* 1-18a, 2a(2nd Cir. 2006)
[1358] *Id.* at 14a.
[1359] 126 S. Ct. 1613 (2006).
[1360] 543 F. 3d 1029 (8th Cir. 2008).

showed that she was of the Bamileke tribe of Anglophone Cameroon and married to a Francophone of the Bikom tribe. Her husband died in an auto crash in 2000. Following his demise, Ngengwe was subjected to obnoxious widowhood mourning rituals, including two months of confinement. She was separated from her children and had her hair shaved with a broken bottle. She was forbidden from normal dressing and forced to sleep on the floor. Her husband's family confiscated all her deceased husband's belongings and closed their bank account. A cumulative of gruesome experiences and threats caused her to escape her marital home with her two children. She stayed with her sister in the Southwest province. After a month, her husband's family showed up at her sister's house and demanded that she marry her late husband's brother or return the bride price paid (traditional marriage dowry). According to her testimony, the supposed brother-in-law was too old and had two wives already. Ngengwe declined coercive marriage and expressed an inability to pay the bride price. Infuriated by her refusal, they knocked her down and gave her a serious beating that resulted in her being hospitalized. They threatened to come back after one month to get their refund her bride price or coerced her into marriage or kill her and take her children away. Ngengwe was unable to seek police help believing that such attempt was ineffective in such a case taken to be a "family matter." Therefore, she escaped from her sister's and stayed with a friend briefly before she finally fled to Canada on a friend's passport and later came to Kansas City to stay with her problem.

During her asylum before IJ, Ngengwe alleged a WFF of persecution based on MPSG as a "widowed Cameroonian female of the Bamileke tribe, in Southern region that belongs to a family or has in-laws from a different tribe and region, the Bikom tribe in the Northwest province, who have falsely accused her of her husband's death." She equally argued that she

belonged to a broader social group of Cameroonian widows. IJ rejected both social groups holding that Ngwengwe was not a member of PSG and did neither suffer past persecution nor was she persecuted on account of MPSG and had no WFF for future persecution. BIA dismissed the respondent's appeal for similar reasons. Additionally, it found that Ngwengwe's first definition of the social group did not have a common immutable characteristic shared by individuals in that group. BIA equally rejected her second social group—Cameroonian widows.

Ngengwe appealed to the Eight Circuit. Contrary to the previous holdings, the Eight Circuit found her second definition of a social group, "Cameroon widows" to be cognizable. On this basis and considering the respondent's past persecutions, the court granted a review and remanded the application to BIA. The respondent's experiences of persecution here are tripod—a threat of forced marriage, demand to return a bride price, death threat and loss of her children. These resonate with the plights of widows in many parts of Africa that are mostly unaccounted for. The inability of both IJ and BIA to interpret these as persecution sends a shockwave to advocates of gender justice. It equally dims the hope of the protection of the rights of women as asylum seekers under PSG. Reports by the DOS and the United Nations recognized the prevalence of brutal widowhood practices and human rights issues in Africa. Among the practices include forced marriages, widow inheritance, and subjugation of widows in many cultural African communities. In 2010, the Sixth Circuit Court in *Bi Xia Qu v. Holder*[1361] boldly asserted that forced marriage constitutes persecution. Here, the respondent was subjected to forced marriage and involuntary servitude enforced by her own father to satisfy a debt he owed to a man. She suffered battery and physical abuse for refusing to have sex with her forced husband. The court interpreted her experience as persecution protectable under CAT. The

[1361] *Bi Xia Qu v. Holder,* 618 F.3d 602 (6th Cir. 2010).

decision is consistent with the international human rights prohibition of forced marriage and gender abuse.[1362]

5.5.8 Honor Killing

The term honor killing or shame killing refers to the murder of an individual by a member of a family, cultural community, or an outsider merely to cleanse what is loosely termed as a dishonor or immoral act. The ritual killing is executed with the intention to restore a family or community's reputation. Honor killing operates in an honor culture. Honor culture is a strict code enforced in a male-dominated society to control gender roles and preserve the integrity of man and the family and perpetuate male control over women. The reasons for honor killing may vary with communities and contexts. Primarily the act is reinforced by a cultural attempt to restore honor to family or communities for what is been perceived to be severe damage done either by the victim or the family or community.[1363] The violations may include failure to comply with a forced or arranged marriage, FGC, opposition to honor-based domestic violence or other gender oppressive rules.[1364] In some religious cultural communities, as will be seen in some parts of Africa and the Middle East, extra-marital relationship, adultery or pregnancy outside marriage can constitute a ground for honor killing. The practice intersects with other sex, power or caste

[1362] UDHR, *supra* note 31 art. 16(2); CEDAW, *supra* note 31 at 16; ICCPR, *supra* note 31 at art. 23; ICESCR, *supra* note 31 at art. 10(1).
[1363] CYNTHIA ELBA, ET AAL, REPORTS ON EXPLORATORY STUDY INTO HONOR VIOLENCE, WESTAT, 1.3, NOVEMBER 26, 2014.
[1364] *Id.*

stratification that is practiced mainly in traditional Africa, the Middle East, Asia, and India.[1365] More often than not, women and girls are the victims of ritual honor killing.[1366]

Despite the consistent efforts of the international community to preserve human rights and dignity, the atrocities of honor killing seemed to have increased in the last decades in many traditional societies. According to a 2020 report by the United Nations and Amnesty International, over five thousand women and girls are murdered each year in honor killing in different cultural and religious communities.[1367] Even recently, honor related killings are still widespread in the world and constitute eighty-one percent of death affecting women as seen in the case of a young Pakistan, Banaz Mahmod murdered by her community men, including her father and uncle in a pretext to restore family honor.[1368] International human rights prohibit any form of killing and absolutely guarantees the right to life and the preservation of human integrity.[1369] Honor killing is a total infringement of the non-derogability of the right to life established in IHRL treaties.[1370]

WESTAT report indicates an occurrence of about 23m honor killings worldwide with ninety-three percent of women as victims, making women a common target for ritual killings.[1371] Individuals who flee from honor killings do so because of death, physical torture, and inhuman

---

[1365] Zainab Hashmi, *The "unpardonable" sin of Honor Killing: A Fatawa,* ISLAMIC LAW BLOG [The Fatwa pronouncement reaffirmed the Islamic law condemnation for the Pakistan practice of honor killing of a woman for marrying a husband of their choice as opposed to the religious and cultural coercive marriages].[1365]
[1366] CYNTHIA ELBA, ET AAL, REPORTS ON EXPLORATORY STUDY INTO HONOR VIOLENCE, WESTAT, NOVEMBER 26, 2014, [stating that 93 percent of honor killings are women and girls].
[1367] *The Honor Killing, Even in US,* AMNESTY INTERNATIONAL USA, 10 April, 2012; Ryan Brown, *How to Understand Honor Killings,* PSYCHOLOGY TODAY, 5 May 2020.
[1368] Haroon Siddique, "*Honor-based" Offences Soared by 81% in the Last Five Years,* THE GUARDIAN , 31 October 2021, https://www.theguardian.com/society/2021/oct/31/honour-based-offences-soared-by-81-in-last-five-years.
[1369] UDHR, *supra* note 31 arts. 3 and 5; ICCPR, *supra* note 31 at art. 6; CAT, *supra* note 165 at art. 3 [All centering on the right to live and freedom from torture].
[1370] ECHR, *supra* note 434 at art. 15(2); CAT, *Op Cite* at art. 6.
[1371] WESTAT, *Op Cite* at 1.5.

and degrading treatment. If such fear is reasonably probable or evidentially discernible, it should meet the Convention's definition of a refugee as demonstrated in *Kasinga.* The UNHCR Guidelines recognized a threat to honor killing as one of the bases for asylum claims, although both the Guidance and Handbook provided more expansive safeguards to the LGBTQ than women at risk to honor killings.[1372] Women who are opposed to certain strict moral codes imposed upon them by their cultural or religious society are commonly perceived as deviants or community salvage.[1373] The consequences of such an act may vary such as punishments, ostracization or coercive sacrifice "to restore the family honor." As noted earlier, the UNHCR Guidelines recognized such victims to belong to the Convention's PSG, hence may claim protection on such basis. In *Sarhan v. Holder*[1374] a female applicant of Jordan native sought asylum and withholding removal from a death threat by her brother and family members after an unverified rumor that she committed adultery. During her hearing, a report on country conditions confirmed evidence of unchecked practices of honor killing prevalent in Jordan as well as the government's inability to protect victims. Although the respondent demonstrated a WFF for persecution and death, the IJ denied her asylum, first because her application was "untimely," filed after one year of arrival into the United States, and she did not show a change of circumstance.[1375] Chapter Six makes a critique of the one-year bar and its human rights effects on claimants. In the extant case, the court held that Besem's plans to kill his sister, Disi do not make her a member of a PSG, and even if she was, she has not shown that the intended killing was on account of her MPSG. Finally, the court held that Disi did not show any reason that

[1372] 2002 Gender Guidelines, *supra* note 116 at paras. 36(vii), 15-17.
[1373] *Fatin, supra* note 76; *Gao, supra* note.
[1374] 658 F. 3d 649 (7th Cir. 2011).
[1375] Held pursuant to See 8 U.S.C. § 1158(a)(2)(B) & (D).

would make internal flight impossible if returned to Jordan.[1376] Based on this reasoning, the IJ denied Disi protection under CAT and the BIA affirmed the denial. On appeal, the Seventh Circuit Court rejected the decisions of both IJ and BIA that Disi's threat to life was a mere family dispute rather than GBP on account of Disi's MPSG. It rendered sound reasoning that challenged the previous decisions, which trivialized the severity of honor killing by denying withholding to a vulnerable Jordan woman whose evidence proved that she had a more likely than not probability to face murder by her own family member in a country where honor killing is tolerated by the government.[1377] Such downplaying of murder threat by the IJ and BIA complicated the United States obligation to CAT and the 1980 Refugee Act. When compared with the existing precedent, Disi's category of a social group as Jordan women condemned to honor killing is not different from Kasinga's group who feared FGC.

Similarly, in *Olga Jad Kamar v. Sessions, B III,*[1378] Kamar sought asylum and withholding removal from a threat to honor killing. She was a native of Lebanon and a citizen of Jordan. According to the respondent, she would be subjected to an honor killing and involuntary protective custody by the Jordan authorities if returned to Jordan. Kamar entered the United States on F-1 status. She violated her status after she got pregnant and left her program. She divorced her previous marriage against her family's wishes. On October 12, 2007, DHS charged Kamar with deportation pursuant to 8 U.S.C. § 1227(a)(1)(C)(1), having failed to fulfill the demands of her F-1 status. She conceded removal but filed a petition for asylum and withholding removal under CAT. She claimed a fear of persecution and honor killing if returned to Jordan. According to her testimony, the Islamic Jordan tradition demands that she would be killed with

[1376] *Sarhan, supra* note 222.
[1377] *Id.*
[1378] *Kamar v. Sessions*, 875 F.3d 811 (6th Cir. 2017).

her child to salvage the shame of pregnancy outside wedlock. She further testified that in the Jordan tradition, if a woman is considered to have shamed her family, the solution is to kill her to cleanse and restore family honor. The Respondent's testimonies indicated evidence of the threat notices sent by her cousin, Alias, who according to their law, would be the person to execute her. He persistently sent reminders to Kamar notifying her about the deadly consequences that await her upon return, which is a traditional measure for girls who dishonor their family. Of course, the evidence on the country's condition indicated that these were not empty threats and that there was no mechanism for effective protection from the Jordan government. According to the Respondent, the government implements measures of depressing confinement as an alternative to killing. The consequence would be to separate her from her one-year United States citizen child, who would be forced to remain in an orphanage.

Despite the compelling nature of her evidence, at the deportation hearing, the IJ denied her application, disbelieved the credibility of her honor-killing threat, and found her alleged persecutor to be faceless, and story ambiguous. The BIA concurred with the reasoning, adding that Kamar did not establish that her fear of persecution was objectively reasonable. In contrast, the Sixth Circuit Court reconsidered Kamar's death threat in the light of the prevailing country's condition and the lack of an effective protection mechanism for women threatened by honor killing. It found that Jordan has widespread incidents of abhorrent legal abuses, women condemned to honor killing face inhuman and degrading treatment. For example, the court found that the Jordanian government offers involuntary and indefinite imprisonment under unhealthy conditions as alternative protection to victims of honor killing. Viewed in the context of the

United States CAT protection,[1379] the court observed that the Jordanian government's prison solution to protect victims of honor killing is by itself torturous and punitive and could result in mental pain and suffering.[1380] Remarkably, the intervention of the Sixth Circuit rescued the respondent from the initial controversial decisions by the IJ and BIA. Kamar like Sarhan represents millions of other examples of female martyrs condemned or subjected to death killed in a gender-repressive verdict. Whereas thousands of such women may not have the opportunities of Kamar and Sarhan to seek or obtain favorable refugee relief either because of poverty or gender biases, to trivialize the severity of GBPs would derogate the rights to life and perpetuate instances of involuntary female martyrdom. Given the challenges of constructing and deconstructing female gender claims within the Convention's PSG, it is imperative to analyze some important lessons from other jurisdictions that may be useful in the determination of gender asylum viability.

5.5.9 United States Jurisprudence and Inconsistencies in the Defining of Gender PSG

In compliance with the 1967 Protocol, the 1980 Refugee Act identified five major grounds for refugee protection as—race, religion, nationality, membership in a particular social group, and political opinion.[1381] While neither of the above instruments provided a definition for any of the grounds of eligibility, MPSG has received a definitive interpretation in *Acosta* and was applied related case laws like *Kasinga* and *Toboso- Alfonso*. In the *Matter of Acosta,* BIA held that Salvadorian drivers were not a cognizable social group because they could change their

[1379] 8 C.F.R. § 1208.16(c)(2) [To qualify for protection under the Convention, a petitioner must show that "it is more likely than not that he or she would be tortured if removed to the proposed country of removal."].
[1380] *Kamar, supra* note 225; *Sarhan,* 658 F.3d at 659.
[1381] 1967 Protocol, *supra* note 17; Congress expressly modeled its law on the Protocol so that the two would be "consistent." H. R. Rep. No. 781, at 20 (1980) (Conf. Rep.), as reprinted in 1980 U.S.C.C.A.N. 160, 161.

profession. It laid down a standard on what would constitute a viable PSG. According to the BIA cognizable social groups will have immutability and fundamental characteristics. To give clarity to this, it stated that:

> The phrase "persecution on account of membership in a particular social group means that persecution was directed to an individual who is a member of a group of persons that share a common and immutable characteristic. The shared characteristics might be an innate one such as sex, color, or kingship ties, or in some circumstances, it might be a shared past experience such as former military leadership or land ownership.[1382]

Understanding the diversities in social groups classifications, *Acosta* indicated that the determination must be made case by case, while the analysis should focus on those group characteristics that cannot change or be required to change.[1383] Therefore, a plausible assessment of the viability of a PSG would explore the common characteristic shared by a particular group, that cannot change because it is fundamental to their identities and conscience.[1384]

Eleven years after the *Acosta* standard was set, BIA applied the principle in *re Fauziya Kasinga* to recognize "a young woman of Tchamba-Kunsuntu Tribe who have not have female genital mutilation as practiced by that tribe, and who opposed the practice" as a cognizable PSG within *Acosta.*[1385] The identity of a group who are opposed to circumcision and are not circumcised is fundamental in a society that practices circumcision, hence they are peculiar and separated from the rest of the circumcised members. Also, the *Acosta* precedent was applied in

---

[1382] *See, e.g., In re Acosta,* 19 I. & N. Dec. 211, 233.
[1383] *Id.* at 233–34.
[1384] *Id;* overruled in part on other grounds by *Matter of Mogharrabi,* 19 I. & N. Dec. 439 (BIA 1987).
[1385] *Kasinga, supra* note 1102*,* at 357, 358.

the *Matter of Tobonso-Alfonso*[1386] to recognize "Cuban homosexuals" as a PSG. Similarly, in *Matter of Fuentes,*[1387] the BIA held that "former members of the Salvadorian police" could be a cognizable PSG viable for asylum.

While gender asylum case laws after the *Acosta* precedent were influenced by the standard, gender asylum decisions years after indicated a total deviation from the standard and even controversial constructions of incongruent structures of a PSG. Although *Acosta* identified sex as a fundamental characteristic of a cognizable social group, the diverse definitions of nexus requirements have consciously omitted sex and, in many situations, rejected sex related persecutions and fears arising therefrom as potential for claiming refugee status. For example, as seen in *Fatin v. INS,*[1388] the Third Circuit Court denied asylum to an Iranian woman, opposed to Iranian law of female restrictions, and denied her claimed social group for failing to carry the burden on *Acosta.*[1389] Although, Fatin has claimed persecution based on her political opinion and MPSG,[1390] the court denied both claims, holding that:

> There are three elements which an alien must establish in order to qualify for withholding of deportation or asylum based on membership in a group. The alien must (1) identify a group that consists of a "particular social group"…(2) establish that he or she is a member of that group, and (3) show that he or she would be persecuted or has a well-founded fear of persecution based on that membership.[1391]

[1386] 20 I. & N. Dec. 819, 822 (BIA 1990).
[1387] 19 I. & N. Dec. 658, 662 (BIA 1988).
[1388] *Fatin, supra* note 76 at 1233.
[1389] *Id.*.
[1390] *Id.* at 1235- 36, 1241.; *Gao, supra* note.
[1391] *Id.*

Recognizing that *Acosta* has identified “sex” as having innate characteristics for a PSG, the court found that Fatin satisfied its first requirement by showing that she would be persecuted or has a WFF for persecution because of her sex as a woman. But according to the court, Fatin could not demonstrate that she would suffer persecution or possess a WFF for persecution “solely” because of her gender.[1392] Therefore, the court rejected Fatin’s PSG for lack of evidence to support that women of Iran are systematically persecuted for being women.[1393] On the same note, it rejected the Respondent’s social group category as “those Iranian women who find those laws so abhorrent that they refuse to conform….” Apparently, the court ignored the sensitivity of the Respondent’s testimonies indicating the brutal consequences of noncompliance like 74 lashes, imprisonment, and rape.[1394] Likewise, the court rejected the Respondent’s claim of persecution on grounds of her political opinion, holding that Fatin was not politically active.[1395] Although the court found her social group to be cognizable, it ruled that Fatin did not demonstrate that she belongs to that group.

Fatin like *Fisher* obviously indicates a discrepancy between Fatin’s defined PSG and the court’s expected standard of PSG. The latter suggests an ambivalence of PSG theory distinct from *Acosta.* Earlier in this Chapter, Paragraph 12 of the 2002 UNHCR Guidelines recognized that women who suffer persecution for noncompliance or breach of restrictive gender norms may claim protection under PSG.[1396] The view aligns with principles of IHRL on the jurisprudence of nonrefoulement and even humanitarian asylum.[1397] *Fatin*’s precedent, though has had dominant influence in the United States, contradicts the human rights justifications to gender asylum under

[1392] *Id.* at 1240.
[1393] *Id.* at 1241.
[1394] *Id.* at 1241-42.
[1395] *Id.*
[1396] 2002 UNHCR Guidelines, *supra* note 116 at para 12.
[1397] CAT, *supra* note 165 at art. 3.

PSG. Implementing the standard have created obstacles for female survivors of GBPs who seek humanitarian protection in the United States. Despite the attempt by *Acosta* to bring clarity to sex related claims and PSG*,* there are still evidence of incongruities in case-by-case analysis of PSG in the United States. This underscores the inherent vagueness of social group classifications.

In *Matter of C-A-,*[1398] the BIA made it clear that *Acosta'*s immutability test was only a starting point to an evidential proof of PSG.[1399] It introduced an additional requirement to show a proof of social visibility to be considered as a PSG.[1400] Against this background, the BIA held that "former noncriminal drug informants working against the Cali drug cartels" lacked the requisite social visibility characteristic of a social group because there was no proof that the larger society perceive them as a group.[1401] Subsequently, in *Matter of A-M-E & J-G-U*,[1402] the BIA identified the social visibility test as a necessary determinant for a social group determination, although it ironically claimed conformance with the UNHCR Guidance.[1403] Following the new standard, the Board found that the "group of wealthy Guatemalans" was too "amorphous," would not pass the test of social visibility because it does not show clearly how much wealth required for membership.[1404] In the *Matter of S-E-G-*[1405] the BIA applied the *A-M-E & J-G-U,* and further restricted the requirements of social visibility and particularity to be a "sufficiently distinct," group recognized in a particular society "as discreet class of person."[1406] Following this analysis, it rejected the claims of a group of youths who have resisted gang

---

[1398] *Matter of C-A-*, 23 I. & N. Dec. 951, 956-57 (BIA 2006) *aff'd, Castillo-Arias v. U.S. Att'y Gen.,* 446 F.3d 1190 (11th Cir. 2006), *cert. Denied sub nom Castillo-Arias v. Gonzales,* 446 F.3d 1190 (11th Cir. 2006).
[1399] 23 I. & N. Dec. at 955.
[1400] *Id.* at 960,
[1401] *Id.*
[1402] 24 I. & N. Dec. 69 (BIA 2007) (amended opinion).
[1403] *Id.*
[1404] *Id.* at 74.
[1405] 24 I. & N Dec. 579 593 (BIA 2008).
[1406] *Id.*

recruitment, although they were found to have met the *Acosta* test of immutability. According to BIA, the respondents failed the test of social visibility because they were neither perceived as a group by society nor possess the elements of particularity. These make them "nebulous."[1407] In the stream of controversy, the Ninth Circuit Court developed a variant PSG termed "voluntary association relationship" like "young working class."[1408] This was distinct from the earlier formulation in *Acosta* and inconsistent with the latter constructions of particularity and social visibility.

In all, the conflicting decisions of what constitutes particularity or elements of social visibility for a PSG largely indicate the existing incongruities about PSG, consequences of which are detrimental to a successful gender asylum claims the United States.[1409] Evidently, the conflation of PSG here complicates the Convention's principle of humanitarian asylum based on a demonstration of WFF of persecution, which is simply a human right for surrogate protection. It was not surprising that the Seventh Circuit Court in *Gatimi v. Holder*[1410] challenged the convoluted construction of social groups to be illogical and without a legal basis. Nonetheless, the PSG controversy has continued to linger, especially in gender asylum decisions. In *Matter of M-E-V.G-,*[1411] and *Matter of W-G-R-.*[1412]the BIA proposed a new standard of rationale for deference, distinct from the past precedents. Also, in *Ngwengwe v. Mukasey,*[1413] the Eight Circuit

---

[1407] *Id; See also Matter of E-A-G-,* 24 I. & N. Dec. 591 (BIA 2007) [holding that gang members or young persons who are perceived to be gang members are not a social group].
[1408] *Matter of C-A-,* 23 I&N Dec. 951 (BIA 2006) [stating that in determining a MPSG, claimants should show that they are united by voluntary association, including former association].
[1409] *Gatimi, supra* note 77 at 611, 615 (7th Cir. 2009) [holding that social visibility "cannot be squared" with previous Seventh Circuit or BIA decisions and, "more important, social visibility makes no sense"]; *Benitez-Ramos v. Holder,* 589 F.3d 426 (7th Cir, 2009) 589 F.3d 426, 429–31 (7th Cir. 2009) [rejecting any social visibility requirement]; *Valdeviezo-Galdamez v. Attorney General of the United States,* 663 F. 3d 582 (3d Cir. 2011)
[1410] *Id.*
[1411] 26 I. & N.
[1412] 26 I. & N. Dec. 208 (BIA 2014).
[1413] 543 F.3d 1029, 1034 (8th Cir. 2008) [requiring social visibility in defining a gender related PSG); *Santos-Lemus v. Mukasey,* 542 F.3d 738 (9th Cir. 2008).

Court adopted *Chevron* deference that required social visibility and particularity to prove an applicant's social group. The narrow-minded structuring of social visibility and particularity here indicates a departure from the successful social group principle developed in *Acosta.* Going by the new standard, female survivors of GBV will unlikely meet the requirements of the social visibility tests for asylum. Yet, in the *Matter of M-E-V-G-,*[1414] BIA developed another standard of social distinction that conflated with the previous PSG test. Although the DHS had conceded to the respondent's claim of persecution on account of the PSG, the BIA stressed that the requirement of nexus to prove the social group category[1415]

The decades of controversy and conflicting interpretations of gender-related social groups were settled in the *Matter of A-R-C-G-.*[1416] In the extant case, the BIA issued a landmark decision that recognized "married women in Guatemala who are unable to leave their relationship" as a "cognizable particular social group that forms the basis for a claim for asylum or withholding."[1417] The precedent-setting decision was binding throughout the United States and made applicable in gender asylum claims. Significantly, it reaffirmed the *Acosta* principles by recognizing that the Respondent's PSG in *A-R-C-G-* shares two immutable characteristics: (1) gender; and (2) marital status (which is immutable when someone is unable to leave the relationship; indicating that this can be demonstrated by a range of possible factors, including religious, cultural and legal rules and norms).[1418] However, the success of the *A-R-C-G-* was ephemeral. In the *Matter of A-B-,*[1419] the A.G. Jeff's Sessions vacated the BIA's decision in *A-R-*

[1414] *Matter of M-E-V-G-,* 26 I&N Dec. 227, 393-94 (BIA 2014).
[1415] *Id.* at 395.
[1416] *A-R-C-G-*, *supra* note 124 at 388.
[1417] *Id.* at 389.
[1418] *Id.*
[1419] In *re A-B- supra* note 56 at 316.

C-G- and overruled the decision.[1420] It rejected Ms. A.B.'s proposed PSG "El Salvadoran women who are unable to leave their domestic relationships where they have children in common" with their partners, and found same to be very similar to the formulation approved in *A-R-C-G-*.[1421] The decision shifted from the basic standard of proof that requires showing of persecution "on account of"[1422] and government's unwillingness or inability to protect. Unfortunately, the verdict altered the previous procedure for the assessment of credible fears through past persecution and government's unwillingness to protect.[1423] Instead, it amplified the evidential standard by requiring a demonstration of government's condonation of persecutor's actions[1424] in a proof persecution by a non-state actor.[1425] Applying the controversial reasoning, the A.G. Session held that Ms. A-B- was not credible for domestic violence asylum.[1426] The impacts of the decision provoked criticisms and demand for a reform of the gender asylum laws.[1427] The *A-B-* effects have lingered up until 2021, during the Biden Administration, when *A-B- 1* and *A-B- 11*[1428] was vacated in *A-B- 111,*[1429] reinstating the *A-R-C-G-* status quo. Despite the developments, some vestiges of the disturbing precedent still affect the court's interpretations of nexus requirements on gender claims. The lack of consistency in the assessments of GBPs under PSG creates numerous disadvantages for asylum seekers whose persecutions are usually gender related, like women. Moreso, the overall lack of conformity to the UNHCR Gender

---

[1420] *Id.* at 320.8 [holding, "…generally, claims . . . pertaining to domestic violence or gang violence perpetrated by no-governmental actors will not qualify for asylum"].
[1421] *Id.*
[1422] 8 C.F.R. § 1208.13(b)(1).
[1423] *See, e.g.* 8 C.F.R. § 1208.13(b)(1); *Yasinskyy v. Holder*, 724 F.3d 983, 989 (7th Cir. 2013); NIJC, 11 [Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Presumption of Future Persecution].
[1424] *Id.* at 338.
[1425] 27 I&N Dec. at 337; NIJC 2019 at 11 [Persecution + Nexus + Protected Ground + Unable/Unwilling to Control/State Actor = Persecution].
[1426] *Id.* at 336.
[1427] Vogel, *supra* note 35 at 242-499.
[1428] Exec. Order No. 14010, § 4(c)(ii), 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021); *Matter of A-B-* 28 I&N Dec. 307 (A.G. 2021).
[1429] *Matter of A-B-* 28 I&N Dec. 307 (A.G. 2021).

Guidelines in the United States has been counter-productive to gender asylum. Whereas countries like Canada[1430]and Australia[1431] have integrated the UNHCR Guidelines into their asylum laws, the United States courts in several decisions shown deference to their domestic laws, while asserting that they are neither bound by the UNHCR Guidelines nor the Consideration.[1432] In many cases, the above situation has made the United States gender asylum jurisprudence almost irreconcilable in terms of nexus and PSG standard. As one of the major Western asylum destinations, the current controversies on gender asylum are significant and would likely affect the treatment of gender claims in other countries.

5.6 *Canada and the Definition of MPSG*

Unlike the United States, Canada incorporated the UNHCR Gender Guidelines in its domestic Chairperson's Guidelines and has consistently applied the same in the interpretation of gender asylum cases. In *Canada v. Ward* (1993),[1433] the Supreme Court of Canada gave a landmark analysis that recognized "the general underlying themes of the defense of human rights and anti-discrimination…"[1434] within the meaning of WFF and PSG "as the basis for the international refugee protection initiative." *Ward* denied claims by a victim of a death sentence and complicity in aiding escape as a former member of a para-military terrorist group to possess a WFF within the Convention's PSG.[1435] The claimant was a former member of the Irish National Liberation Army (INLA) who was sentenced by the group for aiding and abetting the escape of hostages. His testimonies showed that his actions were motivated by conscience and

---

[1430] Immigration and Refugee Board of Canada (IRB), *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (March 1993).www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx.
[1431] Migration Act 1958, *supra* note 1133 at s 36; DIMA, *supra* note 1133.
[1432] *Cardoza-Fonseca, supra* note 357; *Aguirre-Aguirre*, *supra* note 1135 at 415, 427-28; *Ndom, supra* note 1135 at 743, 753.
[1433] *Ward*, *supra* note 539 at 689.
[1434] *Id.*; *Giraldo v MIMA* FCA 113 42, 44 (2001) (Unreported, 2001).
[1435] *Id.*

the instinct to protect his family. The Court rejected the respondent's claim of PSG as superfluous, stating that MPSG should encompass:

> 2) groups defined by innate or unchangeable characteristics; [gender, linguistic background, sexual orientation] 2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the associations; [human rights activists] and 3) groups associated by a former voluntary status, unalterable due its historical permanence.[1436]

By implication, *Ward's* constructed PSG reflected the standard in *Acosta*. First, it distilled the meaning of PSG from human rights and antidiscrimination, consistent with the scholarly views of Hathaway and Goodwill holding and the 2002 UNHCR Guidelines earlier cited.[1437] In the extant case, Ward could not meet the Convention's definition to indicate that his fear of persecution was on account of his former membership in INLA. Therefore, his social group category was rejected for lack of nexus and the inability to demonstrate a WFF. *Ward*'s immutability test acknowledges an individual's past persecution is immutable, hence cannot change. But beyond this, it added another element of voluntary associations, different from the notion articulated in *Sanchez-Trujillo,[1438]* but based on characteristics of human rights and dignity. It further associated group ties with the right to associate with others and express one's beliefs privately and commonly as members of a group. Such characteristics of innate relationships in a group and common identity or interest could be expressed by the group or demonstrated through a resistance that may provoke discrimination or human rights violation.

[1436] 103 D.L.R. (4th) at 33-34 [holding that one's past is an immutable part of that person."].
[1437] Godwin-Gill, *supra* note 269 at 69; Hathaway, *Supra* note 22 at 112.
[1438] (9th Cir. 1986).

Ward brought in a broader specification of PSG based on persecutions engendered by human rights and discrimination. Following *Ward*'s logic, women like Fatin and Fisher persecuted for transgressing gender norms would meet the requirement of a PSG, likewise a Chinese applicant who resists coercive family planning.

In *Uto v. Canada,*[1439] the Federal Court of Canada invoke *Ward* to interpret grounds of persecution and the WFF, finding that a woman whose right to marriage was violated (the right to enter freely into marriage) would meet the requirement for asylum in Canada.[1440] Compared with the United States, Canada's implementation of the basic principles of IHRL alongside the UNHCR Gender Guidance has helped in a fairer assessment of gender asylum claims and the PSG criteria. Also, maintaining consistency with international human rights instruments has reduced the problems of incongruity in the determination of gender asylum viability, as is the case with the United States. Canada has made its Chairperson's Gender Guidelines a key reference document for deciding gender asylum. In fact, in *Narvaez v. Canada*[1441] the Federal Court of Canada set aside a decision by the IRB for a failure to apply the Canadian Gender Guidelines.[1442] Although the precedent cannot bind another jurisdiction, the lesson is highly recommended to other asylum countries to ensure conformity with IHRL, which is central to a fair exercise of asylum discretions.

5.7 Australian Jurisprudence of PSG

Like Canada, Australia is another common law country that has set significant examples in the implementation of the UNHCR Gender Guidelines. Examples of such milestone on

[1439] *Utoh v. Canada* (Minister of Citizenship & Immigration), F.C. 399 [2012].
[1440] *Vidhani v. Canada (Minister of Citizenship and Immigration),* 3 F.C. 60, 86 (T.D.) [1995].
[1441] *Narvaez v Canada (Minister of Citizenship and Immigration)*, 2 FCR 55 [1995].
[1442] *Id.* at 62.

decisions relating to PSG are created in cases like human or sex trafficking,[1443] sex workers,[1444] "young women in Albania,"[1445] and other minority groups. In *SZBFQ v. Minister of Immigration,*[1446] the Federal Court of Australia faulted a decision by the RRA, which rejected "women" as a social group. The Federal Court's position reflected the renewed efforts of the Australian government to confront impact of GBPs, especially sex trafficking that recently constitute a major cause of flight for female refugees. Also, in 2006 the UNHCR Trafficking Guidelines published guidelines, specifying that the experience of trafficking may constitute characteristics of a PSG given its immutable, common, and historical nature.[1447] Developments in foreign jurisdictions like the United States, Australia, and Canada indicate an awareness of the ubiquity of human trafficking and its connection with involuntary migration. Comparably, the United States Congress made an innovative provision for T-visa to benefit survivors of trafficking in the United States. Also, the U-visa provides relief for the victims of crimes, while the VAWA protects the female survivors of domestic violence by their USC spouses or permanent residents.[1448] Significantly, these are concerted efforts of States to fill the void in the Refugee Convention, especially in the determination of gender related claims. Additionally, the

---

[1443] VAO-02635, 22 Mar 2001.
[1444] RRT V01/13868, 6 Sep 2002.
[1445] RRT V01/13868, 6 Sep 2002.
[1446] *SZBFQ v. Minister of Immigration* [2005] FMCA 197 (10 June 2005).
[1447] UNHCR GUIDELINES ON THE INTERNATIONAL PROTECTION NO. 7: THE APPLICATION OF ARTICLE 1A(2) OF THE 1951 CONVENTION AND/OR 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES OF VICTIMS OF TRAFFICKING AND PERSONS AT BEING TRAFFICKED, APRIL 7, 2006, HCR/GIP/06/07.
[1448] In 1994, Congress passed the Violence Against Women Act (VAWA) that provided funding and support for the police departments implementing pro-arrest policies in matters relating to IPV, and provided training for police officers, judges, and prosecutors on violence against women. The Act made special provisions for "self-petitioning" process allowing immigrant survivors of IPV who suffered abuse by their US citizen or permanent resident family members to submit their own petitions for permanent residency.

United States principle of *ejusdem generis* in the *Acosta* approach has inspired created responses in *Ward*[1449] and *Shah*.[1450]

Similarly, some cases in Australia identified female survivors of GBPs under a PSG. In *Khawar,* DIMA recognized that "women in society" may constitute a social group for the purpose of the Convention.[1451] In *Chan v. Minister for Immigration and Ethnic Affairs,*[1452] Dawson J. affirmed that a family could constitute a PSG. Also, in *Applicant A v. Minister of Immigration and Ethnic Affairs,*[1453] a Chinese national who escaped forced sterilization, after breaching the Chinese PCP, has asylum under PSG. The issues for determination include whether Applicant A could fit into the Convention's PSG for the alleged "reason" and "persecution." McHugh J enunciated the principle of "social perception" or "ordinary meaning" approach in the assessment of causality of acts of persecution for defining WFF and MPSG. Like *Acosta* he established that a PSG would share a common uniting characteristic(s) that is cognizable in society.[1454] Ultimately, the court identified common attributes and societal perception as the distinctive elements of a social group category. However, the court further acknowledged that the linkages of membership of a group with persecution and reason cannot be applied as a "safety net" but are solely determined by persecution suffered or common fear of

---

[1449] In *Ward,* the Supreme Court categorized PSGs into 3 groups: (1) the first groups defined by an innate, unchangeable characteristic; (2) second groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) third groups associated by a former voluntary status, unalterable due to its historical permanence: ibid 689, 692.

[1450] In *Shah* [1999] 2 AC 629, 651: Lord Hoffman stated that that [i]n choosing to use the general term "particular social group" rather than an enumeration of specific social groups, the framers of the Convention were … intending to include whatever groups might be regarded as coming within the anti-discriminatory objectives of the Convention.

[1451] *See, e.g., Khawar , supra* note 677 at 210; AUSTRALIAN GENDER GUIDELINES: UK HOME OFFICE, ASYLUM POLICY INSTRUCTION: GENDER ISSUES IN THE ASYLUM CLAIM (2006); DIMA, COMMONWEALTH OF AUSTRALIA, REFUGEE AND HUMANITARIAN VISA APPLICANTS GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS (1996).

[1452] (1989) 169 CLR 379, 396.

[1453] 8 (1997) 142 A.L.R. 331; [1997] INLR 1.

[1454] Id.; (1997) 142 A.L.R. 33.

persecution.[1455] Evidently, the proviso gives a room for judicial discretion on a case by case analysis. However, such a gap can create room for an exclusive application of the law, judicial excess, and imposition of the unnecessary complex evidential burden on some asylum seekers. Taken on its face value, a sex or gender related persecution that is judged by social perception, may likely conflict with reality if viewed from a defective or biased social spectacle and given the implications of cultural relativism. It is unlikely that ordinary meaning, common attributes, and subjective personalized experience would be strictly preserved. In an earlier decision—*Morato v. Minister for Immigration, Local Government and Ethnic Affairs,*[1456] the court distinguished between fear of persecution on account of one's PSG and fear on account of applicant's action.[1457] Whereas the Australian "social perception" approach can be likened to the United States test of social visibility or being cognizable, there exists remarkable contrast with the two in terms of PSG and the *Acosta* or *Ward* test of immutable and common fundamental characteristics. This distinction and subtle linkages are apparent in Dawson J's analysis of the "anti-discriminated" protected group test would amount to creating a "safety net."[1458]

Notably, the decision in *Khawar*[1459] can be described as a void-filling precedent in gender asylum, especially for recognizing a wide range of female membership in a social group comprising "women in society."[1460] The fact showed that a Pakistani citizen and her children who suffered domestic violence by her intimate partner sought protection visa in Australia. In analyzing her social group category, the High Court found that "Pakistani woman" may constitute a PSG that is "distinct and recognizable" and that government's failure to protect such

---

[1455] Dawson, J. at 242.
[1456] (1992) 111 ALR 417 ("Morato").
[1457] *Id.* [holding that Morato's fear of persecution was because of his antecedent as a former drug dealier who has turned Queen's evidence.]
[1458] Dawson J, *supra* note 296.
[1459] HCA 14 [2002] at 1130.
[1460] *Khawar , supra* note 677 at 210.

a category of person may constitute persecution if there is (1) "criminal conduct of private citizens" and (2) "condonation [sic] of such conduct by the state or its agents, in a circumstance where the state has a duty to protect them against harm."[1461] Obviously, *Khawar* was influenced by the Australian Gender Guidelines, and consistent with the UNHCR EXCOM Conclusions.[1462] The decision is remarkable in three ways. First, it set a standard that acknowledged domestic violence as a breach of human rights and the right to nondiscrimination. It recognized the survivor as a cognizable social group deserving protection. Finally, it identified the government's duty to protect such a category of persons, failure of which would make the survivor eligible for surrogate protection in an asylum state. The analysis flaws the reasoning in *A-B- , Fatin* and *Ngengwe,* which exclude human rights and antidiscrimination in the framework of social group experiences and undermine the effects of government's unwillingness or inability to protect.[1463]

Applying the *Khawar* precedent, the Australian Federal Court in 2009 reversed a decision of a lower tribunal that initially denied a Vanuatu woman a domestic violence asylum.[1464] The court recognized her PSG category as "Vanuatu women" or "married Vanuatu women."[1465] Similarly, it acknowledged that although the existing laws in the applicant's country prohibits domestic violence, the mechanisms of enforcement were ineffective, hence insufficient to prove government's willingness and ability to protect.[1466] This was a classical application of the BNF. What it means is that even where there is evidence of gender rights protective laws, such evidence must be balanced with a probability of an effective application to obviate a grant of surrogate protection. This is because in countries where GBPs are prevalent, governments

---

[1461]*Id.* at 723.
[1462] DIMA, *supra* note 1133.
[1463]In *re A-B- supra* note 56 at 317.
[1464]*AZAAR v. Minister for Immigration and Citizenship* 912 FCA. [2009].
[1465]*Id.* at para. 1–3.
[1466]*Id* at para. 6.

condone, normalize, or ignore such acts. Therefore, an applicant's inability to seek police or court assistance would not constitute a bar to her claim because she had a "reasonable apprehension that such an approach would only exaggerate [her] predicament."[1467]

Notwithstanding the recorded achievements, in some decisions the Australian courts have opted out from the *Khawar,* synonymous with the *ejusdem generis,* to adopt a "social perception" test. In contrast, the latter requires an applicant to demonstrate that his or her social group is identifiable by attributes or characteristics relevant to fear of persecution.[1468] McHugh J illustrated this with actions of persecutors targeting left-handed individuals, such common attributes would likely create a public perception that "left-handed men" would comprise a PSG.[1469] Also, in *Applicant S*[1470] the standard was redefined to require evidence of a group being cognizable in society to meet the PSG viability. In expanding the "left-handed" analogy, Gleeson CJ, Gummow, and Kirby JJ construed another attribute of discriminatory treatment against a group of people in a community, distinguishing the PSG from the rest of the community.[1471] Plausible as it appears, the definitive criteria centered on social and legal position rather than the WFF for persecution. The inconsistency of PSG analysis here reflects the United States PSG controversies. Such narrow perspectives or rather wrongful conflation of principles would likely limit the varying aspects of gender claims under PSG, especially cases emanating from family, intimate partner, or other non-state actor persecution. Again, the reasoning raised a problem of inconsistency, which suggests reluctance by adjudicators to recognize broad categories of PSG

[1467]*AZAAR*, *Op Cite* 1464 at 912.
[1468] *See, e.g., Applicant A* (1997) 190 CLR 225, 264. This was endorsed in Shah [1999] 2 AC 629, 645 (Lord Steyn).
[1469] *Id.*
[1470] (2004) 217 CLR 387, 400.
[1471] *Applicant S* (2004) 217 CLR 387, 399 per Gleeson CJ, Gummow and Kirby JJ.

like "women in the country," and "discriminated women in society" for fear of floodgates.[1472] However, these are potential areas of GBPs and sites of human rights violations.

In *Case No VOO/11011,* RRT construed a distinction in the circumstances of "women in Pakistan" in Islam and that of women in Bosnia and Herzegovina does not reveal that women could constitute a PSG in those societies.[1473] Nevertheless, *Case No. VO6/18399,* RRT recognized a related social group "northern Albanian women,"[1474] but rejected "Thai women," "Young Thai Women" or "Thai women without male protection" *VXAJ.*[1475] Although *Khawar* identified persecuted women as viable and the sensitivity of government's unwillingness to protect, *Case No VO2/13996* finds these to be impermissible ground for determining a PSG because according to the judicial opinion here neither of them can stand independently to prove a WFF of persecution.[1476] Of course, the claim is rebuttable and inconsistent with *Khawar.* In all, the challenges, and inconsistencies in the determination of gender claims and PSG, underscore the problems associated with nexus and gender exclusion in the Refugee Convention. Regrettably, these have continued to undermine women's access to refugee protection. The conflicts here mirror what was seen earlier in the United States.

5.8 UK Definition of PSG

Notably, the UK is one of the Western asylum countries that recognize the BNF. A remarkable decision in *Islam v. Secretary for the Home Department (SHD)*[1477] and *R. v.*

[1472] *See, eg,* Case No N98/24000 [2000] RRTA 33 (13 January 2000) [the Tribunal questioned the validity of disparate social groups "vulnerable young Columbian women" or "young women" and their community].
[1473] See also Case No V00/11003 [2000] RRTA 929 (29 September 2000)
[1474] Case No V0618399 [2006] RRTA 95 (22 June 2006) [as opposed to "Albanian women].
[1475] VXAJ (2006) 198 FLR 455, 460 [unpublished].
[1476] Case No V02/13996 [2003] RRTA 56 (22 January 2003)),
[1477] *Islam (AP) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal ex parte Shah* (AP) (Conjoined Appeals) [1999] 2 AC 629, [1999] 2 All ER 545.

Immigration Appeal and SHD ex parte Shah[1478] laid a foundation for the UK gender asylum and PSG. It was a case of domestic violence involving two Pakistani women who fled their country after an abhorrent physical attack for allegedly committing adultery. Under the Pakistani religious moral codes, the consequences of such accusations include torture and death by stoning. Apparently, the appellants have escaped death knowing that their government would be unwilling and unable to protect them from the death sentence. Evaluating their claimed PSG as—women in Pakistan accused of breaching social norms who are unprotected by their husbands and other male relatives, the House of Lords found it cognizable. It further recognized domestic violence as a harm that can give rise to a WFF of persecution under a PSG. On this basis, the appellants were granted asylum. But Lord Steyn found the claim on political opinion to be "unsustainable."[1479]

But subsequently, since the applications of the DFT Procedure by the UK Border Authority (UKBA), the dynamics diminished drastically, reducing the chances for a fair assessment of asylum claims. Like the United States expedited removal process, DFT accelerates unprocedural "quick" removal of asylum seekers using UKBA who are neither lawyers nor judicial officers in a procedural assessment at the border. As observed by Human Rights Watch (HRW), the practice has been inherently detrimental to the successful evaluation of complex cases relating to GBPs. The impacts have equally increased the risks of refoulement for gender claimants.[1480] The report on the UK accelerated procedure indicated that in 2021, seventy percent of the claims were certified unfounded, and claimants were put on a quick deportation removal.

[1478] *Id.*; [1999] 2 W.L.R. 1015; [1999] INLR 144..
[1479] *Id.* at 12.
[1480] *Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK,* HRW, 23 February 2010, http://www.hrw.org/reports/2010/02/24/fasttracked-unfairness-0 [indicating that in 2008 96% of claims mostly by women were refused leaving applicants only to days to apply against denial.]

Fatima H represents one of the unfortunate cases of domestic violence that was squashed in the stream of the DFT program.[1481] The applicant was a Pakistani woman who suffered domestic violence and rape by her husband. She could not seek police protection because of fear and considering that it was ineffective due to her husband's politically influential position in their region. Regrettably, her claim was rejected for a lack of credibility and failure to seek the government's protection. The adjudicator failed to analyze the prevailing country condition and the reason behind Fatima's inability to seek police protection.[1482] Evidently, the shortcomings in the assessment indicate lack of commitment to the UNHCR Gender Guidelines and the overall reluctance to accept GBV as persecution.

5.9 Examples from Other International Jurisdictions

Generally, the attitudes of many countries on gender asylum claims suggest more of disinclination and diffidence. Because gender attacks are usually inflicted by intimate partners, communities, or non-state actors, one of the common assumptions is such harm is private and not credible for the Convention's considerations. Except for FGC and honor crime, women seeking asylum in other GBPs in many states, rarely receive favorable assessments of credible fears.[1483] Even in the cases mentioned, the adjudicators demonstrate a lack of understanding and adequate concern for gender claims. Evidence from the French *Mlle EG Decision* showed that the *Commission des recours des réfugiés* (CRR)[1484] grants alternative forms of protection rather than asylum to gender related claimants.

[1481] *Id.* 33 [Unreported cited by Human Rights Watch 23 Feb. 2010]
[1482] *Id.*
[1483] L. Brocard, H. Lamine and M. Gueguen, "Droit d"asile ou victimisation?" (2007) 75 Plein Droit (Gisti, December 2007).
[1484] Commission des recours des réfugiés (CRR), Mlle EG Decision No 549296, 7 July 2006 (UNHCR RefWorld, 2006); *CRR, SR, 27 mai 2005, 487613, Mme Nariné Ananian ép. Arakelian; Protection subsidiaire*, France: Commission des Recours des Réfugiés (CRR), 27 May 2005, available at: https://www.refworld.org/cases,FRA_CRR,429da18a4.html

In Israel also, the Court for Administrative Affairs largely demonstrates reluctance in acknowledging gender related claims because cases like domestic violence or other intimate partner-related persecutions are generally categorized as private or personal affairs. For example, in *Grace Kappachi v. The Minister of Interior,* a Nigeria citizen who had fled domestic violence was denied asylum by the Israeli Court of Administrative Affairs holding that applicant's fear of persecution was "personal."[1485] Ms. Kappachi was coerced into marrying an old man from a rivalry clan. In 2007, a dispute broke out between the two families that led to the murder of the applicant's father and brother. She rebelled against her marital family and fled to Israel for fear of being persecuted. During the case assessment, the Court held that her fear of persecution had no nexus to the Convention. A similar decision was made in *Jane Doe v. The Minister for Interior.* Ms. Doe, a Nigerian fled her country after her father threatened her life for refusing to submit to a coercive arranged marriage with his debtor. The court rejected her claims for lack of nexus and held that she had not established an objective fear on Convention's ground.

Another case here involved a Chinese lesbian, Xie Guang who suffered domestic abuse by her husband was also threatened with murder for violating family honor. Despite the severity of her claims, the Israeli Court of Administration (ICA) denied her asylum, holding that her fear of persecution was not well-founded on asylum grounds.[1486] Overall, the problem of nexus has been a recurrent obstacle in the determination of gender asylum viability and constitute the condition for denial as well as rejection of gender PSG, albeit the UNHCR's illustrative guidance. What is most troubling is the effects of the denials and the enormous risks they pose to women asylees. The persistent exclusion of women from refugee reliefs amidst prevailing risks

[1485] *Grace Kappachi v. The Minister of Interior* [unreported].
[1486] Jaffa DC *Xie Guang v The Minister of the Interior,* (2012) (Isr.).

of torture, death, and gender rights abuses has given cause to question the purpose of the Refugee Convention.

5.10 Nexus Issues in Gender Asylum, Recommendations, and Conclusion

That IRL did not provide a clear ground for the protection of women has remained vexing issue in the interpretation of gender claims under the Refugee Convention and the problem of nexus. Generally, in claiming refugee protection an applicant must establish a WFF for persecution and must indicate that he or she has suffered persecution or has a WFF for persecution within any of the five enumerated grounds—race, religion, nationality, MPSG and political opinion.[1487] This is referred to as nexus between persecution and the Convention's protected grounds.[1488] Because gender or sex is not specified under the five categories, women who suffer GBPs face numerous hurdles, as seen in many analyzed cases, in the attempt to prove viability for asylum. Failure to discharge the burden of nexus results in denials, rejection and return to the risks they have fled from. A plethora of case laws analyzed in this Chapter have demonstrated several instances of denials not because of a lack of credibility but of the failure to show nexus to the five grounds. In as much as some GBPs could fit into PSG or other grounds, the attempts to make PSG a catch-all for all gender-specific persecutions have proved to be counter-productive and even detrimental to women. Moreso, in many situations, GBPs are interpreted through the Convention's male-centered lens, therefore, misconstrued as private or personal matters. Such biases trivialized the UNHCR recommendations for the assessment of gender-exclusive persecutions[1489] and make the overall concept of gender and PSG viability a patchwork that is unsustainable for a fair exercise of asylum discretion. Therefore, creating sex

[1487] Art. 1A(2); INA § 101(a)(42), 8 U.S.C. § 1101(a)(42) (2018); 8 C.F.R. §§ 208.13(b)(1)–(2), 1208.13(b)(1)–(2).
[1488] Vogel, *Supra* note 35 at 358.
[1489] Examples of sex-based persecutions include sex trafficking, FGC, rape, forced marriage, rape,

as an independent ground for protecting women making gender asylum claims will resolve the problem of sexism in IRL and align the Refugee Convention with the nondiscriminatory principles of international law. Such development would give visibility and fairness to women and other sex, who claim refugee reliefs solely on this ground.

Moreso, the lack of uniformity in the interpretation of IRL as well as variations in immigration laws contribute to diminishing prospects for women's right to protection as refugees. For example, in 2005, the United States Congress passed a Real ID Act that required asylum applicants to show that the central reason for their persecution was connected to one or more of the five grounds.[1490] Enforcing the Act and its nexus requirement complicates the *ejusdem generis* principle in *Acosta.* The controversies relating to the evidential requirements of nexus and PSG have increased a misunderstanding of GBPs, narrowed access to protection and made gender claims intractable.[1491] For example, construing female related persecution and even threats to life or freedom as "private" or "personal" matters would ridicule the values of IHRL and refugee policy. The foundation of refugees' rights is entrenched in international human rights, hence the guarantee to provide surrogate protection for those whose life and freedom are threatened in their countries without assurance of government protection. An attempt to exclude a significant percentage of such a group of people would ridicule the essence. Millions of women today face different kinds of persecution, including the risks of trafficking, abduction, sexualized crimes, and gender repressive laws enforced by family, community and even governments. These categories of persons are invisible in the realm of humanitarian protection as refugees and will likely face biases in asylum courts. Unfortunately, many adjudicators of gender claims have

[1490] g REAL ID Act of 2005, Pub. L. No. 109-13, 119 Stat. 302 (codified in scattered sections of 8 U.S.C.); INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (2018)); Vogel, *Supra* note 242 at 358.
[1491] *In re A-B-, Supra* note; *In re M-E-V-G-, Supra* note at 238; *In re R-A-, Supra* note at 906.

continued to demonstrate insensitivity to the connections GBPs, denial, and human insecurity. The overlooked intersections between GBP and female vulnerability, has far-reaching consequences health, security, and safety needs of female refugees. GBP is deeply rooted in the patriarchal custom of female prejudices that treat women as chattels and disposables. The United States Congress considered these circumstances ahead of the Refugee Convention by making provisions for the T-Visa, U-Visa, and VAWA protections. Such extraordinary efforts deserve emulation by other countries. However, the enforcement of the Real ID Act and judicial emphasis on nexus have continued to demobilize the above developments. The restrictive burden imposed by the nexus requirements on gender claims trivializes women's persecutory experiences and need for refugee protection. The principle of nondiscrimination is the kernel of IHRL and should be the soul of human rights enforcement for IRL. Unfortunately, the Convention created a gender void that has made its realization impracticable. The unattended circumstances of refugee women still weigh down on the conscience of international credible solutions that cannot be sought outside the IRL and the precincts of IHRL.

CHAPTER SIX

ASYLUM BARS AND THE EXCLUSION LAWS—UNITED STATES APPLICATION AND HUMAN RIGHTS EFFECTS ON PROTECTION SEEKERS

6.1 Introduction

In the previous Chapters, we examined the historical background of refugee protection, its meaning, legal framework, grounds of inclusion, and the issues arising from gender exclusion. This Chapter makes a paradigm shift from the inclusion criteria (Article 1A (2))[1492] to reasons for excludability under the Refugee Convention and some legal barriers facing their domestic applications. The exclusion laws are explored from a broad spectrum that affects persons of all gender categories. Discourse attention is focused on the two grounds of exclusion. At first, we examine exclusion under criminal or security bars pursuant to Article 1. F and Article 33(2). Certain individuals are found to be ineligible for refugee protection because of criminal responsibility. Secondly, an individual may be disqualified from the reliefs of Article 1A (2) simply because he or she is no longer a refugee due to a change of circumstances.[1493] Of significance to this Chapter is how the exclusion laws are framed and interpreted in domestic jurisdictions given their lack of uniformity and different historical experiences. Legal developments underlying the bars relate to some historical events like Nazis' persecution in World War II, systemic racism, war and security threats, terrorism, and counterterrorism, and recently the rhetoric of public health threats since the covid-19 pandemic. Also, significant here are the measures taken to develop the policies and legislative trajectories. Against this backdrop,

[1492] 1951 Convention, *supra* note 12 at art. 1.A(2) [defining refugee a refugee and the inclusion criteria].
[1493] *Id.* at art. 1.C-1. E

we examine related responses by government agencies to the migration crisis and the control of labor, as well as fears about the migration floodgate.

Historically, the justification for Article 1F was to ensure that perpetrators of crimes against peace, war crimes, crimes against humanity, serious non-political crimes, and terrorism would not exploit refugee benefits as fugitives of justice. Both Article 1.F, as well as 33(2), can be rightly discussed as deterrent exclusion laws, which give clarity to the distinction between persecution and prosecution. Founded on the principle of international law, the basis of exclusion intersects with the United Nations Charter,[1494] international humanitarian and criminal law,[1495] as well as extradition law.[1496] Therefore, the determination of exclusion claims cannot be in isolation from a comprehensive analysis of international human rights and criminal justice.

But in practice, for lack of uniformity, States' differing interpretations sometimes deviate from the Convention's benchmark and international legal framework. This creates hurdles for potential refugees and asylum seekers. In the United States, the exclusion laws are products of many historical factors like World War II, racial politics, the 9/11 terrorist attack, and political constructions. Whereas the United States asylum law was originally framed from the language of the Convention,[1497] the negative profiling of refugees as criminals, terrorists, security threats, as well as an economic burden, contribute to influencing the overbroad definition of bars. Strikingly, the expansive definition of terrorism bar—terrorist activities, organization and

[1494] *Id.* at art. 1D; UN Charter, *supra* note 31 at arts. 1-3.

[1495] Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1949, U.N.T.S. 78, UNGA, entry into force 12 January 1951; United Nations, Agreement for the Prosecution and Punishment of Major War Criminal of European Axis (London Agreement), 8 August 1945, 82 U.N.T.C. 280, 58 Stat. 1544; Rome Statute of the International Criminal Court (last amended 2010), UNGA, 17 July 1998, 2187 U.N.T.S. 90, entered into force July 1, 2002 [*hereinafter,* "ICC Statute"].

[1496] INTERPOL, Constitution of the ICPO-INTERPOL, art. 3. [I/CONS/GA/1956/(2021)], http://www.interpol.int/About-INTERPOL/Legal-materials/The Constitution [hereinafter INTERPOL Const.

[1497] 1951 Convention, *supra* note 12 at art. 1.A(2); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005) [defining a refugee from the Convention's meaning of a person with WFF of persecution on five listed grounds].

"material support" under the REAL ID requirements changed after 9/11, with zero exemption to duress or victims of terrorist attacks.[1498] Impacts affected the biased narratives of refugees and asylum seekers as burdens, security threats, and "undesirable aliens." Apparently, these have caused a reliving of the 9/11 war on insecurity. This chapter investigates how the connecting issues and barriers affect the framing of some exclusion laws and their overall asylum jurisprudential impacts. Inferences are made from other related policies, enactments as well as treaties that affect asylum and withholding removal, especially on divergent perspectives of security-based exclusion. Focus is given to how the restrictive applications of the asylum and entry bars limit the protection or admission of aliens from certain nationalities, and religious or racial identities, including women and children. Also crucial to the analysis is the judicial review of excludability, such as a guilty mind, criminal responsibility, or factors relating to a change of circumstances.

Additionally, the research investigates the historical trajectory underlying racism and certain immigration exclusion laws. Connecting the past with the present, this chapter traverse history, politics, and racism to examine the rationale behind certain exclusion laws like the Page Act, Chinese Exclusion Law, and Undesirable Alien Act, and their connection with recent immigration bars and deportation laws. On this framework, we discuss the background of Trump's era Title 42 deportation of the undocumented, Trump's executive orders, metering asylum, "remain in Mexico" policy, exclusion under a bilateral agreement with Canada, and filing deadline exclusion. These laws have set an uncommon precedent in the United States refugee jurisprudence, hence the research inquiry to ascertain their legitimacy and possible human rights consequences. Since the primary purpose of exclusion laws is to ensure that

[1498] INA § 212(d)(3)(B)[exceptions to terrorism bars—duress and voluntary medical care—has no gender consideration for female victims of terrorists attacks like kidnap, rape, forced labor or servitude.]

fugitives are not allowed to exploit the Convention's status, creating an overbroad threshold for exclusion will endanger non-fugitives and make cynical the purpose of the Convention. Juxtaposing precedents from Canada, Australia, and UK, this Chapter recommends reconstruction of the United States exclusion laws within the threshold of IRL, international criminal law and human rights. Lessons from international legal frameworks are foregrounded to guide adjudicators to adopt qualitative evaluation of a totality of circumstances to distinguish a guilty mind from a victim of duress and to ensure that deserving refugees are not excluded from protection and become exposed to a preventable risk of death. Legal reforms are insufficient without a fair judicial review that considers a totality of circumstances within the context of international law before invoking the bars. Additionally, extraneous limitations imposed under one-year filing deadline bar, expedited removal practice, safe third country bar, and the United States' interpretations of change of circumstances are re-evaluated in the context of human rights.

6.2 Overview of the Convention's Exclusion Law under Articles 1F

Article 1F and Article 33(2) of the 1951 Convention spelled out the criteria for the exclusion of a person from refugee status, simply because he or she is judged to be unworthy of protection as a refugee. It specifically provides that the Convention shall not apply to:

> …any person with respect to whom there are serious reasons for considering that: (a) [H]e has committed a crime against peace, a war crime, or a crime against humanity, as defined in the international instruments drawn up to make provision in respect of such crimes; (b) He has committed a serious non-political crime outside the country of refuge prior to his admission to that country as a refugee; (c) He has

> been guilty of acts contrary to the purposes and principles of the United Nations.[1499]

Basically, Article 1F applies to individuals who are found to be ineligible for protection having breached international legal standards by either human rights or criminal law violations, which make them fall outside the scope of Article 1A (2) as refugees and become undeserving the reliefs of refugee protection. The rationale of exclusion, as Volker Turk observed, operates twofold—first, to exclude perpetrators of grave criminal acts or human rights violations from refugee protection. Second, it ensures that IRL precludes their criminal accountability.[1500] The persecution and prosecution variance is at the core of inclusion and exclusion laws. Because Article 1F intersects with the framework of criminal responsibility, the underlying jurisprudence of exclusion should be viewed comparatively within the context of international human rights, criminal, humanitarian, and extradition laws. Apparently, Article 1F(a) excludes persons who have committed "a crime against peace, a war crime, or a crime against humanity" from refugee relief. Notably, the 1948 Genocide Convention, the 1949 Geneva Convention, and the 1945 London Agreement are relevant instruments that form a background to the 1951 Convention. In the post-Convention era, the 1977 Additional Protocols as well as the statutes of the ad hoc tribunals—ICTY,[1501] ICTR[1502] and the Rome Statute[1503] are important reference documents in evaluating the elements of crime against peace, war crimes, and a crime against humanity. A

[1499] 1951 Convention, *supra* note 12 at (a)-(c).
[1500] Volker Turker, *Forced Migration and Security,* 15 INT'L J. REFUGEE L. 113 (2003).
[1501] ICTY, *supra* note 487.
[1502] UN Security Council, Statute of the International Criminal Tribunal for Rwanda (last amended on 13 October 2006), 8 October 1994. https://www.refworld.org/docid/3ae6b3953.html [*hereinafter* "ICTR"].
[1503] ICC Statute, *supra* note 1495.

reasonable determination of an applicant's criminal liability and excludability cannot be viewed outside these documents.

Also, Article 1.F(c) excludes persons "guilty of acts contrary to the purposes and principles of the United Nations" from refugee status.[1504] On its face value, the analysis of the purpose of the United Nations is seemingly vague given that the Charter of the United spelled out several unrelated factors under its purposes like international peace and security, protection of territorial integrity, political independence and the rights to self-determination of peoples, peaceful resolution of a dispute, equal rights and political independence. Although scholarly debates seemed to have gained a consensus on the claims that the concept of Article 1F(c) refers to persons who breach international peace and security.[1505] The claim is unmistakable. Whereas Article 1F (a) and (c) are reticent about terrestrial limits of crimes, 1F(b) indicates that the commission of "a serious non-political crime" must be "outside the country of refuge prior to his admission to that country as a refugee." As Musalo observed Turk's article highlighted this distinction between the terrestrial jurisdiction in accordance with Articles 1F (a) and (c) and Article 1F(b). The latter specified that an alien whose criminal antecedent renders him or her undeserving of refugee claims is pursuant to a "serious non-political crime" committed "outside the country of refuge prior to his admission."[1506] For Articles 1F (a) and (c), it does not matter when and where crime against peace, a war crime, a crime against humanity or related act contrary to the purpose of the United Nations was committed.

[1504] 1951 Convention, *supra* note 12 at art. 1F(c).
[1505] Turk, *supra* note at 1500; Musalo et aal, *supra* note 10 at 884-892; *The European Council on Refugees and Exiles, Position on Exclusion from Status,* 16 INT'L J. REFUGEE L. 257, 257-285 (2004) [*hereinafter* "ECRE"].
[1506] 1951 Convention, *supra* note 12 at art. 1F(b); Turk, *Op Cite*; Musalo et aal, *supra* 10 note at 883.

6.3 Evaluating Exclusion under Articles 33(2) and 1.F

Article 33(2) is an exception to the principle of nonrefoulement.[1507] It explicitly specifies that:

> The benefit of the present provision may not, however be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, having been convicted by a final judgement of a particular serious crime, constitutes a danger to the community of that country.[1508]

Whereas Article 1F creates a bar on individuals whose criminal status excludes them from refugee definition and relief, Article 33(2) applies to persons recognized as refugees who become illegible for refugee protection because they are legitimately judged incapable of so for reasons of national security or a conviction by a final judgment of the court.[1509] Those excluded under Article 33(2) are considered to be a serious threat to their host community, hence undeserving for refugee protection or nonrefoulement benefits. As an exception, it prioritizes the safety and security of an asylum country. Although both Articles 1F and 33(2) create a bar to asylum and nonrefoulement, the latter operates more like a sanction or deterrent to aid the process of extradition by removal of a potential criminal to his or her country of origin.

Notably, neither Article 1F nor Article 33(2) clearly defined the meaning and elements of the referred excludable crimes. These create potential gaps for domestic actions as well as divergent interpretations. Whereas inferences may be made from international law (criminal and human rights law) in the interpretation of Articles 1F and 33(2) on the concept of individual

---

[1507] 1951 Convention, *supra* note 12 at art. 33(1) [stating that [N]o Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever….]
[1508] *Id.* at art. 33(2).
[1509] *Id.*

criminal responsibility.[1510] It is unlikely that State jurisdictions will adopt a uniform procedural in the evaluation of evidence on of criminal liability, or threat to national security claims. Compared to other human rights frameworks, Article 1F and 33(2) create an uncommon exception for a derogation on nonrefoulement.[1511] Under Article 3 of CAT, a counterpart to Article 33(1), nonrefoulement obligation operates as a non-derogable principle. It absolutely prohibits States from returning aliens to territories where they would face serious risks of torture. Articles 1F and 33(2) allow States to exercise discretion on certain people where there is reasonable ground for regarding them as a threat to the security of the host country.[1512] Arguably, such discretion could be justified as an endorsement of the States' fiduciary commitment to its people, privileged over refugees' needs. However, scholars like Criddle and Fox-Decent have argued that in the context of global justice and human rights, international law entrusts to sovereign States the power to regulate migration, role in securing international order as well as national and transnational fiduciary duties.[1513] Such sound reasoning justifies the purpose of refugee law and reason to refrain from nonrefoulement. A government's role in providing sanctuary to aliens is immanent on its responsibility to international security. Although IRL seems to be silent on the intersection between refugee protection and international security, such an omission is critical. For instance, the Convention's inability to make provisions for the fate of excluded fugitives whose country of origin may be unable and unwilling to prosecute creates a gap in both criminal responsibility and international security. Arguably, exclusion, rejection or deportation can be considered a necessity when it complements criminal justice without aggravating threat to international security. The Preamble suggested the need for international

---

[1510] *See, e.g.* ICC Statute, *supra* note 1595 at art. 25; *Prosecutor v. Dusko Tadic* IT-94-1-A (1996).
[1511] CAT, *supra* note 165 at art. 3.
[1512] 1951 Convention, *supra* note 12 at art. 1F and 33(2).
[1513] Evan J. Criddle & Evan Fox-Decent, *supra* note 261, 1067-1075, 1068.

burden sharing.[1514] Detention of convicted or reasonably suspected criminals seeking protection be cooperative with international criminal justice rather than an absolute bar. Evidently, Article 1F creates a void, yet to be addressed, albeit the massive clamor to protect global international security.

Again, the Convention's exclusion standard differs fundamentally from CAT. Article 3, CAT unconditionally prohibits the rejection or refoulement of persons who face substantial risks of being tortured and killed in his or her home country.[1515] Other international and regional instruments affirmed the non-derogable character of nonrefoulement, which Article 1.F has permitted denial on certain grounds.[1516] A simple interpretation is that a refugee fleeing a risk of persecution could be returned to that risk if there are reasonable grounds for regarding such a refugee as a threat to the destination country. Another crucial question is the scope of reasonability, and competence of the adjudicator, security, or political agents. In practice, as the research findings will show, security and other border officials have participated in the assessment of fears or unprocedural removals on excludable grounds.

The limitations imposed by the exclusion clause make the peremptory nature of nonrefoulement debatable. If national security consideration is a precondition for admission and protection of refugees, States' response to the principle of nonrefoulement will be implicit not on refugee protection needs but on political interests or what may be likened to a State's prioritized responsibility to nationals, which will likely legitimize State's derogation to renegade Article

---

[1514] *See, e.g.,* 1951 Convention, *supra* note 12 at Preamble at para. 4.
[1515] CAT, *supra* note 165 at art. 3.
[1516] *Id*.; *See, e.g.* OAU Convention, *supra* note 445 at art. I(4)-(5); ACHR, *supra* note 460 at art. 22(8). [stating that "In no case may an alien be deported or returned to a country, regardless of whether or not it is his country of origin, if in that country his right to life or personal freedom is in danger of being violated because of his race, nationality, religion, social status, or political opinions."]; UNHCR on Cartagena Declaration, *supra* note 464 at § III, 5; Brazil Declaration, *supra* note 466.

1.A(2). The serious concern raised about restrictions of different states on refugees since the Covid-19 pandemic attests to the gaps in how the exclusion clause can be extended to achieve political interest. States like Greece, the UK, the United States, and UAE, to say the least, enforced moratoriums on border closure invoking the exclusion authority, and in defiance of their obligations to IRL.[1517] In the United States, the famous Title 42 deployed as a tool of deportation alongside other policies barring asylum under a pretext of public health and national security. Some legal scholars have construed the wrongful expulsion of potential refugees in the interest of national security as a breach of their supranational fiduciary responsibility to provide surrogate protection to asylum seekers.[1518] Their argument aligns with the viewpoint of this Chapter that both inclusion and exclusion criteria ought to be interpreted a larger context of international law given the risk associated with the wrongful application. Although Articles 1.F and 33(2) create a delicate structure of internal inconsistency that warrants the unlimited exercise of States' discretions, reasonable caution is required in the interpretation of the bars given regard to human rights within the context of justice.

6.4 Statutory Bars and Enforcement Under the United States Laws

The United States exclusion law is framed from the standard of the Refugee Convention but with some variations. According to the INA, every person who seeks admission into the United States as a refugee or asylum seeker must fit within the inclusion criteria under INA § 101(a)(42)(A)[1519] and is not excluded under excludable grounds.[1520] Generally, INA § 212(a) has a set of grounds of inadmissibility that make noncitizen ineligible for admission. This applies

[1517] 2020 Greece Pushback on Protection Seekers, *supra* note; 2020 Migrant Workers illegally Expelled, *supra* note; Title 42, *supra* note 8 at 1-43.
[1518]Evan J. Criddle & Evan Fox-Decent, *supra* note 261 1067-1075, 1068.
[1519] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).
[1520] INA § 208(b)(2); [8 U.S.C § 1158(a)(2)]; INA § 241(b) [8 U.S.C § 1231(b)].

generally to all aliens seeking admission whether immigrant or nonimmigrant. The grounds of inadmissibility cover a range of areas like criminal activity, communicable disease, national security, poverty, protection of the workforce as well as emerging administrative and immigration policies.[1521] Aliens subject to the grounds of inadmissibility are denied entry, except if qualified for a waiver.[1522]

INA § 208(b)(2) specified the exceptional conditions for denial of asylum or withholding removal, stating that an alien cannot apply for asylum if:

> (i) the alien ordered, incited, assisted, or otherwise participated in the persecution of any person on account of race, religion, nationality, membership in a particular or political opinion; (ii) the alien, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the United States; (iii) there are serious reasons for believing that the alien has committed a serious non-political crime outside the United States prior to the arrival of the alien in the United States; (iv) there are reasonable grounds for regarding the alien as a danger to the security of the United States; (v) the alien is engaged in terrorist activity within the meaning of INA § 212(a)(3)(B)(i) or § 237(a)(4)(B); and finally, (vi) the alien was firmly resettled in another country prior to arriving in the United States.[1523]

The above provision sparsely reflects Article 1.F(a) and (c) but with additives taken from the United States legislative history. INA § 212(a)(3)(E) included the exclusion of "persecutors of

---

[1521] INA § 212(a); Legomsky and Rodriguez, *supra* note 815 at 371, 420.
[1522] *Id.*
[1523] INA § 208(b)(2); [8 U.S.C § 1158(a)(2)]; INA § 241(b) [8 U.S.C § 1231(b)].

others," a term that evolved from earlier enactment prohibiting the admission or protection of persons identified with to have participated or collaborated with the Nazi government in the "persecution of any person because of race, religion, national origin, or political opinion" from May 1933 to May 1945.[1524] Basically, INA § 208(b)(2) stresses conditions for exclusion from the protection of persons considered unworthy because of crimes or human rights violations. Individuals barred from protection reliefs are unworthy either because of a crime committed or because they are a threat to the security of a host State.[1525] It should be noted that the exclusion criteria differ from loss of status, which may occur because of a fundamental change of circumstances or removal to a third country pursuant to a bilateral or multilateral agreement that would not constitute a risk of life and freedom.[1526]

Prior to September 30, 1996,[1527] the only bar that existed under the United States asylum law was aggravated felony.[1528] In some cases, the US courts have given a broader interpretation to "particular serious crime" to include aggravated felony, convictions, and misdemeanors for the purpose of deportations.[1529] Generally, the bars to asylum and withholding commonly apply to persons convicted of serious crimes considered to be a threat to the United States, persecutors of others, a person who committed serious non-political crimes outside the United States prior to entry into the United States and individuals that constitute a threat to the national security.

[1524] INA § 212(a)(3)(E), 8 U.S.C. §1182(a)(3)(E); Musalo eta al. *supra* note 10 at 903.
[1525] 1951 Convention, *supra* note 12 at art. 1F, art. 33(2); INA § 208(b)(2); [8 U.S.C § 1158(a)(2)]; INA § 241(b) [8 U.S.C § 1231(b)].
[1526] INA § 208(c)(2); 8 U.S.C § 1158(a)(2).
[1527] The effective date of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA).
[1528] *Asylum Bars,* USCIS, 01 April 2011. https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-bars; *Bars to Eligibility for Asylum,* LAW OFFICE OF GRINBERG AND SEGAL*, http://myattorneyusa.com/bars-to-eligibility-for-asylum*.
[1529] *N-A-M v. Holder* 587 F.3d 1052 (10th Cir. 2009).

Additionally, INA § 208(b)(2) enumerates other circumstances that may cause a refugee or an asylum seeker to lose his or her status such as – if he or she is no longer considered to be a refugee due to a fundamental change in circumstances; if an asylum seeker falls within any of the initial bars for asylum; if such an alien may be removed to a safe third country pursuant to a bilateral or multilateral agreement, where he or she he would be eligible for some form of protection; where the alien voluntarily availed himself or herself of protection of her country of nationality or last residence by returning with permanent or the possibility of obtaining such status; or if such alien acquired a new nationality.[1530]

Besides, there are other conditions or circumstances that can potentially create a bar to asylum in the United States such as evidence that an applicant can resettle in a "safe third country," a failure to file asylum within one year of arrival into the United States, evidence of a prior application and denial of relief, and evidence of firm resettlement.[1531] Compared to the Convention, the United States statutory bars replicate Article 1F bar on individuals convicted for particular serious crimes, serious non-political and persons who constitute a danger to national security. But unlike the Convention, INA does not bar individuals who commit crimes against peace, a war crime or crime against humanity. Instead, it creates a bar for persecutors of others, a concept that was not contemplated in the Convention. It is necessary to investigate the import of the differential construction and how this impacts the practice and applications of the bars in refugee claims.

[1530] *Id.*; Musalo et aal, *supra* note 12 at 878.

[1531] *Asylum Bar,* USCIS, https://www.uscis.gov/humanitarian/refugees-and-asylum/asylum/asylum-bars#:~:text=Bars%20from%20a%20Grant%20of,social%20group%2C%20or%20political%20opinion. Last updated, 05/31/2022; 8 CFR § 208.4.

It should be noted also that under the United States law, the bars are categorized into six broad groups namely bars against: i) non-citizens involved directly or indirectly in persecuting others on any of the Convention's grounds; (ii) aliens "convicted by a final judgment of a particularly serious crime," likely to constitute a danger to the United States; (iii) an alien who has committed a serious non-political crime outside the United States prior to the arrival; (iv) an alien who constitutes a danger to the national security; (v) a terrorist or person identified with such activity within the meaning of INA § 212(a)(3)(B)(i) or § 237(a)(4)(B); and finally, (vi) an alien who was firmly resettled in another country prior to arriving in the United States.[1532] It is imperative to evaluate how each of these is interpreted jurisprudentially in the assessment of claims and impacts on gender and human rights.

6.4.1 Implementing Bars Against Persecutors of Others (POO)

As earlier indicated, the notion of persecutors of others (POO) is drawn from the Convention's bars under Article 1F(a) and (c). These preclude the grant of refugee protection to an alien who has committed an international crime and whose act is supposedly contrary to the purpose of the United Nations. The overall purpose of the United Nations as set forth in the preamble and Article 1 is to maintain international peace and security, equality, as opposed to the use of force or breach of peace and security. People who act contrary to the principle are adjudged criminals, deserving individual accountability. Given that fugitives cannot evade criminal justice under a shield of refugee protection, violators are judged to be unworthy of protection. This is consistent with the maxim of equity that those who come to equity must come with clean hands.

[1532] INA § 208(b)(2); 8 U.S.C § 1158(a)(2); INA § 241(b) [8 U.S.C § 1231(b)].

Apparently, the framing of persecutors of others in the United States dates to an earlier enactment that was intended to exclude Nazi collaborators and their allies from entering or remaining in the United States.[1533] The legislative history has an important connection with the origin of the 1951 Convention and its framing of persecution from five major grounds—race, religion, nationality, political opinion, and membership in a particular social group. In the *Matter of Rodriguez-Majano,* IJ applied the principle to deny asylum and withholding removal to a 23-year-old citizen of El Salvador on grounds of ineligibility as a persecutor of others. The respondent entered the United States without inspection in 1984, while fleeing persecution by the Salvadorian guerrillas. He deserted the guerrillas and suffered torture and detention by the government for participating in guerrilla activities. Prior to the eruption of political conflict, the respondent was a cattle businessman who worked for his father and drove his cattle truck at San Miguel. During the conflict between the government and the opposition guerilla movement, he was stopped several times by the guerilla who commanded him to carry merchandise before he could be allowed to pass. This made him become acquainted with the activities of the guerrillas. When the conflict became intense, the government armed forces were kidnapping men suspected to collaborate in guerrilla activities. The respondent testified that they abducted his uncle and cousin and killed them as suspects. During the same period, the guerrillas forced the respondent to join their attack against the government, including burning cars. He was later arrested and tortured by the government forces but was later released through the connection of his lawyer and judge who warned him to flee the country for his life. At the brink of the civil war, he fled fearing persecution from the guerrillas whom he deserted and the government forces who still identify him with the guerrillas.

[1533] INA § 212(a)(3)(E), 8 U.S.C § 1182(a)(3)(E); Musalo et aal, *supra* note 10 at 903.

At Rodriguez-Majano's asylum and withholding hearing, the IJ found him unworthy of the refugee relief, holding that he had engaged in the persecution of others. The critical question is whether a claimant under the respondent's situation would be excluded under the Convention's Article 1F. Although the IJ made no reference to the Convention but found that the respondent meets the definition of a refugee pursuant to INA 101(a)(42), 8 U.S.C §1101(a)(42), yet ineligible for asylum and unworthy for withholding deportation under INA section 243(h)(2)(A) because he participated in the POOs.[1534] The respondent and his counsel challenged IJ's decision before BIA arguing that the respondent was coerced to join the guerrilla and that his activities with the guerrilla against the government in a period of civil war do not amount to persecution.

BIA applied more tactical reasoning in the analysis of the facts and circumstances described to be persecutory. First, BIA found that IJ gave too expansive a definition of the statutory term "persecution," although the only evidence before the court was the activities of the guerrillas at a time of war and no other record supported the reference to persecution. In affirming the claims of the respondent's counsel, BIA held that such activities that were connected directly to a civil war to overthrow a government or defend one's opposition group against the government's forces is not persecution. Arguing further BIA reinforces the importance of the motivation of a persecutor or group threatening harm in establishing POOs on the Convention's grounds. On this reasoning, BIA asserted that the activities of warfare such as forceful drafting of young soldiers, discipline of the rebel group and even prosecution of dodgers "are necessary means of achieving a political goal" in wartime, including burning of cars and

[1534] *Matter of Rodriguez-Majano* 19 1. & N. Dec. 811 (BIA 1988) citing *Matter of McMullen,* 19 I&N dec. 90 (BIA 1984) [emphasizing the various grounds of persecution].

destruction of properties. Therefore, these are not persecution within the meaning of INA section 101(a)(42)(A).[1535]

Lesson from the BIA analysis indicates that judicial review of the exclusion ground must be holistic connecting motivation with possible circumstances, and exceptions and even comparing the gravity of persecution alleged with WFF. Going by IJ's conclusion, grant of refugee relief to ex-servicemen fleeing persecution from a conflict society would be unthinkable. It is evident that Congress does not intend to bar from asylum or withholding those who have taken part in the war as there are no laws to support such a bar within the United States legislative history. Unlike the persecutors of the Nazis, acts in warfare or resistant fighting aggression are different from war crimes, crimes against humanity, aggression and other related acts barred under INA § 208(b)(2). BIA distinguished the above criminal acts from an injury that may be inflicted or suffered from a natural consequence of civil strife.[1536] There is a significant test to this. First, it is important to evaluate the circumstance, motivation of the actor and whether the act(s) resulting in harm can be reasonably justified by a military necessity for it to amount to persecution. Although, the tripod test can be inferred from BIA's classical reasoning.

As BIA rightly observed, the IJ did not determine if Rodriguez-Majano demonstrated any probability of WFF for persecution. On this basis and other attendant issues, the case was remanded. Paragraph 56 of the UNHCR Handbook distinguished the identity of a refugee as a victim or potential victim from a fugitive from justice. Comparably, Paragraph 57 warned against the restrictive conflation of common law offenses and disproportionate notions. Against

---

[1535] BIA further cited *Rodriguez-Rivera v. United States, INS* 848 F. 2d 998 (9th Cir. 1988) and related cases to substantiate its assertion that military activities at wartimes are not persecutory.
[1536] Citing *Martinez-Romero v. INS,* 692 F.2d 595 (9th Cir. 1982); *Matter of Sanchez and Escobar,* 19 I&N Dec. 276 (BIA 1985).

this backdrop, it acknowledged that excessive penal prosecution could be a ground for refugee claims. The rationale is to prevent torture, and inhuman and degrading treatment under CAT.[1537] Although humanitarian asylum and withholding under CAT are recognized under the United States jurisprudence neither of these were contemplated by IJ in *Rodriguez-Majano*. Ordinarily, CAT withholding and CAT deferral of removal, are exceptions to removal.[1538] The former is available to anyone who demonstrates WFF and the likelihood of being subjected to torture. Such a person is not only granted CAT withholding but freedom from detention and may qualify for other ESCRs benefits like employment.[1539] It is consistent with the humanitarian purpose of IRL. But in *Rodriguez-Majano,* IJ failed to consider the excessive torture, prosecution, and inhuman treatment, which the respondent would face upon return as possible grounds for withholding removal.

In contrast, the Australian Tribunal in *RRT Reference N 96/12101,*[1540] the Tribunal assessed the criminal law defense in duress. Here, the applicant, a Liberian national fleeing persecution by Charles Taylor NPFL group in Liberia sought refugee status through a petition for a protection visa submitted to the Department of Immigration Ethnic Affairs. The application was denied pursuant to the Migration Act of 1958. The applicant sought a review of the denial with the Tribunal. Satisfying that the Applicant's request has been validly made, the Tribunal re-evaluated the merit of the case. If found that the Applicant and his community were victims of a warfare between two political factions between ULIMO and NPFL. During an invasion by the NPFL group in his village, forty men suspected to be members of the opposition group were captured and shot. The applicant and his brother were forcibly recruited into the NPFL and taken

[1537] CAT, *supra* note 165 at art. 3.
[1538] 8 C.F.R § § 208.16(c) and 208.17.
[1539] Musalo et aal, *supra* note 10 at 392.
[1540] *RRT Reference N 96/12101* (25 November 1996).

into a training camp. After six weeks, they were sent into a riot to fight the opposition party. The testimony showed that the applicant participated in about six riots but did not shoot to kill anyone. Contrary to the training he received, he avoided shooting anyone in the head or chest, but instead aimed at their legs and arms. According to him, he could not have avoided participating in the riot or shooting as the consequence of such resistance would be his own execution. After about three months, the Applicant was falsely accused of making a plot to kill their leader, Taylor. This led to his detention with eight other men. While awaiting trial, one of the detainees died and they were forced to bury him in a grave near their detention center after he was stinking and decomposing. This became an opportunity for their escape. The applicant escaped to his cousin's place who assisted him to escape to Sierra Leone. From Sierra Leone, he went to Malaysia and from there he boarded a plane on a false passport to Australia. Arriving in Melbourne, he was detained while processing his refugee claims.

The Tribunal evaluated the Applicant's claims and reviewed his excludability within the context of international law. First, it evaluated the country's condition from a human rights report by the U.S. Department of States published in March 1996, which indicated that the war between the NPFL and ULIMO took a horrendous toll on the civilian population resulting in the death of 150,000 people, internal displacement of 1.2 million, while about 750,000 had fled the country because of the danger especially flagrant disregard of human rights. It equally recognized other atrocities like looting, torture, forced labor, gang rape as well as forcible conscription. Viewing the circumstance of the war from this lens, the Tribunal examined the role of the Applicant as a member of NPFL and analyzed his activities within the context of Article 1F. First, it identified that the Applicant belonged to a rebel group that was associated with "flagrant disregard for human rights" and killings. Ordinarily, the activities of the rebel group

implicated the exclusion of Article 1F (a)-(c). Additionally, the Tribunal examined the definitions of the underlisted crimes—against peace, war crimes and crimes against humanity within Paragraph 150 of the UNHCR Handbook, the 1945 London Agreement, and the Charter of the International Military Tribunal as well as the scholarly writing of Goodwin-Gill.[1541] It transcended the base to find that whereas the Applicant's participation in a shooting attack by a rebel group could be a crime within the ambit of Article 1F, responsibility and defenses of the act could exculpate the actor in the light of the circumstance. Given that the Applicant himself, his brother, and the entire village were victims of the crime against humanity. He was attacked as a civilian, forcibly conscripted by the rebels and incarcerated without a fair trial prior to his escape. Furthermore, the Tribunal evaluated his act of involvement in the riots, which were done not of his own volition but because resistance would be fatal. The Applicant lessened the impact of the order to shoot to kill by aiming at people's legs and hands to avoid killing anyone. This was taken to be credible and plausible. Viewed from the context of criminal responsibility under the 1949 Geneva Convention and the Statutes of the ICTY and ICTR, the Tribunal found that the defense of duress, coercion (state of necessity or force majeure) and self-defense could absolve the Applicant since he was forced to join the NPFL, and his acts were not disproportionate and were performed to avoid immediate danger and irreparable loss. Therefore, the Tribunal found that the Applicant cannot be excluded under Article 1F or from seeking refugee protection under Article 1A(2).

It should be noted that the Tribunal's evaluation explored arrays of international legal instruments from Article 1F, the UNHCR Handbook and other relevant frameworks of

[1541] Goodwin-Gill, *supra* note 269 at 98-99, 106-7. [stating that the relevance of Article 1F must be interpreted in the light of recent developments in relevant international instruments].

international humanitarian and criminal law. Such a classical approach in judicial review within the framework of international law is highly recommended to other jurisdictions given that Article 1F is a progeny of criminal responsibility in international law. Moreso, the Tribunal raised the important issue to distinguish acts of complicity from a criminal group and forcible participation while seeking to measure the degree of proportionality. In reaffirming this, it cited the Canadian Federal Court decision in *Ramirez v. MEI*[1542] where the court held that the defense of duress can exculpate an applicant's participation in certain offenses provided the harm degree of harm directed at the actor is greater than the harm inflicted on the victim.[1543] Similarly, ECRE recognizes the principle of proportionality[1544] and the defenses of duress in determining excludability. These critical examinations are imperative to avoid double jeopardy by excluding a bona fide refugee who has been a victim of persecution and with WFF from the reliefs of Article 1A(2). For instance, if the IJ in *Rodriguez-Majano* had applied international jurisprudence in the evaluation of the respondent's personal involvement, knowledge, and participation with the guerrillas the decision would have been different.

Likewise, the Federal Court of Appeal Canada has emphasized the difference between mere membership in a criminally associated organization and mere presence in the criminal acts of such an organization in the case of *Moreno v. Canada (Minister of Employment and Immigration).*[1545] It was a case of a sixteen-year-old boy forcibly recruited into the Salvadoran military and was engaged in armed confrontations with guerrillas. He served as a guard outside a cell in which prisoners were brutally tortured. The lower court held that Moreno participated in the killing of civilians during the armed confrontations merely because of his membership with

[1542] [1992] 2 FC 308 (CA).
[1543] *Id.* at 308, 132.
[1544] ECRE, *supra* note 1505 at 257, 257-285, para. 42.
[1545] 107 D.L.R. 4th 424 (1994).

the military and presence at their scene of torture. It also found Moreno to be an accomplice for failing to take affirmative action to intervene or assist the victims. On this basis, the lower court found him excludable under Article 1F as a soldier who was complicit in the commission of a crime against humanity. By this reasoning, the court ventured into the criminal exclusion of the applicant without assessment of the elements of his *mens rea* and *actus reus.* It was not surprising that the Federal Court of Appeal (FCA) took a different position. Faulting the lower court, FCA found that mere membership in an organization or presence at a scene of a crime is insufficient for exclusion. Citing the authority of *Ramirez v. Canada (Minister of Employment and Immigration),*[1546] FCA excoriated the lower court's reasoning for requiring an applicant's show of benevolent intervention, and heroism at the expense of his own risk as unsound and contrary to the principle of self-defense.[1547] The argument aligns with the decision of the Australian Tribunal in *RRT Reference N 96/12101* that evaluated criminal responsibility taking cognizance of the totality of circumstances and exceptions. Consistent with the Charter of the International Military Tribunal and other relevant international instruments, self-defense and duress are relevant exceptions to criminal responsibility.[1548] In Moreno's situation, although his membership in the military that committed a crime against humanity could ordinarily render him complicit, FCA found that there was no demonstration of intention or active participation in the crime. Instead, he was a victim of coercive recruitment, forced to witness horrible torture and killing under a death threat, if he took a contrary position. He escaped after three months when he had the opportunity to do so. The court's reasoning here accords with the UK the standard in

[1546] 2 F.C. 306; 89 D.L.R. 4th 173 (1992).
[1547] *Id.* [noting that the law does not functions at the level of heroism and cannot demand immediate benevolent intervention at one's own risk].
[1548] Elies van Sliedregt, *Section 9, Justification and Exclusion of Criminal Responsibility,* GENERAL COMMENTARY, 76-86, (2012), https://www.usip.org/sites/default/files/MC1/MC1-Part1Section9.pdf.

ECRE 39, which maintains that in evaluating an individual's criminal responsibility, attention should be given to the "claimant's personal and knowing participation or complicity in the crime or crimes in question." Application of this vital principle of criminal jurisprudence is necessary to establish the actual existence of intention to commit a crime "*mens rea*" and the actual commission of the crime "*actus reus*."

Additionally, there can be a different scenario where an organization has expressed an underlying motive towards persecuting people who oppose their way of life or standard as seen in *Navero and Arduendo v. Canada (Minister of Employment and Immigration).*[1549] FCA in *Ramirez* identified that a unique kind of membership and participation existed in *Navero and Arduendo* because the applicants, Chilean husband, and wife were members of the Chilean secret police who were engaged in persecuting individuals opposed to the government during their tenure. In this case, both intention and actions of persecution implicating Article F are palpable. Such membership is excludable and distinct from Moreno's. The latter Moreno was a minor, who can be rightly described as a child soldier. Given the vulnerabilities of child soldiers, the UNHCR has warned on the need to exempt them from exclusion clauses under Article 1F because in most cases they are victims of international offenses,[1550] except for those that have attained the age of criminal responsibility and mental capacity.

Comparably, the Australian and Canadian jurisprudence as well as, UK's European Council on Refugee in Exile (ECRE)[1551] adopt the international law standard in determining excludability. That was not the case in *Rodriguez-Majano,* where BIA held that involuntariness

---

[1549] 11 Imm. L.R. (2d) 92, 37 F.T.R 161 (1990) [cited by the Federal Court of Appeal Canada in *Moreno*].
[1550] UNHCR Guidelines on International Protection: Child Asylum Claims under Articles 1(A)2 and 1(F) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees 58, U.N. Doc. HCR/GIP/09/08 (Dec. 22, 2009).
[1551] ECRE, *supra* note 1505 at 257.

is not a defense. This presupposes that where an applicant has participated or assisted in persecution, assessment of his *mens rea* is not required to bar him from relief. Although the United States criminal law as well as international law recognized duress as an exception to individual criminal responsibility. A person under duress is faced with imminent danger to life, limb, and freedom that is so great to overbear one's will. The victim commits a criminal offense to avert the danger away from his or herself or a close relative.[1552] In criminal assessment, duress is described as a concession to human frailty, which excuses criminal responsibility because a perpetrator of the crime, acts under coercion, hence lacks the capacity to form a guilty mind, which is a critical element of *mens rea.*

In *Hernandez v. Reno,*[1553] the Eight Circuit Court tactically applied a defense of duress in reasoning akin to *Moreno* and Australian *RRT.* Here the court right considered the circumstance and lack of reasonable evidence of a guilty mind. The applicant was forcibly recruited into the Guatemalan guerillas and was forced under a death threat to participate in armed confrontations. He avoided committing murder when he was ordered to shoot civilians but "attempted to aim away from villagers and tried not to hit anyone."[1554] At an opportune time, he deserted the guerrillas. The court exculpated him from the bar under a defense of duress.

However, the Fifth Circuit Court differed in *Hernandez* in *Bah v. Ashcroft,*[1555] holding the defense of duress to be "irrelevant" where an applicant was compelled to commit acts of

---

[1552] *See, e.g.* UNGA, Rome Statute of the International Criminal Court (last amended 2010), 17 July 1998, 2187 U.N.T.S. 90, entered into force July 1, 2002, art. 33(1)(d). [*hereinafter,* "ICC Statute"]; *DPP v. Lynch* [1975] AC 653 *(Lynch)* [court permitted the defense of duress to be raised in a case of murder; although this was overturned in *R v. Howe and Bannister* [1987] 2 WLR 568. This indicates controversy in the interpretations of duress]; U.S.C. 2 Sec. 8.05 (a)-(e) 1973.
[1553] 258 F.3d 806 (8th Cir. 2001).
[1554] *Id.* at 809.
[1555] 341 F. 3d 348 (5th Cir. 2003).

persecution.[1556] It was a case of a Sierra Leonean whose family members were killed during the armed conflict, and he was forced to join the Revolutionary Union Front (RUF) or be killed. He joined the armed group to avert the danger of being killed and participated in their militarized atrocities as a "concession to human frailty." The Fifth Court barred him as a persecutor of others. The decision here contradicted the Eight Circuit's position in *Hernandez* and even cast doubt on the defense of duress under international and United States jurisprudence. Debates provoked by the troubling precedent commanded the attention of the Supreme Court in *Negusie v. Holder.*[1557] The Court addressed the controversy of whether the exclusion of a persecutor of others could apply in the analysis of involuntariness. In this case, the respondent, Daniel Girma Negusie, possessed a dual nationality of Eritrea and Ethiopia. During an outbreak of armed conflict between the two countries, he resisted the pressure to fight against Ethiopia and was imprisoned by the Eritrea government. Later, he was forcibly recruited to serve in the Eritrea forces for nearly four years during which served as a prison guard. Although he never injured any person directly, he witnessed brutal torture and degrading punishments of prisoners who were kept under the sun for more than two hours. According to the respondent's testimony, this resulted in the death of one. By implication, Negusie was himself a victim of persecution, forced into armed conflicts and was made to witness a horrible scene of crime under a "threat of imminent danger of life, limb and freedom."[1558] Yet, the Fifth Circuit Court held that the involuntariness of Negusie's participation or presence (being compelled to join the Eritrea forces) would not absolve him from being a persecutor of others.[1559] The Supreme Court not only

[1556] *Id.* Musalo et aal, *supra* note 10 at 908-909.
[1557] *Id.;* 129 S.Ct. 1159 (2009).
[1558] Referring to the defense of duress as necessary condition for absolving criminal responsibility. *See, e.g.* ICC Statute, *supra* note 60 at art. 31(1)(d).
[1559] The Fifth Circuit upheld the position of BIA while citing the Supreme Court decision in *Fedorenko v. United States,* 449 U.S. 490 (1981).

remand the decision but reversed its ruling on *Fedorenko,* which was based on the 1948 Displaced Person's Act (DPA), and rejected a defense of duress exception, yet reaffirmed deference to the 1980 Refugee Act. *Negusie* provoked numerous interventions by human rights scholars and immigrant advocates, who argued in support of duress exception in the determination of persecutor bar. Although the DHS at first tried to acquiesce with the view, shortly after the decision, the DHS, under the Trump Administration, filed a brief asserting that the persecutor bar has no exceptions. The standard deviated from Article 33(2) perspective of fair and due process determination. It equally contradicted the principles of international criminal jurisprudence and even the United States criminal law, which recognizes the defense of duress.[1560] Compared with the lessons from Australia's *RRT Reference N 96/12101,* and Canada's *Ramirez v. MEI* on the importance of the assessment of the defense of duress before invoking the bars, we underscore the problems of lack of homogeneity in IRL.

Although States like Canada and Australia have developed established precedents following the international law standard and exceptions to criminal liability, the question of involuntariness or duress in determining persecutor bar is still unresolved in the United States. Also, in the attempt to settle the controversy of criminal intent, the United States Circuit Courts introduce an assessment of knowledge (*scienter*), requiring applicants to demonstrate sufficient knowledge that his or her action(s) may assist in the POOs to make such act(s) culpable.[1561] In *Castaneda-Castello,* a Peruvian national who served with the military during a brutal massacre

[1560] *See, e.g.* McCarthy, 2 U.S. 86, 86-87 [recognizing duress as a valid criminal defense]; Model Penal Code § 2.09 (1962); *State v. Toscano,* 74 NJ 421, 378 a. a 2d 755; The Rome Statute of the International Criminal Court, UN. Doc. A/CONF.183/9, 17 July 1998, reprinted in 37 I.L.M 999 (last amended 2010), [hereinafter ICC Statute], art. 30 [the elements of guilty mind, intent, knowledge, and duress exceptions have been elaborated in the decisions of the ICC as seen in *Akayesu*, *supra* note 172*; Dusko Tadic, supra* note 1510].
[1561] *See, e.g. Balachova v. Mukasey,* 547 F. 3d 374, 385 (2d Cir. 2008); *Castaneda-Castillo v. Gonzales,* 488 F. 3d 17 (1st Cir. 2007) (*en banc*) [requiring that a person's act to be voluntary, which is also a demonstration of knowledge].

of the civilian population sought asylum and withholding. His testimony showed that he was among a military operation dispatched against a Revolutionary group called the Shining Path that fought against the Peruvian government. In obedience to a superior order, the applicant blocked an exit of a town while the other members of the force hunted for the revolutionary group. He claimed to be unaware of the brutal massacre perpetrated by the government's forces against civilians. Although he was in radio contact with his base, he indicated that he only knew about the events after several weeks after the attack.[1562] The government has argued that *sceinter* is not required to impose a persecutor bar.[1563] The Fifth Circuit Court disputed the government's claim, considering the "totality of relevant conduct" in the determination of POOs, even when such an act is involuntary. On the contrary, the court reaffirms the need to consider some degree of moral culpability, hence persecutor bar cannot be applied in the absence of a scienter.[1564]

In *Diaz-Zanatta v. Holder*,[1565] the Sixth Circuit distinguished the existence of knowledge where an applicant, who was an intelligent analyst with the *Servicio de Intelligencia del Ejercito* (SIE). Diaz-Zanatta worked with the Intelligent Unit of the Military. Her testimony demonstrated that she only knew about the human rights violations perpetrated by other parts of the military through the screams in the basement of the building where she worked. The Sixth Circuit Court exculpated her for lack of knowledge and complicity in the persecution. Citing *Fedorenko'*s standard, the court reiterated the requirement for assessment of POOs bar, that:

[1562] *Id.* at 385.
[1563] Citing *Rodriguez-Majano* and *Fedorenko* the government asserted that *scienter* is not required to imposed persecutor bar, it is only the objective effect of a person's action that matters. *Id.*; Musalo et aal, *supra* note 10 at 910.
[1564] *Castaneda-Castillo, supra* note 69 at 488.
[1565] 558 F. 3d 450 (6th Cir. 2009).

> First, the alien must have done more than simply associate with persecutors; there must have been some nexus between the alien's actions and the persecution of others, such that the alien can fairly be characterized as having assisted or otherwise participated in the persecution of others…if such a nexus is shown, the alien must have acted scienter; the alien must have had some level of prior or contemporaneous knowledge that persecution was being conducted.[1566]

The above duo test analysis supports the principle of criminal responsibility, which requires a guilty mind, voluntary, and conscious action to establish culpability.[1567] Similarly, other decisions of courts have affirmed the requirements of *scienter* and associative nexus to invoke a persecutor bar.[1568] It is worthy of note that the legal jurisprudence of knowledge and nexus here are intertwined, thus re-evokes *Rodriguez-Majano*'s precedent and connection with the Convention's grounds. But compared with *Suzhen Meng v. Holder,*[1569] Suzhen's participation demonstrates a direct involvement in the persecution of "unauthorized pregnant women" in China, which is also connected with political and PSG group persecution.

Nonetheless, *Rodriguez-Majano*'s nexus approach was contested by BIA in the *Matter of Alvarado,*[1570] holding that an individual's intent to persecute on account of any of the five grounds is irrelevant to the application of the persecutor bar.[1571] The respondent witnessed severe

---

[1566] *Id.* at 558, 450, 455.
[1567] Sliedregt, *supra* note 56 at 76-86.
[1568] *See, e.g. Abdallahi v. Holder,* 690 F. 3d 467 (6th Cir. 2012) [citing *Diaz-Zanatta* the Sixth Circuit denied review affirming that BIA's recognition of Abdallahi's "requisite knowledge that torture was occurring or was to occur"; *Kumar v. Holder,* 728 F. 3d 993 (9th Cir. 2013) [requiring a show of proof of "purposefully assist[ing] in the alleged]. persecution]; *Suzhen Meng v. Holder,* 770 F. 3d 1071 (2nd Cir. 2014) [holding that the statutory persecutor bar renders Meng ineligible for asylum and withholding for having for 20 years reported the identities of women with unauthorized pregnancy knowing that many of these women would be subjected to forced abortion and sterilization].
[1569] *Id.*
[1570] 27 I. & N. Dec. 27 (BIA 2017).
[1571] *Id.*; Musalo et aal, *supra* note 10 at 911.

mistreatment of a detainee by a superior officer, on account of the victim's political opinion, during his service as a guard in the Salvadorian Civil Guard. The IJ held that Alvarado's knowledge, presence, and position during the victim's persecution did not trigger the persecutor bar because they were a mere consequence of his service in the National Guard and that he had no imputed political opinion on the detainees. The reasoning was plausible within the *Fedorenko* standard of voluntariness and underscored the need for a conscious application of the persecutor's bar to ensure that claimants with WFF are not excluded from asylum relief. However, BIA reversed this decision holding that an individual's personal motivation is irrelevant. This raised a question on whether the act or scienter of an applicant or that of his group is necessary to invoke the persecutor bar. The Supreme Court clarifies the ambiguity in *Negusie* holding that an applicant's motives and culpability are relevant and must be ascertained before attributing a group's motivation to the person.[1572]

Generally, the United States statutory bar on POOs[1573] reflects the Convention's Article 1.F(a) bar on perpetrators of crimes against peace, crimes against humanity, and war crimes. Exclusion under 1F(a) like other exclusions does not apply automatically but is subject to critical evidential scrutiny. This requires a preponderance of evidence clearly assessing the elements of—knowledge, intent, culpable acts, complicity, involuntariness, duress, and self-defense. The last three function as defenses to the persecutor bar. Under the United States asylum and withholding law, the initial burden rests on the DHS to show that a persecutor bar applies. Once, a prima facie case is established by the DHS, the burden shifts of the applicant to demonstrate by

---

[1572] *Id.* at 912; *Aguirre-Aguirre*, *supra* note 1135 at 415, 427-28, 511. [quoting *Fedorenko* the Court said that the proper inquiry should focus on whether particular conduct can be considered assisting in the persecution of civilians.].

[1573] 208(b)(A)(i) [asylum bar on persecutor of others]; 241(b)(3)(B)(i) [withholding bar on persecutor of others, an earlier statutory bar on aliens deportable for participation in Nazi persecution or genocide].

a preponderance of the evidence that the grounds of a statutory bar do not apply.[1574] Where a piece of evidence shows that one of the grounds of the statutory bars applies to the applicant, he or she would be required to prove by evidence that such an act was not done by him or her in or to the contrary that he could be absolved under an exception.[1575] Notably, proof of "prior or contemporaneous knowledge" is necessary to demonstrate a guilty mind (intent) and nexus to persecution before the persecutor bar can be invoked. The defense of duress and self-defense are necessary defenses that can mitigate the bar. Despite the established standard, some controversial decisions of courts have conflated self-defense and duress with complicity and in certain situations misconstrued involuntariness with persecution.[1576] The Supreme Court has emphasized the need for assessment of knowledge, motivation and voluntariness before invoking a persecutor bar.[1577] Likewise, the Ninth Circuit in *Vukrimovic v. Ashcroft*[1578]excoriated the IJ for conflating self-defense with persecution, arguing that the right to self-defense is one of the most ancient human rights and criminal law defense in the Anglo-American acts of self-defense is an important exception to persecutor bar. As noted by the court, to misconstrue an act of self-defense as persecution would run afoul of the statutory requirements of "on account of" and to the contrary deny asylum and withholding to a victim or potential victim of persecution. A persecutor triggers exclusion from refugee relief as well as deportation. The consequences are far more serious than criminal conviction and sentence, even egregious when misapplied on refugees to WFF for persecution. Therefore, adjudicators of exclusion claims should perceive themselves as arbiters on a judgment seat of life and death, hence should consider the totality of

[1574] *See, e.g.* 8 C.F.R § 1208.13(c)(2)(ii).
[1575] 8 C.F.R § 1240.8(d); Musalo et aal, *supra* note 9 at 912.
[1576] *Hernandez* in *Bah,* supra *note 63* [holding that duress defense is irrelevant]
[1577] *Aguirre-Aguirre*, *supra* note 1135 at 559; Musalo et aal, *supra* note 10 at 912.
[1578] 362 F. 3d 1247 (9th Cir. 2004).

circumstances as well as possible exceptions to void a miscarriage of justice. Abuse of such discretion would make cynical the purport of the bars and render the purpose of the Convention meaningless.

6.4.2 Non-Political Serious Crime Bar (NPSC)

Article 1F(b) of the Refugee Convention identified "non-political serious crimes" (NPSC) committed outside the country of refugees as a ground for exclusion. Although, the Convention failed to define what would constitute "NPSC." According to ECRE, Article 1. F(b) was drafted as part of an international solution to "potential conflicts between extradition treaties and refugee law."[1579] The rationale is that by excluding non-political criminals or extraditable aliens from the refugee definition, a fugitive would not exploit the advantage of the Convention's sanctuary and will be made to face justice in his or her country. Apparently, this conflicts with the religious meaning of sanctuary as seen in Chapter One, which rather shelters fugitives for the purposes of humanitarian protection, purgation, and transformation. In other words, the non-derogability of nonrefoulement under the ancient religious sanctuary practice is absolute and not subject to any exclusion. In contrast, Article 1. F(b) bars non-political criminals.

Because of the lack of definition, there is no uniformity in domestic interpretations of the meaning and scope of non-political serious crimes bar. The UNHCR Handbook has also acknowledged that the term serious "non-political" crimes for the purpose of the Convention's exclusion is connotational and varies with legal systems.[1580] Divergence in countries' legislations and criminal codes equally affect the interpretations of what constitutes grave crimes. Moreso, as Nadia Yakob observes the relationship between political and non-political is neither intuitive nor

---

[1579] ECRE, *supra* note 1505 at 257-285.
[1580] The Handbook, *supra* note 349 at para. 155.

self-evident and must be contextualized and approached objectively.[1581] Therefore, a credible analysis of NPSCs will examination of a totality of action alongside mitigating factors as well as the persecution feared. On this note, Goodwin-Gill recommended that adjudicators evaluating individual responsibility should pay attention to a person with "a well-founded fear of severe persecution, such as would endanger life or freedom," to ensure that such a person can only be excluded for the most serious reasons. The rationale here is to establish proportionality in the assessment of claims. Paragraph 156 of the UNHCR Handbook suggests the need for adjudicators "to strike a balance between nature of the offense presumed to have been committed by the applicant and the degree of the persecution feared."[1582] The word "presumed" implies that a claimant has not been found guilty by any competent jurisdiction and can be presumed innocent before the law. In other words, for such a person to be excluded from refugee protection, his crime must be a grave one to make him a fugitive of justice.[1583] In evaluating the nature of an applicant's NPSCs, it is imperative to assess all relevant factors, including possible defenses and mitigating factors, circumstances leading to flight and the danger feared.[1584] Other important factors to be considered include a grant of pardon or amnesty and their effects on the applicant's criminal character.

Generally, under the United States law, withholding deportation is mandatory if the Attorney General determines that an alien's life or freedom would be threatened, or an alien establishes that he or she is more likely than not to face persecution on the five Convention

---

[1581] Nadia Yakoob, *Political Offender or Serious Criminal? Challenging the Interpretation of "Serious, Nonpolitical Crimes" in INS v. Aguirre-Aguirre,* 14 GEO. IMIGR. L. J. 545, 551-552 (2000); Musalo et aal, *supra* note 10 at 913.
[1582] The Handbook, *supra* note 349 at para. 156.
[1583] *Id.* at 88 at para. 156.
[1584] *Id.* at para. 157; Good-will Gill, *supra* note 269 at 106-107.

grounds.[1585] However, such relief is not available if the Attorney General finds that an alien has committed a NPSC before arriving in the United States.[1586] A person is barred from asylum and withholding if "there are serious reasons for believing that the [person] has committed a serious nonpolitical crime outside the United States prior to the arrival of the [person] in the United States."[1587] In *McMullen v. INS,*[1588] a denial of asylum and withholding on the ground of NSPC was upheld by the Ninth Circuit Court. McMullen deserted the British Army and joined the Provisional Irish Republican Army (PIRA) where he participated in a bombing of two military barracks and took active parts in other militarized activities from 1972-1974. After he resigned from PIRA in September 1974, he was arrested in Ireland and charged with inciting riots as a member of PIRA and for unlawful possession of arms. After his release, he was pressured by PIRA to join the group in later activities involving housing, training of PIRA members and illegal transfer of arms. Given his background, the Ninth Circuit found that his violent involvements with PIRA could come within the scope of the NPSC bar and further clarified the Convention's meaning to apply to:

> …a "crime that was not committed out of "genuine political motives," was not directed towards the "modification of the political organization or…structure of the state," and in which there is not direct, "causal link to the crime committed and its alleged political purpose and object…even if the preceding standards are met, a crime should be considered a serious

[1585] 8 U.S.C. §1253(h)(1); *Stevic, supra* note 662 at 407, 429-430.
[1586] §1253(h)(2)(C).
[1587] INA §§ 208(b)(2)(A)(iii); 241(b)(3)(B)(iii), 8 U.S.C. §§1158(b)(2)(A)(iii); 123(b)(3)(B)(iii).
[1588] 788 F. 2d 591 (9th Cir. 1986).

> nonpolitical crime if the act is disproportionate to the object, or if it is "of an atrocious or barbarous nature."[1589]

From the excerpt, relevant inference can be made to the thin line between political and non-political crime. In the case of McMullen, part of his activities with the PIRA has causal connections with politics given that the fact of the case attributed the object of his bombing to an attempt to prevent a planned confrontation of the British Army with Catholic demonstrators. The religious conflict here is inseparable from politics. However, the focus is on the motivations for the alleged crime committed, especially the coordinated illegal arms shipments and the PIRA terrorist attacks which raise questions of insecurity and criminal responsibility. The decision of the Ninth Circuit here is unquestionably justified and coherent with international criminal accountability.

Additionally, courts have grappled with some approaches like the proportionality test in determining excludability in NPSCs. In *Aguirre-Aguirre v. INS,*[1590] the Supreme Court faulted the Ninth Circuit Court decision's decision that required the Board to evaluate the respondent's acts (in relation to their political objectives) following the UNHCR Handbook's approach of a balance of proportionality of the gravity of persecution feared against the seriousness of the crime committed.[1591] The respondent testified his involvement in several acts of protest on the government's policies in Guatemala, including burning buses, assault on passengers, and destruction of private properties. IJ granted his application, but BIA vacated the decision finding him excludable under "NPSC" by applying a weighing test developed in an earlier case.[1592] The

[1589] *Id.* at 595 [noting that the court cited Goodwin-Gill while adopting the UNHCR Handbook].
[1590] 526 U.S. 415 (1999).
[1591] *Id.* at 428 [holding that the Ninth Circuit error is clearest with its decision that BIA must balance respondent's criminal acts with against his risk of persecution in Guatemala].
[1592] BIA held that the common law or criminal character of the respondent's acts outweighed their political nature.

Ninth Circuit faulted BIA's reason and failure to apply the Handbook's proportionality test. At Supreme Court, the Court upheld the BIA decision and aligned its interpretation with *Chevron* deference, which *gives meaning to ambiguous statutory terms through a case-by-case analysis*.[1593] Apparently, the Court made it clear that BIA's denial was pursuant to the statutory requirements of §1253(h) and that neither the Attorney General nor the United States courts are bound to the UNHCR Handbook.[1594] The decision reaffirms our initial argument that in events of conflicts, the United States courts have deferred to domestic laws, as opposed to treaty obligations. This poses jurisprudential challenges in terms of navigating the contours of the bars as well as balancing the probabilities of WFF. In line with the UNHCR recommendation, ECRE endorses the application of "a balancing proportionality between the nature of crime…and the likely persecution feared."[1595] Whereas this has not received strong affirmation in the United States, the principle of proportionality operates at the level of human rights scrutiny to ensure that bona fide claimants are not excluded by a wrongful application of the NPSC bar.

6.4.3 Serious Crimes and Danger to National Security of Host Country Bar

Whereas Article 1F, excludes aliens who do not meet the inclusion criteria because of their criminal antecedents, Article 33(2) is an exception to nonrefoulement. Article 33(2) that "[T]he benefits of" nonrefoulement may not be claimed by "a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is…."[1596] It applies to potential refugees, whose presence is deemed to reasonably constitute a risk to their host country, either because of crime committed or due to a criminal conviction. The justification

[1593] Citing *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 423-433 [reasserting that Chevron deference citing INS v. Cardoza-Fosenca* 480 U.S. 421-425) *Id.* at 428.
[1594] *Id.* at 425-428.
[1595] ECRE, *supra* note 1505 at para. 42.
[1596] 1951 Convention, *supra* note 12 at art. 33(2).

primarily is to safeguard the security of the host country as well as a deterrent. IRL will not fairly provide sanctuary for criminals or terrorists who would become a danger to a destination country. Understandably, every State will prioritize the safety of its citizens first before considering others. A state's duty to preserve its security correlates with a duty to participate in international order and security.

Article 33(2) should be applied discreetly. To prevent a frivolous or presumptuous application, Article 33(2) emphasized establishing evidence of criminal responsibility or evidence of "…having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of that country."[1597] The implication is that the reasonability of the law is not presumed but must be proven by a preponderance of the evidence that is reasonably verifiable by a credible fact-finder, taking cognizance of all surrounding circumstances.

Comparably, the United States has developed several laws of inadmissibility and deportability, framed ostensibly from the notions of Articles 1F and 33(2), but with certain variations in terms of scope and applicability. For instance, INA §208 [8 U.S.C. §1158] and INA § 241[U.S.C. § 1231] authorize the Attorney General to remove an alien determined to be inadmissible or removable if he or she constitutes a risk to the community.[1598] Generally, the bar applies to aliens who are convicted for particularly serious crimes and those whom there are reasonable grounds to believe that they constitute a danger to national security. However, there are no significant indices or thresholds that underly the boundaries of national security risk. Different factors of political interest, national convention, ideologies, and political rhetoric have

[1597] *Id.* at art. 33(2).
[1598] INA §208 [8 U.S.C. §1158]; INA § 241[U.S.C. § 1231].

impacted differently on the construction of crime and insecurity. These also have influence in the construction and assessment of the inadmissibility and exclusions based on national security bars. A typical example is the Trump Administration's rhetoric that created a national security bar for the undocumented and immigrants of color. This was enforced through executive orders demonstrating a politically motivated religious and racial exclusion in pretext of security fears.[1599] To address possible excesses and the danger of a restrictive interpretation of Article 33(2), the UNHCR has warned on the need evaluate the security risk and particularly serious crimes bars within the framework of international law.[1600] Refugee scholars like James Hathaway and Colin Harvey have equally reaffirmed the purpose of Article 33(2) in protecting a country of refuge, however noting the Convention's limitations, in authorizing a government "to refuse to protect a refugee whose presence threatens its most basic interest…a receiving state may even return a dangerous refugee to face the risk of persecution in his or her state of origin…."[1601] This raises serious concerns about the danger of a possible misapplication of Article 33(2). It is therefore important to strike a balance between politically imputed national security risk and actual risk. Assessment of an individual's criminal liability is the surest way for probing the antecedent of a petitioner in conformity with the Convention's test of "reasonable grounds" where evidence of criminal conviction seems remote.

[1599] *See, e.g.,* Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 10:41 AM), https://twitter.com/realDonaldTrump/status/1056919064906469376 (referring to immigrants seeking protection "[M]any Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border."); Donald J. Trump (@realDonaldTrump), Twitter (Oct. 22, 2018, 8:37 AM), https://twitter.com/realDonaldTrump/status/1054351078328885248 ("Criminals and unknown Middle Easterners are mixed in."); President Trump's Remarks on Border Security and Government Funding, C-SPAN (Feb. 15, 2019), https://www.c-span.org/video/?457952-1/president-trump-delivers-remarks-border-securitygovernment-funding ("We're talking about an invasion of our country with drugs, with human traffickers, with all types of criminals and gangs.").

[1600] Musalo et aal, *supra* note 10 at 923-4; Rene Bruin & Knees Waters, *Terrorism and the Non-Derogability of Non-Refoulement,* 15 INT'L J. REFUGEE L. 5 (2003).

[1601] James C. Hathaway & Colin J. Harvey, *Framing Refugee Protection in a World of Disorder,* 34 CORNELL INT'L L. J. 254, 260 (2001).

6.4.4 Applying Security and Particularly Serious Crime (PSC) Bar

In deciding cases on "particular serious crime" bar, the United States courts have centered on establishing the seriousness of a crime, either by a conviction and the security risk such an alien would cause to a host community if allowed to stay. This is different from a presumption of risk based on racial construction. Apparently, the rationales to the bar are threefold—ensuring that victims of crime face criminal accountability, avoiding abuse of asylum discretion or withholding by sheltering fugitives and protecting the security of host communities from dangerous criminals who may exploit asylum to evade accountability. By implication, this accords with common sense and the principle that he who comes to equity must come with clean hands. In the *Matter of Fentescu,*[1602] a twenty-seven-year-old Romanian native was granted refugee status and paroled into the United States on April 9, 1980, pursuant to Section 212(d)(5) of the Act. In November of the same year, he was convicted in the Circuit Court of Cook County, Illinois for burglary with the intent to commit theft contrary to Chapter 39, section 19-1 of the Illinois Revised Statutes.

In his oral decision in 1981, IJ found Mr. Fentescu excludable pursuant to section 212(a)(9),[1603] having been convicted of a crime involving moral turpitude and denied his petitions for asylum and withholding. The applicant appealed against the denial. Upon appeal, BIA laid down the important standards for assessing claims on PSCs, while upholding the previous denial, it held that:

[1602] 18 I. & N. Dec. 244, 246 (BIA 1982).
[1603] INA, 8 U.S.C 1182(a)(9).

1. An alien who has been convicted of a crime involving moral turpitude is not statutorily ineligible for asylum or withholding deportation. 2. Withholding of deportation and asylum are not available to an alien, having been convicted by a final judgment of a "particular serious crime," constitutes a danger to the community of the United States. 3. A "particular serious crime" under section 243(h)(2)(B) of the Immigration and Nationality Act, 8 U.S.C. 1253(h)(B), is not equivalent of "a serious nonpolitical crime" under section 243(h)(2)(C) of the Act, and is, in fact, more serious than a "serious nonpolitical crime." 4. A determination of whether a crime is a "particular serious crime" will depend upon specific facts in each case and, in judging the seriousness of a crime, the Board of Immigration Appeals will consider such factors as the nature of the conviction, the circumstance and underlying facts, the type of sentence imposed and, and most importantly, whether the type and circumstances of the crime indicate that the alien will be a danger to the community.[1604]

Truly speaking, the benchmark issued by the BIA accords with the statutory principle under the Excludable Act of 1952[1605] as well as the Convention. Significantly, *Frentescu* asserted that PSCs and the presumption of danger to the community are inextricably connected.[1606] Although the statute was silent on the meaning of PSCs, *Frentescu* has given some clues for determining when an alien is excludable on grounds of PSCs. It reflected the UNHCR Handbook's guidance

[1604] *Id.* at 244.
[1605] *See, e.g.,* Sec. 212(a)(9); 8 U.S.C. 1182(a)(9).
[1606] *Frentescu* at 244-246.

on PSCs. Significantly, re-emphasize the need to evaluate PSCs within a holistic framework by assessment of the totality of the circumstances.[1607] The principle was involved in the *Matter of Carballe,[1608]* citing *Frentescu,* BIA identified significant correlations between conviction on PSCs and danger to the community.[1609] In *Carballe,* BIA upheld the decision of the IJ, finding the applicant excludable for having convicted of PSCs in a final judgment of a court, which makes him a danger to the community of the United States under section 243(h)(2)(B).

Carballe, a Cuban native was denied asylum and withholding deportation by IJ in a decision dated February 6, 1985. The 22-year applicant appealed to BIA and had his appeal dismissed on the ground that he is excludable having been convicted of a PSC and constitutes a danger to the community of the United States within the meaning of section 243(h)(2)(B) of the Act. His criminal conviction at the Circuit Court of Dade County, Florida was for armed robbery, resulting in a fifteen-year sentence. He was incarcerated at the time of the deportation hearing. The applicant's argument through his counsel was that the IJ erred in interpreting 243(h)(2)(B) given that, according to the counsel, the referred section requires two separate factual findings to determine if the applicant/respondent has committed a PSC and a second distinct finding if the applicant "now" constitutes a danger to the community of the United States, giving special consideration to the present. The respondent counsel further argued that these factors must be scrutinized in the light of present circumstances considering evidence of rehabilitation. Of course, the respondent's aggressively given that criminal proceedings must be thoroughly weighed to avoid double jeopardy. However, the claim is unsustainable by the legislative history and precedence that proof of criminal conviction for a PSC would naturally raise a presumption

[1607] *Id.* at 244-246.
[1608] 19 I. & N Dec. 357 (BIA 1986).
[1609] *Id.* at 347; *Frentescu supra* note 1606 at 244, 246.

of a danger to the community of the United States.[1610] Although such presumption is not irrebuttable, Carballe's case is incapable of shouldering the burden here. He sought asylum while serving a jail sentence for armed robbery. His attorney did not argue to the contrary to rebut the presumption of a danger to the community of the United States. BIA's position is clear. A conviction for armed robbery and offense involving the use of firearms are felonies, grave heinous and dangerous and constitutes a ground of exclusion for asylum and withholding deportation.[1611] The rationale behind section 243(h)(h)(2)(B) among others is to reinforce criminal accountability, a deterrent for criminals, complimenting criminal law, and to preserve national security.

In 1990, Congress expanded the framework of PSCs requirements with the addition of certain crimes as aggravated felonies.[1612] The offenses under the aggravated felony include but are not limited to murder, rape, sexual abuse of minor, illicit trafficking of a controlled substance, illicit trafficking of firearms or destructive device, tax evasion, re-entry after deportation or theft.[1613] These offenses may be committed with within or outside the United States, in so far as the sentence imposed has been served within the past five years. For the purposes of asylum, all aggravated felonies are considered *per se* PSCs.[1614] For withholding deportation, all aggravated felonies for which an individual was sentenced to aggregate terms of five years imprisonment, or more are also *per se* PSCs.[1615] In other words, the threshold is higher with withholding than asylum. But whereas the latter requires aggregate terms of five years

---

[1610] *See, e.g. Frentescu, supra* note 1606 at 244, 246; *Matter of Rodriguez-Coto,* Interim Decision 2985 (BIA 1985).
[1611] *Id.*
[1612] INA §101 (a)(43), 8 U.S.C. §1101(a)(43).
[1613] *Id.*
[1614] INA §208 (b)(2)(B)(i), 8 U.S.C. §1158(b)(2)(B)(ii).
[1615] INA §241 (b)(3)(B)(i), 8 U.S.C. §1231(b)(3)(B).

imprisonment or more, for some aggravated felonies, one year term of imprisonment is all that is required to meet the designation as well as constitute a bar. Hence, all aggravated felonies constitute, but not without a case-by-case evaluation to ensure that the ground of exclusion interpreted as *per se* PSCs meets the standard of the Act,[1616] and taking cognizance of the nature of the conviction as well as sentence imposed.[1617] This judicial endeavor reinforces the intersectionality of refugee law with criminal justice as well as international security. The role of the judicial officer here is most valued as that of a security officer in protecting the security of an asylum nation, to ensure that discreetness in conforming with the rule of law is not compromised.

6.4.5 Danger to Security and Terrorism Bar

Heightened focus on security became part of the aftermath of 9/11 in United States. The unprovoked terrorist attack on the United States security caused a significant expansion of its immigration on terrorist activities and terrorist organizations to ensure the exclusion of any person who has engaged directly or indirectly in terrorist network and activity.[1618] Any individual who belonged to a terrorist organization or engaged in a terrorist related activity is inadmissible and therefore, ineligible for most immigration reliefs, including asylum.[1619] INA created a broad definition of terrorist related activities to apply to individuals and activities that are not commonly associated with terrorism. These encompass militia activities, receiving or supporting military training or combat activities in armed conflicts by independence movements.

[1616] INA §208 (b)(2)(B)(i), 8 U.S.C. §1158(b)(2)(B)(ii); *Frentescu, supra* note 1606 at 244, 246.
[1617] *See, e.g. Matter of N-A-M-,* 24 I. & N. Dec. 336 (BIA 2007).
[1618] INA §212 (a)(3)(B)(i)(I), 8 U.S.C. §1182(a)(3)(B)(i)(I) [codified in the Immigration Act of 1990 Pub. L. No. 101-649, 104 Stat. 4978(1990)].
[1619] Id.; INA §208(b)(2)(A)(v), 8 U.S.C. §1158(b)(2)(A)(v).

Besides, INA made no exception to freedom fighters, even when such a group is supported by the United States government. The application of the bars extends not only to the actors but to their spouses and children. In many cases, such construction of "paper terrorist,"[1620] has posed a unique challenge on vulnerable women and children who are in dire need of protection.

Ordinarily, a person who is found to be inadmissible because of his or her involvement with a terrorist organizations or activity is regarded as a danger to the United States, therefore barred from asylum and withholding.[1621] Generally, an alien may be barred for asylum by the terrorism bar pursuant to INA §208(b)(2)(A)(v), 8 U.S.C. §1158(b)(2)(A)(v) but for withholding removal the terrorist activity is defined under the danger to security bar.[1622] In the *Matter of A-H-,*[1623] the terrorist activity was defined broadly within PSCs that pose serious risks to foreign relations, defense, human security, and economic interest.[1624] *A-H-* measures the overbroad standard of the INA that defined a terrorist activity to include kidnapping, assassination, hijacking, use of firearms, nuclear, biological, or chemical weapons ("other than for mere monetary gain"), with the intent to "endanger the safety of one or more individuals or to cause substantial damage to property."[1625] Also, INA §212 (a)(3)(B)(iii)(I) added to the broad definition an attempt, a threat or conspiracy to do or engage in a terrorist activity.[1626] These include planning or executing acts of terrorism, soliciting others to do so or providing material support to a terrorist organization or support in recruiting members or material support for the

---

[1620] Pooja R. Dadhania, *Paper Terrorists: Independence Movements and the Terrorism Bar,* 108 CAL. L. REV. 1733-1780 (2020).
[1621] INA §208(b)(2)(A)(iv); 1231(b)(3)(B)(iv).
[1622] INA §241 (b)(3)(B)(iv), 8 U.S.C. §1231(b)(3)(B)(iv).
[1623] 23 I. & N. Dec. 774 (A.G. 2005).
[1624] *Id.*
[1625] INA §212 (a)(3)(B)(iii)(I), 8 U.S.C. §1182(a)(3)(B)(iii).
[1626] INA §212 (a)(3)(B)(iii), 8 U.S.C. §1182(a)(3)(B)(iii).

organization.[1627] The framing of material support broadly includes providing housing, transportation, funds or counterfeit documents to a terrorist member or organization.[1628]

In the aftershock of 9/11, the listing of terrorist organizations becomes a duty of the State and an obligation to antiterrorism and counterterrorism. The Secretary of States assumed the important role to designate some organizations as foreign terrorist organizations (FTO) because of their activities.[1629] The groups are identified in their tiers. Under Tier 1, the focus is on the characteristics of a terrorist group, which form the basic criteria for declaring it as an FTO are: 1). The organization must be foreign, 2). The organization must engage in or intend to engage in terrorist activity or terrorism under INA §212 (a)(3)(B), 8 U.S.C. §1182(a)(3)(B).[1630] 3). The terrorist activity of the FTO must have threatened the United States national security (defense, foreign relations, economic interest) or a security of its national(s). In Tier II, an organization is designated as a terrorist upon publication in the federal register by the Secretary of State, in consultation with or upon the request of the Attorney General, after findings that the organization engages in terrorist activity as defined in INA §212 (a)(3)(B(iv)) (8 U.S.C. §1182(a)(3)(B)(iv). This is referred to as the "Terrorist Exclusion List" (TEL). Any organization or member designated under TEL is excluded and barred from entering the United States.[1631] Tier III, popularly known as undesignated terrorists, refers to "a group of two or more individuals

[1627] INA §212 (a)(3)(B).
[1628] INA §212 (a)(3)(B)(iii), 8 U.S.C. §1182(a)(3)(B)(iii).
[1629] INA §219, 8 U.S.C. §1189.
[1630] *See, e.g. Terrorism-Related Inadmissibility (TRIG),* USCIS, https://www.uscis.gov/laws-and-policy/other-resources/terrorism-related-inadmissibility-grounds-trig [*hereinafter* "TRIG, USCIS]; *Foreign Terrorist Organization,* U.S. DEPARTMENT OF STATES, https://www.state.gov/foreign-terrorist-organizations.
[1631] *Id.;* 8 U.S.C §1182 [Section 411 of the USA Patriot Act of 2001) authorizes the Secretary of States, in consultation with the Attorney General, to designate terrorist organizations for immigration purposes.]; *Terrorist List,* DOS, https://www.state.gov/terrorist-exclusion-list/.

whether organized or not, which engages in or has a subgroup which engages in" terrorist activity.[1632]

Evidently, the field of statutory war on terrorism was dominated by the expansive scope of exclusion as a tactical war on individuals and terrorist networks. Given its broad nature, many concerns are raised on the possibility of excluding victims of terrorist attacks under the material support and terrorist activity definitions. With the ascendancy of antiterrorism reforms such as the USA Patrol Act[1633] and Obstruct Terrorist Act REAL ID of 2005,[1634] more restrictive bars were introduced. Among the reforms brought by the REAL ID and the USA Patriot Act include the introduction of Tier II and III definitions of terrorist related activity, terrorist organization and what it means to provide support to a terrorist group. Also, possibilities of proof, or defense were contemplated, but remotely.[1635] Apparently, INA 212(d)(3)(B) recognized certain situational exemptions as well as group-based exemptions. These include exceptions to military support or training under duress. In the case of duress, an alien claiming any of these is required to adduce clear and persuasive evidence of the entire surrounding circumstance to prove duress under INA 212(d)(3)(B) or show that he or she did not know or would not reasonably have known that the group was a terrorist organization.[1636]

Knowing that situations of armed conflicts naturally reproduce displacement and refugee crisis, the expansive scope of terrorism bar compounds the challenges of refugees fleeing conflict related persecutions who may have participated in armed combats or those who receive related

---

[1632] INA §212 (a)(3)(B)(iv), 8 U.S.C. §1182(a)(3)(B)(iv); TRIG, USCIS.
[1633] This is also known as the Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorist Act of 2001. *See,* USA Patriot Act, Pub. L. No. 107-56, 115 Stat. 252 (2001).
[1634] REAL ID Act, Pub. L. No. 109-13, div. B, 119 Stat. 231 (2005).
[1635] Id; INA §212 (a)(3)(B)(vi), 8 U.S.C. §1182(a)(3)(B)(vi)
[1636] INA §212 (a)(3)(B)(iv)(VI)(dd), 8 U.S.C. §1182(a)(3)(B)(iv)(VI)(dd).

kind of military training or provided support in revolutionary movements.[1637] Under the contemporary breathtaking definition of terrorism, even survivors of religious, political or racial persecutions, who participated in their countries' uprising as well as child soldiers will be excluded. International law in the post-World War II regime did not articulate political wars or struggle for self-determination as a crime but the latter is considered as a right for states and emerging nationalities. [1638] Moreso, in recent times new countries have emerged through political struggles as seen in Eritrea, South Sudan, Pakistan, and East Timor will be barred from asylum in the United States.

4.4.6 Implications of the Terrorism Bar for Women Making Gender Claims

As early indicated, the expansion of antiterrorism legislation under the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 [amended in INA section 212] significantly enlarged the scope of definitions for terrorist activity and terrorist organization. Although INA section 212(d)(3)(B) made some exceptions, including duress and voluntary medical care, none of these contemplated any gender exceptions under the terrorist bar. In *Singh-Kaur v. Ashcroft,*[1639] DHS and the court have construed that minimal support is *perse* material, excluding any nominal exception. Even though women and children are the most targeted in security risk,[1640] mainly terrorist attacks,[1641] the drafters of the terrorism bar failed to incorporate any gender exception. the scope of the definition of terrorist activity will likely pose exclude female victims of terrorist

---

[1637] INA §208(b)(2)(A)(iv); 1231(b)(3)(B)(iv); *Hussain v. Mukasey,* 518 F.3d 534, 537, (7th Cir. 2008) [noting that INA stretches the term terrorist or terrorism to refer to use of violence for political end].
[1638] UNGA, Montevideo Convention on the Rights and Duties of States 6 December 1949 A/RES/375, Fourth Session, entered into force 26 December 1934, art. 8 [on the recognition of new states]; UN Charter 1945, *supra* note 77 at art. 1(2); ICCPR 1976, *supra* note 82 at arts. 1 and 12.
[1639] 385 F. 3d 293 (3d Cir. 2004) [noting that material support does not mean immaterial, even minimal counts in so far as it enhances an act of terrorism].
[1640] *See, e.g.* Enloe, *supra* note 113 at 234; Via, *supra* note 113 at 42-53 Ahall, *supra* note 113 at 2-50.
[1641] *Matter of A-C-M-* 27 I&N Dec. 303 (BIA 2018).

abduction like captive wives in wartime since the terrorism bar applies to spouse and children. The danger of misapplying the terrorism bar by over-stretching the boundaries of actors and victims is bound to subject potential refugees to double jeopardy. Such danger is inescapable with a wide scope of terrorist activity and organization.[1642]

Debates have affirmed have shown the difficulties of implementing the REAL ID Act's rigorous credibility requirement on a twenty-nine-year Albanian woman who suffered horrible marital servitude in a coercive relationship and later gang rape by a rebel group during a rebellious conflict in Albania. She was denied asylum and removed from the United States, until the New York Times reported her case, which provoked the government's action to have her return to the United States for a *de novo* asylum hearing.[1643] There are several unreported cases of thousands of women who are excluded by the broad concepts of terrorist activity, terrorist organization, and material support, regardless of their vulnerabilities.

In *Matter of A-C-M-,*[1644] a Salvadorian woman was found to be ineligible for cancellation of removal under the "material support" and "military training" terrorism bar pursuant to section 212(a)(3)(B)(i)(VII). She was abducted by the guerrillas in El Salvador in 1990 and was coerced into undergoing weapon training to be able to perform certain forced labor such as cooking, washing, and cleaning their clothes. Her untold brutal experiences during her period of captivity include the emotional and psychological torture of witnessing the killing of her husband, a sergeant in the El Salvador army. He was forced to dig his grave before he was executed by the guerrillas. At her asylum hearing, IJ found her removable but granted her cancellation, which

[1642] INA §212 (a)(3)(B)(iii), 8 U.S.C. §1182(a)(3)(B)(iii); INA §212 (a)(3)(B)(iv), 8 U.S.C. §1182(a)(3)(B)(iv).
[1643] *See, e.g.* Marisa S. Cianciarulo, *Terrorism and Asylum Seekers: Why the Real ID Act is a False Promise,* 43 HARV. J. LEG., 100-137, 133 (2006).
[1644] 27 I&N Dec. 303 (BIA 2018).

was an available relief under INA § 240A(b)(1).[1645] Notwithstanding her horrific past persecutions, the DHS appealed against the decision, arguing that she was ineligible for cancellation of removal and inadmissible under section 212(d)(3)(B); although DHS conceded to her eligibility to apply for asylum and withholding removal under CAT.

In 2016, the respondent sought asylum and withholding removal under CAT. IJ noted that she could be granted humanitarian asylum and withholding under CAT,[1646] but excluded her on grounds of material support. Instead, she was granted her temporary relief—deferral of removal, which will likely keep her in detention. On appeal, BIA critically examined the contextual meaning of the "material support" bar and the circumstances of the respondent, finding that her forced labor of washing, cooking, and cleaning do not meet the threshold requirements of "promoting, sustaining, and sustaining organization's goals.[1647]

The judicial review movement from IJ to BIA underscores the potential challenges compounded by the terrorism bar creating a thin border between a real terrorist and a paper terrorist. *A-C-M-* reflects a typical example of a constructed terrorist. Many of her likes are re-traumatized in asylum courts, excluded, and returned to countries where they have fled from persecution, hostages, kidnap, sexual exploitations and forced labor in conflict areas. As some scholars have argued, the impact of strict application of the terrorism bar without holistic evaluation of exceptions, and the totality of circumstantial evidence would likely conflict with the humanitarian purpose of IRL. Knowing that a misapplication of the terrorism bar could be

---

[1645] *See, e.g.* INA § 212 (d)(3)(B).
[1646] Citing *Matter of Chen,* 20 I&N Dec. 16 (BIA 1989).
[1647] *Id.* at 303-4 [citing *Haile v. Holder,* 658 F. 3d 1122, 1129 (9th Cir. 2011 noting that the definition of "material support" was broad enough to include collecting funds, supplying provisions, and passing along secret documents – also citing *Matter of S-K-,* 23 I&N Dec. at 943].

deadly, there is a need for conscious, and tactical scrutiny to ensure that only excludable terrorists are barred from refugee relief.

Deferral of removal under CAT is the only remedy available to terrorism bar.[1648] Although this requires a rigorous evidential burden like withholding under CAT, the relief available under deferral is quite minimal. Deferral does not afford any opportunity for release from detention or authorization to work.[1649] Considering the consequences of exclusion or even deferral, adjudicators evaluating claims on terrorism bar must be discreet, taking into account the totality of circumstances as well as possible defenses or exception before invoking an exclusion bar. The danger of exclusion and return of an innocent refugee is tantamount to preventable torture and death. This, of course, will make cynical the humanitarian purpose of IRL.

6.5 Other Forms of Inadmissibility and Exclusion Policies

6.5.1 National Security Threat Bar and Inadmissibility under the Trump Administration

In the wake of 2016-2020, the United States experienced an uncommon increase in deportation orders. Barely three weeks after the Presidential inauguration of President Donald J. Trump on January 27, 2017, the new Administration issued three Orders banning entry of aliens from selected Muslim countries whose nationals were projected to be a threat to the United States security.[1650] The countries were—Libya, Iran, Iraq, Yemen, Somalia, Sudan, and Syria were affected by the Executive Order 1 (EO1).[1651] The politically subjective construction of

[1648] 8 C.F.R. §§ 208.17(a), 1208.17(a).
[1649] 8 C.F.R. §§ 208.17(b)(1), 1208.17(b)(1) [stating that deferral does not grant release from detention, work permit or pathway to permanent residency like asylum].
[1650] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter "EO1". [limited entry of immigrants and non-immigrants from Muslim majority countries]; Exec. Order No. 13780, 82 Fed. Reg. 13, 209 (Mar. 3, 2017); Exec. Order No. 13780 reiterated on September 24, 2017.
[1651] *Id.*

"national security threat" provoke numerous concerns, including lawsuits.[1652] But none mitigated the effects of the political storm on executive orders. Shortly after EO1, there was an unprovoked suspension of the United States Refugee Admission Program (USRAP) for six months.[1653] Effects of the abrupt halting of the USRAP resulted in the barring of the admission of Syrian refugees indefinitely, except in countries where religious minority religious groups experience refugees' persecutions, given special preference to Christians.[1654] Apparently, this sudden closure occurred at a critical time when Syria was a hotspot of the world's humanitarian emergency, with a surge of Syrian refugees across different international doorsteps.[1655]

Notwithstanding the public outcry by human rights and pro-refugee activists, the executive order was enlarged on March 6, 2017, barring seven countries—Iran, Iraq, Sudan, Libya, Yemen, Somalia, and Syria—from the United States for 90 days[1656] and deferring refugee admission for 120days.[1657] These were applied with immediacy and without guidance on the classification of persons to be exempted or excluded. The travel ban gave no consideration for different classes of immigration status, nonimmigrants, or permanent residents. Chaos erupted with the effects of the loopholes created alongside controversial enforcement modes. Dramatic but pathetic spectacles were created at the international airports,[1658] with thousands of arrests,

---

[1652] *Washington v. Trump,* 847 F.3d 1151, 1164-69 (9th Cir. 2017); *Hawaii v. Trump,* 878 F.3d 662, 702 (9th Cir. 2017), rev'd 138 S. Ct. 2392; See Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2088 (2017).
[1653] EO1, *Op Cite* 151 [allowed exception for a "national interest" for individuals of religious minorities facing persecution in their countries like Christian refugees]; Musalo et aal, *supra* note 10 at 96-7.
[1654] *Id.*
[1655] UNICEF Syria Crisis Situation Report - 2017 Humanitarian Results (January 30, 2018). UNICEF Syria Crisis Situation Report - 2017 Humanitarian Results - Syrian Arab Republic | ReliefWeb. [noting that Syrian conflict continued to drive the largest refugee crisis in the world, with 5.4 million Syrian refugees registered in the region].
[1656] See, e.g., Exec. Order No. 13,769, 82 Fed. Reg. § 8977 (Jan. 27, 2017); Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (Mar. 6, 2017); MUSLIM BAN See Timeline of the Muslim Ban, ACLU WASH., https://www.aclu-wa.org/pages/timeline-muslim-ban.
[1657] *Id.* at 8979-80.
[1658] PRESS RELEASE, U.S. DEP'T OF HOMELAND SEC., STATEMENT BY SECRETARY JOHN KELLY ON THE ENTRY OF LAWFUL PERMANENT RESIDENTS INTO THE UNITED STATES (Jan. 29, 2017). https://www.dhs.gov/news/2017/01/29/statement-secretaryjohn-kelly-entry-lawful-permanent-residents-united-

detention, and deportation of entrants that provoked media and human rights attention.[1659] The situation provoked mass protests and a barrage of lawsuits to upend the Orders.[1660]

In *Washington v. Trump,*[1661] the Ninth Circuit Court addressed an injunction, challenging President Trump's travel ban, finding no reason to support the government's request to stay the injunction. Following the court's ruling, the Trump Administration delayed implementation temporarily.[1662] Yet unrelenting, the government issued a second travel ban suspending six of the seven countries in the previous Order, except Iraq.[1663] Two days after, two separate injunctions were filed in the Federal District Courts of Hawaii[1664] and Maryland[1665] blocking the implementation of President Trump's second travel ban, like the first. But the federal government appealed against the two injunctions. In a majority ruling, the Fourth Circuit Court upheld the injunction.[1666] But on a subsequent appeal, the Supreme Court reversed the injunction in favor of the government, asserting President Trump's constitutional authority to make foreign policy, including the decisions to permit or forbid entry into the United States.[1667] However, the

---

STATES; OFFICE OF INSPECTOR GEN., DEPT OF HOMEAND SEC., OIG-18-37, DHS IMPLEMENTATION OF EXECUTIVE ORDER #13769 "PROTECTING THE NATION FROM FOREIGN TERRORIST ENTRY INTO THE UNITED STATEs" (2017); Ernesto Sagas and Ediberto Roman, supra note.

[1659] *Timeline of the Muslim Ban,* ACLU WASH., https://www.aclu-wa.org/pages/timeline-muslim-ban [https://perma.cc/3DWN-SE5T]; *Federal Court Blocks President Trump's New Travel Ban,* ACLU (March 16, 2017). https://www.aclu.org/pressreleases/federal-court-blocks-president-trumps-new-travel-ban.

[1660] *Id.*

[1661] *Washington, supra* note at 1151, 1164-69; *International Refugee Assistant Project, supra* note 160 at 554.

[1662] *Id*.

[1663] *See, e.g.* Exec. Order No. 13,780, 82 Fed. Reg. 13,209 (March 6, 2017); *Id.* at 13,215-16.

[1664] *Hawaii, supra* note 160 at 1122,1123.

[1665] *Int'l Refugee Assistance Project, supra* note 160 at 554, 572.

[1666] *Id.;* (4th Cir. 2017); Timeline of the Muslim Ban, ACLU WASH., https://www.aclu-wa.org/pages/timeline-muslim-ban.

[1667] *See*, *e.g. Trump v. Hawaii,* 138 S. Ct. 2392 (2017) [holding that (1) President Trump fulfilled INA requirements delegating authority to the President to suspend entry by aliens or classes of aliens, upon finding that their entry would be harmful to U.S. interests; (2) the INA provision prohibiting discrimination by national origin in issuing visas does not limit the President's authority to suspend entry by certain classes of aliens; (3) that rational basis review should be applied to the Establishment Clause claim concerning the entry of foreign nationals; (4) that the Proclamation did not violate the establishment clause; and (5) that forceable relocation of U.S. citizens to concentration camps, solely and explicitly on the basis of race, is objectively lawful and outside the scope of Presidential authority…"]

Court narrowed the scope of the ban, barring the government from implementing a 90-day ban on six selected countries. It further precluded the government from executing the 120-day freeze on refugees with credible claims, who have or organization family ties in the United States.[1668] Although the decision left a void that subtly allowed the government's implementation of the exclusion orders, despite a nationwide agitation that the order contravened section 202(a)(1)(A) of the INA.[1669]

Apparently, the several lawsuits challenging the EO1 did not prevent a second and third iteration of the expansion of the travel ban (EO2 and EO3), with a third order blocking the entry of nationals from eight countries– Syria, Somalia, Libya, Iran, Yemen, Chad, North Korea, and certain high-level officials from Venezuela. But the most troubling is that EO3 failed to address refugee concerns. On October 24, 2017,[1670] another new Order was issued that allowed refugee admissions to resume, although with enhanced vetting from 11 countries.[1671] The latter imposed a stricter screening on refugee admission adopting a collaborative check of the UNHCR, National Counterterrorism Center, the Federal Bureau of Investigation, the Department of Homeland Security, and the State Department. To worsen the situation, the policy limited the admission of refugees to the barest minimum, expanding the bars beyond the fear of insecurity to project refugees as a burden to the national economy.[1672] At this time the spectrum of excludability was broadened to include the "burden to national economy" bar. The government created an unprecedented policy contrary to the Convention and legislative scope under the pretext of protecting the national economy. However, empirical evidence has flawed the

[1668] *Id.* at 138.
[1669] INA § 202(a)(1)(A) of the INA [on prohibition of race-based discrimination.]
[1670] Exec. Order No. 13,815, 82 Fed. Reg. 50055 (Oct. 24, 2017) ["Resuming the United States Refugee Admissions Program with Enhanced Vetting Capabilities"].
[1671] *Id.*
[1672] Musalo eta al, *supra* note 10 at 97.

economic burden claims as unsustainable, hence providing a contrary data showing substantial contributions of immigrants to the United States economy, especially in the health sector.[1673] Trump's executive orders eloquently displayed how political interests influence positively or negative the application of the bars.

6.5.2 Impacts of Trump's Executive Orders on Immigration Laws—Expedited Removals

The effects of the era of political exclusion prompted several other restrictions in the United States immigration laws. For example, Trump's exclusion policy enlarged the DHS's authority to remove undocumented aliens from anywhere in the United States, exceeding the scope allowed under INA §208.[1674] The 2020 Order catalyzed the existing effects of IRRIRA. Whereas Title 8 previously authorized the removal of undocumented persons who have entered illegally from within 100 miles of the border,[1675] the 2020 EO allows DHS or ICE to apprehend and deport any undocumented alien found anywhere within the US.[1676] The drastic changes shifted removal procedure from procedural determination to unprocedural removal a fair determination of claims by a competent judicial or asylum official. Policing protection seekers in the new removal procedure has increased the hardships of undocumented persons, especially women fleeing several gender related persecutions and unaccompanied minors.[1677] Statistics showed that the expedited removals from 2017 to 2019 skyrocketed compared with the percentage of deportations in the United States history—from 121,946 (42%) in 2017 to 164, 296

[1673] *Id.;* Julie Hirschfeld Davis and Somini Segunputa, *Trump Administration Rejects Study Showing Positive Impact of Refugees,* N.Y. TIMES (Sept. 18, 2017). https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html?mcubz=0&_r=0.
[1674] 8 C.F.R. § 235.3 (2020).
[1675] 8 USC § 1252(e).
[1676] 8 C.F.R. §235.3 (2020)
[1677] *Id.*; Roel Reyna, *Expedited Removal and Habeas Corpus: How a Recent Supreme Court Ruling, Combined with an Executive Order from Former President Trump Has Affected the Due Process Rights of Illegal Immigrants Detained for Expedited Removal,* 8 LINCOLN MEM'l U. L. REV. 33, 39 (2021).

in 2019.[1678] The situation creates a dangerous precedent, and give cause to question the United States nonrefoulement obligation.

Also, the most disconcerting is that the newly asserted authority under Title 8 does not permit victims in expedited removal to seek judicial review. This is a fundamental breach of Article 16 of the Refugee Convention[1679] and the 1980 Refugee Act.[1680] Yet, the decision in *Dep't of Homeland Sec. v. Thuraissigiam*[1681] has given greater impetus to the denial of rights to habeas corpus. According to Justice Alito of the Supreme Court, individuals subjected to expedited removal proceedings do not have the right to challenge their removals through a habeas corpus petition because such rights do not exist within the United States law.[1682] Of course, the decision conflicts with the purpose of INA §208.16(b)(3)(B) that mandates the Attorney General to withhold removal as a humanitarian relief under CAT.[1683] View from human rights standpoint, the decision gives cause to interrogate the United States commitment to international refugee regime and legacy to prevent torture or human rights violation, the bedrock of nonrefoulement.

Article 33(2) of the 1951 Convention does not seek to impose an unlawful burden but specifies grounds of exclusion—danger to security or pursuant to a final judgment—each determinable by a due process of law.[1684] Equally, Paragraph 155 of the UNHCR Handbook further illustrates on conditions of exclusion the difference between serious crimes—capital and

[1678] *Yearbook of Immigration Statistics 2019*, DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/yearbook.
[1679] 1951 Convention, *supra* note 12 art. 16.
[1680] 19 U.S.T. 6223; *Cardoza-Fonseca, supra* note 38 at 421, 436–3; *Negusie v. Holder,* 555 U.S. 511, 537 (2009) (Stevens, J., concurring in part] [stating that Congress amended the Immigration and Nationality Act (INA) to "bring United States refugee law into compliance with the 1967 Protocol]; 1967 Protocol, *supra* note 34, art. 1(3) [ratifying the Protocol implies commitment to be bound by the 1951 Convention].
[1681] *Dep't of Homeland Sec. v. Thuraissigiam,*140 S. Ct. 1959 (2020).
[1682] *Id*. at 1959.
[1683] § 208.16 s. 241(b)(3)(B) [Withholding removal under CAT]
[1684] 1951 Convention, *Op Cite* 1679 at art. 33(2).

punishable grave acts—as opposed to minor offenses, including any mitigating circumstances, stating that these must be considered by the court.[1685] Judicial remedy or access to court is a fundamental right in international law[1686] and under the United States law.[1687] Moreso, Article 1, Section 9, Clause 3 of the United States Constitution prohibits bill of attainder that is inflicting punishment without a judicial trial. These rights are not restricted to citizens but applied to the undocumented as well. Therefore, the expedited removal process,[1688] which denies judicial review on asylum seekers contravenes the human rights character of the United States constitution and treaty obligations. By denying procedural determination of refugee claims through a presumed exclusion clause or hasty procedural assessments by non-judicial agents, thousands of potential refugees are likely to face the danger of expulsion.

In exercising its authoritative guidance, the UNHCR has warned that countries should exercise removal conditions as a last resort, after exhausting possible human rights remedies.[1689] Even when necessary, determination of a removal process must be applied proportionately "in the sense that the danger in the country or to its community must outweigh the risk to the refugee upon refoulement."[1690] The rationale is to ensure that aliens with a credible fear of persecution are not denied protection because of unverified claims of national security threats or other exclusion criteria. Ordinarily, refugees and asylum seekers face numerous emotional, physical, and psychological conditions that are likely to militate against their discharge of evidential burdens. A situation of this kind is exacerbated by hasty assessments, threats of removal, and even unhealthy detentions. For a fair and credible assessment, adjudicators and security agents

---

[1685] The Handbook, *supra* note 349 at para. 155.
[1686] ICCPR, *supra* note 31 at art. 14(1).
[1687] U.S. Const. amend. XIV, § 2; *Gideon v. Wainwright* U.S. 335 (1963) [reaffirming the right to council as a state's responsibility where a defendant cannot afford it].
[1688] 8 U.S.C. § 1253(h)(1) (2012).
[1689] Advisory Opinion, *supra* note 23 at paras. 10-11; 1951 Convention, *supra* note 12 at art. 32(2).
[1690] *Id*.

should engage and have some psychological understanding of the above circumstances to be able to check against the problems of stereotypes, misinformation, or hasty appraisal of a genuine refugee whose WFF made be misunderstood at a face value.

6.6 Racism and the Trajectory of Exclusion Laws—The Past and Present

Despite remarkable developments in the United States immigration law,[1691] exclusion laws based on race have a long history, centuries before Trump's era of immigration bars. Historically, we find at different periods immigration laws weaved into color tapestries of racism, nativism, and economic or socio-cultural affiliations that constituted a standard for eligibility or excludability. For example, the nineteenth-century United States immigration law was primarily regulated by labor quota and family ties as criteria for admission and exclusion. These conditions primarily survived the three pillars of the United States immigration—economic/labor, family unification, and humanitarian immigration. Nonetheless, from early 1800 to 1965, immigration law was highly restricted by a series of exclusion criteria that were motivated by fear of the floodgates and to exclude Asians, especially the Chinese from becoming residents or citizens.[1692] The Page Act of 1875 specifically prohibited entry or recruitment of Chinese (female) laborers as well as aliens from Japan or any of the oriental countries, apparently associated with prostitution.[1693] Apparently, this forbade the importation of women for the purpose of prostitution, and expressly prohibited the admission of women from the listed nationalities into the United States "for lewd and immoral purposes."[1694] Despite the innovations brought under the era of civil right movement and human rights, there are still vestiges of these

[1691] The extended protections to victims of crimes (U-Visa), trafficking (T-Visa), domestic violence (VAWA) and Visa Protection for unaccompanied minors are innovative immigration reforms by the US Congress.
[1692] Chinese Exclusion Act, U.S.C.§§ 261-299 [2011].
[1693] Pub. L. 43-141.
[1694] *Id.*

laws in contemporary immigration bars. From the age of civil rights movements to the enactment of the 1980 Refugee Act period, policies of different legislative ages have impacted the bars.

Seven years after the Page Act, the Geary Act also known as the Chinese Exclusion Act of 1882 was enacted banning immigration by Chinese male laborers for ten years.[1695] In addition, the Emergency Quota Act of 1921 implemented a nationality-quota system that mostly favored immigrants from Western Europe as opposed to other nationalities, thus barring immigrants from Africa and Asia.[1696] Racial exclusion, white superiority, and color priorities were key factors in these laws. These facts are underscored in a 1938 immigration quota system allocation indicating a total of 356,081 immigrants from Western Europe, 1, 261 from Asia, and 122 from Africa.[1697] Apparently, color-based exclusion bars later permeated other non-Nordics and people of color from Latin America.[1698] Nearly five decades after, the Undesirable Alien Act (UAA) of 1929 also known as Dillingham-Hardwick Act, entry without inspection (EWI) was criminalized as a misdemeanor,[1699] and enforced with immediacy to prosecute illegal immigrants mainly from Latin America.[1700] Although the laws ostensibly intended to remedy the "deficiencies" of previous laws and to empower the government to deport "undesirable aliens,"[1701] it sustained a legacy of racial exclusion and created chains of "immigration crimes" as grounds of exclusion as well as deportation. Effects of racially based antiimmigration and imposed criminalities touched the gamut of human rights, thus representing a dark side of the United States history. Even

---

[1695] Publ. L. 47-126.
[1696] Emergency Quota Act of 1921, Pub. L. 67-5; 42 Stat. 5.
[1697] No. 104.—Immigration Quotas Allotted and Quota Aliens Admitted, BT Country of Birth: Years Ended June 30, 1925 to 1938." Federal Reserve Bank of Louis. https://fraser.stlouisfed.org/files/docs/publications/stat_abstract/pages/52753_1935-1939.pdf.
[1698] Eric S. Fish, *Race, History, and Immigration Crimes,* 107 IOWA L. REV. 1051, 1098 (2022).
[1699] *Id.* [noting that was UAA is a product of the Blease/Davis Bill alongside the Johnson Bill.
[1700] *Id.* at 051, 1098.
[1701] The following persons— specifically communists, anarchists, labor organizers and related activists were characterized as undesirable persons.

though the United States Constitution prohibits discrimination under the Equal Protection Clause,[1702] the Supreme Court has ruled in favor of the government's authority to exclude foreigners as part of its exercise of sovereignty.[1703] To sustain this reasoning, the Supreme Court has deferred to the Congressional notion of alienage, which is a disguised form of discrimination.

6.7 Effect of Exclusion and Criminalization Breaches

Consequently, the product of the exclusion laws barring certain aliens from entry into the United States is punishment for breaches. Tens of thousands of immigrants are incarcerated and prosecuted annually on cases of misdemeanor and felony for breach of unlawful entry and reentry.[1704] According to Eric S. Fisher, of 76,538 felony prosecutions in 2019, 25,426 of them (that is about 33 percent) were defendants charged with unlawful reentry,[1705] and 80, 886 misdemeanor prosecutions for similar purposes.[1706] The staggering statistics indicates that immigration related "crimes" dominate the federal criminal proceedings of the United States' court houses. Such procedures commonly result in incarceration and deportations, with greater demographics from Latin America, Asia, and Africa. Research data by Michelangelo Landgrave and Alex Nowrasteh showed a high increase in detentions from 2010 to 2018 ranging to about 83,698 immigrants detained for "illegal entry."[1707] From 2010 through 2018, ICE detention for

---

[1702] U.S. Const. amend. XIV, § 2. [on Equal Protection Clause].
[1703] *See, e.g. Fong Yue Ting v. United States*149 U.S. 698 (1893), [on Chinese Exclusion, stating "that the right of a nation to expel or deport foreigners…is absolute].
[1704] 8 U.S.C. § 1325 (2018) [misdemeanor]; Id. § 1326. [felony].
[1705] Fisher, *supra* note 206 at 1053; See Dep't of Just. Off. of Pub. Affs., supra note 1; U.S. SENT'G COMM'N, FISCAL YEAR 2019 OVERVIEW OF FEDERAL CRIMINAL CASES 3 (2020), https://www.ussc.gov/sites/default/files/pdf/ research-and-publications/researchpublications/2020/FY19_Overview_Federal_Criminal_Cases.pdf.
[1706] *Id.*; *See*, *e.g.* Press Release, Dep't of Just. Off. of Pub. Affs., Dept. of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 19, 2019), https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-relatedcases-fiscal-year.
[1707] Michelangelo Landgrave and Alex Nowrasteh, *Illegal Immigrants Incarceration Rates,* 890 POLICY ANALYSIS 1-16, 4-5 (April 21, 2020).

illegal migrants accounted for 49-89 percent compared to other forms of incarceration.[1708] Incarceration and criminalization of the undocumented are the byproducts of racial exclusion sustained by the eugenicists' ideology of otherness. As Fish observed exclusion and criminalization of immigration for immigrants of color has remained a major systemic strategy sustaining the 1920 eugenicists' tactics deployed to protect Caucasian Americans from racial contamination, and so do the exclusion antiimmigration laws.[1709] Any attempt to deconstruct Fisher would require conscious historical event-tracing from the nineteenth century Page Act through the Chinese and Asian Exclusion Laws that introduced the quota system and barred non-whites from naturalization in the United States. From the 1920s through 1965, the United States immigration laws were grafted along racial lines to preserve the "privileged" white race Asian and African contaminations.[1710] Aliens who violate the standard were subjected to severe punishment, including deportation.[1711]

Given the dark side of the United States immigration history built on racial eugenics, one can make a valid connection between the past with the present-day threat to security exclusion,[1712] economic and public health exclusion.[1713] As earlier indicated, part of the legacies of the eugenics includes the expansion of exclusion laws and criminalization of breaches with crimes of a misdemeanor for EWI[1714] and a felony for re-entry after deportation.[1715] Restrictive

---

[1708] *Id.* at 5.
[1709] *Fisher, supra* note 76 at 1053.
[1710] *See, e.g.* 8 U.S.C. § 1326; INA 1965 8 U.S.C. §§1101, 1151-1157, 1181-1182, 1201, 1254-1255, 1259, 1322, 1351 [Signed by President Lyndon B. Johnson in the guise of progressivism, yet favoring the European majority as opposed to Asian immigrants.]; *United States v. Thing* Sct. 261 U.S. 204 (1923), [held that an alien from India is not a white, hence ineligible for naturalization]; *Ozawa v. United States* Sct. 260 U.S. 178 (1922). [holding that a Japanese alien is a non-white and therefore not qualified to naturalize].
[1711] *See, e.g.* Kevin R. Johnson, *Race, Immigration Law and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness* 73 IND. L. J. 1111-1159 (1998).
[1712] Undesirable Aliens Act, 8 U.S.C. § 1326; Exec. Order No. 13,769, 82 Fed. Reg. § 8977 (Jan. 27, 2017).
[1713] Act 42 U.S.C. §§ 265, 268.
[1714] 8 U.S.C. § 1325 (2018). And unqualified as the right to prohibit and prevent their entrance into the country…"].
[1715] Id. § 1326.

bars and punishments have remained prevalent under the United States immigration history despite the developments brought by the Civil Rights Act in 1994, which outlawed discrimination on the basis of race, color, sex, religion, and nationality, paving way for a new phase of Immigration and Nationality Act in 1965 (Hart-Celler Act). For example, the advent of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA) introduced a new form of removal, allowing the DHS or security agents to carry out expedited removal of aliens who entered the country by fraudulent means, misrepresentation, or without proper travel documents.[1716] Specifically, Section 1252(e) of title eight of the US Code grants authority for expedited removal, with few exceptions under subsection (b)(1)(B),[1717] allowing immigration office to quickly deport undocumented persons who enter the United States illegally as long as they are apprehended within two weeks and within 100-miles from the border.[1718] The scope was expanded under the Trump Administration, eliminating the 100-mile range, and authorized expedited removals of undocumented persons from anywhere in the United States.[1719] The enlarged scope equally allowed ICE to expand the same authority to expedited removal of the undocumented.[1720] So far, it applications have imposed considerable hurdles on asylum seekers right to nonrefoulement. The 2019 Immigration Yearbook indicated that from 2016 to 2019 a total of 1,307,411 aliens were removed from the United States on deportation, including 838, 538 aliens returned to their home countries.[1721]

[1716] IIRIRA amending Section 235 (a) (1) and (2) (8 U.S.C. 1225).
[1717] IIRIRA amending Section 208 (b)(1)(B) [subject on credible fear need and assessment].
[1718] 8 U.S.C. §1252(e) (2020).
[1719] 8 C.F.R. § 235.3 (2020).
[1720] *Id.*
[1721] *2019 Yearbook on Immigration Statistics,* HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/yearbook/2019.

Enforcement of race-based discriminatory laws limits the fundamental rights of aliens in destination countries. International human rights, as well as the United States Constitution, prohibits discrimination of any form, including race.[1722] Equal Protection Clause prohibits all forms of discrimination or racial segregation.[1723] In *Brown v. Board of Education of Topeka,* the Supreme Court handed in a landmark decision holding that separating children in school because of race is unconstitutional.[1724] Likewise, in *Loving v. Virginia,*[1725] the Supreme Court unanimously struck down that state law banning interracial marriage, holding that such anti-miscegenation statutes violate both Due Process and the Equal Protection Clause of the Fourteenth Amendment. The Fourteenth Amendment Due Process and Equal Protection Clause applies to both citizens and aliens given the legislative language "any person" and "equal protection." The Supreme Court has affirmed the rights of immigrants to the procedural determination of their claims since 1896 as held in *Wong Wing v. United States,*[1726] which allowed a Chinese immigrant to challenge the constitutionality of the Chinese Exclusion Act and the government's authority to incarcerate the undocumented without a jury trial.[1727] In *Trump v. Hawaii,* the Supreme Court reaffirmed the rights of under the Establishment Clause to challenge the exclusion of immigrants from selected countries of the Muslim majority. Although the Supreme Court's majority opinion ruled in favor of the government, contrary to its position in

[1722] ICCPR, *supra* note 31 at arts. 14(1) and 24; UN Charter, *supra* note 31 at art. 1(3); U.S. CONST. amend. XIV, § 1. *See, e.g. Bolling v. Sharpe,* 347 U.S. 497 (1954) (applying the Equal Protection Clause to the federal government through the Due Process Clause). Fisher, supra note at 1057.
[1723] *Id.;* Fourteenth Amendment on Equal Protection Clause provides that "[N]o State shall make or enforce any law which abridge the privileges or immunities of citizens of the United States; not shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." *See, e.g.* U.S. Const. amend. XIV, § 2. 372.
[1724] 347 U.S. 483 (1954) [overruled *Plessy v. Ferguson,* 163 U.S. 537 on the doctrine of separate but equal doctrine].
[1725] 388 U.S. 1 (1967).
[1726] 163 U.S. 228, 233-34 (1896).
[1727] *Id.*; Geary Act of 1892, Pub. L. No. 52-60; *Fisher, supra* note 76 at 1098.

Fong Yue Ting, the Court affirmed the constitutionality of non-discriminatory law.[1728] Implementing discriminatory exclusion as well as punitive measures of incarceration and unprocedural removal violates the United States obligation to nonrefoulement. Regardless of the landmark decisions, several other factors including the 9/11 security related threats, economic downturn, fear of contamination, and refugee crisis provoked by conflicts and natural disasters have increased the restriction on immigration and refugee resettlement.[1729] Attempts by the government agencies to implement the bars have equally exacerbated cases of exclusion, rejection, pushback, and deportations, as subsequent findings will show. There is a need to examine recent issues on these and how they impact the overbroad exclusion laws.

6.8 Enforced Exclusion Under Title 42

In 2019, the outbreak of the Covid-19 pandemic altered the world's landscape, with numerous restrictions that permeated States' immigration laws. The United States, for example, introduced a moratorium on international travel, focusing mainly on undocumented persons.[1730] On March 20, 2020, the governments of the United States, Canada, and Mexico signed a joint agreement to suspend "non-essential" travel through ports of entry in an attempt to control the spread of the Covid-19 pandemic.[1731] Whereas, the restrictions allowed "essential travels," like

---

[1728] *See, e.g. Trump, supra* note at 2418-23; *Koresmatsu v. United States* for anticanonical opinion on discrimination.
[1729] *See, e.g.* Musalo et aal, *supra* note 31 at 95 [stating that the effect of 9/11 froze refugee resettlement for three months, caused dramatic increase in security checks as well as decreases resettlement in 2002 from 70,000 to 27,110).
[1730]*Joint Mexico and U.S. Initiative to Combat Covid-19 Pandemic,* COMMUNIQUE NO 92, COBIERNO DE MEXICO (March 20, 2020), https://www.gob.mx/sre/prensa/iniciativa-conjunta-de-mexico-y-estados-unidos-paracombatir-la-pandemia-de-covid-19; Chad Wolf, *Joint Statement on US Mexico Joint Initiative to Combat the COVID-19 Pandemic,* DEPARTMENT OF HOMELAND SECURITY (March 20, 2020), https://www.dhs.gov/news/2020/03/20/joint-statement-us-mexico-joint-initiativecombat-covid-19-pandemic.
[1731]Joint Declaration and Supplementary Agreement Between the United States of America and Mexico Signed, June 7, 2019, 19 TIAC 5, 19-607 [hereinafter "JDSA"], https://www.state.gov/mexico-19-607; Jorge Loweree, Aaron Reichlin-Melnick and Walter Ewing, *supra* note 145.

"critical supply chains that ensure food, fuel, medicine, and other critical materials,"[1732] tourism and recreational travel that was listed among the non-essential travels.[1733] There was no mention for humanitarian travel of potential refugees with WFF for persecution who seek asylum in the United States. However, the suspension prohibited the introduction of "covered aliens," profiled as a danger to the public.[1734] This sent a red flag on the fate of asylum seekers ostensibly described as potential vectors for the transmission of communicable diseases (Covid-19).

To implement the exclusion clause, the CDC in collaboration with DHHS invoked a new authority under Title 42 that authorized an immediate expulsion of all undocumented arrivals at the southern border.[1735] This caused the Customs and Border Patrol (CBP) to embark on summary expulsion of aliens including unaccompanied minors that arrived at the US-Mexico border.[1736] Reports from CBP news room indicated that about 197,371 individuals were expelled under Title 42 expulsion action from March through September 2020.[1737] The rapidness of the expulsion was horrific, showing that CBP expelled 10,000 aliens barely after two hours of arrivals, [1738] without assessment of their credible fears the law. During the same period, more than 20,000 refugees were forced to remain in Mexico under another simmering exclusion policy that subjected thousands of asylum seekers to harsh conditions in Mexico.[1739] Few months into a

---

[1732] National Archives, *Notification of Temporary Travel Restrictions Applicable to Land Ports of Entry and Ferries Service Between the United States and Mexico*, FEDERAL REGISTER, 85 Fed. Reg. 16,547, 16,548 (March 24, 2020).
[1733] *Id.* 14814.
[1734] Title 42, *supra* note 8 at 1-43.
[1735] *Id.* at 2-23.
[1736] Molly O'Toole, *supra* note 156; Lucas Guttentag, *supra* note 156.
[1737] *See, e.g., FY 2020 Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions,* U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics-fy2020 (updated Nov. 20, 2020) [*hereinafter* "FY2020"].
[1738] O'Toole, *Op Cite* at 3.
[1739] Jenni Bowring-McDonugh, *CVT Denounces Trump Administration's Misguided Attempt to Ban Individuals from Seeking Asylum at U.S. Southern Border,* THE CENTER FOR VICTIMS OF TORTURE (July 15, 2019), https://www.ctv.org/news-events/press-release. [noting that the deported aliens faced numerous horrible conditions in the hands of some Mexican officials].

new administration, in September 2021 more than 4000 Haitian migrants were deported from the Southern border under Title 42, including vulnerable women and children.[1740]

Applying the deportation under Title 42 has provoked serious human rights and responses from pro-refugee critics who question the newly asserted authority and assault on the United States asylum law.[1741] The crucial question is whether the act has breached the United States' obligation to the Protocol[1742] as expressed under the Refugee Act of 1980[1743] and if the Title 42 can be enforced as a deportation clause? Title 42 is an abridged description of a US Coded—42 U.S.C. 265 and 268—a provision within the 1944 Public Health Service Act (PHSA).[1744] It has a predecessor Act of 1891[1745] that generally authorizes the Surgeon General to "suspend" the "introduction of persons or goods, in whole or in part, from such countries or places" where there exist indicators of "any communicable disease" to prevent a "serious danger of the introduction of such disease into the United States."[1746] This functioned merely as a health regulatory legislation, but particularly individuals returning to the United States from countries with reasonable suspicion of communicable diseases to preserve public health and safety.[1747] Originally, this was necessitated by postwar concerns of soldiers returning from foreign countries to prevent contamination.[1748] Historically, this applied to all "persons and properties,"

[1740] Camilo Montoya-Galvez, *U.S. Expels Nearly 4000 Haitians in 9 Days as Part of Deportation Blitz* (Sept. 27, 2021), https://www.cbsnews.com/news/haiti-migrants-us-expels-nearly-4000-in-nine-days/.

[1741] Guttentag, *supra* note 156*;* Jaya Ramiji-Nogales, *Non-refoulement under the Trump Administration,* 23 AMER. SOC. INT'L L. (2019).

[1742] *See, e.g.,* 19 U.S.T. 6223.

[1743] *See, e.g. Cardoza-Fonseca, supra* note 357 at 480, 421; *Negusie, supra* note at 511, 537 [Congress sought to "bring United States refugee law into conformance with the 1967 Protocol]

[1744]Currently codified as 42 U.S.C. § 265.

[1745] Guttentag*, Op Cite*, 4-15 [referring to the predecessor regulation Immigration Act of 1891].

[1746] *Id.*; Q&A: US Title Policy to Expel Migrants at the Border, HRW (April 8, 2021 4.15), https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border?gclid=Cj0KCQiA2NaNBhDvARIsAEw55hidhiP-.

[1747] 42 U.S.C. § 265 [The Public Health Service Act emphasizes that the primary object is to prevent the introduction, transmission, or spread of communicable diseases].

[1748] *Id.* chap 6A pt. G.

regardless of immigration status,[1749] and not exclusive to aliens. Hence, the actual motivation for the recent Order raises skepticism given its discriminatory focus on undocumented persons.[1750] Apparently, the novel authority asserted under Title 42 targeted certain persons, thus replicating the 1929 profiling under the Undesirable Alien Act, labeled for removal to preserve the purity of white race.[1751] Comparably too, the Page Act and the Chinese Exclusion Act are sister legislation crafted under a racial prejudice for the denigrated "other." As Fisher observed vestiges of such eugenicist enactments and scholarships have survived in contemporary immigration laws.[1752] A typical example is the Johnson-Reed Act,[1753] passed in 1924 imposed restriction on immigration quotas on people of color, while privileging the Nordic race (Caucasians from Western Europe) believed to be of superior race and fearing that immigrants from Southern and Eastern Europe as well as could dilute America's Nordic race.[1754]

Although INA 212(a)(1)(A)(i) has held certain foreign nationals to be inadmissible based on communicable diseases of public health significance, such ineligibility is not without a waiver. INA § 212(a)(g)(1) provided waiver on certain conditions relating to family unification and for quarantinable diseases.[1755] Except for drug-related health conditions, a statutory waiver is available to some aliens found to be inadmissible.[1756] Thus, there is no precedent or statutory

---

[1749] *Id* at 42 CFR § 71.40, 2017 [relating to the suspension of person, goods, and property into the United States].
[1750] *Id.* 6891-6978 [The provision regulates "the introduction of persons or property" without distinction.]
[1751] Fish, *supra* note at 1051.
[1752] *Id.* at 1054 [citing speeches, correspondence, bills, legislative reports, racial narratives, extracts in congressional statements and records canvassed to preserve white preserve white supremacy and territory as opposed to the degraded and denigrated immigrants of color and also stating that Harry H. Laughlin's Articles were targeted to protect the "purity" of Caucasian Americans from the contamination of the Latin American immigrants]; *See* Many of the materials from the eugenicist Harry Laughlin were obtained from an archive of his papers maintained at Truman State University. Harry H. Laughlin Papers: Manuscript Collection L1, TRUMAN STATE UNIV.: PICKLER MEM'L LIBR., https://library.truman.edu/manuscripts /laughlinindex.asp (describing the collection, which includes Boxes B-E).
[1753] Immigration Act of 1924, H.R. 7995, 68th Cong. (1924) (enacted).
[1754] *Fish*, *supra* note 1055.
[1755] *See, e.g.* INA § 212(a)(g)(1) waives communicable diseases inadmissibility based on certain conditions that includes family unification.
[1756] INA § 212(a)(g)(1).

justification to a mass expulsion of asylum seekers in a pretext of communicable disease exclusion. INA § 237(a)[1757] is clear about the grounds for deportation and possible conditions for denying withholding removal.[1758] Even under the enumerated conditions, an alien has the right to seek legal representation for procedural determination of claims on removal proceedings.[1759] 42 U.S.C. 265 and 268 (Title 42) do not in any way confer the executive branch with authority to expel immigrants, contrary to the statutory due process of determining withholding removal under CAT relief.[1760] Moreso, there is nothing in the legislative wordings of Title 42 that suggest any intention to enforce deportation against the undocumented.[1761] 42 U.S.C. 265 and 268 explicitly specify the scope of its application to all "persons and properties," from foreign countries where there is a risk of communicable diseases. Evidently, this refers to epidemics affecting a demographical entity, and not in the sense of a global pandemic like covid-19 that affected virtually every country, including the United States. Ironically, at the time of the issuance of the public health exclusion order, the United States was ranked among the highest in the rate of global infection as well as covid-19 related fatalities.[1762] These raise questions of legitimacy and make the claim conjectural.

In terms of managing outbreaks of communicable diseases and quarantine policy, the United States CDC has kept enviable standards during the SARS-CoV epidemic in 2003, MERS,

---

[1757] INA § 237(a) categories the following as deportable grounds – inadmissibility at the time of entry or adjustment of status or violation of status, crime related grounds, failure to register and falsification of documents, public charge, unlawful voters, and security related grounds.
[1758] INA § 208(b)(2); [8 U.S.C § 1158(a)(2)]; INA § 241(b) [8 U.S.C § 1231(b)].
[1759] 8 U.S.C. § 1229(a), INA § 240.
[1760] § 208.16 s. 241(b)(3)(B) [referring to withholding removal under CAT].
[1761] 42 U.S.C. 265 and 268.
[1762] Steven H. Woolf, Derek A. Chapman, Roy T. Sabo and Emily B. Zimmerman, *Excess Deaths from Covid-19 and Other Causes in the US, March, to January 2, 2021,* 17 JAMA 325, 1786-1789 (2021), jama_woolf_2021_ld_210023_1620138060.73422.pdf.

and Ebola in 2014-2016.[1763] Neither of these situations provoked a deportation Order. In contrast, the order wrongly redefined the scope of the Title 42 tool for deportation and singled out undocumented as guineapigs of new discriminatory enforcement.[1764] Paradoxically, the mass expulsion of these potential asylum seekers to Mexico exacerbated the risk to public health for crowded and unprotected deportees forcibly kept in shelters where social distancing and other precautionary measures were lacking. Yet, the United Nations High Commissioner for Refugees (UNHCR) has warned States to desist from enforcement of any blanket measures or policies to preclude the admission of refugees or internationally guaranteed protection.[1765]

INA conforms to this standard,[1766] making it mandatory for the A.G. to withhold deportation of a foreign national, who meets refugee requirements.[1767] The obvious justification for refugee protection is based on human rights and to prevent torture because such alien with WFF has been denied protection by his or her government.[1768][1769] In view of these, the enforced

---

[1763] *Infection Prevention and Control Recommendations for Hospitalized Patients Under Investigation (PUIs) for Ebola Virus Disease (EVD) in U.S. Hospitals,* CDC (August 30, 2018), https://www.cdc.gov/vhf/ebola/clinicians/evd/infection-control.html [hereinafter "PUIS for Ebola"]**;** *Severe Acute Respiratory Syndrome (SARS),* CDC (Dec. 6, 2017), https://www.cdc.gov/sars/index.html; *2014-2016 Ebola Outbreak in West Africa*, CDC (March 8, 2019), https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html.

[1764] *Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes,* 85 Fed. Reg. 56,424, CDC (Oct. 13, 2020) [The Order did not apply to US citizens or permanent residents or entrants with valid documents, but only on undocumented aliens].

[1765] *Key Legal Considerations on access to territory for persons in need of international protection in the context of the COVID-19 response*, 6 UNHCR (March 16, 2020), https://www.refworld.org/docid/5e7132834.html.

[1766] *See, e.g.,* 1951 Convention, *supra* note 34 at art. 1A; art. 33(1); 1967 Protocol, *supra* note 35 at art. 1; 8 U.S.C. § 1101(a)(42)(A).

[1767] 8 CFR § 1208.16 [Withholding of removal under section 241(b)(3)(B) of the Act and withholding removal under the Convention Against Torture); 8 U.S.C. § 1253(h)(1) (2012); *American Courts and The U.N. High Commissioner for Refugees: A Need for Harmony in The Face of a Refugee Crisis,* 131, HARV. L. REV. 1401, 1399-1420 (2018).

[1768] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005); 1951 Convention, art. 33(1); UNHCR Exec. Comm., Non-Refoulement, No. 6 (XXVIII), U.N. Doc. No. 12A A/32/12/Add.1 (Oct. 12, 1977); UNHCR Exec. Comm., General Conclusion on International Protection, No. 79 (XLVII), U.N. Doc. A/AC.96/878 (Oct. 11, 1996); CAT, art. art. 3; Committee on the Rights of the Child ("CRC"), General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6 (Sept. 1, 2005).

[1769] *Id.* UNHCR Exec. Comm., Non-Refoulement, No. 6 (XXVIII), U.N. Doc. 12A A/32/12/Add.1 (Oct. 12, 1977); UNHCR Exec. Comm., General Conclusion on International Protection, 79 (XLVII), U.N. Doc. A/AC.96/878 (Oct.

deportations of bona fide refugees under the Title 42 without assessment of their credible fears constitutes breach of both statutory and treaty obligations to fundamental character of nonrefoulement.[1770] No state is absolved from responsibility by its domestic laws or the effect of a bilateral agreement to violate good faith observation of a treaty.[1771] As Guy Goodwin-Gill & Jane McAdam noted also, a State that returns a refugee to persecution is primarily responsible just as the first State through which the expulsion occurred is jointly liable.[1772] In as much as US enjoys the prerogative of "state sovereignty" and authority to determine whom to admit or remove, such powers are not absolute with treaty obligation.[1773] By committing to international treaty, a State submits part of its sovereignty to international law and remains bound to it.[1774] US is bound to the principle of nonrefoulement as a fundamental principle of international law and peremptory norm of customary international law to prevent torture.[1775] It follows then, that the US government and its agencies contravened these international obligations by embarking on illegitimate deportation of protected persons under Title 42 thereby sending potential refugees to frontiers where they would likely face persecution or torture.[1776] An assertion of "State's

11, 1996); Committee on the Rights of the Child ("CRC"), General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6 (Sept. 1, 2005).

[1770] VCLT, *supra* note 171 at art. 31(1) VCLT provides that: "A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose." Lauterpacht and Bethlehem, *supra* note 41 at 89-117, 108.

[1771] VCLT, *supra* note 115, art. 26 [*pacta sunct servanda*—Every treaty in force is binding on parties to it and must be performed in good faith].

[1772] Guy S. Goodwin-Gill, *Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement,* 23 INT'L J. REFUGEE L. 443, 445 (2011) [arguing that States must not frustrate the rights of alien to seek protection in such a manner as to risk persecution or subjection of aliens to torture].

[1773] The obligation to nonrefoulement is nonderogable and binding on states. States cannot assert a domestic law to derogate from international treaty obligation. VCLT, *supra* note 115, art. 27 [noting that states cannot assert sovereignty or domestic laws to derogate from treaty obligations].

[1774] *Id.,* at art. 27.

[1775] Advisory Opinion, *supra* note at paras. 14 and 15; Jean Allain, *The Jus Cogens Nature of Non-refoulement,* 13 INT'L J. REF. L. 533, 539 (2002); Lauterpacht and Bethlehem, *Op Cite* at 87-177.

[1776] Bowring-McDonugh, *supra* note 162; Jorge Loweree et aal., *supra* note 145. [noting that the deported aliens were subjected to vulnerable states like kidnap, sexual harassment, arrest, unsafe and unsanitary conditions].

sovereignty" is not a valid justification to breach of nonrefoulement.[1777] Articles 1.F and 33(2), 1951 Convention and INA § 208(b)(2) spelt out criteria for nonrefoulement.[1778] There is nothing in these that warrants exclusion under Title 42, or exclusion by loss of status, fundamental change of circumstances or removal to a safe third country pursuant to a bilateral or multilateral agreement.[1779] At the time of deportation, the United States Department of States has warned that Mexico was not a safe country, hence does not qualify for a safe third country.

It has been argued widely that the "Title 42 exclusion clause" is driven by systemic racism in immigration laws, and evolved from racial animus, superiority, and fear of others.[1780] Scholars like Fisher have traced intersectionality with the eugenicists who described Latin American immigrants as inferior, mixed blood, "mongrelized," and "poeons.[1781]" Perhaps, a similar racially driven mischaracterization has informed the Page Act,[1782] and the Chinese Exclusion Act.[1783] In like manner, narratives of hate, fear of others, scape-goatism, and falsely motivated superiority dominated the campaign statements of President Donald J. Trump. He described immigrants coming from Mexico, and other South and Latin America as bad

---

[1777] The obligation to nonrefoulement is nonderogable and binding on states. States cannot assert a domestic law to derogate from international treaty obligation. VCLT, *supra* note 171, art. 27 [noting that states cannot assert sovereignty or domestic laws to derogate from treaty obligations].
[1778] 1951 Convention, *supra* note 12 at art. 1F.
[1779] INA § 208(c)(2); 8 U.S.C § 1158(a)(2).
[1780] Fisher, *supra* note 206 at 1053; Johnson, *supra* note at1111-1159.
[1781] *Id.* at 1051.
[1782] *Op cite* [classifying Asian women as prostitutes and unsuitable for labor in the U.S.]
[1783] *Op cite.*

people,[1784] rapists,[1785] drug addicts, criminals,[1786] and terrorists.[1787] Similar rhetoric influenced the executive orders and immigration exclusion laws of the Trump Administration. These culminated in an amplified physical and legal barricade against undocumented immigrants. Evidently, the past racial conspiracy theories of exclusion have served as raw materials for the present.

6.9 Exclusion Under the Migration Protection Protocol (MPP)

MPP popularly known as "remain in Mexico" is a Trump-era policy that compelled asylum seekers in the United States to go move into Mexico and remain there to process their asylum in the United States. The policy came into birth on December 20, 2018, when DHS issued MPP for asylum seekers to "Return to Mexico Pending Hearing."[1788] Effects of the MPP denied territory to arriving refugees at the southern land border.[1789] Instead, the policy mandated them "to return to Mexico" to process their asylum claims from there. The implementation of the MPP imposed numerous hurdles on vulnerable asylum seekers and dramatically altered the United States asylum law, requiring aliens to be physically present in the United States to

---

[1784] *Id*; See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 10:41 AM), https://twitter.com/realDonaldTrump/status/1056919064906469376 ("Many Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border." Cited by Ashley B. Armstrong, *Co-opting Corona Virus: Assailing Asylum*).

[1785] *Full Text: Donald Trump Announces a Presidential Bid,* WASH. POST: POLITICS (June 16, 2015, 1:03 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donaldtrump-announces-a-presidential-bid.

[1786] *See, e.g.,* President Trump on Border Security and Government Funding, C-SPAN (Feb. 15, 2019), https://www.c-span.

[1787] *See, e.g.,* Exec. Order No. 13,769 (Jan. 27, 2017). (suspending refugee entry into the United States for 120 days).

[1788] Kirstjen M. Nielsen, *Policy Guidance for Implementation of Migration Protection Protocols,* U.S. DHS (Jan. 25, 2019), https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf [*hereinafter* "MPP"]; Migration Protection Protocols FY2020, U.S. CUSTOMS BORDER PROTECTION (FY Oct. 1, 2019 – Sept. 30, 2020), https://www.cbp.gov/newsroom/stats/migrant-protection-protocols-fy-2020.

[1789] *Id.* at 6-7.

process their claims. [1790] Effects of the MPP caused a forcible removal of thousands of refugees from the southern border to Mexico.[1791] Evidence from published literature showed that this imposed unjustifiable human cost to aliens, who were neither Mexicans nor originally seeking asylum in Mexico.[1792]

Although the Biden Administration has vigorously denounced the MPP and even tried to rescind it, on December 3, 2021, they resolved to resume the enforcement of MPP in "good faith."[1793] This was reimplemented on aliens found at the ports of entry of within 96 hours of crossing between ports of entry into US territory to MPP.[1794] Since inception, the policy has caused thousands of asylum seekers to be removed in absentia from the United States or have their cases terminated, without considering the risks they may face in Mexico or if returned to their home countries. Even if some were to pursue asylum in Mexico, there was no guarantee for safety or fair determination of their claims.[1795] Nonetheless, in 2021 approximately 68,000 aliens participated in the first stage, from January 2019 to January 2021, more than 32,000 were ordered removed, about 9000 had their cases terminated, 27,000 had their asylum cases still

---

[1790] INA § 208(a)(1); §1158(a)(1); 94 Stat. 105, as amended, 8 U. S. C. §1158. See §1158(b)(2)(C) [requiring aliens to be physically present in the US to process asylum claims].

[1791] *See, e.g.,* Paul Ratjey, *U.S: Asylum Seekers Returned to Uncertainty, Danger in Mexico, Danger in Mexico,* HRW (July 2, 2019. 12.01AM EDT), https://www.hrw.org/news/2019/07/02/us-asylum-seekers-returned-uncertainty-danger-mexico.

[1792] *Id.*; *Mandates of the Special Rapporteur on the Human Rights of Migrants*, PALAIS DES NATIONS, 1211 GENEVA 10 SWITZERLAND (Mar. 7, 2019), [indicating that it is a double standard because the US Department of State cautioned its citizens from traveling to Mexico because of high risks of human insecurity and widespread nature of violent crime. Yet, US government is forcing migrants to return to Mexico and remain there throughout the request of their application for protection]; *Featured Issue: Migrant Protection Protocol,* AILA, October 7, 2022, https://www.aila.org/advo-media/issues/port-courts.

[1793] *See, e.g., Texas v. Biden* 21-10806 (5th Cir., 2021).

[1794] *See, e.g., Featured Issue: Migrant Protection Protocols (MPP)*, AILA (December 3, 2021), https://www.aila.org/advo-media/issues/all/port-courts.

[1795] INA section 239(b)(2); Deborah L. Rhode, Access to Justice: A Roadmap for Reform, 41 FORDHAM URB. L.J. 1227 (2014); In *Turner v. Rogers,* 564 U.S. 431, 131 (2011) [Supreme Court recognized the right to counsel for indigent litigants, citing *Lassiter v. Dep't of Soc. Servs of Durham County.,* 452 U.S. 18 (1981)].

pending while a handful of 723 was granted asylum.[1796] Such alarming statistics showed that a fair determination of claims cannot be a guarantee, as MPP operates akin to expedited removal. Thousands of the applicants were removed without access to legal representation or in absentia.[1797] Comparatively, like CDC's Title 42 deportation order, the concerns of asylum seekers were downplayed in the MPP. Research evidence showed their horrible conditions at squalid makeshift camps,[1798] during a terrible pandemic.[1799] The MPP policy violates the principle of nonrefoulement, the constitutional obligation to Equal Protection, and equally disrupted INA 208§(a)(1),[1800] regardless of the Supreme Court position in *Biden v, Texas.*[1801]

6.10 Exclusion Under Safe Third Country Agreements (STCA)

Shifting from a trajectory of political and racial kind of exclusion, the STC is reflected in the Preamble to the 1951 Convention as a satisfactory solution to encourage the cooperation of States and burden sharing in an asylum.[1802] It maintains that "[C]onsidering that the grant of asylum may place heavy burdens on certain countries" State members are urged to achieve the purpose of the Convention through international cooperation working with the United Nations.[1803] The rationale for STCA hinges on international cooperation which is the soul of international refugee protection. From the 1933 Convention to the current 1951 Refugee Convention, the United Nations has called for international cooperation through committed

---

[1796] Muzaffar Chishti and Jessica Bolter, *Court-Ordered Relaunch of Remain in Mexico Policy Tweaks Predecessor Program, but Faces Similar Challenges,* POLICY BEAT (December 2, 2021), https://www.migrationpolicy.org/article/court-order-relaunch-remain-in-mexico.
[1797] *Id*.
[1798] Michael Garcia Bochenek, *US: Remain in Mexico" Program Harming Children,* HRW (February 12, 2020). https://www.hrw.org/news/2020/02/12/us-remain-in-mexico-program-harming-children.
[1799] *Id.*
[1800] INA § 208(a)(1).
[1801] *Biden v. Texas* [finding that the DHS has an authority to return an alien arriving at the Southern border pursuant to the MPP citing INA 1254(f)(1).
[1802] *See,* 1951 Convention, *supra* note 12, Preamble at para. 4.
[1803] *Id.* at Preamble at para. 4.

burden sharing, given the challenges that may be involved in hosting an influx of aliens in countries.[1804] Basically, the justification is that a refugee's protection is presumably guaranteed in a safe third state. Although, neither the Convention nor the Protocol construed STC as a bar to asylum.

Additionally, the legal background to the safe third country agreement is found under EXCOM Conclusion 58 (XL), which addressed the phenomenon of refugees and asylum seekers "who move in an irregular manner from countries they would have already found protection…to seek asylum or resettlement in another country."[1805] Apparently, this allows the return of an alien, not to a country of origin, but to where he or she had already sought protection for what is characterized as an irregular movement because it is presumed that protection is available in the STC.[1806] However, there is an exception to this where a refugee or asylum seeker justifiably claims a WFF of persecution in the "safe third country" regardless that he or she previously found persecution. Paragraph g permits a favorable consideration of such claims. In evaluating the scope of its application, it has been established that the safe third country phenomenon does include transit states.[1807]

Despite this long-standing tradition, the plight of refugees has remained a complex problem that continues to compel international attention. Moreso, in practice, many states have in their agreements treated STC Agreements (STCA) as an exclusion if an asylum seeker can

---

[1804] *See, e.g.* The Plenipotentiaries to the Refugee Convention, Recommendation D [stating that "Governments continue to receive refugees in their territories…an act in a true spirit of international cooperation…that these refugees may find asylum and the possibility of resettlement"].
[1805] Executive Committee of the Higher Commissioner's Programme, established by the United Nation's Economic and Social Council (ECOSOC), Resolution 672 (XXV) (30 April 1958) (*hereinafter* "EXCOM Conclusion 98 (XL)).
[1806] *Id.* at para. (f).
[1807] María-Teresa Gil-Bazo, *Safe Third Country Concept in International Agreement of Refugee Protection Assessing State Practice,* 33 NETH. QUART. H. R. 42-77, 48 (2015) [citing Turkey and Germany].

safely be returned to or resettled in a "safe state." In accordance with the STC principle, countries and regions have developed agreements governing the receiving and returning of refugees and asylum seekers. Within the European Union (EU), the principle is governed by the Dublin III regulation, which is an important determinant for the EU Member States for evaluating asylum applications. Different States construe STC as a ground for inadmissibility and exception to grant of asylum. Under the United States law, INA section 208(a) sets forth the circumstances under which an alien may apply for asylum subject to Paragraph 2 on STC rule.[1808] Thus, INA § 208(a)(2); 8 U.S.C §1158(a)(2)(A).
provides that:

> Paragraph (1) shall not apply to an alien if the Attorney General determines that the alien may be removed subject, pursuant to a bilateral or multilateral agreement, to a country (other than the country of the alien's nationality, the country of the alien's last habitual residence), in which the alien's life or freedom would not be threatened…and where the individual would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.[1809]

By implication, the STC bar may be invoked to terminate a grant of asylum pursuant to INA § 208(c)(2)(C). The bar applies on two conditions, first by either a "bilateral or multilateral agreement" showing that an alien is removable and there is an absence of threat to life or

[1808] INA § 208(a)(2); 8 U.S.C §1158(a)(2)(A).
[1809] INA § 208(a)(2); 8 U.S.C §1158(a)(2)(A).

freedom in the third country. Secondly, it must be proven that the alien would receive "a full and fair procedure for determining a claim to asylum or equivalent" relief in the third country.

The United States and Canada entered an STC bilateral agreement (STCA) in 2002 that took effect in 2004.[1810] It presumed each party to be a safe country for refugees for the purpose of protection, therefore, required that an asylum seeker apply in the first country of arrival. The key governing rules include that STCA applies only to: a) aliens arriving at the land border port of entry; b). It does not apply to citizens or having no nationality or habitual residents of the United States and Canada;[1811] c). Individuals subject to the STCA bar will be returned to the country of first physical presence to process their claims there; d). The receiving country will not return an alien to a country of transit under four conditions—if the alien: i). has a family member with legal status in the territory of the receiving country; ii). or a family member at least 18 years of age with a pending claim for refugee status in the receiving country; iii) or an unaccompanied minor; arrived with a visa or is not required to be in possession of a visa. Whereas the rationale for the sub-condition is to ensure that families or refugees with special needs like unaccompanied minors are not separated or made vulnerable, the application favors documented noncitizens. Article 3(1) of the agreement imposes a duty on the parties not to remove "a status claimant" transferred under the STCA until adjudication of the claims is made.[1812] Likewise, such a claimant cannot be transferred to any other country other than a safe third country.[1813]

In practice, the implementation of the STCA has been contingent on other statutory bars and policy bottlenecks. For example, section 208(a)(3) of the United States immigration law

---

[1810] Agreement between the Government of Canada and the Government of the United States of America for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, adopted 5 December 2002, entered into force 29 December 2004 [*hereinafter* "STCA"]; *See also,* 8 C.F.R.§ 208.30(e)(6); 8 C.F.R. 1208.4(a)(6); 8 C.F.R. 1240.11(g); 8 C.F.R. 1003.42(h).
[1811] STCA art. 2
[1812] *Id.* at art. 3(1).
[1813] *Id.* at art. 3(2).

creates a bar, precluding courts from exercising jurisdiction "to review any determination of the Attorney General" on decisions regarding the application of STCA.[1814] In contrast, Article 16(1) of the Convention mandates all Contracting Parties to the Refugee Convention to provide free access to courts as a fundamental right to refugees. This is consistent with international human rights instruments that affirmed States' duty to provide unconditional access to court and legal representatives to refugees.[1815] INA Section 208(a)(3) undermines the right of a refugee to determine his or her habitual residence as well as a safe country to seek asylum. Even so, the United States and Canada asylum jurisprudence are not comparable, but in many ways disparate especially in gender considerations. As seen in Chapter Five, the Canadian Chairperson's Gender Guidelines provide a more compelling and fairer exercise of discretion in gender claims than the United States. Claimants seeking protection on gender grounds, except for those who have family ties in the United States, would prefer to go to Canada even after arriving in the United States. Such a category of persons is likely to be excluded from refugee protection both in the United States and Canada pursuant to the STCA.[1816] For instance, in 2017 *CBS News* reported a famous case of an El Salvador woman with her two children who after arriving Buffalo, New York crossed to the Fort Erie border to Canada to seek refugee claims but was denied entry under the STCA.[1817] It is evident that the STCA may create hurdles for female claimants arriving Canada from the United States border and make them ineligible for protection.

Several concerns are raised by pro-refugee and human rights scholars on the level of detention, as well as poor conditions of asylum seekers in the United States, especially under the

---

[1814] 8 C.F.R. 1208.4(a)(6).
[1815] ICCPR, *supra* note 31 at arts. 2(3), 9(4); CAT, art 3; UDHR, *supra* note 31 at art. 10.
[1816] STCA, *Op Cite* at arts. 1 & 2.
[1817] Silvia Thomson, *El Salvador Woman at the Hear of Legal Challenge to Safe Third Agreement,* CBS NEWS, July 8, 2017 (5.am ET), https://www.cbc.ca/news/canada/safe-third-country-agreement-legal-test-case-1.4195228.

Trump Administration.[1818] Scholarly debates are contesting the designation of the United States as a safe country for asylum seekers.[1819] On the other hand, statistics have shown that thousands of refugees seek protection in Canada each year transit the United States, while fewer hundreds do to Canada.[1820] The disproportionality negative the possibility of achieving the Convention's purpose for burden sharing especially when thousands of aliens still face potential danger of exclusion or refoulement by the STCA. In 2006, the UNHCR expressed serious concern about the human rights challenges associated with the implementation of the agreement such as mass detentions, the danger of losing protection in both countries as well as detention with the procedural determination of claims.[1821] *Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe v. Her Majesty the Queen*[1822] represents a major effort human rights attempt to challenge STCA breach of nonrefoulement obligations.[1823]

Turning to the past and present, a symbiotic connection can be made across the recent policies of exclusions that gradually transposed into a kind of immigration bars like the MPP, Title 42,[1824] and STCA. The danger of excluding a refugee from protection is far-reaching, worst still when applied to women fleeing gender-based violence or unaccompanied minors. There is nothing in the Convention that suggests conflating States' cooperation in sharing the burden of refugees with exclusion. Therefore, STCA has inherent flaws both in the application and by

---

[1818] *See, e.g.* Musalo et aal, *supra* note 10 at 951-2; *Legal Challenge of Safe Third Country Agreement Launched,* AMNESTY INTERNATIONAL (Jul. 5, 2017).
[1819] *Id.*; Amnesty International Canada & Canada Council for Refugees, *Contesting the Designation of the US a Safe Third Country* (May 19, 2017).
[1820] *Id.* at 951 [noting that from 1990 to 2004 an average of 8750 claimants a year applied in Canada after transiting the U.S., while only 200 transits from Canada to apply for relief in the US].
[1821] *Monitoring Report Canada—United States "Safe Third Country" Agreement, 29 December 2004 – 28 December 2005,* UNHCR, 6-7 (UNHCR 2006).
[1822] [2007] F.C. 1262 (Can.).
[1823] *Id.* at 1262 [noting that the US did not comply with its obligation to nonrefoulement and CAT in the implementation of STCA. The decision was overruled in *Her Majesty the Queen v. Canadian Council for Refugees, Canadian Council of Churches, Amnesty International and John Doe,* [2008] F.C.A. 229 (Can.) [challenging the designation of the US as a safe third country].
[1824] *Id.* at 2-23.

ousting the jurisdiction of courts to review the legitimacy of its enforcement, contrary to Article 16. Accountability is at the core of States' treaty obligations. In terms of the Refugee Convention, achieving efficient management and cooperation cannot be severed from a conscious assessment of refugees' claims and needs for protection.

6.11 Exclusion under Article I.E and Jurisprudence of Firm Resettlement

Whereas Article 1.F excludes aliens from refugee definition based on criminal liability, Article 1.E excludes any person "recognized by the competent authorities of the country" in which he or she "has taken residence as having the rights and obligations" that "are attached to the possession of nationality of that country."[1825] The Convention is reticent about the meaning of a refugee being "recognized by the competent authority of the" where he or she "has taken residence as having the rights and obligations…."[1826] Consequently the UHNCR Handbook fills the void, thus describing such category of persons as "national refugees" because they "might otherwise," having been received in a country "where they have been granted most of the rights enjoyed by nationals, but not formal citizenship.[1827] It should be noted here that the rationale for exclusion is somewhat formal, "having the rights and obligations" the person has firmly been resettled and has his or her status assimilated.[1828] Legitimately, he or she is possesses a valid status and will be protected from deportation or expulsion. Article 1.E raises a presumption of resettlement and residence. Therefore, this deters the alien from seeking refuge elsewhere. [1829]

[1825] 1951 Convention, *supra* note 12 at art. 1.E [on exclusion for "national refugees"].
[1826] *Id.*
[1827] The Handbook, *supra* note 349 at para. 144.
[1828] *Id.* at para. 145.
[1829] *Id.* at 146 [noting that the evidence of taking residence distinguished from mere visit to show firm resettlement].

Under the United States law Article 1.E has a statutory equivalent in INA § 208(b)(2)(A)(vi); 8 U.S.C §1158(b)(2)(A)(vi), which provides that asylum may not be granted to an alien who "was firmly resettled in another country prior to arriving the United States."[1830] According to 8 C.F.R. §208.15, a noncitizen is firmly resettled if prior to arrival into the United States has entered another country, or while in that country, received an offer a permanent resident status, citizenship, or some other type of permanent resettlement, unless she or she establishes to the contrary that:

> (a) …his or her entry into the country was a necessary consequence of his or her flight from persecution, that he or she remained in that country only as long as was necessary to arrange onward travel, and that he or she did not establish significant ties in that country; or
>
> (b) …the conditions of his or her residence in that country were so substantially and consciously restricted by the authority of the country of refuge that he or she was not in fact resettled. In making his or her determination, the asylum officer or immigration judge, shall consider the conditions under which other residents of the country live, the type of housing whether permanent or temporary, made available to the refugee…[1831]

In *Rosenberg v. Yee Chien Woo,*[1832] the Supreme Court gave a jurisprudential interpretation of resettlement in the INA that its determining factors would exclude mere presence, transit, or temporary stay prior to arrival to the United States or even lapse of time.[1833]

[1830] 208(b)(2)(A)(vi); 8 U.S.C §1158(b)(2)(A)(vi) [defining firm resettlement pursuant to 8 C.F.R. §208.15].
[1831] 8 C.F.R. §208.15 [noting that determination of firm resettlement will evaluate housing, other privileges like employment, travel, education, documentation, naturalization, right to enter and re-enter and other public benefits.]; *see also* Musalo et aal, *supra* note 10 at 952-2.
[1832] 402 U.S. 49, 91 SCt 1312 28 L. Ed 592 (1971).
[1833] *Id.*

The Court recognized that the focal point is whether the individual's stay in another country constitutes a termination of the original flight for protection as well as his or her link with the country in question. Therefore, establishing a proximate relationship between the reason and consequence of flight is imperative to showing whether the original reason is terminated or not. To this effect, the Court identified some other germane factors necessary for proof of "firm resettlement" as "family ties, intent, business and property connections and other matters.[1834] According to *Cheo v. INS,* the onus lies on DHS to prove firm resettlement bar, however this shift to the applicant to show lack of it.[1835]

Consequently, in *Maharaj v. Gonzales,*[1836] the Ninth Circuit's majority decision established the difference between country shopping for greener pastures by a firmly resettled alien, whose initial fear of persecution is no longer in the third country, and the contrary. Unquestionably, determining the boundaries of WFF and instinct for adventure may be slim. Therefore, there is a need for courts to evaluate the "totality of circumstances" beyond visa and include evidence of other government statuses like a permanent resident, citizenship, or another permanent resettlement status.[1837] The legitimacy is that refugee claims cannot be exploited based on economic need rather humanitarian necessity.

6.12 Art. 1.C Exclusion by a Change of Circumstance, "No Longer a Refugee"

One of the necessary exceptions for a grant of refugee status is evidence of a change of circumstance. This indicates a loss of refugee or asylee status. Article 1.D of the Convention

---

[1834] *Id.* at 592.
[1835] 162 F. 3d 1227 (9th Cir. 1998).
[1836] 450 F. 3d 961 (9th Cir. 2006).
[1837] 8 C.F.R. §208.15.

articulates the several conditions that could result in loss or termination of status. It provides that the Convention's reliefs shall cease to apply if an alien has:

> (1)…voluntarily re-availed himself of the protection of the country of his nationality; or (2) Having lost his nationality, has voluntarily reacquired it; or (3)He has acquired a new nationality, and enjoys the protection of the country of his nationality; or (4) He has voluntarily re-established himself in the country which he left or outside which he remained owing to fear of persecution; or (5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself the protection of the country of his nationality…(6) Being a person who has no nationality…because the circumstance in connection with he has been recognized as a refugee have ceased to exist, able to return to the country of his former habitual residence.[1838]

What gives legitimacy to a change of circumstance bar is that the initial circumstances that provoked a WFF have ceased to exist, and so an alien can safely return to his or her home country without persecution.[1839] Other factors include evidence of reacquired nationality, voluntary nationality, or re-establishment in another country.[1840] The Handbook clarifies these noting that the first four of the six cessation clauses applies to a change of situation initiated by the refugee, while the last two (5 and 6) "are based on the consideration that international protection is no longer justified on account of changes in the country where persecution is

[1838] 1951 Convention, *supra* note 12 art. 1C.
[1839] *Id.* at art. 1C (1) and (6).
[1840] *Id.* at art. 1C (2)-(5).

feared."[1841] For example, a cessation can occur in a transition from a persecutory military regime to democracy. In determining excludability, the existence of such a change cannot be presumed but demonstrated by a preponderance of the evidence. The burden lies on the party who asserts a change of circumstance bar and may shift to the claimant to demonstrate a WFF for persecution.

INA §208(c)(2) is a counterpart to Article 1.C. The former outlines varied circumstances under which an alien may lose his or her refugee/asylum status or have such status terminated. INA §208(c)(2) provides that asylum may be terminated if an alien:

> a. Is no longer considered to be a refugee due to a fundamental change of circumstance; b. falls within any of the bars to asylum; c. may be removed to a third country pursuant to a bilateral or multilateral agreement, where her life or freedom would not be threatened on account of a protected ground, and where she would be eligible for asylum or some other form of protection; voluntarily availed herself of the protection of her country of nationality or last residence by returning with permanent residence status, or the possibility of obtaining such status; or acquired a new nationality

A change of circumstance bar is a necessary determinant of refugee status and deportability that was invoked in *Maharajes*[1842] to ascertain whether the respondent is still eligible under Article 1A, not included under 1C, or is more likely than not to face persecution upon return.[1843]

[1841] The Handbook, *supra* note 349 at paras. 114-115.
[1842] *Id.* at 961.
[1843] *Maharajes, supra* note at 961 [The Ninth Circuit ruled to the contrary holding that the respondent was firmly resettled in Canada prior to entry into the USA and no longer fear persecution in Fiji because of a change in circumstance.]

Whereas the INA replicated Article 1.C, it included STC resettlement. This was mentioned in *Maharajes.*

Also, 8 § C.F.R. 208.24(a)(1) authorizes the United States government to terminate an alien's application on grounds of fraud if the beneficiary was not eligible at the time the relief was granted. However, Paragraph 116 of the Handbook has warned the need to interpret the cessation clauses restrictively to ensure that no other reasons are adduced to already exhaustive to terminate or withdraw refugee status.[1844] Therefore, even debates on voluntariness and involuntariness of an act re-establishment deserve critical scrutiny and simply presumed by mere physical presence or act showing intent to return to a home country without evidence of normalization of relationship between state and individual.[1845] Likewise, voluntary re-establishment in a country of origin may constitute a necessary factor to the loss of status, this should not simply be demonstrated by mere return or the physical presence or acquisition of the country's identification but credible evidence of complete absence of the persecution feared or evidence of government's willingness to protect the victim. A change of circumstance should be interpreted comprehensively from this standpoint to meet the Convention's legitimacy.

6.13 Exclusion on Basis of Default in Filing Deadlines

The filing deadline bar (FDB) is not contemplated in the Convention's exclusion criteria. As part of the reforms brought under the United States IIRIRA, it bars asylum for individuals who do not file within one year of their arrival into the United States[1846] unless he or she "demonstrates to the satisfaction of the Attorney General either existence of change of

---

[1844] UNHCR Handbook, *supra* note 349 at para. 116.
[1845] Goodwin-Gill, *supra* note 269 at 80. [citing Grahl-Madsen and noting that involuntary act of protection obtained should not bring refugee status to an end].
[1846] INA § 208(a)(2)(B); 8 U.S.C §1158(a)(2)(B).

circumstances which materially affect the applicant's eligibility for asylum or extraordinary circumstances relating to the delay in filing the application…."[1847] Change of circumstance here is explained to mean circumstances materially affecting an applicant's eligibility for asylum such as changes in applicant's country or last habitual residence, changes in "applicable U.S. law and activities the applicant becomes involved in outside the country of feared persecution that places the applicant at risk…" other changes that affecting applicant's relationship with a pending application.[1848]

Importantly, INA §208(a)(2)(D) made provisions for "extraordinary circumstances" to the one-year deadline bar. Such circumstances may include but are not limited to health—serious illness, physical or mental disability linked to persecution,[1849] ineffective assistance of counsel, the applicant maintained a temporary lawful status for a reasonable time before filing asylum,[1850] the asylum application was filed before the expiration of the one-year deadline but was rejected or returned for corrections or improper filing and refiled at a reasonable time. Other circumstances include the death or a serious illness of a legal representative or family member.[1851] A possible justification for the FDB is to avoid possible abuse by individuals who may pursue asylum as an afterthought to seeking permanent residence in the United States. However, the standard is incongruent with the Convention. The significant question is whether FDB reinforces or limits the purpose of the Convention. In answering this, the negativities may

---

[1847] INA § 208(a)(2)(D); 8 U.S.C §1158(a)(2)(D).
[1848] 8 C.F.R. § 208.4(a).
[1849] *See, e.g. Mukamusoni v. Ashcroft,* 390 F. 3d 110 (1st Cir. 2004) [holding that a Rwandan woman with posttraumatic stress disorder meets the extraordinary circumstance exception].
[1850] Note that reasonability here is dependent on judicial interpretation. *See, e.g. Matter of T-M-H & S-W-C,* 25 I&N Dec, 193, 193 (BIA 2010) [holding that "[W]aiting six months or longer after expiration or termination of status would not be considered reasonable," even shorter periods of time will be considered case-by-case taking cognizance of totality of circumstances.]; *Husyev v. Mukasey,* 528 F. 3d 1172, 1172, 1178-81 (9th Cir. 2008) [holding that 364-day delay after a lawful nonimmigrant status expired was not a "reasonable period].
[1851] INA §208(a)(2)(D).

outweigh the benefits. Considering the needs of refugees, including psychological, emotional, and economic hardships, linguistic barriers, and social challenges, the one-year deadline bar may likely exclude numerous legitimate refugees recovering from these situations in their host communities. A narrow interpretation of this as well as "change of circumstances" and "extraordinary circumstances" will likely complicate the application of FBA.[1852]

6.14 Conclusion

This Chapter analyzed the exclusion laws under two broad categories—individuals found to be unworthy of refugee reliefs[1853] and those who are no longer refugees due to a change of circumstances. Potentially, the protection bars differ from gender exclusion. Excludability pertains to all kinds of bars to asylum and nonrefoulement or withholding removal, which are enforced based on criminal responsibility or situational changes. Tracing the origin of the bars, the findings are linked with the circumstances of World War II and the rationale to ensure that fugitives were not allowed to exploit refugee advantage or evade criminal justice. These are reflected in the domestic practice and legislative history of the United States but with several variations. For example, the United States' perspectives of the exclusion laws are products of many factors such as—the effects of World War II, racial politics, terrorism, and counterterrorism. There are other recent factors in response to the migration crisis like the effects of the pandemic, and climate change. Although originally framed from the Refugee Convention, the United States—referring to the persecutor of others bar, and danger to host country bar and

[1852] *See, e.g.* Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum,* 31 HASTINGS INT'L & Comp. L. REV. 693 (2008); Musalo et aal, *supra* note 10 at 967.
[1853] exclusion by crimes pursuant Articles 1.F and 33(2).

current bars and inadmissibility are largely overbroad, limiting the changes of protection for potential refugees, hence the need for a more rational reform.

Significantly, 9/11 has a predominant effect on shaping the concepts of security and terrorism bars in the United States immigration law. Research analysis here underscored the expansive perspective of security-based exclusion law on terrorist activity, terrorist organizations, and material support bars. Each of these created wide margins of excludability[1854] that made no exception to freedom fighters, even when supported by the United States government. Also, spouses and children, even female captives of suspected or identified terrorists are barred under the terrorists' threshold**.** This is troubling for different reasons. Under the USA PATRIOT Act of 2001 and the REAL ID Act of 2005, for example, the notion of material support paid less attention to the possible existence of a guilty mind, duress, or even self-defense. Going by the new standard of the criminal bar, victims of terrorism would like women and child soldiers would likely be revictimized, regardless of their WFF for persecution. In *A-C-M-,*[1855] for instance, BIA denied relief for cancellation of removal to a Salvadorian woman and victim of terrorists' persecutions under the "material support" bar.[1856] She typifies a victim-paper terrorist excluded by the terrorist bar. Worst still, the terrorist bar admits no exception. Although INA section 212(d)(3)(B) allowed exceptions to duress and voluntary medical care, gender issues were not contemplated. In contrast, our research findings showed that Canada, Australia as well as the UK have extensively synthesized human rights and criminal law principles in the assessment of the bar.[1857] The danger of misapplying the terrorism bar could be far-reaching for individuals who are fleeing terrorist related persecution whose fears are well-

[1854] Id.; INA §208(b)(2)(A)(v), 8 U.S.C. §1158(b)(2)(A)(v).
[1855] 27 I&N Dec. 303 (BIA 2018).
[1856] Pursuant to 212(a)(3)(B)(i)(VII).
[1857] *RRT Reference N 96/12101;* ECRE, *supra* note 1505.

founded. Therefore, it is highly recommended that adjudicators apply fundamental procedures of criminal law in the evaluation of individual criminal responsibility such as the assessment of the knowledge, intent, action, and possible complicity in any alleged crime. Implicitly, evaluating a preponderance of evidence and possible exceptions will provide comprehensive insight into alleged criminality and a better assessment of the applicant's responsibility or otherwise. Lessons from the UK, Canada, and Australia provided guides on the application of criminal law and principles of human rights in such evidential analysis of crime bars and possible exceptions. BIA took a similar position in *Rodriguez-Majano* by overturning IJ's decision and distinguished the applicant's refugee experience from that of a fugitive of justice. Such classical reasoning is highly recommended in the assessment of excludability to ensure that the right individuals are excluded and to avoid imposing double jeopardy on innocent refugees.

Additionally, the research investigation underscored other militating factors in the construction of immigration bars like the intersection of history, politics, and racial biases. Historically, the trajectory of racial superiority and attempt to preserve Caucasian purity from the contamination of the "other" played predominant roles in the creation of immigration bars in the United States. Against this backdrop, such laws as the Page Act, Chinese Exclusion Act, and the Undesirable Aliens Act were enacted. Moving from the dark history of identity slavery and racism, the impact of the civil rights struggle ushered in a new age of the Civil Right Act and the Equal Protection Act under the Fourteenth Amendment Right. But despite decades of revolutionary struggles to the age of human rights and recent clamor for equal protection, there are still numerous areas of inequalities and racial biases, especially in immigration exclusion laws. Discussion in this chapter highlighted some of these laws enforced either for fear of the floodgate or an attempt to exclude immigrants of color. Vestiges of the restrictive legislations

and policies are still prevalent under Title 42 deportations, Trump's executive orders (now rescinded), expedited removal laws, and other chains of inadmissibility, unjustifiably implemented against refugees and immigrants of color. Some of these began as eugenicist policies and evolved into full-blown legislation that enlarged the scope of excludability. Besides different political policies in the United States have influenced the enactment of other exclusion laws outside the framework of the Refugee Convention such as the— STCA, filing deadline bar, metering asylum bar, MPP, or economic burden bar. Implementation of these bars has contributed to thinning down access to refugee reliefs. For example, under the expanded process of expedited removal, the Supreme Court has held in *Thuraissigiam*[1858] that individuals removed cannot claim access to a judicial review. Such practice is unconstitutional and incongruent with INA §208.16(b)(3)(B)[1859] and the international legal framework. Article 16 of the Convention expressly authorizes refugees to seek a judicial determination of their claims without prejudice to Article 1.F. In various cases, the United States jurisprudence conflicts with this standard and has imposed restrictive burdens that disagree with its own laws as well as the UNHCR interpretative guidance on principles like an absence of scienter,[1860] motivation,[1861] in reaffirmation of *Chevron* deference.[1862] Such narrow-minded constructions, if applied in the exclusion laws will limit chances of inclusion for individuals seeking asylum and withholding removals.

In view of the above issues, this Chapter makes the following recommendations stating that: a.) adjudicators should make clear an indisputable assessment of evidence for the existence

[1858] *Dep't of Homeland Sec. v. Thuraissigiam,*140 S. Ct. 1959 (2020).
[1859] § 208.16 s. 241(b)(3)(B) [Withholding removal under CAT].
[1860] *See, e.g. Balachova v. Mukasey,* 547 F. 3d 374, 385 (2d Cir. 2008); *Castaneda-Castillo v. Gonzales,* 488 F. 3d 17 (1st Cir. 2007) (*en banc*) [requiring that a person's act to be voluntary, which is also a demonstration of knowledge].
[1861] *Aguirre-Aguirre, supra* note 1135 at 526, 415.
[1862] Citing *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837, 423-433 [reasserting that *Chevron deference citing INS v. Cardoza-Fosenca* 480 U.S. 421-425) *Id.* at 428.

of a guilty mind and consciously voluntary act for criminal responsibility taking cognizance of—knowledge, intent, culpable acts, complicity, voluntariness, duress, and self-defense—to avoid the danger of a misconstruing a persecuted as a persecutor. b). There is an urgent need to redefine the framework of exclusion in the United States bars and inadmissibility to reflect the standard of the Refugee Convention and human rights. Such a legislative effort will reform the overbroad concept of terrorism bars and other politically or racially motivated bars that militate against humanitarian protection in the United States immigration law. Specifically, the USA PATRIOT Act of 2001, the REAL ID Act of 2005, and other related terrorist bars should consider gender and duress exceptions in accordance with international law. c.) The need to redefine the procedures of exclusion, agents, and the enforcement criteria is long overdue. Such reformation will define the scopes, and limitations of security agents in the evaluation process of claims, especially at the ports of entry. d). To avoid a miscarriage of justice, adjudicators should ensure that claimants are given exhaustive evidential opportunities in making or defending their claims in competent courts. A preponderance of the evidence must be evaluated critically considering the totality of circumstances, and exceptions before invoking the bar. Without such tactical procedures, the bars can be weaponized as tools of exclusion for victims of persecution. This will not only re-traumatize potential refugees but makes refugee relief far-reaching.

CHAPTER SEVEN

CONCLUSION AND RECOMMENDATIONS

7.1 Introduction

The circumstances of WW II and Nazi persecutions in mid-twentieth century Europe gave rise to the establishment 1951 Convention as a strategy to address the attendant refuge crisis. This is reflected in the definition of refugee status and grounds for protection, enumerated under five grounds race, religion, nationality, political opinion, and MPSG.[1863] Over the years, with a paradigm shift in the diverse circumstances that provoke forced migration, the 1967 Protocol was established to mitigate the geographical and periodic limitations of the Convention. However, the modifications did not update the scope of refugee inclusion and exclusion to reflect the emerging situations in involuntary migration after 1951. Whereas the standard has largely influenced domestic legislation, the impacts of the omission of "unConvention" refugees have been far-reaching. This dissertation has explored numerous issues relating to the lack of comprehensive protection for all bona fide refugees, especially women. From a gender perspective, it challenged Articles 1. A(2) and 33(1) of the Refugee Convention for gendering the criteria for refugee protection.[1864] Apparently, the omission of gender specific persecutions from the grounds of refugee protection raise fundamental questions on the nondiscriminatory clause of international refugee law (IRL) pursuant to Article 3.

Although the Preamble to the Refugee Convention, as well as Article 3, committed to equal protection,[1865] in contrast these eliminated sex, hence creating a discrepancy with normative

[1863] 1951 Convention, *supra* note 12 at art. 1.A(2) [defining refugee a refugee and the inclusion criteria].
[1864] *Id.* Articles 1. A(2) and 33(1) of the Refugee Convention limited the criteria for refugee protection to—aliens who have suffered or fear persecution under race, religion, nationality, political opinion, and membership in a particular social group—and are not excluded under Articles 33(2); 1.D-F.
[1865] I*d.* at art. 3[stating that "[T]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."].

international law treaties.[1866] Aware that violence against women prevails as a global phenomenon and constitute a primary cause of refugee flight. A plethora of asylum laws analyzed in this study underscored the numerous hardships of female asylum seekers, largely perceived as "unconventional" refugees. These pose serious problems to claimants, especially women whose persecutory experiences often center exclusively on gender or sex. Because gender is not depicted as a ground of persecution, women who seek asylum on GBPs battle with the challenges of proving gender viability under MPSG. Unfortunately defining female persecutory experiences within MPSG has remained a daunting task in many asylum courts because of conflicting nexus requirements.[1867] The inability of IRL to resolve these issues confirmed the research claim on sexism, which persistently has made the refugee crisis intractable. Therefore, this dissertation made resolutions for establishing diversity and inclusive protection of all deserving refugees in the light of humanitarian realities. Not only women, but the recommendations also favor emerging categories of refugees like individuals fleeing trafficking, drug crimes, terrorism, and disaster related displacement who face similar interpretative barriers.

Generally, refugee laws evolved from IRL. Understandably, the structure of refugee Articles 1.A(2) and 33(1) dominated the criteria for framing refugee status and inclusion, just as Articles 1.D-F and 33(2) influenced the grounds of excludability. Viewed from the United States jurisprudence, with the establishment of the Refugee Act of 1980 Congress sought to bring it to

[1866] UN Charter, *supra* note 31 at art. 1(3); UDHR 1945, *supra* note 31 at art. 2 [stating that human rights shall apply without distinction of any kind, such as race, colour, sex, language, religion, political other opinion]; ICCPR, *supra* note 31 at art. 3; *supra* note 31; CEDAW, *supra* note 31 at arts. 1 and 2.
[1867] In *re A-B- supra* note 56 at 316; *S-E-G-*, *supra* note 535 at 579; *Matter of ME-V-G-,* 26 I&N Dec. 227 (BIA 2014)*; Matter of W-G-R-,* 26 I&N Dec. 20 (BIA 2014).

conformance with IRL.[1868] By acceding to the 1967 Protocol, the 1980 Refugee Act[1869] adopted verbatim the definition and scope of "refugee" status in the Refugee Convention.[1870] But overtimes, the standard changed with circumstances like the aftermath of 9/11. The United States immigration law and refugee policy embodied restrictive bars and nexus thresholds that persistently eliminate potential refugees from international law-guaranteed benefits. Among the common victims of exclusion are women and other non-Convention refugees that bear extraordinary evidential burdens to prove the viability of their persecutory experiences, sometimes under conflicting jurisprudence. This dissertation examined the effects of these issues from gender specific lens, relating findings to other affected refugees. Exclusion is theorized in two ways—the first as a mechanism of elimination of deserving refugees and as a law of excludability. The latter examined the conditions of legitimate exclusion either on criminal or security grounds or by a change of circumstance. Against this background, we analyzed States practice and the challenges affecting the interpretations of gender viability. Under the exclusion laws, the study examined the loopholes in the United States exclusion laws and several contradictory laws that undermine the legitimate purpose of Articles 1.D-F and 33(2). Examples of these laws include the enforcement of unprocedural removal, punitive laws under IRRIRA, Title 42 "public health" deportation law, MPP exclusion enforced as "remain in Mexico policy," the filing deadline bar, and exclusion under STCA. This dissertation explored the background of the legislations and challenged its validity while seeking human rights resolution to negotiate the humanitarian concerns of refugees with protecting laws, and states' responsibility. Throughout

---

[1868] 8 USC 1101 Refugee Act of 1980, 96th Congress (March 17, 1980); Pub. L. No. 82-414, 66 Stat. 163 (1952). (Codified as amended in scattered sections of 8 U.S.C.); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) [on asylum and refugee protection and withholding removal] [*hereinafter* "1980 Refugee Act"].
[1869] 8 U.S.C 1101 Refugee Act of 1980, 96th Congr. (s. 643, 1980).
[1870] Pub. L. No. 82-414, 66 Stat. 163 (1952) (8 U.S.C.); INA § 101(a)(42)(A), 8 U.S.C § 1101(a)(42)(A).

this study, it sustained a common argument about sexism in IRL and the goal of achieving flexible, and inclusive protection, as well as a reasonable standard of procedural exclusion. Cognizant that humanitarian protection cannot be separated from human rights, it sought solutions within the realm of international law from which IRL gained legitimacy. Consistent with the international law principle of nondiscrimination, this study challenged the exclusive structure of IRL and urged its reconstruction to protection accessible to everyone without distinction.[1871] Particularly, it recommended the inclusion of sex as an independent ground for refugee protection and equally the accommodation of other un-Convention refugees within the framework of BNF. Aware that refugee rights are not always willingly provided by governments, instead states prioritize political interest over their commitment to good faith observance of a treaty. With recurrent cases of the mishandling of refugees' humanitarian concerns, refugees would likely remain intractable without effective strategies for monitoring and accountability at all levels. While reforms are imperative, setting measures of supervision, including complaints procedures will advance a new era in the international refugee regime. Each Chapter has explored the possibilities and prospects.

7.2 Chapter Review and Summary

Chapter One explored the development of the Refugee Convention. It traced the framing of the scope of eligibility (inclusion) and excludability from the male-dominant experiences of WW II. As earlier indicated, Article 1.A(2) set a benchmark for the defining of the meaning and grounds for refugee protection. Acknowledging the deficiency, popular debates about the membership in PSG have defended its flexibility to accommodate a wide range of uncategorized

[1871] UN Charter, *supra* note 31 at arts. 1-3; ICCPR, *supra* note 31 at art. 2; ICESCR, *supra* note 31 at art. 2; CEDAW, *supra* 31 at arts. 1-7.

claims.[1872] But this dissertation has refuted the proposition with several pieces of evidence on failed gender and other claims on PSG.[1873] Instead, it argued that the dearth of definition on the possible component or threshold of the category of persecution viable under the PSG makes it vague and somewhat controversial. Findings on conflicting interpretations of the PSG category in the United States underscore the claim, thus flaws the presumption that PSG would be a catch-all. The most vexing problem of women who make gender specific petitions on PSG is defining an acceptable PSG category. Oftentimes the nexus expectations are based on subjective standards set by individual adjudicators due to a paucity of definitions. Despite developments by the UNHCR to enlighten adjudicators, the interpretation of claims of the so-called "unConvention" refugees in the United States and many other jurisdictions creates human rights conundrum. This is because several domestic laws are simply a reproduction of IRL, even with more restrictive clauses.[1874] In exploring the deficiencies with the exclusive background, the study identified the gap as the source of the benchmark for nexus requirement that would be examined in Chapter Five. Against this backdrop, it connects to the discussion in Chapter Two on the sources of humanitarian protection.

Chapter Two explored the legal frameworks of sanctuary practice from varied perspectives like religious, political, and international law. Traditionally, refugee admission, asylum, and resettlement were integrative, enforced mainly under a sacred tenet that bolstered a religious and cultural belief in collective humanity. The analysis of the Judeo-Christian and

---

[1872] *See, e.g.* Legomsky, *supra* note 790 at 933; Goodwin-Gill, *supra* note at 269 [noting that Membership of a particular social group was ascribed to a Swedish delegate at the deliberations of the *travaux Préparatoires* to the 1951 Convention recommended the inclusion of a kind of "catch-all" social group, since "experience had shown that certain refugee suffer persecution because of their a particular social," distinct from the four grounds].
[1873] *Fisher II, supra* note 76 at 955; *Fatin, supra* note 76 at 1233; *R-A-,* supra note 56 [*R-A-* was a 14year struggle for asylum before approval was at last granted, without precedent].
[1874] INA 101(a)(42)(A) [The United States replicated the scope of Article 1.A(2).

Muslim *Ijara* tradition underscored the ancient practice of asylum entrenched in respect for the dignity and sacredness of human life.[1875] Therefore, sheltering an asylum seeker was premised to preserve human dignity from violation. International law evolved from this concept of natural justice and fairness. However, asylum practice acquired another dimension in the growth of states during the ancient Greek and Roman eras that were utilitarian. Asylum was implemented to reinforce economic, political, and military strength.[1876] The research analysis contextualized the strategy of economic asylum based on productivity, expansion of military strength, and nation building with a contemporary penchant for globalization. Compared with religious sanctuary practice, the latter was humanitarian in nature, while the underlying motivation behind the ancient Greek and Roman asylum was functionality. Nonetheless, both reflected a traditional concept of diversity and inclusive society. The findings are imperative to the dissertation's argument on the inclusive and human rights principles of asylum. Supported by the research outcome, the last chapter disproves the wrongful assumption in the United States that asylum seekers are a burden to the national economy. The foundational insight on an all-inclusive asylum based on fairness and collective responsibility is reinforced in subsequent discussions to support the recommendations on an equitable refugee regime.

In Chapter Three, the study examined the important elements of refugee law—persecution, asylum, and nonrefoulement. The discussion underscored the limitations of IRL in terms of the paucity of definitions and the lack of inclusion. For example, even though persecution is a key element in the establishment of eligibility for refugee protection, neither the Convention nor its Protocol defined its meaning and component. Regrettably, the UNHCR

[1875] Judeo-Christian and Islamic *Ijara* religious culture were based on the tenet of religious morality to preserve life, brotherhood, and human dignity. It was reformatory too.
[1876] Asylum practice in the ancient Greek and Roman institution were both humanitarian and utilitarian to promote the military strength, political and economic expansion.

Handbook did not identify this as a deficiency. Instead, UNHCR ostensibly justified the omission as flexibility and ability to accommodate varieties of attacks.[1877] Nonetheless, the research findings proved the contrary, given the inconsistencies in the interpretations of gender attacks and other uncategorized forms of human rights violations occurring outside the Convention's benchmark. Gender-specific cases like rape, domestic violence, honor killing, severe discrimination, including economic persecution attest to the ubiquity of the persecutions inflicted mainly by non-state actors.[1878] In seeking resolution and possibilities for claimants, this study explored varieties of jurisprudential as well as scholarly definitions of persecution from different jurisdictions. Supported by a plethora of evidence,[1879] it asserted that persecution could be gender specific, occurring outside the five enumerated grounds as severe human rights violations, inflicting physical harm, or threatening one's freedom. But in some cases, courts have required proof of nexus as well as a degree of proportionality.[1880] Also, *Pitcherskaia and Kovav* identified dimensions of non-physical persecution connected with emotional, psychological, and economic torture.[1881] The argument is consistent with views advanced by Goodwill Guy[1882] and Hathaway[1883] on persecution and human rights. However, whereas the viewpoints have been adopted by countries Canada, Australia, New Zealand, and the UK, in many gender decisions the United States have held conflicting interpretations on GBPs under the PSG, as demonstrated in Chapter Four and Five.[1884]

[1877] 2002 UNHCR Guidelines, *supra* note 4 at 6, 22 [considering gender viability with PSG].
[1878] *Fisher II, supra* note 76 at 955; *Fatin, supra* note 76 at 1233; *R-A-,* supra note 56 [on GBPs by non-state actors]; *Sarhan, supra* note at 649.
[1879] *Id.* Hynes, *supra* note at 231-445 [illustrated conflict related attacks on women].
[1880] *Id.; Nagoulko v. INS,* 333 F.3d 1012 (9th Cir. 2003) [court required severity and proportionality to proof economic persecution].
[1881] *Pitcherskaia, supra* note at 641 [9th Circ. Recognized that psychological harm could be persecutory, expanded *Sagermark]*; *Kovac, supra* note at 1726 at 106-7 [9th Circ. examined economic persecution].
[1882] Goodwin-Gill, *supra* note 269 at 69 [links persecution with a breach of human integrity, rights and dignity].
[1883] Hathaway, *supra* note 22 at 112 [defined persecution as a systemic human rights violation…].
[1884] *See, e.g. Fisher II, supra* note 76 at 955; *Fatin, supra* note 76 at 1233; *R-A-,* supra note 56.

Chapter Four analyzed the five grounds of refugee protection—race, religion, nationality, political opinion, and membership in a particular social group. It investigated the legal background and varying jurisprudential interpretations of each to underscore the strength and weaknesses of their domestic applications. The research findings equally identified the issues relating to lack of uniformity in states' practice, and impacts of political interest as seen in the United States.[1885] Significantly, the analysis underlined the challenges associated with gender related claims by women tagged "non-Convention refugees" whose persecutory experiences are not expressly recognized by the Refugee Convention, hence are required to prove the fundamental characteristics or particularity of their social group.[1886] It equally challenged unconventional views raised in *Zacarias* and *Campos* [1887] that required claimants to demonstrate nexus in connection with perpetrator's intent.[1888] Compared with international principles, the troubling precedent is found to have deviated from the central focus of persecution suffered or feared in IRL, and wrongfully invoked a criminal law principle on *mens rea* and *actus reus.* Given the ambiguities caused by misinterpretations of the PSG category, Chapter Five explored gender asylum claims and the problem of nexus to make recommendations for reforms.

Chapter Five continued the investigation of GBPs and asylums. It analyzed the concept from different perspectives—persecutions occurring in private and public such as domestic violence, rape, FGC, punishment for noncompliance to imposed gender norms, forced marriage, and honor killing. Commonly, these represent asylum claims by women who flee from places like Africa, Latin or Central America, and the Middle East. Regardless of their circumstances,

---

[1885] *Id.*; *R-A-, supra* note 59 [lasted for 14yrs under varying political regimes before verdict was reached]; *A-B- 111,* 28 I & N Dec. 307 (A.G. 2021) [Under the Biden Administration *A-B- 111* reversed the Trump-era decisions in *A-B- 11* and *A-B- 11* and reinstated *A-R-C-G,* a decision under the Obama Administration].
[1886] *Fisher II, supra* note 76 at 955; *Fatin, supra* note 76 at 1233; *R-A-, Op Cite* [found GBPs as non-persecutory]; *Sarhan, supra* note 222 at 649 [denied claims on honor killing as non-Conventional].
[1887] *See, e.g. Sofia Campos-Guadado v. I.N.S* 809 F. 2d 285 (5th Cir. 1987).
[1888] *Id.*

the analysis revealed the numerous interpretational barriers of claimants in seeking to prove that the harm suffered because of their sex would meet the Convention's threshold for persecution pursuant to Article 1.A(2).[1889] Cases like *Sarhan, Fatin, Ngengwe* and *R-A-* exemplified the harsh experiences of claimants, who many a time become retraumatized by the outcome of their decisions.[1890] Sadly, the risk of denial, as well as judicial indifference to gender experiences, is far-reaching. According to research findings, such categories of claimants usually are imperiled by the uncertainties and fear of being returned to the danger they have fled. Compelled by the circumstances, the UNHCR developed extensive guidance and Conclusions to guide adjudicators on a fair determination of gender claims. In 2002, the UNHCR Gender Guidelines recognized the viability of GBPs within PSG and maintained that there would be no need to create gender as a separate ground.[1891] Understandably, the UNHCR Guidance and EXCOM Conclusions made a persuasive impact and have been insightful in the development of gender asylum jurisprudence. However, because their recommendations are not binding on states, the progress achieved in mitigating gender biases has been minimal. Cases analyzed here showed that many female refugees who bring gender-specific claims still face challenges of denials on grounds of nexus. Although we recognized some progress in state practice, especially since the adoption of the Gender Guidelines in Canada and Australia, and the introduction of the VAWA protection remedy in the United States. Notwithstanding, this has not benefitted women in countries like the United States where the UNHCR Gender Guidelines are not integrated into their domestic laws. Thus, many female asylum seekers still grapple with a heavy burden of nexus proof. Instances of conflicting decisions in the United States gender asylum on PSG viability attest to the unresolved

[1889] Referring to the definition of a refugee and grounds for protection under Articles 1. A(2) and 33(1).
[1890] *Fatin, supra* note 76 at 1233; *R-A-,* supra note 11; *Sarhan, supra* note at 649; *Ngengwe, supra* note 1153 at 543.
[1891] 2002 UNHCR Gender Guidelines, *supra* note 116 at para. 6 and 9.

jurisprudence on gender and PSG claims. This is attributed to the restrictive framing of Article 1.A(2) grounds of eligibility, which disqualified female refugees continuously undermining a fair assessment of gender claims. Considering these challenges, this dissertation recommends the inclusion of sex as an independent ground for the definition and protection of refugees in compliance with normative international law,[1892] as opposed to the initial argument of the 2002 UNHCR Guidelines.[1893]

Women constitute almost half of the world's population, representing an estimate of about 49.58 percent of the global population.[1894] Therefore, the exclusion of almost half of the world's population in IRL is significant because it undermines the humanitarian goal of the Refugee Convention. The suggestion for gender inclusion is stirred by feminist justice and the core principles of human rights and nondiscrimination fundamental to IRL. Throughout this study, the nondiscriminatory character of international law was bolstered as a required reform in contemporary IRL. Lack of gender parity in IRL has revived an agelong dichotomy of private and public, which for long trivialized human rights violations perpetrated against women in private and shielded perpetrators from accountability. These issues are revisited here.

Chapter Six explored other dimensions of refugee exclusion laws, beyond gender and their applications in the United States jurisdictions. Comparably, it examined the relationships between Convention's Articles 1.D-F and 33(2) and the United States asylum bars. As argued

---

[1892] UN Charter 1945, *supra* note 31 at art. 1(1) and (3); ICCPR, *supra* note 31 at 52 art. 2; ICESCR, *supra* note 31 at 53 art. 3; CEDAW, *supra* note 31 arts. 1-18[International law guarantees equal protection to every person irrespective of sex, religion, race…]

[1893] *Id*.

[1894] *Gender Ratio in the World,* STATISTICS TIMES, https://statisticstimes.com/demographics/world-sex-ratio.php#:~:text=The%20population%20of%20females%20in,101.68%20males%20per%20100%20females; *United Nations, Department of Economic and Social Affairs, Population Division (2019),* WORLD POPULATION PROSPECTS 2019: HIGHLIGHTS, ST/ESA/SER.A/423, 1-20, (2019), https://population.un.org/wpp/publications/files/wpp2019_highlights.pdf.

here, the purpose of the exclusion laws is to preserve the integrity of humanitarian protection, ensuring that only worthy refugees are protected and preventing fugitives of justice from exploiting the benefits. But in practice, as seen in the United States asylum bars, several disparities exist as evidence of practice irregularities. Historically, the United States exclusion laws are developed from Convention bars. But over the years, the aftermath of the 9/11 and wave of global insecurity negatively impacted the overbroad definition of crime and security (terrorism) bar beyond the threshold of Article 1.F and 33(3). This Chapter investigates the restrictive laws, their loose interpretations, and gender consequences. For example, under the REAL ID potential victims of security attacks like women, and children are loosely misconstrued as threats to national security under a delicate framing of material support or security bar. Moreso, the terrorism bar recognized no exception to duress, or victims of terrorist attacks and self-defense.[1895] Enforcing such restrictive bars limits access to protection bona fide refugees. Unfortunately, the overbroad asylum bars unreasonably target aliens in dire need of protection on presumptuous grounds of crime, national security, and inadmissibility policies. Case reviews here demonstrated the difficulties associated with their implementations; especially how eligible refugees are being risked by denials as well as deportations. The controversial standard is contrasted with lessons from other jurisdictions and international instruments to underscore the irregularities. It identified other flaws with the United States MPP, the filing deadline bar, the STCA, and the unconventional deportation order under Title 42. The critical issues raised in Chapter Six are reiterated here with recommendations for legal reform.

[1895] INA § 212(d)(3)(B)[exceptions to terrorism bars—duress and voluntary medical care—has no gender consideration for female victims of terrorists attacks like kidnap, rape, forced labor or servitude.]

Driven by the research goal to challenge discriminatory laws and inequalities in the applications of IRL, this Chapter reasserts the inextricable connection between protection from persecution and preservation from torture, death, and human rights violations. Contenting that the rights of asylum seekers like all human rights are inherent and inalienable, adjudicators interpreting inclusion or excludability should be guided by legitimate principles since human rights are the product of the state's generosity but legal obligations. Although sovereign states exercise the discretion to admit or grant asylum, such discretion must be legitimate, fair, and procedural. Against this background, it challenged the United States' criminalization of illegal entry, punitive measures on asylum seekers, and practice irregularities by judicial officers to cohere with the existing bars. Supported by international instruments, the study challenged the reckless enforcement of expedited removals, pushback, and mass deportations as a consequential breach of nonrefoulement and United States obligations under CAT.[1896] The principle of nonrefoulement is binding on every state even those that have not yet ratified the Refugee Convention[1897] and can serve as an alternative remedy where asylum fails. Since the dissertation arguments centered on the gender perspectives of the inclusion and exclusion laws, the findings, recommendations, and conclusion are summarized accordingly.

7.3 Review of Findings on Gender Exclusion and Recommendations

Common to international legal instruments, the Refugee Convention committed to the then existing international treaties—the United Nations Charter and UDHR. Specifically, it pledged commitment to equality, guaranteeing that all human beings enjoy fundamental rights

[1896] UNHCR Advisory Opinion on Nonrefoulement, *supra note* 23 at para. 8; 1951 Convention, *supra* note 12 at art. 33(1); CAT, *supra* note 165 at art. 3; Cartagena Declaration, *supra* note 464; OAU Refugee Convention, *supra* note 445.

[1897] *Id.*

and freedom without discrimination.[1898] However, the nondiscriminatory clause, Article 3 altogether departed from the affirmed assurance by excluding sex from its standard of nondiscrimination.[1899] Apparently, Article 3 reiterated the scope of Articles 1.A(2) and 33(1), enjoining the Contracting Parties to apply the provisions of the Convention "without discrimination as to race, religion or country of origin." The conscious omission of sex in applying the Convention's defining principles amounts to a colossal breach of the avowed principles of nondiscrimination. The uncommon standard set by Article 3 creates discrepancies with international legal instruments like the United Nations Charter, ICCPR, ICESCR, and the CEDAW.[1900] These specifically, fundamentally prohibited discrimination on grounds of race, sex, language, or religion.[1901] Effects of the contradiction is profound and form the basis for the human rights ambivalence in gender asylum jurisprudence. Chapter One explored the historical background of Articles 1.A(2)[1902] and 33(1)[1903] and the rationale to refugee inclusion laws. Without justifying the gendering of refugee status and protection, following the five enumerated grounds, not all fears of persecution are well-founded, if connected with—race, religion, nationality, MPSG, and political opinion. If clarity should be sought from the above benchmark, the first step should be to deconstruct persecution, being a key element for determining the eligibility for protection. However, the Convention offered no definite meaning for persecution, which is a fundamental gap. Acknowledging the omission, Paragraph 51 of the UNHCR Handbook has urged adjudicators to infer meaning from the five Convention's grounds, taking cognizance of other serious violations of human rights occurring "for the same reason."

[1898] 1951 Convention, *supra* note 12 at Preamble para. 1.
[1899] *Id.* at art. 3.
[1900] UN Charter, *supra* note 31 at art. 1(3); UDHR *supra* note 31 at art. 2; ICCPR, *supra* note 31 at art. 3; ICESCR, *supra* note 31 at art. 3; CEDAW, *supra* note 31 at arts. 1 and 2.
[1901] *Id.*
[1902] 1951 Convention, *supra* note 12 at art. 1. A(2) [defining the status of a refugee under five grounds].
[1903] *Id.* at 33(1) [defined the criteria for nonrefoulement under five enumerated grounds].

Although this appears to be illustrative, Paragraph 51 incurs a similar benign error of Articles 1.A(2) and 33(1) by viewing persecution through the WW II male-centered spectacle.[1904] Debates on persecutions proved that threats or severe attacks on women's sex, people's rights, freedom, and dignity can be persecutory.[1905] However, for an absence of uniformity, the acceptance has not gained traction in gender refugee jurisprudence. Research analysis in Chapter Five demonstrated that many states reject gender claims because of nexus requirements. Applicants mostly women who seek protection from GBPs are compelled to demonstrate that their alleged persecution was on account of the Convention's protected grounds.[1906] Mixed with the restrictive responses motivated by fear of the stronghold, many of such cases like *Fatin, Fisher, Ngengwe, R-A-* and *A-B-* met with controversial decisions, including denials.[1907]

Over the years the UNHCR has developed innovative Gender Guidelines and EXCOM Conclusions[1908] to address the numerous obstacles for gender claimants and to guide adjudicators on the determination of gender asylum claims.[1909] These have made a remarkable impact in creating awareness on gender related persecutions. For example, influenced by the progress, the

---

[1904] *The Handbook, supra* note 114 at para. 51.

[1905] *See, e.g.* Goodwin-Gill, *supra* note 269 at 69; Hathaway, *supra* note 22 at 112; *Ward. Supra* note 126 at 689; *ex parte Shah, supra* note 128 at 653; *Alberto Gonzalez, supra* note 131 at 429 [the US 6th Cir. citing Hathaway to link violation of basic human rights as persecution]; *Khawar,* [the Australian recognized Hathaway's human rights formular for determining persecution.]; *Refugee Appeal No. 2039/93, supra* note 130 [New Zealand court recognized cumulative threats of human rights, breaches and denial of human dignity as persecutory].

[1906] *See, e.g., R-A-, supra* note 56 [a victim of rape attack denied asylum by BIA, holding that her harm was private, hence doe does not meet the requirement of nexus]; *Campos-Guadado*. *Supra* note 1887; *Fatin, supra* note 76 at 1233; *R-A-,* supra note 11; *Sarhan, supra* note at 649; *Ngengwe, supra* note 1153 at 543.

[1907] *Id.*

[1908] *See, e.g.,* EXCOM Conclusion No. 39 (1985) [identifying women who suffer persecution for having transgressed gender mores to meet the requirement of a PSG]; UNHCR Guidelines 1991 [recognize that women who suffer persecutions such as rape, sexual assault and severe sexual discrimination may legitimately claim refugee status]; EXCOM Conclusion No. 73 (1993) [acknowledging that women suffer persecutions differently from men]; 2002 UNHCR Gender Guidelines, at para. 9. [recognizing that GBP may occur in the form of rape, sexual violence, dowry-related violence, FGC, DV, or trafficking]

[1909] The Guidelines on bifurcated nexus formula has been adopted and implemented by countries like Canada, Australia, and New Zealand. *See, e.g., Ward, supra* note 539; *Khawar , supra* note 677. *Ward* advanced the principle of antidiscrimination in the consideration in gender claims, likewise *Khawar*.

United States BIA handed down a landmark decision in the *Matter of Acosta*[1910] that established the doctrine of *ejusdem generis* for analyzing PSG, consistent with other Convention's grounds.[1911] Its application became beneficial in *re Kasinga,*[1912] granting asylum for FGC as and in *Tobonso-Alfonso,*[1913] a claim on sexual orientation-related persecution. Equally, Congress passed a significant VAWA legislation in the early 1990s that favored female survivors of domestic violence [1914] by US-citizen (USC) or permanent residents-spouses (PRS). VAWA provided claimants with the authority to self-petition[1915] and cancel a removal.[1916] However, the VAWA benefits are limited, and not transferable to other female claimants without USC or PRS status who seek asylum protection on similar grounds. Considering that a breach of human rights in one constitutes a fundamental breach of rights enshrined in international law, this study recommended that the VAWA reliefs be made accessible to other women who seek similar benefits on gender asylum. Lessons from the VAWA are equally recommended to other jurisdictions for the advancement of female rights in asylum countries, in the same manner, that countries like Canada, Australia, and the UK have adopted the progressive theory in *Acosta*.[1917] Since the amendment of the Refugee Convention may take a while, such an interim modification will improve the determination of gender claims in asylum countries. Also, countries like the UK, New Zealand, Canada, and Australia have incorporated the gender principles as well as the

---

[1910] 19 IN Dec. (BIA 1985).
[1911] *Acosta, supra* note 229, 211, 233 [*ejusdem generis* literally meaning one of the same kinds, the doctrine construed for analyzing PSG to be consistent with other enumerated grounds]
[1912] *In re Fauziya Kasinga, supra* note 1102.
[1913] 20 I. & N. Dec. 819, 822 (BIA 1990).
[1914] INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m).
[1915] INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g), *supra* note 34.
[1916] INA § 240 A (b)(2); 8 CFR § 1229(b)(2) *supra* note.
[1917] *See, e.g., Ward, supra* note 539 at 689; *Islam (AP), supra* note 1477; *R, supra* note 1477.

BNF in gender decisions.[1918] Nonetheless, for lack of comparability these improvements have not generally translated into effective actions.

Findings in gender case laws attest to the manifest inconsistencies in nexus requirements, especially in the United States.[1919] In our analysis of *Sofia Campos-Guadado v. I.N.S,*[1920] we found that a Salvadorian woman who suffered a vicious rape attack and nervous breakdown was adjudged by the Fifth Circuit not to meet the Convention's requirement for refugee relief.[1921] Her persecutory experience was construed as a common price of any woman in her circumstance. Twelve years after, BIA overturned a grant of asylum to a Guatemalan woman, who suffered abhorrent domestic violence and rape by her husband,[1922] holding that the applicant failed to demonstrate evidence of a cognizable PSG or political opinion. Despite the several outcries provoked by the *Matter of R-A-*, it took fourteen years of persistent human rights struggles to finally obtain justice for Ms. Alvarado, following a political transition. Even though the applicant was granted asylum under PSG,[1923] her case did never set a precedent for future adjudication. In contrast, A.G. Jeff's Sessions set a controversial precedent in the *Matter of A-B-,* after vacating *A-R-C-G-.* The latter previously held that in some circumstances, survivors of domestic violence could receive asylum in the United States.[1924] By overruling *A-R-C-G-*, A.G. rejected Ms. A.B.'s proposed PSG "El Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners," and found same to be very similar to

---

[1918] BNF recognizes the government's unwillingness and inability to protect a victim as persecution within the meaning of Article 1.A(2).
[1919] *R-A-, supra* note 56; *Fisher supra* note 76; *Sardan supra* note.
[1920] 809 F. 2d 285 (5th Cir. 1987).
[1921] *Id.* at 285.
[1922] *R-A-, Op Cite*.
[1923] DHS Brief; *Matter of R-A-* 22 I&N Dec. 906 (A.G. 2009);
[1924] *A-B-,* 27 I&N Dec. at 320.8 [holding, "…generally, claims . . . pertaining to domestic violence or gang violence perpetrated by no-governmental actors will not qualify for asylum"].

the formulation approved in *A-R-C-G-*.[1925] Apparently, *A-B-* set a debilitating barrier to gender asylum seekers. By shifting the evidential requirements on the proof of persecution by showing "on account of,"[1926] it amplified the evidential requirements that the respondent must demonstrate the government's condonation of a persecutor's actions on account of membership in a PSG.[1927]

The Session's decision reflects a prevailing attitude seen earlier in *Fatin.*[1928] Here, the Third Circuit Court denied asylum to a westernized Iranian woman who suffered cruel persecution by state actors for noncompliance to state's law on mandatory religious dress code for women. The court rejected Fatin's claim of PSG, holding that her group was not cognizable and failed to meet the burden on *Acosta.*[1929] Yet, in *Matter of C-A-,*[1930] BIA made it clear that *Acosta'*s immutability test was only a starting point.[1931] One year after, in *Matter of A-M-E & J-G-U,*[1932] the Board described the social visibility test as a vital requirement and necessary factor in social group determination.[1933] At the same period, the Ninth Circuit Court developed variant PSG termed "voluntary association relationship" like "young working class" that was distinct from the earlier formulation in *Acosta.*[1934] The conflicting jurisprudence created a chain of inconsistencies in the actual fundamentals of PSG, thus complicates matters for gender claimants. Unsurprising, in *Gatimi v. Holder*[1935] as the Seventh Circuit challenged the

[1925] *Id.*
[1926] 8 C.F.R. § 1208.13(b)(1).
[1927] *Id.* at 338.
[1928] *Fatin, supra* note 76 at 1233.
[1929] *Id.*
[1930] *Matter of C-A-*, 23 I. & N. Dec. 951, 956-57 (BIA 2006) *aff'd, Castillo-Arias v. U.S. Att'y Gen.,* 446 F.3d 1190 (11th Cir. 2006), *cert. Denied sub nom Castillo-Arias v. Gonzales,* 446 F.3d 1190 (11th Cir. 2006).
[1931] 23 I. & N. Dec. at 955.
[1932] 24 I. & N. Dec. 69 (BIA 2007) (amended opinion).
[1933] *Id.*
[1934] *Matter of C-A-,* 23 I&N Dec. 951 (BIA 2006) [stating that in determining a MPSG, claimants should show that they are united by voluntary association, including former association].
[1935] 606 F.3d 344 (7th Cir. 2010).

convoluted constructions of social groups. It found the controversial standards to be illogical and without legal basis. But *Gatimi* did not deter a subsequent dilemma created in *Matter of M-E-V.G-,*[1936] and *Matter of W-G-R-.*[1937] In both cases, the BIA neither deferred to nor affirmed the requirements of social visibility, but proposed a rationale for deference. Likewise, in *Ngwengwe v. Mukasey,*[1938] the Eight Circuit Court took a different standpoint on *Chevron* deference that required a demonstration of social visibility and particularity as requirements for an applicant's proof of social group. But most sadly, in *Sarhan v. Holder*[1939] a Jordan woman who sought asylum from honor killing was denied protection. Both IJ and BIA held that her alleged fear of honor killing does not make her a member of a PSG. BIA further asserted that even if she was, she did not show that the intent to kill her was on account of her MPSG.[1940] It took a later intervention of the Seventh Circuit after a persuasive public outcry to reconsider and overturn the previous decisions. Obviously, the decision was favored by a political transition, under the Obama administration, after several years of interpretational struggles. A similar verdict was reached in the *Matter of A-R-C-G-,*[1941] where BIA delivered a milestone decision that recognized a "married women in Guatemala who are unable to leave their relationship" as a "cognizable particular social group viable for a claim for asylum or withholding."[1942] The precedential decision became binding and applicable in all immigration cases throughout the United States. Nevertheless, as noted earlier, *A-R-C-G-* was overruled in *Matter of A-B-*[1943] under the Trump Administration by the A.G. Jeff's Session's verdict. The swift reversal illustrates the constant

[1936] 26 I. & N.
[1937] 26 I. & N. Dec. 208 (BIA 2014).
[1938] 543 F.3d 1029, 1034 (8th Cir. 2008) [requiring social visibility in defining a gender related PSG); *Santos-Lemus v. Mukasey,* 542 F.3d 738 (9th Cir. 2008).
[1939] 658 F. 3d 649 (7th Cir. 2011); *Kamar v. Sessions*, supra *note 811.*
[1940] *Id.* at 464.
[1941] *A-R-C-G-*, *supra* note 124 at 388.
[1942] *A-R-C-G-, supra note 18* at 389.
[1943] In *re A-B- supra* note 56 at 316.

swing in immigration jurisprudence by polarized partisan regimes. Impact of *A-B-* intensified the evidential requirements on gender asylum claims. For nearly a decade, *A-B-* precedent has had a predominant influence in gender asylum decisions and oftentimes spawned confusion among courts in the determination of PSG. But in 2021, at the beginning of the Biden Administration, the President issued an executive order directing the AG and DHS Secretary to "promulgate regulations addressing the circumstances" of PSG in *A-B- 1* and *A-B- 11*.[1944] This led to the vacating of *A-B- 1* and *A-B- 11* entirety and the reinstatement of *A-R-C-G-*.[1945] Although, some vestiges of the troubling precedents on nexus requirements are still in place under *Zacarias II*.[1946] Whereas the feat in *A-B- 111*[1947] hangs on the fragile destiny of political trajectory, a reversal with a changing administration is predictable. Given the political manifest political influence on judicial decisions, this study interrogates the efficiency of judicial independence in the United States. These issues are readdressed in the concluding session of this Chapter with recommendations for reform of the United States immigration courts and judicial system.

The United States is not alone. Analysis of case laws in this study revealed negligible responses to gender asylum claims in different jurisdictions due to nexus requirements. For example, in UK's *Islam v. Secretary for the Home Department (SHD) and R. v. Immigration Appeal and SHD ex parte* Shah,[1948] the UK court insisted on nexus proof by two Pakistan women who have fled abusive relationships. Although the majority opinion adopted their social group classification as "Pakistanian women," the court maintained that their PSG cannot be defined solely by persecution. Apparently, it rejected the attributes of "cohesiveness" for a social group,

[1944] Exec. Order No. 14010, § 4(c)(ii), 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021); *Matter of A-B-* 28 I&N Dec. 307 (A.G. 2021).
[1945] *Id.*
[1946] *Elias-Zacarias*, *supra* note 360 at 478 (1992) [insisting on nexus by proving persecutor's intent].
[1947] *A-B-, supra* note 124 at 307.
[1948] [1999] 2 W.L.R. 1015; [1999] INLR 144.

like *R-A-,* making the application of the precedent almost impossible.[1949] Also, the application of the UK DFT increased unprocedural "quick" removal of asylum seekers, including women. *Fatima H,* a Pakistani woman who had fled abhorrent domestic violence and rape was dismissed under the application DFT program.[1950] Her claim was partly rejected for lack of credibility and failure to seek the government's protection. Although Fatima earlier testified that seeking police protection in the Pakistani male-dominated society was practically ineffective. Likewise, the findings from France and Israel indicated a commonality in the mistreatment of gender claims. For example, with the exception of FGC and honor crime, the French jurisdiction rarely gives credibility to GBPs or fears arising therefrom.[1951] Instead, the French *Mlle EG Decision* showed that the *Commission des recours des réfugiés* (CRR) grants an alternative form of protection rather than gender asylum.[1952] In Israel also, the study revealed there has been an overall reluctance by courts to acknowledge gender claims, especially on matters relating to domestic violence or other intimate partner persecutions because these are largely perceived as private or familial affairs.[1953] Overall, these findings contradicted Paragraph 6 of the UNHCR 2002 Guidelines, which claimed that "there is no need to create additional [gender] ground," and that gender claims can be successfully submitted under PSG.

[1949] Adopted and signed by the majority decision of Lords Steyn, Hoffmann, and Hope of Craighead; while Lord Steyn signed on to the more restricted definition and was joined by Lord Hutton; The "cohesiveness" test was enunciated in the United States case of *Sanchez-Trujillo.*

[1950] *Id.* 33 [Unreported cited by Human Rights Watch 23 Feb. 2010]

[1951] L. Brocard, H. Lamine and M. Gueguen, *Droit d"asile ou victimisation?* 75 PLEIN DROIT (December 2007).

[1952] Commission des recours des réfugiés (CRR), Mlle EG Decision No 549296, 7 July 2006 (UNHCR RefWorld, 2006); *CRR, SR, 27 mai 2005, 487613, Mme Nariné Ananian ép. Arakelian; Protection subsidiaire*, France: Commission des Recours des Réfugiés (CRR), 27 May 2005, available at: https://www.refworld.org/cases,FRA_CRR,429da18a4.html.

[1953] *Grace Kappachi v. The Minister of Interior* [unreported] a Nigeria female who fled domestic violence was denied asylum by the Israeli CAA because the court held that applicant's fear of persecution was "personal;" *Jane Doe v. The Minister for Interior,* [a Nigerian female who fled a death threat by her father for refusing to submit to a coercive marriage with his debtor, was denied asylum for lack of nexus. CAA held that Jane did not establish an objective fear on Convention's ground].

Evidently, violence against women is a global phenomenon. But the sensitivity of this crime has not received attention from lawmakers and in the asylum jurisprudence. Thousands of female refugees who flee these risks in their home countries continue to face the danger of denials and repatriation because of conflicting interpretations and uncertainties in gender viability. Although asylum determination should be case by case, constant misinterpretations of GBPs suggest biases that can only be resolved by gender inclusion. Therefore, this dissertation recommends an amendment of Articles 1.A(2) and 33(1) to include sex as a sixth for refugee protection. This will advance gender rights in IRL and independently accommodate the sensitivity of female persecutory experiences. Knowing that GBV in many circumstances can open a spiral of human insecurities leading to forced migration, such advancement will provide solutions for survivors.

Thousands of women today endure horrendous subjugation under the orthodoxy of religious or cultural practices. Yet, the poor response to women who suffer GBPs indicates consistent attempts to undervalue the seriousness of these crimes, mostly committed by non-state actors in private. This study finds the precedent troubling. Norms of international human rights have defied the boundaries of family privacy under CEDAW and related instruments that allow remedies and accountability.[1954] Therefore, the continuous trivialization of GBPs as "private" or "lacking nexus," simply reinforces an illusory standard of family privacy that is antithetical to the rules of international law. If at all any consideration is to be made about family privacy by an asylum court, it should be in terms of implementing the BNF by considering the weight of the government's inability and unwillingness to protect victims of intimate partner persecution in a home country. Therefore, this study recommends the consideration of BNF alongside the

[1954] CEDAW, *supra* note 31 at arts. 18 and 19 [established a committee for accountability on the implementation].

incorporation of sex grounds of persecution for refugee eligibility to save female asylum seekers from double jeopardy.

7.4 Exclusion under the Security and Terrorism Bar: Impacts and Recommendation

Outside gender exclusion, another worrying discovery of this study is the overbroad application of the exclusion laws under the pretext of public security or crime bar, especially in the United States. An earlier review of Chapters One to Five explored Articles 1.A(2) and 3(1), focusing on the critique of gender exclusion. Chapter Seven analyzed the laws of exclusion pursuant to Article 1. F and Article 33(2). Excludability as discussed here applies to all forms of bars to asylum and nonrefoulement or withholding removal. Generally, Article 1. F and Article 33(2) of the Refugee Convention barred certain individuals from the reliefs of Article 1.A(2) on account of crime or a reasonable belief that such individuals would constitute a threat to national security. Also, Article 1. D-E identified certain circumstances that would nullify the refugee benefits provided by Article 1.A(2), rendering a refugee ineligible for protection because of a change of circumstance(s).[1955] Noting that IRL relies on domestic enforceability, this dissertation examined how the exclusion laws have been applied or misapplied by states, focusing on the United States jurisprudence. Just like the Convention's exclusion laws, several factors shaped the construction of the United States exclusion laws such as the circumstances of World War II, racial politics, terrorism, the migration crisis, and the effects of the pandemic. Although originally framed from the Refugee Convention, the research findings identified that the United States' scope of a persecutor of others bar, danger to host country bar, and inadmissibility has been unreasonably expanded beyond the Convention's threshold. With the impact of 9/11, additional restrictions were added to the security bars. Sadly, the implementation of the

[1955] *Id.* at art. 1.C-1. E.

expansive bars has continued to wrongfully deny relief to potential refugees in dire need of protection. Chapter Six confronted the biases and human rights consequences of an unreasonable exclusion of worthy refugees from international law-guaranteed protection. Unlike the inclusion law, the improper applications of security and crime bars affect people of all genders by negating conditions of inclusion.

As earlier indicated, the underlying justification of the exclusion law is to ensure that fugitives are not allowed to exploit refugee advantage to evade criminal justice.[1956] Following this notion, INA developed the persecutor of others bar, and danger to host country bar from Articles 1.F and 33(2). But with the aftermath of the attacks of 9/11, the legal framework of security threats and crime bar became broadened consistent with the government's "war on terror." These are reflected in the expansive classifications of terrorist activity, terrorist organization, and material support bar bars. Unfortunately, neither of these made reasonable exceptions for freedom fighters, or victims of forcible recruitment or terrorist exploitations like women and children.[1957] Even so, the notion of material support in the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 paid less attention to international criminal law acceptable defenses like duress and self-defense, or assessment of the existence of a guilty mind. Consequently, in implementing the "material support" bar, [1958] many adjudicators adopt restrictive interpretations of the security bar that are detrimental to survivors of terrorist persecution.[1959] In *A-C-M-I,* for instance, the court denied relief for cancellation of removal to a Salvadorian woman who was a victim of terrorists' persecutions having misconstrued her to be a

[1956] *See, e.g.,* 1951 Convention, *supra* note 12 at arts. 1.F and 33(2); Turker, *supra* note 1500 at 113.
[1957] Id.; INA §208(b)(2)(A)(v), 8 U.S.C. §1158(b)(2)(A)(v).
[1958] Pursuant to 212(a)(3)(B)(i)(VII).
[1959] *Rodriguez-Majano, supra* note at 811; *A-C-M-, supra* note 154 at 303; *Singh-Kaur supra* note at 294.

supporter of terrorist activity.[1960] *A-C-M-* represents a tiny portion other victims of "paper-terrorist" excluded by the terrorist bar.[1961] Similarly, in *Rodriguez-Majano,* a 23-year-old Salvadorian who had fled for forcible recruitment by the guerrilla was found to be excludable as a persecutor of others, despite applicant's testimony showing evidence of torture by his captors and political opposition. It took an appeal to reverse and reconsider the previous decision.[1962] As argued in Chapter Seven, such a precedent would put the humanitarian protection of refugees at a dangerous precipice.

Generally, the United States criminal law recognizes exceptions but on the contrary, immigration courts have ruled that the terrorist bar has no exceptions.[1963] Applying such restrictive interpretation in the criminal bar has overstretched the exclusion beyond the scope of IRL and international criminal jurisprudence. For instance, in *Hernandez Bah v. Ashcroft,*[1964] the Fifth Circuit Court has held that the defense of duress is "irrelevant" even where an applicant is compelled to commit acts of persecution.[1965] Also, in *Negusie v. Holder,*[1966] the Supreme Court wrestled with the controversy of involuntariness for an applicant who was himself a victim of persecution. Negusie was forced into taking part in an armed conflict and was made to witness a horrible scene of the crime under a "threat of imminent danger of life, limb and freedom,"[1967] In determining his rights, the Court disregarded the duress exception but went ahead to remand the

---

[1960] *Id*.
[1961] Fisher used the expression paper terrorist to characterize those unfairly excluded under the overbroad terrorist bar.
[1962] *Rodriguez-Majano, supra* note at 811.
[1963] *See, e.g.* McCarthy, 2 U.S. 86, 86-87 [recognizing duress as a valid criminal defense]; Model Penal Code § 2.09 (1962); *State v. Toscano,* 74 NJ 421, 378 a. a 2d 755.
[1964] 341 F. 3d 348 (5th Cir. 2003).
[1965] *Id.* Musalo et aal, *supra* note 10 at 908-909.
[1966] *Id.;* 129 S.Ct. 1159 (2009).
[1967] Referring to the defense of duress as necessary condition for absolving criminal responsibility. *See, e.g.* ICC Statute, *supra* note 60 at art. 31(1)(d).

decision and even reversed its previous precedent on *Fedorenko*.[1968] Despite the numerous human rights uproar provoked by *Negusie,* the DHS, under the Trump Administration, filed a brief asserting that the persecutor bar has no exceptions.[1969] Although contrary to international law and the United States criminal law,[1970] the conflicting jurisprudence has remained unresolved. The danger of its application remains daunting given the risks of misclassifying victims of terrorist persecution, even women and children fleeing the terrorist attacks.

Comparably, the analysis of other jurisdictions indicated a fairer evaluation in conformity with international law.[1971] For example, in the Australian *RRT Reference N 96/12101,*[1972] the Tribunal considered the defense of duress in deciding the excludability of Liberian national who has fled persecution by Charles Taylor NPFL group and consequently reversed previous denial by the Department of Immigration Ethnic Affairs. Accordingly, it exculpated the applicant's association with the rebel group under the defense of duress and self-defense, acknowledging that the action was motivated by force and performed to avoid immediate danger and irreparable loss. Similarly, the decision referenced a decision by the Canadian Federal Court in *Ramirez v. MEI,*[1973] holding that the defense of duress can absolve an applicant's participation in certain offenses provided the degree of harm directed on the actor is greater than the harm inflicted on the victim.[1974] The precedent is consistent with the ECRE, where the UK established proportionality of duress as a principle in the determination of excludability.[1975] ECRE further

---

[1968] This was based on the 1948 Displaced Person's Act (DPA) and reaffirmed deference to the 1980 Refugee Act
[1969] *Negusie,Op Cite* at 104.
[1970] *See, e.g.* McCarthy, 2 U.S. 86, 86-87 [recognizing duress as a valid criminal defense]; Model Penal Code § 2.09 (1962); *State v. Toscano,* 74 NJ 421, 378 a. a 2d 755.
[1971] *RRT Reference N 96/12101; Moreno, supra* note; ECRE, *supra* note 1505 at 257, 257-285, para. 42.
[1972] *RRT Reference N 96/12101* (25 November 1996).
[1973] [1992] 2 FC 308 (CA).
[1974] *Id.* at 308, 132.
[1975] ECRE, *Op Cite*.

recognized the need for critical scrutiny of existence of individual's criminal responsibility before invoking the bar. Such evaluation would require a thorough assessment of "claimant's personal knowledge, participation or complicity in the crime or crimes in question."[1976] Arguably, the standard reflects core principles of international law on which the Convention's exclusion laws are derived. But for lack of homogeneity, the United States has kept a disparate standard that is detrimental to asylum seekers. Therefore, this dissertation recommends that a new Protocol be established with practice procedures for the determination of the inclusion and exclusion laws in accordance with the international legal framework. But in the meantime, it is recommended that the United States courts adopt norms of international criminal jurisprudence in the assessment of excludability, following the lessons from Australia, Canada, and UK. This will ensure a reasonable application of asylum discretion.

7.5 A Review of the United States Exclusion Under Inadmissibility Bar

As earlier indicated, the United States' inadmissibility and deportability laws were framed from Articles 1F and 33(2). Under the INA §208 [8 U.S.C. §1158] and INA § 241[U.S.C. § 1231], the Attorney General is authorized to remove an alien determined to be inadmissible or removable if he or she constitutes a risk to the community.[1977] Generally, such bar applies to an alien who is convicted for particularly serious crimes or a noncitizen who is reasonably identified to constitute a danger to national security. To a large extent, such assessment is discretional and may be influenced by subjective reasoning as well as political interest as the boundaries of national security and public policy bars shift with political regimes. For instance, under the Trump era, the rhetoric of national security and public health bar

[1976] *Id.*
[1977] INA §208 [8 U.S.C. §1158]; INA § 241[U.S.C. § 1231].

acquired a new construct that exclusively targeted undocumented immigrants. Chapter Six explored the numerous issues with the implementation of the unconventional bars like President Trump's executive orders excluding Muslims from selected countries labeled as threats to the United States security.[1978] Intersecting the unjustifiable presumption of a national security threat with other categories of racial based exclusion by Trump-era and the trajectory on a racially motivated quota system of exclusion,[1979] has provoked a conclusion that racism is at the base of the United States antiimmigration laws.

Additionally, Chapter Six investigated a new phase of the IIRIRA in the Trump policies of detention and unprocedural removal of the undocumented. Chapter Seven underscored the stages of Trump's executive order that began with a Muslim ban and unwarranted suspension of refugee resettlement for six months, all under the pretext of national security.[1980] Significantly, we reviewed the counter approaches by human rights institutions through several lawsuits to upend the Orders and the judicial responses.[1981] For example, *Trump v. Hawaii*[1982] challenged the travel ban on seven Muslim countries. The Supreme Court justified Trump's order as part of an official fulfillment of the President's authority under the INA "…to suspend entry by aliens or classes of aliens, upon finding that their entry would be harmful to U.S. interests…." Even so, there was no material proof of the alleged threat, instead, the regime was reliving the post-9/11 "war on terror." Apparently, the effects caused the enlargement of the DHS's authority to remove undocumented aliens from anywhere in the United States, beyond the scope of INA

[1978] Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017) [hereinafter "EO1". [limited entry of immigrants and non-immigrants from Muslim majority countries]; Exec. Order No. 13780, 82 Fed. Reg. 13, 209 (Mar. 3, 2017); Exec. Order No. 13780 reiterated on September 24, 2017.
[1979] This analysis referenced the Pact Act, Chinese Exclusion Act, and Undesirable Alien Act.
[1980] EO1, *Op Cite* 151 [allowed exception for a "national interest" for individuals of religious minorities facing persecution in their countries like Christian refugees]; Musalo et aal, *supra* note 11 at 96-7.
[1981] *Washington, supra* note at 1151, 1164-69; *International Refugee Assistant Project, supra* note 160 at 554.
[1982] 138 S. Ct. 2392 (2017).

§208.[1983] This study found that the implementation of pro-Trump expedited removal process was reckless on asylum seekers. Undocumented persons were removed from anywhere within the US, including separation of families and detention of unaccompanied minors.[1984] Even Congress was alarmed and had to invite the DHS agents for a hearing.[1985] But despite these efforts, the security agents under the Trump era continued with a hasty exclusion, punitive detentions, and policing of undocumented persons at different corners.[1986] Vestiges of the practice still survive the current administration with the Title 42 deportations, albeit promised immigration reforms.[1987] Although the Biden Administration has achieved some recorded milestone like the overturning *A-B- I* and *II* to reinstate *A-R-C-G-,*[1988] impacts of the previous situations have continued to increase the hardships on protection seekers, especially women and unaccompanied minors.[1989] This dissertation has challenged the practice of unprocedural removal as a breach of Article 16 of the Refugee Convention, which guarantees a fair determination of asylum claims. Given their debilitating effects, the study has made several suggestions at the end of this Chapter, including human rights monitoring to ensure fair treatment of asylum seekers in destination countries and to empower such committee complaint procedures.

[1983] 8 C.F.R. § 235.3 (2020).
[1984] 8 C.F.R. §235.3 (2020); Catherine A. Solheim and Jaime Ballard, *Ambiguous Loss Due to Separation in Involuntary Transnational Families,* 8 J. FAM. THEO. REV. 341-359 (2016).
[1985] Beth Van Schaack, *New Proof Surfaces that Family Separation was About Deterrence and Punishment,* JUST SECURITY (November 27, 2018), https://www.justsecurity.org/61621/proof-surfaces-family-separation-deterrence-punishment/; Luis Sanchez, *Kamala Harris Grills Homeland Security Secretary on Separating Parents from Kids at Border,* THE HILL (May 16, 2018), https://thehill.com/homenews/administration/387918-kamala-harris-grills-homeland-security-secretary-on-separating/.
[1986] *Id.;* Molly O'Toole, *supra* note 156.
[1987] *US Citizenship Act Bill Summary,* NATIONAL IMMIGRATION FORUM, https://immigrationforum.org/wp-content/uploads/2021/02/US-Citizenship-Act-Bill-Summary.pdf.
[1988] *A-B-, supra* note 124 at 307.
[1989] *Id.*; Roel Reyna, *Expedited Removal and Habeas Corpus: How a Recent Supreme Court Ruling, Combined with an Executive Order from Former President Trump Has Affected the Due Process Rights of Illegal Immigrants Detained for Expedited Removal,* 8 LINCOLN MEM'l U. L. REV. 33, 39 (2021).

7.6 Findings on the Penalization of Protection Seekers and Expedited Removal

The law on expedited removal represents one of the contradictory practices in the United States immigration jurisprudence. This overtly enforces the deportation of aliens without judicial review of their claims. Statistics analyzed in this study showed increasing records of deportation since 2016.[1990] Unfortunately, the disconcerting aspect of the practice is that it denies victims access to the court. In *Dep't of Homeland Sec. v. Thuraissigiam*[1991] the United States Supreme Court has held that individuals subjected to expedited removal proceedings do not have the right to challenge their removals through a habeas corpus petition because such rights do not exist within the United States law.[1992] Chapter Six interrogates the legality of the decision, which conflicts with the United States obligation to Article 19 of the Convention.[1993] Even INA §208.16(b)(3)(B) mandates the Attorney General to withhold removal as a humanitarian relief under CAT.[1994] Therefore, *Thuraissigiam* has set a disconcerting precent that is incongruent with Article 19[1995] and interrogates its conformance with the statutory expedited removal procedure.[1996] Throughout this study, the research argument questions the validity of the expedited removal process on asylum seekers given that the practice undermines asylum due process, oust the jurisdiction of courts, and wrongful engages security agents with hasty removal without a credible fear assessment. Supported by Article 33(2) of the Convention, we contrasted the practice with the legitimate conditions of the grounds of exclusion and removal.[1997]

[1990] *Yearbook of Immigration Statistics 2019*, DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/yearbook [121,946 (42%) aliens removed in 2017; 164, 296]
[1991] *Dep't of Homeland Sec. v. Thuraissigiam,*140 S. Ct. 1959 (2020).
[1992] *Id*. at 1959.
[1993] Article 14 granting access to court and legal representation to refugees and asylum seekers
[1994] § 208.16 s. 241(b)(3)(B) [Withholding removal under CAT]; CAT, *supra* note 165 at art. 3.
[1995] ICCPR, *supra* note 31 at art. 14(1); U.S. Const. amend. XIV, § 2; *Gideon v. Wainwright* U.S. 335 (1963) [reaffirming the right to council as a state's responsibility where a defendant cannot afford it].
[1996] 8 U.S.C. § 1253(h)(1) (2012).
[1997] 1951 Convention, *supra* note 12, art. 33(2).

Paragraph 155 of the UNHCR Handbook reiterated the necessity of a judicial review in an exclusion determination.[1998] On this background, we challenged *Thuraissigiam* as a politically motivated decision, which replicated *Plessy v. Ferguson.*[1999] The findings buttresses an important argument of this dissertation on the effect of politicization of immigration laws and practice. This argument is reinforced as the end to advance the need for a Congressional reform to rewrite the wrongs of *Thuraissigiam,* expunge expedited removal law and set modalities for the achievement of authentic independence for the judiciary.

7.7 Analysis of Legal Intersections of Racial Profiling and Racially Motivated Exclusion

Chapter Six examined the trajectory of framing exclusion laws along the color line in the United States. The research analysis illustrated the inextricable connections between racism/nativism, and labor constituted excludability. On this background, it examined the motivations behind the Page Act of 1875,[2000] the Chinese Exclusion Act of 1882,[2001] and the Emergency Quota Act of 192.[2002] In 1929, the Undesirable Alien Act (UAA) introduced a controversial pattern of penalizing undocumented persons[2003] as well as immediate removal of "illegal immigrants" entering the United States from Latin America.[2004] More than seven decades after, UAA became replicated in the IRRIRA. The latter implemented a stricter punitive exclusion that increased the immigration related prosecution and incarcerations annually with a staggering record on misdemeanor and felony unlawful entry and reentry.[2005] In 2019, there were

---

[1998] The Handbook, *supra* note 349 at para. 155 [Exclusion must be under serious crimes like capital and punishable grave acts as opposed to minor offenses, including any change circumstances].
[1999] 163 U.S. 537 (1896).
[2000] that excluded Asian females "labeled as lewd" from entry or labor migration,
[2001] Publ. L. 47-126. [that banned immigration by Chinese male laborers for ten years]
[2002] Emergency Quota Act of 1921, Pub. L. 67-5; 42 Stat. 5 [1 implemented a nationality-quota system that favored Western [Europe] immigrants to other nationalities, thus barring immigrants from Africa and Asia].
[2003] *Id.* [noting that was UAA is a product of the Blease/Davis Bill alongside the Johnson Bill.
[2004] *Id.* at 051, 1098.
[2005] 8 U.S.C. § 1325 (2018) [misdemeanor]; Id. § 1326. [felony].

approximate records of 76,538 felony prosecutions, 25,426 of them (that is about 33 percent) were defendants charged with unlawful reentry,[2006] and 80, 886 misdemeanor prosecutions for similar purposes.[2007] The statistics affirmed the pervasiveness of immigration related prosecution by the DOJ. Compounded by the other restrictive policies of exclusion, the enforcement of IRRIRA imposes numerous hardships on asylum seekers. While this is analogous to Trump-era unreasonable bars, Chapter Seven made suggestions for a total overhaul of the United States exclusion laws alongside the compelling refugee crisis.

7.8 A Re-assessment of Deportation under Title 42

Chapter Six examined a novel public health deportation authority under Title 42, developed by the CDC and DHHS during the wave of the covid-19 pandemic. Exploring the history of Title 42, it found that the abridged description of a US Coded—42 U.S.C. 265 and 268 evolved from the 1944 Public Health Service Act (PHSA).[2008] Originally this authorized the Surgeon General to "suspend" the "introduction of persons or goods…from such countries or places" where there exist indicators of "any communicable disease" to prevent a "serious danger of the introduction of such disease into the United States."[2009] Historically, the public health and

---

[2006] Fisher, *supra* note 206 at 1053; *See e.g.,* Dep't of Just. Off. of Pub. Affs., supra note 1; U.S. SENT'G COMM'N, FISCAL YEAR 2019 OVERVIEW OF FEDERAL CRIMINAL CASES 3 (2020), https://www.ussc.gov/sites/default/files/pdf/ research-and-publications/researchpublications/2020/FY19_Overview_Federal_Criminal_Cases.pdf.

[2007] *Id.*; *See*, *e.g.* Press Release, Dep't of Just. Off. of Pub. Affs., Dept. of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 19, 2019), https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-relatedcases-fiscal-year; Michelangelo Landgrave and Alex Nowrasteh, *Illegal Immigrants Incarceration Rates,* 890 POLICY ANALYSIS 1-16, 4-5 (April 21, 2020) [Research data by Michelangelo Landgrave and Alex Nowrasteh showed a high increase in detentions from 2010 to 2018 ranging to about 83,698 immigrants detained for "illegal entry."].

[2008] Guttentag*, Op Cite*, 4-15 [referring to the predecessor regulation Immigration Act of 1891].

[2009] *Id.*; Q&A: US Title Policy to Expel Migrants at the Border, HRW (April 8, 2021 4.15), https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border?gclid=Cj0KCQiA2NaNBhDvARIsAEw55hidhiP-.

safety rationale[2010] applies to all "persons and properties," regardless of immigration status,[2011] and was never enforced as a tool of deportation. Opposed to the previous standard, the current Title 42 has persistently caused an unprocedural expulsion of undocumented arrivals at the southern border without exception.[2012] Between 2020 to 2021, US Border Officials recorded approximately 552,919 expulsions by Title 42, including women and unaccompanied children. The statistics have continued to increase to date.[2013] Recently too, it is estimated that Biden officials have deported about 2.7 million adult aliens under Title 42.[2014] Impacts of the mass deportations have provoked diverse responses but none has been able to stop the assault on the United States asylum law and nonrefoulement obligations.[2015] Yet, on December 27, 2022, the Supreme Court ruled to keep Title 42, regardless on the irreparable harm the practice has caused on asylum seekers.[2016] Recently, the Biden Administration has demonstrated intention to end the emergency public health declaration by May 11, 2023, which according to DOJ would equally render moot any case seeking to maintain Title 42. The removal of the Title 42 case from the Supreme Court's docket still raises uncertainties as well as the possibilities of its ending.

[2010] 42 U.S.C. § 265 [The Public Health Service Act emphasizes that the primary object is to prevent the introduction, transmission, or spread of communicable diseases].
[2011] *Id* at 42 CFR § 71.40, 2017 [relating to the suspension of person, goods, and property into the United States].
[2012] *Id.* at 2-23.
[2013] Camilo Montoya-Galvez, *What is Title 42, the Covid Border Policy used to Expel Immigrants Used to Expel Immigrants?* CBS NEWS, January 2, 2023, https://www.cbsnews.com/news/title-42-immigration-border-biden-covid-19-cdc/.
[2014] *Id*.
[2015] Guttentag, *supra* note 156*;* Jaya Ramiji-Nogales, *Non-refoulement under the Trump Administration,* 23 AMER. SOC. INT'L L. (2019).
[2016] *Arizona et aal v. Alejandro Mayorkas, Department of Homeland Security,* 598 US (2022); Yael Schacher, *Supreme Court Title 42 Decision Betrays U.S. Obligations to Asylum Seekers,* REFUGEES INTERNATIONAL, https://www.refugeesinternational.org/reports/2022/12/27/supreme-court-title-42-decision-betrays-us-obligations-to.

Throughout the discussion, Chapter Five challenged the unjustifiable enforcement of Title 42 deportation as a deviation from INA § 237(a),[2017] and a consequential breach of nonrefoulement obligation. The public health policy targeted only asylum seekers creating biases similar to the racially inspired exclusion of "undesirable aliens" and in contradiction of INA.[2018] Adopting Fisher's reasoning, we found Title 42 to share commonalities with the eugenicist enactments that created a dark spot on the United States immigration history.[2019] Contextualized with President Trump's racial rhetoric that immigrants—bad people,[2020] rapists,[2021] drug addicts, criminals,[2022] and terrorists,[2023] Chapter Five intersected political narratives with biased exclusion laws. The analysis showed how anti-racial narratives have continued to amplify restrictive laws against certain immigrants and the role of the judicial system in acquiescing to these. Given the consequences of their enforcement, this dissertation urged Congress to repeal Title 42 and allow the provisions of INA § 208(b)(2) to prevail.[2024]

[2017] INA § 237(a) categories the following as deportable grounds – inadmissibility at the time of entry or adjustment of status or violation of status, crime related grounds, failure to register and falsification of documents, public charge, unlawful voters, and security related grounds.

[2018] INA § 208(b)(2); [8 U.S.C § 1158(a)(2)]; INA § 241(b) [8 U.S.C § 1231(b)].

[2019] *Id.* at 1054 [citing speeches, correspondence, bills, legislative reports, racial narratives, extracts in congressional statements and records canvassed to preserve white preserve white supremacy and territory as opposed to the degraded and denigrated immigrants of color and also stating that Harry H. Laughlin's Articles were targeted to protect the "purity" of Caucasian Americans from the contamination of the Latin American immigrants]; *See* Many of the materials from the eugenicist Harry Laughlin were obtained from an archive of his papers maintained at Truman State University. Harry H. Laughlin Papers: Manuscript Collection L1, TRUMAN STATE UNIV.: PICKLER MEM'L LIBR., https://library.truman.edu/manuscripts /laughlinindex.asp (describing the collection, which includes Boxes B-E).

[2020] *Id*; See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 29, 2018, 10:41 AM), https://twitter.com/realDonaldTrump/status/1056919064906469376 ("Many Gang Members and some very bad people are mixed into the Caravan heading to our Southern Border." Cited by Ashley B. Armstrong, *Co-opting Corona Virus: Assailing Asylum*).

[2021] *Full Text: Donald Trump Announces a Presidential Bid,* WASH. POST: POLITICS (June 16, 2015, 1:03 PM), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donaldtrump-announces-a-presidential-bid.

[2022] *See, e.g.,* President Trump on Border Security and Government Funding, C-SPAN (Feb. 15, 2019), https://www.c-span.

[2023] *See, e.g.,* Exec. Order No. 13,769 (Jan. 27, 2017). (suspending refugee entry into the United States for 120 days).

[2024] INA § 208(b)(2) [authorizes aliens who meet the refugee requirements to seek asylum in the United States].

7.9 The MPP "Remain in Mexico" Policy—A Pushback on Asylum Seekers

Like the notorious Title 42, research analysis showed that the Trump-era "remain in Mexico" policy fractured the United States asylum law by requiring protection seekers to stay outside their host country to process asylum claims.[2025] Apparently, the MPP denied territory to arriving asylees [2026] and mandated a forcible removal of thousands of asylum seekers to Mexico under most vulnerable situations.[2027] Approximately about 68,000 aliens were removed between 2019 to 2021, while only about 723 were granted asylum.[2028] Thousands of other applicants were removed without access to legal representation or in absentia.[2029] Comparatively, this study associates MPP with an existing pattern in the IRRIRA expedited removal process and the later Title 42 deportation. This study found that the systemic practice threatens nonrefoulement and the constitutional duty to Equal Protection. Still, in *Biden v, Texas,*[2030] the Supreme Court has defended MPP by affirming the DHS authority to return alien under this policy.[2031] The decision conflicts with INA § 208(a)(1) that allows an asylum seeker to remain in the destination country to process asylum claims.[2032] At last, the Biden Administration has recently admitted that the implementation of MPP imposed unjustifiable human cost to aliens.[2033] Besides, the research

[2025] INA § 208(a)(1); §1158(a)(1); 94 Stat. 105, as amended, 8 U. S. C. §1158. See §1158(b)(2)(C) [requiring aliens to be physically present in the US to process asylum claims].
[2026] *Id.* at 6-7.
[2027] *See, e.g.,* Paul Ratjey, *U.S: Asylum Seekers Returned to Uncertainty, Danger in Mexico, Danger in Mexico,* HRW (July 2, 2019. 12.01AM EDT), https://www.hrw.org/news/2019/07/02/us-asylum-seekers-returned-uncertainty-danger-mexico.
[2028] Muzaffar Chishti and Jessica Bolter, *Court-Ordered Relaunch of Remain in Mexico Policy Tweaks Predecessor Program, but Faces Similar Challenges,* POLICY BEAT (December 2, 2021), https://www.migrationpolicy.org/article/court-order-relaunch-remain-in-mexico.
[2029] *Id*. at 1-5.
[2030] *Biden v. Texas* [SCOUTUS asserted that the DHS has an authority to return an alien arriving at the Southern border pursuant to the MPP citing INA 1254(f)(1).
[2031] *Id.*
[2032] INA § 208(a)(1); §1158(a)(1); 94 Stat. 105, as amended, 8 U. S. C. §1158. See §1158(b)(2)(C) [requiring aliens to be physically present in the US to process asylum claims].
[2033] *Id.*; *Mandates of the Special Rapporteur on the Human Rights of Migrants*, PALAIS DES NATIONS, 1211 GENEVA 10 SWITZERLAND (Mar. 7, 2019), [indicating that it is a double standard because the US Department of State cautioned its citizens from traveling to Mexico because of high risks of human insecurity and widespread

analysis indicated the numerous obstacles associated with MPP, diminishing the chances of aliens to a fair procedure.[2034] More than 60,000 asylum seekers are being kept waiting at the borders of Mexico under the MPP.[2035] District Judge Matthew Kacsmaryk halted an attempt by the government to terminate the program because Texas and Missouri wanted its continuation.[2036] Although DHS has stopped enrolling new asylees into in the program, the fate of 60,000 asylum seekers remained undetermined while the crisis of involuntary migration still swells.[2037] In every standard, this study found MPP as a total contradiction of the fundamental principles of the 1980 Refugee Act and the Refugee Convention. Even the wrongful assertion of sovereignty over treaty obligation in *Biden v. Texas* runs counter with this standard.[2038] In so far as a sovereign state has the authority to determine whom to admit or remove, such power is not absolute but must be exercised reasonably in accordance with legitimate procedures and treaty obligations.[2039] Supported by normative international instrument, this study questions the authenticity of MPP, which diverges from Articles 1.F and 33(2), and INA § 208(b)(2)[2040] to infringe the basic principles of nonrefoulement and CAT.[2041] Against this backdrop, the dissertation has made recommendations for the repeal of MPP, and suggested alternative strategies of burden sharing.

---

nature of violent crime. Yet, US government is forcing migrants to return to Mexico and remain there throughout the request of their application for protection]; *Featured Issue: Migrant Protection Protocol,* AILA, October 7, 2022, https://www.aila.org/advo-media/issues/port-courts.

[2034] *Id.*

[2035] Kelsey Ables, *U.S. Judge in Amarillo Halts Biden Administration's Attempt to End "Remain in Mexico" Policy,* THE WASHINGTON POST, December 16, 2022, https://www.texastribune.org/2022/12/27/title-42-us-mexico-border-supreme-court/.

[2036] Ables, *supra* note 173.

[2037] *Biden v. Texas, supra* note at 168.

[2038] *Biden v. Texas,* 142 S. Ct. 2528 (2022).

[2039] VCLT, *supra* note 171 at art. 27.

[2040] 1951 Convention, *supra* note 12 at art. 1F.

[2041] The obligation to nonrefoulement is nonderogable and binding on states. States cannot assert a domestic law to derogate from international treaty obligation. VCLT, *supra* note 311, art. 27 [noting that states cannot assert sovereignty or domestic laws to derogate from treaty obligations].

7.10 Exclusion Based on Change in Circumstances or STC

Outside the underlisted bars of Articles 1.F and 33(2), this study examined Articles D-E on the other conditions that could warrant termination or cessation of refugee status. These include—a.) where the initial circumstance that gave rise to a WFF in the country of flight has changed or no longer exists, b.) where the refugee has sought protection in a safe third country (STC), c.) is firmly resettled elsewhere d.) or has acquired a new nationality.[2042] This category of exclusion applies to those whose status are already determined or determinable. So, to evoke exclusion by change of circumstances would require substantial evidence from a home or third country. For this purpose, the Convention has urged State Parties to cooperate with each other in shouldering the burden of refugees to achieve the ideals of STC and firm resettlement practice. Also, complying with the Convention's notion of burden sharing, the EXCOM Conclusion 58 (XL) recommended that a destination country should desist from returning a prospective refugee to a country of origin where safety is indeterminable, but rather to where he or she had already sought protection, STC.[2043] The rationale was based on a presumption that protection is available in the STC, hence the need to address irregular movement when asylum or resettlement is guaranteed in another country.[2044] However, there is nothing here that precludes giving a favorable consideration of claims.[2045] STC does to include transit states. But according to findings, there are several loopholes in the implementation process, partly due to a lack of uniformity and practice irregularities that militate against the effective application in many

---

[2042] 1951 Convention, *supra* note 12 at 1.C-E.
[2043] Executive Committee of the Higher Commissioner's Programme, established by the United Nation's Economic and Social Council (ECOSOC), Resolution 672 (XXV) (30 April 1958) (*hereinafter* "EXCOM Conclusion 98 (XL)).
[2044] *Id.* at para. (f).
[2045] *Id.*

countries.[2046] The research findings showed discrepancies with the applications in domestic jurisdictions.

States under the EU are bound to the STC agreement under the Dublin III Regulation of the EU.[2047] The analysis centered on the 2002 United States and Canada bilateral agreement, (STCA).[2048] According to the United States law, INA § 208(c)(2)(C), the STC bar may be invoked to terminate a grant of asylum pursuant to on two conditions. First, cessation by the STCA occurs if an adjudicator demonstrates that an alien is removable or there is a reasonable presumption of an absence of threat to life or freedom in the third country or that the alien would receive "a full and fair procedure or equivalent relief in the third country. INA section 208(a) identified different circumstances under which an alien may or not apply for asylum pursuant to Paragraph 2 on STC rule.[2049] Additionally, Article 3(1) prohibits the removal of "a claimant" who has been transferred under the STCA until a proper adjudication of the claims is made.[2050] It equally proscribe the transferring of such a person to any other country other than a safe third country.[2051] Of course, the rationale is to prevent a miscarriage of justice. However, Section 208(a)(3) precludes courts from exercising jurisdiction "to review any determination of the Attorney General" on STCA.[2052] The statutory position coheres with *Thuraissigiam*. But that does not guarantee their legitimacy. As argued in Chapter Six, both conflict with Article 16(1) of the Refugee Convention, which ensures free access to courts in the determination of refugees' status. Providing aliens with unconditional access to court and legal representatives in their host

[2046] *Id.*
[2047] The Regulation (EU) No 604/2013 of the European Parliament and of the Council of June 26, 2013, OJ L 180/31 established the standard and mechanism for determining the application of STC by the EU Member members.
[2048] STCA, *supra* note 1810; *See also,* 8 C.F.R.§ 208.30(e)(6); 8 C.F.R. 1208.4(a)(6); 8 C.F.R. 1240.11(g); 8 C.F.R. 1003.42(h).
[2049] INA § 208(a)(2); 8 U.S.C §1158(a)(2)(A).
[2050] *Id.* at art. 3(1).
[2051] *Id.* at art. 3(2).
[2052] 8 C.F.R. 1208.4(a)(6).

community is an established norm of international law, largely adopted as the practice of states.[2053] In this regard, INA Section 208(a)(3) is found to be incongruent with treaty obligation because it undermines the right of a refugee to determine his or her habitual residence and an STC for seeking asylum.

STCA has other shortcomings. For instance, the absence of jurisprudential congruity between contractual parties makes its realization difficult. Under the United States and Canadian jurisprudence, there exist disparate standards in gender asylum applications. Analysis of gender claims in Chapter Five proved that women seeking asylum in Canada receive a fairer assessment than in the United States because of Canada's application of the Chairperson's Gender Guidelines. In view of this, many would prefer to cross the United States to seek asylum in Canada, except for those that have family ties in the United States. Chapter Six exemplified an incidence about a Salvadorian woman with her two children who after arriving in Buffalo, New York transited the Fort Erie border to Canada to seek refugee asylum. But unfortunately, she was denied entry under the STCA.[2054] She represents other hundreds of female claimants, who would be ineligible by STCA, despite their dire needs for protection. If returned to a third country by STCA, the chances of protection would be unpredictable.[2055] Under such varying jurisprudence, practice irregularities are inevitable. Based on the identified gaps, this dissertation maintained that the current STCA does not meet the Convention's purpose for burden sharing, hence complicating an already deteriorating asylum practice. In practice, the STCA creates an additional burden for potential refugees, and even more delicate, makes exclusion possible. Aware of this concern, the UNHCR has lamented the human rights dilemma caused by the

---

[2053] ICCPR, *supra* note 31 at arts. 2(3), 9(4); CAT, *supra* note 165 at art 3; UDHR, *supra* note 31 at art. 10.
[2054] Silvia Thomson, *El Salvador Woman at the Hear of Legal Challenge to Safe Third Agreement,* CBS NEWS, July 8, 2017 (5.am ET), https://www.cbc.ca/news/canada/safe-third-country-agreement-legal-test-case-1.4195228.
[2055] STCA arts. 1 & 2.

misapplication of the STC in different countries, including mass detentions, and refoulement.[2056] Also, some scholars have contested the designation of the United States as a safe country for asylum seekers because of staggering evidence of their violations of refugees, and reckless enforcement of refoulement policies.[2057] While these cannot be divorced as mere cynicism, the United States jurisprudence has evolved through reformations. Therefore, this study asserts that a reorganization of its burden sharing mechanism is probable. To achieve this, there is a need for the parties to the STC agreement to maintain some levels of legal equivalence. This includes an establishment of relatedness in refugee policies and practices to minimize the frustration of shopping asylum territories for a fair deal. The conditions of burden sharing should benefit asylees and asylum states. Although achieving total legislative uniformity may be improbable, the possibility of cohesion in certain significant areas of agreement is achievable to sustain the essence of "a safe third state." Therefore, this dissertation suggests the need to make STC operationally safe for asylees and to guarantee access to safe territory through a fair and accessible judicial process. An assessment of the safety of a third country or the change of circumstance in a home country should take cognizance of a totality of circumstances, before invoking the STC bar. Further recommendations are provided on strategic approaches to inclusive burden sharing in states.

7.10 Revisiting the Rights of Refugees and Some Identified Breaches

International law guarantees certain rights to refugees and asylum seekers. Chapter Two elaborated on the rights of refugees as an obligation of destination states to refugees or asylum

---

[2056] *Monitoring Report Canada—United States "Safe Third Country" Agreement, 29 December 2004 – 28 December 2005,* UNHCR, 6-7 (UNHCR 2006).

[2057] *See, e.g.* Musalo et aal, *supra* note 10 at 951-2; *Legal Challenge of Safe Third Country Agreement Launched,* AMNESTY INTERNATIONAL (Jul. 5, 2017); Amnesty International Canada & Canada Council for Refugees, *Contesting the Designation of the US a Safe Third Country* (May 19, 2017).

seekers. These include—the right of physical presence to seek asylum (with or without documentation),[2058] the right to nondiscrimination,[2059] freedom of religion,[2060] freedom of association,[2061] the right to acquire movable and immovable properties,[2062] access to courts and legal representation.[2063] Subject to the exclusion criteria,[2064] the rights of a Convention refugee or an asylum seeker accrues once he or she steps into the jurisdiction of a state party and must be respected throughout the duration of the refugee status.[2065] In addition, such an alien is entitled to various socio-economic rights while the asylum is pending or granted, depending on the domestic practice. These include the right to work and earn wages,[2066] rights to shelter,[2067] education,[2068] health and social security.[2069] Because the rights of refugees are determined by their circumstances and not by the legitimacy of their documents, state parties to the Refugee Convention and bound to respect this right and protect refugees from refoulement within their territorial jurisdictions.[2070] Article 31 prohibits Contracting Parties from imposing penalties or movement restrictions to refugees and asylum seekers. But to the contrary, the research findings showed an epidemic of detentions of asylum seekers in many jurisdictions, but most recurrently in the United States.

[2058] This is implied in Article 1.A(2) of the Refugee Convention defining the status of a refugee as any person who due to fear of persecution is outside his country and unable to return due to a WFF of persecution.
[2059] *Id*. at art. 3.
[2060] *Id*. at art. 4.
[2061] *Id*. at art. 15.
[2062] *Id*. at art. 13.
[2063] *Id*. at art. 16.
[2064] 1951 Convention, *supra* note 12 at art. 1.D-F and 33(2).
[2065] Hathaway, *supra* note 22 at 156-160.
[2066] *Id*. at art. 17.
[2067] *Id*. at art. 21.
[2068] *Id*. at art. 22.
[2069] *Id*. at art. 24.
[2070] *Id*. at art. 33(2).

With the advent of the paroling method (detaining and releasing protection seekers from detention) in the United States between 1954 and 1982, the detention of asylum seekers skyrocketed significantly.[2071] Subsequently, this reached a crescendo with the establishment of the IIRIRA. The latter subjected asylum seekers to mandatory detention, contrary to Article 31 of the Refugee Convention. The analysis in Chapter Six indicated that the execution of IIRIRA and other related punitive exclusions caused a surge in immigration detention. Considering these, entry without inspection (EWI) became a criminal act of misdemeanor,[2072] re-entry after deportation amounted to a felony.[2073] Whereas misdemeanor and felony were recognized crimes under the United States criminal jurisdictions, IRRIRA made them prosecutable immigration crimes tantamount to a detention, exclusion bar and expulsion were made punishable under the United States immigration law. Unfortunately, these have had staggering consequences, especially for asylum seekers since 2005. In 2014, it was estimated that the rate of detention rose from 230,000 per year to 460,000 per year,[2074] indicating that 49% of the asylum seekers were detained regardless of their credible fear of persecution. Chapter Six further indicated a huge increase under the Trump era expanded the scope of detention and expedited removals.[2075] The practice has enlarged the scope of ICE's detention of undocumented persons.[2076] From 2016 to 2019, a total of 1,307,411 aliens were removed from the United States on deportation, including

---

[2071] Musalo et aal, *supra* note 10 at 96-7; *Trump v. International Refugee Assistance Project,* 127 S. Ct. 2080, 2089 (2017); *Id.* at 1038.
[2072] 8 U.S.C. § 1325 (2018). And unqualified as the right to prohibit and prevent their entrance into the country…"].
[2073] *Id.* § 1326.
[2074] GAO, IMMIGRATION DETENTION: ADDITIONAL ACTIONS NEEDED TO STRENGHTEN MANAGEMENT AND OVERSIGHT OF FACILITY COSTS AND STANDARDS, (OCT. 2014), https://www.gao.gov/assets/670/666467.pdf; Musalo et aal, *supra* note 10 at 1038.
[2075] *See, e.g.* 8 C.F.R. § 235.3 (2020) [ordering detention and expedited removal]; IIRIRA amending Section 235 (a) (1) and (2) (8 U.S.C. 1225); *2019 Yearbook on Immigration Statistics,* HOMELAND SECURITY, https://www.dhs.gov/immigration- statistics/yearbook/2019 [The 2019 Immigration Yearbook indicated that from 2016 to 2019 a total of 1,307,411 aliens were removed from the United States on deportation, including 838, 538 aliens returned to their home countries].
[2076] *Id.*

838, 538 aliens returned to their home countries,[2077] including separation of families in the detention and removal policy.[2078] Women and children were not spared of the inhuman experiences of detaining noncitizens whose only crime was seeking protection from harm.

Chapter Six analyzed the traumatizing case of Kasinga, a Congolese woman who had sought asylum from an FGC attack in her country. Although Chapter Five has earlier identified *re-Kasinga* as a milestone in gender asylum, her earlier experience was a crucible given her experience of solitary jail for sixteen months. She was beaten, strip-searched, and tear-gassed before her case received human rights attention.[2079] What is most troubling was that she suffered arbitrary detention for an "illegal" entry, without considering the circumstance of her migration. Ideally, countries should have an institutionalized structure for providing a preliminary assessment for potential refugees at the port of entry. Arbitrary detention of asylum seekers, worse still, with criminals or convicts in the same jail, defiles the right to seek asylum. Except where there are reasonable grounds to believe that an alien constitutes a danger to national security, punitive detention is illegitimate, and can retraumatize a victim.

The United States is not alone. In 1990, Amnesty International reported the Gambian detention incident, and expulsion of asylum seekers from Senegal.[2080] Also, a recent report in Thailand showed how refugees and other undocumented immigrants were subjected to arrest, detention and unprocedural removal.[2081] Similarly, the Amnesty International reports of 2019

[2077] *2019 Yearbook on Immigration Statistics, supra* note 193.
[2078] Solheim and Ballard, *supra* note at 341-359; Schaack, *supra* note; Sanchez, *supra* note at 108.
[2079] *See, e.g.* Musalo et aal, *supra* note 10 at 357, 369; Young, *supra* note at 577, 578-79.
[2080] *Id.* 371; *The Gambia: Forcible Expulsion (Refoulement) of Senegalese Asylum Seekers,* AMNESTY INTERNATIONAL, 1990.
[2081] *Asylum Seeker's Death Highlights Brutal Impact of Thailand's Detention Policies,* GLOBAL DETENTION PROJECTS, February 21, 2023, https://www.globaldetentionproject.org/asylum-seekers-death-reveals-the-brutal-impact-of-thailands-indefinite-detention-measures-and-paltry-treatment-of-people-fleeing-persecution. [indicating high records of death among asylum seekers due to the deteriorating conditions in asylum detention centers].

indicated that hundreds of refugees were trapped in offshore detention in Australia.[2082] Like IRRIRA, Section 189 of the Australian Migration Act makes detention mandatory for all noncitizens arriving in Australia without valid documentation, including asylum seekers. Under the policy, detainees are required to remain in detention pending the determination of their claims.[2083] Canada has a milder approach, which allows the detention of undocumented entrants first for forty-eight hours after an initial adjudication and finding that him or her pose a danger to the public.[2084] After which, subsequent detention could last for seven days and if renewed for thirty days pursuant to a judicial decision.[2085] The Canadian standard reflects the human rights recommendation to use detention as a last resort where there is a threat to security. Outside security reasons, detention of an asylum seeker violates Article 31, which prohibits punitive measures on refugees.[2086]

Inference from research findings showed that prolonged confinement of individuals fleeing horrendous human rights persecution, especially women and children, could have a long-lasting traumatic effect on survivors.[2087] In many situations, the detainees are expelled from prison to face greater vulnerabilities. Human rights cannot be separated from human security. The primary purpose of humanitarian protection is inextricably bound to human rights and human security. If a state fails in its responsibility of states to protect a refugee or asylum seeker from feared persecution, such default begins a spiral of insecurity for the protection seeker and indirectly on the collective human security. The research findings have demonstrated the

---

[2082] *Refugee Rights in Australia,* AMNESTY INTERNATIONAL 2019,
[2083] Migration Act 1951 D 7 s189; 1900 (Imp), 63 & 64 Victoria, c. 12 § 9 (U.K.).
[2084] Immigration and Refugee Protection Act 2001, at ss. 55–57 entered into force in 2002.
[2085] *Id*.
[2086] 1951 Convention, *supra* note 12 at art. 31.
[2087] *In re Fauziya Kasinga, supra* note; *Matter of X-K-,* 23 I. & N. Dec. 731 (BIA 2005); Fatima E. Marouf, *Alternatives to Immigration Detention,* 38 CARDOZO L. REV. 2141, 2142-70 (2017).

unquestionable reality that women and children face a greater score of insecurities when deported. They are vulnerable to the risk of trafficking, sexual enslavement, forced labor, recruitment by terrorists, and abduction.[2088]

This dissertation denounces arbitrary detention and punishment of refugees as a breach of human rights obligations.[2089] Supported by the UNHCR advisory opinion, it urges states to exercise detention with caution and only as a last resort under a genuine threat to national security or criminal responsibility. Because detention impacts asylum seekers negatively and impairs their access to a fair determination, it is highly recommended that individuals found to demonstrate a credible fear be released to family members, relatives, and friends on a written assurance. Those can sign a bond to ensure that they appear in courts when needed for a process determination of claims. Such detention would supposedly complement the criminal justice system rather than be punitive. The rights to the liberty and freedom of every person are held as inherent, inviolable, and inalienable by the UDHR.[2090] By implication, human rights are, and dignity are not endowed by states but are inherent in every person by birth, refugees whether male or female as no exception.[2091] Article 31 of the Refugee Convention and Article 9(1) of the ICCPR replicates this in part as the right to liberty and security of every person.[2092] Only in exceptional circumstances can the right to liberty be derogated. Even where permissible, Article 10(1) requires that such a person be treated with humanity, and respect for the inherent dignity of

[2088] Lucas Guttentag, *supra* note 156; Eleanor Acer, Kennji Kizuka and Rebecca Gendelman, *Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger,* HUMAN RIGHTS FIRST (May 13, 2020), https://www.humanrightsfirst.org/resource/pandemic-pretext-trump-administration-exploitscovid-19-expels-asylum-seekers-and-children.
[2089] ICCPR, *supra* note 31 at art. 9(1); 1951 Convention, *supra* note 12 at art. 31.
[2090] *Id.;* UDHR *supra* note 31 at art. 2; ICESCR, *supra* note 31 at art. 3; CEDAW, *supra* note 31 at arts. 1 and 2.
[2091] *Id.* [stating that every human being is born free and equal in dignity].
[2092] *Id.*

the human person.[2093] The term inherent means that every person is born with and is entitled to human rights and dignity, regardless of status, sex, or color. Refugees are not excluded from the principles of human rights, as they have been perceived and treated in many states.

IRL still suffers a huge backslide in human rights given the prevailing cases of penalization, discriminatory application of refugee reliefs, and reckless refoulement of refugees. To a large extent, these human rights irregularities can be attributed to a lack of an effective mechanism for the enforcement of refugee rights, poor accountability, and legal discrepancy. In an earlier recommendation, this dissertation has suggested modalities for setting a standard of accountability through UNHCR human rights monitoring platform. Having a Human Right Commission to work independently on refugee rights, and with the UNHCR will ensure states' compliance with good faith observance of the treaty in accordance with the VCLT.[2094]

The refugee crisis in the twenty-first century is an undeniable reality, and so is the burden inevitable. The international community cannot shy away from this responsibility but should devise functional solutions. Among the viable means is to confront the root cause of forced migration diplomatically and through effective burden sharing. Punitive measures are not a dignified approach for handling the crisis of involuntary migration, except for refugees with criminal records or those that pose a real danger to national security. Instead, detention centers should be converted to temporary shelters where asylum seekers can stay to contribute meaningfully to community development like street cleaning, and other relevant duties pending the determination of their claims. This will promote their healthy cohesion within the community. Chapter Two underscored the values of utilitarian-based asylum in ancient Rome

[2093] *Id.* at 10(1).
[2094] VCLT, *supra* note 171 at art. 26 [on *pacta sunt servanda,* emphasizing good faith observance of a treaty obligation].

and Greece. Also, the United States history of immigration diversity lies in its three major pillars—economic, humanitarian, or family-based immigration. Equally, current statistics in the United States have shown that immigrants, including undocumented persons, contribute 64.4 percent of the workforce as against 62.8 percent of workforce by the United States-born citizens.[2095] In 2021, the United States foreign-born immigrants' workforce was 76.8 for men and 53.4 percent for women.[2096] Presumably, the gender disparity underpins the critical argument of this dissertation on the female disenfranchisement and associated economic effects of such disparity. But beyond this, the findings demonstrated the continued contribution of immigrants in the building of the United States economy.[2097] According to Lisa Christensen et aal, undocumented persons in the United States pay at least $11.74 billion per year as tax contributions to the United States economy, while most of them execute menial but supportive jobs that privileged citizens may not do.[2098] Evidently, the statistics can be improved by granting of status as well as work permit to more asylum seekers.[2099] The evidence defeats the initial claim under the Trump Administration that refugees are a burden to the national economy.[2100]

[2095] *Quick Immigration Statistics in the United States,* IMMIGRANT LEARNING CENTER, https://www.ilctr.org/quick-us-immigration-statistics/?gclid=Cj0KCQiAic6eBhCoARIsANlox87W_0HDDRNNZusXLBAL34x.

[2096] *Foreign-Born Workers: Labor Force Characteristics 2021,* NEWS RELEASE BLS, May 18, 2022, https://www.bls.gov/news.release/pdf/forbrn.pdf.

[2097] *Id.* Lisa Christensen Gee et aal., *Undocumented Immigrants' State and Local Tax Contributions,* INSTITUTE ON TAX AND ECONOMIC POLICY, 1-12, 2 (March 2017) [last update], https://www.immigrationresearch.org/system/files/immigration_taxes_2017.pdf

[2098] *Id.*, at 2, 1-12.

[2099] *Id.* [stating that United States will likely increase the state and local tax contribution to $2.18 billion a year, thus increasing the state and local tax to 8.6 percent.]; Julie Hirschfeld Davis and Somini Sengupta, *Trump Administration Rejects Study Showing Positive Impact of Refugees,* N.Y. TIMES (Sept. 18, 2017), https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html.

[2100] Musalo et aal, *supra* note 10 at 97 [noting that part of the justifications to limiting the admission of refugees was that they are burden to national economy].

Moving away from pandemic related fatalities of 101,194, 670 in the United States,[2101] the need for foreign labor has been in higher demand to fill the gaps in the workforce. Reforming the admission and resettlement of immigrants is of necessity, not only in the United States but in other Western countries that are asylum hubs. Lessons from the Greek and Roman practical asylum[2102] should motivate the affected countries with the penchant to increase humanitarian migration for an improved global economy. Over the last century, more than 760,000 immigrants have served in the United States military, many of whom have through heroic service received a pathway to the United States citizenship. Approximately 700,000 foreign-born veterans live in the United States, while about 45,000 immigrants are actively serving in the United States Army.[2103] These are incredible testimonies of the impacts of immigrants in the military and political expansion of the nation, as well as global security. Additional evidence showed that immigrants in the United States seem to be higher in the labor force and contribute to the building of the national economy. The reason is simply that many of them migrate at a working age.[2104] Apparently, these historical realities destabilize the negative profiling of immigrants as threats to national security or public charge. Considering that immigrants are more useful to destination countries when integrated than detained or expelled, it, therefore, stands to reason

---

[2101] John Elflein, *Total Number of Cases and Death from Covid-19 in the United States as of January 4, 2023,* STATISTICA, January 9, 2023, https://www.statista.com/statistics/1101932/coronavirus-covid19-cases-and-deaths-number-us-americans/.

[2102] LIVINUS, *supra* note 62 [stating that asylum in the ancient Rome was based on diversity, economic globalization and political expansion]; Garland, *supra* note 66 [stating that the reason for taking asylum in the ancient Greece must be to the best interest of the host community such as to contribute to its military strength.]

[2103] *5 Things to Know About Immigrants in the Military,* FWD.US NEWS, September 14, 2022, https://www.fwd.us/news/immigrants-in-the-military/#:~:text=The%20most%20recent%20government%20estimates,in%20the%20last%2020%20years.

[2104] *Immigration Share of the U.S. Population and Civilian Labor Force, 1980-Present,* MPI (2019), https://www.migrationpolicy.org/programs/data-hub/us-immigration-trends?gclid=Cj0KCQiAz9ieBhCIARIsACB0oGIrBGEkfyIdbPc4eeU1bIEs_.

that governments dismantle walls of separatism, exclusion, and barriers to inclusion and diversity.

7.12 Recommendations and Suggested Reforms

7.12.1 *Legal Reforms—Inclusion of Sex Criterion and Bifurcated Nexus*

Overall, the research findings identified a wide margin between law and practice. The discrepancy extends to treaty obligations and commitment to human rights principles. The two important frameworks for refugee protection—the laws of inclusion and exclusion—are significant in the determination and fair application of humanitarian principles. Noting that the circumstances of involuntary migration are constantly changing, the inability of asylum adjudicators to see the connection with feared persecution and the government's unwillingness to protect a victim have caused wrongful assessments of gender claims. This is evident in *Sarhan*, where WFF for honor killing is misconstrued as "unConvention" fear of persecution, without considering the consequences of a government's unwillingness to protect. Therefore, this study suggested the need to update Article 1.A(2) and 33(1) considering contemporary humanitarian demands. This would require an amendment of Article 3 of the Refugee Convention to include sex under the principle of nondiscrimination, consistent with international instruments. Essentially, the review of the Refugee Convention should reflect the needs of all "unConvention" refugees, especially women, children, and displaced persons. Knowing that the sensitivity of GBP, as well as the emerging needs of displaced persons, has not received critical attention in asylum jurisprudence, the inclusion of the BNF in the assessment of asylum claims will flexibly accommodate the needs of all excluded individuals. These include survivors of conflicts or natural disasters, whose governments demonstrate unwillingness or inability to protect. To restore female visibility, Articles 1.A(2) and 33(1) as well as INA § 101(a)(42)(A), 8 U.S.C §

1101(a)(42)(A) should be amended to include sex as a sixth ground for refugee protection. Such reform would accommodate the sensitivity of female persecutory experiences. Additionally, Article 3 of the Refugee Convention should be amended to reflect "sex" in the principle of nondiscrimination, in accordance with international instruments. In line with these reforms, the VAWA reliefs should be expanded to be accessible to survivors of domestic violence who seek asylum in the United States where BNF is demonstrable. Also, knowing that gender specific attacks are widespread in many societies, sex related persecution should be evaluated from human rights standpoint. The outcome of the decisions from *R-A-* to *A-B-* demonstrated evidence of increasing vulnerabilities associated with nexus conflicts. Therefore, adjudicators are required to attach serious weight to such human rights in the evaluation of persecution and the existence of a WFF.

Also, adjudicators should consider the impact of gender and cultural nuances associated with GBPs in the construction of the public and private dichotomy. Mindful that the central purpose of asylum is to protect applicants from torture and fear or persecution,[2105] lessons from Canada[2106] and Australia[2107] should inform other asylum countries on gender decisions and nexus scrutiny. Because of the lack of uniformity, it is recommended that IRL establish a new protocol reflecting the gender developments and practice guidelines on the interpretation of the BFN. Such efforts would reinforce the anti-discrimination initiatives of international refugee protection and promote the safety and security of women in asylum countries.[2108] Just as the *Acosta* test has

[2105] 1951 Convention, *supra* note 12 art. 33(1); CAT, *supra* note 165 at art. 3.
[2106] *V99-02929 at 284.*
[2107] *Ward, supra* note 539 at 317.
[2108] *Khawar supra* note 677 at 689; *Giraldo v MIMA* FCA 113 42, 44 (2001) (Unreported, 2001).

received acceptance by other jurisdictions, lessons from *Canada v. Ward* (1993)[2109] and *Khawar*[2110] should be adopted to enhance a fair determination of gender claims.

7.12.2 *Establishing Effective Monitoring Measures*

IRL shares in the weakness of many international treaties on lack of effective mechanisms of enforceability. Unlike CEDAW and international human rights, IRL has no complaint procedure. Moreso, it relies on states for interpretation and application. These make impunity possible, especially in the mishandling of refugee concerns. Therefore, setting a standard of accountability is crucial. This research encourages setting strategies of evaluation at local and international levels that will provide annual reports on asylum decisions, contentious precedents, and resettlement programs. Such a program will balance the state's discretions with international principles and assessment. The discretion to determine and grant asylum, admit, or reject, is not absolute but subject to treaty obligations. But where there are no measures for effective monitoring, State Parties would compromise their responsibility to good faith observance, fair assessment, and delivery as seen in many decisions in the United States jurisprudence.[2111] Such troubling precedents have in many ways frustrated the UNHCR authoritative guidance, especially where amicus curiae are rejected.[2112] Ironically too, the UNHCR partly depends on state funding for its operation, hence would naturally seek state's

---

[2109] *Ward, supra* note 539 at 689.
[2110] *Id* at 1130.
[2111] Citing *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 423-433 [reasserting that Chevron deference citing INS v. Cardoza-Fosenca 480 U.S. 421-425) Id. at 428; Aguirre-Aguirre v. INS,* 526 U.S. 415 (1999).
[2112] *See, e.g.* UN High Commissioner for Refugees (UNHCR), Brief of the Office of the United Nations High Commissioner for Refugee before the United States Court of Appeals for the Ninth Circuit in the Case of *Adelina Solares Milanjos v. William P. Barr,* U.S. Attorney General, 28 February 2020, https://www.refworld.org/type,AMICUS,,USA,5f60a2bd4,0.html.

compromise and good offices. Such an endless web has detrimental effects on efficiency and undermines quality delivery.

To balance principle with purpose, this study suggests the establishment of an effective human rights monitoring committee (HRMC) to work independently but in collaboration with the UNHCR in the supervision of the treatment of refugees in different countries. Such a body should be empowered with a complaint procedure subject to Article 38 and can seek redress for the violations of refugees' rights in the ICJ. It would require an expansion of the scope of Article 38 to allow HRMC to receive complaints from human rights organizations, non-profits, and aggrieved groups or individuals. Upon establishing admissibility, HRMC can seek remedy at the ICJ. Without such accountability, the mistreatment and violations of refugees' rights would be normalized, while the rights of refugees are held as byproducts of the state's generosity. Hence, HRMC should be empowered to hold governments accountable for breaches of the rights of refugees, including unjustified mass refoulement of asylum seekers, punitive detentions, and denial of access to procedural determination of asylum claims. Part of its responsibilities would include bringing annual reports to the United States General Assembly (UNGA) on the treatment of refugees by different countries. Such actions would create an opportunity for the United Nations to evaluate the practices of states, promote best practices, challenge reprehensible domestic laws that imposed unnecessary burdens on refugees, and excoriate delinquent government. Except refugee rights are upheld and treated as human rights by international institutions, domestic structures will continue to show skepticism rather than conviction, and reluctance instead of commitment towards their obligations.

7.12.3 *Redefining the Burden Sharing Obligations in IRL*

Conscious of the profound cost of hosting asylum seekers under increasing demands on humanitarian migration, the drafters of the Refugee Convention recommended burden sharing and cooperation among governments. Given the sobering concern posed by the refugee crisis, the need to redefine and harness an authentic spirit of burden sharing is timely. Therefore, the United Nations and governments should work out a collective approach to address the root causes of forced migration. Understanding that asylum and integration of refugees may add to the state's financial budgets, this study suggested the need to redefine the concept of burden sharing at international and domestic levels. At the international level, burden sharing will require high-level international diplomacy between states at the UNGA. First, the international community should confront the root causes of forced migration. The second stage requires challenging the recalcitrant actions of home countries states with huge records of flights caused by the government's unwillingness or inability to protect their own citizens. At the third level, bilateral and multilateral agreements should be encouraged to set up human rights modalities for burden sharing. Huge asylum-receiving states like the United States should engage in functional agreements with neighboring states to manage border movement and promote sustainable burden sharing and cooperative measures of resettlement, rather than evasive attitudes to involuntary migration.

At the state level, a strong collaboration is encouraged between host states and the UNHCR that can allow non-state actor participation. Human rights, religious, non-profit organizations, and pro-refugee institutions as well as viable citizens can participate in the resettlement programs if they can demonstrate financial viability. Likewise, individuals like United States citizens and legal permanent residents who can sponsor asylum seekers should be

allowed to participate in the admission, resettlement, and reintegration of refugees under the supervision of the DHS or United States Citizenship and Immigration Services (USCIS). Such flexibility will help to democratize internal burden sharing, and equally reduce the burden on the shoulder of the government. Knowing that a robust integration process reinforces the benefits of economic globalization, the above recommendation is beneficial to promoting labor and national economy. Therefore, governments should set up a diversified policy of admission for immigrants and harness their significant contributions to nation-building. A solution may not be immediate but consistent efforts to tackle the problems of refugees from a collective standpoint will turn the struggles of today into an impactful human reality for tomorrow. Lessons from the pandemic have shown that an unaddressed problem that begins in one state may contaminate the global society, and so would the unresolved human rights crisis of refugees.

7.12.4 *Suggested Review and Reformation of the United States Exclusion Laws*

Part of the tasks of this dissertation centered on challenging biased or restrictive legislation that limits the human rights of refugees through an unreasonable exclusion. Centering on the United States jurisprudence, we examined the improper applications of security and crime bars and how these undermine conditions of inclusion. It confronted the expansive construction of the asylum bars in the aftermath of 9/11 and other historical changes that complicated the standard of the 1980 Refuge Act such criminalization of EWI under IRRIRA, legitimizing mass refoulement, expedited removal, or detention of asylum seekers.[2113] This dissertation found these to be antithetical with the human rights norms of IRL[2114] and the values espoused under the 1980

[2113] IRRIRA constitutes a breach of Article 31 of the 1951 Convention, which prohibits penalizing refugees or asylum seekers for illegal entry.
[2114] 1951 Convention, *supra* note 12 at art. 16 [Article 16 of the Convention, which empowers protection seekers to seek fair determination of their claims, hence encouraged detention and unprocedural removal of protection seekers.]; ICCPR, *supra* note 31 at art. 14.

Refugee Act that authorizes an undocumented person in the United States to seek asylum.[2115] Therefore, this study urges the United States Congress review and reform the above laws in line with treaty obligations. The reform should redefine the scope of duties of security agents in dealing with asylum seekers. Engaging security officers to conduct hasty assessments of credible fear at the border ridicules the authenticity of the judicial process and undermines the integrity of the due process. The reformation should be extended to other unconventional immigration bars like the filing deadline bar, metering asylum bar, MPP, and Title 42 deportation. Regardless of the court's decision on the above laws, the findings of this study demonstrated that they are politically motivated laws that lack human rights justifications. Instead, they create hurdles serious burden on protection seekers. Just as *Plessy v. Ferguson* became invalidated with the passing of the Civil Rights Acts, Congress is urged to do the same by passing an alien rights Act consistent with INA §208.16(b)(3)(B)[2116] and Article 16.[2117] Such Congressional reform will nullify the narrow-minded decision in *Thuraissigiam*[2118] and related practice. Hence, the danger of allowing dangerous precedent is far-reaching and would increase assault on the asylum system.

As noted earlier, it is necessary to have uniform procedural guidelines in the assessment of the bars. The analysis of case laws indicated a consistent deviation by immigration courts in the evaluation of crime and security bars. This is attributed to the restrictive structures of the United States exclusion laws. For example, whereas the United States criminal law recognizes exceptions, courts have ruled that the terrorist bar has no exceptions.[2119] The decision is informed

---

[2115] INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).
[2116] § 208.16 s. 241(b)(3)(B) [Withholding removal under CAT].
[2117] 1951 Convention, *supra* note 12 at art. 16; ICCPR, *supra* note 31.
[2118] *Dep't of Homeland Sec. v. Thuraissigiam,*140 S. Ct. 1959 (2020).
[2119] *See, e.g.* McCarthy, 2 U.S. 86, 86-87 [recognizing duress as a valid criminal defense]; Model Penal Code § 2.09 (1962); *State v. Toscano,* 74 NJ 421, 378 a. a 2d 755.

by the fact that the terrorist bars such as the notion of material support in the USA PATRIOT Act of 2001 and the REAL ID Act of 2005 paid little or no attention to international criminal law acceptable defenses like duress and self-defense, or assessment of the existence of a guilty mind. Implementing such a restrictive bar [2120] has caused a reckless exclusion of survivors of terrorist persecution as "paper terrorists." [2121] Also, in other decisions on excludability, there are still manifest discrepancies on the issues relating to the absence of scienter,[2122] and motivation.[2123] To achieve a credible resolution on evidential scrutiny, adjudicators should ensure that the criminal law procedure of evaluation of an existence of a guilty mind is applied before invoking the bar. Such conscious scrutiny of the existence of *mens rea* and *actus reus* is imperative in the assessments of voluntary and involuntary acts of a person for a credible determination of an applicant's criminal responsibility. As akin to the lessons from the Australian jurisprudence, an assessment of criminal culpability on security or crime bar must take cognizance of the existence of the fundamental elements of crime like knowledge, intent, culpable acts, complicity, voluntariness, without losing sight of the important exceptions of duress, and self-defense.[2124] Additionally, such evaluation of a preponderance of the evidence must take into consideration the totality of circumstances, and possible exceptions before invoking the bar. The evidential scrutiny is necessary to prevent a miscarriage of justice or the costly mistake of misconstruing a

---

[2120] Pursuant to 212(a)(3)(B)(i)(VII).
[2121] *A-C-M-, supra* note 153 [a Salvadorian woman and victim of guerrilla exploitations misconstrued as terrorist under the material support bar].
[2122] *See, e.g., Balachova v. Mukasey,* 547 F. 3d 374, 385 (2d Cir. 2008); *Castaneda-Castillo v. Gonzales,* 488 F. 3d 17 (1st Cir. 2007) (*en banc*) [requiring that a person's act to be voluntary, which is also a demonstration of knowledge].
[2123] *Aguirre-Aguirre, supra* note 770 at 415.
[2124] *See, e.g., See, e.g., RRT Reference N 96/12101* [The Australian court that evaluated criminal responsibility taking cognizance of totality of circumstances and criminal law exceptions, citing examples from *Ramirez v. Canada (Minister of Employment and Immigration*].

victim to a perpetrator as in *A-C-M-*.[2125] Therefore, asylum claimants should be given ample opportunities to prove their case, with exhaustive evidence, as well as an appeal where necessary. These can only be achieved through effective practice guidelines and constant monitoring of the judicial process.

7.12.5 *Structural Reforms: Limiting Executive Influence on Immigration Reviews*

Refugee rights are not minimal in the scale of international human rights but exist at par with other universal rights. As part of a solution seeking to dismantle procedural barriers in asylum adjudications, this study recommends the need to dislodge convoluted structures of immigration institutions that create expansive powers for executive interference with immigration jurisprudence. In the United States, for example, there is almost a practical fusion between the executive (administrative) orders, the DHS, the DOJ, and the immigration courts. According to 28 U.S.C. §503, the President appoints the Attorney General with the advice and consent of the Senate.[2126] The United States AG is the head of the Department of Justice, who exercises the duty to appoint immigration judges as administrative judges and AG's delegates.[2127] Indirectly, a sitting President has almost an absolute control on immigration courts through the AG. The interweb has continued to impact immigration review and policies. Decisions in *R-A-, A-B- 1, A-B- 11,* and *A-B- 111* attest to the realities of political influence on judicial independence. To guarantee justice and fairness in the review of asylum cases, the judicial system deserves to be transparent and disentangled from the executive. Also, judicial accountability should be emphasized by every standard. Such autonomy is achievable if the

[2125] *A-C-M-, supra* note 153 [a Salvadorian woman and victim of guerrilla exploitations misconstrued as terrorist under the material support bar].
[2126] Publ. L. 89-554, § 4(C), 1966, 80 Stat. 612.
[2127] §1003.10.

immigration courts are separated from the DOJ and be assigned the Article 1 status like the Tax Courts. Also, the procedure for the appointment of IJs should be done by a neutral (non-partisan) body of judicial commission. Unless the immigration court system is disentangled from the executive influence, likewise the process of selection of judges, achieving the utmost judicial independence will be practically untenable.

A government exists for the people and not vice versa. Under the refugee treaty, a State Party covenants to extend its fiduciary obligation to the protection of noncitizens, including those whose status is not yet determined. The international obligation is yet to be achieved given numerous irregularities that undermine good faith compliance and fairness of asylum laws in the United States. As earlier indicated, the chances of achievement are slim under a polarized political system, where partisan interest trumps treaty obligations and influences legislative bills and the judicial process. Apparently, refugees and asylum seekers in the United States have faced increased barriers under an extremely restrictive bar. The situation got to a climax under the Trump Administration, with the introduction of multiple bars by metering asylum, Muslim ban, MPP, deportation under Title 42, and an expanded structure of expedited removal process.[2128] Despite the several lawsuits that challenged the unconventional laws, the judicial reviews have largely favored the executive policies of the authority as seen in *Thuraissigiam.*[2129] The Supreme Court adopted a contentious position that denied the rights of *habeas corpus,*[2130] which of course, is a legitimate procedure for seeking a fair judicial review. Instead, it defended an expedited removal policy as part of the government's authority to make foreign policy to determine whom to admit or reject. *Thuraissigiam* is not alone. History has records of related controversial

[2128] *See, e.g.,* Act 42 U.S.C. §§265, 268 [on Title 42]; 8 C.F.R. § 235.3 (2020) [on Trump-era expanded scope of removal].
[2129] *Dep't of Homeland Sec. v. Thuraissigiam,* 140 S. Ct. 1959 (2020).
[2130] *Id.*

holdings by the apex Court, which a reasonable mind can interpret as a politically motivated decision such as the trajectory from *Plessy v. Ferguson*[2131] to the overturning of *Roe v. Wades.*[2132] Unfortunately, such a prevarication of justice along partisan interest would gradually obfuscate the temple of justice.

Therefore, this dissertation has recommended a review of the United States' justice system, including the immigration courts. It has suggested the designation of immigration courts with Article 1 status to separate them from other executive institutions. Likewise, the process for the appointment of judges should be reviewed by Congress and equally, be separated from executive influence. Instead of having the President or Attorney General appoint judicial officers, this suggested the establishment of a neutral body of judicial commission that would be empowered to make recommendations for the appointment of judges at all levels. The body of experts would nominate two or three persons based on established scrutiny and have their names submitted to the President for approval, after which the Senate would vote to endorse the nomination. The achievement of judicial autonomy begins with the process of selection, by guaranteeing a neutral and non-partisan influence. Considering that the court is the highest arbiter for the persecuted, the institution must be purged of partisan interests to ensure fairness, integrity, and good faith interpretation of the law, taking cognizance of human rights principles.

Conclusion

This dissertation examined the legal barriers to the inclusive protection of deserving refugees and the impacts of unequal application of asylum benefits in the United States. Understanding that the crisis of refugees has for so long been mismanaged, the study

---

[2131] *Plessy v. Ferguson,* 163 US 537 (1896) [SCOTUS previously recognized segregation law].
[2132] *Roe v. Wade,* 410 U.S. 133 (1973) [previously recognized the rights to abortion].

investigated causes, consequences, developments, and possible solutions. The research findings revealed that the drafting of the scope of refugee protection was a contributory factor to the female exclusion that is replicated in the United States gender asylum. Despite the changing dynamics in the sources of involuntary migration since WW II, for more than seven decades the Refugee Convention has failed to reflect the contemporary needs of increasing demographics of female refugees and asylum seekers in the world.[2133] Drafted in accordance with the needs of WW II refugees, the Refugee Convention centered primarily on five grounds of protection—race, religion, nationality, political opinion, and MPSG, excluding sex related persecutions. Finding that the Refugee Convention is structurally limited to addressing the disparate needs of current refugees, the UNHCR Gender Guidelines and EXCOM Conclusions have since 1985 advanced the recognition. But the developments in the United States gender asylum decisions as well as other jurisdictions indicate that the proposals have not gained traction as a resolution to sexism.

Throughout this study, the findings revealed the numerous obstacles to women seeking asylum on gender related persecutions due to interpretative biases as asylum courts treat them as non-Conventional refugees. The rationale derived from a restrictive application of nexus burden persistently stultifies asylum access for women in dire need of protection. Evidence from the United States case law indicates the numerous hardships of claimants seeking to demonstrate gender viability to be protected from domestic violence, rape, honor killing, severe gender discrimination, and punishments for transgressing gender norms. In many ways, the trivialization of female persecutory experiences as "personal" or "unConvention" triggers a long-standing

[2133] UNHCR: Global Appeal Update, The UN Refugee Agency, 5, 3-165 (2021). https://reporting.unhcr.org/sites/default/files/ga2021/pdf/global_appeal_2021_full_lowres.pdf..

gender stereotype that has continued to perpetuate inequality and female vulnerabilities. Therefore, for IRL to be exorcised of sexism, Article 1.A(2) must be redefined from gendered structures that make female experiences invisible. Consequently, this study suggested that the scope of refugee status and protection should be updated to include sex as an independent ground. Additionally, the recommendation for inclusiveness applies to all categories of deserving refugees that are excludable by Articles 1.D-F or 33(2), including survivors of human trafficking and displaced by natural disasters. Congress has made landmark legislation with the U-Visa and T-visa categories that should inspire progressive reforms in other international jurisdictions. Additionally, this dissertation recommends the adoption of the BNF practiced in Australia, New Zealand, and the UK. The latter will encourage courts to give weight to the government's unwillingness and inability to protect in the assessment of asylum and mitigate the tendency for an abuse of discretion.

Equally, the study challenged the irregularities of the United States exclusion laws such as the terrorism bar, crime bar, and national security bar. For example, it recognized that the unjustifiably expansive definition of terrorist activity and material support under the terrorism bars imposed severe barriers to aliens in desperate need of asylum, including women. Ironically, the anti-terrorism laws that were purported to solve the problem of national security focus only on asylum seekers, ignoring other categories of persons, and potential routes of insecurities. Like other related laws of exclusions—the Title 42 deportation law, MPP, IRRIRA, STCA, and the filing deadline bar—this research found no human rights justification or basis with the Refugee Convention. Instead, they have sustained a dark history of anti-immigration laws that obscure the legacy established under the 1980 Refugee Act and the ultimate goals of IRL. Considering the numerous damages caused by these laws, this study urges Congress to step up with reforms to

repeal them to restore the United States' reputation of liberty, and equal protection, as well as avowed obligations to the international refugee regime.

Legislative reforms are not enough without adequate access to court and legal representation. Hence, the judicial system plays a significant role in the administration of justice in any society. Unfortunately, the findings of this research reveal numerous cases of abuse of discretion and misconduct by immigration judges, which of course result in unfair decisions.[2134] Having addressed the issues of politicization of the court system, judicial accountability is also necessary to ensure diligence, transparency, and fairness in asylum decisions. To achieve this, it suggested the enlargement of the scope of Article 38[2135] to accommodate complaint procedures by asylum claimants and pro-refugee institutions on misinterpretation and judicial misconduct. The measures of accountability should include human rights monitoring on states' compliance with the Refugee Convention, and the treatment of refugees in host states. Suggestions have been made earlier on the prospects of effective monitoring by the United Nations and its agencies to address inconsistent domestic laws or practices that undermine treaty obligations and fair access to humanitarian protection.

Cognizant of the increasing crisis in forced migration in many Western states, it becomes imminent to adopt strategic measures of crisis management at international, regional, and domestic levels. Among the suggested measures in this study is an inclusive approach to burden sharing that will involve state and non-state actors as well as effective international cooperation between neighboring countries. Of course, addressing the root cause of involuntary migration is

[2134] *A-C-M-, supra* note 153 [excluding a female victim of guerrilla attack under material support bar]; *Fisher II, supra* note 76 at 955; *Fatin, supra* note 76 at 1233; *R-A-, supra* note 56 [found GBPs as non-persecutory]; *Sarhan, supra* note at 649 [denied claims on honor killing as non-Conventional].

[2135] 1951 Convention, *supra* note at art. 38 [on settlement of disputes relating to interpretation and application of the Convention].

imperative to ensure the participation of native governments in collaborative solution seeking and burden sharing. Lastly, the achievement of a successful international refugee regime largely depends on inclusive representation and a reasonable exclusion exercised only in the interest of national or international security. Neither of these is tenable if divorced from human rights and the humanitarian purpose of refugee protection. International human rights and treaties protecting the rights of refugees are not empty promises but a time-tested blueprint for the preservation of the rights, freedom, and dignity of every deserving refugee, without exception. Except these human rights norms are enforced effectively in every state to address the realities of humanitarian migration, refugee law would refugee crisis would remain endless, while refugee laws exist as mere relics of history.

BIBLIOGRAPHY

BOOKS

AHMED ABOU-EL-WAFA, THE RIGHT TO ASYLUM BETWEEN ISLAMIC SHARI'AH AND INTERNATIONAL REFUGEE LAW A COMPARATIVE STUDY, 3-254 (SAUDI ARABIA, 2009).

AHMED AL-DAWOODY, THE ISLAMIC LAW OF WAR: JUSTIFICATIONS AND REGULATIONS 3-352, 134 (Palgrave Macmillan, 2011).

ARUA OKO OMAKA, VICTOR'S JUSTICE: ATROCITIES IN POSTWAR NIGERIA, 32 228–246 (Routledge, 2016)

CHINUA ACHEBE, THERE WAS A COUNTRY: A PERSONAL HISTORY OF BIAFRA 167 (The Penguin Press, 2012)

CHINUA ACHEBE, THINGS FALL APART, 124 (LONDON HEINEMANN, 1958).

COLEMAN PHILLIPSON, THE INTERNATIONAL LAW AND CUSTOM OF ANCIENT GREECE AND ROME, 122–209 (Macmillan, 1911)

CYNTHIA ENLOE, MANEUVERS: THE INTERNATIONAL POLITICS OF MILITARIZING WOMEN'S LIVES, 234 (Berkeley, 2010)

DORIAN BELL, GLOBALIZING RACE ANTISEMITISM AND EMPIRE IN FRENCH AND EUROPEAN CULTURE 3-34(ILLINOIS, 2018).

EGODI UCHENDU, WOMEN AND CONFLICT ON THE NIGERIAN CIVIL WAR. (New Jersey, 2007).

JAMES C. HATHAWAY, THE DEVELOPMENT OF THE REFUGEE DEFINITION IN INTERNATIONAL LAW, THE LAW OF REFUGEE STATUS 6 (BUTTERWORTHS CANADA, 1993).

JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARY (CAMBRIDGE PRESS, UK: 2002).

JAMES C. HATHAWAY, THE RIGHTS OF REFUGEE UNDER INTERNATIONAL LAW 76, 156-160; 1-1073 (Cambridge Press, 2005).

LAURA SJOBERG AND SANDRA VIA, GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 124-154, 127 (1st ed., Praeger, 2010).

LIHU LAUTERPACHT AND DANIEL BETHLEHEM, THE SCOPE AND CONTENT OF

THE PRINCIPLE OF NON-REFOULEMENT: OPINION 89-117, 108 (Cambridge Press, 2009).

GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 40 (OXFORD, 1996)

GUY S GOODWIN-GILL AND JANE MCADAM, THE REFUGEE IN INTERNATIONAL LAW 572 (4th ed., OXFORD PRESS, 2021)

IGNATIUS BAU, THIS GROUND IS HOLY: CHURCH SANCTUARY AND CENTRAL AMERICAN REFUGEES 124-133 (Paulist Press, 1985)

JAMES C. HATHAWAY, THE RIGHTS OF REFUGEE UNDER INTERNATIONAL LAW 76, 156-160; 1-1073 (Cambridge Press, 2005).

JAMES HATHAWAY AND MICHELLE FOSTER, THE LAW OF REFUGEE STATUS 128 (2nd ed. 1991).

JAMILLEBIGIO AND RACHEL VOLGESTEIN, COUNTERING SEXUAL VIOLENCE IN CONFLICT 3 (2017).

KAREN MUSALO eta al. REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 3, 96-7 (5th ed. 2018)

KARL SHOEMAKER, SANCTUARY AND CRIME IN THE MIDDLE AGES, 400-1500, 4-292 (Fordham, 2011).

LINDA AHALL, SEXING WAR/POLICING GENDER (MOTHERHOOD, MYTH AND WOMEN'S POLITICAL VIOLENCE, 1-168 (Routledge, 2015).

OGBU C AJA, THE JURISPRUDENCE OF WAR CRIMES 99 (Demi, 2012)

PRAKASH S. SINHA, ASYLUM, AND INTERNATIONAL LAW 10-366, 103, (Martinus Nijhoff, 1971).

SONDRA HALE. GENDER POLITICS IN SUDAN (Westview Press, 1996)

STEPHEN H. LEGOMSKY AND CRISTINA M. RODRIGUEZ, IMMIGRATION AND REFUGEE LAW AND POLICY, 13-1397 (5th ed. Foundation Press, 2009).

TITUS LIVINUS, HISTORY OF ROME TRANS. GEORGE BAKER, A.M. FIRST AMERICAN FROM LONDON LAST ED. I-VI, I (London, 1823).

ARTICLES IN A BOOK

E. Grosz, *A Note on Essentialism and Difference,* in FEMINIST KNOWLEDGE: CRITIQUE AND CONSTRUCT 332 (ed. S. Gunew, 1990).

Jérôme B. Elie and Jussi Hanhimäki, *UNHCR and Decolonization in Africa Expansion and Emancipation, 1950s to 1970s* 48 ARCHIV FÜR SOZIALGESCHICHTE 61, 53-72 (2008).

Laura Sjoberg, *Gendering the Empire's Soldiers: Gender Ideologies, the U.S. Military, and the "War on Terror*, in GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 209-230 (eds. Laura Sjoberg and Sandra Via, 2010)

Liz Kelly, *The Everyday/Everynightness of Rape: Is it Difference in War?* in GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 114-123 (eds. Laura Sjoberg and Sandra Via, 2010)

Mariano P. Barbato, *International Relations and the Pope,* in HANDBOOK ON RELIGION AND INTERNATIONAL RELATIONS 289-301 (ed. Edward Elgar, 2021)

Péter Kovács, *The Protection of Minorities under the Auspices of the League of Nations*, THE OXFORD HANDBOOK OF INTERNATIONAL HUMAN RIGHTS LAW (ed. Dinah Shelton, 2013).

Sandra Via, *Gender, Militarism, and Globalisation: Soldiers for Hire and Hegemonic Masculinity*, in GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 42-53 (eds. Laura Sjoberg and Sandra Via, PRAEGER 2010).

Sondra Hale, *Rape as Maker and Eraser: Darfur and the Nuba Mountains (Sudan)*, in GENDER, WAR, AND MILITARISM: FEMINIST PERSPECTIVES 105-113, 106 (eds. Laura Sjoberg and Sandra Via, 2010)

JOURNAL ARTICLES/LAW REVIEWS

Al Chukwuma and P. Iortyer, *Terrorism and Humanitarian Crisis in Nigeria: Insights from Boko Haram Insurgency*, 14 Gl. J. HSS: F POLITICAL SCIENCE 39-50 (2014).

American Courts and The U.N. High Commissioner for Refugees: A Need for Harmony in The Face of a Refugee Crisis, 131, HARV. L. REV. 1401, 1399-1420 (2018).

Andreas H. Roth, *The Minimum Standard of International Law Applied to Aliens*, INT'L AFFAIRS 113 (1949).

Barbara Nussbaun, *Ubuntu: Reflections of a South African on Our Common Humanity,* REFLECTION, 4(4) 21-26 (2003); R. English, *Ubuntu: The Quest for an Indigenous Jurisprudence,* 12 S. AFR. J. ON HUM. RTS 641 (1996).

Bonny Ibhawoh, *Refugees, Evacuees, and Repatriates: Biafran Children, UNHCR, and the Politics of International Humanitarianism in the Nigerian Civil War,* 63 AFRICAN STUD. REV 568-592 (2020).

Catherine A. Solheim and Jaime Ballard, *Ambiguous Loss Due to Separation in Involuntary Transnational Families,* 8 J. FAM. THEO. REV. 341-359 (2016).

Chris N. Okeke and James A.R. Nafziger, *United States Migration: Essentials for Comparison,* 54 AM. J. COMP. LAW 532, 531-556 (2006).

Constance G. Anthony, *Africa's Refugee Crisis: State Building in Historical Perspective*, 25 INT'L MIGRATION REV. 25 574-91 (1991).

Cynthia Grant Boivman and Elizabeth Al. Schneider, *Feminist Legal Theory, Feminist Lawmaking, and The Legal Profession,* 67 FORDAM L. REV. 249-271, 249 (1998).

Desipio L. Immigrants, *Denizens, and Citizens: Latin American Immigration and Settlement in the 1990s*, 143 DAEDALUS PUB. MED, 48–64 (2013).

Diane S Meier, *Gender Trouble in the Law: Arguments against the Use of Status/Conduct Binaries in Sexual Orientation Law* 15 WASH & LEE J CIVIL RTS & SOC JUST 147, 160 (2008).

Dorothy E. Smith, *Women's Perspective as a Radical Critique of Sociology,* 4 SOCIOLOGICAL INQUIRY 7-13 (1974).

Evan J. Criddle & Evan Fox-Decent, *The Authority of International Refugee Law* 62 WILLIAM & MARY LAW REVIEW 1-45, 4 (2021).

Fatima E. Marouf, *Alternatives to Immigration Detention,* 38 CARDOZO L. REV. 2141, 2142-70 (2017).

Felipe G. Morales, *Mandates of the Special Rapporteur on the Human Rights of Migrants*, PALAIS DES NATIONS, 1211 GENEVA 10 SWITZERLAND, 1-5 (2019).

Gershon Bacon, *Polish Jews and the Minorities Treaties Obligations, 1925: The View from Geneva,* 18 GAL-ED 145–176 (2002).

Ghassan Maarouf Arnaout, *Asylum in the Arab-Islamic Tradition,* INT'L INST. HUM. L 15-21 (1987).

Gloria Gaggioli, *Sexual Violence in Armed Conflicts*' 96 *IRRC* 503–538 (2014).

Guy S. Goodwin-Gill, *Right to Seek Asylum: Interception at Sea and the Principle of Non-Refoulement,* 23 INT'L J. REFUGEE L. 443, 445 (2011).

Jaya Ramiji-Nogales, *Non-refoulement under the Trump Administration,* 23 AMER. SOC. INT'L L. (2019).

Jean Allain, *The Jus Cogens Nature of Non-refoulement,* 13 INT'L J. REF. L. 533, 539 (2002).
Deborah L. Rhode, Access to Justice: A Roadmap for Reform, 41 FORDHAM URB. L.J. 1227 (2014)

Joshua Kaiser and John Hagan, *Gendered Genocide: The Socially Destructive Process of Genocidal Rape, Killing, and Displacement,* 49 LAW & SOCIETY REV. 69-107 (2005)

John Hagan, Wenona Rymond and Alberto Palloni, *Racial Targeting of Sexual Violence in Darfur,* 99 AJPH, (2011).

Johann W. Brugel, *The Bernheim petition: A challenge to Nazi Germany in 1933,* 17:3 PATTERNS OF PREJUDICE, 17-25 (1983).

Marlene Epp, *The Memory of Violence: Soviet and East European Mennonite Refugees and rape in the Second World War,* 9 J. OF WOMEN'S HIST. (1997) 58-89.

Maria-Teresa Gil-Bazo, *Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship,* 34 REFUGEE QUART'LY, 11, 11-42 (2015).

Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion,* 103 HARV. L. REV. 1409 (1990).

Karen Musalo, *Irreconcilable Differences? Divorcing Refugee Protections from Human Rights Norms,* 15 MICH. J. INT'L L. 1214-1219 (1994).

Karen Musalo, *A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women's Claim* 29 REFUGEE SURV. Q 46 (2010).

Karen Musalo & Stephen Knight, *Unequal Protection*, 58 BULL. ATOMIC SCIENTISTS 56, 59 (2002).

Karen Musalo & Marcelle Rice, *Center for Gender & Refugee Studies: The Implementation of the One-Year Bar to Asylum,* 31 HASTINGS INT'L & Comp. L. REV. 693 (2008)

María-Teresa Gil-Bazo, *Safe Third Country Concept in International Agreement of Refugee Protection Assessing State Practice,* 33 NETH. QUART. H. R. 42-77, 48 (2015).

Maria-Teresa Gil-Bazo, *Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship,* 34 REFUGEE QUART'LY, 11, 11-42 (2015).

Patricia Hynes, *On the Battlefield of Women's Bodies: An Overview of the Harm of War to Women*, 27 WOMEN'S ST. INT'L FORUM 231-445 (2004).

Patryk Kugiel, *The Refugee Crisis in Europe: True Causes, False Solutions*, 4 THE POLISH Q. OF INT'L AFFAIRS 41-59 (2016)

Rebecca M. M. Wallace, *Making the Refugee Convention Gender Sensitive: The Canadian Guidelines*, 45, INT'L AND COMP. LAW Q. 702-711, 709 (1996).

Robert E. Burns, The International Nature of Religious Liberty, 41 U. DET. L.J. 83 (1963).

Roel Reyna, *Expedited Removal and Habeas Corpus: How a Recent Supreme Court Ruling, Combined with an Executive Order from Former President Trump Has Affected the Due Process Rights of Illegal Immigrants Detained for Expedited Removal,* 8 LINCOLN MEM'l U. L. REV. 33, 39 (2021).

Susan F. Martin, *Global Refugee Crisis*, 17 GEO. J. INT'L AFFAIRS 5-11 (2016).

Stephanie Robins, Note, *Backing It Up: Real ID's Impact on the Corroboration Standard in Women's Private Asylum Claims*, 35 WOMEN'S RTS. L. REP. 435, 442–43 (2014).

Tendayi Achiume, *Beyond Prejudice: Structural Xenophobic Discrimination against Refugees,* 45 GEORG. J. INT'L L. 323 (2013).

Theresa A. Vogel, *Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence* 58 UNIV' OF MICHI. JOUR. OF LAW REFORM 351, 242-499 (2019).

The European Council on Refugees and Exiles, Position on Exclusion from Refugee Status, 16 INT'L J. REFUGEE L. 257, 257-285, para. 42 (April 2004) [*hereinafter* "ECRE"].

Volker Turker, *Forced Migration and Security,* 15 INT'L J. REFUGEE L. 113 (2003).

Walker, Herman Jr., *Modern Treaties of Friendship, Commerce and Navigation,* 42 MINN. L. REV. 823 (1958).

CASES

Amnesty International and John Doe, F.C.A. 229 (Can. 2008).

Aguirre-Aguirre v. INS, 526 U.S. 415 (1999).

Applicant A. v. Minister for Immigration and Ethnic Affairs (1987).

Arizona et aal v. Alejandro Mayorkas, Department of Homeland Security, 598 US (2022).

Attorney General v. Dow BCLR (6) (1994).

Attorney General v. E, [2000] 3 NZLR 257, 269 (NZ CA, 2000).

Balachova v. Mukasey, 547 F. 3d 374, 385 (2d Cir. 2008).

Bera v. Attorney General of U.S.; Li v. Attorney General of the US, 400 F.3d 157 (3d Cir. 2005).

Canada (Attorney General) v. Ward 2 SCR 689 (1993).

Castaneda-Castillo v. Gonzales, 488 F. 3d 17 (1st Cir., 2007).

Chevron U.S.A., Inc. v. NRDC U.S. 837 (1984).

Commission des recours des réfugiés (CRR), Mlle EG Decision No 549296, (2006).

CRR, SR, 27 mai 2005, 487613, Mme Nariné Ananian ép. Arakelian; Protection subsidiaire, France: Commission des Recours des Réfugiés (CRR) (2005).

*Dep't of Homeland Sec. v. Thuraissigiam,*140 S. Ct. 1959 (2020).

Her Majesty the Queen v. Canadian Council for Refugees, Canadian Council of Churches,

Husyev v. Mukasey, 528 F. 3d 1172, 1172, 1178-81 (9th Cir. 2008).

Gatimi v. Holder 578 F. 3d 611, 615 (7th Cir. 2009).

Grace Kappachi v. The Minister of Interior [unreported].

Greco-Bulgarian Communities, Advisory Opinion PCIJ R., S.B, 17 (1930).

Gideon v. Wainwright U.S. 335 (1963).

Giraldo v MIMA FCA 113 42, 44 (2001) (Unreported, 2001).

He v. Canada (Minister of Employment and Immigration), 25 Imm. L.R. (2d), 128 (F.C.T.D. 1994).
INS v. Stevic, 467 U.S. 407, 413 (1984)

INS v. Cardoza-Fosenca 480 U.S. 421-425, 436 (1987).

INS v. Zacarias, 502 U.S. 478, 812 (1992)

In re Fauziya Kasinga, 21 I. & N. Dec. 357, 358 (BIA 1996).

In *re A-B-* 27 I. & N. Dec. 316 (AG 2018).

Islam v. Secretary for the Home Department (SHD) and R. v. Immigration Appeal and SHD ex parte Shah, (1999) 2 W.L.R. 1015; (1999) INLR 144.

Islam v. Secretary for the Home Department (SHD) and R. v. Immigration Appeal and SHD ex parte Shah, [1999] 2 W.L.R. 1015; [1999] INLR 144.

Kovac v. INS, 407 F. 2d 102, 106-07 (9th Cir. 1969).

Lassiter v. Dep't of Soc. Servs of Durham County., 452 U.S. 18 (1981)

Matter of Acosta, 14 I&N Dec. 338 (BIA 1973).

Matter of R-A- 22 I&N Dec. 906 (BIA 1999).

Matter of X-K-, 23 I. & N. Dec. 731 (BIA 2005).

Matter of C-A-, 23 I&N Dec. 951 (BIA 2006).

Matter of C-A-, 23 I. & N. Dec. 951, 956-57 (BIA 2006) *aff'd, Castillo-Arias v. U.S. Att'y Gen.,* 446 F.3d 1190 (11th Cir. 2006), *cert. Denied sub nom Castillo-Arias v. Gonzales,* 446 F.3d 1190 (11th Cir. 2006).
Matter of S-E-G-, 24 I&N Dec. 579 (BIA 2008).

Matter of R-A- 22 I&N Dec. 906 (A.G. 2009).

Matter of T-M-H & S-W-C, 25 I&N Dec, 193, 193 (BIA 2010).

Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014).

Matter of ME-V-G-, 26 I&N Dec. 227 (BIA 2014).

Matter of W-G-R-, 26 I&N Dec. 20 (BIA 2014).

Matter of A-R-C-G-, 26 I&N Dec. 388 (BIA 2014).

Matter of A-B- 27 I&N Dec. 227 (A.G. 2018).

Matter of A-B- 28 I&N Dec. 307 (A.G. 2021).

Minister for Immigration and Multicultural Affairs v. Khawar, 1130 FCA 1379 (2000).

Minority Schools in Albania, Advisory Opinion, 1932 P.C.I.J. (ser. A/B) No. 64 (Apr. 6).

Mukamusoni v. Ashcroft, 390 F. 3d 110 (1st Cir. 2004).

Plessy v. Ferguson, 163 US 537 (1896).

Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

Prosecutor v. Jean-Paul Akayesu, ICTR-96-4, 598 (1998).

Prosecutor v. Anto Furundžija, Case No. IT-95-17-1, 271 (1998).

R v. Immigration Appeal Tribunal ex p. Jonah Immi AR 7 (1985).

Radomir Kovac and Zoran Vukovic, Case No. IT-96-23-A and IT-9623/1-A (2002).

Rahaman v. Minister of Citizenship and Immigration, ACWSJ Lexis 1026 (Can. FCA 2002).

Ramirez v. Canada (Minister of Employment and Immigration) (1992).

Refugee Appeal No. 2039/93

Roe v. Wade, 410 U.S. 133 (1973).

RRT Reference N 96/12101 (25 November 1996).

Saideh Fisher v. INS 79 F. 3d 955 (9th Cir. 1996).

Santos-Lemus v. Mukasey, 542 F.3d 738 (9th Cir. 2008).

Sagermark v. INS, 767 F.2d 645, 650 (9th Cir. 1985).

Sale v. Haitian Centers Council, Inc 509 U.S. 155 (1993).

Sandralingham Ravichandra, Imm AR 97 (1996).

Stenaj et al v. Alberto Gonzalez, 227 Fed. Appx. 429 (2007)

Sofia Campos-Guadado v. I.N.S 809 F. 2d 285 (5th Cir. 1987).

State v. Toscano, 74 NJ 421, 378 2d 755 (1977).

Texas v. Biden 21-10806 (5th Cir., 2021).

Texas v. Biden 21-10806 (5th Cir., 2021).

The Prosecutor v. Jean-Paul Akayesu, ICTR-96-4-A (June 1, 2001).

Thirunavukkarasu v. Canada (Minister of Employment and Immigration) 1 F.C.R. 589 (C.A.) (1993).

Turner v. Rogers, 564 U.S. 431, 131 (2011).

Trump v. International Refugee Assistance Project, 127 S. Ct. 2080, 2089 (2017).

Trump v. International Refugee Assistance Project, 127 S. Ct. 2080, 2089 (2017)

Zacarias v. INS, 112 S. Ct. 812 (1992).

STATE, FEDERAL, AND RELIGIOUS LAWS

Emergency Quota Act, Pub. L. 67-5; 42 Stat. 5 (1921).

Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

Hart-Celler Act, Pub. L. 89-236 (1965).

8 U.S.C 1101 Refugee Act of 1980, 96th Congr. (s. 643, 1980).

8 USC 1101 Refugee Act of 1980, 96th Congress (s. 643, 1980); Pub. L. No. 82-414, 66 Stat. 163 (1952). (Codified as amended in scattered sections of 8 U.S.C.)

INA §212 (a)(3)(B)(i)(I), 8 U.S.C. §1182(a)(3)(B)(i)(I) [codified in the Immigration Act of 1990 Pub. L. No. 101-649, 104 Stat. 4978(1990)].

INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005) [on asylum].

INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m).

INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J)

INA § 240 A (b)(2); 8 CFR § 1229(b)(2).

INA § 244; 8 CFR § 244

INA § 101(a)42(A); 8 CFR § 208

INA § 241(b)(3); 8 CFR §§ 208; 1208.16(b) [*hereinafter* "withholding removal under INA"].

INA §§ 101(a)(27)(J); 245(h); 8 CFR § 204.11 [*hereinafter* "Special Immigrant Juvenile Status (SIJS)"].

INA § 208(a)(2)(B); 8 U.S.C §1158(a)(2)(B).

§ 208(a)(2)(D); 8 U.S.C §1158(a)(2)(D).

INA §208(b)(2)(A)(v), 8 U.S.C. §1158(b)(2)(A)(v).

§ 208.16 s. 241(b)(3)(B)

212(a)(3)(B)(i)(VII).

208(b)(2)(A)(vi); 8 U.S.C §1158(b)(2)(A)(vi).

INA §208(a)(2)(D).

INA § 212(d)(3)(B).

INA §208(b)(2)(A)(v), 8 U.S.C. §1158(b)(2)(A)(v).

212(a)(3)(B)(i)(VII).

INA §212 (a)(3)(B)(i)(I), 8 U.S.C. §1182(a)(3)(B)(i)(I).

INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m).

INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J)

INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g),

INA § 240 A (b)(2); 8 CFR § 1229(b)(2).

INA §207(b), 8 U.S.C. §1157(b).

INA § 208(c)(2); 8 U.S.C § 1158(a)(2).

INA § 208(a)(1); §1158(a)(1); 94 Stat. 105, as amended, 8 U. S. C. §1158. See §1158(b)(2)(C).

INA § 240 A (b)(2); 8 CFR § 1229(b)(2).

INA § 208(a)(2); 8 U.S.C §1158(a)(2)(A).

INA § 237(a) [*hereinafter* “deportable grounds”].

Ioane Teitiota, Human Rights Committee, CCPR/C/127/D/2728/2016.

8 C.F.R.§ 208.30(e)(6); 8 C.F.R. 1208.4(a)(6)

8 C.F.R. 1240.11(g); 8 C.F.R. 1003.42(h).

8 C.F.R. 1208.4(a)(6).

8 CFR § 1208.16 [Withholding of removal under section 241(b)(3)(B))

8 C.F.R. § 1208.13(b)(1).

8 C.F.R. § 208.4(a).

8 C.F.R. §208.15.

8 C.F.R. § 235.3 (2020).

8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g)

8 CFR §§ 103.2(b)(17(ii) 204.2(c)(2)(i), 204.1(g)

8 C.F.R. § 235.3 (2020) [*hereinafter* “Trump-era expanded scope of removal”].

McCarthy, 2 U.S. 86, 86-87 [recognizing duress as a valid criminal defense]

Model Penal Code § 2.09 (1962)

8 U.S.C. 1225 [IIRIRA amending s. 235 (a) (1) and (2)].

8 U.S.C. § 1325 (2018).

8 C.F.R. § 235.3 (2020).

8 U.S.C. § 1253(h)(1) (2012).

8 U.S.C. § 1325 (2018) [misdemeanor]; § 1326. [felony].

8 U.S.C. § 1253(h)(1) (2012)

8 U.S.C. § 1325 (2018) [misdemeanor] § 1326. [felony].

8 C.F.R. §235.3 (2020).

Exec. Order No. 13,769,82 Fed. Reg. 8977 (Jan. 27, 2017)

ss. 362 & 365 of Publ. Health Service Act 42 U.S.C. §§265, 268 (March 2020).

Exec. Order No. 13,769 (Jan. 27, 2017).

Exec. Order No. 13,769, 82 Fed. Reg. 8977 (Jan. 27, 2017)

Exec. Order No. 13780, 82 Fed. Reg. 13, 209 (Mar. 3, 2017)

Exec. Order No. 13780 reiterated on September 24, 2017.

Exec. Order No. 14010, § 4(c)(ii), 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021)

U.S. CONST. amend. 1

Migration Act 1951 D 7 s189; 1900 (Imp), 63 & 64 Victoria, c. 12 § 9 (U.K.).

Immigration and Refugee Protection Act ss. 55–57 (2001) [entered into force in 2002].

The Holy Bible: Peter 2:11; A Letter to the Hebrew 11:13; Genesis 12:1-3; Gen. 12-15-17; Genesis 47:1-12; Numbers 35:6-34; Exodus 22:21-27; Exodus 13:17-27; 14: 1-12; Exodus 21:12-14; Numbers 35:6-34 [on religious sanctuary laws].

Codex Theodosianus, XVI.10.12 (8th Nov. 392 CE) [*hereinafter* “CT”].

Council of Mayence, 813

Mayence 813, *Concilium Moguntinum* (June 9, 813)

Council of Orange (France), (529 A.D)

Council of Orange (France), (529 A.D)

Imperial Law and Letters Involving Religion [AD 395-431]

TREATIES, DECLARATIONS, AND AGREEMENT

Agreement between the Government of Canada and the Government of the United States of America for the Cooperation in the Examination of Refugee Status Claims from Nationals of Third Countries, 5 December 2002.

Convention Relating to the Status of Refugees, July 28, 1951, U.S.T. 6259, 189 U.N.T.S. 150.

Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted 10 December 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51, reprinted in 23 I.L.M. 1027 (1984), substantive changes noted in 24 I.L.M. 535.

Declaration on Territorial Asylum adopted unanimously by the United Nations General Assembly (UNGA), 14 December 1967, Resolution 2132 (XXII), A/RES/2132 (XXII).

Cartagena Declaration on Refugees, 22 November 1984.

Joint Declaration and Supplementary Agreement Between the United States of America and Mexico, 7 June 2019, 19 TIAC 5, 19-607.
League of Nations, Convention Relating to the International Status of Refugees, 28 October 1933, L.N.T.S. V CLIX 3663.

International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316, 999 U.N.T.S. 171.

International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966 GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316, 993 U.N.T.S. 3.

International Law Commission of the United Nations (ILO), Responsibility of States for Internationally Wrongful Acts, 4 May 2001, A/CN.4/L.602.

IRO, Convention on the Privileges and Immunities of the Specialized Agencies (CPIA), 33 U.N.T.C. Geneva, 29 March 1949.

Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, G.A. Res. 428(V), Annex, U.N. Doc. A/1775.

Organization of Africa Unity (OAU), Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969 4 1001 UNTS 45.

Organization of American States (OAS), American Convention on Human Rights, “Pact of San Jose,” Costa Rica, 22 November 1969, 1144 U.N.T.S. 123.

Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

The Regulation of the European Parliament and of the Council, June 26, 2013, (EU) No 604/2013, OJ L 180/31.

UNHCR, Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons II, Geneva, 1995.

UNHCR, Collection of International Instruments and Other Legal Texts Concerning Refugees and Displaced Persons II, 1 June 2007.

United Nations Charter, Charter of the United Nations, 24 October 1945
1 UNTS XVI.

Universal Declaration of Human Rights, 10 December 1948, UNGA Res 217 A (III).

UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS 1249 (CEDAW), GA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46.

Universal Islamic Declaration of Human Rights, adopted by the *Islamic Council of Europe on 19* September 1981/*21 Dhul Qaidah 1401.*

Vienna Convention on the Law of Treaties, 23 May 1969, 1155 U.N.T.S. 331.

UN DOCUMENTS/ ADDRESSES

Advisory Opinion on The Extraterritorial Application of Non-Refoulement Obligations Under The 1951 Convention Relating to The Status of Refugees and Its 1967 Protocol, 26 January 2007, UNHCR Geneva.

Council Of Europe, *Refugee Women, And the Istanbul Convention* 3 Parliamentary Assembly of The Council of Europe, 23 January 2013.

Committee on the Rights of the Child ("CRC"), General Comment No. 6 (2005): Treatment of Unaccompanied and Separated Children Outside Their Country of Origin, CRC/GC/2005/6, 1 September 2005.

Executive Committee of the Higher Commissioner's Programme, established by the United Nation's Economic and Social Council (ECOSOC), Resolution 672 (XXV), 30 April 1958.

Executive Committee of the Higher Commissioner's Programme, established by the United Nation's Economic and Social Council (ECOSOC), Resolution 672 (XXV), 30 April 1958.

Executive Committee of The UNHCR Programme, Refugee Women and International Protection, No. 39, 36th Session 1985.

Groundswell: Preparing for Internal Climate Migration, The World Bank, 19 March 2018.

Ghassan Maarouf Arnaout, *Asylum in Islamic Tradition,* OFFICE OF THE UN HIGH COMM'R FOR REFUGEE (UNHCR), 1987.

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 Evaluation And Policy Analysis Unit, Department Of International Protection, And Regional Bureau For Europe AMRE Consulting, EPAU/2004/05 1-161, 50 (May 2004)

ICRC: People on War: Country Report: Nigeria ICRC Worldwide Consultation on The Rules of War, Vi Greenberg Report, Geneva, 1999.

International Refugee Organization 1946-1952, NATIONAL ARCHIVES CATALOG.

IOM, UNHCR Announce Temporary Suspension of Resettlement Travel for Refugees, THE UN REFUGEE AGENCY USA, 2019.

Monitoring Report Canada—United States "Safe Third Country" Agreement, 29 December 2004 – 28 December 2005, UNHCR, 6-7 (UNHCR 2006).

Office Of the United Nations High Commissioner for Refugees, Handbook on Procedures And Criteria For Determining Refugee Status, 1979 [Hereinafter "The Handbook"].

Refugee Crisis in Africa: Challenges and Solutions, Address by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees to The Parliament of The Republic of South Africa, 25 Cape Town, March 1997.

Report By the Secretary General on The Future Organisation of Refugee Work, 1930, Ln Doc. Xiii.2.

Report Of the Intergovernmental Commission and Communication from The Governing Body of The Nansen International Office, Ln Doc. C.311, 1 (1933).

Report Submitted by The Sixth Committee to The Assembly: Russian, Armenian, Assyrian, Assyro-Chaldean, Saar and Turkish Refugees, 1935, Ln Doc. A.45, Xii, 2.

Report by the Secretary-General on the Future Organisation of Refugee Work, LN Doc. XIII. 2, 3 (1930).

Report of the Eighth Session of the Asian-African Legal Consultative Committee, Bangkok, 8 Aug. 1966.

Resolutions 319(IV)A. 3 December 1949 A/RES/319 (IV), 3 Dec. 1949, A/RES/428 (V), 14 Dec. 1950.

Sadako Ogata, Refugee Crisis in Africa: Challenges and Solutions, Address by Mrs. Sadako Ogata, Un High Comm'ner for Refugees to The Parliament of South Africa, Cape Town*,* 25 March 1997.

Sadako Ogata, Challenges of Refugee Protection, Statement by Mrs. Sadako Ogata, United Nations High Commissioner for Refugees at The University of Havana, Cuba, 11 May 2000.

UNHCR Exec. Comm., Non-Refoulement, No. 6 (XXVIII), U.N. Doc. No. 12A A/32/12/Add.1 12 October 1977.

UNHCR, Guidelines on The Protection of Refugee Women, Un Doc. EC/SCP/67, July 1991.

UNHCR Exec. Comm., General Conclusion on International Protection, No. 79 (XLVII), U.N. Doc. A/AC.96/878, 11 October 1996.

UNHCR Exec. Comm., General Conclusion on International Protection, 79 (XLVII), U.N. Doc. A/AC.96/878 (Oct. 11, 1996)

UNHCR Guidelines on International Protection No. 2: Membership Of A Particular Social Group Within The Context Of Article 1A(2) Of The 1951 Convention and/or Its 1967 Protocol Relating to The Status Of Refugees, Un Doc. HCR/GIP/02/02, 155, 7 May 2002.

UN High Commissioner for Refugees (UNHCR), Brief of the Office of the United Nations High Commissioner for Refugee before the United States Court of Appeals for the Ninth Circuit in the Case of *Adelina Solares Milanjos v. William P. Barr,* U.S. Attorney General, 28 February 2020.

UNHCR: The UN Refugee Agency, Global Appeal Update, 5, 3-85, 2021, Global_Appeal_2021_full_lowres.pdf (unhcr.org).

UNHCR: Global Appeal Update, The UN Refugee Agency, 5, 3-165, 2021.

UNHCR, The Refugee Agency, Figure at A Glance, UNHCR, USA, July 16, 2022.

UNHCR, Monitoring Report Canada—United States "Safe Third Country" Agreement, 29 December 2004 – 28 December 2005.

INTERNET REPORTS

Alexandra Bro, *Fleeing Home: Refugees and Human Trafficking,* COUNCIL ON FOREIGN RELATIONS, 31 December 2019, *https://www.cfr.org/blog/fleeing-home-refugees-and-human-trafficking.*

Almed Al-Dawoody and Tilman Rodenhauser, *The Principle of non-refoulement under Islamic law and international law: complementing international legal protection in Muslim contexts,* HUM. L. AND POL. (June 20, 2021), https://blogs.icrc.org/law-and-policy/2021/06/20/non-refoulement-islamic-law/

Asylum Seeker's Death Highlights Brutal Impact of Thailand's Detention Policies, GLOBAL DETENTION PROJECTS, February 21, 2023, https://www.globaldetentionproject.org/asylum-seekers-death-reveals-the-brutal-impact-of-thailands-indefinite-detention-measures-and-paltry-treatment-of-people-fleeing-persecution.

Becky Little, *Claiming Sanctuary in the Medieval Church Could Save Life But Lead to Exile,* HISTORY (April 18, 2018), https://www.history.com/news/church-sanctuary-asylum-middle-ages.

Camilo Montoya-Galvez, *What is Title 42, the Covid Border Policy used to Expel Immigrants Used to Expel Immigrants?* CBS NEWS, January 2, 2023, https://www.cbsnews.com/news/title-42-immigration-border-biden-covid-19-cdc/.

Contesting the Designation of the US a Safe Third Country, AMNESTY INTERNATIONAL CANADA & CANADA COUNCIL FOR REFUGEES (17 May 2017).

Coronavirus World Map: Tracking the Global Outbreak, N.Y. TIMES (Jan. 12, 2021), https://www.nytimes.com/interactive/2020/world/coronavirus-maps.html.

Covid-19 Makes Gulf Countries' Abuse of Migrant Workers Impossible to Ignore, AMNESTY INTERNATIONAL (April 30, 2022), COVID-19 makes Gulf countries' abuse of migrant workers impossible to ignore | Amnesty International.

David Engel, *Minorities Treaties,* THE YIVO ENCYCLOPEDIA OF JEWS IN EASTERN EUROPE, https://yivoencyclopedia.org/article.aspx/Minorities_Treaties#author.
Covid-19 & EU Travel Restrictions, SCHENGENVISAINFO NEWS (September 11, 2021), Covid-19 & EU Travel Restrictions (schengenvisainfo.com).

Eleanor Acer, Kennji Kizuka and Rebecca Gendelman, *Pandemic as Pretext: Trump Administration Exploits COVID-19, Expels Asylum Seekers and Children to Escalating Danger,* HUMAN RIGHTS FIRST (May 13, 2020), https://www.humanrightsfirst.org/resource/pandemic-pretext-trump-administration-exploitscovid-19-expels-asylum-seekers-and-children.

Edward H. Landon, *A Manual of Councils of the Holy Catholic Church,* CATHOLICS ONLINE, https://www.ecatholic2000.com/councils2/untitled-16.shtml

Featured Issue: Migrant Protection Protocols (MPP), AILA (December 3, 2021), https://www.aila.org/advo-media/issues/all/port-courts.

Featured Issue: Migrant Protection Protocol, AILA, October 7, 2022, https://www.aila.org/advo-media/issues/port-courts.

Foreign-Born Workers: Labor Force Characteristics 2021, NEWS RELEASE BLS, May 18, 2022, https://www.bls.gov/news.release/pdf/forbrn.pdf.

Foreign Quarantine: Suspension of the Right to Introduce and Prohibition of Introduction of Persons into United States from Designated Foreign Countries or Places for Public Health Purposes, 85 Fed. Reg. 56,424, CDC (13 October 2020).

Full Text: Donald Trump Announces a Presidential Bid, WASH. POST: POLITICS (16 June 2015), https://www.washingtonpost.com/news/post-politics/wp/2015/06/16/full-text-donaldtrump-announces-a-presidential-bid.

Gao, Immigration Detention: Additional Actions Needed to Strengthen Management And Oversight Of Facility Costs And Standards, (Oct. 2014), https://www.gao.gov/assets/670/666467.pdf.

Greece/Turkey: Asylum-Seekers and Migrants Killed and Abused at Borders, AMNESTY INTERNATIONAL (3 April 2020), https://www.amnesty.org/en/latest/news/2020/04/greece-turkey-asylum-seekers-andmigrants-killed-and-abused.

Greece: Investigate Pushbacks, Collective Expulsions—EU Should Press Athens to Halt Abuses, HUMAN RIGHTS WATCH (July 16, 2020), Greece: Investigate Pushbacks, Collective Expulsions | Human Rights Watch (hrw.org).

Gender Ratio in the World, STATISTICS TIMES, https://statisticstimes.com/demographics/world-sex-ratio.php#:~:text=The%20population%20of%20females%20in,101.68%20males%20per%20100%20females

Harry H. Laughlin Papers: Manuscript Collection L1, TRUMAN STATE UNIV.: PICKLER MEM'L LIBR., https://library.truman.edu/manuscripts /laughlinindex.asp.

Health needs of women and children affected by violence in Rwanda, World Health Organization (2000), http://www.unesco.org/courier/1998_08/uk/ethique/txt1.htm.

Health needs of women and children affected by violence in Rwanda, WORLD HEALTH ORGANIZATION (2000). http://www.unesco.org/courier/1998_08/uk/ethique/txt1.htm

Henry Kamm, *Vietnam Goes on trial in Geneva Over its Refugees,* N.Y. TIMES, July 22, 1978.

Immigration Share of the U.S. Population and Civilian Labor Force, 1980-Present, MPI (2019), https://www.migrationpolicy.org/programs/data-hub/us-immigration-trends?gclid=Cj0KCQiAz9ieBhCIARIsACB0oGIrBGEkfyIdbPc4eeU1bIEs_.

Infection Prevention and Control Recommendations for Hospitalized Patients Under Investigation (PUIs) for Ebola Virus Disease (EVD) in U.S. Hospitals, CDC (August 30, 2018), https://www.cdc.gov/vhf/ebola/clinicians/evd/infection-control.html.

Jenni Bowring-McDonugh, *CVT Denounces Trump Administration's Misguided Attempt to Ban Individuals from Seeking Asylum at U.S. Southern Border*, THE CENTER FOR VICTIMS OF
Andrea Salcedo, Sanam Yar & Gina Cherelus, *Coronavirus Travel Restrictions, Across the Globe,* N.Y. TIMES (8 May 2020), https://www.nytimes.com/article/coronavirus-travel-restrictions.html.

John Eriksson, *The International Response to Conflict and Genocide: Lessons from the Rwanda Experience: Synthesis Report,* JOINT EVALUATION OF EMERGENCY ASSISTANCE TO RWANDA (March 1996), a769.PDF (riskreductionafrica.org).

John Elflein, *Total Number of Cases and Death from Covid-19 in the United States as of January 4, 2023,* STATISTICA, January 9, 2023, https://www.statista.com/statistics/1101932/coronavirus-covid19-cases-and-deaths-number-us-americans/.

Jorge Loweree, Aaron Reichlin-Melnick and Walter Ewing, *The Impact of COVID-19 on Noncitizens and Across the U.S. Immigration System,* AMERICAN IMMIGRATION COUNCIL (30 September 2020), https://www.americanimmigrationcouncil.org/research/impact-covid-19-us-immigration-system.

Julie Hirschfeld Davis and Somini Sengupta, *Trump Administration Rejects Study Showing Positive Impact of Refugees,* N.Y. TIMES (18 September 2017), https://www.nytimes.com/2017/09/18/us/politics/refugees-revenue-cost-report-trump.html.

Kelsey Ables, *U.S. Judge in Amarillo Halts Biden Administration's Attempt to End "Remain in Mexico" Policy,* THE WASHINGTON POST, December 16, 2022, https://www.texastribune.org/2022/12/27/title-42-us-mexico-border-supreme-court/.

Key Legal Considerations on Access to territory for persons in need of international protection in the context of the COVID-19 response, UN HIGH COMMISSIONER FOR REFUGEES (UNHCR) (16 March 2020), https://www.refworld.org/docid/5e7132834.html.

Kirstjen M. Nielsen, *Policy Guidance for Implementation of Migration Protection Protocols,* U.S. DHS (Jan. 25, 2019), *https://www.dhs.gov/sites/default/files/publications/19_0129_OPA_migrant-protection-protocols-policy-guidance.pdf* .

Legal Challenge of Safe Third Country Agreement Launched, AMNESTY INTERNATIONAL (Jul. 5, 2017); Amnesty International Canada & Canada Council for Refugees, *Contesting the Designation of the US a Safe Third Country* (May 19, 2017).

Lisa Christensen Gee et aal., *Undocumented Immigrants' State and Local Tax Contributions,* INSTITUTE ON TAX AND ECONOMIC POLICY, 1-12, 2 (March 2017), https://www.immigrationresearch.org/system/files/immigration_taxes_2017.pdf.

Lucas Guttentag, *Coronavirus Border Expulsions: CDC's Assault on Asylum Seekers and Unaccompanied Minors,* STANFORD LAW SCHOOL BLOGS: LEGAL AGGREGATE (15 April 2020), https://law.stanford.edu/2020/04/15/coronavirus-border-expulsions-cdcs-assault-on-asylumseekers-and-unaccompanied-minors/.

Luis Sanchez, *Kamala Harris Grills Homeland Security Secretary on Separating Parents from Kids at Border,* THE HILL (May 16, 2018), https://thehill.com/homenews/administration/387918-kamala-harris-grills-homeland-security-secretary-on-separating/.

Mandates of the Special Rapporteur on the Human Rights of Migrants, PALAIS DES NATIONS, 1211 GENEVA 10 SWITZERLAND (7 March 2019).

Map of the Journey of Abraham, BIBLICAL HISTORY, https://bible-history.com/maps/abrahams-journeys.

Max J. Rosenthal, *Despite Pandemic, Refugee Numbers Grow to Unprecedented Levels*, BLOG HIAS (June 18, 2021). Despite Pandemic, Refugee Numbers Grow to Unprecedented Levels | HIAS.

Michael Garcia Bochenek, *US: Remain in Mexico" Program Harming Children,* HRW (12 February, 2020). https://www.hrw.org/news/2020/02/12/us-remain-in-mexico-program-harming-children.

Michelangelo Landgrave and Alex Nowrasteh, *Illegal Immigrants Incarceration Rates,* 890 POLICY ANALYSIS 1-16, 4-5 (April 21, 2020)

Migrant Workers Illegally Expelled During the Covid-19 Pandemic, AMNESTY INTERNATIONAL (April 15, 2020), Qatar: Migrant workers illegally expelled during COVID-19 pandemic | Amnesty International.

Military Sexual Slavery, 1931-1945, COLUMBIA LAW SCHOOL, CENTER FOR KOREA LEGAL STUDIES, Military Sexual Slavery, 1931-1945 | Korean Legal Studies (columbia.edu)

Migrant Workers Illegally Expelled During the Covid-19 Pandemic, Op Cite 96; Amnesty International, *Covid-19 Makes Gulf Countries' Abuse of Migrant Workers Impossible to Ignore*

(30 April 2022). COVID-19 makes Gulf countries' abuse of migrant workers impossible to ignore | Amnesty International.

Molly O'Toole, *Trump Administration, citing Coronavirus, Expels 10,000 Migrants in Less Than Three Weeks*, L.A. TIMES (April 9, 2020), https://www.latimes.com/politics/story.2020.04.09.

Muzaffar Chishti and Jessica Bolter, *Court-Ordered Relaunch of Remain in Mexico Policy Tweaks Predecessor Program, but Faces Similar Challenges,* POLICY BEAT (December 2, 2021), https://www.migrationpolicy.org/article/court-order-relaunch-remain-in-mexico.

Nationwide Enforcement Encounters: Title 8 Enforcement Actions and Title 42 Expulsions, U.S. CUSTOMS AND BORDER PROT., https://www.cbp.gov/newsroom/stats/cbp-enforcement-statistics/title-8-and-title-42-statistics (updated January 7, 2020).

Nigeria: Abducted Women and Girls Forced to Join Boko Haram Attacks, AMNESTY INTERNATIONAL (14 April 2015), https://www.amnesty.org/en/latest/news/2015/04/nigeria-abducted-women-and-girls-forced-to-join-boko-haram-attacks/.

Pakistan Court Frees a Rapist After "Agreement" to Marry His Victim, CBS, https://www.cbsnews.com/news/pakistan-rape-rapist-released-agreement-marry-victim/.

Paola Favaro, *Asylum in the Ancient and Medieval Rome,* THE CONVERSATION, (5 September 2019), https://brewminate.com/asylum-in-ancient-and-medieval-roome/.

Paul Ratjey, *U.S: Asylum Seekers Returned to Uncertainty, Danger in Mexico, Danger in Mexico,* HRW (2 July 2019), https://www.hrw.org/news/2019/07/02/us-asylum-seekers-returned-uncertainty-danger-mexico.

President Trump on Border Security and Government Funding, C-SPAN (Feb. 15, 2019), https://www.c-span.

Press Release, Dep't of Just. Off. of Pub. Affs., Dept. of Justice Prosecuted a Record-Breaking Number of Immigration-Related Cases in Fiscal Year 2019 (Oct. 19, 2019), https://www.justice.gov/opa/pr/department-justice-prosecuted-record-breaking-number-immigration-relatedcases-fiscal-year

Quick Immigration Statistics in the United States, IMMIGRANT LEARNING CENTER, https://www.ilctr.org/quick-us-immigration-statistics/?gclid=Cj0KCQiAic6eBhCoARIsANlox87W_0HDDRNNZusXLBAL34x.

Q&A: US Title Policy to Expel Migrants at the Border, HRW (8 April 2021), https://www.hrw.org/news/2021/04/08/qa-us-title-42-policy-expel-migrants-border?gclid=Cj0KCQiA2NaNBhDvARIsAEw55hidhiP-.

Refugee Rights in Australia, AMNESTY INTERNATIONAL 2019,

Relief Problems in Nigeria-Biafra: Hearings before the Subcommittee to Investigate Problems Connected with Refugees and Escapees of the Committee on the Judiciary, United State Senate, 91st Congr. 207 (2nd Session, Pt. 2, 1970); Telegram: *Genocide*, WASH. POST, July 2, 1969.

Robert Garland, *Asylum Seekers in the Ancient Greeks: Requirements and Amnesty,* THE GREAT COURSES DAILY, https://www.thegreatcoursesdaily.com/asylum-seekers-in-ancient-greece-requirements-and-amnesty/.

Sanctuary Jurisdiction Policies by States, BALOTPEDIA, https://ballotpedia.org/Sanctuary_jurisdiction_policies_by_state.

Severe Acute Respiratory Syndrome (SARS), CDC (Dec. 6, 2017), https://www.cdc.gov/sars/index.html.

Silva Mathema, *They Are (Still) Refugees: People Continue to Flee Violence in Latin American Countries,* CENTER FOR AMERICAN PROGRESS (1 June 2018), https://www.amerianprogress.org/issues/immigration/reports/2018/06/01/451474/still-refugees-continue-flee-latin-america-countries

Silvia Thomson, *El Salvador Woman at the Hear of Legal Challenge to Safe Third Agreement,* CBS NEWS, July 8, 2017, https://www.cbc.ca/news/canada/safe-third-country-agreement-legal-test-case-1.4195228.

Sierra Leone: Sexual Violence in Sierra Leone Conflict 15 HRW 25-60 (2003), https://www.hrw.org/reports/2003/sierraleone/sierleon0103.pdf.

Stephanie Nebehay, *Executions, Torture, and Slave Markets Persis in Libya: U.N..* COUNCIL ON FOREIGN RELATIONS, 21 March 2018, https://www.reuters.com/article/us-libya-security-rights/executions-torture-and-slave-markets-persist-in-libya-u-n-idUSKBN1GX1JY

The Gambia: Forcible Expulsion (Refoulement) of Senegalese Asylum Seekers, AMNESTY INTERNATIONAL, 1990.

The Rwandan Genocide and its Aftermath, *The State of the World's Refugees* 246, 245-273. The State of The World's Refugees 2000 - Chapter 10 (unhcr.org).

Theodosius I Roman Emperor, BRITANICA, https://www.britannica.com/topic/religion

Timothy Abington, *Armies of Women: The Syria Crisis and the New War Thesis,* E-INTERNATIONAL RELATIONS. SOAS. Armies of Women: The Syria Crisis and the New War Thesis (e-ir.info)

United Nations, Department of Economic and Social Affairs, Population Division (2019), WORLD POPULATION PROSPECTS 2019: HIGHLIGHTS, ST/ESA/SER.A/423, 1-20, (2019), https://population.un.org/wpp/publications/files/wpp2019_highlights.pdf.

US Citizenship Act Bill Summary, NATIONAL IMMIGRATION FORUM, https://immigrationforum.org/wp-content/uploads/2021/02/US-Citizenship-Act-Bill-Summary.pdf.

U.S. SENT'G COMM'N, FISCAL YEAR 2019 OVERVIEW OF FEDERAL CRIMINAL CASES 3 (2020), https://www.ussc.gov/sites/default/files/pdf/ research-and-publications/researchpublications/2020/FY19_Overview_Federal_Criminal_Cases.pdf.

Yearbook of Immigration Statistics 2019, DEP'T OF HOMELAND SECURITY, https://www.dhs.gov/immigration-statistics/yearbook.

Van Schaack, *New Proof Surfaces that Family Separation was About Deterrence and Punishment,* JUST SECURITY (November 27, 2018), https://www.justsecurity.org/61621/proof-surfaces-family-separation-deterrence-punishment/
Yael Schacher, *Supreme Court Title 42 Decision Betrays U.S. Obligations to Asylum Seekers,* REFUGEES INTERNATIONAL, https://www.refugeesinternational.org/reports/2022/12/27/supreme-court-title-42-decision-betrays-us-obligations-to.

Yael Schacher & Chris Beyrer, *Expelling Asylum-Seekers Is Not the Answer: U.S. Border Policy in the Time of COVID-19, Refugees International,* (27 April 2020), https://www.refugeesinternational.org/reports/2020/4/26/expelling-asylum-seekers-is-not-the-answer-usborder-policy-in-the-time-of-covid-19.

2014-2016 Ebola Outbreak in West Africa, CDC (March 8, 2019), https://www.cdc.gov/vhf/ebola/history/2014-2016-outbreak/index.html.

2019 Yearbook on Immigration Statistics, HOMELAND SECURITY, https://www.dhs.gov/immigration- statistics/yearbook/2019.

5 Things to Know About Immigrants in the Military, FWD.US NEWS, September 14, 2022, https://www.fwd.us/news/immigrants-in-the-military/#:~:text=The%20most%20recent%20government%20estimates,in%20the%20last%20200%20years.