

**SEXUAL AND GENDER-BASED VIOLENCE IN INTERNATIONAL
REFUGEE LAW- EXAMINING WHETHER WOMEN ARE
EFFECTIVELY PROTECTED**

By

Kerwin Mel Newton

3757265

A full Thesis submitted in fulfilment for the degree of Master of Laws (LL.M)

in the Faculty of Law,
University of the Western Cape



UNIVERSITY *of the*
WESTERN CAPE

Prepared under the Supervisor

Dr Karin Chinnian

DECLARATION

I declare that this work: Sexual and Gender-Based violence in International Refugee Law-examining whether women are effectively protected is my work, that it has not been submitted for any degree or examination in any other university, and that all the sources I have used or quoted have been indicated and acknowledged by complete references.

Full name: Kerwin Mel Newton

Date: November 2020



Signed:

ACKNOWLEDGEMENTS

First and foremost, I would like to praise and thank God, the almighty, who has granted me countless blessings, knowledge, and the perseverance to complete this thesis.

Secondly, my sincere appreciation and heartfelt gratitude go to my amiable, ever supportive, and humble supervisor, Dr. Karin Chinnian. This thesis would not be possible without your immense contributions, constant guidance, constructive criticism, and patience. Doc, I hold all your comments and encouraging words close to my heart. Your encouragement and a high degree of freedom to me in the course of this thesis are highly appreciated.

Thirdly, immeasurable and abundant gratitude goes to my family and friends. From the very moment I officially started this thesis, I have received continuous and unparalleled love, help, and support from you. I will forever be abundantly grateful.

Lastly, I would like to express my wholehearted appreciation to my sister Kelly Newton. You have solidly been there from the very beginning. You have been my pillar of strength and without your encouraging words and many cups of coffee, I would have not completed this thesis.



UNIVERSITY *of the*
WESTERN CAPE

DEDICATION

This thesis is dedicated to my parents, Mel Newton, and Claudelle Newton. I am forever indebted to my parents, without their sacrifices, hard work, and guidance I would not have all the achievements, opportunities, and experiences that have made me who I am.

To my father, you have always believed in me and wanted the best for me. Throughout my studies, you have always told me: “If you put your mind to it, you can accomplish anything”. These words of love and encouragement have always motivated me to achieve all my goals and dreams. You have instilled in me discipline, strength, boldness, and the culture of hard work. I will continue to make you proud.

To my mother, you will always be the most important person in my life. You have taught me the importance of empathy, the art of persevering through obstacles, and the importance of just getting it done. You have always believed in me and have always gone above and beyond to ensure that I have the “best of the best”. Thank you for giving me the strength to reach for the stars and chase my dreams.

This journey would not have been possible if not for my parents and I dedicate this milestone to them.

The logo of the University of the Western Cape, featuring a stylized building with columns and a pediment.

UNIVERSITY *of the*
WESTERN CAPE

KEYWORDS

Asylum

Gender inequality

Physical Violence

Patriarchy

Rape

Refugees

Sexual and Gender-based Violence (SGBV)

Structural Violence

War-related violence

Women



ABSTRACT

Refugee women experience the full spectrum of Sexual and Gender-based Violence (SGBV) throughout the refugee experience. SGBV is a global crisis that refugee women are subjected to daily. Refugee women face SGBV in their countries of origin, during the journey, in transit, and upon arrival within their country of asylum. The SGBV that refugee women experience is often not considered a priority and the physical consequences of SGBV such as sexually transmitted diseases, infertility, unwanted pregnancy, injury and vulnerability to disease is often overlooked or ignored. Although there are international laws and domestic laws which are drafted to prevent and protect refugee women against SGBV, refugee women are in reality not effectively protected and refugee women have remained extremely vulnerable to SGBV. The gender dimension of the refugee crisis has been largely overlooked and as a result, it has left gaps in the protection of refugee women. This has resulted in an increase in risk for many refugee women. In the international sphere, there has been progress in securing rights for women, however, the realities of refugee women are constantly changing and new manifestations of discrimination against refugee women are regularly emerging. It will be illustrated in this thesis that refugee women throughout the refugee journey and in refugee camps are vulnerable to SGBV and continuously face socio-economic violence such as discrimination and stigmatisation and the denial of access to services, as a result, refugee women are not effectively protected. In illustrating this, the international community's approach to SGBV will be examined with reference to definitions in Conventions and under international law. In conjunction with International instruments such as the Protocol Relating to the Status of Refugees of 1967, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), African Convention and with reference to the United Nations High Commissioner for Refugees (UNHCR). The legal definition of a refugee will be also discussed and the tactics in which the law has been utilised to support SGBV claims will be explored and SGBV will also be conceptualised and examined. The barriers which are preventing the effective protection of refugee women such as gender inequality, the lack of coordination and legal enforcement mechanisms throughout the refugee journey. To conclude recommendations will be given on ways in which refugee women can be effectively protected against SGBV throughout the refugee experience and in refugee camps.

LIST OF ABBREVIATIONS AND ACRONYMS

African Charter	African Charter on Human and Peoples Rights
Beijing Conference	1995 Fourth UN World Conference on Women
CEDA.	Committee on the Elimination of All Forms of Discrimination of Violence Against Women
CRC	UN Convention on the Rights of the Child
DEVAW	Declaration on the Elimination of Violence Against Women
ECOSOC	Economic and Social Council of the United Nations Organisation
FGM	Female genital mutilation
GBV	Gender-based violence
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
IPV	Intimate Partner Violence
IRB.	The Immigration and Refugee Board of Canada
PSG	Particular Social Group
SDG's	17 Sustainable Development Goals



UNIVERSITY of the
WESTERN CAPE

SGBV	Sexual and Gender-based violence
SRH	Sexual and reproductive health
STIs	Sexually transmitted infections
Trafficking Protocol	United Nations Protocol on Trafficking in Persons
UN	United Nations Organization
Universal Declaration	Universal Declaration of Human Rights
UNODC	UN Office of Drugs and Crime
UNCHR	United Nations Commission on Human Rights
Vienna Declaration	World Conference on Human Rights
Women's Convention.	Convention on the Elimination of All Forms of Discrimination Against Women

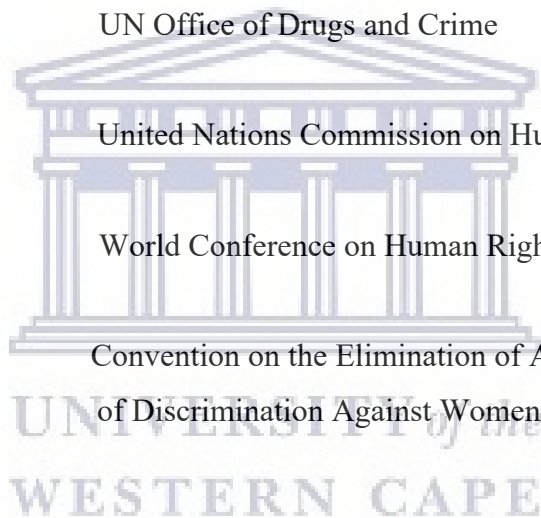


TABLE OF CONTENTS

DECLARATION.....	I
ACKNOWLEDGEMENT.....	II
DEDICATION.....	III
KEYWORDS.....	IV
ABSTRACT.....	V
ABBREVIATIONS AND ACRONYMS.....	VII
TABLE OF CONTENTS.....	VIII

CHAPTER 1

INTRODUCTION AND CONCEPTUAL FRAMEWORK

1.1. INTRODUCTION.....	1
1.2. THE OBJECTIVE AND SIGNIFICANCE OF THE RESEARCH.....	3
1.3. RESEARCH QUESTION(S).....	4
1.4. LITERATURE REVIEW.....	4
1.5. RESEARCH METHODOLOGY AND LIMITATION OF RESEARCH.....	8
1.8. CHAPTER SYNOPSIS	8

CHAPTER 2

INTERNATIONAL REFUGEE LAW AND SEXUAL AND GENDER-BASED VIOLENCE

2.1. INTRODUCTION.....	10
2.2. INTERNATIONAL REFUGEE LAW: SCOPE AND MEANING OF A REFUGEE.....	10

2.3. GENDER-RELATED PERSECUTION: EVOLVING MEANING OF PERSECUTION.....	12
2.4. GENDER-BASED VIOLENCE AGAINST REFUGEE WOMEN.....	16
2.4.1. SCOPE AND MEANING OF GENDER-BASED VIOLENCE.....	17
2.4.2. GENDER-BASED VIOLENCE BY STATE ACTORS.....	20
2.4.3. GENDER-BASED VIOLENCE BY NON-STATE ACTORS.....	22
2.5. SEXUAL VIOLENCE: RAPE.....	34
2.6. THE CONSEQUENCES OF SGBV.....	37
2.7. CONCLUSION.....	40

CHAPTER 3

AN ANALYSIS OF SGBV THROUGHOUT THE REFUGEE JOURNEY AND THE EFFECTIVENESS OF INTERNATIONAL INSTRUMENTS

3.1. INTRODUCTION.....	41
3.2. CONCEPTUALISING A WOMAN REFUGEE'S JOURNEY.....	42
3.3. BECOMING A REFUGEE WOMAN.....	44
3.3.1. GENDER-RELATED PERSECUTION.....	45
3.3.2. WELL-FOUNDED FEAR.....	45
3.3.3. MEMBERSHIP OF A PARTICULAR SOCIAL GROUP (PSG).....	47
3.3.3.1. .DEFINING A PSG.....	47
3.3.3.2. APPLYING THE REFUGEE CONVENTION TO THE PSG CATEGORY.....	50
3.3.4. STATE PROTECTION.....	55
3.4. THE MEDIUM OF A WOMAN REFUGEE'S JOURNEY.....	60
3.4.1. THE EXPLOITATION OF REFUGEE WOMEN.....	61
3.4.2. TRAFFICKING AND SLAVERY OF REFUGEE WOMEN.....	66
3.5. BEING A REFUGEE WOMAN.....	70

3.5.1. DOMESTIC VIOLENCE: INTIMATE PARTNER VIOLENCE.....	72
3.5.2. REFUGEE CAMPS.....	73
3.5.3. INTEGRATION OF REFUGEE WOMEN IN THE HOST COUNTRY.....	75
3.3. CONCLUSION.....	78

CHAPTER 4

BARRIERS PREVENTING THE EFFECTIVE PROTECTION OF REFUGEE WOMEN

4.1. INTRODUCTION.....	80
4.2. GENDER INEQUALITY.....	81
4.2.1. PATRIARCHY.....	84
4.3. BARRIERS WITHIN REFUGEE CAMPS.....	88
4.3.1. INADEQUATE ACCOMMODATION AS A SOURCE OF INSECURITY IN REFUGEE CAMPS.....	88
4.3.2. LACK OF REPORTING WITHIN REFUGEE CAMPS.....	92
4.3.3. INADEQUATE PROTECTION MEASURES IN REFUGEE CAMPS.....	93
4.4. GENDER AND THE RIGHT TO WORK IN HOST COUNTRIES.....	97
4.5. XENOPHOBIA AND RACISM.....	101
4.6. ACCESS TO JUSTICE.....	105
4.7. CONCLUSION.....	108

CHAPTER 5
CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION.....	111
5.2. RECOMMENDATIONS.....	111
5.2.1. GENERAL RECOMMENDATIONS REGARDING GENDER INEQUALITY.....	112
5.2.1.1. DEMONSTRABLE MEASURES TO ELIMINATE GENDER INEQUALITY....	112
5.2.1.2 EFFECTIVE ASSESSMENT OF GENDER-BASED CLAIMS.....	115
5.2.2. RECOMMENDATIONS FOR THE COUNTRY OF ORIGIN	115
5.2.2.1. ADDRESSING THE POWER IMBALANCES.....	115
5.2.2.2. SAFE HAVENS.....	116
5.2.3. RECOMMENDATIONS ABOUT THE PERIOD IN TRANSIT	116
5.2.3.1 ACCESS TO MEDICAL SERVICES.....	117
5.2.3.2. IDENTIFICATION OF VICTIMS OF EXPLOITATION, TRAFFICKING AND SLAVERY.....	117
5.2.4. RECOMMENDATIONS FOR THE HOST COUNTRY.....	117
5.2.4.1. ACCESS TO LEGAL AID PROGRAMMES.. ..	117
5.2.4.2. ADEQUATE ACCOMMODATION AS A SOURCE OF SECURITY FOR REFUGEE WOMEN.....	119
5.2.4.3. EQUAL JOB OPPORTUNITIES FOR REFUGEE WOMEN	120
5.2.4.4. ACCEPTANCE OF REFUGEE WOMEN IN HOST COUNTRIES.....	121
5.3. CONCLUSION.....	121
5.3.1. REVISITING THE RESEARCH QUESTIONS.....	122
BIBLIOGRAPHY.....	125

CHAPTER 1

INTRODUCTION AND CONCEPTUAL FRAMEWORK

1.1. INTRODUCTION

Sexual and Gender-based Violence (SGBV) is a global challenge that is present in every culture and affects diverse groups of women. Throughout history, women have experienced injustices, and have been the main victims of SGBV. In many countries, women live under male authority and abide by rules that men create, and these rules often make women vulnerable.¹ The consequence of this vulnerability is that women become easy targets for SGBV and disproportionately vulnerable to such harm, and their lives and bodies are exploited for the benefit and pleasures of men.² Refugee women are continuously exposed to various forms of SGBV, either in their country of origin, during the journey, whilst in transit and from within their country of asylum. Although there are international laws³ that prevent and protect women against SGBV, they are in reality not protected.

Across various media platforms, the dangerous journey that refugee women endure is highlighted and we are made aware of the strife and perseverance of refugee women, and their commitment to escape their country of origin to reach safety. Refugee women experience SGBV from innumerable sources, these sources are the smugglers and traffickers who aid them

¹As a male, I acknowledge that not all women are the same, not all women are equally situated and not all women have the same experiences. Women have different identities which intersect in terms of race, religion and profession. These identities influence the experiences a woman will face in terms of being a woman. I also acknowledge that not all women will have the same experience in terms of gender-inequality and that not all women are victims. Women have agency, the ability to navigate through the disadvantages which they face. Women have choices and women cannot always be given the identity as being vulnerable. If women are always given the identity as being vulnerable it will limit their progression in terms of their position within the hierarchy which society has created. While I recognise that most women experience disadvantages, I acknowledge that women are not a homogenous group and that women are not always victims and that they have agency.

² Macklin A 'Refugee Women and the Imperative of Categories' (1995) 17 *The Johns Hopkins University Press*.

³ International instruments such as the Protocol Relating to the Status of Refugees of 1967, Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), African Convention and with reference to the United Nations High Commissioner for Refugees (UNHCR).

with documents and/or with travel.⁴ Refugee women traveling alone are deprived of the ‘luxury’ of security to protect them against SGBV and are often forced to partake in “transactional sex”, in which they are forced to exchange sexual relations for assistance.⁵ This thesis will explore the refugee’s journey and illustrate that the SGBV that refugee women experience during this journey, violates many of their basic human rights, such as their right to life, the security of the person, equal protection under the law, and freedom from torture and other cruel, inhumane, or degrading treatment.⁶ These rights are enshrined in many international instruments that were drafted to protect refugee women. However, it is argued that these instruments do not effectively protect refugee women against SGBV throughout the refugee journey, due to the hidden SGBV that refugee women experience, as well as many barriers that prevent development in the protection of refugee women. This argument will be investigated throughout the thesis.

This thesis aims to demonstrate that although there is a framework in place in many international instruments such as the Convention Relating to the Status of Refugees (Refugee Convention) and the CEDAW to protect refugee women, these international instruments do not effectively protect refugee women. There is an obligation upon States parties who have signed and ratified these international instruments, to fulfil their duty to protect refugee women against SGBV and to ensure that a refugee women’s basic human rights are protected and that refugee women realise that they have human rights in their country of asylum.⁷ Many of the agents tasked to ensure that the guidelines in international instruments are followed to protect refugee women are the perpetrators of SGBV or they do not effectively fulfil their duty.⁸

⁴ UNHCR *Report warns refugee women on the move in Europe are at risk of sexual and gender-based violence* (2016).

⁵ Freedman J ‘Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"’ (2016) 24 *Reproductive Health Matters :An international journal on sexual and reproductive health and rights*.

⁶ The Convention Relating to the Status of Refugees 1951.

⁷ Freedman J ‘Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"’ (2016) 24 *Reproductive Health Matters :An international journal on sexual and reproductive health and rights*.

⁸ Mulugeta A ‘Slow Steps of Progress: There productive health rights of refugee women in Africa’(2003) 55 *Agenda: Empowering Women for Gender Equity*.

The purpose of this thesis is to illustrate that the protection of a refugee woman requires more than a “black and white” approach. In addition, this thesis will argue that refugee women are not effectively protected against SGBV because many barriers are preventing the effective protection and treatment of refugee women against SGBV. These barriers include the lack of commitment and strategies from world leaders to acknowledge that hidden aspects of SGBV exist, and that there needs to be development in legal policies, programming, and steps to ensure that refugee women are protected throughout the refugee journey.⁹

1.2. THE OBJECTIVE AND SIGNIFICANCE OF THE RESEARCH

This research will investigate whether the international instruments that exist to protect refugee women, effectively protect them against SGBV throughout the whole refugee experience. The trends and hidden aspects of SGBV throughout the refugee experience will be analysed to determine whether the international community has taken effective measures to ensure the safety and security of refugee women.

There has been a generational hierarchy when it comes to the value of life, some lives are deemed to be more valuable than others, based, amongst others, on status and gender. Throughout history, refugee women have experienced injustices, and have been the victim of SGBV violence, and have deemed their lives less valuable due to their lack of permanent placement by some people.¹⁰ Their lives and bodies are exploited for the benefit and pleasures of men, and refugee women are often an easy target because of their vulnerability.¹¹ Refugee women face many challenges throughout their refugee journey, and these challenges are overlooked and ignored. The Universal Declaration of Human Rights (UDHR) states that all human beings are born free and equal in dignity and rights, however, a refugee women’s right to human dignity and integrity is constantly being violated.¹² There are different barriers that are preventing refugee women from being effectively protected and these barriers are not often explored. This research will show that the international instruments that are drafted to protect

⁹ Ward J ‘Gender-based violence in refugee settings’ (2002) 260 *The Lancet*.

¹⁰ Ward J ‘Gender-based violence in refugee settings’ (2002) 260 *The Lancet*.

¹¹ Macklin A “Refugee Women and the Imperative of Categories” (1995) 17 *The Johns Hopkins University Press*.

¹² Universal Declaration of Human Rights 1948.

refugees are not effectively protecting refugee women against SGBV and that their gender-differentiated experiences are not effectively recognised by international instruments.

1.3. RESEARCH QUESTION(S)

The main research question is whether refugee women are effectively protected against SGBV throughout the entire refugee journey. To holistically answer the research question there are additional sub-questions that need to be posed:

1. What forms of protection against SGBV do international instruments provide to refugee women throughout the refugee journey and how effective are these international instruments?
2. What are the various forms of SGBV that refugee women are subjected to throughout the refugee journey? How do these various forms of SGBV impact the life of refugee women?
3. What are the barriers that present obstacles to the effective protection of refugee women from SGBV?

1.4. LITERATURE REVIEW

The majority of the literature on SGBV in terms of the protection of refugee women has been in the form of journal articles written by human rights scholars. This thesis will primarily focus on the writings of international legal scholars from various jurisdictions, foreign legislation, foreign case law and international conventions.

The primary sources that will be used in this study are conventions and treaties. The secondary sources will be comprised of books, journal articles and internet sources. In arguing that international instruments do not effectively protect refugee women, the conventions and treaties will be analysed. CEDAW imposes an obligation on States to ensure substantive equality for women, with the principal goals of the protection and promotion of women's rights and the elimination of discrimination against women.¹³ Scholars such as Frances Raday have

¹³ Convention on the Elimination of All Forms of Discrimination against Women 1979.

argued that since the adoption of CEDAW by numerous States, it is clear that many challenges are preventing the goal of equality for women.¹⁴ Raday also refers to traditions and religion which also has an impact on the inability to ensure that the goal of equality for women is achieved.¹⁵ Although there have been developments¹⁶ in many traditional and religious practices, to improve the treatment of women, others, still follow outdated practices such as female genital mutilation, marriage by abduction and virginity testing which discriminate against women and which reinforces gender inequality which enforces SGBV.¹⁷

These practices are vital because they influence the drafting of many laws and regulations. In *Feminism Unmodified*, Catharine MacKinnon refers to the notion of law from the perspective of feminism. MacKinnon refers to the law as a system of power, and this power reinforces the supremacy of men over women.¹⁸ In many countries this theory is a reality; women live under male authority and abide by rules men create and these rules make women vulnerable. This vulnerability created by the lawmakers influences domestic violence and gender-persecution. In many countries where the rights of women are limited, SGBV is a norm and women are the main victims of SGBV. This demonstrates that due to the lack of commitment from countries to develop their domestic laws to mirror the principles and goals of international instruments such as the CEDAW and Guidelines on the Protection of Refugee Women, it has a negative impact on the development of the protection and promotion of women's rights and the elimination of discrimination against women.

The religious and traditional practices and stereotypes that oppress women stem from gender inequality which fuels violence. There are many cases where the laws that are drafted to protect women do not give women the justice that they deserve in cases of SGBV. In the Declaration that was adopted in Beijing in 1995¹⁹ violence against women was highlighted, however in the

¹⁴ Raday F 'Gender and democratic citizenship: the impact of CEDAW (2012) 10 *International Journal of Constitutional Law*.

¹⁵ Raday F 'Gender and democratic citizenship: the impact of CEDAW' (2012).

¹⁶ Transforming our world: the 2030 Agenda for Sustainable Development 2015.

¹⁷ Chinnian K *Female genital mutilation as a form of violence against women and girls: an analysis of the effectiveness of international human rights law* (published Master Thesis, University of the Western Cape 2005).

¹⁸ MacKinnon CA *Feminism Unmodified* (1989) United States: Harvard University Press.

¹⁹ The Beijing Declaration and Platform for Action 1995.

Millennium Development Goals, violence against women was not addressed.²⁰ In the case *Zheng v Netherlands*, the case involved a woman who was trafficked for prostitution to the Netherlands and was refused asylum. The court failed to take into consideration the vulnerability of her position, her pregnancy, and her ordeal.²¹ This shows one that there needs to be a gender-sensitive approach in the cases of trafficked women and there needs to be the recognition of their victimhood and particular vulnerability.²²

Many refugee women flee their country of origin because of the fear of gender-persecution.²³ The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol (Refugee Convention) refers to the requirement in which the refugee must prove that the fear experience of the fear of persecution is genuine and reasonable.²⁴ Consequently, Mie A. Jensen argues that the Refugee Convention was 'written from a male perspective' and this opinion has echoed other scholars, like Jane Freedman.²⁵ Freedman argues that the policies which are drafted to support and protect refugee women and asylum seekers, lack gender sensitivity.²⁶ She further argues that due to the Refugee Convention's male perspective, it failed to take into consideration the issues of gender and specific situations of refugee women. An example of this is the lack of gender mainstreaming in policymaking which means that women and children are often grouped instead of being analysed as distinct groups.²⁷ Due to this oversight, refugee women do not effectively get the adequate protection that they are entitled to. In the case of *R.H. v Sweden*, the applicant stated that she was at the risk of persecution from her family because she had fled a forced marriage. She also stated that because of the humanitarian situation in Somalia, she was at the risk of sexual assault because she was a single woman without a husband and this would influence marginalisation. These are factors which many

²⁰ The United Nations Millennium Development Goals are eight goals that all 191 UN member states agreed to try to achieve by the year 2015.

²¹ *Zheng v Netherlands* (2009).

²² *Zheng v Netherlands* (2009).

²³ Humanitarian Law states that Persecution is a crime against humanity and gender may be a ground for fearing persecution.

²⁴ Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002).

²⁵ Jensen MA 'Gender-Based Violence in Refugee Camps: Understanding and Addressing the Role of Gender in the Experiences of Refugees' (2019) 11 *Inquires Journal*.

²⁶ Freedman J 'Mainstreaming gender in refugee protection' (2011) 23 *Cambridge Review of International Affairs*.

²⁷ Freedman J 'Mainstreaming gender in refugee protection' (2011).

women experience. In a joint dissenting point of view, the judges took into consideration that the applicant would experience inhuman or degrading punishment if she returned to her country. The majority judgment considered the facts of the case and stated that the applicant would have access to support from her family and a male protection network if she returned to her country. Although the court took into consideration all the relevant factors relating to the case, the court failed to realistically acknowledge the real humanitarian situation in Somalia which is expressed in international reports.²⁸ Cases like this create fear among women in similar situations, and they fear seeking asylum because they fear it might force them to return to their country of birth, this fear prevents them from being effectively protected.

The Convention Governing the Specific Aspects of Refugee Problems in Africa (African Convention) addresses responsibility sharing to adequately protect refugees, however, there is a failure amongst States to equitably distribute responsibility for refugee protection among States.²⁹ There is a failure amongst States to have the same understanding and commitment towards international refugee law and the principle of responsibility sharing. However, it cannot be said that States and the international community has not taken measures to protect refugee women. The Council of Europe adopted its Gender Equality Strategy 2018-2023 on 7 March 2018. The strategy focuses on six strategic areas which include the achievement of balanced participation of women and men in political and public decision-making and the achievement of gender mainstreaming in all policies and measures.³⁰ Whether the adoption of the Gender Equality Strategy will have an effective impact on the protection of refugee women throughout the refugee journey will be further examined in this thesis.

A major gap that has been noted in refugee literature, is that SGBV exists throughout the whole refugee experience, but that it is not highlighted by the international community.³¹ If a refugee women experience SGBV during one of the stages of the refugee journey, it will influence the rest of her journey. Adequate aid is required after a woman experiences SGBV, and this aid is

²⁸ *R.H. v Sweden*.

²⁹ Convention Governing the Specific Aspects of Refugee Problems in Africa, 1969.

³⁰ Council of Europe Gender Equality Strategy 2018-2023.

³¹ Jensen MA 'Gender-Based Violence in Refugee Camps: Understanding and Addressing the Role of Gender in the Experiences of Refugees' (2019) 11 *Inquires Journal*.

often not given to refugees due to various barriers. Some of these barriers language barriers and because the SGBV happened during the journey to asylum and it resulted in a pregnancy.

This thesis will explore the refugee journey closely, and examines the various ways in which international instruments and policies fail to effectively protect refugee women. This thesis aims to conclude that refugee women are not effectively protected against SGBV.

1.5. RESEARCH METHODOLOGY AND LIMITATION OF RESEARCH

This research will be written from a legal perspective. The purpose of writing this thesis from a legal perspective is to narrow the scope of this study and to contribute to the literature on the protection of refugee women against SGBV. A desktop study will be used for the research conducted in this thesis. Primary sources such as the Refugee Convention, CEDAW, and case law will be analysed. To fully comprehend the complexity, ethical considerations and legal complexities of SGBV, South African and international scholarly works will be employed. This research will not make use of any questionnaires. Empirical research will not be conducted.

This research will be limited to the discussion of the protection of refugee women against SGBV. It is acknowledged that men and children are also victims/survivors of SGBV. This research will, however, be limited to discussing whether refugee women are effectively protected against SGBV. This research will also primarily focus on heterosexual relationships. This research will be conducted from an international perspective, there will be no comparative study.

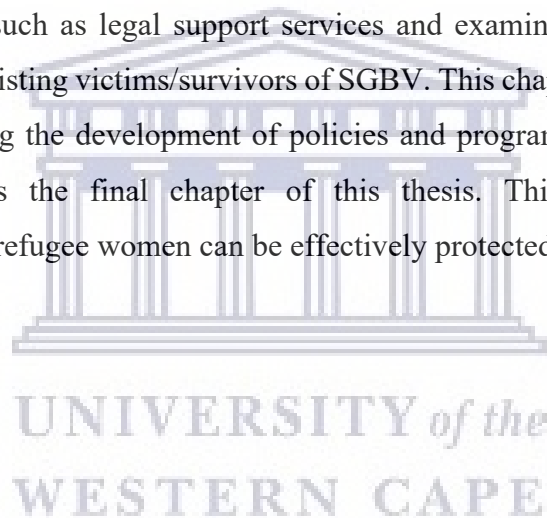
1.6. CHAPTER SYNOPSIS

Chapter 2 will begin with an analysis of the legal definition of a refugee and the legal strategies that have been utilised to support SGBV claims. An analysis of SGBV will also be explored in Chapter 2, Sexual and Gender-based violence will be conceptualised separately. The evolving meaning of persecution and gender-related persecution will be explored. The forms, causes and consequences of SGBV concerning refugee women will be examined. The international community's approach to SGBV with reference to various definitions in Conventions and under international law will be explored, in conjunction with International instruments such as

The Refugee Convention, CEDAW, African Convention and UNHCR. This chapter will conclude with a critique of the legal developments and policies.

The hidden aspects of SGBV that refugee women experience throughout the whole refugee experience will be evaluated in Chapter 3. The whole refugee journey will be explored. This chapter will then further examine whether international instruments protect and assist refugee women throughout the entire refugee journey. The factors which are preventing the implementation of legal instruments throughout the refugee experience will be also explored. This chapter will refer to case law and recent international legal developments.

Chapter 4 will look at the various barriers that are preventing refugee women from being effectively protected throughout the entire refugee experience. This chapter will examine the various support services such as legal support services and examine whether these support systems are effectively assisting victims/survivors of SGBV. This chapter will also identify the barriers that are preventing the development of policies and programmes to prevent SGBV. Chapter 5 will serve as the final chapter of this thesis. This chapter will include recommendations of how refugee women can be effectively protected against SGBV.



CHAPTER 2 INTERNATIONAL REFUGEE LAW AND SEXUAL AND GENDER-BASED VIOLENCE

2.1 INTRODUCTION

The protection of a refugee woman against SGBV is a fundamental human right. There are millions of refugee women who experience SGBV within their country of origin or during various stages of their refugee experience. There are various legal instruments that protect refugee women against SGBV but in order for one to understand how effectively protected a refugee woman is, one needs to first understand what a refugee is and how international law sets out the requirements to be afforded refugee status. This chapter will begin with an analysis of the legal definition of a refugee with the use of international refugee law. For one to understand how SGBV affects refugee women, the evolving meaning of persecution and gender-related persecution will be explored. SGBV is a vital component of this thesis and gender plays a crucial role in fully understanding SGBV. An analysis of SGBV with reference to gender will be explored and sexual and gender-based violence (SGBV) will be conceptualised separately. There are various forms of SGBV that refugee women face throughout their refugee journey, these forms, as well as the causes and consequences of SGBV in relation to refugee women will be examined within this chapter. This chapter will conclude with a summary of the observations of the chapter.

2.2. INTERNATIONAL REFUGEE LAW: SCOPE AND MEANING OF A REFUGEE

The legal instrument which is central to international refugee law is the Refugee Convention. The Refugee Convention was drafted post World War II to manage the millions of people who were displaced. The purpose of the Refugee Convention is to provide surrogate protection to men, women and children from persecution; however, this thesis is focused on the protection afforded specifically to women and whether they are effectively protected against SGBV. There are millions of women who are forced to flee their countries due to conflict, SGBV, systematic discrimination or various forms of persecution. The main international instrument which refugee women must rely on is the Refugee Convention to secure protection. For one to understand how SGBV affects refugee women and whether refugee women are effectively protected, one needs to first understand the scope and the meaning of a refugee and how international refugee law defines and interprets the concept of persecution and gender-based

persecution. The Refugee Convention has a framework that defines who a refugee is. Article 1 of the Refugee Convention defines a refugee as a person who:

As a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, 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.¹

It (the refugee convention and not just the definition) stipulates the conditions that need to be met for one to qualify as a refugee and provides the standard of treatment that refugees ought to be afforded. The Refugee Convention is the only universal treaty that supports the protection of refugees. The UNHCR uses the Refugee Convention as the basis for determining refugee claims in the countries in which the Refugee Convention has not been ratified and adopted into national legislation as the basis of asylum law.² There is no set procedure in determining the protection of refugees. States have different procedures in determining the most appropriate protection for refugees.³ This raises a conflict between international refugee law and international humanitarian and human rights law which in turn makes it complicated for States to find a proper balance between the need for fairness and efficiency.⁴ The application of the additional protocol to the Refugee Convention has presented many shortcomings when applied by many States. The narrow definition provided in the Refugee Convention is only applicable to the specific grounds of, race, nationality, religious belief, political opinion or membership to a particular group.⁵ This definition excludes those refugees who are subjected to torture,

¹ Convention and Protocol Relating to the Status of Refugees, 1951 at 14. The 1951 temporal limitation has since been removed by the 1967 protocol, therefore there are no longer time-specific requirements related to the alleged persecution.

² Freedman J 'Mainstreaming gender in refugee protection' (2011) 23 *Cambridge Review of International Affairs* note 2 at 590.

³ Lauterpacht E & Bethlehem D 'The scope and content of the principle of non- refoulement: opinion' in Feller E, Nicholson F (eds) *Refugee protection in international law: UNHCR's Global Consultations on International Protection* (2003) Cambridge: Cambridge University Press 87-177.

⁴ UNHCR's Global Consultations on International Protection.

⁵ Houghton T 'The limitations of the 1951 Refugee Convention' available at: <https://nswlegalnetwork.wixsite.com> (accessed 3 July 2020).

cruel punishment or other infringement of democratic rights for reasons other than those specified within the Refugee Convention.⁶ The Refugee Convention has relied heavily on the concept of persecution, but there is a failure to effectively provide a universal definition of persecution.⁷ The understanding and meaning of persecution had slowly developed over time. Persecution has developed to include more than the traditional public sphere meaning, to include the private sphere, allowing women's SGBV claims to have a space in refugee law.⁸

2.3. GENDER- RELATED PERSECUTION: EVOLVING MEANING OF PERSECUTION

The term "persecution" is a key aspect of the refugee definition. Persecution is not codified under international refugee law, however, this term has evolved and developed extensively by the means of doctrines as well as case law.⁹ There is no precise definition of the term persecution, and Atle Grahl-Madsen has argued that this lack of a precise definition of persecution was done deliberately. Grahl-Madsen states that:

The term 'persecution' has nowhere been defined and this was probably deliberate. It seems as if the drafters have wanted to introduce a flexible concept which might be applied to circumstances as they might arise; in other words, that they capitulated before the inventiveness of humanity to think up new ways of persecuting fellow men.¹⁰

Grahl-Madsen refers to the notion of a "flexible concept" in the statement, the flexibility associated with the definition of persecution has allowed the concept of persecution to be expanded and developed.¹¹ The flexibility has allowed the concept of persecution to include harms such as domestic violence which many refugees face; this type of harm was not included when the Refugee Convention was originally drafted.¹² The flexibility and the development of

⁶ Houghton T 'The limitations of the 1951 Refugee Convention' (accessed 3 July 2020).

⁷ Maiani F 'The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach' (2010) 28 *Les Dossiers du Grihl* at 2.

⁸ Maiani F 'The Concept of "Persecution" in Refugee Law: Indeterminacy, Context-sensitivity, and the Quest for a Principled Approach' (2010) 28 *Les Dossiers du Grihl* at 2.

⁹ Rempell S 'Defining persecution' 2013 *Utah Law Review* at 283.

¹⁰ Grahl-Madsen A *The Status of Refugees in International Law: Refugee character Volume 1 of The Status of Refugees in International Law* (1966) A.W Sijthoff at 196-197.

¹¹ Khan F & Schreier T *Refugee Law in South Africa* (2014) at 35-36.

¹² Khan F & Schreier T *Refugee Law in South Africa* (2014) at 35-36.

the concept of persecution have created independence for academics to interpret persecution and for the courts in different States to interpret persecution widely.¹³ In the case, *R v Immigration Appeal Tribunal, Ex P Jonah* the term of persecution was generally defined using two dictionary meanings of the word persecution.¹⁴ Whereas in the case of *Islam Shah*, in defining persecution, the court placed an emphasis on the failure of a state to provide protection and that the States discriminatory policy is a relevant factor.¹⁵ Lord Steyn states that ‘everything depends on the evidence and findings of fact in a particular case’.¹⁶ The flexibility of defining persecution has given courts the ability to expand, narrow and adapt the concept of persecution based on the circumstances.

In the Refugee Convention, the term persecution is mentioned as the ‘well-founded fear of being persecuted’.¹⁷ The Refugee Convention also refers to the requirement in which the refugee must prove that the fear experienced of being persecuted is genuine and reasonable.¹⁸ It is not required that the fear must be based on personal experience, we can base the fear of experiences by persons who are in similar situations to the applicant.¹⁹ The ‘Handbook and Guidelines on Procedures and Criteria for Determining Refugee Status’ was published by the UNHCR and the term ‘persecution’ as defined in this document as any threat to life or freedom and it has to be assessed based on an objective and subjective criteria.²⁰ The UNHCR has a list of crimes we can regard as persecution; it has added rape to the list of crimes and it permits the

UNIVERSITY of the
WESTERN CAPE

¹³ Khan F & Schreier T *Refugee Law in South Africa* (2014) at 35-36.

¹⁴ Nolan J adopted the two dictionary definitions of the word persecution. The two dictionary meanings are ‘to pursue, hunt, drive’ and ‘to pursue with malignancy or injurious action; especially to oppress for holding a heretical opinion or belief’. *R v Immigration Appeal Tribunal, Ex P Jonah* [1985] Imm AR 7.

¹⁵ *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah*, R v (1999).

¹⁶ *Islam v Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah*, R v (1999) at 2.

¹⁷ Convention and Protocol Relating to the Status of Refugees, 1951.

¹⁸ Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002).

¹⁹ Guidelines on Gender-Related Persecution, 2002.

²⁰ Nasr L ‘International Refugee Law: Definitions and Limitations of the 1951 Refugee Convention’ (2016) *LSE Human Rights*.

recognition of refugee status as foreseen by the Refugee Convention.²¹ Over time there was an acknowledgment of the need to interpret persecution in a manner that is sensitive to issues of gender.²² During the 1980s, the international community took steps to recognise gender-related persecution. The Executive Committee of the UNHCR states that States should be free 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 1A(2) of the 1951 UN Refugee Convention.²³

This influenced the UNHCR to issue the 'Guidelines on the Protection of Refugee Women' in 1991, which addresses the issues that refugee women face as well as briefly giving recognition to gender-related persecution.²⁴ The concept of gender-based persecution refers to the experiences of women who are persecuted because they are women, this is based on their identity and status as women amongst other things. Whereas gender-specific persecution refers to forms of harm that are specific to women, there is often an overlap between gender-based persecution and gender-specific persecution.²⁵ The Refugee Convention was drafted in 1951 and there was no participation by any women, and this may be one reason gender-based persecution was overlooked.²⁶ There is a lack of gender perspective in the Refugee Convention. The Refugee Convention definition does not recognise gender as a ground of persecution.²⁷ Women experience gender-related persecution differently from men. The experience of being

UNIVERSITY of the
WESTERN CAPE

²¹ Camus A 'The Practical Guide to Humanitarian Law' available at <https://guide-humanitarian-law.org/content/article/3/persecution-1/> (accessed 14 February 2019).

²² Lyth A *Where are the Women? - a Gender Approach to Refugee Law* (unpublished Master Thesis, Lund University 2001) at 15.

²³ UNHCR, Executive Committee, Refugee Women and International Protection, U.N. Doc MAC. 96/673 (1985).

²⁴ Harris LM 'Untold Stories: Gender-Related Persecution and Asylum in South Africa' (2007) 15 *Michigan Journal of Gender & Law* at 304.

²⁵ Feller E, Nicholson F & Turk V *Refugee Protection in International Law* (2003) New York: Cambridge University Press at 89-90.

²⁶ Lyth A *Where are the Women? - a Gender Approach to Refugee Law* (2001) at 16.

²⁷ Wallace RM.M 'Making the Refugee Convention Gender Sensitive: The Canadian Guidelines' (1996) 45 *The International and Comparative Law Quarterly* at 702.

a man or woman is dependent on the historic, cultural and geographic context of the situation, the experience of being a man or a woman will change depending on the time and place.²⁸

The Immigration and Refugee Board of Canada (IRB) adopted the 'Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution' in 1993. Canada became the first state to legitimise the refugee claims of women who face gender-related persecution.²⁹ This movement by Canada influenced other States to issue similar policy papers. The United States³⁰ and Australia³¹ issued similar policy papers in 1995 and 1996.³² Before the 'Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution', refugee women were unlikely to convince the IRB that the persecution they faced as women constituted persecution because of political opinion, religion, race, nationality or membership of a particular social group.³³

The introduction of the Guidelines was significant for refugee women who faced gender-related persecution. The Guidelines not only promotes consistency in the decisions made by the IRB, but it also defines the conceptual framework and it allows the IRB to read gender-related concerns into existing legislation.³⁴ The adoption of the Guidelines has helped validate the gender-related persecution claims of diverse groups of women. These include refugee women fleeing forced abortion in China³⁵, arranged marriage in Kenya³⁶ and rape by military

²⁸ Prithivi A 'Gender Discrimination Against Refugees' (2017) *University of Chicago Law School Chicago Unbound* at 2.

²⁹ Kuttner S 'Gender-Related Persecution as a Basis for Refugee Status: The Emergence of an International Norm' (1997) 16 *Refuge* at 17.

³⁰ United States Bureau of Citizenship and Immigration Services, *Considerations for Asylum Officers Adjudicating Asylum Claims from Women ("INS Gender Guidelines")*, 26 May 1995.

³¹ Australia Department of Immigration and Multicultural Affairs Refugee and Humanitarian Visa Applicants Guidelines on Gender Issues for Decision Makers July 1996.

³² Kuttner S 'Gender-Related Persecution as a Basis for Refugee Status: The Emergence of an International Norm' (1997) at 17.

³³ Laviolette N 'Gender-related refugee claims: Expanding the scope of the Canadian guidelines' (2007) 19 *International Journal of Refugee Law* at 171.

³⁴ An updated version of the 1993 Guidelines has been in effect since 13 November 1996. Valerie O 'Refugee Status for Female Circumcision Fugitives: Building a Canadian Precedent' (1993) 51 *UTFac.L. Rev.* at 287.

³⁵ *Lai v Canada* (2000).

³⁶ *Vitdhani v Canada* (1995).

personnel in Guatemala³⁷. The UNHCR issued the ‘Handbook for the Protection of Women and Girls’ in 2008, the Handbook replaced the UNHCR 1991 Guidelines. The ‘Handbook for the Protection of Women and Girls’ was drafted to address the protection challenges that refugee women and girls face.³⁸ Whereas, the Gender Guidelines which was issued by the UNHCR in 2002, has become an authoritative source that guides the interpretation of gender-related persecution claims.³⁹

The various forms of gender-related persecution that refugee women experience include rape and sexual assault. It is disproportionately women who experience rape in situations of conflict by state actors and non-state actors. In normal settings, women are also vulnerable to rape and in some circumstances, the perpetrator is known or related to her. For a woman to be recognised as a refugee based on gender-related persecution, it may be a requirement for them to prove that they fear persecution on account of being a member of a Particular Social Group (PSG).⁴⁰ The PSG ground has been developed to be used as a ground where there is gender-based persecution. There are five grounds of persecution listed in the refugee definition.⁴¹ The presence of at least one of these grounds determines the application of the Refugee Convention and this limits its scope. The current framework of the Refugee Convention fails to sufficiently protect women who require protection from factors that are closely related to their gender. Refugee women face a greater risk of being exploited and abused during their refugee journey and experience persecution from state actors as well as non-state actors.

2.4. GENDER-BASED VIOLENCE AGAINST REFUGEE WOMEN

Refugee women are vulnerable to various forms of SGBV. As stated sexual and gender-based violence will be explored separately. GBV is a form of persecution that many refugee women

³⁷ *P (KW) (Re)* (1993).

³⁸ UN High Commissioner for Refugees (UNHCR), UNHCR Handbook for the Protection of Women and Girls, January 2008.

³⁹ UN High Commissioner for Refugees (UNHCR), Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002.

⁴⁰ Foote V ‘Refugee Women as a Particular Social Group: A Reconsideration’ (1994) 14 *Refugee* at 9.

⁴¹ The five grounds categorically listed in the refugee definition are race, religion, nationality, membership of a particular social group and political opinion.

face throughout the world. Sexual and gender-based violence must be conceptualised separately so that it can enable an approach to the refugee definition which can accommodate specificity, diversity and heterogeneity.⁴² The conceptualisation of GBV will be done first to understand the scope and meaning of GBV as well as its various forms.

2.4.1. SCOPE AND MEANING OF GENDER-BASED VIOLENCE

The concept of “gender” refers to the power relations between women and men that have been created and enforced by society. The Refugee Convention provides surrogate protection to refugee women from persecution. Gender-based and gender-specific persecution is defined as any act of gender-related violence which inflicts any type of harm.⁴³ GBV is persistent and present in every culture, social group and is linked to the gender inequality that is present in society. Women and men share an unequal share of power within society and this influences the violence that women experience worldwide. The violence that refugee women experience is the most evident and most pervasive but it has become the least recognised human rights abuse in the world.⁴⁴ GBV can be defined in the 1993 United Nations Declaration on the Elimination of Violence against Women (DEVAW) as:⁴⁵

any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.⁴⁶

The U.N. Convention for the Elimination of All Forms of Discrimination against Women (CEDAW), has further defined GBV as:

a violence that is directed against a woman because she is a woman or violence that affects women disproportionately. It includes acts that inflict physical,

⁴² Feller E, Nicholson F & Turk V *Refugee Protection in International Law* (2003) New York: Cambridge University Press at 81-84.

⁴³ Art.1 of the UN Declaration on the Elimination of Violence against Women.

⁴⁴ United Nations Agencies Forward Together in the Response to Violence Against Women.

⁴⁵ There is no universal definition of GBV, each state has a different interpretation of GBV. The term violence against women is often used in conjunction with GBV.

⁴⁶ Art.1 of the UN Declaration on the Elimination of Violence against Women.

mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty.⁴⁷

The definition of GBV defined in the CEDAW validates the argument that women are disproportionately affected by violence and that there are gender-specific forms of violence that women are victims of that are not limited to physical harm. Gender as a concept has an important role in understanding and conceptualising GBV. According to the Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees, it states that gender refers to ‘the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another...’.⁴⁸ Therefore, one can say that gender broadly refers to the norms, values and behaviours that are associated with either being a female or a male.⁴⁹ Gender perceptions and stereotypes have created an unequal gender dynamic. Historically, women have been placed in a position in society where they are not on the same level as a man. Traditions, culture and religion have given men the power to control women.⁵⁰ When one links this to GBV it shifts the focus from women as the victim and shifts the focus to the concept of gender and the unequal power relationships between women and men.⁵¹ Gender equality is not effectively enforced within the legal and education system, and when it is not made a priority and

⁴⁷ The CEDAW does not raise the issue of violence and hence is criticised. The CEDAW is separate from the DEVAW, however, both documents should be used when interpreting the CEDAW. They are however two separate documents, with the convention being enforceable to States that have ratified and the declaration being non-binding. (General Recommendation No. 19), paragraph 6.

⁴⁸ Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees’ (2002) <https://www.unhcr.org/3d58ddef4.pdf>.

⁴⁹ The concept of gender has evolved and it has become sensitive. It is noted that some individuals do not identify as a male or a female. When defining gender there needs to be the inclusion of lesbian, gay, bisexual, transgender and intersex (LGTI) persons. Therefore, it can be said that GBV is directed at an individual based on his or her or their biological sex or their gender identity. Evens E, Lanham M & Santi K’ Experiences of gender-based violence among female sex workers, men who have sex with men, and transgender women in Latin America and the Caribbean: a qualitative study to inform HIV programming’ (2019) 19 *BMC Int Health Hum Rights* 9.

⁵⁰ Trafficking in Persons: A Gender Rights Perspective, UNIFEM Briefing Kit, October 2002, available at <http://www.unifem-eseasia.org/Resources/Traffick2.html> (accessed 1 June 2020).

⁵¹ Trafficking in Persons: A Gender Rights Perspective, UNIFEM Briefing Kit, October 2002, available at <http://www.unifem-eseasia.org/Resources/Traffick2.html> (accessed 1 June 2020).

mainstreamed throughout the education and legal system, a patriarchal system⁵² will perpetuate.⁵³ The patriarchal culture that exists throughout the world is one of the biggest barriers which is restricting the ending of violence against refugee women.

The DEVAW was the first international document to define violence against women within a gender-based context and indicated that women are given a subordinate role in society. This subordinate role has been passed down from generation to generation. Women have tried to break this cycle and gain the same privileges that men are born with, however various factors such as the ideologies that exist in traditions and cultures which have prevented the movement from progressing at a faster pace. The role of women in society has evolved and many feminist movements have influenced the development in the way we conceptualize and understand many terms in the protection of women. The feminist movement has broadened the way academics have conceptualized and defined GBV. Previously, academics focused on the psychological characteristics of the perpetrator and/or victim or they focused on the family relationship.⁵⁴ Feminists have broadened the conceptualization of GBV by reconceptualising rape and the various other forms of violence which are perpetrated by men. This has created an understanding that power and control influence GBV, and one has to understand that gender-based entitlements and status play critical roles in the dynamics of GBV.⁵⁵

The GBV that refugee women experience is inherently linked to power and the main perpetrators of this GBV are men. Women are disproportionately harmed by GBV and the GBV that a refugee woman will experience will differ and vary according to their status. Not all refugee women are equally situated and not all refugee women will have the same experience or challenges. Some refugee women are more vulnerable because they have

⁵² A patriarchal system is a system/social system where men are in authority over women. The characteristics of a patriarchal system is male dominance, male centeredness and oppression of women. The decision making and leadership levels of women are restricted. Mclean H 'Gender and power- structures in refugee camps: social changes following refugee movements' (1999) *Asia Pacific School of Economics and Management Working Papers* at 4.

⁵³ UN Women Europe and Central Asia 'Take Five: 'Patriarchal culture is one of the biggest barriers in ending violence against women' (2019).

⁵⁴ Russo NF & Pirlott A 'Gender-Based Violence: Concepts, Methods, and Findings' (2006) *Annals New York Academy Of Sciences* at 178.

⁵⁵ Prithivi A 'Gender Discrimination Against Refugees' (2017) at 2.

disabilities, are lesbian, bisexual or transgender.⁵⁶ These women face greater challenges and are in a more vulnerable position. Although refugee women do not share common qualities and beliefs, gender-inequality is universal and every refugee woman is prone to it.⁵⁷ Gender inequality is an aspect that has a direct influence on the vulnerability of refugee women and making them an easy target for GBV. An example to illustrate this is Saudi Arabia, where it is very difficult for women to leave the country, as they require approval from their husbands or other male authority.⁵⁸ A refugee scholar, Hathaway, once said that ‘most women can’t get out of their countries, and when they can, they’re lucky to make it to the next country’, and this derives from male dominance, and is linked to control and may lead to force.⁵⁹ Hathaway is correct because in many countries women experience severe inequality, their freedom is restricted, and they feel as if they are handcuffed to the country with no freedom of achieving independence.⁶⁰ The GBV that refugee women experience is linked to power and dominance and many perpetrators whose power and dominance are state actors.

2.4.2. GENDER-BASED VIOLENCE BY STATE ACTORS

A state actor refers to one who is acting on behalf of a government body. State actors include and is not limited to the police, military and prison guards.⁶¹ State actors have the obligation to promote and protect the human rights of the citizens in their respective countries.⁶²

The UNHCR has developed five forms of GBV.⁶³ These forms are sexual violence, physical violence, emotional and psychological violence, harmful traditional practices and socio-

⁵⁶ Russo NF & Pirlott A ‘Gender-Based Violence: Concepts, Methods, and Findings’ (2006) at 183-185.

⁵⁷ Non-refugee women also face these challenges, however the refugee circumstances make such women even more vulnerable. However, similarly to political, social, and economic relations, the circumstances of a women, whether refugee or non-refugee, is influenced by contexts and also the changing contexts of coexistence.

⁵⁸ Macklin A “Refugee Women and the Imperative of Categories” (1995) 17 *The Johns Hopkins University Press* at 213.

⁵⁹ Hathaway JC & Foster M *The Law of Refugee Status* 2nd ed (2014) Cambridge University Press.

⁶⁰ United Nations Agencies Forward Together in the Response to Violence Against Women.

⁶¹ Hans A & Betty RA ‘The Gender Imperative: Human Security vs. State Security’ available at: <http://www.taylorandfrancis.com/books/details/9780415585774/> (accessed 1 September 2020).

⁶² Hans A & Betty RA ‘The Gender Imperative: Human Security vs. State Security’ (accessed 1 September 2020).

⁶³ UNHCR Guidelines for Prevention and Response: Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: United Nations High Commissioner for Refugees (2003).

economic violence. These forms of violence are also regarded as gender-specific persecution.⁶⁴ These forms of GBV can be forms of violence inflicted by state actors and they are experienced throughout the refugee journey. The most common forms of GBV by state agents are physical violence and sexual violence.⁶⁵

Physical violence takes the form and is limited to ‘beating, punching, kicking, biting, burning, maiming or killing, with or without weapons, often used in combination with other forms of sexual and gender-based violence’.⁶⁶ Physical violence perpetrators by state actors are often influential community members such as leaders and those who are tasked to protect and aid refugee women.⁶⁷ Refugee women experience physical violence from these perpetrators in various settings throughout their refugee journey. In war-torn countries, soldiers are given a position of power and they use acts of physical violence with their given weapons to maintain order within the country or prove their position of power. During the refugee journey soldiers or the security guards are in the position of granting or withholding rights and privileges for refugees’ women and they inflict physical violence to show their power.⁶⁸ In these instances, refugee women are not effectively protected against physical violence and they will face challenges in reporting physical violence which they have experienced from anyone in a position of power because as a refugee they feel as though they do not have any power.

An example of physical violence by state agents is the degrading “virginity tests” that female protesters were subjected to in Egypt.⁶⁹ Amnesty International was informed that women protesters were beaten, given electric shocks, subjected to strip searches while being photographed by male soldiers and further subjected to virginity checks. If they refused to

⁶⁴ UNHCR Guidelines for Prevention and Response: Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: United Nations High Commissioner for Refugees (2003).

⁶⁵ Sexual violence in the form of rape will be examined in 2.4.

⁶⁶ WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women.

⁶⁷ Isabella A, Gerald O & Okot AC ‘A Study of Sexual and Gender Based Violence (SGBV) In Pabbo Camp, Gulu District, Northern Uganda’ (2005) *Suffering in Silence* at 1-3.

⁶⁸ Isabella A, Gerald O & Okot AC ‘A Study of Sexual and Gender Based Violence (SGBV) In Pabbo Camp, Gulu District, Northern Uganda’ (2005) at 1-2.

⁶⁹ Amnesty International ‘Virginity tests’ for Egyptian women protesters’ available at: <https://www.amnestyusa.org/virginity-tests-for-egyptian-women-protesters/> (accessed 1 September 2020).

submit to the virginity checks, they were threatened with prostitution charges.⁷⁰ This form of physical violence is regarded as torture and it strips women of their dignity.

State agents may have unlimited power over refugee women. The empowerment of state actors to enforce COVID-19 restrictions has increased the forcible regulation of gender norms.⁷¹ Refugee women may be vulnerable to harassment by police officials who are enforcing COVID-19 restrictions.⁷² Refugee women have reported feeling alienated by police officers during the COVID-19 pandemic. Instead of police or security official directing their attention on the GBV that refugee women are experiencing by non-state agents, the focus is being directed on the enforcement of the COVID-19 restrictions.⁷³ Non-state actors are also responsible for acts of GBV against refugee women.

2.4.3. GENDER-BASED VIOLENCE BY NON-STATE ACTORS

Refugee women are targets of GBV by non-state actors. Refugee women experience GBV by non-state actors in the form of sexual violence, physical violence, emotional and psychological violence and harmful traditional practices.

a) PHYSICAL VIOLENCE

Violence against refugee women usually takes the form of physical violence. The non-state perpetrators are the refugee women's spouse, intimate partner, family member, friend, acquaintance, stranger or anyone in a position of power. It may also include members of parties to a conflict.⁷⁴ A spouse or intimate partner is the most common perpetrators of physical violence and takes the form of domestic violence. An intimate partner usually takes the gender

⁷⁰ Amnesty International 'Virginity tests' for Egyptian women protesters' (accessed 1 September 2020).

⁷¹ PSRP 'COVID-19 and Gender-based Violence in Conflict: New Challenges and Persistent Problems' available at: <https://www.politicalsettlements.org/2020/04/21/covid-19-and-gender-based-violence-in-conflict/> (accessed 1 September 2020).

⁷² PSRP 'COVID-19 and Gender-based Violence in Conflict: New Challenges and Persistent Problems' (accessed 1 September 2020).

⁷³ PSRP 'COVID-19 and Gender-based Violence in Conflict: New Challenges and Persistent Problems' (accessed 1 September 2020).

⁷⁴ WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women.

role of a male, it has become the accepted gender role.⁷⁵ Domestic violence is violence that is experienced by many women globally. In many households, women are exposed to various forms of domestic violence, but the most common form is physical violence. Many women are living under repressive regimes and require their husband's consent or a male's consent to travel and they face difficulties leaving abusive households.⁷⁶ If a woman can leave a domestic violent relationship and attempts to seek asylum, she will face many hurdles. It is the requirement that there must be evidence of the physical mistreatment and proving domestic violence is known for difficult to prove.⁷⁷ In a domestic relationship, a woman will often experience all the forms of physical violence and these forms are not limited to beating, punching, kicking, biting, burning, maiming or killing.⁷⁸

Family members or friends who are the perpetrators of physical violence are people that the victim/survivor trusts and who most likely lives with them in their household. These perpetrators are usually the victims/survivor's father, uncle, brother or family friend and the physical act usually does not get reported.⁷⁹ The physical violence perpetrated by family members is often acting that they do not consider to be physical violence because they are accustomed to it and it seems like a normal form of punishment. The normal form of physical violence experienced within a household is and is not limited to physical beating with objects, punching and kicking.⁸⁰ In many cultures, physical violence is a normal form of punishment and it is passed down from generation to generation. Due to their different cultural values and norms, immigrant and refugee families are at risk for domestic violence.⁸¹ In an interview with Somali refugees, they were interviewed about the concept of physical violence. The Somali refugees indicated that physical violence is not the most appropriate mechanism to resolve conflicts, however, it was indicated that physical violence is an acceptable measure to maintain

⁷⁵ Reed E 'Intimate partner violence: a gender-based issue?' (2008) *Am J Public Health* at 197.

⁷⁶ Saudi Arabia: 10 Reasons Why Women Flee available at: <https://www.hrw.org/news/2019/01/30/saudi-arabia-10-reasons-why-women-flee> (accessed 3 July 2020).

⁷⁷ Reed E 'Intimate partner violence: a gender-based issue?' (2008) *Am J Public Health* at 197.

⁷⁸ Saudi Arabia: 10 Reasons Why Women Flee (accessed 3 July 2020).

⁷⁹ Saudi Arabia: 10 Reasons Why Women Flee (accessed 3 July 2020).

⁸⁰ Chakrabarti A & Handa S 'A cash plus program reduces youth exposure to physical violence in Zimbabwe' (2020) 134 *World Development* at 2.

⁸¹ Chakrabarti A & Handa S 'A cash plus program reduces youth exposure to physical violence in Zimbabwe' (2020) at 2-3.

the patriarchal structure of a family.⁸² Many men use physical violence to gain control and to show their seniority in family settings. In domestic situations, women are given the role to maintain harmony within the household, whereas the husband is given the role of authority and discipline the members of the household. The elder family males are also given the role of authority in households and they use physical violence to prove and maintain their position within the household.⁸³ These cultural norms make it difficult for the victim/survivor to report the physical that they have experienced. In many cultures, domestic violence is a family matter, and it is not acceptable to seek assistance because it is a private family matter. As stated, GBV is not limited to physical acts of violence. GBV can take the form of emotional and psychological violence.

b) EMOTIONAL AND PSYCHOLOGICAL VIOLENCE

A refugee woman's mental health is not viewed as the main concern or it is often overlooked. When a victim/survivor escapes from a domestic relationship that had many forms of abuse, the emotional and psychological violence that they have experienced is often not addressed. The physical or sexual violence which they have experienced takes priority and the emotional and psychological violence which they have experienced is left untreated and they are left to live with the trauma. Defining emotional and psychological violence is difficult, defining non-physical violence is inconsistent and varies depending on the state and their understanding and interpretation. Emotional and psychological violence can be defined as any emotional abuse that has been experienced, psychological maltreatment, verbal abuse, mental abuse, emotional maltreatment.⁸⁴ Some of these terms are synonymous whilst others are easy to differentiate.

Emotional and psychological violence can begin from a very young age and can change and evolve depending on the relationship. A refugee woman might have experienced emotional and psychological violence from her father throughout her childhood and then experienced emotional and psychological violence within her domestic relationship from her spouse or

⁸² Pan A 'Understanding the Role of Culture in Domestic Violence: The Ahimsa Project for Safe Families' (2006) 8 *Journal of Immigrant and Minority health* at 38.

⁸³ Pan A 'Understanding the Role of Culture in Domestic Violence: The Ahimsa Project for Safe Families' (2006) at 39-39.

⁸⁴ Sonkin DJ 'Defining Psychological Maltreatment in Domestic Violence: Perpetrator Treatment Programs: Multiple Perspectives' *Journal of Emotional Abuse*.

intimate partner but to a different degree.⁸⁵ In many cultures' the gender inequality that many women experience is a traumatic experience, and these women will experience emotional and psychological violence throughout their lives. In countries where a women's freedoms and rights are extremely constrained, they experience emotional and psychological violence in the form of demeaning, belittling, undermining self-worth and their personhood is attacked.⁸⁶ Non-violent domestic violence is not limited to swearing or threats, it can extend to controlling a woman's contact with the outside world and support systems as well as defining a women's reality.⁸⁷ There are many cultural situations where women's freedom is limited, and their reality is defined. The emotional and physical abuse that she endures makes her question her perceptions and judgments, the perpetrator uses his power and control to define his victim's reality and this non-physical violence demands subservience from the victim/survivor.⁸⁸

In the case of *R v Immigration Appeal Tribunal, Ex parte Shah*, the adjudicators referred to the position of women in Pakistan and Iran.⁸⁹ The asylum-seekers were female nationals of Pakistan and had been married and had been exposed to false allegations of adultery and violence by their husbands in Pakistan. Their asylum claim was because they would be persecuted on return to Pakistan because of the allegations. It was argued that if a Pakistan woman is accused of transgressing social mores such as adultery, disobedience to her husband, they have no protection and cannot rely on their family for protection.⁹⁰ The Secretary of State stated that if the refugee women were forcefully returned to Pakistan they would suffer persecution in the form of physical and emotional abuse by their husbands, and the persecution would 'not only be condoned by the local Islamic law but would also be aggravated by that law which would subject them to criminal processes and accompanying severe punishment...'.⁹¹

⁸⁵ Sonkin DJ 'Defining Psychological Maltreatment in Domestic Violence: Perpetrator Treatment Programs: Multiple Perspectives'.

⁸⁶ Patrick-Hoffman P *Psychological abuse of women by spouses and live-in lovers* (Unpublished doctoral dissertation, The Union for Experimenting Colleges and Universities, 1982) at 24.

⁸⁷ Patrick-Hoffman P *Psychological abuse of women by spouses and live-in lovers* (1982) at 26.

⁸⁸ El-bushra J & Lopez PE 'Gender-related violence: Its scope and relevance' (1993) 1 *Focus Gend* at 1-9.

⁸⁹ *R v Immigration Appeal Tribunal, Ex parte Shah, United Kingdom: Court of Appeal* (1997).

⁹⁰ *R v Immigration Appeal Tribunal, Ex parte Shah, United Kingdom: Court of Appeal* (1997).

⁹¹ *R v Immigration Appeal Tribunal, Ex parte Shah, United Kingdom: Court of Appeal* (1997).

The belittling of a woman and the norm that a woman should always be subservient to a male is a form of non-physical violence.⁹² Refugee women only focus on the physical violence that they have endured; they do not refer to the gender-related emotional and psychological violence that they have endured within their marriage or throughout their lives. If a woman is placed in a position where she is made to believe that she does not deserve the same rights and freedom as a man or if she requires a male figure in her life to progress in life and to consent to any of her life choices, that is regarded as a form of non-physical violence against a woman.⁹³ The conceptualisation of emotional and psychological violence will always differ, there is no international law instrument that defines what emotional and psychological violence is. However, it can be said that if the non-physical form of violence takes the form of any attempt to undermine or violate a person's feelings, self-worth or independence, it may be considered to be emotional and psychological violence. Emotional and psychological violence is not only experienced within a refugee women's country of origin, it may be experienced at any stage of their refugee journey.

c) HARMFUL TRADITIONAL PRACTICES

Across the world, there are many traditional practices that are practised, preserving the unequal role of women within society. The CEDAW has defined/described harmful traditional practices as:

Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles and perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them of the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms.⁹⁴

There are various forms of harmful traditional practices that exist throughout the world such as forced marriages, female genital mutilation (FGM) and trokosi, amongst many others. Harmful

⁹² Kamga GEK 'Insights into intimate partner violence, the most common form of gender-based violence' (2018) *Gender Justice* at 2.

⁹³ Kamga GEK 'Insights into intimate partner violence, the most common form of gender-based violence' (2018) at 2.

⁹⁴ The Convention on the Elimination of all Forms of Discrimination Against Women (1979).

traditional practices are a serious human rights violation. Within the regional and international sphere, there has been the goal of eliminating all the forms of harmful traditional practices. Although there are various harmful traditions forced marriages, FGM and trokosi will be examined.⁹⁵

i) FORCED MARRIAGES

A woman's right to choose a spouse and enter freely into marriage is one that is central to her life and her dignity and equality as a human being.⁹⁶ There are many international instruments that protect this right such as International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR), CEDAW and the UN Convention on the Rights of the Child 1989 (CRC). Forced marriage constitutes a human rights violation in the international law sphere and it is a criminal offence in the domestic law of some countries. Article 16(2) provides the requirement that in order for a marriage not to be considered as a forced marriage there must be a free and willing undertaking between both parties and both parties must consent to the marriage.⁹⁷ The notion of 'consent' was used in Article 23(3) of ICCPR and Article 1(1) of the Convention on Consent to Marriage in 1962. Article 10 (1) ICESCR used the notion of 'free consent', which made it clearer that the consent between the two parties needed to be made freely and without force from any other parties.⁹⁸ The CEDAW provides a greater detailed explanation of the right to freedom, the CEDAW has also expanded the language of consent to include 'the same right freely to choose a spouse and to enter into marriage only with their free and full consent...'.⁹⁹ There is no universal definition of forced marriage, but based on the various international instruments which address forced marriage, one can understand that forced marriage is one that constitutes a marriage where the parties did not freely consent to the marriage. Despite all the international instrument which exist, the harmful traditional practice of forced marriages is still practised in

⁹⁵ These harmful traditional practices are being examined to show that harmful traditional practices can not only be physically harmful to the refugee women, but it can have more serve consequences on the woman.

⁹⁶ WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women.

⁹⁷ Universal Declaration of Human Rights (1948).

⁹⁸ International Covenant on Economic, Social and Cultural Rights (1966).

⁹⁹ WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women.

many countries. Forced marriage is recognized as a form of gender-related persecution in international refugee law documents.¹⁰⁰

The case *Prosecutor v Brima, Kamara and Kanu* (the AFRC trial) became a landmark case in which it became the first international criminal tribunal to recognise forced marriage as a separate or distinct crime.¹⁰¹ The Trial Chamber held in the case that there was evidence of forced marriage in the Sierra Leone conflict.¹⁰² The defendants were found guilty of war crimes and crimes against humanity, including murder, rape, sexual slavery, and the conscription of child soldiers. It was further held that forced marriage was distinct from the crime of sexual slavery.¹⁰³

Forced marriage is a violation and of women's right to freedom, dignity and equality, amongst many other recognised human rights. The victims/survivors of forced marriages face sexual and gender-based violence. The forms of violence that they experience are physical and non-physical domestic violence such as rape, assault and psychological violence. The victims/survivors right to education and independence may be restricted and, in most cases, they are forced into early/forced pregnancy and childbearing.¹⁰⁴ Women who are forced into marriages fear to reject the marriage because they face many challenges such as isolation from their family bringing shame to their family. They also face social isolation, and, in some cases, they may be physically harmed if they reject the forced marriage. Due to the domestic abuse that many women experience in their forced marriages, many attempt to escape their forced marriage to seek asylum in another country because their domestic laws do not effectively protect them.¹⁰⁵

¹⁰⁰ Dauvergne C & Millbank J 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 *The Peter A. Allard School of Law Allard Research Commons* 57 at 3.

¹⁰¹ *The Prosecutor v Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu* (2007).

¹⁰² Gong-Gershowitz J 'Forced Marriage: A "New" Crime Against Humanity?' (2009) 8 *Northwestern Journal of International Human Rights* 1 at 53.

¹⁰³ Chakrabarti A & Handa S 'A cash plus program reduces youth exposure to physical violence in Zimbabwe'.

¹⁰⁴ Askola H 'Responding to Vulnerability? Forced Marriage and the Law' 4 (2018) *UNSW Law Journal*.

¹⁰⁵ UNHCR Guidelines for Prevention and Response: Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: United Nations High Commissioner for Refugees (2003).

In the case of *R.H. v Sweden*, the applicant stated that she was at the risk of persecution from her family because she had fled a forced marriage. She also stated that because of the humanitarian situation in Somalia, she was at the risk of sexual assault because she was a single woman without a husband and this would influence marginalisation.¹⁰⁶ These are factors which many women experience. In a joint dissenting point of view, the judges took into consideration that the applicant would experience inhuman or degrading punishment if she returned to her country. The majority judgment considered the facts of the case and stated that the applicant would have access to support from her family and a male protection network if she returned to her country. Although the court took into consideration all the relevant factors relating to the case, the court failed to realistically acknowledge the real humanitarian situation in Somalia which is expressed in international reports.¹⁰⁷ Cases like this create fear among women in similar situations, and they fear seeking asylum because they fear it might force them to return to their country of birth, this fear prevents them from being effectively protected.

ii) FEMALE GENITAL MUTILATION (FGM)

FGM violates the human rights of women and girls and it has been recognized in international human rights instruments. Article 1 of CEDAW has defined against women broadly as:

Any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.¹⁰⁸

The practice of FGM fits within the definition of discrimination against women. FGM conflicts with a women's enjoyment of her fundamental rights. FGM does not only cause physical harm but it also causes emotional and psychological harm.¹⁰⁹ The WHO has defined FGM as all procedures that involve partial or total removal of the external female genitalia, or

¹⁰⁶ *R.H. v Sweden*.

¹⁰⁷ *R.H. v Sweden*.

¹⁰⁸ The Convention on the Elimination of all Forms of Discrimination Against Women (1979).

¹⁰⁹ UN Women 'Sources of international human rights law on Female Genital Mutilation' (2011).

other injuries to the female genital organs for non-medical reasons.¹¹⁰ FGM is deeply rooted in many cultures and it has become a tradition in many families. FGM is common in many developing countries and many families perform the procedure so that they can be accepted by the community. The procedure is usually performed to prepare the victim/survivor for marriage and adulthood. The cultural significance is to preserve fertility, chastity, improve hygiene, and enhance sexual pleasure for men.¹¹¹ Although many cultures believe that FGM has various benefits for the victim/survivor, FGM has many short-term and long-term side effects such as extreme pain, infertility due to infection and becoming outcast due to infertility.¹¹²

There are various grounds on which FGM can be used to support an asylum claim. FGM is regarded as a form of GBV and a child-specific form of persecution.¹¹³ FGM violates the principle of non-discrimination because it only affects women and girls. FGM is also harmful towards the health of the victim/survivor and imposes short-term and long-term health consequences, therefore it is regarded as a form of torture. In order for the victim/survivor of FGM to qualify for refugee status, she needs to prove to the that the persecution she fears is for the reason of her race, religion, nationality, membership of a particular social group (PSG) or political opinion.¹¹⁴ FGM is a form of torture and inhuman or degrading treatment, and as a violation of the human rights as well as health and bodily integrity of women and girls.¹¹⁵ It is a violation of the ICCPR and ICESCR. FGM also violates the Convention on the Rights of the Child (CRC) which was drafted to protect children from all forms of physical or mental violence, injury or abuse.¹¹⁶

¹¹⁰ World Health Organization: Female genital mutilation. Fact Sheet 241. 2000 available at

<https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (accessed 4 June 2020).

¹¹¹ Helzner E & Klein 'Female Genital Mutilation: Health Consequences and Complications-A Short Literature Review' (2018) *Hindawi*.

¹¹² Chinnian K *Female genital mutilation as a form of violence against women and girls: an analysis of the effectiveness of international human rights law* (published Master Thesis, University of the Western Cape 2005) at 18.

¹¹³ Flamand C 'FGM: challenges for asylum applicants and officials' (2015) *FMR*.

¹¹⁴ Boyle E & Corl A 'Law and Culture in a Global Context: Interventions to Eradicate Female Genital Cutting' (2010) *Annual Review of Law and Social Science* at 196-197.

¹¹⁵ Masci D 'Human Trafficking and Slavery: Are the World's Nations doing Enough to Stamp It Out?'

¹¹⁶ Convention on the Rights of the Child (1989).

Although there are international instruments that protect women against FGM and that aid women in seeking asylum, there are various challenges and barriers which the victim/survivor may face. Some of these challenges and barriers are the discomfort in discussing the experience and subject. FGM is a traumatic experience and the victim/survivor may find it difficult to disclose the traumatic experience. There are other reasons which will prevent an authentic explanation of the victim/survivor experience such as not trusting the authority figures.

The lack of education can also hinder the disclosure of information.¹¹⁷ FGM is also regarded as a child-specific form of persecution, many young girls may want to seek asylum because they fear the consequences of FGM. If an unaccompanied child applies for asylum on the ground of child-specific persecution, the authorities will need to ensure that the procedure is fulfilled. This procedure includes the interviewing of the victim/survivor and the credibility assessment. The authorities will need to ensure that these procedures are appropriate for a child. There are some instances where a family may apply for asylum because they fear that their child will be a victim of FGM, however, some countries will only grant asylum protection to the child. After all, they are the only member of the family who is at risk of persecution. The asylum authorities view that the other members of the family do not have legitimate reasons for claiming asylum because they are not at risk of persecution.

iii) TROKOSI

Many forms of slavery still exist within many countries, the harmful traditional practise of trokosi is one of them. Trokosi is a traditional practice that is practised in many parts of the Republic of Ghana.¹¹⁸ The trokosi is the sexual property of the priests, they are considered sex slaves. The trokosi is groomed from a young age and does not have the right to refuse and any

¹¹⁷ Masci D 'Human Trafficking and Slavery: Are the World's Nations doing Enough to Stamp It Out?'

¹¹⁸ The traditional custom which is practised requires the offer of a virgin daughter as a trokosi to a traditional fetish shrine to ward off the punishment of the Gods for crimes or moral wrongdoings that have been committed. Once the family has offered the girl to the shrine, there is spiritual bondage between the girl and the shrine. The victim/survivor is required to perform ritual duties and domestic chores and will not receive any form of remuneration. Once a trokosi reaches puberty, the shrine's fetish priest (tronua) is entitled to have sex with the girl to consummate the marriage between her and the gods. Botchway ANK 'Abolished by Law-Maintained in Practice: The Trokosi as Practiced in Parts of the Republic of Ghana' 3 (2008) *FIU Law Review* 369 at 371-372.

daughters born from the sexual relations between the trokosi and the priest will have certain obligations which may be sexual.¹¹⁹ The trokosi practice raises the issue of whether there should be a balancing of cultural relativism and universal human rights. It can be argued that trokosi violates many universal human rights treaties and conventions that is a form of sexual slavery. However, it can be also argued that the practice of trokosi is not a form of slavery and it is an exercise of freedom of religion.¹²⁰

Trokosi is regarded as religious persecution, it is sexual exploitation and forced labour. Trokosi was criminalised in Ghana in 1998, however, there were no prosecutions under the law. Although the traditional practice has been criminalised, it is still being practised in some parts of Ghana, trokosi may be abolished by law but it is still maintained in practice. The survival of trokosi is proof that international human rights conventions are not effective enough to end domestic and religious practices. The CRC and the African Charter on the Rights and Welfare of the Child (African Children's Charter) have been ratified by the majority of African countries, however, illegal practices are still being practised and young girls' rights to liberty and freedom are still being violated.¹²¹ Trokosi violates many conventions such as the Slavery Convention of 1926 and the Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery of 1956. Ghana has also adopted laws against slavery and child labour, however, there were no efforts to prosecute anyone for the practice of trokosi.¹²² The ineffective international protection of women and girls against harmful traditional practices can also be related to the lack of international agreement about contemporary forms of human rights violations. Since the introduction of all the UN frameworks, there has been the prohibition of slavery, child labour, forced labour and human trafficking and it has been a requirement that all States abolish any existing domestic forms of human rights violations.

¹¹⁹ Botchway ANK 'Abolished by Law-Maintained in Practice: The Trokosi as Practiced in Parts of the Republic of Ghana' 3 (2008) *FIU Law Review* 369 at 372.

¹²⁰ Botchway ANK 'Abolished by Law-Maintained in Practice: The Trokosi as Practiced in Parts of the Republic of Ghana' (2008) at 372-373.

¹²¹ Botchway ANK 'Abolished by Law-Maintained in Practice: The Trokosi as Practiced in Parts of the Republic of Ghana' (2008) at 373.

¹²² The 1992 Constitution, the Child's Act 560 of 1998 and the Labour Act 651 of 2003.

All forms of slavery and violence against women and children is prohibited under international law and it belongs under the principle of *ius cogens* in international law.¹²³ The law provides for the protection of women and girls with regard to the granting of asylum or refugee status in accordance with the Refugee Convention. In the case of *Fiadjoe v Attorney General of the United States*, Fiadjoe stated that she was a slave by her father, and she was forced to perform labour for him and she was abused physically and sexually. Fiadjoe further argued that if she was forcefully returned to Ghana she would be subjected to the practice of *trokosi*, which many women are still subjected to. It was further argued that the Ghanaian government authorities were unable or unwilling to prevent and unable to effectively protect women and girls.¹²⁴ The Immigration Judge the BIA concluded that Fiadjoe's testimony was not credible, and that there was not sufficient evidence to prove that the Ghanaian Government was unwilling or unable to control the sexual abuse.

In asylum cases, the law requires that the applicant bear the burden of proof of establishing her eligibility for asylum.¹²⁵ Fiadjie emphasised in her burden of proof that she had experienced persecution by forces the government of Ghana was either unwilling or unable to control and that was the critical element of her claim.¹²⁶ The majority argued that in cases where the asylum claim is based on a private incident of persecution, the claimant will be eligible for asylum when it is committed 'by forces the government is either unable or unwilling to control'.¹²⁷ There was emphasised placed on the notion that the Ghanaian government has criminalized and that have been developments and mechanisms in place to protect girls against the practice of *trokosi*. Fiadjoes asylum claim can be referred to as one that is gender-related and that upon return to her country of origin she may be subjected to the religious practice because of the position of women within her country of origin.

¹²³ *Ius cogen* refers to the notion that principle must be applied unconditionally regardless of whether the country has ratified the relevant conventions.

¹²⁴ *Fiadjoe v Attorney General of the United States* (2005).

¹²⁵ It should be noted that refugee claim cases are not like civil or criminal cases, the subjective elements of the cases are often difficult to prove. The adjudicator will often have to depend on the oral statements made by the applicant and make the assessment in light of the objective situation of the applicant's country of origin. Office Of The United Nations High Commissioner For Refugees Geneva 'Note on Burden and Standard of Proof in Refugee Claims' (1998).

¹²⁶ *Fiadjoe v Attorney General of the United States* (2005).

¹²⁷ *Fiadjoe v Attorney General of the United States* (2005).

It can be questioned whether Fiadjoe would be effectively protected by the domestic laws in her country upon return. It is evident that the practice of trokosi is still being practised in Ghana, and the case raises the question of whether other women and girls will be able to effectively seek asylum or would they be too scared to seek asylum based on the fear that they would not meet the requirements needed to be met in order to gain refugee status. The harmful traditional practices which were explored shows one that these practices preserve the unequal role of women within society. These practices are not only forms of GBV but are regarded as sexual violence.

2.5. SEXUAL VIOLENCE: RAPE

Rape is the most common form of SGBV that refugee women experience throughout their refugee journey. The World Health Organisation (WHO) has defined sexual violence as:

any sexual act, attempt to obtain a sexual act, or other act directed against a person's sexuality using coercion, by any person regardless of their relationship to the victim, in any setting. It includes rape, defined as the physically forced or otherwise coerced penetration of the vulva or anus with a penis, other body part or object.¹²⁸

There are various forms of sexual violence. Some of these forms include rape, marital rape, child sexual abuse, defilement and incest, sexual abuse, sexual exploitation, forced prostitution, sexual harassment and sexual violence as a weapon of war.¹²⁹ Violence against women derives from the inequality that women have endured for generations, it is rooted in the unequal power that women have had throughout history.¹³⁰ Sexual violence is linked to male domination and privilege; it is frequently not associated with sexual desire.¹³¹ Sexual violence is unacceptable and a punishable crime under international law. During armed conflict, sexual violence is

¹²⁸ WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women: available at: <http://www.who.int/mediacentre/factsheets/fs239/en/> (accessed 1 June 2020).

¹²⁹ WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women

¹³⁰ Seller PV "The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation" (2007) *Women's Human Rights and Gender Unit* at 23.

¹³¹ Kalra G & Bhugra D 'Sexual violence against women: Understanding cross-cultural intersections' (2013) *Indian J Psychiatry*.

usually used strategically or tactically by the perpetrators.¹³² Sexual violence is defined in the *Akayesu* case, where the International Criminal Tribunal for Rwanda (ICTR) defined sexual violence as ‘any act of a sexual nature which is committed on a person under circumstances which are coercive’.¹³³ They broadened the definition to include ‘acts which do not involve penetration or even physical contact’.¹³⁴ The United Nations Security Council Resolution 1960 (Resolution 1960 (2010)) reaffirmed that sexual violence is global, systematic in nature and rampant.¹³⁵

In international law, rape has been defined with the help of cases by the international criminal tribunals for Rwanda and the former Yugoslavia. The Trial Chamber in the *Kunarac* case referred to the *Furundžija* case and stated that the definition of rape is too narrow. It added that an ‘act of sexual penetration’ constitutes rape not only if accompanied by ‘coercion or force or threat of force against the victim or a third person’ but also if there are other factors that would render the act non-consensual or non-voluntary.¹³⁶ The International Criminal Court Elements of Crimes further defined rape. The key requirement that is needed for the act to be classified as rape is consent. If the victim/survivor did not give her consent or if there was a lack of voluntary participation, it will classify the act committed by the perpetrator as rape.¹³⁷ Historically, rape during times of war was condoned.¹³⁸ During World War II, soldiers had the task to penetrate enemy territory, it also permitted them to rape.¹³⁹ Nazis also raped countless Jewish women during their path to invade the Soviet Union. The Soviet Union raped German women during their battle through Berlin.¹⁴⁰ Rape during wartime is ignored, and it is considered to be a hidden element and is also generally denied by leaders or the victim/survivor

¹³² Gaggioli G “Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law” (2014) 96 *International Review of the Red Cross* 503–538.

¹³³ *The Prosecutor v Jean-Paul Akayesu*.

¹³⁴ Prithivi A ‘Gender Discrimination Against Refugees’ (2017).

¹³⁵ Security Council Open Debate on Sexual Violence in Conflict (Security Council Resolution 1960) (2010).

¹³⁶ *Prosecutor v Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic*.

¹³⁷ Gaggioli G “Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law” (2014) 96 *International Review of the Red Cross* 503–538.

¹³⁸ Porter H ‘Moral Spaces and Sexual Transgression: Understanding Rape in War and Post Conflict’ (2019) *Development and change* at 1016.

¹³⁹ Thomas DQ ‘Rape in War: Challenging the Tradition of Impunity’ (1994) *The Johns Hopkins University Press* 82-99.

¹⁴⁰ Prithivi A ‘Gender Discrimination Against Refugees’ (2017) at 15-16.

is blamed.¹⁴¹ However, rape is also a mechanism used during wars to carry out the military objectives and to pollute the population of the targeted group of individuals, ethnic cleansing.¹⁴² The evidence that women are targeted and raped, proves it is a gender-based motivation and the perpetrators are driven by the notion that their victims will not report the rape because of the fear of being dishonoured. Women's positions within the fixed sexual hierarchy of the patriarchy are one of the main reasons which prevent the protection of women against rape.¹⁴³ In many cultures, a wife is presumed to have given perpetual consent to engage in sexual intercourse with her husband after entering a marriage. These women are unaware that marital rape is a criminal offence and, in many countries, it does not criminalize marital rape. Women are raped by their husbands and experience domestic violence and they do not report it because of the notion she is the property of the husband. For many generations, women have been sold to men for marriage or there has been the mutual agreement of marriage between the members of the family, this has been the custom in many cultures. These traditional customs rarely require the consent of the bride and it forces the bride to devote herself to her new husband with the fear that if she does not, she will dishonour her family and her traditions. In the case, *AATA Case No. 1413076*, the applicant in her application stated that she feared that if she returned to Nepal she would be persecuted for one or more of the five reasons set out in the Refugees Convention. In her claim, the applicant stated that she left Nepal to gain independence and education. She feared that if she remained in Nepal and if she had to return to Nepal she would be forced into a marriage and she would be forced to devote her life to her husband.¹⁴⁴ This is the reality of many refugee women, many refugee women flee their country because they want to seek higher education and not be forced into marriage. However, many

¹⁴¹ Throughout this thesis, respectfully, I will be referring to women who have experienced any form of sexual assault, specifically rape, as a 'victim/survivor'. In the legal context, the word 'victim' has to be used, however, many rape survivors refer to themselves as 'a survivor of rape' because they were once a victim, but they have survived. The word survivor is also strong and empowering, and it takes any power away from the perpetrator. However, many rape survivors do not like to refer to themselves as a survivor because by using the word survivor it also implies that they have survived the recovery process and it does not remind people of the violent act that they have experienced. Women who prefer to be called 'a victim of rape' have stated that they do not want to be the focus and that they want the crime to be the focus. To be respectful to women who have been raped, I will be referring to them as a 'victim/survivor'.

¹⁴² Prithivi A 'Gender Discrimination Against Refugees' (2017) at 6.

¹⁴³ MacKinnon CA "Sexuality, Pornography, and Method: "Pleasure under Patriarchy" (1989) 99 *The University of Chicago Press* 314-346.

¹⁴⁴ *AATA Case No. 1413076* (2016).

women are not fortunate enough to escape forced marriages and will be forced to devote their lives to their husbands and will be victims of domestic violence. These women are usually unaware that the domestic violence they experience is, in fact, a criminal offence and the men who inflict the violence on them believe that they are exercising their right as a husband.¹⁴⁵ Domestic violence can also take the form of sexual assault and if it is known that the sexual assault is, in fact, a criminal offence, there is the worry of being alone in a foreign country with uncertain immigration status, this prevents many women from leaving their abusive marriage to request asylum.¹⁴⁶ Sexual violence and GBV are traumatic experiences for any woman and there are often serious consequences.

2.6. THE CONSEQUENCES OF SGBV

SGBV has traumatic consequences for the victim/survivor. The consequences may take the form of health consequences, psychological consequences and socio-economic consequences amongst many other forms. Refugee women who have been exposed to any form of SGBV have experienced that the physical effects of SGBV, some of these physical effects include malnutrition, gynecological problems and unwanted pregnancies.¹⁴⁷ The most common health consequence of SGBV is unwanted pregnancies. Access to adequate health care is a challenge for refugee women. The notion of abortion is a very sensitive topic for women due to their own personal and religious beliefs. However, many refugee women do not want to bear the child of their perpetrator and may want to have an abortion. The law on abortion is not universal and each state may have its own domestic laws on abortion which will differ. In some countries, it may be illegal while in others it is legal. For a refugee woman, depending on the stage of her refugee journey, it may be extremely difficult to have access to health facilities and she might attempt to abort the unwanted pregnancy on her own without the necessary medication/procedure. The attempt to abort an unwanted pregnancy may have served medical consequences and complications and has resulted in death.¹⁴⁸

¹⁴⁵ Kaur R & Garg S. 'Addressing domestic violence against women: an unfinished agenda' (2008) *Indian J Community Med* at 73-76.

¹⁴⁶ Kelly N "Gender-Related Persecution: Assessing the Asylum Claims of Women" (1993) 26 *Cornell International Law Journal* note 19 at 630.

¹⁴⁷ Gebreyosus Y 'Gender-Based Violence against Female Refugees in Refugee Camps' (2013) *GRIN Verlag* (published Master's Thesis) at 30.

¹⁴⁸ Gebreyosus Y 'Gender-Based Violence against Female Refugees in Refugee Camps' (2013) at 31.

Access to adequate health care is limited for refugee women, there are many resource restrictions and shortages of medicine or medical care. Due to the lack of adequate health care, the health consequences of SGBV is left untreated and may result in various complications such as infertility and death. Sexually Transmitted Diseases (STD) including HIV/AIDS is another common SGBV health consequence that may affect many refugee women and due to the lack of resources afforded to refugees, these STD's do not get treated.¹⁴⁹ A victim/survivor of SGBV may have been granted asylum but it does not mean that she will be effectively protected from other uncontrolled factors that may result in her death.

The health and physical consequences of SGBV are not usually difficult to identify and treat. The psychological consequences of SGBV are deep-rooted within the mental state of the victim/survivor and will always be a part of her natural life. Some of the psychological consequences of SGBV that a refugee woman may experience is depression, anxiety, post-traumatic stress disorder, shock, memory loss, and sexual dysfunction.¹⁵⁰ The treatment of the psychological consequences of SGBV is difficult to treat and difficult to identify for various reasons such as language barriers and the disbelief of emotional and psychological disorders by many cultures. Every culture has its own form of treatment and diagnosis for emotional and psychological trauma. Some cultures turn to religion while others perform rituals to cleanse the soul and mind. These forms of treatments may not be effective because a more effective form of treatment is needed.

In order for the victim/survivor of SGBV to be granted asylum a burden of proof of the SGBV is required. The victim/survivor must prove that the SGBV that she has experienced happened. The victim/survivor is required to relive the experience that she experienced, and this may be difficult. It is extremely difficult for SGBV victims/survivors to discuss the specifics of their experience of abuse. In the case *Fiadjoe v Attorney General of the United States*, the Immigration Judge strongly believed that Fiadjoe was fabricating her account of rape by her father because there were various inconsistencies. It was noted that the inconsistencies are not evidence of dishonesty, but it was evidence of severe Posttraumatic Stress Disorder.¹⁵¹ The

¹⁴⁹ Sexual Violence Against Refugees: Guidelines on Prevention and Response Geneva 1995.

¹⁵⁰ Sexual Violence Against Refugees: Guidelines on Prevention and Response Geneva 1995.

¹⁵¹ *Fiadjoe v Attorney General of the United States* (2005).

psychological consequences of SGBV that refugee women may experience may be to their disadvantage because it may have a negative influence on their asylum claim.

Although, the asylum authorities take a sensitive approach to SGBV asylum claims, disregarding a victims/survivor's evidence due to inconsistencies should only be done if there is concrete evidence that their inconsistencies are due to dishonesty. A refugee woman's experience is her own experience. Not every victim/survivor of rape, for example, will have the same experience or react in the same way. The psychological effects of the incident might cause the victim/survivor to dramatize the experience or not recollect the specifics such as the memory of dates, times and ages. The psychological consequences of SGBV may also cause the victim/survivor to not trust any person in authority or males. The psychological consequences of SGBV often go untreated and result in the victim/survivor not attending school, engaging in the market or even participating in politics.¹⁵²

The consequence of SGBV is not limited to health and psychological consequences, it extends to socio-economic consequences for refugee women. Victims/ survivors of SGBV may withdraw themselves from society and spend a lot of time on their own. In many cases of SGBV, the community may blame the victim/survivor and the victim/survivor is isolated from the community and this isolation causes further emotional damage like shame and depression. Victims/ survivors of SGBV often do not marry or enter into romantic relationships because of the fear of the violence happening again or due to their distrust in men. The psychological consequences of SGBV may also have an influence on socio-economic conditions, the victim/survivor may withdraw herself from school or her job.¹⁵³ Refugee women who are a victim/survivor of SGBV may find it difficult to interact with men and find it difficult and traumatic to work with men and this may cause economic consequences. Unwanted pregnancies will also cause economic consequences for are a victim/survivor of SGBV. If the victim/survivor bears the child, she will be responsible to care for the child and this may cause her financial strain.¹⁵⁴ Refugee women are vulnerable to all the consequences of SGBV and they are not effectively protected against these consequences.

¹⁵² Sexual Violence Against Refugees: Guidelines on Prevention and Response Geneva 1995.

¹⁵³ Sida 'Preventing and Responding to Gender-Based Violence: Expressions and Strategies' (2015).

¹⁵⁴ Sida 'Preventing and Responding to Gender-Based Violence: Expressions and Strategies' (2015).

2.6. CONCLUSION

The Refugee Convention plays a crucial role in understanding the scope and meaning of a refugee. The Refugee Convention provides surrogate protection to refugee women from persecution. Gender-based and gender-specific persecution is defined as any act of GBV which inflicts any type of harm. The term persecution is a key aspect of the refugee definition and it has not been codified under international refugee law. This chapter has shown how the term persecution has evolved and developed extensively by the means of doctrines as well as case law. This chapter has also examined the international development of gender as a ground of persecution. In understanding the scope and meaning of SGBV, it is vital to conceptualise gender-based and sexual violence separately. This chapter has shown that gender has an important role to play when one is conceptualising SGBV and that the gender roles that society has created have had an influence on the difficulty of ending GBV. This chapter has also highlighted the various SGBV forms that refugee women experience and that SGBV is not limited to physical harm. These various forms are sexual violence, physical violence, emotional and psychological violence, harmful traditional practices and socio-economic violence. These various forms of SGBV are also used to justify refugee claims and can also be referred to as gender-specific persecution. This chapter concluded by examining the consequences of SGBV. It was indicated that there are hidden consequences of SGBV, and these consequences are often not treated. These consequences are socio-economic consequences, health consequences and psychological consequences. The understanding of the scope and meaning of a refugee and SGBV will now enable one to explore the whole refugee journey and further examine whether international instruments protect and assist refugee women throughout the refugee journey.

CHAPTER 3

AN ANALYSIS OF SGBV THROUGHOUT THE REFUGEE JOURNEY AND THE EFFECTIVENESS OF INTERNATIONAL INSTRUMENTS

3.1. INTRODUCTION

The refugee journey is one that will have a life-changing impact on a refugee woman's life. The purpose of this chapter is to outline the refugee journey and examine the protection that exists in relation to SGBV. Thus far the main focus of SGBV against refugee women, has been the perpetration of SGBV within war-conflict settings, thus within the country of origin.¹ However, SGBV exists throughout the refugee experience, of becoming a refugee and within the settings of being a refugee. To fully understand the refugee journey, the journey first needs to be conceptualised to understand that the refugee experience is not linear; it will not be a simple passage from a country of origin to the country of exile, and throughout the journey, SGBV may take place.

There are various reasons for a refugee woman to flee her country of origin. However, even though her motive to escape her country was not because of SGBV, it does not mean that she will not be exposed to SGBV during her refugee journey. In exploring the various reasons which motivate refugee women to flee their country of origin, Kunz's refugee theory will be used as a tool to explore this. This chapter will also focus on three fundamental notions, becoming a refugee woman, being a refugee woman and the medium which connects the two. In exploring the notion of becoming a refugee woman, the critical components within the definition of a refugee according to the Refugee Convention will be used to illustrate the journey of becoming a refugee. In doing so, the SGBV that refugee women experience throughout this journey will also be examined with reference to international instruments and case law. In exploring the notion of being a refugee, the focus is on the SGBV that exists in intimate partner relationships when in the host country as well as the SGBV that exists within refugee camps. The medium that connects becoming and being a refugee is an essential period of the refugee journey that is often not explored. In exploring this part of the journey, two

¹ UNHR SGBV prevention and response training package available at: <https://www.unhcr.org/583577ed4.pdf> (accessed 21 August 2020).

aspects will be examined, the exploitation and trafficking of refugee women. To conclude, the chapter analysis and reflection of the chapter will take place.

3.2. CONCEPTUALISING A WOMAN REFUGEE'S JOURNEY

The journey that a refugee woman will experience is not a simple passage from a country of origin to the country of exile. During the journey, there might be several stops in different countries before reaching the country of exile, and in each country, refugee women are exposed and vulnerable to SGBV. When studies of refugees are conducted, the research usually focuses on either the beginning of the refugee journey or the end of the journey. The medium that connects the beginning of the refugee journey and the end of the journey (this medium is usually referred to as being in transit) is disregarded, or it is forgotten.²

Kunz's refugee theory can be used to conceptualise the foundation of a refugee woman's journey, the motives which influence refugee women to flee their origin.³ Kunz first referred to two kinetic types, the anticipatory refugee movement and acute refugee movement.⁴ The anticipatory refugee movement was defined as a movement by a refugee who senses danger early and flees their country before the crisis occurs. They flee with their family and with their resources intact and have reasonably prepared for their new life. Whereas the acute refugee movement is defined as the fleeing of a country without prior notice and preparation, the main focus during this movement is surviving the disaster zone.⁵ Kunz later expanded the refugee theory, and he defined the concepts of majority-identified, event-related and self-alienated refugees. Majority-identified refugees were defined as refugees who oppose social and political events in their home country and flee their homelands. Whereas, event-related refugees were defined as the refugees who must leave because of discrimination against the particular group to which they belong. Self-alienated refugees were defined as those who flee their country of origin due to personal reasons.⁶

² Benezet G & Zetter R 'Searching for Directions: Conceptual and Methodological Challenges in Researching Refugee Journeys' (2015) 28 *Journal of Refugee Studies* at 297.

³ Kunz refugee theory is also referred to as Kunz's Kinetic Model of Refugee Theory.

⁴ Kunz EF 'The refugee in flight: Kinetic models and forms of displacement'(1973) 7 *International Migration Review* at 125-127.

⁵ Kunz EF 'Exile and resettlement: Refugee theory' (1981) 15 *International Migration Review* 42-51.

⁶ Kunz EF 'Exile and resettlement: Refugee theory' (1981) at 42-51.

Kunz's refugee theory is useful in understanding that not all refugee women will have the same experience; the refugee experience is not one-dimensional. There are various reasons why a refugee woman will flee her country, the cause might not be linked to SGBV, but it does not mean that she will not be exposed to SGBV during any stage of her refugee journey. The study of the refugee journey is important to make the international community aware of the dangers such as human smuggling and trafficking that refugee women face during the medium that connects the beginning of the refugee journey and the end of the journey.⁷ A refugee woman will always remember her refugee journey because it is a life-changing experience.⁸ Every refugee woman will have their own unique experience. However, the fear of SGBV will always be a factor. It is essential to understand the lives of refugee women and the challenges that she faces on her way and upon arrival into her new life.⁹ The journey is challenging; it will have a psychosocial impact on a refugee woman.¹⁰ The new life that she emerges into will be filled with many cultural and structural differences. She will need to adjust to her new reality and deal with any issues of trust and trauma whilst adapting to her society.¹¹

As stated, the refugee journey is not linear; a refugee woman will face different challenges compared to the difficulties that a refugee man will face. Asymmetrical power relations and inequalities have an influence on the movement and safety of refugee women throughout the journey.¹² When a refugee woman receives refugee status, the refugee status does not protect her from SGBV. She may be exposed to SGBV in many ways and from various perpetrators. The experience of being a refugee within a new country may be deep-rooted in SGBV. SGBV is deep-rooted in a refugee woman's journey and her experience of becoming and being a refugee.

⁷ Almustafa M *Refugees from Syria caught between war and borders: A journey towards protection* (published thesis, Wilfrid Laurier University, 2019) at 6.

⁸ Almustafa M *Refugees from Syria caught between war and borders: A journey towards protection* (2019) at 94.

⁹ Almustafa M *Refugees from Syria caught between war and borders: A journey towards protection* (2019) at 101.

¹⁰ Benezet G & Zetter R 'Searching for Directions: Conceptual and Methodological Challenges in Researching Refugee Journeys' (2015) at 298.

¹¹ Benezet G & Zetter R 'Searching for Directions: Conceptual and Methodological Challenges in Researching Refugee Journeys' (2015) at 298.

¹² Almustafa M *Refugees from Syria caught between war and borders: A journey towards protection* (2019) at 47-48.

3.3. BECOMING A REFUGEE WOMAN

The refugee journey begins in the refugee woman's country of origin. The journey begins with a dangerous present toward an uncertain future. The dangerous present for many refugee women is one that is filled with sexual and physical violence and escaping that present may be difficult. There are millions of women who flee their country of origin, many of these women flee their country because of the SGBV that they experience within their country of origin.¹³ The protection afforded against SGBV, in their country of origin, and by the international community will be explored.

The definition of a refugee found in the Refugee Convention is divided into four components.¹⁴ First, the refugee must experience a well-founded fear of persecution. Secondly, this fear must be for reasons of race, religion, nationality, membership of a particular social group or political opinion. Thirdly, the refugee must have fled outside of the country of her or his nationality/habitual residence.¹⁵ And lastly, the refugee is unable or unwilling to avail herself or himself of the protection of that country. These components can further be divided into different elements. Although all of these components are important in relation to SGBV, three of these components in relation to gender-related persecution will be explored.¹⁶

UNIVERSITY of the
WESTERN CAPE

¹³ According to UNHCR, at least 79.5 million people around the world have been forced to flee their country of origin. Among them are nearly 26 million refugees, around half of whom are under the age of 18. UNHCR 'Figures at Glance' available at: <https://www.unhcr.org/figures-at-a-glance.html> (accessed 3 October 2020).

¹⁴ Convention and Protocol Relating to the Status of Refugees, 1951 at 14.

¹⁵ Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A (2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (2002). (Hereafter referred to as Guidelines on International Protection (2002)).

¹⁶ The component of "is outside the country of his nationality...", refers to a person who has fit every stipulation but is still in their home country. They are referred to as an 'internally displaced person', rather than a refugee. Although these persons and this component is important to the refugee definition, for purposes of this thesis, it will not be discussed. What is a refugee? The definition of 'refugee' explained available at: <https://helprefugees.org/news/what-is-a-refugee-the-definition-of-refugee-explained/> (accessed: 21 August 2020).

3.3.1. GENDER-RELATED PERSECUTION

A woman is regarded as a sexual minority and may face persecution in her country of origin.¹⁷ To be granted refugee status, there must be a well-founded fear of persecution, or there needs to be the existence of a real risk of persecution and the absence of protection by the state.¹⁸ Domestic violence, rape, honour-related violence, being a member of a particular social group (PSG) and forced marriage is regarded as gender-related persecution.¹⁹ There are various forms of harm that are used against women that may constitute severe harm and, if combined with a failure of state protection, it may be regarded as persecution. In examining gender-related persecution, the components of a well-founded fear of persecution, belonging to a PSG and the absence of state protection will be explored.

3.3.2. WELL-FOUNDED FEAR

A refugee woman may have experienced gender-related persecution, but for her to be recognised as a refugee, there are specific requirements that need to be met. The general legal principle is that if a woman believes that she is experiencing persecution and she wants to submit a claim for refugee status, the burden of proof will lie upon her to prove that she has/is experiencing persecution.²⁰ The “well-founded fear of being persecuted” is a crucial component of the refugee definition. The well-founded element is evaluated objectively. The element of fear is subjectively assessed, and the cause of the fear is taken into consideration when determining whether the well-founded fear exists.²¹ Both elements are taken into account when determining if the applicant’s claim has met the criteria for refugee status.

¹⁷ Kelly N “Gender-Related Persecution: Assessing the Asylum Claims of Women” (1993) 26 *Cornell International Law Journal* note 52 at 636.

¹⁸ Article 1A (2) of the Refugee Convention.

¹⁹ Kelly N “Gender-Related Persecution: Assessing the Asylum Claims of Women” (1993) at 631-632.

²⁰ Guidelines on International Protection (2002).

²¹ UNHRC, 1992. In the case *R v Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)*, the applicants were six Tamils who were nationals of Sri Lanka. They applied for asylum in the United Kingdom under art 1(A)(2) of the Convention and Protocol relating to the Status of Refugees. Which was incorporated into United Kingdom law by the Statement of Changes in Immigration Rules made by the Secretary of State in 1983, the term 'refugee' applied to any person who 'owing to well-founded fear' of being persecuted for such reasons as his race, religion, nationality or political opinion was unwilling to return to the country of his nationality. The Secretary of State refused the applications

The standard of proof relating to well-founded fear is applied differently by States. For example, in Canada, when evaluating a well-founded fear of persecution, the requirement is met if there is a “reasonable” chance of persecution.²² Whereas, Australia requires that there must be “real chance” of persecution in order for the requirement to be met.²³ The element of fear is the prevalent motive for a refugee woman to seek refugee status. Her opinions and feelings will be under evaluation when the authorities evaluate her application. The UNHCR has stressed that when assessing whether an applicant meets the criteria for refugee status, the criteria should be applied in the spirit of justice and understanding.²⁴ It was also stressed that when applying the criteria, the authorities should not be influenced by the personal consideration that the applicant might be an undeserving case.²⁵

When a claimant seeks refugee protection under the Convention, she is not only required to meet the standards of a well-founded fear of persecution or prove past events. She must also show that if protection is not given, she will be at risk in the future.²⁶ The authorities, when evaluating the claim for refugee status, will assess whether the applicant is credible. The

on the grounds that on the facts known to him the applicants had no reason to fear persecution if they returned to Sri Lanka. The applicants then applied for judicial review of the Secretary of State's decision. The judge dismissed the applications. On appeal the Court of Appeal quashed the Secretary of State's decisions on the ground that he had misinterpreted the expression 'well-founded fear'. It was held that it was misinterpreted because an applicant for refugee status had merely to establish that he had what appeared to him to be a well-founded fear of persecution. The Secretary of State appealed. The requirement in Article 1(A)(2) of the convention that an applicant for refugee status had to have a 'well-founded' fear of persecution if he was returned to his own country meant that there had to be demonstrated a reasonable degree of likelihood that he would be so persecuted, and in deciding whether the applicant had made out his claim that his fear of persecution was well founded the Secretary of State could take into account facts and circumstances known to him or established to his satisfaction but possibly unknown to the applicant in order to determine whether the applicant's fear was objectively justified. Since the Secretary of State had had before him information which indicated that there had been no persecution of Tamils generally or any particular group of Tamils or the applicants in Sri Lanka, he had been entitled to refuse the applications on the ground that there existed no real risk of persecution. The appeals were allowed. *R v Secretary of State for the Home Department, Ex parte Sivakumaran and Conjoined Appeals (UN High Commissioner for Refugees Intervening)* (1988).

²² *Canada (Attorney General) v Ward* (1993).

²³ *Chan v Minister for Immigration and Ethnic Affairs* (1989).

²⁴ UNHRC, 1992.

²⁵ UNHRC, 1992.

²⁶ UNHCR, 2002.

personal and family background will be considered, and it will be assessed whether she is a member of a particular racial, religious, national, social or political group.²⁷ However, the authorities will first refer to the general human rights record of the applicant's country of origin.²⁸ The human rights information enables the authorities to establish a presumption of risk of harm and compare it to the evidence and testimony given by the applicant.²⁹ When evaluating an applicant's claim, the authorities will also refer to experiences of friends or relatives or other persons belonging to the same race or social group, which can indicate that the applicant's fear of being persecuted is well-founded.³⁰

3.3.3. MEMBERSHIP OF PARTICULAR SOCIAL GROUP (PSG)

A refugee woman may be at risk of gender persecution because she is a member of a PSG. In order for one to understand the application of being a member of a PSG, the conceptualisation of a PSG needs to be done. Once a PSG is conceptualised, the application of a PSG should be examined.

3.3.3.1. DEFINING A PSG

PSG is one of the five categories used to claim refugee status; the interpretation of PSG is important because it dictates who will be granted asylum. The PSG category aims to protect specific categories of refugees from various forms of harm. The definition of the PSG element has been interpreted inversely in different jurisdictions. However, it has been interpreted by courts in a manner that has allowed it to expand and evolve to enable a variety of different classes susceptible to persecution.³¹ The term PSG should be read in an evolutionary manner because societies and international human rights norms are continually evolving.³² Refugee

²⁷ UNHCR, 2002.

²⁸ Hathaway JC *The Law of Refugee Status* (1991) Toronto: Butterworths at 93-95.

²⁹ Hathaway JC *The Law of Refugee Status* (1991) at 93-95.

³⁰ Hathaway JC *The Law of Refugee Status* (1991) at 93-95.

³¹ Goodwin-Gill G *The refugee in international law* 2 ed (1996) Clarendon Press at 43.

³² UNCHR Guidelines on International Protection: "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, 7 May 2002. (Hereafter referred to as UNHCR PSG Guidelines).

women may be referred to as a members of a PSG if there is a shared characteristic which is fundamental to their identity as well as a similar backgrounds, habits and social status.³³

The definition of PSG is not present in the Refugee Convention. The lack of a precise definition raises conflict with regards to the interpretation of a PSG. How narrowly or broadly PSG is defined and interpreted can result in inconsistencies in asylum claim decisions.³⁴ If one has to interpret PSG too broadly, it would make the other listed grounds redundant and go against the intention of the drafters of the Refugee Convention. It would undermine the balance between protection and limited state obligations.³⁵ And if one has to interpret it too narrowly, it could also go against the intention of the drafters. A narrow definition could result in a rejection of claims of female applicants who require protection.³⁶ The Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (Refugee Handbook), defined a PSG as:

Persons of similar background, habits or social status. A claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality.³⁷

Although this definition gives one guidance of what constitutes a PSG, it is not sufficient. Defining the categories of PSG differs in different States. Various States have landmark cases that have helped to develop the definition and interpretation of PSG. *Ward v Attorney General of Canada* is a landmark Canadian case that has aided the understanding of membership of a PSG in Canada and other jurisdictions.³⁸ The *Ward* case has remained significant because it has provided an interpretive path and clarification on identifying fear of persecution, the lack of state protection, and on theorising what constitutes a PSG.³⁹ Canada has considered the

³³ UNHCR PSG Guidelines.

³⁴ Paraketsova L 'Why Guidance from the Supreme Court is Required in Redefining the Particular Social Group Definition in Refugee Law' (2018) 51 *University of Michigan Journal of Law Reform* at 448-449.

³⁵ Hathaway JC 'Why Refugee Law Still Matters' (2007) 8 *Melbourne J. Int'l L* at 396.

³⁶ Hathaway JC 'Why Refugee Law Still Matters' (2007) at 396.

³⁷ Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees (1982).

³⁸ The United States Board of Immigration Appeals (BIA) interpretation of PSG has been adopted and cited by many States. *The Matter of Acosta* is a significant case and the approach taken by the BIA was approved and followed in the *Ward* case. *Matter of Acosta* (1985).

³⁹ *Canada v Ward*, (1993).

PSG category in many cases, and before the *Ward* case, it was considered in *MEI v Mayers*. In the *Mayers* case, a woman from Trinidad and Tobago had been abused and raped by her husband. The court held that ‘Trinidadian women subject to wife abuse’ was a particular social group.⁴⁰ The court further defined a PSG as:

- (1) a natural or non-natural group of persons with
- (2) similar shared background, habits, social status, political outlook, education, values, aspirations, history, economic activity or interests, often interests contrary to those of the prevailing government, and
- (3) sharing basic, innate, unalterable characteristics, consciousness and solidarity, or
- (4) sharing a temporary but voluntary status, with the purpose of their association being so fundamental to their human dignity that they should not be required to alter it.⁴¹

This definition was later expanded in the *Ward* case with the use of the immutable characteristic test.⁴² The Supreme court described three possible categories of PSG:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) 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) groups associated by a former voluntary status, unalterable due to its historical permanence.⁴³

By expanding the definition of PSG as seen in the Canadian cases, it has allowed diverse groups of women to have their asylum claims approved. The immutable characteristic test has been used in different jurisdictions, such as the United States and the United Kingdom. Many States have cited the *Ward* case. It was used in reference in the United Kingdom’s significant case *Islam (AP) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, Ex Parte Shah (AP)*. Lords Steyn and Hoffman referred to the *Ward* characteristic analysis, and they relied heavily on it in their judgment.⁴⁴ The Lords also agreed with La Forest J in the *Ward* case when he stated that a PSG could include individuals fearing persecution on

⁴⁰ *Canada (MEI) v Marcel Mayers, FC (CA)* (1992).

⁴¹ *Canada (MEI) v Marcel Mayers, FC (CA)* (1993).

⁴² In the *Acosta* matter, the Board set the requirement that members of a particular social group share a common, immutable characteristic. *Matter of Acosta* (1985).

⁴³ *Canada v Ward*, (1993).

⁴⁴ *Islam (A.P.) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)* (1999).

bases such as gender, linguistic background and sexual orientation.⁴⁵ Defining and interpreting PSG has been discussed in detail in many common law state cases. States have the freedom to adopt their interpretation of PSG as long as it does not deviate from the intention of the Refugee Convention, and it must, in effect, protect women asylum-seekers from harsh and inhumane treatment.

3.3.3.2. APPLYING THE REFUGEE CONVENTION TO THE PARTICULAR SOCIAL GROUP CATEGORY.

Although a PSG is a vital component of the refugee definition, the recognition of a PSG does not necessarily establish refugee status. The female claimant would still be required to prove a well-founded fear of persecution based on membership in the group.⁴⁶ Two social groups, sexual orientation and domestic violence are explored below. It must be noted that a PSG will always be examined in light of the circumstances of the specific society, as well as the actions of the government and non-state actors.⁴⁷

a) DOMESTIC VIOLENCE

Domestic violence is one of the most common forms of SGBV that refugee women will experience. In gender-related persecution claims domestic violence has been consistently recognised as a form of persecution. Domestic violence claims have been increasing in many States, and courts have shown a willingness to accept domestic violence claims; however, the reasoning and application differ across jurisdictions. The most effective way to understand the application is to refer to case law.

⁴⁵ *Islam (A.P.) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P)* (1999).

With reference to the *Acosta* standard, cases by the BIA have recognised that a PSG could be based on gender, tribal and clan membership, sexual orientation, family and past experiences. *Lwin v INS* (1998) ; *Grebemichael v INS* (1st Cir. 1993); *Iliev v INS* (7th Cir. 1997).

⁴⁶ Aleinikoff TA ‘ “Membership in a particular social group”: Analysis and proposed conclusions Background Paper for “Track Two” of the Global Consultations’ available at: <https://www.unhcr.org/3b83b1c54.pdf> (accessed 29 July 2020).

⁴⁷ Aleinikoff TA “Membership in a particular social group”: Analysis and proposed conclusions Background Paper for “Track Two” of the Global Consultations’.

In the case *Narvaez v Canada*, the court cited that that woman facing domestic violence were recognised as a PSG for purposes of an asylum claim based on gender persecution.⁴⁸ The claimant had experienced violence by her husband and feared that if she returned to her country of origin, Ecuador that she would continue to experience domestic violence. The claimant also stated that the police were unable to protect her against the violence effectively.⁴⁹ The court referred to the *Ward* case as well as the Chairperson's Guidelines⁵⁰ on Women Refugee Claimants Fearing Gender-Related Persecution and stated that women in Ecuador subject to domestic violence belong to a particular social group.⁵¹

The court also referred to the past experience of the claimant. It stated that the lack of protection afforded to the claimant and similarly situated women by the state is evidence that there is a lack of protection available. The court also referred to the claimant's marital status and stated that the fact that the claimant was divorced does not affect the level of state protection, and the application was approved.⁵² The decision taken by the court in the *Narvaez v Canada* case is significant. It is often alleged that if a woman in an abusive relationship divorces her spouse, she will no longer experience domestic violence because there will be more alternative protective measures available to her. However, this is not a circumstance in many cases.

In most cases, refugee women who experienced domestic violence by their partners and who have divorced them, fear that if they return to their country of origin that their former spouse will pursue them.⁵³ This case is also significant because it demonstrates that the definition of this social group includes divorced women. Courts have accepted that groups defined as married women, women who express opposition to abuse, women married to abusive husbands and divorced women qualify as a domestic violence PSG.⁵⁴

⁴⁸ *Narvaez v Canada* (1995) at 3-7.

⁴⁹ *Narvaez v Canada* (1995) at 3-7.

⁵⁰ Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution 1996 available at: <https://irb-cisr.gc.ca/en/legal-policy/policies/Pages/GuideDir04.aspx> (accessed 3 October 2020).

⁵¹ *Narvaez v Canada* (1995) at 3-7.

⁵² *Narvaez v Canada* (1995) at 3-7.

⁵³ *CRDD T92-09592* (1993).

⁵⁴ Aleinikoff TA "Membership in a particular social group": Analysis and proposed conclusions Background Paper for "Track Two" of the Global Consultations'.

Defining this social group has been difficult for adjudicators because domestic violence is not limited to women who are married. In determining whether an applicant qualifies as this social group, courts have cited that the question is not whether all members are subject to the risk of domestic violence but to consider the risk based on the applicant's risk and fear of persecution.⁵⁵ Social norms have also made it difficult to define this social group. It is alleged that domestic violence is limited to spouse abuse and that women experience domestic violence by their husbands not because they are women, but because of the existing marital relationship.⁵⁶ The analysis of various case law from different jurisdictions has indicated that in considering the risk of the applicant, we should not stigmatise the persecutor. We should also not insist that he inflicts violence upon his wife because she is his spouse. It should be instead argued that domestic violence continues to take place because the state does not take appropriate action to prevent it. Reference should also be made to the patterns that exist. One needs to realise that the domestic violence abuse suffered by the applicants has occurred because she is a woman, and her gender is the factor that puts her at risk.

b) SEXUAL ORIENTATION

Many refugee women have experienced SGBV because of their sexual orientation. Sexual orientation is unchangeable, and it is fundamental to human dignity.⁵⁷ Seventy-two countries have criminalised same-sex sexual activities.⁵⁸ LGBTQI+ persons are still at risk of persecution, even in countries that have not criminalised same-sex sexual activities. In many jurisdictions, homosexuality has been recognised as a PSG within the meaning of the Refugee

⁵⁵ *Islam (A.P.) v Secretary of State for the Home Department; R v Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P)* (1999).

⁵⁶ Aleinikoff TA “Membership in a particular social group”: Analysis and proposed conclusions Background Paper for “Track Two” of the Global Consultations’.

⁵⁷ As stated, sexual orientation is fundamental to human dignity and change should not be compelled. The UNHCR Guidelines on ‘Membership of a particular social group’ makes mention of the unchangeable characteristic. One should note that sexual orientation is a sensitive topic. Although it is argued that sexual orientation is unchangeable, authors such as Christine Kaestle have argued that sexual orientation is a choice, and that sexuality is fluid. Cassella C ‘Here's More Evidence Sexual Orientation Is Fluid Right Into Our Adult Years’ available at: <https://www.sciencealert.com/sexual-orientation-continues-to-change-right-through-our-teens-and-into-adulthood> (accessed 2 October 2020).

⁵⁸ Dusten M & Held N ‘In or out? A queer intersectional approach to ‘Particular Social Group’ membership and credibility in SOGI asylum claims in Germany and the UK’ (2018) *GenIUS - Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere* at 1.

Convention.⁵⁹ If the protected characteristics or the social perception test were applied, the outcome would be that gays and lesbians, as well as the whole LGBTQI+ community, could constitute a PSG. In order for a claimant to meet the requirement of this social group, courts have required the claimants to prove the “nexus” requirement.⁶⁰ The claimant must be able to prove that the abuse she has/is experiencing is because of her sexual orientation and/or the state has failed to protect her because of her sexual orientation.⁶¹

In the case of *Applicant v State Secretary for Security and Justice*, two Albanian women who were in a relationship, based their asylum applications on their sexual orientation.⁶² They stated that due to their sexual orientation, they could not return to their country of origin. In determining whether the applicants met the nexus requirements, the senior immigration judges had to consider the facts and determine whether the country of origin can be a ‘safe country of origin’. In determining whether a country of origin is safe, it is required by courts to ensure that there is no persecution as described by the Refugee Convention and any other conventions relevant to their jurisdiction. In assessing whether the country of origin is safe, there must be a factual and legal assessment. In the case, the court referred to the Refugee Convention and Article 3 of the European Convention on Human Rights (Article 3 ECHR). The court found that there is legislation in place which prohibits persecution based on sexual orientation and that there is an existing system in place in practice which offers protection against any breaches of the legislation.⁶³ In cases like this, where a claimant fails to meet the nexus requirement, they may be required to return to their country of origin immediately.

In the case of *MK (Lesbians) Albania v Secretary of State for the Home Department*, the applicant was a lesbian. She feared that if she returned to her country of origin Albania, her family would either force her to marry a man or if returned she would be persecuted by both

⁵⁹ *Karouni v Gonzales* (9th Cir. 2005), *Pitcherskaia v INS* (9th Cir.1997).

⁶⁰ Aleinikoff TA “Membership in a particular social group”: Analysis and proposed conclusions Background Paper for “Track Two” of the Global Consultations’.

Claimants must be able to show a nexus between the persecution and one of the protected grounds to qualify as a refugee, this is referred to as the nexus requirement.

⁶¹ *Applicant v State Secretary for Security and Justice* (2016) at 3.

⁶² *Applicant v State Secretary for Security and Justice* (2016).

⁶³ *Applicant v State Secretary for Security and Justice* (2016) at 3.

her family and the community for being gay.⁶⁴ To support her claim to meet the requirement that there is a lack of state protection, she stated that even though homosexuality is legal in Albania. However, culturally it is unacceptable and that the authorities would not help her, and she would suffer discrimination and harassment. The court found that there was no evidence to support the applicant's claim that homosexuals in Albania were at risk of persecution and that women in Albania were not a PSG.⁶⁵ It was further stated that the applicant did not face persecution or discrimination by the state, but it was rather a culturally and social problem. The court also held that the applicant could return to her country of origin and could freely seek any occupation available and that higher education is available to women. It was also held that there are women's groups that could help the applicant to discreetly return to her country so that her family would not know that she had returned.⁶⁶

This decision is an example of the challenges that women face when claiming asylum on the grounds of sexual orientation.⁶⁷ Courts often challenge sexual orientation claims, and it often suggested that they relocate within their country and live discreetly.⁶⁸ The credibility of being a member of the PSG is continually challenged, and their claims are unsuccessful because of the one-dimensional approach taken in these cases. The one-dimensional approach refers to a narrow understanding of sexual orientation, ignoring the other aspects of the claimant's identity and assuming that the claimants are only sexual or gendered beings.⁶⁹ As seen in the *MK (Lesbians) Albania v Secretary of State for the Home Department*, a full understanding of an LGBTQI+ asylum-seekers' experiences is not taken into account.⁷⁰ If the decision-makers do not take into account the claimant's entire experience, they will be unable to make a proper assessment of the circumstances of each case and give a reasoned decision in the case.⁷¹

⁶⁴ *MK (Lesbians) Albania v Secretary of State for the Home Department* (2009) at 3-4.

⁶⁵ *MK (Lesbians) Albania v Secretary of State for the Home Department*, CG (2009) at 73.

⁶⁶ *MK (Lesbians) Albania v Secretary of State for the Home Department*, CG (2009) at 2.

⁶⁷ It should be noted that these challenges are not limited to women, it extends to the whole LGBTQI+ persons.

⁶⁸ Dusten M & Held N 'In or out? A queer intersectional approach to 'Particular Social Group' membership and credibility in SOGI asylum claims in Germany and the UK' (2018) at 6-7.

⁶⁹ Dusten M & Held N 'In or out? A queer intersectional approach to 'Particular Social Group' membership and credibility in SOGI asylum claims in Germany and the UK' (2018) at 1.

⁷⁰ *MK (Lesbians) Albania v Secretary of State for the Home Department*, CG (2009).

⁷¹ Dusten M & Held N 'In or out? A queer intersectional approach to 'Particular Social Group' membership and credibility in SOGI asylum claims in Germany and the UK' (2018) at 2.

The application taken by courts in determining whether a refugee woman qualifies as a member of a PSG will differ depending on the social group as illustrated by case law. Each social group will be subjected to the requirements and methods taken by courts, and these methods and requirements will differ depending on the state. However, in all instances, the court will take into consideration the state protection that is available to the claimant in their country of origin.

3.3.4. STATE PROTECTION

There is the requirement that a well-founded fear of ‘serious harm’ needs to be established for the act to be regarded as persecution, it is also required to prove that there is a failure upon the state to provide protection.⁷² A failure of state protection occurs in situations where the serious harm is perpetrated by authorities or by associated organisations and if a law, policy or practice may be inherently persecutory. State protection is not limited to legislation; a failure of state protection also occurs in situations where the authorities are unwilling to give adequate protection or unable to provide sufficient protection.⁷³ In cases where there is a lack of police response and failure upon the relevant authorities to investigate, prosecute or punish the perpetrator, it may be regarded as a failure of state protection.⁷⁴

The most effective way to understand the failure of state protection is to refer to case law. In the case of *Patron Pedrosa v Minister for Citizenship and Immigration*, the applicant’s claim was based on a fear of persecution on the grounds of gender violence at the hands of her perpetrator who was the mayor of the applicant’s home town.⁷⁵ He was not the mayor at the time of the rape, and when he became mayor, the applicant faced further threats from him.⁷⁶

⁷² Guidelines on International Protection (2002).

The failure of state protection is not limited to these situations.

⁷³ UNHCR Geneva Interpreting Article 1 of the 1951 Convention (2001).

⁷⁴ UNHCR Geneva Interpreting Article 1 of the 1951 Convention (2001).

⁷⁵ *Patron Pedrosa v Minister for Citizenship and Immigration* (2009) at 2-3.

⁷⁶ After the rape had occurred the applicant had attempted to report the rape at the police station but when the perpetrator's name was mentioned to the police officer interviewing her, he proceeded to consult with another officer and, at the instructions of the other officer, the interview was terminated. After filing the police report the applicant had received threats and her family was threatened. When the applicant consulted a lawyer for help, the lawyer informed her that there was no police report and the lawyer was unable to locate the hospital's medical report. A few months after the rape, the applicant had received a threat from her perpetrator, he informed her that she was not smart to pursue the charges and that he would be in touch with her and he further stated that and that

The applicant feared that her perpetrator wanted to rape her again, and the applicant decided to seek refugee status in Canada.⁷⁷ The Immigration and Refugee Board (IRB) first rejected the applicant's claim because a member of the IRB found that the applicant was not credible in recounting the core events and did not believe that the claimant had filed a complaint with the police or had been examined at the hospital. The facts in issue concerned an alleged date rape and whether the applicant sought state protection.⁷⁸ The applicant applied for judicial review of the rejection. In evaluating the IRB decision, the court found there was a failure upon the IRB to make their credibility findings on a reasonable and accurate basis, and application for judicial review was granted.⁷⁹ The *Patron Pedrosa* case referred to the standard of review for state protection. In determining whether state protection was reasonable, a court may take a contextual approach and factors will be taken into consideration and some of these factors include but are not limited to:

- a) The nature of the human rights violation;
- b) The profile of the alleged human rights abuser;
- c) The efforts that the victim took to seek protection from authorities;
- d) The response of the authorities to requests for their assistance, and
- e) The available documentary evidence.⁸⁰

However, the approaches taken by States in determining whether the state protection was reasonable will differ based on their legal authorities.⁸¹ Nonetheless, states are required to

he wanted to renew the night of the rape. *Patron Pedrosa v Minister for Citizenship and Immigration* (2009) at 2-3.

⁷⁷ *Patron Pedrosa v Minister for Citizenship and Immigration* (2009) at 2-3.

⁷⁸ *Patron Pedrosa v Minister for Citizenship and Immigration* (2009).

⁷⁹ The court found that the IRB failed to effectively evaluate the consistency of the arguments and evidence made by the Applicant. The IRB is required to make its credibility findings on a reasonable and accurate basis. As stated there was a failure by the IRB to make their credibility findings on a reasonable and accurate basis. The IRB did not discuss the threats to the Applicant's family members which are consistent with the Applicant's story, and the failure of the police to take any action. The IRB failed to refer to the critical evidence relied upon by the Applicant to show that state protection was not available to her in these particular circumstances *Patron Pedrosa v Minister for Citizenship and Immigration* (2009) at 7-9.

⁸⁰ The Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: Update issued by the Chairperson pursuant to section 65(3) of the Immigration Act (1996).

⁸¹ Immigration Board of Canada 'State Protection' available at: <https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef06.aspx> (accessed 11 September 2020).

ensure that they do not act against the principle of non-refoulement.⁸² The principle of non-refoulement protects all refugees. The principle prescribes that no refugee should be returned to a country where he or she is likely to face persecution or any form of torture.⁸³ This further places an obligation on States to ensure that when they are making a decision, all the facts and circumstances of each applicant is considered before a final decision on the case is made.

However, there is an onus on the claimant to prove that state protection is absent.⁸⁴ The claimant is required to provide evidence to show that it was reasonable for her not to seek state protection or demonstrate that ineffectiveness.⁸⁵ In the case, *Peralta, Gloria Del Carmen v MCI*, the Canadian Trial Division stated that a claimant is not required to show that he or she has exhausted all avenues of protection but to show that reasonable steps were taken.⁸⁶ The court further stated that in determining if the claimant took reasonable steps, the Board must consider the claimant's circumstances and characteristics as well as previous efforts to access state protection.⁸⁷

In the case of *Patron Pedrosa*, the court held that the IRB failed to consider substantial evidence concerning state protection.⁸⁸ It was further argued that the applicant effectively

⁸² Non-refoulement is codified in Article 33 of the Refugee Convention. The non-refoulement principle is applicable to situations where refugees are already in the host state's territory or at its port of entry. Goodwin-Gill G *The refugee in international law* 2 ed (1996) at 201-202.

⁸³ Goodwin-Gill G *The refugee in international law* 2 ed (1996) at 201.

⁸⁴ In the case *Aurelien, Eyon v M.C.I.* (2013) the Court referred to the legal burden that is imposed on claimants. The court stated that it is an error to place a legal burden of seeking state protection on a refugee claimant. There court further held that it is an evidentiary burden which, if met, displaces a legal presumption. It was further argued that an applicant does not need to seek state protection if there is evidence that indicates it would not reasonably have been forthcoming. *Aurelien, Eyon v M.C.I* (2013).

⁸⁵ *Peralta, Gloria Del Carmen v M.C.I.* (2002).

⁸⁶ The Trial Division emphasized that the claimant has to show that he or she has taken all steps reasonable in the circumstances, taking into account the context of the country of origin in general, the steps taken and the claimant's interactions with the authorities. *Peralta, Gloria Del Carmen v M.C.I* (2002).

⁸⁷ *Peralta, Gloria Del Carmen v M.C.I* (2002).

⁸⁸ The IRB did not discuss the 14-month efforts made by the Applicant and her family to follow up on the investigation by the police. The role of the applicant's lawyer in assisting was also ignored. The IRB further failed to discuss the threats to the applicant's family members which are consistent with the applicant's story and the failure of the police to take any action. *Patron Pedrosa v Minister for Citizenship and Immigration* (2009).

proved that state protection was not available to her in the circumstances.⁸⁹ In determining state protection, the failure by authorities to refer to critical evidence is evident in many cases. In the *Ndjavera, Eveline v MCI* case, the court stated that the Refugee Protection Division failed to adequately take into consideration the applicant's age, culture, background and prior experiences, as set out in the Gender Guidelines.⁹⁰ In the Canadian case of *Hindawi, Manal v MCI*, the Federal court stated that the IRB was unreasonable in stating that the applicant's fear was a mere subjective reluctance to engage the state, without exploring the applicant's particular circumstances.⁹¹ The failure of authorities to take into consideration factors that are detrimental to the claimant's asylum claim can have a negative impact on the claimant. If the authorities conclude that there is adequate protection afforded to the claimant in her country of origin, she may be returned to that country.⁹² It may result in the reoccurrence of SGBV inflicted on the claimant on return to her country of origin. In a research conducted by Nicole Acevedo and Adiel Kaplan, it was found that at least 138 refugees were killed after being deported from the United States between 2013 and 2019, the majority of these refugees were women.⁹³ Human Rights Watch also found that 200 El Salvadorian refugees were killed or sexually assaulted and tortured after the United States administration deported them to their country of origin.⁹⁴ International instruments do not effectively protect women in this regard. Although there is an obligation upon States to afford refugee women replacement protection

UNIVERSITY of the
WESTERN CAPE

⁸⁹ *Patron Pedrosa v Minister for Citizenship and Immigration* (2009) at 4.

⁹⁰ In the *Ndjavera, Eveline v M.C.I.* case, the applicant had testified that she attempted to seek assistance from the police and the Traditional Authority but it was unsuccessful. *Ndjavera, Eveline v M.C.I. (F.C., no. IMM-7018-12)*, Rennie, April 30, 2013; 2013 FC 452.

⁹¹ *Hindawi, Manal v M.C.I.* (2015).

⁹² Schultz J 'Understanding the 'internal protection alternative' (Part II)' available at <https://eumigrationlawblog.eu/understanding-the-internal-protection-alternative-part-ii/> (accessed 12 July 2020).

⁹³ Acevedo N & Kaplan A 'Hundreds deported from U.S. to El Salvador have been killed or abused, new report says' available at <https://www.nbcnews.com/news/latino/hundreds-deported-u-s-el-salvador-have-been-killed-or-n1126906> (accessed 12 July 2020).

⁹⁴ Acevedo N & Kaplan A 'Hundreds deported from U.S. to El Salvador have been killed or abused a, new report says' available at <https://www.nbcnews.com/news/latino/hundreds-deported-u-s-el-salvador-have-been-killed-or-n1126906> (accessed 12 July 2020).

as stated in the Refugee Convention, Articles 1A(2) para 2, 1C(5),⁹⁵ 1C(6),⁹⁶ and 1E,⁹⁷ all indicate that when there is no well-founded fear of persecution within the country of origin or another country where the claimant has a national connection, refugee status will not be granted.⁹⁸ As emphasised, courts must consider all the critical evidence concerning state protection in the country of origin. As this research has shown, the courts have the power to save a refugee woman's life. If a refugee is in fact at risk of persecution in her country of origin and the court fails to consider all the evidence, and the refugee woman is returned to her country of origin, she may be persecuted.

As illustrated with the use of case law, the assessment of whether the state- protection afforded to the refugee woman is sufficient and reasonable, can be difficult and complex. For example, if there is the possibility of protection somewhere in the country of origin of the refugee woman, the refugee woman, under certain conditions, might not be granted refugee status.⁹⁹ There is the requirement that there must be the absence of a domestic alternative for the refugee woman to be granted refugee status.¹⁰⁰ It can be asked whether it is reasonable for a refugee woman to relocate internationally when she has experienced gender-related persecution in her country of origin.

One can refer to human rights standards to answer whether it would be reasonable for a refugee woman to relocate internationally. In the case of *R. v Secretary of State for the Home Department and another, ex parte Robinson*, the court stated:

⁹⁵ Article 1C(5) states that refugee status may cease to apply to a refugee where the circumstances giving rise to his or her refugee status have ceased to exist (for instance, where there has been a relevant change in circumstances in the refugee's home country). Available at <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁹⁶ The ceased circumstances clauses, the impact of general political change on the refugee's fear or unwillingness to return (Article 1C(5-6)). Available at <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁹⁷ Article 1E applies to a person to who is excluded from being recognised as a refugee by the country in which he or she has taken residence. The same person may, however, also be excluded, if he or she submits an application in a third country. While the requirements for the application of Article 1 E are the same in both cases, the latter situation also requires the examination of possible bars to removal to the country of residence based on the principle of non-refoulement. Available at <http://www.unhcr.org/refworld/docid/3be01b964.html>.

⁹⁸ Schultz J 'Understanding the 'internal protection alternative' (Part II)'.
⁹⁹ Schultz J 'Understanding the 'internal protection alternative' (Part II)'.
¹⁰⁰ Schultz J 'Understanding the 'internal protection alternative' (Part II)'.
¹⁰⁰ Schultz J 'Understanding the 'internal protection alternative' (Part II)'.

In determining whether it would not be reasonable to expect the claimant to relocate internally, a decision-maker will have to consider all the circumstances of the case, against the backdrop that the issue is whether the claimant is entitled to the status of refugee. Various tests have been suggested. For example, . . . (d) if the quality of the internal protection fails to meet basic norms of civil, political and socio-economic human rights. So far as the last of these considerations are concerned, the preamble to the Convention shows that the contracting parties were concerned to uphold the principle that human beings should enjoy fundamental rights and freedoms without discrimination.¹⁰¹

This fundamental rights approach, unfortunately, has received little judicial attention.¹⁰² As stated by Hathaway, decision-makers may fear that ‘fundamental rights and freedoms’ is an unmanageably vague notion.¹⁰³ The fundamental rights and freedoms of refugee women are continually being infringed. The medium that connects the beginning of the refugee journey and the end of the journey is the period of the journey where a refugee woman is most vulnerable to SGBV.¹⁰⁴

3.4. THE MEDIUM OF A WOMAN REFUGEE'S JOURNEY

The medium of the refugee journey is the period of the journey, which is the most difficult to document and which is challenging to provide adequate protection for refugee women.¹⁰⁵ During transit refugee women remain vulnerable to various forms of SGBV, specifically

¹⁰¹ *R v Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthony Pillai Francis Robinson* (1997) at paragraph 18.

¹⁰² Hathaway JC & Foster M *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination* in *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* (2003) at 357-417.

¹⁰³ Hathaway JC & Foster M *Internal Protection/Relocation/Flight Alternative as an Aspect of Refugee Status Determination* (2003) at 357-417.

¹⁰⁴ Mallett R & Hagen-Zanker J ‘Journeys to Europe: The role of policy in migrant decision-making’ (2016) *ODI Insights* at 10-12.

¹⁰⁵ The medium of a woman refugee's journey refers to the journey from point of exit of country of origin to the point of arrival to host country. This period will be referred to as the “medium”.

Warren R ‘To escape sexual violence at home, female migrants must risk sexual violence on the way to Europe’ available at:

<https://www.washingtonpost.com/news/worldviews/wp/2017/07/06/to-escape-sexual-violence-at-home-female-migrants-must-risk-sexual-violence-on-the-way-to-europe/> (accessed 9 September 2020).

rape.¹⁰⁶ The perpetrators of the SGBV during the medium can range from security, to police officials and smugglers who want to exploit and traffic women.¹⁰⁷ Women encounter more challenges during this journey and become victims of SGBV due to the social norms and legal restrictions within a country of origin may influence the mobility of refugee women.¹⁰⁸ An example of the social norms and legal restrictions is the restriction or prohibition of independent female migration which exists in some countries such as the Arab Republic of Egypt.¹⁰⁹ This implies that women are dependent on the permission of their husbands, fathers or other male household members to apply for travel documents.

These restrictions and prohibitions increase irregular migration. Refugee women are forced to request the assistance of smugglers, and this increases a women's vulnerability to human trafficking.¹¹⁰ During the refugee journey refugee, women naturally assume the role of the primary caretakers for children and elderly family members.¹¹¹ This further supports the need for protection and support for refugee women against SGBV during transit. The journey to the host country may not be linear.¹¹² Refugee women may pass through other borders before reaching the country of destination.¹¹³ During this journey refugee, women are extremely vulnerable to extortion and exploitation as well as trafficking and slavery

3.4.1. EXPLOITATION OF REFUGEE WOMEN

Refugee women are highly vulnerable to being exploited during their migration journey or upon arriving in their country of destination. In practice, it may be difficult to distinguish

¹⁰⁶ Warren R 'To escape sexual violence at home, female migrants must risk sexual violence on the way to Europe'.

¹⁰⁷ Warren R 'To escape sexual violence at home, female migrants must risk sexual violence on the way to Europe'.

¹⁰⁸ Ghosh J 'Migration and gender empowerment: Recent trends and emerging issues' available at: https://www.researchgate.net/publication/46468462_Migration_and_Gender_Empowerment_Recent_Trends_and_Emerging_Issues (accessed 9 September 2020).

¹⁰⁹ Ghosh J 'Migration and gender empowerment: Recent trends and emerging issues'.

¹¹⁰ Ghosh J 'Migration and gender empowerment: Recent trends and emerging issues'.

¹¹¹ UN Women 'Women refugees and migrants' available at: <https://eca.unwomen.org/en/news/in-focus/women-refugees-and-migrants> (accessed 9 September 2020).

¹¹² Pickering S 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU' (2013) 27 *Journal of Refugee Studies* 3 at 340.

¹¹³ Pickering S 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU' (2013) at 341.

between situations in which a refugee woman is trafficked and situations in which a refugee woman is smuggled and subsequently exploited.¹¹⁴ It is also challenging to establish the links between smugglers and subsequent perpetrators of exploitation.¹¹⁵ The main reason for the complexity of distinguishing between these phenomena is due to the lack of harmonised understanding of the concept of exploitation.¹¹⁶ The term exploitation within the context of refugees is usually limited to situations of trafficking.¹¹⁷ The limitation makes it difficult for one to analyse how exploitation is to be understood and applied. A refugee woman may not be trafficked but can still be exploited. Unaccompanied refugee women are particularly vulnerable to exploitation, especially sexual exploitation.¹¹⁸ The term exploitation has been widely used when one refers to the refugee journey; however, there is no international legal definition of the term exploitation. The Trafficking in Persons Protocol can be used to understand the term exploitation broadly.

The Trafficking in Persons Protocol provides a list of examples of exploitative purposes of trafficking as:

at a minimum, the exploitation of the prostitution of others, or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude, or the removal of organs.¹¹⁹

¹¹⁴ Pickering S 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU' (2013) at 341.

¹¹⁵ Touzenis K 'Trafficking in Human Beings: Human Rights and transnational criminal law, developments and law in practice' (2010) *UNESCO* at 140.

¹¹⁶ Touzenis K 'Trafficking in Human Beings: Human Rights and transnational criminal law, developments and law in practice' (2010) at 140.

¹¹⁷ Global Migration Group 'Exploitation and abuse of international migrants, particularly those in an irregular situation: A Human Rights Approach' available at: <https://www.unodc.org/documents/humantrafficking/2013/> (accessed 9 September 2020) at 5.

¹¹⁸ It should be noted that unaccompanied refugee women (refugee women who are travelling alone) are targeted by predators. Travelling alone increases a refugee woman's vulnerability to SGBV. A refugee woman's vulnerability to SGBV heightens if she is travelling alone, has a disability or if she is a single mother travelling with her children (it is not limited to these factors). It should be further noted that these victims/survivors of SGBV should not be blamed for being unaccompanied whilst traveling to her country of destination. The perpetrator should be held responsible for his actions. Global Migration Group 'Exploitation and abuse of international migrants, particularly those in an irregular situation: A Human Rights Approach' at 5-6.

¹¹⁹ Trafficking in Persons Protocol supplementing the United Nations Transnational Organized Crime Convention, Article 3(a).

The examples in the Trafficking in Persons Protocol can be used to understand what constitutes exploitation. However, it is not limited to these examples. The Oxford Dictionary has defined exploitation as ‘the action or fact of treating someone unfairly in order to benefit from their work’.¹²⁰ Therefore it can be assumed that exploitation is an act in which a person takes advantage of something or someone, in particular the act of taking unfair advantage of another for one’s benefit.¹²¹

International instruments do not make specific reference to exploitation, except for the International Convention on the Protection of the Rights of All Migrant Workers, and Members of their Families (ICRMW), CEDAW and the Convention on the Rights of Persons with Disabilities (CRPD). Article 43(d) of the ICRMW mentions the protection of migrant workers in respect of exploitative rent.¹²² Whereas, Article 6 of the CEDAW promotes legislation to prohibit exploitation of the sex work of women. The CRPD in its preamble has acknowledged that women and girls with disabilities are at greater risk of exploitation relative to their male counterparts, and devotes Article 16 to freedom from exploitation, abuse and violence.¹²³

There is no distinction between sexual abuse and sexual exploitation; however, it must be noted that they may both be present but can happen independently from each other.¹²⁴ The Secretary-General of the United Nations has defined sexual exploitation and sexual abuse. Sexual exploitation and sexual abuse have been defined for special measures for the protection from sexual exploitation and sexual abuse. The United Nations has defined sexual exploitation as:

Any actual or attempted abuse of a position of vulnerability, deferential power, or trust, for sexual purposes, including, but not limited to, profiting monetarily, socially or politically from the sexual exploitation of another.¹²⁵

¹²⁰ Available at: <https://www.lexico.com/definition/exploitation> (accessed 9 September 2020).

¹²¹ Global Migration Group ‘Exploitation and abuse of international migrants, particularly those in an irregular situation: A Human Rights Approach’ at 7.

¹²² Global Migration Group ‘Exploitation and abuse of international migrants, particularly those in an irregular situation: A Human Rights Approach’ at 7.

¹²³ Global Migration Group ‘Exploitation and abuse of international migrants, particularly those in an irregular situation: A Human Rights Approach’ at 7.

¹²⁴ Global Migration Group ‘Exploitation and abuse of international migrants, particularly those in an irregular situation: A Human Rights Approach’ at 7.

¹²⁵ United Nations Secretariat ‘Special measures for protection from sexual exploitation and sexual abuse’ available at: <https://www.unhcr.org/protection/operations/405ac6614/secretary-generals-bulletin-special-measures-protection-sexual-exploitation.html> (accessed 9 September 2020) at 1.

Whereas, sexual abuse was defined as ‘the actual or threatened physical intrusion of a sexual nature, whether by force or under unequal or coercive conditions’.¹²⁶ The definitions make it clear that sexual exploitation extends to profiting means; however, it is not limited to profiting monetarily, socially or politically. Whereas, sexual abuse does not make mention any profit motive.

The distinction drawn between sexual exploitation and sexual abuse raises the question of whether sexual acts perpetrated for sexual gratification¹²⁷ can be considered to be exploitative.¹²⁸ The research and literature on the risks and experiences of sexual exploitation during the medium are limited, and the experiences of refugee women during this stage of the journey is broadly documented.¹²⁹ Sexual exploitation is regarded as a human rights violation and an urgent public health concern.¹³⁰ The health consequences of sexual exploitation can range from and are not limited to HIV and other sexually transmitted infections (STIs), post-traumatic stress disorder, depression, substance use and suicidal thoughts.¹³¹

Refugee women who experience or who are at risk of gender-related persecution in their country of origin, often request the assistance of smugglers. Although in most cases, refugee

¹²⁶ United Nations Secretariat ‘Special measures for protection from sexual exploitation and sexual abuse’ at 1.

¹²⁷ The understanding of SGBV in terms of rape is a constant development. Evolutionary psychologists have argued that rape is actually a sexual crime through which men seek sexual gratification from women who would otherwise refuse them. Therefore, it is argued that the perpetrators of the SGBV are benefiting from the SGBV in the form of sexual gratification. However, one should not forget the feminist perspective which argues that sexual violence is a result of gender role inequality found in patriarchal cultures which oppress women and empower men. Barber N ‘Is rape about control or sex? What is rape really about?’ available at: <https://www.psychologytoday.com/za/blog/the-human-beast/201104/is-rape-about-control-or-sex> (accessed 2 October 2020).

¹²⁸ Global Migration Group ‘Exploitation and abuse of international migrants, particularly those in an irregular situation: A Human Rights Approach’ at 21.

¹²⁹ Alrabe K, Biswas D, Freccero J, Seelinger KT & Whiting A ‘Sexual exploitation of unaccompanied migrant and refugee boys in Greece: Approaches to prevention’ (2017) 14 *PLoS Med* 11 at 1-2.

¹³⁰ Alrabe K, Biswas D, Freccero J, Seelinger KT & Whiting A ‘Sexual exploitation of unaccompanied migrant and refugee boys in Greece: Approaches to prevention’ (2017) at 1-2.

¹³¹ Edinburgh L, Harpin SB, et ‘Assessing exploitation experiences of girls and boys seen at a Child Advocacy Center’ (2015) *Child Abuse & Neglect* at 46–59.

women consent to the smuggling, they are still at risk of sexual exploitation.¹³² Refugee women who are smuggled are vulnerable to violence, abuse and exploitation due to the unequal power relationship with smugglers.¹³³ These refugees are hesitant to seek help because they are afraid or unwilling to seek protection from the state. There is also a lack of options for exit strategies because they are dependent on the smugglers for guidance and support.

In most cases, they have paid high fees for the assistance of the smugglers, and this limits their option of escape.¹³⁴ Refugee women who are smuggled also are at risk of extortion and abuse by state officials. These state officials include and are not limited to border authorities or police officers¹³⁵. These States official, in some instances, are given bribes by the smugglers, or they turn a blind eye.¹³⁶ This further puts refugee women in a vulnerable position because they are unable to seek assistance. In the case, *Velasco-Cervantes v Holder, Attorney General*, the applicant attempted to return to the United States with a visitor's visa.¹³⁷ However, her visa application was denied. She was unable to return to the United States legally; this forced her to seek the assistance of smugglers.

The applicant was warned, if caught, not to say anything about the smugglers. The applicant waited two days in a house, waiting for an opportunity to be smuggled across the border. After those two days had passed, she was taken to a second house where she waited another four days to cross the border.¹³⁸ The applicant stated that the conditions in the second house were dire. She was prevented from leaving the house by the smugglers. She further reported that she

¹³² 'Smuggling of migrants, trafficking in persons and contemporary forms of slavery, including appropriate identification, protection and assistance to migrants and trafficking victims' available at: https://refugeesmigrants.un.org/sites/default/files/ts5_issue_brief.pdf (accessed 9 September 2020).

¹³³ It has been highlighted that criminal groups make frequent use of corruption, intimidation and violence, to facilitate their migrant smuggling operations. The smuggling of refugees can generate large revenues. Smugglers use corrupt officials and obtain their complicity and to guarantee that their operations are successful. UNODC, Issue paper 'Corruption and the smuggling of migrants' available at: <https://www.unodc.org/unodc/en/human-trafficking/2013/unodc-launches-paper-on-corruption-and-the-smuggling-of-migrants.html> (accessed 9 September 2020).

¹³⁴ UNODC, Issue paper 'Corruption and the smuggling of migrants'.

¹³⁵ UNODC, Issue paper 'Corruption and the smuggling of migrants'.

¹³⁶ UNODC, Issue paper 'Corruption and the smuggling of migrants'.

¹³⁷ *Velasco-Cervantes v Holder* (2010) at 1623.

¹³⁸ *Velasco-Cervantes v Holder, Attorney General* at 1623.

was only provided with a minimal amount of food and water. It was also reported narrowly avoided being raped by one of the smugglers.¹³⁹ When the applicant reached the border, she was discovered by an immigration agent. A criminal complaint was filed against the driver of the car the following day, and the applicant was named as a material witness in that case.¹⁴⁰ The applicant and her family received threats from the smugglers if she informed the immigration officials about the identity of the smugglers. The threats that she had received from the smugglers further influenced the applicant to apply for asylum because she feared retribution by the smugglers if she was forced to return to Mexico.¹⁴¹

This case is an example of the risks that refugee women experience during their journey to the country of destination. There might be numerous stops before reaching the border of the country of destination, and at each stop, refugee women are vulnerable to SGBV. The case *Velasco-Cervantes v Holder, Attorney General*, has shown one that smugglers also play a vital role in the refugee journey. In many cases, refugee women use the assistance of smugglers. If immigration agents discover them, they fear revealing the identities of the smugglers because of the risk of threats that they might receive from the smugglers.¹⁴² Even though refugee women may seek the aid of a smuggler to reach their country of destination, this does not protect her from being a victim of trafficking. The trafficking for sexual exploitation has remained the most detected form of trafficking.¹⁴³

3.4.2. TRAFFICKING AND SLAVERY OF REFUGEE WOMEN

The refugee journey is dangerous, and it is not safe for refugee women, especially if they are travelling alone. Trafficking and slavery can be defined as the ‘selling and/or trading in human beings for slavery forced sexual activities, forced labour or services, slavery or practices similar to slavery, servitude or removal of organs’.¹⁴⁴ The world is evolving, and traffickers are constantly finding new methods and new ways to traffic women. The purpose of trafficking is

¹³⁹ *Velasco-Cervantes v Holder, Attorney General* at 1624.

¹⁴⁰ *Velasco-Cervantes v Holder, Attorney General* at 1625.

¹⁴¹ *Velasco-Cervantes v Holder, Attorney General* at 1625.

¹⁴² *Velasco-Cervantes v Holder, Attorney General*.

¹⁴³ Smuggling of migrants, trafficking in persons and contemporary forms of slavery, including appropriate identification, protection and assistance to migrants and trafficking victims’ at 3.

¹⁴⁴ WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women.

not limited to sex work; it includes sex work and slave labour. The United Nations Protocol on Trafficking in Persons (Trafficking Protocol) has defined trafficking as:

The recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, or deception, of the abuse of power or a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹⁴⁵

The UN Office of Drugs and Crime (UNODC) has estimated that there are, at a minimum, approximately 2.5 million victims of human trafficking at any given time.¹⁴⁶ UNODC has further reported that about 79% of all human trafficking is for the purpose of sexual exploitation.¹⁴⁷ The ILO has estimated that 98% of the people trafficked for sexual exploitation are women and girls.¹⁴⁸ The victims/survivors of trafficking are often lured into trafficking with a false promise and subsequently forced to work under brutal and inhuman conditions.¹⁴⁹ The UNHCR has stated in the Guidelines on international protection:

The trafficking experience is such forms of severe exploitation as abduction, incarceration, rape, sexual enslavement, enforced prostitution, forced labour, removal of organs, physical beatings, starvation, the deprivation of medical treatment. Such acts constitute serious violations of human rights which will generally amount to persecution.¹⁵⁰

These international frameworks attempt to provide protection to refugee women against trafficking. The movement of refugee women across international borders without proper legal authorisation papers is common, and their motive varies. Some women flee their country of

¹⁴⁵ The United Nations Protocol on Trafficking in Persons (2000).

¹⁴⁶ UN Office on Drugs and Crimes 'Human Trafficking FAQs' available at: <http://www.unodc.org/unodc/en/human-trafficking/faqs.html> (accessed 10 September 2020).

¹⁴⁷ UN Office on Drugs and Crimes 'Human Trafficking FAQs'.

¹⁴⁸ International Labour Office, Give girls a chance: Tackling child labour, a key to the future' available at: https://www.ilo.org/ipecc/Informationresources/WCMS_107913/lang--en/index.htm (accessed 9 September 2020).

¹⁴⁹ International Labour Office, Give girls a chance: Tackling child labour, a key to the future'

¹⁵⁰ Guidelines on international protection: The Application of Article 1A (2) of the 1951 Convention and/or 1967 protocol to the Status of Refugees to victims of trafficking and persons at risk of being trafficked at 15.

origin due to violence, ethnic conflict, famine or natural disasters, amongst other reasons.¹⁵¹ Some women leave their country of origin because of an economic crisis, and they have the goal to search for work, or they leave intending to find better opportunities. Refugee Women fall victim to trafficking for many reasons. Some women seek employment in wealthier countries and are promised jobs as waitresses or nannies and are subsequently forced into sexually exploitative situations upon arrival in the country of destination.¹⁵² The inequality and economic disadvantage which exist throughout the world have played a prominent role in rendering people vulnerable to trafficking.¹⁵³ An equally important contributing factor is the ability to make vast amounts of profits from the exploitation of refugee women without being held accountable for these crimes.¹⁵⁴

The trafficking of refugee women is common in the migration and the movement of people from countries of conflict because there are many refugees and internally displaced women. Refugee women during the medium of the refugee journey find themselves in vulnerable situations, and they are not effectively protected.¹⁵⁵ Refugee women may be forced into trafficking as a way to escape their exploitation or to escape another dangerous situation. The idea of being trafficked to become a labour worker instead of being alone, unemployed and prone to other forms of violence, is more appealing to refugee women.¹⁵⁶

As the world has evolved and globalised, the demand for trafficked labour has increased drastically. There is the misconception that the sole purpose of trafficking is for sex work and other forms of sexual exploitation; however, this is not the reality. The constant changes within the sphere of the globe have created a demand for cheap, labour in many developed and

¹⁵¹Amnesty International ‘Refugees, asylum-seekers and migrants’

Available at: <https://www.amnesty.org/en/what-we-do/refugees-asylum-seekers-and-migrants/> (accessed on: 3 July 2020).

¹⁵² U.S. Department of State ‘Trafficking in persons report’ available at: <https://www.state.gov/trafficking-in-persons-report/> (accessed 9 September 2020) at 8-9.

¹⁵³ ‘Polaris Project’ available at: <http://www.polarisproject.org/content/view/26/47/> (9 September 2020).

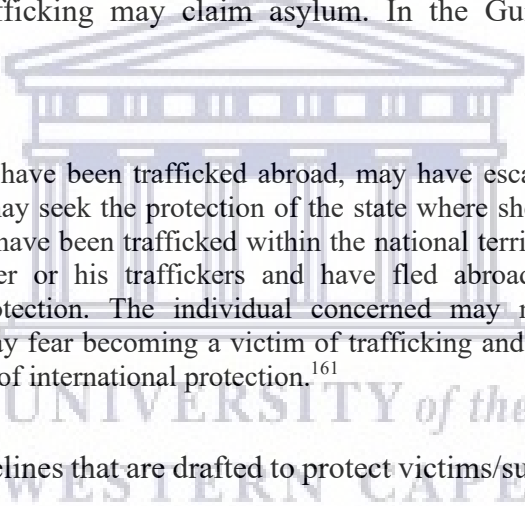
¹⁵⁴ Polaris Project’ available at: <http://www.polarisproject.org/content/view/26/47/> (9 September 2020).

¹⁵⁵ Amnesty International ‘Refugees, asylum-seekers and migrants’.

¹⁵⁶ Amnesty International ‘Refugees, asylum-seekers and migrants’.

developing countries.¹⁵⁷ Refugee women are the ideal persons for trafficking. The majority of refugee women are often from developing countries. Unemployment is a norm, and they are accustomed to low wages and are unfamiliar with the existence of minimum standards.¹⁵⁸ Traffickers are also aware that many refugee women are uneducated, face language barriers and unaware of their human rights, traffickers use this to their advantage. The victims/survivors of trafficking and slavery find themselves in appalling conditions with no option of escape. They are controlled by means of sexual and physical violence, and their passports are taken away from them to prevent them from escaping.¹⁵⁹

Being a victim of trafficking does not guarantee them refugee status. The treaties which have been drafted to protect women against trafficking and slavery are flawed and had inadequate enforcement mechanisms.¹⁶⁰ The UNHCR has drafted factual circumstances in which a victim or potential victim of trafficking may claim asylum. In the Guidelines on international protection, it is stated:



The victim may have been trafficked abroad, may have escaped her or his traffickers and may seek the protection of the state where she or he now is. The victim may have been trafficked within the national territory, may have escaped from her or his traffickers and have fled abroad in search of international protection. The individual concerned may not have been trafficked but may fear becoming a victim of trafficking and may have fled abroad in search of international protection.¹⁶¹

Even though there are guidelines that are drafted to protect victims/survivors of trafficking and to afford them the ability to apply for asylum, refugee women remain ineffectively protected. The decisions by courts in States have shown that there are many instances where refugee

¹⁵⁷ Heyzer N ‘Combating Trafficking in Women and Children: A Gender and Human Rights Framework’ (2002) *The Human Rights Challenge of Globalization: Asia-Pacific-US: The Trafficking in Persons, Especially Women and Children*.

¹⁵⁸ Gaggioli G “Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law” (2014).

¹⁵⁹ Masci D ‘Human Trafficking and Slavery: Are the World’s Nations doing Enough to Stamp It Out?’ (2004) SAGE.

¹⁶⁰ These treaties and ineffective protection will be explored later within the thesis.

¹⁶¹ Guidelines on international protection: The Application of Article 1A(2) of the 1951 Convention and/or 1967 protocol to the Status of Refugees to victims of trafficking and persons at risk of being trafficked at 15.

women who are victims/survivors of trafficking have been denied asylum within the state.¹⁶² In some cases, refugee women have escaped persecution within their country and have been the victim of trafficking during their journey to the country of origin.¹⁶³ If refugee women who escaped their traffickers seek the protection of the state in their country of destination and are further denied asylum, they may further be vulnerable to persecution if they are returned to their countries of origin.¹⁶⁴ Refugee women many challenges and obstacles during the journey of becoming a refugee. However, they experience more significant challenges when they become a refugee within the country of destination.

3.5. BEING A REFUGEE

Refugee women escape their country of origin with the hope of finding safety and protection. However, the new destination does not always offer the security and protection that they hoped for, and they may find themselves subjected to further abuses such as sexual violence, physical assaults and prolonged detention under inhumane conditions.¹⁶⁵ Some States are reluctant or even resistant to host refugees in their country, and this results in a lack of adequate protection against SGBV afforded to refugee women. Refugee women have the right to protection under the Refugee Convention and the Protocol. However, many states are failing to offer adequate protection and instead of improving the protection of refugee women, they are contributing to the inadequate protection of refugee women through large-scale deportation, detention, amongst other means. Refugee women are at risk of experiencing various forms of violence perpetrated by their intimate partners. Multiple factors may contribute to this violence, and in some cases, the struggles that are linked to the refugee journey contribute to this violence. However, in most cases, IPV is related to unequal gender-power dynamics.¹⁶⁶ IPV is experienced in and out of refugee camp settings.

¹⁶² Knight S 'Asylum from Trafficking: A failure of Protection' (2007) 7 *Practical Analysis of Immigration and Nationality Issues* at 2.

¹⁶³ Knight S 'Asylum from Trafficking: A failure of Protection' (2007) 2-3.

¹⁶⁴ This aspect will be explored in greater detail in Chapter 4.

¹⁶⁵ Hwacha-chitanda VS *International protection of refugees: A human rights perspective* (published LLM thesis, University of Manitoba, 1997) at 4.

¹⁶⁶ Bank A, Horn J, Zimmerman C 'Prevention of violence against women and girls: lessons from practice' (2014) *The Lancet* at 3.

A refugee woman may not experience SGBV within her country of origin or during her journey to her host country. However, she may still be at risk of SGBV within the refugee camps. The purpose of a refugee camp is to provide temporary accommodation to refugees. For the temporary period, the refugee camp is a temporary home for refugees, and they are dependent on the resources and security provided by the refugee camp. The unfortunate reality is that SGBV is present in refugee camps. Refugee women are vulnerable to the SGBV in the refugee camps, and the perpetrators are often the individuals who are tasked to protect them.

The access to justice in situations of IPV and SGBV in refugee camps may be limited to refugees, and there may be circumstances that may prevent appropriate action from being taken. When a woman is a victim/survivor of SGBV in her country, she is afforded the opportunity to seek justice and testify against the perpetrator in the domestic courts in her country. One may assume that she will get the justice and closure that she deserves, however, the sad reality is that a female victim/survivor of SGBV may not receive the justice and closure that she genuinely deserves.¹⁶⁷ When a refugee woman is a victim/survivor of SGBV in her host country, she is not afforded the same treatment which is afforded to a female citizen who suffered a similar violation. The refugee woman may not be afforded the opportunity to testify against the perpetrator in the domestic courts.¹⁶⁸ The Refugee Convention and its Protocol does not have clauses that protect refugee women against sexual violations in refugee camps.

Moreover, it has been shown that the victims/survivors of SGBV in refugee camps do not have access to adequate justice in their host country.¹⁶⁹ The provisions of Article 16 of the Refugee Convention states that refugees should have free access to courts in all contracting States. Still, the question that is raised is whether the free access to courts afforded to refugee women effectively provides the justice that they are entitled to.

¹⁶⁷ It should be noted that not every woman will have the same equal access to justice. Not all countries have the same legal systems. Some victims/survivors of SGBV will receive the justice that they deserve while others will not. It should be also noted that everyone has their own opinion of what justice and closure entails. For some, imprisonment, the death penalty and punishment are the appropriate forms of justice and it brings them closure, however, others prefer the perpetrator to be remorseful for their actions and will accept an apology from the perpetrator.

¹⁶⁸ Eberechi OE *Access to justice for victims of sexual violence in refugee camps* (unpublished LLM thesis, University of Pretoria, 2017) at 9.

¹⁶⁹ Eberechi OE *Access to justice for victims of sexual violence in refugee camps* (2017) at 13.

3.5.1 DOMESTIC VIOLENCE: INTIMATE PARTNER VIOLENCE

SGBV against women is not limited to conflict settings. Refugee women might escape their war-torn country without having experienced any form of SGBV and will later be exposed to SGBV in their host country. The main perpetrators of this violence are often assumed to be someone that the victim/survivor does not know. However, research has shown that refugee women are at risk of SGBV by their intimate partners.¹⁷⁰ This may be referred to as IPV.¹⁷¹

Many factors influence IPV. Academics such as Cathy Zimmerman have correctly argued that unequal gender-power dynamics have a significant role to play in shaping the perpetuation of violence against women.¹⁷² Additionally, women are at risk of IPV when there is conflict in the relationship, when there is male dominance and when there is economic stress.¹⁷³ The Refugee Convention affords protection to women who experience IPV in their country of origin. However, many refugee women experience IPV in their host country, and the protection afforded to them is limited. Experiencing IPV in a foreign country can be scary, and various challenges prevent refugee women from seeking assistance. IPV affects women from all social and economic groups. When a refugee woman experiences financial struggles and experiences IPV, she is vulnerable to her partner's power and control because of her lack of resources. Many refugee women who leave their country of origin are from countries where men have dominant roles, and their religious doctrines and beliefs support the notion that men should have dominant roles.¹⁷⁴ These refugee women have been dependent on a male figure their whole life and the fear of being alone in a foreign country and to financially support themselves

¹⁷⁰ Ager A & Stark L 'A Systematic Review of Prevalence Studies of Gender-Based Violence in Complex Emergencies' (2011) *SAGE* at 9.

¹⁷¹ IPV takes the form of physical and psychological harm. It includes and is not limited to rape, beatings, verbal abuse, financial control, and enforced isolation. UNHCR 'Intimate Partner Violence and asylum in the Americas' available at: <https://www.refworld.org/pdfid/5e1844b04.pdf> (accessed 21 July 2020).

¹⁷² Bank A, Horn J, Zimmerman C 'Prevention of violence against women and girls: lessons from practice' (2014) at 3-4.

¹⁷³ Chan KL 'Sexual violence against women and children in Chinese societies' (2008) *Trauma Violence, & Abuse* at 69.

¹⁷⁴ Bank A, Horn J, Zimmerman C 'Prevention of violence against women and girls: lessons from practice' (2014) at 4.

¹⁷⁴ Chan KL 'Sexual violence against women and children in Chinese societies' (2008) at 70.

prevents them from reporting the IPV, so they find themselves trapped in violence in a foreign country.¹⁷⁵

IPV against refugee women in their country of origin has been well documented.¹⁷⁶ However, IPV during resettlement has not been a focal point and has not been as documented. There are various factors that prevent IPV from being investigated and documented during resettlement. Some of these factors include the lack of reporting of IPV from the victim/survivor, as well as the victim/survivor not considering the SGBV to be a crime, or feeling obliged to submit to her partner's sexual needs.¹⁷⁷

3.5.2 SGBV IN REFUGEE CAMPS

The perpetrators of SGBV against refugee women in refugee camps can range from men in power within the refugee camp, their intimate partners, to other male refugees within the camp. The most common perpetrator of SGBV in refugee camps are males who have a position of power within the refugee camp.¹⁷⁸ These males have the ability to control access to goods and services. They also use their power to exchange these goods and services for sexual favours from refugee women.¹⁷⁹ The soldiers and guards within the refugee camps have the ability to withhold rights and privileges, and they may use their power (armed and unarmed) to inflict SGBV.¹⁸⁰

UNIVERSITY of the
WESTERN CAPE

¹⁷⁵ UNHCR 'Intimate Partner Violence and asylum in the Americas' available at: <https://www.refworld.org/pdfid/5e1844b04.pdf> (accessed 21 July 2020).

¹⁷⁶ *SA (Divorced woman - illegitimate child) Bangladesh v Secretary of State for the Home Department*, CG [2011] UKUT 00254(IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 11 July 2011, *AATA Case No. 1412142*, [2015] AATA 3566 (24 October 2015), Australia: Administrative Appeals Tribunal, 24 October 2015, *RRT Case No. 1108892*, [2012] RRTA 432, Australia: Refugee Review Tribunal, 29 May 2012.

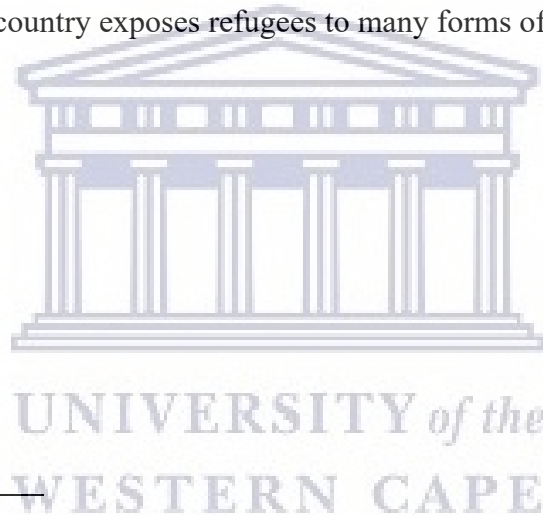
¹⁷⁷ Australian Domestic and Family Violence Clearinghouse 'Improving responses to refugees with backgrounds of multiple trauma: Pointers for practitioners in domestic and family violence, sexual assault and settlement service' available at: <http://library.bsl.org.au/jspui/bitstream/1/> (accessed 21 July 2020).

¹⁷⁸ UNHCR and Save the Children - UK 'Note for implementing and operational partners' (2002) available at: <http://www.unhcr.org/3c7cf89a4.html> (accessed 21 July 2020).

¹⁷⁹ UNHCR and Save the Children - UK 'Note for implementing and operational partners' (2002).

¹⁸⁰ Mulugeta A 'Slow Steps of Progress: Their productive health rights of refugee women in Africa' (2003) 55 *Agenda: Empowering Women for Gender Equity*.

Humanitarian agents who are employed and who volunteer in refugee camps may also be perpetrators of SGBV against refugee women.¹⁸¹ These agents may abuse their power by withholding privileges, delay or deny medical assistance and remove their source of basic survival. This, in turn, creates fear amongst refugee women.¹⁸² In some situations, these humanitarian workers may also pay for sexual favours.¹⁸³ Some refugee women will spend a short period in a refugee camp before obtaining self-independence within their host country, whilst others will spend decades within refugee camps.¹⁸⁴ Refugee women living in refugee camps are at a far greater risk of rape and sexual assault.¹⁸⁵ The living conditions of refugee camps are often unstable, unhygienic with unreliable security. Refugee women in refugee camps are frequently deprived of their self-reliance, are at the risk of being trafficked, and their access to justice is limited.¹⁸⁶ If a refugee woman is fortunate enough to find accommodation with the host country independently, she is still at risk of SGBV. The journey of becoming integrated within the host country exposes refugees to many forms of SGBV.



¹⁸¹ These humanitarian agents include and are not limited to humanitarian aid workers, car givers, international, national and refugee staff of humanitarian aid organisations, including NGOs, UN agencies and host government ministries. UNCHR, 'Sexual and gender- based violence against refugees, returnees and internally displaced: guidelines for prevention and response persons' (2003) available at: <http://www.unicef.org/emerg/files/glsgbv03.pdf> (accessed 21 July 2020).

¹⁸² UNCHR, 'Sexual and gender- based violence against refugees, returnees and internally displaced: guidelines for prevention and response persons' (2003).

¹⁸³ UNCHR, 'Sexual and gender- based violence against refugees, returnees and internally displaced: guidelines for prevention and response persons' (2003).

¹⁸⁴ Donnelly ER & Muthiah V 'Protecting women and girls in refugee camps States' obligations under international law' *LSE* at 2.

¹⁸⁵ Donnelly ER & Muthiah V 'Protecting women and girls in refugee camps States' obligations under international law' *LSE* at 2-3.

¹⁸⁶ UNCHR, 'Sexual and gender- based violence against refugees, returnees and internally displaced: guidelines for prevention and response persons' (2003).

3.5.3 THE INTEGRATION OF REFUGEE WOMEN IN THE HOST COUNTRY

The integration of refugee women within the host country refers to refugee women being integrated within the society of the host country. During this period refugee, women are seeking employment and suitable accommodation, amongst other things.¹⁸⁷ During the integration period, refugee women are exposed to various forms of SGBV. There are often unequal opportunities available for refugee women. The cultural and political views and opinions of refugee women may differ from citizens within the host country.¹⁸⁸ This may influence the adaption to the integration in the host country to be difficult for refugee women.¹⁸⁹ Due to the lack of equal job opportunities and in most cases, the lack of formal education, refugee women are more vulnerable to sexual exploitation as well as xenophobic and racially motivated violence.

Refugee women may be forced into sex work.¹⁹⁰ Refugee women may be promised labour but are subsequently forced into sex work.¹⁹¹ In most cases, refugee women are forced to engage in survival sex. Survival sex is usually understood as the exchange of sex for material support.¹⁹² When one refers to sex trafficking and survival sex, they are discussed as two different concepts. Within the legal framework, there is a significant difference. Trafficking requires force, fraud or coercion or underage commercial sex.¹⁹³ However, refugee women had reported that when they needed money to pay the rent, they would negotiate with men to exchange sex for money. It was further reported that men would forcibly allocate themselves

¹⁸⁷ Smit R 'Trying to Make South Africa My Home': Integration into the Host Society and the Well-being of Refugee Families' (2015) *Journal of Comparative Family Studies* at 39.

¹⁸⁸ Smit R 'Trying to Make South Africa My Home': Integration into the Host Society and the Well-being of Refugee Families' (2015) at 39-40.

¹⁸⁹ Smit R 'Trying to Make South Africa My Home': Integration into the Host Society and the Well-being of Refugee Families' (2015).

¹⁹⁰ UNHCR 'Survivors, Protectors, Providers: Refugee Women Speak Out' available at: <https://www.refworld.org/> (accessed 10 September 2020).

¹⁹¹ UNHCR 'Survivors, Protectors, Providers: Refugee Women Speak Out'.

¹⁹² Dębska K & Mostowska 'An ambiguous hierarchy of inequalities. The political intersectionality of older women's homelessness in Poland' (2020) 29 *Journal of Gender Studies* 4 at 443.

¹⁹³ Covenant house 'Homelessness, Survival Sex and Human Trafficking: As Experienced by the Youth of Covenant House New York' available at: <https://humantraffickinghotline.org/> (accessed 10 September 2020) at 13.

as their “pimp” and they would be forced to have sex with men.¹⁹⁴ Pimps and other exploiters seek refugee women who are in vulnerable positions and who are already engaging in survival sex, and they use these refugee women for their financial gain.¹⁹⁵

The internet has made it easier for exploiters to use the vulnerable for financial gain. Pornography has exploited women for generations.¹⁹⁶ The internet has significantly reshaped the content of pornography that is circulated on the internet. It has been reported that the most popular and easily accessible forms of pornography contain violence, degradation and humiliation of women.¹⁹⁷ It was further reported that “refugee porn” has become a popular category on porn sites.¹⁹⁸ These porn videos depict female protagonists in subjugated roles, and the women used in the videos are of Middle Eastern origins. In explicit scenes, these women are often shown as being dominated sexually by white males. It was also reported that many of these women in adult films are seen wearing a hijab, which is worn by Muslim women. The religious headwear is frequently fetishised as a symbol representing female migrants as a whole.¹⁹⁹

Pornography is strongly connected and one of the contributors to sexual violence.²⁰⁰ It can define masculinity as embodied through violence, hostile attitudes towards women.²⁰¹ It also enforces gender inequality. Sexual exploitation, violence, rape, trafficking, sex work and slavery are recurrent themes in the journeys of refugee women. When refugee women are depicted as a symbol of sexual desire within these pornography films, this also influences

¹⁹⁴ Covenant house ‘Homelessness, Survival Sex and Human Trafficking: As Experienced by the Youth of Covenant House New York’ at 13-14.

¹⁹⁵ Covenant house ‘Homelessness, Survival Sex and Human Trafficking: As Experienced by the Youth of Covenant House New York’ 13.14.

¹⁹⁶ Sanderson S ‘Refugee porn: Where sexual fantasies meet harsh realities’ available at:

<https://www.infomigrants.net/en/post/20204/refugee-porn-where-sexual-fantasies-meet-harsh-realities>

(accessed 10 September 2020).

¹⁹⁷ Sanderson S ‘Refugee porn: Where sexual fantasies meet harsh realities’.

¹⁹⁸ Sanderson S ‘Refugee porn: Where sexual fantasies meet harsh realities’.

¹⁹⁹ Sanderson S ‘Refugee porn: Where sexual fantasies meet harsh realities’.

²⁰⁰ Gittins-Stone D, Huntington C, Orchowski L, Pearlman D, Rizzo C J& Rostad WL ‘The Association Between Exposure to Violent Pornography and Teen Dating Violence in Grade 10 High School Students. Archives of sexual behavior’ (2019) 7 *Archives of sexual behavior* at 2137–2147.

²⁰¹ Sanderson S ‘Refugee porn: Where sexual fantasies meet harsh realities’.

sexual assault against them. However, even though it is largely argued that there is a strong connection between sexually explicit material and instances of sexual violence against women, the social scientific studies prove this are often dismissed by courts.²⁰² The studies have been dismissed by the courts because it is viewed as difficult to interpret, thus making it inconclusive.²⁰³ The reluctance by courts to acknowledge the connection between sexually explicit material and instances of sexual violence against women further creates barriers to protect women against SGBV effectively.

During the integration into the host country, refugee women are sexually exploited. As shown in the research, survival sex is one of the leading ways in which a refugee woman is sexually exploited. The development of the internet has made it easier for refugee women to be sexually exploited. Sex trafficking and porn go hand in hand. Women have reported that they are lured into travelling to a distant part of the country or world for a “modelling gig” or a job. When they arrive at the destination, they are forced into pornography.²⁰⁴ This reality extends to refugee women. As stated, exploiters prey on the vulnerable, in many situations, refugee women are financially vulnerable. Similarly to survival sex, the internet has provided other methods for refugee women to make an income. These methods are sexual, and they indirectly exploit women. Even though it is voluntary, it enforces power imbalances, and the practice itself perpetuates a patriarchal structure which is harmful to women.²⁰⁵ The patriarch structure is one of the barriers which is preventing refugee women from being effectively protected against SGBV.

²⁰² Van D Poll ‘But is it speech? Making critical sense of the dominant constitutional discourse on pornography, morality and harm under the pervasive influence of United States first amendment’ (2012) 15 *P.E.R* 2 at 434.

²⁰³ Van D Poll ‘But is it speech? Making critical sense of the dominant constitutional discourse on pornography, morality and harm under the pervasive influence of United States first amendment’ (2012) at 434, Per Easterbrook J in *American Booksellers Association Inc v Hudnut* 771 F2d 323 7th Cir (1985)n 2, citing *Gregg v The State of Georgia* 428 US 153 (1976) 184-187.

²⁰⁴ Limoncelli SA ‘The Trouble with Trafficking: Conceptualizing Women’s Sexual Labor and Economic Human Rights’ (2009) 32 *Women’s Studies International Forum* 261-269.

²⁰⁵ Limoncelli SA ‘The Trouble with Trafficking: Conceptualizing Women’s Sexual Labor and Economic Human Rights’ (2009) 261-269.

3.5. CONCLUSION

This chapter has shown that the refugee journey is not linear. There are various motives which influence refugee women to seek refugee status. In most instances, the motive stems from gender-related persecution or escaping war-conflict within their country. If a refugee woman does not experience SGBV in her country of origin, she may be at risk of SGBV during her journey to asylum and/or within her host country. Throughout the refugee journey refugee women are not effectively protected against SGBV. The definition of a refugee and its components in the Refugee Convention plays an essential role in determining who qualifies as a refugee.

As discussed earlier in this chapter, the Refugee Convention does not define membership to a PSG. The lack of a precise definition has raised conflict with regard to the interpretation of a PSG. Although the definition of membership to a PSG has been interpreted differently by different States, States have allowed the definition to expand and evolve, to allow a variety of different classes susceptible to persecution.²⁰⁶ In order for a refugee woman to qualify as a member of a PSG, it is dependent on various factors and other components of the refugee definition in the Refugee Convention, such as state protection. Case law has shown that even though there are international instruments which protect refugee from SGBV, they may be at risk of SGBV, but may not qualify as a refugee and may be sent back to their country of origin.

The medium of the refugee journey women are exposed to exploitation and trafficking in the form of sex trafficking and slavery, amongst many others. A refugee woman may have escaped SGBV within her country of origin, but she may still be at risk of SGBV in her host country. This risk is due to various factors. Some host countries are reluctant or even resistant to host refugees in their country, and this results in a lack of adequate protection against SGBV afforded to refugee women. The Refugee Convention and its Protocol provide the refugee with protection. However, many States are failing to offer sufficient protection and instead of improving the protection of refugee women, they are contributing to the inadequate protection of refugee women through large-scale deportation, detention, amongst other means. Even if refugee women are afforded protection and accommodation in refugee camps, they are still at risk of SGBV from diverse groups of perpetrators. The perpetrators range from intimate

²⁰⁶ Goodwin-Gill G *The refugee in international law* 2 ed (1996) Clarendon Press.

partners, the people who are tasked with providing refugee women resources, services and protection, to the male refugees within the camp.

The Refugee Conventions aims to provide protection to women who experience IPV in their country of origin; however, refugee women are still at risk of experiencing various forms of violence perpetrated by their intimate partners. Their protection against this form of violence and other forms of violence is dependent on their access to justice within their host country. Within the host country, during integration, refugee women remain vulnerable to sexual exploitation and other forms of SGBV. This research has shown that survival sex is used as a mode of financial survival. Even though it is often voluntary, and refugee women receive a form of payment, it is a form of sexual exploitation. It enforces the power imbalances that exist between men and women. The practice itself perpetuates a patriarchal structure that is harmful to women and which enforces gender-inequality SGBV. Gender-inequality and patriarchy are regarded as the barriers which are preventing the effective protection of refugee women against SGBV. Other barriers include and are not limited to xenophobia and racism.



CHAPTER 4

BARRIERS PREVENTING THE EFFECTIVE PROTECTION OF REFUGEE WOMEN

4.1. INTRODUCTION

Throughout the refugee journey, there is a range of barriers that prevent refugee women from being effectively protected against SGBV. This chapter will explore the various obstacles which avoid women of refuge from being effectively protected against SGBV. Refugee women face unequal access to resources, protection, education, justice and decision-making in both countries of origin and within the host country.¹ These gender-inequality related barriers contribute to their refugee experiences as women.

SGBV is a phenomenon which is deeply rooted in gender inequality and has been a significant barrier that has manifested itself within every stage of the refugee journey. Gender-inequality will be examined with reference to patriarchy. The barriers which exist within refugee camps will also be explored. These barriers include (and are not limited to) inadequate accommodation as a source of insecurity, lack of reporting and insufficient protection measures.² These barriers will be examined with reference to international instruments that protect the human rights of refugee women. Although the human rights of refugees are protected, xenophobia and racism is a constant recurring barrier which prevents refugee women from being effectively protected from SGBV in country of origin, during transit and within the host country.³ The lineage between xenophobia and SGBV will be explored. This chapter will further examine gender and the restrictions it has on a refugee woman's right to work. In order for refugee women to be protected against SGBV she requires access to justice. A refugee

¹ As discussed, not all refugee women will have the same experience or face the same challenges. The various obstacles that refugee women face is dependent on the country of origin, the transit journey and the host country. Gender Equality Commission (GEC) 'Protecting the rights of migrant, refugee and asylum-seeking women and girls' available at: https://www.ohchr.org/Documents/Issues/SRMigrants/submissions/CoE_Submission_GA-Report.pdf (accessed 28 August 2020).

² UNHCR 'Survivors, Protectors, Providers: Refugee Women Speak Out' available at: <https://www.refworld.org/pdfid/4f310baa2.pdf> (accessed 28 August 2020).

³ Ngwane C, Pino A & Sigsworth R 'The Gendered Nature of Xenophobia in South Africa' (2008) *CSVR*.

woman's access to justice in a host country is an essential human right that she is entitled to as per Article 16 of the Refugee Convention. With reference to Article 16 of the Refugee Convention, a refugee woman's access to justice within her host country will be explored. To conclude, the chapter analysis and reflection of this chapter will take place.

4.2. GENDER INEQUALITY

Gender inequality is the unequal treatment or perceptions of individuals based on their gender.⁴ There is an unquestionable relationship between gender inequality, patriarchy, and SGBV.⁵ A refugee woman's right to equality and non-discrimination is protected in Article 2 UDHR, Articles 2 and 26 ICCPR, Article 2(2) of the International Covenant on Economic, Social and Cultural Rights (ICESCR), Article 2 of the United Nations Convention on the Rights of the Child (CRC), Article 7 of the International Convention for the Protection of the Rights of All Migrant Workers and Members of their Families CMW and in Article 5 of the Convention on the Rights of Persons with Disabilities (CRPD).⁶ The CEDAW explicitly prohibits discrimination based on gender.⁷ The CEDAW defines discrimination against women as:

any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.⁸

Discrimination is closely connected to equality. To overcome gender discrimination, there has to be gender equality.⁹ The CEDAW is a vital instrument that places an obligation on States to ensure that their laws and policies do not discriminate against women. The CEDAW also

⁴ Garcia-Gonzalez J, Forcen P & Jimenez-Sanchez M 'Men and women differ in their perception of gender bias in research institutions (2019) 14 *PLoS ONE* 12 at 4.

⁵ Meger S & Sachseder J 'Militarized peace: understanding post-conflict violence in the wake of the peace deal in Colombia' (2020) 17 *Globalizations* at 963.

⁶ Bartolomei L & Pittaway E 'From Rhetoric to Reality: Achieving Gender Equality for Refugee Women and Girls' (2018) *Centre for International Governance Innovation* at 3-6.

⁷ UN General Assembly, Convention on the Elimination of All Forms of Discrimination against Women, 18 December 1979.

⁸ Convention on the Elimination of All Forms of Discrimination against Women 1979.

⁹ Bartolomei L & Pittaway E 'From Rhetoric to Reality: Achieving Gender Equality for Refugee Women and Girls' (2018) at 6.

recognises a responsibility on States to ensure that women are guaranteed the same rights as men.¹⁰ Refugee women are also entitled to the protection against gender inequality that is afforded to women in the CEDAW.¹¹ The States who have signed CEDAW have committed to ensuring that:

all appropriate measures, including legislation, to ensure the full development and advancement of women, for the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men.¹²

The appropriate measures mentioned in CEDAW may include amending existing laws, regulations, customs and practices which discriminate against women.¹³ States may also be obligated to adopt gender-sensitive statutes and policies. CEDAW also places an obligation on governments to ensure that individual citizens and private organisations do not discriminate against women.¹⁴ This obligation compels States to ensure that refugee women are afforded the same protection against gender inequality that is afforded to women within their country. The international community has made it a goal to combat gender inequality.

The United Nations has acknowledged that there is a need to combat gender inequality and has acknowledged this by including gender equality as one of the 17 Sustainable Development

UNIVERSITY of the
WESTERN CAPE

¹⁰ Gender inequality will continue to exist if States do not apply the principle of substantive equality. Gender inequality has created gender specific barriers. These barriers include and are not limited historical and systemic discrimination and gender stereotypes. The principle of substantive equality provides a framework by which it allows States to effectively recognise and address inequalities faced by woman. Substantive equality will require States to identify the root causes of discrimination. The root to the discrimination of woman is (and is not limited to) power structures and social and economic systems reinforced by gender stereotypes and socialized gender roles, which thus lead to inequalities. Substantive equality will further require States to acknowledge that woman experience inequality differently not only because of who they are as individuals but also because of the gender to which they belong. ‘Substantive Equality And Reproductive Rights: A Briefing Paper On Aligning Development Goals With Human Rights Obligations’ available at: <https://www.reproductiverights.org/> (accessed 7 October 2020).

¹¹ Convention on the Elimination of All Forms of Discrimination against Women 1979.

¹² Convention on the Elimination of All Forms of Discrimination against Women 1979.

¹³ Convention on the Elimination of All Forms of Discrimination against Women 1979.

¹⁴ Convention on the Elimination of All Forms of Discrimination against Women 1979.

Goals (SDGs).¹⁵ Gender equality is listed as Goal 5, and to achieve gender equality and empower all women and girls.¹⁶ SDG 5 includes the goal to eliminate the many root causes of discrimination that currently still affect many women and refugee women in private and public spheres.¹⁷ This goal includes discriminatory laws and the lack of laws to protect women against SGBV. SDG 5 has also made it a goal to eliminate GBV. By making it a plan to eradicate GBV, the international community has acknowledged that there is an urgent need to eliminate GBV. GBV against refugee women constitutes a serious human rights violation; there is an urgent need to eliminate GBV.¹⁸

Although there has been significant development in laws and policies to prevent gender inequality and to promote gender equality, the development has failed to protect refugee women against SGBV effectively.¹⁹ Patriarchal systems and gender inequality are the most significant barriers which prevents refugee women from being effectively protected against SGBV.²⁰ Patriarchal systems and gender inequality are linked to the power structures which exist within society. These power structures affect refugee women because it influences their status, gender relationships, resource access and rulemaking and enforcement.²¹ Although

¹⁵ The 17 SDGs was formulated by the United Nations in September 2015. The United Nations made it their best effort to ensure that the 17 goals are beneficial and inclusive for all so that no one is left behind. There was also the goal to ensure that there is an inclusive gender balance when it comes to achieving the goals. The 17 SDGs are signed by 193 States and all these States have made it a goal to end global poverty, reduced inequalities and to take action against climate change. Mudhar N 'Why we need to achieve gender equality to achieve sustainable development goals by 2030' available at: <https://yourstory.com/herstory/2019/11/gender-equality-sustainable-development-goals> (accessed on 26 August 2020).

¹⁶ UN High Commissioner for Refugees (UNHCR), *The Sustainable Development Goals and Addressing Statelessness*, March 2017.

¹⁷ UN Women 'SDG 5: Achieve gender equality and empower all women and girls' available at: <https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality> (accessed 26 August 2020).

¹⁸ UN Women 'SDG 5: Achieve gender equality and empower all women and girls' available at: <https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality> (accessed 26 August 2020).

¹⁹ Parker S 'Hidden crisis: violence against Syrian female refugees' 2015 *The Lancet*.

²⁰ Mclean H 'Gender and power- structures in refugee camps: social changes following refugee movements' (1999) Papers at 4.

²¹ Mclean H 'Gender and power- structures in refugee camps: social changes following refugee movements' (1999) at 3.

refugee women are not a homogenous group, one can see that there are some commonalities with regards to their experience and position in power structures.²² Refugee women will not have the same gender identity; their gender identity can be shaped and influenced by different factors. These factors include ethnic, historical or cultural background, religion, family structures or class relations.²³ The understanding of gender differs amongst various cultures because each culture has its own understanding of the norms, roles and practices of masculinities and femininities.²⁴ These masculinities and femininities have a significant role to play in creating and maintaining gender inequality within the refugee setting.²⁵ As stated, there is an unquestionable relationship between gender inequality, patriarchy, and SGBV. SGBV creates barriers that will limit the application of international instruments that protect refugee women against SGBV. The patriarchal values which exist within many societies are the root of this unquestionable relationship.

4.2.1. PATRIARCHY

Patriarchal values are deeply linked to gender inequality. Feminist author Bell Hooks has interpreted patriarchy as:

a political-social system that insists that males are inherently dominating, superior to everything and everyone deemed weak, especially females, and endowed with the right to dominate and rule over the weak and to maintain that dominance through various forms of psychological terrorism and violence.²⁶

²² Mclean H 'Gender and power- structures in refugee camps: social changes following refugee movements' (1999) at 6.

²³ Gren O *Gender in displacement- a phenomenological study of a Syrian refugee experience in Sweden from a gender perspective* (published MA Thesis, Stockholm University, 2018) at 18-19.

²⁴ Gren O *Gender in displacement- a phenomenological study of a Syrian refugee experience in Sweden from a gender perspective* (2018) at 8.

²⁵ Gren O *Gender in displacement- a phenomenological study of a Syrian refugee experience in Sweden from a gender perspective* (2018) at 8.

²⁶ hooks b 'Understanding Patriarchy' (2010) *Louisville Anarchist Federation* at 2.

Please note, the above lowercase reference is correct. The author Gloria Watkins published her first book, "Ain't I A Woman: Black Women and Feminism," in which she used her pen name, bell hooks. The pen name is in honour of her maternal great grandmother, Bell Blair Hooks. Watkins used the lowercase letters to shift the attention from her identity to her ideas.

This interpretation of patriarchy supports the notion that patriarchal values are socially constructed and that patriarchy is a system of power between men and women.²⁷ It is further argued that the structure of power is hierarchical and autonomous, permeating every facet of society.²⁸ The CEDAW which obligates all states to take all reasonable steps to guarantee gender equality does not make mention of patriarchy.²⁹ However, it is argued that the CEDAW Committee makes use of the concept of patriarchy when one interprets the obligations of States in the Convention.³⁰ Article 5(a) of the CEDAW indirectly restricts patriarchy, and it makes mention of eliminating harmful gender stereotypes.³¹ It further indirectly refers to patriarchal systems when it obligates States to modify social and cultural practices that reinforce harmful gender stereotypes in public or private spaces.³² Therefore, this obligates States to ensure that any patriarchal values which reinforce gender inequality are modified or eliminated.

Although the CEDAW protects refugee women against patriarchal values that may be harmful or discriminatory against them, the male violence that exists within patriarchal systems is multidimensional.³³ The assertion of power does not need to be physical; it may take the form of domestication, economic inequality, political under-representation and financial dependency.³⁴ These are all the hidden barriers that are reinforcing gender-inequality. Although patriarchy is a product of gender inequality, the consequences of patriarchy run deeper than gender inequality.³⁵ The survival of patriarchal systems survival is dependent on the norms and traditions that exist and which are embodied within society. The values and beliefs of the patriarchal system are appealing to both men and women.³⁶ This barrier is one that prevents

²⁷ Mudgway C ‘Smashing the patriarchy: why international law should be doing more’ (2019) *LSE* at 3.

²⁸ Mudgway C ‘Smashing the patriarchy: why international law should be doing more’ (2019) at 4.

²⁹ 189 States have signed the CEDAW treaty. These 189 States are obligated to take all reasonable steps to guarantee gender equality. Convention on the Elimination of All Forms of Discrimination against Women 1979.

³⁰ Mudgway C ‘Smashing the patriarchy: why international law should be doing more’ (2019) at 4.

³¹ Convention on the Elimination of All Forms of Discrimination against Women 1979.

³² Convention on the Elimination of All Forms of Discrimination against Women 1979.

³³ Dworkin A & MacKinnon CA In Harm’s Way: *The Pornography Civil Rights Hearings* (1997) Cambridge: Harvard University Press.

³⁴ Dworkin A & MacKinnon CA In Harm’s Way: *The Pornography Civil Rights Hearings* (1997).

³⁵ Enloe C ‘The persistence of patriarchy’ available at: <https://newint.org/columns/essays/2017/10/01/patriarchy-persistence> (accessed 28 August 2020).

³⁶ Patriarchy is not limited to the value and belief that men are/ should be dominate over women. Patriarchal beliefs also include the notion that humans of different races are/ should be ‘naturally’ ranked in a hierarchy. It

the dismantling of the patriarchal system. One cannot effectively dismantle a system that is appealing and supported by the same gender that it discriminates against. Patriarchy is appealing to refugee women because it protects them from alienation and abandonment.³⁷ When refugee women submit to patriarchy, they consider the SGBV that they experience as punishment or “for their own good”, rather than a human rights violation.³⁸ Filmmaker Leena Yadav has argued that some of the biggest gatekeepers of patriarchy are women. She argued that gender equality cannot effectively be achieved because of the social conditioning of men and women.³⁹ Social conditioning refers to the process of inheriting norms, customs and ideologies. Women become the gatekeepers of patriarchy when they uphold traditions and customs which reinforce patriarchy.

An example of this is the widowhood process in African cultures. When a woman is widowed, she is required to wear black and cover her head out of ‘respect’.⁴⁰ She is also required to sit and sleep on a mattress for a week or more. She is required to continue the mourning process after the burial for three to six months. For these months, she is required to maintain her all-black attire and is required to stay away from ‘colourful’ and cheerful spaces.⁴¹ In most instances, a senior woman in the family has to ensure that the widow upholds the widowhood process.⁴² If a woman had to disapprove of the widowhood process and not uphold the custom,

also includes the notion that the world is a dangerous place that requires men to act as the protectors of women. Enloe C ‘The persistence of patriarchy’.

³⁷ Haque U ‘Why Do (So Many) American Women Still Support Patriarchy?’ available at: <https://eand.co/why-do-enough-american-women-still-support-patriarchy-53767f2d7a4> (accessed 28 August 2020).

³⁸ The use of the word “submit”, refers to a refugee woman voluntarily accepting the subordinate role within their intimate partner relationship or within their family structure. Haque U ‘Why Do (So Many) American Women Still Support Patriarchy?’

³⁹ ‘Some of the biggest gatekeepers of patriarchy are women: Filmmaker Leena Yadav’ available at: <https://www.th.equint.com/news/hot-news/some-of-the-biggest-gatekeepers-of-patriarchy-are-women-filmmaker-leena-yadav> (accessed 28 August 2020).

⁴⁰ Manala M ‘African traditional widowhood rites and their benefits and/or detrimental effects on widows in a context of African Christianity’ (2015) 71 *HTS Teologiese Studies/ Theological Studies* 3 at 2.

⁴¹ ⁴¹ Manala M ‘African traditional widowhood rites and their benefits and/or detrimental effects on widows in a context of African Christianity’ (2015) at 2-3.

⁴² Tau S ‘Women- The Gatekeepers Of Patriarchy’ available at: <https://www.huffingtonpost.co.uk/siphokazi-tau/> (accessed 28 August 2020).

she would receive disapproval from other women and other women would encourage her to uphold the custom. This example shows one that women are kept to a certain standard, and they are expected to live up to this standard.⁴³ However, by maintaining this standard, women are contributing to strengthening the patriarchal system.

As stated, the consequences of patriarchy run deeper than gender inequality. Refugee women experience the full spectrum of the results. If they do not experience it within their country of origin, they will experience it in their host country. Patriarchal values have a psychological effect on refugee women. They become emotionally and economically dependent on a male figure.⁴⁴ In refugee camps, refugee women may find it difficult to adjust to their new norm, to adapt to the culture in the host country and may depend on a male figure for direction and support.⁴⁵ Refugee men may also find it difficult to adjust and accept the new role that refugee women have within the host country.⁴⁶ Men are the heads of the family within the patriarchal system; when they are unable to provide for their family sufficiently, they feel weak. The use of violence against women is used by refugee men to feel more masculine, and this helps them fulfil their defined role within the patriarchal system.⁴⁷ When refugee women are given a subordinate position in society, it makes them vulnerable to SGBV.⁴⁸ Although gender inequality, patriarchal beliefs and values have created barriers to ineffectively protect refugees against SGBV, there are also other barriers within refugee camps that fuel the ineffective treatment of women against SGBV.

⁴³ It should be noted that this standard will differ based on various factors such as settings, culture and tradition. As stated, all women are not equally situated and will not have the same experiences.

⁴⁴ Enloe C 'The persistence of patriarchy'.

⁴⁵ Wigget MT *The forgotten voices of female refugees: An analysis of gender roles in the refugee society* (unpublished Master's thesis, Northeastern University, 2013).

⁴⁶ Wigget MT *The forgotten voices of female refugees: An analysis of gender roles in the refugee society* (2013).

⁴⁷ Shalhoub-Kevorkian N *Militarization and violence against women in conflict zones in the Middle East* (2009) Cambridge UK: Cambridge University Press at 41.

⁴⁸ Shalhoub-Kevorkian N *Militarization and violence against women in conflict zones in the Middle East* (2009) at 112.

4.3. BARRIERS WITHIN REFUGEE CAMPS

As established earlier in the thesis, refugee women are vulnerable and exposed to SGBV within refugee camps. Refugee women who are victims/survivors of SGBV often do not report their experiences, or they are afraid to report their SGBV incidents within refugee camps. Refugee camps are humanitarian aid established to provide shelter and security to refugees. However, there may be shelter and security barriers that prevent and contribute to refugee women being ineffectively protected against SGBV. Reliable and adequate protection measures within refugee camps are crucial to the refugee experience. It fulfils the host country's obligation to protect the human rights of refugee women. Inadequate housing limits refugee women from being effectively protected, housing and accommodation act as a source of security for refugee women. Without adequate accommodation and protection, refugee women are more vulnerable to SGBV.

4.3.1. INADEQUATE HOUSING AND ACCOMMODATION AS A SOURCE OF INSECURITY IN REFUGEE CAMPS

The lack of inadequate housing and accommodation exposes refugee women disproportionately to SGBV. As refugees in general, refugee women are afforded the right to housing within their host country. The drafters of the Refugee Convention have protected this right.⁴⁹ Refugee women have been guaranteed this right in article 21 of the Geneva Refugee Convention.⁵⁰ Article 21 of the Refugee Convention states:

As regards housing, the Contracting States, in so far as the matter is regulated by law or by regulations or is subject to the control of public authorities, shall accord to refugees lawfully staying in their territory treatment as favourable as possible and, in any event, not less favourable than that accorded to [non-citizens] generally in the same circumstances.⁵¹

⁴⁹ Some of the treaties and conventions that guarantee or protect the right to housing for refugee women include ICESCR, the ICCPR, the ACHPR, the CEDAW, the CRC, the ACRWC and the CERD. Kavuro C *Refugees' Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity* (unpublished LLD, thesis, Stellenbosch University, 2018) at 330.

⁵⁰ Article 21 of the Refugee Convention provides the right to housing to all refugees. The right to housing is not limited to refugee women.

⁵¹ Article 21 of the Refugee Convention, 1951.

However, this provision is limited to refugee women who are lawfully within staying in the territory of the host state.⁵² This provision also affords refugee women with the same treatment, which must not be less favourable than what is afforded to non-citizens in the same circumstances.⁵³ A refugee woman is entitled to enjoy this right; however, the enjoyment of the right shall be in accordance with domestic housing laws or regulations or is subject to the control of local authorities.⁵⁴

Article 6 of the Migration for Employment Convention contains the standard of treatment afforded to refugee women. Article 6 of the Migration for Employment Convention states:

Each Member for which this Convention is in force undertakes to apply, without discrimination in respect of nationality, race, religion or sex, to immigrants lawfully within its territory, treatment no less favourable than that which it applies to its nationals in respect of....accommodation.⁵⁵

Article 6 of the Migration for Employment Convention affords refugees with the same treatment that is afforded to citizens of the host country.⁵⁶ The CEDAW specifically provides the minimum standard of protection for refugee women. Articles 14(2)(h) provides that refugee women are entitled to sanitation, electricity and water supply, and transport and communications.⁵⁷ These facilities must also be available for refugee women. Whereas, Article 15(2) of the CEDAW states:

States Parties shall accord to women, in civil matters, a legal capacity identical to that of men and the same opportunities to exercise that capacity. In particular, they shall give women equal rights to conclude contracts and to administer property and shall treat them equally in all stages of procedure in courts and tribunals.⁵⁸

⁵² Article 21 of the Refugee Convention, 1951.

⁵³ Article 21 of the Refugee Convention, 1951.

⁵⁴ Article 21 of the Refugee Convention, 1951.

⁵⁵ International Labour Organization (ILO), Migration for Employment Convention (Revised), C97, 1 July 1949, C97.

⁵⁶ ILO, Migration for Employment Convention (Revised), (1949).

⁵⁷ Articles 14(2)(h) CEDAW, 1979.

⁵⁸ Article 15(2) CEDAW, 1979.

Article 15(2) of the CEDAW allows refugee women to seek legal recourse in a court of law if they are discriminated against in the host country.⁵⁹ Article 15(2) of the CEDAW also ensures that refugee women are afforded the same right as men with regards to their right to enter into lease agreements and mortgage homes.⁶⁰

Although there are a significant number of international conventions and treaties that guarantee and protect refugee women's right to adequate housing within host countries, it is challenging for host countries to provide adequate housing for refugees. It is because it is just as challenging for many host countries to guarantee the right to housing of their citizens.⁶¹ Refugee women become even more vulnerable to SGBV when there is inadequate housing and accommodation. They are more likely to be exposed to SGBV when they do have adequate housing and accommodation that will provide them with security.⁶² When a refugee woman arrives in a host country, and there is no adequate housing and accommodation available, they are forced to find shelter or sleep in open parks, fields or on the streets.⁶³ In some situations, even if there are refugee camps available for refugee women, the camps are overcrowded, and it does not provide adequate protection to them.⁶⁴

The basic requirements of adequate housing, as well as security and privacy, are necessary for the protection of refugee women to protect them from experiencing SGBV within the host country. Refugee camps often do not provide sufficient privacy for refugee women.⁶⁵ Refugee women within refugee camps in Sweden and Germany stated that the refugee camps do not

⁵⁹ Article 15(2) CEDAW, 1979.

⁶⁰ Kavuro C *Refugees' Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity* (2018) at 306.

⁶¹ Kavuro C *Refugees' Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity* (2018) at 286.

⁶² Freeman J 'Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"' (2016) 24 *Reproductive Health Matters* 18-26.

⁶³ Freeman J 'Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"' (2016) 18-26.

⁶⁴ Freeman J 'Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"' (2016) 18-26.

⁶⁵ "Falling Through the Cracks: Refugee Women and Girls in Germany and Sweden" (2016) *Women's Refugee Commission* at 7.

provide refugees with private spaces for individuals or families.⁶⁶ They also said that the lack of intimate spaces, leaves refugee women unable to change their clothes in private or remove their hijabs.⁶⁷ The lack of intimate spaces is not limited to sleeping areas. There is often a lack of sex-separated toilets and shower facilities with locking doors to ensure that refugee women are given privacy and safety.⁶⁸ Instead of providing adequate privacy and security to refugee women, refugee camps are creating an environment for SGBV to thrive.⁶⁹

The inadequate facilities in refugee camps place refugee women at risk of SGBV. In the vast majority of refugee camps, there is poor access to adequate clean water and sanitation. The inadequate facilities are a problem in both urban and rural areas, and refugee women are often required to walk kilometres to a water point, this further exposes refugee women to SGBV.⁷⁰ Refugee women are not only exposed to SGBV within the refugee camp setting. Refugee women have reported being raped while collecting firewood or water, or even while travelling to the market.⁷¹ The lack of inadequate housing and accommodation creates barriers to protect refugee women against SGBV effectively. Due to language barriers and overcrowding, it is often difficult for the humanitarian staff in refugee camps to identify victims/survivors of SGBV.⁷² Refugee women who experience SGBV within refugee camps usually do not disclose their experiences of SGBV; this makes it difficult for them to attain the appropriate support, medical treatment and attention that they require.⁷³

UNIVERSITY of the
WESTERN CAPE

⁶⁶ “Falling Through the Cracks: Refugee Women and Girls in Germany and Sweden” (2016) at 1.

⁶⁷ “Falling Through the Cracks: Refugee Women and Girls in Germany and Sweden” (2016) at 6.

⁶⁸ “Falling Through the Cracks: Refugee Women and Girls in Germany and Sweden” (2016) at 1.

⁶⁹ If a refugee woman is fortunate enough secure housing in urban areas, due to the high prices of rent, refugee women are often forced to share accommodation. This results in many people sleeping in small spaces. Unaccompanied refugee women in urban areas frequently have to share rooms with single men. This heightens the risk and exposure to SGBV. UNHCR ‘Survivors, Protectors, Providers: Refugee Women Speak Out’ available at: <https://www.refworld.org/pdfid/4f310baa2.pdf> (accessed 28 August 2020).

⁷⁰ UNHCR ‘Survivors, Protectors, Providers: Refugee Women Speak Out’.

⁷¹ UNHCR ‘Survivors, Protectors, Providers: Refugee Women Speak Out’.

⁷² Falling Through the Cracks: Refugee Women and Girls in Germany and Sweden” (2016) at 6.

⁷³ Obare F, Odwe G & Undie C ‘Attitudes towards help-seeking for sexual and gender-based violence in humanitarian settings: the case of Rwamwanja refugee settlement scheme in Uganda’ (2018) *BMC International Health and Human Rights* at 5.

4.3.2. LACK OF REPORTING IN REFUGEE CAMPS

SGBV is a silent epidemic in many humanitarian settings. Refugee women who are victims/survivors of SGBV often conceal their experiences.⁷⁴ Studies have shown that 1 in 5 female refugees have experienced sexual violence.⁷⁵ However, due to many unreported cases, this number may be higher. The lack of reporting by refugee women can be due to various factors; one of these factors is the social stigma that is associated with SGBV.⁷⁶ Other factors which influence the lack of reporting is inadequate justice systems, policies and enforcement of policies which do not prosecute or arrest the perpetrators of SGBV. An added factor is that refugee women often fear that they will be further mistreated by law enforcement.⁷⁷

The norms and attitude towards SGBV in communities or refugee camps will also have an impact on whether a refugee woman will report the SGBV that she has experienced.⁷⁸ In communities where SGBV is observed to be a normal act or where it is tolerated, the victim/survivor of SGBV will be hesitant to report the SGBV what she has experienced.⁷⁹ Factors such as age, marital status, and education are also important factors which determine whether a victim/survivor will seek help or report the SGBV.⁸⁰ In some cultures, any form of SGBV is perceived as shameful because the purity and virginity of women reflect the honour of the family.⁸¹ The victims/ survivors are stigmatised by their family or community members.

⁷⁴ Obare F, Odwe G & Undie C 'Attitudes towards help-seeking for sexual and gender-based violence in humanitarian settings: the case of Rwamwanja refugee settlement scheme in Uganda' (2018) at 11.

⁷⁵ Vu A, et al 'The prevalence of sexual violence among female refugees in complex humanitarian emergencies: a systematic review and meta-analysis' (2014) *PLOS Currents Disasters* at 4.

⁷⁶ United Nations High Commissioner for Refugees. Sexual and gender-based violence against refugees, returnees, and internally displaced persons. Geneva May 2003.

⁷⁷ United Nations High Commissioner for Refugees. Sexual and gender-based violence against refugees, returnees, and internally displaced persons. Geneva May 2003.

⁷⁸ Naved RT, Parvin K & Sultana N 'Disclosure and help-seeking behaviour of women exposed to physical spousal violence in Dhaka slums' (2016) *BMC Public Health* at 2.

⁷⁹ Coker AL, et al 'Social support protects against the negative effects of partner violence on mental health' (2002) *Women's Health Gender-Based Med* at 466-477.

⁸⁰ Naved RT, Parvin K & Sultana N 'Disclosure and help-seeking behaviour of women exposed to physical spousal violence in Dhaka slums' (2016) at 2-3.

⁸¹ United Nations High Commissioner for Refugees. Sexual and gender-based violence against refugees, returnees, and internally displaced persons. Geneva May 2003.

Within the refugee camp context and out of the refugee camp context, SGBV will not only have physical, emotional and psychological consequences by the victim/survivor. The community may also ostracise them. The victim/survivor may be unable to marry or stay married.⁸²

If refugee women do not report the SGBV that they have experienced, this will have negative effects on the prevention of SGBV, as well as the adequate protection of refugee women against SGBV.⁸³ Refugee workers within refugee camps are required to take practical steps to reduce the risk of SGBV. If cases of SGBV are not reported by refugee women, refugee workers are likely to assume that the practical steps that they have taken to reduce and prevent SGBV are efficient. Refugee workers and officials may deny that there is SGBV within the camps because the incidents are not reported. However, refugee women may not report SGBV because the refugee staff is not adequately trained to deal with SGBV victims/survivors.⁸⁴ Although the lack of reporting is a barrier that impacts the inadequate protection of refugee women against SGBV, the ineffective protection measures provided may also be a contributing barrier.

4.3.3. INADEQUATE PROTECTION MEASURES IN REFUGEE CAMPS

Refugee camps offer shelter for many refugee women. Although refugee camps are set up as a temporary housing solution for refugees, they also serve as a source of protection against SGBV. Refugee camps are an essential element to the humanitarian response to refugees.⁸⁵ In order for refugee camps to be truly humanitarian, they are required to provide sufficient safety and security measures to refugee women. It obligates the host country to ensure that all refugee camps within their territory offer adequate protection that is in accordance with relevant international law and regional instruments.⁸⁶ International law has failed to define and codify a human rights definition of security effectively; this makes it challenging to establish what the

⁸² United Nations High Commissioner for Refugees. Sexual and gender-based violence against refugees, returnees, and internally displaced persons. Geneva May 2003.

⁸³ United Nations High Commissioner for Refugees. Sexual and gender-based violence against refugees, returnees, and internally displaced persons. Geneva May 2003.

⁸⁴ Obare F, Odwe G & Undie C 'Attitudes towards help-seeking for sexual and gender-based violence in humanitarian settings: the case of Rwamwanja refugee settlement scheme in Uganda' (2018) at 2.

⁸⁵ Opaye C 'Refugee camp security in West Africa: An ecowas priority?' (2005) *KAIPTC* at 3.

⁸⁶ Opaye C 'Refugee camp security in West Africa: An ecowas priority?' (2005) at 10.

safety and security of refugees entail.⁸⁷ Scholars like Hathaway have turned to various international human rights treaties to establish what security entails with regards to refugees within a host country.⁸⁸ Hathaway has stated that a refugee's right to physical security is not codified in the Refugee Convention because the right is paramount. He further has argued that the drafters of the Refugee Convention assumed that it did not need to be codified because they believed that the remaining refugee rights if properly enforced, will give effect to their right to physical security.⁸⁹ One of the international treaties that scholars have referred to, to justify a refugee right to safety and security is the ICCPR. In the ICCPR, the element of security is addressed in Articles 6, 7 and 9. These articles apply to refugees in refugee camps. The UN Human Rights Committee has confirmed this. The UN Human Rights Committee stated that non-citizens within a country:

have an inherent right to life, protected by law, and may not be arbitrarily deprived of life. They must not be subjected to torture or cruel, inhuman or degrading treatment or punishment... Aliens have the full right to liberty and security of person.⁹⁰

The confirmation by the UN Human Rights Committee guarantees and affords refugee women the right to physical security. Article 7 of the ICCPR refers to freedom against torture, cruel, inhuman or degrading treatment. Article 7, in essence, affords refugee women protection against SGBV. The element of torture is essential with regards to understanding how a breach of Article 7 of the ICCPR can amount to an infringement of the right to physical security. There is a need to understand the criteria required for an act to be regarded as torture.⁹¹ Article 1 of the Convention against Torture states that an act may only be defined as torture if the criteria that are listed are satisfied. The criteria states:

1. The act in question must result in severe physical or mental pain or suffering.
2. The act which causes the pain or suffering must be intentional.
3. There must be a specific motivation for the intentional infliction of harm, such as – but not limited to – extraction of a confession, intimidation, punishment, or discrimination (but not including lawful punishment).

⁸⁷ Jeewa T 'Refugees' right to physical security: What does it practically mean?' (2020) *Refugee Research Online*.

⁸⁸ Hathaway JC *The Law of Refugee Status* (1991) Toronto: Butterworths.

⁸⁹ Hathaway JC *The Law of Refugee Status* (1991).

⁹⁰ CCPR General Comment No. 15: The Position of Aliens Under the Covenant, 11 April 1986.

⁹¹ Jeewa T 'Refugees' right to physical security: What does it practically mean?' (2020).

4. The act must be committed by, or under the authority of, a public official.⁹²

It may be challenging to satisfy all the criteria; this may be the reason why refugees are most commonly regarded as being victims of inhuman or cruel treatment rather than torture. Hathaway has argued that actions are “inhuman or cruel” if they meet most, but not all the criteria for torture.⁹³ Host countries may be found to have participated in cruel or inhuman treatment if they did not respond appropriately to grave risks that they were aware of.⁹⁴ Therefore, if host countries have failed to protect refugee women from torture, they have also failed to protect refugee women. The CEDAW further demands host countries to protect refugees against SGBV. The CEDAW Committee has adopted the layered obligations for States to ‘respect, protect, promote and fulfil’ women’s right to be free from GBV.⁹⁵ The International Protocol on the Documentation and Investigation of Sexual Violence in Conflict has further obligated host countries to protect refugee women against human rights abuses.⁹⁶ This means that host countries must refrain from interfering with or curtailing the enjoyment of human rights. Host countries are obligated to take positive action to facilitate the enjoyment of human rights.⁹⁷

Host countries must ensure that refugee women are protected against SGBV within refugee camps. As this thesis has shown, refugee women are vulnerable to SGBV. Studies that have been conducted have shown that refugee women are more affected by, and more at risk of SGBV compared to any other population of women in the world.⁹⁸ Research has found that refugee camps offer limited protection against SGBV.⁹⁹ Studies have further revealed that

⁹² Article 1 The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 1987.

⁹³ Hathaway JC *The Law of Refugee Status* (1991).

⁹⁴ Jeewa T ‘Refugees’ right to physical security: What does it practically mean?’ (2020).

⁹⁵ Convention on the Elimination of All Forms of Discrimination against Women 1979.

⁹⁶ Foreign & Commonwealth Office "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a crime or violation of International Law", 2017.

⁹⁷ Foreign & Commonwealth Office "International Protocol on the Documentation and Investigation of Sexual Violence in Conflict: Best Practice on the Documentation of Sexual Violence as a crime or violation of International Law", 2017.

⁹⁸ UNHCR, ‘Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response’, May 2003.

⁹⁹ Chinkin C ‘Addressing violence against women in the Commonwealth within states’ obligations under international law’ (2014) *Commonwealth Law Bulletin* at 471-501.

refugee camps do not have effective police or security personnel. The lack of police or security personnel put refugee women at risk.¹⁰⁰ Refugee women within refugee camps have also reported that the police and security personnel tasked with providing protection, are also responsible for committing acts of physical and sexual violence against the refugees.¹⁰¹ This insecurity within refugee camps has also made it easy for bandits to raid camps and commit acts of SGBV.¹⁰² Melanie O'Brien has argued that refugee women often are forced to engage in 'survival sex' to ensure their own or families' survival from hunger or to ensure that they are given protection.¹⁰³ As stated in this thesis, refugee workers tasked to provide protection and aid to refugees are also the perpetrators of SGBV. Refugee women are at risk of sexual exploitation such as abduction, forced prostitution and trafficking; the lack of protection measures make it difficult for the refugee to seek help or justice.¹⁰⁴ The Oxfam scandal has exposed and revealed that sexual exploitation takes place in situations where women and girls are vulnerable.¹⁰⁵ The Oxfam scandal also shows one that it is easy for 'privileged' men to abuse those who they are tasked to protect.¹⁰⁶

The lack of sufficient protection against SGBV within refugee camps is a barrier that prevents refugee women from being effectively protected against SGBV. Although some international conventions and treaties afford refugee women the right to safety, security and protection, there

¹⁰⁰ Chinkin C 'Addressing violence against women in the Commonwealth within states' obligations under international law' (2014) 471-501.

¹⁰¹ Abdi AM 'In Limbo: Dependency, Insecurity, and Identity amongst Somali Refugees in Dadaab Camps' (2008) 5 *Bildhaan* at 26.

¹⁰² Abdi AM 'In Limbo: Dependency, Insecurity, and Identity amongst Somali Refugees in Dadaab Camps' (2008) at 25.

¹⁰³ O'Brien M *Criminalising Peacekeepers: Modernising National Approaches to Sexual Exploitation and Abuse* (2017) Palgrave Macmillan 1-57.

¹⁰⁴ O'Brien M *Criminalising Peacekeepers: Modernising National Approaches to Sexual Exploitation and Abuse* (2017) 87.

¹⁰⁵ Oxfam is a charitable organisation which focuses on the alleviation of global poverty. The Oxfam scandal involved young, vulnerable girls of Haiti who were sexually exploited by seven Oxfam employees along with the Haiti country manager following the earthquake in 2010. Following the allegation, further allegations revealed that there was the use of sex workers by Oxfam staff in Chad in 2006.

BBC News 'Oxfam Haiti allegations: How the scandal unfolded' available at: https://www.bbc.com/news/uk-43112200?intlink_from_url=&link_location=live-reporting-story (accessed 29 August 2020).

¹⁰⁶ BBC News 'Oxfam Haiti allegations: How the scandal unfolded'.

are barriers that prevent these human rights from being enjoyed. Refugee camps are a source of hospitality for refugees. However, in most situations, refugee women do not experience this hospitality. Refugee women often experience exploitation, extreme insecurity, and constant harassment. The perpetrators are not only from local populations but also from national authorities.¹⁰⁷ In order for a refugee woman to escape the harsh realities of a refugee camp, she will have to be able to enter the labour market and make a sustainable income to be able to pay for housing or accommodation that will offer her adequate protection.

4.4. GENDER AND THE RIGHT TO WORK IN HOST COUNTRIES

As explored in Chapter 3, there are often unequal employment opportunities available for refugee women.¹⁰⁸ The inability to earn an income within the traditional labour market increases a refugee woman's vulnerability to SGBV in the form of sexual exploitation.¹⁰⁹ The right to work is included in a number of international and regional instruments.¹¹⁰ The Refugee Convention provides a comprehensive explanation of the protection of refugee workers' rights.

During the drafting of the Refugee Convention, U.S. delegate Louis Henkin stated that if refugees do not have the right to work, all other rights would be meaningless.¹¹¹ The right to work is fundamental to refugees. It not only refers to the ability to work but also the ability to rebuild their lives with dignity.¹¹² However, the right to work for refugees is dependent on

¹⁰⁷ Abdi AM 'In Limbo: Dependency, Insecurity, and Identity amongst Somali Refugees in Dadaab Camps' (2008) at 26.

¹⁰⁸ It should be noted that unequal employment opportunities are not limited to refugee women.

¹⁰⁹ UNHCR 'Survivors, Protectors, Providers: Refugee Women Speak Out' available at:

<https://www.refworld.org/> (accessed 10 September 2020).

¹¹⁰ European Social Charter, Article 15 Charter of Fundamental Rights of the European Union, Article 15 of the African Charter on Human and Peoples' Rights, Article 45 of the Charter of the Organization of American States, Article XIV of the American Declaration on the Rights and Duties of man, Article 6 of the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Article 6 of the and Cultural Rights, Article 34 of the Arab Charter on Human Rights and Article 6 of the ICESCR.

¹¹¹ UN Ad Hoc Committee on Refugees and Stateless Persons, Ad Hoc Committee on Refugees and Stateless Persons, Second Session: Summary Record of the Thirty-Seventh Meeting Held at the Palais des Nations, Geneva, on Wednesday, 16 August 1950, at 3.00 p.m., 26 September 1950, E/AC.32/SR.37, available at: <https://www.refworld.org/docid/3ae68c1a0.html> (accessed 7 October 2020).

¹¹² Hathaway JC *The Rights of Refugees under International Law* (2005) Cambridge University Press at 154.

various factors. Hathaway has explained that refugees' right to work is dependent on the nature and duration of a refugee's stay in a country.¹¹³ The Refugee Convention refers to 'lawfully in' and 'lawfully staying'.¹¹⁴ These are factors that must be satisfied in order for refugees to be entitled to self-employment and wage-earning employment rights within their host country.¹¹⁵ Article 18 of the Refugee Convention, affords protection to a refugee who is lawfully in their country of asylum. They are afforded the right to engage in self-employment on terms no less favourable than those given to aliens generally.¹¹⁶ A refugee will accrue wage-earning employment rights when they are lawfully staying in their country of asylum.¹¹⁷ This means that when a refugee obtains refugee status, they have an immediate right to wage-earning employment, a right that is equal to the maximum access available to a foreigner.¹¹⁸ Therefore, a refugee who is lawfully staying in their host country will accrue the protection of Article 17(1) of the Refugee Convention.¹¹⁹

The drafters of the Refugee Convention intended for refugees to be given the same highest access to employment afforded to other foreigners.¹²⁰ As stated, the protection of the right to work within the Refugee Convention is supported by other international instruments. Article 6 of the ICESCR recognises that everyone should have the right and the opportunity to gain his or her living by work, which he or she freely chooses or accepts.¹²¹ It has been confirmed by the Committee who oversees the compliance of ICESCR that the right to work applies to everyone including non-nationals, such as refugees, asylum seekers, stateless persons, migrant

¹¹³ Hathaway JC *The Rights of Refugees under International Law* (2005) Cambridge University Press at 154.

¹¹⁴ Convention and Protocol Relating to the Status of Refugees, 1951.

¹¹⁵ Asylum Access and the Refugee Work Rights Coalition 'Global Refugee Work Rights Report' available at: <https://www.refworld.org/pdfid/542903a64.pdf> (accessed 7 October 2020) at 10.

¹¹⁶ Self-employment may include and is not limited to a entrepreneurial activities such as starting a new business, farming for consumption, sale or trade. Article 18 of the Refugee Convention, 1951.

¹¹⁷ Asylum Access and the Refugee Work Rights Coalition 'Global Refugee Work Rights Report at 12.

¹¹⁸ Asylum Access and the Refugee Work Rights Coalition 'Global Refugee Work Rights Report at 12.

¹¹⁹ Article 17(1) provides the same rights of wage-earning employment to refugees as those accorded to the 'most favorable' 'nationals of a foreign country in the same circumstances'.

¹²⁰ Asylum Access and the Refugee Work Rights Coalition 'Global Refugee Work Rights Report at 12-13.

¹²¹ Article 6 of the UN General Assembly, International Covenant on Economic, Social and Cultural Rights, 16 December 1966.

workers and victims of international trafficking, regardless of legal status and documentation.¹²²

Although refugee women are afforded the right to work, there are factors which prevent refugee women from enjoying this right. Refugee status does not guarantee security within the host country, living with refugee status is an insecure way of life and there are various factors which influence this insecurity.¹²³ Gender is a factor which influences a refugee woman's inability to enjoy the full potential of her right to work.¹²⁴ Gender intersects with socio-cultural barriers and legal barriers that prevent gender equality within the workforce.¹²⁵ Patriarchal values and customs may prevent a refugee woman from seeking employment. Refugee women are often given the role of the caregiver and have an obligation to take care of children and the elderly. The gender role as the caregiver of the household restricts their ability to enter the labour market.¹²⁶ Gender discriminatory rules and regulations make it difficult for refugee women to seek jobs and economic opportunities and navigate within the labour market.¹²⁷ The gender discriminatory rules and regulations within a refugee woman's country of origin might have prevented her from obtaining an education, thus making it difficult for her to enter the labour market in her host country.¹²⁸

¹²² UN Committee on Economic, Social, and Cultural Rights, General Comment No. 20, Non-Discrimination in Economic, Social and Cultural Rights, U.N. Doc. E/C.12/GC/20 (2009) at paragraph 30.

¹²³ Khan F 'Has South Africa committed in good faith to article 34 of the UN Refugee Convention, which calls for the naturalisation of refugees?' (2019) 23 *Law Democracy & Development* at 86.

¹²⁴ KNOMAD 'Refugees' Right to Work and Access to Labour Markets - An Assessment' available at: <https://www.knomad.org/sites/> (accessed 7 October 2020) at 26.

¹²⁵ KNOMAD 'Refugees' Right to Work and Access to Labour Markets - An Assessment' at 26.

¹²⁶ Enloe C 'The persistence of patriarchy'.

¹²⁷ International Rescue Committee 'Ruled out of work: Refugee women's legal right to work' available at: <https://reliefweb.int/sites/reliefweb.int/files/resources/ruledoutofworkpolicybriefv3.pdf> (accessed 8 October 2020) at 1-2.

¹²⁸ In South Sudan 73% of girls do not go to primary school. South Sudan's government only spends 2.6% of its total budget on education. In Niger only 17% of girls are literate and in Mali, less than half (38%) of the girls within the country have completed primary school. There are serious consequences if girls do not receive an education. In many countries, girls out of school will be more likely to become child brides and are more vulnerable to diseases such as HIV. Guy-Allen C 'The 10 toughest places for a girl to get an education' available at: <https://www.one.org/us/blog/girls-education-toughest/> (accessed 8 October 2020).

However, the host country may have rules and regulations which economically exclude and marginalise refugee women.¹²⁹ The gender pay gap plays a role in excluding and marginalising refugee women. Research has found that the employment rate of refugee women in Germany, Jordan and Lebanon is as low as 6%, it was further found that the refugee gender pay gap is the widest in Turkey.¹³⁰ Refugee women in Turkey earn just 6 cents for every dollar earned by a host man.¹³¹ These factors further place refugee women in positions that make them vulnerable to SGBV.

As explored in Chapter 3, exploiters prey on the vulnerable. The inability to make a sustainable income will result in poor and dangerous living conditions for refugee women which will further expose them to SGBV.¹³² This chapter has explored the inadequate housing and accommodation available to refugee women within host countries. The inability of refugee women to enter the labour market to make a sustainable income will not only result in poor and dangerous living conditions, but it will force them to be dependent on others. It was reported by a refugee woman that when she arrived in South Africa, she was forced to sleep on the streets. When she went to a mosque for assistance, she was approached by a man who offered her accommodation at his home. Upon arriving at his home, his wife tried to sell the refugee woman's body to men for income.¹³³ The citizens within host countries use the vulnerability of refugees for their own personal gain for sexual exploitation or even cheap labour. There is often a tense relationship between refugees and the local community within the host country, and this further fuel the vulnerability of refugee women to SGBV.

¹²⁹International Rescue Committee 'Ruled out of work: Refugee women's legal right to work' at 2.

¹³⁰ International Rescue Committee 'Ruled out of work: Refugee women's legal right to work' at 3.

¹³¹ International Rescue Committee 'Ruled out of work: Refugee women's legal right to work' at 3.

¹³² Crankshaw TL, Freedman J, Mutambara VM 'Sexual and reproductive health of asylum seeking and refugee women in South Africa: understanding the determinants of vulnerability' (2020) 28 *Sexual and Reproductive Health Matters* 1 at 5.

¹³³ Another refugee woman stated that a man had provided her with accommodation. After a few days he informed her that she had to become his wife or else she had to find alternative accommodation. The fear of living on the streets forced her to become his wife and stay with him. Crankshaw TL, Freedman J, Mutambara VM 'Sexual and reproductive health of asylum seeking and refugee women in South Africa: understanding the determinants of vulnerability' (2020) at 6.

4.5. XENOPHOBIA AND RACISM

Xenophobia and racism is a factor that contributes to the inadequate protection of refugee women. States are tasked with the challenge of accommodating refugees of different nationalities, cultures, races, religions and languages within their country. In order for States to effectively facilitate the diversity within their country, they need to find political, legal, social and economic mechanisms to ensure that there is mutual respect between refugees and citizens.¹³⁴ The mechanisms will also mediate the relations across the differences.¹³⁵ People often do not accept or accommodate diversity.¹³⁶ Xenophobia and racism manifest in many societies. Xenophobia has not been defined under International law. UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes has stated that xenophobia is an ambiguous and contested term and that for present purposes, a holistic definition of xenophobia is adopted. Xenophobia is defined as, 'attitudes, prejudices and behaviour that reject, exclude and often vilify persons based on the perception that they are outsiders or foreigners to the community, society or national identity'.¹³⁷ This definition includes both negative attitudes and chauvinistic behaviour. It extends to actions that are discriminatory, stereotyping and dehumanising remarks. It includes discriminatory policies and practices by government and private officials. Within the refugee context, it includes assault and harassment by state agents, particularly the police and immigration officials.¹³⁸

Racism is prohibited by the International Convention on the Elimination of Racial Discrimination (ICERD), and the ICERD has the mission to eliminate all forms of racial

¹³⁴ UNHCR 'The Integration of resettled refugees essentials for establishing a Resettlement Programme and fundamentals for Sustainable Resettlement Programmes' available at: <https://www.unhcr.org/52a6d85b6.pdf> (accessed 28 August 2020).

¹³⁵ ILO 'International Migration, Racism, Discrimination and Xenophobia' available at: <https://www2.ohchr.org/english/issues/migration/taskforce/docs/wcar.pdf> (accessed 28 August 2020).

¹³⁶ Ngwane C, Pino A & Sigsworth R 'The Gendered Nature of Xenophobia in South Africa' (2008) *CSVR* at 5.

¹³⁷ UNHCR's Regional Office for Southern Africa's Xenophobia Related Programme 'Protection from xenophobia: An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes' available at: <https://www.unhcr.org/55cb153f9.pdf> (accessed 28 August 2020) at 7.

¹³⁸ UNHCR's Regional Office for Southern Africa's Xenophobia Related Programme 'Protection from xenophobia: An Evaluation of UNHCR's Regional Office for Southern Africa's Xenophobia Related Programmes' at 7.

discrimination.¹³⁹ The common factor that connects xenophobia and racism is the discrimination that it imposes against persons. International conventions and treaties prohibit xenophobia and racism. Xenophobia and racial discrimination are often interpreted in conjunction with each other. The ICERD is often used to define xenophobia and racial discrimination. In the ICERD, racial discrimination is defined as:

Any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.¹⁴⁰

Although xenophobia and racial discrimination are different in principle, the definitions overlap. Racism stems from the physical characteristics of a person, whereas xenophobia stems from the origin of the person, the person being a foreigner within the country.¹⁴¹ However, xenophobic actions by persons lead to discriminatory actions against refugee women on the basis of their nationality or ethnic origin; this is the linkage that connects the two.¹⁴²

Many factors contribute to racism and xenophobia. Some of these factors include political movements, violent armed groups and governments who use racial discrimination and xenophobia as a tool to for the political mobilisation of supporters, for exclusion, exploitation, oppression, and even the extermination of others.¹⁴³ Xenophobia and racism can also intersect with gender discrimination. It can diminish or violate refugee women's right to exercise their human rights.¹⁴⁴ In the case *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea (Guinea case)*, Sierra Leonean refugees were

¹³⁹ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

¹⁴⁰ UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations, Treaty Series, vol. 660, p. 195.

¹⁴¹ ILO IOM OHCHR 'International Migration, Racism, Discrimination and Xenophobia' (2001).

¹⁴² ILO IOM OHCHR 'International Migration, Racism, Discrimination and Xenophobia' (2001).

¹⁴³ Statement by Human Rights Watch to the First Preparatory Committee for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance 'Racism, Racial Discrimination, Xenophobia and Related Intolerance Four Areas for International Action' available at <https://www.hrw.org/legacy/campaigns/race/hrw-statement0.htm> (accessed 29 August 2020).

¹⁴⁴ Ngwane C, Pino A & Sigsworth R 'The Gendered Nature of Xenophobia in South Africa' (2008) *CSVR* at 7.

exposed to mass discrimination perpetrated by soldiers and citizens in Guinea.¹⁴⁵ It was alleged by the complainant that the mass discrimination was initiated by the Guinean President Lansana Conté. It was alleged that the President instructed on the national radio, that all Sierra Leonean refugees in Guinea should be arrested, searched and confined to refugee camps.¹⁴⁶ It was reported that Guinean soldiers evicted Sierra Leoneans from their homes and refugee camps. The soldiers looted the homes of refugees. The soldiers proceeded to confiscate their food, personal property and money.¹⁴⁷

Refugee women experienced various forms of violence that ranged from beatings to rapes and shootings.¹⁴⁸ The speech by the President also initiated a widespread rape of Sierra Leonean women in Guinea. Furthermore, Guinean soldiers subjected refugee women to humiliating strip searches which were sometimes conducted several times a day. These strip searches were conducted in front of large groups of people and on-looking soldiers.¹⁴⁹ The Sierra Leonean refugee women had to choose one of two fates. They had the option of tolerating the harassment, torture and possibility of death in Guinea or they could return to Sierra Leone, amid civil war where they would face an equally harsh fate.¹⁵⁰ It is often difficult for refugee women to escape or evade xenophobic or racial violence. It is difficult for refugee women to blend into the population of their host country because of various 'markers of difference' that set them apart. These markers of difference include and are not limited to their native languages, their accents, traditional clothing, and cultural practices.¹⁵¹ The markers of

¹⁴⁵ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004).

¹⁴⁶ It was alleged that President Lansana Conté's speech on the radio incited soldiers and civilians alike to engage in mass discrimination against Sierra Leonean refugees in violation of Article 2 of the African Charter.

¹⁴⁷ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004).

¹⁴⁸ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004).

¹⁴⁹ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea* (2004).

¹⁵⁰ *Institute for Human Rights and Development in Africa (on behalf of Sierra Leonean refugees in Guinea) v Guinea*, 249/02, African Commission on Human and Peoples' Rights, December 2004.

¹⁵¹ Ngwane C, Pino A & Sigsworth R 'The Gendered Nature of Xenophobia in South Africa' (2008) at 17.

difference make refugees vulnerable to exploitation, xenophobia and racially motivated violence.¹⁵²

The *Guinea* case is an example of the treatment that many refugee women experience in their host country. This research shows that refugee women may escape the threat of persecution or any other form of SGBV in their country of origin, but that does not mean that they will be effectively protected in their host country. Xenophobia and racism is a barrier which prevents refugee women from being effectively protected against SGBV.¹⁵³ The Guinea case confirms that the perpetrators of the xenophobic and racist attack are not only limited to citizens of host countries. The perpetrators are also officials who have the duty to protect and defend refugee women. When refugee women are exposed to xenophobia and racial violence, and local remedies are exhausted, they have no other choice but to return to the same country in which they suffered persecution.¹⁵⁴ They also have the option of escaping to an alternative host country but may be exposed to the same xenophobic and racial violence.

As illustrated, there are many international conventions and treaties which prohibit xenophobia and racism. However, many States do not take accountability for xenophobic crimes, and there is a lack of prosecution of the perpetrators for the crimes committed against refugees.¹⁵⁵ Governments and police officials often do not publicly acknowledge the violent attacks against refugees, and there are no proper police investigations of xenophobic crimes.¹⁵⁶ Refugee women are not only exposed to xenophobic violence. Racially motivated violence remains a barrier because of the structural racism that prevails within the States.¹⁵⁷ Racism manifests itself within domestic policies, practices as well as unintentional actions and inactions of

¹⁵² Ngwane C, Pino A & Sigsworth R 'The Gendered Nature of Xenophobia in South Africa' (2008) at 17-18.

¹⁵³ In a 2018 Institute for Security Studies report on migrant women in South Africa most women cited gender-based or sexual violence as one of their top threats. Institute for Security Studies (ISS) 'Woman migrants: forgotten victims of South Africa's xenophobia' available at: <https://issafrica.org/iss-today/woman-migrants-forgotten-victims-of-south-africas-xenophobia>

¹⁵⁴ Ngwane C, Pino A & Sigsworth R 'The Gendered Nature of Xenophobia in South Africa' (2008) at 7.

¹⁵⁵ Mavhinga D 'South Africa Launches Plan to Combat Xenophobia and Racism' available at: <https://www.hrw.org/news/2019/03/25/south-africa-launches-plan-combat-xenophobia-and-racism> (accessed 28 August 2020).

¹⁵⁶ Mavhinga D 'South Africa Launches Plan to Combat Xenophobia and Racism'.

¹⁵⁷ International Convention on the Elimination of All Forms of Racial Discrimination opened for signature Mar. 7, 1966, art. 1(1), 660 U.N.T.S. 195, 216.

individuals.¹⁵⁸ The lack of prosecution of racially motivated violence inflicted by private and public actors assist in maintaining racism within States.¹⁵⁹ Refugee women may also find it difficult to seek legal assistance to prosecute the perpetrators. In host countries, refugee women's access to justice may be limited

4.6. ACCESS TO JUSTICE

Access to justice refers to and is not limited to initiatives and programs which are designed to provide legal services to people. Access to justice allows people to exercise their rights, challenge discrimination or hold decision-makers accountable.¹⁶⁰ Access to justice is a fundamental principle of the rule of law.¹⁶¹ When there is an absence of access to justice, refugee women are unable to have their voices heard; they are unable to exercise their rights, challenge discrimination or hold decision-makers accountable.¹⁶² Every state has a responsibility to respect and to ensure that the human rights of everyone in their jurisdictions are protected and that everyone has equal access to justice. International and regional human rights standards play a vital role in ensuring that these rights are protected and that the rights of refugee women are recognised and effectively safeguarded and integrated into their host country. Article 16 of the Refugee Convention (Article 16) states that:

1. A refugee shall have free access to the courts of law on the territory of all Contracting States;
2. A refugee shall enjoy in the Contracting State in which he has his habitual residence the same treatment as a national in matters pertaining to access to the Courts, including legal assistance and exemption from *cautio judicatum solvi*;
3. A refugee shall be accorded in the matters referred to in paragraph 2 in countries other than that in which he has his habitual residence the treatment granted to a national of the country of his habitual residence.¹⁶³

¹⁵⁸ Racial discrimination is often the unintentional, but predictable consequence of public or private action. International Convention on the Elimination of All Forms of Racial Discrimination opened for signature Mar. 7, 1966, art. 1(1), 660 U.N.T.S. 195, 216.

¹⁵⁹ International Convention on the Elimination of All Forms of Racial Discrimination opened for signature Mar. 7, 1966, art. 1(1), 660 U.N.T.S. 195, 216.

¹⁶⁰ United Nations and the Rule of Law 'Access to Justice' available at: <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (accessed 28 August 2020).

¹⁶¹ United Nations and the Rule of Law 'Access to Justice'.

¹⁶² United Nations and the Rule of Law 'Access to Justice'.

¹⁶³ UN Refugee Convention (1951) art16.

Article 16 of the Refugee Convention confirms that refugee women who are victims/survivors of SGBV are entitled to enjoy the full benefit of this provision.¹⁶⁴ The provision also affirms that any legal disputes or issues that a refugee may have must be dealt with in the domestic courts of the host country. However, as seen with many legal instruments, on the one hand, the scope of the instrument may provide the victim/survivor of SGBV with sufficient access to justice. However, in its application by host countries, the victim/survivor of SGBV may not be afforded the opportunity to enjoy the full benefits of the provision in Article 16.

The domestic laws of a state will have an influence in determining whether a refugee woman will be afforded sufficient access to justice. A provision of Article 16, notes that a refugee should be afforded ‘the same treatment as a national in matters pertaining to access to the Courts...’¹⁶⁵ In interpreting this, it can be inferred that if a female citizen of a host state who has experienced SGBV is denied access to court, then a refugee woman will be treated in the same manner. The notion of the provision is to provide refugees with the same treatment as the nationals of the country. This calls to question whether contracting parties in practice treat refugees (specifically refugee women) in the same manner as they do their citizens.

The right to access to justice has been described in General Recommendation 33 by the CEDAW Committee as ‘multidimensional’.¹⁶⁶ There is a positive obligation upon States to ensure that their domestic laws do not directly or even indirectly discriminate against women.¹⁶⁷ For there to be access to justice, there needs to be availability and accessibility to a justice system. This imposes an obligation upon States to remove financial and any language barriers that may influence a refugee woman’s right to access justice.¹⁶⁸ Article 16(2) of the Refugee Convention refers to refugees’ right to legal assistance, and this can also be referred

¹⁶⁴ It should be noted that refugee women who are formally recognised as refugees and whose status in the country has been permitted and regularised and who reside (i.e. have temporary or permanent residence) in the country of asylum the right to the maximum and full range of rights and benefits accorded by the Refugee Convention. However, the right of access to justice is recognised by States as an essential component of human rights and is vital to the rule of law. UNHCR ‘Rights of Refugees in the Context of Integration: Legal Standards and Recommendations’ available at <https://www.unhcr.org/44bb90882.pdf> (accessed 21 July 2020).

¹⁶⁵ UN Refugee Convention (1951) art16.

¹⁶⁶ CEDAW Committee, General Recommendation No. 33 on women’s access to justice (2015).

¹⁶⁷ Article 7 UDHR.

¹⁶⁸ Article 2 CEDAW. General Recommendation 28.

to as legal aid. In the case of *Airey v Ireland*, the matter confirmed that the right of effective access to justice may include legal assistance.¹⁶⁹ This case has been cited as a precedent in illustrating that there are economic and social rights dimensions within civil and political rights. The case also demonstrates that States may have positive obligations with respect to civil and political rights.¹⁷⁰ In the case, the court upheld the complainant's entitlement to legal assistance as a result of threats, physical assault and judicial separation. Thus, it can be argued that victims/survivors of SGBV should and can be given the same opportunity to enjoy this same right as is provided for in Article 16 (2) of the Refugee Convention.¹⁷¹

However, the reality is that many refugee women face various barriers that prevent them from seeking justice or their right to access to justice is violated. Barriers which prevent them from seeking justice include language difficulties, cultural differences and social isolation.¹⁷² States have an obligation to ensure that they rectify any obstacles that prevent refugee women from seeking justice against SGBV.¹⁷³ States often neglect to realise that refugee women are not in the same position as citizens with regards to accessing justice. Refugee women may have a lack of legal knowledge in understanding their rights and the obligations of the state under the law.¹⁷⁴ Refugee women may also lack financial independence and feel intimidated about the court process. The intimidation may also be linked to pre-arrival experiences and traumatic backgrounds.¹⁷⁵

Due to patriarchal norms, refugee women often rely on the male head of the household to engage with anyone who is in a position of authority. These women often have a tough time engaging with people, and this prevents them from reporting the SGBV that they have

¹⁶⁹ *Airey v Ireland* 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305.

¹⁷⁰ *Airey v Ireland* (1979).

¹⁷¹ Eberchi OE *Access to justice for victims of sexual violence in refugee camps* (2017).

¹⁷² 'Barriers to Access to Justice for Migrant and Refugee Women' available at: <https://jccd.org.au/wp-content/uploads/2018/06/Migrant-Refugee-Women-FACTSHEET.pdf> (accessed 28 August 2020).

¹⁷³ Menavanza F 'Access to Justice in Buffalo and Beyond: Making the Justice System More Welcoming for Refugees' (2016) *Impact Center for Public Interest Law* 47-48.

¹⁷⁴ Menavanza F 'Access to Justice in Buffalo and Beyond: Making the Justice System More Welcoming for Refugees' (2016) at 42-43.

¹⁷⁵ Menavanza F 'Access to Justice in Buffalo and Beyond: Making the Justice System More Welcoming for Refugees' (2016) at 44.

experienced.¹⁷⁶ This is a significant barrier that prevents victims/survivors from seeking justice. Factors by the state may further influence these barriers. These factors include the attitudes and actions of judicial officers, specifically the lack of cultural sensitivity and competency.¹⁷⁷ The lack of interpreters available has remained a constant challenge- in many states, and there are often no interpreters available for refugees.¹⁷⁸ Securing a private lawyer may be difficult for refugee women. If a refugee woman does not get legal assistance from an NGO, it may be difficult to seek justice. This difficulty is due to government resistance, case backlogs, and complications around legal status, language, cultural barriers and cost.¹⁷⁹ States may have an enabling legal framework; however, the national resources of a country may be stretched beyond capacity, and this makes it difficult to provide legal aid to all refugees in need.¹⁸⁰

4.7. CONCLUSION

This chapter has shown that the barriers which are present throughout the refugee journey contribute to the inadequate protection of refugee women. The CEDAW has explicitly prohibited discrimination based on gender.¹⁸¹ However, gender inequality has remained a barrier which not only prevents refugees from being effectively protected against SGBV but also prevents the breakage of the generational cycle of gender inequality. The relationship between gender inequality, patriarchy, and SGBV further prevents refugee women from being protected against SGBV. However, it can be argued that refugee women have a role in maintaining gender inequality and patriarchy. When a refugee woman upholds traditions and customs which are discriminatory to women and which reinforces patriarchy, these refugee

¹⁷⁶ Menavanza F 'Access to Justice in Buffalo and Beyond: Making the Justice System More Welcoming for Refugees' (2016) at 43.

¹⁷⁷ 'Barriers to Access to Justice for Migrant and Refugee Women' available at: <https://jccd.org.au/wp-content/uploads/2018/06/Migrant-Refugee-Women-FACTSHEET.pdf> (accessed 28 August 2020).

¹⁷⁸ International Rescue Committee 'Access to Justice in Crisis Legal Empowerment for Rohingya refugees living in Cox's Bazar, Bangladesh' available at: <https://www.rescue-uk.org/sites/default/files/document/2078/accesstojusticeincrisis.pdf> (accessed 28 August 2020).

¹⁷⁹ International Rescue Committee 'Access to Justice in Crisis Legal Empowerment for Rohingya refugees living in Cox's Bazar, Bangladesh'.

¹⁸⁰ UNHCR 'Turkey: Strengthening legal protection and access to justice' available: <https://reliefweb.int/sites/reliefweb.int/files/resources/63878.pdf> (accessed 29 August 2020).

¹⁸¹ Convention on the Elimination of All Forms of Discrimination against Women 1979.

women are contributing to maintaining the barrier which is preventing them from being effectively protected against SGBV. This barrier manifests itself within the country of origin, during transit as well as in the country of destination.

Within the host country, there are also barriers present in and out of refugee camps. Inadequate housing and accommodation as a source of insecurity have contributed to making refugee women vulnerable and exposed to SGBV within refugee camps. The gender barriers which restrict a refugee woman's ability to enter the labour market also has the ability to make refugee women vulnerable and exposed to SGBV. Furthermore, the lack of adequate shelter, protection and security violates refugee women's right to security and places them in a vulnerable position. A host country must protect the human rights of refugee women. Thus this requires the state to provide refugee women with adequate accommodation that has protection measures in place.¹⁸² However, this obligation is limited to refugee women lawfully staying within the territory of the host state.¹⁸³

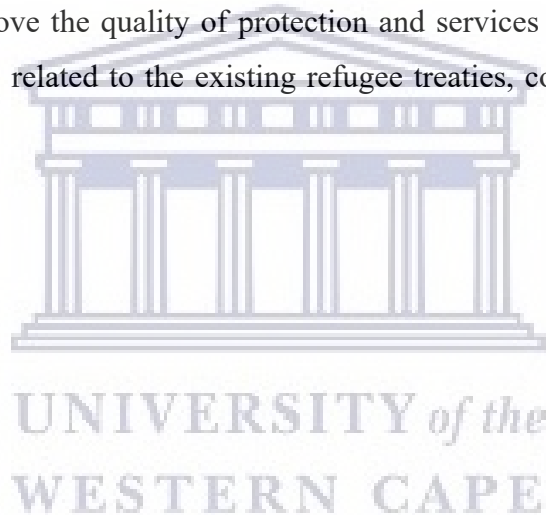
This research has shown, that although refugee women are a vulnerable group, they are not given preferential treatment. Refugee women are entitled to the same level of treatment that is afforded to the citizens and non-citizens of a state. As per Article 6 of the Migration for Employment Convention, refugee women should be afforded the same standard of housing and accommodation which are afforded to the citizens in the state. However, as stated, the reality is that many states do not have sufficient resources to provide refugee women with adequate accommodation and protection measures. A state's inability to provide inadequate housing and accommodation may be linked to the lack of resources within the state. As mentioned, many states are unable to provide adequate housing and accommodation for their citizens, and this inability may extend to refugee women. A state's availability of resources may influence the standard of living that will be afforded to refugee women by the state. Due to this, refugee women are viewed as a burden to many states, and this may influence xenophobic and racist responses.¹⁸⁴

¹⁸² Article 21 of the Refugee Convention.

¹⁸³ Article 21 of the Refugee Convention.

¹⁸⁴ Ngwane C, Pino A & Sigsworth R 'The Gendered Nature of Xenophobia in South Africa' (2008).

Xenophobia and racism, like gender-inequality, manifest themselves within society and is a barrier that further prevents the effective protection of refugee women. Refugees remains vulnerable to xenophobia because of the lack of measures taken by states to protect them from hate crime and violence effectively. Other barriers that are preventing refugee women from being effectively protected against SGBV is the lack of reporting by refugee women and the lack of adequate access to justice. The lack of reporting may be linked to the limited access to justice that is available to refugee women. Access to justice is a fundamental principle of the rule of law, and when this principle is absent, it creates doubt in the legal system, and this has an impact on the reporting of SGBV victims/survivors. Refugee women also hesitate to report the SGBV that they experience because they fear that the inadequate justice system will not prosecute or arrest the perpetrators of SGBV.¹⁸⁵ This research has shown that refugee women are not effectively protected against SGVB. To improve the realities of refugee women, recommendations to improve the quality of protection and services need to be made. These recommendations must be related to the existing refugee treaties, conventions and domestic laws of states.



¹⁸⁵ United Nations High Commissioner for Refugees. Sexual and gender-based violence against refugees, returnees, and internally displaced persons. Geneva May 2003.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.1. INTRODUCTION

Women have faced sexual exploitation for generations. Refugee women experience the full spectrum of sexual exploitation.¹ The sexual exploitation which refugee women experience is linked to gender inequality and male dominance which exists throughout the world.² Gender inequality is a barrier that is preventing the effective protection of refugee women against SGBV. The chapters in this thesis have shown that refugee women are continuously exposed to various forms of SGBV.³ They are exposed to these forms either in their country of origin, in transit or in their country of asylum.⁴ As stated, although there are international laws that prevent and protect women against SGBV, these instruments do not provide adequate protection to refugee women against SGBV. Recommendations must be made to improve the reality of refugee women and to help further give guidance on ways and mechanisms that may aid in protecting them against SGBV.

5.2. RECOMMENDATIONS

The research in the previous chapters has shown that refugee women are not effectively protected against SGBV. The study has shown that even though there are international instruments in place, there are various barriers that are preventing refugee women from being effectively protected against SGBV. The recommendations below are an attempt to improve the protection and security of refugee women against SGBV.

¹ WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women.

² WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women.

³ Chapter 2 explored the various forms of SGBV that refugee women are exposed to throughout the refugee journey.

⁴ Chapter 3 of the thesis examined the refugee journey and explored forms of SGBV that exist during each stage of refugee journey.

5.2.1. GENERAL RECOMMENDATIONS REGARDING GENDER INEQUALITY

This thesis has shown that gender inequality is a prominent factor which is not only fuelling SGBV but it also preventing the protection of refugee against SGBV. States need to not only eliminate gender inequality, but there must be an effective assessment of gender-based claims with gender sensitivity.

5.2.1.1. DEMONSTRABLE MEASURES TO ELIMINATE GENDER INEQUALITY

This research has shown SGBV is a phenomenon that is deeply rooted in gender inequality.⁵ The UN SDGs Goal 5 is specifically aimed at achieving gender equality and the empowerment of women and girls.⁶ To achieve Goal 5, there must be a significant development and change by states. To reduce refugee women's vulnerability to SGBV, gender inequality needs to be tackled.⁷ UNICEF has stated that:

In its most insidious form, gender inequality turns violent. Some 1 in 20 girls between the ages of 15 and 19 – around 13 million – have experienced forced sex. In times of both peace and conflict, adolescent girls face the highest risk of gender-based violence. Hundreds of millions of girls worldwide are still subjected to child marriage and female genital mutilation – even though both have been internationally recognized as human rights violations. And violence can occur at birth, like in places where female infanticide is known to persist.⁸

This extract/provision further proves that there is a strong connection to SGBV and gender inequality. This research has also shown that there is an unquestionable relationship between gender inequality, patriarchy, and SGBV.⁹ Therefore, to effectively protect refugee women against SGBV, states need to ensure that their domestic laws do not directly or indirectly enforce gender inequality. States need to ensure there is equal political representation and gender quotas in the workplace and all societal or institutional forums. There must be a universal obligation upon states to implement and encourage gender equality in all aspects of

⁵ Garcia-Gonzalez J, Forcen P & Jimenez-Sanchez M 'Men and women differ in their perception of gender bias in research institutions (2019) at 4.

⁶ Mudhar N 'Why we need to achieve gender equality to achieve sustainable development goals by 2030

⁷ UNICEF 'Gender equality' available at: <https://www.unicef.org/gender-equality> (accessed 25 September 2020).

⁸ UNICEF 'Gender equality'.

⁹ Meger S & Sachseder J 'Militarized peace: understanding post-conflict violence in the wake of the peace deal in Colombia' (2020).

life and international committees need to ensure and monitor that states are fulfilling their obligations as per the treaties and conventions.

There are many gender norms that are harmful to women.¹⁰ Some of these gender norms are entrenched in the laws and policies of states and violates the rights of women.¹¹ States need to ensure that there are equal economic opportunities for women. Women must be afforded the same opportunities that are afforded to men. By states enforcing equal economic opportunities for women, it will not only enforce gender equality, but it may limit a woman's dependence on a man.¹² It has been shown that a barrier that is preventing the protection of refugee women against SGBV is their dependence on a male figure for financial support or their lack of independence.¹³ If all states enforce equal economic opportunities, this may reshape the lives of many refugee women by reducing the ever-widening gender gap which exists throughout the world.¹⁴ There needs to be a mission by states across all sectors from business, and government to civil society to accelerate the pace of their actions to advance the lives of women further everywhere and to reverse the widening gap of gender inequality through education and training programmes.¹⁵

¹⁰ This research focuses on the SGBV that refugee women face, in this chapter will not be referring to gender inequality exclusively to refugee women. I will be making reference to 'women' because the gender inequality that refugee women face is also faced by women who do not have refugee status. Gender inequality extends beyond refugee women and in order to tackle it we need not only look at it from the perspective of refugee women.

¹¹ An example of gender norms that are entrenched in laws and policies is the restriction of women from inheriting property. South Asia, Afghanistan, Bangladesh, Pakistan, Nepal and Maldives do not provide for equal inheritance rights for sons and daughters. World Bank 'Where in the world do women still face legal barriers to own and administer assets?' available at: <https://blogs.worldbank.org/opendata/where-world-do-women-still-face-legal-barriers-own-and-administer-assets> (accessed 25 August 2020).

¹² It should be noted that although economic independence is an important part of gender equality, it does not guarantee such equality.

¹³ hooks b 'Understanding Patriarchy' (2010) at 2.

¹⁴ Polman P 'To close the gender gap, we need to change how we think' available at: <https://www.weforum.org/agenda/2017/11/why-is-gender-equality-in-decline-and-how-can-we-reverse-it/> (accessed 25 September 2020).

¹⁵ The gender gap refers to the differences between women and men within society. The gender gap is present in all aspects of life, especially as in social, political, intellectual, cultural, or economic attainments or attitudes. The gender gap is closely linked to gender inequality. Polman P 'To close the gender gap, we need to change how we think'.

Stereotypes and the social conceptions of masculinity are other mechanisms that are fuelling gender inequality and thus creating an environment for SGBV to thrive. In order for the gender gap to be eliminated, states and individuals must encourage transformation. There are outdated stereotypes that are harmful to women. These stereotypes limit the expectations of what women can or should do, and it places women in a vulnerable position.¹⁶ These stereotypes must be challenged. The UN Secretary General's High-Level Panel on Women stated that 'changing norms should be at the top of the 2030 Agenda' and this highlights the urgency to transform stereotypes and the social conceptions of masculinity.¹⁷ Although the international community and states have the obligation to draft and enforce laws and policies which eliminates gender inequality, we all have a role to play to challenge adverse social norms and to reshape stereotypes which fuel gender inequality.

It is assumed that laws and policies have the sole ability to reduce problems that exist within society effectively. However, this research has highlighted that gender inequality is present in every aspect of life and is engraved in religion and traditional practices and customs. We cannot depend on laws and policies to eliminate the gender inequality that exists. A tool to eliminate gender inequality is through education. Education can be used as a tool to discourage discriminatory practices, laws and perceptions which exist within society. Gender inequality and the patriarchal system is maintained because of the lack of understanding of the negative consequences that it inflicts upon women. Education in the form of formal education and workshops can be used as a tool to highlight these negative consequences.

Although eliminating gender inequality will not effectively protect refugee women from SGBV, it is a starting point that may reduce their risk to SGBV within the country of origin, during transit and in the country of destination. In order for refugee women to be effectively protected against SGBV, they need to have access to legal aid programmes that will protect them and afford them the justice which they deserve.

¹⁶ Polman P 'To close the gender gap, we need to change how we think'.

¹⁷ UN Women 'Final report of the UN High-Level Panel on Women's Economic Empowerment calls on leaving no one behind' available at: <https://www.unwomen.org/en/news/stories/2017/3/new-final-report-of-the-un-high-level-panel-on-womens-economic-empowerment> (accessed 25 September 2020).

5.2.1.2 EFFECTIVE ASSESSMENT OF GENDER-BASED CLAIMS

This research has shown that decision-makers do not usually assess gender-based claims in relation to awareness of gender roles or power structures, or of ideological expectations placed on men and women.¹⁸ There should be measures in place to manage the issues faced by the applicant's claiming gender-based persecution. The way we understand gender and gender dynamics is continuously evolving and changing. Refugee women are facing new challenges and risks; therefore, there is an urgent need to revise the definition of gender in the gender guidelines as well as in the refugee definition.¹⁹ Therefore, all decision-makers should attend training courses to effectively understand gender-based asylum claims so that they are effectively informed of the gendered aspects in such claims. A gender specialist can also be appointed to these committees to advise the committee and to keep up to date on new gender research and developments.

5.2.2. RECOMMENDATIONS FOR THE COUNTRY OF ORIGIN

Chapter 3 has highlighted the various reasons which motivate refugee women to flee their country of origin. Although these reasons are not all linked to SGBV, in order for states to effectively protect refugee women against SGBV, states need to address the power imbalances which exist and create safe havens for women.

5.2.2.1. ADDRESSING THE POWER IMBALANCES

As explored in Chapter 2 and Chapter 4, patriarchal systems and power imbalances have an active role in preventing the protection of refugee women against SGBV. Many refugee women do not have the political space to voice their opinions and exercise their rights, both in their

¹⁸ Johansson L *Gender-Based Persecution and the (inadequate) use of the Concept of Gender: A textual analysis of the construction of women's gender-based asylum claims in the Swedish asylum determination system* (published Master's thesis, University of Gothenburg, 2013) at 58.

¹⁹ Johansson L *Gender-Based Persecution and the (inadequate) use of the Concept of Gender: A textual analysis of the construction of women's gender-based asylum claims in the Swedish asylum determination system* (2013) at 58.

country of origin and asylum.²⁰ States need to ensure that there is a platform for women to voice their opinions and concerns relating to the power imbalances which exist within society that fuel gender-persecution and other forms of SGBV. States need to be open and willing to address the power imbalances which exist within their country. States need to ensure that they are committed to achieving the goals as per the UN SDGs, specifically Goals 5. States should also have the obligation to offer women protection when they speak out, as they may face backlash.

5.2.2.2. SAFE HAVENS

Chapter 3 highlighted that refugee women often do not leave abusive relationships because of the fear of isolation. Chapter 2, 3 and 4 also highlighted that state officials are often the perpetrators of SGBV or they do not effectively protect women against SGBV. There needs to be the establishment of safe havens for women fleeing SGBV and women who are displaced within their country. The establishment of safe havens for women in every state will not only provide refugee women with temporary shelter but will also provide refugee women with protection against SGBV. These safe havens must also have free legal advice and services available for women who want to seek asylum in another country.

5.2.3. RECOMMENDATIONS ABOUT THE PERIOD IN TRANSIT

Chapter 3 briefly highlighted that the medium of the refugee journey is one that is not easy to document and which is not extensively documented. During this stage of the journey, refugee women are vulnerable to the risk of exploitation, trafficking and slavery. During the medium of the refugee journey, refugee women are often travelling with untreated medical conditions that stem from the SGBV that they experienced in their country of origin or during transit.

²⁰ Sengupta I 'Becoming a Refugee Woman: Gender-based persecution and Women Asylum Seekers under International Refugee Law' (2009) *SSRN* at 6-7.

5.2.3.1. ACCESS TO MEDICAL SERVICES

In order to achieve the vision of the 2030 Agenda and the SDGs, to leave no one behind, the health needs of refugee women must be adequately addressed. There needs to be the strengthening of international cooperation regarding the health of refugees. States need to ensure that there are medical services available for refugee women at every transit point and all borders.

5.2.3.2. IDENTIFICATION OF VICTIMS OF EXPLOITATION AND TRAFFICKING

As explored in Chapter 3, refugee women are vulnerable to exploitation, trafficking and slavery during the medium of the refugee journey. Security and humanitarian officials who are stationed at transit points and borders should be adequately trained to identify victims of exploitation, trafficking and slavery. The international community should also impose severe penalties for security and humanitarian officials who accept bribes from perpetrators to grant them the freedom to exploit and traffic refugee women across borders. There should also be protection mechanisms in place to protect refugee women against these perpetrators.

5.2.4. RECOMMENDATIONS FOR THE HOST COUNTRY

Chapter 3 and 4 of this thesis highlighted not only the barriers which prevent the protection of refugee women in the host country but also the factors which fuel SGBV in host countries. Below are recommendations that attempt to improve the protection and security of refugee women against SGBV in host countries.

5.2.4.1. ACCESS TO EFFECTIVE LEGAL AID PROGRAMMES

A refugee women's right to legal assistance is a vital component of the refugee journey. In many states and during the medium of the refugee journey, there are no legal aid programmes available to refugee women. The lack of access to justice has been identified as a barrier that is preventing refugee women from being effectively protected against SGBV.²¹ A long-term strategy to afford refugee women legal aid is the establishment of targeted programmes to

²¹ 'Barriers to Access to Justice for Migrant and Refugee Women'.

address the challenges refugee women victims/ survivors of SGBV encounter in accessing the judicial system. These challenges are and are not limited to the ignorance of the law, lack of faith in the legal system as well as widespread illiteracy.²²

States need to ensure that there are institutions which have *pro bono* judicial assistance programme that will provide advice, explanation and assistance to refugee women. These institutions must also provide a detailed and comprehensive explanation on the functioning of the domestic judicial system and accompany the victims/survivors of SGBV through the whole process and duration of the judicial proceedings. Due to the sensitivity of SGBV, these legal aid programmes must create an atmosphere that is safe and comforting to the victims/survivors. During the consultation process refugee, women should feel safe, and the staff must be experts within the field. The staff must have good judgment and must possess both legal and technical expertise. The international community needs to ensure that they are legal aid assistance available to refugee women at borders. The medium of the refugee journey is the point of the journey that is poorly documented, and refugee women are exposed to various forms of SGBV during this period thus making it essential that there is legal aid available to refugee women at borders.

The access to legal aid programmes will not only provide the victim/survivors of SGBV with the justice and protection that they deserve, but it may also increase refugee women's trust in the judicial system. If states have effective judicial systems that afford refugee women the justice which they deserve, they will be more confident to report the SGBV that they have experienced. This will result in the perpetrators getting arrested for the SGBV acts which they have committed. As this research has shown, police and security forces are the most visible perpetrators of SGBV.²³ These state officials use ineffective and corrupt judicial systems to their advantage to perpetrate SGBV and to exploit refugee women.²⁴ If refugee women have access to targeted programmes to address the challenges that they are facing in accessing the judicial system, it will further protect them against SGBV perpetrated by state officials.

²² Hans A & Betty RA 'The Gender Imperative: Human Security vs. State Security'.

²³ Hans A & Betty RA 'The Gender Imperative: Human Security vs. State Security'.

²⁴ Hans A & Betty RA 'The Gender Imperative: Human Security vs. State Security'.

States must ensure that there is a formal justice system located in or near refugee camps. By having a formal justice system near refugee camps, it will not only enhance access to justice, but it will curb the current culture of impunity.²⁵ The courts within states should incorporate the principle of reparation as enshrined in Article 75 of the Rome Statute of the ICC.²⁶ Article 75 provides for reparation for victims of violations of international human rights and gross violations of international humanitarian law.²⁷ Furthermore, Article 79 creates a trust fund for the settlement of reparation to victims, and it will relieve the barrier of logistics in approaching a civil court for remedies.

Furthermore, states must be held accountable for the crime of SGBV against refugee women if refugee women are denied access to justice. Article 16 of the Refugee Convention guarantees refugee women with free access to court for refugees in host countries. If states fail to fulfil this obligation, it is a breach of international obligations.²⁸

5.2.4.2. ADEQUATE ACCOMMODATION AS A SOURCE OF SECURITY FOR REFUGEE WOMEN

There is an obligation upon states to provide refugee women with adequate accommodation. Many states fulfil this obligation; however, the accommodation that is provided to refugee women do not effectively protect them from SGBV. States need to ensure that the accommodation provided to refugee women effectively protects them against SGBV. There should be separate accommodation available for women who are travelling alone, and there should be security in place to protect them against SGBV. The bathrooms within these accommodation facilities should have locks to avoid forced entry. States need to ensure that there is sufficient accommodation available to refugee women to prevent overcrowding. There should be effective security measures in place to protect refugee women against SGBV within these accommodations. The employment of female security officials should be mandatory. Victims/survivors of SGBV often feel more comfortable approaching female security officials;

²⁵ Eberchi OE *Access to justice for victims of sexual violence in refugee camps* (2017).

²⁶ Rome Statute of the International Criminal Court (Rome statute) 17 July 1998, United Nations, Treaty Series, volume 2187, 3.

²⁷ Rome Statute of the International Criminal Court (Rome statute) 17 July 1998.

²⁸ Eberchi OE *Access to justice for victims of sexual violence in refugee camps* (2017).

therefore, having female security officials present at these accommodations will make it easier for refugee women to report any acts of SGBV.

5.2.4.3. EQUAL JOB OPPORTUNITIES FOR REFUGEE WOMEN

Refugee women must be allowed to earn an income. Suppose it is difficult for refugee women to find job opportunities or earn a sustainable income. In that case, it makes them vulnerable to many forms of exploitation such as sex work and trafficking (amongst many others). If a refugee woman does not have a sustainable income, it forces them to resort to sex work or any other illicit acts to earn an income, and this exposes them to SGBV. As this research has shown, the lack of job opportunities is not the only barrier that is preventing refugee women from earning an income; gender has a vital role to play. A survey by UN Women/REACH has shown that there are various factors that prevent Jordanian women and Syrian refugee women from entering the labour market.²⁹

These factors include but are not limited to cultural, societal, familial or religious pressures, a lack of job opportunities that match women's education, skills or training, unacceptable pay for women, childcare and housework responsibilities.³⁰ These factors prevent refugee women from not only earning a sustainable income, but it may also prevent them from leaving violent intimate partner relationships. States have the obligation to ensure that women enter the labour market on an equal basis to men.³¹ The Beijing Conference calls on governments, NGOs and civil society to “promote and protect the full enjoyment of all human rights and the fundamental freedoms of all women throughout their life cycle”.³² It has been two decades since the Beijing Conference and women still do not have equal access to the labour market.³³

²⁹ These factors are not limited to refugee women. Women face various factors which prevent them from entering the labour market on an equal basis with men.

³⁰ International labour organisation ‘Jordan: Advancing gender equality and supporting job creation among refugees and host communities through public works’ available at: <https://www.ilo.org> (accessed 25 September 2020).

³¹ United Nations, Beijing Declaration and Platform of Action, adopted at the Fourth World Conference on Women, 27 October 1995.

³² United Nations, Beijing Declaration and Platform of Action (1995).

³³ International labour organisation ‘Jordan: Advancing gender equality and supporting job creation among refugees and host communities through public works.

There should be equal job opportunities available to refugee women. States need to ensure that businesses are not underpaying refugee women. States also need to ensure that work permits are available to refugee women. These work permits should be easy to obtain, and it should be at an affordable price. States should further educate refugee women on their labour rights and responsibilities to avoid exploitation. As stated, ensuring that refugee women are afforded the right to equal job opportunities will not only guarantee them sustainable income, but it will also give them independence. Independence will protect refugee women against SGBV by removing the dependency that they may have on men and also allowing refugee women to pay for accommodation that has the necessary security measures to protect them from SGBV.

5.2.4.4. ACCEPTANCE OF REFUGEE WOMEN IN HOST COUNTRIES

Chapter 5 has highlighted that xenophobia and racism are barriers which are preventing the protection of refugee women against SGBV. States need to ensure that they prosecute individuals who perpetrate violence towards refugee women in the forms of hate speech and physical violence. By states showing their willingness and openness to welcome refugee women within their territory, it will reduce the SGBV that refugee face within their country of destination.

5.3. CONCLUSION

This thesis has investigated whether the international instruments that exist to protect refugee women, effectively protect refugee women against SGBV throughout the whole refugee experience. Throughout the research, the trends and hidden aspects of SGBV throughout the refugee experience have been analysed to determine whether the international community has taken significant measures to ensure the safety and security of refugee women. In determining whether refugee women are effectively protected against SGBV, international instruments and international case law was examined and explored.

5.3.1. REVISITING THE RESEARCH QUESTIONS

In Chapter 1, it was stated that in order for one to answer the main research question³⁴, there are additional sub-questions that need to be explored in order for one to answer the main research question. Each sub-question and the main research question will be answered below.

This thesis examined various international instruments such as the Refugee Convention, CEDAW, DEVAW and African Convention, amongst many others. These international instruments protect refugee women against any physical, sexual or psychological harm.³⁵ These international instruments have criminalised violence against women and have codified the rights of refugee women to live and be free of SGBV throughout the refugee journey. The Refugee Convention provides surrogate protection to refugee women. The leading international instrument which refugee women must rely on to secure protection is the Refugee Convention. This research has shown that although there are many international instruments and programmes which have been drafted to protect refugee women, these instruments and programmes do not effectively protect refugee women against SGBV. As examined in Chapter 4, there are various barriers that exist which prevent the effective protection of refugee women. To fully understand the concept of SGBV, the various forms of SGBV was explored in Chapter 2 as well as Chapter 3. The impact and consequences of these forms of SGBV on the life of refugee women were also explored in Chapter 2.

In Chapter 2, gender-related persecution was explored as well as the multiple forms of GBV perpetrated by state and non-state officials. In Chapter 3, the exploitation and trafficking of refugee women during transit was explored. It was highlighted that the trafficking of refugee women is common in the migration and the movement of people from countries of conflict because there are many refugees and internally displaced women. The exploitation of refugee women is another form of SGBV that refugee women are vulnerable to. Refugee women are highly vulnerable to being exploited during their migration journey or upon arriving in their country of destination. In practice, it may be difficult to distinguish between situations in which a refugee woman is trafficked and situations in which a refugee woman is smuggled and

³⁴ The main research question is whether refugee women are effectively protected against SGBV throughout the entire refugee journey.

³⁵ Art.1 of the UN Declaration on the Elimination of Violence against Women.

subsequently exploited.³⁶ Exploitation is not limited to the medium of the refugee journey. Refugee women are also vulnerable to SGBV within their country of origin. Chapter 3 further explored the various forms of SGBV refugee experience within refugee. It was established that the most persistent form of SGBV that refugee experience throughout the refugee journey is rape. Refugee women are vulnerable to rape at every stage of the refugee journey. Chapter 2 explored the various consequences and impact of these consequences on a refugee woman's life. SGBV may have socio-economic consequences, health consequences and psychological consequences.

Chapter 4 highlighted all the barriers which are preventing the ineffective protection of refugee women against SGBV. The main obstacle which is preventing the protection of refugee is gender inequality. As stated, there is an unquestionable relationship between gender inequality, patriarchy, and SGBV. If states do not take effective measures to eliminate GBV and encourage gender equality as per Goal 5 of the SDGs, refugee women will remain vulnerable to SGBV. This research has also shown that a refugee woman's access to justice is limited. There are barriers that prevent refugee women from receiving the justice which they deserve. It was further shown that state officials play an active role in limiting refugee's right to effective protection against SGBV. State officials have limited refugee woman's' right to protection against SGBV through illicit acts such as corruption, exploitation and by being perpetrators of SGBV against refugee women.³⁷

The research in this thesis has shown that refugee women are not effectively protected against SGBV. We cannot depend on international instruments and mechanisms to protect refugee women; we have to take a more proactive role within society to reduce and stop the violence against refugee women. The hidden factors which are limiting a refugee women's need to be eliminated and more legal action with a gender-sensitive approach is needed to protect refugee women effectively. States need to make it a long term goal to create and enforce protection mechanisms for refugee women not only within their states but throughout the routes which refugee women travel to reach their country of destination. Although some refugee women are fortunate enough to have agency, autonomy and authority, the fear of being a victim/survivor

³⁶ Pickering S 'Gender, Securitization and Transit: Refugee Women and the Journey to the EU' (2013) at 341.

³⁷ Russo NF & Pirlott A 'Gender-Based Violence: Concepts, Methods, and Findings' (2006) at 183-185.

to SGBV is one that is consistent in every stage of the refugee journey. The reality is that this fear exists not only in the minds of refugee women but of all women. This fear is confirmation that refugee women are not only ineffectively protected against SGBV but are also vulnerable to SGBV throughout the refugee journey.



UNIVERSITY *of the*
WESTERN CAPE

BIBLIOGRAPHY

BOOKS

Boot M *Genocide, Crimes Against Humanity, War Crimes: Nullum Crimen Sine Lege and the Subject matter Jurisdiction of the International Criminal Court* (2002) New York: Intersentia

Cook AB *Women and War: A Historical Encyclopaedia From Antiquity to the Present* (2006) California: ABC-CLIO

Cseste J & Kippenberg J *The War Within The War: Sexual Violence Against Women And Girls in Eastern Congo* (2002) New York: Human Rights Watch

De Brouwer AM *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) Antwerp: Intersentia

Durham H & Gurd T (eds) *Listening to Silences: Women And War* (2005) The Netherlands: Martinus Nijhoff Publishers

Dworkin A & MacKinnon CA *In Harm's Way: The Pornography Civil Rights Hearings* (1997) Cambridge: Harvard University Press

Feller E, Nicholson F & Turk V *Refugee Protection in International Law* (2003) New York: Cambridge University Press

Goodwin-Gill G *The refugee in international law* 2 ed (1996) Clarendon Press

Grahl-Madsen A *The Status of Refugees in International Law: Refugee character Volume 1 of The Status of Refugees in International Law* (1966) A.W Sijthoff

Hathaway JC & Foster M *The Law of Refugee Status* 2nd ed (2014) Cambridge University Press

Khan F *Immigration law in South Africa* (2018) Cape Town, South Africa: Juta and Company

Khan F & Schreier T *Refugee Law in South Africa* (2014) South Africa: Juta

Kippenberg J *Soldiers Who Rape, Commanders Who Condone: Sexual violence and Military Reform in the Democratic Republic of Congo* (2009) New York: Human Right Watch

Lauterpacht E & Bethlehem D *Refugee protection in international law: UNHCR's Global Consultations on International Protection* (2003) Cambridge: Cambridge University Press

MacKinnon CA *Feminism Unmodified* (1989) United States: Harvard University Press

Macklin A *Refugee Women and the Imperative of Categories* (1995) The Johns Hopkins University Press

O'Brien M *Criminalising Peacekeepers: Modernising National Approaches to Sexual Exploitation and Abuse* (2017) Palgrave Macmillan

Shalhoub-Kevorkian N *Militarization and violence against women in conflict zones in the Middle East* (2009) Cambridge UK: Cambridge University Press

Skjelsbaek I *The Political Psychology of War Rape: Studies from Bosnia and Herzegovina* (2012) Abingdon: Routledge

Steer C *Translating Guilt: Identifying Leadership for Mass Atrocity Crimes* (2017) The Netherlands: Asser Press

Williams S *Hybrid and International Criminal Tribunals* (2012) North America: Hart Publishers

CASE LAW

INTERNATIONAL

AATA Case No. 1412142, [2015] AATA 3566 (24 October 2015) Australia: Administrative Appeals Tribunal, 24 October 2015, *RRT Case No. 1108892*, [2012] RRTA 432 Australia: Refugee Review Tribunal, 29 May 2012

AATA Case No. 1413076, [2016] AATA 3769 (2 May 2016), Australia: Administrative Appeals Tribunal, 2 May 2016

Airey v Ireland 32 Eur Ct HR Ser A (1979): [1979] 2 E.H.R.R. 305

American Booksellers Association Inc v Hudnut 771 F.2d 323 7th Cir (1985) n 2, citing *Gregg v The State of Georgia* 428 US 153 (1976)

Applicant v. State Secretary for Security and Justice, 201603036/1/V2, Netherlands, The Council of State (Raad van State), 14 September 2016

Aurelien, Eyon v. M.C.I. (F.C., no. IMM-10661-12), Rennie, June 26, 2013; 2013 FC 707

Canada (MEI) v. Marcel Mayers, FC (CA), 5 Nov. 1992, [1993] 1 FC 154 (C.A.)

Canada v. Ward, (1993) 2 S.C.R. 689, 739

CRDD T92-09592, September 14, 1993

Denmark Refugee Appeals Board's decision of 16 January 2017

Fiadjoe v. Attorney General, 411 F.3d 135 (3d Cir. 2005) (A77 943 716)

Grebemichael v. INS, 10 F.3d 28, 36 (1st Cir. 1993)

Hindawi, Manal v. M.C.I. (F.C., no. IMM-4337-14), Shore, May 6, 2015; 2015 FC 589

Iliev v. INS, 127 F.3d 638, 642 & n.4 (7th Cir. 1997)

Islam v. Secretary of State for the Home Department Immigration Appeal Tribunal and Another, Ex Parte Shah, R v. [1999] UKHL 20; [1999] 2 AC 629; [1999] 2 All ER 545

Lwin v. INS, 144 F.3d 505, 511-12 (7th Cir. 1998)

Matter of Acosta, 19 I. & N. Dec. 211 (1985)

MD (Guinea) v. Secretary of State for the Home Department, [2009] EWCA Civ 733, United Kingdom: Court of Appeal (England and Wales), 17 June 2009

MK (Lesbians) Albania v. Secretary of State for the Home Department, CG [2009] UKAIT 00036, United Kingdom: Asylum and Immigration Tribunal / Immigration Appellate Authority, 9 September 2009

Narvaez v. Canada (Minister of Citizenship and Immigration), [1995] 2 F.C. 55 (T.D.)

Ndjavera, Eveline v. M.C.I. (F.C., no. IMM-7018-12), Rennie, April 30, 2013; 2013 FC 452

Peralta, Gloria Del Carmen v. M.C.I. (F.C.T.D., no. IMM-5451-01), Heneghan, September 20, 2002; 2002 FCT 989

Prosecutor v Anto Furundzija (Trial Judgement) IT-95-17/1-T International Criminal Tribunal for the former Yugoslavia (ICTY)

Prosecutor v. Dragoljub Kunarac, Radomir Kovac and Zoran Vukovic (Trial Judgment) IT-96-23-T & IT-96-23/1-T International Criminal Tribunal for the former Yugoslavia (ICTY)

Prosecutor v. Issa Hassan Sesay, Morris Kallon and Augustine Gbao (the RUF accused) (Trial judgment), Case No. SCSL-04-15-T, Special Court for Sierra Leone, 2 March 2009

R v Immigration Appeal Tribunal, Ex P Jonah [1985] Imm AR 7

R v. Secretary of State for the Home Department, Immigration Appeals Tribunal, Ex parte Anthony Pillai Francis Robinson, Case No :FC3 96/7394/D, United Kingdom: Court of Appeal (England and Wales), 11 July 1997

R.H. v Sweden no. 4601/14, Council of Europe: European Court of Human Rights Rennie, April 30, 2013; 2013 FC 452

SA (Divorced woman - illegitimate child) Bangladesh v. Secretary of State for the Home Department, CG [2011] UKUT 00254(IAC), United Kingdom: Upper Tribunal (Immigration and Asylum Chamber), 11 July 2011

The Prosecutor v. Jean-Paul Akayesu (Trial Judgement) ICTR-96-4-T International Criminal Tribunal for Rwanda (ICTR)

The Prosecutor vs. Alex Tamba Brima, Brima Bazzy Kamara and Santigie Borbor Kanu (the AFRC Accused), SCSL-04-16-T, Special Court for Sierra Leone (2007)

Zheng v. Netherlands Communication No. 15/2007, UN Doc. CEDAW/C/42/D/15/2007 (26 Oct. 2009)

JOURNAL ARTICLES

‘Falling Through the Cracks: Refugee Women and Girls in Germany and Sweden’ (2016) *Women’s Refugee Commission* at 1-14

Abdi AM ‘In Limbo: Dependency, Insecurity, and Identity amongst Somali Refugees in Dadaab Camps’ (2008) 5 *Bildhaan* at 6-14

Ager A & Stark L ‘A Systematic Review of Prevalence Studies of Gender-Based Violence in Complex Emergencies’ (2011) *SAGE* at 34-127

Askola H ‘Responding to Vulnerability? Forced Marriage and the Law’ 4 (2018) *UNSW Law Journal* 977-1002

Bank A, Horn J, Zimmerman C 'Prevention of violence against women and girls: lessons from practice' (2014) *The Lancet* at 1672-1684

Bartolomei L & Pittaway E 'From Rhetoric to Reality: Achieving Gender Equality for Refugee Women and Girls' (2018) *Centre for International Governance Innovation* at 1-17

Benezer G & Zetter R 'Searching for Directions: Conceptual and Methodological Challenges in Researching Refugee Journeys' (2015) 28 *Journal of Refugee Studies* at 297-318

Botchway ANK 'Abolished by Law-Maintained in Practice: The Trokosi as Practiced in Parts of the Republic of Ghana' 3 (2008) *FIU Law Review* at 369-393

Boyle E & Corl A 'Law and Culture in a Global Context: Interventions to Eradicate Female Genital Cutting' (2010) *Annual Review of Law and Social Science* at 195-215

Chakrabarti A & Handa S 'A cash plus program reduces youth exposure to physical violence in Zimbabwe' (2020) 134 *World Development* at 1-22

Chan KL 'Sexual violence against women and children in Chinese societies' (2008) *Trauma Violence, & Abuse* at 4-51

Chinkin C 'Addressing violence against women in the Commonwealth within states' obligations under international law' (2014) *Commonwealth Law Bulletin* at 471-501

Coker AL, et al 'Social support protects against the negative effects of partner violence on mental health' (2002) *Women's Health Gender-Based Med* at 465-476

Dauvergne C & Millbank J 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 *The Peter A. Allard School of Law Allard Research Commons* 57 at 57-88

De Andrade JHF ' "On the Development of the Concept of "Persecution" in International Refugee Law' (2008) 2 *Anuário Brasileiro de Direito Internacional* at 114-136

Donnelly ER & Muthiah V 'Protecting women and girls in refugee camps States' obligations under international law' *LSE* at 2-74

Dusten M & Held N 'In or out? A queer intersectional approach to 'Particular Social Group' membership and credibility in SOGI asylum claims in Germany and the UK' (2018) *GenIUS - Rivista di studi giuridici sull'orientamento sessuale e l'identità di genere* at 1-17

Eboe-Osuji C 'International Law and Sexual Violence in Armed Conflicts' (2012) *Brill* at 18-344

El-bushra J & Lopez PE 'Gender-related violence: Its scope and relevance' (1993) 1 *Focus Gend* at 1-9

Evens E, Lanham M & Santi K' Experiences of gender-based violence among female sex workers, men who have sex with men, and transgender women in Latin America and the Caribbean: a qualitative study to inform HIV programming' (2019) 19 *BMC Int Health Hum Rights* 9 at 1-14

Fernandez L 'Religious persecution as a crime against humanity: ending impunity' (2013) 6(1/2) *International Journal for Religious Freedom* at 1-12

Flamand C 'FGM: challenges for asylum applicants and officials' (2015) *FMR* at 80-81

Foote V 'Refugee Women as a Particular Social Group: A Reconsideration' (1994) 14 *Refuge* at 8-12

Freedman J 'Mainstreaming gender in refugee protection' (2011) 23 *Cambridge Review of International Affairs* at 589-607

Freedman J 'Sexual and gender-based violence against refugee women: a hidden aspect of the refugee "crisis"' (2016) 24 *Reproductive Health Matters An international journal on sexual and reproductive health and rights* at 18-26

Gaggioli G 'Sexual violence in armed conflicts: A violation of international humanitarian law and human rights law' (2014) 96 *International Review of the Red Cross* at 503-538

Garcia-Gonzalez J, Forcen P & Jimenez-Sanchez M ‘Men and women differ in their perception of gender bias in research institutions (2019) 14 *PLoS ONE* at 1-12

Gong-Gershowitz J ‘Forced Marriage: A "New" Crime Against Humanity?’ (2009) 8 *Northwestern Journal of International Human Rights* 1 at 54-76

Harris LM ‘Untold Stories: Gender-Related Persecution and Asylum in South Africa’ (2007) 15 *Michigan Journal of Gender & Law* at 291-347

Hathaway JC ‘Why Refugee Law Still Matters’ (2007) 8 *Melbourne J. Int’l L* at 89-103

Helzner E & Klein ‘Female Genital Mutilation: Health Consequences and Complications-A Short Literature Review’ (2018) *Hindawi* at 1-7

hooks b *Understanding Patriarchy* (2010) *Louisville Anarchist Federation* 1-5

Isabella A, Gerald O & Okot AC ‘A Study of Sexual and Gender Based Violence (SGBV) In Pabbo Camp, Gulu District, Northern Uganda’ (2005) *Suffering in Silence* at 1-28

Jeewa T ‘Refugees’ right to physical security: What does it practically mean?’ (2020) *Refugee Research Online* at 1-2

Jensen MA ‘Gender-Based Violence in Refugee Camps: Understanding and Addressing the Role of Gender in the Experiences of Refugees’ (2019) 11 *Inquires Journal* at 1-1

Kalra G & Bhugra D ‘Sexual violence against women: Understanding cross-cultural intersections’ (2013) *Indian J Psychiatry* at 244–249

Kamga GEK ‘Insights into intimate partner violence, the most common form of gender-based violence’ (2018) *Gender Justice* at 1-1

Kaur R & Garg S ‘Addressing domestic violence against women: an unfinished agenda’ (2008) *Indian J Community Med* at 73–76

Kelly N 'Gender-Related Persecution: Assessing the Asylum Claims of Women' (1993) 26 *Cornell International Law Journal* at 626-674

Khan F 'Has South Africa committed in good faith to article 34 of the UN Refugee Convention, which calls for the naturalisation of refugees?' (2019) 23 *Law Democracy & Development* at 68-99.

Kunz EF 'Exile and resettlement: Refugee theory' (1981) 15 *International Migration Review*

Kunz EF 'The refugee in flight: Kinetic models and forms of displacement'(1973) 7 *International Migration Review* at 125-146

Kuttner S 'Gender-Related Persecution as a Basis for Refugee Status: The Emergence of an International Norm' (1997) 16 *Refuge* at 17-21

MacKinnon CA 'Sexuality, Pornography, and Method: "Pleasure under Patriarchy' (1989) 99 *The University of Chicago Press* at 314-346

Macklin A 'Refugee Women and the Imperative of Categories' (1995) 17 *The Johns Hopkins University Press* at 213-277

Mclean H 'Gender and power- structures in refugee camps: social changes following refugee movements' (1999) *Asia Pacific School of Economics and Management Working Papers* at 1-15

Meger S & Sachseder J 'Militarized peace: understanding post-conflict violence in the wake of the peace deal in Colombia' (2020) 17 *Globalization* at 953-973

Menavanza F 'Access to Justice in Buffalo and Beyond: Making the Justice System More Welcoming for Refugees' (2016) *Impact Center for Public Interest Law* at 42-49

Mudgway C 'Smashing the patriarchy: why international law should be doing more' (2019) *LSE* at 1-1

Mujuzi JD ‘ ‘The African Commission on Human and Peoples’ Rights and the promotion and protection of refugees’ rights’ (2009) *African Human Rights Law Journal* 160-182

Mulligan M ‘Obtaining Political Asylum: Classifying Rape as a Well-Founded Fear of Persecution on Account of Political Opinion’ (1990) 10 *Boston College Third World Law Journal* at 355-380

Mulugeta A ‘Slow Steps of Progress: There productive health rights of refugee women in Africa’ (2003) 55 *Agenda: Empowering Women for Gender Equity* at 73-80

Nasr L ‘International Refugee Law: Definitions and Limitations of the 1951 Refugee Convention’ (2016) *LSE Human Rights* at 1-1

Naved RT, Parvin K & Sultana N ‘Disclosure and help-seeking behaviour of women exposed to physical spousal violence in Dhaka slums’ (2016) *BMC Public Health*

Ngwane C, Pino A & Sigsworth R ‘The Gendered Nature of Xenophobia in South Africa’ (2008) *CSVR* at 5-35

Obare F, Odwe G & Undie C ‘Attitudes towards help-seeking for sexual and gender-based violence in humanitarian settings: the case of Rwamwanja refugee settlement scheme in Uganda’ (2018) *BMC International Health and Human Rights* at 1-12

Opaye C ‘Refugee camp security in West Africa: An ECOWAS priority?’ (2005) *KAIPTC* at 1-190

Pan A ‘Understanding the Role of Culture in Domestic Violence: The Ahimsa Project for Safe Families’ (2006) 8 *Journal of Immigrant and Minority health* at 35–43

Paraketsova L ‘Why Guidance from the Supreme Court is Required in Redefining the Particular Social Group Definition in Refugee Law’ (2018) 51 *University of Michigan Journal of Law Reform* at 437-467

Petersen L 'Shared Dilemmas: Justice for Rape Victims Under International Law and Protection for Rape Victims Seeking Asylum' (2008) 31 *Hastings Int'l & Comp* at 509-530

Porter H 'Moral Spaces and Sexual Transgression: Understanding Rape in War and Post Conflict' (2019) *Development and change* at 1009-1032

Prithivi A 'Gender Discrimination Against Refugees' (2017) *University of Chicago Law School Chicago Unbound* at 1-17

Raday F 'Gender and democratic citizenship: the impact of CEDAW (2012) 10 *International Journal of Constitutional Law* at 512–530

Reed E 'Intimate partner violence: a gender-based issue?' (2008) *Am J Public Health*

Rempell S 'Defining persecution' (2013) *Utah Law Review* at 197–198

Russo NF & Pirlott A 'Gender-Based Violence: Concepts, Methods, and Findings' (2006) *Annals New York Academy of Sciences* at 178-205

Seller PV 'The Prosecution of Sexual Violence in Conflict: The Importance of Human Rights as Means of Interpretation' (2007) *Women's Human Rights and Gender Unit* at 1-41

Sonkin DJ 'Defining Psychological Maltreatment in Domestic Violence: Perpetrator Treatment Programs: Multiple Perspectives' *Journal of Emotional Abuse*

Thomas DQ 'Rape in War: Challenging the Tradition of Impunity' (1994) *The Johns Hopkins University Press* at 81–99

Valerie O 'Refugee Status for Female Circumcision Fugitives: Building a Canadian Precedent' (1993) 51 *UTFac.L. Rev* at 278-303

Van D Poll 'But is it speech? Making critical sense of the dominant constitutional discourse on pornography, morality and harm under the pervasive influence of United States first amendment' (2012) 15 *P.E.R 2* at 416-452

Vu A, et al 'The prevalence of sexual violence among female refugees in complex humanitarian emergencies: a systematic review and meta-analysis' (2014) *PLOS Currents Disasters* at 1-15

Wallace RM.M 'Making the Refugee Convention Gender Sensitive: The Canadian Guidelines' (1996) 45 *The International and Comparative Law Quarterly*

Ward J 'Gender-based violence in refugee settings' (2002) 260 *The Lancet* at 13-14

THESES

Almustafa M *Refugees from Syria caught between war and borders: A journey towards protection* (published thesis, Wilfrid Laurier University, 2019)

Chinnian K *Female genital mutilation as a form of violence against women and girls: an analysis of the effectiveness of international human rights law* (published Master Thesis, University of the Western Cape 2005)

Eberechi OE *Access to justice for victims of sexual violence in refugee camps* (unpublished LLM thesis, University of Pretoria, 2017)

Gebreiyosus Y 'Gender-Based Violence against Female Refugees in Refugee Camps' (2013) *GRIN Verlag* (published Master's Thesis)

Gren O *Gender in displacement- a phenomenological study of a Syrian refugee experience in Sweden from a gender perspective* (published MA Thesis, Stockholms University, 2018)

Kavuro C *Refugees' Access to Socio-Economic Rights: Favourable Treatment for the Protection of Human Dignity* (unpublished LLD, thesis, Stellenbosch University, 2018)

Lyth A *Where are the Women? - A Gender Approach to Refugee Law* (unpublished Master Thesis, Lund University 2001)

Patrick-Hoffman P *Psychological abuse of women by spouses and live-in lovers* (Unpublished doctoral dissertation, The Union for Experimenting Colleges and Universities, 1982)

Wigget MT *The forgotten voices of female refugees: An analysis of gender roles in the refugee society* (unpublished Master's thesis, Northeastern University, 2013)

TREATIES AND CONVENTIONS

Canada: Immigration and Refugee Board of Canada, Guidelines Issued by the Chairperson Pursuant to Section 65(4) of the Immigration Act: Guideline 4 - Women Refugee Claimants Fearing Gender-Related Persecution, 13 November 1996, No. 4 (1996)

Inter-Agency Standing Committee, Guidelines for Gender-Based Violence Interventions in Humanitarian Settings: Focusing on Prevention of and Response to Sexual Violence in Emergencies, September 2005 (2005)

International Committee of the Red Cross, Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977, 1125 UNTS 3 (1949)

International Committee of the Red Cross, Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (1949)

International Convention on the Elimination of All Forms of Racial Discrimination opened for signature Mar. 7, 1966, art. 1(1), 660 U.N.T.S. 195, 216 (1966)

International Labour Organization, Migration for Employment Convention (Revised), C97, 1 July 1949, C97 (1949)

Organization of African Unity, African Charter on Human and Peoples' Rights, 27 June 1981, CAB/LEG/67/3 rev. 5, 21 I.L.M. 58 (1982)

Organization of African Unity, Convention Governing the Specific Aspects of Refugee Problems in Africa, 10 September 1969, 1001 U.N.T.S. 45 (1969)

UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, United Nations, Treaty Series (1979)

UN General Assembly, International Convention on the Elimination of All Forms of Racial Discrimination, 21 December 1965, United Nations (1965)

UN General Assembly, Statute of the Office of the United Nations High Commissioner for Refugees, 14 December 1950, A/RES/428(V) (1950)

UN High Commissioner for Refugees, Guidelines for Prevention and Response: Sexual and Gender-Based Violence against Refugees, Returnees and Internally Displaced Persons: United Nations High Commissioner for Refugees (2003)

UN High Commissioner for Refugees, Guidelines on International Protection No. 1: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002, HCR/GIP/02/01 (2002)

UN High Commissioner for Refugees, Guidelines on International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, 7 May 2002 (2002)

UN High Commissioner for Refugees, Sexual and Gender-based Violence Prevention and Response In Refugee Situations in the Middle East and North Africa, 25 November 2015 (2015)

UN High Commissioner for Refugees, Sexual Violence Against Refugees: Guidelines on Prevention and Response, 8 March 1995 (1995)

UN High Commissioner for Refugees, The 1951 Convention Relating to the Status of Refugees and its 1967 Protocol, September 2011 (2011)

UN High Commissioner for Refugees, The Sustainable Development Goals and Addressing Statelessness, March 2017 (2017)

United Nations High Commissioner for Refugees (UNHCR), UNHCR Handbook for the Protection of Women and Girls (2008)

United Nations High Commissioner for Refugees. Sexual and gender-based violence against refugees, returnees, and internally displaced persons. Geneva May 2003 (2003)

INTERNET SOURCES

Amnesty International ‘Virginity tests’ for Egyptian women protesters’ available at: <https://www.amnestyusa.org/virginity-tests-for-egyptian-women-protesters/> (accessed 1 September 2020)

‘Barriers to Access to Justice for Migrant and Refugee Women’ available at: <https://jccd.org.au/wp-content/uploads/2018/06/Migrant-Refugee-Women-FACTSHEET.pdf> (accessed 28 August 2020)

Acevedo N & Kaplan A ‘Hundreds deported from U.S. to El Salvador have been killed or abused, new report says’ available at <https://www.nbcnews.com/news/latino/hundreds-deported-u-s-el-salvador-have-been-killed-or-n1126906> (accessed 12 July 2020)

Aleinikoff TA ‘“Membership in a particular social group”: Analysis and proposed conclusions Background Paper for “Track Two” of the Global Consultations’ available at: <https://www.unhcr.org/3b83b1c54.pdf> (accessed 29 July 2020)

Australian Domestic and Family Violence Clearinghouse ‘Improving responses to refugees with backgrounds of multiple trauma: Pointers for practitioners in domestic and family violence, sexual assault and settlement service’ available at: <http://library.bsl.org.au/jspui/bitstream/1/> (accessed 21 July 2020)

BBC News ‘Oxfam Haiti allegations: How the scandal unfolded’ available at: https://www.bbc.com/news/uk-43112200?intlink_from_url=&link_location=live-reporting-story (accessed 29 August 2020)

Burbage ML Walker DK ‘A Call to Strengthen Mental Health Supports for Refugee Children and Youth’ available at <https://nam.edu/a-call-to-strengthen-mental-health-supports-for-refugee-children-and-youth/> (accessed on 23 May 2019)

Camus A ‘The Practical Guide to Humanitarian Law’ available at <https://guide-humanitarian-law.org/content/article/3/persecution-1/> (accessed 14 February 2019)

Enloe C ‘The persistence of patriarchy’ available at: <https://newint.org/columns/essays/2017/10/01/patriarchy-persistence> (accessed 28 August 2020)

Gender Equality Commission (GEC) ‘Protecting the rights of migrant, refugee and asylum-seeking women and girls’ available at: https://www.ohchr.org/Documents/Issues/SRMigrants/submissions/CoE_Submission_GA-Report.pdf (accessed 28 August 2020)

Gender Equality Commission (GEC) ‘Protecting the rights of migrant, refugee and asylum-seeking women and girls’ available at: https://www.ohchr.org/Documents/Issues/SRMigrants/submissions/CoE_Submission_GA-Report.pdf (accessed 28 August 2020)

Gray A ‘These are the countries where child marriage is legal’ available at: <https://www.weforum.org/agenda/2016/09/these-are-the-countries-where-child-marriage-is-legal/> (accessed 27 August 2020)

Hans A & Betty RA ‘The Gender Imperative: Human Security vs. State Security’ available at: <http://www.taylorandfrancis.com/books/details/9780415585774/> (accessed 1 September 2020)

Haque U ‘Why Do (So Many) American Women Still Support Patriarchy?’ available at: <https://eand.co/why-do-enough-american-women-still-support-patriarchy-53767f2d7a4> (accessed 28 August 2020)

Houghton T ‘The limitations of the 1951 Refugee Convention’ available at: <https://nswlegalnetwork.wixsite.com> (accessed 3 July 2020)

ILO ‘International Migration, Racism, Discrimination and Xenophobia’ available at: <https://www2.ohchr.org/english/issues/migration/taskforce/docs/wcar.pdf> (accessed 28 August 2020)

Immigration Board of Canada ‘State Protection’ available at: <https://irb-cisr.gc.ca/en/legal-policy/legal-concepts/Pages/RefDef06.aspx> (accessed 11 September 2020)

International Rescue Committee ‘Access to Justice in Crisis Legal Empowerment for Rohingya refugees living in Cox’s Bazar, Bangladesh’ available at: <https://www.rescue-uk.org/sites/default/files/document/2078/accesstojusticeincrisis.pdf> (accessed 28 August 2020)

Kelly E ‘Efforts to prevent and end child marriage’ available at: <https://www.icrw.org/news/icrw-and-girls-not-brides-release-briefs-designed-to-increase-efforts-to-prevent-and-end-child-marriage/> (accessed 27 August 2020)

Merriam Webster Online Dictionary available at: <http://www.merriamwebster.com/dictionary/xenophobia> (accessed 28 August 2020)

Merriam Webster Online Dictionary available at: <http://www.merriamwebster.com/dictionary/racism> (accessed 28 August 2020)

Mudhar N ‘Why we need to achieve gender equality to achieve sustainable development goals by 2030’ available at: <https://yourstory.com/herstory/2019/11/gender-equality-sustainable-development-goals> (accessed on 26 August 2020)

PSRP ‘COVID-19 and Gender-based Violence in Conflict: New Challenges and Persistent Problems’ available at: <https://www.politicalsettlements.org/2020/04/21/covid-19-and-gender-based-violence-in-conflict/> (accessed 1 September 2020)

Saudi Arabia: 10 Reasons Why Women Flee available at: <https://www.hrw.org/news/2019/01/30/saudi-arabia-10-reasons-why-women-flee> (accessed 3 July 2020)

Schultz J ‘Understanding the ‘internal protection alternative’ (Part II)’ available at: <https://eumigrationlawblog.eu/understanding-the-internal-protection-alternative-part-ii/> (accessed 12 July 2020)

Some of the biggest gatekeepers of patriarchy are women: Filmmaker Leena Yadav' available at: <https://www.thequint.com/news/hot-news/some-of-the-biggest-gatekeepers-of-patriarchy-are-women-filmmaker-leena-yadav> (accessed 28 August 2020)

Statement by Human Rights Watch to the First Preparatory Committee for the World Conference Against Racism, Racial Discrimination, Xenophobia and Related Intolerance 'Racism, Racial Discrimination, Xenophobia and Related Intolerance Four Areas for International Action' available at: <https://www.hrw.org/legacy/campaigns/race/hrw-statement0.htm> (accessed 29 August 2020)

Trafficking in Persons: A Gender Rights Perspective, UNIFEM Briefing Kit, October 2002, available at: <http://www.unifem-eseasia.org/Resources/Traffick2.html> (accessed 1 June 2020)

UN News 'New UN initiative aims to protect millions of girls from child marriage' available at: <https://news.un.org/en/story/2016/03/523802-new-un-initiative-aims-protect-millions-girls-child-marriage#.V-PELPArKUn> (accessed 27 August 2020)

UN Women 'SDG 5: Achieve gender equality and empower all women and girls' available at: <https://www.unwomen.org/en/news/in-focus/women-and-the-sdgs/sdg-5-gender-equality> (accessed 26 August 2020)

UNCHR, 'Sexual and gender-based violence against refugees, returnees and internally displaced: guidelines for prevention and response persons' (2003) available at: http://www.unicef.org/emerg/files/glsgbv_03.pdf (accessed 21 July 2020)

UNFPA 'Child Marriage Fact Sheet: State of World Population 2005' available at: www.unfpa.org/swp/2005/presskit/factsheets/facts_child_marriage.htm (27 (accessed 27 August 2020)

UNHCR 'Intimate Partner Violence and asylum in the Americas' available at: <https://www.refworld.org/pdfid/5e1844b04.pdf> (accessed 21 July 2020)

UNHCR 'Intimate Partner Violence and asylum in the Americas' available at: <https://www.refworld.org/pdfid/5e1844b04.pdf> (accessed 21 July 2020)

UNHCR ‘Rights of Refugees in the Context of Integration: Legal Standards and Recommendations’ available at: <https://www.unhcr.org/44bb90882.pdf> (accessed 21 July 2020)

UNHCR ‘Survivors, Protectors, Providers: Refugee Women Speak Out’ available at: <https://www.refworld.org/pdfid/4f310baa2.pdf> (accessed 28 August 2020)

UNHCR ‘The Integration of resettled refugees essentials for establishing a Resettlement Programme and fundamentals for Sustainable Resettlement Programmes’ available at: <https://www.unhcr.org/52a6d85b6.pdf> (accessed 28 August 2020)

UNHCR and Save the Children - UK ‘Note for implementing and operational partners’ available at: <http://www.unhcr.org/3c7cf89a4.html> (accessed 21 July 2020)

UNHCR’s Regional Office for Southern Africa’s Xenophobia Related Programme ‘Protection from xenophobia: An Evaluation of UNHCR’s Regional Office for Southern Africa’s Xenophobia Related Programmes’ available at: <https://www.unhcr.org/55cb153f9.pdf> (accessed 28 August 2020)

UNHR SGBV prevention and response training package available at: <https://www.unhcr.org/583577ed4.pdf> (accessed 21 August 2020)

UNICEF ‘Child marriage’ available at: <https://www.unicef.org/rosa/what-we-do/child-protection/child-marriage> (accessed 27 August 2020)

United Nations and the Rule of Law ‘Access to Justice’ available at: <https://www.un.org/ruleoflaw/thematic-areas/access-to-justice-and-rule-of-law-institutions/access-to-justice/> (accessed 28 August 2020)

What is a refugee? The definition of ‘refugee’ explained available at: <https://helprefugees.org/news/what-is-a-refugee-the-definition-of-refugee-explained/> (accessed: 21 August 2020)

WHO Fact sheets: Violence against Women Intimate Partner and Sexual Violence against Women: available at: <http://www.who.int/mediacentre/factsheets/fs239/en/> (accessed 1 June 2020)

World Health Organization: Female genital mutilation. Fact Sheet 241. 2000 available at <https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation> (accessed 4 June 2020).

United Nations Secretariat 'Special measures for protection from sexual exploitation and sexual abuse' available at: <https://www.unhcr.org/protection/operations/405ac6614/secretary-generals-bulletin-special-measures-protection-sexual-exploitation.html> (accessed 9 September 2020)



UNIVERSITY *of the*
WESTERN CAPE