

RESEARCH ARTICLE

Gender Apartheid and Asylum: Establishing General Risks of Gender-Based Persecution in International Refugee Law

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Abstract

Does the situation in Afghanistan amount to persecution due to the accumulation of repressive measures enacted against women and is it sufficient that women are affected by such measures merely on the basis of their gender? While these two questions remain in front of the Court of Justice of the EU, several EU member states have moved to grant asylum to women and girls from Afghanistan on general risks of gender-based persecution. This dynamism in asylum regulations across the EU has occurred alongside renewed discussions around gender-based persecution and gender apartheid in international criminal law in light of the ongoing process for a Crimes Against Humanity Treaty. In this article, I put these developments into conversation through case study method and legal-institutional analysis, and argue that the historical link between international refugee law and international criminal law provides a space to envision an integrated system of protection around gender-related claims. To this end, I offer three outlooks for establishing general risks of gender-based persecution in international refugee law and the relationship between gender apartheid and asylum.

Keywords: asylum; gender apartheid; Afghanistan; international law; gender-based persecution

Introduction

In January 2023, the European Union Agency for Asylum (EUAA) issued a “Country Guidance: Afghanistan” which provides an analysis on the qualifications for international protection given the deterioration of women’s rights in Afghanistan (86–91). The EUAA determined that for women and girls in the country, a “well-founded fear of persecution would in general be substantiated” (EUAA 91). Although the EUAA Guidance does not legally oblige EU member states to implement corresponding measures, member states must take this guidance into

consideration when evaluating asylum claims (EUAA 6). Subsequently, Denmark moved to grant asylum to women and girls from Afghanistan, whereas Sweden and Finland had already announced similar policies prior to the publication of the EUAA Guidance. (European Parliament Think Tank 2023). Yet, other member states have been hesitant to take this step.

The divergence in member state regulations regarding asylum for Afghan women and girls exists in the context of a decision by the Court of Justice of the EU (CJEU) on two cases of women seeking protection from the Taliban regime in Austria (CJEU 2023a).¹ The Court of Justice's Advocate General issued an opinion on the matter in November 2023 stating that "the discriminatory measures adopted against Afghan women by the Taliban regime amount, on account of their cumulative effect, to persecution" (CJEU 2023a). The Advocate General further stressed that said measures are "applied deliberately and systematically" and are designed to "establish a social structure based on a regime of segregation and oppression of women and girls" (CJEU 2023b, 11).

This dynamism in asylum regulations across the EU has occurred along renewed discussions around gender-based persecution and gender apartheid in international criminal law with gender apartheid being articulated as the systematic and institutionalized exclusion of persons from (all) areas of life based on their gender (International Service for Human Rights [ISHR] 2023). For example, during the 53rd UN Human Rights Council Session, the UN Special Rapporteur (UNSR) on Afghanistan described the repression of women's rights in the country as amounting to "gender persecution - a crime against humanity" that can be "characterised as gender apartheid" (Banjo 2023; United Nations Human Rights Office of the High Commissioner [OHCHR] 2023). The International Criminal Court (ICC) has been looking into war crimes and crimes against humanity in Afghanistan since 2006, and the ICC Office of the Prosecutor (OTP) first considered gender-based persecution in this regard around 2017 (ICC 2017).

Simultaneously, the UN International Law Commission has moved forward with its plans to develop a Crimes Against Humanity Treaty (CAH), presenting an opportunity to categorize gender-based persecution as a stand-alone crime and to codify gender apartheid in international criminal law (Global Justice Center 2023a). The timeline for debates on draft articles of the Treaty involved state submissions by December 2023 that were made public in January 2024, followed by the UN General Assembly's Sixth Committee second dedicated session to discuss the treaty in April 2024, and a subsequent decision on next steps come October (Global Justice Center 2023a).

In scholarship on international criminal law, discourse on gender apartheid has returned in the form of comparative analyses of "Taliban 1.0 and Taliban 2.0" gender policies, conceptual genealogies of gender apartheid, and the implementation of a "gender apartheid" tracker with important implications for the Treaty process (Altınay and Petó 2022; Banjo 2023; Bennoune 2023; Grey et al. 2019; Stevenson 2018). In scholarship on international refugee law, however, discourse on gender apartheid is only slowly evolving despite the noted changes in asylum regulations across the EU.

In efforts to fill this gap, I use case study method and legal-institutional analysis to explore the relationship between gender apartheid and asylum with a focus on

establishing general risks of gender-based persecution. By comparing Denmark, Sweden, and Finland as case studies in which asylum is granted to women and girls from Afghanistan on general risks of gender-based persecution, in contrast to Germany and France as case studies for main destination countries of Afghans without such measures, I examine determining factors and delineate further lines of inquiry as demands for akin policies for women and girls from Iran forge ahead. Leaning on my analysis, I develop three outlooks for establishing general-risks of gender-based persecution in international refugee law and the relationship between gender apartheid and asylum, namely the addition of gender as a protected ground in the refugee definition, the refinement of established grounds of protection inclusive of gender, and the categorization of gender-based persecution as a stand-alone crime and the codification of gender apartheid in the CAH Treaty.

I argue that the premise for establishing general risks of gender-based persecution lies between and within international refugee law and international criminal law: as developments around gender-based persecution and gender apartheid proceed in international criminal law, so should conceptualizations thereof in international refugee law. The historical linkage between international criminal law and international refugee law provides a foundation for this given that the drafters of the 1998 Rome Statute, the principal treaty in international criminal law on gender-based persecution, were influenced by international refugee law (Oosterveld 2006). This leads me to suggest that the relationship between gender apartheid and asylum may well be influenced by international criminal law now.

I begin my analysis with an engagement of theoretical and legal discourse on gender-based persecution and gender apartheid, highlighting how gender-based persecution has been addressed across institutional levels and how gender apartheid has been defined over time. Against this background, I introduce my comparative case study analysis by providing a contextual overview of relevant frameworks at the EU level, followed by a mapping of country responses to the situation in Afghanistan vis-à-vis asylum. I conclude the article with the noted outlooks and substantiate my claim that the historical link between international refugee law and international criminal law and the alignment of current developments provide a space to envision an integrated system of protection around gender-related claims.

Gender-Based Persecution: Theoretical and Legal Discourse

Extensive literature exists on gender-based persecution in international criminal law that analyzes the Rome Statute and other legal-institutional frameworks, such as the OTP policy on Sexual- and Gender-Based Crimes (“Gender Policy”). According to Article 7 (1)(h) of the Rome Statute, “persecution against any identifiable group or collectivity on... gender” constitutes a crime against humanity. “Gender” is defined here in binary terms, referenced as the “two sexes, male and female, within the context of society” (ICC 1998 Article 7, 3). The OTP first considered gender-based persecution in Afghanistan around 2017, noting that: “Pursuant to the ideology and rules of the Taliban, women and girls

have been deliberately attacked by the Taliban and affiliated armed groups to prevent them from studying, teaching, working or participating in public affairs, through intimidation, death threats, abductions and killings. As a result of such attacks, countless other women and girls have reportedly stopped going to school or working due to the attendant climate of fear” (ICC 2017).

Since then, the Taliban regained power in Afghanistan and inquiries into gender-based persecution have continued as the UNSR on Afghanistan recently asked the OTP “to consider whether the ‘crime of gender persecution’ was taking place” in the country (Qaane 2023). These perpetual queries have occurred while the OTP released a new 2022 document on gender persecution and scholarly discourse around revisiting the gender definition in the Rome Statute has become imminent (Qaane 2023; Global Justice Center 2023b).

To Grey and others (2019) — for example, the hard-won fight that gender, albeit defined in binary terms, was included in the Rome Statute has been limited as the OTP has yet to “bring allegations of gender-based persecution beyond the pre-trial process in any case” (958).² In their analysis, Grey and others find that the fact that the ICC Pre-Trial Chamber refused to authorize an investigation in Afghanistan in 2017 “means that the possibility of justice for these crimes is uncertain, pending determination of the OTP’s appeal of the decision” (975).

But, with the ongoing process on draft articles of the CAH Treaty categorizing gender-based persecution as a stand-alone crime and codifying gender apartheid, as well as the request by the UNSR on Afghanistan for the OTP to determine whether the crime of gender-based persecution is taking place in the country, this might change. On this account, de Silva de Alwis (2023) posits that “a persuasive argument can be made for prosecuting Taliban officials for the crime of gender persecution, given the specific gender-based nature of their actions and their violation of fundamental rights” (37).

de Silva de Alwis suggests that paradigms under international human rights law, international criminal law, and the Women, Peace, and Security Agenda offer important frameworks to examine gender apartheid in Afghanistan, and argues that both the OTP’s “Gender Policy” and the recent document on gender persecution signal a commitment to pursue accountability in this context (10). In speaking specifically to the recent document, which conceives of gender-based crimes to be committed “due to the traditional construction of gender roles,” de Silva de Alwis holds that “given the systemic nature of gender role stereotyping and segregation evident in the Taliban’s directives and edicts, this broadened understanding of the Rome Statute becomes critical in addressing and prosecuting such offenses effectively” (11).

Similar to de Silva de Alwis, in this article, I connect different paradigms in international criminal law and international refugee law to examine an understudied area, namely the relationship between gender apartheid and asylum. A common notion between the two areas of law is the term “persecution.” Persecution is established as a crime against humanity as per the Rome Statute, and persecution premises grounds of protection in the refugee definition as per the 1951 Refugee Convention (Li, 2020). In both understandings of the term, the focus lies in discriminatory acts either by those committing the acts (international criminal law) or those subjected to the acts (international refugee law).

Principles of gender-based persecution have historically been linked as the drafters of the Rome Statute were influenced by international refugee law. Oosterveld (2006) emphasizes that this link is helpful “because international and domestic refugee law has explored certain elements of gender-related persecution” that were, at the time, “unexplored in international criminal law” (52). Therefore, Oosterveld maintains that “when the ICC’s judges are determining the content of the elements of the crime against humanity of gender-based persecution, they should examine principles or rules found within refugee law” (2006). Oosterveld cautions, however, not to directly transfer “a definition of gender-related persecution found within international refugee law... to the crime against humanity of gender-based persecution,” but rather that the ICC “should evaluate how refugee law approaches to gender-related persecution can shed considerable light on international criminal law” (2006).

A place to start exploring how refugee law approaches gender-related persecution is the mentioned Refugee Convention. Absent of gender being a stand-alone ground for protection under the Convention, gender-related persecution claims for asylum have been relegated under the established grounds of political opinion, religion, and membership in a particular social group (PSG), for instance (Freedman, 2015). The UN Refugee Agency (UNHCR) has published several gender guidelines for the application of the Convention, notably the 2002 UNHCR Guidelines on Gender-Related Persecution (from here on UNHCR Guidelines) (UNHCR 2002). The UNHCR Guidelines define gender-related persecution in terms of refugee status determination, including persecution based on gender, sex, and sexuality. The Guidelines explicitly affirm that “it is an established principle that the refugee definition as a whole should be interpreted with an awareness of possible gender dimensions in order to accurately determine claims to refugee status” (UNHCR 2002).

Political Opinion

The protected ground of political opinion connotes aspects of gender-based persecution in cases where views are contrary to those espoused by dominant political groups and/or the political system and are presumed on gender-related matters (UNHCR 2002, para. 25). The UNHCR Guidelines establish that “political opinion should be understood in the broad sense,” such as opinions on gender roles and “non-conformist behavior” that lead to ascribing a particular opinion onto a person (UNHCR 2002, para. 32). Notwithstanding, it is important to note that adjudication in these cases is often narrowly interpreted, and thus albeit being promising for public sphere claims, political opinion as gender-based claims remains limited in other regards (i.e., domestic violence) (UNHCR 2002).

Sengupta (2009) — for example, stresses that the political opinion convention ground necessitates a direct relationship with the state as part of which persecution is faced at the hands of the state, and/or as part of which the state is unwilling or unable to offer protection. Demonstrative of this are instances of dowry harassment and forced marriage in which persecutory acts are only considered as such if this occurs at the hands of the State or due to failure of protection. As Kelley (2001) further explicates: “Where such discrimination is

imposed or countenanced by the State, women who oppose such measures and face persecution if they fail to abide by them, are increasingly recognized as doing so on the basis of their political opinions” (564).

Religion

In terms of religion-based claims, gender-based persecution has been more widely examined, not least because the UNHCR Guidelines provide a more expansive protection framework in this regard (UNHCR 2002). Paragraph 25 of the UNHCR Guidelines emphasizes that in certain states, “religion assigns particular roles or behavioural codes to women and men respectively” and when a woman “does not fulfil her assigned role or refuses to abide by the codes, and is punished as a consequence, she may have a well-founded fear of being persecuted for reasons of religion.” The Guidelines also note that “there is some overlap between the grounds of religion and political opinion in gender-related claims” in cases where religious tenets might require “certain kinds of behaviour from a woman” that can subsequently be perceived as evidence of an unacceptable political opinion (UNHCR 2002, para. 26).

Despite these Guidelines in place, Dadhania (2023) finds that “religion is seldom used as the primary ground for asylum in gender-based claims” and argues that gender-based restrictions in public and private “are patriarchal tools of social control that can be bolstered by religion” (1604, 1608). Relatedly, Crawley (2022) warns that because “non-conformity” to “acceptable legal discourse of persecution may jeopardize their [women’s] chances of gaining asylum, it is always in their [women’s] interests to conform to the hegemonic narrative of persecution” (372). This is especially so, as Crawley suggests, when it comes to Islamophobia and anti-Muslim sentiments, to which gender is central as women’s rights are seen as incompatible with Islam. As such, the potential interwovenness between religion and politics becomes a key area of contestation, with gender not fitting squarely into either religion-based grounds or political-opinion based grounds for protection (1612; see also Akram 2000; McKanders 2019).

Membership of a Particular Social Group

Similar complexities can also be identified pertaining to the PSG category (UNHCR 2002, para. 28). The PSG category is not explicitly defined in the Refugee Convention, yet it has been noted that it is not “a ‘catch all’” term to be applied to any person fearing persecution (UNHCR 2002; see also Einarsen 2011). More specifically, the UNHCR Guidelines state that a PSG “is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society” (para. 29). In this way, “the characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one’s human rights,” and sex/gender — as characteristic — has been accepted as falling within this definition (UNHCR 2002).

In the literature, two main approaches toward defining a PSG have been established (Rikhof and Geerts 2019): the social perception approach stresses the cognizability of the PSG itself while the protected characteristic approach “focuses on the innate or unchangeable characteristic of the particular social group” (Kelley-Widmer and Rich 2019, 345, 391). Speaking to this, Firth and Mauthe (2013) highlight the notion of personhood by means of addressing definitional boundaries of the PSG category through a “gender sensitive human rights paradigm” as part of which “a reconceptualization of the presentation of women’s cases” takes place (11).

In sum, gender-based persecution has been subject of debate in discourse on international criminal law and international refugee law. What connects the two is the historical linkage around the notion of persecution, and, more specifically, questions about the motivation, scope, and direction around gender-based persecution targeted at a group in particular areas of life and exerted through specific forms of control. These connecting points also exist in discourse on gender apartheid in international criminal law and related fields, and as I propose in this article, should evolve more fully in discourse on international refugee law.

Gender Apartheid: Theoretical and Legal Discourse

The conceptual genealogy of gender apartheid can be broadly traced to the 1990s and Amnesty International’s (AI) 1995 report on Afghanistan (Amnesty International 1995; Gallagher 2000). In the report, AI observed widespread rape, abduction, and torture of women in the country (Amnesty International 1995). Subsequently, AI activists and other organizations began to use the term gender apartheid in reference to what was unfolding in Afghanistan (Gallagher 2000, 384). For example, at a 1997 demonstration in Washington, D.C., the president of the US-based organization Feminist Majority Foundation (FMF), Eleanor Smeal, urged that “we [FMF] cannot stand silently by as Afghan women become victims of inhumane gender apartheid” (Gallagher 2000, 387). Smeal went on to ask: “How can women be safe anywhere if some governments can carry out gender apartheid with impunity?” (Feminist Majority Foundation 1997; Stevenson 2018, 93). Following this, FMF announced its “Campaign to Stop Gender Apartheid in Afghanistan” in the same year, thereby making the concept of gender apartheid central to the fight for women’s rights in Afghanistan in the US context (Gallagher 2000, 387; Stevenson 2018, 94).

In Europe, Emma Bonino, former Italian politician, issued the “A Flower for the Women of Kabul” campaign in light of International Women’s Day in 1998. The campaign was organized by the EU’s Humanitarian Agency and was supported by the European Community Humanitarian Office with the objective to “mobilize public opinion against gender apartheid in Afghanistan and elsewhere” (Gallagher 2000, 389). This included a call by the European Parliament for nations to address the situation in the country. In launching the campaign, Bonino drew a parallel to racial apartheid in South Africa; a parallel prominently used in discourse on gender apartheid for years to come: “We face a

question of principle comparable to that of apartheid in South Africa before reforms there. We face apartheid based on gender, by which Afghan women are deprived of their right to choose how to live.” (Gallagher 2000).

Then and now, the usage of the term gender apartheid has remained contested in scholarship, advocacy, and law. At the time (1996), the US-based Muslim Women’s League did not use the term gender apartheid and insisted that the Taliban’s gender policies were not based on Islam (Gallagher 2000, 391). On the other hand, the Revolutionary Association of the Women of Afghanistan, established in Kabul in 1977, has continuously warned of gender apartheid, notably in its education policy, stating that “any kind of behavior that promotes gender apartheid” is to be avoided (RAWA n.d.; Stevenson 2018, 108).

In a recent interview with Shaharзад Akbar, Afghan feminist activist and scholar in exile, Altınay and Petö (2022) inquired about Akbar’s usage of gender apartheid (as concept) in the contemporary moment. In responding to a question about the contentiousness of the term, Akbar pointedly explains: “... in the last few decades, when I speak about gender apartheid, I’m adapting a language that I hope makes sense to international players, to the UN human rights mechanisms. It’s not a language that necessarily makes sense to people in my own country, but they are not my audience when I’m utilizing this framework” (Altınay and Petö 2022, 4–5).

Akbar continues by emphasizing that using gender apartheid as concept seeks to “communicate the severity of the situation,” noting that “being a woman right now in Afghanistan is not only culturally a crime or a liability; it is, by law, a liability, a crime” (Ibid., 5).

Drawing on Akbar and stressing that the gender apartheid framework can be a “powerful mobilizing tool,” Bennoune (2023) defines gender apartheid as a “hierarchical system that maintains the inferiority of women and the superiority of men, not simply their equal separation” (25). In reflecting on parallels to racial apartheid, Bennoune finds that in current Taliban Afghanistan, gender apartheid “seeks to foreground the way in which discrimination has been made the system of governance itself ... [and] that the aim of government and public policy is to discriminate” (Altınay and Petö 2022, 25, 26).

Bennoune’s (2023) discussion on international obligations to address gender apartheid in Afghanistan delineates three principal arguments to consider: 1) states’ obligations to address sex discrimination are firmly established in international human rights law, 2) disregard of these obligations leads to an “imbalance” between commitments to address sex discrimination and racial discrimination, and 3) adopting an international legal framework on gender apartheid might be the only way to “effectively tackle systematic Taliban abuses” (Bennoune 2023, 2). As per Bennoune, the concept of gender apartheid then “offers not only a factually accurate description” but also “an essential mechanism for generating some global legal accountability for the Taliban’s return to power” (Bennoune 2023, 8). Here, early works such as Mayer’s (2000) article “A Benign Apartheid” provide further insights as stated: “Confronting two closely related phenomena, international law has made one, racial apartheid, anathema, because it involves inhumane acts amounting to a crime against humanity.

However, international law has avoided criminalizing equivalent inhumane treatment of women” (Mayer 2000, 239).

Mayer arrives at this claim by studying “treatments” of racial apartheid and gender discrimination in the 1973 Apartheid Convention and in the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), contending that the former “indicates that apartheid is linked to a political problem, the oppression of one group by another” and that the latter speaks to different forms of such oppression on the basis of gender, absent of the actual usage of such terminology (Mayer 2000, 244, 246). Mayer sees this as a critical juncture point for how gender apartheid has been rationalized in that treating racial apartheid as criminal “while treating comparable forms of gender discrimination as less deserving of sanctions is not the obvious outcome of the scheme set forth in the first human rights instruments” (247).

Other analyses on configuring gender apartheid within various areas of international law have built on Mayer. For instance, in the book *From Cape Town to Kabul*, Andrews (2012) suggests that a redrafting of articles in the Apartheid Convention by replacing “race” with “gender” results in a compelling argument to be made about gender apartheid (156). In conducting said exercise, Andrews constructs the definition of gender apartheid to include “persecution of organizations and persons, by depriving them of fundamental rights and freedoms, because they oppose gender oppression, subordination and discrimination” (157).

Qureshi (2014) similarly inquires into the legal understanding of gender discrimination as gender apartheid and argues that “apartheid, whether racial or gender, should be treated equally, and gender apartheid should accordingly be considered a ‘crime against humanity’” (Qureshi 2014, 91–101). In also leaning on the Apartheid Convention and the Rome Statute, Qureshi holds that “the proof that discriminatory acts are severe, systematic and institutionalized are enough to establish the crime” with government inactions to address these abuses being “tantamount to *de facto* approval of these practices,” hence constituting persecution based on gender within the meaning of international law (91, 94). To Qureshi, gender apartheid takes varied forms (i.e., gender-based violence, female genital mutilation etc.) and encompasses a range of human rights violations (i.e., threat to life, security, and dignity etc.).

The ongoing process of the CAH Treaty has become a space for deliberation on the concept and practice of gender apartheid. In the latest version of the draft articles, apartheid is defined as inhumane acts committed in the context of “an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups and committed with the intention of maintaining that regime,” leaning on the Rome Statute (UN Sixth Committee 2023). When “racial” is complemented by “gender,” as is proposed for the CAH Treaty, contestations around the meaning and definition of “gender” and “gender groups” arise.

For instance, concerns have been raised around the potential binary understanding of “gender” as it prevails in the Rome Statute (Human Rights and Gender Justice Clinic and MADRE 2024). In the document “LGBTQI+ Inclusion and the Definition of the Crime of Gender Apartheid,” the progressiveness of the codification of gender apartheid in the CAH Treaty is posited against the possible

shortcomings of such codification if gender apartheid, as concept and practice, is not considered in inclusive terms (Human Rights and Gender Justice Clinic and MADRE 2024, 1). To this end, it is suggested that the Treaty's definition of apartheid recognize the "social construction of both gender and race" as has been done in international customary law (Human Rights and Gender Justice Clinic and MADRE 2024, 2, 10).

Other challenges with the proposed definition of gender apartheid in the CAH Treaty draft articles involve the definition of "gender groups." Here, we must review historical definitions of "groups" in different areas of international law, such as the definition of "racial groups" in the Apartheid Convention and prior to this, the 1948 Genocide Convention toward which the drafters of the Apartheid Convention looked (Human Rights and Gender Justice Clinic and MADRE 2024, 6). Under the Genocide Convention, "racial groups" are defined narrowly, and since racial apartheid has yet to be tried as a crime against humanity, "there is no formal jurisprudence available to interpret how protected 'groups' are legally understood under the crime of apartheid" (Human Rights and Gender Justice Clinic and MADRE 2024). This leaves significant discretion given that the language of the draft articles is still being defined.

Still, as per the "Expert Legal Brief on Gender Apartheid," which has been endorsed by a collective of jurists, scholars, and civil society representatives, the proposed definition of gender apartheid to be adopted in the CAH Treaty reads as follows: "the crime of apartheid' means inhumane acts ... committed in the context of an institutionalized regime of systematic oppression and domination by one racial group over any other racial group or groups, or by one gender group over another gender group or groups, and committed with the intention of maintaining that regime" (Global Justice Center, 2023b).

As with discourse on gender-based persecution, connecting points across different areas of law on gender apartheid, notably international criminal law and international human rights law, involve questions around the motivation, scope, and direction of gender-based persecution targeted at a group in particular areas of life and exerted through specific forms of control. My discussion of theoretical and legal discourse on gender-based persecution and gender apartheid commonly shows intentionality (motivation) in the systemic and institutionalized (scope) ways that forms of control (segregation, domination, oppression) are enacted toward a group with the commitment of upholding said control. How this applies to the relationship of gender apartheid and asylum in the context of Afghanistan in light of the recent developments in the EU is explored next.

Case Studies: Gender Apartheid and Asylum

Between December 2022 and February 2023, Sweden, Finland, and Denmark moved to grant asylum to women and girls from Afghanistan on general risks of gender-based persecution, while Germany and France, as main destination countries for Afghans, have refrained from such a step. Across these countries,

varied regulations regarding gender-based asylum claims principally exist alongside varied responses to the specific situation in Afghanistan.

These national-level responses vis-à-vis asylum operate within legal-institutional frameworks at the EU level, such as the 2011 Qualification Directive and the 2011 Istanbul Convention. The Qualification Directive offers guidance to EU member states in the application of the Refugee Convention and provides that acts of persecution “can, inter alia, take the form of... acts of a gender-specific nature” (EU 2011, art. 9, para. 2[f]). Although this is the only explicit mention of gender-based persecution in the Directive, the legislative instrument addresses the term PSG relevant to gender-based asylum claims by defining it as follows: “It is equally necessary to introduce a common concept of the persecution ground ‘membership of a particular social group’. For the purposes of defining a particular social group, issues arising from an applicant’s gender, including gender identity and sexual orientation, which may be related to certain legal traditions and customs ... should be given due consideration in so far as they are related to the applicant’s well-founded fear of persecution” (EU 2011, para. 30).

This definition of PSG, inclusive of gender dynamics, is pertinent to the Directive’s objective of providing guidance in the application of the Refugee Convention, which neither lists gender as a protected ground nor defines membership of a PSG in detailed ways. Furthermore, in Article 10 of the Directive — *Reasons for Persecution* — gender-related aspects are emphasized as member states are urged to give “due consideration for the purposes of determining membership of a particular social group or identifying a characteristic (i.e. gender) of such a group” (EU 2011, art. 10, para. 1[d]).

Outside of the Qualification Directive, Articles 60 and 61 of the Istanbul Convention contain important measures on asylum. According to Article 60, — *Gender-based asylum claims* — gender-based violence (GBV) constitutes a legitimate basis for legal protection (Council of Europe 2011). In addition to ensuring that GBV is recognized as a form of persecution, as per Article 61, the principle of non-refoulement must be upheld by member states, guaranteeing that survivors of GBV are not returned back to a country of persecution (Council of Europe 2011).

Beyond the Qualification Directive and the Istanbul Convention, and in particular regards to asylum granted to women and girls from Afghanistan, the pending CJEU decision, along with the EUAA Guidance on Afghanistan and the UNHCR “Statement on the concept of persecution on cumulative grounds in light of the current situation for women and girls in Afghanistan” (from here on: UNHCR Statement) offer further contextual background for my case study analysis.

In September 2022, Austria’s Supreme Administrative Court referred a request for a preliminary ruling to the CJEU about whether the situation in Afghanistan amounts to persecution due to the accumulation of restrictive measures on women’s rights, and whether it is sufficient that a woman is affected by such measures merely on the basis of their gender (UNHCR 2023). The pending ruling has significant impact on member states as national courts “dispose of the case [C-608/22 and C-609/22] in accordance with the Court’s decision, which is similarly binding on other national courts or tribunals before which a similar

issue is raised” (CJEU 2023a). The Court of Justice’s Advocate General issued an opinion on the matter in November 2023 holding that: “There is nothing to prevent a Member State from recognising, in respect of those women, the existence of a well-founded fear of persecution on grounds of their gender, without having to look for other factors specific to their personal situation” (CJEU 2023a).

To this end, the UNHCR (2023) issued a statement outlining relevant legal principles regarding cumulative grounds of persecution. In the statement, the UNHCR suggests that “forms of harm may cumulatively constitute persecution,” emphasizing that what matters for the assessment is the “severity of the measures and sanctions adopted or liable to be adopted against the person concerned” (2, 3). The Statement lists several national court cases in EU member states regarding persecution on cumulative grounds that gesture to the potential application of an aligned ruling by the CJEU (3, 4). The Agency specifically highlights that the Austrian Supreme Administrative Court indeed “considered that the sum of discriminatory measures against women during the first Taliban rule (e.g. arbitrary violence, systematic restrictions to medical care, etc.) amounted to persecution,” thereby setting an important precedent (UNHCR 2023, 4; Austria Supreme Administrative Court, 2002).

In the 2023 EUAA Guidance, the current deterioration of women’s rights is detailed, stating that regulations have been issued that impact women’s freedom of movement and expression as well as access to education, employment, healthcare, and social protections (EUAA 2023, 86). Based on a country-wide risk assessment, the EUAA concluded that the accumulation of said measures amounts to persecution (91). In explaining its reasoning, the EUAA notes: “...the persecution of women and girls in the form of accumulation of various measures is likely to be for reasons of religion. Other grounds, such as membership of a particular social group and (imputed) political opinion may also be substantiated” (2023).

The outlined grounds of persecution, including religion, political opinion, and PSG, demonstrate the intersectional and interconnected premise of establishing general risks of gender-based persecution in international refugee law. Yet, it is important to note that membership of a PSG constitutes the sole category that explicitly offers room for gender-inclusiveness as per the Qualification Directive, which, unlike the EUAA Regulation, is legally binding on member states. The forthcoming case study analysis further illuminates this.

Sweden

On December 6, 2022, the Swedish Migration Agency recognized that “the degradation of Afghan women’s and girls’ rights qualifies as persecution on the basis of gender” and thus refugee status (European Parliament Think Tank 2023). In the words of Carl Bexelius, Director of Legal Affairs at the Swedish Migration Agency: “Being a woman from Afghanistan is in itself considered to be a sufficient basis for obtaining protection in Sweden” (Migrationsverket 2022). According to the corresponding legal note, the fundamental rights of Afghan women and girls are violated, *inter alia*, within the meaning of the Qualification

Directive (ELENA 2022). Reports show that in 2023, an increase in positive asylum decisions for Afghan women and girls (Geneva Convention Status) can be noted (EuroStat *n.d.a, b*).

While this presents a significant departure from Sweden's more restrictive asylum measures over the past decades, the decision falls in line with existing regulations on gender-based asylum, such as the Swedish Aliens Act containing an expanded refugee definition that includes well-founded fear of being persecuted on grounds of gender in addition to other recognized grounds often used for gender-based asylum claims (i.e., religion, political opinion, and PSG) (Højberg Høgenhaug 2023; Swedish Government 2005, 716, chap. 4, sec. 1). Hence, even before granting asylum to women and girls from Afghanistan on general risks of persecution, Sweden had a legal-institutional framework in place that was conducive to recognizing gender as a sole ground for persecution.

Finland

Finland was the second country amongst EU member states to grant asylum to women and girls from Afghanistan on general risks of gender-based persecution. The Finnish Immigration Service updated its guidelines on processing asylum applications for Afghan women and girls, reflective of Antti Lehtinen's, Director of Asylum Unit, statement: "Afghan women have very generally been granted asylum even before this, but gender has been only one of the many aspects taken into account in the decision-making process. Now gender alone is sufficient grounds for asylum" (Finnish Immigration Service 2023; Helsinki Times 2023).

In 2022 and 2023, Finland recorded higher positive asylum decisions for Afghan women and girls than previously, and after July 2021, Finland suspended return proceedings for Afghan asylum-seekers whose applications had not been successful (EuroStat, *n.d.b*, Højberg Høgenhaug 2023).

Similar to Sweden, Finland's decision aligns with existing regulations on gender-based asylum claims, namely that Finland's Aliens Act Section 87a (323/2009) holds that acts of persecution may take the form of a gender-specific nature; furthermore, Section 87b (422/2014) of the Act establishes that reasons for persecution in regards to membership of a PSG shall take into account gender identity and other gender-related aspects as characteristics of such group as per the Qualification Directive (Finish Government 2004). Although gender is not part of the official refugee definition in Finland (as is the case in Sweden), the mentioned specification of the PSG category has provided a legal-institutional framework for establishing general risks of persecution based on gender in the context of Afghanistan.

Denmark

Denmark became the third member state to grant asylum to women and girls from Afghanistan on general risks of gender-based persecution. In January 2023, Denmark's Refugee Appeals Board announced these changes along with reopening rejected asylum claims filed between August 2021 and February 2023 from female Afghan applicants (European Parliament Think Tank 2023). Subsequently,

numbers of positive asylum decisions for Afghan women and girls more than quadrupled between 2022 and 2023 (EuroStat, *n.d.b*). This decision was made based on the noted EUAA Guidance as well as other human rights reports describing the situation of women's rights in the country (DRC 2023). An important nuance to stress here is that “an application for asylum in Denmark can only be made by being physically present in Denmark” and that “no changes in neither visa restrictions nor resettlement schemes are to be expected” according to the Danish Refugee Council (DRC 2023).

The move toward granting asylum on general risks of gender-based persecution is quite significant as the Danish Aliens Act defines refugees solely within the protected grounds of the Refugee Convention and Denmark has not “previously recognized women and girls from an entire country as refugees based on their gender” (DRC 2023). Thus, unlike Sweden and Finland, Denmark's legal-institutional framework was not conducive for making such changes, however, given the binding nature of the Qualification Directive and the fact that the EUAA Guidance is to be considered in asylum claims by member states, renders this decision as particularly notable in contrast to countries that haven't taken such step, including Germany and France.

Germany

Although Germany is one of the leading destination countries for Afghan nationals, it has not followed suit with Sweden, Finland, or Denmark in regard to granting asylum on general risks of gender-based persecution (European Parliament Think Tank 2023). Despite this measure not being in place, it has been reported that more than half of all asylum applications filed by Afghan women were successful in 2023 for varied status of protection (EuroStat, *n.d.b.*; Infomigrants 2023). In this context, Clara Büniger, a member of parliament for the Left Party, voiced that “every woman in Afghanistan fears massive discrimination and fear of persecution; they should all, therefore, be granted refugee status” — but there is no consensus on this amongst decision-makers (Infomigrants 2023).

As Germany remains hesitant to make such move, news outlets have also warned that other ongoing evacuation programs have been insufficient or suspended altogether, and that deportations of Afghans have indeed continued (Foreign Policy 2022). These weak protections for Afghans, including women and girls, appear at odds with the fact that Germany's amended Asylum Act (2016) includes sex as part of the PSG category in line with the Qualification Directive (German Government 2016, art. 2). In this way, Germany's legal-institutional framework on gender-based asylum claims resembles that of Finland, absent of establishing general risks of gender-persecution in terms of what is unfolding in Afghanistan.

France

Albeit also being a leading destination country for Afghan asylum-seekers amongst member states, France has not followed suit in establishing general risks of gender-based persecution. Formative here has been case-law of the

National Court of Asylum (CNDA), which in September 2021 held that “subsidiary protection based on the existence of a generalised conflict was no longer applicable as the Taliban takeover had put an end to this conflict;” the CNDA further specified at the end of 2021 that the “mere stay in Europe was not sufficient to justify fears in the event of return and to obtain protection.” (ECRE and AIDA 2023). In 2023, the Court reversed some of this case law for individuals applying for asylum from specific regions and rhetoric around “bringing over women threatened by the Taliban because they held prominent positions in Afghan society or had close contact with Westerners” was expressed by Didier Leschi, Director of the French Office of Immigration and Integration (RFI 2023). Yet, negative asylum decisions for Afghan women and girls slightly rose in 2023 (EuroStat, n.d.b).

The prevailing inaction on this rhetoric in the form of establishing general risks of gender-based persecution must be reconciled against the fact that according to France’s Code for Entry and Residence of Foreigners and Right of Asylum, grounds for persecution on the basis of gender “are duly taken into account for the purposes of recognizing membership in a certain social group or identifying a characteristic of such a group” (Tahirih Justice Center 2021; see Qualification Directive). As with Germany and Finland, France understands gender as a characteristic under the PSG category while failing to grant asylum on general risks of gender-based persecution (similar to Germany, different from Finland) as it pertains to the situation in Afghanistan.

Establishing general risks of gender-based persecution in international refugee law?

In comparing these varied approaches toward granting asylum to women and girls from Afghanistan across countries, several determining factors can be delineated that offer important outlooks for establishing general risks of gender-based persecution in international refugee law and for the relationship between gender apartheid and asylum. For one, having an existing legal-institutional framework that is conducive to recognizing gender and gender-related matters, either under an expanded refugee definition (i.e., Sweden) or under other protected grounds (i.e., Finland), appear important, however, they do not form a necessary basis to granting asylum on general risks. In Denmark, for instance, the existing legal-institutional framework does not include either of these aspects, but women and girls from Afghanistan can now apply for asylum on grounds of general risks under the PSG category, whereas in Germany and France, the respective existing legal-institutional frameworks — at minimum — make reference to gender-related claims under the PSG category, but neither country has moved toward granting asylum in the same manner.

Secondly, the EUAA Guidance seems to have moderate impact on national responses to the deterioration of women’s rights in Afghanistan relative to asylum. Both Sweden and Finland decided to grant asylum to women and girls from Afghanistan prior to the EUAA’s publication and only in the case of Denmark was a clear connection made. In terms of Germany, it has been noted that more than half of all applications filed by Afghan women were successful

in 2023, possibly in line with the EUAA Guidance, while the country remains hesitant to follow suit with Sweden, Finland, and Denmark in establishing general risks of gender-based persecution. Similarly, in France, region-specific amendments have been made regarding asylum claims filed; how these affect women and girls deserves further attention.

Thirdly, despite existing binding frameworks such as the Qualification Directive and the Istanbul Convention, the implementation of provisions on gender-related asylum claims can be considered as fragmented at best. As such, the Qualification Directive as refugee policy and the adjacent Istanbul Convention as gender policy again gesture to the intersectional and interconnected premise of establishing general risks of gender-based persecution in international refugee law, and point to the urgency of considering developments in other areas of law, namely international criminal law and the ongoing process of the CAH Treaty, when exploring the relationship between gender apartheid and asylum.

Outlooks: Gender Apartheid and Asylum

In light of the existing, albeit fragmented, legal-institutional frameworks on gender and asylum, the addition of gender as a protected ground in the refugee definition, the refinement of established grounds of protection inclusive of gender, as well as the developments in international criminal law, comprise three outlooks to envision an integrated system of protection around gender-related claims.

Adding Gender as a Protected Ground in the Refugee Definition

With regards to discourse on adding gender as a protected ground in the refugee definition, Shapiro (2022) suggests that the best way to ensure that gender-based claims are protected under international law is “through a new convention protocol that adds gender to the refugee definition as the sixth protected ground” (797). To Shapiro, gender shares commonalities with currently protected grounds and that gender meets the immutable characteristic, social distinction, and sufficient particularity attributes (801, 802). Shapiro’s proposal is that a binding, non-self-executing protocol is to be created to expand the refugee definition, and that the implementation of this protocol takes place *vis-à-vis* gender policy, rather than in asylum legislation (812, 813).

Proposals to add gender to the refugee definition are not new and remain disputed. For example, Anker and Lufkin (2003) note that opponents of such proposals insist that “the bars to women’s eligibility for refugee status lie not in the refugee regime’s legal categories *per se*...but in the incomplete and gendered interpretation of refugee law.” Thus, “simply adding gender or sex to the refugee regime’s current enumerated grounds of persecution...would not solve this problem” (Anker and Lufkin 2003). Similarly, Musalo (2021) argues that the addition of the sixth ground of gender is a “wrong-headed solution” because it “may ‘fix’ the problem for one category of asylum seekers, but it will leave out in

the cold all the others who rely on the particular social group ground for their claims.”

What has changed, however, is the “how” with a focus now placed on gender policy as a space where gender-related asylum claims can be moved forward such as through the implementation of CEDAW and the Istanbul Convention. Taking CEDAW as an example, to which all countries under examination are a party, the 1992 General Recommendation No. 19 establishes that “gender-related forms of persecution are forms of persecution that are directed against a woman because she is a woman or that affect women disproportionately.” Further so, the 2014 General Recommendation No. 32 supplements the Refugee Convention by stating that: “States parties apply a gender perspective when interpreting all five grounds, use gender as a factor in recognizing membership of a particular social group for purposes of granting refugee status under the 1951 Convention and further introduce other grounds of persecution, namely sex and/or gender, into national legislation and policies relating to refugees and asylum seekers” (CEDAW 2014).

As such, Recommendation No. 32 offers a framework for the “addition” approach within the adjacent field of gender policy as suggested by Shapiro and as seen in the case of Sweden. This, notwithstanding, must be nuanced against the fact that other countries also developed similar asylum regulations (Finland and Denmark) for women and girls from Afghanistan, absent of gender being part of the refugee definition. In this way, gender as a sixth ground of protection does not seem to form a necessary basis for establishing general risks of gender-based persecution in international refugee law, though it offers a legal-institutional framework that is conducive to it, and that could be reinforced through a non-self-executing protocol that may lean on Recommendation No. 32 and the CJEU decision.

Refining the Particular Social Group Category Inclusive of Gender

In terms of refining established grounds of protection, notably the PSG category, key points of discussion in discourse have concerned the specification of “women from [country]” in order to meet the immutable characteristic, social distinction, and sufficient particularity attributes of this protected ground. Defining a PSG through notions of “women from [country]” has been done previously in the UK where courts and tribunals have found the category to exist for women from Afghanistan, as well as Pakistan, Côte d’Ivoire, Somalia, and Bangladesh — amongst others (European Parliament 2012, 55). In this context, Goronja (2020) suggests judicial action that defines a PSG encapsulating “asylum claims based plainly on gender, along with the explicit recognition that gender-based groups are valid” (347). This falls in line with the existing provisions on gender-related asylum claims in the Qualification Directive that can be further bolstered through the CJEU ruling, and hence renders the PSG category of particular consideration as an outlook for establishing general risks of gender-based persecution in international refugee law.

Relatedly, Querton (2022) contends that amongst some EU member states, there is legal recognition, whether through legislative provision or judicial

interpretation, of the PSG category that “women may have a well-founded fear of being persecuted because they are women” (446). Essential to highlight here is that gender may constitute a protected characteristic on its own or by means of gender having a “distinct identity in the relevant country,” reflective of notions of “women from [country]” under the PSG category (Querton 2022). Here, Querton proposes that a convergence approach “by which a group may be perceived as ‘being different by the surrounding society’ in a given country by virtue of the innate characteristic of sex itself” must be adopted (447).

Further, Hathaway and Foster (2014) remind us that the PSG category “should be interpreted in a dynamic way in light of developing norms of international law.” Hathaway and Foster stress that a human rights approach to the interpretation of a PSG in matters of persecution is “consistent with the general rule of treaty interpretation,” making CEDAW and the Istanbul Convention again relevant in this context (447, 448). Focusing on the Istanbul Convention, which now applies to all EU member states given the recent accession to the treaty by the entire bloc, Article 60 Paragraph 2 of the Convention speaks to the application of the Refugee Convention as it pertains to gender-based persecution under established grounds of protection: (2) “Parties shall ensure that a gender-sensitive interpretation is given to each of the Convention grounds and that where it is established that the persecution feared is for one or more of these grounds, applicants shall be granted refugee status according to the applicable relevant instruments.”

This provision of granting refugee status “according to the applicable relevant instruments” points to the importance of the PSG category in establishing general risks of gender-based persecution in international refugee law as it presents a link between the Istanbul Convention (gender policy) and the Qualification Directive (asylum policy), both in which persecution on the basis of gender is explicitly mentioned as part of the category (Council of Europe 2011, EU 2011).

All examined case study countries are individual parties to the Istanbul Convention, with Finland, Germany, and France holding provisions on gender-inclusive PSG categories, but only Finland moved to establish general risks of gender-based persecution relative to women and girls from Afghanistan. This then goes to show that refining a PSG inclusive of gender, backed by the CJEU ruling, appears to offer a considerable approach to configuring gender apartheid and asylum into international refugee law, while not definitively premising it.

Categorizing Gender-Based Persecution as a Stand-Alone Crime and Codifying Gender Apartheid in International Criminal Law

The ongoing process for a CAH Treaty presents an opportunity to categorize gender-based persecution as a stand-alone crime and to codify gender apartheid in international criminal law with implications for international refugee law (Grey et al. 2019, 959). To Grey and others (2019), the trajectory for gender-based persecution as a crime against humanity can be envisioned through the ICC’s *Al Hassan* case and the attempt for a charge of gender-based persecution by the OTP.

In brief, the *Al Hassan* case involves alleged persecution on gender grounds by Ansar Dine and Al-Qaeda in Timbuktu in 2012 and 2013 (Grey et al. 2019, 975, 976). The document containing the charges describes the targeted group as “the women and girls from Timbuktu and its region,” arguing that such targeting was based on gender grounds “because it was motivated by discriminatory views about the appropriate roles and behaviours of this female population” (International Criminal Court 2018). Charges of gender-based persecution were confirmed *inter alia* by the Pre-Trial Chamber in 2019 and Grey and others delineate two important aspects of this confirmation, namely understanding the social meaning of gender, and recognizing the concept of intersectionality (977, 979): “First, the Chamber acknowledged that the women of Timbuktu faced persecution ‘*pour motifs sexistes*’ that is, on the basis of ‘gender’ as defined in the Rome Statute in the sense that these women were treated as ‘objects’. This phrasing acknowledges that the women of Timbuktu were not simply targeted because of their biological sex, but because of the social meaning allegedly given to that sex by the perpetrators (specifically, the view of women as objects). Second, the Chamber alluded to the concept of intersectionality, by recognizing that women were persecuted on religious and gender grounds, and moreover, that those with darker skin were treated worse than those with fairer skin” (977).

The mentioned importance of the social meaning of gender and intersectionality underscore the historical link between international criminal law and international refugee law in terms of conceptualizing gender-based persecution. On that account, Oosterveld’s (2014) discussion of how understandings of GBV, as a specific form of gender-based persecution, have informed cases in both areas of law over time, provides crucial insights.

In situating gender at the intersection of international criminal law and international refugee law, Oosterveld (2014) draws parallels in regard to categories. Oosterveld emphasizes that in international criminal law and in international refugee law alike, categories to “prove” gender-related claims are “determinative” and “important,” but both areas of law “struggle with the funneling of women’s experiences into restricted categories” (963). This, according to Oosterveld, provides “constant reminders that gender is still surrounded by misconceptions and inaccurate assumptions that continually threaten progress that has come before” (973). Arguably, the progressive developments in the draft articles of the CAH Treaty to categorize gender-based persecution as a stand-alone crime and to codify gender apartheid can be seen as an opportunity to overcome these misconceptions and assumptions, especially when understood beyond binary terms, which may well, as I propose, inform international refugee law on the matter. This is especially so when it comes to categories in refugee status determination.

Gender Apartheid and Asylum: Moving Forward

The extent to which international criminal law should and can influence international refugee law as it pertains to refugee status determination has been subject of debate. Smith (2008), for instance, argues that ICC decisions should be relied on in refugee status determination as it pertains to levels of persecution and levels of protection for asylum-seekers. To Smith, the information provided

in ICC decisions is “cogent” to refugee law and practice in assessing the “functionality of national legal systems,” and thus country-wide risk assessments as implied by the CJEU ruling, the UNHCR Statement, and the EUAA Guidance (167). Smith recommends that “refugee practitioners should see, and take advantage of, the overlap between the work of the ICC and refugee status inquiries” as this will “help to ensure that persons deserving international protection get it” and that this will “bring us another step closer to the development of a fully integrated system for the protection and promotion of human rights” (166).

Smith’s analysis and recommendations are pertinent to my argument on the relationship between gender apartheid and asylum given the requested inquiry for the OTP on crimes against humanity regarding gender-based persecution in Afghanistan and the developments seen within the EU regarding granting asylum to women and girls on general risks of gender-based persecution. Indeed, in bringing these ongoing developments into conversation, the overlap between international criminal law and international refugee law becomes clear. How this overlap will be operationalized in terms of establishing general risks of gender-based persecution in international refugee law presents the very foundation of my inquiry and the proposed outlooks offer a response to it.

Nevertheless, critical positions toward the “cross-reference” between international criminal law and international refugee law must be considered. These critiques bring us back to the discussion on the notion of persecution, as well as the caution raised against a direct transfer of definitions, not least in regard to gender-based claims (see Li 2020; Oosterveld 2006). A point in case is Zimmermann and Mahler’s (2011) commentary on the intentionality of persecution, a connecting point between discourse on gender-based persecution and gender apartheid in international criminal law and international refugee law.

In leaning on the Tadić decision (1997) of the International Criminal Tribunal for the Former Yugoslavia (ICTY), which involved an examination around the “criminal responsibility due to participation in a group with a common purpose,” Zimmermann and Mahler assert that international refugee law is a distinct area of law concerned with human rights violations on established grounds of protection, whereas international criminal law is concerned with criminal liability (Sassoli and Olson 2000, 735). As such, the understandings of persecution are different in the sense that norms in international refugee law “cannot readily be applied to customary international criminal law entailing individual criminal responsibility” (ICTY Trial Judgement, 1997). In terms of the relationship between gender apartheid and asylum, this emphasis on intentionality and the distinction between individual liability versus collective liability is of chief importance as gender apartheid has been defined as “inhumane acts...committed in the context of an institutionalized regime of systematic oppression and domination with the intention of maintaining that regime,” thus inscribing collective liability imposed by a regime with intentionality, a telling aspect for country-wide risk assessments in international refugee law.

Of further relevance in this regard is also the caution against the direct transfer of definitions on gender-based persecution derived from the Kupreškić decision (2000) of the ICTY (see Hathaway and Foster 2014; Oosterveld 2006).

The decision operated on the assertion that the determination of persecution in international refugee law is “more on the state of mind of the person claiming to have been persecuted (or to be vulnerable to persecution) than on the factual finding of whether persecution has occurred or may occur,” hence emphasizing individual risk assessment. However, in the case of gender apartheid and asylum as demonstrated in the CJEU ruling, the UNHCR Statement, and the EUAA Guidance, a country-wide risk assessment on levels of gender-based persecution is considered (cited in Oosterveld 2006 FN 8, 51). In this way, the categorization of gender-based persecution as a stand-alone crime and the codification of gender apartheid in international criminal law can overcome tensions between individual risk assessments and country-wide risk assessments in international refugee law.

My argument falls in line with other recent analyses on “group-based” or “cumulative” protection for Afghan women and girls under international refugee law, and notions of *prima facie* recognition. For example, Feith Tan and Ineli-Ciger (2023) propose that since the Taliban’s treatment of Afghan women and girls amounts to gender-based persecution on a country-wide scope, there is “no need to assess the individual circumstances of each individual to grant them refugee status” (793). Notable examples here are Sweden, Finland, and Denmark which recognize general risks of gender-based persecution for Afghan women and girls and have implemented simplified or accelerated asylum procedures in this regard (Feith Tan and Ineli-Ciger 2023, 816).

Adding to this, the mentioned UNHCR Statement clarifies that “while the term ‘persecution’ is not expressly defined in the 1951 Convention...forms of harm may cumulatively constitute persecution” and that “what amounts to persecution on cumulative grounds cannot be stated in the abstract” (UNHCR 2023, C-608/22, C-609/22, 2). This renders the proposed definition of gender apartheid in the CAH Treaty, reflecting intentionality (motivation) in the systemic and institutionalized (scope) ways that forms of control (segregation, domination, oppression) are enacted toward a group with the commitment of upholding said control, as particularly relevant for establishing general risks of gender-based persecution in international refugee law and the relationship between gender apartheid and asylum (Ashraph et al. 2023).

Conclusion

In this article, I offered an analysis of establishing general risks of gender-based persecution in international refugee law by examining the relationship between gender apartheid and asylum in the context of Afghanistan through the case studies of Sweden, Denmark, Finland, Germany, and France. Building on my analysis, I outlined determining factors and proposed three outlooks in this regard, such as the addition of gender as a protected ground in the refugee definition, the refinement of established grounds of protection inclusive of gender, and the categorization of gender-based persecution as a stand-alone crime and the codification of gender apartheid in international criminal law. I demonstrate that all three outlooks form some basis for establishing general

risks of gender-based persecution in international refugee law and provide insights for the relationship between gender apartheid and asylum, but emphasize that the link between international criminal law and international refugee law is especially crucial.

My analysis gestures to the intentionality (motivation) in the systemic and institutionalized (scope) ways that forms of control (segregation, domination, oppression) are enacted toward a group with the commitment of upholding said control as connecting points between the two areas of law on matters of gender-based persecution and gender apartheid. This leads me to suggest that the historical link between international refugee law and international criminal law and the alignment of current developments provide a space to envision an integrated system of protection around gender-related claims. In this integrated system of protection, general risks of gender-based persecution are recognized in situations such as Afghanistan that can be described as gender apartheid. As these developments continue, central questions that emerged in my discussion require further inquiry, such as binary understandings of gender, definitions of gender groups, and distinctions between individual risk assessment and country-wide risk assessment. These are relevant to forge forward an aligned conceptualization around gender-based persecution and gender apartheid in different areas of international law.

Notes

1. Please note that as this article was going to press in October 2024, the CJEU issued its decision on the cases, finding that the discriminatory measures adopted in respect of women by the Taliban regime constitute acts of persecution, and that it is sufficient to take into account the asylum applicant's nationality and gender alone.
2. Please note that in June 2024, the ICC delivered its judgment on the *Al Hassan* case (Mali), the first case on the charge of gender-based persecution.

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