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Cover Page Footnote
International Law; Commercial Law; Law
COMMENT

Adjudication of Gender Persecution Cases Under the Canada Guidelines: The United States Has No Reason to Fear an Onslaught of Asylum Claims†

Fatimah’s Story

Fatimah was born in Mali, Africa in 1958. Fatimah’s mother, adhering to her interpretation of Islamic culture and religion in Mali, had her daughter genitaly mutilated[2] at the age of four. In 1986, Fatimah married Hassain and they had one son, Tiab. In 1989, Hassain received funding from the government in Mali to pursue a graduate degree at a university in North Carolina. Hassain decided to take Fatimah with him, but forced her to leave their son behind. Fatimah related that her husband continued to beat her in America, as he had done in Mali. She said that Hassain felt that he had the right to beat her because the religious culture and government in Mali allows men to beat their wives[3].

Because Fatimah was genitaly mutilated, sex was very painful for her and thus she never wanted to have sex. Due to Fatimah’s lack of sexual interest, Hassain generally went elsewhere for intercourse. There were times, however, when Hassain demanded sex from Fatimah and he refused to use birth control. As a result, Fatimah has given birth to two sons while in the United States. Hassain took no interest in the welfare of the children. He would leave for periods of time without telling Fatimah where he was. Because Hassain refused to provide any monetary support for the children, Fatimah took two jobs to support the children and walked to work everyday, even when she was nine months pregnant with her second son.

The day before she gave birth to her second son, she was bleeding all after-

† The author would like to thank I.F. Liebich and Krista M. Daley of the Immigration and Refugee Board for providing the Canadian gender persecution cases and other pertinent information.

1 The facts described are based on an actual asylum claim pending at Immigration and Naturalization Services (INS) in Arlington, Virginia. The names and some of the details have been changed in order to protect the privacy of the client. An application and brief supporting Fatimah’s asylum claim was filed with INS in June 1994 and is on file at the law offices of Manlin Chee in Greensboro, N.C.

2 For a description of female genital mutilation, see infra note 5.

3 “‘Violence against women, including wife beating, is accepted in Malian society, though there are no statistics to indicate how widespread it may be . . . . Legal action for redress of injury is not normally available.’ ” Karen Bower, Note, Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group, 7 GEO. IMMIGR. L.J. 173, 186-87 (1993) (quoting U.S. DEP’T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES FOR 1990, 102d Cong., 1st Sess. 1 (1991)).
noon, and her husband refused to drive her to the hospital. She contacted a local church for help, and two women from the church drove her to the hospital where her second son was born by cesarean section. Touched by the kindness of the Christian women, Fatimah gave her newborn son a Christian middle name. Hassain was infuriated by the idea of his son having a Christian name, and so he refused to visit his son in the hospital or even acknowledge that he was the father.

After Hassain returned to Mali without her, Fatimah continued to receive help from the local church, and she began to explore the Christian religion. She says that she finds strength in the teachings of the Christian religion, and that this strength helps her to deal with her problems. She works ten hours a day to support her children and then teaches her oldest, a pre-schooler, to read in the evenings.

If Fatimah and her children were returned to Mali, she believes that she would be unable to take care of her children. She fears that her husband would continue to beat her and provide no support to their children. According to Fatimah, the Malian government will not help women who are beaten by their husbands and thus she would have no way to protect herself. Fatimah knows that her husband would continue, at times, to demand intercourse from her. As well as being extremely painful, the doctor that examined Fatimah noted that forced intercourse would exacerbate recurrent sores and thicken the scar tissue resulting from the mutilation she experienced as a child. The continued production and aggravation of these sores makes Fatimah very susceptible to infection. Fatimah also fears that she would be unable to get a job to support her children because of their Christian middle names. Fatimah believes both her husband and the society would treat her and her children as outcasts based on their association with the Christian religion.

I. Introduction

Under U.S. asylum law, it is unlikely that gender-based persecution claims, such as Fatimah's spousal abuse and rape claims or female genital mutilation claims, will be recognized as legitimate forms of

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4 Under the Immigration and Nationality Act § 101(a)(42), 8 U.S.C. § 1101(a)(42) (1988) [hereinafter INA], an applicant must meet the definition of refugee in order to be granted asylum in the United States. The INA defines a "refugee" as:

any person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.

8 U.S.C. § 1101(a)(42)(A)-(B) (1988). Furthermore, once an applicant proves eligibility for asylum by meeting the refugee definition, the immigration judge still has discretion to deny asylum. See 8 U.S.C. §§ 1101(a)(42), 1158 (1988). While the discretionary power of an immigration judge is broad, courts have imposed limits. See Melendez v. United States Dept of Justice, 926 F.2d 211, 218 (2d Cir. 1991) (holding that threshold findings of fact upon which a discretionary denial is based must pass the substantial evidence test); Matter of Pula, Int. Dec. 5033 (BIA 1987) (stating that the circumvention of orderly refugee procedures is not alone sufficient to deny asylum in the exercise of discretion).

5 Practiced for more than 2500 years primarily in Africa and the Middle East, female genital mutilation (FGM), sometimes called female circumcision, involves the cutting away of part or all of the external female genitalia. Alison T. Slack, Female Circumcision: A Critical Appraisal, 10 Hum. Rts. Q. 437, 439 (1988). The instruments used to perform FGM include kitchen knives, old razor blades, broken glass, sharp stones, and scalpels. Id. at 442. The
persecution entitling women to asylum. In fact, if Fatimah is able to establish eligibility for discretionary grant of asylum, her refugee status will probably result from a determination that she has a well-founded fear of persecution based on her Christian religious practices, not on the fact that she will be beaten and raped by her spouse if she is returned to Mali. A major reason for the continued denial of gender persecution claims is that such claims, like rape, are generally considered private rather than public matters, even when perpetrated by a government agent or occurring during a political conflict.6 Traditional interpretations of what constitutes a refugee all include the critical quality of "political," which is drawn from public sphere activities dominated primarily by men.7 Because the site of women's oppression most often occurs in the private sphere, where acts of violence generally go unrecognized by the public world, women's persecutory experiences are ignored by the refugee definition. This general denial of women's persecution can be characterized as a public/private dichotomy where "state oppression of a religious minority is political, while gender oppression at home is not."8

World-wide opinions about the legitimacy of gender persecution claims as a basis for refugee status are slowly beginning to change, however. For example, Dorris M. Meissner, the Commissioner of Immigration and Naturalization Services (INS), has commented that "gender based asylum claims—such as those filed by some Muslim and Bosnian women based on their rape by Serbian soldiers during the civil war in the former Yugoslavia—present a 'persuasive argument' that the INS

most severe form of the practice is called infibulation where the majority of the external genitalia are removed, and the open area is then sewn shut with a tiny hole left for the passing of urine and menstrual fluid. Id. at 441-42. The operation has been performed by Christians, Jews, Animasts, and atheists, but has most heavily been practiced by Muslims. Id. at 446. Although the practice is often supported by Islamic leaders, there is no scripture in the Koran that requires female genital mutilation. Id. at 446. One writer reported that the male equivalent of female genital mutilation would be "amputation or cutting of the penis and its surrounding tissues." A. M. Rosenthal, Female Genital Torture, N.Y. Times, Nov. 12, 1993, at A33. For a discussion of the practice, the health consequences, and the arguments for and against FGM, see Slack, supra, at 437-86.

6 Nancy Kelly, Gender-Related Persecution: Assessing the Asylum Claims of Women, 26 CORNELL INT'L L.J. 625, 628 (1993) (describing the facts of Campos-Guardado v. INS, 809 F.2d 285 (5th Cir.), cert. denied, 484 U.S. 826 (1987)). Kelly's general thesis is that U.S. asylum law must incorporate the advances in international human rights that address violence against women. Id. at 569. See also Pamela Goldberg, Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence, 26 CORNELL INT'L L.J. 565 (1993). Goldberg argues that under U.S. asylum law, women are much less likely than men to be found eligible for asylum, but demonstrates how gender-based claims can be incorporated into each of the four requirements of the refugee definition. Id. at 527.

7 See Jacqueline Greatbatch, The Gender Difference: Feminist Critiques of Refugee Discourse, 1 INT'L J. REFUGEE L. 518 (1989). Greatbatch argues for an expansive approach in determining refugee status, which includes the recognition of women as a particular social group and requires the adoption of guidelines and practices which will provide women access to the system and proper adjudication of their claims. Id. at 519.

8 Kelly, supra note 6, at 628 (citing Doreen Indra, A Key Dimension of the Refugee Experience, 6 REFUGEE 3 (1987)).
will have to be sensitive to over time."9 Far more progressive are the Canada Guidelines,10 which recognize that gender-based violence is a legitimate form of persecution for the purpose of granting refugee status. These guidelines are an international first in breaking the public/private dichotomy. The Canada Guidelines forge a new understanding and acknowledgment of gender persecution as they "set out a systematic method" for the evaluation of claims on the applicable grounds of race, religion, nationality, membership in a particular social group, and political opinion.11 Since the creation of the Canada Guidelines in March 1993, there has not been an increase in either the number of women making asylum claims or the number of asylum claims granted to women.12

Unlike the Canadian system, U.S. asylum law, both in its present form and its interpretation by the courts, offers few concrete possibilities of asylum for women fleeing gender-based persecution.13 This Comment takes the position that this injustice exists because of an underlying fear that if the definition of refugee is expanded to include forms of persecution occurring in the private sphere, the "floodgate will burst" and millions of women will suddenly have legitimate claims for asylum. In other words, any move by the courts or by Congress to open up the refugee definition to include the types of persecution experienced by women will potentially expose the United States to an onslaught of legitimate asylum claims. In response to this concern, this Comment argues that the Canadian system is presently recognizing gender-based persecution claims while successfully controlling the floodgate problem by using the Canada Guidelines to establish clear standards for distinguishing real forms of gender persecution from mere dislike of a country's law or policy.

Part II of this Comment examines some of the particular difficulties that women face when making gender persecution claims in U.S. courts. Specifically, this section discusses the problems that women refugee claimants face in the interview process and potential problems for women refugee claimants under the new asylum procedures that

9 Pamela Goldberg, Asylum Law and Gender-Based Persecution Claims, IMMIGR. BRIEFINGS, Sept. 1994, at 1, 2 (quoting Ms. Meissner's statement in 70 Interpreter Releases 1470 (Nov. 8, 1993)).

10 IMMIGRATION AND REFUGEE BOARD, GUIDELINES ISSUED BY THE CHAIRPERSON PURSUANT TO SECTION 65(3) OF THE IMMIGRATION ACT, WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1993) [hereinafter CANADA GUIDELINES].

11 Goldberg, supra note 9, at 4.

12 Telephone Interview with Krista M. Daley, Legal Advisor, Immigration and Refugee Board of Canada (Apr. 3, 1995). Ms. Daley stated that the decision making process regarding women’s asylum claims has become more consistent since the implementation of the Guidelines. Id. Canada’s Immigration and Refugee Board has adjudicated approximately 150 gender-based cases and granted asylum to seventy percent of the applicants. Goldberg, supra note 9, at 4.

13 See, e.g., Goldberg, supra note 6; Kelly, supra note 6.
This section then asserts that generally American courts have narrowly defined the categories of persecution, such as "membership in a particular social group" or "political opinion," in order to ensure that the United States is not faced with uncontrollable numbers of refugees. Part III then analyzes both the Canada Guidelines and a representative sample of cases adjudicated under the Canada Guidelines. Ultimately, this section argues that the Canada Guidelines "keep the floodgate from bursting" because they follow a systematic method for identifying and evaluating gender persecution claims. Finally, Part IV concludes that the United States should follow Canada in its recognition and protection of women fleeing gender persecution.

II. U.S. Law and Policy

To establish eligibility for asylum in the United States, an applicant must show that he or she has been persecuted or has a well-founded fear of persecution from either a government official or from a group or individual that the government cannot or will not control. The applicant must also show that the basis of the persecution is on account of either her race, religion, nationality, political opinion, or membership in a particular social group. Making this showing for a gender-based persecution claim, that is, fitting gender-based persecution claims into the U.S. asylum law definition, requires that an applicant meet four general factors.

The easiest factor to meet is the first requirement: that a woman's fear of gender-based persecution is well-founded. The U.S. Supreme Court has decided that a "well-founded fear" means a reasonable possibility that an individual will be persecuted. The Court also requires
the applicant to show both a subjective and an objective element of fear. A subjective fear means that the applicant's fear is genuine, insofar as the fear puts the applicant in "a state of apprehension or anxiety not usually subject to rational measurement." An objective fear means that the applicant’s fear is reasonable, that is the fear has "some basis in the reality of the circumstances" and is not just "mere irrational apprehension." Therefore, an applicant who successfully establishes a well-founded fear of persecution has shown that she faces a reasonable possibility of persecution if returned to her country, and that she has both a subjective and objective fear of persecution.

Although considered the easiest requirement for an applicant bringing a gender-based persecution claim to meet, the well-founded fear standard can pose obstacles or problems different from those faced by applicants making non-gender-based persecution claims. One such problem may arise at the initial INS interview. This interview is the applicant’s first chance to tell her story, and either asylum will be granted or her case will be referred to an immigration judge. Problems can arise because the applicant feels uncomfortable or ashamed of discussing with a male interviewer the nature of her persecution, which often includes rape, gang rape by pirates, and other forms of sexual abuse. Some female applicants come from cultures that blame the woman if she is sexually assaulted, and these applicants have an especially hard time describing the events that happened to them. Because very few countries have female staff involved in their
refugee determination procedures, women bringing gender-based persecution claims usually speak with male interviewers. Unable to fully express their stories, they can have difficulty meeting the subjective and objective elements of the well-founded fear standard.

The difficulties of meeting this first requirement may intensify with the new asylum procedures. These new procedures establish a "grant-refer" system whereby asylum officers will either grant asylum or refer the applicant to an immigration judge for deportation or exclusion proceedings. Whereas the old procedures required the asylum officer to issue a notice of intent to deny asylum (NOID), the new procedures no longer include NOIDs, and no longer give the applicant the opportunity to rebut the intended denial at this initial stage of the administrative process. The immigration judge receives the applicant's case without any written record of why the asylum officer did not grant asylum. Thus, if the asylum officer denied the woman's claim because she was not able to express details of her situation, which made her unable to establish either the subjective or objective element of the well-founded fear standard, neither the immigration judge nor the applicant's attorney would have a written record of this reason for the denial. A written record could indicate to the attorney that the applicant needs to become more comfortable in telling her story, as well as indicating to the immigration judge that a particular applicant may have experienced traumas that are difficult to talk about. Of course, it is too early to tell if this problem will intensify with the new asylum procedures because they went into effect only on December 5, 1994. However, commentators on the new asylum procedures have criticized the elimination of the NOID requirement on the grounds that the NOID protects applicants' rights and insures more accurate decisions by asylum officers.

Another element of the refugee definition that poses particular problems for women making gender-based claims is the requirement that the persecution experienced by the women must be on account of either her race, religion, nationality, political opinion, or membership has no other family with her, or a woman who has become the head of her family due to the death or missing status of the former male head of the family and is at risk of physical danger or persecution due to the fact that she is alone. Some of these files were about Vietnamese boat women who, on their way to Indonesia, were brutally raped and humiliated by pirates and crews of other vessels. The staff members who interviewed these women in Indonesia continually noted that these women did not want their families or husbands to find out what happened because it would bring shame on the families. The staff members also noted that these women had difficulty in accepting that they were not to blame for their assaults. Fortunately, because UNHCR negotiates directly with foreign governments like the United States, these refugees in the resettlement process do not go through normal asylum procedures and are not generally required to tell their stories to male interviewers.

30 Johnsson, supra note 28, at 223.
31 71 Interpreter Releases 1577, 1579 (Dec. 5, 1994).
33 71 Interpreter Releases 1577, 1579 (Dec. 5, 1994).
in a particular social group. Applicants making gender-based persecution claims in the United States have trouble gaining refugee status because the 1951 Convention and the 1967 Protocol do not explicitly recognize gender as a category upon which persecution can be based, and U.S. asylum law has generally failed to incorporate gender-based claims into one of the existing enumerated grounds of persecution. Insofar as gender is not directly recognized as a protected category, incorporating gender-based claims into the existing refugee definition requires a broad-based interpretation of "persecution."

34 The 1980 Refugee Act states that the Attorney General has the authority to grant asylum to any person who meets the statutory definition of refugee (see INA § 208(a), 8 U.S.C. § 1158(a) (1988)) by showing persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion. 8 U.S.C. § 1101(a)(42)(A) (1988). For the text of the refugee definition, see supra note 4.


35 See 1951 Convention, supra note 34; 1967 Protocol, supra note 34.

36 Goldberg, supra note 6, at 588. See Gomez v. INS, 947 F.2d 660, 664 (2d Cir. 1991) (holding that possession of broad characteristics such as youth and gender will not by themselves establish persecution based on membership in a particular social group, even though Ms. Gomez was raped and brutalized by Salvadoran soldiers in her youth); Campos-Guardado v. INS, 809 F.2d 285, 289 (5th Cir.), cert. denied, 484 U.S. 826 (1987) (holding that Ms. Campos-Guardado was not persecuted on account of any political opinion she herself possessed or was believed by the soldiers to possess, even though she was brutally raped and forced to watch her uncle and cousins tortured and killed by Salvadoran soldiers). But see Fatin v. INS, 12 F.3d 1233, 1237, 1241 (3d Cir. 1993) (recognizing that an innate characteristic like gender could create a particular social group, but denying the applicant's persecution claim based on her membership in the particular social group of women who refused to wear a veil because she did not show that complying with the restrictions that Islamic law places on women was tantamount to persecution for her); Lazo-Majano v. INS, 913 F.2d 1432, 1435-36 (9th Cir. 1990) (granting asylum based primarily on the idea that the Salvadoran army sergeant, who harassed, raped, and forced Ms. Lazo-Majano to perform unpaid labor for him, had imputed the political opinion of subversive to the applicant when he threatened that if she reported him, he would kill her and then say that she was a subversive).

37 Neither the 1951 Convention and 1967 Protocol nor the 1980 Refugee Act provide an actual definition of persecution. According to commentators, the omission of a precise definition for persecution was a deliberate attempt by the drafters to permit a case-by-case determination of whether any particular action or conduct constituted a persecutory act. Goldberg, supra note 6, at 577 (citing James C. Hathaway, The Law of Refugee Status 104 (1991) (citing, inter alia, Ate Grahl-Madsen, Identifying the World’s Refugees, 467 Annals Am. Acad. Pol. & Soc. Sci. 11, 15 (1983))); see also Guy S. Goodwin Gill, The Refugee in International Law 40 (1983) ("There being no limits to the perverse side of human imagination, little purpose is served by attempting to list all known measures of persecution. Assessments must be made from case to case by taking account, on the one hand, of the notion of individual integrity and human dignity and, on the other hand, of the manner and degree to which they stand to be injured.").
recognition that "state liability" encompasses harms committed by private actors, not just state actors,\textsuperscript{38} and an open interpretation of the five types of persecution recognized by the refugee definition, particularly the categories of political opinion and membership in a particular social group.\textsuperscript{39}

Why do U.S. courts often fail to utilize open interpretations of categories of persecution, such as membership in a particular social group and political opinion?\textsuperscript{40} The answer to this question was well expressed by the 9th Circuit in *Sanchez-Trujillo v. INS*.\textsuperscript{41} by opening the refugee definition, the court risks "extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country."\textsuperscript{42} For example, if a court were to grant asylum to a woman who is continually abused by her husband, then the court risks the potential of having to extend refugee status to a vast number of abused women around the world. This fear of "opening the floodgates" underlies the United States restrictive asylum policies.\textsuperscript{43} In limiting the scope of who can apply for asylum by narrowly interpreting the elements of the refugee definition, courts ensure that the United States is not faced with accepting vast demographic groups of people from oppressed countries throughout the world.\textsuperscript{44} By narrowing these definitions, however, courts create arbitrary hierarchies of persecution: abuse by government officials and forced recruitment by guerrilla groups is afforded protection through asylum, but abuse by one's husband and forced female genital mutilation is not. Such hierarchies discriminate against groups of refugees like women raising gender-based persecution claims. In order for the United States to extend asylum to women making gender-based claims, the "opening the floodgates" problem must be faced. Part III will show that Canada has created guidelines which both extend asylum to women making gender-based claims and ensure that the country is not faced with an uncontrollable amount of applicants.

\textsuperscript{38} See Goldberg, *supra* note 6, at 584-85. For a discussion of Canada's recognition of state liability for private actors, see *infra* notes 177-181 and accompanying text.

\textsuperscript{39} See generally Goldberg, *supra* note 10. She argues that the particular social group category was "meant to be broader than the other categories and was included in the 1951 Convention definition to protect refugees from forms of persecution that arose from unforeseeable circumstances." *Id.* at 590 (citing ATLE GRAHL-MADSEN, *I THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966)).

\textsuperscript{40} See *supra* note 37.

\textsuperscript{41} 801 F.2d 1571 (9th Cir. 1986).

\textsuperscript{42} *Id.* at 1577.


\textsuperscript{44} *Id.*
III. The Canadian Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: A Systematic Method for Evaluating Gender-Related Persecution Claims

In recognition of the difficulties frequently faced by women refugees presenting gender-based persecution claims, the Immigration and Refugee Board of Canada (IRB) developed the Canada Guidelines (Guidelines)\textsuperscript{45} "to deal more sensitively with gender-related refugee claims—both from substantive and procedural perspectives."\textsuperscript{46} These Guidelines were first issued under a new provision in recent amendments to Canada's Immigration Act\textsuperscript{47} which authorized the IRB Chairperson to develop guidelines to assist the IRB staff in carrying out their duties.\textsuperscript{48} The Guidelines are an international first in that they "formally address[] the rights of refugee women in the context of domestic refugee determination systems and [they] recognize[] that women fleeing persecution because of their gender can be found to be refugees."\textsuperscript{49} The Guidelines ensure that the 1951 Convention\textsuperscript{50} is applied to gender-related refugee claims in Canada "in a way which acknowledges the different forms of persecution experienced by women in their countries of origin."\textsuperscript{51}

A. The Guidelines

The Guidelines begin by stating that when a woman claims to have a gender-related fear of persecution, the central issue is the determination of the "linkage between gender, the feared persecution, and one or more of the five definition grounds:"\textsuperscript{52} race, religion, nationality, political opinion, and membership in a particular social group. Establishing this linkage in order to prove a valid gender-based claim involves a number of substantive issues which the Guidelines address.

\textsuperscript{45} CANADA GUIDELINES, supra note 10.
\textsuperscript{47} Immigration Act, R.S.C., ch. 1-2, § 65(3) (1993) (Can.).
\textsuperscript{48} Id. The IRB has jurisdiction over refugee determinations and hears about 25,000 claims for refugee status per year. SAMUEL BERMAN & CAROLINE MCCHESNEY, REFUGEE DETERMINATION PROCEEDINGS 3 (1995).
\textsuperscript{49} Nurjehan Mawani, Determining Gender-Related Claims to Refugee Status: The Canadian Perspective, Address to the Carnegie Endowment for International Peace 1 (Apr. 19, 1994) (transcript on file with the author).
\textsuperscript{50} See 1951 Convention, supra note 34.
\textsuperscript{51} Nurjehan Mawani, Determining Gender-Related Claims to Refugee Status: The Canadian Perspective, Address to the Carnegie Endowment for International Peace 1 (Apr. 19, 1994) (transcript on file with the author).
\textsuperscript{52} CANADA GUIDELINES, supra note 10, at 1.
1. Interpreting the 1951 Convention Definitions of Refugee to Include Women

The Guidelines recognize that, although gender is not specifically enumerated as one of the grounds for establishing 1951 Convention refugee status, the 1951 Convention can be interpreted to provide protection to women making gender-based claims on any one or a combination of the five enumerated grounds. Before determining the appropriate grounds applicable to a particular claim, the Guidelines require that the decision maker identify the nature of the persecution experienced or feared by the claimant. Recognizing that women can suffer different forms of persecution from men, the Guidelines identify four broad, nonexclusive categories of persecution that women refugees face. First, women can fear persecution under "the same 1951 Convention grounds, and in similar circumstances, as men." Second, women can fear persecution because of kinship. In addition, women can fear persecution resulting from "circumstances of severe discrimination on the grounds of gender," or resulting from violent acts by public authorities or private citizens against which the state is either unwilling or unable to offer protection. Finally, women can fear persecution as a "consequence for failing to conform to, or for transgressing, gender-discriminating religious or customary laws and practices in their country of origin."

Once the nature of the persecution that a claimant faces has been identified, the decision maker will then determine if the basis of the persecution falls within one of the five enumerated 1951 Convention grounds. The Guidelines explain how gender-based claims fit into each of the five 1951 Convention categories.

The first category is race. The Guidelines reveal that women refugees may fear persecution both because of their race and their gender. The Guidelines use an example of an Asian woman living in an African society who may fear persecution because of her race and her gender. Women are often harassed in order to reveal information about these relatives. Women also may have the same political opinions of these family members "imputed" to them.

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53 Canada Guidelines, supra note 10, at 1.
54 Id.
55 Id. at 2.
56 Id. When women fear persecution on the same grounds and in the same circumstances as men, the substantive analysis of the claim does not change due to the woman's gender. Id. However, the procedural issues may vary at the hearing in order to be sensitive to the particular harms that she may have experienced as a function of her gender. Id.
57 Id. at 3. Kinship persecution occurs because of the views and activities of their spouses, parents, or other relatives. Id. Women are often harassed in order to reveal information about these relatives. Id. Women also may have the same political opinions of these family members "imputed" to them. Id.
According to the Guidelines, "[t]he notion of religion may encompass [both] the freedom to hold a belief system of one's choice or not to hold a particular belief system [as well as] the freedom to practice a religion of one's own choice or not to practice a prescribed [system]." As an example of gender-based religious persecution, the Guidelines state that a woman who lives in an Islamic society and "chooses not to subscribe to or follow the precepts of a state religion may be at risk of persecution for reasons of religion."63

A gender-based persecution claim also may be based on nationality if, under a national law, an applicant's marriage to a foreign national may cause her to lose her citizenship.64 In this situation, "it is not the fact of losing her nationality . . . but the consequences she may suffer as a result" of the loss, that "constitutes good grounds for fearing persecution."65

Gender-based persecution can also occur due to a woman's political opinion. Specifically, "[a] woman who opposes institutionalized discrimination of women, or expresses views of independence from male social/cultural dominance in her society, may fear persecution for reasons of imputed political opinion, because she is perceived by the established social/political structure as expressing politically antagonistic views."66 When interpreting the concept of "political opinion," decision makers must consider two factors. First, in societies where women are subordinated, women's political protest may occur in ways that differ from men.67 Second, the oppression of women by both religious laws and rituals can be political in nature.68 In other words, a woman's failing to conform to religious laws may be interpreted as a threat to the society and the authority's political power, and a woman may be persecuted for challenging this power.69

Finally, a woman may experience persecution solely by reason of her gender, and therefore may bring a claim on the grounds of membership in a particular social group of women.70 Membership in a certain family can also be classified as membership in a particular social group.71 When employing membership in a particular social group as a ground for gender-based persecution, the Guidelines suggest that the decision maker keep the following considerations in mind: (1) it is immaterial that a "particular social group consists of large numbers of

62 Id.
63 Id.
64 Id.
65 Id.
66 Id.
67 Id.
68 Id.
69 Id.
70 Id. at 5. The Supreme Court of Canada has explicitly affirmed the idea that gender can by itself be the basis for membership in a particular social group. Ward v. Attorney Gen. of Can., 2 S.C.R. 689, 739 (1993).
71 CANADA GUIDELINES, supra note 10, at 5.
the female population in the country concerned;"72 instead, what is material is evidence that this particular group of women fears suffering persecution that is distinguishable from other women or from the general population;73 (2) an identifiable sub-group of women may exist when women living in a particular area are exposed to and denied protection from physical, cultural, and domestic violence;74 and (3) refugee status is an "individual remedy."75 Thus, when a female refugee makes a claim under any of the five enumerated grounds, she must show that she has a genuine fear of harm, that her gender is the reason for the feared harm, that the harm is sufficiently serious to amount to persecution, that there is a reasonable possibility for the feared persecution to occur if she is to return to her country of origin and, that she has no reasonable expectation of adequate national protection.76

As illustrated above, the Guidelines have interpreted each of the five 1951 Convention grounds to include the persecutory experiences unique to women. At the same time, the Guidelines acknowledge the potential of "opening the floodgates" to vast amounts of women, especially in the "particular social group category."77 In recognition of this problem, the Guidelines stress that asylum is an "individual remedy"78 and require the female applicant to meet specific requirements.79

2. Under What Situations Does Sexual Violence or the Threat of Sexual Violence, or Other Discriminatory Treatment of Women Constitute Persecution?80

Women can experience persecution in ways that differ from men, such as rape, "infanticide, genital mutilation, bride burning, forced marriage, domestic violence, forced abortion, and compulsory sterilizations."81 However, the fact that particular forms of violence against women, such as spousal abuse are prevalent throughout the world is irrelevant when deciding whether a gender-related crime constitutes persecution.82 Instead, the important issues are whether the violence or cultural norm is a "serious violation of a fundamental human right"83 and whether the risk of violence stems from a failure of

72 Id. at 6.
73 Id.
74 Id.
75 Id.
76 Id. The application of these specific requirements is discussed in Part III.B.
77 See id.
78 Id.
79 See supra text accompanying note 76.
80 CANADA GUIDELINES, supra note 10, at 1.
81 Id. at 7.
82 Id.
83 Id. The social, cultural, traditional and religious norms and laws affecting women can be assessed by reference to human rights instruments which provide a framework of international standards. Id. Such international instruments include, but are not limited to: Universal Declaration of Human Rights, G.A. Res. 217A(III), U.N. Doc. A/810 (1948) [here-
The Guidelines further state that "[a] woman's claim to [1951] Convention refugee status cannot be based solely on the fact that she is subject to a national policy or law to which she objects."\textsuperscript{85} In order to establish that she is persecuted by the law or policy, the applicant must show that either "the policy or law is inherently persecutory,"\textsuperscript{86} or "the policy or law is used as a means of persecution for one of the enumerated 1951 Convention grounds,"\textsuperscript{87} or "the policy or law, although having legitimate goals, is administered through a persecutory means,"\textsuperscript{88} or "the penalty for non-compliance with the policy or law is disproportionately severe."\textsuperscript{89}

The Guidelines recognize that a particular law or policy can function in a persecutory manner\textsuperscript{90} and thus a woman can be granted asylum due to her forced exposure to the law or policy. However, just because a woman has been exposed to a law she does not like does not mean that she will automatically be granted refugee status. Rather, she must show that the law violates a fundamental human right and that the harm she has experienced resulted from a failure of state protection.\textsuperscript{91} As the cases in Part III.B will show, Canada's interpretation of "failure of state protection" holds states accountable for state inaction—their failure to protect women against either public or private violence.\textsuperscript{92} Women can therefore gain protection under the Convention from persecutory acts committed by private individuals.

### 3. Key Evidentiary Elements for Gender-Related Claims\textsuperscript{93}

To establish a gender-related fear of persecution, the evidence must show that the claimant genuinely fears persecution based on a 1951 Convention ground as distinguished from random acts of violence committed against the claimant.\textsuperscript{94} The chief factor in the assessment of this aspect of a gender-related claim is the applicant's
“particular circumstances in relation to both the general human rights record of her country of origin and the experiences of similarly situated women.”95 The Guidelines recognize the difficulty that women may face in proving their claims.96 Thus, as the IRB cases adjudicated under the Guidelines will show, decision makers have examined the human rights record of the applicant’s country of origin and the experiences of other similarly situated women in order to assess the credibility of the applicant’s story.97

The Guidelines suggest that the weight and credibility of the claimant’s evidence be evaluated in light of a number of considerations. First, “[a] gender-related claim cannot be rejected simply because the applicant comes from a country where women face generalized oppression” or persecution.98 Also, when a gender-related claim involves sexual violence perpetrated by agents of the state or citizens, the state cannot control, the claimant may have difficulty supporting her claim with statistical data measuring sexual violence in her country of origin.99 In addition, a state government can be considered to be condoning sexual violence if it has been aware that such violence existed and did nothing to stop the violence; in this case, the applicant would be considered to be without state protection.100 The Guidelines, while requiring that the claimant genuinely fear persecution, also recognize that women may face particular evidentiary problems. By recognizing and calling attention to these problems, the Guidelines minimize the possibility that these problems alone will destroy a woman’s claim.

4. Special Problems Faced by Female Applicants at Refugee Determination Hearings

Special problems may arise at determination hearings “because of cross-cultural misunderstandings.”101 One such situation that the Guidelines describe occurs when the applicant is a woman from a society where “the preservation of one’s virginity or marital dignity is the cultural norm.”102 This norm may cause her to be reluctant to discuss her experiences of sexual violence, because, to do so, would be to openly admit her “shame” and to dishonor her family.103 Furthermore, some women come from cultures where men do not disclose

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95 Id.
96 Id. The Guidelines recognize that the violence women experience may not be documented by traditional notions of reliable data. Id.
97 See infra note 171 and accompanying text.
98 CANADA GUIDELINES, supra note 10, at 8.
99 Id.
100 Id.
101 Id. at 1.
102 Id. at 9.
103 Id.
104 Id.
details of their political, military, or social activities to their female family members. Due to a lack of knowledge, these women may find themselves unable to answer questions about the associations, experiences, and actions of their male relatives. In addition, female claimants who have suffered sexual violence or domestic violence may require "extremely sensitive handling." Thus, the Guidelines suggest that, in some cases, it may be appropriate for claimants to testify either by means of affidavit, videotape, or in front of specially trained hearing officers.

By acknowledging that women often experience persecution in different ways from men and by recognizing that these forms of persecution are protected under the 1951 Convention, the Guidelines have opened up the possibility of asylum to women who fear gender-related persecution. In essence, the Guidelines have collapsed the gender-based persecution hierarchies that still persist in the United States.

B. Immigration and Refugee Board Cases Adjudicated with the Use of the Canada Guidelines

Although the Guidelines increase the types and number of claimants that can apply for refugee status by broadly interpreting the 1951 Convention refugee definition, the adjudication process controls the "bursting of the floodgates" problem by assessing the applicant's credibility, determining the possibility of state protection and/or an "internal flight alternative," and separating gender-related fears of persecution from mere dislike of a country's law or policy.

The stories of persecution described below include spousal abuse, rape, forced marriage, female genital mutilation, child custody discrimination, forced following of religious customary laws, abuse and stalking by a military soldier, and abuse and stalking by a private citizen. The claims are grounded in one or a combination of the Convention categories of membership in a particular social group, political opinion, religion, and race.

105 Id.
106 Id.
107 Id.
108 Id.
109 See discussion supra part II.
110 The unpublished IRB decisions discussed in this section were chosen by the staff of the IRB as representative of the types of gender-related cases adjudicated by the IRB, and representative of the types of claimants that are granted or denied asylum. The author had access to only those unpublished decisions that were chosen by the IRB staff. The cases were sanitized by the IRB staff for the protection and privacy of the refugees. All of the unpublished decisions discussed are on file with the author. The cases are cited in the format suggested by the Convention Refugee Determination Division (CRDD) of the IRB.
111 An "internal flight alternative" is the ability of an applicant to live safely in another part of her home country. United Nations High Commissioner for Refugees, Annotated Thesaurus Legal Issue List (unpublished manuscript, on file with the author).
1. **Membership in a Particular Social Group**

This section presents six claims of persecution based on membership in a particular social group. The first five stories are described and then analyzed together. The sixth story, because it shows the IRB's capacity to be selective in distinguishing valid spousal abuse claims from invalid claims, is presented and analyzed separately.

Applicant A was a female student at a university in Pakistan. In August 1992, the applicant was returning from a meeting of a student political group when she was attacked, beaten, and raped by a member of a rival student political group. "Because of strict social mores and laws concerning rape in Pakistan, the applicant did not report the rape nor did she admit to being raped when questioned by a doctor." The applicant also feared that if her father knew about the rape, he would have her killed "in order to protect the family honor." When she finally went with her mother to the police station to report the beating (but not the rape), the police laughed at her and disbelieved her story "because it took her two days to report the incident." As a result of the rape, the applicant became pregnant and could not receive an abortion because they are illegal in Pakistan. The applicant explained that under the law of the Koran, which prevails in Pakistan, "persons who have relations outside of marriage could face a death sentence." The applicant would have had to prove that she did not forniciate by producing "four Muslim men who would testify that they witnessed the rape and penetration," which the applicant could not do. The applicant claimed to fall under the 1951 Convention refugee definition by reason of her "membership in a particular social group—a single, raped Pakistani female with a child born out of wedlock."

Applicant B was a Honduran woman who was subject to "severe spousal abuse by her former common-law husband." The applicant reported the incidents of abuse to the police, who "summoned the husband to come and sign a document which stated that he would be fined if he struck the applicant again." The fine for violating the signed document was a two-day jail sentence, which the husband's
mother kept her son from serving by paying bail. Thus, the husband was free, and no prohibitions were placed upon him with regard to seeing or abusing the applicant. The husband continued to beat and threaten the applicant with knives and guns. In April 1990, he attempted to kill her with a broken bottle. The applicant moved in with her parents for protection, but the husband stalked her at work and attacked her with a knife, even attacking a co-worker in her presence. In 1991, the husband abducted and hid the couple’s daughter. A court ordered the return of the child, but nothing was done about the physical abuse. The applicant stopped reporting the abuse to the police because the police would not respond. The applicant finally left the country for fear of being killed by her husband. After the applicant left, her mother informed her that the husband continued to threaten the applicant and the applicant’s parents. The applicant claimed refugee status because she had a “well-founded fear of persecution for reason of membership in a particular social group”—“Honduran women subject to wife abuse.”

Applicant C was a Salvadoran woman who was attacked with a machete by a Salvadoran soldier at a soccer match. The applicant’s father tried to defend her and was also injured. Due to her injuries, the applicant was in the hospital for eight days. Upon release from the hospital, the applicant went with her doctor and her father to the police station to report the attack. The police told the applicant that they could do nothing about the attack because the assailant was a soldier. Later that year, the same assailant soldier came to the applicant’s home and tried to abduct her. Fortunately, her aunt heard her screaming and called her uncles who overpowered the assailant. The applicant’s parents went to talk to the soldier and his parents, but the applicant’s parents were told by the soldier that he would never leave their daughter alone. The applicant and her parents decided

\[\text{\textsuperscript{129} Id. }\]
\[\text{\textsuperscript{124} Id. }\]
\[\text{\textsuperscript{125} Id. }\]
\[\text{\textsuperscript{126} Id. }\]
\[\text{\textsuperscript{127} Id. }\]
\[\text{\textsuperscript{128} Id. at 3. }\]
\[\text{\textsuperscript{129} Id. Apparently, their two children are with the claimant’s parents. Id. }\]
\[\text{\textsuperscript{130} Id. }\]
\[\text{\textsuperscript{131} Id. }\]
\[\text{\textsuperscript{132} Id. }\]
\[\text{\textsuperscript{133} Id. }\]
\[\text{\textsuperscript{134} CRDD T93-08795, Hope, Winkler, at 2 (Mar. 8, 1994). }\]
\[\text{\textsuperscript{135} Id. }\]
\[\text{\textsuperscript{136} Id. }\]
\[\text{\textsuperscript{137} Id. }\]
\[\text{\textsuperscript{138} Id. }\]
\[\text{\textsuperscript{139} Id. }\]
\[\text{\textsuperscript{140} Id. }\]
that it was best for her to leave El Salvador for her protection.\textsuperscript{141} After leaving the country, the applicant's father told her that the soldier had said he would stay in the army until the applicant returned, and when she did return he would kill her.\textsuperscript{142} The soldier reported to the father that his position in the army prevented anyone from doing anything against him.\textsuperscript{143} The applicant based her persecution claim on her membership in a particular social group—young rural women trapped in an environment that denies them protection.\textsuperscript{144}

Applicant D and her daughter were Somali citizens.\textsuperscript{145} At the age of sixteen, the applicant entered into an arranged marriage with a man twenty years her elder.\textsuperscript{146} The applicant testified that during their eleven-year marriage her husband "drank excessively and repeatedly beat her and their daughter."\textsuperscript{147} The applicant stated that she remained with her husband out of fear that he would take the children if she left him.\textsuperscript{148} As punishment for disagreeing with him, the applicant's husband hid their first born son, now twelve, and refused to allow him to have any contact with her.\textsuperscript{149} The applicant's husband later divorced her, and, as a male, was automatically entitled to custody of the children under Somali law.\textsuperscript{150} The applicant left Somalia with her other two children. She stated that her former husband had ties to the Issaq Somali National Movement and therefore, if she was returned to Somalia, it would be impossible for her to escape control of her husband and his family.\textsuperscript{151} The applicant related that she would be destroyed if she could not see her children, and she emphasized that if she were to lose custody of her daughter, she would be powerless to prevent her daughter from being genitally mutilated, a widely practiced custom in Somalia.\textsuperscript{152} The applicant was herself genitally mutilated when she was eight and did not want her daughter to suffer in the same way.\textsuperscript{153} The applicant and her daughter thus claimed to be Convention refugees on the basis of their fear of persecution on the grounds of membership in a particular group—women.\textsuperscript{154}

Applicant E was an Iranian woman who claimed that Islamic law fundamentally required her to change her lifestyle because she was de-

\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id.
\textsuperscript{144} Id. at 1.
\textsuperscript{145} CRDD T93-12198, T93-12199, T93-12197, Ramirez, McCaffrey, at 1 (May 10, 1994).
\textsuperscript{146} Id. at 2.
\textsuperscript{147} Id.
\textsuperscript{148} Id. The applicant testified that her husband had taken their first-born child out of the home when he was only one year old as an act of retribution against the applicant after she had asked for a divorce. Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 3.
\textsuperscript{151} Id.
\textsuperscript{152} Id. For a discussion of FGM, see supra note 5.
\textsuperscript{153} Id.
\textsuperscript{154} Id. at 1.
nied higher education for her failure to wear a veil. The applicant stated that, despite her love for education, she refused to wear the veil because she was ideologically opposed to the laws of Islam as they pertain to women. The applicant also testified that she had discovered that an outstanding warrant for her arrest existed dating from the time when she had donated money to her son and his friends who were protesting against the Islamic regime under the Ayatollah Khomeini. The applicant fled Iran and stated that she feared returning to Iran "because [she is] a woman and [is] known as someone who is opposed to the Islamic republic and Islamic law." The applicant therefore "claimed a well-founded fear of persecution based on her political opinion and her membership in a particular social group"—women.

Applicants A, B, C, D, and E all claimed to have a well-founded fear of persecution by reason of membership in a particular social group. Applicant E also claimed a well-founded fear of persecution on the basis of her political opinion. The IRB granted asylum to applicants A, B, C, and D but denied asylum to applicant E. The four applicants granted asylum shared four general factors.

The first factor common to these applicants was their ability to distinguish themselves as members of a particular social group. The Supreme Court of Canada and the Canada Guidelines have recognized that a woman can be a member of a particular social group just on the basis of her gender. In applicant A's case, the IRB found that the Pakistani criminal justice system had created "an extremely

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156 Id.
157 Id. at 3.
158 Id.
159 Id. at 1.
160 See supra notes 155-59 and accompanying text.
161 CRDD U93-06372, Fraser, Silcoff, at 7 (Oct. 1, 1993).
162 CRDD C93-00288, Wieler, Pawa, at 7 (Sept. 1, 1993).
163 CRDD T93-08795, Hope, Winkler, at 11 (Mar. 8, 1994).
164 CRDD T93-12198, T93-12199, T93-12197, Ramirez, McCaffrey, at 7 (found for mother), 11 (found for daughter) (May 10, 1994).
166 See Ward v. Attorney Gen. of Can., 2 S.C.R 689, 739 (1993). The Court identified three categories of particular social group:
(1) groups defined by an innate or unchangeable characteristic (for example, individuals fearing persecution on the basis of gender, linguistic background and sexual orientation);
(2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association (for example, human rights activists); and
(3) groups associated by a former voluntary status, unalterable due to its historical permanence. An example of such a group might be persons who were capitalists and independent businessmen in pre-communist Eastern Europe. Chan v. Minister of Employment and Immigr., 20 Immigr. L.R.2d 181, 190 (F.C.A. 1993) (citing to Ward, 2 S.C.R. 689).
167 CANADA GUIDELINES, supra note 10, at 5.
adverse and precarious situation for women, and in particular for women victims of rape."\textsuperscript{168} The applicant was pregnant as the result of her rape, and because she did not have four Muslim witnesses to testify to her rape and penetration, she would be punished under the law, whether she complained about the rape or not.\textsuperscript{169} Citing the Canada Guidelines as authority, the IRB panel thus found that the applicant was a member of a particular social group on the basis of her gender.\textsuperscript{170}

The IRB panel determined that applicant B was a member of a particular social group by finding that "women who are subject to domestic violence and abuse share a similar background and should be categorized as a particular social group."\textsuperscript{171} In applicant C's case, the IRB panel identified her gender-defined group as "young rural women exposed to an environment that denies them protection."\textsuperscript{172}

Applicant D was a member of a particular social group of divorced mothers who, under the jurisdiction of Sharia law, do not have their rights as parents upheld as required under international human rights instruments.\textsuperscript{173} Applicant D's daughter was also found to be a member of a particular social group on the basis of gender, because under international human rights instruments her rights to personal security would be violated if forced to undergo female genital mutilation.\textsuperscript{174}

Unlike the previous claimants, applicant E, who was denied asylum, could not show that she was a member of a particular social group based on gender because the IRB panel found there to be "encouraging signs of change in the role of women in Iranian society."\textsuperscript{175} Thus applicant E should no longer have experienced discrimination on the basis of her gender on her return to Iran.

In all of these cases, the IRB recognized that gender is "an innate or unchangeable characteristic"\textsuperscript{176} and thus, when persecution occurs because of gender, gender can be the defining characteristic of a particular social group.

The second factor shared by the applicants who were granted asylum was proof that the state was unable or unwilling to protect them

\textsuperscript{168} CRDD U93-06372, Fraser, Silcoff, at 6-7 (Oct. 1, 1993).
\textsuperscript{169} Id. at 7.
\textsuperscript{170} Id.
\textsuperscript{171} CRDD C93-00288, Wieler, Pawa, at 4 (Sept. 1, 1993) (citing CRDD U92-008714, Maraj, Shecter, at 7 (June 4, 1992)).
\textsuperscript{172} CRDD T93-08795, Hope, Winkler, at 10 (Mar. 8, 1994).
\textsuperscript{173} CRDD T93-12198, T93-12199, T93-12197, Ramirez, McCaffrey, at 5 (May 10, 1994). The panel referred to the UDHR, \textit{supra} note 83, at art. 3, 7, and CEDAW, \textit{supra} note 83, at art. 15.
\textsuperscript{175} CRDD T93-00768, Vickers, Morrison, at 7 (May 20, 1993).
\textsuperscript{176} See, e.g., CRDD T93-12198, T93-12199, T93-12197, Ramirez, McCaffrey, at 11 (May 10, 1994).
from persecution. The Canada Guidelines state that in order for a claimant to be considered a 1951 Convention refugee, the violence experienced by the woman must "result from a failure of state protection." The women claimants therefore needed to show that they tried to seek state protection and that none existed. It is clear that applicant A had no state protection insofar as the police laughed at her when she reported part of her attack, and she faced persecution from the religious state that might have sentenced her to death for being a single female with a child born out of wedlock. Applicant B also established that the police provided no protection from her abusive husband, and that there was nowhere in the country that she could escape the abuse of her husband. In other words, she had no "internal flight alternative." Applicant C showed that there was no protection from a Salvadoran military soldier—an agent of the state. Applicant D was in a position arguably different from other women in her country. Specifically, because applicant D's husband was so well-connected to high government officials, the state would not stop the abduction of her children, the threats against the applicant, or the forced female genital mutilation of her daughter.

A third factor that the applicants granted asylum shared was that the violence or discrimination they suffered rose to the level of persecution. The Canada Guidelines call for the use of numerous human rights instruments to determine whether a particular action rises to the level of persecution. However, when an applicant is basing her claim on a law or policy, the Canada Guidelines state that the claim for 1951 Convention status cannot be based solely on the fact she is subject to a national policy or law to which she objects. The Canada Guidelines list four types of persecutory laws as opposed to merely discriminatory laws. For applicant A, the law that a woman must produce four male Muslim witnesses to prove that she was raped was found to be inherently persecutory. Furthermore, the fact that women who have sexual relations outside of marriage can be subject to death seemed a disproportionately severe penalty. Applicants B and C did not base their claims for persecution on a particular law or policy. The IRB panel defined the persecution suffered by applicant B

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177 CANADA GUIDELINES, supra note 10, at 7.
180 CRDD T93-08795, Hope, Winkler, at 2-3 (Mar. 8, 1994).
182 Id. at 8.
183 Id. at 10. For a list of the requirements, see supra text accompanying notes 94-97.
184 CANADA GUIDELINES, supra note 10, at 8. See CRDD U93-06372, Fraser, Silcoff, at 6-7 (Oct. 1, 1993).
185 Id. at 6.
186 Id. at 8.
187 See supra notes 121-44 and accompanying text.
through the use of international instruments.\textsuperscript{188} Insofar as there is no
direct discussion of the type of persecution that applicant C suffered,
the IRB panel seemed to consider that the applicant's exposure to the
stalker soldier was inherently persecutory.\textsuperscript{189} For applicant D, the law
which stated that women automatically lose custody of their children
upon divorce seemed inherently persecutory.\textsuperscript{190} The panel also used
international instruments to show that the state persecuted applicant
d by compromising certain basic human rights identified by these in-
stitutions.\textsuperscript{191} The IRB panel found that applicant E, who was denied
the opportunity to complete her higher education, was merely discrimi-
nated against as opposed to being persecuted.\textsuperscript{192} Specifically, the IRB
panel stated that differences in the way groups are treated do not rise
to a level of persecution unless they constitute a "serious restriction[ ]
on [the] right to earn a livelihood, [the] right to practice religion, or
[are a bar to the] access of normally available educational facilities."\textsuperscript{193}
This language underscores the principle that discriminatory treatment
rises to a level of persecution when a fundamental human right con-
tained in an international instrument is violated.\textsuperscript{194}

The fourth factor that the successful asylum applicants shared can
be characterized as general credibility. This notion of credibility takes
different forms depending on the particular situation of the applicant.
For some applicants, credibility may not become an issue at all. For
example, the IRB panel did not raise the issue of credibility with appli-
cants A and B.\textsuperscript{195} The credibility of applicant C was questioned due to
some conflicting evidence presented by the refugee hearing officer,
but the IRB found applicant C's story to be credible in light of what is
generally known about the conditions in El Salvador.\textsuperscript{196} The credibil-
ity of applicant D's testimony was also generally accepted by the IRB
panel insofar as credibility was not raised as an issue by the IRB
Panel.\textsuperscript{197} Applicant E, who was denied refugee status, was not found to

\textsuperscript{188} For applicant B, the panel referred to the UDHR, \textit{supra} note 83, and the UNHCR
Guidelines on the Protection of Refugee Women. \textit{Office of the United Nations High Com-

\textsuperscript{189} CRDD T93-08795, Hope, Winkler, at 5-11 (Mar. 8, 1994).

\textsuperscript{190} CRDD T93-12198, Ramirez, McCaffrey, at 5 (May 10, 1994).

\textsuperscript{191} Id. Specifically, the Panel refers to the UDHR, \textit{supra} note 83, and the CEDAW, \textit{supra}
note 83.

\textsuperscript{192} CRDD T93-00768, Vickers, Morrison, at 7 (May 20, 1993). The applicant's dislike of
having to wear a veil was also determined to be choice in dress style rather than a political
opinion. \textit{Id.} at 8.

\textsuperscript{193} Id. at 7-8 (citing \textit{United Nations High Commissioner for Refugees, Handbook on
Procedures and Criteria for Determining Refugee Status Under the 1951 Convention
UNHCR Handbook]}).

\textsuperscript{194} See \textit{Canada Guidelines, supra} note 10, at 7.

\textsuperscript{195} See CRDD U93-00372, Fraser, Silcoff (Oct. 1, 1993); CRDD C93-00288, Wieler, Pawa
(Sept. 15, 1993).

\textsuperscript{196} CRDD T93-08795, Hope, Winkler, at 4-5 (Mar. 8, 1994).

\textsuperscript{197} See CRDD T93-12198, Ramirez, McCaffrey (May 10, 1994).
be credible by the IRB panel because she was vague and evasive in responding to questions by the panel. In particular, the IRB further questioned why applicant E did not make a refugee claim when she visited two of her sons that lived in Germany and England. The IRB panel stated that the fact that the applicant did not make claims in either of these countries, while knowing that there was a possibility that she could be sent back to Iran, "belie[d] the well-foundedness of her claim." As the court indicated, a lack of credibility undermines a claim for asylum by calling into question the substantive elements of a claim such as, in applicant E's case, the well-founded fear element.

Opponents of a "broadened" interpretation of the refugee definition may especially worry that the acceptance of spousal abuse claims under the membership in a particular social group category could potentially subject the United States to an onslaught of legitimate asylum claims. The IRB Panel has demonstrated that it is possible to be selective in the decision making process by requiring that the applicant first seek out all forms of state protection. The next case illustrates this selectivity.

Applicant F and her children were Israeli citizens. According to the applicant's narrative, her husband was a drug addict who had abused her and harassed her for money to support his drug habit. As a result of the husband's harassment of the applicant at her workplace, she was fired because her boss feared for the safety of the other employees. The applicant stated that for years she wanted to leave her marriage, but was afraid of what her husband might do. However, as the husband's violence toward the applicant escalated, she sought an end to the marriage and police protection for herself and her children. The applicant stated that she could find no protection and was "essentially trapped in an abusive marriage." The applicant tried to obtain a divorce, but found that she would have to get the consent of her husband, who could legally withhold his consent for

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198 CRDD T93-00768, Vickers, Morrison, at 4-12 (May 20, 1993). For example, when asked about the nature of the political activities that her son engaged in and that she allegedly supported, the applicant had no knowledge about the particular political views held by her son's group other than the fact that they were freedom lovers. Id. at 5; see supra note 157. The IRB panel found this answer not to be credible in light of the prolonged association that the applicant had with these individuals. CRDD T93-00768, Vickers, Morrison, at 5 (May 20, 1993).

199 Id.

200 Id.

201 See id.


203 Id. at 2.

204 Id.

205 Id.

206 Id. at 2-3.

207 Id. at 2.
up to fifteen years. The applicant fled Israel with her children in order to escape her abusive marriage. The applicant and her children claimed a well-founded fear of persecution by reason of membership in a particular social group—a family subject to abuse.

In determining whether applicant F had a well-founded fear of persecution by reason of membership in a particular social group, the IRB panel accepted the assertion that the applicant and her children suffered persecution based on membership in their family group. The panel then focused its analysis on "whether there was adequate state protection for this particular family suffering from domestic violence." After hearing evidence on the remedies available to protect battered women, the court found that if the applicant and her children returned to Israel at the present time, the applicant would have "adequate recourse to bring her abusive husband to justice." Although sympathizing with the applicant, it was clear to the panel that the applicant and her children did not meet the 1951 Convention refugee definition because there was adequate state protection available to them. This denial exemplifies the fact that all women who suffer spousal abuse, or other types of violence based on gender, are not necessarily refugees. By requiring applicants to show that they sought and were denied state protection, the IRB avoids having to accept vast numbers of women solely on the basis that they have experienced gender-related violence.

2. Religion

The Canada Guidelines also recognize that a woman may experience gender-related persecution based on her choice not to hold a particular religious belief system. For example, applicant G was an Algerian woman who earned her international Baccalaureate degree in England. When the applicant completed her studies and returned to Algeria, her father decided that she was too "westernized" and imposed a Muslim way of life upon her. She was unable to leave the house alone, her phone calls were censored, and her books were taken away from her. When the applicant turned twenty-five, her father decided that it was time for her to marry and chose a sixty-two-year-old man.
year-old wealthy friend who was also a devout Muslim. According to Islamic tradition, the applicant could not refuse the marriage; in fact, her presence was not even required at the wedding ceremony. She left Algeria to avoid being subjected to the marriage. She feared that if she returned to Algeria, her father would kill her for not following an Islamic way of life, and she testified that since her family is well-known in Algeria, she could not have obtained police protection anywhere in the country. The applicant claimed to have a "well-founded fear of persecution by reason of her religion."

 Applicant G was granted asylum. Citing the Canada Guidelines, the IRB panel explained that the notion of religion includes a freedom "not to hold a particular belief system." By censoring her phone calls and books and forcing her into a traditional Islamic marriage, the applicant's father had forced her into an Islamic lifestyle. Referring to the Universal Declaration of Human Rights in order to show persecution, the IRB panel recognized the father's physical and emotional force to be "a violation of the claimant's security of the person... [which] amounted to cruel, inhuman and degrading treatment." The IRB panel found the applicant's testimony to be generally credible and free of exaggeration. Unlike applicant F, who had access to state remedies against spousal abuse, applicant G could not have obtained police protection since her family was well known in Algeria. This case illustrates some of the factors that are required to establish a gender-based religious persecution claim: a choice not to practice a prescribed religion, harm that rises to the level of persecution, a credible claimant, and a lack of state protection from further violence.

3. Political Opinion

The Canada Guidelines also recognize that a woman can experience gender-related persecution on account of her political opinion. Applicant H was an Iranian woman who opposed wearing the traditional Islamic chador. The applicant stated that she was threatened
with expulsion from school and brought before the authorities twice for disobeying the clothing code. 239 Three years later, the applicant and a friend were seized in a shop by the authorities, accused of anti-Islamic conduct for not wearing the traditional chador, and sentenced to a choice of either ten strokes with a whip or a payment of a fine. 233 Each of the women’s families paid the fine. 234 The applicant was later distributing some political pamphlets with her friend when she was spotted by a neighbor who verbally abused her. 235 Her girlfriend’s father arranged for them to leave Iran. 236 The applicant claimed a well-founded fear of persecution by reason of her political opinion. 237

This case was an appeal from the IRB panel that denied the applicant asylum. The IRB denied the applicant’s claim because it found the law imposing a clothing standard to be generally applicable legislation and therefore not persecutory in nature. 238 Disagreeing with the IRB, the federal court reasoned that “even where there is a law of general application, that law may be applied in such a way as to be persecutory.” 239 The court held that a penalty of seventy-five strokes without any procedural guarantees was a disproportionate penalty, and therefore a persecutory law. 240 Furthermore, the court stated that the applicant had a well-founded fear of persecution by reason of her political opinion because “in a country where the oppression of women is institutionalized any independent point of view or act opposed to the imposition of a clothing code will be seen as a manifestation of opposition to the established theocratic regime.” 241 The court accordingly remanded applicant H’s claim back to the IRB for further consideration under the standards identified by the court. 242 Under the Guidelines, a generally applicable law can be found persecutory when

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1-2 (Fed. Ct. of Can., Trial Div. Nov. 5, 1993). The information about this case comes from an Order of the Trial Division granting judicial review.

232 Id. at 2.
233 Id.
234 Id.
235 Id.
236 Id.
237 Id. at 1.
238 Id. at 2.
239 Id. at 4 (quoting Cheung v. Minister of Employment and Immigr. of Can., No. A-785-91 (F.C.A., Apr. 1, 1993) (not reported) (citing Padilla v. Minister of Employment and Immigr. of Can., 13 Immigr. L.R.2d 1 (F.C.A. 1991))). In Canada, denials by the IRB can be appealed to the Federal Trial Court Division and then to the Federal Court of Appeal and the Supreme Court of Canada. Unlike the U.S. courts, the Canadian Federal Trial Courts do not have jurisdiction over the merits of claims from the IRB so that once they rule on questions of law, the case is remanded back to the IRB for a final decision on the merits. Walter C. Long, Escape From Wonderland: Implementing Canada’s Rational Procedures to Evaluate Women’s Gender-Related Asylum Claims, 4 UCLA WOMEN’S L.J. 179, 219 n.162 (1994) (referring to an interview with Rod Catford, Canadian Immigration Attorney (Mar. 10, 1994)).

241 Id. at 5-6.
242 Id. at 6.
the penalty is excessive and when opposition to such a law can be found to be political in nature.

4. Race and Membership in a Particular Social Group

The Canada Guidelines also recognize that a women can experience gender-related persecution because of her race. As in applicant I's case below, more than one category of persecution may be asserted. Applicant I was an Asian woman living in Tanzania.243 The applicant was physically and sexually abused at her workplace by two men who claimed that they worked for the Department of Home Affairs.244 The applicant reported the incident to her father, who told the applicant to remain quiet because of Muslim customs.245 The two men continued to harass the applicant, but she did not report the abuse because she was "convinced that the Tanzanian government turns a blind eye to the physical abuse of women."246 The applicant's family arranged a marriage for her, which was Muslim custom, but her fiance called off the marriage when he learned of her attack.247 The applicant assumed that the assailants notified her fiance's family about the incident at her workplace.248 After her fiance canceled the marriage, the applicant took a holiday in Spain, France, the United Kingdom, and Canada for about two months.249 The applicant did not seek refugee status in any of these countries during her visits.250 When the applicant returned home, she was harassed by a local party leader and instructed to stand on night guard duty in her residential area.251 The applicant felt uneasy about being the only Asian woman among five African men on this guard duty and believed that she was being singled out by the local party leader, especially because the local leader was acquainted with one of her assailants.252 The applicant's father tried again to arrange a marriage for her but failed again because, according to the applicant, the intended's family found out about the sexual abuse.253 The harassment from the two men continued, and consequently the applicant felt that she had no choice but to join her sister in Canada.254 After arriving in Canada, the applicant spoke with her father, who reported that one of the male abusers had come to inquire about her wherea-

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243 CRDD T93-05072, Howson, Cheeseman, at 1, 4 (Oct. 18, 1993).
244 Id. at 2.
245 Id. See supra text accompanying notes 118-19 for a discussion of problems women face in Muslim cultures regarding sexual abuse.
246 Id. at 3.
247 Id.
248 Id.
249 Id.
250 Id.
251 Id.
252 Id.
253 Id. at 4.
254 Id.
bouts. The applicant claimed a well-founded fear of persecution for three reasons: on the basis of her race, Asian; on the basis of her religion, Muslim; and on the basis of her gender, female (because she was molested by two males).

Applicant I's main contention was that she could not turn to the police for protection because of her racial background and situation: being an Asian in an African culture. She believed that if the problems she had with her two assailants had happened to a black woman, the police would have taken the black woman's case far more seriously. The applicant also believed that she suffered further disadvantage because she was a woman. Although sympathizing with the applicant's plight, the IRB panel found no evidence that the government of Tanzania practiced a policy of discrimination against the Asian minority. Police protection was available to Asians, and they had as much access to such protection as any other citizen. After examining evidence about the status of women in Tanzania, the IRB panel further found it unlikely that the applicant would face persecution on account of her gender because progress in women's rights was noticeable in urban areas such as where the applicant lived. The applicant's claim was denied because she did not establish that her persecution was the result of either her racial background or her gender. This case clearly illustrates that a woman who suffers persecution does not automatically receive refugee status. She must show that the reason for the persecution is based on a 1951 Convention ground, and she must show her country of origin is unwilling or unable to protect her from the persecution.

C. Summary of the Canada Cases Adjudicated Under the Canada Guidelines

These cases illustrate how the Canada Guidelines have interpreted the 1951 Convention definition of refugee to include gender-related issues. These cases also demonstrate that the Canada Guidelines can control the floodgate problem through procedural and substantive requirements, and thus, prevent holdings that would allow large populations of women suffering a particular abuse to seek asylum. A woman who has suffered spousal abuse must show that no state protection ex-

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255 Id.
256 Id.
257 Id. at 6.
258 Id.
259 Id.
260 Id. at 7-8.
261 Id. at 8.
262 Id. at 7.
263 Id. at 7-9.
264 Id. at 10.
A woman who was forced into marriage by her father must show that the political power of her father made it impossible for her to receive police protection. A woman who fears persecution because of her identification with a political group must prove her credibility by showing that she knew of the particular beliefs of this political group, and she must explain why she did not seek refugee status in any of the safe countries that she visited before Canada. These examples, along with others, show that women who suffer gender-related persecution are not automatically granted asylum. They can be (and are) denied asylum if they do not meet the procedural and substantive requirements set out in the Guidelines.

IV. Conclusion

Canada is the first nation to interpret the 1951 Convention definition of refugee to include gender-related persecution claims. By including gender-related persecution in the refugee definition, the Canada Guidelines have broken down discriminatory hierarchies of persecution that, on the one hand, could find abuse by a guerrilla faction to be persecution, but, on the other, would find abuse by one's spouse not to be persecution. In order to control the potential flood of women applicants following this "broadened" definition, the Canada Guidelines have imposed procedural and substantive elements that prevent judicial holdings that would grant asylum to vast populations of women suffering similar abuses.

United States asylum policy, however, still remains restrictive in the area of gender-related persecution because of the potential "opening the floodgates" problem. The Canadian system for recognizing gender-related claims, which appears to control the floodgate problem, should therefore encourage the United States to follow suit. A framework for incorporating gender-based claims into U.S. asylum law has been developed by the Women Refugees Project. These Proposed Guidelines for Women's Asylum Claims follow the Canada Guidelines in recognizing the different forms of persecution experienced by women, and they impose some of the same substantive and procedural elements that can control the floodgate problem. If they, or similar guidelines, are adopted by the United States, women refugees like Fatimah will finally gain equal access to eligibility for asylum in the United States.

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See supra notes 177-81 and accompanying text.
See supra notes 229-30 and accompanying text.
See supra notes 198-201 and accompanying text.
See supra notes 40-44 and accompanying text.
Id. at 815-23.