

COMMENTARY

# Migration scenarios for gender apartheid and asylum: when International Criminal Law and International Refugee Law Meet

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## Abstract

A multi-year process of debate around draft articles for a Crimes Against Humanity Treaty is underway and calls to categorize gender-based persecution as a stand-alone crime and to codify gender apartheid form fundamental aspects of discussion. These developments in international criminal law are significant to anticipate forced migration as recent changes in asylum regulations across the EU suggest. 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. This falls in line with the EU Agency for Asylum establishing that the accumulation of repressive measures against women and girls in the country, which have been described as gender apartheid, amounts to persecution. In efforts to offer new perspectives on foresight in forced migration, I use case study method and legal-institutional analysis to delineate migration scenarios for gender apartheid and asylum. On the example of Afghanistan, I compare Sweden, Finland, and Denmark as case studies in which asylum is granted to women and girls on general risks of gender-based persecution in contrast to Germany and France as case studies for main destination countries of Afghan asylum-seekers absent of such policies. I explore factors towards policy in/action and provide outlooks for further lines of inquiry regarding anticipatory methods in forced migration.

## Policy Significance Statement

This commentary carries policy significance as it analyzes recent developments in international criminal law alongside developments in international refugee law to conceptualize migration scenarios for gender apartheid and asylum with a focus on establishing general risks of gender-based persecution. The potential for an integrated system of protection on gender-related claims between these two areas of law reveals important insights when it comes to foresight that inform policy. By placing international criminal law and international refugee law into conversation, this commentary offers new perspectives on how policy changes may inform migration patterns and how qualitative data can contribute to big data questions.

## 1. Introduction

A multi-year process of debate around draft articles for a Crimes Against Humanity (CAH) Treaty is underway and calls to categorize gender-based persecution as a stand-alone crime and to codify gender apartheid, articulated as the systematic and institutionalized exclusion of persons from (all) areas of life based on their gender, form fundamental aspects of discussion (Global Justice Center, 2023; International

Service for Human Rights 2023). These calls have centered on women and girls in Afghanistan with the UN Special Rapporteur (UNSR) describing the repression of women's rights in the country as amounting to "gender persecution - a crime against humanity" that can be "characterized as gender apartheid" (UN OHCHR 2023). These developments in international criminal law are significant to anticipate policy-making in forced migration given the historical link between the two areas of law: the drafters of the Rome Statute looked to international refugee law when conceptualizing gender-based persecution (Oosterveld, 2006, 2014). This 'look' may well be inverse at this moment as developments in asylum regulations in the EU suggest.

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. This falls in line with the EU Agency for Asylum (EUAA) finding that the accumulation of repressive measures against women and girls in the country amounts to persecution on the protected grounds of religion, political opinion, and membership of a particular social group (PSG) (EUAA 2023, 86). Country-wide risk assessments and considerations regarding cumulative forms of persecution also premise a decision by the Court of Justice of the EU (CJEU) on two cases of women seeking protection from the Taliban regime and a statement by the UN Refugee Agency (UNHCR) on the situation of women and girls in Afghanistan (CJEU 2023a,b; UNCHR, 2023).

In efforts to offer new perspectives on foresight in forced migration, I use case study method and legal-institutional analysis to delineate migration scenarios for gender apartheid and asylum with a focus on establishing general risks of gender-based persecution. On the example of Afghanistan, I compare Sweden, Finland, and Denmark as case studies in which general risks of gender-based persecution have been established in contrast to Germany and France as case studies for main destination countries of Afghan asylum-seekers absent of these policies. I explore factors of this policy in/action and outline possible migration scenarios and corresponding asylum regulations in foresight of developments in international criminal law and international refugee law. Based on this analysis, I offer outlooks for further lines of inquiry regarding anticipatory approaches towards forced migration as it pertains to gender apartheid and asylum.

### ***1.1. Why the CAH treaty matters to migration: linking international criminal law and international refugee law***

International criminal law and international refugee law have been closely linked around the notion of persecution: persecution constitutes a crime against humanity as per the Rome Statute and forms the basis for grounds of protection as per the Refugee Convention (Li, 2020). With specific regard to gender-based persecution, Oosterveld (2006) points out that "international refugee law has acknowledged gender-related forms of persecution since 1985," which subsequently "influenced the drafters of the Rome Statute to include gender within the list of persecutory grounds in the crimes against humanity provision" (51). I propose that now this can function in reverse with discussions in international criminal law taking place regarding the categorization of gender-based persecution as a stand-alone crime and the codification of gender apartheid; these aspects may well inform the conceptualization around general risks of gender-based persecution in international refugee law.

Of chief concern in terms of the extent to which international criminal law should and can inform international refugee law is the process of refugee status determination. Here, varied perspectives exist within scholarship on matters of individual and country-wide risk assessments for protection. For instance, Smith (2008) suggests that international criminal law can provide insights into the level of persecution in respective countries and thus the "functionality of national legal systems," which is essential for country-wide risk assessments in international refugee law (167). Two specific cases of the International Criminal Court (ICC) have been discussed in this context, namely the Tadić decision (1997), which involved an examination of criminal responsibility as part of a group, and the Kupreškić decision (2000), which invoked discussions around the definitional applicability of persecution in international refugee law (Hathaway and Foster, 2014; Sassoli and Olson, 2000). While in each case, it

was asserted that the areas of law are distinct from one another and that cross-reference should be pursued with caution, the fact that the situation of women and girls in Afghanistan has been described as gender apartheid implores a country-wide risk assessment that is relevant for international criminal law and international refugee law alike (International Service for Human Rights 2023).

Indeed, the significance of country-wide risk assessments in regard to establishing general risks of gender-based persecution in international refugee law cannot be overstated and is evidenced in the recent developments in asylum regulations across the EU. For example, in January 2023, the EUAA's 'Country Guidance: Afghanistan' determined that for women and girls in the country, a "well-founded fear of persecution would in general be substantiated" (86–91). This country-wide risk assessment was made given the Taliban's measures on women's freedom of movement and expression as well as access to education, employment, healthcare, and social protections (Ibid., 86). While the EUAA's guidance does not legally oblige EU member states to implement corresponding regulations, member states must take this guidance into consideration when evaluating asylum claims (Ibid., 6).

The EUAA's Guidance emerged shortly after Austria's Supreme Administrative Court referred a request for a preliminary ruling to the CJEU on two cases of women seeking protection from the Taliban regime (Press Release No 172/23). In question is whether the situation in Afghanistan amounts to persecution due to the accumulation of said repressive measures and whether it is sufficient that a woman is affected by such measures merely on the basis of their gender (UNHCR, 2023). The ruling addresses the interpretation of the EU Qualification Directive which holds that acts of persecution "can, inter alia, take the form of... acts of a gender-specific nature" (EU 2011, art 9, para 2(f)). To this end, the Court of Justice's Advocate General issued an opinion 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, b, Press Release No 172/23). In the opinion, the Advocate General affirmed that:

There is nothing to prevent a Member State from recognizing, 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 (Ibid.).

Relatedly, the UNHCR (2023) published a 'Statement on the concept of persecution on cumulative grounds in light of the current situation for women and girls in Afghanistan' which clarifies that "forms of harm may cumulatively constitute persecution" (2). These emerging trajectories in international refugee law render the respective discussions on the CAH treaty of utmost relevance for anticipating policy-making in the forced migration.

### ***1.2. What has happened so far: EU member states and general risks of gender-based persecution***

In December 2022, Sweden became the first EU member state to recognize that "the degradation of Afghan women's and girls' rights qualifies as persecution on the basis of gender" in alignment with the country's expanded refugee definition that includes gender as a sixth protected ground (EP Think Tank, 2023; Swedish Aliens Act, 2005, 716 chap 4, sec 1). In Finland, the Aliens Act holds provisions as part of the PSG category that takes gender dynamics into account within which asylum has been granted to women and girls from Afghanistan (EP Think Tank, 2023). Denmark followed suit shortly after in direct connection to the EUAA's Guidance. Unlike Sweden and Finland, however, Denmark does not hold any specific gender components in its asylum law (whether as sixth protected ground or as part of the PSG category) and has not "previously recognized women and girls from an entire country as refugees based on their gender" (Ibid.). The move then, to grant asylum to women and girls from Afghanistan under the PSG category on general risks of gender-based persecution, is particularly notable, especially since other member states have not done so yet.

Germany and France, for example, have gender-inclusive provisions as part of the PSG category in their asylum laws, but neither has established general risks of gender-based persecution as per the EUAA's Guidance (Asylum Act, 2016, art 2; Tahirih Justice Center, 2021). Although policy-makers in Germany

and France have expressed concern about the situation of women and girls in Afghanistan, the prevailing policy inaction on this rhetoric must be reconciled against the fact that the countries constitute the main destinations for Afghan asylum-seekers in the EU (Infomigrants, 2023; RFI, 2023).

The case studies of Sweden, Finland, Denmark, Germany, and France demonstrate the fragmented approach towards common asylum regulations that is notorious across the EU. This fragmentation regarding gender apartheid in Afghanistan vis-à-vis asylum indicates that there are currently no conclusive determining factors towards policy in/action on the matter. I argue that it is exactly this variation in policy responses that demonstrates the importance of a CAH Treaty containing gender-based persecution as a crime against humanity and the codification of gender apartheid on migration patterns by way of linkages between international criminal law and international refugee law.

### ***1.3. What might happen in the future - Part 1: Anticipatory methods for gender apartheid and asylum***

To explore the potential implications of developments in international criminal law and international refugee law on future migration patterns, scenarios provide a suitable approach in anticipatory methods. Scenarios describe “qualitative narratives about the future of migration that emphasize possible structural changes and their consequences for migration” (Sohst et al. 2020, 101). The objective of scenarios is to “create alternate visions of the future” that are reflective of factors that inform migration (Ibid.; Vezzoli et al. 2017). As such, scenarios answer the question ‘What if’ and hold limited predictive power and instead focus on long-term strategic planning with uncertainties (Wilkinson 2017).

In the literature, different types of scenarios have been explored. For instance, Sohst et al. (2020) separate migration scenarios by general purpose, geographic focus, and thematic focus (107). Pertaining to gender apartheid and asylum in relation to Afghanistan, migration scenarios of geographic focus (EU) and thematic focus (gender) are relevant. Sohst et al. further delineate that across the varied types of scenarios, migration drivers are analyzed on macro, meso, and microlevels. Of these levels, an emphasis is placed on macrolevel developments, such as the Taliban takeover, forming the primary context based on which meso (apartheid) and micro (gender) level migration drivers can then be determined (Ibid., 112).

Relatedly, Boissonneault et al. (2020) understand migration scenarios as “any foresight exercise about migration” and assert that any future characterization around migration starts with the purpose of the scenarios (5 & 6). The scholars differentiate between explorative, predictive, and normative types of migration scenarios, each with their own purpose. In terms of gender apartheid and asylum, explorative migration scenarios are relevant as they aim at “determining what could happen in the future,” namely changes in policy based on developments in international criminal law and international refugee law, as I argue (Ibid., 10).

Regarding methods used to develop migration scenarios, the field has been described as being based on “dispersed methodological foundations,” ranging from participatory approaches, large-scale mixed studies, existing scenario-building, Delphi, and computer-aided (Sohst et al. 2020, 118, 125). In this way, scenarios draw on quantitative and qualitative data, summarized by Boissonneault et al. as follows:

Scenarios that are qualitative can be based on previous narratives, while scenarios that are quantitative can rely on time series analysis. Scenarios that rely on either the qualitative or quantitative approaches can further be based on participatory work or assign likelihoods to different variants (11).

For the purpose of this commentary, I rely on qualitative methods in the form of case study analysis and legal-institutional analysis that assign likelihoods to different factors and offer outlooks for future lines of inquiry. Given that the discussed developments in international criminal law and international refugee law are continuously and simultaneously evolving, robust quantitative data are yet to emerge more fully. However, data from the EuroStat Data Browser and the EUAA Case Law Database offer some insights to contextualize the proposed migration scenarios for gender apartheid and asylum.

For example, within just a month of the Taliban’s return to power, the highest numbers of first-time applications filed by female Afghan asylum-seekers (all ages) were reported in the EU and in many of the

countries under examination (EuroStat Data Browser a, 2021–2023). While these numbers have fluctuated over time, it was with the publication of the EUAA Country Guidance that the numbers of first-time applications rose again. Of note here are Denmark and Finland, where first-time applications tripled and quadrupled in the months immediately following the publication and the countries including general risks of gender-based persecution in their PSG category. Similarly, France recorded its second highest monthly numbers of first-time applications one month after the EUAA publication, whereas Germany matched its top five-monthly numbers in January 2023.

Numbers of first-time asylum applications filed suggest a snapshot of the urgency to provide international protection to Afghan women and girls, but this presents only half the picture. The remaining picture appears when looking at the decisions of these applications. Across the EU, a steady increase in positive asylum decisions for Afghan women and girls (Geneva Convention Status) can be noted between 2021 and 2023 (EuroStat Data Browser b, 2021–2023). This trend is mirrored in nearly all of the countries included in this commentary, with a particularly stark incline reported for Denmark between 2022 and 2023 where numbers more than quadrupled.

These data on positive asylum decisions must be situated in the context of the number of challenged asylum cases concerning Afghan women on gender-based persecution with positive outcomes which have more than quadrupled across the EU since the Taliban take-over in August 2021 (EUAA Case Law Database, 2021–2023). In 2022 and 2023, the most frequently challenged asylum cases documented from a single country came from Afghanistan with 2023 constituting the highest numbers of positive outcomes in different member states.

#### ***1.4 What might happen in the future - Part 2: Migration scenarios for gender apartheid and asylum***

In leaning on available data and following principles in anticipatory methods outlined above, I propose three different migration scenarios for gender apartheid and asylum pertaining to the situation in Afghanistan. To reiterate, the key drivers in these migration scenarios are the Taliban take-over (macrolevel), the institutionalization of what has been characterized as gender apartheid (meso level), and the impacts thereof on women and girls (microlevel). The key uncertainties that remain and that inform the scenarios concern developments in international criminal law and international refugee law. In regards to international refugee law, the scope and content of the EUAA Guidance, the UNHCR Statement, as well as the decision by the CJEU must be taken into account, while in regards to international criminal law, calls to categorize gender-based persecution as a stand-alone crime and to codify gender apartheid must be taken into account. It is important to note that these developments, although occurring continuously and simultaneously, have varied time frames.

For instance, the EUAA Guidance states that country-wide risk assessments “should be considered valid as long as current events and developments fall within the trends and patterns of violence observed” (EUAA 2023, 116). Since the publication of the Guidance under study (January 2023), a renewed version has been issued (May 2024) which reaffirms general risks of gender-based persecution for Afghan women and girls, demonstrating regular frequency on up-to-date assessments (EUAA 2024). The UNHCR Statement, on the other hand, forms a specific response to the request for a preliminary ruling by the CJEU that might be referenced in future instances with similar queries around persecution on cumulative grounds. Lastly, the decision by the CJEU will have a significant impact on member states. Although the CJEU does not decide on the dispute itself, 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,b).

Relative to international criminal law, the ongoing process of the CAH Treaty has a concrete timeline: state submissions with comments on the draft articles were published in January 2024, followed by the UN General Assembly’s Sixth Committee second dedicated session for discussion (April 2024) and a subsequent decision by the Committee on next steps for the treaty in October (Global Justice Center 2023, 5). Across this timeline, updates on the categorization of gender-based persecution as a standalone crime as well as the codification of gender apartheid can be expected.



Of note here is that out of the 30 state submissions on the draft articles, more than half mentioned at least one gender-related issue (Just Security, 2024). The EU and three of the Nordic countries under examination in this commentary (along with Iceland and Norway) published joint submissions inclusive of gender-related aspects, whereas Germany and France shared individual submissions absent of considering such aspects. In the Nordic countries' joint submission, it is emphasized that "a future convention on crimes against humanity would constitute an important tool to assist States in their efforts to prevent and punish gender-based crimes" (UN Sixth Committee, 2024, p. 3). Furthermore, it is stated that the Nordic countries "would like to explore the potential of listing other gender-related crimes as independent crimes against humanity," a potential gesture towards codifying gender apartheid in international criminal law (Ibid).

It is against these key drivers and key uncertainties that I propose the following three migration scenarios for gender apartheid and asylum. All scenarios assume the continuous governance of Afghanistan by the Taliban with gender apartheid measures that necessitate the protection of women and girls vis-à-vis asylum.

#### *1.4.1. Scenario 1: Immediate protection on general risks of gender-based persecution*

In this scenario, the EUAA's country-wide risk assessment on Afghanistan denoting general risks of gender-based persecution is maintained, and the CJEU aligns its ruling with the UNHCR Statement as well as the opinion of the Advocate General and takes into consideration debates around the mentioned gender components in the CAH Treaty. As such, two binding legal-institutional frameworks, namely the CJEU ruling and the CAH Treaty, provide the premise for immediate protection on general risks of gender-based persecution.

In the context of the case studies, this might lead to challenges in the national courts of Germany and France against policy inaction to grant asylum on general risks of gender-based persecution, especially given the countries' gender-inclusive provisions as part of the PSG category. Since CJEU decisions are applicable in all member states, the scope of this scenario is far reaching, not least if aligned with gender components of the CAH Treaty. In this scenario, asylum applications by Afghan women and girls might increase as data from the EuroStat Data Browser and the EUAA Case Law Database gestured to in light of the EUAA Guidance publication and some countries moving to grant asylum on general risks of gender-based persecution. A similar 'shock' can be anticipated when an integrated system of protection for gender-related claims exists between international criminal law and international refugee law.

#### *1.4.2. Scenario 2: Intermediate protection on general risks of gender-based persecution*

In this scenario, similar to the previous one, the EUAA's Guidance is maintained, but the CJEU's ruling diverges from the UNHCR Statement, the opinion of the Advocate General, as well as the draft articles of the CAH Treaty on gender-based persecution and gender apartheid. As such, only one binding legal-institutional framework prevails (CAH Treaty) with an intermediate timeframe given the ongoing treaty process.

As part of this intermediate timeframe, member states might still consider provisions of the EUAA Guidance in terms of granting asylum on general risks of gender-based persecution under existing categories; however, the scope of this protection might be fragmented at best given the non-binding basis of the Guidance. This fragmentation can be seen in data on first-time applications filed by Afghan women after the publication of the EUAA Guidance in member states such as Greece, which recorded the second highest number in this regard after Germany and before France (EuroStat Data Browser a, 2021–2023). In this way, asylum applications and protection granted for Afghan women and girls may fluctuate, an uncertainty which can be rectified by the next steps in the CAH Treaty process within a prolonged timeframe.

### 1.4.3. Scenario 3: Deferred protection on general risks of gender-based persecution

In this scenario, neither the EUAA's Guidance on Afghanistan is maintained nor does the CJEU align its ruling with the UNHCR Statement, the opinion of the Advocate General, but the CAH Treaty categorizes gender-based persecution as a stand-alone crime and codifies gender apartheid. Similar to Scenario 2, only one binding legal-institutional framework might premise policy in/action on asylum, but in this situation, with an even further deferred timeframe given the multi-year process of the CAH Treaty.

Absent of the EUAA's country-wide risk assessment on gender-based persecution and a favorable CJEU ruling, asylum regulations with regards to Afghan women and girls are left to individual member states without an explicit supra-national reference framework on the matter. While this might still result in granting asylum for women and girls from Afghanistan in line with existing national asylum regulations that are conducive to this (i.e., gender as a sixth ground of protection; gender-inclusive PSG category) and with the Qualification Directive, establishing general risks of gender-based persecution in international refugee law in a comprehensive manner might be deferred while the CAH Treaty process is still underway. Of note here again is the content of state submissions for the draft articles, especially by the Nordic countries, stressing the importance of making gender-based persecution a stand-alone crime and gesturing to other gender-related crimes that can be considered as such, namely gender apartheid.

In all three scenarios, the ongoing process around the CAH Treaty is presumed as a central component for policy changes in international refugee law. Just as the drafters of the Rome Statue looked to international refugee law in adding gender in the crimes against humanity provision, so can the EUAA in upcoming country-wide risk assessments, the CJEU in its ruling, and individual member states look to developments in international criminal law. Whether these implications take immediate shape or in an intermediate and deferred timeframe, I contend that an integrated system of protection of gender-related claims between the two areas of law is one to be watched.

## 2. Outlooks

In this commentary, I developed initial migration scenarios on gender apartheid and asylum with key uncertainties unfolding over the next years. This preliminary analysis prompts the need for complementary inquiry based on more robust quantitative data that will allow us to predict and normatively assert policy in/action in terms of an integrated system of protection on gender-related claims that spans international criminal law and international refugee law. To this end, anticipatory methods through machine learning afford prospects, especially given the varied policy responses to the situation in Afghanistan by member states vis-à-vis asylum at this point.

For example, Hoffman Pham and Luengo-Oroz (2023) provide a relevant computational framework to leverage data for predictive models in forced migration, consisting of three phases: data collection, definition of the prediction problem, and model implementation (410 & 411). Hoffman Pham and Luengo-Oroz detail the main questions to ask when anticipating forced migration, speaking to dynamics that are crucial to gender apartheid and asylum such as feature factors of context and data scarcity (i.e., key uncertainties; asylum claims filed on general risks of gender-based persecution) as well as unit of analysis (i.e., women and girls from Afghanistan) (Ibid., 415).

Relatedly, Carammia et al. (2022) explore anticipatory approaches that are specific to forced migration in the EU by presenting an adaptive machine learning algorithm that "integrates administrative statistics and non-traditional data sources at scale to effectively forecast asylum-related migration flows" (2). As part of their analysis, a focus is placed on monitoring drivers in countries of origin and destination to detect early onset and to estimate the effects of individual drivers. This, in turn, addresses a main challenge in migration scenarios, namely that "migration processes connect origin and destination countries in complex systems whose functioning varies largely over space and time" (Ibid.). Considering the key uncertainties in the outlined migration scenarios for gender apartheid and asylum, Carammia et al. provide a promising way for further examination in this regard.

### 3. Conclusion

Whether general risks of gender-based persecution will take the form of an immediate, intermediate, or deferred time frame of protection is informed by developments within and between international criminal law and international refugee law. In this context, the outlined migration scenarios present new perspectives for policy-making in anticipating forced migration for women and girls from Afghanistan and other countries of concern for gender apartheid (i.e., Iran). Based on the historical link between international criminal law and international refugee law, the ongoing process of draft articles of the CAH Treaty, including the categorization of gender-based persecution as a standalone crime and the codification of gender apartheid, must be followed closely in efforts to anticipate policy in/action in international refugee law yet to come, and this commentary serves as a starting point to do so.

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