

Sanctuary, Safe Harbor and Asylum. But Is it Available for Domestic Violence Victims? The Analysis of Domestic Violence Asylum Seekers in the United States and Internationally

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I. INTRODUCTION

Scared, panicked, running, looking for a place to hide, she lives in a place where no one will help her. A phone call to the police is of no use because they are easily bribed to look the other way. After years of torture, Tatiana Burbano decides to escape from her husband, a man who has raped her, beat her, and tried to kill her on numerous occasions. In her mind she has finally reached her destination, her safe haven, the United States. However, is the United States truly her safe haven? Has she truly escaped? This is one of many horrific stories where a woman, who has been violently abused, seeks freedom from constant torment. Domestic violence victims all over the world face this constant horror and yearn to find safety.

Across the globe, women who are domestic violence victims are living in fear, worry, and depression that a loved one may get angry and hit them, rape them, or even kill them. In the midst of their despair, the word “asylum” gives them some relief. Asylum is defined in Webster’s dictionary as a “place of retreat and security.”¹ The opportunity for asylum gives women who are domestic violence victims the ability to escape and live a life without

1. *Asylum*, MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/asylum> [https://perma.cc/46S5-TJSX] (last visited Mar. 20, 2020).

constant fear. These women need asylum; however, the opportunity and availability of asylum varies from nation to nation.

Internationally, women who are domestic violence victims have the right to, and may seek, asylum in many countries within the European Union in order to find a sanctuary from the place where they are a victim of abuse.² In contrast, domestic violence victims seeking asylum in the United States have an unclear future. In *Matter of A-B-*, former Attorney General Jeff Sessions ruled that international women who are domestic violence victims are no longer eligible for asylum in the United States.³ This ruling contradicts international law and protections of human rights, further victimizing those most in need of protection.⁴ Months after *Matter of A-B-*,²⁷ I&N Dec. 316, 345 (2018), was published, District Court Judge Emmet G. Sullivan ruled, in *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), to give back to domestic violence victims the avenue to apply for asylum in the United States.⁵ Despite this ruling, the right to asylum for women who are domestic violence victims is still uncertain because President Trump's administration has appealed, and there is no legislative protection for women who are domestic violence victims yet.⁶

Alongside the lack of legal certainty, lack of legislative protection, and the lack of acceptance of domestic violence asylum seekers,⁷ the United States also lacks gender-sensitive and adequate medical procedures to serve domestic violence victims in immigration detention centers.⁸ More often than not, while seeking asylum or awaiting a decision from the immigration court, domestic violence victims face possible detention.⁹ In these detention

2. *The Common European Asylum System*, EUROPEAN COMM'N 1 (2016), https://ec.europa.eu/home-affairs/sites/homeaffairs/files/what-we-do/policies/european-agenda-migration/background-information/docs/20160713/factsheet_the_common_european_asylum_system_en.pdf [<https://perma.cc/K8YN-JEBS>] [hereinafter CEAS].

3. *Matter of A-B-*, 27 I&N Dec. 316, 345 (2018), abrogated by *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), appeal docketed, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

4. Ed Kilgore, *Sessions: No More Asylum for Victims of Gangs and Domestic Violence*, N.Y. INTELLIGENCER (June 11, 2018), <http://nymag.com/daily/intelligencer/2018/06/sessions-ends-asylum-for-gang-and-domestic-violence-victims.html> [<https://perma.cc/YU5U-8L8L>].

5. *Grace*, 344 F. Supp. 3d at 146.

6. *Id.*

7. See Kilgore, *supra* note 4.

8. *United States Immigration Detention Profile*, GLOBAL DETENTION PROJECT (last updated May 2016), <https://www.globaldetentionproject.org/countries/americas/united-states> [<https://perma.cc/4MTC-YRDY>].

9. *Id.*

centers, there are no gender sensitive trainings for the staff, and while there may be a healthcare policy in effect, the enforcement of such policy is lacking.¹⁰ The lack of gender sensitive care and medical attention further prolongs the abuse that these domestic violence victims are trying to escape.

In comparison, Sweden, Germany, and Canada have implemented asylum policies to combat high volumes of asylum seekers without targeting a specific group from seeking asylum. Sweden has called for stricter policies and global sharing.¹¹ Germany has adopted the Council of European Convention on preventing and combatting violence against women and domestic violence of 2011 (hereafter Istanbul Convention),¹² which provides aid in preventing and combatting violence against women and domestic violence.¹³ Furthermore, countries in the European Union have training for detention center staff geared towards providing gender-sensitive care to domestic violence victims.¹⁴ While training procedures are not strictly enforced,¹⁵ the need to provide gender-sensitive attention to domestic violence victims is recognized within the European Union.¹⁶ Conversely, Canada grants asylum to domestic violence victims; however, it has adopted a high threshold for proving persecution by domestic violence.¹⁷ Canada has also worked closely with the United Nations High Commissioner of Refugees (UNHCR) to provide asylum for individuals fleeing their countries.¹⁸

This Comment aims to interpret the United States' asylum laws that impact domestic violence victims and analyze the effect they have both domestically and globally on those victims. Additionally, this Comment

10. *Cf. id.*

11. Statens Offentliga Utredningar [SOU] 2018:22 Sweden's migration and asylum policy [government report series].

12. *Reception of Female Refugees and Asylum Seekers in the EU Case Study: Germany* (2016), EUROPEAN PARLIAMENT, POLICY DEP'T FOR CITIZENS RIGHTS & CONSTITUTIONAL AFFAIRS, [http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536497/IPOL_STU\(2016\)536497_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2016/536497/IPOL_STU(2016)536497_EN.pdf) [<https://perma.cc/F42D-ZUCH>] [hereinafter EUR. PARLIAMENT].

13. Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, 2011 O.J. 25, art. 60 (210) 1, 17 [hereinafter The Istanbul Convention].

14. EUR. PARLIAMENT, *supra* note 12.

15. *Thematic Focus: Gender-Based Violence*, EUROPEAN UNION AGENCY FOR FUNDAMENTAL RIGHTS, <https://fra.europa.eu/en/theme/asylum-migration-borders/overviews/focus-gender-based-violence> (last visited Feb. 1, 2020).

16. The Istanbul Convention, *supra* note 13.

17. Maciej Lipinski, *Can Domestic Abuse Victims Qualify as Refugees? – A Comment on Matter of A-R-C-G- et al.*, THECOURT.CA (Sept. 29, 2014), <http://www.thecourt.ca/can-domestic-abuse-victims-qualify-as-refugees-a-comment-on-matter-of-arcg-et-al/> [<https://perma.cc/W2ZQ-6T7C>].

18. *Canada and the United Nations High Commissioner for Refugees*, GOV'T OF CAN., https://www.international.gc.ca/world-monde/international_relations-relations_internationales/multilateral-multilateraux/unhcr-hcr.aspx?lang=eng [<https://perma.cc/37QC-82FE>].

will analyze and compare Sweden, Germany, and Canada's asylum laws and policies with United States' asylum laws and policies in order to provide a comprehensive analysis of the effects these countries' asylum laws have on their societies. Finally, this Comment will provide judicial and legislative recommendations to replace the current United States asylum policy with one that incorporates a domestic violence victim's right to be granted asylum or receive asylum and implements a gender sensitive approach to medical care in detention centers.

A. Background

Many countries have signed the United Nations' 1951 Convention Relating to the Status of Refugees (and the Protocol amending it effective in 1967)¹⁹ and the 1948 Declaration of Human Rights and have used these treaties as guides for their own asylum laws.²⁰ The United States briefly deviated from these guidelines when refusing asylum to domestic violence victims.²¹ The United States case, *Matter of A-B-*, has caused controversy, both locally and globally.²² Since then, Judge Sullivan's ruling in *Grace v. Whitaker*, has rectified the deviation from international human rights guidelines.²³ However, this may not be final and is subject to change since a notice of appeal has been filed in the United States District Court of Columbia.²⁴

19. The 1951 convention was to help only refugees displaced during WWII and from a specific region. The amendments in the Protocol gave a permanent and worldwide character to the Convention. *See* Convention and Protocol Relating to the Status of Refugees, Dec. 16, 1966, G.A. Res. 2198 (XXI), at 2 [hereinafter The 1951 Refugee Convention].

20. The 1951 Refugee Convention, *supra* note 19; G.A. Res. 217 (III) A, Universal Declaration of Human Rights, at art. 14 (Dec. 10, 1948) [hereinafter the 1948 Universal Declaration of Human Rights].

21. *See generally* Reade Levinson & Sarah N. Lynch, *U.S. Attorney General Curbs Asylum for Immigrant Victims of Violence*, REUTERS (June 11, 2018), <https://www.reuters.com/article/us-usa-immigration-asylum/us-attorney-general-curbs-asylum-for-immigrant-victims-of-violence-idUSKBN1J7246> [<https://perma.cc/SSC3-TSA7>].

22. *Id.*

23. Victoria Nielson, *New Government Guidance on Matter of A-B- Incorporates Grace v. Whitaker*, CLINIC (Jan. 28, 2019), <https://cliniclegal.org/resources/asylum-and-refugee-law/new-government-guidance-matter-b-incorporates-grace-v-whitaker> [<https://perma.cc/RTU7-BUFL>].

24. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 138 (D.D.C. 2018), appeal docketed, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

1. United States

In the United States, more than 318,000 affirmative asylum applications were pending in 2018.²⁵ Additionally, there were over 733,000 defensive asylum cases pending.²⁶ On average, affirmative asylum seekers who receive asylum relief waited more than 1,000 days to be granted asylum.²⁷ Asylum seekers face being put in detention centers while awaiting a decision.²⁸ Furthermore, recent case law in the United States has provided an unclear future for domestic violence victims seeking asylum in the United States. In 2018, former Attorney General Jeff Sessions ruled in *Matter of A-B* that the United States would no longer be accepting asylum applications from individuals who are seeking asylum because of domestic violence,²⁹ thus restricting these domestic violence victims who wanted to seek asylum in the United States from being granted protection. Then, in January 2019, District Judge Sullivan ruled in *Grace v. Whitaker* that the holding in *Matter of A-B* was inconsistent with existing interpretation of asylum laws.³⁰

Prior to *Matter of A-B* and *Grace*, in 2014, under the Obama administration, case law allowed domestic violence victims to seek asylum.³¹ The Board of Immigration Appeals (BIA), in 2014, in *Matter of A-R-C-G*, recognized domestic violence victims as a particular social group, meaning that domestic violence victims fit within the definition of individuals eligible to apply for asylum.³² In *Matter of A-R-C-G*, a woman applied for asylum after years of experiencing brutal physical and psychological abuse.³³ The

25. *Asylum in the United States*, AMERICAN IMMIGR. COUNCIL (May 14, 2018), <https://www.americanimmigrationcouncil.org/research/asylum-united-states> (defining affirmative asylum seekers as individuals who are physically present in the United States when requesting asylum and are awaiting a decision after filing an application and interviewing with USCIS).

26. *Fact Sheet: Immigration Courts*, NAT'L IMMIGR. F. (Aug. 7, 2018), <https://immigrationforum.org/article/fact-sheet-immigration-courts/> [<https://perma.cc/8BUQ-5HT8>] (defining defense asylum seekers as those who are in removal proceedings and must go through immigration courts to seek asylum).

27. *Id.*

28. *See generally Immigration Detention*, HUMAN RIGHTS FIRST, <https://www.humanrightsfirst.org/topics/immigration-detention> [<https://perma.cc/3M3E-FP5S>] (last visited Mar. 21, 2020).

29. *See Matter of A-B*, 27 I&N Dec. 316, 346 (2018), abrogated by *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), appeal docketed, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

30. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 138 (D.D.C. 2018), appeal docketed, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

31. *See generally Matter of A-B*, 27 I&N Dec. at 346; *see also* Evan Halper, *Trump administration moves to block victims of gang violence and domestic abuse from claiming asylum*, L.A. TIMES (June 11, 2018), <https://www.latimes.com/politics/la-na-pol-sessions-asylum-20180611-story.html> [<https://perma.cc/L3HB-G9KK>].

32. *See Matter of A-R-C-G*, 26 I&N Dec. 338, 388 (BIA 2014).

33. *Id.* at 389.

court granted her asylum reasoning that the woman was of a “particular social group” and there was no government remedy in Guatemala.³⁴ However, in 2018, in *Matter of A-B-*, former Attorney General Jeff Sessions arrived at a different conclusion, overturning the precedent from *Matter of A-R-C-G-*.³⁵ In *Matter of A-B-*, the respondent’s husband beat her, raped her, and threatened to kill her on numerous occasions.³⁶ She sought protection from the Salvadorian government, but the local authorities were “unwilling or unable to protect” her.³⁷ The types of abuse endured by the women in *Matter of A-B-* and those in *Matter of A-R-C-G-* are strikingly similar; however, the rulings were opposite. In *Matter of A-B-*, the court held women who endured domestic violence in their country and sought asylum in the United States would not be granted asylum because they no longer legally belonged to a particular social group and did not meet the criteria for asylum.³⁸

Shortly thereafter, in 2019, twelve adults and children, in *Grace v. Whitaker*, brought a class action in a federal district court.³⁹ Plaintiffs alleged that denying them the ability to seek asylum, even though the asylum officer believed that there was a credible fear of persecution, was a violation of immigration laws.⁴⁰ District Judge Sullivan found that the decision and policy of denying domestic violence victims from exercising their right to apply for asylum at the border in the manner articulated in *Matter of A-B-* violated immigration laws.⁴¹ Applying *Matter of A-B* at the border would have resulted in deporting many women who were seeking asylum in the United States before they could apply for it, robbing them of the opportunity to apply for asylum in the future.⁴² *Grace v. Whitaker*, for the time being,

34. *Id.* at 388–89.

35. *See generally Matter of A-B-*, 27 I&N at 346.

36. *Id.* at 321.

37. *Id.*

38. Reena Ayra, *Attorney General issues precedent decision, Matter of A-B-, seeking to limit protection for asylum seekers*, CATHOLIC LEGAL IMMIGRATION NETWORK. INC., <https://cliniclegal.org/resources/attorney-general-issues-precedent-decision-matter-b-seeking-limit-protection-asylum> [<https://perma.cc/Z8ZH-TUCB>] (last visited Feb. 2, 2020).

39. *Grace v. Whitaker*, 344 F. Supp. 3d 96, 104 (D.D.C. 2018).

40. *See id.* at 105.

41. *Id.* at 146.

42. *Cf. id.* at 133.

allows domestic violence victims to continue seeking asylum in the United States.⁴³ However, the Trump Administration has appealed.⁴⁴

Following *Grace v. Whitaker*, Senator Patrick Leahy and Representative Zoe Lofgren led the bicameral introduction of the Refugee Protection Act of 2019.⁴⁵ The Act makes asylum claims by domestic violence victims more viable.⁴⁶ It restores the United States' refugee and asylum system in response to the Trump Administration's decisions on asylum.⁴⁷

2. Sweden

“Sweden has registered around 400,000 asylum requests since 2012.”⁴⁸ Sweden has continued to recognize domestic violence victims as a part of particular social groups allowing them to be able to seek asylum.⁴⁹ Over the years, the number of asylum seekers in Sweden has grown tremendously⁵⁰ and to address the influx of asylum requests, Sweden has planned stricter policies and requested global responsibility-sharing in its 2018 asylum policy, in order to help its national economy.⁵¹ However, based on Sweden's 2018 election results, the future of Sweden's immigration law may change drastically. During the September 2018 election there was a one month deadlock⁵² because “no party in Sweden [was able] to agree to a coalition

43. *See generally id.*

44. Appeal still pending. *See* Notice of Appeal, *Grace v. Whitaker*, 344 F. Supp. 3d 96, 138 (D.D.C. 2018), appeal docketed, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

45. Press Release, U.S. House of Representatives: Congresswoman Zoe Lofgren (Nov. 21, 2019), <https://lofgren.house.gov/media/press-releases/leahy-lofgren-introduce-bicameral-refugee-protection-act-2019> [<https://perma.cc/TY5Y-TZYQ>].

46. *Id.*

47. *Id.*

48. *Human rights chief 'concerned' about Sweden's asylum laws*, THE LOCAL (Feb. 16, 2018), <https://www.thelocal.se/20180216/human-rights-chief-slams-swedens-asylum-laws> [<https://perma.cc/PCF4-67QE>].

49. *See Sweden's Migration and Asylum policy*, Ministry of Justice, June 2019, <https://www.government.se/4adac4/contentassets/183ca2f36f1c49f3b7d1b5724a5753ce/swedens-migration-and-asylum-policy--fact-sheet-2019.pdf> [<https://perma.cc/ET96-YP5P>] (last visited Feb 2, 2020).

50. *See, e.g., "Now everyone will become super nationalistic": Sweden's backlash against immigrants and the rise of the right*, CBS NEWS (Apr. 12, 2019), <https://www.cbsnews.com/news/sweden-rise-of-the-right-immigrants-unwelcome-cbsn-originals/> [<https://perma.cc/YAV6-P83X>].

51. *See Swedish parties temporary asylum plan*, THE LOCAL (Oct. 23, 2015), <https://www.thelocal.se/20151023/swedish-parties-set-to-reveal-new-refugee-plans> [<https://perma.cc/5BEC-H6ZD>].

52. *Amalie Henden, Sweden election: Leader of former neo-Nazi party SLAMS Moderate party member's plan*, SUNDAY EXPRESS (Oct. 3, 2018), <https://www.express.co.uk/news/world/1026559/Sweden-election-2018-Sweden-Democrats-influence-Moderate-Party-Sweden-news-latest> [<https://perma.cc/66MA-U5WD>].

deal to form a [new] government.”⁵³ The Sweden Democrats held majority votes, and they were broadening political views to grow their platform.⁵⁴ The Sweden Democrats ran on an anti-immigration platform,⁵⁵ that would have had a significant negative impact on the number of asylum requests Sweden approves.⁵⁶ Sweden Democrats’ anti-immigration platform attracted many lower-income and lower-educated voters burdened by unemployment and economic risks who blamed the influx of migrants.⁵⁷ Now that Sweden Democrats hold 18% of the votes in parliament depending on whether the majority supports their anti-immigration policies,⁵⁸ there may be many anti-immigration policies and reforms that come to light in the next few years adversely affecting asylum based on domestic violence.⁵⁹

3. Germany

“The German constitution grants asylum to those who are victims of political persecution.”⁶⁰ Political persecution means “danger to life and limb, imprisonment or other violations of human dignity on the basis of race, religion, nationality, political convictions or belonging to a particular social group.”⁶¹ The political persecution needs to be inflicted by a state actor from the individual’s country of origin.⁶² Once the individual is eligible for asylum, he or she will receive a residence permit to live Germany for

53. Chris Tomlinson, *Swedish Anti-Mass Migration Leader Offers Resignation to Allow his Party to Enter Government* (Oct. 8, 2018), BREITBART, <https://www.breitbart.com/london/2018/10/08/swedish-anti-mass-migration-leader-offers-resignation-to-allow-his-party-to-enter-government/> [<https://perma.cc/Y5B2-5M7C>].

54. *Id.*

55. *Sweden Democrats Tap into Immigration Fears*, BBC NEWS (Sept. 25, 2018), <https://www.bbc.com/news/world-europe-29202793> [<https://perma.cc/8PKP-XQNK>].

56. Sheri Berman, *Five Takeaways from the Swedish Elections – and the Far Right Wave across Europe*, WASH. POST (Sept. 12, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/09/12/what-the-swedish-elections-tell-us-about-europes-democratic-upheavals/?utm_term=.43202e56f605 [<https://perma.cc/TTW5-FTJ3>].

57. *Id.*

58. *Id.*

59. *Swedish PM Calls for Substantial Reduction in Refugee Numbers*, THE LOCAL (Jan. 18, 2020), <https://www.thelocal.se/20200118/swedish-pm-calls-for-dramatic-reduction-in-refugee-number> [<https://perma.cc/2SQH-NJBF>].

60. *Forms of Asylum and Refugee Protection*, U.N. HIGH COMM’R OF REFUGEE, <http://help.unhcr.org/germany/asylum-in-germany/forms-of-asylum-and-refugee-protection/> [<https://perma.cc/5MYW-BXXH>] (last visited Jan. 20, 2020).

61. *Id.*

62. *Id.*

three years.⁶³ If, during the three years, the individual is no longer in fear of their home country, the individual needs to return to his or her home country.⁶⁴ However, if the circumstances in the individual's home country have not changed, then the three-year residency permit will be renewed.⁶⁵

Germany has adopted and ratified the Istanbul Convention.⁶⁶ The Istanbul Convention's legislative framework recognizes gender-based violence as persecution and the importance of providing a gender-sensitive interpretation for particular social groups regarding reception procedures and support services for asylum seekers.⁶⁷

In 2015, German Chancellor Angela Merkel adopted an open door approach for asylum seekers.⁶⁸ Those who had originally sought asylum in another European country could now seek asylum in Germany.⁶⁹ Germany's number of asylum seekers rose to 1.4 million.⁷⁰ The number of asylum seekers registered with the Office of Migrants and Refugees (BAMF) in 2015 was close to 890,000.⁷¹ The number fell to about 280,000 asylum seekers registered with the BAMF in 2016 and 186,644 in 2017.⁷²

Germany claims the decrease in asylum applications within the past few years was caused in part by the "closing of the Balkan and Mediterranean routes previously used by many migrants to get to Europe" and by better equipping German authorities to determine asylum seekers' true identities.⁷³ Chancellor Merkel's plan to "establish transit centers close to the [Austrian] border" where asylum seekers in Germany, but currently registered in another European Union country, "will be processed before being returned to [the country where they first sought asylum]" will contribute to the further decrease in the number of asylum application.⁷⁴ In May 2019, the German Interior

63. *Id.*

64. *Id.*

65. *Id.*

66. EUR. PARLIAMENT, *supra* note 12, at 9.

67. *Id.*

68. *Id.*

69. Judith Vonberg, *Why Angela Merkel is no longer the 'refugee chancellor'*, CNN (July 6, 2018), <https://www.cnn.com/2018/07/06/europe/angela-merkel-migration-germany-intl/index.html> [<https://perma.cc/MD2B-NERW>].

70. *Id.*

71. Jefferson Chase, *Refugee numbers in Germany dropped dramatically in 2017*, DEUTSCHE WELLE MADE FOR MINDS (Jan. 16, 2018), <https://www.dw.com/en/refugee-numbers-in-germany-dropped-dramatically-in-2017/a-42162223> [<https://perma.cc/5V3G-PTB5>].

72. *Id.*

73. *Id.*

74. *Germany's Angela Merkel backs Austria on stronger EU borders*, DEUTSCHE WELLE MADE FOR MINDS (Sept. 16, 2018), <https://www.dw.com/en/germanys-angela-merkel-backs-austria-on-stronger-eu-borders/a-45513221> [<https://perma.cc/P9AP-6Y22>].

Minister Horst Seehofer proposed the Orderly Return Bill which further proposed tougher rules and regulations for migrants and asylum seekers.⁷⁵

4. Canada

“Canada was the world’s ninth-largest recipient of asylum claims” in 2017,⁷⁶ “with 47,800 claims registered[,] more than double the 23,600 claims in the previous year.”⁷⁷ In Canada, domestic violence victims are recognized as part of a particular social group. However, women escaping domestic violence encounter significant challenges to provide evidence that their home state is unwilling or unable to protect them from their abuser.⁷⁸ Canadian courts have adopted a high threshold for determining when claimants have provided sufficient evidence.⁷⁹ Even when the claimants have evidence of state unwillingness to help and lack of legal remedies against domestic abuse, many claimants have still failed to satisfy Canada’s high threshold of evidence.⁸⁰ Despite this high threshold, some women have been granted asylum based on domestic violence claims.⁸¹ For example, in *Narvaez v. Canada*, [1995] 89 F.C. 94 (Can.), an Ecuadorian woman who was raped and abused by her husband was granted asylum.⁸² Narvaez proved she was a victim of domestic violence and also proved the Ecuador government was not providing protection based on evidence that the Ecuadorian police took bribes from her husband to cover the abuse.⁸³ Thus, the court granted her asylum based on her claim.⁸⁴

75. *German Cabinet agrees tougher rules for deporting migrants*, DEUTSCHE WELLE (May 4, 2019), <https://www.dw.com/en/german-cabinet-agrees-tougher-rules-for-deporting-migrants/a-48379715> [<https://perma.cc/5J8M-JUH7>].

76. Geoffrey York, *Number of asylum claims more than double in Canada in 2017*, UN SAYS, THE GLOBE AND MAIL (last updated June 20, 2018), <https://www.theglobeandmail.com/world/article-asylum-claims-doubled-in-canada-last-year-un-says/> [<https://perma.cc/96XH-S7NP>].

77. *Id.*

78. *Narvaez v. Canada*, [1995] 89 F.C. 94 (Can.).

79. *Id.*

80. *See cf. id.*

81. *Id.*

82. *See generally id.*

83. *Id.*, paras. 22, 27.

84. *Id.*

Canada has also cooperated with the UNHCR to provide asylum for domestic violence victims.⁸⁵ On January 11, 2019, a young Saudi woman's story made international headlines when seeking asylum after fleeing domestic violence.⁸⁶ She had fled from her abusive family but was stopped at the Bangkok, airport, in Thailand, by immigration officers who denied her entry and seized her passport.⁸⁷ The young woman, afraid for her life, barricaded herself in a hotel room.⁸⁸ The UNHCR requested Canada to accept her as a refugee, and Prime Minister Justin Trudeau agreed to grant her asylum,⁸⁹ stating that Canada has, "always stood up for human rights and women's rights around the world[.]"⁹⁰

II. APPLICABLE LAW

The applicable law for domestic violence victims seeking asylum is divided into four sections: (A) International laws, (B) European Union laws, (C) United States laws, and (D) Canadian laws.

A. *International Laws*

The United Nations ratified two relevant international laws regarding asylum seekers' rights: (1) the 1948 Universal Declaration of Human Rights,⁹¹ and (2) The United Nations 1951 Refugee Convention.⁹² Agencies have been created to implement these law, including the UNHCR, the leading international Refugee Agency, a global organization dedicated to protecting rights for asylum seekers.⁹³

1. *Universal Declaration of Human Rights*

Article 14 of the Universal Declaration of Human Rights states: "(1) Everyone has the right to seek and to enjoy in other countries asylum from persecution. (2) This right may not be invoked in the case of prosecutions

85. *Canada will grant asylum to Saudi woman fleeing alleged abuse: Trudeau*, CBC NEWS (Jan. 11, 2019), <https://www.cbc.ca/news/politics/canada-saudi-woman-asylum-alleged-abuse-1.4974344> [<https://perma.cc/9AGN-G9HW>].

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. The 1948 Universal Declaration of Human Rights, *supra* note 20.

92. The 1951 Refugee Convention, *supra* note 19.

93. *History of UNHCR*, UNHCR, <https://www.unhcr.org/en-us/history-of-unhcr.html> [<https://perma.cc/N33Y-BN3X>] (last visited Jan. 31, 2020).

genuinely arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations.”⁹⁴

2. *The 1951 Refugee Convention*

The 1951 Refugee Convention is the centerpiece of international refugee protection today.⁹⁵ Refugee rights are grounded in Article 14 of the 1948 Universal Declaration of Human Rights, which was ratified on December 10, 1948. The Declaration recognizes the right of persons to seek asylum from persecution in other countries.⁹⁶ Under Article I of the 1951 Refugee Convention, in order to be able to seek asylum and become a refugee, a refugee must:

be a person outside of his/her country of nationality or habitual residence and has a well-founded fear of persecution because of his/her race, religion, nationality, membership in a particular social group or political opinion, and is unable or unwilling to avail himself/herself of the protection of that country or to return there, for fear of persecution.⁹⁷

Governments who have signed onto the Convention are responsible for protecting refugees.⁹⁸ The UNHCR maintains a “watching brief” of host governments that are primarily responsible for protecting refugees, intervening if necessary to ensure bona fide refugees are granted asylum and are not forcibly returned to their countries where their lives may be in danger.⁹⁹

3. *UNHCR: The United Nations Refugee Agency*

Individual countries are responsible for carrying out refugee status determinations (RSD).¹⁰⁰ However, when countries are unable or unwilling to determine the status of an asylum seeker, the UNHCR may get involved to provide registration of asylum seekers.¹⁰¹ In situations where national

94. The 1948 Universal Declaration of Human Rights, *supra* note 20.

95. The 1951 Refugee Convention, *supra* note 19.

96. *Id.* at 13.

97. *Id.* at 18.

98. *Id.* at 23.

99. *Frequently asked questions about the 1951 Refugee Convention*, UNHCR THE UN REFUGEE AGENCY, <http://www.unhcr.org/en-us/news/stories/2001/6/3b4c06578/frequently-asked-questions-1951-refugee-convention.html> [https://perma.cc/ZSX8-UNPC] (last updated June 1, 2001).

100. *Asylum and Refugee Status Determination*, UNHCR STATISTICAL Y.B. 2005, at 44.

101. CBC NEWS, *supra* note 85.

procedures do not exist or are insufficient to protect an individual, the UNHCR is compelled to conduct RSDs under its mandate.¹⁰²

In 2013, the UNHCR registered a record high of 203,200 individual asylum applications.¹⁰³ As a result, the UNHCR's RSDs backlog rose to a historical high of 252,800 pending applications.¹⁰⁴ However, even with the backlog, the UNHCR is continuing to explore and implement measures that enhance the fairness, quality and efficiency of the RSD operations and procedures.¹⁰⁵

B. European Union Law

The European Union has a Common European Asylum System (CEAS) by which all European Union member states must abide.¹⁰⁶ Additionally, the Council of Europe has adopted the Istanbul Convention, which provides for legal actions against violence against women and legal processes for victims of domestic violence seeking asylum.¹⁰⁷

1. The Common European Asylum System (CEAS)

The CEAS provides a common minimum standard of treatment for all asylum seekers and applicants in the European Union.¹⁰⁸ Although there is a common legal framework for asylum laws in the European Union, in practice each nation treats asylum seekers and application differently.¹⁰⁹ This divergence between member states in treatment of asylum seekers contributes to encourage secondary movements and influences asylum seekers' selection of country to seek asylum in.¹¹⁰ The goal of the CEAS is to create a system that provides orderly and safe pathways to the European Union from third world countries and to move away from poorly implemented and uncontrolled irregular migratory flows.¹¹¹ The CEAS allows asylum for people fleeing persecution or serious harm. The process includes the following steps:

102. *Asylum and Refugee Status Determination*, *supra* note 100.

103. *Asylum and Refugee Status Determination*, UNHCR STATISTICAL Y.B., 2013, at 54, 56.

104. Niamh Kinchin, *The Intersectionality of Domestic and Global Accountability*, 87 STATISTICAL ADMIN. L. FORUM 60, 62 (2017).

105. *Asylum and Refugee Status Determination*, *supra* note 100.

106. CEAS, *supra* note 2.

107. The Istanbul Convention, *supra* note 13, art. 60.

108. CEAS, *supra* note 2.

109. *Id.*

110. *Id.*

111. *Id.*

1. An application for asylum is made.
2. Reception Conditions Directive: Asylum applicants benefit from common, minimum material reception conditions, such as housing and food.
3. European Agency for the Operational Management of large-scale IT Systems in the Area of Freedom, Security and Justice: The applicant is fingerprinted, the information is sent to the Eurodac database, and the data is used to help identify the country responsible for the asylum application.
4. Qualification Directive and Asylum Procedures Directive: The asylum applicant is interviewed to determine whether he/she may qualify for refugee status or subsidiary protection.
5. If the asylum is not granted at first, the refusal can be appealed in court.
 - a. If the negative decision is overturned on appeal, the applicant will be granted asylum.
 - b. However, if there is confirmation of the negative decision by the court the applicant may be returned to the country of origin or transit.
6. If the refugee or subsidiary protection status is granted: This gives the person certain rights, such as a residence permit, access to the labor market, and health care (Qualification Directive).¹¹²

2. *The Istanbul Convention*

The Istanbul Convention is based on the understanding that violence against women is a form of gender-based violence.¹¹³ Countries that sign onto the Convention take on an obligation to fully address and take measures to prevent violence against women and protect victims of violence.¹¹⁴

Article 60 of the Convention addresses three aspects: (1) parties to the Convention must provide the legislative framework to recognize gender-based violence as a ground for persecution within the meaning of Article 1 of the 1951 Refugee Convention; (2) a gender sensitive interpretation must be given by states to all the other grounds of Article 1, *e.g.*, membership

112. *Id.*

113. The Istanbul Convention, *supra* note 13, art. 60.

114. *Id.*

of a social group; and (3) states must develop gender sensitive reception procedures and support services for asylum seekers.¹¹⁵

C. Germany

The right to asylum is embedded into article 16a of the German Basic Law but is only afforded to individuals who have traveled from unsafe third world countries.¹¹⁶ The Federal Office for Migration and Refugees (BAMF) then determines whether or not an individual should be afforded protection from their home countries.¹¹⁷

1. Article 16a German Basic Law

This section of German Basic Law gives a person the right to asylum.¹¹⁸ Article 16(a)(1) states: “Persons persecuted on political grounds shall have the right of asylum.”¹¹⁹ Further, Article 16(a)(2) presumes “that a foreigner from such state is not persecuted, unless he presents evidence justifying the conclusion that, contrary to this presumption, he is persecuted on political grounds.”¹²⁰

D. United States Law

The United States has an affirmative asylum process that lays out the steps for an asylum seeker who is looking to gain asylum in the United States.¹²¹ The United States enacted the Refugee Act of 1980,¹²² which tries to address the realities of modern refugee problems. For a while, case law in the United States allowed domestic violence victims to seek asylum,

115. *Id.*

116. Ahmad Wali Achakzai, *What’s the right to asylum as stated in the German constitution?*, INFOMIGRANTS (Nov. 23, 2018), <https://www.infomigrants.net/en/post/13525/what-s-the-right-to-asylum-as-stated-in-the-german-constitution> [<https://perma.cc/A7WY-AKC4>].

117. German Federal Office for Migrants and Refugees, *The Stages of the German Asylum Procedure*, https://www.bamf.de/SharedDocs/Anlagen/EN/AsylFluechtlingsschutz/Asylverfahren/das-deutsche-asylverfahren.pdf?__blob=publicationFile&v=12 [<https://perma.cc/JR79-XC4M>].

118. DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] [THE BASIC LAW FOR THE FEDERAL REPUBLIC OF GERMANY], May 23, 1949, art. 16, at 23.

119. *Id.*

120. *Id.*

121. U.S. CITIZENSHIP AND IMMIGRATION SERVICES (USCIS), *Obtaining Asylum in the United States*, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/obtaining-asylum-united-states> [<https://perma.cc/67R7-P2TC>].

122. 8 U.S.C. 1521 § 411 (1980).

but *Matter of A-B*- changed that¹²³ and completely barred domestic violence victims from obtaining asylum.¹²⁴ However, *Matter of A-B* no longer sets precedent, it was overturned by the decision in *Grace v. Whitaker*, which now allows domestic violence victims to seek asylum.¹²⁵

1. *The Immigration Court Process*

Immigration courts decide various cases regarding removal proceedings and hear asylum claims.¹²⁶ Immigration courts have approximately 400 immigration judges who preside over sixty-three United States Immigration Courts.¹²⁷ Immigration courts have twice the caseload of federal and district court judges, tighter budgets, and far less administrative support.¹²⁸

Immigrants have basic rights under the United States Constitution, through the right to equal protection and the right to due process.¹²⁹ However, immigrants are not entitled to a court appointed attorney and eighty-six percent of immigrants who are detained appear without an attorney present.¹³⁰ Immigration trials are civil trials, rather than criminal trials;¹³¹ however, the proceedings very much resemble a criminal trial.¹³² For instance, immigrants who have been convicted of crimes, even low level offenses, are often subject to mandatory detention during their immigration hearings and are brought into the court room wearing a jumpsuit and shackles.¹³³

123. *Matter of A-B*-, 27 I&N Dec. 316, 346 (2018), abrogated by *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), appeal docketed, No. 19-5013 (D.C. Cir., Jan. 30, 2019).

124. *Id.*

125. *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), appeal docketed, No. 19-5013 (D.C. Cir., Jan. 30, 2019).

126. See *Fact Sheet: Immigration Courts*, *supra* note 26.

127. See generally EOIR Immigration Court Listing, *Executive Office for Immigration Review* (EOIR), U.S. DEP'T. OF JUSTICE, <https://www.justice.gov/eoir/eoir-immigration-court-listing> [<https://perma.cc/4HZA-484G>].

128. Fatma Marouf, *How Immigration Courts Work*, TEXAS A&M TODAY (June 26, 2018), <https://today.tamu.edu/2018/06/26/how-immigration-court-works/> [<https://perma.cc/TV63-BA2D>].

129. *Fact Sheet: Immigration Courts*, *supra* note 26.

130. Fatma Marouf, *What Makes Immigration Court Different from Typical Judicial Proceedings?*, PAC. STANDARD (June 25, 2018), <https://psmag.com/social-justice/how-does-immigration-court-work> [<https://perma.cc/GKA7-RWBH>].

131. See *Fact Sheet: Immigration Courts*, *supra* note 26.

132. See Marouf, *supra* note 128.

133. *Id.*

Immigration proceedings are drastically different from judicial court proceedings.¹³⁴ The Department of Justice Executive Office for Immigration Review, under the power of the Attorney General, operates the immigration court system.¹³⁵ Immigration courts are not part of the judicial branch; rather, immigration judges are appointed by the Attorney General.¹³⁶ Those appointed as judge in the immigration courts often have political views that align with immigration enforcement, whereas judges sitting in federal courts are independent members of the United States judiciary.¹³⁷

If an immigration proceeding outcome is unfavorable, an immigrant may appeal the deportation order to the Board of Immigration Appeals, a Virginia-based Department of Justice agency.¹³⁸ However, only a small percentage of immigrants choose to appeal.¹³⁹ The Board of Immigration Appeals may affirm an opinion without providing any rationale or explanation for the outcome.¹⁴⁰

The Board of Immigration Appeals may affirm an opinion without providing any rationale or explanation for the outcome.¹⁴¹ The Attorney General also holds the power to overrule and remove Board members at will.¹⁴² The United States laws also allow the Attorney General to intervene in the appeals process; “the Attorney General can take over the case at the request of the Board of Immigration Appeals or can direct it to himself. Historically, [Attorneys General] have only done this once or twice a year.”¹⁴³ However, former Attorney General Jeff Sessions intervened four times in 2018.¹⁴⁴

If there is no favorable outcome at the Board of Immigration Appeals level, an immigrant can appeal and file a petition for review to the United States Court of Appeals.¹⁴⁵ These petitions must be filed within thirty days of the Board of Immigration appeals decision.¹⁴⁶ However, unlike the Board of Immigration, once an appeal reaches the federal level, the individuals requesting asylum are no longer afforded protection from deportation.¹⁴⁷

134. *See id.*

135. *See Fact Sheet: Immigration Courts, supra* note 26.

136. *See* Marouf, *supra* note 128.

137. *See id.*

138. *Id.*

139. *Id.*

140. *Id.*

141. Marouf, *supra* note 128.

142. *Id.*

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.*

147. *Id.*

Immigrants appealing the federal appellate court risk deportation while awaiting a decision.¹⁴⁸

Occasionally, a district court judge will certify a case as a class action suit and order an injunction applying to all members of a defined class.¹⁴⁹ If these members are of a nationally located class, then the injunction will apply nationally.¹⁵⁰ Thus, any injunction or order that requires the United States Citizenship and Immigration services (USCIS) to act in a certain way are issued from the federal district courts¹⁵¹

2. *The Affirmative Asylum Process*

The affirmative asylum process is for individuals who are physically present in the United States when requesting asylum and are not in removal proceedings.¹⁵² By contrast, the defensive asylum process is when an individual requests asylum as a defense against removal or deportation proceedings from the US.¹⁵³ There are seven steps an individual must undergo to apply for asylum. The steps are as follows:

1. Arrive in the U.S.,
2. Apply for asylum,
3. Undergo fingerprint and background/security checks,
4. Receive an interview notice,
5. Interview,
6. Asylum officer makes determination on eligibility and supervisory asylum, officer reviews the decision,
7. Receive a decision.¹⁵⁴

148. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, ADJUDICATOR'S FIELD MANUAL CHAPTER 14.5 DECISIONS OF FEDERAL Courts (2013), <https://www.uscis.gov/ilink/docView/AFM/HTML/AFM/0-0-0-1/0-0-0-2281/0-0-0-2368.html#0-0-0-334> [perma.cc/2BWY-JEBX].

149. *Id.*

150. *Id.*

151. *Id.*

152. U.S. CITIZENSHIP AND IMMIGRATION SERVICES, THE AFFIRMATIVE ASYLUM PROCESS, <https://www.uscis.gov/humanitarian/refugees-asylum/asylum/affirmative-asylum-process> [https://perma.cc/N6DC-2D3J] (last visited Feb. 3, 2020).

153. *Id.*

154. *Id.*

3. *Immigration and Nationality Act (INA)*

Prior to the INA's creation in 1952,¹⁵⁵ there were a variety of statutes that governed immigration law.¹⁵⁶ The INA gives individuals the right to apply for asylum in the United States.¹⁵⁷ Section 1158(a)(1) of the INA states that:

Any alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section or, where applicable, section 1225(b) of this title.¹⁵⁸

Section 1158(a)(1) does not apply if the "alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection."¹⁵⁹ However, if the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States, then the Attorney General will allow an application for asylum.¹⁶⁰ Essentially, an individual must be persecuted for the above reasons to be eligible for asylum.

Additionally, the INA gives the Attorney General and the Secretary of Homeland Security the power to grant or deny asylum.¹⁶¹ Section 1158 (b)(1)(A) states that,

The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum in accordance with the requirements and procedures established by the Secretary of Homeland Security or the Attorney General under this section if the Secretary of Homeland Security or the Attorney General determines that such alien is a refugee within the meaning of section 101(a)(42)(A).¹⁶²

4. *The Refugee Act of 1980*

The Refugee Act of 1980 was "the first major change in United States immigration law that attempted to address the realities of modern refugee problems by articulating a national policy and providing mechanisms that

155. Immigration and Nationality Act of 1965, 8 U.S.C. § 1158 (2014).

156. *Id.*

157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*

are capable of adapting to changing world events and policies.”¹⁶³ The Refugee Act of 1980 updated the definition of “refugee” in accordance with the definition used in the United Nations Refugee Convention.¹⁶⁴ The Act modified the definition of “refugee” to include a person with a “well-founded fear of persecution.”¹⁶⁵ Under the Refugee Act, a “refugee” is defined as a person “who is outside his/her country of nationality or habitual residence”, or someone who is without any nationality, and is unable or unwilling to return to his or her homeland because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a social group or membership in a political group or party.¹⁶⁶

5. Matter of *A-R-C-G-*

In 2014, the Board of Immigration Appeals (BIA) decided *Matter of A-R-C-G-*, the first case where the BIA issued a binding asylum decision for domestic violence victims.¹⁶⁷ In *Matter of A-R-C-G-*, the respondent was beaten and raped on multiple occasions by her husband in Guatemala.¹⁶⁸ Respondent contacted the Guatemalan police on several occasions but the police stated that they would not get involved in a marital relationship.¹⁶⁹ The court in *Matter of A-R-C-G-* held several pivotal holdings: (1) that the respondent suffered harm that rose to the level of persecution, (2) that the respondent was a member of a “particular social group”, and (3) that the persecution was because of her membership in the particular social group.¹⁷⁰ Domestic violence victims were viewed as a part of a particular social group because the members of the group share a common immutable characteristic: gender.¹⁷¹ The BIA then remanded the case to the immigration judge to

163. Dan Moffett, *What Is the United States Refugee Act of 1980?*, THOUGHTCO. (Nov. 13, 2019), <https://www.thoughtco.com/united-states-refugee-act-1980-1952018> [<https://perma.cc/T83N-HYFZ>].

164. *Id.*

165. *Frequently asked questions about the 1951 Refugee Convention*, *supra* note 99.

166. *Id.*

167. Tatyana Delgado, *Landmark Asylum Decision for Domestic Violence Victims*, CATH. LEGAL IMMIGR. NETWORK. INC., <https://cliniclegal.org/resources/articles-clinic/landmark-asylum-decision-domestic-violence-victims> [<https://web.archive.org/web/20190215201448/https://cliniclegal.org/resources/articles-clinic/landmark-asylum-decision-domestic-violence-victims>] [<https://perma.cc/6TGY-JLXE>] (last visited Jan. 26, 2020).

168. *Matter of A-R-C-G-*, 26 I&N Dec. 338, 388 (BIA 2014).

169. *Id.* at 389.

170. *Id.* at 394–95.

171. *Id.* at 392.

consider whether the government of Guatemala was unwilling or unable to remedy the situation.¹⁷² On remand, the immigration judge did not provide a reason “as to the Guatemalan’s government’s inability or unwillingness to protect the respondent from her abuser”; instead the judge granted asylum upon the stipulation among the parties.¹⁷³

6. Matter of A-B-

In 2018, *Matter of A-B* overruled the precedent set in *Matter of A-R-C-G-*. In *Matter of A-B-*, the respondent’s husband beat her, raped her and threatened to kill her on numerous occasions.¹⁷⁴ She sought protection from the Salvadorian authorities, but they offered her no protection or remedy.¹⁷⁵ The decision held that domestic violence victims are not part of a “particular social group” and the fact that a country has trouble policing domestic violence cannot itself establish asylum claims, reasoning that “a particular social group must ‘exist independently’ of the harm asserted in an application for asylum or statutory withholding of removal.”¹⁷⁶ Further, the decision stated that if a group is defined by the persecution of its members, then the group’s definition extinguishes the need to establish actual persecution.¹⁷⁷ For this reason, the individuals in the group must share a characteristic narrower than their risk of persecution.¹⁷⁸ Furthermore, defining a particular social group in a way that seeks to avoid issues of social particularity by having a narrow definition—for example, Guatemalan women who are unable to leave their domestic relationship where they have children in common—will lack sufficient social distinction to be a distinct social group.¹⁷⁹

7. Grace v. Whitaker

In 2018, a group of plaintiffs appealed a decision denying their asylum based on a decision determined in *Matter of A-B-*; in *Grace v. Whitaker* consisted of twelve adults and children expressed accounts of sexual abuse,

172. *Id.* at 395.

173. Sophia Genovese, *Sessions Likely to End Asylum Eligibility for Victims of Domestic Violence*, THE INSIGHTFUL IMMIGR. BLOG (Mar. 20, 2018), <http://blog.cyrusmehta.com/2018/03/sessions-likely-to-end-asylum-eligibility-for-victims-of-domestic-violence-how-courts-can-resist.html> [https://perma.cc/75CA-NCHP].

174. *Matter of A-B-*, 27 I&N Dec. 316, 321 (2018), abrogated by *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), appeal docketed, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

175. *Id.*

176. *Id.* at 334.

177. *Id.* at 135.

178. *Id.*

179. *Id.*

kidnappings, and beatings in their country of origin to an asylum officer.¹⁸⁰ The plaintiffs were denied the right to seek asylum although the asylum officer found their accounts sincere.¹⁸¹ The decision of the asylum officer was based on the standard set forth in *Matter of A-B-*, which denies asylum to victims of domestic violence because they are not a protected class.¹⁸² The plaintiffs brought this action against the Attorney General arguing that he violated the Immigration and Nationality Act because the *Matter of A-B-* standard created an unlawful and arbitrary heightened standard for a for domestic violence victims.¹⁸³

In *Matter of A-B-*, the court stated the general rule that if a domestic violence victim claims “asylum based on membership in a particular social group, then officers must factor the [standards explained in *Matter of A-B-*] into their determination of whether an applicant has a credible fear or reasonable fear of persecution.”¹⁸⁴ The court in *Grace v. Whitaker* held this general rule violated the Immigration and Nationality act for two reasons: first, “the general rule is arbitrary and capricious because there is no legal basis for an effective categorical ban on domestic violence victims;” and second, “a general rule runs contrary to the individualized analysis required by the INA.”¹⁸⁵ Under current immigration laws, the credible fear interviewer must prepare a case-specific factually intensive analysis for each individual.¹⁸⁶ A general rule that bars asylum seekers based on the category of their abuse is “inconsistent with congress’s intent to bring United States refugee law into conformance with the protocol” and with congress’ intent to read “[a] particular social group” broadly.¹⁸⁷ Consequently, the court further noted that, “in interpreting particular social group in a way that results in a general rule, in violation of the requirements of the statute, the Attorney General ha[d] failed to stay within the bounds of his statutory authority.”¹⁸⁸

180. See generally *Grace v. Whitaker*, 344 F. Supp. 3d 96 (2018).

181. *Id.* at 104–05.

182. *Id.* at 105.

183. *Id.*

184. *Id.* at 126.

185. *Id.*

186. *Id.*

187. *Id.* at 126 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 436–37 U.S. (1987)).

188. *Id.* (citing *Dist. of Columbia v. Dep’t of Labor*, 819 F.3d. 444, 449 (D.C. Cir. 2016)).

Furthermore, the district court addressed the validity of the former Attorney General Sessions’ ruling in *Matter of A-B*.¹⁸⁹ The district court held that it had

exclusive jurisdiction to review challenges to the validity of the expedited removal system. Such systemic challenges include challenges to the constitutionality of any provision of the expedited removal statute. The district court also included challenges claiming that a given regulation or written policy directive, guideline, or procedure is inconsistent with the law.¹⁹⁰

In *Matter of A-B*, the court identified specific guidelines for asylum cases, and stated that these guidelines were “clearly a written policy directive.”¹⁹¹ Therefore, sufficient cause existed to challenge the validity of the case.¹⁹²

8. *Refugee Protection Act of 2019*

In 2019, Senator Patrick Leahy and Representative Zoe Lofgren led the bicameral introduction of the Refugee Protection Act of 2019.¹⁹³ The Act provides for asylum laws that take into consideration domestic violence victims by indicating that these victims may seek asylum.¹⁹⁴ Section 206(c)(5), addressing Refugees of Special Humanitarian Concern, states:

[i]n this section, the term “refugee of special humanitarian concern to the United States” means any individual who, in his or her country of nationality has suffered (or in the case of an individual who remains in his or her country of nationality, has a well-founded fear of suffering)

(A) domestic, sexual, or other forms of gender-based violence, including forced marriage and persecution based on sexual orientation or gender identity.¹⁹⁵

9. *Immigration and Customs Enforcement (ICE): Policy and Healthcare Protocol*

While waiting to hear a decision from the immigration court or asylum application, asylum seekers may be placed in detention centers.¹⁹⁶

“United States law distinguishes between three different types of asylum-seekers: affirmative asylum-seekers who are not in removal proceedings;

189. *Id.* at 118–19 (clarifying that the court is reviewing the credible fear issue from *Matter of A-B*).

190. *Id.*

191. *Id.* at 116.

192. *Id.*

193. Press Release, U.S. House of Representatives: Congresswoman Zoe Lofgren, *supra* note 45.

194. Refugee Protection Act of 2019, H.R. 5210, 116th Cong. § 206(a)(2) (2019).

195. *Id.* § 206(c)(5).

196. XAVIER BECERRA, THE CALIFORNIA DEP’T OF JUSTICE’S REVIEW OF: IMMIGRATION DETENTION IN CALIFORNIA 3 (Feb. 2019).

defensive asylum seekers who seek asylum in removal proceedings before an immigration judge, and asylum seekers who enter the United States without proper documents and are subject to expedited removal.¹⁹⁷ All three types of asylum seekers may be detained under certain conditions.¹⁹⁸ All types of asylum seekers are often detained once they have been denied asylum or have overstayed after their visas expired.¹⁹⁹ Additionally, asylum seekers claiming asylum at a United States' port of entries, or after entering the United States without proper documents, are automatically detained pending an interview to determine if they have a credible fear of persecution.²⁰⁰ If the interviewer finds that the asylum seeker does not have a credible fear of being persecuted in their home country, they are detained and subject to removal.²⁰¹ Asylum seekers who are found to have a credible fear can be released, however, they are often detained until an immigration judge makes a decision about their asylum status.²⁰²

Healthcare standards are in place at detention centers for women²⁰³ but they are rarely enforced, and they do not take into consideration gender sensitive measures for those who have endured domestic violence. The United States Immigrant Customs and Enforcement's (ICE) health care standards provide some expected outcomes, such as appropriate gynecological and obstetrical health care; pregnancy services, including prenatal care and pregnancy testing; and deterrence of ICE officials from restraining pregnant detainees.²⁰⁴

While the ICE health care protocol portrays values of care for human life and health, the reality is that individuals at detention centers are subject to less stringent standards of health care while in custody: the medical treatment provided to detainees is often inadequate, and medical staff are often overworked or under qualified.²⁰⁵ Furthermore, because the financial penalties from the Bureau of Prisons for privately-run detention centers

197. GLOBAL DETENTION PROJECT, *supra* note 8.

198. *Id.*

199. *Id.*

200. INA 235(b)(1)(B)(ii), 8 U.S.C. § 1225(b)(1)(B)(ii); *see also*, GLOBAL DETENTION PROJECT, *supra* note 8.

201. GLOBAL DETENTION PROJECT, *supra* note 8.

202. *Id.*

203. IMMIGRATION CUSTOMS ENFORCEMENT, 2011 OPERATIONS MANUAL ICE PERFORMANCE-BASED NATIONAL DETENTION STANDARDS 322 (last modified Dec. 2016).

204. For a full list of ICE's healthcare expected outcomes in medical care for women, *see id.* at 322–23.

205. GLOBAL DETENTION PROJECT, *supra* note 8.

are so low, paying the penalty for not complying with standards can be less costly than trying to meet the medical standard.²⁰⁶

E. Canada Law

The Immigration and Refugee Protection Act (IRPA) lays out the immigration laws of Canada²⁰⁷ and case law dictates the outcome of domestic violence victims who are seeking asylum.

1. The Immigration and Refugee Protection Act (IRPA)

The United Nation's refugee's definition has been adopted by Canadian law,²⁰⁸ in Division 1 section 96 of the IRPA:

A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
- (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.²⁰⁹

2. Narvaez v. Canada

In *Narvaez v. Canada*, the female applicant from Ecuador had suffered consistent verbal and physical abuse, including rape, by her husband during their marriage and after separation.²¹⁰ She sought protection with the police, but her complaint was erased from the record after her husband bribed the police.²¹¹ Her initial application was denied, but then reversed after appealing to a federal court it was ultimately held that women in Ecuador who have been subjected to domestic violence belong to a particular social group and Narvaez was granted asylum.²¹²

206. *Id.*

207. Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.).

208. *Id.*

209. *Id.*

210. *Narvaez v. Canada*, [1995] 89 F.C. 94 (Can.).

211. *Id.*

212. *Id.*

3. 2012 CanLII 94152

In 2012 CanLII 94152, the female applicant suffered abuse by her husband for many years.²¹³ She sought protection from the Guyanese police on five separate occasions,²¹⁴ and every time, the Guyanese police arrested her husband, gave him a verbal warning, and held him overnight.²¹⁵ However, he was never charged with a crime.²¹⁶ The Immigration and Refugee Board found that while the female applicant was part of a particular social group, she had not presented clear and convincing evidence that the Guyanese authorities did not reasonably try to protect her.²¹⁷ She was denied asylum because she did not meet the standard to be a Convention refugee.²¹⁸

4. *Narvaez v. Canada* vs. 2012 CanLII 94152

In *Narvaez v. Canada*, the female applicant ultimately received asylum because she not only was able to show that she was a victim of domestic violence but also that the Ecuadorian police did not provide her with any form of protection.²¹⁹ In 2012 CanLII 94152, even though the female applicant was a victim of domestic violence, she was unable to prove that the Guyanese police were not willing to protect her because the Guyanese police had taken some measures to reprimand her husband.²²⁰ Canada's immigration proceedings are very stringent: to be eligible to seek asylum based on domestic violence, the applicant must be able to prove both that they were victim of domestic violence and that the police in their country were unable to provide them with protection.²²¹

213. 2012 CanLII 94152, para. 3 (Can. Ont. I.R.B.).

214. *Id.* at para. 4.

215. *Id.*

216. *Id.*

217. *Id.* at paras. 19–20.

218. *Id.*

219. *Narvaez v. Canada*, [1995] 89 F.C. 94 (Can.).

220. 2012 CanLII 94152 (Can.).

221. *Narvaez v. Canada*, [1995] 89 F.C. 94 (Can.); *see also* Seema Kwar, *Asylum Seekers Fleeing Domestic Violence: The Case for a Broader Approach that Better Protects Claimants*, NATO ASS'N OF CAN. (June 23, 2016), <http://natoassociation.ca/asylum-seekers-fleeing-domestic-violence-the-case-for-a-broader-approach-that-better-protects-claimants/> [https://perma.cc/9SPQ-5CQT].

III. LEGAL ANALYSIS

In order to find a better solution for domestic violence victims seeking asylum in the United States, this section will provide an overview of the positive and negative attributes of Sweden's, Germany's, and Canada's asylum laws. It will then conclude by providing judicial and legislative suggestions on how to improve the United States' asylum laws by incorporating international asylum laws.

A. Sweden

Sweden's asylum laws adopted the 1951 Refugee Convention and the Universal Declaration of Human Rights.²²² Sweden recognizes women who are domestic violence victims as part of a particular social group and thus eligible for asylum.²²³ In addition to domestic laws, Sweden's immigration laws are regulated by the European Union's Common European Asylum System²²⁴ and the Istanbul Convention,²²⁵ both of which include provisions to protect women who are domestic violence victims.

Recently, Sweden has been impacted with a huge influx of asylum seekers.²²⁶ Sweden's 2018 asylum policy proposed changes to its previous asylum policies and called for stricter policies and global responsibility-sharing in order to help the economic state of the country, which has struggled due to the high influx of asylum seekers and other immigration patterns.²²⁷ Even though Sweden has recognized women who are domestic violence victims as part of a particular social group and have given them the right to be granted asylum, the process nonetheless has been very difficult due to the huge influx of asylum seekers in Sweden.²²⁸

Sweden has signed and ratified the Istanbul Convention, which states in Article 60 that: (1) parties to the convention must provide the legislative framework to recognize gender based violence as a ground for persecution within the meaning of Article 1 of the 1951 Refugee Convention; (2) a

222. *Refugee Law and Policy: Sweden*, LIBRARY OF CONG., <https://www.loc.gov/law/help/refugee-law/sweden.php> [<https://perma.cc/YA9E-PFFP>] (last visited Jan. 30, 2020).

223. U.N. High Comm'r for Refugees: Evaluation and Policy Analysis Unit, *Comparative Analysis of Gender-Related Persecution in National Asylum Legislation and Practice in Europe* § 412, at 91, EPAU/2004/05 (May 2004).

224. CEAS, *supra* note 2.

225. The Istanbul Convention, *supra* note 13, art. 60.

226. *Refugee Law and Policy: Sweden*, *supra* note 222. During the European "refugee crisis" of 2015, Sweden accepted the highest number of refugees when compared to other European countries.

227. *Id.*

228. *See generally infra* Part I.A.2. (explaining the political problems and difficulties surrounding refugees in Sweden).

gender sensitive interpretation must be given by states to all the other grounds of Article 1; and (3) states must develop gender sensitive reception procedures and support services for asylum seekers.²²⁹ Some of the actions Sweden has taken to implement parts 1 and 2 of Article 60²³⁰ of the Istanbul Convention include doubling the Swedish Migration Agency's staff from 4,000 to 8,000 staff members and requiring the employees to complete gender based violence training in their introductory training programs.²³¹ However, despite the Swedish Migration Agency's acknowledgement of the need for protection of refugee and asylum seeking female domestic violence victims, Sweden has not yet reached the level of the European Union's protection standards.²³²

Sweden has tried to remedy the high influx of asylum seekers by taking a global responsibility approach instead of creating a policy that halts asylum seekers from seeking asylum.²³³ By taking this approach, Sweden has taken a humanitarian stance and has tried to find an alternative to the crisis. Women who are fleeing their country in fear of their abusers are given the opportunity to seek asylum and are not denied that fundamental right.²³⁴ At a minimum, the United States should adopt and follow the approach Sweden has taken toward domestic violence victims who are seeking asylum and give them the opportunity to seek asylum. Further, the United States should try to find a remedy for the high influx of asylum seekers instead of finding ways to prohibit and restrict the number of asylum seekers.

B. Germany

In the summer of 2015, Germany accepted 1.4 million asylum seekers.²³⁵ During that summer, Chancellor Merkel adopted an open door policy,

229. The Istanbul Convention, *supra* note 13, art. 60.

230. *Id.*

231. Eur. Parl. Ass., *Protecting Refugee Women from Gender-Based Violence*, Doc. No. 14284 (Apr. 7, 2017), at ¶¶ 48–49, available at <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=23533&lang=en> [<https://perma.cc/TFV5-LNYG>].

232. *Id.*

233. See GOV'T OFF. OF SWEDEN, MINISTRY OF JUST., SWEDEN'S MIGRATION AND ASYLUM POLICY (2019), <https://www.government.se/government-policy/migration-and-asylum/> [<https://perma.cc/U7XE-GFAN>].

234. *See id.*

235. Niall McCarthy, *Germany is Home to the Most Refugees*, STATISTA: EUROPEAN UNION (June 29, 2018), <https://www.statista.com/chart/14494/germany-is-home-to-the-most-refugees/> [<https://perma.cc/C3LR-RZCU>].

meaning that Germany allowed asylum seekers and immigrants to freely enter into the country.²³⁶ However, due to the high influx of individuals seeking asylum and the community blaming the increase of high crimes rates on immigrants, the government established transit centers in order to return asylum seekers to the countries where they had originally sought asylum.²³⁷ When that is not possible, Germany has agreed to send the asylum seekers back across the border to Austria, the entry point of a significant number of migrants.²³⁸ These drastic changes to Germany's open door policy may contradict the open and humanitarian approach that Germany has taken in the past. Since 2005, persecution based on gender had been routinely recognized as grounds for asylum in Germany.²³⁹ Sadly however, in practice, this type of persecution has been less and less taken into account.²⁴⁰

Germany has also adopted the Istanbul Convention which states that gender sensitive accommodations should be provided in reception centers.²⁴¹ However, in reality, the German reception centers lack any private space for individuals or families.²⁴² Additionally, many individuals staying in these reception centers face depression, assault, and abuse,²⁴³ making these centers unsafe places, where asylum seekers who are in need of gender sensitive accommodations are not given the treatment and attention they need.

Even though Germany's asylum laws are becoming increasingly stricter, Germany still recognizes that domestic violence victims are members of a particular social group and it grants them the opportunity to apply for asylum.²⁴⁴

Furthermore, Germany has found a solution to address the high influx of immigrants by creating a system that sends back asylum seekers who

236. Judith Vonberg, *Why Angela Merkel is no longer the 'refugee chancellor'*, CNN (July 6, 2018), <https://www.cnn.com/2018/07/06/europe/angela-merkel-migration-germany-intl/index.html> [<https://perma.cc/SE5Q-894V>].

237. Nadine Schmidt & Judith Vonberg, *Germany's Merkel strikes deal with interior minister on migration dispute*, CNN (July 2, 2018), <https://www.cnn.com/2018/07/02/europe/merkel-seehofer-government-intl/index.html> [<https://perma.cc/HQA6-4F5U>].

238. *Id.*

239. Heather Bourbeau, *A Refuge Reduced: How Changes in German Asylum Laws and Practices Impact Syrian Women Refugees*, INST. FOR WOMEN'S STUDIES IN THE ARAB WORLD 1, 8 (June 2017), https://iwsaw.lau.edu.lb/publications/images/IWSAW-occasional-paper%2034_Bourbeau.pdf [<https://perma.cc/B6PT-HFJS>].

240. *Id.*

241. The Istanbul Convention, *supra* note 13, art. 60.

242. *Id.*

243. *Id.*

244. *Gender Based Asylum*, THE ADVOCATES FOR HUMAN RIGHTS (Jan. 2010), https://www.stopvaw.org/gender-based_asylum [<https://perma.cc/H8X8-PHEW>].

had originally sought asylum in another country.²⁴⁵ This solution has allowed Germany to address the influx of asylum seekers, but altogether, it has disallowed asylum seekers from seeking asylum and protection from their abusers.

The United States should adopt in its Constitution a convention similar to the Istanbul Convention. Moreover, the United States should go one step further than Germany and ensure that the convention's standards are implemented into the detention centers. By recognizing this right, the United States will be more in line with the United Nation's standard of protection for women seeking asylum.

C. Canada

Due to the United States' comparatively more stringent asylum laws, Canada is facing an influx of immigrants.²⁴⁶ Under Canadian law, women victims of domestic violence are recognized as a "particular social group" and they are given the opportunity to apply for asylum.²⁴⁷ However, while Canada recognizes domestic violence victims as being a part of a particular social group in fear of persecution, the Canadian courts have adopted heightened standards as to what qualifies as a government unwilling to provide protection to domestic violence victims.²⁴⁸

In evaluating asylum applications, Canada considers evidence of a lack of police cooperation in a victims' home country.²⁴⁹ A mere delay in protection will not suffice as proof that the police or government is not helping them seek safety from their abuser.²⁵⁰ For example, in 2012 CanLII 94152, a Guyanese female applicant who suffered abuse by her husband was denied

245. Jenny Gesley, *Germany*, in REFUGEE LAW AND POLICY IN SELECTED COUNTRIES 136 (2016).

246. Stephanie Ali & Katherine Boy Skipsey, *Canada's Asylum Policy Falls Short for Victims of Domestic Violence*, FORDHAM INT'L L.J. BLOG (2019), <https://www.fordhamilj.org/iljonline/2019/4/28/canadas-asylum-policy-falls-short-for-victims-of-domestic-violence> [https://perma.cc/6FYR-RKSH].

247. *Id.* But see Tony Keller, *Canada Has its Own Way of Keeping Out Unwanted Immigrants*, THE ATLANTIC (July 12, 2018), <https://www.theatlantic.com/ideas/archive/2018/07/canada-immigration-success/564944/> [https://perma.cc/MB4E-SE2B].

248. Ali & Skipsey, *supra* note 246.

249. *Id.*; Diana Nasr Demian, *Interpreting Narratives of No Return: Canadian Asylum Claim Decision and the Emergence of the "Anti-Refugee"* 34 (Aug. 2016) (unpublished M.A. thesis, University of British Columbia) (on file with University of British Columbia Library).

250. Demian, *supra* note 249, at 34–35.

asylum because the local police had intervened, gave the abuser verbal warnings, had arrested him, and kept him over night on various occasions.²⁵¹ Because the police had intervened, though ineffective, it showed that the government made an effort to help her therefore, the court denied her application for asylum.²⁵² Although applying stringent standards, Canada still allows for domestic violence victims to seek asylum;²⁵³ it thus properly follows the standards set out by the United Nations and the human rights standards.

The United States should adopt a similar standard; it could help address the high influx of asylum seekers. Such heightened standards on who would qualify for asylum could potentially lower the number of individuals applying, without putting a ban on all domestic violence victims seeking asylum.

IV. PROPOSED RECOMMENDATION FOR THE UNITED STATES ASYLUM LAWS

The United States, through the decision in *Matter of A-B-*, stated that domestic violence victims are no longer a particular social group cannot seek asylum in the United States based on this ground.²⁵⁴ Then in *Grace v. Whitaker*, the court held that the decision in *Matter of A-B-* was inconsistent because the standards went against the INA and that there was no legal basis for an effective categorical ban on domestic violence victims.²⁵⁵ The holding in *Grace v. Whitaker* better conforms to Article 14 of the Universal Declaration of Human Rights, which the United States is a party to, and asserts that everyone has the right to seek and to enjoy asylum from persecution.²⁵⁶ In denying women who are domestic violence victims the right to seek asylum from their persecutors, the holding in *Matter of A-B* is denying women their basic human rights.²⁵⁷

The United States has a high number of applicants who are coming to the United States with the hopes of seeking asylum.²⁵⁸ In an effort to remedy

251. *Id.* at 33–34.

252. *Id.* at 33–35.

253. *Id.* at 33–36; Keller, *supra* note 247.

254. *Matter of A-B-*, 27 I&N Dec. 316, 346 (2018), abrogated by *Grace v. Whitaker*, 344 F. Supp. 3d 96 (D.D.C. 2018), appeal docketed, No. 19-5013 (D.C. Cir. Jan. 30, 2019).

255. *Grace v. Whitaker*, 344 F. Supp.3d 96, 105 (D.C. Dec. 17, 2018).

256. The 1948 Universal Declaration of Human Rights, *supra* note 20, art. 14.

257. *CGRS and HRW Release Video, Call on Government to Restore Protections for Domestic Violence Survivors*, CTR. FOR GENDER & REFUGEE STUD. (Jan. 23, 2019), <https://cgrs.uchastings.edu/news/cgrs-and-hrw-release-video-call-government-restore-protections-domestic-violence-survivors> [<https://perma.cc/Y257-N764>].

258. *See generally* DEPT. OF HOMELAND SECURITY, NADWA MOSSAAD, OFFICE OF IMMIGRATION STATISTICS ANNUAL FLOW REPORT: REFUGEES AND ASYLEES: 2017 *Fact Sheet*:

the high influx of asylum seekers, the United States attempted to ban and to deny all domestic violence victims the ability to apply for asylum.²⁵⁹ However, the ruling in *Grace v. Whitaker* once again gave domestic violence victims the chance to apply for asylum.²⁶⁰ Even though domestic violence victims now have the ability to apply for asylum, the United States still has not recognized domestic violence as a particular social group. *Grace v. Whitaker* only recognized that there is no legal basis for an effective categorical ban on domestic violence victims presenting themselves at the border but it did not recognize domestic violence victims as part of a particular social group.²⁶¹

The United States should adopt laws similar to Canada's, where women who are domestic violence victims are recognized as part of a particular social group.²⁶² Altogether not recognizing women who are domestic violence victims as a particular social group in fear of persecution does not provide a gender sensitive interpretation of what it means to be a member of a particular social group.

Unlike the European Union, the United States is not a part of a union where it can rely on other countries to share and manage the huge influx of immigration. But it could potentially adopt an immigration policy similar to Sweden's 2018 immigration policy, which implements stricter policies and aims to create methods to share global responsibilities with neighboring countries.²⁶³

In addition to recognizing domestic violence victims as a particular social group, the United States should create a legislative framework similar to the Istanbul Convention. Recently, the United States proposed a Refugee Protection Act, in 2019, that recognizes domestic violence victims as persons who qualify for asylum.²⁶⁴ However, this Act does not provide a framework

U.S. Asylum Process, NAT'L IMMIGR. F. (Jan. 10, 2019), <https://immigrationforum.org/article/fact-sheet-u-s-asylum-process/> [<https://perma.cc/YB3W-Q5AW>].

259. See generally *Matter of A-B-*, 27 I&N Dec. 316, at 317–18.

260. See *Grace v. Whitaker*, *supra* note 255, at 105.

261. *Id.* at 131–32.

262. See COMM. ON IMMIGRATION AND NATIONALITY LAW OF ASS'N OF THE BAR OF THE CITY OF N.Y., GENDER-RELATED ASYLUM CLAIMS AND THE SOCIAL GROUP CALCULUS: RECOGNIZING WOMEN AS A "PARTICULAR SOCIAL GROUP" *PER SE* 15 (2003); see generally Victoria Foote, *Refugee Women as a Particular Social Group: A Reconsideration*, 14 REFUGEE 8, 8–10 (Dec. 1994) (defining refugee women as a particular social group and subsequent critiques).

263. See generally GLOBAL DETENTION PROJECT, *supra* note 8.

264. See Refugee Protection Act of 2019, H.R. 5210, 116th Cong. § 206(a)(2) (2019).

that takes into consideration gender sensitive interpretation of the particular social group.²⁶⁵ Therefore, the United States would benefit from adopting a law similar to the Istanbul Convention.

By adopting laws similar to the Istanbul Convention, the new legislation could provide a legal framework that recognizes “gender based violence as a grounds for persecution,” provide “gender sensitive” interpretations of membership in particular social groups, and “develop gender sensitive reception procedures and support services for asylum seekers.”²⁶⁶ Currently, those seeking asylum in the United States and those who are waiting for their applications to be processed face detention, and only some of them are allowed to live in the United States.²⁶⁷ Similarly to those detained in Sweden and Germany, those who are detained in the United States experience harsh living conditions, such as housing with individuals convicted of criminal offenses, inappropriate and excessive physical restraint, and inadequate access to healthcare.²⁶⁸ Creating a law similar to the Istanbul Convention would not only provide a legal framework that would recognize gender based violence and provide gender sensitive perspectives, but also provide services that protect the well-being of victims and offer remedies to victims in detention or reception centers.

A. Legislative Recommendations

The INA lays out who is eligible for asylum, the exceptions to eligibility, and who is responsible for deciding eligibility.²⁶⁹ The INA requires, among other criteria, that an individual’s life must be “threatened on account of race, religion, nationality, membership in a particular social group, or political opinion.”²⁷⁰ This language was adopted from the United Nations 1951 Refugee Convention, Article I, which states individuals should be granted asylum if they are:

[A person] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a

265. *Id.*

266. EUR. PARLIAMENT, *supra* note 12, at 9.

267. Camila Domonoske et al., *Trump Administration Will Send Asylum-Seekers To Mexico While Claims Are Processed*, NPR (Dec. 20, 2018), <https://www.npr.org/2018/12/20/678643441/trump-administration-will-send-asylum-seekers-to-mexico-while-claims-are-process> [<https://perma.cc/33LF-6AD6>].

268. *The U.S. Human Rights Record*, THE ADVOCATES FOR HUMAN RIGHTS, https://www.theadvocatesforhumanrights.org/u_s_human_rights_record.html#Violence%20Against%20Women [<https://perma.cc/4BVM-AH3E>] (last visited Jan. 20, 2019).

269. 8 U.S.C. § 1158 (1952).

270. § 1158.

nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.²⁷¹

However, the INA is written in the negative, stating that an individual will not be eligible to receive asylum if:

[the] alien's life or freedom would not be threatened on account of race, religion, nationality, membership in a particular social group, or political opinion, and where the alien would have access to a full and fair procedure for determining a claim to asylum or equivalent temporary protection, unless the Attorney General finds that it is in the public interest for the alien to receive asylum in the United States.²⁷²

While the INA essentially states that asylum should be given to those who are in fear of persecution, the Act should mirror the positive language used in the United Nations 1951 Refugee Convention which more clearly reflects international standards of human rights. Additionally, the Act should incorporate the following ideals from the Istanbul Convention that state that parties to the Convention must (1) provide a legislative framework that recognizes gender based violence as a ground for persecution within the meaning of Article 1 of the 1951 Refugee Convention; (2) provide a gender sensitive interpretation of all the other grounds of Article 1, e.g., membership of a social group; and (3) develop gender sensitive reception procedures and support services for asylum seekers.²⁷³ By incorporating the ideals from the Istanbul Convention the United States will be better suited to help women who are domestic violence victims.

The proposed Refugee Protection Act of 2019 should incorporate the following:

1. Individuals shall be given the right to apply for asylum if they are in fear of persecution due to their race, religion, nationality, membership in a particular social group, or political opinion, and the government in their country of origin has not afforded them protection.
 - a. Those who suffer domestic violence victims or victims of violence should be recognized for purposes of this section.

271. The 1951 Refugee Convention, *supra* note 19, at 14.

272. § 1158.

273. EUR. PARLIAMENT, *supra* note 12, at 9.

- b. “Particular social group” shall be defined as mass groups of people who endure similar experiences globally.
 2. Additionally, those who are persecuted based on gender should be recognized as a particular social group and should be eligible for asylum based on this ground.
 - a. Gender-sensitive policies must be adopted and followed in reception and detention centers, and in particular when dealing with victims of abuse.
 - b. Domestic violence training should be provided to employees who work at ICE detention centers in order to provide the best care for those who are victims of domestic abuse.

Furthermore, in addition to amending the INA, the United States should follow in the steps of Germany and incorporate a right to asylum into the United States Constitution. The article to the United States Constitution should be as follows: An individual persecuted on political grounds shall have the right to asylum. Political grounds shall be defined as individuals in fear of persecution due to his/her race, religion, nationality, gender, membership in a particular social group or political opinion, and the government of his/her country has not afforded them protection. The term particular social group shall include mass groups of people who endure similar experiences globally.

B. Judicial Recommendations

In the United States, immigration courts are not a part of the federal court system but rather they are a part of homeland security, subject to the attorney general.²⁷⁴ The fact that immigration courts are not a part of the judicial branch creates situations where the appointed judge may not be impartial.²⁷⁵ Impartial judges can ameliorate the potential for biased decisions.²⁷⁶

Additionally, the courts should adopt a standard similar to Canada. The courts in Canada have recognized that domestic violence victims are part of a particular social group and have heightened requirements in place to determine whether their home country is providing protection from the

274. *Fact Sheet: Immigration Courts*, *supra* note 26.

275. *AILA Joins Senators in Call for Immigration Court Reform and Access to Counsel*, AMERICAN IMMIGRATION LAWYERS ASS’N (Mar. 6, 2019), <https://www.aila.org/advocacy/media/press-releases/2019/aila-joins-senators-in-call-for-immigration-court> [<https://perma.cc/W7MY-CZSF>].

276. Immigration Court Improvement Act of 2019, S. 663, 116th Cong. (2019).

abuser.²⁷⁷ By adopting a similar approach to Canadian courts, the United States would have a systematic judicial procedure for accepting and denying domestic violence asylum seekers. By incorporating the legislative change provided above, the United States courts should adopt a standard similar to the Canadian court's procedure. The judicial standards that should be implemented are as follows:

1. The victim must be a part of a particular social group:
 - a. Particular social groups include domestic violence victims.
 - b. The asylum applicant must provide proof that they are a part of the particular social group by providing the courts with evidence of abuse.
2. The victim must prove that his or her home country's government failed to provide he or she with protection.
 - a. This standard should be given more weight.
 - b. The government has not failed to provide protection if the government has aided or helped the victim. However, the government has failed to provide protection if the government did not help the victim because of lack of resources or authority or the government was not able to provide the best protection.

If the domestic violence victim is unable to provide evidence of abuse by her abuser, asylum should not be granted. Additionally, if the domestic violence victim is unable to prove that the government failed to provide protection from his or her abusers, the domestic violence victim will not be granted asylum.

By adopting these recommendations, the United States will be able to classify domestic violence victims as part of a particular social group. The United States government will be able to meet its goal in reducing the amount of asylum seekers in the United States by imposing heightened standards that would deter those who do not meet the requirements. The United States will be able to provide relief and remedy for those domestic violence victims who are in need of protection, thereby adopting a judicial system that provides a humanitarian approach.

277. Lipinski, *supra* note 17.

V. CONCLUSION

United States' asylum laws are currently unstable. Although current case law, following *Grace v. Whitaker*, provides domestic violence victims with a chance to apply for asylum, the Trump administration has appealed and a new decision in opposition of asylum seekers is pending. The denial of asylum will lead to deportation back to places where these victims will endure not only psychological and mental injury but also continuous abuse that could lead to serious injury or even death. This Comment proposes that given the current instability of the United States law on asylum for domestic violence victims, the United States should take on a more global and humanitarian role in order to protect women who are domestic violence victims.

Former Attorney General Sessions' approach towards victims of violence seeking asylum was extreme. It had completely eliminated the possibility of a domestic violence victim from receiving asylum in the United States. The holding in *Grace v. Whitaker* has re-opened a window to allow domestic violence victims to be granted asylum. However, the chances of appeal and further changes in legislation could lead to negative impacts on domestic violence asylum: the future is unclear. By adopting provisions similar to the Istanbul Convention, the United States could create procedures and regulations for domestic violence victims that better protect them, while still maintaining its policy considerations and concerns.

These changes would put the United States in alignment with the United Nations asylum standards which establishes an individual's right to claim asylum on the basis of gender-based persecution and crimes. By taking a more humanitarian approach, not only will domestic violence victims' benefit, but society as a whole will benefit. Creating an atmosphere where compassion and kindness are afforded to other individuals will generate a society in the United States that promotes diversity and inclusion for all. Furthermore, if the United States were to take this type of approach, Tatiana Burbano who was mentioned at the beginning of this Comment and who escaped her abusive husband, could feel as if she had reached a safe harbor in the United States, and she would be protected and be able to live a life free of torment and abuse.