

**ASYLUM IN THE U.S.: DOMESTIC BARRIERS TO GENDER-BASED
PROTECTION**

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Master of Arts

In

Political Science

by

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San Francisco, California

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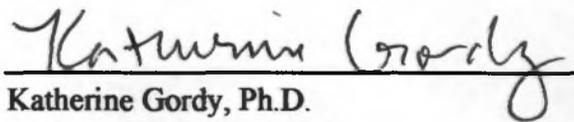
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CERTIFICATION OF APPROVAL

I certify that I have read *Asylum in the U.S.: Domestic Barriers to Gender-Based Protection* by Colleen Keane Walsh, and that in my opinion this work meets the criteria for approving a thesis submitted in partial fulfillment of the requirement for the degree Master of Arts: Political Science at San Francisco State University.



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ASYLUM IN THE US: DOMESTIC BARRIERS TO GENDER-BASED
PROTECTION

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2019

Due to the lack of reference to gender within asylum law, gender-based persecution has been widely debated as falling outside the scope of international protection. Although the U.S. has seen some legal success in securing asylum for seekers with these types of claims through a more flexible use of the particular social group category, there continues to exist a lack of consistency in the general approach to determining these cases at the procedural and judicial level. Given that U.S. asylum law itself has not changed, this deviation in interpretation and adjudication can be attributed to changes in political leadership and domestic policies. In looking at the asylum determinations of gender-related cases from two recent contrasting presidential eras, it is clear that the judgment of these claims and the level of expansion of the PSG category to include gendered groups are largely subjective to executive approaches to asylum and immigration policy, as well as preexisting domestic factors that influence judicial decisions.

I certify that the Abstract is a correct representation of the content of this thesis.



Chair, Thesis Committee

5-16-2019
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TABLE OF CONTENTS

List of Tables.....	vii
Introduction.....	1
Chapter 1: International Law.....	14
Chapter 2: Gender-Based Asylum from a Feminist Perspective.....	35
Chapter 3: Domestic Politics of Gender-Based Asylum.....	51
Chapter 4: Obama Era Case Outcomes.....	68
Chapter 5: Trump Era Case Outcomes.....	82
Chapter 6: Discussion and Conclusion.....	98

LIST OF TABLES

1. CGRS Case Outcomes 1/2013-12/2016.....	72
2. CGRS Case Outcomes 1/2017-2/2019.....	85

Refugee law is encompassed by a combination of agreed-upon standards of customary law, conventions with which states are party to, and widely accepted fundamental norms by which the international community conducts its human rights practices. The Refugee Convention of 1951 and the 1967 Protocol Relating to the Status of Refugees are the predominant binding instruments among states that recognize and define who qualifies for refugee status and the rights of individuals who wish to seek asylum. Modeled after Article 14 of the 1948 Universal Declaration of Human Rights, these standards describe the responsibility of sovereign states to recognize the rights of persons to seek refuge from persecution they have endured on account of their race, religion, nationality, political opinion or membership to a particular social group. However, despite the normative reverence upon which these instruments are built, sovereign nations continue to reserve the right adjudicate these concepts within their own political and legal landscape, as states maintain the freedom to uphold these standards in their domestic policies and practices as they deem fit. The ambiguity of asylum law leaves much room for interpretation, and the precarious nature of what constitutes persecution is determined subjectively and, in most states, on a case by case basis; for asylum-seekers whose claims *debatably* fall within the five explicated grounds, the possibility of refuge has proven extremely difficult.

QUESTION AND HYPOTHESIS

Over the past few decades, gender-based persecution has been debated and discussed as an essential area missing from asylum law, as issues that involve gender specifically -- sexual assault, spousal abuse, and LGBT-targeted violence -- have been widely acknowledged by the international community as societal issues that plague

countless populations. Despite the various international instruments aimed at acknowledging gender-based violence from an interpretive standpoint, U.S. asylum law itself has not been altered or amended to specifically reference gender; in spite of procedural changes that have been implemented to approach these claims with gender-sensitivity, cases of this nature have remained especially vulnerable to the U.S.'s evolving political landscape. Furthermore, like other classifications unrecognized by asylum law, most applicants seeking refuge from gender-related persecution are compelled to base their claim upon membership to a particular social group, the category which is arguably the most subjective to interpretation and ideology.

Given this, the extent to which gender-based persecution has been recognized as a valid claim for asylum has been largely reliant on the legal approach endorsed by the U.S. government at the time, and the corresponding domestic policies and procedures that have been implemented and practiced in adjudicating these cases. Is the domestic expansion of the social group category in asylum law an effective strategy to create changes to U.S. asylum standards, in the absence of amendments to asylum laws? My hypothesis is that domestic policies and standard procedures that the U.S. has adopted over the years to expand the understanding of gender-based violence as persecution based on social group have not been enough to broaden the approach to asylum law to consistently include victims of gendered persecution. Furthermore, the interpretation of the law was and continues to be largely influenced by the political and ideological climate in the U.S. and its leaders' approach to immigration and the role of asylum as a mode of protection. Given these constraints, domestic efforts to expand the flexibility of the particular social group category to include victims of gender-based persecution are

limited in their ability to broaden the normative understanding of asylum law and its five categories to provide recourse for groups that are not formally recognized within asylum law.

SIGNIFICANCE

Broadly speaking, highlighting the relationship between the adoption of international norms and their relative intent through measures that have been practiced by the U.S. at the domestic level, as well as the extent to which these norms have become legitimately adopted as benchmarks in U.S. domestic policy and its legal approach could allow for a better understanding of the obstacles and barriers that have served as a hindrance to a more human rights approach to asylum law. This analysis could speak to the larger question of how domestic policy practices and standards serve the convenient interests of states during a specific time or political era, and the lasting effects this could have on the extent to which general human rights norms are actually enforced within national governments.

More specifically, this discussion could contribute to the ongoing discourse pertaining to asylum law and the debatable qualifications for refuge, especially in cases involving gender-related persecution. A closer examination into domestic policy measures relevant to asylum could allude to a potential relationship that may or may not exist between changes in policy and changes in the interpretation of asylum law, particularly the social group category. Furthermore, investigation into the unique difficulties that are specific to gender-related claims can allow for a better understanding of why these cases face challenges that are subjective to political leanings and considerations, and not just the legal interpretation of asylum law.

To provide contextual background to this analysis, a discussion of why gender is a contested asylum category is necessary, as well as the gender-neutral context in which the term “refugee” is approached. There are several theories pertaining to the overlooking of sexual assault and gender-based violence that support the notion that there exist some very specific difficulties in addressing this type of abuse in any legal capacity. In more cases than not, gender –based persecution involves sexual and/or domestic assault which is typically regarded as “private” in the categorical sense; not only does this approach often prevent this type of abuse from meeting the standard of persecution, but the propensity to regard these cases as isolated incidents of harm contradicts the notion that gender based violence and persistent violence against women represent a societal epidemic. Furthermore, it has proven extremely difficult for victims of gender-based persecution to adequately demonstrate that the abuse they have suffered is *on account of* their gender or sex, and not simply methods of abuse that are *specific to* their gender or sex; as such, gender-related claims are typically regarded as falling outside of the scope of asylum law. Despite the acknowledgement that a propensity towards gender-motivated violence exists around the world, asylum has yet to be fully accepted as the proper recourse.

Understanding the process by which the principles that form international standards for human rights are implemented and internalized at the domestic level could help explain some of the approaches that the U.S. has taken in adjudicating asylum law over the last few decades. Although the U.S. has not changed the law itself, the general practices and procedures pertaining to asylum have evolved in congruence with political leadership. As different levels of power have faced unique challenges in their efforts to

expand and develop national asylum standards, domestic sociopolitical influences have also continued to impact progress both affirmatively and defensively.

METHODS

In order to highlight and identify the political subjectivity with which gender-related claims are vulnerable to, an analysis of actual determinations is imperative. To determine if or the extent to which changes in policy and governmental ideology are synonymous with changes in the legal interpretation of the asylum categories to include or discredit gender-related claims, I plan to examine the determinations and outcomes of recent gender-related cases from two different presidential administrations, each with vastly contrasting policies and approaches pertaining to immigration, asylum, and gender-based protection. An in depth analysis of the disparities between these two groups of outcomes, assuming any exist, can allow us to see if and how domestic political factors create barriers in these types of cases; furthermore, an examination of these decisions and the use of the particular social group category can help us better determine if or how the PSG category is an effective strategy in gender-related cases.

In order to do this, I will use a database provided by UC Hastings' Center for Gender and Refugee Studies, an organization that works to provide legal training and research for attorneys representing migrants with gender-related claims, as well as guidance and support for asylum seekers fleeing this type of persecution. The Center was founded in 1999 by Karen Masulo, following her involvement in the Matter of Kasinga, a landmark case in which asylum was granted to a young Togolese woman who fled genital mutilation and forced marriage in her home country. Since its inception, the Center has consistently and relentlessly advocated for migrants who have experienced similar

atrocities, whose precarious experiences of persecution have left them unprotected by asylum law. The CGRS provides tools and training for attorneys, as well as scholarship and research on international policy and human rights in an effort to better represent and counsel their clients and colleagues. The cases they take on are predominately gender-related, involving domestic abuse (both partner and child), LGBT-related asylum, female genital mutilation (FGC), forced marriage and polygamy, sexual assault and rape (including gang-related), and specifically “violence and persecution, committed with impunity when governments fail to protect their citizens” (CGRS 2019). From an academic standpoint, the Center for Gender and Refugee Studies has continued to remain the country’s primary resource for scholars and researchers examining policy and human rights development with regards to gender-based asylum, while also providing counsel and support for victims who have been subjected to this type of abuse. Furthermore, the Center’s lawyers and advocates have solidified themselves as the leading representatives for applicants with these types of claims, with an unsurpassed knowledge of this particular area of the law and its distinct challenges (2019).

DATA COLLECTION

To obtain these cases, I will use the CGRS case outcomes database, which includes records of nearly 16,000 cases. Despite the CGRS’s focus on gender-related cases, the database also includes thousands of asylum case outcomes unrelated to gender. In order to access only gender-related cases, I will screen the search by limiting the outcomes to cases only involving gender based persecution; to do this, I will use the following filters: cases involving domestic violence (partner abuse only), future and/or past female genital cutting, sexual assault and/or rape (including gang-related), sexual

orientation, gender identity, marriage related harms, child/forced marriage, and sex trafficking/slavery. To determine whether or not a relationship exists, I will examine 80 gender-based asylum cases and their outcomes, 40 decided during Obama's second term (January 2013 through December 2016), and 40 decided during the recent Trump administration (January 2017 until present).

TIMELINE AND JUSTIFICATION

The purpose of comparing case outcomes and decision bases between these particular eras is to determine the extent to which political objectives and domestic changes actually influence the adjudication of gender-related cases. Given that the law itself has not changed in its lack of recognition of gender as a protected category, it may be possible that trending interpretations to either expand or restrict the particular social group category to include gender are the result of the ideological and political climate, domestic practices related to the adjudication of asylum claims, or general attitudes towards immigration policy. These two administrations are as recent as they are different in their approach to asylum. Furthermore, the change in leadership and authority between these two eras is synonymous with the legal shift in course for gender-based asylum, exemplified by the progressive decision in the *Matter of A-R-C-G-* in 2014, followed by its subsequent overruling in the *Matter of A-B-* in 2018.

Obama Era

The Obama Administration began pushing for asylum protections for victims of gender-based persecution back in 2009, with the decision to grant asylum to a female victim of domestic abuse from Mexico. The case, known as the *Matter of L-R-* was one of the first victories for domestic violence and gender-based asylum since 1996, as the

Bush Administration had stalled many of the legal strides made by Clinton to legally recognize domestic violence and sexual abuse as persecution (The Guardian 2009). The Obama era's approach to adjudicating many of these claims relied largely on the notion that the victims in question were unable to escape the physical or sexual abuse they had suffered or obtain protection from their governments, as violence against women was embedded into the cultures of their own countries (2009). However it wasn't until the ruling decision in the *Matter of A-R-C-G-* in 2014 that the legal interpretation of the particular social group category began to progress; according to the Cornell Law Review, this ruling as well as its vocal support by the President led to a "trend in social group definitions being scrutinized less strictly", allowing for a more flexible standard for membership to include gender-motivated violence (Cornell 2018).

In 2014, the Obama Administration was faced with a surge of women and children attempting to enter United States by way of the southern border, with the majority coming from Central America's Northern Triangle: El Salvador, Guatemala, and Honduras. While organized crime and gang violence have plagued some of these communities for decades, sexual assault and rape became increasingly prevalent between 2008 and 2013, as well as the murder rate of women; nearly 40% of migrants coming into the U.S. during 2014 were women, an increase of nearly 15% since Obama's previous term (NY Times 2014). While we cannot know for sure that more women and victims of gender-based persecution were granted asylum during Obama's second term, we can reasonably suggest that more of these types of cases were adequately considered, as Obama's policy ensured that claims of this nature were valid and eligible for review. Furthermore, given the legitimate recognition during this era that marital and familial

status, as well culture and country of origin could solidify membership to a particular social group, it can be inferred that the particular social group category was practiced more flexibly during this time to include gender-based persecution as grounds for asylum.

Trump Era

The Trump Administration has been consistently vocal about their feelings regarding immigration, border control, and their concerns about allowing certain migrant groups into the United States. Apart from their employment of a “zero-tolerance” policy at the border, Trump has utilized legal tactics to curb the number of asylum grants and limit the flexibility of asylum law to include unrecognized groups. In January of 2018, now former Attorney General Jeff Sessions issued a decision suspending judges in immigration courts from practicing administrative closure, a tactic that had been used in federal immigration courts and the Board of Immigration Appeals as a means to “decline prosecuting low priority cases without formally terminating them”, allowing immigration judges to remove cases from their dockets without issuing final decisions (Arthur 2018). It has been inferred that many judges hold off on making final decisions in immigration cases in an effort to alleviate some of the administrative difficulties that often arise with respondents, as well as to allow for proper legal counsel to be obtained and potentially to delay deportation, a strategy often employed in asylum cases; not only do these cases often take years, but it is not atypical for applicants to lack necessary legal resources or evidence in their hearings. Not only has this order principally lessened the authority of immigration judges nationwide, but it has sped up hasty asylum denials and deportations.

The Trump Administration's revocation of Obama's policy to include victims of gang and domestic violence as protected asylum seekers has changed the procedural expectations for asylum as well as the legal standards for determining membership to a particular social group, as Sessions' decision in the *Matter of A-B-* reinforced the notion that gendered abuse constitutes a "personal crime" not equitable to persecution. Because of the lack of explicit reference to spousal, sexual, or gender motivated violence in asylum law, this policy represents a legal loophole for the U.S. government, in which they can legally deny a substantially large percentage of potential asylum applicants physical entry into the United States, or legitimate consideration for asylum on behalf of the American legal system. Not only has this policy severely restricted the interpretation of the particular social group category to include gender-related persecution, but its suggested analysis is politically motivated in both practice and interpretation.

HYPOTHESIS

The purpose of this case analysis and comparison is to identify the thematic trends that exist among these two eras in terms of how gender-related cases are adjudicated, assuming these trends are present. In order to do this, I will utilize a strategy of thematic analysis to identify patterns and themes within the cases, in an effort to deduce what factors are most salient within the two eras, and the extent to which the disparity in policy has affected the examination and determinations of these cases (Maguire & Delahunt 2017). These themes and patterns may reflect the current domestic approach to asylum and immigration during each era, as well as judicial constraints and pressures that may have been imposed by executive orders and expectations as well as the political climate. To identify these patterns, I will focus predominately on the flexibility and expansion of

the particular social group category and its frequency and effectiveness, as well as general trends in the type of persecution discussed in the individual case; despite gender-based cases being the focus of this study, the specific nature of the abuse can vary substantially, from domestic and gang violence and LGBT-motivated persecution to forced marriage and polygamy. In addition to the broader themes present in these cases, as well as their final outcomes, I will look at other factors of the case that may have been influential in the decisions to grant or deny asylum. In order to determine whether or not the domestic policies between the two eras resulted in interpretive differences at the judicial level, I will look predominately at the basis for which asylum was either granted or denied. Furthermore, I will examine other possible trends that may exist among the cases that may have been determining factors; these include the applicant's country of origin, the jurisdiction in which the decision was made (city, state), and disparities between decisions made in asylum offices and immigration courts.

I hypothesize that the case outcomes between the two eras will reflect differences in the legal interpretive approach between the Obama and Trump eras, and the general effectiveness of the particular social group category as a means to claim asylum for gendered persecution will vary between the two eras. I theorize that in the Obama era: 1) the particular social group category will be used more flexibly, in the connection between the type of persecution suffered, the individual's gender/sex, and the individual's membership to a PSG will be stronger, 2) the types of persecution suffered (within the realm of gender-based abuse such as spousal abuse, FGC, rape, etc.) in successful cases will be more varied and 3) the location or jurisdiction of the hearing will not represent a determining trend in grants and denials. I hypothesize that in the Trump era: 1) the

particular social category will be used less frequently and more literally; in other words, there will be less of a correlation between the type of persecution suffered, the individual's gender/sex, and their membership to a PSG, 2) the types of persecution among successful cases and in those where PSG is claimed will be less varied, and 3) there may be an identifiable trend between the location of the hearing and final outcomes.

LIMITATIONS

The limits of this case study are primarily a result of the incongruity in the levels of descriptions of the cases on the CGRS database, as well as the disparity between the cases recorded and the actual number that were decided in the last six years. The largest limitation faced in this analysis is the disproportion between grants and denials; contrary to expectations, most of the judicial cases have concluded in legal victories on behalf of gender-based claims, therefore, the number of cases where asylum was denied are few, making it difficult to identify a trend in denials between the two areas. Although we can reasonably assume more claims were denied under Trump, we are looking for trends in the *bases* for which cases were denied, in an effort to see the interpretive differences between the administrations. Secondly, the case outcomes vary in their levels of description; while the majority provide the bases for the decision of the judge or officer, many are limited in the amount of detail they provide for the grant or denial of asylum. While the country of origin and gender is provided for every case description, there are few who fail to provide the location or jurisdiction of the hearing. Furthermore, although country of origin may be a determining factor in many of these cases, the overwhelming majority of claimants in this case collection have come from the Northern Triangle in Central America (Honduras, El Salvador, Guatemala) and Mexico; given the lack of

variation among the countries of nationality, it is difficult to argue that this would represent a determining trend in influencing outcomes.

ROADMAP

To lay the foundation for asylum law in the domestic arena, this project begins with a discussion of the international instruments with which the United States is party to. Not only do these treaties lay the groundwork for the fundamental principles of domestic asylum law in the U.S., but they provide a framework for the human rights norms and objectives that govern the international community. Following that chapter is a literature review of gender-based asylum from a feminist perspective, and an examination of the particular difficulties and challenges associated with gender-based persecution and the legal realm. The project continues with a review of the relationship between domestic politics and gender-based asylum, and the levels of political leadership that influence determination processes; this chapter also introduces a case prototype that has reflected the general progress and dispute surrounding gender-based asylum. The case studies in the following chapters begin with an analysis of the current domestic policies and practices pertaining to immigration and asylum during that era, followed by a survey of the gender-based case outcomes and a thematic analysis of the determinant patterns. I conclude this project with an analysis of my findings.

CHAPTER 1: INTERNATIONAL LAW

Human rights laws and norms are principally represented by a series of international legal instruments, which provide the basis and foundation for domestic laws and practices within individual states. These international covenants are, in essence, an agreement among nations to uphold a relatively united approach to conducting human rights practices, while providing an ideal set of standards to be practiced in congruence with national laws. Although international law articulately expresses a contractual and legitimate expectation to be observed by its signatories, and is therefore legally binding among its Contracting States, it generally mirrors more customary ideals with which laws can embody, rather than practical strategies for adjudicating human rights statutes. That said, participating nations and their governments do possess a certain measure of autonomy and self-determination with regards to their own application and practice of these legal standards, and often, the extent to which domestic laws and procedures actually reflect and uphold these international norms tends to fluctuate among various states. Furthermore, the manner in which universal legislation and its purposes are translated and implemented into domestic laws is largely influenced by the respective social, political, economic, and cultural climate of a given state. Given this reality, the practical expansion of these human rights norms varies within the international community.

Asylum represents an area of the law which is notably diverse among different states; in other words, despite the existence of the Refugee Convention as the dominant legal covenant with which asylum laws are based, the interpretation of the law varies among participating countries, which is reflected in their general practice and respective

domestic policies. The Convention itself is both restrictive in its definitions and ambiguous in its utilization; the extent to which it can be broadened and applied more liberally largely depends on the domestic application of its features. Although the law provides a definition for the term “refugee” and a reference to the five established grounds for persecution, the general understanding of its terms and its application to specific cases is largely dependent on the respective government and its strategy and methods. The term refugee is referenced in the Convention to indicate individuals who possess a well-founded fear of persecution based on race, religion, nationality, political opinion, or membership to a particular social group (Refugee Convention 1951). Though these five established grounds vary from each other, they fail to include a number of possible motives for persecution; furthermore, their reference fails to clearly demonstrate the boundaries and characteristics that could possibly encompass political opinion or membership to a particular social group.

The Refugee Convention does not explicitly recognize sex or gender as a protected ground under which one can be persecuted, nor does it reference the precarious nature and prevalence of gender-related persecution. However, despite its absence in the Convention, there has been some historical success in asylum cases involving persecution based on gender or sex, in which a more liberal, flexible interpretation of the particular social group category was used, with the argument that persistent violence against women is often motivated by their immutable characteristics, such as sex or gender. The international community has provided recourse for making more considerate determinations in cases involving gender-based persecution and has even suggested legal interpretive guidelines to help instill more consistent practices in evaluating these types

of circumstances, most notably in the form of the UNHCR's 2002 Guidelines. It remains to be seen, however, if these suggested approaches can be successfully implemented at the domestic level; despite the growing progressivism surrounding women's representation and gender-related issues, a broader interpretation of the social group category to include women and gender specifically is still largely dependent on domestic policies and practices, as well as a gender-sensitive approach to asylum law as a whole.

UNIVERSAL DECLARATION OF HUMAN RIGHTS

The Universal Declaration of Human Rights was affirmed by the United Nations General Assembly in 1948; its formation represents the key initial international instrument that recognizes the rights of individuals to seek asylum (UN General Assembly 1948). The Declaration contains 30 articles which encompass common standards for fundamental human rights of individuals to be upheld at the international level (1948). The Declaration was adopted as a declaration as opposed to a treaty, in the hopes that it would serve as a foundation for the member states' national laws as well as the formulation of future international treaties. In essence, the purpose of the adoption of the Declaration was to define the "fundamental freedoms" that appear in the United Nations Charter and serve as a foundation for customary international law (Morsink 1999, 18). Following the human rights violations and atrocities of World War II, it became apparent within the international community that there was a need among member states for an agreement that sufficiently enumerated the rights of individuals within a more explicit testimony; Charles Malik, the diplomatic representative from Lebanon, stated that the document was "inspired in opposition to the barbarous doctrines of Nazism and Fascism" (Morsink 1993, 365). The document itself, however, has no

legal binding among member states, despite the impact and influence it has had in the legal landscape of national and international human rights law.

Articles 13 and 14 of the Declaration explicitly reference the rights of persons to leave their country of origin and seek residence and safety within the borders of international member states; it is a suggested and widely accepted notion that this section was inspired as a response to the large population of victims who tried to flee Europe during the Holocaust and were denied entry into other states (Morsink 1993, 360). The second line of Article 13 states that “Everyone has the right to leave any country, including his own, and return to his country”; Article 14 goes on to declare that “Everyone has the right to seek and to enjoy in other countries asylum from persecution” (UN General Assembly, 1948). Although in theory, the core of this Article treats asylum as a fundamental *human* right, in its genesis, the concept was regarded as more of a political ideal than anything else, as it states that “This right may not be invoked in the case of prosecutions generally arising from non-political crimes or from acts contrary to the purposes and principles of the United Nations” (1948). At this point in history, the concept of what constituted persecution was still fairly narrow and strictly conceived, therefore the right to asylum was generally reserved for victims of war and political upheaval.

In the realm of asylum specifically, the Declaration proposes a fairly vague idea of who and in what situations the granting of refuge would be appropriate, however following the war crimes and human rights violations of the early to mid-20th century, the affirmation that asylum existed in a legitimate sense was progressive. The Declaration has gone on to serve as the principle foundation for a number of human rights

instruments, including the International Covenant on Civil and Political Rights and the Covenant on Economic, Social and Cultural Rights, as well as the International Convention on the Elimination of All Forms of Racial Discrimination, the International Convention on the Elimination of the Discrimination of Women, the United Nations Convention Against Torture, and the United Nations Convention on the Rights of the Child. More specifically, however, Article 14 has served as the principle framework for asylum law at the domestic and international level.

CONVENTION RELATING TO THE STATUS OF REFUGEES

Stipulations of the Convention

The 1951 Refugee Convention has been described by the Office of the High Commissioner as being the “key legal document that forms the basis of our work” pertaining to refugees and asylum, as it delineates the core principles that comprise asylum law at the international level (UNHCR 1951). The Convention was built around Article 14 of the Universal Declaration of Human Rights, which recognizes the rights of person to seek asylum from persecution they have experienced in their country of origin. In essence, the Convention describes the rights that refugees are entitled to enjoy, the general obligations of states with regards to refugees, core principles that party states must abide by, and most importantly, how the term “refugee” is defined. Article 1 of the Convention defines the term “refugee” any person who:

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

residence as a result of such events, is unable or, owing to such fear, unwilling to return to it.”

(UN General Assembly, 1951).

Article 2 goes on to describe the legal expectation that all refugees abide by the respective laws in the country in which they find themselves, as well as act in accordance with any regulations that the corresponding government may impose in the maintenance of public order (UN General Assembly, 1951). The Convention prohibits Contracting States from prohibiting border entry or access to courts to any potential refugee based on their religion, nationality, or country of origin, and enforces the notion that refugees are to receive generally the same treatment and considerations as any other immigrants (1951). In essence, so long as the individual lawfully fulfills the Convention’s definition of a refugee, they are entitled to generally the same rights as nationals with regards to welfare, housing, access to wage-earning employment, public education and freedom of movement (1951). The Convention protects the rights of refugees to seek asylum regardless of whether or not they entered the country illegally and prohibits the expulsion of any refugee for purposes of national security or public order (1951). The personal status of refugees is to be governed by the law of the country in which they reside; in other words, any rights afforded to individual refugees are dependent on legal recognition by the respective national government that the individual is in fact a refugee (1951). That being said, any rights previously acquired by refugees in their country of origin that are dependent on or related to their personal status, such as marriage, are to be respected by contracting states, provided that these rights are legitimately recognized in said country of origin (1951).

The Convention delineates the rights afforded to contracting states and grants them certain liberties with regards to procedural methods of processing refugees.

Although Article 32 forbids states from expelling refugees for the sole purpose of national security interests, Article 9 authorizes that the Convention will not interfere with any states' use of provisional measures in times of "war and grave circumstances" with regards to a pending determination involving an individual refugee, if "such measures are necessary in the interest of national security" (1951). The decision to eject any refugee from a contracting state for these reasons therefore must have been reached "in accordance with due process of the law" (1951). Furthermore, any restrictions regarding the movement of refugees or the time allotted for them to relocate should only be imposed in the event that they have been granted admission into another country (1951).

Article 33 of the Convention prohibits the expulsion or forced return of any refugee to any territory where their life or freedom would be threatened on account of one of the five explicated grounds (1951). However, this non-refoulment principle, which is arguably the cornerstone of the Convention, allots contracting states the right to revoke this liberty in the event that any individual poses a threat to the safety of the country based on their conviction of a serious crime (1951). As such, in the absence of a legitimate conviction, the non-refoulment principle must be upheld. Furthermore, the Convention requires states to provide statistical data and documentation to the United Nations regarding the condition of refugees in their country, evidence of the tangible implementation of the Convention, and knowledge of any new laws or regulations pertaining to refugees in their country (1951). The Convention represents a legally-binding instrument which, as explained in Article 38, allows any parties involved to settle any disputes pertaining to its interpretation or implementation to refer to the International Court of Justice (1951).

Establishing Nexus and the Five Categories

The legal defining of an individual as a refugee requires the establishment of nexus; in other words, there must exist a “causal connection between one of the five grounds and the persecutory act” (Council of the European Union 2004). The phrase “on account of” draws the link between the persecution itself and the motivation behind it; as such, failure to reasonably prove that the persecution was driven by race, religion, nationality, political opinion, or membership to a particular social group likely results in a denial of asylum. The persecution itself can manifest in a number of ways; in an attempt to provide a guiding definition, the Council of European Union included in its Qualification Directive which certain acts could be considered persecution: “acts of physical or mental violence, including acts of sexual violence; legal, administrative, police, and/or judicial measures which are in themselves discriminatory or which are implemented in a discriminatory manner... acts of a gender-specific or child-specific nature” (EU 2004).

The Qualification Directives implemented by the EU also provide clarification with regards to the interpretation of the five enumerated grounds. In cases where persons have been persecuted for purposes of their race, religion, or nationality, it is established that the individual “need not actually possess the racial, religious, or national characteristic in question”; in other words, persecution based on *perceived or assumed* ideas regarding an individual’s race, religion, or nationality, which may have been adopted by the abuser, is no less persecutory (2004). However, it must be reasonably shown that the persecution was individualized, and as such, the individual was singled out for persecution based on one or more of these criteria (Siskind 2018). Although

racism, religions, and nationalities are generally represented by collective bodies of people, it is essential to prove that the asylum seeker in question faced individualized risk; in some cases, individuals members of these particular types of groups are denied asylum based on the notion that they are part of a larger body of people facing persecution, and therefore face a “generalized risk” rather than deliberate persecution (Siskind 2018).

Establishing political opinion as a basis for persecution poses a particular challenge because of the varied interpretations of what constitutes political opinion and how causal effect can be proved. Like the three aforementioned grounds, political opinion can be imputed by the abuser, and therefore victims of persecution need not actually possess the given political creed for which they are being persecuted; furthermore, in cases involving political dissent, it is not required of individuals to prove or show that their governments, which either perpetrated or condoned their abuse, were even made aware of the individual’s respective political opinion (Siskind 2018). When the 1951 Refugee Convention was first created, the idea of what constituted a political opinion was narrower, and generally restricted to ideas involving governmental affairs, political leaders, wars and conflicts, whistleblowing, and political ideology. As society has progressed, asylum law has broadened in some more progressive states; some less conventional but equally critical ideas have been accepted as political opinions as defined by asylum law, including but not limited to feminism, domestic violence, marriage and family, and neutrality (UNHCR 2002).

Perhaps the most widely debated area pertaining to the asylum categories would be the discussion of what constitutes membership to a particular social group. In their Directives, the Council of the European Union proposed an interpretation, stating that:

“persons may be considered to constitute a particular social group when they share a common immutable characteristic, that is, something innate to their being or so fundamental to their being that they cannot be expected to change it, and have a distinct identity within their country of nationality or habitual residence because they are perceived as being different by that society” (EU 2004).

The extent to which this definition is broadened and the manner in which it is applied remains largely dependent on the individual case in question; furthermore, diverging from asylum law itself, the general idea of what constitutes a particular social group can be influenced by various social, cultural, and political understandings, which vary among different states, communities and legislators. This established ground has, however, been subject to some expansion, especially in the realm of sex, gender, and sexual orientation. The UNHCR, along with their 2002 issued Guidelines advocating for a more gender-sensitive approach to refugee determination, provide navigation for a more expansive and up-to-date understanding of this category in their 2011 re-issued Handbook on Procedures and Criteria for Determining Refugee Status. The Guidelines provide instruction for a more generous approach to determining characteristics that may establish membership to a particular social group, attributes that may have been ignored or gone unrecognized by more traditional understandings of social group traits. These include but are not limited to shared backgrounds such as family, color, or sex, shared values, beliefs or behaviors, such as sexuality, gender-identity, or familial circumstances, and shared past experiences, such as military or political leadership or association (UNHCR 2011). Additionally, the guidelines assert that the “historical, social, legal and political realities to which the group relates will be relevant in identifying both the group’s existence and the persecution which its members suffer or are likely to suffer”

(UNHCR 2011). Although establishing membership is essential, it is equally imperative that asylum seekers demonstrate that they have experienced or remain at risk for individualized persecution. In other words, it is not sufficient to show that the group in question has been persecuted; individuals must reasonably show that they have or will be targeted for persecution based on their own membership to such a group (UNHCR 2011).

1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES

The Protocol was entered into effect in October of 1967, predominately as an addendum to the 1951 Convention, in an effort to expand the scope of international law relating to refugees. The original Convention had adopted the term of refugee to refer only to individuals “who have become refugees as a result of events occurring before 1 January 1951”; the Protocol, however, aimed to acknowledge and provide recourse for individuals who may meet the standards for refugee status as explicated in the Convention, but whose situation may not be the result of events prior to 1951 (Refugee Convention Protocol 1967). In its preamble, the Protocol considered that “new refugee situations have arisen since the Convention was adopted”, and that “it is desirable that equal status should be enjoyed by all refugees covered by the definition in the Convention, irrespective of the deadline” (UN General Assembly 1967). In essence, the 1951 Convention was largely spearheaded by the international response to the events of WWII in Europe, therefore the language of the Convention referring to “events occurring before 1951” was often interpreted by states as specifically referring to “events occurring in Europe”, despite the presence of refugee crises all over the world (1967). The Protocol served to lift this limiting interpretation by removing any “geographic limitations” that may serve to restrict the understanding of the definition of the term refugee and who

qualifies as such or restrict the scope of the instrument itself (1967). Along with restating the expectation that party states provide information on their domestic implementation of the Protocol, the treaty provides recourse for states who had ratified the 1951 Convention to choose whether or not to retain the original definition of refugee, which is restricted to persons affected by events in Europe (1967). Of the 146 parted states, only four chose to maintain this restriction, two of which have since dropped it upon ratification (UNTC 2019).

Although the Protocol was incorporated as an expansion to the 1951 Convention, it is not required that states be parted to the original Convention in order to adopt or ratify the Protocol; however, agreeing to the terms of the Protocol requires accepting all terms of the original Convention (UNHCR 1989). Both 1951 Convention and 1967 Protocol represent a legally binding instrument among Contracting States who have signed and ratified the treaty, meaning that it requires and prohibits certain actions among its signatories. It is expected that the domestic laws and procedures of Contracting States reflect and work in congruence with these international obligations (UNHCR 1989). However, as treaties of this nature tend represent more of a guideline for national governments with regards to refugees as opposed to an enforceable law pertaining to the handling of refugees and asylum at the domestic level, the status of its legality is often regarded as more implied than literal. There has been little recourse for enforcement or censure for not following the stipulations of the Protocol, and despite the regulatory responsibilities of the United Nations High Commissioner for refugees, there is no collective body that continually monitors its compliance at the domestic level (UNHCR 1989). The UNHCR further recognizes that the “legislative approach adopted by states”

to implement and practice these international standards will most likely reflect the states' own respective legal, political, and socio-economic considerations (1989).

GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION

The UNHCR's 2002 adoption of the Guidelines on Gender-Related Persecution was introduced to serve in conjunction with the 1951 Refugee Convention and its 1967 Protocol, with the intention of providing "legal interpretative guidance for governments, legal practitioners, decision makers and the judiciary", as well serve as a guiding reference for the UNHCR in its refugee determination processes (UNHCR 2002). The Guidelines issued are prearranged to be understood within the context of international refugee law, meaning they utilize the Convention and Protocol's refugee definition and are intended to be interpreted in congruence with the agreed upon protections and requirements of the treaty (2002). In its preface, the Guidelines state their focus to understand the refugee definition "from a gender perspective", one which has many dimensions and possible interpretations, and suggests procedural practices that may provide context and support to the refugee determination process to ensure that gender-related asylum claims are given proper consideration (2002). The Guidelines go on to clearly distinguish between "gender" and "sex", noting that a firm understanding of the socially and culturally defined nature of gender can aid in navigating through the precarious nature of gender-related claims of persecution. Prior to the conclusion of its preamble, the UNHCR makes clear that the Guidelines are not a revision or addendum to the international refugee agreements already in place, nor are they a means to rewrite the legal definition of the term refugee or amend the necessary requirements for obtaining

refugee status. Rather, they represent a medium in which a more “gender-sensitive” interpretation of the 1951 Convention and Protocol can be maintained in the international community (2002).

The Substantive Analysis section of the Guidelines’ text provides some historical context to the discussion of gender-related persecution, and as such, makes a case for why a less gender-neutral approach to adjudicating refugee and asylum laws and procedures is necessary to a consistent and just interpretation of the refugee Convention and Protocol: “Historically, the refugee definition has been interpreted through a framework of male experiences, which has meant that the claims of many women and homosexuals have gone unrecognized” (UNHCR 2002). In its text, the UNHCR recognizes the variation that exists among the experiences of persecuted individuals and that in some cases, their gender is related to, though not necessarily the core motivation for the abuses of which they have been victim. That being said, the Guidelines suggest a more thorough, comprehensive approach to determining these claims, one that takes into consideration the backgrounds of individuals, as well as “up-to-date knowledge of historically, geographically, and culturally specific circumstances of their country of origin” that may have contributed to their experience (2002). The UNHCR’s suggestion acknowledges the reality that a gender-neutral approach to the refugee determination process is not only an ineffective way to evaluate an individual’s well-founded fear of persecution, but that such an approach is rarely practiced; there has and continues to exist a paradigm in which asylum claims are compared to and evaluated based on the experiences of male refugees (2002). Such an approach fails to consider that for some

individuals, the treatment they endure within their place of nationality is monumentally influenced by their gender.

In congruence with the Refugee Convention and Protocol, the UNHCR's Guidelines echo the importance of careful and thorough inquiry when determining well-founded fear and persecution. The suggested guidelines state that although such persecution is determined on a case-by-case basis, gender-related abuses such as rape, domestic violence, genital mutilation, or any type of sexual assault do meet the standard for persecution as they "inflict severe pain-both mental and physical, whether they are perpetrated by State or private actors" (UNHCR 2002). This acclamation also acknowledges that acts of abuse need not be illegal within a state to meet the standard of persecution, as many national laws, especially pertaining to the rights of women, are reflective of cultural norms and traditions as opposed to international human rights codes (2002). A given State's prohibition of specific acts of violence is not enough to constitute protection for victims of abuse; national governments are expected to actively denounce these acts of violence and steadily administer punishment for offenders. Furthermore, in cases where an individual breaches national law in an effort to protect oneself from abuse or violence, state-sanctioned punishment may constitute persecution if such punishment is severe and disproportionate (2002).

The Guidelines recognize the role that discrimination and discriminatory practices play in gender-related asylum claims, and acknowledge that although discrimination in and of itself is not typically enough to constitute persecution, discrimination that serves to considerably hinder an individual's rights and safety can evoke a well-founded fear that "warrants international protection" (UNHCR 2002). Given the reality that, in most cases,

discriminatory actions do not represent isolated incidents but rather a pattern of unfair treatment, the Guidelines regard any State's reluctance to remedy discrimination, or compliance with discriminatory practices which may hinder an individual's personal security or access to their state sanctioned rights, as meeting the threshold for persecution (2002). The Guidelines regard discrimination based on sexual orientation as falling within the scope of gender-related persecution, as it reinforces the notion of predefined positions within society based on gender or sex: "in many cases, the individual has refused to adhere to socially or culturally defined roles or expectations of behavior attributed to his or her sex" (UNHCR 2002). Regardless of whether or not homosexuality or transvestism is illegal within the State in question, any abuse, punishment, or denial based on sexual orientation or practices, state-sanctioned or not, can amount to persecution.

As previously stated, the Guidelines are meant to serve in conjunction with the Refugee Convention and therefore, reiterate that a well-founded fear of persecution requires attribution to one of the five grounds-race, religion, nationality, political opinion, or membership to a particular social group. However, although the chosen ground must be a contributing factor, "it need not be shown as the sole, or dominant cause" (UNHCR 2002). The Guidelines provide recourse for gender-based asylum claims in which there is a "causal link" between the applicable ground and the abuse suffered; in other words, given the precarious nature of gender-based claims, a "causal connection" between the chosen Convention ground and the persecution inflicted is deemed appropriate to establish a well-founded fear (2002). The Guidelines maintain that a gender-sensitive interpretation of the five Convention grounds is not meant to lower the threshold for

establishing well-founded fear or to loosen asylum standards and procedures in cases involving women, but to acknowledge that there often exists a link between these grounds and gender: “In many societies a woman’s political views, race, nationality, religion, or social affiliations, for example, are often seen as aligned with her community” (2002). The purpose of allowing for a causal link in determining refugee status is to provide protection for those who have a well-founded fear of persecution, regardless of the *strength* of the connection between such a fear and the attributed Convention ground. The Guidelines aim to interpret the Refugee Convention in such a way that it doesn’t serve to limit certain individuals or groups from claiming asylum based solely on the language of the treaty: “persecution feared could be for one, or more of the Convention grounds...the Claimant is not required to identify accurately the reason why he or she has a well-founded fear of being persecuted” (UNHCR 2002).

Typically, gender-related claims are analyzed within the established ground of membership to a particular social group or political opinion, with the latter being more common; however, the ambiguity of the concept of what is necessary to qualify as having membership can be problematic, and therefore the UNHCR provides clarification. Their proposed interpretation serves to acknowledge and address some of the reasoning pertaining to why gender and sex are so often disregarded as valid claims; for purposes of these Guidelines working in conjunction with the Refugee Convention, a particular social group is characterized as:

29. “a group of persons who share a common characteristic other than their risk of being persecuted or are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience, or the exercise of one’s human rights.”

30. "it follows that sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men".

31. "The size of the group has sometimes been used as a basis for refusing to recognize 'women' generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size" (UNHCR 2002).

The Guidelines further state that there should be no reason why members of a particular social group must be close associates, or that all must have experienced, on some level, persecutory abuse (2002). This interpretation emphasizes the reality that gender is in fact a solidifying characteristic within society that can serve to alter or determine the treatment of certain groups of people, and as such, claims of gender-related persecution based on membership to a particular social group should not be held to a higher standard of proof than other established grounds.

The UNHCR's Guidelines are provided as a tool for interpretative guidance for those involved in asylum and refugee determination processes. They embody a set of normative standards that can be utilized and examined in the practice of international and domestic asylum law, as well as in the formulation and implementation of policies and approaches pertaining to asylum and gender-related persecution. The Guidelines do not, however, represent a legally binding instrument for Contracting States, and therefore there exists no penalty for states that fail or refuse to comply with their measures or uphold its interpretation. Given this reality, the Guidelines conclude with an urging for States to adopt a more gender-sensitive approach to adjudicating asylum law at the domestic level, while stating that new policies and procedures are necessary in order to maintain and consistently practice these norms (2002).

ASYLUM LAW AT THE DOMESTIC LEVEL

The Refugee Convention and Protocol outline a legal framework which provide the foundation for the domestic asylum laws of respective Contracting States. While a substantial portion of the Convention delineates the rights afforded to individual refugees and asylum seekers and the requirements they are expected to fulfill, a considerable portion of the agreement explains the liberties allotted to nations parties to the treaty, and the preferences they are entitled to with regards to asylum practices and procedures. Although the Convention is a legally binding instrument, it serves as an effective human rights tool only to the extent that a state's domestic policies mirror its objectives; despite its legitimacy, it establishes a relatively basic and fundamental agreement, which requires the critical action and pursuit of individual nations to enforce. Furthermore, despite the existence of international bodies that aim to represent refugees and emphasize the priority of international human rights norms, the legitimacy and efficacy of these global instruments exist on a spectrum, which varies according to the governments and policies of individual nations.

Initiatives and guidelines authored by bodies such as the UNHCR and the EU aim to provide interpretive guidance for governments and legislators at the domestic level; they propose certain pathways for understanding some of the more complex aspects of international asylum law. Not only do these protocols propose more human rights-oriented approaches to the statutes themselves, but their suggested defining and analysis of many of the legal concepts and categories within the treaties allow for a more flexible understanding of the terminology, which allows authorities and legislators to take into consideration the complicated nature of fear and persecution, and the evolving notions

surrounding political opinions and social group membership. Furthermore, these international instruments suggest more comprehensive approaches to the analysis of all relevant factors of a case, those which are not mentioned or referenced in the laws themselves; these include but are not limited to the social, cultural, economic and political environments of respective states, which may contribute to or influence the situations that persecuted victims may find themselves in. The more progressive approaches encouraged by these protocols also highlight the disagreement and incongruence that exists among different nations pertaining to developing views on identity and social order, circumstances that can drastically influence the experiences of persecuted individuals.

The objective of interpretive instruments is not to change asylum law *per se*, but rather to broaden and develop our understanding of its concepts and categories so that individual cases can be assessed thoroughly and with the recognition of all relevant considerations. Being that refugee determinations are processed at the domestic level, and asylum claims are adjudicated by the state, a more critical approach to asylum claims relies almost entirely on the domestic policies, practices and procedures implemented by national governments; therefore, progress for unprotected groups in asylum law relies on development at the national level and changes in state behavior, as “domestic understandings condition the impact of international norms in policy debates” (Cortell & Davis 2000, 66). A more exhaustive understanding of the particular social group category, for example, could allow for persecuted groups and individuals to be recognized that are currently unrecognized in asylum law; this, however, requires domestic change. Furthermore, a more developed understanding of asylum law as a

whole would demand a more expansive and current interpretation of the five categories- race, religion, nationality, political opinion and membership to a particular social group, which must be reflected in domestic policy on more than just a theoretical level.

Adopting more inclusive ideals is not sufficient to expand these categories in a practical way; tangible and consistent progress is improbable without legal and procedural instruments at the domestic level that reflect and monitor its application.

CHAPTER 2: GENDER-BASED ASYLUM FROM A FEMINIST PERSPECTIVE

The lack of reference to gender within asylum law is arguably the most obvious reason for why asylum claims involving gender-based persecution are so difficult to adjudicate. Despite the existing guidance and interpretations provided by international instruments and groups, most national legislation on asylum does not explicitly reference gender, sex, or gender-motivated harm. Women, children, homosexuals, and transgendered persons are some examples of groups that do not represent protected categories within asylum law, despite history's acknowledgment of the deliberate recurrence of persecution of these groups in many of the world's communities. Although there has been some moderate progress within the legal realm in recognizing these groups as having distinguishing characteristics that could constitute membership to a particular social group, it has repeatedly proven difficult to establish the relevance of gender or sex with regards to recurrent experiences of persecution, discrimination, and abuse. This reality is attributed not only to the existent gaps in domestic and international asylum law itself, but to relevant social mores and attitudes surrounding gender and sex that tend to normalize these behaviors and regard them as falling outside the scope of international protection. Not only does this bias perpetuate this type of oppression, but it silently legitimizes the legal barriers which inhibit progress in this area of the law, making cases involving gender-based persecution troublesome to navigate.

GENDER NEUTRALITY

The gender-neutral legal standards of international asylum law are largely reliant on the underlying ideals of human rights law, which, although theoretically include both men and women, largely fail to address or reflect the significant differences in the

experiences among the sexes (Kim 1994, 112). At their origin, human rights instruments were inducted to “presuppose gender equality and neutrality”, in an effort to demonstrate some semblance of impartiality and equilibrium, and validate to the international community that all human beings, regardless of background, culture, class, or gender were entitled to the same rights (Kim 1994, 115). Although in theory, women were not legitimately excluded from such instruments or disregarded as human beings protected under human rights legislation, the “gender-neutral” approach to the practice and application of these laws has resulted in a very narrow and male-dominated exercise of its norms and procedures, causing a social and cultural divide between women’s rights and human rights: “The segregation between women’s rights and human rights has only reinforced the fact that traditions which violate the rights of women are not challenged under the human rights umbrella” (Kim 1994, 111). Despite the growth and progress that has been made since the initial inception of these human rights laws and norms in the international community, there continues to exist a disparate approach to dealing with human rights violations against women, one that marginalizes their experiences as belonging solely to the arena of women’s related issues, further alienating them from the realm of international law. This rift has had significant ramifications on legislation and the application of human rights law, particularly within the realm of asylum.

Within the Refugee Convention, the term “refugee” represents a gender-neutral concept; in other words, in accordance with its initial prescription, the gender or sex of an individual is meant to be irrelevant to the determination of their refugee status, regardless of whether or not it has been relevant to their persecution (UNHCR 2002). Therefore, the procedural requirements for applying for refugee status and the legal expectations for

determining a well-founded fear of persecution are meant to refrain from taking into consideration the gender, sex or age of individuals. Although in theory, this method of interpretation suggests some measure of impartiality and consistency to asylum in the procedural sense, it serves to further subordinate individuals whose experiences are not confined by the five established grounds.

LACK OF GENDER BASED ASYLUM CATEGORIES

Although asylum is intended to act as a method of protection for individuals who have experienced persistent harm in their countries of origin, the underlying ideals of domestic asylum programs are not necessarily synonymous with their practice. Despite its core normative purpose, asylum is deeply rooted in an ethnocentric and superior state of thought, and its processes often reflect cultural and racially charged attitudes regarding non-Western regions of the world (Takagi 2010, 62). Many scholars have theorized that asylum practices are heavily influenced by Orientalist notions about refugees and the societies they come from, as well as views of American Exceptionalism and superiority, with “an ideological view of the East as being dark, mysterious, chaotic, feared, and in need of governance... (and) the notion of a U.S. that is civilized, powerful, and has the “God-given” right to govern the east” (63). Though these orientations do not tangibly exist in asylum legislation, they have the capacity to influence asylum processes by subscribing to ideals and assumptions that can marginally distort how the experiences of refugees are understood (63). In other words, it is not uncommon for the experiences of refugees to be interpreted according to the underlying and often flawed presumptions regarding that individual’s country of origin, culture, and way of life.

Asylum processes that take place in western democratic states, such as the U.S., often subscribe to western notions surrounding what constitutes persecution or well-founded fear; these ideas are largely based on cultural and societal norms that characterize eastern and peripheral states as being underdeveloped and lacking in impartiality. This system of thought reduces the experiences of many refugees, and often characterizes the persecution they have suffered as being “attributable to the cultural “backwardness” of their countries”, and not one of the five established grounds (Takagi 2010, 82). This reality is especially precarious for victims of gender-based persecution, considering the fact that violence against women and its manifestation is often interpreted culturally, and with underlying predispositions of gendered power arrangements (86). Stereotypes surrounding the customs and family practices of non-western cultures can blur the line between personal and political persecution; this leaves many female asylum seekers vulnerable to western asylum processes that are often manipulated by stereotyping and flawed perceptions, often purporting the assumption that they are victims of their own cultures and family environments rather than persecuted members of society.

One of the biggest problems with the often used ethnocentric approach to refugee determination processes and asylum law in general is that, despite its intention to remain gender neutral in practice, the asylum claims of women become largely interpreted from the perspective of the male experience; this reinforces a fixed, predetermined idea of who qualifies as a refugee and what constitutes gender-based persecution (Crawley 2015, 17). The lack of acknowledgement for gender or sex within international asylum law further reinforces the male-dominated understanding of persecution and what such an experience

entails, while narrowly defining the persecutory ordeals of female asylum seekers:

“current approaches to women as asylum seekers often counter-pose the ‘male experience’ of persecution with a ‘female model’. This model generalizes about women’s experiences of gender-related persecution...at the expense of other forms of resistance and repression that are experienced by women in their countries of origin”

(18). Arguably, the largest issue with the gender-neutral approach to refugee law and its corresponding procedures is the reality that the international community’s general understanding of the term “refugee” is not gender-neutral at all; rather, it is rooted in a politically male-dominated sphere that marginalizes female asylum seekers and presumes to understand the nature of their experiences. Furthermore, this neutrality allows for a rigid and restrictive conceptualization of persecution to remain intact, which serves to de-politicize issues that plague women specifically as well as gender-related violence as a whole. This approach only further alienates female refugees from the asylum process in both the legal and political capacity: “the framework for asylum determination needs to be transformed to accommodate the inclusion of women not as a special case deviating from but as one of the many groups whose experiences must be contextualized if they are to be properly understood” (20). A *gender-sensitive* approach to refugee determination, however, could allow for a more considerate recognition of these claims, without destabilizing international asylum law altogether.

CONTESTING GENDER AS GROUNDS FOR PERSECUTION

It has been suggested that the failure of the Refugee Convention to recognize gender as a protected group is reflective of the lack of acceptance in many areas of the world that women are just as vulnerable to political violence as their male counterparts.

There is a reluctance to admit that the identity of women can be political in nature, and that any violation towards her, sexual or otherwise, is a political transgression as well as a personal one. This has been presented as an issue in the overall lack of acceptance of women as asylum seekers, due to a tendency in the international community to characterize many female asylum seekers as victims of unfortunate circumstances, and not as refugees fleeing persecution (Crawley 2015, 16). Furthermore, scholars have suggested that because of the repetitive failure of authorities to regard women as political participants, and the manner in which females are targeted and persecuted, the stipulations of the Refugee Convention do little to ensure their equitable protection and benefit:

“whilst overt expression of a political opinion through conventional means such as involvement in political parties may be considered as a basis for political asylum, less conventional forms of political resistance, such as refusal to abide by discriminatory laws or to follow prescribed rules of conduct, are often wrongly characterized as “personal conduct” (Crawley 2018, 18).

Decision makers in refugee and asylum determination processes often fail to take into consideration the extent to which asylum law neglects to acknowledge the greater risks that women may face in terms of harassment, sexual violence and exploitation; what is seldom considered in determination processes is whether or not these repetitive acts of violence would meet the threshold for persecution if the victims were male (2018).

Despite the reality that women are generally more vulnerable as political actors in many parts of the world, their cases face unique difficulty in meeting the stipulations of asylum law when they are not recognized as civic participants by their governments.

GENDERED NATURE OF THE ASYLUM PROCESS

Because such a large percentage of the female asylum seekers coming into the U.S. are from poorer, peripheral countries with social and economic disparities, there is a common tendency to identify these women as “battered wives” who are simply victims of their own impoverished circumstances and abusive home lives, as opposed to refugees who are fleeing persistent danger (Crawley 2015). Many female asylum seekers come from communities which live by social or religious customs that fail to regard forms of gendered violence, such as spousal abuse, marital rape, or sterilization as crimes or legitimate violations; as such, there is a common impulse to disregard these grievances as personal issues not worthy of legal recognition or asylum consideration (Seith 1997). Although the personal stories and experiences of these individuals are necessary to their claim for asylum as well as representative of the abuse they have endured, the common narrative of victimhood can have negative consequences for claimants; this is largely reflective of ethnocentric assumptions about their culture, womanhood and abuse: “judges and officials demand that female petitioners behave and respond in ways familiar to their western sensibilities, they conversely require a non-western explanation for the actions of their persecutors” (Takagi 2010, 73). Domestic asylum processes, especially in western democratic states tend to impose a preconceived idea of how an “appropriate” asylum seeker behaves and what they have experienced; unfortunately for many female asylum seekers, their success in the determination process hinges on whether or not they effectively “present themselves as “worthy” victims”, an expectation much more common in cases where the petitioner is female (74). Fixating on the identity and behavior of victims can be dangerous to the legal process of applying for asylum, as it reduces their experiences of persecution to being merely a result of their troublesome

home lives and unforgiving cultural standards; furthermore, it creates an arbitrary “type” of asylum seeker that further narrows the space for gendered violence to be properly recognized in asylum law.

PROBLEMS WITH GENDER-BASED PERSECUTION

Within the realm of gender-based persecution, it is not uncommon for the nature of the abuse itself to be critiqued for falling outside the scope of persecution as it is commonly understood in asylum law. In other words, regardless of the strength of the case or clear comprehensibility that the crimes were motivated by one of the five established grounds, in cases where persecutory acts were committed by non-governmental persons, family members, or a spouse, it can prove considerably more difficult to establish a well-founded fear of future persecution in a *legal* capacity.

Although asylum law does not require that crimes must be committed by governmental persons to constitute persecution under the law, in many cases involving gender-based violence, such transgressions are typically regarded as more comparable to unfortunate, isolated incidents or circumstances rather than patterns of persecution. Within the asylum adjudication system, it is common for judges and officers to subscribe to ideas of more “normative situations of political persecution” in making determinations, which women’s cases involving gendered persecution rarely mirror (McKinnon 2010, 85). Furthermore, women’s claims of persecution are often regarded as “private acts” of violence, despite the common reality that their governments were unwilling or unable to protect them. Even in communities where governments are deliberately unresponsive to such violence, the motivation behind and practice of such abuse often outweighs the state’s lack of protection in a court of law: “women are often persecuted by individuals

without direct connection to the state, such as guerilla groups, intimate kin, or even strangers... immigration judges have been less willing to interpret asylum claims as political in instances where governments were complicit through indifference” (86).

What this common legal approach fails to acknowledge, however, is the extent to which these governments’ reluctance or refusal to help these victims condones and perpetuates this type of violence, as the consent and ignorance of these authorities speaks to the respective social and political landscape of these communities; in this sense, the experiences of many of these female refugees strongly mirrors political persecution.

Because of the lack of reference to gender or gender-related persecution in asylum law, there is a tendency that exists among courts to characterize violence against women in a specific light, one that diverges from the types of persecution that men face.

Therefore, it has proven considerably difficult to demonstrate that sexualized and gender specific forms of persecution pose a persistent and immutable threat to the lives of individuals, as abuse that takes the form of sexualized violence is often regarded as a “private” crime and not a matter of public concern. Furthermore, it is often implied or assumed that instances of sexual assault, regardless of their frequency, are motivated by personal feelings as opposed to social or civic considerations; as such, with regards to asylum, it has proven challenging to legally establish that any ongoing sexual assault that amounts to a well-founded fear of harm was motivated by race, religion, nationality, political opinion, or membership to a particular social group: “in instances of sexual assault or intimate violence, it is rare that assailants will directly state their motivation” (McKinnon 2010, 86). Furthermore, considering the prevalence of rape and sexual assault in communities plagued by gang violence, corruption, and political upheaval,

claimants whose well-founded fear is based on their gender and identity as females run the risk of “defining their membership too broadly” (87). Despite the persecutory abuse of women in many of these states, the population of women who have or continue to experience sexual assault is often regarded as being too large to reasonably prove persecution based on one’s political opinion or membership to a particular social group.

Particular characterizations and classifications of gender-based persecution claims have made it distinctly challenging to widen the legal interpretative understanding of the particular social group category. Despite the reality that so many female asylum seekers’ fears of persecution are motivated by or related to their gender or sex, the inclusion of gender as a social group category has been widely dissented by legislators. Furthermore, despite the prevalence of gender-related persecution among female asylum seekers, it is not uncommon for some individual cases of persecution to be regarded as “gender-related” even if they are motivated by other factors, simply because the claimants are women and may have experienced some type of threat or abuse that is related to their gender or anatomy, such as rape or other forms of sexual assault. Given the reality that gendered claims are often disregarded as falling outside the scope of asylum law, and gender as a possible social group category has been generally refuted as being too wide in breadth to be applicable in the law, the inconsistencies in approach to these cases have proven dangerous for many female victims of persecution: “without a category of asylum protection based on gender, women confront contradictory conceptions of their experiences as either too narrow or too broad to qualify them as refugees... (there is) the unique burden imposed on female asylum applicants to fit their claims within this circumscribed notion of a refugee” (Condon 2002, 208). Regardless of the fact that in

many cases, a woman's gender or sex is relevant to and often motivation for the persecution or threat she has experienced, there exists a fear that widening the conceptualization of what constitutes a particular social group to include sex and gender will overly generalize asylum law as a whole, in which case it will become regarded as a remedy for all misfortune rather than a protectorate for victims subjected to arbitrary cruelty.

What often fails to be considered is the fact that for female asylum applicants, their gender and sex are rarely if ever detached from their experiences of abuse, even when such abuse is motivated by other factors deemed unrelated, such as race, religion, or nationality. Furthermore, in cases where the persecution experienced was on account of the immutable characteristics of the individual pertaining to their gender, establishing membership to a particular social group based on these characteristics casts too wide a net for many courts to accept; this attitude further "promotes the gender paradox, by requiring that a social group be more particularized than gender alone, but still possess societally significant breadth and cohesion" (Condon 2002, 212). Not only are a large portion of female asylum seekers victims of abuse that is particular to their gender and in many cases, motivated by such traits, but it should be recognized that in many communities around the world, the failure of these women to obtain protection from their government is based solely on the fact that they are women. The gender paradox, therefore, creates determinative barriers not only for female asylum seekers who wish to claim persecution on the basis of their particular social group characteristics as women, but also for female claimants whose gender or sex was in any way determinative in the forms of persecution they suffered.

CHALLENGES OF EXPANDING THE “SOCIAL GROUP” CATEGORY

The particular social group category, though arguably the most inclusive of the five established grounds, has proven difficult to determine in cases involving gender-based persecution; this is attributed not only to the common critique that gender encompasses too broad of a group to be applicable to asylum law, but also due to the popular discourse that expanding the interpretation of the particular social group category to include abused women will “open the floodgates” and allow asylum law to become an exploited method of easy and accessible immigration (Mullaly 2011, 459). Historically, this category has been used to provide protection for individuals and groups that are not explicitly referenced in asylum law or whose claims do not fit obviously in the other four categories; in cases involving gender-based persecution, it is arguably the most commonly claimed category, as it provides recourse for applicants whose persecution is on account of or related to their sex and/or gender, neither of which represent legitimately protected classes. However, expansive interpretations of the social group category, such as those proposed by the UNHCR, have been met with judgment and trepidation by many states, as they indirectly suggest a looser and more progressive interpretation of domestic and international asylum law, which could pose a potential threat to the political agendas of their current governments or administrations. The ideas behind the “floodgate theory” are directly linked to immigration politics, which has the capacity to unfairly influence determinations in individual asylum cases and foreordain asylum rulings based not on the merit or strength of a case but on the fear that the case in question is one of too many:

“as described by Helen Grant, is the belief that “to recognize women as a social group and domestic violence as persecution” would “open the floodgates to these types of claims...petitioners would fraudulently claim that their husbands beat them in order to gain entry,

which would overwhelm immigration officers and end up closing the borders to people who need protection" (Takagi 2010, 78).

Although contentious immigration politics can inhibit efforts towards more expansive interpretations of asylum categories and the general success and consistency of all asylum determinations, cases involving gendered persecution remain especially vulnerable to suspicion and critique. Despite its flawed logic as it pertains to asylum, the floodgate theory mirrors popular sentiments among many states and decision makers, especially given the prevalence of domestic abuse and sexual assault in all areas of the world. Unfortunately for many female victims and asylum seekers, the pervasiveness of their experiences represents an all too common phenomenon, which courts and officers often use to justify denying asylum. Furthermore, the precarious nature of gendered persecution and its absence in most domestic asylum laws condones the frequent denial of many of these cases on the basis that they contradict domestic asylum and immigration standards.

CONCLUSION

The law is not immune to the cultural and social constructions of femininity and masculinity that exist within society; although domestic and international laws are created with the intention of being unbiased to the particular and immutable characteristics of individuals, adjudicators approach cases with preconceived notions, which may influence how they characterize a person. For refugees, asylees and immigrants in general, this criticism is even more pronounced, as they are often times expected to represent the "type" of individual deemed fit to acclimate to the respective state. For female asylum seekers, specifically, this scrutiny is even more burdensome, as their cases so often hinge on the particular state's position on women's rights, and the

extent to which the claimant's "womanhood" has played a role in her experience:

"womanhood can make you too private, too meek, too scandalous, while at the same time rarely affording one the ability to speak and be heard in public or by states—especially if the state is not one you "belong" to" (McKinnon 2011, 182).

It has proven no great secret that, for the large majority of female asylum seekers, their home countries recognized them as neither political beings nor contributing civic members of their communities; for most, their womanhood largely contributed to their lack of power and protection. Although their potential granting or denial of asylum is largely contingent on the extent to which their experiences meet the necessary requirements and the strength of their case, the success or failure of many female asylum claims, especially those involving gender-related persecution, are largely dependent on the level of importance granted to women's rights and the extent to which the adjudicating state exercises women's subjectivity within the law (180). Although political, social, and cultural considerations nearly always maintain the ability and propensity to influence the exercise of the law, this reality puts forth a standard that female asylum seekers are expected meet, one which is not imposed upon male asylum seekers: "The rhetoric of transnational women asylum seekers then is not rhetoric on behalf of the subject who does the speaking. Rather, the protection (or exclusion) offered in these cases serves as a rhetorical buttress for the state's modernity as one that defends the rights of women" (180). While the gender-neutral approach to asylum law has proven inhibiting to the potential expansion of our understanding of the five categories to include gender-based persecution, the exercise of determining asylum claims based on political biases and current representations of certain immigrants further constructs the

position of these women and arbitrarily predetermines their cases at the individual level, proving devastating for those who are excluded. Although there is a need for gender-sensitive approaches to asylum law and interpretative guidance for gender-based persecution, the outcome of individual cases should not hinge on current objectives to “restore the image of the state as one that defends the rights of women” (181). Not only does this approach perpetuate the already existing inconsistencies presently practiced in asylum law, but it diminishes the validity of asylum, reducing it from a legal instrument for preserving human rights to a mere political procedure used for strategical purposes.

Cases involving gender-motivated abuse are representative of a systemic trend that perpetuates this type of violence; not only do women in crisis receive inadequate protection on behalf of authorities at the local and national level in many states, but in many of these nations, there are no existing laws that formally condemn violence against women or femicide as a whole (Seith 1997). Given this reality, it would seem appropriate to argue that the precarious danger that women face in many communities in the world justifies asylum as one of the many tools that could recognize and protect victims who have faced persecution of this nature. However, the lack of protections for gendered groups within asylum laws are vindicated by the reasoning that violence against women, though unfortunate and even criminal, is not representative of an international human rights issue, and is therefore incongruent with the foundational purposes of asylum: “female subordination runs so deep that it is still viewed as inevitable or natural, rather than seen as a politically constructed reality maintained by patriarchal interests, ideology, and institutions” (Bunch 1990, 487). In essence, the lack of acknowledgment for gender within asylum law and its corresponding procedures demonstrates a general

uneasiness among the international community to formally include gender as a legitimate consideration within its legal processes and procedures. Considering that the Refugee Convention was conceived largely in response to the human rights atrocities that took place in Europe in the 20th century, the current lack of protection still allotted for victims of gendered violence within the statute and its protocol echoes the sentiment that the systemic subordination of women around the world does not represent a social or political crisis worth combating within the realm of asylum. Despite the more progressive approaches that some contracting states have taken in interpreting asylum law and implementing more inclusive determination practices to consider gender, the fundamental lack of consistency in the legal approach to gender-based persecution among the international community only preserves the segregation between women's rights and human rights within the law and society at large.

CHAPTER 3: DOMESTIC POLITICS OF GENDER-BASED ASYLUM

Interpretive practices and theoretical orientations involving gender as a basis for asylum are not the only considerations to examine in looking at the general obstacles that plague these types of cases. Asylum practices involving all types of cases are vulnerable and subjective to political pressures and developments, and therefore are largely dependent on the actions taken by our domestic levels of power and the restrictions they may face in establishing potential asylum reform as a priority. The domestic factors that inhibit progress in asylum cases involving gender-based persecution are not purely normative; although there exist many interpretive disputes pertaining to how these types of cases should be adjudicated within the confines of asylum law, there are other elements aside from cultural biases and gender normative theories that serve to influence movement and potential success in this particular area of the law.

Asylum processes within the United States are three-fold, and there are different levels of power that retain the capacity to impact refugee determination processes and the potential for asylum grants and denials. Decisions are not solely resolved by adjudicators' methods of approaching the law, nor are they always reflective of the court's general ideals pertaining to asylum law and the types of cases or individuals deemed appropriate for protection. Rather, the outcome of these cases can often be determined by particular policies and programs enforced by the executive and legislative branches of government involving asylum determination processes; furthermore, approaches implemented by these decision makers may often have little to do with ideological views on gender-based harm or female asylum seekers, but rather may be

more reflective of social and political constraints involving immigration, economic considerations, and foreign policy development.

DOMESTIC POLICIES TO THE RESCUE?

There has been some effort made by individual states in the last few decades to allow for more legitimate asylum consideration for victims of gendered persecution; some of these domestic efforts have aimed to expand governments' understanding of asylum law, gender motivated abuse, and the particular social group category. Prior to the formal adoption of the UNHCR's Guidelines on Gender-Related Persecution in 2002, some states initiated their own guidelines in an attempt to provide proper recourse for gender-related claims for asylum. The Canadian government's adoption of Interpretative Guidelines for Gender in 1993 effectively prompted other states to follow suit; although their protocol did not revise their national asylum law or amend their refugee definition, their guidelines were the first domestic agreement to propose an interpretation of the social group category to formally include gender, maintaining that "gender is an innate characteristic and, therefore, women may form a particular social group within the Refugee Convention definition" (Immigration and Refugee Board of Canada, 1993). The Guidelines also formally recognized family as being constitutive of a social group, and persecution pertaining to kinship as being a legitimate gender-based claim (1993).

The United States followed soon thereafter, with the adoption of their INS Asylum Gender Guidelines in 1995. Essentially, the U.S.'s INS guidelines were implemented to "allow INS officers to better analyze claims by women alleging persecution based on their gender" (AILA 1995). Like those adopted by Canada, the initiative did not represent a revision of the U.S.'s national asylum law or refugee

definition, but rather served as an addendum to their domestic asylum procedures in an effort to effectively navigate gender-related cases within the narrow confines of asylum law (1995). In 1996, Australia's Administrative Appeals Tribunal also adopted a series of Guidelines on Gender, stating in its preamble their objectives to "further promote a gender inclusive and gender sensitive review process" as well as "recognize the social and cultural difficulties applicants face when making and presenting gender-related claims" (Australia Dept. of Immigration 1996). In congruence with the newly adopted U.S. Guidelines, Australia's protocol provided direction and oversight to determination processes involving gender-related asylum cases, while echoing more thorough definitions of gender and gendered forms of violence as they pertain to asylum law.

Although the consistency and practice of these guidelines at the domestic level is debatable, they do largely reflect a response to the oft-mentioned floodgate theory, as they aim to acknowledge and recognize the legitimacy and validity of many gender-related claims. In spite of the difficulty institutions may face in enforcing and implementing these practices, their mere existence is recognition that gender-based asylum claims do have merit and can effectively be adjudicated within the parameters of asylum law. However, despite the noble intentions of these instruments to address the existing gender paradox, political considerations bear the capacity to weigh equally if not more in their impact on the actual outcomes of gender-related cases.

THE JUDICIARY

There are a variety of considerations at the court level that may affect an applicant's ability to be granted asylum, or even have their cases heard. It is important to recognize that U.S. immigration courts are categorized as administrative courts within the

Department of Justice's Executive Office for Immigration Review; as such, immigration courts do not represent an "independent judiciary", but rather are appointed and directed by the Attorney General, who is appointed by the President (Rosenberg, Levinson, & McNeill 2017). Their decisions are overseen by the Justice Department, who may impose certain restrictions, constraints, and even expectations upon judges in congruence with agenda goals, which may influence judges' rulings; as such, it is not uncommon for case rulings and precedent to be decided or overturned as a means to maintain or enforce particular immigration programs. The selection of judges based on their ideological leanings and agreement with current initiatives, as opposed to their objectivity, is not an uncommon strategy, as practiced recently by the current administration: "Of the 28 judges Sessions has appointed so far, 16 are former ICE prosecutors...making them 23% more likely to order deportation" (Rosenberg et.al. 2017). The political nature of Immigration courts imposes obstacles for all migrants, specifically its most vulnerable who seek protection; essentially, the courts' connection to the executive branch allows for political subjectivity in adjudicating asylum decisions, which is especially dangerous for those whose claims are not explicitly protected in national asylum legislation. Furthermore, it often allows their determinations to be deciphered by policy initiatives and not by the merits of individual cases.

Although decisions passed by immigration courts and the Board of Immigration Appeals can be appealed to federal courts, those decisions are only binding for the district in which they take place; therefore, even if one gender-related claim is successful, it does little to establish any precedential pattern for future cases, which further exacerbates a lack of consistency in how these claims are processed (USCIS 2018). Despite the wide

variation that exists among cases involving gender-based persecution, it has been argued that the fate of asylum applicants rests on two random circumstances: *who* decides the case and *where* the case goes to court (2017). Recent studies have shown that even when controlling for other determining factors such as country of origin, there remains very little equality among judges with regards to asylum rulings, as “immigration judges are bound by precedents established in the federal appeals court that covers their location” (Rosenberg et. al. 2017). Although there are hundreds of judges spread throughout the United States’ 58 immigration courts, cases are assigned to courts based on where the individual is currently living, which is often determined by their country of origin and port of entry (2017). Furthermore, the geographical location of hearings is often indicative of general political and ideological leanings; as such, a liberal judge in California may render an individual’s sex or gender as being an appropriate trait to establish membership to a particular social group, where as a more conservative jurist in the South may rule that the causal connection between one’s persecution and this trait is too weak, as gender encompasses too wide a category. Despite the efforts of attorneys to encourage relocation for their clients to ensure a better chance of asylum consideration, most refugees lack the legal counsel and resources to become fully aware of these external factors that may weaken their case. Furthermore, there remains little recourse for assisting asylum seekers who have entered the country illegally; many who are released on bond remain uninformed of where they can retain legal status and what jurisdictions would allot them a better chance of a fair hearing (2017). Although individual judges are at liberty to evaluate a case as they see fit, they are not authorized to speak on their determinations; this rule puts asylum seekers who have been victims of

gender-related harm at a significant disadvantage because of the already existing lack of precedent in these types of cases, especially those in which asylum has been successfully granted.

LEGISLATIVE LEVEL

The adoption of the 1980 Refugee Act has been regarded by some as an effort by the legislature to align U.S. domestic asylum law with the Refugee Convention and Protocol (Long 1994, 181). Although it provides the framework for the minimal obligations pertaining to refugees and asylum, the U.S. recognizes the Protocol as a non-self-executing treaty and as such, its *domestic* asylum laws, represented by the 1980 Refugee Act, are legally binding to the United States and take precedence over international instruments (Thiele 2000, 222). When the U.S. ratified the Refugee Act they expanded the definition to include not only individuals who feared future persecution but also those whose fear was based on past persecution, a precedent which “demonstrates Congress’ ability to expand the protections offered by the more limited international definition of refugee” (223). However, despite the legal capacity for Congress to expand the definition to recognize unprotected groups, such as victims of gendered violence, there has been minimal effort to do so. Furthermore, there remains difficulty in incorporating progressive and inclusive policy initiatives into the strict confines of the Refugee Convention and domestic asylum law, as well as into the general political environment in the U.S.

Despite international efforts to provide interpretive guidance for gender-related violence within asylum law, many of these instruments lack the structure and legal means to protect and represent victims; although the United States Congress has implemented

some policies in the last few decades to uphold these approaches, they are often counterbalanced by other administrative actions aimed at controlling immigration or mediating foreign policy goals (Long 1994, 183). For example, in their effort to adopt neutral and objective immigration policies and control illegal immigration, Congress has continued to practice a relatively “gender-blind” approach to asylum procedure which further narrows the U.S.’s refugee description, adding to the existing difficulty for applicants with gender-based claims: “an immigrant visa is one of the scarcest, most sought after public benefits that the U.S. government offers...immigrant statutes adopted for apparently gender-neutral objectives can disrupt female migration patterns or disadvantage immigrant women because of their gender” (Fitzpatrick 1997, 27). Although asylum claims are judged on a case by case basis and are vulnerable to a number of subjective factors, Congress’ role in adopting policies pertaining to asylum is a way to provide courts “the means to recognize a gender-related claim” and consider it properly; many past asylum policies introduced by Congress, such as the INS Guidelines in 1995 or the 2014 protocol for protecting LGBT asylum seekers have been more comparable to standard procedures than binding statutes. Furthermore, because immigration courts’ asylum decisions have remained unpublished for so many years, the extent to which procedures and guidelines introduced by Congress have actually influenced gender-related asylum case outcomes have remained largely unknown.

Congressional action over the past few decades has also been largely influenced by the political climate in the U.S. at the time, as well as the public’s perception of immigration and humanitarian issues. As such, Congress’ efforts to introduce more inclusive policy approaches to asylum admissions are often determined by agenda-based

responsibilities and assurances they have to their constituents, and not necessarily the extent to which they regard gender-based violence as a humanitarian issue that the U.S. government needs to address: “legislators typically view migration through geographic and sector-specific lenses that reflect the impact of immigration on their districts and states...Congress is also susceptible to interest group pressure because migration creates benefits and costs for particular economic and social factors” (Saleyhan & Rosenblum 2008, 107). In essence, much of the restriction that Congress faces in their capacity to introduce gender-sensitive asylum standards comes from domestic barriers that prevent them from approaching asylum from a human rights perspective. This is largely due to the geography-specific nature of their constituencies, which may or may not benefit from more progressive immigration policy.

EXECUTIVE ORDERS

The executive branch’s ability to approach asylum policy from a more human-rights oriented approach is constrained by somewhat different factors than that of Congress. Most obviously, the President is not bound by such geographic restrictions, as his constituency encompasses the entire country; as such, presidential administrations’ approaches to immigration and asylum policy are less bound by short-term concerns: “Presidential pressures are less susceptible to short term interest group and narrow geographic pressures...Presidents’ broader constituencies and longer time horizons should cause them to view migration (and other issues) through a broader national lens” (Saleyhoun & Rosenblum 2008, 107). Although this reality seems to suggest more liberty for the executive office to exercise a human rights approach to immigration and asylum policy, free of the backlash or loss of support that members of Congress may face

from their smaller districts, the policy initiatives proposed by the President are national in scope, as opposed to regional; therefore, they are bound by the potential effects they may have at the national level. Refugees who have applied for asylum under the claim that they have faced or will face gender-based persecution represent a relatively narrow group who would benefit from very specific and focused types of reforms. Furthermore, with regards to immigration, much of the executive office's actions are bound by restrictions that take precedence over humanitarian concerns and gender-sensitive policies: "the execution of migration policy requires decision making with respect to millions of individual immigrants...presidents are more likely to consider the diplomatic and national security implications" (108). Unfortunately for refugees, asylum is rarely regarded as a separate issue from immigration on the national level, and therefore the specific problems that plague asylum determination processes are overlooked in the wake of broader immigration policies and approaches. As such, the likelihood of gender-sensitive asylum reform becoming a national priority on the agenda of the executive office has continued to remain doubtful; furthermore, the possibility that the gender-restrictive and subjective asylum standards that these victims face will become a concern within the broader policy issue of immigration has not proven hopeful.

THE IMPACT OF PUBLIC OPINION

Public opinion regarding immigration has proven to be a determining factor in the policy approaches taken by decision makers with regards to asylum; furthermore, American ideals pertaining to immigration have been shown to vary within the evolving political climate, especially in times of polarity in the government and general unrest (Saleyhan & Rosenblum 2008, 110). Pertaining to asylum specifically, political trends

have continued to influence the public's take on whether asylum represents an immigration enforcement issue or a human rights concern: "depending on the specific nature of asylum/immigration issues at the time, public scrutiny of immigration issues will shift between these two priorities" (110). As such, human rights norms may take precedence over economic or national security issues in determining asylum standards and approaches during times of relative bipartisanship and political civility; however, when polarity and controversy regarding the economy, political priorities and our leaders in office are more prevalent, asylum may tend to fall under national policy pertaining to immigration. It goes without saying that public pressures and concerns maintain the capacity to influence legislative and executive approaches to dealing with asylum standards; it remains to be seen, however, if asylum reform on behalf of human rights is even possible in the United States.

MATTER OF A-R-C-G

The 2014 case entitled the *Matter of A-R-C-G-* concerned an applicant from Guatemala who, along with her three children, came to the United States to seek refuge from the abuse she had endured by her husband. According to Ms. C.G., the maltreatment she experienced began shortly after she and her husband were married when she was only seventeen; in her testimony, she stated that she had sustained persistent injuries by her husband over the years, and was subjected to regular beatings as well as being raped and burned on multiple occasions. She described her efforts to escape the abuse, in which she left town with her children and father for three months; although her husband had promised her the abuse would cease upon their return, it nevertheless continued. Ms. C.G. affirmed that although she had contacted the police

numerous times, she was informed by local authorities that they “would not get involved in a marital relationship”; her husband continued to threaten her life if she contacted the police again (26 I&N Dec. 388). She and her three children arrived in the U.S. on Christmas Day 2005, and applied for asylum shortly thereafter (Harvard Law Review 2019).

Ms. C.G.’s application attested that she had suffered past persecution and had a well-founded fear of future persecution on account that she belonged to a particular social group comprised of “married women in Guatemala who are unable to leave their relationship” (26 I&N Dec. 388). Despite considering her a credible witness, the immigration judge denied her asylum, finding that there was “inadequate evidence” to demonstrate that the abuse suffered was on account of such membership (26 I&N Dec. 388). Furthermore, the judge contended that “the respondent’s abuse was the result of “criminal acts, not persecution”, which were perpetrated “arbitrarily” and “without reason” (26 I&N Dec. 388). The hearing concluded on October 14, 2009, with the final decision being that Ms. C.G. did not meet the requirements needed for asylum, nor was she eligible for withholding of removal.

Ms. C.G. and her representatives appealed this decision to the Board of Immigration Appeals, stating that she had established eligibility for asylum as a victim of domestic violence. Although the DHS initially maintained that the decision by the Immigration Judge should be upheld, they eventually conceded that not only did the abuse suffered by the respondent rise to the level of persecution, but that it was in fact on account of her membership to the particular social group to which she belonged (HLR 2019). Ms. C.G.’s counsel submitted to the board further amicus briefs “to address the

issue of whether domestic violence can, in some instances, form the basis for a claim of asylum or withholding”, as well as additional evidence to demonstrate the validity of her claim (26 I&N Dec. 388).

In claiming asylum based on membership to a particular social group, applicants must demonstrate that the group is “composed of members who share a common characteristic”, “defined with particularity”, and “socially distinct within the society in question” (I&N Dec. 392). In assessing Ms. C.G.’s appeal, the Board focused predominately on whether or not the particular social group presented in the case, that which encompassed “married women in Guatemala who were unable to leave their relationship”, did in fact meet the requirements previously adopted into the Board’s framework (HLR 2019). They eventually found that the traits shared by the group, being gender and marital status, were immutable characteristics that “either cannot be changed or should not be required to change” (2019). Furthermore, the Board contended that the group was defined with particularity, and that membership was impacted by both the “social expectations and legal constraints of Guatemalan society” (26 I&N Dec. 388). Lastly, the Board established that the particular social group in which Ms. C.G. held membership was socially distinct due in large part to the “sociopolitical factors” related to domestic abuse, family violence, and male domination that exists in the respondent’s home country and culture; they concluded by finding that Ms. C.G.’s membership to this particular social group was “at least one central reason” for the persecution she had suffered (2019). The Board’s decision in the *Matter of A-R-C-G-* was the first “published precedential decision that affirmed the validity of a particular social group encompassing victims of domestic violence” (2019). Although American judges have remained

generally divided in their contentions as to whether or not domestic violence and sexual abuse consistently meet the threshold of persecution in the legal sense, this case marked a progressive turn in the U.S. courts' capacity to consider gender-related asylum cases. Not only did its adjudicators allow for a more liberal interpretation of the particular social group category that recognized the gender divide that exists in marital relationships, especially those subject to abuse, but for the first time in assessing a gender-related asylum claim, the BIA took into consideration the extent to which societal and cultural considerations (in this case Guatemalan society) pertaining to gender and sex put women at particular risk in their home countries.

In June of 2018, the now former Attorney General Jeff Sessions issued a decision in the *Matter of A-B-*, an asylum case involving a woman from El Salvador, who wished to be granted asylum based on the claim that she held membership to a particular social group of "Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners" (27 I&N Dec. 316). The case, which strongly mirrored that of Ms. C.G., relied on the BIA's decision in the *Matter of A-R-C-G-* as precedent. Upon review of the case, the Sessions denied the applicant's claim for asylum and issued an opinion stating that the decision in the "*Matter of A-R-C-G-* is overruled", and that the "decision was wrongly decided and should not have been issued as a precedential decision" (27 I&N Dec. 316). The ruling went on to discredit the considerations taken by the Board in deciding their opinion in the case of Ms. C.G., contending that not only was the application "fatally flawed", but that any applicant's membership to a particular social group must exist in relationship to the "exact delineation of any proposed social group" (27 I&N Dec. 316). Furthermore, the decision

issued a future requirement that a “particular social group must exist independently of the harm asserted in an application”, a condition opposing the notion that gender-based persecution motivated by an individual’s gender or sex can represent a valid claim for asylum (27 I&N Dec. 316). Lastly, the *Matter of A-B-* stated that claims for asylum could not be supported by any societal issues or a propensity for crime that may exist within the applicants country of origin, regardless of the fact that “certain populations are more likely to be the victims of crime” (27 I&N Dec. 316).

In congruence with his ruling, the former Attorney General issued the USCIS Guidance for Adjudicating Credible Fear and Asylum Claims in July 2018. Essentially, these Guidelines reiterated the general points discussed in his rationale for denying asylum in the *Matter of A-B-*, instructing officers to make at least “five basic inquiries” when an applicant raises a claim based on membership to a particular social group, substantially raising the threshold of proof of membership that has been common practice (Smith 2019). Specifically, the Guidelines state that “most particular social group claims defined by the members’ vulnerability to gang or domestic violence by non-government actors would *not* warrant asylum or meet the threshold necessary to satisfy the credible fear assessment” (USCIS 2019). Considering the reality that in affirmative asylum claims, determinations are made predominately by asylum officers as opposed to immigration judges and seasoned attorneys with expansive knowledge of the law, these Guidelines attempt to streamline the USCIS’s legal interpretation of the particular social group category in accordance with its usage in the *Matter of A-B-*, posing a particular danger to the fate of applicants with gender-related claims. While the decision in the *Matter of A-B-* does overturn four years of precedent in these types of cases, not all

judges have adhered to or followed that restriction in defensive asylum cases. In affirmative claims, however, these applicants' criteria and evidence is reviewed with relatively strict adherence to the issued Guidelines, solidifying that their cases will not warrant formal adjudication if they have been subject to domestic abuse or gang violence (2019).

MATTER OF A-B-: HARSH RULING OR SYSTEMIC ISSUE?

Not only did the ruling in the *Matter of A-B-* overturn the only published precedential decision acknowledging domestic violence as a valid claim for asylum here in the U.S., but the proposed interpretations provided in the decision set a debilitating standard for gender-based asylum claims to meet. In his decision, Sessions suggests an understanding of the particular social group category that seeks to exclude any group whose existence is assumed or unconfirmed, effectively eliminating the most vulnerable populations of many societies. Furthermore, the notion that any alleged persecution must be completely independent from such a group discounts the reality that in most of these cases, especially gender-related cases, the persecution suffered often predetermines the existence of the group in question. As such, the former Attorney General's contention that these types of cases should be examined independently from considerations relating to the applicant's country of origin that may contribute to the alleged persecution suggests that gender-motivated violence does not represent a systemic issue as far as the U.S. government is concerned, and the inability of women who experience this persistent trauma to obtain protection is not a state issue.

The large majority of claims which are denied asylum do not make it to the Board of Immigration Appeals and therefore, the basis on which they are granted or denied

holds little precedential value. However, the *Matter of A-R-C-G-* is a case that not only established a new precedent for gender-related claims and cases involving violence against women, but one that mirrors the politicization of asylum law and its interpretive value. The initial success of this case was due largely to the practice of a more liberal approach to understanding the particular social group category, one that considered the societal circumstances that contribute to experiences of persecution as well as the lack of protection for women in many regions and cultures. Its decision echoed a more humanitarian approach to asylum law, which acknowledged the relationship between gender-motivated violence and predetermined societal roles. The decision to overturn this precedent in the *Matter of A-B-* was upheld by a more literal and restrictive approach to the particular social group category, based on the notion that persecution in itself cannot predetermine social groups or social group characteristics, regardless of its prevalence or insidious nature. This more definitive approach to interpreting asylum law reflects a more controlled ideal for granting protection, which regards asylum practices as a necessary strategy in maintaining immigration standards and balancing foreign policy objectives.

Because of the lack of protection allotted to gender-related groups in asylum law, these cases are especially vulnerable to inconsistency and undue influence. Not only do adjudicators vary in their opinions regarding women and gender as protected classes, but the methods and procedures used in determining these cases have continued to fluctuate according to social and political changes and constraints at the domestic level. The decision issued in the *Matter of A-B-* is not a reflection of the weakness of the case in question, nor is it a legitimate critique of the alleged flaws present in the *Matter of A-R-*

C-G-. Furthermore, the opinion of the former Attorney General that these claimants fail to warrant international protection may not necessarily be the result of theoretical beliefs or approaches to the asylum statute and its requirements, or interpretive leanings pertaining to the language of the law itself or the particular social group category. The decision to overturn this particular precedential decision is representative of a larger trend that exists in the outcomes of gender-related asylum cases; it mirrors the inconsistency that exists at the judicial level as well as the subjectivity of gender-related claims. *Why the Matter of A-R-C-G-* was overturned could be reasonably answered through examining the record of Jeff Sessions and the corresponding policies in place at the time pertaining to asylum and immigration; the general motivation and reasoning behind this decision presents no great mystery. However, this case is one of thousands that presents domestic violence and gender-motivated persecution as a basis for asylum, and as such, it mirrors the inconsistency in which these types of cases are approached. An examination of what factors caused this case to go from an initial loss, to a legal win for gender-based asylum law, and then back down again could potentially expose what particular constraints and determinants are responsible for this inconsistency and how they manifest within the decision making process to grant or deny asylum. Furthermore, given the complex nature of the asylum process, and the political and ideological subjectivity of asylum law itself, an examination of the basis on which these cases are determined can help to identify the extent to which domestic factors are salient in determination outcomes.

CHAPTER 4: OBAMA ERA CASE OUTCOMES

OBAMA ERA: 1/2013-12/2016

Obama's approach to immigration and asylum standards during his second term as President was determined largely by his efforts to humanely control the insurmountable surge of immigrants from the Northern Triangle coming through the southern border. This crisis, which came to a head in 2014, despite its many years of genesis, was propelled by the alarming increase of gang and drug related activity and violence in Central America, as well as stunting poverty and general governmental incompetence. The initial influx of immigrants with children was met with an increase in detainment, the appointment of larger numbers of border patrol agents, and changes to ICE standards; DHS also placed higher priority on deporting criminals and drug carriers while increasing the detainment duration stay for families and children in order to obtain them legal counsel and court hearings. Obama's policies during this time were met with particular contention and were subject to criticism from both the left and the right; while conservatives condemned his strategy to loosen refugee and asylum standards in order to protect migrant children, liberals blasted the detention and hasty deportation of families as a means to deter migrants from the Northern Triangle.

Prior to Obama's second term, the maximum number of refugees the U.S. was allotted to take in annually, otherwise known as the refugee ceiling, was capped at 70,000, with 2015 recording the highest number of refugees from the Northern Triangle the U.S. had received since 1996 (Lind 2014). In an effort to respond to the humanitarian crisis in Central America, Obama raised the ceiling in 2016 to 85,000, while also announcing it would begin accepting refugee applications from minors in the Northern

Triangle who had relatives legally residing in the U.S. (Lind 2018) In an effort to speed up legal proceedings for asylum applicants, the Obama administration partnered with Costa Rica, the UNHCR, and the International Organization for Migration in 2016 to form the Protection Transfer Agreement (PTA), a program allowing for the pre-screening of asylum applicants in the Northern Triangle by U.S. officers and the transfer of the most vulnerable to Costa Rica to await processing and resettlement to the United States. (Lind 2018) These efforts to alleviate pressure at the court level and speed up determinations processes, while aimed at providing a safer recourse for migrant families and children, were criticized for compromising asylum procedures and utilizing the system as a means to mitigate the humanitarian crises taking place in Central America (Lind 2018).

Prior to the decision in the *Matter of A-R-C-G-* in August of 2014, the Obama Administration initiated no *formal* policy aimed at protecting gender-based persecution as a valid claim for asylum; they did, however, neglect to follow the general approach practiced by the Bush administration, which urged the BIA and circuit courts subscribed to the legal interpretation “that a particular social group cannot be defined by the persecution suffered or feared” (ILW 2019). This reading of the particular social group category not only substantially increased the level of difficulty associated with gender related claims, but effectively rejected many of them almost immediately, especially those reporting domestic violence or gang-related sexual assault, as such instances of persecution often predetermined social group membership for many of these victims. Although the Obama administration didn’t introduce a formal rewriting of the definition, they actively endorsed an interpretation of the particular social group category that

acknowledged its “conceptual ambiguity”, while also recognizing that “gender-based claims are founded on *theories* of social group membership”, rather than fixed unalterable definitions (ILW 2019). Furthermore, Obama’s formal acknowledgement that domestic abuse and gang-related violence, two types of claims that overwhelm the large majority of gender-related cases, could be valid petitions for asylum gave license to officers and jurists at the court level to determine their decisions without some of the looming causal restrictions that plague many these types of cases.

U.S. asylum standards during this period endorsed a similar recognition of gender related claims as those of international standards, such as the Convention on the Elimination of All Forms of Discrimination and Canada’s 1993 Guidelines on Gender-Related Persecution (ILW 2019). As such, the administration’s practices in determining gender-related claims during this time took on a more human rights approach to asylum, one that aimed to preserve the initial objectives of international human rights and refugee protocols that the U.S. was party to, rather than focusing on the strict and outdated parameters of domestic asylum law itself.

Many have argued that Obama’s approach to immigration and asylum during his second term allowed many migrants to enjoy refugee status prematurely, while criticizing the assumption that asylum seekers should be granted protection based on the conditions of their countries of origin, and not their actual experiences of persecution. In analyzing the general policy approach taken by the Obama administration in response to the 2014 immigration crisis, experts have referred to the “push” and “pull” perspectives in understanding governmental responses immigrants and refugees. According to Karen

Masulo from the CGRS, the general difference lies with who or what is in need of protection in migrant situations:

“For those adopting the “push” factor outlook, the crisis is a humanitarian one, reflecting human rights violations and deprivations in the region, and the protection needs of refugees. While acknowledging that the reasons for migration may be mixed, this view recognizes the seriousness of regional refugee protection needs. For those focusing on “pull” factors, the crisis has its roots in border enforcement policies that were perceived as lax by potential migrants, and thereby acted as an inducement to migration” (Harding, 2014; Navarette Jr, 2014; UNHCR, 2014; Masulo, 2015).

It would be overly simplistic to argue that Obama strictly endorsed solely a “push” or “pull” style program with his immigration policies, as they could arguably be characterized as a mixture of both. Nevertheless, his administration’s approach to determining gender-related claims allowed for an acknowledgement of the social and political environment from which many of these applicants were coming from, as well as an opportunity for jurists to exercise a less restrictive and literal application of asylum law. Furthermore, it is important to note is that this shift in asylum standards during Obama’s second term, especially with regards to gender-based persecution and unrecognized groups was likely more of a response to the immigration crisis at the border and the human rights violations occurring in the Northern Triangle, rather than a reflection of his administration’s general ideological stance regarding gendered persecution and the use of the particular social group category. However, this likely reality further reinforces notion that these types of cases remain the most vulnerable to the political climate and legislative objectives.

Obama Era Case Outcomes 1/2013-12/2016

Case no.	Date	Sex	Country of Origin	Immigration Court or Asylum Office/Location	Decision Outcome	PSG	Type of Persecution
10774	1/13	F	El Salvador	AO/San Francisco, CA	Granted	n/a	Domestic Violence
10810	8/13	M	Mexico	AO/SF, CA	Granted	n/a	Gender/sexual orientation
12240	2/13	M	El Salvador	AO/SF, CA	Granted	n/a	LGBT/rape
10744	1/13	F	El Salvador	AO/SF, CA	Granted	n/a	Sexual Orientation
2994	5/14	F	Ethiopia	IJ/Portland, OR	Granted	n/a	FGC
10877	10/14	F	El Salvador	AO/California	Granted	n/a	Domestic Violence/LGBT
10174	6/14	F	Guatemala	IJ/Los Angeles, CA	Granted	n/a	Gender Identity/rape
10771	9/14	M	Pakistan	AO/California	Granted	n/a	Sexual Orientation
10925	10/14	F	El Salvador	IJ/Washington	Granted	n/a	Domestic violence/gang-related
9943	4/14	F	Pakistan	IJ/Maryland	Granted	n/a	Forced Marriage/sexual orientation
11071	11/14	F	Colombia	IJ/Texas	Denied	n/a	Sexual Persecution
10670	8/14	F	Guatemala	AO/LA, CA	Granted	PSG: Indigenous Women	Rape/gang-related
9955	4/14	M	Mexico	IJ/SF, CA	Granted withholding of removal	n/a	LGBT
11083	11/14	F	Guatemala	AO/California	Granted	n/a	Rape/sexual & gang violence
11172	12/14	M	El Salvador	AO/Oregon	Granted	n/a	Domestic violence/rape
10008	4/14	F	Honduras	AO/Florida	Granted	n/a	Domestic violence/forced marriage
10850	9/14	F	El Salvador	IJ/Arlington, VA	Granted	n/a	Rape/forced prostitution
10877	10/14	F	El Salvador	AO/California	Granted	n/a	Sexual Orientation/Domestic Violence
10904	10/14	F	Guatemala	IJ/LA, CA	Granted	n/a	Domestic violence/rape
10128	6/14	F	El Salvador	IJ/San Antonio, TX	Denied	PSG: Salvadoran women unable to leave domestic relationships	Domestic violence
10129	6/14	F	Guatemala	IJ/San Antonio, TX	Denied	PSG: Guatemalan women unable to leave domestic relationships	Domestic Violence

10831	9/14	M	Honduras	IJ/Washington	Granted withholding of removal	n/a	Sexual Orientation
11286	1/15	Trans F	Honduras	IJ/Portland, OR	Granted	n/a	Domestic violence/sexual abuse
11504	3/15	F	El Salvador	AO	Granted	n/a	Domestic violence/rape/gang- related
11752	4/15	F	Guatemala	IJ/Seattle, WA	Granted	n/a	Domestic violence/gang- related
12436	7/15	F	El Salvador	IJ	Granted	n/a	Rape/sexual violence
11330	1/15	F	Guatemala	IJ/SF, CA	Granted	n/a	Rape/sexual/gang violence
11909	5/15	F	Ivory Coast	AO	Granted	PSG: women from Ivory Coast who lack effective protection from male neighbors	Domestic violence/rape/FGC
11408	2/15	F	Cameroon	IJ/NY, NY	Granted	n/a	Domestic violence/LGBT
12057	6/15	F	El Salvador	IJ/SF, CA	Granted	n/a	Rape/Domestic violence
11429	2/15	F	Mexico	IJ/York, PA	Denied	n/a	Domestic Violence/forced marriage
11435	2/15	F	El Salvador	AO	Granted	n/a	Domestic violence/Gender Identity
12223	6/15	F	El Salvador	IJ	Granted	PSG: married women who are unable to leave their marriage	Domestic violence/rape
13494	1/16	M	El Salvador	IJ	Granted	PSG: LGBT people from El Salvador	LGBT/sexual orientation
14014	3/16	F	Guatemala	AO	Granted	PSG: female Guatemalan children with lack of parental protection	Domestic violence/sexual assault
16557	12/16	F	Mali	IJ	Granted	PSG: Bambara women	FGC
15487	8/16	F	Honduras	IJ	Denied	PSG: Honduran women who are unable to leave a domestic relationship	Domestic Violence
16753	12/16	F	Nigeria	AO	Referred to IJ (cited A- B-)	n/a	Domestic violence
10705	8/14	F	Guatemala	IJ	Denied withholding	n/a	Domestic violence
12665	8/15	F	Honduras	IJ	Granted	n/a	Domestic violence

(UC Hastings Center for Gender and Refugee Studies, 2019)

ANALYSIS

The cases included in the Obama era outcomes were substantially more limited in their level of detail than those that comprise the subsequent Trump era outcomes; although this contributes to difficulties in analyzing their interpretive differences, the simplified recording of many of these cases could also signify the general level of challenge or difficulty in securing asylum for the applicants in question. In other words, the cases themselves may have been limited in deliberation and inquiry, in which case the decision to grant asylum in many of these cases may have been less contentious and more efficient given President Obama's approach. Of the 40 cases examined, 23 were decided in immigration court, while the remaining were determined in asylum offices, however there appeared to be no disparity in the level of detail or expectation of nexus between the two systems. The Obama era outcomes, however, do not vary significantly from those of the recent Trump era with regards to the applicants' countries of origin, with 80% being natives of the Northern Triangle and Mexico, and the small remainder coming from Ethiopia, Cameroon, Mali, Colombia, and Pakistan. Roughly 72% of the applicants in this group of cases are female, while the remaining 28% represent male claimants, whose majority of cases are LGBT related.

PARTICULAR SOCIAL GROUP CATEGORY: SUCCESSFUL STRATEGY?

In this group of outcomes, the effectiveness of the particular social group category to include gender-related persecution was limited not by its flexibility but by its infrequency. Of the 40 cases examined, only about 25% explicitly proposed a particular social group with which the applicant help membership; furthermore, of this fraction of cases, only about half were granted asylum. This is not necessarily indicative of the level

of success associated with the particular social group category as a strategy in gender-related asylum cases, but rather the general level of necessity to use the category consistently within the political and judicial climate. As such, the infrequency with which various memberships were proposed as part of the PSG category in cases during President Obama's second term could be more suggestive of the notion that the threshold of proof needed to prove fear of persecution based on membership was simply lower.

The flexibility of the particular social group category to include more varied factions of individuals during this era was relatively adaptable; as such, among the successful cases in which different social groups were posed, the persecution suffered and/or the gender or sex of the individual claimant was not void of connection or relatability, further signifying that during this time, the judicial system was relatively receptive to the notion that *persecution can in fact predetermine membership to a particular social group*. Of the cases in which asylum was granted based on membership, the following social groups were posed: *LGBT people from El Salvador, women from the Ivory Coast who lack effective protection from male neighbors, married women from El Salvador who are unable to leave their marriage, indigenous women, female Guatemalan children with lack of parental protection, and Bambara women from Mali*. These few legal victories do provide recourse for navigating gender-related claims in that they legitimize the existence of certain factors that tend to plague the success of gender-related asylum cases. First, the inclusion of the applicant's country of origin in their proposed social group acknowledges the reality that the social and political culture of the victim's country of origin can often decriminalize the persecution they suffer, further preventing them from obtaining governmental or authoritative protection.

Second, the inclusion of the gender or sex of the applicant in their proposed social group recognizes that such traits can effectively predetermine not only their membership to a social group but also their propensity to experience abuse; in other words, the gender or sex of females in some communities warrants the abuse they may suffer, which in turn endows them with the vulnerability and societal position that ensures their membership to a particular social group. This circular theory of abuse also reinforces the notion that no trait, such as gender or sex, is too broad or general to solidify the existence of a particular social group. Lastly, these posed social groups grapple with the reality that more than one characteristic or trait can motivate the practice of persecution; while most immigration legislation neglects to acknowledge the precarious position of females, gays, children, and married persons, this more flexible approach to the PSG category acknowledges the lack of equity among these factions, and the societal characteristics that predispose them to abuse.

The flexible interpretation of the social group category in these few cases, however, does not necessarily signify a greater expansion of asylum law to include gender per se; furthermore, it does not undoubtedly suggest that this flexibility is synonymous with or reliant President Obama's more progressive ideals relating to asylum and immigration. It may, however, reflect the preexistence of a developing acceptance of the particular social group category to represent gender-related groups and persecutory situations that are currently unrecognized by asylum law, a preexistence that is supported and upheld by the Obama administration's approach to asylum.

This group of cases, however, also included outcomes that signified that the particular social group category was not *consistently* an effective strategy to securing

asylum during this time in cases involving gendered abuse. These social groups were posed in cases where asylum was effectively denied: *Honduran women who are unable to leave a domestic relationship, Salvadoran women who cannot leave a domestic relationship, and Guatemalan women who are unable to leave a domestic relationship.* In all of these cases, the bases for denial was the judges' "dissatisfaction" with the proposed social group. In the case involving a woman from El Salvador, the judge alluded that "the proposed group is not a particular social group, as the persecution was inflicted by the boyfriend and not the government", reinforcing the more conservative argument that persecution is not equitable to a personal crime (CGRS 2019). In the case involving a woman from Guatemala, the judge contended that "discord and abuse is a feature in domestic relationships, and Guatemala is taking steps to combat violence against women", further resisting the notion that the cultural and political characteristics of one's community can cause or predetermine persecution or one's membership to a PSG (2019). In examining these denials and their corresponding proposed social groups, it would be safe to argue that despite some progression towards accepting gender as a characteristic that can comprise a social group, there remained some skepticism on the judicial level as to whether or not gender, marital status, and country of origin were sufficient characteristics that could solidify the existence of a particular social group and further provide motivation for persecution, particularly in domestic violence cases.

TYPE OF PERSECUTION

15 of the 40 cases included in this group referenced the applicant's sexual orientation, gender identity, or membership to the LGBT community as the basis for their claims of persecution. This particular area of persecution is arguably the least

contentious within the realm of gender-related asylum given the international recognition that gays, lesbians and transgendered persons have been historically subjected to discrimination in all areas of the world, and that the LGBT community represents a social and political group with human rights objectives that supersede beyond the scope personal activities and sexual preferences. Despite the continued prevalence of injustice that the LGBT community continues to experience on a global scale, the asylum claims of gay and transgendered individuals are typically met with less skepticism, as their claims are inherently political in nature. As such, despite the inclusion of their claims as being gender-related, their use of the particular social group category to obtain asylum does not signify any particularly expansive progression within the realm of gender-based protection. Therefore, the success of the 15 claimants in these cases in obtaining asylum, though justified and well-deserved, represents no identifiable anomaly.

Three of the cases within this group involved female genital cutting/mutilation (FGC or FGM), with applicants from Ethiopia, Ivory Coast, and Mali, respectively. Cases involving this particular type of persecution signified a few of the first legal victories that brought gender-based asylum cases into the limelight in terms of legal debate and asylum standards, not only due to the heinous nature of the abuse, but also the systemic challenges for migrant women in their efforts to obtain asylum. Furthermore, cases involving victims who are subjected to female genital cutting or mutilation typically involve two circumstances that are incredibly prevalent in gender-related asylum cases involving women: the act (or abuse) is inherent within the culture or society in which she lives, and the persecution suffered is determined by the woman's husband or marital status. Like members of the LGBT community, individuals who have suffered or

fear future FGC are typically granted asylum, and therefore these three grants are more indicative of the aforementioned preexistence of the general acceptance that this particular type of gender-related abuse rises to the level of persecution.

Nearly 2/3 of the cases included in this group involved domestic abuse, which is arguably the most debated area of gender-based asylum, due to its popularly deemed “personal nature”. It is important to note that this approximate 67% of cases does not include the previous cases discussed involving LGBT and FGC claims; in other words, although domestic violence is often included as an element in cases involving sexual orientation and female genital mutilation, this majority represents cases pertaining *solely* to domestic forms of marriage or partner-related violence, including rape and sexual assault. Given that LGBT and FGC related claims have become widely yielded as acceptable and valid claims for asylum, this distinction is significant, as domestic violence and sexual abuse cases void of such characteristics continue to remain highly contested. Furthermore, the legal success in domestic abuse asylum cases is a relatively new phenomenon, whose short history has been especially inconsistent, as we saw in the *Matters of A-R-C-G- and A-B-*.

The majority of domestic violence cases in this group do not propose membership to a particular social group, and of the four that do, three are unsuccessful due to the judges’ dissatisfaction with the posed social group, as mentioned previously. However, in many of the domestic violence cases where a group was not proposed but asylum was granted, other terms are included and utilized to describe the abuse suffered, such as “rape”, “sexual violence”, and “gang violence”. This particular division among the Obama era cases may be representative of a trend, one that we can reasonably argue may

be significant to and indicative of Obama's policies at the time, where victims of domestic and gang violence were protected and their claims legally eligible for asylum consideration. Given the relative scarcity with which the particular social group category was used among the domestic violence cases where asylum was successfully granted, compiled with the fact that among the portion of cases where asylum was denied, half were domestic violence cases that proposed a particular social group based on the applicant's marital status, we can rationally suggest that expanding the particular social group category to include victims of domestic violence may have been *less necessary* for obtaining asylum in congruence with Obama's tenure.

In three of the domestic violence cases where asylum was denied, the claimants' representation posed a particular social group in which the individual held membership; as mentioned previously, all of these groups included the nationality, gender, and relationship status of the applicant in question (ex: *Honduran women* who are unable to leave a *domestic relationship*). The lack of success in these cases could be attributable to a number of factors, including but not limited to the location of the hearing, the credibility of the witness, the strength of the evidence, or the personal ideology of the judge. However, in the recorded bases for these denials, the judges expressed a dissatisfaction with the proposed social group, and a strong position that domestic violence, though dangerous, is not a societal or cultural issue but rather the infliction of harm from one individual onto another, as the relationship with the persecutor was of a personal nature (CGRS 2019). The lack of success in these cases in obtaining asylum based on these proposed social groups suggests that, despite the Obama administration's actions to protect these victims' claims as eligible for consideration, the particular social

group category in of itself continues to be subject to legal and theoretical scrutiny that may not be influenced by domestic efforts to change asylum standards.

JURISDICTION

Although a few case outcomes failed to provide the location of the immigration court or asylum office where the final decision was made, the overwhelming majority of the hearings took place on the west coast, predominately in liberal areas such as San Francisco, Los Angeles, Portland, OR, and Washington state. What was most significant, however, was that 4 of the 6 hearings where asylum was denied took place in Texas, with 3 being held in San Antonio, specifically, in June, August, and November of 2014, before, during, and after the *Matter of A-R-C-G-*. The case held in November concerned a female applicant from Colombia who claimed asylum on the basis that she was gay; her claim was denied based on her inability to effectively prove past or future persecution. The outcomes of the other three cases, however, were similar, all involving women from the Northern Triangle fleeing domestic violence who were denied asylum based on a Texas judge's contention that female victims of spousal abuse who are unable to obtain protection do not comprise a particular social group (CGRS 2019). Although these few cases do not represent a statistically significant group, given the lack of identifiable trends among this case era, we can reasonably suggest that jurisdiction and judge selection was a determining factor during Obama's second term.

CHAPTER 5: TRUMP ERA CASE OUTCOMES

TRUMP ERA: 1/2017-PRESENT

Trump utilized immigration as arguably the most predominant platform upon which his presidential campaign was built; much of his stance has relied heavily on undermining President Obama's approach to dealing with the immigration crisis at the southern border and the Democratic party's alleged misplaced tolerance towards undocumented aliens. Although Trump's platform has focused heavily on border security and the hasty deportation of illegal immigrants and criminal offenders, he has also continually expressed his distaste and lack of sympathy for refugees and asylum seekers, especially those coming from nations that he has deemed "beneath" the United States. In an effort to legitimize his extreme policies pertaining to migrants seeking asylum, Trump has continued to maintain that certain ethnic groups pose a threat to the safety of Americans through anti-migrant rhetoric and sentiment, using words like "infest" and "animals" in reference to immigrants, and vowing not to allow the U.S. to become a "migrant camp" (Golshan 2018).

In his first month in office, President Trump introduced an executive order titled Border Security and Immigration Enforcement Improvements, addressing plans for stricter policies pertaining to ports of entry, undocumented aliens, and migrants seeking asylum. Section 11 of the order pertaining to parole, asylum, and removal states its intentions to "end the abuse of parole and asylum provisions currently used to prevent the lawful removal of removable aliens"; though the order does not clearly eliminate the rights of refugees to apply for asylum once they are on American soil, its objectives are counteractive as they aim to marginally disrupt the asylum process for those entering

through the southern border, while maintaining its contention to prevent the “exploitation” of federal laws (order no.13767, 2017). The order further clarifies that asylum referrals and credible fear determinations will only be considered in a manner “consistent with the plain language of those provisions”, effectively eliminating the possibility of an asylum hearing for anyone whose claim does not satisfactorily fall within a plain text reading of the five categories (2017).

Section 5 of President Trump’s order directs the Department of Homeland Security to build additional detention facilities at the southern border for migrants to await the assignment of asylum officers and immigration judges to conduct hearings (CMS 2017). Not only have these centers detained entrants who are awaiting interviews, but Section 6 of the order directs the detainment of all noncitizens at or near the southern border, including those who have already applied for asylum (CMS 2017). As such, the overcrowding of these centers has dramatically impeded on the ability of potential applicants to obtain a credible fear interview and legal representation, while the arbitrary holding of all noncitizens has allowed for the expedited removal of many refugees before they can even apply for asylum. Furthermore, by reducing the number of applicants who are “free” while their cases are pending, the DHS has been able to quickly deport many applicants before their claims have been properly determined; as such, many asylum seekers have been hastily released with nowhere to go, forcing them to retreat to the homes from which they have tried to escape (CMS 2019).

Given that the U.S. cannot legally deport an asylum seeker without allotting them a legitimate credible fear interview, much of Trump’s policy approach has relied on making the asylum seeking process so convoluted and tortuous that fewer migrants,

especially those coming from Mexico and Central America, will attempt to seek refuge in the United States. The current administration's recent adoption of the Migrant Protection Protocol exemplifies this effort, as it reflects a "concerted effort to deter migration flows" and impede on the due process rights of asylum seekers (Lind 2019). An estimated 75% of migrants that are given a pre-screening interviews pass, and thus are permitted to remain in the U.S. while they await a court hearing; the new protocol grants the U.S. government permission to deport these migrants to Mexico while their claims are processed, during which time they remain in the custody of the Mexican government (Lind 2019). Generally, when their court date is confirmed, they are escorted by U.S. officials to their hearing, and subsequently returned back to Mexico with either a deportation order or a future court date to continue their case (Lind 2019). While detained in Mexico, these asylum seekers are significantly limited in their access to proper legal counsel or representation; furthermore, because immigration courts are run by the Department of Justice and not the DHS, these case dockets have become quickly derailed, with many applicants missing their hearings as a result of the chaotic process (Lind 2019).

In conjunction with their zero-tolerance immigration policies and new asylum procedures, the Trump administration has made great efforts to minimize the number of asylum seekers who are granted protection in the courts by adopting a stringent and inflexible interpretation of asylum law to be upheld at the judicial level. With the decision of *A-B-* in June of 2018, Trump's former Attorney General Jeff Sessions overturned the only precedential decision upholding domestic violence as a valid claim for persecution based on membership to a particular social group. Furthermore, the

decision explained the necessity that in all asylum claims, the persecution itself must be distinct from the individual's membership; as such, not only did this decision counteract monumental progress for domestic abuse victims seeking protection, but it has served to exclude the claims of many unrecognized groups whose social group membership has been largely defined by their experiences of harm and inability to obtain protection. In his rationale for this decision, the former Attorney General formally declared that unlike the former Obama administration, the current administration will no longer recognize domestic and gang violence as potentially valid claims for asylum, a declaration that has impeded upon the credibility of many asylum seekers at the border, as well as sanctioned immigration judges with conservative views on asylum to quickly deny protection for victims with legitimate claims. Although Sessions has maintained that this decision reflects an effort to "uphold the fundamental principles of asylum law", this approach is largely contradictory to the fundamental principles of asylum as a tool for protecting human rights (NPR 2018).

Trump Era Case Outcomes 1/2017-Present

Case no.	Date	Sex	Country of Origin	Immigration Court or Asylum Office/Location	Decision Outcome	PSG	Type of Persecution
20563	9/17	F	Honduras	IJ/6 th Circuit	Granted	PSG: Honduran women who live under male dominion	Domestic violence
27319	8/17	F	Honduras	IJ/Texas	Denied	n/a	Domestic violence
18652	5/17	F	Honduras	AO/Louisiana	Granted	PSG: women viewed as property	Rape/sexual & gang violence
17640	3/17	F	El Salvador	IJ/New Mexico	Granted withholding of removal	n/a	Domestic & gang violence
22358	12/17	F	Guatemala	AO	Granted	PSG: indigenous females in Guatemala	Rape/sexual violence

21256	10/17	F	Peru	IJ	Granted	n/a (judge cited ARCG)	Domestic Violence
22404	12/17	M	Mexico	IJ	Granted	PSG: Gay Mexican males	LGBT
22079	11/17	F	El Salvador	IJ	Granted	PSG: Salvadoran women who are unable to leave their relationships	Domestic Violence
20375	8/17	F	Guatemala	IJ	Granted	PSG: Indigenous people	Domestic Violence
17972	4/17	F	Honduras	IJ	Granted	PSG: Honduran females without effective protection	Domestic violence/rape
22101	11/17	F	Saudi Arabia	AO	Granted	PSG: Saudi females who refuse to conform to the gender-specific religious and political standards expected of Saudi girls	Domestic violence/forced marriage
25159	12/18	F	El Salvador	IJ/Bufalo, NY	Granted withholding of removal (cited A-B-)	PSG: Salvadoran women viewed as property	Rape/gang/sexual violence
26234	12/18	F	Guatemala	IJ/SF, CA	Granted	PSG: Guatemalan women	Domestic violence
27308	12/18	Trans F	Guatemala	IJ/Phoenix, AZ	Granted	PSG: trans women in Guatemala	Domestic violence/sex trafficking
21557	12/18	F	India	AO/New Mexico	Granted	n/a	Domestic violence/forced marriage
26240	7/18	F	Morocco	AO/New Jersey	Granted	PSG: Married Moroccan women	Domestic violence
25076	5/18	F	El Salvador	IJ/SF, CA	Granted	PSG: Salvadoran women	Domestic violence
26250	7/18	F	Ivory Coast	AO/California	Denied	n/a	Domestic Violence/FGC
25182	6/18	F	Guatemala	IJ/NY, NY	Granted withholding of removal	PSG: Guatemalan women not subservient to men	Domestic Violence
24280	3/18	F	Mexico	IJ/Chicago, IL	Granted	PSG: Mexican domestic partners unable to leave relationships	Domestic Violence
22948	2/18	F	Brazil	IJ/1 st Circuit Massachusetts	Granted	PSG: married women in	Domestic violence

						Brazil who are unable to leave domestic relationships	
27568	4/18	F	Guatemala	AO/Massachusetts	Granted	PSG: Women from Guatemala who are treated as property	Domestic Violence
27708	9/18	F	Honduras	IJ/NY, NY	Granted	n/a	Domestic violence
23821	12/18	F	El Salvador	IJ/SF, CA	Granted	n/a	Gang/Domestic Violence
28778	11/18	F	Mexico	IJ/SF, CA	Granted	n/a	Domestic Violence
23923	3/18	F	Honduras	IJ/Kansas City, MO	Granted	PSG: Honduran victims of gang crimes	Gang rape/sexual violence
26761	9/18	M	Dominica	AO/Connecticut	Granted	PSG: Gay men in Dominica	Sexual Orientation
26478	8/18	Trans F	Guatemala	IJ/Florida	Granted	PSG: trans Guatemalan women	Domestic violence/gender identity
25334	5/18	F	Saudi Arabia	IJ/Arlington, VA	Granted	n/a	Domestic violence
25055	5/18	F	Guatemala	IJ	Granted	PSG: Guatemalan women unable to leave relationships	Domestic violence/rape
23982	3/18	F	Cameroon	AO	Granted	n/a	Rape/sexual violence
23370	2/18	F	Cameroon	AO	Granted	PSG: Bamileke widows	Domestic violence/forced marriage
28546	10/18	F	Nigeria	AO	Granted	PSG: Nigerian women in domestic relationships	Domestic violence
24444	4/18	F	Honduras	IJ	Granted	PSG: Honduran women viewed as property due to their position in a domestic relationship	Domestic violence
23617	5/18	Trans F	El Salvador	AO	Granted	PSG: trans women in El Salvador	Rape/gender identity
27319	8/18	F	Honduras	IJ	Denied	n/a	Domestic/gang violence
25403	5/18	F	Honduras	IJ	Granted	PSG: Honduran women unable to leave domestic relationships	Domestic Violence
25565	2/19	F	El Salvador	IJ/Alaska	Granted	PSG: women and girls in the immediately family of applicant's father	Domestic violence

29066	2/19	F	Haiti	IJ/SF, CA	Granted	PSG: family member of brother	Gang-related sexual violence
28495	2/19	F	Guatemala	AO/Oregon	Granted	n/a	Domestic violence/gang-related

(UC Hastings Center for Gender and Refugee Studies, 2019)

ANALYSIS

The 40 cases included in the Trump era outcomes provided more detail in their records of the cases than that of the previous era; in other words, the majority of the cases specified a more thorough account of the details of each individual case with regards to the basis on which asylum was granted or denied, the use of the particular social group category, and the location of the hearing. Given that these cases took place more recently than the former group, this may or may not be significant to the level of analysis with which these cases were reviewed; furthermore, given the efforts made on behalf of the Trump administration to significantly limit the number and breadth of asylum claims, there may be more of a concerted effort on behalf of attorneys and advocates to record these cases with more singularity and specification. The majority of claimants in this group are females, with only two cases representing male applicants with LGBT-related claims. Like the former group, the majority of these claims were determined in immigration courts throughout the country, with only 13 taking place in asylum offices; similarly, there appeared to be no identifiable discrepancy in the outcomes or levels of analysis between the two systems. Like the Obama era cases, roughly 70% of the applicants in this group are natives of Mexico and the Northern Triangle, with the remainder coming from Haiti, India, Morocco, Ivory Coast, Brazil, Saudi Arabia, Nigeria, Colombia, Peru, Dominica, and Cameroon.

PARTICULAR SOCIAL GROUP: SUCCESSFUL STRATEGY?

The use of the particular social group category in this group of cases far exceeded that of the previous era, with 28 out of 40 cases articulating a proposed particular social group with which the applicant held membership. Of these cases where a specific group was proposed, 18 were decided prior to June of 2018, or rather, prior to the decision to overturn the *Matter of A-B-*, thus significantly limiting the social group category. However, given that the time period between Trump's inauguration and June 2018 exceeds the 11 months that has passed since the *Matter of A-B-*, this may represent no significant phenomena in terms of judicial behavior. What may be significant, however, is the consistency and recurrence with which the particular social group category is used during this era in comparison to those of the Obama era. It may be reasonable to suggest that, despite the executive office's restrictive stance on what types of claims and situations may qualify one as having membership to a PSG, many jurists continue to practice an interpretation of this category that neglects to unequivocally exclude unrecognized groups and certain types of gender-related claims. Furthermore, the legal and political debate surrounding the former Attorney General's decision to overturn precedent that protected victims of domestic violence as constituting a particular social group may have incited a social expansion of the category from an ideological perspective, further inciting attorneys and advocates to continue to use the PSG category in gender-related cases despite the conservative efforts to restrict its interpretation. As such, in contradistinction with the Obama era, a persistent use of the particular social group category, in spite of its surrounding contention, remains imperative within gender-related claims amidst Trump's exclusive asylum policies.

Despite executive efforts to restrict the judicial interpretation of the PSG category, many jurists proved accepting of a more flexible translation of social group, one that acknowledged the personal nature of the persecution suffered. Like that of the Obama era outcomes, the judicial system since 2017 has seemed to continue to exercise a reading of particular social group that allows for a relative connection between the persecution suffered and the individual's membership; in other words, the legal system appears relatively cognizant of the reality that in many of these gender-related claims, the person's membership is decisively determined by the abuse they have suffered and the inability or unwillingness of their governments to protect them, an unwillingness often swayed by the victim's gender and/or marital status. Of the cases in which asylum was granted based on membership, the following groups were posed: *women viewed as property, Honduran females without effective protection, married Moroccan women, Guatemalan women not subservient to men, women from Guatemala treated as property, Honduran victims of gang crimes, and Bamileke widows*. Furthermore, this group also included a number of posed social groups of a similar formula, which included the applicant's gender, country of origin and marital status: *ex: Honduran, Nigerian, Guatemalan, Mexican, Brazilian, or Salvadoran women who are unable to leave their domestic relationships*. The particular success of many of these posed social groups in this collection of cases is not only significant to the flexibility of the PSG category or the relative consistency of judges' determinations in adjudicating asylum claims of a more precarious nature. As we saw in the Obama era outcomes, many jurists continue to be relatively accepting of the existence of a relationship between the social group itself and the harm suffered by the individual. However, given the strict interpretive guidance

suggested in *the Matter of A-B-*, compounded with the exclusive asylum policies introduced by the Trump administration, the relative success of the use of the particular social group category in gender-related cases during this time frame speaks more to the general legal approach that many adjudicators practice *in spite of* domestic policies and suggested asylum standards. Furthermore, these case outcomes, like those of the latter era, further reflect not only an acceptance of gender-related harm as grounds for asylum from a legal perspective, but also a recognition that personal crimes and a contextual geographic history of the individual's experiences of persecution can contribute to social group membership in the same capacity as the immutable characteristics that predetermine the group's existence.

Of the three cases included in this collection in which asylum was denied, none provided a detailed rationale for why asylum was not granted. However, these cases, which all concerned female victims of domestic violence, also all failed to propose a particular social group in which the applicant held membership; while this lack of detail may have been unintentionally omitted by those keeping records, it is equally likely that the inadequacy of the claim rested upon the absence of a posed particular social group. In comparing the two eras, an overwhelmingly larger percentage of claimants in the Trump era posed a particular social group in establishing nexus; and as mentioned previously, the ability of claimants during the Obama era to obtain asylum despite not posing a PSG may have been reflective of the general ideological climate and executive policies during that time that protected unrecognized groups and practiced more liberal asylum standards. As such, the larger emphasis placed on establishing a particular social group to which applicants held membership during the Trump era may be reflective of

the lack of consideration allotted to gender-based claims since his tenure began; in other words, given the more conservative asylum standards introduced by the Trump presidency, as well as the higher expectations for proving a motivation for the persecution suffered, arguing the existence of and membership to a particular social group has become more imperative during the current era. Given this, it is not surprising that gender-based claims that have neglected to pose a PSG have been less successful.

TYPE OF PERSECUTION

Given the Trump administration's vocal condemnation of domestic abuse and gang violence as valid grounds for asylum, it would be reasonable to suggest that within the realm of gender-related claims, the type of persecution suffered would bear some significance during this era in terms of influencing outcomes. As discussed previously, LGBT-related claims and cases involving female genital mutilation have been generally accepted by political communities and legal systems as both political and persecutory enough to constitute a valid claim for asylum; there has been no concerted effort by the United States to exclude these types of claims despite their gender-related nature, nor does there remain a significant level of discussion or debate surrounding whether or not U.S. asylum standards should continue to include victims with these types of claims. Asylum cases involving domestic abuse and sexual violence, however, have continued to ignite disagreement among legislators and jurists, as many contend that such acts of violence are crimes of a personal nature and not persecution based on one of the five categories. Furthermore, gang-related harm and violence has remained a contested claim for asylum, despite its prevalence in numerous regions of the world, as opponents of such pleas have maintained that victims of gang-violence are not targets of persecution but

rather unfortunate bystanders, and that while organized crime plagues many communities, the violence taking place in one's home country does not necessarily warrant international protection. Although gang-related claims do not always involve gender, the high number of female victims of gang-associated sexual violence results in gang-related claims making up a large portion of gender-related cases.

Gang-related claims are precarious in the legal capacity for many reasons, two in particular. First, victims of gang-related harm, whether they be female or male, tend to be scrutinized according to their association with the gang itself; in other words, many female asylum seekers who claim they have been raped or sexually assaulted by gang-affiliated members are often assumed to have some preexisting connection with those individuals, an assumption that can severely impede upon the applicant's credibility and also render her a victim of a "personal crime". Secondly, gang-related claims are subject to a certain type of political and social scrutiny that not all asylum claims are subject to, one that considers gang-violence to be a part of the culture from which these victims come from; this perspective provides conservative judges an opportunity to discredit gang-related claims based on the notion that such violence is somehow inherent to the communities and ways of life of claimants who wish to escape it.

Within this group of outcomes, 7 cases list gang-related rape and/or sexual violence as the type of persecution suffered, with applicants coming from Honduras, El Salvador, Guatemala, Cameroon, and Haiti; for purposes of clarity, these seven cases do not include gang-related domestic abuse claims. The posed social groups in these cases were as follows: *women viewed as property (Honduras)*, *Salvadoran women viewed as property*, *Honduran victims of gang crimes*, and *family members of the victim's brother*.

Given the success of these seven claimants in obtaining asylum, we can reasonably suggest that many jurists continue to practice a more inclusive approach to adjudicating asylum claims and that, despite political leaders' efforts to dismiss claims involving gang-violence, many continue to regard such activity as an epidemic whose victims are worthy of international protection. Furthermore, in spite of the Trump administration's attempts to discredit asylum seekers coming from Central America and Mexico, it appears that many immigration judges recognize that the political upheaval and organized crime taking place in the Northern Triangle is neither frivolous nor exaggerated, and that women represent a core faction that continue to bear the brunt of such danger.

31 of the cases included in the Trump era collection involve domestic violence claims, with victims coming from Mexico, the Northern Triangle, Nigeria, Cameroon, Saudi Arabia, Brazil, Morocco, Ivory Coast, and Peru. As mentioned previously, the revocation of protections for asylum claims involving domestic violence by the DOJ has resulted in there being a higher standard for 1) posing a cognizable particular social group, 2) establishing membership to that group, and 3) reasonably proving that the persecution suffered was on account of one's membership to that group. Although the aforementioned requirements have not been altered since the previous administration, the current office's efforts to exclude these claims have placed an immediate and defined scrutiny on proving that domestic abuse rises to the level of persecution.

It is worth noting that within the realm of gender-based asylum, domestic violence cases have always experienced distinct difficulties; this is attributed to the personal relationship between the persecutor and the victim, the difficulty in establishing motivation for the abuse, the popular but flawed assumption that wives are compliant in

their abuse, and the lack of recourse provided within asylum law for women, their gender, and their inability to obtain protection in their home countries. As such, the challenges that have plagued domestic abuse cases during the current Trump era do not differ substantially from those of the Obama era, despite domestic efforts to restrict asylum law and interpretation. Asylum claims from domestic abuse victims continue to be met with a level of suspicion that, while prevalent in other gender-related claims, is a fixture in testimonies of marriage-related harm.

The general level of success among the domestic violence cases in the Trump era could be indicative of a few things. First, there appears to be no identifiable disparity between the domestic abuse cases decided before and those after the decision to overturn *Matter of A-R-C-G-* in June of 2018; as such, we can assume that while the success of the woman who was granted asylum in this case may have had a positive effect on future domestic violence asylum claims, the decision to overturn that precedent did little to disrupt progress in this area of the law. Secondly, although the Trump administration's immigration and asylum policies have marginally obstructed the asylum process in terms of seekers' abilities to obtain a hearing, his efforts do not appear to have resulted in a decline of asylum grants at the judicial level among gender-related cases. In other words, although Trump's concerted efforts to deter asylum seekers, especially those fleeing domestic abuse and gang violence, may have been successful in limiting the ability of migrants to apply for asylum, and thus have resulted in a decline in asylum rates as a whole, gender-related cases that make their way to court continue to maintain the attention and consideration of many immigration judges.

JURISDICTION

While only slightly more than half of cases included in this collection provide the jurisdiction of the hearing, the locations are significantly more varied than those of the previous Obama era, and include the following areas: Texas, Louisiana, New Mexico, New York, New Jersey, California, Arizona, Illinois, Massachusetts, Missouri, Florida, and Virginia. Given that judge selection is well known to be a strong determining factor in asylum cases, this varied collection of locations provides us with little recourse for identifying a trend. Furthermore, of the 3 cases in which asylum was denied, only 2 provide the location of the hearing (California and Texas). Given Trump's aforementioned controversial border policies, we could reasonably theorize that the outcomes of hearings solely taking place in Texas and California may be reflective of a trend, especially considering that most if not all migrants entering through the southern border have come from Mexico and Central and South America. However, considering that this analysis is allocated according to the administration and not restricted by location, it would be a stretch to suggest that among these 40 cases, jurisdiction was a strong determining factor.

As established by the cases included in this group, there appears no disparity between liberal and conservative states in their acceptance of the PSG category in gender-related claims; while the majority of the cases included in the Obama era were determined in liberal jurisdictions such as San Francisco, Los Angeles, and the Pacific Northwest, this group is much more varied. Considering the extent to which gender-related claims are determined according to personal ideology and interpretation, we can reasonably argue that since Trump's inauguration, the general partisan leanings of the jurisdiction, or rather that state's general position pertaining to Trump and his policies in

which the case is taking place may be less influential in swaying judge's opinions. As legal activists have continued to maintain that judge selection can effectively predetermine the outcomes of asylum cases, the *jurisdiction* in which that judge resides may be less of a factor. As such, the interpretive approach to the particular social group category and its relationship to gender-related harm may be more reflective of the judge's individual analysis of the claim than partisan predilections pertaining to asylum.

CHAPTER 6: ANALYSIS AND CONCLUSION

From an interpretive standpoint, the variation between the Obama era and Trump era cases do reflect differences in the judicial approach and adjudication of gender-related claims during these respective administrations. In a *qualitative* sense, they diverge in their level of emphasis on the particular social group category and its utilization. This contrast could very well be attributed to the general executive approach to asylum and immigration during each respective era, as well as case-specific factors that were most salient in securing asylum for individual seekers. From a *quantitative* perspective, however, these two eras closely mirror one another in terms of asylum grants and denials, a phenomenon which could indicate a pre-existing acceptance of gender-related persecution as being worthy of asylum from a judicial perspective, despite political efforts to restrict asylum's law's legal interpretation. As such, the quantitative likenesses of these two eras bears less importance than that of the emphasis on the particular social group category, as well as singular factors pertaining to individual cases that may have influenced the overall outcomes.

During their second term, the Obama administration's approach to asylum involved a significant amount of consideration and regard for the human rights violations taking place in Central America and the prevalent failure of women and children to obtain protection from the drug and gang-related violence taking place in their communities. Although some of the executive immigration policies during this time were geared towards controlling the influx of migrants coming through the southern border, asylum continued to remain a viable recourse for those who feared past or future harm. Although no formal policy was introduced during this time to amend asylum law

or its corresponding procedures to include victims of domestic abuse and other forms of gendered persecution, the U.S. government recognized that these instances of violence against women could rise to the level of persecution based on social group. As such, in congruence with the ruling in the *Matter of A-R-C-G-*, a decision supported by the Obama Administration, many asylum claims involving gender-based persecution based on particular social group were examined with a recognition of the precarious nature of these types of cases. This support included the acknowledgement that the particular social group category is subjective to ideological leanings, and that despite the pre-existing legal argument that the motivation for persecution must remain distinct from the abuse itself, when social and cultural circumstances are taken into account, the existence of particular social groups and an individual's membership may be determined by the persecution of which they suffer.

The collection of cases during the Obama era demonstrated both an infrequency in which the particular social group category was used in gender-related cases and a slight inconsistency in its rate of success. However, this implies more of a deviation between domestic policy and legal approaches to gender-based asylum cases rather than a disparity between policy and the judicial outcomes of these cases. Furthermore, the use of the particular social group category as a successful strategy in of itself does not necessarily indicate an overall progression for gender-related protection, but rather the acknowledgment that gender-motivated violence can predetermine the existence of social groups. Given the executive office's more liberal approach to asylum standards and qualifications during this time, and the infrequency with which individual claimants posed a particular social group in which they held membership, we can reasonably

suggest that the PSG category was simply *less necessary* as a legal strategy in gender-related cases during this time period, as the government was relatively accepting of gender-based persecution as worthy of international protection.

While the previously discussed Obama era reflected a more humanitarian approach to asylum as a tool of protection, the Trump administration has focused on practicing asylum law's more literal principles, as well as its more traditional legal interpretations. Given their exclusive immigration policies, the current executive office has approached asylum standards in a somewhat reactionary manner, one that has sought to undo the "looser" standards practiced in the previous presidency. Furthermore, the Department of Justice under Trump has endorsed a more restrictive understanding of the particular social group category, as explicated in their decision in the *Matter of A-B-*; as such, this interpretation places little importance on recognizing the social, political and cultural context from which many gender-related claims come, notably with their exclusion of domestic abuse and gang-violence as valid claims, while focusing on a clear detachment between the existence of a particular social group, the individuals membership, and the persecution they have suffered.

In contrast to the Obama era case outcomes, the Trump era collection reflected a frequent and relatively creative use of the particular social group category, even in cases which were determined during and after the June 2018 decision in the *Matter of A-B-*. Not only were an array of specific particular social groups posed in determination hearings, but many of them contradicted the restrictive interpretation of the category suggested in the former Attorney General's decision, drawing a clear connection with the type of persecution suffered, the individual's membership, and their sex and/or gender.

This suggests that, amidst Trump's restrictive approach to asylum, the use of the particular social group category as a legal strategy to ensure protection was not only more of a necessity, but also proved to be a relatively successful approach. Furthermore, the collection of cases during this time period indicates that within the realm of gender-based asylum, legal *successes* bear more influence on judicial decision making than legal *setbacks*, and as such, judges' determinations did little to follow the undoing of precedent in the *Matter of A-B-*, or the executive order to exclude victims of domestic abuse and gang-violence.

The variation and likenesses between these two era's outcomes shows that although domestic policy can alter the popular legal interpretation of the particular social group category and the extent to which it includes unprotected groups, this expansion or restriction does not necessarily have a long term effect on the inclusion of gender-based harm as a valid claim for asylum. Although political efforts to expand the PSG category can aid in the success of gender-based claims, executive objectives to restrict its interpretation and breadth to exclude unprotected groups is less critical in its ability to influence judges' decisions. This is not to say that domestic policy is not determinant in shaping asylum outcomes, as the Trump administration has exemplified the manner in which these orders can contort the already complicated asylum process. However, from a legal perspective, the expansion of the particular social group category to include gender has shown to be more of a reflection of jurists' ideological approaches to the category itself and case specific circumstances, rather than presidential efforts to include or exclude certain groups.

Despite the vulnerability of gender-related claims within asylum's legal landscape, the relative success of these cases within these two respective eras, amidst their differences in approach to gender-based asylum, signifies a preexisting acceptance of gender-based protection. Though there continues to remain conservative ideas to the contrary, these restrictive leanings may be more of a reflection of general attitudes pertaining to immigration policy and asylum as a whole, rather than a fundamental disregard for gender-related harm and the extent to which it rises to the level of persecution. Furthermore, the comparison between these two eras suggests that partisan politics lacks the ability to monumentally change the judicial system's position regarding gender as a basis for asylum, as the ideals either for or against the use of asylum to protect gender-based victims are relatively secured into minds of judges and subjective to their own individual interpretation of the social group category and case specific circumstances.

This conclusion does not completely contradict the hypothesis discussed in the beginning of this project, as the U.S. continues to experience an inconsistency in its overall approach to handling gender-related claims; furthermore, the absence of gender within asylum law continues to render these types of cases vulnerable to the political climate and domestic leadership. As such, the recurrent obstacles faced in gender-related claims and their consistent vulnerability within the judicial system will *most likely* continue to prevail so long as gender remains an unprotected category. While this is not to say that including gender as a category would effectively eliminate the arbitrary factors that inhibit success within this area of asylum law, success in gender-related claims will likely continue to be sensitive to changes political development and immigration policy,

as gender's long-standing lack of legal recognition has rendered it so. However, despite this reality, these findings signify the relatively positive progression of gender-based asylum in an ideological and legal interpretive capacity, and as such, the weak relationship between executive interpretations of the social group category and judicial outcomes of gender-based cases may represent a fundamentally positive development for asylum seekers fleeing this type of harm. Although it remains to be seen if the particular social group category will continue its upward trajectory in its ability to provide recourse for gender-based victims and female asylum seekers as a whole, the recent era of asylum outcomes solidifies that gender-based protection has proven resilient and relentless in the face of political objection, and that is hopeful.

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