

Exclusion of Women from Refugee Protection and Effects in the United States Gender Asylum Jurisprudence

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Abstract

The protection of female asylum seekers is one of the most mismanaged processes in international refugee law. Despite the ubiquity of gender related persecutions (GRP) around the world, survivors who flee abusive attacks face interpretation barriers in asylum countries. This is because of the perception of gender-based persecutions (GBPs) as “unConvention” matters without nexus qualification. International Refugee Law (IRL) created a huge disadvantage for women by omitting sex as a ground for refugee status and protection. Article 1. A(1) of the 1951 Convention Relating to the Status of Refugee (the Refugee Convention) established eligibility criteria to only those aliens who suffered or fear persecution under race, religion, nationality, political opinion and membership in a particular social group (MPSG). Although GBPs can occur on any of the Convention’s grounds, certain severe human rights violations are gender specific. Those are eliminated from the Convention’s conditions for protection. Findings by the 2002 Guidelines of the United Nations High Commissioner (UNHCR) indicated that women are more common victims of GBPs than men. Unfortunately, the elimination of their persecutory experiences from the scope of refugee protection have increased female vulnerabilities and inequalities. Despite the numerous developments by the UNHCR to reinforce the recognition of GBPs within the (MPSG), conflicting jurisprudence in the United States gender asylum attests to its lack of sustainability. Asylum claimants on GBPs are largely interpreted as “unConvention” refugees, while their persecutory experiences are perceived as “personal,” hence do not meet the burden of nexus. This study examines the issues affecting female disenfranchisement in IRL, impacts on the United States gender asylum, the prospects of integration of gender experiences in IRL as well as possible reforms in the United States asylum practice.

Keywords: refugee protection, asylum, United Nations High Commissioner, human rights.

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1. Introduction

Despite the global clamor to end gender-based violence (GBV), human rights violations committed against women in private and public arenas remain pervasive. Yet, women fleeing gender or sex related persecution receive minimal protection because of the common interpretations of gender related persecution (GRP) as private and lacking in nexus grounds.² Even though the primary purpose of the 1951 Convention Relating to the Status of Refugee (the Refugee Convention) and its 1967 Protocol is to protect refugees fleeing persecution and threats to life, the construction of the import of the

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² *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999); *Fatin v. INS*, 12 F. 3d 1233 (1993).

Convention's persecution expressly excluded women's experiences.³ Articles 1. A(2) and 33(1) of the Refugee Convention limited the criteria for refugee protection to—aliens who have suffered or fear persecution under race, religion, nationality, political opinion, and membership in a particular social group—and are not excluded under Articles 33(2); 1.D-F. Apparently, the omission of gender specific persecutions from the grounds of refugee protection raise fundamental questions on the nondiscriminatory clause of international refugee law (IRL) pursuant to Article 3. Although the Preamble to the Refugee Convention as well as Article 3 committed to equal protection,⁴ in contrast these eliminated sex, hence create a discrepancy with normative international law treaties.⁵ Such gender invisibility poses serious problems to claimants, especially women whose persecutory experiences often center exclusively on gender or sex. Because gender is not depicted as a ground of persecution, women who seek asylum on gender-based persecutions (GBPs) battle with the challenges of proving gender viability under the membership in a particular social group (MPSG). Unfortunately defining female persecutory experiences within MPSG has remained a daunting task in many asylum courts because of conflicting nexus requirements.⁶

Yet, the membership in male or female sex constitutes a site of persecution.⁷ Perpetrators of gender-based human rights attacks target primarily if not exclusively their sex. Generally, such harms are inflicted by state or non-state actors whom the government may be unwilling or unable to control.⁸ Guidelines by the United Nations High Commissioner for Refugees (UNHCR) recognized that gender-based persecutions could occur in the form of rape, sexual violence, domestic abuses, female genital cutting (FGC), forced marriage, dowry-related violence, honor killing, oppression or punitive measures for the transgression of gender norms, and trafficking.⁹ Also, empirical

³ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150 [hereinafter "1951 Convention or Refugee Convention"] [defining the meaning and eligibility for refugee protection on five grounds—race, nationality, religion, political opinion, and membership in a particular social group].

⁴ *Id.* at art. 3 [stating that "[T]he Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin."].

⁵ UN Charter, Article 1(3), 1 UNTS XVI, entered into force 24 October 1945; Universal Declaration of Human Rights UNGA Res 217 A (III) 10 December 1948, [hereinafter "UDHR 1945"], art. 2 [stating that human rights shall apply without distinction of any kind, such as race, colour, sex, language, religion, political other opinion]; International Covenant on Civil and Political Rights (ICCPR), GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171, entered into force 23 March 1976, art. 3; International Covenant on Economic, Social and Cultural Rights (ICESCR), art. 3, GA Res 2200A (XXI), 21 U.N. GAOR Supp. (No. 16) at 49, U.N. Doc. A/6316 (1966), 993 U.N.T.S. 3, entered into force 3 January 1976; UN General Assembly, Convention on the Elimination of All Forms of Discrimination Against Women, 18 December 1979, UNTS 1249 (CEDAW), arts. 1 and 2, GA Res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46, entered into force 3 September 1981.

⁶ *In re A-B-* 27 I. & N. Dec. 316 (AG 2018); *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008); *Matter of ME-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 20 (BIA 2014).

⁷ Rebecca M. M. Wallace, „Making the Refugee Convention Gender Sensitive: The Canadian Guidelines”, 45, *International and Comparative Law Quarterly*, 702-711, 709 (1996); *In re A-B-* 27 I. & N. Dec. 316 (AG 2018).

⁸ *Id.*; *INS v. Cardoza-Fonseca*, 480 US 421, 438-39 (1987); *In re A-B-* 27 I. & N. Dec. 316 (AG 2018).

⁹ See, e.g., UNHCR Guidelines on International Protection No. 2: Membership of A Particular Social Group Within the Context of Article 1a(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/GIP/02/02, 155 (7 May 2002) [hereinafter "2002 UNHCR Guidelines"] at paras. 5 and 9.

literature attests to the fact that women and girls are common targets of other gender related attacks like marital rape, sex trafficking, forced prostitution, abduction, and conflict related sex crimes.¹⁰ These gender attacks equally prevail in public and private spheres, peace, or wartimes, affecting women more disproportionately.¹¹ In some cultural and religious communities too, they grapple with obnoxious cultural and religious practices like FCT, forced sterilization, honor killings, certain imposed dress codes and forced marriages enforced by non-state actors.¹² Studies have shown that the aforementioned gender impositions are commonly enforced in some traditional or religious societies as severe discriminatory, oppressive, or punitive measures for disobeying biased religious and socio-cultural norms.¹³ For example, in some places women's freedom is restricted in terms of movement, international travel, education, driving, economic as well as career development, and even personal relationships because of dominant patriarchal regulations.¹⁴ Women who violate such restricted gender codes are subject to serious sanction, including physical harm and even death sentences.¹⁵ Testimonies of female survivors in their asylum countries as in the cases of *Fisher*,¹⁶ *Fatin*,¹⁷ *Matter of R-A*,¹⁸ and *Sarhan v. Holder*,¹⁹ underpin the horrendous persecutory experiences of survivors in home countries. Yet, international refugee law (IRL) made no consideration for this category of persons, instead they are identified as un-Convention asylum seekers. As a result, gender claimants wrestle with heavy evidential requirements burden of nexus proof. In *Fisher* and *Fatin*, for example, the United States Circuit Courts disregarded the applicants' social group, holding that their alleged persecution for noncompliance is unprotected by the Convention. Likewise, in *Sarhan* both the immigration judge (IJ) and Board of Immigration Appeal (BIA) denied asylum to a Jordan woman who feared a threat of honor killing on account of an unverified rumor of adultery. It took an intervention of the Seventh Circuit to save Sarhan from the life-threatening danger, including a deportation to death. Also, in *Matter*

¹⁰ Heaven Crawley and Trine Lester, *Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe*, United Nations High Commissioner for Refugees Evaluation and Policy Analysis Unit, Department of International Protection, and Regional Bureau for Europe AMRE Consulting, EPAU/2004/05 1-161, 50 (May 2004); Sondra Hale, *Rape as Maker and Eraser: Darfur and the Nuba Mountains (Sudan)*, in Laura Sjoborg and Sandra Via (eds.) *Gender, War, and Militarism: Feminist Perspectives* 105-113, 106, Praeger 2010; Liz Kelly, *The Everyday/Everynightness of Rape: Is it Difference in War?* in Laura Sjoborg and Sandra Via (eds.) *op. cit.*, 114-123; Gloria Gaggioli, „Sexual Violence in Armed Conflicts”, 96 *International Review of the Red Cross* 503-538 (2014).

¹¹ *Id.*; *In re A-B-*, *supra* note 5; *S-E-G-*, *supra* note 5; *Saideh Fisher v. I.N.S [Fisher II]* 79 F.3d 955 (9th Cir. 1996).

¹² See, e.g., UNHCR Guidelines on International Protection No. 2: Membership of A Particular Social Group Within the Context of Article 1a(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/GIP/02/02, 155 (7 May 2002) [hereinafter “2002 UNHCR Guidelines”] at para. 9.

¹³ *Id.* Rebecca M. M. Wallace, „Making the Refugee Convention Gender Sensitive: The Canadian Guidelines”, 45, *Intertional and Comparative Law Quaterly*, 702-711, 702 (1996).

¹⁴ *Discrimination Against Muslim Women-Fact Sheet*, ACLU, <https://www.aclu.org/other/discrimination-against-muslim-women-fact-sheet>; See, e.g., *Fisher II*, *Op Cite* 10 at 955; *Fatin v. INS*, 12F. 3d 1233 (3rd Circ. 1993).

¹⁵ *Id.*

¹⁶ *Id.* at 955.

¹⁷ *Id.*

¹⁸ 22 I&N Dec. 906 (BIA 1999).

¹⁹ 658 F. 3d 649 (7th Cir. 2011); *Kamar v. Sessions*, *supra* note 811.

of *R-A-*,²⁰ a female survivor of horrible abusive relationship, rape and threat to life was denied asylum by IJ, and BIA.²¹ Despite her pathetic testimonies, she had to wait for fourteen years under different political regimes, until her denial was reversed under the Obama Administration and asylum was granted without precedent.²² Naturally, such harsh experience could retraumatize victims, leaving them with lasting emotional and psychological consequences after gaining asylum.

Nonetheless, the disenfranchisement of women from refugee reliefs is not entirely a United States problem but inherited from the restricted scope of IRL. The Refugee Convention was established in 1951 in response to the humanitarian emergencies of World War II. Since then, it has remained static despite the changing dynamics in the sources of involuntary migration and recurrence of gender persecution. In consequence, gender asylum claimants have continued to receive insufficient attention in domestic courts for dearth of gender recognition. Understandably, the circumstances of World War (WW) II and Nazi persecutions in mid-twentieth century Europe gave rise to the founding of 1951 Convention as a strategy for addressing the crisis of refugees. This is reflected in the definition of refugee status and grounds for protection.²³ But over the years, the circumstances that provoke humanitarian migration have varied significantly. While violence against women at public and private sphere has attained a crescendo.²⁴ Yet, the subsequent establishment of 1967 Protocol Relating to the Status of Refugees to address the Convention's limitations,²⁵ failed to accommodate the problems of gender invisibility. Unfortunately, the standard has largely influenced domestic legislation and their interpretations of gender claims. Refugee jurisprudence has evolved, centering primarily on other grounds excluding gender.²⁶ Because gender is not expressly recognized as a separate ground in the 1951 Convention and its 1967 Protocol, applicants making gender-based asylum claims would need to link the persecution suffered to one or more of the five enumerated grounds for asylum eligibility.²⁷ But for several reasons, applicants to gender asylum claims face numerous interpretative dilemmas because many adjudicators reject gender-based PSGs as being too broad for fear of floodgates.²⁸ Gender-based attacks are equally denied based on nexus, as courts have held such harm to be "personal reasons"²⁹ and not tantamount to persecution.

Violence against women prevails is a global phenomenon and constitutes the

²⁰ *R-A-*, *supra* note 1 at 906.

²¹ *Id.*

²² *Id.*

²³ 1951 Convention, *supra* note 3 at art. 1.A(2) [defining refugee a refugee and the inclusion criteria], art. 1. B(1) [stating that the Convention applies to events occurring in Europe or anywhere else before January 1, 1951].

²⁴ Crawley and Lester, *supra* note 10 at 1-161; Hale, *supra* note 10 at 105-113, 106; *In re A-B-*, *supra* note 6; *S-E-G-*, *supra* note 6; *Saideh Fisher v. I.N.S [Fisher II]* 79 F.3d 955 (9th Cir. 1996).

²⁵ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267, art. 1(1) [hereinafter "1967 Protocol"] [art. 1(3) stating that the Protocol shall apply without geographical limitations].

²⁶ *Id.* at 703.

²⁷ See, e.g., art. 33(1) 1951 Convention, *supra* note 3.

²⁸ NIJC: National Immigration Center, A Heartland Alliance Program, Practice Advisory: Applying for Asylum after *Matter of A-B* 1-32, 2 (January 2019) [hereinafter NIJC, 2019].

²⁹ *Matter of R-A-*, 22 I&N Dec. 906 (BIA 1999).

primary cause of refugee flight. Therefore, the elimination of sex from the grounds of refugee protection for more than seven decades is significant. Cognizant of the attendant challenges, the UNHCR through the Executive Committee has developed several guidelines to enhance a fair interpretation of gender-related asylum claims in different jurisdictions.³⁰ In 1985, the Executive Committee of the UNHCR Programme issued an “EXCOM Conclusion No. 39” that explored the issues relating to the protection of refugee women internationally.³¹ Six years later, UNHCR developed the 1991 Guidelines on the protection of refugee women,³² urging Parties to the Convention “to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores as a ‘particular social group’ within the meaning of Article 1 A(2)...”³³ Subsequently, the scope was expanded in the 2002 Guidelines, in which UNHCR urged States to adopt the standard in the determination of gender asylum claims.³⁴ But because the recommendations are only advisory guidance, countries are not bound to them. Whereas countries like Canada³⁵ and Australia³⁶ have integrated the UNHCR Guidelines into their gender asylum laws, the United States courts in several decisions have maintained that they are neither bound by the UNHCR Guidelines nor the Considerations developed from it.³⁷ Such nonconformity to the UNHCR Gender Guidelines has had a negative impact on the United States gender jurisprudence. In the *Matter of Acosta*,³⁸ the Board of Immigration Appeal (BIA) set a foundational threshold for defining the membership in a PSG, which received international acceptance.³⁹ But the later controversial precedents on the *Acosta* test attest to a lack of consistency and dilemma on PSG application. For example, in different decisions, the circuit courts have required applicants in gender and gang-based asylum to show proof of particularity,⁴⁰ immutable characteristics,⁴¹ and social visibility of a PSG.⁴² These create numerous hurdles for women whose asylum claims are sought solely under MPSG.

³⁰ UNHCR, Guidelines on the Protection of Refugee Women, U.N. Doc. ES/SCP/67 (July 1991) [hereinafter “UNHCR GUIDELINES”].

³¹ Executive Committee of the UNHCR Programme, Refugee Women and International Protection, No. 39 para. (k) (36th Session 1985) [hereinafter “EXCOM Conclusion No. 39”].

³² The UNHCR, Guidelines on the Protection of Refugee Women, UN Doc. EC/SCP/67 para. 55 (July 1991).

³³ *Id.* at para. 55.

³⁴ See, e.g., UNHCR Guidelines on International Protection No. 2: Membership of A Particular Social Group Within the Context of Article 1a(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/GIP/02/02, 155 (7 May 2002) [hereinafter “2002 UNHCR Guidelines”].

³⁵ Immigration and Refugee Board of Canada (IRB), *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (March 1993). www.irb-cisr.gc.ca/eng/brdcom/references/pol/guidir/Pages/women.aspx.

³⁶ Migration Act 1958 (amended 2012) (Cth) s 36. http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118; see also: Department of Immigration and Multicultural Affairs (DIMA), *Guidelines on Gender Issues for Decision Makers* (July 1996).

³⁷ *INS v. Cardoza-Fonseca*, 480 U.S. 421, 438-39 (1987); *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427-28 (1999); *Ndom v. Ashcroft*, 384 F.3d 743, 753, n4 (9th Cir. 2004).

³⁸ 19 I&N Dec. 211 (BIA 1985).

³⁹ The *Acosta* principle has been cited or applied by courts in Canada, UK and Australia. See, e.g. *Canada (A.G.) v. Ward*, 2 S.C.R. 689 [1993]; *Minister for Immigration and Multicultural Affairs v. Khawar*, 1130 FCA 1379 [2000];

⁴⁰ *Matter of S-E-G-*, 24 I&N Dec. 579 (BIA 2008).

⁴¹ *Matter of E-A-G-*, 24 I&N Dec. 591 (BIA 2008).

⁴² *Matter of ME-V-G-*, 26 I&N Dec. 227 (BIA 2014); *Matter of W-G-R-*, 26 I&N Dec. 20 (BIA 2014).

Whereas scholarly debates attribute the incongruities to the fear of the floodgates,⁴³ the discussion explores other dimensions to the argument. It argues that the UNHCR's total reliance on PSG for gender viability is not sustainable. PSG cannot serve as a catch-all for un-Convention refugees. Knowing that certain persecutions are intrinsically sex related, it is imperative to include sex as an independent ground for refugee claims. IRL has for several years failed in the avowed promise of nondiscrimination by gendering its protection, to the detriment of female claimants. Deprioritizing the human rights experiences of women and other non-Convention refugees would imply making their rights and dignity less human as well as unprotected. To impose such limitations on the rights of any individual because of sex or any other social identity undermines the principle of equality. Therefore, this study challenges discriminatory laws, policies and practices that create hurdles to equal protection access for all refugees but especially female asylum seekers. It examines the United States gender asylum jurisprudence, history, and practice. The aim is to trace the root cause to female disenfranchisement, evaluate inherent issues affecting gender viability and to seek resolution for gender equality and justice in the application of refugee laws. Evidence from research findings forms the background for suggestions and recommendations. These will explore prospects for reforms to achieve diversity, and inclusive protection of all deserving refugees but especially women. For the Refugee Convention to achieve sustainability in the light of emerging humanitarian realities, the scope of protection must be inclusive and nondiscriminatory.

2. Structural mapping

The research discussion is grouped into four parts. Part One introduces the problem of study, the background to the framing of refugee status and protection criteria. It traces the root cause of female invisibility to limitations of the Refugee Convention and the 1967 Protocol, inherited by states. Part two continued the discussion by underlining the Convention's gap in providing definitive meaning for persecution, particularly by allowing inferences to be made from male-centered grounds of persecution pursuant to Article 1.A(2). The analysis outlines the root cause of nexus requirement and the associated problems on gender asylum jurisprudence. Additionally, the discussion seeks meaning with the UNHCR guidance and debates on the possible redefinition of persecution in an inclusive manner to accommodate varying gender needs. Part three investigates the practice of states, specifically centering on the developments in the United States refugee regime and gender asylum law. The research findings reinforced the argument on the lack of competence of PSG as a blanket for gender claims and the need to integrate female persecution experiences independently as a ground for refugee protection. In view of these, Part Four makes recommendations for establishing a gender inclusive refugee law that is consistent with the nondiscriminatory principle of international law and alongside the realities of the contemporary humanitarian needs of refugees, whether male or female. Finally, it makes suggestions for practice guidelines and reforms to strengthen judicial accountability in the exercise of discretion for asylum claims. Overall, the article demonstrates that the

⁴³ Karen Musalo, „Protecting Victims of Gendered Persecution: Fear of Floodgates or Call to (Principled) Action?“ 14 *Virginia Journal of Social Policy & the Law* 119, 132 (2007).

rights of female refugees should be at par with all human rights. Refugee rights are not the product of state's generosity but international human rights that create an obligation on states and their agents. These realities must be reflected both in law and practice.

3. Framing refugee status, protected “persecution” and gender limitations

IRL did not provide any definite meaning for the term persecution but inferred its connotation from Articles 1A(2) and Article 33(1). Article 1A(2)⁴⁴ defines a refugee to mean: *any person who... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.*⁴⁵

The meaning and the eligibility for refugee status are restricted here to five grounds—race, religion, nationality, membership of a particular social group (MPSG), or political opinion. Similarly, Article 33(1)⁴⁶ defined the scope of nonrefoulement within the five enumerated ground,⁴⁷ and subject to evidence of the government's inability or unwillingness to protect. Going by the calculus, only individuals who meet the Convention's inclusion criteria will be sheltered from torture.⁴⁸ Evidently, the Refugee Convention made no consideration for persecution occurring exclusively on gender grounds. As earlier indicated, the historical focus on WW II category of refugees shaped the construction of status and eligibility for refugee protection. This favored primarily the male-dominant experiences on the kind of persecution criminalized during the War and Holocaust. Consequently, Article 1.A(2) set a benchmark for meaning and grounds for refugee protection on these, restricted five grounds and to the exclusion of others.

Divorcing gender experiences from the meaning of persecution creates a potential problem for contemporary IRL and equally subjects victims especially women to human rights enigma. Women constitutes almost half of the world's population, representing estimated 49.58 percent of the global population.⁴⁹ An exclusion of almost

⁴⁴1951 Convention, *supra* note 3 at art. 1A(2) *op. cit.* 17.

⁴⁵ 1951 Convention, *supra* note 7 at art. 1A(2).

⁴⁶ Protocol Relating to the Status of Refugees, art. I(1) (1967) 19 U.S.T. 6223, 606 U.N.T.S. 267 [hereinafter “1967 Protocol”] [States Party to the Protocol undertake to apply the 1951 Convention].

⁴⁷ *Id* at art. 1 (1); 1951 Convention *supra* note 7 at art. 33 [prohibited or return of “a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened” on account of race, nationality, religion, MPSG and political opinion].

⁴⁸*Id.*; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 Dec. 1984, G.A. Res. 39/46, U.N. GAOR 39th Sess., Supp. No. 51, at 197, U.N. Doc. A/39/51, art. 3 (1985) [hereinafter “Convention Against Torture or CAT”] [protection from refoulement]; Human Rights Committee, General Comment No. 29: art. 4: Derogations during a State of Emergency, U.N. Doc. CCPR/C/21/Rev.1/Add.11, 31 August 2001, para. 11 (The proclamation of certain provisions of the Covenant as being of a non-derogable nature, in article 4, para. 2, is to be seen partly as recognition of the peremptory nature of some fundamental rights ensured in treaty form in the Covenant).

⁴⁹ *Gender Ratio in the World*, Statistics Times, <https://statisticstimes.com/demographics/world-sex-ratio.php#:~:text=The%20population%20of%20females%20in,101.68%20males%20per%20100%20females;>

half of the world's population in IRL is significant because it undermines the humanitarian goal of the Refugee Convention. Unfortunately, the deficiency has revived an agelong dichotomy of private and public that has for long trivialized human rights violations perpetrated against women and equally shielded perpetrators from accountability. The scope of refugee inclusion affects the interpretation of refugee related persecution in the absence of a definition.

Although persecution is a key element in the determination of refugee status, the Refugee did not provide a definitive meaning for the term. Cognizant of the Convention's limitations,⁵⁰ Paragraph 51 inferred the meaning of the term from the Convention, identifying persecution to be "a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution" as well as "[O]ther serious violations of human rights—for the same reasons..."⁵¹ Even though framed from Articles 1A(2) and 33(1),⁵² Paragraph 51 recognized other serious violations of human rights occurring on grounds similar to the five Convention's categories. Consistent with this reasoning scholars like Hathaway⁵³ and Good-Will Gill⁵⁴ attempted to define persecution in relation to a systemic violation of rights and denial of human rights protection by one's government. The subtext, as we shall demonstrate later, reflects the bifurcated nexus test incorporated by countries like Australia, Canada, New Zealand, and the UK in the determination of persecution within the threshold of the government's unwillingness and inability to protect.⁵⁵ Both developments are imperative to the research argument, urging a reconstruction of persecution to bolster the human rights purpose of IRL. Significant to this is the fact that any persecution that threatens a person's rights to life, freedom and human dignity would naturally meet the threshold of Articles 1.A(2) and 33(1) and deserve to be protected under similar human rights frameworks.⁵⁶ Nevertheless, the optimism is marred by manifest gender invisibility.

Although in its Preamble and Article 3, the Refugee Convention affirmed consistency with the international law principle of nondiscrimination,⁵⁷ lack of gender prominence in the scope of refugee protection makes the Article contradictory. Apparently, sex is excluded from the Convention's grounds of nondiscrimination. This

United Nations, Department of Economic and Social Affairs, Population Division (2019), World Population Prospects 2019: Highlights, ST/ESA/SER.A/423, 1-20, (2019), https://population.un.org/wpp/publications/files/wpp2019_highlights.pdf.

⁵⁰ The Office of the United Nations High Commissioner, *The Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, Geneva, 1979, HCR/1P/Eng./Rev.2, paragraph 51 [hereinafter "The Handbook"] Para. 51 of the UNHCR Handbook admitted that there is no accepted universal definition for "persecution," because the "various attempts to formulate such a definition have met with little success.]

⁵¹ *Id.* at para. 51.

⁵² 1951 Convention, *supra* note 2 at arts. 1A(2) and 33(1); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).

⁵³ J. Hathaway, *The Law of Refugee Status*, 112 (Butterworth, 1991).

⁵⁴ Guy Godwin-Gill, *The Refugee in International Law*, 69 (2nd ed., Oxford University Press, 1996).

⁵⁵ *Minister for Immigration and Multicultural Affairs v. Khawar*, 1130 FCA 1379 [2000]; *AZAAR v. Minister for Immigration and Citizenship* 912 FCA. [2009].

⁵⁶ CAT, *supra* note 44 at art. 3.

⁵⁷ 1951 Convention, *supra* note 3 at Preamble at para 1.

creates a discrepancy with normative international law.⁵⁸ However, an absence of recognition does not make GRP non-existent. A plethora of literature affirmed the ubiquity of persecutions committed against women in public and private, by state and non-state actors, which commonly constitute a ground for refugee claims.⁵⁹ Domestically, certain factors like abuse by intimate partners and family members, and obnoxious cultural norms constitute reason for flight and refugee claims.⁶⁰ But as Goodwin-Gil has noted the Refugee Convention is “founded on a highly individualistic conception of persecution” and premised on a highly restrictive environment.⁶¹ Sadly, the effects have for several decades undermined female experience as asylum seekers. Hence the argument that the Convention does not intent to protect victims of GRPs.⁶² Others associate the unresolved issue with male privileges in the world’s political space that “...virtually ignores forms of oppression [...] specific to women,”⁶³ and immune perpetrators to accountability.⁶⁴ Aware of its debilitating consequences, the UNHCR has resorted to several solutions to create viability for female claimants.⁶⁵ Investigation into the strength and weaknesses of these efforts is important to determining whether PSG is enough to accommodate the needs of female refugees without having to establish sex as an independent ground to accommodate gender specific persecutory experiences.

4. UNHCR Guidance on making gender based claims

Concerned of the numerous obstacles for female asylum seekers, over the years the UNHCR has developed innovative Gender Guidelines and EXCOM Conclusions⁶⁶ to guide adjudicators on the determination of gender asylum claims.⁶⁷ For example, the 1985 EXCOM Conclusion No. 39 on Refugee Women and International Protection

⁵⁸ See, e.g., UDHR 1945, *supra* note 5 at art. 2; ICCPR, *supra* note 5 at art. 3; ICESCR, *supra* note 5 at art. 3; CEDAW, *supra* note 5 at arts. 1 and 2.

⁵⁹ Crawley and Lester, *supra* note 11 at 1-161, 50; Hale, *supra* note 11 at 105-113, 106; Kelly, *supra* note 11 at 114-123; Gaggioli, *supra* note 11 at 503-538.

⁶⁰ Excom Conclusion No. 39, *supra* para. 55; US State Dept Report.

⁶¹ Guy S. Goodwin-Gil, „Asylum: Law and Politics of Change”, *International Journal of Refugee Law* 1-18, 8 (1995).

⁶² Karen Musalo, „A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly Be Inching Towards Recognition of Women’s Claim” 29 *Refugee Survey Quarterly* 46 (2010).

⁶³ Parekh, *supra* note 13 at 206.

⁶⁴ Musalo, *op. cit.* 58; Theresa A. Vogel, „Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence” 52 *University of Michigan Journal of Law Reform* 242-499, 409 (2019).

⁶⁵ UNHCR, Guidelines on the Protection of Refugee Women, UN Doc. EC/SCP/67, July 1991 [*hereinafter* “UNHCR Guidelines, 1991”].

⁶⁶ See, e.g., EXCOM Conclusion No. 39 (1985) [identifying women who suffer persecution for having transgressed gender mores to meet the requirement of a PSG]; UNHCR Guidelines 1991 [recognize that women who suffer persecutions such as rape, sexual assault and severe sexual discrimination may legitimately claim refugee status]; EXCOM Conclusion No. 73 (1993) [acknowledging that women suffer persecutions differently from men]; 2002 UNHCR Gender Guidelines, at para. 9. [recognizing that GBP may occur in the form of rape, sexual violence, dowry-related violence, FGC, DV, or trafficking]

⁶⁷ Khawar, *supra* 55 note at 1379; AZAAR *supra* note 52 at 912; Minister for Immigration and Multicultural Affairs, *supra* note 52 [Canada and Australia incorporated the UNHCR Guidelines in their case decisions as reflected in the *Ward* principle of antidiscrimination. The precedent is significant in the consideration of gender claims. Apparently, *Ward* replicated the Australian principle in *Khawar*.]

specifically addressed gender limitations in IRL. It urged State Parties to adopt an interpretation that recognizes: *...women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of society in which they live... as a “particular social group” within the meaning of Article 1A(2) of the 1951 United Nations Refugee Convention.*⁶⁸

EXCOM Conclusion No. 39 further recognized that the survivors of harsh persecutions or punitive measures for breach of “social mores” could meet the Convention’s requirement of a PSG. Differing from Conclusion No. 39,⁶⁹ the 1991 UNHCR Guidelines on the Protection of Refugee Women⁷⁰ sought conformity with the Convention. It indicated that “the grounds for establishing refugee status do not include gender. However, the Guidelines acknowledged the realities of gender specific persecutions like rape, abduction, forced marriage, saying the least.”⁷¹ Also, by referencing the 1985 EXCOM Conclusion, it recognized that women persecuted for violating social norms or customs may be considered a social group.⁷² Even without acknowledging the viability of gender claims, the Guidelines recognized that women who suffer “severe sexual discrimination,” or rape as well as other forms of sexual violence occurring during war or at peacetimes constitute viable social groups for legitimate refugee claims.⁷³

Two years after, in 1993, UNHCR EXCOM issued another Conclusion that centered on gender asylum for refugee determination.⁷⁴ Significantly, EXCOM Conclusion No. 73 acknowledged that women experience differently from men. Accordingly, it encouraged adjudicators to consider the sensitivity of GRPs affecting women as well as the degree of disproportionality in different parts of the world.⁷⁵ In 2002, the UNHCR created a major guidance that gave comprehensive attention to the procedural and judicial interpretation on gender related claims.⁷⁶ The 2002 UNHCR Guidelines expressly identified rape, sexual violence, dowry-related violence, FGC, DV, or trafficking,⁷⁷ and other gender related human rights violations⁷⁸ as protectable under MPSG.⁷⁹ Additionally, it established other forms of persecution, including punitive or coercive laws enforced on women for non-compliance to gender norms.⁸⁰ Furthermore,

⁶⁸ Executive Committee (EXCOM) Conclusion No. 39 on Refugee Women and International Protection, from Conclusions on International Protection of Refugees adopted by Executive Committee of the UNHCR Programme, No. 39 (36th Session 1985) (Published by the Office of UNHCR, Geneva, 1995), para. k.

⁶⁹ Pursuant to Article 35

⁷⁰ UNHCR, Guidelines on the Protection of Refugee Women, UN Doc. EC/SCP/67, July 1991 [hereinafter “UNHCR Guidelines, 1991”].

⁷¹ *Id.* at para. 26.

⁷² *Id.* at para 54.

⁷³ *Id.* para. 56.

⁷⁴ EXCOM Conclusion No. 73 on Refugee Protection and Sexual Violence, from Conclusions on the International Protection of Refugees adopted by the Executive Committee of UNHCR Programme, No. 73 (44th Session 1993) (Published by the Office of the UNHCR, Geneva, 1995).

⁷⁵ *Id.* at para. (e).

⁷⁶ See, e.g., UNHCR Guidelines on International Protection No. 2: Membership of A Particular Social Group Within the Context of Article 1a(2) of the 1951 Convention and/or Its 1967 Protocol Relating to the Status of Refugees, UN Doc. HCR/GIP/02/02, 155 (7 May 2002) [hereinafter “2002 UNHCR Guidelines”].

⁷⁷ *Id.* at para. 9.

⁷⁸ *Id.* at para. 5.

⁷⁹ *Id.* at para. 6.

⁸⁰ *Id.* at para. 10-15.

Paragraph 6 found that any of the underlisted could meet the Convention's PSG pursuant to Article 1A(2). Paragraph 22 admitted that the survivors of domestic violence or other forms of gender-based violence (GBV) would meet the requirements of membership of a PSG.⁸¹

Mindful of the overwhelming problems of nexus in the determination of gender claims, UNHCR released another document in 2002 that reflected on the existence of nexus in GRPs. The later readdressed the question of gender as a PSG, reaffirming that gender has "immutable/fundamental characteristic(s), or by social perception."⁸² This indirectly gave primacy to the bifurcated nexus formula by establishing the necessity of a causal connection between gender-based persecution and a government's unwillingness to protect in asylum.⁸³ Additionally, in 2008, the UNHCR issued a Handbook for the protection of women and girls addressed the impacts of displacement on women and girls and other problems of gender diversity as well as women at risk.⁸⁴ Significantly, the latter alongside the 2002 Guidelines clarified the linkages between harm committed by non-state actors, the Convention's ground for protection, and the government's unwillingness and inability to protect.⁸⁵ Both Guidelines set a paradigm for identifying the relationship between a risk(s) of being persecuted on the Convention's grounds and evidence of reasonable circumstances or account on government's unwillingness or inability to protect.⁸⁶

Evidently, the developments under the UNHCR Guidelines have made a remarkable impact on the recognition of GRPs in many countries, but particularly in those countries where the recommendations are fully integrated into their domestic jurisprudence. Countries like New Zealand, Canada, and Australia incorporated the gender principles as well as the bifurcated nexus formula (BNF).⁸⁷ Also, influenced by the progress, the United States established the—*Consideration for Asylum Officers Adjudicating Asylum Claims from Women*.⁸⁸ Constant with the Guidelines, the Consideration recognized that sexual violence, slavery, forced marriage, forced abortion and even discrimination may rise to persecution. But despite the awareness created, the UNHCR provisions were handed as non-binding documents and was never incorporated into the United States asylum law. Likewise, the United States Considerations were directed exclusively to asylum officers and not to immigration judges. In many decisions, courts have differed with the Guidelines to hold applicants making gender claims as incompetent for the Convention's reliefs.⁸⁹ Knowing that the United States occupies a significant position as a huge asylum receptor, such practice has far-reaching consequences on claimants. Therefore, this article seeks a resolution and explores

⁸¹ *Id.* para. 22.

⁸² *Id.* at paras. 12-13.

⁸³ *Id.* at para. 21-23.

⁸⁴ UNHCR, Handbook for the Protection of Women and Girls, January 2008, 9-12, 5-361, <https://www.refworld.org/docid/47cfc2962.htm>.

⁸⁵ See, e.g. UNHCR Particular Social Group Guidelines para. 21-23.

⁸⁶ *Id.*; 2002 UNHCR Guidelines, *supra* note 73 at paras. 28-29.

⁸⁷ *Id.*; *Khawar*, *supra* note 55; *Azaar*, *supra* note 55; *Canada (A.G.) v. Ward*, 2 S.C.R. 689 [1993].

⁸⁸ INS Gender Guidelines Regarding Adjudication of Asylum on the Basis of Gender, 26 May 1995, <https://www.refworld.org/docid/3ae6b31e7.html>.

⁸⁹ *In re A-B-*, *supra* note 5; *S-E-G-*, *supra* note 5; *Saideh Fisher v. I.N.S [Fisher II]* 79 F.3d 955 (9th Cir. 1996).

prospects for gender asylum viability in the United States.

5. IRL and the development of the United States refugee regime

The establishment of the Refugee Act of 1980 marked a turning point in the history of the United States refugee law and commitment to bring to bring conformance with IRL.⁹⁰ By acceding to the 1967 Protocol, the 1980 Refugee Act⁹¹ adopted verbatim the definition and scope of “refugee” status in the Refugee Convention.⁹² Specifically, the Immigration and Nationality Act (INA) INA § 101(a)(42)(A), 8 U.S.C § 1101(a) (42) (A) defined a refugee as: *[A]ny person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.*⁹³

But in replicating the standard of Article 1A(2), INA included the “himself or herself” pronoun to demonstrate gender consciousness. Also, unlike the previous requirement, INA eliminated reference to aliens fleeing communist related persecution and conformed to the Convention’s definition.⁹⁴

By embracing the Convention’s language, the Refugee Act demonstrates consistency with international refugee law, and seeks to have the same implemented in the United States.⁹⁵ Amending the Act, INA⁹⁶ made it mandatory rather than discretionary for the A.G. to withhold deportation of a foreign national, having met the refugee requirements, “if the Attorney General determines that such alien’s life or freedom would be threatened in such country on account of race, religion, nationality, membership in a particular social group or political opinion.”⁹⁷ However, the congruity with IRL reinforces both the strength and limitations of IRL, especially the already acknowledged gender gaps. The influence of Articles 1.A(2) and 33(1) on INA is patent and has largely affected the determination of gender claims as well as the nexus threshold in the United States, regardless of the innovations by the UNHCR. Investigating the United States responses to the tide in gender jurisprudence amidst the prevailing controversies in requirements is necessary.

Until recently, the United States has maintained a progressive record since World War II as the world’s top country in the admission and resettlement of refugees,

⁹⁰ 8 USC 1101 Refugee Act of 1980, 96th Congress (March 17, 1980); Pub. L. No. 82-414, 66 Stat. 163 (1952). (Codified as amended in scattered sections of 8 U.S.C.); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A) [on asylum and refugee protection and withholding removal] [*hereinafter* “1980 Refugee Act”].

⁹¹ 8 U.S.C 1101 Refugee Act of 1980, 96th Congr. (s. 643, 1980).

⁹² Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

⁹³ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).

⁹⁴ See, e.g. Hart-Celler Act of 1965, Pub. L. 89-236.

⁹⁵ 8 U.S.C. § 1253(h)(1) (2012); *American Courts and The U.N. High Commissioner for Refugees: A Need for Harmony in The Face of a Refugee Crisis*, 131, HARV. L. REV. 1401, 1399, 1402-1420 (2018).

⁹⁶ Pub. L. No. 82-414, 66 Stat. 163 (1952) (codified as amended in scattered sections of 8 U.S.C.).

⁹⁷ 8 U.S.C. § 1253(h)(1) (2012); „*American Courts and The U.N. High Commissioner for Refugees: A Need for Harmony in The Face of a Refugee Crisis*”, 131, *Harvard Law Review* (5) 1401, 1399-1420 (2018).

especially with the establishment of the 1980 Refugee Act.⁹⁸ Regardless of the rigorous vetting process and other restrictive policies that came in the aftermath of 9/11, the United States Refugee Admission Process (USRAP) set proactive procedures for resettlement programs of refugees.⁹⁹ Under the United States law, INA §207, 8 U.S.C. §1157 empower the President, in consultation with Congress, to make an annual determination on the number of admission and ceilings for refugees based on humanitarian concern. Accordingly, the President in consultation with Congress can respond to “special humanitarian concern” when “justified by grave humanitarian concern.”¹⁰⁰ In practice, this statutory requirement has in recent times fluctuated along partisan regimes with fundamental influence on asylum decisions. Knowledge of how this influence gender asylum decision is equally relevant to the research discussion. Recently, debates on the implementation of USRAP has been criticized its lack of neutrality and inherent interest in geographical as well as ideological factors.¹⁰¹ To ascertain the credibility of the critiques, other factors associated with the exercise of executive power and how these affect policies and judicial decisions deserve investigation.

Generally, the United States asylum procedure is somewhat convoluted, being linked with the administrative institutions—the Department of Homeland Security¹⁰² and the Department of Justice. Each of these is empowered to promulgate asylum laws and regulations that are enforceable by asylum adjudicators.¹⁰³ Applicants who seek asylum in the United States are required to file an application for asylum or withholding of removal, “either affirmatively with the United States Citizenship and Immigration Services (USCIS), a branch of the Department of Homeland Security (DHS),¹⁰⁴ or defensively,”¹⁰⁵ if the asylum seeker is involved in removal proceedings before an immigration judge.¹⁰⁶ If asylum is denied, and the alien demonstrates a well-founded fear for persecution (WFF), he or she would have the option to apply for withholding removal before an immigration judge (IJ).¹⁰⁷ The DOJ supervises the decisions of immigration courts and the BIA through the Executive Office of Immigration Review.¹⁰⁸ Although the BIA is the highest judicial body in reviewing appeals from immigration

⁹⁸ 8 U.S.C 1101, *supra* note 48.

⁹⁹ USRAP is one of the procedures established under the 1980 Refugee Act for admission of refugees outside United States, whereas the second procedure applies to refugees within the United States or at the border.

¹⁰⁰ INA §207(b), 8 U.S.C. §1157(b).

¹⁰¹ Musalo, *supra* note at 86; Silva Mathema and Sofia Carratala, *Rebuilding the US Refugee Program for the 21st Century*, 26 October, 2020, <https://www.americanprogress.org/article/rebuilding-u-s-refugee-program-21st-century/>.

¹⁰² The DHS was created originally from INS, developed in 1933 to administer immigration laws and regulations. It was later dissolved and recreated as the DHS. *See, e.g.* U.S. Citizenship & Immigration Service, USCIS History Office and Library, Overview of INS History 7, 11 (2012), <https://www.uscis.gov/sites/default/files/USCIS/History%20and%20Genealogy/Our%20History/INS%20History/INSHistory.pdf>

¹⁰³ *See, e.g.*, 8 C.F.R. § 208 (laws by the DHS), 8 C.F.R. § 1208 (DHS laws duplicated by the DOJ).

¹⁰⁴ DHS supervises affirmative asylum filed under the USCIS and represents the governments during defensive asylum.

¹⁰⁵ *Id*; Bassina Farbenblum, „Executive Deference in U.S. Refugee Law: Internationalist Paths Through and Beyond Chevron”, 60 *Duke Law Journal* 1059, 1071–72 (2011).

¹⁰⁶ *In re A-B-* 27 I. & N. Dec. 316 (AG 2018); *INS v. Cardoza-Fonseca*, 480 US 421, 438-39 (1987).

¹⁰⁷ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A)(2005).

¹⁰⁸ Theresa A. Vogel, „Critiquing Matter of A-B-: An Uncertain Future in Asylum Proceedings for Women Fleeing Intimate Partner Violence”, 52 *University of Michigan Journal of Law Reform* (2) 343 (2019).

courts, its decisions can be reviewed by the Circuit Courts, who may remand or adopt such decision.¹⁰⁹ The Attorney General presides over the appointment of judges and can alter the decisions of BIA through certification.¹¹⁰ Where there exist interpretational conflicts, such a decision can equally be sent to the Supreme Court under certiorari.¹¹¹ With the delicate fusion of the executive and judiciary, asylum decisions are inevitably complicated and sometimes controversial. Hence, the case analysis underscores the impacts on gender asylum determinations.

6. Investigating the United States asylum and gender jurisprudence

The United States immigration law and refugee policy are byproducts of history built on the trajectory of economic, family-based, and humanitarian immigration laws. Over the years, several circumstances like World War II, racial politics, terrorism, the migration crisis, divergent partisan ideologies and lately the Covid-19 Pandemic have shaped the asylum laws. Unfortunately, each has had an impact on non-Convention refugees but mostly fundamentally on women. As earlier indicated, Congress has made historic progress in trying to traverse the limitations of the Refugee Convention. Notably, the establishments of some landmark legislations for specific categories of un-Convention refugees indicate a remarkable commitment to improve to advance the United States human rights jurisprudence. In view of this, Congress made considerations for the survivors of the victims of crimes,¹¹² domestic violence,¹¹³ natural disasters¹¹⁴ or alien children who seek protection from violence and abuses.¹¹⁵ Equally significant is the passage of the VAWA legislation in the early 1990s. This favored female survivors of domestic violence by US-citizen or permanent residents-spouses.¹¹⁶ VAWA provided

¹⁰⁹ *Id.*; Board of Immigration Appeals, U.S. Dep't of Justice, <https://www.justice.gov/eoir/board-of-immigration-appeals>; *Fatin v. INS*, 12F. 3d 1233 (3rd Circ. 1993).

¹¹⁰ *R-A-*, *supra* note 1 at 906.

¹¹¹ *In re A-B-* 27 I. & N. Dec. 316 (AG 2018); *INS v. Cardoza-Fonseca*, 480 US 421, 438-39 (1987).

¹¹² INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m).

¹¹³ US Congress enacted Violence Against Women Act of 1994 to protect immigrants/immediate relatives who are victims of human rights abuses in the hands of US citizens (USC) or legal permanent residence (LPR) and to provide them a pathway to permanent residency. The Act was updated in 2000 under the Battered Immigrant Women Protection Act of 2000 and the Violence Against Women Reauthorization Acts of 2005 and 2013. The latter authorized "self-petition" for victims to prevent an abuser from frustrating the immigration process. *See, e.g.*, INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b) (17 (ii) 204.2(c)(2)(i), 204.1(g). A VAWA petitioner may seek adjustment of status under INA § 245(a). If such victim is under removal proceeding, he or she can seek VAWA Cancellation of removal under INA § 240 A (b)(2); 8 CFR § 1229(b)(2).

¹¹⁴ Humanitarian parole or temporary protected status are granted to victims of disaster and humanitarian emergency. *See, e.g.*, INA § 244; 8 CFR § 244. Such alien may equally claim asylum if they meet the requirement of refugee. *See, e.g.*, INA § 101(a)(42)(A); 8 CFR § 208. If such alien is under a removal proceeding, he or she may equally seek withholding removal under INA § 241(b)(3); 8 CFR §§ 208; 1208. 16(b).

¹¹⁵ Unaccompanied refugee children or undocumented children who are victims of human rights abuses may claim humanitarian protection under Special Immigrant Juvenile Status (SIJS). *See, e.g.*, INA §§ 101(a)(27)(J); 245(h); 8 CFR § 204.11.

¹¹⁶ INA §§ 101(a)(15)(U), 214(p), 212(d)(14), 245(m).

claimants with the authority to self-petition¹¹⁷ and to cancel a removal.¹¹⁸ In these, Congress has increasingly demonstrated awareness of the vulnerabilities of special categories of noncitizens. However, espousing the limitations of Article 1.A(2), VAWA reliefs are made exclusive, not transferable to other female claimants who have fled a similar kind of GBV in their countries.

However, neither the Refugee Convention nor the INA identified gender as the basis for asylum. Applicants making gender related claims are required to establish eligibility by proving (a) a well-founded fear (WFF) of persecution; (b) based on past persecution or risk of persecution in the future if returned to the country of origin; (c) because of the applicant's membership in a PSG (or facts giving rise to a claim under one of the other enumerated grounds) wherein; (d) the persecutor is a government actor and/or a non-governmental actor that the government is unwilling or unable to control.¹¹⁹ The applicant bears the burden of proof to establish eligibility.¹²⁰ Asylum decisions on gender underscore the hurdles involved in discharging the burden of nexus proof in gender and PSG.¹²¹

In 1995, the Immigration and Naturalization Service (INS)¹²² developed the *Considerations for Asylum Officers Adjudicating Asylum Claims from Women*¹²³ in response to the 1993 UNHCR Guidelines. The Considerations acknowledge that gender-related persecution can come within "the framework provided by existing international human rights instruments."¹²⁴ It is equally recognized that GRPs can be the basis of an asylum claim in the United States,¹²⁵ while political opinion and social groups can be possible grounds upon which gender claims could be made.¹²⁶ But despite the expressed optimism, the Considerations were directed only to asylum officers and were not binding on immigration courts, the BIA and circuit courts.¹²⁷ For several years, practitioners and pro-gender immigrants awaited a progressive ruling from the BIA on the viability of female violence asylum claims.¹²⁸

Consistent with the progress under the Considerations, BIA handed down a landmark decision in the *Matter of Acosta*¹²⁹ that established the doctrine of *ejusdem generis* for analyzing the Convention's PSG grounds.¹³⁰ In this decision,¹³¹ BIA established that asylum applicant seeking relief upon membership in a PSG must show that he or she is "an individual who is a member of a group of persons all of whom share

¹¹⁷ INA §§ 204(a)(1)(A), (iii)-(vi), (B)(i)-(v)(C)(D)(J); 8 CFR §§ 103.2(b)(17)(ii) 204.2(c)(2)(i), 204.1(g), *supra* note 35.

¹¹⁸ INA § 240 A (b)(2); 8 CFR § 1229(b)(2) *supra* note 35.

¹¹⁹ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

¹²⁰ *Id.*

¹²¹ *Saideh Fisher v. I.N.S [Fisher II]* 79 F.3d 955 (9th Cir. 1996); *Fatin v. INS*, 12F. 3d 1233 (3rd Cir. 1993).

¹²² INS is the predecessor to USCIS.

¹²³ INS Gender Guidelines, "Considerations for Asylum Officers Adjudicating Asylum Claims for Women," (1995) [hereinafter "Considerations"]. <https://www.refworld.org/docid/3ae6b31e7.html>.

¹²⁴ *Id.*

¹²⁵ *Id* at 8-10.

¹²⁶ *Id* at 6-15.

¹²⁷ *Id.*

¹²⁸ NIJC 2019, *supra* note 42 at 4.

¹²⁹ 19 IN Dec. (BIA 1985).

¹³⁰ *Acosta*, *supra* note 229, 211, 233 [*ejusdem generis* literally meaning one of the same kind, a the doctrine construed for analyzing PSG to be consistent with other enumerated grounds].

¹³¹ *Acosta*, *supra* note 84 at 211.

common, immutable characteristics...members of a group cannot change... because it is fundamental to their individual identities or consciences.”¹³² Acosta recognized sex as cognizable because it possesses fundamental and immutable characteristics to form a PSG.¹³³ Its application became beneficial in *re Kasinga*¹³⁴ that granted asylum for FGC as and to a claim on sexual orientation-related persecution in *Tobonso-Alfonso*.¹³⁵ Fauziya Kassindja was a Togolese teenager who sought asylum in the United States, having escaped the practice of FGC in Togo. BIA held that women fleeing a gender based persecution like FGC could be eligible for asylum in the United States.¹³⁶

Notwithstanding the developments, subsequent analysis of gender case laws contentious due to the lack of congruity on nexus requirements in female related asylum claims. In *Sofia Campos-Guadado v. I.N.S.*,¹³⁷ a Salvadorian woman who was a victim of a vicious rape attack and nervous breakdown was construed to be a non-refugee, having failed the nexus requirement.¹³⁸ The Fifth Circuit identified Campos-Guadado's experience as a common price of any woman in her circumstance.¹³⁹ Also, in *Lazo-Majano v. INS*, a thirty-four-year-old Salvadorian woman and mother of three sought asylum in the United States after suffering brutal rape, emotional and psychological violence by a Sergeant of Salvadorian. She was twenty-nine when her husband flees El Salvador for political reasons, as a right-wing paramilitary group known as ORDEN. During his absence, Sergeant Rene Zuniga subjected Lazo-Majano to forced domestic labor, rape, sexual enslavement, and physical torture. She was unable to seek the government's protection because of fear and knowing that it would be ineffective. Upon fleeing her abuser to seek asylum in the United States, BIA interpreted Lazo-Majano's brutal experience as "...strictly personal actions that do not constitute persecution within the meaning of the Act."¹⁴⁰ During appeal, the Ninth Circuit Court reversed and remanded the BIA's denial for further review.¹⁴¹ Reasoning differently, the court found that Sergeant Zuniga held a political (machismo) opinion that was targeted to dominate the right to dominate Lazo-Majano, a victim of his hyper-masculinity.¹⁴²

However, Judge Poole dissented from the majority decision holding that although the respondent may have suffered physical and emotional abuse during her relationship with Sergeant Zuniga, such mistreatment was merely personal and would not constitute persecution within the meaning of the immigration laws.¹⁴³ BIA and Judge Poole's views have gained traction rather than the Ninth Circuit's. Unfortunately, interpreting sexual violence as a private reinforces what Alice Edwards described as a dilemma of public-private dichotomy in international law.¹⁴⁴ Of course, the outcome

¹³² *Id.* at 217.

¹³³ *Id.*

¹³⁴ *In re Fauziya Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996).

¹³⁵ 20 I. & N. Dec. 819, 822 (BIA 1990).

¹³⁶ *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

¹³⁷ 809 F. 2d 285 (5th Cir. 1987).

¹³⁸ *Id.* at 285.

¹³⁹ *Id.*

¹⁴⁰ *Olimpia Lazo-Majano v. INS*, A24 345 083 (9th Cir. 1987).

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at para. 25.

¹⁴⁴ A. Edwards, *Age and Gender Dimensions in International Refugee Law*, E. Feller, V. Türk, and F.

creates a gulf between the international law concept of non-discrimination and the practice of female marginalization. Although bifurcated, normative international human rights law (IHRL) recognizes the importance of all rights whether civil and political rights or economic social and political rights.¹⁴⁵ Contemporary human rights jurisprudence has consistently demonstrated the inextricable ties between the two generations of human rights.¹⁴⁶ Yet, IRL reinvents the private/public dichotomy by gendering the grounds of persecution to five male-centered grounds. By demarcating human rights persecutions occurring at the five Convention's grounds from human rights persecutions suffered by a woman in private, refugee law creates an unsustainable structure of human rights that is prone to discrimination.¹⁴⁷ Such a sexist's construction of human rights has been bolstered in the United States gender asylum determinations.¹⁴⁸ Gendering the meaning of persecution implies interpreting the term from a male (gender) centered lens was the case in *Lazo-Majano*. Of course, setting such a troubling precedent would not only trivialize criminal responsibility limit access to humanitarian justice for female refugees in destination countries.

Generally, the development in *Acosta*, *Kasinga*, and the Consideration brought enlightenment on the better understanding of GBP. But neither of these has substantially enhanced protection for gender claimants. As the circumstances of GBPs increase in many countries, so do the challenges of survivors who seek viability in gender related social groups. The Ninth Circuit Court held in *Saideh Fisher v. INS*¹⁴⁹ punishments of forced compliance with strict gender norms and fear of torture for transgressing gender norms are insufficient to meet the requirements of nexus for refugee protection.¹⁵⁰ The decision reflected an earlier Supreme Court's position in *INS v. Elias Zacarias* that religious, political or imputed political opinion may not be claimed where there is evidence that a particular restriction or forced compliance is required of all persons.¹⁵¹ Consistent with the restrictive interpretation "on account of," the Ninth Circuit Court *en banc* reversed *Fisher 1* and held that Iranian the physical harm suffered by Fisher—arrest, detention, and gun-threat by state actors—did not amount to persecution on account of political and religious opinion. Referencing *Ghaly*, the Ninth Circuit interpreted Fisher's gender persecution as mere discrimination on account of her sex and not on account of religious or political opinion.¹⁵² Although the court acknowledged that certain discrimination may be offensive with severe proportion to constitute persecution

Nicholson (eds) *Refugee Protection in International Law: UNHCR's Global Consultations on International Protection* 48 (Cambridge, 2003).

¹⁴⁵ UN General Assembly, Vienna Declaration and Programme of Action, 12 July 1993, A/CONF.157/23, <https://www.refworld.org/docid/3ae6b39ec.html>; Danwood M. Chirwa, „Toward Revitalizing Economic, Social, and Cultural Rights in Africa”, *Human Rights Brief* 10, no. 1 (2002): 14-17, 25.

¹⁴⁶ *Id.*

¹⁴⁷ J. Oloka-Onyango, „The Plight of the Larger Half: Human Rights, Gender Violence and Legal Status of Refugee and Internally Displaced Women in Africa”, 24 *Denver Journal of International Law & Policy* 362 (1995).

¹⁴⁸ H. Charlesworth and C. Chinkin, „The Gender of Jus Cogens”, 15 *Human Rights Quarterly* 63, 69 (1993)

¹⁴⁹ *Saideh Fisher v. INS* 79 F. 3d 955 (9th Cir. 1996).

¹⁵⁰ *Id.*

¹⁵¹ *INS v. Zacarias*, 502 U.S. 478, 482 (1992) [The requirement to prove “on account of” characteristics belong the victim. The Supreme Court further cited that the Jews in Nazi were not persecuted on account of their political opinion rather as members of a social and religious group].

¹⁵² *Id.* at 482.

but according to its reasoning, *Ghaly* excludes discrimination as persecutory. The restrictive opinion of the Ninth Circuit on nexus is a clear demonstration of a judicial caution that is influenced by a fear of floodgates. The subsequent analysis makes this assertion more glaring.

In *Matter of R-A*¹⁵³, BIA overturned a grant of asylum to a Guatemalan woman, who suffered abhorrent domestic violence and rape by her husband, holding that the applicant failed to demonstrate evidence of a cognizable PSG or political opinion. Despite the several outcries provoked by the case, it took fourteen years of persistent human rights struggles and agitations by pro-refugee institutions, as well as the political transition, to finally obtain justice for Ms. Alvarado.¹⁵⁴ Although she was granted asylum under PSG,¹⁵⁵ her case did never set any precedent for future adjudication. But in 2018, at the *Matter of A-B*-, A.G. Jeff's Sessions vacated *Matter of A-R-C-G*-, which previously held that in some circumstances, survivors of domestic violence could receive asylum in the United States.¹⁵⁶ By overruling *A-R-C-G*-, A.G. rejected Ms. A.B.'s proposed PSG "El Salvadoran women who are unable to leave their domestic relationships where they have children in common with their partners," and found same to be very similar to the formulation approved in *A-R-C-G*-.¹⁵⁷ *A-B*- set a debilitating barrier to gender asylum. This shifted the evidential requirements from the basic standard of proof that requires showing of persecution "on account of,"¹⁵⁸ and amplified the requirement of evidence that the respondent's government condoned persecutor's actions or persecution on account of membership in a PSG,¹⁵⁹ contrary to the UNHCR Guidelines on bifurcated nexus.¹⁶⁰ The Session's decision reflects a prevailing attitude gender asylum claims in the United States. Prior to *A-B*-, the Third Circuit Court denied asylum to a westernized Iranian woman who suffered cruel persecution by state actors for noncompliance to the Iranian law on mandatory religious dress code for women. It rejected her claim of PSG, holding that Fatin's group was not cognizable and failed to meet the burden on *Acosta*.¹⁶¹

For several years, the United States asylum courts has held disputing decisions on the *Acosta* test, even though the formula had gained a wider international acceptance.¹⁶² In *Matter of C-A*-,¹⁶³ BIA made it clear that *Acosta*'s immutability test was only a starting point.¹⁶⁴ One year after, in *Matter of A-M-E & J-G-U*,¹⁶⁵ the Board described the social visibility test as a vital requirement and necessary factor in social

¹⁵³ 22 I&N Dec. 906 (BIA 1999).

¹⁵⁴ *Id.*

¹⁵⁵ DHS Brief; *Matter of R-A*- 22 I&N Dec. 906 (A.G. 2009).

¹⁵⁶ *A-B*-, 27 I&N Dec. at 320.8 [holding, "...generally, claims . . . pertaining to domestic violence or gang violence perpetrated by no-governmental actors will not qualify for asylum"].

¹⁵⁷ *Id.*

¹⁵⁸ 8 C.F.R. § 1208.13(b)(1).

¹⁵⁹ *Id.* at 338.

¹⁶⁰ Implemented in *Khawar*, *supra* 52 note; *Azaar* *supra* note.

¹⁶¹ *Saideh Fisher v. I.N.S* [*Fisher II*] 79 F.3d 955 (9th Cir. 1996); *Fatin v. INS*, 12F. 3d 1233 (3rd Circ. 1993).

¹⁶² *Khawar*, *supra* 52 note at 1379; *Azaar* *supra* note 52 at 912; *Minister for Immigration and Multicultural Affairs*, *supra* note 52].

¹⁶³ *Matter of C-A*-, 23 I. & N. Dec. 951, 956-57 (BIA 2006) *aff'd*, *Castillo-Arias v. U.S. Att'y Gen.*, 446 F.3d 1190 (11th Cir. 2006), *cert. Denied sub nom Castillo-Arias v. Gonzales*, 446 F.3d 1190 (11th Cir. 2006).

¹⁶⁴ 23 I. & N. Dec. at 955.

¹⁶⁵ 24 I. & N. Dec. 69 (BIA 2007) (amended opinion).

group determination.¹⁶⁶ At the same period, the Ninth Circuit Court developed a variant PSG termed “voluntary association relationship” like “young working class” that was distinct from the earlier formulation in *Acosta*.¹⁶⁷ The conflicting jurisprudence has created a chain of inconsistencies in the framing of what actually conflate PSG, making gender asylum claims intractable. Unsurprising, the discrepancy received judicial attention in *Gatimi v. Holder*,¹⁶⁸ as the Seventh Circuit challenged the ongoing convoluted constructions of social groups. *Gatimi* found the controversial standards to be illogical and without legal basis. Although this did not deter its subsequent digression in *Matter of M-E-V-G*,¹⁶⁹ and *Matter of W-G-R*.¹⁷⁰ In both cases, the BIA neither deferred to nor affirmed the requirements of social visibility, but proposed a rationale for deference. Likewise, in *Ngwengwe v. Mukasey*,¹⁷¹ the Eighth Circuit Court took a different standpoint on *Chevron* deference that required a demonstration of social visibility and particularity as requirements for an applicant’s proof of social group.

In *Sarhan v. Holder*,¹⁷² a Jordan woman was fleeing death by honor killing was denied protection. Both IJ and BIA held that her alleged fear of honor killing does not make her a member of a PSG. Arguing further BIA asserted that even if she was, she did not show that the intent to kill her was on account of her MPSG.¹⁷³ It took an intervention of the Seventh Circuit to overturn the previous decisions.¹⁷⁴ Obviously, the favorable decision was made possible by a political transition, under the Obama administration, after several years of interpretational struggles in a conservative regime. A similar verdict was reached in the *Matter of A-R-C-G*-,¹⁷⁵ where BIA delivered a milestone decision that recognized “married women in Guatemala who are unable to leave their relationship” as a “cognizable particular social group viable for a claim for asylum or withholding.”¹⁷⁶ The precedential decision became binding and applicable in all immigration cases throughout the United States, years during the Obama Administration. However, *A-R-C-G*- was overruled in *Matter of A-B*-.¹⁷⁷ under the Trump Administration by the A.G. Jeff’s Session’s verdict. Apparently, the swift reversals of judicial precedents were influenced by the Trump-era immigration atmosphere. Similarly, the influence of the Attorney General and the executives in asylum determinations was evident in the decisions. For instance, *A-B*-.¹⁷⁸ intensified the evidential requirements on gender asylum claims. For nearly a decade, the precedent has had a predominant influence in gender asylum decisions and oftentimes spawned confusion among courts

¹⁶⁶ *Id.*

¹⁶⁷ *Matter of C-A*-, 23 I&N Dec. 951 (BIA 2006) [stating that in determining a MPSG, claimants should show that they are united by voluntary association, including former association].

¹⁶⁸ 606 F.3d 344 (7th Cir. 2010).

¹⁶⁹ 26 I. & N.

¹⁷⁰ 26 I. & N. Dec. 208 (BIA 2014).

¹⁷¹ 543 F.3d 1029, 1034 (8th Cir. 2008) [requiring social visibility in defining a gender related PSG]; *Santos-Lemus v. Mukasey*, 542 F.3d 738 (9th Cir. 2008).

¹⁷² 658 F. 3d 649 (7th Cir. 2011); *Kamar v. Sessions*, *supra* note 82.

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ *Matter of A-R-C-G*-, 26 I&N Dec. 388 (BIA 2014).

¹⁷⁶ *A-R-C-G*-, *supra* note 19 at 389.

¹⁷⁷ *In re A-B*-, 27 I. & N. Dec. 316 (A.G. 2018).

¹⁷⁸ *In re A-B*-, 27 I. & N. Dec. 316 (A.G. 2018).

in the determination of PSG.¹⁷⁹ But in 2021, at the beginning of the Biden Administration, the President issued an executive order directing the AG and DHS Secretary to “promulgate regulations addressing the circumstances” of PSG in *A-B- 1* and *A-B- 11*.¹⁸⁰ This case *A-B- 1* and *11* to be vacated in entirety and the reinstatement of *A-R-C-G*.¹⁸¹ Evidently, the developments affirmed the political impacts on immigration law and asylum jurisprudence.¹⁸² Despite current progressive achievements, some vestiges of the past troubling precedents on nexus requirements are still in place under *INS v. Elias Zacarias*.¹⁸³ Still the feat in *A-B- 111*¹⁸⁴ hangs on the fragile destiny of systemic political influence. Hence, a reversal with a changing administration is predictable. The fact that the political and partisan ideologies impact judicial decisions in the United States is indisputable, though a concern. However, the situation interrogates the reality of judicial independence.

Nonetheless, the United States is not alone in conflicting gender interpretations. Analysis of case laws in other states showed certain negligible responses to gender asylum claims. For instance, in the UK’s *Islam v. Secretary for the Home Department (SHD)* and *R. v. Immigration Appeal and SHD ex parte Shah*,¹⁸⁵ two Pakistan women who have fled abusive relationships were subjected by the UK court to prove nexus between their experiences and the Convention’s import of persecution. Although the majority opinion adopted their social group classification as “Pakistani women,” the court maintained that their PSG cannot be defined solely by persecution. Apparently, it rejected the attributes of “cohesiveness” for a social group, like *R-A-*, which makes the application of the precedent almost impossible.¹⁸⁶ Also, the application of the UK DFT increased the unprocedural “quick” removal of asylum seekers, including women. In *Fatima H*, the case of a Pakistan woman who had fled abhorrent domestic violence and rape was dismissed under the application DFT program.¹⁸⁷ Her claims were equally rejected for lack of credibility and failure to seek the government’s protection. Although she earlier testified that seeking police protection in the Pakistan male-dominated society was ineffective, her adjudicators discountenanced the bifurcated nexus requirement.

Likewise, the practice in other jurisdictions like France and Israel established a commonality in the trivialization of gender asylum claims. In France, for example, with exception of FGC and honor crime, women seeking asylum in other GBPs, rarely received a favorable assessments of credible fears.¹⁸⁸ Instead, the French *Mlle EG Decision* showed that the *Commission des recours des réfugiés* (CRR) grants an

¹⁷⁹ *Gonzales-Veliz v. Barr* 938 F. 3d 219 (5th Cir. 2019) [the Fifth Circuit Court asserts deference with to *A-B-*, indicating indifference to *Grace* injunction; ¹⁷⁹ *S.E.R.L. v. U.S. Attorney General* 894 F. 3d 535 (3d Cir. 2018).

¹⁸⁰ Exec. Order No. 14010, § 4(c)(ii), 86 Fed. Reg. 8267, 8271 (Feb. 2, 2021).

¹⁸¹ *Matter of A-B-* 28 I&N Dec. 307 (A.G. 2021).

¹⁸² *Gonzales-Veliz*, at 219; *S.E.R.L.*, *supra* at 535.

¹⁸³ *INS v. Elias Zacarias* 502 U.S. 478 (1992).

¹⁸⁴ *A-B- 111*, 28 I & N Dec. 307 (A.G. 2021).

¹⁸⁵ [1999] 2 W.L.R. 1015; [1999] INLR 144.

¹⁸⁶ Adopted and signed by the majority decision of Lords Steyn, Hoffmann, and Hope of Craighead; while Lord Steyn signed on to the more restricted definition and was joined by Lord Hutton; The “cohesiveness” test was enunciated in the United States case of *Sanchez-Trujillo*.

¹⁸⁷ *Id.* 33 [Unreported cited by Human Rights Watch 23 Feb. 2010]

¹⁸⁸ L. Brocard, H. Lamine and M. Gueguen, „Droit d’asile ou victimisation?” 75 *Plein Droit* (December 2007).

alternative forms of protection rather than asylum to gender related claimants.¹⁸⁹ In Israel also, there has been an overall reluctance by courts to acknowledge gender claims, especially on matters relating to domestic violence or other intimate partner persecutions because these are largely perceived as private or familial affairs.¹⁹⁰

Even so, the analyzed cases are indicative of the fact that GBPs pervasive attacks on women in many countries with repressive gender and cultural norms. Women who contravene gender cultural and religious restrictions in such countries face risks of punitive measures, including physical abuses, threats to life and freedom. Repression of gender rights in gender-restrictive societies may include but is not limited to prohibitions on female education, employment, driving, covering the Muslim burka or hijab as well as restriction on freedom of movement.¹⁹¹ In societies where such practice prevail, the purveyors enforce severe punishments for violation, including ostracization, torture, degrading and humiliating treatments as well as honor killing.¹⁹² Because the norms are traditionally instituted by the male hierarchy to regulate women's life, women are the common victims of these repressive gender norms. Regrettably, the state institutions in such religious or deeply traditional society largely condone, tolerate, and acquiesce to such acts. In view of this, the UNHCR Guidelines has identified the significance of bifurcated nexus analysis to ensure that adjudicators take cognizance of the lack of government's protection as an indicator of persecution within the meaning of Article 1. A(2). However, the United States courts are yet to consider the applicability of the BNF as was done in *Minister for Immigration and Multicultural Affairs v. Khawar*.¹⁹³ In *Khawar*, the Australian High Court recognized a "Pakistani woman" as a "distinct and recognizable group," and equally held government's failure to protect the respondent as persecution.¹⁹⁴ The success of *Khawar* decision is attributable to the Australian Gender Guidelines, which considered the sensitivity of GBPs¹⁹⁵ and their viability for refugee claims.¹⁹⁶ But contrary to *Khawar* the overall case reviews indicate the hardship of

¹⁸⁹ Commission des recours des réfugiés (CRR), Mlle EG Decision No 549296, 7 July 2006 (UNHCR RefWorld, 2006); CRR, SR, 27 mai 2005, 487613, *Mme Nariné Ananian ép. Arakelian; Protection subsidiaire*, France: Commission des Recours des Réfugiés (CRR), 27 May 2005, available at: https://www.refworld.org/cases,FRA_CRR,429da18a4.html.

¹⁹⁰ *Grace Kappachi v. The Minister of Interior* [unreported] a Nigeria female who fled domestic violence was denied asylum by the Israeli CAA because the court held that applicant's fear of persecution was "personal;" *Jane Doe v. The Minister for Interior*, [a Nigerian female who fled a death threat by her father for refusing to submit to a coercive marriage with his debtor, was denied asylum for lack of nexus. CAA held that Jane did not establish an objective fear on Convention's ground.]

¹⁹¹ *Discrimination Against Muslim Women—Fact Sheet*, ACLUU, (November, 2008), <https://www.aclu.org/other/discrimination-against-muslim-women-fact-sheet>; Amira Mashahour, „Islamic Law and Gender Equality: Could there be a Common Ground?: A Study of Divorce and Polygamy in Sharia Law and Contemporary Legislation in Tunisia and Egypt”, 27 *Human Rights Quarterly* 562-596 (2005).

¹⁹² *Saideh Fisher v. I.N.S [Fisher II]* 79 F.3d 955 (9th Cir. 1996); *Fatin v. INS*, 12F. 3d 1233 (3rd Cir. 1993).

¹⁹³ *Id* at 1130.

¹⁹⁴ *Id.* at 723.

¹⁹⁵ *Id.* at s 1.

¹⁹⁶ Migration Review Tribunal (Mrt); Refugee Review Tribunal (Rrt), Gender Guidelines (May 2010), [hereinafter Australian Gender Guidelines]; MRT and RRT, Australian Gender Guidelines (March 2012). <http://www.mrt-rrt.gov.au/Files/HTML/GenderGuidelines-GU-CD.html> [updating the 2010 Guidelines]; *Minister for Immigration and Multicultural Affairs v. Khawar*, 1130 FCA 1379 [2000]; *AZAAR v. Minister for Immigration and Citizenship* 912 FCA. [2009]; *Minister for Immigration and Multicultural Affairs v Sarrazola* 101 FCA [1999].

pricing gender viability under MPSG. The findings contradict Paragraph 6 of the UNHCR 2002 Guidelines, which claimed that “there is no need to create additional [gender] ground,” and that gender claims can be successfully submitted under PSG. Despite the widespread awareness of the pervasiveness of GBPs in conservative states, the outcome of gender asylum in the United States indicates manifest insensitivity to the impact of sex related persecutions, poor awareness of risks of abuse of asylum discretions and their human rights consequences. To address these issues and the potential risks of denial, and deportation, this article has made recommendations for the effective determination of sex related persecutions and other reforms in the asylum process.

7. Recommendations

Inclusion of sex as a ground for refugee protection. Violence against women is a global phenomenon. But the sensitivity of this crime has not received attention from lawmakers and courts in refugee jurisprudence. Thousands of female refugees who flee these risks in their home countries encounter interpretational biases as well as a danger of denial and repatriation given. Conflicting interpretations such as seen in *R-A*,¹⁹⁷ *Fisher*,¹⁹⁸ and *Sarhan*¹⁹⁹ create uncertainties for claimants and undermines every prospect for protection. For example, the controversies in the definition of PSG as well as nexus requirements destabilize the chances female asylum seekers whose fears of persecution are well-founded. It is evident that the barriers in this interpretation are neither the United States nor other states’ problems but inherited from the gender biases inherent in the discriminatory framing of Articles 1.A(2) and 33(1). The danger of misapplying discretion under such a structure is obvious. However, its consequences are far-reaching given the intersectionality between GBV and the spiral of human insecurities. Because GBPs constitute common causes of involuntary migration for women, it is recommended that adjudicators attach serious weight to such human rights in the evaluation of elements of persecution and existence of a WFF. For an attack or threat to amount to persecution, physical, mental, or economic, such action, inaction, or threat must have violated or threaten to violate the victims’ rights to freedom and dignity without the protection of one’s government. It is immaterial whether the victim is immaterial whether the subject matter is directly linked to the five Convention’s ground. In so far as, the breach or threatened falls within the scope of international law guaranteed rights, this article recommends that such a person deserving asylum should be accorded protection based on human rights and BNF, that is considering the consequences of government’s unwillingness and inability to protect.²⁰⁰ The recommendation reaffirms the views of Hathaway and Goodwin-Gill but slightly differed with Paragraph 51 of the Handbook that restricted its meaning of human rights to the five Convention’s grounds.²⁰¹ To achieve a fair and comprehensive adjudicatory

¹⁹⁷ *R-A*, *supra* note 153.

¹⁹⁸ *Fisher* *supra* note 149.

¹⁹⁹ *Sardan* *supra* note 172.

²⁰⁰ The recommendation reaffirms the views of Hathaway and Goodwin-Gill but slightly differed with Paragraph 51 of the Handbook that restricted its meaning of human rights to the five Convention’s grounds.

²⁰¹ UNHCR Handbook, *supra* note 51 at para. 51; *Hathaway*, *supra* note 53; *Goodwin-Gill*, *supra* note 54.

solution, the interpretation of refugee rights cannot be separated as human rights at any level.

Knowing that gender specific attacks are widespread in many societies, sex related persecution should be conferred a special place in the definition of a refugee. Decisions from *R-A-* to *A-B-* have demonstrated the interpretative dilemma with setting acceptable nexus threshold in gender, which have contributed to increasing the vulnerabilities of female asylum seekers. While the restrictive standard is associated with fear of the floodgates, the reality is that only few female survivors of GBPs could afford to leave their abusive environments because of low income, lack of courage or other cultural reasons. To retraumatize the few who seek asylum creates a human rights enigma as well as a double jeopardy. Therefore, to restore female visibility, Articles 1.A(2) and 33(1) as well as INA § 101(a)(42)(A), 8 U.S.C § 1101(a)(42)(A) should be amended to include sex as a sixth ground for refugee protection. Such reform would accommodate the sensitivity of female persecutory experiences. Additionally, Article 3 of the Refugee Convention should be amended to reflect “sex” in the principle of nondiscrimination, in accordance with international instruments. In line with these reforms, the VAWA reliefs should be expanded to be accessible to survivors of domestic violence who seek asylum in the United States where BNF is demonstrable.

Hundreds of thousands of women today endure horrendous social, cultural, religious, and economic subjugation under the orthodoxy of “private,” and “public” dichotomy. Yet, the response to women who suffer GBPs indicates consistent attempts to undervalue the seriousness of crimes committed against women in private by non-state actors. This study finds the precedent troubling. Under contemporary international law, the norms of IHRL defy the boundaries of family privacy. For example, the CEDAW and the Human Rights Committee have increasingly emphasized complain procedure as part of the remedies for accountability.²⁰² It is, therefore, prejudicial that asylum courts persistently misconstrue female persecutions as “private” or “personal,” while seeking to reinforce a restrictive nexus requirement. Knowing that IRL derived its existence from international law, this article finds the construction of family privacy dichotomy to be antithetical to the rules of international law. If any consideration is to be made, the respect of individual rights and dignity in a family, which claims on severe violations should be given an assessment by asylum courts. The principle should be interpreted alongside the BNF by considering the weight of the government’s inability and unwillingness to protect victims of persecution in their native country. Such consideration along the recognition of sex ground will certainly improve the status of female asylum seekers and save them from unrestrained risks of refoulement.

Redefining bifurcated nexus to accommodate other non-convention refugees. Overall, the research findings identified a wide margin between law and practice. The discrepancy extends to treaty obligations and commitment to human rights principles. The two important frameworks for refugee protection—the laws of inclusion and exclusion—are significant in the determination and fair application of humanitarian principles. Noting that the circumstances of involuntary migration are constantly

²⁰² See, e.g. *Individual Communications*, Committee on the Elimination of Discrimination Against Women, CEDAW, <https://www.ohchr.org/en/treaty-bodies/cedaw/individual-communications> [allows complain procedure for individual women who suffer human rights violations as well as discrimination whether in private or public].

changing, the inability of asylum adjudicators to see connection with feared persecutions and government's unwillingness to protect a victim have caused wrongful assessments of gender claims. This is evident in *Sarhan*, where WFF for honor killing is misconstrued as "unConvention" fear for persecution, without considering the consequences of government's unwillingness to protect. The necessity of a proper evaluation of the BNF cannot be stressed. Hence, the decisions in *Khawar*, and *AZAAR* demonstrates that BNF can serve as an extended inclusion criteria for accommodating the needs of many other unclassified refugees as well as displaced persons. Therefore, it is recommended that IRL establish another protocol containing practice guidelines on the interpretation of the BFN. This will espouse sex as the sixth and BNF as the seventh ground for refugee protection. Consistent with Article 1.A(2), the latter will accommodate the emerging needs of refugees like persons displaced by natural disasters, or other survivors of human rights violations that are not sex related.

Secondly, in evaluating the sixth category, it is important that adjudicators consider the impact of sex, culture, and the emotional effects of GBPs by intimate partners especially in deconstructing the public and private dichotomy. Mindful that the central purpose of asylum is to protect applicants from torture and fear or persecution,²⁰³ the UNHCR Guidelines²⁰⁴ reflected these circumstances. Decisions in *Canada*²⁰⁵ and *Australia*²⁰⁶ held pursuant to the Gender Guidelines integrated the guidance on the emotional effects of GBPs suffered or feared especially during evidence.²⁰⁷ None of these are reflected in the United States gender decisions and nexus scrutiny. To achieve a fair determination, it is recommended that the United States adopt the UNHCR Gender Guidelines and Considerations alongside suggested gender reforms to alter the negative approaches to gender asylum interpretations. While the amendment of the Refugee Convention or establishment of a new Protocol may take time, in the interim, State Parties are required to adopt the UNHCR Gender Guidelines and principles of international human rights law in the assessment of gender asylum claims. Such efforts would reinforce the anti-discrimination initiatives of international refugee protection and promote the safety and security of women in asylum countries.²⁰⁸ Just as *Acosta* test have received acceptance by other jurisdictions, lessons from *Canada v. Ward* (1993)²⁰⁹ and *Khawar*²¹⁰ should be adopted to enhance a fair determinations of gender claims.

Establishing Effective Monitoring Measures. IRL shares in the weakness of many international treaties on lack of effective mechanisms of enforceability. Unlike CEDAW and international human rights, IRL has no complaint procedure. Moreso, it relies on states for interpretation and application. These make impunity possible especially in the mishandling of refugee concerns. Therefore, setting a standard of accountability is crucial. This research encourages setting strategies of evaluation at local and international levels that will provide annual reports on asylum decisions,

²⁰³ 1951 Convention, art. 33(1); 1984 Convention Against Torture, art. 3.

²⁰⁴ *Id.*, para. 55 [The EXCOM Conclusions urge State Parties to the Convention to consider the assessment of sexual abuses and other related GBV perpetrated in private].

²⁰⁵ V99-02929 at 284.

²⁰⁶ *Khawar*, *supra* note at 317.

²⁰⁷ Implemented in *Khawar*, *supra* 51 note; *AZAAR* *supra* note.

²⁰⁸ *Ward*, *supra* note 79, at 689; *Giraldo v MIMA* FCA 113 42, 44 (2001) (Unreported, 2001).

²⁰⁹ *Canada (A.G.) v. Ward*, 2 S.C.R. 689 [1993].

²¹⁰ *Id* at 1130.

contentious precedents, and resettlement programs. Such a program will balance the state's discretions international assessment. The discretion to determine and grant asylum, admit, or reject, is not absolute but subject to treaty obligations. But where there are no measures for effective monitoring, State Parties would compromise their responsibility to good faith observance, fair assessment, and delivery as seen in many decisions in the United States jurisprudence.²¹¹ Such troubling precedents have in many ways frustrated the UNHCR authoritative guidance, especially where amicus curiae are rejected.²¹² Ironically too, the UNHCR partly depends on state funding for its operation, hence would naturally seek state's compromise and good offices. Such an endless web has detrimental effects on efficiency and undermines quality delivery.

To balance principle with purpose, this study suggests the establishment of an effective human rights monitoring committee (HRMC) to work independently but in collaboration with the UNHCR in the supervision of the treatment of refugees in different countries. Such a body should be empowered with a complaint procedure subject to Article 38 and can seek redress for the violations of refugees' rights in the ICJ. It would require an expansion of the scope of Article 38 to allow HRMC to receive complaints from human rights organizations, non-profits, and aggrieved groups or individuals. Upon establishing admissibility, HRMC can seek remedy at the ICJ. Without such accountability, the mistreatment and violations of refugees' rights would be normalized, while the rights of refugees are held as byproducts of the state's generosity. Hence, HRMC should be empowered to hold governments accountable for breaches of the rights of refugees, including unjustified mass refoulement of asylum seekers, punitive detentions, and denial of access to procedural determination of asylum claims. Part of its responsibilities would include bringing annual reports to the United States General Assembly (UNGA) on the treatments of refugees by different countries. Such actions would create an opportunity for the United Nations to evaluate practices of states, promote best practices, challenge reprehensible domestic laws that imposed unnecessary burdens on refugees and excoriate delinquent government. Except refugee rights are upheld and treated as human rights by international institutions, domestic structures will continue to show skepticism rather than conviction, and reluctance instead of commitment towards their obligations.

Structural reforms: limiting executive influence on the United States immigration reviews. Refugee rights are not minimal in the scale of international human rights but exist at par with other universal rights. As part of a solution seeking to dismantle procedural barriers in gender asylum adjudications, this article recommends the need to dislodge convoluted structures of immigration institutions that create expansive powers for executive interference with immigration jurisprudence. In the United States, for example, there is almost a practical fusion between the executive (administrative) orders, the Department of Homeland Security (DHS), the Department of Justice (DOJ), and the immigration courts. According to 28 U.S.C. §503, the President

²¹¹ Citing *Chevron U.S.A Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 423-433 [reasserting that *Chevron* deference citing *INS v. Cardoza-Fonseca* 480 U.S. 421-425) *Id.* at 428; *Aguirre-Aguirre v. INS*, 526 U.S. 415 (1999).

²¹² See, e.g. UN High Commissioner for Refugees (UNHCR), Brief of the Office of the United Nations High Commissioner for Refugee before the United States Court of Appeals for the Ninth Circuit in the Case of *Adelina Solares Milanjos v. William P. Barr*, U.S. Attorney General, 28 February 2020, <https://www.refworld.org/type,AMICUS,,USA,5f60a2bd4,0.html>.

appoints the Attorney General with the advice and consent of the Senate.²¹³ The United States Attorney General (AG) is the head of the Department of Justice, who exercises the duty to appoint immigration judges as administrative judges and AG's delegates.²¹⁴ Indirectly, a sitting President has almost an absolute control on immigration courts through the AG. The interweb has continued to impact immigration review, and policies. Decisions in *R-A-*, *A-B- 1*, *A-B- 11* and *A-B- 111* attest to the realities of political influence on judicial independence. To guarantee justice and fairness in the review of asylum cases, the judicial system deserves to be transparent, disentangled from the executive and accountable by every standard. Therefore, to achieve this the immigration courts should be separated from the DOJ and be assigned with the Article 1 status like the Tax Courts. The appointment of IJs should be done by a neutral (non-partisan) body of judicial commission. An utmost judicial independence is untenable where the system is partially entwined with the executive and the process of selection of judges is not free from partisan influence. Ultimately, a government exists for the people and not vice versa. Under the refugee treaty, a State Party covenants to extend its fiduciary obligation to the protection of noncitizens, including those whose status is not yet determined. This international obligation has not reflected in the treatment of refugees, good faith compliance and fair assessment of asylum seekers in the United States, especially women.

8. Conclusion

This article examined the legal barriers to inclusive protection of female refugees and the impacts of unequal application of asylum benefits in the United States. Understanding that the crisis of refugees has for so long been mismanaged, the study investigated causes, consequences, developments, and possible solutions. The research findings revealed that the drafting of the scope of refugee protection was a contributory factor to female exclusion that is replicated in the United States gender asylum. Despite the changing dynamics in the sources of involuntary migration since WW II, for more than seven decades the Refugee Convention has failed to reflect the contemporary needs of increasing demographics of female refugees and asylum seekers in the world.²¹⁵ Drafted in accordance with the needs of WW II refugees, the Refugee Convention centered primarily on five grounds of protection—race, religion, nationality, political opinion, and MPSG, excluding sex related persecutions. Finding that the Refugee Convention is structurally limited to addressing the disparate needs of current refugees, the UNHCR Gender Guidelines and EXCOM Conclusions have since 1985 advanced the recognition. But the developments in the United States gender asylum decisions as well as other jurisdictions indicate that the proposals have not gained traction.

Women seeking asylum in gender related persecutions still face procedural and interpretative obstacles as asylum courts treat them as non-Conventional refugees. The rationale derived from a restrictive application of nexus burden persistently stultify asylum access for women in dire need of protection. Evidence from the United States

²¹³ Publ. L. 89-554, § 4(C), 1966, 80 Stat. 612.

²¹⁴ §1003.10.

²¹⁵ UNHCR: Global Appeal Update, The UN Refugee Agency, 5, 3-165 (2021). https://reporting.unhcr.org/sites/default/files/ga2021/pdf/global_appeal_2021_full_lowres.pdf.

case law indicate the numerous hardships of claimants seeking to demonstrate gender viability to be protected from domestic violence, rape, honor killing, severe gender discrimination, and punishments for transgressing gender norms. In many ways, the trivialization of female persecutory experiences as “personal” or “unConvention” triggers a long-standing gender stereotype that have continued perpetuate inequality and female vulnerabilities. Therefore, for IRL to be exorcise of sexism, Article 1.A(2) must be redefined and unfettered from gendered structures that make female experiences invisible. The scope of refugee status and protection should be updated to include sex as an independent ground. Additionally, the recommendation for inclusiveness applies to all categories of deserving refugees that are excludable by Articles 1.D-F or 33(2), including survivors of human trafficking and displaced by natural disasters. Congress has made landmark legislation with the U-Visa and T-visa categories. In addition, this article makes recommendation for the adoption of the BNF practiced in Australia, New Zealand, and the UK. The latter will encourage courts to give weight to government’s unwillingness and inability to protect in the assessment of asylum and mitigate the tendency for an abuse of discretion. Knowing that the judicial system plays a significant role in the administration of justice, this article has made recommendations for depoliticizing the judicial system to achieve true independence and transparency. Also, asylum claimants and pro-refugee institutions should equally have the right to complain procedure in a case of judicial misconduct. Lastly, the achievement of a successful international refugee regime largely depends on inclusive representation. Ideally, fair inclusion cannot be separated from human rights, which is a core principle of IRL. Legitimizing the experiences of female asylum seekers is paramount to this.

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