

REVITALIZING AND REFORMING INTERNATIONAL ASYLUM LAW: A PROPOSAL TO ADD GENDER TO THE REFUGEE DEFINITION

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ABSTRACT

*On July 28, 1951, the U.N. Conference of Plenipotentiaries adopted the Convention Relating to the Status of Refugees, which set out international principles for the protection of refugees and provided a definition of refugee. The 1967 Optional Protocol Relating to the Status of Refugees broadened this definition, removing the geographic and temporal restrictions of the 1951 Convention. While purporting to be gender-neutral, the refugee definition excluded gender as a basis for asylum, which has posed a challenge for gender-based asylum seekers. While some steps have been taken to address this gap, such efforts have largely been insufficient. Countries have also taken steps on their own to protect refugees facing gender-based violence. For example, in *Matter of Kasinga*, the BIA recognized that women fleeing gender-based violence could be eligible for protection in the United States. However, without robust international protections for gender-based claims (that place such claims on the same level as the other enumerated grounds), such claims remain vulnerable, as demonstrated by the actions of the Trump administration. Moving forward, it is imperative to ensure that gender-based claims are firmly protected within a modern legal framework. I argue that the best way to do this is through a new convention protocol that adds gender to the refugee definition as the sixth protected ground.*

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I. INTRODUCTION

On July 28, 1951—in response to the horrific events of World War II—the international community adopted the landmark treaty, the 1951 Convention Relating to the Status of Refugees (Convention), which set out international refugee protection principles and provided a definition of refugee.¹ However, the Convention was largely envisioned as a solution to the influx of European male refugees, so it was limited to those displaced as a result of “events occurring in Europe before 1 January 1951.”² The 1967 Optional Protocol Relating to the Status of Refugees (Protocol) later broadened the refugee definition by removing the Convention’s geographic and temporal restrictions after new conflicts and independence movements around the world produced a host of new refugees and displaced persons.³

Today, 146 countries have signed on to the Convention⁴ and 147 have signed the Protocol.⁵ These agreements represent a momentous step forward for the international community; however, they also established a male-centric framework that often excludes women. Though purporting to be gender-neutral, the refugee definition excluded gender as a basis for asylum, creating a nearly insurmountable obstacle for gender-based asylum seekers. While international human rights law has made great strides in expanding international protection for women and recognizing that women’s rights are human rights, the refugee definition has never been updated to reflect such developments.

Steps have been taken, however, to address this shortfall, though such efforts have been insufficient. In 1991, the United Nations High Commissioner for Refugees (UNHCR) issued Guidelines on the Protection of Refugee Women, seeking to apply the Convention to protect women.⁶ Countries have also taken their own steps to protect gender-based asylum seekers and refugees. Romania includes gender as a ground for persecution, though Belgium, France, Hungary, Italy, Malta, and the United Kingdom do not recognize a separate category for gender.⁷ United States jurisprudence recognizes gender-based particular social groups. Although most countries do not explicitly include gender as a protected ground, many recognize gender as a particular social group, which is a recognized basis for asylum.

1. See Convention Relating to the Status of Refugees, July 28, 1951, 189 U.N.T.S. 137; Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.) (amending the Immigration and Nationality Act of 1952).

2. See Convention Relating to the Status of Refugees, *supra* note 1, at art. I A(2).

3. Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267.

4. Convention Relating to the Status of Refugees, U.N. TREATY COLLECTION, <https://perma.cc/79FW-9PMT> (last accessed May 15, 2021) (list of parties to the Convention).

5. Protocol Relating to the Status of Refugees, U.N. TREATY COLLECTION, <https://perma.cc/ES7F-AG62> (last accessed May 15, 2021) (list of parties to the Protocol).

6. U.N. HIGH COMM’R FOR REFUGEES, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (July 1991), <https://perma.cc/3P77-D22A>.

7. EUROPEAN PARLIAMENT, DIRECTORATE GENERAL FOR INTERNAL POLICIES, GENDER-RELATED ASYLUM CLAIMS IN EUROPE 8 (2012), <https://perma.cc/L4YQ-ZUYZ>.

However, there is a need for more robust international protections for gender-based claims that would place these claims on the same level as the other enumerated grounds. Without such a change, these claims remain vulnerable to domestic pressures to reduce asylum or anti-immigration backlashes, as demonstrated by the actions of the Trump administration. Because gender was not codified as a basis for asylum, the administration sought to reduce asylum by targeting gender-based claims that never firmly fit within the international refugee framework. As such, the Trump administration targeted gender-based asylum seekers through a myriad of actions in addition to a host of procedural changes, administrative hurdles, and regulatory and executive actions designed to curtail asylum in general.⁸

Moving forward, it is imperative to not only reverse the damage of the Trump administration but also to ensure that gender-based claims are more firmly protected in the future under a framework that reflects modern notions of gender, including the gravity of gender-based violence as an issue of public concern. I argue that this requires another Convention Protocol to expand the international refugee definition to include gender as a protected category.

In this Note, I will begin by providing an overview of gender-based violence in Section II. In Section III, I will outline international refugee law and its history. In Section IV, I will examine the impact of an international refugee legal framework that is not designed to protect women, focusing on action taken by the Trump administration, while showing that this issue extends beyond the United States.⁹ I will discuss the efforts that have been taken to correct this issue, resulting in the current piecemeal approach to gender-based claims. In Section V, I outline the solution of adding gender to the refugee definition through another Convention Protocol, discussing benefits and likely challenges. Section VI addresses counterarguments to my proposal, and Section VII concludes the Note.

II. GENDER-BASED VIOLENCE

While sex refers to biological differences between men and women, gender refers to “socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex or another.”¹⁰ Gender-based violence consists of “harmful acts directed at an individual based on their gender” and is “rooted in gender inequality, the abuse of power and

8. See generally ANDREW I. SCHOENHOLTZ, JAYA RAMJI-NOGALES & PHILIP G. SHRAG, *THE END OF ASYLUM* (2021).

9. See, e.g., *Gender-Based Asylum Claims and Non-Refoulement: Articles 60 And 61 of the Istanbul Convention*, COUNCIL OF EUROPE 10 (Dec. 2019), <https://perma.cc/ELY9-5CWQ> (providing an example of how only five European countries codified gender-based violence as a basis for asylum).

10. U.N. HIGH COMM’R FOR REFUGEES, *GUIDELINES ON INTERNATIONAL PROTECTION: GENDER-RELATED PERSECUTION WITHIN THE CONTEXT OF ARTICLE 1A(2)* (May 7, 2002), <https://perma.cc/S5GS-SKWJ>.

harmful norms.”¹¹ Gender-based violence includes sexual, physical, economic, and mental abuse, as well as threats to inflict such harm.¹² Examples include domestic violence, female genital mutilation, forced marriage or child marriage, and honor crimes.¹³ Gender-based violence may be directed at men, women, trans women or men, or nonbinary individuals.

Today, violence directed at women and girls is one of the world’s most prevalent human rights abuses.¹⁴ A World Health Organization (WHO) study found that nearly one-third of women worldwide have been subjected to physical or sexual violence by either a partner, non-partner, or both.¹⁵ It is estimated that roughly half of the world’s refugees are women and girls who face particular vulnerabilities and violations as a result of their gender.¹⁶ While women asylum seekers flee their home countries for a myriad of reasons, many are seeking protection from gender-based violence after failing to secure protection in their home country. As such, as many as one-third of the women that UNHCR interviewed in 2016 at Mexico’s southern border were fleeing gender-based violence.¹⁷ Similarly, gender-based violence is the most common basis for asylum for women seeking relief in Canada.¹⁸ It is predicted that more than 15 percent of women asylum seekers in Canada over the last five years were seeking asylum due to gender-based violence.¹⁹

III. OVERVIEW OF REFUGEE LAW

A. *History of International Refugee Law*

Refugees emerged as a matter of international concern after World War I.²⁰ However, until 1951, international refugee law primarily consisted of agreements to protect specific groups like Russian and Armenian refugees.²¹ Article 14(1) of the 1948 Universal Declaration of Human Rights recognized the right to seek and enjoy asylum under customary international law.²² In

11. *Gender-Based Violence*, U.N. HIGH COMM’R FOR REFUGEES, <https://perma.cc/V772-78Q8> (last visited April 12, 2021).

12. *Id.*

13. *Id.*

14. *Gender-Based Violence*, U.N. POPULATION FUND, <https://perma.cc/TQ6P-HA44> (last visited Oct. 31, 2021). Gender-based violence can also be directed at men, women, trans women or men, or nonbinary individuals, but in this Note, I focus on women facing gender-based violence because of its prevalence, but my proposals are not limited to women.

15. *Violence against Women*, WORLD HEALTH ORG. (Mar. 9, 2021), <https://perma.cc/6U3K-3VS9>.

16. Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, The United Kingdom, and the United States*, 23 AM. U. J. GENDER, SOC. POL’Y & L. 529, 530 (2015).

17. See U.N. HIGH COMM’R FOR REFUGEES, *Women on the Run* 2, 4 (Oct. 2015), <https://perma.cc/U7Z4-FQ3V>.

18. See Tara Carman & Anita Elash, *Gender Persecution the Top Reason Women Seek Asylum in Canada*, CBC (Feb. 7, 2018), <https://perma.cc/CFH4-6PRA>.

19. *Id.*

20. *The Refugee Convention, 1951: The Travaux Préparatoires Analysed with a Commentary by Dr. Paul Weis*, U.N. HIGH COMM’R FOR REFUGEES 4 (1990), <https://perma.cc/4MHR-2YFW>.

21. Leila Nasar, *International Refugee Law: Definitions and Limitations of the 1951 Refugee Convention*, LONDON SCH. OF ECON. (Feb. 18, 2016), <https://perma.cc/L9CA-8NJW>.

22. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 14(1) (Dec. 10, 1948).

1951, the Refugee Convention codified this right to seek asylum,²³ establishing the principle of *non-refoulement*, which prohibits States from forcibly returning an asylum seeker to a country where his or her life would be threatened.²⁴ The Convention also set out State obligations to refugees, including rights that they should be afforded, such as the freedom of movement and freedom to seek employment.²⁵ Most significantly, the Convention defined a refugee. While the Convention aimed to create a universal definition of a refugee, it was limited to Europeans displaced prior to or as a result of World War II.²⁶

Over the next decade, as new conflicts erupted around the world and produced refugees, it became clear that a broader refugee definition was needed. As such, the 1967 Optional Protocol Relating to the Status of Refugees removed the geographic and temporal restrictions of the 1951 Convention.²⁷ However, the refugee definition was never expanded to explicitly include gender despite progress in other areas of international law to protect women, including the 1979 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).²⁸

In April 2017, international refugee law underwent its first reform in many years. After eighteen months, the General Assembly adopted the non-binding New York Declaration for Refugees and Migrants, paving the way for the 2018 Global Compact on Refugees (and the Global Compact for Safe, Orderly, and Regular Migration).²⁹ Unfortunately, the Global Compact on Refugees (“the Compact”) is limited in its ability to produce meaningful change. It does not impose any commitments on States because it is simply a “[l]egally non-binding cooperative framework for international cooperation in migration.”³⁰ Accordingly, though the Compact mentions women twenty-seven times, such statements are not accompanied by commitments to take concrete action.³¹ Adding gender to the refugee definition, on the other hand, is a concrete step that the international community can take to produce meaningful reform for gender-based refugees and asylum seekers.

23. While there is a right to seek asylum, there is no right to asylum in international law.

24. Convention Relating to the Status of Refugees, *supra* note 1, at art. 33(1).

25. *Id.* at art. 1.

26. *Id.* at art. 1(A)(1).

27. See Protocol Relating to the Status of Refugees, *supra* note 3, at art. 1.2.

28. Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), Dec. 18, 1979, 1249 U.N.T.S. 13.

29. *New York Declaration for Refugees and Migrants*, U.N. HIGH COMM’R FOR REFUGEES, <https://perma.cc/5TVA-B4RP>.

30. Tim Höflinger, *Non-Binding and Therefore Irrelevant? The Global Compact for Migration*, 75 INT’L J. 662, 663 (Nov. 27, 2020). However, the non-binding nature of the agreement does not necessarily indicate that it is ineffective. While Höflinger cites several positive attributes of the Compact including its legitimacy and relevancy, he states that its monitoring framework is not comprehensive enough to constitute an effective soft law instrument.

31. Jenna Hennebry & Allison Petrozziello, *Closing the Gap? Gender and the Global Compacts for Migration and Refugees*, 57 INT’L MIGRATION 116, 119 (2019).

B. *Current International Refugee Law*

1. *International Refugee Framework*

According to Article 1(A)(2) of the 1951 Refugee Convention, as amended by its 1967 Protocol, a refugee is someone 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, is unable or, owing to such fear, is unwilling to return to it.³²

Thus, under international law, one must meet several elements to prove refugee status,³³ including demonstrating persecution on account of one of the five enumerated grounds, namely race, religion, nationality, political opinion, or membership in a particular social group. Since gender is not one of the grounds for asylum, such claims are generally included under membership in a particular social group. Though international law provides a general framework, countries have their own asylum systems, which include the requirements that an asylum seeker must meet to establish refugee status in a particular territory.

2. *Gender Compared to Other Asylum Grounds*

Despite its exclusion from the refugee definition, gender shares key commonalities with the currently protected grounds. First, gender is a near universal societal categorization, not specific to any one culture or region, akin to race, religion, nationality categorization.³⁴ Second, similar to the five protected grounds that are either immutable (such as race or nationality) or so fundamental to one's identity that one should not have to change it (such as religion or political opinion), gender is an immutable or fundamental aspect of one's identity.³⁵ The immutability of gender is also recognized by the U.S.

32. *What Is a Refugee?*, U.N. HIGH COMM'R FOR REFUGEES, <https://perma.cc/Z492-AGV7> (last visited April 12, 2021).

33. In international law, an individual is considered an asylum seeker before demonstrating refugee status. In the United States context, an asylum seeker refers to a person already in the United States or arriving at the border who claims to meet the international definition of a refugee, while a refugee is a person located outside the United States who has been determined to meet to the eligibility criteria for refugee status. I use the term asylum seeker as it is used in international law to refer to people outside their home countries who are seeking refugee status.

34. It is important to note that while gender is used to categorize people throughout the world, this categorization may operate differently depending on the society. While most societies do in fact operate according to the gender-binary system, some cultures recognize a third gender and/or envision gender as a more fluid and flexible categorization. See Carol R. Ember, Milagro Escobar, Noah Rossen & Abbe McCarter, *Gender*, EXPLAINING HUMAN CULTURE, HRAF (Nov.18, 2019), <https://perma.cc/43AF-XVHG>.

35. See *In re Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

constitutional jurisprudence.³⁶ The immutability and fundamental nature of these characteristics matter because it is particularly unjust to persecute an individual for traits outside of their control.

Moreover, persecution on the basis of such fundamental characteristics precludes the enjoyment of rights and freedoms, which is a primary reason that the protected grounds were selected.³⁷ According to Professor Guy Goodwin-Gill, the grounds for protection in the Convention reflect the classifications in the Universal Declaration of Human Rights (UDHR) anti-discrimination principle, prohibiting discrimination on characteristics that “ought to be irrelevant to the enjoyment of fundamental human rights.”³⁸ Similarly, in the United Kingdom cases, *Shah and Islam*, Lord Hoffman proclaimed that a concern for discrimination affecting the exercise and enjoyment of fundamental rights and freedoms was central to the Convention.³⁹ However, in contrast to the Convention, the UDHR includes a prohibition on sex-based discrimination.⁴⁰ As such, the UDHR recognized that sex shared a key commonality with race, religion, national origin, and political opinion in that discrimination on the basis of such characteristics precluded the enjoyment of human rights.

One could distinguish gender from the other asylum grounds in that the latter may involve State persecution, while gender-based violence is often perpetrated by private actors. However, most States interpret international refugee law to include both protection against State persecution and the failure of the State to provide protection.⁴¹ As such, this distinction is not relevant as long as the asylum seeker can demonstrate that she was unable to secure State protection.⁴²

In the United States, this burden of showing State failure to protect can be met by demonstrating state inaction in response to persecution by private actors based on one of the five enumerated grounds, akin to the State’s role in many gender-based claims. For example, in *Matter of O-Z & I-Z*, a father and

36. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973) (“since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth . . .”).

37. See Guy S. Goodwin Gil, *The International Law of Refugee Protection*, in *THE OXFORD HANDBOOK OF REFUGEES AND FORCED MIGRATION* 36 (Elena Fiddian-Qasimiyeh, Gil Loescher, Katy Long & Nando Sigona eds., 2014).

38. *Id.* at 39.

39. See Alice Edwards, *Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010*, 29 *REFUGEE SURVEY QUARTERLY* 21, 29 (2010).

40. G.A. Res. 217 (III)A, Universal Declaration of Human Rights, art. 2, (Dec. 10, 1948) (“Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.”). Though color and language are also not included in the refugee definition, they are arguably covered by race or nationality that are grounds for asylum, but there is no equivalent for gender in the asylum definition. Property, birth, or other status are also mentioned by the UDHR, but they are not necessarily categories that operate similarly throughout the world, in the same way as gender.

41. Deborah Anker, *Refugee Status and Violence against Women in the Domestic Sphere: The Non-state Actor Question*, 15 *GEO. IMMIGR. L.J.* 391, 392–93 (2001).

42. See *infra* Part V.B.2, for discussion on why gender-based violence often involves the state’s failure to fulfill its obligations to protect and why gender-based violence should not be viewed simply as a private matter.

son in Ukraine were beaten multiple times, and their home was vandalized by private actors because they were Jewish.⁴³ The Board of Immigration Appeals (BIA) found that the victims had met the burden to show that the State was unwilling or unable to protect them because they had reported these attacks and the police did nothing to help them beyond writing a report.⁴⁴ Likewise in *Matter of S-A-*, a Respondent was abused by her father because of her unwillingness to adhere to his strict religious beliefs.⁴⁵ Similar to many gender-based asylum seekers, the Respondent in this case did not request police protection nor seek help because she believed it would not have been effective based on her mother's failed attempts to secure assistance.⁴⁶ The court found that the Respondent had sufficiently demonstrated that the State was unwilling or unable to protect her, even though her persecutor was a private actor.⁴⁷

IV. EXCLUSION OF WOMEN AS PERSISTING GAP IN THIS FRAMEWORK

A. *Historical Exclusion of Women from the Refugee Protection Regime*

While the 1951 and 1967 definitions appear gender-neutral, they reflect a male-centric framework created by men.⁴⁸ Accordingly, the Convention's anti-discrimination provision only includes protection against racial, religious, and country of origin discrimination, and as noted above, gender was not recognized as a basis for asylum⁴⁹ despite its similarities to the other Convention grounds.⁵⁰

Moreover, the refugee framework does not acknowledge violence perpetrated by non-State actors, which more commonly affects women.⁵¹ In other words, "women's experiences of persecution, and forms of harm that only or mostly affect them, have tended to be excluded from the dominant interpretation of the Convention, and they have been unable to benefit consistently and equitably from its protection."⁵² Even the UNHCR Guidelines on Gender-Related Persecution acknowledge that "[h]istorically, the refugee definition has been interpreted through a framework of male experiences, which has

43. *In re O-Z & I-Z*, 22 I. & N. Dec. 23, 26 (B.I.A. 1998).

44. *Id.* at 26. *See also* Afriyie v. Holder, 613 F.3d 924, 933 (9th Cir. 2010) (finding that the government was unwilling or unable to protect a Christian individual who was persecuted by local Muslims because there was evidence that the police had made progress in solving the murders of his family combined with the requirement that victims are required to bring evidence of the crime to the police).

45. *In re S-A-*, 22 I. & N. Dec. 1328 (B.I.A. 2000).

46. *Id.* at 1330.

47. *Id.* at 1335.

48. *See* Alice Edwards, *Transitioning Gender: Feminist Engagement with International Refugee Law and Policy 1950–2010*, 29 REFUGEE SURVEY QUARTERLY 21, 23 (2010) (no women were included in the drafting of the 1951 Convention).

49. *See* Convention Relating to the Status of Refugees, *supra* note 1, at 17.

50. *See id.* at 14.

51. SUSANNE BUCKLEY-ZISTEL & ULRIKE KRAUSE, GENDER, VIOLENCE, REFUGEES 3–4 (Susanne Buckley-Zistel & Ulrike Krause eds., 2017).

52. BRIEFING: GENDER ASPECTS OF MIGRATION AND ASYLUM IN THE EU: AN OVERVIEW, EUROPEAN PARLIAMENT (2016), <https://perma.cc/U62R-CZDE>.

meant that many claims of women and of homosexuals, have gone unrecognised.”⁵³

The Convention’s travaux préparatoires confirms its lack of regard for gender-based issues, as any discussion of gender or sex is nearly absent. Sex is only briefly mentioned in regard to the Convention’s anti-discrimination clause.⁵⁴ The Yugoslav representative proposed adding “or sex” following the words “country of origin,” but this suggestion was opposed by the representatives from Austria, Colombia, Italy, Switzerland, Turkey, the United Kingdom, and the United States.⁵⁵ As such, this proposal was rejected with no further discussion on the matter.

Moreover, the well-founded fear standard has been interpreted and applied by men in accordance with their reality to the detriment of women asylum seekers. The well-founded fear standard measures fear based on an “objective” yardstick, rather than on a person’s subjective frame of mind.⁵⁶ However, in the 1950s, all immigration judges were men almost certainly with little experience or direct knowledge of gender-based violence,⁵⁷ so they lacked the frame of reference or experience to conduct this “objective fear” analysis. Rather than attempting to overcome this issue by considering an asylum seeker’s subjective fear, judges were to rely on their own conception of reasonable fear, despite lacking the experience to make this assessment. Moreover, securing “objective” evidence on the plight of victims of gender-based violence when domestic violence was viewed (and still often is) as a private and shameful matter would have made this task impossible. Beyond the practical challenges that this “objective” approach posed to women asylum seekers, it also created the illusion of objectivity and neutrality, obscuring the gender bias in the system. Today, the presence of women as judges may mitigate this issue by bringing a more diverse viewpoint, including a greater understanding of gender-based issues,⁵⁸ but men are still overrepresented, comprising 60 percent of immigration judges.⁵⁹

53. GUIDELINES ON INTERNATIONAL PROTECTION, *supra* note 10, at 2.

54. Convention Relating to the Status of Refugees, *supra* note 1, at 17 (“The Contracting States shall apply the provisions of this Convention to refugees without discrimination as to race, religion or country of origin.”).

55. *The Refugee Convention, 1951*, *supra* note 20, at 36.

56. *Id.* at 7.

57. See, e.g., J. Gordon Hylton, *Adam’s Rib as an Historical Document: The Plight of Women Lawyers in the 1940s*, MARQUETTE UNIV. L. SCH. FACULTY BLOG, (discussing how only 3.5 percent of U.S. lawyers were women in 1950).

58. While gender diversity matters, it is also important to apply an intersectional approach, recognizing that women may possess other characteristics that affect their experiences with gender-based violence.

59. See Rikha Sharma Rani, *Trapped at the Border? Hope for a Female Judge*, POLITICO (June 15, 2018), <https://perma.cc/A2LF-8PJ4>. Moreover, the research of Jaya Ramji-Nogales, Andrew Schoenholtz & Philip Schrag demonstrates that an immigration judge’s gender is a significant factor in asylum grant rates, as female immigration judges grant asylum at a higher rate than male judges. Female judges may be more sympathetic to stories of persecution, citing statistics showing that while 18.5 percent of male federal judges had experienced race of sex discrimination, 81 percent of female federal judges had experienced sex discrimination. See Jaya Ramji-Nogales, Andrew I. Schoenholtz & Philip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 343–44 (2007).

B. *Efforts to Include Women in the Current Refugee Framework*

1. *Gender Guidelines*

One important step in the inclusion of gender-based asylum seekers was the implementation of UNHCR guidelines on gender-based claims. In 1985, UNHCR's Executive Committee recognized that refugee women constituted the majority of the world's refugee population but faced unique problems in securing protection on account of their gender.⁶⁰ UNHCR then adopted the Executive Committee's Conclusion No. 39, affirming that "women asylum seekers who fear harsh or inhumane treatment for gender-based reasons may be considered a Particular Social Group under the Convention."⁶¹ In 1987, UNHCR even went a step further and issued instructions on improving the protection of refugee women.⁶²

The adoption of the UNHCR guidelines has pioneered the current regime of piecemeal efforts to include women in the 1951 refugee convention. While helpful to some degree, it has been a limited solution to this issue. Even the guidelines acknowledge the limitation of the international refugee law in providing international protection to women asylum seekers, as gender is not one of the grounds listed in the refugee definition.⁶³

Moreover, the non-binding nature of the UNHCR guidelines limits their ability to effectively constrain action. According to the U.S. Supreme Court, "[t]he U.N. Handbook may be a useful interpretative aid, but it is not binding on the Attorney General, the BIA, or United States courts."⁶⁴ As such, the Trump administration rejected the notion that the UNHCR's guidelines could constrain its asylum restrictions,⁶⁵ indicating that UNHCR guidelines of any form will not ensure that gender-based asylum seekers are adequately protected.

2. *Particular Social Group*

Since few countries include gender in their refugee definition, gender-based claims are generally evaluated as a particular social group. Countries take one of two approaches to defining a particular social group: the social

60. Exec. Comm. of the High Comm'r's Programme, REFUGEE WOMEN AND INTERNATIONAL PROTECTION NO. 39 (XXXVI)—1985, U.N. HIGH COMM'R FOR REFUGEES (Oct. 18, 1985), <https://perma.cc/6KR4-XBKA>.

61. Deborah Anker, *The History and Future of Gender Asylum Law and Recognition of Domestic Violence as a Basis for Protection in the United States*, AM. BAR ASS'N (Apr. 27, 2020), <https://perma.cc/HHM8-DRYY>.

62. U.N. HIGH COMM'R FOR REFUGEES, NOTE ON REFUGEE WOMEN AND INTERNATIONAL PROTECTION EC/SCP/59, (Aug. 28, 1990), <https://perma.cc/ZW3V-87GC>.

63. *Id.*

64. *INS v. Aguirre-Aguirre*, 526 U.S. 415, 427 (1999).

65. *See, e.g.*, Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 80,274 (Dec. 12, 2020) (Another commenter pointed to the UNHCR's approach toward gender and numerosity. In response, the Departments note that they are not bound by the UNHCR, and commenters' reliance on guidance from UNHCR is misplaced.).

perception approach and the protected characteristic approach.⁶⁶ Australia, France, and Germany tend to utilize the social perception approach,⁶⁷ while the United States and Canada apply the protected characteristic approach. The protected characteristic approach focuses on the innate or unchangeable characteristic of the particular social group. However, it tends to offer more narrow protection than the social perception approach,⁶⁸ which focuses on how the group is set apart from society.⁶⁹ The social perception approach is particularly problematic when it comes to gender-based particular social groups as it is subjective and often leads to inconsistent decisions as to whether to recognize such a group.⁷⁰

However, whether a country follows the social perception or the protected characteristic approach, both are part of a problematic approach. In both these approaches, gender-based asylum seekers must present their claims as persecution on account of membership in a particular social group, which subjects them to a supplementary burden that other asylum seekers do not have to face. In addition to proving persecution on account of a protected ground and inability to avail themselves of the protection of the State, they must prove the cognizability of the particular social group itself.⁷¹ In the United States, for example, those seeking asylum based on their membership in a particular social group must meet three elements to prove that the claimed group constitutes a social group, in addition to the standard elements of an asylum claim.⁷² Moreover, because one must meet the three elements, gender is often an insufficient basis for persecution. Instead, one must create a convoluted particular social group consisting of more than simply gender, such as women viewed as property in X country or women in X country who are unable to leave their domestic relationships.

As demonstrated by *Matter of A-B-*, the three requirements for establishing the cognizability of the particular social group often serve as a means to block gender-based claims.⁷³ For instance, a particular social group that is defined too broadly will fail the particularity requirement because it lacks clear boundaries as to who belongs to the group, but if the group is defined too narrowly, it will fail the social distinction requirement because it will not represent a group with social significance in the particular society at issue.⁷⁴

66. Joseph Rikhof & Ashley Geerts, *Protected Groups in Refugee Law and International Law*, LAWS (Oct. 22, 2019), <https://perma.cc/6PKH-6YT9>.

67. *Id.* at 3, 6; Jaclyn Kelley-Widmer and Hillary Rich, *A Step Too Far: Matter of A-B-, 'Particular Social Group,' and Chevron*, 29 CORNELL J.L. & PUB. POL'Y 345, 391 (2019).

68. Rikhof & Geerts, *supra* note 66, at 3.

69. *Id.*

70. *Id.* at 6.

71. See Randall, *supra* note 16, at 532.

72. See Shebani Bhargava and Shreenandini Mukhopadhyay, *The Quest for Gender Based Asylum: Exploring 'Women' as a Particular Social Group*, INTLAWGRRLS (Aug. 13, 2020), <https://perma.cc/CL9R-6MYL>.

73. See, e.g., *In re A-B-*, 27 I. & N. Dec. 316, 331–32 (A.G. 2018).

74. *Id.* at 336.

Matter of S-A- represents an alternative to the particular social group approach, in which one can use one of the other protected grounds as a hook to present a gender-based claim. While often successful if one can find a hook, it exemplifies the disadvantage that gender-based asylum seekers face compared to those with claims on the protected grounds. While the Respondent's case was presented as based on religious discrimination, in reality the Respondent had a prototypical gender-based violence claim, in that she faced abuse from her father because of her unwillingness to adhere to his views of gender. She was brutally beaten, for example, for wearing short skirts and after her father caught her speaking to men. However, the court noted that though gender did not constitute persecution on account of membership in a particular social group, the Respondent's claim was cognizable because it was about religion.⁷⁵

C. *Existing Domestic Refugee Systems in the Absence of Comprehensive International Solutions*

1. *Europe*

As noted in a 2016 U.N. report, courts in Europe routinely determine that gender-based asylum applicants are not eligible for asylum as their claims do not clearly fall under any of the five grounds for asylum in the refugee convention.⁷⁶ Some judges claim that gender-based claims fall within the "personal sphere" rather than one that requires international protection.⁷⁷ While the European Union's Qualification Directive requires E.U. member States to consider gender when assessing an asylum claim,⁷⁸ there is a significant discrepancy in the approaches that countries take when it comes to protecting women asylum seekers,⁷⁹ which often ends up generating confusion and unpredictability for those seeking protection. In some European countries, gender-based violence is codified into law as a form of persecution and a ground for seeking asylum, (Finland, France, Montenegro, Portugal, Sweden), but this is not the case for all countries throughout the Council of Europe Member States.⁸⁰ Switzerland, for example, does not include private

75. *In re S-A-*, 22 I. & N. Dec. 1328, 1336 (B.I.A. 2000).

76. See U.N. WOMEN, WOMEN AND GIRLS' ACCESS TO ASYLUM IN THE EUROPEAN UNION 6 (2017), <https://perma.cc/ACM4-7RGC>.

77. *Id.* at 8.

78. "Directive 2011/95 of the European Parliament and of the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted, 2011 O.J. (L. 337) 11 ("For the purposes of defining a particular social group, issues arising from an applicant's gender, including gender identity and sexual orientation . . . should be given due consideration in so far as they are related to the applicant's well-founded fear of persecution.")

79. See COUNCIL OF EUROPE, GENDER-BASED ASYLUM CLAIMS AND NON-REFOULEMENT: ARTICLES 60 AND 61 OF THE ISTANBUL CONVENTION 10 (2020), <https://perma.cc/6CV5-SX75>.

80. COUNCIL OF EUROPE, *supra* note 79, at 10–11.

violence in its refugee definition.⁸¹ Below, this Note briefly discusses the current state of gender-based asylum in several European countries, as well as recent reforms intended to restrict asylum. Unlike in the U.S. context, none of these explicitly target gender-based claims, although they inevitably will impose an even greater cost for women asylum seekers who are likely to be more vulnerable than their counterparts.

Spain: Spain provides codified protection to some degree, but its asylum law specifies that gender is not grounds for asylum in itself; this depends on the circumstances in the applicant's country of origin.⁸²

Denmark: Gender is considered to some degree in asylum decisions, although the country does not have gender-specific guidelines as recommended by UNHCR. Adjudicators in Denmark often do not interpret gender-based claims to constitute a form of persecution under the asylum grounds and often consider sexual violence to constitute a private act outside the scope of the refugee regime.⁸³ It is also significant to note that following a surge in asylum applications in 2015, Denmark implemented several changes to its asylum system, most of which went into force in February 2016.⁸⁴ Some of these changes include decreasing the amount of assistance that is available for asylum seekers, delaying family reunification, and seizing the assets of asylum seekers to pay for the costs of their housing and upkeep.⁸⁵

France: In 2015, France passed a controversial asylum law that aimed to restrict asylum in several ways, such as requiring applicants to apply for asylum within ninety days of entering French territory or otherwise be subject to an expedited process with fewer safeguards.⁸⁶ However, this law did include gender and sexual orientation as factors to consider when evaluating a particular social group.⁸⁷ With regard to the grounds for persecution, aspects relating to sex, gender identity and sexual orientation are duly taken into account for the purposes of recognition of membership of a certain social group or of identification of a characteristic of such a group. More specifically, Article L.711-2 of the Code on the Admission and Residence of Foreign Persons and the Right to Asylum states that "when it comes to grounds for persecution,

81. See, e.g., Crystal Dole, *Isn't "Persecution" Enough? Redefining the Refugee Definition to Provide Greater Asylum Protection to Victims of Gender-Based Persecution*, 15 WASH. & LEE J. CIV. RTS. & SOC. JUST. 519, 547 (2009); EUROPEAN PARLIAMENT, *supra* note 7 at 19 ("[T]he recognition that gender may be an essential element in asylum claims is still lacking in some EU member States.").

82. *Right to Asylum Guide, Asylum and Gender*, COMISIÓN DE AYUDA AL REFUGIADO EN EUSKADI, <https://perma.cc/B7CP-9E7E> (last visited Nov. 3, 2021).

83. See Maya Kjærhaug Okkels, *Gaps in Refugee Protection: A Case Study on Denmark's Implementation of Gender-Guidelines in the Asylum System*, MALMÖ UNIV. 1, 27, 36 (2020), <https://perma.cc/ZM5P-KCRE>.

84. See *Refugee Law and Policy in Selected Countries*, LAW LIBR. OF CONG. 1, 69–70 (Mar. 2016), <https://perma.cc/M2MN-PGQD>.

85. *Id.* at 62.

86. Camille Marquis, *France Approves Flawed Asylum and Immigration Law*, HUM. RTS. WATCH (Aug. 4, 2018), <https://perma.cc/LC6B-94TZ>.

87. See Annie Hylton, *Macron Turns His Back on Refugee Women*, NEW REPUBLIC (April 24, 2018), <https://perma.cc/7MZY-QBD7>.

gender and sexual orientation are factors that should be given due consideration when determining whether the individual belongs to a particular social group.⁸⁸ However, this addition of gender is said to have a limited application.⁸⁹ For example, while trafficking would constitute persecution, forced marriage is not considered as a form of persecution in its own right and honor killings may constitute persecution if they are repeated or if the family has a history of such crimes.⁹⁰

Sweden: Sweden includes both sex and sexual orientation in its refugee definition.⁹¹ Furthermore, Sweden has non-binding gender asylum guidelines as recommended and recognizes domestic violence victims as members of a particular social group.⁹² However, not even Sweden is immune from political pressures to reduce the number of asylum seekers, particularly following the surge in cases in 2015. As such, Sweden has adopted policies designed to reduce the number of asylum seekers. Instead of granting permanent residency to refugees, as a result of temporary legislation passed in 2016, refugees were given temporary residency permits for three years or less.⁹³ Those who did not qualify for asylum but would face danger if returned to their home countries were given temporary permits for thirteen months.⁹⁴ In July 2021, the Swedish Parliament passed legislation to enact these temporary changes into law.⁹⁵

2. *United States*

In 1980, the United States passed the Refugee Act of 1980, which implemented the United States' obligations as a party to the 1967 Refugee Protocol.⁹⁶ The United States adopted the Convention's definition of a refugee, which included five possible grounds for asylum but excluded gender and sex. The 1985 BIA case, *Matter of Acosta*, was one of the first cases to create a space in the refugee definition for gender-based claims, recognizing that a particular social group had to be based on an immutable characteristic like sex.⁹⁷ However, it was not until the 1990s that gender-based claims began to be recognized as valid bases for asylum. In 1995, the United States took a step forward in issuing guidelines for gender-based claims, but the

88. WOMEN VICTIMS OF VIOLENCE: A PRACTICAL GUIDE FOR NON-FRENCH NATIONALS, THE FRENCH LEAGUE FOR HUM. RTS. 1, 10, <https://perma.cc/UT4V-97DK> (last visited Nov. 3, 2021).

89. Hylton, *supra* note 87.

90. WOMEN VICTIMS OF VIOLENCE, *supra* note 88, at 11.

91. *See Countries with Asylum/Refugee Laws That Explicitly Protect Those Fleeing Gender-Based Persecution*, TAHIRIH JUST. CTR. (2021), <https://perma.cc/Z8K7-7ZZL> (A refugee is a person who "ow[es] to well-founded fear of being persecuted for reasons of race, religion, nationality, sex, sexual orientation or membership of a particular social group or political opinion . . .").

92. EUROPEAN PARLIAMENT, *supra* note 7, at 30, 38.

93. *Id.*

94. *Id.*

95. *Sweden's Recent Permanent Residence Laws Will Impede Refugees' Ability to Integrate and Seek Work*, SCOOP (July 27, 2021), <https://perma.cc/URX4-A4WMR>.

96. Anker, *supra* note 61.

97. 19 I. & N. Dec. at 233.

impact of these nonbinding guidelines was rather limited because they were only directed at the asylum officers who conduct the initial screening to evaluate a person's credible fear.⁹⁸

In 1996, in *Matter of Kasinga*, the BIA granted asylum to a young woman fleeing female genital mutilation or cutting and forced marriage for the first time.⁹⁹ The BIA found that her persecution was on account of her status as a “young wom[a]n who [is a] member of the Tchamba-Kunsuntu Tribe of northern Togo who have not been subjected to female genital mutilation,” which is a cognizable group because both her gender and membership in the Tchamba-Kunsuntu Tribe are immutable, and having intact genitalia is so fundamental to the identity of a young woman that she should not be required to change it.¹⁰⁰ In 1999, the BIA decided *Matter of RA*, which was another significant milestone in gender-based asylum jurisprudence. The Respondent was a Guatemalan woman who faced severe domestic violence. She sought asylum based on her membership in the particular social group, “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”¹⁰¹ The BIA denied her claim, finding that her proposed group was not particular.¹⁰² The BIA contrasted her proposed group with the groups included in the refugee definition. While the grounds for refugee status, namely race, religion, nationality, and political opinion, are the typical and frequent groupings in society, the Respondent's group lacked this societal recognition.¹⁰³ Attorney General Reno voided the decision and called for national regulations recognizing domestic violence asylum claims, but these regulations never materialized.¹⁰⁴ The status of domestic violence claims remained unclear for the next decade, as there was no consistency as to how these cases were decided. In 2014, the BIA issued the precedential decision in *Matter of A-R-C-G-*, holding that a respondent could be eligible for asylum as a member of the group, “married women in Guatemala who are unable to leave their relationship.”¹⁰⁵ As such, this case enabled domestic violence victims to seek asylum on that basis.

However, two studies from the Center for Gender and Refugee Studies (CGRS) illustrate the limitations of this piecemeal approach to gender-based asylum. In the first study, Blaine Bookey analyzed 206 domestic violence

98. Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, 36 HARV. INT'L REV. 45, 46 (2014).

99. *In re Kasinga*, 19 I. & N. Dec. 357, 357–58 (B.I.A. 1996).

100. *Id.*

101. *In re R-A-*, 22 I. & N. Dec. 906, 911 (A.G. 2001; B.I.A. 1999).

102. *Id.* at 907.

103. *Id.* at 917–18.

104. *Tahirih Explains: Gender-Based Asylum*, TAHIRIH JUST. CTR. (June 2020), <https://perma.cc/B63Y-W52D>. This case went back and forth for years, with several subsequent attorneys general intervening in this case. Attorney General Ashcroft was going to reinstate the denial, but the government filed a brief that the respondent had met the legal definition of a refugee and should receive protection.

105. *In re A-R-C-G-*, 26 I. & N. Dec. 388 (B.I.A. 2014).

asylum cases from 1994 to 2012 to see how the development in case law that recognized gender-based claims impacted the grant rate of related claims.¹⁰⁶ Results indicated that these decisions had some impact on the grant rates, but many adjudicators were not persuaded by these decisions, so asylum seekers could not necessarily rely on these decisions.¹⁰⁷ Bookey later evaluated the impact of *Matter of A-R-C-G-* on grant rates and did not find that it had a robust impact overall because immigration judges still had significant discretion.¹⁰⁸ Bookey explained that the lack of binding standards and the lack of specific guidance on how to analyze gender-based claims resulted in the continuation of inconsistent and arbitrary decision-making.¹⁰⁹

Though the previous approach was insufficient, the gender-based asylum legal landscape underwent a dramatic shift during the Trump administration, with a host of new restrictive regulations and attorney general decisions designed to curtail asylum, including gender-based asylum in particular.¹¹⁰ One of the most significant decisions was *Matter of A-B-* as it claimed to overrule *Matter of A-R-C-G-* on the basis that the BIA had not rigorously analyzed the cognizability of this group based on the factors articulated in *Matter of M-E-V-G-* (immutability, particularity, and social distinction).¹¹¹ The Attorney General also devoted much of this opinion (in what is arguably dicta) to explaining that domestic violence victims (as well as those facing gang violence) will not qualify for asylum. Unlike the other bases for asylum in the refugee definition, domestic violence is simply private violence, motivated by greed or a private vendetta. Moreover, domestic violence cannot constitute persecution per se because persecution is something that the government does (either directly or indirectly).¹¹² While in prior cases, an applicant had to demonstrate that the government was unwilling or unable to protect them, *Matter of A-B-* raised the standard, requiring the applicant to show that either the government condoned the private actions “or at least demonstrated a complete helplessness to protect the victims.”¹¹³ *Matter of A-B-* reflected a fundamental misunderstanding of domestic violence and gender-based violence as simply private violence without examining its societal roots. Most significantly, this decision exposed the weakness of case law

106. Blaine Bookey, *Domestic Violence as a Basis for Asylum: An Analysis of 206 Case Outcomes in the United States from 1994 to 2012*, 24 HASTINGS WOMEN’S L.J. 107, 148 (2012).

107. *See id.*

108. Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G-: Evolving Standards and Fair Application of the Law*, 22 SW. J. INT’L L. 1, 19 (2016).

109. *Id.*

110. *See* SCHOENHOLTZ, RAMJI-NOGALES & SHRAG, *supra* note 8, at 1–2. This included efforts directed at gender-based asylum seekers specifically. *Id.* at 32. And, also included prohibiting them from using expert testimony to establish that women are often viewed as property in their home country through regulations banning judges from considering evidence that includes gender stereotypes. *See id.* at 91.

111. 27 I. & N. Dec. at 319–20.

112. *See id.* at 320 (“[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum.”).

113. *Id.* at 337.

protecting gender-based asylum seekers, suggesting that the current piecemeal approach is insufficient. Unfortunately, *Matter of A-B-* was only one of the many restrictions imposed by the Trump administration on gender-based claims and on asylum in general.

On June 16, 2021, Attorney General Merrick Garland vacated *Matter of A-B-*.¹¹⁴ While this is surely a positive decision for gender-based asylum seekers in the short term, this brief three-page decision also reflects the attorney general's expansive discretionary power over the asylum system, including their ability to swiftly make unilateral changes with the stroke of the pen. Given that it is extremely likely that the next Attorney General in a Republican administration would simply reinstate *Matter of A-B-*, vacating this holding is simply a temporary solution.

V. THE REFUGEE DEFINITION SHOULD BE EXPANDED TO INCLUDE GENDER

A. *Proposal for Convention Protocol*

I propose expanding the refugee definition to include gender as the sixth ground for asylum through a Convention Protocol.¹¹⁵ Because of the immense challenges in securing a binding legal instrument, this protocol would require a lengthy negotiation process, accomplished in phases. The first step would be a forum on gender-based violence followed by efforts to negotiate a non-binding declaration, in which States would commit to negotiating an expansion of the refugee definition, hopefully leading to a binding Protocol.

1. *Non-Self-Executing*

The protocol would be non-self-executing due to concerns that many countries would refuse to sign on if it were self-executing. In addition, the international refugee law only provides a basic framework, which then must be implemented by the States. Thus, a modification to the refugee definition should fit in with the existing framework. Moreover, given that international refugee law is not directly enforceable, adding gender to the refugee definition would only be impactful if it could be enforced domestically, necessitating countries to implement this change into their existing laws.

In terms of implementation in United States, I would seek to enact this change via non-immigration legislation because the United States has not been able to pass substantial immigration legislation since the Immigration Act of 1990. Instead, I would suggest including it in the next reauthorization

114. *In re A-B-*, 28 I. & N. Dec. 307 (A.G. 2021).

115. Karlo Goronja, *The Fractured Colossus: An Evaluation of Gender-Based Asylum Evaluation of Gender-Based Asylum Claims for the 2020s*, 27 WASH. & LEE J. CIV. RTS. & SOC. JUST. 317, 349 (2020).

of the Violence against Women Act (VAWA) or legislation akin to Amy Klobuchar's recent bill that expands VAWA.¹¹⁶

One could argue that since a non-self-executing treaty already requires domestic legislation, it would make more sense to focus on passing legislation. However, in addition to the benefits discussed further in the next section, domestic legislation in the context of an international protocol may actually be more palatable for countries. While countries fear a refugee surge, the expansion of the international refugee definition may ease such concerns since the increase in asylum claims would be shared by other countries. Moreover, expanding the definition in an international setting allows countries to coordinate and collaborate to implement this change. In light of the scale of the gender-based violence problem, countries must coordinate effectively to address the issue, requiring an international-level solution.

2. *Need for a Binding Legal Instrument*

Though a soft law commitment may be more realistic than a binding protocol, reflected in the trend towards the adoption of international soft law instruments,¹¹⁷ elevating the gender to equal status as the other protected grounds requires that it be similarly codified.¹¹⁸ Moreover, while the UNHCR gender guidelines are arguably already soft law that had sought to incorporate women in the Convention, these guidelines are only effective when States choose to comply, as demonstrated by the Trump administration.¹¹⁹ Likewise, an aim of codifying gender as a protected category is to ensure that gender-based asylum seekers are protected even when domestic pressures push political actors to do otherwise. Thus, a soft-law commitment whose enforcement is dependent on the will of political actors will not achieve this objective.

3. *Challenges and Lessons from the Global Compact*

The Global Compact negotiation process suggests that a binding commitment would be difficult to secure. Several States had insisted that the would-be Global Compact be a non-binding declaration, and they ultimately prevailed.¹²⁰ Even in its non-binding form, several States, including the United States, withdrew from negotiations based on concerns that the Compact was incompatible with their sovereignty.¹²¹ However, modifying an existing commitment via a Protocol could be more feasible than drafting a new

116. News Release, Amy Klobuchar, Senator, Klobuchar Introduces Legislation to Protect Immigrant Victims of Domestic Violence (Feb. 17, 2021), <https://perma.cc/SZ9W-XRYW>.

117. Höflinger, *supra* note 30, at 664.

118. See *infra* V.B.1.

119. See, e.g., Rikhof & Geerts, *supra* note 66, at 2.

120. Francesca Capone, *The Alleged Tension Between the Global Compact for Safe, Orderly and Regular Migration and State Sovereignty: 'Much Ado About Nothing'?*, 33 LEIDEN J. INT'L L. 713–30 (2020).

121. *Id.*

instrument, since countries would not face any additional constraints on their sovereignty. Moreover, many States already offer some protection to gender-based asylum seekers. Therefore, my proposed protocol would be an opportunity to streamline and improve current practices without necessarily subjecting a State to new and onerous binding obligations. Overall, negotiating a binding commitment will be a challenging endeavor. Accordingly, the protocol's scope should remain narrow to minimize complexities and areas for disagreements. I do anticipate concerns about the scope of this change, particularly in regard to the impact on gang-related cases (including concerns that this change would recognize gang-related gender-based violence claims). However, this modification only adds gender but does not remove current restrictions and burdens that asylum seekers must meet, which should minimize concerns about a surge in asylum seekers. Additionally, the Convention still does not provide asylum seekers the right to asylum, so even with this expanded definition, the international refugee regime would remain restrictive and under the control of the States.

B. *Proposal Advantages*

1. *Protects Gender-Based Asylum Seekers Amidst an Anti-immigrant Political Climate*

Even though the United States has taken some steps to recognize gender-based asylum, the anti-refugee mood of the previous administration all but ensured that these claims would fail. While the United States was unique in that it explicitly targeted gender-based claims, several countries in Europe have also implemented policies designed to curtail asylum, which may have a disproportionate impact on vulnerable women asylum seekers, although more research is needed.¹²²

To evaluate whether international law may protect gender-based asylum seekers amidst an anti-immigrant climate, I will explore the degree to which international law may constrain a future administration that seeks to pursue a distinct policy agenda from his or her predecessor. If international law has a lasting impact on domestic policy, codifying gender as a protected category in the international refugee definition could provide some certainty that gender-based asylum seekers would be protected in a future administration that is hostile to asylum seekers. Given that President Erdogan of Turkey recently

122. Data on gender-based asylum claims for European countries is unavailable, but data is available on asylum decisions by gender. I analyzed the data for first instance decisions involving male and female asylum seekers in Europe and found that while there is a significant discrepancy in the total number of first instance decisions for men as compared to women, the grant rate is higher for women than men. I also looked at the average grant rate from 2011–15 and then 2016–20 (generally and in countries that passed restrictive policies) by gender to evaluate the impact of these policies. As the chart in the appendix demonstrates, the average grant rate (reflecting the average of all 28 countries in Europe) declined for both genders after 2016, but much more substantially for men. Raw data obtained from: *First Instance Decisions on Applications by Citizenship, Age and Sex—Annual Aggregated Data*, EUROSTAT, <https://perma.cc/L3YD-TVSQ> (last updated Feb. 2, 2021).

withdrew from the 2014 binding Istanbul Convention on domestic violence¹²³ and Poland may follow suit,¹²⁴ the lasting impact of international commitments in the face of political pressures that may be pulling a country in the opposite direction is particularly important. This issue is especially salient as applied to international law to protect gender-based violence victims, as it involves both migration and gender, which are increasingly seen as highly divisive and political issues. In the next section, I will explore the degree to which international treaties will constrain a future president in the United States context.¹²⁵

While the U.S. constitution is silent on the issue of treaty withdrawal, international treaties can generally be revoked at will by a president,¹²⁶ depending on the type of agreement at issue and whether Congress has passed implementing legislation.¹²⁷ However, while a president has the authority to alter the international commitments entered into by his or her predecessor, in reality, most presidents are rather constrained by these commitments.¹²⁸ A president who chooses to alter the nation's international obligations may face significant domestic political costs in addition to the "usual status quo bias and bureaucratic inertia."¹²⁹ Moreover, "the United States typically has a strong interest in compliance with its international obligations, in part so that it can expect compliance or cooperation from other nations."¹³⁰ However, the Trump administration withdrew from an unprecedented number of treaties,¹³¹ demonstrating that such commitments only minimally constrain a president who largely rejects international law and presidential norms.

On the other hand, the Trump administration never formally withdrew from the Refugee Protocol, which has been firmly accepted as part of U.S. law due to enactment through domestic legislation,¹³² so there is no indication that a future president would seek to withdraw from the treaty. Moreover, the Trump administration does not argue that it was not bound by

123. Jo Harper, *Poland Pitches 'Warsaw Convention' as Turkey Exits Istanbul Version*, EMERGING EUROPE (Mar. 22, 2021), <https://perma.cc/XK24-NC8Q>.

124. Sandrine Amiel, *Istanbul Convention: Poland Moves a Step Closer to Quitting Domestic Violence Treaty*, EURONEWS (Jan. 4, 2021), <https://perma.cc/4T69-J3PC>.

125. This issue largely depends on the country's procedures for entering and withdrawing from a treaty and the relationship between the branches of power, so this analysis may differ depending on the country.

126. Penny Venetis, *Making Human Rights Treaty Law Actionable in the United States: The Case for Universal Implementing Legislation*, 63 ALA. L. REV. 97, 116 (2011).

127. *Id.*

128. Curtis Bradley & Jack Goldsmith, *Presidential Control over International Law*, 131 HARV. L. REV. 1201, 1205 (Mar. 2018) (discussing presidential power as relates to international commitments).

129. *Id.* at 1254.

130. *Id.* at 1205.

131. Zachary B. Wolf & JoElla Carman, *Here Are All the Treaties and Agreements Trump Has Abandoned*, CNN (Feb. 1, 2019), <https://perma.cc/U977-RSSY>.

132. *See also* INS v. Cardoza-Fonseca, 480 U.S. 421, 436–37 (1987) (The U.S. Supreme Court found "abundant evidence" that Congress intended to conform the definition of refugee and the asylum law of the U.S. "to the United Nations Protocol to which the United States has been bound since 1968.").

international refugee law, indicating some willingness to adhere to certain international obligations, albeit in a limited capacity.¹³³

However, the administration's efforts to restrict asylum reflects another way in which a future president who seeks to curtail (or end) the United States' Protocol obligations could do so without withdrawing from the treaty. The administration employs the strategy of taking advantage of the ambiguity of international and national refugee law to implement asylum restrictions targeting gender-based asylum. In evaluating the extent to which embedded international norms constrain a State's domestic choices, Elizabeth Grimm Arsenault found that in the case of a vague norm or "when a lacuna exists in an embedded norm," competing norms emerge and actors' preferences and cost-benefit calculation of compliance versus non-compliance impacts whether the norm is followed.¹³⁴ In contrast, "[n]orms that are more clearly and concisely expressed, such as the Geneva Conventions, will likely encounter intense domestic contestation only when aspects of the international armed conflict are not directly addressed by the proscriptions of the norm."¹³⁵

While the norm regarding the State's duty to protect refugees has been embedded in U.S. culture (and has been formally implemented via the 1980 refugee law),¹³⁶ there are ambiguities in both the international and domestic framework that provide space to implement regulations that would otherwise appear to conflict with this settled norm. One of the asylum regulations introduced by the Trump administration states that "Congress . . . has not defined . . . 'membership in a particular social group.' Nor is the term defined in the United Nations Convention Relating to the Status of Refugees . . . or the related Refugee Protocol. Further, the term lacks the benefit of clear legislative intent." In addition to the lack of codified definition, the introduced regulation goes a step further and creates the impression that this is a particularly muddled issue, which provides more space for its "clarifying guidance."¹³⁷ As explained in its explicit restrictions against gender-based asylum:

the Departments note that gender was not included among other broad categories, such as race or nationality, as a basis for refugee status in either the 1951 Refugee Convention or the 1980 Refugee Act. Further,

133. See, e.g., Procedures for Asylum and Bars to Asylum Eligibility, 84 Fed. Reg. 69,640, 69,644 (Dec. 19, 2019) (The administration repeatedly states (in addressing concerns that the regulations would violate international law) that the framework described above "is consistent with U.S. obligations under the 1967 Protocol Relating to the Status of Refugees [T]hese treaties are not directly enforceable in U.S. law, but some of the obligations they contain have been implemented by domestic legislation.").

134. Elizabeth Grimm Arsenault, *The Domestic Politics of International Norms: Factors Affecting U.S. Compliance with the Geneva Conventions* (Apr. 23, 2010) (Ph.D. dissertation, Georgetown University) (on file with Georgetown Repository).

135. *Id.* at 31.

136. While this norm is arguably waning at this point, this shift seems to have been precipitated by the actions of the previous administration.

137. See Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review, 85 Fed. Reg. 36,264, 36,281 (June 15, 2020) ("Accordingly, the proposed rule would provide clearer guidance on situations in which alleged acts of persecution would not be on account of one of the five protected grounds.").

no precedential decision has unequivocally recognized gender, standing alone, as a basis for asylum . . . At least three circuits have concluded that gender is too broad or sweeping to constitute a particular social group itself . . .¹³⁸

Matter of A-B- operates similarly, in that Attorney General Sessions claims the authority to define a particular social group because of its ambiguity, thereby making space for a new asylum (and gender-based asylum) norm.¹³⁹ He continues to highlight the ambiguity of the law (and the lack of settlement) throughout this opinion. For example, according to Attorney General Sessions, subsequent BIA decisions after *Matter of A-R-C-G-* have upheld the particular social group consisting of domestic violence victims, but several courts of appeal have remained skeptical.¹⁴⁰

While a future anti-immigration administration could still create the illusion of ambiguity, it would certainly be more difficult to do if gender-based violence was added to the refugee definition. The regulations above indicate that the administration views its obligations to protect asylum seekers facing gender-based violence differently than those facing nationality or race-based persecution. Thus, adding language to the refugee definition to establish that gender is part of the refugee definition may close the gap regarding the norms for the protection of gender-based violence, ensuring better compliance with this norm of refugee protection (for gender-based violence victims) going forward.

2. *Frames Gender-Based Violence as a Significant Issue of Public Concern*

Adding gender to the refugee definition enables the reframing of gender-based violence as an issue of equivalent significance to persecution based on other inherent or fundamental characteristics. This framing of gender-based violence is particularly important, as international norms can impact domestic policies and practices. In contrast to domestic law, the discourse of international law (including the language of State sovereignty, justification, and obligation of international law) enables it to have a special impact on social norms and behavior in a domestic context.¹⁴¹

138. 85 Fed. Reg. 80,335 n.58 (Dec. 11, 2020)

139. See 27 I. & N. Dec. at 326 (“Neither the INA nor the implementing regulations define “particular social group.” “The concept is even more elusive because there is no clear evidence of legislative intent The Attorney General has primary responsibility for construing ambiguous provisions in the immigration laws.”).

140. *Id.* at 332.

141. See Beth Simmons, *Treaty Compliance and Violation*, 13 ANN. REV. POL. SCI. 273, 296 (June 2010); Michael Tomz, *Reputation and the Effect of International Law on Preferences and Beliefs* (Feb. 2008) (unpublished manuscript) (on file with author) (“[International law transforms policy preferences. Individuals are far more likely to oppose policies that would violate international legal agreements than to oppose otherwise identical policies that would not trammel [sic] upon existing pacts.”).

a. Significant Issue

Adding gender to the refugee definition enables the reframing of gender-based violence as an issue of equivalent significance to persecution based on other inherent or fundamental characteristics. Currently, only persecution based on the four explicit grounds (plus membership in a particular group) of the refugee definition is recognized as meriting refugee status, which may indicate that the enumerated categories are the most significant bases for persecution. However, it is often such attitudes, namely the view that gender-based violence is not a serious issue or one requiring police intervention, that enable gender-based violence to continue until one has no choice but to flee the country.¹⁴²

Professor Medina explains that the law is a tool to convey societal values. Thus, including gender as a protected category can indicate a commitment to addressing gender-based violence.¹⁴³ She points to several U.S. laws from the Nineteenth Amendment to Title VII of the Civil Rights Act, which explicitly included women and signified a commitment to women's equality.¹⁴⁴ While women's equality has taken decades, the explicit inclusion of women was a critical step in this journey.¹⁴⁵ Similarly, the law can also be important for its symbolic value in indicating which behaviors are and are not acceptable.¹⁴⁶ As such, elevating gender-based claims to the status of the other protected grounds could send a message on the seriousness of gender-based violence and that it will not be tolerated, leading to a change in attitudes that undergird gender-based violence.

b. Of Public Concern

Adding gender to the refugee definition also enables the reframing of gender-based violence as an issue of public concern. Gender-based violence often occurs in the private realm, seemingly beyond the reaches of international law.¹⁴⁷ Likewise, historically refugee status was a form of protection only available for those facing public persecution usually at the hands of the State.

142. An applicant must demonstrate that the state was unable or unwilling to provide protection, so gender-based asylum seekers must show that they could not secure protection from the state.

143. M. Isabel Medina, *Guest Post—A Response to Professor Musalo: Naming What Matters—Recognition of Gender as a Protected Classification for Refugee Law* by M. Isabel Medina, IMMIGRATIONPROFBLOG (Mar. 15, 2021), <https://perma.cc/5B2Q-R9YU>.

144. *Id.*

145. *Id.*

146. Jeni Klugman, BACKGROUND PAPER FOR WORLD DEVELOPMENT REPORT 2017: GENDER BASED VIOLENCE AND THE LAW (2017), <https://perma.cc/9CDU-7EL7>.

147. See Jennifer L. Ulrich, *Confronting Gender-Based Violence with International Instruments: Is a Solution to the Pandemic Within Reach?*, 7 IND. J. GLOB. LEGAL STUD., 629, 633 (2000); see also Andrea Fernández Aponte, *Left in the Dark: Violence Against Women and LGBTI Persons in Honduras and El Salvador*, LATIN AMERICA WORKING GROUP, <https://perma.cc/5JN7-G48F> (last visited Nov. 1, 2021) (“Sexual violence is not a primary concern of the state in terms of public security. In the words of Vilma Vaquerano of ORMUSA, ‘There is talk of homicides, with luck, of femicides, but sexual violence is not talked about.’”). However, under international law, a state may be responsible for acting to protect individuals from private violence. The Declaration of the Elimination of Violence Against Women enumerates state responsibilities to protect women, which includes duties to punish acts of violence

This framing of gender-based violence as a private matter may even exacerbate the issue because it ignores the State's culpability in gender-based violence, thereby possibly reducing any pressure on the State to address this issue. Additionally, when gender-based violence is framed as a private matter involving two individuals, it loses its connection to other gender-based claims, appearing as one incident impacting one person, instead of a pervasive problem afflicting large segments of the population. In doing so, the societal impact of gender-based violence is minimized. Not only may this framing reduce the attention that this issue receives but it may also obscure the need for more systemic solutions that address the root cause of gender-based violence. However, including gender-based violence in the framework of public violence can recast it as a public issue. As Isabel Marcus explains, "[u]nlike torture and terrorism, widely perceived as fundamental violations of individual and communities, gender-based domestic violence still is widely excused" ¹⁴⁸ She further explains that reframing domestic violence as akin to a form of torture or reform could help relocate domestic violence from the private sphere into the public, thereby increasing accountability and decreasing impunity for acts of domestic violence. ¹⁴⁹

VI. COUNTERARGUMENTS TO PROPOSAL

Some have argued that adding gender to the refugee definition simply adds another exclusionary category, thereby continuing to exclude other people seeking protection. ¹⁵⁰ While adding gender to the refugee definition is a critical step, it is certainly not a sufficient solution to the problem of exclusion of women from the international refugee law to issues plaguing women more broadly or human rights abuses more generally. However, asylum functions within an international framework consisting of sovereign States with territorial sovereignty (who control their borders), so asylum is a limited solution reserved for the people facing the direst of circumstances. Therefore, any expansion of the asylum system will be limited. I advocate including gender specifically into the refugee definition because gender-based violence is a far-reaching issue affecting large portions of the population. It is also similar to the other included groups in that it is a widely recognized immutable

committed against women, provide them with access to justice, including just remedies, including resources in national budgets for the elimination of violence against women, amongst others. Likewise, General Recommendation 19 of the Convention of the Elimination of all Forms of Discrimination Against Women provides that, "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence, and for providing compensation." See U.N. HUM. RTS. OFF. OF THE HIGH COMM'R, 15 YEARS OF THE UNITED NATIONS SPECIAL RAPporteur ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES 25 (2009).

148. See Isabel Marcus, *Reframing domestic violence as torture or terrorism*, ZBORNIK RADOVA PRAVNOG FAKULTETA 13, 21 (2014) <https://perma.cc/7BT2-2X36>.

149. *Id.* at 14.

150. Karen Musalo, *Guest Post: The Wrong Answer to the Right Question: How to Address the Failure of Protection for Gender-Based Claims?*, IMMIGRATIONPROFBLOG (Mar. 9, 2021), <https://perma.cc/93HU-JQMG>.

societal categorization and many States do already include gender as a basis for asylum in some capacity. Moreover, the fact that one group has specific needs that are not being addressed by proposed reforms should not be a basis for rejecting it. For example, domestic anti-discrimination provisions protect specific groups, thereby necessarily excluding others as well, but this is not a reason to reject them. Likewise, such concerns may justify rejecting incremental reforms in general for not going far enough, ultimately resulting in the preservation of the status quo when no compromise can be reached.

Another counterargument is that the UNHCR definition already includes gender; the gaps in the protection based on gender is a domestic issue rather than an international issue because it is the U.S. refugee definition that is inconsistent with current international law.¹⁵¹ However, as explained above, the lack of protection for women, particularly those facing gender-based violence is not only a United States issue. Moreover, even if the current administration changes the domestic refugee definition to better comply with the UNHCR definition, it does not ensure that the next administration does not revert to the old system; international law can function as a check on future administrations.

One may argue that even if gender is added to the refugee definition, the United States can use other elements of an asylum claim, such as nexus, to prevent these claims.¹⁵² However, *Matter of A-R-C-G-* recognized that women fleeing domestic violence could constitute a cognizable particular social group.¹⁵³ While this recognition occurred within the context of the other restrictions in U.S. asylum law that make it difficult to apply for asylum, such as nexus, the recognition of these particular asylum claims was impactful in securing protection for women.

A third counterargument is that including gender-based claims risks depicting women as the victims and men as the perpetrators, which reinforces the structures that harm women in the first place.¹⁵⁴ First, while I acknowledge that gender-based violence affects people of all genders and is not limited to just women, the reality is that more women face gender-based violence. Second, in the asylum context, where one is not able to avail themselves of the protection of the State, gender-based violence mainly involves a question of the context in which the violence was able to fester, rather than a focus on the specific dynamics between the participants (the victim and the perpetrator), decreasing the tendency to portray the characters in the stereotypical victim-perpetrator dichotomy.

151. *Id.* at 48; See Bret Thiele, *Persecution on Account of Gender: A Need for Refugee Law Reform*, 11 HASTING'S WOMEN'S L.J. 221, 228 (2000).

152. See Thiele, *supra* note 151.

153. 26 I. & N. Dec. at 388.

154. See BUCKLEY-ZISTEL & ULRIKE KRAUSE, *supra* note 51, at 5–6.

VII. CONCLUSION

In sum, as we aim to rebuild the asylum system dismantled during the Trump era, it is not enough to return to the weak and inconsistent piecemeal system for gender-based asylum seekers. Instead, we must update the existing legal framework to reflect the progress made over the past seventy years to the protection of women. As noted in a recent op-ed by Jamie Gorelick and Layli Miller-Muro, “Just as our collective understanding of violence against women has evolved, so must the laws that protect women.”¹⁵⁵ Thus, it is imperative to convey that gender-based persecution is as problematic as persecution based on any of the protected grounds and cannot simply be disregarded by the State. As described in this Note, a crucial step in accomplishing this goal is updating the refugee definition to include gender via a new protocol.

While our legal refugee framework should reflect the progress made since the Refugee Convention, the framework should also be strong enough to withstand attempts by political actors who seek to erase such progress on international human rights and the protection of refugees. I suggest that the codification of gender into the international refugee definition may dissuade domestic political actors from targeting gender-based claims in an attempt to curtail asylum.

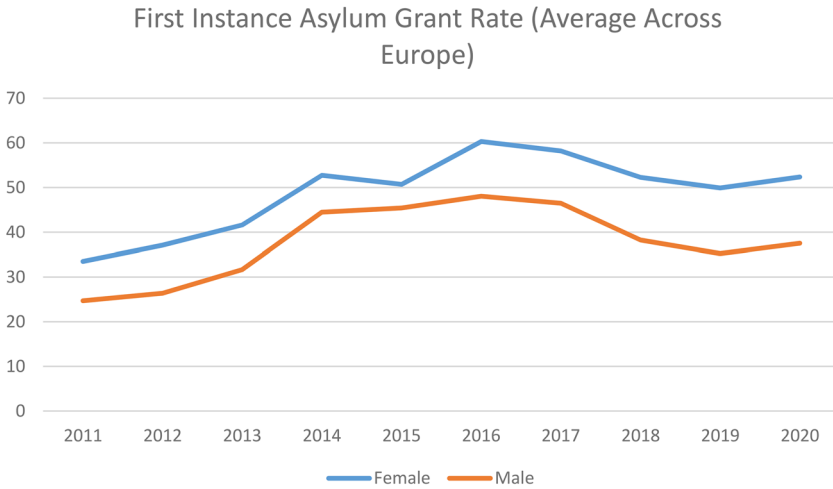
There would certainly be challenges in securing a new protocol. However, with the rise of the #MeToo movement and increased societal attention on violence against women,¹⁵⁶ we are in the midst of a moment of reckoning with regard to the mistreatment of women. It is critical that we use this moment to advocate for a more robust international refugee framework that reflects an evolved understanding of gender.

155. See Jamie Gorelick & Layli Miller-Muro, Opinion, *U.S. Asylum Law Must Protect Women*, WASH. POST (Apr. 7, 2021), <https://perma.cc/H2XV-9HGM> (discussing need for change to United States asylum laws).

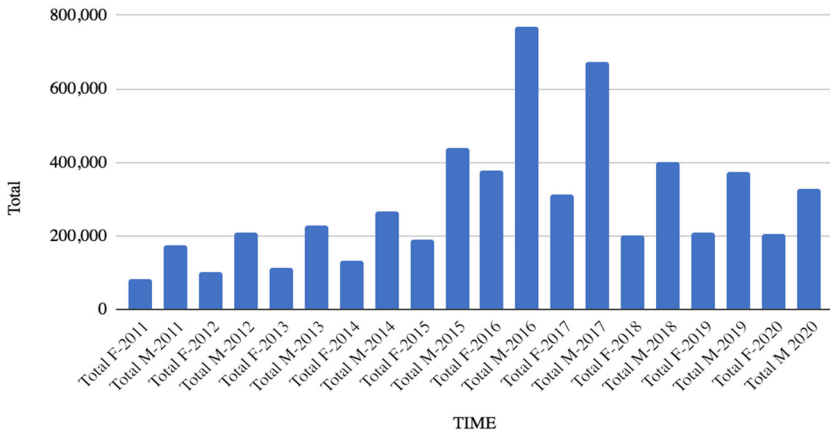
156. See, e.g., Nina Dos Santos, *The UK Is Facing a Reckoning on Gender-Based Violence. Boris Johnson's Government Has Botched Its Response*, CNN (Mar. 17, 2021), <https://perma.cc/KC8F-HV7K>.

VIII. APPENDIX

A. *European Asylum Data*¹⁵⁷



Total First Instance Asylum Decisions From 2011-2020 in Europe



157. Information derived from *First Instance Decisions on Applications by Citizenship, Age and Sex—Annual Aggregated Data*, EUROSTAT, <https://perma.cc/S2XZ-XSAD> (last updated Aug. 2, 2021).