

Proposed Amendment to the Immigration & Nationality Act (INA) to Add “Gender” as a 6th Ground of Asylum

Codifying “Gender” As An Independent Statutory Basis for Asylum Is Critical to Ensuring Sustained, Consistent, and Equal Access to Protection for Women and Girls Fleeing Gender-Based Persecution

I. Proposed Amendment:¹

INA § 101(a), 8 U.S.C. § 1101(a) is amended to read as follows:

(42) The term “refugee” means

(A) any 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 person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail themselves 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, political opinion, **or gender.**

(1) The term “gender” includes, but is not limited to, concepts such as sex, sexual orientation, gender identity, gender expression, and sex characteristics.

II. Why is this Amendment Needed?

The definition of a refugee in the United States (US) Immigration & Nationality Act (INA) is taken verbatim from the United Nations (UN) 1951 Convention and 1967 Protocol Relating to the Status of Refugees (Convention). It allows those who fear persecution on account of race, religion, nationality, political opinion, and/or membership in a particular social group (PSG) to seek asylum. Like these five grounds, “gender” or “sex,” is a demonstrable, fundamental attribute that persecutors commonly seek to punish. Yet, it is notably absent from the refugee definition, admittedly because the Convention was drafted seventy years ago when the scale and societal impact of gender-based violence was not well accepted.

Through various guidance,² the United Nations High Commissioner for Refugees (UNHCR) has since made it clear that survivors of gender-based persecution such as forced marriage, domestic violence, sexual assault, and so-called “honor” crimes are nonetheless eligible to receive asylum, primarily as members of a PSG. The UNHCR also deemed it unnecessary to add an additional ground because gender-based dimensions to asylum claims are “an established principle” “widely accepted among State parties.” This is not the case for the vast majority of women’s claims in the US, and a sixth ground is needed here. While countries such as Canada, France, and the United Kingdom have long held their doors open to applicants fearing gender-based persecution, the US has struggled for decades to meaningfully and consistently protect women and girls in particular. In fact, under the previous administration, gender-based asylum was rendered all but extinct and its fate is now unclear.

In the absence of a statutory “gender” ground of asylum, judicial and executive actions clarifying or reinforcing the viability of gender-based asylum claims have proven inadequate from one administration to the next. While the US abides the Convention’s outdated framework at the expense of survivors, numerous other signatories -

¹ Most countries that have added a 6th ground of asylum in legislation use the term “gender”; UNHCR also generally uses “gender” to encompass all concepts such as sex, gender identity, and sexual orientation. See [UNHCR - Guidelines on International Protection No. 1](#); [UNHCR - Guidelines on International Protection NO. 9](#)

² See *id.* and <https://www.unhcr.org/3d58de2da.pdf>

even those that do a better job of protecting them already – have forged a new path. More and more countries have enacted legislation explicitly strengthening protections for survivors, including adding a sixth ground of asylum for “sex” or “gender” as we propose now. (See Appendix #1) To ensure equal and enduring access to asylum for survivors, it has never been more urgent for the US to follow suit.

1. Deviating from Convention Language in Domestic Law is Appropriate When Needed to Ensure Compliance with the Convention

As a party to the 1967 Protocol, the US has an obligation to enact and construe legislation to ensure compliance with the Convention. In most cases, codifying Convention language verbatim is sufficient to fulfill this duty. When it is not sufficient, deviating from Convention language may be necessary to facilitate proper implementation. A departure from Convention language in domestic legislation is not, therefore, problematic *per se*; it is only problematic when done to *diminish* protection, rather than augment or align it with the Convention’s framework.³

In the context of gender-based asylum, maintaining the Convention’s current framework – without an independent “gender” ground - is harmful because it is precisely what causes us to violate the Convention. While UNHCR guidance clearly extends Convention protection in gender-based claims, it is the Convention’s outdated and marginalizing language that is codified in our statute, not the guidance; any administration can readily ignore it. It is therefore *critical* that we deviate from the Convention’s language when it comes to survivors’ claims, in order to ensure compliance. Survivors who are indigenous, detained, *pro se*, and subject to expedited removal are at a particular disadvantage under the current framework; they are hardly well-versed in the nuanced international law arguments it requires to succeed.

Maintaining exact alignment with the Convention’s language may be appealing in principle, but it quickly loses merit when we undermine our own interests, and those of the survivors we promise to protect, in the process. Rather, we can best serve the Convention’s original and ultimate purpose by recognizing its historical limitations and updating our approach to implementation accordingly.

- III. Efforts to Clarify PSG, “Nexus,”⁴ or Other Elements of Asylum are Necessary but Insufficient on their Own to Meaningfully and Equitably Protect Survivors

1. Administrative and Judicial Fixes are Subject to Revocation

Our current asylum framework situates gender-based claims largely within the PSG ground. While UNHCR guidance interprets the Convention as unequivocally protecting survivors under PSG or any other ground, this guidance is non-binding on State parties. And, without a clear, statutory mandate allowing claims based on “gender” alone, gender-based PSG claims brought by women and girls have been fraught with ambivalence, confusion, and inconsistency in the US. The former administration took full advantage of this by issuing legal precedents⁵ and sweeping regulations that aimed to gut gender-based asylum entirely. Notably, the administration cited the omission of “gender” from the Convention in part as its justification.⁶

³ The US Terrorism-Related Inadmissibility Grounds (TRIG) is an example.

⁴ The term “nexus” refers to the required connection between a persecutor’s motive in harming an individual and one or more of the grounds of asylum; it is also called the “on account of” element.

⁵ [Matter of A-B- #1](#); [Matter of A-B- #2](#); [Matter of A-C-A-A-](#)

⁶ See Department of Homeland Security, Department of Justice, [Procedures for Asylum and Withholding of Removal; Credible Fear and Reasonable Fear Review](#), 85 Fed. Reg. 80,274, 80,385 (Dec. 11, 2020). The rule was to go into effect on January 11, 2021, however, the Northern District of California issued a preliminary injunction blocking its implementation in [Pangea Legal Servs. v. U.S. Department of Homeland Security](#). The fate of the rule is now in the hands of the Biden Administration and the courts.

In response, the Biden administration has ordered a review of damaging precedents, and the promulgation of new, corrective PSG regulations.⁷ Regulations will aim to alleviate confusion as to what constitutes a cognizable PSG and whether a person has established membership in it. However, administrative and judicial actions remain vulnerable to rescission by any future administration determined to reinstate a blanket prohibition on gender-based claims. The impact includes not only closing the door on prospective applicants, but potentially leaving survivors granted relief under one administration severely re-traumatized by having it revoked under the next.

2. The PSG Ground is Inherently Problematic

PSG claims – involving violence against women and girls in particular - are by nature disadvantaged compared to other types of claims. PSG members must prove that their group is cognizable, that they are a member of the group, and that the persecution they suffered was on account of such membership (“nexus”). While “nexus” is a component of all claims, the gender-based PSG nexus determination is highly dependent on the initial, multi-pronged analyses of PSG ‘cognizability’ and ‘membership.’ Relegating women’s claims to the PSG ground is marginalizing in itself, as it perpetuates the outdated and damaging fiction that women’s claims are a deviation from the ‘norm’ that deserve additional, heightened scrutiny.

The complexity of the PSG ground also makes it extremely difficult for survivors to retain skilled *pro bono* counsel for both initial representation and appeals, leaving them susceptible to exploitation by unscrupulous lawyers ill equipped for a protracted legal fight. It also yields systemic inefficiencies, contributing to backlogs and diverting critical resources from taxpayers and agency components such as CBP, ICE, USCIS, EOIR, and the federal courts. Survivors are also needlessly re-traumatized by having to relive elements of trauma in painstaking detail relevant to the gender-based PSG and related nexus analysis that would not be needed when presenting a simpler “gender” ground claim. New regulations or proposed legislation such as the Refugee Protection Act of 2019⁸ that aim to clarify PSG are therefore ultimately insufficient to ensure equal and lasting protection for survivors.

3. Gender-Based Claims Brought Under Existing Grounds Will Remain Marginalized In the Absence of a “Gender” Ground

Survivors’ claims involving persecution on account of other grounds, e.g., ‘feminism’ as a political opinion, also routinely invite undue, heightened skepticism. Even adjudicators bound by favorable caselaw - regardless of the ground asserted - arbitrarily refuse to grant women’s claims. They 1) discount gender-based PSGs and nexus simply because women as a group are so numerous;⁹ 2) deny women’s claims because they view violence against women as a common, inevitable feature of all societies best kept behind closed doors; 3) dismiss domestic violence as a ‘private dispute,’ ignoring the fact that a private actor’s motive in inflicting gender-based violence is no more “personal” than the motive of a private actor targeting an individual based on the other grounds (See

⁷ See <https://www.whitehouse.gov/briefing-room/presidential-actions/2021/02/02/executive-order-creating-a-comprehensive-regional-framework-to-address-the-causes-of-migration-to-manage-migration-throughout-north-and-central-america-and-to-provide-safe-and-orderly-processing/>

⁸ See Refugee Protection Act of 2019: <https://www.congress.gov/bill/116th-congress/house-bill/5210/text>; <https://www.congress.gov/bill/116th-congress/senate-bill/2936>

⁹ Longstanding fears of the ‘floodgates’ have not materialized. See [Precarious-Protection - Tahirih-Justice-Center](#) Appendix A at 42. Survivors face tremendous obstacles to escaping gender-based persecution, as it typically includes intra-family violence, social and economic isolation, disbelief of the victim, and searing social stigmas. Women have diminished access to family resources due to discriminatory property, business ownership, or inheritance laws and policies. They may face extraordinary risks traveling alone or without a male relative while trying to flee. It is *because* survivors are so disenfranchised by pervasive violence and discrimination worldwide that they are *least* likely to be able to overcome these obstacles to flee *en masse*, reach another country, and readily ask for help. See [UNHCR Guidelines for Protecting Refugee Women](#)

Appendix #2); and 4) inexplicably conflate recognizing gender-based claims with a ‘free pass’ for all women, even though each applicant must always fully and credibly meet all elements of her claim.

Without a sixth ground for “gender,” we deny gender-based violence its rightful place alongside the other grounds as an entrenched, systemic, societal affliction equally worthy of international redress. A statutory change to the definition of a refugee that explicitly allows applicants persecuted on account of their gender to qualify for asylum is critical for ensuring, once and for all, that asylum is unequivocally available to women, girls, and other survivors.

IV. Conclusion

If the US is truly committed to dismantling the structural inequality that sustains violence against women, then we must stop relying on a 1950’s human rights framework to protect them. Corrective administrative or judicial fixes for PSG and nexus are certainly helpful but ultimately miss the mark; the PSG framework itself is inherently flawed, imposing complex, multi-pronged, inequitable standards for survivors’ cases to the detriment of all stakeholders. And even the most well-crafted policy cannot withstand calculated attacks by any future executive. Rather, we must now follow the example of other nations and amend our statute to include “gender” as an independent ground of asylum.