Hood College

GENDER-BASED ASYLUM CLAIMS UNDER INTERNATIONAL REFUGEE LAW AND U.S. IMMIGRATION POLICY

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ABSTRACT

This paper explores the relationship between international refugee law and domestic U.S. asylum policy. In doing so, the inconsistencies in the application between international guidelines and domestic policies are highlighted. Furthermore, besides the inconsistencies between the two bodies of law, this paper will explore the discrepancies of the application in the U.S. owing to the administrative position of the adjudicatory mechanism responsible for asylum/refugee cases in the executive branch. This will be explored through the qualitative analysis of judicial decisions, constitutional frameworks, and other, both international and domestic, legal sources, and evidence. Thus, this paper will demonstrate how international treaties become an authoritative source of law, the evolution and inclusion of gender under intentional law, the incorporation of international legal provisions in U.S. law, and the inconsistent application across different presidential administrations. Conclusively, this paper highlights the necessity for Congress to introduce an independent framework to adjudicate refugee/asylum claims. This will allow for stability and consistency in an area of law tasked with protecting some of the most vulnerable groups of people.

1.0 TABLE OF CONTENTS

2.0 LIST OF ACRONYM AND ABBREVIATIONS

UN	*United Nations*
Convention	*United Nations Convention Relating to the Status of Refugees*
Protocol	*UN Protocol Relating to the Status of Refugees of 1967*
UNHCR	*United Nations High Commissioner for Refugees*
ExCom	*Executive Committee of the of the High Commissioner's Program*
Guidelines	*2002 Guidelines on Gender-Related Persecution*
Handbook	*Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refuge*
SFRC	*Senate Foreign Relations Committee*
DoJ	*Department of Justice*
Act	*1980 Refugee Act*
USCIS	*United States Citizenship and Immigration Services*
DHS	*United States Department of Homeland Security*
EOIR	*Executive Office of Immigration Review*
BIA	*Board of Immigration Appeal*
AIC	*American Immigration Council*
Chevron	*Chevron Doctrine*
Ninth Circuit	*United States Court of Appeals for the Ninth Circuit*
Fifth Circuit	*United States Court of Appeals for the Fifth Circuit*
Second Circuit	*United States Court of Appeals for the Second Circuit*
INS	*U.S. Immigration and Naturalization Service*
Considerations	*Considerations for Asylum Officers Adjudicating Asylum Claims from Women*

3.0 INTRODUCTION

This paper will highlight the evolution of international refugee law as it relates to asylum claims based on gender and the application in US immigration policy. Gender, for the purposes of this paper "[…] refers to the relationship between women and men based on socially or culturally constructed and defined identities, status, roles and responsibilities that are assigned to one sex […]" (UNHCR, 2). That is because the alleged prosecution goes beyond merely the biological sex of an individual. Rather, the nexus between membership to a particular group (through which gendered claims are usually interpreted) and the prosecution occur because of the position of an individual in a social and/or cultural context. The terms "asylum" and "refugee" will be used interchangeably because the difference is negligible for this analysis. The difference between the two is a procedural one. According to the Department of Homeland Security, a refugee and an asylum seeker have to meet the same standard/definition outlined under International and domestic law. However, a refugee is not physically located in the U.S. when petitioning while an asylum seeker is. This paper will be divided into roughly four main parts.

The first part (Section 4) will focus on the domestic aspects of the refugee policy including the application of international refugee law under U.S. law/jurisdiction. This section will establish the constitutional framework that dictates the relationship between international treaties and domestic laws, pursuant to the U.S. Constitution. The distinction between self-executing and non-self-executing treaties will be essential, as well as illustrating where the 1967 Protocol falls within this dichotomy

The second part (Section 5) will focus on the main international treaties, namely the 1951 Refugee Convention and the 1967 Protocol Relating to the Status of Refugees. The main focus

will be on the evolution of gender as a protected class under the meaning of the text outlined in the Convention/Protocol. Here, a textual analysis of the Convention will be performed with particular attention to some of the main Articles within the document (in this case the particular social group category and the protections provided). Moreover, special attention will be placed on the interpretation/position put forth by the United Nations High Commissioner for Refugees (UNHCR) over the years, concerning the validity and legality of refugee claims based on gender.

The third part (Section 6) will explore any domestic legislation that was passed to bring US refugee policy in line with its international obligations upon ratifications of the Protocol, such as Congressional Acts/bills and court decisions that address gender as a basis for refugee claims. Additionally, several other aspects that play a role in the US' immigration policy and enforcement of international treaties be illustrated. For instance, the *Chevron* Doctrine dictates that courts must defer to government agencies for the interpretation of an ambiguous statute. The role of the Board of Immigration Appeals will be analyzed, which represents the final appellate administrative body of the U.S. Citizenship and Immigration Services (USCIS). It follows that some landmark decisions relating to gender-based refugee claims from the Board of Immigration Appeals will be closely looked at, highlighting some of the seemingly arbitrary disparities in those decisions over the years.

Finally, the fourth part (Section 7) will merge the two previous viewpoints. A comparative analysis will be performed by looking at how the U.S. and its immigration system have complied or not complied with the provision within the treaty and interpretations by the UNHCR. This will require an in-depth look into the interactions between presidential administrations, the BIA and their reliance, or lack thereof, on guidance provided by the UNHCR. This will provide a basis to illustrate how the definitions and legal standards for gender as a protected category under

the 1967 Protocol change depending on the political climate in the country. Thus, this paper will explore the early stages of gender-inclusive asylum policies (which will encompass the last year of the Bill Clinton presidency and two terms of the George W. Bush presidency). The subsequent Barack Obama (D) and Donald Trump (R) administrations will serve to illustrate the "[…] considerable power [of the executive] to influence and even direct the Justice Department's interpretation of asylum law through the Attorney General and the Board of Immigration Appeals, for political or other purposes" (Sweeney, 138).

Ultimately, this analysis will highlight the need to formalize an independent mechanism for asylum adjudication, as the current system "[…] leaves people seeking protection promised by international treaty to the whims of a politically responsive enforcement agency" (*Id.* at 127). Additionally, there is the potential for passing legislation that will bring the U.S. into compliance with its obligations under international law, which would appear unlikely considering the polarizing state of politics today.

4.0 GENERAL FRAMEWORK ON INTERNATIONAL TREATIES AND U.S. LAW

4.1 Constitution-Treaty Relationship

Examining inconsistencies in the application of international refugee law under U.S. immigration policy is a complex task. The primary challenge with applying international treaties to domestic practices is the intricate legal, judicial, and jurisdictional questions that arise when attempting such an analysis. This is due to the unique nature of international law as well as specific questions of its enforcement. These challenges are further exacerbated by specific constitutional and jurisprudential questions within U.S. domestic law and how they relate to both the enforcement and implementation of international laws within the U.S. legal and judicial system. As such, any attempt to reach a valid conclusion on the question of inconsistencies in the application of international law in asylum claims based on gender needs to first address the relationship between international and domestic law.

As with many legal questions of this magnitude, it is imperative to first look at the U.S. Constitution itself. As the guiding document and supreme law of the land, the Constitution does address procedural issues in addition to providing a legal framework regarding the implementation and enforcement of international treaties. At first glance, the Founding Fathers provided the most consequential, albeit simple, interpretation of the relationship between international law (in the form of bilateral and multilateral treaties) and U.S. laws.

The process by which treaties are drafted and ratified is fairly straightforward: as outlined in Article II, section 2 of the Constitution the President of the U.S. "[…] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two-thirds of the Senators present concur […] (U.S. Const. art. II, § 2). The supermajority threshold in the Senate, which amounts to 67 Senators having to vote in favor if all hundred are present, sets a high

benchmark and makes the ratification of treaties an endeavor requiring bipartisan support. Since 1935, only four treaties have been outright rejected by the Senate (Peake, 833). This suggests that there is no singular, partisan or, any other divide or objection in terms of the treaties signed by the President and sent for ratification to the Senate Foreign Relations Committee. But that number is a bit deceiving because 8.3 percent or 79 treaties between 1949 and 2013 that were submitted by Presidents did not get ratified "[…] as they were either ignored by the Senate Foreign Relations Committee (SFRC) or not brought to the floor following committee action […]" (Peake, 833). The percentage of treaties that do not get ratified, according to Peake, is higher for multilateral treaties (such as the one discussed in this paper) at 11.7%, with multilateral treaties being twice as likely not to get ratified than bilateral ones (at 5.6%). It is important to note that the study by Peake only includes treaties that were signed by the President and then submitted to the Senate for ratification, thereby making the actual number of treaties that the U.S. is not a state party to even higher.

Considering the study took into account more than a sixty-year period of treaty ratification in the Senate, it is important to make a distinction about the contemporary political climate. Partisanship — that is particularly evident in the contemporary context — has fostered "[…] ideologically polarized parties of the more recent decade [that] make treaty ratification especially difficult" (Peake, 833). As such, Peake notes "[…] that President Obama has had a particularly poor record in getting his treaties ratified, largely owing to the record-level partisan polarization in the Senate during his presidency" (Peake, 833). This trend of political/partisan polarization has, arguably, continued into the Trump presidency. As such the "Senate's aversion to any form of UN treaties is now so intense and pervasive that none have been ratified in the past decade and only one (on cybercrime) in the past 15 years" (Sachs, 2017). This represents a

stark contrast to the time "[f]rom the 1940s to the 1970s, [when] the U.S. led the way in promoting U.N.-based treaty law" (Sachs, 2017) on the international stage.

Some arguments often cited against the ratification of certain treaties are that, as some argue, "[m]any […] treaties conflict with the Constitution of the United States" (Bricker et al, 531) and/or "[…] on the ostensible grounds that the treaty obligations would infringe [on] U.S. sovereignty" (Sachs, 2017). This has resulted in a situation in which the U.S. is not a state party to some universally accepted multilateral treaties, especially when compared to its Western counterparts. Some examples include: the Rome Statute (creating the International Criminal Court), the Convention on the Rights of the Child, Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), International Covenant on Economic, Social and Cultural Rights, the Kyoto Protocols and others (Robillard, 2012).

Specifically, the notion that treaties and the Constitution are somehow competing sources of law is further complicated by Article VI of the Constitution that reads that "[t]his Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, […] shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby […]" (U.S. Const. art. VI, cl. 2), commonly known as the Supremacy Clause. The Constitution, at first glance, established the paradigm that treaties are the supreme law of the U.S. — on par with the Constitution itself.

Article VI appears fairly self-explanatory, yet it has the potential of creating a legal conundrum, especially when an argument is presented that a particular treaty and established procedural norms are at odds with each other. While this is an anomaly, courts and constitutional scholars have addressed this situation at length in cases where a hypothetical conflict between the different branches of government and application of international treaties arises.

4.2 Self-Executing and Non-Self-Executing Treaties

The question thus does arise — when do treaties that get ratified truly become supreme law of the land and thus enforceable in proceedings before U.S. courts? In a 1796 case, the Supreme Court established the precedent that a "[…] treaty being sanctioned as the supreme law, by the Constitution of the United States, which nobody pretends to deny to be paramount and controlling to all state laws, and even state constitutions, wheresoever they interfere or disagree. The treaty, then, as to the point in question, is of equal force with the constitution itself; and certainly, with any law whatsoever" (*Ware v. Hylton*, 3 U.S. 199, 284 (1796)).

The decision, which was subsequently upheld in other Supreme Court cases, reaffirmed the notion that stipulations within a treaty, if they comply with articles of and amendments to the Constitution, rise to the level of federal law and are supreme to state laws and constitutions. But the Court did not address when a treaty is enforceable by U.S. courts or establish a universal standard of review in resolving possible conflicts until 1829.

In *Foster v. Neilson*, Chief Justice Marshall, writing in the majority, made an important distinction that a treaty ought to be considered "[…] as equivalent to an act of the legislature, whenever it operates of itself, without the aid of any legislative provision" (*Foster v. Neilson*, 27 U.S. 253, 314 (1829)), therefore making the treaty self-executing. However, a treaty is non-self-executing "[…] when the terms of the stipulation import a contract, when either of the parties engages to perform a particular act, the treaty addresses itself to […]" (*Foster v. Neilson*, 27 U.S. 253, 314). Foster appears to require Congress to enact domestic legislation before matters relating to the treaty can be adjudicated before U.S. courts. This in part answers the question of when treaties truly become the supreme law of the land. The term "self-executing" was later coined to describe treaties that do not require Congressional action to come into effect, a concept that

"[…] lower courts have long considered […] to be 'one of the most confounding doctrines in treaty law'" (Vázquez, 42).

Finally, while the Supreme Court has yet to definitively and unequivocally answer questions regarding the relationship between the Constitution and international treaties. The consensus according to Levin and Chan is "[…] that the substantive limitations which apply to any action by the federal government, such as those enumerated in the Bill of Rights or those imposed on Congress in Article I, section 9, apply to the treaty power; and that the Constitution is, consequently, absolutely supreme to treaties" (Levin et al, 242).

The constitutionality of the *Protocol*, the treaty at the forefront of this paper, has not yet been challenged. As such, analysis of the enforceability of the *Protocol* under federal law and courts, withstanding the constitutionality of its provisions, comes down to the question of whether or not the treaty is self-executing? Furthermore, if it is determined that the *Protocol* is not self-executing, did Congress take the necessary steps and pass legislation that would make the *Protocol* part of the corpus of domestic refugee laws.

4.3 Plenary Power Doctrine

When discussing the implementation of international and domestic refugee law, it is imperative to determine which branches of government have the power to make policies that influence the adjudication of refugee cases — policies that fall under the broader purview of the United States' immigration policy. The Supreme Court's decision in *Chae Chan Ping v. United States* (also known as the *Chinese Exclusion Case*) answered this exact question in 1889.

The *Chae Chan Ping* precedent "[…] is traditionally taken as the fountainhead of the plenary power doctrine" (Martin, 30). The plenary power doctrine, as the name would suggest, is the directive that a particular branch of government has plenary or absolute control over a

particular area of governance. Justice Field, writing for a unanimous Court, asserts in the *Chae Chan Ping* decision "[t]hat the government of the United States, through the action of the legislative department, can exclude aliens from its territory is a proposition which we do not think open to controversy" (*Chae Chan Ping v. United States*, 130 U.S. 581, 603 (1889)). The Court affirmed that it was within the constitutional power of Congress to enact legislation that prevented Chinese immigrants from being admitted to the U.S. — a move that, in hindsight, was based on "[…] xenophobic and racist agitation in California, scapegoating the Chinese in the midst of a severe economic recession" (*Id.* at 30, 31). The decision further clarified that legislation passed by the House of Representatives and the Senate supersedes international treaties that the United States might have previously ratified. The holding in Chae Chan Ping has remained the guiding Constitutional principle, in regards to the allocation of decision-making powers in immigration matters, to this day.

The Court in 1889 first introduced the plenary power doctrine which, while not explicitly mentioned in the Constitution, allocates full control over immigration matters to the federal government and particularly Congress. The *Chae Chan Ping* decision was largely based on the principle of sovereignty and thus, the Court determined that laws concerning immigration ought to be confined to limited judicial review. For example, judicial review is not warranted in examining the motivations and the validity of reasoning behind legislation. Although the motivation behind fully excluding or banning Chinese individuals from the possibility of immigrating to the United States (the law at the center of the *Chinese Exclusion Case*) was morally questionable or wrong, the precedent established continues to be good law. Consequently, since 1898, the Supreme Court has affirmed the underlying and fundamental principle that Congress

possesses the plenary power in matters of immigration law and that the executive branch is tasked with enforcing those laws.

Namely, in 1950, the Court affirmed that the exclusion of aliens is a fundamental power associated with sovereignty; a power that is reserved for the federal legislature. In *United States ex rel. Knauff v. Shaughnessy*, the Court clarified that Congress has the authority to delegate immigration-related powers to the President who can then further delegate them to the relevant administrative agency and executive officers. Justice Minton wrote in the opinion that "[w]hatever the procedure authorized by Congress is, it is due process as far as an alien denied entry is concerned" (*United States ex rel. Knauff v. Shaughnessy*, 338 U.S. 537, 544 (1950)).

There are certain instances where there is an overlap between immigration and foreign affairs/diplomacy — the latter of which is largely controlled by the executive branch and several of its departments and agencies. This leaves open some legal questions about the possibility of shared power or political conflicts of primacy between Congress and the President when dealing with situations where concurrent powers or authority is evident. Nonetheless, "[…] the executive has no inherent power over immigration, [and] it must stay within the grant of authority defined by the statute [such that] [a]s in other areas of the law, the function of executive agencies in the field of immigration is to enforce the legislation passed by Congress" (Weissbrodt et al, 106).

It is important to stress that the Supreme Court has never indicated that plenary power allows for the implementation of policies and laws that might otherwise violate the Constitution. The precedent that possession of plenary power does not indicate complete freedom from constitutional oversight, was suggested as early as 1819. In the Supreme Court's decision in *McCulloch v. Maryland* (17 U.S. 316 (1819)) regarding plenary power of commerce "[…] Justice

Marshall's formulation [in no way] suggests complete freedom from constitutional restraint […]" (Cox, 476).

Furthermore, in the 1983 case *INS v. Chadha*, the Supreme Court indicated that "[t]he plenary authority of Congress over aliens under Art. I, § 8, cl. 4, is not open to question, but what [can be] challenged […] is whether Congress has chosen a constitutionally permissible means of implementing that power" (*INS v. Chadha*, 462 U.S. 919, 940-941 (1983)). This decision represents the most contemporary and direct example of case law that relates to plenary power in regards to immigration law and policies.

Even with some constitutional safeguards in place, the general notion of plenary power might appear radical at first, insofar that it appears to mostly absolve the political branches of government of checks and balances from the judiciary in certain areas of governance. Martin (2015) highlights several reasons why the doctrine "[…] has persisted despite a steady and vigorous stream of scholarly criticism" (Martin, 29) for more than a century. It has persisted even in the contemporary political discourse, where immigration has become a highly contentious and polarizing topic in the United States government and politics. He attributes the endurance of the political branch's plenary power over immigration to several reasons. These include:

a. the assertion that government receives its sovereign power from the people, and as such the bounds of what is acceptable and what is not are established and tested through elections;
b. the long-standing norm, as reiterated by Justice Field, that "[…] the nation must speak with one voice, and it is not for the courts to introduce a discordant sound" (*Id.* at 41);
c. the possible drawbacks of lengthy litigation (particularly in lower courts) to resolve disputes of motivations behind certain actions by Congress and/or the President could interfere with foreign affairs which often require swift (re)action, and

d. the reality that "[…] a majority of the Justices harbor a deep skepticism that lower courts can be trusted to give sufficient weight to foreign policy concerns in making any such threshold assessment" (*Id*. at 48).

These assertions made by Justice Minton, and echoed by Martin (2015), raise profound questions regarding the legitimacy of checks and balances for constitutional and legal questions that fall within the purview of immigration. The Supreme Court has stated, again, in 1953, that "[…] the power to expel or exclude aliens as a fundamental sovereign attribute exercised by the Government's political departments largely immune from judicial control" (*Shaughnessy v. United States ex rel. Mezei*, 345 U.S. 206, 210). This statement alone, though, does not provide a realistic and fair overview of the role of the judicial branch in immigration matters. Nevertheless, there are thousands of immigration cases before U.S. courts annually. That is because "Chae Chan Ping imposes no barrier to challenges alleging that administrative action departed from legal requirements based in statute or regulation [which] provides valuable checks and balances, particularly on administrative action" (Martin, 51).

Besides the possibility of judicial review of statutory and regulatory consistency by the legislative and/or executive branch, Martin (2015) proposes another avenue. He suggests that judicial processes are not the only way to "[…] defend constitutional values against objectionable statutes […]" (*Id.* at 52); instead, the electorate has the potential to shape and, if necessary, alter the composition of Congress and influence the election of the President if such actions are taken. Thus, the plenary power doctrine provides a preliminary framework that highlights how powers are delegated in matters concerning immigration within the U.S. federal government.

5.0 INTERNATIONAL LEGAL FRAMEWORK

5.1 Gender-based Asylum Claims and the 1967 Protocol

Assessing inconsistencies in the application of international refugee law in U.S. immigration policy requires the examination of treaties that govern the subject in question. Historically, immigration was largely unregulated on an international scale and instead was a matter of internal, domestic politics of nation-states. This was true until 1951 when the recently-founded United Nations (hereinafter the UN) first adopted a treaty on refugees — the *UN Convention Relating to the Status of Refugees* (hereinafter the Convention). This treaty "[…] sought to deal with situations arising immediately after World War II, and by its terms was limited to persons who became refugees before January 1, 1951" (Ira, 294). In essence, the status of refugee was reserved for Europeans who were forced to leave their respective countries "[…] owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion […]" (UNGA, 14) during and immediately after WWII.

The definition of a refugee, as understood under the *Convention,* was crucially amended in the *UN Protocol Relating to the Status of Refugees of 1967* (hereinafter the Protocol). The Protocol, unlike the 1951 Convention, removed the temporal and geographic restrictions which previously were part of the criteria that were used to define individuals as refugees under international law. This had the effect of drastically enlarging the pool of individuals who qualified as refugees — a change which has consequentially altered and affected refugee politics in the upcoming, post-WWII decades. The Protocol retained the definition of a refugee as someone who demonstrates a "[…] well-founded fear of being persecuted for reasons of race, religion, nationality,

membership of a particular social group or political opinion […]" (UNGA, 14) while extending the scope of the treaty to include non-Europeans, claiming refugee status after January 1, 1951.

It is important to note that explicit mention of gender as grounds for claiming refugee status is absent in the text of the Protocol — a fact that might lead some to believe that a well-founded fear of persecution based on gender is not covered or even contemplated under the current text and articles of international refugee law. This assumption is at best too simplistic, and at worst, arguably, could be considered factually inaccurate. It is important to first illustrate how the interpretation of IA(2) of the *Convention/Protocol*, particularly by the United Nations High Commissioner for Refugees (hereinafter UNHCR), has evolved over the years to include gender under the umbrella term of particular social group. Only then can an analysis follow on the inconsistencies in the implementation in domestic refugee policies in the U.S.

Opinions and interpretations by the UNHCR are of particular interest because of Article 2(1) of the *Protocol.* It stipulates that "[t]he States Parties to the present Protocol undertake to co-operate with the Office of the United Nations High Commissioner for Refugees […] in the exercise of its functions, and shall in particular facilitate its duty of supervising the application of the provisions of the present Protocol" (UNGA, 47). The UNHCR's role "[…] resembles a supervisory body of the Convention [which] promulgated its own interpretations of various provisions of the Convention [and] also presented its opinions to national courts […]" (131 Harv. L. Rev. 1399, 1399) including the U.S. Supreme Court. The Supreme Court's reliance on the interpretations and opinions provided by the UNHCR has varied over the years, which is another contentious topic that influences the matters discussed in this paper.

Besides defining who is considered a refugee under international law, the Protocol further bestows certain basic rights upon those who seek asylum in a state party to the treaty. The rights

articulated in Articles 31 and 33 are of particular importance as they outline steps that state parties cannot undertake. Article 31 § 1 dictates that a state party to the treaty "[…] shall not impose penalties, on account of their illegal entry or presence […]" (UNGA, 28). Article 33 § 1 prohibits the "[…] [expulsion or return of] a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened […]" (UNGA, 29) even "[…] on grounds of national security or public order […]" as per Article 32 § 1 (UNGA, 28). Additionally, the Article 3 guarantees that states cannot discriminate in the application of the Protocol based on the "[…] race, religion or country of origin" (UN, 17) of the refugee.

5.2 History of Gender as Grounds for Refugee Claims

International refugee law has undergone a significant evolution and "[…] progressed from a time, prior to the 1990s, when the interests and needs [of refugee women and girls] were ignored or marginalized from the 'mainstream'" (Edwards, 21) to contemporary state of affairs where their rights "[…] are relatively high on the international agenda […]" (Edwards, 22). The processes that have led to this evolution have been occurring gradually over the past seventy years and have indeed been flawed. Nevertheless, major improvements have been achieved and "[…] international refugee law, the [UNHCR], regional organizations and governments have adopted various forms of gender-inclusive guidance for those involved in the refugee claims process" (Oosterveld, 954). It is crucial to provide an overview of this evolution to accurately assess the inconsistency of decisions under U.S. jurisdiction and how that inconsistency affects the legitimacy of those decisions.

As stated earlier, the 1951 Convention and the subsequent 1967 Protocol were, at their inception, "[…] characterized by a complete blindness to women, gender, and issues of sexual inequality" (Edwards, 22). This is evident in the exclusion of sex or gender from the text of the

Convention/Protocol. The exclusion was attributed to arguments pertaining to sovereignty that in this particular instance would dictate that issues of sex-discrimination remained and a question exclusively within the scope of individual states and "[…] doubts [on] whether there would be any cases of persecution on account of sex" (Edwards, 23). This error continued to be the norm under international refugee law until the mid-1980s.

The monumental change happened in 1985, and coincided with the UN Decade of Women, when the Executive Committee of the of the High Commissioner's Program (hereinafter ExCom) "[…] acknowledged for the first time that 'women asylum seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society' fall within Article 1A(2) of the 1951 Convention" (Edwards, 24). While the importance of this declaration cannot be understated, it is important to mention that the UNHCR, while broadening the understanding of Article IA(2) to include gender, reiterated its position that states retain a substantial degree of discretion in terms of the implementation of this change.

The inclusion of gender within the meaning of Article IA(2) was reemphasized ten years later when in 1995 the ExCom issued the opinion that "[…] guidelines should recognize as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or gender-related persecution" (Edwards, 25). The opinion was based on the principle "[…] that women's rights were human rights […]" (United Nations Population Fund, 2006) — an assertion that was confirmed two years earlier at the 1993 UN World Conference on Human Rights in Vienna.

Arguably, the most consequential interpretation by the UNHCR, which continues to be the guiding document on claims of persecution based on gender, can be found in the *2002 Guidelines on Gender-Related Persecution* (hereinafter the Guidelines). In the Guidelines, the UNHCR argues that "[…] despite the absence of 'gender' as a listed ground in the Refugee Convention, a gender-sensitive interpretation should be given to the existing enumerated grounds [which] has been confirmed in numerous domestic jurisdictions" (Oosterveld, 963), including the United States. The inclusion of gender largely rests on the notion that women or a particular subset of women within a given society constitute a particular social group and thus are included in the text of the Convention. "Jurisprudence in the [U.S.] has been at best muddled" in terms of recognizing "[…] women or particular women as members of [a particular social group]" (Edwards, 30). It is important to note that the "UNHCR has been careful to distinguish between 'sex' and 'gender' in its guidelines, although there continues to be much conflation between the term in practice" (Edwards, 37).

In 2004, the UNHCR further developed its goal "[…] to promote gender equality and respect for women's rights and children's rights in order to enhance the protection of refugees […]" (Edwards, 38) through the Age, Gender and Diversity Mainstreaming (AGDM) policy. Ultimately, "[r]efugee adjudicators are overwhelmingly reluctant to deem a social group simply as "women" in a particular country of origin, even though case law indicates that 'women' in a particular country constitute a particular social group and that gender may be the true cause of the applicant's predicament […]" (Oosterveld, 963). This happens to be the case despite the fact that the interpretation "[…] of the UNHCR was codified — simultaneous to the Refugee Act's passage — in the *Handbook of Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and 1967 Protocol Relating to the Status of Refuge* […]" (Perish, 929) (hereinafter the

Handbook). In the Handbook, the UNHCR offers an intentionally broad interpretation of the particular social group category, stating that " […] 'particular social group' normally comprises persons of similar background, habits or social status" and that [a] claim to fear of persecution under this heading may frequently overlap with a claim to fear of persecution on other grounds, i.e. race, religion or nationality" (UNHCR, e/77).

It is certainly challenging, if not impossible, to make overarching statements about women as a social group within a country but it is especially challenging when considering cultural, social, and economic boundaries. It is, however, certainly possible to assert that women represent a particular social group, especially within the context of the standard established under international and domestic refugee law of well-founded fear of prosecution. To allow the difficulty to make generalizations to impede the effectiveness and implementation of refugee law has the potential of, inadvertently, casting a shadow on the entire framework of international law and particularly human rights — progress that the international community has overwhelmingly championed since WWII. After all, the same standard is not applied to the other categories mentioned in the *Convention/Protocol*, for example, race and religion. Conversely, as mentioned earlier, the reluctance of adjudicators to merit claims based on gender can be, in part, attributed to the argument that to label women within a country a particular social group is overly inclusive and general. In order to further address this conundrum, in 2016 the UNHCR provided a set of seven traits that expand on and define in detail how membership to a particular social group should be determined.

It is important to first illustrate how the interpretation of Article I(A)2 of the *Convention/Protocol*, particularly by the UNHCR, has evolved over the years to include gender as a particular social group before discussing the corresponding domestic policies in the U.S. According to the

UNHCR, membership in a particular social group is characterized by seven distinctive traits — traits within women or certain women can fall under. One of the most recent and explicit interpretations provided by the UNHCR can be found in the guide issued in 2016 entitled *UNHCR's Views on Gender Based Asylum Claims and Defining "Particular Social Group" to Encompass Gender*. The guide explicitly addressed how to utilize contemporary "[…] international law to support claims from women seeking protection in the U.S."(UNHCR, 1), in which the UNHCR lays out that membership to a particular social group is characterized by seven traits. Accordingly, to be considered a member of a social group eligible for refugee claims under the purview of the *Protocol* the following should be considered:

1. Membership to a group that is "[…] distinct as an entity within the broader society and definable in terms of non-arbitrary characteristics shared by its members;"
2. The group must be defined by characteristics that are "[…] innate (such as sex, caste, color, family background)"
3. A degree of "[…] integrity […] must exist in the perceptions of group members […] and/or from the viewpoint of the particular society, or segments therein […]"
4. The group ought to exhibit "[…] characteristics [that] will exist independently of the fact of persecution but must nevertheless play a role in the persecution […]"
5. Exemplify "[…] historical, social, legal and political realities [that] will be relevant in identifying both the group's existence and the persecution which its members suffer or are likely to suffer;"
6. The individual exemplifies a well-founded fear of prosecution based on the membership in the social group; and
7. Examine possible intersectionality between the membership to a particular social group and other traits such as religious, racial, political affiliation, etc.

Applying the aforementioned traits to women highlights how and why women ought to be considered members of a particular social group within the framework of international refugee law. It follows that women are indeed defined by immutable characteristics that exist

independently from, hypothetical circumstances of persecution, based on the normative classification of sex/gender. Furthermore, they represent a group within broader society that can and does exemplify a certain degree of integrity in terms of gender categorization. This categorization has historically, though not universally (i.e. matriarchal societies), resulted in disparaging treatment in comparison to other segments of society, namely in comparison to men when talking in terms of the binary construction of gender. The sixth and seventh traits address individual aspects necessary and are assessed on a case-by-case basis. As such the UNHCR expressed its "[…] view that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a 'particular social group'" (UNHCR, 3), and thus warrant the consideration of refugee claims based on gender under the meaning of Article I(A)2. This was a significant shift and further reiterated the inclusion of gender-based asylum claims under international refugee law.

While refugee adjudicators should consider claims based on gender through other categories mentioned in the *Convention/Protocol* (such as political opinion or religious affiliation), as there is often an intersectionality between two or more factors, "[…] funneling of gender-related claims into the 'particular social group' category is a common occurrence and, indeed, may reflect the best category for a particular claim […]" (Oosterveld, 965). Thus, while the UNHCR has recognized sex/gender as a valid claim for obtaining refugee status under the *Convention/ Protocol*, important legal questions remain. These questions are further complicated with the introduction of particular constitutional mechanisms (in terms of the interactions between the three branches of government) within the U.S. The question arises, specifically, in relation to the judicial enforcement of international treaties by U.S. courts in the face of partisan polarization within the political sphere is further addressed in this paper.

6.0 THE 1967 PROTOCOL AND THE APPLICATION IN U.S. POLICY

6.1 US Refugee Policy and the 1967 Protocol

The U.S. is often referred to as a nation of immigrants and a 'melting pot' of cultures. This notion is deeply rooted in the fabric and history of American society. It is also evident that the U.S. has had a complex history regarding immigration that sometimes involved the implementation of anti-immigrant laws and policies (the *Chinese Exclusion Case*). However, for the purpose of this paper, the focus will be primarily on 1968 and onwards.

The United States was not a state party to the 1951 *Convention* and as such was not obligated to abide by the provisions of the treaty. This changed in 1968 when members of Congress, notably Senator Edward Kennedy (D-MA), advocated for the signing and ratification of the 1967 Protocol. This new-found enthusiasm was motivated, in part, by the important amendment to the *Convention* that established the new criteria, namely the removal of the geographic and temporal requirements or individuals who intend to claim refugee status. This happened to coincide with the presidency of Democrat Lyndon B. Johnson, whose administration reviewed the contents of the *Protocol* and "[…] concluded that the United States was already meeting its obligations under international refugee law" (Hamlin, 324). This paved the way for the Senate to ratify the *Protocol* in 1968 by a vote of 59 for and none against —a move that was seen largely symbolic in part due to the assertion that the U.S. already complied with the articles of the *Protocol*. The U.S. clarified that the ratification of the "[…] *Protocol* and *Convention* do not specifically impose obligations on receiving refugees, but seek to assure fair and humane treatment for refugees situated in the territory of the contracting state" (Ira, 294). The U.S. government and the Department of Justice (hereinafter the DOJ), in particular, have argued in the past that the *Protocol* is not 'self-executing' and is thus unenforceable by U.S. courts. The main

argument centers around the intent of the executive branch and the legislature when the *Protocol* was ratified. The arguments are based on the assertion that the treaty was not meant to be self-executing because federal laws already in place complied with those stipulated by the treaty, and thus the ratification of the treaty was purely symbolic (Flanigan, 88).

The issue of whether the Protocol is self-executing was raised more recently in the 1992 case *Haitian Centers Council, Inc. v. McNary 789 F. Supp. 541 (E.D.N.Y. 1992)*, where judges for the United States District Court for the Eastern District of New York "[…] denied the requested relief because it believed that it was constrained by the Second Circuit's decision in *Bertrand v. Sava* […]" (Vázquez, 40, 41). The United States Court of Appeals for the Second Circuit's (hereinafter the Second Circuit) 1982 decision in *Bertrand v. Sava*, which is the leading precedent on whether to categorize the *Protocol* as self-executing or not, highlighted that "[…] under the circumstances presented [in the case], the Protocol affords the petitioners no rights beyond those they have under our domestic law" (*Bertrand v. Sava*, 684 F.2d 204, 219 (1982)). The Court further indicated the necessity for the passage of domestic legislation by Congress if it wished to make provisions of the *Protocol* applicable under U.S. law and enforceable by U.S. courts. The judges refer to the "[…] Refugee Act of 1980 [that] was designed, at least in part, to bring the United States into compliance with the Protocol […]" (*Id.* at 218). The Refugee Act and its provisions are discussed in more detail in section 6.2.

The Second Circuit and other courts that heard cases involving the *Protocol* have failed to reach a "[…] consensus […] on just why legislation is necessary — that is, on just what it is that a non-self-executing treaty fails to accomplish […]" (Vázquez, 44). Therefore the Protocol is left in legal limbo between being the supreme law of the land and symbolic international law. The Supreme Court has not directly addressed questions relating to the *Protocol*, arguably in part due

to the plenary power doctrine. However, the Supreme Court has heard a case regarding questions raised by a different treaty where the majority opinion stated that a "[…] non-self-executing treaty, by definition, is one that was ratified with the understanding that it is not to have domestic effect of its own force" (*Medellin v. Texas*, 552 U.S. 491, 527 (2008)).

While the Supreme Court has since reaffirmed the legal distinctions between self-executing and non-self-executing treaties, it has not addressed the question of whether the *Protocol* itself is self-executing or not. Since the Court has been silent on the issue, we must rely on the Second Circuit's decision that has unequivocally determined that the protocol is non-self-executing.

If the argument that the Protocol is not 'self-executing' is accepted as "good law," then in the absence of clarification by the Supreme Court, it does not dismiss possible arguments that gender ought to be considered as grounds for refugee claims as defined by the 1967 Protocol. Twelve years after the ratification of the *Protocol*, Congress acknowledged that it "[…] was not clear whether […] the Protocol's provisions were self-executing within U.S. law" so "[…] in order to bring United States law into conformity with [their] international treaty obligations […]" (Keller, 194), Congress passed the Refugee Act of 1980. Thus, Congress seemingly fulfilled the requirement set forth by the courts that dictates that non-self-executing treaties required the passage of appropriate legislation to make the treaty the supreme law of the land. The question remains: which aspects of the treaty were included in the domestic legislation passed and whether the interpretations/opinions provided by the UNHCR are by extension of specific domestic legislation enforceable by U.S. Courts.

6.2 Refugee Act of 1980

Based on the plenary power doctrine involving immigration described in Section 4.3, Congress possesses an absolute directive to govern immigration which encompasses, amongst other parts of the law, refugee law. As a consequence, as mentioned earlier, in 1980, the 96th Congress passed the 1980 Refugee Act (hereinafter the Act) and was subsequently signed into law by President Carter. The legislative history concerning the passing of the Act highlights the specific intent to bring the United States into conformity with its international obligations agreed upon by the ratification of the Protocol. The Act represents "[…] the first comprehensive amendment of [the US'] general immigration laws designed to face up to the realities by stating a clear-cut national policy and providing a flexible mechanism to meet the rapidly shifting developments of a troubled world" (Roberts, 4).

In passing the Act, Congress adopted the exact definition of a refugee found in Article I(A)2 of the Protocol — including the particular social group category. It did not, however, "[…] attempt to define the exact meaning of 'social group' or other specific terms within the new refugee definition […]" (Parish, 925). Rather, the sole purpose of the Act was to incorporate the definition from the Protocol into domestic law as a guarantee that the U.S. refugee policy is consistent with international law. Furthermore, in retaining the exact definition and abstaining from further defining the exact meaning of the particular provision, Congress indicated that question relating to the definition of a refugee as per the Act is "[…] intended to be construed consistent with the Protocol" (*Id.* at 925).

Although, as earlier illustrated, the interpretation of a particular social group has evolved over time and eventually lead to the explicit inclusion of gender as a viable claim under that category by the UNHCR. It is imperative for a fair assessment of the congressional intent to look

at the contemporary definition at the time when the Act was deliberated upon and ultimately passed. A primary interpretive source is the UNHCR's Handbook that was first published in 1979, which indicates a purposely broad view of a particular social group. This "[…] demonstrates that the social group category had developed into a broad and flexible concept by the time of its incorporation into U.S. law" (*Id.* at 929). In addition, scholarly work made available to Congress at the time indicated the all-encompassing nature of the terms, social groups, under international law.

This sentiment, particularly in relation to the role of the Handbook, was echoed by the Supreme Court in a 1987 decision. Namely, in *INS v. Cardoza-Fonseca*, the majority opinion acknowledged that "[t]he Handbook provides significant guidance in construing the Protocol, to which Congress sought to conform [and that] [i]t has been widely considered useful in giving content to the obligations that the Protocol establishes" (*Immigration and Naturalization Service v. Cardoza-Fonseca,* 480 U.S. 421(1987)). This case would turn out to be one of the most influential cases for interpreting the legal relationship between the Protocol and the Act, which will be explored in more detail below.

There is overwhelming evidence to point to the fact that "[…] the expansive interpretation given to the term 'social group' by the UNHCR, foreign case law, and the writings of publicists is highly persuasive evidence that Congress intended this phrase be read broadly" (Parish, 929-930). This is important as congressional intent will be the center when discussing the inconsistencies in the application of the 'social group' category of the Protocol and Act in terms of asylum claims based on gender.

Besides codifying the fundamental definition and basis for seeking refugee status, the Act put forth certain structural mechanisms involved in the practical implementation of its provisions.

The primary provision that is of concern to this paper is the provision which "[…] delegated to the president the power to determine the number of refugees to be admitted each year and gave the president the authority to delegate substantive screening decisions to lower level executive officials" (Rodríguez, 1814-1815). The delegation of power to the executive branch will be important for this paper, as it will help explain the inconsistencies in the adjudication of gender-based asylum claims across political administrations.

Besides bringing U.S. policy in line with international obligations, by passing the Act, Congress intended to replace the prior arrangement. This prior arrangement primarily consisted of the President unilaterally making the majority of decisions relating to refugee admission, without much input from Congress (Cox, 505). This, in turn, "[…] has resulted in refugee admissions that reflect the president's foreign policy agenda at the expense of humanitarian concerns, reflected in the long-standing preference for refugees from communist regimes over other deserving refugee populations" (*Id.* at 1818).

Although Congress agreed that the system had to be changed, the two chambers of Congress were not in agreement with the extent of how far to allow the President to influence refugee policy. The Senate raised similar concerns to those highlighted by Martin (2015) in Section 4.3 on Immigration's Plenary Power — concerns over the fluctuating nature of refugee crises that sometimes require swift action and the directive of the executive branch. Ultimately, these factors resulted in the inclusion of provisions that delegated a significant degree of power to the President, the Attorney General, and relevant executive agencies on matters of refugee law. Thus, the Act which was "[…] designed to check unfettered executive discretion, arguably has amounted to nominal participation involving little direct control [from Congress] over the policy decision of whom to admit" (*Id.* at 1819). As such, significant power in matters related to refugee

and asylum seekers is directly influenced by the President, executive officers, and agencies. This does have a profound impact on the implementation of the Protocol and Act, particularly in terms of the inclusion of gender as a viable basis for claims to demonstrate a well-founded fear of persecution.

6.3 Chevron Doctrine and the Board of Immigration Appeals

The current framework involved in the adjudication of refugee claims in the United States Citizenship and Immigration Services (hereinafter USCIS) which is situated within the United States Department of Homeland Security (hereinafter DHS). There are two general types of asylum applications: affirmative and defensive. In affirmative applications, which are handled by USCIS, the applicant has not yet been placed in removal proceedings for violating certain laws that would render their presence in the U.S. illegal. Conversely, defensive applications are filed by applicants who have been placed in removal proceedings. The executive agency that is at the center of immigration adjudication is the Executive Office of Immigration Review (hereinafter EOIR). The EOIR includes immigration judges that hear appeals from USCIS decisions and have original jurisdiction in defensive asylum cases (cases in which asylum is used as a defense for withholding of removal). All cases decided by the immigration judges can be further appealed to the Board of Immigration Appeals (hereinafter BIA). The immigration courts and the BIA "[…] are institutionally located within the Justice Department, and their judges and Board members are all considered to be 'agency attorneys representing the United States government' and serving at the pleasure of the Attorney General" (Sweeney, 138).

The BIA is the appellate and final administrative body for immigration matters within the EOIR. It consists of fifteen members who are directly appointed by the attorney general. Following several reforms in 2002, a single BIA member can affirm (either with a written opinion

or without), while "[a] small number of cases are adjudicated by a three-member panel when the BIA needs to reverse an IJ opinion, resolve inconsistencies among opinions, or establish new precedent" (Farbenblum, 1072). Thus, decisions by the BIA represent the final administrative action in immigration and asylum adjudications. Statutory provisions do exist, however, that allow individuals to appeal a decision by the BIA in U.S. federal appeals/circuit courts. According to the American Immigration Council (AIC), the statutory provisions outline that federal circuit courts have jurisdiction to review decisions that address constitutional claims or questions of law, and although the court "[…] retains jurisdiction to review most aspects of the asylum determination [there are] limitations on jurisdiction affecting discretionary decisions, cases involving criminal offenses, and specific asylum determinations […]" (AIM, 4).

The BIA is located in the DOJ and therefore is under direct supervision and directive of the attorney general. This grants the attorney general sweeping powers in refugee adjudication, including the "[…] power to hire, assign and fire judges and Board members at will" and, arguably, more strikingly "[r]egulations also give him the authority to certify to himself and directly decide substantive questions of the interpretation of immigration law, bypassing the existing court and appeal system and overturning its decisions" (Sweeney, 138). It is important to reiterate that federal appeals courts do have a certain degree of judicial oversight and review over the decisions by the BIA, particularly in refugee adjudication.

The judicial oversight by federal appeals courts certainly appears to be a positive aspect of the contemporary U.S. immigration framework, although these efforts are severely hindered by a 1984 Supreme Court decision that established the *Chevron Doctrine* (hereinafter Chevron). *Chevron* limits the extent to which appeals courts can intervene in matters where alleged violations or misinterpretations of relevant refugee provisions have been applied by the BIA. The precedent

arose from the decision in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1987). The case dealt with the introduction of regulations by the Environmental Protection Agency (EPA), which included the interoperation of a seemingly ambiguous provision of The Clean Air Act. The Court concluded that "[…] the legislative delegation to an agency on a particular question is implicit, rather than explicit [and] a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency" (*Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844). The *Chevron* decision applies to other federal agencies and acts. Therefore, broadly speaking, *Chevron* instructs Courts to defer to reasonable interpretations of ambiguous provisions of legislation to the appropriate federal agencies. Furthermore, it is not necessary for this delegation of power to be explicitly included in the legislation — the delegation can be implicit. However, "[a]s administrative agencies have grown in size and power, the Supreme Court and lower courts have struggled for thirty years to discern the proper limits to deference and balance of power between the branches of government in agency decision making" (Sweeney, 148).

The lack of clear limits to the bounds of *Chevron* is true in the application to matters related to immigration and specifically questions surrounding refugee adjudication. In that respect, "[…] *Chevron* […] dictates the rigor with which courts review published [BIA] and Attorney General decisions interpreting the provisions defining eligibility for protection" (*Id.* at 30). There is substantial precedent from the Supreme Court that deals with specific questions that attempt to address the extent and limitations of *Chevron* in the context of the Refugee Act and the Protocol.

The first challenge to the BIA's implementation of refugee provisions came before the Supreme Court only two years after their initial decision in *Chevron.* In *Immigration and*

Naturalization Service v. Cardoza-Fonseca, the respondent was granted relief based on the decision of the United States Court of Appeals for the Ninth Circuit (hereinafter the Ninth Circuit) which reversed a decision by an immigration judge that was also previously affirmed by the BIA. In their opinion, the Ninth Circuit found that the immigration judge and the BIA erred in their decision to apply the standard for withholding of removal in an asylum request that "[…] requires that the Attorney General [to] withhold deportation of an alien who demonstrates that 'it is more likely than not that the alien would be subject to persecution' in the country to which he would be returned" (*INS v. Cardoza-Fonseca,* 480 U.S. 421, 421 (1987)). According to the Ninth Circuit, rather than applying the withholding of removal standard, the appropriate threshold that should have been applied is a well-founded fear of persecution provision from the Protocol and Refugee Act of 1980.

The Supreme Court affirmed the Ninth Circuit's decisions and emphasized in its reasoning that "[…] the abundant evidence of an intent to conform the definition of 'refugee' and our asylum law to the United Nations Protocol to which the United States has been bound since 1968 […]" (*INS v. Cardoza-Fonseca,* 480 U.S. 421, 432-433 (1987)). It is important to mention that the Court only distinguished between which standard of review ought to be applied in asylum adjudication. The Court did not further comment on the "well founded fear" standard. However, the majority decision did "[…] offered the observation that the [X] phrase was ambiguous and that courts would need to respect the agency's adjudicatory interpretations giving it concrete meaning case by case, citing to *Chevron* — a good indication that the Court was assuming that the *Chevron* deference would apply to the agency's decisions interpreting a well-founded fear (though it did not say so directly)" (Sweeney, 159). In hindsight, the conclusion reached by the Supreme Court in *INS v. Cardoza-Fonseca* appears to be somewhat ambiguous. It

fails to address the relationship between and possible conflict in the interpretation of the phrase as part of a, arguably, a greater obligation by the U.S. as a State Party (one of almost 150) to a multilateral treaty, and a domestic policy question based upon the interpretations of political appointees (the attorney general and the BIA). Despite these ambiguities, "[…] U.S. courts have been laboring under the mistaken perception that they are bound, under the *Chevron* doctrine, to defer to the BIA's construction of U.S. refugee statutes, regardless of whether that construction is consistent with international law" (Farbenblum, 1064).

Furthermore, jurisprudence from the Supreme Court has not been entirely consistent in its mechanisms aimed at construing ambiguous provisions of the Act and Protocol. Moreover, the Court's approach in terms of assessing the relationship between domestic and international refugee law has, similarly, been unclear. The lack of clarity and, arguably, inconsistency in the analysis are highlighted in *Immigration and Naturalization Service v. Aguirre-Aguirre*, 526 U.S. 415 (1999). The case addressed questions surrounding the definition of "serious nonpolitical crimes" provision — domestic provision INA § 243(h)(2)(C) which "[…] mirrors Article 1F(b) of the Convention" (Farbenblum, 1089). These provisions stipulate that individuals who are found to have committed serious non-political crimes prior to their arrival in the U.S. can subsequently be ineligible for withholding of removal.

Initially, *Aguirre-Aguirre* was granted asylum based on a well-founded fear of prosecution based on the respondent's political opinion. This decision was later overturned by the BIA which defined the serious nonpolitical crime provision utilizing a balancing test it had previously established in a different case that looked at the character of the alleged crime and the political nature thereof. Upon appeal, the BIA's decision in *Aguirre-Aguirre* was reversed by the Ninth Circuit Court. Interestingly, the judges of the Ninth Circuit made no reference to *Chevron* in their

decision. Rather, the Court "[…] rejected the BIA's test [and instead] held that because Congress intended the nonpolitical crimes exception to be consistent with Article 1F(b) of the Convention, the BIA should have considered additional factors enumerated in the UNHCR Handbook" (Farbenblum, 1090). Based on guidance from the Handbook, the Court developed a three-pronged test to address the ambiguity of the serious nonpolitical crimes provision.

However, on final appeal, the Supreme Court determined that the Ninth Circuit erred in its judgment. The unanimous decision by the Court, unlike that of the Ninth Circuit, is heavily reliant on the *Chevron* doctrine. The BIA's interpretation of the provision was permissible based on the notion that it "[…] gives ambiguous statutory terms meaning through a process of case-by-case adjudication" (*INS v. Aguirre-Aguirre*, 526 U.S. 415, 416). The Court additionally relied on the precedent from *Cardoza-Fonseca* and echoes the sentiment regarding the intent by Congress to bring the U.S. into compliance with its obligations under international law. The Court further rejected the Ninth Circuit's reliance on the Handbook. Farbenblum argues that "[i]nstead of locating the UNHCR's position within a broader international jurisprudential context, [the Supreme Court] simply concluded that because the Handbook was not directly binding on U.S. courts, it could not constrain the BIA's interpretation of the corresponding domestic statute" (Farbenblum, 1090).

The most recent instance of the Supreme Court attempting to answer a question related to the Protocol/Convention was in the case *Negusie v. Holder*, 555 U.S. 511 (2009). The case centered around the "prosecutor bar" — a provision of Immigration and Naturalization Act that dictates that individuals who participated in the prosecution of others are not eligible for withholding of removal or asylum. The Court was presented with the specific question of whether the prosecutor bar is applicable when the participation of an individual seeking asylum

occurred under duress or coercion. Although the exact language of the prosecutor bar is not evident in the text of the Convention/Protocol, […] the statute's legislative history indicates that Congress intended it to comport with principles underlying Article 1F(a) of the Convention" (Farbenblum, 1093).

The BIA issued an opinion, that was affirmed by the United States Court of Appeals for the Fifth Circuit (hereinafter Fifth Circuit), that the prosecutor bar applied even when it is apparent that the individual was coerced or acted under duress. However, the Supreme Court remanded the case to the BIA based on its decision that the BIA and the Fifth Circuit erred in their application of *Fedorenko v. United States*, 449 U.S. 490 (1981). The *Fedorenko* precedent barred those who, voluntarily or not, participated in Nazi persecution during WWII from obtaining visas to the U.S. The decision in *Fedorenko* was based on a provision in the Displaced Persons Act of 1948 — and not the Protocol/Convention. Citing *Chevron* and *INS v. Ventura*, 537 U.S. 12 (2002) (appellate courts ought to remand cases to the appropriate agency for review). Therefore, the majority "[…] held in *Negusie* that because the BIA had mechanically applied *Fedorenko*, it should have an opportunity to determine "in the first instance" the legal question of whether the INS' prosecutor bar applies to actions committed under duress" (Farbenblum, 1094).

The Court, once again, acknowledged that congressional intent is to conform its refugee policies to the standard set forth in the Protocol, but they did not directly address Article 1F(a). It further distinguished the case from the *Cardoza-Fonseca* decision on the basis that Congress did not directly address the exact question at hand (the prosecutor bar) (*Negusie v. Holder*, 555 U.S. 511, 517 (2009)). It is important to mention certain aspects of Justice Stevens' dissent in part, in which he criticized the majority for "[…] broadening of the ambit of agency deference as being inconsistent with *Cardoza-Fonseca*" (Farbenblum, 1095). He also addressed the congressional intent

to conform domestic refugee law to provisions of the Protocol/Convention. He argued that this intent encompassed Article 1F(a) that, as mentioned earlier, exempts individuals who are coerced to participate in the prosecution of others from being denied asylum solely on the grounds of that participation. Most importantly, Justice Stevens expressed that "Congress' effort to conform United States law to the standard outlined in the U. N. Convention and Protocol […] underscores that Congress did not delegate the question presented by this case to the agency" (*Negusie v. Holder*, 555 U.S. 511).

These cases highlight the inconsistent application of the *Chevron* doctrine in cases concerning provisions of the refugee Protocol/Convention. The deference under *Chevron* to the BIA and attorney general "[…] leans toward a generous standard that allows the Executive substantial latitude" (Sweeney, 164). Subsequently, this insistency and deference have allowed the executive branch to substantially influence the refugee policy of the United States. This encompasses the inclusion or exclusion of gender as a protected class under the language of the Protocol. The Supreme Court has not addressed this question specifically, but political changes in the executive branch (including the position of the attorney general and the composition of the BIA) lead to uncertainty surrounding gender and asylum claims. Since this question has not been at the forefront of the debate for a long time, it is interesting to look at the particulate shifts that occurred over the past few presidential administrations.

7.0 APPLICATION OF LEGAL THEORY AND PRECEDENT

7.1 Early Years of Gender-related Claims

In 1996, the U.S. Immigration and Naturalization Service (hereinafter INS), the predecessor to the USCIS, issued the *Considerations for Asylum Officers Adjudicating Asylum Claims from Women* (hereinafter the Considerations), which represented "[…] non-binding guidance directed to Asylum Officers, who form the first tier of decision-making in the US system" (Musalo, 52) in affirmative asylum applications. The Considerations, bedsides being non-binding for asylum officers, were not directed towards immigration officers or the BIA and U.S. Circuit Courts who are responsible for adjudicating defensive asylum cases (cases in which the individual is removal proceedings). The Considerations drew upon and were, in part, based on guidance from several UNHCR documents and Canadian guidelines. The Considerations, amongst other things, acknowledged that male and female asylum claims are similar, but women "[…] may also have had experiences that are particular to their gender [based on] laws and customs of some countries contain[ing] gender-discriminatory provisions" (INS, 4). The Considerations, issued by the INS included a list of specific examples of crimes that disproportionately affect women and may rise to the level of prosecution as understood under the Protocol and Act. These include "[…] rape (including mass rape in, for example, Bosnia), sexual abuse and domestic violence, infanticide and genital mutilation […]" (INS, 4).

The *Matter of Kasinga* involved a woman from Togo who arrived in the U.S. with fake documentation and applied for asylum. She fled Togo and applied for asylum based on the fact that as "[…] a member of the Tchamba–Kunsuntu tribe; social customs required FGC [female genital cutting] and forced polygamous marriages [and] [v]iolence against women, including wife-beating, was pervasive, and the authorities did little to protect women from such

treatment" (Musalo, 53-54). Because the petitioner entered the U.S. with fake documents, she was placed in removal proceedings before an immigration judge. As such, the Considerations that were issued by the government a few months earlier and that explicitly mentioned FGM did not apply.

The immigration judge denied the application for asylum for two reasons: first, the judge did not find her account of a well-founded fear of prosecution credible. Second, the judge inferred that even if he did determine that her claim was credible, it was not prosecutorial in nature because all members of the petitioner's ethnic group are expected to undergo FGC, arguably, implying that the custom cannot be persecutory. After all, it is a common cultural practice amongst the petitioner's ethnic groups.

On appeal, the BIA reached a landmark decision in which the petitioner was granted asylum. The decision is important due to several factors. Initially, the INS rejected an offer to submit a brief, but, after public pressure, they submitted a brief. The INS rejected the immigration judge's credibility assessment and advocated that the petitioner had a reasonable basis for claiming asylum. However, contrary to the petitioner's counsel, they argued that a favorable outcome would necessitate a new interpretation of persecution. However, the BIA sided with the petitioner. The decision "[…] found FGC to be persecution, notwithstanding the fact that it is a widely condoned cultural practice […] recognized that social groups could be defined in reference to gender and it did so in a case involving non-state actors [and] it had no difficulty finding a nexus between the persecution and the social group membership" (Musalo, 55). The decision in *Matter of Kasinga* brought the U.S. a step closer to fulfilling its obligation under the Protocol/Convention, thereby bringing domestic asylum policy in-line with guidance issued by the UNHCR.

The progress towards recognizing gender-based claims was stifled in the 1999 case *Matter of R-A-*. The petitioner sought asylum in the U.S. on the basis that she suffered severe domestic abuse from her husband in Guatemala. Upon failing to receive any protection from the Guatemalan government and judiciary, that viewed the disputed as a solely a private matter that did not warrant official intervention, the petitioner applied for asylum in the U.S. Her petition was based on her fear of prosecution from her husband and inadequate response from Guatemala. Initially, this petition was granted and the immigration judge "[…] ruled that the applicant's gender and prior association with her husband were characteristics that she could not or should not be expected to change" rendering "[…] Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" (McKinnon, 188) to be a particular social group as defined by the Protocol and Act.

The BIA reversed the immigration judge's ruling. The BIA accepted the facts in the case; the fact that the petitioner suffered egregious abuse and that the Guatemalan government failed to protect the petitioner. However, they overturned the decision. However, the BIA overturned the decision based on the fact that the petitioner failed to establish that 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' is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala" (*Matter of R-A-*, BIA 1999, 918). Moreover, this decision highlighted that besides possessing an immutable characteristic, the petitioner has to establish that the social group possessed *social visibility* and *particularity*. This decision departed from the *Matter of Kasinga,* insofar that it did not take into consideration the societal context in establishing

the nexus between the particular social group and the prosecution. In the *Matter of R-A-*, the BIA argued "[…] that the motivation of the Government in failing to protect cannot be used to establish the motivation of the actual persecutor" (Musalo, 58).

The decision was highly criticized which prompted Janet Reno, the attorney general under President Bill Clinton (D) to propose regulations to address situations such as the one presented in the *Matter of R-A-*. Furthermore, Reno "[…] evaluated the case and remanded the case to the BIA with suggestions for how [the petitioner's] claim should be affirmatively evaluated" (McKinnon, 193). However, after the 2000 presidential elections and change in administration, the regulations proposed by Attorney General Reno were not implemented. That is until 2003 when George W. Bush's (R) Attorney General John Ashcroft certified the case to himself and "[i]n an unanticipated development, the Government – which had appealed the original grant of asylum to Ms. Alvarado – now filed a brief arguing that she had 'established statutory eligibility for asylum'" (Musalo, 58-59). In their brief, the government argued that the petitioner had successfully established both membership to a particular group (married women in Guatemala who are unable to leave the relationship) and a nexus between the membership and the prosecution she had endured. This move rejected the BIA's previous assertion and interpretation that a particular group required *social visibility* and *particularity.* Instead, the presence of an immutable characteristic would suffice. However, Attorney General Ashcroft followed the course of action of his predecessor. But, once again, the regulations were not finalized. President Bush's last Attorney General Michael Mukasey in 2008 (some 9 years later), "[…] took jurisdiction over the case [and] ruled that it was not necessary for the BIA to await finalized regulations, and he made a joint request [with the petitioner] to send the case back to an [immigration judge] for the submission of additional evidence and legal arguments" (Musalo,

59-60). The petitioner would not be granted asylum during the two-term presidency of George W. Bush.

However, the matter was not resolved in either President Clinton's final years or President Bush's two-term presidency. This could be, in part, attributed to allegations that the Bush DOJ engaged in politically motivated hiring and demotions in order to promote the desired agenda. Evidence from "[….] investigations by the Inspector General and the Office of Professional Responsibility found that the Bush Administration relied on improper political considerations to hire immigration judges more likely to agree with the administration's immigration policies" (Sweeney, 143-144).

7.2 A Shift Towards Recognition of Gender-based Claims

The Matter of R-A- had been adjudicated for about 10 years when a major shift in policy occurred. The shift can be attributed to the election of President Barack Obama (D). The Matter of L-R- case, similarly dealt with a Mexican woman claiming asylum based on the severe domestic abuse and inability of the Mexican government to provide her with protection. Her claim was initially denied in 2007 by an immigration judge because the petitioner did not establish membership to a particular social group or a nexus. The government, under George W. Bush, supported the judge's decision to deny relief. A major shift occurred, when attorneys for the Obama Administration "[…] explained how intimate violence could be grounds for asylum under the statutes if their experiences meet the standards of harm and lack of protection in their country" (McKinnon, 193). The brief submitted by the Obama Administration could not ignore the previous precedent and jurisprudence of social visibility and particularly, hence, the brief argued for possible ways in which victims of domestic violence can establish those categories. Furthermore, the brief addressed how these policy shifts would bring the U.S. closer into

compliance with its international obligations as outlined by the UNHCR. Ultimately, through the intervention of the Obama Administration, both the Matter of R-A- and the Matter of L-R- were resolved by an immigration judge granting asylum by discretion in 2009 and 2010 respectively. The brief in Matter of L-R- had a significant impact on the favorable decision.

The decisions in these cases did not, however, establish a precedential decision that would represent an authoritative source. This is because "[…] a limited number of BIA decisions rendered by a three-member panel or by the board *en banc* are designated as precedential" (Farbenblum, 1072-1073). The BIA did not establish a precedent that would allow other victims of domestic violence to request asylum in the U.S. This changed in 2014, in the case *Matter of A-R-C-G-*. The petitioner first entered the U.S. after years of abuse at the hands of her husband in Guatemala. Her request was initially denied by an immigration judge, who opined that what the petitioner experienced in Guatemala was not prosecution "[…] rather, it was a series of 'criminal acts' [and] membership in her proffered particular social group was not the 'reason' that she suffered the abuse — her husband acted 'arbitrarily' and 'without reason'" (128 Harv. L. Rev. 2090, 2091).

The petitioner appealed to the BIA which determined, in part based on the decision in Matter of R-A-, that women who suffer domestic abuse can constitute a particular social group. The BIA performed an analysis that included a three-pronged test aimed at clarifying the appropriate method and standard to determine membership to a particular social group in domestic violence claims. The first prong is immutable characteristics, which in this case are the gender of the petitioner and her marital status. Marital status was included based on the determination from the fact in the case that is it reasonable to assume that the petitioner could not leave the marriage without suffering possibly life-threatening repercussions. Second, the BIA

agreed that the group exemplified particularity insofar that "[…] terms used to describe the group — 'married,' 'women,' and 'unable to leave the relationship' — have commonly accepted definitions within Guatemalan society based on the facts in this case […]" (26 I&N Dec. 388, BIA 2014, 393). Third, the group is socially distinct, particularly when observing sociopolitical factors in Guatemala and the position of the particular social group within the social hierarchy. Finally, the BIA concluded that the petitioner has experienced persecution, in part, based on her membership in the group. The decision in the Matter of "[…] *A-R-C-G-* is the first published precedential decision from the Board that affirms the validity of a particular social group encompassing victims of domestic violence" (128 Harv. L. Rev. 2090, 2093).

The decision in *Matter of A-R-C-G-* did leave some questions unanswered, for example how this decision would affect domestic violence in other countries where government inaction is evident. However, it is a groundbreaking decision that has the gravity to impact the decisions of immigration judges across the U.S. It is also important that even after the decision, several immigration judges continued to issue unfavorable decisions in domestic violence-related asylum applications due to a plethora of reasons, many of which remain permissible in light of the precedent set in *Matter of A-R-C-G-*. This addressed the concerns of critics, highlighting that "[…] decision was not likely to open any immigration floodgates [in part because] abuse victims will still have to meet other rigorous requirements" (Preston, 2014). The decision in the case was handed down in late August of 2014 in the second half of President Obama's second term. The upcoming presidential election would have immigration at its forefront. It is difficult to overstate the impact that the outcome of the election would have on immigration, particularly the U.S. refugee policy, considering the influence of the executive branch over these policy areas.

7.3 Rollback of Protections

One of the most important policy areas of presidential candidate Donald Trump (R) was his strong stance on immigration and specifically illegal immigration. However, upon winning the 2016 presidential election against Hillary Clinton, some of his first actions as President were directed towards U.S. refugee policy. Within the first week of President Trump assuming the office, he issued the controversial Executive Order 13769 which banned the admission of refugees from war-torn Syria, temporarily suspended all refugee admissions, and lowered the annual admission of refugees. The first and second iteration of the Executive Order was struck down by Courts due to the travel-ban provision, which banned the entry of individuals from seven Muslim majority countries. However, the third version was ultimately upheld by the Supreme Court in a 5-4 decision in *Trump v. Hawaii*, 585 U.S. ___ (2018). This has resulted in "[…] the lowest-ever yearly target for refugee admissions in 2018 (45,000), admitted less than half that small number in fiscal year, and then slashed the limit for 2019 to two-thirds of the 2018 target (30,000)" (Sweeney, 136).

President Trump appointed his first attorney general, who similarly, built his political reputation on his tough stance on illegal immigration. Upon assuming the position of attorney general, a position he held for less than two years, Jeff Sessions made sweeping changes to the immigration system — a system which he described was '"subject to rampant abuse and fraud' […] by 'dirty immigration lawyers who are encouraging their otherwise unlawfully present clients to make false claims of asylum providing them with the magic words needed to trigger the credible fear process.'" (Sweeney, 137). Similar to the credible accusations made against the Bush DOJ, Sessions has also been accused of appointing judges to immigration courts and the BIA that would render decisions that conform to the political goals of the Department and, more

broadly, the whole administration. This resulted in the introduction of policies, such as the "zero-tolerance" policy which, according to some predictions, resulted in the criminal prosecution of almost 90 percent of potential refugees (Sweeney, 137).

Furthermore, Attorney General Sessions severely limited the ability of petitioners to establish a credible claim for asylum based on prosecution from non-governmental/non-state actors. This policy was introduced in an unusual move in which Attorney General Sessions overturned the 2016 decision of the BIA in the *Matter of A-G-,* a case in which a Salvadoran woman who suffered domestic violence was granted asylum based on the decision in. In the decision, Session directly addressed and declared that the 2014 decision in *Matter of A-R-C-G-* was wrongly decided and should not have been issued as a precedential decision. The decision in the *Matter of A-G-* was written "[…] with sweeping language designed to preclude virtually all similar future claims, as well as all those arising from persecution by gangs" (Sweeney, 137-138). This virtually reversed almost 20 years of progress across three different administrations (both Republican and Democratic) towards recognizing gender under the provision of the Refugee Act and Protocol. The argument was based on the notion applicants who want to establish prosecution based on being victims of domestic violence, what Sessions described as a "[…] private criminal activity [….] must show that the government condoned the private actions or demonstrated an inability to protect the victims" (27 I&N Dec. 316, A.G. 2018).

Attorney General Sessions would leave this position in November of 2018 after criticism from President Trump who stated in an interview that amongst other reasons he is not "[…] happy at the border […]" (Miller, 2018). Nonetheless, Sessions was able to profoundly impact and alter the refugee jurisprudence, precedent, and mechanisms in place in the U.S. in less than two years in the role. His actions are expected to adversely affect female asylum seekers from

Central America who have relied on the precedent in *Matter of A-R-C-G-* to escape violence in the eyes of inaction from their respective governments. This further highlights how this policy area is easily changed through the actions of a single political appointee.

8.0 CONCLUSION

This paper illustrated the complexity of the interaction between international law and U.S. policy. Constitutional provisions appear self-explanatory at first but ultimately fail to provide a clear pathway and mechanism to navigate possible discrepancies and conflicts between the two sources of law. Jurisprudence from the Supreme Court aimed to establish some clarity and precedent in understanding the intricate route regarding the incorporation of international law into U.S. law. International law often is merely a persuasive source of law, rather than an authoritative or guiding principle. To be an authoritative source of law, an intentional treaty has to be self-executing and if not it requires the passage of accompanying domestic legislation.

This paper applied those constitutional and jurisprudential standards to one of the most intertwined areas of international and domestic law -- the law governing refugee and asylum adjudication. It is clear from precedent from the Supreme Court that the Protocol is not self-executing. However, Congress in the 1980 passed legislation that was specifically intended to bring the U.S. into compliance with its international obligations agreed upon with the ratification of the Protocol. It did this by including the exact language of particular articles of the Protocol into the text of the Act. Thus the Refugee Act of 1980 included, most notably, and incorporated the exact definition of a refugee as the one in the Protocol.

Furthermore, this paper highlighted that even though the inclusion of gender in refugee claims was not explicitly induced in the text of the Protocol, the UNHCR in 1985 first recognized the possibility of adjudicating gendered asylum claims under the particular social group category of the Protocol. As with many things in international law, the UNHCR does not possess the capacity to ensure that state parties are abiding by their obligation under the Protocol.

Finally, the current status quo of the U.S. immigration system is disproportionately skewed towards giving overarching powers to the executive branch (particularly the attorney general and the BIA). Congressional intent in this matter was clear. The intent behind ratifying the Protocol and passing the Refugee Act was to bring the U.S. into conformity with its international refugee obligation. The road towards acceptance of gendered claims in the U.S. has been mixed. Beginning in the mid-1990s, the U.S. appeared to follow the guidance issued by the UNHCR. However, indisputable recognition did not occur until 2014 during the Obama presidency, when the BIA in the *Matter of A-R-C-G-* recognized domestic violence victims as potentially falling within the particular social group category. Ultimately, in 2016, Attorney General Jeff Sessions by overturning the decision in the *Matter of A-G-* declared that the *Matter of A-R-C-G-* was wrongly decided. This decision practically propelled the U.S. back to square one in the two-decade-long process of recognizing gendered asylum claims.

Attorney General Sessions's and his predecessors' actions were legal under the current statutes. Current laws give the executive branch (particularly the attorney general and the BIA) the directive to influence the adjudication of asylum/refugee cases. Hence, decades of progress in recognizing the unique situation of women within the refugee framework were reversed based on the potential for political gains. Therefore, this illustrates the necessity for Congress to employ its plenary power and introduce a mechanism for asylum/refugee adjudication that operates independently and beyond the purview of the executive branch. This view is supported by the National Association of Immigration Judges, "[....] the American Bar Association, the Federal Bar Association, and an increasing number of other organizations, jurists, and legislators." (Sweeney, 130). This approach would, arguably, provide for more stable and

apolitical adjudication of refugee claims that aim to provide protection provided under international law to some of the world's most vulnerable groups of people.

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