

REPORT SUMMARY & UPDATE

Eroded U.S. Asylum Protections for Gender Based Violence Survivors

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Submitting Organizations:

MADRE; Contact: JM Kirby, <http://madre.org>, advocacy@madre.org, 121 W 27th St., New York, NY 10001¹

Human Rights and Gender Justice Clinic, CUNY School of Law; Contact: Lisa Davis, <http://law.cuny.edu/academics/clinics/hrgj>, davisl@law.cuny.edu, 2 Court Sq., Long Island City, NY 11101²

Center for Gender & Refugee Studies; Contact: Kate Jastram, jastramkate@uchastings.edu, <https://cgrs.uchastings.edu/>, 200 McAllister St., San Francisco, CA 94102³

Florence Immigrant and Refugee Rights Project; Contact: Lauren Dasse, ldasse@firrp.org, Laura St. John, lstjohn@firrp.org, <https://firrp.org/>, P.O. Box 86299, Tucson, AZ 85754⁴

This briefing summarizes and updates a [report](#) on human rights violations committed by the Government of the United States of America (U.S.) against asylum seekers who are fleeing gender-based violence (GBV). Since the U.S.'s 2015 Universal Periodic Review (UPR), human rights conditions have dramatically worsened for asylum seekers, in contravention of member states' recommendations.⁵ New policies and practices aimed at curbing asylum overall have disproportionately harmed GBV survivors. A 2018 decision by the U.S. Attorney General, *Matter of A-B-* has directly led to the denial of asylum grants for women GBV survivors who would have previously been granted asylum. Together with longstanding barriers to due process in the asylum system that have thwarted GBV asylum seekers' claims for decades, the U.S. is effectively shutting down its protection system for a population that human rights law recognizes as especially vulnerable. Since the start of the COVID-19 pandemic, instead of alleviating hazardous health conditions in detention centers and cross-border camps where asylum seekers await processing, the administration has acted to all but eliminate asylum, and to cement the notion that GBV is "private violence" that does not merit state action.

Background

Violence against women and girls for reasons of their gender is a recognized push factor for migration and a well-known risk in transit.⁶ In the last decade, increasing numbers of people, particularly women and children from Mexico and Northern Central America, have sought asylum at the U.S.-Mexico border, fleeing uncontrolled violence, including severe domestic violence and other forms of gender-based persecution.⁷ Like other asylum applicants, GBV survivors face extreme hardship applying for asylum in the U.S. due to longstanding unfair policies and practices, as well as the Trump administration's anti-immigrant policies.⁸ However, they face additional and specific barriers where their claims are premised on being a member of a "particular social group" that has experienced persecution, which is the most common enumerated ground applied in GBV cases.⁹ Many remain in prolonged detention during the asylum application process where they experience re-traumatization so severe they consider abandoning their asylum claims despite their fear. They would face serious danger of physical and sexual assault and even death if deported to their home countries, where levels of violence amid impunity have only intensified since many fled to the U.S.¹⁰

Matter of A-B-

In 2018, former Attorney General Jeff Sessions issued *Matter of A-B-*, vacating *Matter of A-R-C-G*, a decision that clearly recognized that women survivors of domestic violence may establish eligibility for asylum.¹¹ In his decision, Sessions made the sweeping pronouncement that "[g]enerally, claims by aliens pertaining to domestic violence or gang violence perpetrated by non-governmental actors will not qualify for asylum."¹² The effect was catastrophic. With regard to merits hearings, grant rates for asylum seekers from Northern Central American countries dropped a full ten points in the first six months after the decision,¹³ and were down by fifty percent from August 2019 to June 2020 as compared to 2016.¹⁴ Several federal courts have found Sessions's ruling faulty and emphasized that blanket denial of asylum based on domestic violence claims is illegal, yet many survivors are wrongfully denied asylum as a result of *Matter of A-B-*, and the decision has not been overruled by any federal court reviewing the merits of a claim.¹⁵ As part of proposed new regulations,¹⁶ described further below, that would largely eviscerate asylum

protections for those seeking protection in the U.S., the Trump administration is seeking to codify *Matter of A-B-*, and introduce new barriers to asylum that harm GBV survivors' due process rights.¹⁷ Attorney General William Barr recently issued yet another decision, *Matter of A-C-A-A*,¹⁸ vacating a decision to grant asylum to a Salvadoran woman fleeing gender-based persecution. The decision places new burdens on all asylum seekers seeking to appeal negative case outcomes¹⁹ in a system marked by arbitrary judicial decision-making. (*See below, p. 6*) Citing *A-B-*, the decision also contains language that may be interpreted as limiting GBV survivors' ability to seek asylum, and reiterates the current administration's framing of GBV as "private" violence that fails to meet nexus standards required to find an individual was persecuted as a member of a particular social group.²⁰

Other recent policies disproportionately impacting asylum seekers fleeing GBV

Starting since at least 2016, the U.S. departed from its longstanding practice of timely processing individuals who come to a land port of entry seeking asylum by implementing a policy of "metering," whereby only a small number of asylum seekers may enter U.S. territory per day.²¹ U.S. Customs and Border Patrol (CBP) stops migrants from entering and forces them to wait weeks or even months in Mexico, where they are vulnerable to predation by violent criminal groups, before requesting asylum.²²

Another unprecedented policy called the "Migrant Protection Protocols" (MPP) forcibly sends asylum seekers who have been processed by CBP to Mexico pending their immigration hearings, which could be for well over a year.²³ With MPP hearings suspended due to the pandemic, the wait is now indefinite.²⁴ These policies place asylum seekers at risk of further violence in Mexico, including sexual violence.²⁵ Those removed under MPP must periodically travel from Mexican border cities to courthouses in downtown U.S. cities, often for early morning court appearances.²⁶ When combined with waiting periods stretching from months to over a year, the secondary effects of MPP have led to a dramatic negative trend in legal outcomes for affected asylum seekers.²⁷ Similarly, a July 2019 DHS and DOJ regulation that contradicts longstanding U.S. law by barring asylum for those who have transited a third country en route to the U.S. also led to a steep increase in asylum denials, although the policy was vacated by a Federal court in June 2020.²⁸

Policies Introduced Since March 2020

Even as it should have been apparent that conditions in immigrant detention centers in the U.S. and makeshift encampments in Mexico were ripe for spreading COVID-19, the U.S. Government has worsened public health conditions for asylum seekers and their communities,²⁹ and leveraged the pandemic to institute draconian barriers to asylum. In March 2020, citing the COVID-19 pandemic, the U.S. Centers for Disease Control and Prevention issued an interim final rule and an order limiting entry to the U.S. by undocumented asylum seekers.³⁰ U.S. Department of Homeland Security (DHS) interpreted the rule to permit "expulsions" of asylum seekers at the southern border with no due process, effectively shutting down asylum at the border, and "expelling" over 40,000 individuals within the first three months of the order.³¹ The U.S.' ongoing deportation practices furthered the spread of COVID-19 in countries with weak health systems.³² In July, the Trump administration proposed another regulation,³³ that would use pretextual public health concerns to classify entire categories of asylum seekers (all those from a particular country, for example) as a

national security threat. Once in effect, it would bar asylum seekers from seeking protection in the U.S. even on the basis of having simply traveled through a country where an infectious disease is present.³⁴

Further troubling, on June 15, DHS and the U.S. Department of Justice (DOJ) proposed a lengthy new regulation³⁵ that would nearly eliminate asylum protections in the U.S., and would pose specific barriers to those fleeing GBV, including by codifying *Matter of A-B*.³⁶ Among its many harmful provisions, the rule substantially heightens standards for credible fear interviews, which are meant to be inclusive in order to avoid *refoulement* at an early stage in the asylum process.³⁷ It requires asylum officers to consider internal relocation as a possible bar in this preliminary stage, for example, and discounts persecution by “private actors” in relation to a victim’s inability to safely relocate within her country of origin, by shifting the burden of proof and requiring her to show the government “sponsored” the “private actor,” with “sponsorship” undefined.³⁸ The rule provides that when gender is a factor in the applicant’s persecution, it will generally be impossible to show that the persecution was on account of one of the five enumerated grounds.³⁹ The rule also allows judges to “pretermite” a case, and deny asylum with no hearing, based solely on an initial written application generally submitted *pro se* before an asylum seeker has access to guidance or interpretation.⁴⁰ For this complicated proposed rule representing an overhaul of the asylum system and redefining legal terms in the refugee definition in a manner directly contrary to UNHCR guidance, the Government allowed only 30 days for public comment. So great was public alarm over this unprecedented attack on asylum that over 86,000 comments opposing the new regulations were submitted.⁴¹ In late September, the DOJ again proposed a regulation with only a 30-day public comment period, that severely curtails asylum seekers’ ability to present their cases by, among other new due process barriers, allowing only fifteen days to file an asylum application.⁴²

Longstanding Policies and Practices Deny GBV Survivors’ Right to Seek Asylum

Longstanding due process violations at every stage of the asylum process further violate asylum seekers’ rights, severely impeding GBV survivors’ ability to mount an effective asylum claim, or even to make a claim at all.

Detention of Asylum Seekers Fleeing GBV

The U.S. has a long history of detaining asylum seekers for months or years by failing to properly implement parole for asylum seekers arriving at ports of entry. Under a 2017 Executive Order by the Trump administration, they are now hardly ever released on parole.⁴³ Women have tended to spend disproportionate lengths of time in detention, with their average length of stay prior to the 2017 Executive Order varying between ten to eighteen percent longer than men’s.⁴⁴ The Trump administration, which has resorted to draconian detention policies for asylum seekers out of step with U.S. policies and international law,⁴⁵ has been explicit that it is using detention to punish asylum seekers and send a message of deterrence.⁴⁶ To escape the harmful physical and mental health impacts of detention conditions, some GBV trauma survivors have understandably waived their right to appeal erroneous asylum decisions in order to leave detention, despite facing extreme danger upon deportation.⁴⁷ Recently, the Federal Court of Canada struck down the Safe Third Country Agreement between the U.S. and Canada for violating the Canadian Charter of Rights and Freedoms, finding the U.S.’ imprisonment of asylum seekers deprives their right to liberty,

and noting the “related harms regarding the conditions of detention and the heightened risk of *refoulement*.”⁴⁸

Denying GBV Asylum Seekers the Right to Establish a “Credible Fear” of Persecution

U.S. law requires that a person subject to expedited removal must be asked whether they fear return. Anyone who expresses such a fear must be given a “credible fear” interview with an asylum officer, then appear before an immigration judge for a full hearing on the merits of their claim if found to meet this preliminary standard. U.S. Customs and Border Patrol (CBP) officers often fail to refer individuals with viable asylum cases for credible fear interviews, provide false information to asylum seekers,⁴⁹ and even populate forms with inaccurate, misleading, or false information.⁵⁰ CBP officers have reportedly accused GBV survivors seeking asylum of “lying about their fears of return,” and have told them that “they do not have rights, and that they will be deported no matter what they say.”⁵¹

Lack of Psycho-Social Support and Trauma-Informed Approaches for GBV Survivors During Asylum Application Process

Throughout the asylum process, applicants are not offered adequate privacy or psychosocial support. Initial screenings in the asylum process are often conducted in open, non-confidential spaces by armed, uniformed CBP officers who lack adequate training in victim assistance, GBV and trauma.⁵² During this stage and at other stages in the asylum process, to make an effective claim, GBV survivors must disclose traumatic experiences, which often involving physical and sexual violence, and their children may be present during the initial screening.⁵³ Immigration detention facilities across the U.S. lack adequate mental health services,⁵⁴ leaving detained GBV survivors with little to no psycho-social support as their cases are processed.⁵⁵ Women trauma survivors placed in expedited removal proceedings have told advocates that they could not describe their stories of abuse to asylum officers or immigration judges because of the trauma’s severity, a situation that resulted in deportation for many of them.⁵⁶ Despite being trained to conduct trauma-informed interviews, asylum officers continue to fail to adequately identify bona fide asylum seekers during the credible fear process, for reasons including their inability to build rapport with applicants, and the use of telephonic interviews that hinder trust building.⁵⁷ Such conditions discouraging disclosure can harm asylum seekers fleeing GBV at later stages of the asylum process if an immigration judge finds their testimony to be inconsistent.⁵⁸

Lack of Interpretation Services

Inadequate language interpretation limits many asylum seekers’ ability to communicate their fear.⁵⁹ The ability to communicate this fear upon presentation at the point of entry or upon apprehension by CBP is critical, as it determines whether asylum seekers actually get an opportunity to make their case to an asylum officer or before an immigration judge.⁶⁰ If referred for a credible fear interview, they often must undergo an interview with an asylum officer by telephone from semi-public areas in detention centers, and many women asylum seekers have reported not being able to hear USCIS interviewers or interpreters properly.⁶¹ Those who speak Indigenous languages are particularly harmed, and can even face longer detention times.⁶² This

undermines their ability to obtain relief, and in some cases, has resulted in the erroneous deportations of mothers and children who are unable to communicate their fear to officials.⁶³

Lack of Legal Representation

Seeking asylum in the United States involves navigating a complex legal system, and success during a hearing frequently depends on whether applicants have a competent lawyer,⁶⁴ a prohibitive cost, particularly for detained asylum seekers.⁶⁵ Many asylum seekers go without legal representation.⁶⁶ For those made to wait in Mexico, where many endure inadequate access to food and shelter, as well as targeting by criminal gangs, finding legal representation is a challenge, and only 9.3 % are represented by lawyers.⁶⁷

Arbitrary Case Adjudication

If asylum seekers make it to the adjudication process, winning one's asylum case often depends on the immigration judge assigned to the case and their personal predilections, instead of the merits of the claim and an objective application of the law to the facts.⁶⁸ Denial rates vary widely across immigration courts and even among judges sitting on the same court. As of 2019, the denial rates for cases at the San Francisco and Houston Immigration Courts, which saw similar caseloads, were 29.5 percent and 91.9 percent respectively. At the New York Immigration Court, the denial rate ranged from 85.2 percent to 2.6 percent depending on the judge deciding the case.⁶⁹

Suggested Recommendations to the U.S. Government:

1. Rescind *Matter of A-B-* and *Matter of A-C-A-A-* and ensure that asylum claims of survivors of domestic violence or other forms of gender violence are adjudicated fairly and in accordance with international norms.
2. Withdraw (or, if finalized, rescind) the proposed June 15, 2020 DHS and DOJ regulations, and the proposed Sept. 23, 2020 DOJ regulations, and ensure that all asylum seekers, including GBV survivors, have fair access to asylum procedures in accordance with international norms.
3. Withdraw (or, if finalized, rescind) proposed rules to bar or deport asylum seekers on the basis of specious public health rationales.
4. Withdraw from the so-called "Asylum Cooperative Agreements" with Central American Governments and rescind "third country transit bar" regulations.
5. End the Migrant Protection Protocols, and parole into the U.S. all asylum seekers with pending cases who are in Mexico.
6. Provide qualified interpreters for all asylum seekers, including Indigenous language speakers, at the time of apprehension, during any period of detention, in conversations with lawyers, and during asylum interviews and hearings. Provide translations of written materials reflective of literacy and education levels, and in Indigenous languages.
7. Guarantee legal counsel for asylum seekers.
8. Release asylum seekers on apprehension with a Notice to Appear and clear instructions on when and where to appear in court, with the aim of ending detention of asylum seekers pending their case outcomes, and investing in community-based case management alternatives to detention.

9. Establish meaningful oversight of immigrant and asylum seeker detention conditions, including a formal, enforceable codification of conditions, in accordance with international human rights standards, that ensures elimination of contracts with facilities out of compliance.
10. Consult with women's and gender-based violence survivors' experts, in order to develop and implement training and protocols for officials who interact with gender-based violence survivors seeking asylum, from DHS and its sub-agencies, as well as Immigration Judges, on best practices and trauma-informed approaches to interviewing survivors and ensuring asylum seekers understand their legal rights.
11. Suspend use of "fast-track" removal methods, such as expedited removal and reinstatement of removal that remove these decisions from judicial decision-making.
12. Reform the asylum system to ensure efficient and consistent adjudication of asylum claims and eliminate procedural rules that block asylum claims from being heard.

¹ MADRE is an international women's human rights organization that collaborates with grassroots women's organizations in settings of conflict, disaster and their aftermath, to help them meet their communities' needs and advocate for long-term change, including gender justice.

² The City University of New York's Human Rights and Gender Justice Clinic (HRGJ) clinic conducts international human rights legal advocacy campaigns addressing various forms of gender-based violence, as well as economic and social rights, and children's rights.

³ The Center for Gender & Refugee Studies (CGRS) protects the fundamental human rights of refugee women, children, LGBT individuals, and others who flee persecution in their home countries. We provide legal expertise, training, research and publications, engage in appellate litigation and policy development, and use international human rights instruments to address the root causes of persecution and to advance human rights.

⁴ The Florence Immigrant and Refugee Rights Project (FIRRP) provides free legal and social services to detained men, women, and children under threat of deportation in Arizona.

⁵ UNHRC, REPORT OF THE WORKING GROUP ON THE UNIVERSAL PERIODIC REVIEW, UNITED STATES ¶¶ 176.125, 176.153, 176.252, 176.253, 176.321, 176.338, 176.339 (Jul. 20, 2015) U.N. Doc. A/HRC/30/12/.

⁶ Anja Parish, *Gender Based Violence Against Women: Both Cause for Migration and Risk Along the Journey*, MIGRATION POLICY INSTITUTE (Sept. 7, 2017) <https://www.migrationpolicy.org/article/gender-based-violence-against-women-both-cause-migration-and-risk-along-journey>; UNHCR, WOMEN ON THE RUN 15-30 (2015), <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>.

⁷ WOMEN'S REFUGEE COMMISSION, MIGRANT AND REFUGEE CARAVANS: FAILED RESPONSES TO WOMEN AND CHILDREN IN NEED OF INTERNATIONAL PROTECTION AND HUMANITARIAN AID 1 (2019), <https://www.womensrefugeecommission.org/rights/resources/1761-migrant-and-refugee-caravans>. UNHCR, WOMEN ON THE RUN 2-6, 25-27 (2015), <http://www.unhcr.org/en-us/publications/operations/5630f24c6/women-run.html>; AMNESTY INT'L, REFUGEES ARE IN URGENT NEED OF PROTECTION FROM SEXUAL AND GENDER-BASED VIOLENCE, (Nov. 25, 2016), <https://www.amnesty.org/en/latest/news/2016/11/refugees-are-in-urgent-need-of-protection-from-sexual-and-gender-based-violence/>. The number of asylum seekers originating from the Northern Triangle reached 110,000 in 2015, a five-fold increase from 2012. Rocio Cara Labrador & D. Renwick, *Central America's Violent Northern Triangle*, COUNCIL ON FOREIGN RELATIONS (Jun. 26, 2018), <https://www.cfr.org/backgrounder/central-americas-violent-northern-triangle>.

⁸ Immigrant Legal Resource Center, *100+ Policy Changes That Have Devastated Immigrants and Asylum Seekers*, <https://www.ilrc.org/immigration-attacks#top> (last visited Oct. 12, 2020).

⁹ The other protected grounds for establishing asylum eligibility include political opinion, race, religion, and nationality. All of these grounds may be applied in cases involving GBV, but the social group ground is the most commonly argued where gender is the motivating factor of the persecutor.

¹⁰ Azam Ahmed, *Either They Kill Us, or We Kill Them—Inside Gang Territory in Honduras*, N.Y. TIMES (May 13, 2019), <https://www.nytimes.com/interactive/2019/05/04/world/americas/honduras-gang-violence.html?searchResultPosition=9> (“[G]overnments hollowed out by corruption are either incapable or unwilling to apply the rule of law, enabling criminal networks to dictate the lives of millions.”).

¹¹ *Matter of A-R-C-G-*, 26 I&N Dec. 388 (B.I.A. 2014).

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- ¹² *Matter of A-B-*, 27 I&N Dec. 316, 320 (A.G. 2018).
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- ¹⁹ Andrew Geibel, *Attorney General's Decision Makes Matters Worse for Asylum Seekers*, HIAS BLOG (Oct. 5, 2020), <https://www.hias.org/blog/attorney-generals-decision-makes-matters-worse-asylum-seekers>.
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- ²¹ CONGRESSIONAL RESEARCH SERVICE, THE DEPARTMENT OF HOMELAND SECURITY'S REPORTED "METERING" POLICY: LEGAL ISSUES 1-2 (Aug. 13, 2019), <https://fas.org/sgp/crs/homsec/LSB10295.pdf>
- ²² Debbie Nathan, *Trump's "Remain In Mexico" Policy Exposes Migrants to Rape, Kidnapping and Murder In Dangerous Border Cities*, THE INTERCEPT (Jul. 14, 2019), <https://theintercept.com/2019/07/14/trump-remain-in-mexico-policy/>
- ²³ A federal district court enjoined the policy as violating U.S. law, including its *nonrefoulement* obligations. *Innovation Law Lab v. Nielsen*, 366 F.Supp.3d 1110 (N.D. Cal. 2019). The Ninth Circuit Court of Appeals temporarily stayed the injunction pending appeal on the merits. *Innovation Law Lab v. McAleenan*, 924 F.3d 503 (9th Cir. 2019).
- ²⁴ *Department of Justice and Department of Homeland Security Announce Plan to Restart MPP Hearings*, U.S. DEPARTMENT OF JUSTICE (Jul. 17, 2020), <https://www.justice.gov/opa/pr/department-justice-and-department-homeland-security-announce-plan-restart-mpp-hearings>; Jasmine Aguilera, *Migrants Stranded in Mexico Have 1 Year to File for Asylum. COVID-19 Is Making That Deadline Nearly Impossible*, TIME (Sept. 25, 2020), <https://time.com/5888791/covid-19-asylum-seekers-mexico/>.
- ²⁵ *US: Asylum Seekers Returned to Uncertainty, Danger in Mexico*, HUMAN RIGHTS WATCH (Jul. 2, 2019), <https://www.hrw.org/news/2019/07/02/us-asylum-seekers-returned-uncertainty-danger-mexico> (citing risks to migrants returned to Ciudad Juarez including kidnapping, sexual assault and violence based on interviews with asylum seekers and observations of court proceedings). In addition, the policy deprives asylum seekers of humanitarian aid in overwhelmed shelters and leaves them without access to legal counsel. Miriam Jordan, *Trump Administration Can Keep Sending Asylum Seekers to Mexico, Court Rules*, N.Y. TIMES (May 7, 2019), <https://www.nytimes.com/2019/05/07/us/asylum-seekers-trump-mexico.html?searchResultPosition=8>.
- ²⁶ AMERICAN FRIENDS SERVICE COMMITTEE, DISMANTLING ASYLUM: A YEAR INTO THE MIGRANT PROTECTION PROTOCOLS 9 (Jan. 2020), https://www.afsc.org/sites/default/files/documents/MPP_Final_Jan2020-300hi.pdf. Studies have uncovered evidence of Customs and Border Patrol (CBP) agents charging migrants in exchange for adding them to list of those received for asylum admission on a given day. This number of persons allowed on this list is limited, due to the Trump Administration's new "metering" policy. AMERICAN FRIENDS SERVICE COMMITTEE, DISMANTLING ASYLUM: A YEAR INTO THE MIGRANT PROTECTION PROTOCOLS 7-8 (Jan. 2020), https://www.afsc.org/sites/default/files/documents/MPP_Final_Jan2020-300hi.pdf

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