

5-2017

# The Deliberate Contradictions in the United States Human Rights System: A Case Analysis and History of Post 9/11 Immigration Policies

Jacqueline Muir

*Sarah Lawrence College*, [jmuir@slc.edu](mailto:jmuir@slc.edu)

Follow this and additional works at: [http://digitalcommons.slc.edu/womenshistory\\_etd](http://digitalcommons.slc.edu/womenshistory_etd)



Part of the [Women's History Commons](#)

---

## Recommended Citation

Muir, Jacqueline, "The Deliberate Contradictions in the United States Human Rights System: A Case Analysis and History of Post 9/11 Immigration Policies" (2017). *Women's History Theses and Capstones*. 27.  
[http://digitalcommons.slc.edu/womenshistory\\_etd/27](http://digitalcommons.slc.edu/womenshistory_etd/27)

This Thesis - Open Access is brought to you for free and open access by the Women's History Graduate Program at DigitalCommons@SarahLawrence. It has been accepted for inclusion in Women's History Theses and Capstones by an authorized administrator of DigitalCommons@SarahLawrence. For more information, please contact [alester@sarahlawrence.edu](mailto:alester@sarahlawrence.edu).

**Sarah Lawrence College**

**The Deliberate Contradictions in the United States Human Rights  
System:  
A case analysis and history of post 9/11 immigration policies**

**Jacqueline Muir**

**April 25, 2017**

**Submitted in partial completion of the Master of Arts Degree at  
Sarah**

**Lawrence College, May 2017**

## Table of contents

<b>Introduction</b>	.....	<b>3</b>
<b>Chapter 1</b>	.....	<b>11</b>
<b>Chapter 2</b>	.....	<b>24</b>
<b>Chapter 3</b>	.....	<b>60</b>
<b>Conclusion</b>	.....	<b>80</b>
<b>Bibliography</b>	.....	<b>88</b>

## **Introduction**

“Shocks the conscience,” is a legal phrase occasionally used in the United States immigration system. It is used to justify a decision, i.e., the facts of this case “shocks” a judge’s conscience and influences the decision. Sometimes the decisions are appealed, on the basis that the judge misunderstood the facts or had too sensitive of a stomach. This small legal phrase is an effective representation and introduction into the world of the asylum system in the United States: a court system where immigrants attempt to gain “refugee” status to protect their human rights after fleeing their country of origin. The issues in this system are many, but the most fundamental problem is the contradictory nature of having a system designed to find truth (by excluding the “undeserving” immigrant) that allows complete subjectivity and the biases associated with it to be the basis of life or death decision-making. The paradox of this system became quite clear after 9/11.

This paradox became quite evident in one immigration case that occurred inconveniently just six days after the Twin Towers were destroyed. Takky Zubeda was a young Congolese woman who, despite suffering from sexual slavery and the murder of her family, was denied asylum but granted

Convention Against Torture (which has far fewer benefits attached to it). In the judge's opinion, she was not a credible witness, and her suffering was not due to an immutable characteristic but was generalizable to the entire population of her country. In denying her asylum, while granting her CAT, the judge invalidated her suffering while the system prolonged that suffering by keeping Zubeda in prison for four years.

This case is an accurate representation not only of the asylum system in a post-9/11 context, but also of the supranational structures of the human rights system and how that particular system has developed since 1948. The only way to fully understand this system is through such a text that blends both a case study and a larger theoretical examination while acknowledging the plasticity of identity categories. This is the goal of this thesis: to provide such an analysis.

Some authors have attempted to tackle a comprehensive analysis of this system, but have been exceedingly limited by their presentation of human rights as a static and transcendent concept (accepting the United Nations documents as essentially good and beyond historical critique). For many years, historians shied away from histories that attempted to tackle what human rights meant in history. The two most prominent voices, Lynn Hunt and Samuel Moyn, both fail to fully acknowledge the role marginalized identities play in the history of human rights. Sexism, racism, and anti-Semitism are mentioned in passing,

instead of being fundamental threads in their arguments. Even when they do mention these identity categories, they fail to historicize them and consequently use anachronistic understandings of race and gender to define the past. Because of this, their histories focus more on the invented “universal human” accessing his rights, but the universal human always is a coded representation of the most powerful group: white men<sup>1</sup>.

Lynn Hunt’s book *Inventing Human Rights: A History*<sup>2</sup> is an example of this “universal human” trope in human rights history. She begins her analysis in the 1700s and ends in 1948 (the year the Universal Declaration of Human Rights was proclaimed). This book was the beginning of a historical discussion of human rights post 9/11, and in many ways shaped the discussion by examining human rights as an intellectual concept invented around the 1700s. Hunt’s book is driven by the contradictory nature of human rights, which she defines as universal (even though these rights aren’t applicable everywhere and at every point in human history), self-evident (even though not all human beings know what they are), and inherent to human beings (even though the majority of human beings have had their rights violated). Hunt attempts to answer the paradoxical nature of rights by stating, “you know the meaning of human rights

---

<sup>1</sup> Richard Dyer, *White*. (London: Routledge, 1997), 61.

<sup>2</sup> Hunt, Lynn, *Inventing Human Rights: A History* (New York, New York : W.W. Norton & Company, 2008).

because you feel distressed when they are violated. The truths of human rights might be paradoxical in this sense, but they are nonetheless self-evident.”<sup>3</sup>

Effectively answering her foundational, philosophical questions about human rights with circular logic, while producing a refugee in her book that is inherently white, European, heterosexual, and male.

Other histories barely question the concept of human rights at all, and place it outside of social construction through sweeping analyzes covering decades of history. Books like *The History of Human Rights* by Micheline R. Ishay<sup>4</sup> attempt to locate human rights in ancient civilizations to present, and do not provide a background social context that would explain how people thought, acted, and felt in regards to human rights during various time periods. This text cements contemporary understandings of rights, oppression, and identity as superior and true by not analyzing their plasticity or the diversity of experiences. Human rights thus become a nebulous ideology anachronistically projected onto all of human history, a perfect utopic concept resting in the wings of time.

Samuel Moyn is a harsh critic of this conceptualization of human rights, criticizing historians for producing a modern “utopia” myth: writing human

---

<sup>3</sup> Hunt , *Inventing Human Rights: A History*, 214

<sup>4</sup> Micheline Ishay, *The History of Human Rights: From Ancient Times to the Globalization Era*, (Berkeley: University of California Press, 2004).

rights as if it were a transcendent concept of universal human empathy and understanding. In Moyn's two books on the subject, *The Last Utopia* and *Human Rights and The Uses of History*<sup>5</sup>, he examines early to modern human rights history and argues that the concept only gained popularity during the Carter administration because of Carter's revolutionary dedication to implementing human rights in his policies. Moyn condemns his fellow historians on their analysis of key historical human rights texts (such as United Nations documents, political speeches, or legal texts). He critically notes their failure to historicize, their fallacious conclusions, or the way in which they analyze human rights as a static concept. Surprisingly, in his own analysis he glosses over oppression in his discussion of human rights. Identity categories like gender or race are either static or unmentioned in his writing. In attempting to cover such a large portion of history where others have failed, unfortunately Moyn repeats their mistakes.

In contrast to the books attempting to provide comprehensive histories, several authors have examined the specifics of human rights and the internal mechanisms of the human rights system. These texts are largely sociological, although some label their work as a history. For example, sociologist David

---

<sup>5</sup> Samuel Moyn, *The Last Utopia: Human Rights in History* (Cambridge, Mass: Belknap Press of Harvard University Press, 2010).

Haines wrote *Safe Haven: A History of Refugees in America*<sup>6</sup>: in it, he provides a broad overview of the general experience of a refugee in the United States, using Vietnamese refugees in Richmond, Virginia as a case study to demonstrate his points. This book provides important theoretical perspectives about the experiences of refugees, but it lacks historical context: one example is Haines description of the refugee's experience of assimilation in Richmond, but he fails to contextual this narrative in the greater historical tradition of immigrant assimilation in the United States. Similarly, Carol Bohmer and Amy Shuman wrote a sociological book, *Rejecting Refugees: Political Asylum in the 21st Century*<sup>7</sup>, that blended critical legal theory with a collection of interviews with refugees, but this book was very much a product of contemporary understandings. This lack of historicization makes these texts less comprehensible and incomplete from a historian's perspective. Their writing in the sociological present hinders readers from developing an understanding of how certain asylum categories have changed over time. This is essentially a lack of reflexivity: the authors' lack of awareness of their place in relation to the text, to attempt to prevent a biased perspective.

---

<sup>6</sup> David W. Haines *Safe Haven?: A History of Refugees in America* (Sterling, VA: Kumarian Press, 2010).

<sup>7</sup> Carol Bohmer and Amy Shuman, *Rejecting Refugees: Political Asylum in the 21st Century* (London: Routledge, 2008).

Sara L. McKinnon's *Gendered Asylum: Race and Violence in U.S. Law and Politics*<sup>8</sup> most closely resembles this thesis, in that it is an analysis of U.S. immigration history that uses race and gender as sites of analysis. McKinnon interweaves several case studies in each chapter to demonstrate the way in which "gender" became a category of persecution in U.S. asylum law. McKinnon's background is in communications with no formal training in history or historical analysis, which becomes very evident in her book. The historical background she provides for her arguments are just dates and significant events, and she fails to historicize identity categories that shaped the policies she's analyzing. Although it follows a time line, gender is not examined as the fluid category it is that shifts over time.

This thesis is a synthesis of these texts, in that it benefits from the perspectives each offers while attempting to avoid the pitfalls. By providing a historical summary alongside Zubeda's personal testimony, an overview and dissection of the foundations of the international human rights system, and finally a close reading of a single court case in contrast to the facts provided previously, this thesis threads together different levels of analysis to present a comprehensive examination of the United States asylum system that is anchored

---

<sup>8</sup> Sara L. McKinnon, *Gendered Asylum: Race and Violence in U.S. Law and Politic* (Urbana: University of Illinois Press, 2016).

in the early 2000s which produces a multidimensional understanding of the system highlighting the effects of these structures and the localized actors within the system. I believe that this conceptualization is the only way to fully understand the human rights system in the United States and its inherent contradictions.

To provide the full story at the very beginning, chapter 1 provides specifics of Takky Zubeda's experiences and an overview of the Democratic Republic of the Congo's history. This chapter's importance becomes clear in relation to chapter 3: in her court case, Zubeda's story was examined and scrutinized, and then grossly misrepresented. Chapter 1 sets up the events leading up to Zubeda's flight, which are connected to the DRC's history of war and gender violence, to provide later contrast to claims made in court.

The second chapter is a deep reading into the foundational documents of the international human rights system: *The Universal Declaration of Human Rights*, *The Convention Relating to the Status of Refugees*, and finally, *The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Each text added to the evolving discourse of human rights, so the history behind them is equally important in providing context to Zubeda's case. The UN produced a paradigm implicit in these definitions, in which ambiguity and narrow definitions allowed governments to adopt each document to each country's own

standards and levels of political acceptability. In the context of the United States immigration laws, this meant a dependence on subjective assessments to make decisions, and thus the continued proliferation of oppressive structures through systematic ratification of discrimination, especially against people from Africa and other “non-white” nations.

Finally, chapter 3 surveys the specifics of the case itself: close readings of each text presented in the court demonstrate the ways in which actors of the United States asylum system were subjective in their judgments, as allowed by the international human rights system. These biased conclusions become a paradigm through which the case exists. This means that at each level of legal proceedings Zubeda’s story is represented through the personal opinions of Judge William Durling, the first immigration judge to hear her case. This case study ties the international into the local, and reveals the power that is given to sovereign states to redefine human rights.

## **1. History and Testimony: The Facts Behind the Case**

The United States asylum system, remaining true to the United States immigration paradigm<sup>9</sup>, has a self-legitimizing façade: being a vital institution that divides the “deserving” from the “undeserving” through logic and empirical

---

<sup>9</sup> The set of laws pertaining to U.S.’s management of immigrants through border control, interior enforcement, and a court system.

truth. The system produces and reifies these fabricated persons in the process of sorting them. This happens in two ways, by validating some forms of human suffering while ignoring others (by inventing traits associated with “real” suffering) and by invoking a false sense of scarcity by putting a cap on how many people a country can “save” by allowing them to migrate to the U.S. *Entry Denied: Controlling Sexuality At The Border* by Eithne Luibheid examines a similar process in the prevention of immigration through providing a close case study of the United States’ ban on lesbian immigration from 1965 to 1990. Luibhéid argues that immigration officers used physical traits associated with lesbianism (smaller breasts, more masculine features) to then expel them, even though there is no evidence that such markers exist. The invented lesbian physicality is the perfect analogy to the invention of the “true refugee”, and the processes still occurring in the system today where the goal seems to be to find the “real” victim of human rights violations (the “real” rape victim, the “true” torture victim, etc.) and the “deceitful” immigrant attempting to cheat the system<sup>10</sup>.

The use of evidence, testimony, and the (false) detection of lies created a performance of a quest for truth in the Zubeda case. To best demonstrate the liberties taken with the presentations of facts, this chapter provides a

---

<sup>10</sup> Eithne Luibhéid, *Entry Denied: Controlling Sexuality at the Border* (Minneapolis: University of Minnesota Press, 2002), 3

comprehensive background into the Democratic Republic of the Congo and a narrative account of Zubeda's experiences, told through the notes of my interview with her<sup>11</sup>. This narration is the result of a set of unstructured interviews with Zubeda, collected over a series of phone conversations and a single in-person interview which lasted six hours on March 25<sup>th</sup>, as well as a culmination of all the pieces of information presented during her court case. This chapter sets up a contrast by providing the background circumstances of Zubeda's case. These are the facts that led Zubeda to request asylum, and the same facts that the United States immigration system used to deny her that protection.

The Democratic Republic of the Congo's history defies a concise and complete summary. Most histories begin with an analysis of the colonization of the DRC by King Leopold II of Belgium<sup>12</sup>. King Leopold and, later, the Belgian government wrung the DRC for its natural resources by forcing Congolese people into grueling and dangerous labor with little profit of the indigenous inhabitants. This serfdom continued until the middle of the 20<sup>th</sup> century; the Democratic Republic of the Congo was massively profitable for Belgium. They

---

<sup>11</sup> Zubeda did not wish to be recorded.

<sup>12</sup> For more information on the early colonization of the Democratic Republic of the Congo and the atrocities committed by King Leopold II and the Belgium government, see *King Leopold's Ghost: A Story of Greed, Terror, and Heroism in Colonial Africa* by Adam Hochschild. See also, *The History of Congo* by C. Didier Gondola, a history which spans pre-colonization Congo through to 2001.

secured their investment through the continuation of colonization, all while actively denying Congolese education or advancement. After a series of strikes and riots, Belgium granted independence to a nation that they had almost produced to fail: little education, few work opportunities, and no government structure was the Belgian legacy<sup>13</sup>.

Joseph-Désiré Mobutu (later known as Mobutu Sese Seko) came to power with the help of Belgium in 1965. The first democratically elected leader, Patrice Lumumba, was overthrown by Mobutu (with the help of the CIA) and assassinated, leaving Mobutu in power for 32 years after. Zubeda was born during Mobutu's reign, and left just prior to his ouster (1997) and eventual death in exile months later. Over the course of Mobutu's term, extreme political unrest and violence was the rule of the day: dissent was exterminated, but ethnic conflict, particularly from Rwanda, slowly plunged the DRC into gruesome and horrific war<sup>14</sup>.

On April 6<sup>th</sup>, 1994, Rwandan president Juvénal Habyarimana (who was ethnically Hutu) died after his plane was attacked and crashed near Kigali International Airport. Many blamed the Rwandan Patriot Front (RPF) and its

---

<sup>13</sup> Jane Freedman, and Jane L. Parpart, *Gender, Violence and Politics in the Democratic Republic of Congo*, (Taylor and Francis, 2016), 5

<sup>14</sup> Emizet F. Kisangani, *Civil Wars in the Democratic Republic of Congo, 1960-2010* (Boulder: Lynne Rienner Publishers, 2012).

leader and now current president Paul Kagame for the attack, because they were Tutsis attempted to usurp power from Hutus through an ongoing civil war. This assassination was symptomatic of prior ethnic tensions, but the act itself created an intense escalation of those tensions as Hutus began to massacre Tutsis and moderate Hutus. This eventually resulted in the genocide of an estimated 800,000 people. The civil war occurring in the neighboring Rwanda deeply affected the Democratic Republic of the Congo as two million fleeing Hutus sought refuge particularly in Eastern Congo after the genocide. Kagame wanted these Hutus to stand trial and take blame for the Rwandan Genocide, and as a result the conflict continued across the Congolese border from refugee camps. These camps turned combat zones were located mainly in South Kivu.



15

Zubeda was born in South Kivu on November 14<sup>th</sup>, 1974. She lived through the aftereffects of a brutal civil war, which affected her life until her eventual flight.

During our interviews, Zubeda looked happy when remembering her family; she described them as very loving and everyone getting along well. She told me her father was Muslim and her mother was Christian; their relationship was equal and she never saw them fight or her mother get hurt. Her father would go fishing and sell his catch for money, while her mother stayed at home with the children. Zubeda was the middle child of three, with an older brother and younger sister. They all went to school, although Zubeda at times disliked

---

<sup>15</sup> "Almost 50 years on, UN still struggles in Congo." Congolese Action Youth Platform Blog. November 19, 2013. Accessed May 09, 2017. <https://congoayuk.wordpress.com/2013/11/19/almost-50-years-on-un-still-struggles-in-congo/>.

going. She told me a story where she went to her aunt one morning complaining that she had a toothache and couldn't go to school. Her tooth did actually ache but she really just wanted to miss a day of classes. Zubeda's aunt, to her delight, told her she didn't have to go. Before she could celebrate her day off, however, her aunt took her to the doctor to have her tooth pulled. She laughed recalling this memory, and told me she hadn't really ever told anyone these stories. They certainly hadn't been a part of the court case, because any mention of happiness in her life would have marred the effect needed for a judge to rule her a "perfect victim".

Zubeda had an arranged marriage on February 6th, 1999 to Ndume Ibochwa, He had been from the same town as Zubeda, and remembered her. He fled the DRC for the United States a few years prior to Zubeda, and called his parents one day to ask if they could help him find a wife. He said he couldn't find any in the US, and they responded to him that there were many beautiful women still in the DRC that he could marry. He especially asked if Zubeda was still single; soon, they were married in a wedding ceremony in neighboring Tanzania (Ibochwa wouldn't be able to return to the U.S. if he visited the DRC due to specific immigration laws, so the wedding couldn't be there). Zubeda showed me pictures of the wedding; she wore a wedding dress Ndume had brought from America which had a full skirted bottom with an off the shoulder

bodice, and white flower puffs covering it. She took one last photo from the album to show me a rarity: a photo of her mother. We sat silently as we looked.

After the wedding, Zubeda followed custom and moved in with her in laws. She felt understandable apprehension as she worried about fitting in and being accepted into the family. Ndume returned to the United States to start the process of helping his wife immigrate, and Zubeda waited. Phone calls were difficult and expensive, so they rarely spoke. Zubeda was also separated from her family; her in laws lived outside of South Kivu, so she wasn't able to be with them as much as she used to be.

After living with her husband's family for a while, Zubeda received a horrifying phone call. Her mother had been attacked by soldiers and gang raped. She had sustained injuries from the assault, so Zubeda immediately traveled back to South Kivu to help her family. They were unsure if the soldiers were government or rebel; Zubeda felt that her family was neutral in this war but she often wondered if her father participated politically unbeknownst to her family. Both sides had a "with us or against us" mentality but she still was confused by the specific targeting of her family. She knew that men in the DRC tended to be more reserved and did not feel the need to be open with their families, so perhaps her father was active in some way. She told me that people in the DRC didn't really talk about politics because when they did they were severely

punished. Political opinions were repressed under Mobutu, and one person openly expressing dissent could endanger their entire family. The family considered their recourse for the shocking assault. Her father discussed going to a human rights organization for assistance. Before he could, however, the soldiers came back.

It is important to understand these violent acts in relation to the political climate in the DRC; these were not random acts of cruelty. There was purpose, intention, and a great sociopolitical meaning behind these assaults. War and gender-based violence are intricately linked in the Democratic Republic of the Congo<sup>16</sup>. The use of rape is not an unintended consequence of this turmoil, like shrapnel, but instead it a site of conflict. Rape holds specific social meaning in war; it “ruins” the woman, humiliates the men who could not protect her, and reaffirms the masculinity of the rapist(s)<sup>17</sup>. Especially due to the ethnic tension, the taboo of miscegenation adds further symbolic weight to the act of rape, as it becomes a way to “damage” or “weaken” an ethnic group.<sup>18</sup> In her 2001 court case, the Judge ruled that Zubeda’s rape was an unfortunate but random occurrence; she was merely at the wrong place at the wrong time, instead of

---

<sup>16</sup> Human Rights Watch, “Soldiers Who Rape, Commanders Who Condone: Sexual Violence and Military Reform in the Democratic Republic of Congo,” 16 July 2009, 1-56432-510-5, available at: <http://www.refworld.org/docid/4a5efe262.html> [accessed 9 May 2017]

<sup>17</sup> Maria Eriksson Baz and Maria Stern, *Sexual Violence As a Weapon of War?: Perceptions, Prescriptions, Problems in the Congo and Beyond* (London: Zed Books, 2013).

<sup>18</sup> Freedman, *Gender, Violence and Politics*, 69.

being specifically and intentionally persecuted because of her gender and ethnic identity. That ruling is contradicted by the very nature of rape in the DRC during this time period<sup>19</sup>, and the facts of the case itself. These were soldiers who chose to target this family twice by raping and killing the women, and decapitating the men before burning all their possessions. These actions connect with the systemic use of rape in the DRC, are persecutory in nature.

Zubeda did not know if the soldiers were rebels or from the government, but rape was used on both sides of the war in the same way. The soldiers broke into her family's home with machetes, and tied up her father and brother. They gang-raped Zubeda as her relatives were forced to watch, before the men decapitated the male members and trapped her mother and sister in the home as they set it ablaze. Zubeda was dragged out of the home to be taken as a prisoner. The men climbed into a military vehicle that had supports on the back for a tarp covering. They drove for several miles into a dense forest, eventually reaching their encampment.

Zubeda described the base as a large one-story structure. She assumed it to be an abandoned house that the soldiers had found or taken over, because it looked too old and less like a military compound. She was forced into a room with several women, and only let out to perform tasks, eat, or use the bathroom

---

<sup>19</sup> Baz, *Sexual Violence As a Weapon of War*, 42

that was a small outhouse a ways away from the base in the forest. The room she was kept in didn't have lighting, so she was unable to tell how many other people, soldiers or prisoners, were in the camp. She did know that among the women she was kept with, she was the youngest. Most were in their forties and fifties, while she was in her twenties. Although she wasn't exactly chained up in the compound, Zubeda said that because any village or town was too far to walk to, and the soldiers had vehicles and guns, escape was incredibly dangerous. Escape was also discouraged because the soldiers had murdered whole families of the women who were kept prisoner, so no one was looking for them and there was no home for them outside of the camp.

Zubeda and four other women decided to risk it anyway. One woman was more familiar with the area, so during dinner one night when they were allowed to go together to the rest room, they fled on foot through the forest. Because the base's location was unknown to Zubeda, the forest she fled from remains a mystery. These forests had a variety of dangerous wildlife: venomous snakes, gorillas, and elephants. Zubeda told me that she never once considered the animals though: she was too afraid of the people who could recapture her.

The five women, after running through the night, finally came upon Lake Tanganyika, the second largest and deepest lake in the world. They found a canoe near by, and began the long trek across to Tanzania. The lake at some

points is more than 40 miles wide, and without a map or compass, traveling in the dark, it may have taken the women five or more hours to paddle across.

After canoeing through the night, the group was taken in by a nearby Christian church who fed them and gave them a place to stay. During prayers one day, a woman, hearing Zubeda's story, gave her twenty dollars and her passport and told her to go to the United States. Zubeda described this as perhaps one of the biggest mistakes of her life.

She left Tanzania in 2000, and arrived at the Newark International airport a week before Christmas with only one hundred dollars and someone else's passport. When asked the reason for her visit, fearfully she said she was visiting her brother and attending a bible school. She must have been exhausted; her feet were touching solid ground for the first time in 18 hours. She had recently fled for her life from the rebel camp, running on foot, not knowing where she was or where to find safety. She had to row across the deepest lake in Africa before finding someone who would offer her help. It's hard to imagine what it felt like to sit down for 18 hours after such a trek. When pressed, she admitted that she was seeking asylum, and promptly she was placed in a cell awaiting an interview with an asylum officer. She waited, from December 16<sup>th</sup> 2000, until February 1<sup>st</sup> 2001. This was a full six weeks until she could even tell her story.

The asylum officer found her to be credible<sup>20</sup>, but the INS appealed the decision to court. This was the first big step in her proceedings, which lead her to stand in front of Judge Durling on September 18th, just over a week since the Twin Towers had burned down on September 11, 2001.

Judge Durling ruled that she was incredible, or not to be believed. He thought she was lying about her past persecutions: the rapes, the murder of her family, her capture. He did rule that she shouldn't be deported for fear of being tortured on her return, although this ruling came with no additional rights and the constant fear of being deported there after. This decision was appealed by the INS to a higher court, arguing that Durling was too lenient in his decision, especially if she was incredible. At the Board of Immigration Appeals, the board ruled that because she had been deemed a liar, it was most likely untrue that she would be tortured upon her return and thus should be deported. Zubeda's lawyers appealed that decision. The Third Circuit court then sent it all the way back to Judge Durling, who essentially reinstated his first decision. This confusing process all relied on assumptions originally made by Durling about the facts presented in this chapter, assumptions that are contradictory and at times even illogical. All this is allowed by the international human rights system's foundations, which give enough leeway to powerful governments to

---

<sup>20</sup> Meaning believable.

allow them cultural fluidity (the ability to make subjective judgments based on current social ideology). The system is structured in a way that allows judges to pick and choose how they want to apply the laws, with the ability to change their interpretations based on the current political discourse of the moment. This puts asylees in particular peril because judges unequally apply the law over time, and can discriminate at will. After 9/11, the United States government used that leeway to begin an anti-immigrant crusade.

## **2. A System of Loopholes**

This chapter provides a historical context to the human rights system by looking at three principal documents that the United Nations produced. Each text illuminates the United Nation's production of a purportedly universal and comprehensive summary of all essential rights for humane conditions. However, these texts remain restrictive, ethnocentric, and ineffectual. Later United States immigration laws reflect this framework, and expound upon the issues inherent in the framework, which can be seen in the Immigration and Nationality Act (signed into law in 1965, with provisions added in 2002), and the Immigration Judge's Benchbook<sup>21</sup>, a text provided to judges by the INS that provides advice and relevant legal articles to assist them in their decisions. These texts are the

---

<sup>21</sup> "Immigration Judge Benchbook." The United States Department of Justice. Accessed April 24, 2017. <https://www.justice.gov/eoir/immigration-judge-benchbook-credibility-standard-language>.

foundation of the asylum system of the United There is a distinctive pattern in the composition of human rights texts that provide openings for sovereign states' interpretations, particularly in the definitions of rights. Essentially, the authors either provide too much detail or too little when defining rights, which either allows states to make up their own details or renders the definition ineffectual due to its restrictions. These "disproportionate definitions" allows and effectively encourages the subjectivity and cultural biases intrinsic to the US asylum system. This is a supranational institution with no physical power of its own; thus, the only way the United Nations can exist is if it is beneficial and non-threatening to the world powers, like the United States.

### **Universal Declaration of Human Rights**

The United Nations, the primary structure of the international human rights system<sup>22</sup>, officiated the discourse of human rights with the creation of the Universal Declaration of Human Rights (UDHR) in 1948. It contains 30 articles, outlining the ideal human condition and how sovereign states should protect the rights associated with that condition. This foundational text begins the rhetorical discourse that covertly allows sovereign states more power: it does so by making

---

<sup>22</sup> As I explained in the introduction, this system consists of nongovernmental (and thus considered "non-partial") organizations like the United Nations, and are populated by countries who see their membership in this system as a commitment to the human rights laid out by those organizations. This a contradiction in and of itself since China, Russia, the US etc. have historically violated human rights either of their citizens or citizens of other countries, but remain the bulwark of the UN Security Council.

large claims about its impact, claiming that it is a universal and comprehensive text when it actually is quite limited; its ethnocentrism, its now-obsolete conceptualization, and the restrictive definitions for each of its articles limit their efficiency by giving sovereign states the power of interpretation and application.

The UN represents the history of the document as a result of human astonishment and subsequent compassion in the face of atrocities:

The Universal Declaration of Human Rights, which was adopted by the UN General Assembly on 10 December 1948, was the result of the experience of the Second World War. With the end of that war, and the creation of the United Nations, the international community vowed never again to allow atrocities like those of that conflict happen again.<sup>23</sup>

Samuel Moyn disputes this narrative however, arguing instead that human rights were actually a development of a Nazi project: national welfarism<sup>24</sup> with an emphasis of personal freedoms as one major distinction. The most definitive nail in the coffin of this Holocaust-response account of human rights is that there is no record of anyone discussing the Holocaust during the creation of the UDHR, save for one author who wrote of “barbarous acts” that Moyn postulates was the only Jewish man present for the creation of the declaration, Rene Cassin. This origin myth is an important part of contemporary understandings of the

---

<sup>23</sup> "History of the Document." United Nations. Accessed April 10, 2017.  
<http://www.un.org/en/sections/universal-declaration/history-document/>.

<sup>24</sup> An ideology supporting the welfare state, a paradigm in which the government has the power to determine and uphold a certain quality of life for its citizens (in terms of medical care, education, or housing for example).

United Nations, as it reflects a nationalistic narrative similar to what a sovereign state might have (similar to the way in which the Revolutionary War is represented in the US mainstream as a symbol for patriotic values of freedom and democracy). This myth is an impassioned claim that generates power through the cultural weight of the Holocaust, but it obscures actual intentions and history of this document.

Moyn argues that the intent of these documents was not to prevent another Holocaust. Instead, he believes:

What is fascinating about these documents [...] is that while fulsomely invoking human rights, they exacerbate the sovereignist premises of national welfarism in view of memories of colonialism – including colonialist entanglements of human rights in the 1940s. One can recall, after all, Western policy as late as 1950 was not to arrest the minimal advance of international enforcement of human rights that a few advocates demanded, not to insert a colonial clause to ensure that human rights did not apply to international spaces. [...] They [governmental representatives at the UN] invoked human rights to set up a shield against intervention, not as a rationale for it, except when ending colonialism was at stake.<sup>25</sup>

Essentially, the UN produced documents that protected states' colonialist interests and their sovereign power. This argument is evident in the rhetorical choices covered below that made this document subservient to sovereign states. Because this was a disputed and deliberated text that went through several drafts, one must assume that these choices were intentional.

---

<sup>25</sup> Moyn, *Human Rights and the Uses of History*, 93

All conventions and treaties exist within the paradigm that this document created. This is similar to the United States Constitution, where amendments or clarifications can be added later on but still must adhere to the original context. In the human rights system, just like in the United States, this document has gained symbolic status; although new rights may be added, these rights still must adhere to the discourse the UDHR originally created. There are even calls to regress to the original intent and meaning of its rights by UN representatives at times. Although the words of UDHR are quite obviously products of their time and thus cannot easily be applied to modern society, the UDHR is endowed with transcendent qualities: This document purports to contain universal, inalienable, and self determined human rights but the rights it presents are limited in scope especially to oppressed groups, and the document remains restricted to what the “norm” of human experience was in the 1940s<sup>26</sup>. Because every document must reference back to this constrictive article, the entire system has been locked into 1940s understandings of the human condition.

These limitations become very apparent when delving into the specifics of how the declaration is organized. Within the document, these rights are described as universal, and inalienable: universal meaning all human beings

---

<sup>26</sup> There is no article, for example, about humans being allowed by nation states to have consensual sex and/or relationships with same-gender partners; thus there is no protection for the queer community in the UDHR.

should have them, and inalienable meaning you can not willingly give up these rights. In the document, the UN cemented a system for these universal rights where nations acquired the role of providing and protecting the rights of their citizens, while the UN's job was to monitor those nations and suggest structures to better implement those rights. Although the United Nations by no means invented nation states, the Universal Declaration of Human Rights reified the state-based structures already in place by building on that foundation.

For Zubeda's case and the conventions connected to it, articles 2, 5, 6, and 7 are the most essential. Beginning with article 2, the UDHR<sup>27</sup> further clarifies who the rights apply to while condemning specific forms of discrimination:

Article 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status<sup>28</sup>. Furthermore, no distinction shall be made on the basis of the political, jurisdictional or international status of the country or territory to which a person belongs, whether it be independent, trust, non-self-governing or under any other limitation of sovereignty.<sup>29</sup>

Most would probably balk if asked to meticulously write an article that attempts to protect all humans from every form of discrimination for the present and unforeseeable future. Yet, in five points, this article attempts just that. Even for

---

<sup>28</sup> It is noteworthy that the list of possible attributes which people might use to discriminate is whittled down in later documents, not expounded upon as new or evolved forms of discrimination arose.

<sup>29</sup> United Nations, *Universal Declaration of Human Rights*.

the 1940s, these articles are reductive. The essentialism of these five categories limits their applications, especially because it denies the existence of persecution that occurred or was worsened due to multiple by the presence of several oppressed identity categories. This invalidates an individual's experience of discrimination, which always operates in ways specific to the individual and the multiple facets of their identity. This essentialism is further problematized due to the way historical context of these categories: each has changed *drastically* since this convention was written. Take the inclusion of "sex" as a category of discrimination: in contemporary usage, there is a distinction between sex, gender, and sexuality. However, this definition lumps all together under the umbrella of "sex". The other categories have aged just as well as "sex" did. This not only inhibits these categories from being applicable to the modern day, but can actually prevent assistance being provided to of people outside of these categories who have faced extreme persecution (such as transgender people).

Article 2, outside of identity categories, also produces interesting nationalistic effects: first, it reifies (acknowledging yet still perpetuating the categorization of people based on identity) the way in which the government classifies its citizens and their social standing, while reproducing the necessity and hegemonic normalcy of the nation-citizen relationship. Because in this

paradigm, your human rights are protected or violated by your nation<sup>30</sup>, your rights are then limited to your nation's power. If a person belongs to a self-governing territory and a separate nation decides to absorb them, without an army or other power mechanisms to protect that person's rights, those rights would be violated.

Article 5 provides a fleeting discussion on torture, which eventually became the basis of an entire convention in 1987. The convention which covers torture expanded the definition of torture, however, it still had to use this article as the basis of simple and ill-defined article: "Article 5: No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment."<sup>31</sup> Although short and concise, this article provides important information in its lack of specificity and demonstrates a very vital part of the UDHR<sup>32</sup>: leaving huge portions of the text open to interpretation. States could simply redefine torture based on social mores and what was considered torture at the time based on however they defined the intentions of the torturer.<sup>33</sup>

Articles 6 and 7 present an example of how leaving out certain details can allow states to follow these articles while still violating human rights. These

---

<sup>30</sup> Hannah Arendt. *The Origins of Totalitarianism*, (New York: Schocken Books, 2004), 291.

<sup>31</sup> United Nations, *Universal Declaration of Human Rights*.

<sup>32</sup> Ibid.

<sup>33</sup> For example, consider the ongoing debate of whether rape should be legally defined as torturous which occurs in Zubeda's case

articles describe how the equal application of law is a fundamental human right.

Later, these articles became particularly relevant to non-citizens and the way states were supposed to treat them in the legal system:

Article 6: Everyone has the right to recognition everywhere as a person before the law.

Article 7: All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.<sup>34</sup>

Although the declaration does provide a universal legal model for states to use, it doesn't do anything to deter the class bias which occurs in court based systems: every human might have equal right to a lawyer, but for immigrants in the United States, for example, they must pay for the lawyer themselves or risk the extreme likelihood of being deported:

Representation	Number	Percent Denied
All asylum seekers	297,240	69.0%
No attorney	51,258	93.4%
Attorney	245,982	64.0%

<sup>35</sup>

---

<sup>34</sup> United Nations, *Universal Declaration of Human Rights*.

<sup>35</sup> "Immigration Judges," TRAC Immigration, July 31 2006, accessed May 2, 2017, <http://trac.syr.edu/immigration/reports/160/>

As the chart above demonstrates, it is almost impossible to get asylum without the assistance of an expensive attorney (unless the asylum seeker can find one who would work pro bono). Even when the articles do not explicitly favor the nation state, by leaving out recommendations for the application of the article it allows states to apply it how they see fit.

The document continued with various other articles, outlining various differing rights, but all of them were limited not only by their temporality, but by ethnocentrism. Western cultural values are touted as the ideal human experience in this document, which is very obvious in Article 16:

1. Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution. 2. Marriage shall be entered into only with the free and full consent of the intending spouses. 3. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.<sup>36</sup>

The heterosexual family as a kinship unit was central to the United States' nationalistic identity, to the point of it becoming an *essential* human right, as if not having the chance to be married (outside of religious reasons, because those rights are already protected by a separate article) is close to being equal to the right to life or sustenance. It also holds the western ideal of a family unit above all others by not even mentioning other forms of families (such as polygamous

---

<sup>36</sup> United Nations, *Universal Declaration of Human Rights*.

marriages, arranged marriages, matrilineal societies, etc.) For the UN, this limiting document became its core structure, with room to branch out as long as the primary ideology remained intact. Thus, the interstices of the UDHR became conventions.

### **Convention and Protocol Relating to the Status of Refugees**

Even when conventions claim to be filling some of the gaps that the UDHR created, they actually serve to narrow the definitions of human rights and which humans should enjoy them. In the “Convention and Protocol Relating to the Status of Refugees”, this rings particularly true by inventing a new system that purports to protect those who are “rightless” because they lack citizenship. With this concept, the necessity of states is cemented, while giving states more power to decide who can be a refugee. This status is protected by this document; states are not allowed to deport refugees for example. However, it is states who get to decide who is a refugee, and that decision is subjective.

The gap that this convention attempts to fill is one created by the “stateless”; groups of people without a nationality that were considered the most vulnerable human beings with effectively no rights. The original crisis that brought about this discussion was that of Jewish people fleeing Germany during World War II. Hannah Arendt wrote at length about the plight of the stateless,

and advocated for policy change to prevent the inevitability of stateless and thus right-less people that was created in the present system:

No paradox of contemporary politics is filled with a more poignant irony than the discrepancy between the efforts of well-meaning idealists who stubbornly insist on regarding as “inalienable” those human rights, which are enjoyed only by citizens of the most prosperous and civilized countries, and the situation between the rightless themselves. Their situation has deteriorated just as stubbornly, until the internment camp—prior to the Second World War the exception rather than the rule for the stateless—has become the routine solution for the problem of domicile of the “displaced persons.” Even the terminology applied to the stateless has deteriorated. The term “stateless” at least acknowledged the fact that these persons had lost the protection of their government and required international agreements for safeguarding their legal status.<sup>37</sup>

Hannah Arendt believed that the loss of citizenship meant the loss of a person’s rights, supporting her claim with the mass denaturalization of the Jews during World War II. Arendt claimed that rights were tied to citizenship in that states were the enforcers of their peoples’ rights, thus without a political community the stateless had no one to enforce their rights. Arendt found several issues associated with statelessness, which have since been addressed, yet the complexity of the problem makes simple solutions almost impossible.

Connected to this is a way in which many countries have dealt with refugees and the stateless: by keeping them out of the borders. Many countries enforce their borders fiercely, sometimes resulting in the deaths of those

---

<sup>37</sup> Arendt. *The Origins of Totalitarianism*, 279

attempting to gain refuge. According to Suzanne Daley<sup>38</sup>, Spain (who ratified both the convention and the protocol on refugees) has attempted to enforce their borders by spending thirty million Euros in physical defenses. Spanish officers have gone so far as to shoot immigrants with rubber bullets who were attempting to swim into Spain. Fifteen bodies were found in the water afterwards. Refugees have the right to asylum, but to do so they need access to the countries first. However, Spain (as well as other countries in this position) lacks the economic resources to properly handle the bulk of the refugees from Africa, many of whom live in makeshift camps with varying degrees of injury.

Eventually, the UN responded to these critiques with the Convention for Refugees, along with a new grouping of terms and definitions, “refugee” being one of them. There are three basic parts to the definition: what makes a refugee, when a person stops being a refugee, and who cannot be a refugee. As we’ll see later, these definitions become crucial when deciding whether or not to deport someone whose life is on the line, so this convention essentially “keeps migration exclusion morally defensible while protecting the global gatekeeping operation as a whole”<sup>39</sup>. Regardless of the life or death scenario, a person can be

---

<sup>38</sup> Suzanne Daley, “As Africans Surge to Europe’s Door, Spain Locks Down” (New York Times) February 27, 20014.

<sup>39</sup> Jacqueline Bhabha, “Seeking Asylum Alone: Treatment of Separated and Trafficked Children in Need of Refugee Protection”, 2004, *International Migration*. 42, no. 1: 140-148.

characterized as a non-refugee and thus deported, so delving into the specifics of these definitions will demonstrate the complexities which provide an excuse to end lives.

This gate keeping starts with the basic definition of “refugee”, which creates a false dichotomy of legitimate refugee versus regular immigrant through the intentions of those who violated their human rights. In this definition, a person’s rights must be violated by someone particularly persecuting them based on only five different types of identities deemed to be “inalienable” or things that a person could not change about themselves:

As a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>40</sup>

As with other human rights documents, this convention continues the same composition patterns as its predecessor, the UDHR, though disproportionate definitions. This explanation of the term “refugee” has three parts, and in each part there is the essential ambiguity to allow exclusionary politics.

---

<sup>40</sup> UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 1 April 2017]

Firstly, to be a refugee there must be particular persecution. Someone must seek out the asylum seeker for a factor of their identity that they cannot change about themselves. However, this document only provides five identity categories that a human could be persecuted for: race, religion, nationality, political opinion, and being a member of a particular social group. Gender, sexuality, and disability were not included in this definition<sup>41</sup>. This puts certain oppressed groups immediately at a distinct disadvantage. In their cases they must then not only argue that they have been specifically persecuted, but they must shoehorn their persecution into one of the five categories<sup>42</sup>.

The *Matter of Kasinga* case of 1996 was the first example of an asylum seeker successfully arguing that the persecution she faced as a cisgender woman in Togo fit into the “member of a particular social group” (PSG) category. Although she gained asylum for gender-based persecution, this decision still fit into the system, and altered it minimally. This case became a precedent: people persecuted for their gender could now attempt to argue that they were being persecuted for being in a particular social group. This new path raises its own new set of issues: to make this argument successfully, the asylum seekers must prove three things: that they are in a particular social group, that that group is

---

<sup>41</sup> Sara L. McKinnon, *Gendered Asylum: Race and Violence in U.S. Law and Politics*. (University of Illinois, 2016).

<sup>42</sup> Jacqueline Bhabha, and Sue Shutter. *Women's Movement: Women Under Immigration, Nationality and Refugee Law*, (Staffordshire, Eng: Trentham Books, 1994).

recognizable in their country of origin, and that they were persecuted based on their membership in that group. The group cannot be too broad, else it becomes too “common” to count as persecution, or too narrow, or else it is too obscure to be socially recognizable. In the Kasinga case, her attorney’s used her tribal identity to argue for PSG, claiming her group was “young women of the Tchamba-Kunsuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, and who oppose the practice.”<sup>43</sup> Because the tribe was a recognized social group and the women were singled out, she gained asylum. If not for her indigenous identity, she would have most likely had a PSG that was too broad. In her case, this was often discussed: if the judge allowed one African woman asylum to flee from circumcision, wouldn’t all African women then come to the United States? This was the legal rhetoric of the Kasinga case, which is inherently racist and essentialist, but it demonstrates how a broad PSG definition can potentially harm a case. In the inverse scenario, take for example the *Matter of A-R-C-G et al.*, which was decided in 2014. This case featured a social group, “married woman in Guatemala who was unable to leave the relationship”, that was too specific for the judge and thus the persecution could be discounted as random:

The Immigration Judge found that the respondent did not demonstrate

---

<sup>43</sup> In re Fauziya Kasinga, 3278, United States Board of Immigration Appeals, 13 June 1996, available at: [http://www.refworld.org/cases,USA\\_BIA,47bb00782.html](http://www.refworld.org/cases,USA_BIA,47bb00782.html) [accessed 3 April 2017]

that she had suffered past persecution or has a well-founded fear of future persecution on account of a particular social group comprised of “married women in Guatemala who are unable to leave their relationship.” The Immigration Judge determined that there was inadequate evidence that the respondent’s spouse abused her “in order to overcome” the fact that she was a “married woman in Guatemala who was unable to leave the relationship.” He found that the respondent’s abuse was the result of “criminal acts, not persecution,” which were perpetrated “arbitrarily” and “without reason.” He accordingly found that the respondent did not meet her burden of demonstrating eligibility for asylum or withholding of removal under the Act.<sup>44</sup>

The details of the legal arguments required to get there make it almost impossible for women who do not have the benefit of a lawyer, or those whose cases are a little more complicated. Thus a rather straight forward case of a woman being persecuted for her own gender must go through an intensive legal ordeal to be successful in this system due to the narrow definitions provided of what it means to be a refugee.

Even if someone were to possess all the traits that would allow them to be characterized as a refugee, there are several factors that would prohibit them from that protection. These include their nationality, changing country conditions, or crimes they may have committed. Some countries have laws about countries they do and do not accept refugees from; for example, Canada refuses

---

<sup>44</sup> Matter of A-R-C-G- et al., 26 I&N Dec. 388 (BIA 2014), United States Board of Immigration Appeals, 26 August 2014, available at: [http://www.refworld.org/cases,USA\\_BIA,5400846f4.html](http://www.refworld.org/cases,USA_BIA,5400846f4.html) [accessed 2 April 2017]

to take asylum seekers from the United States.<sup>45</sup> These asylum seekers can also lose asylum if their country's human rights conditions change: a war ending, a coup, or an influx of government forces removing a threat (such as a gang) would all be reasons that the United States could reconsider a country to be "safe" for their refugees and thus return them to their country of origin. Lastly, if the asylum seeker had committed a crime or even participated in a group that is considered to commit terrorist activities, that person cannot gain asylum.

The case of Ibrahim Parlak demonstrates this last exclusion. He fled Turkey in 1991 and he was granted asylum in 1992 to protect him from the ethnic persecution he faced as a Kurd. In 1997, the United States officially labeled the Kurdish Worker's Party to be a terrorist group, and suddenly Parlak had a terrorist background and was in danger of being deported. Turkey requested his return so he could be tried and convicted for the crimes he committed as a Kurdish activist; he had previously been tortured in high school for his political activities. The case is on going; he could be deported any day for his activities as a young man<sup>46</sup>. Parlak's case demonstrates the effects these rhetorical spaces

---

<sup>45</sup> There is a fascinating history about asylum seekers from the U.S., even if some countries do not recognize these individuals as refugees. The most pertinent and recent example would be black panthers fleeing persecution; Assata Shakur fled to Cuba because it was one of the few countries that would offer protection from the United States (as detailed in her autobiography, *Assata: An Autobiography*). Edward Snowden is a more recent example, as well.

<sup>46</sup> Free Ibrahim. Accessed May 02, 2017. <http://freeibrahim.com/>.

have for governments to utilize; the United States decided not to take terrorists as refugees, labeled an activist group as a terrorist organization, and thus were allowed to revoke protection for Parlak. This case demonstrates the arbitrary nature of refugee status; the same person can go from “deserving” to “undeserving” easily if the government flexes its power to redefine the perimeters of their protection or if the political situation in either country changes.

Outside of labeling certain groups as “terrorist”, governments can label entire countries as refugee producing, or non-refugee producing. These decisions have symbolic weight to geopolitical relationships, and thus demonstrate the alternative advantages to redefining the definition of refugee. In the United States, the 1994 “wet feet, dry feet” policy from the Clinton administration was an excellent example of how relationships between nations could produce immigration policies. Essentially, the policy allowed any Cuban who set foot in the United States automatically gain asylum.<sup>47</sup> Coastguards could return any asylum seekers if they were caught in the ocean, but those arriving by plane did not face that issue. This policy drained Cuba of its wealthier citizens who could afford a plane ticket while making the bold statement that Cuba violated the

---

<sup>47</sup> Ann Bardach, "Why Are Cubans So Special?" The New York Times. January 29, 2015. Accessed May 02, 2017. <https://www.nytimes.com/2015/01/30/opinion/why-are-cubans-so-special.html>.

rights of its citizens. On the flipside, there is the concept of a “safe country” which signifies a country that has been deemed to not produce refugees <sup>48</sup>, so other countries could refuse to take asylum seekers from there. Although “safe countries” are somewhat theoretical, countries like Canada, or Sweden are examples of countries that are considered to not produce refugees by other nations. Clearly, these decisions symbolize relationships between countries; accepting refugees can be an insult between governments and can send a political message. Not accepting refugees’ signals a sense of trust. By deciding refugee cases by entire countries, governments communicate their perceived relationships and opinions about one another. This facet of the system reveals the way in which the term “refugee” is used for political reasons, which works directly against the prevention of human rights violations.

“Refugee”, when examined, quickly loses a lot of its meaning due to the arbitrary way it is used, especially in the “Convention and Protocol Relating to the Status of Refugees”. This document was a response to the issue of refugees, or the statelessness. Instead of a remedy to the extreme vulnerability experienced by those without a state to protect them, this document produced a system which

---

<sup>48</sup> United Nations High Commissioner for Refugees. "Background Note on the Safe Country Concept and Refugee Status." UNHCR. Accessed May 09, 2017. <http://www.unhcr.org/afr/excom/scip/3ae68ccec/background-note-safe-country-concept-refugee-status.html>.

prioritized the assistance of a privileged few while providing justification for ignoring the rest. Due to an overly specific description of “refugee” paired with ambiguous articles, the application of this convention created the United States asylum system and the fundamental binary at the heart of it: the deserving and undeserving immigrant. The deserving immigrant, like many other privileged groups, functions mostly as a foil to the undeserving. The traits associated with the undeserving can change or be modified to fit contemporary needs, but essentially it is a scheming, selfish migrant. Someone who lies to trick their way into a space meant for someone who “actually” needs it. This binary implies another important myth: a false sense of scarcity paired with the belief that immigrants are a detriment to the communities they inhabit.

### **Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment**

In 1984, the United Nations produced a document, The “Convention against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment” that was hotly debated: Every article was deliberated, and each word considered. This deliberation occurred because banning torture was a somewhat contentious subject, although certainly not new. A proposed prohibition of prolonged human suffering has occurred sporadically throughout

history; the Calas Affair<sup>49</sup> is one example. The effects of this debate were limited by 20<sup>th</sup> century understandings of torture: prolonged physical and mental pain, generally used in war, by men. It was separate from punishment and random violence due to the importance of intent. These specifications were the product of debate at the UN, and occurred over 38 different sessions: the end result continued the trend of the other human rights documents, and served state interest over human rights.

The backdrop of this historical document and new understanding of torture coincides with the history of Amnesty International, a pioneering NGO which refined the role not-for-profits had with sovereign states. Amnesty International was founded in 1961 by Peter Benenson, a Jewish lawyer from London who was enraged by an article he read about Portuguese students who were sentenced to seven years in prison for raising their glasses to freedom<sup>50</sup>. He was inspired to pen his famous essay, which publicized Appeal for Amnesty, a campaign that became Amnesty International. The article, "Four Forgotten

---

<sup>49</sup> Jean Calas was a French Protestant Christian who was convicted of murdering his son to prevent him from converting to Catholicism. He was sentenced to death by the wheel, a torture device that slowly rips the victim apart. Voltaire used this case to argue against torture, and the religious corruption he felt was present in its ruling. See Lynn Hunt's *Inventing Human Rights* for more details.

<sup>50</sup> "Who We Are." Amnesty International. Accessed May 09, 2017. <https://www.amnesty.org/en/who-we-are/>.

Prisoners”, seeks to defend the 18<sup>th</sup><sup>51</sup> and 19<sup>th</sup><sup>52</sup> articles in the “Universal Declaration of Human Rights”, mainly the right to have and express opinions (political and religious) freely. In this document, which renewed the conversation on torture (even citing Voltaire), we see the first seeds of how torture would be framed in the upcoming campaigns by Amnesty International.

Benenson began his essay with an example of prisoners of conscience<sup>53</sup>. These examples not only place torture exclusively in male centric spheres, but limits torture to male experiences:

In Spain, students who circulate leaflets calling for the right to hold discussions on current affairs are charged with "military rebellion." In Hungary, Catholic priests who have tried to keep their choir schools open have been charged with "homosexuality."<sup>54</sup>

Using the Catholic church and Universities as his examples completely blocked women from this discussion, because women could not participate as leaders in the Catholic church regardless of the country, and in Spain during the 1960s gender equality was just being introduced so most women were still confined to

---

<sup>51</sup> Article 18: Everyone has the right to freedom of thought, conscience and religion: this right includes freedom to change his religion or belief, and freedom either alone or in company with others in public or private, to manifest his religion or belief in teaching, practice, worship and observance.

<sup>52</sup> Article 19: Everyone has the right to freedom of opinion and expression: this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers.

<sup>53</sup> “Prisoners of Conscience;’ [...]: "Any person who is physically restrained (by imprisonment or otherwise) from expressing (in any form of words or symbols) any opinion which he honestly holds and which does not advocate or condone personal violence." We also exclude those people who have conspired with a foreign government to overthrow their own."

<sup>54</sup> Peter Benenson, “Four Forgotten Prisoners,” Amnesty International, accessed May 2, 2017

the domestic sphere<sup>55</sup>. These examples, and others like them, became the standard in explaining prisoners of conscience. The issue of prisoners of conscience then opened the floor to the debate on torture, but prisoners of conscience were at the forefront of that debate because they represented the perfect victim.

Benenson's brainchild snowballed into Amnesty International, whose main focus was prisoners of conscience. A decade after its inception, in their annual report on the international rights situation, they detailed their campaign for the abolition of torture. Describing a meeting in Paris, the report summarizes the work of four committees, but the most notable one was Committee B:

Commission B, dealing with the socioeconomic and political factors affecting torture, formulated special recommendations for action against torture to be taken by police and military personnel, religious organizations, educators, artists, trade unions and business enterprises and employers.<sup>56</sup>

Because Amnesty International had situated torture as a male issue, the professionals who they believed would assist in this movement were all in male dominated spheres. It is particularly notable that they wanted police and military to take action, when it was those actors who were specifically committing torture

---

<sup>55</sup> "Spain - The Changing Attitudes In Spain." Gender, Cohabitation, Family, Definition, Development, and Family - JRank Articles. Accessed May 09, 2017. <http://family.jrank.org/pages/1622/Spain-Changing-Attitudes-in-Spain.html>.

<sup>56</sup> Amnesty International. *Annual Report 1973-1974*.

with impunity. This is the campaign that inspired the United Nations to write the “Convention against Torture and Other Cruel, Inhumane or Degrading Treatment or Punishment”, and it began with a completely biased and ineffectual perspective of what torture was and who suffered it.

The question of torture was submitted to the agenda for the 29<sup>th</sup> session of the General Assembly of the United Nations in 1974, and it was decided that the Third Committee (dealing with social, humanitarian and cultural issues) would examine the issue and make a document of their findings. They created updates and drafts until the 58<sup>th</sup> session; tracking the drafts and changes made to the document, as well as the recommended changes, reveals the discourse of the document which contains the shifting and accepted definitions and boundaries of human suffering.

While drafting the document, a paper trail was left behind which demonstrates the bureaucratic process of the United Nations; dozens of reports exist in which proposals to suspend, reexamine, or to add in new considerations litter the online archives of the United Nations. Hundreds of documents mention torture, yet only contain phrases such as,

The Economic and Social Council approves the recommendation made by the Commission on Human Rights in paragraph 2 of its resolution 18 (XXXIV) and authorizes the holding of a meeting of a working group open to all members of the Commission for one week immediately before the thirty-fifth session of the Commission with the task of preparing for the

Commission concrete drafting proposals for a draft convention on torture and other cruel, inhuman or degrading treatment or punishment.<sup>57</sup>

These types of documents show the arbitrary yet time-consuming processes that are a product of the United Nations system; it took over a decade to produce this document.

During the thirty-fourth session, on January 23<sup>rd</sup>, 1978, Sweden presented a draft that became the foundation of the polished document. Throughout the text, “cruel, degrading, or inhumane treatment or punishment” is given equal standing with torture, but in doing so the authors created a division between “punishment” and “torture”. Later on, this distinction made it far easier for torture to be banned, as it was differentiated from inhumane punishment and thus sovereign governments could hypothetically ban interrogation while keeping solitary confinement. Something that remains prevalent in the US, even though solitary confinement is now defined in international conventions as an aspect of torture. This fact is especially important, because even the inclusion of punishment was a site of debate. The US was one of the main and successful actors against its inclusion<sup>58</sup>, because banning cruel punishment would have infringed on the United States norms.

---

<sup>57</sup> J.H. Burgers, “Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.” (United Nations, 1984).

<sup>58</sup> Iveta Cherneva, “The Drafting History of Article 2 of the Convention Against Torture” (*Essex Human Rights Review* 9.1, 2012), 8

The debates surrounding this particular document illuminate the changes which were then represented in the final product. In a response to the Swedish draft, one Egyptian representative, Ms. Emara, inquired on the specific wording regarding where the state has an obligation to prevent torture and how the Swedish draft failed to cover occupied territories. French representatives also argued against the wording, however, their issue was quite different:

France voiced the argument that the phrase ‘within its jurisdiction’ should be replaced with ‘in its territory’ because the phrase ‘within its jurisdiction’ could be interpreted too widely to cover citizens of one state who are resident in another state. That argument was countered with the observation that the wording ‘within its jurisdiction’ would cover torture inflicted aboard a ship or an aircraft registered in that state, as well as its occupied territories.<sup>59</sup>

Yet again, the document was pushed to better reflect the norms as opposed to the possibilities and essentially allowed governments to torture colonial subjects.

Large phrases like this contribute to the freedoms benefiting governments in this document, but even the small definitions of certain words favor governments over human beings.

The most important piece of this document lies in its definitions. These definitions build off of Amnesty International’s framework, while furthering the masculinization and even narrowing the concept of torture further. The definition of “Torture” in this draft, means,

---

<sup>59</sup> Burgers, “Report of the Working Group”, 39

any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted by or at the instigation of a public official on a person for such purposes as obtaining from him or a third person information or confession, punishing him for an act he has committed or is suspected of having committed, or intimidating him or other persons. It does not include pain or suffering arising only from, inherent in or incidental to, lawful sanctions to the extent consistent with the Standard Minimum Rules for the Treatment of Prisoners.<sup>60</sup>

Notably, masculine pronouns are used through out, already providing an overtone indicating who can be tortured. The authors have also limited torture to three possible scenarios: at the request of a public official<sup>61</sup>, as punishment, or for intimidation. This leaves out all other situations of torture that are experienced more by women, like rape. This effectively creates fewer cases of torture while erasing the torture felt by oppressed minorities.

The final document is the culmination of months of debate by dozens of different UN actors, and yet it has by far the narrowest conceptualization of what one should consider torture. This indicates that the authors were swayed over time to specify the experience of torture and thus implicitly acquiesce to the

---

<sup>60</sup> Lars Grundberg, "Draft of the International Convention Against Torture and Other Cruel, Inhumane, or Degrading Treatment or Punishment." (United Nations, 1978).

<sup>61</sup> This particular part of the article perfectly demonstrates how vague and thus inefficient these documents are. I know they are attempting to prevent blame deferral, but they don't go into any of the reasons why an official might request that someone be tortured, nor do they ban officials from asking their underlings to torture others.

majority of torture occurring. To completely unravel this definition, it must be quoted in its entirety:

For the purposes of this Convention, the term "torture" means any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions.<sup>62</sup>

This paragraph protects state interests through three compositional devices: through ambiguous adjectives, the use of overly specific scenarios, and the structure it recommends for determining torture. First, the vague use of words like "severe", or "suspected" essentially provide a political "fill in the blanks" for government actors to use at their own convenience. Secondly, the four different scenarios of torture are arbitrarily restrictive, and seem to only imagine torture in spaces of war or conflict. Finally, advocating that torture be defined by the intentions of the torturer instead of the experience of the tortured invalidates the experiences of victims of torture while putting the onus on them to prove the intent behind their torturers' actions. Each compositional subtlety like these three

---

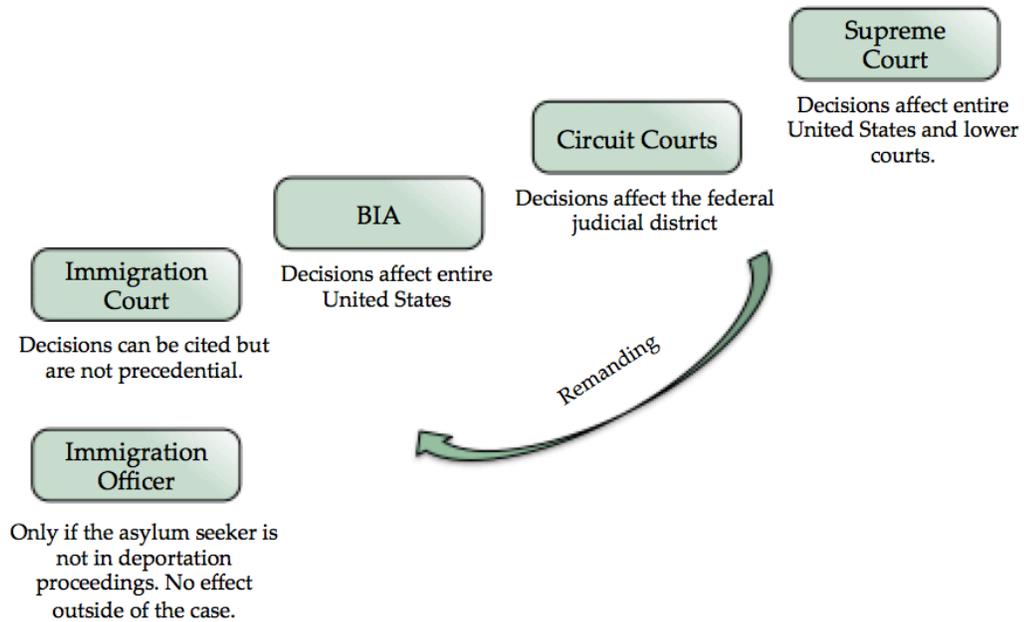
<sup>62</sup> UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 2 May 2017]

examples puts more and more interpretive power into the hands of sovereign states, and these were intentional choices.

The history of the convention and the document itself does not reveal the authors' definition of torture; more so it reveals a discourse that determined who should be protected from suffering, and what obligation states had in the protection of that person. Although this system purports to be an upholder of human rights, due to its nature it instead protects state sovereignty and government interests. If that is true, then this document is not ineffectual at all, but in fact quite successful.

United States domestic law operates using same the definitions of the three previously covered UN texts, and demonstrates in practice what the over and under specificity of the wording allows governments to do. Even if it had a religious adherence to the UDHR's human rights standards (which it does not), the US's immigration system would still violate the rights of thousands each year simply based on its' heavy reliance on subjectivity. This system puts immigrants through a criminal trial, where they are required to provide evidence, give testimony, and painstakingly wrangle with the legal norms to try and make their case, and all of it would be for nothing if the judge thinks the asylum seeker is lying.

The way in which the United States adopted these conventions demonstrates exactly how a government can protect its sovereignty instead of human rights through exploitation of the “wigggle room” provided by these disproportionate descriptions. The entire process of being an asylum seeker (someone attempting to gain asylum) is an example in and of itself. It follows most of the protocols provided by the United Nations, but it takes years to go through, is incredibly expensive, and in the process causes human rights violations of its own. This bureaucratic process has several stages: if not in deportation proceedings, it begins with an asylum officer, then the immigration court, the board of immigration appeals, the circuit courts, and finally, the supreme court. At any stage the decision can be “remanded” or returned to a lower court. This minimizes the affects of a decision; the higher courts can use this by essentially agreeing with the lower court and then they do not have to make a decision themselves that could be precedential. Below is a chart to depict the levels of this system and how powerful they are:



The U.S. Citizenship and Immigration Services, meaning the same branch of the government whose purpose is to filter and exclude people, controls this system. Unsurprisingly, the asylum system in the United States is far more concerned with removing the “undeserving” than sheltering the “deserving”. This is especially true after the 1990 Immigration Act that reflected the new bipartisan trend of anti-immigration policies.<sup>63</sup> The first level of the asylum system is to submit an application for asylum within a year of arrival<sup>64</sup>. Then, the asylum seeker would have a private interview with an asylum officer who has

<sup>63</sup> Joseph Nevins. *Operation Gatekeeper: The Rise of the “Illegal Alien” and the Making of the U.S.-Mexico Boundary*, (New York: Routledge, 2002), 107.

<sup>64</sup> This time limit is completely arbitrary, because there is no argument for why it exists. It certainly isn’t fantastical to imagine an asylum seeker whose country had changed over the course of several years in a way that would make their return dangerous or life threatening.

the power to decide whether or not they receive asylum or are deported. This interview is a privilege, however, because it is exclusively for those who can legally travel into the United States and ask for asylum from within, or who have traveled across the border without being apprehended. Those who are caught at the border, or those who were denied by the asylum officer and seek to appeal the decision, go to immigration court. At this level, the ambiguity and arbitrary specificities of the prior documents becomes clear. Judges have the power to decide on a case-by-case basis whether or not the immigrant is a refugee or not; there is no in between and thus a binary of “deserving” and “undeserving” immigrants is produced.

The process of immigration systems, and the act of attempting to find and regulate true refugees produces the characters of “deserving” and “undeserving” immigrant while attributing specific traits to both. What these processes do is to create a binary of “deserving” and “undeserving” immigrants, allowing states to define the process of applying these stereotypes to real human beings:

[O]ne important effect of the bureaucratized humanitarian interventions that are set in motion by large populations displacements is to leach out the histories and the politics of specific refugees’ circumstances. Refugees stop being specific persons and become pure victims in general; universal man, universal woman, universal child, and, taken together, universal family. (Linke, 101)<sup>65</sup>

---

<sup>65</sup> Uli Linke, and Danielle Taana Smith, *Cultures of Fear: A Critical Reader*, (London: Pluto Press, 2009,) 101.

In the production of the universal victim, a universal impostor is also constructed who attempts to cheat the system. The justified immigrant must be completely without fault, and fit every needless specificity that these UN documents provide. All others fall into the category of deceptive immigrant, a greedy and malevolent character attempting to suck resources from unfortunate countries that happen to have the resources to support them.

The inherent criminality of immigrants is central to many human rights debates; viewing refugees as guilty until proven innocent serves as a gate-keeping paradigm that ultimately defies basic definitions of human rights:

[...] States have resisted adoption of any standards on treatment of non-nationals. A counter-offensive against human rights as universal, indivisible and inalienable underlies resistance to extension of human rights protection to migrants. A parallel trend is deliberate association of migration and migrants with criminality. [...] Intergovernmental cooperation on migration "management" is expanding rapidly, with functioning regional intergovernmental consultative processes in all regions, generally focused on strengthening inter-state cooperation in controlling and preventing irregular migration through improved border controls, information sharing, return agreements and other measures.<sup>66</sup>

Patrick A. Taran demonstrates here the state exigency in preventing non-citizens from entering the country. During this time period (and explanations do change

---

<sup>66</sup> Patrick A. Taran "Human rights of migrants: challenges of the New Decade", (International Migration. 38, no. 6.), 8

over time), the United States was preventing immigration as a way of reasserting its power after a terrorist attack on its own soil on 9/11.

The power of sorting human beings into this crude binary and enforcing the criminalization of immigrants rests in the hands of a judge. Complete subjectivity is not just allowed in these cases, but encouraged. In the *Judge's Benchbook*, a guide for immigration judges written by the Executive Office for Immigration Review, the recommendation for how judges should consider evidence like witness testimony is:

Credibility determination - Considering the totality of the circumstances, and all relevant factors, a trier of fact may base a credibility determination on the demeanor, candor, or responsiveness of the applicant or witness, the inherent plausibility of the applicant's or witness's account, the consistency between the applicant's or witness's written and oral statements (whenever made and whether or not under oath, and considering the circumstances under which the statements were made), the internal consistency of each such statement, the consistency of such statements with other evidence of record (including the reports of the Department of State on country conditions), and any inaccuracies or falsehoods in such statements, without regard to whether an inconsistency, inaccuracy, or falsehood goes to the heart of the applicant's claim, or any other relevant factor. There is no presumption of credibility, however, if no adverse credibility determination is explicitly made, the applicant or witness shall have a rebuttable presumption of credibility on appeal.<sup>67</sup>

This set of standards, “demeanor, candor, or responsiveness,” fundamentally requires subjective judgment. By looking at case rejection statistics, the subjective

---

<sup>67</sup> "Immigration Judge Benchbook." The United States Department of Justice. Accessed April 24, 2017. <https://www.justice.gov/eoir/immigration-judge-benchbook-credibility-standard-language>.

and thus unequal application of the law is evident: Judge Larry R. Dean of New York, from 2000-2005, denied 84.5 of his asylum cases. Also in New York, Judge Margaret McManus over the same period denied 9.8 percent of her cases<sup>68</sup>.

Perhaps in a strange twist of fate, Judge Dean only saw non-deserving immigrants and Judge McManus only saw deserving ones. But the more likely scenario is that the law allows for judges to subjectively decide the fate of thousands of people each year, which leads to a disproportionate amount of rejections depending on the personal biases or temperament of the judge.

These subjective decisions have significance in the United States: each one can be referenced and thus used to deny thousands of other asylum seekers later on. More importantly, these decisions are a site of identity production for the United States. Within these judgments are explicit and specific definitions of the human body and experience. In *The Matter of Kasinga* for example, the 9<sup>th</sup> Circuit deliberated on a cultural practice they had never been party to: female circumcision. During this case, they define a woman's basic human experience as one that requires sexual pleasure: implicit in that decision are dozens of explicit categorizations. "Woman" comes to be equated with a vagina deemed to be "functional", through heterosexual intercourse and the ability to give birth. The system produces the meanings of race, gender, sex, religion, ability, and prescript

---

<sup>68</sup> "Asylum Denial Rates by Immigration Judge." TRAC Immigration. Accessed April 24, 2017. [http://trac.syr.edu/immigration/reports/160/include/judge\\_0005\\_name-r.html](http://trac.syr.edu/immigration/reports/160/include/judge_0005_name-r.html).

those meanings unto the human body forcibly; deportation (which can be a death sentence) is on the line if a person cannot fit within the parameters of those categories. Through their own interpretations of these documents, the United States immigration system enforces oppressive hierarchal structures and can reassert its state power and proliferate nationalism through the production of a common enemy. The protection and proliferation of state power through subtle but crucial rhetorical choices within these texts produced a paradigm shift, justifying the status quo more so than changing it. In the Zubeda case, the living consequences of these documents becomes clear as each level of the court uses their definitions to deny her humanity while enforcing state power.

## **1. Echoes in the Court Chambers: Hidden Biases and Necessary Incompetence**

The actors in the United States asylum system utilize the loopholes in the United Nations documents, to help shape the discourse concerning immigrants in the United States: although prior to 9/11 there wasn't a shortage on xenophobia, the events that transpired that day dramatically increased hateful rhetoric as immigrants were the strawman for "terror". Although Zubeda was from the Democratic Republic of the Congo, and was not a Muslim (the most

targeted religious group after 9/11), she still felt the consequences of this discourse and suffered greatly. The system was already set up for subjectivity and thus the allowance of personal biases; accordingly, this case was built on assumptions, omissions, and falsehoods. Even though Zubeda was eventually allowed to stay (without any of the benefits of being a refugee, of course), it was due to her lawyers agreeing with the judge's logic and pushing it further.

This chapter provides an in depth reading of the court documents to illuminate the assumptions Judge Durling first made in the Immigration Court, that Zubeda was not credible but should not be deported. At the Board of Immigration Appeals, that logic was taken a step further as the board agreed if she was not credible, she should be deported. This surprising ruling can be linked to new immigration policies occurring at the time, which created a bottleneck of immigration cases that forced court officials to make hasty or erroneous decisions. Finally, at Third Circuit court the decision simply remanded the decision back to Judge Durling, completing a full circle that accepted the subjectivity of Durling's statements at every level.

Zubeda did not receive asylum, and the reasons for this reveal how much evidence must be given in support of an asylum seeker while very little was needed to deny them. Judge Durling cited two reasons for this denial: lack of credibility, and lack of evidence. Durling cited six points of her testimony that he

found to be lacking, or as it is labeled in asylum law, incredible. When used in a legal context, this means “improbable” or “not to be believed”. Judge Durling provided several reasons for his adverse credibility ruling. This included the discrepancy between her stating that she did not know any of the soldiers who had raped her, and her writing that she was able to recognize one of the soldiers as someone she had seen in her town; that she said her mother and sister had burned to death, but in her written testimony she stated that she was unsure if they had survived the fire; after being raped, she testified that she was placed in a truck, while in her written statement she was placed into a car, and the number of women who were abducted with her fluctuated between one and four; lastly, in the camp she referred to three women, one woman, and then three women again in explaining her time there and eventual escape. Notably, Ms. Zubeda did not speak English when these written and verbal testimonies were given. There are many instances of translation error leading to a perceived lie, and thus a lack of credibility.<sup>69</sup> Particularly with the car and truck discrepancy, those two words basically provide the same meaning: a vehicle. The sixth and final reason Judge Durling gave for not believing Zubeda was the perceived ease with which she escaped, and how she neglected to provide details about her flight such as how

---

<sup>69</sup> A documentary, *A Well Founded Fear*, records translator error and its effects on asylum seekers' cases while recording asylum officers. Anne Delaney, and Phil Glendinning, *A Well Founded Fear*. (Video Education Australasia, 2011).

long the boat ride was, or what body of water they crossed. An important thing to remember is that these are the recollections of a trauma victim, who had experienced torture and the loss of everyone she knew in a matter of days. Small memory errors are expected in such situations.

Judge Durling purportedly rejected those opinions because of the specific nature of the Democratic Republic of the Congo's human rights condition. Judge Durling believed that Zubeda did not fit with the definition of refugee as set out by the "Convention Relating to the Status of Refugees". This definition stated that to be a refugee, Zubeda would need to prove that she was sought out and persecuted based on her race, religion, nationality, political opinion, or her membership in a particular group. Noticeably, Zubeda's story fits into those narrow categories. She was persecuted for her gender, which has been considered as a particular social group by several judges. She and her family were persecuted for not supporting the rebellion, which had taken control of South Kivu at the time. Her membership in the Bembe tribe could also have made her vulnerable to attack, as well as her religion as a converted Christian. It is impossible to ever truly know why she was targeted, but the results remain the same. The official claim put forth by her lawyers argued that she was persecuted because of her father's political opinions (whatever opinions led him to consider reporting the rape of his wife to human rights organizations near by). Both Judge

Durling, and the Immigration and Naturalization Services disagreed that this was a legitimate basis for persecution.

Judge Durling's explanation for this rejection relates back to the *Matter of A-R-C-G et al.*, where the asylum seeker's purported particular social group was too narrow; in Zubeda's case, her group was too wide. In his decision, Judge Durling found that she wasn't singled out enough to prove particular persecution, writing:

[...] I am not unaware of the atrocious human rights violations in the Congo, including the raping of women by security forces, and the indiscriminate murders of civilians by these forces. All in all, the government of the Congo is a miserable excuse of a sovereign government, and I cannot grant relief to an alien on the mere fact of hailing from such a country. Again, this respondent's testimony is suspect for the reasons I have noted, and she has the burden of proof to present detailed and consistent testimony, which she has failed to do. Consequently, I have no alternative but to deny her application for asylum and withholding of removal[2] [...].<sup>70</sup>

Each word and statement require deconstruction to understand exactly what Judge Durling communicated by denying her for these specific reasons. Firstly, his statement contained a double negative, "I am not unaware", these carefully chosen words neither confirmed nor denied the depth of his knowledge but covered him enough to purport a lack of ignorance. Ironically, this statement did demonstrate ignorance to Zubeda's case as he misunderstood the fundamental

---

<sup>70</sup> In the Matter of Takky Zubeda, (United States Immigration Court, York PA October 22, 2001).

argument of who was persecuting her and for what reason. Firstly, he referred to the Democratic Republic of the Congo as simply, the “Congo”, erasing a complicated history of that region which led to the separation of two states and the consequential differing names. More importantly, this statement demonstrated his lack of understanding of the political situation in the DRC, in that Judge Durling conflated the rebels that persecuted Zubeda with the government. His statement “the government of the Congo is a miserable excuse of a sovereign government, [yet] I cannot grant relief to an alien on the mere fact of hailing from such a country”<sup>71</sup> completely misrepresented the facts of Zubeda’s case. The DRC was in the throes of a civil war, in which a large region had been taken and controlled by rebel soldiers. Her past persecution was by this faction of the DRC, and could not have been helped by the official government. His assertion that her experience of torture was not unique to her, and was merely a typical experience of a Congolese person was false then, because her persecution was a result of the political situation, and her family’s opinions, and most importantly her gender. By denying the warfare and making it out to be a form of daily civil strife, Judge Durling fundamentally distorted the facts of this case. Such an erasure demonstrates the way in which a subjective analysis was preferred over fact. Regardless of the country conditions reports that were

---

<sup>71</sup> In the Matter of Takky Zubeda, 2001

submitting that back up Zubeda's claims<sup>72</sup>. Even if there was evidence that human rights violations were happening around her, the framework allowed the judge to dismiss her claims if he didn't believe that those specific violations happened her. Judge Durling followed the *Judge's Benchbook*, considered her demeanor and the way she related her experiences, and found her incredible, in step with the asylum system.

Another important assumption Judge Durling made was the conclusion that her experiences were "normal" for a citizen of the DRC. This means Zubeda would not be able to fit under the "particular persecution" part of the refugee definition, but Durling's judgments had no factual backing. Her home region, indigeniety, class status, opinions, and most importantly gender set her apart from other citizens. As a woman living in a war-torn area, she was specifically targeted. This is extremely pertinent because this method was brought into the DRC as Hutus fled to the DRC (Zaire at the time) and continued launching assaults against Tutsis (in Rwanda and Zaire) from refugee camps. Zubeda's ethnic identity as a member of the Bembe placed her in direct conflict with both Hutus and Tutsis as the Bembes had past and ongoing conflicts with both groups. Zubeda was specifically targeted as a result of this conflict, but because

---

<sup>72</sup> IRIN, DRC: *Rape cases soar in South Kivu*, 3 June 2009, available at: <http://www.refworld.org/docid/4a2e1016c.html> [accessed 9 May 2017]

Judge Durling did not recognize the civil war in his decision, he could come to the conclusion that she was not.

In his decision, Judge Durling came to conclusions based on subjective assumptions. However, it must be clear: this decision was analyzed through two other court systems and by countless lawyers and was deemed acceptable. This decision was not a break from the system, but an accurate representation of how the Immigration court operated. Asylum could be easily lost not on the basis of an asylum seeker's merits, but by the social context of the court room; who the judge is, what their personal biases may be, and how their perspective is effected by current world events (like 9/11 in Judge Durling's case).

Despite the rejection of Zubeda's asylum claims, she was allowed to stay in the United States based on the Convention Against Torture. Judge Durling ruled that there was significant probability of her being tortured upon her return; this ruling contained notable arguments about the DRC, torture, and imprisonment. These conclusions hold particular importance because they were then reexamined, debated, and reinforced in the proceeding court cases. The BIA agreed with the majority of Judge Durling's statements, and when they disagreed with him it was on the basis that he was being too lenient and took his assumptions a step further. In the Third Circuit they remanded this case back to

the Immigration judge, because they found his decision to be acceptable.

Essentially, Judge Durling's analysis of her suffering was ultimately accepted.

The overarching crux of his argument was that being a citizen of the DRC meant you would more likely than not be tortured, particularly if you had a cause to interact with government officials:

Notwithstanding my concerns about the respondent's testimony, there has not been raised as an issue in this case the respondent's Congolese nationality and citizenship. Consequently, the United States must seek the permission of the government of Congo [sic] in returning this respondent to her homeland. And it is this very point which greatly troubles me. As noted above, the State Department Country Reports, as well as other documentary evidence, shows a government which takes upon itself the systematic abuse of large segments of its population. The security forces are out of control, if indeed the government has any real interest in exerting control over its forces. Not only is there arbitrary and random violence against opponents of the regime, but against the hapless population as well, including against those persons detained or imprisoned, including the systematic use of torture.<sup>73</sup>

Again, there was no mention of any of the significant political events in the DRC which led to Zubeda's persecution. This erasure created a false understanding of her experience; by ignoring the war, the Judge can more easily characterize Zubeda as an undeserving immigrant. Someone who left a "bad" country to go to a "good" country, instead of someone fleeing war and torture.

---

<sup>73</sup> In the Matter of Takky Zubeda (United States Immigration Court, York PA October 22, 2001).

After evaluating the country conditions as generally poor, Judge Durling ended his statement with a generalized theory as to what could possibly happen to Zubeda should she return:

Can I state with any degree of confidence that this respondent would be permitted to arrive in the Congo and immediately go about her business unmolested? No I can't, and neither can I state with any degree of certainty that the respondent would be physically harmed upon her return. [...] I have little confidence that this respondent, whatever her background, would be treated with more deference than her fellow citizens, none of whom apparently is immune to government atrocities. It is clear from the evidence in this record that the Congolese government, through its security forces, are irresponsible as a whole and have no regard for the well being nor the human rights of its citizens.<sup>74</sup>

Consider the irony that he found it to be unlikely that she was raped, and yet was unable to send her back because it was likely that she will be raped. Again, this was partially due to his belief that she wasn't specifically targeted, as he stated that the DRC "didn't hold a monopoly on abusive treatment of its citizens" thus he couldn't grant her asylum for being a citizen of that country. But he put great emphasis on the fact that he found her to be incredible. This fact hurt her quite a bit in later cases. What conclusions can be drawn when a judge doesn't believe the words of the Congolese immigrant that she was raped, but predicts based on Western reports that she will be raped should she return? Subconscious biases were allowed and accepted in the courtroom. So on October

---

<sup>74</sup> In the Matter of Takky Zubeda, 2001

22nd, 2001, Judge Durling denied Zubeda asylum but would allow her to stay in the United States (sans any rights) under the Convention against Torture. At this point she had been imprisoned for 10 months and a week.

### **Board of Immigration Appeals**

Although Zubeda remained in detention and without asylum, the INS were not satisfied with Judge Durling's decision and appealed it to the Board of Immigration Appeals. On January 4th, 2002 they submitted a brief containing their arguments against the Judge, and in favor of her deportation: a "merits appeal". To do so, they argued about incredibility, the conditions of the Democratic Republic of the Congo, and if prison conditions (however bad) actually constituted torture. First, the INS launched an attack on her credibility based on Judge Durling's ruling; essentially they argued that if she had lied about the past then her future fears must be a lie as well. They also took the fact that she had not appealed Durling's decision as an admission of guilt.

Aside from her apparent lack of credibility, the lawyers from the INS argued that the respondent would not be detained in the DRC, and even if she was that would not amount to torture:

The background evidence shows serious problems in the Congo's [sic] human rights record, but it does not show likelihood that deportees are at risk of suffering the type of severe harm at the hands of the government that could conceivably constitute

“torture.” There is a dearth of evidence to support any finding that the respondent is likely to be detained for any reason.<sup>75</sup>

They continued Judge Durling’s habit of misrepresenting the political situation of the DRC while speaking falsely about crucial facts about the deportation process. When deporting an immigrant, the INS had to ask the government of origin if they could return the deportee, and tell the government that they should detain the immigrant upon their return. This was standard procedure and can be seen in the forms which they sent with deported immigrants.

Further covering every base, the INS then reexamined the meaning of torture so that even if the other counts were false (which they were), Zubeda’s future experience would not amount to torture.

Even if she were, harsh prison conditions do not constitute “torture” as that term is defined. Torture requires that the harm be intentionally inflicted upon the victim.<sup>76</sup>

Notice that the INS has redefined the issue here: instead of her fearing rape as a Congolese woman (particularly from the rebel held region of South Kivu) being detained, she becomes a trait-less immigrant fearing the potentially undesirable conditions of a jail cell. Returning to the *Convention Against Torture*, intent defined torture. The INS recast the intentions of Zubeda’s torturers by framing it as punishment and redefining Zubeda’s identity. By removing and invalidating

---

<sup>75</sup> In the Matter of Takky Zubeda (Board of Immigration Appeals), June 7<sup>th</sup> 2002

<sup>76</sup> Ibid.

the marginalized parts of her identity, they created an imagined harmless atmosphere for her, where her gender, race, ethnicity, and religion wouldn't be cause to single her out. Sadly, this hypothetical utopia was not her reality. By denying her traits and the details of her situations, the lawyers feigned blindness to the oppression she faced due her identity and thus invalidated her experiences of persecution.

The INS's brief rhetorically closed every door, even when it was contradictory. They both heavily criticized the immigration Judge's decision while relying on it to label Zubeda as incredible. They characterized the DRC as a country that has "serious problems" with human rights, yet represented her fears of rape and torture as, "at best, generalized civil strife". They argued that she wouldn't be detained, but even if she were, it wouldn't amount to torture. This brief demonstrated the modus operandi of the INS; the acceptable level of misrepresentation (to the point of lying), illogical arguments, and ignorance towards the basic facts of the case. These issues were not mistakes, but were essential to this process and completely acceptable to the asylum system. This is the subjectivity encouraged by the framework produced by the United Nations. At all levels the set of assumptions at the center of this case were accepted and perpetuated, because reality was disregarded in favor for something much more

powerful and persuasive to an overworked court: the familiar story of a deceptive immigrant.

The response brief demonstrates the strategic choices that the respondent's lawyers had to make when replying to the INS. Essentially their argument validates the decision of Judge Durling, claiming that he made the correct decision and that torture was defined correctly and that CAT applied to Zubeda. This brief dug deep into the specificities of torture and the legal interpretations of the Torture convention, which in turn asked the court to narrow their understanding of torture.

To do this, the brief lays out the five characteristics of torture in the Convention Against Torture:

(1) The act must cause severe physical or mental pain or suffering; (2) the act must be intentionally inflicted; (3) the act must be inflicted for a proscribed purpose; (4) the act must be inflicted by or with the consent or acquiescence of a public official who has custody or physical control of the victim; and (5) the act cannot arise from lawful sanctions.<sup>77</sup>

The lawyers argued that the passage from a country conditions report of the DRC covers all five of those features: "The law forbids torture; however, security forces and prison officials used torture, and often beat prisoners in the process of arresting or interrogating them". Generally these statements reasserted the

---

<sup>77</sup> In the Matter of Takky Zubeda, 2002

points that Judge Durling made, and attempted to narrow the case's effects and thus make it more likely to be successful.

The most extreme example of this narrowing occurs when they interpreted Zubeda's claim to torture by attempting to make her case a special exception. The lawyers implicitly stated that the act of raping a person does not constitute torture in and of itself. "Rape is categorized in international instruments as an act of ill-treatment rather than of torture," they asserted. However, they defined Zubeda's case as an exception due to the severe mental and physical trauma that could occur if she were to be raped when detained. To further demonstrate that this case was worthy of the torture label, the brief asserted several facts to assuage any doubt that the rape was potentially consensual. Firstly, they reasserted how the rebel soldiers who gang raped her in front of her family were strangers (aside from the potential connection that they may have been the soldiers who raped her mother days before). The basis of this argument was to prove the lack of consent, which had to be established because whether or not she knew the soldiers came up frequently through out the trials. Durling had found her to be untrustworthy partially because she recognized one of the soldiers as someone who she saw around her village occasionally. Such a connection became a contention of doubt, because even the slightest hint of a prior connection would become fodder for the INS to denigrate her. The

respondent's lawyers had to have an airtight case that she was the perfect victim, or her life was on the line.

The Board of Immigration Appeals ruled to return Zubeda immediately to the DRC on June 7<sup>th</sup>, 2002. The basis of their decision relied on a previous case, that of J-E<sup>78</sup>, which found that prison conditions could be life threatening and indefinite but not torture. They also used Judge Durling's finding of her incredibility to disprove her fears; because the burden of proof was on the respondent, and her testimony was a large portion of her evidence, they were able to dismiss her claims easily by calling her unreliable. This decision was significantly plagiarized from the INS's briefs. Some parts were completely lifted from the text, others parts were reworded slightly. Not only does this demonstrate the way in which the subjective assumptions of Judge Durling were taken at face value, but the way in which entire chunks of the INS's assumptions were literally cemented into legal rhetoric through this decision.

"We agree with the Service," they begin, arguing that Zubeda does not qualify for the Convention Against Torture. The J-E- case was the main support for this argument, in that it was a BIA decision claiming that Haiti's prisons did not constitute torture:

---

<sup>78</sup> In the Matter of the Application of J.E., Supreme Court, 2015

In Matter of J-E-, 23 I&N Dec. 291 (BIA 2002), the Board concluded that the indefinite detention of criminal deportees by Haitian authorities does not constitute torture within the meaning of 8 C.F.R. 208. 18 (a) where there is no evidence that the authorities intentionally and deliberately detain deportees in order to inflict torture. We further held that substandard prison conditions in Haiti do not constitute torture within the meaning of 8 C.F.R. 208. 18 (a) where there is no evidence that the authorities create and maintain such conditions in order to inflict torture. *Id.* In addition, we found therein that evidence of the occurrence in Haitian prisons of isolated instances of mistreatment that may rise to the level of torture as defined in the Convention Against Torture is insufficient to establish that it is more likely than not that the respondent will be tortured if returned to Haiti. Based upon the facts of the instant case, we find dispositive our decision in Matter of J-E-, *Supra*.<sup>79</sup>

These statements established two things in the case. First, their specific conclusions about Haiti could be applied to the DRC without understanding the specific conditions of the latter. And secondly, the BIA applied CAT not in a way that prevents the actual experience of torture because the intent was considered more important than the actual victim's suffering. The way in which the BIA set up the facts to support their decision created dissonance in the way Zubeda was represented; she became further obscured by misinformation, but their final word in the matter defined her anew in the role of fallacious immigrant.

After presenting what they deemed to be the facts of the case, the BIA ultimately blamed the respondent for not providing enough evidence:

The background evidence establishes that prison conditions in the Congo [sic] remain harsh and life threatening. The Immigration Judge found that

---

<sup>79</sup> In the Matter of Takky Zubeda (Board of Immigration Appeals), June 7<sup>th</sup> 2002

the respondent would be detained upon return to the Congo (I.J. at 8). However, we note a dearth of evidence to support any finding that the respondent is likely to be detained for any reason. We find that the respondent has failed to establish that the harsh prison conditions establish a probability that she will be detained in a prison in the Congo, much less that she will be individually targeted for any harm by the government of the Congo. The evidence of record does not remotely establish a likelihood that the respondent will be tortured by the government of the Congo. While she claims to have been previously tortured in the Congo, the Immigration Judge specifically found her to be incredible and the respondent has not contested this finding (I.J. at 3-5). As such, the respondent has failed to meet her burden of proof. Accordingly, the Service's appeal will be sustained.<sup>80</sup>

This decision functioned largely as a repetition of the INS's arguments, with clear indication that they did not know or were willing to ignore the specifics of Zubeda's case.

As Zubeda was fighting to stay in the United States, she was also fighting to get out of prison. Over email, Jonathan Feinberg discussed the case with Ayodelle Gansallo and Judi Bernstein-Baker, as well as two other lawyers working on similar cases. Zubeda had been in prison for almost two years at this point. She had applied twice already to be "paroled", the legal term for being allowed to leave detention while awaiting deportation orders (or the unlikely case of her gaining withholding of removal). The INS had control of detained immigrants, and could decide whether or not she was a danger to United States,

---

<sup>80</sup> In the Matter of Takky Zubeda (Board of Immigration Appeals), June 7<sup>th</sup> 2002

or a “flight risk”<sup>81</sup>. If the INS continually made “rubberstamp” decisions (unconscious and incorrect conclusions), there was the ability that they could bring up the case in front of an appellate judge: an I 130 case, or Habeus Corpus<sup>82</sup>.

Feinberg and two other lawyers discussed their Habeus corpus cases and exchanged opinions and casual advice. One of the lawyers related his experience with Judge Sease, a judge working in the same court as Judge Durling:

As for our good friend Judge Sease . . . [sic] FORGET IT!!!! I tried asking her, in court, for a bond hearing for an LPR [legal permanent resident] arriving alien (like Alaka) and she dismissed it outright. I proceeded to argue Alaka, Patel, Ngo and Radonic [Habeas Corpus cases] with her but she would not hear of it. Finally (I could not resist) I told her: “I just find it interesting that in the same building (YCP) one judge would grant my client a bond hearing and the other will not.” She turned red, took off her glasses and retorted: “Mr. [redacted], Juge [sic] Durling is entitled to his opinion and I am entitled to mine.” I responded in closing: “I understand and respect that your honor. I guess I will just have to go back to Federal court once again to get my client released.” I thought she was gonna blow up!!! She said “Do what you have to do!” In the beginning, I was a bit intimidated by Judge Sease. Now it is kind of comical to watch her explode so needlessly.<sup>83</sup>

Although the Sease’s legal opinion had to be respected, the lawyers discussed her (and comparatively Durling) based on her subjective interpretations of the law. She was considered a “bad” judge, because she was unrelenting to requests

---

<sup>81</sup> Flight risk meaning an immigrant at risk of not complying with immigration law and living in the United States illegally.

<sup>82</sup> Latin for “you have the body”, Habeas Corpus is a type of case preventing wrongful or illegal imprisonment.

<sup>83</sup> Author Redacted, Personal Email to John Feinberg, 2003

thought to be reasonable. Even if she was considered “bad” there was not much the lawyers could do about her decision and it was deemed acceptable by the law that the two judges could have completely different conclusions which both must be carried out equally. Unequal application of the law demonstrates the incredible amounts of bias that were allowed and solidified by the system enough for its actors to casually discuss “good” versus “bad” judges.

Feinberg sent multiple drafts to the HIAS (Hebrew Immigrant Aid Society) lawyers to make sure his arguments were persuasive; Zubeda’s release was becoming more desperate as her condition was worsening. Zubeda told me that York County prison was alright and she was giving adequate health care, but she had been moved to Bedford Hills Correctional Facility for Women. She was housed in maximum security with inmates who had committed violent crimes. Zubeda was afraid of some of the women who would verbally harass her. If guards ever came to investigate the noise, the inmates would blame Zubeda and she would get in trouble: the guards didn’t trust asylum seekers who were being detained in the prison. The conditions were much worse than York and her mental and physical health suffered. She was receiving some treatment but was still in a lot of pain as she awaited her Third Circuit trial or to be paroled by the INS.

Feinberg's writing reflected Zubeda's discomfort and her need to be released. On November 8<sup>th</sup>, 2002, Feinberg sent in a letter to Judge Schiller. His memorandum<sup>84</sup> he stressed that Zubeda had spent 23 months in detention at this point and hadn't been free since she stepped foot in the United States. He argued that although the INS has jurisdiction over the detainment of immigrants and to determine whether or not they pose a risk to the community or a flight risk, that jurisdiction was not boundless. He argued that they were neglecting their duties by making "boilerplate" decisions and not reading her records before making a decision about her parole. In his letter, Feinberg argued:

The [INS's argument] that Ms. Zubeda could remedy the problems with her application by providing a birth certificate, "specific information" from relatives ensuring Ms. Zubeda's appearance at immigration hearings, and relevant information about Ms. Zubeda's medical condition, all of which information *was* provided with the application, gives rise to the inference that the INS officials considering her application *did not read it*. Accordingly, the INS's review of Ms. Zubeda's parole applications does not, by any means, constitute the "searching periodic review" of the need for detention required by due process. Rather, it can only be classified as a 'grudging and perfunctory review', clearly 'not enough to satisfy the due process right to liberty.'<sup>85</sup>

This letter exposes Feinberg's frustration, which in turn demonstrates the assumptions he had for the way in which this system *normally* ran. The extraordinary circumstances brought on by the Patriot Act (explained below)

---

<sup>84</sup> A legal letter arguing that Judge Schiller should petition the INS to release Zubeda.

<sup>85</sup> In the Matter of Takky Zubeda (Board of Immigration Appeals), June 7<sup>th</sup> 2002

were actively changing the process of these cases, and this new conduct was acceptable in upper levels of the immigration system. Judge Schiller ordered that the INS must conduct another bond hearing of her case, without condemning or attempting to fix their mistakes. He allowed the INS one month to respond to the arguments. Schiller had sent in this decision on November 18<sup>th</sup>, so the INS had until December 18<sup>th</sup> to make their case. Mr. Feinberg found out the name of the INS lawyer assigned to Zubeda, and contacted her by phone on the 27<sup>th</sup> of November. K. T. Tomlinson was somewhat unresponsive to Feinberg: he attempted to find out if she had planned to respond to the petition for Habeus Corpus and potentially talk her out of doing so; Tomlinson stated that she intended to respond and pointed towards a gaping hole in the case which normally wouldn't have been an issue. Zubeda had been moved to several different prisons and thus different districts, so Judge Schiller technically didn't have jurisdiction over her case any longer.

Feinberg discussed with the other lawyers over email about why Tomlinson would bring up this technicality, especially because it was usually never considered a problem. When he inquired with Tomlinson, she had merely answered that the INS had overlooked that detail for other cases but that didn't mean Zubeda would gain the same advantage. One lawyer working a similar case had a different idea however:

The ONLY reason they are raising this now is because they are swamped. In all of the habeases I filed in ED PA before, NEVER has this issue come up. And with the AGs [Attorney General's] new BIA streamlining procedures, they better start getting used to it or hire on more Asst US Attorneys.<sup>86</sup>

But why was the system overwhelmed? During this time period, there was a tremendous backlog of immigration cases. In 2000, there were 125,734 cases pending; by 2001 that number rose to 149,338 and in 2002 it was 166,061<sup>87</sup>. More and more cases piled up and the average wait time for immigrants went from a 372 days in '98, to 528 days by '02. This drastic change occurred largely in part to policy changes directly related to 9/11.

Four days after Zubeda was denied asylum (and only six weeks after 9/11), President George W. Bush signed the Patriot Act. This text contained ten articles, intended to remedy some of the issues post-9/11 and begin, as its full title states, "Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism". For the Patriot Act, "strengthening America," meant a more powerful government that could, at will, investigate, interrogate, and detain (indefinitely) the people within the United States borders. To achieve this, the Patriot Act:

---

<sup>86</sup> Author Redacted, Personal Email to John Feinberg, 2003

<sup>87</sup> U.S. Deportation Proceedings in Immigration Courts. Accessed May 09, 2017.  
[http://trac.syr.edu/phptools/immigration/charges/deport\\_filing\\_charge.php](http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php).

[...] authorized a tripling of the number of border patrol personnel, customs personnel, and immigration inspectors along the U.S. northern border, plus an addition \$100 million to improve monitoring technology along the northern border.<sup>88</sup>

With more immigration enforcement officers, coupled with the rhetorical vilification of immigrants in United States' cultural zeitgeist, resulted in an astronomical increase in detentions and deportations.<sup>89</sup> There were no provisions for more judges, or lawyers to deal with the consequences of this act, which meant the current system was overwhelmed by wrongful imprisonment cases and deportation proceedings. This is all evident in Zubeda's case. Reviewing this case, it becomes clear that the INS was actively trying to keep her imprisoned instead of allowing her a hearing to fight for her freedom. They continually didn't read her documents, failed to alert her lawyers of important meetings, and used minute details to shut down this case at every turn.

The last piece of the Habeas Corpus case was Judge Schiller's decision. In the end, this part of the case illuminates the role inaction has in this system, and how it ultimately is beneficial to it. Judge Schiller had decided that he could not rule over the case because it was outside of his jurisdiction. Because Zubeda had not been "officially" or "legally" admitted to the US, she could be detained at the Attorney General's discretion: even indefinitely. The Habeas Corpus case is

---

<sup>88</sup> Wendy Biddle, *Immigrants' Rights After 9/11*, (New York: Chelsea House, 2008).

<sup>89</sup> Ibid.

crucial to understanding Zubeda's trials because it was so intertwined with her immigration case: the reason she was imprisoned was purportedly her attempts to gain asylum, while being imprisoned could have had an effect on her perceived credibility due to the subconscious biases one might have against prisoners. Lastly, it demonstrates the bureaucratic nature of this system and how different branches interact with each other: the missed lines of communication and uneven applications of the law directly resulted in the prolonged and tortuous detention of Zubeda and the complete violation of her human rights, while she awaited protection for those rights.

Zubeda wasn't released until her case went all the way back to the Immigration Court. The Third Circuit's decision was to remand the case back, preventing her case from having any larger affects than what occurred at the BIA level. The Third Circuit accepted all of Judge Durling's arguments, finding them to be just and a fair application of the law. This turn of events best capsulated the way in which the United States system functioned post 9/11: a prolonged and bureaucratic series of procedures which all relied on one man's flawed conceptualizations of this case. This ending was depicted as joyous and just in tabloid articles about Zubeda's case, but after almost four years in prison, to have a court decide to return the decision to the immigration judge's decision of three years prior seems anything but satisfactory.

## **Conclusion**

Over the course of this thesis I have located Zubeda's experiences of persecution in the history of Democratic Republic of the Congo, in doing so corroborated her accounts while providing a new political lens for viewing the gender-based violence committed against her. I then scrutinized the texts and history of the United Nations documents to illuminate the rhetorical choices that favored the sovereign state over human rights; I then demonstrated how those choices work in have been cemented into the United States immigration system. Finally, the case itself pulls together the two prior chapters, demonstrating the shared set of assumptions used to come to the conclusion that Zubeda did not deserve asylum. This conclusion was completely in step with the asylum system, even though they contradict the actual history of what was happening un the DRC.

When I first contacted Zubeda, she worried about the effects that this project would have. "I just want a normal life," she said on multiple occasions. She told me that her friends or coworkers would look her up on Google, and the first thing they would find would be these legal decisions (when a case goes through the Third Circuit, the decisions are made public), detailing her time spent in prison and the trauma she had experienced in detail. She was

profoundly hurt by the judgments people made when they found out she had spent four years in maximum security prison, even though it was due to her immigration status. The ongoing social struggles due to the handling of this case seem deeply unfair to her, but it is not the most disappointing part of the court's outcome. Zubeda has spent the last thirteen years working several jobs a day while studying. She wants to be a nurse one day. Her status means she must frequently check in with the INS and they are allowed to frequently drop in without warning, a constant cause of stress. Every facet of her life has been made more difficult due to her lack of rights and citizenship, and her precarious status puts her into vulnerable situations with little recourse.

Her story compelled me to write about it, perhaps because deep down I saw her as being at least close to the "perfect victim" stereotype that met the definition of a refugee. It surprised me to no end that this woman did not get asylum. In writing this, I came to realize that the sympathy I felt was forcing me into the logic of the asylum system: that some people deserve protection and should have gotten it. The deserving cannot exist without the undeserving. Impassioned emotional reaction is essential for the ideology behind asylum to be successful. Subjectivity slips past us if we agreed with the judgment.

This is where reform of the system begins to breakdown. Non-governmental organizations like Amnesty International use extreme or

extraordinary cases to make arguments; however, there is always an implicit other, the undeserving, in telling those stories. It is impossible to fight this paradigm without specifically targeting the idea that everyone deserves protection and it is inhumane to try and sort out humans who do not deserve it. Zubeda's story is not a case I want to present as a horrific mistake, or a case that fell through the cracks during a politically tumultuous time period. Zubeda's case is a successful representation of the system as a whole, and the way in which that system clashes when attempting to sort real humans into a binary.

## Bibliography

### Primary Sources:

"Immigration Judge Benchbook." The United States Department of Justice. Accessed April 24, 2017. <https://www.justice.gov/eoir/immigration-judge-benchbook-credibility-standard-language>.

Author Redacted, Personal Email to John Feinberg, 2003

In re Fauziya Kasinga, 3278, United States Board of Immigration Appeals, 13 June 1996

In the Matter of Takky Zubeda (Board of Immigration Appeals), June 7<sup>th</sup> 2002.

In the Matter of Takky Zubeda (United States Immigration Court, York PA October 22, 2001.

In the Matter of the Application of J.E., Supreme Court, 2015

Matter of A-R-C-G- et al., 26 I&N Dec. 388 (BIA 2014), United States Board of Immigration Appeals, 26 August 2014

The United Nations. 1948. *Universal Declaration of Human Rights*.

UN General Assembly, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, 10 December 1984, United Nations, Treaty Series, vol. 1465, p. 85, available at: <http://www.refworld.org/docid/3ae6b3a94.html> [accessed 2 May 2017]

UN General Assembly, Convention Relating to the Status of Refugees, 28 July 1951, United Nations, Treaty Series, vol. 189, p. 137, available at: <http://www.refworld.org/docid/3be01b964.html> [accessed 2 May 2017]

U.S. Deportation Proceedings in Immigration Courts. Accessed May 09,

2017.[[http://trac.syr.edu/phptools/immigration/charges/deport\\_filing\\_charge.php](http://trac.syr.edu/phptools/immigration/charges/deport_filing_charge.php).]

#### Secondary Sources:

"Almost 50 years on, UN still struggles in Congo." Congolese Action Youth Platform Blog. November 19, 2013. Accessed May 09, 2017.  
<https://congoayuk.wordpress.com/2013/11/19/almost-50-years-on-un-still-struggles-in-congo/>.

"Asylum Denial Rates by Immigration Judge." TRAC Immigration. Accessed April 24, 2017.  
[http://trac.syr.edu/immigration/reports/160/include/judge\\_0005\\_name\\_r.html](http://trac.syr.edu/immigration/reports/160/include/judge_0005_name_r.html).

"History of the Document." United Nations. Accessed April 10, 2017.  
<http://www.un.org/en/sections/universal-declaration/history-document/>.

"Spain - The Changing Attitudes In Spain." Gender, Cohabitation, Family, Definition, Development, and Family.  
<<http://family.jrank.org/pages/1622/Spain-Changing-Attitudes-in-Spain.html>>.

"Who We Are." Amnesty International. Accessed May 09, 2017.  
<https://www.amnesty.org/en/who-we-are/>.

Amnesty International. "Stop Torture." *Stop Torture*. Amnesty International.  
<<https://www.amnesty.org/en/get-involved/stop-torture/>>.

Arendt, Hannah. *The Origins of Totalitarianism*, New York: Schocken Books, 2004.

Baaz, Maria Eriksson, and Maria Stern. *Sexual Violence As a Weapon of War?: Perceptions, Prescriptions, Problems in the Congo and Beyond*. London: Zed Books, 2013.

Bardach, Ann Louise. "Why Are Cubans So Special?" *The New York Times*.

- January 29, 2015. Accessed May 02, 2017.  
<https://www.nytimes.com/2015/01/30/opinion/why-are-cubans-so-special.html>.
- Benenson, Peter. "Four Forgotten Prisoners." Amnesty International.  
<<https://www.amnesty.org/en/>>.
- Bhabha, Jacqueline "Seeking Asylum Alone: Treatment of Separated and Trafficked Children in Need of Refugee Protection", 2004, *International Migration*. 42, no. 1: 140-148.
- Bhabha, Jacqueline, and Sue Shutter. *Women's Movement: Women Under Immigration, Nationality and Refugee Law*. Staffordshire, Eng: Trentham Books, 1994.
- Biddle, Wendy, *Immigrants' Rights After 9/11*, New York: Chelsea House, 2008.
- Burgers, J.H. *Report of the Working Group on a Draft Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*. Rep. no. E/CN.4/1984/72. (United Nations, 1984).
- Cherneva, Iveta "The Drafting History of Article 2 of the Convention Against Torture" (*Essex Human Rights Review* 9.1, 2012)
- Daley, Suzanne. "As Africans Surge to Europe's Door, Spain Locks Down." *New York Times*, February 27, 2014.
- Delaney, Anne, and Phil Glendinning. *A Well-Founded Fear*. 2015.
- Dyer, Richard. *White*. London: Routledge, 1997.
- Free Ibrahim. Accessed May 02, 2017. <http://freeibrahim.com/>.
- Freedman, Jane, and Jane L. Parpart. *Gender, Violence and Politics in the Democratic Republic of Congo*. Taylor and Francis, 2016.
- Kisangani, Emizet F. *Civil Wars in the Democratic Republic of Congo, 1960-2010*. Boulder: Lynne Rienner Publishers, 2012.

- Linke, Uli, and Danielle Taana Smith. *Cultures of Fear: A Critical Reader*. London: Pluto Press, 2009.
- Luibhéid, Eithne. *Entry Denied: Controlling Sexuality at the Border*. Minneapolis: University of Minnesota Press, 2002.
- McKinnon, Sara L. *Gendered Asylum: Race and Violence in U.S. Law and Politics*. 2016.
- Moyn, Samuel. *Human Rights and the Uses of History*. (London: Verso, 2014)
- Moyn, Samuel. *The Last Utopia: Human Rights in History*. Cambridge, Mass: Belknap Press of Harvard University Press, 2010.
- Nevins, Joseph. *Operation Gatekeeper: The Rise of the "Illegal Alien" and the Making of the U.S.-Mexico Boundary*. New York: Routledge, 2002.
- Taran, Patrick A. 2000. "Human rights of migrants: challenges of the New Decade". *International Migration*. 38, no. 6.
- TRAC. "Immigration Judges." TRAC Immigration. July 31, 2006. Accessed May 2, 2017, <http://trac.syr.edu/immigration/reports/160/>