



## Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law

**KAREN MUSALO**

In August 2014, the US Board of Immigration Appeals (BIA), the highest immigration tribunal in the country, conceded that women fleeing domestic violence could meet the refugee definition and qualify for protection.

The case in question, *Matter of A-R-C-G- et al.*, involved Aminta Cifuentes, a Guatemalan woman who had suffered egregious brutalization over a 10-year period at the hands of her spouse. Her husband beat and kicked her, including incidents where he broke her nose and punched her in the stomach when she was eight months pregnant with such force that the baby was born prematurely and with bruises. Ms. Cifuentes told her husband she would call the police, but he said it would be pointless since “even the police and the judges beat their wives.” Unfortunately, her husband’s claim bore true; she called the police on at least three occasions and they dismissed her complaints as marital problems and told her to go home to her husband.

The decision in *Matter of A-R-C-G- et al.* is notable for many reasons, not the least because it put an end to a controversy that had been raging in US law since 1999 when the same body denied protection to another Guatemalan woman, Rody Alvarado, whose case presented very similar

KAREN MUSALO is a law professor and director of the Center for Gender and Refugee Studies at the University of California Hastings College of the Law. She has made major contributions to asylum law, especially gender asylum, through her scholarship and her litigation of landmark cases.

facts. Ms. Alvarado, like Ms. Cifuentes, had suffered more than a decade of violent abuse, and her appeals to both the police and the judicial system had been met with scorn, indifference, and inaction.

In the interim—between 1999 when the BIA denied Ms. Alvarado’s claim, and 2014 when it ruled in favor of Ms. Cifuentes—there existed a remarkable level of disagreement at the highest levels of the US government on the central issue of whether women fleeing domestic violence are entitled to asylum protection. No fewer than three Attorneys General of the United States (Janet Reno, John Ashcroft, and Michael Mukasey) became personally

involved in the issue, and various federal agencies adopted diametrically opposed positions. These entrenched differences in policy positions led to a virtual deadlock that lasted for 15 years.

Why has the issue of protection for women who are brutalized by their intimate partners been such a lightning rod for controversy and evoked such strong dissension and resultant gridlock? In order to answer, it is necessary to situate the question of asylum protection for victims of domestic violence within the broader context of “gender asylum” (claims for protection arising from gender-motivated rights violations), and to examine both the origins of our modern refugee protection regime and the historical resistance to recognizing women’s rights as human rights.

### Historical Context

The birth of our international refugee protection regime can be traced back to the aftermath of World War II and the recognition of the failure to protect Jews and other victims of the Holocaust. Many who fled and attempted to seek haven were turned back. One of the most shameful and iconic examples of this refolement occurred when the US refused safe harbor to a ship, the *St. Louis*, carrying Jews from Europe after they were denied promised landing in Cuba. The *St. Louis* with its more than 400 passengers was forced to return to Europe, where many of the people on board perished in concentration camps.

When representatives of state governments came together to draft an international treaty to address refugees, the World War II experience stood foremost in their consciousness. The 1951 Convention Relating to the Status of Refugees (Refugee Convention) and its 1967 Protocol defined a refugee as an individual with a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion,” grounds which reflected the historical period and the drafters’ understanding of reasons for persecution. The drafting of these treaties preceded the recognition of women’s rights as human rights, and therefore, it is not surprising that gender is absent from the list of criteria.

There are currently 147 countries, including the United States, that are parties to the Refugee Convention, its Protocol, or both. These countries have, with some qualifications, adopted the international refugee definition in their domestic legislation, with its requirement of demonstrating that persecution be linked to one of the five aforementioned “protected grounds.”

### Growing Recognition of Women’s Rights

Historically, the violation of women’s rights was not seen as an issue of concern within the international human rights framework. Violations of women’s rights were often considered expressions of cultural norms or were justified as being mandated by religion. In addition, there persisted a perceived delineation between violations by governments committed against its citizens in the public sphere and violations by non-state actors of women in the so-called

“private sphere.” It was only through the efforts of women’s rights activists that this distinction has been largely eroded, and within the human rights arena there has been growing acceptance that violations of women’s rights, even if they take place in “private,” are a matter of public concern and state responsibility.

Such progress came much more slowly in the area of refugee protection, where two principal conceptual barriers were in play. First, there was the reluctance to recognize traditional practices, such as female genital cutting (FGC), as acts of “persecution.” Second, and equally important, was that the definition of “refugee” in the UN Refugee Convention—which has been adopted by most countries that are parties to it—does not include gender as one of the five protected grounds. In 1985, the United Nations High Commissioner for Refugees (UNHCR), whose role it is to provide guidance to governments on their application of the 1951 Convention and its 1967 Protocol, began to address the potential exclusion of women from refugee protection. The UNHCR encouraged a broader recognition of gender-related harms as persecution, as well as the use of the “particular social group” protected ground to include claims based on gender. In 1993, the UNHCR, in Executive Committee Conclusion 73, recommended that state parties to the Refugee Convention or Protocol develop “appropriate guidelines on women asylum-seekers in recognition of the fact that women refugees often experience persecution differently from refugee men.”

In 1995, in an apparent response to the UNHCR’s recommendation, the United States issued gender guidelines, which were generally positive in their approach towards recognizing violations of women’s rights as deserving of asylum protection. Their impact, however, was limited by the fact that they were directed only to the first tier of decision-makers in the US system, asylum officers. Even at that level, the guidelines had no binding effect, leaving it up to the discretion of each asylum officer whether to follow them or not.

An immigration judge’s denial of asylum to Fauziya Kassindja, a young woman from Togo fleeing FGC, provided clear demonstration of the guidelines’ circumscribed effect. Ms. Kassindja appealed the judge’s ruling to the BIA, and there, the principle of protection for women fleeing gendered harms prevailed. In a 1996 decision known as *Matter of Kasinga*, the BIA ruled that the physical and psychological harm inflicted by FGC met the legal definition of “persecution,” and that it would be imposed on Ms. Kassindja because of her “membership in a particular social group,” defined in significant part by gender. The BIA’s holding was a landmark in US law as the first to accept that women fleeing harms inflicted because of gender could qualify for refugee status. However, it had a strong basis in existing law; the definition of persecution had long included acts of physical and psychological harm analogous to FGC, and a 1985 precedent decision, *Matter of Acosta*, had specifically ruled that social groups could be defined by “sex.”

The 15-Year Controversy in the United States

Shortly after the BIA's positive decision in Fauziya Kassindja's case, Rody Alvarado—a Guatemalan woman fleeing brutal domestic violence, whose case is referred to above—was granted asylum by an immigration judge in San Francisco. The judge applied the same rationale as the BIA had in Ms. Kassindja's case—that egregious harms inflicted because of a woman's gender in combination with other characteristics can be the basis for a successful claim to asylum. Implicit in the decision was that the judge saw no reason to treat the harm of domestic violence any differently than the harm of FGC. Although they took different forms, both rose to the required level of severity, and both were imposed or motivated by the gender-defined social group of the victim. Given the rationality of this approach, it was a surprise to many when the attorney representing the US government decided to appeal the grant of asylum to Ms. Alvarado, and even more of a surprise three years later when the BIA, which had granted asylum to Ms. Kassindja, reversed the grant of asylum to Ms. Alvarado in a decision known as *Matter of R-A-*.

The Board's decision in *Matter of R-A-* set off a series of Executive Branch actions which often conflicted with each other, and laid bare the deep divides between governmental actors on the issue. In December 2000, then-Attorney General Janet Reno issued proposed regulations specifically intended to sweep away the legal barriers to asylum for domestic violence survivors imposed by the decision in *Matter of R-A-*. She next took the unusual step of personally intervening in the *R-A-* case (in a process called "certification"), and wiped out the negative ruling. She directed the board to decide the case anew once the proposed regulations were issued as final.

In the subsequent years, Attorneys General Ashcroft and Mukasey would also undertake the somewhat rare measure of directly intervening in Rody Alvarado's case. In 2003, Ashcroft certified the case to himself and asked both parties—Ms. Alvarado and the government, represented by the Department of Homeland Security (DHS)—to submit briefs on the issue of whether Ms. Alvarado met the refugee definition.

Information leaked from government sources indicated that Ashcroft took the case with the intention of reinstating the earlier board denial. However, in an unexpected change of position, the government—the party that had disagreed with the asylum grant to Ms. Alvarado in 1996 and lodged the appeal that resulted in the reversal—filed a brief in 2004 stating that Ms. Alvarado met the legal definition of



**A group of Kenyan girls who left their homes to avoid female genital cutting (FGC) by their community in 2002, like Ms. Kassindja, whose 1996 asylum decision ruled FGC to be persecution under US asylum laws. With the help of the NGO Centre for Human Rights and Democracy, they became the first Kenyan girls to successfully win a restraining order against anyone attempting to subject them to FGC.**

a refugee and should be granted protection. This made it quite impossible for Ashcroft to reinstate the denial, when the government itself (albeit the DHS, a different agency from Ashcroft's Department of Justice) was arguing that she should be granted asylum. Ashcroft decided to dodge the issue by declining to decide it and sending the case back to the BIA with the same directive as had his predecessor Janet Reno—to decide the matter once the proposed regulations were issued as final.

The depth of controversy around this issue affected the ability of the relevant government agencies to agree on issuing regulations; by 2008 the regulations proposed in 2000 had still not been finalized, and to this date have not been finalized. At that point Michael Mukasey, the third Attorney General to involve himself, decided to intervene. He certified the case to himself, and ordered the BIA to decide Ms. Alvarado's case on the basis of the existing law, and not await finalized regulations.

In compliance with his order, Ms. Alvarado's case went back to the BIA, which agreed to send it back to an immigration judge. During the trial, the DHS repeated its statement from 2004 when the case was in front of John Ashcroft: that Rody Alvarado qualified for relief and should be granted protection. She was thus granted asylum once more, 13 years after she had originally been granted asylum—but this time the decision was not appealed, and her odyssey for protection came to a positive conclusion. Nonetheless, this did not by any means resolve the issue on a national level. Decisions by immigration judges do not bind other immigration judges, and it would be five more years until there would be binding precedent assuring protection for women fleeing gender-based harms such as domestic violence. That binding precedent was *Matter of A-R-C-G-*.

Why all the Controversy?

Why has there been such resistance? There is prob-

ably no single answer, but rather a long list of factors. The comments of some who oppose protection often reveal a resistance to accepting that women's rights are indeed human rights, and therefore of legitimate concern within a human rights and refugee rights framework. Their remarks frequently demonstrate an adherence to the old public/private sphere approach, stating that one should not "expect asylum law to address 'personal' or 'family' issues." But this argument ignores the fact that the fundamental purpose of the refugee regime is to provide a safe haven to those who are persecuted in situations where their governments fail to protect them. There is no legitimate reason to exclude women from this arc of protection.

Asylum is one of the few areas of immigration law not subject to maximum quotas; any individual who makes it to the United States and passes preliminary screening procedures can apply for protection. It should be noted however, that the process of applying is difficult, and the legal standard quite demanding. Notwithstanding these challenges, there is the fear of floodgates opening, and it is not hard to see how this fear has fueled the controversy over protection. Fear of the opening of the floodgates was repeatedly given voice around the case of Fauziya Kassindja, with some commentators observing that approximately 3 million girls are subject to FGC each year, and that a positive decision in her case would lead to the United States being deluged with girls and women seeking protection. However, the positive decision in her case came down 18 years ago, and the hordes of refugee women have not materialized. The experience of Canada also refutes this fear: it has recognized gender-based refugee claims since 1993 (including, explicitly, domestic violence) and has not experienced any appreciable increase in women's claims.

There are many reasons why skyrocketing numbers of women asylum seekers have not resulted from recognition of their legitimate claims to protection. Included is the fact that women who have claims to protection often come from countries where they have little or no rights, which limits their ability to leave in search of protection at all. They are frequently the primary caretakers for their children and extended family, and have to choose between leaving family behind or exposing them to the risks of travel to the potential country of refuge. In addition, they often have little control over family resources, making it very difficult for them to have the money to travel to countries where they might seek asylum. Unfortunately, the fear of floodgates has continued to have currency, notwithstanding the fact that predicted deluges have not materialized, and that there are genuinely good reasons that explain why they have not.

#### Different Asylum Claims?

A common narrative accompanying the claims of female asylum seekers is that they are asking for special treatment. This discourse assumes women fleeing gender-related persecution would not qualify for protection absent

some twisting of the legal standard to accommodate their claims. This erroneous perspective harkens back to the largely repudiated vision of a human rights system, discussed above, which places women in a private sphere and privileges culture and religion over universality of rights. It is quite ironic that opponents continue to make the argument that the protection of women requires special (that is, favorable) rules, when in reality, women have been excluded from protection precisely because of a refusal to fairly apply the refugee definition in an unbiased and neutral fashion.

The multitude of harms that women (and women in particular) suffer—sexual slavery, rape, female genital cutting, honor killings—are clearly grave enough to constitute persecution. Furthermore, as early as 1985, in *Matter of Acosta*, US law recognized that particular social groups could be comprised of individuals who share an immutable or fundamental characteristic, such as "sex." There is simply no credibility to the argument that recognizing women as refugees accords them special treatment or requires a distortion of the legal standards.

#### Conclusion

The right to protection for women fleeing female genital cutting, although contentious at the time the courts first heard the issue, was accepted almost 20 years ago in *Matter of Kasinga*. The principles established in that decision should have been applied to cases involving domestic violence. Instead it has taken the nearly two decades since to accept that women fleeing brutal partner abuse are entitled to protection.

There are other forms of gender violence that frequently arise in claims for protection raised by female asylum seekers. These forms include practices such as forced marriage, rape, sexual slavery, trafficking for labor or sexual exploitation, honor killings, and repressive social norms (e.g., forbidding education or employment). In a number of these areas, there is still no binding legal precedent that would assure protection for the women who have escaped such violations. In the absence of binding precedent, many judges refuse to apply the *Kasinga* principles to find that these harms are acts of persecution inflicted because of gender or social group membership.

It would be unfortunate if judges continued to read *Kasinga* and subsequently, *A-R-C-G-* so narrowly, viewing them simply as decisions that apply to FGC and domestic violence—rather than as landmarks with far broader implications. The legal principles in both cases chart an analytical approach for gender claims in general. The two decisions demonstrate that special interpretations and rules are not necessary in order to extend protection to women fleeing gender-motivated harms. To the contrary, the rulings stand for the proposition that an unbiased application of the law—particularly of the terms "persecution" and "particular social group"—will result in protection for women who fear grave harms because of their gender in situations where their governments cannot or will not protect them. ❖