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THE STRUGGLE FOR EQUALITY: WOMEN’S RIGHTS, HUMAN RIGHTS, AND ASYLUM PROTECTION

By Karen Musalo*

In focusing on immigration in the Trump era, we have seen policies that have seemingly caused the United States to retreat from the previous trajectory of immigration advances over the last 20 years. I’m going to give you an overview in what I would call the struggle for equality around women’s rights, human rights, and asylum protection. The focus of my presentation is on the issue of asylum protection for women who face a range of harms that can be called “gender-based harms.” This could be female genital cutting, forced marriage, domestic violence or the many other harms unique to, or disproportionately inflicted upon women.¹

The international origins of domestic refugee law came into existence in the wake of World War II with the 1951 Refugee Convention and the 1967 Refugee Protocol, which was the international community’s response to the failure to protect refugees and other persecuted groups fleeing the Holocaust.²

The refugee definition in international and domestic law comes from that time period, with a refugee being defined as encompassing an individual with a well-founded fear of being persecuted for reasons of race, religion, nationality, political opinion, or membership in a particular social group (the “five grounds”).³ The U.S. became a party to the 1967 Protocol

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1. Karen Musalo, *Protecting Victims of Gender Persecution: Fear of Floodgates or Call to (Principled) Action?*, 14 VA. J. SOC. POL’Y & L. 119 (2006-2007).

2. U.N. High Comm’r for Refugees, *Introductory Note to Convention and Protocol Relating to the Status of Refugees 2* (2010), <https://www.unhcr.org/3b66c2aa10>.

3. *An Overview of U.S. Refugee Law and Policy*, AM. IMMIGR. COUNCIL (Sept. 17, 2018), https://www.americanimmigrationcouncil.org/sites/default/files/research/an_overview_of_united_states_refugee_law_and_policy_0.pdf.

in 1968,⁴ when it took on the obligation to protect refugees. Twelve years later, Congress enacted the 1980 Refugee Act (the “Refugee Act”), which is our domestic counterpart to the Protocol – or said another way – it is the implementation of our international obligations.⁵ Our domestic law, the Refugee Act, adopted the international definition of a refugee as an individual with a well-founded fear of persecution on account of one of the five grounds (race, religion, nationality, political opinion, or membership in a particular social group).⁶

The Refugee Act, which specifically applies to people seeking asylum, states – and I say this because this has been a big point of contention under the Trump administration – that any individual who is physically present in the United States or who arrives to the United States may apply for asylum.⁷ It applies whether the person arrived at a designated port of arrival or not, and irrespective of such person’s status.⁸

Furthermore, it is not a crime to seek asylum.⁹ A person can enter between ports of entry without breaking the law, even if this person is undocumented. The Refugee Act really could not have been more clear that these individuals have the right to seek asylum.

In considering the international refugee definition in the historical context, we can see why there have been barriers to protecting women who flee gender-based harms like female genital cutting, forced marriage, and domestic violence. There were conceptual barriers to seeing women as qualifying as refugees or meeting the refugee definition. One of these barriers is that the harms these women suffer were often seen as cultural practices or religious norms and not persecution, which is required to meet the refugee definition.¹⁰ In addition, the international definition and the domestic definition of a refugee require that there be a “nexus” or connection between the harm or the persecution, and one of the five grounds (race, religion, nationality, political opinion, or membership in a particular social group). Many women are persecuted because of their gender, and gender is not one of these grounds.¹¹

Furthermore, the persecution that women face is often not inflicted directly by the government. In some cases it may be at the government’s

4. *Id.*

5. Refugee Act of 1980, Pub. L. 96-212, 94. Stat. 102 (codified in scattered sections of 8 U.S.C.) (domestic law definition of “refugee”).

6. *Id.*

7. *Id.*

8. *See id.*

9. *See id.*

10. *Id.*

11. *See id.*

hands, but often the persecution is the result of societal norms or is committed by non-State actors, such as gang members, or abusive partners. Conceptually, there was this reluctance to accept a case of gender persecution as being a legitimate basis for a woman to qualify for refugee status. The United Nations High Commissioner for Refugees (“UNHCR”), which is the UN body that advises countries in their compliance with the international refugee treaties (1951 Convention and 1967 Protocol), began to see that there were barriers to protecting women. Consequently, beginning in 1985, the UNHCR began to give guidance as to how countries might look at claims involving violations of women’s rights.¹²

I have oversimplified and am really summarizing and distilling, but there are main takeaways from the UNHCR and the series of guidance it provided. First, as to persecution, UNHCR recommended that States look at human rights norms. When what a woman suffers would be a violation of human rights, the UNHCR advised that it should be recognized as persecution.¹³ This should be the case even if the harm is mandated by culture or religion.¹⁴

As for the persecution having to be “on account” of one of the five grounds, often what happens to women is because of race, religion, nationality or political opinion. However, sometimes it is simply because of their gender and UNHCR’s guidance was to use the “particular social group” as the ground that could encompass gender.¹⁵ Consequently, a woman persecuted because of her gender could be seen to be persecuted because she is a member of a particular social group of women in a particular country and in a particular situation. Finally, UNHCR affirmed that persecution need not be by the State if the State is unable or unwilling to protect her.¹⁶

The UNHCR was sending a message to the countries who are parties to the international refugee definition, that they may think there are barriers to protection of women, but really there is a way to understand the refugee definition that includes women. These barriers do not exist and women can be recognized. The UNHCR called on all the parties to the Convention and the Protocol to issue guidelines for their adjudicators that would incorporate this guidance, and to encourage adjudicators to recognize women as refugees when certain criteria could be met.¹⁷

12. See G.A. Res. 36/39, ¶ 1 (Oct. 18, 1985).

13. *Id.* at ¶¶ 3-5.

14. See *id.*

15. *Id.* at ¶ 11.

16. See *id.*

17. *Id.* at ¶ 8.

Canada was the first country to do so, in 1993, and the U.S. was quick to follow, in 1995.¹⁸ However, despite this adoption, the U.S. wasn't implementing its gender guidance in its actual decision making. In 1995, the same year U.S. gender guidance was issued, an immigration judge in Philadelphia denied asylum to a young woman from Togo.¹⁹ This young woman was fleeing a forced marriage and female genital cutting; the latter is a prototypical gender-based harm,²⁰ it is only inflicted on women, because they are women.

This young woman from Togo, Fauziya Kassindja, went in front of the immigration judge in Philadelphia, who denied her protection.²¹ After that, I had the privilege of being the lead attorney on the team that took her case to the administrative appellate level, which is the Board of Immigration Appeals ("BIA"). The BIA ultimately reversed the immigration judge's denial and granted Fauziya asylum. This case, known as *Matter of Kasinga*, became a landmark decision on the issue of gender persecution.²²

The BIA essentially did what the UNHCR had advised. It recognized female genital cutting to be persecution, even though it is a cultural norm.²³ It held that it was inflicted on account of her being a member of a particular social group that was defined in part by gender, her ethnicity, and her status of not having been cut.²⁴ The BIA also noted that the government of her country, Togo, was unable or unwilling to protect her. Instead, the police would have returned her to the man to whom she'd been sold into marriage and who would require her to undergo the ritual practice of female genital cutting.²⁵

This decision was a very positive step forward. Many advocates and scholars saw the rationale used in *Kasinga* as opening the door to other claims of gender-related persecution – not just FGC. The BIA decided *Kasinga* in 1996. In that same year, a Guatemalan woman named Rody Alvarado applied for asylum protection.²⁶ What she was fleeing was

18. MEMORANDUM FROM PHYLLIS COVEN, U.S. IMMIGRAT. AND NATURALIZATION SERV., OFFICE OF INT'L AFFAIRS, CONSIDERATIONS FOR ASYLUM OFFICERS ADJUDICATING ASYLUM CLAIMS (May 26, 1995), <https://www.refworld.org/docid/3ae6b31e7.html>.

19. Transcript of Oral Decision at 1, *Kasinga*, No. A73 476 695 (Immigr. Ct. Aug. 25, 1995), <https://www.justice.gov/sites/default/files/eoir/legacy/2008/05/09/kasinga1.pdf>.

20. *Id.* at 8-9.

21. *Id.* at 14. Ms. Kassindja's name was improperly recorded by the immigration authorities as "Kasinga" and the decision issued in her case bears that name.

22. *Kasinga*, 21 I. & N. 357, 358 (BIA 1996).

23. *Id.* at 357.

24. *Id.* at 367.

25. *Id.*

26. R-A-, No. A73 753 922 (Immigr. Ct. Sept. 20, 1996), https://www.refworld.org/cases,USA_BIA,3f8fb4774.html.

domestic violence. She was married to a brutal man; a former soldier who bragged about all the women and children he had killed during Guatemala's civil war.²⁷

An immigration judge in San Francisco, relying on the *Kasinga* precedent, granted asylum to Rody Alvarado. The judge compared domestic violence to female genital cutting, finding that the applicant was suffering this harm because she is a woman in Guatemala.²⁸ Because of the cultural norms that prevail in Guatemala, the authorities would not protect her.²⁹ The immigration judge granted asylum to Ms. Alvarado. However, that was not the end of the story, because the government appealed.

The BIA, the same court that had granted Fauziya Kassindja asylum, reversed the grant of asylum to Rody Alvarado, in a case known as *Matter of R-A*.³⁰ The BIA tried to distinguish the R-A- case from *Kasinga*, but they are not really distinguishable.³¹ They are both, at their heart, the same thing.

Maybe what's different is that Togo is further away than Guatemala, and female genital cutting looks exotic to people in the U.S. Domestic violence as a basis for asylum for somebody coming from Central America raises the fear of opening the floodgates. It is important to note that there have always been discriminatory practices against asylum claims from Central America, which are all too much on the resurgence now. So the BIA reversed the grant of asylum to Rody Alvarado.³²

Fortunately, Rody Alvarado was not detained during the litigation of her claim for protection, which went on for 13 years. She was finally granted asylum in 2009.³³ However, it should be noted that between 1999, when the BIA reversed her grant of asylum, and 2009, when she was finally granted asylum, three separate Attorneys General intervened in her case: Janet Reno, John Ashcroft, and Michael Mukasey.³⁴ Their intervention shows the level of controversy over the concept, not only of gender asylum, but specifically of domestic violence as a basis for asylum.³⁵

27. *Id.*

28. *Id.*

29. *Id.*

30. R-A-, 22 I. & N. Dec. 906 (BIA 1999).

31. *Id.*

32. *Id.*

33. Julia Preston, *U.S. May Be Open to Asylum for Spouse Abuse*, N.Y. TIMES (Oct. 29, 2009), <https://www.nytimes.com/2009/10/30/us/30asylum.html>.

34. Esta Soler & Karen Musalo, *Time to End an Asylum Limbo for Abused Women*, WASH. POST (July 18, 2009), <https://cgrs.uchastings.edu/sites/default/files/KM%20and%20ESoler%2C%20Time%20to%20End%2C%20WashPost%2C%2007-2009.pdf>.

35. *Id.*

When Rody Alvarado was finally granted asylum, it was at the level of an immigration judge, meaning that it didn't constitute binding precedent. It wasn't until August of 2014, 18 years after the BIA decided *Matter of Kasinga*, that the BIA issued a precedent decision in *Matter of A-R-C-G-*, a case involving domestic violence. The BIA finally affirmed the fact that women fleeing domestic violence could qualify for asylum.³⁶ After a long struggle, this decision finally brought a real victory in 2014.

In light of this victory, what did the Trump administration do? The administration took a case called *Matter of A-B-*, which raised the same set of issues as *Matter of A-R-C-G-*, domestic violence as a basis for asylum. The Attorney General certified it to himself.³⁷ He has the power to take a decision of the BIA, to take authority over it, and to issue a new decision.³⁸

Matter of A-B-, involved a Salvadoran woman who was fleeing domestic violence. Ms. A-B- had been denied asylum by an immigration judge in Charlotte, North Carolina. This judge has one of the highest asylum denial rates in the country.³⁹ She appealed to the Board of Immigration Appeals, and the BIA reversed.⁴⁰ Relying on *A-R-C-G-*, the BIA held that Ms. A-B- met the standard for asylum.⁴¹ The BIA also remanded to the immigration judge, for the sole purpose of doing a background check, and then granting her asylum.⁴² The immigration judge, however, refused to grant her asylum, and instead sat on the case. Some think there was improper communication between the immigration judge and then-Attorney General Jeff Sessions. In any event, Sessions certified the case to himself and issued a decision that both reversed the grant to Ms. A-B- and also vacated *Matter of A-R-C-G-*,⁴³ the precedent decision which had finally issued after 18 years of protracted legal struggle.

What does *Matter of A-B-* do? Here, we have to differentiate between what it does, and what it was intended to do. When Sessions issued his decision in *A-B-*, he reversed *Matter of A-R-C-G-*. That is what he actually did, but beyond that, he made some very broad blanket statements, such as this one: "Generally, claims by aliens pertaining to domestic violence or

36. *A-R-C-G-*, 26 I. & N. Dec. 388, 388-89 (BIA 2014).

37. David Hausman, *How Jeff Sessions is Attacking Immigration Judges and Due Process Itself*, ACLU (Oct. 1, 2018; 2:00 PM), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-jeff-sessions-attacking-immigration-judges>.

38. *Id.*

39. *A-B-*, 27 I. & N. Dec. 321 (A.G. 2018).

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 317.

gang violence perpetrated by non-governmental actors will not qualify for asylum.”⁴⁴

He was trying to send the message that these claims don’t qualify for asylum, and that they don’t even qualify at the low “credible fear” screening standard, which they need to pass in order to be permitted to apply for asylum under a procedure known as “expedited removal.” As a result of this broad language, which was intended to serve as a blanket exclusion of these claims, actual asylum grants plummeted after *Matter of A-B*.⁴⁵ Every case is supposed to be decided on its own merits, and on its own facts. However, these general statements made by the Attorney General sent the message that these cases should be denied. What *A-B* actually does as a legal matter, is it reverses the decision in *A-R-C-G*-, and it has some specific holdings that make it much harder for these domestic violence cases to prevail.

After the decision in *A-B*- came out, the U.S. Citizenship and Immigration Services (“USCIS”) issued guidance that was also very sweeping about how these cases should be denied.⁴⁶ Although it will take time for Ms. A-B-’s case, which is on appeal,⁴⁷ to get up to the federal circuit courts of appeal,⁴⁸ there is still a unique challenge that we (the Center for Gender and Refugee Studies and the ACLU) were able to bring on the issue of how *Matter of A-B*- and the USCIS Guidance were being applied as a blanket preclusion of cases involving domestic violence or fear of gangs in the expedited removal process.

In *Grace v. Whitaker*, Judge Emmet Sullivan, a U.S. District Court Judge in the District of Columbia, held that many of the holdings of *Matter of A-B*-, and aspects of the USCIS guidance, are unlawful.⁴⁹ Judge Sullivan issued a nationwide permanent injunction, prohibiting the application of

44. *Id.* at 320.

45. Laura Gottesdiener & John Washington, *They’re Refugees, Fleeing Gang Violence and Domestic Abuse. Why Won’t the Trump Administration Let Them In?*, THE NATION (Nov. 28, 2018), <https://www.thenation.com/article/trump-asylum-gangs-domestic-violence/>.

46. MEMORANDUM FROM U.S. CITIZENSHIP & IMMIGRAT. SERV. (USCIS), GUIDANCE FOR PROCESSING REASONABLE FEAR, CREDIBLE FEAR, ASYLUM, AND REFUGEE CLAIMS IN ACCORDANCE WITH MATTER OF A-B-, U.S. DEP’T OF HOMELAND SECURITY (July 11, 2018), <https://www.uscis.gov/sites/default/files/USCIS/Laws/Memoranda/2018/2018-06-18-PM-602-0162-USCIS-Memorandum-Matter-of-A-B.pdf>.

47. See David Hausman, *How Jeff Sessions is Attacking Immigration Judges and Due Process Itself*, ACLU (Oct. 1, 2018; 2:00 PM), <https://www.aclu.org/blog/immigrants-rights/deportation-and-due-process/how-jeff-sessions-attacking-immigration-judges>.

48. See Fatma Marouf, *How Immigration Courts Work*, THE CONVERSATION (June 25, 2018, 6:36 AM), <https://theconversation.com/how-immigration-court-works-98678>.

49. *Grace v. Whitaker*, 344 F.Supp.3d 96, 105 (D.D.C. 2018), *rev’d sub nom.*

those aspects of the decision and its guidance that he found to be unlawful to asylum seekers in the credible fear process.⁵⁰

Finally, I would like to end by helping to put a human face on this issue. Although Ms. A-B- has chosen to protect her identity (which is why she uses her initials only), she's shared her story with NPR,⁵¹ as well as in a short video produced by Human Rights Watch and CGRS.⁵² I recommend those to you. For those interested in learning more about the case, and the larger #ImmigrantWomen2 advocacy efforts, you can visit the CGRS website.⁵³

50. *Id.*

51. Joel Rose, *This Salvadoran Woman Is At The Center Of The Attorney General's Asylum Crackdown*, NPR (May 22, 2018, 5:01 AM), <https://www.npr.org/2018/05/22/611920968/this-salvadoran-woman-is-at-the-center-of-the-attorney-generals-asylum-crackdown>.

52. Human Rights Watch, *She Escaped Brutal Domestic Violence -- Now the U.S. Government Wants to Send Her Back*, YOUTUBE (Jan. 28, 2019), <https://www.youtube.com/watch?v=QRQpXRWQL0>.

53. CENTER FOR GENDER AND & REFUGEE STUDIES, <https://cgrs.uchastings.edu> (last visited May 16, 2019).