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PERSPECTIVES

Recognizing Women's Rights as Human Rights

BY KAREN MUSALO

One of the most contentious policy issues in the United States has been whether women who suffer violations of their fundamental human rights—such as female genital cutting (FGC), domestic violence, or forced marriage—should be recognized as refugees. For more than a decade, U.S. policy has followed a zigzag course, demonstrating a contradictory position on the issue. At the heart of this debate is the unexpectedly controversial question of whether the United States will ultimately recognize women's rights as human rights.

Under U.S. and international law, a refugee is defined as an individual with a "well-founded fear of persecution" on account of "race, religion, nationality, political opinion, or membership in a particular social group." This definition has its origins in the post-World War II period when countries came together following the Holocaust and drafted a multilateral treaty committing nations to the protection of those fleeing persecution. This treaty, the 1951 Refugee Convention, and its 1967 Protocol provide the definition for "refugee" and oblige states not to return these individuals to their homelands where they would continue to be in danger.

Much of the controversy over the protection of women in the United States and across the globe is focused on the issue of whether violations of their rights constitute "persecution" under the refugee definition, and whether women harmed *because* of their gender can be protected when gender is not one of the five grounds on which refugee status is normally determined (i.e., race, religion, nationality, political opinion, membership in a particular social group).

Since the 1980s, the United Nations High Commissioner for Refugees (UNHCR), whose role is to provide guidance to countries that are parties to the Refugee Convention, has recommended that women who suffer violations of their fundamental human rights, be recognized as refugees. UNHCR has made clear that gender-related human rights violations should be recognized as persecution and that, although gender is not one of the five grounds, women who suffer because of their gender can be recognized as members of a "particular social group." With the objective of encouraging countries to extend protection to women fleeing persecution, the UNHCR Executive Committee in 1993 recommended that countries issue guidance for their decision makers.

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Canada was the first to do so in 1993, and in 1995, the United States distinguished itself as a leader by being the second country to issue gender guidelines. The guidelines—although not binding law—were a step in the right direction. One year later, the United States took another very significant step forward when the Board of Immigration Appeals (BIA), the highest immigration tribunal in the country, granted asylum to Fauziya Kassindja (also known as "Kasinga"), a young woman from Togo fleeing FGC. The decision, *Matter of Kasinga*, recognized that FGC is persecution, and that women could be protected under the "particular social group"

ground of the refugee definition. Importantly, in contrast to the gender guidelines, the *Kasinga* decision was binding on immigration judges and asylum officers across the country.

But U.S. ambivalence on this issue soon manifested itself. In 1999, the BIA—the same court that had granted protection to Fauziya Kassindja three years earlier—reversed a grant of asylum by an immigration judge to Rodi Alvarado, a Guatemalan woman who fled her country after suffering ten years of brutal and sadistic beatings at the hands of her husband; she was forced to flee in order to save her life after neither the police nor the courts would intervene. The BIA justified its decision by finding differences between FGC and domestic violence. However, both practices constitute human rights violations, and the differences the BIA focused on were not legally relevant, but rather served to justify its denial of protection in Ms. Alvarado’s case.

The reality is that the “floodgates” are a myth, and countries that recognize gender claims for asylum have not experienced an explosion of applicants.

The denial of asylum to Ms. Alvarado sparked outrage by many women’s rights, refugee rights, and immigrants rights groups across the country. After more than a year of intense and sustained advocacy by a large and diverse coalition of these groups, then-Attorney General Janet Reno intervened. She personally took authority over Ms. Alvarado’s case and vacated the decision denying her asylum.

In December of 2000, the Justice Department issued proposed regulations that would provide binding, positive authority in gender cases. As one of her last acts while in office, Janet Reno directed the BIA to re-decide Ms. Alvarado’s case once the proposed regulations were issued in final form. More than seven years have passed, but the federal government has yet to finalize the regulations proposed by the Justice Department under Attorney General Reno. In the absence of clear guidance, many women have been denied protection.

In September 2007, the BIA made the situation worse by issuing another decision that is extremely hostile to women’s rights. The case, known as *Matter of A-T*, involves Alima Traore, a young woman from Mali who suffered FGC as a child and whose parents sold her into marriage. Although FGC is condemned as a physically and psychologically devastating practice with life-long consequences, the BIA ruled that it did not cause permanent, ongoing harm to Ms. Traore. In contradiction to numerous international human rights norms that recognize forced marriage as a fundamental human rights violation, the BIA rejected Ms. Traore’s claim of forced marriage as a form of persecution.

In the same fashion that the decision in Rodi Alvarado’s case was a catalyst for activism, the decision in Ms. Traore’s case has also stirred a national campaign aimed at reversing the court’s decision. The campaign was jumpstarted by the publication of a sympathetic piece by Adam Liptak in *The New York Times*.

U.S. resistance to recognizing the claims of women fleeing gender persecution has not been without a price in terms of its international reputation. In November 2007, a Canadian federal judge ruled that the United States does not comply with its obligations under the Refugee Convention and the Convention against Torture. This decision was rendered in a case challenging the “Safe Third Country Agreement” (STCA), which allows Canada to turn back arriving refugees who have transited the United States before arriving in its territory and requires them to apply for asylum in the United States. (It also requires the converse—that the United States can refuse entry to refugees who travel to Canada first, but this is much less common.) The Canadian judge’s decision was not exclusively premised on the treatment of gender-based claims by the United States. However, treatment of women’s claims was one of the significant areas in which the United States was found lacking. Throughout the course of the lawsuit, which was brought by Canadian advocates, the U.S. government defended its record on women’s claims. However, the tracking of hundreds of actual decisions in gender asylum cases by the Center for Gender & Refugee Studies allowed advocates to successfully refute U.S. claims.

“Fear of Floodgates”

Given the initial positive measures taken by the U.S. government—in issuing gender guidelines in 1995 as well as the landmark *Kasinga* decision in 1996—what accounts for its subsequent retreat and resistance? All too often resistance to these claims stems from a so-called “fear of floodgates,” or the fear that by recognizing these claims, the country will be deluged by women fleeing persecution. The reality is that the floodgates are a myth, and countries that recognize gender claims for asylum have not experienced an explosion of applicants. Advocates need to do a better job of addressing this fear. One place to start might be to remind the U.S. government that the reason the countries of the world came together and committed to the 1951 Refugee Convention was because of the international community’s failure to protect Jews during the Holocaust. In that situation, the fear of Jewish refugees deluging the borders was never a legitimate argument for denying protection.

The appropriate and just response to the fear of floodgates is not to turn away those fleeing persecution, but rather to offer them protection while addressing the underlying conditions that caused them to flee their homelands. This “root cause” approach is both principled and practical—and it links refugee

protection with foreign policy choices. Specifically, if the United States does not want to accept large numbers of women refugees from a particular country, it should use its influence to pressure that country to put an end to policies and practices that violate the fundamental rights of its women.

The case of Guatemalan asylum seeker Rodi Alvarado is a paradigm of this root-cause approach—and of the direct relationship between human rights violations and refugee flows. Ms. Alvarado fled brutal domestic violence at the hands of her husband, who enjoyed absolute impunity for his unremitting violence against her over a ten-year period.

Sadly, Ms. Alvarado's situation is not unusual. Violence against women in Guatemala has reached epidemic proportions, resulting in a phenomenon that has been referred to as femicide—the gender-motivated killings of women. In the past seven years more than 3,500 women have been brutally murdered, and investigations and prosecutions have occurred in less than one percent of these killings. Instead of denying protection to women like Ms. Alvarado, the U.S. government—which has provided millions of dollars to Guatemala for training police, prosecutors, and other court personnel—should require accountability for these funds and it should ask why, out of every 100 women killed, do 99 perpetrators go free?

Those of us who struggle for women's rights must continue to fight on both sides of the border; we must not only demand refugee protection for women fleeing violations of their most fundamental human rights, but we must also demand that the practices forcing them to flee their homes be put to an end. By supporting organizations that seek to identify and address the root causes of refugee flows, foundations can make a long-term, sustainable contribution to women's human rights on a global scale.

Recommendations for Foundations

Grantmakers have a key role to play in promoting women's human rights and can aid this effort by:

- Funding studies of the root causes that force women to flee their home countries.
- Supporting groups advocating for U.S. foreign policy measures that improve human rights protections for women in countries around the world.
- Fostering partnerships between groups in refugee-sending and refugee-receiving countries that address migration among women and girls experiencing human rights violations.
- Investing in legal services and other efforts that preserve and expand legal protections in the United States for women and girls fleeing gender-based violence and persecution.
- Funding health and mental health programs that help women heal from the traumas of human rights violations.
- Creating opportunities for dialogue between refugees and immigrants who have experienced gender-based violence, as well as providing pathways for these groups to meaningfully inform the advocacy debate on these issues.
- Supporting programs that provide mentoring and training for students—particularly students of color, immigrants, and children of immigrants—who may become future leaders in the human rights and refugee protection fields.

About GCIR

Founded in 1990, Grantmakers Concerned with Immigrants and Refugees (GCIR) provides publications, programs, and other resources that foundations need to address the challenges facing newcomers and their host communities and to strengthen society as a whole. Its mission is to influence the philanthropic field to advance the contributions and address the needs of the country's growing and increasingly diverse immigrant and refugee populations.



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