
Domestic Violence in the United States and its Effect on U.S. Asylum Law

by Jennifer Podkul

THE UNITED STATES PRIDES ITSELF ON BEING a nation built by immigrants, many of whom have fled persecution, oppression, and egregious violence in their home countries. Historically, the United States has promulgated refugee law that reflects international human rights standards. The United States Department of Justice (DOJ), however, is now stalling on the issue of whether one particular group of refugees, victims of domestic violence, should be granted protection under U.S. asylum law. The United States has the opportunity to join other countries in protecting victims of domestic violence who have fled their homes because their countries were unable or unwilling to protect them from persecution.

The refugee definition, as defined by the 1951 United Nations Convention relating to the Status of Refugees (Refugee Convention), must be interpreted from a gender-sensitive perspective to ensure that proper consideration is given to women claimants and that gender-related persecution is treated as a serious human rights violation. The United States should not allow its domestic violence problem to hinder its ability to recognize domestic violence as an egregious form of persecution that warrants international protection. Policymakers in the United States must provide protections for all victims of gender-based persecution, not just for victims of the types of persecution that are uncommon in American culture.

THE DEVELOPMENT OF INTERNATIONAL REFUGEE LAW

THE REFUGEE CONVENTION WAS CREATED in response to the large number of European refugees in the aftermath of World War II. The Refugee Convention defines a refugee as a person who is outside his or her country of nationality or habitual residence; has a well-founded fear of persecution because of his or her race, religion, nationality, membership in a particular social group, or political opinion; and is unable or unwilling to avail himself of the protection of that country or to return there for fear of persecution. This international treaty sought to protect people who suffered past persecution or feared future persecution in countries with governments unable or unwilling to protect them.

Historically, the “refugee” definition has been narrowly interpreted through a male paradigm, reflecting the experiences of the numerous political dissidents who sought asylum at the time the Refugee Convention was created. Despite the drafters’ attempt to provide protection for all persons in need, this narrow interpretation limited the kinds of refugees who were able to successfully seek asylum. As human rights standards evolved, many countries expanded their understandings and definitions of persecution to protect not only political dissidents, but also victims of other forms of persecution. Despite the limitations imposed by the five statutory categories of the refugee definition (race, religion, nationality, membership in a particular social group, and political opinion), the Refugee Convention has remained relevant because, as international human rights law developed, States Parties have interpreted it in ways that comport with new human rights standards. For example, in the aftermath of Nazi

persecution during World War II, most countries understood persecutors to be only state actors. Over time, and as sensitivities to human rights violations expanded, states began to recognize persecution by non-state actors in cases where a government is unable or unwilling to protect the victim.

MODERN REFUGEE LAW

AS A RESULT OF CHANGING SENSITIVITIES to different kinds of persecution over the past few decades, awareness of the need to protect certain groups in society, including women, indigenous people, and homosexuals, has influenced the way States Parties interpret the Refugee Convention. International human rights standards and humanitarian law instruments, as well as national legislation and jurisprudence, have become increasingly important in interpreting the Refugee Convention. In recent years, for example, many countries have signed human rights treaties, declarations, and resolutions addressing violence against women. In 1994, the UN issued its Declaration on the Elimination of Violence against Women, which defined violence against women as “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.”

As a result of the increase in global recognition of women’s rights as human rights, countries around the world have created binding international agreements to combat domestic violence. Both the Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) signify recognition by the international community that violence against women is a violation of human rights. CEDAW has been ratified by almost 200 countries, and all but three countries in the Americas are party to the Inter-American agreement. The United States, however, has not ratified either of them. By refusing to ratify these treaties, the United States is sending a message to the international community that it is not committed to upholding the human rights of women.

INTERNATIONAL STANDARDS

Because the Refugee Convention does not define the scope of each statutory category in the “refugee” definition, each State Party to the Convention must implement its own domestic law based on its interpretation of the Convention definition. As a result, States Parties have made refugee determinations very differently, and only some have recognized a right to asylum for domestic violence victims. In its 1991 “Guidelines on the Protection of Refugee Women,” the Office of the United Nations High Commissioner of Refugees (UNHCR) explained that domestic violence victims may be eligible for asylum protection, provided that the applicant meets the other statutory requirements. In recent years, many countries, including Canada, South Africa, the Netherlands, Norway, Sweden, and Ireland, have interpreted their asylum laws in accordance with the UNHCR’s guidelines to include gender-based violence as a possible ground for asylum. Although the United States has also issued gender guidelines, they

do not specifically address domestic violence claims. As a result, in the United States, there is no standard for adjudicators to follow in deciding these types of claims.

TREATMENT OF GENDER-BASED CLAIMS IN THE UNITED STATES

U.S. COURTS CURRENTLY GRANT ASYLUM in certain types of gender-based violence cases, provided that applicants meet all statutory requirements. Such types of gender-based violence include female genital mutilation (FGM), honor killings, and forced marriage. The recognition of such forms of violence as persecution is consistent with international and domestic human rights standards. Although the United States has recognized that these categories of violence can rise to the level of persecution and thus warrant international protection, it continues to lag behind other countries in considering domestic violence a persecutory crime.

The United States began recognizing gender-based persecution in 1993 when it decided *Matter of D-V-*. In that case, the Board of Immigration Appeals (BIA) held that the rape of a woman by members of the Haitian military was a form of persecution. In 1996, the BIA granted asylum in *Matter of Kasinga*, recognizing

BIA with the intention of issuing his own decision, but, in January 2005, Ashcroft announced that he would not decide the case after all and remanded it back to the BIA. In response, the Department of Homeland Security (DHS), the body responsible for enforcing immigration law in the United States, stated it would not deport her, leaving the status of immigration law vis-à-vis domestic violence in a state of uncertainty.

THE “PARTICULAR SOCIAL GROUP” DEFINITION

THE CURRENT DEBATE IN U.S. ASYLUM LAW focuses on, among other issues, the inclusion of victims of domestic violence in the category of “particular social group.” Ashcroft’s refusal to make a decision in *Matter of R-A-* highlights the United States’ lack of a clear policy on domestic violence-based asylum claims because this precedent-setting case has no resolution. As a result, decisions on these types of claims continue to vary. Some courts rely on *Matter of R-A-* in determining that domestic violence victims are not part of a particular social group, while other adjudicators are finding that they fall within the definition. Yet other adjudicators find victims of domestic violence to fall into other statutory categories, such as political opinion (assuming they are “feminists” who

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FGM as a form of persecution. Since *Kasinga*, immigration judges have granted relief in many cases dealing with FGM. Courts in the United States have also granted asylum to applicants fleeing forced marriages, provided that the applicants meet all other requirements.

MATTER OF R-A-

In recent years, one case, *Matter of R-A-*, has highlighted the United States’ failure to enact federal guidelines to allow domestic violence victims to qualify as refugees under the “particular social group” category of the refugee definition. In this case, the applicant, Rodi Alvarado, a Guatemalan woman, was brutally abused by her husband for years and was repeatedly denied any protection by her government. Advocates hope that a favorable decision in this case will ensure favorable treatment of gender-based claims in U.S. courts.

Ms. Alvarado was originally granted asylum, but the government appealed to the BIA, which reversed that decision. In January 2001, then-Attorney General Janet Reno responded to a nationwide campaign of concern by overturning the BIA’s decision and proposing that the DOJ create new regulations to address gender-based asylum claims. These regulations would allow victims of domestic violence in certain circumstances to be considered members of a particular social group. Reno remanded the case and instructed the BIA to issue a new decision in Ms. Alvarado’s case consistent with the new proposed regulations. Those regulations, however, have yet to be implemented by the Bush Administration. Attorney General Ashcroft took the *Matter of R-A-* decision away from the

believe women should not be subordinate to their husbands) or religion. Because there are no clear guidelines on whether or how domestic violence claims should be evaluated, the results of these cases tend to depend more on the personal views of the adjudicator than on the actual merits of the case.

OTHER INTERPRETATIONS OF THE “PARTICULAR SOCIAL GROUP” CATEGORY

The United States has relied on a “particular social group” definition from *Matter of Acosta*, in which the BIA found that a particular social group is one united by an immutable characteristic or by a characteristic that is so fundamental to human dignity that a person should not be compelled to forsake it. The characteristic may also be innate, such as sex or ethnicity, or unalterable for other reasons, such as the historical fact of a past association. The DHS also determined that marital status can be reasonably characterized a “social group” if that status is believed fundamental to one’s identity. This might be so if divorce was impossible because of cultural restraints or because one’s spouse would not recognize a divorce, a common problem in violent relationships.

Most U.S. jurisprudence has followed the *Acosta* definition, and several U.S. appellate courts have interpreted the holding in *Acosta* as recognizing that domestic violence victims fall within the particular social group category. These decisions have confirmed that an individual’s status in a domestic relationship is within the realm of characteristics that may define a particular social group. There are still some federal circuit courts, however, which interpret

the definition of social group differently. Some U.S. courts have found that gender will not endow individuals with membership in a particular social group. Those courts use the words “particular” and “social” that modify the word “group” in the Refugee Convention definition to exclude victims of domestic violence because they represent too broad a segment of the population. Other U.S. adjudicators have insisted that many members of a particular social group be closely affiliated with each other, that they seek voluntary associations with other members of the group, or that every member of a group would have to face persecution in order for the particular social group to be recognized.

These requirements leave victims of domestic violence unable to make social group claims because batterers often isolate women from family and friends and forbid them to socialize with other victims. Moreover, in many cultures, there is often a great deal of shame associated with being a victim of violence, rendering it unlikely that domestic violence victims would even have the opportunity to associate with other battered women. This restrictive interpretation of the Refugee Convention has been rejected not only by DHS, but also by other States Parties to the Refugee Convention.

The regulations proposed by the DOJ allow adjudicators to determine that gender can form the basis of a particular social group. Under the new regulations, if the society in which a group exists distinguishes members of the group and accords them different treatment or status than other members of that society, those members are indeed part of a particular social group. This definition allows for domestic violence victims to qualify as members of a social group without expanding the definition of refugee to include all domestic violence victims. This definition is more consistent with DHS’ and with other States Parties’ interpretations of the Refugee Convention. This approach, accepted by more and more countries around the world, would open a door for domestic violence victims to make a viable claim of asylum.

IMPLEMENTATION OF THE PROPOSED REGULATIONS WILL NOT OPEN THE “JUDICIAL FLOODGATES”

Opponents of the proposed DOJ regulations have an unwarranted fear that if the regulations are implemented, the “judicial floodgates” will open and thousands of victims of domestic violence will try to seek asylum in the United States. The language in the proposed regulations, however, does not automatically qualify every victim of domestic violence for asylum. Instead, the regulations limit the eligibility by only allowing women who are persecuted by their intimate partners, who live in countries where they cannot safely relocate, who do not receive protection from their governments, and who are actually able to reach the United States to successfully define their membership in a particular social group. A claimant must also prove that she was persecuted “on account of” her membership in that particular group.

After Canada began to recognize gender-based asylum claims, including those based on domestic violence, the numbers of asylum seekers granted asylum only increased by two percent. For these reasons, the “floodgates” concern is overstated.

UNITED STATES DOMESTIC VIOLENCE LAW

THE UNITED STATES’ RELUCTANCE to recognize domestic violence as a basis for asylum stands in striking contrast to the strong position it has taken against domestic violence within its borders. Over the past 20 years, lawmakers in the United States have creat-

ed state and federal laws to combat the problem of domestic violence. Federal legislators enacted the Violence Against Women Act and have allocated millions of dollars in resources to combat domestic violence. Yet, DOJ statistics indicate that at least one in four American women report incidents of domestic violence.

Although state lawmakers in all 50 states have created both civil and criminal remedies to combat the problem, enforcement remains a problem. Victims’ advocates blame this disparity on continued social inequality and a cultural perception that domestic violence is a private problem unfit for government interference. Every day in the United States, victims of domestic violence face numerous barriers in accessing the legal structures designed to protect them, such as unsympathetic police or hostile judges.

The prevalence and cultural acceptance of domestic violence



Richard Boswell

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in the United States has hindered the ability of lawmakers to see domestic violence as a violation of human rights worthy of refugee protection. If Americans begin seeing domestic violence for what it really is, a form of persecution, lawmakers will be forced to recognize their obligation to protect domestic violence victims, both domestically and internationally. U.S. courts define persecution as something that “shocks the conscience.” The prevalence of domestic violence in the United States has prohibited lawmakers from recognizing domestic violence as shocking. Sadly, some American lawmakers have adopted the cultural perception that domestic violence is a private matter and not a form of harm that warrants international protection.

DOMESTIC VIOLENCE AS A GLOBAL PROBLEM

DOMESTIC VIOLENCE IS A GRAVE PROBLEM throughout the world. The World Health Organization (WHO) and the UN Special Rapporteur on Violence against Women have investigated the extent of violence against women internationally. Both submitted reports that contained shocking results on the high rates of domestic violence around the world. Many countries with problems of domestic violence, however, have been able to transcend their own cultural biases on the issue by recognizing such abuse as an international human rights violation, and offer asylum protection for victims. These countries have brought their immigration policies up to

par with their understanding of international human rights law.

The United Kingdom, Canada, Sweden, and South Africa all have domestic violence problems, yet each country has a comprehensive set of asylum guidelines that allows victims of domestic violence to fall under the “particular social group” category, making them eligible for asylum. For example, the British Crime Survey reports that every minute in the UK police receive a call from the public for assistance for domestic violence. Yet, in 1999, the Immigration Appeal Tribunal decided *ex Parte Shah*, which recognized female victims of domestic violence to be a particular social group warranting protection. According to the WHO, 29 percent of women in Canada reported being physically assaulted by a current or former partner since the age of sixteen. Yet Canada was the first country to produce a comprehensive set of guidelines on the inclusion of gender as a “particular social group.” In 2003, Sweden proposed regulations to amend its asylum law to include gender-based persecution as a ground for granting Convention refugee status. In the same year, however, a Swedish appeals court acquitted four men accused of gang rape based on the archaic notion that the victim’s “prior sexual experiences led the men to believe that she was game for their sexual advances.” And although most countries provide non-binding guidelines on how gender may be incorporated into the category of “social group,” South Africa is one of the few countries that has formally amended its Refugee Act to recognize victims of domestic violence as refugees, even though, according to the WHO, every six days a South

African woman is killed by her partner and 80 percent of rural women report being victims of domestic violence.

These statistics indicate that many countries with their own domestic violence problems have been able to recognize that it is still a violation of international human rights and that victims deserve protection when no other protections are available to the victim in their home country.

CONCLUSION

IT IS IMPERATIVE THAT THE NEW U.S. ATTORNEY GENERAL, Alberto Gonzalez, facilitate the implementation of the DOJ’s proposed regulations. The United States should recognize that victims of domestic violence may be members of a “particular social group” and, as such, merit international protection when their home countries are unable or unwilling to protect them. The United States should join other countries in holding that domestic violence victims who are not provided with any protection in their home countries are protected under the Convention’s definition of “refugee.” Many countries have relied on American jurisprudence in creating domestic asylum laws, making it that much more important for the United States to ensure that its asylum laws comport with modern understandings of international human rights. The United States must reconcile its domestic and international policies and should not limit its protection of refugees to those who are fleeing types of violence uncommonly practiced within its borders. *HRB*



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