



Tahirih Explains: Gender-Based Asylum

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WHAT IS ASYLUM?

Asylum is a legal pathway to immigration status for people in the United States or at its borders who fear persecution in their country of citizenship.

The legal right to seek asylum was created under the Universal Declaration of Human Rights in 1948. It was expanded upon in a 1951 treaty known as the Refugee Convention. The Refugee Convention, written in the aftermath of the Holocaust, obligates governments to provide for the safety and human rights of individuals who seek protection from persecution. The U.S. ratified the Convention's 1967 Protocol and took on these obligations, adopting the definition of a refugee into its domestic asylum law in 1980.

When the U.S. applies this definition to someone seeking protection outside of its borders, the person is called a *refugee*. When the definition is applied to someone in the U.S. or at its borders, the person is called an *asylee*.

Under U.S. law, people who qualify for asylum are offered immigration status and the full protection of the U.S. government. They may be able to obtain permanent residency and, eventually, citizenship.

In order to qualify, asylum seekers endure an exceptionally arduous process of proving that they meet the definition of a refugee. They must demonstrate that they have a well-founded fear of persecution in their country of citizenship, and that their own governments are either persecuting them or cannot or will not protect them from persecution by a non-state actor.

Beyond this requirement of the government's involvement in or inability to stop persecution, the definition is narrower still. While persecution refers broadly to threats against a person's life or freedom, asylum is only available to people persecuted on account of one of five specific reasons: race, religion, nationality, political opinion, or membership in a particular social group. These are known as the five "protected grounds."

The Definition of Refugee

A refugee, according to the Convention, is someone who is unable or unwilling to return to their country of origin because of a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group, or political opinion.

RECOGNIZING GENDER-BASED ASYLUM IN THE U.S.

Although gender-based violence is a serious human rights abuse, the 1951 Convention's definition of a refugee does not explicitly mention sex or gender as a protected ground. It does, however, provide wide-ranging protection from persecution on account of membership in a particular social group. Through sustained efforts in Congress, the immigration courts, and elsewhere, advocates have won broad recognition that many survivors of gender-based violence are entitled to protection on that basis.

The United Nations High Commissioner for Refugees, or UNHCR, which oversees the Refugee Convention, has confirmed that people fleeing gender-based persecution do, in fact, qualify for asylum under the Convention's definition of a refugee.

Despite the UNHCR's interpretation, survivors of gender-based violence are still fighting for predictable, uniform access to asylum in the United States. And while Congress demonstrated the U.S. government's commitment to addressing gender-based violence when it passed the Violence Against Women Act (VAWA) in 1994, the road to protection for asylum seekers fleeing gender-based persecution has been much longer.

In 1985, in *Matter of Acosta*, the U.S. Board of Immigration Appeals (BIA) explained that the "particular social group" ground for asylum protects individuals persecuted on account of a fundamental characteristic, including one's sex.

In 1996, in *Matter of Kasinga*, the BIA granted asylum to a young woman fleeing female genital mutilation/cutting and forced marriage, recognizing that her persecution was partly motivated by her gender. The precedent set by *Kasinga* seemed to pave the way for those fleeing other types of gender-based violence.

But in 1999, in *Matter of R-A-*, the BIA denied asylum to Rodi Alvarado, a woman who had escaped severe domestic violence. This new precedent bred uncertainty, and cases involving gender-based persecution were decided inconsistently across the country. Realizing the need for a nationwide clarification that domestic violence victims could be granted asylum protections, then-Attorney General Janet Reno voided the decision in *Matter of R-A-* and called for federal regulations settling

What is gender-based violence?

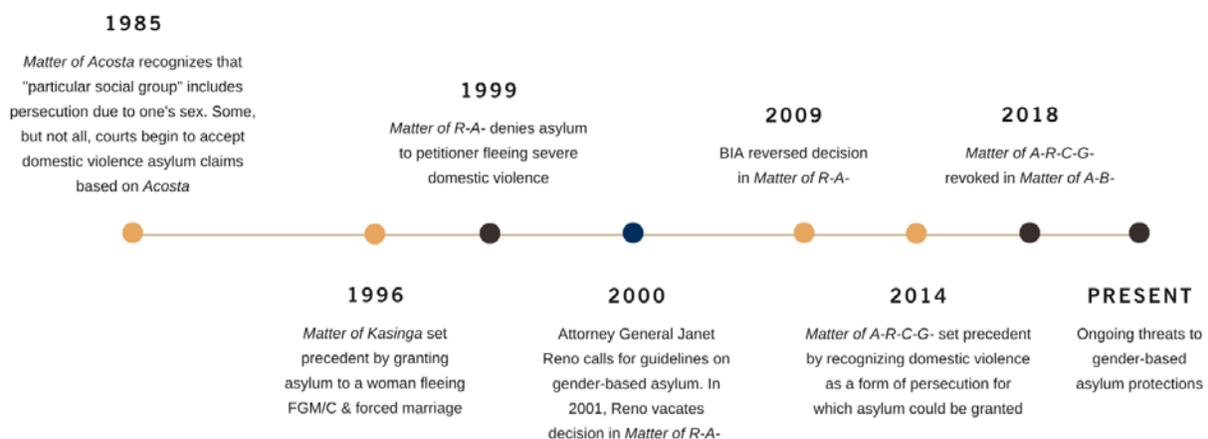
Gender-based violence is harm inflicted based on gender norms and expectations. While most victims are women and girls, anyone who transgresses these norms can be targeted for gender-based violence. Examples include female genital mutilation/cutting, intimate partner violence, rape, forced marriage, targeted harm based on sexual orientation or gender identity, "honor" violence, and human trafficking.

the debate. While the regulations were never issued, a decade of litigation and advocacy finally resulted in the BIA reversing course and granting asylum to Ms. Alvarado in 2009.

Unfortunately, without regulations prescribing a clear path to protection for survivors of domestic violence, immigration judges and other officials continued to issue inconsistent decisions. Many of them remained confused about the state of the law, the dynamics of abuse, and the role of government in condoning, allowing, and even perpetuating domestic violence. As a result, many individuals were wrongly denied protection, incorrectly decided cases went through time and resource intensive appeals, and the legal landscape became increasingly complex and difficult to navigate. Finally, in 2014 the BIA clarified the situation when it ruled in *Matter of A-R-C-G-* that domestic violence was broadly a form of persecution for which asylum could be granted.

This positive development did not last long, however, as the precedent set by *A-R-C-G-* was revoked by then-Attorney General Jeff Sessions in 2018's *Matter of A-B-*. The decision clearly attempted to undo decades of legal advocacy, but contained profound legal flaws and is being challenged in legal cases around the country.

Timeline: Development of Gender-Based Asylum



AN ONGOING THREAT

This legal back-and-forth over gender-based asylum, and the complex and ever-changing field of law that it has created, denies countless survivors the vital protection they need and are guaranteed under both U.S. and international law.

Without clear regulations or legal protections for asylum seekers fleeing gender-based violence, this critical area of law remains under constant threat. It can at any time be attacked, weakened, and even eliminated by a new court ruling or executive policy that partially or completely closes off existing avenues to safety.