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PROTECTING VICTIMS OF GENDERED PERSECUTION: FEAR OF FLOODGATES OR CALL TO (PRINCIPLED) ACTION?

Karen Musalo

What do you think would happen if the United States were to grant asylum to Rodi Alvarado?
[Chana Gazit (PBS documentary producer)]

It would be powerful because it would send a message to the Guatemalan government that it could no longer allow violence against women with impunity to continue. [Hilda Morales Trujillo (Guatemalan women’s rights attorney and activist)]

INTRODUCTION

One of the most controversial issues in the U.S., as in a number of other refugee-receiving countries, is whether women who suffer gendered forms of violence (e.g. domestic violence, female genital cutting, trafficking for sexual exploitation, honor killings) qualify for protection as refugees. This controversy is exemplified in the U.S. by the more than decade-long legal claim for asylum of Rodi Alvarado, a Guatemalan woman who fled ten years of brutal domestic violence, in a situation where neither the police nor the courts would take any action to protect her. Although her claim has been considered by the highest immigration tribunal, the Board of Immigration Appeals (BIA), and two successive attorney generals – Janet Reno and John Ashcroft – it has yet to be resolved.

There are many arguments raised in opposition to a grant of asylum in cases involving gender-related harms. Included among these

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1 This question was asked in June 2004; it is notable that Hilda Morales Trujillo did not predict an exodus of women, but rather a changed policy on the part of the Guatemalan government.
arguments are that the 1951 Convention relating to the Status of Refugees (Refugee Convention), and its 1967 Protocol Relating to the Status of Refugees (1967 Protocol), were never intended to extend protection in these situations, and that grants of protection in gender asylum cases smack of cultural imperialism, constituting an impermissible critique of what may be a cultural norm or practice. Underlying much of this opposition, however, is the fear of the floodgates— that a grant of asylum will result in a deluge of claims. Some opponents further opine that political support for refugee protection cannot be sustained if such claims were to be recognized.

In this Article I will principally address the fear of floodgates. I will discuss why opposition based on fear of floodgates is misinformed because history demonstrates that the acceptance of gender asylum does not give rise to a skyrocketing number of claims. I will also argue that it is unprincipled because the response to a fear of floodgates should not be to return victims to situations where their rights will be violated, but rather to address the human rights violations that are the root cause for the refugees' claims. Rodi Alvarado's claim for asylum will be used as an example of the relationship between root cause problems and refugee flows, and of the feasibility of principled and concrete policy responses.

Part I briefly addresses the argument that the Refugee Convention and Protocol were not intended to extend protection to women suffering gender-related violations of their human rights. Part II outlines the history of gender asylum claims in the U.S., while Part III provides an overview of the contemporary factors which give rise to opposition to gender claims—including fear of floodgates. Part IV discusses the precedent—both international and within the U.S.—for policy responses to address the root cause of refugee flows. Part V focuses on violence against women in Guatemala as the root cause of claims such as Rodi Alvarado's, and also provides concrete recommendations for measures the U.S. could undertake to help bring an end to violence against women in Guatemala.

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I. INTERNATIONAL ORIGINS OF THE REFUGEE DEFINITION AND PERCEIVED BARRIERS TO GENDER CLAIMS

The contemporary U.S. and international refugee protection regime has its origins in the post-World War II period. The international community, which had failed to extend protection to Jews and other targeted groups fleeing Nazi genocide and persecution, came together in the wake of World War II to draft those instruments which would establish the norms of protection – the Refugee Convention,\(^4\) and its 1967 Protocol.\(^5\) The Refugee Convention and its Protocol define a refugee in gender-neutral terms as a person with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion . . ."\(^6\) This definition is understood to require a harm grave enough to constitute "persecution" which has a causal relationship, or bears a "nexus" to the asylum seeker’s race, religion, nationality, membership of a particular social group or political opinion.

Those who argue that the Refugee Convention and its Protocol were not intended to extend protection to women fleeing gender-related harms generally raise three points to support their position. First, they contend that the harms imposed on women do not meet the definition of "persecution" because they arise from cultural norms (e.g., female genital cutting, forced marriage, polygamy), or constitute religious requirements. Second, they assume that persecution must be government-inflicted, and they reject the validity of women’s claims because the persecution is often at the hands of family members or members of the community. Third, and perhaps most importantly, they argue that women’s claims fail to meet the nexus requirement, because women are often persecuted because of their gender, and gender is not one of the five Convention grounds.\(^7\)

\(^4\) Refugee Convention, \textit{supra} note 2.
\(^6\) Refugee Convention, \textit{supra} note 2, Art. 1.A(2).
\(^7\) A related, but different, nexus obstacle arises when women are the victims of rape or other sexual assaults by their political opponents during war or civil unrest. Notwithstanding the political context, it is often argued that the assault was "personal" rather than political. \textit{See}, e.g., \textit{Campos-Guardado v. I.N.S.}, 809 F.2d 285, 291 (5th Cir. 1987) (holding that there was no showing of political motive on the part of individuals who shouted political slogans during an incident in which they gang raped the female relatives of the leader of an agricultural cooperative, and killed the cooperative leader and his male relatives). \textit{But see Garcia-Martinez v. Ashcroft}, 371 F.3d 1066, 1076 (9th Cir.
These bases for excluding women from protection have been addressed and rejected by the United Nations High Commissioner for Refugees (UNHCR), which plays an important role in interpreting the Refugee Convention and its Protocol, and in supervising its application by States that are signatories to these instruments. The UNHCR’s position generally has been affirmed by other relevant U.N. bodies and has been adopted by various States in the form of national guidelines. UNHCR has made clear its position that women who suffer gender-related harms can be recognized as refugees. Although a detailed discussion of its analysis is outside the scope of this article, suffice it to say that UNHCR takes the position that: 1) human rights norms – rather than culture – should guide the determination of whether a harm is persecution; 2) persecution by non-State actors, such as family or community members, can qualify one as a refugee; and, perhaps most importantly; 3) under appropriate circumstances women may constitute a

2004) (overturning BIA’s decision that gang rape by soldiers during civil war in Guatemala was a personal, criminal act rather than political persecution).


"particular social group," within the meaning of the Refugee Convention, and may be able to demonstrate a nexus between the harm they fear and their social group membership.

II. THE CONTROVERSY WITHIN THE UNITED STATES ON GENDER ASYLUM

Over the last ten years, the U.S. position on gender asylum has been characterized by a persistent ambivalency that has led to contradictory measures at the administrative level, and inconsistent decision-making. As the following illustrates, the U.S. has taken steps towards accepting gender claims, only to retreat shortly after.

In 1995, the U.S. became a leader in gender asylum, heeding the call of UNHCR for States to provide guidance on gender asylum for their adjudicators by issuing its Considerations for Asylum Officers Adjudicating Asylum Claims from Women (Gender Considerations). It was second only to Canada, which had issued guidelines in 1993. Yet, the same year that the U.S. issued its mostly favorable Gender Considerations, a U.S. immigration judge, Donald Ferlise, denied asylum to Fauziya Kassindja, a young woman from Togo, who claimed asylum to escape from the fate of being forced into a polygamous marriage against her will, a condition of which was to undergo female

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11 A timeline of the developments discussed in Part II appears at the end of the section.
14 IMMIGRATION AND REFUGEE BOARD OF CANADA, GUIDELINES ON WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION 1 (March 1993); IMMIGRATION AND REFUGEE BOARD OF CANADA, GUIDELINE 4: WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION: UPDATE (Feb. 2003).
15 When Fauziya Kassindja first arrived in the United States, the Immigration and Naturalization Service incorrectly recorded her name as “Kasinga” and the landmark case which resulted from her claim bears that spelling.
The form of genital cutting (FGC) practiced among her ethnic group was one of the most severe forms of FGC, in which her genitalia was to be removed and the resulting wound sewn shut, leaving only a small opening for the flow of urine and menstrual blood. Although Judge Ferlise was ultimately reversed by the Board of Immigration Appeals (BIA), which issued Matter of Kasinga, a landmark decision recognizing gender persecution as a basis for asylum\(^\text{17}\), the ambivalency and resistance which Judge Ferlise’s denial demonstrated — coming on the heels of the issuance of U.S. Gender Considerations — continued in U.S. law. It next manifested itself in a 1999 decision of the BIA in the case of the Guatemalan asylum seeker, Rodi Alvarado.\(^\text{18}\)

The facts of Ms. Alvarado’s claim — which are undisputed — are that her husband, who had been a soldier in the Guatemalan military, subjected her to vicious and unremitting physical abuse;\(^\text{19}\) that her attempts to escape him within Guatemala were futile; and that her pleas to the police and the courts went unheeded because they would not “interfere in domestic disputes.”\(^\text{20}\) Although the decision for her was an anguished one because it meant leaving her two small children behind, Rodi Alvarado fled Guatemala, believing that if she remained, her husband would eventually take her life. After arriving in the U.S. and being apprehended by immigration authorities, she applied for asylum.

\(^{16}\) Many articles have been written about Fauziya Kassindja’s plea for asylum. See, e.g., Karen Musalo, Ruminations on In re Kasinga: The Decision’s Legacy, 7 U.S.C. REVIEW OF LAW AND WOMEN’S STUDIES 357 (1998); Karen Musalo, In Re Kasinga: A Big Step Forward for Gender-Based Asylum Claims, 73 INTERPRETER RELEASES 853 (July 1, 1996); Arthur C. Helton and Alison Nicoll, Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of In Re Fauziya Kasinga and Prospects for More Gender Sensitive Approaches, 28 COLUM. HUMAN RIGHTS L. REV. 375 (1997); Mary M. Sheridan, In re Kasinga: The United States has Opened its Doors to Victims of Female Genital Mutilation, 71 ST. JOHN’S L. REV. 433 (1997).

\(^{17}\) In re Fauziya Kasinga, 21 I. & N. Dec. 357 (BIA 1996).

\(^{18}\) In re R-A-, 22 I. & N. Dec. 906 (BIA 1999).

\(^{19}\) Her husband broke windows and mirrors with her head, whipped her with electrical cords, threw a machete at her, woke her up with a knife at her throat, subjected her to rape and sodomy, and brutally kicked her around the spine when she was pregnant with their child, in an attempt to cause a miscarriage. Karen Musalo, Matter of R-A-, An Analysis of the Decision and Its Implications, 75 INTERPRETER RELEASES 1177, 1179 (1999).

\(^{20}\) Id.
Relying to a large degree on the favorable precedent established by the BIA decision in Matter of Kasinga, an immigration judge in San Francisco granted Ms. Alvarado asylum. The Immigration and Naturalization Service (INS)\textsuperscript{21} appealed that grant, and in 1999 a majority of the BIA – the same body that had granted Ms. Kassindja’s case three years earlier – reversed the immigration judge’s grant of asylum to Rodi Alvarado.\textsuperscript{22} The BIA attempted to distinguish the two cases to justify the grant in one case and the denial in the other.\textsuperscript{23}

The ongoing ambivalency on the issue of gender asylum became apparent approximately eighteen months after the BIA’s decision when the Department of Justice (DOJ) issued proposed asylum regulations to address claims of gender persecution.\textsuperscript{24} The preamble to the regulations explicitly states that their purpose is remove “certain barriers that the In re R-A- decision seems to pose”\textsuperscript{25} to claims for asylum based on domestic violence. Within a little more than a month of issuing the proposed regulations, then Attorney General Janet Reno took the unusual step of exercising her authority to review the decision in In re R-A-. She vacated the denial of asylum, and sent the case back to the BIA, instructing it to reconsider the case when the proposed regulations were issued as final.

Although more than five years have passed, the ongoing contradictory tendencies on this issue have prevented any resolution.\textsuperscript{26}

\textsuperscript{21} The Homeland Security Act (HSA), which created the Department of Homeland Security (DHS) effectuated a massive reorganization of the federal government. Pub. L. No. 107-296, 116 Stat. 2135. As part of this reorganization, the Immigration and Naturalization Service ceased to exist, and its functions were transferred into the DHS.

\textsuperscript{22} In re R-A-, supra note 18.

\textsuperscript{23} Although there are many who would disagree that the distinctions mandate these very different results, a detailed legal analysis is beyond the scope of this article. For critiques of the legal analysis, see In re R-A, supra note 18 (Gwendelsberger, Board Member, dissenting); Danette Gomez, Last in Line - The US Trails Behind in Recognizing Gender-Based Asylum Claims, 25 WHITTIER L. REV. 959 (2004); Karen Musalo, Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence, 52 DEPAUL L. REV. 777 (2003).


\textsuperscript{25} Id. at 76,589.

\textsuperscript{26} The observations of one well-placed official in the Department of Justice, who had worked for the government on immigration issues for many years, illustrates the degree of contention around these regulations. Around the time
The proposed regulations – pending since December 2000 – have yet to be finalized. Attorney General Ashcroft assigned the case of Rodi Alvarado to himself, with the apparent intent of deciding it during his term in office, but then decided not to decide it – and instead sent it back to the BIA for its decision. In the meantime, the Department of Homeland Security (DHS), formerly the INS, which had appealed the original grant of asylum to Rodi Alvarado and opposed her claim for eight years, changed its position, filing a brief in February 2004 in which it argued that she was eligible for recognition as a refugee.

The absence of clear guidance in the form of regulations, or a precedential decision in Matter of R-A- has left a vacuum, which has resulted in arbitrary decision-making, often notable for its confused misunderstanding of the status of the law.\textsuperscript{27} Federal court decisions on that the regulations were proposed in 2000, this individual commented to me that they were the “most controversial” issue on which this individual had been involved in her entire government career.

\textsuperscript{27} The following provide examples of the confused and erroneous decision-making:

- In a May 29, 2003 decision, an immigration judge was unaware of the fact that Matter of R-A- had been vacated three years earlier; she cited to and relied upon the vacated decision in denying relief to an Albanian woman who had escaped after being kidnapped, held in captivity and repeatedly raped by traffickers. \textit{In re H-II-}, No. [redacted], (Chicago Immig. Ct., May 29, 2003), available at Center for Gender and Refugee Studies, Case No. 2506, http://cgrs.uchastings.edu/about/contact.php and on file with author.

- In a July 16, 2004 decision, another immigration judge appeared to believe that Matter of R-A- was still good law, citing to it in a decision denying relief to a young Chinese woman who had been physically abused throughout her childhood by her mother and then sold by her parents into marriage to an older man. The immigration judge relied upon an aspect of the Matter of R-A- decision that had been specifically addressed and repudiated in the DOJ’s proposed regulations. \textit{In re Xi Mei Chen}, No. A97-660-069 (Chicago Immig. Ct., July 16, 2004), available at Center for Gender and Refugee Studies, Case No. 1298, http://cgrs.uchastings.edu/about/contact.php and on file with author.
• In an October 28, 2004 decision, an immigration judge acknowledged that Matter of R-A had been vacated, but then noted that it nonetheless indicated the BIA's "concerns" regarding domestic violence cases, and stated that the vacated decision was "pertinent for determining which aspects of the respondent's claim must be closely analyzed." Ultimately the court denied relief to the 21-year-old Ugandan applicant who had been drugged and raped by the 68-year-old man her parents had "arranged" for her to marry. She had fled before the marriage took place, but after the abuse had occurred. In re Loy Lwabaai, No. A77-816-221 (BIA, Oct. 28, 2004), available at Center for Gender and Refugee Studies, Case No. 3163, http://cgrs.uchastings.edu/about/contact.php and on file with author.

• In an October 7, 2004 decision, an immigration judge incorrectly stated that the proposed regulations had "been withdrawn and therefore do not control." Although the proposed regulations have not yet been issued as final, they have never been withdrawn. The judge in this case also appeared to believe that an acceptable form of protection to the applicant was available in the form of an offer by several of her male relatives to attack or even kill her husband to protect her. The judge conceded that "[s]elf-help is abhorrent in the United States criminal justice system," but seemed to believe that it was acceptable in Guatemala. In re C-T., A-L., and D-L., No. [redacted] (Memphis Immig. Ct., Oct. 7, 2004) available at Center for Gender and Refugee Studies, Case No. 2731, http://cgrs.uchastings.edu/about/contact.php and on file with author.

• In an August 25, 2003 decision, an immigration judge appeared confused about the status and significance of virtually all of the developments relevant to gender asylum. The judge first stated that the decision in Matter of R-A had provided the opportunity for "domestic violence to be a viable claim." This positive reading of the case is inconsistent with the virtually unanimous assessment of it as imposing a barrier to such claims. The judge then stated that the case had been "decertified" so that it no longer provided a "basis upon which a claim can lie." At the time the judge made this statement, the case had been certified and was pending before Attorney General Ashcroft. The judge further observed that since the proposed regulations had not yet been "implemented" he did
the issue have provided some guidance, but have not comprehensively addressed the issue the way that regulations with nationwide applicability would.\textsuperscript{28} The finalization of these regulations has become more complicated with the reorganization of immigration functions pursuant to the Homeland Security Act.\textsuperscript{29} Whereas prior to the reorganization, the regulations were within the sole jurisdiction of the DOJ, they are now within the joint jurisdiction of the DOJ and the DHS, which means that both agencies will need to reach some consensus on the regulations before they can be finalized.

not believe that the administration was going to “authorize such a basis” anytime in the near future. The immigration judge denied relief to the asylum seeker, a Mexican woman whose husband had battered her in their home country and then followed her to the U.S., where he continued his violence against her until he ended up in prison as a result. The undisputed facts in the case include that the claimant had made a total of eight complaints to the authorities in Mexico before fleeing to the United States, and that no governmental assistance had been forthcoming. In re [redacted], No. [redacted] (Los Angeles Immig. Ct., Aug. 25, 2003) available at Center for Gender and Refugee Studies, Case No. 1258, http://cgrs.uchastings.edu/about/contact.php and on file with author.

\textsuperscript{28} Federal court decisions on the issue of gender asylum have included: \textit{Gao v. Gonzales}, 440 F.3d 62 (2d Cir. 2006) (recognizing that: 1) a valid claim exists where the applicant is a member of a particular social group consisting of “women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable,” and 2) a lifelong involuntary marriage is a form of persecution “on account of” membership in this social group); \textit{Abay v. Ashcroft}, 368 F.3d 634 (6th Cir. 2004) (finding that applicant mother meets the definition of a refugee based on her fear that her applicant daughter will be subject to FGC upon return to Ethiopia); \textit{Mohammed v. Gonzalez}, 400 F.3d 785 (9th Cir. 2005) (granting appeal from denial of motion to reopen due to ineffective assistance of counsel where applicant’s first counsel failed to present a past persecution claim based on the applicant’s prior subjection to female genital mutilation in Somalia, finding that female genital cutting is an ongoing harm, and holding that BIA erred in requiring that evidence be presented with the motion that FGC would likely be performed in the future); \textit{Niang v. Gonzales}, 422 F.3d 1187 (10th Cir. 2005) (holding that when identifying a particular social group, the \textit{Acosta} standard does not require more than gender plus tribal membership).

\textsuperscript{29} Homeland Security Act, supra note 21.
Timeline on Executive Branch Action Related to Gender Claims

**May 1995**  
INS issues non-binding guidance to asylum officers entitled Considerations for Asylum Officers Adjudicating Asylum Claims for Women

**Aug. 1995**  
Immigration Judge Donald Ferlise denies asylum to Fauziya Kassindja, who fled female genital cutting and forced polygamy

**June 1996**  
The BIA in *Matter of Kasinga* grants asylum and recognizes that women persecuted because of their gender may be recognized as “members of a particular social group”

**Sept. 1996**  
Immigration Judge Mimi Yam grants asylum to Guatemalan asylum seeker Rodi Alvarado who suffered ten years of brutal domestic violence

**June 1999**  
The BIA in *Matter of R-A* reverses the grant of asylum to Rodi Alvarado and limits the applicability of the *Kasinga* decision

**Dec. 2000**  
The DOJ issues proposed rules setting forth guidance for deciding gender asylum claims; the preamble to the regulations state that they “remove certain barriers that the *In re R-A* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.”

**Jan. 2001**  
Attorney General Janet Reno overturns the *Matter of R-A* decision, and she orders the BIA to decide the case again when the proposed rules issued by the DOJ become finalized

**Feb. 2003**  
Attorney General John Ashcroft orders the BIA to send *Matter of R-A* to his office for a decision
Feb. 2004 The DHS files a brief to the Attorney General which sets forth an analytical framework for deciding gender claims, and argues in favor of a grant of asylum in Matter of R-A-

Jan. 2005 Attorney General John Ashcroft returns Matter of R-A- to the BIA for a decision; it remains pending

III. XENOPHOBIA, CLAIMS OF CULTURAL IMPERIALISM, AND FEAR OF THE “FLOODGATES”

There are a number of factors that underlie the resistance to extending protection to victims of gender persecution, and that explain the controversy that has arisen from this issue. With the end of the Cold War, the U.S. — along with other industrialized countries — has become less welcoming of asylum seekers — male and female alike. During the Cold War, the admission of refugees who fled Soviet bloc repression served U.S. foreign policy. Furthermore, the exit restrictions which existed in many of the sending countries managed to keep the numbers of asylum seekers from these countries low. These factors no longer exist; refugees come from countries all around the world, and few (perhaps with the exception of Cubans) fit the category of “trophy” refugees — a term used to describe dissidents who fled those countries the U.S. condemned as being repressive.

This overall decrease in enthusiasm for welcoming those fleeing persecution is exacerbated by an anti-immigrant climate. Although cycles of nativistic tendencies accompanied by restrictionist measures have characterized U.S. immigration policy for more than a century, the terrorist attacks of September 11, 2001 have hardened attitudes, and

increased xenophobia. All of this has translated into measures for greater militarization of the border, and expanded authority to deport or remove undocumented immigrants while affording them with a minimum of procedural rights. Accordingly, recent legislation has been characterized by its exceedingly harsh and punitive effects.\textsuperscript{33}

This anti-immigrant climate, with its flagging commitment to refugee protection in general, places in context the resistance to women’s claims. This resistance is exacerbated by the fact that gender claims do not fit the traditional male paradigm of a refugee as a courageous political dissident, and that women’s fears of persecution are often intertwined with cultural and religious norms and practices. These two factors have led some opponents of gender asylum to opine that the harms the women suffer are not really serious,\textsuperscript{34} or to accuse those who argue for protection as being “cultural imperialists,” with the implication being that a grant of asylum to a woman fleeing persecution imposed by her culture is somehow an inappropriate judgment on the culture itself.\textsuperscript{35}

Both of these propositions represent fundamental misunderstandings; the harms at issue in these gender cases are not minor or trivial, but include grave human rights violations such as rape, sexual enslavement, mutilation, acid burning, brutal domestic battering,

\textsuperscript{33} REAL ID Act of 2005, 109 Pub. L. No. 13. The title of the original House bill (H.R. 418) describes the general purposes of the Act: “To establish and rapidly implement regulations for State driver’s license and identification document security standards, to prevent terrorists from abusing the asylum laws of the United States, to unify terrorism-related grounds for inadmissibility and removal, and to ensure expeditious construction of the San Diego border fence.” The REAL ID Act included measures that increased the burden of proof for asylum seekers by making it more difficult to establish a nexus with one of the five enumerated grounds, and making it easier for adjudicators to deny cases on the basis on credibility. In fall 2005, Congress took up immigration again, and the House enacted H.R. 4437, one of the most anti-immigrant pieces of legislation to be enacted in many years.

\textsuperscript{34} As reported by Newsweek columnist Anna Quindlen, one anti-immigrant activist snidely commented, “You get a punch in the mouth, and you’re home free.” Anna Quindlen, Torture Based on Sex Alone, NEWSWEEK, Sept. 10, 2001, at 76.

and murder (i.e., "honor" killings). And although it might be a form of cultural imperialism if the attorneys representing these women were to launch a broadside condemnation of the cultures from which their clients come, this is not what is taking place. To the contrary, it is the women asylum seekers who are objecting to the imposition of the cultural norms of their society on themselves. It does not seem that one can call it "cultural imperialism" when a member of a society disagrees with, and criticizes aspects of her own culture.

A. Fear of Floodgates

Perhaps the overarching basis for the opposition to gender claims is the fear that acceptance of these cases will result in the floodgates. Although some opponents do not admit to fear of floodgates as a reason to deny women’s claims, others expressly state that this is the basis for their concern.36 The spectre of thousands – or tens of thousands – of women arriving at the borders of the United States to request asylum is raised as a reason to not recognize their legitimate claims to protection.

The floodgates were evoked around the claim of Fauziya Kassindja; many who opposed a grant of asylum pointed to the fact that millions of women a year are subject to FGC, and predicted that the U.S. would be overwhelmed with asylum seekers if it recognized fear of FGC as a basis of asylum. Fauziya Kassindja was granted asylum, but the dire predictions of a flood of women seeking asylum never materialized. In fact an INS publication37 explicitly noted that “[a]lthough genital mutilation is practiced on many women around the world, INS has not

36 David Ray of the Federation for American Immigration Reform (FAIR) was quoted in a recent article as stating that asylum “was never meant to be divorce court . . . . To expect asylum law to address family issues is impractical and invites huge abuses of the system.” Azadeh Ensha, Fear of Persecution, COLORLINES, Vol. 6, No. 4 (Winter 2003-2004), available at http://www.findarticles.com/p/articles/mi_m0KAY/is_4_6/ai_112129636.

On another occasion, Ray directly invoked the floodgates, commenting, “You can’t just say, ‘I’m in a bad situation and therefore I’m a member of some new social group.’” If the categories grow so large as to include millions of people, asylum policy is going to crumble.” Dan Stein, Ashcroft Re-Considers Clinton-Era Asylum Rule, THE STEIN REPORT, March 3, 2003, available at http://www.steinreport.com/archives/001682.html.

seen an appreciable increase in the number of claims based on FGM” after the *Kasinga* decision. In this same publication, INS stated that it did not expect to see a large number of claims if the U.S. recognized domestic violence as a basis of asylum.

The experience of Canada provides additional evidence that countries which recognize gender asylum do not experience a floodgates of women. Since 1993, when Canada became the first country in the world to issue Gender Guidelines and accept that women fleeing gender-related persecution qualified for refugee protection, it has maintained statistics on gender asylum. Canada reported that there was no explosion of claims; to the contrary, gender claims consistently constituted only a minuscule fraction of Canada’s total claims, and had actually declined in the seven-year period following the adoption of the Gender Guidelines.  

There are several explanations why the number of women asylum seekers has not dramatically increased with the legal recognition of gender claims for protection. First, women who would have legitimate claims for gender asylum often come from countries where they have little or no rights, which limits their ability to leave their countries in search of protection. Second, they are frequently – if not always – primary caretakers for their children and extended family. Thus they often have to choose between leaving family behind, or exposing them to the risks of travel to the potential country of refuge. (Rodi Alvarado faced just this choice, and only left her home country when she reached the conclusion that if she remained in Guatemala her husband would kill her, so her children would lose their mother forever.) Finally, women asylum seekers often have little control over family resources, making it impossible for them to have the means to travel to a country where they might seek asylum.

Notwithstanding the fact that the floodgates argument is without basis, it provides the opportunity to engage in a discussion about alternative responses to the fear of an inundation of asylum seekers: one response is to deny protection to women seeking asylum for gender persecution, the other is to examine the conditions which cause women to flee, and to craft policy responses and strategies which address those root causes.

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38 E-mail from Janet Dench, Canadian Council for Refugees, to Karen Musalo, on file with author.
IV. THE "ROOT CAUSE" APPROACH – PRAGMATIC AND PRINCIPLED

The principle that States might respond to migration or refugee flows by addressing root causes is by no means unprecedented; a number of recent international instruments make reference to just such an approach. For example, the 1999 Presidency Conclusions of the European Council meeting in Tampere looks to root causes when it proclaims that a "comprehensive approach to migration [must address] political, human rights and development issues in countries and regions of origin and transit" and that this "requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children." In 2002 the European Council reaffirmed this position, stating that "an integrated, comprehensive and balanced approach to tackling the root causes of illegal immigration must remain the European Union’s constant long-term objective." Notwithstanding the fact that they are focused more on development than human rights issues, the Trafficking and Smuggling Protocols to the United Nations Convention against Transnational Organized Crime also affirm a root cause or "push" factor approach to addressing migration.

40 Id. at para. 11.
41 Id. (emphasis added).
46 Article 9, § 2 of the Trafficking Protocol provides that “States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons.” Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, supra note 43, Art. 9, § 2.
Although U.S. policy makers may not have referred to it in root cause terms, during his presidency, President William Clinton resolved the then-existing Haitian refugee crisis by addressing its root cause. The crisis had been precipitated by the September 1991 military coup which had ousted Haiti's democratically elected president, Jean Bertrand Aristide. As the U.S. Supreme Court observed, in the aftermath of Aristide's ouster, "hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property . . . . Thousands have been forced into hiding."47

Tens of thousands also attempted to flee Haiti, which created a problem of grand magnitude for President Clinton. His predecessor, President George Herbert Walker Bush, had issued an Executive Order48 pursuant to which the Coast Guard interdicted and returned Haitian asylum seekers, without providing them with the opportunity to apply for refugee protection. This Executive Order was condemned as inhumane and violative of domestic and international law. Prior to his election, when he was the Democratic challenger to President Bush, William Clinton also had decried the policy, declaring that he was "appalled by the decision of the Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum . . . . This process must not stand. It is a blow to the principle of first asylum and to America's moral authority in defending the rights of refugees around the world."49

However, once he was elected, President Clinton opted to continue the policy of interdiction and repatriation. His adoption of former

Article 15, § 3 of the Smuggling Protocol provides that: "Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as poverty and underdevelopment." Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, supra note 44, Art. 15, § 3.

President Bush's policy led to harsh criticism from many quarters, most notably the Congressional Black Caucus, and African American community leaders, including TransAfrica president Randall Robinson, who went on a hunger strike in protest. As a result of this pressure, Clinton first modified his policy towards the asylum seekers, but then ultimately addressed the root cause of the refugee exodus, which was the ouster of President Aristide. As a result of increasing U.S. pressure, including the threat of military force, Haiti's coup leaders were forced from power, and Aristide was returned to Haiti.

Whereas the action taken by President Clinton to resolve the Haitian refugee crisis involved the threat and actual use of military force, the foreign policy measures necessary to address violence against women in Guatemala do not require such drastic means. To the contrary, what is needed is for the U.S. to use the significant influence it has as a major provider of economic assistance to Guatemala to pressure the

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Guatemalan government to seriously address the violation of women’s rights.

V. VIOLENCE AGAINST WOMEN AS THE ROOT CAUSE OF REFUGEE FLOWS FROM GUATEMALA

The root cause of Rodi Alvarado’s plea for asylum is the violence against women which is endemic in Guatemala, and which is committed with virtual impunity. Although violence against women in Guatemala has historic roots, in recent years it has dramatically increased. Between 2001 and 2007 more than 3,000 women have been killed.\(^{53}\) The killings of women cannot be simply explained by the general increase in homicides in Guatemala in that the murder rate of women has escalated at a higher rate than that of men.\(^{54}\)

According to available statistics, the women killed are between the ages of 13 and 36, and include “students, housewives and professionals, domestic employees, unskilled workers, members or former members of street youth gangs and sex workers.”\(^{55}\) These murders have been dubbed “femicides” because gender appears to be the primary or only unifying characteristic of the victims, and the crimes are frequently carried out with a misogynistic brutality, accompanied by sexual violence and mutilation.

Investigation and prosecution of these killings has been woefully inadequate;\(^{56}\) less than 10 percent of the crimes have even been

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\(^{53}\) Many readers may be more familiar with the femicides in Ciudad Juarez and Chihuahua, Mexico, where a reported 400 women and girls have been killed since 1993. There has been far more news coverage of Mexico’s femicides, although the numbers of women killed in Guatemala in a shorter time period have been much higher.


\(^{56}\) Angélica Cházaró and Jennifer Casey, \textit{Getting Away with Murder: Guatemala’s Failure to Protect Women and Rodi Alvarado’s Quest for Safety},
investigated. The absence of a meaningful law enforcement response to these murders has resulted in the proliferation of theories as to who is behind them, but little proof to pinpoint responsibility. One of the theories is that a significant portion of the killings – perhaps a third – are the result of domestic violence. There is some basis for this belief, in that in 31 percent of the cases being handled by the Special Prosecutor’s Office in Guatemala, the murder victim previously had been threatened and had filed a report.57

Notwithstanding the lack of an overarching theory, the existence of virtual impunity must be seen as a factor; those who commit these crimes most likely view their apprehension, prosecution and punishment as a remote possibility. Further, the crimes are being committed in a societal context where women suffer de jure and de facto discrimination, and anachronistic attitudes prevail. These outdated attitudes are quite evident in laws and policies around marital rights and domestic violence. For example, under Guatemalan law, domestic violence is not criminalized. When a husband batters his wife, it will only constitute the crime of assault if signs of physical injury persist for as long as ten days. Spousal rape is also not recognized as a crime, and a man who rapes a woman who is not his wife is released from criminal culpability if he marries his victim as long as she is twelve years of age or older. Until as recently as 1998, the Civil Code precluded women from enjoying equal legal status,58 and patriarchal attitudes have resulted in

Ctr. for Gender and Refugee Studies, (Nov. 2005), at 11-13, available at
57 Getting Away with Murder, supra note 56, at 1, 8; Alba Estela Maldonado,
Investigación sobre Femicidio en Guatemala at 49, 59, available at
http://pangea.org/~entrep/noticias/archivos/INVESTIGACION_SOBRE_FEMI
NICIDIO_EN_GUATEMALA.pdf (Investigation on Femicides in Guatemala)
[hereinafter Investigation of Femicide]; Interamerican Commission on Human
Rights, Justicia en Inclusión Social: Los Desafíos de la Democracia en
Guatemala, [Justice and Social Inclusion: The Challenges of Democracy in
Guatemala], (2003), at 5, available at
http://www.cidh.oas.org/GUATEMALA.2003.pdf [hereinafter Justice and
Social Inclusion].
58 Getting Away with Murder, supra note 56, at 7-8. Until the 1998 reforms, the
Civil Code provided that: “[t]he husband had the duty to protect and support his
wife, while she had the right and duty to care for and raise minor children and
oversee domestic tasks,” “[h]usbands could legally object to their wives
working outside the home,” “[h]usbands alone could legally represent the
married couple, and they were the sole administrators of the household’s
gross inequality in terms of educational opportunity and earning capacity in the workplace.\textsuperscript{59}

Commenting on the overall plight of women in Guatemala, the scholar and activist Hilda Morales Trujillo,\textsuperscript{60} has written that they “must overcome societal assumptions of a man’s right to abuse his partner . . . only to encounter inadequate protection due to lenient laws and judicial attitudes that allow their abusers to get away with impunity.” According to Ms. Morales Trujillo, a woman who is battered by her partner or spouse will only rarely be able to obtain protection under the civil or criminal law systems, and attempts to escape the abuse by attempted relocation within the country will most likely result in even more “extreme” violence.

Within this context it is not difficult to see how a woman, such as Rodi Alvarado, who has been battered and threatened with death by her husband, might ultimately decide to flee the country rather than undertake what would probably be futile steps to seek protection within her home country. The root cause of her claim – and the claims of other Guatemalan women in similar situations – is the violence against women committed with impunity. Rather than fear the floodgates from granting protection to Rodi Alvarado, the U.S. should undertake the principled response of adopting foreign policy measures that adequately address the conditions that cause women to flee.

\textit{A. U.S. LEVERAGE TO PRESSURE GUATEMALA ON WOMEN'S RIGHTS}

The U.S. has a long history of influence over Guatemala.\textsuperscript{61} In recent years it has been a major provider of economic assistance, with much of the monies allocated for the purpose of strengthening democratic and legal institutions. Since 1992, the U.S. has provided approximately

\begin{footnotesize}
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\item financial resources, as well as of any of the family assets,” and “[e]ven when parents had joint custody, fathers were still the sole legal representatives of their children and the administrators of their assets.” \textit{Id.}
\item Justice and Social Inclusion, supra note 57, at para. 305, 313.
\item Ms. Hilda Morales Trujillo’s affidavit is attached as an appendix to this article.
\item Decades of repression and violence in Guatemala followed the U.S. backed coup which ousted democratically elected president Jacobo Arbenz in 1954. U.S. support and assistance to repressive military forces has been documented. \textit{See, e.g., Stephen Schlesinger and Stephen Kinzer, Bitter Fruit: The Story of the American Coup in Guatemala,} Expanded Version (1999).
\end{itemize}
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$38.5 million to Guatemala under the “Rule of Law” program administered by the U.S. Agency for International Development (USAID); the most recent allocation was $7.8 million in 2005. Between 1992 and 2002, an additional $13.6 million was directed to police and prosecutor functions to improve investigation, including forensic examinations, which are critical to successful investigation and prosecution. U.S. funding has also been allocated for the specific purpose of improving women’s legal rights. In 2002, USAID’s Office of Women in Development instituted the Women’s Legal Rights (WLR) Initiative with a purpose to advance “the legal, civil, property, and human rights of women in countries where USAID is working.”

As a major donor, the U.S. can – and should – require transparency and accountability, as well as appreciable results on the part of the Guatemalan government. To date, it has not done so. U.S. funding to improve law enforcement and judicial functions in Guatemala shows very little in the way of positive results, especially in the context of the protection of women’s rights.

Yakin Erturk, the U.N. Special Rapporteur on Violence Against Women, commented on Guatemala’s “inability to provide women with

62 “Rule of law assistance provides support for criminal justice reform, greater access to the justice system for poor and marginalized populations, and strengthened capacity of law enforcement agencies to investigate crimes.” Getting Away with Murder, supra note 56, at 14.

63 These monies were allocated through the International Criminal Investigative Training Assistance Program (ICITAP), formerly administered by the Department of Justice, now folded into the Bureau for International Narcotics and Law Enforcement Affairs.

ICITAP funds are directed towards the unification of police and prosecutor forensic laboratories, the establishment of an Internal Affairs Unit at the Public Ministry, the computerization of police case files, and the continued development of a model precinct that includes offices for prosecutors and judges to increase successful case investigation and closure.


legal, judicial and institutional protection from violence." The failings are quite evident in the context of the femicides; a recent report by Amnesty International outlines the systemic and pervasive failings of both the police and the prosecutors. Among the police, there is a “frequent failure to protect, examine or preserve the crime scene and deficiencies in collecting evidence.” A special police unit within the National Civil Police (PNC) which was created to respond to the femicides has been given very few resources, and members of the PNC itself have been implicated in the murders of women. The Public Ministry, which has the role of investigating and prosecuting crimes, has failed to demonstrate a timely and effective response, with the U.N. Special Rapporteur reporting that “forty percent of the cases [murder cases involving women] are filed and never investigated.” In light of these dismal results, the U.S. should impose concrete requirements, which could include mandating the collection of data on gender crimes, including the femicides, and calling for some showing of increased prosecution and conviction for these crimes.  

65 Getting Away with Murder, supra note 56, at 11.
67 Id. at 17.
68 The special unit, created in 2004, consisted of 22 officers, who each had been assigned 23 cases. The officers shared one cell phone and one car. By 2005, 17 of the 22 officers had been transferred out of the special unit, leaving only five officers in the unit. Investigation on Femicide, supra note 57, at 52; Amnesty Report 2005, supra note 55, at 15.
69 Twenty-three officers have been implicated in the murders. Investigation on Femicide, supra note 57, at 53.
71 For a list of specific recommendations, see Getting Away with Murder, supra note 56, at 15-17. Four of the recommendations most pertinent to this discussion are that USAID should:

- Request the WLR team to collect data on the investigation, prosecution, conviction and sentencing of the perpetrators of these crimes [the femicides] and publish the data in its Quarterly and Annual Best Practices Reports.

- Identify femicides as a problem in its Ruling Justly program and set forth specific goals aimed at eradicating them by increasing the capacity of Guatemalan authorities to investigate, prosecute, convict and sentence the perpetrators.
USAID is not the only governmental entity with a potentially constructive role to play on this issue. Congress also has a role – it could do what it has done in other areas where it has been concerned about particular types of rights violations; in these instances it has conditioned economic assistance on data keeping and demonstrated progress. It took such an approach under the International Religious Freedom Act of 1998,\textsuperscript{72} where countries that have engaged in or tolerated particularly serious violations of religious freedom may be subject to economic sanctions. It adopted a similar approach pursuant to the Trafficking and Violence Protection Act of 2000,\textsuperscript{73} which permits the

- Allocate a portion of existing economic assistance to fund the establishment of a state forensics laboratory for DNA testing and forensics training.

- Provide data and statistics demonstrating a decrease in violence and a corresponding increase in prosecution and conviction for these crimes.

\textit{Getting Away with Murder, supra} note 56, at 16-17.

\textsuperscript{72} International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (1998), \textit{amended by} Pub. L. No.106-55, 113 Stat. 401 (1999) (codified as amended in scattered sections of 22 U.S.C.). The International Religious Freedom Act (IRFA) established the Office of International Religious Freedom (OIRF) at the Department of State. The OIRF monitors religious persecution and discrimination worldwide; it carries out its mission by issuing annual reports on 195 countries. Countries that have engaged in or tolerated particularly severe violations of religious freedom during the reporting period are designated as “countries of particular concern” under the IRFA by the Secretary of State, and can be subject to further action, including economic sanctions.

\textsuperscript{73} Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), \textit{amended by} Trafficking and Violence Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003). The objectives of the TVPA are to combat trafficking, ensure just and effective punishment for traffickers and to protect their victims. The TVPA authorizes the establishment of the Office to Combat Trafficking in Persons (OCTP) which issues an annual report on Trafficking in Persons (TIP Report). The TIP Report identifies countries that are not meeting the minimum standards for the elimination of trafficking set forth in the TVPA; it places countries in one of three tiers, with the Tier 3 being those countries that do not fully comply with the minimum standards in the TVPA and are not making significant efforts to do so. A Tier 3 designation may result in the withholding of non-humanitarian, non-trade related assistance from the U.S.
WITHHOLDING OF SPECIFIC FORMS OF ASSISTANCE TO COUNTRIES THAT FAIL TO MEET THE MINIMUM STANDARDS FOR THE ELIMINATION OF TRAFFICKING. IF CONGRESS WERE SERIOUSLY CONCERNED ABOUT SECURING PROTECTION OF WOMEN’S RIGHTS IN GUATEMALA, IT COULD REQUIRE GUATEMALA TO PROVIDE STATISTICS REGARDING ITS PROGRESS ON ERADICATING VIOLENCE AGAINST WOMEN, AND COULD CONDITION ASSISTANCE ON THE PROVISION OF SUCH DATA. THIS WOULD SEND A CLEAR MESSAGE THAT THE ISSUE WAS ONE OF IMPORTANCE TO THE UNITED STATES.⁷⁴

CONCLUSION

After World War II the nations of the world made a commitment to protect individuals fleeing persecution. In the last half-century the Cold War has come to an end, much of the movement of asylum seekers is from the global south to global north, and the types of claims, as well as the complexion of those seeking protection, has changed. As a consequence, countries have become less welcoming of asylum seekers, and have erected various barriers – some procedural, and some substantive. It is in this climate that gender asylum claims – which vary from the historically traditional claims – have given rise to controversy, and resistance from States that fear an inundation of asylum seekers.

As outlined in this Article, the inextricable relationship between human rights violations and refugee claims for protection points to another solution to countries wary that the acceptance of gender claims will lead to waves of asylum seekers. This solution is to simultaneously extend protection to those in need of it, while taking measures to address the underlying causes of refugee flows. Such a response is not only principled, but it is consistent with commitments undertaken in the wake of World War II. Furthermore, such an approach is both pragmatic and feasible.⁷⁵ The claim of Rodi Alvarado provides an opportunity to put this model to the test – instead of denying her protection, the United States should recognize her valid claim to asylum, and turn its attention to Guatemala to help bring an end to impunity for violence against women.

⁷⁴ See Recommendations, Getting Away with Murder, supra note 56, at 17.
⁷⁵ This approach has been studied in the area of poverty-related migration, and has demonstrated that, in the long run, policies which address the root causes of poverty and under-development will result in reduced migration. Hein de Haas, International Migration, Remittances and Development: Myths and Fact (Global Comm’n on International Migration ed., 2005) at http://www.gcim.org/attachments/GMP%20No%2028.pdf.
Affidavit of Hilda Morales Trujillo

Expertise and Teaching

1. My name is Hilda Morales Trujillo. I am an attorney practicing in Guatemala with expertise in the areas of human rights, women’s rights, union and labor law. I obtained my legal degree from the University of San Carlos in 1970. I am a lecturer at the University of San Carlos. I teach women’s rights in the Human Rights Masters program at Rafael Landivar University. In addition to my academic activities, I have been a substitute magistrate for the appellate, family, and children’s courts, and a regular magistrate judge for the appeals court for labor and social security. I held public office in 1993 as the Vice Minister of Labor and Social Security. In this position, I helped establish the Unit for the Promotion of Women Workers and later was the advisor for international labor issues. In 1997, I became the director of the Project for Legal Reforms in Favor of Women.

2. In 1991, I was appointed by the to be a delegate for the University of San Carlos to the National Women’s Office (Oficina Nacional de la Mujer or ONAM) and began advocating for policy change and legal reform. My efforts assisted to secure Guatemala’s ratification of the Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women, and the passage of the Bill for the Prevention, Punishment and Eradication of Domestic Violence, a law aimed to provide security and protective measures for women threatened and attacked by their husbands and partners.

3. As a result of an acute need for women advocates with legal expertise, I, along with other interested women, founded the Center for Investigation, Formation and Support to Women (Centro de Investigación, Capacitación y Apoyo a la Mujer or CICAM) in 1995. At CICAM, we advocated for legal reform through the promotion of laws designed to protect women from violence. Therefore, we engaged in extensive and comparative research on the nature and prevalence of violence against women, the criminal, civil, and procedural codes in place, Guatemalan constitutional guarantees, and the possibility for women to obtain protection from their abusers. Our objectives were to initiate dialogue with authorities, so that they would deal with reports of abuse in a professional manner, compile accurate statistics, investigate women’s killings, and promote the punishment of those responsible.

4. I have written extensively in the area of legal reforms. In 1997, I wrote a diagnostic report on behalf of the No Violence Against Women Network (Red No Violencia contra las Mujeres), on the family courts’ refusal to apply the 1996 law for the Prevention, Punishment, and Eradication of Domestic Violence. This report demonstrated the need to develop a regulatory law; it was through these efforts that the National Commission for the Prevention of Domestic Violence (CONAPREVI) was created. In a more recent attempt to radically change the current and ineffective legislative system, I co-authored a book, entitled Delitos Contra Mujeres—Una Nueva Visión: Propuesta para Modificar el Código Penal (Crimes Against Women—A New Vision: A Proposal to Modify the Criminal Code), in which we address the inadequacies of the Guatemalan Criminal Code and recommend concrete reforms to provisions that discriminate against women who have been sexually abused. The revisions would finally make sexual harassment a serious crime, remove the possibility of pardons for perpetrators of family violence, and allow women to have their attackers prosecuted. It would also achieve the redefinition of family violence and consider it a crime with penalties in accordance with the gravity of the act.
5. I, along with Mary Robinson, the former United Nations High Commissioner for Human Rights, were named 2004 Ambassador of Conscience by Art for Amnesty, in collaboration with Amnesty International. This award recognizes exceptional leadership in the fight to protect and promote human rights. I received this honor as a result of my commitment to create change for women in Guatemala.

6. My other activities have contributed to a personal and comprehensive understanding of the widespread existence of violence against women in Guatemala. I have spent the last 30 years representing battered women in private cases, and I have assisted numerous women in filing formal complaints against their batterers in a time when there was no specific legislation addressing these issues. I have coordinated and participated in working groups throughout the country as part of the Project for the Reduction of Violence Against Women. We have enlisted the participation of lawyers specialized in criminal law, as well as accepted written comments from other attorneys who have prosecuted domestic violence cases, in an attempt to have a discussion on the nature of proposed penal reforms. I have also trained judges, prosecutors and individuals in the Human Rights Ombudsmen's office, and the police on the law and women's legal rights.

Status of Women

7. Through my endeavors, I have seen the plight of Guatemalan women who must overcome societal assumptions of a man's right to abuse his partner and face insurmountable financial obstacles, only to encounter inadequate protection due to lenient laws and judicial attitudes that allow their abusers to get away with impunity.

8. The root cause of the abuse stems from a culture that embraces the subjugation of women and celebrates the man's right to dominate. An abused woman in Guatemala is scared to leave her violent husband or partner because normally she is totally dependent on him—economically, socially, and psychologically. Furthermore, a woman's absolute dependence on a man is reinforced by the idea that a woman changes from being a daughter of the father to being the "daughter" of the husband. The husband has the complete right to tell the woman what she can and cannot do, and she must obey him as if she were a child. If a woman challenges this structure, she will be punished, not only by her husband, but also by others in the form of social stigma for being a "bad woman." The normalcy of this abuse is reflected in all aspects of Guatemalan society—in the press, in the streets, and in the laws. Women are expected to withstand the abuse because it is assumed to be part of the culture. For example, if a woman tries to report her abuser to the police, they treat her as if she were the criminal. I have had clients who have been told by the police, when they have gone to them to report their abusive husbands, that they could fix things by simply having more sex with their husbands.

9. The stark reality faced by women is exemplified by this attitude of blaming the woman if and when a man "misbehaves." The notion that the woman asks for harassment because of what she may wear or is at fault for being beaten because she does not obey her husband are prevalent throughout Guatemala, especially amongst the governmental and judicial authorities. The cycle of violence against women cannot be eradicated when those designed to protect women, simply shirk their responsibility by blaming the woman. These attitudes are based on the idea that the man has the right to use violence against a woman as a means
of exercising power and control over her. I personally have been insulted for defending abused women that want to flee their situation.

10. A new epidemic of killings of women in Guatemala, now being labeled as "femicides," further illustrates the low-level perception of the status of women. Though some claim that the killings are random, it is clear that the legal system and a culture that lacks respect for women have served as signals to men engaging in such violence that they will not be punished for their acts. The number of killings is so high, 2,170 femicides between January 2000 and September of 2005, that officials do not investigate every case. Moreover, statistics indicate that up to a third of the killings were the product of domestic violence. It has been reported that many women are killed by people they know, and possibly in retaliation for having previously reported spouses and boyfriends to the police. Through my work with the No Violence Against Women Network, I have met the victims' families who have told me that they suspected estranged boyfriends and husbands as the perpetrators.

Inadequacies of the Civil Legal System

11. Neither the civil nor the criminal law systems are adequate to provide protection to women. As described below, the recently enacted 1996 Law, which is designed to protect women who are being battered, fails in its conception and enforcement. First, even if properly applied and enforced, the most it results in is the husband being removed from the home for a limited period of time. Second, police, prosecutors and judges are generally unaware of the law's protections. Finally, even when judges are aware of the law, they are reluctant to apply it. This is why the legal system as a whole has failed to provide effective protection to women who are victims of violence, and despite great efforts in this field by women's groups to inform Guatemalan women of their rights, things have not changed.

12. Underlying the complicated situation battered women in Guatemala face is the patriarchal framework of the legal system. Even though the Constitution guarantees equality among the sexes, the actual laws of the country violate that concept every day. For example, the dissolution of marriage is structured so as to protect property, which disproportionately favors men. Many abusive men terrorize their partners, commonly threatening that they will report her for "abandonment" if she tries to escape the abuse at home. Aside from being considered a dishonor for a woman to leave her house, this concept of "abandonment" is considered a legal offense and a basis for separation or divorce with unfavorable terms for the woman. The Civil Code precludes a woman from soliciting financial support from her husband if she leaves him. This is a good example of how men can manipulate a permissive legal system to their advantage—be it by deception by leading a woman to believe she could be arrested, or through legitimate means by taking away her right to ask for alimony. Although the 1996 Law should make this form of coercion obsolete as it gives an abused woman the right to petition for support, normally judges are not familiar with the new law, or if they are, simply decide not to apply it. Essentially, the 1996 Law is ineffective because it is viewed as an unacceptable threat to a man by those who put male property rights above the right of a woman to her personal safety.

13. There are many more difficulties when a woman attempts to divorce her husband. Most of these have to do with issues of support for the wife and the children, called pension alimentista. Judges often have the attitude that whatever the woman asks for is excessive. For example, an amount of 2,000 quetzales (a little less than $300) would be considered
extravagant. Theoretically, the judge should order a socio-economic study to determine the appropriate amount of support based on the husband’s salary and the wife’s needs. However, a fair assessment is generally not done. Instead, the judge attempts to get the wife to agree to a low amount by asking the woman what is the least amount she is willing to accept. Even after the amount is set, women have a difficult time collecting that amount. A garnishment is sometimes possible, but can only assure payment when the husband has a fixed job or guarantees the support obligation with a mortgage on the house or other property. Therefore, a court order requiring a husband to pay support is generally for an insufficient sum and also not always enforceable. Financial support can also be used to completely deny a woman’s right for divorce. A judge will not order divorce if the husband will not guarantee the payment of livelihood expenses. This allows a husband to wield a significant amount of power, as he can thwart the divorce by refusing to guarantee payment. If this happens, the woman has to show she can support herself, or has property or a house—which is rare since most property is in the husband’s name. Husbands also often transfer property to avoid paying support.

14. In order to understand the current state of the law on violence against women and the lack of protection it affords for women, it must be highlighted that Guatemalan congressional lawmakers have been reluctant to make any reforms and have only done so in face of international pressure. In 1992, various women’s organizations proposed a new law to the Guatemalan Congress to protect abused women, only to meet legislative hostility. The Guatemalan Congress did not want to approve it, claiming that it was unconstitutional and went against concepts of equality, allegedly giving women more rights than men. Later in 1994, the regional conference in Belén do Pará, Brazil, was held in order to create a framework that could be implemented nationally to help end violence towards women. This framework contains the Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women. With an enormous effort spearheaded by women’s groups, the Guatemalan Congress finally approved the treaty. These same women’s groups then initiated a movement within Guatemala to create a law that would codify the spirit of the Belén do Pará framework. As a result, the Congress passed the 1996 Law that incorporated 14 of the proposed 40 articles that sought to enhance protection for victims of domestic violence. Unfortunately, the law itself does not have an explicit enforcement or punishment provision, making it only marginally useful.

15. Very few women who seek to use the law receive protection. The 1996 Law defines intra-family violence as a human rights violation and recognizes domestic violence as a social problem. It also outlines measures available to courts in order to protect victims of domestic violence, yet it explicitly limits these protective measures stating that they cannot exceed six months. Thus, even if a woman were to succeed, the most she could accomplish would be to have the husband removed from the home for a short amount of time, though it is possible for the woman to ask for an extension beyond six months. Nonetheless, I know only of a very few cases in which the woman has succeeded in having the husband removed.

16. Although many advocates, including myself, have worked tirelessly to ensure the inclusion of substantive recognition of and procedural mechanisms to fight against violence against women, many people are still unaware of the legal protections for women. Obviously, this includes the victims, but unfortunately it also includes police, lawyers, advocates and judges. I can easily say that less than a dozen lawyers in the entire country even try to use the 1996
Law. The government does next to nothing to educate those in the judicial system about the law and even less to expose it to the public.

17. Thus, there are problems at each stage of the 1996 Law’s application—attitudes held by the police, the prosecutors and judges, as well as the limited scope of the law itself. As mentioned earlier, the law nominally gives protection to women, but it does not have provisions on punishment.

18. Part of the problem is also that judges often say they cannot apply the 1996 Law. First, they say it is unenforceable because it violates property rights, unjustly framing the remedy for a domestic violence claim in terms of real property. Judges will often say that if a man owns the house, he cannot be ordered removed, and the reality is that men often own the homes. Another excuse judges give in not applying the 1996 Law is that it is unconstitutional. Under the Guatemalan Constitution, individuals are allowed to have guns if they obtain a license, and the 1996 Law allows police to seize weapons used to threaten the woman, and they use this “inconsistency” as a means to deem the law in its entirety unconstitutional. Finally, judges claim that the 1996 Law is against the required judicial process, under which, according to civil rights, a person cannot be convicted if he or she has not been cited, heard, and tried. The judges maintain that the security methods are a sentence and therefore, it is improper to take action against a man without full procedure. However, this perspective is faulty in that there are other precautionary measures—such as liens upon bank accounts imposed upon debtors—where such action is taken before the completion of all legal proceedings to guarantee payment.

Inadequacies of the Criminal Legal System

19. As described below, criminal provisions are also ineffective. The current Penal Code completely ignores violence against women as a serious crime, impairing women’s access to justice and fostering a climate of impunity for abusive partners. Though there are a number of codifications criminalizing acts against women, including cases of sexual violence that are considered “private crimes,” acts of domestic violence are not specifically named as crimes in the Penal Code. In cases of sexual violence, the “opportunity criteria” applies and the perpetrator can be pardoned if the woman agrees. Worse still, a man can pay a woman or marry a woman he rapes instead of being criminally prosecuted. Many women agree to these measures because they either do not know their rights or are too afraid to criminally pursue their abusers. These provisions are not supposed to apply to minors, but in reality they do. This concept of “opportunity criteria” is a clear indication that crimes of violence against women are not seen as being a crime against society, but rather seen as private acts, and not of any concern to the larger society.

20. Because the judicial system does not view crimes of violence against women as a problem, women face a serious disadvantage in attempting to have their abusers prosecuted under the current legal framework. For example, if a woman goes to Family Court or the Public Ministry (comparable to a District Attorney’s office), she is not provided with a lawyer, nor are her options explained to her. In contrast, the aggressor is provided with a public defender. The woman has to decide how to carry the case forward on her own without legal advice or help from the government. This daunting situation is compounded by the fact that most women in Guatemala have had little or no exposure to the legal system. Thus, those battered women who have the wherewithal to try to use the criminal justice system encounter a dual
challenge, first in maneuvering through a court system that is particularly alienating and generally nonresponsive to the plight of battered women, and second, they must base their claims on laws that are deficient and prejudicial and also largely unknown to them.

**Lack of Resources**

21. There is a severe lack of services for female victims of family violence, enhancing the general inability of the state to offer protection to women attempting to escape abuse. The most significant problem is how difficult it is for a woman to secure legal representation in divorce and criminal proceedings. Most women do not have the money to hire private attorneys. In rare occurrences, the attorney will take a case on the agreement that the women will pay when the husband pays support. Women also have the possibility of using the “public law firms” of the universities, but they provide inadequate representation.

**Inability to escape the abuser**

22. I also have personal knowledge as to the extreme difficulty women face in attempting to escape their abusers by relocating within Guatemala. When an abuser tracks his partner down, he is often even more enraged that she attempted to escape him, and the violence is extreme. I share the following as an example of this.

23. I was attending a meeting of indigenous women in the Peten region of Guatemala, to discuss violence against women. As I was talking about the problem, I noticed that a small group of women became very upset and began to cry. Because I do not speak their indigenous language, I was working with an interpreter. I did not immediately understand what had disturbed them, and at first I thought I had said something culturally insensitive. I stopped and asked the interpreter to speak to them and to inquire what they were distraught about. The interpreter spoke to the women and told me that my presentation had made them think of a woman from their community who had lived with a very violent man. This woman had attempted to escape the man on many occasions by going to stay with family or friends, but he had always found her. Finally, she decided to go somewhere different, where she thought he could not find her. But her husband managed to track her down. When he found her, he killed her, brutally cutting her to pieces with his machete. It was the memory of this woman, and the horrible death she had died at the hands of this man, that had caused them to become upset and to cry during my presentation.

**Summary**

24. In Guatemala, violence committed against women operates on several levels: in the home by the abuser; perpetuation through societal attitudes; and an unresponsive and ineffective legal system that is unwilling to protect women. Each of these spheres reinforces the idea that domestic violence by a man against a woman is normal and expected. From my extensive experience in fighting for legislative reform and representing battered women, I strongly believe that Guatemala remains a society in which women have limited, if not non-existent, means to escape family violence. Not only does society promote the subjugation of women, the government condones violence against women because it is unwilling to implement legislative reforms that would offer real protection for abused women.
I swear under penalty of perjury that the foregoing is true and correct.

Dated: 11/18/05
Signed: __________________________

Licda. Hilda Morales Trujillo

I, Diana Rodriguez, hereby declare that I am fluent in the English and Spanish languages and that the above is a true and correct translation of the attached document from Spanish to English.

Executed on November 18, 2005 at San Francisco, California.

______________________________
Declaración Jurada de la Licenciada Hilda Morales Trujillo

Especialización y Maestría


2. En 1991, fui designada como delegada de la Universidad de San Carlos para la Oficina Nacional de la Mujer (ONAM) y empecé a abogar por el cambio de políticas y por la reforma jurídica. Mis esfuerzos ayudaron a asegurar la ratificación de la Convención Interamericana para Prevenir, Sancionar y Erradicar de la Violencia contra la Mujer por parte de Guatemala, y la aprobación de la ley para Prevenir, Sancionar y Erradicar de la Violencia Doméstica, una ley enfocada a brindar seguridad y medidas de protección a mujeres amenazadas y atacadas por sus esposos y parejas.

3. Como consecuencia de una necesidad aguda de mujeres (defensoras) con experiencia legal, yo, junto con otras mujeres interesadas, fundamos el Centro de Investigación, Capacitación y Apoyo a la Mujer (CICAM) en 1995. En CICAM abogamos por la reforma legal mediante la promoción de leyes diseñadas para proteger a las mujeres de la violencia. Por lo tanto, realizamos investigación extensa y comparativa sobre la naturaleza y el predominio de la violencia contra la mujer, sobre los códigos penales, civiles y de procesales que existen, garantías constitucionales de Guatemala, y la posibilidad de las mujeres para asegurarse protección en contra de sus abusadores. Nuestros objetivos eran iniciar el diálogo con las autoridades para que atiendan las denuncias de abuso de una manera profesional, compilen estadísticas precisas, investiguen la matanza de mujeres y promuevan el castigo de los responsables.

4. He escrito extensamente en el área de reformas legales. En 1997, elaboré un diagnóstico de parte de la Red en contra de la Violencia contra la Mujer con respecto a la negativa de las cortes familiares para aplicar la Ley de Prevención, Castigo y Erradicación de la Violencia Domestica (ley de 1996) el cual sirvió para establecer la necesidad de desarrollar la ley con un reglamento en el cual se creó la Coordinadora Nacional para la Prevención de la Violencia Domestica (CONAPREV). En un intento más reciente de cambiar radicalmente el actual e ineficaz sistema judicial, co-redacté un libro titulado Delitos Contra Mujeres - Una Nueva Visión: Una Propuesta para Modificar el Código Penal en el cual examinamos las insuficiencias del Código Criminal de Guatemala y recomendamos reformas concretas a las cláusulas que discriminan en contra de las mujeres que han sido sexualmente abusadas. Las revisiones finalmente harían del
acoso sexual un serio crimen, removerían la posibilidad de perdonar para los perpetradores de la violencia familiar y permitirían a la mujer enjuiciar a sus atacantes. También se lograría la redefinición del concepto de violencia familiar para considerarla como delito con penas acordes a su gravedad.

5. Junto con Mary Robinson, la Ex Alta Comisionada para los Derechos Humanos de las Naciones Unidas, fui nombrada Embajadora de Conciencia para 2004 por Arte para la Amnistía, en colaboración con Amnistía Internacional. Este premio reconoce liderazgo excepcional en la lucha para proteger y promover los derechos humanos. Recibí este honor como resultado de mi compromiso para crear cambios para las mujeres en Guatemala.

6. Mis otras actividades han contribuido a un entendimiento personal y exhaustivo de la amplia existencia de la violencia contra la mujer en Guatemala. He pasado los últimos 30 años representando a mujeres maltratadas en casos privados y he asistido a muchas mujeres en presentar demandas contra sus abusadores en una época en la que no había legislación específica para enfrentar estos problemas. He coordinado y participado en grupos de trabajo a través del país como parte del Proyecto para la Reducción de la Violencia Contra la Mujer. Hemos convocado a la participación de abogados especializados en Derecho Penal, así como aceptado comentarios escritos de otros abogados que han tratado casos de violencia doméstica, con el objetivo de entablar una discusión en la naturaleza de las reformas penales propuestas. También he entrenado a jueces, fiscales e individuos de la Oficina del Ombudsman para los Derechos Humanos y de la policía en la ley y derechos legales de la mujer.

**Estatus de la Mujer**

7. A través de mis esfuerzos, he visto la lucha de las mujeres de Guatemala al tener que superar la presunción social que cree en el derecho del hombre a abusar de su pareja y enfrentar obstáculos financieros insuperables, solo para encontrarse con protección inadecuada debido a leyes indulsantes y actitudes judiciales que permiten a sus abusadores escapar con impunidad.

8. La causa principal del abuso proviene de una cultura que suscribe la subyugación de la mujer y celebra el derecho de dominación del hombre. Una mujer abusada en Guatemala tiene miedo de dejar a su esposo o pareja violenta porque normalmente ella depende totalmente de él – económicamente, socialmente y psicológicamente. Aún más, la dependencia absoluta de la mujer del hombre es reforzada por la idea de que una mujer cambia de ser una hija del padre a "hija" del esposo. El esposo tiene el completo derecho de decir a la mujer lo que puede y lo que no puede hacer, y ella debe obedecerle como si fuera una criatura. Si una mujer reta esta estructura ella será castigada, no solo por su esposo sino también por otros en la forma de estigma social por ser una “mala mujer”. La normalidad de este abuso se refleja en todos los aspectos de la sociedad guatemalteca – en la prensa, en las calles y en las leyes. Se espera que las mujeres soporten este abuso porque se asume que es parte de la cultura. Por ejemplo, si una mujer trata de reportar a su abusador a la policía, ellos la tratan como si ella fuera la criminal. He tenido clientes a los que la policía ha dicho que han reportado abuso de parte de sus esposos, que ellas podrían arreglar las cosas simplemente teniendo más sexo con sus maridos.
9. La cruda realidad que afrontan las mujeres se ejemplifica con esta actitud que culpa a la mujer cuando un hombre "se porta mal". Las nociones de que la mujer invita el acoso por la ropa que esté usando o que sea ella la culpable por ser golpeada pues no ha obedecido a su esposo son prevalentes en Guatemala, especialmente entre las autoridades gubernamentales y judiciales. El ciclo de violencia en contra de la mujer no se puede erradicar cuando aquellos designados a proteger a la mujer simplemente esquivan su responsabilidad al culparla a ella. Estas actitudes están basadas en la idea de que el hombre tiene el derecho de usar violencia en contra de la mujer como un medio de ejercitar su poder y control sobre ella. Yo he sido insultada personalmente por defender a mujeres abusadas que quieren escapar de su situación.

10. Una nueva epidemia de asesinatos de mujeres en Guatemala, ahora llamados "femicidio", ilustra aún más la percepción del bajo estatus de la mujer. Aunque algunos aseguran que las matanzas son al azar, es claro que el sistema legal y una cultura que no respeta a la mujer han enviado señales a hombres que practican esta violencia de que no serán castigados por sus actos. El número de asesinatos es tan alto, 2170 femicidios entre enero de 2000 y septiembre de 2005, y los oficiales no investigan cada caso. Además, las estadísticas indican que hasta un tercio de los asesinatos fueron producto de violencia doméstica. Se ha reportado que muchas mujeres son asesinadas por personas que ellas conocen, y posiblemente en venganza por haber reportado previamente a esposos o novios a la policía. Mediante mi trabajo con la Red de No Violencia Contra las Mujeres, he conocido a las familias de las víctimas, quienes me han relatado que han sospechado que los perpetradores han sido esposos y novios con los que las víctimas se habían peleado o separado.

**Insuficiencias del Sistema Legal Civil**

11. Tanto los sistemas de ley civil como penal no son adecuados para proveer protección a las mujeres. Como se describe arriba, la recientemente promulgada ley de 1996, que ha sido diseñada para proteger a las mujeres que son golpeadas, falla en su concepción y en su entrada en vigor. Primero, aunque sea bien aplicada y cumplida, el máximo resultado que puede llegar a alcanzar es que el esposo sea removido del hogar por un período limitado de tiempo. Segundo, la policía, los fiscales y los jueces generalmente no conocen las protecciones que otorga la ley. Finalmente, aún si los jueces conocen la ley, son remuertes de aplicarla. Es por esto que el sistema legal en general ha fallado en proveer protección efectiva a las mujeres que son víctimas de violencia, y a pesar de grandes esfuerzos en esta área de parte de grupos de mujeres para informar a las mujeres Guatemaltecas de sus derechos, las cosas no han cambiado.

12. Bajo la complicada situación que enfrentan las mujeres maltratadas en Guatemala se encuentra la estructura patriarcal del sistema legal. Aunque la Constitución garantiza igualdad entre los sexos, las leyes actuales del país violan este concepto todos los días. Por ejemplo, la disolución del matrimonio esta estructurada para proteger la propiedad, la cual favorece desproporcionadamente al hombre. Muchos hombres abusivos aterrorizan a sus parejas, comúnmente amenazándolas con reportarlas por "abandono" si es que trata de escapar el abuso en el hogar. Además de considerarse como un deshonor para una mujer si es que deja su casa, este concepto de "abandono" es considerado como una ofensa legal y un fundamento para la separación o el divorcio con términos desfavorables para la mujer. El Código Civil impide a la
mujer solicitar apoyo financiero si es que ella lo deja. Este es un buen ejemplo de cómo los hombres pueden manipular un sistema legal permisivo para su ventaja — ya sea mediante engaño o haciendo que la mujer crea que puede ser arrestada, o mediante medios legítimos quitándole a la mujer el derecho de demandar una pensión alimenticia. A pesar de que la ley de 1996 debería hacer a esta forma de coerción algo obsoleto, ya que le da a la mujer abusada el derecho de hacer una petición de apoyo económico, normalmente los jueces no están familiarizados con la nueva ley, o, si es que lo están, simplemente deciden no aplicarla. Eso es lo que la Ley de 1996 es ineficaz porque se ve como una amenaza inaceptable a un hombre por aquellos que poseen los derechos de propiedad masculinos por encima del derecho de seguridad personal de una mujer.

13. Hay muchas otras dificultades cuando una mujer trata de divorciarse de su esposo. La mayoría de estas tiene que ver con problemas de apoyo económico para la mujer y los hijos, llamado pensión alimenticia. Los jueces frecuentemente adoptan la actitud de que cualquiera sea el monto que pide la mujer, es excesivo. Por ejemplo, un monto de 2,000 quetzales (un poco menos de US $300) se considera extravagante. En teoría, el juez debe ordenar un estudio socio-económico para determinar el monto apropiado de la pensión, basándose en el salario del esposo y en las necesidades de la esposa. Sin embargo, generalmente no se hace una evaluación justa. En vez de eso, el juez trata de hacer aceptar a la esposa un monto más bajo al preguntarle a ella cuál sería el monto más bajo que ella estaría dispuesta a aceptar. Aún cuando el monto haya sido fijado, es muy difícil para las mujeres recolectar esa cantidad. Un embargo es a veces posible, pero solo puede asegurar el pago cuando el esposo tiene un trabajo fijo o si se garantiza la obligación alimentaria con una hipoteca sobre su casa u otro bien inmueble. Por lo tanto, una orden de la corte que ordena al esposo pagar una pensión es generalmente una cantidad insuficiente y no siempre se puede hacer cumplir. El soporte económico también se puede usar para negar completamente el derecho al divorcio de una mujer. Un juez no aprobaría un divorcio si el esposo no garantiza el pago de gastos alimenticios. Esto permite a un esposo ejercer una cantidad significativa de poder, ya que le permite frustrar el divorcio al rehusarse a garantizar el pago. Si esto ocurre, la mujer debe demostrar que ella es capaz de mantenerse económicamente, o que tiene propiedades o una casa- lo que es raro ya que la mayoría de las propiedades están bajo el nombre del marido. Los esposos también frecuentemente transfieren propiedades para evitar el pago de pensiones y gastos.

14. Para poder entender el estado actual de la ley referente a la violencia contra la mujer y la falta de protección que ésta le da a las mujeres, es necesario recalcar que los diputados al congreso de la república guatemaltecos han sido renuentes en hacer reformas y solo lo han hecho al enfrentar presión internacional. En 1992, varias organizaciones de mujeres propusieron una nueva ley al Congreso de Guatemala para proteger a mujeres abusadas, solo para encontrarse con hostilidad legislativa. El Congreso no quiso aprobar la ley, diciendo que era inconstitucional e iba en contra de los conceptos de igualdad, supuestamente otorgando a las mujeres más derechos que a los hombres. Más tarde, en 1994, se llevó a cabo la Conferencia regional en Belén do Pará, Brasil, para crear un marco que pudiera ser implementado a nivel nacional y ayudar a terminar la violencia en contra de la mujer. Ese marco contiene la Convención Interamericana para Prevenir, Sancionar, y Erradicar la violencia contra la mujer. Con enorme esfuerzo, liderado por grupos de mujeres, el Congreso de Guatemala finalmente aprobó el tratado. Estos mismos grupos de mujeres entonces iniciaron un movimiento dentro del país para crear una ley que codificara el espíritu del marco de Belén do Pará, hasta que el Congreso decretó la Ley de 1996 que incorporó
14 de los 40 artículos propuestos que tenían como propósito mejorar la protección para las víctimas de violencia doméstica. Desafortunadamente, la ley en sí no tiene una norma explícita para hacerla cumplir o castigar a los culpables, haciendo que ésta sea debilmente útil.

15. Muy pocas mujeres que buscan usar la ley reciben protección. La Ley de 1996 define a la violencia intra-familiar como una violación a los derechos humanos y reconoce a la violencia doméstica como un problema social. También establece las medidas disponibles para las cortes con el fin de proteger a las víctimas de violencia doméstica, sin embargo limita explícitamente estas medidas protectoras especificando que no pueden exceder de seis meses. Por lo tanto, aunque una mujer logre ganar, lo máximo que podría conseguir sería la remoción del esposo de la casa por un corto período de tiempo, aunque es posible para la mujer pedir una extensión más allá de seis meses. De todas formas, conocemos de solo unos pocos casos en los que la mujer ha conseguido remover al esposo del hogar.

16. Aunque muchas activistas, entre las que incluyo mi persona, han trabajado incansablemente para asegurar la inclusión de un reconocimiento substancial, y mecanismos de procedimiento para luchar contra la violencia a la mujer, muchas personas todavía no conocen las protecciones legales para las mujeres. Obviamente, esto incluye a las víctimas, pero desafortunadamente también incluye a la policía, abogados, defensores y jueces. Puedo decir fácilmente que menos de una docena de abogados en el país entero tratan de usar la Ley de 1996. El gobierno hace casi nada para educar a aquellos en el sistema judicial sobre la ley y mucho menos para exponerla al público.

17. Entonces, existen problemas en cada etapa de la aplicación de la Ley de 1996- actitudes practicadas por la policía, fiscales y jueces, así como el alcance de la ley misma. Como se mencionó anteriormente, la ley otorga protección nominal a las mujeres, pero no tiene cláusulas para sanciones.

18. Otra parte del problema es que los jueces frecuentemente dicen que no pueden aplicar la Ley de 1996. En primer lugar, dicen que es una ley que no se puede hacer cumplir porque viola los derechos de propiedad, de esta forma, enmarcando injustamente al remedio de un caso de violencia doméstica en términos de propiedad real. Los jueces dicen frecuentemente que si un hombre es dueño de la casa, no se puede ordenar que se lo remueva de ella, y la realidad es que los hombres son los que más a menudo tienen la propiedad de las casas. Otra excusa que los jueces dan al no aplicar la Ley de 1996 es que es inconstitucional. Bajo la Constitución de Guatemala, un individuo puede tener armas de fuego si es que obtiene una licencia, y la ley de 1996 permite a la policía confiscar armas usadas para amenazar a la mujer. Entonces usan esta "inconsistencia" como un medio para declarar a la ley en su totalidad como inconstitucional. Finalmente, los jueces dicen que la Ley de 1996 va en contra del debido proceso judicial, en el cual, según los derechos civiles, nadie puede ser condenado si no ha sido citado, oído y vencido en juicio. Los jueces mantienen que las medidas de seguridad son una condena, y por lo tanto es impropio tomar acción en contra de un hombre sin la totalidad del proceso. Sin embargo, esta perspectiva es errónea ya que existen otras medidas de precaución —como por ejemplo embargos a cuentas bancarias impuestos a los deudores— en donde esta acción se toma antes de completar todos los procedimientos legales, para garantizar el pago.
Insuficiencias del Sistema Legal Penal

19. Como se describe abajo, las normas penales también son ineficaces. El Código Penal actual ignora completamente la violencia contra la mujer como una ofensa criminal seria, dificultando el acceso de las mujeres a la justicia y fomentando un clima de impunidad para hombres abusivos. A pesar de que hay una serie de codificaciones que penalizan actos contra las mujeres, incluyendo casos de violencia sexual que son considerados “crímenes privados”, actos de violencia doméstica no son nombrados específicamente como crímenes en el Código Penal. En casos de violencia sexual, se aplica el criterio de la oportunidad y el perpetrador puede ser perdonado si la mujer está de acuerdo. Peor aún, un hombre puede pagarle a una mujer o casarse con una mujer que él haya violado en vez de ser acusado criminalmente. Muchas mujeres aceptan estas medidas porque, o no conocen sus derechos, o tienen demasiado miedo de perseguir a sus abusadores a nivel penal. Estas reglas supuestamente no se aplican a menores, pero en realidad sí lo son. Este concepto de criterio de la oportunidad es una clara indicación de que los crímenes de violencia en contra de las mujeres no son vistos como crímenes en contra de la sociedad sino mas bien como actos privados, y no de la preocupación de la sociedad en general.

20. Debido a que el sistema judicial no considera a los crímenes de violencia contra la mujer como un problema, las mujeres enfrentan desventajas muy graves al intentar acusar a sus abusadores bajo el sistema legal actual. Por ejemplo, si una mujer va a una Corte Familiar o al Ministerio Público (comparable a la oficina del Fiscal General en Estados Unidos), no se le provee de un abogado, ni tampoco se le explican sus opciones. En cambio, se provee al agresor de un defensor de oficio. La mujer tiene que decidir cómo llevar el caso adelante por su cuenta sin ningún consejo legal o ayuda de parte del gobierno. Esta difícil situación es empeorada por el hecho de que la mayoría de mujeres en Guatemala han tenido ninguna o muy poca exposición al sistema legal. Por lo tanto, aquellas mujeres golpeadas que tienen la voluntad para tratar de usar el sistema de justicia penal se encuentran con un reto doble, primero deben maniobrar en un sistema judicial que es particularmente excluyente y que en general no responde a la problemática de las mujeres abusadas, y segundo, deben basar sus argumentos en leyes deficientes y prejuiciosas y que además ellas desconocen.

Falta de Recursos

21. Hay una falta severa de servicios para mujeres víctimas de la violencia doméstica, aumentando la in habilidad general del estado para ofrecer protección a las mujeres que tratan de escapar el abuso. El problema más significativo es lo difícil que es para una mujer asegurarse representación legal en caso de divorcio o procedimientos criminales. La mayoría de mujeres no tienen el dinero para contratar abogados privados. En raras ocasiones, el abogado toma el caso acordando que la mujer le pagará cuando el esposo pague la pensión económica. Otra posibilidad para las mujeres es usar los bufetes populares de las universidades, sin embargo estos proveen representación inadecuada.
Inhibibilidad para escalar del abusador

22. También tengo conocimiento personal de las extremas dificultades que enfrentan las mujeres al tratar de escapar de sus abusadores huyendo dentro de Guatemala. Cuando un abusador logra encontrar a su pareja, generalmente se vuelve más enfurecido de que ella haya tratado de escaparse de él, y la violencia es extrema. A continuación doy un ejemplo de esto.

23. Estaba en una reunión con mujeres indígenas en la región de Petén en Guatemala para discutir la violencia en contra de las mujeres. Mientras estaba hablando del problema, me di cuenta que había un pequeño grupo de mujeres que estaban muy alteradas y empezaron a llorar. Ya que yo no hablaba su idioma, tenía a un intérprete traduciendo. No entendí inmediatamente que era lo que les había afectado y al principio pensé que había dicho algo culturalmente insensible. Paré de hablar y le pedí al intérprete que les preguntara qué era lo que les había afectado. El intérprete les tradujo y me dijo que mi presentación les había recordado a una mujer de su comunidad que había vivido con un hombre muy violento. Esta mujer había intentado escapar de ese hombre en muchas ocasiones refugiándose con familiares o amigos, pero el siempre la encontraba. Finalmente, ella decidió irse a un lugar diferente [cerca de la frontera con Belice] donde pensó que él no podría encontrarla. Sin embargo, el esposo logró identificar su paradero. Cuando la encontró, la mató brutalmente cortándola en pedazos con su machete. Era la memoria de esta mujer y la horrible muerte que sufrió en manos de este hombre lo que había causado que las mujeres se alteraran y lloraran durante mi presentación.

Resumen

24. En Guatemala, la violencia cometida en contra de las mujeres opera en varios niveles: en el hogar por parte del abusador, por perpetuación mediante actitudes sociales, y por un sistema judicial que es ineficaz, que no responde, y que no posee la voluntad para proteger a las mujeres. Cada una de estas esferas refuerza la idea de que violencia doméstica del hombre en contra de la mujer es normal y esperada. Desde mi extensa experiencia al luchar por la reforma judicial y al representar a mujeres abusadas, creo firmemente que Guatemala se mantiene como una sociedad en la que las mujeres tienen medios limitados o inexistentes para escapar de la violencia familiar. No solamente la sociedad promueve la subyugación de la mujer, el gobierno tolera la violencia en contra de la mujer porque no tiene la voluntad para implementar reformas legislativas que pudieran ofrecer protecciones verdaderas para las mujeres abusadas.
Juro bajo la pena de perjurio que lo anteriormente expuesto es verdadero y correcto.

Fecha: 11/10/05

Firma: 

Lcda. Hilda Morales Trujillo