



2019

## Immigrants, Refugees and Women: International Obligations and the United States

Rosemary Barkett

Follow this and additional works at: <https://scholarlycommons.law.emory.edu/eilr>

---

### Recommended Citation

Rosemary Barkett, *Immigrants, Refugees and Women: International Obligations and the United States*, 33 Emory Int'l L. Rev. 493 (2019).

Available at: <https://scholarlycommons.law.emory.edu/eilr/vol33/iss4/1>

This David J. Bederman Lecture is brought to you for free and open access by the Journals at Emory Law Scholarly Commons. It has been accepted for inclusion in Emory International Law Review by an authorized editor of Emory Law Scholarly Commons. For more information, please contact [law-scholarly-commons@emory.edu](mailto:law-scholarly-commons@emory.edu).

**DAVID J. BEDERMAN LECTURE**  
**IMMIGRANTS, REFUGEES AND WOMEN: INTERNATIONAL  
OBLIGATIONS AND THE UNITED STATES**

*Judge Rosemary Barkett\**

**PROFESSOR ABDULLAHI AN-NA'IM:** Hello. My name is Abdullahi An-Na'im. I teach here at Emory Law School. I am responsible for a center called Center for International and Comparative Law. It is set in the [indiscernible] place in the corner where nobody seems to go. But please, we are delighted that you are here. This is really the highlight of our annual activities. Our friend, David Bederman, in whose name and honor this lecture has been named, and there is a fellowship, too. Some of you may be aware of that. So, the next fellows are already here in the room with us. So, the idea is to present international speakers because David himself was really a master of international—private and public—law, as well as admiralty and many other things. He was brilliant, and we are really sad to lose him so early in his life. But, at the same time, we are grateful for the heritage and the legacy that he left behind, including a daughter who is now an Emory scholar as well.

Our speaker for today is Judge Rosemary Barkett who is, since 2013, a member of the Iran-United States Claims Tribunal. And incidentally, David Bederman himself was at that same institution at the beginning of his academic career. So that is one connection that you could see with our speaker today. Judge Barkett was elected Honorary President of the American Society of International Law. In 2015, the President of the United States appointed Judge Barkett to the Panel of Conciliators for the International Centre for the Settlement of Investment Disputes.

Prior to her appointment to the Tribunal, Judge Barkett was a member of the United States Court of Appeals for the Eleventh Circuit for approximately twelve years. Prior to her service in the United States federal courts, she was the first woman Justice on the Florida Supreme Court and was chosen by her

---

\* Judge Rosemary Barkett has served a Judge of the Iran-United States Claims Tribunal in The Hague since October 2013. Prior to joining the Tribunal, Judge Barkett served as a Judge on the United States Court of appeals for the Eleventh Circuit, nominated by President William J. Clinton; was elected as Honorary President of the American Society of International Law in 2016; appointed to the Panel of Conciliators for the International Centre for the Settlement of Investment Disputes in 2015. Judge Barkett graduated, *summa cum laud*, from Spring Hill College, Mobile, Alabama (1967); graduated from University of Florida college of Law, where she was the first women to be awarded the J. Hillis Miller Memorial Award.

colleagues as the Chief Justice of Florida. It's remarkable really to see so many brilliant careers realized here and thoughtfully merging in one person's lifetime.

She has received seven honorary degrees from institutions of higher education. She also earned many prestigious awards. In 2017, she was awarded the Prominent Woman in International Law Award at the American Society of International Law. I could go on and on, there are so many other distinctions that I could mention, but I think probably the best gift that Judge Barkett has given us is an extremely topical and controversial subject for her talk today. And she really promised and in fact volunteered to say that she'd be delighted to take any questions whatsoever on the subject.

To that end, we have two mics on two sides of the podium where we would request please if you can come and line up behind the mic so that we don't waste time trying to get the mic from one person to the next.

With all pleasure, please join me and welcome her to the podium.

**JUDGE ROSEMARY BARKETT:** Thank you very much. Thank you for that introduction and thank you to Emory and the Bederman family for inviting me and having me here.

This lecture has been given for several years, and there are, I am sure, at each of those lectures people that lauded David Bederman, and I want to convey to his parents—who are unfortunately a little ill and weren't able to come today, and his wife—who is here, and his daughter, my own appreciation for his contributions, both personally and on behalf of my Tribunal and many others in The Hague, where he is still remembered extremely warmly.

When learning that I was here for this event, Judge Joan Donahue, the United States Judge on the International Court of Justice, sent me an email right away saying, it's great that you are giving a lecture in honor of Professor Bederman, a prolific and energetic scholar whose life was far too short.

I do not, by the way, intend to address the workings of the Tribunal upon which he and I have served in my main topic, but I am happy to do so and answer any questions that might occur to you after the lecture.

As I said, I didn't know David Bederman personally, but clearly one of the most remarkable measures of his impact is inspiring members of this great law school to stop for a few minutes every year and think about human rights domestically and globally. Today, I want to focus those few minutes on the topic of immigrants, refugees and women—topics that are significant to me both

personally and professionally. Personally, because obviously I am a woman, which is not to say that all women automatically care equally about those rights, and not so obviously, perhaps, because I am also a Syrian-Mexican immigrant. I was born in Mexico of Syrian parents who left Syria in the 1920's en route to the United States and had to remain in Mexico for approximately twenty years because of the national origins quota system in effect at that time.

My family came to Miami when I was six, and I grew up in a time and a place where immigrants were proud to be immigrants, and extremely proud to have become Americans. Professionally, I have spent over forty years studying, enforcing, and extolling the virtues of the American vision of a government that was built by immigrants. That American vision was expressed in our founding documents when we specifically stated that we were created for the express purpose of, "establishing justice and securing the blessings of liberty to ourselves and our posterity,"<sup>1</sup> and that posterity includes those seeking refuge from persecution and torture in other countries.

From the time of our revolution in 1776 to the present, well, the almost present, we have continuously and publicly recognized that we were a land of immigrants and refugees dedicated to welcoming those from different nations, different creeds, different cultures, and protecting all of their rights to life, liberty, justice, and equality.

As early as 1776, George Washington said, "the bosom of America is open to receive not only the opulent and respectable Stranger."<sup>2</sup> I was going to say from Norway but I'm not going to do that. The opulent—I'm sorry. "Not only the opulent and respectable Stranger but the oppressed and persecuted of all nations and religions whom we shall welcome to a participation of all our rights and privileges."<sup>3</sup> One hundred years later, the poem of Emma Lazarus inscribed on the Statue of Liberty remarkably echoed George Washington's words promising a worldwide welcome to the tired, the poor and the masses yearning to breathe free.

President Lyndon Johnson noted, and I quote, "our beautiful America was built by a nation of strangers."<sup>4</sup> The land flourished because it was fed from so many sources, because it was nourished by so many cultures and traditions and

---

<sup>1</sup> U.S. CONST. pmb1.

<sup>2</sup> Letter from George Washington to Joshua Holmes (Dec. 2, 1783) (on file with U.S. Library of Congress, Washington, D.C.).

<sup>3</sup> *Id.*

<sup>4</sup> Lyndon B. Johnson, U.S. President, Remarks at the Signing of the Immigration Bill, Liberty Island, New York (Oct. 3, 1965) (transcript available in the LBJ Presidential Library).

peoples. George W. Bush later articulated the same thought when he said, “Nearly all Americans have ancestors who braved the oceans—liberty-loving risk-takers in search of an ideal—the largest voluntary migrations in recorded history . . . [i]mmigration is not just a link to America’s past, it’s also a bridge to America’s future.”<sup>5</sup>

So, the place immigrants hold in the history and traditions of our country is something that is very well known, and it is etched into our DNA. However, at this time in our history we must remind ourselves that our obligation towards immigrants and refugees now derives from much more than just our tradition and our history.

In December 1948, the General Assembly of the United Nations adopted the Universal Declaration of Human Rights. Article 14, Paragraph (1) of that Declaration recognizes that, and I quote, “Everyone has the right to seek and to enjoy in other countries asylum from persecution.”<sup>6</sup>

In 1968, the United States specifically committed to abide by that principle by signing on to the 1967 Protocol to the United Nations Convention relating to the status of refugees. Specifically, Article 33 of that Convention, which we signed, provides that, and I quote, “no contracting state shall expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>7</sup>

It defines a refugee as any person who, and I quote, “owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or owing to such fear unwilling to avail himself of the protection of that country.”

The Convention further stipulates that asylum seekers must be given access to courts and, subject to specific exceptions, should not be penalized for their illegal entry or stay, recognizing that those seeking asylum can require refugees to breach immigration orders. These obligations are binding upon us as our law. As Article VI of our own Constitution made those treaties the law of the land by providing that, and I quote from our Constitution, this Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all

---

<sup>5</sup> George H.W. Bush, U.S. President, Remarks on Signing the Immigration Act of 1990 (Nov. 29, 1990) (transcript available in the George H.W. Bush Presidential Library Center).

<sup>6</sup> G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 14 (Dec. 10, 1948).

<sup>7</sup> Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150.

Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.

In 1980, in addition to the signing of the treaty, Congress gave effect to the treaty and the international legal obligations we assumed therein through the passage of a law, The Refugee Act. So, under international law as well as under our Constitution, our treaties, and then our domestic statutes, any person has a right, a legal right, to seek asylum in our country and is entitled to due process protections to effectuate that right.

Then in addition to the Convention on Refugees and subsequent statutes, the United States in 1984, along with 161 other nations, also ratified the United States Convention against Torture, which prohibits any country from returning, extraditing or repatriating any person to a state, quote, where there are substantial grounds for believing that he would be in danger of being subjected to torture.

So, we've passed laws and we've signed treaties which our Constitution defines as part of the Law of the Land, enshrining our original ideals into laws granting asylum and refuge to those who are persecuted and who fear torture or death in their own country. These treaties are in effect right now.

But notwithstanding our rhetoric or our legal commitments, and no matter how good we are, or we try to be, we here in the United States as well as human nature everywhere, have periodically failed to live up to our fundamental principles and our laws. The good news is that we do know how to correct the lapses that we have permitted, and our history reflects our acknowledgment and correction of prior mistakes. Indeed, many, many of our greatest legal achievements have occurred only after astronomical failures.

We have for example previously precluded entry to the United States based only upon fear and racism. For the first 100 years of our history, we had open immigration. Then in 1882, Congress passed the Chinese Exclusion Act, the very first restriction on immigration prohibiting the immigration of all Chinese persons. The Act was supported and advanced by entities like the Supreme Order of Caucasians whose primary focus was to evict the Chinese from the United States for no other reason than they were Chinese. And the Act passed notwithstanding the efforts of Republican Senator George Hoar who aptly described the Act as "nothing less than the legalization of racial

discrimination.”<sup>8</sup> It took until 1943, but the Chinese Exclusion Act was finally repealed.

There were other periodic attempts to use immigration laws to implement racism and bigotry. For example, the Emergency Quota Act of 1921, and the Immigration Quota Act of 1924, each restricted immigration by implementing quotas based on a person’s national origin. These laws aimed to reduce immigration from outside the Western Hemisphere, especially targeting those from the Southern and Eastern European areas, and especially Italians and Eastern European Jews, and virtually closing the border to anyone from Africa and Asia.

The caps imposed by these Acts were the basis used by the United States in 1939 to reject the ship carrying approximately 900—mostly Jewish—refugees fleeing Nazi Germany, thereby forcing them to return to persecution in Europe because we would not let them enter the United States. These Acts, too, were later repealed, although certainly not in time to assist those refugees.

When repealing those quota systems limiting access from particular countries some forty years later, Lyndon Johnson denounced the National Origins Act and policy saying, quote, for over four decades the immigration policy of the United States has been twisted, and has been distorted by the harsh injustice of the National Origins Quota system. It might have occurred to Lyndon Johnson today, as it did to Yoga Berra a few years ago, that we are experiencing déjà vu all over again.

And I can think of no clearer example of abandoning our values and ideals than our appalling wholesale seizure and captivity of Japanese Americans during World War II with no evidence whatsoever presented to support such a decision.

The Supreme Court’s opinion in *Korematsu v. United States*<sup>9</sup> baselessly upheld the authority of the government to imprison people arbitrarily and indefinitely solely on the basis of national origin. It took us until 1988, with the passage of the Civil Liberties Act,<sup>10</sup> to formally recognize that the internment was meritless and, in the words of the Commission recommending the passage of the Act, it was, “based on racial prejudice, war hysteria, and a failure of political leadership.”

---

<sup>8</sup> See ROGER DANIELS, *COMING TO AMERICA: A HISTORY OF IMMIGRATION AND ETHNICITY IN AMERICAN LIFE* 271 (2002).

<sup>9</sup> 323 U.S. 214 (1944).

<sup>10</sup> 50 U.S.C. §§ 4211–20.

The Civil War provides another example, albeit in a different context. After Abraham Lincoln attempted to bypass the due process protections of our court system by instituting ad hoc military tribunals to try civilians, the Supreme Court denied his authority to do so. The Supreme Court noted its fear of where such unfettered power might one day lead saying in 1866, and I quote from that opinion, this nation as experience has proved cannot always remain at peace and has no right to expect that it will always have wise and humane rulers sincerely attached to the principles of the Constitution. Wicked men, ambitious of power, with hatred of liberty and contempt of law, may fill the place once occupied by Washington and Lincoln, and if this right is conceded and the calamities of war again befall us, the dangers to human liberty are frightful to contemplate.

In yet another example, *Brown v. Board of Education*<sup>11</sup> was preceded by three abhorrent decisions. First, *Dred Scott v. Sandford*,<sup>12</sup> in which the then Chief Justice declared that all blacks, slaves as well as free, were not and could never become citizens of the United States. Second, the civil rights cases which struck down the Civil Rights Act of 1875 and permitted racial discrimination in businesses and public accommodations even after the passage of the Thirteenth, Fourteenth, and Fifteenth Amendments. And finally, *Plessy v. Ferguson*<sup>13</sup> upholding state segregation and leading to decades of Jim Crow laws. While it should not have taken sixty years, through *Brown* we ultimately began to correct these previous inequities.

As a final example, in addition to errors regarding matters of race, there is this country's lengthy history of failure to grant women human rights, including the right to be free from gender-based violence which has been clearly documented throughout the years. Throughout the first half of the Twentieth Century, the United States recognized domestic violence only as a personal issue that took place within the confines of a private relationship. Indeed, the initial aim of the U.S. Family Court system was to keep families together, and judges therefore, were encouraging battered women to accept responsibility for their role in provoking domestic violence and discouraged them from filing criminal charges.

Thus, the idea that gender-based crimes might one day serve as the basis for an asylum claim was almost inconceivable until the [Board of Immigration Appeals]'s 1985 decision in *Matter of Acosta*,<sup>14</sup> which held that sex is an

---

<sup>11</sup> 347 U.S. 483 (1954).

<sup>12</sup> 60 U.S. 393 (1857).

<sup>13</sup> 163 U.S. 537 (1896).

<sup>14</sup> *Matter of Acosta*, 19 I. & N. Dec. 211, 212 (BIA 1985).

immutable characteristic for purposes of articulating membership in a particular social group.

That decision paved the way for a relatively recent string of decisions that have developed two legal frameworks for treating domestic violence as a form of persecution within the definition of refugee. First in 1987, the Ninth Circuit Court of Appeals considered the case of a Salvadoran woman who was brutally and continually physically and sexually abused by a member of the Salvadoran military. In *Lazo-majano v. INS*, finding that persecution was, “stamped on every page of the record,” Judge John T. Noonan, Jr. on behalf of the Ninth Circuit held that Lazo-majano was entitled to asylum on the basis of political opinion. He held that she had exhibited her abuser’s imputed political opinion that a man has a right to dominate women in every sense of the word, and when by flight Lazo-majano exhibited her own political opinion that men do not have such a right, she became exposed to persecution for that assertion.

In a fairly chauvinistic dissent, Judge Cecil F. Poole invoked a very familiar refrain, arguing that Lazo-majano’s claim should be denied because he saw gender-based assault as a, “one-on-one interpersonal conflict of emotional and physical confrontation,” and characterized the constant rapes and beatings that she suffered as a mere, “pathological display of lovers’ wooing.”

It was not until 2014 that the BIA finally rendered its first binding decision in which domestic abuse served as the basis for an asylum claim in *Matter of ARCG*, holding that the lead respondent, a victim of severe domestic violence, was “a member of a particular social group composed of married women in Guatemala who are unable to leave their relationship.” Since then, *ARCG* has served as the basis for numerous grants of domestic-violence-based asylum claims and has been extended to include abuse between unmarried domestic partners.

So, our past, in so many ways and in so many areas, is both a source of great pride in our achievements and disappointment in our failures. And today we unfortunately face other failures regarding our obligations to immigrants and refugees. Indeed, despite rectifying many of our past lapses, we are still failing to grant asylum and to provide refuge to those who fear persecution or discrimination or death in their own countries in accordance with our legal obligations.

Today, many asylum seekers are indefinitely detained or subjected to expedited removal, sometimes without an adequate hearing, effectively depriving them of their due process rights. Others are turned immediately away

without being given the chance to request asylum in our country, and many of the people actually ordered removed from the United States have not ever seen an immigration judge.

Too often, many of these people who have not committed any criminal offense but only violated a civil regulation are treated worse than any prisoner accused of committing the most serious of felonies.

I wish I had the time to paint a clear picture, for example, of the thousands and thousands of people, including children who have crossed alone into the United States, and delineate the treatment they have received when they are, for example, detained at our borders in railroad cars without any amenities and kept so cold that they are called *hieleras* or freezers. Many are entitled to asylum, withholding a removal or other legal relief, but are completely precluded from access to courts or cannot maneuver through the complex system we have established in order to obtain those remedies. Nor should we ignore the suffering of 500,000 or more U.S.-born American children who have been exiled to Central America or elsewhere in order to be with their deported parents, or the hundreds of thousands of children currently living in the United States who were torn from their detained and/or deported parents, both of which constitute growing populations with little thought given to their plight or evaluation of their legal claims.

Conditions are deteriorating. As situations worsen in many countries in the world, the increasing exodus of refugees fleeing torture and persecution in their own countries has generated a worldwide crisis which we should not ignore simply because it does not impact our daily lives. In that regard, it is the women and the children upon whom the greatest harm falls from the world's treatment of refugees and immigrants.

Women in refugee camps and communities suffer extraordinary reproductive and other health problems as well as the constant fear of sexual violence, as rape is a familiar weapon used by both those inside and outside the refugee community to terrorize, demoralize and control women. And the pain of indescribable poverty and homelessness has to be so much greater when a mother is forced to share it with her children, not to mention the horrible dread and very legitimate fear too often actualized that those children will be stolen and sold into slavery for sex and labor.

At the same time, I do not minimize the problems faced by countries attempting to balance liberty, justice, and equality with the welfare and safety of their own citizens. For example, in Lebanon nearly one in four people are

refugees, the highest ratio in the world. Lebanon's infrastructure, barely adequate before the refugee crisis, is overwhelmed with the tremendous and unexpected influx of massive numbers of refugees. And the biggest burden of the refugee crisis is thus being borne by countries least able to assist. At the same time, countries with the greatest excess of wealth are hardly doing enough or are even impeding refugees and asylum seekers from finding the sanctuary to which they are entitled.

I obviously cannot turn this into a lecture on the intricacies of immigration and refugee law. We would be here for an entire course. My point today is simply to remind ourselves of the ideals upon which we were founded, to remind ourselves of the legal obligations we have undertaken, to remind ourselves of the indisputable fact that we have sometimes failed to live up to those ideals and legal obligations, and most importantly to remind ourselves that we have in the past, as we should do now, worked successfully to correct our errors.

*We are* a great country, not because we've succeeded in achieving our goals of equality and justice, because we obviously have not yet done, but because we did not discard our ideals after every failure. Instead we continued to cherish them. We recognized our shortcomings and we worked to achieve the justice and equality we have purportedly sought from our very beginnings.

Last year, Senator John McCain captured the essence of our international role as Americans in an open letter titled *Why We Must Support Human Rights*. He said, and I quote:

We are a country with a conscience. We have long believed moral concerns must be an essential part of our foreign policy, not a departure from it. Our values are our strength and greatest treasure. We are distinguished from other countries because we are not made from a land or a tribe or a particular race or creed, but from an ideal that liberty is the inalienable right of mankind.<sup>15</sup>

I believe that we must look to our history as well as to our future, not only to remember and to renew the ideals of our founders but also to avoid the mistakes of the past and most importantly to correct our current ones. We should remember that our rule of law promises, promises in many, many ways to assure equality and protection of life and liberty to every individual who faces persecution or torture. I, for one, think we *ought* to keep our promises.

---

<sup>15</sup> Joh McCain, *Why We Must Support Human Rights*, N.Y. TIMES: OPINION (May 8, 2017), <https://www.nytimes.com/2017/05/08/opinion/john-mccain-rex-tillerson-human-rights.html>.