DOMESTIC VIOLENCE ASYLUM CLAIMS AND RECENT DEVELOPMENTS IN INTERNATIONAL HUMAN RIGHTS LAW: A PROGRESS NARRATIVE?

I. INTRODUCTION

Recent years have witnessed significant developments in international human rights law relating to domestic violence. No longer viewed as a matter 'essentially within the domestic jurisdiction of the State', domestic violence now frequently commands the attention of international human rights bodies. The obligations imposed on States include positive obligations of due diligence to prevent, investigate and to punish domestic violence, whenever and wherever it occurs.[1] Judicial dialogue across the borders of human rights and refugee law has also expanded access to asylum for women fleeing domestic violence, bringing with it a gradual recognition of the positive obligations that international law now imposes on States. However, as recent cases such as *Jessica Gonzalez v the United States*[2] and *Opuz v Turkey*[3] reveal, significant gaps remain between the rhetoric of human rights law and the reality of everyday enforcement and implementation on the ground. These gaps are most keenly felt by refugee women. While State practice suggests greater gender inclusivity and sensitivity in the practice of refugee law, women fleeing domestic violence continue to face obstacles in making their claims heard.

The ambivalence with which domestic violence claims are treated in asylum adjudication reflects the hesitation to affirm the human rights norms and attendant obligations underpinning such claims.[4] The very prevalence of domestic violence disadvantages women in presenting claims to persecution. The widespread impunity of State and non-state actors for crimes of domestic violence brings into question the exceptional claim of the asylum seeker and raises the spectre of opening floodgates in response to a human rights violation that is both familiar and endemic. Despite more than a decade of gender guidelines on international protection standards and

[1] See CEDAW General Recommendation No. 19, 'Violence Against Women' (11th Session) (1992) UN Doc A/47/38, para 9.

[2] *Jessica Gonzales v United States*, Petition No. 1490-05, Inter-American Court of Human Rights, Rep No. 52/07, OEA/Ser.L./V/II.128, Doc 19 (2007) [Admissibility Decision]. For the US Supreme Court decision that preceded the petition to the Inter-American Commission, see: *Town of Castle Rock v Gonzales*, 545 US 748, 768 (2005). For commentary see: C Bettinger-Lopez, '*Jessica Gozalez v United States*: An Emerging Model for Domestic Violence & Human Rights Advocacy in the United States' (2008) 21 Harvard Human Rights Journal 183.

[3] *Opuz v Turkey*, Application No. 33401/02, Judgment of 9 June 2009.

[4] MG Heyman, 'Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations' (2005) 17 Int J Refugee Law 729; D Anker, 'Refugee Status and Violence against Women in the Domestic Sphere: The Non-State Actor Question Selected Papers at the October, 2000 Conference of the International Association of Refugee Law Judges at Bern, Switzerland' (2000) 15 Geo Immigr LJ 391; A Macklin, 'Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims' (1998) 13 Geo Immigr LJ 25; H Crawley, *Refugees and Gender: Law and Process* (Jordan, Bristol 2001); H Crawley,'Comparative analysis of gender-related persecution in national asylum legislation and practice in Europe' (Evaluation and Policy Analysis Unit, UNHCR, Geneva 2004).

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procedures,[5] refugee women continue to face difficulties in presenting claims of persecution and in demonstrating a failure of State protection when the harm suffered takes place, as the European Court of Human Rights (ECtHR) notes, 'within personal relationships or closed circuits.'[6]

This article examines developments in international human rights law relating to domestic violence and questions how or whether refugee law has integrated those developments into asylum adjudication processes. Cautious recognition that domestic violence may give rise to a legitimate claim to asylum is evident in recent case-law. Significant progress has been made in recognizing persecution by non-state actors,[7] and in breaking down gendered divisions between the public and the private that, for so long, limited the application of refugee law to gender related asylum claims. Developments within international human rights law have played an important role in pushing for an expansion of the scope of protection offered by refugee law. As yet, however, refugee law is not keeping pace with the inclusion of domestic violence in the panoply of rights and positive obligations now recognized by international human rights law. This failing may be attributed to the continuing constraints of refugee law's categories,[8] its potential for inclusion and exclusion, and the ever present imperative of migration control which, while not relevant to an assessment of protection needs, nonetheless, frequently constrains the willingness of states to offer protection.

As the 2002 UNHCR gender guidelines note, the analysis of sex and gender in refugee law has been expanded through the practice of States, the case law of domestic courts and academic writing.[9] This expansion has occurred in parallel to, and has been assisted by, developments in international human rights law and through the jurisprudence of the ad-hoc International Criminal Tribunals and the Rome Statute of the International Criminal Court. It is UNHCR's position that the refugee definition,

[5] See: Office of the UNHCR, Ex Com Conclusion No. 39 (XXXVI) 'Refugee Women and International Protection' (1985); ibid; Guidelines on the Protection of Refugee Women, UN Doc ES/SCP/67 (1991); ibid. Guidelines on International Protection: Gender-related persecution within the context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol relating to the Status of Refugees (7 May 2002) UN Doc HCR/GIP/02/01. At national level, see: Australia, Dept of Immigration and Multicultural Affairs, Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision-Makers (1996); Immigration and Refugee Board of Canada, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* 1 (March 1993). The Canadian Immigration and Refugee Board (IRB) has issued an updated Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution (13 November 1996) as well as a Compendium of Decisions: Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update (February 2003); UK Immigration Appellate Authority, *Asylum Gender Guidelines* (2000), Asylum Policy Instruction: Gender Issues in the Asylum Claim (October 2006); US Department of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims From Women, memorandum from Phyllis Coven, Office of International Affairs (May 26, 1995).

[6] *Opuz v Turkey* (n 3) para 132.

[7] See, in particular, art 6(c), Council Directive 2004/83/EC of 29 April 2004 on Minimum Standards for the Qualification and Status of Third Country Nationals or Stateless Persons as Refugees or as Persons who otherwise need International Protection and the Content of the Protection Granted, OJ L304, 30/09/2004 paras 12–23.

[8] T Inlender, 'Status Quo or Sixth Ground?: Adjudicating Gender Asylum Claims' in SBaJ Resnik (ed), *Migration and Mobilities: Citizenship, Borders and Gender* (NYU Press, New York, 2009).

[9] Guidelines on International Protection No. 1: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/01).

'properly interpreted', includes gender-related claims and that further amendment is not necessary in order to recognize the gender dimension of persecution.[10] Yet, as the 2002 UNHCR Guidelines also note, women continue to face difficulty in bringing gender related claims within the scope of refugee law. Domestic violence is a paradigmatic test case for refugee law challenging, as it does, not only the boundaries of refugee law's categories, but also the continuing gap between 'private harms' and State accountability.

International human rights law has expanded the scope of the due diligence standard when harm occurs at the hands of non-state actors, with significant implications for our understanding of States' positive obligations of prevention, protection and enforcement. The application of the due diligence standard has brought with it much greater scrutiny of State responses, their actions and omissions, in the face of so-called private harms. As we shall see, however, the potential for an expanded protection norm within refugee law has not yet been fully realized.

II. HUMAN RIGHTS AND AN EXPANDING NORM OF DUE DILIGENCE

A. The Optional Protocol to the 1979 UN Convention on the Elimination of All Forms of Discrimination Against Women

As is now well documented, the text of the 1979 UN Convention on the Elimination of All Forms of Discrimination (CEDAW) does not explicitly address violence against women. Through its General Recommendations[11] and, more recently, the jurisprudence arising under the Optional Protocol, the CEDAW Committee has greatly expanded the potential reach of the Convention.[12] In this it has been aided by the work of other human rights treaty bodies and by the human rights Special Procedures.[13] In its General Recommendation No. 19, the CEDAW Committee defined violence against women, including domestic violence, as a form of discrimination that seriously inhibits women's enjoyment of human rights. Drawing on the formula adopted in *Velasquez Rodrigues v Honduras*,[14] the Committee concluded that States' responsibility extended not only to State action, but also to private acts where the State failed to act with due diligence to 'prevent violations of rights or to investigate and punish acts of violence, and for providing compensation.'[15] The due diligence standard was subsequently

[10] ibid 3, para 6.

[11] General Recommendation No. 19 (n 1) and General Recommendation No. 21 'Equality in marriage and Family Relations' (19th Session, 1994), UN Doc A/47/38.

[12] On the jurisprudence of the Optional Protocol, see: A Byrnes and E Bath, 'Violence against Women, the Obligation of Due Diligence, and the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women: Recent Developments' (2008) 8 Human Rights Law Review 517.

[13] See generally R Adams, 'Violence Against Women and International Law: The Fundamental Right to State Protection from Domestic Violence' (2007) 20 NY Int'l L Rev 57, 104–129.

[14] *Velasquez Rodrıguez v Honduras* Inter-American Court of Human Rights Series C No. 4 (29 July 1988), 30; 'An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.' Para 172.

[15] See (n 1).

applied in the 1993 Declaration on Violence Against Women, which adopted an uncompromisingly universalist stance in its condemnation of gender-based violence, rejecting any appeal to custom, tradition or religion to limit States' accountability.[16] In its General Recommendation 21, on equality in marriage and family relations, the CEDAW Committee again stressed women's right to be free from violence in public and family life, noting that such violence seriously impedes the enjoyment of rights and freedoms.[17] In its most recent Recommendation, on women migrant workers, the risks of abuse and violence faced by migrant domestic workers, in particular, are highlighted, as are the added risks and vulnerability that come with uncertain or dependant migration status.[18] The 'universal prevalence' of gender-based violence and gendered cultural practices are identified as factors influencing women's migration, often acting as 'push' factors in women's decisions to cross borders and move on.[19]

The adoption of the 1999 Optional Protocol to CEDAW opened up new avenues of redress and challenge for women's rights advocates.[20] The Committee's jurisprudence under the Protocol has reinforced the due diligence standard to be applied to States in examining accountability for domestic violence. The Committee's jurisprudence highlights again, however, the failings of enforcement within States, and the lengths to which it may be necessary to go to secure an effective remedy for domestic violence. The first case to be considered on its merits under the Optional Protocol, *A T v Hungary*, concerned domestic violence and the failure of the respondent State to prevent or protect the applicant from severe abuse over several years.[21] Drawing on General Recommendation No. 19 and its own Concluding Observations on Hungary's Combined fourth and fifth periodic report,[22] the Committee found violations of the applicant's Convention rights under articles 2 (a), (b) and (e) and 5 (a) (read in conjunction with article 16). The Committee reiterated its view that, 'traditional attitudes by which women are regarded as subordinate to men contribute to violence against them.'[23] In addition to requiring the State to take, 'immediate and effective measures to guarantee the physical and mental integrity of A. T. and her family',[24] the Committee made a series of more programmatic recommendations to the State to strengthen its legislative and policy framework on domestic violence and to expand the support structures available to victims of domestic violence.[25] The decision in this

[16] Declaration on the Elimination of Violence against Women, GA Res. 48/104, (20 December 1993) UN Doc A/RES/48/104, art 4.

[17] UN Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation 21, 'Equality in Marriage and Family Relations' (13th Session) UN Doc A/47/38.

[18] UN Committee on the Elimination of All Forms of Discrimination Against Women, General Recommendation No. 26 on women migrant workers, (5 December 2008) UN Doc EDAW/C/2009/WP.1/R, paras 19–20.

[19] ibid para 5.

[20] Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, (1999) 2131 UNTS 83.

[21] *Ms A T v Hungary* (Views adopted on 26 January 2005, 32nd Session), UN Doc A/60/38 (Part I). Notably, the Committee deemed the claim as admissible, although most of the incidents in question had pre-dated the entry into force of the Optional Protocol in Hungary. Nonetheless, they formed part of a continuing pattern of alleged failing of state protection and culpable inaction on the part of the State, from 1998 to the time of the Committee's decision. The Committee noted that there was in this case a continuing grievance; para 8.5.

[22] See UN Doc CEDAW/C/TUR/4-5 and Corr.1, (15 February 2005) para 28.

[23] See (n 21) para 9.4.

[24] See (n 21).

[25] ibid 21.

case also specifically addresses the intersectionality of disability and gender, with the Committee finding that the State had failed to ensure an effective remedy was available to the applicant and her family, one that accommodated her specific needs as the primary carer of a severely disabled child. The case is important in highlighting the specificity of due diligence obligations and the requirement that States recognize the concrete needs and rights claims of individual women.

Two further domestic violence cases have been considered by the Committee. The cases of *Yildirim v Austria*[26] and *Goekce v Austria*[27] were brought on behalf of two Austrian women, both of Turkish descent, who died as a result of severe domestic abuse at the hands of their spouses, having endured protracted periods of abuse over several years. The Committee found violations of CEDAW in both cases. Although the Austrian Government had adopted a 'comprehensive model' to address domestic violence, which included legislation, education initiatives, shelters, and civil as well as criminal law remedies, this was not enough to discharge its obligations. This comprehensive system, the Committee found, had to be, 'supported by State actors, who adhere to the State's due diligence obligations.'[28]

The 'assumptions of discontinuity,'[29] that often surface in domestic violence cases and shape perceptions of public harm, were evident in the proceedings before the Committee in the *Goekce* case. In contesting the admissibility of the complaint, the Austrian Government pointed to Şahide Goekce's own actions in failing to give testimony against her husband, in hesitating to proceed with criminal prosecutions and, on occasion, seeking to downplay the heinousness of her husband's actions.[30] The continuity and complexity of Goekce's intimate relationship with her spouse, however, was not considered fatal to her claim. In contrast with the approach often taken by asylum adjudicators, the complex web of intimate relations was accepted as part of the everyday context of domestic violence. An awareness of both *Yildirim* and *Goekce*'s locations in Austrian society is also evident in the proceedings before the Committee. Both women were of Turkish descent. In its determination of admissibility in the *Goekce* case, the Committee specifically noted that the German language was not Şahide Goekce's mother tongue, and taking this into account, along with the continuing threat of serious violence, concluded that complex and obscure remedies such as a constitutional court procedure, or an 'associated prosecution', could not be considered effective.[31]

In *Yildirim*, the Committee repeated its finding in *Goekce* that the arrest and conviction of the abusive spouse was not sufficient to discharge the State's obligations under articles 2 and 3 of CEDAW, or to vindicate the victim's right to life and to mental and physical integrity.[32] The Committee found that the failure to arrest and detain Fatima Yildirim's husband, despite knowledge of the extremely dangerous threat posed and the ongoing harm being endured, constituted a failure of due diligence on the part of the State. They called for enhanced coordination between judicial and

[26] *Yildirim v Austria* (2005) UN Doc CEDAW/C/39/D/6/2005.
[27] *Goekce v Austria* (2005) UN Doc CEDAW/C/39/D/5/2005.
[28] ibid para 12.1.2.
[29] This term is borrowed from: CG Oxford, 'Protectors and Victims in the Gender Regime of Asylum' (2005) 17 National Women's Studies Association Journal: Special Issue: States of Insecurity and the Gendered Politics of Fear Contents 18–38.
[30] See (n 27) paras 4.7–4.8. [31] ibid para 11.3. [32] See (n 26) para 12.1.5.

law enforcement officers, and greater cooperation with non-governmental organizations working to protect victims of gender-based violence. Repeating its finding in *AT v Hungary*, the Committee concluded that 'the perpetrator's rights cannot supersede women's human rights to life and to physical and mental integrity.'[33]

The work of CEDAW has been complemented by significant developments, albeit belated, in the work of other UN human rights treaty bodies and the human rights Special Procedures. In 2003, the United Nations Commission on Human Rights expressly recognized the nexus between gender-based violence and discrimination, noting that all forms of violence against women occur within the context of '*de jure* and *de facto* discrimination against women [. . .] and are exacerbated by the obstacles women often face in seeking remedies from the State.'[34] In his third report, (2006),[35] the UN Special Rapporteur on Violence against Women, its causes and consequences, argued that the obligation of States to 'prevent and respond to acts of violence against women with due diligence' was now a rule of customary international law. The Special Rapporteur on Torture has repeatedly addressed domestic violence in the exercise of his mandate[36] and in its General Recommendation No. 2, issued in 2008, the Committee against Torture acknowledged that domestic violence may constitute torture or ill-treatment under the 1984 UN Convention Against Torture.[37] The Committee's Recommendation specifically recognizes the centrality of gender in identifying the risks and consequences of Convention violations for women and notes that non-conformity with socially determined gender roles and violence by private actors, are part of the context within which women and men may be at risk. The Human Rights Committee has also repeatedly criticized States for failing to take effective action on domestic violence, drawing on its own General Comment No. 28 on the Equality of rights between men and women.[38]

The Committee on Economic, Social and Cultural Rights has highlighted States' obligations of due diligence in relation to gender-based violence perpetrated by non-state actors, and pointed to States' positive obligations to ensure that victims of domestic violence have access to housing, to effective remedies and to redress.[39] Examining the wider implications of violence within the family, the Committee on the

[33] See (n 18) para 12.1.5. In the case of Şahida Goekce, the police had failed to respond to an emergency call made a few hours before her murder, despite having knowledge of the danger posed by her husband and the history of violent abuse. The Committee also found that the Public Prosecutor should not have denied earlier requests from the police to arrest and detain Mustafa Goekce, given the high threshold of violence displayed in this case, of which the Prosecutor was aware. See (n 27) paras 12.1.4–5.

[34] UN Commission on Human Rights, 'Elimination of Violence Against Women' Resolution 2003/45, UN Doc E/CN.4/2003/L.11/Add.4.

[35] Special Rapporteur on Violence Against Women, Third Report (20 January 2006) presented to the UN Commission on Human Rights (UN Doc E/CN.4/2006/61).

[36] See Report of the UN Special Rapporteur on Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, (15 January 2008) UN Doc A/HRC/7/3.

[37] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, General Recommendation No. 2, CAT/C/GC/2 (24 January 2008), paras 17 and 22.

[38] General Comment No. 28, on the Equality of Rights between Men and Women (art 3), (29 March 2000), CCPR/C/21/Rev1/.

[39] UN Committee on Economic, Social and Cultural Rights, General Comment No. 16 (2005), The equal right of men and women to the enjoyment of all economic, social and cultural rights, art 3 of the International Covenant on Economic, Social and Cultural Rights, UN Doc E/C.12/2005/4, para 27.

Rights of the Child has highlighted a child's right to heard in disputes arising from such violence, as well as the duties of States to prevent such violence and to ensure access to appropriate services.[40] The Committee on the Elimination of Racial Discrimination's General Recommendation on the gender related dimensions of racial discrimination, recognizes the need for greater engagement with the intersections of gender and 'race,' and with potential discrimination in access to legal remedies and the administration of justice.[41] Evidence of greater engagement with gendered experiences of racial discrimination can be found in more recent years in the scrutiny of States Parties reports, though such scrutiny is regrettably limited. The intersections of gender, race and ethnicity in the context of domestic violence were specifically addressed by the Committee in its 2008 Concluding Observations on the US Report. Expressing concern at the 'alleged insufficient will of federal and state authorities' to take effective action in response to abuse suffered by women from minority communities, the Committee noted that such inaction, 'deprives victims [. . .] of their right to access to justice and the right to obtain adequate reparation or satisfaction for damages suffered.'[42] The CERD Committee is coming late to significant developments that have taken place in human rights law, particularly at regional level, where sustained advocacy across civil society networks has led to potentially transformative change.

B. Regional Developments: Due Diligence, Non-Discrimination and Protection Obligations

Developments within regional human rights bodies include standard-setting initiatives and a growing body of jurisprudence, much of which owes its origins to grassroots movements, social activism and transnational advocacy by feminist NGOs. On standard setting, both the African human rights and Inter-American human rights systems have taken a lead. The Protocol on the Rights of Women in Africa adopts an expansive definition of violence against women, applicable to both public and private life.[43] The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women (Convention of Belém do Pará)[44] is the first and only international treaty to exclusively address violence against women. The treaty's prohibition on violence against women applies, 'within the family or domestic unit or within any other interpersonal relationship,' whether or not a residence is shared with the perpetrator.[45] States' duties are informed by the standard of due diligence.[46] In *Maria Da Penha v Brazil*,[47] the Inter-American Commission found that the State's

[40] UN Committee on the Rights of the Child, General Comment No. 12 (2009), 'The right of the child to be heard' UN Doc CRC/C/GC/12, para 32.

[41] General Recommendation XXV, Gender Related Dimensions of Racial Discrimination, (Fifty-sixth session, 2000) UN Doc A/55/18, annex V, para 2.

[42] See Committee on the Elimination of Racial Discrimination, Concluding Observations, CERD/C/USA/CO/6, (2008), para 26.

[43] Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa, adopted 11 July, 2003, art 4.

[44] Adopted by the Organisation of American States (OAS) and entered into force on 5 March 1995.

[45] Art 2(a).

[46] Art 7(b).

[47] Case 12.051, Rep No. 54/01, Inter-American Court of Human Rights, Annual Report 2000, OEA/Ser.L/V.II.111 Doc.20 rev (2000).

failure to exercise due diligence to prevent and investigate a domestic violence complaint, violated the applicant's rights under the American Convention on Human Rights, the American Declaration on the Rights and Duties of Man and the Convention of Belém do Pará. The case involved not only failure to fulfil the obligation to investigate and prosecute, but also the obligation to prevent domestic violence. The violence suffered by Maria da Penha was identified by the Commission as being, 'part of a general pattern of negligence and lack of effective action by the State', which included 'general and discriminatory judicial ineffectiveness,'[48] all of which, they noted, created a climate conducive to domestic violence.

The due diligence standard's applicability to domestic law enforcement on domestic violence is now being tested further in a high profile case taken by Jessica Gonzales against the United States. The case is currently awaiting a decision on the merits by the Inter-American Commission on Human Rights, following a highly contested admissibility decision in October 2007.[49] The case of Jessica Gonzales, like many of these cases, is a harrowing one. Gonzalez's three daughters were abducted by her estranged husband and killed. The killings followed repeated failures to enforce the domestic violence restraining order that had been issued against Gonzalez's husband and, specifically, failures to respond to emergency calls on the night of the killings. Gonzalez's petition to the Commission argues that the preventable death of the three children and the harms suffered by Gonzalez herself, violated their rights to life and personal security, their rights to special protection as victims of domestic violence, and their rights to protection of family and home under the American Declaration on the Rights and Duties of Man.[50] (The US is not a party to the American Convention on Human Rights, so the available avenues for redress are already limited). The petition specifically invokes the due diligence standard and notes that failings to exercise

[48] ibid paras 55 and 56.

[49] See (n 2). A final decision on the merits is expected by summer 2011. For further details on the timeline of the case, see American Civil Liberties Union at: http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-v-usa, accessed March 23 2011.

[50] See generally: American Declaration of the Rights and Duties of Man, OAS Res. XXX, International Conference of American States, 9th Conference, OEA/Ser.L/V/I.4 Rev. XX (May 2, 1948); Charter of the Organization of American States (30 April 1948) 119 UNTS 3 (entered into force December 13, 1951); Statute of the Inter-American Commission on Human Rights, art 1(2)(b). The admissibility of the petition was challenged by the US Government, on the ground that the American Declaration did not include any provision imposing obligations of enforcement or due diligence with respect to the rights specified therein. These arguments were rejected by the Commission (n 2): art 20 of the Statute of the IACHR provides that, in respect to those OAS Member States that are not parties to the American Convention on Human Rights, the Commission may examine communications submitted to it and any other available information, to address the government of such states for information deemed pertinent by the Commission, and to make recommendations to such states, when it finds this appropriate in order to bring about more effective observance of fundamental human rights. See also the Organization of American States, arts 3, 16, 51, 112, 150; Regulations of the Inter-American Commission on Human Rights, arts 26, 51–54; I/A. Court H.R., Advisory Opinion OC-10/8 'Interpretation of the Declaration of the Rights and Duties of Man within the Framework of Article 64 of the American Convention on Human Rights,' (14 July 14, 1989, Series A N° 10 (1989), paras 35–35; Inter-American Commission of Human Rights, *James Terry Roach and Jay Pinkerton v United States*, Case 9647, Res. 3/87, (22 September 1987) Annual Report 1986–87, paras 46–49.

due diligence were attributable in part to negative stereotypes and/or discriminatory practices on the part of State officers.[51]

The case follows a long and protracted legal battle in the US. In 2005, the US Supreme Court found that Jessica Gonzales had no constitutional right to police enforcement of the restraining order.[52] Reflecting the potential for transnational mobilization, more than 70 organizations and individuals have filed amicus briefs in the case, which put the spotlight on the everyday enforcement practices of local police departments and the responsibilities of States for violence perpetrated by non-state actors.[53] In the observations submitted on the Merits hearing, Jessica Gonzalez specifically addresses the discrimination aspect of her case, highlighting the intersections of gender, race and ethnicity that shaped her engagement with the State.[54] The amicus brief submitted by Women Empowered Against Violence (*Weave*) supports Gonzalez's position, noting that Native American, ethnic minority, and immigrant women are the groups most affected by gender-based violence in the United States.[55] Police inaction in this context, they argue, further exacerbates experiences of 'race, ethnicity and class-based vulnerability and exclusion'.

In the landmark case of *Caso González y otras v México*, (the *Campo Algondero* case),[56] the Inter-American Court ruled that Mexico had violated both the 1978 American Convention of Human Rights and the 1994 Convention of Belém do Pará. The case was brought by the families of three young women, Esmeralda Herrera Monreal, Laura Berenice Ramos Monárrez and Claudia Ivette González, whose bodies were discovered in a former cotton field (Campo Algodonero) in Ciudad Juárez on 6 and 7 November 2001, along with the bodies of five other young women. The Court's decision specifically addressed States' positive obligations to respond to violence by non-state actors and, drawing on the work of CEDAW, the IACHR Rapporteur on the Rights of Women, and the jurisprudence of the ECtHR, the Court recognized gender-based violence as coming within the scope of the general prohibition of discrimination.[57] The pattern of abduction, rape and murder of predominantly migrant women and girls in Ciudad Juárez since the early 1990s was the subject of the first inquiry by

[51] See Petition Alleging Violations of the Human Rights of Jessica Gonzales by the United States of America and the State of Colorado, with request for an investigation and hearing on the merits, submitted 23 December 2005, Petition No. P-1490-05, 33.

[52] See (n 2).

[53] *Jessica Gonzales v United States of America*—Amicus Briefs Submitted for October 2008 Merits Hearing, available at: http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-v-usa, accessed on March 23 2011.

[54] *Gonzales v USA*: Post-Hearing Brief, Observations & Responses Concerning the 22 October 2008, Hearing Before the Commission (2 March 2009) 19, available at: http://www.aclu.org/human-rights-womens-rights/jessica-gonzales-v-usa, accessed 23 March 2011.

[55] See Weave Amicus Brief, (n 12) 9; see also Callie Marie Rennison, Bureau of Justice Statistics, US Dept of Justice, Intimate Partner Violence, 1993–2001 (2003), available at http://www.ojp.usdoj.gov/bjs/pub/pdf/ipv01.pdf, cited in *Gonzales v USA*: Post-Hearing Brief, (n 54).

[56] Inter-American Court of Human Rights, Case of *González et al ('Cotton Field') v Mexico*, Judgment of 16 November 2009 (Preliminary Objection, Merits, Reparations, and Costs), available at: http://www.corteidh.or.cr/docs/casos/articulos/seriec_205_ing.doc.

[57] ibid paras 398–399. The link between discrimination and gender based violence was highlighted, in particular, in the expert testimony given by Professor Rhonda Copelon in the case. See: Expert Testimony of Professor Rhonda Copelon, Profferred by the Inter-American Commission on Human Rights, Santiago, Chile, April 28 2009, available at: http://ccrjustice.org/files/Rhonda%20Copelon%20declaration.doc.

the CEDAW Committee, under article 8 of the Optional Protocol. In finding a violation of the obligation not to discriminate on grounds of gender, and that a 'culture of discrimination' existed, the Court cited evidence provided to CEDAW by the Mexican government, that 'the murders [of women in Ciudad Juárez] were not perceived . . . as a significant problem requiring immediate and forceful action on the part of the relevant authorities,' and, further, that the culture of discrimination was, 'based on the erroneous idea that women are inferior.'[58] The Court concluded that where such stereotyping is reflected in policies and practices, and in the language and reasoning of judicial police authorities, as in this case, the creation and use of stereotypes becomes 'one of the causes and consequences of gender-based violence against women.'[59]

Ultimately, the Court found multiple violations of the American Convention on Human Rights,[60] and of the due diligence obligations imposed under article 7(b) of the Convention of Belém do Pará. Specifically the Court concluded that the State had failed to investigate the disappearances and killings with due diligence, and that stereotyping of the young women victims—evident in questions concerning sexual preferences in the missing persons forms and comments from police officials on 'disreputable' behaviour[61]—had created a context of discrimination within which public officials and authorities 'minimized the problem' and showed a 'lack of interest and willingness to take steps to resolve a serious social problem.'[62] In a concurring opinion, Judge Cecilia Medina Quiroga found that a further violation of the prohibition of torture should also have been found, as the level of suffering endured was sufficient, in her view, to meet the threshold required by article 5(2) of the American Convention.[63]

In addressing the links between violence and discrimination, the Court drew heavily on the judgment of the European Court of Human Rights in *Opuz v Turkey*, which, for the first time in Strasbourg case-law, linked States' obligations to combat domestic violence to non-discrimination norms.[64] There, the applicant, Mrs Nahide Opuz, claimed that the State authorities had failed to protect both her and her mother from domestic violence, resulting in the death of her mother and her own ill-treatment. Drawing on the due diligence standard,[65] the Court found Turkey to have violated articles 2, 3 and 14 of the European Convention on Human Rights (ECHR) and concluded that the 'general and discriminatory judicial passivity [. . .] created a climate that was conducive to domestic violence.'[66] In arriving at its conclusion, the Court drew upon a wide body of international law, including the jurisprudence of the Inter-American Commission and Court of Human Rights and the standards set down in the *Belém do Pará* Convention. The Court cited not only the text of CEDAW itself and the general prohibition on discrimination, but also General Recommendation 19, the jurisprudence of the Optional Protocol and the CEDAW Committee's Concluding

[58] See (n 56) para 398. [59] ibid para 401.
[60] Specifically, the Court found violations of arts 1.1, 2, 4, 5, 7, 8, 19 and 25.
[61] See (n 56) paras 208, 400, 401. [62] ibid para 203. [63] See (n 56). [64] See (n 3).
[65] The work of the Council of Europe has also been significant. See: Council of Europe Committee of Ministers, Recommendation of the Committee of Ministers to Member States on the Protection of Women Against Violence, (30 April 2002) 5; and Council of Europe Parliamentary Assembly, Recommendation 1847 Combating Violence Against Women: Towards a Council of Europe Convention (3 October 2008). Rec 1847 (2008).
[66] See (n 3) para 192.

Observations on Turkey's combined fourth and fifth periodic reports.[67] The Court's judgment builds on an earlier body of case-law addressing the scope of States' positive obligations in the context of gender-based violence.[68] The previous failure to link gender-based violence to the ECHR non-discrimination norm had become increasingly conspicuous, given developments in human rights law at both UN and regional levels.

The characterization of violence against women as discrimination, by CEDAW and regional human rights bodies, is not without its difficulties. While the context of disadvantage and underlying hierarchies of power may be acknowledged by such characterization, the requirement of establishing discrimination is also constraining and places, as Edwards notes, an additional burden on the claim of violation.[69] The harm endured is defined not by the harm itself, but by its underlying cause. Such is the constraining force of the inherited structures of human rights law.

The European Court of Human Rights has, again, recently addressed the links between a generalized context of discrimination and States' obligations concerning domestic violence. The case of *N v Sweden*[70] involved an Afghan woman who argued that, if returned to Afghanistan, she would face a real risk of being persecuted, or even sentenced to death, because she had separated from her husband and was involved in an intimate relationship with another man. She further claimed that she risked being subjected to inhuman and degrading treatment in Afghanistan as her family had disowned her and she, therefore, would have no social network or male protection to safeguard against the real risks faced. Her application for asylum had been denied by the Swedish Migration Board, because of discrepancies and some delays in the evidence presented, and questions as to risks faced if returned to Afghanistan. The Court criticized the failure of the Board to take due account of the 'special situation of asylum seekers',[71] and emphasized the need to allow for minor inconsistencies in evidence submitted to support a claim.

In analysing the risks faced by the applicant, the Court drew, in particular, on the 2009 UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Afghan Asylum-Seekers.[72] The Guidelines highlight specific risks faced by women who have adopted a 'less culturally conservative lifestyle', including those returning from exile in Europe, who are perceived as, 'transgressing entrenched social and religious norms' and who may, as a result, be subjected to domestic violence and other forms of punishment.[73] The Court pointed out that, on return to Afghanistan, the

[67] See UN Doc CEDAW/C/TUR/4-5 and Corr.1, 15 February 2005.

[68] See: *X and Y v the Netherlands* A 91 (1985); 8 EHRR 235; *SW & CR v United Kingdom* A 335-C (1995); 21 EHRR 363; *Aydin v Turkey* 1997-VI; 25 EHRR 251; *E v United Kingdom* 36 EHRR 31; *MC v Bulgaria* 2003-XII; 40 EHRR 20; *Bevacqua and S v Bulgaria* Application No. 71127/01, Judgment of 12 June 2008; and *Maslova v Russia* 48 EHRR 37. For commentary see: P Londono, 'Developing Human Rights Principles in Cases of Gender-based Violence: Opuz v Turkey in the European Court of Human Rights' (2009) 9 Human Rights Law Review 657; C McGlynn, 'Rape, Torture and the European Convention on Human Rights' [2009] 58 ICLQ 565.

[69] A Edwards *Violence Against Women under International Human Rights Law* (CUP, Cambridge, 2010) 195.

[70] Application No. 23505/09, European Court of Human Rights, (20 July 2010) para 53.

[71] ibid.

[72] UNHCR, Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Afghanistan, (July 2009) Rev, available at: http://www.unhcr.org/refworld/docid/4a6477ef2.html, accessed 14 November 2010.

[73] ibid para 55.

applicant's spouse could decide to resume their married life together against her wish. The Court noted the 'gloomy figures' indicating the very high incidence of domestic violence in Afghanistan[74] and the recent passage of the Shiite Personal Status Law, which, requires, inter alia, women to comply with their husbands' sexual requests and to obtain permission to leave the home, except in emergencies. Significantly, the Court concluded that the 'general risk indicated by statistics and international reports' could not be ignored, and that the applicant faced 'various cumulative risks of reprisals,'[75] which fell within the scope of article 3 ECHR, from her husband, his family, her own family and from Afghan society. The case is significant in highlighting the *sur place* protection needs that can arise for women living in exile, and the absence of effective State protection that may be inferred from generalized situations of insecurity in a country of origin. The Court's reasoning and final conclusions place a significant burden on the returning State, in this case, Sweden, to demonstrate that an individual risk does not exist, where there is overwhelming evidence of a generalized context of discrimination and insecurity.

Taken together, these developments in international and regional human rights law have greatly expanded the scope of States' due diligence obligations, eroding the impunity long enjoyed by States in the context of domestic violence. As yet, these developments have not fully permeated refugee law, though cautious progress may be seen in the recognition of severe forms of domestic violence as potentially giving rise to asylum claims.

III. DOMESTIC VIOLENCE ASYLUM LAW IN THE US

A. In the Matter of R-A

The US case, *In the Matter of R-A*,[76] has come to symbolize the many forces that combine to deny survivors of domestic violence a legitimate place in asylum adjudication. *Rodi Alvarado* was finally granted asylum on 10 December 2009, after more than a decade of protracted legal battles. Her case highlighted the limited reach of gender guidelines in asylum proceedings and the vulnerability of asylum claims to migration 'panics'. *Rodi Alvarado* was a Guatemalan woman who had suffered severe domestic violence at the hands of her husband over a 10 year period. She repeatedly sought the assistance of law enforcement bodies in Guatemala, but to no avail. She finally fled to the US and sought asylum. Although initially granted asylum by an immigration judge, this decision was overturned by the Board of Immigration Appeals (BIA) in 1999. The decision was overturned, not because of a lack of a credibility or a denial of the severity of the harm suffered, but rather because of a failure to establish the necessary causal link with a Convention ground. This failure reflects the ongoing

[74] See (n 70) para 58. [75] ibid.

[76] *Matter of R-A*, 22 I&N Dec. 906 (BIA 1999), vacated, 22 I&N Dec. 906 (A.G. 2001), *remanded*, 23 I&N Dec. 694 (A.G. 2005), *remanded*, 24 I&N Dec. 629 (A.G. 2008). See: K Musalso, 'Matter of R-A: An Analysis of the Decision and its Implications' 76 Interpreter Releases 1177 (9 August 1999). Documentation and commentary in relation the case are available at the Centre for Gender and Refugee Studies, Hastings College of Law: http://cgrs.uchastings.edu/campaigns/alvarado.php, accessed on 21 March 2010. See: Harvard Immigration and Refugee Project, *Brief of Amici Curiae in Support of Affirmance of Decision of the Immigration Judge in Re R-A-A73-753-922*, available at: http://cgrs.uchastings.edu/campaigns/alvarado.php#advocacy, accessed on March 23 2011.

difficulties faced in 'fitting' gender related harms into the established categories of international law.

The BIA had accepted that Rodi Alvarado was a credible witness, and agreed that she had suffered 'heinous abuse', including repeated rapes and severe physical beatings which had, on occasion, rendered her unconscious.[77] The acts of violence occurred 'whenever [Ms Alvarado's husband] felt like it, wherever he happened to be: in the house, on the street, on the bus.'[78] The evidence submitted as to the prevalence of domestic violence in Guatemala, and the impunity enjoyed by perpetrators was not disputed by the BIA. It was accepted that Rodi Alvarado had repeatedly sought the protection of the police and had, on several occasions, fled her family home, only to be found again by her husband. On three occasions, the police had issued summons against her husband, but he did not appear. At least twice, Rodi Alvarado had contacted the police and requested assistance but they did not respond. When she appeared before a judge in proceedings against her husband, she was informed by the presiding judge that he did not interfere in, 'domestic disputes'.[79] The BIA concluded the level of harm endured by the claimant was more than sufficient to constitute persecution. However, in a divided opinion, they found that the required nexus with a Convention ground had not been established. Reflecting the continuing significance of divisions between the public and the private, the Board concluded that to find 'private acts of violence to be qualifying governmental persecution, by virtue of the inadequacy of protection,' would obviate the requirement of causality in the refugee definition.[80]

As the DHS was to note subsequently, the Board's reasoning on causality was fundamentally flawed. In arriving at its conclusions, the Board noted that no evidence had been submitted to suggest that domestic violence represented 'desired behavior within Guatemala or that the Guatemalan Government encourages domestic abuse.'[81] This failure to recognize the link between State inaction and the required Convention nexus went against evolving jurisprudence and refugee law standards on this issue. The UNHCR has explicitly pointed out that State inaction, the failure to protect, if linked to a Convention ground, satisfies the requirement of causality. The findings of the UK House of Lords in *Shah and Islam*,[82] decided just shortly before the *Matter of R-A*, were brought to the attention of the BIA, specifically to highlight the link between State inaction and the required Convention nexus. The Board, however, rejected the relevance of the case to either the causality argument or the possible nexus with a Convention ground. The Board also rejected the relevance of the INS Gender Guidelines to its findings, noting that while the Guidelines were instructive, they were not controlling and, in particular, did not answer the question of whether or when past spouse abuse might qualify a female applicant as a refugee under US asylum law. Abstracted from the context of impunity for domestic violence, and gendered societal inequalities, Alvarado was returned to the sphere of the domestic, and required to

[77] See *Matter of R-A* ibid 908.

[78] ibid 908–909.

[79] See: UNHCR, Re: Matter of Rodi Alvarado Peña (*A73-753*-922), Advisory Opinion on International Norms: Gender-Related Persecution and Relevance to 'Membership of a Particular Social Group' and 'Political Opinion' (9 January 2004) 3, available at: http://cgrs.uchastings.edu/campaigns/alvarado.php#advocacy, accessed on March 23 2011.

[80] ibid.

[81] See *Matter of R-A* (n 76) 923.

[82] *Islam (AP) v Secretary of State for the Home Department Regina v Immigration Appeal Tribunal and Another Ex Parte Shah (AP)* (Conjoined Appeals) [1999] 2 AC 629, [1999] 2 All ER 545.

demonstrate the precise motivations for her husband's systematic abuse. The context within which Rodi Alvarado endured 'heinous abuse' was denied legal significance.

Alvarado's asylum claim also foundered on the required fit with a Convention ground. Her assertion of persecution on grounds of political opinion and membership of a particular social group both failed. In a majority decision, the Board found that Rodi Alvarado had not succeeded in establishing that the violence she had endured was the result of her political opinion, or imputed political opinion, as to her gender role and status as a spouse. As was noted in subsequent submissions on the case, and in the dissenting opinion, the Board's rejection of the political opinion ground seemed to contradict its own statements on the nature of the abuse suffered in the case, and the repeated links made by Ms Alvarado's spouse to her status and role as a woman.[83] The Board's conclusion that motivation could not be definitively established was also at odds with its own jurisprudence and that of the US Supreme Court, which had found that motivation may be inferred from circumstantial evidence, including the socio-cultural or political purpose of the harm.[84] The UNHCR, in its advisory opinion on the case, highlighted the political nature of the abuse suffered pointing out that the abuse escalated following Ms Alvarado's attempted escapes or requests for assistance from State authorities.[85] The political context within which domestic violence occurs with impunity was highlighted by the dissent in the *R-A* case.[86] It was precisely this context of domestic violence, however, that was set aside by the majority opinion of the Board.

Defining a particular social group was also to prove problematic. As in many such cases, the scope and parameters of the proposed group were disputed. Ultimately, the Board found that the respondent has not shown that 'Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination' is a group that is recognized and understood to be a societal faction, or is otherwise a recognized segment of the population, within Guatemala.[87] The size of the potential social group, and the concomitant consequences for rising numbers of asylum applicants was clearly to the fore in the Board's decision. As the UNHCR and others noted, however, other Convention grounds are not restricted in this way, and jurisprudential authorities did not support such a finding.[88]

It would have been open to the Board to identify a sub-group of women making up a particular social group, such as happened in the *Kasinga* decision,[89] for example. The delineation of the sub-group in *Kasinga* has been criticized, however, and the suggestion that such a restriction would be preferable goes, again, beyond the recognition of gender as a distinguishing feature of the group in question, and a sufficient explanatory framework for the persecution experienced.[90] The UNHCR, in its advisory

[83] See Harvard Immigration and Refugee Project (n 76) 42.

[84] *See INS v Elias-Zacarias*, 502 US, 483 (proof of motive can be direct or circumstantial); *Matter of S-P-*, 21 I&N Dec. at 11–14 (examining circumstantial evidence of the social and political context of persecution in order to determine motive). Cited in Harvard Immigration and Refugee Project, Amiculs Curiae Brief, (n 83) 8.

[85] ibid.

[86] *In the Matter of R-A* (n 76) 925.

[87] ibid 918.

[88] See: UNHCR Re: *Matter of R-A*, Advisory Opinion, (n 79) 8.

[89] *In re Kasinga*, Interim Dec. 3278 (BIA 1996).

[90] See A Macklin, 'Refugee Women and the Imperative of Categories' (1995) 17 Human Rights Quarterly 213, 247, making this argument in an analysis of the Canada's Immigration and Refugee Board 1993 guidelines: *Women Refugee Claimants Fearing Gender-Related Persecution*, Immigration and Refugee Board, Guidelines Issued by the Chairperson pursuant to section 65(3) of the Immigration Act, (1993).

opinion on the case, had argued that Ms Alvarado could be identified as a member of a particular social group because of her sex, her marital status and her position in a society that condones discrimination against women.[91] Having sought the protection of the State, and having complained of her abuse, she could be identified as a woman who had, 'transgressed social mores' in her society, where women were 'expected to accept their fate'. This view was not heeded, however.

B. A Decade of Political Debate, Advocacy and Final Resolution

The BIA's findings in the *Matter of R-A* attracted widespread criticism and spurred a nationwide campaign on gender, domestic violence and asylum that was ultimately to span three US Presidential administrations. Responding to the BIA's decision, immigration lawyers and academics argued that the decision was inconsistent with the growing international consensus amongst the international community, including within the US, recognizing the gravity of gender-related persecution and the potential for inclusion of such claims within the particular social group ground. In January 2001, then-Attorney General Janet Reno overturned the BIA's decision, and ordered the Board to reconsider the case and issue a new decision pending the issuance of proposed Department of Justice regulations on the subject of particular social group and gender.[92] Those regulations, however, were never finalized by the Bush Administration. In February 2003, Attorney General Ashcroft certified the decision on the case to himself, and ordered a supplementary briefing on Rodi Alvarado's, 'eligibility for relief under the Immigration and Nationality Act'. In its 2004 briefing to the Attorney General, the Department of Homeland Security (DHS) concluded that Rodi Alvarado was eligible for asylum and that no bar existed to the granting of asylum.[93] On a best reading of existing legal standards, they argued, 'married women in Guatemala who are unable to leave the relationship' is a particular social group and Ms Alvarado was a member of that group.[94] They concluded that the reasoning of the BIA on causality, and on membership of a particular social group, was flawed, and argued that the case was now moot as both parties agreed on the proposed outcome. Given this agreement, they suggested that a grant of asylum be issued in the case, without an opinion, to allow for the rulemaking process on gender related persecution and membership of a particular social group to evolve in a cautious and coherent manner. In 2005, however, Attorney General Ashcroft remanded the case for reconsideration to the BIA again, pending issuance of the gender and social group regulations.[95] Finally in September 2008, recognizing perhaps that progress on this matter was now unlikely, Attorney General Mukasey ordered the BIA to reconsider the case, this time, however, removing the

[91] See (n 79) 9.

[92] See *Attorney General Reno's order overturning the decision in Matter of R-A- (January 19, 2001*), available at: http://cgrs.uchastings.edu/campaigns/alvarado.php, accessed 21 March 2010, See also: *Proposed Regulations on Gender/social group—Asylum and Witholding Definitions, Department of Justice, Immigration and Naturalization Service*, 65 Fed. Reg. 76588-98 (Dec 7, 2000).

[93] JD Whitley, Department of Homeland Security General Counsel et al, 'US Department of Homeland Security's Position on Respondent's Eligibility for Relief (in re: Rodi Alvarado Peña, respondent).' File No.: A 73 753 922, San Francisco, (19 February 2004).

[94] ibid 33.

[95] Attorney General Ashcroft's January 2005 order remanding *Matter of R-A* back to the BIA, available at: http://cgrs.uchastings.edu/campaigns/alvarado.php.

requirement that the decision await the issuance of the proposed regulations.[96] Following a joint motion from Ms Alvarado's advocates and the DHS, the case was remanded back to immigration court to allow for additional evidence to be presented on the social visibility and particularity of her social group.

Prior to the final decision in the *Matter of R-A*, the DHS was requested to submit a supplemental briefing in another domestic violence case, the *LR* case, involving a woman and her two sons who had fled Mexico and sought asylum in the US.[97] In its briefing, the DHS accepted that considerable confusion surrounded the definition of a particular social group in domestic violence cases. Adopting a contextual approach, one that appeals directly to the societal context within which abuse is perpetrated, the Department suggested that a particular social group might be defined in light of evidence as to how the claimant's abuser and her society perceived her and her role within the domestic relationship. The DHS briefing set out a framework under which victims of domestic violence might be able to advance 'cognizable asylum claims'. This framework, which was not intended to be exhaustive, focused on possible social group formulations that might be drawn upon, with the caveat that the particularity of any social group would remain to be defined on a case-by-case basis.[98]

In *LR*, the DHS concluded that the applicant had failed to establish that protection was unavailable to her in her country of origin, Mexico, or that internal relocation was not reasonable. Despite this conclusion, the DHS briefing was pivotal to the later developments in the *R-A* case. The subsequent submission by Ms Alvarado's advocates to the BIA, drew on the DHS brief in *LR* and argued that Ms Alvarado's proposed social group—'married women in Guatemala who are unable to leave the relationship'—was defined by immutable characteristics and fulfilled the new social visibility and particularity requirements that had emerged from BIA jurisprudence[99] and UNHCR guidelines since the initial hearing in 1999.[100] In October 2009, the DHS

[96] See Attorney General Mukasey's September 2008 order to the BIA to reconsider the case, removing the requirement that the BIA await the issuance of proposed regulations, available at: http://cgrs.uchastings.edu/campaigns/alvarado.php.

[97] Department of Homeland Security, Supplemental Briefing, *In the Matter of L-R*, submitted, (13 April 2009), available at: http://cgrs.uchastings.edu/pdfs/Redacted%20DHS%20brief%20on%20PSG.pdf, accessed 23 March 2011.

[98] ibid 11–12, See commentary in *New York Times*: J Preston, 'New Policy Permits Asylum for Battered Women' (New York New York July 15, 2009) available at http://www.nytimes.com/2009/07/16/us/16asylum.html?_r=1.

[99] See In re A-M-E & J-G-U-, 24 I&N Dec. 69 (BIA 2007): '(1) Factors to be considered in determining whether a particular social group exists include whether the group's shared characteristic gives the members the requisite social visibility to make them readily identifiable in society and whether the group can be defined with sufficient particularity to delimit its membership.'

[100] See UNHCR, Guidelines on International Protection No. 2: 'Membership of a Particular Social group' within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (HCR/GIP/02/02), adopted 7 May 2002. The UNHCR recommends a reconciliation of the 'social perception,' and 'protected characteristics' approaches to determining membership of a social group, ibid para 11. The definition of particular social group was the subject of some controversy in the drafting of the EU Qualification Directive, with concerns remaining that there continue to be gaps in protection, as a result of the definition adopted, which requires a combination of both approaches, see (n 7) art 10(1)(d). See: H Storey, 'EU Refugee Qualification Directive: A Brave New World?' (2008) 20 International Journal of Refugee Law 1, 1–49; H Lambert, 'The EU Asylum Qualification Directive, its Impact on the Jurisprudence of the United Kingdom and International Law' (2006) 55 ICLQ 1, 161–192.

filed its response in the case, taking the position that Ms Alvarado was 'eligible for asylum and merits a grant of asylum as a matter of discretion.'[101] On December 10, 2009, the immigration judge issued a summary decision granting Ms Alvarado asylum, and with that, Rodi Alvarado's long struggle for asylum was finally resolved.[102]

IV. THE CATEGORIES OF REFUGEE LAW: CONTINUING BARRIERS TO INCLUSION

The ineffectiveness of States in responding to even very severe forms of domestic violence, is highlighted in the expanding body of case-law now emerging from international and European human rights bodies. The standard of due diligence applied in such cases, however, is not yet applied as the norm in assessing the adequacy of State protection in asylum claims. The categories of refugee law, though they have become more porous over the last decade, continue to pose obstacles to domestic violence asylum claims. The *Matter of R-A* highlights the many challenges that women face in presenting a gender-related asylum claim.[103] The recognition that domestic violence engages the responsibility of the State has come late to international human rights law and continues to be resisted by States, even where there is strong evidence to suggest that the actions or omissions of the State demonstrate a failure to protect.

A. Establishing a Nexus with a Convention Ground

Progressive developments in human rights law are often slow to cross over into refugee law, reflecting the peculiar challenge to State sovereignty that comes with a request for asylum. Immigration remains one of the last bastions of State sovereignty and asylum adjudication is often tainted by immigration control concerns. Domestic violence asylum claims are no exception, and may perhaps be even more vulnerable to these concerns. The gate-keeping function of refugee law is evident throughout the *Matter of R-A* proceedings. In its 2004 briefing, the DHS repeatedly expressed caution on the need for coherent and careful development of this body of law, seeking repeatedly to narrow the scope of the particular social group to which Ms Alvarado could appeal. Domestic violence is not the story of an 'exotic other female,'[104] it is a story that is familiar and endemic. Given the often less than exemplary record of receiving States, asylum adjudicators may be reluctant to cast judgment on the record of the country of origin, when faced with a familiar account of intimate violence. Although domestic violence has now been included within the international legal lexicon of prohibitions on torture and inhuman treatment, its essentially political nature continues to be disputed in asylum claims and, as in the *R-A* jurisprudence, can be difficult to sustain in a

[101] See Documents and Information on Rodi Alvarado's Claim for Asylum in the US, Current Updates, available at: http://cgrs.uchastings.edu/campaigns/alvarado.php, accessed 23 March 2011.

[102] K Musalo, 'A Short History of Gender Asylum in the United States: Resistance and Ambivalence May Very Slowly be Inching Towards Recognition of Women's Claims' 29 2010 Refugee Survey Quarterly 46.

[103] See generally MS Ciancarulo and C David, 'Pulling the Trigger: Separation Violence as a Basis of Refugee Protection for Battered Women' (2009) 59 American University Law Review 2, 337–384.

[104] K Engle, 'Female Subjects of Public International Law: Human Rights and the Exotic Other Female' (1992) 26 New England Law Review 1509.

sceptical asylum adjudication process. Difficulties encountered in establishing the required nexus with political opinion, are mirrored in the much contested particular social group ground. The continuing difficulty that is encountered in defining the particular social group to which a woman fleeing a situation of domestic violence belongs, highlights the additional burdens, the layers of disadvantage, that have to be overcome when presenting such claims.[105]

As is now well documented, the judgment of the House of Lords in *Shah and Islam*[106] played a key role in challenging interpretations of refugee law that hindered the recognition of domestic violence asylum claims. The history of this case itself reveals the implicit and sometimes explicit assumptions that operate in gender asylum adjudication. Both women had fled Pakistan, having experienced domestic violence and abuse, and had sought asylum in the UK. *Shah* claimed that if forced to return to Pakistan she would be subject to false accusations of adultery, and to further violence from her husband. Her application for asylum was denied on the ground that she did not fall within a 'particular social group'. An appeal against this finding failed, and leave to review the IAT's decision was granted, despite the position of the Secretary of State that the claim to refugee status was, as a matter of law, 'unsustainable.'[107] The second appellant, *Islam*, was a teacher, who had been subject to accusations of infidelity from a political faction in her school following her intervention in a dispute with opposing factions. She was subsequently assaulted by her husband, who was sympathetic to the accusing faction, and twice hospitalized. In rejecting her claims, the Chairman of the IAT had warned against 'overt and implicit criticisms of Pakistani society and the position of women in that and other Islamic states.' The purpose of the Convention, he said, was not to 'award refugee status because of a disapproval of social mores or conventions in non-western societies.'[108] Here, the conflation of social mores and conventions with discrimination and persecution is evident. On this reading of refugee law, the very pervasiveness of the problem of domestic violence brings into question the validity of the human rights norms impugned and their application to the domestic sphere. The relativism underpinning the IAT's findings, the failure to recognize the rights claims arising and the concern with comity between States, were roundly criticized by the House of Lords. It is perhaps in Lord Hoffman's judgment that the significance of gender to the claim is most strongly acknowledged. There was, he said, nothing personal about the State's unwillingness or inability to provide protection in these cases. 'The evidence', he concluded, 'was that the State would not assist them because they were women. It denied them a protection against violence which it would have given to men.'[109] Earlier, however, Lord Hoffman had found that the threat of violence to the claimants from their husbands was 'a personal affair, directed against them as individuals.' It was only in finding of a failure of State protection, that the political nature of the violence endured was recognized. The public/private divide remained essentially intact.[110]

[105] See also *In re D-K-, slip. op. at 4 (EOIR Immigr. Ct. Dec. 8, 1998)*, available at http://www.uchastings.edu/cgrs/law/ij/117.html, (accessed on March 23 2011), and discussed in: L Nessell '"Willful Blindness" to Gender-Based Violence Abroad: United States' Implementation of Article Three of the United Nations Convention Against Torture' (2004) 89 Minn LR 1, 71–162. [106] See (n 80). [107] See (n 80) per Lord Steyn.
[108] Cited by Lord Hoffman, (n 80). [109] ibid.
[110] See A Edwards, *Violence Against Women Under International Human Rights Law* (CUP, Cambridge, 2010) 192.

In *Shah and Islam*, as in the *Matter of R-A*, finding a nexus with a Convention ground was also to prove problematic. The claim of persecution on grounds of political opinion was dismissed as being, 'unsustainable,'[111] despite the Court's finding that discrimination against women in Pakistan was institutionalized in the law and practice of the State itself. This finding reveals again the difficulties of capturing women's human rights claims within the Convention's political opinion ground. Having dismissed political opinion as a relevant nexus, much of the debate before the House of Lords turned on how to define the particular social group. Ultimately the Court found by a majority, (Lord Millet dissenting), that 'women of Pakistan' or 'women who had offended against social mores or against whom there were imputations of sexual misconduct', could form a particular social group within the meaning of the Convention.[112] Cohesion within the group was not considered to be a requirement of refugee law, a finding that was subsequently confirmed by the UNHCR in its *Guidelines on Membership of a Particular Social Group*.[113]

The House of Lords judgment in *Shah and Islam* marked a significant turning point in gender asylum law in the UK and elsewhere. In *Khawar*, the Federal Court of Australia found that a woman fleeing domestic violence might be entitled to asylum if she could demonstrate sustained or systemic absence of State protection.[114] Again, in *Khawar*, it had been argued that width of the social group postulated, made it difficult to establish a causal nexus with a Convention ground. Citing the House of Lords in *Shah and Islam* however, the Court found that once the focus shifted, properly, to the failure of State protection, it was possible to define with precision a particular social group from whom the State and its agencies had withdrawn protection.[115] Notably, in both the *Shah and Islam* and the *Khawar* cases, the courts drew heavily on domestic gender guidelines, and on UNHCR guidelines and ExCom Conclusions. In Canada, the question of how a particular social group should be defined so as to include women fleeing persecution has attracted much attention. In *Mayers and Marcel v MEI*,[116] a case decided by the Federal Court of Appeal prior to the adoption of Gender Guidelines, the Court ruled that the appellant could be found to belong to a social group comprised of 'Trinidadian women subject to wife abuse.' In a later case, a young Zimbabwean woman forced into a polygamous marriage with an abusive husband, was defined as belonging to a particular social group to which she belonged as 'unprotected Zimbabwean women or girls subject to wife abuse.' [117]

The broader approach to defining a social group, drawing on *Shah and Islam*, was evident in a subsequent decision of the Refugee Status Appeals Authority in New Zealand,[118] where it was found that women of Iran constituted a particular

[111] ibid. [112] See (n 80) 645, 655, 658–659. [113] See (n 100).

[114] *Minister for Immigration & Multicultural Affairs v Khawar* [2000] FCA 1130, per Lindgren J, para 160.

[115] ibid. In a minority judgment, Callinan J in the High Court rejected the claim of persecution in this case, noting that 'elements of deliberation and intention on the part of the State', were required to establish the necessary causal link between the abuse suffered and the failure of state protection, *Minister for Immigration v Khawar* [2002] HCA 14; 210 CLR 1; 187 ALR 574; 76 ALJR 667 (11 April 2002), para 156. With the emergence of a jurisprudence of positive obligations, premised on the due diligence standard, this requirement clearly falls short of the standard to which States must be held.

[116] (1992), 97 DLR (4th) 729 (FCAD).

[117] CRDD No. U92-06668 No. U92-06668, Smith, Daya, (19 February 1993).

[118] Refugee Appeal No. 71427/99 (NZ) [2000] INLR 608.

social group. In justifying this finding, the Appeals Authority noted that the 'overarching characteristic of those fundamentally disenfranchised and marginalized by the state is the fact that they are women.'[119] It was not accepted that the violence suffered by the asylum applicant at the hands of her husband was for reasons of membership of a social group or political opinion. It was accepted, however, that the failure of State protection was because of her membership of a particular social group, religion and political opinion, and she was therefore found to be entitled to refugee status on that basis. A systematic failure of State protection was identified in this case, recognizing, as Macklin has noted, that the failure to protect women from intimate violence represents 'an uncoordinated yet highly efficient matrix of inertia, consolidated at all loci of the criminal justice system.'[120] In recognizing women of Iran as a particular social group, the case goes beyond the more limiting, and in some cases tautological, claims that the social group must be limited further, for example to women who are at risk of spousal or intimate partner abuse. Gender is recognized as the relevant variable here, in assessing the reasons for persecution.

In the *Fornah* case,[121] the House of Lords again addressed the applicability of the social group ground to gender asylum cases, this time in the context of female genital mutilation. Situating the case within the broader context of gender discrimination, Lord Bingham distinguished the particularity of the relevant group, either 'women of Sierra Leone' or 'intact or uninitiated women and girls who are in tribes in Sierra Leone which practice FGM'.[122] Addressing a dispute that had remained post *Shah and Islam*, on the potential for circularity in the identification of a particular social group, he concluded that the distinguishing feature of the group in this case, was not the persecution complained of, but rather the 'position of social inferiority as compared with men,'[123] within which women in Sierra Leone found themselves. The case is significant in linking the harm complained of to the broader context of gender discrimination and failure of State protection, a link that has been made by both international and regional human rights bodies.

B. Gendered Persecution, Stereotypes and the Need for Greater Specificity

The risk of essentializing the position of all women in a particular society is a risk that must be continuously attended to in assessing progress in asylum adjudication. It is a risk that is particularly evident when women's claims are constrained within the parameters of the particular social group ground. The asylum adjudication process is sometimes criticized for positing a 'victim subject', denied of agency, defined by patriarchal forces of religion and culture,[124] with limited attentiveness to the historical, socio-economic and cultural specificities that shape and define experiences of gender discrimination, and that fragment the categories of gender and women.[125]

[119] ibid para 108.
[120] ibid 234.
[121] *SSHD v K and Fornah v SSHD* [2006] UKHL 46, [2007] 1 AC 412, [2007] 1 All ER 671, [2006] 3 WLR 733.
[122] ibid, per Lord Bingham of Cornhill, [2006] UKHL 46, para 31.
[123] ibid.
[124] R Kapur, 'The Tragedy of Victimzation Rhetoric: Resurrecting the "Native" Subject in International/Post-Colonial Feminist Legal Politics' 15 Harvard Human Rights Journal.
[125] See SM Akram, 'Orientalism Revisited in Asylum and Refugee Claims' (2000) 12 Int J Refugee Law 7.

The categories of refugee law reinforce such tendencies. More nuanced presentations of gendered persecution risk falling victim to the all encompassing requirements to demonstrate a failure of State protection, the absence of an internal protection alternative, or nexus with a Convention ground, and so 'women of Pakistan' becomes a social group in the quest to make an asylum claim 'fit' with refugee law's categories.[126]

Refugee women fleeing domestic violence may often find themselves in a double bind.[127] In presenting a claim for protection, it becomes necessary to position the asylum applicant as an abject victim, powerless in the face of the coercive powers of state or non-state actors. The gendered stereotypes of 'Third World women' are thereby reinforced.[128] The racial 'othering' of the asylum applicant also poses a barrier to domestic violence asylum claims, as presumptions concerning the extent of domestic violence in a particular society reinforce the view that to recognize a claim for asylum would open floodgates.[129] The imperiled Muslim woman, and the dangerous Muslim man, are now familiar tropes in Western societies.[130] Such tropes bring with them assumptions as to the status and position of women in majority Muslim countries, which may not always work in favour of the female asylum applicant.

The rhetoric of international discourse on violence against women is not always matched by effective State protection on the ground. A preoccupation with immigration control continues to limit the willingness of States to grant asylum, particularly when faced with a human rights violation that is both familiar and endemic. This gap between the rhetoric of human rights norms and the reality of protection offered is not unique to the domestic violence context. Dauvergne and Mills have highlighted similar gaps in asylum practice on forced marriage claims, despite the rhetoric of laws and policy that claim to combat forced marriages.[131] As Goodwin-Gill has noted, self-interest rather than humanitarian concerns, has often been a primary motivating factor in State responses to refugee flows.[132] In recent years, we have increasingly seen Muslim women placed at the center of the Islamic world versus human rights dialectic. Against this background, it may well serve the interests of States to condemn the human rights record of the country of origin, and to do so by extending a grant of asylum. Only a handful of asylum claims, however, attract the kind of media attention that lead to such politicking. Many others fall below the radar, and despite much

[126] See ZH (Women as Particular Social Group) Iran CG [2003] UKIAT 00207, in which women in Iran were found not to constitute a social group.

[127] See Macklin (n 90) 263–264. See also: D McGoldrick, 'Accommodating Muslims in Europe: From Adopting Sharia Law to Religiously Based Opt Outs from Generally Applicable Laws' (2009) 9 Human Rights Law Review 603.

[128] See A Sinha, 'Domestic violence and US asylum law: eliminating the "cultural hook" for claims involving gender-related persecution' (2001) 7 NYU L Rev 6, 1562–1598.

[129] See C Dauvergne and J Millbank, 'Forced Marriage as a Harm in Domestic and International Law' (2010) 73 Modern Law Review 57, discussing such 'racial othering' in the context of forced marriage asylum claims.

[130] S Razack, 'Dangerous Muslim Men, Imperiled Muslim Women and Civilized Europeans: Legal and Social Response to Forced Marriages.' (2008) 12 Feminist Legal Studies 2, 129–174.

[131] See (n 129).

[132] See G Goodwin-Gill, 'The Politics of Refugee Protection' (2008) 27 Refugee Survey Quarterly 8.

rhetoric, at both national and international levels, the day to day practice of asylum adjudication leaves many protection gaps.

As with any totalizing movement, there is always a 'remainder'. In domestic violence claims, the specificity of an applicants claims frequently bring to the fore many overlapping axes of persecution. The risks that arise when the specificity of an applicant's claims are ignored, or denied, is evident when claims seek to highlight the intersecting risks of gender and sexual orientation related persecution. The case of *MK (Lesbians) Albania CG* involved an Albanian lesbian woman who had claimed, inter alia, to be at risk of domestic violence if returned to Albania.[133] The Asylum and Immigration Tribunal criticized the earlier findings of the Immigration Judge, who had relied on outdated Country Guidance decisions in the cases of *IM* and *DM*,[134] which related to the risks faced by male homosexuals and women as a particular social group in Albania. The need for greater specificity in the assessment of risks faced by lesbian women was highlighted by the Tribunal.[135] Such information is not always readily available, however, and within the context of accelerated procedures and limited rights of appeal, errors can be difficult to correct.

C. Risk, Internal Relocation Alternatives and Credibility Assessments

The prevalence of domestic violence in all societies can often lead to the severity of domestic violence as persecution, in and of itself, being denied. In asylum jurisprudence, repeated reference is made to severe forms of domestic violence as persecution or to recognition of domestic violence as amounting to persecution when combined with other more 'exotic' claims, such as female genital mutilation or forced marriage. The caution surrounding the final resolution of the *R-A* case in the US highlights the continuing requirement of a very high threshold of suffering, below which a failure of State protection can be tolerated. It is notable that in several of the cases outlined above, in which the failings of States have attracted the condemnation of international human rights bodies, or asylum has been granted, deaths of family members or of the abuse victim herself, have occurred.

A certain tolerance of risk is evident also in the assessment of possibilities of internal relocation for an asylum applicant.[136] In line with UNHCR guidelines[137] and case-law,[138] an internal relocation alternative must be reasonable. To date, the internal relocation alternative has not fit easily with norms of State protection that require due

[133] *MK (Lesbians) Albania CG* [2009] UKAIT 00036 (9 September 2009).

[134] See: IM (Albania) CG [2003] UKIAT 00067 and DM Albania CG [2004] UKIAT 00059.

[135] See (n 133) Appendix A, para 43.

[136] See: *AB (Jamaica) v Secretary of State for the Home Department* [2008] EWCA Civ 784 (02 April 2008); *FS (domestic violence, SN and HM, OGN) Pakistan CG* [2006] UKAIT 00023 (13 March 2006); *SN & HM (Divorced women, risk on return) Pakistan CG* [2004] UKIAT 00283 (25 May 2004).

[137] UNHCR, Guidelines on International Protection: 'Internal Flight or Relocation Alternative' in the Context of Article 1A(2) of the 1951 Convention and/or Protocol Relating to the Status of Refugees' (23 July 2003) UN Doc HC/GIP/O3/04.

[138] *Robinson* [1997] EWCA Civ 2089, *AE and FE* [2002] UKIAT 036361. In the context of internal relocation and the protection against *refoulement* afforded by art 3 ECHR, see *Salah Sheekh v the Netherlands* (11 January 2007).

diligence, not only to investigate and punish domestic violence, but also to ensure that effective systems are in place to prevent such violence.[139] The internal relocation imperative puts the burden back on the domestic violence victim to escape the perpetrator(s) of abuse. The reasonableness of the relocation alternative in domestic violence asylum cases, and the effectiveness of State protection, is not yet being subjected to the same level of scrutiny as is seen in the case-law arising under CEDAW's Optional Protocol, or in regional human rights bodies. Reasonableness tends to be assessed from the perspective of the resources and opportunities available to the asylum applicant, rather than through scrutiny of the actions of the State, or of its due diligence obligations. In the *SN & HM* case, the UK Asylum and Immigration tribunal assessed the reasonableness of relocation within Pakistan for women fleeing domestic violence.[140] Although it was accepted that progress in improving State protection was slow, and that the availability of shelters and other supports for victims of domestic violence was limited, the Tribunal concluded nonetheless that possibilities for relocation existed. In arriving at its conclusion, the Tribunal asked whether protection was available from the Pakistani State, from a woman's own family members, or from a current partner or his family.[141] The suggestion by the Tribunal is that the obligation of the State to provide protection may be discharged by the goodwill of NGOs or family members. The State may, on this line of reasoning, be left off the hook.

Procedural and evidentiary hurdles also continue to present significant barriers to gender asylum claims, and the expanding use of accelerated determination procedures can make access to the regular asylum process difficult.[142] Refugee women face particular difficulties in establishing credibility, despite more than a decade of gender guidelines on international protection standards and procedures.[143] As Munro and others have argued, improved practices within the criminal justice system relating to domestic violence have not yet been transferred to asylum services or to the asylum adjudication process. The disparities in practice as between criminal justice and the asylum system are evident, for example, in how late disclosure of domestic violence allegations are received.[144] In the asylum system, late disclosure can bring into question the reliability of the evidence submitted and the credibility of the applicant. Narrative inconsistencies, calm demeanor or late disclosure of evidence, are often viewed negatively in assessing the credibility of the asylum applicant.[145]

[139] C Bennett, *Relocation, Relocation: The impact of Internal Relocation on Women Asylum Seekers*, (Asylum Aid, UK, 2008) available at: www.asylumaid.org.uk/.../Relocation_Relocation_research_report.pdf, accessed 23 March 2011.

[140] *SN & HM (Divorced women, risk on return) Pakistan CG* [2004] UKIAT 00283 (25 May 2004). See also *KA and Others (domestic violence risk on return) Pakistan* CG [2010] UKUT 216 (IAC), confirming that the guidance given in *SN & HM* remained valid.

[141] ibid para 48.

[142] See Human Rights Watch (2010) (n 151).

[143] Asylum Aid *Unsustainable: the quality of initial decision-making in women's asylum claims* (Asylum Aid: January 2011, London, UK), available at: http://www.asylumaid.org.uk/pages/.html, accessed on March 23 2011.

[144] See H Baillot, S Cowan and VE Munro, 'Seen But Not Heard? Parallels and Dissonances in the Treatment of Rape Narratives Across the Asylum and Criminal Justice Contexts' (2009) 36 Journal of Law and Society 2, 195–219, discuss a range of measures designed to facilitate and support disclosure of rape within the criminal justice process.

[145] *AS (Pakistan) v Secretary of State for the Home Department* [2007] EWCA Civ 703 (21 June 2007), involving a domestic violence claim, in which it was found that inconsistencies in the applicant's testimony can lead to a finding of lack of credibility.

These findings of a lack of credibility also affect the claims presented by minors in domestic violence cases,[146] reinforcing what Jacqueline Bhabha has documented as the tendency to view refugee children as migrants first, and in need of protection, second.[147]

Negative findings on credibility can lead to asylum claims being diverted through accelerated procedures, with reduced time limits and rights of appeal, an outcome that stands in marked contrast to the reforms that have been made in the operation of criminal justice systems in addressing crimes of domestic violence. Findings of lack of credibility persist, even in the face of reliable expert evidence. In the recent UK case of *VH (Malawi) v Secretary of State for the Home Department*,[148] the Court of Appeal strongly criticized the Asylum and Immigration Tribunal for dismissing, 'as speculative', expert evidence as to child custody practices in divorce proceedings, including in cases involving severe forms of domestic violence, such as this one. Although the applicant's claim was ultimately upheld by the Court, it is difficult to understand why such a protracted legal process was necessary to vindicate the rights claims arising.

The opportunities for women to recount their own narratives, an important step in disclosing domestic violence, are seriously constrained by the limits and forms imposed by the asylum process and the constant return to the categories of refugee law. Assumptions as to appropriate victim behaviour may also hinder credibility assessments, or a willingness to acknowledge the severity of the risk faced. Such assumptions can be particularly problematic in the context of domestic violence, where a woman's previous conduct in remaining within an abusive relationship or seeking to limit the sanctions imposed by law enforcement bodies may not fit well with the expectations of 'discontinuity' and rupture that attend asylum claims.[149]

Disclosure and reporting of domestic violence, particularly sexual violence, requires a 'leap of faith' on the part of the asylum applicant. It requires a safe, non-judgmental environment, in which there is a possibility of trust and the potential of refuge.[150] This can be difficult to secure in the asylum context, where adjudicators may be preoccupied with factual details concerning country of origin information, travel routes, or alternative protections sought by the applicant. Access to the regular asylum procedure will depend on overcoming initial check-lists concerning routes of travel, documentation of identity and status, and 'fit' with complex legal categories. Given that domestic violence touches deeply on the affective realm, the obstacles to disclosure, to consistent and coherent narratives, are many.

V. CONCLUSION

Most notable in the case law on domestic violence asylum cases is the limited reference to recent developments in international human rights standards on domestic

[146] See *MD (Guinea) v Secretary of State for the Home Department* [2009] EWCA Civ 733 (17 June 2009), in which a 17-year-old, fleeing domestic abuse, was denied asylum because of a lack of credibility.

[147] J Bhabha, 'Arendt's Children: Do Today's Migrant Children Have a Right to Have Rights?' (2009) 31 Human Rights Quarterly 410.

[148] [2009] EWCA Civ 645 (02 July 2009). [149] See (n 29). [150] See (n 1448) 207.

violence, and to the standard of due diligence in particular. The worlds of refugee and human rights law continue to remain apart. The robust approach taken by international and regional bodies, in assessing the adequacy of State protection and the State's positive obligations of due diligence, could usefully inform the practice of refugee law on the availability of State protection and the risks of *refoulement* facing survivors of domestic violence if returned to their countries of origin. If applied in the context of asylum adjudication, the due diligence standard would require much greater scrutiny of States' legislative and policy frameworks on domestic violence and of law enforcement practices on the ground, than has occurred to date. The reasonableness of relocation alternatives would also be open to much greater questioning to assess whether or not due diligence obligations are being fulfilled by States.

Many of the earlier obstacles that faced asylum claimants fleeing domestic violence have been overcome. The expansion of international human rights standards which clearly name domestic violence as a human rights violation has removed doubts about the international legal obligations that are engaged by failures of States to ensure effective protection. Severe forms of domestic violence are now recognized as constituting persecution, where a failure of State protection is established. Persecution by non-state actors is recognized as falling under the scope of the Convention definition of a refugee, and the required nexus with a Convention ground may be established by defining a particular social group or potentially by recognizing the political nature of the claim, although difficulties in such attempts persist. The political nature of domestic violence, and of resistance to such abuse, continues to be challenged. While the particular social group ground has been interpreted to include a range of gender-related claims, this has often meant that other possible Convention grounds, such as political opinion or religion, are overlooked. The politics of resisting domestic violence may still be viewed as a personal matter, unless the State is engaged, and so the 'political opinion' ground of refugee law frequently remains beyond the reach of refugee women.

The path of progress is not without obtacles. Gender guidelines for asylum adjudication have been adopted only in a minority of jurisdictions worldwide, and their effectiveness, where adopted, continues to be disputed.[151] Many of the challenges that are now faced by asylum applicants bubble beneath the surface, less likely to raise the grand conceptual debates that for so long preoccupied asylum adjudicators. Instead, it is the lower level preoccupations with credibility, availability of protection and internal relocation that now function as the primary gatekeepers in asylum adjudication. Overcoming these barriers will require much greater attention to, and application of, the standards of international human rights law. As we have seen, recent years have witnessed significant developments in international human rights law. An expanded transnational judicial dialogue is bringing positive obligations jurisprudence to bear on the issue of domestic violence. The due diligence standard, developed through CEDAW's Optional Protocol jurisprudence and the case-law of the European and Inter-American human rights systems, holds out considerable potential to raise the bar

[151] See Human Rights Watch, *Fast-Tracked Unfairness: Detention and Denial of Women Asylum Seekers in the UK* (23 February 2010) available at http://www.hrw.org/node/88671, accessed 21 March 2010, 7.

in assessing the adequacy of State protection in domestic violence asylum proceedings. As the CEDAW Committee has noted, legislative and policy frameworks need to be supported by the everyday practices of State actors. Such a requirement would bring the practice of refugee law closer to recognizing the 'everyday life' realities of domestic violence.[152]

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[152] On an international law of everyday life, see H Charlesworth, 'International Law: A Discipline of Crisis' (2002) 65 Modern Law Review 377.

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