

# REFUGE FROM VIOLENCE?

## A Global Comparison of the Treatment of Domestic Violence Asylum Claims

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### INTRODUCTION

While domestic violence has been recognized as an international human rights issue, States consistently fail to meet their domestic and international obligations to adequately address and protect against domestic violence. This failure is compounded when domestic violence survivors seeking asylum face a myriad of obstacles in having their claims approved. This note uses a comparative framework to critically examine the treatment of domestic violence-based asylum claims in a number of countries, and to offer recommendations to alleviate the challenges that domestic violence survivors face when they seek asylum. In order for these recommendations to be effective, however, refugee-receiving States will have to reckon with the prevalence of domestic violence and with their own failures to adequately protect against and address the harms of domestic violence within their own countries.

Asylum seekers fleeing domestic violence face a number of obstacles in countries throughout the world. For example, States often have not recognized gender as a protected ground for persecution. Narrow definitions of “particular social group” (PSG) constrict claims; for example, the PSG “married women in Guatemala who cannot leave their relationship” excludes those who were not living with their abusers or whose abusers are not their spouses.<sup>1</sup> Additionally, because abusers are often private actors, it can be difficult for those seeking asylum to prove that the State was unable or unwilling to protect them.<sup>2</sup> For example, in 2018, former United States’ Attorney General Jeff Sessions ruled adversely in *Matter of A-B-*, which attempts to place a higher burden on those seeking asylum based on persecution from private actors.

One underlying problem is the way that refugee-receiving States view asylum claims of domestic violence, since domestic violence against women<sup>3</sup> occurs within their own countries. As described by Efrat Arbel in the context of Canada, domestic violence claims challenge countries’ conceptions of themselves and challenge the way they exoticize persecution. However, this phenomenon is widespread beyond Canada. It becomes difficult for countries to accept domestic violence claims when domestic

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1. See, e.g., *In re A-R-C-G- et al.*, 26 I&N Dec. 388 (B.I.A. 2014).

2. See, e.g., *In re A-B-*, 27 I&N Dec. 316 (A.G. 2018).

3. I use “women” at times throughout the article, since members of that gender are most often those seeking asylum based on domestic violence. It is important to note, however, that domestic violence affects people of all genders.

violence is prevalent within their own countries. Thus, domestic violence often is not a harm that adjudicators easily identify as worthy of protection through asylum. This phenomenon reveals a country's own failure to protect women within its own borders, which itself is a failure to uphold international human rights and due diligence.

In this note, I identify areas where individual countries could improve their asylum law for survivors of domestic violence. States could add gender as an enumerated ground under their definition of "refugee." If gender was listed as a ground for asylum, then those seeking asylum based on domestic violence would more easily qualify. States could also enact guidelines related to gender-based asylum claims that are binding on decision-makers. States could enact mandatory domestic violence training for adjudicators of asylum claims. Lastly, States should not use an elevated standard for violence committed by non-state actors.

As an international community, we should also enact solutions globally. The United Nations (U.N.) could put forward an international agreement, such as an additional protocol to the Refugee Convention that included domestic violence and other gender-based violence. Hopefully, States would recognize the importance of protecting victims of domestic violence, given its recognition as a violation of human rights. Lastly, the international community could encourage advocates and survivors to appeal domestic violence asylum denials to international bodies, in order to conform better with current human rights norms. In Part I, I define terminology and provide background information on asylum law. In Part II, I compare how different countries treat asylum claims that are based on domestic violence. I specifically analyze the United States (U.S.), United Kingdom, Canada, Australia, New Zealand, South Africa, and Costa Rica. In Part III, I provide recommendations for change that could provide enhanced protection for domestic violence-based asylum seekers.

## I. BACKGROUND ON ASYLUM LAW

The States discussed here have all signed the 1951 Refugee Convention and 1967 Protocol.<sup>4</sup> The Convention was created in the aftermath of the refugee crisis generated by World War II.<sup>5</sup> The Protocol removed the geographic and temporal limitations that the original Convention contained.<sup>6</sup> The Convention and Protocol define a refugee as someone who (1) has a "well-founded fear" of persecution, (2) for reasons of "race, religion, nationality, membership of a particular social group or political opinion," (3) is outside his or her country of origin, and (4) "owing to such

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4. See generally, United Nations High Commissioner for Refugees ("UNHCR"), States Parties to the 1951 Convention relating to the Status of Refugees and the 1967 Protocol, July 28, 1951, 189 U.N.T.S. 137, <http://www.unhcr.org/en-us/protection/basic/3b73b0d63/states-parties-1951-convention-its-1967-protocol.html>.

5. See UNHCR, *The Refugee Convention, 1951: The Travaux Préparatoires Analyzed with a Commentary by Dr. Paul Weis* (1995), <http://www.unhcr.org/en-us/protection/travaux/4ca34be29/refugee-convention-1951-travaux-preparatoires-analysed-commentary-dr-paul.html>.

6. UNHCR, *Convention and Protocol Relating to the Status of Refugees*, 2 n. 2 (December 2010), <http://www.unhcr.org/en-us/3b66c2aa10>. While the Protocol is often described as "amending" the Convention, in fact it is a separate document and State parties to the Protocol "agree to apply articles 2 to 34 of the Convention to refugees defined in article 1 thereof, as if the dateline were omitted (article I of the Protocol)." This is what expanded the definition of "refugee" beyond refugees from World War II. The Protocol was created by a colloquium of legal experts, whose approach was accepted by the UNHCR. Later, the UN General Assembly "took note" of the Protocol, which required six ratifications before it entered into force on October 4, 1967, See Guy S. Goodwin-Gill, *Introductory Note on Convention Relating to the Status of Refugees, 1951, and Protocol Relating to the Status of Refugees, 1967*, AUDIOVISUAL LIBRARY OF INTERNATIONAL LAW, <http://legal.un.org/avl/ha/prsr/prsr.html> (last visited Nov. 28, 2017).

fear, is unwilling or unable to avail” himself or herself “of the protection of that country.”<sup>7</sup> The enumerated grounds for persecution did not include gender, since they “reflected the historical period and the drafters’ understanding of reasons for persecution.”<sup>8</sup>

The drafters included “particular social group” as a catch-all phrase for the refugee situations that did not fit within the other four protected grounds.<sup>9</sup> Since “gender” is not listed in the Convention, “particular social group” has been used in cases where domestic violence survivors are seeking asylum.<sup>10</sup> Domestic violence-based claims are said to fit within the “broader context of ‘gender asylum’ (claims for protection arising from gender-motivated rights violations),” although domestic violence-based cases have often been treated differently than other gender asylum claims.<sup>11</sup> For example, in the U.S., female genital cutting (FGC) was recognized as gender-motivated persecution before domestic violence was, and many adjudicators have been uncomfortable recognizing domestic violence as a form of persecution worthy of refugee protection.<sup>12</sup>

In the Convention and Protocol, there is a prohibition against *refoulement*, which is the return of a refugee to a country where he or she will face persecution.<sup>13</sup> Article 33(1) reads, “No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>14</sup> Thus, States who are parties to the Convention have an obligation against returning a refugee to their home country if they will face persecution there. Domestic violence complicates States’ endeavors to adhere to this prohibition, since many refugee-receiving States struggle with recognizing and protecting asylum seekers fleeing domestic violence.

An asylum seeker is someone “who is seeking international protection.”<sup>15</sup> Within a country that has a particular procedure for granting asylum, an asylum seeker is an individual from another country whose claim is not yet decided.<sup>16</sup> If their claim is granted, then they are recognized as a refugee.<sup>17</sup> Therefore, an asylum seeker must meet the statutory definition of a “refugee” in order to be granted asylum.<sup>18</sup> Asylum is the grant of protection by a State to someone from another State fleeing persecution.<sup>19</sup>

7. UNHCR, *supra* note 6, at 14.

8. Karen Musalo, *Personal Violence, Public Matter: Evolving Standards in Gender-Based Asylum Law*, HARV. INT’L. REV., Fall 2014-Winter 2015, at 46.

9. See Lauren N. Kostas, *Domestic Violence and American Asylum Law: The Complicated and Convoluted Road Post Matter of A-R-C-G-*, 30 CONN. J. INT’L L. 211, 214-15 (2015).

10. Ctr. for Gender and Refugee Studies, *Review of Gender, Child, and LGBTI Asylum Guidelines and Case Law in Foreign Jurisdictions* 1 (May 2014), <http://www.refworld.org/docid/54fd6f204.html> (last visited Nov. 29, 2017) [hereinafter CGRS].

11. See Musalo, *supra* note 8, at 46.

12. See *Id.*; see also *infra* pp. 27-28.

13. *Convention and Protocol Relating to the Status of Refugees*, *supra* note 6, at 3.

14. *Id.* at 30.

15. UNHCR, *Master Glossary of Terms Rev. 1, 4*, (June 2006), <http://www.refworld.org/docid/42ce7d444.html> (last visited Nov. 4, 2017).

16. *Id.*

17. See *id.* at 4, 17.

18. See *id.* See, e.g., Immigration and Nationality Act, 8 U.S.C. § 1158(b)(1)(A) (2012) (“The Secretary of Homeland Security or the Attorney General may grant asylum to an alien who has applied for asylum . . . if the Secretary of Homeland Security or Attorney General determines that such an alien is a refugee within of section 1101(a)(42)(a) of this title.”).

19. See *Master Glossary of Terms*, *supra* note 15, at 4.

Many States that have ratified the Convention have included the Convention's definition of a refugee within their own legal systems. For example, the U.S. Congress passed the Refugee Act in 1980, which incorporated the U.N. definition of a refugee into the Immigration and Nationality Act (INA).<sup>20</sup> According to the INA, asylum is available to those who meet the definition of a refugee and who are already in the U.S. or who are arriving in the U.S.<sup>21</sup>

In 1991, the U.N. High Commissioner for Refugees (UNHCR) first issued recommendations on expanding the refugee definition in order to include those who had experienced sexual violence as well as other gender-based persecution in its "Guidelines on the Protection of Refugee Women."<sup>22</sup> In 2002, UNHCR issued more detailed guidelines on gender-based persecution.<sup>23</sup> In 2008, UNHCR issued the "UNHCR Handbook for the Protection of Women and Girls," a supplement to the 1991 guidelines that addresses the international and regional legal framework and other issues relating to refugee protection for women and girls.<sup>24</sup> This Handbook lists the UNHCR's "Five Commitments to Refugee Women," which include "tackling SGBV [sexual and gender-based violence], including domestic violence."<sup>25</sup> Since the U.S. and other States have followed the U.N. Convention and adopted the U.N. refugee definition, it follows that they should also utilize the U.N. guidelines on gender-based asylum claims. This will likely assist these States in achieving their international commitments to asylum-seekers.

## II. COMPARISON OF DOMESTIC VIOLENCE ASYLUM CLAIMS IN DIFFERENT COUNTRIES

### *Domestic Violence in International Human Rights Law*

Domestic violence is a serious global problem. According to the World Health Organization (WHO), most violence against women is intimate partner violence.<sup>26</sup> Almost one in three women (30%) "who have been in a relationship report that they have experienced some form of physical and/or sexual violence by their intimate partner in their lifetime."<sup>27</sup> Furthermore, intimate partner violence can be lethal. The WHO reports that globally as many as 38% of the murders of women are committed by a male intimate partner.<sup>28</sup>

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20. See American Immigration Council, *An Overview of US Refugee Law and Policy* (Sep. 17, 2018), <https://www.americanimmigrationcouncil.org/research/overview-us-refugee-law-and-policy>; 8 U.S.C. § 1101(a)(42).

21. See 8 USC. § 1158(b)(1)(A).

22. CGRS, *supra* note 10, at 2-3.

23. *Id.* at 3.

24. *Id.*

25. UNHCR, *Handbook for the Protection of Women and Girls*, 15 (January 2008), <http://www.unhcr.org/en-us/protection/women/47cfa9fe2/unhcr-handbook-protection-women-girls-first-edition-complete-publication.html>.

26. World Health Org., *Violence Against Women* (Nov. 29, 2017), <http://www.who.int/mediacentre/factsheets/fs239/en/> (last visited Nov. 28, 2017) (citing World Health Org., *Global and regional estimates of violence against women: prevalence and health effects of intimate partner violence and non-partner sexual violence* (2013), <http://www.who.int/reproductivehealth/publications/violence/9789241564625/en/> (last visited Nov. 28, 2017); World Health Or., *World report on violence and health* (2002), [http://www.who.int/violence\\_injury\\_prevention/violence/world\\_report/en/](http://www.who.int/violence_injury_prevention/violence/world_report/en/) (last visited Nov. 28, 2017)).

27. *Id.*

28. *Id.*

Through recent developments, international human rights law has recognized States' obligations to prevent, prosecute, and punish domestic violence due to their obligation of "due diligence."<sup>29</sup> This "due diligence" standard was developed through the Convention on the Elimination of all Forms of Discrimination Against Women's (CEDAW) Optional Protocol jurisprudence and through case law in the European human rights system and the Inter-American human rights system.<sup>30</sup> States who have agreed to be subject to the jurisdiction of the European Court of Human Rights and the Inter-American Court of Human Rights could thus be subject to binding decisions relating to the due diligence standard. For others, the obligation is expressed through complaints or decisions that are non-binding, but represent a strong shaming mechanism common in international law. The Optional Protocol set up complaint and inquiry mechanisms for CEDAW. In its first case in 2005, *Ms. A. T. v Hungary*, the Committee found that Hungary failed to protect the applicant from domestic violence over several years, which was a violation of its obligation to exercise due diligence.<sup>31</sup> Thus, domestic violence has been recognized as a violation of human rights at the international level. Another example of this standard applied in a domestic violence scenario is in the case of *Jessica Lenahan (Gonzales) v. United States*.<sup>32</sup> That case went before the Inter-American Commission on Human Rights ("Commission"), which issued a decision in 2011.<sup>33</sup> Ms. Gonzales had suffered domestic violence by her ex-husband, and she held a restraining order against him.<sup>34</sup> The Commission found that the U.S had failed to exercise due diligence when it neglected to adequately respond to her repeated and urgent calls to the police that her husband had taken her daughters and refused to return them in violation of her restraining order.<sup>35</sup> The three girls were later found shot to death in their father's truck after an exchange of gunfire with the police.<sup>36</sup> The Commission concluded that the U.S. "failed to act with due diligence" to protect Ms. Gonzales and her daughters "from domestic violence, which violated the state's obligation not to discriminate and to provide for equal protection before the law under Article II of the American Declaration."<sup>37</sup> Thus, the Commission specifically found that the State's failure to act with due diligence to protect Gonzales and her children from domestic violence was a form of discrimination and it affirmed the State's obligation to her, even though her persecutor was a private actor.<sup>38</sup>

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29. Siobhán Mullally, *Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?* 60 INT'L & COMPARATIVE L.Q. 459, 459 (2011).

30. *Id.* at 483-84. *See also* Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Oct. 6, 1999, 2131 U.N.T.S. 83.

31. *Id.*; *Ms. A.T. v. Hungary*, Communication 2/2003, Comm. on the Elimination of Discrimination against Women, ¶ 9.6 (Jan. 26, 2005), <http://www.un.org/womenwatch/daw/cedaw/protocol/decisions-views/CEDAW%20Decision%20on%20AT%20vs%20Hungary%20English.pdf> (last visited 29 Jan. 2018).

32. *See* Jessica Lenahan (Gonzales) et al. v. United States, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11 (2011).

33. *Id.*

34. *Id.*, at ¶ 2.

35. *Id.*

36. *Id.*

37. *Id.* at ¶ 5.

38. *See id.* at ¶ 119 (noting that the Commission has "held that the rights contained in the American Declaration may be implicated when a State fails to prevent, prosecute and sanction acts of domestic violence perpetrated by private individuals.").

This is but one example of a number of cases that have affirmed a State's human rights obligation for due diligence around domestic violence.<sup>39</sup> For example, in 2000 the Inter-American Commission found in *Maria da Penha v. Brazil* that the applicant's rights were violated when the State failed to exercise due diligence to prevent and investigate her domestic violence complaint.<sup>40</sup> In 2009, the European Court of Human Rights found in *Opuz v. Turkey* that the State violated the applicant's rights in failing to protect her and her mother from domestic violence.<sup>41</sup> Thus, regional human rights institutions have recognized the State's affirmative responsibility to domestic violence victims under the due diligence standard.

These cases, which affirmed the obligation for due diligence in international human rights law, should help asylum seekers fleeing domestic violence in two ways: first, the receiving country should be required to protect asylum seekers from domestic violence by offering them asylum if they qualify as refugees; second, these developments should make it more difficult for refugee-receiving countries to claim that an asylum seeker had the availability of State protection in their home country, when the home country has failed to exercise its own due diligence to protect the domestic violence victim.<sup>42</sup>

However, despite these advancements in international human rights law, and the affirmation of a due diligence standard for States, refugee law has remained separate from international human rights law and has not often referred to this standard.<sup>43</sup> If asylum and refugee law included an understanding of the due diligence standard, this could "raise the bar in assessing the adequacy of State protection in domestic violence asylum proceedings."<sup>44</sup> As Siobhán Mullally argues, the inclusion of an understanding of States' due diligence obligations would inform the practice of refugee law and would give adjudicators a greater understanding of the availability of State protection (or lack thereof), the risks of *refoulement* of those who are not recognized as asylees but should be, and it would require adjudicators to scrutinize a State's legislative and policy frameworks more carefully.<sup>45</sup> She further argues that "[t]he 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."<sup>46</sup> If States worked past this hesitation, and accepted the human rights due diligence standard, it would be easier for those seeking asylum based on domestic violence to show that the state was unable or unwilling to protect them.

Even as they are falling short, some governments have recognized that asylum cases should adhere to international human rights norms.<sup>47</sup> For example, the

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39. See generally Mullally, *supra* note 29, at 465-70 (discussing various cases where the Commission found the State failed to meet its due diligence obligations).

40. See *Maria da Penha v. Brazil*, Case 12.051, Inter-Am. Comm'n H.R., Report No. 54/01 (2001).

41. *Opuz v. Turkey*, Application no. 33401/02, Eur. Ct. H.R. (2009), available at <http://www.refworld.org/cases,ECHR,4a2f84392.html> (last visited Dec. 6, 2017).

42. See, e.g., Mullally, *supra* note 29, at 482-483.

43. *Id.* at 483.

44. *Id.* at 483-84.

45. *Id.* at 483.

46. *Id.* at 459.

47. See, e.g., Memorandum from Phyllis Coven, US Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims from Women, (May 26, 1995), available at <http://www.refworld.org/docid/3ae6b31e7.html> (last visited Dec. 6, 2017).

U.S. Department of Justice’s “Considerations for Asylum Officers Adjudicating Asylum Claims from Women” from 1995 states that “[t]he evaluation of gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations.”<sup>48</sup> The Considerations also mention various international instruments and documents that promote women’s rights as universal human rights. The instruments mentioned include CEDAW, the 1993 United Nations Declaration on Women’s Rights, UNHCR conclusions on women asylum seekers, and the Canadian Guidelines on Gender-Related persecution.<sup>49</sup> In a footnote, the Considerations note that “[t]hese instruments need not be ratified by the United States to provide guidance as a source of human rights norms.”<sup>50</sup> Therefore, as States themselves have recognized, asylum law should meet international human rights standards. In the *Gonzales* case and others, the international community has established the importance of acting with due diligence in protecting domestic violence victims from their abusers. Thus, asylum law that fails to see domestic violence as persecution that is worthy of State protection is inadequate for States’ human rights obligations.

#### *Asylum in the United States Based on Domestic Violence*

The U.S. has advanced considerably regarding domestic violence asylum claims, but challenges remain. As mentioned above, the U.S. adopted guidelines for gender-based claims in 1995, the “Considerations for Asylum Officers Adjudicating Asylum Claims from Women.”<sup>51</sup> However, these guidelines apply only to asylum officers and have no binding effect, meaning following the guidelines is discretionary.<sup>52</sup> In 1985, in *Matter of Acosta*, the Board of Immigration Appeals (BIA) found that membership in a PSG could be established based on a “common immutable characteristic,” including innate characteristics “such as sex, color, or kinship ties.”<sup>53</sup> The Board determined that the characteristic “must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.”<sup>54</sup> This was the first case where the BIA set out guidelines for a PSG analysis, since it was the first precedential BIA decision after the Refugee Act of 1980 was enacted.<sup>55</sup>

The first precedential case that recognized a gender-based asylum claim in the U.S. was in 1996, *Matter of Kasinga*.<sup>56</sup> In that case, Ms. Kassindja<sup>57</sup> had fled from

48. *Id.* at 2; See also Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, The United Kingdom, and the United States*, 23 Am. U.J. Gender Soc. Pol’y & L. 529 at 551 (2015).

49. Coven, *supra* note 47, at 2-3.

50. *Id.* at 2 n. 2.

51. Coven, *supra* note 47.

52. See Melanie Randall, *Particularized Social Groups and Categorical Imperatives in Refugee Law: State Failures to Recognize Gender and the Legal Reception of Gender Persecution Claims in Canada, The United Kingdom, and the United States*, 23 Am. U.J. Gender Soc. Pol’y & L. 529 at 546 (2015).

53. *Id.* at 553. In *Matter of Acosta*, the case itself was not about gender. The respondent in that case, a male taxi driver and member of a cooperative organization of taxi drivers, was found not to be part of a PSG. See *Matter of Acosta*, 19 I&N Dec. 211 at 234 (BIA 1985).

54. *Matter of Acosta*, 19 I&N Dec. 211 at 233 (BIA 1985).

55. *Id.* at 233. Thus, even though this case was not about gender, it has been helpful for advocates to include gender-based claims within the nexus of PSG.

56. Musalo, *supra* note 8, at 46; see *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

57. Unfortunately, the BIA had misspelled her name; see Musalo *supra* note 8.

female genital cutting (FGC) in Togo and was granted asylum in the U.S. by the BIA.<sup>58</sup> Previously, the Immigration Judge had denied her applications for asylum and withholding of deportation.<sup>59</sup> On appeal, the parties agreed that FGC could be the basis for granting asylum.<sup>60</sup> The BIA referenced the U.S. Guidelines For Asylum Officers Adjudicating Claims From Women, which listed “domestic violence,” among other forms of gender-based violence, that could serve as evidence of past persecution on account of one of the five protected grounds.<sup>61</sup> The Board concluded that Ms. Kassindja belonged to the PSG “young women of the Tchamba-Kunsuntu Tribe who have not had FG[C], as practiced by that tribe, and who oppose the practice.”<sup>62</sup> The Board also stated in its social group analysis, “[t]here is nothing about a social group definition based upon gender that requires us to treat it as either an aberration, or as an unanticipated development requiring a new standard.”<sup>63</sup> Thus, the Board applied its general standard to gender-based persecution, which provided an opening for future gender-based asylum claims.

Following *Matter of Kasinga*, a woman fleeing domestic violence in Guatemala, Rody Alvarado, was granted asylum in an unpublished decision by a U.S. Immigration Judge in 1996. The Judge applied “the same rationale as the BIA had in Ms. Kassindja’s case.”<sup>64</sup> Similar to the court’s decision in *Matter of Kasinga*, the Judge found that Ms. Alvarado belonged to a PSG of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>65</sup> As Karen Musalo argues, “implicit in the decision was that the judge saw no reason to treat the harm of domestic violence any differently than the harm of FGC.”<sup>66</sup> However, the government appealed Ms. Alvarado’s grant of asylum, in *In re Matter of R-A-*, and the case went through thirteen years of appeals and delays before she was granted asylum.<sup>67</sup> Since the final decision was by an Immigration Judge, Ms. Alvarado’s case had no precedential value and thus did not “resolve the issue on a national level.”<sup>68</sup> Thus, this case did not have the kind of clarity and precedent for asylum seekers fleeing domestic violence as *Matter of Kasinga* did for those fleeing FGC.

After many years of uncertainty regarding domestic violence as a basis for asylum in the United States, the BIA issued a precedential decision in the case *Matter of A-R-C-G-* in 2014.<sup>69</sup> Musalo contends that the precedent established in *Matter of Kasinga* for gender-based violence “should have been applied to cases involving domestic violence. Instead it has taken the nearly two decades since to accept that women fleeing brutal partner abuse are entitled to protection.”<sup>70</sup> In *Matter of A-R-C-G-*, the BIA held that women suffering from domestic violence could form the basis

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58. *Id.*

59. *Matter of Kasinga*, 21 I&N Dec. 357 at 357 (BIA 1996).

60. *Id.* at 358.

61. *Id.* at 362; see Coven, *supra* note 47, at 4.

62. *Matter of Kasinga*, *supra* note 59, at 368.

63. *Id.* at 375.

64. Musalo, *supra* note 8, at 47.

65. *Matter of R-A-*, Interim Decision #3403 (BIA 1999) (vacated).

66. Musalo, *supra* note 8, at 47.

67. *Id.*

68. *Id.*

69. *Matter of A-R-C-G-*, 26 I&N Dec. 388 (BIA 2014).

70. Musalo, *supra* note 8, at 48.



of a PSG.<sup>71</sup> It agreed that Ms. A-R-C-G's PSG was "married women in Guatemala who are unable to leave their relationship."<sup>72</sup> Significantly, amici for the American Immigration Lawyers Association, the U.N. High Commissioner for Refugees, and the Center for Gender & Refugee Studies argued for the inclusion of gender as a PSG in the case.<sup>73</sup> However, the BIA determined that since Ms. A-R-C-G's membership in a PSG was established under the more particular group "married women in Guatemala who are unable to leave their relationship," it was unnecessary to determine if gender alone could constitute a PSG.<sup>74</sup> The BIA thereby did not recognize gender as a PSG, but did leave open that possibility.

A 2017 Ninth Circuit decision, *Bringas-Rodriguez v. Sessions*, clarifies that those who are facing the State-protection barrier to asylum do not have to report persecution by private actors to State authorities in order to qualify for asylum, which could also be helpful for those seeking asylum based on domestic violence.<sup>75</sup> When persecution is committed by a "private" actor, the asylum seeker has to show that the government was "unable or unwilling" to protect them.<sup>76</sup> Bringas was denied asylum, withholding of removal, and protection under the Convention Against Torture (CAT) by the BIA.<sup>77</sup> The Immigration Judge and the BIA found that sexual orientation and identity could establish membership in a PSG and that Bringas' testimony was credible regarding the physical and sexual abuse that he suffered as a child because of his sexual orientation.<sup>78</sup> Bringas did not report the abuse to State authorities.<sup>79</sup> Therefore, the Immigration Judge and the BIA determined that Bringas' evidence was insufficient to demonstrate that the "government was unable or unwilling to control the private individuals who attacked him."<sup>80</sup> The case was eventually heard *en banc* at the Ninth Circuit, which reiterated that the test for "unable or unwilling" does not require reporting of persecution by non-State actors to authorities and also does not impose a higher evidentiary burden on applicants who do not report persecution by private actors.<sup>81</sup> This further diminishes the public/private distinction as grounds for denying domestic violence-based applications and should be helpful to applicants with domestic violence-based applications for asylum.

Unfortunately, some of this progress has been abrogated in the U.S. due to Former Attorney General Jeff Sessions' ruling in *Matter of A-B*, which vacated *Matter of A-R-C-G*.<sup>82</sup> *Matter of A-B* involved an asylum-seeker from El Salvador who had endured over fifteen years of physical, sexual, and emotional violence.<sup>83</sup> In Sessions'

71. *Matter of A-R-C-G*, *supra* note 69, at 392.

72. *Id.*

73. *Id.* at 395 n. 16; *AILA Amicus on Asylum Claims Based on Domestic Violence* (Nov. 14, 2012), available at <http://www.aila.org/infonet/amicus-brief-mjv-rdcp-g-and-arc-g> (last visited Jan. 27, 2018); *Brief of Amicus Curiae, The United Nations High Commissioner for Refugees in Support of Respondents*, available at <http://www.refworld.org/pdfid/50b5c2a22.pdf> (last visited Jan. 27, 2018).

74. *Matter of A-R-C-G*, *supra* note 69, at 395.

75. See *Bringas-Rodriguez v. Sessions*, 850 F.3d 1051, 1073-74 (9th Cir. 2017).

76. Blaine Bookey, *Gender-Based Asylum Post-Matter of A-R-C-G: Evolving Standards and Fair Application of the Law*, 22 *Southwestern Journal of International Law* 1 at 17 (2016).

77. *Bringas-Rodriguez*, *supra* note 75, at 1055.

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.*

82. See generally *In re A-B*, *supra* note 2.

83. CENTER FOR GENDER AND REFUGEE STUDIES, *Backgrounder and Briefing on Matter of A-B*, available at: <https://cgrs.uchastings.edu/our-work/matter-b> (last visited June 26, 2018).

ruling, he articulated a higher standard for “private violence,” or violence that is not perpetrated by a government actor.<sup>84</sup> He stated that an asylum “applicant must show that the government either condoned the actions ‘or at least demonstrated a complete helplessness to protect the victim of violence.’”<sup>85</sup> This standard, if followed, would make it very difficult for domestic violence victims to win a grant of asylum. However, there is a strong argument to be made that the holding in *Matter of A-B-* is narrow, and Sessions’ broad pronouncements about private violence are actually just dicta.<sup>86</sup>

While some immigration judges and the BIA have made adverse rulings based on *Matter of A-B-*, there have also been positive decisions coming from asylum offices, immigration judges, and some circuit courts, which have reiterated case-by-case analysis in asylum decisions, and interpreted the holding in *Matter of A-B-* to be narrow, and thus distinguishable in future cases.<sup>87</sup> There has not yet been a court of appeals decision that expressly rejects the *Matter of A-B-* statements on private actors to be dicta. Thus, the reach of this case remains uncertain and the issue will continue to be litigated.<sup>88</sup>

In sum, while the U.S. does have guidelines for asylum claims based on gender-based violence, including domestic violence, these guidelines are not binding. And as of 2014, the U.S. courts have recognized domestic violence as a means of gaining asylum, although the BIA chose a narrowly circumscribed PSG. With a step backwards in *Matter of A-B-*, it is unclear how future domestic violence-based cases will be treated, although domestic violence claims have continued to be recognized. There are some indications that progress will continue even in the wake of that decision.

#### *Asylum in the United Kingdom Based on Domestic Violence*

The United Kingdom (U.K.) has recognized a relatively broad PSG for a domestic violence asylum claim; however, systemic challenges remain. In 1993, the U.K. incorporated the Refugee Convention into U.K. law with the Asylum and Immigration Appeals Act.<sup>89</sup> The U.K. also has guidelines for gender-based persecution claims.<sup>90</sup> In 2000, the Immigration Appellate Authority adopted the Asylum Gender Guidelines, which were based on those written by the Refugee Women’s Legal Group, a non-profit organization.<sup>91</sup> Furthermore, the U.K. Border Agency Home Office published guidance notes regarding gender issues in asylum claims in 2010.<sup>92</sup>

84. *In re A-B-*, *supra* note 2 at 337.

85. *See id.*

86. *See, e.g.*, CENTER FOR GENDER AND REFUGEE STUDIES, *Post-Matter of A-B- Litigation Update* at 3 (Dec. 2018).

87. *Id.*

88. *See id.* Note that a D.C. District Court Judge issued a permanent injunction *Grace v. Whitaker*, which challenges *Matter of A-B-*’s application to credible fear interviews, which provide an initial hurdle for some asylum-seekers in the U.S. *See Grace v. Whitaker*, 344 F. Supp. 3d 96, 146 (D.D.C. 2018).

89. CGRS Review, *supra* note 10 at 57; Asylum and Immigration Appeals Act 1993, 1993 c. 23, available at <http://www.legislation.gov.uk/ukpga/1993/23/contents> (last visited Jan. 27, 2018).

90. Randall, *supra* note 52, at 546; *see, e.g.*, Immigration Appellate Authority: *Asylum Gender Guidelines* (Nov. 1, 2000), available at <http://www.unhcr.org/refworld/docid/3ae6b3414.html> (last visited Jan. 27, 2018).

91. CGRS Review, *supra* note 10, at 58.

92. *Id.*; UK BORDER AGENCY, *Gender Issues in the Asylum Claim*, available at <https://www.refworld.org/docid/4cc7ff092.html> (last visited Jan. 27, 2018).

The U.K. recognized gender as the basis for a particular social group in *Shah & Islam*.<sup>93</sup> This conjoined case “marked a significant turning point in gender asylum law in the U.K. and elsewhere.”<sup>94</sup> It specifically recognized that gender persecution could be a PSG.<sup>95</sup> In the case, the applicants were two women who were subject to domestic violence in Pakistan who “were at risk of being accused of and punished for adultery if returned to Pakistan.”<sup>96</sup> The House of Lords determined that they were entitled to refugee protection on account of their persecution based on membership in a PSG, which was determined to be “women in Pakistan.”<sup>97</sup> Lord Steyn stated “[g]eneralisations about the position of women in particular countries are out of place in regard to issues of refugee status.”<sup>98</sup> Instead, he wrote that the finding of a PSG depends on the particular facts of the case.<sup>99</sup> Furthermore, Lord Steyn explained that while domestic violence is prevalent in Pakistan as well as in many other countries, the salient feature in that case was that women in Pakistan are unprotected by the State.<sup>100</sup> On the issue of State protection, Lord Hoffman further concluded that, in relation to these applicants, “the State would not assist them because they were women. It denied them a protection against violence which it would have given to men.”<sup>101</sup> Thus, a lack of State protection was emphasized in both opinions.<sup>102</sup>

Lord Hoffman also commented on the prevalence of domestic violence within the U.K. He stated that the domestic violence suffered by the applicants in that case “is regrettably by no means unknown in the United Kingdom.”<sup>103</sup> However, he stated that this domestic violence in the U.K. would not be considered persecution under the Refugee Convention because in the U.K. victims of domestic violence would be entitled to State protection in the form of criminal prosecution, restraining orders, or the exclusion of their husbands from their homes.<sup>104</sup> Thus, the House of Lords acknowledged that domestic violence could amount to persecution in some States, while distinguishing this from domestic violence within the U.K. itself, where the State—at least in the eyes of Lord Hoffman—protects victims.

A 2013 article by Susan Millns and Charlotte Skeet found that in the U.K. “far fewer women than men make applications” under the Refugee Convention.<sup>105</sup> They argue that this lack of applications by women is due in part to the lack of jurisprudence on claims by women with gendered experiences, and because the procedural requirements are not “equally accessible to both men and women.”<sup>106</sup>

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93. See generally *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and another Ex Parte Shah (A.P.) (Conjoined Appeals) (Shah & Islam)*, UK, House of Lords, 1998-99, available at <http://www.refworld.org/pdfid/3dec8abe4.pdf> (last visited Dec. 15, 2018).

94. Mullaly, *supra* note 29, at 477.

95. Randall, *supra* note 52, at 550; *Shah & Islam*, *supra* note 93, at 16.

96. CGRS Review, *supra* note 10, at 61.

97. *Shah & Islam*, *supra* note 93, at 16.

98. *Id.* at 2.

99. *Id.*

100. *Id.*

101. *Id.* at 17.

102. See *id.* at 7.

103. *Id.* at 13.

104. *Id.*

105. Susan Millns and Charlotte Skeet, *Gender Equality and Legal Mobilization in the United Kingdom: Using Rights for Lobbying, Litigation, Defense, and Attack*, CANADIAN JOURNAL OF LAW AND SOCIETY 28, no. 2 169, 179 (2013).

106. *Id.* at 180.

Furthermore, Asylum Aid, an organization that assists asylum seekers in the U.K., has noted that after *Shah and Islam*, the Immigration Appeal Tribunal has often overturned decisions relating to gender-based persecution and adopted more particular and restricted interpretations of PSG than the one in *Shah and Islam*.<sup>107</sup> Millns and Skeet note that few Immigration Judges refer to gender guidelines in their adjudication of asylum cases.<sup>108</sup> However, the European Court of Human Rights provides guidance on these kinds of cases, often upholding additional protection for asylum seekers from being returned to their home countries.<sup>109</sup> The inconsistent application of *Shah and Islam* could potentially end with continued guidance from the House of Lords and the European Court of Human Rights.<sup>110</sup> Making training or referring to gender guidelines mandatory for Immigration Judges adjudicating gender-based cases could also improve outcomes for domestic violence-based claims.<sup>111</sup>

In conclusion, the U.K. included a relatively broad PSG for an asylum seeker fleeing domestic violence in *Shah and Islam*. However, the House of Lords took care to distinguish the U.K. from Pakistan even as it recognized the prevalence of domestic violence in both countries, thus enforcing the use of othering in asylum adjudication. Lastly, while this case represented a positive shift for asylum seekers, there is evidence that its precedent within the U.K. has not always led to positive outcomes for domestic violence victims.

#### *Asylum in Canada Based on Domestic Violence*

Canada has recognized domestic violence asylum claims, but not at a rate nearly as high as other gender-based claims. Canada incorporated the Refugee Convention with its Canadian Immigration and Refugee Protection Act.<sup>112</sup> Canada has also issued guidelines relating to gender-based persecution leading to asylum claims.<sup>113</sup> The Guidelines, “Women Refugee Claimants Fearing Gender-Related Persecution,” were issued in 1993 and were the first national guidelines in the world that formally recognized that women fleeing gender-based persecution could be recognized as “refugees” under the Convention.<sup>114</sup> Randall explains, “the *Guidelines* are significant for the claims of women who seek asylum based on persecution in the form of domestic violence.”<sup>115</sup> This is because the Guidelines enable decision-makers

107. *Id.* at 181.

108. *Id.* at 182. However, there was another positive decision in the House of Lords Judicial Committee regarding a gender-based asylum claim in 2006. *See, e.g., Fornah v. Secretary of State for the Home Department* [2006] UKHL. In that case, the House of Lords found that a woman subjected to Female Genital Cutting in Sierra Leone could be a member of the PSG “women in Sierra Leone” or, alternatively, “uninitiated women in Sierra Leone who had not been subjected to FGM.”

109. Millns and Skeet, *supra* note 105, at 183.

110. *See id.* at 181-85.

111. *See id.* at 182.

112. CGRS review, *supra* note 10 at 15; Immigration and Refugee Protection Act, S.C. 2001, c. 27 (Can.), available at <http://laws-lois.justice.gc.ca/eng/acts/i-2.5/> (last visited Dec. 7, 2017).

113. *See* Randall, *supra* note 52, at 536; IMMIGRATION AND REFUGEE BOARD OF CANADA, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution - Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act -Update* (Nov. 13, 1996), available at <http://www.refworld.org/docid/3ae6b31c98.html>, (last visited Dec. 7, 2017).

114. Catherine Hunter, *Khawar and Migration Legislation Amendment Bill (No 6) 2001: Why Narrowing the Definition of A Refugee Discriminates Against Gender-related Claims*, AUJIHRights 8(1), 107, 115 (2002).

115. Randall, *supra* note 52, at 538.

to take gender into account.<sup>116</sup> The Guidelines explain that gender is not included as an independent enumerated ground within the definition of a refugee.<sup>117</sup> However, gender-related persecution has been “more widely recognized” and should be assessed by adjudicators hearing the claim.<sup>118</sup> For those with a gender-related fear of persecution “the central issue is thus the need to determine the linkage between gender, the feared persecution and one or more of the definition grounds.”<sup>119</sup>

Within Canadian refugee case law, domestic violence has been recognized as a form of persecution.<sup>120</sup> In 1993, in *Ward v. Canada*, the Supreme Court of Canada held that gender and sexual orientation could define a particular social group.<sup>121</sup> In the 1995 case of *Narvaez v. Canada*, “women facing domestic violence were recognized as a particular social group for purposes of an asylum claim based on gender persecution.”<sup>122</sup> Furthermore, the Canadian Federal Court Trial Division indicated that while the gender Guidelines were not binding, they were meant to be followed “unless circumstances are such that a different analysis is appropriate.”<sup>123</sup> The Immigration and Refugee Board of Canada had determined that the applicant, a woman who suffered domestic violence in Ecuador, was a victim of personal violence and did qualify as a member of a PSG.<sup>124</sup> She had sought police assistance, but her complaint was erased after her husband bribed the police.<sup>125</sup> The Board stated:

No evidence was adduced to suggest or to establish that the claimant had a well-founded fear of persecution by her husband by reason of her nationality, race, religion, or political opinion. Her fear of persecution is based solely on the fact that she has been the victim of domestic violence perpetrated by her husband who had raped her, and subjected her to physical violence.<sup>126</sup>

The Court overturned the Board’s determination and held that the claimant’s particular social group could be “women subject to domestic violence in Ecuador.”<sup>127</sup>

In addition to the challenge of fitting into a PSG, asylum claims based on domestic violence are often limited by the difficulty of a showing of a failure of State protection.<sup>128</sup> One study, for example, demonstrated that the majority of Mexicans

116. *See id.*

117. IMMIGRATION AND REFUGEE BOARD OF CANADA, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution - Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act - Update*, 1 (Nov. 13, 1996), available at <http://www.refworld.org/docid/3ae6b31c98.html>, (last visited Dec. 7, 2017).

118. *Id.*

119. *Id.*

120. Randall, *supra* note 52, at 541.

121. CGRS Review, *supra* note 10, at 17; *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, Canada: Supreme Court, June 30 1993, available at <http://www.unhcr.org/refworld/docid/3ae6b673c.html> (last visited Dec. 7, 2017).

122. Randall, *supra* note 52, at 542 n. 62; *See Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 FCR 55, available at <https://www.canlii.org/en/ca/fct/doc/1995/1995canlii3575/1995canlii3575.html> (last visited Dec. 7, 2017).

123. CGRS Review, *supra* note 10, at 17.

124. *See Narvaez v. Canada (Minister of Citizenship and Immigration)*, 2 FCR 55 (1995), available at <https://www.canlii.org/en/ca/fct/doc/1995/1995canlii3575/1995canlii3575.html> (last visited Dec. 7, 2017).

125. *Id.*

126. *Id.*

127. *Id.*

128. Randall, *supra* note 52, at 542.

seeking asylum in Canada due to domestic violence were denied “because they are unable to demonstrate the lack of state protection.”<sup>129</sup> Even though domestic violence has been recognized as a form of gender persecution in Canada, the rejection rate of these types of claims is high.<sup>130</sup> Moreover, rejections of claims in Canada based on domestic violence are often upheld on appeal.<sup>131</sup>

Efrat Arbel conducted a study of domestic violence-based asylum cases in Canada which found that domestic violence claims were treated differently than other gender-based asylum claims. In the study, she analyzed a total of 645 decisions and compared domestic violence cases with cases of forced abortion, compulsory sterilization, and female genital cutting.<sup>132</sup> Through her analysis, she found that “adjudicators rarely identified domestic violence as a rights violation in itself.” Instead, they based their decisions “on the availability of state protection and frequently located the source of persecution in cultural difference.” Adjudicators generally found claimants to be members in a “highly specific” PSG.<sup>133</sup> She found that claims based on domestic violence were distinguished from other types of gender-based violence claims.<sup>134</sup> Since forced sterilization and genital cutting were seen as “exotic” harms, “perceived only to occur in foreign countries,” they were more easily labeled rights violations.<sup>135</sup> Thus, refugee-receiving countries’ own struggles with gender violence often preempts them from granting asylum based on domestic violence claims. She argues that this brings up a dilemma: “Given the prevalence of domestic violence within Canada, can Canada conclusively assert its ability to protect victims of domestic violence from harm?”<sup>136</sup> The tension in this question garners what Arbel characterizes as a defensive response from adjudicators:

Characterizing the violence suffered by refugee women as a product of culture operates as a protective device that distinguishes it from the violence suffered by Canadian women. By locating persecution in cultural difference, adjudicators subtly sidestep the possibility that, despite Canada’s clear commitment to gender equality and rights protection, women in Canada still suffer persecution.<sup>137</sup>

Rather than being located within human rights jurisprudence, and thus not located politically, the process is “deeply intertwined with Canadian national values and Canada’s national self-understanding.”<sup>138</sup> Lastly, Arbel calls for a more accurate

129. Rupaleem Bhuyan, Adriana Vargas, Margarita Pintín-Perez (2016) “Fleeing Domestic Violence from a “Safe” Country?: Refugee Determination for Mexican Asylum-Seekers in Canada,” 32 *Refuge* 95 (2016).

130. Randall, *supra* note 52 at 542.

131. *Id.* at 543.

132. Efrat Arbel, *The Culture of Rights Protection in Canadian Refugee Law: Examining the Domestic Violence Cases*, 58 *McGill L.J.* 729, 747 (2013).

133. *Id.* at 748-49.

134. *Id.* at 769.

135. *Id.*

136. *Id.* at 769-770.

137. *Id.* This is the case in the US as well, which amplifies the impact of the Jessica Lenahan case at the Inter-American Court. In asylum cases, the US often emphasizes other countries’ inferior protection of their citizens, but in the Lenahan case, the Inter-American Commission ruled that the US violated Lenahan’s human rights and the rights of her daughters. See *Jessica Lenahan (Gonzales) v. U.S.A.*, *supra* note 32.

138. Arbel, *supra* note 132, at 771.

understanding of domestic violence dynamics, including cultural and power dynamics, and gender imbalances.<sup>139</sup>

Canada issued guidelines on gender-based asylum claims before any other country did. Moreover, Canada has recognized domestic violence as persecution. However, there are still difficulties faced by domestic violence survivors seeking asylum in Canada potentially due in part to the harsh reality that Canada would have to recognize that domestic violence is persecution rising to the level of guaranteeing asylum when Canada itself experiences difficulties protecting against domestic violence.

#### *Asylum in Australia Based on Domestic Violence*

Similar to the other countries profiled, Australia has adopted international principles and has recognized domestic violence claims, but challenges remain. Australia incorporated the Refugee Convention into Australian Law through the Australian Migration Act of 1958.<sup>140</sup> This Act sets the requirements for asylum, which in Australia is called a “protection visa.”<sup>141</sup> Australia has developed two sets of guidelines for gender-based claims. The “Guidelines on Gender Issues for Decision Makers” were developed in 1996, by the Department of Immigration and Multicultural Affairs.<sup>142</sup> These were based on the Canadian Guidelines.<sup>143</sup> The “Australian Migration Review Tribunal and Refugee Review Tribunal’s Gender Guidelines” were issued in May 2010 and updated in 2012.<sup>144</sup> In 2015, the Administrative Appeals Tribunal also issued “Guidelines on Gender.”<sup>145</sup>

In 2002, in *Minister for Immigration and Multicultural Affairs v. Khawar*, the High Court of Australia upheld a finding setting aside the denial of a protection visa by the Refugee Review Tribunal (RRT).<sup>146</sup> The Court held that a woman from Pakistan qualified for refugee status due to a fear of severe abuse by her husband and his family and due to the fact that the State “could not or would not intervene.”<sup>147</sup> Before this appeal, the Federal Court of Australia determined that the RRT had failed to consider a State’s discriminatory tolerance of violence, which could amount to persecution in

139. *Id.*

140. CGRS Review, *supra* note 10, at 8; Migration Act 1958, Protection visas—criteria provided for by this Act (Cth) § 36. available at [http://www.austlii.edu.au/au/legis/cth/consol\\_act/ma1958118](http://www.austlii.edu.au/au/legis/cth/consol_act/ma1958118) (last visited Dec. 7, 2017).

141. Migration Act 1958, Protection visas—criteria provided for by this Act (Cth) § 36.

142. CGRS Review, *supra* note 10, at 8; DEPARTMENT OF IMMIGRATION AND MULTICULTURAL AFFAIRS, REFUGEE AND HUMANITARIAN VISA APPLICANTS: GUIDELINES ON GENDER ISSUES FOR DECISION MAKERS (1996), available at <http://refugeestudies.org/UNHCR/66%20-%20Refugee%20and%20Humanitarian%20Visa%20Applicants.%20Guidelines%20on%20Gender%20Issues%20for%20Decision%20Makers.pdf> (last visited Apr. 15, 2019).

143. Hunter, *supra* note 114, at 116.

144. MIGRATION REVIEW TRIBUNAL & REFUGEE REVIEW TRIBUNAL, GENDER GUIDELINES (2012), available at <http://www.refworld.org/docid/54fd73cc4.html> (last visited Dec. 7, 2017).

145. ADMINISTRATIVE APPEALS TRIBUNAL MIGRATION AND REFUGEE DIVISION, GUIDELINES ON GENDER (2015), available at <http://www.mrt-rrt.gov.au/Files/HTML/GenderGuidelines-GU-CD.html> (last visited Dec. 7, 2017).

146. Nikola Lusk, *When State Silence Becomes Persecution: The Case of Domestic Violence Refugees in Minister for Immigration and Multicultural Affairs v. Khawar*, 21 U. Queensland L.J. 227, 229 (2001).

147. CGRS Review, *supra* note 10, at 10; *Minister for Immigration and Multicultural Affairs v. Khawar*, HCA 14 (2002) (Aus.), available at <http://www.unhcr.org/refworld/docid/3deb326b8.html> (last visited Dec. 7, 2017).

the definition of a refugee in the Convention.<sup>148</sup> The Federal Court cited the U.K. decision *Shah & Islam*, and according to Siobhán Mullally, “the Court found that once the focus shifted . . . 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.”<sup>149</sup> As in *Shah & Islam*, the court determined that “Pakistani women” could be a PSG.<sup>150</sup>

After *Khawar*, however, the Australian Minister for Immigration and Multicultural Affairs saw this case as “a reason for narrowing the definition of a refugee.”<sup>151</sup> As a result, Migration Amendment Bill (No. 6) was introduced and passed in 2001, which attempts to limit “the ability of decision makers to apply the refugee definition only to those that fall within a strict and narrow interpretation.”<sup>152</sup> According to Catherine Hunter, this narrow reading tends to exclude gender-related claims.<sup>153</sup> She argues that while the Refugee Convention was not intended to distinguish between male and female refugees, if it “fails to be sensitive to the types of persecution typically experienced by women,” then it should be considered discriminatory.<sup>154</sup> Furthermore, since Australia is a signatory to other international human rights treaties that prohibit discrimination, such as CEDAW, its “interpretation must not discriminate against gender-related claims.”<sup>155</sup> However, Bill No. 6 “will disproportionately [e]ffect the claims of women applicants” because of its narrow approach.<sup>156</sup>

Despite this law narrowing the interpretation of the Refugee Convention, the Australian Federal Court overturned the Tribunal’s denial of another claim related to domestic violence in 2009 in *Azaar v. Minister for Immigration and Citizenship*.<sup>157</sup> In that case, the Court held that in spite of the fact that there were laws and “other mechanisms” for addressing domestic violence in Vanuatu, this was not enough to find that the State would protect the applicant from domestic violence.<sup>158</sup> Both the Tribunal and the Federal Court held that the applicant belonged to the PSG of either “Vanuatu women” or “married Vanuatu women.”<sup>159</sup>

In conclusion, Australia has promulgated guidelines for gender-based claims and case law regarding refugees. Australia has followed a similar approach to the U.K. and Canada, in defining the PSG “Pakistani women” in the *Khawar* case.<sup>160</sup> However, after that case, there was resistance from the Minister of Immigration and Multicultural

148. Lusk, *supra* note 146; *Minister For Immigration & Multicultural Affairs v Khawar*, N 1379 of 1999, FCA 1130 (2000) (Aus.), available at [http://www.refworld.org/cases,AUS\\_FC,3ae6b6f80.html](http://www.refworld.org/cases,AUS_FC,3ae6b6f80.html) (last visited Dec. 7, 2017).

149. Mullally, *supra* note 29, at 477.

150. CGRS Review, *supra* note 10, at 10; *Minister for Immigration & Multicultural Affairs v Khawar*, FCA 1130.

151. Hunter, *supra* note 114, at 107.

152. Hunter, *supra* note 114, at 107. Migration Legislation Amendment Bill (No. 6) (2001), available at: <https://www.legislation.gov.au/Details/C2004B01015> (last visited Dec. 7, 2017); Migration Legislation Amendment Act (No. 6) (2001), available at: <https://www.legislation.gov.au/Details/C2004A00893> (last visited Dec. 7, 2017).

153. *Id.*

154. Hunter, *supra* note 114, at 109.

155. *Id.*

156. *Id.* at 114.

157. CGRS Review, *supra* note 10 at 10; *Azaar v. Minister for Immigration and Citizenship*, FCA 912 (2009) (Aus.), available at: <http://www.unhcr.org/refworld/docid/4aae4fd212.html> (last visited Dec. 7, 2017).

158. *Azaar v. Minister for Immigration and Citizenship*, FCA 912.

159. *Id.* at ¶ 2-3.

160. See *Khawar*, *supra* note 147.



Affairs against what he saw as the “broadening” of the definition of a refugee.<sup>161</sup> Despite this resistance, *Azaar* appears to continue the momentum from *Khawar*, recognizing “Vanuatu women” or “married Vanuatu women” as a PSG.<sup>162</sup>

*Asylum in New Zealand Based on Domestic Violence*

New Zealand has recognized domestic violence asylum cases, in one case using a broad PSG. New Zealand incorporated the definition of a refugee from the Refugee Convention in domestic law with its Immigration Act of 1987.<sup>163</sup> Unlike the previous countries discussed, New Zealand has not issued gender specific guidelines, but instead chooses to refer to the Vienna Convention on the Law of Treaties when adjudicating asylum claims based on gender-related persecution.<sup>164</sup>

One notable domestic violence-based case in New Zealand is Refugee Appeal No. 76501.<sup>165</sup> In that case, a woman from Fiji was granted asylum based on domestic violence inflicted by her police officer husband.<sup>166</sup> In its decision, the Refugee Appeal Authority wrote: “the persecution that the appellant faces is for reason of her membership of a particular social group, namely women.”<sup>167</sup> However, additionally the Refugee Appeal Authority noted that whether women constitute a PSG is country-specific.<sup>168</sup> The opinion then cited Lord Steyn in *Shah & Islam*, where the House of Lords were determining the PSG: “[g]eneralisations about the position of women in particular countries are out of place in regard to the issues or refugee status.”<sup>169</sup> The court determined that “the country information concerning the status of women in Fiji establishes that the specific social and cultural position of women, combined with the absence of effective state protection from police and the judiciary in cases of domestic violence, is such that they are appropriately recognised as a particular social group for the purposes of the Refugee Convention.”<sup>170</sup> For example, “women remain subject to a traditional hierarchy in which men exert dominance in the private sphere (including through domestic violence) and rely on traditional socio-cultural practices incorporated into the criminal law to deflect legal and criminal consequences.”<sup>171</sup>

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161. Hunter, *supra* note 114, at 114.

162. See *Gender Guidelines*, *supra* note 144 and *Guidelines on Gender*, *supra* note 145.

163. CGRS Review, *supra* note 10 at 39; Immigration Act 1987, art. 129D(1) (Aus.) (1999), available at <http://www.legislation.govt.nz/act/public/1987/0074/latest/DLM113053.html> (last visited Dec. 7, 2017).

164. CGRS Review, *supra* note 10 at 39. Article 31(1) of the Convention provides that “A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.” See *supra* note 7.

165. CGRS Review, *supra* note 10 at 41. Refugee Appeal No. 76501, [2012] NZIPT 800041, available at [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20101119\\_76501.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20101119_76501.pdf) (last visited Dec. 7, 2017).

166. Refugee Appeal No. 76501, [2012] NZIPT 800041, available at [https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref\\_20101119\\_76501.pdf](https://forms.justice.govt.nz/search/IPT/Documents/RefugeeProtection/pdf/ref_20101119_76501.pdf). at para 7, 63-64 (last visited Dec. 7, 2017).

167. Refugee Appeal No. 76501, *supra* note 166 at ¶ 57.

168. *Id.* at ¶ 58.

169. *Id.*

170. *Id.* at ¶ 60.

171. *Id.* at ¶ 62.

Therefore, the Authority determined that the applicant faced a “real chance” of persecution by her husband and that State protection was “not available.”<sup>172</sup>

In conclusion, while New Zealand has not issued gender guidelines, it has granted asylum based on domestic violence and defined the PSG broadly. Although this was later qualified with particular country conditions information, the definition of PSG could potentially allow women or gender to be the sole criteria for a PSG in New Zealand in the future.

#### *Asylum in South Africa Based on Domestic Violence*

South Africa has some positive law regarding asylum, however, in practice it has failed to recognize domestic violence asylum claims just as with other States profiled here. South Africa incorporated the Refugee Convention domestically with its South African Refugees Act of 1998.<sup>173</sup> Unlike in the other countries discussed here, this Act included gender as an enumerated category under PSG.<sup>174</sup> This inclusion requires decision makers to consider gender a PSG.<sup>175</sup> The Amendment Act of 2008 also “explicitly incorporates gender-related persecution claims by including gender as one of the possible bases for a ‘particular social group’ as well as by adding gender as a separate ground for refugee status.”<sup>176</sup>

However, South Africa does not have guidelines for adjudicating gender-based persecution asylum claims.<sup>177</sup> According to a study by Lindsay M. Harris, implementation of the Refugees Act has been lacking.<sup>178</sup> Harris interviewed decision-makers, reviewed legal files, and interviewed individual survivors of gender-related persecution who had applied for asylum in South Africa.<sup>179</sup> As of the writing of her article in 2009, the Refugee Appeal Board (RAB) did not have a single holding that “recognized domestic violence as persecution.”<sup>180</sup> The RAB indicated that one of the main barriers to recognizing domestic violence based claims is lack of proof of the State’s inability or unwillingness to protect the victim.<sup>181</sup> The RAB emphasized the need for “medical documentation of the abuse” as well as proof that the “state was unwilling or unable to intervene” on behalf of the victim of persecution.<sup>182</sup> The Chairperson of the Standing Committee told Harris in an interview that domestic

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172. *Id.* at ¶ 63. The opinion uses the word “available,” which likely refers to the Refugee Convention Article A(2) requirement that a refugee is “unable or, owing to such fear, unwilling to avail himself of the protection of that country.” See *Refugee Convention*, *supra* note 7.

173. See CGRS Review, *supra* note 10, at 48; *Refugees Act 130 of 1998*, art.1 § 1.(xxi), available at [http://us-cdn.creamermedia.co.za/assets/articles/attachments/22555\\_a130-98.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/22555_a130-98.pdf) (last visited Dec. 7, 2017).

174. *Refugees Act 130 of 1998*, available at [http://us-cdn.creamermedia.co.za/assets/articles/attachments/22555\\_a130-98.pdf](http://us-cdn.creamermedia.co.za/assets/articles/attachments/22555_a130-98.pdf) (last visited Dec. 7, 2017).

175. Lindsay M. Harris, *Untold Stories: Gender-Related Persecution and Asylum in South Africa*, 15 Mich. J. Gender & L. 291, 348 (2009) at 306.

176. CGRS Review, *supra* note 10, at 48; Refugees Amendment Act 33 of 2008, art. 4(a), available at <http://www.refworld.org/cgi-bin/texis/vtx/rwmain/opendocpdf.pdf?reldoc=y&docid=556da5624> (last visited Dec. 7, 2017).

177. CGRS Review, *supra* note 10, at 48.

178. Harris, *supra* note 175, at 310.

179. *Id.* at 307.

180. *Id.* at 310. However, “If the RAB also denies the claim, the applicant may appeal as of right to then High Court, within South Africa’s federal court system.” See Harris, *supra* note 175, at 300.

181. Harris, *supra* note 175, at 310.

182. *Id.* at 310.

violence would not fit within the definition of persecution.<sup>183</sup> He claimed that abused women do not fall into a particular social group and thus domestic violence claims are “manifestly unfounded” and “state assistance is not required to prevent domestic violence.”<sup>184</sup> Harris’ study also showed that Refugee Status Determination Officers agreed with the Chairperson, since Harris’ review of files demonstrated that “all clients fleeing domestic violence were denied asylum.”<sup>185</sup> Harris concluded that “the problems faced by these asylum seekers in South Africa re-affirm the need for the practical application of international and country-specific gender guidelines and sensitivity in addressing” cases involving gender-based persecution.<sup>186</sup> As of 2014, in a practice advisory published by the Center for Gender and Refugee Studies, South Africa still did not appear to have any published decisions related to gender-based refugee claims.<sup>187</sup>

Therefore, even though South Africa does have gender as a separate enumerated ground and gender is listed under PSG, so far this has not led to a greater number of asylum grants for domestic violence claims compared to other countries that do not include gender as a separate enumerated ground.

#### *Asylum in Costa Rica Based on Domestic Violence*

Costa Rica domesticated the Refugee Convention’s definition of a “refugee” in its immigration law, “Ley General de Migración y Extranjería.”<sup>188</sup> Costa Rica does not have guidelines for gender-related asylum claims.<sup>189</sup> Notably, however, in 2008 “Costa Rica granted asylum to a woman from the United States who sought protection on the basis of domestic violence suffered in the United States.”<sup>190</sup> In that case, “the court held that domestic violence can be the basis for refugee status, and that it would be inconsistent with international refugee rights to deny protection on that basis.”<sup>191</sup> However, the court also noted that domestic violence-based claims will not automatically be granted.<sup>192</sup> The U.S. itself is a refugee-receiving country, and because this application was granted, it indicates that under the Convention, Costa Rica found the applicant “unable to avail” herself of the protection of the U.S.<sup>193</sup>

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183. *Id.*

184. *Id.* at 311.

185. *Id.*

186. *Id.* at 340.

187. CGRS Review, *supra* note 10, at 49.

188. *Id.* at 18; *Ley General de Migración y Extranjería*, Ley No 8.764, Aug 4, 2009, available at <http://www.unhcr.org/refworld/docid/4b0273cb2.html> (last visited Dec. 7, 2017).

189. CGRS Review, *supra* note 10, at 20.

190. *Id.*; *Resolution No 1023-2008 DMG*, Costa Rica, July 23 2008, Ministry of the Interior and Police [*Ministerio de Gobernación y Policía*], Office of the Secretary, San José (on file with CGRS); see also Adam Taylor, *Can an American become a refugee? Yes, and some already have*, WASHINGTON POST, available at [https://www.washingtonpost.com/news/worldviews/wp/2017/01/20/can-an-american-become-a-refugee-yes-and-some-already-have/?utm\\_term=.e002f844b4ac](https://www.washingtonpost.com/news/worldviews/wp/2017/01/20/can-an-american-become-a-refugee-yes-and-some-already-have/?utm_term=.e002f844b4ac) (last visited Dec. 7, 2017).

191. CGRS Review, *supra* note 10, at 20; *Resolution No 1023-2008 DMG*, Costa Rica, July 23 2008, Ministry of the Interior and Police [*Ministerio de Gobernación y Policía*], Office of the Secretary, San José (on file with CGRS).

192. *Id.* *Resolution No 1023-2008 DMG*, Costa Rica, July 23 2008, Ministry of the Interior and Police [*Ministerio de Gobernación y Policía*], Office of the Secretary, San José (on file with CGRS).

193. See Randall, *supra* note 52, at 531-32; See Refugee Convention.

### *Commonalities and Differences Between Countries' Approaches*

Many of the countries compared here, including the U.S., the U.K., Canada, and Australia, have issued guidelines on gender-based asylum claims. In contrast, New Zealand, South Africa, and Costa Rica have not issued guidelines. However, within this sample, whether or not a country has issued guidelines does not seem to determine the outcome of its treatment of domestic-violence related asylum claims. For example, while New Zealand and Costa Rica do not have guidelines, they have both granted asylum based on domestic violence. Furthermore, New Zealand and Australia have relied on the precedent set by the *Shah & Islam* case in the U.K.<sup>194</sup> Both the U.K. and Australia used the PSG “Pakistani women” in cases involving domestic violence, which was based on that decision.<sup>195</sup>

One difference in how various countries deal with domestic violence-based asylum cases is in relation to the particularity of the PSG. For example, the U.K. in *Shah and Islam* determined that the PSG in that case was “women in Pakistan,” while the U.S. BIA in *Matter of A-R-C-G-* used the much more specific group, “married women in Guatemala who are unable to leave their relationship.”<sup>196</sup> Furthermore, New Zealand determined “women” to be a PSG, although it later qualified this to make it country-specific.<sup>197</sup> Canada’s determination of a PSG in *Narvaez* was “women subject to domestic violence in Ecuador.”<sup>198</sup> Therefore, the different cases sampled from these countries have varied in specificity when discussing the PSG of women fleeing from domestic violence.

### *Cultural Exoticism and Domestic Violence*

As Erfat Arbel points out in her study of Canadian gender-based violence cases, there is a tension created by issues of culture and domestic violence in asylum adjudications in refugee-accepting countries.<sup>199</sup> Refugee-receiving countries more readily recognize harms that are exoticized and are more hesitant to recognize domestic violence due to their inability to address the issue domestically. Ironically, this compounds the problems facing those who have suffered domestic violence as it is difficult both for them to receive adequate protection within their State and for them to receive refugee status in the refugee-receiving State. This tension is also apparent in the other countries analyzed here. For example, the U.S. was willing to grant a gender-based persecution case for female genital cutting (FGC) in a BIA precedential decision in 1996, *Matter of Kasinga*.<sup>200</sup> However, a similar precedential decision relating to domestic violence as a form of persecution did not follow until 2014, when the BIA decided *Matter of A-R-C-G-*.<sup>201</sup> As of this writing, moreover, *Matter of A-R-C-G-* has been overturned by *Matter of A-B-*.<sup>202</sup> Considering that domestic violence is very prevalent in the U.S., it is possible that the reasons behind the failure to recognize domestic violence as a ground for asylum in a precedential decision are similar to the

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194. See Khawar, *supra* note 147; Refugee Appeal No. 76501, *supra* note 166.

195. See *Shah & Islam*, *supra* note 93; Khawar, *supra* note 147.

196. See *Shah & Islam*, *supra* note 93; *Matter of A-R-C-G-*, *supra* note 69.

197. See Refugee Appeal No. 76501, *supra* note 166.

198. *Narvaez*, *supra* note 124.

199. See Arbel, *supra* note 132, at 769-71.

200. *Matter of Kasinga*, *supra* note 59.

201. Musalo, *supra* note 8, at 45; *Matter of A-R-C-G-*, *supra* note 69.

202. See *Matter of A-B-*, *supra* note 2.

reasons outlined by Arbel in her study of Canadian domestic violence asylum cases. Furthermore, FGC is more easily exoticized and “othered” than is domestic violence.

This issue is also raised by the *Gonzales* case, and the asylum grant for a U.S. citizen in Costa Rica. In the *Gonzales* case, the Inter-American Commission determined that the U.S. failed in its due diligence to protect Jessica Gonzales and her children.<sup>203</sup> Therefore, if she had applied for asylum in another country that has granted asylum based on domestic violence previously, the “unable or unwilling” test of lack of State protection would likely be met. This is possibly what happened in the Costa Rica case, where a U.S. citizen was granted asylum due to a domestic-violence based claim.<sup>204</sup> Thus, the U.S. must contend with how it conceptualizes domestic violence asylum claims when the U.S. government itself is unable or unwilling to protect domestic violence victims.

In the New Zealand case, the court recognized a broad PSG, but simultaneously blamed another country’s culture for domestic violence. There, the Refugee Appeal Authority utilized the broadest PSG of the cases studied here, that of “women.”<sup>205</sup> However, it then went on to carefully contextualize this PSG based on Fijian culture and norms that subjugate women.<sup>206</sup> This is in spite of the fact that domestic violence is widespread throughout the world, and that it is not particular to any one culture.<sup>207</sup> This issue is also raised by the more particular PSG employed in the U.K. and Australian cases: “Pakistani women.”<sup>208</sup> The ways in which asylum-granting countries characterize an applicant’s home country are misleading in their depictions of domestic violence because they purport to indicate that domestic violence is particular to the applicant’s home country, when in fact it remains a problem in asylum-granting countries as well.

Another example of this phenomenon is Lord Hoffman’s analysis in *Shah and Islam*. While he acknowledged that domestic violence occurs in the U.K. as well, he determined that it would not qualify as persecution under the Convention because of the availability of State protection, including restraining orders.<sup>209</sup> However, after *Gonzales*, under human rights law, at least in the Inter-American context, the availability of restraining orders would not be enough to show State protection.<sup>210</sup> Instead, the State would also have to show that it exercised due diligence in enforcing the restraining orders.<sup>211</sup> This change would be striking, since, for example, the U.S. Supreme Court held that Ms. Gonzales did not have a procedural due process right to the enforcement of her domestic violence restraining order.<sup>212</sup> The Court also held that the Colorado statute that mandates arrest for restraining order violations was actually

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203. *Jessica Lenahan (Gonzales) v. USA.*, Case No. 12.626, Inter-Am. C.H.R., Report No. 80/11 (2011).

204. See *Resolution No 1023-2008 DMG*, *supra* note 190.

205. Refugee Appeal No. 76501, *supra* note 166, at ¶105.

206. *Id.* at ¶ 106.

207. See World Health Organization, *Violence Against Women: Intimate Partner and Sexual Violence Against Women Fact Sheet*, updated November 2016, available at <http://www.who.int/mediacentre/factsheets/fs239/en/>.

208. See *Shah & Islam*, *supra* note 93; *Khawar*, *supra* note 147.

209. See *Shah & Islam*, *supra* note 93, at 13.

210. See *Jessica Lenahan (Gonzales) v. USA.*, Case No. 12.626, Inter-Am. C.H.R., Report No. 80/11 (2011); see also *Town of Castle Rock v. Gonzales*, 545 U.S. 748 (2005).

211. See, e.g., *Jessica Lenahan (Gonzales) v. USA.*, Case No. 12.626, Inter-Am. C.H.R., Report No. 80/11 (2011).

212. *Town of Castle Rock v. Gonzales*, 545 U.S. 748, 768 (2005).

discretionary.<sup>213</sup> Thus, if this change was enforced, the U.S. Supreme Court's decision would be in clear violation of the standard and other States would have to provide for far greater protection. Furthermore, if the international due diligence standard was extended to asylum law, a person suffering from domestic violence while in the U.K. likely would not be denied refugee status in other countries as easily as Lord Hoffman suggests.

### III. RECOMMENDATIONS

#### *Making Gender One of the Protected Grounds*

Scholars have argued that making "gender" a specifically listed protected ground would aid women in gender-based asylum claims, including domestic violence-based claims.<sup>214</sup> Furthermore, the United Nations CEDAW Committee General Recommendation No. 32 urges States to recognize sex, gender, and LGBT status as their own grounds of asylum.<sup>215</sup> Others, such as the amici in the *Matter of A-R-C-G-* case, have called for gender to be considered a PSG.<sup>216</sup> For example, the UNHCR amicus brief in *Matter of A-R-C-G-* described how gender alone is an applicable PSG, such as "women in Guatemala."<sup>217</sup> The brief goes on to argue that gender is a clear example of an immutable characteristic that fits within that category of a social group.<sup>218</sup> The brief then cited various sources, domestic and international, such as the BIA in *Acosta*, the British House of Lords, the Canadian Supreme Court, and the High Court of Australia, indicating that they "have all recognized that gender can serve as a shared characteristic defining a particular social group for purposes of refugee protection."<sup>219</sup>

Notably, the only country profiled here that includes gender as one of the protected grounds and as a PSG is South Africa.<sup>220</sup> However, as noted above, in that country, this additional protection for those seeking asylum based on persecution in the form of domestic violence has not led to greater recognition of domestic violence as a form of persecution. As demonstrated by South Africa, additional work will be required to ensure that adjudicators correctly apply these protections. However, including "gender" as a PSG, along with guidance and oversight, will hopefully lead to more positive adjudication for those fleeing persecution based on domestic violence.

State parties to the Refugee Convention should amend their definitions of a refugee to include gender as an enumerated ground and as a PSG. Although this has not been fully effective, an amendment would help adjudicators understand why domestic violence survivors qualify as "refugees." Furthermore, it would rectify the

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213. *Id.* at 766.

214. *See, e.g.*, Randall, *supra* note 48, at 566.

215. UN Committee on the Elimination of Discrimination Against Women (CEDAW), *General recommendation No. 32 on the gender-related dimensions of refugee status, asylum, nationality and statelessness of women*, 5 November 2014, CEDAW/C/GC/32, available at: <http://www.refworld.org/docid/54620fb54.html> [accessed 28 October 2017]; *see also* Randall, *supra* note 52, at 568-69.

216. *See In re A-R-C-G- et al.*, 26 I&N Dec. at 395 n.16.

217. Brief of Amicus Curiae The United Nations High Commissioner for Refugees In Support of Respondents at 15, *In re A-R-C-G- et al.*, 26 I&N Dec. 388 (B.I.A. 2014) UNHCR Amicus Brief, at 15, available at <http://www.refworld.org/pdfid/50b5c2a22.pdf> (last visited Dec. 7, 2017).

218. *Id.*

219. *Id.* at 15-16.

220. *See Refugees Amendment Act, 2008*, *supra* note 176.

omission by the original drafters of the Refugee Convention who did not include “gender” as a protected ground.

Adding “gender” is just a first step and certainly is not enough. In addition to adding “gender” to the definition of “refugee,” there should be guidelines that include all victims of domestic violence. This should not just include domestic violence victims from specific countries, but should instead recognize that domestic violence is a form of persecution that effects people globally. These guidelines should separately note the effects of domestic violence on children and domestic violence in same-sex relationships, which may not be as clear to adjudicators as coming under the definition of gender-based violence.

One argument against adding gender as a protected ground is that it would “open up the floodgates.” This is likely what the Minister of Immigration and Multicultural Affairs had in mind in Australia after the *Khawar* case when he claimed that the courts were interpreting the definition of a refugee too broadly.<sup>221</sup> Randall effectively refutes this argument on a number of grounds.<sup>222</sup> First, even with gender as an enumerated ground, not everyone will have a claim, since the requirements of being a refugee are still very specific and relatively difficult to meet.<sup>223</sup> Furthermore, a fear of opening the floodgates has not stopped other enumerated grounds, such as political opinion or race, from being recognized.<sup>224</sup> Moreover, the floodgates argument misses the fact that refugee law is individualized and that migration is not easy.<sup>225</sup> Therefore, the “floodgates” argument is flawed. Finally, even if it were possible that this would increase refugee flows, the benefits of recognizing gender as an enumerated ground outweigh the potential increase in applications. This potential increase is incomparable to the potential harm and loss of life that will occur when collective inaction to protect victims of domestic violence who are fleeing their countries of origin continues.

#### *Gender Guidelines that are Binding on Adjudicators of Asylum Claims*

Each country should have guidelines that provide adjudicators with an understanding of gender-based persecution, including domestic violence, and a set of considerations for deciding cases that involve domestic violence. While the U.S., the U.K., Canada, and Australia have all adopted guidelines to help adjudicators make decisions in asylum cases based on gendered violence, none of these guidelines is binding. In order to have a fairer global system for domestic violence victims seeking asylum, these guidelines must be binding. We can see a glimpse of the potential effect of this from the *Narvaez* case in Canada. In *Narvaez*, the Court stated that while the gender guidelines were not binding, they should be followed “unless circumstances are such that a different analysis is appropriate.”<sup>226</sup> If the Refugee Board had followed these guidelines, they would likely not have originally denied the claimant’s application. This is in part because the guidelines state that women can belong to a “gender-defined social group.”<sup>227</sup> Thus, if countries required adjudicators to consider

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221. Hunter, *supra* note 114, at 114.

222. Randall, *supra* note 52, at 562.

223. *Id.* at 563.

224. *Id.* at 564.

225. *Id.*

226. *Narvaez v. Canada (Minister of Citizenship and Immigration)*, [1995] 2 FCR 55, available at <https://www.canlii.org/en/ca/ct/doc/1995/1995canlii3575/1995canlii3575.html> (last visited Dec. 7, 2017).

227. CGRS Review, *supra* note 10 at 16; *Gender Guidelines*, *supra* note 117, at 4.

gender-based violence in their decisions and required them to follow certain guidelines, individual attitudes or biases about domestic violence would be a lot less likely to derail an asylum applicant's claim.

For example, if South Africa had binding gender guidelines that stated that domestic violence could form the basis for asylum and listed examples of factors the adjudicators should consider, then it would not be possible for an adjudicator to deny claims because of a personal belief that abused women do not fall into a PSG, and that "state assistance is not required to prevent domestic violence."<sup>228</sup> Mandatory guidelines regarding domestic violence asylum claims would ensure uniformity in the process, and would afford domestic violence survivors a greater chance at being granted asylum.

*Training on Domestic Violence and Obligations Under Human Rights Norms*

Training should be required for adjudicators on the subjects of domestic violence and the obligations of States to exercise due diligence under international human rights norms. If judges were more knowledgeable and more sensitive to issues surrounding domestic violence, this would likely result in better outcomes for asylum seekers fleeing domestic abuse in their home countries, or at the very least a better understanding of domestic violence by adjudicators, who could then more fairly assess the situations faced by domestic violence survivors.

Furthermore, there should be more training on international human rights obligations, and how these relate to domestic violence and asylum. As Siobhán Mullally points out, refugee law in various countries rarely refers to the "due diligence" standard that has been accepted within international human rights law.<sup>229</sup> If adjudicators were trained on current human rights law and domestic violence, this would likely enable them to better understand their own countries' obligations to exercise due diligence to protect victims of domestic violence. Furthermore, it would allow adjudicators to better understand the severe risks in denying a claim for asylum, and returning victims of abuse to countries that are violating their human rights by not acting with due diligence to protect them from domestic violence. Lastly, it would enable adjudicators to better analyze and evaluate whether the applicant's home country is able or willing to protect them. Refugee and asylum law fall under international human rights, and there is considerable sharing of case precedent and ideas between countries that have signed the Refugee Convention.<sup>230</sup> Therefore, States should work towards a better global understanding of domestic violence as a human rights issue on the basis of which asylum seekers should be afforded protection. Training would lead to States meeting their international human rights obligations, rather than allowing individual cases to be decided unfairly because adjudicators are uninformed about domestic violence and about human rights norms.

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228. See Harris, *supra* note 175, at 311.

229. Mullally, *supra* note 29, at 475.

230. See for example *Shah & Islam*, *supra* note 93, at 7, where the House of Lords discusses United States asylum jurisprudence.



### *Standard for Non-State Actors*

Asylum applications should not be adjudicated under a standard that places a higher burden on those whose persecution was committed by non-state actors, since this makes it very difficult for domestic violence victims to receive asylum.<sup>231</sup> This is due to the fact that domestic violence perpetrators are most often non-state actors. A standard that requires States to condone or be completely helpless to prevent domestic violence does not recognize the difficulties domestic violence survivors face in obtaining police protection. This type of standard fails to protect domestic violence survivors who otherwise qualify for asylum.

### *Passing Another International Agreement or Protocol on Refugees*

Another possible solution to remedy the current situation for gender-based violence and asylum would be to pass another protocol (or an amendment) to the Refugee Convention. While this approach would face a lot of hurdles, this could potentially promote more uniformity between different States in their adjudication of these claims. Just as the 1967 Protocol updated the 1951 Convention in order to include refugees who had not fled World War II specifically, a new Protocol that included “gender” as an enumerated category could remedy the oversight of the original Convention, which did not explicitly include gender-based persecution in its definition of “refugee.”<sup>232</sup>

There certainly is a need for such an international instrument. The Refugee Convention is missing information related to gender and standards based on gender, and CEDAW likewise failed to acknowledge gender-based violence.<sup>233</sup> Therefore, a new Protocol would not only make it easier for domestic violence survivors who are seeking asylum to qualify as refugees, it would also fill a hole that is left by major international instruments that have not fully recognized gender-based violence. Ideally, this new Protocol would also acknowledge other forms of gender-based violence, and would also include individuals who are LGBT under its enumerated categories.

### *International Appeals for Asylum Denials*

Just as Jessica Gonzales was able to take her case to the Inter-American Commission on Human Rights after losing at the U.S. Supreme Court, one way to remedy denials of asylum to individuals who are facing persecution in the form of domestic violence would be to encourage advocates to aid them in appealing these denials in front of international and regional human rights bodies. Though the *Gonzales* decision before the Inter-American Commission was not binding on the U.S., it is important for public perception and vindication for domestic violence

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231. This is particularly relevant to the U.S. after *Matter of A-B-*. See, e.g., *Matter of A-B-*, 27 I&N Dec. 316 (A.G. 2018).

232. See *Refugee Convention*, *supra* note 7, at 14.

233. Mullally, *supra* note 29, at 461; *Convention on the Elimination of All Forms of Discrimination Against Women*, 1979, available at <http://www.un.org/womenwatch/daw/cedaw/text/econvention.htm> (last visited Jan. 15, 2018). While the original Convention did not mention violence against women, subsequently General Recommendation No. 19 (11th session, 1992) acknowledged violence against women. See *General Recommendation No. 19*, available at <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm> (last visited Jan. 15, 2018).

victims and hopefully will lead to changes in how the U.S. treats them. While bringing these cases to international bodies would pose a challenge, the outcome could lead to more uniformity between States' asylum laws and international human rights norms. Those denied asylum should appeal their denial as a violation of the due diligence obligations of the receiving state.

### CONCLUSION

Each of the countries described in this paper has struggled with how to address asylum claims made by those fleeing domestic violence-based persecution in other countries. Evident in all of the countries is a concern about how to define domestic violence as persecution when the refugee-receiving countries themselves struggle with pervasive domestic violence. Domestic violence is a worldwide phenomenon that is not country-specific. In order to protect asylum seekers who fear domestic violence-based persecution, there needs to be international standards holding States accountable. The framework for each State's treatment of gender-based asylum claims needs to be revised, as do international frameworks.

The 1951 Refugee Convention and the 1967 Protocol provide protection to refugees, yet this protection is circumscribed due to the historical periods in which they were drafted. Since the drafting, the UNHCR and various countries have presented guidelines to try to bridge the gap that was left when the drafters did not include "gender" as a protected ground. However, due to this original oversight and other issues surrounding domestic violence, there is still much that could be improved to protect domestic violence survivors and to make it easier for them to be granted asylum.

With the global epidemic of domestic violence, many lives are at stake. Asylum law is an important area that can be used to fight domestic violence and provide protection for those at risk of further harm by their abusers. As individual countries and as a global community, we must make improvements to better aid these asylum seekers.