

Persecution in the Home

Applying the Due Diligence Standard to Harmful Traditional Practices within Human Rights and Refugee Law

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Abstract: Violence against women and children in the form of harmful traditional practices remains one of the most pressing challenges facing the international human rights community. This article discusses the applicability of the due diligence obligation from the perspective of human rights and refugee law. Dilemmas relating to discriminatory legislation and/or social norms, as well as non-responsive courts and police complicate the assessment of a state's willingness and ability to protect victims within asylum determination. Similarly, the familiar context in which non-state actors pursue forced marriage, honour killing, female genital mutilation, and domestic violence upon their relatives prompts adjudicative institutions to apply creative analysis to avoid assignment of state responsibility, thereby denying protection.

Keywords: Harmful Traditional Practices; Violence Against Women; Non-Discrimination; Persecution; Due Diligence; Female Genital Mutilation; Forced Marriage; Domestic Violence; Honour Killing; Asylum; Internal Flight Alternative.

One of the ironies of the Arab Spring is that it prompted attention to harmful traditional practices (HTP) against women; the world was stunned by images of female demonstrators in Tahir Square in Egypt who were subject to virginity testing as reprisal for their political engagement.² At present, feminists are concerned that women are suffering setbacks in political representation, which may result in a loss of gains within the legal protection arena.³ HTP are often linked to cultural and/or religious hierarchical/patriarchal orientations, which perpetuate inferior

1 This article is based on my lecture for the INTACT-UNHCR seminar on "La protection internationale face aux 'pratiques traditionnelles néfastes' 22 November 2011, Brussels, Belgium. I extend my warmest thanks to Jo Stigen for his comments.

2 See David Kirkpatrick, 'Egypt's Women Find Power Still Hinges on Men' *The New York Times* (New York, 9 January 2012).

3 See statement by Mahnaz Afkhami to the US Senate Foreign Relations Subcommittee on International Operation and Organizations, Human Rights, Democracy, and Global Women's Issues and the Subcommittee on Near Eastern and South Central Asia Affairs (Public statement 2 November 2011) <<http://www.hsdl.org/?view&did=691848>> accessed 7 February 2012.

roles of women and girls within the family and society.⁴ They exemplify the merger of public/private dimensions of human rights protection.⁵ In spite of celebrating the 60th anniversary of the Universal Declaration of Human Rights, there remains a pressing need to address the widespread prevalence of violence against women and children in the home. This article presents the due diligence obligation in relation to harmful traditional practices, highlighting both progress and protection gaps within the fields of human rights and refugee law. Section 1 explains Harmful Traditional Practices as Violence, Section 2 delineates HTP as Persecution, Section 3 addresses the challenge of due diligence, examining legislation and discrimination, Section 4 highlights the special interest of children, Section 5 reviews the typology of HTP including Forced Marriage, Dowry Murder and Honour Killing, and Female Genital Mutilation, Section 6 reviews Domestic Violence, highlighting the Jessican Lenahan case in the Inter-American Commission of Human Rights, and Section 7 offers a Conclusion.

I. Harmful Traditional Practices as Violence

HTP are cloaked in stereotypes regarding morality and gender biases and, in essence, are considered to constitute violence. The UN Declaration on the Elimination of Violence against Women (1993), article 2 defines violence as:

Any act of gender-based violence that results in, or is likely to result in physical, sexual, and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation, and other traditional practices harmful to women.⁶

4 However, they also affect men and boys, for example in the context of honour related violence and sacrifice of children.

5 See Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000) 59. See also Nancy Kim, 'Toward a Feminist Theory of Human Rights: Straddling the Fence Between Western Imperialism and Uncritical Absolutism' (1993) 25 *Columbia Human Rights Law Review* 49. See also Heaven Crawley, *Refugees and Gender: Law and Process* (Jordans 2001) 18-19.

6 See also Bronwyn Winter, Denise Thompson and Sheila Jeffreys, 'The UN Approach to Harmful Traditional Practices: Some Conceptual Problems' (2002) 4(1) *International Feminist Journal of Politics* 72, underscoring western practices which amount to harmful traditional practices, such as cosmetic surgery and eating disorders due to negative socialisation.

Article 4 sets forth that states are required to condemn violence against women and should *not* invoke any custom, tradition or religious consideration to avoid their obligations. This has also been confirmed by the UN Committee of the Convention on the Elimination of Discrimination Against Women in its General Recommendation 19 (1992). As a result of HTP, victims are denied reproductive autonomy, financial independence, employment, education, nutrition, health care, political participation, and civic rights. Hence, HTP are undeniably *protection issues* given that they are considered to violate international human rights, inter alia, the rights to life, physical integrity, security, freedom from torture, inhuman and degrading treatment, dignity, equality, non-discrimination, and privacy (including identity, personal integrity, intimacy, autonomy, and body). Because many women and girls at risk of harmful traditional practices are forced to flee abroad, it is necessary to examine the refugee regime in particular. The next section presents the concept of persecution in relation to HTP.

II. Asylum

Persecution

Provision of asylum or humanitarian protection is an important tool in the response of the international community to violence against women and girls. Many forms of HTP are considered *gender related persecution* under the 1951 Convention on the Status of Refugees. UNHCR's Gender Guidelines set forth that rape and other forms of gender-related violence, such as dowry-related violence, female genital mutilation, domestic violence, and trafficking, are acts which inflict severe pain and suffering—both mental and physical— and which have been used as forms of persecution under article 1 of the 1951 Convention on the Status of Refugees, whether perpetrated by state or private actors.⁷ It is important to recall that cases often involve a combination of different harmful traditional practices. Further, UNHCR Gender Guidelines set forth that if the state, as a matter of policy or practice, does not accord certain rights or protection from

7 UNHCR 'Guidelines on International Protection: Gender-Related Persecution within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees (Geneva 2002) <<http://www.unhcr.org/3d58ddef4.html>>. See also Binaifer Davar, 'Rethinking Gender-Related Persecution, Sexual Violence, and Women's Rights: A New Conceptual Framework for Political Asylum and International Human Rights Law' (1997) 6 Texas Journal of Women and the Law 241.

serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution under article 1 of the 1951 Convention on the Status of Refugees.⁸ At the regional level, within the Council of Europe, the Convention on Preventing and Combating Violence against Women and Domestic Violence (2011) calls upon parties to ensure that gender based violence is recognised as persecution and serious harm, guaranteeing non-refoulement protection and asylum.

Important case law from the United States has helped to promote recognition of harmful traditional practices as persecution and granting protection, for example *In re Fauziya Kasinga*,⁹ addressing female genital mutilation, *Sarhan v Holder*,¹⁰ addressing honour killing, *Gao v Gonzales*,¹¹ addressing forced marriage, and *Matter of R.A.*,¹² addressing domestic violence. Other jurisdictions are also increasingly recognising victims of harmful traditional practices and domestic violence as refugees (Argentina, Australia, Canada, Ecuador, France, Germany, Hungary, Ireland, New Zealand, Romania, Spain, and UK).¹³

Protection Categories

Some jurisdictions have enacted new regulations recognising protection categories linked to harmful traditional practices and violence. For example, the United States Department of Homeland Security supports the following characteristic of a particular social group:

- (nationality) women in domestic relationships who are unable to leave; or
- (nationality) women who are viewed as property by virtue of their positions within a domestic relationship.¹⁴

8 See also UK Ex parte Shah, setting forth that Pakistani women subject to domestic violence are denied protection by a discriminatory state apparatus- thereby establishing the formula: Persecution = Serious Harm + State Failure to Protect in *Islam (A.P.) v. Secretary of State for the Home Department; R v. Immigration Appeal Tribunal and Another, Ex Parte Shah (A.P.)*, Session 1998-1999, United Kingdom: House of Lords (Judicial Committee), 25 March 1999 <<http://www.unhcr.org/refworld/docid/3dec8abe4.html>> accessed 2 February 2012.

9 *In re Fauziya Kasinga* (3278 US Board of Immigration Appeals) (1996).

10 *Sarhan and Disi v Holder* (No. 10-2899 USCA 7th Circuit) (2011).

11 *Hong Ying Gao v Alberto Gonzales* (No. 04-1874-ag USCA 2nd Circuit) (2006).

12 *Matter of R.A.* (24 I&N Dec. 629 AG) (2008).

13 Cases are available <<http://cgrs.uchastings.edu/law/>>.

14 See also <<http://www.michiganlawreview.org/articles/welcoming-women-recent-changes-in-u-s-asylum-law>>.

The Canadian Immigration and Refugee Board has recognised the following as consisting of a social group: Women and girls who do not conform to Islamic fundamentalist norms, young women without male protection, women (divorced in a country with Sharia law), women who belong to a women's organisation that oppose the treatment of women in Iran, women who fear persecution as the consequence of failing to conform to or for transgressing gender discriminating religious or customary laws and practices in their country of origin (forced marriage), divorced women in Iran, and unmarried women.¹⁵ In essence, the Canadian system recognises that women are a social group- and looks at the social context in which they are considered or treated as inferior to men, as property of men, and as subject to male domination without regard to their own will. It assesses women's vulnerability for physical, cultural or other reasons, to violence in an environment, which denies them protection.

It should be noted that case law within the United States and New Zealand has also recognised 'political opinion' as a relevant protection category as women seeking asylum due to their risk of domestic violence were characterised as resisting oppression, seeking emancipation, or expressing individual autonomy.¹⁶ Hence a woman's opposition to adhere to religious/cultural behavioural codes may be characterised as falling under the category of 'religion', 'political opinion', or 'social group'. In addition, her failure to receive protection from the state may be due to discrimination against her race, religion, nationality, political opinion, or gender (social group), resulting in an alternative nexus formation within a protection assessment.

It is important to keep in mind that women and girls may be subjected to HTP/domestic violence and then trafficked for prostitution or forced labour in the realm of domestic work, agriculture, industry, etc.¹⁷ Victims of trafficking risk being subjected to ostracism upon return to their countries of origin, hence they should be given the opportunity to apply for asylum or humanitarian protection.

15 Canada's guidelines and those of other jurisdictions are available <http://cgrs.uchastings.edu/law/gender_guidelines.php>.

16 *Refugee Appeal No. 2039/93 Re MN*, New Zealand: Refugee Status Appeals Authority, 12 February 1996 <<http://www.unhcr.org/refworld/docid/3ae6b741c.html>> accessed 2 February 2012; *Fatin v. Immigration and Naturalization Service*, 12 F.3d 1233, United States Court of Appeals for the Third Circuit, 20 December 1993 <<http://www.unhcr.org/refworld/docid/3ae6b6d60.html>> accessed 2 February 2012.

17 Viviana Waisman, 'Human Trafficking: State Obligations to Protect Victims' Rights, the Current Framework and a New Due Diligence Standard' (Spring 2010) 33 *Hastings International and Comparative Law Review* 385.

Unfortunately, several countries require victims of trafficking to cooperate in investigation and prosecution initiatives, rendering provision of protection conditional on testimony, etc. This is irrespective of the fact that victims may fear reprisals against them or their families; hence it is not surprising that there is often reluctance to accept this type of protection.¹⁸

It may be argued that there is also a counter-trend characterised by formalistic positive consideration of the state's ability and will to protect the applicants from HTP as well as formalistic assessment of internal flight alternatives.

III. Ability and Will of the State to Protect against HTP: The Challenge of Due Diligence

When assessing protection, the UN human rights system places great emphasis in seeking promotion of ratification and implementation of the Convention on the Elimination of Discrimination Against Women (CEDAW) (1981) and the Convention on the Rights of the Child (CRC) (1990), as well as adoption or amendment of national legislation to condemn HTP practices. However, a state's ratification of a convention is no guarantee that HTP will be vanquished; on the contrary, it indicates the beginning of a long process of societal evolution. Reform of cultural attitudes within a society requires extended educational initiatives in the field that are contingent on resources, which are often difficult to attain.¹⁹

CEDAW and the UN Declaration on the Elimination of Violence Against Women establish a *due diligence* obligation framework that set forth where a state facilitates, conditions, accommodates, tolerates, justifies, or excuses private denials of women's rights, the state will bear responsibility for its lack of diligence to prevent, control, correct or discipline private acts through state organs. This has been confirmed by the UN Human Rights Council and the UN Special Rapporteur on Violence against Women, noting that the due diligence obligation had

18 See Anna Marie Gallagher, 'Triply Exploited: Female Victims of Trafficking Networks – Strategies for Pursuing Protection and Legal Status in Countries of Destination' (2004-2005) 19 Geo Immigr LJ 99. See also Cecilia Bailliet, 'Report on Trafficking and Human Rights' New Challenges in Policy Development: Norway as Destination Country for Trafficking, Trafficking and Human Rights Conference (Amnesty International Norway/ProSenteret 2005).

19 See for example, John Tobin, 'The International Obligation to Abolish Traditional Practices Harmful to Children's Health: What Does It Mean and Require of States?' (2009) 9(3) Human Rights Law Review 373-396.

attained the status of customary international law.²⁰ Although protection approaches originally focused on response to acts of violence, there has been a shift towards prevention of violence by dismantling patriarchal gender structures that promote violence.²¹ Nevertheless, progress has been muted in some regions. Corinne AA Packer underscores ‘the general incapacity of the State per se to challenge traditions, since the State does not typically have the cultural legitimacy to do so.’²²

Legislation

In many countries, legislation continues to reflect patriarchal religious/cultural perspectives on family law. Hence, men may not be prosecuted for marital rape, and domestic violence may not be addressed in national penal codes. Yakin Ertürk explains:

In many parts of the world, right to culture claims provide a reference point for the judicial system to excuse acts of violence against women and girls, thus sustaining parallel normative systems. These parallel systems of justice may sanction acts of violence by deeming them acceptable forms of ‘traditional’ practice or by handing down severe punishments (such as honour killings) for women who allegedly transgress societal norms.²³

The legal system and the customary system become instruments of repression in which women and children are left unprotected from threats to their lives or free-

20 UN Human Rights Council, ‘Accelerating Efforts to Eliminate All Forms of Violence Against Women: Ensuring Due Diligence in Prevention’ (16 June 2010) UN Doc A/HRC/14/L.9/Rev.1; UNCHR ‘Report of the Special Rapporteur on Violence against Women on The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Yakin Ertürk’ (20 January 2006) UN DocE/CN.4/2006/61.

21 See UN Human Rights Council ‘Accelerating Efforts to Eliminate All Forms of Violence Against Women: Ensuring Due Diligence in Prevention’ Res 14/12 (30 June 2010) UN Doc A/HRC/RES/14/12.

22 Corinne AA Parker, *Using Human Rights to Challenge Tradition: Traditional Practices Harmful to Women’s Health in sub-Saharan Africa* (Intersentia 2002) 15.

23 Yakin Ertürk, ‘The Due Diligence Standard: What Does it Entail for Women’s Rights’ in C Benninger-Budel (ed), *Due Diligence and Its Application to Protect Women from Violence* (Brill 2008) 34. Farida Shareed confirms that ‘women rarely define the dominant culture, because they do not have the economic, social or political power to do so.’ Farida Shareed, ‘Violence against Women Legitimized by Arguments of “Culture”-Thoughts from a Pakistani Perspective’ in the same volume by Benninger-Budel 245.

dom.²⁴ Furthermore, in the event of actual reform, the process of adoption of national legislation can often exclude consultation of the relevant interest groups, and the society's actual knowledge about the relevant conventions and national legislation may be limited, if existent at all.²⁵ National legislation may not be translated into local languages, and States may lack resources to train judges and police and disseminate the norms within the communities.²⁶ There can also be a mismatch between national legislation and customs- as noted by Siobhan E Laird in relation to Ghana's Children Act (1998), which addresses a Western nuclear family model, ignoring customary practices such as 'polygamy, high fertility, split marital residence, separate purses for spouses among some ethnic groups, patrilineal inheritance and succession, matrilineal child maintenance norms, and inter-dependent material exchange family activities in lieu of cash economy.'²⁷ When the law is not relevant to how traditional family life is lived, it limits the potential for actual protection. Furthermore, deficient policy planning may result in an increased risk of vulnerability to women and children when family structures are altered without accompanying welfare support from the state.²⁸

Discrimination

In practice, women seeking protection from the state are often subjected to severe discrimination impeding access to justice. The most significant challenge to eliminating harmful traditional practices against women and girls is the phenomenon

24 See Riane Eisler, 'Human Rights: Toward an Integrated Theory for Action' (Spring 1987) *Feminist Issues* 36, noting: '... (W)hile laws and customs that restrict women's life opportunities are still so numerous as to be almost ubiquitous, and have throughout history been the cause of tremendous suffering, indignities, and injustices, they are still so generally taken for granted that they are often merely considered "women's lot in life".'

25 See Suya P Subedi, 'Protection of Women Against Domestic Violence: The Response of International Law' (1997) 6 *European Human Rights Law Review* 587.

26 See Susana Chiarotti Boero, 'Women's Citizen Security' (2011) 65 *University of Miami Law Review* 797.

27 Siobhan E Laird, 'Enforcing the Law on Child Maintenance in Sub-Saharan Africa: A Case Study of Ghana' (2011) 25 *Int'l J L & Pol'y & Fam* 220.

28 See for example, Brian H Howard and others, 'Barriers and Incentives to Orphan Care in a Time of AIDS and Economic Crisis: A Cross-Sectional Survey of Caregivers in Rural Zimbabwe' (2006) 6 *BMC Public Health* 27, noting: 'Within weakening patrilineal structures (including waning wife inheritance customs), some fathers (of maternal orphans), aunts, and uncles are defaulting on traditional orphan-care responsibilities. In increasing numbers, orphans are being fostered (used here in the sense of being taken in and raised, although Zimbabweans would not usually attach the term 'fostering' to what they view as family arrangements) by relatives from the maternal side who are female, widowed, old, and poor, or by siblings – each a risk factor for deepening poverty.'

of dysfunctional state institutions that render implementation of legislation ineffective. Corruption, delays, under-funding, non-responsiveness or gender bias of police, judiciary, and other institutions in charge of preventing, monitoring, and responding to HTP are revealed by low statistics of investigation and prosecution of perpetrators.²⁹

HTP are largely considered to be private family matters not meriting police response. Furthermore, women are not likely to seek redress from a court or state institution due to lack of financial resources to pay fees, travel costs, geographic distance, lack of witnesses, victim protection service, or legal aid.³⁰ They may also fear reprisal (including physical assault, murder, eviction from the home, loss of custody of children, economic violence, or prosecution), stigmatisation or ostracism from their communities. Prosecution and incarceration of the family provider may not be pursued due to dependence on his income for maintenance of the family. An innovative trend is that some countries, such as Brazil, have enacted legislation addressing economic violence, for example when the abusive husband of a woman wipes out her economic means of subsistence or deprives her of the property as part of the abuse.³¹ Women need protective orders that restore property, guarantee custody of children, and order the aggressor to leave the domicile.

NGOs may have problems determining the actual scope of HTP given its private nature; hence it may be difficult to establish a pattern of state failure to respond. Women who do not report their abuse, therefore, have difficulties establishing a finding of faulty law enforcement and are thereby hampered in their asylum claims. It is essential that asylum caseworkers have a full understanding of the existence of discriminatory structures affecting women's access to justice. The fact that applicants come from countries in which they face generalised oppression and violence should not be held against them when considering the evidence within asylum hearings.

29 See UNESCAP, 'Violence Against Women Harmful Traditional and Cultural Practices in the Asian and Pacific Region' (2007) <http://www.unescap.org/ESID/GAD/Publication/Others/Publication_EGM-VAW.pdf>.

30 See Alice Edwards, *Violence against Women under International Human Rights Law* (Cambridge 2010) 128.

31 See Law No. 11.340 Maria Del Penha Law 2006 (BR) art 7 as cited on UN Women, 'Definition of Domestic Violence' <<http://www.endvawnow.org/en/articles/398-definition-of-domestic-violence.html>>.

Ertürk proposes the following scope of due diligence protection at the level of the individual:

. . . [R]equires states to ensure that women and girls who are victims or at risk of violence have access to justice as well as to healthcare, legal assistance and support services that respond to their immediate needs, protect against further harm and address the ongoing consequences of violence for them. To this end, states are required to develop appropriate legislative frameworks, policing systems and judicial procedures to provide adequate protection for all women, including a safe and conducive environment for women to report acts of violence against them and measures such as restraining or expulsion orders and victim protection procedures. In situations where in particular women and girls are at known risk of violence, law enforcement agencies have an obligation to set up effective and appropriate protective mechanisms with utmost confidentiality to prevent stigmatization and harm from occurring.³²

The dilemmas faced by asylum adjudicators are that they often lack sufficient information regarding the state infrastructure relevant to long-term aspects of due diligence protection, beyond immediate needs. Victims of HTP may be subject to discrimination and harm upon resettlement to other parts of the country, and these issues may not be adequately considered in asylum determination.

IV. HTP and Children

Since girls undergo discriminatory treatment on account of both their gender and age, it is important to take into consideration the Convention on the Rights of the Child as well as the Convention on the Elimination of Discrimination Against Women. Article 19 of the CRC protects children from physical and mental violence, exploitation, and sexual abuse.³³ Included within this category are:

32 Yakin Ertürk (n 23) 40. See also UNCHR, 'Report of the Special Rapporteur on The Due Diligence Standard as a Tool for the Elimination of Violence Against Women, Yakin Ertürk' (29 January 2006) UN Doc E/CN.4/2006/61.

33 See also UN Committee on the Rights of the Child, 'General Comment 8, Corporal Punishment and Other Cruel or Degrading Forms of Punishment, including Physical and Non-Physical Punishment which Humiliates the Child' (2006) UN Doc CRC/C/GC/8. See also Tony Waterson and Jacqueline Mok, 'Violence Against Children: The UN Report' (2008) 93 Arch Dis Child 85.

female genital mutilation/cutting, forced/child marriage, early pregnancy, honour/dowry killings and maiming, infanticide, sex-selective abortion, sex-selective neglect and abuse, forced medical treatment (sterilisation/mandatory virginity testing), and denial of education and economic opportunities for women and girls.³⁴ Harmful practices against children include these violations as well as corporal punishment, amputations, burning, branding, violent and degrading initiation rites, accusations of ‘witchcraft’ and related harmful practices, such as ‘exorcism’.³⁵ The most disturbing aspect of this type of abuse is that the perpetrators are often the victim’s own mother, aunt, grandmother, father, brother, uncle, grandfather, etc. Survivors grapple with the irreconcilable fact that the persons whom they most loved and trusted subjected them willingly to severe physical and/or psychological harm; and that the locus of persecution was the home. As explained by Saliwe Kawewe, ‘child maltreatment is embodied in the very fabric of a society’s culture. For example, if a culture defines children as private property and includes violence and harmful practices into its basic normative scripts, that society’s ability to prevent child maltreatment is limited.’³⁶ Asylum adjudicators may be challenged to conceptualise persecution as occurring within the intimacy of family life. At the same time they may unconsciously exhibit biased judgment by considering cultural practices as generalised rites that do not fit within the classic notion of individualised targeting. The essential element is the asylum applicant’s appeal for recognition of the risk of violation to her human dignity, with linkage to related rights such as physical integrity, autonomy, etc. The fact that others are subjected to similar assaults should not discount the validity of her claim.

The next section discusses the typology of HTP and domestic violence.

34 See Plan Norway, ‘No More Excuses! Ending All Harmful Traditional Practices against Girls and Young Women’ (Report) (2007) <[http://www.plan.fi/File/1e3f1736-1ce2-4ac2-824f-172803cc8088/No+more+excuses+\(Plan+2007\).pdf](http://www.plan.fi/File/1e3f1736-1ce2-4ac2-824f-172803cc8088/No+more+excuses+(Plan+2007).pdf)>.

35 Aleksandra Cimpric, ‘Children Accused of Witchcraft: An Anthropological Study of Contemporary Practices In Africa’ (UNICEF 2010) <http://www.unicef.org/wcaro/wcaro_children-accused-of-witchcraft-in-Africa.pdf>.

36 Saliwe Kawewe, ‘The Inability of the United Nations to Reform World Practices Endangering Third World Children’ (1998) 14 *New Global Development* 48.

V. Typology of HTP and Domestic Violence

Forced Marriage

According to the UDHR article 16, ICCPR article 23, IESCR article 10, and CEDAW article 16, marriage shall be entered into only with the free and full consent of the intending spouses. Forced marriage is a violation of human rights and constitutes persecution.

Persons seeking asylum on account of forced marriage are fleeing either the threat of being forced to marry someone against their will or trying to escape a marriage they have already been forced to enter. This must be distinguished from arranged marriages in which families assist in selecting spouses, but the latter retains ultimate choice and consent. Forced marriage denies consent to the potential spouse and involves duress. Some women may initially consent to a marriage but later experience abuse and are unable to end or leave the marriage. Women may be imprisoned, isolated, abducted, beaten, subjected to domestic violence, raped, or verbally/psychologically abused, or subjected to a severe economic disadvantage. It is the context of coercion or duress that changes the characterisation of the marriage from voluntary to forcible.

Girls may be sold by their fathers or other family members to settle debts or disputes (also called 'girl compensation'), for financial gain or exchange of valuable goods (as families have pressing economic needs), or as a remedy in response to rape or sexual abuse (thereby sparing the victim of stigmatisation).³⁷ Families sincerely believe that they are guaranteeing the security of the daughter and the family through this practice.

Girls under the age of consent (identified as eighteen by the CRC) are subject to early marriage, and this often results in vesico-vaginal fistulas, pregnancy-related complications due to the immaturity of the reproductive organs, as well as illiteracy as girls are forced to abandon education. It has been estimated that 40% of girls in western and central Africa are married before they are 18, in some countries the rate is 70%.³⁸ Studies have demonstrated a correlation between low rates of education for girls and high percentages of early

37 See UNAMA and OHCHR, 'Harmful Traditional Practices and Implementation of the Law on Elimination of Violence Against Women in Afghanistan' (Report) (2010) <http://unama.unmissions.org/Portals/UNAMA/Publication/HTP%20REPORT_ENG.pdf>.

38 See UNICEF, 'Early marriage: A Harmful Traditional Practice. A Statistical Exploration' (Report) (2005) <http://www.unicef.org/publications/files/Early_Marriage_12.lo.pdf>.

marriages.³⁹ It is noteworthy that the World Press Photo competition of 2011 awarded first prize in the Contemporary Issues category to Stephanie Sinclair for her photo of a child bride with her husband in Yemen, whom she had married at 6 years old whereas he was 25 years old.⁴⁰

Some forced marriages also require female genital mutilation, cutting, or virginity testing (resulting in beating or murder if negative), and lead to multiple violations. Forced marriage also includes wife inheritance, in which a widow is forced to marry an in law when her husband passes away. Women who identify themselves as lesbian may be subjected to forced marriage to cure them. Similarly, women who espouse feminist views or liberal perspectives regarding religious or cultural practices may also be subjected to forced marriage due to their challenge of social mores. Other societies practice temporary marriages in which women are subject to sexual relations and then discarded.⁴¹ Women who reject marriage proposals may be subject to reprisals, such as spraying of acid on their faces. Should they flee, family members often track them down, beat them, and subject them to confinement. Within the context of war, forced marriage of women abducted by soldiers results in rapes, beatings, branding, forced domestic labour, and forced child bearing. The Special Court for Sierra Leone found ‘forced marriage’ to constitute a crime against humanity.⁴²

A complex issue for asylum adjudicators is the phenomenon that some women are granted particular freedoms, such as permission to pursue education, on condition that they return to forced marriage after attaining their degree (in order to retain control of the woman). Adjudicators often grapple with a tendency to question credibility in such cases as they may have trouble understanding the combination of freedom and coercion in specific contexts. Control of woman comes in many forms; this may include a variety of combinations of liberties and limitations, not only restrictions. These variations defy the logical rationale of adjudicators who have radically different reference points for social and familial relations and may operate under an unconscious bias. Moreover, because forced marriages may be customary, there may

39 See Jeannette Bayisenge, ‘Early Marriage as a Barrier to Girl’s Education: A Developmental Challenge in Africa’ (Report) (2009) <<http://www.ifuw.org/fuwa/docs/Early-marriage.pdf>>.

40 See <http://www.washingtonpost.com/lifestyle/style/world-press-photo-2012-winners/2012/02/10/gIQA1EJ83Q_gallery.html?hpid=z6#photo=4>. It is estimated that almost half of all women in Yemen are married during childhood.

41 Intisar A Rabb, ‘The Islamic Rule of Lenity: Judicial Discretion and Legal Canons’ (2011)

44 Vanderbilt Journal of Transnational Law 1299.

42 Neha Jain, ‘Forced Marriage as a Crime Against Humanity: Problems of Definition and Prosecution’ (2008) 6 (5) J Int Criminal Justice 1013-1032.

be no legal documentation of the marriage; hence asylum adjudicators would need to rely on the testimony itself and other types of corroborative evidence. Asylum adjudicators often make the mistake of addressing the concrete harm separately from the context of forced marriage or treating the marriage as a cultural arrangement, contractual matter, or private family issue unrelated to protection.⁴³

Dowry Murder and Honour Killing

In many societies, the honour of a family/clan/tribe is defined in terms of women's assigned sexual and familial roles. Acid throwing and honour killings are oppressive cultural practices in which a woman/girl/boy/homosexual man/woman is beaten, stabbed, attacked with acid, stoned, shot, or strangled by family members. This is in response to the perception that the woman has dishonoured the family or clan via communication, elopement/romantic involvement with a person not selected by the family, homosexuality, disobedience to cultural norms involving dress, or having herself been a victim of rape. Families are subject to social pressure by their tribe, clan, village, etc to restore family honour by killing the person. Honour killings occur in Pakistan, Turkey, Afghanistan, India, Jordan, as well as other regions, including Europe. Indeed, it has been estimated that the rate of honour crimes in the UK averages 17,000 per year.⁴⁴ Within Arab cultures, the woman is considered to hold all of the honour for the family and this in turn supports the social order. The honour code is called the *purda* and requires women to be protected against unauthorised social conduct. John Alan Cohan sets forth:

The disgrace of a family member is inevitably a humiliation to others in the family, despite their innocence of any wrongdoing. The negative feelings toward the child are, at least in some way, imputed to the parents. . . (restoration of honor) may require a performance of some act of penance to restore honor: apologizing, paying blood money, going to jail, moving to a different community and starting a new life, or just biding one's time until the community gets over the dishonor.⁴⁵

43 Kim Thuy Seelinger, 'Forced Marriage and Asylum: Perceiving the Invisible Harm' (2010) 42 Colum Hum Rts L Rev 55.

44 See —, 'A Question of Honour: Police say 17,000 women are victims' *The Independent* (UK 10 February 2008) <<http://www.independent.co.uk/news/uk/home-news/a-question-of-honour-police-say-17000-women-are-victims-every-year-780522.html>>.

45 John Alan Cohan, 'Honor Killings and the Cultural Defense' (2010) 40 Cal W Int'l L J 177, 184.

Dowry murder (including acid attacks) is the murder of a woman by her husband or in-laws because her family is unable to meet their demands for her dowry (common in South Asia).⁴⁶

In some countries, killing the offending woman is actually considered the duty of the aggrieved family in order to redeem the family honour. There is discussion, planning, and deliberation within the family, hence the action does not occur immediately after an alleged transgression. The issue of timing creates problems for asylum adjudicators who may question the degree of risk after a certain amount of time has passed. Some women are forced into exile as a result of dishonouring the family. Assumption that the risk assessment only pertains to the immediate period after the event of dishonour is incorrect, as murders have occurred months and years afterwards, including across borders.⁴⁷

Female Genital Mutilation

Female Genital Mutilation (FGM) is practiced in over 25 African countries, along with other regions.⁴⁸ It entails the surgical removal of all or parts of the female genital organs. It includes the following variants:

- a) Circumcision: the removal of the prepuse and tip of the clitoris
- b) Excision or clitordectomy, removal of the clitoris and labia minora
- c) Infibulation: excision plus the removal of labia majora and stitching of two sides.

The intended purpose is to ensure virginity and chastity and it is performed on infants, children, adolescents, and adult women. It is often performed by women within the family, tribe, clan, etc. This practice is conducted pursuant to the genuine concern of the family for the moral standing of the girl, her transition to womanhood, social integration, and economic security of the family through

46 Meghana Shah, 'Rights under Fire: The Inadequacy of International Human Rights Instruments in Combating Dowry Murder in India' (2003-2004) 19 Conn J Int'l L 209.

47 See also Shira T Shapiro, 'She Can Do No Wrong: Recent Failures in America's Immigration Courts to Provide Women Asylum from 'Honor Crimes' Abroad' (2010) 18 (2) Journal of Gender, Social Policy & The Law 293.

48 Included within the list are: Benin, Burkina Faso, Central African Republic, Chad, Côte d'Ivoire, Egypt, Gambia, Guinea, Guinea Bissau, Kenya, Liberia, Mali, Nigeria and Togo, Djibouti, Ethiopia, Eritrea, Sierra Leone, Somalia, and Sudan (North). Cases are also reported in the Middle East, Europe, and Asia.

facilitation of marriage by way of compliance with cultural practices.⁴⁹ Complications include infections, haemorrhage, infertility, obstructed labour, psychological trauma, chronic pain, HIV infection, and death.

FGM is considered to violate the right to be free from discrimination, torture, inhuman and degrading treatment, the right to life, to security, to physical integrity, health, and the right to privacy. The UN Special Rapporteur on Violence against Women has characterised this type of violence as constituting *torture*.⁵⁰ (Similarly, rape, sexual abuse, incest, forced abortion, honour killings, dowry-related violence, forced marriages, human trafficking, and forced prostitution all fall within the realm of torture.) Although several countries have passed legislation against FGM, the practice is ongoing and some communities opt for cross-border techniques in which they send the girls to relatives in countries lacking legal penalties.⁵¹ Many young women/girls who undergo FGM are later unable to forgive their mothers and grandmothers for the extreme pain and suffering forced upon them and remain incredulous that such decision could have been made allegedly in their 'best interest'. Girls who refuse to undergo FGM are often ostracised from their families and tribes; some seek asylum abroad. Ironically, in spite of the egregiousness of this practice, the provision of asylum or humanitarian protection to girls facing such risk of harm as well as the parents of girls has been uneven and indicates a need to support further education of adjudicators.⁵²

49 Jo Boyden, Alula Pankhurst and Yisak Tafere, 'Harmful Traditional Practices and Child Protection: Contested Understandings and Customs of Female Early Marriage and Genital Cutting in Ethiopia' (Draft Report) (24 August 2011) <http://www2.ohchr.org/english/bodies/cedaw/docs/cedaw_crc_contributions/JoBoyden-AlulaPankhurst-YisakTafere.pdf>.

50 See <<http://www.endfgm.eu/en/female-genital-mutilation/a-human-rights-violation/fgm-amounts-to-torture/>>. See also Statement by UN Special Representative on Torture, Juan Mendez (1 June 2011) confirming that FGM qualifies as torture and noting that legislation against FGM is insufficient to combat this practice: <<http://www.endfgm.eu/en/news-and-events/news/press-releases/legislation-against-fgm-not-sufficient-says-un-special-rapporteur-on-torture-0053/>>.

51 Carole Ageng'o, 'Harmful Traditional Practices in Europe: Judicial Interventions' (Expert Paper) (21 May 2009) EGM/GPLHP/2009/EP.12 prepared for the UN Expert Group Meeting on Good Practices in Legislation to Address Harmful Practices Against Women (May 2009).

52 See Zsaleh E Harivandi, 'Invisible and Involuntary: Female Genital Mutilation as a Basis for Asylum' (2010) 95 Cornell Law Review 599. See also Melanie A Conroy, 'Refugees Themselves: The Asylum Case of Parents of Children at Risk of Female Genital Mutilation' (2009) 22 Harvard Human Rights Journal 109. See *In re Fauziya Kasinga* (3278 US Board of Immigration Appeals) (1996) <<http://www.unhcr.org/refworld/docid/47bb00782.html>> accessed 2 February 2012. See also *Secretary of State for the Home Department (Respondent) v K (FC) (Appellant); Fornah (FC) (Appellant) v Secretary of State for the Home Department (Respondent)* [2006] UKHL 46 (Judicial Committee) <<http://www.unhcr.org/refworld/docid/4550a9502.html>> accessed 2 February 2012.

Application of Internal Flight Alternative as Contrary to Due Diligence

The European Court of Human Rights held that female genital mutilation is considered to constitute ill treatment in violation of ECHR, article 3.⁵³ Nevertheless, recent case law has failed to provide non-refoulement protection. In three cases, *Collins and Akaziebie v Sweden*,⁵⁴ *Izevbekhai v Ireland*,⁵⁵ and *Omeredo v Austria*⁵⁶ all the applications were found to be inadmissible because the Court held that there was an internal flight alternative in Northern Nigeria hence there was no real risk of violation. I suggest that formalistic application of the internal flight alternative risks running contrary to the due diligence principle as it may actually fail to prevent HTP. UNHCR issued a Guidance Note on Refugee Claims Relating to Female Genital Mutilation (2009), which states that ‘The lack of effective State protection in one part of the country is an indication that the State will not be able or willing to protect the girl or woman in any other part of the country.’⁵⁷

Indeed, national asylum adjudicators often apply internal flight alternative analysis to cases involving harmful traditional practices.⁵⁸ Key problems include formalistic assessments that fail to discuss whether relocation would be unreasonable and unduly harsh. There is often a failure to assess the actual position of women in society, including their level of education, literacy, and economic self-sufficiency. There is also often little discussion of the government’s ability to protect and provide reasonable relocation. A study by UK Asylum Aid demonstrated that the immigration authorities cited country reports selectively, resulting in a positive finding of IFA in spite of the fact that the country report actually indicated a lack of state protection.⁵⁹ With respect to referral to shelters, there may be little insight as to how long victims can stay, whether there are age restrictions, and the availability of psycho-social support or health care. Decisions may not consider

53 *Collins and Akaziebie v Sweden* (App No 23944/05) ECHR 8 March 2007.

54 *Ibid.*

55 *Izevbekhai v Ireland* (App No 43408/08) ECHR 17 May 2011.

56 *Omeredo v Austria* (App No 8969/10) ECHR 20 September 2011.

57 UNHCR, ‘Guidance Note on Refugee Claims Relating to Female Genital Mutilation’ (2009) <<http://www.unhcr.org/refworld/pdfid/4a0c28492.pdf>> [28].

58 C Bennett, ‘Relocation, Relocation: The Impact of Internal Relocation on Women Asylum Seekers’ (Asylum Aid 2008) <www.asylumaid.org.uk/data/files/publications/89/Relocation_Relocation_research_report.pdf>.

59 Asylum Aid, ‘Unsustainable: The Quality of Initial Decision-Making in Women’s Asylum Claims (Report) (2011) <<http://www.asylumaid.org.uk/data/files/publications/151/UnsustainableWEB.pdf>>.

whether the children (including males) can stay with her, or whether she can obtain a divorce and custody of the children? Other issues include whether the husband or his family can reach the victim and whether entry into shelter is considered taboo, resulting in reprisal or stigma? It is imperative that asylum adjudicators harmonise their practice with the due diligence principle, ensuring full consideration of the actual impact of an IFA conclusion in each individual case.

VI. Domestic Violence

Whereas Forced Marriage, Dowry Murder, Honour Killing, and Female Genital Mutilation are often characterised as relevant to ‘others’, eg non-western cultural groups, domestic violence has been commonly recognised as a prevailing form of oppression affecting women and children in all societies and classes. Domestic violence has been characterised by the CEDAW Committee as a type of abuse linked to traditional attitudes by which women are regarded as subordinate to men.⁶⁰ Further, in General Recommendation No. 19 and in two cases involving deceased victims of domestic violence, the CEDAW Committee set forth that states have a due diligence obligation to ensure that their institutions follow up preventing, investigating, and prosecuting domestic violence as well as providing compensation.⁶¹ The Committee emphasised the state’s duty to implement its own legislation.

At the regional level, the European Court of Human Rights has held that the state’s failure to protect women against domestic violence breaches their right to equal protection.⁶² The Council of Europe Convention on Preventing and Com-

60 UN Committee on the Elimination of Discrimination against Women, *AT v Hungary* (2005) UN Doc CEDAW/C/36/D/2/2003.

61 UN Committee on the Elimination of Discrimination against Women, *Goekce v Austria* (2007) UN Doc CEDAW/C/39/D/5/2005; UN Committee on the Elimination of Discrimination against Women, *Yildirim v Austria* (2007) UN Doc CEDAW/C/39/D/6/2005. See also Siobhan Mullally, ‘Domestic Violence Asylum Claims and Recent Developments in International Human Rights Law: A Progress Narrative?’ (2011) 60(2) *International and Comparative Law Quarterly* 459. See also Andrew Byrnes and Eleanor Bath, ‘Violence Against Women, the Obligation of Due Diligence and the Optional Protocol to the Convention on the Elimination of Discrimination Against Women- Recent Developments’ (2008) 8 (3) *Human Rights Law Review* 517-533.

62 See *Opuz v Turkey* (App no 33401/02) ECHR 9 June 2009. See Lee Hasselbacher, ‘State Obligations regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection’ (2010) 8 *Northwestern University Journal of International Human Rights* 190.

bating Violence against Women and Domestic Violence (2011), article 5, also identifies a due diligence standard of protection:

1. Parties shall refrain from engaging in any act of violence against women and ensure that State authorities, officials, agents, institutions and other actors acting on behalf of the State act in conformity with this obligation.
2. Parties shall take the necessary legislative and other measures to exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors.

The European Court of Human Rights in *N v Sweden* (2010), addressed the general risk of domestic violence in Afghanistan (citing the statistic that 80% of women are victims), the stigmatisation of separated women within the society, and the likelihood of various cumulative risks of reprisals by the applicant's husband, his family, her family, and the Afghan society as indicating violation of Article 3.⁶³

The Inter-American Convention on the Prevention, Punishment, and Eradication of Violence Against Women (1994), article 7, sets forth a due diligence framework for protection:

The States Parties condemn all forms of violence against women and agree to pursue, by all appropriate means and without delay, policies to prevent, punish and eradicate such violence and undertake to:

- a. refrain from engaging in any act or practice of violence against women and to ensure that their authorities, officials, personnel, agents, and institutions act in conformity with this obligation;
- b. apply due diligence to prevent, investigate and impose penalties for violence against women;

The Inter American Court of Human Rights in *Gonzalez v Mexico* (2009), held Mexico responsible for failing to uphold its due diligence obligation to protect women and girls from violence by private actors.⁶⁴ This case involved the sexual

⁶³ *N v Sweden* (App no. 23505/09) 20 July 2010.

⁶⁴ *Claudia Ivette Gonzales and Others v Mexico*, Judgment, Series C No 205 IACtHR (15 November 2009).

assault, torture, and murder of hundreds of women in Ciudad Juarez for over a decade. The Court held that the cases established a pattern of systematic violence linked to social class, age, and gender:

Mexico did not prove that it had adopted reasonable measures, according to the circumstances surrounding these cases, to find the victims alive. The State did not act promptly during the first hours and days following the reports of the disappearances, losing valuable time. In the period between the reports and the discovery of the victims' bodies, the State merely carried out formalities and took statements that, although important, lost their value when they failed to lead to specific search actions. In addition, the attitude of the officials towards the victims' next of kin, suggesting that the missing persons' reports should not be dealt with urgently and immediately, leads the Court to conclude reasonably that there were unjustified delays following the filing of these reports. The foregoing reveals that the State did not act with the required due diligence to prevent the death and abuse suffered by the victims adequately and did not act, as could reasonably be expected, in accordance with the circumstances of the case, to end their deprivation of liberty. This failure to comply with the obligation to guarantee is particularly serious owing to the context of which the State was aware – which placed women in a particularly vulnerable situation – and of the even greater obligations imposed in cases of violence against women by Article 7(b) of the Convention of Belém do Pará.⁶⁵

The state was ordered to eliminate the structural discriminatory factors that resulted in violence against women.⁶⁶

The Inter-American Commission of Human Rights has also addressed domestic violence. In the case of *Maria Da Penha Maia Fernandez*, the Inter American Commission held Brazil was responsible for failing to protect a victim of domestic violence (including shooting and electrocution which left her paralysed) and failing to provide a remedy for two decades.⁶⁷ The Commission underscored a pattern of impunity, which contradicted the state's obligations to

⁶⁵ Ibid [284].

⁶⁶ See Rosa M Celorio, 'The Rights of Women in the Inter-American System of Human Rights: Current Opportunities and Challenges in Standard-Setting' (2011) 65 University of Miami Law Review 819.

⁶⁷ *Maria Da Penha Maia Fernandes v Brazil*, Report No 54/01, IACHR, Case 12.051 (16 April 2001).

prevent, prosecute, and convict the perpetrator. Brazil enacted a new law on domestic and family violence in response to the Commission's recommendations. Elizabeth AH Abi-Mershed poignantly characterises the scope of the due diligence obligation within the context of violence against women:

It is, in principle, an obligation of means rather than results. In other words, it is not the existence of a particular violation that demonstrates the failure to apply due diligence, but rather a lack of reasonableness in measures of prevention, and/or a lack of seriousness in measures of response.⁶⁸

The Commission went on to address the United States' institutional due diligence protection gaps in the Jessica Lenahan case. As presented below, the case reveals dilemmas related to federalism which complicates access to justice at the national level, underscoring the importance of an international system which is responsive to violence against women and children. It is estimated that almost 25% of women in the United States are subject to some form of domestic violence.⁶⁹

Jessica Lenahan Case

Background

The Inter-American Commission of Human Rights issued a report in the case of Ms Lenahan who had attained a permanent protection order from the State of Colorado against her ex-husband. The police failed to respond to her complaints regarding the abduction of her three daughters.⁷⁰ The pre-printed restraining order addressed law enforcement officials:

You shall use every reasonable means to enforce this restraining order. You shall arrest, or, if an arrest would be impractical under the circumstances, seek a warrant for the arrest of the restrained person when you have information amounting to probable cause that the restrained person has violated or attempted to violate any provision of this order . . .⁷¹

68 Elizabeth AH Abi-Mershed, 'Due Diligence and the Fight against Gender-Based Violence in the Inter-American System' in *Benninger-Budel (ed)* (n 23) 137.

69 Will Dunham, 'Quarter of US Women Suffer Domestic Violence: CDC' *Reuters* (Washington 7 February 2008) <<http://www.reuters.com/article/2008/02/07/us-violence-domestic-usa-idUSN0737896320080207>>.

70 *Jessica Lenahan (Gonzales) et al v United States*, Report No 80/11, IACHR, Case 12.626 (21 July 2011).

71 *Town of Castle Rock v Gonzalez* (545 U.S. 748) (2005).

The ex-husband drove to the police station and after an exchange of gunfire, the girls were found shot to death in the back of their father's truck. The autopsy report confirmed that they died of gunshots but did not identify whether the bullets were from the father or the police. Ms Lenahan alleged that the state never duly investigated the deaths nor provided adequate remedy.

Ms Lenahan filed suit in the US District Court of Colorado, alleging that the City of Castle Rock and police had violated her due process rights, both denying her substantive protection and procedural protection in failing to implement the restraining order and denying her entitlement to that right. The District Court had held that since the police were given discretion to determine whether probable cause existed, Ms Lenahan did not have a protectable property interest in the enforcement of the order. The Tenth Circuit Court of Appeals reversed the decision stating that 'the statute promised a process by which the restraining order would be given vitality through careful and prompt consideration of an enforcement request, and the constitution required no less. Denial of that process drained all of the value from her property interest in the restraining order'.⁷²

The US Supreme Court

The case was appealed to the US Supreme Court, *Town of Castle Rock v. Gonzales*,⁷³ in which the majority (Justice Scalia delivering the Opinion) held that Ms Lenahan's due process rights under the 14th Amendment of the US Constitution had not been violated. Despite the fact that Ms Lenahan had obtained a permanent restraining order against her ex-husband, the majority held that the police maintained a traditional discretion to grant or deny the protection order, hence she could not be considered to have a personal entitlement to mandatory enforcement of the order (which they classified as 'vague' and 'novel'). Justice Stevens (together with Justice Ginsburg) issued a scathing dissent, pointing out that should the respondent have entered into a contract with a private security firm, her interest would have been considered 'property' within the meaning of the Due Process Clause. Hence, if the Colorado statute or order by a Colorado judge created the equivalent of such contract by granting entitlement to mandatory individual protection by the police, that state-created right would also qualify as property. Justice Stevens disagreed that the main issue involved the US Constitution; rather he stated that the issue of whether Coloradan state law had established a right to police assistance was more properly addressed by Coloradan

72 *Gonzalez v City of Castle Rock*, 366 F.3d 1093 (10th Cir. 2004) [97].

73 *Ibid* [752].

courts which were more qualified in matters of state law. He added that the mandatory language used in the pre-printed restraining order ('shall arrest') indicated it reasonable for the State Court to conclude that the legislature intended to abrogate the presumption of police discretion in domestic violence cases. In short, he favoured recognition of judicial restraint and federalism. Justice Stevens noted the crisis of under-enforcement of domestic restraining orders in the US and the response by many state legislatures to enact mandatory arrest statutes. He underscored that under the statute, '... the police were *required* to provide enforcement; *they lacked discretion to do nothing.*' (emphasis added) He noted that the respondent was entitled to fair procedures in the case of deprivation of her interest in the enforcement of the protection order, hence given the police's failure to listen to her and apply the correct criteria indicated a false procedure in violation of due process.

The Inter-American Commission of Human Rights

Ms Lenahan then raised a claim with the Inter-American Commission of Human Rights that the judiciary had an obligation to provide a remedy for the police officer's failure to enforce the restraining order pursuant to the American Declaration of Human Rights. She alleged that the US Supreme Court left victims of domestic violence without remedy. Ms Lenahan argued that the US has duties under the American Declaration to exercise due diligence to protect domestic violence victims who have restraining orders, as well as a duty to provide a remedy when it fails to protect, and that she has a right to truth and information about how her daughters died.

The United States argued that the American Declaration does not place a due diligence duty upon the state to prevent the commission of individual crimes by private actors. The US stated that:

It is essential to bear in mind that the judging of governmental action such as in this case has been and will remain a matter of domestic law in the fulfilment of a state's general responsibilities incident to ordered government, rather than a matter of international human rights law to be second-guessed by international bodies.⁷⁴

74 Reply by the Government of the United States of America to the Final Observations Regarding the Merits of the Case by the Petitioners (17 October 2008) 41.

The US considered the due diligence standard to be unclear, and it argued that nevertheless, the domestic criminal legal system was sufficient to meet this standard.

The Commission determined that the restraining order issued by the state was the only means of protection available to Jessica Lenahan and her children. The police failed to effectively enforce the protection order, and this was linked to a lack of organisation and coordination by the state to address domestic violence. The Commission held that this constituted a form of discrimination in violation of article II of the American Declaration (demonstrating that there had been a historical problem with enforcement of protection orders, disproportionately affecting women, also equal protection):

The international and regional systems have pronounced on the strong link between discrimination, violence, and due diligence, emphasizing that a State's failure to act with due diligence to protect women from violence constitutes a form of discrimination, and denies women their right to equality before the law. These principles have also been applied to hold States responsible for failures to protect women from domestic violence acts perpetrated by private actors. Domestic violence, for its part, has been recognized at the international level as a human rights violation and one of the most pervasive forms of discrimination, affecting women of all ages, ethnicities, races, and social classes.⁷⁵

It set forth that states are obligated to give legal effect to the obligations contained in article II of the American Declaration which extend to the prevention and eradication of violence against women, as a crucial component of the state's duty to eliminate both direct and indirect forms of discrimination.

The Commission found violations of the right to life and right to judicial protection. In accordance with this duty, state responsibility may be incurred for failures to protect women from domestic violence perpetrated by private actors in certain circumstances. The Commission determined that the state did not duly investigate the complaints and did not investigate the deaths. It cited the UN Principles on the Effective Prevention and Investigation of Extra-Legal, Arbitrary, and Summary Executions that would require collection of evidence, interview of witnesses, determination of cause of death, and apprehension of those responsi-

75 *Jessica Lenahan (Gonzales) et al v United States*, Report No 80/11, IACHR, Case 12.626 (21 July 2011) [195].

ble. It also referred to the UN Manual on the Effective Prevention and Investigation of Extra-Legal, Arbitrary and Summary Executions calling for full and impartial investigation, autopsies, etc.

The Commission called upon the state to conduct a serious, impartial, and exhaustive investigation into systemic failures re enforcement of protection orders, to reinforce through legislative measures the mandatory character of the protection orders and other precautionary measures to protect women from imminent acts of violence, and to create effective implementation mechanisms:

Compliance with this State obligation (to investigate the deaths and communicate the results to the family) is critical to sending a social message in the United States that violence against girl-children will not be tolerated, and will not remain in impunity, even when perpetrated by private actors.⁷⁶

It concluded that the US failed to act with due diligence to protect the victims 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. The state violated the right to life under article I of the Declaration due to failure to undertake reasonable measures to prevent the deaths, in conjunction with their special protection as girl children under article VII of the American Declaration. The Commission also stated that the state violated the right of judicial protection under XVIII. The US has not complied with the decision, hence the decision was publicised.

VII. Conclusion

The Jessica Lenahan case underscores the importance of the international human rights regime in tackling ongoing resistance within domestic legal and customary systems to grant women and girls protection of their autonomy, security of the person, right to life, and basic access to justice. Although the European Court of Human Rights complements the Inter-American Commission of Human Rights in addressing state responsibility to counter domestic violence, it upheld the application of an internal flight alternative to deny asylum to women fearing female genital mutilation. Hence, the regional systems are not harmonised in

⁷⁶ Ibid.

relation to expanding recognition of the scope of due diligence, and this may well be linked to the fact that the Inter-American case was purely domestic in context, whereas the European case arose within the context of asylum, which carries additional implications regarding multiple 'otherness' (gender/nationality). Hilary Charlesworth and Christine Chinkin declared that 'violence against women is neither random nor circumstantial. Rather it is a structural problem, directly connected to the manifold expressions of imbalance in power between women and men that can be found all around the globe'.⁷⁷ The extensive prevalence of Harmful Traditional Practices and Domestic Violence among societies around the world requires a dedicated effort by states, NGOs, IOs, and academics to ensure that the due diligence principle is recognised as a binding obligation to be met in order to guarantee freedom to women and girls. In practice, this will require substantial investment in education of communities (with special programs for girls and women), training of police and members of the justice system, provision of legal aid and support systems, legislative reform, provision of remedies, and issuance of output such as resolutions, reports, and decisions. Many of these goals are actively being promoted by the UN Agency for Gender Equality and the Empowerment of Women (UN Women) as well as Amnesty International's campaign 'Stop Violence Against Women'.⁷⁸

It is suggested that asylum adjudicators also interpret the due diligence obligation to apply to their important work in reviewing asylum claims linked to HTP and domestic violence. Adjudicators should avoid formalistic assessments of the state's ability and will to protect as well as application of internal flight alternative in such cases. Failure to achieve this will no doubt be interpreted as a negative response to Catharine A MacKinnon's famous query: 'Are Women Human?'⁷⁹ I wish to underline the importance of recognising the protection interests of women and girls (as well as boys) as extending beyond the most egregious physical violations. The Inter-American Court of Human Rights articulated the right to a life's project, in which a woman can aspire to achieve her personal and professional aspirations without interference.⁸⁰ When girls and women are denied the

77 Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Juris 2000) 12-13.

78 See UN Women, 'Focus Areas' <[http://www.unwomen.org/focus-areas/?show=Violence against Women](http://www.unwomen.org/focus-areas/?show=Violence%20against%20Women)> and Amnesty International, 'Stop Violence Against Women' <<http://www.amnesty.org/en/campaigns/stop-violence-against-women>>.

79 Catharine A MacKinnon, *Are Women Human? And Other International Dialogues* (Harvard University Press 2006).

80 *Loayza Tamayo case*, Reparations, Series C No 42, IACtHR (27 November 1998) [147-153].

opportunity to study, work, or even the possibility of imagining or articulating the aspiration of a life's project; this results in systematic oppression. It is essential that immigration authorities take a holistic approach when assessing the protection needs of the applicant, articulation of aspirations relating to education, work, and family life should not be classified as 'socio-economic' concerns unrelated to protection. They form an important part of the evaluation of the potential reparative impact asylum can offer- a best practice approach to enable persons to realise their potential, instead of submitting to harmful traditional practices.

Foremost is the need for all communities to recognise the underlying link between the attainment of equality between men and women and the aspiration to improve the human condition. The family is the foundation of all societies, hence commitment to non-violence within the home may well be considered a necessary first step towards realising the potential of humanity to 'practice tolerance and live together in peace with one another as good neighbours'.⁸¹

81 Charter of the United Nations (entered into force 24 October 1945) 1 UNTS XVI preamble.