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ARTICLE: THE CENTER FOR CHILDREN, FAMILIES, AND THE LAW INTERDISCIPLINARY CONFERENCE: "WELCOME TO AMERICA: IMMIGRATION, FAMILIES, AND THE LAW": PROTECTING VICTIMS OF GENDERED PERSECUTION: FEAR OF FLOODGATES OR CALL TO (PRINCIPLED) ACTION?

NAME: Karen Musalo *

BIO: * Resident Scholar at the University of California, Hastings College of the Law, Director, Center for Gender & Refugee Studies. I would like to express my gratitude to my research assistants, Meghann Boyle and Neela Chakravartula for their exceptional assistance. I would also like to thank CGRS legal interns Jennifer Casey and Angelica Chazaro, for their outstanding research on the femicides in Guatemala. Finally, I dedicate this article to my husband, Richard A. Boswell, whose support makes everything possible.

SUMMARY:

... My efforts assisted to secure Guatemala's ratification of the Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women, and the passage of the Bill for the Prevention, Punishment and Eradication of Domestic Violence, a law aimed to provide security and protective measure for women threatened and attacked by their husbands and partners. 3. ... Part V focuses on violence against women in Guatemala as the root cause of claims such as Rodi Alvarado's, and also provides concrete recommendations for measures the U.S. could undertake to help bring an end to violence against women in Guatemala. ... Timeline on Executive Branch Action Related to Gender Claims May 1995 INS issues non-binding guidance to asylum officers entitled Considerations for Asylum Officers Adjudicating Asylum Claims for Women Aug. 1995 Immigration Judge Donald Ferlise denies asylum to Fauziya Kassindja, who fled female genital cutting and forced polygamy June 1996 The BIA in Matter of Kasinga grants asylum and recognizes that women persecuted because of their gender may be recognized as "members of a particular social group" Sept. 1996 Immigration Judge Mimi Yam grants asylum to Guatemalan asylum seeker Rodi Alvarado who suffered ten years of brutal domestic violence June 1999 The BIA in Matter of R-A-reverses the grant of asylum to Rodi Alvarado and limits the applicability of the Kasinga decision Dec. 2000 The DOJ issues proposed rules setting forth guidance for deciding gender asylum claims; the preamble to the regulations state that they "remove certain barriers that the In re R-A-decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group." ... Notwithstanding the fact that the floodgates argument is without basis, it provides the opportunity to engage in a discussion about alternative responses to the fear of an inundation of asylum seekers: one response is to deny protection to women seeking asylum for gender persecution, the other is to examine the conditions which cause women to flee, and to craft policy responses and strategies which address those root causes. ... As outlined in this Article, the inextricable relationship between human rights violations and refugee claims for protection points to another solution to countries wary that the acceptance of gender claims will lead to waves of asylum seekers.

HIGHLIGHT: What do you think would happen if the United States were to grant asylum to Rodi Alvarado?

[Chana Gazit (PBS documentary producer)]

It would be powerful because it would send a message to the Guatemalan government that it could no longer allow violence against women with impunity to continue.

[Hilda Morales Trujillo (Guatemalan women's rights attorney and activist)] n1

TEXT:

[*119]

Introduction

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

There are many arguments raised in opposition to a grant of asylum in cases involving gender-related harms. Included among these [*120] arguments are that the 1951 Convention relating to the Status of Refugees (Refugee Convention), n2 and its 1967 Protocol Relating to the Status of Refugees (1967 Protocol), n3 were never intended to extend protection in these situations, and that grants of protection in gender asylum cases smack of cultural imperialism, constituting an impermissible critique of what may be a cultural norm or practice. Underlying much of this opposition, however, is the fear of the floodgates - that a grant of asylum will result in a deluge of claims. Some opponents further opine that political support for refugee protection cannot be sustained if such claims were to be recognized.

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

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

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I. International Origins of the Refugee Definition and Perceived Barriers to Gender Claims

The contemporary U.S. and international refugee protection regime has its origins in the post-World War II period. The international community, which had failed to extend protection to Jews and other targeted groups fleeing Nazi genocide and persecution, came together in the wake of World War II to draft those instruments which would establish the norms of protection - the Refugee Convention, n4 and its 1967 Protocol. n5 The Refugee Convention and its Protocol define a refugee in gender-neutral terms as a person with a "well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion" n6 This definition is understood to require a harm grave enough to constitute "persecution" which has a causal relationship, or bears a "nexus" to the asylum seeker's race, religion, nationality, membership of a particular social group or political opinion.

Those who argue that the Refugee Convention and its Protocol were not intended to extend protection to women fleeing gender-related harms generally raise three points to support their position. First, they contend that the harms imposed on women do not meet the definition of "persecution" because they arise from cultural norms (e.g., female genital cutting, forced marriage, polygamy), or constitute religious requirements. Second, they assume that persecution must be government-inflicted, and they reject the validity of women's claims because the persecution is often at the hands of family members or members of the community. Third, and perhaps most importantly, they argue that women's claims fail to meet the nexus requirement, because women are often persecuted because of their gender, and gender is not one of the five Convention grounds. n7

[*122] These bases for excluding women from protection have been addressed and rejected by the United Nations High Commissioner for Refugees (UNHCR), n8 which plays an important role in interpreting the Refugee Convention and its Protocol, and in supervising its application by States that are signatories to these instruments. n9 The UNHCR's position generally has been affirmed by other relevant U.N. bodies n10 and has been adopted by various States in the form of national guidelines. UNHCR has made clear its position that women who suffer gender-related harms can be recognized as refugees. Although a detailed discussion of its analysis is outside the scope of this article, suffice it to say that UNHCR takes the position that: 1) human rights norms - rather than culture - should guide the determination of whether a harm is persecution; 2) persecution by non-State actors, such as family or community members, can qualify one as a refugee; and, perhaps most importantly; 3) under appropriate circumstances women may constitute a [*123] "particular social group," within the meaning of the Refugee Convention, and may be able to demonstrate a nexus between the harm they fear and their social group membership.

II. The Controversy within the United States on Gender Asylum

Over the last ten years, the U.S. position on gender asylum has been characterized by a persistent ambivalence that has led to contradictory measures at the administrative level, and inconsistent decision-making. n11 As the following illustrates, the U.S. has taken steps towards accepting gender claims, only to retreat shortly after.

In 1995, the U.S. became a leader in gender asylum, heeding the call of UNHCR n12 for States to provide guidance on gender asylum for their adjudicators by issuing its Considerations for Asylum Officers Adjudicating Asylum Claims from Women (Gender Considerations). n13 It was second only to Canada, which had issued guidelines in 1993. n14 Yet, the same year that the U.S. issued its mostly favorable Gender Considerations, a U.S. immigration judge, Donald Ferlise, denied asylum to Fauziya Kassindja, n15 a young woman from Togo, who claimed asylum to escape from the fate of being forced into a polygamous marriage against her will, a condition of which was to undergo female [*124] genital cutting. n16 The form of genital cutting (FGC) practiced among her ethnic group was one of the most severe forms of FGC, in which her genitalia was to be removed and the resulting wound sewn shut, leaving only a small opening for the flow of urine and menstrual blood. Although Judge Ferlise was ultimately reversed by the Board of Immigration Appeals (BIA), which issued Matter of Kasinga, a landmark decision recognizing gender persecution as a basis for asylum n17, the ambivalence and resistance which Judge Ferlise's denial demonstrated - coming on the heels of the issuance of U.S. Gender Considerations - continued in U.S. law. It next manifested itself in a 1999 decision of the BIA in the case of the Guatemalan asylum seeker, Rodi Alvarado. n18

The facts of Ms. Alvarado's claim - which are undisputed - are that her husband, who had been a soldier in the

Guatemalan military, subjected her to vicious and unremitting physical abuse; n19 that her attempts to escape him within Guatemala were futile; and that her pleas to the police and the courts went unheeded because they would not "interfere in domestic disputes." n20 Although the decision for her was an anguished one because it meant leaving her two small children behind, Rodi Alvarado fled Guatemala, believing that if she remained, her husband would eventually take her life. After arriving in the U.S. and being apprehended by immigration authorities, she applied for asylum.

[*125] Relying to a large degree on the favorable precedent established by the BIA decision in *Matter of Kasinga*, an immigration judge in San Francisco granted Ms. Alvarado asylum. The Immigration and Naturalization Service (INS) n21 appealed that grant, and in 1999 a majority of the BIA - the same body that had granted Ms. Kassindja's case three years earlier - reversed the immigration judge's grant of asylum to Rodi Alvarado. n22 The BIA attempted to distinguish the two cases to justify the grant in one case and the denial in the other. n23

The ongoing ambivalence on the issue of gender asylum became apparent approximately eighteen months after the BIA's decision when the Department of Justice (DOJ) issued proposed asylum regulations to address claims of gender persecution. n24 The preamble to the regulations explicitly states that their purpose is remove "certain barriers that the *In re R-A*- decision seems to pose" n25 to claims for asylum based on domestic violence. Within a little more than a month of issuing the proposed regulations, then Attorney General Janet Reno took the unusual step of exercising her authority to review the decision in *In re R-A*-. She vacated the denial of asylum, and sent the case back to the BIA, instructing it to reconsider the case when the proposed regulations were issued as final.

Although more than five years have passed, the ongoing contradictory tendencies on this issue have prevented any resolution. n26 [*126] The proposed regulations - pending since December 2000 - have yet to be finalized. Attorney General Ashcroft assigned the case of Rodi Alvarado to himself, with the apparent intent of deciding it during his term in office, but then decided not to decide it - and instead sent it back to the BIA for its decision. In the meantime, the Department of Homeland Security (DHS), formerly the INS, which had appealed the original grant of asylum to Rodi Alvarado and opposed her claim for eight years, changed its position, filing a brief in February 2004 in which it argued that she was eligible for recognition as a refugee.

The absence of clear guidance in the form of regulations, or a precedential decision in *Matter of R-A*-has left a vacuum, which has resulted in arbitrary decision-making, often notable for its confused misunderstanding of the status of the law. n27 Federal court decisions on [*127] [*128] the issue have provided some guidance, but have not comprehensively addressed the issue the way that regulations with nationwide applicability would. n28 The finalization of these regulations has become more complicated with the reorganization of immigration functions pursuant to the Homeland Security Act. n29 Whereas prior to the reorganization, the regulations were within the sole jurisdiction of the DOJ, they are now within the joint jurisdiction of the DOJ and the DHS, which means that both agencies will need to reach some consensus on the regulations before they can be finalized.

[*129] Timeline on Executive Branch Action Related to Gender Claims May 1995 INS issues non-binding guidance to asylum officers entitled *Considerations for Asylum Officers Adjudicating Asylum Claims for Women*

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

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

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

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

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

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

Feb. 2003 Attorney General John Ashcroft orders the BIA to send Matter of R-A- to his office for a decision

[*130] Feb. 2004 The DHS files a brief to the Attorney General which sets forth an analytical framework for deciding gender claims, and argues in favor of a grant of asylum in Matter of R-A-

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

III. Xenophobia, Claims of Cultural Imperialism, and Fear of the "Floodgates"

There are a number of factors that underlie the resistance to extending protection to victims of gender persecution, and that explain the controversy that has arisen from this issue. With the end of the Cold War, the U.S. - along with other industrialized countries - has become less welcoming of asylum seekers - male and female alike. During the Cold War, the admission of refugees who fled Soviet bloc repression served U.S. foreign policy. Furthermore, the exit restrictions which existed in many of the sending countries managed to keep the numbers of asylum seekers from these countries low. n30 These factors no longer exist; refugees come from countries all around the world, and few (perhaps with the exception of Cubans) fit the category of "trophy" refugees - a term used to describe dissidents who fled those countries the U.S. condemned as being repressive. n31

This overall decrease in enthusiasm for welcoming those fleeing persecution is exacerbated by an anti-immigrant climate. Although cycles of nativistic tendencies accompanied by restrictionist measures have characterized U.S. immigration policy for more than a century, n32 the terrorist attacks of September 11, 2001 have hardened attitudes, and [*131] increased xenophobia. All of this has translated into measures for greater militarization of the border, and expanded authority to deport or remove undocumented immigrants while affording them with a minimum of procedural rights. Accordingly, recent legislation has been characterized by its exceedingly harsh and punitive effects. n33

This anti-immigrant climate, with its flagging commitment to refugee protection in general, places in context the resistance to women's claims. This resistance is exacerbated by the fact that gender claims do not fit the traditional male paradigm of a refugee as a courageous political dissident, and that women's fears of persecution are often intertwined with cultural and religious norms and practices. These two factors have led some opponents of gender asylum to opine that the harms the women suffer are not really serious, n34 or to accuse those who argue for protection as being "cultural imperialists," with the implication being that a grant of asylum to a woman fleeing persecution imposed by her culture is somehow an inappropriate judgment on the culture itself. n35

Both of these propositions represent fundamental misunderstandings; the harms at issue in these gender cases are not minor or trivial, but include grave human rights violations such as rape, sexual enslavement, mutilation, acid burning, brutal domestic battering, [*132] and murder (i.e., "honor" killings). And although it might be a form of cultural imperialism if the attorneys representing these women were to launch a broadside condemnation of the cultures from which their clients come, this is not what is taking place. To the contrary, it is the women asylum seekers who are objecting to the imposition of the cultural norms of their society on themselves. It does not seem that one can call it "cultural imperialism" when a member of a society disagrees with, and criticizes aspects of her own culture.

A. Fear of Floodgates

Perhaps the overarching basis for the opposition to gender claims is the fear that acceptance of these cases will result in

the floodgates. Although some opponents do not admit to fear of floodgates as a reason to deny women's claims, others expressly state that this is the basis for their concern. n36 The spectre of thousands - or tens of thousands - of women arriving at the borders of the United States to request asylum is raised as a reason to not recognize their legitimate claims to protection.

The floodgates were evoked around the claim of Fauziya Kassindja; many who opposed a grant of asylum pointed to the fact that millions of women a year are subject to FGC, and predicted that the U.S. would be overwhelmed with asylum seekers if it recognized fear of FGC as a basis of asylum. Fauziya Kassindja was granted asylum, but the dire predictions of a flood of women seeking asylum never materialized. In fact an INS publication n37 explicitly noted that "although genital mutilation is practiced on many women around the world, INS has not [*133] seen an appreciable increase in the number of claims based on FGM" after the Kasinga decision. In this same publication, INS stated that it did not expect to see a large number of claims if the U.S. recognized domestic violence as a basis of asylum.

The experience of Canada provides additional evidence that countries which recognize gender asylum do not experience a floodgates of women. Since 1993, when Canada became the first country in the world to issue Gender Guidelines and accept that women fleeing gender-related persecution qualified for refugee protection, it has maintained statistics on gender asylum. Canada reported that there was no explosion of claims; to the contrary, gender claims consistently constituted only a minuscule fraction of Canada's total claims, and had actually declined in the seven-year period following the adoption of the Gender Guidelines. n38

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

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

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IV. The "Root Cause" Approach - Pragmatic and Principled

The principle that States might respond to migration or refugee flows by addressing root causes is by no means unprecedented; a number of recent international instruments make reference to just such an approach. For example, the 1999 Presidency Conclusions of the European Council meeting in Tampere n39 looks to root causes when it proclaims that a "comprehensive approach to migration [must address] political, human rights and development issues in countries and regions of origin and transit" n40 and that this "requires combating poverty, improving living conditions and job opportunities, preventing conflicts and consolidating democratic states and ensuring respect for human rights, in particular rights of minorities, women and children." n41 In 2002 the European Council reaffirmed this position, stating that "an integrated, comprehensive and balanced approach to tackling the root causes of illegal immigration must remain the European Union's constant long-term objective." n42 Notwithstanding the fact that they are focused more on development than human rights issues, the Trafficking n43 and Smuggling n44 Protocols to the United Nations Convention against Transnational Organized Crime n45 also affirm a root cause or "push" factor approach to addressing migration. n46

[*135] Although U.S. policy makers may not have referred to it in root cause terms, during his presidency, President William Clinton resolved the then-existing Haitian refugee crisis by addressing its root cause. The crisis had been precipitated by the September 1991 military coup which had ousted Haiti's democratically elected president, Jean Bertrand Aristide. As the U.S. Supreme Court observed, in the aftermath of Aristide's ouster, "hundreds of Haitians have been killed, tortured, detained without a warrant, or subjected to violence and the destruction of their property ... Thousands have been forced into hiding." n47

Tens of thousands also attempted to flee Haiti, which created a problem of grand magnitude for President Clinton. His predecessor, President George Herbert Walker Bush, had issued an Executive Order n48 pursuant to which the Coast Guard interdicted and returned Haitian asylum seekers, without providing them with the opportunity to apply for refugee protection. This Executive Order was condemned as inhumane and violative of domestic and international law. Prior to his election, when he was the Democratic challenger to President Bush, William Clinton also had decried the policy, declaring that he was "appalled by the decision of the Bush Administration to pick up fleeing Haitians on the high seas and forcibly return them to Haiti before considering their claim to political asylum ... This process must not stand. It is a blow to the principle of first asylum and to America's moral authority in defending the rights of refugees around the world." n49

However, once he was elected, President Clinton opted to continue the policy of interdiction and repatriation. His adoption of former [*136] President Bush's policy led to harsh criticism from many quarters, most notably the Congressional Black Caucus, and African American community leaders, including TransAfrica president Randall Robinson, who went on a hunger strike in protest. As a result of this pressure n50 Clinton first modified his policy towards the asylum seekers, n51 but then ultimately addressed the root cause of the refugee exodus, which was the ouster of President Aristide. As a result of increasing U.S. pressure, including the threat of military force, Haiti's coup leaders were forced from power, and Aristide was returned to Haiti. n52

Whereas the action taken by President Clinton to resolve the Haitian refugee crisis involved the threat and actual use of military force, the foreign policy measures necessary to address violence against women in Guatemala do not require such drastic means. To the contrary, what is needed is for the U.S. to use the significant influence it has as a major provider of economic assistance to Guatemala to pressure the [*137] Guatemalan government to seriously address the violation of women's rights.

V. Violence against Women as the Root Cause of Refugee Flows from Guatemala

The root cause of Rodi Alvarado's plea for asylum is the violence against women which is endemic in Guatemala, and which is committed with virtual impunity. Although violence against women in Guatemala has historic roots, in recent years it has dramatically increased. Between 2001 and 2007 more than 3,000 women have been killed. n53 The killings of women cannot be simply explained by the general increase in homicides in Guatemala in that the murder rate of women has escalated at a higher rate than that of men. n54

According to available statistics, the women killed are between the ages of 13 and 36, and include "students, housewives and professionals, domestic employees, unskilled workers, members or former members of street youth gangs and sex workers." n55 These murders have been dubbed "femicides" because gender appears to be the primary or only unifying characteristic of the victims, and the crimes are frequently carried out with a misogynistic brutality, accompanied by sexual violence and mutilation.

Investigation and prosecution of these killings has been woefully inadequate; n56 less than 10 percent of the crimes have even been [*138] investigated. The absence of a meaningful law enforcement response to these murders has resulted in the proliferation of theories as to who is behind them, but little proof to pinpoint responsibility. One of the theories is that a significant portion of the killings - perhaps a third - are the result of domestic violence. There is some basis for this belief, in that in 31 percent of the cases being handled by the Special Prosecutor's Office in Guatemala, the murder victim previously had been threatened and had filed a report. n57

Notwithstanding the lack of an overarching theory, the existence of virtual impunity must be seen as a factor; those who commit these crimes most likely view their apprehension, prosecution and punishment as a remote possibility. Further, the crimes are being committed in a societal context where women suffer de jure and de facto discrimination, and anachronistic attitudes prevail. These outdated attitudes are quite evident in laws and policies around marital rights and domestic violence. For example, under Guatemalan law, domestic violence is not criminalized. When a husband batters his wife, it will only constitute the crime of assault if signs of physical injury persist for as long as ten days. Spousal rape is also not recognized as a crime, and a man who rapes a woman who is not his wife is released from criminal culpability if he marries his victim as long as she is twelve years of age or older. Until as recently as 1998, the Civil Code precluded women from enjoying equal legal status, n58 and patriarchal attitudes have resulted in [*139] gross inequality in terms of educational opportunity and earning capacity in the workplace. n59

Commenting on the overall plight of women in Guatemala, the scholar and activist Hilda Morales Trujillo, n60 has written that they "must overcome societal assumptions of a man's right to abuse his partner ... only to encounter inadequate protection due to lenient laws and judicial attitudes that allow their abusers to get away with impunity." According to Ms. Morales Trujillo, a woman who is battered by her partner or spouse will only rarely be able to obtain protection under the civil or criminal law systems, and attempts to escape the abuse by attempted relocation within the country will most likely result in even more "extreme" violence.

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

A. U.S. Leverage to Pressure Guatemala on Women's Rights

The U.S. has a long history of influence over Guatemala. n61 In recent years it has been a major provider of economic assistance, with much of the monies allocated for the purpose of strengthening democratic and legal institutions. Since 1992, the U.S. has provided approximately [*140] \$ 38.5 million to Guatemala under the "Rule of Law" n62 program administered by U.S. Agency for International Development (USAID); the most recent allocation was \$ 7.8 million in 2005. Between 1992 and 2002, an additional \$ 13.6 million was directed to police and prosecutor functions to improve investigation, including forensic examinations, which are critical to successful investigation and prosecution. n63 U.S. funding has also been allocated for the specific purpose of improving women's legal rights. In 2002, USAID's Office of Women in Development instituted the Women's Legal Rights (WLR) Initiative with a purpose to advance "the legal, civil, property, and human rights of women in countries where USAID is working." n64

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

Yakin Erturk, the U.N. Special Rapporteur on Violence Against Women, commented on Guatemala's "inability to provide women with [*141] legal, judicial and institutional protection from violence." n65 These failings are quite evident in the context of the femicides; a recent report by Amnesty International n66 outlines the systemic and pervasive failings of both the police and the prosecutors. Among the police, there is a "frequent failure to protect, examine or preserve the crime scene and deficiencies in collecting evidence." n67 A special police unit within the National Civil Police (PNC) which was created to respond to the femicides has been given very few resources, n68 and members of the PNC itself have been implicated in the murders of women. n69 The Public Ministry, which has the role of investigating and prosecuting crimes, has failed to demonstrate a timely and effective response, with the U.N. Special Rapporteur reporting that "forty percent of the cases [murder cases involving women] are filed and never investigated."

n70 In light of these dismal results, the U.S. should impose concrete requirements, which could include mandating the collection of data on gender crimes, including the femicides, and calling for some showing of increased prosecution and conviction for these crimes. n71

[*142] USAID is not the only governmental entity with a potentially constructive role to play on this issue. Congress also has a role - it could do what it has done in other areas where it has been concerned about particular types of rights violations; in these instances it has conditioned economic assistance on data keeping and demonstrated progress. It took such an approach under the International Religious Freedom Act of 1998, n72 where countries that have engaged in or tolerated particularly serious violations of religious freedom may be subject to economic sanctions. It adopted a similar approach pursuant to the Trafficking and Violence Protection Act of 2000, n73 which permits the [*143] withholding of specific forms of assistance to countries that fail to meet the minimum standards for the elimination of trafficking. If Congress were seriously concerned about securing protection of women's rights in Guatemala, it could require Guatemala to provide statistics regarding its progress on eradicating violence against women, and could condition assistance on the provision of such data. This would send a clear message that the issue was one of importance to the United States. n74

Conclusion

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

As outlined in this Article, the inextricable relationship between human rights violations and refugee claims for protection points to another solution to countries wary that the acceptance of gender claims will lead to waves of asylum seekers. This solution is to simultaneously extend protection to those in need of it, while taking measures to address the underlying causes of refugee flows. Such a response is not only principled, but it is consistent with commitments undertaken in the wake of World War II. Furthermore, such an approach is both pragmatic and feasible. n75 The claim of Rodi Alvarado provides an opportunity to put this model to the test - instead of denying her protection, the United States should recognize her valid claim to asylum, and turn its attention to Guatemala to help bring an end to impunity for violence against women.

[*144]

Affidavit of Hilda Morales Trujillo

Expertise and Teaching

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

2. In 1991, I was appointed by the to be a delegate for the University of San Carlos to the National Women's Office (*Oficina Nacional de la Mujer* or ONAM) and began advocating for policy change and legal reform. My efforts assisted

to secure Guatemala's ratification of the Inter-American Convention to Prevent, Sanction and Eradicate Violence Against Women, and the passage of the Bill for the Prevention, Punishment and Eradication of Domestic Violence, a law aimed to provide security and protective measure for women threatened and attacked by their husbands and partners.

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

4. I have written extensively in the area of legal reforms. In 1997, I wrote a diagnostic report on behalf of the No Violence Against Women Network (*Red No Violencia contra las Mujeres*), on the family courts' refusal to apply the 1996 law for the Prevention, Punishment, and Eradication of Domestic Violence. This report demonstrated the need to develop a regulatory law; it was through these efforts that the National Commission for the Prevention of Domestic Violence (CONAPREVI) was created. In a more recent attempt to radically change the current and ineffective legislative system, I co-authored a book, entitled *Delitos Contra Mujeres-Una Nueva Vision: Propuesta para Modificar elCodigo Penal (Crimes Against Women-A New Vision: A Proposal to Modify the Criminal Code)*, in which we address the inadequacies of the Guatemalan Criminal Code and recommend concrete reforms to provisions that discriminate against women who have been sexually abused. The revision would finally make sexual harassment a serious crime, remove the possibility of pardons for perpetrators of family violence, and allow women to have their attackers prosecuted. It would also achieve the redefinition of family violence and consider it a crime with penalties in accordance with the gravity of the act.

[*145] 5. I, along with Mary Robinson, the former United Nations High Commissioner for Human Rights, were named 2004 Ambassador of Conscience by Art for Amnesty, in collaboration with Amnesty International. This award recognizes exceptional leadership on the fight to protect and promote human rights. I received this honor as a result of my commitment to create change for women in Guatemala.

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

Status of Women

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

8. The root cause of the abuse stems from a culture that embraces the subjugation of women and celebrates the man's right to dominate. An abused woman in Guatemala is scared to leave her violent husband or partner because normally she is totally dependent on him-economically, socially, and psychologically. Furthermore, a woman's absolute dependence on a man is reinforced by the idea that a woman changes from being a daughter of the father to being the

"daughter" of the husband. The husband has the complete right to tell the woman what she can and cannot do, and she must obey him as if she were a child. If a woman challenges this structure, she will be punished, not only by her husband, but also by others in the form of social stigma for being a "bad woman." The normalcy of this abuse is reflected in all aspects of Guatemalan society-in the press, in the streets, and in the laws. Women are expected to withstand the abuse because it is assumed to be part of the culture. For example, if a woman tries to report her abuser to the police, they treat her as if she were the criminal. I have had clients who have been told by the police, when they have gone to them to report their abusive husbands, that they could fix things by simply having more sex with their husbands.

9. The stark reality faced by women is exemplified by this attitude of blaming the woman if and when a man "misbehaves." The notion that the woman asks for harassment because of what she may wear or is at fault for being beaten because she does not obey her husband are prevalent throughout Guatemala, especially amongst the governmental and judicial authorities. The cycle of violence against women cannot be eradicated when those designed to protect women, simply shirk their responsibility by blaming the woman. These attitudes are based on the idea that the man has the right to use violence against a woman as a means [*146] of exercising power and control over her. I personally have been insulted for defending abused women that want to flee their situation.

10. A new epidemic of killings of women in Guatemala, now being labeled as "femicides," further illustrated the low-level perception of the status of women. Though some claim that the killings are random, it is clear that the legal system and a culture that lacks respect for women have served as signals to men engaging in such violence that they will not be punished for their acts. The number of killings is so high, 2170 femicides between January 2000 and September of 2005, that officials do not investigate every case. Moreover, statistics indicate that up to a third of the killings were the product of domestic violence. It has been reported that many women are killed by people they know, and possibly in retaliation for having previously reported spouses and boyfriends to the police. Through my work with the No Violence Against Women Network, I have met the victims' families who have told me that they suspected estranged boyfriends and husbands as the perpetrators.

Inadequacies of the Civil Legal System

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

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

13. There are many more difficulties when a woman attempts to divorce her husband, Most of these have to do with

issues of support for the wife and the children, called *pension alimentista*. Judges often have the attitude that whatever the woman asks for is excessive. For example, an amount of 2,000 *quetzales* (a little less than \$300) would be considered [*147] extravagant. Theoretically, the judge should order a socio-economic study to determine the appropriate amount of support based on the husband's salary and the wife's needs. However, a fair assessment is generally not done. Instead, the judge attempts to get the wife to agree to a low amount by asking the woman what is the least amount she is willing to accept. Even after the amount is set, the women have a difficult time collecting that amount. A garnishment is sometimes possible, but can only assure payment when the husband has a fixed job or guarantees the support obligation with a mortgage on the house or other property. Therefore, a court order requiring a husband to pay support is generally for an insufficient sum and also not always enforceable. Financial support can also be used to completely deny a woman's right for divorce. A judge will not order divorce if the husband will not guarantee the payment of livelihood expenses. This allows a husband to wield a significant amount of power, as he can thwart the divorce by refusing to guarantee payment. If this happens, the woman has to show she can support herself, or has property or a house-which is rare since most property is in the husband's name. Husbands also often transfer property to avoid paying support.

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

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

16. Although many advocates, including myself, have worked tirelessly to ensure the inclusion of substantive recognition of and procedural mechanisms to fight against violence against women, many people are still unaware of the legal protections for women. Obviously, this includes the victims, but unfortunately it also includes police, lawyers, advocates and judges. I can easily say that less than a dozen lawyers in the entire country even try to use the 1996 [*148] Law. The government does next to nothing to educate those in the judicial system about the law and even less to expose it to public.

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

18. Part of the problem is also that judges often say they cannot apply the 1996 Law. First, they say it is unenforceable because it violates property rights, unjustly framing the remedy for a domestic violence claim in terms of real property. Judges will often say that if a man owns the house, he cannot be ordered removed, and the reality is that men often own

the homes. Another excuse judges give in not applying the 1996 Law is that it is unconstitutional. Under the Guatemalan Constitution, individuals are allowed to have guns if they obtain a license, and the 1996 Law allows police to seize weapons used to threaten the woman, and they use this "inconsistency" as a means to deem the law in its entirety unconstitutional. Finally, judges claim that the 1996 Law is against the required judicial process, under which, according to civil rights, a person cannot be convicted if he or she has not been cited, heard, and tried. The judges maintain that the security methods are a sentence and therefore, it is improper to take action against a man without full procedure. However, this perspective is faulty in that there are other precautionary measures—such as liens upon bank accounts imposed upon debtors—where such action is taken before the completion of all legal proceedings to guarantee payment.

Inadequacies of the Criminal Legal System

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

20. Because the judicial system does not view crimes of violence against women as a problem women face a serious disadvantage in attempting to have their abusers prosecuted under the current legal framework. For example, if a woman goes to Family Court or the Public Ministry (comparable to a District Attorney's office), she is not provided with a lawyer, nor are her options explained to her. In contrast, the aggressor is provided with a public defender. The woman has to decide how to carry the case forward on her own without legal advice or help from the government. This daunting situation is compounded by the fact that most women in Guatemala have had little or no exposure to the legal system. Thus, those battered women who have the wherewithal to try to use the criminal justice system encounter a dual [*149] challenge, first in maneuvering through a court system that is particularly alienating and generally nonresponsive to the plight of battered women, and second, they must base their claims laws that are deficient and prejudicial and also largely unknown to them.

Lack of Resources

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

Inability to escape the abuser

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

23. I was attending a meeting of indigenous women in the Peten region of Guatemala, to discuss violence against women. As I was talking about the problem, I noticed that a small group of women became very upset and began to cry.

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

Summary

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

[*150] I swear under penalty of perjury that the foregoing is true and correct.

Dated: 11/10/05

Signed:

Lieda, Hilda Morales Trujillo

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

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

Diana Rodriguez

Legal Topics:

For related research and practice materials, see the following legal topics:

Family Law Marriage Validity Plural Marriages Immigration Law Asylum & Related Relief Eligibility International Law Sovereign States & Individuals Asylum

FOOTNOTES:

n1. This question was asked in June 2004; it is notable that Hilda Morales Trujillo did not predict an exodus of women, but rather a changed policy on the part of the Guatemalan government.

n2. Convention Relating to the Status of Refugees, adopted July 28, 1951, *19 U.S.T. 629*, 189 U.N.T.S. 150, 1951 U.S.T. LEXIS 563 [hereinafter Refugee Convention].

n3. Protocol Relating to the Status of Refugees, opened for signature Jan. 31, 1967, *19 U.S.T. 6223*, 606 U.N.T.S. 167, 1967 U.S.T. LEXIS 761 [hereinafter 1967 Protocol].

n4. Refugee Convention, *supra* note 2.

n5. 1967 Protocol, *supra* note 3.

n6. Refugee Convention, *supra* note 2, Art. 1.A(2).

n7. A related, but different, nexus obstacle arises when women are the victims of rape or other sexual assaults by their political opponents during war or civil unrest. Notwithstanding the political context, it is often argued that the assault was "personal" rather than political. See, e.g., *Campos-Guardado v. I.N.S.*, 809 F.2d 285, 291 (5th Cir. 1987) (holding that there was no showing of political motive on the part of individuals who shouted political slogans during an incident in which they gang raped the female relatives of the leader of an agricultural cooperative, and killed the cooperative leader and his male relatives). But see *Garcia-Martinez v. Ashcroft*, 371 F.3d 1066, 1076 (9th Cir. 2004) (overturning BIA's decision that gang rape by soldiers during civil war in Guatemala was a personal, criminal act rather than political persecution).

n8. U.N. High Comm'r for Refugees (UNHCR), Guidelines on International Protection: Gender Related Persecution within the Context of 1(A)(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees, para. 3-6, U.N. Doc. HCR/GIP/02/01 (May 7, 2002); U.N. High Comm'r for Refugees (UNHCR), Exec. Comm., Conclusions Adopted by the Executive Committee: Refugee Women and International Protection, No. 39 (XXXVI) (1985), available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=41b041534>; U.N. High Comm'r for Refugees (UNHCR), Exec. Comm., Conclusions Adopted by the Executive Committee: Refugee Women, No. 54 (XXXIX) (1988), available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=41b041534>; U.N. High Comm'r for Refugees (UNHCR), Exec. Comm., Conclusions Adopted by the Executive Committee: Refugee Women and International Protection, No. 64 (XLI) (1990), available at <http://www.unhcr.org/cgi-bin/texis/vtx/publ/opendoc.pdf?tbl=PUBL&id=41b041534>; U.N. High Comm'r for Refugees (UNHCR), Exec. Comm., Conclusions Adopted by the Executive Committee: Refugee Protection and Sexual Violence, No. 73 (XLIV) (1993), available at

<http://www.unhcr.org/cgi-bin/txis/vtx/publ/opendoc.pdf?tbl=PUBL&id=41b041534>.

n9. G.A. Res. 428 (V), para. 8, U.N. Doc. A/1775 (December 14, 1950); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 439 n.22 (1987).

n10. See, e.g., U.N. Comm'n on Human Rights, Report of the Special Rapporteur on Violence Against Women, its Causes and Consequences, Provisional Agenda Item 9(a), para. 4-5, U.N. Doc. E/CN.4/1996/53 (1996) (recommending that "refugee and asylum laws should be broadened to include gender-based claims of persecution, including domestic violence").

n11. A timeline of the developments discussed in Part II appears at the end of the section.

n12. UNHCR Exec. Comm., Refugee Protection and Sexual Violence, para. e, (1993), available at <http://www.unhcr.ch/cgi-bin/txis/vtx/home/opendoc.htm?tbl=EXCOM&id=3ae68c6810&page=exec>.

n13. Office of Int'l Affairs, U.S. Immigration and Naturalization Service, Considerations For Asylum Officers Adjudicating Asylum Claims From Women (1995).

n14. Immigration and Refugee Board of Canada, Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution 1 (March 1993); Immigration and Refugee Board of Canada, Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update (Feb. 2003).

n15. When Fauziya Kassindja first arrived in the United States, the Immigration and Naturalization Service incorrectly recorded her name as "Kasinga" and the landmark case which resulted from her claim bears that spelling.

n16. Many articles have been written about Fauziya Kassindja's plea for asylum. See, e.g., Karen Musalo, Ruminations on *In re Kasinga*: The Decision's Legacy, 7 U.S.C. Review of Law and Women's Studies 357 (1998); Karen Musalo, *In re Kasinga*: A Big Step Forward for Gender-Based Asylum Claims, 73 Interpreter Releases 853 (July 1, 1996); Arthur C. Helton and Alison Nicoll, Female Genital Mutilation as Ground for Asylum in the United States: The Recent Case of *In re Fauziya Kasinga* and Prospects for More Gender

Sensitive Approaches, 28 *Colum. Human Rights L. Rev.* 375 (1997); Mary M. Sheridan, In re Kasinga: The United States has Opened its Doors to Victims of Female Genital Mutilation, 71 *St. John's L. Rev.* 433 (1997).

n17. *In re Fauziya Kasinga*, 21 *I. & N. Dec.* 357 (BIA 1996).

n18. *In re R-A-*, 22 *I. & N. Dec.* 906 (BIA 1999).

n19. Her husband broke windows and mirrors with her head, whipped her with electrical cords, threw a machete at her, woke her up with a knife at her throat, subjected her to rape and sodomy, and brutally kicked her around the spine when she was pregnant with their child, in an attempt to cause a miscarriage. Karen Musalo, *Matter of R-A-*, An Analysis of the Decision and Its Implications, 75 *Interpreter Releases* 1177, 1179 (1999).

n20. *Id.*

n21. The Homeland Security Act (HSA), which created the Department of Homeland Security (DHS) effectuated a massive reorganization of the federal government. Pub. L. No. 107-296, 116 Stat. 2135. As part of this reorganization, the Immigration and Naturalization Service ceased to exist, and its functions were transferred into the DHS.

n22. *In re R-A-*, *supra* note 18.

n23. Although there are many who would disagree that the distinctions mandate these very different results, a detailed legal analysis is beyond the scope of this article. For critiques of the legal analysis, see *In re R-A*, *supra* note 18 (Guendelsberger, Board Member, dissenting); Danette Gomez, Last in Line - The US Trails Behind in Recognizing Gender-Based Asylum Claims, 25 *Whittier L. Rev.* 959 (2004); Karen Musalo, Revisiting Social Group and Nexus in Gender Asylum Claims: A Unifying Rationale for Evolving Jurisprudence, 52 *DePaul L. Rev.* 777 (2003).

n24. 65 *Fed. Reg.* 76,588-98 (Dec. 7, 2000).

n25. *Id. at 76,589.*

n26. The observations of one well-placed official in the Department of Justice, who had worked for the government on immigration issues for many years, illustrates the degree of contention around these regulations. Around the time that the regulations were proposed in 2000, this individual commented to me that they were the "most controversial" issue on which this individual had been involved in her entire government career.

n27. The following provide examples of the confused and erroneous decision-making:

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

. In a July 16, 2004 decision, another immigration judge appeared to believe that Matter of R-A was still good law, citing to it in a decision denying relief to a young Chinese woman who had been physically abused throughout her childhood by her mother and then sold by her parents into marriage to an older man. The immigration judge relied upon an aspect of the Matter of R-A decision that had been specifically addressed and repudiated in the DOJ's proposed regulations. In re Xi Mei Chen, No. A97-660-069 (Chicago Immig. Ct., July 16, 2004), available at Center for Gender and Refugee Studies, Case No. 1298, <http://cgrs.uchastings.edu/about/contact.php> and on file with author.

. In an October 28, 2004 decision, an immigration judge acknowledged that Matter of R-A had been vacated, but then noted that it nonetheless indicated the BIA's "concerns" regarding domestic violence cases, and stated that the vacated decision was "pertinent for determining which aspects of the respondent's claim must be closely analyzed." Ultimately the court denied relief to the 21-year-old Ugandan applicant who had been drugged and raped by the 68-year-old man her parents had "arranged" for her to marry. She had fled before the marriage took place, but after the abuse had occurred. In re Loy Lwabaai, No. A77-816-221 (BIA, Oct. 28, 2004), available at Center for Gender and Refugee Studies, Case No. 3163, <http://cgrs.uchastings.edu/about/contact.php> and on file with author.

. In an October 7, 2004 decision, an immigration judge incorrectly stated that the proposed regulations had "been withdrawn and therefore do not control." Although the proposed regulations have not yet been issued as final, they have never been withdrawn. The judge in this case also appeared to believe that an acceptable form of protection to the applicant was available in the form of an offer by several of her male relatives to attack or even kill her husband to protect her. The judge conceded that "self-help is abhorrent in the United States criminal justice system," but seemed to believe that it was acceptable in Guatemala. In re C-T-, A-L-, and D-L-, No. [redacted] (Memphis Immig. Ct., Oct. 7, 2004) available at Center for Gender and Refugee Studies, Case No. 2731, <http://cgrs.uchastings.edu/about/contact.php> and on file with author. . In an August 25, 2003 decision, an immigration judge appeared confused about the status and significance of virtually all of the developments relevant to gender asylum. The judge first stated that the decision in Matter of R-A had provided the opportunity for "domestic violence to be a viable claim." This positive reading of the case is inconsistent with the virtually unanimous assessment of it as imposing a barrier to such claims. The judge then stated that the case had been

"decertified" so that it no longer provided a "basis upon which a claim can lie." At the time the judge made this statement, the case had been certified and was pending before Attorney General Ashcroft. The judge further observed that since the proposed regulations had not yet been "implemented" he did not believe that the administration was going to "authorize such a basis" anytime in the near future. The immigration judge denied relief to the asylum seeker, a Mexican woman whose husband had battered her in their home country and then followed her to the U.S., where he continued his violence against her until he ended up in prison as a result. The undisputed facts in the case include that the claimant had made a total of eight complaints to the authorities in Mexico before fleeing to the United States, and that no governmental assistance had been forthcoming. In re [redacted], No. [redacted] (Los Angeles Immig. Ct., Aug. 25, 2003) available at Center for Gender and Refugee Studies, Case No. 1258, <http://cgrs.uchastings.edu/about/contact.php> and on file with author.

n28. Federal court decisions on the issue of gender asylum have included: *Gao v. Gonzales*, 440 F.3d 62 (2d Cir. 2006) (recognizing that: 1) a valid claim exists where the applicant is a member of a particular social group consisting of "women who have been sold into marriage (whether or not that marriage has yet taken place) and who live in a part of China where forced marriages are considered valid and enforceable," and 2) a lifelong involuntary marriage is a form of persecution "on account of" membership in this social group); *Abay v. Ashcroft*, 368 F.3d 634 (6th Cir. 2004) (finding that applicant mother meets the definition of a refugee based on her fear that her applicant daughter will be subject to FGC upon return to Ethiopia); *Mohammed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (granting appeal from denial of motion to reopen due to ineffective assistance of counsel where applicant's first counsel failed to present a past persecution claim based on the applicant's prior subjection to female genital mutilation in Somalia, finding that female genital cutting is an ongoing harm, and holding that BIA erred in requiring that evidence be presented with the motion that FGC would likely be performed in the future); *Niang v. Gonzales*, 422 F.3d 1187 (10th Cir. 2005) (holding that when identifying a particular social group, the Acosta standard does not require more than gender plus tribal membership).

n29. Homeland Security Act, *supra* note 21.

n30. Audrey Macklin, *Disappearing Refugees: Reflections on the Canada-U.S. Safe Third Country Agreement*, 36 *Colum. Hum. Rts. L. Rev.* 365 (2005).

n31. Joan Fitzpatrick, *Flight from Asylum: Trends Towards Temporary "Refuge" and Local Responses to Forced Migration*, 35 *Va. J. Int'l L.* 13, 28 (1994).

n32. Kevin R. Johnson, *Race, the Immigration Laws, and Domestic Race Relations: A "Magic Mirror" into the Heart of Darkness*, 73 *Ind. L. J.* 1111 (1998); Michael A. Olivas, *The Chronicles, My Grandfather's Stories, and Immigration Law: The Slave Traders Chronicle as Racial History*, 34 *St. Louis U. L. J.* 425 (1990); Bill Ong

Hing, *Defining America Through Immigration Policy* (Temple University Press 2004); Richard Boswell, *Racism and U.S. Immigration Law: Prospects for Reform After "9/11?"*, 7 *Gender Race & Just.* 315, 317-326 (2003).

n33. REAL ID Act of 2005, 109 Pub. L. No. 13. The title of the original House bill (H.R. 418) describes the general purposes of the Act: "To establish and rapidly implement regulations for State driver's license and identification document security standards, to prevent terrorists from abusing the asylum laws of the United States, to unify terrorism-related grounds for inadmissibility and removal, and to ensure expeditious construction of the San Diego border fence." The REAL ID Act included measures that increased the burden of proof for asylum seekers by making it more difficult to establish a nexus with one of the five enumerated grounds, and making it easier for adjudicators to deny cases on the basis on credibility. In fall 2005, Congress took up immigration again, and the House enacted H.R. 4437, one of the most anti-immigrant pieces of legislation to be enacted in many years.

n34. As reported by Newsweek columnist Anna Quindlen, one anti-immigrant activist snidely commented, "You get a punch in the mouth, and you're home free." Anna Quindlen, *Torture Based on Sex Alone*, Newsweek, Sept. 10, 2001, at 76.

n35. Dan Stein, *Gender Asylum Reflects Mistaken Priorities*, *The Human Rights Journal* (1996), available at <http://www.wcl.american.edu/hrbrief/v3i3/stein33.htm>; Hope Lewis, *Between Irua and Female Genital Mutilation: Feminist Human Rights Discourse and the Cultural Divide*, 8 *Harv. Hum. Rts. J.* 1 (1995).

n36. David Ray of the Federation for American Immigration Reform (FAIR) was quoted in a recent article as stating that asylum "was never meant to be divorce court To expect asylum law to address family issues is impractical and invites huge abuses of the system." Azadeh Ensha, *Fear of Persecution*, *Colorlines*, Vol. 6, No. 4 (Winter 2003-2004), available at http://www.findarticles.com/p/articles/mi_m0KAY/is_4_6/ai_112129636.

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

n37. *Questions and Answers: The R-A-Rule*, Immigration and Naturalization Services, Dec. 7, 2000, <http://uscis.gov/graphics/publicaffairs/questsans/RARule.htm>.

n38. E-mail from Janet Dench, Canadian Council for Refugees, to Karen Musalo, on file with author.

n39. Presidency Conclusions of the Tampere European Council, Oct. 15-16, 1999, available at <http://ue.eu.int/ueDocs/cms Data/docs/pressData/en/ec/00200-r1.en9.htm>.

n40. *Id. at para. 11.*

n41. *Id.* (emphasis added).

n42. Presidency Conclusions of the Seville European Council, June 21-22, 2002, at 10, available at <http://ue.eu.int/ueDocs/cms Data/docs/pressData/en/ec/72638.pdf>.

n43. Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex II, U.N. Doc. A/RES/55/25 (2000).

n44. Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime. G.A. Res. 55/25, Annex III, U.N. Doc. A/RES/55/25 (2000).

n45. Convention against Transnational Organized Crime, G.A. Res. 55/25, Annex I, U.N. Doc. A/RES/55/25 (2000).

n46. Article 9, §2 of the Trafficking Protocol provides that "States Parties shall endeavour to undertake measures such as research, information and mass media campaigns and social and economic initiatives to prevent and combat trafficking in persons." Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, *supra* note 43, Art. 9, §2.

Article 15, §3 of the Smuggling Protocol provides that: "Each State Party shall promote or strengthen, as appropriate, development programmes and cooperation at the national, regional and international levels, taking into account the socio-economic realities of migration and paying special attention to economically and socially depressed areas, in order to combat the root socio-economic causes of the smuggling of migrants, such as

poverty and underdevelopment." Protocol against the Smuggling of Migrants by Land, Sea and Air, supplementing the United Nations Convention against Transnational Organized Crime, *supra* note 44, Art. 15, §3.

n47. *Sale v. Haitian Ctrs. Council, Inc.*, 509 U.S. 155, 162 (1993).

n48. Executive Order 12887, 57 *Fed. Reg.* 23,133 (May 24, 1992).

n49. Clinton Continues Summary Return of Haitians; U.S. Lawyers Investigate In-Country Processing, Refugee Reports (U.S. Comm'n for Refugees), Jan. 29, 1993, at 2, available at <http://www.refugees.org/data/refugee-reports/archives/1993/01Jan29.pdf>.

n50. See, e.g., Steven A. Holmes, With Persuasion and Muscle, Black Caucus Reshapes Haiti Policy, *N.Y. Times*, July 13, 1994, at A10; Rich Lowry, Mr. Robinson's Hoods; TransAfrica America Executive Director Randall Robinson's Bully Tactics to Change Clinton Administration Policy Toward Haiti, *Nat'l Review*, Aug. 29, 1994, at 22; Karen De Witt, Hunger Strike on Haiti: Partial Victory at Least, *N.Y. Times*, May 8, 1994, at A7; Walt Bogdanich & Jenny Nordberg, Democracy Undone: Back Channels vs. Policy; Mixed U.S. Signals Helped Tilt Haiti Toward Chaos, *N.Y. Times*, Jan. 29, 2006, at 1.

n51. Interdicted Haitians would no longer be summarily returned, but would be "screened" for asylum eligibility, and those who qualified would be given some form of safe haven in Panama or other countries in the Caribbean which the U.S. had negotiated with for these purposes. Harold Hongju Koh, Refugees, the Courts, and the New World Order, 1994 *Utah L. Rev.* 999, 1005 (1994); Renewed Exodus from Haiti Challenges U.S. Screening Procedures, Refugee Reports (U.S. Comm. for Refugees and Immigrants, D.C), Jun. 30, 1994, at 7-8, available at <http://www.refugees.org/data/refugee-reports/archives/1994/1994JunJul.pdf>; Org. of Am. States, Inter-Am. Comm'n on Human Rights, Report on the Situation of Human Rights in Haiti 1995, para. 227, 234, Doc. OEA/Ser.L/v/II.88 10 rev. (Feb. 9, 1995), available at <http://www.cidh.org/countryrep/EnHa95/eh95p2.htm>.

n52. Leslie A. Benton and Glenn T. Ware, Haiti: A Case Study of the International Response and the Efficacy of Nongovernmental Organizations in the Crisis, 12 *Emory Int'l L. Rev.* 851, 880-81 (1998); Stephen J. Schnably, The Santiago Commitment as a Call to Democracy in the United States: Evaluating the OAS Role in Haiti, Peru, and Guatemala, 25 *U. Miami Inter-Am. L. Rev.* 393, 457 (1994); Koh, *supra* note 51, at 1024.

n53. Many readers may be more familiar with the femicides in Ciudad Juarez and Chihuahua, Mexico, where a reported 400 women and girls have been killed since 1993. There has been far more news coverage of Mexico's femicides, although the numbers of women killed in Guatemala in a shorter time period have been much higher.

n54. Between 2002 and 2004, murders of men increased by 36 percent while murders of women increased by 56 percent. Procurador de los Derechos Humanos de Guatemala, *Muertes Violentas de Mujeres Durante el 2004 (Violent Deaths of Women During 2004)* at 16, (2005) available at <http://www.wola.org/central-america/guatemala/pdh-informe-mujeres.pdf>.

n55. Amnesty International, *No Protection, No Justice: Killings of women in Guatemala* (June 2005), at 4, available at [http://web.amnesty.org/library/pdf/AMR340172005ENGLISH/\\$File/AMR3401705.pdf](http://web.amnesty.org/library/pdf/AMR340172005ENGLISH/$File/AMR3401705.pdf) [hereinafter *Amnesty Report 2005*].

n56. Angelica Chazaro and Jennifer Casey, *Getting Away with Murder: Guatemala's Failure to Protect Women and Rodi Alvarado's Quest for Safety*, Ctr. for Gender and Refugee Studies, (Nov. 2005), at 11-13, available at <http://cgrs.uchastings.edu/documents/cgrs/cgrs-guatemala-femicides.pdf> [hereinafter *Getting Away With Murder*].

n57. *Getting Away With Murder*, supra note 56, at 1, 8; Alba Estela Maldonado, *Investigation sobre Femicidio en Guatemala* at 49, 59, available at <http://pangea.org/entrep/noticias/archivos/INVESTIGACION-SOBRE-FEMINICIDIO-EN-GUATEMALA.pdf> (*Investigation on Femicides in Guatemala*) [hereinafter *Investigation of Femicide*]; Interamerican Commission on Human Rights, *Justicia en Inclusion Social: Los Desafios de la Democracia en Guatemala*, [Justice and Social Inclusion: The Challenges of Democracy in Guatemala], (2003), at 5, available at <http://www.cidh.oas.org/GUATEMALA.2003.pdf> [hereinafter *Justice and Social Inclusion*].

n58. *Getting Away with Murder*, supra note 56, at 7-8. Until the 1998 reforms, the Civil Code provided that: "the husband had the duty to protect and support his wife, while she had the right and duty to care for and raise minor children and oversee domestic tasks," "husbands could legally object to their wives working outside the home," "husbands alone could legally represent the married couple, and they were the sole administrators of the household's financial resources, as well as of any of the family assets," and "even when parents had joint custody, fathers were still the sole legal representatives of their children and the administrators of their assets." *Id.*

n59. Justice and Social Inclusion, *supra* note 57, at para. 305, 313.

n60. Ms. Hilda Morales Trujillo's affidavit is attached as an appendix to this article.

n61. Decades of repression and violence in Guatemala followed the U.S. backed coup which ousted democratically elected president Jacobo Arbenz in 1954. U.S. support and assistance to repressive military forces has been documented. See, e.g., Stephen Schlesinger and Stephen Kinzer, *Bitter Fruit: The Story of the American Coup in Guatemala*, Expanded Version (1999).

n62. "Rule of law assistance provides support for criminal justice reform, greater access to the justice system for poor and marginalized populations, and strengthened capacity of law enforcement agencies to investigate crimes." *Getting Away with Murder*, *supra* note 56, at 14.

n63. These monies were allocated through the International Criminal Investigative Training Assistance Program (ICITAP), formerly administered by the Department of Justice, now folded into the Bureau for International Narcotics and Law Enforcement Affairs.

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

Getting Away with Murder, *supra* note 56, at 14 (quoting Bureau for Int'l Narcotics and Law Enforcement Affairs, U.S. Dep't of State, *International Narcotics Control Strategy Report 2005: Canada, Mexico and Central America* 184 (2005)).

n64. USAID, Women In Development, at [http://www.usaid.gov/our work/cross-cutting programs/wid/activities/womens legalrights rc.html](http://www.usaid.gov/our%20work/cross-cutting%20programs/wid/activities/womens%20legalrights%20rc.html).

n65. *Getting Away with Murder*, *supra* note 56, at 11.

n66. Amnesty Report 2005, supra note 55.

n67. Id. at 17.

n68. The special unit, created in 2004, consisted of 22 officers, who each had been assigned 23 cases. The officers shared one cell phone and one car. By 2005, 17 of the 22 officers had been transferred out of the special unit, leaving only five officers in the unit. Investigation on Femicide, supra note 57, at 52; Amnesty Report 2005, supra note 55, at 15.

n69. Twenty-three officers have been implicated in the murders. Investigation on Femicide, supra note 57, at 53.

n70. Integration of the Human Rights of Women and the Gender Perspective: Violence Against Women, Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights. at 16, U.N. Doc. E/CN.4/2005/72/Add.3 (2005).

n71. For a list of specific recommendations, see *Getting Away with Murder*, supra note 56, at 15-17. Four of the recommendations most pertinent to this discussion are that USAID should:

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

- . Identify femicides as a problem in its Ruling Justly program and set forth specific goals aimed at eradicating them by increasing the capacity of Guatemalan authorities to investigate, prosecute, convict and sentence the perpetrators.

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

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

Getting Away with Murder, supra note 56, at 16-17.

n72. International Religious Freedom Act of 1998, Pub. L. No. 105-292, 112 Stat. 2787 (1998), amended by Pub. L. No. 106-55, 113 Stat. 401 (1999) (codified as amended in scattered sections of 22 U.S.C.). The International Religious Freedom Act (IRFA) established the Office of International Religious Freedom (OIRF) at the Department of State. The OIRF monitors religious persecution and discrimination worldwide; it carries out its mission by issuing annual reports on 195 countries. Countries that have engaged in or tolerated particularly severe violations of religious freedom during the reporting period are designated as "countries of particular concern" under the IRFA by the Secretary of State, and can be subject to further action, including economic sanctions.

n73. Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, 114 Stat. 1464 (2000), amended by Trafficking and Violence Protection Reauthorization Act of 2003, Pub. L. No. 108-193, 117 Stat. 2875 (2003). The objectives of the TVPA are to combat trafficking, ensure just and effective punishment for traffickers and to protect their victims. The TVPA authorizes the establishment of the Office to Combat Trafficking in Persons (OCTP) which issues an annual report on Trafficking in Persons (TIP Report). The TIP Report identifies countries that are not meeting the minimum standards for the elimination of trafficking set forth in the TVPA; it places countries in one of three tiers, with the Tier 3 being those countries that do not fully comply with the minimum standards in the TVPA and are not making significant efforts to do so. A Tier 3 designation may result in the withholding of non-humanitarian, non-trade related assistance from the U.S.

n74. See Recommendations, *Getting Away with Murder*, *supra* note 56, at 17.

n75. This approach has been studied in the area of poverty-related migration, and has demonstrated that, in the long run, policies which address the root causes of poverty and under-development will result in reduced migration. Hein de Haas, *International Migration, Remittances and Development: Myths and Fact* (Global Comm'n on International Migration ed., 2005) at <http://www.gcim.org/attachements/GMP%20No%2028.pdf>.