# Failure of State Protection Within the Context of the Convention Refugee Regime with Particular Reference to Gender-Related Persecution

Elizabeth Adjin-Tettey

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## Introduction

This article analyzes the requirement that there be evidence of a failure of State protection before the responsibility of the international community to accord refugee protection is engaged. Refugee status is essentially surrogate protection which comes into play only when the rights threatened cannot be vindicated domestically. This brings into question the "agents of persecution" recognized by the Convention refugee regime. In this article, it will be argued that both State and non-State actors can be the architects of harm sufficient to give rise to the need for surrogate international protection. The issue of failure of State protection also involves a consideration of whether the claimant has an internal relocation option, in other words, whether the claimant can effectively be protected from the threat of harm by moving elsewhere in the country of origin. In view of the surrogate nature of refugee status, refugee protection is deemed unnecessary where the threat of harm can be redressed in other parts of the country of origin, but this must be a realistic option. A claimant must first seek the protection of local authorities. However, a claimant need not literally approach State authorities if there is evidence that protection will not be forthcoming, as is the case in many gender-related harms in certain societies. In such situations, failure to seek domestic protection will not jeopardize a woman's claim to refugee protection.

## I. What Is Persecution?

Persecution is the lynch pin of international refugee protection. The 1951 Convention Relating to the Status of Refugees,[1] as supplemented

* LL.B(Hons.), University of Ghana; LL.M., Queen's University, Canada; LL.M., University of Calgary, Canada; Doctor of Jurisprudence (D.JUR.), Osgoode Hall Law School. The author is associated with the Centre for Refugee Studies of York University in Ontario, Canada.

[1] Final Act of the United Nations Conference of Plenipotentiaries on the Status

by the 1967 Protocol,[2] defines the term "refugee" to mean a person who is outside the country of her nationality, religion, membership in a particular social group or political opinion.[3] Persecution consists of two distinct components: first, to be eligible for refugee protection, the human rights violation from which a claimant seeks protection must be serious enough to constitute persecution; and second, there must be evidence of failure of State protection before the responsibility of the international community can be engaged.[4] James C. Hathaway notes that "persecution may be defined as the sustained or systemic violation of basic human rights demonstrative of a failure of state protection."[5] Simply put, the concept of persecution is inherently linked to the absence of protection. Persecution not only requires that a claimant be at risk of sustaining serious harm, but also that she cannot expect meaningful protection from that harm in her home country. Thus, recognizing that gender-related harms which threaten basic human rights of women constitute serious harm is not sufficient to sustain a finding of fear of persecution. To warrant the label "persecution," the harm feared must be directly or indirectly attributable to the State. The existence of a well-founded fear of persecution will be recognized only when the State of origin can be held accountable for the harm feared, in the sense that the individual cannot expect meaningful protection from authorities in the country of origin.

Consequently, a person who fears even very serious harms has no claim to Convention refugee status if her home government is willing and able to protect her.[6] However, such protection must constitute an effective

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of Refugees and Stateless Persons, July 2-25, 1951, 189 U.N.T.S. 2545 [hereinafter Convention Relating to the Status of Refugees].

[2] Protocol Relating to the Status of Refugees, Jan. 31, 1967, art. 1(2), 606 U.N.T.S. 8791.

[3] Convention Relating to the Status of Refugees, *supra* note 1, at art. 1A (2).

[4] JAMES C. HATHAWAY, THE LAW OF REFUGEE STATUS 101-05 (1991).

[5] *Id.* at 104-05.

[6] *See* Canada (Minister of Employment and Immigration [M.E.I.]) v. Satiacum [1989], 99 N.R. 171, 175-76 (F.C.A.) In *Satiacum*, the respondent—an American Indian chief—sought refugee protection in Canada prior to sentencing following criminal convictions. He alleged fear of persecution arising from an unfair judicial process. In setting aside the decision of the Immigration and Refugee Board which had allowed the respondent's claim to refugee status, Mr. Justice MacGuigan noted that there is no evidence that the right complained of cannot be redressed in a democratic country like the United States. *Id.* Similarly, in Canada (Att'y Gen.) v. Ward [1993], 2 S.C.R. 689, 717-19. Mr. Justice La Forest affirmed that refugee status is not needed whenever national protection is available to victims of human

solution to the harm feared.[7] Whatever the formal position of the State of origin, the point of departure will be whether there is a *de facto* failure of protection.[8] This means a finding of lack of State protection can be reached even where avenues of remedy exist formally, but women are deprived of the opportunity of exercising these options,[9] or when the decisions of the competent authority are biased, or have no effect.[10]

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rights violations. *See also* Council of Europe, *Joint Position Defined by the Council on the Basis of Article K.3 of the Treaty on European Union on the Harmonized Application of the Definition of the Term "Refugee" in Article 1 of the Geneva Convention of 28 July 1951 Relating to the Status of Refugee*, § 5.1.1(c) (adopted Mar. 4, 1996) (noting that persecution will be recognized only in the absence of effective national remedy for the harm feared) [hereinafter *The Joint European Position*].

[7] ATLE GRAHL-MADSEN, THE STATUS OF REFUGEES IN INTERNATIONAL LAW 192 (1966). Grahl-Madsen has noted that failure of a government to *effectively* redress human rights violations may be considered such a flaw in the organization of the State that it may justify a recognition of refugee status. Guy S. Goodwin-Gill, *The Principles of International Refugee Law*, *in* ASYLUM 11, 20 (Sophie Jeleff ed., 1995).

[8] *See* HATHAWAY, *supra* note 4, at 130.

[9] For instance, financial constraints may prevent a woman from obtaining redress for harms sustained from domestic violence. The failure to provide legal aid services for women in countries where they are denied the opportunity to engage in economic activities may be tantamount to not having redress for the harm feared. In such situations, the State of origin may be held to be in breach of its duty to safeguard the rights of its citizens.

[10] *See The Joint European Position*, *supra* note 6, § 5.1.1(c). Sometimes, women risking serious harm are denied refugee protection because the State of origin formally denounces the harm feared without actually being satisfied that such remedies are effective. In a case involving a Trinidadian woman named Dularie Boodlal, the claimant alleged fear of persecution arising from abuse inflicted on her by her husband for almost two decades. The husband followed the claimant to Canada where he continued to terrorize her. After being convicted eleven times in Canada for assaulting and/or threatening her, he voluntarily returned to Trinidad rather than serve a jail sentence in Canada. He continued to menace her through letters and phone calls, threatening to kill her if she returned to Trinidad. Dularie's claim to refugee status was denied because Trinidad had recently passed a law proscribing family violence and she was therefore expected to avail herself of the protection offered by the authorities in her own country. Bob Cox, *Battered Woman "Will Be Leaving;" Trinidad Protects Her, Immigrations Says*, EDMONTON J., Sept. 17, 1992. This determination was without regard to the effectiveness of the Trinidadian law, such that Dularie could effectively be protected from her husband. To ensure the gender-inclusiveness of the refugee regime,

Citizens enjoy the human rights to which they are entitled.[11] Accordingly, a State not only has an obligation to refrain from violating the human rights of its citizenry, but it also has a duty to protect its citizens from human rights violations by non-State entities. Thus, a government has the duty to control and prevent the conduct of private entities which violates the rights of others. A State is therefore obligated to investigate violations when they occur, bring the perpetrators to justice, and compensate the victim in appropriate circumstances.[12] As the minority decision in *Chan v. Canada (M.E.I.)*[13] noted, the ability to ensure the security of nationals is, after all, the essence of sovereignty and the most basic obligation a State owes its citizen.

Similarly, the German Constitutional Court has stated that preserving peace is the rationale for State authority.[14] This suggests that a State must be able to safeguard the peace and security of its citizens by ensuring that they enjoy the human rights to which they are entitled. In fact, the ability of a State to safeguard basic entitlement of its citizenry is often cited as a measure of its continuing legitimacy. As was argued and accepted by the French Conseil d'Etat in the case of *Esshak Dankha*:[15]

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particular attention must be paid to the effectiveness of laws protecting women from gender-related harms. More often than not such remedies prove ineffective in protecting women from harm. It is not uncommon for women to be stalked and killed by spouses against whom a court of law has issued a restraining order.

[11] The Vienna Declaration explicitly notes that "[w]hile the significance of national and regional particularities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms." World Conference on Human Rights, *The Vienna Declaration and Program of Action*, ¶ 5 (adopted June 25, 1993).

[12] *See International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 37th Sess. Ann. 5, Gen. Comment 7(16), ¶ 1 (1982) U.N. Doc. A/37/40 (1982).

[13] [1995], 128 D.L.R. (4th) 213. *See also* Canada (Att'y Gen.) v. Ward [1993], 2 S.C.R. 689, 725 (Mr. Justice La Forest observed that in the absence of evidence to the contrary, States should be presumed capable of protecting their nationals as this is the essence of sovereignty).

[14] A 1989 Federal Republic of Germany Constitutional Court Decision, BVerfGE 80, 315 (334), *cited in* Ulrike Davy, *Refugees from Bosnia and Herzegovina: Why Aren't They Genuine?* 40-41 (1994) (unpublished manuscript on file with *Journal of International Legal Studies*).

[15] France Conseil d'Etat Decision No. 42.074, May 27, 1983, *cited in* HATHAWAY, *supra* note 4, at 127-28.

> [T]he existence and the authority of the State are conceived and justified on the grounds that it is the means by which members of the national community are protected from aggression, whether at the hands of fellow citizens, or from forces external to the state.[16]

Failure of a State to guarantee human rights amounts to a breach of its duty and correspondingly points to a need for international protection. Where the basic human dignity of its citizens is threatened as a result, the need for surrogate protection through refugee status becomes logical.

States are generally presumed to be capable of protecting their citizens. In the absence of specific evidence to the contrary, States are presumed to have fair and independent judiciaries that can redress human rights violations of its citizens when they occur.[17] Refugee protection only provides a forum of second resort for individuals at risk of serious harm who cannot vindicate the rights threatened in their own country. Refugee protection is therefore a surrogate approachable only upon failure of national protection.[18] Hence, there must be evidence of failure of State protection regarding the rights at risk before a person can be eligible for refugee status.

The primacy of domestic protection requires that individuals at risk of serious harm must ordinarily first approach the State of origin before engaging the responsibility of other States. As Hathaway puts it: "[o]bviously, there cannot be said to be a failure of State protection where a government has not been given the opportunity to respond to a form of harm in circumstances where protection might reasonably have been forthcoming."[19] A claimant need not always literally approach the State or its

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[16] *Id.* (unofficial translation).

[17] Canada (Att'y Gen.) v. Ward [1993], 2 S.C.R. 689, 725. *See also* Canada (M.E.I.) v. Hernandez Ruiz [1993] FCJ 157, confirming the *Satiacum* judgement. The 1989 decision of the French Commission des recours in Santesteaban Goicoechea, *abstracted in* IJRL/0060, 2(4) INT'L J. REF. L. 652 (1990), suggests that there is a presumption that acts of torture, or for that matter, serious violations of human rights in democratic countries can be remedied through the national legal system.

[18] Canada (Att'y Gen.) v. Ward [1993] 2 S.C.R. 689, 709 (confirming the position in HATHAWAY, *supra* note 4, at 135).

[19] HATHAWAY, *supra* note 4, at 130. *See also* Adebisi v. I.N.S., 952 F.2d 910 (5th Cir. 1992). In dismissing the claim to refugee status, the Fifth Circuit relied on the claimant's failure to seek help from the police in holding that he had failed to establish that the Nigerian government could not protect him from the harm feared.

authorities before she can be eligible for refugee protection. A refugee claimant is not required to seek domestic protection if it would be unreasonable to do so.[20] This means that a woman's failure to approach local authorities may be adjudged to be reasonable insofar as it is established that women are unlikely to be protected from the harm feared. For example, such actions may be reasonable where the violation in question is so endemic as to be beyond police control or where authorities are known to systematically refuse protection for the violation complained of.

The requirement of State accountability for the harm feared is a reflection of the public/private dichotomy which informs the liberal tradition from which the Convention refugee definition emerged.[21] This in turn

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[20] Since refugee status is meant to protect individuals against serious harm in their own country, it defeats the purpose of refugee protection to require a claimant to risk her life seeking protection when such protection is not likely to be provided. HATHAWAY, *supra* note 4, at 130; Canada (Att'y Gen.) v. Ward [1993], 2 S.C.R. 689, 723-24. *See also* Memorandum to All I.N.S. Asylum Officers from Phyllis Coven, *I.N.S. Office of Int'l Affairs* 17 (May 26, 1995) (considerations for asylum officers adjudicating asylum claims from women, on file with the I.N.S.). This position was endorsed in the New Zealand case of Re S (1991), Refugee Appeal No. 11/91, where the Refugee Status Appeal Authority observed that failure to seek domestic protection will not automatically lead to refusal of refugee status. *Id.* at 17. However, "evidence of state unwillingness or incapacity to protect must be scrutinized in the light of reasonable efforts made by the claimant to seek out the protection of the state." In Baldizon-Ortegaray v. Canada (M.E.I.) [1993], 64 F.T.R. 190, 194 (F.C.T.D.), the Federal Court Trial Division made it clear that failure of a claimant to actually seek the protection of an impotent State will not jeopardize the claim to Convention refugee status. A specific application of this position is seen in Ahmed v. Canada (M.E.I.), 22 IMMIGR. L.R. (2d) 119 (F.C.T.D. 1993). In this case, the Federal Court held that given the apparent intimacy between the persecuting forces and the national government, the claimant's failure to report his fear of persecution to the authorities was reasonable under the circumstances.

[21] Liberal political ideology, the dominant ideology in the West, is premised on a bifurcation of society into public and private spheres. The duality which pervades liberal thinking enables the demarcation of areas deserving of legal regulation and those which fall within the sphere of personal autonomy. Within this framework, the governance of the society is limited to the public sphere while individual liberty defines the organization of the private sphere. Liberal theorists assume that the distinction between public and private spheres is general and neutral with respect to individuals, and that both areas are equally important. *See* JOHN LOCKE, TWO TREATISES OF CIVIL GOVERNMENT (Peter Laslett ed., 1965); JEAN BETHKE ELSHTAIN, PUBLIC MAN, PRIVATE WOMAN: WOMEN IN SOCIAL AND POLITICAL THOUGHT, 116-27 (1981). Since countries of the West were the major architects of the Refugee Convention and have mostly interpreted and applied the definition of

has ensured that the label "persecution" has often been restricted, especially in European practice, to situations in which the State is actively engaged in, or can be held responsible for, the harm feared.[22] Insisting on State accountability for the harm feared has a disproportionate effect on gender-related refugee claims. While there is a myriad of incidents in which women are directly victimized by the State or its agents, most of the harms which may motivate women to flee occur in the so-called "private realm," where they are most vulnerable yet State presence is considered inappropriate.[23] Yet women whose fear of persecution arises from privately inflicted harms are expected to establish some form of State accountability for the harm feared before they can be eligible for refugee protection. Consequently, even when gender-related harms have been recognized to constitute serious harm, women refugee claimants have to cross yet another hurdle by persuading refugee adjudicators that the harm feared is somehow attributable to the State.

The gender implications of the requirement of State accountability can hardly be overstated. As Hilary Charlesworth has observed, although the empirical evidence of violence against women is overwhelming and undisputed, it has yet to be adequately reflected in the development of inter-

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Convention refugee, jurisprudence on the meaning of "refugee" has been influenced by the public/private dicotomy which pervades liberal thinking.

[22] The public/private distinction has influenced the traditional understanding of the types of human rights violations that are sufficiently serious to warrant Convention refugee protection. The designation of particular areas as free from legal regulation renders the vindication of rights threatened in the so-called "private sphere" difficult, if not impossible, within the Convention refugee regime as historically understood. Human rights violations that may entitle a person to refugee status have mostly been seen to occur in the public sphere (where men dominate) and at the hands of the State or its agents. Audrey Macklin has observed that the typical examples of persecution involve conduct that can be attributed to the State, such as torture of political prisoners. Audrey Macklin, *Refugee Women and the Imperative of Categories*, 17 HUM. RTS. Q. 213, 232 (1995). *The Joint European Position* limits the notion of persecution by third parties to incidents that are encouraged or permitted by State officials. *The Joint European Position*, *supra* note 6, ¶ 5.2.

[23] Celina Romany notes that although women are paradigmatic victims of violence in the family, "[y]et the human rights discourse of protection has not been available" to them. Celina Romany, *State Responsibility Goes Private: A Feminist Critique of the Public/Private Distinction in International Human Rights Law*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 85 (Rebecca J. Cook ed., 1994).

national law.[24] Violence against women remains unaddressed for a number of reasons, including the fact that the legal system is focused on "public" actions by the State.[25] In short, the difficulty in assigning the label "persecution" to gender-related harms, in part, often turns on the absence of State responsibility for the alleged harms.

In sum, threats to fundamental human rights *per se* do not give rise to a need for refugee status. As a backup to domestic protection, refugee status becomes necessary only when the State of origin has failed to provide effective remedies for the harm feared. There are two aspects of the concept of failure of State protection. First, who are the perpetrator(s) of harm which may be considered persecutory? Second, must a claimant's fear of persecution relate to the entire territory of the country of origin? In other words, since the need for refugee status ultimately boils down to the availability of domestic protection for the harm feared, an individual has no claim to refugee protection if the harm feared can be remedied elsewhere in the country of origin.

## II. Agents of Persecution

A finding of lack of State protection resulting in the prospect of a need for surrogate protection can be made where a State actively violates or supports violations of basic human rights of its citizens. Surrogate protection may be needed even when the State is not strictly an accomplice to the harm complained of, but wilfully neglects to protect the basic human dignity of its populace. Since the point of departure for refugee protection is the absence of effective national protection, such a finding can also be made where the State of origin is simply unable to provide protection, despite its intentions and even efforts to do so.[26] Thus, when citizens of a particular country are denied the *de facto* enjoyment of basic human entitlements—whether as a result of commission, omission or incapacity—there arises a need for surrogate protection through refugee status. Not all States recognize a need for refugee protection where the inability to protect is not deliberate.

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[24] Hilary Charlesworth, *What are "Women's International Human Rights"?*, *in* HUMAN RIGHTS OF WOMEN, *supra* note 23, at 72.

[25] *Id. See also* Macklin, *supra* note 22, at 232-33.

[26] *See Office of the U.N. High Commissioner for Refugees: Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 65 U.N. Doc. HCR/PRO/4 (1979)[hereinafter *UNHCR Handbook*].

### *A. Persecution Committed by the State of Origin*

Persecution in its classic form emanates from actions by a State or its organs, e.g., the police, the military, or the judiciary as a whole.[27] Failure of State protection will be found where it is established that officials in the State of origin are responsible for the serious harm feared.[28] When the State of origin creates the harm feared, it is unreasonable to look to the State as a source of protection.

Persecution by the State to suppress political dissent may involve the use of brute force such as torture or harassment. State persecution may also involve administrative or judicial measures which have the appearance of legality. An example of such State persecution is the imposition of severe punishment on women who fail to prove rape under the Pakistani Hudood Ordinance.[29] Persecution by the State may also take the form of

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[27] HATHAWAY, *supra* note 4, at 125. In Chan v. Canada (M.E.I.) [1995], 128 D.L.R. (4th) 213 (S.C.C.), the minority decision explicitly affirmed that actions of subordinate State authorities may give rise to failure of State protection. It may also include entities such as student or union leaders known to engage in actions in support of the government. In Barrios v. Canada (M.E.I.) [1993], the Federal Court Trial Division acknowledged that student leaders were agents of persecution.

[28] It poses no theoretical problems to recognize that State-inflicted harms against women are attributable to the State, as such a recognition is within the normal principles of State responsibility doctrines. *See* Thomas Buergenthal, *State Obligations and Permissible Derogations*, *in* THE INTERNATIONAL BILL OF RIGHTS: THE COVENANT ON CIVIL AND POLITICAL RIGHTS 72, 74 & 77 (Louis Henkin ed., 1981).

[29] The Pakistani Hudood Ordinance was promulgated in 1979 and came into effect in 1980. The law requires that a woman alleging rape (*zina*) corroborate her complaint with the testimony of four male witnesses. Failure to prove that sexual contact occurred without the consent of the woman leaves the complainant vulnerable to criminal prosecution. At a minimum, women who are unable to prove their rape allegations face social ostracism. The gender-discriminatory effect of the Hudood Ordinance became a sad reality in the celebrated Pakistani case of Safia Bibi. Safia was a blind, minor girl who alleged that she was raped. The alleged rapist retorted that the blind girl was of loose morals. Failing to prove her case, the Sessions Court found Safia in violation of the Hudood Ordinance and sentenced her to three years rigorous imprisonment. The decision was set aside by the Federal Shariat Court on technical grounds amid national and international outcry. Meanwhile, the alleged rapist did not spend a day in jail due to insufficient evidence. Radhika Coomaraswamy, *To Bellow Like a Cow: Women, Ethnicity, and the Discourse on Rights*, *in* HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES 39, 50 (Rebecca J. Cook ed., 1994).

aberrant behavior by official agents of the State, ostensibly in violation of the law, such as sexual assault of female inmates/detainees or abuse of women perpetrated by State agents in their official capacity, which is not subject to a timely and effective rectification by the government.[30] Thomas Buergenthal notes that the obligation to "ensure" the enjoyment of civil and political rights creates affirmative obligations on States, for example, to discipline their officials.[31] Failure to do so effectively may lead to a finding of a failure of State protection and the need to seek surrogate protection for the harm feared.

Persecution by the State may also take the form of schemes that discriminate against certain individuals or groups of persons, e.g., the enactment of gender-discriminatory laws, such as the dress code for women in fundamentalist Islamic countries like Iran.[32] Where a woman's fear of serious harm arises from the implementation of such gender-discriminatory laws, she cannot be expected to look to the State for protection since it is the very agent responsible for the harm feared. Similarly, when the government of Ireland imposes restrictions on women's rights to freedom of

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[30] In reaching the conclusion that the central government of China condones coerced sterilization carried out by local authorities, the minority decision in Chan v. Canada (M.E.I.) [1995], 128 D.L.R. (4th) 213, held that not only does the Chinese government fail to punish local officials who execute such sterilizations, but in fact, it encourages such practices by creating an atmosphere in which incentives for mistreatment is ripe. It is without a doubt that in such situations, the government of China is not using its machineries to protect persons at risk from such practices. Similarly, there could be failure of State protection where a government fails to respond to claims of women who are abused in official capacities. This was the case in a German decision, Federal Republic of Germany Constitutional Court Decision BvR 2 (1989) 958 (986) *abstracted in* IJRL/0154, 5(2) INT'L J. REF. L. 275 (1993), in which the mayor of a town who the applicant had approached for assistance abducted and sexually abused her. The Court found the mayor was acting as an agent of the State. The Court further noted that it was irrelevant whether the claimant had approached Romanian authorities for redress. This conclusion is seemingly based on the assumption that no effective State protection would have been forthcoming even if she had sought the protection of national authorities. If, however, such protection would have been available, then the German Court wrongly applied the principle of failure of State protection.

[31] Buergenthal, *supra* note 28, at 77.

[32] *See* Haleh Afshar, *Women, Marriage and the State in Iran*, *in* WOMEN, STATE AND IDEOLOGY: STUDIES FROM AFRICA AND ASIA 73-75 (Haleh Afshar ed., 1987). Among other things, Afshar notes that Iranian clergymen have determined that women must shroud their bodies, except for their face and hands, with a veil. *Id.*

expression[33] and movement,[34] and when its Courts issue injunctions preventing clinics and student groups from disseminating information on family planning services,[35] the Irish government cannot be looked to as a source of protection for the rights in question.

In sum, when the State is directly responsible for the risk of serious harm, it is unreasonable to look for protection within the country of origin. The need for refugee protection in such circumstances can hardly be overstated. In such situations, a finding of failure of State protection may be made insofar as it is established that the harm feared is perpetrated by the State or organs of the State.

When the State has been identified as being directly responsible for the risk to the basic human rights in question, neither the gender of the victim nor the nature of the harm feared would affect a finding of lack of State protection leading to the need for refugee status. However, recognition of failure of State protection becomes difficult when the State is *not* directly responsible for the harm feared. Domestic violence or the operation of discriminatory customs and practices are examples of gender-related harms sustained by women at the hands of private entities. These issues are discussed in the subsequent subsections.

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[33] Subsequent to a 1983 amendment to the Irish Constitution which recognized the fetus' right to life as a specific right, the Irish government has restricted the right to disseminate information about family planning. *See* IR. CONST. amend. XIII (1983). Although the Abortion Information Bill of March 1995 provides that information may be distributed upon request, it still limits the ability of clinics and physicians to notify the general public about family planning services abroad. HUMAN RIGHTS WATCH WOMEN'S RIGHTS PROJECT, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS 444-45, 448-51 (1995) [hereinafter GLOBAL REPORT].

[34] Subsequent to the adoption of the Eighth Amendment, the Irish High Court, in the *X Case*, issued an injunction prohibiting a fourteen-year old girl impregnated through rape and her parents from travelling outside Ireland to obtain abortion services in a country where it was legally available. On appeal to the Supreme Court of Ireland, the Court held that since the girl was suicidal, her life was in danger and therefore could seek abortion. Attorney General v. X, 1992 1 I.R. 1 (Ir. S.C.). Human Rights Watch has pointed out that "the court's narrow ruling failed to address whether a woman has the right to leave Ireland to seek abortion if her life was not in danger." GLOBAL REPORT, *supra* note 33, at 447.

[35] In Society for the Protection of Unborn Children (Ireland) v. Grogan, 1989 I.R. 760, the Irish Supreme Court prohibited student groups from disseminating information regarding abortion services overseas.

### *B. Persecution Condoned or Wilfully Neglected by the State of Origin*

A State will breach its protective duty even when it is not directly responsible for the harm complained of, but condones it either by approving or sanctioning the same. In this case, violations of basic human rights are carried out with the tacit support of the State of origin. Sometimes, the State may not directly support the human rights abuses in question, but may be indifferent to the same, and therefore permit the abuses without authoritative interference. In both cases, there can be a finding of failure of State protection because the State of origin has deliberately refused to protect its citizens from privately inflicted harms, even though it may have the resources to do so. Undoubtedly, this will amount to a breach of its duty to *ensure* its citizens enjoyment of basic human rights to which they are entitled.[36] In *Mojica v. Dom. Rep.*,[37] the United Nations Human Rights Committee addressed the situation of a "disappeared" individual who had received death threats from certain military officers. The Dominican government had failed to respond to a request for an investigation into the disappearance. The Committee held that the Dominican Republic breached its duty of protection because it failed to take effective measures at its disposal to prevent the disappearance and to investigate it thoroughly.

Traditionally, however, there has been an unwillingness to acknowledge State accountability for privately-inflicted harms.[38] Arguably, this stems from the public/private dichotomy by which State presence in the private, familial sphere is considered inappropriate. This traditional unwillingness to acknowledge State accountability disproportionately affects

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[36] The German Higher Administrative Court has held that the actions of individual Muslims were rightly attributable to the Turkish State, where that State failed to offer protection, even though it was in a position to do so. Decision A 12 S 533/89, *abstracted in* IJRL/0080, 3(2) INT'L J. REF. L. 337 (1991); *see also* Memorandum regarding the Law of Refugee Status: Chapter 4.5.1: Agents of Persecution from Professor James Hathaway, Osgoode Hall Law School of York University, (May 10, 1994)(discussing German Constitutional Court Decision, BVerfGE 80 315, 1989) (on file with author) where the Constitutional Court unequivocally said that harm inflicted by private groups was properly attributable to the State if the State was unwilling to offer protection, notwithstanding that it had the means to afford protection.

[37] Barbarin Mojica v. Dom. Rep., U.N. GAOR, Hum. Rts. Comm., 51st Sess. (1994).

[38] *See* Andrew Byrnes, *Women, Feminism and International Human Rights Law Methodological Myopia, Fundamental Flaws or Meaningful Marginalisation?, Some Current Issues*, 12 AUST. Y.B. INT'L L. 205, 235 (1992).

women who seek refugee protection, since women are so often the victims of privately-inflicted harms. Gender-related harms which are perceived to have occurred in the private, unregulated realm, for which the victims receive no effective State protection, have routinely been dismissed as not deserving refugee protection.

In *Williams v. Canada (M.E.I.)*,[39] the applicant sought, *inter alia,* for a stay of a deportation order. The applicant alleged fear of violence at the hands of her common law spouse if returned to her native Jamaica.[40] In dismissing her application, the court held that although fear of physical persecution at the hands of a State of origin may constitute a threat to the "security of the person," it did not concede that such a proposition could be extended to cover fears of violence in the *private* realm in violation of the laws of that country.[41]

Although the *Williams* decision did not specifically deal with the meaning of persecution within the Convention refugee definition, the case nevertheless indicates the unwillingness of States to recognize that violence against women at the hands of private individuals, coupled with lack of State protection, can constitute persecution for which refugee protection might be appropriate. The decision suggests that violence against an individual suffered at the hands of private entities in contravention of the laws of the country of origin ought to be redressed in the national legal system. But the court failed to recognize that frequently the indifference of authorities, inadequate punishments, and refusals to convict render such laws ineffective, amounting to official sanction of these harms.[42] To preclude

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[39] [1985], 2 F.C. 153 (T.D.) 158-59.

[40] *Id.*

[41] *Id.*

[42] Traditionally, the courts regarded wife beating as the husband's prerogative. *See* WILLIAM BLACKSTONE, 1 BLACKSTONE'S COMMENTARIES 444-45 (1803); Williams, *The Equality Crisis: Some Reflections on Culture, Courts and Feminism*, 7 WOMEN'S RTS. L. R. 175, 177 n. 9 (1982). Pamela Goldberg notes (in relation to a Honduran woman who had been the victim of spousal abuse) that the police were reluctant to file charges against the abusive husband because it would be an exercise in futility. The police took this position because "she was his 'woman' and he could do what he wanted to her." Pamela Goldberg, *Anyplace But Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L. J. 565, 565-66 (1993). The argument in favour of non-intervention in the familial sphere has been made by men to prevent women and children from evoking State power to protect their human dignity. Although this may no longer be the case in some countries, various State officials may acquiesce to such conduct by their unwillingness to enforce laws proscribing wife beating, thereby empowering males

women from refugee protection when the serious harm they fear cannot be directly attributed to the State is equivalent to denying them recourse for harms suffered or feared simply because of the locale, i.e., in the private, familial sphere. This is yet another example of how the public/private split disenfranchises women, and insulates abuse and patriarchal power in the private, unregulated sphere.

The traditional position which does not hold States accountable for privately-inflicted harms is inconsistent with contemporary interpretations of the State responsibility doctrine. Under the doctrine of State responsibility, actions of private individuals or groups acting with the explicit or tacit support of a government are attributed to the State.[43] This position makes it clear that violations of human rights stem from governments and non-State

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within the familial sphere. In Canada (M.E.I.) v. Mayers [1993], 1 F.C. 154 (F.C.A.), the respondent alleged that she had suffered abuse, including rape at the hands of her spouse, from their marriage in 1971 up to her flight to Canada in 1986. Although she had brought this to the attention of the police, they had failed to do anything concrete about it. The police usually took hours to respond to her calls, interviewed her in the presence of the husband, and often left after the husband assured them that it was merely a domestic spat. The respondent became convinced that police involvement yielded nothing, it instead exacerbated the abuse. She thereupon fled to Canada to seek refugee protection. For indifference of the police *vís-a-vís* violence against women generally, see Elizabeth A. Stanko, *Missing the Mark? Policing Battering*, *in* WOMEN, POLICING, AND MALE VIOLENCE: INTERNATIONAL PERSPECTIVES 46, 54 (Jalna Hanmer et al. eds., 1989); Kathleen J. Ferraro, *The Legal Response in the United States*, *in* WOMEN, POLICING, AND MALE VIOLENCE: INTERNATIONAL PERSPECTIVES 155, 169-70 (Jalna Hanmer et al. eds., 1989).

[43] The protection of human rights against the actions of private individuals challenges traditional assumptions and conceptions. *See* W.N. Nelson, *Human Rights and Human Obligations*, *in* HUMAN RIGHTS 281 (J.R. Pennock et al. eds., 1981). Nelson notes that a tacit assumption underlying human rights appears to be that the obligations associated with these rights only lie with one's government. *Id.* Nelson concludes that these are rights against institutions. *Id.* at 294. Writing in the late 1970s, Henkin stressed that human rights are rights against the State. LOUIS HENKIN, THE RIGHTS OF MAN TODAY (1978). Henkin seems to have modified his position subsequently when he noted that States are also obligated "to ensure" the recognized rights. Louis Henkin, *The International Bill of Rights*, *in* INTERNATIONAL ENFORCEMENT OF HUMAN RIGHTS 1, 10 (Rudolf Bernhardt et. al. eds., 1987). It therefore appears that human rights can now be asserted against other persons. Clapham notes that applying the European Convention on Human Rights to acts of private bodies would not be inconsistent with the current international law on State responsibility. ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE 106-07 (1993).

actors alike.[44] Governments are therefore obliged to take appropriate preventive and punitive measures to protect individuals against private violations of guaranteed rights. This is what Andrew Clapham refers to as "the privatization of human rights."[45]

The United Nations Human Rights Committee has recognized that the classical civil and political rights impose positive obligations on States to prevent infringement by private individuals.[46] The Committee has stated that the prohibition on torture, or cruel, inhuman or degrading treatment or punishment includes a duty to ensure protection against such treatment even when committed by persons acting outside or without any official authority.[47] The Committee's 1992 General Comment on this article goes even further, unequivocally stating that the scope of protection to be undertaken by States extends to cover torture or other cruel, inhuman or degrading treatment or punishment by people acting in their "private capacity."[48] In addition, the Committee has demanded to know the actual conditions of discrimination that may be practiced either by the community or private

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[44] In its Draft Code on Crimes Against Peace and Security of Mankind, the International Law Commission has noted that possible perpetration of the crimes is not restricted to public officials or representatives alone. Although they may have more opportunity to commit such crimes, the possibility of private individuals committing the kind of systematic and mass violations of the rights covered is not overruled. *Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. GAOR, Int'l Law Comm'n, 46th Sess., Supp. No. 10, at 238-39, U.N. Doc. A/46/10 (1991); *Draft Code of Crimes Against the Peace and Security of Mankind*, U.N. GAOR, Int'l Law Comm'n, 47th Sess., Supp. No. 10, U.N. Doc. A/47/10 (1992).

[45] CLAPHAM, *supra* note 43, at 1.

[46] *International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 36th Sess., Gen. Comment 16(32), ¶ 9-10, U.N. Doc. CCPR/C/21/Rev 1, (1989). Similarly, in S.S. v. Norway (Comm. No. 79/1980, *in* International Covenant on Civil and Political Rights, Human Rights Committee, 1 SELECTED DECISIONS UNDER THE OPTIONAL PROTOCOL 30 (1985)), both the Norwegian government and the Human Rights Committee seemed to have agreed that failure by a State to take appropriate measures to prevent the invasion of a person's privacy by other individuals could amount to a violation of the right to privacy.

[47] *International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 37th Sess., Annex 5, Gen. Comment 7(16), ¶¶ 1-3, U.N. Doc. A/37/40 (1982), *revised by* U.N. Doc. CCPR/C/21/Rev.I/Add.3 (1992).

[48] *International Covenant on Civil and Political Rights*, U.N. GAOR, Hum. Rts. Comm., 44th Sess., Gen. Comment 20 (44), ¶ 2, U.N. Doc. CCPR/C/Rev.I/Add.3 (1992).

entities.[49] Similarly, the European Court of Human Rights has held that the human rights obligations of States include the adoption of measures designed to secure respect for private life, even in the sphere of relations between individuals.[50]

A State is obligated to take whatever measures are necessary to prevent or to effectively redress private interference with the enjoyment of human rights. As Professor Andrew Byrnes has pointed out, "international law requires a State not to just stand idly by while private individuals infringe the rights of other individuals; they must take positive steps to stop those violations or offer redress for them."[51] A State may be in breach of its duty of protection when it fails to take reasonable measures to prevent attacks on the basic rights of its citizens. In addition, a State's failure to establish an appropriate system of laws and institutions to investigate, punish or remedy such violations when they occur may be tantamount to failure of State protection.[52] The Inter-American Commission on Human Rights

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[49] *International Covenant on Civil and Political Rights*, *supra* note 48, ¶ 11, *cited in* CLAPHAM, *supra* note 43. Examples of such discriminatory privately-inflicted practices may include gender-based harms like dowry deaths and female genital mutilation which are carried out by the community, families or private individuals. The Committee's attention to these issues suggests that a State which fails to effectively prevent, punish or compensate victims of such gender-discriminatory practices may be in breach of its duty of protection. The United Nations Committee on the Elimination of Discrimination Against Women has also emphasized that the Women's Convention covers both public and private acts. The Recommendation examines "private" matters such as family violence and abuse, forced marriage, dowry deaths, etc. U.N. GAOR, Committee on the Elimination of Discrimination Against Women, General Recommendation 19, CEDAW/C/1992/L.I/Add. 15, Jan. 29, 1992. The Committee on the Elimination of Discrimination Against Women has also recently affirmed State accountability for the routine non-prosecution of violence against women at the hands of private individuals. The Committee specifically noted that "States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights, or to investigate and punish acts of violence[.]" *Id.* ¶ 10. In addition, Article 2(d) of the Racial Discrimination Convention calls on States to end by all possible means racial discrimination by any persons, groups or organizations. *International Convention on the Elimination of All Forms of Racial Discrimination*, U.N. GAOR, G.A. Res. 2106A, 606 U.N.T.S. 9464.

[50] X and Y v. Netherlands, 91 Eur. Ct. H.R. (ser.A) ¶ 23 (1985). *See also* CLAPHAM, *supra* note 43, at 89, 93-94.

[51] Byrnes, *supra* note 38, at 227.

[52] In a German case involving a Romanian Gypsy, the Administrative Court of Germany held that the failure of the Romanian government to prosecute private

succinctly summed up the nature of a State's duty of protection regarding private violations of human rights. The court stated that a government is required to

> take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim adequate compensation.[53]

Thus, there may be failure of State protection when a State allows private persons or groups to act freely and with impunity to the detriment of rights recognized by the human rights regime.[54] In such cases, the responsibility of the government will be engaged not because it perpetrated the harm in question, but because of its failure to effectively respond to such occurrences.[55]

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individuals who inflicted harms against Gypsies, coupled with the fact that the victims never received compensation for the harms sustained, amounted to failure of State protection for which asylum was granted. Federal Republic of Germany Administrative Court Stuttgart, (1991), *abstracted in* IJRL/ 0194, 6(2) INT'L J. REF. L. 283 (1994). *See generally* N. Roht-Arriaza, *State Responsibility to Investigate and Prosecute Grave Human Rights Violations in International Law*, 78 CAL. L. REV. 451 (1990).

[53] Velásquez Rodríguez, Inter-Am. C.H.R., ser. C, No. 4, Judgement of July 29, 1988, *in* 28 I.L.M. 291, ¶ 174 (1989).

[54] Given the centrality of non-discrimination in the enjoyment of human rights, the level of a State's responsibility to protect the rights of its citizens increases in the case of vulnerable groups who are susceptible to discrimination. Thus, in countries or societies where gender-discriminatory customs or practices are prevalent, the State will have to take extra precaution to ensure that women are protected from violations of their basic rights. Merely legislating against such practices may not be an adequate response to the risk of harm facing women in particular societies. States should take proactive measures to ensure that women are actually protected from these harms. In LK v. The Netherlands, Communication 4/1991, opinion issued on Mar. 16, 1993, *reported at* 8(2) INTERIGHTS BULL. 32 (1994), the Committee on the Elimination of Racial Discrimination found that the mere enactment of a law making racial discrimination a criminal offense did not exhaust a State's obligation to prevent racial discrimination. A State should investigate threats to the right protected with due diligence and expeditiously.

[55] *See* Henry J. Steiner, *Book Review*, 89 AM. J. INT'L L. 844, 846 (1995) (reviewing ANDREW CLAPHAM, HUMAN RIGHTS IN THE PRIVATE SPHERE (1993)).

The contemporary doctrine of State responsibility which holds a State accountable for privately inflicted harm has been recognized in refugee law. Currently, some countries recognize that direct government involvement is not required to establish failure of State protection. Such a finding can be made where the harm complained of is perpetrated with the implicit support of the government or its agents. In *Canada (Att'y Gen.) v. Ward*, the Supreme Court of Canada affirmed the position that a State need not be the source of the harm feared to establish failure of State protection.[56] Similarly, in *Desir v. Ilchert*,[57] the United States Court of Appeals for the Ninth Circuit held that a person seriously threatened by a group acting with the consent of the State is persecuted within the meaning of the Convention refugee definition.[58] This is because the victim of such harassments cannot reasonably be protected by the government. An example of this persecution is a person exposed to serious harm by non-governmental entities, which have some link to the government, such as guerrillas supported by the government or party members acting with the government's tacit approval.[59]

Thus, a State may fail in its duty of protection not because of the act itself, but because of the lack of due diligence to prevent the violation or to respond as required by international law and practice. This rendition of the State responsibility doctrine ensures that a State will be vicariously responsible for privately-inflicted violations of core human rights when it supports or condones the same.[60] As James C. Hathaway points out, "[b]ut for this notion of vicarious responsibility, ill-willed States could deprive

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[56] Canada (Att'y Gen.) v. Ward [1993], 2 S.C.R. 689, 713-17.

[57] 840 F.2d 723 (9th Cir. 1988).

[58] *Id.* at 727-28.

[59] *See Information Note on Article 1 of the 1951 Convention*, U.N. High Comm'r for Refugees, ¶ 5 (Mar. 1995); HATHAWAY, *supra* note 4, at 126-27. In De Calles v. Canada (F.C.T.D. 1993), *abstracted in* 19 IMM. L.R. (2d) 317, the Federal Court Trial Division unequivocally held that "unofficial" agents whose activities are encouraged by the government are in fact agents of persecution. Similarly, in Adebisi v. I.N.S., 952 F.2d 910 (5th Cir. 1992), the United States Court of Appeals acknowledged that persecutory acts may stem from the activities of supporters of a regime.

[60] In Rubio v. Colombia, Communication 161/1983, Nov. 2, 1987, the U.N. Human Rights Committee held that Colombia was in breach of the right to life because it had failed to take appropriate measures to prevent the disappearance and subsequent killing of two of its citizens and to investigate effectively those responsible for these acts.

their victims of recourse to refugee protection simply by contracting their agenda of harm to unofficial instrumentalities."[61]

These developments clearly pave the way for recognizing State responsibility *vis-a-vis* gender-related violence in the so-called "private sphere" where such abuses are most prevalent—raising the possibility of according refugee protection where the State condones serious, privately-inflicted violations of women's fundamental human dignity. Official sanction of privately inflicted harms may take the form of non-criminalization of harms which uniquely affect women such as marital rape exemptions in law, lack of police responses to pleas for assistance, failure to investigate or prosecute perpetrators of such harms, and reluctance to convict or punish those responsible.[62] Refugee protection may be appropriate where such official sanction results in threats to fundamental human dignity. Consequently, women threatened with a privately-inflicted serious harm such as violence in intimate relationships or arising from gender-discriminatory practices, customs and traditions which are encouraged by the State cannot expect meaningful State protection, and may be eligible for Convention refugee status.

Under the contemporary interpretation of the State responsibility doctrine, a State that is not actively supporting privately-inflicted harm but is nevertheless tolerating it, may be found to have breached its duty of protection. Thus, even in the absence of direct State involvement, a State may be implicated in harms against women carried out in the name of culture, religion, tradition, or by the general populace where organs of the State purposefully turn a blind eye toward such abuses.[63] Authorities of the country of origin must not knowingly tolerate such abuse.

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[61] HATHAWAY, *supra* note 4, at 126.

[62] Failure to effectively respond to privately inflicted violence against women sends a signal that such attacks are justified, or at a minimum will not be punished, thereby endangering the interests of the victims. *See* GLOBAL REPORT, *supra* note 33, at 344. In Kumar v. Canada (M.E.I.) [1991] F.C.J. 131 (F.C.A.), the Federal Court of Appeals explicitly acknowledged that there may be failure of protection leading to a grant of refugee status in respect of acts not committed by the State, but in regard to which the State has failed to offer appropriate protection. *See also* Rajudeen v. Canada (M.E.I.)[1984], 55 N.R. 129 (F.C.A.) and Surujupal v. Canada (M.E.I.) [1985], 60 N.R. 73 (F.C.A.), where the Federal Court of Appeals recognized the need for refugee protection in respect of harms carried out by private entities that are knowingly tolerated by authorities of the State of origin.

[63] *See* GRAHL-MADSEN, *supra* note 7, at 189 (observing that behavior tolerated by the government in such a way as to leave the victims unprotected by the agencies of the State may lead to the grant of refugee status). Brownlie notes that a

Every society creates social arrangements to order interaction among members of the community which, almost invariably, includes distinct gender roles. Where the maintenance of gender roles involves discrimination against women in their enjoyment of fundamental human rights, and where the State fails to intervene, the State should be adjudged to have breached its duty to *ensure* protection of its citizens.

An example of State toleration of gender-discriminatory practice can be seen in the performance of gynecological examinations on women and girls in Turkey. Turkish State officials routinely tolerate and sometimes sanction the performance of involuntary gynecological examinations on women and girls to maintain the ideal of female virginity, clearly overriding the individual rights of women to bodily integrity, privacy and equality before the law.[64] In view of State toleration of this practice, State protection is unlikely and refugee protection may be appropriate.

Similarly, although the performance of certain gender-discriminatory customs and traditions such as female genital mutilation, arranged marriages or bride burning can hardly be directly attributed to the State, such practices often arise in a context of inadequate or non-existent State protection.[65] For the most part, women are pressured by family or community to undergo these female-specific practices, and they cannot look to the State to effectively protect them. Failure by a State to provide adequate legal recourse to protect women against these pressures or to punish the perpetrators, clearly amounts to a violation of its duty to safeguard the basic rights of its citizens. Again, refugee protection may be appropriate.[66]

Further, refugee protection may be appropriate when the State has specifically legislated against the practice in question but fails to enforce

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State's responsibility can be engaged not only when it commits the harm in question, but also when one or more organs of the State neglect to take reasonable precautionary and preventive action, and inattention to the harm complained of in a way indicative of official indifference. IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 446, 452 (4th ed. 1990).

[64] *See Forced Virginity Exams in Turkey*, *in* GLOBAL REPORT, *supra* note 33, at 418-19.

[65] *See infra* note 80 and accompanying text.

[66] A case in point is the Nigerian government's toleration of forced marriages orchestrated by parents. The Nigerian government should rightly be held accountable for this violation of women's rights. *See* GLOBAL REPORT, *supra* note 33, at 415. When a woman's fear of harm emanates from such breach of her right to choose her own spouse, she cannot look to the Nigerian government for protection. Refugee status may be warranted.

the law despite having the opportunity and resources to do so.[67] In the *Case of Aminata Diop*,[68] involving the practice of female genital mutilation, the French Commission des Recours made it clear that even when a State opposes the practice, an individual might still be able to establish a claim to refugee status. The court held that even though the authorities of Mali had undertaken campaigns for the eradication of this practice, the fact that the campaign had thus far proved insufficient to stop the operations even in State-controlled hospitals, was an indication that this practice had been tolerated, for one reason or another, by the public authorities. The Court was of the view that official inaction indicates a failure of State protection sufficient to establish eligibility for refugee protection. The claimant was, however, denied refugee protection because she failed to establish that she was confronted with this particular risk.

In view of the differences in the role and status of women relative to men in most societies, a State's obligation to ensure equal enjoyment of human rights by women as by men might entail the adoption of measures quite different from those which would be sufficient to protect men alone. Thus, where a State has established male-oriented protective measures without recognizing the gender dimension in the enjoyment of a particular right, the State has probably failed in its duty to provide women with equal protection. This may constitute State toleration of the harm feared leading to a finding of failure of protection, and the necessity for refugee protection.

In sum, whereas it was traditionally difficult to accept State responsibility for privately-inflicted harms, modern interpretation of the State responsibility doctrine acknowledges that governments may be held responsible for harms perpetrated by private entities where the government or its agents condone or ignore the harms complained of. This progressive position, which is arguably aimed at responding to threats of violence regardless of the identity of the perpetrator and the site of its occurrence, has been carried over to the refugee regime in some jurisdictions.

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[67] Some countries have expressed disapproval of certain female-discriminatory practices and have actually outlawed the same. Yet, there is ample evidence that such laws have rarely been enforced, leaving women threatened with these practices with no effective means of protection. One such example is the outlawing of the giving of dowry by the father of the bride in India, which nevertheless still persists in contemporary times. *See* Linda Cipriani, *Gender and Persecution: Protecting Women Under International Refugee Law*, 7 GEO. IMMIGR. L.J. 511, 520-22 (1993).

[68] Decision 164078 of the Commission des Recours des Refugees (Second Section), Sept. 18, 1991, *abstracted in* IJRL/0097 4(1) INT'L J. REF. L. 92 (1992).

This logical position reinforces the surrogate nature of refugee protection.[69] It follows then that when a government willfully neglects to protect women from harms perpetrated by private entities, resulting in threats to basic human rights, refugee protection may be warranted. Consequently, in countries where women are potentially at risk of serious harm at the hands of both State and non-State actors, the absence of State policy or legislation regarding the human rights of women may be indicative of State unwillingness to provide protection. Refugee protection will be appropriate where this results in threats of serious harm.[70] Undoubtedly, this position deserves universal acceptance.

### *C. Inability of the Home State to Offer Protection*

There can be a finding of failure of State protection even when the government is not strictly an accomplice to the harm feared, but is simply unable to provide meaningful protection from private violations of basic human rights.[71] Acts of private entities which the government is incapable of controlling may give rise to the need for refugee protection. The rationale for this position is that the absence of national protection for serious harm is the point of departure for the recognition of refugee status, whether or not the absence of protection is deliberate. Unfortunately, this principled approach is not universally supported. In particular, most European States have refused to recognize the need for refugee status in situations where persecution is not committed, condoned, or tolerated by the State of origin.

In Canada (Att'y Gen.) v. Ward, the Supreme Court of Canada unequivocally affirmed that a finding of failure of State protection can be made with respect to harms perpetrated by private entities totally unconnected with the State, if the State is unable to protect the victims from the rights threatened. Mr. Justice La Forest pointed out that "there is a substantial agreement that a State's inability to protect is an integral component of

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[69] But for this approach, victims of serious violations of human rights not directly attributable to the State would be left without redress. This would have constituted an unfair sanctioning of the public/private distinction to the detriment of victims of privately inflicted serious human rights violations, who would mostly be women.

[70] *See* T. Alexander Aleinikoff, *The Meaning of 'Persecution' in United States Asylum Law*, 3 INT'L J. REF. L. 5, 21 (1991).

[71] Canada (Att'y Gen.) v. Ward [1993], 2 S.C.R. 689, 717; HATHAWAY, *supra* note 4, at 127; Memorandum to All I.N.S. Asylum Officers, *supra* note 20, at 16-17.

the notion of [persecution]."[72] In other words, a government's inability to provide protection from harm feared may lead to a finding of lack of State protection.

In an Information Note on Article 1 of the 1951 Convention,[73] the United Nations High Commissioner for Refugees (UNHCR) has noted that, "[i]n such cases, it must be concluded that the State is not in a position to give effective protection to its national who has a fear of persecution, and that international protection is the only available option for the person involved."[74] This approach to determining the need for refugee status has been explicitly recognized in New Zealand jurisprudence.[75]

Courts in the United States have also supported this position. U.S. Courts have been willing to extend refugee protection in situations where, although the government is not directly responsible for the harm feared, it has nevertheless been unable or unwilling to provide meaningful protection against the same. In *Adebisi v. I.N.S.*[76] the Fifth Circuit Court of Appeals held that fear of persecution could emanate from groups that the government is unable to control. However, asylum was denied to the applicant because the claimant failed to show that his fear of persecution originated from the government or a group which the government was unwilling or unable to control.[77]

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[72] Canada (Att'y Gen.) V. Ward [1993], 2 S.C.R. 689, 711. This position was confirmed in the minority decision in Chan v. Canada (M.E.I.)[1995], 128 D.L.R. (4th) 213 (S.C.C.).

[73] *Information Note on Article 1 of the 1951 Convention*, *supra* note 59.

[74] *Id.* The UNHCR has emphasized that it is essential that refugee protection is extended to victims of fundamental human rights violations by non-State actors, even in the absence of State accountability for the harm feared.

[75] *See* Rodger P.G. Haines, *Gender-based Persecution: New Zealand Jurisprudence*, at 16-17 (a paper prepared for the Symposium on Gender-Based Persecution organized by the Office of the United Nations High Commissioner for Refugees, Geneva, February 22 & 23, 1996).

[76] 952 F.2d 910 (5th Cir. 1992).

[77] *Id.* at 914. This position was affirmed in Bartesaghi-Lay v. I.N.S., 9 F.3d 819 (10th Cir. 1993), where the court acknowledged that threats of serious harm emanating from non-governmental entities can found a claim to refugee protection if the government is unable or unwilling to control the persecutor(s). In rejecting the claim of an Egyptian Christian who claimed a threat of religious persecution if returned to Egypt, the court held that the evidence did not show a systematic official persecution of Christians in Egypt nor of the government's inability to control the Muslim majority. *See generally* Aleinikoff, *supra* note 70.

Evidence of intentional harm on the part of the State of origin is not required to establish failure of State protection. A finding of failure of State protection can be made even if the government has the best of intentions to protect victims of particular human right abuses, but is simply unable to do so.[78] In support of this position, Atle Grahl-Madsen points out that:

> There are actually valid reasons for contending that even if a government has the best of intentions to prevent atrocities on the part of the public (or certain elements of the population), but for some reason or other is unable to do this, so that the threatened persons must leave the country in order to escape injury, such persons shall be considered true refugees. As a matter of fact, they may be just as destitute, just as much in need of help and assistance as any other group of refugees.[79]

This position underscores the surrogate nature of refugee protection as providing a forum of second resort to victims of serious human rights violations who cannot vindicate the rights threatened at home. Such may be the case where a State expressly condemns violence against women wherever it occurs (as for example, the operation of gender-discriminatory customs and practices), yet is unable to enforce such laws due to the systemic and widespread nature of the practice or the strength of custom among particular communities.[80]

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[78] In Adaros-Serrano v. Canada (M.E.I.), *abstracted in* 22 IMM. L.R. (2d) 31 (F.C.T.D. 1993), the Federal Court held that although the Chilean government has expressed intentions to redress human rights abuses in that country, there was no evidence that the government would be able to take any action which might stop the applicant's torturers from persecuting her. In such situations, refugee protection may be warranted.

[79] GRAHL-MADSEN, *supra* note 7, at 191; *see also* Patricia Hyndman, *The 1951 Convention Definition of Refugee: An Appraisal with Particular Reference to the Case of Sri Lankan Tamil Applicants*, 9 HUM. RTS. Q. 49, 67 (1987). Hyndman notes that the fact that the government wishes to provide protection, but is unable to do so, does not negate the need for protection.

[80] An example of gender-based discriminatory practice that persists despite governmental intentions to eliminate the same is the practice of female genital mutilation. Although the custom has been officially banned in most countries, thousands of women and girls continue to live under threats of this practice. *See* Valerie Oosterveld, *Refugee Status for Female Circumcision Fugitives: Building a Canadian Precedent*, 51 FAC. L. REV. 277, 299-300 (1993). The practice of widow burning (*sati*) presents yet another example. Though *sati* had been outlawed both by the British in 1829 and again by the Indian government in 1969, the practice

The liberal position supported by Canadian, New Zealand and United States jurisprudence, still raises some gender-related concerns. The *Satiacum* decision suggests that the existence of national structures to safeguard individuals from the harm in question raises a presumption of the State's ability to protect it citizens.[81] This position disregards the fact that in view of the historically subordinate status of women in certain societies, such formal structures may not necessarily respond to the violations of women's rights effectively. The *Ward* decision goes a step further to inquire whether the existing structures actually work.[82] This exercise is not meant to compare conditions in the country of origin with those prevailing in the asylum State. Instead, this analysis focuses on whether national protection is sufficient. Mr. Justice La Forest pointed out that national protection need not be perfect, but simply adequate.[83] The danger of this position for gender-related claims is that it allows decision-makers, mostly operating from a male perspective, to determine what they perceive to be adequate national protection, based on publicly recognizable indicators which may not necessarily reflect conditions in the so-called "private sphere". Thus, this position has the potential of disenfranchising women fleeing privately-inflicted, gendered human rights violations.

This liberal approach to failure of State protection is justifiable: the logic of requiring citizens to entrust their welfare in their government derives from the reciprocal obligation on the part of the State to safeguard the basic interests of its population. When a State is unable to respond to legitimate protection needs of its own, international protection is the only available option for safeguarding basic rights.

Not only is this principled approach consistent with modern interpretation of the State responsibility doctrine, but it also ensures that women confronted with threats of serious harms at the hands of private entities

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persists. Evidence of the continued practice of *sati* is seen from the Roop Kanwar Sati Case, in which an eighteen-year old university student was burned alive on her husband's funeral pyre in 1987. Three months after this incident, the Indian Parliament passed another law banning *sati*. The effectiveness of this law has yet to be seen. *See* Cipriani, *supra* note 67, at 520-21. For a detailed analysis of *sati*, its history, scriptural sanction, legislation against it, and evidence of its continued practice, see generally SAKUNTALA NARASIMHAN, SATI: A STUDY OF WIDOW BURNING IN INDIA (1992).

[81] Canada (M.E.I.) v. Satiacum [1989], 99 N.R. 171, 179 (F.C.A.).

[82] Canada (Att'y Gen.) v. Ward [1993], 2 S.C.R. 689. In *Ward*, Mr. Justice La Forest noted that there must be clear and convincing evidence of a State's inability to protect the claimant. *Id.* at 724.

[83] *Id.* at 726.

totally unconnected with the State are not excluded from refugee protection simply because neither the government nor its agents are the perpetrators of the harm feared. Women have been the paradigmatic victims of privately-inflicted harms, such as sexual assault during times of civil unrest, when no government wields effective power. This holistic understanding of failure of State protection makes it possible for women to qualify for Convention refugee protection not only when a State willfully or negligently fails to protect them, but also when the State is simply unable to offer the required protection, regardless of its intentions to do so.

This qualification may apply in cases of women from war-torn countries such as Somalia, Rwanda and the former Yugoslavia, where there is no effective government in power to which they can turn to vindicate their guarantees of basic human dignity when threatened by private entities.[84] The absence of an effective government to defend human rights does not negate the need for refugee protection. Instead, this situation underscores the necessity of international protection since domestic protection is unavailable. But for such an interpretation, most women would be excluded from refugee protection not because they do not risk threats to their basic human dignity, but because the government is not in a position to defend the rights threatened.

Regrettably, this principled approach to establishing the need for refugee protection in cases where a State is unable to offer protection does not find universal acceptance. In particular, most European countries have declined to recognize State responsibility where failure of protection is not deliberate, but follows from the absence of an effective national authority from which to seek protection, or simply from inability or lack of resources to effectively respond to the protection needs of its citizens. Whereas some decisions follow the Canadian and United States' approach, most do not.[85]

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[84] In Canada (M.E.I) v. Villafranca [1992], 99 D.L.R. 4th 334 (F.C.A.), the Court of Appeals noted that where the State is so weak, and the government is ineffective, it may be said to be unable to redress human rights violations of its citizens. Refugee protection may be appropriate in such circumstances.

[85] In The Queen v. Secretary of State for the Home Department, Ex parte S.J., *abstracted in* IJRL/0079, 3(2) INT'L J. REF. L. 336 (1985), the Queen's Bench Division endorsed paragraph 65 of the *UNHCR Handbook*, *supra* note 26, holding that serious acts of discrimination or other offensive acts committed by the local populace may be considered as persecution if the State is unable to offer effective protection. Similarly, the German Administrative Appeals Court has held, in the case of an individual from Lebanon, that persecution need not emanate from the State, but may rather be carried out by third parties when the State is unable to provide protection. Decision 13 UE 1568/84, Administrative Appeals Court of

In particular, German Courts have sometimes held that harms inflicted by private persons cannot be attributable to the State if the State did not have the resources to offer protection or where there is no State to appeal to, as in the case of Bosnia.[86] Similarly, France has refused to recognize persecution where no national authority exists, as in the case of Somalia.[87]

The European Union's Joint Position on the Harmonized Application of the Convention Refugee Definition makes clear that member States are not prepared to recognize the need for refugee status in situations where failure to respond to the harm feared was not intentional, but simply beyond the State's control. They instead called for individuated assessment of claims of this nature in accordance with national judicial practice.[88] Thus, whereas European countries agree that there can be a finding of failure of State protection regarding harms perpetuated by private entities, no uniform practice has yet emerged from Europe where there is neither a deliberate action undertaken, or not responded to, by the State.[89]

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Hesse, 1991, *abstracted in* IJRL/0083, 3(2) INT'L J. REF. L. 342 (1991). But in a case involving a Turkish woman who feared abduction upon return to the country of origin, the German Federal Administrative Court held that the abduction would not amount to direct or indirect persecution by the Turkish State if it carried out normal police activities to suppress crime. German Federal Administrative Court, 1990, *abstracted in* IJRL/0064, 2(4) INT'L J. REF. L. 656 (1990). In addition, the French position insists that persecution not committed or condoned by the State of origin cannot found a claim to refugee status. UNITED STATES COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 140 (1995) [hereinafter 1995 WORLD REFUGEE SURVEY].

[86] *See* Davy, *supra* note 14, at 13, 40-41 (citing Decision No.D1689839-122, Refugee Office, Zirndorf, May 19, 1993; D1696166-122, Refugee Office Zirndorf, May 26, 1993).

[87] *See* UNITED STATES COMMITTEE FOR REFUGEES, WORLD REFUGEE SURVEY 144 (1996) [hereinafter 1996 WORLD REFUGEE SURVEY].

[88] *The Joint European Position*, *supra* note 6, § 5.2.

[89] So far, only Denmark and Sweden are willing to recognize lack of State protection in such situations where the State is simply not in a position to respond to the harm feared. This conclusion is inferred from *The Joint European Position*, *supra* note 6, at ann. II, in which the Danish and Swedish delegations expressed the opinion that harms inflicted by private entities fall within the scope of the Convention Refugee Definition when the authorities prove unable to offer protection. *See also* Canada (M.E.I.) v. Villafranca [1992], 99 D.L.R. 4th 334 (F.C.A.), where the Court of Appeals held that where a State is in effective control of its territory and makes serious efforts to protect its citizens, the mere fact that it is not always successful at doing so will not be enough to justify a claim to Convention refugee protection.

The European position dictates that women threatened with risk to their basic human entitlement at the hands of private entities whom the government cannot control are not eligible for surrogate protection through refugee status—since mere failure by the State to protect is not equivalent to wilful conduct or neglect. The key factor for not granting refugee status should be that a woman enjoys *effective* protection in the country of origin—not that the State is not actively engaged in or supportive of the harmful acts. Equating even serious efforts to protect with *actual* protection may foreclose the possibility of seeking international protection when basic rights are not effectively protected at home. As threats to basic human rights can emanate from both governmental and non-governmental entities,[90] it is logical to recognize the need for refugee protection when a State's efforts do not provide at least basic protection for the claimant from the harm feared, whether or not the harm follows from official action or neglect. Since the purpose of refugee status is to offer surrogate protection of rights which cannot be vindicated domestically, the point of departure ought to be absence of national protection. A claimant should be able to qualify for refugee protection irrespective of any steps taken by the State of origin to remedy the situation if the claimant does not enjoy *de facto* protection for her basic human dignity. Any efforts to protect a claimant are irrelevant if they do not result in effective protection.

Thus, in order to promote a gender-inclusive refugee regime, active State culpability should *not* be a prerequisite to engaging the responsibility of a State. In fact, the UNHCR has condemned the European position as being inconsistent with the Refugee Convention.[91] A State need not be directly responsible for the violation of women's rights. Failure of State protection may be established insofar as the State of origin, however willing, proves unable to protect basic human rights of its citizens. The need to protect basic human rights does not diminish because the perpetrator is a private entity and the State's failure to protect is not deliberate.

## III. Internal Relocation Alternative

Following from the primacy of domestic protection and the surrogate nature of refugee status, a person cannot invoke international protection if she can effectively be protected in some other part of her country of

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[90] *See supra* note 42 and accompanying text.

[91] The UNHCR has noted that the "interpretation of agents of persecution" by which refugee protection is restricted to situations where State responsibility can be established "has no foundation in the 1951 [Refugee] Convention." 1996 WORLD REFUGEE SURVEY, *supra* note 87, at 144 (quoting the UNHCR).

origin. The crucial issue is whether the risk confronting the individual is absent in some other part of the country of origin.[92] Where safety exists, a claimant is expected to avail herself of national protection. The relocation alternative may be applicable in situations where the fear of persecution is localized or perpetrated by private persons or groups.[93] This is, however, not a blanket requirement. The internal relocation principle requires legal and practical accessibility to a stable area of the country of origin. As well, conditions in that part of the country of origin where a claimant finds an internal relocation alternative must be of an acceptable quality depending on the asylum State.

An internal relocation alternative that would permit a claimant to avoid persecution must be legally accessible to the claimant. There can be no internal relocation alternative in countries like China where internal migration is illegal. In such circumstances, international protection by way of refugee status will be the only recourse for the claimant.

In addition, an internal relocation alternative must be practically accessible to the claimant. An individual should not be expected to seek protection in the home State if doing so would be unreasonable under the circumstances.[94] Any barriers to internal sanctuary should be reasonably

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[92] *See* Decision 2 BvR 502/86, *abstracted in* IJRL/0084, 3(2) INT'L J. REF. L. 343 (1991) (a 1989 Federal Constitutional Court of Germany decision).

[93] *See UNHCR Handbook*, *supra* note 26, ¶ 91. In Etugh v. I.N.S., 921 F.2d 36 (3rd Cir. 1990), the Court denied refugee protection on the ground that there was no possibility that the claimant would face persecution beyond the local vicinity of his hometown. He was therefore required to settle elsewhere in the country of origin, where persecution was unlikely to occur. *But see* Soopramanien v. Canada (M.E.I.) [1993] FCJ 1002, where the claimant feared persecution at the hands of agents of the government. The Federal Court held that given the fact that the persecution feared was at the hands of the government and its agents, the army, and given also that the government controls the entire Seychelles territory, the claimant could not reasonably have sought protection elsewhere in the country. This decision suggests that there cannot be a relocation alternative open to a claimant fearing persecution at the hands of the government unless the authority of the government does not extend to the whole of the territory. This definitively excludes the possibility of an internal relocation alternative where the government is responsible for perpetrating gender-discriminatory harms against women.

[94] *See UNHCR Handbook*, *supra* note 26, ¶ 91. Hathaway notes that there is a *prima facie* duty on claimants to seek internal protection where there is "a secure alternative home to those at risk" within the country of origin. HATHAWAY, *supra* note 4, at 133. *See also* Re: RS, Refugee Status Appeals Authority of New Zealand Decision 135/92, 48 (June 18, 1993).

surmountable. For example, a claimant should not be expected to resort to internal protection in the face of difficulties such as crossing battle lines, or where financial, logistical or other barriers prevent a claimant from reaching internal safety.[95]

Conditions in the part of the country of origin where an internal relocation alternative exists must be stable, realistic and predictable. There should be no foreseeable risk of persecution in the part of the country. A person who could find a safe alternative place in the country of origin only by successfully hiding from her persecutor does not have a meaningful relocation option and refugee protection may be appropriate.[96] The internal relocation option must be evoked where it constitutes a durable solution to the claimant's fear of persecution.[97] The need for international protection cannot be negated simply because a claimant has lived in some other part of the country of origin in the past without any fear of persecution. The possibility of a claimant being persecuted in the formerly safe haven must be

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[95] *See* HATHAWAY, *supra* note 4, at 134; IMMIGRATION AND REFUGEE BOARD LEGAL SERVICES, COMMENTARY ON INTERNAL FLIGHT ALTERNATIVE 7 (Apr. 1994).

[96] In Ahmed v. Canada (M.E.I.) [1993], 156 N.R. 221 (F.C.A.), the Federal Court of Appeals held that the fact that the claimant had lived for some time without significant problems away from his home and half in hiding was not sufficient evidence that he could rely on State protection in his country of origin. *See also* R v. Immigration Appeal Tribunal, Ex parte Jonah [1985] IMMIG. APP. RER. 7 (Q.B.D.). Judge Nolan held that although the applicant would not be at risk of persecution in another part of the country of origin, to require the applicant to live in a remote village away from his immediate family and to abandon his employment was unreasonable. Meaningful protection was not available to the applicant at home; therefore the domestic relocation alternative was not a viable option for the applicant.

[97] The need for permanency in domestic protection has been emphasized in German jurisprudence. In a case involving a Yugoslav citizen of Albanian ethnicity, the German Administrative Court held that in light of recent political instability in the former Yugoslavia, an internal flight alternative was not available to the applicant. German Administrative Court, Stuttgart, Decision A 9 K 10452/89, *abstracted in* IJRL/0092 3(4) INT'L J. REF. L. 744 (1991). In another decision involving a Lebanese national, the German Court held that an internal flight alternative was not available to the claimant because the Syrians were in the process of extending their control. It was uncertain that the applicant would be safe from persecution at the hands of the Syrian military for a considerable period of time and therefore was found to deserve refugee protection abroad. Decision 13 UE 1568/84, Administrative Appeals Court of Hesse, 1991, *abstracted in* 3(2) INT'L J. REF. L. 342 (1991).

evaluated in light of present circumstances.[98] Furthermore, the possibility of an internal relocation alternative may be negated when there are different languages, cultures and religions involved, and when, combined with other factors, this may create a volatile situation.

There is a range of views on the appropriate test for ascertaining how viable an internal relocation alternative ought to be. The conservative position, reflected in British jurisprudence, requires that there be no risk of persecution in the alternative location available to the claimant.[99] In determining whether a person's lack of protection can be remedied internally, all of the circumstances prevailing in the country of origin must be taken into account. On the balance of probabilities, there should be no serious possibility of the applicant being persecuted in the part of the country where she can relocate.[100] According to the British position, only an absence of persecution is a relevant issue for consideration in determining whether a claimant has an internal relocation alternative. Thus, refugee protection will be denied where a claimant can successfully escape persecution by relocating to another part of the country, even though conditions in the place of refuge may be unreasonable for her.[101]

The German position takes the conservative test further by providing that not only should there be no risk of persecution, but there should also be no equivalent disabilities or dangers in the place where a claimant can seek refuge.[102] In other words, a claimant should not be exposed there

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[98] In Sinnathamby v. Canada (M.E.I.), 23 Imm. L.R. (2d) 32 (F.C.T.D. 1993), the claimant was a Sri Lankan Tamil who had previously resided in Colombo without any problems, but had discontinued his residence there for seventeen years. In overturning the IRB's decision, the Federal Court discounted the relevance of his prior residency in Colombo as tending to show that city as a viable internal relocation alternative. The court noted that though the claimant did not have any problems during his prior residency, the state of affairs in Colombo some seventeen years ago is not relevant in assessing the present State of affairs.

[99] *See* R. v. Secretary of State for the Home Dep't, Ex parte Yurekli [1990] IMMIG. APP. REP. 334.

[100] *Id.*

[101] This was the situation in Yurekli, involving a Turkish applicant who had successfully escaped persecution in one region of his country only by going into another region where he was compelled to be separated from his family and was unable to obtain regular employment by reason of his ethnicity. The court, nonetheless denied his claim to refugee status because of the existence of an internal relocation alternative. *Id.*

[102] *See* BVerfGE, Nos. 2 BvR 502/86, 1000/86, 961/86, *abstracted in* 3 INT'L J. REF. L. 343 (1991) (a 1989 decision that a relocation alternative presupposes that

to any conditions that may rise to the level of persecution and that did not exist in the place of origin.[103]

The liberal position, supported by Canadian and New Zealand practice, requires that in addition to an absence of risk of persecution, it should not be unreasonable, under any circumstances, for the claimant to seek refuge there.[104] This liberal position brings into the refugee status determination personal circumstances of the claimant, other than personal convenience,[105] which uniquely affect her in what might otherwise be a safe area.[106] This is consistent with the individual nature of refugee protection.

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the place in question offers the refugee claimant reasonable protection against persecution).

[103] *Id.*

[104] *See* Rasaratnam v. Canada (M.E.I.) [1992], 1 F.C. 706. *See also UNHCR Handbook*, *supra* note 26, ¶ 91; GUY S. GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 42 (1983); Haines, *supra* note 75, at 25-28.

[105] *See* GRAHL-MADSEN, *supra* note 7, at 254. In Thirunavukkarasu v. Canada (M.E.I.)[1994], 1 F.C. 589, (F.C.A.), the Federal Court of Appeals held that an area could be safe even if the claimant had no relatives or friends there, or could not find suitable employment.

[106] *See* Saini v. Canada (M.E.I.)[1993], 151 N.R. 239 (F.C.A.). The Federal Court of Appeals held that the evidence disclosed no circumstances particular to the claimant that would lead to a likelihood of persecution in some other part of the country of origin. There is no limit to the factors which might affect a particular decision under consideration. *See* Re: RS, Refugee Status Appeal Authority of New Zealand, Decision 135/92, 48 (June 18, 1993). Contrary to the *Thirunavukkarasu* decision, such considerations may include socio-economic factors such as the ability to assimilate and become established, knowledge of the language spoken in the alleged safe area, religious affiliations or the presence of relatives and friends. In Saidi v. Canada (M.E.I.) [1993], 68 F.T.R. 125 (F.C.T.D.), the Court's finding that the claimant had a reasonable relocation alternative in Northern Somalia was influenced, *inter alia*, by the claimant's knowledge of the dialect used in that part of the country. Similarly, in Abubakar v. Canada (M.E.I.)[1993], 67 F.T.R. 313 (F.C.T.D.), the Federal Court found that although an internal relocation alternative in the country was possible, it was not reasonable in the particular circumstances of the applicant who alleged, among other things, that he had never lived in Somalia, that he did not know the whereabouts of his family, that he does not speak the language, and that he had no prospects for residence or employment in Somalia. *See also* Sharbdeen v. Canada (M.E.I.) [1993], 66 F.T.R. 10 (F.C.T.D.), in which the Federal Court held that the determination of a reasonable internal relocation alternative requires a consideration of socio-economic prospects in the allegedly safe area for the applicant beyond simply the ability to secure "basic survival."

This individualized and holistic approach to ascertaining whether a claimant has an internal relocation option available to her is consistent with a gender-inclusive refugee regime because it allows an assessment of particular circumstances affecting particular claimants. It concedes that the possibility of internal relocation for some women may be negated by gender-related factors that affect women more than men. Thus, although a woman might find a safe haven in some other part of the country of origin together with other victims of persecution, particular factors may render living there unreasonable. For instance, internal relocation may not be a realistic option for single women heads of households in a country where women are prohibited from engaging in economic activities, since this will seriously jeopardize their basic entitlement such as access to food, housing, education and health care.[107] For example, in *Re B*,[108] a New Zealand court found that a 34 year-old woman of Sikh faith did not have a relocation alternative in India, her country of origin, and therefore allowed her application for refugee protection. This conclusion was based on the fact that the woman would be returning to India alone with no male relatives to a culture that is very protective of its females and that considers it unacceptable to have a woman living alone. International protection may be the only recourse to ensure such women the protection of their basic interests threatened at home.

## Conclusion

In view of the fact that refugee protection is only a surrogate in the event of failure of State protection, the need for refugee status ultimately boils down to the availability of domestic protection for serious harm confronting a particular claimant. State accountability for the harm feared is required in order to establish eligibility to Convention refugee status. This requirement is traceable to the public/private dichotomy which has influenced initial understanding of refugee law, with the result that only violations of human rights committed by the State or its authorities, or

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[107] The Refugee Status Appeals Authority of New Zealand has held that a 23 year-old single female Tamil who lived in Jaffna and who feared persecution at the hands of the LTTE did not have an internal relocation option open to her in Colombo. The Appeals Authority holds that, as a single woman with no relatives in Colombo and lacking job skills, she would not only be susceptible to the security risk which young Tamils face there, but she would also be unable to maintain herself. Re KG, Refugee Appeal No. 497/92, 6 (Feb. 3, 1994).

[108] Refugee Appeal No. 790/92, 8 (Aug. 9, 1994) (Refugee Status Authority of New Zealand).

which are visible to the State, are grounds for a claim to Convention refugee status.

Women have had difficulties establishing their claim to refugee protection because, for the most part, harms from which they flee are perpetrated by private entities and cannot be directly attributed to the State. This does not mean that refugee law is an ineffective means of redressing gendered violations of human rights in the so-called "private sphere." Evolution of the State responsibility doctrine now transcends the public/ private dichotomy, and extends governmental responsibility to areas which have historically been deemed inappropriate for legal regulation. This is what has been referred to as the "privatization of human rights." Similarly, modern refugee law recognizes a need for surrogate protection with respect to privately-inflicted human rights violations.

This principled approach to refugee protection ensures that neither the identity of the perpetrator nor the site of the harm feared can affect a State's duty to respect and safeguard the human rights of its citizens. The recognition that the obligation of a State *vís-a-vís* the human rights of its citizens extends to the so-called private sphere means that women, who are the paradigmatic victims of abuse in this sphere, are entitled to look to the State for protection. Failure of the State to effectively protect women from harms feared, both publicly and privately, whether by purpose, neglect or inability, gives rise to the need for surrogate protection through Convention refugee status.

But there has been resistance to this shift, particularly where a State proves unable to safeguard basic entitlements of its population. Whereas the UNHCR, Canada, the United States, New Zealand, Denmark and Sweden are willing to recognize a need for refugee status when a State is simply not able to offer protection, members of the European Union are not prepared to concede failure of domestic protection in situations of objective inability to respond to the harm complained of.

In view of the surrogate nature of refugee status, international protection is not warranted where an internal relocation alternative is open to the claimant. An internal relocation option must be practically and legally possible, as well as realistic and predictable. There should be no risk of persecution, or any conditions equivalent to persecution, in the area where a claimant finds refuge. A gender-inclusive refugee regime requires that personal circumstances of each claimant must be taken into account in determining whether an internal relocation alternative is available to her. This individualized assessment is consistent with modern refugee law as an individual remedy to threats of human rights violations in the country of origin.