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## FROM ASYLUM TO VAWA: HOW U.S. IMMIGRATION LAWS CAN PROTECT VICTIMS OF DOMESTIC VIOLENCE

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*Every person has the right to the protection of the law against abusive attacks upon his honor, his reputation, and his private and family life.*<sup>1</sup>

### I. OVERVIEW

In recent years, domestic violence has moved into the forefront of both domestic and international law.<sup>2</sup> Long treated as a mere private matter, those who found themselves victims of the atrocities of domestic violence often faced great obstacles when seeking recourse in the United States judicial system.<sup>3</sup> Only in the past few decades has domestic violence been framed as a human rights issue.<sup>4</sup> As a result, there have been concerted efforts nationally and internationally to both prevent domestic violence and ensure that victims of domestic violence receive adequate protection from the government.<sup>5</sup>

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<sup>1</sup> American Declaration of the Rights and Duties of Man, art. V, Apr. 1948.

<sup>2</sup> For a timeline following the Violence Against Women Act through history and its impact on other federal legislation combating domestic abuse, see U.S. DEP'T OF JUSTICE: OFFICE OF VIOLENCE AGAINST WOMEN, VIOLENCE AGAINST WOMEN ACT FIFTEEN YEARS WORKING TOGETHER TO END VIOLENCE, <http://www.ovw.usdoj.gov/docs/history-vawa.pdf>. To learn more about international efforts concerning domestic violence, see The Advocates for Human Rights, International Domestic Violence Laws, ADVOC. HUM. RTS., [http://www.stopvaw.org/the\\_international\\_legal\\_framework](http://www.stopvaw.org/the_international_legal_framework) (last updated Oct. 26, 2012).

<sup>3</sup> See *Domestic Violence Facts*, NAT'L COAL. AGAINST DOMESTIC VIOLENCE (NCADV PUB. POLICY OFFICE, WASHINGTON D.C.), JULY 2007, available at [www.NCADV.ORG/FILES/DOMESTICVIOLENCEFACTSHEET\(NATIONAL\).PDF](http://www.NCADV.ORG/FILES/DOMESTICVIOLENCEFACTSHEET(NATIONAL).PDF) (explaining how only certain relationships are protected under state domestic violence laws and that restraining orders are often violated by the violent partner).

<sup>4</sup> See *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.142, doc. 11 (2011); Bonita Meyersfeld, *Domestic Violence, Health, and International Law*, 22 EMORY INT'L L. REV. 61 (2008).

<sup>5</sup> See U.S. DEP'T OF JUSTICE, *supra* note 2; The Advocates for Human Rights, *supra* note 2.

By framing domestic violence as a human rights issue, the United States is forced to look at its immigration policies in order to ensure that it complies with international standards. Current immigration law provides a telling glimpse of how the United States has struggled with the treatment of victims of domestic violence. While immigrant victims of domestic violence may find relief in the form of asylum, the U nonimmigrant status, and the ability to self-petition under the Violence Against Women Act (“VAWA”), each form of relief provides its own unique challenges. Immigration practitioners, as well as anyone that works with immigrants or victims of domestic violence, must understand the legal requirements of each form of relief in order to be effective advocates for some of the most vulnerable members of society.

## II. IN THE BEGINNING: UNIVERSAL DECLARATION OF HUMAN RIGHTS & THE REFUGEE CONVENTION

Adopted on December 10, 1948 by the United Nations General Assembly, the Universal Declaration of Human Rights has proven to be one of the most influential documents in international law.<sup>6</sup> It has been described as “the foundation of international human rights law, the first universal statement on the basic principles of inalienable human rights, and a common standard of achievement for all peoples and all nations.”<sup>7</sup> The Declaration provides for the protection of man’s most basic, fundamental rights, including the right to life, liberty, and personal security, the right to equality, and the right to an effective remedy for the violation of one’s human rights.<sup>8</sup> The Universal Declaration also provides for the protection of mothers and children, and the right to seek asylum.<sup>9</sup> According to the United Nations Secretary General, Ban Ki-Moon, “in a world still reeling from the horrors of the Second World War, the Declaration was the first global statement of what we now take for granted—the inherent dignity and equality of all human beings.”<sup>10</sup> The Declaration of Human Rights was

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<sup>6</sup> For an in-depth examination of the Universal Declaration of Human Rights, as well as the actual text, see Mary Robinson, *The Universal Declaration of Human Rights: A Living Document*, 52 AUSTRALIAN J. OF INT’L AFFAIRS (No. 2) 117 (1998).

<sup>7</sup> *Id.*

<sup>8</sup> See Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), available at <http://www.unhcr.org/refworld/docid/3ae6b3712c.html>.

<sup>9</sup> *Id.* at art. 25(2), 14(1).

<sup>10</sup> 60TH ANNIVERSARY OF THE DECLARATION OF HUMAN RIGHTS, <http://www.un.org/en/events/humanrightsday/udhr60/> (last visited Feb. 21, 2012).

a product of its environment. Directly influenced by the post-World War II era, the creators of the Declaration aspired to create a document that would never allow atrocities such as those committed during the Holocaust to happen again.<sup>11</sup>

In 1951, as the world still grappled with the exodus of European refugees, the United Nations adopted the Convention Relating to the Status of Refugees (“Refugee Convention”).<sup>12</sup> The 1951 Refugee Convention has been described as the “centerpiece of international refugee protection.”<sup>13</sup> The Refugee Convention is rooted in Article XIV of the Universal Declaration of Human Rights, which recognizes the right to seek asylum, and was originally limited to Europeans fleeing persecution prior to January 1, 1951.<sup>14</sup> The 1967 Protocol expanded the Refugee Convention by removing the deadline and geographical requirement, thus making the definition of refugee universal. The United States ratified the 1967 Protocol on November 1, 1968.<sup>15</sup> The underlying fundamental principles of the Convention include “non-discrimination, non-penalization and *non-refoulement*.”<sup>16</sup> Despite being a signatory to the 1967 Protocol, the United States has been criticized in recent years for its violation of these fundamental principles, in that current U.S. immigration law allows for the detainment of asylum-seekers as well as their return to the country of persecution in the form of “expedited removal.”<sup>17</sup>

While both the Universal Declaration of Human Rights and the Refugee Convention were a direct response to World War II, their scope has expanded over the past sixty years as international human rights law continues to evolve. It is only within the past twenty years, for example, that domestic violence has fallen under human rights and

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<sup>11</sup> *The First Global Statement of the Inherent Dignity and Equality of All*, HUMAN RIGHTS DAY 2008, <http://www.un.org/en/events/humanrightsday/2008/history.shtml> (last visited Nov. 11, 2012).

<sup>12</sup> UNITED NATIONS HIGH COMMISSION FOR REFUGEES, HISTORY OF UNHCR, <http://www.unhcr.org/pages/49c3646cbc.html> (last visited Nov. 11, 2012).

<sup>13</sup> Office of the United Nations High Comm’r for Refugees, *Introductory Note to CONVENTION AND PROTOCOL RELATION TO THE STATUS OF REFUGEES*, available at <http://www.unhcr.org/3b66c2aa10.pdf> (last visited Feb. 20, 2012).

<sup>14</sup> *Id.*

<sup>15</sup> United Nations High Comm’r for Refugees, States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol, available at <http://www.unhcr.org/3b73b0d63.html> (last visited Feb. 21, 2012).

<sup>16</sup> *Introductory Note to CONVENTION AND PROTOCOL RELATION TO THE STATUS OF REFUGEES*, *supra* note 13 (emphasis in original).

<sup>17</sup> 8 C.F.R. § 235.3 (2011).

refugee law, causing U.S. immigration laws and policies to evolve as well.<sup>18</sup>

### III. WHEN DOMESTIC VIOLENCE BECAME A HUMAN RIGHTS ISSUE: *LENAHAN V. UNITED STATES*

In July 2011, the United States came to realize the drastic implications of the State's failure to protect its citizens from domestic violence. In the landmark decision, *Lenahan v. United States*, the Inter-American Commission on Human Rights held the United States responsible for human rights violations for failing to enforce a restraining order, which resulted in the deaths of three young girls.<sup>19</sup> This was the first time that a victim of domestic violence has brought a claim against the United States before an international human rights body.<sup>20</sup>

In 1999, Jessica Lenahan (formerly Gonzales) obtained a restraining order against her estranged husband, Simon Gonzales.<sup>21</sup> When Gonzales abducted Lenahan's three young daughters from her home in violation of the protective order, Lenahan turned to the police for help.<sup>22</sup> She contacted the Castle Rock, Colorado Police Department eight times—both over the phone and in person.<sup>23</sup> The police were dismissive of Lenahan's pleas for help, at one point stating, "that's a little ridiculous making us freak out and thinking the kids are gone."<sup>24</sup> Hours later, Gonzales drove to the Castle Rock Police Department and opened fire.<sup>25</sup> Police returned fire, killing Gonzales.<sup>26</sup> Upon searching Gonzales' vehicle, police found the bodies of Lenahan's three daughters shot to death.<sup>27</sup> The authorities failed to conduct a

<sup>18</sup> Sudha Shetty & Janice Kaguyutan, *Immigrant Victims of Domestic Violence: Cultural Challenges and Available Legal Protections*, VAWNET.ORG (Feb. 2002), [www.vawnet.org/applied-research-papers/print-document.php?doc\\_id=384](http://www.vawnet.org/applied-research-papers/print-document.php?doc_id=384).

<sup>19</sup> *Lenahan (Gonzales) v. United States*, Case 12.626, Inter-Am. Comm'n H.R., Report No. 80/11, OEA/Ser.L./V/II.142, doc. 11 (2011).

<sup>20</sup> Press Release, Univ. of Miami Sch. of Law, International Commission Finds United States Denied Justice to Domestic Violence Survivor (Aug. 17, 2011) *available at* <http://www.aclu.org/womens-rights/international-commission-finds-united-states-denied-justice-domestic-violence-survivor>.

<sup>21</sup> *Lenahan (Gonzales)*, Inter-Am. Comm'n H.R., Report No. 80/11 ¶ 20.

<sup>22</sup> *Id.* ¶ 24.

<sup>23</sup> *Id.* ¶¶ 25, 28–31.

<sup>24</sup> *Id.* ¶ 76.

<sup>25</sup> *Id.* ¶ 81.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* ¶¶ 81, 84; Press Release, Univ. of Miami Sch. of Law, *supra* note 20.

proper investigation of the tragedy, and, as a result, Lenahan still does not know the cause, place, or time of death of her three daughters.<sup>28</sup>

Shortly after the tragic death of her daughters, Lenahan sued the Castle Rock, Colorado Police Department in federal court, claiming that the Police Department violated her rights to due process of law by failing to enforce the restraining order.<sup>29</sup> The case eventually reached the United States Supreme Court, and in 2005 the Court held that Lenahan “had no constitutional right to police protection, and that the failure of the police to enforce Lenahan’s order of protection was not unconstitutional.”<sup>30</sup> This decision prompted Lenahan to seek justice in the Inter-American Commission on Human Rights.<sup>31</sup>

After the Commission published its decision, Professor Caroline Bettinger-Lopez, director of the Human Rights Clinic at the University of Miami School of Law, stated that “[a]s our country seeks to promote human rights of women and children around the world, we must also look at our own record here at home.”<sup>32</sup> In its decision, the Commission “urged the United States to adopt further laws and policies aimed at preventing and eradicating violence to comply with its human rights obligations.”<sup>33</sup>

Having established that domestic violence is a human rights violation, we turn to whether current immigration laws are in compliance with the United States’ obligations under international human rights law.

#### IV. U.S. IMMIGRATION LAW

In the past twenty years, United States immigration law has recognized the need to protect victims of domestic violence.<sup>34</sup> For many, however, this recognition is long overdue. Asylum-seekers are still faced with uncertainty given the government’s lack of formal recognition of victims of domestic violence as a particular social group.<sup>35</sup>

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<sup>28</sup> Press Release, Univ. of Miami Sch. of Law, *supra* note 20.

<sup>29</sup> Lenahan (Gonzales), Inter-Am. Comm’n H.R., Report No. 80/11 ¶¶ 86, 37.

<sup>30</sup> Press Release, Univ. of Miami Sch. of Law, *supra* note 20.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> HUMAN RIGHTS CLINIC AT THE UNIV. OF MIAMI SCH. OF LAW, *Summary: Jessica Lenahan (Gonzales) v. United States*, [http://www.law.miami.edu/hrc/pdf/Gonzales\\_summary\\_timeline.pdf](http://www.law.miami.edu/hrc/pdf/Gonzales_summary_timeline.pdf) (last visited Feb. 21, 2012).

<sup>34</sup> Shetty & Kaguyutan, *supra* note 18.

<sup>35</sup> *See id.*

Other forms of relief, such as U nonimmigrant status and VAWA, provide clearer guidelines, yet have their own inherent challenges as well.<sup>36</sup>

(A) *Asylum and the “Particular Social Group” Conundrum*

In 1991, the United Nations High Commissioner of Refugees (UNHCR) issued “Guidelines on the Protection of Refugee Women,” confirming that domestic violence victims are eligible for asylum, provided they meet the other statutory requirements.<sup>37</sup> While countries such as Canada, South Africa, the Netherlands, Norway, Sweden, and Ireland have interpreted their asylum laws in accordance with the UNHCR guidelines, the United States has had a harder time extending asylum to victims of domestic violence.<sup>38</sup> As a result, women applying for asylum based on domestic violence face great uncertainty about whether they will be granted relief and are often engaged in legal battles that drag on for years.

The 1951 Convention provides the starting point for refugee and asylum law in the United States. The Convention on the Status of Refugees defines a refugee as anyone who:

owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.<sup>39</sup>

Based on this definition, those seeking asylum in the United States must prove (1) that domestic violence rises to the level of persecution, (2) that the persecution was *on account of* one of the enumerated statutorily protected grounds (race, religion, nationality, membership of a particular social group or political opinion), (3) that the applicant falls into one of the statutorily protected categories, (4) that there is a “well-

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<sup>36</sup> *Id.*

<sup>37</sup> U.N. HIGH COMM’R FOR REFUGEES, GUIDELINES ON THE PROTECTION OF REFUGEE WOMEN (1991).

<sup>38</sup> Jennifer Podkul, *Domestic Violence in the United States and its Effect on U.S. Asylum Law*, 12 No. 2 HUM. RTS. BRIEF 16 (2005).

<sup>39</sup> Convention relating to the Status of Refugees art. 1.2, Apr. 22, 1954, 189 U.N.T.S. 150.

founded” fear of being subjected to domestic violence, and (5) that the state is unwilling to protect from domestic violence.<sup>40</sup>

Based on recent asylum cases in the United States, membership in a “particular social group” has been the biggest obstacle to asylum claims. In *Matter of R-A*, the petitioner, Rodi Alvarado, defined the social group as “married women in Guatemala who are unable to leave the relationship.”<sup>41</sup> Ms. Alvarado was repeatedly beaten and raped by her husband, a Guatemalan army officer.<sup>42</sup> He dislocated her jaw, attempted to cut off her hands with a machete, shoved her head through windows, and beat her unconscious in front of her children.<sup>43</sup> Despite repeated attempts to seek protection from the authorities, Ms. Alvarado was told this was a “private matter” and eventually fled to the United States, where she filed for asylum.<sup>44</sup> Her case was pending for fourteen years, and on December 10, 2009, she was finally granted asylum.<sup>45</sup>

Ms. Alvarado’s case is indicative of how the United States’ lack of a definitive asylum policy has put people’s lives in jeopardy. One common argument is that the United States will open the “floodgates” if it grants asylum to victims of domestic violence.<sup>46</sup> However, other countries that have granted asylum to victims of domestic violence have not had this experience. For example, “Canada was the leader in this area of the law, accepting domestic violence as a viable asylum ground in 1993.”<sup>47</sup> As law Professor Helen Grant points out, in the two years following Canada’s decision to grant asylum to victims of domestic violence, only two percent were gender-based.<sup>48</sup>

While asylum law appears to be moving in the right direction when it comes to victims of domestic violence, it is doing so at a snail’s pace. The thousands of women who are fleeing this form of persecu-

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<sup>40</sup> See generally *id.*

<sup>41</sup> Ctr. For Gender & Refugee Studies, *Documents and Information on Rody Alvarado’s Claim for Asylum in the U.S. – Current Update*, CTR. FOR GENDER & REFUGEE STUDIES, <http://cgrrs.uchastings.edu/campaigns/alvarado.php> (last visited Feb. 2012).

<sup>42</sup> *In re R-A*, 22 I&N Dec. 906 (BIA 1999).

<sup>43</sup> *Id.* at 908–09.

<sup>44</sup> *Id.* at 909.

<sup>45</sup> Ctr. For Gender & Refugee Studies, *supra* note 41.

<sup>46</sup> Helen P. Grant, *The Floodgates Are Not Going to Open, But Will the U.S. Border?*, 29 Hous. J. Int’l L. 1, 5 (2006–2007).

<sup>47</sup> *Id.* at 53 (referencing Immigration and Refugee Board, *Women Refugee Claimants Fearing Gender Related Persecution* (1993)).

<sup>48</sup> *Id.*

tion in their home countries can no longer wait for the United States to take a firm stand on its asylum policies. For some women, there may be alternate forms of relief to asylum under the U nonimmigrant status or VAWA.

(B) *U Nonimmigrant Status*

The U Visa was created in Section 1513 of the Victims of Trafficking and Violence Prevention Act, which states that the U Visa “will strengthen the ability of law enforcement agencies to detect, investigate, and prosecute cases of domestic violence, sexual assault, trafficking of aliens, and other crimes . . . while offering protection to victims of such offenses in keeping with the humanitarian interests of the United States.”<sup>49</sup> Congress created the U Visa to address the problem that “immigrant women and children are often targeted to be victims of crimes committed against them in the United States.”<sup>50</sup> Further, “[a]ll women and children who are victims of these crimes committed against them in the United States must be able to report these crimes to law enforcement and fully participate in the investigation of crimes committed against them and the prosecution of such crimes.”<sup>51</sup>

In order to qualify for a U Visa, the applicant must show:

- 1) That she suffered substantial physical or mental abuse as a result of being a victim of qualifying criminal activity;
- 2) That she provided credible and reliable information establishing she had knowledge of the details of the criminal activity;
- 3) That she cooperated with the authorities in the investigation of the criminal activity (through the I-918 Certification); and
- 4) That the criminal activity occurred in the United States.<sup>52</sup>

Domestic violence is one of the qualifying crimes enumerated in the statute, and women who have cooperated with the authorities in the investigation and prosecution of the crime are eligible for U nonimmigrant status, which results in work authorization and the ability to apply for permanent residency after three years in U status.<sup>53</sup> Other qualifying crimes include felonious assault, sexual assault, and rape.<sup>54</sup>

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<sup>49</sup> Victims of Trafficking and Violence Protection Act of 2000, § 1513(a)(2)(A), Pub. L. No. 106-386, 114 Stat. 1464 (2000) (codified as amended in various sections of the U.S.C.).

<sup>50</sup> *Id.* § 1513(a)(1)(A)-(B).

<sup>51</sup> *Id.*

<sup>52</sup> 8 C.F.R. § 214.14(b)(1)-(4) (2012).

<sup>53</sup> *Id.* at § 214.14(a)(9).

<sup>54</sup> *Id.*



In order to apply for U status, the applicant must have a certification signed by the investigating authority “verifying that the noncitizen has been helpful in the investigation or prosecution of the crime perpetrated against him or her.”<sup>55</sup> Authorities have discretion over whether to sign the certification.<sup>56</sup> While this prevents frivolous claims and ensures that the applicant was helpful to authorities in the investigation of the crime, this unbridled discretion can also be devastating if authorities make a blanket refusal to sign all certifications given their “tough” stance on immigration.

Given the uncertainty about whether one can obtain a signed certification, practitioners should be careful to keep their clients’ expectations reasonable by explaining the discretionary nature of the certification. Furthermore, it must be explained to clients from the very beginning that without the signed certification, they cannot apply for U nonimmigrant status.

### (C) VAWA: *The Violence Against Women Act*

In 1994, Congress passed the Violence Against Women Act.<sup>57</sup> Then-Senator Joe Biden stated:

violence that primarily targets women has too often been dismissed without response. . . . I’ve become convinced that the violence against women reflects as much a failure of our nation’s collective moral imagination as it does a failure of our nation’s laws and our nation’s regulations. We are helpless to change the course of this violence . . . unless and until we achieve national consensus that it deserves our profound public outrage and laws that reflect that profound public outrage.<sup>58</sup>

In terms of immigration policies, VAWA “addresses a widespread problem: some abused noncitizens stay in abusive relationships because an abusive family member holds a vital key to their immigration status in the United States.”<sup>59</sup> Congress created VAWA “to permit victims in this situation to gain lawful status on their own without having

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<sup>55</sup> Sejal Zota, *Law Enforcement’s Role in U Visa Certification*, 2 U.N.C. SCH. GOV’T IMMIGR. L. BULL. 1 (2009), available at <http://sogpubs.unc.edu/electronicversions/pdfs/ilb02.pdf> (last visited Feb. 21, 2012).

<sup>56</sup> *Id.* at 4.

<sup>57</sup> Violence Against Women Act, Pub. L. No. 103-322, tit. IV, 108 Stat. 1902 (1994) (codified as amended in various sections of the U.S.C.).

<sup>58</sup> Biden, Del. Senator, News Conference with Senator Joseph Biden (D-DE), Senator Dianne Feinstein (D-CA), and Senator Carol Moseley-Braun (D-IL) Response to Release of “Response to Rape Report,” (May 27, 1993).

<sup>59</sup> EVANGELINE ABRIEL & SALLY KINOSHITA, *THE VAWA MANUAL: IMMIGRATION RELIEF FOR ABUSED IMMIGRANTS 1-1* (5th ed. 2008).

to rely on abusive spouses to start and complete the [immigration] process.”<sup>60</sup>

In order to apply for lawful permanent resident status under VAWA, the applicant must show, *inter alia*, that:

- 1) She is the abused spouse, child, or parent of a lawful permanent resident or U.S. citizen;
- 2) She was subjected to battery or extreme cruelty by the lawful permanent resident or U.S. citizen;
- 3) She lived with the abuser at some time; and
- 4) She has good moral character (did not commit certain crimes or immigration offenses).<sup>61</sup>

The primary differences between U nonimmigrant status and VAWA are that under VAWA the abuser must be a U.S. citizen or lawful permanent resident and share a spousal or parental relationship with victim.<sup>62</sup> Also, VAWA applicants whose petitions are approved become lawful permanent residents, whereas those in U status must wait until they have been in U status for three years prior to filing for permanent residency.<sup>63</sup>

Furthermore, VAWA does not require a certification signed by law enforcement authorities, so if an applicant is eligible for both U non-immigrant status and VAWA, the latter is usually the faster form of relief.<sup>64</sup>

#### V. THE FUTURE OF IMMIGRATION LAW AS APPLIED TO VICTIMS OF DOMESTIC VIOLENCE

From asylum to VAWA, victims of domestic violence now have forms of immigration relief that simply did not exist twenty years ago. Through an exploration of the evolution of international human rights law, as well as current U.S. immigration law, one can come to appreciate the recent gains that have been made on behalf of victims of domestic violence, as well as determine what changes need to be made in order to ensure that the United States meets internationally recognized standards when it comes to human rights. While the past twenty years have shown much promise in way of domestic violence

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 1-6 to 1-7.

<sup>62</sup> *Id.* at 1-6.

<sup>63</sup> *Id.* at 1-8, 12-2.

<sup>64</sup> *Id.* at 12-9.

milestones, there is still much to be done. It is up to practitioners and advocates to make sure that the voices of domestic violence victims do not go unheard.

