

## THE FLOODGATES ARE NOT GOING TO OPEN, BUT WILL THE U.S. BORDER?

*Helen P. Grant\**

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\* Professor of Law, Elon University School of Law, L.L.B. (Hons.), Queensland University of Technology, Australia, L.L.M., Queensland University of Technology, Australia, Ph.D. (in law), University of Queensland, Australia. I wish to thank my former colleague, Prof. Maria Pabón López of the Indiana University School of Law – Indianapolis, for her never ending support throughout the writing of this Article.

*[S]ex-specific violence [and discrimination] has never been treated with the same seriousness as other human rights abuses. . . . If a person is murdered because of his or her politics, the world justifiably responds with outrage. But if a person is beaten or allowed to die because she is female, the world dismisses it as “cultural tradition.”<sup>1</sup>*

Great strides have been taken in recent years to address this misconception; however, vestige of this erroneous belief persists for female asylum-seekers who are the victims of domestic violence. These women flee and seek refuge in the United States because their own country cannot or will not provide them with protection from spousal abuse. Their countries tolerate, condone, or encourage domestic violence, and, it could well mean death for these women to remain within their countries' borders. Nonetheless, the United States sees its protectionist role as limited—that is, limited to those who can prove that the reason their spouse abused them is because of the wife's race, religion, nationality, or political opinion. The United States has yet to acknowledge that domestic violence can occur simply because a wife is seen as part of an inferior class—that of “women”—a possession not seen as deserving of protection by their own country and also not, it would seem, deserving of asylum.

The most publicized and renowned case<sup>2</sup> of this kind is that of Rodi Alvarado Peña, a woman who was beaten from the day she married Francisco Osorio, a Guatemalan army officer. She was repeatedly raped; her jaw was dislocated; her husband attempted to cut off her hands with a machete; he kicked her in an attempt to abort their second child; he shoved her head through windows; and he kicked her in the genitalia causing her to bleed for eight days.<sup>3</sup> Although a number of these attacks occurred while the couple was in public, and Ms. Alvarado sought legal intervention, the Guatemalan courts and the police

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1. Lori Heise, *Crimes of Gender*, WORLD WATCH, Mar./Apr. 1989, at 13.

2. See Fredric N. Tulsy, *Asylum Denied for Abused Girl: Ruling of Appeals Panel Is Assailed*, WASH. POST, July 4, 1999, at A3; Editorial, *Victim and Refugee: A Guatemalan Woman Was Abused by a Sexist State*, PITT. POST-GAZETTE, July 7, 1999, at A10.

3. In re R-A-, 22 I. & N. Dec. 906, 908–10 (B.I.A. 1999).

failed to come to her assistance. Her attempts to flee within her own country were also unsuccessful. In 1995, after ten years of this brutal violence, she fled to the United States seeking protection from certain death.<sup>4</sup> In 1996, an immigration judge granted her claim for asylum on the grounds that Guatemala was unwilling to provide her with protection from the persecution she suffered because of her social group—“Guatemalan women involved intimately with Guatemalan male companions, who believe that women are to live under male domination”—and her political opinion—opposition to male domination.<sup>5</sup> The Immigration and Naturalization Service (INS) appealed the immigration judge’s decision, and the Board of Immigration Appeals (BIA) reversed Ms. Alvarado’s grant of asylum.<sup>6</sup> The BIA rejected the respondent’s claim that she was persecuted because of her social group and/or political opinion, instead concluding that the domestic violence was perpetrated because her husband could, and that it was a personal matter.<sup>7</sup> Ms. Alvarado sought review and simultaneously sought certification of the BIA’s decision to the Attorney General. Prior to the Attorney General accepting certification, the Department of Justice (DOJ) issued a proposed rule (the Proposed Rule) to deal with the issue of asylum and domestic violence.<sup>8</sup> After publication of the Proposed Rule, then Attorney General Janet Reno accepted certification of the matter, vacating the decision of the BIA and remanding it to the BIA for reconsideration in accordance with the Proposed Rule upon its being issued in final form.<sup>9</sup> With the change of administration, however, Attorney

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4. *Id.*

5. *See In re Rodi Alvarado Peña*, File No. A, U.S. Dept. of Justice, Executive Office for Immigration Review, Immigration Court, San Francisco, CA (Sept. 20, 1996).

6. R-A-, 22 I. & N. Dec. at 906.

7. *Id.* at 921 (“[W]e perceive that the husband’s focus was on the respondent because she was *his* wife, not because she was a member of some broader collection of women.” (emphasis added)).

8. Department of Justice, Immigration and Naturalization Service, Asylum and Withholding Definitions, 65 Fed. Reg. 76,588 (Proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208) [hereinafter Proposed Rule].

9. R-A-, 22 I. & N. Dec. at 906 (“Pursuant to 8 C.F.R. § 3.1(h)(1)(iii), the Acting Commissioner of the Immigration and Naturalization Service has referred to the Attorney General for review the June 11, 1999, decision of the Board of Immigration

General John Ashcroft directed the BIA to certify the case to him.<sup>10</sup> During Ashcroft's term as Attorney General, he refrained from making a decision on the matter, and the Proposed Rule was not published in final form. By an order dated January 19, 2005, he vacated the matter and remitted it to the BIA.<sup>11</sup> However, the Proposed Rule, which would lead to a grant of asylum to Rodi Alvarado, has not been issued in final form as of the publication of this Article.

Representatives of Ms. Alvarado are touting the return of her matter to the BIA as a victory.<sup>12</sup> However, the fate of Ms. Alvarado is now once again in the hands of the BIA, and the long awaited immigration regulations—which, in their draft form, indicated support for asylum claims for women fleeing a country that cannot or will not protect them against domestic violence—still remain to be finalized. The appointment of Alberto Gonzales as Attorney General provides no further certainty as to the outcome of Ms. Alvarado's case or the cases of those seeking protection under similar bases. During his confirmation hearings, Attorney General Gonzales refrained from voicing a view on the *Alvarado* case and, in fact, aroused concern as to whether the Proposed Rule would ever be issued in final form.<sup>13</sup> The fate of Ms. Alvarado and others who are in similar positions is still far from certain.

What is certain is that the United States' Attorney Generals passed on making an affirmative finding as to whether a woman

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Appeals (Board) that overturned the Immigration Judge's decision dated Sept. 20, 1996. The June 11, 1999 decision of the Board is hereby vacated and the matter is remanded to the Board for reconsideration. I direct the Board to stay reconsideration of the decision until after the proposed rule published at 65 FED. REG. 76588 (Dec. 7, 2000) is published in final form. The Board should then reconsider the decision in light of the final rule.”)

10. Brief on Behalf of Rodi Alvarado Peña to the Attorney General of the United States at 3 (Feb. 18, 2004), *available at* [http://cgrs.uchastings.edu/documents/legal/ra\\_brief\\_final.pdf#search=%22attorneygeneral order 2379 %22](http://cgrs.uchastings.edu/documents/legal/ra_brief_final.pdf#search=%22attorneygeneral%20order%202379%22).

11. Amnesty Int'l USA, Attorney General Ashcroft Declines to Act on Domestic Abuse Asylum Claim, Jan. 27, 2005, <http://www.amnestyusa.org/regions/americas/document.do?id=86FB7874FF9D696C85256F9A005F10F4>.

12. *See id.*; *see also* Mark Sherman, *Battered Guatemalan Wife Can Stay in U.S., Government Says*, ASSOCIATED PRESS WORLDSTREAM, Jan. 21, 2005.

13. *See Confirmation Hearings on the Nomination of Alberto R. Gonzales to be Attorney General of the United States: Hearing Before the Comm. on the Judiciary United States S.*, 109th Cong. 174 & 348 (2005).

in these circumstances may ever be granted asylum and avoid being deported. The delay in making a decision on this case, the delay in publishing the Proposed Rule in final form, and the approach of the BIA demonstrate a reluctance to grant asylum to women who are victims of domestic violence and are clearly in need of protection. One of the major concerns behind the approach of the United States is the floodgates argument—the potential risk to the American economic and social well-being if it were to recognize women as a social group and domestic violence as persecution for the purposes of asylum. Statistics presently conclude that one in four women in the United States experience some form of domestic violence.<sup>14</sup> If that is the case in a country whose laws and infrastructures condemn and seek to eradicate domestic violence, what would the statistics be in a country in which very few, if any, controls exist? The number of potential asylum-seekers, those seeking a new life in a country they perceive will protect and provide a future, can only lead those who control immigration to panic. The natural thought is that the borders would open beyond all reason. Couple this belief with the concern of fraudulent claims (how easy it must be to bring a claim of asylum by saying “my husband beats me”) and you have the result of closing the borders to those in need of protection.

The panic, however, is unnecessary. There is absolutely no reason that a grant of asylum, safeguarding Ms. Alvarado from the persecutory acts of her husband, given that her country is unable or unwilling to provide such protection, will open the floodgates to these types of claims. Panic has blinded the administrators, the courts, and the government to limitations that were built into the 1951 Convention on the Status of

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14. Sarah Glazer, *Violence Against Women*, CQ RESEARCHER, Feb. 26, 1993, at 171; AM. PSYCHOL. ASS'N, *VIOLENCE AND THE FAMILY: REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION PRESIDENTIAL TASK FORCE ON VIOLENCE AND THE FAMILY 10* (1996) (“Nearly one in every three adult women experiences at least one physical assault by a partner during adulthood.”); PATRICIA TJADEN & NANCY THOENNES, *FULL REPORT OF THE PREVALENCE, INCIDENCE, AND CONSEQUENCES OF VIOLENCE AGAINST WOMEN: FINDINGS FROM THE NATIONAL VIOLENCE AGAINST WOMEN SURVEY 26* (2000) (finding that one out of every five women in the United States is physically assaulted by an intimate partner).

Refugees (the 1951 Convention),<sup>15</sup> the United Nations Protocol Relating to the Status of Refugees (the 1967 Protocol),<sup>16</sup> and the domestic asylum laws,<sup>17</sup> precluding this type of situation from arising.

The United States' restrictive approach to domestic violence and asylum law is out of step with the other major nations who are signatories to the 1967 Protocol and/or 1951 Convention. Countries such as Australia, Canada, New Zealand, and the United Kingdom have recognized that women within a given society can and do constitute cognizable social groups, and, as such, can be and are persecuted because of their status as women within that particular grouping.<sup>18</sup> The United Nations High Commissioner for Refugees' (UNHCR) approach clearly conforms to the approaches of these nations rather than the United States' approach.<sup>19</sup>

It is the aim of this Article to prove that, by adopting the approach advocated by the UNHCR and the countries mentioned, the United States' borders will not be flooded by female asylum-seekers. The safeguards that the United Nations built into the 1951 Convention and the 1967 Protocol still can and do provide the required balance and protection for signatory countries, even in these modern day situations. This Article

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15. See Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137, reprinted in IMMIGRATION & NATIONALITY LAWS OF THE UNITED STATES 633 (T. Alexander Aleinikoff et al. eds, 1967) [hereinafter Refugee Convention 1951].

16. See United Nations Protocol Relating to the Status of Refugees, June 11, 1968, 19 U.S.T. 6223, 606 U.N.T.S. 267, reprinted in IMMIGRATION & NATIONALITY LAWS OF THE UNITED STATES 648 (T. Alexander Aleinikoff et al. eds, 1967) [hereinafter 1967 Protocol].

17. Immigration & Nationality Act of 1952 § 101 (codified at 8 U.S.C. § 1101).

18. See, e.g., Minister for Immigration & Multicultural Affairs v. Khawar (2002) 210 C.L.R. 1 (Austl.); Narvaez v. Minister of Citizenship & Immigration, [1995] 2 F.C. 55 (Can.); Diluna v. Minister of Employment & Immigration, [1995] 29 Imm. L.R. (2d) 156 (Fed. Ct. T.D.) (Can.); Refugee Appeal No. 71427/99, [2000] N.Z.A.R. 545 (N.Z.); Islam v. Sec'y of State for the Home Dep't (Shah), [1999] 2 A.C. 629 (H.L.) (U.K.); Hovarth v. Sec'y of State for the Home Dep't, [2000] 1 A.C. 489 (H.L.) (U.K.).

19. U.N. High Comm'r for Refugees [UNHCR], *Guidelines on International Protection: Internal Flight or Relocation Alternative Within the Context of Article 1A(2) of the 1951 Convention and/or 1967 Protocol Relating to the Status of Refugees*, paras. 20–21, 30, HCR/GIP/03/04 (July 23, 2003).

analyzes the threshold requirements imposed by the 1951 Convention and U.S. law for a valid grant of asylum. There are five key preconditions, or limitations, which an asylum-seeker must satisfy. Each precondition is discussed in this Article, including the effect of these threshold requirements on those who seek asylum as victims of domestic violence. In examining the threshold requirements of “Nexus” and “Convention grounds,” this Article compares and analyzes differing approaches taken in other major signatory countries to support the theory that, not only is the United States out of conformity with these other major signatory countries, but the fear of open borders to which the United States clings is without a strong foundation.

#### I. OVERVIEW—THE BASICS OF ASYLUM LAW

The origins of modern day asylum law in this country and throughout the world are found in the 1951 Convention<sup>20</sup> and the 1967 Protocol.<sup>21</sup> In 1951, still dealing with the after effects of World War II, the United Nations convened a Conference of Plenipotentiaries to draft a convention that would assist in dealing with the ongoing issue of refugees and displaced persons. The 1951 Convention did so by providing a definition of who qualified as a refugee under international law, what a state party’s obligations were to refugees, and what the obligations of those granted refugee status were to the granting state.<sup>22</sup> Given that the back drop of the 1951 Convention was World War II, the Conference of Plenipotentiaries limited the Convention’s operation geographically to those displaced within Europe, and further limited its operation to those displaced prior to January 1, 1951.<sup>23</sup> The United States was not a signatory to the 1951 Convention and, therefore, did not adopt its obligations.<sup>24</sup>

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20. See Refugee Convention 1951, *supra* note 15.

21. See 1967 Protocol, *supra* note 16.

22. JAMES C. HATHAWAY, *THE LAW OF REFUGEE STATUS* 6 (1991).

23. *Id.*; see also KAREN MUSALO ET AL., *REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH* 32 (2d ed. 2002).

24. UNHCR, *STATES PARTIES TO THE 1951 CONVENTION RELATING TO THE STATUS OF REFUGEES AND THE 1967 PROTOCOL*, available at <http://www.unhcr.org/cgi->

However, with the drafting of the 1967 Protocol and thereby the lifting of the time and geographical boundaries, the United States acceded to the 1967 Protocol on November 1, 1968.<sup>25</sup> By acceding to the 1967 Protocol, the United States agreed to the obligations imposed by the 1951 Convention and the definition of who qualifies as a refugee. As of March 1, 2006, 145 other countries have similarly adopted the international obligations imposed by one or both of these instruments.<sup>26</sup>

Until the enactment of the Refugee Act of 1980,<sup>27</sup> no formalized process existed in the United States for carrying out its international obligations under the 1967 Protocol.<sup>28</sup> The Refugee Act of 1980 codified the 1951 Convention definition of refugee and provided a process by which refugee and asylum-seeker claims for protection could be assessed.<sup>29</sup> The 1980 Act has been amended significantly over the years, but the core definition of who qualifies as a refugee remains consistent with that found in the 1951 Convention:

[A]ny person who is outside any country of such person's nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.<sup>30</sup>

This provision establishes the threshold requirements of who qualifies for protection, and in doing so provides the

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bin/texis/vtx/protect/opendoc.pdf?tbl=PROTECTION&id=3b73b0d63 (last visited Oct. 14, 2006).

25. *Id.*

26. *Id.*

27. Pub.L. 96-212, tit. I, § 101(b), 94 Stat. 102 (1980) [hereinafter Refugee Act of 1980].

28. *See, e.g.,* Marincas v. Lewis, 92 F.3d 195, 198 (3d Cir. 1996) (citing Refugee Act of 1980, *supra* note 27).

29. Refugee Act of 1980, *supra* note 27, § 101(a); *see also* Refugee Convention 1951, *supra* note 15, art. 33.

30. 8 U.S.C. § 1101(a)(42)(A) (2000).

boundaries of the United States' international obligation of protection. An analysis of this provision demonstrates that victims of domestic violence persecuted in countries that are unable or unwilling to protect them from such violence, can (subject to the circumstances of the individual case) meet this definition of refugee. Furthermore, the acceptance of these women as *bona fide* asylees will not open the borders to all female applicants who suffer the fate of domestic violence in their own country.

## II. THE FIRST LIMITING FACTOR—THE DOMESTIC VIOLENCE MUST RISE TO THE LEVEL OF PERSECUTION

Not every victim of domestic violence will qualify for asylum. The treatment they experience or allege they will experience if returned to their country of origin must be persecutory in nature.<sup>31</sup> The 1951 Convention and the 1967 Protocol do not provide a definition as to what type or extent of mistreatment or discrimination qualifies as persecution. Similarly, Congress did not include a definition of persecution in the Immigration and Nationality Act of 1952, nor have any regulations been passed attempting the same.<sup>32</sup> The reasoning behind this approach is best described by the UNHCR:

There is no universally accepted definition of “persecution”, and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951 Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion or membership of a particular social group is always persecution. Other serious violations of human rights—for the same reasons—would also constitute persecution.<sup>33</sup>

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31. See Refugee Convention 1951, *supra* note 15, art. 1(A)(2) (defining the term “refugee”); 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. § 1208.13 (2006).

32. See 8 U.S.C. § 1101.

33. UNHCR, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS UNDER THE 1951 CONVENTION AND THE 1967 PROTOCOL RELATING TO THE STATUS OF REFUGEES, para. 51, HCR/IP/4/Eng/REV.1 (Jan. 1992) [hereinafter Refugee Handbook].

For this reason, most signatory nations to the 1951 Convention and/or the 1967 Protocol have refrained from providing any guidance in their domestic legislation as to the meaning of this threshold requirement.<sup>34</sup> The definition of persecution has, therefore, been left to the development of the domestic agencies and courts of the various signatory states. In the case of the United States, the development of the definition has therefore been left to the BIA and the courts.

Current dicta of the U.S. Supreme Court states that persecution is “the infliction of suffering or harm upon, those who differ [in race, religion, or political opinion] in a way regarded as offensive.”<sup>35</sup>

The question then begs for a further definition of what is conduct regarded as “offensive?” The definition of offensive is multifaceted. The starting point of defining offensiveness is that actions will be regarded as offensive if they are serious violations of human rights.<sup>36</sup> While all violations of human rights may be regarded as repugnant to those who live in a democratic nation such as the United States, this will not be sufficient to qualify as offensive for the purposes of protection under the Immigration and Nationality Act.<sup>37</sup> The similar approach of other signatory states is as follows: “[R]efugee law ought to concern itself with actions which deny human dignity *in any key way* and that the *sustained or systemic* denial of *core human rights* is the appropriate standard.”<sup>38</sup>

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34. Cf. Migration Act, 1958, § 91(R)(1) (Austl.) (providing guidance as to which matters “may” constitute persecution). This, however, is an inclusive and not an exclusive definition, which again testifies to the difficulty in determining an exhaustive definition.

35. Matter of Acosta, 19 I. & N. Dec. 211, 222 (B.I.A. 1985) (The BIA stated that persecution will include threats to life, confinement, torture, and economic restrictions so severe that they constitute a threat to life or freedom.). This is consistent with the approach advocated by the UNHCR. See Refugee Handbook, *supra* note 33, paras. 51–54.

36. Desir v. Ilchert, 840 F.2d 723, 729 (9th Cir. 1988).

37. Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993) (“[P]ersecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional.”). This is consistent with the approach advocated by the UNHCR. See Refugee Handbook, *supra* note 33, para. 54.

38. Refugee Appeal No. 71427/99, [2000] N.Z.A.R. 545 (N.Z.), para. 51 (citing HATHAWAY, *supra* note 22, at 108) (emphasis added); see also NABD v. Minister for

Even if an act is regarded as a serious violation of core human rights, this is not, by itself, sufficient to be deemed offensive. The act must be selective in the sense that it is not an act of random violence, and it must be of an egregious nature.<sup>39</sup> Mere harassment or discrimination will not rise to the level of persecution.<sup>40</sup> Finally, the asylum-seeker must prove that the harm was inflicted by a government or persons a government is unwilling or unable to control.<sup>41</sup> Therefore, a petitioner's ability to prove that her treatment qualifies as persecution will need to be assessed by asylum adjudicators on a case-by-case basis.<sup>42</sup> As the starting point of determining whether domestic violence qualifies as persecution, it is not surprising that courts around the world have assessed the act of domestic violence is persecutory in nature according to Human Rights Conventions.<sup>43</sup> The UNHCR, in providing guidance to signatory countries, clearly advocates this approach. In doing so, the UNHCR states that reference should be made to International Human Rights Law and International Criminal Law because these instruments "clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterization as serious abuses, amounting to persecution."<sup>44</sup>

Key human rights instruments clearly state that violence

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Immigration & Multicultural & Indigenous Affairs (2005) 216 A.L.R. 1 (Austl.) paras. 109–11 (High Ct.); *Canada (Att'y Gen.) v. Ward*, [1993] 2 S.C.R. 689, 733 (Can.) (citing HATHAWAY, *supra* note 22, at 108); *Shah*, 2 A.C. at 629.

39. *Rios v. Ashcroft*, 287 F.3d 895, 901 (9th Cir. 2002); *Agbuya v. INS*, 241 F.3d 1224, 1228 (9th Cir. 2001); *Shoafera v. INS*, 228 F.3d 1070, 1074 (9th Cir. 2000); *Singh v. INS*, 94 F.3d 1353, 1358–59 (9th Cir. 1996).

40. *Nelson v. INS*, 232 F.3d 258, 264 (1st Cir. 2000). In making an assessment of whether the alleged persecutory conduct is sufficiently serious, the cumulative effect of all the incidents an asylum-seeker suffered is to be taken into account. *Singh*, 134 F.3d at 967 (9th Cir. 1998).

41. *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996); *Acosta*, 19 I. & N. Dec. at 222–23; *McMullen v. INS*, 658 F.2d 1312, 1315 (9th Cir. 1981); *Refugee Handbook*, *supra* note 33, para. 65.

42. *See* *Refugee Handbook*, *supra* note 33, para. 52.

43. *Id.* paras. 58–60.

44. UNHCR, *Sexual and Gender-Based Violence Against Refugees, Returnees and Internally Displaced Persons: Guidelines for Prevention and Response* paras. 8–11 (May 2003) [hereinafter UNHCR Guidelines on Gender]; *Refugee Handbook*, *supra* note 33, para. 51.

against women is an abuse of human rights and fundamental freedoms. These instruments include the Universal Declaration of Human Rights (UDHR);<sup>45</sup> the International Convention on Civil and Political Rights;<sup>46</sup> the International Convention on Economic, Social, and Cultural Rights;<sup>47</sup> the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW);<sup>48</sup> the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment;<sup>49</sup> the Declaration on the Elimination of Violence Against Women (DEVAW);<sup>50</sup> and the Beijing Declaration and Platform for Action.<sup>51</sup>

CEDAW is regarded as the leading international convention in the area of discrimination against women,<sup>52</sup> but the Convention itself fails to address whether violence against women is a form of discrimination. This was clarified in 1993 when DEVAW passed. DEVAW explicitly defines violence against women as including “[p]hysical, sexual and psychological violence occurring in the family, including battering, sexual abuse of female children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence

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45. Universal Declaration of Human Rights, G.A. Res. 217, U.N. GAOR, 3d Sess., U.N. Doc. A/810 (Dec. 12, 1948) (recognizing a wide range of rights including the right to life, liberty, and security of the person and the right to freedom from torture or other cruel, inhuman, or degrading treatment or punishment).

46. International Covenant on Civil and Political Rights, G.A. Res. A/RES/2200A (XXI) (Dec. 16, 1966) (recognizing many of the same rights as the UDHR and that discrimination on the basis of gender is a human rights violation).

47. International Covenant on Economic, Social and Cultural Rights, G.A. Res. A/RES/2200A (XXI) (Dec. 16, 1966).

48. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, (Dec. 18, 1979).

49. Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 39/46, (Dec. 10, 1984).

50. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, (Dec. 20, 1993) [hereinafter DEVAW].

51. Fourth World Conference on Women, Sept. 4–15, 1995, *Beijing Declaration and Platform for Action*, U.N. Doc. A/CONF.177/20 (Oct. 17, 1995) and U.N. Doc. A/CONF.177/20/Add.1 (Oct. 27, 1995).

52. See Human Rights Watch, *CEDAW: The Women's Treaty*, <http://hrw.org/campaigns/cedaw> (last visited Oct. 4, 2006).

and violence related to exploitation.”<sup>53</sup> DEVAW further clarifies that “[w]omen are entitled to the equal enjoyment and protection of all human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”<sup>54</sup>

The UNHCR views “the United Nations Declaration on the Elimination of Violence against Women, adopted by the General Assembly in 1993, and the Beijing Declaration and Platform for Action, adopted in Beijing in 1995, [as declaring] all forms of discrimination as violence against women and girls and reaffirm[ing the] States’ responsibility to work to eliminate them.”<sup>55</sup> The United States has not ratified or acceded to the international treaty and is therefore not legally bound by the Convention’s provision or its subsequent clarification.<sup>56</sup>

Therefore, it is not surprising that early decisions determining whether violence against women, for example rape, could constitute persecution, indicated a trend on the part of U.S. immigration officials to treat such violent acts as being a personal matter rather than persecution.<sup>57</sup> For example, an immigration judge, denying a grant of asylum, concluded that the rape of the petitioner Catalina Mejia by the soldier who accused her of being a guerrilla, was not an act of persecution but “was more because she was a female convenient to a brutal soldier acting only in his own self-interest.”<sup>58</sup> The United States

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53. DEVAW, *supra* note 50, art. 2(a).

54. *Id.* art. 3.

55. UNHCR Guidelines on Gender, *supra* note 44, para. 8, [http://humanitarianinfo.org/liberia/coordination/sectoral/protection/doc/SGV\\_guidelines\\_eng.pdf](http://humanitarianinfo.org/liberia/coordination/sectoral/protection/doc/SGV_guidelines_eng.pdf).

56. United Nations Division for the Advancement of Women: Department of Economic and Social Affairs, *States Parties*, <http://www.un.org/womenwatch/daw/cedaw/states.htm> (last visited Oct. 14, 2006). “As of 11 Aug 2006, 184 countries—over ninety percent of the members of the United Nations—are party to the Convention. An additional State has signed, but not ratified, the treaty therefore it is not bound to put the provisions of the Convention into practice.” *Id.* That State is the United States, which signed the Convention on July 17, 1980. *Id.*

57. See EITHNE LUIBHEID, ENTRY DENIED: CONTROLLING SEXUALITY AT THE BORDER 103–05 (2002) (surveying immigration official responses to rape at the United States borders).

58. MUSALO, *supra* note 23, at 648 (citing SUSAN FORBES MARTIN, REFUGEE WOMEN 24 (1991) (citing AMNESTY INTERNATIONAL, WOMEN ON THE FRONT LINE: HUMAN RIGHTS VIOLATIONS AGAINST WOMEN 49 (1991))); see also Campos-Guardado v. INS, 809

has since determined that sexual violence and serious abuses involving women can constitute persecution. As such it is now without dispute that rape,<sup>59</sup> female genital mutilation,<sup>60</sup> slavery,<sup>61</sup> forced marriage,<sup>62</sup> and forced abortion<sup>63</sup> are all forms of persecution. The U.S. Department of Justice's Asylum Gender Guidelines,<sup>64</sup> in recognizing all of the aforementioned as forms of persecution, also states that domestic violence constitutes persecution.<sup>65</sup>

A domestic violence asylum-seeker may now be viewed as readily able to meet the threshold of persecution. However, it must be made clear that not all cases or forms of domestic violence will constitute persecution, and the applicant must

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F.2d 285, 290 (5th Cir. 1987) (holding the appellant was ineligible for a discretionary grant of asylum not "on account of political opinion"); Patricia A. Seith, Book Note, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1822 (1997) (citing Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 638-41 (1993) (stating that courts have resisted the establishment of "rape as a form of persecution")); Hannah R. Shapiro, *The Future of Spousal Abuse As A Gender-Based Asylum Claim: The Implications of the Recent Case of Matter of R-A-*, 14 TEMP. INT'L & COMP. L.J. 463, 472 (discussing how an applicant must show a voluntary association with a group).

59. See *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1993); *In re D-V-*, 21 I. & N. Dec. 77, 79 (B.I.A. 1993); *Lazo-Majano v. INS*, 813 F.2d 1432, 1436 (9th Cir. 1987); see also UNHCR, *Guidelines on the Protection of Refugee Women*, §§ 59-60 (July 1991), <http://www.unhcr.org/cgi-bin/texis/vtx/publ/openssl.pdf?tbl=PUBL&id=3d4f915e4>; Canada Immigration and Refugee Board, *Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act: Women Refugee Claimants Fearing Gender-Related Persecution*, at 15 (1993) [hereinafter Canadian Gender Guidelines].

60. *Kasinga*, 21 I. & N. Dec. at 357.

61. Memorandum from Phyllis Coven, Office of International Affairs, U.S. Department of Justice, to all INS Asylum Officers and HQASM Coordinators (May 26, 1995), reprinted in MUSALO, *supra* note 23, at 680-81 [hereinafter DOJ Guidelines].

62. *Id.* at 680-81.

63. Congress specifically amended the Immigration and Nationality Act to provide asylum for forced abortion. See 8 U.S.C. § 1101(a)(42); see also *In re X-P-T*, 21 I. & N. Dec. 634 (B.I.A. 1996) (granting asylum to applicant because she was forcibly sterilized after she and her husband violated China's one child policy by having three children); *Li v. Ashcroft*, 356 F.3d 1153, 1158 (9th Cir. 2004) (finding the circumstances to be persecution when the petitioner was forced to undergo gynecological examination against her will and threatened with abortion by government officials if she became pregnant).

64. DOJ Guidelines, *supra* note 61, at 680-81.

65. *Id.* at 681. The issue of rape and other forms of violence against women being classified as a personal matter continues when determining the issue of "nexus" as discussed later in this Article.

meet her evidentiary burden to convince the asylum officer that domestic violence has actually been perpetrated on her or there is a well-founded fear that it will be.<sup>66</sup> The applicant must provide some direct or circumstantial evidence revealing the extent of the domestic violence is sufficiently serious, selective in nature, and that she lives in a country that condones, tolerates, or is unable to provide protection for victims of domestic violence.<sup>67</sup>

The DOJ Guidelines do not further analyze what constitutes domestic violence or what forms of domestic violence will be considered serious enough to warrant being considered persecutory in nature.<sup>68</sup> It is beyond doubt that physical abuse will qualify, provided it is of sufficient severity. It is also possible that the imposition of behavioral rules on women—for example, dress and religious beliefs—or confinement *may* qualify.

Outside of the domestic violence context, U.S. case law holds that a country's or religion's laws that control a woman's behavior will only constitute persecution if the asylum-seeker has been able to prove that the imposition of these beliefs on them is profoundly abhorrent *or* that failure to comply poses the possibility of serious harm.<sup>69</sup> In *Fatin v. INS*,<sup>70</sup> the Third Circuit considered a case in which an Iranian woman refused to comply

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66. *Id.*; Acosta, 19 I. & N. Dec. at 221–22. Well-founded fear is the fourth threshold requirement for asylum and is discussed in depth later in this Article.

67. See R-A-, 22 I. & N. Dec. at 906 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992)); Matter of T-M-B-, 21 I. & N. Dec. 775, 785 (B.I.A. 1997).

68. See Seith, *supra* note 58, at 1821 (“Women have had difficulty establishing that various forms of violence constitute persecution.”).

69. See, e.g., Matter of M-K-, A72-374-558 (IJ Arlington, Va., Aug. 9, 1995) (discussing a female asylee from Sierra Leone who faced physical retribution because of her opposition to female genital mutilation, polygamy, and the subordinate position of women in her society); Matter of D, (IJ San Francisco, CA, July 3, 1996) (discussing an Afghan woman who faced punishment by way of death and/or rape for failing to conform because she pursued an education despite religious opposition and refused to wear the chador and other dress); Center for Gender & Refugee Studies, Case Number 445, available at <http://cgrs.uchastings.edu/law/summaries.php> (discussing an applicant arrested for violating Taliban rules stating that women cannot work and women cannot go out of their homes alone; she was imprisoned, repeatedly beaten, interrogated, chained, forced to stand in cold, deep water, and had electric shocks administered to her breasts, head, and neck).

70. 12 F.3d at 1241.

with traditional Islamic dress, subjecting her to a potential punishment of seventy-four lashes. The court was prepared to recognize that “the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual’s deepest beliefs.”<sup>71</sup> This strongly indicated that imposition of physical punishment was not required, with the proviso that the applicant would be able to prove imposition of the rules was “profoundly abhorrent” to her value system. As Fatin failed to show that the imposition of the Islamic Code was profoundly abhorrent to her beliefs or if returned, she would disobey the rules and be at risk of serious punishment, she was denied asylum.<sup>72</sup> One would think that to prove profound abhorrence, active opposition is required. However, if she actively opposes the rules then she faces the likelihood of severe punishment. It is a Catch-22 situation.

This ongoing struggle for females, whose basis of persecution is repressive social mores, is illustrated also by the Ninth Circuit’s second decision in *Fisher v. INS*.<sup>73</sup> While in an earlier hearing in this case the Ninth Circuit was prepared to overturn and remand the BIA’s decision to deny asylum on the basis that Fisher may have suffered persecution on account of her religious and political beliefs as a result of Iran’s enforcement of its conduct and dress codes,<sup>74</sup> the court, sitting en banc, ultimately denied asylum.<sup>75</sup> In doing so, the Ninth Circuit harmonized its approach with the Third Circuit.<sup>76</sup> The basis of the denial was that Fisher failed to show that her refusal to conform would result in “disproportionately severe punishment or [was a pretext to] prosecution,”<sup>77</sup> and therefore, did not qualify as persecution. The court concluded that there was no evidence suggesting that Fisher ever “spoke out against the government’s political or religious practices or even publicly

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71. *Id.* at 1242.

72. *Id.*

73. 79 F.3d 955, 960–61 (9th Cir. 1996).

74. *Fisher v. INS*, 37 F.3d 1371 (9th Cir. 1994).

75. *Id.* at 958.

76. *Id.* at 962 (citing *Abedini v. INS*, 971 F.2d 188, 191 (9th Cir. 1992)).

77. *Id.*

articulated any political or religious opinions.”<sup>78</sup> It would therefore seem that the threshold of profound abhorrence is so high that the threat of severe punishment must be proven.

Consequently, there is little doubt that a woman who suffers psychological abuse alone, who suffers minor physical abuse at the hands of a husband, or who is required to conform to his ideals without an overriding threat of serious physical harm will be unable to successfully seek asylum and avoid deportation under U.S. asylum law.<sup>79</sup> Cases that have dealt with restrictive social mores imposed by husbands have resulted in grants of asylum. However, in these cases the applicants have been able to demonstrate that the social mores the husband wishes his wife to follow are profoundly abhorrent to her value system *and* the domestic violence she faces or has faced is a sufficiently serious form of punishment.<sup>80</sup>

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78. *Id.* at 962–63 (quoting *Abedini*, 971 F.2d at 192).

79. *See* *Klawitter v. INS*, 970 F.2d 149, 152 (6th Cir. 1992) (“Congress did not contemplate that a claim of sexual harassment would constitute the type of persecution for which political asylum would be granted.”). In practice, the approach of the United States regarding the imposition of social mores seems to be contrary to the general consensus of World Organizations and other countries. *See, e.g.*, European Council On Refugees and Exiles, *Position on Asylum Seeking and Refugee Women*, para. 9 (Dec. 1997), <http://www.ecre.org/positions/women.shtml> (“Persecution can also take the form of severe restrictions on the way a woman behaves through, for example, dress codes and restrictions on movement, employment or education . . . . In some cases, these forms of serious harm can in themselves constitute persecution. Alternatively, the persecution may be identified as the consequences for a woman of refusing to submit to gender-discriminatory norms where the level of punishment for this refusal is particularly severe.”). Similarly, the Refugee Women’s Legal Group’s Gender Guidelines for the Determination of Asylum Claims in the UK, which have been accepted by the courts, take a much more liberal approach than those in the United States. *See* Refugee Women’s Legal Group, *Guidelines for the Determination of Asylum Claims in the UK* (July 1, 1998) §§ 2.1–2.18 (“Decision-makers are reminded that the legal obligation to eliminate all forms of discrimination against women is a fundamental tenet of international human rights law.”).

80. *See, e.g.*, *Matter of A and Z* (IJ Arlington, Va., Dec. 20, 1994) (A Jordanian woman was subjected to years of physical and psychological abuse including imprisonment, travel restrictions, economic dependency, beatings, and being terrorized for days with a gun for opposition to her husband’s and society’s ideals. She was seeking to pursue Western ideals of education and a career, despite her husband’s opposition.); *Matter of M-K-*, A72-374-558 (IJ Arlington, Va., Aug. 9, 1995); Center for Gender & Refugee Studies, *Case No. 2717*, <http://cgrs.uchastings.edu/law/summaries.php> (A Pakistani woman was granted asylum when she entered into an arranged marriage,

This furthers the central arguments of this Article: the limitations the system places on the right to determine asylum are sufficient and fears of floodgates are unfounded. One must suffer physical abuse that is sufficiently severe to overcome the threshold of persecution. One who suffers minor physical abuse or psychological abuse alone cannot overcome the threshold.

The domestic violence applicant will also be required to prove that the persecution is selective rather than a random act of violence.<sup>81</sup> It is acknowledged that if the applicant can prove sufficiently serious harm, then this requirement will not be an impediment to determining that the action in question is persecutory. Beatings and restrictions on one's beliefs and freedoms by a spouse is clearly not an act of random violence, but rather the selective action of one who seeks to control by power. It is directed at the applicant because of the position that she holds in his household: that of an inferior female who should be subjected to the power of her spouse.<sup>82</sup> In fact the BIA recognizes that the reason that a spouse perpetrates the domestic violence is because he can—he sees her as his property.<sup>83</sup>

The final requirement for an act to qualify as persecution is that the government of the country from where the asylum

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wherein her spouse and family abused her. After entering and residing in the United States with her spouse, she became “Americanized,” spoke English, dressed in Western clothes, and was less religious. She filed for divorce and sought a restraining order. She feared that if she returned to Pakistan, she would be the subject of an honor killing.)

81. Asylum and Withholding Definitions, 65 Fed. Reg. 76593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

82. Catharine A. McKinnon, *On Torture: A Feminist Perspective on Human Rights*, in *HUMAN RIGHTS IN THE TWENTY-FIRST CENTURY: A GLOBAL CHALLENGE* 21, 26 (Kathleen E. Mahoney & Paul Mahoney eds., 1993); Shanyn Gillespie, *Terror in the Home: The Failure of U.S. Asylum Law to Protect Battered Women and a Proposal to Right the Wrong of In re R-A-*, 71 GEO. WASH. L. REV. 131, 134 (2003) (recognizing that violence is a tool used to “sustain the power imbalance between the sexes”); UN Center for Social Development & Humanitarian Affairs, *Violence Against Women in the Family* (1989), quoted in RHONDA COPELON, *INTIMATE TERROR: UNDERSTANDING DOMESTIC VIOLENCE AS TORTURE*, in *HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES* 120 (Rebecca J. Cook ed., 1994) (exploring the widely-held cultural belief that women are inferior) [hereinafter *Violence Against Women in the Family*]; Seith, *supra* note 58, at 1810.

83. R-A-, 22 I. & N. Dec. at 921, 925.

applicant has fled is unwilling or unable to provide protection.<sup>84</sup> Consequently, an applicant unable to prove lack of state protection for the punishment that is imposed by a husband has little hope of being regarded as persecuted. In *Matter of Pierre*,<sup>85</sup> a woman sought asylum on the basis that she feared that her husband would kill her if she returned to Haiti. Her husband threatened her life and attempted to kill her by burning their house down. The respondent claimed she could not avail herself of the protection of the Haitian authorities as her husband was a deputy in the Haitian Government, rendering protection unlikely.<sup>86</sup> The BIA concluded that “it would first have to be shown that the government concerned was either unwilling or unable to control the persecuting individual or group,” and the respondent presented no evidence to support her claim of lack of governmental protection.<sup>87</sup> A letter from the U.S. Department of State was in evidence confirming that the respondent’s husband did hold the official position of deputy in the Haitian Government, but this by itself was insufficient to prove lack of state protection.<sup>88</sup> In comparison, the case of *R-A*<sup>89</sup> revealed extensive evidence of the lack of effective methods for dealing with spousal abuse in Guatemala.<sup>90</sup> The BIA agreed with the immigration judge’s conclusion that the harm suffered by Alvarado rose to the level of persecution, and she successfully established that she had not been able to avail herself of protection within Guatemala.<sup>91</sup>

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84. See *supra* note 34 and accompanying text.

85. 15 I. & N. Dec. 461 (B.I.A. 1975).

86. *Id.* at 462.

87. *Id.*

88. *Id.* The decision was also interspersed with statements concerning the personal nature of the abuse. “The motivation behind his alleged actions appears to be strictly personal. Thus, even if the respondent had shown that the government of Haiti was unable or unwilling to restrain her husband, she could not qualify for temporary withholding of deportation. Not every unlawful act of individual harassment will amount to persecution.” *Id.* at 463.

89. *R-A*, 22 I. & N. Dec. at 906.

90. *Id.* at 910–11.

91. See *id.* at 914. However, lack of state protection was an issue in the context of “nexus” (discussed later in this Article). See *infra* Part III.

Consequently, if the country of origin provides protection, the petitioner will be unable to successfully claim asylum. The purpose of the 1951 Convention, to which the United States has acceded, is to protect those who are unable to gain protection from within the borders of their country.<sup>92</sup> This does not require that the country of origin provide a legal enforcement and judicial system equal to that of the United States, but rather that they are able to provide “meaningful assistance.”<sup>93</sup> As a result, an individual—for example a resident in New Zealand who has suffered domestic violence at the hands of her spouse—will have no possibility of successfully seeking asylum in the United States because New Zealand has an “effective” system of control.<sup>94</sup> It is irrelevant that the system may not be perfect.

The types of circumstances that may lead to the conclusion that protection is unavailable are a lack of laws treating domestic violence as a specific crime; a lack of applying of other existing laws to a case of domestic violence; a lack of action on the part of law enforcement officials including police and the judicial system; a general acknowledgement or understanding that domestic violence is a matter between a wife and her husband and not the province of authorities; and a lack of facilities where women can find support and protection for themselves and their children making it nearly impossible for women, particularly those dependent on their spouse for financial support, to flee an abusive relationship. Often these countries are those where women are seen as second class citizens with few legal rights and subordinate to the control of the head of the family.<sup>95</sup> It may be the case that it is not just the males that harbor these beliefs but also other female family members who are accepting of the subordination of women and a

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92. Cf. R-A-, 22 I. & N. Dec. at 912.

93. *Id.* at 914.

94. Bureau of Democracy, Human Rights, and Labor, *Country Reports on Human Rights Practices* (Feb. 25, 2004), <http://www.state.gov/g/drl/rls/hrrpt/2003/27783.htm>.

95. See Purna Sen, *Development Practice and Violence Against Women*, in *VIOLENCE AGAINST WOMEN* 8 (Caroline Sweetman ed., 1998); Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian and Australian Approaches to Gender-Related Asylum Claims*, 13 *GEO. IMMIGR. L.J.* 25, 48 (1998); *Violence Against Women in the Family*, *supra* note 82, at 120.

man's right to treat a woman as his property. As discussed, any domestic violence victim who claims persecution will be required to provide evidence of the lack of state protection, limiting the United States' legal responsibility for domestic violence victims.

Thus, for an applicant to qualify for asylum, she must prove that the actions of her abuser are persecutory. To be persecutory, the abuse will almost certainly be required to be of a physical nature and of sufficient severity. It must also be the case that the persecution occurs in a country whose legal system fails to provide "meaningful assistance" to domestic abuse victims. Persecution effectively restricts the pool of potential women who may seek asylum on the basis of domestic abuse.

### III. THE SECOND LIMITING FACTOR—PROVING NEXUS

Any petitioner seeking asylum must prove not only that she was persecuted but also that the persecution she suffered was on account of one of the enumerated 1951 Convention reasons: race, religion, nationality, political opinion, or social group.<sup>96</sup> These enumerated reasons are commonly referred to as the "nexus" or "causal" requirement.<sup>97</sup> It is not necessary for the purposes of 1951 Convention protection, nor under the domestic law of the United States, that the sole reason for the persecution be a 1951 Convention ground. However, the persecution must be on account of one of the nexus reasons.<sup>98</sup>

The petitioner must prove the persecution is threatened or "inflicted in order to punish the victim for having one or more of the characteristics protected under the statute."<sup>99</sup> Therefore, "[t]he asylum applicant bears the burden of providing evidence,

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96. 8 U.S.C. § 1101(a)(42)(A); Refugee Convention 1951, *supra* note 15, art. 33.

97. James C. Hathaway, *The Causal Nexus in International Refugee Law*, May 17, 2002, <http://www.refugeecaselaw.org/english.pdf> (stating that the words "for reasons of" in the international refugee definition is where the nexus requirement is derived and is the cause of much debate).

98. *Singh v. Illchert*, 63 F.3d 1501, 1509 (9th Cir. 1995); S-P-, 21 I. & N. Dec. 486 (B.I.A. 1996).

99. U.S. Dept. of State, Memorandum, *Guidelines, Office of International Affairs, Immigration and Naturalization Service, Regarding Adjudicating Asylum Cases on the Basis of Gender* (May 26, 1996) (citing *Acosta*, 19 I. & N. Dec. at 226), available at <http://www.state.gov/s/1/65633.htm>.

either direct or circumstantial, from which it is reasonable to conclude that her persecutor harmed her at least in part because of a protected ground.”<sup>100</sup> To prove this, the petitioner must present evidence that the persecutor was aware of or could become aware that the applicant possesses the Convention characteristic, and the persecutor has both the ability and the predilection to persecute the applicant for this reason.<sup>101</sup> That the persecutor chose to persecute because of their own race, religion, nationality, political opinion, or social group is not itself sufficient to satisfy this requirement, nor an actual requirement.<sup>102</sup> Instead, the evidence must prove the persecutor was motivated because of the actual or imputed belief of the applicant’s race, religion, nationality, political opinion, or social group.<sup>103</sup>

It is not an easy task to prove what was in the mind of the persecutor. While the U.S. Supreme Court stated that all that is required is “*some* evidence of it, direct or circumstantial,”<sup>104</sup> the applicant has generally fled her country of origin without much thoughtful planning and in total ignorance of what will be required to persuade the U.S. asylum adjudicator that she should be afforded protection. The applicant will generally have little if any documentary or physical evidence to support her case, and while it would seem feasible that family or friends who have fled or suffered a similar fate may be able to provide corroborating testimony, they may well be undocumented,

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100. R-A-, 22 I. & N. Dec. at 912–13 (citing *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (9th Cir. 1992); T-M-B-, 21 I. & N. Dec. at 775).

101. See *Elias-Zacarias*, 502 U.S. at 483; *In re Mogharrabi*, 19 I. & N. Dec. 439, 446 (B.I.A. 1987).

102. *Elias-Zacarias*, 502 U.S. at 482. It may make the applicant’s claim for asylum more plausible if there is, for example, recognized animosity between two religions or two cultures.

103. *Id.* Consequently, the U.S. Supreme Court in *Elias-Zacarius* determined that the fact the guerilla sought to forcibly recruit the petitioner into his cause was irrelevant to determine if the petitioner was being persecuted on account of political opinion. *Id.* *Elias-Zacarius* failed to prove by some real or circumstantial evidence that the guerilla sought to forcibly recruit him because of Elias’s political opinion. *Id.* *Elias-Zacarius* was therefore not entitled to the protection of the United States. *Id.*

104. *Id.* at 483 (emphasis in the original).

fearful of authorities, and unwilling to cooperate.<sup>105</sup> In the usual case, whether the applicant is able to persuade the asylum adjudicator that she was persecuted because of one of the 1951 Convention reasons will depend largely on her own testimony, and therefore, her credibility will be an issue.<sup>106</sup> Whether the applicant can persuade the decision maker that she was or would be persecuted because of her race, religion, nationality, social group, or political opinion if she returned to her native country, will ultimately hinge on the applicant's proffered reasons for the abuse and any statements she alleges the persecutor may have made to her. Moreover, the asylum adjudicator will keep the veracity of the applicant's statements in mind.

Domestic violence victims have experienced extreme difficulty in convincing asylum adjudicators that the abuse they suffered at the hands of their spouses is because the spouses are seeking to overcome a protected characteristic that the female applicants possess. What was in the mind of her husband while he was beating her? What was his reason for perpetrating the violence against his wife? Initially, this threshold requirement appeared insurmountable. Violence against women was being presumptively viewed by asylum adjudicators as a personal matter rather than as an act that could be perpetrated because of the woman's race, religion, nationality, political opinion, or social group.

Reference to the initial case law demonstrates this presumption. In *Campos-Guardado v. INS*,<sup>107</sup> the applicant visited her uncle to repay a family debt. While at his house, a number of people arrived and forced the family, including the applicant, out of the house. Then the women were forced to

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105. Midland Immigrants and Human Rights Center, Basic Procedure Manual for Asylum Representation Affirmatively and In Removal Proceedings, (2006) at 36 <http://www.immigrantjustice.org/documents/MANUALMay2006FullDocument.pdf>.

106. *Mogharrabi*, 19 I. & N. Dec. at 445 (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 437 (1987) ("The alien's own testimony may in some cases be the only evidence available, and it can suffice where the testimony is believable, consistent, and sufficiently detailed to provide a plausible and coherent account of the basis for his fear.")).

107. 809 F.2d 285, 287 (5th Cir. 1987).

watch the uncle and male cousins being hacked with machetes before being shot to death.<sup>108</sup> The attackers then raped the applicant and female cousins, while chanting political slogans. Campos-Guardado's uncle had been the chair of a local agricultural cooperative formed as a result of the controversial agrarian land reform movement instituted in El Salvador.<sup>109</sup> Her uncle informed her upon her arrival that he had been threatened the day before because of his political activities.<sup>110</sup> After the incident, while visiting the home of her parents, she was introduced to two cousins—one of whom was one of her assailants. He then sought her out on several occasions, threatening to kill her and her family if she revealed his identity.<sup>111</sup> The Fifth Circuit agreed with the BIA's finding that the applicant had not established that she was targeted because of her own political opinion nor because her assailants had attributed her uncle's political opinion to her. Rather, the BIA concluded and the Fifth Circuit agreed that she was a victim of the general civil unrest in her country.<sup>112</sup> The Fifth Circuit did not dispute the BIA's view that the threats of reprisal by her assailant "were personally motivated."<sup>113</sup>

Similarly in *In re D-V*, the immigration judge denied asylum to a woman who had been a proactive member of a church established by President Aristide during his presidency of Haiti.<sup>114</sup> The Church was responsible for raising funds to support Aristide.<sup>115</sup> After the fall of Aristide, the petitioner was threatened because of her activities as a prominent member of the Church. She was gang-raped and severely beaten by soldiers. The soldiers hunted her down at her home; asked for her by her nickname; referred to the fact that she was a church member; and stated that another of her fellow members had

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108. *Id.* at 287.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Campos-Guardado*, 809 F.2d at 289–90.

113. *Id.* at 288.

114. 21 I. & N. Dec. at 77.

115. *Id.* at 78.

already been killed; implying that she was next.<sup>116</sup> The immigration judge denied her petition for asylum because the evidence did not show her as a prominent supporter of Aristide and because she feared only the “general conditions of violence in that country, and it was pure speculation on her part that the same attackers would rape and beat her again or kill her.”<sup>117</sup> While this typified the attitude of immigration officials to claims for asylum on the ground of gender-based violence, it also resulted in a successful review by the BIA<sup>118</sup> and the current awareness that gender-based violence can be a result of one of the enumerated 1951 Convention reasons.

In 1995, the U.S. Department of Justice issued guidelines to assist immigration officials in the evaluation of gender-based asylum claims.<sup>119</sup> Importantly, these guidelines first recognize that certain types of mistreatment are gender specific. Examples of gender-specific treatment are “sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence and forced abortion.”<sup>120</sup> The DOJ Guidelines also recognize that gender-specific violence may be perpetrated because of one of the five 1951 Convention reasons. “[A]n applicant may assert that she has suffered persecution on account of her gender or because of her membership in a social group constituted by women. She might also assert that her alleged persecutors seek to harm her on account of political or religious belief concerning gender.”<sup>121</sup>

Second, and arguably most important, given early adjudication in this area, the DOJ Guidelines caution asylum officers to seriously analyze these applications and to “understand . . . [the] complexities and give proper consideration to gender-related claims.”<sup>122</sup>

The result of the DOJ Guidelines is profound and has led to the education of asylum officers with respect to gender-based claims. They have also led to justifiable recognition that women,

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116. *Id.* at 78–79.

117. *Id.* at 79.

118. *Id.* at 79–80.

119. MUSALO, *supra* note 23, at 679.

120. *Id.* at 680–81.

121. *Id.* at 680.

122. *Id.*

just as men, can be persecuted for reasons of race, religion, nationality, social group, and political opinion. Simply because the type of persecution is gender specific does not remove the claim for asylum from one of the enumerated grounds to that of a personal matter. This is at least the case with respect to a female petitioner who frames her asylum claim on the grounds that she is being persecuted because of her race,<sup>123</sup> nationality,<sup>124</sup> religion,<sup>125</sup> and/or political opinion.<sup>126</sup> However, this is not necessarily the case for one whose claim is based on persecution because of their social group.

Basing a claim on the ground of persecution because of social group is definitely problematic for women who are victims of domestic violence. Asylum adjudicators are reluctant to classify “women” or “women within a particular society” as a recognized social grouping.<sup>127</sup> The BIA and the U.S. courts are

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123. *Korablina v. I.N.S.*, 158 F.3d 1038, 1042, 1046 (9th Cir. 1998) (granting asylum to a Russian Jew of Ukrainian citizenship because she was severely harassed, beaten and threatened, and granting asylum to her daughter because she too was attacked and threatened with rape because of her mother’s Jewish heritage). *See generally* *Shoafra v. INS*, 228 F.3d at 1070 (granting asylum because applicant was raped on account of her ethnicity).

124. *Korablina*, 158 F.3d at 1043 (9th Cir. 1998).

125. D-V-, 21 I. & N. Dec. at 78 (granting asylum to petitioner because she was raped and beaten on account of her membership in a church that supported former Haitian President Aristide); *Kumar v. INS*, 204 F.3d 931 (9th Cir. 2000) (stating that even though an applicant was denied asylum on the ground of changed conditions in her country of Fiji, she had been persecuted because she and her mother were attacked in a Hindu temple and urged to convert to Christianity; she was also persecuted because of her Indian Ethnicity and family’s political affiliations); *In re S-A-*, Interim Dec. 3433 (B.I.A. 2000) (granting asylum to a young Moroccan woman who was abused physically and emotionally by her father due to her father’s orthodox Muslim beliefs).

126. D-V-, 21 I. & N. Dec. at 77 (granting asylum because petitioner was raped and beaten on account of her political support of former Haitian President Aristide); *Lopez-Galarza v. INS*, 99 F.3d 954, 963 (9th Cir. 1996) (granting asylum because petitioner was repeatedly raped, starved, and abused by Sandinista military officers in Nicaragua for her support of counter-revolutionary *contras*).

127. *See, e.g.*, R-A-, 21 I. & N. Dec. at 907 (denying asylum based on the fact that petitioner was unable to satisfy the BIA’s requirements, declaring the gender-based social group to which petitioner claimed she belonged as contrived); *Pierre*, 15 I. & N. Dec. at 462 (refusing asylum on the ground that Pierre was persecuted by her husband for personal reasons relating to their marriage); Center for Gender & Refugee Studies, *In re D-K-* Case No. 117 (Dec. 8, 1998), <http://cgrrs.uchastings.edu/law/index.php> (holding that applicant was unable to satisfy the asylum requirement when she was unable to

far more comfortable granting asylum on a finding that the domestic abuse was perpetrated on account of a 1951 Convention reason other than that of social group. An asylum adjudicator can understand that a woman can be persecuted because of her race, religion, nationality, or political opinion; there is precedent providing validity and plausibility to persecution for these concepts.<sup>128</sup> In comparison, authorities are reluctant to conclude that a woman is beaten simply because she is a woman. This goes hand-in-hand with a resistance to accepting women within society, except in very limited situations, as forming a social group.

Part of this resistance is arguably due to a lack of understanding why husbands beat their wives. This is evident in the BIA decision in *R-A*.<sup>129</sup> The approach that the Board takes in analyzing the reasons that a husband beats his wife can be viewed as ignorant, deliberately obtuse, or contrived. One would think that it is the former rather than the later:

He harmed her, when he was drunk and when he was sober, for not getting an abortion, for his belief that she was seeing other men, for not having her family get money for him, for not being able to find something in the house, for leaving a cantina before him, for leaving him, for reasons related to his mistreatment in the army, and “for no reasons at all.” Of all these apparent reasons for abuse, none was “on account of” a protected ground, and the arbitrary nature of the attacks further suggests it was not the respondent’s claimed social group characteristic that he sought to overcome.<sup>130</sup>

The BIA at no point discussed the psychological reasons that husbands abuse their wives. It did not consider that domestic abuse is selective action perpetrated to control the victim. Abuse is directed at the applicant because of the position she holds in his household—that of an inferior female subject to the power of

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prove that her husband beat her because of her status as a Congolese woman or because of her status as a member of a particular social group) [hereinafter D-K- Case Summary].

128. *See supra* notes 124–27.

129. *See, e.g.*, *R-A*, 22 I. & N. Dec. at 906.

130. *Id.* at 921.

her husband or father.<sup>131</sup> Nor did the BIA discuss in any depth that in a society that tolerates or permits domestic violence, women cannot be seen as equal to men; but rather, women within that society are seen as an inferior group such that a husband or father has the right to control by use of force if they deem it appropriate.<sup>132</sup> By ignoring the psychological reasons why husbands abuse and by failing to link these with the lack of governmental protection, the BIA effectively and logically reached the conclusion that women are not abused because they are a member of a cognizable social group but rather a member of an unfortunate marriage:

[This relationship] was a personal problem . . . . [H]er ex-husband . . . is not after her because she is an abused woman or because she shares some characteristic with any other women, but simply because she is the respondent, the woman he believed to be his woman, and that he feels he has the right to abuse, and the right to punish because she left him.<sup>133</sup>

It is here that the U.S. law diverges dramatically from other prominent signatory countries such as Australia, Canada, New

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131. See McKinnon, *supra* note 82, at 26; Gillespie, *supra* note 82, at 134; *Violence Against Women in the Family*, *supra* note 82, at 120; Seith, *supra* note 58, at 1810.

132. See R-A-, 22 I. & N. Dec. at 916. Upon the same basis, it can be argued that if a society views women as inferior and not entitled to equal protection of the law from assault, rape, and other forms of physical violence, it is a political issue. The respondent in R-A- also argued that she was persecuted on account of her political opinion—that is, her refusal to be dominated and controlled by men—but the BIA found she was unable to prove that this was her husband's reason for persecuting her. *Id.*

133. Center for Gender & Refugee Studies, In re G-R- Case No. 37, <http://cgrs.uchastings.edu/law/summaries.php> (last visited Aug. 30, 2006) [hereinafter G-R- Case Summary]. In his January 26, 1995 decision, the immigration judge found that the evidence did not demonstrate that El Salvadorian authorities refused to prosecute domestic violence cases. *Id.* Perhaps this would have made the matter social or political rather than personal, if the judge had ruled otherwise. *Id.* However, this promise did not come to fruition; the BIA subsequently granted a motion to remand. On the rehearing on Nov. 20, 1997, the immigration judge stated that, as far as domestic violence cases are concerned, they would be ineffective “except perhaps in the most severe cases.” *Id.*; see also D-K- Case Summary, *supra* note 126, at 4 (“The IJ determined that the applicant failed to establish past persecution on account of her actual or imputed political opinion.”); R-A-, 22 I. & N. Dec. at 921 (discussing the issue of why the domestic violence occurred, the BIA concluded that the abuse perpetrated on Ms. Alvarado was a private act of violence).

Zealand, the United Kingdom and a number of the European nations. First, these countries have been willing to recognize that women can constitute a recognizable social group within a society<sup>134</sup> on the basis that such groupings “reflect the operation of cultural, social, religious and legal factors bearing on the position of women in . . . [the given] society and upon their particular situation in family and other domestic relationships.”<sup>135</sup>

Recent decisions of the aforementioned countries led to the determination of why persecution should not be viewed simply as the persecutor’s personal motives. Instead, the phrase “on account of” incorporates the motivation of a state in its unwillingness or failure to provide protection.<sup>136</sup> This approach is based on the following premise:

Accepting as we do that Persecution = Serious harm +  
The failure of state protection, the nexus between the  
convention reason and the persecution can be provided  
*either* by the serious harm limb *or* by the failure of the  
state protection limb. This means that if a refugee  
claimant is at real risk of serious harm at the hands of  
a non-state agent (eg [sic] husband, partner or other  
non-state agent) for reasons unrelated to any of the  
Convention grounds, but the failure of state protection  
is for reason of a Convention ground, the nexus  
requirement is satisfied. Conversely, if the risk of harm  
by the non-state agent is Convention related, but the  
failure of state protection is not, the nexus requirement  
is still satisfied. In either case the persecution is for  
reason of the admitted Convention reason. This is  
because “persecution” is a construct of two separate but

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134. *See supra* note 18 and accompanying text.

135. Khwar, 210 C.L.R. at 28. Other countries willing to recognize women in a given society as a social group include Canada, Ward [1993] 2 S.C.R. at 739; New Zealand, Refugee Appeal No. 71427/99, paras. 104–06; and the United Kingdom, Shah, 2 A.C. at 652. This is also the opinion of the United Nations. *See* UNHCR Programme Executive Committee, Conclusion on Refugee Women and International Protection, 36<sup>th</sup> Sess., No 39(k) (1985).

136. Khawar, 210 C.L.R. at 12–13, 29, 40–41; Refugee Appeal No. 71427/99, N.Z.A.R. 545, para. 112; Shah, 2 A.C. at 646, 648, 653, 654; Hovarth, 1 A.C. at 515–16; *Incirciyan v. Minister of Employment and Immigration*, [1987] Immigration Appeal Board Decision M87-1541X (Can.).

essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is “for reason of” a Convention ground, the summative construct is itself for reason of a Convention ground.<sup>137</sup>

The reasoning behind the approach is the essential tenet behind the 1951 Convention and 1967 Protocol:

The international community was meant to be a forum of second resort for the persecuted, a “surrogate,” approachable upon failure of local protection. The rationale upon which international refugee law rests is not simply the need to give shelter to those persecuted by the state, but, more widely to provide refuge to those whose home state cannot or does not afford them protection from persecution.<sup>138</sup>

The BIA rejected “failure of state protection” as sufficient to bridge the nexus in R-A-,<sup>139</sup> finding that while “[s]ocietal attitudes and the concomitant effectiveness (or lack thereof) of governmental intervention very well may have contributed to the ability of the respondent’s husband to carry out his abusive actions,”<sup>140</sup> nexus is established not by lack of state protection but by the motivation of the persecutor.<sup>141</sup> In this case, it was motivated by the husband and not for a Convention reason. The reasoning behind the BIA’s decision is twofold. First, even if a

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137. Refugee Appeal No. 7142/99, N.Z.A.R. 545, para. 112; *see also* Khawar, 210 C.L.R. at 40–41; Rajudeen v. Minister of Employment and Immigration, [1984] 55 N.R. 129 (Can.); Shah, 2 A.C. at 646, 648, 653, 654; Hovarth, 1 A.C. at 515–16. This is consistent with the approach of the UNHCR. *See* UNHCR, *Guidelines on International Protection: Gender-Related Persecution within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees* § 21 (May 2002) (“In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reasons of a Convention ground, the causal link is also established.”).

138. Ward, 2 S.C.R. at 716–17; *see also* Khawar, 210 C.L.R. at 38; Refugee Appeal No. 71427/99, N.Z.A.R. 545, para. 58; Hovarth, 1 A.C. at 508–09.

139. R-A-, 22 I. & N. Dec. at 922.

140. *Id.*

141. *Id.*

country does have effective laws, it does not follow that these laws will deter a husband's abusive behavior.<sup>142</sup> While it may not deter, an effective legal system can nonetheless restrain the behavior. For example, in the case of Ms. Alvarado, she sought assistance from the police and the courts. The level of abuse she suffered was so great, one would have thought that in a country with an effective system of protection, the husband would have faced a term of imprisonment, if not, at the very least, a restraining order. Furthermore, while no method of protective order is absolute, it definitely would have made his abusive behavior more difficult and may have deterred some, if not all, of the abuse.<sup>143</sup>

Second, the BIA likewise rejected the broader argument of failure of state protection—that is, if the reason for the state's failure to provide protection is related to a 1951 Convention reason, then this is sufficient to meet the nexus requirement. According to the BIA, this approach, advocated by other major signatory countries, was inconsistent with the “on account of”<sup>144</sup> test as laid down in *Elias-Zacarias*.<sup>145</sup> The true motive, however, becomes evident upon further reading of the BIA's decision—it is the fear of floodgates. The BIA's ground for strictly applying *Elias-Zacarias*<sup>146</sup> is that if it were to adopt “failure of state protection” to establish nexus, it would be powerless to restrict its operation to violence against women.<sup>147</sup> Of particular concern to the BIA was its application to claims “arising from civil war, as well as any other circumstance in which a government lacked the ability effectively to police all segments of society.”<sup>148</sup>

However, the BIA is incorrect in its argument that there would be no principled way of limiting the ambit of nexus if based on failure to provide state protection.<sup>149</sup> Consequently, the BIA's overwhelming concern of opening the borders to all in a

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142. *Id.*

143. *Id.*

144. *Id.* at 923.

145. *Elias-Zacarias*, 502 U.S. at 478.

146. *Id.*

147. R-A-, 22 I. & N. Dec. at 923.

148. *Id.*

149. *Id.*

country that cannot provide protection for reasons such as civil war is unwarranted. Failure to provide state protection is and has been limited by those signatory countries that favor this approach by the application of three principles: (1) the burden of proof; (2) the standard of state protection; and (3) nexus between the lack of state protection and a 1951 Convention reason.

In analyzing the first limitation, the fundamental principle is that unless a state is in a condition of complete breakdown, there is a presumption that the state is capable of protecting its citizens.<sup>150</sup> Accordingly, an applicant who wishes to claim persecution on account of failure of state protection bears the burden of providing evidence of a “capable state’s” failure to protect. The applicant must present sufficient evidence to establish that the government of her country is unable or unwilling to provide protection. Canada<sup>151</sup> and New Zealand<sup>152</sup> have stipulated the burden as “clear and convincing evidence,” while the United Kingdom<sup>153</sup> and Australia<sup>154</sup> require “sufficient cogency.”

The second limitation—the standard of state protection—makes it clear that it is not the duty of a state to eliminate all risks of harm for their citizens; the failure of state protection is not synonymous with guaranteed immunity from persecution. The laws of Australia, Canada, New Zealand, and the United Kingdom are in relative conformity on this issue. The only protection a state must offer is “effective protection from private

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150. Khawar, 210 C.L.R. at 39; Ward, 2 S.C.R. at 725; Refugee Appeal No. 71427/99, N.Z.A.R. 545, para. 68.

151. Ward, 2 S.C.R. at 724 (finding that this presumption can be rebutted by “clear and convincing” evidence of the state’s inability to protect); *see also* Canadian Gender Guidelines, *supra* note 59, para. C(2) (providing further guidance as to how an applicant may meet the “clear and convincing evidence test;” cautioning that simply because a woman has not approached the state for protection should not mean that her claim should be refused if she can demonstrate that it was objectively unreasonable for her to do so and that traditional types of evidence may not always be available to meet the clear and convincing test; and further cautioning that adjudicators should be prepared to refer to alternative forms of evidence, including testimony of others in similar situations or the testimony of the claimant alone).

152. Refugee Appeal No. 71427/99, N.Z.A.R. 545, para. 68 (expressly approving the approach in Ward).

153. Hovarth, 1 A.C. at 511.

154. Khawar, 210 C.L.R. at 29 (using the term “sufficient cogency”).

persecution sufficient to remove any real chance that it will occur . . . . [A]bsolute guarantees against harm are impossible in fact, and are not required in law to negate a real chance of persecution.”<sup>155</sup> For a state to be regarded as being unable or unwilling to provide protection, more is required than “maladministration, incompetence, or ineptitude.” What must be demonstrated is “state tolerance or condonation of domestic violence and systematic discriminatory implementation of the law.”<sup>156</sup>

The third limitation is that the reason for the state’s failure to provide protection must be related to one of the 1951 Convention reasons—that is, race, religion, nationality, political opinion, or social group as explicitly recognized by those states who have adopted this approach.<sup>157</sup>

The fear stated in *R-A*<sup>158</sup> is scare mongering. If “failure of

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155. *Mehmood v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 1799 (Austl.), para. 15 (citing *Minister for Immigration and Multicultural Affairs v. Thiyagarajah*, (1997) 80 F.C.R. 543, 566–68 (Austl.)); *Minister for Immigration and Multicultural Affairs v. Prathapan* (1998) 86 F.C.R. 95, 101–06 (Austl.); *Minister for Immigration and Multicultural Affairs v. Kandasamy* (2000) F.C.A. 67 (Austl.) paras. 50–52; *Ahmed v. Minister for Immigration and Multicultural Affairs* (2000) F.C.A. 123, 27.

156. *Khawar*, 210 C.L.R. at 12. Canada, New Zealand, and the United Kingdom have also acknowledged that effective protection is all that is required. *See Minister of Employment and Immigration v. Villafranca* (1992) FCA 130, 132–33; *Refugee Appeal No. 71427/99*, N.Z.A.R. 545, para. 68; *Hovarth*, 1 A.C. at 500, 507, 510–11, 516. It has been suggested that the law in the United Kingdom is inconsistent with this approach. *See Refugee Appeal No. 71427/99*, N.Z.A.R. 545, paras. 62–63. This, however, is incorrect. While Lord Craig in *Hovarth* did conclude that “the sufficiency of state protection is not measured by the existence or a real risk of an abuse of rights but by the availability of a system for the citizen and a reasonable willingness by the state to operate it,” (*see Hovarth*, 1 A.C. at 516), he was seeking to link failure of state protection to a 1951 Convention ground, for which determination of the state’s attitude is an important part. In doing so, he sought to negate a wider interpretation, which was that a real risk of failure to protect, for whatever reason, was by itself sufficient to trigger 1951 Convention protection. *See id.*

157. *Khawar*, 210 C.L.R. at 13, 28, 40; *Canadian Gender Guidelines*, *supra* note 59, para. D(2); *Refugee Appeal No. 71427/99*, N.Z.A.R. 545, para. 63; *Hovarth*, 1 A.C. at 499–500.

158. *R-A*, 22 I. & N. Dec. at 923 (stating the fear that the adoption of “failure of state protection” would result in shifting the analysis in cases of refugee claims arising from civil war, in that a state could not provide protection and therefore all victims of the civil war would be able to seek asylum).

state protection” is to fulfill nexus, it must be proven that the reason for a state’s tolerance or inability to protect is for a 1951 Convention reason. Additionally, the individual must prove that she is not a victim of random violence occurring in her own country to satisfy the threshold requirement of persecution.<sup>159</sup> The BIA failed to address these limiting factors.

Finally, *Elias-Zacarius*<sup>160</sup> cannot be read as preempting the Supreme Court’s view that failure of state protection for a 1951 Convention reason cannot satisfy nexus. Failure of state protection was not raised in the context of the nexus argument, and until the Supreme Court is asked to render a decision on this basis, it remains an open question.

The 1951 Convention requirements effectively limit the application of “failure of state protection,” and the fear of floodgates is misguided. A member of the House of Lords drew an arresting hypothetical that brings this issue into perspective:

[S]uppose that the Nazi government in those early days did not actively organise violence against Jews, but pursued a policy of not giving any protection to Jews subjected to violence by neighbours. A Jewish shopkeeper is attacked by a gang organised by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on grounds of race? Again, in my opinion, he is.<sup>161</sup>

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159. See Macklin, *supra* note 95, at 40 and accompanying text; see also G. GOODWIN-GILL, *THE REFUGEE IN INTERNATIONAL LAW* 175 (1996) (stating, with respect to applicants who have fled a civil war, “it nevertheless remains for the applicant to show that he or she is unable to obtain the protection of the state, and to establish the requisite Convention link”).

160. *Elias-Zacarias*, 502 U.S. at 483.

161. *Shah*, 2 A.C. at 654.

#### IV. THE THIRD LIMITING FACTOR—ESTABLISHING A CONVENTION GROUND

Any applicant for asylum must prove that he or she possesses, or the persecutor believes that they possess, one of the enumerated characteristics: race, religion, nationality, political opinion, or social group.<sup>162</sup> Some evidence, direct or circumstantial, must be provided to persuade the asylum adjudicator that the petitioner is a member of a particular race, nationality, religious order, or social group; possesses a particular political opinion; or the persecutor imputed such a characteristic to the petitioner.<sup>163</sup>

While the 1951 Convention and likewise the INA do not provide a definition of any of the enumerated characteristics that have been left to be developed within the domestic laws of the signatory countries, none have posed more difficulty than the characteristic of “social group.”<sup>164</sup> In determining what types of persecution should be included within the 1951 Convention, social group was added to the definition “as an afterthought.”<sup>165</sup> The only explanation was that “experience had shown that certain refugees had been persecuted because they belonged to particular social groups.”<sup>166</sup> This was a recognition that groups existed in the past and that new social groups may develop, that while not yet foreseen, may nonetheless be deserving of 1951 Convention protection.<sup>167</sup> It, therefore, has been suggested that “the ‘social group’ category was meant to be a catch-all that

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162. See Convention Relating to the Status of Refugees, G.A. Res. 429(v), ch. I, art. I(A)(2) (Dec. 14, 1951).

163. R-A-, 22 I. & N. Dec. at 912. (citing Elias-Zacarias, 502 U.S. at 483; T-M-B-, 21 I. & N. Dec. at 775).

164. As the categories of race, religion, nationality, and political opinion do not give rise to the fear of floodgates, they will not be examined in detail. See generally R-A-, 22 I. & N. Dec. at 906 for a discussion of how a fear of the floodgates motivated the court’s decision with respect to the category of gender.

165. ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966).

166. Fatin, 12 F.3d at 1239 (quoting Conference of Plenipotentiaries on the Status of Refugees & Stateless Persons, Summary of Records of the 3rd Mtg., U.N. Doc. A/CONF.2/SR.3 at 4 (Nov. 19, 1951)).

167. David L. Neal, *Women as a Social Group: Recognizing Sex-Based Persecution as grounds for Asylum*, 20 COLUM. HUM. RTS. L. REV. 203, 229 (1998).

could include all the bases for and types of persecution which an imaginative despot might conjure up.”<sup>168</sup> This assertion justifiably creates a fear that the limits of who and what may constitute a social group is boundless and will open the borders to a wide array of refugees. As will be discussed, the concept of social group was not intended to be a catch-all and does have bounds that renders groundless the fear created by these types of statements.

While the characteristics of race, religion, nationality, and political opinion are all concepts asylum adjudicators generally understand, in comparison the characteristic of social group is amorphous. The inherent danger associated with its amorphous nature is that countries concerned with its potential width, particularly if it is a catch-all,<sup>169</sup> may adopt too narrow a definition out of fear of opening their borders to all of mankind who face persecution. If a government was so narrow-minded, it could adopt so narrow a definition that it might preclude any asylum claim on the ground that a petitioner does not fall within a protected social group. United States jurisprudence is indicative of caution and adopts a narrow concept of social group. The BIA first indicated this adoption as preferable in the case of *In re Acosta*:

[P]ersecution on account of membership in a particular social group [encompasses] persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common

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168. Kelly, *supra* note 58, at 648 (citing Arthur C. Helton, *Persecution on Account of Membership in a Social Groups as a Basis for Refugee Status*, 15 COLUM. HUM. RTS. L. REV. 39, 41–42, 45 (1983)).

169. See UNHCR, *Guidelines On International Protection: “Membership of a particular social group” within the context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol relating to the Status of Refugees*, § 2 (May 7, 2002) (stating that it is not intended for the social group category to be interpreted as a catch-all).

characteristic that defines the group, it must be one that members of the group either cannot change or should not be required to change because it is fundamental to their individual identities or consciences.<sup>170</sup>

The *Acosta* decision, however, did represent promise for those who are victims of gender persecution. In defining social group as requiring an “immutable characteristic,” the BIA stated that “the shared characteristic might be an innate one such as sex, color or kinship ties, or in some circumstances it might be a shared past experience . . . .”<sup>171</sup>

In 1990, the BIA, relying on the immutable characteristic definition, found that homosexuals constituted a social group, striking down the INS’s argument that “socially deviated behavior, i.e. homosexual activity, is not a basis for finding a social group.”<sup>172</sup> This decision was instrumental in the Attorney General, Janet Reno issuing an Order that “an individual who has been identified as homosexual and persecuted by his or her government for that reason alone may be eligible for relief under the refugee laws on the basis of persecution because of membership in a social group.”<sup>173</sup> The acceptance of homosexuals as forming a social group therefore was thought to demonstrate much promise for social groups based on gender.

These decisions however were concerned more with sexual orientation than gender, and it was not until 1996 that the first successful case based on female gender—*In re Kasinga*<sup>174</sup>—was

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170. *Acosta*, 9 I. & N. Dec. at 233.

171. *Id.* at 234.

172. *In re Toboso-Alfonso*, 20 I. & N. Dec. 819, 822 (B.I.A. 1990) (granting asylum to a gay Cuban man); see also *In re Tenorio*, No. A72-093-558 (B.I.A. 1999). The I.J. granted asylum to a Brazilian man on the ground that he was persecuted because of his homosexuality—he was beaten and stabbed while his attackers used antigay epithets. *Id.* On appeal, the BIA upheld the lower court’s decision finding that the I.J. was correct in determining that Tenorio was a member of a social group based on his sexuality. *Id.*; see also *In re Dickson Odibi*, 21 Immig. Rptr. B1-257 (B.I.A. 2000) (denying a gay male admission because the BIA determined that the applicant had not proven a well-founded fear of being persecuted on the evidence provided). For commentary on these cases, see *Immigration Daily*, <http://www.ilw.com/immigdaily/digest/2000,0825.shtm>.

173. Attorney Gen. Order No. 1895 (June 19, 1994).

174. *Kasinga*, 21 I. & N. Dec. at 359.

decided. The BIA made a ground-breaking decision when it granted asylum to a young woman, persecuted because of her social group, expanding the definition of social group to include “young women of the Tchama-Kunsuntu Tribe who have not had FGM [female genital mutilation], as practiced by that tribe, who oppose the practice.”<sup>175</sup> The BIA found the defined social group met the *Acosta* immutable characteristic requirement “being a ‘young woman’ and a ‘member of the Tchama-Kunsuntu Tribe’ cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”<sup>176</sup>

This, however, was the high point of the gender decisions. *R-A-* represents the low point as for women who base their claim for protection on their gender. When the BIA once again came to deal with the issue of whether women constitute a particular social group, it took great pains to restrict the scope of *Kasinga*,<sup>177</sup> drawing on its statement in *Acosta* that “[t]he particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis”<sup>178</sup> and that sharing common immutable characteristics was only the “starting point” of the assessment.<sup>179</sup>

In *R-A-*, Ms. Alvarado claimed to be persecuted on account of her membership in the social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.”<sup>180</sup> While recognizing that the *Acosta* test would probably be satisfied, the BIA nevertheless concluded that Ms. Alvarado’s claim, based on particular social group, must fail.<sup>181</sup> The reason for this failure was Ms. Alvarado’s inability to prove a voluntary associational relationship of the alleged social group; recognition or perception by the applicant’s society of the existence of the alleged group; opposition on her part to the

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175. *Id.* at 358, 365, 367.

176. *Id.* at 366.

177. *Kasinga*, 21 I. & N. Dec. 357.

178. *Acosta*, 19 I. & N. Dec. 211.

179. *R-A-*, 22 I. & N. Dec. at 919

180. *Id.* at 920.

181. *Id.* at 918–19.

alleged persecution; and the sufficiently limited size of the claimed grouping.<sup>182</sup> While the BIA signified that these were not mandatory requirements, they were the death knell for Ms. Alvarado's alleged social grouping.<sup>183</sup>

The BIA explicitly stated that the lack of "a voluntary associational relationship," was of "central concern," citing several decisions of the Ninth Circuit supporting this as a requirement for the establishment of a particular social group.<sup>184</sup> This restrictive approach had come to the forefront in *Sanchez-Trujillo v. INS*:<sup>185</sup>

[T]he term [social group] does not encompass every broadly defined segment of a population . . . . Instead, the phrase . . . implies a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete group.<sup>186</sup>

Curiously, this was not seen by the BIA as a requirement in *Kasinga*, nor in the cases concerned with homosexuality,<sup>187</sup> all of which had been decided post *Sanchez-Trujillo*.<sup>188</sup>

Since its inception, the *Sanchez-Trujillo*<sup>189</sup> definition of social group has been viewed as far too restrictive, and for this reason it has been heavily criticized.<sup>190</sup> Some courts have refused to

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182. *Id.*

183. *Id.* at 919.

184. *Id.* at 917–18.

185. 801 F.2d 1571 (9th Cir. 1986).

186. *Id.* at 1576.

187. *See* Toboso-Alfonso, 20 I. & N. Dec. at 822; *In re* Tenorio, No. A72-093-558 (IJ San Francisco, Ca., July 26, 1993). For commentary on these cases, see Immigration Daily, <http://www.ilw.com/immigdaily/digest/2000,0825.shtm>.

188. 801 F.2d 1571.

189. *Id.*

190. *See, e.g.*, Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in Particular Social Group*, 26 CORNELL INT'L L.J. 505, 555 (1993); Suzanne B. Goldger, *Give Me Liberty or Give Me Death: Political Asylum and the Global Persecution of Lesbians and Gay Men*, 26 CORNELL INT'L L.J. 605, 612 (1993); Daniel Compton, *Recent Development: Asylum for Persecuted Social Groups: A Closed Door Left Slightly Ajar*, 62 WASH. L. REV. 913, 914 (1987).

adopt it,<sup>191</sup> and the Ninth Circuit itself refined its operation in *Hernandez-Montiel v. INS*<sup>192</sup>—though, unfortunately, not until the year following the decision of *R-A*-. The Ninth Circuit determined that “gay men with female sexual identities in Mexico” constituted a particular social group for the purposes of the INA.<sup>193</sup> In doing so, the Ninth Circuit explicitly dealt with the *Sanchez-Trujillo* requirement of the “existence of a voluntary associational relationship among the purported members.”<sup>194</sup> The court acknowledged that it was the only circuit court to create such a requirement and agreed with the Seventh Circuit that this requirement “[when] read literally conflicts with *Acosta*’s immutability requirement.”<sup>195</sup> Furthermore, the court acknowledged that other decisions it made conflicted with a voluntary associational relationship.<sup>196</sup> The Ninth Circuit resolved the inconsistency by finding that the voluntary associational requirement is an alternative to the requirement of an immutable characteristic:

We thus hold that a “particular social group” is one united by a voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or consciences of its members that members either cannot or should not be required to change it.<sup>197</sup>

In this way, the court was able to apply the *Acosta* standard and determine that Geovanni Hernandez-Montiel’s transvestite sexual identity was an immutable characteristic, part of his inherent identity, and, as a consequence, he should not be required to change it.<sup>198</sup> The lack of voluntary association, as a consequence of the Ninth Circuit’s decision, is no longer a

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191. *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998).

192. 225 F.3d 1084 (9th Cir. 2000).

193. *Id.* at 1094.

194. 801 F.2d at 1576.

195. *Herandez-Montiel*, 225 F.3d at 1092 (quoting *Lwin*, 144 F.3d at 512).

196. *Id.*

197. *Id.* at 1093 n.6 (stating that this “harmonizes it with *Acosta*’s immutability requirement” and that this is similar to the definition of social group adopted by the Supreme Court of Canada in *Canada v. Ward*).

198. *Id.* at 1095.

fundamental reason for the BIA's failure to recognize Ms. Alvarado's particular social grouping.

The BIA also concluded that Ms. Alvarado's claim failed because Guatemala does not perceive this group to exist in any form—that is, “Guatemalan women who have been involved intimately with Guatemalan male companion, who believe that women are to live under male domination.”<sup>199</sup> The BIA concluded that the group was contrived principally, if not exclusively, for purposes of this asylum case, and that Ms. Alvarado failed to establish that victims of spousal abuse or their male oppressors viewed the victims as falling within this social grouping.<sup>200</sup>

It is true, one must admit, that this group is contrived; the description of the group itself is cumbersome and artificial. However, the blame for this and the failure to articulate the group more realistically can be laid at the door of immigration officials, including the BIA, the circuit courts, and their concern for floodgates. The social grouping—“Guatemalan women who have been involved intimately with a Guatemalan male companion, who believes that women are to live under male domination”—carries with it an inference that the petitioner opposes the treatment and beliefs of her companion. This relates directly to the requirement that there must be opposition to the complained persecution, as articulated in cases such *Fatin*<sup>201</sup> and *Kasinga*.<sup>202</sup>

When determining the meaning of particular social group in *Acosta*, the BIA applies the doctrine of *ejusdem generis*, concluding that a particular social group must be construed in a manner consistent with the other 1951 Convention categories of race, nationality, religion, and political opinion.<sup>203</sup> The only requirement denoted on this basis was that the other 1951 Convention categories required persecution aimed at an immutable characteristic—a characteristic either beyond the

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199. R-A-, 22 I. & N. Dec. at 918.

200. *Id.*

201. *Fatin v. INS*, 12 F.3d at 1241.

202. *Kasinga*, 21 I. & N. Dec. 365–66.

203. *Acosta*, 19 I. & N. Dec. at 233 (“[G]eneral words used in an enumeration with specific words should be construed in a manner consistent with the specific words.”); see also *Cleveland v. United States*, 329 U.S. 14, 15 (1946) (discussing *ejusdem generis*).

power of an individual to change or is so fundamental to individual identity or conscience that the individual ought not be required to change it.<sup>204</sup> Since *Acosta* and because of the amorphous nature of “particular social group,” the BIA has selectively imposed a requirement of opposition to treatment that has its place not in determining whether a particular social group exists, but in whether there is a “well-founded fear of persecution.”<sup>205</sup> There is no requirement of opposition imposed on individuals to establish that they are of a certain race, religion, or nationality or hold a particular political opinion. Therefore, upon the application of *ejusdem generis*, no such requirement should be placed on those who seek to establish that they are part of a particular social group. If a Jewish woman in Nazi Germany had failed to oppose the rape and beatings that she was meted out by Arian Germans, would her claim of being persecuted as a Jew not be recognized?

Whether an individual opposes persecution plays a role in assessing asylum and in imposing a boundary against limitless protection. However, its role is not in the concept of determining social group, race, religion, nationality, or political opinion, but rather whether persecution or the fear thereof is “well-founded.”<sup>206</sup> It may be that in some situations, no opposition is necessary for a fear to be well-founded, and, in other situations, it may tip the balance. Imposing a requirement that to constitute a recognizable female social group, the grouping must encompass opposition to persecution (for example “young women of the Tchama-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, who oppose the practice.”<sup>207</sup>) is clearly aimed at limiting the size of the social group. The questionable nature of this is furthered when it is realized that no opposition requirement is imposed in articulating and recognizing homosexuals, transvestites and families as social groups.

The other reason for the contrived nature of the social group was arguably the concern that if the group was claimed to be

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204. *Id.* (citing GRAHL-MADSEN, *supra* note 165, at 39; GOODWIN-GILL, *supra* note 159, at 31).

205. *Acosta*, 19 I. & N. Dec. at 224.

206. *See infra* Part V (discussing whether a fear is well-founded).

207. *Id.* at 358, 365, 367.

“married women in Guatemala” or “women in Guatemala,” the BIA would reject the grouping on the basis of the size of the group. While this was not explicitly stated, it is implicit from the BIA’s approach that, if the social group analysis was simply based on the fact that common characteristics were shared by persons within the group, then “the social group concept would virtually swallow the entire refugee definition if common characteristics, coupled with a meaningful level of harm, were all that need be shown.”<sup>208</sup> Furthermore, in *Sanchez-Trujillo*, the Ninth Circuit, in defining social group, asserted that it must be a cognizable group and not “encompass every broadly defined segment of a population.”<sup>209</sup>

Size of the social group is, therefore, an important issue in determining whether a particular social group has been recognized.<sup>210</sup> However, it is argued that size has no part to play. The 1951 Convention protection is not founded on how large or small a particular social group may be. “Once a person is subjected to a measure of such gravity that we consider it ‘persecution,’ that person is ‘persecuted’ in the sense of the [1951] Convention, irrespective of how many others are subjected to the same or similar measures.”<sup>211</sup> Yet, it is what also arguably led the BIA in *Kasinga* to determine the social group to be “young women of the Tchama-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, who oppose the practice.”<sup>212</sup> The BIA accepted this as the most preferable of several options put forward by the parties. It is what lead petitioners for asylum in later cases to similarly contrive their grouping.

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208. R-A-, 22 I. & N. Dec. at 919.

209. *Sanchez-Trujillo v. INS*, 801 F.2d at 1576.

210. *Bortnikov v. INS*, 63 Fed. Appx. 287, 289 (9th Cir. 2003) (“Russian journalists are too large and diverse a collection of individuals to qualify as a ‘particular social group.’”); *Lukwago v. Ashcroft*, 329 F.3d 157, 172 (3d Cir. 2003) (noting that children are not a social group as this grouping represents an “extremely large and diverse” group); *Civil v. INS*, 140 F.3d 52, 56 (1st Cir. 1998) (stating that a Haitian youth who possessed pro-Aristide political views failed to show a cognizable social group on the basis that social group does not encompass “every broadly defined segment of a population”).

211. Felicite Stairs & Lori Pope, *No Place Like Home: Assaulted Migrant Women’s Claims to Refugee Status and Landings on Humanitarian and Compassionate Grounds*, 6 J.L. & SOC. POL’Y 148, 171 (1990) (quoting GRAHL-MADSEN, *supra* note 165, at 213).

212. *Id.* at 358, 365, 368.

The concern that “[t]o hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country,”<sup>213</sup> is simply untrue. Any applicant for asylum, whether basing their persecution on social group or one of the other 1951 Convention grounds, must prove they meet the threshold requirements for refugee status. Simply because a social grouping exists and is large in size does not mean the petitioner is entitled to a grant of asylum.

Harking back to the approach in *Acosta* and the application of *ejusdem generis*, no size limitation is imposed on race, religion, nationality, or political opinion. If an individual is persecuted because she is of the Catholic faith, Jewish, or an ethnic Albanian, to give but a few examples, protection is not denied because the size of the individual’s religion, race, or nationality is too great. Rather, each individual’s entitlement to 1951 Convention protection is based on meeting all of the requirements of the refugee definition.

The social group to which Ms. Alvarado belongs, and that should have been claimed, is that of “married women in Guatemala” or “women in Guatemala.” It is a cognizable group within Guatemalan society. The artificial and incorrect application of the requirements of size and opposition with respect to membership in a social group based on gender resulted in the invention of a group that the BIA correctly found was not recognized by Guatemalan society. Importantly and interestingly, the majority of the BIA did not close the door to the possibility that this type of grouping may later qualify as a cognizable social group. Instead, the majority expressed the view that it was unnecessary to discuss the other proposed social group definitions of “Guatemalan women” and “battered spouses” on the basis that these groupings would fail under the nexus requirement. Therefore, the majority deemed it unnecessary to discuss whether these alternative proposals may qualify.<sup>214</sup>

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213. Sanchez-Trujillo, 801 F.2d at 1577; see also Lopez v. INS, 775 F.2d 1015, 1017 (9th Cir. 1985); Chavez v. INS, 723 F.2d 1431, 1434 (9th Cir. 1984).

214. R-A-, 22 I. & N. Dec. at 920 n.2.

Other signatory countries have not taken the limiting and artificial approach that the U.S. BIA and courts have taken in applying their definition of particular social group to gender-based claims. That a social group can be defined by gender has clearly been accepted.<sup>215</sup> Precedents in Canada,<sup>216</sup> New Zealand,<sup>217</sup> and the United Kingdom<sup>218</sup> are largely synonymous with that of the United States, at least to the extent that they have adopted a test of immutable characteristics or voluntary association. While Australian jurisprudence discussing who constitutes a social group is arguably wider than the United States' jurisprudence, it certainly includes immutable characteristics.<sup>219</sup>

Similar to the Ninth Circuit approach in *Hernandez-Montiel*, voluntary association or cohesiveness is not to be the

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215. Some countries expressly legislated to this effect. *See, e.g.*, Refugee Act, 1996 (Act No. 17/1996) (Irish law stating that a particular social group includes "membership of a group of persons whose defining characteristic is their belonging to the female or the male sex"), available at [http://www.irishstatutebook.ie/1996\\_17.html](http://www.irishstatutebook.ie/1996_17.html); *see also* Refugees Act, 1998, Bill 19544 (GG) (South African law specifically enumerating gender as a social group deserving protection under the Refugees). Swedish legislation, while not providing that women can constitute a social group, nevertheless provides protection. *See* Swedish Aliens Act ([SFS] 2006:716).

216. Ward, 2 S.C.R. at 739 ("(1) [G]roups defined by an innate or unchangeable characteristic [for example, by gender, linguistic background, sexual orientation]; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association [for example, human rights activists]; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.").

217. Refugee Appeal No. 71427/99, N.Z.A.R. 545, para. 98 ("(a) Groups defined by an innate or unchangeable characteristic; (b) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (c) Groups associated by a former voluntary status, unalterable due to its historical permanence.") (quoting Ward, 2 S.C.R. at 689); *see also* Re G.J. [1998] I.N.L.R. 387 (N.Z. Refugee Status Appeals Authority).

218. Shah, 2 A.C. at 643–44, 651, 658. The United Kingdom adopted an approach similar to Ward in *Montoya v. Sec'y of State for the Home Dep't*, [2002] E.W.C.A. Civ. 620 ¶ 7 (A.C.).

219. *S v. Minister for Immigration and Multicultural Affairs* (2004) 217 C.L.R. 387, 400 (Austl.) ("First, the group must be identifiable by a characteristic or attribute common to all members of the group. Secondly [sic] the characteristic or attribute common to all members of the group cannot be the shared fear of persecution. Thirdly [sic], the possession of that characteristic or attribute must distinguish the group from society at large.").

sole determinate of the existence of a social grouping, although it may assist in defining the group.<sup>220</sup> The importance of the cognizability has also been recognized; however, it has been cautioned that:

Communities may deny the existence of particular social groups because the common attribute shared by members of the group offends religious or cultural beliefs held by a majority of the community. Those communities do not recognize or perceive the existence of the particular social group, but it cannot be said that the particular social group does not exist.<sup>221</sup>

Rather, they must establish three things, one of which is “the possession of that characteristic or attribute must distinguish the group from society at large.”<sup>222</sup> Importantly, each of these countries has affirmatively stated that size has no role to play.<sup>223</sup> The reason was ably explained in *Minister for Immigration and Multicultural Affairs v. Khawar*: “There are instances where the victims of persecution in a country have been a majority. It is power, not number, that creates the conditions in which persecution may occur.”<sup>224</sup> Finally, nowhere in the definition of any of these countries is it voiced that opposition to the threatened or occurring persecution is a requirement.

In applying the immutable characteristics test, the courts in Canada, New Zealand, and the United Kingdom have all recognized that “women within a given society” can constitute a social grouping.<sup>225</sup> Similarly, Australia reached this conclusion in

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220. *A v. Minister for Immigration and Ethnic Affairs* (1997) 190 C.L.R. 225, 228 (Austl.); *Ward*, 2 S.C.R. at 739; *Chan v. Canada (Minister of Employment and Immigration)*, [1995] 128 D.L.R. (4th) 213, 247; *Refugee Appeal No. 71427/99*, N.Z.A.R. 545, para. 104; *Shah*, 2 A.C. at 642–43, 651, 657–58, 661.

221. *S*, 217 C.L.R. at 400, 404, 413.

222. *Id.* at 400.

223. UK Immigration Appellate Authority, *Asylum Gender Guidelines* § 3.45 (2000); *cf. Khawar*, 210 C.L.R. at 13; *Canadian Gender Guidelines*, *supra* note 59, at Guideline 4, A. III; *Immigration Appellate Authority, Asylum Gender Guidelines* 40 (Can. 2000), *available at* <http://www.asylumsupport.info/publications/iaa/gender.pdf>; *Refugee Appeal No. 71427/99*, N.Z.A.R. 545, para. 109.

224. *Khawar*, 210 C.L.R. at 13.

225. *Narvaez*, 2 F.C. 55, para. 9 (Fed. Ct.); *Refugee Appeal No. 71427/99*, N.Z.A.R.

applying its test for “social group.”<sup>226</sup> In adopting this approach, not all women will qualify as being part of a particular social group. Social, cultural, religious, or similar reasons will need to define the group, and, in this way, the group is circumscribed. “Generalisations about the position of women in particular countries are out of place in regard to issues of refugee status. Everything depends on the evidence and findings of fact in the particular case.”<sup>227</sup> However, if the applicant in *R-A* claimed she was part of the social group of “married women in Guatemala,” based on the approach taken in these countries, she would have been part of a cognizable social group. Evidence was provided of the extreme patriarchal nature of Guatemalan society establishing that domestic abuse is regarded as a family matter and, therefore, women’s options are few.<sup>228</sup> As such, “married women” are regarded as culturally and socially different. Their gender defines their status within Guatemalan society.

It should also be remembered that the other threshold requirements of the refugee definition also serve the purpose of further defining and limiting the scope of women from within a grouping being entitled to protection. Therefore, “married woman in X society” would need to prove that they were persecuted or face persecution; that the persecution is on account of their membership of their social grouping; and that their fear was well-founded. Additionally, as will be discussed, they will need to have entered the borders of the United States.

#### V. THE FOURTH LIMITATION—THE FEAR MUST BE “WELL-FOUNDED”

Before any applicant may be granted asylum, she bears the burden of proving to the satisfaction of the asylum adjudicator that her fear of persecution is well-founded.<sup>229</sup> For individuals to gain protection, they do not have to prove that they have been persecuted in the past, but only that they have a well-founded

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545, para. 106; Shah, 2 A.C. at 629.

226. Khawar, 210 C.L.R. at 1–2.

227. Shah, 2 A.C. at 635.

228. *R-A*, 22 I. & N. Dec. at 919, 939.

229. 8 C.F.R. § 208.13(a) (2006).

fear of future persecution if they are returned to their country of nationality.<sup>230</sup>

The Supreme Court determined that the applicant's fear will be well-founded if she is able to establish a reasonable possibility of persecution if returned to her country.<sup>231</sup> This does not mean that it must be more probable than not,<sup>232</sup> but rather a reasonable possibility may be as low as a one in ten chance.<sup>233</sup> This standard has now been statutorily enacted in the Code of Federal Regulations:

An applicant has a well-founded fear of persecution if . . . (A) the applicant has a fear of persecution in his or her country of nationality or . . . last habitual residence[;] . . . (B) [t]here is a reasonable possibility of suffering such persecution if he were to return to that country, and (C) he or she is unable or unwilling to return to, or avail himself or the protection of that country because of such fear.”<sup>234</sup>

To prove a reasonable possibility, the applicant must satisfy a two prong test. She must show that her fear of persecution is both “subjectively held” and “objectively reasonable.”<sup>235</sup> To fulfill the subjective prong, the applicant will need to prove that the fear of persecution if returned to her country of origin is genuine. This will largely be a credibility determination.<sup>236</sup> In comparison, the objective prong is aimed at determining whether the reactive fear of the applicant is rational and

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230. Both fear of future persecution and past persecution may form the basis of a “well-founded fear of persecution.” See *Yang v. U.S. Att’y Gen.*, 418 F.3d 1198, 1202 (11th Cir. 2005) (finding that the applicant presented neither fear of future persecution nor evidence of past persecution); 8 U.S.C. § 1101(a)(42)(A); 8 C.F.R. 208.13(b)(1).

231. *INS v. Stevic*, 467 U.S. 407, 424–25 (1984).

232. *Cardoza-Fonseca*, 480 U.S. at 431.

233. *Rantung v. Ashcroft*, 94 Fed. Appx. 679, 681 (10th Cir. 2004) (holding a one in ten chance does not qualify as more likely than not).

234. 8 C.F.R. § 208.13(b)(2).

235. *Diaz-Escobar v. INS*, 782 F.2d 1488, 1492 (9th Cir. 1986); see also *Lopez-Galarza v. INS*, 99 F.3d at 958–59 (finding that “a well-founded fear of future persecution has both subjective and objective components”).

236. *Yang*, 418 F.3d at 1202; *Fisher v. INS*, 79 F.3d 955, 960 (9th Cir. 1993), *Lopez-Galraza v. INS*, 99 F.3d 954, 958 (9th Cir. 1996).

reasonable. In *Matter of Mogharrabi*,<sup>237</sup> the BIA declared that the objective prong will be verified if it can be demonstrated that:

- (1) The alien possesses a belief or characteristic a persecutor seeks to overcome in others . . . ;
- (2) The persecutor is already aware, or could easily become aware, that the alien possess this belief or characteristic;
- (3) The persecutor has the capability of punishing the alien; and
- (4) The persecutor has the inclination to punish the alien.<sup>238</sup>

“The objective component requires a showing by credible, direct, and specific evidence . . . of facts supporting a reasonable fear of persecution on the relevant ground.”<sup>239</sup> Documentary or other corroborative evidence may be used to establish this;<sup>240</sup> however, if the applicant is unable to produce such evidence, which may well be the case of persons who flee their country in fear of persecution,<sup>241</sup> then, objectively, a well-founded fear may be established by virtue of applicants’ own credible testimony,<sup>242</sup> provided that “the testimony is believable, consistent, and sufficiently detailed to prove a plausible and coherent account of the basis for his fear.”<sup>243</sup>

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237. 19 I. & N. Dec. 439 (B.I.A. 1987).

238. *Id.* at 446. The dictum in this case has been limited as to the requirement of “punishment”. The Ninth Circuit in *Pitcherskaia v. INS*, 118 F.3d 641 (9th Cir. 1997) determined that whilst punishment may constitute persecution, an individual may also be persecuted by one who believes that they are acting for the victim’s own good and in doing so cause the victim suffering or harm.

239. *Ghaly v. INS*, 58 F.3d 1425, 1428 (9th Cir. 1995) (citing *Arriaga-Barrientos v. INS*, 925 F.2d 1177, 1178 (9th Cir. 1991)); *Fisher*, 79 F.3d at 960.

240. *Mogharrabi*, 19 I. & N. Dec. at 445–46.

241. *Id.*

242. 8 C.F.R. § 208.13(a) (“The testimony of the applicant, if credible, may be sufficient to sustain the burden of proof without corroboration.”); *see also Chand v. INS*, 222 F.3d 1066, 1077 (9th Cir. 2000) (“[The court] will not infer that a petitioner’s otherwise credible testimony is not believable merely because the events he relates are not described in a State Department document. Credible testimony by itself is sufficient to support an asylum claim.”).

243. *Mogharrabi*, 19 I. & N. Dec. at 445.

A well-founded fear of persecution may also be based on past persecution.<sup>244</sup> Past persecution creates a presumption of a well-founded fear of future persecution on the basis of the original claim.<sup>245</sup> However, the INS<sup>246</sup> has the ability to rebut the presumption<sup>247</sup> if “there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution,” if returned to her country,<sup>248</sup> or if “the applicant could avoid future persecution by relocating to another part of the applicant’s country of nationality.”<sup>249</sup>

While the standard of reasonable possibility only requires a one in ten chance of future persecution occurring,<sup>250</sup> this is not an easy burden to overcome. In the case of a domestic violence victim, it is highly unlikely that fear of future persecution without past persecution will be sufficient to equate with a reasonable possibility. The restrictive approach to domestic violence as a ground for asylum weighs against this type of applicant being successful. Previously demonstrated in the discussion of persecution, it will nearly always be the case that physical abuse of a sufficient degree must have been inflicted on the applicant for domestic violence to qualify as persecution. Lesser degrees of persecution, such as restrictive social mores and emotional abuse, alone are unlikely to qualify. Based on the same reasoning, lack of past abuse will not meet the reasonable possibility test, and it is likely that the applicant’s fears will be regarded as irrational and unreasonable.

In the case of a domestic violence victim who has suffered past persecution, there is of course the benefit of the presumption of a well-founded fear of future persecution; however, this presumption is rebuttable. If the INS is able to

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244. 8 C.F.R. § 208.13(b)(1).

245. *Id.*

246. 8 C.F.R. § 208.13(b)(1)(ii) (“The [Immigration and Naturalization] Service shall bear the burden of establishing by a preponderance of the evidence the requirements of paragraphs (b)(1)(i)(A) or (B) of this section.”).

247. *Id.* § 208.13(b)(1).

248. *Id.* § 208.13(b)(1)(i)(A).

249. *Id.* § 208.13(b)(1)(i)(B). This is known as the internal flight alternative. UNHCR, *Guidelines on International Protection*, § 3, U.N. Doc. HCR/GIP/03/04 (July 23, 2003).

250. *Cardoza-Fonseca*, 480 U.S. at 431.

prove a change in circumstances, for example, that the country of origin is now enforcing laws against domestic violence and providing support to victims or if the abuser died, the fear of future persecution can no longer be said to be well-founded. Alternatively, it may be proven that internal flight was a reasonable option for the applicant, in which case, once again the fear will not be well-founded.<sup>251</sup> An example of this is if she could relocate to another part of the country to avoid the abuse by her husband.

In the case of Rodi Alvarado, her husband continues to live. Despite some small steps in the right direction, Guatemala continues to fail to protect victims of domestic violence.<sup>252</sup> Her attempts to relocate were unsuccessful; her husband found and beat her and forced her to return to the matrimonial home.<sup>253</sup> Her only chance of survival was to flee her home leaving behind not only her country but also her family.

#### VI. THE FIFTH LIMITATION—OUTSIDE HIS OR HER COUNTRY OF NATIONALITY

Before a petitioner can raise an issue of the exercise of discretion to grant asylum, the petitioner must be outside the borders of her country of nationality. In the case of a person who does not have a nationality, the petitioner must be outside the borders of her country of last habitual residence.<sup>254</sup> Additionally, before she is able to seek asylum from the United States, she must reach or enter the U.S. border.<sup>255</sup>

One of the United States' major concerns behind opening floodgates and domestic violence is the number of South

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251. 8 C.F.R. § 208.13(b)(3) (determining whether internal relocation is reasonable involves consideration, among other things, of “whether the applicant would face other serious harm in the place of suggested relocation; any ongoing civil strife within the country; administrative, economic, or judicial infrastructure; geographical limitations; and social and cultural constraints, such as age, gender, health and social and familial ties”).

252. R-A-, 22 I. & N. Dec. at 910–11 (citation omitted).

253. *Id.* at 908–09.

254. 8 U.S.C. § 1101(a)(42)(A).

255. 8 U.S.C. § 1158(a)(1) (2005).

American countries that tolerate or condone domestic violence.<sup>256</sup> When one looks to the countries in relative proximity to the United States, this argument may have some substance. Countries providing questionable protection against domestic violence include Mexico, Guatemala, Chile, Ecuador, and Brazil.<sup>257</sup> However, this is no reason for the United States to shirk its 1951 Convention responsibilities.

For the most part, women in these countries will not possess the resources to flee to the United States, especially if they have children.<sup>258</sup> Furthermore, if they do flee and enter the border of the United States, they will only be entitled to asylum after establishing all of the requirements of the refugee definition, which, as has been demonstrated, is not any easy task.

Even though the United States borders countries with poor human rights records with respect to domestic violence, it does not justify the United States' rejection of claims for asylum, but rather, it reinforces the United States' responsibilities as a signatory to the 1967 Protocol. Importantly, the issue of close borders highlights an additional remedy to the situation and the United States' fear of opening floodgates. The United States can seek to solve any threat of floodgates caused by victims of domestic violence by working with its neighboring countries to reform their human rights records with respect to the treatment

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256. See, e.g., U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—MEXICO (2005); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—GUATEMALA (2005); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—CHILE (2005); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—ECUADOR (2005); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—BRAZIL (2005); U.S. DEP'T OF STATE, BUREAU OF DEMOCRACY, HUMAN RIGHTS, & LABOR, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES—MEXICO (2005) (all citing unchecked domestic violence against women as a major concern in the country).

257. Seith, *supra* note 58, at 1813–14.

258. See *id.* at 1839 (noting that it is “expensive, difficult, and traumatic to uproot oneself” from one’s home country, especially as a woman). *But see* Lizette Alvarez & John M. Broder, *More and More, Women Risk All to Enter U.S.*, N.Y. TIMES, Jan. 10, 2006, at A1 (noting that a growing number of single women, both childless and with children, are making the crossing despite the expense in search of better jobs).

of women.

Finally, the experience of other countries that have granted asylum to victims of domestic violence has not resulted in the opening of floodgates. Canada was the leader in this area of the law, accepting domestic violence as a viable asylum ground in 1993.<sup>259</sup> “There were 40,000 refugee claims filed in Canada [in the two years following], of which only two percent were gender-based.”<sup>260</sup> The figure has not been broken down into cases of domestic violence, but these would only represent a portion of the two percent.

## VII. CONCLUSION

Domestic violence is not a personal matter; it is a human rights violation and a universal problem experienced throughout the world. While progress is being made to eradicate domestic violence, it persists and will persist for the foreseeable future. This proves true even in nations with effective forms of protection for victims of domestic violence. The need for protection of women who are in a country that does not provide effective protection against domestic violence is therefore obvious. However, the United States’ response to the pleas of victims of domestic violence, who seek protection on the basis that their own country is unable or unwilling to protect them from this persecutory conduct, has been largely to turn a blind eye, fearful of opening floodgates that recognition of such claims would cause. However, other countries such as Australia, Canada, New Zealand, and the United Kingdom have been prepared to accept their international obligation of protection. The fear of the borders opening to indeterminate claims from abused women has not deterred these countries, even though they are democratic nations with high standards of living and, therefore, equally desirable to those seeking a better life. The lack of fear is justifiably found in the safeguards built into the definition of refugee. The 1951 Convention requirements of persecution, nexus, convention ground, well-founded fear, and

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259. Immigration and Refugee Board, *Women Refugee Claimants Fearing Gender Related Persecution* (1993).

260. Seith, *supra* note 58, at 1838.

being outside one's country limit those to whom asylum may be granted.

It is acknowledged that the United States has made great strides in recent years in recognizing that 1951 Convention protection should be extended to homosexuals, women facing female genital mutilation, and more recently, women who face honor killings. The next step is recognition that, subject to 1951 Convention requirements, victims of domestic violence are legitimate asylees. It is time for the United States to look to the approach of the other signatory nations to recognize that the fear of opening floodgates is not justified and to accept the international obligations to which it acceded.