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## COMMENTS

### DOMESTIC VIOLENCE AND ASYLUM: IS THE DEPARTMENT OF JUSTICE PROVIDING ADEQUATE GUIDANCE FOR ADJUDICATORS?

By Christina Glezakos\*

#### I. INTRODUCTION

On December 7, 2000, the Department of Justice (DOJ) and the United States Immigration and Naturalization Service (INS) proposed a rule stating “generally applicable principles that will allow for case-by-case adjudication of [asylum] claims based on domestic violence or other serious harm inflicted by individual non-state actors.”<sup>1</sup> This rule would amend the Code of Federal Regulations, specifically, Title 8, Part 208 pertaining to procedures for asylum and withholding of removal.<sup>2</sup> The Board of Immigration Appeals (BIA) proposed the rule in *In re R-A*.<sup>3</sup> to address certain barriers to a claim that domestic violence could satisfy the definition of “refugee”<sup>4</sup> under established asylum law

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1. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

2. See Procedures for Asylum and Withholding of Removal, 8 C.F.R. § 208 (2002).

3. *In re R-A*, Hein’s Interim Decisions Service, Interim Decision 3403 (B.I.A. 1999), vacated by Attorney General, remanded to B.I.A.

4. The term “refugee” is defined as:

[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.

in the United States.<sup>5</sup> The rule addresses each component of the legal definition of "refugee" and seeks to "provide guidance for the resolution of novel issues in some of the asylum . . . claims that the Department [of Justice] has encountered in recent years."<sup>6</sup> One such novel claim is the extent to which victims of domestic violence may be considered to fall within the asylum laws of the United States.<sup>7</sup>

Domestic violence is a social problem that affects women in every nation.<sup>8</sup> Although the international community has recently taken steps toward addressing this form of violence,<sup>9</sup> a disturbing number of countries remain dominated by patriarchal social structures that do not recognize gender-based violence as a punishable offense.<sup>10</sup> Social and cultural traditions in these nations also limit the avenues of redress available to women who find themselves in traumatic situations.<sup>11</sup> Indeed, the legal systems of many countries provide sanction for domestic violence by recognizing "honor" or "heat of passion" as ac-

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8 U.S.C. § 1101(a)(42) (2000).

5. Asylum and Withholding Definitions, 65 Fed. Reg. at 76,589.

6. *Id.*

7. *See id.*

8. *See* U.N. CTR. FOR SOC. DEV. AND HUMANITARIAN AFFAIRS, VIOLENCE AGAINST WOMEN IN THE FAMILY at 11-12, U.N. Doc. ST/CS/DHA/2, U.N. Sales No. E.89.IV.5 (1989) [hereinafter *WOMEN IN THE FAMILY*] (indicating that family violence plagues women in every society and is part of "every day life"); Pamela Goldberg & Nancy Kelly, *International Human Rights and Violence Against Women*, 6 HARV. HUM. RTS. J. 195 (1993) (discussing recent developments in the treatment of violence against women as human rights restrictions).

9. *See* U.N. Convention on the Elimination of All Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, U.N.T.S. 13 (entered into force Sept. 3, 1981) (prohibiting discrimination against women and calling on states to take affirmative action to eradicate such discrimination); *U.N. Declaration on the Elimination of Violence Against Women*, G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/RES/48/104 (1994) [hereinafter *Women's Declaration*] (identifying domestic violence as a human rights violation). The fourth World Conference on Women held in Beijing, China, in 1995, at which 190 countries adopted a Platform for Action which declared that "violence against women constitutes a violation of basic human rights and is an obstacle to the achievement of the objectives of equality, development and peace." Report of Fourth World Conference on Women, U.N. Doc. A/Conf. 177/20 (1995).

10. *See* *WOMEN IN THE FAMILY*, *supra* note 8, at 11 (stating that in many countries domestic violence "has gone largely unpunished, unremarked and has even been tacitly, if not explicitly, condoned").

11. *See, e.g.*, ROBIN LEVI & REGAN E. RALPH, HUMAN RIGHTS WATCH, TOO LITTLE, TOO LATE: STATE RESPONSE TO VIOLENCE AGAINST WOMEN (Dorothy Q. Thomas & Rachel Denber eds., 1997); HUMAN RIGHTS WATCH, 2000 ANNUAL REPORT (2000).

ceptable defenses to domestic violence charges.<sup>12</sup>

Given this state of affairs, it is no wonder that many women possess little hope that their own countries will provide protection against domestic violence. Consequently, there will be times when a woman's only safe option will be to leave her country and seek asylum in a foreign nation.<sup>13</sup> Nonetheless, the traditional view of domestic violence as a private matter, coupled with its international and domestic prevalence, has made United States' asylum adjudicators hesitant to conclude that such claims comport with the legal parameters of domestic asylum law.<sup>14</sup>

This comment examines the legal barriers established by the BIA in *In re R-A-*,<sup>15</sup> and analyzes whether the proposed rule sufficiently addresses the hurdles established by that case.<sup>16</sup> The comment discusses asylum law in the United States, its evolution, and how it has traditionally been applied,<sup>17</sup> focusing specifically on jurisprudence revolving around "particular social group" to give context to the proposed rule.<sup>18</sup> The comment's focus then shifts to a detailed discussion of the BIA's decision in *In re R-A-* in order to identify the problems the case raised for asylum claims based on domestic violence.<sup>19</sup> The comment concludes with a discussion of whether the proposed rule achieves its goal of providing a legal framework within which adjudicators can critically analyze asylum claims based on domestic violence.<sup>20</sup> The comment recommends that, in cases of domestic vio-

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12. For example, Pakistan, Jordan, and South Africa honor these defenses. See generally SAMYA BURNEY, HUMAN RIGHTS WATCH, CRIME OR CUSTOM: VIOLENCE AGAINST WOMEN IN PAKISTAN (Regan E. Ralph & Cynthia Brown eds., 1999); BINAIFER NOWROJEE & BRONWEN MANBY, HUMAN RIGHTS WATCH, THE STATE RESPONSE TO DOMESTIC VIOLENCE AND RAPE (Bronwen Manby & Dorothy Q. Thomas eds., 1995); HUMAN RIGHTS WATCH, 2000 ANNUAL REPORT 444-46 (2000). See also Press Release, Human Rights Watch, Jordanian Parliament Supports Impunity for Honor Killings (Jan. 27, 2000), available at <http://www.hrw.org/press/2000/01/jord0127.htm>.

13. See, e.g., Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 CORNELL INT'L L.J. 565, 565-66 (1993) (reciting a case of a woman named "Nora" who was severely abused by her husband and was repeatedly denied assistance by law enforcement officials in her home country).

14. See Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT'L L.J. 625, 672 (1993).

15. Interim Decision 3403 (B.I.A. 1999), vacated by Attorney General, remanded to BIA.

16. See discussion *infra* Part IV.B.

17. See discussion *infra* Part II.A.

18. See discussion *infra* Part II.B.

19. See discussion *infra* Part IV.A.

20. See discussion *infra* Part IV.B.

lence, asylum should not be denied to a woman who adequately satisfies the elements of the law.<sup>21</sup>

## II. BACKGROUND

To have a context within which to understand the propositions of this comment, this comment begins with the legal development of asylum law in the United States. The fundamental purpose of this body of law is to "provide surrogate international protection where there is a fundamental breakdown in state protection."<sup>22</sup>

### A. *Defining and Applying the Term "Refugee"*

The 1951 Geneva Convention Relating to the Status of Refugees (The Convention)<sup>23</sup> was the first international treaty to adopt a universal definition of "refugee."<sup>24</sup> The Convention defined a refugee as a person who has a well-founded fear of persecution for "reasons of race, religion, nationality, membership in a particular social group, or political opinion."<sup>25</sup> Initially, the United States did not adopt the Convention's definition into domestic legislation.<sup>26</sup> However, in 1980 when the United States

21. See discussion *infra* Part V.

22. *In re R-A-*, Hein's Interim Decisions Service, Interim Decision 3403, at 7 (B.I.A. 1999), *vacated* by Attorney General, *remanded* to BIA.

23. Geneva Convention Relating to the Status of Refugees, *opened for signature* July 28, 1951, 19 U.S.T. 6260, T.I.A.S. No. 6577, 189 U.N.T.S. 137 [hereinafter Geneva Convention].

24. However, the terms of the Convention limit the definition of refugee to those persons affected by events occurring before January 1, 1951. See Geneva Convention, *supra* note 23, at art. 1, at A(2). This definition was expanded by the Protocol Relating to the Status of Refugees, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 8791 [hereinafter Protocol], which was drafted to protect persons who became refugees as a result of events which took place after January 1, 1951. The United States is not a signatory to the Convention but only to the Protocol.

25. Article 1(A). Definition of the term "refugee":

For the purposes of the present Convention, the term "refugee, shall apply to any person who: . . . 2) As a result of events occurring before January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Geneva Convention, *supra* note 23, at art. 1(A).

26. See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 512

Congress implemented legislation that revised the then-existing procedures relating to refugees entering the United States, it adopted the above definition.<sup>27</sup>

The Refugee Act used language very similar to that in The Convention, defining refugees as individuals with a "well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion."<sup>28</sup> Applying this definition is less simple because grants of asylum are discretionary.<sup>29</sup> Applicants wishing to establish eligibility must first overcome several legal obstacles.<sup>30</sup>

### 1. State Action Requirement

Initially, the applicant must demonstrate that the state committed acts of persecution or threatened persecution.<sup>31</sup> State responsibility can be imputed from facts demonstrating that the state refused to act or failed to provide protection to the victimized person from persecution at the hands of a group or individual.<sup>32</sup>

In cases of domestic violence state inaction has often been difficult to establish. Several elements contribute to this difficulty. First, although states may have legislation forbidding

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n.40 (1993) (recognizing that there was no explicit legislation which authorized the admittance of refugees, rather, Attorneys General were able to exercise their parole power under section 212 (d)(5) of the Immigration and Nationality Act to admit refugee groups).

27. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

28. See definition of "refugee" *supra* note 4.

29. Asylum is a form of discretionary relief, meaning that even if an applicant demonstrates their eligibility for asylum, the judge may still deny the relief sought in the exercise of discretion. See *INS v. Cardoza-Fonesca*, 480 U.S. 421, 443 (1987) ("[A]n alien who satisfies the applicable standard under § 208(a) does not have a right to remain in the United States; he or she is simply eligible for asylum, if the Attorney General, in his discretion, chooses to grant it."). Although the judge's discretion is broad, it is not boundless. See *Melendez v. United States Dep't of Justice*, 926 F.2d 211, 218 (2d Cir. 1991) ("[W]e hold that though the ultimate denial of asylum in applications brought under § 208(a) of the Act is reviewed for an abuse of discretion, the threshold finding of fact of whether the alien has established a well-founded fear of persecution qualifying that person for refugee status is reviewable under the substantial evidence test.").

30. See, e.g., *Diallo v. INS*, 232 F.3d 279, 287 (2d Cir. 2000) (explaining that applicant bears the burden of proof to show that he or she is a refugee within the meaning of section 101(a)(42)(A) of the INA, 8 U.S.C. section 1101(a)(42)(A)).

31. See, e.g., *Villalta*, 20 I. & N. Dec. 142, 147 (B.I.A. 1990); *H-*, 21 I. & N. Dec. 337 (B.I.A. 1996); *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996); *In re Acosta*, 19 I. & N. Dec. 211, 222-23 (B.I.A. 1985).

32. See *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

domestic violence in their legal code, the appropriate authorities often do not enforce such legislation.<sup>33</sup> Further, in cases where courts have imputed responsibility to the state for private acts, the applicant has demonstrated either that seeking such assistance would have been futile given the state's general response to such claims,<sup>34</sup> or that the simple act of seeking such redress would have caused her greater harm at the hands of her persecutor.<sup>35</sup>

## 2. *Well-Founded Fear of Persecution*

Additionally, the applicant must demonstrate that she has a "well-founded fear of persecution."<sup>36</sup> The United States Supreme Court has interpreted "well-founded" to incorporate not purely an objective inquiry about the rationality of the fear, but also an inquiry into the individual's subjective belief about her persecution.<sup>37</sup> A twist on the objective standard was articulated in *In re Mogharrabi*,<sup>38</sup> in which the BIA recognized that the fear of persecution could be viewed as well-founded if a reasonable person under analogous circumstances would also fear persecution.<sup>39</sup>

More often than not, a woman seeking refuge in a foreign country in order to escape severe domestic violence will not have a difficult time establishing her subjective fear of persecution.<sup>40</sup> Her testimony can provide adequate evidence of the trauma she has endured and the lasting fear that such experiences have left her with.<sup>41</sup> However, demonstrating the objectivity of her fear may prove more burdensome. Given the growing

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33. See Patricia A. Seith, *Escaping Domestic Violence: Asylum as a Means of Protection for Battered Women*, 97 COLUM. L. REV. 1804, 1813-15 (1997) (asserting that the presence of laws forbidding domestic violence disguise the reality that in many states women have no governmental protection).

34. See *In re Kasinga*, 21 I.& N. Dec. 357, 367 (B.I.A. 1996) ("[A]cts of violence and abuse against women in Togo are tolerated by the police; 3) the Government of Togo has a poor human rights record; and 4) most African women can expect little governmental protection from FGM.").

35. See S-A-, Hein's Interim Decisions Service, Interim Decision 3433, at 10(B.I.A. 2000) (finding that had respondent sought state protection "respondent would have been compelled to return to her domestic situation and her circumstances may well have worsened").

36. See definition of "refugee" *supra* note 4.

37. See *INS v. Cardoza-Fonesca*, 480 U.S. 421, 431 (1987).

38. 19 I. & N. Dec. 439 (B.I.A. 1987).

39. See *id.* at 445.

40. See *In re Kasinga*, 21 I.& N. Dec. 357, 358-59 (B.I.A. 1996) (pointing to the applicant's own testimony as evidence of her fear of persecution).

41. See *id.*

public awareness of the effects of domestic violence and increased literature on the topic, a woman can now utilize expert testimony to affirm the effects that repetitious episodes of domestic violence have on her psyche.<sup>42</sup>

Over the years, the BIA and the courts have applied varying standards to determine what constitutes persecution. Much of this wavering is due to the fact that no universally accepted definition of persecution exists.<sup>43</sup> Neither Congress, the BIA, nor the courts have articulated a clear definition.<sup>44</sup> Rather, they have based the requisite harm to prove persecution on a generally accepted meaning that has evolved from judicial and administrative decisions.<sup>45</sup> The *INS Manual*<sup>46</sup> states that persecution is a "serious threat of life or freedom on account of"<sup>47</sup> one of the five enumerated asylum grounds, and that "[s]erious violations of basic human rights can constitute acts of persecution."<sup>48</sup> The Supreme Court has held that persecution is "a seemingly broader concept than threats to 'life or freedom'"<sup>49</sup> and subsequent decisions by various Courts of Appeal and the BIA have expanded this interpretation.<sup>50</sup> The BIA has also articulated that an applicant need not demonstrate that her persecutor had a putative or

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42. See *id.* at 360-63 (indicating that the Board took notice of additional exhibits provided by the applicant from various scholars with expertise on the topic of female genital mutilation).

43. OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS at para. 51, U.N. Doc. HCR/IP/4/Eng. Rev. (1988).

44. See Alyson Springer, *Proposed Rule Addresses Asylum for Victims of Gender-Based Persecution*, 22 REFUGEE REPORTS 1, 3 (2001).

45. See *id.*

46. IMMIGRATION & NATURALIZATION SERV., BASIC LAW MANUAL: ASYLUM, SUMMARY AND OVERVIEW CONCERNING ASYLUM LAW 25 (1991) [hereinafter *INS MANUAL*].

47. *Id.* at 20.

48. *Id.*

49. *INS v. Stevic*, 467 U.S. 407, 428 n.22 (1984).

50. See, e.g., *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997). *Pitcherskaia* defined persecution as "the infliction of suffering or harm upon those who differ . . . in a way regarded as offensive." *Id.* (quoting *Sangha v. INS*, 103 F.3d 1482, 1487 (9th Cir. 1997)). The case also stated that "[t]his definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem 'offensive.'" *Id.* See also *Singh v. INS*, 94 F.3d 1353, 1360 (9th Cir. 1996) (finding that persecution is not limited to physical harm and can include repeated threats in the context of harassment); *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993) (determining that persecution can result from the violation of one's fundamental beliefs); *Fisher v. INS*, 79 F.3d 955 (9th Cir. 1996) (*en banc*) (holding that mental suffering can rise to the level of persecution).



malignant intent to harm her in order to prove persecution.<sup>51</sup> Given this context, the First Circuit has found that mere annoyance or harassment will not suffice to show persecution, while concluding that it is not necessary to demonstrate threats to life or freedom.<sup>52</sup>

An applicant may satisfy the requirement of persecution or a well-founded fear of persecution by demonstrating past persecution or, alternatively, by showing a reasonable fear of future persecution.<sup>53</sup> An alien who establishes past persecution is presumed to have a well-founded fear of future persecution.<sup>54</sup> A country may overcome this presumption by evidence that, since the time the initial persecution occurred, the country's conditions have improved to the extent that the applicant's fear of persecution is no longer well-founded<sup>55</sup> or that she may escape persecution by relocating within her country.<sup>56</sup> If the applicant has shown past persecution, the burden shifts to the INS to demonstrate, by a preponderance of the evidence, that the conditions in the country have changed or that the possibility of relocation exists.<sup>57</sup>

In light of this broad conceptual framework, it seems evident that a woman who has been the victim of severe and repetitious domestic violence will sufficiently satisfy the threshold requirements to exhibit persecution.<sup>58</sup> Domestic violence encompasses conduct such as physical and mental harm, forcing a woman to perform sexual or other acts against her will, repeated emotional or verbal abuse, and even murder.<sup>59</sup> Given the gravity of the acts which define domestic violence, the requisite level of harm necessary to show persecution will almost always be present.<sup>60</sup> Additionally, the international community recently recognized that domestic violence is a human rights violation, which strongly supports the claim that conduct categorized as domestic violence suffices to meet the level of persecution re-

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51. See *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

52. See *Aguilar-Solis v. INS*, 168 F.3d 565, 570 (1st Cir. 1999).

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

54. See 8 C.F.R. § 208.13(b)(1)(i) (2000).

55. See *id.*; *In re Chen*, 20 I. & N. Dec. 16 (B.I.A. 1989).

56. See 8 C.F.R. § 208.13(b)(1)(i).

57. See *id.*

58. See Springer, *supra* note 44.

59. See Goldberg, *supra* note 13, at 583.

60. See *id.*

quired by domestic asylum law.<sup>61</sup>

### 3. "On Account of" Requirement

The statute clearly indicates that acts of persecution, no matter how egregious, will not be grounds for asylum eligibility unless they can be shown to be "on account of" race, religion, nationality, membership in a particular social group, or political opinion.<sup>62</sup> The United States Supreme Court clarified the extent of the necessary nexus between the persecution and the claimed ground for seeking asylum in *INS v. Elias-Zacarias*.<sup>63</sup> The Court wrote, "since the statute makes motive critical, [the applicant] must provide *some* evidence of [motive], direct or circumstantial"<sup>64</sup> by showing that the persecutor targeted the applicant because of the claimed asylum eligibility ground.<sup>65</sup> In order to satisfy the "on account of" requirement, the applicant must pass a two-part test.<sup>66</sup> First, the applicant must show that her case does in fact fall into one of the five enumerated grounds for asylum.<sup>67</sup> For example, if the applicant claims that she is being persecuted for her political opinion, she must demonstrate that she in fact holds that political opinion.<sup>68</sup> Second, the applicant must demonstrate that there is a nexus between her political opinion and the persecution she fears.<sup>69</sup>

### B. Jurisprudence Involving "Membership in a Particular Social Group"

As highlighted by the above discussion, gender-based violence is not one of the enumerated grounds upon which a woman may base an asylum claim.<sup>70</sup> Thus, a woman basing her asylum application on domestic violence must structure her argument so that it fits into one of the five enumerated grounds.<sup>71</sup> One approach frequently used to circumvent this problem is as-

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61. See G.A. Res. 104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/RES/48/104 (1993).

62. See 8 U.S.C. § 1101(a)(42) (2000).

63. See 502 U.S. 478 (1992).

64. *Id.* at 483.

65. See *id.*

66. See, e.g., *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

67. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482 (1992).

68. See *id.* at 483.

69. See *id.*

70. See definition of "refugee" *supra* note 4.

71. See definition of "refugee" *supra* note 4.

serting that a woman's well-founded fear of persecution due to domestic violence is "on account of" her membership in a particular social group.<sup>72</sup>

### 1. *Historical Context*

To understand what membership in a particular social group is grounds for asylum, this section details why this category was originally included in the refugee definition and how it has been interpreted over the years in U.S. asylum law. This category was added to the 1951 Geneva Convention<sup>73</sup> by the Swedish delegation in recognition of the fact that "experience ha[s] shown that certain refugees ha[ve] been persecuted because they belong to particular social groups. Th[e] draft Convention [makes] no provision for such cases, and one designed to cover them should be accordingly included."<sup>74</sup> When Congress enacted the 1980 Refugee Act,<sup>75</sup> it also included "particular social group" as an enumerated ground for asylum without further explanation of its particular applicability.<sup>76</sup> However, it is important to note that almost thirty years had passed between the Refugee Act and the original inclusion of the social group terminology in the Convention.<sup>77</sup> During that period commentators began to sketch the boundaries of the social group concept, and Congress gave no indication that it intended to reject those developments.<sup>78</sup>

Academics have engaged in discourse on the topic of what the language "particular social group" encompasses. Atle Grahl-Madsen, a pre-eminent scholar on international refugee law, expressed the belief that the social group category was added to the Convention to protect against the persecution that would arise from unforeseen circumstances, and should be broadly interpreted.<sup>79</sup> Other scholars commenting on the interpretation

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72. See definition of "refugee" *supra* note 4.

73. See Geneva Convention *supra* note 23 at art. 1(A)(2). This definition was expanded by the Protocol, *opened for signature* Jan. 31, 1967, 19 U.S.T. 6223, T.I.A.S. No. 6577, 606 U.N.T.S. 8791, which was drafted to protect persons who became refugees as a result of events which took place after January 1, 1951. The United States is not a signatory to the Convention but only to the Protocol.

74. Fullerton, *supra* note 26, at 509 (quoting U.N. Doc. A/CONF.2/SR.3, at 14 (1951)).

75. The Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 (codified as amended in scattered sections of 8 U.S.C.).

76. See *id.*

77. See Fullerton, *supra* note 26, at 514.

78. See *id.*

terpreted.<sup>79</sup> Other scholars commenting on the interpretation of social group within the context of American asylum law have also argued for a broad interpretation.<sup>80</sup>

## 2. *Judicial Application*

Since the legislature gave no direction as to what the social group category entails, judicial application of this category has varied. In the leading case on social group, *In re Acosta*,<sup>81</sup> the BIA applied the doctrine of *ejusdem generis*<sup>82</sup> to give a meaning to "particular social group" that was consistent with the other four categories for asylum.<sup>83</sup> Recognizing that the other four grounds for asylum describe "persecution aimed at an immutable characteristic," the Board found persecution based on social group to be defined by common characteristics that members of the group either cannot change or should not be required to change because they are fundamental to their individual identities.<sup>84</sup> The Board stated that "[t]he shared characteristic might be an innate one such as sex, color, or kinship ties," and 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>85</sup> Unless otherwise articulated by a circuit court decision, this test is binding on all immigration courts analyzing a social group basis for an asylum claim.<sup>86</sup>

In *Sanchez-Trujillo v. INS*,<sup>87</sup> the Ninth Circuit Court of Appeals announced a different test than the one promulgated by the BIA.<sup>88</sup> In *Sanchez-Trujillo*, the court outlined a four-part test for determining whether an applicant is a member of a "particular social group."<sup>89</sup> First, it must be shown that the class of peo-

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79. 1 ATLE GRAHL-MADSEN, *THE STATUS OF REFUGEES IN INTERNATIONAL LAW* 219 (1966)

80. See Goldberg, *supra* note 13, at 591.

81. 19 I. & N. Dec. 211 (B.I.A. 1985).

82. "A canon of construction holding that when a general word or phrase follows an enumeration of specific persons or things, the general word or phrase will be construed as applying only to persons or things within of the class within which the specific falls." BLACK'S LAW DICTIONARY 218 (Pocket ed. 1996).

83. See *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

84. See *id.* at 233-34.

85. *Id.* at 233.

86. See Goldberg, *supra* note 13, at 594.

87. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

88. Compare *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), with *In re Acosta*, 19 I. & N. Dec. 211 (B.I.A. 1985).

89. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1573-74 (9th Cir. 1986).

ple that the applicant claims comprises the group is cognizable as a "particular social group" under the immigration statutes.<sup>90</sup> Second, the applicant must establish that she qualifies as a member of the group.<sup>91</sup> Third, the applicant must demonstrate that the claimed "social group" has in fact been targeted for persecution on account of the characteristics of the group members.<sup>92</sup> Finally, the court must determine whether such "special circumstances" are present to justify that mere membership in that social group constitutes per se eligibility for asylum.<sup>93</sup> The *Sanchez-Trujillo* court then interpreted the statute and concluded that the "term does not encompass every broadly defined segment of a population."<sup>94</sup> The court further found that "[o]f 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 social group."<sup>95</sup>

The distinct test applied by the Ninth Circuit has not proven influential outside of that circuit.<sup>96</sup> The Ninth Circuit recently clarified the *Sanchez-Trujillo* test in *Hernandez-Montiel v. INS*.<sup>97</sup> The court refined the social group test by articulating that a 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>98</sup> The court found that this test harmonized the holding of *Sanchez-Trujillo* with that announced by the BIA in *In re Acosta*.<sup>99</sup>

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90. *Id.* See also 8 U.S.C. § 1101(a)(42) (2000).

91. See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1574-75 (9th Cir. 1986).

92. See *id.* at 1575.

93. See *id.* at 1576. See also OFFICE OF THE U.N. HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS at para. U.N. Doc. HCR/PRO/4 (1979). "Mere membership in a particular social group will not normally be enough to substantiate a claim to refugee status. There may, however, be *special circumstances* where mere membership can be a sufficient ground to fear persecution." *Id.* at para. 79.

94. *Id.*

95. *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1576 (9th Cir. 1986).

96. See, e.g., *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1998) (stating that "[t]he Ninth Circuit's requirement of a 'voluntary associational relationship,' read literally, conflicts with *Acosta's* immutability requirement").

97. *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (finding that a gay Mexican man with female sexual identity is a member of a particular social group).

98. *Id.* at 1093.

99. *Id.* at 1093 n.6.

### 3. Gender as a "Particular Social Group"

Over the years, courts have taken different views on whether gender, either alone or coupled with other characteristics, can constitute a "particular social group."<sup>100</sup> In *Fatin v. INS*,<sup>101</sup> the Third Circuit Court of Appeals found that an Iranian applicant, who feared persecution for being a woman, qualified as a member of a particular social group under the Immigration and Nationality Act.<sup>102</sup> In contrast, the Second Circuit Court of Appeals stated that gender alone could not constitute a "social group."<sup>103</sup> The court held that "[p]ossession of broadly-based characteristics such as youth and gender will not by itself endow individuals with membership in a particular group."<sup>104</sup>

In 1995 the DOJ circulated a memorandum to all INS Asylum Offices regarding gender asylum claims.<sup>105</sup> The DOJ Guidelines<sup>106</sup> suggested that gender could provide the basis for membership in a particular social group, in light of the BIA's statement in *In re Acosta* that "sex" might be the type of shared characteristic that could define a social group.<sup>107</sup> Additionally, the DOJ Guidelines found this view consistent with the approach taken by the United Nations High Commissioner for Refugees (UNHCR) Executive Committee, of which the United States is a member.<sup>108</sup>

100. See Memorandum from Phyllis Coven, Office of International Affairs, U.S. Department of Justice, Considerations For Asylum Officers Adjudicating Asylum Claims From Women, to all INS Asylum Officers and HQASM Coordinators (May 26, 1995) [hereinafter DOJ Guidelines].

101. *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993).

102. See *id.* at 1241-42.

103. *Gomez v. INS*, 947 F.2d 660 (2d Cir.1991).

104. *Id.* at 664. The Second Circuit found that the social group the applicant claimed (women who have been previously battered and raped by Salvadoran guerillas) did not possess common characteristics other than gender or youth; characteristics which on their own did not constitute a "social group." Additionally, the court noted that the evidence presented provided no indication that the applicant would be singled out for further persecution or that she was more likely to be persecuted by Salvadoran guerillas than other women. See *id.*

105. See DOJ Guidelines, *supra* note 100.

106. See *id.*

107. See *id.* at 14.

108. See *id.* The DOJ Guidelines included a quote from the UNHCR Executive Committee that:

recognized that States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhumane treatment due to their having transgressed the social mores of the society in which they live may be considered a "particular social group" within the meaning of Article 1 A(2) of the 1951 United Nations Refugee

## III. IDENTIFICATION OF THE PROBLEM

In light of the fact that the international community has taken affirmative steps in recent years to address the problem of gender-based violence,<sup>109</sup> it seems appropriate for the United States to take measures to conform its domestic asylum law to these international trends. As the law stands now, with no specific recognition of gender as a basis for claiming asylum,<sup>110</sup> a woman seeking asylum based on her well-founded fear of persecution due to domestic violence would have several substantial legal hurdles to overcome before she could succeed in her asylum claim.

The main question is whether the DOJ's proposed rule sufficiently tackles the barriers established by the BIA in *In re R-A* and provides an adequate framework for asylum adjudicators to address claims based on domestic violence.<sup>111</sup> If not, then what portions of the rule could be better articulated to address asylum claims based on domestic violence?<sup>112</sup>

Since asylum applications based on domestic violence have arisen only recently,<sup>113</sup> the DOJ and the INS have not yet articulated how courts should adjudicate such claims with enough specificity to provide uniform application of the law.<sup>114</sup> Given the gravity of the outcome of asylum claims for individual applicants, whether adjudicators now have sufficient guidance on the subject or whether there is still room for improvement remains an important question.<sup>115</sup>

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Convention.

*Conclusion on the International Protection of Refugees, adopted by the UNHCR Executive Committee Programme, 36th Sess., No. 39(k) (1985).*

109. See *supra* note 9 and accompanying text.

110. See *supra* note 4 and accompanying text.

111. See *infra* Part IV.B.

112. See *infra* Part V.

113. See *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588, 76,589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

114. See DOJ Guidelines, *supra* note 100, at 1.

115. See *infra* Part V.

## IV. ANALYSIS

A. In re R-A-<sup>116</sup>

In *In re R-A-*, the leading case to date on domestic violence as a basis for asylum, the BIA found that the applicant did not qualify for asylum under the Immigration and Nationality Act (INA).<sup>117</sup> In reaching its conclusion, the Board found that the "existence of shared descriptive characteristics is not necessarily sufficient to qualify those possessing the common characteristics as members of a 'particular social group.'"<sup>118</sup> In addition, the Board found that the applicant failed to demonstrate the requisite nexus between the persecution and her membership in the claimed social group.<sup>119</sup> In its decision in this case, the Board established several new hurdles for women attempting to gain asylum based on domestic violence.<sup>120</sup>

The applicant, a Guatemalan woman, testified to the severity of the abuse she suffered over several years at the hands of her husband.<sup>121</sup> From the beginning of the marriage, her husband tormented her both sexually and physically.<sup>122</sup> When the applicant became distraught from the repeated abuse, she attempted to escape by taking refuge with various family members, including her brother and parents.<sup>123</sup> However, every time she escaped, her husband managed to find her and force her to return home with him.<sup>124</sup> After one such occasion, her husband woke her in the middle of the night, "struck her face, whipped her with an electrical cord, pulled out a machete and threatened to deface her, to cut off her arms and legs, and leave her in a wheelchair if she ever tried to leave him."<sup>125</sup> The applicant at-

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116. Hein's Interim Decisions Service, Interim Decision 3403 (B.I.A. 1999), *vacated by Attorney General, remanded to BIA*. In addition to basing her asylum claim "on account of" her membership in a particular social group, the applicant alternatively based her asylum claim "on account of" her political opinion or imputed political opinion. *See id.* However, that claim is beyond the scope of this comment and will not be discussed.

117. *See id.* at 2.

118. *Id.* at 1.

119. *See id.* at 1.

120. *See id.* at 6-14.

121. *See id.* at 3-5.

122. *See In re R-A-*, Hein's Interim Decisions Service, Interim Decision 3403, at 3 (B.I.A. 1999), *vacated by Attorney General, remanded to BIA*.

123. *See id.* at 4.

124. *See id.*

125. *Id.*



tempted to gain protection from the police on several occasions, but the police refused to become involved.<sup>126</sup> Her husband's former military service and resultant familiarity with local law enforcement officials made calling the police futile.<sup>127</sup> Distressed by her situation, the applicant even sought judicial intervention, but the judge she appeared before informed her that "he would not interfere in domestic disputes."<sup>128</sup> When asked about why she believed her husband treated her in this horrible manner, the applicant testified, "he saw her 'as something that belonged to him and he could do anything he wanted' with her."<sup>129</sup> Finally, the applicant decided to leave permanently, and with help, managed to flee Guatemala and come to the United States.<sup>130</sup>

At the outset the Board recognized that in rendering the decision the immigration judge relied, in part, on the DOJ Guidelines.<sup>131</sup> The Board went on to state that although the DOJ Guidelines establish various considerations for addressing social group claims, they fail to set forth definitive instructions on how to specifically address such claims.<sup>132</sup> Therefore, the Board determined that the DOJ Guidelines were not controlling on whether domestic violence may qualify a female applicant as a "refugee" under domestic asylum law.<sup>133</sup> Significantly, the Board's determination nullified the judge in *In re R-A*'s perception of how gender-based asylum claims should be adjudicated. The judge based this on the considerations set forth by the DOJ Guidelines, which allowed the Board to apply the law as it saw fit.<sup>134</sup>

The Board highlighted the fact that in 1996 Congress created specific forms of relief, outside the context of asylum law, for some women living in or escaping from situations involving domestic violence.<sup>135</sup> It found this legislation significant, given

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126. See *id.* at 5.

127. See *id.*

128. *In re R-A*-, Hein's Interim Decisions Service, Interim Decision 3403, at 6 (B.I.A. 1999), *vacated by* Attorney General, *remanded to* BIA.

129. *Id.* at 4.

130. See *id.* at 5.

131. See *id.* at 9.

132. See *id.*

133. See *id.*

134. See *In re R-A*-, Hein's Interim Decisions Service, Interim Decision 3403, at 16-17 (B.I.A. 1999), *vacated by* Attorney General, *remanded to* BIA.

135. See § 240A(b)(2) of the INA, 8 U.S.C. § 1229 (b)(2) (Supp. II 1996) (cancellation of removal for spouses battered by a permanent resident or United States citizen); § 244(a)(3) of the INA, 8 U.S.C. § 1254 (a)(3) (1994) (suspension of deportation

that Congress failed to simultaneously make comparable changes to the refugee definition or the asylum statute to address claims of battered spouses.<sup>136</sup> Due to congressional inaction, the Board questioned whether "Congress intended or expected that our immigration laws, even in the refugee or asylum context, would cover battered spouses leaving marriages to aliens having no ties to the United States."<sup>137</sup>

Refusing to be bound by the DOJ Guidelines and its interpretation of Congress' silence, the Board analyzed the case by looking at how the other grounds of the statute's "on account of" clause operate.<sup>138</sup> However, given that the social group category was arguably included to address situations where the other grounds are not applicable,<sup>139</sup> and the relative uniqueness of domestic violence as a basis for the "social group" category, the Board's conclusions seem ill-applied.

The Board agreed with the immigration judge that the applicant's extensive injuries rose to the level of persecution, and that she was unable to obtain state assistance in ending such persecution.<sup>140</sup> Therefore, the definitive issue in the case was whether the applicant demonstrated that the harm she suffered was, or in the future may be, inflicted "on account of" a statutorily protected ground.<sup>141</sup> In its analysis, the Board embarked on an extensive discussion of whether the applicant demonstrated a cognizable social group of which she was a member and whether there was a sufficient nexus between her persecution and her membership in that group.<sup>142</sup>

In discussing the cognizableness of the social group identified by the applicant,<sup>143</sup> the Board initially applied the social group test articulated by the Ninth Circuit in *Sanchez-Trujillo* and found that a voluntary associational relationship was miss-

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for spouses battered by a permanent resident or United States citizen).

136. See *In re R-A-*, Hein's Interim Decisions Service, Interim Decision 3403, at 9 (B.I.A. 1999), vacated by Attorney General, remanded to BIA.

137. *Id.*

138. See *id.*

139. See *supra* text accompanying note 79.

140. See *In re R-A-*, Hein's Interim Decisions Service, Interim Decision 3403, at 10 (B.I.A. 1999), vacated by Attorney General, remanded to BIA.

141. See *id.*

142. See *id.* at 14-21.

143. See *id.* at 14. The Board identified the social group as that of "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that woman are to live under male domination." *Id.*

ing from the claimed classification.<sup>144</sup> Additionally, it stated that in order for a social group to be viable under asylum law, there must be "some showing of how the characteristic is understood in the alien's society, such that [the Board], in turn, may understand that the potential persecutors in fact see persons sharing the characteristic as warranting suppression or the infliction of harm."<sup>145</sup> Although the Board asserted that it is not determinative whether the claimed characteristic is prominent within a society,<sup>146</sup> this additional requirement created a further hurdle for an applicant—she must show that others in her society view this characteristic as "prominent" or "important."<sup>147</sup> More importantly, the Board created this added obstacle without referring to precedent dealing with the social group requirement.<sup>148</sup> In fact, the Board's addition seemed to stem from a "slippery-slope" argument that without this consideration the social group category would virtually swallow the entire refugee definition.<sup>149</sup> However, since asylum is an individual remedy, the applicant would still be required to establish her eligibility under the refugee definition, thus nullifying the Board's assertion.<sup>150</sup>

The next step in the Board's analysis was directed at determining the nexus between the harm suffered by the applicant "on account of" her membership in a social group, particularly "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."<sup>151</sup> It articulated the "on account

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144. See *id.* The Board applied the precedent of the Ninth Circuit because that is the district in which this Board was located.

145. *Id.* at 14.

146. See *In re R-A-*, Hein's Interim Decisions Service, Interim Decision 3403, at 15 (B.I.A. 1999), *vacated* by Attorney General, *remanded* to BIA.

147. See *id.*

148. See *id.* Although the Board made reference to this requirement's presence in *In re Kasinga*, 21 I. & N. Dec. 357 (B.I.A. 1990), it is important to note that in that case the social group identified was composed of women in a particular tribe who opposed the practice of female genital mutilation (FGM). Thus, the "important societal attribute" in that context was the performance of a traditional tribal ritual, which was openly practiced. In contrast, given the private nature of domestic violence, it will almost never be shown conclusively to be "important" within a given society. Additionally, in *In re Kasinga*, the Board did not articulate that it reached its decision on accepting the social group definition based on the "importance" or "prominence" of the group in society at large. See *id.*

149. See *id.* at 15-16.

150. See Kelly, *supra* note 14, at 656.

151. *In re R-A-*, Hein's Interim Decisions Service, Interim Decision 3403, at 17 (B.I.A. 1999), *vacated* by Attorney General, *remanded* to BIA.

of" test as directing "an inquiry into the motives of the entity actually inflicting the harm," to resolve whether the persecutor's actions were due to the applicant's membership in the asserted social group.<sup>152</sup> The Board viewed the fact that the persecutor in this case targeted only his wife, and no other females, as proof that no nexus was present, but rather that this husband simply wished to harm his wife.<sup>153</sup> Additionally, it focused on societal attitudes and the government's response, deducing that domestic violence is not viewed as desirable in Guatemala, that it is an acknowledged problem, and that some governmental action has been taken to respond to it.<sup>154</sup> These two additional requirements applied in *In re R-A-* established further barriers to domestic violence claims than previously present in asylum case law.

The dissent articulated several problems with the Board's decision.<sup>155</sup> First, it recognized that the DOJ Guidelines<sup>156</sup> specifically assert that domestic violence can be an instance where there is a fundamental breakdown in state protection, thus triggering the application of refugee law.<sup>157</sup> Furthermore, it articulated that the DOJ Guidelines were promulgated to address the disparity between the more private forms of persecution, typically suffered by women, and the more public forms of persecution, typically suffered by men.<sup>158</sup> The dissent explicitly focused on the fact that domestic violence is a gender-based crime, in which the essential purpose "is to punish, humiliate, and exercise power over the victim on account of her gender," and thus does not often exist beyond the confines of the relationship between the persecutor and the applicant.<sup>159</sup> In addition, the dissent recognized that the persecutor knew that, through subjecting his wife to his subordination, she would not receive any protection from authorities if she attempted to resist his abuse or seek help.<sup>160</sup> Thus, despite the fact that Guatemalan society does not officially sanction domestic violence, the country is domi-

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152. *See id.* at 17-18.

153. *See id.*

154. *See id.* at 19. However, right before this assertion the Board recognizes that "the views of society and of many governmental institutions in Guatemala can result in the tolerance of spouse abuse at levels we find appalling." *Id.*

155. *See id.* at 28-49.

156. *See* DOJ Guidelines, *supra* note 100.

157. *See In re R-A-*, Hein's Interim Decisions Service, Interim Decision 3403, at 30-31 (B.I.A. 1999), *vacated by* Attorney General, *remanded to* BIA.

158. *See id.* at 40.

159. *Id.*

160. *See id.* at 40.

nated by extremely patriarchal views, firmly rooted in Guatemalan society,<sup>161</sup> which preclude abused women from seeking state remedies.

### B. *The Proposed Rule*

The dissent's criticism of the majority's application of asylum law in *In re R-A-* emphasized the need for the DOJ to further clarify the Guidelines for adjudicators dealing with domestic violence asylum claims.<sup>162</sup> It also highlighted the need for the DOJ to specifically address the application of the "particular social group" criterion in asylum jurisprudence in order for applicants and adjudicators alike to better understand this issue.<sup>163</sup> The proposed rule was introduced to address these exact issues and to eliminate "certain barriers that the *In re R-A-* decision seems to pose to claims that domestic violence . . . rises to the level of persecution of a person on account of membership in a particular social group."<sup>164</sup> However, the DOJ explicitly stated that the proposed rule did not address the precise characteristics that might categorize a "particular social group," since each case will encompass a very particular set of facts.<sup>165</sup> Given this variability, the proposed rule states general principles that "will allow for case-by-case adjudication of claims based on domestic violence."<sup>166</sup>

#### 1. *State Action Requirement*

Despite extensive case law imputing responsibility to a state for actions by private actors whom the government is unable or unwilling to control, there has been minimal formal guidance on the issue.<sup>167</sup> The rule proposed by the DOJ formally incorporates this precedent and sets forth a standard to measure what qualifies as government unwillingness or inability.<sup>168</sup> The rule establishes that the threshold the government must meet is whether it has "take[n] reasonable steps to control the infliction of harm or

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161. *See id.* at 40.

162. *See supra* text accompanying notes 136-141.

163. *See supra* text accompanying notes 129-135.

164. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,589 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

165. *Id.*

166. *Id.*

167. *See Springer, supra* note 44, at 3.

168. *See Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588, 76,591 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

suffering and whether the applicant has reasonable access to the state protection that exists."<sup>169</sup> It then proceeds to state a non-exhaustive list of evidentiary considerations that an adjudicator may take into account when determining if state responsibility should be imputed.<sup>170</sup> The proposed rule further establishes that the applicant has the burden of providing evidence that will demonstrate that this standard has been met.<sup>171</sup> Ultimately, the rule acknowledges that "no government is able to guarantee the safety of each of its citizens at all times."<sup>172</sup>

The codification of judicial precedent on this issue is very important. It provides conclusively that an adjudicator may impute the acts of private individuals to the state if the state cannot, or will not, control such actors.<sup>173</sup> However, the language is not without its critics. Commentators have suggested that the inclusion of the non-exclusive list may lead adjudicators to believe that the list is determinative, since the list is mentioned only in the preamble, not in the actual regulation.<sup>174</sup> Also, some worry that any government action may be considered "reasonable" without inquiring into whether that action actually sought to eliminate the well-founded fear of persecution.<sup>175</sup>

In the domestic violence context, the above concerns are especially relevant. The fact that a government has made it illegal to commit such acts does not necessarily reflect that country's treatment of the activity as criminal.<sup>176</sup> This is evinced by the majority's opinion in *In re R-A-*, which determined that the Guatemalan government was willing to address the issue, and was taking steps to deal with the problem.<sup>177</sup> In fact, the BIA found that the applicant failed to demonstrate that the persecutor's actions "represent[ed] desired behavior within Guatemala or that the Guatemalan Government encourages domestic abuse."<sup>178</sup> In order to address such instances, the rule should include an inquiry into the actual circumstances in the country, and the actual

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169. *Id.*

170. *See id.*

171. *See id.*

172. *Id.*

173. *See id.*

174. *See Springer, supra* note 44, at 4.

175. *See id.*

176. *See id.*

177. *See In re R-A-*, Hein's Interim Decisions Service, Interim Decision 3403, at 20 (B.I.A. 1999), *vacated* by Attorney General, *remanded* to BIA.

178. *Id.*

actions that the government has taken to ameliorate domestic violence, not just a facial inquiry into the law on the books.<sup>179</sup>

## 2. *Well-Founded Fear of Persecution*

The language of the proposed rule indicates that persecution includes both an objective and a subjective component. The rule states that persecution is “the infliction of objectively serious harm or suffering that is experienced as serious harm or suffering by the applicant, regardless of whether the persecutor intends to cause harm.”<sup>180</sup> It further states that this definition is not intended to diminish the level of harm that has previously been recognized as sufficient by the BIA and Courts of Appeals.<sup>181</sup>

The subjective component of the definition emphasizes the applicant’s need to experience the treatment as harm in order to establish persecution.<sup>182</sup> Therefore, it is irrelevant whether the persecutor possessed any putative or malignant intent to harm the applicant.<sup>183</sup> This language codified the BIA’s ruling on persecution in *In re Kasinga*, where the Board had found intent by the persecutor irrelevant to the inquiry.<sup>184</sup> In relation to domestic violence claims, it remains relatively uncomplicated to demonstrate that what the applicant experienced was seriously harmful, since a woman can testify to the level of harm she has suffered and the seriousness of the effects that harm has had on her.<sup>185</sup>

However, the inclusion of language in the proposed rule relating to the objective component of the harm or suffering alters established precedent by requiring that such harm be “serious.”<sup>186</sup> Commentators have expressed fear that the incorporation of this adjective may lead asylum adjudicators to heighten

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179. See Nathalia Berkowitz & Catriona Jarvis, *Asylum Gender Guidelines*, IMMIGRATION APPELLATE AUTH., at 2.B.2 (2000), available at <http://www.iaa.gov.uk/GenInfo/IAA-Gender.htm> (last visited Sept. 27, 2002) (stating that “the level of protection to be expected is a practical standard in keeping with every state’s primary duty to provide protection to those within its jurisdiction”). In addition, the *Asylum Gender Guidelines* state that “[t]he actual practice of the country should be considered rather than theory.” *Id.* at 2.B.3.

180. *Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588, 76,597 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208.15(a)).

181. See *id.* at 76,590.

182. See *id.*

183. See *id.*

184. *In re Kasinga*, 21 I. & N. Dec. 357, 365 (B.I.A. 1996).

185. See *supra* text accompanying note 37.

186. See Springer, *supra* note 44, at 2-3.

the level of harm required to establish persecution, which could result in the denial of valid asylum claims.<sup>187</sup> By including the word "serious," the rule may act to further confuse, rather than clarify, the meaning of persecution for claim handlers. Although the explanation accompanying the rule indicates that adjudicators should still refer to "other sources for guidance" when defining persecution,<sup>188</sup> an adjudicator may interpret the addition of the adjective "serious" as an indicator that the subjective focus on defining persecution should be surpassed by an objective definition. This language is included in the rule to help focus on the applicant's subjective interpretation of the harm. As a result, inclusion of the term "serious" could severely distract an adjudicator's focus from the individual's perception—to an inquiry into whether the harm is sufficiently egregious as to constitute persecution.<sup>189</sup>

In light of the fact that the rule was proposed to elucidate issues raised in recent asylum claims based on domestic violence, it seems that the inclusion of language completely new to established case law blurs, rather than clarifies, the issue. The addition of the term "serious" may prove substantially problematic for women fleeing situations of domestic violence, whose only evidence of their suffering is their own testimony. It may be impossible for them to give objective proof of the harm they experienced without corroborating evidence or testimony, which they may not be able to obtain.

### 3. "On Account of" Requirement

In order to satisfy the "on account of" requirement, the proposed rule sets forth a two-part test.<sup>190</sup> First, the applicant must demonstrate that the persecutor acted, "at least in part," based upon the victim's protected characteristic.<sup>191</sup> Second, she must show that the protected characteristic was a "central" motivation for the persecutor's actions.<sup>192</sup> However, the rule disregards an imposition included in *In re R-A-*, by clarifying that an applicant need not show evidence that the persecutor targeted others that

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187. See *id.* at 3.

188. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,590 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

189. See Springer, *supra* note 44, at 3.

190. See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,592 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

191. *Id.* at 76,591.

192. See *id.* at 76,592.



share the applicant's protected characteristic.<sup>193</sup> Although such evidence may be considered if it is available, the rule specifically states that "it shall not be required."<sup>194</sup> This formal acknowledgment is significant for domestic violence victims because it recognizes that the abuser may have the opportunity and motivation to "harm only one of the women who share this [protected] characteristic, because only one of these women is in a domestic relationship with the abuser."<sup>195</sup>

The proposed language claims to comport with current case law and "allows for the possibility that a persecutor may have mixed motives" in carrying out his actions.<sup>196</sup> However, by including the term "central," the rule seems to depart from several established rulings on this issue. Previously, courts have held that an applicant need only show that one of the motives for the persecution relates to the protected ground.<sup>197</sup>

The new language not only departs from established precedent, but also substantially increases the applicant's evidentiary burden.<sup>198</sup> Requiring evidence that the protected characteristic was "central" to the persecutor's motive forces the applicant, to discern, from several possible motives, that the protected ground was in fact the persecutor's main impetus for action.<sup>199</sup> Although the rule is the DOJ's attempt to synchronize various interpretations of the extent to which the persecutor's motivation must relate to the protected characteristic,<sup>200</sup> the use of the word "central" may lead adjudicators to require an applicant to demonstrate knowledge-motive she may not have or be able to prove.

Perhaps a clearer, more realistic approach would be to require the applicant to satisfy the first part of the test, and end the inquiry there. This part relates to evidence that indicates that the protected ground was "at least" part of the persecutor's mo-

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193. *See id.*

194. *Id.*

195. *Id.* at 76,593.

196. *Id.* at 76,592.

197. *See Tagaga v. INS*, 228 F.3d 1030, 1035 (9th Cir. 2000) ("We have held that a petitioner for asylum need not prove that his well-founded fear of persecution is based exclusively on a ground for refugee status . . . . Rather, so long as one of the motives for the feared persecutory conduct relates to a protected ground, the petitioner is entitled to that status.").

198. *See Springer, supra* note 44, at 5.

199. *See id.*

200. *See Asylum and Withholding Definitions*, 65 Fed. Reg. 76,588, 76,592 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

tive. While some may argue this sets forth too lenient a standard, it is the standard that has been applied by several Courts of Appeals, and has thus evinced its appropriateness in asylum litigation.<sup>201</sup>

#### 4. *Membership in a Particular Social Group*

In addressing the issue of "particular social group," the proposed rule attempts to clarify the least well-defined ground for asylum.<sup>202</sup> The rule codifies the definition given in *In re Acosta*, that a social group "is composed of members who share a common, immutable characteristic, such as sex . . . that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it."<sup>203</sup> The proposal explicitly states that gender may form the basis of such a group,<sup>204</sup> and that an applicant may be able to show that the persecutor harmed her because of her gender or because of her intimate relationship with the abuser.<sup>205</sup> Further, in deciding whether an applicant cannot change, or should not be expected to change the shared characteristic, the rule directs an adjudicator to consider all relevant evidence, including the applicant's particular situation and her country's conditions or societal views.<sup>206</sup>

The language in this portion of the rule is extremely helpful in focusing adjudicators on what is relevant in considering an asylum claim based on membership in a particular social group. Not only does the wording acknowledge that gender can be the basis of a social group, but it also recognizes that gender is an immutable characteristic that a woman cannot alter, and that often gender is the defining factor of a woman's persecution.<sup>207</sup> Moreover, this language focuses attention on circumstances where a woman's involvement in an intimate relationship, including marriage, may be considered immutable because she could not reasonably be expected to leave or divorce due to religious, cultural, or legal constraints.<sup>208</sup> These recognitions ac-

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201. See Springer, *supra* note 174.

202. See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

203. *Id.*

204. *Id.* at 76,588.

205. See *id.* at 76,593.

206. See *id.*

207. See *id.*

208. See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,593 (pro-

knowledge that the persecution that women suffer is often rooted in long-standing societal norms concerning their respective roles, and that such norms are sanctioned by the state, either expressly or by implication.

The rule goes on to enumerate a non-exhaustive list of additional factors that may be considered in examining whether a particular social group exists in order to lend conformity to judicial decisions on this issue.<sup>209</sup> The first three factors are drawn from the Ninth Circuit's decision in *Sanchez-Trujillo*.<sup>210</sup> The DOJ views these factors as "considerations that may be relevant in some cases, but not as requirements for a particular social group."<sup>211</sup> The final three factors are taken from the BIA's decision in *In re R-A-*, and are once again prefaced as considerations, but not requirements.<sup>212</sup> The rule also explains that evidence relating to societal attitudes about the group members could be relevant in determining the applicability of the enumerated factors, including whether societal institutions provide fewer protections or benefits to members of the group than to society at large.<sup>213</sup>

Some commentators have expressed fear that the inclusion of the list of factors, despite its predication as a consideration rather than a requirement, might lead adjudicators to rely exclusively on the factors enumerated as determinative.<sup>214</sup> This concern seems relevant, given the expressed statements by the DOJ about the proposed rule that it is attempting to develop "broadly applicable principles" rather than bright-line rules.<sup>215</sup> In light of that goal, inclusion of such a list may be counter-productive if it risks leading adjudicators to rely on those factors as conclusive in defining what constitutes a particular social group in any

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posed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

209. *See id.* at 76,594. The list of factors is (1) close affiliation between members; (2) a common interest among members; (3) a voluntary relationship exists among them; (4) the group is a societal faction or recognized segment of the population; (5) members view themselves as members of the group; and (6) society distinguishes members of the group for different treatment or status than others in society. *See id.*

210. 801 F.2d 1571 (9th Cir. 1986).

211. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,594 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

212. *See id.*

213. *See id.*

214. *See Springer, supra* note 44, at 5.

215. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,595 (proposed Dec. 7, 2000) (to be codified at 8 C.F.R. pt. 208).

given case.<sup>216</sup> However, the validity of such concerns will not be tested until the rule is implemented and there is evidence of how adjudicators are using the list in their decisions.

## V. PROPOSAL

The international community has taken only conservative measures to bring attention to the problem of domestic violence. The United States, as a global super-power and proponent of international human rights, should take steps to align domestic asylum law with recent international legal movements that have begun to recognize domestic violence as a possible basis for an asylum claim.

Specifically, the U.S. standards should focus on whether "the violence-experienced or feared-is a serious violation of a fundamental human right for a [Geneva] Convention ground and in what circumstances . . . the risk of that violence [can] be said to result from a failure of state protection."<sup>217</sup> Focusing upon whether the infliction of harm or suffering was "upon persons who differ in a way regarded as offensive"<sup>218</sup> would direct the persecution inquiry in a manner consistent with existing precedent.<sup>219</sup> Finally, the true inquiry should rest upon whether the state actually was able or willing to address the persecution. Then, in assessing the violence, such factors as social, cultural, traditional, and religious norms, as well as the laws affecting women in the applicant's country, should be analyzed in light of existing human rights instruments that provide standards for recognizing the specific protection needs of women.<sup>220</sup>

The guidelines adopted by the Canadian Immigration and Refugee Board (CIRB) in 1993, to help adjudicators deal with female refugee applicants who feared gender-based persecution, could serve as a model for a successful U.S. program.<sup>221</sup> The guidelines recognized that the "circumstances which give rise to women's fear of persecution are often unique to women" and as

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216. See Springer, *supra* note 44, at 5.

217. IMMIGRATION AND REFUGEE BOARD OF CANADA, WOMEN REFUGEE CLAIMANTS FEARING GENDER-RELATED PERSECUTION (1996) [hereinafter CANADIAN GUIDELINES], available at [http://www.irb.gc.ca/en/about/legal/guidline/women/GD4\\_C\\_E.htm](http://www.irb.gc.ca/en/about/legal/guidline/women/GD4_C_E.htm) (last updated June 28, 2002).

218. See Springer, *supra* note 44, at 3.

219. See *id.*

220. See *id.*

221. See CANADIAN GUIDELINES, *supra* note 217.

such, must be specifically addressed by asylum law.<sup>222</sup> Additionally, the CIRB stated that membership in a particular social group could be defined solely by gender, regardless of the large numbers included in such a group.<sup>223</sup> The guidelines expressly acknowledged that, "women face violence amounting to persecution, because of their particular vulnerability as women in their societies and because they are so unprotected."<sup>224</sup> Since asylum is an individual remedy, a woman would still need to show that the facts in her particular case sufficiently qualify her to receive the remedy of asylum based upon gender violence. This requirement would eliminate legislators' fear that all women who find themselves in situations of domestic violence will legally qualify for asylum.<sup>225</sup>

Reflection upon the language of the above guidelines promulgated by the CIRB indicates that the DOJ's proposed rule lacks sufficient clarity. In fact, the CIRB guidelines plainly recognize that "although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of *Convention refugee* may properly be interpreted as providing protection to women who demonstrate a well-founded fear of gender-related persecution."<sup>226</sup> Such definitive language is not present in the DOJ's proposed rule and is necessary to direct adjudicators' attention to the underlying goal the DOJ is attempting to address—allowing gender-based asylum claims that satisfy the statutory definition of "refugee."

Thus, despite the stated goal of establishing broadly applicable principles to guide asylum adjudicators, the proposed rule instead provides specific and rather limiting language in regards to the components of the legal definition of "refugee."<sup>227</sup> By specifying that the asylum inquiry should be conducted in such a manner, asylum law in the United States would begin to be compatible with current international practices by acknowledging the particular problems that women in the world face.

## VI. CONCLUSION

Domestic violence is a severe problem that affects women in

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222. *Id.*

223. *See id.*

224. *Id.*

225. *See id.*

226. *Id.*

227. *See* 8 U.S.C. § 1101(a)(42) (2000).

all parts of the world. Despite initial steps by the international community to address this issue, it is uncertain how long it will be before deep-rooted social, cultural, and religious norms regarding the role of women in society will change globally so that domestic violence will be recognized as a fundamental violation of women's human rights. In light of this situation, it is imperative that the United States take strategic steps to harmonize domestic asylum law with growing international trends towards recognizing gender-based asylum claims. In spite of any underlying fear that such recognition would open the floodgates to a potentially enormous group of women, asylum remains an individual remedy that should be made available to those battered women who satisfy every element of the law. While the DOJ's proposed rule is an important development in providing asylum adjudicators with guidance on the issue, as this comment indicates, there is still much more that needs to be done to establish domestic violence as the basis for a legitimate asylum claim.

#### POSTSCRIPT

As this issue went to press, Attorney General John Ashcroft had taken decisive action that could severely curtail asylum claims based on gender-related violence, including domestic violence. On March 1, 2003, the Immigration and Naturalization Service officially merged into the Department of Homeland Security. However, the Attorney General still maintained jurisdiction over immigration judges and the Board of Immigration Appeals (BIA). Attorney General Ashcroft stated in testimony given before the Senate on March 4, 2003, that he has certified the *In re R-A-* decision to himself for review. Informed sources suspect that he will reinstate the decision of the BIA in *In re R-A-*, which denied the applicant asylum because her abuse was not perpetrated by a government, and because she was an individual and not a member of a "particular social group." Additionally, it is believed that the Attorney General will completely revamp the proposed regulations, signaling a change in policy and law that will impact all women and girls fleeing gender-based violence perpetrated by non-state actors.

Such action would not only have grave consequences for the applicant in *In re R-A-*, who will be deported back to Guatemala to face potentially lethal consequences at the hands of her abuser, but for women and girls fleeing such horrific human

rights abuses as trafficking, sexual slavery, and honor killing. As other countries such as Canada and Great Britain take steps to align domestic immigration law with a growing international awareness surrounding unique human rights abuses based on gender, the United States could become further out of sync with international refugee law if Attorney General Ashcroft does indeed follow the suspected course of action detailed above. It remains to be seen what the final outcome will be, but the prospect for successful gender-based asylum claims in the United States appears to be grim.