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TOLERATED TERROR: MEXICO'S FAILURE TO PUNISH GENDER-
BASED VIOLENCE IN CIUDAD JUÁREZ AND POTENTIAL AVENUES FOR
RELIEF UNDER U.S. ASYLUM LAW

TOLERATED TERROR:

***Mexico's Failure to Punish Gender-Based Violence in Ciudad Juárez and
Potential Avenues for Relief under U.S. Asylum Law***

Introduction

This paper examines the phenomenon of gender-related violence in Ciudad Juárez, Mexico and surveys what legal mechanisms exist to protect the human rights of the women who are being targeted there. The first section of the paper presents background information regarding the violence in Ciudad Juárez. This section first explores the historical and economic developments in Mexico that led to the migration of thousands of young, rural women to Ciudad Juárez. I then discuss the nature of the violence against these women in Ciudad Juárez as it has been reported by human rights agencies, journalists and scholars. Finally, I survey some of the theories that have emerged to explain the pattern of violence against women in Ciudad Juárez.

The second section of the paper probes what legal remedies are available through local, state and federal authorities in Mexico to protect the women of Ciudad Juárez from violence. This section also discusses Mexico's human rights obligations under international human rights instruments to which it is a party and to what extent those obligations translate into real protection for the women of Ciudad Juárez. The data and commentary presented in this section establish that: (1) Mexico has failed to protect the women of Ciudad Juárez by its inadequate investigation of the murders, its inability to locate and prosecute the perpetrators, and its failure to implement preventive measures; and (2) the international human rights regime, while raising the profile of the murders and exerting considerable pressure on the Mexican government to take

meaningful steps to eradicate the violence, is not an effective mechanism for protecting the women of Ciudad Juárez.

The third section of the paper examines what relief might be available under United States asylum law to women who are actual or potential victims of the violence in Ciudad Juárez. This section presents an overview of U.S. asylum law, followed by a step-by-step analysis of whether and under what circumstances these women could make successful asylum claims.

The paper concludes with a general assessment of the “rule of law” in Mexico with respect to the human rights of the women of Ciudad Juárez. This assessment is broken down into three categories: (1) efficacy of the Mexican local and federal legal framework; (2) efficacy of the relevant international human rights organizations; and (3) efficacy of international refugee law as applied in the U.S. context. I also suggest topics for further research.

Section 1: Background

The implementation of the North American Free Trade Agreement (NAFTA) in the mid-1990’s coincided with an increase in the murder rate of women in Ciudad Juárez.¹ That rate has remained elevated and is proportionately higher than the rates for similarly situated cities and the national average in Mexico.² Specifically, while homicide rates in Ciudad Juárez increased for both men and women between 1993 and 2001, the rate for women rose at double the rate for men.³ Although exact numbers are difficult to establish, over 375 women have been murdered in Ciudad Juárez, Mexico since 1993.⁴

¹ Grace C. Spencer, *Her Body is a Battlefield: The Applicability of the Alien Tort Statute to Corporate Human Rights Abuses in Juarez, Mexico*, 40 GONZ. L. REV. 503, 510 (2004-05).

² Inter-American Commission on Human Rights, *The Situation of the Rights of Women in Ciudad Juárez, Mexico: The Right to be Free from Violence and Discrimination* (Mar. 3, 2003), ¶¶ 4, 42 (available at <http://www.cidh.oas.org/annualrep/2002eng/chap.vi.juarez.htm>) (last accessed Mar. 26, 2006) (IACHR Report).

³ IACHR Report, *supra* note 2, ¶ 42.

Many of the victims have been young, employed by *maquiladoras*⁵ or were students.⁶ A number of the victims were recent transplants to Ciudad Juárez who had migrated from other parts of Mexico.⁷ Most of the women are from poor backgrounds.⁸ Additionally, the killings have been extremely brutal, involving sexual violence and/or beatings, strangulation or stabbings.⁹ The bodies of the victims often bear signs of torture.¹⁰ For example, many of the victims have been “mutilated . . . with breasts hacked off, objects thrust up body cavities and deep slashes across [the] chest and face . . .”¹¹

The *maquiladora* industry in Mexico existed for many years prior to the passage of the NAFTA.¹² In the mid-1960s, Mexico implemented the Border Industrialization Program (BIP),¹³ which created the conditions that gave rise to the *maquiladoras*.¹⁴ Although NAFTA did not cause the establishment of the first *maquiladoras*, the number of foreign-owned companies along

⁴ Sylvia Moreno, *Unresolved Murders of Women Rankle in Mexican Border City; New State Officials Seek Justice in Hundreds of Bungled Cases*, WASH. POST, Dec. 16, 2005, at A30.

⁵ The terms “*maquiladora*” and “*maquila*” refer to assembly plants in Mexico that produce goods for export.

⁶ Spencer, *supra* note 1, at 510; IACHR Report, *supra* note 2, ¶ 3; Amnesty International, *Intolerable Killings: 10 years of abductions and murders of women in Ciudad Juárez and Chihuahua*, at 7 (Aug. 10, 2003) (available at [http://web.amnesty.org/library/pdf/AMR410262003ENGLISH/\\$File/AMR4102603.pdf](http://web.amnesty.org/library/pdf/AMR410262003ENGLISH/$File/AMR4102603.pdf)) (last accessed Mar. 26, 2006).

⁷ IACHR Report, *supra* note 2, ¶ 44.

⁸ *Intolerable Killings*, *supra* note 6, at 7.

⁹ IACHR Report, *supra* note 2, ¶ 4.

¹⁰ *Id.*, ¶¶ 33, 62.

¹¹ Linda Diebel, *The murdered women of Juarez*, TORONTO STAR, Feb. 19, 2006, at A10.

¹² Griselda Vega, Student Note, *Maquiladora's Lost Women: The Killing Fields of Mexico – Are NAFTA and NAALC Providing the Needed Protection?*, 4 J. GENDER RACE & JUST. 137, 144 (2000).

¹³ Jessica Livingston, *Murder in Juárez: Gender, Sexual Violence, and the Global Assembly Line*, 25.1 FRONTIERS – A JOURNAL OF WOMEN'S STUDIES 59, 60 (2004).

¹⁴ *Intolerable Killings*, *supra* note 6, at 22.

the U.S.-Mexico border increased dramatically following its passage.¹⁵ NAFTA helped to create 1.2 million jobs in Mexico, over one quarter of which are located in Ciudad Juárez.¹⁶

Expansion in the number of factories located along the U.S.-Mexico border has led to a population increase in those areas.¹⁷ *Maquiladora* workers typically come from small towns and rural parts of Mexico.¹⁸ While the *maquiladora* industry profits from paying its employees lower wages than those paid in more developed countries, the *maquiladoras* offer comparatively higher wages than elsewhere in Mexico and thus draw many people from other parts of the country.¹⁹ In addition to economic need, young women seek employment with the *maquiladoras* in order to achieve independent social lives.²⁰ Thus, the migration of women to work in the *maquiladoras* has created “a new phenomenon of mobile, independent – and vulnerable – working women living in the city.”²¹ Young women seeking work in the *maquiladoras* continue to arrive in Ciudad Juárez at a rate of forty to sixty thousand per year.²²

While employment with the *maquiladoras* presents economic opportunities for young women in Mexico, it also carries with it substantial risk. The perpetrators of the murders that have taken place in Ciudad Juárez since 1993 have abducted many of their victims while the

¹⁵ Vega, *supra* note 12, at 144.

¹⁶ Livingston, *supra* note 13, at 60.

¹⁷ Spencer, *supra* note 1, at 509.

¹⁸ Livingston, *supra* note 13, at 60.

¹⁹ Intolerable Killings, *supra* note 6, at 23.

²⁰ Livingston, *supra* note 13, at 61.

²¹ *Id.* at 60 (internal citations and quotation marks omitted).

²² *Id.* at 61.

victims were on their way to and from work at the *maquiladoras*.²³ This pattern of abduction is not surprising given that many of the women working in the *maquiladoras* cannot afford secure transportation to and from work.²⁴ These women walk through unlit dirt roads each day, sometimes alone, often leaving early in the morning in order to account for the longer travel time.²⁵

Furthermore, although it is difficult to characterize the motivation behind these crimes with much specificity, “there is general agreement among both the state and non-state sectors that most [of the crimes] relate to manifestations of violence with gender specific causes and consequences.”²⁶ Amnesty International has stated that the suffering of the victims “indicates a form of violence based entirely on their domination and humiliation as young women.”²⁷ As mentioned previously, many of the victims’ bodies have shown evidence of sexual violence and torture, including lacerations, amputation and biting of the breasts and/or genitals.²⁸ Some women were discovered bound, “with panties wound around [their] knees and scarves or purse strings tied around [their] throats.”²⁹ The pattern and nature of these killings leave little doubt that the perpetrators are targeting the victims, at least in part, because they are women.

Several theories have been advanced to explain the murders in greater detail. One such theory is that the women working in the *maquiladoras* challenge traditional notions of

²³ Spencer, *supra* note 1, at 510.

²⁴ *Id.* at 511; IACHR Report, *supra* note 2, ¶ 90.

²⁵ Spencer, *supra* note 1, at 511.

²⁶ IACHR Report, *supra* note 2, ¶ 43.

²⁷ Intolerable Killings, *supra* note 6, at 28.

²⁸ Diebel, *supra* note 11.

²⁹ *Id.*

womanhood in Mexico.³⁰ According to this theory, it may be that some Mexican men, who traditionally occupy the role of breadwinner, feel threatened by the increasing economic independence of these women.³¹ Conversely, unemployment and low wages diminish the ability of Mexican men to support their households, which likely challenges their perceptions of their own masculinity.³² In fact, labor shortages have led to increased numbers of males working in the *maquiladoras*; it is estimated that men comprise 35 to 50 percent of the *maquiladora* work force.³³ Thus, misogyny expressed through violence could be a consequence of women's challenge to the traditional role of men as economic providers in the context of a culture in which men dominate women.³⁴

However, given their frequency and nature, there is something unique about the murders in Ciudad Juárez. Although the theory of "gender backlash" has intuitive appeal, it does not account for why the murders are taking place in Ciudad Juárez and not throughout Mexico, where the aforementioned cultural factors are also presumably present. While the broader context of Mexican social norms may explain the perpetrators' motivation to carry out the violence, it does not explain who the perpetrators are or why they are concentrated in Ciudad Juárez. In other words, despite the pervasiveness of patriarchal social mores in Mexico, the perpetrators of the violence represent an anomalous subset of the population that is motivated to carry out the ultimate punishment against these women. Thus, the theory of gender backlash is

³⁰ Livingston, *supra* note 13, at 67 (citing Susan Tiano and Carolina Ladino, *Dating, Mating, and Motherhood: Identity Construction Among Mexican Maquila Workers*, 31 ENVIRONMENT AND PLANNING A 305, 307 (1999)).

³¹ *Id.* at 69.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 70.

limited in that it cannot account for the differences between the perpetrators and other members of Mexican society who have not chosen to commit violence against women.

Nevertheless, the prevalence of domestic violence in Mexican society supports the notion that some of the violence against women is traceable to societal norms. Several studies indicate that one third to one half of Mexican women in relationships suffer some form of abuse by their partners, especially women between the ages of 15 and 29 and pregnant women.³⁵ Not surprisingly, Ciudad Juárez currently has the highest rate of domestic violence in Mexico.³⁶ Furthermore, it was not until the year 2000 that the State of Chihuahua even made domestic violence a criminal offence.³⁷ Finally, in addition to the murders of the young workingwomen by presumably unknown assailants, a substantial number of the killings in Ciudad Juárez since 1993 have taken place in the domestic and intrafamilial context.³⁸ Thus, it can certainly be said that, although precise causal explanations remain elusive, the violence against the women in Ciudad Juárez is taking place in a broader context of gender-related violence in Ciudad Juárez and Mexico in general.

³⁵ IACHR Report, *supra* note 2, ¶ 59.

³⁶ Livingston, *supra* note 13, at 71.

³⁷ Intolerable Killings, *supra* note 6, at 8.

³⁸ IACHR Report, *supra* note 2, ¶ 57.

Section 2: Legal Protections under Domestic and International Law

The murders of the women in Ciudad Juárez have gained international attention.³⁹ However, the vast majority of the murders remain unsolved and the investigation by Mexican authorities has been inadequate; only 20 percent of the killings had resulted in prosecutions and convictions as of March 2003.⁴⁰ Among the aspects of the inadequate response by Mexican authorities are: (1) delay in the initiation of investigations; (2) insufficient effort once investigation has commenced; (3) mishandling of evidence; (4) mistreatment of family members of victims; (5) lack of technical and scientific capability of the police; and (6) failure to gather evidence regarding sexual violence.⁴¹ Additionally, some Mexican officials and human rights organizations have raised serious concerns regarding allegations of the use of torture to coerce confessions from suspects.⁴² Such allegations raise further doubts about the ability of Mexican law enforcement to bring the actual perpetrators to justice.

Moreover, the Inter-American Commission on Human Rights (IACHR) has received reports of threats against human rights defenders, family members of the victims, and journalists reporting on the crimes.⁴³ For example, family members of victims have informed the IACHR that they were watched or followed, that they received anonymous, intimidating phone calls warning them to stop pursuing accountability for the murders, and that they did not report the

³⁹ Spencer, *supra* note 1, at 513.

⁴⁰ *Id.* at 514; IACHR Report, *supra* note 2, ¶¶ 4, 81, 135.

⁴¹ IACHR Report, *supra* note 2, ¶¶ 70-72.

⁴² *Id.*, ¶ 49; *Intolerable Killings*, *supra* note 6, at 51.

⁴³ IACHR Report, *supra* note 2, ¶ 65.

intimidation to the local authorities out of fear and lack of confidence in the authorities' response.⁴⁴

No official has been held accountable for the deficiencies in the Mexican government's response to the killings.⁴⁵ Mexico's National Human Rights Commission issued recommendations in 1998 that addressed some of these deficiencies, yet none of the recommendations had been implemented as of 2003.⁴⁶

Domestic Law

Recent amendments to the state and federal laws of Mexico appear to provide increased protection for women's rights. For example, Article 1 of the Mexican Constitution was amended in 2001 to prohibit all forms of discrimination, including discrimination based on gender.⁴⁷ The Constitution of Chihuahua incorporates all of the rights recognized in the federal constitution, as well as those recognized in the international human rights treaties to which Mexico is a party.⁴⁸ Furthermore, the Chihuahua Criminal Code has been amended to prohibit physical, verbal, emotional or sexual violence against a family member.⁴⁹

While these reforms represent positive advances in legal protections for women, it remains to be seen whether government bodies and Mexican society at large will internalize the principles underlying these reforms. For example, the Chihuahua legislature attempted to pass a

⁴⁴ IACHR Report, *supra* note 2, ¶¶ 65, 147.

⁴⁵ *Id.*, ¶¶ 5, 142.

⁴⁶ *Id.*, ¶ 34.

⁴⁷ Constitución Política de los Estados Unidos Mexicanos [Const.], *as amended*, art. 1, Diario Oficial de la Federación [D.O.], 5 de Febrero de 1917 (Mex.).

⁴⁸ Constitución Política del Estado de Chihuahua [Const.], *as amended*, art. 4, 17 Junio de 1950 (Chihuahua, Mex.).

⁴⁹ Código Penal del Estado de Chihuahua [Chihuahua Criminal Code], *as amended*, art. 190, 4 de Marzo de 1987.

law that would have allowed defendants in rape cases to offer evidence regarding whether the victim “provoked” the attack, which would reduce the defendant’s minimum sentence from four years to one year.⁵⁰ Although the law did not pass, the fact that such a law was even debated in the legislature suggests such principles have not fully taken hold.

While the State of Chihuahua has criminal jurisdiction over the many instances of violence against women that have taken place since 1993, the federal government has a responsibility to apply its resources as well.⁵¹ The federal authorities did not participate in the investigations of the Juárez murders for several years on the grounds that such crimes did not fall under federal jurisdiction, although in recent years the *Procuraduría General de la República* (PGR) (Office of the Attorney General) has cited evidence of federal offenses, such as organ trafficking and pornography, in connection with the killings in order to claim jurisdiction.⁵²

The Mexican *Comisión Nacional de Derechos Humanos* (CNDH) (National Human Rights Commission) published a report in 1998 following its investigation of 81 cases of murdered women in the state of Chihuahua.⁵³ The CNDH concluded in its report that state and municipal authorities in Chihuahua were guilty of negligence and dereliction of duty in connection with the investigations and prosecutions – or lack thereof – of the murders.⁵⁴ The

⁵⁰ Livingston, *supra* note 13, at 66.

⁵¹ IACHR Report, *supra* note 2, ¶¶ 140-41.

⁵² Intolerable Killings, *supra* note 6.

⁵³ See Comisión Nacional de Derechos Humanos, Recomendación 044/98 (available at <http://www.cndh.org.mx/recomen/1998/044.htm>) (last accessed Mar. 27, 2006) (CNDH Report).

⁵⁴ *Id.*, § 4(j).

report called for criminal and administrative investigations of a variety of officials charged with coordinating and carrying out investigations of the murders.⁵⁵

State and municipal authorities rejected the recommendations, accusing the CNDH of trying to damage the public image of the ruling party in Chihuahua, the *Partido Acción Nacional* (PAN), during an election year.⁵⁶ However, the victorious *Partido Revolucionario Institucional* (PRI) administration also failed to implement the recommendations on the justification that the recommendations referred only to the previous government.⁵⁷ Thus, while the abduction and murders of the women in Ciudad Juárez were central issues in the state election campaign that year, resort to the political process failed to provide an adequate remedy for the victims and their families.⁵⁸

The ineptitude of the judicial and political processes in Mexico led victims and human rights groups to file complaints with international human rights governing bodies.⁵⁹ These organizations -- and the international community in general -- have responded with sharp criticism of the Mexican government, have increased awareness regarding the violence, and have engaged the Mexican government in dialogue regarding how it might begin to deal with this problem effectively. Unfortunately, these measures are limited in terms of providing actual protection for those have been or are becoming victims of the ongoing violence; it is ultimately Mexico's responsibility to prevent and punish the violence that is taking place on its soil.⁶⁰

⁵⁵ *Id.*, § 5.

⁵⁶ *Intolerable Killings*, supra note 6, at 35.

⁵⁷ *Id.*

⁵⁸ *Id.* at 48.

⁵⁹ IACHR Report, supra note 2, ¶ 2.

⁶⁰ *Id.*, ¶ 104.

International Conventions

The inability of state and federal authorities in Mexico to adequately address the violence against women means that Mexico is in violation of international human rights covenants to which it is a party.⁶¹ Pursuant to its obligations under international law, Mexico is required to investigate, prosecute and punish crimes of violence against women.⁶² The Universal Declaration of Human Rights (Universal Declaration),⁶³ the International Covenant on Civil and Political Rights (ICCPR),⁶⁴ the International Covenant on Economic, Social and Cultural Rights (ICESCR),⁶⁵ the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁶⁶ the American Convention on Human Rights (American Convention)⁶⁷ and the Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará)⁶⁸ are among the relevant international human rights instruments to which Mexico is a party.⁶⁹

⁶¹ Intolerable Killings, *supra* note 6, at 13.

⁶² IACHR Report, *supra* note 2, ¶ 9.

⁶³ Universal Declaration of Human Rights, Dec. 10, 1948, G. A. Res. 217A (III), U. N. Doc. A/810.

⁶⁴ International Covenant on Civil and Political Rights, Dec. 19, 1996, 999 U.N.T.S. 171.

⁶⁵ International Covenant on Economic, Social and Cultural Rights, Dec. 19, 1966, 993 U.N.T.S. 3, 6 I.L.M. 360.

⁶⁶ Convention on the Elimination of All Forms of Discrimination against Women, Jul. 17, 1980, G.A. Res. 34/180, U.N. GAOR, 34th Sess., Supp. No. 46, U.N. Doc. A/34/46, 19 I.L.M. 33.

⁶⁷ American Convention on Human Rights, Nov. 22, 1969, 1144 U.N.T.S. 123, 9 I.L.M. 673.

⁶⁸ Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women, 33 I.L.M. 1534 (in force Mar. 5, 1995).

⁶⁹ IACHR Report, *supra* note 2, ¶ 9.

The Universal Declaration, the ICCPR and the ICESCR each broadly recognize women's right to equality and the prohibition of discrimination.⁷⁰ The CEDAW requires signatory states to adopt specific measures to combat discrimination against women.⁷¹ In order to give effect to its guarantees, the American Convention also requires signatory states to adopt legislative and other measures to implement the guarantees in practice.⁷² The Convention of Belém do Pará requires signatory states to prevent, investigate and punish gender-based violence.⁷³ Additionally, the American Convention obliges signatory states to provide effective judicial recourse for anyone alleging violations of her or his rights under domestic law or under the American Convention itself.⁷⁴ Where such recourse is unavailable or ineffective, the inter-American system provides an avenue for recourse through its individual petition system.⁷⁵ Furthermore, Mexico is obliged under the UN Convention on the Rights of the Child (CRC)⁷⁶ to locate these missing women, given that a large number of them are minors.⁷⁷ These international human rights instruments underscore Mexico's obligation to investigate and prosecute gender-based violence, even when the perpetrators of such violence are non-state agents.⁷⁸

⁷⁰ Universal Declaration, *supra* note 63, arts. 1 & 2; ICCPR, *supra* note 64, arts. 2 & 3; ICESCR, *supra* note 65, arts. 2 & 3.

⁷¹ CEDAW, *supra* note 66, art. 2.

⁷² American Convention, *supra* note 67, art. 2.

⁷³ Convention of Belém do Pará, *supra* note 68, art. 7.

⁷⁴ American Convention, *supra* note 67, art. 25.

⁷⁵ IACHR Report, *supra* note 2, ¶ 102.

⁷⁶ Convention on the Rights of the Child, Nov. 20, 1989, 1577 U.N.T.S. 3, 28 I.L.M. 1448.

⁷⁷ Intolerable Killings, *supra* note 6, at 33; IACHR Report, *supra* note 2, ¶ 121.

⁷⁸ Intolerable Killings, *supra* note 6, at 65.

Furthermore, Mexico's human rights obligations apply equally to violence that takes place in both the "public" and "private" spheres. The Inter-American Commission on Human Rights (IACHR) points out that "there is an insufficient understanding [by Mexican authorities] that these deaths, whether perpetrated . . . by unknown perpetrators . . . or . . . by intimate partners, are equally violative of the right to be free from violence, and equally manifest the objectification or dehumanization of the victim based on gender."⁷⁹

The CNDH has found Mexico to be noncompliant with some of the aforementioned instruments with respect to the situation in Ciudad Juárez.⁸⁰ Furthermore, although Mexico has adopted some legislation that conforms to its obligations under these instruments, Mexico has not properly enforced these laws.⁸¹ The IACHR published a report in 2003 denouncing Mexico's failure to prevent the violence and punish the perpetrators, which has raised awareness but has done little to effect real change in Mexico's enforcement of its own laws. Furthermore, the IACHR has received individual petitions from victims' families and advocates, yet there is no indication that the IACHR has acted upon these petitions beyond preliminarily evaluating them.⁸² The women of Ciudad Juárez therefore remain subject to ongoing gender-based violence, despite the existence of domestic and international laws aimed at securing their fundamental human rights. Because no effective recourse is available through Mexican and international legal mechanisms, it is possible that women fleeing persecution in Ciudad Juárez could make a claim for asylum in the United States.

⁷⁹ IACHR Report, *supra* note 2, ¶ 123.

⁸⁰ CNDH Report, *supra* note 53, Summary, ¶ 5 (finding violations of articles 1 & 2 of the Convention of Belém do Pará and articles 1 & 7 of the Universal Declaration).

⁸¹ IACHR Report, *supra* note 2, ¶ 153.

⁸² *Id.*, ¶ 26.

Section 3: Potential Avenues for Relief under United States Asylum Law

The purpose of asylum law is to protect potential or actual victims of persecution whose states of origin are unable or unwilling to provide such protection.⁸³ Asylum law in its modern form originated as part of an international response to the tragedies of World War II that displaced millions of people. Shortly after its own inception, the United Nations drafted the 1951 Geneva Convention Relating to the Status of Refugees (1951 Convention),⁸⁴ which set forth internationally accepted principles of asylum law.⁸⁵ The 1951 Convention was later amended by the 1967 Protocol Relating to the Status of Refugees (1967 Protocol).⁸⁶ The United States did not sign the 1951 Convention, though it is a signatory of the 1967 Protocol.⁸⁷ The 1967 Protocol was incorporated into United States domestic law by the passage of the Refugee Act of 1980 (Refugee Act),⁸⁸ which amended the Immigration and Nationality Act of 1952 (INA).⁸⁹

⁸³ Karen Musalo, Jennifer Moore & Richard Boswell, REFUGEE LAW AND POLICY: A COMPARATIVE AND INTERNATIONAL APPROACH 4 (Karen Musalo, Jennifer Moore & Richard Boswell eds., Carolina Academic Press 2d ed. 2002). The meaning of “persecution” in the context of asylum law is discussed more fully below.

⁸⁴ Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6223, 189 U.N.T.S. 150.

⁸⁵ See Teresa L. Peters, Note, *International Refugee Law and the Treatment of Gender-Based Persecution: International Initiatives as a Model and Mandate for National Reform*, 6 TRANSNAT’L L. & CONTEMP. PROBS. 225, 231 (1996).

⁸⁶ Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267. The 1967 Protocol amended Article 1 of the 1951 Convention, which set forth the definition of a “refugee,” to eliminate certain geographical and temporal restrictions on this definition.

⁸⁷ 1967 Protocol, *supra* note 86.

⁸⁸ Pub. L. No. 96-212, 94 Stat. 102 (1980).

⁸⁹ 66 Stat. 163 (1952) (codified at 8 U.S.C. §§ 1101-1537).

In order to qualify for asylum in the United States, an applicant must prove that she is a refugee as defined by the INA.⁹⁰ The INA defines a refugee as:

[A]ny person who is outside any country of such person's nationality, 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.⁹¹

The INA definition is based upon the definition found in Article 1 of the 1951 Convention and amended by the 1967 Protocol,⁹² and sets forth three factors that the applicant must satisfy in order to be eligible for asylum.

First, the applicant must have fled from her home country or country of last habitual residence.⁹³ Second, the applicant must be unable or unwilling to return to the country in which she fears persecution because she has already been persecuted (past persecution) or has a well-founded fear of persecution (future persecution).⁹⁴ Finally, the persecution that the applicant fears must be based on one of five enumerated grounds: race, religion, nationality, membership in a particular social group, or political opinion.⁹⁵

⁹⁰ INA § 208(b)(1)(B)(i), 8 U.S.C. § 1158(b)(1)(B)(i) (“The burden of proof is on the applicant to establish that the applicant is a refugee, within the meaning of [INA] section 101(a)(42)(A) [8 U.S.C. § 1101(a)(42)(A)].”).

⁹¹ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

⁹² 1951 Convention, *supra* note 84, art. 1(A)(2); 1967 Protocol, *supra* note 86, art. 1; Caryn L. Weisblat, Comment, *Gender-Based Persecution: Does United States Law Provide Women Refugees with a Fair Chance?*, 7 TUL. J. INT’L & COMP. L. 407, 413 (1999).

⁹³ INA § 208(a)(1), 8 U.S.C. § 1158(a)(1); INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

⁹⁴ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A); INA § 208(a)(1), 8 U.S.C. § 1158(a)(1) (“Any alien who is physically present in the United States or who arrives in the United States . . . may apply for asylum in accordance with this section . . .”).

⁹⁵ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

The analysis presented in this paper presumes that the asylum claimant has fled to the United States from Mexico, thus satisfying the first prong of the refugee definition. The paper therefore focuses on the second and third factors, namely, the nature of the persecution from which the asylum applicant is fleeing and the basis upon which the applicant alleges the persecution is taking place.⁹⁶ The following section (Step One) presents how persecution is analyzed under the INA and how the women from Ciudad Juárez might fit into this analysis. The section is broken down into two subcategories: (1) whether the applicant fears harm that rises to the level of “persecution” for asylum purposes; and (2) whether the fear is “well-founded,” based on either past persecution or potential future persecution.

⁹⁶ Although this paper is primarily concerned with the legal analysis of how persecuted women from Ciudad Juárez might assert their asylum claims in the United States, it is worth mapping the basic administrative and judicial hierarchy through which such claims must travel. Prior to the passage of the Homeland Security Act of 2002 (HSA), Pub. L. No. 107-296, 116 Stat. 2135 (2002), the Immigration and Naturalization Service (INS), an agency of the U.S. Department of Justice (DOJ), was responsible for adjudicating asylum claims. This responsibility is now shared between the Bureau of Citizenship and Immigration Services (BCIS) in the Department of Homeland Security (DHS), and the Executive Office for Immigration Review (EOIR), an agency within the DOJ. 8 C.F.R. § 1.1 (2003); *see also* U.S. Department of Justice, Executive Office for Immigration Review, News Release, *Asylum Protection in the United States*, ¶ 5 (April 28, 2005) (DOJ News Release), available at <http://www.usdoj.gov/eoir/press/05/AsylumProtectionFactsheetQAApr05.htm> (last accessed on March 14, 2006).

For cases in which an asylum applicant is affirmatively seeking asylum (“affirmative” claims), BCIS asylum officers interview the applicant and determine whether to grant asylum. 8 C.F.R. § 208.14(b) (2000). If the asylum officer does not grant asylum, the officer refers the applicant’s case to an EOIR immigration court. 8 C.F.R. § 208.14(b)(2) (2000). The asylum officer’s determinations are not binding on the EOIR immigration judge (IJ), who evaluates the applicant’s claim *de novo*. DOJ News Release, ¶ 9. Asylum claims that are asserted as a defense to removal (“defensive claims”) begin in the EOIR immigration court, which has jurisdiction over removal proceedings. INA § 240(a)(1), 8 U.S.C. § 1230(a)(1).

Decisions made by the IJ may be appealed to the Bureau of Immigration Appeals (BIA) within the DOJ, as was the case prior to the passage of the HSA. 8 C.F.R. § 1003.1(b)(9) (2005). BIA decisions, which are binding on the lower immigration courts, 8 C.F.R. § 1003.1(g) (2005), are final executive decisions and may be appealed directly to the federal circuit court of appeals for the jurisdiction in which the case is taking place. 8 C.F.R. § 1003.1(d)(7) (2005); *see also* 8 C.F.R. § 1003.1(h) (2005) (the Attorney General may review BIA decisions under certain circumstances). Finally, federal circuit court decisions, which are themselves binding on the BIA and lower immigration courts in the relevant circuits, are subject to review by the Supreme Court of the United States. U.S. Const. art. III, § 2.

Step One: Well-Founded Fear of Persecution

A. What is Persecution?

In making her claim for asylum, the applicant has the burden of proving that she fears persecution in her home country.⁹⁷ Neither the 1951 Convention nor the Refugee Act defines “persecution.”⁹⁸ However, the BIA construed the meaning of “persecution” as “harm or suffering [that] must be inflicted upon an individual in order to punish him for possessing a belief or characteristic a persecutor seeks to overcome.”⁹⁹ The federal circuit courts of appeal have generally accepted persecution in this context to mean “the infliction or suffering of harm upon those who differ . . . in a way regarded as offensive.”¹⁰⁰ The offensive treatment must be “extreme” to qualify as persecution.¹⁰¹ Some courts have expanded upon this definition, holding that

[P]ersecution includes more than threats to life and freedom . . . and therefore includes a variety of forms of adverse treatment, including non-life-threatening violence and physical abuse . . . or non-physical forms of harm such as the deliberate imposition of a substantial economic disadvantage[.]¹⁰²

⁹⁷ 8 C.F.R. § 1208.13(a) (2003).

⁹⁸ See generally 1951 Convention, supra note 84; Refugee Act, supra note 88; see also INA § 101(a)(42), 8 U.S.C. § 1101(a)(42); *Li v. AG of the United States*, 400 F.3d 157, 170 (3d Cir. 2005) (“Congress chose not to define “persecution” in the Refugee Act, nor has any legislative definition been enacted in the interim.”).

⁹⁹ *Matter of Acosta*, 19 I. & N. Dec. 211, 223 (BIA 1985).

¹⁰⁰ *Li*, 400 F.3d at 170-71.

¹⁰¹ *Korablina v. INS*, 158 F.3d 1038, 1044 (9th Cir. 1998) (holding that the cumulative effect of several instances of violence and harassment compel a finding of persecution); *Tamas-Mercea v. Reno*, 222 F.3d 417, 424 (7th Cir. 2000) (holding that mere harassment is not persecution).

¹⁰² *Ivanishvili v. U.S. Dept. of Justice*, 433 F.3d 332, 341 (2d Cir. 2006) (internal citations and quotation marks omitted); see also *Mashiri v. Ashcroft*, 383 F.3d 1112, 1120 (9th Cir. 2004) (holding that violence against family members and emotional trauma may constitute persecution).

Furthermore, the courts may consider the cumulative harm an applicant has suffered, even if no single incident considered in isolation would rise to the level of persecution.¹⁰³

Persecution under the INA includes persecution by a non-governmental group that the foreign government is "unwilling or unable to control."¹⁰⁴ For example, the failure of police to respond in a meaningful way to an applicant's reports of persecution by a non-state actor can form the basis for a valid asylum claim.¹⁰⁵ Whether a government is "unable or unwilling to control" private actors is a factual question that the immigration courts resolve on a case-by-case basis.¹⁰⁶

Violence and oppressive acts against women are kinds of persecution that may form the basis for a valid asylum claim.¹⁰⁷ The international community has accepted that sexual violence committed for reasons of race, religion, nationality, membership of a particular social group or

¹⁰³ *Chand v. INS*, 222 F.3d 1066, 1074 (9th Cir. 2000).

¹⁰⁴ *Batalova v. Ashcroft*, 355 F.3d 1246, 1253 (10th Cir. 2004) (quotation omitted); *Korablina*, 158 F.3d at 1044 ("Discrimination, harassment, and violence by groups that the government is unwilling or unable to control can . . . constitute persecution.") (internal citation omitted); see also 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 (UNHCR Guidelines on International Protection), U.N. Doc. HCR/GIP/02/01, ¶ 15 (2002) ("If the State . . . does not accord certain rights or protection from serious abuse, then the discrimination in extending protection, which results in serious harm inflicted with impunity, could amount to persecution.").

¹⁰⁵ *In re O-Z- and I-Z-*, 22 I. & N. Dec. 23, 26 (BIA 1998) (upholding a grant of asylum where "the respondent reported at least three . . . incidents to the police, who took no action beyond writing a report."); but cf. *Hasalla v. Ashcroft*, 367 F.3d 799, 804 (8th Cir. 2004) (The fact that police did not take action on anonymous threats "does not necessarily mean that the . . . government was unable or unwilling to control the individuals who made the threats.").

¹⁰⁶ *Menjivar v. Gonzales*, 416 F.3d 918, 921 (8th Cir. 2005).

¹⁰⁷ Amanda Blanck, Note, *Domestic Violence as a Basis for Asylum Status: A Human Rights Based Approach*, 22 WOMEN'S RIGHTS L. REP. 47, 59 (2000).

political opinion may be considered persecution for asylum purposes if governmental authorities knowingly tolerate such violence or are unable to offer effective protection from it.¹⁰⁸

The federal circuit courts of the United States have also recognized that gender-based violence and sexual violence may constitute persecution. For example, the BIA has held that female genital mutilation (FGM) is a form of persecution.¹⁰⁹ Moreover, the Ninth Circuit has held that sexual assault, including forced oral sex, may amount to persecution.¹¹⁰ The BIA has also found that persecution can include beatings, rape and threats.¹¹¹ Thus, physical and psychological harm alike may be persecution in the context of gender-based asylum claims.

Domestic violence is another example of gender-based persecution. In *Aguirre-Cervantes v. INS*,¹¹² the Ninth Circuit granted asylum to a Mexican woman who was abused by her father. The court supported its holding by pointing to evidence the applicant produced that

¹⁰⁸Blanck, *supra* note 107, at 66; UNHCR Guidelines on the Protection of Refugee Women (UNHCR Guidelines), U.N. Doc. EC/SCP/67, ¶ 59 (1991); UNHCR Guidelines on International Protection, *supra* note 104, ¶ 3 (“Gender-related claims have typically encompassed, although are by no means limited to, acts of sexual violence, family/domestic violence, coerced family planning, female genital mutilation, punishment for transgression of social mores, and discrimination against homosexuals.”).

¹⁰⁹*In re Kasinga*, 21 I. & N. Dec. 357, 358 (BIA 1996); *see also* *Mohamed v. Gonzales*, 400 F.3d 785 (9th Cir. 2005) (“[W]e have no doubt that the range of procedures collectively known as female genital mutilation rises to the level of persecution within the meaning of our asylum law.”).

¹¹⁰*Hernandez-Montiel v. INS*, 225 F.3d 1084, 1097 (9th Cir. 2000), *overruled in part on other grounds by* *Thomas v. Gonzales*, 409 F.3d 1177, 1187 (9th Cir. 2005); *see also* *Boer-Sedano v. Gonzales*, 418 F.3d 1082, 1088 (9th Cir. 2005) (finding persecution where a police officer forced the applicant, a homosexual man, to perform oral sex on him nine times).

¹¹¹*In re D-V-*, 21 I. & N. Dec. 77 (BIA 1993); *see also* *Navas v. INS*, 217 F.3d 646, 658 (9th Cir. 2000) (death threats alone may constitute persecution); *but see* *Sepulveda v. United States AG*, 401 F.3d 1226, 1231 (11th Cir. 2005) (holding that menacing telephone calls and threats did not amount to persecution); *Mitev v. INS*, 67 F.3d 1325, 1330-31 (7th Cir. 1995) (holding that the question of whether a threat amounts to persecution depends on the context in which the threat is made).

¹¹²242 F.3d 1169 (9th Cir. 2001), *reh'g granted*, 270 F.3d 794 (9th Cir. 2001), *vacated per stipulation and remanded to BIA*, 273 F.3d 1220 (9th Cir. 2001).

demonstrated the pervasiveness of domestic violence in Mexico.¹¹³ The court also found that the Mexican government was unable or unwilling to control the woman's father.¹¹⁴ Although this panel decision is not binding precedent (the decision was vacated and remanded to the BIA pursuant to the parties' stipulation¹¹⁵ after Aguirre-Cervantes' father was murdered), the decision is instructive in that it demonstrates how the pervasiveness of domestic violence in Mexico and the Mexican government's failure to control it can form part of the basis for a grant of asylum.

The reasoning in *Aguirre-Cervantes* is mirrored in *Matter of Maria T.*,¹¹⁶ an immigration judge (IJ) decision involving a woman fleeing her abusive husband in Mexico. The IJ in *Maria T.* held that "there is no doubt that [the applicant] suffered from . . . persecution in the form of repeated beatings, emotional and verbal abuse, and death threats against her and her family over a number of years."¹¹⁷ The IJ also found that societal attitudes and the "unwillingness of Mexican authorities to control persecutors in situations involving domestic violence" supported the applicant's claim that she had a well-founded fear of persecution.¹¹⁸

In light of the above-cited authority, the various types of violence committed against women in Ciudad Juárez qualify as persecution under U.S. asylum law. First, there can be no question that certain women in Ciudad Juárez have suffered from extremely harmful acts, including disappearance, sexual violence, torture and murder. The *Comisión Nacional de*

¹¹³ *Id.* at 1178 (citing evidence that, in Mexico, "the most pervasive violations of women's rights involve domestic and sexual violence which is believed to be wide-spread and vastly under reported.") (internal quotation marks omitted).

¹¹⁴ *Id.* at 1178-79 (citing evidence that "domestic violence is widely condoned in Mexico and . . . law enforcement authorities are unwilling to intervene in such matters.").

¹¹⁵ *Aguirre-Cervantes v. INS*, 273 F.3d 1220 (9th Cir. 2001).

¹¹⁶ No. A76665 (Immigr. Ct., San Francisco, Ca., Dec. 19, 2002).

¹¹⁷ *Id.* at 3; see also *Matter of --*, No. A76911 (Immigr. Ct., San Antonio, Tx., May 6, 2002) (finding that the applicant's husband persecuted her in the form of physical, sexual and emotional abuse).

¹¹⁸ *Maria T.*, at 7.

Derechos Humanos (CNDH), the Inter-American Commission on Human Rights (IACHR), Amnesty International and the U.S. Department of State have concluded that Mexican authorities have failed to prevent, prosecute and punish these acts.¹¹⁹ This failure means that the Mexican government is unable or unwilling to control those responsible for violating the human rights of these women.¹²⁰ Second, an applicant who has not been physically harmed but has received threats or other indicia of imminent violence may be found to have suffered persecution.¹²¹

While the nature of the violence committed against women in Ciudad Juárez lends itself to a finding of persecution under the INA, the applicant must still demonstrate whether she has suffered persecution in the past or reasonably fears suffering persecution in the future.¹²²

B. Past Persecution

In order to be eligible for asylum on the basis of past persecution, the applicant must establish that she has “suffered persecution in the past in [her] country of nationality . . .”¹²³ An applicant who establishes that she has suffered past persecution is presumed to have a well-founded fear of future persecution.¹²⁴

¹¹⁹ CNDH Report, *supra* note 53, § 4(j); IACHR Report, *supra* note 2, ¶¶ 4, 5; Intolerable Killings, *supra* note 6, at 13; *See also* Bureau of Democracy, Human Rights & Labor, U.S. State Department, *2005 Country Reports on Human Rights Practices - Mexico* (Mar. 8, 2006), at <http://www.state.gov/g/drl/rls/hrrpt/2006/62736.htm>, § 5 (DOS Country Report) (last visited Mar. 15, 2005) (citing reports that “impunity for sexual violence against women in the country was extensive and . . . perpetrators of such crimes rarely were brought to justice.”).

¹²⁰ *Aguirre-Cervantes*, 242 F.3d at 1179; *Batalova*, 355 F.3d at 1253; *In re O-Z- and I-Z-*, 22 I. & N. Dec. at 26.

¹²¹ *Navas*, 217 F.3d at 658; *Mitev*, 67 F.3d at 1330-31.

¹²² 8 C.F.R. § 1208.13(b) (2003) (An asylum applicant “may qualify as a refugee either because . . . she has suffered past persecution or because . . . she has a well-founded fear of future persecution.”).

¹²³ 8 C.F.R. § 208.13(b)(1).

¹²⁴ *Desir v. Ilchert*, 840 F.2d 723, 729 (9th Cir. 1988); 8 C.F.R. § 1208.13(b)(1).

There are a variety of ways that women from Ciudad Juárez could show that they have suffered past persecution. For example, an applicant could present evidence regarding stalking or threats that she has received that lead her to reasonably fear that she will soon be among the hundreds of women who have suffered from sexual violence and murder in Ciudad Juárez. Additionally, women affected by domestic violence in Ciudad Juárez can present evidence of beatings, sexual violence and other harms that rise to the level of persecution.

One problem, however, is that many of the women in Ciudad Juárez do not live to tell about the persecution they have suffered. Thus, women who fear persecution in Ciudad Juárez are caught between not having enough evidence of persecution and having too much. Certainly a woman who has survived domestic violence, sexual assault, kidnapping, rape or attempted murder will be likely to establish that she has suffered past persecution under the INA.

Assuming the applicant is able to establish that she has suffered past persecution, the inquiry does not end there. Although a showing of past persecution creates a presumption of a well-founded fear of persecution,¹²⁵ DHS can overcome the presumption by showing that either: (1) there has been a fundamental change in circumstances such that the applicant no longer has a well-founded fear of persecution;¹²⁶ or (2) the applicant could avoid future threats by relocating within the country, assuming that it would be reasonable under all the circumstances to do so.¹²⁷

Because the situation in Ciudad Juárez shows no sign of changing in the near future,¹²⁸ DHS is unlikely to be able to show a fundamental change in circumstances to overcome a

¹²⁵ 8 C.F.R. § 208.13(b)(1).

¹²⁶ 8 C.F.R. § 208.13(b)(1)(i)(A); *see also Galina v. INS*, 213 F.3d 955 (7th Cir. 2000) (holding that vague assertions in a Department of State country report are insufficient to show a fundamental change in circumstances).

¹²⁷ 8 C.F.R. § 208.16(b)(1)(i)(B).

¹²⁸ DOS Country Report, *supra* note 119, ¶ 2 (“Violence against women continue[s] to be a problem nationwide, particularly in Ciudad Juarez and the surrounding area.”).

presumption of future persecution.¹²⁹ DHS may have more success, however, if it argues that women fleeing Ciudad Juárez should relocate within Mexico to avoid persecution. In order to successfully overcome the presumption of future persecution, DHS must show that relocation is (1) possible and (2) reasonable under the circumstances.¹³⁰ DHS can demonstrate whether relocation is possible by showing that the persecution from which the applicant is fleeing does not exist throughout the country.¹³¹ Given that the 2005 DOS Country Report for Mexico states that “[v]iolence against women continue[s] to be a problem nationwide[,]”¹³² DHS may have difficulty establishing that relocation is possible.

However, assuming DHS is able make this showing, it must next prove that relocation is reasonable.¹³³ In determining the reasonableness of relocation, asylum adjudicators may consider, but are not limited to considering: “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.”¹³⁴ The

¹²⁹ See *Boer-Sedano*, 418 F.3d at 1089 (holding that INS failed to rebut presumption of future persecution against a Mexican homosexual applicant because Department of State country reports for Mexico indicated that “persecution similar to that experienced by the petitioner still exists [in Mexico].”).

¹³⁰ 8 C.F.R. § 1208.13(b)(3); see also *Mohamed v. Ashcroft*, 396 F.3d 999, 1006 (8th Cir. 2005) (“Relocation must not only be possible, it must also be reasonable.”); *Gambashidze v. Ashcroft*, 381 F.3d 187, 189 (3d Cir. 2004) (“The regulation envisions a two-part inquiry: whether relocation would be a *successful* means of escaping persecution, and whether relocation would be *reasonable*.”) (emphasis in original).

¹³¹ *Melkonian v. Ashcroft*, 320 F.3d 1061, 1069 (9th Cir. 2003) (“[B]ecause a presumption of well-founded fear arises upon a showing of past persecution, the burden is on the INS to demonstrate by a preponderance of the evidence, once such a showing is made, that the applicant can reasonably relocate internally to an area of safety.”).

¹³² DOS Country Report, *supra* note 119, ¶ 2.

¹³³ 8 C.F.R. § 1208.13(b)(3).

¹³⁴ 8 C.F.R. § 1208.13(b)(3); see also *Melkonian*, 320 F.3d at 1071 (familial ties are a factor to be considered in the reasonableness analysis); *Knezevic v. Ashcroft*, 367 F.3d 1206, 1214 (9th Cir. 2004) (difficulty finding employment and having no means of support may be considered in the reasonableness analysis); *In re T-M-B*, 21

reasonableness analysis must be based on the totality of the circumstances.¹³⁵ The applicable regulation notes that “these factors may or may not be relevant, depending on all the circumstances of the case, and are not necessarily determinative of whether it would be reasonable for the applicant to relocate.”¹³⁶

Although there is evidence that gender-based violence exists throughout Mexico,¹³⁷ relocation to avoid persecution may be possible for some of the women of Ciudad Juárez. Nevertheless, even if DHS can establish relocation as a possibility, relocation may not necessarily be *reasonable*. Depending on the circumstances of each case, relocation may not be reasonable due to familial ties, lack of economic opportunity in Mexico, and lack of resources to do so. Given that many women migrated to Ciudad Juárez from poorer areas of Mexico, economic considerations may hold the most sway with the immigration judges.¹³⁸ However, because each case presents a unique set of facts, any number of them could be determinative in the reasonableness of relocation analysis.¹³⁹

If the applicant is able to prove past persecution, and if the government cannot carry its burden of showing changed circumstances or an internal relocation alternative, the applicant must next show that the persecution is taking place on account of her protected characteristic(s)

I. & N. Dec. 775, 789 (BIA 1997) (reasonableness determination includes consideration of likely financial or logistical barriers).

¹³⁵ *Gambashidze*, 381 F.3d at 192.

¹³⁶ 8 C.F.R. § 1208.13(b)(3).

¹³⁷ DOS Country Report, *supra* note 119, at ¶ 2.

¹³⁸ *Spencer*, *supra* note 1, at 509.

¹³⁹ 8 C.F.R. § 1208.13(b)(3).

under the INA.¹⁴⁰ However, if the applicant fails to show that she has suffered past persecution, she may still qualify as a refugee if she can establish her well-founded fear of future persecution.

C. Well-Founded Fear of Future Persecution

To make a claim based on a well-founded fear of future persecution, an applicant must show “both a genuine, subjective fear of persecution, and an objective basis by credible, direct, and specific evidence in the record, of facts that would support a reasonable fear of persecution.”¹⁴¹ Well-founded fear thus consists of both a subjective and an objective component.¹⁴²

An applicant may satisfy the subjective prong by showing that events in the country from which she is fleeing have personally or directly affected her.¹⁴³ The applicant can satisfy this component if she credibly testifies that she genuinely fears persecution.¹⁴⁴ To fulfill the objective component, the applicant must submit documentary evidence or testimony alleging specific facts that lend support to her subjective fear.¹⁴⁵ Applicants thus bear the burden of meeting the objective component by demonstrating a well-founded fear of persecution through “credible, direct, and specific evidence in the record.”¹⁴⁶ A threat need not be statistically more

¹⁴⁰ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

¹⁴¹ *Wiransane v. Ashcroft*, 366 F.3d 889, 893 (10th Cir. 2004) (quotation omitted).

¹⁴² See *Melendez v. United States Dept of Justice*, 926 F.2d 211, 215 (2d Cir. 1991).

¹⁴³ *Id.* (The subjective component “may be based on the applicant’s reaction to events that impinge on [her] personally.”).

¹⁴⁴ *Prasad v. INS*, 47 F.3d 336, 338 (9th Cir. 1995); *Singh v. INS*, 134 F.3d 962, 966 (9th Cir. 1998).

¹⁴⁵ *Melendez*, 926 F.2d at 215 (“[O]nce subjective fear is demonstrated, the applicant need only show that such fear is grounded in reality to meet the objective element of the test.”); *Del Valle v. INS*, 776 F.2d 1407, 1411 (9th Cir. 1985) (“Documentary evidence of past persecution or a threat of future persecution will usually suffice to meet the ‘objective component’ of the evidence requirement.”).

¹⁴⁶ *Fisher v. INS*, 79 F.3d 955, 960 (9th Cir. 1996).

than fifty-percent likely to effect a well-founded fear; even a threat that is only ten percent likely to take place could form the basis for a well-founded fear of persecution.¹⁴⁷

The fact that threats against an applicant have yet to be carried out does not render her fear unreasonable.¹⁴⁸ Threats on one's life, within a context of political and social turmoil or violence, have long been held sufficient to satisfy a petitioner's burden of showing an objective basis for fear of persecution.¹⁴⁹ The relevant inquiry is whether the group making the threat "has the will or the ability to carry it out."¹⁵⁰ Furthermore, "[t]he significance of a specific threat to an individual's life or freedom is not lessened by the fact that . . . the lives and freedom of a large number of persons are threatened . . . [i]f anything . . . that fact may make the threat more serious or credible."¹⁵¹

Moreover, an applicant need not prove that she will be singled out for persecution if she can prove a pattern or practice of persecution of people similarly situated to her who are members of a protected group.¹⁵² She must produce some evidence connecting her subjective

¹⁴⁷ *Lim v. INS*, 224 F.3d 929, 934-935 (9th Cir. 2000) ("[T]he Supreme Court has suggested that even a one-tenth possibility of persecution might effect a well-founded fear.") (citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 430 (1987)); *Diallo v. INS*, 232 F.3d 279, 284 (2d Cir. 2000) ("An alien's fear may be well-founded even if there is a slight, though discernible, chance of persecution.").

¹⁴⁸ *Desir*, 840 F.2d at 729.

¹⁴⁹ *Id.*

¹⁵⁰ *Bolanos-Hernandez v. INS*, 767 F.2d 1277, 1285 (9th Cir. 1985).

¹⁵¹ *Bolanos-Hernandez*, 767 F.2d at 1285.

¹⁵² 8 C.F.R. § 1208.13(b)(2)(iii)(A)-(B) (proof of particularized persecution to establish a well-founded fear not required only where the applicant proves a pattern or practice of persecution of a protected group to which the applicant belongs); *Kotasz v. INS*, 31 F.3d 847, 852 (9th Cir. 1994) (finding BIA erred in requiring gypsy petitioners to prove they were singled out for persecution where there was evidence other gypsies were being persecuted).

fear to her membership in one of the five enumerated categories.¹⁵³ UNHCR reports and news articles can serve as such evidence.¹⁵⁴

In the case of *In re Kasinga*,¹⁵⁵ the BIA held that a woman fleeing from a country that would not protect her from the practice of FGM had a well-founded fear of persecution.¹⁵⁶ The applicant in that case was a citizen of Togo whose tribe practices FGM on women once they turn age fifteen.¹⁵⁷ Although her father initially protected her from FGM, her aunt forced her into a polygamous marriage following his death.¹⁵⁸ Her aunt and husband then planned to force her to undergo the tribal custom of FGM.¹⁵⁹ Fearing imminent mutilation, she fled Togo and eventually arrived in the United States.¹⁶⁰

In support of its decision to grant asylum, the BIA cited a lack of evidence that Togo had made any efforts to protect women from FGM.¹⁶¹ The BIA held that, given her credible testimony and the documentary evidence supporting her claim, the applicant had a well-founded

¹⁵³ *INS v. Elias-Zacarias*, 502 U.S. 478, 483 (1992) (holding that, where an asylum applicant alleges persecution on account of political opinion, the applicant must show that he was persecuted *because of* that opinion); *see also Gao v. Gonzales*, 2006 U.S. App. LEXIS 5406 (holding that the applicant had a well-founded fear of persecution on account of her membership in a social group comprised of Chinese women who were sold into marriage).

¹⁵⁴ *Knezevic*, 367 F.3d at 1213.

¹⁵⁵ 21 I. & N. Dec. 357 (BIA 1996).

¹⁵⁶ *Id.* at 358.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

¹⁶⁰ *Id.* at 358-59.

¹⁶¹ *Id.* at 362.

fear of persecution because “a reasonable person in her circumstances would fear persecution upon return to Togo.”¹⁶²

Similarly, in *Gao v. Gonzales*,¹⁶³ the Second Circuit held that a woman fleeing forced marriage and domestic abuse in China had a well-founded fear of persecution. The court cited evidence that trafficking of women is widespread in China and that the Chinese government’s efforts to combat this problem have been ineffective.¹⁶⁴ The court found that, as a member of a social group consisting of women sold into marriage in an area where such marriages are considered valid and enforceable, the applicant had a well-founded fear of persecution upon return to China.¹⁶⁵

What are the circumstances that would support a claim of a well-founded fear of persecution for the women of Ciudad Juárez? The statistics and data cited above support the notion that there is a climate of gender-based violence in Ciudad Juárez, both in the public and “private” contexts, that goes unpunished by the Mexican authorities. However, mere reference to general social conditions in an applicant’s country of origin will likely stretch the limits of the “pattern or practice” exception to the rule requiring the applicant to allege specific facts that demonstrate that she may be singled out for persecution.¹⁶⁶ On the one hand, women fleeing from domestic violence -- in Ciudad Juárez or anywhere else in Mexico -- will likely be able to testify to specific acts of their abusers that, if not amounting to past persecution, may nevertheless form the basis of a well-founded fear of future persecution. Yet, on the other hand,

¹⁶² *Id.* at 366 (internal citation and quotation marks omitted).

¹⁶³ 2006 U.S. App. LEXIS 5406 (2d Cir. 2006).

¹⁶⁴ *Id.* at *24.

¹⁶⁵ *Id.* at *21.

¹⁶⁶ See 8 C.F.R. § 1208.13(b)(2)(iii)(A)-(B); *Kotasz*, 31 F.3d at 852.

women who fear persecution in the public sphere of Ciudad Juárez may have more difficulty establishing the reasonableness of that fear absent some other indicia that they may face persecution.

For example, in both *Kasinga* and *Gao*, the applicants had some notice of impending persecution: Kasinga knew that her aunt and husband wanted her to undergo FGM; Gao knew that her husband had “purchased” her and intended to treat her as if she were his property. In contrast, the women who have been persecuted in Ciudad Juárez in the “public” sphere have probably never had much notice of the impending violence such that they could have fled to the United States and asserted their well-founded fear. A great number of those women were abducted prior to being beaten, raped, tortured and murdered.¹⁶⁷ It therefore seems that women fleeing the public violence in Ciudad Juárez would have difficulty establishing a well-founded fear of persecution without presenting some further evidence of an increased risk of persecution that separates them from other women in the area.¹⁶⁸

In contrast, women fleeing domestic violence should have less trouble presenting objective evidence of imminent persecution. A victim of domestic violence will usually know her abuser and the acts of which he is capable; such knowledge provides the victim with notice of future harm and an opportunity to flee before it is too late. In either case, however, the climate of gender-based violence taking place with impunity in Ciudad Juárez will bolster women’s claims of a well-founded fear of persecution.

¹⁶⁷ Spencer, *supra* note 1, at 510.

¹⁶⁸ *Gao*, 2006 U.S. App. LEXIS 5406 at *19-20.

Once an applicant has established a well-founded fear of persecution, she is still subject to an internal relocation inquiry.¹⁶⁹ If she establishes her well-founded fear of persecution by a non-state actor, and if she has not established past persecution, then she bears the burden of establishing that it would be unreasonable for her to relocate to escape persecution.¹⁷⁰ In other words, the burden of proof in the relocation analysis shifts from DHS to the applicant where the applicant has not established past persecution and where the feared persecution is not by a government or government-sponsored.¹⁷¹ This would likely be the case for a woman fleeing from Ciudad Juárez who has not suffered from past persecution; the violence from which she flees is mostly likely at the hands of a non-state actor. She would therefore have to show why relocation would be impossible and/or unreasonable. The reasonableness analysis is the same as described above for applicants who have established past persecution.¹⁷²

Assuming the applicant has established her well-founded fear of persecution, she must next demonstrate that the persecution she fears is on account of her possession of characteristics that are protected under the INA.¹⁷³

¹⁶⁹ 8 C.F.R. § 1208.13(b)(2)(ii) (“An applicant does not have a well-founded fear of persecution if the applicant could avoid persecution by relocating to another part of the applicant’s country of nationality . . . if under all the circumstances it would be reasonable to expect the applicant to do so.”); *Arboleda v. United States AG*, 434 F.3d 1220, 1223 (11th Cir. 2006) (“[I]t is not unreasonable to require a refugee who has an internal resettlement alternative in his own country to . . . establish that such an option is unavailable.”) (internal citation and quotation omitted).

¹⁷⁰ 8 C.F.R. § 1208.13(b)(3)(i) (“In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.”); *Vente v. Gonzales*, 415 F.3d 296, 303 (3d Cir. 2005) (holding that the applicant’s burden was limited to demonstrating the present unreasonableness of internal resettlement).

¹⁷¹ 8 C.F.R. § 1208.13(b)(3)(i) (“In cases in which the applicant has not established past persecution, the applicant shall bear the burden of establishing that it would not be reasonable for him or her to relocate, unless the persecution is by a government or is government-sponsored.”).

¹⁷² 8 C.F.R. § 1208.13(b)(2)(ii); *Mohamed*, 396 F.3d at 1006; *Gambashidze*, 381 F.3d at 189.

¹⁷³ INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

Step Two: Protected Category and Nexus

In order to be eligible for asylum under the INA, the persecution from which the applicant is fleeing must be “on account of” the applicant’s race, religion, nationality, membership in a particular social group, or political opinion.¹⁷⁴ This connection between the feared persecution and characteristics of the applicant is often referred to as the “nexus” requirement. The United States Supreme Court has held that applicants for asylum must provide evidence connecting their persecutor’s intent to one of the protected categories.¹⁷⁵ However, the persecutor’s illicit motive need not be the sole cause of the persecution.¹⁷⁶

Nevertheless, the INA “makes motive critical,” and the applicant “must provide *some* evidence of [motive], direct or circumstantial.”¹⁷⁷ In some cases, “the factual circumstances alone may provide sufficient reason to conclude that acts of persecution were committed on account of . . . protected grounds.”¹⁷⁸ Thus, regardless of the severity of harm from which the asylum applicant is fleeing, she is not eligible for asylum unless such harm is based on one of the five enumerated grounds.¹⁷⁹

¹⁷⁴ *Id.*

¹⁷⁵ *Elias-Zacarias*, 502 U.S. at 483.

¹⁷⁶ See *Lukwago v. Ashcroft*, 329 F.3d 157, 170 (3d Cir. 2003) (“A persecutor may have multiple motivations for his or her conduct, but the persecutor must be motivated, at least in part, by one of the enumerated grounds.”) (citing *Chang v. INS*, 119 F.3d 1055, 1065 (3d Cir. 1997)); *Borja v. INS*, 175 F.3d 732, 735 (9th Cir. 1999) (en banc) (holding that applicants for asylum are not required to prove persecution “solely” on account of protected status); *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994) (finding that “persecution on account of” does not mean “persecution solely on account of”); see also *Girma v. INS*, 283 F.3d 664, 667-68 (5th Cir. 2000) (per curiam) (following *Borja* and *Osorio* and applying a “mixed motive analysis”).

¹⁷⁷ *Elias-Zacarias*, 502 U.S. at 483.

¹⁷⁸ *Navas*, 217 F.3d at 657.

¹⁷⁹ *Blanck*, supra note 107, at 56.

While the factors set forth in the INA's refugee definition cover a wide range of factual scenarios, gender is conspicuously absent from the list.¹⁸⁰ The absence of gender from the INA definition makes it extremely difficult for women to assert successful asylum claims.¹⁸¹ Because no gender category is available, this paper focuses on the "particular social group" category as an avenue for the women of Ciudad Juárez to articulate an asylum claim under the INA.¹⁸²

A. Particular Social Group

The phrase "particular social group" has been defined to encompass a group of people who are "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."¹⁸³ The applicant must establish that her particular social group exists independently of the persecution she has suffered or reasonably fears.¹⁸⁴ In *Matter of Acosta*, the BIA defined a "particular social group" as:

. . . 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 former military leadership or land ownership. The particular kind of group characteristic

¹⁸⁰ Blanck, *supra* note 107, at 56.

¹⁸¹ UNHCR Guidelines, *supra* note 108, ¶ 54; *but see* UNHCR Guidelines on International Protection, *supra* note 104, ¶ 6 ("The refugee definition, *properly interpreted* . . . covers gender-related claims.") (emphasis added).

¹⁸² The women of Ciudad Juárez may also be able to frame their asylum claims using some of the other enumerated categories (e.g. political opinion and religion), though I do not analyze such claims here.

¹⁸³ *Hernandez Montiel*, 225 F.3d at 1093 (emphasis in original).

¹⁸⁴ *Lukwago*, 329 F.3d at 172; *Rreshpja v. Gonzales*, 420 F.3d 551, 556 (6th Cir. 2005) ("[A] social group may not be circularly defined by the fact that it suffers persecution. The individuals in the group must share a narrowing characteristic other than their risk of being persecuted."); *but see* UNHCR Guidelines on International Protection, *supra* note 104, at ¶ 31 ("[D]iscrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context.").

that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.¹⁸⁵

Most of the federal circuit courts have adopted this definition in some form.¹⁸⁶ However, some courts have adopted the *Acosta* standard while relaxing its emphasis on the term “immutable characteristic.”¹⁸⁷ For example, the Seventh Circuit has held that “education, manner of speech, or profession may be more mutable [characteristics] than one’s race, ethnicity, or religion, but these traits are nevertheless distinguishing markers within a given society that are not easily changed or hidden.”¹⁸⁸ This holding remains consistent with the *Acosta* standard in that, under *Acosta*, the shared characteristic can be either a characteristic that the group members cannot change, or one they should not be required to change -- even though they can -- because the characteristic is fundamental to their individual identities.¹⁸⁹

To make a showing that she is a member of a particular social group, the applicant must (1) specify the particular social group, (2) show that she is a member of that group, and (3) show that she has a well-founded fear of persecution based on her membership in that group.¹⁹⁰ The

¹⁸⁵ *Acosta*, 19 I. & N. Dec. at 233.

¹⁸⁶ *Gao*, 2006 U.S. App. LEXIS 5406, at *13 (noting that federal courts of appeal have deferred to *Acosta*’s interpretation of “particular social group.”)

¹⁸⁷ *Lwin v. INS*, 144 F.3d 505, 512 (7th Cir. 1988).

¹⁸⁸ *Orejuela v. Gonzales*, 423 F.3d 666, 672 (7th Cir. 2005).

¹⁸⁹ *Acosta*, 19 I. & N. Dec. at 233.

¹⁹⁰ *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

inquiry should focus on whether the feared danger affects the population in an undifferentiated way, or if the danger exists on account of one of the five categories protected under the INA.¹⁹¹

United States case law provides myriad examples of what may or may not constitute a social group under the INA, though the precedential value of these cases is limited by their fact-specific nature.¹⁹² For example, the Sixth Circuit has held that women who reasonably fear FGM constitute a social group.¹⁹³ The Fourth Circuit has likewise held that family membership may constitute membership in a particular social group under the INA.¹⁹⁴ The Ninth Circuit held that homosexual men in Mexico constitute a social group.¹⁹⁵

In contrast, the Third Circuit held that abduction of children to become child soldiers was not based on membership in social group of children, but on need for labor in military group; violence was indiscriminate and affected all civilians.¹⁹⁶ The Second Circuit, in a case involving sexual violence against women, held that women who have been abused by Salvadoran guerillas are not a social group because such women do not “possess common characteristics -- other than gender and youth -- such that would-be persecutors could identify them as members of the

¹⁹¹ *Orejuela*, 423 F.3d at 672.

¹⁹² *Gao*, 2006 U.S. App. LEXIS 5406, at *11.

¹⁹³ *Abay v. Ashcroft*, 368 F.3d 634, 638-40 (6th Cir. 2004); *see also Kasinga*, 21 I. & N. Dec. 357.

¹⁹⁴ *Lopez-Soto v. Ashcroft*, 383 F.3d 228, 235 (4th Cir. 2004).

¹⁹⁵ *Boer-Sedano*, 418 F.3d at 1088; *see also Hernandez-Montiel*, 225 F.3d at 1094 (holding that gay men with female sexual identities in Mexico comprise a particular social group); *Karouni v. Gonzales*, 399 F.3d 1163, 1173 (9th Cir. 2005).

¹⁹⁶ *Lukwago*, 329 F.3d at 171-73.

purported group.”¹⁹⁷ In other words, the court held that the applicant failed to demonstrate that she would be more likely than any other woman to be persecuted.¹⁹⁸

However, the Second Circuit recently clarified this holding in *Gao*.¹⁹⁹ As mentioned above, Gao was a Chinese woman who had been sold into marriage with an abusive man.²⁰⁰ When she tried to break their engagement, he threatened her.²⁰¹ In finding that Gao was a member of a particular social group made up of “women who have been sold into marriage . . . and who live in a part of China where forced marriages are valid and enforceable[,]”²⁰² the court limited its holding in *Gomez* to apply only to situations in which an applicant “fails to show a risk of future persecution on the basis of the ‘particular social group’ claimed . . .”²⁰³ The court held that “the statutory term ‘particular social group’ is broad enough to encompass groups whose main shared trait is a common one, such as gender, at least so long as the group shares a further characteristic that is identifiable to would-be persecutors and is immutable or fundamental.”²⁰⁴ The court therefore found that Gao set forth a stronger claim for a particular social group than the one in *Gomez* because her proposed group shared identifiable characteristics in addition to gender.²⁰⁵ The decision in *Gao* leaves open the possibility that an

¹⁹⁷ *Gomez v. INS*, 947 F.2d 660, 664 (2d Cir. 1991).

¹⁹⁸ *Id.*

¹⁹⁹ 2006 U.S. App. LEXIS 5406.

²⁰⁰ *Id.* at *4.

²⁰¹ *Id.*

²⁰² *Id.* at *21.

²⁰³ *Id.* at *19-20 (emphasis in original).

²⁰⁴ *Id.* at *3.

²⁰⁵ *Id.* at *21.

asylum applicant could make a claim based on a broadly defined “particular social group” so long as the applicant can establish that she faces a risk of future persecution based on her membership in that group.

B. Applicable Social Groups in Ciudad Juárez

The workingwomen and female students of Ciudad Juárez should be considered members of a particular social group for the purposes of U.S. asylum law. First, as women who are challenging traditional notions of their role in Mexican society, they are more likely than other women to be targets for violence. In a patriarchal society such as Mexico’s, women who leave their homes unaccompanied draw attention.²⁰⁶ If such women take a similar route to work or school each day, but cannot afford secure transportation, they become easy prey for those seeking to harm them. While the characteristic of leaving the home for work may be “less mutable” than race or nationality, the right to earn a living or to educate oneself is certainly fundamental. Therefore, these women should not have to revert to more traditional roles in order to avoid persecution.

Furthermore, the proposed social group is not defined by the persecution; female students and blue-collar workingwomen in Ciudad Juárez will continue to exist if and when the murders and sexual violence cease. Finally, the social group comprised of working or studying women, or simply women who are becoming economically independent in Ciudad Juárez, meets the *Gao* standard of a social group consisting of gender plus one or more other identifiable characteristics. In other words, the proposed social group is narrower than a group simply comprised of “Mexican women” or even “women from Ciudad Juárez.” The group would be defined as working class women from Ciudad Juárez who are asserting independence contrary to

²⁰⁶ Livingston, *supra* note 13, at 70.

the patriarchal norms of Mexican society. This assertion can take the form of seeking an education, working for the *maquiladoras* or having some other form of financial independence. Such a group would be consistent with the UNHCR Guidelines on the Protection of Refugee Women, which instructs that women persecuted for violating social mores should be protected as a social group.²⁰⁷

However, as U.S. case law makes clear, a social group must be defined with some precision in order to set outer limits on who may claim asylum. There are thousands of workingwomen in Ciudad Juárez and other cities in Mexico. The U.S. government will likely be concerned about the “floodgate effect,” i.e., that any number of these women could simply claim that they fear being the next in the string of murders in Ciudad Juárez in order to gain access to better economic opportunities in the United States.

Nevertheless, as mentioned previously, any woman who is seeking asylum in the United States must still establish that she has suffered past persecution or has well-founded fear of future persecution.²⁰⁸ This requirement should narrow the field of potential asylees because only a limited number of women have suffered past persecution.²⁰⁹ Furthermore, as mentioned above, many of these women do not survive the encounter with their persecutor and thus cannot assert a claim for protection. The vast majority of women who fall somewhere in-between will likely have to demonstrate, based on the circumstances of each individual case, that they are at an increased risk of harm compared to the rest of the population of women in Ciudad Juárez. Therefore, with regard to future persecution, an applicant will likely have to show something

²⁰⁷UNHCR Guidelines, *supra* note 108, ¶ 54.

²⁰⁸INA § 101(a)(42)(A), 8 U.S.C. § 1101(a)(42)(A).

²⁰⁹Maryellen 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, 561 (1993).

more than general country conditions in order to satisfy the objective prong; she may have to prove specific facts, such as stalking, threats, or other indicia of impending violence. Unfortunately, the numbers of women who are lucky enough to foresee an impending attack and escape to safety are probably very low. Thus, as the likelihood of these women establishing their well-founded fear of persecution is low, the “floodgate” concern would be misplaced with respect to this particular social group.

C. Nexus

In addition to establishing that she is a member of a particular social group, the applicant must then prove that the persecution she fears is *on account of* her membership in that group. This “nexus” requirement has caused great difficulty for women asserting claims that are essentially gender-based claims.²¹⁰ The difficulty stems from the pervasiveness of violence against women worldwide, which may cause immigration judges -- albeit, perhaps, subconsciously -- to view such violence as “normal” or at least “unremarkable.” Such views may be at the heart of why gender was not enumerated in the 1951 Convention or the 1967 Protocol in the first place; perhaps the drafters of the 1951 Convention did not view gender-based persecution as unique or deserving enough to warrant a grant of refugee status. Unfortunately, the failure to recognize gender as a protected category has meant that vast numbers of women who have suffered persecution largely on account of their gender have not had a remedy under asylum law.

²¹⁰ See, e.g., *Matter of R-A-*, 22 I. & N. Dec. 906 (BIA 1999) (denying asylum claim in part because the applicant failed to prove that her husband persecuted her on account of a protected characteristic), *remanded by Attorney General*, 23 I. & N. Dec. 694 (AG 2005); see also UNHCR Guidelines, *supra* note 108, ¶ 54 (“The claim to refugee status by women fearing harsh or inhumane treatment because of having transgressed their society’s laws or customs regarding the role of women presents difficulties under [the refugee] definition.”).

Nevertheless, “the refugee definition, *properly interpreted* . . . covers gender-related claims.”²¹¹ For example, women who suffer gender-based persecution can still establish nexus if they can show that the danger they fear is not merely “undifferentiated” violence,²¹² but rather that the danger exists on account of their membership in a particular social group.²¹³ The Tenth Circuit has held that, for gender-related claims, “the focus . . . should be not on whether . . . gender constitutes a social group . . . but on whether the members of that group are sufficiently likely to be persecuted that one could say that they are persecuted ‘on account of’ their membership.”²¹⁴ The inquiry therefore centers on whether the victim’s characteristics as a member of a particular social group elicit within the persecutor a motivation to harm the victim; the precise nature of the persecutor’s subjective intent is irrelevant.²¹⁵ Furthermore, as mentioned previously, an applicant can satisfy the nexus requirement even if her protected characteristics are not the sole cause of the persecution.²¹⁶

The reasoning of the IJ in *Matter of Maria T.* is instructive in the present context. The IJ in that case cited *Kasinga* for the proposition that “nexus can be established by either showing

²¹¹ UNHCR Guidelines on International Protection, *supra* note 104, at ¶ 6 (emphasis added); UNHCR Guidelines, *supra* note 108, ¶ 54 (“The Executive Committee of UNHCR has encouraged States to consider [persecuted] women . . . as a ‘social group’ to ensure their coverage, but it is left to the discretion of countries to follow this recommendation.”).

²¹² See *Ahmed v. Ashcroft*, 348 F.3d 611, 619 (7th Cir. 2003) (Asylum claims based on membership in a particular social group “must . . . be examined to determine whether the danger flows from an ongoing violent struggle affecting the population in a relatively undifferentiated way or if danger exists on account of a protected ground; only the latter will suffice under the [INA].”).

²¹³ *Orejuela*, 423 F.3d at 672.

²¹⁴ *Niang v. Gonzales*, 422 F.3d 1187, 1199-1200 (10th Cir. 2005).

²¹⁵ *Pitcherskaia v. INS*, 118 F.3d 641, 647 (9th Cir. 1997) (“That the persecutor inflicts the suffering or harm in an attempt to elicit information, . . . for his own sadistic pleasure, . . . to ‘cure’ his victim, or to ‘save his soul’ . . . is irrelevant. . . . It is the characteristic of the victim (membership in a group, religious or political belief, racial characteristic, etc.), not that of the persecutor, which is the relevant factor.”) (internal citations omitted).

²¹⁶ See *Lukwago*, 329 F.3d at 170.

the persecutor's own motives or the *broader societal reasons* for the persecution.”²¹⁷ The IJ found that a broad recognition of nexus is justified where a state's failure to protect its citizens from domestic violence is a contributing or substantial factor in that violence.²¹⁸ If the U.S. courts adopt this position, the failure of Mexico to prevent and punish gender-based violence in Ciudad Juárez could be sufficient to establish nexus. As mentioned previously, the prevailing atmosphere of impunity in Ciudad Juárez is a contributing factor in the continuing violence perpetrated against these women.²¹⁹

However, women fleeing the violence in Ciudad Juárez may still establish nexus beyond reference to broader societal conditions. For example, in *Maria T.*, the IJ also cited evidence that applicant's husband abused her because “he believed he had the right to . . . because she was his wife.”²²⁰ The IJ thus found that the husband was at least partially motivated by her status as a woman in a domestic relationship.²²¹

The reasoning in *Aguirre-Cervantes* is also on point. The court in that case cited evidence that “[d]omestic violence is purposeful and instrumental behavior . . . directed at achieving compliance . . . so the abused person will become exclusively devoted to fulfilling the needs . . . of the batterer.”²²² The court held that the abuser's goal “was to dominate and persecute members of his immediate family.” Although *Aguirre-Cervantes* is no longer binding

²¹⁷ *Maria T.*, at 4 (citing *Kasinga*, 21 I. & N. Dec. at 366) (emphasis added).

²¹⁸ *Id.*

²¹⁹ IACHR Report, *supra* note 2, at ¶ 128 (“The violence [in Ciudad Juárez] has its roots in concepts of the inferiority and subordination of women. When the perpetrators are not held to account . . . the impunity confirms that such violence and discrimination is acceptable, thereby fueling its perpetuation.”)

²²⁰ *Maria T.*, at 8.

²²¹ *Id.*

²²² 242 F.3d at 1177 (internal citation omitted).

precedent,²²³ the court's exploration of an abuser's motivation is compelling in that it represents a shift away from the broad notion that violence against women is "normal" or "undifferentiated." In other words, the court's analysis in *Aguirre-Cervantes* supports the notion that, despite its pervasiveness, gender-based violence may be something more than common crime; under some circumstances, gender-based violence is deliberate behavior targeted at characteristics that the INA protects.

There is ample evidence that the violence against the women in Ciudad Juárez is not indiscriminate; these women are being targeted because of their gender and their independence.²²⁴ The circumstantial evidence of nexus can be broken down into three categories: (1) The correlation of increased violence against these women with the implementation of NAFTA and the consequent expansion of the *maquila* industry (which gives rise to the inference that the women are being targeted for their participation in this industry); (2) the type of violence that is being committed (rape, sexual violence, murder); (3) evidence of torture that indicates a desire to humiliate or punish. Individually and collectively, these factors demonstrate that the violence in Ciudad Juárez is not "undifferentiated" but rather is taking place on account of the victims' membership in the social group of Mexican women asserting their independence.

²²³ See *Aguirre-Cervantes v. INS*, 273 F.3d 1220 (9th Cir. 2001) (vacating rehearing en banc per stipulation of the parties).

²²⁴ *Intolerable Killings*, supra note 6, at 25 ("Although murders of women can be attributed to many different motives and perpetrators, many cases share common features that indicate gender-based violence; that is to say, *the gender of the victim seems to have been a significant factor in the crime*, influencing both the motive and the context as well as the type of violence suffered by the woman and the way in which the authorities responded to it.") (emphasis added).

Conclusion

The murders of women in Ciudad Juárez since 1993 are the tragic result of a convergence of factors. First, Mexican society has traditionally limited the autonomy of women. The prevalence of domestic violence in Mexico demonstrates that resistance to male domination, at least within the confines of the home, can be met with violent consequences. Second, the expansion of the *maquiladora* industry and of the city itself has shifted the demographics of Ciudad Juárez and has enabled thousands of young women to become financially independent. Third, although no one is sure who they are or why they are concentrated in Ciudad Juárez, the perpetrators of these crimes seem to be unique in that similar patterns of violence cannot be found throughout Mexico. Fourth, and perhaps most important, the state and federal authorities in Mexico have been unable to prevent these crimes or bring most of the perpetrators to justice.

The international community and human rights organizations have raised awareness of the problem in Ciudad Juárez and have stimulated the Mexican and Chihuahuan governments to take administrative and legislative action. Unfortunately, however, the mere existence of new commissions or laws does little to provide actual protection to the victims, whose numbers are steadily increasing.²²⁵ Thus, in the present context, the persistent failure of Mexican authorities to apply Mexican law effectively, as well as Mexico's inability to fulfill its international treaty obligations, demonstrates that the women of Ciudad Juárez cannot reasonably rely on the Mexican legal system to vindicate their human rights.

²²⁵The UNHCR Guidelines on International Protection state that

Even though a particular State may have prohibited a persecutory practice . . . the State may nevertheless continue to condone or tolerate the practice, or may not be able to stop the practice effectively. In such cases the practice would still amount to persecution. The fact that a law has been enacted to prohibit or denounce certain persecutory practices will therefore not in itself be sufficient to determine that the individual's claim to refugee status is not valid.

UNCHR Guidelines on International Protection, *supra* note 104, ¶ 11.

More research must be done to determine whether this state of lawlessness pervades the entire Mexican criminal justice system. For example, it would be interesting to know whether an executive of one of the *maquiladoras* would face similar obstacles in procuring state protection from a kidnapping or murder threat. If such a threat were carried out, how would the Mexican government respond? What resources would the government expend in investigating the crime? Such information would be useful in determining the degree of the government's inability or unwillingness to control violence against women in comparison to other groups of people.

What remains clear today, however, is that the government authorities in Mexico are not protecting the women in Ciudad Juárez. Given this context of violence carried out with impunity, those women who are actual or potential victims and who flee to the United States are refugees. Thus, these women should be eligible for relief under U.S. asylum law. First, there can be no question that the types of harm that characterize the violence in Ciudad Juárez, such as sexual violence and murder, rise to the level of persecution. Second, depending on the specific facts of each case, some of the women from Ciudad Juárez may be able to establish that they have suffered from past persecution or that they have a well-founded fear of future persecution. The major obstacle in this step is that the woman must *survive* whatever happens to her that forms her basis for reasonably fearing persecution if she were to return to Mexico.

Third, women who are asserting their independence, through either their work or their education, should be considered a particular social group for asylum purposes. The background information presented above establishes that Mexican society perceives these women as pushing against traditional norms. Furthermore, the proposed social group of independent women in Mexico meets the *Gao* standard of gender plus one or more identifying attributes. Although the attributes that may comprise "independence" could manifest themselves in any number of ways,

they should all qualify as “fundamental” under the *Acosta* standard because women should not have to give up their right to pursue their emotional, financial and intellectual independence.

Finally, the nature of the violence against women in Ciudad Juárez suggests that the persecutors are targeting these women on account of their gender and independence. The victims have been mostly young workingwomen or students. The violence includes rape, mutilation of breasts and genitals, and murder. These facts give rise to the inference that the women are not victims of random crime; they are being targeted because of their specific characteristics. In other words, male *maquiladora* workers, women who do not challenge their traditional roles, and women with enough resources to travel safely do not face the same threat because they do not share the characteristics of the women who are being targeted in Ciudad Juárez.

In the final analysis, the women who are in danger of persecution in Ciudad Juárez deserve protection. The Mexican government will not afford them protection, so they should at least be eligible for protection in the form of asylum in the United States. This is the fundamental purpose of asylum law.