Health Is a Human Right: Why the U.S. Immigration Law Response to Gender-Based Asylum Claims Requires More Attention to International Human Rights Norms

Caroline J. O’Neill

Follow this and additional works at: http://scholarship.law.edu/jchlp

Recommended Citation
Available at: http://scholarship.law.edu/jchlp/vol17/iss1/12
COMMENTS

HEALTH IS A HUMAN RIGHT: WHY THE U.S. IMMIGRATION LAW RESPONSE TO GENDER-BASED ASYLUM CLAIMS REQUIRES MORE ATTENTION TO INTERNATIONAL HUMAN RIGHTS NORMS

Caroline J. O'Neill*

INTRODUCTION

In 1995, advocates for women refugees celebrated when the Immigration and Naturalization Service (INS) of the United States Department of Justice (DOJ) issued guidelines that broadened the opportunities for women to bring asylum claims based on harms that are unique to their gender.\(^1\) The INS Guidelines, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (INS Guidelines or Guidelines), set forth considerations and procedures for Asylum Officers to follow to assure sensitivity to the experiences of women who had been victims of domestic violence, rape, female genital mutilation, and other forms of violence.\(^2\) The purpose of the Guidelines is to foster uniformity

* J.D. Candidate 2001, Columbus School of Law, The Catholic University of America; M.A. 1991, George Washington University; B.S. 1984, Georgetown University. The author thanks Professor Lisa Lerman and Dr. A.G. Harmon for their guidance.

1. Memorandum of Phyllis Coven, Immigration and Naturalization Service, U.S. Dep't of Justice, Considerations for Asylum Officers Adjudicating Asylum Claims from Women (May 26, 1995) [hereinafter INS Guidelines], reprinted in Deborah E. Anker, Women Refugees: Forgotten No Longer?, 32 SAN DIEGO L. REV. 771, 794-817 (1995). Until April 1995 when the case of In re D-V was made binding precedent, there had been no precedential gender-based asylum decision. Id. at 775-776 (citing In re D-V-, Interim Decision 3252 (BIA 1993) (designated as precedent on April 25, 1995)).

2. INS Guidelines, supra note 1, at 794. The INS Guidelines were an outgrowth of gender guidelines issued by the United Nations High Commissioner for Refugees (UNHCR), 1993 Canadian gender guidelines, 1994 proposed guidelines developed by the Women Refugees Project (WRP) of the Harvard Immigration and Refugee Program, and case law. Id.
and consistency in procedures and decisions. However, the Guidelines have not been followed consistently by asylum adjudicators. The Guidelines also summon INS Asylum Officers to evaluate gender-based claims “within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations.” The Guidelines acknowledge that this framework “recognize[s] and promote[s] the principle that women’s rights are human rights, and that women’s rights are universal.”

The concept of human rights is relatively recent. Most international human rights principles and instruments came into existence in the last fifty to sixty years of the twentieth century. The human rights system is based on principles of human dignity and social justice such as “life, liberty and security of the person” as well as equality and nondiscrimination. The international human rights framework that shaped the Guidelines includes declarations, conventions and treaties proposing standards and methods for promoting individual and group protection from governmental violation of internationally guaranteed rights.

The international human rights framework continues to evolve. International law now recognizes as human rights violations governmental failure to prevent and punish “private” acts, such as violence within the home. Domestic violence “violates non-discrimination norms fundamental to international human rights.” International law has also begun to recognize that human rights violations have an impact on health. Therefore, under international law, violence against women

3. Id.
4. Id. at 795.
5. Id.
implicates human rights not only because governments may fail to protect victims from abuse by non-State actors, but also because violence against women constitutes a fundamental assault on women’s physical and mental well-being.

Domestic violence is clearly a gender-specific crime, committed predominantly by men against women. Defined as "violence that occurs within the private sphere, generally between individuals, who are related through intimacy, blood or law," domestic violence threatens women’s physical and mental health so dramatically that it is recognized worldwide as a significant public health problem. In its global study on violence against women, the World Bank reports that “the health burden from gender-based victimization among women age 15 to 44 is comparable to that posed by other risk factors and diseases already high on the world agenda, including the human immunodeficiency virus (HIV), tuberculosis, sepsis during childbirth, cancer, and cardiovascular disease.”

The concept of health as a human right does not receive the attention in U.S. immigration law that the gravity of the problem of domestic violence warrants, given current international norms. Although the Guidelines represent an important human rights policy initiative, several factors hinder the ability of U.S. immigration law to ensure a consistent approach to evaluating gender-based asylum claims and to providing safe haven to those deserving protection.

First, at the broadest level, formal international human rights law remains primarily enforceable only against States (i.e. governments) and not against individuals who commit violent acts, acts that are regarded in many societies as private and not subject to governmental control. Despite enforcement difficulties, the policy expressed in international human rights instruments is clear: governments are responsible for protecting the equal rights of all citizens, including women. It follows that governments are responsible for protecting domestic violence victims and

12. Id.
14. Id.
15. Lynn P. Freedman, Censorship and Manipulation of Family Planning Information, in Mann et al., supra note 10, at 148.
prosecuting their abusers, whether State or non-State actors perpetrate the violence. It also follows that governments are responsible for protecting women's well-being, including the right to health.

Although the INS Guidelines acknowledge that Asylum Officers may consider situations where it appears that a State has failed to provide legal protection for victims of domestic violence, the Guidelines merely suggest, rather than require, that Asylum Officers consider this factor and other international human rights principles. The Guidelines do not describe fully the international human rights instruments that address women's rights, or domestic violence in particular and they do not address specifically the right to health as a human rights principle promoted by the international human rights community. As a result, the INS Guidelines are useful primarily for describing, rather than for emphasizing or ensuring adherence to, existing human rights instruments.

Second, all asylum applicants must prove governmental failure to protect, but this burden is particularly problematic for domestic violence victims, who often cannot flee their violent environments or who are reluctant to report their abuse. The particular constraints faced by victims of domestic violence must receive greater consideration in the assessment of a gender-based asylum claim. Third, U.S. asylum law does not recognize gender as a basis for persecution and effectively cuts off a group that might be entitled to asylum under international human rights principles.

Fourth, the INS Guidelines are merely advisory and are not legally binding. They apply only to INS Asylum Officers, rather than to all asylum adjudicators.

17. INS Guidelines, supra note 1, at 797 (stating that the Guidelines are not meant to be a “full compendium of international sources of gender-related instruments and documents, only illustrative of the types of initiatives which have taken place during recent years.”).
19. The Guidelines do not apply to immigration judges or to the Board of Immigration Appeals (BIA), which is the highest administrative tribunal in the immigration field. The INS and the BIA are distinct entities. The INS enforces immigration laws and administers immigration and naturalization benefits. The BIA and the Immigration Courts are components of the Executive Office for Immigration Review (EOIR). The BIA and the Immigration Courts adjudicate cases in accordance with the immigration and nationality laws. The INS may appear as a party before immigration judges and the BIA. Bd. of Immigr. Appeals, Executive Office for Immigr. Rev., U.S. Dep’t of Justice, Bd. of Immigration Appeals Practice Manual 1-2 (1999), at http://www.usdoj.gov/eoir/bia/qua pracmanual/pracmanei.htm.
mandatory for all asylum adjudicators. Fifth, there are relatively few precedent-setting decisions in gender-based asylum cases, which has led to confusion as to the applicable legal standards in such cases. The INS and the Bureau of Immigration Appeals (BIA) should develop a clear standard for determining when a decision should be designated as precedent in gender-based asylum cases.

The controversial, precedent-setting decision of Matter of R-A-\(^{20}\) has called into question the INS's commitment to its own Guidelines.\(^{21}\) It also raises questions as to the degree to which other asylum adjudicators apply the human rights principles articulated in the Guidelines and international human rights instruments. Rodi Alvarado Peña suffered serious injuries at the hands of her husband. She fled to the United States when all other avenues to secure help in Guatemala failed.\(^{22}\) A U.S. immigration judge granted asylum to Alvarado Peña,\(^{23}\) but in 1999 the BIA reversed the decision.\(^{24}\) The BIA found that the INS Guidelines were merely instructive and that Alvarado Peña had failed to establish that she was abused on one of the five grounds recognized under U.S. immigration law: race, nationality, religion, political opinion, or membership in a particular social group.\(^{25}\)

This Comment is not the first to articulate these individual factors; health experts, human rights activists, or immigration specialists have identified these factors separately in the past. Here, I propose that an important link exists between the right to health as a human right and the human rights principles that asylum adjudicators are summoned to consider and to respect. When U.S. asylum adjudicators consider a gender-based asylum claim, they should consider more seriously the health implications of domestic violence because health is considered a fundamental human right under international human rights principles. U.S. asylum law must do so if it is to evaluate such claims in a manner truly consistent with existing international human rights instruments.

This Comment discusses the impact of domestic violence on women's health and the need for greater attention to its human rights implications in U.S. immigration law. First, I examine the personal and economic

---

25. See id. at 2-3.
health consequences of domestic violence and the international instruments that address the human rights implications of domestic violence. Second, I summarize an asylum applicant’s burden of proof and then describe the particular difficulties faced by women whose claims are gender-based, focusing primarily on the case of Rodi Alvarado Peña, Matter of R-A -. 26 Third, I analyze U.S. human rights obligations under international and American law and explore the issue of gender as a basis upon which to make a valid claim for asylum. Finally, I conclude with recommendations for strengthening consistent treatment of gender-based asylum cases and adherence to international human rights norms under U.S. asylum law.

I. BACKGROUND: DOMESTIC VIOLENCE AND ITS RELEVANCE TO INTERNATIONAL HUMAN RIGHTS LAW

A. The Nature and Scope of Violence; Personal and Economic Consequences

According to the World Health Organization, “Health is a state of complete physical, mental, and social well-being and not merely the absence of disease or infirmity.” 27 Women across the globe confront violence regularly in their daily lives, making it almost impossible to achieve this state of well-being. Although violence against women affects women in both industrialized and developing nations, it poses greater health risks for women in developing countries where infectious disease, malnutrition and war already threaten women’s well-being. 28

Violence against women takes many forms, including rape, female genital mutilation, infanticide, and domestic violence. 29 Abuse of women by intimate partners is the most common form of violence against women. 30 Examples of domestic violence behavior include slapping, kicking, pushing, cutting, burning, choking, threatening a woman with a weapon or killing her. 31 The most visible consequences of domestic

29. HEISE ET AL., supra note 13, at 3.
30. See id. at 4.
31. Fischbach et al., supra note 28, at 1163.
violence are injury and death.\textsuperscript{32} Physical health outcomes of violent acts against women include sexually transmitted diseases, injury, pelvic inflammatory disease, unwanted pregnancy, miscarriage, chronic pelvic pain, headaches, gynecological problems, alcohol and drug abuse, asthma, irritable bowel syndrome, injurious health behaviors, and partial or permanent disability.\textsuperscript{33}

Battered women may also suffer from various psychological disorders, particularly stress-related illnesses.\textsuperscript{34} Experts point out that mental distress or disorder observed in abused women is directly related to their experiences as victims of domestic violence.\textsuperscript{35} Domestic violence victims may experience post-traumatic stress disorder, depression, anxiety, sexual dysfunction, eating disorders, multiple personality disorder and obsessive-compulsive disorder.\textsuperscript{36}

The global prevalence of domestic violence is difficult to measure because of underreporting by victims and a lack of population-based data on abuse and its health consequences.\textsuperscript{37} Nevertheless, a World Bank analysis of existing data on domestic violence from over twenty countries worldwide describes it as a significant cause of physical mortality and morbidity for women in almost every culture in the world.\textsuperscript{38} The authors of the report, Lori L. Heise, Jacqueline Pitanguy and Adrienne Germain, note that "one-quarter to more than half of women report having been physically abused by a present or former partner. An even larger percentage have been subjected to ongoing emotional and psychological abuse, a form of violence that many battered women consider worse than physical abuse."\textsuperscript{39} The World Bank also reports that gender-based violence accounts for almost one in five years of healthy life lost to women between the ages of fifteen and forty-four.\textsuperscript{40}

The United Nations Special Rapporteur on Violence against Women (U.N. Special Rapporteur) indicates the global nature of the problem:

(1) In 1990, a random sampling of women in Guatemala found

\begin{itemize}
\item \textsuperscript{32} \textit{Id.} at 1161.
\item \textsuperscript{33} HEISE ET AL., \textit{supra} note 13, at 18.
\item \textsuperscript{34} \textit{Id.;} Fischbach et al., \textit{supra} note 28, at 1168-1171.
\item \textsuperscript{35} Fischbach et al., \textit{supra} note 28, at 1168.
\item \textsuperscript{36} \textit{Id.}
\item \textsuperscript{37} HEISE ET AL., \textit{supra} note 13, at 1; Fischbach et al., \textit{supra} note 28, at 1167.
\item \textsuperscript{38} HEISE ET AL., \textit{supra} note 13; Fischbach et al., \textit{supra} note 28, at 1161.
\item \textsuperscript{39} HEISE ET AL., \textit{supra} note 13, at 4. The study's authors note that most studies were based on probability samples with a large number of respondents (Colombia, Kenya, Mexico, U.S). \textit{Id.}
\item \textsuperscript{40} \textit{Id.} at 17.
\end{itemize}
that 49 per cent of them had been physically, emotionally and/or sexually abused by a male partner;

(2) In the United Republic of Tanzania, 60 per cent of the women surveyed in a three-district study on domestic violence, reported that they had been physically battered by a domestic partner;

(3) In the United States of America, an estimated 2 million women are beaten by their male partners each year, approximately half of whom seek medical treatment;

(4) In Nicaragua, 44 per cent of surveyed men admitted that they beat their wives;

(5) In New Zealand, 22.4 per cent of women in a random sample survey had been physically battered at some point since the age of 16;

(6) A survey of violence against women in India revealed that in almost 94 per cent of the cases the victim and the offender were members of the same family; in 90 per cent of these cases the wife was the victim of the husband.41

Just as domestic violence may negatively impact a woman’s health, it may also burden her financial status and her country’s healthcare system. In the U.S., the Department of Justice (DOJ) reports that hospital emergency department data indicate that women represent approximately eighty-four percent of those seeking hospital treatment for an intentional injury caused by an intimate assailant.42 One study estimates that medical treatment for victims of domestic violence costs $1633 per victim per year.43 Another study indicates that victims of rape or assault pay two and a half times the medical costs of women who were not abused.44 The DOJ also reports that domestic violence victims pay almost $150 million in medical expenses from the physical trauma of domestic violence, broken or stolen property, and lost pay per year.45 These estimates may be conservative given the fact that domestic violence victims are often reluctant to disclose their abuse to medical providers or to police.46

41. Special Rapporteur, supra note 11, at 13-14.
42. U.S. DEP’T OF JUSTICE, ANALYSIS OF DATA ON CRIMES BY CURRENT OR FORMER SPOUSES, BOYFRIENDS, AND GIRLFRIENDS v (Mar. 1998).
43. See Charting a Course for the Future of Women’s and Perinatal Health in Volume II-Reviews of Key Issues 169 (H.A. Grason et al. eds., Women’s and Children’s Health Policy Center, Johns Hopkins School of Public Health (1999)).
44. See Heise et al., supra note 13, at 22.
46. Grason et al., supra note 43, at 169.
Domestic violence also jeopardizes a nation's economic health. Ruth L. Fischbach of Harvard Medical School and Barbara Herbert of Harvard School of Public Health state that "the loss of female labor in the paid and unpaid workforce due to the mortality and morbidity attributed to domestic violence, may equally disadvantage the continued development of emerging economies in low income countries." National levels of productivity and development are diminished in many countries because abused women have lower educational attainment and income levels than they would if they were not battered. For example, a 1993 study conducted in the United States indicates that abused women earn three to twenty percent less each year than do women who have not been abused. The costs of domestic violence are considerable for both victims and society.

B. The International Human Rights Framework

1. Human Rights Instruments

Given the clear health consequences for victims of domestic violence, what protections does international law offer? This section discusses specific instruments that address human rights broadly, in addition to women's rights, the human rights category into which most instruments place domestic violence. The obligations of nations to abide by these instruments are discussed in Part III.B.

The international human rights system is based on the idea that nations have an obligation to respect their citizens' human rights, and that "other nations and the international community have a right, and responsibility, to protest if this obligation is not lived up to." This principle is embodied in the instruments of international law, which include international declarations, conventions, and treaties. This system also recognizes the binding force of customary law, understood as the "general practice of states." This "general practice of states," according to Trimble et al., may be understood to include two elements. First, diplomatic acts and instructions as well as public measures and other governmental acts and official statements of policy.

47. Fischbach et al., supra note 28, at 1168.
49. See Grason et al., supra note 43, at 169.
50. Bilder, supra note 6, at 844.
The practice necessary to create customary law... must be ‘general and consistent.’ A practice can be general even if it is not universally followed;... but it should reflect wide acceptance among the states particularly involved in the relevant activity.\(^{52}\)

Second, a practice has the force of customary law if “states follow the practice from a sense of legal obligation.”\(^ {53}\)

Customary law dictates, under the principle of \textit{jus cogens}, that compelling norms that are accepted by the international community as a whole cannot be overridden by international agreement or national law.\(^ {54}\) Human rights principles set forth in declarations and conventions, therefore, may be considered binding on the basis of customary law.\(^ {55}\) The human rights system also requires individual nations to enact and implement criminal laws for the protection of human rights.

The issuance of the \textit{1948 Universal Declaration of Human Rights} (UDHR) by the newly formed United Nations (U.N.) ushered in a period of increased international concern for human rights. The UDHR summons the global community to accept human rights and dignity as self-evident, the “highest aspiration of the common people,”\(^ {56}\) and “the foundation of freedom, justice and peace.”\(^ {57}\) Article five of the UDHR states that all individuals have the right to seek asylum.\(^ {58}\)

Women’s rights are not identified as a specific area of concern in the UDHR, but women’s rights had received international attention prior to 1948. The \textit{Hague Conventions} of the early twentieth century had identified conflicts in national laws on marriage, divorce and custody, and later on trafficking of women for prostitution.\(^ {59}\) However, it was not until

52. \textit{Id.} at 138 (quoting \textsc{Restatement (Third) of Foreign Relations Law} § 102 cmt. (1986)).
53. \textit{Id.} This principle of customary law is known as \textit{opinio juris}. \textit{Id.}
55. See \textit{e.g.}, Bilder, \textit{supra} note 6, at 848 (observing that “some standards set by the Universal Declaration of Human Rights, although initially only recommendatory and nonbinding have now become legally binding as customary law through their wide acceptance by nations as having normative effect.”).
57. \textit{Id.}
58. \textit{Id.}
59. Felice D. Gaer, \textit{And Never the Twain Shall Meet? The Struggle to Establish Women’s Rights as International Human Rights}, in \textit{The International Human Rights of Women: Instruments of Change} 5 (Carol Elizabeth
two decades after the UDHR that conventions and treaties began to include language regarding discrimination against and equal protection for women.

In 1966, the U.N. issued the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESC). The ICCPR prohibits discrimination and requires equal protection for men and women in the enjoyment of their civil and political rights. It contains prohibitions against violence, including rights to legal protection of life and security of person. Similarly, the ICESC declares that men and women have the right to the enjoyment of all economic, social and cultural rights.

The 1969 American Convention on Human Rights, signed or ratified by countries throughout the Americas, not only reaffirms the human rights principles of the UDHR and the ICCPR, but also provides for enforcement mechanisms for human rights violations. Specifically, the American Convention "establishes a system whereby individuals, groups of individuals, and non-governmental organizations (NGOs) are each capable of lodging complaints and seeking redress for violations of the Convention."

The first U.N. world conferences to address women's rights, and domestic violence in particular, were held in Copenhagen in 1980 and in Nairobi in 1985. The Copenhagen conference identified the need to improve women's physical and mental health by developing programs and

Lockwood et al. eds., 1998).


61. HUMAN RIGHTS WATCH, THE HUMAN RIGHTS WATCH GLOBAL REPORT ON WOMEN'S HUMAN RIGHTS 343 (1995) (citing articles 2(1) and 26 of the ICCPR).

62. Id. (citing articles 6(1) and 9(1) of the ICCPR).

63. ICESC, Article 3, reprinted in CARTER ET AL., supra note 7, at 418.


65. See id.

66. Id. at 254.

policies for the elimination of violence against women.\textsuperscript{68} However, the Copenhagen conference recognized neither women's rights nor domestic violence protections as a human right.\textsuperscript{69} This recognition came five years later at the Nairobi conference, where participants characterized violence against women as a major hurdle to the achievement of peace.\textsuperscript{70} However, the Nairobi conference did not recommend formally that States assume responsibility for prosecuting abusers or preventing violence.\textsuperscript{71}

During and following the U.N. Decade for Women (1975-85), domestic violence gained greater visibility in the human rights area, particularly within the U.N. community.\textsuperscript{72} In 1979, the U.N. adopted the \textit{Convention on the Elimination of All Forms of Discrimination Against Women} (CEDAW).\textsuperscript{73} CEDAW details norms on matters of equality and opportunity for women yet, like other international declarations up to this time, it did not formally recognize violence against women as a human rights violation.\textsuperscript{74}

In 1994, the U.N. appointed a Special Rapporteur on the Status of Women to document the causes and consequences of violence against women.\textsuperscript{75} In the same year, the U.N. issued the \textit{Declaration on the Elimination of Violence against Women}.\textsuperscript{76} This Declaration affirms that violence against women violates women's ability to enjoy human rights and freedoms but does not actually declare domestic violence as a human rights violation.\textsuperscript{77} Felice D. Gaer, Director of the Jacob Blaustein Institute for the Advancement of Human Rights of the American Jewish Committee, explains that, “by stating that violence merely impairs the

\begin{footnotesize}
\begin{enumerate}
\item Id.
\item Id. at 14.
\item Id.
\item Id. at 19.
\item Id. at 19.
\item Id. at 11.
\item Id. at 12.
\item Id. at 23.
\item \textit{Special Rapporteur, supra} note 11, at 1.
\item See \textit{id.}
\end{enumerate}
\end{footnotesize}
enjoyment of rights, the Declaration on Violence allowed governments to continue to characterize violence as a common crime, not as a violation of international human rights.\(^\text{78}\) Despite this shortcoming, the Declaration on Violence contains the first official definition of violence against women.\(^\text{79}\) The Declaration also instructs States to condemn violence against women, including violent acts justified by perpetrators on the basis of custom, religion, or tradition.\(^\text{80}\)

The Fourth U.N. World Conference on Women, held in Beijing in 1995, went even further than the Copenhagen conference in identifying domestic violence as an infringement of women’s human rights. Whereas the Copenhagen conference spoke more generally of domestic violence as an obstacle to peace, development and equality, the Beijing conference described violence as “violat[ing] and impair[ing] or nullif[yng] the enjoyment by women of their human rights.”\(^\text{81}\) Gaer describes the Beijing conference’s emphasis on governmental accountability for violence against women as a “dramatic advance over past conferences.”\(^\text{82}\) She notes that the Beijing Conference drew greater attention to the human rights implications of violence against women. It did so by calling, not only for reporting and monitoring of violations and investigation and prosecution of abusers, but for governments to exercise due diligence in preventing such acts and accountability for the perpetration of such acts.\(^\text{83}\)

Whereas international instruments protecting women’s rights have been slow to develop, international law is explicit on the protection of refugees fleeing human rights abuses. The 1951 *Convention Relating to the Status of Refugees* prohibits the return to any country of any individual outside that country who is unable or unwilling to return because of fear of persecution or a well-founded fear of persecution based on race, religion, nationality, membership in a particular social group or political

\(^{78}\) *Id.* at 23.

\(^{79}\) *Id.* Article 1 of the Declaration on Violence defines violence against women as: “any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life.” Declaration on Violence, supra note 76, at 391.

\(^{80}\) *Id.*


\(^{82}\) Gaer, supra note 59, at 63.

\(^{83}\) *Id.*
opinion.\textsuperscript{84} Similarly, \textit{the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment} (CAT) forbids the return to a country of any person who can prove that he or she would be in danger of being subject to torture.\textsuperscript{85} The CAT recognizes torture as severe physical and/or mental pain, intentionally inflicted for specified purposes, with some form of either active or passive official involvement.\textsuperscript{86}

How does health fit into this international human rights framework? Attorney and public health specialist Lynn P. Freedman observes that human rights work has focused primarily on the protection of political and civil rights; it has not focused on economic, social, or cultural rights due to the difficulty of defining and monitoring these rights.\textsuperscript{87} Gaer notes that the human rights community has tended to categorize domestic violence as a "women's rights" issue, and has placed low priority on women's human rights issues.\textsuperscript{88} Consequently, it is not surprising that the international human rights community has placed lower priority on the health implications of domestic violence in the past. Relatively few human rights instruments explicitly articulate the right to health.\textsuperscript{89} Nevertheless, inquiry into the definition of the more general rights to well-being, security of the person, and freedom from violence articulated in many human rights instruments reveals that these terms include the right to health as a fundamental human right.


\textsuperscript{85} Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, opened for signature Feb. 4, 1985, S. TREATY DOC. NO. 100-20 (198), 1465 U.N.T.S. 85.

\textsuperscript{86} Id.

\textsuperscript{87} Lynn P. Freedman, \textit{Reflections on Emerging Frameworks of Health and Human Rights}, in Mann et al., supra note 10, at 237.

\textsuperscript{88} Gaer, supra note 59, at 20. In addition, Gaer identifies historic obstacles to the integration of the status of women into human rights instruments including: the organizational separation within the U.N. of women's rights from human rights; the lack of emphasis on prohibitions against discrimination; the fact that international human rights norms were developed by representatives of governments; and the fact that most of the delegates to human rights discussions were men and lawyers, who focused primarily on due process considerations. Id.

\textsuperscript{89} But see ICESC art. 12, supra note 60, at 421 (stating that every individual possesses the right to the enjoyment of the highest attainable standard of physical and mental health).
2. Domestic Violence Human Rights Violations: The Role of the State

Domestic violence is often viewed as a private, family matter. Authorities are often reluctant to intervene in such "private" matters. The DOJ reports that most violence victims fail to contact police because they believed the attack was a private or personal matter, they feared retaliation, or they believed the police could not help. The same study reveals that, of the total number of cases reported from 1992-1996 in the U.S., three quarters of all nonfatal violent acts against women occurred at or near the victim's home. Women in various countries hesitate to report abuse because they feel ashamed or because they fear their reporting may incriminate family members. The U.N. Special Rapporteur has characterized domestic violence worldwide as an instrument of oppression that "sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home."

Even in countries that may recognize the severity of the problem, "each society has mechanisms that legitimize, obscure, deny - and therefore perpetuate - violence." Social institutions - the State, families, and normative systems that regulate gender relations - collude in maintaining the status quo. In many cultures, just being female puts women in jeopardy. Researchers M.E. Beasely and D.Q. Thomas note that "failure to prosecute perpetrators of domestic violence against women reflects a pattern of gender-based, systematic, discriminatory non-enforcement of national criminal law which differentially disadvantages women and puts their mental health and indeed, their lives at risk simply because of their gender."

Arguably, one of the most important human rights developments in recent years is the international community's recognition of States' responsibility for the actions of non-State actors. When a government fails to protect women from abuse, the supposed "personal act" of

90. Special Rapporteur, supra note 11, at 27.
91. U.S. Dep't of Justice, supra note 42, at v.
92. See id. at 15.
93. Heise et al., supra note 13, at 5.
94. Special Rapporteur, supra note 11, at 6.
95. Heise et al., supra note 13, at 1.
96. Fischbach et al., supra note 28, at 1161.
97. Id. (citing M.E. Beasely et al., Domestic violence as a human rights issue in The Public Nature of Private Violence: The Discovery of Domestic Abuse (M.A. Fineman et al. eds., 1994)).
domestic violence becomes a matter of equal protection subject to human
d Patriots, Governmental complicity is established when
governments consistently fail to protect the equal rights of women.98
International human rights instruments, such as CEDAW, "clearly
establish State responsibility in safeguarding against human rights
violations that occur in this context."99 The U.N. Special Rapporteur
explains that:

States are held legally responsible for the acts or omissions of
private persons in the following instances: the person is an agent
of the State the private acts are covered by provisions of a treaty
obligation there is State complicity in the wrongs perpetrated by
private actors and there is State failure to exercise due diligence
in the control of private actors.100

Under the CAT, domestic violence not only may qualify as torture, but
it "occurs with at least the tacit involvement of the State if the State does
not exercise due diligence and equal protection in preventing domestic
abuse."101 These views have been incorporated into the INS Guidelines,
which acknowledge explicitly that when States will not or cannot protect
domestic violence victims, States contribute to the perpetuation of
violence against women.102

Although international human rights instruments also compel
governments to enact criminal laws for the prevention of human rights
violations, the U.N. Special Rapporteur concludes in her study of
legislation from twenty-one countries worldwide that criminal laws
providing legal relief for victims of domestic violence are not highly
developed in most countries.103 She reveals that with the exception of
marital rape, "general criminal prohibitions have not explicitly excluded
criminal behaviour committed within the family. However, due to the
'hands-off' approach traditionally assumed by law enforcement agents
and the judiciary in cases occurring within the private sphere, such laws

98. Special Rapporteur, supra note 11, at 7.
99. Bemma Donkoh, Domestic Violence in the Context of the Refugee
Definition, United Nations High Commissioner for Refugees (UNHCR),
presentation at the Carnegie Endowment for International Peace (July 28, 1999),
at http://www.uchastings.edu/cgrs/documents/unhcr_dv.htm. (last visited Nov. 8,
1999).
100. Id.
101. Special Rapporteur, supra note 11, at 9-10.
102. INS Guidelines, supra note 1, at 813.
103. Special Rapporteur, supra note 11, at 27.
have not been invoked to punish perpetrators of domestic violence.

II. ESTABLISHING A CLAIM FOR ASYLUM IN THE UNITED STATES

A. Burden of Proof: General Requirements

Asylum is one type of remedy for persecution, resulting in permission to remain in the U.S. at least temporarily, and usually permanently. It intends to "protect people who are seriously at risk, people who are in some way targeted for persecution." A potential asylee is defined as "any person who is in the U.S. or applying for admission at a port of entry, and who is unable or unwilling to return to his or her country of nationality because of persecution, or a well-founded fear of persecution." This definition derives from the 1951 Convention Relating to the Status of Refugees, incorporated into the U.S. Refugee Act of 1980, which mandates that:

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

As stated above, asylum claims are made at ports of entry to the U.S. or from within the U.S. An applicant's immigration status is irrelevant to his or her asylum claim; thus a claim for asylum by an undocumented person does not result in automatic removal from the United States. Authority to decide most asylum claims lies with the INS Asylum Officer Corps. At ports of entry to the United States, persons claiming asylum

104. Id. at 28.
109. Immigr. and Naturalization Service, supra note 107, at 3.
110. Id. at 7. Beginning April 1, 1991, Asylum Officers decide on most claims.
are referred to an Asylum Officer for a “credible fear interview.”

All asylum applicants must first qualify as refugees. They must prove past persecution and/or a well-founded fear of persecution. Past persecution is established when the applicant can prove that he or she:

[S]uffered persecution in the past in his or her country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion, and that he or she is unable or unwilling to return to or avail himself or herself of the protection of that country owing to such persecution.112

If the applicant proves past persecution, it is assumed that the applicant has a well-founded fear of persecution, unless country conditions have changed, such that the fear no longer exists.113 Therefore, an asylum application may be denied at this stage, unless the applicant establishes a "well-founded fear of persecution," based on "compelling reasons for being unwilling to return to his or her country of nationality or last habitual residence arising out of the severity of the past persecution."114

Specifically, the well-founded fear of persecution element is satisfied if the applicant can establish:

[F]irst that he or she has a fear of persecution in his or her country of nationality or last habitual residence on account of race, religion, nationality, membership in a particular social group, or political opinion; second, that there is a reasonable possibility of suffering such persecution if he or she were to return to that country; and third, that he or she is unable or unwilling to return to or avail himself or herself of the protection of that country because of such fear.115

If the INS Asylum Officer finds the applicant’s fear of persecution to be credible, the applicant is permitted to apply for asylum before an immigration judge.116 If the applicant does not establish a credible fear of persecution, he or she may request a review of the interview by an

---

111. The credible fear interview is required by INA § 235(b)(1)(B). See 8 C.F.R. §§ 208.30(a), (b) (2000).
113. 8 C.F.R. § 208.13(b)(2).
114. 8 C.F.R. § 208.13(b)(i).
115. 8 C.F.R. § 208.13(b)(ii).
116. Bd. of Immigr. Appeals, supra note 19. Immigration judges have jurisdiction on issues of asylum, removability, deportability, and excludability. Id. at 2.
immigration judge.\textsuperscript{117}

The applicant may appeal an immigration judge’s denial of asylum to the BIA.\textsuperscript{118} The BIA has nationwide jurisdiction to review orders of immigration judges and sometimes INS decisions.\textsuperscript{119} In some cases, a federal court of appeals may hear an appeal from a BIA denial.\textsuperscript{120} The Attorney General also has the authority to overrule or modify BIA decisions.\textsuperscript{121} A final denial of asylum results in the placement of an otherwise undocumented person in removal proceedings.\textsuperscript{122}

1. Defining Persecution and the Question of Nexus: Basic Parameters

There is no standard, universally accepted definition of persecution. American immigration law relies primarily on the \textit{United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status,}\textsuperscript{123} case law, and international human rights law.\textsuperscript{124} The UNHCR \textit{Handbook} defines persecution fairly broadly as a threat to life or freedom because of race, religion, nationality, political opinion or membership in a particular social group.\textsuperscript{125} The INS Guidelines state that the threat of persecution can come from the government or from individuals or groups whom the government is unwilling or unable to control.\textsuperscript{126} They also note that “serious physical harm consistently has been held to constitute persecution.”\textsuperscript{127} The INS \textit{Basic Law Manual} states that “[D]iscrimination is not normally persecution. However, discriminatory practices and experiences can

\begin{itemize}
  \item \textsuperscript{117} 8 C.F.R. § 208.30(e) (2000).
  \item \textsuperscript{118} 8 C.F.R. § 208.30(f)(3); 8 C.F.R. § 3.1 (b) (2000).
  \item \textsuperscript{119} BD. OF IMMIGR. APPEALS, supra note 19, at 5; 8 C.F.R. § 3.1 (b).
  \item \textsuperscript{120} U.S. DEP’T OF JUSTICE, \textit{infra} note 124, at 12.
  \item \textsuperscript{121} 8 C.F.R. § 3.1(d)(3).
  \item \textsuperscript{122} 8 C.F.R. §§ 208.30(e),(f).
  \item \textsuperscript{125} U.N. High Comm’r for Refugees, supra note 123.
  \item \textsuperscript{126} INS Guidelines, supra note 1, at 813.
  \item \textsuperscript{127} Id. at 804.
\end{itemize}
accumulate over time or increase in intensity so that they rise to the level of persecution."\textsuperscript{128}

Case law provides additional interpretations of the term "persecution." Citing Matter of Acosta,\textsuperscript{129} the Guidelines note that harsh conditions suffered by many persons do not necessarily constitute persecution.\textsuperscript{130} In the 1999 gender-based asylum case of Abankwah v. INS,\textsuperscript{131} the Second Circuit stated that the asylum applicant's own testimony may be sufficient to establish fear of persecution without corroboration,\textsuperscript{132} stressing that the fear must be objectively reasonable.\textsuperscript{133}

In that instance, Abankwah had fled her home in Ghana because she feared she would be subject to female genital mutilation (FGM).\textsuperscript{134} She sought safety in the capital city of Accra, but when members of her tribe located her there, she fled to the United States.\textsuperscript{135} In a reversal of the BIA's denial of asylum, the Second Circuit found that Abankwah's testimony was credible because she provided evidence that proved that her fear of FGM was subjectively real, objectively reasonable, and well founded.\textsuperscript{136} The court elaborated that "it must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation."\textsuperscript{137}

Although not explicitly required under immigration regulations, case law indicates that the applicant must also prove that he or she had no internal flight opportunities. Specifically, applying a standard of reasonableness under all of the circumstances, the INS Guidelines instruct asylum officers to "explore the circumstances giving rise to the harm or


\textsuperscript{129} Matter of Acosta, 19 I\&N Dec. 211 (BIA 1985). Acosta was overruled on other grounds by Matter of Mogharrabi, 19 I\&N Dec. 439 (BIA 1987), but is still referred to in the Guidelines and in other sources when describing the factors that constitute persecution. See INS Guidelines, supra note 1, at 803-805.

\textsuperscript{130} INS Guidelines, supra note 1, at 804.

\textsuperscript{131} Abankwah v. INS, 185 F.3d 18 (2d Cir. 1999).

\textsuperscript{132} Id. at 22.

\textsuperscript{133} Id. at 22-23.

\textsuperscript{134} Id. at 20.

\textsuperscript{135} Id.

\textsuperscript{136} Id. at 23.

\textsuperscript{137} Id. at 26.
risk of harm, as well as the extent to which government protection would have been available in other parts of the country." 138 Specifically, "the adjudicator must consider whether protection was available as a factual matter as well as in the law of the country and whether, under all the circumstances, it would be reasonable to expect a woman to seek residency elsewhere in her country." 139

2. Political Opinion and Membership in a Social Group

Asylum applicants must prove "nexus": that the persecution was carried out because of the applicant's race, nationality, religion, political opinion or membership in a social group. 140 Political opinion and membership in a social group are the grounds discussed here because most domestic violence asylum claims appear to fall analytically within one of these two grounds. 141 This section summarizes general principles underlying the categories of political opinion and particular social group.

Deborah E. Anker of Harvard's Immigration and Refugee Program, and author of The Law of Asylum in the United States, groups gender-related claims on the basis of political opinion into three categories:

First, women can be subject to laws that discriminate against them on account of their gender, and violation of those laws may be an expression of political opinion. Second, and relatedly, women may be subject to persecution because they express or manifest through conduct, (including violation of social or cultural norms), political opinions favoring social equality of women. Women may be subject to formal or informal state sanctions as a result, or the beliefs they assert may trigger persecution by non-state actors. Often such non-state actors are intimates or family members, from whom the state may be unwilling or unable to provide protection. Third, women may be persecuted or be at risk of persecution because of family associations. 142

Anker emphasizes that a woman's mere statement of her political

138. INS Guidelines, supra note 1, at 815-816 (citing Acosta, 19 I&N Dec. 211; Matter of Fuentes, 19 I&N Dec. 658 (BIA 1988); Matter of R-, Int. Dec. 3195 at 7-9 (BIA 1992); Beltran-Zavala v. INS, 912 F.2d 1027, 1030 (9th Cir. 1990)).
139. Id.
140. 8 C.F.R. § 208.13(b)(2) (2000).
141. For detailed discussions of the grounds of political opinion and membership in a particular social group, see Anker, supra note 9, and Macklin, infra note 147.
142. Anker, supra note 9, at 366.
opinion will not satisfy her burden of proof. The "applicant must prove that she possesses a cognizable political belief," and that the persecution she suffered was carried out because of her belief. The Guidelines address this ground briefly and advise Asylum Officers generally to consider all of the facts surrounding an applicant's claim of persecution on the basis of political opinion, in order to determine whether the victim has actually expressed a political opinion, or had a political opinion imputed to her.

The INS Guidelines state that membership in a particular social group is the least clearly defined ground for eligibility as a refugee and often causes adjudicators to rely more on the other enumerated grounds if possible. The Guidelines note that the BIA stated in Acosta that:

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

The Guidelines also point to the sometimes conflicting Circuit Court decisions interpreting the meaning of "particular social group." The Guidelines attempt to reduce the confusion inherent in this asylum ground by advising Asylum Officers, albeit in a general matter, that when they consider gender-based asylum claims, they should consider "whether gender might combine with other characteristics to define a particular social group [and] asylum adjudicators should consider whether such

143. Id. at 298.
144. Id.
145. See INS Guidelines, supra note 1, at 806-807.
146. Id. at 808.
149. INS Guidelines, supra note 1, at 808-813.
additional characteristics are likely to be ascertainable by persecutors.\footnote{150}

The \textit{Acosta} test was applied by an immigration judge in the first pre-
Guidelines case to grant asylum based on domestic violence, \textit{Matter of A-
Z.}\footnote{151} There, a Jordanian woman who had been severely abused by her
husband for over thirty years had applied for asylum. The immigration
judge found that the woman’s social group consisted of “those women
who espouse Western values and who are unwilling to live their lives at
the mercy of their husbands, their society, their government.”\footnote{152} He
elaborated that “the respondent is beaten to achieve her submission into
the society’s mores. The respondent should not be required to dispose of
her beliefs.”\footnote{153} Later, in \textit{Matter of Kasinga},\footnote{154} a landmark decision issued
after the issuance of the INS Guidelines, the BIA granted asylum because
Kasinga’s fear of genital mutilation stemmed from her membership in the
particular social group of “young women of the Tchamba-Kunsuntu tribe
who have not had female genital mutilation, as practiced by that tribe, and
who oppose the practice.”\footnote{155}

\textbf{A. Gender-Based Asylum Claims: Examining the Record}

The Center for Gender and Refugee Studies (CGRS) of the Hastings
College of Law tracks decisions in gender asylum law.\footnote{156} CGRS reports
that, since 1995, the BIA has denied many gender-based asylum claims.\footnote{157}
It is difficult to determine just how many gender-based asylum
applications are approved or denied, as not all INS, immigration judge, or
BIA decisions are published. In addition, there appears to be no formal
system for tracking gender-based asylum cases, although the Guidelines
promise to develop procedures for tracking such claims.\footnote{158}

\footnote{150. \textit{Id.} at 811.}
Aug. 9, 1995) \textit{available at} \url{http://www.uchastings.edu/cgrs/law/ijdec.html} (last
visited Sept. 6, 2000).}
\footnote{152. \textit{Id.} at 15.}
\footnote{153. \textit{Id.}}
\footnote{154. \textit{Matter of Kasinga}, Interim Decision 3278 (BIA 1996).}
\footnote{155. \textit{Id.} at 3.}
\footnote{156. \textit{See} Center for Gender and Refugee Studies, at
\url{http://www.uchastings.edu/cgrs/caselaw/caselaw.html} (last visited Sept. 6, 2000).}
\footnote{157. \textit{Id.}}
\footnote{158. INS Guidelines, \textit{supra} note 1, at 816. Tracking gender-based asylum
decisions may be difficult because gender is not currently a ground for persecution
under asylum law. Anker explains that gender-based asylum claims may be
categorized analytically under more than one of the grounds for asylum. \textit{ANKER,
Decisions of Asylum Officers are not officially published and are not binding on other immigration judges or on Asylum Officers. BIA decisions may be designated as precedent or non-precedent decisions. Only those BIA decisions designated as precedent are binding on the BIA, immigration judges, and the INS. Anker notes that the BIA "publishes as precedent a very small portion of its decisions, and the large majority of its precedent asylum decisions are denials, so there are few precedent examples of what is required to successfully establish a claim."

Audrey Macklin, a former member of Canada’s Immigration and Refugee Board, explains that assessing a trend of decisions or the impact of the INS Guidelines, and similar guidelines in Canada and Australia, is further complicated by the fact that the number of women who both claim and receive refugee status fluctuates in any given year.

1. **Matter of Re R-A-.** The Guidelines Fail to Protect in a BIA Precedent-Setting Decision

Rodi Alvarado Peña, a citizen of Guatemala, was a young bride of sixteen when her husband began to abuse her. As reported in the BIA decision reversing her grant of asylum:

Her husband would insist that the respondent [Alvarado Peña] accompany him wherever he went, except when he was working. He escorted the respondent to her workplace, and he would often wait to direct her home. To scare her, he would tell the respondent stories of having killed babies and the elderly while

**supra** note 9, at 388.

159. *BD. OF IMMIGR. APPEALS, supra* note 19, at 39.

160. *Id.* at 7. The BIA describes the criteria for designating a decision as precedent as including, but not limited to, “...the resolution of an issue of first impression; alteration, modification, or clarification of an existing rule of law; reaffirmation of an existing rule of law; resolution of a conflict of authority; and discussion of an issue of significant public interest.” *Id.*

161. *Id.* (citing 8 C.F.R. § 3.1, 3.38 (2000)).

162. *ANKER, supra* note 9, at 8.

163. Macklin, *supra* note 147, at 34.

164. *ANKER, supra* note 9, at 260.


he served in the army. Oftentimes, he would take the respondent to cantinas where he would become inebriated.

When she left a cantina before him, he would strike her. As their marriage proceeded, the level and frequency of his rage increased concomitantly with the seeming senselessness and irrationality of his motives. He dislocated the respondent’s jaw bone when her menstrual period was 15 days late. When she refused to abort her 3-to-4-month-old fetus, he kicked her violently in her spine. He would hit or kick the respondent ‘whenever he felt like it, wherever he happened to be: in the house, on the street, on the bus.’ The respondent stated that ‘as time went on, he hit me for no reason at all.’

The respondent’s husband raped her repeatedly. He would beat her before and during the unwanted sex... he would accuse her of seeing other men and threaten her with death. The rapes occurred almost daily and they caused her severe pain.... When she protested, he responded, as he often did, ‘You’re my woman, you do what I say.’

[H]e... whipped her with an electrical cord, pulled out a machete and threatened to deface her, to cut off her arms and legs, and to leave her in a wheelchair if she ever tried to leave him.... He broke windows and a mirror with her head. Whenever he could not find something, he would grab her head and strike furniture with it.... One night, the respondent attempted to commit suicide. Her husband told her, ‘If you want to die, go ahead. But from here, you are not going to leave.’

Alvarado Peña attempted to find protection from the Guatemalan police and courts. Police took no action when her husband failed to respond to three police summons. A Guatemalan judge told Alvarado Peña that he would not interfere in domestic disputes. Alvarado knew of no shelters or other organizations in Guatemala that could protect her. After fleeing to the United States in May 1995, Alvarado Peña learned through her sister-in-law that her husband would “hunt her down and kill her if she [came] back to Guatemala.”

167. Id. at 4.
168. Id. at 5.
169. Id.
170. Id.
171. Id.
172. Id. at 5.
173. Id.
Alvarado Peña based her initial asylum request on persecution suffered because of her membership in a particular social group. She successfully established past persecution and a well-founded fear of persecution, if she were to return to Guatemala. Applying the Acosta test, the immigration judge granted asylum.\(^1\) She found that Alvarado Peña was a member of the cognizable and cohesive social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination,”\(^1\) because members of this group “shared the common and immutable characteristics of gender and the experience of having been intimately involved with a male companion who practices male domination through violence.”\(^1\) In addition, the immigration judge found that Alvarado Peña’s husband was motivated to abuse her because she held the political opinion that women should not be dominated by men.\(^1\)

When the INS appealed the grant of asylum to Alvarado Peña, it asked the BIA to consider “whether the repeated spouse abuse inflicted on the respondent makes her eligible for asylum as an alien who has been persecuted on account of her membership in a particular social group or her political opinion.”\(^1\) In response, Alvarado Peña presented expert testimony as to the specific countrywide conditions of the status of women in Guatemala. Emphasizing that “women don’t have any rights” because “men have all the power,”\(^1\) the expert witness described the legalized discrimination faced by Guatemalan women as follows:

> The Guatemalan civil code recognizes the male as a married couple’s legal representative; the female is in charge of child care and other domestic responsibilities. A husband can legally forbid his wife to engage in activities outside the home. The husband also has the primary authority in disposing of joint property.\(^1\)

The BIA was not persuaded by Alvarado Peña’s arguments. While admitting its extreme contempt for the husband’s conduct,\(^1\) the BIA reversed, finding that “the respondent has failed to show that her husband was motivated to harm her, even in part, because of her membership in a

\(^{174}\) Id.  
\(^{175}\) Id.  
\(^{176}\) Id.  
\(^{177}\) Id.  
\(^{178}\) Id. at 4.  
\(^{179}\) Musalo, supra note 21, at 1179.  
\(^{180}\) Id.  
particular social group or because of an actual or imputed political opinion."182 The court concluded that the members of Alvarado Peña's particular social group were not "recognized and understood to be a societal faction"183 and there was no evidence that "women are expected by society to be abused."184 In other words, the husband treated Alvarado Peña as he did because she was his wife, not because she was a member of a "broader collection of women."185 In reaching its decision, the BIA consulted the INS Guidelines but found them "instructive, yet not controlling."186

Karen Musalo, Alvarado Peña's lawyer and Director of CGRS, stressed that the BIA went beyond the Acosta test and imposed an additional burden of proof on Alvarado Peña. Specifically, she states that the BIA required Alvarado Peña to demonstrate that: (1) the members of her social group "understand their own affiliation with the grouping, as do other persons in the particular society;" and 2) the harm suffered (spouse abuse) "is itself an important societal attribute, or in other words, that the characteristic of being abused is one that is important within Guatemalan society."187 Because the BIA designated this decision as precedent, future asylum claims brought by domestic violence victims will be forced to adhere to this higher burden of proof. As the dissent in Matter of R-A- described it, the BIA:

disregards decisions of tribunals, both domestic and foreign, which extend asylum protection to women who flee human rights abuses within their own homes. It also ignores international human rights developments and the guiding principle of the Charter of the United Nations, the Universal Declaration of Human Rights, and the 1951 Convention Relating to the Status of Refugees, 'that human beings shall enjoy fundamental rights and freedoms without discrimination.'188

III. BARRIERS FACED BY DOMESTIC VIOLENCE VICTIMS SEEKING ASYLUM

Although the INS Guidelines represent an important statement of

---

182. Id. at 4.
183. Id.
184. Id.
185. Id. at 21.
186. Id. at 6.
187. Musalo, supra note 21, at 1182.
188. Id. at 1183 (quoting Matter of R-A-, Int. Dec. 3403 at 34).
policy, domestic violence victims still confront a multitude of legal, social and cultural barriers to obtaining asylum. This section describes some of those barriers and includes recommendations for strengthening the consistent and fair assessment of domestic violence-based asylum claims.

A. Women's rights and rights to health under international law

Historically, the substantive scope of women's rights under international human rights law has not been clear. Also, the international legal community and national governments have not provided sufficient protections for women's rights. That being the case, another area of long neglect, health as it relates to women's rights, has also been inadequately protected. Therefore, the health implications of domestic violence have fallen outside the scope of international law's purview.

The substantive scope of women's rights has evolved over the last twenty years, and has developed into a more cohesive body of human rights law.189 International law explicitly compels governments to guarantee equality before the law for all of its citizens, regardless of sex.190 However, accountability for human rights violations by private actors is still at a low level and thus endangers the equal rights and health status of domestic violence victims. This means that women, who are the usual victims of domestic violence, ultimately may suffer human rights violations in ways different from men,191 which raises concerns as to the level of equal protection afforded by States.

The U.N. Special Rapporteur explains that the distinction between public and private actors within human rights law traditionally has caused women to remain silent despite physical abuse and other forms of oppression.192 Noting the importance of attaining a human rights strategy focused on human rights violations against women, she finds that the “ability to get a remedy, to assert one's right so as to demand a remedy,” is the primary source of empowerment.193 The availability of a remedy under national laws may depend upon the degree to which nations

189. See Gaer, supra note 59, at 56, commenting that in 1995, “the Beijing conference opened with the human rights of women still mired in controversy [in that] it was unclear what human rights language would be used in the conference’s concluding documents.” Id.

190. See HUMAN RIGHTS WATCH REPORT, supra note 61, at 343.


192. See Gaer, supra note 59, at 55 (describing comments made by the Special Rapporteur at the Beijing conference).

193. Id.
commit themselves to uphold international human rights norms and whether they choose, or are able, to honor those commitments.\textsuperscript{194}

The INS Guidelines provide some guidance as to how applicants can obtain one remedy, asylum, by encouraging INS Asylum Officers to consider the absence of State protection when assessing a gender-based claim. However, the Guidelines do not, but should, address fully the obligation of U.S. law to adhere to human rights principles that call for the protection of women’s rights, including the right to health. While health status alone should not be a basis for granting asylum, the health implications of domestic violence must be better understood to represent a serious human rights violation that, consequently, must factor into any assessment of the asylum claim of a domestic violence victim.

\textbf{B. Adherence to international human rights norms by States}

As described in Part I.B., human rights norms are expressed in different instruments, including treaties, conventions, and declarations, some of which are binding under nations’ domestic laws, some of which are not. The degree to which international law binds countries to the terms of a human rights treaty depends upon whether the country is a signatory or a party to the treaty, or whether countries bind themselves to the human rights principles of the various instruments under customary law.

The \textit{Vienna Convention on the Law of Treaties} states that an international agreement is a treaty that is “concluded between States in written form, and governed by international law, whether embodied in a single instrument or in two or more related instruments.”\textsuperscript{195} Signatory states are obligated to respect the object and purpose of a treaty, but are not fully bound to its terms.\textsuperscript{196} Parties to a treaty, on the other hand, are fully bound to perform the treaty in good faith.\textsuperscript{197} Parties are those countries that have ratified the treaty via a process that, in the U.S. includes advice and consent from the U.S. Senate prior to ratification by the President. States may qualify their ratification by stipulating certain reservations or by requiring additional implementing legislation.\textsuperscript{198}

Article VI of the U.S. Constitution, known as the Supremacy Clause, mandates adherence to international treaties: “This Constitution, and the

\begin{itemize}
\item \textsuperscript{194} Discussed \textit{infra}, Part III.B.
\item \textsuperscript{195} Vienna Convention on the Law of Treaties, \textit{supra} note 54, at 49 art. 2.
\item \textsuperscript{196} \textit{Id.} at 54 (art. 18).
\item \textsuperscript{197} \textit{Id.} at 57 (art. 26).
\item \textsuperscript{198} \textit{Id.} at 55 (art. 19).
\end{itemize}
Law of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." Administrative regulations developed by agencies under the DOJ, such as the INS, must adhere to this constitutional principle.

The Guidelines acknowledge that even if the U.S. is not a party to a particular international human rights treaty, the human rights principles contained therein may have some force as customary international law. U.S. case law also holds that when no treaty exists, and there is no controlling executive or legislative act or judicial decision, "resort must be had to the customs and usages of civilized nations."

Among the international human rights treaties described earlier, the U.S. has ratified only the Refugee Convention. The U.S. is not a party to the most important international human rights treaty, the ICCPR, because this treaty required implementing legislation that Congress has never passed. In the U.S., the lack of ratification of certain key human rights instruments reflects a lack of commitment to human rights. However, the U.S. became a signatory to the ICCPR, which obligates it at least to respect its object and purpose.

Although the UDHR is not a treaty and is not a legally binding document, as noted earlier, it has been argued that the UDHR is binding under customary law. For example, the INS Basic Law Manual states that although the UDHR initially was not a binding resolution of the U.N., it is recognized as proof of binding customary human rights law. Since President Clinton signed legislation requiring DOJ to develop regulations in accordance with CAT, refugee advocates are turning to the CAT as an alternative basis for requesting asylum. The other

199. U.S. CONST., art. VI, cl. 2.
200. INS Guidelines, supra note 1, at 795 (citing INS BASIC LAW MANUAL, supra note 128 at 11-12).
201. The Paquete Habana, 175 U.S. 677 (1900).
202. ICCPR, supra note 60.
203. Bilder, supra note 6, at 848.
204. INS BASIC LAW MANUAL, supra note 128, at 12-13 (cited in ANKER, supra note 9, at 174).
declarations on violence against women are not legally binding like formal treaties. However, as customary law requires, numerous countries have signed these instruments and therefore accept as a general practice the legal obligation to protect human rights. The U.S. should adhere to the human rights principles designed to protect the human rights of all persons, including those of domestic violence victims.

C. *Inherent Barriers for Domestic Violence Victims: The Internal Flight Alternative and Gender as a "Particular Social Group"

There are two problematic aspects of U.S. asylum for applicants whose claims are gender-based: the "internal flight alternative" and the lack of recognition of gender as a type of social group subject to persecution in certain societies.

The INS Guidelines note that case law requires Asylum Officers to examine whether an asylum applicant tried to secure assistance through judicial means, through relocation, or through other attempts to find safety in the applicant's country.\(^\text{206}\) This poses problems for domestic violence victims, according to the U.N. Special Rapporteur, who stresses that the expectation that flight to another town guarantees a domestic violence victim's safety may be unrealistic. She notes that "the lack of resources, legal and community support and alternative means to survive may make escape seem impossible."\(^\text{207}\) In addition, because domestic violence is a crime between intimate partners, the intimacy "remains a bond between victim and perpetrator" that "leaves women vulnerable to threats of pressure to withdraw their complaints,"\(^\text{208}\) and makes it difficult for them to escape violent relationships.

Although the Guidelines acknowledge that gender may have some relation to the persecution asylum applicants may suffer,\(^\text{209}\) U.S. immigration law does not recognize gender as a "particular social group" that may be subject to persecution. The absence of such recognition causes U.S. asylum law to fall short of compliance with international human rights principles as enunciated in the instruments described in Section I. Instead, Anker states that "recognition that gender itself can be the essential, defining characteristic of a particular social group is

\[^{206}\text{INS Guidelines, supra note 1, at 815-16.}\]
\[^{207}\text{Special Rapporteur, supra note 11, at 10.}\]
\[^{208}\text{Id. at 28.}\]
\[^{209}\text{See INS Guidelines, supra note 1, at 803 ("the applicant's gender may bear in the claim in significant ways to which the adjudicator should be attentive."). Id.}\]
necessary in order to provide women with equal access to refugee protection and to avoid general distortions in interpretation of the refugee definition."\(^{210}\)

Opponents of gender-based asylum law argue that gender is an overreaching and excessively broad basis for admitting refugees to the U.S., \(^{211}\) and that it will open the floodgates, requiring asylum to be granted to any woman who has been abused. This argument is refuted by Anker, Nancy Kelly, and John Willshire-Carrera, \(^{212}\) who note that

\[\text{[R]ecognition of particular social group claims based on gender would not make all women from a given country eligible for asylum . . . [because] a woman who has never been abused and cannot articulate specific grounds for fearing that she will personally be battered in the future will not be able to establish an objective basis for her claim.}\(^{213}\)

Perhaps even more compelling is Anker’s argument that the “floodgates” concern already applies equally to the grounds of nationality and race which, like gender, include large numbers of individuals who could potentially present asylum claims. \(^{214}\) Under current immigration law, persecution based on nationality and race may justify asylum. According to Anker, “[N]ot to acknowledge that women constitute a particular social group creates analytical confusion, treats women fundamentally differently and holds them to a higher standard - treatment specifically rejected by the INS Gender Guidelines.”\(^{215}\) Since the Guidelines reject any notion that asylum claims brought by women whose persecution is gender-based are less valid than those presented on other bases, it follows that the Guidelines must recognize gender in order to avoid holding women’s gender-based claims to a higher standard.

---

210. ANKER, supra note 9, at 389.


213. Id.

214. ANKER, supra note 9, at 379.

215. Id. at 392. Anker also refers to the experience of Canada, where case law recognizes domestic violence as a grounds for asylum. Canada has not experienced a flood of applicants as a result of this recognition. Id. at 260.
D. INS Guidelines: Mere administrative directives

The INS Guidelines apply only to INS asylum officers; immigration judges, the BIA, and federal courts are not subject expressly to the Guidelines and may choose whether or not to apply them. As such, the Guidelines cannot achieve their goal of analyzing gender-based claims within a human rights framework when they apply only to some of the adjudicators who will decide such cases and not to all asylum adjudicators. As a policy initiative, the Guidelines may be having some effect, but Macklin points out that the choice to apply the guidelines remains at the discretion of all non-Asylum Officer adjudicators.

The INS Guidelines, merely advisory, have led to a series of decisions reflecting nonexistent or, at best, inconsistent application of the Guidelines. Even if an immigration judge applies the Guidelines to a domestic violence asylum claim and grants asylum, his or her decision is not binding on other immigration judges or on Asylum Officers. Asylum Officers only have to follow those BIA decisions designated as precedent decisions in similar cases. BIA precedent decisions apply nationally, except in federal courts with conflicting law. Federal district court decisions usually are binding neither on Asylum Officers nor on other courts. This can lead to varying and confusing decisions as to the requirements for establishing a successful asylum claim based on gender-based domestic violence.

As described earlier, the lack of precedent setting decisions in grants of asylum in gender-based decisions compounds this problem. Matter of R-A- is a dangerous precedent setting case because future applicants whose asylum claims are based on persecution “on account of” membership in a particular group may be held to an even higher and possibly unrealistic legal standard. These factors effectively reinforce the notion that human rights advocates have been battling for years: that violence against women, with all of its health consequences, is not a serious enough human rights violation to warrant the protection offered by asylum.

216. Id.
217. ANKER, supra note 9, at 9 (noting that “federal judges have referred to the Guidelines as statements of INS policy.”).
218. Macklin, supra note 147, at 34.
220. 8 C.F.R. § 3.1(a).
221. 8 C.F.R. § 3.1(g).
222. IMMIGR. AND NATURALIZATION SERVICE, supra note 107, at 12-13.
CONCLUSION

The INS Guidelines represent an important policy initiative toward full recognition of the particular types of persecution faced by women. However, neither the INS Guidelines nor the result in Kasinga the year following the issuance of the INS Guidelines "blazed an unambiguous trail for others seeking safe haven from persecution based on sex." Matter of R-A- calls attention to the difficult hurdles domestic violence victims face in meeting their burden of proof for gaining asylum. The continued lack of acceptance of gender as a basis upon which violence is inflicted ignores compelling human rights norms, which recognize domestic violence as a serious human rights violation. The severe consequences of domestic violence for women's health, and nations' health at large, call for greater recognition of the right to health and underscore the need for U.S. immigration law to consider the special circumstances faced by domestic violence victims. Immigration law was never intended to resolve the problem of domestic violence in general, or to solve its health consequences. However, international human rights instruments, which explicitly or implicitly guarantee the right to physical and mental well-being, compel adherence to human rights principles as promised by the INS Guidelines.