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Asylum for Victims of Domestic Violence: Is Protection Possible After In Re R-A-?

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Protection and assistance for domestic violence victims in the United States has improved substantially during the past twenty years as recognition of the pervasive and severe nature of violence against women has increased.

Consequently, law enforcement agencies, the court system,
and communities have created better services and protections to help women who are in abusive relationships.

The same public recognition of violence against women, however, is not present in many other countries. Domestic violence is a global problem affecting an estimated 25 million women every year. It is also the leading cause of death among women. In addition to domestic violence, millions of women worldwide suffer from rape, female genital mutilation (FGM), infanticide, and “bride burning.” Yet, in many cultures, women do not have a viable means of redress.

3. See SCHECHTER, supra note 1, at 160. The women's movement worked legislatively to ensure that spouse abuse became a crime. See id. at 159. The movement recognized, however, that effective police response was crucial to create genuine change. See id. at 157-58. Before the movement, police did not weigh the possibilities that abuse would result in homicide. See id. at 158. Policies advocated avoidance of arrest in situations of spousal abuse. See id. at 157. One commentator noted that police departments' general attitudes resulted in "institutional complicity." Id. at 160. Battered women's groups filed class action suits charging the police and court with "gross failure to comply with the law" in order to affect systemic change. Id. For example, in New York City, the Litigation Coalition for Battered Women filed a lawsuit that resulted in a settlement requiring that the police must: arrest men who commit felonious assaults; respond in person to every call from a woman being abused; make arrests in misdemeanor cases; where a husband has violated a family court protection order, assist a woman in obtaining medical attention; and to search for batterers who flee the scene of the crime as they would search for any other criminal suspect. See id. This settlement illustrates societal recognition that lack of state assistance perpetuated, if not enabled, some situations of domestic violence to continue without consequences.

4. See generally, HEALEY ET AL., supra note 2, at 97 (providing numerous examples of programs and support that are available to women in the United States who need assistance due to abuse). Chapter Six of the Department of Justice's Batterer Intervention: Program Approaches and Criminal Justice Strategies includes resources for batterer intervention and training materials, criminal justice materials and information, a list of national organizations concerned with domestic violence, identification of state coalitions on domestic violence, and a list of individuals with expertise in batterer intervention nationwide. See id.

5. See United Nations, Understanding the Problem, in WOMEN AND VIOLENCE: REALITIES AND RESPONSES WORLDWIDE 2 (Miranda Davies ed., 1994) (concluding that marital violence exists worldwide, however, some communities deny its existence because of their belief in the importance of family privacy) [hereinafter Understanding the Problem]; see also PIRKKO KOURULA, BROADENING THE EDGES: REFUGEE DEFINITION & INTERNATIONAL PROTECTION REVISITED 138 (1997).

6. See id. (reporting that some estimates indicate that more than 25 million women worldwide are beaten every year).


9. See, e.g., Brief of Amici Curiae Refugee Law Center and International Human Rights/Migration Project in support of Respondent's Response to Gov't's Appeal at 7, In
ditions make it even more difficult for women to leave abusive relationships because of limited resources. Where no social programs or court protections are in place, women have few options for safety. Victims of gender-based violence, therefore, increasingly are seeking safety in other countries under asylum law.

There is “universal agreement” that the international community must address the needs of refugee women. In 1991, the United Nations High Commissioner for Refugees issued guidelines on the protection of refugee women. Three years later, in response to reports of widespread violence against women, the United Nations General Assembly adopted a declaration to eliminate violence against women. Similarly, in March 1994, the Commission on Human Rights appointed a special rapporteur on violence against women.

The international community has begun to recognize violence against women in the home as a serious violation of human rights. In 1996, the special rapporteur specifically recommended that governments interpret refugee and asylum laws “to include gender-based claims of persecution,

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10. See R-A., Interim Dec. 3403 (BIA 1999) [hereinafter Amici Brief]. “The problem of impunity is exacerbated in cases of domestic violence where both the police and the courts tend to view domestic violence as a family affair and generally encourage women seeking their help to keep the problem to themselves.” Id. (quoting a report prepared by the Information and Research Branch of the Canadian Immigration and Refugee Board).

10. See Healey et al., supra note 2, at 7 (concluding that, although women of all socioeconomic classes are victims of domestic violence, women with limited economic independence “must often rely exclusively on the criminal justice system for protection”).

11. See Deborah Anker et al., Women Whose Governments are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify as Refugees Under United States Asylum Law, 11 Geo. Immigr. L.J. 709, 733-35 (1997) (noting that states often fail to protect women against violence by non-state and state actors); see also Amici Brief, supra note 9, at 7 (stating that there are no shelters for battered women in Guatemala).

12. See generally Anker et al., supra note 11.

13. See Kourula, supra note 5, at 139.


17. See Understanding the Problem, supra note 5, at 7 (“The right to be free from domestic violence is a fundamental and human right.”); see also Anker et al., supra note 11, at 717 (advocating for the INS to reinforce the promises made in the Gender Guidelines to “integrate women’s rights as human rights into its doctrine and practice, and to ensure equal and non-discriminatory treatment of the claims of women to asylum protection”).
including domestic violence." Subsequently, Canada, Australia, and the United States issued guidelines to assist in the adjudication of gender-based claims, and Canada, Australia, and Great Britain granted asylum to victims of gender-based violence, including victims of domestic abuse. Nevertheless, disagreement persists on how the global commu-


20. See Amici Brief, supra note 9, at 10 n.4 (presenting an extensive list of cases granting asylum for gender-based claimants). The Amici in In re R-A- cited and summarized the following examples:

Immigration and Refugee Board Decisions T93-10498 (Canada, July 27, 1994) (granting refugee protection to a woman from Yugoslavia after attempted rape by two government security agents); T93-07492 (Canada, July 27, 1994) (granting refugee protection to Ghanaian union activist who was beaten and raped during government detention); T93-12197/8/9 (Canada, May 10, 1994) (granting protection to [a] woman and her son and daughter based on inflicting of female genital mutilation upon [her] daughter and mandatory loss of custody of children by [a] mother under Somali laws) . . .; M.M.G. v. the Secretary of State for the Home Department, Immigration Appeal Tribunal, Case No. TH/9515/85 (5216) (United Kingdom, Feb. 25, 1987) (finding that penalties imposed upon women for transgressing the mores of dress and behavior in Iran can amount to persecution) . . .; Refugee Appeal No. 80/91 re: NS, (Refugee Status Appeals Authority) (New Zealand, Feb. 20, 1992) (granting protection to woman based on membership in a particular social group consisting of Moslem women living separate from their husbands in Moslem community with no accommodation and no male family or financial support available to them and with a reputation for having transgressed the mores of their community).

Id. at 10-11 n.4.

21. See Anker et al., supra note 11, at 714-15 (noting that other parties to the U.N. Refugee Convention have granted refugee status based on domestic violence). Domestic violence is "well-established in Canadian case law, including decisions of the Canadian Immigration and Refugee Board, and its federal courts." Id. at 714. Further, in Australia, the Refugee Review Tribunal granted asylum to victims of domestic violence. See id. at 714-15. "According to the Australia's Refugee Review Tribunal's records, '[d]omestic violence was an issue in 76 refugee cases between July 1993 and 31 December 1996 . . .. Nineteen of the claimants in these cases were successful in their appeals," which constituted 25% of the 76 domestic violence cases. Id. at 715 n.23. These cases accounted for only 0.19% of all refugee board decisions during that time, indicating that granting asylum to these victims does not open the floodgate for domestic violence claims. See id.
Asylum for Victims of Domestic Violence

United States decision makers began implementing the recommendations by recognizing gender-based asylum claims.\(^2\) For example, the Board of Immigration Appeals (the Board or BIA) gave hope to advocates for women attempting to escape gender-based violence when it recognized FGM as extreme persecution in *In re Kasinga*.\(^3\)

Just as the door was opening to gender-based asylum claims, however, the Board seemed to slam it shut in *In re R-A*.\(^4\) There, the Board denied protection to Rodi Alvarado Pena, a woman whose life was in danger in Guatemala because of an ongoing pattern of spousal abuse.\(^5\) This decision, coming just three years after *Kasinga*, drastically altered the course of adjudication of gender-based claims.\(^6\) *In re R-A* indicates that American immigration courts are far from accepting asylum law as the appropriate forum for domestic violence victims seeking refugee status.\(^7\)

Despite this profound setback, the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT)\(^8\) may open a new door for these victims. Proponents of the CAT believe that it will afford protection to people rejected under traditional asylum procedures.\(^9\)

This Comment examines the framework of asylum cases in the context of domestic violence and gender related violence. Part I outlines the ap-

\(^{22}\) See [Kourula, supra note 5, at 139](#) (discussing the need for state endorsement of legal measures on behalf of refugee women, but recognizing that a debate exists regarding the definition of persecution).


\(^{24}\) See id.; see also Connie M. Ericson, *In re Kasinga: An Expansion of the Grounds for Asylum for Women*, 20 HOUS. J. INT’L L. 671, 672 (1998) (contending that the decision “may provide a broader basis for findings of persecution in other gender related asylum claims than has been available in the past”).


\(^{26}\) See Interim Dec. 3403 at 2.

\(^{27}\) See Musalo, *supra* note 25, at 1177, 1185-86.

\(^{28}\) Cf. Interim Dec. 3403 at 27 (“The solution to the respondent’s plight does not lie in our asylum laws as they are currently formulated.”). Women’s rights advocates have assailed the decision. See Fredric Tulsky, *Abused Woman is Denied Asylum: Immigration Ruling Reflects Split Over Gender Persecution*, WASH. POST, June 20, 1999, at A1.


plication procedure for asylum under the Immigration and Nationality Act\(^3\) (INA or the Act). Part I also explores case law of the United States and other jurisdictions that interprets the elements of the Act relevant to domestic violence. In Part II, this Comment discusses the principle case, \textit{In re R-A-}, and its implications for victims seeking protection in the United States. In Part III, this Comment considers the CAT as an untapped alternative for domestic violence victims. Finally, in Part IV, this Comment argues that the forced return of Rodi Alvarado, and women like her, to situations of serious, and possibly life threatening, danger is inconsistent with both international standards of human rights law and domestic policy.

I. INTERPRETATION OF THE IMMIGRATION AND NATIONALITY ACT IN ADJUDICATION OF GENDER-BASED CLAIMS

A. Process of Application for Asylum: The Immigration and Nationality Act

The INA implements the United States' international treaty obligations, and sets forth the legal standards for asylum claims.\(^3\) The Act allows persons fleeing persecution to apply for refugee status in order to remain in the United States.\(^3\) The fundamental purpose of refugee law is to provide surrogate protection where there is a fundamental breakdown in state protection.\(^3\) Under the Act, a person must first establish that she suffered persecution or has a well-founded fear of persecution.\(^3\) Second, she must establish that the harm was inflicted "on account of" one of the five enumerated categories: race, religion, nationality, membership in a particular social group, or political opinion.\(^3\)

\begin{itemize}
\item \textit{See 8 U.S.C. § 1225(b)(1).}
\item \textit{See INS Guidelines, supra note 19, at 16.}
\item \textit{See id.}
\end{itemize}
Upon application for asylum, an immigration officer determines whether an alien may be inadmissible because of fraud or lack of appropriate documentation. If the applicant indicates a fear of persecution or requests asylum, an asylum officer makes a preliminary determination of whether she has a "credible fear of persecution." The officer then reviews the application during an interview with the applicant and decides whether to grant asylum. If the officer denies the application, the officer refers the alien to an immigration judge (IJ) for removal proceedings. An applicant may appeal an IJ decision to the Board of Immigration Appeals, and then to the federal courts.

B. The Framework for Gender-based Asylum Claims Prior to the Board’s Decision in In re R-A-

1. Gender-based Violence as Persecution

Under the Act, Applicants must show evidence of past persecution or a well-founded fear of future persecution. United States courts define 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.

Id.

Some commentators consider the refugee definition to be gender-biased. See KOURULA, supra note 5, at 131 ("The absence of the term ‘sex’ or ‘gender’ as a ground for persecution has led to practical difficulties in the application of the definition.").

39. See 8 C.F.R. § 208.9.
40. See id. § 208.7.
41. See id. § 208.7(c)(2). Under certain circumstances, the Board must refer its decisions to the Attorney General for review. See id. § 3.1(h). Those circumstances include when 1) the Attorney General directs, 2) the Chairman or a majority of the Board believe the Attorney General should review the decision, and 3) the INS Commissioner requests referral.
42. See 8 U.S.C. § 1225(b)(1)(B)(v) (Supp. III 1998); see also Acewicz v. INS, 984 F.2d 1056, 1061-62 (9th Cir. 1993). This Comment concentrates on discussion of past persecution. Where an applicant establishes past persecution, a well-founded fear of future persecution is a regulatory presumption. See 8 C.F.R. 208.13(b)(1)(i) (2000). The INS must show by a preponderance of the evidence that conditions have changed, such that the individual would no longer have a well-founded fear of future persecution. See id. Gender-based claims also use a well-founded fear of future persecution in order to establish refugee status. See In re Kasinga, Interim Dec. 3278, 1996 WL 379826 (BIA June 13, 1996). Well-founded fear exists where a “reasonable person” in the circumstances of the applicant would fear persecution. See Amici Brief, supra note 9, at 41 (citing In re Mogharrabi, 19 I. & N. Dec. 439, 445 (BIA 1987)). Therefore, an applicant must establish
persecution as the "threat to life or freedom of, or the infliction of suffering or harm upon those who differ in a way regarded as offensive."\textsuperscript{3} Applying this standard, courts have ruled that any serious human rights violation constitutes persecution.\textsuperscript{4} American courts recognize beating and rape as persecution.\textsuperscript{4} In re D-V- affirmed that rape is persecution by stating that "rape is not a sexual act per se, but also an act of violence."\textsuperscript{5} Because instances of coerced sex and rape are often present in abusive relationships,\textsuperscript{7} the determination that rape can be persecution is relevant for domestic violence victims seeking asylum.\textsuperscript{48}

Recognizing the special nature of gender-based asylum claims, the INS has determined that violence and oppressive acts against women can constitute human rights violations warranting asylum.\textsuperscript{49} In 1995, to facilitate better consideration of claims brought by alien women, the INS issued guidelines\textsuperscript{50} (Guidelines or INS Guidelines) interpreting asylum law that a "reasonable person" would fear that she will be subjected to the practice of FGM if she returns to her country. See Kasinga, 1996 WL 379826.

43. In re Acosta, 19 I. & N. Dec. 211, 222-23 (BIA 1995) (citing cases employing this definition).

44. See Desir v. Ilchert, 840 F.2d 723, 728 (9th Cir. 1988).


47. See HEALEY ET AL., supra note 2, at 3 ("Between 33 and 46 percent of battered women are subjected to sexual abuse, such as rape (especially following other physical violence), unwanted sexual practices, sexual mutilation, or forced or coerced prostitution."); see also Copelon, supra note 8, at 312 n.57 (reporting that the psychological effects of rape in domestic violence are illustrated by the fact that women who eventually kill their batterers were more likely to have been raped by the men than those who did not kill their batterers).

48. In Lopez-Galarza v. INS, 99 F.3d 954, 960 (9th Cir. 1996), the Ninth Circuit held that an applicant who was raped and mistreated while in military detention was persecuted under the Act, and therefore entitled to asylum. Further, in Lazo-Majano v. INS, 813 F.2d 1432 (9th Cir. 1987), the Ninth Circuit also recognized sexual violence as persecution. There, a sergeant in the El Salvador military physically and sexually abused the applicant, which the court found was persecution. See id. at 1434-35. But see Klattwitter v. INS, 970 F.2d 149, 152 (6th Cir. 1992) (ruling that "harms or threats of harm based solely on sexual attraction do not constitute 'persecution' under the Act"). More recently, however, the BIA has determined that rape is persecution. See Audrey Macklin, Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims, 13 GEO. IMMIGR. L.J. 25, 40 & n.73 (1998). Further, the INS Guidelines state that the "appearance of sexual violence in a claim should not lead adjudicators to conclude automatically that the claim is an instance of purely personal harm." INS Guidelines, supra note 19, at 17.


50. See INS Guidelines, supra note 19, at 5 (encouraging offices to assign a female officer to cases when sensitive issues and evidence may be presented by a female claimant); see also Anker et al., supra note 11, at 710 ("Since adoption of the guidelines, many
under the Act. The Guidelines, however, are binding only on asylum officers, not on IJs or the Board. The Guidelines specifically provide that “[s]evere sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution.” The law distinguishes sexual abuse inflicted by private actors, however, from that inflicted by state actors. This distinction creates problems of proof for women asserting state involvement in their persecution.

a. Abuse By a State Actor Versus a Private Actor

Although the gradual recognition of sexual abuse as persecution when performed by state actors has improved asylum opportunities for female victims of violence, courts are less likely to extend protection when the assailant is a “private actor.” Differentiating between public and private harm can hinder the claims of women by eliminating these women from the realm of human rights protection. As one commentator remarked: “women’s rights are traditionally ignored or characterized as private or personal, often resulting in women’s exclusion from the discourse and implementation of national and international protection altogether.”

International human rights standards, however, do not require a persecutor to be a government actor for asylum purposes. According to the United Nations High Commissioner for Refugees, states may consider asylum officers, immigration judges, and INS trial attorneys have shown greater sensitivity in addressing gender-related asylum claims.”): Macklin, supra note 48, at 36-37 (noting that both the United States’ and Australia’s guidelines benefit claimants by encouraging the assignment of female officers to these claims).

51. See INS Guidelines, supra note 19, at 1-4.
52. See Amici Brief, supra note 9, at 13 n.6 (explaining the relevance of the Guidelines).
53. Id. at 9.
54. See INS Guidelines, supra note 19, at 16-18 (summarizing the case law and international instruments that explain the distinctions between public and private acts in cases of alleged gender-based persecution).
55. See Amici Brief, supra note 9, at 8.
56. See Macklin, supra note 48, at 28.
57. See id. at 39-40, 49.
58. See Anker et al., supra note 11, at 711.
59. Id. (comparing the rights of women with the rights of men).
60. See OFFICE OF THE UNITED NATIONS HIGH COMMISSIONER FOR REFUGEES, HANDBOOK ON PROCEDURES AND CRITERIA FOR DETERMINING REFUGEE STATUS ¶ 65, at 14-15 (1979) [hereinafter UNHCR HANDBOOK]; see also INS Guidelines, supra note 19, at 17 (including in its list of potential persecutors: the government, a public official committing a seemingly private act, or “a person or group outside the government that the government is unable or unwilling to control”).
acts of violence to be persecution "if they are knowingly tolerated by the authorities, or if the authorities refuse, or prove unable, to offer effective protection."61

Consistent with both INS and United Nations' guidance, United States courts recognize the notion of private actors inflicting persecution. In McMullen v. INS,62 the Ninth Circuit held that groups outside the control of the established government can inflict persecution, and therefore granted the asylum petition of an Irish applicant who presented "[e]vidence of a pattern of uncontrolled [Provisional Irish Republican Army] persecution of defectors."63 Hence, the foreign government does not have to sanction the harm inflicted on the applicant explicitly in order for a U.S. decision maker to find persecution.64 Where society, rather than government causes the persecution, one may attribute the abuse to the state when the government is unable or unwilling to stop it.65

Advocates for women argue that a husband who batters his wife knowing his government will not punish him is acting under a government who is unwilling to stop the abuse.66 American courts, however, have been reluctant to make this connection in situations of domestic

61. See UNHCR HANDBOOK, supra note 60, at 17.
62. 658 F.2d 1312 (9th Cir. 1981).
63. Id. at 1318.
64. See id.; see also Fatin v. INS, 12 F.3d 1233, 1240 (3d Cir. 1993). In Fatin, the applicant presented evidence that women in Iran suffer a penalty for refusing to conform to gender-based laws and social norms. See id. at 1241. Punishments for non-conformance include flogging, imprisonment, possibly rape, and death. See id. The court stated a precaution in viewing government action in relation to persecution, observing that "[t]he concept of persecution does not encompass all treatment that our society regards as unfair, unjust, or even unlawful or unconstitutional." Id. at 1240. However, it also recognized the effect of discriminatory laws on persecution stating that "the concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." Id. at 1242. Nevertheless, the court denied the applicant's claim on other grounds. See id. at 1241, 1244.
66. See Anker et al., supra note 11, at 735.

The issue of impunity is fundamental. In some cases, there is virtually complete impunity for violence perpetrated in the domestic sphere; states which fail to take minimum steps necessary to protect women's rights to life and physical integrity "send a message that such attacks are justified and will not be punished." Id. The law "should not sit idly by while those who seek relief lose hope, and those who abuse it are emboldened by its failure to provide sanctions. Unless penal measures are effectively implemented to punish those guilty of wife abuse [the situation] will continue." Id. at 730 (quoting Canadian Immigration and Refugee Board, Dec. No. U92-08714 (1993)).
violence. Nevertheless, the reluctance is fading as evidenced by federal court, BIA, and IJ case law recognizing sexual violence by non-state actors as persecution.

b. Ability to Find Safety in One’s Own Country: Internal Flight

When an applicant cannot safely escape to another part of her country, the harm committed by a private actor may amount to persecution. If internal flight or escape in one’s own country is a viable option, the INA permits denial of asylum. Thus, in *In re Acosta*, the Board stated that a woman is not eligible for asylum in the United States if she is able to escape persecution in her own country. However, a domestic violence victim may lack possibilities for protection in her country if her government does not intervene. Despite international recognition of domestic violence as a human rights violation, many countries do not intervene officially in even the most brutal cases, viewing domestic violence as a private matter. Hence, the failure of government protection is relevant to the analysis of internal flight possibilities for an applicant fleeing persecution.

To obtain asylum, the applicant must demonstrate that the government does not have effective mechanisms to prevent, protect against, or punish the violent actions. In *In re Kasinga*, the applicant fled her country in

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67. See Macklin, *supra* note 48, at 49 ("Indeed the notion that domestic violence is merely a 'private harm' committed by an individual man on an individual woman for personal reasons still figures into Australian and American refugee jurisprudence.").
68. See Anker et al., *supra* note 11, at 713-14.
70. See 8 U.S.C. § 1101(a)(42)(A) (1994 & Supp. IV 1999) (defining refugee); id. § 1158(c)(2)(A) (providing that the Attorney General may revoke a grant of asylum if a person is no longer a refugee).
72. See id. at 235-36.
73. See Anker et al., *supra* note 11, at 728-29 (acknowledging that “[s]tate failure occurs when the state does not provide reasonable protection from serious harms by non-state actors"). “In other cases, there may be evidence of systemic failure to provide any adequate legal structures of protection, either though formal laws or by implementation, such as in situations in which social custom dictates that domestic violence is a tolerated practice.” Id. at 735. If the state has failed in its duty of protection, the violation may amount to persecution. See id. at 728.
75. See Macklin, *supra* note 48, at 28.
77. Id.
order to avoid the painful and hazardous practice of FGM. The Board rejected the INS' argument that the applicant could avoid FGM by moving elsewhere in Togo, relying on the following four factors: 1) FGM is widely practiced in the country; 2) acts of violence and abuse against women are tolerated by police; 3) the government has a poor human rights record; and 4) most African women "can expect little government protection from FGM."

c. Proving Persecution Exists

Proving persecution and fear of persecution may present difficulties for applicants, especially in gender-based claims. The court in Abankwah v. INS discussed the amount of proof that is required for an applicant to prove a "well founded fear" of persecution. The applicant feared that if she returned to Ghana her tribe would subject her to FGM. In reversing and remanding the BIA's denial of asylum, the Second Circuit held that Abankwah had established both subjective and objective evidence that her fear was real. Expert testimony on FGM in Ghana sufficiently established that Abankwah's fear was objectively justified. The Court stated that "[w]ithout discounting the importance of objective proof in asylum cases, it must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation." The court criticized the Board as being "too exacting both in the quantity and the quality of evidence that it required." The court's analysis of the applicant's proof has possible implications for the quantum of proof required to establish other elements of asylum claims.

78. See id.
79. See id.
80. Id.
81. See id.
82. 185 F.3d 18 (2d Cir. 1999).
83. See id. at 20-24.
84. See id. at 20. The Board denied asylum because it found that Abankwah failed to demonstrate an objectively reasonable fear that her tribe would subject her to FGM and, therefore, she did not have a well founded fear of persecution. See id.
85. See id. at 23-25. Federal regulations require the applicant to present credible, specific, and detailed evidence, whether by her own testimony or corroborating proof, that a reasonable person in her position would fear persecution if returned to her native country. See 8 C.F.R. § 208.13(a)-(b) (2000).
86. See Abankwah, 185 F.3d at 24.
87. Id. at 26.
88. Id. at 24.
89. See Musalo, supra note 25, at 1186 & nn. 76-77.
2. Persecution “On Account Of” Social Group Membership and Political Opinion

a. Nexus: The Motivation Requirement of the Act

The Act requires an applicant to provide evidence regarding the motivation of the persecutor, known as the “nexus” between the protected ground and the reasons for the infliction of harm. In *INS v. Elias-Zacarias*, the Supreme Court held that the applicant must present some evidence that the persecutor harmed her at least in part “on account of” a protected ground. Applicants must present evidence showing the motive of the person who is inflicting the harm. The Board, however, recognized the difficulty in proving motive in *In re S-P*, stating that “an asylum applicant is not obliged to show conclusively why persecution has occurred or may occur.” Instead, the applicant need only produce evidence from which “it is reasonable to believe that the harm was motivated by a protected ground.”

b. Political Opinion

Political opinion is one of the possible qualifying categories for victims of gender-related violence claiming asylum once they have satisfied the persecution element. According to *Singh v. Ilchert*, in order to prevail on an asylum claim based on political opinion, an applicant must specify the political opinion on which she relies, show that she holds that opinion, and that she would be persecuted or has a well-founded fear of persecution because of that opinion.

In *In re D-V*, the Board granted asylum to a Haitian woman based on political opinion. The Board found that requiring proof of the actual reason would be inconsistent with the “well-founded fear” standard embodied in the definition of “refugee.”

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90. *See 8 U.S.C. § 1101(a)(42) (1994) (requiring “persecution on account of” five statutory grounds in order to grant asylum); see also INS Guidelines, supra note 19, at 10.*
92. *See id. at 482.*
93. *See id. at 483.*
94. *Interim Dec. 3287 (BIA 1996).*
95. *Id. at 5.*
96. *Id. at 6.* Further, the Board found that requiring proof of the actual reason would be inconsistent with the “well-founded fear” standard embodied in the definition of “refugee.” *See id.*
97. *See Macklin, supra note 48, at 56; see also Seith, supra note 46, at 1826. The categories are not mutually exclusive—courts allow an applicant to claim persecution upon more than one ground. See, e.g., Singh v. Ilchert, 63 F.3d 1501, 1509 (9th Cir. 1995).*
98. *63 F.3d 1501 (9th Cir. 1995).*
99. *See id. at 1509; see also Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993).*
100. *Interim Dec. 3252 (BIA 1993).*
on her political opinion. Soldiers gang-raped and severely beat the woman because she supported overthrown Haitian President Jean Bertran Aristide. Therefore, her claim satisfied the requirements of the Act because "she has suffered grievous harm in direct retaliation for her support of and activities on behalf of Aristide."

In Lazo-Majano v. INS, the Ninth Circuit recognized that the political opinion of an assailant might be imputed to the victim. Lazo-Majano was a Salvadoran woman who suffered sexual abuse and beatings by an army sergeant. Thus, the court found that the sergeant was "asserting the political opinion that a man has a right to dominate women, and that he persecuted [the applicant] to force her to accept this opinion without rebellion." Similarly, the court in Argueta v. INS, held that an applicant may establish a claim based on imputed political opinion. It is irrelevant "whether the victim holds the political opinion imputed to her or him, so long as the persecutor believes the victim holds that belief."

Finally, the Guidelines state that an applicant who can demonstrate persecution "on account of her (or his) beliefs about the role and status of women in society could be eligible for refugee status on account of political opinion." This INS policy, coupled with case law establishing feminism as a political opinion, provided a foundation for domestic violence claims before In re R-A-.

101. See id. at 3-4.
102. Id. at 4-5. This case is significant for gender-based violence claims because the Board affirmed that rape is a form of persecution, see id. at 3-4, and later declared this position as binding precedent after the INS issued its gender Guidelines. See Seith, supra note 46, at 1833 & n.200. In Fatin v. INS, 12 F.3d 1233, 1242 (3d Cir. 1993), the court opined in dicta that a woman opposing male domination, abuse by her husband, and societal violence toward women might be expressing a political opinion; specifically, feminism. Although the court observed that feminism is a "political opinion within the meaning of the relevant statutes," the court upheld the BIA's decision not to grant the applicant asylum because the administrative record failed to "establish that Iranian feminists are generally subjected to treatment so harsh that it may accurately be described as 'persecution.'" Id.
103. 813 F.2d 1432 (9th Cir. 1987).
104. See id. at 1435.
105. Id. at 1435-36; see also Musalo, supra note 25, at 1183 (discussing In re R-A- and mentioning Lazo-Majano).
106. 759 F.2d 1395 (9th Cir. 1985).
107. See id. at 1397.
108. Argueta v. INS, 759 F.2d 1395, 1397 (9th Cir. 1985). But see INS v. Elias-Zacarias, 502 U.S. 478, 482 (1991) (noting that in order to satisfy § 101(a)(42) of the Act, the persecution must be "on account of" the victim's political opinion, not the persecutor's, thus creating some confusion as to the application of imputed political opinion).
109. INS Guidelines, supra note 19, at 11.
c. Social Group Membership

The strongest argument for gender-based claims is that the persecution is on account of social group membership. The United Nations Executive Committee on Refugee Women and International Protocol urges states to interpret a "particular social group" to include "women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live."

In the United States, in order to establish membership in a particular social group, decision makers "focus on whether the group is cognizable, cohesive, and whether its members are being singled out for persecution. In re Acosta," the Board interpreted the Act to require two elements to prove persecution because of social group membership. First, the applicant must prove that the common characteristic defining the group remains permanent. Second, the characteristic must be one that the group members should not be required to change because of its fundamental nature. Acosta also suggests that sex may be a defining characteristic. The Board's dicta left room for interpretation regarding whether "women" can qualify as a social group.

Following Acosta, the Third Circuit opined that women opposing a
particular social policy might qualify as a social group in *Fatin v. INS*.\textsuperscript{118} Although the court upheld the Board’s denial of Fatin’s asylum petition, it acknowledged that an Iranian woman who feared persecution in Iran simply because she is a woman could satisfy the requirements for membership in a particular social group.\textsuperscript{119} In making this assertion, the court cited *Acosta*, stating that “the Board [in *Acosta*] specifically mentioned ‘sex’ as an innate characteristic that could link the members of a ‘particular social group.’”\textsuperscript{120} Similarly, in *Kasinga*, the Board also found that the applicant was a member of a particular social group.\textsuperscript{121} It defined the group as “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”\textsuperscript{122} In addition, IJs have granted asylum to victims of domestic violence “on account of” social group membership.\textsuperscript{123}

Some foreign courts recognize that women qualify as a social group. In a recent appellate decision in Great Britain, the House of Lords addressed social group analysis in the context of abuse toward women.\textsuperscript{124} In *Islam v. Secretary of State for the Home Department*, the House of Lords stated, “[t]he discrimination against women, which is tolerated and sanctioned by the state in Pakistan, is the defining factual framework of this

\begin{thebibliography}{9}
\bibitem{118} 12 F.3d 1233, 1241 (3d Cir. 1993).
\bibitem{119}  See id. at 1240. The court determined, however, that the applicant failed to demonstrate that she would suffer persecution based solely on her gender. See id.
\bibitem{120} Id.; see also *Fisher*, 79 F.3d at 966 (Canby, J., concurring).
\bibitem{122} Id.
\bibitem{123} See *In re S-S*, No. A73-556-883 (Immigr. Ct., New York, N.Y., Sept. 27, 1996), available at <http://www.uchastings.edu/cgrs/caselaw/ij/> (order granting asylum to a Bangladeshi woman on account of her political opinion and membership in a social group). The IJ defined the applicant's social group as “young, Westernized, educated Muslim wives in Bangladesh . . . subject to particular restraints and abuse sanctioned by the state.” Id. at 12. The applicant presented a history of spousal abuse in which even the victim's in-laws participated, which the IJ found “consistent with the societal, religious, financial and legal framework” of Bangladesh. Id. The IJ observed that the mental aspects of spouse abuse were similar to torture because both forms of violence attempt to subdue the “will of the victim in order to keep the oppressor in control.” Id.; see also *In re A- & Z.*, Nos. A72-190-893, A72-793-219 (Immigr. Ct., Arlington, Va., Dec. 20, 1994), available at <http://www.uchastings.edu/cgrs/caselaw/ij/> (order granting asylum to a Jordanian woman who was a victim of domestic violence). In *In re A- & Z.*, the IJ granted asylum on account of membership in a particular social group “of women who are challenging the traditions of Jordanian society and government.” Id. at 15.
\end{thebibliography}
The treatment of women in the applicant’s country of origin, Pakistan, was critical in the decision to grant asylum under “social group membership.”

The Canadian Immigration and Refugee Board (CIRB) has granted asylum consistently for domestic violence victims based on social group membership where state protection does not exist. For example, the CIRB found that a group of “unprotected Zimbabwean women or girls subject to wife abuse” were a social group. Before In re R-A-, these crucial developments in gender-based asylum jurisprudence, both within the United States and internationally, provided an analytical model for protection of an alien victim of domestic violence applying for asylum in the United States.

II. In re R-A-: United States Changes Course in Adjudicating Gender-Based Asylum Claims

A. Procedural and Factual History of In re R-A-

Rodi Adali Alvarado-Pena, a native and citizen of Guatemala, entered the United States in 1995 seeking asylum. In 1996, an IJ granted her request for asylum. The IJ determined that Alvarado was persecuted on account of her membership in a particular social group and on account of her political opinion.

First, the IJ determined that Alvarado’s husband abused her physically, sexually, and emotionally by repeatedly raping and beating her. During their ten years of marriage, he had dislocated her jaw, attempted to cut her hands off with a machete, nearly pushed her eye out, broke windows and mirrors with her head, and kicked her in the abdomen. During a pregnancy, he “attempted to forcefully abort their second child by kicking her in the spine.” These acts rose to the level of persecution.
even under "the most narrow interpretations."135 Further, the IJ found that Alvarado did not possess an internal flight alternative.136 She sought protection from the police and the judicial system to no avail.137 She could not obtain a divorce because her husband would not consent; further, Guatemalan authorities never prosecuted her husband for the abuse he inflicted.138 These factors demonstrate the "institutional biases against women that prevent female victims of domestic violence from receiving protection from their male companions or spouses."139

The IJ also found that Alvarado's persecution was "on account of" both her political opinion and her membership in a particular social group.140 The relevant political opinions were either express or imputed.141 Hence, the IJ made the factual determination that Alvarado's husband believed that women were subordinate to men, and then concluded that when Alvarado resisted, her husband believed that she was challenging his opinion.142 The IJ relied on the language in Lazo-Majano, where the court concluded that a woman's flight from persecution that was rooted in male dominance constituted a political opinion.143 Another important finding by the IJ regarding nexus to social group membership was that Alvarado's husband abused her because he believed that female partners should be dominated and controlled by violence.144

135. See id. at 8.
136. See Amici Brief, supra note 9, at 6 (stating that the record "amply demonstrates that Alvarado could not obtain protection from continuing abuse in Guatemala").
137. See id.
138. See id.
139. Alvarado, No. A73-753-922, slip op. at 8; see also Musalo, supra note 25, at 1179 n.14 (citing a 1990 survey of 1000 women in Guatemala finding that 48% of respondents were beaten by their partners). Not only is domestic violence pervasive in Guatemala, it also exists in tandem with other forms of legalized discrimination against women. See id. at 1179. The Guatemalan civil code recognizes the husband as the legal representative of a married couple and allows a husband to "legally forbid his wife to engage in activities outside of the home." Id. (quoting Tisdale, Abuse of Women in Today's Guatemala, 10 GUAT. BULL., No.4 (1992)).
140. See In re Alvarado, No. A73-753-922, slip op. at 9-10 (finding that the women are "targeted by their male companions [who] attempt to control them through violence"). Beliefs of male dominance coupled with the absence of state protection established that the persecution was "on account of" Alvarado's social group membership. See id. The IJ defined social group membership as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination." Id. at 9.
141. See id. at 12.
142. See id. at 9-12.
143. See id. at 11 (citing Lazo-Majano v. INS, 813 F.2d 1432, 1435-36 (9th Cir. 1987)).
144. See id. at 8. "This Court is convinced that Osorio tormented her because he believed that the women with whom men are intimate should be dominated and controlled."
B. The Board Reverses the Immigration Judge

The Board, sitting en banc, overturned the IJ’s decision in a sharply divided 10-5 vote.\(^\text{145}\) The Board did not dispute that Alvarado’s suffering amounted to persecution.\(^\text{146}\) It did not agree, however, that Alvarado was a member of a particular social group that warranted asylum.\(^\text{147}\) Further, the Board found that there was no “nexus” between the persecution and the husband’s motivation for abusing his wife.\(^\text{148}\) Finally, it rejected the IJ’s finding that Alvarado was persecuted on account of political opinion, either express or imputed.\(^\text{149}\)

Alvarado’s case received national and international attention,\(^\text{150}\) and she appealed to the Ninth Circuit.\(^\text{151}\) Members of Congress wrote a letter to Attorney General Janet Reno urging her to reverse the decision.\(^\text{152}\) The case also garnered national media attention due to the sharp division in the Board’s opinion.\(^\text{153}\) Finally, Alvarado filed a petition with the Board to reopen her case under the CAT.\(^\text{154}\)


\(^{146}\) See id. at 9 (stating that “the level of harm experienced [by Alvarado] rises beyond the threshold of that required for ‘persecution’").

\(^{147}\) See id. at 2.

\(^{148}\) See id. (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 particular social group or because of an actual or imputed political opinion”). Furthermore, the Board found that the record did not “indicate that the harm arose in response to any objections made by respondent to her husband’s domination over her.” Id. at 11. But see In re Alvarado, No. A73-753-922, slip op. at 4 (finding that “each time [Alvarado] protested or tried to get help, the beatings worsened”). The IJ concluded that her husband “saw her continued protests and attempts to leave him as an affront to his authority over her.” Id.

\(^{149}\) See In re R-A-, Interim Dec. 3403 at 12. Instead, the Board supported its decision, citing Elias-Zacarias, arguing that a woman must offer some evidence that her political opinion motivated her persecutor. See id. at 12. The dissent, however, found that even after Elias-Zacarias, the notion of imputed political opinion survives, and that Alvarado’s abuser imputed such an opinion to her. See id. at 41-44 (Guendelsberger, Bd. Mbr., dissenting). Hence, the source of these differing interpretations regarding the extent to which the battering husband’s behavior was influenced by his perception of his victim’s opinion flows from disagreement over the breadth of application of the Supreme Court’s decision in Elias-Zacarias.

\(^{150}\) See infra notes 151-53.

\(^{151}\) See Musalo, supra note 25, at 1178.

\(^{152}\) See Letter from Members of the Hispanic Congressional Caucus to Attorney General Janet Reno (July 22, 1999) (on file with the Catholic University Law Review). “We cannot overstate our very strong support for timely action on your part to reverse this extremely troubling decision.” Id. at 1. The letter declares congressional leaders’ “unwavering” belief that Alvarado qualifies for asylum under the Act. See id.

\(^{153}\) See Susan Sachs, Fears of Rape and Violence: Women Newly Seeking Asylum, N.Y. TIMES, Aug. 1, 1999; Tulsky, supra note 28.

\(^{154}\) See Petitioner’s Motion to Reopen and Remand Pursuant to the Convention
Whether or not the CAT is an avenue that decision makers will allow alien victims of domestic violence to pursue successfully is a new question. To date, the Board has not yet issued a decision under the CAT based on domestic abuse as torture.

C. The Torture Convention as an Alternative

The CAT prohibits the involuntary return of a person to a country where the person would be in danger of torture. In February 1999, the INS issued the implementing regulations for the CAT. Since then, the CAT is "rapidly becoming a new source of protection for those fleeing persecution and torture."

An applicant must prove three elements under the CAT: the infliction of severe pain, that the pain was committed for a specified purpose, and that it was done with the consent, instigation, or acquiescence of a public official. Because the implementing regulations are so new, courts and the BIA have decided few CAT cases to date, therefore we have little insight into the analysis that asylum decision makers will give to issues affecting domestic violence victims.

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156. See id.
158. See 8 C.F.R. § 208.16(c)(4), (d)(1) (2000). The implementation of these regulations is significant because the Board had ruled that torture victims could not invoke these protections in regular asylum proceedings in the absence of implementing legislation. See Sklar, supra note 30 (citing In re H-M-V-, Interim Dec. 3365 (BIA 1998)).
159. Sklar, supra note 30.
160. See 8 C.F.R. § 208.18(a)(6)-(7) (2000). The United States Senate ratified the CAT, but imposed understandings and reservations concerning government involvement with torture. See id. at § 208.18(a). The implementing regulations define torture as the intentional infliction of severe physical or mental pain and suffering for specified purposes, "by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Id. § 208.18(a)(1) (emphasis added). Hence, the torturous acts must occur within the context of government authority if they are to provide the basis for an asylum claim. The implementing regulations construe the term "acquiescence" to require that the public official be aware of the specific activity, prior to the activity constituting torture, and subsequently breach a legal responsibility to intervene. See id. at § 208.18(a)(7).
161. See Sklar, supra note 30.
162. See generally INS Opposition to Respondent's Motion to Remand and Reopen, In re R-A-, Interim Dec. 3403 (BIA 1999) [hereinafter INS Opposition Memorandum] (on
III. NEW QUESTIONS FOR DOMESTIC VIOLENCE: *IN RE R-A*- CLOSES ONE DOOR BUT MAY OPEN ANOTHER

If the Board's decision in *In re R-A*- stands, women who bring asylum claims alleging severe domestic violence have a weak chance for success. Proponents of the CAT, therefore, believe that women should assert the CAT and its implementing regulations in their petitions.

A. The Board's Approach Raises Serious Obstacles for Domestic Violence Claims

The Board's approach in *In re R-A*- narrows the interpretation of the elements of the Act and, therefore, limits domestic violence claims. The Board's analysis of *In re R-A*- is inconsistent with precedent regarding nexus, social group membership, and political opinion. In light of *In re R-A*., the nexus requirement will be the most difficult element for domestic violence claimants to demonstrate under the Act.

The Board criticized Alvarado's domestic violence claim by stating that the applicant did not show how "other members of the group may be at risk of harm from him," meaning Alvarado's abusive spouse. In the context of intimate violence, this statement skews the reality that Alvarado was harmed because of her unique status as his partner.

file with the *Catholic University Law Review*). The INS Opposition Memorandum relies purely on statutory construction arguments, see generally id., because no relevant case law exists.


164. See generally *In re R-A*-., Interim Dec. 3403 (BIA 1999) (Guendelsberger, Bd. Mbr., dissenting); see also Tulsky, supra note 28 (calling the decision the "latest zigzag in U.S. immigration policies toward women").

165. *See In re R-A*-., Interim Dec. 3403 at 17. The Board stated that even if it were to accept "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination" as a particular social group, Alvarado failed to establish that "her husband has targeted and harmed [her] because he perceived her to be a member of this particular social group." *Id.*; see also *In re Kuna* (Immigr. Ct., Elizabeth, N.J., Sept. 1998), available at <http://www.uchastings.edu/cgrs/caselaw/kuna.html>. In *Kuna*, the IJ held that an abused woman from the Democratic Republic of Congo was not eligible for asylum. *See id.* The IJ found that, although the respondent may have been a member of a particular social group, either as a Congolese woman, or as a Congolese woman who was unwilling to remain with a battering spouse, the abuse she suffered was not "on account of" this membership. *See id.* The respondent "simply did not show that the violence against her [was] related to anything more than the evil in the heart of her husband." *Id.* at 7.

166. *In re R-A*-., Interim Dec. 3403 at 17 (emphasis added).

167. *See id.* at 4. Alvarado argued that Osorio's statements were examples of his belief that he could dominate her because she was his wife. *See id.* When she left him, he believed that she defied his authority to control and dominate. *See id.* at 12. Therefore,
1. The Board's Demand for Proof of Motivation for the Domestic Violence

In re R-A- provokes discussion as to whether the persecutor must be consciously aware or able to articulate his motivation for inflicting harm. For example, the IJ and five members of the Board emphasized the fundamental nature of domestic violence in order to infer the motivation of the persecutor, Alvarado's husband. Likewise, a dissenting Board member recognized that the purpose of domestic violence is to "punish, humiliate, and exercise power over the victim on account of her gender." The dissent presented a lucid argument that, consistent with numerous domestic violence studies, one can infer motive based on a batterer's attitude toward gender. The dissent is bolstered by the Report of the Committee on the Elimination of Discrimination Against Women, which states that domestic violence "not only derives from but also sustains the dominant gender stereotypes and is used to control women." Thus, if a man denies that his violent behavior is a problem, it is reinforced by a "conspiracy of silence" on a societal level.

Research indicates that some men batter their wives because it is a社会化ed method of control over a female partner. Others may act out

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168. See id. at 24 ("The dissent itself does not claim that either the respondent or her husband understood the abuse to be motivated, even in part, by the respondent's political opinion or social group membership."). The majority explores the different reasons "why" Osorio abused his wife, concluding that, often, he did it for no reason at all. See id. But see SCHECHTER, supra note 1, at 221-22 (explaining that while abuse may appear to be "out of the blue" or spurred by seemingly minor events, there is a "hidden rationality for this seemingly irrational behavior" which is the "unstated power dynamic and the restoration of male authority").

169. See In re R-A-, Interim Dec. 3403 at 40 (Guendelsberger, Bd. Mbr., dissenting).

170. Id.

171. See RHODE, supra note 1, at 244 ("Most available research indicates that assaultive behavior is learned behavior, and that abuse against women builds on traditional assumptions about gender roles.").


of frustration that they are unable to control their female partners.\footnote{176} The question remains, therefore, whether a tribunal is too strict if it requires proof that a batterer is fully aware of why he is battering.\footnote{177} After all, statements accepted as fact in \textit{In re R-A-}, such as “You’re my woman and I can do whatever I want [to you],”\footnote{178} provide subjective evidence from which an adjudicator may infer motive.\footnote{179}

Despite research-based analysis of abusive behavior,\footnote{180} the majority emphasized Alvarado’s failure to present subjective motivational evidence,\footnote{181} amici curiae presented thorough discussion and research regarding the nature of domestic violence and its offenders.\footnote{182} In certain circumstances, this may be the only evidence of motivation that victims of domestic violence are able to provide.\footnote{183} It may be unrealistic, there-

\footnote{176} See id. at 5.
\footnote{177} See Shelley M. Hall, \textit{Quixotic Attempt? The Ninth Circuit, the BIA and the Search for a Human Rights Framework to Asylum Law}, 73 WASH. L. REV. 105, 112 (1998) (arguing that “the [U.S.] government should not deny protection to victims who had the misfortune of suffering under an unfocused persecutor”); cf. Maurice Goldman, \textit{The Violence Against Women Act: Meeting Its Goal in Protecting Battered Immigrant Women?}, 37 FAM. & CONCILIATION CTS. REV. 375, 383, 385 (1999). Evidentiary standards for immigrant women who are victims of domestic violence by citizen spouses can also provide a significant barrier to relief. See id. at 385. Federal regulations allow the women to self-petition for residency and petition for suspension of removal in situations of extreme cruelty by their citizen spouse. See 8 C.F.R. § 216.5(e)(3) (2000). However, “women who did not anticipate the need for a paper trail often have their petitions denied.” Goldman, supra, at 385. Consequently, the unique circumstances of battered immigrant women, whether living in the United States or seeking asylum here, create evidentiary obstacles when these women attempt to seek the protections of U.S. law.
\footnote{179} See \textit{Schechter}, supra note 1, at 219 (asserting that “[m]en are not necessarily consciously aware of their need to dominate”).
\footnote{180} See, e.g., \textit{Rhode}, supra note 1, at 244.
\footnote{181} See \textit{In re R-A-}, Interim Dec. 3403 at 2 (finding that respondent failed to show that her husband’s motivation to harm her fell within any of the statutory protected grounds).
\footnote{182} See \textit{generally} Amici Brief, supra note 9 (providing an extremely comprehensive background on gender related violence in the context of asylum and international law and discussing the reasons for violent spousal abuse).
\footnote{183} See \textit{Understanding the Problem}, supra note 5, at 6-7. The chapter cited is an excerpt from United Nations’ materials discussing theories that attempt to explain the existence or causes of domestic violence, which would relate to the “motivation” element of the act. See \textit{id}. Theories tie the reasons for domestic violence to individual factors or to social and societal structures related to inequality. See \textit{id}. Some scholars question the validity of theories that explain domestic violence by focussing on the individual. See \textit{id}. Rather, a social and societal explanation may be more accurate given the pervasiveness of
fore, to demand particularized motivation evidence in the context of spousal abuse. 184

Adjudicators have access to extensive objective evidence regarding the "motivation" of abusers. 185 This does not mean that the "reasons" that abuse occurs do not differ. 186 It does suggest, however, that courts could view objective evidence provided by empirical research in conjunction with an abuser's statements. 187 For example, Osorio threatened to kill Alvarado and stated, "You're my woman and I can do whatever I want." 188 This statement supports the notion that he acted, at least in part, due to his wife's gender identity and the societal expectations of the relationship of the husband and wife. 189

2. The Law Allows for a Lesser Quantum of Proof Under Certain Circumstances

The Supreme Court in INS v. Elias-Zacarias 190 stated that evidence of motive can be "direct or circumstantial." 191 In Abankwah v. INS, 192 the

domestic violence. See id.

184. Cf. Anker et al., supra note 11, at 741 n.163 (quoting In re S-P-, Interim Dec. 3287 at 5 (BIA 1996) ("Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases [requiring such proof]").

185. See Kantor & Jasinski, supra note 175, at 5 (discussing various studies of male dominance and control). This objective evidence includes, for example, indications that in some households males may use physical violence to legitimate their dominant positions. See id. Further, "cultural norms supporting unequal family power structures or traditional gender roles may help explain some variations in rates of spousal violence." Id. Frustration born from an inability to control the female partner may also spawn aggression. See id.; see also SCHECHTER, supra note 1, at 17 (asserting that battering is "purposeful behavior"). Schechter cites a study by R. Emerson Dobash and Russell Dobash, which concluded that "[w]hen a husband attacks his wife, he is either chastising her for challenging his authority or for failing to live up to his expectations or attempting to discourage future unacceptable behavior." Id. (quoting R. EMERSON DOBASH & RUSSELL DOBASH, VIOLENCE AGAINST WIVES: A CASE AGAINST PATRIARCHY 23-24 (1979)).

186. See Kantor & Jasinski, supra note 175, at 5.


189. Cf. RHODE, supra note 1, at 237. Professor Rhode argues that "[t]he conflicts that give rise to domestic violence are rooted in broader power relations and social norms." Id. Further, she contends that "[f]amily violence is a symptom as well as a cause of women's subordination." Id. at 244.


191. Id. at 483; see also Pitcherskaia v. INS, 118 F.3d 641, 646-47 (9th Cir. 1997) (finding that proof of subjective intent was not required because the definition of persecution is objective).

192. 185 F.3d 18 (2d Cir. 1999).
court sharply criticized the Board’s expectations of proof.\textsuperscript{193} The court’s criticism of the Board’s strict evidence standard was related to the “objective” evidence that an applicant must present to prove credibility. The court’s logic is also applicable to evidence regarding the nexus analysis.\textsuperscript{194} The Board itself has acknowledged that it is difficult to prove a persecutor’s exact motivation.\textsuperscript{195} Therefore, in \textit{In re R-A-}, the Board could have granted asylum based on evidence that motivation is often tied to societal attitudes about gender.\textsuperscript{196}

3. \textbf{The Board Uses a Restrictive View of Social Group Membership}

The Board’s restrictive approach in \textit{In re R-A-} established a narrow application of “social group membership.”\textsuperscript{197} The Board viewed the \textit{Acosta} test as a basic requirement or “starting point,” rather than a two-part inquiry.\textsuperscript{198} It relied on \textit{Sanchez-Trujillo v. INS} to impose a more exacting standard that required proof of a “voluntary associational relationship among the purported members.”\textsuperscript{199} Most courts outside of the Ninth Circuit, however, have applied \textit{Acosta} rather than \textit{Sanchez-Trujillo}.\textsuperscript{200}

The decision by the IJ in \textit{In re R-A-} was consistent with the Board’s own decision in \textit{Kasinga}.\textsuperscript{201} Both decisions defined social group membership by “reference to gender in combination with one or more additional factors.”\textsuperscript{202} In \textit{Kasinga}, the Board cited the \textit{Guidelines} in support of its

\textsuperscript{193} See \textit{id.} at 22-26 (noting that the applicant met her evidentiary burden to establish well-founded fear, but that the Board failed to give the proffered evidence proper consideration).

\textsuperscript{194} See \textit{Musalo}, \textit{supra} note 25, at 1170, 1186 & n.76; see also \textit{Abankwah}, 185 F.3d at 26 (stating that “it must be acknowledged that a genuine refugee does not flee her native country armed with affidavits, expert witnesses, and extensive documentation”).

\textsuperscript{195} See \textit{supra} note 184.

\textsuperscript{196} See \textit{In re R-A-}, Interim Dec. 3403 at 41 (BIA 1999) (Guendelsberger, Bd. Mbr., dissenting) (“It is reasonable to believe, on the basis of the record before us, that the husband was motivated, at least in part, ‘on account of’ [Alvarado’s] membership in a particular social group that is defined by her gender.”).

\textsuperscript{197} See \textit{id.} at 14-16 (finding that the proposed group satisfies the \textit{Acosta} framework of “social group,” but characterizing this framework as a “basic requirement” rather than as a two-part test). The Board determined that \textit{Acosta} was more of a starting point rather than an ending point. \textit{See id.} at 16.

\textsuperscript{198} \textit{See id.} at 14-16.

\textsuperscript{199} \textit{Id.} at 8 (quoting \textit{Sanchez-Trujillo v. INS}, 801 F.2d 1571, 1576 (9th Cir. 1986)).

\textsuperscript{200} \textit{See id.} at 34-35 (Guendelsberger, Bd. Mbr., dissenting).

\textsuperscript{201} \textit{See Amici Brief, supra} note 9, at 36. In \textit{Kasinga}, the Board followed Canada’s lead when it granted asylum. \textit{See id.}

\textsuperscript{202} \textit{See id. Compare In re Alvarado, No. A73-753-922, slip op. at 4 (Immigr. Ct., San Francisco, Cal., Sept. 20, 1996)} (defining the social group as “Guatemalan women who are
decision to grant asylum based on FGM as persecution on account of social group membership.\textsuperscript{203} It specifically quoted the \textit{Guidelines}, noting that "rape[, ... sexual abuse, and domestic violence ... are forms of mistreatment primarily directed at girls and women and they may serve as evidence of past persecution on account of one or more of the five grounds."\textsuperscript{204} After \textit{In re R-A-}, advocates for applicants question the Board's refusal to continue to apply the principles it established in \textit{Kasinga}.

\textbf{B. The Trend in International Adjudication of Domestic Violence Asylum Claims is Contrary to the Board's Decision in \textit{In re R-A-}}

There is a trend in the international community toward recognizing the special needs of women refugees.\textsuperscript{205} Although Canada, Australia, Great Britain, and the United States apply the identical definition of a refugee,\textsuperscript{206} these nations do not agree on the precise application of the definition.\textsuperscript{207} Varying, albeit similar, interpretations exist in the jurisprudence and internal guidance of each country; however, Canada, Great Britain, and Australia have granted asylum based on domestic violence.\textsuperscript{208} In light of \textit{In re R-A-}, the United States stands alone, contrary to its previous congruence with the trend toward recognition of the needs of women refugees.\textsuperscript{209}

subjected to threat of violence from their former or current male companions, who believe in male domination"), with \textit{In re Kasinga}, Interim Dec. 3278, 1996 WL 379826 (BIA June 13, 1996) (describing the social group as "young women of the Tchamba-Kunsuntu Tribe who have not had FMG, as practiced by that tribe, and who oppose the practice"). Domestic abuse in \textit{Alvarado} and FGM in \textit{Kasinga} were forms of persecution that the respective communities accepted and sanctioned as cultural norms, thereby alleviating the possibility of state protection. \textit{See Amici Brief, supra} note 9, at 36. Both forms of violence share the overarching societal objective of assuring male domination. \textit{See id.}

\textsuperscript{203} \textit{See Kasinga}, 1996 WL 379826.

\textsuperscript{204} \textit{Id.} (quoting INS Guidelines, \textit{supra} note 19, at 4).

\textsuperscript{205} \textit{See Tulsky, supra} note 28. Karen Musalo, counsel in the \textit{Kasinga} case, stated, "What is so distressing is that the Board seems either to have not understood its decision in \textit{Kasinga}, or is refusing to apply its own principles." \textit{Id.} (internal quotations omitted).

\textsuperscript{206} \textit{See INS Guidelines supra} note 19, at 1 (asserting that while "human rights violations against women are not a new phenomenon" they have recently "risen to the forefront of the international agenda").

\textsuperscript{207} \textit{See Macklin, supra} note 48, at 25, 27.


\textsuperscript{209} \textit{See Macklin, supra} note 48, at 27-29.

\textsuperscript{210} \textit{See Musalo, supra} note 25, at 1186; \textit{see also} Tulsky, \textit{supra} note 28 (quoting Deborah Anker, head of the Harvard University Immigration and Refugee Clinic, as stating
The House of Lords, the Supreme Court of Canada, and the High Court of Australia broadened the refugee concept to include gender-based claims. For example, in *Islam*, the House of Lords advocated the importance of an evolutionary approach when considering international agreements such as the Refugee Convention. This approach enables decision makers to account for "discriminatory circumstances which may not have been obvious to the delegates when the Convention was being framed." The United Nations High Commission on Refugees also recognizes that protection principles are evolving continuously.

Great Britain, Australia, and Canada accept gender as a social group, and base their decisions on *Acosta*. In *Islam*, the House of Lords discussed its interpretation of *Acosta* and rejected *Sanchez-Trujillo* as "restrictive," explicitly finding "no support" in the literature for the reasoning asserted in *Sanchez-Trujillo*. In addition, English case law contains no authority that cohesiveness is an indispensable requirement for finding the existence of a social group. Likewise, in *Attorney-General of Canada v. Ward*, the Canadian Supreme Court also rejected *Sanchez-Trujillo*; instead adopting the *Acosta* rationale by deciding that gender could qualify as a particular social group.

Each of these interpretations from leading Western nations clash with the Board’s decision that Alvarado was not a member of a particular social group. American variance from the international trend is difficult that the decision "was contrary to a growing body of international authority.


213. *Id.*


215. *See Islam*, 2 [1999] All E.R. at 557 (opinion of Lord Steyn) ("The reasoning in the *Acosta* case, which has been followed in Canada and Australia, is applicable.").

216. *See id.* at 553-55 (opinion of Lord Steyn). "What is not justified is to introduce into that formulation an additional restriction of cohesiveness. To do so would be contrary to the *ejusdem generis* approach so cogently stated in *Re Acosta*." *Id.* at 555.

217. *See id.* at 555.

218. *See id.* at 554.


220. *See id.* at 739; *see also Islam*, 2 [1999] All E.R. at 554 (Lord Steyn) (observing that the Canadian Supreme Court in *Ward* adopted a broader approach based on *Acosta*).

221. *Compare In re R-A-, Interim Dec. 3403 at 14 (BIA 1999) (stating that Alvarado was not a member of a particular social group absent "a voluntary associational relationship"); with Ward, [1993] 2 S.C.R. at 739 (finding that social group membership includes individuals fearing persecution on the basis of gender), and Anker et al., supra note 11, at 743 n.178 (stating that the Canadian Federal Court found that women subjected to domes-
to explain because the INS recognizes the framework provided by international human rights instruments as a source of guidance.222 The Guidelines explicitly acknowledge the influence of Canada's guidelines stating that "more than two years after their release, the Canadian Guidelines remain a model for gender-based asylum adjudication."223 In fact, Canada has since issued a newer version of its guidelines that "repeatedly recognize domestic violence as a cognizable basis for protection."224 Because the INS Guidelines specifically recognize the influence of Canadian and international standards, it is difficult to reconcile the outcome of In re R-A- with sources that recognize gender-based violence as persecution on account of social group membership.225

C. Resistance to Protection Under the Act Forces Victims to Look Elsewhere: Is Domestic Violence as Torture a Viable Alternative for Protection?

Research indicates that severe domestic violence may amount to torture.226 First, domestic violence involves severe physical harms that are comparable to torture.227 For example, both forms of violence include "beating with hands or objects, biting, spitting, punching, kicking, stabbing, strangling, scalding, burning, and attempted drowning."228 In addition, the psychological components of domestic violence are analogous to torture.229 Thus, severe domestic violence can satisfy the first element of

222. See INS Guidelines, supra note 19, at 2 (citing the INS BASIC LAW MANUAL 11-12 (2d ed. 1991)). In addition, the Guidelines state "[t]hese instruments need not be ratified by the United States to provide guidance as a source of human rights norms." Id. at 2 n.2.

223. Id. at 3; see also Macklin, supra note 48, at 29 (comparing the UNHCR, American, Australian, & Canadian guidelines).

224. Amici Brief, supra note 9, at 12-13 (citing Canadian Immigr. & Refugee Bd., Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution—Update (Nov. 24, 1996)).

225. See Musalo, supra note 25, at 1186-87 (arguing that the Board's decision is counter to principles set forth in the Guidelines and in the adjudications of other nations).

226. See Anker et al., supra note 11, at 713. "Domestic violence often involves repeated physical assaults, under certain circumstances amounting to torture, frequently resulting in death." Id.

227. See Copelon, supra note 8, at 311-12.

228. Id. at 311.

229. See id. at 311-12, 319 (identifying threats of death and grave physical harm as psychological torture, as noted by the Human Rights Committee); see also Liane V. Davis, Domestic Violence, in ENCYCLOPEDIA OF SOCIAL WORK 780, 782 (1991). Davis reports that Schechter "identified five tactics of emotional spouse abuse: (1) isolation, (2) humiliation and degradation, (3) "crazy-making" behavior, (4) threats to harm the woman and those she loves, and (5) suicidal and homicidal threats." Id. "Often among the most in-
Asylum for Victims of Domestic Violence

the CAT: intentional infliction of severe pain or suffering.\textsuperscript{230}

Second, under the CAT, the harm must be inflicted for a specific purpose, such as to intimidate, coerce, or punish.\textsuperscript{231} The purposes of domestic violence are to intimidate and exercise power over women.\textsuperscript{232} Canadian officials analogized the severity and purpose of domestic violence to torture, comparing a torture chamber with an abusive home, in the case of an Ecuadorian woman whose husband raped and beat her for over ten years.\textsuperscript{233}

Third, private acts are torture if they are carried out with the "consent or acquiescence of a public official or other person acting in an official capacity."\textsuperscript{234} This could include private violence against women where there is no state intervention.\textsuperscript{235} Based on this paradigm, domestic abuse can rise to the level of torture, suggesting the use of the CAT as an avenue for protection aside from the traditional petition under the INA.

There are two significant differences between the CAT and the INA.\textsuperscript{236} An applicant proceeding under the CAT does not have to show that the harm was inflicted on account of one of five categories as she does under the INA.\textsuperscript{237} However, actions that the INA considers "persecution" may
not rise to the definition of torture under the CAT.\textsuperscript{238} The United States' version of the CAT implies that adjudicators may require a higher level of government involvement than the original treaty mandates.\textsuperscript{239} Therefore, although domestic violence applicants proceeding under the CAT will not be required to prove that harm occurred "on account of" a protected category (as they must under the INA), they may find it difficult to prove the requisite government involvement under the CAT.\textsuperscript{240}

The abuse that Alvarado suffered arguably meets the statutory elements of the CAT.\textsuperscript{241} Just as a clear division exists in interpretation of the INA, however, early signs suggest that the same is true for the CAT, particularly regarding the element of "government acquiescence."\textsuperscript{242} To prove acquiescence, an applicant must show that government officials had prior awareness of the activity and thereafter breached their legal responsibility to intervene to prevent such activity.\textsuperscript{243} The INS opposed Alvarado's argument under the CAT, stating that "[i]n this case, there simply is no evidence that any government official had . . . prior knowledge about a specific incident of abuse, and breached a legal duty to prevent it."\textsuperscript{244} In contrast, the Board's dissent explicitly found that the "harm to [Ms. Alvarado] occurred in the context of egregious governmental acquiescence."\textsuperscript{245} Specifically, Alvarado sought government assistance after her husband abused her; both the police and a judge knew of the continuous life threatening abuse, but refused to intervene.\textsuperscript{246} Although the INS denied that Guatemalan government officials breached a

\textsuperscript{238} See id.

\textsuperscript{239} See id.

\textsuperscript{240} See id.

\textsuperscript{241} See generally Motion to Reopen, supra note 154.

\textsuperscript{242} Compare id. at 1 (arguing that Alvarado's claim satisfies each element of the CAT), with INS Opposition Memorandum, supra note 162, at 4 (arguing that there was no government acquiescence).

\textsuperscript{243} See 8 C.F.R. § 208.18(a)(7) (2000).

\textsuperscript{244} INS Opposition Memorandum, supra note 162, at 4. But see Petitioner's Reply Memorandum in Support of Motion to Reopen and Remand Pursuant to the Convention Against Torture at 5, In re R-A-, Interim Dec. 3403 (BIA 1999) [hereinafter Reply to INS Opposition] (arguing that the INS interpretation is "illogical" and "contrary to the intent and language of the CAT" and "would lead to irrational results"). The INS interpretation, in essence, precludes many gender-based claims. See id. The requirement of consent and acquiescence would impose extreme limitations. See id. In the INS' view, an applicant could satisfy the "consent and acquiescence" requirement only if a private actor told a public official exactly how he was going to torture someone and, after the public official took no action, the private actor carried out his torture exactly as threatened. See id.

\textsuperscript{245} In re R-A-, Interim Dec. 3403 at 29 (Guendelsberger, Bd. Mbr., dissenting).

\textsuperscript{246} See id.
Alvarado argued that those officials had a legal responsibility under international law to respond to her repeated requests for protection. This conflict suggests a new tension in the law and an obstacle to deploying the CAT for protection from this type of harm.

In addition to legal duty, "acquiescence" requires that an act "must be directed against a person in the offender's custody or physical control." The interpretation of "control" is critical for domestic violence victims. Alvarado's argument is compelling: one who repeatedly flees her batterer, only to be found and severely beaten by him, is under the batterer's physical control where she has no government protection. However, the INS criticized her attempts to escape Osorio because she went to stay with family, which the agency characterized as "[an] obvious place[] to begin a search." Yet, considering Alvarado's presence in a country where there are few safe or secret avenues of escape, the INS criticism is weak. The Board accepted as true medical testimony that Alvarado

247. See INS Opposition Memorandum, supra note 162, at 4.
248. See Motion to Reopen, supra note 154, at 11-12 (citing the American Convention on Human Rights, Arts. 5, 25 (1969)). Guatemala is a signatory state of the American Convention on Human Rights; therefore, it is required to develop and enforce remedies to protect the rights of every person to "simple and prompt recourse and a competent court for protection from torture or cruel, inhuman, or degrading treatment." Id. at 11-12.
249. See Sklar, supra note 30. The specific limits imposed by the Senate understandings, which impose a higher level of government involvement, may be inconsistent with the CAT requirements. See id. The stipulations requiring "prior awareness" of the activity and the breach of a legal responsibility to intervene to prevent the activity may "impose unnecessary and inappropriate roadblocks to coverage of such widely condemned acts as FGM . . . and atrocities committed by private and paramilitary groups." Id. Professor Sklar argues that the understandings alter or undermine the basic treaty requirements. See id.
250. 8 C.F.R. § 208.18(a)(6) (2000).
251. See Reply to INS Opposition, supra note 244, at 6.
252. See Motion to Reopen, supra note 154, at 12-13.
253. INS Opposition Memorandum, supra note 162, at 7. But see Motion to Reopen, supra note 154, at 15 (noting that at Alvarado's hearing, an expert witness testified that she was not aware of any shelters for battered women in Guatemala).
254. See Motion to Reopen, supra note 154, at 15.
255. See INS Opposition Memorandum, supra note 162, at 6. Disputing the control issue, the INS contended that Alvarado "chose to return to her husband after leaving him and moving to another town." Id. But see In re R-A-, Interim Dec. 3403 at 4 (BIA 1999) (recognizing that Alvarado could not legally obtain a divorce, that Alvarado "knew of no shelters or other organizations in Guatemala that could protect her," and, accepting as true, testimony that her husband found her and beat her when she fled, suffering no punishment for his actions); see also Reply to INS Opposition, supra note 244, at 6-7.

The Service attempts to bolster their contention by criticizing Ms. Alvarado for seeking refuge with her family because that would be an obvious hiding place . . . The CAT does not, as the Service asserts, require a petitioner to orphan oneself in exile in order to be eligible for protection.
"possessed an extraordinary fear of her husband."\textsuperscript{256} This indicates that she would believe his threats to come find her and any "choice" would be physically and psychologically unavailable to her.\textsuperscript{257}

Finally, law enforcement practices that implicitly condone or minimize the seriousness of gender-based violence reflect "consent of the state as well as formal gender discrimination."\textsuperscript{258} Adjudicators could find state "acquiescence" where women have no state protection,\textsuperscript{259} as in the case of Alvarado.\textsuperscript{260} It is not, however, an argument certain to prevail, and currently, applicants must consider both the INA and the CAT in pursuit of protection with the very real possibility that the IJ or the Board will still deny them asylum.

\section*{D. In re R-A- Is Counter To Policy Considerations That Mandate Protection}

The Board asserts that legislative correction is necessary for it to accede to asylum requests like Alvarado’s.\textsuperscript{261} Nevertheless, there is strong support for the argument that the INS should interpret the Refugee Act to grant asylum to victims of domestic violence when their own countries fail to protect them.\textsuperscript{262} In its effort to scrutinize each element separately, the Board has lost sight of the overall humane purposes of the INA.\textsuperscript{263}

Domestic policy also dictates protection for victims of domestic abuse. President Clinton recently declared that the United States is "committed to the protection and promotion of human rights and fundamental freedoms."\textsuperscript{264} Through an Executive Order, the government is required to "fully respect and implement its obligations under the international hu-

\textsuperscript{256} \textit{In re R-A-}, Interim Dec. 3403 at 5.
\textsuperscript{257} The notion that Alvarado had a choice completely ignores her fear for her life, developed from years of brutal, life-threatening violence and threats. \textit{Cf. id.} at 3-6 (describing the "deplorable conduct" of Alvarado’s husband and conditions in-country).
\textsuperscript{258} \textit{Cf. id.} at 3-6 (deploring the "deplorable conduct" of Alvarado’s husband and conditions in-country).
\textsuperscript{259} \textit{Cf. id.} at 3-6 (deploring the "deplorable conduct" of Alvarado’s husband and conditions in-country).
\textsuperscript{260} \textit{Cf. id.} at 3-6 (deploring the "deplorable conduct" of Alvarado’s husband and conditions in-country).
\textsuperscript{261} \textit{Cf. id.} at 3-6 (deploring the "deplorable conduct" of Alvarado’s husband and conditions in-country).
\textsuperscript{262} \textit{Cf. id.} at 3-6 (deploring the "deplorable conduct" of Alvarado’s husband and conditions in-country).
\textsuperscript{263} \textit{Cf. id.} at 3-6 (deploring the "deplorable conduct" of Alvarado’s husband and conditions in-country).
\textsuperscript{264} \textit{Cf. id.} at 3-6 (deploring the "deplorable conduct" of Alvarado’s husband and conditions in-country).
man rights treaties to which it is a party. Under The Refugee Act and
the CAT, governments are obligated to protect victims who face persecu-
tion or torture in their own countries. Alvarado’s husband has stated
that he will kill her if she returns to Guatemala. Therefore, if the
United States deports her, it is not only failing in its obligation to protect
her, but it is essentially sending her to her death.

IV. A FORWARD LOOKING SOLUTION: THE UNITED STATES SHOULD
DEMONSTRATE ITS COMMITMENT TO PROTECTION OF WOMEN
REFUGEES UNDER ITS TREATY OBLIGATIONS AND DOMESTIC POLICY

Respect and implementation of the United States’ obligations necessi-
tates protection of victims of severe gender-based violence. Thus, the
Board’s decision in In re R-A- is a step backward.

Developments in domestic law and social programs for victims of do-
meric violence indicate the depth of public understanding about the se-
verity of domestic violence. The lack of protection available in light of
In re R-A-, however, indicates that responsiveness to gender issues is still
inadequate under current immigration law. The level of abuse that
some women endure rises to the level of persecution under the “most
narrow . . . definitions.” In many cases, domestic violence that contin-
ues without state intervention is a human rights violation comparable to
torture. The protections for victims of harsh intimate violence, how-
ever, are shaky and uncertain at best, if they exist at all. The Ninth
Circuit should shore up these protections by reversing the Board’s deci-
sion in In re R-A-. Reversal is appropriate based on interpretation of

265. Id.
266. See Sklar, supra note 30; Amici Brief, supra note 9, at 8-14 (explaining the current
standards of asylum law that support Alvarado’s claim).
268. See supra Part III.D.
269. See Letter from Members of the Hispanic Congressional Caucus to Attorney
General Janet Reno, supra note 152, at 3 (stating that the decision is a step backward).
270. See supra notes 1-4 and accompanying text (discussing the emergence of commu-
nity, police, and governmental responses to domestic violence and violence against
women).
271. See Musalo, supra note 25, at 1185 (discussing the implications of the Board’s de-
cision).
272. See In re Alvarado, No. A73-753-922, slip op. at 8 (Immigr. Ct., San Francisco,
273. See generally Copelon, supra note 8; supra Part III.C.
274. See supra Parts III.A-B; see also Tulsky, supra note 28. After the Board’s deci-
sion in In re R-A-, Jane Kroeshe, the respondent’s attorney, asked, “If she is not pro-
tected, what kind of woman would be?” Id.
current case law, as well as policy.\textsuperscript{275}

\textbf{A. Recognition of the Evolutionary Approach in Order to Address the Needs of Women Refugees}

The United States should adhere to an evolutionary approach in its interpretation of the Act and social group membership.\textsuperscript{276} When the United Nations drafted the Refugee Convention, society did not possess the same understanding of the needs of women refugees nor did it recognize the severe forms of violence against women.\textsuperscript{277} In order to respond to these needs, the United States must recognize that gender is a form of social group where there is no state protection from violence.\textsuperscript{278} Clearly, there is an international trend to afford protection to domestic violence victims in these circumstances.\textsuperscript{279}

The Board’s hesitation to allow gender as a social group factor has no basis in law.\textsuperscript{280} Decision makers must determine whether a social group exists by its characteristics, not by the size of the group.\textsuperscript{281} Denial of protection by tightening social group membership is consistent only with hesitation to open the “floodgates” to large numbers of immigrants.\textsuperscript{282} This fear is unwarranted, however, because it is difficult for women to leave their batterers and even more difficult to gain the means to flee their countries of origin to do so.\textsuperscript{283} Further, the recognition of claims based on domestic violence does not dictate the outcome of all claims

\textsuperscript{275} See \textit{In re R-A-}, Interim Dec. 3403 at 29 (BIA 1999) (Guendelsberger, Bd. Mbr., dissenting) (concluding that the majority’s insistence that Alvarado’s husband did not harm her “even in part, because of her membership in a particular social or because of an actual or imputed political opinion” cannot be reconciled with . . . United States law”). The majority’s holding is at odds with “our own precedent, federal court authority, and Department of Justice policy.” \textit{Id.} (Guendelsberger, Bd. Mbr., dissenting).

\textsuperscript{276} See supra Part III.B (discussing the evolutionary approach).

\textsuperscript{277} See \textit{Kourula}, supra note 5, at 131-38.

\textsuperscript{278} See Anker et al., supra note 11, at 715.

\textsuperscript{279} See Musalo, supra note 25, at 1186.

\textsuperscript{280} See \textit{In re R-A-}, Interim Dec. 3403 at 29 (Guendelsberger, Bd. Mbr., dissenting) (arguing that the decision not to recognize Alvarado as a member of a social group “cannot be reconciled either with the reality of [her] situation in Guatemala or with United States law”).


\textsuperscript{282} See Hall, supra note 177, at 110 (concluding that the Board’s narrower interpretation of the Act’s elements “often relied on political, ‘floodgate’ concerns when denying asylum claims”); see also \textit{Kourula}, supra note 5, at 63. The “interpretation of the refugee definition is influenced not only by legal considerations but also by political expediences and economic realities as well as the size of a particular refugee influx.” \textit{Id.}

\textsuperscript{283} See Seith, supra note 46, at 1839 (noting the difficulties and expense of fleeing one’s country).
that involve intimate violence.\textsuperscript{284}

Other countries recognizing claims based on violence against women have not been overwhelmed; neither Canada nor Australia is overwhelmed by claims as a result of more responsive asylum decisions.\textsuperscript{285} Researchers analyzed the number of applications after Canada's recognition of claims based on fear of FGM.\textsuperscript{286} Statistics demonstrate that the decisions granting asylum did not generate a large influx of claimants.\textsuperscript{287} Therefore, even political sentiments that are anti-immigration need not force the return of women like Alvarado to a situation of grave danger.\textsuperscript{288}

\textbf{B. Consideration of Research-Based Knowledge of Domestic Violence for Persecutor's Motivation}

Decision makers could alleviate some of the problems created in light of \textit{In re R-A-} by giving adequate weight to expert testimony that relies on domestic violence research. The women's movement has influenced other areas of the law, forcing discriminatory practices to change.\textsuperscript{289} The same changes should occur in asylum law. Courts recognize the difficulties in determining the exact motive of a persecutor.\textsuperscript{290} Consequently, they have allowed mixed-motive analysis, and consideration of direct and circumstantial evidence.\textsuperscript{291} Moreover, the \textit{Abankwah} court recently noted the dangerous circumstances that a claimant faces when fleeing her

\begin{itemize}
\item \textsuperscript{284} See Anker et al., \textit{supra} note 11, at 715 (observing that decisions are made on an individual or case-by-case basis). Domestic violence will not always rise to the level of persecution. \textit{See id.} Therefore, simply recognizing gender as a possible social group does not mean that every one who is beaten is eligible for asylum. \textit{See id.}
\item \textsuperscript{285} See Macklin, \textit{supra} note 48, at 34.
\item \textsuperscript{286} See \textit{id.}
\item \textsuperscript{287} See \textit{id.}
\item At a minimum, however, it appears safe to assert that the appearance of the Guidelines in Canada in 1993 did not lead to a "flood" of women seeking asylum. \textit{\ldots} The numbers of positive [gender-based] claims decided in accordance with the Canadian Guidelines since they were promulgated in March, 1993 are: 78 in 1993, 204 in 1994, 212 in 1995, 150 in 1996, 104 in 1997, and 95 in 1998 (through September). \textit{Id.}
\item This data includes the years after 1996 when the revised version of the Canadian Guidelines specifically mentioned domestic violence several times as a possible claim. \textit{See id.}
\item \textsuperscript{288} See Esta Soler, \textit{Denying Asylum to A Battered Woman}, \textit{WASH. POST}, Nov. 8, 1999, at A21.
\item \textsuperscript{289} See \textit{supra} note 3 (discussing the role of women's organizations in improving police response to domestic violence in the United States).
\item \textsuperscript{290} See \textit{In re R-A-}, Interim Dec. 3403 at 40 (BIA 1999) (Guendelsberger, Bd. Mbr., dissenting) (articulating that under federal case law, "[i]llegitimate motives can give rise to an inference that the harm occurred on account of a statutorily protected characteristic").
\end{itemize}
home country, and therefore accepted a less than perfect showing of objective evidence. \textsuperscript{292} The court also reprimanded the Board for its "exact-ing" demand. \textsuperscript{293}

Asylum adjudicators should apply the same realistic evidentiary standards employed in \textit{Abankwah} in cases of applicants claiming domestic violence. \textsuperscript{294} Researchers have widely studied the motivations of batterers, and much evidence establishes that their motivations are related to gender and control. \textsuperscript{295} The courts should allow the use of these studies, and infer motive in cases with facts that corroborate such a finding. \textsuperscript{296} Failure to comprehend fully the motivation for a particular actor's continuous brutal battering should not weaken a woman's claim. \textsuperscript{297} Conversely, the ability partially to understand domestic violence due to social science research should strengthen the claim. \textsuperscript{298}

\textbf{C. The Torture Convention: Provide Clear Interpretations of Acquiescence that are Consistent with the Purpose of the CAT}

If the United States is not willing to expand protection under the Act, the CAT represents a new avenue for protection. \textsuperscript{299} The United States has an opportunity to provide a fresh start in adjudication of severe domestic violence claims. \textsuperscript{300} United States immigration courts should interpret the element of "acquiescence" broadly. \textsuperscript{301} A broad interpretation of state involvement in a CAT analysis is consistent with the CAT's pur-

\begin{itemize}
\item \textsuperscript{292} \textit{See Abankwah v. INS}, 185 F.3d 18, 24 (2d Cir. 1999).
\item \textsuperscript{293} \textit{See id.}
\item \textsuperscript{294} \textit{See Amici Brief, supra note 9, at 5.}
\item \textsuperscript{295} \textit{See supra Part III.A.1.}
\item \textsuperscript{296} \textit{See In re R-A-}, Interim Dec. 3403 at 10 (BIA 1999). "The respondent has established that there is a basic patriarchal notion which prevails in Guatemala that a man should be able to control the women, whom they are or have been involved with . . . ." \textit{Id.} When men attempt to control women through violence in Guatemala, nothing is done to punish them. \textit{See id.; see also id. at} 28 (Guendelsberger, Bd. Mbr., dissenting) (determining that "the respondent's husband engaged in . . . abuse designed to dominate and to overcome any effort on her part to assert her independence or to resist his abuse").
\item \textsuperscript{297} \textit{See id. at} 39 (Guendelsberger, Bd. Mbr., dissenting) (concluding that "the very incomprehensibleness of the husband's motives supports the respondent's claim that the harm is 'on account' of a protected ground").
\item \textsuperscript{298} \textit{Cf id. at} 39-40 (Guendelsberger, Bd. Mbr., dissenting). "Domestic violence exists as a means by which men may systematically destroy the power of women, a form of violence rooted in the economic, social, and cultural subordination of women." \textit{Id.} (citing Copelon, \textit{supra} note 8, at 303-06).
\item \textsuperscript{299} \textit{See Sklar, supra note} 30.
\item \textsuperscript{300} \textit{See id.}
\item \textsuperscript{301} \textit{See id.}
\end{itemize}
pose of preventing the return of a victim to her torturer.\textsuperscript{302} Courts should find that acquiescence by the government exists when a state knowingly denies assistance to a victim of continuous beating.\textsuperscript{303} The current position taken by the INS in Alvarado’s case rejects this approach, advocating an unrealistic standard for state involvement.\textsuperscript{304} A broader approach, however, provides an appropriate balance because protection is limited to circumstances where the applicant sought assistance and a government official denied it, despite the official’s knowledge that the abuse was ongoing.\textsuperscript{305}

D. Improving Protection and Decreasing the Harm

A more generous policy toward domestic violence victims would not create an overwhelming burden on the immigration system. First, a country may improve over time in the way that it reacts to domestic violence.\textsuperscript{306} Second, increased international pressures on countries that do not protect women may force them to react differently.\textsuperscript{307} Improvements will alleviate the need for women to flee.\textsuperscript{308} Consistent state recognition of gender-based violence elevates its importance.\textsuperscript{309} Recognition increases the pressure on these states with inadequate protections to im-

\begin{itemize}
\item \textsuperscript{302} See 8 C.F.R. § 208.16(c)(4), (d)(1) (2000).
\item \textsuperscript{303} See Reply to INS Opposition, supra note 244, at 4 (arguing that the “government’s failure to come to Ms. Alvarado’s aid [despite reports of the beatings] meets even the [INS’] purported requirement [of acquiescence]”).
\item \textsuperscript{304} Compare INS Opposition Memorandum, supra note 162, at 4-5 (arguing that even though respondent sought government assistance after her husband abused her and a judge knew of the continuous life threatening abuse, the knowledge did not qualify as acquiescence), with Motion to Reopen, supra note 154, at 10 (arguing that Guatemala’s failure to take meaningful action constitutes acquiescence). “A Guatemalan Judge specifically told Ms. Alvarado that he would not interfere in domestic disputes, thus consenting and acquiescing to the torture . . . .” Id. Once the level of violence escalates to this level, it becomes practically certain that, absent intervention, it will happen again. See Healey et al., supra note 2, at 20.
\item \textsuperscript{305} See Motion to Reopen, supra note 154, at 13. Alvarado’s attorneys do not argue that domestic violence always constitutes torture. Rather, their argument turns on the definitive refusal by the state to act. See id.
\item \textsuperscript{306} See supra note 1 (explaining the dramatic improvements in domestic violence recognition and services that occurred in the United States from the 1970s to the 1990s).
\item \textsuperscript{307} See INS Guidelines, supra note 19, at 2 (citing CEDAW).
\item \textsuperscript{308} Although this Comment does not argue that this is likely to happen quickly and in all countries, there is reason to think that advocates for women can make progress due to the existence of numerous international instruments demanding state action. See Amici Brief, supra note 9, at 10 (citing international pronouncements that recognize the need to respond to violence against women worldwide).
\item \textsuperscript{309} See Seith, supra note 46, at 1842.
\end{itemize}
prove protections internally.\textsuperscript{310}

Finally, recognition of claims is consistent with domestic policy.\textsuperscript{311} A woman's right to be free from the "threat of domestic violence is a fundamental and universal human right."\textsuperscript{312} Administrative and judicial actions denying asylum to victims whose human rights have been severely violated are far from respectful of the United States' commitment to protect and promote women's rights. As a nation, we should not place political calculations regarding immigration ahead of justice.\textsuperscript{313}

\textbf{V. CONCLUSION}

The visibility of women who suffer from domestic violence is increasing, as are their cries for help. For some, international protection is their only possibility for safety. The purpose of both the INA and the CAT overwhelmingly goes against the return of women refugees such as Alvarado to their home countries. When there is disagreement about the extent of protection offered by current laws in the United States, asylum decision makers should resolve any conflict in interpretation in an applicant's favor. Adjudicators agreed that Alvarado has no remedy for the horrific abuse in her home country. Her situation is the very kind that asylum law exists to protect. The fundamental purpose of refugee law is to provide protection in response to human rights violations when there is a fundamental breakdown in state protection. International guidance and domestic policy specifically recommends that courts interpret asylum law to include domestic violence. A remedy is necessary, and protection is the only humane option.

\textsuperscript{310} See id. at 1842-43. In contrast, a refusal to legitimate women's plights and grant asylum merely de-emphasizes its importance. See Amici Brief, supra note 9, at 5 (arguing that the INS position in Alvarado's case trivializes the severity of domestic violence and fails to employ the commitments expressed in the INS Guidelines).

\textsuperscript{311} See INS Guidelines, supra note 19, at 2 (providing that "the evaluation of gender-based claims [in the United States] must be viewed within the framework provided by existing international human rights instruments and the interpretation of these instruments by international organizations"); see also Exec. Order No. 13,107, 3 C.F.R. 234 (1999-2000).

\textsuperscript{312} Understanding the Problem, supra note 5, at 7.

\textsuperscript{313} See Soler, supra note 288; see also Tulsky, supra note 28. "The majority's opinion reflects the caution that many Immigration Judges and U.S. officials feel about allowing new categories of eligible asylum seekers that would open the floodgates to large numbers of new claims . . . ." Id.