

**GENDER-RELATED ASYLUM CLAIMS  
AND THE SOCIAL GROUP CALCULUS:  
RECOGNIZING WOMEN AS A  
“PARTICULAR SOCIAL GROUP” *PER SE***

The Committee on Immigration and Nationality Law of  
Association of the Bar of the City of New York

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## I. INTRODUCTION

In recent years, forms of persecution unique to or disproportionately affecting women have been identified and recognized by the UN High Commissioner for Refugees (“UNHCR”), various state parties to the UN Convention Relating to the Status of Refugees (the “Refugee Convention” or the “Convention”),<sup>1</sup> and, indeed, the Immigration and Naturalization Service (the “INS”). Courts in many countries party to the Refugee Convention have acknowledged women to be a “particular social group” on account of which gender-specific persecution is inflicted. Moreover, following UNHCR’s lead,<sup>2</sup> several state parties to the Convention have promulgated guidelines for adjudicators determining gender-based asylum claims that explicitly recognize gender-based persecution as a ground for asylum.<sup>3</sup> The INS’ Considerations for Asylum Officers Adjudicating Asylum Claims from Women (“INS Gender Guidelines”), issued in 1995, specifically identify forms of persecution that are unique to women or that more commonly befall women than men,<sup>4</sup> and affirm that courts in the United States “have concluded as a legal matter than gender can define a particular social group.”<sup>5</sup>

The ill-reasoned *Matter of R—A—* decision<sup>6</sup> in which the Board of Immigration Appeals (the “BIA” or the “Board”) denied asylum to Rodi Alvarado Peña, a Guatemalan victim of what the Board acknowledged to be “tragic and severe” domestic violence at the hands of her brutal husband,<sup>7</sup> represented a radical departure from the Board’s own asylum jurisprudence and the widely accepted understanding of domestic violence in international human rights and asylum law. In denying Ms. Alvarado Peña’s asylum

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<sup>1</sup> UN Convention Relating to the Status of Refugees, opened for signature July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 137 [hereinafter Refugee Convention].

<sup>2</sup> See, e.g., U.N. GAOR, 36<sup>th</sup> Sess., at U.N. Doc. A/AC.96/673 ¶ 115(4)(k) (1985) [hereinafter Conclusion No. 39]; UNHCR, Guidelines on Protection of Refugee Women, U.N. Doc. EC/SCP/67, III(B)(ii)(a) (July 22, 1991) [hereinafter UNHCR Gender Guidelines].

<sup>3</sup> See, e.g., Immigration and Refugee Bd. of Can., Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution: Update (Nov. 13, 1996) <<http://www.irb.gc.ca/en/about/guidelines/women/>> (visited Feb. 26, 2003) [hereinafter Canadian Gender Guidelines]; Department of Immigration and Multicultural Affairs of Austl., Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers (1996) [hereinafter Australian Gender Guidelines]; Immigration Appellate Authority, Asylum Gender Guidelines (Nov. 2000) [hereinafter UK Gender Guidelines].

<sup>4</sup> “The forms of harm that women suffer around the world, and that therefore will arise in asylum claims, are varied. Forms of harm that have arisen in asylum claims and that are unique to or more commonly befall women have included sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence, and forced abortion.” Memorandum from Phyllis Coven, Office of International Affairs, U.S. Department of Justice, Considerations For Asylum Officers Adjudicating Asylum Claims From Women, to all INS Asylum Officers and HQASM Coordinators (May 26, 1995), at 9 [hereinafter INS Gender Guidelines]. The INS Gender Guidelines clearly establish that these unique forms of harm must be analyzed in a manner consistent with all other instances of persecution: “The form of harm or punishment may be selected because of the gender of the victim, but the analysis of the claim should not vary based on the gender of the victim. Asylum adjudicators should assess whether an instance of harm amounts to persecution on the basis of . . . general principles.” *Id.*

<sup>5</sup> *Id.* at 13.

<sup>6</sup> *Matter of R—A—*, Int. Dec. 3403 (BIA 1999).

<sup>7</sup> *Id.* at 26.

claim, the BIA majority applied a fundamentally flawed test of social group and commingled the separate analyses of whether a “particular social group” exists, and the nexus between the persecution suffered and the grounds on account of which the persecution is perpetrated. Ms. Alvarado Peña petitioned to the Court of Appeals for the Ninth Circuit for review of the BIA’s decision and filed a motion for stay of the Board’s order of deportation. The Ninth Circuit granted Ms. Alvarado Peña’s motion to stay deportation on August 13, 1999.<sup>8</sup> Counsel for Ms. Alvarado Peña and a consortium of one hundred *amici curiae* also petitioned the Attorney General to certify and reverse the Board’s decision in *Matter of R—A—*.<sup>9</sup> The Ninth Circuit granted a stay of briefing, deferring its proceedings pending the Attorney General’s consideration of the case.<sup>10</sup> A proposed regulation on gender- and domestic violence-based asylum claims issued in December 2000 while the Attorney General’s review of the Board’s *Matter of R—A—* decision was pending, but never implemented (the “Proposed Rule”),<sup>11</sup> would have clarified that women may constitute a “particular social group” *per se*. On January 19, 2001, Attorney General Janet Reno vacated the decision of the BIA and remanded the case to the Board: the Attorney General’s order directed the Board to stay reconsideration until after the publication of the Proposed Rule in final form, and to then reconsider its decision in light of the final rule. The Immigration and Nationality Law Committee (the “Committee”) of the Association of the Bar of the City of New York (the “Association”) contends that the BIA’s reasoning in *Matter of R—A—* was erroneous as a matter of law, and the Board’s denial of Ms. Alvarado Peña’s application for asylum was properly vacated by Attorney General Janet Reno. The Committee urges Attorney General John Ashcroft to not reinstate the Board’s decision in *Matter of R—A—*.

The Committee also joins domestic and international asylum advocates in contending that a broad definition of social group in cases involving gender-based asylum claims is consistent with the Refugee Convention, the INS Gender Guidelines, and international gender guidelines and case law, and preferable over narrow sculptings of the social group definition that incorporate the specific characteristics of a woman experiencing persecution and the specific nature of the persecution suffered. Recognition that gender can itself be the essential, defining characteristic of a “particular social group” is necessary in order to provide women with equal access to refugee protection and to avoid gender-based distortions of the refugee definition. The Committee recognizes the need for further rule-making clarifying the test for establishing a cognizable “particular social group”, and strongly advocates that regulations identifying the unique forms of harm to which women are subject and explicitly recognizing gender-based social groups be adopted by the Justice Department and the Department of Homeland Security.

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<sup>8</sup> *Pena v. INS*, No. 99-70823 (9<sup>th</sup> Cir. Aug. 13, 1999).

<sup>9</sup> Brief on Behalf of Rodi Alvarado Peña in Support of Request for Certification and Reversal of the Decision of the Board of Immigration Appeals *In Re R—A—* (Interim Decision No. 3403) 3 (Jan. 3, 2000) [hereinafter Alvarado Peña Brief]; Brief of *Amici Curiae* in Support of Request for Certification and Reversal of the Decision of the Board of Immigration Appeals *In Re R—A—* (Interim Decision No. 3403) 1 (Jan. 21, 2000) [hereinafter *Amici* Brief].

<sup>10</sup> *Pena v. INS*, No. 99-70823 (9<sup>th</sup> Cir. Sept. 30, 1999).

<sup>11</sup> Asylum and Withholding Definitions, 65 Fed. Reg. 76588 (Dec. 7, 2000).

## II. APPLICATION OF THE “PARTICULAR SOCIAL GROUP” GROUND TO GENDER-RELATED PERSECUTION PRIOR TO *MATTER OF R—A—*: AN OVERVIEW

### A. Persecution on Account of “Membership in a Particular Social Group”

The clearest and most widely endorsed definition of “particular social group” is the immutable characteristic test elaborated by the BIA in *Matter of Acosta*.<sup>12</sup> In *Matter of Acosta*, the Board noted that the other four grounds of persecution recognized under the Refugee Convention – race, religion, nationality and political opinion – describe persecution directed at an immutable characteristic that is “either beyond the power of an individual to change or is so fundamental to individual identity or conscience that it should not be required to be changed.”<sup>13</sup> Applying the statutory canon of *ejusdem generis* – general words included in a list of more specific words should be construed in a manner consistent with the more specific words<sup>14</sup> – the BIA pronounced:

“persecution on account of membership in a particular social group” encompasses persecution that is directed towards an individual who is a member of a group of persons all of whom share a common, immutable characteristic. The shared characteristic might be an innate one such as sex, color, or kinship ties, or in some circumstances it might be a shared past experience such as military leadership or land ownership. The particular kind of group characteristic that will qualify under this construction remains to be determined on a case-by-case basis. However, whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.<sup>15</sup>

Because *Matter of Acosta* is designated as precedent, the immutable characteristic test is binding on all asylum officers and immigration judges. Domestic courts have also clearly favored *Acosta*’s immutable characteristic test<sup>16</sup>: in *INS v. Cardoza-Fonseca*, the Supreme Court held that because the Refugee Act of 1980 (the “Refugee Act”) accords the BIA significant interpretive authority, Article III courts must give deference to the *Acosta* immutable characteristics test.<sup>17</sup> No Article III court has explicitly rejected the

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<sup>12</sup> *Matter of Acosta*, Int. Dec. 2986 (BIA 1985).

<sup>13</sup> *Id.* at 30-31.

<sup>14</sup> *Id.* at 30.

<sup>15</sup> *Id.* at 31.

<sup>16</sup> The Courts of Appeals for the First, Third and Seventh Circuits have adopted the immutable characteristics test. See, e.g., *Lwin v. INS*, 144 F.3d 505, 512 (7<sup>th</sup> Cir. 1998); *Meguenine v. INS*, 139 F.2d 25, 28 n.2 (1<sup>st</sup> Cir. 1998); *Fatin v. INS*, 12 F.3d 1233, 1239-41 (3d Cir. 1993); *Gebremichael v. INS*, 10 F.3d 28, 36 (1<sup>st</sup> Cir. 1993); *Alvarez-Flores v. INS*, 909 F.2d 1, 7 (1<sup>st</sup> Cir. 1990); *Ananeh-Firempong v. INS*, 766 F.2d 621, 626 (1<sup>st</sup> Cir. 1985).

<sup>17</sup> *INS v. Cardoza-Fonseca*, 480 U.S. 421, 448 (1987).

*Acosta* test: the Ninth Circuit in *INS v. Sanchez-Trujillo*<sup>18</sup> chose to not acknowledge the *Acosta* test in formulating its alternative definition of “particular social group.”

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<sup>18</sup> *INS v. Sanchez-Trujillo*, 801 F.2d 1571, 1576 (9<sup>th</sup> Cir. 1986). The principal social group definition presented as an alternative to the *Acosta* standard – not as the BIA majority incorrectly insisted in *Matter of R—A—*, a supplementary standard to be overlaid on the *Acosta* analysis, see *Matter of R—A—*, Int. Dec. 3403, at 16 – is the voluntary association test. The Ninth Circuit formulated the voluntary association test in *INS v. Sanchez-Trujillo*, disregarding, and thus not rejecting, the *Acosta* test. Starting from the initial premise that the social group ground is broad and flexible, extending to encompass groups not falling within the categories of race, nationality, religion and political opinion, yet delimited by a “practical appreciation of the reasonably limited scope of the term “refugee,”” see *Sanchez-Trujillo*, 801 F.2d at 1576, the *Sanchez-Trujillo* court defined a “particular social group” as:

a collection of people closely affiliated with each other, who are actuated by some common impulse or interest. Of central concern is the existence of a voluntary associational relationship among the purported members, which imparts some common characteristic that is fundamental to their identity as a member of that discrete group.”

*Id.* at 1576. The voluntary association test can thus be broken down into three elements:

- (1) a voluntary associational relationship;
- (2) a common characteristic (or impulse or interest); and
- (3) a characteristic fundamental to group identity.

The Ninth Circuit has relied on the voluntary association test since *Sanchez-Trujillo*, but has applied the standard inconsistently. Outside the Ninth Circuit, the test is disfavored: only the Eighth Circuit has cited the test (and the Eight Circuit has, in fact, indicated its support for the immutable characteristic test). See *Safaie v. INS*, 25 F.3d 636, 640 (8<sup>th</sup> Cir. 1994) (applying elements of both the voluntary association and immutable characteristic tests, but defining the “common characteristic” element of the voluntary association test in terms of the *Acosta* immutable characteristic standard, as a characteristic which is “essentially beyond the petitioner’s power to change or is so fundamental to the individual’s identity or conscience that he or she ought not to be required to change”). The voluntary association test has been widely criticized for its inconsistency with *Acosta*’s immutable characteristic test, see, e.g., *Lwin*, 144 F.3d at 512 (finding that the immutable characteristic and voluntary association tests are incompatible); Peter C. Godfrey, *Defining the Social Group in Asylum Proceedings: The Expansion of the Social Group to Include a Broader Class of Refugees*, 3 J.L. & POL’Y 257, 267-68 (1994) (noting that the voluntary association test has been criticized for conflicting with the immutable characteristic test); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 CORNELL INT’L L.J. 625, 651 (1993), and the fact that voluntary association should not be a necessary prerequisite to recognizing a “particular social group”:

The questionableness of the “voluntary association” element of the Ninth Circuit’s definition renders the definition itself suspect. Close analysis of the other two elements reveals that they are not useful in distinguishing “groups” from “particular social groups,” since the “common characteristic” and “fundamental to group identity” factors are circular descriptions. Whatever characteristics define the group will always be common characteristics shared by the group. Furthermore, the characteristics used to define the group will always be fundamental to the group members, at least insofar as their membership in that particular social group is concerned. Voluntary association, in itself, is not sufficient. Moreover, it should not be a necessary element of proof. The refugee definition should encompass social groups that include members whose association with each other is involuntary.

Foreign courts have also relied on *Acosta*'s immutable characteristics test in defining "particular social group." In *Ward*,<sup>19</sup> the Canadian Supreme Court adopted the *Acosta* "particular social group" definition, explicating the immutable characteristics test by reference to three categories:

- (1) groups defined by an innate or unchangeable characteristic;
- (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (3) groups associated by a former voluntary status, unalterable due to its historical permanence.<sup>20</sup>

Moreover, in the *Islam & Shah* case decided by the British House of Lords,<sup>21</sup> the three Lords based their reasoning on the *Acosta* decision, which Lord Steyn described as "seminal."<sup>22</sup> The Australian Tribunal, has also embraced the immutable characteristics test in evaluating asylum claims based on the "particular social group" ground.<sup>23</sup>

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Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 505, 556-57 (1993); see also John Hans Thomas, Note, *Seeing Through a Glass, Darkly: The Social Context of "Particular Social Groups" in Lwin v. INS*, 1999 BYU L. REV. 799, 808 (noting immutable characteristics are not necessarily acquired through a voluntary association); Karen Bower, *Recognizing Violence Against Women as Persecution on the Basis of Membership in a Particular Social Group*, GEO. IMMIGR. L.J. 173, 197 (1993) (finding the Ninth Circuit's restrictive reading of the term "social group" inappropriate); T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 942-44 (1992) (contending that the *Sanchez-Trujillo* standard is a radical departure from previous understandings of the term "membership in a particular social group" because it uses faulty logic, misreads the statute's language and conflicts with the *Acosta* standard and international law).

Whereas the *Acosta* test has been embraced by adjudicators in other countries, the *Sanchez-Trujillo* voluntary association test is disdained internationally. In *Islam & Shah*, Lords Steyn, Hoffman and Hope rejected the *Sanchez-Trujillo* test, finding that cohesiveness is not a necessary element of a "particular social group." *Islam & Shah*, [1999], 2 All E.R. 545, 555-56 (Steyn, L.), 563 (Hoffmann, L.), 568 (Hope, L.). The Lords noted that the dearth of support for the *Sanchez-Trujillo* formulation in legal and academic commentary, see *id.* at 555 (Steyn, L.), determined that the preponderance of U.S. case law does not support *Sanchez-Trujillo*, see *id.* at 554 (Steyn, L.); see also UK Gender Guidelines, *supra* note 3, at ¶ 3.42, and discussed Canadian, see, e.g., *Ward*, [1993], 2 S.C.R. at 739, and Australian, see, e.g., *A. v. Minister for Immigration and Ethnic Affairs*, [1998] I.N.L.R. 1., case law rejecting the voluntary association test.

<sup>19</sup> *Ward*, [1993], 2 S.C.R. at 689.

<sup>20</sup> *Id.* at 739.

<sup>21</sup> *Islam & Shah*, [1999], 2 All E.R. 545.

<sup>22</sup> *Id.* at 556 (Steyn, L.) (finding that the *Acosta* Board's explanation that the shared characteristic might be an innate one "such as sex, color, or kinship ties" covers Pakistani women because they are discriminated against and as a group they are unprotected by the state, which, indeed, tolerates and sanctions the discrimination); see also *id.* at 563 (Hoffmann, L.) (reasoning, like the *Acosta* Board, that the "particular social group" ground must be interpreted consistently with the other enumerated grounds – each of which are either "immutable" or "part of an individual's fundamental right to choose for himself" – and with the anti-discrimination purposes of the Refugee Convention and human rights law generally); *id.* at 569 (Hope,

## B. Gender as a “Particular Social Group”

### 1. Domestic Case Law Assessing Claims Based on “Particular Social Groups” Defined by Reference to Gender

Despite *Acosta*'s clear indication that sex is the kind of shared immutable characteristic that may define a “particular social group,”<sup>24</sup> adjudicators have frequently muddled the analytically separate inquiries into the bounds of social group and the nature of persecution. However, while, as the INS Gender Guidelines acknowledge, no court has yet concluded as a factual matter that an applicant has demonstrated that the government or a persecutor, who the authorities were unwilling or unable to control, persecuted her solely on account of her gender,<sup>25</sup> domestic courts – both the Third Circuit in *Fatin v. INS*<sup>26</sup> and the Eighth Circuit in *Safaie v. INS*<sup>27</sup> – have determined or implied as a legal matter that gender can define a “particular social group” *per se*. Moreover, in *Matter of Kasinga*,<sup>28</sup> the BIA found both as a legal matter that Fauziya Kasinga established her membership in a cognizable gender-based “particular social group” and as a factual matter that Ms. Kasinga demonstrated a well-founded fear of persecution on account of her membership in this “particular social group.”

When Ms. Kasinga was seventeen years old, she learned that in accordance with the customs of her Tchamba-Kunsuntu tribe, she was to become the fourth wife of a 45-year-old former politician and that prior to the consummation of the marriage, she would

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L.) (applying the *ejusdem generis* reasoning undertaken by the *Acosta* Board, and cited *Matter of Acosta*'s definition of “particular social group” by reference to a shared, common, immutable characteristic).

<sup>23</sup> See N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994).

<sup>24</sup> *Matter of Acosta*, Int. Dec. 2986, at 31.

<sup>25</sup> INS Gender Guidelines, *supra* note 4, at 4.

<sup>26</sup> *Fatin v. INS*, 12 F.3d 1233 (3d Cir. 1993). In *Fatin*, a case involving an Iranian woman's opposition to fundamentalist laws and oppressive gender-related practices, the Third Circuit found that gender itself satisfied the definition of “particular social group.” *Fatin*, 12 F.3d at 1240. Replicating the *Acosta* Board's analysis of the (limited) guidance provided by statutory language and scholarly commentary, and deferring (as required under *Cardoza-Fonseca*) to the *Acosta* test, the *Fatin* court cited *Acosta*'s identification of “sex” as an innate characteristic that could link the members of a “particular social group,” and held that “to the extent the petitioner in this case suggests that she would be persecuted or has a well-founded fear that she would be persecuted in Iran simply because she is a woman, she has satisfied the . . . element [of membership in a “particular social group].” *Id.*

<sup>27</sup> *Safaie v. INS*, 25 F.3d 636 (8<sup>th</sup> Cir. 1994). Iranian fundamentalist laws and the harsh restrictions they impose on women were also at issue in *Safaie*. Ms. Safaie claimed to be a member of the social group of Iranian women. *Id.* at 25 F.3d at 640. In imprecise language, but clearly relying on the reasoning of the Third Circuit in *Fatin*, the Eighth Circuit rejected the “particular social group” of Iranian women as overbroad given the evidence before it: in so holding, the *Safaie* court unfortunately combined two distinct inquiries – (i) whether the class of people identified by the asylum applicant is cognizable as a “particular social group;” and (ii) whether the group has in fact been targeted for persecution on account of the characteristics of the group members. *Id.* While the *Safaie* court's commingled analysis is fundamentally flawed – the definitive characteristics of a particular social group are those which mark the group for persecution and not the actual persecution itself – the *Safaie* court thus does not decide that gender could never constitute a “particular social group,” but rather fails to recognize a gender-based social group in Ms. Safaie's case.

<sup>28</sup> *Matter of Kasinga*, 21 I. & N. Dec. 357.

undergo female genital mutilation (“FGM”). With the help of a sister, Ms. Kasinga fled her native Togo<sup>29</sup> and applied for asylum in the United States, claiming a well-founded fear of persecution on account of her social group. In reviewing an Immigration Judge’s denial of Ms. Kasinga’s application, the Board first undertook the social group inquiry. Relying on the *Acosta* analysis and *Fatin*’s identification of sex as the kind of immutable characteristic upon which a “particular social group” may be defined, the BIA found Ms. Kasinga to be a member of the “particular social group” of “young women of the Tchamba-Kunsuntu Tribe who have not had FGM, as practiced by that tribe, and who oppose the practice.”<sup>30</sup> The Board stated explicitly that in recognizing Ms. Kasinga’s social group it had applied the *Acosta* definition: “[i]n accordance with *Acosta*, the particular social group is defined by common characteristics that members of the group cannot change, or should not be required to change because such characteristics are fundamental to their individual identities.”<sup>31</sup> The Board then found that the characteristics defining the “particular social group” of which Ms. Kasinga was a member are immutable: “The characteristics of being a “young woman” and a “member of the Tchamba-Kunsuntu Tribe” cannot be changed. The characteristic of having intact genitalia is one that is so fundamental to the individual identity of a young woman that she should not be required to change it.”<sup>32</sup>

The Board separately analyzed the “persecution” inquiry. Drawing upon the record in describing FGM generally – “FGM is extremely painful and at least temporarily incapacitating. It permanently disfigures the female genitalia. FGM exposes the girl or woman to the risk of serious, potentially life-threatening complications. These include, among others, bleeding, infection, urine retention, stress, shock, psychological trauma, and damage to the urethra and anus”<sup>33</sup> – and the form of FGM practiced by Ms. Kasinga’s tribe – “an extreme type involving cutting the genitalia with knives, extensive bleeding and a 40-day recovery period”<sup>34</sup> – the BIA found that FGM constitutes persecution,<sup>35</sup> and that Ms. Kasinga’s fear of persecution in the form of FGM was on account of her “particular social group.”<sup>36</sup> Although the *Kasinga* Board does not cite the INS Gender Guidelines promulgated the previous year, the Board’s recognition of persecution on account of an applicant’s gender-based “particular social group” is very much consistent with their provisions.

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<sup>29</sup> *Id.* at 358, 360.

<sup>30</sup> *Id.* at 365. In *Abankwah v. INS*, 185 F.3d 18 (2d Cir. 1999), the Second Circuit reversed the BIA’s denial of asylum in a case involving a Ghanaian applicant’s fear of FGM. The facts in *Abankwah* differed substantially from those in *Matter of Kasinga*: the Nkumssa tribe, to which Ms. Abankwah belonged, did not regularly practice FGM but would perform FGM on a woman designated to become the Queen Mother – and Ms. Abankwah was so designated – where it was suspected or known that she had engaged in premarital sex. *Id.* at 20. In contrast to *Matter of Kasinga*, where Ms. Kasinga claimed a well-founded fear of FGM on account of her membership in a gender-based “particular social group,” Ms. Abankwah’s social group, although not precisely defined by the court, was defined by her membership in the Nkumssa tribe and “her knowledge of and experience with the customs of her tribe.” *Id.* at 25.

<sup>31</sup> *Matter of Kasinga*, 21 I. & N. Dec. at 365-66.

<sup>32</sup> *Id.* at 366.

<sup>33</sup> *Id.* at 361.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 365.

<sup>36</sup> *Id.* at 367.

## 2. Foreign Case Law Recognizing Gender-Based “Particular Social Groups”

Various foreign tribunals have explicitly recognized that “particular social groups” may be defined by gender. Although the *Ward* case, decided by the Canadian Supreme Court, did not involve a female applicant,<sup>37</sup> in enumerating its three-part “particular social group” definition, the court provided general guidance, clarifying that its first category – “groups defined by an innate or unchangeable characteristic”<sup>38</sup> – “would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation.”<sup>39</sup> The *Ward* court’s description of its enumerated categories of “particular social group” has been widely accepted; indeed, *Ward*’s pronouncement that women constitute a “particular social group” was endorsed by Canada’s Immigration and Refugee Board in the Canadian Gender Guidelines.<sup>40</sup>

In 1999, in its landmark *Islam & Shah* ruling, the British House of Lords granted asylum to two Pakistani women, Shahanna Islam and Syeda Shah, both victims of domestic violence at the hands of their husbands. Writing separately, four of the five Lords ruled in favor of granting asylum, three favoring a broad, gender-defined formulation of the “particular social group” as “women in Pakistan.”<sup>41</sup> In reaching their determination, the Lords determined that internal cohesiveness is not a requirement for the existence of a “particular social group,”<sup>42</sup> and rejected any formulation of “particular social group” that made the persecution feared an element of the definition of the group.<sup>43</sup> The three Lords recognizing the appellants as members of the social group of Pakistani women applied the *Acosta* standard and relied on *Acosta*’s pronouncement that the characteristic shared by the members of the “particular social group” may be an innate

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<sup>37</sup> The appellant was a Northern Irish man who claimed persecution on account of his “particular social group” and political opinion at the hands of the ILNA, a para-military terrorist group dedicated to the political union of Ulster and the Irish Republic.

<sup>38</sup> *Ward*, [1993], 2 S.C.R. at 739.

<sup>39</sup> *Id.*

<sup>40</sup> Canadian Gender Guidelines, *supra* note 3, at § A.III.

<sup>41</sup> *Islam & Shah*, [1999], 2 All E.R. at 556 (Steyn, L.), 563 (Hoffmann, L.), 569 (Hope, L.); *see generally* Deborah Anker et al., *Defining “Particular Social Group” in Terms of Gender: The Shah Decision and U.S. Law*, 76 INTERPRETER RELEASES 1005 (July 2, 1999).

<sup>42</sup> *Islam & Shah*, [1999], 2 All E.R. at 555 (Steyn, L.) (“I am satisfied that for the reasons given in *Acosta*’s case the restrictive interpretation of “particular social group” by reference to an element of cohesiveness is not justified.”), 563 (Hoffmann, L.) (“I cannot accept that the term “particular social group” implies an additional element of cohesiveness, co-operation or interdependence.”), 568 (Hope, L.) (“Mr. Pannick Q.C. said that a social group normally required cohesion between its members, and that if it lacked cohesion this was a very strong indication that it was not a group. But I think that this cannot be so in all cases. There are various ways in which a social group may be formed. It may be voluntary and self-generating. . . . But, in the context of article 1.A(2) of the Convention, I do not think that it needs to be self-generating.”).

<sup>43</sup> *Id.* at 552 (Steyn, L.) (“It is of common ground that there is a general principle that there can only be a “particular social group” if the group exists independently of the persecution. . . . [R]elying on persecution to prove the existence of a group would involve circular reasoning.”), 564 (Hoffman, L.) (noting that defining a “particular social group” by reference to persecution is circular), 569 (Hope, L.) (“The rule that the group must exist independently of the persecution is useful, because persecution alone cannot be used to define the group.”).

one, such as sex. Lord Steyn observed that *Acosta*'s identification of sex as the kind of immutable characteristic by which "particular social group" may be defined provides for the recognition of the social group of "Pakistani women," particularly given that women in Pakistan "are discriminated against and as a group they are unprotected by the state" (which, indeed, tolerates and sanctions the discrimination).<sup>44</sup> Applying the *Acosta* reasoning, Lord Hoffmann reasoned that the "particular social group" ground must be interpreted consistently with the other enumerated grounds, each of which are either "immutable" or "part of an individual's fundamental right to choose for himself." Recognizing the anti-discrimination purposes of the Refugee Convention and human rights law generally," Lord Hoffman concluded that women in Pakistan constitute a "particular social group":

Within [Pakistan], it seems to me that women form a social group of the kind contemplated by the Convention. Discrimination against women in matters of fundamental human rights on the grounds that they are women is plainly *in pari materiae* with discrimination on grounds of race. It offends against their rights as human beings to equal treatment and respect. . . I therefore think that women in Pakistan are a social group.<sup>45</sup>

Lord Hope also applied the *ejusdem generis* reasoning undertaken by the *Acosta* Board, and relying upon *Acosta*'s recognition of "particular social groups" defined by reference to sex, found that:

The unchallenged evidence in this case shows that women are discriminated against in Pakistan. I think that the nature and scale of the discrimination is such that it can properly be said that the women in Pakistan are discriminated against by the society in which they live. The reason why the appellants fear discrimination is not just because they are women. It is because they are women in a society which discriminates against women. In the context of that society I would regard women as a particular social group within the meaning of article 1.A(2) of the Convention. . .

[A] particular social group [can] include persons who fear[] persecution because they [are] being discriminated against on the basis of gender. So to hold that the appellants were members of a particular social group in Pakistan because they are women and because women are discriminated against in that country would be consistent

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<sup>44</sup> *Id.* at 556 (Steyn, L.).

<sup>45</sup> *Id.* at 563 (Hoffmann, L.).

with previous authority. I do not think it is necessary in this case to define the social group more narrowly.<sup>46</sup>

The Lords also found that the appellants were persecuted on account of their membership in a broadly-defined gender-based “particular social group.” Lord Steyn noted that “it is plain that the admitted well-founded fear of the two women is “for reasons” of their membership of [the broad] social group.”<sup>47</sup> Effectively anticipating one of the BIA majority’s justifications for its decision in *Matter of R—A—*, Lord Steyn continued: “Given the central feature of state tolerated and state-sanctioned gender discrimination, the argument that appellants fear not because of membership of a social group but because of the hostility of their husbands is unrealistic.”<sup>48</sup> Through the development of an analogy, Lord Hoffman also effectively anticipated the *R—A—* majority’s flawed contention that the persecutor’s exclusive focus on the respondent (and not other members of the designated social group) precluded the persecution from being on account of the respondent’s social group membership and, additionally, described the impact of the failure of state protection on the nexus inquiry:

Answers to questions about causation will often differ according to the context in which the question is asked. Suppose oneself in Germany in 1935. There is discrimination against Jews in general, but not all Jews are persecuted. Those who conform to the discriminatory laws, wear yellow stars out of doors and so forth can go about their ordinary business. But those who contravene the racial laws are persecuted. Are they being persecuted on account of race? In my opinion, they plainly are. It is therefore a fallacy to say that because not all members of a class are being persecuted, it follows that persecution of a few cannot be on grounds of membership in that class. Or to come nearer to the facts of the present case, suppose the Nazi government in those days did not actively organi[z]e violence against the Jews, but pursued a policy of not giving any protection to Jews subject to violence by neighbo[]rs. A Jewish shopkeeper is attacked by a gang organi[z]ed by an Aryan competitor who smash his shop, beat him up and threaten to do it again if he remains in business. The competitor and his gang are motivated by business rivalry and a desire to settle old personal scores, but they would not have done what they did unless they knew that the authorities would allow them to act with impunity. And the ground upon which they enjoyed impunity was that the victim was a Jew. Is he being persecuted on account of race? Again, in my opinion, he is.

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<sup>46</sup> *Id.* at 569 (Hope, L.).

<sup>47</sup> *Id.* at 558 (Steyn, L.).

<sup>48</sup> *Id.*

An essential element in the persecution, the failure of the authorities to provide protection, is based upon race. It is true that one answer to the question “Why was he attacked?” would be “because a competitor wanted to drive him out of business.” But another answer, and in my view the right answer in the context of the Convention, would be “he was attacked by a competitor who knew that [the shopkeeper] would receive no protection because he was a Jew.”

In the case of Mrs. Islam, the legal and social conditions which according to the evidence existed in Pakistan and which left her unprotected against violence by men were discriminatory against women. For the purposes of the Convention, this discrimination was the critical element in the persecution. In my opinion, this means that she feared persecution because she was a woman. There is no need to construct a more restricted social group simply for the purpose of satisfying the causal connection which the Convention requires.<sup>49</sup>

Australian case law also recognizes social groups defined by gender: in a case involving a Filipina victim who was systematically physically and sexually abused over the course of a 27-year marriage and who was denied state protection against her husband, Lesley Hunt, a member of the Australian Tribunal, describes how shared immutable and social characteristics bind women as a “particular social group” *per se*:

It is the Tribunal’s view that “women” . . . whilst being a broad category, nonetheless have both immutable characteristics and shared common social characteristics which make them cogni[z]able as a group and which may attract persecution. The obvious immutable characteristic is that of gender. It simply cannot be argued that gender is a characteristic which can be, or should be required to change. It is a characteristic fundamental to individual identity . . .

The shared social characteristics common to all women, relate to gender and either emanate from, or are generally perceived to emanate from gender. They include the ability to give birth, the role of principal child-rearers, nurturers, keepers of the family home, supportive partners in a relationship. And . . . it is commonly expected throughout most societies that it is characteristic of women to remain loyal to their husband, to keep marriages together,

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<sup>49</sup> *Id.* at 565 (Hoffmann, L.).

regardless of their treatment within that marriage. It is the Tribunal's view therefore that women form a cogni[z]able group. . .

. . . That women share a common social status is evident from the fact that women generally earn less than men and that few women hold positions of power in both government and non-government institutions. . .

Another element binding all women, regardless of culture or class, is that of the fear of being subjected to male violence. Whether the fear relates to violence in the form of rape, domestic violence, incest, sexual harassment, sexual exploitation, or female genital mutilation, it is all located within the context of male violence. That such fear is a common characteristic amongst women is evidenced by . . . laws aimed specifically at addressing the issue of violence against women. That such fear is well-founded is evidenced by the high incidence of violence against women. . .

That domestic violence . . . is regarded in many countries as a private problem rather than a public crime, can be directly attributed to women's social status; to the fact that historically, in many societies, women have been, and in many instances still are, regarded as being the private property of firstly their fathers then their husbands. That women face differential treatment within the legal system arising from their social status, is evident from the focus given to women and violence against women, in for example, the U.S. Department of State Country Reports. . . That women share a common social status is further evidenced by the establishment of the United Nations Commission on the Status of Women and other formal mechanisms for the advancement of women's status including the UN Decade for Women from 1975 to 1985. Women as a group have been specifically highlighted in the International Convention on the Elimination of All Forms of Discrimination Against Women [and] the Convention on the Political Rights of Women. . .

It is the Tribunal's view that there is ample evidence indicating that "women" are a particular social group as, in spite of being a broad group, they are a cogni[z]able group in that they share common fundamental and social characteristics. Whilst there does exist separation in

lifestyles, values, political leaning etc., women share a defined social status and as such are differentially dealt with by society as a group. It is women's social status that often leads to the failure of state protection, and this is particularly so with regard to domestic violence.<sup>50</sup>

### 3. The Gender Guidelines

The cases discussed above highlight the evolving and often erratic nature of the jurisprudence concerning claims alleging persecution on account of gender-based "particular social groups." The inconsistencies in the case law and the uncertainties inherent in presenting asylum claims based on gender-related persecution led asylum advocates, scholars and domestic and international organizations to press for the development of more efficient procedures for the adjudication of gender-based asylum claims, and ultimately, on May 26, 1995, prompted the INS Office of International Affairs to issue Considerations For Asylum Officers Adjudicating Asylum Claims From Women, a memorandum intended to "provide the INS Asylum Officer Corps with guidance and background on adjudicating cases of women having asylum claims based wholly or in part on their gender."<sup>51</sup> Broadly speaking (and as described in greater depth below), this guidance includes the delineation of forms of persecution that are unique to women or predominantly inflicted on women, the clarification that women *per se* (or a sub-group of women) may constitute a "particular social group," and the recognition that harms inflicted on women in the so-called "private sphere" may constitute persecution where the state is unwilling or unable to protect the victim.

The INS Gender Guidelines are premised on the principle that gender-based asylum claims must be evaluated within the framework provided by international human rights instruments and the interpretation of those instruments by international organizations.<sup>52</sup> The INS Gender Guidelines refer directly to the Conclusions of the UNHCR Executive Committee, the UNHCR Guidelines on the Protection of Refugee Women and the Canadian Gender Guidelines, which along with other international models, are described below.

*i. Guidance Provided by UNHCR: Conclusion No. 39 and the Guidelines on the Protection of Refugee Women*

Spurred on by the UN General Assembly's 1979 adoption of the comprehensive Convention on the Elimination of All Forms of Discrimination Against Women ("CEDAW"),<sup>53</sup> in 1985 the Executive Committee of UNHCR adopted Conclusion No.

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<sup>50</sup> N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994) (Hunt) (emphasis added), quoted in 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, at 64-66 (1988).

<sup>51</sup> INS Gender Guidelines, *supra* note 4, at 1.

<sup>52</sup> *Id.* at 2.

<sup>53</sup> CEDAW, the most comprehensive international instrument detailing women's human rights, seeks to eliminate the obstacles that prevent the equal participation of women in political, social, economic and cultural life. Signatory states are prohibited from taking actions discriminatory towards women and are

39.<sup>54</sup> Noting that refugee women and girls, who constitute the majority of the world's refugee population, are exposed to "special problems" on account of their gender,<sup>55</sup> Conclusion No. 39 encouraged States to recognize female asylum-seekers who face harsh or inhuman treatment due to their transgression of social mores as a "particular social group" within the meaning of the Refugee Convention.<sup>56</sup>

UNHCR followed Conclusion No. 39 with the Guidelines for the Protection of Refugee Women<sup>57</sup> in 1991. While the UNHCR Gender Guidelines focus primarily on international protection of refugee women and are particularly concerned with treatment of women and girls in refugee camps, the guidelines point to the need for domestic immigration regimes to accept gender-based persecution as a valid basis for a grant of asylum status, and elaborate on Conclusion No. 39 by recommending that women "fearing persecution or severe discrimination on the basis of their gender should be considered a member of a social group for the purposes of determining refugee status."<sup>58</sup> Although the UNHCR Gender Guidelines are not binding on state parties to the Refugee Convention and Protocol, UNHCR's interpretations of the Refugee Convention are widely respected and often followed.<sup>59</sup> Indeed, the persuasive value of the UNHCR Gender Guidelines is reinforced by Conclusions issued by the UNHCR Executive Committee since promulgation of the guidelines, stressing their applicability to forms of persecution unique to or disproportionately suffered by women:

In accordance with the principle that women's rights are human rights, these guidelines should recogni[z]e as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and the 1967 Protocol, including persecution through sexual violence or other gender-related persecution.<sup>60</sup>

ii. *Canada's Guidelines for Women Refugee Claimants Fearing Gender-Related Persecution*

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required to take affirmative steps to eradicate discriminatory treatment of women. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. res. 34/180, 34 U.N. GAOR Supp. (No. 46) at 193, U.N. Doc. A/34/46 at Arts 1 & 2, entered into force Sept. 3, 1981; accord INS Gender Guidelines, *supra* note 4, at 2.

<sup>54</sup> Conclusion No. 39, *supra* note 3.

<sup>55</sup> *Id.* at ¶ (c).

<sup>56</sup> *Id.* at ¶ (k) ("States, in the exercise of their sovereignty, are free to adopt the interpretation that women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered a "particular social group" within the meaning of Article 1 A(2) of the United Nations Refugee Convention.").

<sup>57</sup> UNHCR Gender Guidelines, *supra* note 3.

<sup>58</sup> *Id.* at 40.

<sup>59</sup> Macklin, *supra* note 50, at 29; Diana Saso, *The Development of Gender-based Asylum Law: A Critique of the 1995 INS Guidelines*, 8 HASTINGS WOMEN'S L.J. 263, 269 (1997).

<sup>60</sup> Recommendation of UNHCR Executive Committee (1995) (quoted in Australian Gender Guidelines, *supra* note 3, at ¶ 2.6).

The Canadian Gender Guidelines,<sup>61</sup> issued by the Canadian Immigration and Refugee Board in 1993 (and updated in 1996), were the first national guidelines to formally recognize that women fleeing gender-related persecution can be refugees under the Refugee Convention. The Canadian Gender Guidelines are predicated upon the general proposition that:

Although gender is not specifically enumerated as one of the grounds for establishing Convention refugee status, the definition of Convention refugee may properly be interpreted as providing protection for women who demonstrate a well-founded fear of gender-related persecution by reason of any one, or a combination of, the enumerated grounds.<sup>62</sup>

The guidelines specifically acknowledge that certain forms of persecution may be inflicted exclusively or predominantly on women: noting that the “[t]he circumstances which give rise to women’s fear of persecution are often unique to women,”<sup>63</sup> the guidelines cite domestic violence, as well as infanticide, genital mutilation, bride-burning, forced marriage, forced abortion and compulsory sterilization as examples of female-specific experiences, and point out that these forms of harm may constitute persecutory acts.<sup>64</sup> The guidelines highlight that many women “fear persecution resulting from certain circumstances of . . . acts of violence either by public authorities or at the hands of private citizens from whose actions the state is unwilling or unable to adequately protect the concerned persons” and confirm that “the acts of violence which a woman may fear include violence inflicted in situations of domestic violence.”<sup>65</sup> The guidelines provide that the pervasiveness of domestic violence (and other gender-specific crimes) in a society is irrelevant in determining whether such violence constitutes persecution: the real issues in the “persecution” inquiry are, rather, (i) whether the violence – experienced or feared – is a serious violation of a human right; and (ii) whether the experienced or feared violence can be said to result from a failure of state protection.<sup>66</sup>

The Canadian Gender Guidelines also illuminate the “particular social group” inquiry. The guidelines endorse the three-prong *Ward* test of “particular social group” and recognize social groups defined by gender *per se*: “Gender is an innate characteristic and, therefore, women may form a particular social group within the Convention refugee definition.”<sup>67</sup> It thus being established that women can constitute a “particular social group,” analysis then shifts to “whether a claimant, as a woman, has a well-founded fear of persecution in her country of nationality by reason of her membership in this group.”<sup>68</sup> The Canadian guidelines are adamant that this “nexus” question must be analyzed

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<sup>61</sup> Canadian Gender Guidelines, *supra* note 3.

<sup>62</sup> *Id.* at § A.I.

<sup>63</sup> *Id.* at § B.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at § A.I.

<sup>66</sup> *Id.* at § B.

<sup>67</sup> *Id.* at § A.III.

<sup>68</sup> *Id.*

separately from the “particular social group” inquiry, and after a particular social group has been identified: failure to satisfy the nexus – that the well-founded fear of persecution was *on account of* the identified social group – does not demote a “particular social group” to an inferior status once the common “innate or unchangeable characteristic”<sup>69</sup> of its members has been recognized.

iii. *Australia’s Guidelines on Gender Issues*

Australia’s Gender Guidelines,<sup>70</sup> although issued by the Department of Immigration and Multicultural Affairs in 1996 (after the distribution of the INS Gender Guidelines), represent a further aid to the adjudication of gender-based asylum claims. Paraphrasing domestic case law unambiguously recognizing a “particular social group” defined by gender *per se*,<sup>71</sup> the Australian Gender Guidelines state that:

While ‘gender’ of itself is not a Convention ground, it may be a significant factor in recogni[z]ing a particular social group or an identifying characteristic of such a group. . . [W]hilst being a broad category, women nonetheless have both immutable characteristics and shared common social characteristics which may make them cogni[z]able as a group and which may attract persecution.<sup>72</sup>

The Australian guidelines echo the Canadian Gender Guidelines in identifying the forms of persecution unique to or disproportionately affecting women.<sup>73</sup>

iv. *The United Kingdom’s Asylum Gender Guidelines*

Issued recently in November 2000, the UK Gender Guidelines<sup>74</sup> are the most comprehensive of the national guidelines to date. The UK Gender Guidelines explicitly challenge the assumption that men and women benefit equally from the international protection granted by the Refugee Convention, pointing out that “since the drafting of the Refugee Convention, the dominant conception of the refugee in Western jurisprudence

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<sup>69</sup> *Id.* (quoting *Ward* test).

<sup>70</sup> Australian Gender Guidelines, *supra* note 3.

<sup>71</sup> See N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994).

<sup>72</sup> Australian Gender Guidelines, *supra* note 3, at ¶ 4.33.

<sup>73</sup> Notably, however, while both the INS and Canadian Gender Guidelines recognize domestic violence as a form of persecution directed at women, the Australian Gender Guidelines do not explicitly identify domestic violence as a persecutory act. However, because the guidelines’ language recognizing women *per se* as a “particular social group” is drawn from N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994), a case granting asylum to a Filipina victim of systematic physical and sexual abuse at the hands of her husband, the Australian Gender Guidelines implicitly acknowledge that domestic violence can constitute persecution. See *generally*, Macklin, *supra* note 50, at 39, 41.

<sup>74</sup> UK Gender Guidelines, *supra* note 3.

has been of a man.”<sup>75</sup> The UK Gender Guidelines are specifically intended to correct this imbalance.<sup>76</sup>

One feature distinguishing the comprehensive approach of the UK Gender Guidelines from the other national guidelines is the UK guidelines’ articulation of various definitions relating to gender and elements of the refugee definition. In particular, the UK guidelines define “gender-specific forms of harm”:

Certain forms of harm are more frequently or only used against women or affect women in a manner which is different from men. These include, but are not limited to, for example, sexual violence, societal and legal discrimination, forced prostitution, trafficking, refusal of access to contraception, bride burning, forced marriage, forced sterili[z]ation, forced abortion and (forced) female genital mutilation, enforced nakedness / sexual humiliation.<sup>77</sup>

Although not included in this list, elsewhere, the UK guidelines specifically identify domestic violence,<sup>78</sup> “marriage-related harm” and “violence within the family”<sup>79</sup> as forms of gender-specific harms that may constitute persecution. Consistent with the Canadian guidelines, the UK Gender Guidelines propose that the “persecution” inquiry should focus on two separate questions: (i) Is there a violation of human rights or harm which amounts to serious harm? and (ii) Is the state unable or unwilling to offer effective protection?<sup>80</sup>

The UK Gender Guidelines set forth explicitly than “particular social groups” may be defined by gender *per se*: adopting the *Acosta* definition of social group<sup>81</sup> and describing at the Lords’ discussion of social group in *Islam & Shah*,<sup>82</sup> the UK guidelines provide that “[p]articular social groups can be identified by reference to innate or unchangeable characteristics that a woman should not be expected to change,”<sup>83</sup> and cite gender as an example of such a characteristic.

v. *The INS Considerations For Asylum Officers Adjudicating Asylum Claims From Women*

Drawing on both international human rights instruments and domestic case law, and consistent with the Canadian, Australian and UK guidelines, the INS Gender

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<sup>75</sup> *Id.* at ¶ 1.1.

<sup>76</sup> *Id.* at ¶ 1.2.

<sup>77</sup> *Id.* at ¶ 1.14.

<sup>78</sup> *Id.* at ¶ 2B.9.

<sup>79</sup> *Id.* at ¶ 2A.17.

<sup>80</sup> *Id.* at ¶ 2.5.

<sup>81</sup> *Id.* at ¶ 3.40.

<sup>82</sup> *Id.* at ¶¶ 3.35-38, 3.41-43, discussing *Islam & Shah*, [1999], 2 All E.R. 545.

<sup>83</sup> UK Gender Guidelines, *supra* note 3.

Guidelines recognize the varied forms of harm that are unique to or commonly befall women, identifying “sexual abuse, rape, infanticide, genital mutilation, forced marriage, slavery, domestic violence and forced abortion” as forms of harm that have arisen in the asylum context.<sup>84</sup> The INS guidelines note that in assessing whether gender-specific harms constitute persecution, analysis “should not vary based on the gender of the victim.”<sup>85</sup> In light of the “issues of particular complexity” raised by gender-related claims,<sup>86</sup> the INS Gender Guidelines seek to ensure equal treatment of men and women under the Refugee Act by helpfully suggesting that the “persecution” inquiry should typically result in a finding of persecution where certain gender-related harms are alleged. The guidelines emphasize that “serious physical harm has consistently been held to constitute persecution,” and note that “severe sexual abuse does not differ analytically from beatings, torture, or other forms of physical violence that are commonly held to amount to persecution.”<sup>87</sup> Indeed, the INS Gender Guidelines imply that domestic violence, along with rape, infanticide and genital mutilation – forms of harm primarily directed at women and girls that the guidelines explicitly recognize may constitute past persecution<sup>88</sup> – also do not differ analytically from beatings and torture: the guidelines insist that asylum can be granted for private actions, including domestic violence, when the applicant’s government is either unable or unwilling to protect her.<sup>89</sup> The INS Gender Guidelines are consistent with the other national guidelines in providing that a finding of persecution does not bear upon the separate inquiry of whether the persecution was inflicted on account of protected ground.<sup>90</sup>

Adopting the *Acosta* test, the INS Gender Guidelines also clarify that “particular social groups” may be defined by gender *per se*: the guidelines note the *Fatin* court’s recognition of a social group defined by gender *per se*, and cite the *Safaie* decision’s confirmation that a social group may be defined solely in terms of gender.

While the INS Gender Guidelines are not formally binding on immigration judges or appellate courts, critics and concerned advocates found the BIA’s holding in *Matter of R—A—* especially alarming, given the guidelines’ explicit recognition that harms inflicted on women in the so-called “private sphere” – such as domestic violence – constitute persecution where the state is unwilling or unable to protect the victim and specific clarification that “particular social groups” may be defined in terms of gender. Of course, the BIA majority’s analysis and conclusions in *Matter of R—A—* highlight the weaknesses of the INS Gender Guidelines, and confirm that regulatory support is required to promote the fair adjudication of gender-based asylum claims.

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<sup>84</sup> INS Gender Guidelines, *supra* note 4, at 9.

<sup>85</sup> *Id.*

<sup>86</sup> *Id.* at 8.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 4. Sexual abuse is also enumerated in this list.

<sup>89</sup> “[T]he persecutor might also be a person or group outside the government that the government is unable or unwilling to control. If the applicant asserts a threat of harm from a non-government source, the applicant must show that the government is unwilling or unable to protect its citizens. It will be important in this regard, though not conclusive, to determine whether the applicant has actually sought help from government authorities. Evidence that such an effort would be futile would also be relevant.” *Id.* at 17-18.

<sup>90</sup> *Id.* at 8.

### III. *MATTER OF R—A—*

#### A. *The Facts*

Rodi Alvarado Peña was born and raised in Jutiapa, Guatemala. In 1984, at the age of sixteen, she married Francisco Osorio, a former soldier who was five years her senior, and they moved to Guatemala City. Domineering and violent, Osorio physically and sexually abused Ms. Alvarado Peña from the very beginning of the marriage. The BIA described Osorio’s “terribl[e]”<sup>91</sup> abuse of Ms. Alvarado Peña (the “respondent” or the “applicant”) as follows:

Her husband would insist that the applicant accompany him wherever he went, except when he was working. He escorted the respondent to her workplace and he would often wait to direct her home. To scare her, he would tell the respondent stories of having killed babies and the elderly while he served in the army. Often he would take the respondent to cantinas where he would become inebriated. When the respondent would complain about his drinking, her husband would yell at her. On one occasion, he grasped her hand to the point of pain and continued to drink until he passed out. When she left a cantina before him, he would strike her. As their marriage proceeded, the level and frequency of his rage increased concomitantly . . . He dislocated the respondent’s jaw bone when her menstrual period was 15 days late. When she refused to abort her 3-4 month old fetus, he kicked her violently in the spine. He would hit or kick the respondent “whenever he felt like it, wherever he happened to be: in the house, on the street, on the bus.”

The respondent’s husband raped her repeatedly. He would beat her before and during the unwanted sex. When the respondent resisted, he would accuse her of seeing other men and threaten her with death. The rapes occurred “almost daily” and they caused her severe pain. He passed on a sexually transmitted disease to the respondent from his sexual relations outside of their marriage. Once, he kicked the respondent in her genitalia, apparently for no reason, causing the respondent to bleed severely for 8 days. The respondent suffered the most severe pain when he forcefully sodomized her. When she protested, he

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<sup>91</sup> *Matter of R—A—*, Int. Dec. 3403, at 26.

responded as he often did, “You’re my woman, you do what I say.”<sup>92</sup>

Osorio also nearly put the respondent’s eye out, broke windows and mirrors with her head, tried to cut off her hands with his machete, kicked her in the abdomen, whipped her with pistols, and threatened her with knives.<sup>93</sup>

Ms. Alvarado Peña unsuccessfully sought refuge from her husband within Guatemala: she ran away to her brother’s and parent’s homes, but her husband always found her, beat her and forced her to return home with him; she rented a room outside Guatemala City, but Osorio found her, hit her in the head so hard she lost consciousness and, when she regained consciousness hit and kicked her until she blacked out again; after she returned home with Osorio, one night he woke her with a harsh blow, “struck her face, whipped her with an electrical cord, [and] pulled out a machete and threatened to deface her, to cut off her arms and legs, and to leave her in a wheelchair if she ever tried to leave him. He warned her that he would be able to find her wherever she was.”<sup>94</sup> After Ms. Alvarado Peña fled to the United States, Osorio told her sister that he would hunt down and kill the respondent if she ever returned to Guatemala.<sup>95</sup>

Ms. Alvarado Peña’s attempts to secure the protection of the Guatemalan authorities proved as futile as her attempts to hide from her husband. The police refused to get involved and although, at her insistence, they ultimately issued three citations to Osorio to appear, they took no action when he ignored them. Ultimately, one of the respondent’s complaints was referred to a judge who indicated that he “would not interfere in domestic disputes.”<sup>96</sup> Moreover, the respondent knew of no shelters or other organizations in Guatemala that could protect her.<sup>97</sup>

### ***B. The Immigration Judge’s Ruling and Reasoning***

In a written decision, Immigration Judge (“IJ”) Mimi Schooley Yam granted Ms. Alvarado Peña’s application for asylum. The IJ found that the applicant had suffered past persecution and established a well-founded fear of future persecution<sup>98</sup> at the hands of her husband, who the government of Guatemala was unwilling to control “because domestic abuse. . . is considered a family matter in which outside intervention is inappropriate.”<sup>99</sup> The IJ determined that Ms. Alvarado Peña’s was a member of the social group of “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination”<sup>100</sup> and that this

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<sup>92</sup> *Id.* at 3.

<sup>93</sup> *Id.* at 4.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 5.

<sup>96</sup> *Id.*

<sup>97</sup> *Matter of R—A—*, Int. Dec. 3403, at 5.

<sup>98</sup> *Matter of Alvarado*, No. A73753922 (IJ (San Francisco) Sept. 20, 1996) at 8.

<sup>99</sup> *Id.*

<sup>100</sup> *Matter of Alvarado*, No. A73753922 (IJ (San Francisco) Sept. 20, 1996) at 9.

group constituted a “particular social group”<sup>101</sup>: citing to *Acosta*, the IJ observed that members of the applicant’s group shared gender and past associations – namely “intimate[] involvement with a male companion who practices male domination through violence”<sup>102</sup> – and thus satisfied the immutable characteristic test. The IJ held that the applicant’s gender was a fundamental characteristic that she should not be expected to change and that her prior relationship with her husband was a historical reality she could not change.<sup>103</sup> The judge noted that Guatemalan society permits men to control their female intimate companions through violence without fear of legal or social reproach. Identifying Guatemala’s social climate and the government’s inaction as evidence of the persecutor’s motivations, and noting that “[the applicant], and others like her, are targeted for persecution specifically *because* they are women who have been involved intimately with their male companions, who believe in male domination,”<sup>104</sup> the IJ thus concluded that Ms. Alvarado Peña was persecuted on account of her social group membership.

The INS appealed the IJ’s grant of asylum, asserting that the respondent had “not demonstrated that she suffered harm or persecution, nor that she fears harm or persecution, based upon race, religion, nationality, political opinion or membership in a particular social group.”<sup>105</sup> Given that there had been several other highly publicized IJ grants of asylum in domestic violence cases in which the INS had not pursued appeals<sup>106</sup> and in light of the INS Gender Guidelines’ contemplation of domestic violence as a basis for asylum, Ms. Alvarado Peña’s counsel wrote a letter to the INS General Counsel asking if the Service might “reevaluate its position in [the] case and withdraw its appeal.”<sup>107</sup> However, neither the written request nor subsequent verbal communications altered the INS’ decision to appeal.<sup>108</sup>

### C. *The Decision of the BIA Majority*

The BIA heard the appeal *en banc*, and in a sharply divided 10-5 vote, reversed the IJ’s grant of asylum. The majority confirmed the IJ’s finding that the harm suffered by the respondent was “more than sufficient” to constitute persecution<sup>109</sup>: indeed, in concluding a detailed account of the facts, the majority noted “[w]e struggle to describe

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<sup>101</sup> *Id.* at 9-10.

<sup>102</sup> *Id.* at 10.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Notice of Appeal by INS, Sept. 18, 1996.

<sup>106</sup> *See, e.g., Matter of A & Z*, Nos. A72-190-893 & A72-793-219, (IJ (Arlington) Dec. 20, 1994) (granting asylum to a Jordanian women who had been physically and verbally abused throughout a 30-year marriage by her husband, who was a wealthy and successful businessperson; the IJ found the applicant to be a member of the social group of women who are “challenging the traditions of Jordanian society and government”); *Matter of M & K*, No. A72-374-558 (IJ (Arlington) Aug. 9, 1995) (granting asylum on social group and political opinion grounds to a woman from Sierra Leone who was subjected to FGM against her will, and verbally and physically abused by her husband; the IJ defined the social group as “women who have been punished with physical spouse abuse for attempting to assert their individual autonomy”).

<sup>107</sup> Letter from Jane B. Kroesche to David Martin, INS General Counsel, July 21, 1997.

<sup>108</sup> Karen Musalo, *Matter of R—A—: An Analysis of the Decision and Its Implications*, 76 INTERPRETER RELEASES 1177, 1181 (Aug. 9, 1999).

<sup>109</sup> *Matter of R—A—*, Int. Dec. 3403, at 10.

how deplorable we find the husband’s conduct to have been.”<sup>110</sup> The majority also did not dispute that the respondent successfully established a failure of state protection.<sup>111</sup> However, the BIA majority rejected the IJ’s “particular social group” and “nexus” analyses: the majority held (i) that the social group defined by the IJ does not constitute a “particular social group”;<sup>112</sup> and (ii) that the persecutor was not motivated to harm the respondent on account of her membership in the described social group.<sup>113</sup>

### 1. The Majority’s “Particular Social Group” Analysis

In rejecting the IJ’s finding that “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” constitute a “particular social group,”<sup>114</sup> the BIA majority abruptly departed from settled jurisprudence, muddling the *Acosta* and *Sanchez-Trujillo* tests, and imposing a new – internally inconsistent – test for establishing the existence of a “particular social group.” The majority pronounced that the *Acosta* immutable characteristic test stated only a threshold requirement: “The starting point for “social group” analysis remains the existence of an immutable or fundamental individual characteristic in accordance with *Matter of Acosta*. We never declared, however, that the starting point for assessing social group claims articulated in *Acosta* was also the ending point.”<sup>115</sup> The majority then imposed, in addition to the *Acosta* test, two fundamentally new, additional requirements for demonstrating the existence of a cognizable social group: (i) that the members of the proposed group “understand their affiliation with the grouping, as do other persons in the particular society;” and (ii) that the harm suffered (i.e. the spousal abuse<sup>116</sup>) “is itself an important societal attribute, or in other words, that the characteristic of being abused is one that is important within Guatemalan society.”<sup>117</sup> While acknowledging that the social group identified by the IJ “may satisfy the basic requirement of containing an immutable or fundamental individual characteristic,”<sup>118</sup> the majority found that the described social group did not meet the additional criteria. The BIA majority also referred to Ninth Circuit case law, and summarily concluded that the “particular social group” defined by the IJ failed under the *Sanchez-Trujillo* voluntary association test.<sup>119</sup>

Analyzing its additional criteria, first, the majority found that the respondent had failed to show that “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” is a group that is “recognized and understood to be a societal faction, or is

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<sup>110</sup> *Id.* at 5.

<sup>111</sup> *Id.* at 10.

<sup>112</sup> *Id.* at 17.

<sup>113</sup> *Id.* at 21.

<sup>114</sup> *Id.* at 17.

<sup>115</sup> *Id.* at 16.

<sup>116</sup> Implicitly “privatizing” the persecution suffered by the respondent, the BIA majority referred to domestic violence as “spouse abuse” throughout its opinion.

<sup>117</sup> *Id.* at 15.

<sup>118</sup> *Id.* at 14.

<sup>119</sup> *Id.*

otherwise a recognized segment of the population, within Guatemala”<sup>120</sup>: the majority determined that Ms. Alvarado Peña had demonstrated “neither that the victims of spouse abuse view themselves as members of this group, nor, most importantly, that their male oppressors see their victimized companions as part of this group.”<sup>121</sup> Intermingling the “particular social group” and “nexus” inquiries, the majority found persuasive the fact that the group’s supposed lack of external recognizability “makes it much less likely that . . . the respondent will be able to establish that it was her group characteristic which motivated her abuser’s actions,”<sup>122</sup> and concluded that the respondent had failed to satisfy this element.

Second, imposing a requirement derived from a misreading of the BIA’s own analysis in *Matter of Kasinga*, the majority held that the respondent had not demonstrated that spouse abuse is an “important societal attribute.” In deriving this additional requirement, the majority noted that in *Matter of Kasinga*, the Tchamba-Kunsuntu tribe expected or required FGM of women prior to marriage, and that women faced threats, acts of violence or social ostracization for either refusing the practice or attempting to protect female children from FGM. The majority asserted that these facts signified the pervasiveness and importance of the practice of FGM within the Tchamba-Kunsuntu culture.<sup>123</sup> Where Ms. Kasinga had demonstrated that FGM was so pervasive and important that the Tchamba-Kunsuntu tribe targeted “young women. . . who have not had FGM, . . . and who oppose the practice,”<sup>124</sup> Ms. Alvarado Peña, the majority insisted, had not shown “that domestic violence is as pervasive in Guatemala as FGM is among the Tchambu-Kunsuntu tribe, or, more importantly, that domestic violence is a practice encouraged and viewed as societally important in Guatemala.”<sup>125</sup> Commingling the “persecution” inquiry with the “particular social group” analysis, the majority faulted the respondent for failing to show that “women are expected by society to be abused, or that there are any adverse societal consequences to women or their husbands if the women are not abused,”<sup>126</sup> and rejected her described social group on this basis.

Although the Board asserted that both of the additional criteria were required under both Ninth Circuit law and the BIA’s independent assessment of what constitutes a qualifying social group, never before had the Board even mentioned – much less required – these additional requirements in its social group decisions.

## 2. The Majority’s Nexus Analysis

The Board maintained that even were it to accept that “Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination” constitute a “particular social group,” the respondent had not demonstrated that her husband targeted and persecuted her because he

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<sup>120</sup> *Id.* at 15.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 22.

<sup>124</sup> *Id.* (quoting *Matter of Kasinga*, 21 I. & N. Dec. at 365).

<sup>125</sup> *Id.*

<sup>126</sup> *Matter of R—A—*, Int. Dec. 3403, at 15.

believed her to be a member of this social group. Pointing out that Osorio targeted only the respondent, and that he had shown no interest in any member of the social group other than the respondent, the majority insisted that “if group membership were the motivation behind his abuse, one would expect to find some evidence of it manifested in actions towards other members of the same group.”<sup>127</sup> Finding no evidence that other members of the group may be at risk from Osorio, the majority concluded that the persecution suffered by the respondent was not on account of her social group membership.<sup>128</sup> Osorio, the majority argued, was not motivated to harm Ms. Alvarado Peña “even in part because of her membership in a particular social group”<sup>129</sup>: rather “the husband’s focus was on the respondent because she was *his* wife, not because she was a member of some broader collection of women, however, defined, whom he believed warranted the infliction of harm.”<sup>130</sup>

#### **D. The Dissent**

The dissent, joined by BIA Chairman Paul Schmidt, argued vigorously that the IJ had been correct in granting Ms. Alvarado Peña asylum, and articulated its vehement disagreement with the majority opinion: “[The majority opinion] is at odds with [the BIA’s] own precedent, federal court authority, and Department of Justice policy pronouncements, which effectuate our obligation to provide surrogate protection for persons who fear harm inflicted because of some fundamental aspect of their identity.”<sup>131</sup> Contending that the IJ’s decision was consistent with the BIA’s *Acosta* and *Kasinga* precedents in applying the immutable characteristic test exclusively, the dissent insisted that the “laundry list of hurdles” the majority imposed before the respondent could establish her membership in a “particular social group”:

disregards decisions of tribunals, both domestic and foreign, which extend asylum protection to women who flee human rights abuses within their own homes. It also ignores international human rights developments and the guiding principle of the Charter of the United Nations, the Universal Declaration of Human Rights, and the 1951 Convention Relating to the Status of Refugees, “that human

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<sup>127</sup> *Id.* at 17.

<sup>128</sup> The Proposed Rule would specifically address (and reject) this analysis. *See* Proposed 8 C.F.R. § 208.13(b), published at 65 Fed. Reg. at 76598.

<sup>129</sup> *Matter of R—A—*, Int. Dec. 3403, at 2.

<sup>130</sup> *Id.* at 18 (emphasis in original). The majority contended that the respondent’s own testimony undercut the nexus claims: the BIA majority concluded that Osorio abused the respondent “when he was drunk and when he was sober, for not getting an abortion, for his belief that she was seeing other men, for not having her family get money for him, for not being able to find something in the house, for leaving the cantina before him, for reasons related to his mistreatment in the army, and “for no reason at all. Of all these apparent reasons for abuse, none was “on account of” a protected ground, and the arbitrary nature of the attacks further suggests that it was not the respondent’s claimed social group characteristics that he sought to overcome.” *Id.*

<sup>131</sup> *Id.* at 29 (Guendelsberger, Bd. Mem., dissenting).

beings shall enjoy fundamental rights and freedoms without discrimination.”<sup>132</sup>

The dissent also rejected the majority’s “nexus” analysis, contending that the majority was wrong to find that the domestic violence which the respondent suffered was not inflicted on account of her membership in a “particular social group.”<sup>133</sup>

### 1. The Dissent’s “Particular Social Group” Analysis

Invoking the Board’s precedent in *Acosta* and confirming *Acosta*’s identification of sex as a shared immutable characteristic by which a “particular social group” may be defined, the dissent noted preliminarily how the BIA’s decision in *Matter of Kasinga* was not only consistent with the principle articulated in *Acosta*, but also confirmed that “particular social group” may be “defined by reference to gender in combination with one or more additional factors.”<sup>134</sup> The dissent explained how the IJ’s decision – and not the majority’s opinion – was consistent with the BIA’s analysis in *Matter of Kasinga*: in *Kasinga*, the additional factors were ethnicity (membership in the Tchamba-Kunsuntu tribe), bodily integrity (“having intact genitalia”), and opposition to the practice of FGM; in *R—A—*, as the IJ noted, the additional factors were nationality (Guatemalan), relationship with an abusive partner and opposition to domestic violence.<sup>135</sup> Thus, the dissent argued, just as the BIA recognized Ms. Kasinga to be a member of a “particular social group,” the IJ was right to find Ms. Alvarado Peña to be a member of a cognizable social group.

The dissent further rejected the distinctions between *Kasinga* and *R—A—* upon which the majority relied in imposing its additional criteria: not only were the pervasiveness of FGM, its societal importance and possible ostracization for resistance not factors in the formulation of social group in *Kasinga*, the record in *Kasinga* “did not suggest that [Ms.] Kasinga would face severe social ostracization for her refusal to submit to FGM.”<sup>136</sup> Rather, the dissent found that both *Kasinga* and *R—A—*:

involve[d] a form of persecution inflicted by private parties upon family members. In both cases, the victims opposed and resisted a practice that was ingrained in the culture, broadly sanctioned by the community, and not prevented or punished by the state. In both cases, the overarching societal objective underlying the cultural norm was the assurance of male domination.<sup>137</sup>

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<sup>132</sup> *Id.* at 30 (Guendelsberger, Bd. Mem., dissenting).

<sup>133</sup> *Id.* at 39 (Guendelsberger, Bd. Mem., dissenting). In addition to its “particular social group” and “nexus” analyses, the dissent drew upon international human rights instruments, international case law and developments in domestic law (in particular, the INS Gender Guidelines) weighing in favor of affirming the IJ’s grant of asylum to the respondent. These arguments are explored elsewhere in this article.

<sup>134</sup> *Id.* at 32 (Guendelsberger, Bd. Mem., dissenting).

<sup>135</sup> *Id.* (Guendelsberger, Bd. Mem., dissenting); *see also* Alvarado Peña Brief, *supra* note 9, at 19.

<sup>136</sup> *Matter of R—A—*, Int. Dec. 3403, at 32 (Guendelsberger, Bd. Mem., dissenting).

<sup>137</sup> Musalo, *supra* note 106, at 1184.

The dissent also rejected the majority’s reference to the *Sanchez-Trujillo* voluntary association test.<sup>138</sup> Although the majority’s finding that the “particular social group” described by the IJ did not satisfy the voluntary association test was not a basis for its decision, the dissent references a number of subsequent Ninth Circuit decisions in which the court analyzed social group claims without reference to the test enumerated in *Sanchez-Trujillo*. The dissent also notes that the voluntary association test has been rejected by most courts outside the Ninth Circuit, including the House of Lords in *Islam & Shah*.<sup>139</sup>

## 2. The Dissent’s “Nexus Analysis”

Looking first at the factual circumstances surrounding the violence, the dissent concludes that the “record reflects quite clearly that the severe beatings were directed at the respondent by her husband to dominate and subdue her, precisely because of her gender.”<sup>140</sup>

Second, the dissent argues that the very incomprehensibility of the husband’s motives in harming the respondent supports her claim that the persecution was on account of her social group membership.<sup>141</sup> Noting that courts have recognized that the absence of legitimate motives can give rise to an inference that the harm occurred on account of a statutorily protected characteristic,<sup>142</sup> the dissent insists that in *R—A—*, a case where the respondent’s husband treated her as his property, to do with as he pleased, placing undue emphasis (as did the majority) on the respondent’s explanations for her husband’s motivations “misses the obvious point that *no good reason* could exist for such behavior.”<sup>143</sup>

In a related third argument, the dissent focuses on the motive underlying domestic violence, and determines that this underlying motive – the control and subordination of women – gives rise to a presumption that the persecution the respondent suffered was inflicted on account of her gender. Recalling that in *Kasinga*, the Board determined FGM to be a means of controlling women’s sexuality, the dissent analogizes the domestic violence at issue in *R—A—* – “so too does domestic violence exist 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”<sup>144</sup> – and concludes that “the fundamental purpose of domestic violence is to punish, humiliate and exercise power over the victim on account of her gender.”<sup>145</sup> The dissent thus concludes that just as the Board found that Ms. Kasinga had a well-founded fear of persecution in the form of FGM on account of her gender-based “particular social group,” so should the majority have

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<sup>138</sup> *Matter of R—A—*, Int. Dec. 3403, at 30-31 (Guendelsberger, Bd. Mem., dissenting).

<sup>139</sup> See *Islam & Shah*, [1999], 2 All E.R. 545, 554-55 (Steyn, L.).

<sup>140</sup> *Matter of R—A—*, Int. Dec. 3403, at 39 (Guendelsberger, Bd. Mem., dissenting).

<sup>141</sup> *Id.* at 39 (Guendelsberger, Bd. Mem., dissenting).

<sup>142</sup> *Id.* at 40 (Guendelsberger, Bd. Mem., dissenting).

<sup>143</sup> *Id.* at 39 (Guendelsberger, Bd. Mem., dissenting).

<sup>144</sup> *Id.* at 40 (Guendelsberger, Bd. Mem., dissenting).

<sup>145</sup> *Id.* (Guendelsberger, Bd. Mem., dissenting).

recognized Ms. Alvarado Peña as having a well-founded fear of persecution in the form of domestic violence on account of her membership in a gender-based group.

#### IV. THE IMPACT OF MATTER OF R—A—: RESPONSES AND REGULATION

The Board’s decision in *Matter of R—A—* was a substantial setback. Not only was the decision inconsistent with the INS Gender Guidelines and with the Board’s decision in *Matter of Kasinga* (where the BIA recognized that harms unique to women may nonetheless constitute persecution, that social group membership may be defined by gender in combination with other relevant factors, and that nexus determinations may take societal norms and failure of state protection into consideration), by muddling the definition of “particular social group,” *Matter of R—A—* also seriously undermined protection for all asylum seekers whose claims did not fit within the other four enumerated grounds and who allege that they are persecuted on account of their social group membership. *Matter of R—A—* also made establishing nexus in social group claims more difficult, particularly in situations where a persecutor targets a single member of the social group predominantly or exclusively. A further cause of concern to women’s rights activists and human rights organizations was the Board’s “differentiation between the supposedly more private forms of persecution, typically suffered by women, and the more public forms of persecution, typically suffered by men.”<sup>146</sup> Indeed, advocates around the world remain highly concerned by the decision, given the pervasive influence of U.S. case law on the asylum jurisprudence of other countries.

##### A. *Arguments on Appeal: Advocacy for a Broad-Definition of “Particular Social Group” in Cases of Gender-Related Persecution*

The appeals to the Attorney General for certification and reversal of the BIA’s decision in *Matter of R—A—* highlighted the immigration community’s consternation over the ruling: counsel for Ms. Alvarado Peña urged that “[t]he Board’s decision is devastating, not only to Ms. Alvarado, but also as an express refusal to abide by the Board’s own precedent and its failure to recognize the unique and terrible realities faced by victims of domestic violence in other countries,”<sup>147</sup> and the *amici* echoed:

The Board’s decision should be reversed because its refusal to acknowledge that domestic violence can be “on account of” gender represents a radical departure both from the Board’s own asylum jurisprudence and the widely accepted understanding of domestic violence in international human rights and asylum law, domestic civil rights law and the sociological and psychological literature.<sup>148</sup>

##### 1. “Particular Social Group” Arguments

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<sup>146</sup> *Matter of R—A—*, Int. Dec. 3403, at 44 (Guendelsberger, Bd. Mem., dissenting).

<sup>147</sup> Alvarado Peña Brief, *supra* note 9, at 2.

<sup>148</sup> *Amici* Brief, *supra* note 9, at 1.

Counsel and the *amici* argued emphatically that gender can properly be the defining characteristic of a “particular social group”: drawing on the *Acosta* precedent, both counsel and the *amici* confirmed, as had the BIA dissent, *Acosta*’s identification of sex as a shared immutable characteristic by which a “particular social group” may be defined.<sup>149</sup> Counsel described the consistent reliance on the *Acosta* standard by the Board<sup>150</sup> and, like the BIA dissent, highlighted the BIA’s confirmation in *Kasinga* of the application of the *Acosta* standard to social groups defined in terms gender (and other characteristics in addition to gender).<sup>151</sup> Counsel confirmed the dissent’s analogy between the additional defining characteristics in *Kasinga* and the additional identifying factors in *R—A—*,<sup>152</sup> and rejected as inconsistent with *Kasinga* the additional requirements the BIA engrafted to the *Acosta* social group test:

There is no mention in *Kasinga* that the *Acosta* “immutable and fundamental formulation is simply a threshold for establishing a cognizable social group, or that additional criteria must be met. There is also no mention that Ms. Kasinga understood her affiliation with her social group or that the potential harm was an important social attribute. The characteristics which define the social group in *In re R—A—* (gender, nationality, prior relationship) are no less immutable or fundamental than those accepted by the Board in *Kasinga*, or in the unbroken line of Board cases beginning with *Acosta*. The Board’s attempt to spontaneously erect new hurdles must be rejected.<sup>153</sup>

Both counsel and the *amici* discussed federal courts’ adoption of the *Acosta* test and application of the standard in recognizing “particular social groups” defined by gender.<sup>154</sup> As had the BIA dissent, counsel criticized the Board’s suggestion that Ninth Circuit law requires voluntary association as “overbroad,”<sup>155</sup> and the *amici* described the Ninth Circuit’s express recognition that “an immutable characteristic can provide the basis for finding persecution on account of . . . membership in a social group.”<sup>156</sup> Counsel and the *amici* cited foreign courts’ endorsement of the *Acosta* standard and acknowledgment that the test applies to gender-based social groups,<sup>157</sup> and the *amici* also described commentators’ endorsement of the *Acosta* formulation.<sup>158</sup>

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<sup>149</sup> Alvarado Peña Brief, *supra* note 9, at 14-15; *Amici* Brief, *supra* note 9, at 13-14.

<sup>150</sup> Alvarado Peña Brief, *supra* note 9, at 15 (“Subsequent to *Acosta*, the Board has consistently recognized social groups based both on immutable trait and shared past experience.”).

<sup>151</sup> *Id.* at 16.

<sup>152</sup> *Id.* at 19-20.

<sup>153</sup> *Id.* at 20.

<sup>154</sup> *Id.* at 22-24; *Amici* Brief, *supra* note 9, at 16-17.

<sup>155</sup> Alvarado Peña Brief, *supra* note 9, at 23.

<sup>156</sup> *Amici* Brief, *supra* note 9, at 17 (quoting *Velarde v. INS*, 140 F.3d 1305, 1313 (9<sup>th</sup> Cir. 1998)).

<sup>157</sup> Alvarado Peña Brief, *supra* note 9, at n.5 (citing *Ward and Islam & Shah*); *Amici* Brief, *supra* note 9, at n.26 & nn.33-35 (citing *Ward, Islam & Shah*, and N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994)).

<sup>158</sup> *Amici* Brief, *supra* note 9, at 14-15.

## 2. Nexus Arguments

Both counsel and the *amici* insisted that Ms. Alvarado Peña’s was persecuted on account of her membership in a “particular social group,” and that:

[i]n rejecting the incontrovertible evidence that the domestic violence in this case was directed at Ms. Alvarado on account of her membership in a gender-based social group, the Board ignored well-established principles for determining persecutory motive in the asylum context and relied on an outdated view of domestic violence as aberrant, irrational behavior rather than purposeful conduct that is typically used to control women and enforce gender stereotypes.<sup>159</sup>

First, as had the BIA dissent, counsel and the *amici* identified how the BIA majority ignored overwhelming direct evidence that gender was the motivating factor for the abuse Ms. Alvarado Peña suffered.<sup>160</sup>

Second, like the BIA dissent’s third argument, counsel and *amici* insisted that the motive underlying domestic violence – the control and subordination of women – compels the conclusion that Ms. Alvarado Peña was persecuted on account of her gender. Recalling both the Supreme Court’s and the Board’s recognition that a persecutor’s motivations may be inferred from circumstantial evidence, including the socio-cultural or political purpose of the harm,<sup>161</sup> counsel and the *amici* noted how in *Kasinga* the Board relied on expert evidence that FGM had “been used to control women’s sexuality” and “to assure male dominance and exploitation” to conclude that the practice was engaged in “on account of” membership in a gender-based social group.<sup>162</sup> As had the BIA dissent, counsel and *amici* contended that domestic violence, like FGM, is inflicted to assure male domination and control.<sup>163</sup> Relying on various experts, counsel argued that “domestic violence is not random, that is, it is directed at women *because they are women* and is

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<sup>159</sup> *Id.* at 23.

<sup>160</sup> Alvarado Peña Brief, *supra* note 9, at 26-27 (“As the Immigration Judge found here, Ms. Alvarado’s husband brutalized her because she is a woman, because she is his wife, to dominate and control her, and to force her to accept his will. This finding is compelled by Ms. Alvarado’s husband’s numerous statements that he could abuse her because she was a woman and his wife.”); *Amici* Brief, *supra* note 9, at 25 (citing express statements by Ms. Alvarado’s husband, such as “You’re my woman and I can do what I want with you.”).

<sup>161</sup> *Amici* Brief, *supra* note 9, at 25 & n.52 (citing *INS v. Elias Zacharias*, 502 U.S. 478, 483 (1992) (holding that proof of motive can be “direct or circumstantial”); *Matter of S—P—*, Int. Dec. 3287, at 11-14 (1996) (examining circumstantial evidence of the social and political context of persecution in order to determine motive)); Alvarado Peña Brief, *supra* note 9, at 25-26.

<sup>162</sup> *Amici* Brief, *supra* note 9, at 25; Alvarado Peña Brief, *supra* note 9, at 27.

<sup>163</sup> Alvarado Peña Brief, *supra* note 9, at 27; *Amici* Brief, *supra* note 9, at 23, 28 (“[T]he typical batterer uses violence to meet needs for power and control over others. Their actions are often fueled by stereotypical sex-role expectations for “their” women. Moreover, . . . the strongest risk factor for being a victim of partner violence is being female.”) (internal quotations omitted).

committed to impede women from exercising their rights. As such, it is an essential factor in maintaining women’s subordinate status.”<sup>164</sup> *Amici* confirmed that numerous international human rights documents and reports corroborate how domestic violence is inflicted upon women with the intention of forcing them into a subordinate position: *amici* cited a 1992 report of the UN Committee on the Elimination of Discrimination Against Women –

[a]t its most complex, domestic violence exists as a powerful tool of oppression. Violence against women in general, and domestic violence in particular, serve as essential components in societies which oppress women, since violence against women not only derives from but also sustains the dominant gender stereotypes and is used to control women in the one space traditionally dominated by women, the home<sup>165</sup> –

and discussed the conclusions of the UN report *Violence Against Women in the Family* – that “[v]iolence against women is the product of the subordination of women” and that “violence against wives is a function of the belief . . . that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.”<sup>166</sup> On the basis of the experts’ research and international human rights reports describing how domestic violence assures male dominance and exploitation, counsel and the *amici* echo the BIA dissent in arguing that just as the Board recognized that FGM was threatened on Ms. Kasinga on account of her gender-based social group, domestic violence was inflicted upon Ms. Alvarado Peña on account of her social group membership.<sup>167</sup>

Counsel for Ms. Alvarado Peña also undercut the BIA majority’s conclusion that the respondent had not been persecuted on account of her “particular social group” because her husband targeted only the respondent and not all members of the gender-based group. Counsel contended that the Board’s conclusion is inconsistent with its earlier decision in *Kasinga*: in *Kasinga*, Ms. Kasinga’s aunt and prospective husband, who required that Ms. Kasinga submit to FGM as part of the marriage arrangement, did not target all women, but only Ms. Kasinga on the eve of her marriage; similarly, Ms. Alvarado Peña’s husband targeted her exclusively because only she was his wife. Concluding that, as in *Kasinga*, the dispositive factor in *R—A—* should have been whether the individual persecutor was motivated to persecute because of an immutable or fundamental characteristic of the victim – not whether the persecutor persecuted multiple

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<sup>164</sup> Alvarado Peña Brief, *supra* note 9, at 27 (quoting Dorothy Q. Thomas & Michelle E. Beasley, *Domestic Violence as a Human Rights Issue*, 58 ALB. L. REV. 1119, 1144 (1995)).

<sup>165</sup> *Amici* Brief, *supra* note 9, at 30 (quoting *Report of the Committee on the Elimination of Discrimination Against Women*, ¶ 26, 47<sup>th</sup> Sess. Supp. No. 38, at 8, U.N. Doc. A/47/38 (1992)).

<sup>166</sup> *Amici* Brief, *supra* note 9, at 30-31 (quoting *Violence Against Women in the Family*, U.N. Sales No. E.89.IV.5 at 33, 105 (1989)).

<sup>167</sup> Alvarado Peña Brief, *supra* note 9, at 28; *see also Amici* Brief, *supra* note 9, at 31.

victims<sup>168</sup> – counsel insisted that Ms. Alvarado Peña had satisfactorily proven that her well-founded fear of persecution was on account of her social group membership.

### 3. Arguments Drawn from International Human Rights and International Asylum Law

Noting that “[b]oth the United States and the international community have taken substantial steps in recent years toward recognizing the gravity of gender-related persecution and have specifically recognized domestic violence as a ground for asylum,” the *amici* argued that the Board’s refusal to find a nexus between Ms. Alvarado Peña’s persecution by her husband and her membership in a gender-based social group is inconsistent with recent developments in international and domestic human rights and asylum law.<sup>169</sup> The *amici* argued that a critical element in the development of women’s human rights has been the recognition that the serious harms women suffer – harms that typically are the result of cultural or customary practices imposed at the hands of members of the woman’s family or community and that have traditionally been ignored or characterized as private and personal matters – are important human rights concerns, warranting the full protection accorded to more “traditional” human rights violations.<sup>170</sup> The *amici* observed that, parallel with this growing sensitivity to women’s human rights, the international community has developed greater awareness of the special needs of women and girls for protection under refugee and asylum law.<sup>171</sup>

The *amici* described specifically the growing international recognition of domestic violence as a basis for asylum. *Amici* cited the 1996 *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences* for its recommendation that refugee and asylum laws be interpreted “to include gender-based claims of persecution, including domestic violence.”<sup>172</sup> The *amici* noted how various foreign tribunals, including the British House of Lords, have granted refugee protection to women based on membership in social groups defined by gender-based characteristics.<sup>173</sup> *Amici* emphasized how the Canadian Gender Guidelines allow for a

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<sup>168</sup> Alvarado Peña Brief, *supra* note 9, at 28-29.

<sup>169</sup> *Amici* Brief, *supra* note 9, at 6-7.

<sup>170</sup> *Id.* at 7-8, (citing *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/23 (1993); *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, 15 September 1995, U.N. Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 I.L.M. 1534; Declaration on the Elimination of Violence Against Women, G.A. res. 48/104, U.N. GAOR, 48<sup>th</sup> Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993)).

<sup>171</sup> *Id.* at 8 (citing Conclusion No. 39, *supra* note 3; UNHCR Gender Guidelines, *supra* note 3).

<sup>172</sup> *Id.* at 10 (citing *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ESCOR Commission on Human Rights, 52<sup>nd</sup> Sess., Provisional Agenda Item 9(a), ¶ 142(o), U.N. Doc. E/CN.4/1996/53 (1996)).

<sup>173</sup> *Id.* at 9; *see, e.g., Islam & Shah*, [1999], 2 All E.R. 545 (holding that women subject to state-tolerated domestic violence constitute a “particular social group”); V95-02904 (Immigration and Refugee Board of Canada, Convention Refugee Determination Division, Nov. 26, 1997), *reprinted in* GENDER ASYLUM LAW IN DIFFERENT COUNTRIES: DECISIONS AND GUIDELINES 458 (Refugee Law Center, Inc. ed., 1999) [hereinafter GENDER ASYLUM LAW IN DIFFERENT COUNTRIES] (granting refugee protection to a woman from the Ukraine on the basis of membership in a gender-based “particular social group”); Refugee Appeal

grant of asylum based on domestic violence.<sup>174</sup> Finally, drawing upon the INS Gender Guidelines – and citing their express recognition that women often experience types of persecution different from men and that among the types of persecution that are “particular . . . to gender” and that can serve as a basis for asylum is “domestic violence”<sup>175</sup> – the *amici* argued that the Board’s decision contradicts both international and domestic asylum law and policy, and should therefore be reversed.

### ***C. The Proposed Rule on Gender- and Domestic Violence-Based Asylum Claims***

On December 7, 2000, in an acknowledged reaction to advocates’ consternation over the BIA’s analysis and decision in *Matter of R—A—*, and in response to the recognized need for an enhanced analytical framework for the consideration of gender-related and other asylum claims based on the social group ground, the INS issued a Proposed Rule offering guidance on the definition of “membership in a particular social group” and analyzing the requirement that persecution be “on account of” a protected characteristic.<sup>176</sup> As explained in the preamble to the Proposed Rule, the rule was intended to “remove[] certain barriers that the *In re R—A—* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social group.”<sup>177</sup> Nonetheless, the Proposed Rule would not have delineated specifically how a claim of persecution based on domestic violence should be crafted: indeed, in recognition of the difficulty inherent in any effort to establish a universal model for persecution claims based on domestic violence (and, indeed, the inappropriateness of such an attempt), the Proposed Rule would not have set forth the precise characteristics by which a “particular social group” in a domestic violence case should be defined.<sup>178</sup> Rather, the Proposed Rule clarified the test for establishing a cognizable social group and identified gender as an immutable characteristic by which a “particular social group” may be defined. The fundamental change the Proposed Rule would have worked was an amendment to the Code of Federal Regulation – in particular, to 8 C.F.R. § 208.15. As amended, this section would have contained definitions of “persecution,” “on account of the applicant’s protected characteristic” and “membership in a particular social group” in addition to the definition of “firm resettlement” currently located in 8 C.F.R. § 208.15.

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No. 2039/93, at 53 (New Zealand Refugee Status Appeals Authority, Feb. 12, 1996) *reprinted in* GENDER ASYLUM LAW IN DIFFERENT COUNTRIES 581, 633 (granting refugee protection to a woman from Iran and citing favorably Conclusion No. 39, *supra* note 3); N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994) (granting refugee protection to a woman fleeing domestic violence in the Philippines on the basis of membership of the “particular social group” of women).

<sup>174</sup> *Id.* at 11 (citing Canadian Gender Guidelines, *supra* note 3, at § B).

<sup>175</sup> *Id.* at 12 (citing INS Gender Guidelines, *supra* note 4, at 4).

<sup>176</sup> 65 Fed. Reg. 76588; *see generally* INS Issues Proposed Rule on Gender- and Domestic Violence-Based Asylum Claims, 77 INTERPRETER RELEASES 1737 (Dec. 18, 2000) [hereinafter *INS Issues Proposed Rule*].

<sup>177</sup> 65 Fed. Reg. at 76589.

<sup>178</sup> *INS Issues Proposed Rule*, *supra* note 174, at 1738.

The Proposed Rule sought to codify the *Acosta* social group definition: proposed 8 C.F.R. § 208.15(c)(1) would have provided that “[a] particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it.”<sup>179</sup> This definition would have confirmed that gender may be a defining characteristic of a “particular social group”: as the preamble to the Proposed Rule enumerated, “[g]ender is clearly such an immutable trait, is listed as such in *Matter of Acosta*, and is incorporated in this rule.”<sup>180</sup> The definition would also have clarified that the “particular social group” must exist independently of the fact of persecution.<sup>181</sup> The Proposed Rule would have explicitly limited *Sanchez-Trujillo*, providing that the elements of the *Sanchez-Trujillo* voluntary association definition of social group are factors that may be considered in the social group determination, but are not mandatory: proposed 8 C.F.R. § 208.15(c)(3)(i)-(iii) would have stated that “factors that may be considered in addition to the required factors . . . , but [that] are not necessarily determinative, in deciding whether a particular social group exists include whether (i) the members of the group are closely affiliated with each other; (ii) the members are driven by a common motive or interest; [and] (iii) a voluntary associational relationship exists among the members”.<sup>182</sup> The “societal faction” test the BIA majority engrafted to the *Acosta* analysis in *Matter of R—A—* – i.e. whether “the group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question” – would also have been listed as one of the non-determinative factors.<sup>183</sup>

In elaborating the nexus requirement that persecution be “on account of the applicant’s protected characteristic,” the Proposed Rule would have provided that a showing, as demanded by the BIA majority in *Matter of R—A—*, that a person who is motivated to harm a victim because of a characteristic the victim shares with others is also prone to harm or threaten others who share the targeted characteristic should not necessarily be required as a matter of law.<sup>184</sup> Explaining this relaxation of the *R—A—* Board’s stringent nexus analysis, the preamble offered an example:

[I]n a society in which members of one race hold members of another race in slavery, that society may expect that a slave owner who beats his own slave would not beat the slave of his neighbor. It would nevertheless be reasonable to conclude that the beating is centrally motivated by the victim’s race. Similarly, in some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of her gender or because of her status in a domestic relationship. This may be a characteristic that she shares with other women in her

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<sup>179</sup> Proposed 8 C.F.R. § 208.15(c)(1), published at 65 Fed. Reg. at 76598.

<sup>180</sup> 65 Fed. Reg. at 76593.

<sup>181</sup> Proposed 8 C.F.R. § 208.15(c)(1), published at 65 Fed. Reg. at 76598.

<sup>182</sup> Proposed 8 C.F.R. § 208.15(c)(3)(i)-(iii), published at 65 Fed. Reg. at 76598.

<sup>183</sup> Proposed 8 C.F.R. § 208.15(c)(3)(iv), published at 65 Fed. Reg. at 76598.

<sup>184</sup> 65 Fed. Reg. at 76592.

society, some of whom are also at risk of harm from their partners on account of this shared characteristic. Thus, it may be possible in some cases for a victim of domestic violence to satisfy the “on account of” requirement, even though social limitations and other factors result in the abuser having the opportunity, and indeed the motivation, to harm only one of the women who share this characteristic, because only one of the women is in a domestic relationship with the abuser.<sup>185</sup>

Accordingly, proposed 8 C.F.R. § 208.13(b) would have stated that “[e]vidence that the persecutor seeks to act against other individuals who share the applicant’s protected characteristic is relevant and may be considered but shall not be required.”<sup>186</sup>

The Committee recognizes the need for further rule-making clarifying the test for establishing a cognizable “particular social group”, and strongly advocates regulations identifying the unique forms of harm to which women are subject and explicitly recognizing gender-based social groups be adopted by the Justice Department and the Department of Homeland Security. The Committee endorses the Proposed Rule as a model for such regulations.

## V. CONCLUSION

The Committee urges Attorney General John Ashcroft to not reinstate the BIA’s *Matter of R—A—* decision. The Board’s flawed analysis and shocking result in *Matter of R—A—* and evidence of the dangerous precedent this ill-reasoned Board decision sets verify that regulation is needed to confirm standards for gender-related asylum claims and to guide adjudicators in analyzing whether applicants fall within gender-based “particular social groups” and fear persecution on account of their social group membership. The Proposed Rule issued in December 2000 created a valuable model by identifying forms of persecution unique to or disproportionately suffered by women and explicitly recognizing that gender can define a “particular social group”. While, in substance, regulations modelled on the Proposed Rule would codify the international development of the “particular social group” ground, the potential influence of such regulations over domestic asylum jurisprudence would be decisive. The Committee advocates that the Attorney General, in conjunction with the Secretary of the Department of Homeland Security, promulgate regulations regarding gender- and domestic violence-based asylum applications as soon as possible.

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<sup>185</sup> *Id.* at 76593.

<sup>186</sup> Proposed 8 C.F.R. § 208.13(b), published at 65 Fed. Reg. at 76598.

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