PROTECTION AGAINST DOMESTIC VIOLENCE IN ASYLUM LAW IN THE UNITED STATES: PROBLEMS OF DEFINING 'MEMBERSHIP IN A PARTICULAR SOCIAL GROUP'

DICKSON MUGENDI DAVID NTWIGA

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Thesis
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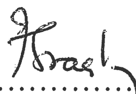
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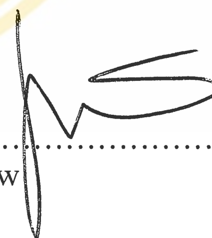
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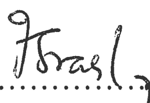
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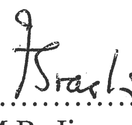
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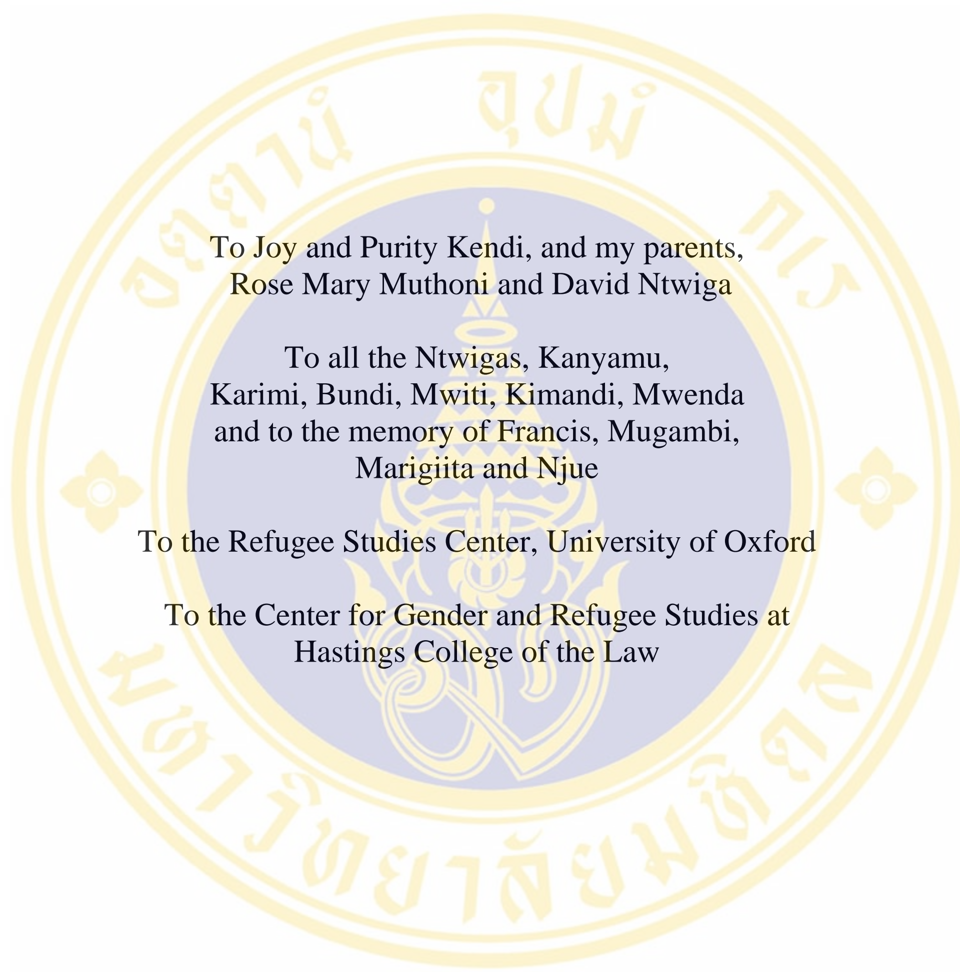

To Joy and Purity Kendi, and my parents,
Rose Mary Muthoni and David Ntwiga

To all the Ntwigas, Kanyamu,
Karimi, Bundi, Mwiti, Kimandi, Mwenda
and to the memory of Francis, Mugambi,
Marigiita and Njue

To the Refugee Studies Center, University of Oxford

To the Center for Gender and Refugee Studies at
Hastings College of the Law

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ABSTRACT

Women's rights advancement continues to uncover and seek to redress gender-related human rights violations like domestic violence which is the subject of this study. This issue is sometimes discussed as a "private" matter, which makes invoking refugee and international human rights laws to provide victims with protection a challenge. This study examines how the United States deals with this problem. The definition of 'membership in a particular social group' which is the Refugee Convention ground for the protection of domestic violence is, at best, problematic. In an effort to ensure that the definition is not too encompassing, jurists have frequently adopted conflicting interpretations of the 1951 Refugee Convention and domestic law, as demonstrated in the U.S.. However, the definitions in various countries, for example countries such as New Zealand, Canada, United Kingdom and Australia show that convergence on a particular definition is possible. Even though the U.S. was the pioneer of the definition of 'membership in a particular social group' in the context of the present study, they have not honoured this definition, and they should return to using it.

KEY WORDS: REFUGEE LAW/ DOMESTIC VIOLENCE/ASYUM-LAW/UNITED STATES/MEMBERSHIP IN A PARTICUALR SOCIAL GROUP

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LIST OF ABBREVIATIONS

BIA	Board of Immigration Appeals (USA)
CA	Court of Appeal
CAT	Convention Against Torture, 1984
CEDAW	Convention on the Elimination of Discrimination Against Women, 1979
CERD	Convention on the Elimination of All Forms of Racial Discrimination, 1965
ICCPR	International Covenant on Civil and Political Rights
CJ	Chief Justice
Executive Committee	Executive Committee of the High Commissioner's Programme
FGM	female genital mutilation
HCHR	High Commissioner for Human Rights
HRC	Human Rights Committee
IAA	Immigration Appellate Authority (UK)
IAT	Immigration Appeal Tribunal (UK)
ICC	International Criminal Court
ICCPR	International Covenant on Civil and Political Rights, 1966
ICESCR	International Covenant on Economic, Social and Cultural Rights, 1966
ICJ	International Court of Justice
IJ	Immigration Judge
INA	Immigration and Nationality Act (USA)
INLA	Irish National Liberation Army
INS	Immigration and Naturalization Service (USA)
IRB	Immigration and Refugee Board (Canada)
J	Justice
NGO	Non-governmental Organization
RRT	Refugee Review Tribunal (Australia)
RSAA	Refugee Status Appeals Authority (New Zealand)

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LIST OF ABBREVIATIONS (cont.)

UDHCR	Universal Declaration of Human Rights, 1948
UN	United Nations
UNGA	United Nations General Assembly
UNGAOR	United Nations General Assembly Official Records
UNHCR	United Nations High Commissioner for Refugees

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CHAPTER 1
INTRODUCTION

As human rights for women continue to advance, sensitive issues like domestic violence which has long been ignored as a "private" issue are now unfolding as acts of human rights abuses in need of redress at both national and international level. When domestic violations occur, victims seek the protection of their governments. If they cannot obtain protection, they seek surrogate protection in other countries as refugees. This would necessarily be in the event where the state in question tolerates or condones such an act.

Many female asylum seekers take flight for fear of domestic violence in their country of origin. This has in turn prompted debates by human rights and refugee advocates as well as feminist scholars on the issue with a view to finding a remedy to the problem. These discussions revolve within the understanding that women's rights are human rights, and that every woman should benefit from these rights without distinction of any kind.

Women fleeing into other countries for fear of domestic violence and owing to a failure of state's protection in the country of origin are entitled to asylum in those countries in accordance with the principle of asylum. The latter "expresses both practice and objective: security on the territory of a state for those in flight from particular kinds of risks or danger in their country of origin; and a durable solution to their plight" (Parliamentary Assembly 1995, p. 13). However, it should be noted that neither the international instruments nor municipal laws of most countries define asylum (Parliament 1995, pp. 13-14).[1] Article 1 of the 1967 United Nations Declaration on Territorial Asylum stresses that the "state granting asylum to evaluate the grounds for the grant of asylum". This therefore means that "the so-called "right"

[1] Article 14 of the 1948 Universal Declaration of Human Rights merely points that: "Everyone has the right to seek and to enjoy in other countries asylum from persecution".

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of asylum remains that of the state, to accord or not protection on its territory, subject only to the constraints of *non-refoulement*" (Parliamentary Assembly 1995, p. 13). While the latter principle will not be discussed in detail (and other relevant protection theories, discussed in chapter 3 below, for that matter) because of the limitation of the thesis, it is very significant in the broader aspect of refugee protection, especially how victims of domestic violence could be protected in the United States in the event where refugee status has not been granted (How this could work is discussed in the concluding chapter 5 below). As Goodwin-Gill asserts:

> The principle of *non-refoulement* must now be understood as applying beyond the narrow confines of Articles 1 and 33 of the 1951 Refugee Convention… the central, if not the only valid question in the *non-refoulement* debate is that of risk to refugees (Chimni 2000, p. 109).

Although the *non-refoulement* principle is already included in the 1951 Refugee Convention, as mentioned above, it will be presented separately to stress its significant role in providing protection to refugees in a broader sense. For example, as will be demonstrated by this thesis, vulnerable groups such as battered women still find it difficult to obtain refugee status on the grounds of 'membership in a particular group', thus the *non-foulement* principle becomes considerably vital to the refugee enquiry.

The theory of top-down processes of change will be discussed to generally highlight the challenges of asylum regime in providing protection to refugees in international law (see discussion in chapter 2). The fact that this theory has an impact on the probability of protecting refugees in a states' jurisprudence, it is deemed to be relevant to the refugee enquiry. It is assumed that when, for instance, states undertake to provide asylum to asylum seekers, international law should take precedence over domestic laws of the states in question. Yet in reality the scheme of protection "operates in contrast to the assumed hierarchy of legal norms, where international should take precedence over domestic law" (Alfredsson et al. 2001, p. 430).

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As will be demonstrated in chapter 2 on "Contextualizing Domestic Violence as Persecution", domestic violence claims a call for an interpretation that is both gender-inclusive and gender-sensitive because the form of harm often experienced by women is different from that of their male counterparts. Just as asylum is not defined in most domestic and international laws, so is persecution. For the purpose of this thesis, the definition of persecution will be adopted from New Zealand's formula: persecution=serious harm + the failure of the state to protect. In reference to the *Ward* case, the New Zealand's Refugee Status Appeals Authority (the RSAA) asserts that the meaning of persecution takes into account "actions which deny human dignity in any key way, and that the sustained or systematic core human rights is the appropriate standard" (Feller at el. 2003, p. 327). (This will be discussed in chapters 3 and 4 below). Although 'political opinion' and 'religion' convention grounds have been invoked to provide protection to victims of domestic violence, 'membership in a particular social group' is presently considered as the most appropriate ground for this purpose. However, this particular convention is the least elaborated of the five convention grounds[2], not withstanding the additional friction imposed by the general reality of top-down processes of change. The U.S. case analysis presented in this paper will affirm this view, while the selected social group definitions in New Zealand, Canada, United Kingdom and Australia will demonstrate how these challenges of analysis of a social group could be accommodated. New Zealand, Canada and United Kingdom have adopted similar approaches toward defining the 'membership in a particular social group.' (This will be discussed in chapter 4 below).

Victims of domestic violence should be some of the beneficiaries of the contemporary sources of international law that generally aims to protect human rights. Where the country of origin fails or is unable to protect human rights of its citizens as is its responsibility, the issue then becomes "a matter of international concern and responsibility" (Feller et al. 2003, p. 37). In the light of this, one of the underlying

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[2] Membership of a particular social group was added to the definition "with no other motive than 'to stop a possible gap' in the coverage afforded by the other, more specific categories … the proposal was adopted without discussion or dissent", Aleinikoff, 'The Meaning of "Persecution" in U.S. Asylum Law', in Howard Adelman, ed., *Refugee Policy*: *Canada and the United States* (York Lanes Press, Toronto, 1991), pp. 296-98).

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questions of this thesis is how this translates into reality, given the fact that in order for victims of gender-based violence to be protected under asylum law the interpretation of relevant national laws almost entirely depends on international human rights instruments and documents. Again, the appropriate convention ground for domestic violence protection-membership in a particular social group-is the weakest of the five convention grounds in terms of elaboration.

There will be a discussion on relevant legal standards for protection against domestic violence in asylum law in chapter 2. For instance, it will be important to demonstrate how domestic violence could be protected in asylum; that is, the extent to which domestic violence qualifies as asylum claim under the 1951 Convention. To this end, it will be necessary that relevant theories relating to domestic violence protection be analyzed, including the two existing schools of thoughts on gender-related persecution.[3] It is an aspect worth comprehending for an understanding of the position of domestic violence cases within the larger context of gender-related persecution claims. While "gender" or "sex" are not explicit refugee protection grounds in the convention, protection against domestic violence is still achievable. The two avenues for the protection against domestic violence are discussed in chapter two below. They are accomplished either through the granting of refugee status to claimants, or preventing return (refouler) to countries where persecution is feared.

Another important aspect for investigation will be the way protection against domestic violence is implemented in the U.S. through the membership in a particular group definition. In a memorandum prepared for the Attorney General of Canada by David A. Martin, 'Treatment of Gender-Based Asylum Claims in the United States' (March 31, 2003), the U.S. is portrayed as being prominent in adopting a variety of protections for female asylum seekers and in pioneering progressive doctrine on gender-based asylum claims. For example, eight years before Canada gave its ruling on the *Ward* case, the "U.S. Board of Immigration Appeals [BIA] issued a widely cited and internationally influential decision interpreting the convention concept of

[3] This will be discussed in detail in the following chapter 2.1.

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persecution on account of membership in a "particular social group" to include persecution on account of sex",(*Matter of Acosta* [4], 19 1 &N Dec. 211, 233 1985). Again, in 1995 the U.S., through the INS, issued a set of guidelines on women's asylum claims. This move was highly applauded by both the UNHCR and NGOs.[5] Even at the international level, the U.S. has showed commendable commitment toward promoting women's rights through active participation in international conferences on protecting women against violence. On a practical note, the U.S. adopted two major statutes to address violence against women. Under these special provisions, spouses subjected to abuse (both those married to a U.S. citizen or permanent residents) can seek "self-petition" for permanent resident status without the spouse's involvement. When granted, the abused spouse is allowed relief from deportation on "favorable terms". The second provision allows victims of trafficking and other forms of criminal mistreatment to apply for "T" and "U" visas which can provide permanent status to them. There are many more examples in this regard, including the highly publicized decision in *Matter of Kasinga*, 21 1&N Dec. 357 (BIA).[6] However, the current progress in this area of law is met with intense resistance as will be demonstrated later in the controversial case in *Matter of R-A-*[7], Int. Dec. 3403 (BIA 1999). Knight (2002, p. 689), sees recent victories made in this area of law in the United States as remaining "incomplete" and "…one- *Aguire-Cervantes*- has been erased." Nevertheless, the progress is being made in the U.S. law "toward the recognition that violations of the human rights of women are a deserving basis for asylum protection" (Knight 2002, p. 689). He cites Attorney General Reno's vacation of the ruling of the Board of Immigration Appeals (BIA) in *Matter of R-A-* in January 2001 as a sign of progress, including the publication of the draft regulations on particular social group in December 2000. Both of these new developments are "… important legal and political victories" (Knight 2002, p. 689). While the *Acosta*'s immutable analysis has set an

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[4] This case is analyzed in chapter 3.2 below.

[5] This commentary can be found in 72 Interpreter Releases 771, 781 (1995).

[6] This case will be included for reference purposes only. It is labelled as 'Appendix A: *Matter of Kasinga*'.

[7] This particular case, discussed in detail below, will demonstrate the continuing challenges faced by those seeking protection from gender persecution in the U.S.

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international standard thus moving the U.S. to the top of the ladder in this area of law, the unresolved case in *Matter of R-A-* casts much doubt on the way forward. Meanwhile, other countries like New Zealand, Canada, and United Kingdom have been inspired by the U.S.'s progress and built on its established foundation to take a considerable leap forward.

In the U.S., two cases, namely *Acosta* and *R-A-* will be analyzed. The first case serves as precedent decision in gender-based persecutions. This particular case is very significant because it serves as a 'seed' for defining the social group both in the U.S. and other jurisdictions outside the U.S., including New Zealand, Canada and United Kingdom. These three countries' definitions of the social group will be presented to demonstrate, though not without difficulty, the possibility of convergence in defining the social group. Australia will highlight a social group definition different from the one adopted by these three countries. The *R-A-* case will be important to highlight the current challenges defining what 'membership in a particular social group' entails and the current situation of domestic violence claims in the U.S.

1.1 Statement of Research Problem and Objectives

Although jurisprudence of most countries seem to agree that domestic violence can be protected under the 'membership of a particular group' category of the 1951 Convention, states seem to vary in their definition. At present, there are two prominent approaches for defining a social group, namely 'protected characteristics' and 'social perception'. In an effort to ensure that the adopted approaches are not too encompassing, jurists have frequently adopted conflicting interpretations of the 1951 Convention and domestic law. While it is possible to identify convergence among states, the present controversial U.S. case in *Matter of R-A-* demonstrates that the task of defining the 'membership in a particular social group' is still problematic and therefore claims brought under this convention ground need to be handled with extreme sensitivity and competence.

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The objectives of this research are:

1) To analyze and examine the 'membership in a particular group' definition in the U.S. aiming at understanding the extent to which their jurisprudence is in accordance with international legal standards. At present the U.S. definition of a social group is, for the most part, restricted to domestic law.
2) To analyze relevant prominent cases on domestic violence in the U.S.A. to understand how standards are applied and subsequently analyze the INS guidelines issued after the *Matter of R-A-*with a view to examining the extent to which the latter provides a clear guidance on the compounded interpretation at present.
3) To examine various 'membership in a particular social group' definitions in New Zealand, Canada, United Kingdom and Australia aiming at identifying convergence among states on the most appropriate approach. Also, it will be useful to understand the differences both within the same jurisdictions and other jurisdictions. Australian will particularly provide a different definitional approach to the other three.

1.2 Research Questions

- What are the legal obligations (both national and international) for the U.S. to protect asylum seekers from fear of domestic violence
- To what extent is the U.S.'s definition of 'membership in a particular social group' is in line with the international law instruments and documents?
- How are these legal obligations interpreted and implemented by the judiciary in the U.S.?
- To what extent is the 'membership in a particular social group' definition problematic in other countries?

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1.3 Research Methodology

The research will be centered on describing and analyzing asylum law documents relating to protection against domestic violence, including both the jurisprudence and academic commentary on all of the relevant issues. In the U.S., *Acosta* will be analyzed as the main precedent decision on gender-based violence asylum claims.[8] One of the most controversial cases in the U.S. asylum law, *Matter of R-A-*, will be analyzed to demonstrate the challenges faced by adjudicators attempting to secure protection for domestic violence violence claimants. It will be important to analyze the new regulations issued after the *Matter of R-A-* to see if those guidelines provide the intended guidance on the issue.

The 1951 Convention relating to the status of refugees and its 1967 Protocol is one of the most important international instruments dealing with refugees. Equally important in this research are the human rights treaties at the universal level.[9] For the purpose of this paper (there are other international documents that are relevant to this thesis but more emphasis will be focused on the ones listed), they include the Convention Against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT); the Convention on Elimination of Discrimination Against Women (CEDAW); and the International Covenant on Civil and Political Rights (ICCPR). These instruments, for the most part, will play an interpretative role. However, the CAT and the ICCPR, in addition to interpreting the 1951 Convention relating to the status of refugees and its Protocol, peremptorily provide protection under the principle of *non-refoulement* of relevant international refugee law; in Articles I and 3, and Article 7 respectively (this principle will be discussed in chapter 2 below).

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[8] *Matter of Kasinga* is also a precedent decision in this area of law, but it is not the primary resource for this thesis (the case is has been included for reference in *Appendix A: Matter of Kasinga*). Another case that would have served as a precedent is *Aguirre-Cervantes*, but it was vacated by the 9th Circuit in 2001. (See *Aguirre-Cervantes v. INS,* 242 F. 3d 1169 (9th Cir. 2001), vacated, 273 F. 3d 1220 (9th Cir. 2001)).

[9] While regional human rights mechanisms are also important instruments of refugee protection, they are outside the scope of this paper. The paper examines the international mechanisms in the light of their influence toward securing protection to refugees within domestic laws of Sates– in this case U.S. asylum law.

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CHAPTER 2
RELEVANT PROTECTION THEORIES

Three theories relevant to this thesis will be discussed. They are top-down processes of change, the basis of obligation and international law protection theory. The theories will endeavor to justify and demonstrate domestic violence as a claim under asylum law. While the top-down processes of change does not specifically demonstrate how it is relevant to this study, it does however offer a hint on the challenge to be expected in adjudicating claims that especially fall under the social group ground category owing to the reasons mentioned above. For this reason, therefore, it is important that it be discussed under this topic.

2.1 Top-down Processes of Change Theory

The concept of "top-down processes of change" is significant in this research because while domestic violence cannot be prevented in the country of origin, it could find remedy under asylum law, but this requires that both national law and international law play particular roles. The concept of top-down process of change assumes that international law takes precedence over domestic law. In practice, however, the reverse is true: "An inverse hierarchy ranks local over national law with international law remaining unknown" (Alfredsson et al. 2001, p. 430).While it has been possible to make considerable achievements in advancing women's rights, including giving women a "political voice", attempts to undertake "domestic legal changes have lagged far behind" (Alfredsson et al. 2001, p. 430). This is attributed, among other things, to the two layers of normative duality:

(a) international human rights law is not directly applicable in many countries, remaining parallel to domestic law but separated from it and often immune to its influence;

(b) in quite a few countries customary law prevails over statutory, or religious over secular law; legal reforms accomplished through the adoption of constitutions and legislation thus runs parallel to

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customary law and/or religious law, which tends to remain immune to their influence (Alfredsson et al. 2001, p. 430).

States in the exercise of their sovereignty evaluate the grounds for the grant of asylum. In this context, the controversial case in *Matter of R-A-* will seek to affirm that "top-down processes of change encounter too many barriers on their way towards women who are intended to benefit from them" (Alfredsson et al. 2001, p. 430). And when "this assumption proves erroneous, there is often too little willingness and ability to foster bottom-up processes of change" (Alfredsson et al. 2001, p. 430).

International law protection theory spells out the two main ways for protection against domestic violence in asylum law. Some highlight the protection standards (international) under which domestic violence is possible of protection as an asylum claim will be discussed; although domestic violence by itself is not a protection convention ground. The contextual analysis of the kind of persecution feared by women victims of domestic violence will provide a justifiable basis for protection. The two existing schools of thought-reformulation and reinterpretation-on gender-related persecution will be weighed in light of this. The first school of thought seeks to have sex or gender added to the five convention grounds. The second school of thought holds that there is no need for a sixth convention ground. It is possible to reinterpret the convention to include gender-based claims. This particular thesis is in favor of the second school of thought. The authors of this school of thought are also known as "authors from the human rights approach" (Spijkerboer 2000, p. 166). Protection will be realized through interpreting the 1951 Convention in line with "a holistic gender-sensitive and gender-inclusive approach to refugee law" (Edwards 2001, p. 48). The views of both the academics in the field of human rights and refugee law and advocates with "feminist" interests will highlight the anticipated obligatory approach for states. Noteworthy, are views of the office of the United Nations High Commissioner for Refugees (hereinafter 'UNHCR') reflected in its handbook on criteria relating to the Status of refugees and its subsequent General Conclusions on International Protection.

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Whereas domestic law is above individuals and assumes a pyramid-like structure "with the sovereign person or unit in a position of supremacy on top..., the international system is horizontal consisting of over 180 independent states, all equal in legal theory (in that they all possess the characteristics of sovereignty) and recognizing no one in authority over them" (Shaw 1997, p. 5). This therefore means that domestic law is between individuals while international law is between states. In domestic law, specific institutions create the law, but the individuals' choice is whether to obey the law or not while on the other hand, states create the law and obey or disobey it (Shaw 1997, p. 5).

Only when we talk about human rights do we see an individual as a subject of international law. For the purpose of this paper, international law of human rights is relevant to the refugee question because it sets out general standards of treatment. My opinion tends to hold that human rights mechanisms are designed is such a way that could possibly see human rights violations decline considerably were they to be implemented freely and willingly by states. But nowadays this notion seems to stagger amid increasing concern over national security, especially after the terrorist attacks on America in September 2001. Asylum policies are becoming increasingly restrictive largely due to internal political reasons, thereby compromising the states' international obligation to the global asylum regime. For example, the U.S. in attempting to prevent another attack from happening has undertaken significant measures on immigration, including the abolition of the Immigration and Naturalization Service (INS) after it established the Department of Homeland Security (DHS) to oversee terrorism prevention (this is discussed in chapter three below).

The very fact that the Universal Declaration of Human Rights has been proposed and advocated by willing states (universally), which can be interpreted, to a greater extent to mean customary practice, falls within the borders of international law. In fact this was reaffirmed by states in the Vienna Declaration. Moreover, mutual collaboration for effective protection is advocated. For example, UNHCR's 'Guidelines on Gender-related Persecution' highlights this mutual role of protection:

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> International human rights law and international criminal law clearly identify certain acts as violations of these laws, such as sexual violence, and support their characterisation as serious abuses, amounting to persecution. In this sense, international law can assist decision-makers to determine the persecutory nature of a particular act.

Essentially, refugee law, international human rights law and customary international law need to complement each other's protection role (this point is emphasized in the concluding chapter).

Basically the Universal Declaration of Human Rights is based on an individual context, in contrast to the international customary law. The latter exhibits no reference to an individual, thus creating a field for debate as to the pertinent relationship between the two entities. International customary law has adamantly retained its states-oriented nature since its inception. This conservative character has prevailed throughout history.

In order to bring the Universal Declaration of Human Rights under its ambit, international customary law has been prompted to open its ever protected territory. This is a considerable achievement toward development of international law in general.

The fact that the Universal Declaration of Human Rights is clearly documented (common standard of reference) – stipulating clearly the expectation of states in this regard – chances of a future dynamic progress in the entire international law in terms of further evolution seem likely. To be precise as to my implication here: Universal Declaration of Human Rights, through their respective covenants, imposes to member states (also to some extent non-member states alike) some considerable obligations. States are expected to implement the rights of individuals within their territories, through the bill of rights in their national laws but monitoring of the same adopts an international perspective. This means that the state in question has to open its border for such monitoring to be carried out thus comprising its sovereignty. Article 2(7) of

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the United Nations Charter at this point is put to test (I will touch upon this later, particularly in my conclusion).

The International Bill of Rights (derived from Universal Declaration of Human Rights) adopted and enforced by municipal law, sets an admirable mechanism of extension of one of the international customary law's tentacles to a predictable destiny. The question, though, is whether the international customary law will be willing to nurture this newborn to maturity, which looks so different from its parents.

For many years, international law alienated the individual entity from its spheres. An individual was not a subject of international law. International law operates on a moral principle of willingness of states, thus customary law is one of the most popular sources of international law. One may ask why, then, states never considered an individual as a subject of international law, although the moral spirit of willingness was the impetus behind which international law was founded. Some of the possible answers to this question could be that the fact that most individuals were subjects in empires, and that there was no common problem shared by nations at an international level and this saw the non-development of more human rights. There were moments in the 19th century when some states, however, extended their hands or crossed the borders in what was referred to as humanitarian intervention to protect minorities living within states. Examples are actions undertaken on behalf of the Greek population living within the Ottoman Empire in 1827, against Syria in 1860, and 1876 to protect Christians from Ottoman troops (Ravindran 1998, p. 4).

Having given these as examples of human rights 'seeds' obviously does not necessarily mean the concept of rights on individual basis was a clear-cut one. In this humanitarian intervention, rights of individuals were protected in some specified spheres in relation to particular states. However, what seemed to prevail then was the arbitrary denial of fundamental human rights against the will of the people by the ruling power within its sovereignty. This kind of humanitarian intervention can be regarded as 'seeds' of human rights. It is significant in this context because it is on the same minority basis that, according to international law experts, the precursor of

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modern international human rights instrument featured. After World War I minority treaties were adopted. This was however confined to Europe. It should not be forgotten too that on the same basis (protecting the minority within states), Hitler attacked Czechoslovakia in the name of protecting his Sudetan Germans incorporated into this new state before the inception of World War II. My point here is that the rights pursued then did not suggest in any way that individual's rights protection in the context of human rights prevailed.

2.2 The Basis of Obligation

Domestic violence still remains confined to domestic law for redress. While this is the most desired remedy, it does not mean remedy failures in domestic law are incapable of redress. As soon as domestic law fails to protect domestic violence victims, this automatically becomes a human rights issue, thus losing its sovereignty legitimacy. The question of obligation in this thesis will amplify the need for states to live up to their obligation as this "might more accurately be characterized as a condition necessary to render formal sources of law operative or effective" (Siederman 2001, p. 13). Indeed, the very absence of a sense of obligation in any international legal system where norms are binding and states are required to comply with them in their behavior, cannot be described as "law" (Siederman 2001, p.13).[10]

Further more, in the Vienna Convention on the Law of Treaties (1969), Article 31 encourages states to carry out interpretation of treaties "in good faith and in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". This aspect will be discussed in chapter 3 and 4 when looking at the 'membership in a particular social group' definition, emphasizing especially on an adoption of the minimum standard of protection inferred in Article 33 of the 1951 Convention.

In theoretical terms, the basis of obligation of states to protect victims of domestic violence in asylum stem from the fact that the individual in question is not

10 Comments of Rosalyn Higgins regarding the importance of an obligation in International law. In the same chapter, Ian notes that "obligation is, in a certain sense, also a source of law".

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enjoying the protection of any particular country from persecution. This obligation is stipulated in the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol to the Convention (This is stated at the 'International Law Protection Theory' below). These two instruments "are the modern legal embodiment of the ancient and universal tradition of providing sanctuary to those at risk and in danger. Both instruments reflect a fundamental human value on which global consensus exists and are the first and only instruments at the global level which specifically regulate the treatment of those who are compelled to leave their homes because of a rupture with their country of origin" (Feller et al. 2oo3, p. 3). The obligation is clearly spelt out in the UN refugee convention. However, the underlying question within this theory in the present context is the extent to which this obligation, often stipulated by an international instrument, is limited by the national-international law relationship.

2.3 International Law Protection Theory

A. *Legal protection theory under refugee status*

Protection accorded under refugee status is principally stipulated in the 1951 United Nations Convention and Protocol relating to status of refugees, thus any person who:

> as a result of events occurring before 1 January 1951 and owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Domestic violence, through proper interpretation of the refugee definition, would necessarily and not exclusively, fall under two of the five enumerated grounds in the UN refugee convention: membership of a particular social group and political opinion (Spijkerboer 2000, p. 115).[11]

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[11] Here it is observed that "in other jurisdictions, the precise formulation of the persecution grounds constitutes a major issue and the case law and legal doctrine are concentrated on the correct interpretation of, most notably, the terms political opinion and particular social group."

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It is worth mentioning at this point that membership of a particular social group and political opinion grounds under which gender-based violence is capable of protection may overlap when assessing cases for refugee status. 'Membership in a particular social group' ground is preferred in assessing gender-based claims to 'political opinion' ground of the 1951 Refugee Convention. For example, Spijkerboer (2000, p. 168) notes: "The distinctness of women's experiences, it is argued, must be acknowledged by assigning particular social group as the persecution ground". Further more, New Zealand's Refugee Status Appeal Authority 5 April 1995, case, 915/92 summaries this view as follows:[12]

> An approach to refugee determination which unjustifiably favours the political opinion ground to the exclusion of the social group ground will tend to reinforce the male gender bias often complained of by female asylum seekers, and inhibit the development of a refugee jurisprudence which properly recognises and accommodates gender issues within the legitimate bounds of the Refugee Convention.

This thesis is in favor of this view. As demonstrated in chapter 4 below, most prominent jurisdictions seek to provide protection to victims of domestic violence under the 'membership in a particular social group' definition.

(I) *Membership of a particular social group*

According to Goodwin-Gill (1996, p. 49) membership of a particular social group convention ground falls short of "then unrecognized groups facing new forms of persecution…but there is no reason in principle for why this ground, like any other, should not be progressively developed" to encompass contemporary groups missing therein.[13] The summary conclusions of the San Remo Expert Roundtable (Sept. 6-8, 2001) is the result of a series of global consultations conducted with a view of 'updating'international protection where domestic violence featured as one of the

[12] This is as quoted in UNHCR Division of International Protection 1997, 105.

[13] It was also recommend by the Swedish delegate that the groups be mentioned explicitly (UN docs. A/CONF.2/SR.3, p. 4).

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failed areas in protection.[14] The roundtable discussion identified one of the most frequent, but neglected situations where women are harmed by non-state actors, including their husbands; in understanding No. 6: “In cases where there is a real risk of serious harm at the hands of a non-state actor (e.g. Husband, partner or other non-state actor) for reasons unrelated to the convention ground, and the lack of state protection is for reason of convention ground, it generally recognized that the nexus required is satisfied. Conversely, if the risk of harm by the non-state actor is convention related, but the failure of State protection is not, the nexus required is satisfied.”

Hathaway, an academic and a well distinguished author and expert in refugee law makes a view to the effect that domestic violence could be protected within the social group category: “while gender is not independent enumerated ground for convention protection, it is properly within the ambit of the social group category” (Hathaway 1994, p. 162).

The Executive Committee of UNHCR (1985) endorsement gives a hint as to how the social group category could be interpreted in a context capable of protecting victims of gender-based violence, thus:

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

(II) *Political opinion*

As mentioned above, the present study is not in favor of the ‘political opinion’ ground for determining claims based on gender-based violence. But this does not mean that gender-based violence cannot be protected under this Convention ground. For example, Goodwin-Gill (Goodwin-Gill 1996, p. 49), an academic and

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[14] This effort was organized by the United Nations High Commissioner for Refugees and the International Institute of Humanitarian Law. The discussion was moderated by Deborah Anker, Harvard Law School.

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authority of refugee law, adopts a considerable broad interpretation of "political opinion" capable of including gender-based violence within its fold:

> The typical 'political refugee' is one pursued by the government of a state or other entity on account of his or her opinions, which are an actual or perceived threat to that government or its institutions, or to the political agenda and aspirations of the entity in question. Political opinions may or may not be expressed, and they may be rightly or wrongly attributed to the applicant for refugee status.

In the *Matter of R-A-* discussed below, there will be an attempt by adjudicators to invoke this particular Convention ground to protect Ms. Alvarado, a victim of gender-based violence seeking asylum in the U.S. However, according to the position of the U.S.' Department of Homeland Security on this issue, it is an unlikely that 'political opinion' will be included as a possible convention ground to protect gender-based violence victims even after the promulgation of the INS proposed regulations after the *Matter of R-A-* (See the following discussion in chapter two).

B. Legal protection theory under obligations of non-refoulement

Non-refoulement principle seems to be so fundamental that both the refugee and human rights law uphold it on a relatively equal footing. It may be questioned why I have chosen to separate *non-refoulement* from refugee status determination, which seems to include this principle as well. This is because it is independent of any official undertaking of states to determine refugee status (UNHCR 1985). As far as a state decides to send a refugee to his or her country of origin where it is known to produce refugees or its human rights record hints to the likelihood of risk to the failed asylum-seeker upon return, the burden of proof rests on that state in question. The acceptable justification would, therefore, be on the basis of the country of origin's human rights conditions. Otherwise the decision to send back an asylum seeker to his or her country of origin would constitute a breach of the duty of *non-refoulement* regardless of notions of fault, either directly for the acts and omissions of its officials, or indirectly as a result of administrative lapses thereof. This undermines a remedy or guarantee which is required by an applicable international standard

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(Chimni 2000, p. 110). Both Articles 1 and 33 of the 1951 Refugee Convention and Article 3 of the Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment accord protection to claimants by not "returning" them back to countries where they fear persecution.

(a) 1951 Convention relating to the Status of Refugees, Article 33 (1), in this respect stipulates:

> no Contracting State shall expel or return ("refouler") a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion. The benefit of the present provision may not, however, be claimed by a refugee whom there are reasonable grounds for regarding as a danger to the security of the country in which he is, or who, having been convicted by a final judgment of a particularly serious crime, constitutes a danger to the community of the country.

(b) 1984 Convention against Torture and Other Cruel, Inhuman Degrading Treatment or Punishment, Article 3, provides:

1. No State Party shall expel, return ("refouler") or extradite a person to another State where there are substantial grounds for believing that he would be in danger of being subjected to torture.
2. For the purpose of determining whether there are such grounds, the competent authorities shall take into account all relevant considerations including, where applicable, the existence in the State concerned of a consistent pattern of gross, flagrant, or mass violations of human rights.

(c) 1967 Declaration on Territorial Asylum adopted by the United Nations General Assembly (UNGA), Article 3 provides:

> No person referred to in article 1, paragraph 1[seeking asylum from persecution], shall be subjected to measures such as rejection at the frontier or, if he has already entered the territory in which he seeks asylum, expulsion or compulsory return to any State where he may be subjected to persecution.
>
> 2. Exception may be made to the foregoing principle only for overriding reasons of national security or in order to safeguard the population, as in the case of mass influx of persons.

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3. Should a State decide in any case that exception to the principle stated in paragraph 1 of this article would be justified, it shall consider the possibility of granting the person concerned, under such conditions as it may deem appropriate, an opportunity, whether by way of provisional asylum or otherwise, of going to another State.

(d) UN Human Rights Committee, General Comment No. 20 (1992) provides:

States parties must not expose individuals to the danger of torture or cruel, inhuman or degrading treatment or punishment upon return to another country by way of their extradition, expulsion or refoulement.

2.4 Contextualizing Domestic Violence as Persecution

It is out of question as to whether domestic violence qualifies as an asylum claim. It falls within the ambit of the refugee convention definition: “UNHCR, in its recent ‘Guidelines on International Protection’ on membership of a particular social group, has stated that women can be a ‘particular social group’ for the purpose of the refugee definition” (UNHCR 2002, p. 70). In fact, UNHCR rejects denial of women asylum claims based on the size of the group: “...no basis in fact or reason, as the other grounds are not bound by this question of size” (UNHCR 2002, p. 52).

In assessing gender-related claims in refugee law, it is possible that the term discrimination can easily be resorted to define protection failure with respect to asylum claims involving gender-based violence. However, a research conducted by Spijkerboer (2000, p. 40) showed this not to be the case and therefore conclude that “the most plausible interpretation of the available data is that discrimination does not occur”.

Moreover, given the significant progress in recognition of these types of claims to refugee status over the last decade, it would be deemed an understatement to make a claim on the basis of discrimination against women per se. In 1985, the Executive Committee of the High Commissioner’s programme first acknowledged the fact that “women asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of their society in which they lived may be considered as

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a "particular social group" within the meaning of Article 1 A(2)" (UNHCR 1985 p. 51); although the discretion was left to States. Again, in 1990 there was the first mention of a need to have skilled female interviewers in refugee status determination procedures also ensuring access by women asylum seekers to such procedures regardless of accompaniment by male family members or not (UNHCR 1990). The UNHCR Guidelines on the Protection of Refugee Women played part in seeing subsequent resolutions, thus it was advised that "special efforts may be needed to resolve problems faced specifically by refugee women" also urging that training for refugee determination officials be conducted on the claims of women asylum seekers (UNHCR 1991). In 1993, states were encouraged to "develop appropriate guidelines on women asylum-seekers, in recognition of the fact that women refugees often experienced persecution differently from refugee men" (UNHCR 1993). In 1995, 996, 1997 and 1999, UNHCR, in the General Conclusions on International Protection adopted by the Executive Committee of the High Commissioner's Programme in this direction, promised its support to States in improving protection for women, thus:

> calle[d] upon the High Commissioner to support and promote efforts by states towards the development and implementation of criteria and guidelines on responses to persecution specifically aimed at women…In accordance with the principle that women's rights are human rights, these guidelines should recognise as refugees women whose claim to refugee status is based upon well-founded fear of persecution for reasons enumerated in the 1951 Convention and 1967 Protocol, including persecution through sexual violence or gender-related persecution.

It is important to note the expounded emphasis that features in the last sentence of the General Conclusion: "…including persecution through sexual violence or gender-related persecution."

In order to ensure non-discriminatory application of refugee law in this context, however, it is important that "…gender-sensitive and inclusive-asylum procedures are in place" (UNHCR 2002, p. 47). Domestic violence falls within the "gender-related persecution" category. It, therefore, necessitates a clear distinction between "sex" and "gender". For the purpose of this thesis, gender is interpreted to mean, according to UNHCR (1993):

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> the relationship between women and men based on socially and culturally constructed and defined identities, status, roles, and responsibilities that are assigned to one sex or another, while sex is a biological determination.

Within the contextual framework of domestic violence as persecution, a broader framework of advancements in international human rights law should include, but not be limited to, such important Conventions as the Convention on the Elimination of All Forms of Discrimination Against Women 1979 and its Optional Protocol,[15] the Declaration on the Elimination of Violence Against Women 1993,[16] the Convention on the Rights of the Child,[17] and the follow-up 'Beijing Platform Plus 5' Special Session of the General Assembly.[18]

2.4.1 Schools of thought: Reinterpretation or Reformulation of the Refugee Definition

These two theories are relevant in that they both legitimize the basis for protection victims of domestic violence in asylum law. The first school of thought holds that there is a need to include sex, or gender, as a persecutory ground in the U.N. Refugee Convention. Within this school of thought also, a reformulation of 'persecution' is advocated in order to take into account the experience of women (Indra 1996, p. 370). Another aspect strongly acknowledged by this school of thought is:

> the language of masculine reference used in all international legal instruments related to refugees…[g]eneralized references to 'refugees' obscure more than they illuminate. They obscure the ways in which gender may play a major role in how refugees are created, and how distinct the refugee situation can be for women and men. They obscure the divergent relationships to the State and to the public realm which women

[15] 1249 UNTS 13 and UNGA resolution A/RES/54/4, 6 Oct. 1999.

[16] UNGA resolution 48/104, 20 Dec. 1993.

[17] UNGA resolution 44/25, 20 Nov. 1989 (hereinafter 'CRC').

[18] 'Women 2000: Gender Equality, Development and Peace in the Twenty-First Century', 23 rd session of the General Assembly, UN doc. A/55/341, 5- 9 June 2000.

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and men have in source countries. Far from a politically neutral concept, the current image of 'the refugee' is deeply political (Indra 1987, p. 64).

The second school of thought, favored by the present research, maintains that the existing refugee convention should be interpreted differently in order to deal with women's experiences.[19] Technically, this school of thought holds an opinion to the effect that incorporating human rights law to the U.N. Refugee law would constitute a legal regime blended in a way capable of according effective protection from gender persecution, including women victims of domestic violence.

The authors upholding the second school of thought (also known as "authors from the human rights approach") have endeavored "a precise taxonomy of women's flight motives" (Spijkerboer 2000, p. 166). First, women facing the same persecution as men; otherwise referred as "gender-neutral" claims. Second, women whose claims are specific to their gender; a good example in this category is sexual violence. Third, women persecuted on account of gender. Furthermore, the same authors have subdivided gender-related persecution into four categories:[20] women facing persecution as a result of transgressing social mores; sex discrimination; relation to politically active relatives under a dictatorship; and battery or abuse by non-government agents for which protection of their government is unavailable.

Theorists of school 2 also tackle the public/private issue that tends to prevail in most gender-based persecutions like domestic violence. Greatbatch (1989, pp 518-527), a school 2 theorist, argues that by upholding the bifurcated vision of society where there is a complete split between public and private would be to ignore the facets of women's lives outside the domestic sphere and in so doing create a theoretical and rhetorical barrier between domestic and culture. The historical and

[19] Cf. *International Journal of Refugee Law* (1997: 79): "Although it is increasingly recognised that women are victims of violence and persecution around the world and in need of protection, the debate centres on whether it is legally correct and desirable to achieve this protection through the grant of refugee status under the 1951 Convention relating to the status of Refugees."

[20] For more information see N. Kelly, *Gender-related persecution: Assessing the Asylum Claims of women*, vol. 26, (1993), p. 625-74.

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cultural context views, in this case, would have been left out, thus rendering the analysis meaningless. This interference with their public roles therefore illustrates that "the political nature of oppression rests upon its relation to the state, rather than the realm of human endeavour affected" (Greatbatch 1989, p. 518). Further more, she believes adequate protection would, therefore, be achieved through:

> A human rights based approach to defining persecution, the recognition of women as a particular social group, documentation of discriminatory and repressive measures aimed at or particularly affecting women, access to full and fair determination procedures, and liberal reading of the Convention definition, would provide the basis for the development of a profile of gender based refugee claims, and for the recognition of the difference gender makes (Greatbatch 1989, p. 526).

Greatbatch's point is significant in the present study. As I have earlier argued in chapter 2 (and in my concluding chapter 5), international law of human rights is crucial in providing effective protection to victims of gender-based violence. While the structured applications of a human rights paradigm in refugee law are recent and limited, the strength of the latter to develop depends on whether it develops within the former.

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CHAPTER 3
APPLICATION OF THE STANDARD(S) IN THE UNITED STATES

This chapter has two parts: (a) how the standard on protection against domestic violence is set under asylum law in the United States; and (b) analysis of the new guidelines issued after the *Matter of R-A-* with the intention of investigating if they indeed provide guidance to the conflicting analytical approaches within the same jurisdiction. The first two cases are the main precedent decisions on domestic violence claims in the U.S. The third case (*In re R-A-)* is significant since it prompted the issuing of regulations by the INS. According to a news release by the U.S. Department of Justice of December 7, 2000, "… the proposed regulation is intended to address and modify some aspects of the *Matter* of *R-A-* decision as well as broader issues by social group claims." This *Matter of R-A-* has been pending since January 19, 2001. As a consequence, the progress in setting an internationally recognized standard in this area of law by the U. S. is being downplayed by its delay in finalizing the proposed regulation. Moreover, the ethical integrity of the regime is questionable forasmuch as it fails to produce a sound decision "as expeditiously as possible" (Parliamentary Assembly 1995, p. 38).

As will be demonstrated later in the paper, the difficulty in assessing domestic violence claims relates mostly to the interpretation of both the terms 'membership of a particular social group and "for reason of" of the 1951 Convention. The Immigration and Nationality Act (INA) forms the domestic law of the United States. It is the basic source of asylum law. It is codified in Title 8 of the United States Code. Implementation of the statute is done through an administrative structure, which is under the Department of Homeland Security. The administrative body was previously under the Department of Justice, but this changed in the aftermath of

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September 11 terrorist attacks on America in 2001.[21] Within the Immigration and Naturalization Service (INS), many cases (but not all) are decided by a Corps of Asylum Officers in the first stance. But the decisions are not officially published (Anker 1999, p. 260). Immigration judges- acting under the Executive Office of Immigration Review (EOIR) 8 C. F. R.§ 3.0 (1998) – preside over formal administrative hearings in which non-citizens can launch an asylum claim and apply for withholding protection. Decisions of these judges are sometimes in written form. However, their interpretations of law are non-binding on other immigration judges or INS asylum officers. It is at the Board of Immigration Appeal's level that immigration judges' decisions are heard and both precedence (also called "published") and non-precedence decisions are issued on varying standards for law, fact, and discretion (Anker 1999, p. 8). These decisions are binding on the other administrative actors, except in the event where a federal court of appeals overrules a decision. And future proceedings involving similar issues are controlled by these precedence decisions. Noteworthy in this context, though, is the fact that the BIA follows only those precedence decisions of the Federal Court of Appeals in the circuit in which it has jurisdiction, but not a rule it disagrees with and is outside the jurisdiction of a particular circuit (Anker 1999, p. 8). The Board will only operate within the jurisdiction of the court in question in applying contrary ruling of the Federal Court of Appeals, pending and as so far as the Supreme Court finally comes up with the question. Besides the Board's decisions, the Department of Justice (perhaps in the near future this role will be undertaken by the newly formed Department of Homeland Security) and its sub-agencies put into effect regulations under the statute. These [regulations] may be binding on Asylum officers, Immigration judges, or both (Anker 1999, p. 8).

This therefore means that the primary source of administrative interpretation is derived from the BIA and the regulations. The latter however are somewhat limited to the extent to which they can offer substantive interpretation in asylum claims. It is only on a few occasions does the Board outline a "general rule or

[21] See more on a description of the ongoing restructuring of the adjudicating body below.

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policy" that is clear on application to similar cases (Anker 1999, p. 8). This is because of the nature of case law; wherefore its sole purpose is to work with facts given by the claimant. Again, few portions of the regulation decisions are published as precedent, most of which are denials. In this setting, therefore, there are available very few precedent examples that could stipulate the requirement to a successful claim. Inconsistency has been cited in the BIA's decisions as division in the Board prevailed over asylum claim decisions. "Sub-regulatory and informal administrative sources" have been looked to cover the space (Anker 1999, p. 9). The *Basic Law Manual* in which there are key doctrines in asylum law, is published by the INS, while the latter's Office General Counsel and the Office of International Affairs made several memoranda regarding asylum issues. Another significant source of asylum law are the *gender guidelines*, issued in 1995 by the Office of International Affairs. They have considerably influenced the interpretation of the law, and have been referred by federal judges "as statements of INS policy" (Anker 1999, p. 9). The guidelines are said to have been cited by a court to the effect that the INS recognizes them in light of sexual violence and rape as forms of persecution (Anker 1999, p. 9).

For the purpose of conforming to the U.S. law to the U.N. Refugee Convention, the congress enacted the Refugee Act of 1980. But the refugee definition contained in the U.N. Refugee Convention is different from that of the U.S. statute. The Refugee Act has adopted the refugee definition in the U.N. Refugee Convention as a basis for determining refugee status, while its *non-refoulement* protection is highlighted in the withholding of removal provisions of its statutes. In recognition of international standards in asylum, the U.S. has emphasized, by making reference to, the United Nations High Commissioner for Refugees' interpretation of the refugee definition in the latter's *Handbook on Procedures and Criteria for Determining Refugee Status*, thus "where the Board has not addressed specific issues… reference to international law may assist in determining whether an alien meets…the definition of a refugee" (INS, 1994). International human rights law has also been invoked by the INS towards interpreting various criteria for determining refugee status, in particular in determining gender-related claims (INS, 1994)

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3.1 Interpretations of Asylum law as Applied to Domestic Violence Claimants

To satisfy the standard requirement discussed above, an applicant has to demonstrate that the violence suffered or feared rise to the level of persecution. In an attempt to define "persecution", adjudicators have looked to international legal documents and case law "that has developed under the Refugee Act for guidance" (Sinha 2001, 1571). The U.S. courts and administrative authorities identify "serious harm" as falling within the "persecution" definition but "not limited to severe physical harm or threats to life or freedom" (Anker 1999, p. 10). A government can induce punishment to its citizens for failure to comply with its laws and policies that are incompatible with an individual's convictions; such an act qualifies as persecution. For example, in the *Matter of Fatin v.* INS, 12 F. 3d 1233, 1242 (3d Cir.1993) the court stated: "[t]he concept of persecution is broad enough to include governmental measures that compel an individual to engage in conduct that is not physically painful or harmful but is abhorrent to that individual's deepest beliefs." Although discrimination is not *per se* persecution, it can rise to the level of persecution in the event where a government administers restrictions "of a prejudicial nature" (Anker 1999, p. 10). In a broader human rights context, the INS has instructed Asylum Officers to observe human rights standards toward defining persecution, thus "One must determine whether the conduct alleged to be persecution violates a basic human right, *protected under international law*" (Anker 1999, p. 10). In its justification, the INS (in *The Basic Manual*) provides:

> The United States has cited the American Convention on Human Rights, the International Covenant on Civil and Political Rights, and the European Convention for the Protection of Human Rights and Fundamental Freedoms as evidence that customary international law forbids the use of torture. The Universal Declaration of Human Rights, originally a non-binding resolution of the U.N. General Assembly, is now also being recognized as evidence of a customary international law of human rights.

In *Matter of Hernandez-Ortiz v. INS*, 777 F. 2d 509, 516 (9 th Cir. 1985) it is noted that there is a common trend that "unjustified threat of serious physical harm, including a threat to life or freedom, on the basis of a difference found to be offensive" constitutes persecution, but "[deprivation of life or physical freedom] is the most

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consistently recognized form of persecution". The weight being accorded violence against women as women violation has impacted on the way domestic violence is characterized in asylum cases. For example, in *Lopez –Galarza v.* INS the Ninth Court acknowledges that rape and sexual abuse may constitute persecution. The BIA in its decision in *In re* D-V- found that rape can be a form of persecution. Moreover, spousal abuse in *In re M-K-* has been acknowledged by the Immigration Court as persecution.

It is, however, not sufficient to only demonstrate that violence rises to the level of persecution as this merely portrays the first step in the asylum process. Following this, the claimant must "satisfy the statutory requirement" in linking the persecution suffered or feared to one of the five enumerated grounds- "on account of" (Sinha 2001, 1573). As mentioned in the introduction above, this particular requirement has presented great difficulty to women victims of domestic violence seeking asylum in the U.S. Often, adjudicators have rejected domestic violence claims on the grounds that they fail to fall "within the statutorily protected category claimed, or that the violence was not inflicted on account of the protected ground" (Sinha 2001, 1573). For example, in *Klawitter v.* INS the Sixth Circuit found that the claimant's rape by a government official not to be stimulated by "any interest on his part to 'persecute' her." In *Campos-Guardado v. INS,* the BIA found that rapes sustained by a claimant to be "personally motivated," thus not on account of her political opinion.

3.2 Standard (s) Setting- Based on 'Social Group' Ground

The BIA and the Ninth Circuit have played a leading role in "constructing different interpretations of 'particular social group'" (Feller et al. 2003, p. 275). And subsequently, the other federal circuit courts of appeals have "largely adopted the BIA's approach" (Feller et al. 2003, p. 275). This therefore means that there is a practice of two standards of application of the asylum procedure in the United States; depending on where the case is brought for judgment. These standards are based on two prominent cases: case of *Matter of Acosta* and in *Sanchez-Trujillo v. INS.* Setting a standard acceptable by both the courts and the BIA, has proven somewhat difficult in the present study. I have tried without success to understand the legal basis for the prevailing resistance and the subsequent "disarray" of the asylum

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regime in this area of law resulting from this kind of protection approach by the U. S. asylum administrative bodies. This has therefore necessitated that I change my initial approach of analyzing a number of U. S. asylum case laws for identification of a consistent trend in order to examine the standard of implementation of asylum law in accordance with international refugee law and international human rights law. Without an acceptable standard by these bodies, it would prove futile, and even render my present research all the more compounding, if I embarked on analyzing blindly relevant case laws available on this subject in the U.S. In view of this therefore, as mentioned above, three prominent cases in this area of law will be analyzed and weighted against the backdrop of the new proposed regulations to see if they offer the intended guidance.

Since I tend to disagree with the INS' proposed regulation which aims at combining the two standards for the purpose of compromise, I will disregard the *Sanchez-Trujillo* standard altogether, thereby holding an assumption that it is been subsumed within the *Acosta* standard. The justification in line with my present purpose— an attempt to identify a standard that is upheld internationally, thus providing a basis for legitimacy of its implementation within the international standards— would be that the criticism of the *Sanchez-Trujillo* standard went far as crossing international borders, where its definition of a particular social group under the Refugee Convention has been rejected by both the UK and Australian Courts.

a. *The Case of Matter of Acosta* [22]

The *Acosta* standard has gained an international recognition and even followed by, for example, the Canadian supreme courts, New Zealand and Britain. The standard in itself is a product of the BIA, which in effect is looked to provide interpretation sources for a vast majority of administrative decisions. Again, the fact that this standard was born in 1985, ten years before the issuance of the US Gender guidelines by the Office of International Affairs, is significant in this study. This amplifies my argument that the international legal instruments and documents often

[22] The facts of this case are based on the BIA's Interim Decision #2986.

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hold limited impact on national legal documents in times of implementation of the standard. And yet even in the absence of such international documents such as guidelines, it is still possible to uphold protection within the minimum standard as stipulated by various international legal instruments and documents.

In 1985, the BIA gave a highly influential ruling in the case of *Matter of Acosta*. The applicant, male, was a native and citizen of El Salvador. He was 36 years old. BIA (1985, pp. 216-17) presented the facts of his case as follows:

> In 1976 he, along with several other taxi drivers, founded **COTAXI**, a cooperative organization of taxi drivers of about 150 members. The cooperative was designed to enable its members to contribute the money they earned toward the purchase of their taxis. It was one of five taxi cooperatives in the city of San Salvador and one of many taxi cooperatives throughout the country of El Salvador. Between 1978 and 1981, the respondent held three management positions with **COTAXI,** the duties of which he described in detail, and his last position with the cooperative was that of general manager. He held that position from 1979 through February or March of 1981. During the time he was the general manager of **COTAXI**, the respondent continued on the weekends to work as a taxi driver. Starting around 1978, **COTAXI** and its drivers began receiving phone calls and notes requesting them to participate in work stoppages. The requests were anonymous but the respondent and the other members of **COTAXI** believed them to be from anti-government guerrillas who had targeted small businesses in the transportation industry for work stoppages, in hopes of damaging El Salvador's economy. **COTAXI** received threats of retaliation for failing to comply with these requests. **COTAXI**'s board of directors refused to comply with the requests because its members wished to keep working, and as a result **COTAXI** received threats of retaliation. Over the course of several years, **COTAXI** was threatened about 15 times. The other taxi cooperatives in the city also received similar threats. Beginning in about 1979, taxis were seized and burned; or used as barricades, and **COTAXI** drivers were assaulted or killed. Ultimately, five members of **COTAXI** were killed in their taxi by unknown persons. Three of the **COTAXI** drivers who were killed were friends of the respondent and, like him, had been founders and officers of **COTAXI**. Each was killed after receiving an anonymous note threatening his life. One of these drivers, who died from injuries he sustained when he crashed his cab in order to avoid being shot by his passengers, told his friends before he died that three

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> men identifying themselves as guerrillas had jumped into his taxi, demanded possession of his car, and announced they were going to kill him. The respondent received three anonymous notes threatening his life during January and February 1981. The first note, which was slipped through the window of his taxi and addressed to the manager of **COTAXI**, stated: "Your turn has come, because you are a traitor." The second note, which was also put on the respondent's car was directed to "the driver of Taxi No. 95," which was the car owned by the respondent, and warned: "You are on the black list." The third note was placed on the respondent's car in front of his home, was addressed to the manager of **COTAXI**, and stated: "We are going to execute you as a traitor." In February 1981, the respondent was beaten in his cab by three men who then warned him not to call the police and took his taxi. The respondent is of the opinion that the men who threatened his life and assaulted him were guerrillas who were seeking to disrupt transportation services in the city of San Salvador. He also has an impression, however, that **COTAXI** was not favored by some government officials because they viewed the cooperative as being too socialistic. After being assaulted and receiving the three threatening notes, the respondent left El Salvador because he feared for his life. He declared at the hearing that he would not work as a taxi driver if he returned to El Salvador because he understands that there is little work for taxi drivers now. He explained that the people are too poor to call taxis. Additionally, he stated that the terrorists are no longer active.

The BIA interpreted a 'particular social group' as being 'a group of persons all of whom share a common, immutable characteristic'. In substantiating what that might be, thus: "an innate one such as sex, color, or kinship ties'. 'A shared past experience such as former military leadership or land ownership' was also considered as constituting part of the definition. Of importance, the common characteristic must demonstrate "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" (Feller et al. 2003, p. 276). It is only when this has been satisfied "does the mere fact of group membership become something comparable to the other four grounds of persecution of the refugee definition" (Feller et al. 2003, p.

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276).[23] The BIA purportedly invoked the interpretive principle of *ejusdem generis* in its reasoning. This means that a common element was identified in the other four convention grounds and then applied to the term 'particular social group' (Feller et al. 2003, p. 276).[24] In this case, the element identified was 'immutability'. This must have been, argues Aleinikoff, based on race and national origin aspects of the convention definition. The U.S. constitutional law and its subsequent anti-discrimination principles would in a way tally with the latter in this setting. It is argued that this approach is appealing because immutable characteristics such as gender and ethnic background have often been the basis for invidious treatment and it aims at putting a limit to very broad and ill-defined category (Feller et al. 2003, p. 276). This standard, however, was unable to encompass 'religion' or 'political' Convention grounds. This therefore led to a second aspect of the test being added: characteristics so fundamental that one should not be required to change them (Feller et al. 2003, p. 276).[25]

The Ninth Circuit Court of Appeals took a different approach to the BIA's *Acosta* standard. In *Sanchez-Trujillo* v. INS, 801 F 2d 1571 (9th Circuit), 1986 decision involving an El Salvadoran applicant, a social group of young, urban, working-class males of military age in El Salvador, the Court stated:

> [t]he term ['social group'] does not encompass every broadly defined segment of a population, even if a certain demographic division does have some statistical relevance. Instead, the phrase 'particular social group' implies a collection of people

[23] Cf. Formulation in *Ward* case. The Canadian Supreme Court emphasizes that the characteristic "must be so fundamental that an individual should not be compelled to change… not the voluntary association based on the characteristic".

[24] This form of reasoning has been adopted in other jurisdictions e.g., in *Islam v. Secretary of State for the Home Department* and *R.V. Immigration Appeal Tribunal and Secretary of State for the Home Department, ex parte Shah,* UK House of the Lords, [1999] 2 WLR 1015; [1999] INLR 144, also reprinted in 11 *International Journal of Refugee Law,* 1999, p. 496. It is however not clear, argues Aleinikoff, whether this kind of reasoning is appropriate in interpreting the 'for reasons of' grounds of the refugee definition.

[25] Under this standard, gender, tribal and clan membership, sexual orientation, family, and past experiences are recognized social groups under which refugee claims can be based. Cases rejected under this standard included, a Chinese opposed to coercive family planning practices and women subjected to sexual and physical abuse (the standard for the latter is evolving, though. This will be resumed in details later). Both standards accommodate 'family-based groups' as being embraced by the Convention's language.

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> 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 characteristics that is fundamental to their identity as a member of that discreet group.

The claim was deemed not to fit the above definition because the group to which the applicant claimed to belong failed to show that it was 'cohesive, homogeneous group' (Feller et al. 2003, p. 277). In a way similar to the protected standard, the 'voluntary association' and 'cohesiveness' elements of the *Sanchez-Trujillo* were purposely formulated by the Court in order to curtail unlimited social group ground for refugee status. In its explanation the Court stated:

> Major segments of a population of an embattled nation, even though undoubtedly at some risk for general political violence, will rarely, if ever, constitute a distinct 'social group' for the purpose of establishing refugee status. To hold otherwise would be tantamount to extending refugee status to every alien displaced by general conditions of unrest or violence in his or her home country.

The *Sanchez-Trujillo* standard has been received with high level of criticism from commentators, and to the extent of even being explicitly rejected by courts in *Islam v. Shah* in the United Kingdom and Australia in *Applicant A. and Another v. Minister for Immigration and Ethnic Affairs and Another*, High Court of Australia, (1997) 190 CLR 225; 142 ALR 331 in Australia.[26] For example, Anker in respect to this standard observes: "to the extent that *Sanchez-Trujillo* presents an inconsistent and unclear framework – emphasizing "voluntary associational relationship" and then providing the family as a "prototyp[e]"- its test should probably be disregarded and subsumed within the Board's approach, which has been endorsed by commentators and other courts" (Anker 1999, p. 382).

The Australian court in its analysis of its *Applicant A*. standard ('social perception' or 'ordinary meaning' approach) asserts, unlike the *Sanchez-Trujillo* standard, that this "would not reach 'statistical' groups that may share a demographic

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[26] This opinion will be revisited when discussing INS Published Draft Regulations and New Zealand's definition of the 'social group'.

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factor but neither recognize themselves as a group nor are perceived as a group in society" (Feller et al. 2003, p. 271). The House of Lords (UK Court) rejected the 'social group' definition upheld by the U.S. Court of Appeals in its decision in *Sanchez-Trujillo* case in which it cited 'cohesiveness' as a requirement to recognition under the Convention. "A majority of the House of Lords identified an anti-discrimination principle as underlying the five grounds mentioned in the Convention" (Feller et al. 2003, p. 274).

In its recent decision in *Hernandez-Montiel v.* INS, 225 F 3d 1084 (9th Circuit), 2000 involving Mexican gay men, the Ninth Circuit seems to have come to some sort of compromise between its earlier decision in *Sanchez-Trujillo* and the BIA's widely accepted protected characteristics standard in the *Acosta* case. In that ruling the Ninth Circuit stated that Mexican 'gay men with female sexual identities' constituted a particular social group, thereby tallying with *Acosta* standard but rendering its initial position in the *Sanchez-Trujillo* case questionable. In striking the compromise the Ninth Circuit stated:

> We thus hold that a 'particular social group' is one united by voluntary association, including a former association, or by an innate characteristic that is so fundamental to the identities or conscience of its members that members either cannot or should not be required to change it.

In this context, the two standards seem to be competing. Aleinikoff sees this move as having caused "confusion" and led the INS to propose regulations which only make the situation compounding (Feller et al. 2003, p. 287).

b. Matter of R-A-: A Test Case for Progress of Gender-based Claims in the U.S.

This case has been highly controversial and led the INS to propose regulations in recognition of the problem (the draft regulations were published at 6 Fed. Reg. 76.588 (proposed Dec. 7, 2000)). The regulations aim to address the prevailing concerns on the overall claims relating to gender-based persecution, especially "when" and "how" gender-based claims can be bases for granting asylum.

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The BIA's decision reversed an earlier decision by an immigration judge's grant of asylum *In re Alvarado*, No. A 73753922 (IJ (San Francisco) Sept. 20, 1996) at 8. Ms. Rodi Alvarado Pena, a woman from Guatemala, had suffered violent abuses at the hands of her husband. The case was vacated in 1999 by Attorney General Janet Reno and later reinstated by the current Attorney General Gonzales. The presiding immigration judge in the case, Mimi Schooley Yam, found Ms. Alvarado to qualify as a refugee because she "had suffered past persecution, and established a well-founded fear of future persecution at the hands of her husband, who the government was unwilling to control" (Musalo 1999, p. 1180). The presumption of future persecution took into consideration unavailability of evidence to prove that "conditions in Guatemala have changed to such an extent since this harm occurred as to obviate the respondent's need for protection". The BIA was reportedly silent on the issue of gender-based claims for more than three years before issuing the decision in *Matter of R-A-*. Musalo (1999, p. 1177) reports that the vote-10-5- was "sharply divided… and has generated considerable controversy,[] and raised serious concerns regarding the nature and scope of protection for the victims of gender-based persecution". The BIA accepted the fact that brutal abuses experienced by the respondent rose to the level of persecution and that the state protection was not obtainable, but rejected the IJ's ruling that "the respondent was harmed on account of either actual or imputed political opinion or membership in a particular social group". This therefore means that "the applicant's credibility is not at issue, and the facts are uncontested" (Musalo 1999, p. 1178).This case will stress the point that the absence of a consistent standard can compromise the integrity of an asylum regime of a state. I have chosen to conduct an in-depth analysis of *In re R-A-* decision and later look at the United States' Department of Homeland Security's position on the respondent's eligibility for relief and learned commentaries on the case, including Brief of *amici curie* in Support of Affirmance of Decision of the Immigration judge *In R-A-*, A. 73-753-922.

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A summary of the facts of the case is presented below as adopted from Interim the Decision # 3403 by the BIA and the subsequent analysis of the case by Musalo.[27]

Rodi Alvado Pena (the applicant/respondent in the case) is from Guatemala. She married Francisco Osorio when she was 16 years old. He was then 21 years old. Francisco had formerly served in the army. He and his two children currently reside in Guatemala. Upon marriage, the couple moved to Guatemala City. Francis Osorio reportedly "engaged in acts of physical and sexual abuse …'always mistreated me from the moment we were married, he was always aggressive'". He was also said to be domineering and violent. The BIA described Francis Osorio's acts of abuse against Alvarado Pena as follows:

> Her husband would insist that the respondent 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. Oftentimes, 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 with the seemingly senselessness and irrationality of his motives. He dislocated the respondent's jaw bone when her menstrual period was 15 days late. When she refused to abort her 3-to-4-month-old festus, he kicked her violently in her spine. He would hit or kick the respondent "whenever he felt like it, where he happened to be: in the house, on the street, on the bus." The respondent stated that "[a]s time went on, he hit me for no reason at all."

[27] I opted to use both of these versions of presenting the facts of the case especially for reasons of underscoring the "uncontested" position of the present case. Another reason is that while the basic reason for not using the real names of the claimants by most courts is on ground of protecting the confidentiality of the clients, the same could be open to abuse. "Privatization" of cases such as the one discussed here can mean restricting any possible monitoring on its progress, thereby turning it into, in compliance with popular 'traditions', a "private" matter of the courts. As such, I will adopt Musalo's use of respondent's and respondent's husband's real names for the purpose of perceiving particularly the respondent in human terms to avoid the temptation of being abstract in my analysis; an aspect I consider to impact decisions made.

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> 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 threatened 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 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 most severe pain when he forcefully sodomized her. When she protested, he responded, as he often did, "You're my woman, you do what I say."

Francisco Osorio continued his abuse against Alvarado; he almost put her eye out, broke windows and mirrors with her head, and whipped her with electrical cords. He worked as a private security guard throughout the course of their marriage, and was in possession of weapons. He used these weapons to assault her. At one point, in the middle of the night, he woke her with a harsh blow telling her that he hated her and threatened to plunge his machete into her neck. Once he pistol-whipped her, and another occasion threw his machete toward her, barely missing her hands.

Alvarado's attempts to seek refuge within Guatemala from her husband proved to be unsuccessful. Going to the homes of her brother and parents, which were some distance away, did nothing to prevent Mr. Osorio from pursuing her. When she rented her own room, just before she had decided to leave Guatemala, and took her daughter out of school to escape from Mr. Osorio, he found her and beat her unconscious before their two children.

Ms. Pena did unsuccessfully seek protection from the authorities. The police told her that they would not get involved. It was only when she insisted that they ultimately issued three citations to Mr. Osorio, which he ignored. The authorities took no action against him for this. When one of her complaints was ultimately, referred to a judge, "he told her that he would not interfere in domestic disputes" (BIA 1999, 5).

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Mr. Osorio continued to intimidate and threaten Alvarado. Several times, he warned her against leaving him because he would "cut off her arms and legs, and… leave her in a wheelchair if she ever tried to leave him" (BIA 1999, 9). Ms. Alvarado's sister, who resides in Guatemala, informed a witness that Mr. Osorio threatened her with death, "… [he would] hunt her down and kill her if she comes back [.]" (BIA 1999, 10).

Country Conditions

As part of the adjudication process, evidence of country conditions is supposed to be presented before the adjudicators and courts in the case. The respondent is required to prove that due to changed conditions in his or her country of origin there is fear of return. U.S. asylum law does not limit the "changed conditions" to only "major or public occurrences; persecution may emanate from non-state actors including a person's family and community" (BIA 1999, 37). However, "the critical criterion is that the circumstances affect the individual's situation and result in a particularized fear of persecution, on account of one of the five grounds" (BIA 1999, 37).

In the case of Alvarado relevant country conditions was presented "through the testimony of an expert witness [...] and through the submission of documentary evidence" (Musalo 1999, p. 1179). The testimony, by Dr. Doris Bersing, an expert on matters of domestic violence and women's issues in Latin America, informed that "militarism, combined with a patriarchal culture, has contributed to a particularly poor situation for woman, … "and 'women don't have rights' because 'men have the power'"(Musalo 1999, p.1179). Guatemala was said to be one of the worst countries in this regard. The testimony also found that spousal abuse was common, and that it occurs at all social-economic levels. The government of Guatemala does not provide protection or support to the victims, the testimony noted. The Department of State advisory opinion aligned itself with the testimony of Dr. Doris and stated that Ms. Alvarado's mistreatment "could have occurred" and decried the increase in complaints of spousal abuse in Guatemala from 30 to 120 a month

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(Musalo 1999, p. 1179). Elsewhere outside the United States, Musalo (1999, p. 1179) examined a report in Canada in which there is existence of "pervasiveness of domestic violence, and discussed the deep cultural attitudes and institutionalized discrimination that perpetuate the problem and result in an inadequate response from the police and judicial system". On the issue of Guatemala in effect legalizing discrimination against women, one of the crucial documentations submitted before the court highlights that: "The Guatemalan civil code recognizes the male as a married couple's legal representative; the female is in charge of child care and other domestic responsibilities. A husband can legally forbid his wife to engage in activities outside the home. The husband also has the primary authority in disposing of joint property" (Tisdale 1992). As a result, the U.S. Department of State's Country Reports on Human Rights Practices for 1994 (1995, p. 87) notes that the U.N. Committee on the Elimination of Discrimination Against Women expressed its "increased…concern at the discrimination institutionalized in law". Other aspect taken into account by the documentary evidence presented was the "poor economic conditions for women in Guatemala, including their extremely low rate of formal education and high rate of illiteracy" (Musalo 1999, p. 1180).

The trend of U.S. asylum law's application shows that the "relationship between the administrative authorities and the federal courts reviewing administrative decisions often has been contentious, resulting, at times, in conflicting interpretations of doctrine among different jurisdictions" (Anker 1999, p. 1). The *Matter of R-A-* is however noteworthy due to the amount of agreement, especially between the IJ's opinion and the decision of the BIA, on the key determining elements for refugee status, including the findings that "the severe injuries sustained by the respondent rise to level of harm sufficient (and more than sufficient) to constitute "persecution"' (BIA 1999, p. 914). Equally interesting, the BIA in its continuing battle does not "dispute that the respondent established a failure of state protection" (Musalo 1999, p. 1181). However the BIA[28] disagrees in four identifiable issues as highlighted by Musalo (1999, p. 1181): (1) the social group identified by the IJ-Guatemalan woman

[28] Five members of the BIA dissented with the majority's opinion- 10.

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intimately involved with male companions who practice domination through violence- does not constitute a particular social group; (2) the motivation of the persecutor to harm the respondent- not on account of the described social group; (3) possession of a political opinion by the respondent- found not to have one; (4) the motivation of the persecutor not on account of any opinion she held, or he thought she held.

(1) Social group

The majority opinion acknowledged the social group identified by the IJ, thus "the respondent fits within the proposed group. [And] may satisfy the basic requirement of containing an immutable or fundamental individual characteristic" (BIA 1999, p. 918). Nonetheless, these criteria by themselves are insufficient as they are "only threshold requirements" (Musalo 1999, p. 1182). BIA (1999, p. 918) cites two additional requirements: (1) the proposed group is expected to "understand their own affiliation with the grouping, as do other persons in the particular society", (2) the harm suffered "is itself an important societal attribute, or, in other words, that the characteristic of being abused is one that is important within Guatemalan society". Upon putting these two additional provisions under the *Acosta* test, the majority opinion finds that the "social group identified by the IJ fails to meet the requirements because its members are not "'recognized and understood to be a societal faction'... [and] there is no evidence that 'women are expected by society to be abused'" (Musalo 1999, p. 1182). The conclusion of the majority finds that Mr. Osorio abused Ms. Alvarado Pena because she was his wife, "and not because she belonged to a 'broader collection of women'" (Musalo 1999, p. 1182). Another fault noted by the majority as disqualifying the social group persecution was the "failure to establish the persecutor's motivation to harm the respondent because of her membership in the particular social group" (Musalo 1999, p. 1182). A very interesting argument of the majority's opinion regards the issue of societal attitudes and state failure of protection. The IJ ruling found that the failure of state protection was due to institutional biases against women thus necessitated a consideration of the issue of nexus in the context of these attitudes. The majority did not deny the fact that discrimination against women existed. However, a majority's factual finding showed that husbands in Guatemala are

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"'supposed to honor, respect and take care of their wives' and that the government of Guatemala recognizes spouse abuse as a problem" (Musalo 1999, p. 1182). This reasoning goes against the IJ's ruling that the failure of state protection was motivated by societal and government bias against women. The majority argued that even in the event where there is a failure of state protection, this would not substitute for the motivation of the actual persecutor and that the initial finding by the majority that Osorio's motivation to harm the respondent was not on account of social group membership sustained (Musalo 1999, p. 1182).[29] In conclusion of the social group analysis, the majority discussed its earlier opinion in *Kasinga*, citing consistency in its ruling in *R-A-*. The majority relied on a comparison of the two different forms of persecutions to back its consistency position. The difference between the two cases, which the majority argues explains the different results thereof, took into consideration the "form of persecution" and "its place" within the two societies in question. In *Kasinga* the form of persecution-FGM- was characterized as a "pervasive and important practice among the Tchamba-Kunsuntu tribe, one that women are expected to undergo and to suffer ostracization for resisting" (Musalo 1999, p. 1183). On the other hand, according to the majority, domestic violence is not as pervasive in Guatemala as FGM is in Togo and that it is not a "practice encouraged and viewed as societally important in Guatemala… and that women are expected to undergo abuse from their husbands" (BIA 1999, p. 924).

(2) Actual and imputed political opinion

The Immigration Judge's ruling that Mr. Osorio abused Ms. Avalrado on account of political opinion he imputed on her or that which he believed her to have upon resisting his acts of violence and abuse, was ruled out by the majority. According to Musalo (1999, p. 1183) the majority took two-step analysis to arrive to this viewpoint. First, an examination as to whether Ms. Alvarado Pena possessed a

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[29] Musalo cites the majority's reference to the decision of the House of Lords in the UK, *Islam (A.P) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah (A.P.)* "where the failure of state protection was a factor in determining nexus". The majority, however, finds that this "part[s] company" with this approach or rationale in determining nexus.

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political opinion is undertaken and then a discussion on the issue of nexus follows. The majority points that the only opinion of Ms Alvarado Pena was "the common human desire not to be harmed or abused" (BIA 1999, p. 915). According to the majority, this does not constitute a political opinion. Also, Musalo (1999, p. 1183) points to the rejection by the majority of the possibility that Mr. Osorio's motivation to harm Ms. Alvarado was because he believed that she "disagreed with his views of women". But rather, Mr. Osorio "harmed the respondent regardless of what she actually believed, or what he thought she believed" (BIA 1999, p. 914). *Lazo-Majano v. INS*, 813 F. 2d 1432 (9 th Cir. 1987) was discussed as it had been partially relied upon in the IJ's decision. The case involved a Salvadoran woman who had experienced sexual violence and beatings at the hands of an army sergeant with whom she shared a non-marital relationship. In order to characterize the persecution of the victim as "on account of", the Ninth Circuit undertook the following analytical constructs as analyzed by Musalo (1999, p. 1183): first, there was a "finding of cynical imputation of political opinion by the persecutor". Second, the persecutor was found to have been "asserting the political opinion that a man has the right to dominate and he has persecuted (the alien) to force her to accept this opinion without rebellion". The majority disagreed with the second rationale because the nexus is established on the basis of the persecutor's political opinion instead of the victim's. The majority made an observation that after the U.S. Supreme Court's decision in *INS v. Elias Zacarias*, 502 U.S. 478 (1992) in which the persecutor's own motivation to harm the respondent will not be sufficient for an "account of" qualification; "a showing must be made that he was motivated to harm the victim for her political opinion" (Musalo 1999, p. 1183)

Dissent opinion[30]

The dissent finds the majority's opinion to be "at odds with our own precedent, federal court authority, and Department of Justice policy pronouncements, which effectuate our obligation to provide surrogate protection for persons who fear harm

[30] This analysis is based on the analysis therein *Matter of R-A-*, Int. Dec. 3403 and an analysis of the decision by Musalo, "*Matter of R-A-*: An Analysis of the Decision and its Implications," 76 Interpreter Releases 1177 (Aug. 9, 1999).

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inflicted because of some fundamental aspect of their identity" (BIA 1999, p. 930). The majority made a "laundry list of hurdles" to be cleared before the respondent demonstrate membership in a particular social group "disregards decisions of tribunals, both domestic and foreign, which extends asylum protection to women who flee human rights abuses within their own homes. It also ignores international human rights developments and the guiding principle of the Charter of the United Nations, the Universal Declaration of human rights, and the 1951 Convention Relating to the Status of Refugees, 'that human beings shall enjoy fundamental rights and freedoms without discrimination'" (BIA 1999, p. 930).

(1) Social group

The dissent's analysis begins by making reference to *Acosta*[31] as the case that established the fundamental rule that a "social group is to be defined by reference to common, immutable characteristics, which may be innate (sex, color, kinship) or may arise from shared past experience (such as former military leadership or land ownership)" (Musalo 1999, p. 1183). The dissent cites to numerous cases as evidence of widespread application of the *acosta*'s analytical approach including in *Matter of Fuentes*, *Matter of Toboso-Alfonso*, *Matter of H-*, and *Matter of V-T-S-*. The Board's decision in *Kasinga* was consistent with the *Acosta*'s principle and clarified that "social group could be established by reference to gender in combination with one or more additional factors" (Musalo 1999, p. 1184). The "additional factors" in *Kasinga* are identified as "ethnic affiliations and the characteristic of not having been subject to FGM" while in *R-A-*, they are "relationship to an abusive partner, and opposition to domestic violence" (Musalo 1999, p. 1184). The dissent disagrees with the majority about their argument on the formulation of social group in *Kasinga* and sees the purported distinctions between the latter and *R-A-* as having been "contrived" and that there are "a number of other striking similarities between the instant case and *Kasinga*. Both cases involve a form of persecution inflicted by private parties upon family members. In both cases, the victims opposed and resisted a practice that was

[31] This case has been analyzed above at 42.

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ingrained in the culture, broadly sanctioned by the community, and not prevented or punished by the states. In both cases, the overarching societal objective underlying the culture norm was the assurance of male domination" (BIA 1999, p. 932). Also, *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986) was critically analyzed. The formulation in this Ninth Circuit decision calls for a showing of "voluntary associational relationship". The majority did make reference to this formulation although it was not the basis for its decision. In response to this, the dissent cited a number of cases in which the courts had analyzed "social group claims without reference to 'voluntariness'" (Musalo 1999, p. 1184). Moreover, the dissent notes that the formulation in *Sachez-Trujillo v. INS* has been rejected by most courts outside the Ninth Circuit and even outside the United Sates such as the Britain's House of Lords in its decision in *Sha*h. The dissent in its final analysis of the social group definition saw the "developments in International and domestic law" as a 'sound basis for providing protection' to the respondent in question (Musalo 1999, p. 1184). For example, the Declaration on the Elimination of Violence Against Women was cited as rejecting domestic violence as simply "a private matter, but constitutes a violation of fundamental human rights" (Musalo 1999, p. 1184). To this end, the INS Gender Guidelines, a U.S. domestic body, recommends that 'the evaluation of gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of those instruments by international organizations' (BIA 1999, p. 936). Elsewhere in both Canada and Britain domestic violence has been found to constitute a particular social group within the meaning of the Refugee Convention, in *Mayers v. Canada*, 97 D.L.R. 4 th 725 (C.A. 1992) and *Islam (A.P.) v. Secretary of State for the Home Dep't* respectively. Similarly, Canada and Britain underscore the importance of viewing gender-based claims within the framework provided by international law. For example, the Canadian court in overturning the decision by the Refugee Division cited the latter's failure to "look to 'foreign jurisprudence and learned commentary' in order to construe the phrase 'membership in a particular social group'" and cited the U.S. case – in *Sanchez-Trujillo*- as a critical example in this respect (BIA 1999, p. 937). In addressing the issue of nexus, the dissent accepts the fact that there are no clear motives for the harm inflicted upon Ms. Alvarado by her husband, but noted that the courts "have

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recognized that the absence of legitimate motives can rise to 'an inference that the harm occurred on account of a statutory protected characteristic[.]'"(Musalo 1999, p.1184). In making this argument- about nexus between the persecution suffered by the respondent and her membership in a social group partially defined by gender-the dissent turns to the "fundamental purpose of domestic violence… [like that of FGM] is to control and subordinate women" (Musalo 1999, p. 1184). The dissent quotes the Report of the Committee on the Elimination of Discrimination Against Women's affirmation of the power dynamic underlying domestic violence: "At its most complex, domestic violence exists as a power 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". Also, the dissent finds the "societal norms and level of impunity for the persecutor" to be relevant for a determination of nexus e.g. Mr. Osorio "knew he could act with total impunity because 'of the respondent's gender and their relationship'" (Musalo 1999, p. 1184). This therefore led the dissent to conclude that "[i]t is reasonable to believe, on the basis of the record before us, that the husband was motivated, at least in part, 'on account of' respondent's membership in a particular social group that is defined by her gender, her relationship to him, and her opposition to domestic violence" (BIA 1999, p. 939).

(2) Actual and imputed political opinion

Basing its assertion on particularly the case of *Fatin v. INS*, 12 F3d 1233 (3d Cir. 1993), and also citing a vast number of Ninth Circuit cases, the dissents points that "[o]opposition to male domination and violence against women, and support for gender equality, constitutes a political opinion" (BIA 1999, p. 35). According to Musalo (1999, p. 1185) the dissent considered Ms. Alvarado Pena's statements and actions such as "resisting her husband's violence, attempting to flee, and seeking police and court intervention" as "demonstrating her political opinion of opposition". On the majority's opinion that Mr. Osorio's acts of violence were not in any way

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motivated by his wife's actual or imputed political opinion, where it claimed that these violent acts began since marriage, the dissent noted that as a matter of fact they did escalate and that it was his increasing attempts to 'stifle and overcome' Ms. Alvarado Pena's opposition (Musalo 1999, p. 1885). In its concluding remark, the dissent notes that should Ms. Alvarado Pena been 'subjected to such heinous abuse due to political opposition to communism, imputed as a result of her family's economic class or political activities' the majority's opinion would change drastically because there would be no difficulty recognizing "that she had suffered persecution on account of political opinion, and that she is no less entitled to protection 'on account of her political opinion' opposing male domination expressed through the abuse of women by their husbands[.]'" (Musalo 1999, p. 1185).

The INS Proposed Regulation After the Matter of R-A-

The United States has had positive[32] developments in claims relating to gender, but, as noted by Musalo and Knight (2001), when this is viewed in relation to developments elsewhere in a similar context, it reflects considerable level of resistance in the way forward on the part of the US asylum law. As discussed above, the U.S. *Acosta* standard received significant acknowledgement and approval both locally and internationally, and was subsequently adopted by countries like Canada, Britain, and New Zealand. However, the BIA decision in the R-A- case seems to undo the past glory. This controversial case led the Department of Homeland Security to issue Proposed Asylum and Withholding Definitions Regulations after the *Matter of R-A-*. This increased the hope of many actors in this area of law, including NGOs, law school instructors and legal clinics across the United States. It is worth noting that the DHS made its position known following the publication of the draft regulations in a brief released on February 2004. Regarding the ongoing saga of particularly

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[32] A memorandum from David A. Martin, Doherty Professor of Law and Weber Research Professor of Civil Liberties and Human Rights, University of Virginia and Yvonne Lamoureux University of Virginia School of Law, Treatment of Gender-based Asylum Claims in the United States (March 31, 2003), independently finds the U.S. as having "been prominent in adopting a variety of protections for female asylum seekers and in pioneering progressive doctrine on such claims… [but] most of the concern about U.S. treatment of gender-based claims seems to focus on one especially difficult and controversial area of doctrine, that having to do with refugee status claims based on domestic abuse…"

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attempting to secure protection for victims of domestic violence, the brief noted: "The legal standards governing this case and others like it have been obscured by the uneven development of case law and by the need for a coherent administrative framework for interpretation on these issues" (DHS, 2004, 5). The main concern of the DHS, which somewhat explains the prevailing battle in the case, is that if the decision is not "narrowly tailored and limited as much as possible, it is possible to permit "too expansive a reading of the term 'particular social group'" (DHS, 2004, 4).[33] The DHS further notes that this would result in "a significant adverse operational impact" (DHS, 2004, 4). It also finds the R-A- case "grantable" based on the new regulations, but stresses that "the rule itself does not address domestic violence per se" (DHS, 2004, 6). The DHS supports the granting of refugee status to Ms. Alvarado under the "membership in a particular social group" category, which is based on an immutable characteristic, such as gender or family membership. As the DHS finds this particular case to contain "unusual facts and exceptional circumstances", the Attorney General "should grant asylum in this case…without issuing an opinion" (DHS, 2004, 3). However, the political opinion claim of the case as argued by the BIA was sustained by the DHS arguing that "this portion of the decision does not open new lines of reasoning and should not be disturbed" (DHS, 2004, 13).

On behalf of several organizations, law school instructors and legal clinics, Harvard Immigration and Refugee Clinic of Greater Boston Legal Services, Inc. and Harvard Law School, sent a letter to the U.S. Department of Homeland Security in which they raised "a critical legal issue… to consider final promulgation of the Proposed Asylum and Withholding Definition regulations, which have been pending since December 2000". The letter brought to the attention of the DHS the following key issues:

- that the rule of law prevail in the field of asylum protection;

[33] Cf. Feller et al., *Refugee Protection in International law*: *UNHCR's Global Consultations on International Protection*, p. 280 (2003), in which "the RSAA has suggested that a test that looks to external social perceptions would be too encompassing".

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- consider final promulgation of the Proposed Regulations in line with its "clear and well-thought out position" of February 2004 brief in the case of Rodi Alvarado;
- take into consideration comments[34] made to the Proposed Regulations; and
- to uphold and preserve the progress ("longstanding precedent and policy") attained in this area of law for the last 20 years.

The proposed regulations issued by the INS seek to establish the following, according to a summary by Aleinikoff (Feller et al. 2003, pp 280-79):

> (c) Membership of a particular social group
>
> (1) A particular 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…
>
> (3) Factors that may be considered in addition to the required factors…
> but not necessarily determinative, in deciding whether a particular social group exists:
>
> a. the members of the group are closely affiliated with each other;
> b. the members are driven by a common motive or interest;
> c. a voluntary association relationship exist among members;
> d. the group is recognized to be a societal faction or is otherwise recognized segment of the population in the country in question;
> e. members view themselves as members of the group;
> f. the society in which the group exists distinguishes members of the group for different treatment of status than is accorded to other members of the society

Most learned commentators in this area of law like Aleinikoff are not optimistic about the new proposed regulation. He argues that the "INS formulation seeks to be inclusive and responsive, but in the end may provide rather little guidance to

[34] These comments can be accessed at www.humanrightsfirst.org/asylum/gender_comments.pdf; http://www.gbls.org/immigration/HIRC_and_Coalition_Comments_2001_Gender_and_Social_Group_Proproposed_Regulations.pdf.

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adjudicators" (Feller et al. 2003, p. 280). For example, the INS argues that due to the fact that administrative and judicial decisions have been "subject to conflicting interpretations" the new regulation will seek to resolve "those ambiguities by providing that, while these factors may be relevant in some cases, they are not requirements for a particular group" (INS 2000, p. 7). Aleinikoff sees this, in fact, as producing "more ambiguities than it has resolved". Specifically, the additional phrase, for instance, in defining social group as sharing a "common, immutability characteristic", that is, "a person should not be required to change it", is deemed to be unnecessary as the characteristic must be immutable. Again, if immutability is required, it does not serve any purpose to list other factors that may be consulted in defining membership in a particular social group.

While the discussion so far had considered the two alternative approaches expressly adopted by the United States jurisprudence-*Acosta* and *Sanchez-Trujillo*-, there is, arguably, a third one called 'externalist' approach which has been hinted at without recognition of its analysis in *Gomez v. INS*, thus "a particular social group is comprised of individuals who possess some fundamental characteristic in common which serves to distinguish them in the eyes of a persecutor-or in the eye of the outside world in general" (Feller et al. 2003, p. 279). In its regulation, INS (2000, p. 7) likewise states: "this rule clarifies that the Department views the *Sanchez-Trujillo* factors as considerations that may be relevant in some cases, but not as requirements for a particular social group". According to Aleinikoff (Feller et al. 2003, p. 280), this "looks in the direction of the 'sociological' approach of *Applicant A*" (this is discussed in chapter 4 below).

Although the DHS (2004, 3) argues that the Proposed Regulations will provide guidance to "avoid the kinds of overbroad social group definitions that have confused the analysis of cases in the past", and indeed implicitly disapproves of BIA's 'nexus'[35] analysis, this does not seem likely as long as the approach being favored in

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[35] In relation to the 'for reason of' requirement, the INS 65 Fed. at 76593 explains: "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 the characteristic, because only one of these women is in a domestic relationship with the abuser".

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this regard points in the direction of *Applicant A* (this formulation is discussed below). This therefore means that upon promulgation, there will be a third analytical approach- 'social perception' approach of *Applicant A*.- in addition to the 'protected characteristics' of *Acosta* and the "voluntary associational relationship' of *Sanchez-Trujillo*. For the purpose of practically setting out guidance, an understanding as to how these three distinct analytical approaches will harmoniously work together, not compete with each other, is deemed invaluable. In the application of both the *Acosta*/*Ward* and *Applicant A*. formulations, overlap[36] has been reported. For example, homosexuals and prior large landowners in Communist States constitute particular social groups. Another example is in *Chen Shi Hai v. Minister for Immigration and Multicultural Affairs,* (2000) 170 ALR 553; a case involving an Australian-born claimant who was a third child of a Chinese couple. The Refugee Review Tribunal had concluded that 'black children' –children born outside the family planning policies- constituted a particular social group (Feller et al. 2003, P. 272). This opinion is justifiable under either the *Acosta*/*Ward* or *Applicant A*. "because 'black children' are perceived and treated as a distinct group in China and because birth order is immutable" (Feller et al. 2003, p. 272). There are, however, applications in which the two approaches would hardly converge. An example is in a case involving private entrepreneurs in a socialist State, wealthy landowners targeted by guerrilla groups, or members of a labor union. While this would find no difficulty satisfying the 'social perception' approach requirement, it would prove impossible to justify the same under the 'protected characteristics' approach. In other words, the "immutability" requirement of the latter can not be met within this definition of a social group. However, as it will be demonstrated by the RSAA's definition of the social group below, it is possible to adopt an approach that is "not too encompassing"[37] and still uphold the non-exclusionary intent of the 1951 Convention. Any applicable analytical

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[36] This is not something new in refugee law. For example, race and nationality Convention grounds often overlap in their definitions, but when this aspect is put into consideration as part of the adjudication criteria with a complementary objective, the result reflects upon both "practice" and "purpose" of the principle of asylum (Parliamentary Assembly, *Asylum* 13 (1995)). This means that the country of asylum provides: 1. security on the territory of a state for those in flight from persecution in their country of origin; and 2. a durable solution to their plight.

[37] C.f. with Aleinikoff's view "that invocation of *ejusdem generis* or understanding the Convention primarily in 'non-discriminatory' terms has only limited relevance for interpreting the term 'particular social group'" (Feller et al. 2003, p. 310).

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approach would, therefore, accomplish its "humanitarian" purpose adequately if applied in an obligatory fashion aiming at meeting the minimum standard of protection to claimants (this is described below in the RSAA's explanation of "for reason of"-linkage to the convention ground). The 'protected characteristics approach' seems to lean on the main concept of protection which upholds the anti-discrimination principles in the convention. Should the regulations lead the refugee adjudication toward this main road, the seemingly setbacks arising from the *Matter of R-A-* could be corrected, and the current potential to seriously undermine claims based upon social group reversed. Moving in this direction would, in the first instance, discourage the prevailing problem of standards "competition" explained above, thereby focusing more attention on the specific elements of the claim. Adopting this "humanitarian" approach would most likely bring into reality the DHS (2004, 6) expressed ultimate purpose in this matter:

> …this case should be resolved by rigorously analyzing each element of the applicant's claim under the applicable legal standards. While these questions may arise in different and unfamiliar ways in the context of a claim based on domestic violence, they are in fact the same questions that are asked in every asylum case.

Conclusion

The prevailing difficulty in achieving protection for women victims of domestic violence lies, for the most part, in the social group ground definition. It is by interpretation that standards are set, which seem, in the case of U.S., to vary depending on the administrative body deciding the case. The current standards are disharmonized, thus rendering particularly gender-based claims susceptible to a compounded interpretation. One remedy would possibly be to undertake an analytical approach that ensures that its formulation adopts the minimum standard of protection as part and parcel of the integral elements of the refugee inquiry, thus minimizing fears of encompassing groups that are outside the ambit of the convention. In this respect, the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status notes:

> [t]here is no universally accepted definition of 'persecution', and various attempts to formulate such a definition have met with little success. From Article 33 of the 1951

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> Convention, it may be inferred that a threat to life or freedom on account of race, religion, nationality, political opinion, or membership in a particular social group is always persecution. Other serious violations of human rights – for the same reasons-would constitute persecution.

As Sedley notes in the *Islam* and *Shah* case, a more holistic approach would ideally underscore the following:

> [A]djudication [of a social group claim] is not a conventional lawyer's exercise of applying a legal litmus test to ascertain facts; it is a global appraisal of an individual's past and prospective situation in a particular cultural, social, and legal milieu, judged by a test which, though it has legal and linguistic limits, has a broad humanitarian purpose.

In order for the final regulations to be effective, there will be a need to establish an "appropriate vehicle for developing the kind of comprehensive administrative interpretive approach needed for the adjudication of particular social group cases" (DHS, 2004, 3). This is a very significant step forward considering that one of the present main sources of administrative interpretation-the BIA-continues to be criticized for inconsistency and recently being "sharply divided in many of its decisions on asylum claims" (Anker 1999, pp. 8-9). This trend of the BIA has prompted intense criticism from NGOs, academia and renowned scholars in this area of law. For instance, Aleinikoff (1991, p. 28) sees this as a reconstruction of the original intention of the drafters of the 1951 Convention to read:

> The Convention drafters faced a post-World War II Europe overflowing with displaced persons who feared returning home based on dozens of different grounds. From all the possible grounds for fear, the drafters selected just five: race, religion, nationality, political opinion, and membership in a social group… Thus to be true to the convention (and Congressional intent to adopt the convention's definition), the Board must ensure that applicants come within one of the preferred categories. Other forms of persecution may be unfortunate, but they are beyond the purview of the relevant legal texts.

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While the present *Matter of R-A-* could serve as a wakeup call for the U.S. to adopt favorable reforms to its asylum regime particularly those that will put its prominence in adopting a variety of protections for female asylum claimants and in pioneering progressive doctrines in such claims on track, as Deborah *et al* (2005) stresses, particularly "longstanding principle in U.S. law that the 'membership in a particular social group' category is based on an immutable characteristic, such as gender of family membership", the result in achieving this objective remains to be seen. For example, significant changes in this area of institution have occurred with the creation of the DHS. The Attorney General remains in charge of the BIA and the immigration judges. Other immigration functions have been transferred out of the Department of Justice. The INS, which was responsible for drafting the proposed regulations, was abolished on March 1, 2003. Meanwhile, most of the INS functions have been absorbed within the new DHS. Asylum Officers will now serve under the DHS Bureau of Citizenship and Immigration Services.

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CHAPTER 4
PROMINENT SOCIAL GROUP DEFINITION IN NEW ZEALAND, CANADA, UNITED KINGDOM AND AUSTRALIA

This chapter will present the two prominent tracks of defining 'membership in a particular social group'-"protected characteristics" and "social perceptions"- in New Zealand, Canada, United Kingdom, and Australia. While the definitions of these countries seem to vary, there are also points of convergence. For example, the first three countries in question seem to agree that the most appropriate track of defining social group is "protected characteristics" and, surprisingly, each one of them follows the approach of the American case *Matter of* Acosta discussed above. Australia is in favor of the "social perceptions" track, which is also significant in this context, especially when we consider the ultimate motive of adding the social group category as a fifth convention ground to: "… 'stop a possible gap' in the coverage afforded by other, more specific categories" (Zolberg et al. 1989, p. 25). (I will come back to this later in my conclusion). Another point I would like to underline through presenting these countries' social group definitions, particularly where I have noted "convergence" among states, is the importance of the principle of 'universality'[38] in asylum, asserting my earlier point[39] that refugee protection is indeed a human rights issue and as such the international law of human rights is indispensably relevant to the principle of protection (I will return to this later in my conclusion as well). Moreover, the advisory opinion of the *International Court of Justice in obligation to arbitrate*

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[38] While the concept of 'universality' of human rights remains largely theoretical and open to debate, the benefits arising from upholding it can not be understated. The principle of international co-operation among states, for example, has unified states with a view to finding solutions to various problems affecting the international community, including resolving refugee problems in line with the principle of 'burden sharing'. Article 1.3 of the UN Charter seeks to "achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and promoting and encouraging respect for human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion".

[39] In my earlier discussion on 'The Basis of Obligation', I stressed the point that as soon as any State is unable or unwilling to provide protection to its citizen, it automatically loses its "sovereignty legitimacy", thereby paving the way for human rights law to take course.

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under section 21 of the United Nations Headquarters Agreement [1988] ICJ Reports 12 affirms that international law remains the governing criterion when a state's responsibility is at issue, like in *R-A-*. Again, I would like to emphasize the 1951 Convention's intention to ensure universal access to the refugee protection regime by all persons who are, or likely to be victims of persecution, including victims of domestic violence (except for those justified under the exclusion provisions of Article 1D, 1E, and 1F of the Convention).[40] It is also worth mentioning that the "usual materials consulted in the interpretation of international agreements provides little assistance on the question of membership of a particular social group" (Feller et al. 2003, p. 264). Thus, these definitions of the social group are invaluable resource to those adjudicating claims on domestic violence and other general purposes in the refugee discourse.

A. *New Zealand*

New Zealand has a long history of promoting women's rights, including being the first country in the world to grant women the vote. On the asylum front, New Zealand ensures that the refugee adjudication systems underscore the need to sensitize gender in a number of ways. For example, the Refugee Status Branch[41] is composed of seventeen immigration officers. Eleven are apparently women- 65% of the entire staff currently employed by the Refugee Status Branch. Similarly, the Refugee Status Appeals Authority (the RSAA), an independent body staffed by practicing or recently retired lawyers drawn "entirely from outside government", comprise of a considerable number of women as its members (Haines 1997). Out of fifteen members presently constituting the RSAA, six are women- a remarkable progress from 1991 when all of the three original appointees were men. In addition, the Terms of Reference provides that a representative of the UNHCR is *ex officio* a member of the RSAA. At the

[40] In fact, the 1967 Protocol to the Convention "fundamentally transformed the 1951 Convention from a document fixed in a specific moment in history into a human rights instrument which addresses contemporary forms of human rights abuses which are properly called persecutions" (Feller et al. 2003, p. 326).

[41] This division of the New Zealand's Immigration Service, under the Terms of Reference which came into force on August 30, 1993, makes a first instance determination of refugee status.

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present time, all two UNHCR representatives filling this position at the RSAA are women.

The New Zealand government has undertaken its own actions aimed at sensitizing gender-related persecution in its jurisprudence as mentioned above. Yet, New Zealand cases generally follow the U.S. *Acosta/*Canada *Ward* protected characteristics definition. Noteworthy in the New Zealand's analysis[42] of the social group definition are:

(1) Following the UNHCR's Global Consultations on International Protection, RSAA's definition of the 'membership of a particular social group' was acknowledged as developing "…largely through the careful and exhaustive analysis of Rodger Haines[43], Chairman of the Refugee Status Appeals Authority (RSAA)" (Feller et al. 2003, p. 280).

(2) The analysis is solely based on other country's formulations that have been internationally approved, particularly *Acosta* and *Ward* opinions.

(3) The anti-discrimination principle forms the basis of the *Acosta*/*Ward* approach, which is deemed to be an underlying norm of the 1951 Convention that can provide interpretive guidance.

(4) The formulation sought the lead of relevant Gender-guidelines such as the INS, 'Gender Guidelines' and 'Michigan Guidelines on Nexus to a Convention Ground' along with other traditional sources of interpretation of international law like opinions of recognized scholars and commentators.

(5) RSSA (the body responsible for defining the social group) is an independent Tribunal in New Zealand whose principal purpose is to hear appeals and make determinations in relation to a person's refugee status on applications made by refugee status officers.

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[42] The actual analysis is discussed in chapter 4.

[43] Haines was in fact commissioned by UNHCR to write a background paper for an expert roundtable discussion on gender-related persecution organized as part of the Global Consultations on International Protection in the context of the 50th anniversary of the 1951 Convention Relating to the Status of Refugees. Following this, his paper was incorporated as part of UNHCR's current authority in the field of refugee law (see Feller et al. 2003, pp. 319-350).

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In explaining the meaning of 'for reason of' – how to best understand the causal linkage or nexus between the Convention ground and the risk of being persecuted-Refugee Appeal No. 71427/99, New Zealand Refugee Status Appeal Authority (NZ RSAA), [2000] NZR 545, makes reference to a colloquium elaboration in 2001 the 'Michigan Guidelines on the Nexus to a Convention Ground and states:

> Accepting as we do that persecution = Serious Harm + The Failure of State Protection, the nexus between the Convention reason and the persecution can be provided *either* by the serious harm limb *or* by the state failure of protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (e.g. husband, partner, or other non-state agent) for reasons unrelated to any of the Convention ground, the nexus requirement is satisfied. Conversely, if the risk by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because 'persecution' is a construct of two separate but essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is 'for reason of' a Convention ground, the summative construct is itself for reason of a Convention ground.

The RSAA first and foremost makes it clear that its analysis is based on the 1951 Convention and draws on the principle that "serious harm cannot be inflicted for reasons of personal status … the principle of non-discrimination enshrined in the Universal Declaration, Article 2…" (Feller et al. 2003, p.344).[44] Similarly, Article 26 of the ICCPR asserts:

> the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any grounds such as race, colour, sex

[44] The Universal Declaration, Article 2 states: "Everyone is entitled to all the rights and freedom set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or *other status*… (emphasis added). RSAA affirms this by making reference to some academic writing of a recognized scholar-D.J. Steinbock, 'The Refugee Definition as Law: Issues of Interpretation' in *Refugee Rights and Realities: Evolving International Concepts and Regimes* (ed. F. Nicholson and P. Twomey, Cambridge University Press, 1999), p. 13, at pp. 20-23.

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language, religion, political, or other opinion, national or social origin, property, birth or other status.

RSAA notes that both the Universal Declaration and the ICCPR instruments fall short of listing comprehensively the characteristics upon which discrimination might be based, thereby recognizing that an exhaustive definition is impossible. By the same token, "the social group ground in the 1951 Convention is an open-ended category which does not admit of a finite list of applications" (Feller et al. 2003, p. 345). However, the limitation involved is inherent "in the words 'particular social group'… one of the five categories. It is not an all-encompassing category" (Feller et al. 2003, p. 345). At least in common law jurisdictions it has been stressed that the existence of a 'particular social group' be "independent of, and is not defined by, the persecution" (Feller et al. 2003, p. 345). Although the persecutory conduct cannot be looked to definite the social group, the "actions of the persecutors may serve to identify or even cause a creation of a particular social group" (Feller et al. 2003, p. 345). The RSAA rejects the "cohesiveness" requirement for the social group existence, but accepts that it may help to prove the existence thereof. The other four convention grounds (race, religion, nationality, and political opinion) identify the core concept of protection through description of "…a characteristic or status which is either beyond the power of an individual to change, or so fundamental to individual identity or conscience that it ought not be required to be changed" (Feller et al. 2003, p. 345). In *Ward*, this concept was applied against the infliction of harm on grounds of difference in personal status or characteristics to produce the following three possible categories of 'particular social group': "(a) groups defined by an innate or unchangeable characteristic; (b) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (c) groups associated by a former voluntary status, unalterable due to its historical permanence"(Feller et al. 2003, p. 345). Practically, the first category would accommodate individuals fearing persecution on the bases such as "sex, linguistic background, and sexual orientation, while the second would encompass, for example, human rights activists" (Feller et al. 2003, p. 345). However, exclusion from this definition are those groups that are defined by a changeable

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characteristic or from which disassociation is possible without necessarily compromising one's basic human rights. The RSAA also considers women who "behave in a manner at odds with prevailing social or cultural mores" as a particular group. What unites the group is the "shared attitudes and value systems intrinsic to the nature of the persons concerned which to go to their identity and status" (Feller et al. 2003, p. 346). In this context, argues the RSAA, "external factors beyond the group's internally unifying characteristics" become relevant to associate persons as a social group. An example is given where discrimination, though not creating a social group by itself, "it may help to give it more definition, by setting persons aside from the broader tolerated segments of society" (Feller et al. 2003, p. 346). This approach encompasses, within the convention, women who are outside the "framework of accepted social codes and who are at risk of severe punishment because of their choice…" (Feller et al. 2003, p. 346).[45] The RSAA further adds that persecution may result from associations relating to family or kinship. These may be looked to define a particular social group. For example, a woman may face persecution arising from attempts to demoralize or punish "members of her family or community, or in order to pressure her into revealing information" (Feller et al. 2003, p. 346).

B. *Canada*

Canada was the first country in the world to formally establish procedures for the adjudication of refugee claims made by women through its *Guidelines on Women Refugee Claimants Fearing Gender-related Persecution* of March 1993. Essentially, the *Guidelines* formally recognizes that women may face gender-related form of persecution and as such it necessitates that the determination take into account the central issue of determining the linkage between gender, the feared persecution and one or more of the definition grounds. In *Attorney General v. Ward*, the Supreme Court of Canada provides an important discussion on the social group definition. The case involved an Irish National Liberation Army (INLA) former member who sought asylum in Canada upon being sentenced to death by the INLA for

[45] This approach, as noted by RSAA, makes other Convention grounds, namely political opinion (actual or imputed) and religion, relevant for refugee status determination.

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assisting hostages to escape. He claimed that he would be persecuted if returned to Northern Ireland because of his membership in the INLA.

Concerned about an interpretation on the membership in a particular social group category that would "render it a 'safety net to prevent any possible gap in the other four categories'", the Supreme Court rejected the case (Feller et al. 2003, pp. 268-9).[46] Judge La Forest J explains that "such a broad reading would make the other Convention grounds superfluous" (Feller et al. 2003, p. 269). La Forest adopted a limiting principle in his reasoning that the definition of membership in a particular social group "should 'take into account the general underlying themes of the defense of human rights and anti-discrimination law that form the basis for the international refugee protection initiative'" (Feller et al. 2003, p. 269). The *Ward* definition encompassed the following as constituting social group:

(1) groups defined by an innate or unchangeable characteristic[e.g. by gender, linguistic background, sexual orientation];

(2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association [e.g. human rights activists]; and

(3) groups associated by a former voluntary status, unalterable due to its historical permanence.

Upon applying this test, the Court found *Ward* not to meet the Convention definition. The persecution he feared "was not based on former membership of the INLA, nor did the INLA itself constitute a 'particular social'" (Feller et al. 2003, p. 269). Another requirement for refugee status that *Ward* failed to satisfy is that of "nexus" between the convention ground claimed and a well-founded fear of being persecuted. The court explains that *Ward*'s membership in the INLA "placed him in the circumstances that led to his fear, but the fear itself was based on his actions, not his affiliations".

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46 Here, Aleinikoff points that the Supreme Court relied on the work of renowned scholars to make its arguments. Among the works he cites as contributing to the latter are: I. Foighel, 'The Legal Status of the Boat-People', 48 *Nordisk Tidsskrift for International Relations*, 1993, p. 217; A. C. Helton, 'Persecution on Account of Membership of a Social Group as a Basis for Refugee Status', 15 *Columbia Human Rights Law Review*, 1983, p. 39; G.S. Goodwin-Gill, *The Refugee in International Law* (Ist edn, Clarendon, Oxford, 1983), p. 30; M. Graves, 'From Definition to Exploration: Social Group and Political Asylum Eligibility', 26 *San Diego Law Review*, 1989, p. 739.

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Although the *Ward* standard is often referred as an 'immutability' test, which comes under the first category defined by an innate or unchangeable characteristic, it "plainly would recognize groups beyond those based on characteristics that are unchangeable… characteristics that are fundamental to human dignity but perhaps changeable" (Feller et al. 2003, p. 269). According to the Court, this second category, groups whose members voluntarily associates, would include groups such as human rights activists. It is worth noting in this context that what is considered by the category as a basis for a social group "is not the shared possession of voluntarily assumed characteristic; rather, it is the *voluntary association* of group members that it would be unfair to ask group members to forsake because the *association*… is fundamental to their human dignity" (Feller et al. 2003, pp. 269-70). Aleinikoff points that in practice the difference between the two might be slight because it is likely that adjudicators will conclude that persons have a right to associate with others based on characteristics fundamental to human dignity (Feller et al. 2003, p. 270). He gives an example in which the exercise of freedom of though is deemed to be fundamental human right, thus requiring that people not be compelled to forgo associations with like-minded persons.

The *Ward*'s 'immutability' test falls short of fully describing the groups within this standard. Aleinikoff classifies the standard under the 'protected characteristics approach'. He argues that in addition to the terminology embracing the groups defined by the *Ward* test, it indicates that the "analysis primarily looks at 'internal' factors… not on how the group is perceived in the society" (Feller et al. 2003, p. 270). However, when it is recognized that the test goes beyond the immutable characteristics, it becomes problematic. For example, an issue such as "the underlying principle that unites the categories identified in *Ward*" comes into play (Feller et al. 2003, p. 270). The concept of discrimination has sometimes been asserted as the key principle that unites the categories, but as Aleinikoff notes, "it cannot explain why groups must 'voluntarily associate' in order to receive protection" (Feller et al. 2003, p. 270). Discriminating against a group of persons who are a group because of a shared protected characteristic whether or not the group member know each other or choose to associate is "equally unjust" according to Aleinikoff. Pursuant to this logic

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in *Ward*, La Forest concluded that “Chinese applicants resisting coercive family practices could constitute a particular social group” (Feller et al. 2003, p. 270). This conclusion, however, has been rejected by other jurists on the basis that it risks interpreting the social group ground too broadly to the extent of including all persons whose human rights might be violated. It therefore seems that the “‘voluntary association’ test of *Ward*’s second category appears intended to ensure that the social group definition does not become a safety net” (Feller et al. 2003, p. 271). In this setting, the adjudicators are presented with a problem of making the most appropriate choice of defining the social group ground under this test. If they choose to accept the limitations, it becomes difficult “to construct a coherent principle that underlies the *Ward* categories” (Feller et al. 2003, p. 271). On the other hand, if they uphold the La Forest’s reasoning based on ‘voluntary association’ test, the definition of the social group ground will be deemed to be too encompassing.

C. United Kingdom[47]

The ‘membership in a particular social group” definition in the UK is based on a joint decision by the House of Lords in *Islam v. Secretary of State for the Home Department and R. v. Immigration Appeals Tribunal and Secretary of State for the Department, ex parte Shah,* UK House of Lords , [1999] 2 WLR 1015. The claims involved two Pakistani married women who fled their country of origin owing to being subjected to serious physical abuse by their husbands. The applicants asserted that the State would either be unable or unwilling to protect them if they were to return to Pakistan. The House of Lords’ careful reasoning in this case “has attracted attention from adjudicators in other common law jurisdictions” (Feller et al. 2003, p. 273).[48] The counsel for the claimants sought to define the membership in a particular social group as “women in Pakistan accused of transgressing social mores who are

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[47] While there is a claim based on ‘political opinion’ in *Islam* and *Shah*, it will not be discussed as it falls outside the intended scope of this thesis.

[48] Aleinikoff draws attention to the following writings as evidence of the vast attention prompted by *Islam* and *Shah* case: G. S. Goodwin-Gill, ‘Judicial Reasoning and “Social Group” after *Islam* and *Shah*’, 11 *International Journal of Refugee Law*, 1999, p. 537; M. Vidal, ‘“Membership of a Particular Social Group” and the Effects of *Islam* and *Shah*’, 11 *International Journal of Refugee Law*, 1999, p. 528.

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unprotected by their husbands or other male relatives" (Feller et al. 2003, p. 273). In intervening, the UNHCR suggested a definition that seems, according to Aleinikoff (in the footnotes), to "ride two horses, perhaps hoping that one will cross the finishing line first" (Feller et al. 2003, p. 271). The UHNCR, in line with its Executive Committee Conclusion No. 39, defined the social group as "'individuals who believe in or are perceived to believe in values and standards at odds with the social mores of the society in which they live'" (Feller et al. 2003, p. 270). A majority of their Lordships was in favor of a broad definition of the social group as "'Pakistani women', although there was also support for the more limited definition urged by the claimants" (Feller et al. 2003, p. 274). The principles agreed upon by the House of Lords in this decision include the "widely accepted views that the social group cannot be defined solely by the persecution and that the definition of a group is not defeated simply by showing that some members of the group may not be at risk" (Feller et al. 2003, p. 274). The 'cohesiveness' requirement for recognition of social group convention ground in US Courts of Appeals decision in *Sanchez-Trujillo* was rejected by the House of Lords. An anti-discrimination principle was identified by the majority of the House of Lords as "underlying the five grounds mentioned in the Convention" (Feller et al. 2003, p. 274). Even with this seemingly consensus of the House of Lords on the definition, the overall approach to the definition of the term membership in a particular social group seems to vary. "The protected characteristics analysis of the Canadian Supreme Court in *Ward*" was relied upon by Lords Steyn and Hoffmann to define the social group while "Lords Hope of Craighead (with the majority) and Millett (in dissent) adopted language closer to the social perception approach of the High Court of Australia in *Applicant A*." (Feller et al. 2003, p. 274). (This case is discussed below). The facts of the case, however, did not call for choice between these views because "women in Pakistan met either test… and a majority of the House of Lords accepted the broadest definition of the class (Pakistan women)" (Feller et al. 2003, p. 274).

In *Montoya*, Appeal No. CC/15806/2000, 27 April 2001, a more precise definition of the social group is presented, which draws on the previous case of *Islam* and *Shah*. The Immigration Appeal Tribunal (IAT) "understood the House of Lords to have adopted a protected characteristics standard in *Islam* and *Shah*" (Feller et al.

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2003, p. 274). As a basic principle, the IAT asserts that "the unifying characteristic of the 'must be one that is immutable or, put summarily, is beyond the power of the individual to change except at the cost of renunciation of fundamental human rights'" (Feller et al. 2003, p. 274). Essentially, the IAT made reference to the *Ward* and in *Matter of Acosta* analysis (discussed above):

(1) groups defined by an innate or unchangeable characteristic[e.g. by gender, linguistic background, sexual orientation];
(2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association [e.g. human rights activists]; and
(3) groups associated by a former voluntary status, unalterable due to its historical permanence.

The IAT cautions against invoking the latter two categories expanded the first group definition, arguing that this "would be to depart from 'the underlying need for the Convention to afford protection against discrimination denial of core human rights entitlements'" (Feller et al. 2003, p. 275).

D. *Australia*

Applicant A. was the High Court of Australia's leading decision involving applicants who claimed to fear forced sterilization because of their non-acceptance of China's 'one-child' policy. The court adopted a 'social perception' or 'ordinary meaning' analytical approach. In order "to be a 'particular social group', a group must share a common, uniting characteristic that sets its members apart in the society" (Feller et al. 2003, p. 271). In describing the group, McHugh J, notes that "what distinguishes the members of a particular social group from other persons in their country 'is a common attribute and a societal perception that they stand apart'" (Feller et al. 2003, p. 271). A similar description is provided by Dawson J: "a collection of persons who share a certain characteristic or element which unites them and enables them to be set apart from society at large. That is to say, not only must such persons exhibit some common element, the element must unite them, making those who share it a cognizable group within their society" (Feller et al. 2003, p. 271). The High Court

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cited *Sanchez-Trujillo* as being a 'safety net' approach inclusive of 'statistical' groups that may share a demographic factor but "neither recognize themselves as a group nor are perceived as a group in the society" (Feller et al. 2003, p. 271). The High Court asserts this not to be the case in *Applicant A*. The Court applies another limiting principle, that is, to reject the social group definition solely by the persecution inflicted, arguing that the "'uniting factor' could not be 'a common fear of persecution" (Feller et al. 2003, p. 271). Dawson J explains: "There is more than a hint of circularity in the view that a number of persons may be held to fear persecution by reason of membership of a particular social group where what is said to unite those persons into a particular group is their common fear of persecution" (Feller et al. 2003, pp 271-272). The formulation in *Applicant A*. is significantly different from the Canadian's *Ward* discussed above. The latter is "based on an analogy to anti-discrimination principles while the former "is more sociological" (Feller et al. 2003, p. 272). In a 'sociological' approach, external factors- namely, whether the group is perceived as distinct in society-play a key role in the definition of social group. On the other hand, the anti-discrimination principle looks to some "protected characteristic" that defines the group- or a characteristic that group members should not be asked to change. New Zealand's RSAA sees the sociological approach as "too encompassing". *In Re* G.J., New Zealand Refugee Status Appeals Authority (RSAA), Refugee Appeal No. 1312/93, 1 NLR 387, 1995, it states:

> The difficulty with the 'objective observer' approach is that it enlarges the social group category to an almost meaningless degree. That is, by making societal attitudes determinative of the existence of the social group, virtually any group of persons in a society perceived as a group could be said to be a particular social group.

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CHAPTER 5
CONCLUSION

In this concluding chapter I will stress that although the 'membership in a particular social group' is the least elaborated convention ground, through interpreting key criteria of the refugee definition based on human rights principles, states find points of convergence in defining social group ground. This view has been demonstrated in chapter 4 above. New Zealand, Canada and United Kingdom all have an identical definition of the social group ground. The obligations of both national laws and international laws are to be acknowledged and implemented accordingly in order to adequately protect victims of domestic violence. Also, I will adopt the Supreme Court of Canada's view, in *Ward*, on the relationship that should exist between the refugee regime and the international human rights law to emphasize that interpretation of 'membership in a particular social group' can be enhanced by acknowledging refugee law as originating from the international human rights paradigm. This is important if refugee law is to continue to contribute to the elaboration of human rights norms. Finally, I will underscore the role the civil society continues to play in strengthening refugee protection, particularly in the event where the bottom-up processes of change becomes stalemate like in the U.S. case.

The *R-A-* case has showed that restricting the interpretation of membership in a particular social group to national law can potentially exclude domestic violence victims from the benefit of international protection available to other forms of persecution and go against a number of other significant developments and trends that might have taken place in this area of law. For example, the opinion of the BIA in the *Matter of R-A-* has blurred the vision of gender-based claims which was once clear in the U.S. asylum law, which had even gained an international approval and inspired many countries like New Zealand, Canada and United Kingdom to the point of finding convergence in 'membership in a particular group' definition. This is a significant step forward in the development of asylum law relating to gender-based persecution. It is

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unfortunate that this encouraging evolution course of gender cases in the United States is being reversed. While it is not clear as to the BIA's motivation for reversing the course, it may be that the usual fear of floodgates (also common is other refugee receiving countries) was the primary consideration. However, Musalo (1999, 1186) disagrees with this assumption and cites *Kasinga* opinion as not encouraging women fleeing from FGM to enter the U.S.:

> Prior to the decision in *Kasinga*, the fear of floodgates was an oft-repeated argument against granting asylum to those who flee FGM. However, there is no evidence that, in the aftermath of the *Kasinga* decision, there was a great upsurge in arrivals to the U.S. of women fleeing FGM, and there is no rational basis for thinking that it would be otherwise in the case of domestic violence.

In fear of "floodgates" the U.S. opts to invoke its national asylum law to realize its intended objective, but in the process bypasses international law which sets out general standards. Perhaps the more plausible reasons for the U.S.'s determination to deny protection to such compelling cases like the *R-A-* would be underscored by the observation of Spijkerboer (2000, p. 197): "Loescher and Scanlan conclude that America's willingness to admit refugees was limited '(w)hen the United States has perceived that no vital interests will be served by welcoming refugees, or no propaganda points made'." The consequences of this position can be seen in the continuing conflicting standards within the same jurisdiction. It is doubtful that the BIA's motivation, whatever it might be, surpasses the legacy of this kind of practice. It is, however, not too late for the U.S. to restore confidence in both critics at home and abroad. This could be particularly possible through promulgation of the U.S.'s long awaited INS draft regulations into their final form, taking into account the comments of renowned professors and teachers of immigration and asylum law, along the lines of the DHS's "well-thought out position". Specifically, this would be necessarily achieved through the analysis of the 'membership in a particular social group' that has been basic to U.S. law for 20 years- a fundamental, immutable or unchangeable characteristic.

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New Zealand, Canada and United Kingdom definitions of 'membership in a particular social' ground seems to be in favor of the 'protected characteristics approach'. So far, this thesis finds this definition to be more preferable to the 'social perceptions' approach of *Applicant A*. The 'protected characteristics approach' seems to lean on the main concept of protection which upholds the anti-discrimination principles in the Convention. Further more, the RSAA's explanation of "for reason of"- linkage to the convention ground-in which it heavily draws on the interpretation of 'Michigan Guidelines on Nexus to the convention ground', provides emphasis required in ensuring a gender-sensitive and gender-inclusive approach that would meet the required minimum standard of protection under the 1951 Convention.

As mentioned (above in looking at "the basis of obligation"), the requirement that states interpret international law in "good faith" is of vital importance if minimum standard of protection is to be accorded to domestic violence claimants. But this will also require that refugee law be acknowledged as an integral part of international law of human rights. At present, there remains a considerable distance between the two regimes. This is relevant because human rights treaties (including rules of customary international law) broadly protect refugees and asylum seekers within a state as well. For example, human rights treaties require that remedy be provided for every violation of human rights without distinction as to the national origin of the individual in question within a state, and a duty of a state to protect everyone within its jurisdiction from torture (Parliamentary Assembly 1995). In this context, the states' practice would somewhat be monitored and publicized to deter any potential abuse.

As showed in the *Matter of R-A-*, states are more likely than not inclined to increase their abuse on asylum regimes in the future. Also, the U.S. case study shows that the refugee rights movement has tended to advance in activity with the failure of the state to fulfill its duty under internationally agreed upon human rights norms. For example, when the BIA was seeking Ms. Alvarado's removal from the U.S., NGOs and academic institutions involved in refugee advocacy, championed by the Hastings College of the law, intervened and succeed in invoking the principle of

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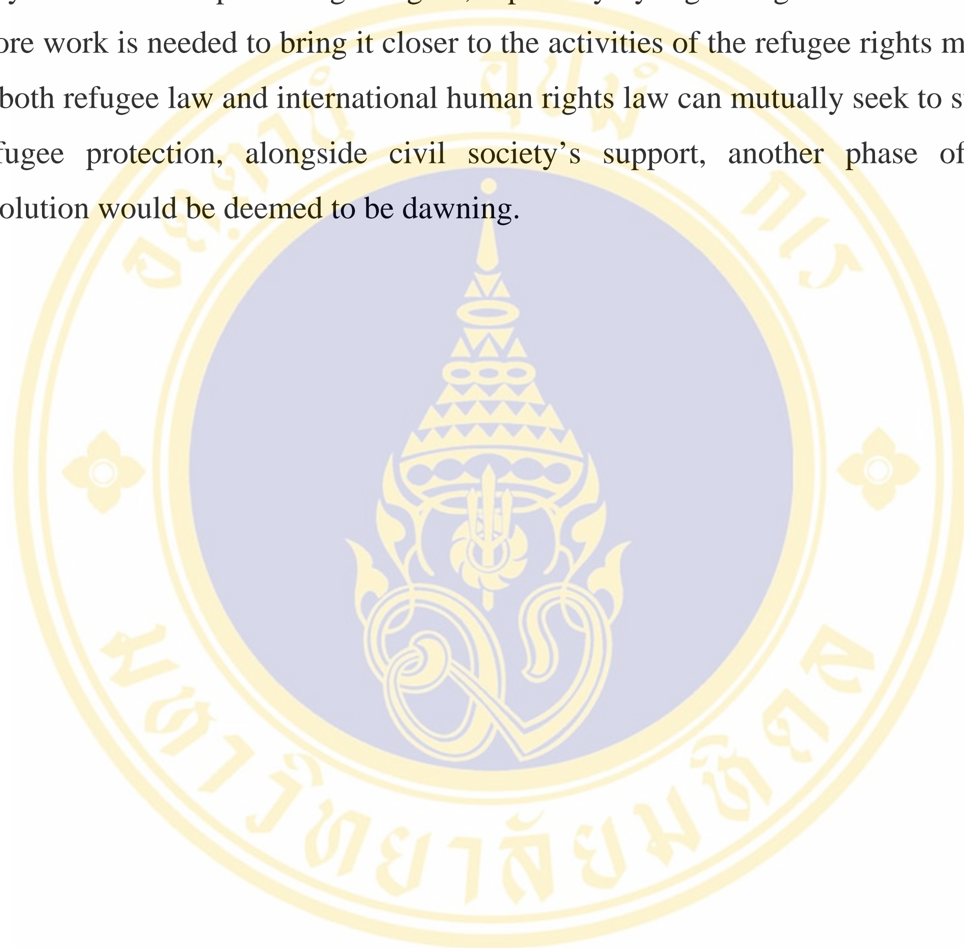
non-refoulement to protect her from being returned to Guatemala where she would potentially face torture at the hands of her husband. This attests to the importance of strengthening the larger civil society present in refugee hosting countries, including refugee rights movement and human rights movement. Although the latter continues to play a vital role in protecting refugees, especially by regulating the behavior of states, more work is needed to bring it closer to the activities of the refugee rights movement. If both refugee law and international human rights law can mutually seek to strengthen refugee protection, alongside civil society's support, another phase of refugee evolution would be deemed to be dawning.



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APPENDIX

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APPENDIX A: Matter of Kasinga

The narrative of this case is presented for reference purposes. In the R-A- case, a comparison is made between the cases on the grounds of the seriousness of their harm. The *Matter of Kasinga* decision is considered one of the earlier groundwork, and has been instrumental in "granting asylum to women fleeing harms such as domestic violence…" (Knight 2002, p. 689). Musalo (1996) characterizes it as "a milestone in recognizing the special circumstances faced by female asylum-seekers". At the same time, the decision in this case has been met with a high level of criticism. For example, Sihha (2001, p. 1564) sees the case as bringing to light issues relating to "cultural stereotypes and gender inequalities that pervade asylum law". Following is the case summary of the facts of the case as adopted from the Interim decision number 3278, Dept. of Justice, BIA:

> The applicant is a 19-year-old native and citizen of Togo. She attended 2 years of high school .She is a member of the Tchumba-Kunsuntu Tribe of northern Togo. She testified that young women of her tribe normally undergo FGM at age 15. However, she did not because she initially was protected from FGM by her influential, but now deceased, father.
> The applicant stated that upon her father's death in 1993, under tribal custom her aunt, her father's sister, became the primary authority figure in the family. The applicant's mother was driven from the family's home, left Togo, and went to live with her family in Benin. The applicant testified that she does not currently know her mother's whereabouts.
>
> The applicant further testified that her aunt forced her into polygamous marriage in October 1994, when she was 17. The husband selected by her aunt was 45 years old and had three other wives at the time of marriage. The applicant testified that, under tribal custom, her aunt and her husband planned to force her to submit to FGM before the marriage was consummated.
>
> The applicant testified that she feared imminent mutilation. With the help of her older sister, she fled Togo for Ghana. However, she was afraid that her […] aunt and her husband would locate her there. Consequently, using money from her mother, the applicant embarked for Germany by plane.

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Upon arrival in Germany, the applicant testified that she was somewhat disoriented and spent several hours wandering around the airport looking for fellow Africans who might help her. Finally, she struck up a conversation, in English, with a German woman.

After hearing the applicant's story, the woman offered to give the applicant temporary shelter in her home until the applicant decided what to do next. For the next 2 months, the applicant slept in the woman's living room, while performing cooking and cleaning duties.

The applicant further stated that in December 1994, while on her way to a shopping center, she met a young Nigerian man. He was the first person from Africa she had spoken with since arriving in Germany. They struck up a conversation, during which the applicant told the man her situation. He offered to sell the applicant his sister's British person so that she could seek asylum in the United States, where she has an aunt, an uncle, and a cousin. The applicant followed the man's suggestion, purchasing the passport and the ticket with money given to her by her sister.

The applicant did not attempt a fraudulent entry into the United States. Rather, upon arrival at Newark International Airport on December 17, 1994, she immediately requested asylum. She remained in detention by the Immigration and Naturalization Service ("INS") until April 1996.

The applicant testified that the Togolese police and the government of Togo were aware of FGM and would not take no steps to protect the practice. She further testified that her aunt had reported her to the Togolese police. Upon return, she would be taken back to her husband by the police and forced to undergo FGM. She testified at several points that there would be nobody to protect her from FGM in Togo.

In her testimony, the applicant referred to letters in the record from her mother (Exh). Those letters confirmed that the Togolese police were looking for the applicant and that the applicant's father's family wanted her to undergo FGM.

The applicant testified that she could not find protection anywhere in Togo. She stated that Togo is a very small country and her husband and aunt, with the help of the

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police, could locate her anywhere she went. She also stated that her husband is well known in Togo and is a friend of the police. On cross-examination she stated that it would not be possible for her to live with another tribe in Togo.

The applicant also testified that the Togolese police could locate her in Ghana. She indicated that she did not seek asylum in Germany because she could not speak German and therefore could not continue her education there. She stated that she did not have relatives in Germany as she does in the United States. […].

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