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PROTECTING FOREIGN VICTIMS OF DOMESTIC VIOLENCE: AN ANALYSIS OF ASYLUM REGULATIONS

*Michael G. Heyman**

INTRODUCTION

Asylum practice can be daunting because the plight of asylum seekers is so extreme. Being “among the world’s most desperate people,”¹ they have fled their homes, looking for protection elsewhere. Yet that protection is often not easily achieved. They must not only establish that persecutory country conditions exist in their home countries, but that they are likely targets of that persecution. And they must often do this through translators. Not surprisingly, denials frequently result from negative findings on credibility because it is so difficult to establish that an individual is a likely target for persecution.²

While all participants in asylum proceedings are involved in a high stakes enterprise, asylum seekers alleging state failure to curb domestic violence face additional difficulties because of enormous evidentiary problems, murky legal standards, and the fact that domestic violence claims depart from the usual paradigm for asylum cases. Most asylum applicants seek protection from persecution by their home countries.³ But the applicant seeking asylum on domestic vio-

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1. GIL LOESCHER AND JOHN A. SCANLAN, *CALCULATED KINDNESS: REFUGEES AND AMERICA’S HALF-OPEN DOOR, 1945 TO THE PRESENT*, at xiii (1986).

2. *See, e.g.,* *Taha v. Ashcroft*, 362 F.3d 623, 627 (9th Cir. 2004), *rev’d per curiam*, 389 F.3d 800 (9th Cir. 2004) (Farah Taha had filled out his asylum form without the aid of an attorney. Because he later found one, and his testimony was substantially more detailed than before, the immigration judge found him not credible).

3. The definition of refugee under American law was amended in 1996 to include those facing “coercive population control” by their home countries. Illegal Immigration Reform and Immigrant Responsibility Act of 1996, 8 U.S.C. § 1101(a)(42) (2000), Pub. L. No. 104-208, § 601, 110 Stat. 3009-689 (granting refugee status to victims of coercive population control programs). This measure was principally intended to deal with applicants from the People’s Republic of China. *See, e.g.,*

lence grounds usually seeks protection from the conduct of her own partner, and frequently alleges that the state was unable or unwilling to provide meaningful protection. Thus, she seeks protection from the actions of a private party. Many courts have resisted these asylum claims because they view the issue as a form of private conflict, which cannot be resolved by asylum law.

This Article will suggest how asylum claims based on domestic violence should be decided. Part I examines several doctrinal challenges posed by the Geneva Convention's definition of refugee. After the turbulent period following World War II, members of the Geneva Convention of 1951 crafted a definition of refugee, which serves as the basis for all asylum claims.⁴ First, the definition requires applicants to fit within a cognizable category for relief.⁵ Second, applicants must show that the agent of persecution is either the State or a private party acting in the capacity of the non-state actor; moreover, applicants must show that the State is unwilling or unable to contain these acts of persecution. Finally, applicants must demonstrate that the acts of persecution are because of the applicant's political views or group membership. Victims of domestic violence applying have generally sought asylum based on either the political opinion component or membership in a particular social group, and both categories have been problematic. Part II examines the much-publicized case of Rodi Alvarado,⁶ which reflects all three of the doctrinal challenges to asylum law discussed in Part I. This Part analyzes the Board's decision, Attorney General Reno's vacating of that decision, and pending proposed regulations.

Thomas L. Hunker, *Generational Genocide: Coercive Population Control as a Basis for Asylum in the United States*, 15 FLA. ST. J. TRANSNAT'L L. & POL'Y 131, 133 (2005).

4. Convention relating to the Status of Refugees (Geneva, 28 July 1951) 189 U.N.T.S. 137, *entered into force* 22 April 1954 [hereinafter Convention]. The Convention applied to events occurring before January 1, 1951. Its scope was enlarged by the Protocol of 1967 to include all refugees, regardless of when the events that caused their suffering occurred. Protocol relating to the Status of Refugees (New York, 31 Jan. 1967) 606 U.N.T.S. 267, *entered into force* 4 Oct. 1967 [hereinafter Protocol]. The United States adopted the Protocol, though not the Convention, on November 1, 1968. United Nations High Comm'r for Refugees, *States Parties to the 1951 Convention Relating to the Status of Refugees and the 1967 Protocol*, (Oct. 1, 2008), available at <http://www.unhcr.org/protect/PROTECTION/3b73b0d63.pdf>. Thereafter, the United States enacted the Refugee Act of 1980, which incorporated the essential provisions of the Convention. Pub. L. No. 96-212, 94 Stat. 102 (1980).

5. Convention, *supra* note 4, 189 U.N.T.S. at 152 (requiring the applicant to have a well-founded fear of persecution based on "race, religion, nationality, membership of a particular social group or political opinion.").

6. *In re R-A-*, 22 I. & N. Dec. 906 (B.I.A. 1999), *vacated*, 22 I. & N. Dec. 906 (Att'y Gen. Jan. 19, 2001).

Part III analyzes the benefits and drawbacks of the proposed regulations and suggests changes that would better protect asylum-seekers who experience gender-based persecution. Inconsistency pervades asylum decision making generally. In a seminal empirical study, the authors found troubling levels of inconsistency, asserting that “the outcome of a refugee’s quest for safety in America should be influenced more by law and less by a spin of the wheel of fate that assigns her case to a particular government official.”⁷ The authors later dismiss the notion that “a more detailed codification of the substantive rules governing asylum” would reduce those unacceptable disparities.⁸

I disagree with this dismissal. Codification of clear standards would guide decision makers and protect a neglected class of asylum seekers:—victims of gender-based persecution.⁹ Part III proposes changes to the proposed regulations in the following three vital areas: (1) the definition of social group, (2) the definition of persecution in the context of the non-state actor, and (3) the need to demonstrate that persecution was motivated by the victim’s social group membership.

I.

REQUIREMENTS OF THE GENEVA CONVENTION

Asylum law provides surrogate protection for those whose countries have failed them. Addressing that “factual breach of bond” between country and citizen, it affords protection to those left vulnerable by their countries of origin.¹⁰ It does this through the medium of the refugee definition. That definition bases refugee status of a claim of persecution based on one of five so-called grounds: race, religion, nationality, membership of a particular social group, or political opinion.¹¹ Applicants seeking asylum because of domestic violence

7. Jaya Ramji-Nogales, Andrew I. Schoenholtz & Phillip G. Schrag, *Refugee Roulette: Disparities in Asylum Adjudication*, 60 STAN. L. REV. 295, 305 (2007).

8. *Id.* at 379.

9. Obviously, improved asylum adjudication simply provides protection after the fact of persecution. Ideally, states must address these underlying problems so as to partially obviate the very need for better asylum laws. See Michael G. Heyman, *Domestic Violence and Asylum: Toward a Working Model of Affirmative State Obligations*, 17 INT’L J. OF REFUGEE L. 729, 748 (2005).

10. Atle Grahl-Madsen, *The Emergent International Law Relating to Refugees: Past-Present-Future*, in *THE LAND BEYOND: COLLECTED ESSAYS ON REFUGEE LAW AND POLICY* 180, 192 (Peter Macalister-Smith & Gudmundur Alfredsson eds., Martinus Hijhoff Publishers 2001); see also Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,592. (Dec. 7, 2000) (to be codified at C.F.R. pt. 208) (noting that “[a] refugee is traditionally an individual as to whom the bonds of trust, loyalty, protection, and assistance existing between a citizen and his country have been broken and have been replaced by the relationship of an oppressor to a victim”).

11. Convention, *supra* note 4, 189 U.N.T.S. at 152.

invariably assert this well-founded fear of persecution because of their political opinion or social group membership, with most claims sounding in social group in recent years. These categories are hardly self-explanatory, particularly social group membership.¹²

A. *Membership in a Particular Social Group*

Intuitively, the notion of social group membership provides a bad fit for an asylum claim based on allegations of unchecked domestic violence. Despite the indeterminacy of the term, it evokes notions of either voluntary associational ties or of membership at birth. Yet the victim of domestic violence is simply the partner to someone who victimizes her within their home and relationship, and the concept of social group seems to contemplate a cognizable group oppressed by state action. What was “a little used term of art” in refugee law, barely relied on during the first few decades of the Convention, has become a term both frequently used and just as frequently confused.¹³

This departure from the paradigm of state-sponsored group persecution produces two frequently overlapping problems. First, it is unclear just how social groups should be defined, be it by social perceptions, voluntarily assumed associational ties, membership at birth, or some combination. Second, because domestic violence involves private acts of persecution, these intertwined notions of social group and private persecution seem to elude Convention norms. However, the United Nations High Commissioner for Refugees published a handbook interpreting the Convention. The handbook states that though “[p]ersecution is normally related to action by the authorities of a country[,]” it may “emanate from sections of the population that do not respect the standards established” by law.¹⁴ This statement

12. The social group component was placed in the Convention definition as an amendment by the Swedish representative and adopted without dissent. The Swedish Representative noted that “[e]xperience ha[s] shown that certain refugees ha[ve] been persecuted because they belonged to particular social groups.” See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT’L L.J. 505, 509–10 (1993) (citation omitted).

13. See Maryellen Fullerton, *Persecution Due to Membership in a Particular Social Group: Jurisprudence in the Federal Republic of Germany*, 4 GEO. IMMIGR. L. J. 381, 444 (1990).

14. Office of the U.N. High Comm’r for Refugees, *Handbook on Procedures and Criteria for Determining Refugee Status Under the 1951 Convention and the 1967 Protocol Relating to the Status of Refugees*, ¶ 65, U.N. Doc. HCR/IP/4/Eng/REV.1 (Jan. 1992), available at <http://www.unhcr.org/publ/PUBL/3d58e13b4.pdf> [hereinafter Handbook]. The Handbook has frequently been regarded as authoritative in asylum decisions throughout the world and, though not binding, has been enormously influential among the countries adhering to the Convention.

clearly recognizes the possibility that the agent of persecution may be a non-state actor and that the victim may be one closely related to him.

But it has been difficult to create a definition of social group that adequately accommodates both state-initiated persecution as well as persecution at the hands of the non-state actor. A variety of tests have been used, and some have finally gained substantial acceptance within the international community.¹⁵ The American experience reflects these slowly evolving standards.

In *Sanchez-Trujillo v. INS*,¹⁶ the Ninth Circuit Court of Appeals began to clarify this area by distinguishing between statistical groups and social groups. According to the court, whereas the mere existence of distinguishing statistics could bespeak the existence of groups, that definition does not capture the notion of social group effectively.¹⁷ For example, a group of males taller than six feet, even if the group were at great risk of persecution, would not comprise a social group based on the Convention definition.¹⁸ Nothing binds the group together, other than this mere happenstance of height.

Unfortunately, in rejecting mere demographic divisions as social groups, the court did not go far enough. But, in requiring “the existence of a voluntary associational relationship among the purported members,”¹⁹ it went too far. The court’s requirement of group cohesiveness did not necessarily require membership by choice and could just as easily have been satisfied by innate membership. Thus, its very example of the immediate family as the “prototypical example of a particular social group” could as easily be construed as the product of biology as of associational choice.²⁰ Moreover, *Sanchez-Trujillo* conflicted with administrative immigration practice, the view taken by other circuits, and evolving State practice abroad.²¹ Increasingly, the touchstone of group membership became the possession of “a com-

15. I have dealt with the issue of social group definition elsewhere. Michael G. Heyman, *Asylum, Social Group Membership and the Non-State Actor: The Challenge of Domestic Violence*, 36 U. MICH. J.L. REFORM 767, 774–86 (2003).

16. *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986).

17. *Id.* at 1577.

18. *Id.* at 1576.

19. *Id.*

20. *Id.*

21. THOMAS ALEXANDER ALEINIKOFF ET AL., *IMMIGRATION AND CITIZENSHIP: PROCESS AND POLICY* 901 (6th ed. 2008) (noting that other federal circuits did not adopt the *Sanchez-Trujillo* approach and that even the Ninth Circuit broadened its social group definition to include groups united by a voluntary association, an immutable characteristic or a characteristic fundamental to the members’ identity).

mon, immutable characteristic,"²² one that members either could not or should not be required to change.

The Board decision in *Matter of Acosta* reflected that dominant approach. Acosta, a taxi driver in San Salvador, said he feared persecution by both the government and the guerillas because he refused to join in work stoppages.²³ Though the Board recognized that he faced punishment for his refusal to join in the stoppages, it said he could have avoided that possibility by either joining in the stoppages or changing jobs.²⁴ His plight was not because of group membership but rather his choice of occupation and decision to continue at that occupation. The Board developed a test that focused on the shared characteristics of a group as its essential defining characteristic. Those characteristics could either be innate, such as sex, color, or kinship ties; or they could reveal a shared past experience, such as former military service or ownership of land.²⁵ Stressing the flexibility of this test, the Board recognized that the analysis must often proceed on a case-by-case basis.²⁶ However, the touchstone for those decisions would always be the presence of a characteristic that "members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences."²⁷

This definition makes sense if it deals with a universally familiar pattern of persecution. But what does not make sense is *confining* the notion of social group to that definition. Indeed, some commentators have suggested enlarging the definition of social group to include factors that involve individual choice, such as education, economic activity, and shared aspirations.²⁸ And though it is possible to somehow shoehorn these latter examples within the *Acosta* test, viewing them as pursuits people should not be compelled to forego, such an interpretation strains the formulation "for the sake of reaching an appropriate result in a manner that would not undermine the protected characteristics approach."²⁹ Groups should be protected not because members share common, immutable characteristics but because members some-

22. See, e.g., *Matter of Acosta*, 19 I. & N. Dec. 211, 233 (B.I.A. 1985).

23. *Id.* at 234.

24. *Id.*

25. *Id.* at 233.

26. *Id.*

27. *Id.*

28. See Maryellen Fullerton, *A Comparative Look at Refugee Status Based on Persecution Due to Membership in a Particular Social Group*, 26 CORNELL INT'L L.J. 509, 517 (1993).

29. T. Alexander Aleinikoff, *Protected Characteristics and Social Perceptions: An Analysis of the Meaning of 'Membership of a Particular Social Group,'* in REFUGEE PROTECTION IN INTERNATIONAL LAW: UNHCR'S GLOBAL CONSULTATIONS ON INTER-

how stand out *as* members and experience persecution as a result of that group membership.

Subsequent developments worldwide have further crystallized this core notion of affording protection to those who somehow stand out because of either innate characteristics or some exercise of choice, though no international consensus cabins this notion of social group.³⁰ Unfortunately, an absence of a clear definition of group membership in the U.S. has resulted in many failed asylum applications. This situation reflects the need for a clearer definition of group membership.

B. *The Motive Requirement*

The Convention requires not only membership in a cognizable group but also persecution “for reasons of” being a member of that group.³¹ The applicant must provide evidence about the persecutor’s motivation, which is often a difficult task because (1) the conduct took place in another country, (2) the agent of persecution is not present at the proceedings, and (3) a public record of this conduct illuminating the persecutor’s motive rarely exists. Even when the state is the persecutor, it is difficult to piece together the various threads of evidence to reveal a coherent picture of this conduct. But it is certainly easier when the state is the persecutor (as opposed to a non-state actor), as with the example of coerced population control in the People’s Republic of China. In that type of case, public governmental statements exist as well as demonstrable examples of the implementation of

NATIONAL PROTECTION 263, 296 (Erika Feller et al eds., 2003), *available at* <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=470a33b30&page=search>.

30. Indeed, perhaps the most helpful developments here are reflected in the case law of Australia and New Zealand. Justice McHugh, writing for the High Court of Australia, took the helpful view that social group may be empirically verifiable, thus perhaps obviating the need to engage elaborate abstractions: “The fact that actions of the persecutors can serve to identify or even create ‘a particular social group’ emphasises the point that the existence of such a group depends in most, perhaps all, cases on external perceptions of the group. The notion of persecution for reasons of membership of a particular social group implies that the group must be identifiable as a social unit.” *A. v. Minister for Immigration and Ethnic Affairs* (1997) 190 C.L.R. 225, 264 (Austl.).

31. See *Sanchez-Trujillo v. INS*, 801 F.2d 1571, 1575 n.5 (9th Cir. 1986) (citing the Convention requirement that a refugee must show a “well-founded fear of being persecuted *for reasons of* race, religion, nationality, membership of a particular social group or political opinion” (emphasis added and removed)). The American version is functionally the same, requiring that the persecution be “on account of” one those factors. Convention, *supra* note 4 (defining refugee as one who has a “well-founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion . . .”).

government policy.³² Still, the evidentiary difficulties of the motive requirement often lead to failed asylum applications.

C. *The Non-State Actor*

Evidentiary problems are exacerbated by the involvement of the non-state actor. Though cases can involve police and judicial intervention, the conflicts themselves occur in private—quite literally behind closed doors. The private nature of these matters poses two problems. First, proof of motive is difficult because not only are the events filtered through the applicant in her testimony and written statements, but it is also difficult to grasp what actuated conduct as violent and dramatic as domestic abuse, viewed solely through the applicant's testimony and nothing more. It would often seem to be the product of anger, alcohol, mental illness, or some similar aberration. The mere recitation of the horrible facts of these events by the applicant could scarcely provide a basis for tying the conduct to the Convention requirements.

Second, even if the motive is somehow discernible as a psychological matter, that insight is not easily subsumed within asylum law. A clear disconnect between the discourses of the two areas means psychological insights do not easily convert into legally workable notions of persecution and motivation.³³ Thus, even if we define the social group as women or married women, the many possible causes of violent conduct—anger, alcohol, or some other factors—strain legal notions of causation.

Because of the difficulties discussed, many sources have simply proclaimed domestic violence a private matter, thus placing it beyond the reach of asylum law.³⁴ But since many of the world's refugees

32. Statements of policy and history would bolster the applicant's claim. This would include similar instances of persecution, either regionally or nationally, and other matters representing state action in the area. The administrative case of *Matter of Chang* discusses these issues involved with obtaining proof. 20 I & N Dec. 38, 42–43 (B.I.A. 1989).

33. Sheldon Glueck has written on the difficulty with which behavioral scientists and lawyers communicate, owing perhaps to the different objectives of the disciplines. Thus, for example, because law asks categorical questions about matters such as responsibility, it speaks in few shades of grey. For psychiatrists, those tones dominate. See SHELDON GLUECK, *LAW AND PSYCHIATRY: COLD WAR OR ENTENTE CORDIALE* (John Hopkins University Press 1966).

34. See discussion *infra* Part II (discussing the danger and falseness of the public/private dichotomy). But see Deborah Anker, *Refugee Status and Violence Against Women in the "Domestic" Sphere: The Non-State Actor Question*, 15 GEO. IMMIGR. L.J. 391, 401 (2001) (suggesting that the public/private dichotomy may be important in domestic violence cases).

flee from persecution at the hands of the non-state actor, legal systems must successfully address the issues created by that phenomenon.³⁵ Placing domestic violence beyond the reach of asylum law misconceives both the nature of domestic violence and the State's role in such cases. The State has an obligation to protect all of its citizens, both from public and so-called private acts of persecution.

II.

R-A- AND ITS AFTERMATH

The Board of Immigration Appeals decision in *In re R-A-* addressed the various aspects of the refugee definition but failed to understand the significance of the social group and the non-state actor in the context of domestic violence. It thus failed to advance the development of asylum law in the domestic violence context. In this case, Rodi Alvarado, who married at age sixteen, was abused by her husband, Osorio, over many years.³⁶ The Guatemalan authorities failed to protect her from abuse that the Board of Immigration Appeals characterized as "heinous abuse."³⁷ Nevertheless a bitterly divided Board concluded that her claims "failed to show a sufficient nexus between her husband's abuse of her" and her asserted social group membership; thus, the Board reversed the grant of asylum to Ms. Alvarado.³⁸

A. Membership in a Particular Social Group

The discussion by the Board of Immigration Appeals in *In re R-A-* about the social group category flowed from the group identity proposed by her attorney. In the case before the immigration judge, the group was defined as "Guatemalan women who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination."³⁹ This kind of detailed, hyper-specific group definition was common at the time the case was heard, and the immigration judge found it a cognizable group.⁴⁰ But the Board disagreed and regarded the description as a

35. See Walter Kälin, *Non-State Agents of Persecution and the Inability of the State to Protect*, 15 GEO. IMMIGR. L.J. 415, 429, 431 (2001).

36. *In re R-A-*, 22 I. & N. Dec. 908 (B.I.A. 1999).

37. *Id.* at 907.

38. *Id.* at 923.

39. *Id.* at 917.

40. Steve Legomsky has commented on the tendency to create bloated definitions of social group. He made the following comment regarding the complexity of the social group definition:

[E]very one of the formulations contains one or more elements that duplicate other requirements of a prima facie case of asylum. As a result, the

statistical category rather than a social group.⁴¹ In its view, that group partook of neither associational ties nor immutable characteristics, thus eluding the dominant tests for social group. Accordingly, the Board found that the applicant had “proposed a social group definition that may amount to a legally crafted description of some attributes of her tragic personal circumstances.”⁴²

This group definition relied upon in *In re R-A- did* seem like an artificial construct, one more descriptive of an individual’s plight than an existent social group. Accordingly, the majority questioned why her husband confined his abuse to her. First, it noted that only she had been a target and he “has not shown an interest in any member of this group other than the respondent herself.”⁴³ Then, noting that she was not at risk “until she married him,”⁴⁴ the majority seemed satisfied that the characterization of her group left the applicant in a “‘group’ by herself of women presently married to that particular man.”⁴⁵ Because his persecution was bounded by their marriage and he had only, at that point, persecuted her, he was not an agent of persecution but only a man who was her private, sole tormenter. According to the majority, because she did not belong to an externally recognized group, his dreadful conduct constituted a private problem.

B. The Motive Requirement

Osorio Alvarado’s pattern of abuse, in its very arbitrariness, signaled to the Board of Immigration Appeals a total absence of any motive as defined by the Convention. The Board stated the following:

He harmed her, when he was drunk and when he was sober, for not getting an abortion, for his belief that she was seeing other men, for not having her family get money for him, for not being able to find something in the house, for leaving a cantina before him, for leav-

determination of whether the hypothesized group meets the definition of a social group becomes much more complicated than it needs to be.

STEPHEN H. LEGOMSKY, *IMMIGRATION AND REFUGEE LAW AND POLICY* 1021 (Foundation Press 4th ed. 2005) (discussing *In re Kasinga*, 21 I. & N. Dec. 357, 365–66 (B.I.A. 1996)). The social group definition in *Kasinga* was “young women of the Tchamba-Kunsuntu Tribe [of Northern Togo] who have not had [female genital mutilation], as practiced by that tribe, and who oppose the practice.” *In re Kasinga*, 21 I. & N. Dec. at 365.

41. *In re R-A-*, 22 I. & N. Dec. at 919 (stating that “the mere existence of shared descriptive characteristics is insufficient to qualify those possessing the common characteristics as members of a particular social group.”).

42. *Id.* at 919.

43. *Id.* at 920.

44. *Id.* at 921.

45. *Id.* at 921.

ing him, for reasons related to his mistreatment in the army, and “for no reason at all.” Of all these apparent reasons for abuse, none was “on account of” a protected ground, and the arbitrary nature of the attacks further suggests it was not the respondent’s claimed social group characteristics that he sought to overcome.⁴⁶

The majority’s conclusion that he did not have the necessary motive reveals a failure to grasp the appalling phenomenon of domestic violence.

The dissent recognized this failure and concluded that “the very incomprehensibility of the husband’s motives supports the respondent’s claim that the harm is ‘on account of’ a protected ground.”⁴⁷ In treating her “merely as his property, to do with as he pleased,” her husband revealed key elements of gender-based violence.⁴⁸ Thus, though the dissent skirted the issue of defining the group of which she was a member,⁴⁹ it properly placed his motive within the context of domestic violence. The dissent found persuasive the Committee on the Elimination of Discrimination Against Women report, which noted that the perpetrators of domestic violence use oppression to dominate women in the home, a space where women ironically often dominate traditionally.⁵⁰ Whereas the majority was flummoxed by the apparent randomness of his attacks, the dissent correctly viewed the case as fitting all too understandably within the context of domestic violence.

Rooting the husband’s behavior in that context, the dissent recognized it as gender-based persecution.⁵¹ Moreover, rather than being perplexed by his motives, the dissent recognized that he was motivated “at least in part” by membership in a group defined by gender.⁵² Accordingly, the dissent recognized the inherently reductive nature of

46. *Id.*

47. *Id.* at 938 (Guendelsberger, A.L.J., dissenting).

48. *Id.*

49. The dissent concluded that she fell within a social group “defined by her gender, her relationship to him, and her opposition to domestic violence.” *Id.* at 939. In essence, the dissent adopted the attributes of the group definition proffered by counsel and derided by the majority.

50. *Id.* (citing U.N. Comm. on the Elimination of Discrimination Against Women, *Report of the Committee on the Elimination of Discrimination Against Women*, ¶ 26, U.N. Doc. A/47/38 (1992)). Article 17 of the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) established a Committee to assess progress made in implementing the CEDAW, and Article 21 empowered the Committee to make reports from time to time, embodying suggestions and general recommendations. Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, arts. 17, 21, 24 U.N. GAOR, 34th Sess., 107th plen. mtg., U.N. Doc. A/34/46 (Dec. 18, 1979) [hereinafter CEDAW].

51. *In re R-A-*, 22 I. & N. Dec. at 930 (Guendelsberger, A.L.J., dissenting).

52. *Id.* at 939.

the quest for motive and that men in such circumstances act out for a variety of reasons, among them being their view of women as inferior.

C. *The Non-State Actor*

The last divide within the Board involved the role of the non-state actor. As previously explained, though the Convention definition ordinarily envisions State action, it also acknowledges an additional dimension to refugee protection—the State owes its citizens a duty of protection. A State's failure to protect, whether through act or omission or because it is unwilling or unable to protect, represents State failure. This additional dimension explains the dissent's view of both motive and the non-state actor issues.

The motive for persecution is important because it reveals whether a citizen faces persecution for a recognized reason. It reveals whether a cognizable group within the State is left vulnerable. Thus, the function of motive differs dramatically from that, for example, within the criminal law or tort law. Those areas are concerned with matters of accountability and of fault. Asylum law, in contrast, is forward-looking and embraces a protection model for the victims of persecution.⁵³ Thus, when the agent of persecution is a private individual, it is unacceptable to deny protection on the assertion that private conduct is beyond the reach of asylum law.

But that is precisely what the majority did. As if to repeat the preposterous, the majority stated that “construing private acts of violence to be qualifying governmental persecution, by virtue of the inadequacy of protection, would obviate, perhaps entirely, the ‘on account of’ requirement in the statute.”⁵⁴ That statement misconstrues the relationship between the State and its citizens and fails to recognize the State's duty of protection. Unsurprisingly, the majority concluded that since the government of Guatemala neither “encourages” its male citizens to engage in domestic violence nor views abusive marriage as “desirable,” the acts of her husband fall outside the bounds of asylum protection.⁵⁵

The dissent saw his conduct as “not that of an individual acting at variance with societal norms, but one who recognized that he was act-

53. Michelle Foster, *Causation in Context: Interpreting the Nexus Clause in the Refugee Definition*, 23 MICH. J. INT'L L. 265, 298 (2002) (noting that asylum law affords protection to “those who are persecuted and not on apportioning liability and blame for wrongful acts”); see Heyman, *supra* note 15, at 802.

54. *In re R-A-*, 22 I. & N. Dec. at 923.

55. *Id.* at 922.

ing *in accordance with them*.”⁵⁶ Ms. Alvarado sought the aid of local officials but was rebuffed at all turns. Indeed, her husband smugly told her that because of his past military service, calling the police would be futile because he knew how to deal with law enforcement officials.⁵⁷ Her flight to the United States in May 1995 came only after she realized she could seek relief neither in a shelter nor in the laws of Guatemala. Thus, the linchpin of her claim was in this “egregious governmental acquiescence” in the husband’s acts of domestic violence.⁵⁸

The dissent endorsed the views of the immigration judge that institutional biases against women stemmed from the belief that “a man should be able to control a wife or female companion by any means he sees fit: including rape, torture, and beatings.”⁵⁹ The dissent embraced the notion from the Handbook that acts of private individuals provide the basis for asylum protection, so long as they are either “knowingly tolerated by the authorities” or the authorities “refuse, or prove unable, to offer effective protection.”⁶⁰ Since the mission of asylum law is to afford surrogate protection, regardless of the existence of active governmental wrongdoing, these gross governmental failures more than called for such protection.

D. Further Developments of the Case

In re R-A- was decided in 1999. In 2001, Attorney General Janet Reno, as one of her final acts as Attorney General, vacated the decision until the proposed rules on gender-based asylum claims were made final.⁶¹ After a change in administrations and the appointment of John Ashcroft as Attorney General, the case took an additional turn. Ashcroft reviewed the Board’s decision in Ms. Alvarado’s case, vacated the measures taken by Ms. Reno, and ordered the parties to brief the case anew.⁶² To the surprise of many, the Department of Home-

56. *Id.* at 922 (emphasis added) (Guendelsberger, A.L.J., dissenting).

57. *Id.* at 909 (majority opinion) (noting that “[t]he respondent’s pleas to Guatemalan police did not gain her protection”).

58. *Id.* at 929 (Guendelsberger, A.L.J., dissenting).

59. *Id.* at 930 (quoting the immigration judge).

60. See Handbook, *supra* note 14, at ¶ 65.

61. *In re R-A-*, 22 I. & N. Dec. at 906 (Attorney General Reno directed “the Board to stay reconsideration of the decision until after the proposed rule published at 65 Fed. Reg. 76588 (Dec. 7, 2000) is published in final form. The Board should then reconsider the decision in light of the final rule.”).

62. *In re R-A-*, 24 I. & N. Dec. 629 (A. G. 2008) (noting that “[o]n February 23, 2003, Attorney General Ashcroft certified the Board’s decision for review . . .”).

land Security (DHS) supported Ms. Alvarado's request for asylum.⁶³ Its brief asserted that "[a] final rule is the best vehicle for providing much needed guidance on the adjudication of particular social group asylum claims, including those based on domestic violence."⁶⁴ Accordingly, it advised Attorney General Ashcroft that a rule was under consideration and that the DHS "plans to finalize it promptly."⁶⁵ In January 2005, Attorney General Ashcroft remanded the case to the Board, where it now remains.⁶⁶ The Department of Homeland Security was urged to "consider final promulgation of the proposed Asylum and Withholding Definition regulations, which have been pending since December 2000."⁶⁷ Those proposed regulations, which largely embody the thinking of the *In re R-A*-dissenters, remain in a limbo state—neither adopted nor withdrawn.⁶⁸ Domestic law in the area is in complete disarray.⁶⁹

Commenting on the status of the law in the absence of regulations, Karen Musalo, counsel to Ms. Alvarado and director of the Center for Gender & Refugee Studies at Hastings College of the Law at the University of California, described it as "arbitrariness run amuck."⁷⁰ She elsewhere recounted the enormous inconsistency in decision making in this area.⁷¹ We need to codify clear standards to provide much-needed protection to a neglected class of asylum seekers—foreign victims of domestic violence.

63. Department of Homeland Security's Position on Respondent's Eligibility for Relief 43, *In re R-A*-, 22 I. & N. Dec. 906 (Feb. 19, 2004) [hereinafter DHS Brief].

64. *Id.* at 4.

65. *Id.* at 5.

66. *In re R-A*-, 24 I. & N. Dec., at 629 (A. G. 2008).

67. Letter from Harvard Immigration and Refugee Clinic of Greater Boston Legal Servs., Inc. and the Harvard Law School, to Michael Chertoff, Sec'y of the Dep't of Homeland Sec. (Aug. 25, 2005), available at http://www.gbls.org/immigration/Final_Letter_To_Chertoff.pdf [hereinafter Chertoff letter].

68. On September 25, 2008, Attorney General Mukasey cancelled a stay in the case, and remanded it to the Board for a decision in the absence of proposed regulations. *In re R-A*-, 24 I. & N. Dec., at 631–32 (A. G. 2008).

69. Indeed, Ms. Alvarado's own status in the United States is completely indeterminate. See *In re R-A*-, 24 I. & N. Dec., at 629 (A. G. 2008) (remanding the case to the Board of Immigration Appeals).

70. Karen Musalo, *Panel One—Empowering Survivors with Legal-Status Challenges*, 22 BERKELEY J. GENDER L. & JUST. 304, 309 (2007).

71. Karen Musalo, *Protecting Victims of Gendered Persecution: Fear of Flood-gates or Call to (Principled) Action?*, 14 VA. J. OF SOC. POL'Y & L. 119, 126–28 (2007).

III.

THE PROPOSED REGULATIONS

Recognition of gender-based persecution, though perhaps slow in coming, has increased dramatically over the last few decades. The enactment of the CEDAW⁷² and the Declaration on the Elimination of Violence Against Women (DEVAW)⁷³ certainly show the sense of urgency with which the international community has tried to address this issue. Similarly, a number of States have issued gender-based guidelines for asylum decision making.⁷⁴ Despite these developments, the decision of *In re R-A-* is testament to the need to do more. Despite Attorney General Reno's vacating of that decision and repudiation of the majority view, immigration judges still seem uncertain of its status.⁷⁵

Regulations can provide consistency and clarity in this area of law. Indeed, had *In re R-A-* been decided under regulations similar to those proposed, the Board would clearly have decided in favor of Ms. Alvarado. Nevertheless, the proposed regulations are not perfect. They drew substantial and justifiable criticism during the comment period, and they should be revised in the following areas: (1) the definition of social group, (2) the definition of persecution and the agents of persecution, and (3) the discussion of the proper legal standards for determining the motive of the non-state actor.

A. *Membership in a Particular Social Group*

Section 208.15(c) of the proposed regulations attempts to define the elusive concept of "social group."⁷⁶ The definition incorporates a variety of approaches that, taken together, may cause more harm and

72. See CEDAW, *supra* note 50 and accompanying text.

73. Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., 85th plen. mtg., U.N. Doc. A/48/49 (Dec. 20, 1993) [hereinafter DEVAW].

74. See, e.g., Memorandum from Phyllis Coven, Office of HQASM Coordinators of Int'l Affairs, to All INS Asylum Officers (May 26, 1995), available at <http://www.state.gov/s/l/65633.htm>; Immigration and Refugee Bd. Of Can., Guideline 4, Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act, Update (1996), available at http://www.irb-cisr.gc.ca/en/references/policy/guidelines/women_e.htm.

75. For example, Karen Musalo has cited judges who believe that it is still "good" law. Musalo, *supra* note 71, at 126 n.27. Musalo mentioned a 2004 decision by an immigration judge who apparently believed *In re R-A-* was still good law. That judge relied on *In re R-A-* in denying asylum to a Chinese woman who "had been physically abused throughout her childhood by her mother and then sold by her parents into marriage to an older man." This example serves as a chilling reminder of the difficulty with which the somewhat unguided decision-maker navigates this area.

76. Membership in a particular social group.

confusion than good. First, it sets out a core definition that essentially repeats the *Acosta* test previously discussed, focusing largely on the presence of shared characteristics among the group's members.⁷⁷ Next, it repeats the notion that the group must exist independently of the persecution.⁷⁸ Third, it makes an incoherent proposal regarding the relevance of "past experience."⁷⁹ Finally, and most controversially, it creates a series of factors that may be considered, though they are not necessarily determinative, in deciding whether a group exists.⁸⁰ These factors are whether:

- (i) The members of the group are closely affiliated with each other;
- (ii) The members are driven by a common motive or interest;
- (iii) A voluntary associational relationship exists among the members;
- (iv) The group is recognized to be a societal faction or is otherwise a recognized segment of the population in the country in question;
- (v) Members view themselves as members of the group; and
- (vi) The society in which the group exists distinguishes members of the group for different treatment or status than is accorded to other members of the society.⁸¹

(1) A particular social group is composed of members who share a common, immutable characteristic, such as sex, color, kinship ties, or past experience, that a member either cannot change or that is so fundamental to the identity or conscience of the member that he or she should not be required to change it. The group must exist independently of the fact of persecution. In determining whether an applicant cannot change, or should not be expected to change, the shared characteristic, all relevant evidence should be considered, including the applicant's individual circumstances and information country conditions information about the applicant's society. [sic]

(2) When past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it.

Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,598. (Dec. 7, 2000) (to be codified at C.F.R. pt. 208).

77. *See id.*

78. Factor vi seems to establish the fact that sometimes the very fact of persecution demonstrates the existence of the group. But the nexus requirement of the refugee definition makes clear that persecution, in itself, cannot trigger asylum protection. *Id.* (noting that "[t]he group must exist independently of the fact of persecution").

79. *Id.* (noting that "[w]hen past experience defines a particular social group, the past experience must be an experience that, at the time it occurred, the member either could not have changed or was so fundamental to his or her identity or conscience that he or she should not have been required to change it").

80. *Id.* at 76,594 (noting that "while these factors may be relevant in some cases, they are not requirements for the existence of a particular social group").

81. *Id.* at 76,598.

Respondents during the comment period vigorously objected to the latter two provisions. First, they stated that the provision on past experience does not conform to U.S. law or international obligations.⁸² I agree with that position, and that provision should be struck. Second, respondents believed that the factors would create confusion and denial because they speak to different, perhaps contradictory, approaches that have been taken to defining social group.⁸³ Though the primary definition in the regulations borrows from *Acosta*, the first few factors are based on *Sanchez-Trujillo*, and the latter few are from *In re R-A*.⁸⁴ So, respondents fear that the factors may be used as a checklist where denials are given for failure to satisfy all factors. Also, the factors appear to borrow from the discredited views of *In re R-A* and *Sanchez-Trujillo*.⁸⁵

However, these provisions attempt to do what other commentators have welcomed, by injecting into the definition elements that rightly go beyond mere innate characteristics.⁸⁶ Thus, though the drafting may not be artful, the objective is worthy—to widen the notion of social group to encompass more than mere immutable traits. The first three factors widen the definition of social group by including people who have *joined* some disfavored group. Additionally, the fourth and fifth factors afford protection to those who are viewed as different, no matter what those differences spring from. These factors should not be scuttled, because they provide an inclusiveness that mirrors the evolving notion that group identity may derive from social perceptions.⁸⁷

82. See Letter from Jeanne A. Butterfield, Executive Dir., American Immigration Lawyers Ass'n to Director, Policy Directives and Instructions Branch, Immigration & Naturalization Serv., available at <http://www.vkblaw.com/news/eighthundredsix.htm> (Jan. 17, 2001) [hereinafter Letter from Jeanne A. Butterfield] (noting that "[b]ecause proposed Section 208.15(c)(2) is not consistent with U.S. or international case law, and because the concerns it is intended to address are dealt with elsewhere, this section of the proposed regulations should be struck").

83. SEE COMMENTS OF THE LAWYERS COMM. FOR HUMAN RIGHTS ON INS. NO. 2092-00; AG ORDER NO. 2339-2000: ASYLUM AND WITHHOLDING DEFINITIONS 10, 12 (2001), available at http://www.humanrightsfirst.com/asylum/gender_comments.pdf (noting that the Lawyers Committee for Human Rights was "very concerned" about this listing, fearing that it could be used as a "checklist") (hereinafter Lawyers Committee).

84. See Asylum and Withholding Definitions, 65 Fed. Reg. at 76, 594.

85. See Lawyers Committee, *supra* note 83, 12 (stating that some factors run "contrary to evolving jurisprudence" because they embody notions from these decisions).

86. See *supra* note 30 and accompanying text.

87. See T. David Parish, Note, *Membership in a Particular Social Group Under the Refugee Act of 1980: Social Identity and the Legal Concept of the Refugee*, 92 COLUM. L. REV. 923, 953 (1992).

The 2002 Office of the United Nations High Commissioner for Refugees (UNHCR) guidelines reflect this inclusiveness and provide the appropriate bases for protection.⁸⁸ They address these protection gaps created by resorting to the either/or of one test or another. Thus, attempting to reconcile the approaches of either analyzing actual traits or perceived ones, UNHCR favors looking at both approaches:

[A] particular social group is a group of persons who share a common characteristic other than their risk of being persecuted, or who are perceived as a group by society. The characteristic will often be one which is innate, unchangeable, or which is otherwise fundamental to identity, conscience or the exercise of one's human rights.⁸⁹

This formulation adopts the findings from the meeting of the Expert Roundtable on Gender-Related Persecution in San Remo, Italy in 2001.⁹⁰ Thus, the guidelines expressly recognized gender-based claims, noting that "sex can properly be within the ambit of the social group category, with women being a clear example of a social subset defined by innate and immutable characteristics, and who are frequently treated differently than men."⁹¹ Sufficiently broad to embrace the major approaches, this formulation expressly recognizes that the protected group is women—it is not some hyper-specific sub-set as discussed above but simply women.⁹²

88. UNHCR issues guidelines pursuant to its mandate in the Statute of the Office of the United Nations High Commissioner for Refugees and Article 35 of the 1951 Geneva Convention. The guidelines "provide legal interpretative guidance for governments, legal practitioners, decision-makers and the judiciary, as well as UNHCR staff carrying out refugee status determinations in the field." United Nations High Comm'r for Refugees [UNHCR], *Guidelines on International Protection: Gender-Related Persecution Within the Context of Article 1A(2) of the 1951 Convention and/or its 1967 Protocol Relating to the Status of Refugees*, 1, UN Doc. HCR/GIP/02/01 (May 7, 2002), available at <http://www.unhcr.org/refworld/docid/3d36f1c64.html> [hereinafter UNHCR Guidelines].

89. *Id.* at 8 (emphasis omitted).

90. Global Consultations on International Protection, San Remo Expert Roundtable, available at <http://www.unhcr.org/protect/PROTECTION/3baf2fb88.pdf> (UNHCR and the International Institute of Humanitarian Law organized this roundtable, which met from Sept. 6-8, 2001).

91. *Id.*

92. Various commentators have addressed the size problem presented by this social group vision. Karen Musalo states that if gender were recognized as a basis for asylum, nothing in the abstract or in international experience suggests a floodgate issue. Musalo, *supra* note 71, at 132-33. Similarly, UNHCR has said that group size should not be used as a basis for refusing to recognize women as a group because the claim must still meet the other Convention requirements. UNHCR Guidelines, *supra* note 88, at 8 (noting that "it should be possible to identify the group independently of the persecution, however, discrimination or persecution may be a relevant factor in determining the visibility of the group in a particular context") (footnote omitted.).

In fact, some instruments have treated gender quite specifically as either a cognizable basis for persecution or a defining element of a group. A recent change in the German Residence Act⁹³ does this, as does a directive of the European Union.⁹⁴ However, it is not necessary for these regulations to specifically list gender as a basis for the definition of the social group. The commentary to the definition of group in the regulations would clarify any remaining ambiguity about the coverage of that definition. Accordingly, the spare but inclusive definition of the UNHCR should replace the entirety of section 208.15(c) of the proposed regulations.

B. The Motive of the Persecutor

Changing the regulations to recognize gender as a basis for social group membership does not, however, provide a complete solution to the challenge posed by domestic violence. The refugee definition still requires the applicant to show that she fears persecution *because* of her gender. The nexus requirement—the coupling of the group membership to the conduct of the agent of persecution—provides formidable problems of proof previously discussed above. Though the Convention trait must somehow actuate the conduct (i.e. motivate the persecutor), this evidentiary coupling can prove nearly impossible. Worse, the proposed regulations require that “[i]n cases involving a persecutor with mixed motivations, the applicant must establish that the applicant’s protected characteristic is central to the persecutor’s motivation to act against the applicant.”⁹⁵ We should reject this centrality requirement.

The motive requirement should be satisfied by demonstrating that the actor was at least in part motivated to persecute the victim because of her social group membership. Accordingly, we should reject the language of the proposed regulation and should instead adopt the following language:

93. [German Residence Act], June 30, 2004, Federal Law Gazette vol. 2004, part I no. 41, at 60, § 60, last amended by the Act Amending the Residence Act, Mar. 14, 2005, Federal Law Gazette I at 721, *translated at* http://www.proasyl.de/fileadmin/proasyl/fm_redakteure/Englisch/Residence_Act.pdf (“When a person’s life . . . is threatened solely on account of their sex, this may also constitute persecution due to membership of a certain social group.”).

94. Council Directive 2004/83, art. 9(2)(f), 2004 O.J. (L 304) 12, 17 (EU) (stating that “acts of a gender-specific or child specific nature” can constitute acts of persecution).

95. Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,598. (Dec. 7, 2000) (to be codified at C.F.R. pt. 208).

In cases involving a persecutor with mixed motives, the motive is demonstrated if the persecutor acts at least in part because of a protected characteristic.

This standard creates a fair and workable standard for asylum law. The requirement of “centrality” hopelessly and unnecessarily burdens the asylum seeker. Virtually all comments to the proposed regulations reached the same conclusion, highlighting the practical difficulties of requiring proof of centrality in this area.⁹⁶

Discussion of motive in this area often takes on a surreal tinge. The persecutor is not present, and little paper trail exists. Thus, decision makers are left to discuss what motivated the conduct in a factual vacuum. So, as in *In re R-A-*, though the majority opinion recited instances of persecution, it viewed them as random events, revealing no consistent motive, and surely no Convention motive.⁹⁷ Of course we cannot know what fundamentally drove him to act as he did on all of those occasions. But what, then, should the legal response be? As the dissent said, in his very pattern of seemingly random abuse, he revealed the distinct, characteristic traits of the spousal abuser.

However, achieving a proper understanding of the phenomenon of domestic violence helps to make the case for the required motive. As the DHS brief stated, “[i]n the domestic violence context, evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that the applicant has within the family relationship is highly relevant to determining the persecutor’s motive.”⁹⁸ So, for example, Osorio Alvarado’s statements that “[y]ou’re my woman, and I can do whatever I want” and “you do what I say” reveal his asserted domination over her and his attitude about male and female relationships.⁹⁹

Yet, despite its ability to understand his behavior within the context of domestic violence, DHS still recommended a lower standard than centrality. Citing administrative and federal court opinions, it recommended a standard that only requires that the persecutor is motivated “at least in part” by the protected characteristic.¹⁰⁰ This standard satisfies two objectives. First, it recognizes the complexity of human conduct and thus the absurdity of positing a single or central

96. The UNHCR takes a similar position. UNHCR Guidelines, *supra* note 88, at 6 (noting that “[t]he Convention ground must be a relevant contributing factor, though it need not be shown to be the sole, or dominant, cause”).

97. See *supra* note 48–54 and accompanying text.

98. DHS Brief, *supra* note 63, at 35.

99. See *id.* at 36.

100. *Id.* at 33.

motive. Second, it consequently lowers the proof requirement for the asylum seeker. Since asylum is based on a protection model and it is unconcerned with assigning responsibility or meting out punishment, this lower standard appears sensible.

This standard effectively acknowledges the psychological complexity of human behavior by looking beyond reductive notions of motive to explain conduct. The *In re R-A*-majority was perplexed by both the apparent randomness of his conduct and its confinement to Rodi. But a discussion of motive as though it was monolithic and the only cause of behavior would be incomplete. Subsequent case law has recognized this complexity, using the notion of “mixed motive” to describe the confluence of factors discussed here.¹⁰¹ Human behavior results from a variety of transitory factors, as well as more deep-seated traits and penchants. Thus, much of the legal discussions we read about people’s motives should strike us as psychologically naïve, especially given the relative dearth of evidence we truly have on such issues. We can and must distinguish, then, between the triggering events for behavior and what the behavior itself apparently reflects. As Anthea Roberts has noted, we should recognize the temporal nature of these events that trigger behavior, but we should not lose sight of an essential component of domestic violence: the actor’s belief in the appropriateness of such violent responses as a means to achieve domination and subordination over his partner.¹⁰² Certainly, Osorio may have beaten Rodi after a frustrating day, or when drunk, but his *choice* to act out in that fashion at those times speaks to his personal and cultural identity.

The majority in *In re R-A*-did not understand the context of domestic violence and was thus puzzled by why Osorio confined his abuse to Rodi. The cultural context is that Guatemala did and still does suffer from rampant, largely unchecked domestic violence.¹⁰³

101. See, e.g., *In re S-P*-, 21 I. & N. Dec. 486, 492 (BIA 1996) (noting that “[i]n adjudicating mixed motive cases, it is important to keep in mind the fundamental humanitarian concerns of asylum law”).

102. Anthea Roberts, *Gender and Refugee Law*, 22 AUSTL. Y.B. OF INT’L L. 159, 186 (2002).

103. See generally ANGELICA CHAZARO & JENNIFER CASEY, CTR. FOR GENDER & REFUGEE STUDIES, GETTING AWAY WITH MURDER: GUATEMALA’S FAILURE TO PROTECT WOMEN AND RODI ALVARADOS’ QUEST FOR SAFETY (2005), http://cgrs.uchastings.edu/documents/cgrs/cgrs_guatemala_femicides.pdf; Amnesty Int’l, *Guatemala: No Protection, No Justice: Killing of Women in Guatemala* 29 (2005), <http://www.amnesty.org/en/library/asset/AMR34/017/2005/en/dom-AMR340172005en.pdf> (“The organization concurs with other national and international experts that the number of killings of women is increasing, that it has increased beyond national averages usually associated with killings of both men and women and that it should be considered as a

Changes in both its civil and criminal system have been largely ineffective.¹⁰⁴ The majority also did not understand that a “man may beat his wife because she is a woman without beating women generally because an act of persecution involves a complex relationship between motivation and opportunity.”¹⁰⁵ Because a man’s abusive behavior can be explained through a complex mix of situational, personal, and cultural factors, the standard of “centrality” would severely undermine the objective it seeks to further. The standard we should adopt is that motive can be demonstrated if the persecutor acts at least in part because of a protected characteristic.

However, domestic violence further strains asylum doctrine because of the private nature of the persecutive conduct. Thus, not only must the asylum seeker prove that she fears persecution because of her group membership, not only must she demonstrate the nexus between her protected traits and that likely persecution, but she must also prove that the agent of persecution counts for Convention purposes. The feared persecution must rise above mere personal tragedy; it must count as persecution from which the State must protect its citizens.

C. *Persecution and the Non-State Actor*

The role of the non-state actor has confounded judges both in the United States and worldwide. The usual paradigm for asylum cases rests on the notion of persecution by the State. But in the context of domestic violence, the shadowy figure of the unseen, scarcely known

priority within the issue of public and human security.”). The 2007 State Department report on human rights is in accord:

Violence against women, including domestic violence, remained a common and serious problem. The law prohibits domestic abuse but does not provide prison sentences for cases of domestic abuse. Prosecutors noted that the law permits charging abusers with assault only if bruises from the abuse remained visible for at least 10 days. The law provides for the issuance of restraining orders against alleged aggressors and police protection for victims, and it requires the PNC to intervene in violent situations in the home. In practice, however, the PNC often failed to respond to requests for assistance related to domestic violence. Women’s groups commented that few officers were trained to deal with domestic violence or provide assistance to victims.

U.S. Dep’t of State, Guatemala: Country Reports on Human Rights Practices (Mar. 11, 2008), available at <http://www.state.gov/g/drl/rls/hrrpt/2007/100641.htm>.

104. Musalo, *supra* note 71, at 149 (stating that “Guatemala remains a society in which women have limited, if not non-existent, means to escape family violence. Not only does society promote the subjugation of women, the government condones violence against women because it is unwilling to implement legislative reforms that would offer real protection for abused women.”) (quoting affidavit of Hilda Morales Trujillo, practicing attorney in Guatemala and expert in the area of human rights).

105. Roberts, *supra* note 103, at 186.

persecutor strains doctrine and requires a rethinking of the basis for asylum. Asylum provides surrogate protection in the face of State failure; it should little matter just why the State has failed, so long as it has. This failure in itself signals the need for protection, regardless of the source of persecution.

1. Before the Emergence of the Due Diligence Standard

With State-instigated persecution, the evidence of failure is vividly before us, and issues of motive and group membership are rather easily resolved. But when the failure lies in a mere failure of protection, the inquiry settles on the reasons for that failure, be they indifference, inefficiency, or outright tolerance of abuse from private actors. Because of the somewhat attenuated connection between the persecution and the State, judges have been troubled by when to conclude that the failure has crossed the threshold to the point of justified third-country intervention.

State failure may consist of either complicity in persecution or the inability to control dangerous elements of the populace. Increasingly, States are required to provide effective protection for their citizens. The UNHCR has concluded that States fail either in their inability or unwillingness to provide these needed protections.¹⁰⁶ Similarly, the European Union has embraced the view that failure lies in being “unable or unwilling” to provide protection against persecution.¹⁰⁷

Specifying a test for failure, however, has been difficult. In the celebrated case of *Khawar*,¹⁰⁸ the Australian courts puzzled over just when State failure existed. There, a Pakistani woman recounted tales of horror—her husband beat her and even doused her with petrol.¹⁰⁹ The police and other authorities turned a blind eye; they even told her that women should not blame their husbands for their own misfortunes but should instead “sort out their ‘own work.’”¹¹⁰ The variety of opinions and positions among the justices of the Federal Court of Australia and its High Court was bewildering, though the High Court did find her claim cognizable. By Justice Kirby’s view, State failure may

106. See UNHCR Guidelines, *supra* note 88, at 6.

107. Council Directive, *supra* note 95, at art. 6(c).

108. Minister for Immigration and Multicultural Affairs v. *Khawar* (2002) 210 C.L.R. 1 (Austl.).

109. *Id.* ¶ 94.

110. *Id.* ¶ 95.

consist of condonation of persecution, tolerance of it, or its refusal or inability to control it.¹¹¹

Justice Lindren of the Federal Court is particularly insightful in trying to cabin that last notion of mere inability to protect the citizenry. Seeking to find a link between the state and privately motivated harassment,¹¹² he required “something more” than a mere failure of protection.¹¹³ The failure must reflect a “sustained or systemic failure of state protection” for women, demonstrating that the state did not regard women as worthy of equal treatment under the laws.¹¹⁴ Thus, a failure of protection that was “atypical,” reflective only of an officer’s personal attitudes or ineptitude, would not suffice for a grant of asylum.¹¹⁵ Such failures would not speak to the system of justice in place, but only to the unrepresentative actions of individuals within it.

Roger Haines, writing for the New Zealand Refugee Status Appeals Authority, started to supply the content for this ineffable “something more.”¹¹⁶ Haines discussed the case of an Iranian woman whose second husband had regularly beaten and tortured her, yet the Refugee Authority cast her out of her family home and denied her custody of her son.¹¹⁷ The Refugee Authority expressly recognized the group as “women in Iran”¹¹⁸ and found no need to establish State complicity. Rather, echoing the thinking of the Canadian court in *Canada v. Ward*,¹¹⁹ it set out the following four situations that might satisfy the Convention requirement for persecution:

1. Persecution committed by the state concerned,

111. *Id.* ¶ 114.

112. *Id.* ¶ 19.

113. *Id.* at 4.

114. *Id.* ¶ 70 (quoting JAMES C HATHAWAY, *THE LAW OF REFUGEE STATUS* 112 (1991)).

115. *Id.* ¶ 97.

116. Roger Haines is Deputy Chairperson to the Authority. Moreover, he has participated in numerous international workshops and written extensively on asylum matters, particularly gender-based persecution. See Deborah E. Anker, *Refugee Law, Gender, and the Human Rights Paradigm*, 15 HARV. HUM. RTS. J. 133, 139 n.31 (2002) (describing Haines as taking an “integrative perspective” by “interpreting forms of violence against women within mainstream human rights norms and definitions of persecution”).

117. See Refugee Appeal No. 71427/99, [2000] N.Z.A.R. 545, 2000 N.Z.A.R. LEXIS 9 (Refugee Status Apps Auth.).

118. *Id.* ¶ 106. The opinion further notes that “the evidence relating to Iran establishes that the overarching characteristic of those fundamentally disenfranchised and marginalized by the state is the fact that they are women.” *Id.* ¶ 108.

119. *Canada v. Ward*, [1993] 2 S.C.R. 689, 726 (Can.) (concluding that “state complicity is not a necessary component of persecution, either under the ‘unwilling’ or under the ‘unable’ branch of the definition”).

2. Persecution condoned by the state concerned,
3. Persecution tolerated by the state concerned,
4. Persecution not condoned or tolerated by the state concerned, but nevertheless present because the state either refused or is unable to offer adequate protection.¹²⁰

Indeed, Haines commented expressly on both the majority and minority opinions of *In re R-A-*, concluding that “neither of the opinions meaningfully grapple [sic] with the issues.”¹²¹

In shading the State’s approval of private persecution, he began to elaborate a workable test for State failure. The proposed regulations attempt to do the same, by requiring governments to take reasonable steps to control persecution from the non-state actor and to provide victims with reasonable access to State protection. However, in focusing on government complicity, unresponsiveness, and denial of essential services to these victims, the regulations skew the analysis by concentrating chiefly on the unwillingness prong of State failure.¹²²

Thus, though virtually all respondents during the comment period applaud this recognition that State failure is the proper test for dealing with this source of persecution, they are similarly strenuous in criticizing the factors listed that indicate State failure.¹²³ All factors somehow sound in State “unwillingness” and do not deal effectively with an increasing prevalence of simple inability to cope with this deviant sector of the population. The regulations try to embellish on Haines’ suggested fourth factor but fail to give it useful content.

But in shifting his focus from complicity to the inability to control domestic violence, Haines himself distorts the relationship between the Convention traits and the persecutor’s conduct. In Refugee Appeal No. 71427, the Refugee Authority concluded that the nexus requirement could be satisfied by a failure of state protection, even if the harm is threatened for reasons unrelated to the Convention.¹²⁴ Accordingly, for the Refugee Authority, the claim is made based on satis-

120. Refugee Appeal No. 71427/99, 2000 N.Z.A.R. LEXIS 9 ¶ 60.

121. *Id.* ¶ 114.

122. See Asylum and Withholding Definitions, 65 Fed. Reg. 76,588, 76,597. (Dec. 7, 2000).

123. The Lawyers Committee for Human Rights suggested that the list be expanded to include examples of inability, sketching out the outlines for such a non-exclusive list. Lawyers Committee, *supra* note 85, at 8. Also, the American Immigration Lawyers Association (AILA) suggested a test for “effective” State protection, defining “effective” as that which reduces the “applicant’s fear . . . to below the level of a well-founded fear.” Letter from Jeanne A. Butterfield, *supra* note 82. However, the AILA’s test seems conclusory and unhelpful because regulations should specify *how* we test to see if States are providing effective protection.

124. Refugee Appeal No. 71427/99, 2000 N.Z.A.R. LEXIS 9 ¶ 112.

fying the simple equation of: "Persecution = Serious Harm + The Failure of State Protection."¹²⁵ I disagree with this position, because it improperly deflects the focus from the political nature of such conduct and the pressing need for proper political responses.

The inability to provide protection may result from a variety of reasons, including a lack of funds or resources or a failing State infrastructure. Thus, it is incoherent to posit Convention reasons for an inability to protect. Such failure may just inhere in the limits of that State, regardless of its stance on domestic violence. Moreover, it is unnecessary to ascribe Convention reasons to mere failure, for the acts of the non-state actor satisfy that nexus requirement. Since domestic violence is motivated, at least in part, by Convention reasons, that satisfies the motive requirement of the Convention. In settings of domestic violence, we are not dealing with purely private conduct but with persecution of a vulnerable social group. Rejecting Haines' somewhat facile equation preserves a meaningful distinction between unable and unwilling, and grounds domestic violence in its proper context as a species of conduct from which States must protect their citizens through law enforcement.¹²⁶

2. *The Emergence and Development of the Due Diligence Standard: The Contributions of CEDAW*

Due diligence has obvious relevance in asylum adjudication because it answers the challenge of persecution by the non-state actor. The core notion of this standard—that governments must not only inflict no harm but also restrain the conduct of dangerous private parties—has inspired developments in other areas. Here, CEDAW and asylum doctrine have begun a symbiotic relationship, providing separate points of entry into humanitarian law. As CEDAW has refined the notion of due diligence, those refinements provide invaluable lessons for asylum decision makers and all participants in asylum adjudication. Indeed, an examination of the work of the CEDAW Committee reveals the way in which it has interpreted the requirements of due diligence, thus providing workable tests for State failure in the asylum arena.

125. *Id.*

126. See Roberts, *supra* note 102, at 191 (Roberts notes that sometimes unwillingness masquerades as inability. Thus, a claimed inability to protect women may simply indicate a failure to properly prioritize. However, the two are analytically distinct, and pure cases of inability surely exist.).

Article 21 of CEDAW provides a mechanism for its Committee to make suggestions and recommendations from time to time.¹²⁷ Employing this mechanism, it has adopted twenty-five general recommendations, including, in 1992, General Recommendation No. 19, which expressly recognizes State responsibility for the acts of the non-state actor and requires it to react to them with “due diligence.”¹²⁸ Paragraph 9 enlarges State responsibility beyond its own acts to include “private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence.”¹²⁹ Moreover, it requires States to compensate the victims of violence.¹³⁰ In this, it echoes the Declaration on the Elimination of Violence against Women, which similarly requires States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.”¹³¹ Together, these instruments begin to flesh out the areas in which States are remiss in their failure to address this form of human rights violation. They begin to specify the kinds of actions that must be taken to prevent human rights violation and to redress them when they occur. If no redress has taken place, these failures provide the basis for asylum in third countries.

The due diligence standard has evolved and matured. Advanced by advocates such as Radhika Coomaraswamy,¹³² it has developed through an interactive process. Tests to determine State failure must develop through experience, observation, criticism, and involvement by groups such as the CEDAW Committee. Beyond that, the United Nations Rapporteur on Violence Against Women visits countries, communicates with governments, and recommends courses of action to address issues. In her 1996 report to the Commission on Human Rights, Ms. Coomaraswamy elaborated on this due diligence stan-

127. See CEDAW, *supra* note, 50 and accompanying text. These recommendations fill the gaps in the Convention, much in the way regulations do for legislation.

128. Report of the Committee on the Elimination of Discrimination Against Women, U.N. GAOR, 47th Sess., Supp. No. 38 at 2, U.N. Doc. A/47/38 (1993).

129. *Id.* ¶ 9.

130. *Id.*

131. DEVAW, *supra* note 73, at art. 4(c).

132. Ms. Coomaraswamy was the first United Nations Special Rapporteur on Violence Against Women from 1994 to 2003, a position that was created in the fiftieth session of the Commission on Human Rights in 1994. This Special Rapporteur position is charged with analyzing the cause and consequences of violence and reporting to the Commission on an annual basis. In 2006, Ms. Coomaraswamy was appointed by Kofi Annan Under-Secretary-General, Special Representative for Children and Armed Conflict.

dard.¹³³ Responding to a judgment by the Inter-American Court of Human Rights on State obligations,¹³⁴ she made the following observations:

The Court also clearly stated that a single violation of humans rights or just one investigation with an ineffective result does not establish a lack of due diligence by a State. Rather, the test is whether the State undertakes its duties seriously. Such seriousness can be evaluated through the actions of both State agencies and private actors on a case-by-case basis. The due diligence requirement encompasses the obligation both to provide and to enforce sufficient remedies to survivors of private violence.¹³⁵

These considerations add to the test adumbrated by Justice Lindren and embellished by Roger Haines. Ms. Coomaraswamy's successor, Yakin Ertürk, hails due diligence as "a yardstick to determine whether a State has met or failed to meet its obligations in combating violence against women."¹³⁶ Not content to simply invoke this concept, Ms. Ertürk elaborated a typology whereby obligations exist at the community, State, and transnational levels to protect, respect, promote, and fulfill the human rights of all citizens.¹³⁷ Then, for each of these categories, she specified what is required to properly discharge this duty.¹³⁸

Si-Si Liu, the Amnesty International Chairperson for Hong Kong, believes that these obligations, properly viewed, "reinforce and create a virtuous circle of good practice."¹³⁹ Ms. Liu detailed the content of these obligations, culling a list of virtuous practices from various international sources.¹⁴⁰ The following four kinds of obligations dictate

133. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, U.N. Doc. E/CN.4/1996/53 (Feb. 6, 1996) (prepared by Radhika Coomaraswamy) [hereinafter Coomaraswamy].

134. Velásquez Rodríguez v. Hond. Case, Inter-Am. Ct. H.R. (ser. C) No. 4, ¶ 72, (July 29, 1988) (concluding that what might appear as private conduct is transformed into a constructive act of State, "because of the lack of due diligence to prevent the violation or to respond to it as required by the [American] Convention").

135. Coomaraswamy, *supra* note 133, ¶ 37.

136. U.N. Econ. & Soc. Council [ECOSOC], Comm'n on Human Rights, *Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ¶ 14, U.N. Doc. E/CN.4/2006/61 (Jan. 20, 2006) (prepared by Yakin Ertürk).

137. *Id.* ¶¶ 75–76.

138. *Id.* ¶¶ 78–99.

139. Si-si Liu, *Due Diligence: The Duty of State to Address Violence Against Women* 4 (2006), <http://www.hku.hk/ccpl/documents/SisiLiu.pdf>.

140. Among others, Liu quotes the following duties:

1. Make criminal and civil laws gender-sensitive;
2. Ensure access to justice for women;
3. Ensure best practices during investigation and prosecution;

State practice in all conceivable areas. First, the duty to *respect* requires the State to refrain from interfering directly with the right to be free from violence. Second, states must *protect* their citizenry by preventing non-state actors from committing acts of violence. Third, the obligation to *fulfill* requires States to adopt appropriate legislative, administrative, budgetary, and judicial measures to protect these rights. Finally, the obligation to *promote* requires States to adopt measures to educate their citizens about these rights through a variety of mechanisms.¹⁴¹

These elaborations on due diligence are meant to inform State practice, by apprising States of the broad ways in which they must enforce this fundamental human right to live free from violence.¹⁴² They are meant to influence primary behavior, by providing guidance on the demands of this due diligence standard. To further that goal, CEDAW has provided several mechanisms by which States are required to communicate with the Committee, and States may be held accountable for failure to properly address problems.

CEDAW provides two forms of reporting procedures. First, under Article 29, States may refer disputes about its meaning or implementation to arbitration.¹⁴³ Thereafter, the matter may be referred to the International Court of Justice.¹⁴⁴ To date, that procedure has not been used. More importantly, CEDAW requires State parties to submit reports to its Committee within one year of accession or ratifi-

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4. Provide appropriate punishments;
 5. Create civil remedies in conjunction with criminal penalties;
 6. Provide training to judicial, law enforcement personnel, and other professionals;
 7. Provide adequate reparations;
 8. Enact national plans of action and gender mainstreaming;
 9. Research and compile sex-disaggregated statistics, and
 10. Create adequate budgets to accomplish these goals, "responding to need, for the infrastructure of the criminal justice system, services and support to survivors.

Id. at 5–8.

141. *Id.* at 4, 8. Indeed, though some might think education will have little effect on conduct, studies have shown that lack of concern about violence against women led to denial, and high levels of such violence. However, "[r]aising awareness, or more accurately changing awareness, is an important precursor for behavioral and attitudinal change." Hilary Fisher, *Building Promising Practices: Campaigning, Awareness Raising and Capacity Building to Combat Violence Against Women—A Human Rights Approach* 6 (2005), available at <http://www.un.org/womenwatch/daw/egm/vaw-gp-2005/docs/experts/fisher.amnesty.pdf>.

142. This Article only examines domestic violence. But these initiatives are directed to all forms of violence, including sexual assault, trafficking, "honor crimes," sexual harassment, and all other forms of gender-based persecution.

143. CEDAW, *supra* note 50, at art. 29.

144. *Id.*

cation.¹⁴⁵ Then, reports are to be filed every four years or at the request of the Committee.¹⁴⁶ In those reports, States must indicate measures that have been adopted to implement the requirements of CEDAW.¹⁴⁷ After that, the Committee discusses these reports with governments and explores areas in which further action may be necessary.¹⁴⁸ However, both of these mechanisms are directed toward States, not individuals.

That changed in December 2000 with the adoption of the Optional Protocol.¹⁴⁹ The Protocol brings State obligations down to an individual level by providing the following two forms of procedures for dealing with complaints by individuals or groups: (1) the Communications Procedure and (2) the Inquiry Procedure. Individuals or groups first have the right to complain to the CEDAW Committee about alleged violations.¹⁵⁰ Then, under the Inquiry Procedure, the Committee initiates a confidential investigation.¹⁵¹ It may visit the territory of the State Party and, if conditions warrant, forward comments or recommendations to it, to which the State must respond within six months.¹⁵² After that, the Committee may establish a follow-up procedure and require the State to undertake remedial efforts.¹⁵³ Through this structure and process, the standard of due diligence has begun to develop substantial content.

This process has been used, and the Committee has issued opinions. In Communication No. 5/2005, the Committee considered a complaint brought by two groups in Vienna against Austria, as State party.¹⁵⁴ In that case, the deceased victim had reported attacks to the police on numerous occasions and sought the assistance of the Public

145. *Id.* at art. 18(1)(a).

146. *Id.* at art. 18(1)(b).

147. *Id.* at art. 18(2).

148. *Id.* at art. 21.

149. Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 54/4, at 5, Annex, GAOR, 28th plen. mtg., UN Doc. A/54/49 (Vol. I) (Oct. 15, 1999), available at <http://daccessdds.un.org/doc/UNDOC/GEN/N99/774/73/PDF/N9977473.pdf>. As of November 27, 2007, 90 States had signed, acceded to or ratified the Protocol. The United States had not, nor had it ratified CEDAW itself.

150. *Id.* at art. 7(1).

151. *Id.* at art. 8.

152. *Id.*

153. *Id.* at art. 9.

154. Views of the Committee on the Elimination of Discrimination Against Women Under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Communication No. 5/2005, at 2, U.N. Doc. CEDAW/C/39/D/5/2005 (Aug. 6, 2007). The Vienna Intervention Centre Against Domestic Violence and the Association for Women's Access to Justice brought the complaint on behalf of the descendants of the victim.

Prosecutor. The police responded to most calls and recommended that the husband be detained. The Prosecutor denied these requests.¹⁵⁵ Three years after the first incident, the husband obtained a handgun, despite a valid weapons prohibition against him. Three weeks later, the victim called the police after another incident. No patrol car was sent to the scene, and she was killed several hours after that call.¹⁵⁶

The groups that initiated this process did so on behalf of the victim's surviving children, filing the communication with the Committee in July 2004 and alleging a "prevailing lack of seriousness with which violence against women is taken."¹⁵⁷ After taking evidence from both sides and making admissibility rulings, the Committee decided the case on the merits in August 2007. The Committee addressed the following two aspects of the Austrian legal system: (1) its infrastructure for dealing with domestic violence and (2) the actual role played by the actors within that system. It first commended the State for having "established a comprehensive model to address domestic violence that includes legislation, criminal and civil-law remedies, awareness-raising, education and training, shelters, counseling for victims of violence and work with perpetrators."¹⁵⁸ Austria's achievements in those areas are prodigious, far outstripping those of many other States.

However, such extensive infrastructure is only a necessary, not sufficient condition for satisfying the due diligence standard. The Committee faulted the State because "the political will that is expressed in the aforementioned comprehensive system of Austria must be supported by State actors, who adhere to the State party's due diligence obligations."¹⁵⁹ Here, both the police and the Public Prosecutor failed the victim, Şahide Goekce. The police failed by not responding properly to the call and allowing the husband to purchase a handgun, and the prosecutor failed twice by not detaining him. Both failures violated provisions of the Convention and General Recommendation 19.¹⁶⁰

155. *Id.* at 3–4.

156. *Id.* at 21.

157. *Id.* at 6.

158. *Id.* at 21.

159. *Id.*

160. *Id.* at 22 ("While noting that Mustafa Goekce was prosecuted to the full extent of the law for killing Şahide Goekce, the Committee still concludes that the State party violated its obligations under article 2 (a) and (c) through (f), and article 3 of the Convention read in conjunction with article 1 of the Convention and general recommendation 19 of the Committee and the corresponding rights of the deceased Şahide Goekce to life and physical and mental integrity.").

While proper infrastructure and willingness to act are indispensable to a State's serious assumption of the obligation to act with due diligence, it is also necessary for the State to learn from failures. In addition to examining Austria's institutions for protection and its political will as reflected in the actions of the actors within that infrastructure, the Committee also made several recommendations to Austria. First, the Committee recommended that Austria "strengthen its implementation and monitoring" of its laws by exercising due diligence to prevent and respond to violence against women.¹⁶¹ It also recommended that the State "vigilantly and in a speedy manner prosecute perpetrators" both to do justice and to send the right message to the public at large about the seriousness of such offenses.¹⁶² Third, it recommended coordination among all actors in the system to protect and support women victims.¹⁶³ Finally, it recommended strengthening training programs and education on domestic violence for judges, law enforcement personnel, and lawyers in the system.¹⁶⁴ Austria was required to reply to these findings, indicating the actions it had taken to satisfy these recommendations.¹⁶⁵ The work of the Committee provides a veritable blueprint for assessing State failure. In this case, though Austria had failed the victim, it was neither unwilling nor unable to protect such victims and thus did not fail its citizens. A State has failed its citizens when it exhibits a pervasive pattern of non-protection. Sporadic failures cannot signal State failure, and here, Austria had merely not operated optimally to prevent this form of harm. This case and others decided by the Committee further develop the due diligence standard for assessing State action.¹⁶⁶ Though the Committee's role is obviously different from that of the asylum decision maker, the Committee's actions are part of a community of interpretation and norm generation.¹⁶⁷

161. *Id.*

162. *Id.*

163. *Id.* at 23.

164. *Id.*

165. *Id.*

166. For example, in the 2003 case of *A.T. v. Hungary*, the Committee also added to the development of a full theory of due diligence. See Views of the Committee on the Elimination of Discrimination Against Women Under Article 7, Paragraph 3, of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination Against Women, Communication No. 2/2003, Ms. A.T. v. Hungary, (Jan. 26, 2005).

167. See Robert M. Cover, *The Supreme Court 1982 Term: —Foreword: Nomos and Narrative*, 97 HARV. L. REV. 4, 15–16 (1983) (referring to entities as members of a "jurisgenerative" community, who share a community identity and participate in a common enterprise of law creation).

As mentioned above, clearly expressed standards can provide guidance and lead to consistency in asylum decision making. Certainly immigration judges and asylum officers would follow such standards, but case preparation and presentation would also take place in that context. Due diligence would, then, provide a workable standard, and its implementation would help prevent the repetition of failures such as that in *In re R-A-*. Indeed, the contrast between the Committee action and that of the Board majority demonstrates the giant strides made in giving real content to both the standard and its successful application.

This due diligence standard should be domesticated within American law. Section 208.15(a) should be changed to reflect this. Accordingly, the first two sentences of the definition of persecution should be retained, with the inclusion of this standard within the next sentence. The definition of persecution should read as follows:

In evaluating whether a government is unwilling or unable to control the infliction of harm or suffering, the immigration judge or asylum officer should consider whether the government exercises due diligence to prevent, investigate, prosecute, and punish acts of violence against women, whether those acts are perpetrated by the State or by private persons.¹⁶⁸

The rest of the definition in 208.15(a) should be deleted for two reasons. First, the expected commentary to the proposed rule would explicate this standard. As this standard undergoes continuing international exegesis, its content will expand with this ongoing human rights endeavor. Second, these evidentiary factors are simply examples of breaches of this standard, and are necessarily under-inclusive, and should only be used as indicators of failure, not as exclusive factors.¹⁶⁹ Domestic asylum decision makers must apply this evolving standard to protect the foreign victims of domestic violence.

CONCLUSION

Domestic violence results from a variety of forces—some personal, many deeply embedded in culture and tradition. To some, that might indicate a kind of complex, ingrained problem with which the law can scarcely deal. It might suggest a virtually intractable form of behavior, unresponsive to legal controls. That pessimism may be deepened by the recognition that frequently State law not only tolerates domestic violence but even reinforces it through its institutional-

168. This is essentially the DEVAW standard on due diligence. See DEVAW, *supra* note 73, at art 4(c).

169. DHS Brief, *supra* note 63, at 5.

ization of gender-based discrimination.¹⁷⁰ That pessimism is unwarranted.

An examination of international developments dispels this gloom. International developments reveal an active dialogue between States and international entities, which has resulted in substantial, often sweeping legal changes. True, the pace of change has been slowed by many factors, not least of which is inertia and indifferent political will, but those hindrances have often been exposed and corrected. The adherence to that virtuous circle of good practice to respect, protect, fulfill, and promote has guided a variety of State practices to effectively address domestic violence. States have undertaken the affirmative obligation of dealing with domestic violence. They have done this by taking the standard of due diligence seriously.

However, the transformative power of law should not be exaggerated. Failures do occur, and there a remedial focus dominates. The actions of the CEDAW Committee demonstrate the capacity to correct failures, both of will and institutions. But the Committee deals with States directly, making recommendations for change and overseeing those changes. Asylum adjudication is different. There we face States that have truly failed. But due diligence has the potential to inform that process also.

The contrast between the Board and the Committee could not be sharper. In *In re R-A-*, the Board wholly lacked the doctrinal tools to deal with Alvarado's situation. It stumbled completely in vital areas, thus denying her relief. By contrast, in the Austrian case, the Committee analyzed the requirements of due diligence in detail, carefully discussing Austrian failures and the need for corrective change.

The enactment of the regulations proposed here would greatly ease the asylum process at every stage. The asylum application would be drafted in keeping with these standards, and attachments would further buttress the claim of state failure. The applicant and witnesses would testify not only about country conditions, but about the State failure to exercise due diligence in the prevention, investigation, prosecution, and punishment of non-state actors.

In *In re R-A-*, the majority described Guatemalan failures but did not understand their significance. Hilda Morales Trujillo, a practicing attorney in Guatemala and a human rights advocate, has written on this total State failure.¹⁷¹ She described the 1996 Guatemalan law,

170. See Heyman, *supra* note 15, at 812–13 (discussing the provisions of Guatemalan law that enshrined notions of male domination within its code).

171. See Musalo, *supra* note 71, at 119.

which was supposed to protect battered women, as having failed in both “conception and enforcement.”¹⁷² Indeed, “the legal system [of Guatemala] as a whole has failed to provide effective protection to women who are victims of violence, and despite great efforts in this field by women’s groups to inform Guatemalan women of their rights, things have not changed.”¹⁷³ This is precisely the kind of expert opinion that would form an integral part of the asylum case pursued under the regulations. The sad facts of cases such as *In re R-A-*, viewed through the prism of this standard, clearly expose States that are unable to afford effective protection.

Moreover, the other pitfalls of that case would also be avoided. Rather than crafting a hyper-detailed description of social group that seems patently unrealistic, counsel could rely on women as the cognizable group. Since the other proof would demonstrate the significance of domestic violence as State-ignored persecution, that group designation would fit perfectly.

Finally, the bugaboo of motive would also largely disappear. First, the distinction between triggering events and motive properly captures the complex relationship between persecutor and victim. Then, eschewal of the “centrality” requirement and adoption of the notion that the persecutor need only be motivated “in part” by the victim’s gender, would prevent the kind of mindless perplexity that the majority exhibited in *In re R-A-*.

Thus, adoption of these regulations would change the legal landscape of asylum practice. I resist the notion of an inevitable “refugee roulette,” in which changes in substantive law were thought irrelevant to consistent decision making. I believe that the transformations that would take place would guide everyone. Indeed, many claims would simply be granted at the primary level. Also, because of this newly-assumed clarity of legal standards, little reason would exist for the government to appeal a grant of asylum in a properly tried and decided case. The spectacle of cases such as *In re R-A-* would fade over time.

The United States should enact regulations, as suggested here, that embody these mature notions of due diligence. The Department of Homeland Security and the Department of Justice must finally revisit those long-abandoned regulations, make the suggested changes proposed in this Article, and thus condemn human rights abuses by providing effective refuge for foreign victims of domestic violence.

172. *Id.* at 146.

173. *Id.*

