

**Before the
United States Department of Justice
Attorney General John Ashcroft**

**BRIEF OF *AMICI CURIAE*
IN SUPPORT OF AFFIRMANCE OF DECISION OF THE IMMIGRATION JUDGE
IN RE R-A-
*A73-753-922***

**Nancy J. Kelly
Deborah Anker
John Willshire-Carrera
Women Refugees Project
Harvard Immigration and Refugee Clinic
Greater Boston Legal Services
197 Friend Street
Boston, Massachusetts 02114
617-603-1808**

(See the Appendix for a complete listing of the *Amici Curiae*)

Dated: February 13, 2004

TABLE OF CONTENTS

| | |
|--|----|
| TABLE OF AUTHORITIES | i |
| STATEMENT OF INTEREST OF THE <i>AMICI CURIAE</i> | 1 |
| STATEMENT OF THE CASE..... | 2 |
| STATEMENT OF FACTS | 6 |
| ARGUMENT | |
| I. The Decision of the Immigration Judge to Grant Asylum to Ms. Alvarado is Consistent with Recent Developments in International and Domestic Human Rights and Asylum Law | 8 |
| II Ms. Alvarado Has Established Past Persecution and a Well Founded Fear of Future Persecution Based on Her Membership in the Particular Social Groups A Guatemalan Women@ and AMarried Guatemalan Women.@ | 13 |
| A. Gender Can Be the Defining Characteristic of a Particular Social Group | 14 |
| 2. A Particular Social Group Can Be Comprised of A Subgroup of Women..... | 21 |
| III The Domestic Violence Inflicted on Ms. Alvarado and Which She Fears on Return to Guatemala Constitutes Persecution AOn Account of@ her Gender | 23 |
| A. The Harm Inflicted by Mr. Osorio Was on Account of Ms. Alvarado=s Gender and Marital Status | 25 |
| B. Ms. Alvarado was Denied the Protection of her Government Because of Her Gender and Her Status as the Wife of Mr. Osorio | 32 |
| Conclusion | 34 |
| Appendix - List of Amici Curiae | |

**BRIEF OF *AMICI CURIAE* IN SUPPORT OF RODI ALVARDO PENA IN APPEAL
BEFORE THE ATTORNEY GENERAL**

This brief is submitted by one hundred and eighty seven (187) *amici curiae* in support of the request by the Respondent, Rodi Adali Alvarado Peña (hereinafter Respondent or Ms. Alvarado) that Attorney General Ashcroft affirm the decision of the Immigration Judge granting her application for political asylum based on an undisputed record reflecting years of severe domestic violence and the failure of the government of Guatemala to respond to Ms. Alvarado's repeated efforts to obtain protection from this abuse. A decision to reverse the Immigration Judge and deny Ms. Alvarado's petition would represent a radical departure from both domestic jurisprudence and the widely accepted understanding of domestic violence in international human rights and asylum law, as well as sociological and psychological literature regarding domestic violence.

The decision of the Immigration Judge to grant Ms. Alvarado's asylum claim was based on a finding that Ms. Alvarado had been persecuted in the past and that she has a well-founded fear of persecution based on her political opinion and on her membership in a particular social group. This brief addresses only the question of Ms. Alvarado's eligibility for asylum based on her membership in a particular social group.

Statement of Interest of the *Amici Curiae*

This brief is submitted on behalf of a coalition of ninety-three organizations and ninety-four law faculty who have experience as legal advocates and scholars in the immigration, human rights and domestic violence fields. Based on our extensive experience

and expertise in these areas, we believe that a grant of asylum in this case is consistent with both well-established principles of international and domestic law and the realities of domestic violence as it is generally understood by the international community.

Statement of the Case

Ms. Alvarado was apprehended by the Immigration and Naturalization Service (hereinafter the AService@ or the AINS;@ currently the Department of Homeland Security, or ADHS@) shortly after entering the United States and placed in deportation proceedings, charged with entry without inspection in violation of Section 241(a)(1)(B) of the Immigration and Nationality Act (hereinafter the AINA@ or the AAct@). She conceded deportability and sought political asylum before the Immigration Court. On September 20, 1996, the Immigration Judge granted Ms. Alvarado=s application for asylum, finding that Ms. Alvarado had been subjected to persecution in the form of domestic violence based on her political opinion and her membership in a particular social group defined by her gender and her marital status.¹ The Service appealed the decision to the Board of Immigration Appeals (hereinafter the ABoard@ or the ABIA@).

On June 11, 1999, the Board reversed the decision of the Immigration Judge and denied Ms. Alvarado=s application for asylum. Based on the record, the Board concluded that Ms. Alvarado had suffered Asevere injuries@ that were Amore than sufficient@ to constitute persecution and that she was unable to avail herself of the protection of the

¹Specifically, the Immigration Judge defined the particular social group as AGuatemalan women, who have been involved intimately with Guatemalan male companions, who believe that women are to live under male domination.@ Decision of the Immigration Judge (hereinafter AIJ Dec.@) at 9. The Immigration Judge identified the political opinion expressed by Ms. Alvarado as opposition to male domination of her as a woman. IJ Dec. at 12.

government of Guatemala. *Matter of R-A-*, 22 I&N Dec. 906, 908 (BIA June 11, 1999)

vacated (A.G. Jan. 19, 2001). Among the express findings of the Board were the following:

- X **Ms. Alvarado=s husband was Adomineering and violent@ and A[f]rom the beginning of the marriage . . . engaged in physical and sexual abuse of@ Ms. Alvarado. *Matter of R-A* at 908.**
- X **A[T]he record strongly indicates that he would have abused any woman, regardless of nationality, to whom he was married.@ *Id.* at 921.**
- X **AThere is little doubt that [Ms. Alvarado=s husband] believed that married women should be subservient to their own husbands.@ *Id.***
- X **Statements made by Ms. Alvarado=s husband, such as AYou=re my woman and I can do whatever I want,@ and C in response to Ms. Alvarado=s protests while being sexually assaulted C AYou=re my woman, you do what I say,@ A may well reflect his own view of women and, in particular, his view of the respondent as his property to do with as he pleased.@ *Id.* at 908, 915.**
- X **The acts of violence occurred A>whenever [Ms. Alvarado=s husband] felt like it, wherever he happened to be: in the house, on the street, on the bus=@ and included such plainly gender-specific acts as Adislocat[ing Ms. Alvarado=s] jaw bone when her menstrual period was 15 days late,@ Akick[ing] her violently in her spine@ when Ashe refused to abort her 3- to 4-month-old fetus,@ Akick[ing her] in her genitalia, causing [Ms. Alvarado] to bleed severely for 8 days,@ as well such acts as pistol-whipping her, breaking windows and a mirror with her head, Agrab[bing] her head and strik[ing] furniture with it,@ throwing a machete at her hands, and whipping her with an electrical cord. *Id.* at 908-909.**
- X **Ms. Alvarado=s husband raped her A>almost daily= . . . caus[ing] her severe pain@ and Awould beat her before and during the unwanted sex@ and Aforcefully sodomize[] her.@ *Id.* at 908.**
- X **Ms. Alvarado=s husband insisted that she Aaccompany him wherever he went, except when he was working@ and he Aescorted [her] to her workplace, and . . . would often wait to direct her home.@ *Id.***
- X **When Ms. Alvarado ran away to her brother=s and parents= home, Aher husband always found her@ and, on at least one occasion, beat her unconscious. He reportedly has threatened to A>hunt her down and kill her if she comes back to Guatemala.=@ *Id.* at 908-910.**

- X **A[T]he level and frequency of [Ms. Alvarado=s husband=s] rage increased concomitantly with the seeming senselessness and irrationality of his motives@ and Athere [was] nothing the respondent could have done to have satisfied her husband and prevented further abuse.@ *Id.* at 908, 921.**
- X **AHe 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 leaving him, for reasons related to his mistreatment in the army, and >for no reason at all.=@ *Id.* at 921.**
- X Ms. Alvarado=s Apleas to the Guatemalan police did not gain her protection. On three occasions, the police issued summons for her husband to appear, but he ignored them, and the police did not take further action. Twice, the respondent called the police, but they never responded. When the respondent appeared before a judge, he told her that he would not interfere in domestic disputes. Her husband told the respondent that, because of his former military service, calling the police would be futile as he was familiar with law enforcement officials. The respondent knew of no shelters or other organizations in Guatemala that could protect her.@ *Id.* at 909.

Despite these findings, however, the Board, in a divided decision, rejected Ms. Alvarado=s asylum claim, finding that she had not been persecuted on account of membership in a particular social group or her political opinion. Ms. Alvarado filed a timely petition for review of the Board=s decision with the Ninth Circuit Court of Appeals and sought certification of the case by then Attorney General Janet Reno. The Ninth Circuit granted a stay of the proceedings in the case pending a decision on the certification request by the Attorney General.

On December 7, 2000, the Department of Justice (hereinafter the ADOJ@) published in the Federal Register a Proposed Rule which set forth its understanding of the meaning of

Amembership in a particular social group@ as applied to asylum proceedings. 65 Fed. Reg. 76588. While this proposed rule has not been issued as a final regulation, it serves as an expression of the DOJ=s understanding of the law as it applies to persecution on account of membership in a particular social group and asylum based on domestic violence. Among the points set out in the Proposed Rule and its preamble are the following.²

- a) **The Proposed Rule acknowledges that the Aimmutable characteristic test@ set forth in *Matter of Acosta*, 19 I&N Dec. 211 (BIA 1985), rev=d on other grounds by *Matter of Mogharrabi*, 19 I&N Dec. 439 (BIA 1987), is the appropriate test to be applied in evaluating the existence of a particular social group within the meaning the Arefugee@ definition and acknowledges that Agender@ is Aclearly such an immutable characteristic.@ 65 Fed. Reg. 76593. In addition, the preamble and proposed rule indicate that Athere may be circumstances in which an applicant=s marital status could be considered immutable.@ The proposed rule effectively addresses longstanding confusion in this area brought about by the Ninth Circuit=s decision in *Sanchez-Trujillo v. INS*, 801 F.2d 1571 (9th Cir. 1986), by adopting the clarification set out by that court in *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9thCir. 2000) and reconciling the Ninth Circuit=s interpretation with *Acosta*. This interpretation is consistent with U.S. case law and with the established international understanding of the particular social group ground in the UN Refugee Convention. See e.g. *Fatin v. INS*, 12 F3d 1233 (3d Cir. 1993); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996); *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 (SC; Can); *R.V. Immigration Appeal Tribunal and another, Ex parte Shah* [1999] 2 A11 E.R. 545, [1999] 2 A.C. 629; *Refugee Appeal No. 1312/93* [1998] I.N.L.R. 387, *Refugee Appeal No. 71427/99* [2000] N.Z.A.R. 545.**
- b) **The preamble and the proposed rule acknowledge that an asylum claim can be based on domestic violence. The preamble states, AThis proposed rule removes certain barriers that the *In re R-A-* decision seems to pose to claims that domestic violence, against which a government is either unwilling or unable to provide protection, rises to the level of persecution of a person on account of membership in a particular social**

²This should not be read as an endorsement of the proposed rule in its entirety as the *amici* have concerns regarding several aspects of the proposed rule, including possible misinterpretation of the significance of the six factors enumerated in Section 208.15 (c)(3).

group. 65 Fed. Reg. 76589. The preamble to the proposed rule also acknowledges that domestic violence centers on power and control over the victim and recognizes that such patterns of violence are not private matters, but rather should be found to be persecution when they are supported by a legal system or social norms that condone or perpetuate domestic violence.

- 3) The proposed rule provides that 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 takes reasonable steps to control the infliction of harm or suffering and whether the applicant has reasonable access to state protection that exists. In explaining factors to consider in determining whether an individual has reasonable access to state protection, the preamble to the rule instructs that the adjudicator should consider what kind of access the individual applicant has to whatever protection is available and any steps the individual applicant has taken to seek such protection. The preamble instructs that in each case, all factors relevant to the availability of and access to state protection should be examined in determining whether the government of the country in question is unwilling or unable to protect the applicant from a non-state persecutor. *Id.* at 76591.
- 4) The preamble to the proposed rule acknowledges that a persecutor may in fact target an individual victim because of a shared social group characteristic, even though the persecutor does not act against others who possess the same characteristic. *Id.* at 76592-3. In some cases involving domestic violence, an applicant may be able to establish that the abuser is motivated to harm her because of her gender or because of her status in a domestic relationship. This may be a characteristic which she shares with other women in her society, some of whom are at risk of harm from their partners on account of this shared characteristic. *Id.* at 76593.
- 5) The preamble to the proposed rule acknowledges that both direct and circumstantial evidence are relevant to a determination of the motivation of the persecutor. In any asylum or withholding case, evidence about the persecutor's statements and actions will be considered. In addition, evidence about patterns of violence in the society against individuals similarly situated to the applicant may also be relevant to the applicant's account of the determination. For example, in the domestic violence context, an adjudicator would consider any evidence that the abuser uses violence to enforce power and control over the applicant because of the social status that a woman may acquire when she enters into a domestic relationship. *Id.* at 76593.

- 6) The preamble to the proposed rule acknowledges that Amany cultures have a variety of ways in which they condone and perpetuate domestic violence,@ and that Aboth nationally and internationally, domestic violence centers on power and control over the victim and that, as a result of these factors, a woman=s attempts to leave her abusive partner Atypically increases the abuser=s motivation to locate and harm her.@ *Id.* at 76595.

On January 19, 2001, then Attorney General Janet Reno vacated the decision of the Board in this case and remanded it for reconsideration **by the Board following the final publication of the Proposed Rule. *Matter of R-A-, supra.***

On February 21, 2003, Attorney General John Ashcroft ordered the Board to certify Ms. Alvarado=s case to him. This brief is offered to Attorney General Ashcroft in support of Ms. Alvarado=s case on appeal.

STATEMENT OF FACTS

The material facts of this case are not in dispute. The Respondent, Ms. Rodi Adalí Alvarado Peña, entered the United States on May 17, 1995, after nearly ten years of daily, brutal violence at the hands of her husband, Francisco Osorio, a former soldier in the Guatemalan army and a member of a private security force. Tr. at 18 - 19; Ex. 2A at 2. Francisco Osorio and Rodi Alvarado Pena were married in 1994, when Rodi was sixteen years old. The abuse Ms. Alvarado experienced at the hands of her husband, from the beginning of their marriage, included repeated rape, severe beatings, manipulation, threats and humiliation. Tr. at 20-36, 43-44, 48, 128-29. Mr. Osorio inflicted severe physical injury upon her, including dislocating her jaw, nearly pushing out her eye, kicking her in the abdomen and the spine, and attempting to cut off her hands with a machete. Tr. at 23-24,

26-27, 29-36, 39, 127-29; Ex. 2A at 4-9. He would drag her by her hair, use her head to break windows and mirrors, whip her with pistols and electrical cords, and threaten her with knives. Tr. at 23-24, 26-27, 29-36, 127-129; Ex. 2A at 4-9. **He dislocated her jaw when her menstrual period was fifteen days late. See *Matter of R-A-*, supra at 908. When she refused to undergo an abortion, he kicked her violently in the spine. *Id.* at 908. IJ Dec. at 4.**

During these brutal attacks, Mr. Osorio would often tell Ms. Alvarado that he was able to do this to her because she was *Ahis woman@* or *his Awife@* and that he could do with her as he wanted. Rec. 694-497. Despite the fact that his attacks on her were often carried out in public, no one ever offered her protection or assistance. IJ Dec. at 8. Ms. Alvarado actively sought the protection of the Guatemalan government, but in each instance protection was denied. For example, when she tried to obtain a divorce, the Court would not permit a divorce without the consent of her husband. *Id.* When she tried to file complaints with the police, they simply told her that they *Awould see what happened.@* Ex. 2A at 10; Tr. at 127. When she tried to pursue the complaints, the police did not respond. Ex 2A at 10. On three occasions, when she did succeed in having citations issued against her husband, Osorio simply ignored the citations, and the police did nothing to enforce them. Ex. 2A at 10-11; Tr. at 40-41, 129-30.

Ms. Alvarado tried to leave her husband on several occasions, but each time he tracked her down and forced her to return, on at least one occasion beating her unconscious in front of her children. Tr. at 34, 38-39; Ex. 2A at 6-7, 12. Finally she felt that the only way could find safety was to flee the country.

The abuses suffered by Ms. Alvarado are set forth in detail in the Brief of the Respondent. The *amici* hereby incorporate by reference the statement of facts set forth in the Respondent's Brief.

ARGUMENT

I. The Decision of the Immigration Judge to Grant Asylum to Ms. Alvarado is Consistent with Recent Developments in International and Domestic Human Rights and Asylum Law.

The international community, including the United States, has taken substantial steps over more than a decade toward recognizing the gravity of gender-related persecution. This progress has included specific recognition that domestic violence can be a basis for an asylum claim. It would be fundamentally inconsistent with this international consensus for the United States in this case to fail to recognize that the harm which Ms. Alvarado suffered - and which she fears suffering again if returned to Guatemala - is persecution based on her membership in a particular social group defined by her gender and by her marital status. It would also contravene a decade of effort by the U.S. government to rectify long-standing inequities in the treatment of male and female asylum claimants.

A critical element in the development of women's human rights has been the recognition that the serious harms women suffer typically are the result of cultural or customary practices and that these harms are often imposed at the hands of members

of the woman=s family or community.³ Consequently, the rights of women traditionally have been ignored or characterized as private and personal matters, often resulting in the exclusion of women from national and international protection altogether. In recent years, however, those harms more typically perpetrated against women and girls have come to be viewed in the international human rights arena as important human rights concerns warranting full recognition and protection. As a result, numerous international human rights documents now specifically address the concerns of women.⁴

³See generally Deborah Anker, *Law of Asylum in the United States* 388-94 (3d ed. 1999); Deborah Anker, Lauren Gilbert, and Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify As Refugees Under United States Asylum Law*, 11 *Geo. Immigr. L.J.* 709 (1997) (hereinafter AAnker, *Domestic Violence Refugees*); Pamela Goldberg, *Anyplace but Home: Asylum in the United States for Women Fleeing Intimate Violence*, 26 *Cornell Int'l L. J.* 565 (1993); Nancy Kelly, *Gender-Related Persecution: Assessing the Asylum Claims of Women*, 26 *Cornell Int'l L. J.* 625 (1993); Jacqueline Greatbatch, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 *Int'l J. Refugee L.* 518 (1989).

⁴See *Beijing Declaration and Platform for Action*, Fourth World Conference on Women, 15 September 1995, U.N. Doc. A/CONF.177/20 (1995) and A/CONF.177/20/Add.1 (1995); Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women, June 9, 1994, 33 *I.L.M.* 1534; *Vienna Declaration and Programme of Action*, World Conference on Human Rights, Vienna, 14-25 June 1993, U.N. Doc. A/CONF.157/23 (1993); United Nations Declaration on the Elimination of Violence Against Women, G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993); Rome Statute on the International Criminal Court, adopted July 17, 1998, art. 7(1)(g), U.N. Doc. A/Conf.183/9 (1998), 37 *I.L.M.* 999.

This development in international human rights has been accompanied by a parallel increase in awareness by the international community of the particular needs of women and girls for protection under refugee and asylum law. In 1985, the United Nations High Commissioner for Refugees= (AUNHCR@) Executive Committee first recognized that women may qualify for asylum based on membership in gender-based social groups;⁵ and, throughout the late 1980s and 1990s, it adopted a series of conclusions aimed at affording more meaningful protection to women fleeing persecution in their home countries.⁶ In 1998, the U.N. Special Rapporteur on Violence Against Women (hereinafter the ASpecial Rapporteur@) expressed her support for the view that gender should be recognized as the basis of a A particular social group@ for purposes of adjudicating asylum claims.⁷ More recently, the United Nations High Commissioner for Refugees (hereinafter the AUNHCR@) issued Guidelines Aintended to provide legal interpretative guidance for government, legal

⁵*Conclusion on Refugee Women and International Protection*, UNHCR Programme Executive Committee, 36th Sess., No. 39(k) (1985) available at <<http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom39.htm>>.

⁶ See *Conclusion on Refugee Protection and Sexual Violence*, UNHCR Programme Executive Committee, 44th Sess., No. 73 (1993) available at <<http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom73.htm>>; *Conclusion on Refugee Women*, UNHCR Programme Executive Committee, 39th Sess., No. 54 (1988) available at <<http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom54.htm>>; *General Conclusion on the International Protection of Refugees*, UNHCR Programme Executive Committee, 38th Sess., No. 46 (1987) available at <<http://www.unhcr.ch/refworld/unhcr/excom/xconc/excom46.htm>>; See also the UNHCR *Guidelines on the Protection of Refugee Women* which encouraged States to consider women who face severe violence for violating social mores governing the role of women as a A social group,@ in order to ensure protection as refugees. Office of the United Nations High Commissioner for Refugees, & 54, U.N. Doc. ES/SCP/67 (1991) (the *AUNHCR Guidelines@*).

⁷*Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ESCOR Commission on Human Rights, 54th Sess., Provisional Agenda Item 9(a), at sec. III.B.1., U.N. Doc. E/CN.4/1998/54 (1998) (hereinafter the *A1998 Report of the Special Rapporteur on Violence Against Women@*) (citing the *Report of the Expert Group Meeting on Gender-Based Persecution*, United Nations Division for the Advancement of Women, U.N. Doc. EGM/GBP/1997/Report (1997)).

practitioners, decision-makers and the judiciary, as well as UNHCR staff@ regarding assessment of cases raising gender-related persecution claims. See *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*, HCR/GIP/01/01 (May 7, 2002) (hereinafter *AUNHCR Gender Guidelines 2002*") at 1. In these *Guidelines*, the UNHCR notes that, although Agender is not specifically referenced in the refugee definition, it is widely accepted that it can influence, or dictate, the type of persecution or harm suffered and the reasons for this treatment. The refugee definition, properly interpreted, therefore covers gender-related claims.@ *Id.* at 3.

The tribunals of many countries C including the British House of Lords C have granted refugee protection to women based on membership in social groups defined by gender-based characteristics.⁸ Several countries have developed immigration policy and guidelines recognizing gender-based asylum claims and adopting the position that gender is an appropriate characteristic defining a Aparticular social group@ for

⁸See, e.g., *Islam (A.P.) v. Secretary of State for the Home Department, Regina v. Immigration Appeal Tribunal and Another Ex Parte Shah*, 2 A11 E.R. 545 (H.L. 1999) (women subject to state-tolerated domestic violence constitute a Aparticular social group@); V95-02904 (Immigration and Refugee Board of Canada, Convention Refugee Determination Division, Nov. 26, 1997) reprinted in *Gender Asylum Law in Different Countries Decisions and Guidelines* 458 (Refugee Law Center, Inc. ed., 1999) (hereinafter *AGender Asylum Law in Different Countries*@) (granting refugee protection to a woman from the Ukraine on the basis of membership in a gender-based particular social group); Refugee Appeal No. 2039/93, at 53 (New Zealand Refugee Status Appeals Authority, Feb. 12, 1996) reprinted in *Gender Asylum Law in Different Countries* 581, 633 (granting refugee protection to a woman from Iran and citing favorably the UNHCR Executive Committee Conclusion that Awomen asylum-seekers who face harsh or inhuman treatment due to their having transgressed the social mores of the society in which they live may be considered as a >particular social group= within the meaning of the . . . Convention@); N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994) (granting refugee protection to a woman fleeing domestic violence in her home country on the basis of being a member of the particular social group of women.).

asylum purposes.⁹

⁹See, e.g., Immigration and Refugee Board of Canada, *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Nov. 25, 1996) (the *ACanadian Guidelines Update*), Guideline 4.A.III reprinted in *Gender Asylum Law in Different Countries* 106, 116; Immigration and Refugee Board of Canada, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (March, 1993) (the *ACanadian Gender Guidelines*) reprinted in *Gender Asylum Law in Different Countries* 87; Memorandum from Phyllis Coven, Office of International Affairs, U.S. Immigration and Naturalization Service, to All INS Asylum Officers and HQASM Coordinators, *Consideration for Asylum Officers Adjudicating Asylum Claims for Women* (May 26, 1995); Australian Department of Immigration and Multicultural Affairs, *Refugee and Humanitarian Visa Applicants: Guidelines on Gender Issues for Decision Makers* (July 1996) reprinted in *Gender Asylum Law in Different Countries* 7; Refugee Act, No. 17, '1.-(1) (1996)(Ir.) (Ireland Refugee Act expressly defining membership of particular social group to include membership of a group of persons whose defining characteristic is their belonging to the female or male sex) reprinted in *Gender Asylum Law In Different Countries* 137, 138; See The Committee on Immigration and Nationality Law of Association of the Bar of City of New York, *Gender-Related Asylum Claims and The Social Group Calculus: Recognizing Women as a Particular Social Group Per Se*, March, 2003; Immigration Appellate Authority of the United Kingdom, *Asylum Gender Guidelines* (November 2000).

In addition, there has been a growing recognition within the international community that domestic violence is an important human rights issue and a basis for asylum. For example, the 1993 Declaration on the Elimination of Violence against Women expressly recognized the importance of eliminating domestic violence in order to advance the human rights of women.¹⁰ Similarly, in her 1996 *Report on Violence Against Women in the Family*, the Special Rapporteur recommended that refugee and asylum laws be interpreted to include gender-based claims of persecution, including domestic violence.¹¹ As she observed, A[d]espite the apparent neutrality of the term, domestic violence is nearly always a gender-specific crime, perpetrated by men against women and is directed primarily at women with the intention of depriving them of a range of rights and maintaining their subordination as a group.¹²

Reflecting this view that domestic violence is targeted at women based on their gender, parties to the U.N. Convention/Protocol (from which United States asylum law is derived)¹³ have granted numerous claims to refugee status based on domestic

¹⁰G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).

¹¹*Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ESCOR Commission on Human Rights, 52nd Sess., Provisional Agenda Item 9(a), & 142(o), U.N. Doc. E/CN.4/1996/53 (1996) (hereinafter the *A1996 Report of the Special Rapporteur on Violence Against Women*); *accord Report of the Expert Group Meeting on Gender-Based Persecution*, United Nations Division for the Advancement of Women, & 46, U.N. Doc. EGM/GBP/1997/Report (1997) (A women are often persecuted, mainly, partly or solely because they are women); *see generally Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences*, ESCOR Commission on Human Rights, 55th Sess., Provisional Agenda Item 12(a), U.N. Doc. E/CN.4/1999/68 (1999) (hereinafter the *A1999 Report of the Special Rapporteur on Violence Against Women*).

¹²*1996 Report of the Special Rapporteur on Violence Against Women* && 23, 53 (emphasis added).

¹³ A>[O]ne of Congress' primary purposes in passing the Refugee Act was to implement the principles agreed to in the 1967 United Nations Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6224, T.I.A.S. No. 6577 (1968), to which the United States acceded in 1968. The Protocol incorporates by reference Articles 2 through 34 of the United Nations Convention Relating to the Status of Refugees, 189 U.N.T.S. 150 (July

violence. For example, domestic violence as a ground for refugee protection is well established in Canadian case law, including decisions of the Canadian Immigration and Refugee Board,¹⁴ and the *Canadian Guidelines Update* which explicitly provide for a grant of asylum based on gender-motivated domestic violence.¹⁵ More recently, the British House of Lords found that Pakistani women could establish claims to refugee status under the U.N. Convention/Protocol as victims of domestic violence.¹⁶

28, 1951).@ *INS v. Aguirre-Aguirre*, 119 S. Ct. 1439, 1446 (1999) (citation omitted).

¹⁴See, e.g., U97-01917 (Immigration and Refugee Board of Canada, Convention Refugee Determination Division, Nov. 10, 1997) reprinted in *Gender Asylum Law in Different Countries* 454 (granting refugee protection based on the particular social group of Nigerian women who are victims of domestic violence); U96-02325 (Immigration and Refugee Board of Canada, Convention Refugee Determination Division, Dec. 20, 1996) reprinted in *Gender Asylum Law in Different Countries* 407 (granting refugee protection based on the particular social group of women subjected to domestic violence in Ghana).

¹⁵*Canadian Guidelines Update*, Guideline 4.A.I.3 reprinted in *Gender Asylum Law in Different Countries* 110, 113.

¹⁶*Ex parte Shah*, 2 A11 E.R. 545; see also Deborah E. Anker, Nancy Kelly and John Willshire-Carrera, *Defining A Particular Social Group@ in Terms of Gender: The Shah Decision and U.S. Law*, 76 Interpreter Releases 1005 (1999). See also Immigration Appellate Authority of the United Kingdom, *Asylum Gender Guidelines* (November 2000) at 18-19.

Consistent with these developments in the international community, the INS (now DHS) and the DOJ have taken major steps toward redressing the discriminatory treatment of female asylum seekers within the United States. With the issuance in 1995 of the *Considerations for Asylum Officers Adjudicating Asylum Claims for Women* (the *AINS Guidelines*), the INS set out both the procedural and substantive considerations to be applied when evaluating asylum claims brought by women applicants.¹⁷ The *Guidelines* state that the evaluation of gender-based claims must be viewed within the framework provided by existing international human rights instruments and the interpretation of those instruments by international organizations,¹⁸ *Id.* at 2, and they expressly recognize that women often experience types of persecution different from men and that among the types of persecution that are particular to . . . gender and can serve as a basis for asylum is domestic violence.¹⁹ *Id.* at 4¹⁸. The Proposed Rule issued by the Department of Justice in December 2000, elaborates on the position taken by the Service in the *INS Guidelines* by addressing directly factors to be considered in evaluating a claim to asylum based on domestic violence. In addition, the Board of Immigration Appeals and numerous Immigration Judges have recognized that persecution constituting a basis for asylum can be inflicted in the form of domestic violence or other harms inflicted by family members *See*

¹⁷The *INS Guidelines* formally apply only to cases filed with the INS Asylum Office and are not binding on Immigration Judges or the Board of Immigration Appeals. However, because they represent the agency's interpretation of the law in this area, the issues highlighted within them are equally relevant and instructive to gender-related asylum claims in a deportation context.

¹⁸See also *Matter of S-A*- 22 I&N Dec. 1328 (BIA 2000) (granting asylum to a woman based on domestic violence by her father on account of religion).

Matter of S-A-, 22 I&N Dec. 1328 (BIA 2000); *Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996).

II Ms. Alvarado Has Established Past Persecution and a Well Founded Fear of Future Persecution Based on Her Membership in the Particular Social Groups @AGuatemalan Women@ and AMarried Guatemalan Women@

To qualify for refugee status, a claimant must show that he or she has suffered past persecution or has a well-founded fear of future persecution on account of race, religion, nationality, political opinion, or membership in a particular social group. 8 U.S.C. § 1101(a)(42)(A). The record of this case plainly establishes that Ms. Alvarado was subjected to, and reasonably fears being further subjected to, domestic violence at the hands of her husband, Francisco Osorio, on account of her membership in a social group characterized by her gender, either standing alone or in combination with her marital relationship to Mr. Osorio.¹⁹

A. Gender Can Be the Defining Characteristic of a Particular Social Group.

In *Matter of Acosta*, its earliest and most often cited case construing the phrase "a particular social group," the Board ruled that "a particular social group" should be defined by common characteristics that its individual members either cannot or should not be expected to change.²⁰ Gender plainly meets this definition, as *Acosta* itself explicitly acknowledged in stating that "sex" is an example of an immutable

¹⁹This brief does not address the additional claim raised by Ms. Alvarado that she was persecuted based on her political opinion. It also does not address a third gender based particular social group which is supportable by the facts of this case, "women who fail to conform to societal norms."

²⁰*Matter of Acosta*, 19 I. & N. Dec. 211, 233-34 (BIA 1985).

characteristic that defines a social group.²¹

²¹*Id.* at 233.

In analyzing the meaning of the phrase *Particular social group*,²² the Board in *Acosta* examined the nature of the protection afforded by the other four bases enumerated in the refugee definition and, applying the principle of *ejusdem generis*, reasoned that the general words *Particular social group* should be read in a manner consistent with the more specific words contained in the definition: race, religion, nationality, and political opinion. Observing that each of the four specific grounds concerned an immutable characteristic that individuals are unable by their own actions, or as a matter of conscience should not be required to change, the Board established a similar *Immutable characteristic* test to guide interpretation of the *Particular social group* category.²² Thus, the common characteristic defining a *Particular social group* must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or conscience.²³ This definition:

includes within the notion of social group (1) groups defined by an innate, unalterable characteristic; (2) groups defined by their past temporary or voluntary status, since their history or experience is not within their current power to change; and (3) existing groups defined by volition, so long as the purpose of the association is so fundamental to their human dignity that they ought not to be required to abandon it. Excluded, therefore, are groups defined by a characteristic which is changeable or from which dissociation is possible, so long as neither option requires renunciation of basic human rights.²⁴

²²*Id.* at 233-34.

²³*Id.* at 233.

²⁴James C. Hathaway, *The Law of Refugee Status*, Butterworths Canada (1991) at 161.

The Board's analysis in *Acosta* has been widely endorsed by commentators²⁵ and has been applied in numerous Board²⁶ and federal court decisions, including the First, Third, Sixth and Seventh Circuits.²⁷ In *Lwin v. INS* 144 F.3d 505 (7th Cir. 1998), the Seventh Circuit embraced the formulation proposed by *Acosta* as the best approach to determination of particular social groups as it preserves the concept that refugee status is restricted to individuals who are either unable by their own actions, or as a matter of conscience should not be required, to avoid persecution.²⁸ *Id.*, quoting *Acosta*.

In *Hernandez-Montiel v. INS*, the Ninth Circuit took steps to resolve longstanding confusion in the proper interpretation of the words membership in a particular social group²⁹ caused by its earlier decision in *Sanchez-Trujillo v. INS*, 801

²⁵See Heaven Crawley, *Refugees and Gender: Law and Process* 6-7 (2001); James Hathaway, *The Law of Refugee Status*, *Id.*; Deborah Anker, *Refugee Law, Gender and the Human Rights Paradigm*, 15 Harv. Hum. Rts. J. 133 (2002); Deborah Anker, *Refugee Status and Violence Against Women in the Domestic Sphere*, 15 *Geo. Immigr. L.J.* 391 (2001); The Committee on Immigration and Nationality Law of Association of the Bar of City of New York, *Gender-Related Asylum Claims and The Social Group Calculus: Recognizing Women as a Particular Social Group* *Per Se*, March, 2003.

²⁶See e.g. *Matter of Kasinga*, 21 I&N Dec.357 (BIA 1996); *Matter of H-*, 21 I&N 337 (BIA 1996) (recognizing members of a particular clan or subclan as members of a particular social group).

²⁷See e.g. *Fatin v. INS*, 12 F3d 1233 (3d Cir. 1993) (recognizing Iranian women and a subgroup of Iranian feminists who refuse to conform to the government's gender-specific laws and social norms as particular social groups under the *Acosta* standard); *Ananeh-Firempong v. INS*, 766 F2d 621 (1st Cr. 1985) (applying *Acosta* standard and finding that family relations can be the basis of a particular social group); *Lwin v. INS*, 144 F.3d 505, 511-112 (7th Cir. 1998) (recognizing parents of Burmese student dissidents as part of a social group because they share a common, immutable characteristic); *Hernandez-Montiel v. INS*, 225 F.3d 1084 (9th Cir. 2000) (recognizing particular social group of men with female sexual identities in Mexico as a particular social group applying the *Acosta* standard); *Aguirre-Cervantes v. INS*, 242 F3d 1169 (9th Cir. 2001) (finding that members of a family constitute a particular social group as they share a common immutable characteristic); *Castellano-Chacon v INS*, 314 F.3d 533 (6th Cir. 2003) (adopting *Acosta* standard, but finding that in instant case tattooed youth is overbroad and cannot be seen as constituting a collection of people closely affiliated with each other, who share a common, immutable characteristic).

F.2d 1571 (9th Cir. 1986).

The *Sanchez-Trujillo* court held that the class of working class, urban males of military age who maintained political neutrality in El Salvador did not constitute a particular social group for which the immigration laws provide protection from persecution.....

We are the only circuit to suggest a voluntary associational relationship requirement. *Id.* at 1576. The Seventh Circuit has noted that this requirement read literally, conflicts with *Acosta's* immutability requirement. *Lwin*, 144 F.3d at 512. Moreover, in *Sanchez-Trujillo*, we recognized a group of family members as a prototypical example of a particular social group (footnote omitted). Yet, biological relationships are far from voluntary. We cannot, therefore, interpret *Sanchez-Trujillo's* central concern of a voluntary associational relationship strictly as applying to every qualifying particular social group. For, as *Sanchez-Trujillo* itself recognizes, in some particular social groups, members of the group are not voluntarily associated by choice. (footnote omitted).

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

Hernandez-Montiel, 225 F.3d at 10478-79. The *Acosta* standard has most recently been incorporated by the Department of Justice into its Proposed Rule on the meaning of a particular social group. See 65 *Fed. Reg.* 76593.

This position is consistent with now well-established interpretations of the term a particular social group applied by adjudicatory bodies of other countries.²⁸ As

²⁸See, e.g. *Ex parte Shah*, 2 A11 E.R. 545 (finding Pakistani women subject to state-tolerated domestic violence to constitute a particular social group); *Ward*, 2 S.C.R. 689 (agreeing with and elaborating on *Acosta's* social group definition); *Refugee Appeal* No. 1312/93 [1998] I.N.L.R. 387 (New Zealand Refugee Status Appeals Authority, Aug. 30, 1995) reprinted in *Gender Asylum Law in Different Countries* (2000) at 547 (granting refugee protection to a man from Iran based on his membership in the banned Tudeh Party and his sexual orientation); *Minister for Immigration and Multicultural Affairs v. Khawar* [2000] F.C.A. 1130 (Khawar II); *Khawar v. Minister*, [1999] F.C.A. 1529, [1999] 168 A.L.R. 190 (Khawar I); *Refugee Appeal* No. 1312/93 [1998] I.N.L.R. 387; *Refugee Appeal* No. 71427/99 [2000] N.Z.A.R. 545.

these authorities have recognized, the *Acosta* definition addresses qualities that relate directly to the underlying purpose of refugee law. That purpose, grounded in values similar to the non-discrimination principle embodied in human rights law, is to protect those persons who are fundamentally marginalized within their societies and unable to seek governmental protection because of characteristics that should be protected as basic rights or over which they have no control.²⁹ The anti-discrimination orientation of the refugee definition implies that, like other grounds of persecution, a particular social group is also characterized by a marginalized or disadvantaged status in society which makes [the group] vulnerable to oppression, including (but not limited to) the actual persecution feared by the claimant.³⁰

Underlying the Convention is the international community's commitment to the assurance of basic human rights without discrimination. *Ward* 733. This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates who negotiated the terms of the Convention. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. In distilling the content of the head of a particular social group, therefore, it is appropriate to find inspiration in discrimination concepts. The manner in which groups are distinguished for the purposes of discrimination law can be appropriately imported into this area of refugee law. *Ward* 735. In short, the meaning assigned to a particular social group should take into account the general underlying themes of the defense of human rights and anti-discrimination that form the basis of international refugee protection: *Ward* 739. See also *Applicant A* at 232 & 257 and *Saha* at 639 C-D, 651A-D, 656E, 658H.

Refugee Appeal No. 1312/93 [1998] I.N.L.R. at 39-40.

²⁹See Hathaway, *The Law of Refugee Status* at 135-41.

³⁰Audrey Macklin, *Cross-Border Shopping for Ideas: A Critical Review of United States, Canadian, and Australian Approaches to Gender-Related Asylum Claims*, 13 *Geo. Immigr. L.J.* 25, 63 (1998) (Macklin, *Cross-Border Shopping for Ideas*); see also Hathaway, *The Law of Refugee Status* at 135-41; Anker, *Law of Asylum in the United States* at 377.

Gender is unquestionably a characteristic that satisfies the *Acosta* standard because it is both immutable and fundamental to an individual's identity. Moreover, it is a fundamental, distinguishing characteristic that often is the basis for an individual's disadvantaged political or civil status and a lack of state protection. Accordingly, in addition to the Board itself in *Acosta*,³¹ the Third Circuit in *Fatin*,³² the INS in its *INS Guidelines*,³³ the Department of Justice through its Proposed Rule regarding the definition of membership in a particular social group,³⁴ along with the British House of Lords,³⁵ the Canadian Supreme Court,³⁶ the Canadian Immigration and Refugee Board,³⁷ the Australian Refugee Review Tribunal,³⁸ and the Refugee Status Appeals Authority of New Zealand,³⁹ all have expressly recognized that gender or asexuality is a shared characteristic defining a particular social group for the purpose of determining eligibility for refugee protection. In 2002, the United

³¹9 I. & N. Dec. at 233.

³²*Fatin v. INS*, 12 F.3d at 1240.

³³See Memorandum from Phyllis Coven, Office of International Affairs, U.S. Immigration and Naturalization Service, to all INS Asylum Officers and HQASM Coordinators, *Considerations for Asylum Officers Adjudicating Asylum Claims for Women* (May 26, 1995) at 13-15.

³⁴65 Fed. Reg. 76593.

³⁵See *Ex parte Shah*, 2 A11 E.R. 545.

³⁶See *Ward*, 2 S.C.R. at 739.

³⁷See Immigration and Refugee Board of Canada, *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Nov. 1996) reprinted in *Gender Asylum Law in Different Countries* (1999).

³⁸See N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994).

³⁹*Refugee Appeal* No. 1312/93 [1998] I.N.L.R. 387.

Nations High Commission for Refugees, through its UNHCR Gender Guidelines, specifically found that gender can be the defining characteristic of a particular social group:

29. Thus, 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.

30. It follows 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. Their characteristics also identify them as a group in society, subjecting them to different treatment and standards in some countries. (citations omitted)

UNHCR Gender Guidelines 2002 at 7.

As the Australian Refugee Review Tribunal has noted, women, in addition to sharing the immutable characteristic of gender, have shared common social characteristics that make them cognizable as a social group. As the Tribunal explained:

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

the Political Rights of Women, and the Convention on the Nationality of Married Women. . .

[T]here is ample evidence indicating that >women= are a particular social group as, in spite of being a broad group, they are a cogni[z]able group in that they share common fundamental and social characteristics. Whilst there does exist separation in lifestyles, values, political leanings etc., women share a defined social status and as such are differentially dealt with by society as a group. Furthermore . . . women can face harm based on who they are as women, and therefore their membership in this particular social group. It is women=s social status that often leads to the failure of state protection, and this is particularly so with regard to domestic violence.

N93/00656 (Australian Refugee Review Tribunal, Aug. 3, 1994).

The fact that large numbers of people may share particular characteristics that are immutable or fundamental to their identity is not relevant to whether a A particular social group@ defined by such characteristics exists for purposes of refugee determination.⁴⁰ Each of the other four grounds within the refugee definition C race, religion, nationality, political opinion C may similarly encompass large numbers of people. However, since asylum is an individual remedy, even where an applicant can show membership in a A particular social group,@ she must additionally establish her individual eligibility for asylum under all of the elements of the refugee definition. These other factors will necessarily make the size of the group ultimately eligible for

⁴⁰See *UNHCR Gender Guidelines 2002* at p.7, & 31.

The size of the group has sometimes been used as a basis for refusing to recognise >women= generally as a particular social group. This argument has no basis in fact or reason, as the other grounds are not bound by this question of size. There should equally be no requirement that the particular social group be cohesive or that member of it voluntarily associate, or that every member of the group is at risk of persecution. It is well-accepted 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. (citations omitted).

protection significantly smaller than the overall size of a particular social group.⁴¹

⁴¹See, e.g., Macklin, *Cross-Border Shopping for Ideas*, *supra* note 35 at 64 (AA finding that claimant was persecuted because of her ethnicity (Tamil) is not tantamount to a finding that all Tamil people are refugees. So too with a finding that a woman had been violated because of her membership in a particular social group (women)).

Thus, in addition to establishing the existence of a particular social group, the applicant must show that she is a member of that group and that she has been persecuted in the past or that she has a well-founded fear that she will be persecuted in the future because of her group characteristic. See, e.g., *Fatin v. INS*, 12 F.3d 1233, 1240 (3d Cir. 1993). To prove that her fear of persecution is well founded, she must establish that (i) the persecutor is aware, or could become aware, of her social group membership, (ii) the persecutor has the capability of persecuting the applicant, and (iii) the persecutor has the inclination to persecute her. See *Matter of Mogharrabi*, 19 I. & N. Dec. 439, 446 (BIA 1987). A woman seeking protection must also show that her fear is reasonable under all the circumstances. Thus, a woman who has never been abused in the past and cannot articulate specific grounds for fearing that she will personally be abused in the future would not be able to establish an objective basis for her claim.⁴² In addition, where the persecutor is a nonstate actor, as in most domestic violence cases, a woman would have to establish that her home government is unwilling or unable to provide reasonable protection from her persecutor.⁴³

⁴²This is born out by statistics regarding the number of women seeking and gaining protection in both the United States and Canada. AAs of October, 1996, the INS had identified only approximately 75 women=s claims since the issuance of the [*INS Guidelines*].@ Deborah Anker, Lauren Gilbert, and Nancy Kelly, *Women Whose Governments Are Unable or Unwilling to Provide Reasonable Protection from Domestic Violence May Qualify As Refugees Under United States Asylum Law*, 11 Geo. Immigr. L. J. 709 at 716 (citing information from INS Asylum Office, Oct. 1996). In November 1996, Canada, which has the most voluminous jurisprudence on women=s claims, reported that since the 1993 introduction of its *Gender Guidelines*, only 1134 gender-related claims had been adjudicated and, of those, 624 had been granted. Immigration and Refugee Board of Canada, *Backgrounder: the Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: Update* (Nov. 1996) reprinted in *Gender Asylum Law in Different Countries (1999)* at 109; see also Pamela Goldberg, *U.S. Law and Women Asylum Seekers: Where Are They and Where Are They Going?*, 73 Interpreter Releases 889, 897-98 (1996) (providing similar statistics with respect to Canada).

⁴³Anker *et al*, *Domestic Violence Refugees* at 730-37.

3. A Particular Social Group Can Be Comprised of A Subgroup of Women.

As the Board itself has acknowledged, a particular social group can also be defined by gender in combination with another characteristic.⁴⁴ **A gender-based subgroup supported by this record is the particular social group of Amarrried Guatemalan women.**⁴⁵ **Use of this social group formulation is appropriate where the persecution takes the form of domestic violence, which specifically Atargets women because of their role within the [domestic] sphere@ and Ais intended to impact directly and negatively, on women within the domestic sphere.@**⁴⁶

⁴⁴See *In Matter of Kasinga*, 21 I&N Dec. 357 (BIA 1996)(recognizing under Acosta=s immutable or fundamental characteristic standard a gender subgroup consisting of Ayoung women of the Tchamba-Kunsuntu tribe who had not had [female genital mutilation] as practiced by that tribe, and who oppose the practice...@).

⁴⁵See e.g. *Canadian Guidelines Update*, Guidelines 4.A.III reprinted in *Gender Asylum Law in Different Countries* at 110, 119 (in appropriate cases, the particular social group may consist of gender plus another immutable characteristic such as marital status).

⁴⁶See 1996 Report of the Special Rapporteur on Violence Against Women &28 (defining family violence against women). This definition includes violence against other family members and domestic workers. In an appropriate case, a social group could be defined as including women in such relationships.

In this case, the Immigration Judge found that Ms. Alvarado was abused because of her characteristic as a woman involved in an intimate relationship with a man who believed that women with whom men are intimate should be dominated and controlled. IJ Dec. at 9. Similarly, the Board expressly found that Ms. Alvarado=s husband abused her because she was his wife and that he would have abused any woman who was his wife. *Matter of R-A* at 921. Clearly, Ms. Alvarado was persecuted because of her status as a wife. Like gender generally, the status of being a wife or female intimate partner is fundamental to the identity of the individual, and often immutable, and the right to marry is fundamental to human dignity. Indeed, even where a woman can overcome the often substantial legal and economic obstacles to divorce or separation, her status as a former wife or intimate partner may serve as an immutable or past characteristic that is the basis for a well-founded fear of continuing and often heightened persecution.⁴⁷ Finally, there is no question that it is precisely in their role as spouse or intimate partner that women often have a Amarginal or disadvantaged status in society which makes [them] vulnerable to oppression.@⁴⁸

The record of this case clearly indicates that Ms. Alvarado=s relationship to Mr. Osorio was immutable. She attempted to obtain a divorce and was told by the

⁴⁷*See Matter of Fuentes*, 19 I&N Dec. 658, 662-63 (BIA 1988)(status as former member of national police is an immutable characteristic that can be the basis for a particular social group claim); *See generally* Ronet Bachman and Linda E. Saltzman, Violence against Women: Estimate from the Redesigned Survey 4 (1995) (Bureau of Justice Statistics show that A[a]mong victims of violence committed by an intimate, the victimization rate of women separated from their husbands [at the time of the interview] was about 3 times higher than that of divorced women and about 25 times higher than that of married women.@).

⁴⁸Macklin, *Cross-Border Shopping for Ideas* at 63.

Court that she could not do so without the acquiescence of her husband. She sought on numerous occasions to leave her husband, but each time he found her and forced her to return to the marriage. Even were she able to obtain a legal divorce, the actions of Mr. Osorio indicate that he would continue to consider her as his wife, and therefore his property, and to act against her with impunity. Clearly, Ms. Alvarado is a member of a cognizable social group characterized by gender in combination with her marital status or intimate relationship with a man.

III The Domestic Violence Inflicted on Ms. Alvarado and Which She Fears on Return to Guatemala Constitutes Persecution AOn Account of@ her Gender.

Under well-established doctrine, an applicant may meet the criteria for asylum or refugee status by demonstrating that the harm she has experienced or fears either is inflicted by her government, or by a person or group that the government is unable or unwilling to control. AThe agent of the harm may include non-state entities or persons that the government is unable or unwilling to control.@⁴⁹

Ms. Alvarado fears serious harm at the hands of her husband, including violations of her fundamental rights to personal and physical integrity,⁵⁰ from which the state has not in the past, and she fears will not in the future, provide protection. The record is uncontroverted: Ms. Alvarado=s husband subjected her to ten years of the most brutal violations of her basic rights, including rapes, severe beatings and virtual imprisonment. Tr.

⁴⁹See UNHCR *Gender Guidelines* (2002), & 19; Anker, *Law of Asylum in the United States* at 191 (discussing relevant U.S. caselaw).

⁵⁰The U.S. government, courts and international authorities agree that serious human rights violations, protected by international law, constitute persecution . See Anker, *Law of Asylum in the United States* at 174, at 174; *Ward* at 733 (persecution embraces serious human rights abuses, reflecting systemic

at 23-24, 26-27, 29-36, 127-129; Ex 2A at 4-9. The record also establishes that the Guatemalan government is unable and even unwilling to provide her any protection.⁵¹ Indeed, the record establishes that Guatemalan women suffer both *de facto* and *de jure* discrimination, especially in the marital relationship. Exs 2P, 2.1. They live under severely degraded conditions, and suffer, with little protection from police or authorities, from epidemic levels of violence in the home. *Id.* In Ms. Alvarado=s particular case, the Guatemalan police and courts specifically refused to intervene to prevent or punish the violence. Ex 2A at 10; Tr at 127; IJ Dec. at 4.

conduct, Ademonstrative of a failure of state protection@).

⁵¹The function of refugee law is remedial providing protection to particular individuals who meet its criteria, where their States have failed them either deliberately or through non-action. *See generally*, James C. Hathaway, *New Directions to Avoid Hard Problems*, 8 J. Refugee Stud. 289 (1995). Refugee law is not concerned with abstract questions of culpability, i.e. whether the state is doing enough in general to protect its citizens. Rather refugee law is concerned with the very concrete question of protection in individual cases, i.e. whether a State=s system of laws functions in practice to eliminate a real (well-founded) risk of harm for the applicant.

Persecution is constituted by two elements, a serious harm and a failure of state protection.⁵² Where, as in this case, the agent of harm is a non-state actor, the applicant may establish the nexus, or causal relationship to a Convention ground, with reference *either* to the non-state actor *or* to the failure of state protection.

In cases where there is a risk of being persecuted at the hands of a non-State actor (e.g. husband, partner or other non-State actor) for reasons which are related to one of the Convention grounds, the causal link is established, whether or not the absence of State protection is Convention related. Alternatively, where the risk of being persecuted at the hands of a non-State actor is unrelated to a Convention ground, but the inability or unwillingness of the State to offer protection is for reason of a Convention ground, the causal link is also established.

UNHCR Gender Guidelines 2002, & 21.⁵³

Thus, an applicant can establish asylum eligibility if she can demonstrate that *either* the failure of state protection *or* the serious harm from the non-state actor (in this case, Ms. Alvarado's husband) is on account of one of the grounds stated in the Convention. In this case, Ms. Alvarado has demonstrated both. On the one hand, Ms. Alvarado has established that the failure of the Guatemalan state to protect her is on account of her membership in the two gender-related particular social groups: (1) Guatemalan women, and (2) married Guatemalan women.⁵⁴ On the other hand, Ms. Alvarado has demonstrated that the harm her husband inflicted on her was for reasons of her membership in the two articulated groups.

⁵²See *Ex parte Shah*, [1999] 2 All E.R. 545, 565 (H.L.) (U.K.); Hathaway, *Law of Refugee Status* at 109; Deborah Anker, *Refugee Law, Gender and the Human Rights Paradigm*, 15 Harv. Hum. Rts. J. 133, 137 (2002).

⁵³See also *Refugee Appeal No. 71427/99* [2000] N.Z.A.R. at para. 112.

⁵⁴Ms. Alvarado also has established a nexus between her well-founded fear of persecution and her political opinion; but, as noted, this brief does not address that ground.

A. **The Harm Inflicted by Mr. Osorio Was on Account of Ms. Alvarado=s Gender and Marital Status**

The Anexus@ criterion of the refugee definition is often framed in terms of motives and requires evidence that the reasons for the infliction or threat of harm relate to a protected characteristic, embodied in one of the Convention=s grounds. See *INS v. Elias-Zacarias*, 502 U.S. 478, 482-83 (1992); *Matter of S-P-*, 21 I&N Dec. 486, 6, 13 (BIA 1996). Both the Supreme Court and the Board have made clear that, in the words of the Board, to establish this nexus, or the >on account of= element Aan applicant does not bear the unreasonable burden of establishing the exact motivation of a >persecutor= where different reasons for actions are possible.@ *Matter of S-P-*, 21 I&N Dec. at 6 (quoting *Matter of Fuentes*, 19 I. & N. Dec. 658, 662 (BIA 1988)). In addition, Apersecuratory conduct may have more than one motive, and so long as one motive is one of the statutorily enumerated grounds, the requirements have been satisfied.@ *Harpinder Singh v. Ilchert*, 63 F.3d 1501, 1509 (9th Cir. 1995).⁵⁵ AIn adjudicating mixed motive cases, it is important to keep in mind the fundamental humanitarian concerns of asylum law. . . . Such an approach is designed to afford a generous standard for protection in cases of doubt.@ *Matter of S-P-*, 21 I&N Dec. at 10. As the Board has explained:

Persecutors may have differing motives for engaging in acts of persecution, some tied to reasons protected under the Act and others not. Proving the actual, exact reason for persecution or feared persecution may be impossible in many cases. An asylum applicant is not obliged to show conclusively why

⁵⁵See also *Borja v. INS*, 175 F.3d 732, 735 (9th Cir. 1999) (en banc) (A>persecution on account of the victim=s political opinion,= does not mean persecution *solely* on account of the victim=s political opinion@ (quoting *Osorio v. INS*, 18 F.3d 1017, 1028 (2d Cir. 1994)) (emphasis in original); *Matter of S-P-*, 21 I&N Dec. at 6.

persecution has occurred or may occur. Such a rigorous standard would largely render nugatory the Supreme Court's decision in *INS v. Cardoza-Fonseca*, 480 U.S. 421 (1987), and would be inconsistent with the well-founded fear standard embodied in the Arefugee definition.

Id. at 6.

Both the Supreme Court and the Board have held that there need not be direct evidence of a persecutor's motives; rather, motivation may be inferred from circumstantial evidence, including the socio-cultural or political purpose of the harm.⁵⁶ For example, in *Kasinga*, the Board relied on expert evidence that FGM had been used to control women's sexuality and to assure male dominance and exploitation to conclude that the practice was engaged in on account of membership in a gender-based social group. In addition, although the persecutor must be partly motivated by a protected characteristic or perceived characteristic, he need not have a subjective intent to punish or harm on account of that ground.⁵⁷ The Michigan Guidelines on Nexus to a Convention Ground, issued by consensus of the experts attending the Second Colloquium on Challenges in International Refugee Law (2001)(hereinafter *Michigan Guidelines*), frame this contextual approach to nexus in terms of predicament; it is the applicant's predicament which must be causally linked to a Convention ground.⁵⁸

⁵⁶See *INS v. Elias-Zacarias*, 502 U.S. at 483 (proof of motive can be direct or circumstantial); *Matter of S-P-*, 21 I&N Dec. at 11-14 (examining circumstantial evidence of the social and political context of persecution in order to determine motive).

⁵⁷See *Pitcherskaia v. INS*, 118 F.3d 641, 646-48 (9th Cir. 1997) (proof of subjective and malevolent intent, or intent to punish is not required since a definition of persecution is objective, in that it turns not on the subjective intent of the persecutor but rather on what a reasonable person would deem >offensive=); *Matter of Kasinga*, 21 I&N Dec. 357, 365 (punitive intent is not necessary).

⁵⁸University of Michigan School of Law, Program on Asylum and Refugee law, *The Michigan Guidelines on Nexus to a Convention Ground*, & 7 (2001)

(<http://www.law.umich.edu/CentersAndPrograms/pral/english/pdf>).

In this case, Mr. Osorio openly declared his motivation in beating and raping Ms. Alvarado: AI can do it any time I want. You=re my woman and I can do whatever I want.@ IJ Dec. at 4. Because she was a woman, and because she was *his* woman, he could attack her with impunity.

Mr. Osorio=s attitude is consistent with numerous studies of domestic violence which recognize that it is Aintentional behavior with a historical, culturally-sanctioned purpose, which was and is for men to keep their wives >in their place.= . . . It cannot be understood apart from the historical and cultural context of female subordination.@⁵⁹ Even those professionals who focus on psychological approaches to individual batterers acknowledge that domestic violence is purposeful behavior intended to control and dominate a female domestic partner. For example, a study of the American Psychological Association (hereinafter the AAPA@)⁶⁰ observes that A[e]xperts generally agree that in an abusive family situation, the abuser uses physical, sexual, or psychological coercion or intimidation for the purpose of achieving power and control over family members or to punish them for not

⁵⁹David Frazee, Ann M. Noel, and Andrea Brenneke, *Violence Against Women: Law and Litigation* ' 1.41, at 1-45 (1998) (AFrazee, *Violence Against Women@*); see also V. Michael McKenzie, *Domestic Violence in America* 8 (1995) (A[s]pousal battery is a choice men exercise intentionally and purposefully to resolve conflict and achieve their goals of dominance, and coercive control of women@); Kimberle Williams Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, in *The Public Nature of Private Violence: The Discovery of Domestic Abuse* 93, 93 (Martha Albertson Fineman & Roxanne Mykitiuk eds., 1994) (A*The Public Nature of Violence@*) (Abattering and rape, once seen as private (family matters) and aberrational (errant sexual aggression), are now largely recognized as part of a broad-scale system of domination that affects women as a class@); Murray A. Straus, *Physical Violence in American Families: Incidence Rates, Causes, and Trends*, in *Abused and Battered: Social and Legal Responses to Family Violence* 17, 17 (Dean D. Knudsen & JoAnn L. Miller eds. 1991) (family violence Ais not the exclusive property of a few cruel or mentally ill parents or spouses@); R. Emerson Dobash and Russell Dobash, *Violence Against Wives* 15 (1979) (domestic violence must be understood in its Asocial and cultural context@ as Athe extension of the domination and control of husbands over their wives@).

⁶⁰*Violence and the Family: Report of the American Psychological Association Presidential Task Force on Violence and the Family* (1996) (hereinafter the AAPA Report@).

meeting the abuser=s needs.@ APA Report at 11. More specifically, the APA concludes that one of the Aprinciples that emerge[s] from the extensive body of psychological knowledge@ concerning family violence is that A[w]hat people learn about and adopt regarding gender roles plays an important part in the development and continuation of violent behavior@:

Men, for example, receive the false message that they have a right and a mandate to control the women and children in their families. That belief contributes significantly to men=s continued use of violence to maintain power and control.

Id. at 112.⁶¹ Thus, the Atypical batterer@ Ause[s] violence to meet needs for power and control over others. Their actions are often fueled by stereotypical sex-role expectations for >their= women.@ *Id.* at 82. Moreover, as the APA finds, A[t]he strongest risk factor for being a victim of partner violence is being female.@ *Id.* at 19 (emphasis in original).

⁶¹*See also id.* at 121 (AViolence within the family is used as a method of social control, tending to keep both women and men within rigidly-defined social roles.@); *id.* at 18 (finding that among the most significant individual Arisk factors@ correlated with domestic violence is A[r]igid acceptance of traditional concepts of men=s entitlement to superiority and control over family members,@ and among the most significant sociocultural influences are a A[w]idespread assumption and social expectations that men are superior to women and are entitled to exert control over their family members@ and A[g]ender stereotypes@).

Similarly, a study by the National Institute of Justice on batterer intervention programs found that studies have documented the sense of *entitlement* batterers feel in controlling their partners' behavior and in justifying violence if these women deviate from the female sex role and that in practice, regardless of their primary perspective, most [batterer intervention] programs . . . view sexual inequality and masculine role expectations of dominance as core issues to address.⁶² Thus, even programs that focus on the psychology of the individual batterer have come to recognize the importance of socially and culturally reinforced beliefs such as the cultural expectation that men should be dominant and successful, and thoughts that encourage wife-beating, such as "She should obey me. I'm the man of the household."⁶³

Although much of this literature focuses on violence in the United States, international human rights documents and reports have reached similar conclusions with respect to domestic violence in other countries and cultures. The Declaration on the Elimination of Violence against Women, adopted by the United Nations General Assembly in 1993, recognizes domestic violence as a manifestation of historically unequal power relationships between men and women, and condemns it as one of the crucial social mechanisms by which women are forced into a subordinate position compared with

⁶²Kerrey Healey, Christine Smith, Chris O'Sullivan, *Batterer Intervention: Program Approaches and Criminal Justice Strategies* 18-19, 28 (1998) (emphasis in original).

⁶³*Id.* at 21, 26; see also Isabel Marcus, *Reframing Domestic Violence: Terrorism in the Home, in The Public Nature of Violence* 11, 23 (describing statements made by batterers in court-mandated educational programs that speak to well developed notions of sex-based power, control, and hierarchy); James Ptacek, *Why Do Men Batter Their Wives*, in *Feminist Perspectives on Wife Abuse* 133, 147-49 (Kersti Yllö & Michelle Bograd eds., 1988) (describing how batterers who had participated in a counseling program often justified their violence by seeing themselves as punishing the woman for her failure to be a good wife).

men.@⁶⁴ Similarly, the Committee on the Elimination of Discrimination Against Women has recognized the use of domestic violence as a tool of oppression against women:

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

⁶⁴G.A. Res. 48/104, U.N. GAOR, 48th Sess., Supp. No. 49, at 217, U.N. Doc. A/48/49 (1993).

Report of the Committee on the Elimination of Discrimination Against Women, & 26, 47th Sess., Supp. No. 38, at 8, U.N. Doc. A/47/38 (1992).⁶⁵

This understanding of domestic violence as a means for subordinating women was spelled out in great detail in a United Nations report, *Violence Against Women in the Family* (U.N. Sales No. E.89.IV.5 (1989) (hereinafter the A.U.N. Report@). In discussing the limitations of various theories or explanations concerning the causes of violence against women in the home, the report states it is perhaps best to conclude that violence against wives is a function of the belief . . . that men are superior and that the women they live with are their possessions or chattels that they can treat as they wish and as they consider appropriate.@ *Id.* at 33. The U.N. Report continues:

[T]he social framework relegates the woman, none the less, to the level of a chattel. Here structures place her in a position of dependence on the man and predict that she will fulfil certain roles. This combines with the isolation of the family as an institution and the respect that is offered to it in terms of privacy and autonomy by all agents within the society, to allow violence to occur if the wife is seen to overstep her traditional role.

The collected scholarship that seeks to explain violence against women in the home indicates that the explanation is complex and certainly multi-factorial. Any explanation must, however, be seen against a background of gender inequality, wherein the victim of such violence is most often the woman and the perpetrator most often the man and wherein the structures of society be they economic, political or legal act to confirm this inequality. (emphasis added).

⁶⁵See also 1999 Report of the Special Rapporteur on Violence Against Women, Its Causes and Consequences, ESCOR Commission on Human Rights, 55th Sess., Provisional Agenda item 12(a), U.N. Doc. E/CN.4/1999/68 (1999), & 9 (A[t]he culturally-specific, ideologically dominant family form in any given society . . . serves as the standard against which individual women are judged and, in many cases, demonized for failing to ascribe to moral and legal dictates with respect to family and sexuality@ and Aegitimizes violence against women in the form of sexual harassment, rape, domestic violence, female genital mutilation, forced marriages, honor killings and other forms of femicide@).

Id. In addressing structural causes of violence in the family, the U.N. Report concludes that A[v]iolence against women is the product of the subordination of women@ and that Aunless there is a fundamental change in the social and economic structures that maintain the subordination of women within marriage and within wider society,@ no long-term solution will be found. *Id.* at 105.

Mr. Osorio=s beliefs and actions must also be viewed in the political and social context of Guatemala. The uncontroverted evidence in this case demonstrates that Guatemala is a country in which domestic violence is pervasive, *See e.g.* Exs. 2P, 2.1, and in which the legal system and society reinforce Mr. Osorio=s belief that, because Ms. Alvarado was his wife, it was his right to harm her without consequence. The prevalence of domestic violence in Guatemala is confirmed by the U.S. Department of State, which noted in its advisory letter that Acomplaints of spousal abuse by husbands increased from 30 to 120 a month@ in 1995, Ex. 2G at 1, and by the Information and Research Branch of the Canadian Immigration and Refugee Board, which reported that forty percent of all murders of women in Guatemala are committed by their husbands. Ex. 2P.

The undisputed record also demonstrates that there is a broad culture of impunity in Guatemala. Notwithstanding efforts toward judicial reform, neither the police and prosecutors, nor the judges carry out their respective responsibilities for the investigation and punishment of crimes of domestic violence. Exs. 2S-2W. The problem of impunity in domestic violence crimes is exacerbated by societal attitudes which result in a tendency among police and the courts to Aview domestic violence as a family affair and generally encourage women seeking their help to keep the problem to themselves.@ Ex. 2P. The record also demonstrates the existence in Guatemala of firmly entrenched patriarchal attitudes which embrace the view that women are subordinate. Exs. 2.1-2.4. Violence

against women is both a result of this patriarchy and a means of sustaining it: AWhat is culturally taught and learned about what a woman is and the role she must play are significant factors sustaining the patriarchal system and violence toward women.@ Ex. 2.1. The Guatemalan women=s movement is the least developed in all of Central America, because of the country=s deeply conservative and patriarchal nature. Ex. 2.3. Against this backdrop, it is not surprising that there are no shelters for battered women in Guatemala. Ex. 2P

The record in this case, with respect to both the general status of women in Guatemala and the specific actions and statements of Ms. Alvarado=s husband,⁶⁶ can leave no doubt that the domestic violence here was purposeful and was directed at Ms. Alvarado Aon account of@ her gender. Ms. Alvarado=s husband acted against her in the belief that, because she was a woman and because she was his wife, he had the right to beat her at will, and could act against her with impunity. *See* IJ Dec. at 4. His belief was confirmed by the actions and inactions of the legal and social structures in place in Guatemala, and by the experiences of Ms. Alvarado when she sought protection from his abuse.

B. Ms. Alvarado was Denied the Protection of her Government Because of Her Gender and Her Status as the Wife of Mr. Osorio.

As discussed above, the evidence in the record details a pattern of serious discrimination against women in Guatemalan law and practice, especially with respect to protection from

⁶⁶*See, e.g.,* I.J. Dec. at 29 (Gundelsberger, J., dissenting) (quoting Immigration Judge=s findings that the Ainstitutional biases@ against victims of domestic violence in Guatemala A>appear to stem from a pervasive belief . . .that a man should be able to control a wife or female companion by any means he sees fits: including rape, torture, and beatings=@); *supra* at 2-3 (describing husband=s expressions of such beliefs by word and deed).

violence in the home and in the marital relationship. The failure of state protection enabled Mr. Alvarado=s violent actions against his wife:

Ms. Alvarado=s Apleas to the Guatemalan police did not gain her protection. On three occasions, the police issued summons for her husband to appear, but he ignored them, and the police did not take further action. Twice, the respondent called the police, but they never responded. When the respondent appeared before a judge, he told her that he would not interfere in domestic disputes. Her husband told the respondent that, because of his former military service, calling the police would be futile as he was familiar with law enforcement officials. The respondent knew of no shelters or other organizations in Guatemala that could protect her.

Matter of R-A-, supra at 909.⁶⁷

⁶⁷See also IJ Dec. at 4 (Record at 188)(AAlvarado testified that Guatemalan practice will not allow a women to obtain a divorce without her husband=s permission. And because Osorio would not consent, Alvarado should not divorce him.@ AAlvarado tried to get help from the police and the courts in Guatemala. Usually, the police either did not respond at all to Alvarado=s requests for help or take a statement but told her that they would not get involved. See Exhibit 1B. Her husband simply ignored the few citations he did receive: the police never questioned or arrested him.@).

The House of Lords in *Ex Parte Shah*, in similar circumstances of state abdication of responsibility and protection, found the requisite nexus between persecution and the gender-related particular social group. *Ex Parte Shah* involved the conjoined appeal of refugee claims of two Pakistani women, who came to the United Kingdom after fleeing their violent husbands.⁶⁸ The House of Lords held that the state's failure to protect the Pakistani women applicants from domestic violence (which, the House of Lords specifically found, placed the applicants at risk from non-state agents, i.e., their husbands), constituted discrimination on account of their gender. On this basis, the applicants established the required nexus between their well-founded fear of persecution, and their membership in a gender-related particular social group. The evidence was that the state would not assist them because they were women. It denied them a protection against violence which it would have given to men. These two elements [the threat of violence from the husbands and the discriminatory denial of protection from the State] have to be combined to constitute persecution within the meaning of the Convention.⁶⁹

Adjudicatory bodies in other countries including the High Court of Australia⁷⁰ and the New Zealand Refugee Authority, as well as numerous commentators,⁷¹ have adopted

⁶⁸*Ex parte Shah* 2 All E.R. 545, 564 (Hoffman, L.).

⁶⁹*Ex parte Shah*, *Id.* at 564-65 (Hoffman, L.).

⁷⁰See *Minister for Immigration and Multicultural Affairs v. Khawar*, [2002] [HCA S 128/2001] (Australia) (refugee tribunal must consider evidence of gender discrimination in failure of state to provide protection, in evaluating refugee claim of Pakistani woman fleeing violent husband).

⁷¹See Heaven Crawley, *Refugees and Gender: Law and Process* 6-7 (2001); James Hathaway, *supra*; Deborah Anker, *Refugee Law, Gender and the Human Rights Paradigm*, 15 *Harv. Hum. Rts. J.* 133 (2002); Deborah

the same analysis. The Proposed Rule also describes domestic violence as persecution when supported by a legal system or social norms that condone or perpetuate it. In all cases, failure of state protection must be evaluated in the particular context, in light of the specific applicant=s past experience and future fear or violence, and other harms. It is the law as it is practiced for the particular applicant - in light of her past harm and well-founded fear - not just the law on the books, that must be considered in determinations of asylum claims.

Clearly Ms. Alvarado=s disenfranchised status within the Guatemalan legal system and society because of her gender and marital status left her vulnerable to abuse by her husband. It was because Ms. Alvarado is a Guatemalan woman, and because she was a *married* Guatemalan woman, that she was subjected to ten years of the most brutal abuse imaginable on a daily basis. Her husband believed, and everyone surrounding Ms. Alvarado, including the Guatemalan Courts and the police, accepted that it was his right to do so because she was a woman and his wife. In Guatemala, as a woman and as his wife, she was not able to assert her right to protection. She will be subjected to continued abuse and will possibly be killed by her husband if she is forced to return to Guatemala.

Conclusion

For the reasons set forth above, the *amici curiae* respectfully request that the Attorney General uphold the decision of the Immigration Judge and grant Ms. Alvarado=s application for asylum.

Anker, *Refugee Status and Violence Against Women in the >Domestic Sphere*,= 15 *Geo. Immigr. L.J.* 391 (2001); The Committee on Immigration and Nationality Law of Association of the Bar of City of New York, *Gender-Related Asylum Claims and The Social Group Calculus: Recognizing Women as a AParticular Social Group@ Per Se*, March, 2003.

Respectfully Submitted,

**Nancy Kelly
Deborah Anker
John Willshire-Carrera
Women Refugees Project
Harvard Immigration and Refugee Clinic
Greater Boston Legal Services
197 Friend St.
Boston, MA 02114
(617) 603-1808**